2

Proxy Representation and the Global Legal Order

Integrating Philosophical and Legal Perspectives

2.1 Introduction

The political discussions of the past two decades show that the medium- and long-term ecological impacts of industrialisation on the planet and human societies represent an enormous challenge for societies worldwide and, indeed, the international community. This is most clearly demonstrated by climate change. It is obvious today that the living conditions of human beings worldwide are – and will be in the future – massively negatively affected by climate change. However, although the impacts of climate change have been very clearly demonstrated by scientists, not least through the regular reports of the Intergovernmental Panel on Climate Change (IPCC), there is still political controversy about how to respond to this crisis.

Given that greenhouse gas emissions do not respect national borders, effective responses to climate change must be both national and international. While many governments have established mechanisms to address climate change, both in terms of mitigation and adaptation, these measures are insufficient. The same applies to the global legal order and its related institutions. While some improvements to the global climate regime – including related conference of parties' (COP) decisions – have been negotiated in recent years, serious doubts remain as to the effectiveness of this regime.

At the heart of the global climate regime is the *Paris Agreement*. This treaty relies on countries making voluntary mitigation commitments in Nationally Determined Contributions (NDCs). To date, states have failed to commit to sufficiently stringent NDCs at the level scientists say is necessary to address climate change. The wealthy states (that cause the problem in the first place) have failed to show leadership in reducing emissions. Moreover, the same wealthy countries have not provided the required finance – essential for both mitigation and adaptation – with only about one-third of what experts say is required having

been pledged.[1] In addition, there are concerns that the *Paris Agreement* may be structurally flawed, given its reliance on non-binding (soft law) commitments (Lawrence & Wong 2017) and its lack of an effective compliance mechanism, with non-governmental organisations (NGOs) excluded from playing a vital role in holding states to account (Van Asselt 2016). The consequences of weak climate policy entailing inadequate mitigation and adaptation efforts involve harm to both vulnerable people alive today and harm to future vulnerable people, especially the poor.

This brief description of the current situation suggests that it is important to explore new ways to develop and implement a sustainable climate policy from a global perspective. The distinctive feature of this book is its exploration of sustainable law- and policy-making through establishing new forms of proxy representation of future generations. The idea behind this is that, if future generations are represented in the global legal system, this will help facilitate the pursuit of effective and sustainable climate policy- and law-making. Since future generations cannot determine their own representatives, representation in this context must involve forms of 'proxy representation'.

Proxy representation occurs when a person or thing cannot speak for itself; in other words, it gives a voice to the 'inarticulate'. The proxy representative makes reasonable assumptions about the interests of the person or thing being represented. How can we justify proxy representation? Representation is closely linked to theories of democracy. One strand of the argument justifies proxy representation with reference to the core elements of existing democratic theory, which need to be modified in the face of global ecological threats and the needs of future generations. Put differently, these theories need to be modified to incorporate a new model of proxy representation which can help plug a blind spot in democratic theory. Proxy representatives give a voice to vulnerable groups – and future generations – particularly the future people living in poverty, who arguably constitute the most vulnerable. While highly contested, this book takes the position that the ideal of democracy does, and should, apply at the international level.

If we can find convincing ways to represent future generations in democracies, this can give us a blueprint at the theoretical level to develop and sustainably implement proxy representation of future generations at the international legal level as well. In the following philosophical Chapter 3, we will turn to representation as a key mechanism of democracy and discuss whether and how our understanding of

[1] As Ruth Adler (2024) states in her doctoral dissertation, *The Green Climate Fund: A Case Study in the Legitimacy of Global Climate Finance Governance*: 'In this regard, the Intergovernmental Panel on Climate Change (IPCC) estimates climate policies consistent with a 1.5°C temperature goal would require energy system supply-side investment levels of USD1.6–USD3.8 trillion per year for the period 2016–2050'. See also Rogelj et al. (2018) and IPCC (2023). Recent financial transfers thus represent approximately 36 per cent of what is required to meet the lower end of IPCC estimates of what is needed to achieve the temperature goal.

representation can be further developed to respond to the climate crisis and incorporate the interests of future generations. We will demonstrate which impulses the philosophical discussion might have for these developments. On this basis, we explore how the further development of the idea of proxy representation can be transferred to the international level, including both international legal rules and institutions. Our thesis is that developing new forms of democratic proxy representation can be an important strategy in this reform process, both domestically and internationally.

The remainder of the present chapter is structured as follows. First, we demonstrate that traditional concepts of representation – including agency-based, audience, and surrogacy models – struggle in their application in relation to future generations (Section 2.2). We then propose a definition of representation in the legal context, before moving on to define proxy representation, distinguishing between direct and indirect variants. We then proceed to sketch various modes of proxy representation at the national level, ranging from ombudsman-style mechanisms through to informal representation, through social movements and citizens' assemblies (Section 2.3). Such national mechanisms are relevant because they provide inspiration for proposals at the international level. We then describe a range of existing forms of proxy representation in the international legal order, to demonstrate that proxy representation of future generations represents a modest, rather than radical, reform of international law (Section 2.4). Next, we turn to assessing the extent to which indirect representation of future generations is incorporated in the international legal order in terms of environment-related principles (Section 2.5). A matrix setting out the range of functions which proxy representation may perform is then set out. We argue that, by distinguishing these functions, a more nuanced understanding can be obtained as to the functions of existing modes of proxy representation, as well as reform proposals. Finally, we draw conclusions (Section 2.6).

2.2 Traditional Concepts of Representation and Their Limitations

Representation is one important and basic attribute of democratic institutions. It seems perfectly clear what representation does: namely, it provides a vehicle for expressing or articulating the interests of citizens. In this way, large, differentiated societies can facilitate political action and bring to life the democratic idea of participation by all citizens. On closer examination, however, it becomes clear that it is not so simple. At the outset, it is important to note that there is no single definition of representation. For this reason, we outline three important models of representation – and their limitations – from a philosophically inspired perspective.

First, representation is often described as an agency-based concept which relies on the representative being authorised by citizens to form government and represent their interests through the process of democratic elections. In democracies,

representatives are elected in a fair and transparent electoral process to deal with challenges, and political decisions are legitimated through the representative's holding office through the electoral process. On the one hand, these representatives are authorised by the *demos*, traditionally understood as the sum of the citizens of a society or a state. On the other hand, these representatives are accountable to the people for what they decide.

In this mode of representation, political parties often play an important role in democratic procedures. Parties offer different strategies to deal with current challenges, for example, climate change. Representation by politicians of different parties in democracies can be understood as a form of (at least partly) 'unbounded' representation. What is meant by 'unbound' in this context? This can be explained by looking at the concrete actions of representatives. Although representatives are authorised to act by the people who voted them into office, they can – once in office – make decisions independently of the electors and with reference only to the basic ideas of the party to which they belong. This shows that their actions are ultimately relatively 'unbound': they have a relatively significant margin of leeway in their political decision-making. Philosophically, such an understanding of representation is called 'actor-centred' because it focuses on the actions of the politician, authorised by the voters.

Looking at the long-term consequences of this type of political action, we can immediately see some problems inherent to such an understanding: agency-based concepts of representation clearly do not work in relation to future generations because they cannot authorise the representatives in a strict sense. Precisely because future generations cannot authorise the representatives – because they are not yet alive – their interests remain at risk of being neglected on a very basic level. If human beings were hardwired to take the long-term view, then this issue would not arise. But empirical studies in the social sciences (see Boston & Lempp 2011; González-Ricoy & Gosseries 2016; MacKenzie 2016) suggest the opposite: human beings tend to insufficiently consider the long-term impacts of their action on future generations.

Second, in addition to this 'narrow' definition of representation, a much broader concept of representation is possible. According to Andrew Rehfeld's influential definition (Rehfeld 2006: 8), for example, Person or Institution A represents Person or Thing B, where A claims to act or speak on behalf of B with respect to a specified set of issues, and this is accepted by a particular audience.[2] In this broad, audience-based definition, representation is less about direct authorisation and more about ensuring that concerns are heard.

[2] This discussion of Rehfeld's and Saward's definitions of representation is based on Lawrence (2021: 604–605).

Rehfeld's concept of representation can work in relation to future generations if we consider the relevant audience not to be future generations but, rather, contemporaries upon whose support the proxy representative relies. Thus, for example, a United Nations Special Envoy for Future Generations, should one be created (see Chapter 8), could, in the context of the UN climate negotiations, be considered as representing future generations if the participants in those negotiations recognised this Special Envoy as having this function through the applicable rules of procedure. Rehfeld's theory keeps separate the question of whether the act of representation is legitimate, rather than building it into the definition of representation itself. However, as Anja Karnein points out, there are usually at least some background norms shared between the representor and the representee.[3] Of course, if there is no audience who accepts that one is speaking on behalf of future generations, this model also does not work to represent them in political processes (Lawrence 2021: 24).

Third, Michael Saward's surrogacy-based concept of representation constitutes another promising way to conceiving of proxy representation of future generations (Saward 2008; 2009). Saward views representation more as a claim than as a fact arising from elections, thus opening the possibility of legitimate representation outside the electoral context. In Saward's view, someone represents the interests of a specified group where they represent the particular group's interests 'because of X' (Saward 2009), where X can be a range of factors, including, for example, ties to a tradition. Thus, according to this view, the representative can act as a 'surrogacy for wider interests' and this can occur outside the electoral context (Saward 2009: 12). Where there is no formal process to assess the claim of representation by the constituency, Saward uses an 'authenticity' criterion to assess the claim of representation. This involves asking whether the representative appears to speak 'genuinely' on behalf of marginalised persons in a context where a stakeholder has a stake in the decision being made, giving rise to a right to have their interests included in the decision-making process (Saward 2009: 13). Under this approach, then, an assumption is made that an organisation or individual purporting to represent a particular marginalised group is genuine, absent evidence to the contrary. If we apply this model to a proxy claiming to represent future generations – provided we assume that the stakeholders have contingent rights upon being born, giving them a stake in the decision – this test might seem too easy to meet. However, if we combine these criteria for representation with

[3] Karnein (2016: 90) provides as an example of a 'shared background norm', the norm that a representative of a member state to the World Trade Organization (WTO) reflects the concept of sovereignty. Thus, a person in charge of the military in a particular state could be accepted as a representative of the particular country by the WTO members, but not the manager of the local convenience store, a block away from the UN Headquarters in New York.

checks and balances – such as a requirement that the interests of future generations be properly reflected in the mandate of the proxy representative, and NGOs are given power to hold to account a proxy representative in terms of whether they are performing in compliance with the particular mandate involved – these concerns can arguably be addressed (Lawrence 2021).

This brief description of three models of representation – agency-based, audience-based, and surrogacy-based – already shows that it is not easy to develop a collective understanding of representation applicable to future generations. Moreover, it is not easy to develop new forms of representation in the face of the global ecological crisis. The reason for this is that democratic representation necessarily implies some important structural limitations: for example, it is possible that representatives elected by democratic procedures do not care at all about the concerns of future generations. Moreover, democracies' inherent limitation of the *demos* to the *current* citizens in a specific territory (nation) tends not to be questioned, despite the obvious global consequences flowing from national political decisions. Both limitations are obviously highly problematic in view of the ongoing extensive discussions about climate impacts and their political treatment.

So far, the concept of representation has been presented as a political concept. A subcategory of political representation includes representation in the legal context.[4] If we consider an international tribunal's capacity to represent future generations, it is important to note that, under Rehfeld's concept of representation, an international tribunal would represent future generations if the 'rules of recognition' – in this case, constituted by the statute of the particular tribunal as interpreted by that tribunal – allow for representation of future generations by, for example, a state appearing before the tribunal or an NGO or scientist presenting evidence before the tribunal. (For more detail, see the scenarios relating to the International Court of Justice (ICJ) set out in Chapter 6.) Indeed, *legal* concepts of representation follow this approach. Lawrence and Köhler define 'representation' in the legal context as involving,

> a claim by a 'representative' to be acting on behalf of a person or thing being represented (the 'representee') in relation to a particular function, based on a legal foundation which involves an authorisation given either by the representee or directly by law.[5] Authorisation 'directly by law' would include the statute of a tribunal explicitly or implicitly allowing for the representation of future generations (Lawrence & Köhler 2017: 654).

[4] The discussion in this paragraph draws on Lawrence & Köhler (2017).

[5] See on this legal concept of representation the original Art. 389 French Civil Code (*Code civil*) (1804), 21 March 1804, as amended on 3 January 2018. The original version of this provision allowed a father to represent the interests of his children within certain boundaries, with women possessing limited rights; this pattern was subsequently introduced across Continental European (and South American) civil law systems. In the modern context, see Larenz & Wolf (2004: 829).

A further possibility is that an international tribunal indirectly represents future generations by applying or developing international law rules which reflect their interests (see Section 2.3). It is important to consider more deeply the wide spectrum of different forms of proxy representation to which we now turn.

2.3 Proxy Representation

As we have seen, proxy representation occurs when a person or thing is incapable of communicating their or its needs or interests because: (i) they or it does not yet exist, as in the case of future generations, or (ii) is incapable of communicating as in the case of a severely disabled person and in the case of non-human nature or ecosystems (Lawrence & Köhler 2017: 654). In *Representing Future Generations*, 'representation' refers to 'proxy representation', unless otherwise specified.[6]

The representation of future generations may be direct or indirect. In this book, we refer to 'direct representation', where a representative explicitly claims to act on behalf of future generations. By contrast, where the representative does not purport to act on behalf of future generations but, rather, highlights their interests, we use the term 'indirect representation'. Both concepts are strongly linked, given that the objectives of representation in each case will often overlap. This distinction between 'direct' and 'indirect' representation can be explained with an example. Imagine that a biologist, who researches climate impacts under a mandate of the *Convention on Biological Diversity* (CBD) (1992), writes a report highlighting the interests of nature and future generations in terms of climate impacts. The biologist does not claim to speak on behalf of nature or future generations, so writing the report would, strictly speaking, fall outside our definition of 'direct' representation. Yet, the report could still constitute 'indirect' representation. The same biologist may also speak explicitly on behalf of future generations, younger people, or a threatened biological species in a media interview or blog contribution as linked to various political processes, constituting 'direct' representation.

This example demonstrates that, as well as being direct or indirect, representation can operate in various contexts with more than one function, with the legitimacy of representation in each case having a different basis. So, in the context of the biologist writing a report on the impacts of climate change on future biodiversity (upon which future human beings will depend) under the CBD, the legitimacy of this representation may rest on the scientific expertise of the expert and the CBD processes. In contrast, the blog piece for an NGO (for example, Extinction Rebellion) may rest on a different source of legitimacy, linked more to

[6] This section draws on Lawrence (2022).

the expertise of the person as a scientist (independent of the CBD), combined with their voice as a concerned citizen (Lawrence 2022: 4).

This example points to yet another important aspect: proxy representation is usually related to a clearly identifiable actor who speaks on behalf of someone else. In many current debates, such an understanding is assumed when discussing ombudspersons for future generations. In some cases, an institution can also be understood as an actor. In these cases, however, proxy representation also implies an agency connotation, meaning that the institution acts as a quasi-individual actor on behalf of someone else.

In this book, we do not limit ourselves to representation in this narrow sense. This is because entirely different forms of proxies are conceivable. First, we must recognise that collective entities (for example, networks or social movements) are also forms of proxy representation. Such entities are not clearly defined as individual actors; yet, they also purport to speak on behalf of someone else, including future generations. Moreover, discourses or individual practices can also be understood as forms of proxy representation. If a practice sees itself as a regular collective action through which future generations are to be heard and integrated into society, this can also be a form of proxy representation. An example of this is the practice of science, ranging from the individual climate scientist to the institutional level (for example, the IPCC). Science – particularly the climate science relevant to this book – is quite evidently a crucial proxy, without which the concerns of future generations would certainly not have received as much attention as they have in recent years. In scientific practice, the heterogeneity within a proxy becomes simultaneously evident. Discussions around the significance of Indigenous knowledge for climate policy provides an example of this (Abe et al. 2024). Both make the concerns of future generations audible in the present, but in separate ways and with different objectives. The recognised rules regarding how such conflicts should be addressed will vary, depending on the institution or practice (Latulippe & Klenk 2020; Wilkens & Datchoua-Tirvaudey 2022).

The law itself can also be a proxy. To take one example, if the constitution of a state refers to future generations as legal subjects to be considered and protected, then this is also a form of proxy representation for future generations. The embodiment of future generations' interests in multilateral treaty obligations or in principles of customary international law is also a form of proxy representation.

Concepts of representation are intertwined with the concept of interests. Future generations share with current generations the important attribute that their multiple interests cannot be reduced to a single dimension or currency (Driver 2014). In the past, it was often assumed that such interests were objectively 'out there', with the proxy representative having only to reveal them (Tanasescu 2014). This view is challenged by Mihnea Tanasescu, who maintains

that proxy representation involves a strong 'creative and relational' dimension: the proxy brings into existence the interests concerned through an active process whereby the representor necessarily injects a normative element in terms of how they would like the world to be reformed (Tanasescu 2014). Similarly, Robyn Eckersley argues that proxy representation assumes the possibility that the proxy has knowledge of either future generations or ecological systems being represented (Eckersley 2004). We agree with Eckersley's position that knowledge in this context – spanning both scientific and Indigenous – must necessarily be interpreted through cultural and other social norms, but that this does not deny the existence of knowledge independent of the existence of the knowing agents or representatives (Eckersley 2004).

At the national level, a range of different mechanisms of proxy representation can be distinguished. The first category of proposals focuses primarily on the executive branch and aims, for example, to establish ombudsmen, guardians, or trustees (Weiss 1989; Birnbacher 1988; Thompson 2010). Ombudsmen emerge from a Scandinavian tradition that provides extensive powers to investigate complaints made by individual citizens relating to the actions of bureaucrats and public entities. Their findings are normally non-binding (Lawrence & Linehan 2021: 5); they also have important standard-setting and educational functions (McCormack & Hansen-Lohrey 2021). In the West, ombudspersons have become institutionalised in the formal political system. They can, for example, examine laws in terms of their consequences for future generations and make recommendations where laws do not adequately consider the interests of future generations. This is about representation of future generations as an advocate. The task for such officials is sometimes also to develop concrete policy concepts that benefit future generations, to which legislative proposals from other areas must be oriented. Various future forums also fall into this category.[7]

Proposals for a second category are directed at the reform of parliamentary representation. Dobson (1996), for example, suggests electing experts to parliament as representatives of future generations. Eleki (2005) develops a similar proposal, earmarking 5 per cent of parliamentary seats for representatives of future generations. Other authors favour establishing a third chamber of Parliament to deal with future issues (Roderick 2010). Jonathan Boston points to a wide range of so-called commitment devices that can help factor in long-term interests in parliamentary-style democracies: from reforming auditing processes through to appointing a scientific advisor to the Parliament to highlight long-term climate impacts (Boston et al. 2019). In New Zealand, for example, the strategy has been to appoint a Parliamentary Commissioner for the Environment (Boston 2021a).

[7] For a survey of various types of national institutions for future generations, see Lawrence & Linehan (2021).

Corresponding to the liberal theories described earlier and their focus on legal instruments, a third group of proposals involves reforms to the legal system to facilitate representation of future generations (both direct and indirect) or embedding the rights of future generations in constitutional provisions (Boston 2021b). In terms of the judiciary, an important possibility is to give standing (the right to sue) to NGOs to bring claims on behalf of future generations, or to allow such organisations or scientists to lodge *amicus curiae* briefs that highlight the distinctive interests of future generations (Lawrence & Köhler 2017).[8]

A fourth group of proxy presentations that goes beyond the formal political system includes, for example, strengthening social movements (Thompson 2005) and paying greater attention to cultural actors (such as religious communities) as proxies for the concerns of creation or future fellow human beings. Religious communities have increasingly become a topic in many contemporary political theories (Gerten & Bergmann 2012; Reder & Müller 2012). Even in a post-secular society, these groups can contribute importantly to representation of the future – precisely because of their creation-theological perspective towards the future. This applies equally to the diverse civil society activities: the 'Fridays for Future' school strikes are a case in point.

A further possibility involves citizens' assemblies which bring together a wide diversity of citizens – including young people below the voting age – to debate issues and then formulate recommendations which are then fed into the formal political process. Such mechanisms have been used in many jurisdictions, including Scotland (Linehan 2021).

Looking at the literature on proxy representation, it is striking that a single type of proxy representation is not usually proposed as a vehicle for giving sustainable attention to nature or future generations in political processes; more often, different forms are combined. For example, Simon Caney (2016) proposes a combined strategy involving a government manifesto for the future, a parliamentary committee, a future vision day, and an independent future council.

From this initial survey of forms of proxy representation, it becomes clear that there are already many approaches at the national level involving further development of democratic representation to include future generations or nature. Several of the models for representation of future generations at the national level have provided inspiration for moves at the international level to represent future generations. (Part III of this book explores several modes of representation at the international level in detail.) At this point, it is important to set out in general terms the various modalities for representation of future generations in relation to the global legal order and related institutions.

[8] *Amicus curiae* briefs allow a person or organisation that is not a direct party to a particular case to assist the court by providing expert information.

2.4 Existing Forms of Proxy Representation in International Law

The general rule is that, before international courts and tribunals, only states or individuals can rely on violations of their own rights. Put differently, only individuals or states suffering damage to their own interests have standing to bring claims before such tribunals. Prima facie, this creates an insurmountable problem for future generations bringing claims before such tribunals, or being represented by a proxy in some shape or form, because only potential (rather than actual) damage can be the basis of a claim.

In this section, however, we demonstrate that there are already several examples in the international legal order of claims being brought before an international tribunal in relation to damage or harm that was not suffered by the person or entity bringing the claim – but on a proxy basis.[9] These examples – set out as short case studies – show that the notion of claims being brought by states or entities on behalf of future generations is not as radical as it might seem. Rather, it involves only incremental reform to international law and institutions.

In relation to each of these short case studies, we examine: (i) who can bring a claim; (ii) on behalf of whom; (iii) whose rights are violated; and (iv) what assumptions are made in terms of the rights/interests of the person or entity violated.

2.4.1 League of Nations Mandate System

Under the League of Nations mandate system, and as confirmed by the ICJ in the 1971 case *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (*Namibia case*), all members of the League had an obligation to act under the mandate system in the interests of the inhabitants of the country/entity covered by the mandate. In the *Namibia* case, the ICJ accepted the principle that, even following the dissolution of the League of Nations, South Africa had an obligation according to which the well-being and development of the peoples living in such territories formed 'a sacred trust of civilisation' (*Covenant of the League of Nations* 1919: art. 22). The duties here flowed from a treaty between the League and South Africa, which took on the obligations of a trustee in relation to the people of Southwest Africa. This system involved the mandate power being under an obligation to 'promote to the utmost the material and moral well-being and the social progress of the inhabitants of the Territory subject to the present Mandate' (The League of Nations 1920: art. 2) which, in turn, involved the mandatory making assumptions about the interests of the people it purported

[9] This section relies on an unpublished paper by Matthias Hartwig and Peter Lawrence; it is incorporated here with Hartwig's permission.

to represent. In turn, the ICJ in its advisory opinion of 1971 in the *Namibia* case made assumptions about the interests of the people covered by the mandate; for example, concluding that the apartheid system was not in the interests of the people of Southwest Africa (now Namibia) and that it was in violation of the UN Charter. In this example, then, the inhabitants of a particular mandate could not directly bring their interests before the ICJ. Nevertheless, this system involved the notion that the mandate state should act on behalf of the persons covered by the mandate, with a set of assumptions being made about their interests.

Addressing our criteria, we can say that, under this system: (i) any individual state member of the League can bring a claim against the mandatory for violation of the mandate (treaty between the League and the mandatory); (ii) such a claim could be brought on behalf of the inhabitants of the mandate; (iii) such a claim could relate to violations of the 'best interests' of the inhabitants of the mandate (for example, through the system of apartheid); and (iv) it was assumed that the inhabitants of the mandate possessed basic human rights (not couched in the language of human rights), including the right to be free of apartheid, and that the mandatory should exercise its governance over the mandate respecting these rights.

2.4.2 Erga Omnes *Claims under the International Law Commission Articles on State Responsibility*

In the *Case Concerning the Barcelona Traction, Light and Power Company Limited* (*Barcelona Traction* case 1970), the ICJ drew a distinction between obligations owed to a particular state and those owed to the international community as a whole 'in view of the importance of the rights involved, States can be held to have a legal interest in their protection; they are obligations erga omnes' (*Barcelona Traction* case 1970: 33), referring to the outlawing of acts of aggression, and of genocide, and principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. The International Law Commission (ILC) in its articles on state responsibility codified this concept in article 48, which provides that:

> 1. Any State other than an injured State is entitled to invoke the responsibility of another State … if:
>
> (a) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or (b) the obligation breached is owed to the international community as a whole. (ILC 2001: art. 48)

The ILC in its commentary emphasised that a state acting under article 48 would be acting not based on its individual capacity by reason of its suffering injury, but rather 'in its capacity as a member of the group of states to which the obligation

is owed or indeed as a member of the international community as a whole' (ILC 2001: 126). The preconditions for this to occur are, first, that the obligation is owed to a group to which the state invoking responsibility belongs and, second, that the obligation has been established 'for the protection of the collective interest' (ILC 2001: 137). The obligation can be derived from treaties or customary international legal obligations. Examples of such collective interests include in relation to the environment or security of a region; the ILC makes clear that the interest extends beyond that of individual member states to a 'wider common interest' (ILC 2001: 126). An example is the *Treaty of Versailles* (1919), which established an international regime for the Kiel Canal to keep the canal open to foreign vessels. This broader common interest was upheld in the case of *S.S. Wimbledon*, *Britain et al. v. Germany* (*Wimbledon* case 1923) by the Permanent Court of International Justice (PCIJ). Japan joined this litigation, although not directly affected by the disruption of the passage of the *Wimbledon* (flying a French flag) through the canal.

The list of obligations which may fall into the category of obligations owed *erga omnes* is not static and may develop over time. As mentioned earlier, the ICJ in the *Barcelona Traction* case considered that outlawing aggression and genocide would fall within this category, as would the 'basic rights of the human person, including protection from slavery and racial discrimination' (*Barcelona Traction* case 1970: 33). In the *East Timor Case (Portugal v. Australia)* (*East Timor* case 1995), the ICJ added the right of self-determination to the list of obligations owed *erga omnes*.

It is crucial to note, however, that establishing an obligation owed *erga omnes* as a matter of state responsibility is distinct from establishing jurisdiction of an international tribunal to hear such a claim. Thus, the ICJ in the *Barcelona Traction* case stated that 'the instruments which embody human rights do not confer on States the capacity to protect the victims of infringements of such rights irrespective of their nationality' (*Barcelona Traction* case 1970: 48). The upshot is that, where an international obligation falls into the category of *erga omnes*, a state does not have to demonstrate that it has suffered damage as a precondition to bringing a claim, but the state still needs to demonstrate that the tribunal concerned has jurisdiction to hear the case.

Applying our matrix, first, under article 48, we ask, 'Who can bring a claim?' A state other than the injured state can bring a claim, provided there is a breach of an obligation owed to a group of states including that state, or the obligation breached is an obligation owed to the international community. Second, we ask, 'On whose behalf is such a claim brought?' The claim may be brought on behalf of the beneficiary (for example, in relation to human rights obligations) but also on behalf of the international community, which is considered to have an interest

in upholding the obligation involved. Third, we ask, 'Whose rights are violated?' Under article 48, the rights of the third state are notionally violated, regardless of whether they in fact suffer injury. Fourth, we ask, 'What assumptions are made in relation to the rights or interests violated?' The assumption made is that it is in the interests of both individuals benefiting from the obligations in question and the entire international community to ensure that the norms, including basic human rights norms, are upheld.

2.4.3 Claims brought under the European Convention on Human Rights

Under the *European Convention on Human Rights* (ECHR) (1950), only a person, state or NGO whose interests are violated can make a claim before the European Court of Human Rights (ECtHR 2023). However, under article 33 of the Convention, a state can bring a claim when another state (that is a party to the Convention) violates the human rights of a person. This mechanism is quite distinct from diplomatic protection in that there does not need to be a link of nationality between the person whose rights are violated and the other state bringing the claim. The mechanism can be used in relation to violations against individuals and systemic issues. In relation to individual alleged violations, the exhaustion of local remedies is required, but this is not required in relation to claims of systemic violations. An interesting example is the case brought by *Denmark, France, Norway, Sweden and the Netherlands v. Turkey* (ECtHR 1983), when Turkey dissolved its Parliament, which included also a claim of systemic violation. The case was settled. This interstate procedure has been used with increasing frequency in recent years (Risini & Eicke 2024).[10]

Applying our matrix, under article 33 of the *European Convention on Human Rights*: (i) a state can bring a claim on behalf of an individual whose rights have been violated under the ECHR; (ii) provided there is evidence that the individual's rights are violated or there is systematic violation of rights; and (iii) the assumption in relation to such claims is that it is in the interest of all states within this regional human rights mechanism to have strong compliance with the obligations contained in the ECHR. The striking proxy representational feature in this example is that such claims can be brought, regardless of whether the applicant country is affected and regardless of whether the victim is one of its nationals or a national of another member state.

[10] As of 19 August 2024, there was a total of 37 pending or completed interstate applications using article 33. See 'Interstate Applications', European Court of Human Rights. Available at www.echr.coe.int/inter-state-applications.

2.4.4 American Convention on Human Rights

The Inter-American Commission on Human Rights provides that NGOs and other associations can bring cases before the Commission in relation to the violation of the interests of third persons in relation to the *American Convention on Human Rights* (ACHR) (1969). However, neither NGOs nor individuals can go before the Inter-American Court on Human Rights (IACtHR), only states can do this. Article 23 of the Rules of Procedure of the Inter-American Commission on Human Rights reads:

> Any person or group of persons or non-governmental entity legally recognized in one or more of the Member States of the OAS may submit petitions to the Commission, on their behalf or on behalf of third persons, concerning alleged violations of a human right recognized in, as the case may be, the American Declaration of the Rights and Duties of Man, the American Convention on Human Rights (Inter-American Commission on Human Rights 2013: art. 23).

The NGO or association does not need to demonstrate that it has suffered damage itself. It is sufficient that the NGO claims the violation of the rights of persons under the protection of the ACHR. Interestingly, most cases before the Inter-American Commission on Human Rights have been initiated by NGOs.

Thus, in summary, under the Inter-American system of human rights, an NGO can bring a claim on behalf of third persons whose rights under the ACHR are violated on the assumption that it is in the community interest to have strong compliance with the obligations set out in the ACHR.

2.4.5 Aarhus Convention

The *Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters* (Aarhus Convention) (1998) encompasses three main principles:

1. access to information on environmental matters;
2. participation of persons and groups in the decision-making process on the construction of specific technical installations such as refineries, coke ovens, or nuclear power plants; and
3. access to justice.

The last provision is the most relevant in the context of our topic. Access to justice is granted for the violation of the right to access to information and for the violation of any substantial or procedural violation of any decision related to participation in the decision-making process. It is left to the national legislature to identify the group of persons and organisations which might have a right or interest in such

a proceeding (Aarhus Convention 1998: art. 9 § 2). However, 'for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest' (Aarhus Convention 1998: art. 2 § 5).

These provisions mean that NGOs working in the field of environmental protection will be entitled to bring a claim, even if these organisations or their members are not directly affected by the act or omission which is impugned. Many national legal systems which grant standing before national courts (mostly administrative courts in environmental matters) only where there is a subjective right or interest at stake, have had to modify their rules to meet the international legal requirements of the Aarhus Convention. As a result, the protection of the environment before a court becomes possible independent of individual interests. From a strictly procedural point of view, an environmental NGO (ENGO), such as Greenpeace, would be acting on its own behalf in articulating the interests of nature. From a broader perspective, however, the ENGO is acting on behalf of nature and thereby in the interests of future generations. In this sense, the ENGO is representing nature and future generations.

In summary, under the Aarhus Convention, ENGOs can bring a claim on behalf of third persons whose rights under the Convention are violated, on the assumption that strong compliance with the Convention's obligations is in the community's interest.

2.4.6 Case Studies: Conclusions

What can be gleaned from these case studies? A common thread is that a person whose rights are violated is not able, owing to their vulnerability, to defend their own rights. This vulnerability provides the justification for allowing another entity (whether it be a state in relation to which they are not a citizen, or an NGO) to step in to make a claim on their behalf. Thus, under the mandate system of the League of Nations, there was limited freedom of political assembly and a lack of access to courts, both factual and de jure. In relation to the interstate complaints mechanism of the *European Convention on Human Rights*, the rationale here is that individuals whose rights are violated may not necessarily be able to bring claims to ensure compliance with the Convention, particularly in relation to systemic violations. A third state may be better placed to do this.

Another common thread in these examples is that the state or NGO which is making a claim on behalf of the vulnerable person or persons is not doing so as an agent of this person or persons; rather, it is making reasonable assumptions as to the essential basic interests or rights of this person or persons.

These short case studies demonstrate that the international legal order already contains mechanisms which involve the proxy representation of persons who are

vulnerable and not necessarily in a position to make claims on their own behalf. This is made possible by reasonable assumptions being made about the core interests of such persons. Thus, for example, an assumption is made that inhabitants of mandate territories under the League system have an interest in not living under a system of apartheid. Similarly, it is assumed that citizens living in countries covered by the *European Convention on Human Rights* have an interest in the Convention being fully implemented.

The upshot of these case studies is that the notion of international tribunals representing future generations in relation to climate change litigation involves only a modest reform, rather than a radical departure from existing international legal rules and mechanisms. In Section 2.5, we explain the various forms proxy representation of future generations in the international legal order could take.

2.5 Proxy Representation of Future Generations in the International Legal Order and Its Functions

Indirect representation of future generations in the international legal order can take place, if a particular rule of international law reflects the interests of future generations. Such rules can be found in treaties or rules of customary international law; they can be substantive or procedural. In terms of substance, on the face of it, the international environmental law principle of sustainable development and the related concept of intergenerational equity (both enshrined in the *Paris Agreement* and other treaties) should – at least in theory – ensure that future generations' interests are incorporated into climate law and policy-making. The *United Nations Framework Convention on Climate Change* (UNFCCC) (1992) requires parties to implement it guided by the following principle: 'the Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity' (UNGA 1992: art. 3(1)). The Preamble to the *Paris Agreement* refers to the need, 'when taking action to address climate change', to promote various principles, including 'intergenerational equity' (*Paris Agreement* 2015: preambular para 11). The status of this principle in customary international law remains disputed and its content rather vague, in that it does not specify what weight should be given to future generations vis-à-vis the current generation (Lawrence 2014; Scholtz 2021). Nevertheless, its inclusion in the UNFCCC (1992) and the *Paris Agreement* (2015) makes it clear that intergenerational equity should be considered in interpreting and implementing these global treaty instruments.

The concept of sustainable development is strongly linked to intergenerational equity in that one of its most influential formulations defines sustainable development as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs' (World Commission

on Environment and Development 1987: 43). Nevertheless, developing countries have been concerned that sustainable development may imply limitations on their right to develop (Bodansky et al. 2017: 54). Reflecting this concern, Article 3(4) of the UNFCCC (1992) provides that 'the Parties have a right to, and should, promote sustainable development' (see also Bodansky et al. 2017: 129). In international law, the concept of sustainable development has been described as an 'interstitial norm' – meaning a norm that, without being legally binding or clearly defined, can nevertheless play a role in shaping the interpretation and application of customary or treaty norms (Lowe 1999; Viñuales 2021).

Indirect representation of future generations may occur in the global legal order, if a particular treaty regime adopts sufficiently stringent rules to ensure that the interests of future generations are protected in relation to the subject matter covered by the treaty. This has occurred in relation to the *Montréal Protocol on Substances That Deplete the Ozone Layer* (1987), which has included rules of sufficient stringency to ensure protection of the ozone layer to the benefit of future generations.[11]

The proposition that global politics should also take future generations into account and that new political programmes are needed for this purpose is becoming more prevalent (Lawrence 2020). While the Sustainable Development Goals (SDGs) adopted by the United Nations in 2015 (UN 2015) do not explicitly refer to the interests of future generations, many of the goals imply a requirement to consider the interests of future generations (Soltau 2021).

Unfortunately, to date, the mitigation measures under the climate regime fall well short of what is required. As mentioned earlier, emission reduction pledges made under the *Paris Agreement* will – when combined – see global warming continue to rise well above the 1.5°C ceiling identified by scientists (UNEP 2022).

A range of other possibilities for representation of future generations in the global legal order have procedural dimensions linked to courts. In March 2023, the UN General Assembly passed a resolution asking the ICJ to pronounce on whether failure by states to take strong mitigation measures in relation to climate change violates their obligations under international law, including in relation to future generations (see Chapter 6). Further options include a Pacific island state bringing a claim in the ICJ against a large emitter state on behalf of both its current and future generations, and indirect representation such as *amicus curiae* briefs by NGOs or scientists highlighting the impacts on future generations in relation to an ICJ case (Lawrence & Köhler 2017). A further possibility is for a tribunal (such as the ICJ itself) to act as a proxy or guardian of future generations. This was proposed

[11] Thanks to parties' commitment to the *Montréal Protocol* (1987), the ozone layer is predicted to recover by the middle of this century (see UNEP n.d.).

by Christopher Weeremantry (*Nuclear Tests Case (New Zealand v. France)* 1974: 341) but has not been taken up by the Court to date (see Chapter 6).

Further options include seeking clarification from international human rights bodies or tribunals along the lines that human rights obligations extend into the future to ensure the protection of future generations. In the climate change context, this involves certain preventative obligations to mitigate or put in place adaptation measures. There has been some progress in recent years in jurisprudence in this area in relation to the application of the *European Convention on Human Rights* (Karlsson-Niska 2020). While the global human rights regime remains relatively underdeveloped, recent cases have begun to push further development of this regime in this area, with young people bringing cases in which they purport to speak on behalf of both their own interests and future generations (see Chapter 7).

At the international level, proxy representation can perform a range of political and legal functions. First, proxy representation may perform a *proxy representative function*, which occurs when the proxy purports to speak or act on behalf of future generations ('direct representation'). As discussed earlier, this contrasts with the situation where the proxy does not purport to speak on behalf of future generations but highlights their interests, for example, a scientist highlighting the impacts of climate change and biodiversity on future generations. We will refer to this as 'indirect representation'.

A second function of proxy representation in the international legal order involves the idea of a *proxy compliance function*, where the proxy functions to ensure compliance with existing international legal rules which operate to the benefit of future generations. This will involve links to the substantive and procedural rules of the institution in question, which must empower the particular proxy institution, court, or tribunal to perform such a function. To be effective in performing this function, there will need to be sufficient carrots and sticks to ensure compliance – involving capacity building to assist countries struggling with implementation, as well as sanctions where countries have the means but not the political will to comply. (While this aspect of the global climate regime is very important, space precludes its discussion in this book.)

Third, there is a function of proxy representation that we call a *proxy reform function*. The essence of this function is that the proxy is proactive in advocating reform to existing international legal institutions and rules to ensure better protection of the interests of future generations. This could occur, for example, if a newly created UN Special Envoy for Future Generations advocated a strengthening of the global climate regime.

Fourth, there is a *proxy norm entrepreneurial function* which occurs where the proxy plays a leadership role in persuading others to adopt a particular norm which

benefits future generations; for example, a UN Special Envoy could advocate for the norm of *intergenerational equity* entailing that an assessment of the impacts of current policies on future generations be incorporated across all UN programmes. The concept of 'norm entrepreneurs' is linked to constructivist concepts of international relations (Finnemore & Sikkink 1998; Wendt 2001). Intuitively, it would seem likely that there is a strong relationship between the legitimacy of the norm being advocated and the legitimacy of the leadership of the proxy representative. Put differently, if the norm being advocated is not seen as in the interests of all countries, then a proxy representative advocating for this norm will have an uphill battle. Conversely, if the norm is perceived as being in the interest of all states, this may facilitate the proxy norm entrepreneurial function.

In accordance with the aim of this book, these conceptual distinctions appear useful in terms of understanding in a more nuanced way the modes in which representation of future generations works in relation to the global legal order, as well as its role in creative reform strategies. A proxy representative of future generations, for example, may perform some or all these functions to varying degrees (considered further in Chapter 8). A central argument of this book is that the most effective proxy representative will maximise the performance of all these functions. In line with pragmatist logic, the evaluative development of (political) practices is always about achieving the best possible consequences for all parties involved. By breaking down proxy representation into these elements, we can make a more nuanced analysis of what, exactly, a proxy representative is and should be doing. As we shall see, this breakdown also allows for a more nuanced analysis of the democratic legitimacy of proxy representatives considered in the case studies presented in Part III.

2.6 Synthesis

A starting point of this chapter was that traditional concepts of representation based on agency do not work in relation to future generations. We nevertheless saw that proxy representation of future generations does fit within Rehfeld's concept of audience-based representation and Saward's concept of surrogacy-based representation. We proposed a definition of representation in the legal context, central to which was the concept of representation being authorised directly by law. We moved on to define proxy representation, distinguished between direct and indirect variants, and sketched various modes of proxy representation at the national level which have provided inspiration for proposals at the international level. We then described a range of existing forms of proxy representation in the international legal order (both direct and indirect), spanning the League of Nations mandate system through to more contemporary human rights mechanisms, to demonstrate that proxy representation of future generations represents a modest, rather than radical,

reform of international law. We saw that the extent to which indirect representation of future generations is incorporated in the international legal order in terms of environment-related principles in the climate regime is limited. We presented a matrix setting out the range of functions that proxy representation might perform, and argued that, by distinguishing these functions, a more nuanced understanding of the functions of existing modes of proxy representation, as well as reform proposals, might be had.

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