Part III Human Health and Human Rights, 17
Intergenerational Equity, Ocean Governance, and the United Nations

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17.1 Introduction

In the message on 8 June 2014 on the occasion of the World Oceans Day, the Secretary-General stated as follows:

The observance of World Oceans Day this year coincides with the 20th anniversary of the entry into force of the United Nations Convention on the Law of the Sea. Known as the ‘Constitution for the Oceans’, this instrument provides a comprehensive legal regime for all ocean activities and is critical to the sustainable use of the world’s seas and oceans. We have to ensure that oceans continue to meet our needs without compromising those of future generations. They regulate the planet’s climate and are a significant source of nutrition. Their surface provides essential passage for global trade, while their depths hold current and future solutions to humanity’s energy needs. On this World Oceans Day, let us reflect on the multiple benefits of the oceans. Let us commit to keep them healthy and productive and to use their resources peacefully, equitably and sustainably for the benefit of current and future generations.¹

There is no doubt that there is great commitment within the United Nations (UN) organization to the needs of future generations, in the fulfilment of the concept of intergenerational equity or solidarity. This is evidenced by various statements of the Secretary-General of the UN, of which the most important was issued in 2013.² The concept of intergenerational equity is inexorably linked to the principle of sustainable development; in fact, it is one of its elements.

This was acknowledged already in 1987 Report Our Common Future, the so-called Brundtland Report, issued by the United Nations World Commission on Environment and Development (WCED). The definition of sustainable development included in this report was formulated as follows: ‘development that meets the needs of the present (p. 358) without compromising the ability of future generations to meet their own needs’.³ The WCED noted that: ‘We act as we do because we can get away with it: future generations do not vote, they have no political or financial power; they cannot challenge our decisions’.⁴ As understood in the Secretary-General’s Report, the concept of intergenerational solidarity refers most frequently to ‘relations between the younger and older generations of those living, including children–parent relations, social participation of elderly people and children in communities, affordability of pensions and elderly care’.⁵ The trend is, however, inclusion of all generations, due to rapidly ageing societies, where family-oriented policies need to take into account the changing role, needs, and demands of all generations. There are other UN adopted documents that include all generations into the concept of intergenerational solidarity.

For instance, the Madrid International Plan of Action on Ageing 2002, adopted at the United Nations Second World Assembly on Ageing, provides that ‘Solidarity between generations at all levels—in families, communities and nations—is fundamental for the achievement of a society for all ages. Solidarity is also a major prerequisite for social cohesion and a foundation of formal public welfare and informal care systems’.⁶ Furthermore, the ECOSOC has identified ‘social integration and intergenerational solidarity’ as one of the three themes to guide the Commission on Social Development’s preparations for the twentieth anniversary of the International Year of the Family.⁷ The concept of intergenerational equity
(solidarity) is wider as it embraces future generations, who do not yet exist, and is therefore not limited to the relations among currently living representatives.

### 17.2 The Concept of Intergenerational Equity within the Context of Sustainable Development and the Protection of the Environment

Professor Brown-Weiss was the first scholar to conceptualize the concept of intergenerational equity within the context of the protection of the environment. According to her, this concept encompasses all generations because ‘we, the human species, hold the natural environment of our planet in common with all members of our species: past generations, the present generation, and future generations’. Each generation is both a trustee for the planet with duties to care for it and a beneficiary with rights to use it.

There are three basic principles of intergenerational equity—the ‘conservation of options’, which entails conserving the diversity of the natural and cultural resource base, to a level comparable to that enjoyed by the previous generation, the ‘conservation of quality’, which entails passing on a planet which is comparable in quality to that enjoyed by previous generations and ‘the conservation of access’, which entails rights of access to past legacies. Furthermore, ‘Intergenerational planetary rights may be regarded as group rights ... they exist regardless of the number and identity of individuals making up each generation’.

Brown-Weiss introduced the concept of trust between the generations, which is based on the concept of trust in common law. She proposed the establishment of a guardian for future generations in order to enforce laws for their benefit for and to represent them. This can be done by in the form of an ombudsman. Brown-Weiss' theory of trust is not without controversy, in particular concerning the rights and obligations created. She argues that ‘the rights are always associated with obligations’. She then claims that ‘each generation is both a trustee for the planet with obligations to care for it and a beneficiary with rights to use it’. According to Hadjiargyrou, this analysis is prima facie entirely legal as it implies that beneficiaries have rights by virtue of their status as beneficiaries and that trustees have obligations by virtue of their status as trustees which is indeed the case in the law of trusts. There is no reason for it; the mere creation of a trust gives rise to such contingencies. Brown-Weiss also adds to her theory of trust a moral dimension, stating that the rights and obligations ‘represent at first a moral protection of interests, which must be transformed into legal rights and obligations’, thus avoiding a legal analysis instead transcending to principles of morality, which translate into legal rights and obligations.

One of the most severe critics of the theory of Brown-Weiss is Vaughan Lowe. He defined this theory as the ‘Chimera’, and then asked the following question: ‘Who are the beneficiaries? What are their rights of actions? What are the duties of trustees?’ He also notes that intergenerational equity lacks any legal content and the perceived rights of future generations are purely metaphorical. According to Lowe, obligations and duties of trustees are not enforceable, as ‘international law lacks institutions and mechanisms with the authority and ability to make rational choices of this kind’. There were also other critical comments regarding the theory of Brown-Weiss, on the basis of the Derek Parfit’s paradox analysis, and that of the chaos theory, which looks at the long-term effects that even the flapping of a butterfly’s wings can have on the environment. D’Amato argues that we cannot discharge our obligation if in the process of doing so we deprive the designated future generation of life due to our intervention. Therefore, is it better to live in a degraded environment than not to live at all. D’Amato also criticized Brown-Weiss’ theory as anthropocentric.
The philosophical basis of Brown-Weiss’ trusts theory is the theory of distributive justice of John Rawls, termed ‘justice as fairness’, and which is a conception of justice shared by citizens as a basis of a reasoned, informed, and willing political agreement. He formulated two principles of justice, which regulate institutions and form the basic structure of society: (i) ‘Each person has an equal claim to ... equal basic rights and liberties’ and (ii) ‘social and economic inequalities are to satisfy two conditions: first, they are to be attached to positions and offices open to all under conditions of fair equality of opportunity; and second they are to be of the greatest benefit of the least advantaged members of society’. Rawls introduced the famous veil of ignorance and uses the ‘original position’ to explain his perspective of justice, operating behind a veil of ignorance, in order to treat everybody equally.

Unlike Rawls, Brown-Weiss elaborated her theory based on the concept of justice as the just savings principle; the difference principle, the original position, and the veil of ignorance are applied by Brown-Weiss in an intergenerational context, which Rawls’ theory does not do. There are several theoretical obstacles to the application of the Rawls theory in the intergenerational context. How can an agreement be arrived at, which forms the very basis of any contract theory, when the parties to the contract are not even present? ‘Rawls’ social contract theory is very much limited to the relationship between physically existing people, given that the principles must be chosen and agreed upon within a society which currently exists. It might be speculated that indirect reciprocity underpins Rawls’ just savings principle, which requires that each generation passes on in real capita in return for what it received which also underpins Brown-Weiss’ entire theory in that the planet should be passed on in no worse condition than it was received in. As it was noted: ‘It comes as no surprise that a concept, which is so malleable within its own terms, proves to be highly problematic when invoked in practice’.

17.3 International Conventions and Soft Law Instruments Including the Principle of Intergenerational Equity

The concept of future generations has part and parcel of numerous legally binding international environmental agreements. The 1946 International Convention for the Regulation of Whaling states ‘the governments ... safeguarding for future generations ... whale stocks’. Another example of hard law, which appeals to future generations, is the 1992 United Nations Framework Convention on Climate Change (UNFCCC), a treaty adopted at the Rio Conference in 1992. Article 3 states: (p. 361) ‘(1) The parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity... (2) take precautionary measures to anticipate, prevent ... causes of climate change’. The 1979 Bonn Convention on the Conservation of Migratory Species of Wild Animals states ‘the contracting parties ... aware that each generation of man holds the resources of the earth for future generations and has an obligation to ensure that this legacy is conserved ... used wisely’ (emphasis added).

Principle 2 of the 1972 Stockholm Declaration on Human Environment states ‘The natural resources of the earth ... must be safeguarded for the benefit of present and future generations’ and Principle 3 of the 1992 Rio Declaration on Environment and Development states: ‘The right to development must be fulfilled as to equitably meet developmental and environmental needs of present and future generations’.

The element of intergenerational equity is inexorably linked with the concept of sustainable development, as had already been defined in the Brundtland report. Therefore, such milestone events as the Johannesburg Summit on Sustainable Development; the 2012 Rio +20 Conference and its outcome document The Future We Want; ‘Transforming Our
The 2002 Johannesburg Declaration on Sustainable Development acknowledged future generations, referring to children:

3. At the beginning of this Summit, the children of the world spoke to us in a simple yet clear voice that the future belongs to them, and accordingly challenged all of us to ensure that through our actions they will inherit a world free of the indignity and indecency occasioned by poverty, environmental degradation and patterns of unsustainable development.

4. As part of our response to these children, who represent our collective future, all of us, coming from every corner of the world, informed by different life experiences, are united and moved by a deeply felt sense that we urgently need to create a new and brighter world of hope.

The document *The Future We Want* includes the following:

We resolve to take urgent action to achieve sustainable development. We therefore renew our commitment to sustainable development, assessing the progress to date and the remaining gaps in the implementation of the outcomes of the major summits (p. 362) on sustainable development and addressing new and emerging challenges. We express our determination to address the themes of the United Nations Conference on Sustainable Development, namely, a green economy in the context of sustainable development and poverty eradication, and the institutional framework for sustainable development (para 12).

And finally, ‘Transforming our world: the 2030 Agenda for Sustainable Development’ used the following formulation:

The challenges and commitments contained in these major conferences and summits are interrelated and call for integrated solutions. To address them effectively, a new approach is needed. Sustainable development recognizes that eradicating poverty in all its forms and dimensions, combating inequality within and among countries, preserving the planet, creating sustained, inclusive and sustainable economic growth and fostering social inclusion are linked to each other and are interdependent (para 13).

### 17.4 The 1982 United Nations Convention on the Law of the Sea and Intergenerational Equity

The 1982 United Nations Convention on the Law of the Sea (UNCLOS) includes in its part XI a concept of the common heritage of mankind (CHM), covering the ‘Area’ (i.e. the seabed and ocean floor and subsoil thereof beyond the limits of national jurisdiction). This concept was introduced at the forum of the United Nations by the Maltese ambassador Arvid Pardo to the United Nations General Assembly (UNGA) in 1967. He suggested that the seabed and ocean floor beyond national should be under the CHM regime. Under this regime, resources of the Area are to be used by the international community of states, subject to international administration and management for the common good of all humanity, in contrast to the freedom of the seas.
Article 136 declares the Area and its resources to be under the regime of ‘common heritage of mankind’. The Area and its resources cannot be claimed, appropriated, or owned by any state or person (Article 137). All rights to resources belong to mankind as a whole, with the International Seabed Authority (ISA) acting on mankind’s behalf (Article 140). The ISA’s task is to ensure the equitable sharing of financial and other benefits arising from activities in the Area, taking into particular account the needs and interests of developing states and others. The ISA’s functions are also promotion of research, transfer of technology to developing states, and protection of the marine environment’s ecological balance (Articles 143–145). There is no doubt that this concept takes into account future generations and the needs of developing countries. Further clarification and elucidation of the function of the ISA in relation to the rights of future generations is found in the Advisory Opinion of the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea (ITLOS) on Responsibilities and Obligations of States with Respect to Activities in the Area. According to the Advisory Opinion, neither the UNCLOS nor the relevant regulations specify what constitutes compensatable damage, or which subjects may be entitled to claim compensation. The Chamber explained that it may be envisaged that the damage would include damage to the Area and its resources constituting the common heritage of mankind, and damage to the marine environment (paragraph 179). Although there is no provision of the UNCLOS explicitly entitling the ISA to make such a claim, it may, however, be argued, the Chamber said, that such entitlement is implicit in Article 137 of the UNCLOS, which states that the ISA shall act ‘on behalf of mankind’. Each state party may also be entitled to claim compensation in light of the erga omnes character of the obligations relating to preservation of the environment of the high seas and in the Area. The Chamber made a reference to Article 48 of the ILC Articles on State Responsibility. It may be added that these Articles also include the obligations erga omnes partes which give a standing to a state part of a multilateral convention to bring a case before the Court, even without a direct harm. There is therefore a real possibility with such wide understanding of the functions of the ISA and also standing granted by Article 48, the interests of the future generations can be secured and redressed.

17.5 International Case Law and Future Generations

The first and visionary case which can be said advocated the concept intergenerational equity was the Pacific Fur Seal Arbitration, the subject matter of which was a dispute between the UK and the USA concerning seal hunting. The British Government disputed the US’s claim to sovereignty of the Bering Sea and fur seals found therein, outside the three miles of sea bordering its islands. The arguments the USA adopted were forward looking, if not visionary. The USA announced its claim was justified on the grounds of a common interest or property of mankind:

Either [seals] they belong to, or are within, the jurisdiction and control of the United States, as that country claims, or else they are the common property of all mankind. These are the alternatives on the question of ownership which confront Great Britain.

Intergenerational equity might be said to hold some of its roots in the concept of a common interest of mankind. The International Court of Justice, the juridical organ of the UN, made important statements in relaxation to nuclear testing and the use of threat of use of nuclear weapons concerning intergenerational equity and future generations. In particular, the former judge and vice-president of the Court, Christopher Weeramantry in his separate judgments, has made a long-lasting contribution to further clarification of this concept. The 1995 Nuclear Tests II case was a result of the Nuclear Tests I case of 1974. Paragraph 63 of the 1974 judgment stated that: ‘[i]f the basis of this Judgment were to be affected, the Applicant...
could request an examination of the situation ...’. The 1974 cases concerned the atmospheric testing whilst the 1995 case, underground testing. In 1995 France had planned to conduct eight final underground nuclear weapons tests in the South Pacific.

The Court, in 1995, found that the judgment of 1974 dealt exclusively with atmospheric nuclear tests and that this formed the basis of the judgment. Therefore, the Court declined its jurisdiction, as the new case related to underground nuclear tests. New Zealand requested the induction of provisional measures by the Court for France to refrain from further nuclear tests before the environmental impact assessment would have been conducted and that no action be taken which might aggravate the dispute. This request for provisional measures was rejected.

The Court’s narrow interpretation of its jurisdiction gave rise to the controversy, as it was argued that the Court focused on technicalities rather than merits of the case. Judges Weeramantry, Koroma, and Judge ad hoc Sir Geoffrey Palmer viewed the Court’s role from a broader perspective, inter alia, as a trustee of rights of future generations.

According to Judge Weeramantry’s dissenting opinion, the Judgment was a very unwelcome decision in relation to nuclear tests, due to their well-documented long lasting effects.

Judge Weeramantry stated that:

> The case before the Court raises ... the principle of intergenerational equity—an important and rapidly developing principle of international law ... if the damage of this kind alleged had been inflicted on the environment by the people of the Stone Age, it would be with us today ... this is an important aspect that an international tribunal cannot fail to notice. This court must regard itself as trustee of those (intergenerational rights) ... The rights of the people of New Zealand include the rights of unborn posterity. Those are rights which a nation is entitled, and indeed obliged, to protect.\(^46\)

(p. 365) In cases like that, it was further viewed, the principle on intergenerational equity is very important and has to be recognized in its own right. Judge Weeramantry supported the concept of trust the present generations’ rights includes those of posterity.

In 1996 the International Court of Justice gave an Advisory Opinion on *The Legality of the Threat or Use of Nuclear Weapons*, pursuant to Article 96(1) of the UN Charter. The UNGA asked the Court: ‘Is the threat or use of nuclear weapons in any circumstance permitted under international law?’

It was stated that:

> The Court recognises that ... the environment ... represents ... the very health of human beings, including generations unborn. The existence of the general obligation of States to ensure that activities within their jurisdiction ... respect the environment of other States or of areas beyond national control is now part of the corpus of international law ... (para. 29) ... The destructive power of nuclear weapons cannot be contained in either space or time ... the use of nuclear weapons would be a serious danger to future generations. Ionizing radiation has the potential to damage the future environment ... and to cause genetic defects and illness in future generations (para 35) ... it is imperative for the Court to take account of the unique characteristics of nuclear weapons ... [and] their ability to cause damage to generations to come (para 36).\(^47\)
The opinion of the Court raised certain dissatisfaction as the Court stopped short of explicitly relying on a principle of intergenerational equity. It may be stated, however, that although non-binding, advisory opinions play a very important role in the crystallization of international law and, in this particular Opinion, the Court stressed the importance of the environment and in this context of the rights of future generations.

The case concerning the Gabčíkovo-Nagymaros Project\(^48\) concerned a dispute between the Slovak Republic (the case was brought before the Court after the separation of Czechoslovakia) and the Republic of Hungary concerning the construction and operation of a hydroelectric power plant on the Danube River, based on a bilateral treaty, which did not have termination clauses. Only a part of the project had been finished before Hungary suspended and then terminated the project, partly due to environmental concerns.

The Court stated:

> It is clear that the Project’s impact upon … the environment are of necessity a key issue … vigilance and protection are required on account of the often irreversible character of damage to the environment … Throughout the ages, mankind has, for economic … reasons, constantly interfered with nature. Owing to … a growing awareness of the risks for mankind—for present and future generations—of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed … such norms have to be … given proper weight … this need (p. 366) to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development…\(^49\)

Judge Weeramantry, in his Separate Opinion, referred to the ‘trusteeship of earth resources’, and asserting that ‘since flora and fauna have a niche … they must be expressly protected. There is a duty lying upon all members of the community to preserve the integrity and purity of the environment. Natural resources are not individually, but collectively, owned’\(^50\).

In the Case Concerning Certain Phosphate Lands in Nauru\(^51\), concerning a dispute over the rehabilitation of certain phosphate lands mined under Australian administration before Nauru gained independence, the latter claimed that Australia had breached the trusteeship obligations it had accepted under Chapter XII, Article 76 of the UN Charter 1945 and Articles 3 and 5 of the Trusteeship Agreement for Nauru of 1 November 1947. More specifically, Article 3 of the Trusteeship Agreement lays out the obligations to administer the territory in such a way that achieves the requirements of Article 76 of the UN Charter, which requires the promotion of ‘[t]he political, economic, social and educational advancement of the inhabitants of the trust territories and their progressive development towards self-government …’, while Article 5(2)(a) of the Trusteeship Agreement further provided that the Administering Authority would ‘[r]espect the rights and safeguard the interests both present and future, of the indigenous inhabitants of the territories’.

Nauru argued that it had a legal entitlement to the Australian allocation of the overseas assets and that Australia was under a duty to make appropriate reparations for losses caused to the Republic of Nauru as a result of the breaches of its legal obligations and its failure to recognize the interest of Nauru in the overseas assets.

The case before the Court had elements of rights of future generations as Australia was placed in the position of both trustee and beneficiary as it had once enjoyed the benefits of the phosphate and was later in a position of administering the phosphates. Both present and future generations of the Nauru peoples were in the position of beneficiaries; thereby creating a system of distributive justice through the operation of a trust. Additionally, trust funds were set up to rehabilitate the worked-out land, operating as a system of corrective
justice for damage done. The *Nauru* case exhibits both elements of Brown-Weiss’ theory, that is, corrective and distributive justice (intergenerational justice and trust).

In conclusion, it may be said the International Court of Justice has noted in its jurisprudence the rights of future generations. It, however, has not elaborated either on their legal character or on its role as a trustee of such rights. Such a role is very difficult to define as the nights of future generations are rather vague from a legal and positivist point of view. Such rights are a nexus of legal and moral rights, whereas the Court (p. 367) adjudicates its cases on a legal basis, therefore the result of the Court’s examination of rights of future generations and the concept of intergenerational equity, may appear to be not entirely satisfactory, or fulfilling expectations. There is also a tension between the rights of future generations and those of the present, in particular including economic rights. Such a problem is very complex and it cannot be rationally expected that the Court is in the position to clarify and crystallize all issues pertaining to the rights of future generations and to the concept of intergenerational equity.

### 17.6 National Case Law and Future Generations

Turning to national case-law, without doubt the Minors *Oposa* litigation is the most famous case concerning intergenerational equity. A group of children, including those of environmental activist Antonio Oposa, brought this lawsuit in conjunction with the Philippine Ecological Network, Inc. (a non-profit organization) to stop the destruction of the fast disappearing rain forests in their country. The minors claimed that they were ‘entitled to the full benefit, use and enjoyment of the natural resource treasures that is the country’s virgin tropical rainforests’. The children claimed that they represented themselves and generations yet unborn, thereby incorporating intergenerational equity into their suit. Standing was permitted insofar as it accommodated the right to a healthful ecology as embodied in Sections 15 and 16 of Article II of the Philippine Constitution.

The Court held:

> Needless to say, every generation has a responsibility to the next to preserve that rhythm and harmony for the full enjoyment of a balanced and healthful ecology. Put a little differently, the minors’ assertion of their right to a sound environment constitutes, at the same time, the performance of their obligation to ensure the protection of that right for the generations to come ...

While the right to a balanced and healthful ecology is to be found under the Declaration of Principles and State Policies and not under the Bill of Rights, it does not follow that it is less important than any of the civil and political rights enumerated in the latter. Such a right belongs to a different category of rights altogether for it concerns nothing less than self-preservation and self-perpetuation—aptly and fittingly stressed by the petitioners—the advancement of which may even be said to predate all governments and constitutions. As a matter of fact, these basic rights need not even be written in the Constitution for they are assumed to exist from the inception of humankind. If they are now explicitly mentioned in the fundamental charter, it is because of the well-founded fear of its framers that unless the rights to a balanced and healthful ecology and to health are mandated as state policies by the Constitution itself, thereby highlighting their continuing importance and imposing upon the state a solemn obligation to preserve the first and protect and advance the second, the day would not be too far when all else would be lost not only for the (p. 368) present generation, but also for those to come—generations which stand to inherit nothing but parched earth incapable of sustaining life.53
This case, however, also illustrates the legal difficulties the position of future generations in issues such as the standing before the Court. These considerations were very aptly expressed by Judge Feliciano in his Separate Opinion:

The Court explicitly states that petitioners have the locus standi necessary to sustain the bringing and maintenance of this suit (Decision, pp 11–12). Locus standi is not a function of petitioners’ claim that their suit is properly regarded as a class suit. I understand locus standi to refer to the legal interest which a plaintiff must have in the subject matter of the suit. Because of the very broadness of the concept of ‘class’ here involved—membership in this ‘class’ appears to embrace everyone living in the country whether now or in the future—it appears to me that everyone who may be expected to benefit from the course of action petitioners seek to require public respondents to take, is vested with the necessary *locus standi*. The Court may be seen therefore to be recognizing a beneficiaries’ right of action in the field of environmental protection, as against both the public administrative agency directly concerned and the private persons or entities operating in the field or sector of activity involved. Whether such beneficiaries’ right of action may be found under any and all circumstances, or whether some failure to act, in the first instance, on the part of the governmental agency concerned must be shown (‘prior exhaustion of administrative remedies’), is not discussed in the decision and presumably is left for future determination in an appropriate case.\(^{54}\)

Similar considerations were expressed by Gatmaytan, who was of the opinion that ‘Oposa is overrated’, and that the praise and acclamation it has received in recent years are misdirected.\(^{55}\) He stated, inter alia, that the decision did not affect the government’s conduct towards Timber Licensing Agreements (TLAs) which were not cancelled thereby, judgment of the Court having no practical effect on future generations. He also opined that the granting of standing to sue on behalf of future generations was only *obiter dictum* thereby not really affecting the value of intergenerational equity as a binding legal right or obligation. As Judge Feliciano, Gatmaytan observed that in this case the issue of standing in the Philippines is approached very widely and loosely. Overall, Gatmaytan has admitted that the *Oposa* case was a valuable decision, but only as it recognized as justiciable the constitutional right to a healthful ecology, in contrast to issues regarding intergenerational equity in this case, which he has not considered as meaningful or adding any new legal dimension.

Lowe also expressed a negative evaluation of the *Oposa* case. He has stated that ‘it is not the right of a future generation, but the duty of some members of the present (p. 369) generation that is being enforced at the instance of other members of the present generation’,\(^{56}\) as the future generations, he says could not be bound by *Oposa*. According to him, future generations cannot possess rights of enjoyment or exercise their duty even to mitigate logging because they do not exist. Lowe argued the invocation of future generations in this case only served as a rhetorical device.\(^{57}\)

There are several other cases in which the concept of intergenerational equity was invoked but with varied results. In *M Farooque v Bangladesh and Others*,\(^{58}\) the petitioner appealed to *Oposa* to sue on his own behalf and also on behalf of future generations. *Oposa*, however, was entirely rejected due to the fact that no constitutional right inherently entailed the rights of future generations in Bangladesh, as was the case in the Philippines. In Pakistan, however, the concept has never been applied.

In India, in *People United for Better Living Calcutta v State of West Bengal (1992)*\(^{59}\) on water pollution and the maintenance of wetlands in Calcutta, the Court held that: ‘there shall be a proper balance between the development and the environment’, thereby invoking sustainable development whilst claiming that: ‘The present day society has a responsibility towards the posterity ... to breathe normally and live in a cleaner environment ...’.\(^{60}\)
thereby creating an ethos of intergenerational duty. In *S Jagannath v Union of India* (1996),61 the petitioners filed a claim against intensified shrimp farming, which posed a serious threat to the environment and ecology. The Court held that it had ‘no hesitation in holding that Sustainable Development … has been accepted as a part of the customary international law, thereby recognising the rights of future generations … some of the salient principles of Sustainable Development … are Inter-Generational Equity’.62 Through recognizing sustainable development as primary international law, the court recognized and identified intergenerational equity as such, and required it as an element to be taken account of in any environmental impact assessment.

In the High Court of Delhi, in *Vedanta Alumina Ltd v Prafulla Samantra and Others*,63 the petitioner filed a complaint against the construction of an aluminium smelter plant. Reference was made to *ND Jayal v Union of India*,64 which stated that: ‘Weighty concepts like inter-generational equity … public trust doctrine … could only be nurtured by ensuring sustainable development’.65

This overview of cases clearly indicates that although the intergenerational equity has been invoked several times, its legal content and the standing in cases of its invocation is not entirely clear or straightforward. Somehow, the very wide and imprecise formulation of this concept does not sit easily with strict requirements of national law regarding rules of standing before courts. Indeed, as Lowe stated, at times it appears that the reliance of intergenerational equity is a purely rhetorical device.

**Constitutional and Institutional Protection of the Rights of Future Generations**

There are several Constitutions that refer to the rights of future generations. The 2010 Constitution of Kenya, currently in operation, makes multiple references to future generations. The preamble of the Constitution states: ‘We the people of Kenya … respectful of the environment, which is our heritage, and determined to sustain if for the benefit of future generations’. Articles 42, 69, 70, and 201 make further references to the rights of future generations. The Argentinian Constitution Article 41(1) states that: ‘All inhabitants are entitled to the right to a healthy and balanced environment … productive activities shall meet present needs without endangering those of future generations; and shall have the duty to preserve it’.

The Constitution of Poland Article 74(1) states that: ‘Public authorities shall pursue policies ensuring the ecological security of current and future generations’. Article 20a of the German Constitution states: ‘Mindful also of the responsibility toward future generations, the State shall protect the natural bases of life by legislation and, in accordance with law and justice, by executive and judicial action, all within the framework of the constitutional order’.

The Constitution of South Africa includes both the right to a clean environment and generational justice. In 2015, in Wales was promulgated the Well-being of Future Generations (Wales) Act 2015, which is based on the sustainable development concept. Interestingly, it also established the office of Future Generations Commissioner for Wales in order to promote the needs of future generations by monitoring and reporting on the extent to which the public bodies are setting and seeking to meet their well-being objectives in accordance with the sustainable development principle; and to provide for the Commissioner to carry out reviews of public bodies.66

In Israel, the Commission for Future Generations operated from 2001 until 2006. The Commission regulated matters that were of special interest to future generations, providing parliament with recommendations on bills and secondary legislation. The Commission had a
policing role in stating that it had ‘powers to examine each legislative act wherever there is a suspicion of possible prejudice to future generations’. 67

In particular, the Commission performed four basic functions: ‘To give opinions regarding bills brought ... that are of concern to future generations’; ‘[t]o give opinions regarding secondary legislation and regulations ... that are of concern to future generations’; ‘[t]o provide parliament ... with recommendations on any matter the Commissioner [head of the commission] considers to be of importance to future generations’; and ‘[t]o provide the members of the parliament with advice on matters that are of special interest regarding the future generations’. 68 The Commissioner had the (p. 371) authority to review any prospective primary or secondary legislation and participate in all top-level debate on the legislation. The Commissioner had his right to access relevant information:

The Knesset Commissioner for Future Generations may request from any organization or body being investigated ... any information, document or report ... in the possession of that body and which is required by the Commissioner for the implementation of his tasks; the aforesaid body will give the Commissioner the requested information. 69

Former Deputy Commissioner Nira Lamay wrote that the ‘motto was that while the political world was busy with issues of defence and war, we would prepare for the “day after” peace, when future generations would have clean water to drink and clean air to breathe’. 70 However, it ceased to exist in 2006 because allegedly the Commission was unnecessary, ineffective, and wasted public funds.

In Hungary, the Office of the Parliamentary Commissioner for Future Generations was established in 2008 (the so-called Green Commissioner) in 2012 and was also incorporated into the Office of the Commissioner for Fundamental Rights, together with the Office of the Parliamentary Commissioner for Civil Rights and the Office of the Parliamentary Commissioner for the National and Ethnic Minorities Rights. 71

The Green Ombudsman ‘serves as a consultative body to the Parliament regarding environmental legislation, may initiate proceedings at the Constitutional Court or intervene in court litigations in the interest of future generations and the enforcement of the right to a healthy environment’. However, ombudspersons in Hungary have no authority to issue binding and enforceable resolutions. Nonetheless, the office contributed the identification of possible solutions of environmental conflicts. The Green Ombudsman also participates in ongoing discussions related to the general issues of environmental policy and environmental law and regularly contributes to the legislative process by issuing proposals. 72


The Canadian Commissioner of the Environment and Sustainable Development, appointed by the auditor general, ‘provides parliamentarians with objective, independent (p. 372) analysis and recommendations on the federal government’s efforts to protect the environment and foster sustainable development’. 73

Finally, there were several proposals for the establishing of the Ombudsperson for Future generations on the UN level. In preparation for the Rio+20 (UN Conference on Sustainable Development), a coalition of Civil Society and the Major Group Youth/Children have introduced the idea for the establishment of ‘Ombudspersons for Future Generations’ at

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global, national, and local level, in order to advocate ‘sustainable development as envisaged and defined by the Brundtland Commission: to enhance the well-being and prospects of present and future generations to meet their needs, serve as an auditor at the heart of governments and deal with citizens complaints’.74

The following were criteria for Effective Representation of Future Generations: each Ombudsperson for Future Generations needs to be designed in accordance with local or national legal and cultural reality. Sustainable Development Councils, in states where they exist, should be mandated to act as the representative for future generations. The Ombudsperson and its staff should be independent and not hold another governmental post that would influence their freedom of reasoning nor should they have any interests in commercial sectors. The office should be established on the principles of legitimacy and should enjoy large public support, and also of civil society. The selection process of the actual Ombudsperson should be designed to guarantee broad support and citizens who should have the direct access to deliver inputs and receive information. In order to enjoy and increase trust, the office should also be based on the principle of transparency, that is, provide a clear mandate to access all information, especially early in the policy-making process. It should maintain open relationships with all stakeholders during investigations and should report regularly about its work in a format that is accessible to all citizens. Such an office should also have some authority; the ‘shadow of enforcement’ for the more effective intervention.75

17.8 The United Nations and Future Generations

The Major Group Children and Youth suggested the establishment of national level ombudspersons for Future Generations in order to provide an assessment of the long-term impacts of public policies and legislative proposals. Their functions would be as follows: responding to citizen petitions, investigating claims of environmental crimes and offences and engaging in either conciliation or litigation. The call was reiterated in the Declaration adopted at the sixty-fourth annual Conference of the Department of Public Information for Non-Governmental Organizations held in Bonn, Germany, (p. 373) 3–5 September 2011.76

This Declaration proposed the establishment of ombudspersons for future generations at the global, national, and local levels, who will support sustainable development, as envisaged and defined by the Brundtland Commission, to enhance the well-being and prospects of present and future generations to meet their needs, serve as an auditor at the heart of governments and deal with citizens’ complaints.77

It was submitted that the establishing of the High Commissioner for Future Generations (HCFG):

would further the global objectives of intergenerational justice by encouraging focus on issues that are of critical importance to the wellbeing of future generations but are often side-lined within the structure and procedures of present political and legal systems. The existence of such an office at the United Nations would help address, in a focused manner, the long-term consequences of present-day actions, by spotlighting impact on the future in tangible, non-abstract terms and by rallying support for integrating sustainability into planning decisions by governments, business, and individuals. The office would also play an advocacy role by highlighting the moral imperative of leaving behind a healthy world in which future generations will live out their lives. Finally, such an office may function best in the context of the United Nations, where the vision of a better tomorrow and planning for future generations are in keeping with the United Nations Charter and are among the driving values of the Organization’.78
The core powers and responsibilities of HCFG would include: international agenda-setting and leadership; monitoring, early warning, and review; public participation; capacity for innovation at national and sub-national levels; public understanding and evidence; and reporting.\textsuperscript{79}

As an international entity within the UN system, the HCFG is envisaged thus as having significantly different functions from similar national institutions set up to serve future generations. Supporters argue that ‘the political dynamics, responsibilities, and powers of national institutions would largely be absent at an international level, with a High Commissioner for Future Generations ... playing a more limited role’.\textsuperscript{80}

Other approaches addressing the needs of future generations include raising awareness and focus on future generations within existing institutions and offices, recognition of the needs of young people and future generations in the Sustainable Development Goals, or establishing a special envoy. Proponents for the establishment of a HCFGs argue, however, that this will be the most effective way of protecting the interests of future generations.\textsuperscript{81}

There was submitted a wide spectrum of options.

(p. 374) The idea which garnered the most support was setting up a Commissioner for Future Generations. The Commissioner would advocate support for intergenerational solidarity through interactions with the member states and other stakeholders, as well as across the UN entities and specialized agencies. Such an office could initiate research and foster expertise on policy practices to enhance intergenerational solidarity in the context of sustainable development on the international, regional, national, and sub-national level and disseminate this expertise as deemed appropriate. It could, on request from the UN (or any of its entities, specialized agencies, or affiliated organizations), offer advice on implementation of existing intergovernmental commitments to enhance the rights and address the needs of future generations and could, upon request, also offer its support and advice, including to individual member states on best practices and policy measures to enhance intergenerational solidarity. It could also undertake research on policy practices to enhance intergenerational solidarity in the context of sustainable development on the international, regional, national, and sub-national level and disseminate this expertise as deemed appropriate.\textsuperscript{82}

Another option, less supported, was the establishment of a Special Envoy of the Secretary General on Future Generations to serve ‘as a global independent advocate for intergenerational solidarity, with a particular concern for the welfare of future generations, and would promote and facilitate the inclusion of best practices in policy-making at all levels. The Special Envoy would promote and facilitate the engagement and full participation of all stakeholders in the UN processes related to intergenerational solidarity and future generations, such as the High-level Political Forum, as well as conduct public advocacy to raise awareness of measures needed globally’.\textsuperscript{83}

Yet another proposal was the setting up of the Agenda item in high-level political forum. The high-level political forum ‘could address intergenerational solidarity and the needs of future generations as a recurring agenda item, which would serve to keep the issue on the agenda of international decision-making and promote its integration within the sustainable development framework. Specifically, intergenerational solidarity and future generations could be addressed through thematic plenary or roundtable discussions and result in possible recommendations included in the Forum’s declarations’.\textsuperscript{84}

Finally, the inter-agency coordination on the needs of future generations was suggested. ‘The Secretary-General could be invited to promote intergenerational solidarity and future
generations within the UN System through the Chief Executives Board (CEB) and its mechanisms to ensure policy coherence within the system.85

There is also a specific question of the rights of future generations in relation to the oceans. The present author is of the view that the suggestion of Professor Brown-Weiss, who supported the creation of an institution of an Ombudsman to secure the rights of future generations at the international for a, is a very valid proposal. Such an institution would participate in negotiations of any Convention which would relate to ocean governance. In setting up such a body, states must be mindful of the interests of multiple stakeholders participating in ocean activities and the principle of sustainable development, which includes the principle of sustainable use. Therefore, the Oceans Ombudsman should balance the needs of present and future generations and the sustainable use of natural resources. Various interests of future generations should be taken into account such as their wealth, welfare, education etc. It would be of a benefit to set up a permanent body (similar to the ISA) which would oversee and protect the rights of future generations and analyse reports from states how they implement in their legislation regarding oceans the rights of future generations, that is, such a body would also act similarly to the Commission on Sustainable Development (at present High-level Political Forum on Sustainable Development) which analyses the reports from states regarding implementing sustainable development in their countries.

In conclusion, it may be said that the question of national legislations and the institutional aspect of an establishment of an ombudsman for future generations is a complex and varied matter. There is no one single pattern of the institutional development. There is also quite little practice as there are not many institutions set up to exclusively deal with the interests of future generations. Some of the national legislations include the interests of future generations.

Within the organs dealing with sustainable development, the most instructive was the institution set up in Israel, which although ceased to exist, developed an extensive list of functions for the Ombudsman for Future Generations. However, there is no doubt that there is a real need to establish such an institution at the international level, within the United Nations. Growing pollution and the destruction of the environment call for the United Nations to take an action, as evidenced by the Report of the Secretary-General. This is supported by civil society and non-governmental organizations.

17.9 Conclusions

There are a few subjects in international and national laws, and philosophy that have resulted in such vibrant and robust discussions as the rights of future generations. It is a multidisciplinary subject and confining it to only the legal dimension does not reflect the true nature of the problem. It has a very important aspect of ethics in it and distributive justice. However, as the review of views in this report indicate, the theoretical aspect of the concept of intergenerational equity results in robust but inconclusive debate. Therefore, the way forward is to look for practical solutions, as evidenced by the reports of the UN Secretary-General. It is needed and it is feasible. (p. 376)

Footnotes:

* The author would like to express her gratitude to HE Judge David Attard for his very thoughtful comments on the first draft of this chapter.


4 ibid.

5 See n 1, at 6.


7 E/RES/2012/10.


9 Brown-Weiss (n 8) 198–99.

10 ibid 203.

11 ibid 205.

12 See Hadjiargyrou (n 8) 4.

13 Brown-Weiss (n 8) 202.

14 ibid 200.

15 ibid 202.

16 Hadjiargyrou (n 8) 4.

17 Vaughan Lowe, ‘Sustainable development and Unsustainable Arguments’ in A Boyle and D Freestone (eds), International Law and Sustainable Development: Past Achievements and Future Challenges (OUP 1999) 27.

18 ibid 28.

19 Anthony D’Amato, ‘Do We Owe a Duty to Future Generations to Preserve the Global Environment’ (1990) 84 American Journal of International Law 190, 191.


23 ibid 5–6.

24 ibid 11.

25 Hadjiargyrou (n 8) 9.
27 Hadjiargyrou (n 8) 10.
28 ibid 10.
39 Responsibilities and Obligations of States with Respect to Activities in the Area, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, 10.
40 ‘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.’ See Responsibility of States for Internationally Wrongful Acts 2001 http://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf (last accessed October 2016).
41 The Whaling in Antarctic case is an example of such a case where Australia and New Zealand intervening sued Japan over scientific whaling. Whaling in the Antarctic (Australia v Japan: New Zealand intervening), Judgment, ICJ Reports 2014, 226. See also Malgosia Fitzmaurice and Dai Tamada (eds), Whaling in Antarctic: Significance and Implications of the ICJ Judgment (Brill/Martinus Nijhoff 2016).
42 Pacific Fur Seal Arbitration (United States of America v Great Britain) (1893) 1 Moore’s International Arbitral Awards 733.
In this case the arbitral tribunal upheld the position of Great Britain regarding the freedom of the high seas.


ibid.


Minors Oposa v Secretary of the Department of Environment and Natural Resources (DENR), Supreme Court of the Philippines, 30 July 1993, 33 ILM (1994) 173.

ibid.

See Judge Feliciano, Separate Opinion http://hrlibrary.umn.edu/research/Philippines/Oposa%20v%20Factoran,%20GR%20No.%20101083,%20July%2030,%201993,%20on%20the%20State%27s%20Responsibility%20To%20Protect%20the%20Environment (last accessed October 2016).


Lowe (n 17) 27.

ibid.

(1997) 49 DLR (AD) 1.

AIR 1993 Cal 215, 97 CWN 142.

ibid.


ibid.

LPA 277/2009


ibid.


Fitzmaurice (n 26) 151.

69 ibid.


73 See http://jno.hu/en/ (n 71).


75 ibid 13.


77 ibid para 55, at 35–36.


79 ibid., para 57, at 36.

80 ibid para 58, at 37–38.

81 ibid para 60, at 38–39.

82 ibid para 63, at 39–40.

83 ibid para 65, at 41.

84 ibid para 66, at 41.

85 ibid para 67, at 42.