

# 1

## Introduction

### 1.1 Aim of the Book

The aim of this book is to examine the question of whether future generations ought to be represented in the global legal order and institutions to address the climate change challenge and, assuming a positive answer to this, how best such representation should occur. ‘Future generations’ is defined as persons born in the future.<sup>1</sup> In light of the recent legal claims by young persons on behalf of future generations, and the recent School Strikes for Climate campaign, one might question whether it makes sense to consider representation of future generations as distinct from representation of young people. Without doubt, the interests of young people (loosely defined as people under 18 years of age) overlap significantly with those of future generations, in terms of being subject to climate impacts. Moreover, young people who are denied the vote have limited opportunities to have their views reflected in decisions by governments. But, in distinction to future generations, young people can articulate their interests. Owing to this factor – as well as empirical evidence that questions the extent to which young people in fact act more favourably than other parts of the population in relation to long-term interests<sup>2</sup> – the approach taken in this book is to limit the analysis to representation of future generations defined as persons born in the future. However, it is recognised that young people may act as proxies for future generations and that future generations do not constitute a discrete group; the group of living human beings is constantly expanding and, in this sense, generations are multiple and overlapping (Barry 1977: 271).

If the interests of future generations were already effectively incorporated in international and national law and policy-making on climate change, then proxy representation of their interests would be unnecessary – as would the writing of

<sup>1</sup> cf. other definitions of future generations in Tremmel (2009: 19–20).

<sup>2</sup> The empirical evidence as to whether young people *are* more concerned about the future than older people is mixed. See discussion of the literature in Gonzalez-Ricoy and Rey (2019: 7).

this book. However, it is clear that in the context of climate change, current international law rules, and national laws – including treaties, legislation, and judicial decisions, are inadequate to meet the threat of climate change, and the interests of future generations are inadequately reflected in these laws, rules, and decisions.

Extensive evidence demonstrates that contemporary global law and institutions are proving inadequate to prevent ever-worsening anthropogenic ecological impacts, and climate change impacts in particular. For example, the 2019 sixth Global Environment Outlook report (GEO-6) of the United Nations Environment Program (UNEP)<sup>3</sup> points to the unfolding of a major species extinction event that compromises planetary integrity and Earth's capacity to meet human needs; declining genetic diversity in turn threatens food security and ecosystem resilience (UN Environment 2019: 325). This is intimately intertwined with climate change, which is a global driver of an array of environmental, social, health, and economic impacts, as well as heightened, society-wide risks (UN Environment 2019: 04). The Intergovernmental Panel on Climate Change (IPCC), which brings together the world's climate scientists, paints a grim picture in its 2023 report of the gap between what scientists state is required to bring down greenhouse gas emissions and the action taken by governments to do so.<sup>4</sup> The IPCC report also concludes that global warming will continue to increase in the near term due to increased cumulative CO<sub>2</sub> emissions, even in low-emission scenarios.<sup>5</sup> Scientists have elaborated a concept of planetary boundaries that conceptualises certain thresholds related to

<sup>3</sup> As of July 2024, UNEP had taken action to coordinate meetings of experts to draft a seventh Global Environment Outlook (GEO-7) report pursuant to a UN Environment Assembly resolution of 2 March 2022 (UNEP/EA.5/Rev. 1) to be released not earlier than 2025. UNEP stated, *inter alia*, that:

GEO-7 proposes to build on key findings from GEO-6 and those of other major assessments which are:

- Current policies cannot keep pace with the rate of environmental degradation we face today.
- With current policies none of the environmental SDGs [Sustainable Development Goals] of the main internationally agreed environmental goals (e.g. Paris Agreement, Aichi Targets, etc.) will be achieved.
- Because of this we face a triple planetary crisis of climate change, biodiversity loss and pollution.

Available at: [www.unep.org/geo/global-environment-outlook-7](http://www.unep.org/geo/global-environment-outlook-7).

<sup>4</sup> See IPCC (2023). This report makes clear that, while the UN climate regime 'is supporting rising levels of national ambition' (A.4: 10),

a substantial 'emissions gap' exists between global GHG [greenhouse gas] emissions in 2030 associated with the implementation of NDCs [Nationally Determined Contributions] announced prior to COP26 and those associated with modelled mitigation pathways that limit warming to 1.5°C (>50%) with no or limited overshoot or limit warming to 2°C (>67%) assuming immediate action (high confidence). This would make it *likely* that warming will exceed 1.5°C during the 21st century (high confidence)

(footnotes omitted) (A.4.3: 11). While '[m]any countries have signalled an intention to achieve net zero GHG or net zero CO<sub>2</sub> by around mid-century ... pledges differ across countries in terms of scope and specificity, and limited policies are to date in place to deliver on them' (A.4.3: 11). The report notes that there is a lag in the adoption of low-emission technologies in most developing countries, particularly less-developed countries 'due in part to limited finance, technology development and transfer and capacity' with public and private financial flows from fossil fuels 'still greater than for climate adaptation and mitigation' and climate finance falling short of the levels needed to limit warming to below 2°C or to 1.5°C (A.4.5: 11).

<sup>5</sup> IPCC (2023) B.1.1: 12.

various dimensions of earth systems (including climate, biodiversity, and ocean acidification) which cannot be transgressed without serious risks for human beings continuing to operate within a ‘safe operating space’ (Lade et al. 2020).

Given human beings’ dependence on the continuing functioning of these earth systems, the transgression of a number of these boundaries (including in relation to climate) is already impacting human beings, with developing countries and the poor most affected. In addition, these impacts are projected to continue to become worse, with future generations increasingly impacted. Future generations will be impacted by climate change in highly differentiated ways, depending on a range of vulnerability factors, including economic level, Indigenous status, gender, age, disability status, and geography, with low-lying islands and countries with low-lying coastal areas particularly affected (see Section 3.4.3). Other factors are linked to highly variable levels of adaptability and resilience. For example, whether individuals and communities can afford to install air-conditioning units could affect their ability to survive heat waves, as could their capacity to build storm surge walls to survive a hurricane or systems to lessen the impact of river flooding.

One potential objection to our focus on ‘future generations’ lies in the fact that individuals and communities will experience differentiated impacts. This has led some to question whether the concept ‘future generations’ is coherent and to assert that its use necessarily masks these differences (Humphreys 2023: 1063; cf. Lawrence 2023). While it is true that climate impacts will affect future generations in highly differentiated ways, depending on their economic and other statuses, it is also true that *all* future generations are at risk from climate change. Thus, for example, a wildfire or storm surge causally linked to climate change can now – and in the future – decimate a wealthy settlement and cause extensive loss of life. In summary, ‘future generations’ has heuristic value; its use in this book does not imply that future generations comprise a homogenous group.

A further possible objection to the approach we take in this book is that it could be contended that it rests on an assumption that one can look into a crystal ball and predict the future, which stretches credibility, especially the further into the future one goes. There are good answers to this concern. First, the fact that there could be a groundbreaking technological breakthrough (for example, to remove carbon from the atmosphere) – whether next year or in 2100 – is not relevant in the sense that any proxy representative institutional mechanism can only make assumptions based on *current* knowledge, including in relation to technological capacity, the need for a stable climate, and for adequate food and shelter. Moreover, scientific projections in relation to climate change currently tend not to go beyond 2100. In addition, as a practical matter, any proxy-style institution or mechanism for future generations would likely focus on projected future generations’ interests in the short and medium term rather than the exceptionally long term (and not

beyond 2100). Indeed, in terms of future generations' interests, the fact that climate impacts are projected to become increasingly harmful illustrates the failure of current international and national law and policy-making to incorporate sufficiently the interests of future generations.

While international environmental law rules – such as the principle of intergenerational equity, which *prima facie* reflects future generations' interests – do exist, these rules tend to be too vague and/or only weakly implemented at the national level because of vested interests. Law- and policy-making – at both the national and international levels – continue to be heavily biased against the interests of future generations.<sup>6</sup> A range of factors accounts for this, from the prevalence of short-term thinking as a matter of human psychology through to the dominance of discourses and powerful vested economic interests resisting change (Stoddard et al. 2021: 661–2). In particular, the neoliberal discourse of unending economic growth and unfettered resource extraction underpinned by property rights has stymied the necessary regulation required to address climate change (Capra & Mattei 2015: 71).

A key argument in this book is that proxy-style institutions can help remedy this bias against the interests of future generations in current international law-making. While mainstreaming the interests of future generations in law- and policy-making remains 'the main game', proxy-style institutions can and should be utilised as a parallel strategy. In this book, we elaborate a theory of proxy representation which allows for a more nuanced appreciation of the different ways proxy representatives could operate. This theory distinguishes, for example, between a 'proxy representative function', which occurs when the proxy purports to speak or act on behalf of future generations, and a 'proxy compliance function', which occurs when the proxy acts to ensure better compliance with (international) legal rules that protect future generations. However, where such rules are absent or inadequate, stronger rules are required, thereby entailing a 'proxy law reform function' in which the proxy advocates for stronger rules which respect the interests of future generations.

In practical terms, proxy representation of future generations in relation to climate change in the international legal order can include a range of scenarios. First, it could involve a claim by a state before an international tribunal (such as the International Court of Justice (ICJ)) on behalf of future generations; for example, where a Pacific island state brings an action against a major greenhouse gas emitter state, with the island state purporting to bring the claim on behalf of the state's future generations, in addition to its existing citizens.

A similar scenario is presented by the 2023 decision of the United Nations General Assembly (UNGA) to request the ICJ give an advisory opinion on the

<sup>6</sup> For a discussion of the concept of bias in this context, see Lawrence (2021).

obligation of states under international law towards both their own citizens and future generations (UNGA 2023). This scenario forms the subject of one of the case studies in this book (Chapter 6). This scenario includes the possibility of an intergovernmental or non-government organisation (NGO) or scientist presenting an *amicus curiae* brief to the ICJ which highlights the interests of future generations, for example, through highlighting future impacts on biodiversity. A further possibility is an international tribunal itself purporting to decide on behalf of future generations, and/or the court itself acting as a proxy or guardian for future generations. Finally, there is the possibility of a claim before an international human rights committee by young persons purporting to speak on behalf of future generations, as discussed in the analysis of the *Sacchi* case brought to the UN Committee on the Rights of the Child (Chapter 7).

The possibilities sketched earlier involve climate change related litigation before international tribunals. This book, however, takes a broader view of ‘the global legal order’ that comprises international institutions (including international tribunals) and international law. The latter encompasses both ‘hard’ (binding) and ‘soft’ (non-binding) international law, including in the form of treaties and resolutions adopted by states meeting as the conference of parties (COP) of the UN climate bodies, as well as resolutions of other UN organs. We acknowledge that burgeoning climate change related rule-making is occurring at levels beyond the traditional state–state paradigm, including by substate and non-state entities, such as subnational governments, cities, corporations, and NGOs captured by the concept of ‘transnational law’ (Etty et al. 2017, 2018; Cotterrell 2012, 2016; Heyvaert 2017; O’Connell & White 2019). To keep the scope of this book manageable, we do not cover this broader field here, but the normative framework of this book provides a strong basis for future research in this direction. While we define ‘global legal order’ as referring to ‘international law’, rather than the broader concept of ‘transnational law’, we acknowledge that international law interacts with national law in a variety of complex ways – and not necessarily in a top-down manner. Thus, for example, non-binding COP resolutions of the UN climate regime (‘soft law’) may be taken up and given greater weight in national court decisions, which, in turn, influence the content and direction of international legal obligations. In addition, we acknowledge that non-state actors – including, for example, highly organised, corporate fossil fuel interests hostile to action on climate change – influence the form, content, and level of bindingness of international legal rules relating to climate change (Cotterrell 2016; Etty et al. 2017, 2018; Heyvaert 2017),<sup>7</sup> as well

<sup>7</sup> McGee and Steffek (2016) trace the rise of voluntary-style approaches to climate change regulation linked to neoliberalism, which then found expression in the rise of ‘pledge and review’ style mechanisms in the UN climate regime.

as particular discourses, such as the dominant neoliberal discourse which prioritises economic growth (Drysek 2021; Stevenson & Drysek 2014).<sup>8</sup>

This book analyses international law and international institutions and related literature within its scope as of 1 July 2024. In terms of international institutions, this book also explores proxy representation through establishing new institutions in the UN system. These issues have strong contemporary policy relevance. As this book went to press, the United Nations held a Summit of the Future on 22 September 2024 and adopted a *Pact for the Future*, including a non-binding *Declaration on Future Generations*.<sup>9</sup> The Declaration in para 32 noted the proposal by the UN Secretary General to appoint a Special Envoy for Future Generations but did not agree to create one (United Nations General Assembly 2022a: para 3). However, in October 2024 it was reported that a senior UN official had announced at a major international conference that the Secretary-General was intending to proceed to create such an envoy (Day 2024).

Answering the ‘ought’ part of the research question at the heart of this book – ‘Why should future generations be represented in international law-making and related institutions?’ – entails drawing on philosophical theories relating to inter-generational justice and theories of representation. Representation of future generations can only be by proxy. This book breaks new ground by elaborating a theory of proxy representation which melds political theory with legal theory.

In this chapter we set out the methodology adopted in the writing of this book (Section 1.2) before discussing connections with the Earth System Governance Project (Section 1.3) and possible critiques (Section 1.4). We conclude with an explanation of the structure of the book (Section 1.5).

## 1.2 Our Methodology: A Pragmatist Approach

An important impulse of this book is its interdisciplinary approach. We are convinced that combining philosophy and international law provides many significant insights, particularly regarding the justification of proxy representation for future generations. To understand our approach, it is important to explain the book’s methodology, which is rooted in the philosophical tradition of pragmatism. This

<sup>8</sup> The relationship between intergenerational justice and the dominant discourses in the UN climate negotiations is analysed in Lawrence (2014: 150–68).

<sup>9</sup> For all outcomes of the UN Summit for the Future, including the *Pact for the Future* and *Declaration for Future Generations*, see United Nations (2024). For the mandate of the Summit see United Nations General Assembly (2022a: para 4). The mandate included considering the appointment of a UN Special Envoy for Future Generations contained in the Secretary-General’s report (United Nations Secretary-General 2022). In September 2021, the UN Secretary-General first announced his intention to appoint a Special Envoy for Future Generations and create an Office of Youth affairs. See [www.un.org/sg/en/content/sg/speeches/2021-09-21/address-the-76th-session-of-general-assembly](https://www.un.org/sg/en/content/sg/speeches/2021-09-21/address-the-76th-session-of-general-assembly).

understanding sets it apart from many other philosophical (and interdisciplinary) approaches. But what exactly does this approach involve?

Many philosophical approaches work with a top-down approach. For example, moral principles are first justified on an abstract level, which are then to be implemented top-down. Abstract arguments may, for example, first claim the universality of democracy in general and its moral principles in particular (for example, freedom). In a second step, these theory-based principles are applied to the apparent ‘non-ideal’ (globalised) world. The problem with this approach is that every theoretical justification implies multiple presuppositions, which are open to criticism from other views, in global and transcultural terms, from the standpoint of other cultural narratives. Thus, with this strategy, ethics often quickly get caught up in theoretical meta-discussions. These discussions are important but are of limited help in a concrete challenge, such as the ethical consideration of the further development of proxy representation. To address this challenge, it is important to recognise and adapt the range of practices – with their diverse normative underpinnings.

Therefore, we propose a different methodology – inspired by the philosophical pragmatism of John Dewey, a central philosopher of the early twentieth century. Dewey’s analysis of many global crises of his time led him to observe that many scientific answers – and ethical reflections – were too ideological; as a result, they could contribute little to shaping social and political reality. Reflecting on the normative foundations of democracy, Dewey adopts a different approach: bottom-up, rather than top-down.

Democracy, he argues, should always begin with an empirical observation of current problems. This method is founded on Dewey’s approach to epistemology. He views knowledge – and this also applies to political knowledge – as originating from the processing of experiences. Therefore, inquiry involves a multistage process. In his *Theory of Inquiry*, Dewey (1986) identifies the typical steps that constitute this process: (i) identifying a situation that is experienced as a problem; (ii) creating a hypothesis about the various aspects of the problem; (iii) developing viable solutions; and (iv) undertaking an evaluation aimed at proving the validity of the solution.

To find out which values might help offer solutions in the experimental processes of democracies dealing with concrete global problems, pragmatist approaches follow (more or less) Hegel’s interpretation of social life and normativity. Hegel’s intention was not to prescribe the adoption of top-down political mechanisms to society but, rather, to develop them out of existing social and political practices, and the values embedded in them. This entails integrating values and ethical life with a focus on the variety of social, political, and cultural practices as the starting point of philosophical reflection. Thus, democracy is not the implementation



of abstract moral principles through law and institutions. Instead, philosophers indebted to Hegel emphasise the heterogeneous social and political practices that must be improved over time. Pragmatist theories argue that democracies should recognise these various practices and discourses and their potential to deal with social and political problems practically.

Of course, practices can also contradict or conflict with each other. In pragmatist terms, it is then a matter of a joint evaluative and experimental consideration of which practices are best suited to dealing with the practices at hand, to help all people equally to grow in the sense of a flourishing life (Festenstein 2008). This idea of shared growth can, for example, be translated into normative benchmarks – for example, the threshold concept involving all persons subsisting above a threshold as a minimal requirement of justice – with pragmatist approaches that emphasise the constant experimental verification and dynamic development of such benchmarks. This approach helps to avoid democracies basing their moral principles on abstract reasons. From an ethical viewpoint, the genesis and validity of values underpinning democracies are always connected, which means that the validity of these norms can only be proved by reconstructing social discourses and practices.

Dewey does not provide a clear, universal criterion, but neither do his considerations fall into relativism. Quite the contrary. To assess whether particular social, political, or legal practices are better than others, there are two important approaches. The first is to inquire whether these practices contradict their own implied values; for example, if a political practice promises justice but proves to be unjust in its implementation (for instance, by disregarding the interests of future generations), it becomes self-contradictory and needs further development. In the second approach, Dewey argues, these improvements in practices should always be oriented towards the growth and flourishing of all individuals (Festenstein 2008). In other words, political or legal practices should enable a flourishing life for all people. This demand can then be translated into other values (such as justice or solidarity), as we demonstrate in Chapter 3 in the ethical Section 3.4.

In line with this pragmatist methodology, *Representation of Future Generations* follows a bottom-up approach. This approach is less about developing an ideal form of representation from a normative argument, and more about understanding which normative discourses and practices already shape national and international law and society today; how these can be philosophically conceptualised; and what they can contribute to a further development of proxy representation.

Thus, to address the question of how proxy representation can be ethically justified, it is necessary to look afresh at the political form of government assumed to involve the fair, transparent, and just negotiation of political interests: democracy. In Chapter 2, we elaborate on the normative core of democracy from the perspective of different theoretical traditions and explain how, on this basis, a broader



development of representation as a basic mode of democracy can be conceptualised. Our aim is to establish a normative basis for the development of proxy representation to include future generations – not from an ideal or abstract theoretical consideration, but from the reconstruction and discussion of the normative foundations of democracy itself. We argue that this ideal is just as applicable to the international realm as it is to the national.

In this context, a key assumption of this book is that the democratic ideal applies at both the international and national levels. This assumption is controversial. Some argue that the democratic ideal cannot apply at international level because many states are not democratic. However, this argument is unconvincing in that the rationale for democracy – in terms of minimising the risk of abusing public power and increasing the likelihood that the value of justice is maximised – is equally applicable at the international level (Chapter 3). Moreover, democracy is not an all-or-nothing proposition; it can provide an invaluable yardstick for reform – even though some structural features of the international system make such reforms particularly challenging.

Dewey's pragmatism can also help us to understand and analyse global dynamics and problems in a more convincing way than, for example, the current debate on global justice. Dewey's pragmatism invites a focus on the experiences of problematic situations. On this basis, pragmatism seeks social, cultural, and political solutions. Pragmatists are usually open to considering alternatives to ideal theoretical framings in the traditions of (Western) philosophy, thus allowing fresh perspectives on global crises. The potential of pragmatism, then, lies in its ability to fully account for the manifold experiences of global problems and of future generations. Moreover, pragmatism enables political solutions that are not biased in favour of political and legal traditions which are part of the problem in the first place. Additionally, pragmatism also leads to an alternative understanding of normativity. Thinking about normativity in the global age does not mean searching for ultimate normative principles (such as global justice) but rather – in a bottom-up sense – for an (inter) culturally anchored and plural understanding of global normativity. In the current debates on global issues, some scholars have already reflected on the potential benefits of Deweyan pragmatism (see, for example, Bray 2009; Cochran 2010; Festl 2021; Frega 2017; Green 2008; Heilinger 2020). This scholarship is helpful in developing arguments as to why, and in what ways, pragmatism can enable us to rethink and reconstruct the meta-theoretical frameworks for proxy representation in the international legal order.

While Dewey wrote little about the law, his pragmatist approach undoubtedly strongly influenced theorising about international law, particularly the emergence of the Legal Realist approach to international law. *Representation of Future Generations* follows the Legal Realist approach, the core premises of which are

set out as follows. First, we must approach international law not only from a doctrinal point of view – which asks questions about the content of particular rules of international law by application of the rules on sources but also from an explanatory point of view – which asks about the meaning and origin of particular rules and how they actually function in the international system. Reflecting the pragmatist tradition of empiricism, determining such functions relies on empirical studies that extend beyond narrow, formal approaches to sources of international law to include private and public–private standard-setting activities, for example (Shaffer 2022). Following this approach, international law is studied in its broader social and political contexts (Shaffer 2015, 2022; Bodansky 2015). In addition, law is conceived in instrumental terms, as a means for solving problems and furthering progressive politics (Bodansky 2015: 271).

Following this approach, international law is not just a reflection of power and ideology, but also reflects struggles between competing conceptions of rights and justice. We accept that, in most cases, the rules of international law are clear. The role of judge or other actors in the system is to first apply the accepted formal sources of law, as this is necessary to ensure stability and predictability in the system (Dewey 1924: 24; Hart et al. 1994). Not doing so would risk undermining the legitimacy of the system: decisions would seem arbitrary, reflecting no more than the individual preferences of the person interpreting the rules. In addition, law would risk becoming an apology for power. However, in cases where applying the accepted rules on sources does not yield a result, we agree with the Legal Realists that extra-legal factors must, and should, come into play, and that this should be made transparent. In this situation, recourse should be had to the overarching purposes of the international legal system and to the underlying community values of the system as a whole (Hart et al. 1994). Some scholars question whether such values can objectively be determined, arguing that actors cannot escape their subjective values (Koskeniemi 2005: 532). However, even if objectivity could be shown to be a myth, there is value in maintaining it: abandoning the myth would create a worse situation, in which international law quickly lost its legitimacy and potential to curb power, as it would be perceived as totally arbitrary (Meier 2017: 528).

Legal Realist approaches eschew the application of overarching ethical principles (or natural law) to the international legal order and take a problem-oriented perspective from which values can be tested in terms of how they operate in the real world – their efficacy in resolving particular problems. Dewey (2005) is clear that it is essential to critically assess both practices and the ends for which practices are being pursued in the light of new social realities. The criteria to be employed in making this evaluation are opaque in Dewey's writing, but the normative goal of democracy is critical in his approach – in his view, it involves the realisation of individuals' full capacities.

Applying these Legal Realist-pragmatist approaches to the subject matter of this book, our methodology involves identifying existing rules and principles of international law – such as the principles of intergenerational equity and solidarity – and then ask how these principles and rules can be applied (and, where necessary, modified or extended) to meet the challenge of the global ecological crisis represented by climate change. These normative heuristics can be the basis for creatively developing innovative solutions. This is undertaken on the basis that the overarching goal of the international legal system includes the promotion of justice (extended to include intergenerational justice) and is defined as ensuring the ability of both current and future generations to enjoy the human rights necessary to lead a decent life (see Section 3.4.1). We argue that international law, whatever other functions it has – such as maintaining stability and peace and avoiding war – ought to further justice (Franck 1995). Justice is defined as the protection of human rights (Ratner 2015; Buchanan 2004). The basis for this normative framework lies in the international legal system itself, including in the consensus support by states of instruments reaffirming these values, such as the Universal Declaration on Human Rights (UDHR) (UNGA 1948). In addition, the President of the ICJ has stated that, ‘The Court ... has the important and noble role of determining existing law and rendering justice between States’ (Couvreur 2012). Consistent with the principle that all persons, regardless of when or where they are born, are entitled to human rights, justice must be extended to include future generations (Lawrence & Köhler 2017: 645). Thus, a core aim or value of the global legal order is securing the human rights of both current and future generations. Given human beings’ dependence on the continuing functioning of the global ecosystem – including the climate system – justice requires ensuring the integrity of these systems. This interconnection between human beings and the environment is reflected in the human right to a clean, healthy, and sustainable environment, which has received consensus support from all states following its adoption in a UN General Assembly resolution (UNGA 2022b). Indeed, the right to a healthy environment is implicit in all human rights; without protection of the environment, it is not possible for other human rights to be secured (Inter-American Court of Human Rights 2017).

In summary, then, the approach we adopt is that, where international law rules are unclear, judges and other actors operating in the international system cannot avoid making value-based judgements. Where this occurs, normative principles ought to be made explicit and applied to interpret international law to meet the requirements of these principles and the overarching purpose of the entire system to achieve justice, including intergenerational justice. We are not suggesting that philosophical concepts relating to proxy representation or intergenerational justice and solidarity should be invoked directly as a novel source of treaty interpretation within international law rules relating to, for example, the interpretation treaties.

Rather, our position is that philosophical reasoning related to these concepts can help in making explicit value-based decisions where international law rules are unclear. Moreover, it can sharpen reasoning adopted by judges or other actors in the system when interpreting international legal rules, where the accepted rules on sources do not yield clear-cut answers. In relation to treaties, we accept that application of the international law rules on treaty interpretation set out in the *Vienna Convention on the Law of Treaties* (VCLT) (1969) must be the starting point. But, where application of these rules does not give a clear-cut answer, recourse should be had to the aim of the particular treaty in conjunction with the values underlying the international legal order as a whole. How this approach works in practice is illustrated in our case study of the ICJ advisory opinion on climate change, where the normative framework is applied to interpret several important principles and rules of international law relevant to the climate context (Chapter 6).

In addressing customary international law, we accept that international tribunals have not followed their own pronouncements in requiring extensive and virtually uniform state practice and *opinio juris* (the conviction that a rule is considered binding) as preconditions for finding the existence of a rule of customary international law (Bodansky & van Asselt 2024: 273–93). As Bodansky and van Asselt (2024) point out, it is the general acceptance of a rule by the international community which is determinative of whether a rule is accepted as custom, while international tribunals (such as the International Court of Justice (ICJ)) may speed up this process by pronouncing that the rule has become custom. This means that, while we accept that the formal requirements of custom should be applied, again, where this yields an indeterminate outcome, recourse should be had to the normative values underlying the particular rule in question and the international legal system as a whole.

In addition, we identify existing normative discourses about the international legal order which can provide a blueprint for reform of the relevant international legal rules and institutions – potentially valuable for political advocacy surrounding the reform of international law and related international institutions. These normative discourses are not assumed to have a priori validity; rather, they provide a provisional basis for reform, with their ultimate value only determined in terms of how they work out in practice. Given that the rules and institutions we are talking about are future oriented, this gives rise to challenges in terms of legitimacy and effectiveness (explored in Chapter 5). In general, the Legal Realist approach provides both a valuable reference point for the full gamut of individuals and organisations involved in political advocacy to reform the international legal system and related international institutions; ultimately, the value of reforms is only ascertainable by seeing how they work out in practice. Governance reform at all levels is central to the Earth System Governance Project, to which we now turn.

### 1.3 Connections with the Earth System Governance Project

The main arguments for the representation of future generations made in this book relate in many ways to the basic ideas of the Earth System Governance (ESG) Project. Five of these arguments play a particularly significant role. First, the book contributes to scholarship on intergenerational justice and democracy, both of which are explicitly identified as research areas in the ‘Earth Systems Governance Science and Implementation Plan’ (2018).

Second, the book makes a contribution to exploring ways of ensuring better representation of future generations of human beings – squarely within the evolving Earth Systems Law approach, which seeks to include marginalised vulnerable groups (including unborn human beings) and involves law reaching out to other disciplines.<sup>10</sup> While the focus of the book is limited to the representation of human beings, we make clear that this does not imply that representation of non-human nature is unimportant or unjustified. Moreover, there are synergies between arguments for representing future generations and nature (Lawrence 2022). We took the decision that it would be too much to include in one volume both proxy representation of human beings and non-human nature (Lamalle & Stoett 2023).

Third, the elaboration for the first time of a theory of proxy representation linked to international law, including specific proxy-style mechanisms, fits well with the Earth System Governance Project’s interest in exploring novel and more effective governance mechanisms to cope with the current transitions in the socio-ecological systems of our planet. We make it clear that proxy representation is not a silver bullet and must be combined with a range of other strategies.

Fourth, the book focuses on international law and global governance, while also acknowledging the interaction between international law and law-making at regional and national levels. While two of the case studies in the book involve tribunals at the international level, there is the potential for the principles clarified by these tribunals at the global level to percolate into regional and national law-making, and into political discourses more generally. This mirrors nicely the ESG approach entailing exploration of interactions between various levels of governance.

Finally, the interdisciplinary character of the book (combining philosophy, international law, and global governance) on the reconstruction, discussion, and further development of global governance mechanisms and international law rules sits in the interdisciplinary research tradition of ESG. These five arguments

<sup>10</sup> ‘[A] law informed by an earth system perspective would be oriented towards the more egalitarian goal of achieving social-ecological justice, notably at a planetary scale (Biermann & Kalfagianni 2020), by fully embracing all present and future earth system constituents including especially marginalized and unborn humans and the non-human world’ (Kotzé, Holley & Kim 2022: 5).

demonstrate that the question of the representation of future generations, and the approach to this issue taken in this book, has strong synergies and fits well with the ESG approach.

### 1.4 Possible Critiques

Alongside the international legal community, the audience for this book includes scholars from adjacent disciplines (such as the humanities or social sciences) and activists engaged in the debate on how best to respond to the climate crisis. In both communities, a certain ambivalence towards law as proxy representation can be observed. On the one hand, the book shows how scholars and activists of these communities worldwide use law to better anchor future concerns in the political system. The rapid increase in climate litigation at the international, regional, and national levels is indicative of this, as are the diverse efforts worldwide to enshrine the interests of future generations in constitutions. Because law is not only influential in liberal-democratic states but also plays a significant role globally in shaping the political landscape, it is used, in a sense, to overcome the limitations of traditional law, which is often more focused on the present. This applies equally to the interpretation and utilisation of various forms of proxy representation in international law.

On the other hand, these academic and activist communities also evince a certain scepticism towards law or representation in general. Especially in Western societies, law is sometimes interpreted in these communities as a typical instrument of liberal convictions that is inherently present oriented and closely tied to an economic logic. In Germany, for example, Christoph Menke (2020) criticises subjective rights because they involve basic freedoms only in the form of property rights.

Another form of this criticism of law targets the Western-oriented logic of law. The argument is that law, deriving from Western culture, inherently implies a superior attitude towards other cultures. In post-colonial discourses, this argument is made, for example, in relation to human rights. Human rights are a Western idea built on a sovereign (and often male) subject with property – which it seeks to protect. Therefore, the law inherently implies the exclusion of people who have been suppressed or excluded through colonisation. All expansions of human rights (for example, social and cultural rights) are interpreted as illusory, thus making little or no change to this logic of exclusion.

In the pragmatic approach of this book, we take these objections seriously, while simultaneously refuting them. Viewing law as a social experimental process allows for a transformation of exclusion mechanisms in law at a fundamental level. Recognising the freedom and interests of future generations in the constitution (for

example, in Brazil and Germany) is not just cosmetic and superficial. Instead, it potentially changes thinking and practice. Law and lawmakers must always consider the future. *Representation of Future Generations* argues that law can be used to improve law, in the sense that values inherent in international law can be used as a springboard for reform, by extending these values to help resolve recent problems.

Moreover, after such a critique of law, it often remains unclear what could be put in its place. The idea and practice of law implies many advantages and potentials, particularly against the backdrop of the outlined normative heuristics, which cannot be replaced by other instruments – at least not currently. This holds equally true for international law, where experimental processes are even more open, and are rapidly evolving. Our case studies show that these changes can lead to fundamentally new legal practices, through which the vulnerability of future generations is recognised and politically addressed.

Some scholars and activists also apply this critique of law to the idea of representation. This criticism involves the idea that representation always entails a new form of exclusion: representation of one group results in the concerns of another group not being considered or the group even being recognised. In this critique, then, representation produces what it seeks to overcome: it aims to enable inclusion and participation but, ironically, entails new forms of exclusion. Thus, research on intersectionality points out that forms of discrimination and social exclusion must be analysed and addressed not individually, but in an interconnected manner. This is because the representation of one disadvantaged group is intricately linked to the situation of another group.

*Representation of Future Generations* rejects this argument in a comparable way: certainly, every form of proxy representation is at risk of narrowing the political and legal focus. It places one group at the centre, diverting political attention from other groups. In extreme cases, this can lead to exclusion or even disregard. However, this potential limitation does not speak against the instrument of proxy representation as such, only against its misuse or lack of evaluation. Indeed, the idea of proxy representation of future generations aims to give a voice to an excluded group – namely, future living people – in the current political and legal process, to recognise their interests and legally secure them. Of course, this entails the risk that other concerns become less important; for example, the currently living poor populations in the Global South. Therefore, an ongoing evaluation of proxy representations from the viewpoints of *intra* – not just *inter* – generational justice is indispensable and a fundamental part of representation itself. In other words, the fact that something can be developed poorly does not mean it should not be attempted. In our view, the potential benefits of proxy representations far outweigh these drawbacks – always subject to the condition that the new transformations are constantly evaluated and the forms of representation continuously developed.



A final limitation of this book is that the case studies involve international institutions (such as a proposed UN Special Envoy for Future Generations) and international tribunals – including the International Court of Justice (ICJ) and the UN Committee on the Rights of the Child (CRC) – but not climate treaty processes. This omission does not in any way imply that such treaty processes are not important. While the UN climate regime has, to date, been limited in its effectiveness, it nevertheless provides a forum for the representation of future generations' interests in the climate context, which has occurred, not just through governments, but increasingly, also through subnational or non-state actors (Kuyper et al. 2018; Kuyper & Bäckstrand 2016; Angstadt & Betsill 2021). Indeed, in addition to climate treaty processes, there is a need to research proxy representative mechanisms in relation to rule-making by subnational and non-state actors. This is clearly an area where more research is needed.

### **1.5 Structure of the Book**

In broad terms, the book is structured as follows. Part I addresses the question of why we ought to represent future generations in the international legal order and related institutions, sets out a normative framework, and links this to a concept of proxy representation. Part II introduces criteria for evaluating the effectiveness and legitimacy of proxy-style mechanisms for representing future generations. An examination of existing mechanisms in the UN system that involve representation of vulnerable groups helps to indicate which normative arguments are likely to gain traction in supporting new innovative mechanisms to represent future generations. Part III contains a series of case studies that illustrate the value of the normative framework and apply the effectiveness and legitimacy criteria. The case studies also provide a springboard for discussion of reform options more generally (Chapter 9).

We now turn to explaining the structure in more detail. Part I presents a normative framework which forms the basis for both evaluating existing international legal mechanisms and frameworks, and for proposing law reform options (undertaken in Part III). The normative framework involves a theory of proxy representation (Chapter 2), before presenting an argument as to why future generations ought to be represented in the international legal order, which draws on theories of democracy and justice (Chapter 3).

Part II begins by setting out the criteria for evaluating the effectiveness of proxy-style mechanisms for the representation of future generations (Chapter 4). The analysis proceeds on the basis that legitimacy and effectiveness are distinct but interconnected concepts, with effectiveness contributing to legitimacy and legitimacy contributing to effectiveness. Each of the possible modes of proxy representation is evaluated in terms of its democratic legitimacy and effectiveness using

criteria derived from Klaus Dingwerth (2014) and Sylvia Karlsson-Vinkhuyzen and Antto Vihma (2009). Legitimacy is particularly crucial here, as previous attempts to establish bodies of this nature (including a proposal for a UN Commissioner for future generations made at the 2014 Rio +20 summit) failed due to lack of support from developing countries (Lawrence 2014: 17). Garnering such support will be essential for any such mechanism to succeed.

We then examine several existing mechanisms established at the international level aimed at representing vulnerable groups (children, disabled persons, women, and people living in poverty) to identify which normative arguments are likely to gain traction in efforts to establish proxy-style representative institutions for future generations in the international legal order (Chapter 5).

The case studies in Part III have been chosen to reflect contexts in which proxy-style representation might offer the greatest potential for progress on climate change. The case studies aim to demonstrate how normative arguments for proxy representation can nourish legal arguments in ways that increase the possibility of factoring in future generations' interests.

The case studies contained in Part III include an assessment of the effectiveness of various modes of proxy representation of future generations using the criteria set out in Chapter 4.

The optimal approach to redressing the bias against future generations in international law and policy-making is the mainstreaming of these interests in such processes. As we have observed, mainstreaming often does not work for a variety of reasons. This book does not present proxy representation as a silver bullet for addressing the failure of mainstreaming to adequately internalise the costs imposed on future generations in the climate change context. Rather, our more modest aim is to demonstrate how proxy representation mechanisms can help put pressure on governments to move in this direction. *Representation of Future Generations* aims to provide a strong normative grounding for such mechanisms. In addition, the case studies demonstrate how, exactly, such mechanisms can work, by delineating the links between normative underpinnings and the structuring of global institutions and international legal rules. We aim to show that cross-fertilisation between philosophical ideas and law can result in innovative approaches that feed into a range of ongoing, important processes, including both climate litigation strategies and grassroots activism.

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