Intergenerational Equity

Edith Brown Weiss

Subject(s):
Customary international law — Intertemporal law — Equality before the law — Right to food — Water — Indigenous peoples — Nationality of individuals — Sustainable development — Equitable principles — Natural resources

Published under the auspices of the Max Planck Foundation for International Peace and the Rule of Law under the direction of Rüdiger Wolfrum.
A. Concept

1. General Remarks

1 The principle of intergenerational equity states that every generation holds the Earth in common with members of the present generation and with other generations, past and future. The principle articulates a concept of fairness among generations in the use and conservation of the environment and its natural resources (see also → Conservation of Natural Resources; → Environment, International Protection). The principle is the foundation of → sustainable development. It has also been applied to cultural resources and to economic and social problems.

2. Source of the Principle

2 The principle of intergenerational equity has deep roots in diverse cultural and religious traditions, including the Judeo-Christian, Islamic, and Asian non-theistic traditions. It has roots in Islamic law, the common law, civil law traditions, African customary law, and Native American traditional law, among others.

3 In international law, the principle builds upon the use of equity, initially formulated by Aristotle and elaborated by Grotius, who treated equity as addressing those cases not covered by the universal law (see also → Equity in International Law). In the 20th century, equity was often cited as synonymous with being ‘just’ or with ‘justice’, as articulated by the → International Court of Justice (ICJ) in the → North Sea Continental Shelf Cases and in the Case Concerning the Continental Shelf (Tunisia v Libya). Especially in the latter half of the 20th century, equity has been invoked in international law as a basis upon which to provide standards for allocating and sharing resources and for distributing the burdens of caring for the resources and the environment in which they are found. This use of equity provides a foundation for a principle of intergenerational equity.

3. Content of the Principle

(a) Definition of Future Generations

4 The term future generations refers to all those generations that do not exist yet. The present generation refers to all those people who are living today. The present generation encompasses multiple generations among those living today, but they are treated collectively as the present generation.

(b) Elements of the Principle

5 The principle of intergenerational equity is a foundation for the concept of sustainable development. The World Commission on Environment and Development, which preceded the 1992 Rio Conference on Environment and Development, defined sustainable development ‘as meeting the needs of the present without compromising the ability of future generations to meet their own needs’ (Our Common Future at 8). This general language has been repeated in many different legal documents. It reflects concerns expressed in the earlier Stockholm Declaration on the Human Environment (→ Stockholm Declaration [1972] and Rio Declaration [1992]).

6 There is no international legal instrument that defines the elements of the principle of intergenerational equity. A review of juridical writings and legal instruments indicates that the core of the principle is that while the present generation has a right to use the Earth and its natural resources to meet its own needs, it must pass the Earth on to future generations in a condition no worse than that in which it was received so that future
generations may meet their own needs. This generally applies both to the diversity of the resources and to the quality of the environment.

7 In the 1980s, Brown Weiss identified a principle of intergenerational equity in which all generations hold the Earth in common as a trust. People are both beneficiaries entitled to use the environment and its resources, and at the same time trustees (or stewards or custodians) with an obligation to pass it on in no worse condition on balance than that in which it was received. This theory articulated three elements of intergenerational equity: non-discriminatory access to the Earth and its resources; comparable options (as reflected in the diversity of resources); and comparable quality in the environment. These elements apply to both natural and cultural resources and lead to a suite of intergenerational strategies. The elements of the principle met four criteria: that they neither authorize unreasonable exploitation by the present generation nor impose unreasonable burdens on it; that they not require predicting the values of future generations and provide flexibility to future generations to achieve their own goals; that they be reasonably clear in application to foreseeable situations; and that they be generally shared by different cultural traditions and acceptable to different economic and political systems.

8 The concept of comparable options rests on the assumption that future generations are more likely to survive and attain their goals if they have a variety of options for addressing their problems and opportunities. Conserving the diversity of natural and cultural resources will provide future generations with a robust and flexible heritage through which they can achieve their own well-being. The concept of comparable quality requires that on balance the quality of the natural and cultural environment be at least in no worse condition than that in which it was received. Trade-offs will be inevitable in implementing this element. Both the obligations to provide comparable options and comparable quality are part of the core obligation to pass on the environment in no worse condition than that in which it was received. The element of access gives the present generation a reasonable, non-discriminatory right of access to natural and cultural resources to use for its own benefit, and the obligation to pass on at least a minimal level or improved conditions of access.

9 Not all activities that harm the environment raise intergenerational issues. Noise pollution and surface water pollution, for example, need not raise intergenerational issues. However, disposal of wastes whose impact cannot be contained either spatially or over time, particularly toxic contamination of ground water and lakes, nuclear contamination of the oceans (→ Nuclear Waste Disposal), climate change from human activities (see also → Climate, International Protection), depletion of the ozone layer through chemical pollutants (see also → Ozone Layer, International Protection), rapid extinction of species (see also → Biological Diversity, International Protection; → Endangered Species, International Protection), destruction of tropical forests sufficient to affect biodiversity in the region significantly (see also → Forests, International Protection), loss of soils, and destruction of gene banks, do raise important intergenerational issues. The principle of intergenerational equity applies to these and many other problems and leads to prescriptive actions.

10 It could be argued that it is not possible to know the interests of future generations and that by trying to protect those interests, the present generation is imposing its values upon them. The response is that all actions that we take today inherently affect the well-being of future generations. The elements of the principle of intergenerational equity are intended to ensure that future generations inherit a robust environment, which is resilient to dramatic changes, and that they have diverse options through which to pursue their own values.
(c) **Relationship of Intergenerational Equity and Intragenerational Equity**

11 There is general agreement that there are severe problems of equity among people living today. The equity problems are addressed in the concept of intragenerational equity, ie equity among peoples today. The quest for intergenerational equity requires that intragenerational equity issues be addressed. In practice, the two kinds of equity are joined, because poor communities cannot be expected to fulfil intergenerational obligations if they are not able to meet basic needs today. There is also a conceptual link between equity today and the principle of intergenerational equity. However, there is no consensus as to the nature of the linkage. One view is that they are two separate concepts, that intragenerational equity is meaningful only when it is defined, and that there is no agreement on its definition. Another view is that the broad concept of equity encompasses both intragenerational and intergenerational equity. Yet another is that the principle of intergenerational equity encompasses intragenerational equity as an integral element. Under this last view, as future generations become living generations, they assume the rights and obligations inherent in intergenerational equity. This defines intragenerational equity, for the same postulates of comparable access, options, and quality owed to future generations apply among people living today. While there may be general agreement on the basic elements of a principle of intergenerational equity, there is not yet general agreement on the definition of intragenerational equity and on its legal status.

(d) **Relationship of Rights and Obligations**

12 The principle of intergenerational equity creates responsibilities on the part of the present generation towards future generations. There is controversy as to whether the principle of intergenerational equity also conveys rights. Do future generations have rights, with correlative obligations in the present generation? A right is an interest that is juridically protected and always associated with a duty. A duty is not always associated with a right. In the context of future generations, if we were to follow the philosophers Austin and Kelsen, the obligations of the present generation to future generations constitute obligations or duties for which there are no correlative rights, because determinate persons to whom the right attaches do not exist yet. The rights of future generations may be more nearly analogous to → group rights that protect interests held in common. They represent valued interests that attach to future generations, and that representatives of future generations can protect. The 1997 → United Nations Educational, Scientific and Cultural Organization (UNESCO) Declaration on the Responsibilities of the Present Generations toward Future Generations (‘UNESCO Responsibilities Declaration’) speaks only of the present generation having the responsibility to ensure that ‘the needs and interests of present and future generations are fully safeguarded’ (Art. 1 UNESCO Responsibilities Declaration). The 1988 Goa Guidelines on Intergenerational Equity, drafted under the auspices of the → United Nations University (UNU), refer both to ‘rights and obligations’, and recognize a ‘complementarity’ (see Brown Weiss [1989] 294) between recognized → human rights and intergenerational rights.

13 Intergenerational rights could be viewed as part of international human rights law. While international human rights agreements have not yet explicitly referenced rights of future generations, their rights could arguably be encompassed within the specific rights guaranteed in particular instruments. Economic, social, and cultural rights embodied in international covenants could be regarded as articulating the rights of both present and future generations. Rights to food, water, and similar elements might be read as implicitly recognizing the rights of future generations (see also → Food, Right to, International Protection; → Water, Right to, International Protection). There is controversy over whether a right to environment exists as part of international human rights law, and if it does, whether it should be regarded as a basic human need or as a collective right, following on civil and
political rights and economic and social rights. A right to environment would implicitly include rights of both present and future generations.

4. Related Principles and Concepts

14 As noted earlier, the principle of intergenerational equity provides a foundation for sustainable development. The 1992 Rio Declaration on Environment and Development (‘Rio Declaration’) developed the legal principles to carry out sustainable development. It recognized ‘the integral and interdependent nature of the Earth, our home’ (Preamble Rio Declaration). Art. 5 International Union for Conservation of Nature (‘IUCN’) Draft International Covenant on Environment and Development recognizes the principle of intergenerational equity and refers to it as ‘an essential foundation of all international law relating to environmental protection and to the concept of sustainable development’ (Commentary to Art. 5 IUCN Draft Covenant on Environment and Development). Thus, the procedural and substantive duties that have been articulated to ensure sustainable development may be regarded as implementing the principle of intergenerational equity.

15 The doctrine of the → common heritage of mankind anticipates a need to address obligations related to commonly held environments. The doctrine was first mentioned in 1935 (domaine public universel qui informe le patrimoine commun de l’Humanité), but was not further developed and promoted until after 1950, when scholars began to stress its relevance to common environments, such as → outer space. In 1967, it was enunciated as applicable to the deep seabed resources in the oceans (see also → International Seabed Area). As the debates concerning the → law of the sea revealed, there is no consensus on the doctrine. While the common heritage of mankind is related to intergenerational equity in the sense that both address environments held among generations, it has generally been limited in application to areas such as outer space and oceans, and involves different content than the principle of intergenerational equity.

16 A related concept of ‘common concern of humankind’ emerged in the 1990s. For example, the Convention on Biological Diversity refers in its Preamble to the conservation of biological diversity as a ‘common concern of humankind’, which is not defined. The ‘common concern of humankind’ could be viewed as having a temporal dimension. However, this concept has not developed much further.

17 The principle of → common but differentiated responsibilities, articulated in the Rio Declaration, could also be regarded as related to a principle of intergenerational equity to the extent that historical actions affect the allocation and timing of responsibilities owed to present and future generations. The principle has been invoked in deliberations regarding such long-term issues as climate change and depletion of the ozone layer.

18 The principle of intergenerational equity may also be associated with an emerging principle of solidarity, since intergenerational equity implicitly rests upon solidarity among generations (see also → Solidarity Rights [Development, Peace, Environment, Humanitarian Assistance]). Similarly, the principle of intergenerational equity is related to a notion of → community interest, since the community may be defined as extending over time into other generations.
5. Difference from the Doctrine of Intertemporal Law

The principle of intergenerational equity should not be confused with the very different doctrine of intertemporal law in international law. Intertemporal law primarily relates to the legal criteria for the validity of actions in the present to legal criteria in the past in order to judge the validity of claims. As enunciated in the Island of Palmas Arbitration and by the Institut de Droit international, the determination of whether specific acts are valid should be made in light of the law at the time of their creation. However, rights that are acquired in a valid manner may be lost if they are not maintained in a way consistent with the changes in international law. In public international law, the intertemporal doctrine has been applied to territorial claims, to certain rules of customary international law, and to several aspects of treaties. In private international law, the intertemporal doctrine is reflected in rules governing conflict of laws.

B. Status in International Law

The principle of intergenerational equity has deep historical roots, but has been widely referenced and discussed only within the last few decades.

1. Treaties and Other Legal Instruments

Since the mid-1940s, States have frequently indicated concern for future generations in their legal documents and have often included provisions in treaties and in declarations that are intended to protect and enhance the welfare of both present and future generations. The 1945 United Nations Charter provides: ‘We the peoples of the United Nations, determined to save succeeding generations from the scourge of war’ (Preamble UN Charter).

Concern in international law for future generations in relation to the environment and natural resources has a long history. The agreements early in the 20th century for the conservation of certain species of marine mammals, such as the 1911 Treaty for the Preservation and Protection of Fur Seals, the 1931 Convention for the Regulation of Whaling, the subsequent 1949 Washington International Convention for the Regulation of Whaling, and related agreements reflect a concern with ensuring sustainable harvesting, and thus with ensuring that these animals exist for future generations. There are also early agreements for protecting birds, such as the 1902 Convention for the Protection of Birds Useful to Agriculture, the London Convention for the Protection of Wild Animals, Birds and Fish in Africa, the 1916 Canada-United States Convention for the Protection of Migratory Birds, and the 1936 Mexico-United States Convention for the Protection of Migratory Birds and Game Animals (see also Migratory Species, International Protection).

Among regional agreements, the 1940 Washington Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere and the 1968 African Convention on the Conservation of Nature and Natural Resources, and the much later 1985 Association of Southeast Asian Nations (ASEAN) Agreement on the Conservation of Nature and Natural Resources, also reflect concern with ensuring the robustness of nature for future generations. Important multilateral environmental agreements concluded in the 1960s and 1970s are concerned with protection of endangered species, wild animals, wetlands, and marine ecosystems (see also Marine Environment, International Protection). These agreements look towards conserving the resources for present and future generations. Agreements covering pollution of the oceans, regional seas, or fresh water are also
concerned with ensuring that the resources are robust for both present and future generations.

24 At least three treaties in the 1970s explicitly include language protecting the natural and/or cultural resources for future generations: the 1972 London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, the 1973 Washington Convention on International Trade in Endangered Species of Wild Fauna and Flora, and the 1972 UNESCO Convention concerning the Protection of the World Cultural and Natural Heritage (→ World Natural Heritage). References to future generations appear in the 1992 UN Framework Convention on Climate Change (Preamble; Art. 3.1) and the 1992 Convention on Biological Diversity (Preamble; Art. 2). The 1992 UN Economic Commission for Europe (‘UNECE’) Convention on the Protection and Use of Transboundary Waters and International Lakes (‘UNECE Convention’) provides that in implementing the measures called for in the Convention, ‘the Parties shall be guided by the following principles: ... (c) Water resources shall be managed so that the needs of the present generation are met without compromising the ability of future generations to meet their own needs’ (Art. 2 (5) UNECE Convention). The 1998 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention; see also → Information on Environmental Matters, Access to) notes in its Preamble that the every person has the duty to protect and improve the environment for present and future generations. There are over 1,200 international legal instruments concerned with the environment and conservation of natural fauna and flora, many of which implicitly or explicitly address conservation for present and future generations.

25 Other legal instruments explicitly reference the interests of future generations. Foremost of these is the Declaration of the UN Stockholm Conference on the Human Environment (‘Stockholm Declaration’). The Preamble proclaims that ‘to defend and improve the human environment for present and future generations has become an imperative goal for mankind’ (Preamble Stockholm Declaration para. 6). Furthermore, the Declaration provides that ‘Man has the fundamental right to freedom, equality and adequate conditions for life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations’ (Principle 1 Stockholm Declaration). The Stockholm Declaration explicitly addresses future generations and the environment. It provides that ‘the natural resources of the Earth, including the air, water, land, flora and fauna and especially representative samples of natural ecosystems, must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate’ (Principle 2 Stockholm Declaration). The 1982 UN World Charter for Nature ‘reaffirms’ that ‘man must ... use natural resources in a manner which ensures the preservation of the species and ecosystems for the benefit of present and future generations’ (Preamble UN Charter for Nature). In 1992, the Rio Declaration, the Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests, and → Agenda 21 reference future generations, with Agenda 21 acknowledging the proposal to appoint a guardian for future generations (Agenda 21 para. 38.45). The 1995 IUCN Draft Covenant on Environment and Development explicitly enunciates a principle of intergenerational equity. In 1997 UNESCO adopted a Declaration on the Responsibilities of Present Generations Towards Future Generations. The Declaration in part grew out of the Cousteau Society initiative for a Bill of Rights for Future Generations. In 2001, the Cousteau Society formally presented to the UN Secretary-General its Bill of Rights for Future Generations in the form of a draft UN General Assembly Resolution and a petition with more than 9 million signatures supporting the document. In 2012, the zero draft of the
outcome document prepared by governments for the Rio + 20 Conference in Rio de Janeiro included a call for the creation of a High Commissioner for Future Generations.

2. Judicial Application

(a) International Court of Justice Opinions

26 The ICJ has not explicitly referenced the principle of intergenerational equity as a legal basis for the resolution of a dispute before the court. However, the ICJ has referred to future generations, and some concurring and dissenting opinions, particularly by former Judge Weeramantry, have invoked it.

27 On 8 July 1996, the ICJ issued its advisory opinion on the Legality of the Threat or Use of Nuclear Weapons, in which the ICJ explicitly referred to the interests of future generations (see also → Nuclear Weapons Advisory Opinions). It noted that ‘it is imperative for the Court to take account of the unique characteristics of nuclear weapons, and in particular their ability to cause damage to generations to come’ (at 244). Judge Weeramantry, in his dissenting opinion, wrote that ‘this Court … must, in its jurisprudence, pay due recognition to the rights of future generations … [T]he rights of future generations have passed the stage when they were merely an embryonic right struggling for recognition. They have woven themselves into international law through major treaties, through juristic opinion and through general principles of law recognized by civilized nations’ (at 455). The principle of intergenerational equity was raised and referenced in a concurring opinion in the 1993 Denmark v Norway Case and in two of the dissenting opinions in the 1995 Nuclear Test Case (New Zealand v France) (see also → Nuclear Tests Cases). In the latter case, Judge Weeramantry wrote that the ‘principle of intergenerational equity’ was ‘an important and rapidly developing principle of contemporary environmental law’ (at 341). The principle was also referenced in the subsequent 1997 ICJ → Gabčíkovo-Nagymaros Case (Hungary/Slovakia).

(b) The Inter-American Court of Human Rights

28 The → Inter-American Court of Human Rights (IACtHR) has also referenced the interests of future generations in the → Mayagna (Sumo) Awas Tingni Community v Nicaragua Case, involving the rights of indigenous communities (see also → Indigenous Peoples). While the IACtHR’s decision referred to the communities’ relations to the land as necessary to ‘preserve their cultural legacy and transmit it to future generations’ (at para. 149), the Joint Separate Opinion of three of the judges addressed the intertemporal dimension more fully and explicitly. The judges noted that ‘we relate ourselves … in time, with other generations (past and future), in respect of which we have obligations’ (Opinion Judge Cançado-Trindade, Pacheco-Gómez and Abreu-Burelli para. 10). Footnote 6 to this part of the opinion references works on future generations and international law.

(c) National and Local Court Decisions

29 Some national courts have embraced the principle of intergenerational equity. In 1993, in Juan Antonio Oposa et al v the Honorable Fulgencio Factoran, Jr Secretary of the Department of the Environment and Natural Resources et al, the Philippine Supreme Court granted standing to a group of children as representative of themselves and of future generations, when they brought a claim against the Environment and Natural Resources Department to seek cancellation of timber licence agreements and a ban on the approval of new ones. The Philippine Supreme Court noted that ‘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 generations to come’ (at para. 22). The right of the
people to a balanced and healthful ecology is found in Art. II Sec. 16 Constitution of the Philippines.

30 In March 2006, in Waweru v Republic of Kenya, the High Court of Kenya explicitly applied the principle of intergenerational equity to a case involving water pollution from the disposal of waste water and sewage. After referring to the principle, the court noted that ‘intergenerational equity obligates the present generation to ensure that health, diversity and productivity of natural resources are maintained or enhanced for the benefit of future generations’ (at 13).

31 In Brazil, the High Court handed down five decisions between 2007 and 2011 that emphasized the constitutional duty to protect the environment for future generations. Most recently, in a 2010 case involving the protection of mangrove swamps in Brazil, the Superior Court of Justice noted the legal duty to preserve the threatened ecosystem, equating the destruction that would deprive future generations of its use to the theft of chattel.

32 Various scholarly writings have provided detailed analyses of the incorporation of intergenerational equity into judicial cases and legislation in other countries, such as Canada and Brazil.

3. Parliamentary and Governmental Implementation

33 One of the most recent developments is the creation in several countries of an Ombudsman for Future Generations attached to the national parliament (see also → Ombudsperson). In 2001, the Knesset, Israel’s parliamentary body, established a Commission on Future Generations with a Knesset Commissioner for Future Generations. The Commission, which was terminated in 2011, assessed bills of particular relevance for future generations, advised members of the Knesset, and presented recommendations on issues of special relevance to future generations. The Commission focused especially on the protection of children, as embodying interests of future generations. In November 2007, the Hungarian Parliament passed a law creating an Ombudsman for Future Generations, who has broad functions, including reviewing legislation and advising on impacts for future generations, and challenging actions that could harm future generations. The Ombudsman was appointed in May 2008. Finland has a parliamentary Committee for the Future to consider future implications of its decisions, which focused on energy and climate during the 2007–2011 parliamentary terms. In France, in 1993, at the urging of the late Jacques-Yves Cousteau, the government established a Council for the Rights of Future Generations, which Cousteau chaired. The Council addressed nuclear power issues before it lapsed following Cousteau’s resignation as the council’s president in 1995 to protest France’s decision to resume nuclear testing in the Pacific.

34 Some national and State or provincial constitutions have adopted protection of future generations into their own constitutions.

C. Concluding Observations

35 Climate change raises inherently intergenerational issues. As governments address the complexities of this problem, they will be making choices that have profound effects upon the robustness and integrity of the Earth and upon the well-being of future generations. Fairness between generations will be central to these choices. The principle of intergenerational equity is therefore likely to receive increased attention. This should mean
that the components of the principle will be further refined and the principle more widely referenced, implemented, and applied at a variety of levels in the international community.

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