

THE DOCTRINE OF INTERGENERATIONAL EQUITY IN GLOBAL  
ENVIRONMENTAL GOVERNANCE

by

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## **ABSTRACT**

In the absence of binding international enforcement mechanisms, global environmental governance must rely on a legal framework that has widespread normative force around the world. In particular, any framework for global environmental governance must be consistent with two dominant organizing principles in human societies, those of Rights and Responsibility. In addition, such a framework should be sufficiently detailed and pragmatic to allow for effective implementation, should achieve the goal of environmental protection, and should be reasonable in terms of the level of sacrifice expected of the present generation (particularly in the developing world).

This Thesis argues that the comprehensive doctrine of intergenerational equity is an effective and appropriate legal framework for global environmental governance. The doctrine of intergenerational equity posits the present generation of humans as simultaneously beneficiaries of the planetary legacy handed down from past generations, and trustees of that legacy for the future. The doctrine integrates the language of rights and responsibility, and incorporates viable implementation mechanisms. As a result, the doctrine of intergenerational equity is superior to the presently hegemonic paradigm of sustainable development. I conclude that the international community should adopt the doctrine of intergenerational equity as a framework for global environmental governance.

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## DEDICATION

*To the future.*

# 1 INTERGENERATIONAL EQUITY: BRIDGING THE GAP BETWEEN RIGHTS AND RESPONSIBILITIES IN GLOBAL ENVIRONMENTAL GOVERNANCE

## 1.1 The International Contest between Rights and Responsibilities

Although human societies may be governed by diverse values such as need, care, or love,<sup>1</sup> two dominant organizing principles are those of rights and responsibility (the latter encompassing both duty and obligation).<sup>2</sup> Indeed, the reification of rights or responsibility is a defining characteristic in many societies. In the West,<sup>3</sup> “rights are the currency of political and legal discourse.”<sup>4</sup> In contrast, “[duty] is the paradigm-creating fundamental [concept] in Islamic, Jewish, Hindu, Christian, Confucian, and other cultures.”<sup>5</sup> In the environmental context specifically, responsibility towards nature is the

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<sup>1</sup> See e.g. Tim Wichert, Mennonite Central Committee, “A Mennonite Human Rights Paradigm?” online: <<http://www.mcc.org/peacetheology/Wichert.pdf>> (“[for Mennonites], human rights language tends to be a ‘second language’, after the preferred language of compassion, care, and community”). See also Michael A. Santoro, “Human Rights and Human Needs: Diverse Moral Principles Justifying Third World Access to Affordable HIV/AIDS Drugs” (2006) 31 N.C. J. Int’l L. & Com. Reg. 923 at 932-939.

<sup>2</sup> See Jason Morgan-Foster, “Third Generation Rights: What Islamic Law Can Teach the International Human Rights Movement” (2005) 8 Yale H.R. & Dev. L.J. 67 at 74 [Morgan-Foster, “Third Generation Rights”]. See also Leon Trakman & Sean Gaten, *Rights and Responsibilities* (Toronto: University of Toronto Press, 1999).

<sup>3</sup> I use the (admittedly vague) term “the West” herein to refer to the “industrialized democracies” of Europe, North America, Australia and New Zealand. See Alex Y. Seita, “Globalization and the Convergence of Values” (1997) 30 Cornell Int’l L. J. 429 at 469. See also Samuel Huntington, *The Clash of Civilizations and the Remaking of World Order* (New York: Touchstone, 1997) at 46-47.

<sup>4</sup> Trakman & Gaten, *supra* note 2. See also Louis Henkin, *The Age of Rights* (New York: Columbia University Press, 1990). Although there is a rich and voluminous literature on the discourses of rights and responsibilities, I have chosen to rely substantially herein on the analysis of Trakman & Gaten because it is, in my view, particularly useful in the environmental context.

<sup>5</sup> Morgan-Foster, “Third Generation Rights”, *supra* note 2 at 74.



dominant paradigm in the discourse of ecological ethics,<sup>6</sup> while the language of rights<sup>7</sup> is increasingly invoked in the realm of environmental advocacy.<sup>8</sup>

It is clear that any system of global environmental governance must have legitimacy in both paradigms if it is to achieve widespread international compliance and support.

Moreover, a system that integrates both rights and responsibility may be substantively more effective at achieving the twin goals of environmental protection and sustainable development than one based in either paradigm alone.<sup>9</sup> Unfortunately, “[b]ecause the rights-based perspective and the duties-based perspective form such deep-seated paradigm-establishing assumptions in their respective legal cultures, it is not easy to reconcile the two approaches into a universally acceptable international theory.”<sup>10</sup>

This Thesis will explore the doctrine of intergenerational equity as an integrative legal framework reconciling the two paradigms in the area of global environmental governance. Before proceeding further, it is necessary to define the terms of the inquiry.

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<sup>6</sup> Klaus Bosselmann, “Human Rights and the Environment: Redefining Fundamental Principles?” in Brendan Gleeson & Nicholas Low, eds., *Governing for the Environment* (Basingstoke, Hampshire: Palgrave, 2001) at 126.

<sup>7</sup> See Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977) at 184.

<sup>8</sup> See Romina Picolotti & Jorge Daniel Taillant, eds., *Linking Human Rights and the Environment* (Tucson, AZ: The University of Arizona Press, 2003); Sumudu Atapattu, “The Right to Life or the Right to Die Polluted?” (2002) 16 Tul. Envtl. L.J. 65; Adriana Fabra Aguilar, “Enforcing the Right to a Healthy Environment in Latin America” (1994) 3 Rev. Eur. Community & Int’l Envtl. L. 215.

<sup>9</sup> See Trakman & Gatien, *supra* note 2 at 215.

<sup>10</sup> *Ibid.* at 102.

## 1.2 Definition of Terms

Although the concepts of “rights”, “duty”, “obligation”, and “responsibility” are undoubtedly fluid and contextual,<sup>11</sup> I will adopt the following definitions for the purpose of facilitating an intelligible analysis:

Rights are “‘interests’ or ‘benefits’ secured for persons by rules regulating relationships...A right-holder, X, has a right whenever the protection or advancement of X’s interest(s) is recognized as a reason for imposing obligations...”<sup>12</sup> An “obligation” may be defined as “a moral or legal requirement, duty”,<sup>13</sup> while a duty is a “task or action that a person is bound to perform for moral or legal reasons.”<sup>14</sup> This Thesis is concerned primarily with *legal* rights, obligations, duties, and responsibilities (i.e. those created and/or maintained by law).

Responsibility is related to, but distinct from, duty and obligation. Feinberg asserts that “[a] responsibility, like a duty, is both a burden and a liability; but unlike a duty it carries considerable discretion (sometimes called ‘authority’) along with it....[A] goal is assigned and the means of achieving it are left to the independent judgment of the responsibility party.”<sup>15</sup> Trakman and Gatién also view responsibility as distinct from duty and obligation:

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<sup>11</sup> See e.g. Ben Saul, “In the Shadow of Human Rights: Human Duties, Obligations, and Responsibilities” (2001) 32 Colum. Hum. Rts. L. Rev. 565 at 587-588.

<sup>12</sup> Trakman & Gatién, *supra* note 2 at 3, n. 3.

<sup>13</sup> Saul, *supra* note 11 at 581-582.

<sup>14</sup> *Ibid.*

<sup>15</sup> Joel Feinberg, *Rights, Justice and the Bounds of Liberty* (Princeton: Princeton University Press, 1980), cited in Saul, *supra* note 11 at 582.

[A] duty is an obligation correlative to a right. Duties [are] *external limits* on rights because A's duties are generated by B's rights. Responsibilities are [also]...correlative to rights but are not conceived of as *external limits* upon them. A's rights, not B's rights, generate responsibilities for A.<sup>16</sup>

[Further], [a] responsibility is generated when an important interest, *not protected by countervailing rights or state action*, is or would be detrimentally affected by the exercise of a right."<sup>17</sup>

Two important observations may be made concerning this formulation of responsibility.

First, in Trakman and Gatién's theory, responsibility may be seen as a kind of "gap filler", arising in the situation where no duty or obligation exists. Second, responsibility in this formulation is *integrated* with the definition of the right; it alters the nature of the right from within, and originates with the right-holder's moral agency.<sup>18</sup> In the environmental context, I concur with the second proposition, and disagree with the first.

In my view, in the area of global environmental governance at least, it is most helpful to conceptualize responsibility as a broad overarching category that encompasses and overlaps with, but also extends beyond, the sub-categories of duty and obligation. In this formulation, although responsibility does perform a gap-filling function when no duty or obligation applies, it may also co-exist with a duty and/or obligation. In other words, some responsibilities will also be duties and/or obligations, while others will not. The exercise of a right will in many cases be subject to both internal (responsibility) and external (duty) limitations.

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<sup>16</sup> Trakman & Gatién, *supra* note 2 at 63, n. 43.

<sup>17</sup> *Ibid.* at 10 [emphasis added].

<sup>18</sup> See Trakman & Gatién, *supra* note 2 at 252-253 (asserting that this model "reconstitutes" rights, to "reflect *this* reality: *rights are not free*. They come with responsibilities." [emphasis in original]).

Although I differ with Trakman and Gatién in adopting this broad definition of responsibility, I concur with their assertion that a responsibility should be seen as an internal limitation on a right. This “internal limit” model is particularly appropriate in the environmental context. It seems reasonable to conclude that an *ex ante* integration of rights with environmental responsibility will militate in favour of an ethic of precaution and sustainability. In contrast, the rights-duty equation, in which a right holder begins from a place of freedom and latitude in exercising the right, until and unless it collides with the right(s) of another, is more consistent with an ethic of consumption, with competing rights being addressed through mitigation (at best) or even outright opposition.<sup>19</sup>

Any proposal for rights reform at the global level faces the challenge of rights entrenchment in the West. As we will see, the version of rights theory that has evolved with Western liberalism is particularly absolutist, leaving little room for the discourse of responsibility. This theory, in which rights tend to supersede all other values, has been institutionalized and exported at the international level through international human rights law.

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<sup>19</sup> See Trakman & Gatién, *supra* note 2 at 248 (noting that the rights-duty (“external limit”) model requires several conditions to be met before it can result in environmental protection:

- (1) There must be a subject willing to assert a right to protect the environment against the harmful exercise of a right by a state or other right-holder.
- (2) That subject’s right must prevail [or]
- (3) There must be some non-correlative duty that would limit the harm caused by the exercise of the [first right-holder’s] right.

Trakman and Gatién argue persuasively that these conditions are frequently absent, with the result that the traditional rights-duty equation is inadequate to achieve environmental protection.

### 1.3 The Preeminence of Rights in the West

The hegemony of rights is a relatively new phenomenon in the history of Western thought. As Morgan-Foster explains, foundational Western thinkers including Aristotle,<sup>20</sup> Thomas Aquinas, and Niccolo Machiavelli all emphasized the centrality of individual duty to the community, the republic, and/or the Divine.<sup>21</sup> Indeed, duty (to the church, to the feudal lord, to the husband/father) was a central organizing principle in pre-modern Europe.<sup>22</sup>

Enlightenment philosophers including Thomas Hobbes (1588-1679), John Locke (1632-1704) and Jean-Jacques Rousseau (1712-78) first posited the autonomous individual as a key player in Western political theory.<sup>23</sup> The theory of the Social Contract, conceived by Hobbes and developed by Locke and Rousseau, took the then radical position that the individual (male) begins as a free and equal being with the right to live his life according to his own will.<sup>24</sup> The theory postulates that society, or the State, is formed when an aggregate of (male) individuals voluntarily consent to delegate their freedom to the collective for the purpose of maximizing their individual welfare.<sup>25</sup> The claims of the

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<sup>20</sup> Morgan-Foster, "Third Generation Rights", *supra* note 2 at 76-79.

<sup>21</sup> *Ibid.* See also David Selbourne, *The Principle of Duty: An Essay on the Foundations of the Civic Order* (University of Notre Dame Press, 2001) at 100.

<sup>22</sup> See Saul, *supra* note 11 at 608.

<sup>23</sup> See generally David Boucher & Paul Kelly, eds., *The Social Contract from Hobbes to Rawls* (New York: Routledge, 1994).

<sup>24</sup> See *Ibid.* For concise summaries of social contract theories, see also April L. Cherry, "Social Contract Theory, Welfare Reform, Race and the Male Sex-Right" (1996) 75 Or. L. Rev. 1037 at 1044-1055; Liliya Abramchayev, "A Social Contract Argument for the State's Duty to Protect from Private Violence" (2004) 18 St. John's J. Legal Comment. 849 at 849-853.

<sup>25</sup> See *Ibid.*

Enlightenment philosophers became the basis for liberalism,<sup>26</sup> and set the stage for the rise of rights and individualism in the West.

However, contemporary liberals' emphasis on individual rights as the preeminent political value is a deviation from early liberal theory. Indeed,

[e]arly liberals were very conscious of the individual's connections with a wider community, nation, history, language, literature, custom, and tradition. John Stuart Mill wrote that "[t]he contented man, or the contented family, who have no ambition . . . to promote the good of their country or their neighbourhood . . . excite in us neither admiration nor approval. The very idea of Rousseau's social contract presupposed reciprocal rights and responsibilities, and "assumed a considerable degree of communal coherence, and the existence of a social ethic of public responsibility, as part of the heritage of feudal society."<sup>27</sup>

Although Western liberalism had the historical and theoretical potential to recognize the importance of both rights and responsibility, contemporary Western thought operates on a clear hierarchy in which rights reign supreme. Thus, Dworkin has written that "[t]he language of rights now dominates political debate in the United States."<sup>28</sup> Selbourne, for his part, argues that:

[t]he notion...of the need for reciprocity or "balance" between rights and duties has survived in the corrupted liberal order, despite the attenuation of the principle of duty in practice, but in a mutant and a-civic form: under the rule of dutiless right and demand-satisfaction, the citizen-turned-stranger insists upon his dutiless or absolute rights as citizen, or ostensible citizen, on the one hand and upon the rightless duties to him of the civic order, or of its instrument the state, on the other.<sup>29</sup>

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<sup>26</sup> See generally J. B. Schneewind, *The Invention of Autonomy: A History of Modern Moral Philosophy* (Cambridge: Cambridge University Press, 1997).

<sup>27</sup> Saul, *supra* note 11 at 584 [footnotes omitted].

<sup>28</sup> Dworkin, *supra* note 7 at 184.

<sup>29</sup> Selbourne, *supra* note 21 at 188-89, quoted in Morgan-Foster, "Third Generation Rights", *supra* note 2 at 84.

Despite these concerns, the Western notion of preeminent rights has been incorporated into international law, through the construct of “human rights”.

### 1.3.1 The Emergence of International Human Rights Law

Contemporary human rights law is based philosophically in the Western traditions of natural law/natural rights and Enlightenment notions of the contingency of state legitimacy on respect for certain irreducible individual rights.<sup>30</sup> Historically, the creation of the foundational human rights documents came as a response to the abuses of the European nation-states and, most particularly, the atrocities of Nazi Germany.<sup>31</sup> Although human rights law, like rights theory more generally, could have maintained a reciprocal recognition of responsibility, it has largely failed to do so.

Thus, Morgan-Foster writes that “[i]n human rights law, rights are explicit, while corresponding duties are implicit, controversial, and poorly theorized.”<sup>32</sup> Although a number of important human rights instruments do contain references to duty and/or responsibility,<sup>33</sup> it cannot seriously be questioned that rights remain hegemonic in the

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<sup>30</sup> See Robert D. Sloane, “Outrelativizing Relativism: A Liberal Defense of the Universality of International Human Rights” (2001) 34 Vand. J. Transnat’l L. 527 at 541-543.

<sup>31</sup> Note however, that there were relevant precedents in existing international law. In particular, Steiner and Alston argue that human rights law was related to international humanitarian law (the laws of war), international law governing state treatment of aliens, and the regime of minority rights protection developed under the League of Nations. See Henry J. Steiner & Philip Alston, eds., *International Human Rights in Context: law, politics, morals* (Oxford: Clarendon Press, 1996) at 26 *et seq.* The prohibition of slavery was also an important precedent for international human rights law. See Makau Wa Mutua, “Savages, Victims and Saviors: the Metaphor of Human Rights” (2001) 42 Harv. Int’l L.J. 201 at 205 [Mutua, “Metaphor”].

<sup>32</sup> Morgan-Foster, *supra* note 2 at 68.

<sup>33</sup> See Saul, *supra* note 11.

field.<sup>34</sup> Indeed, the human rights paradigm has arguably marginalized duty *intentionally*, viewing duty as antithetical to the rights of the individual. Saul explains:

In the West, the history of the human rights movement is, in part, a history of struggle...against the millstones of duty and obligation to the church; feudal lords and nobles; the monarch; the revolutionary, imperial, nationalist, fascist, or communist State; and to the husband and family. Over many centuries in Europe, these...institutions...commanded and enforced loyalty, allegiance, and obedience from their subjects, who were duty-bound by morality or law to fulfill numerous, often onerous social obligations.<sup>35</sup>

Whether or not rights supremacy is appropriate in light of Western history, the export of a human rights paradigm arising out of the specific culture and history of the West has provoked sustained criticism from the non-Western world.

#### **1.4 Challenges to the Human Rights Paradigm**

There is a rich and voluminous literature analyzing the merits and pitfalls of human rights law and discourse, and a fulsome evaluation of this question is beyond the scope of this Thesis. I will not attempt to resolve the conflict between rights and responsibility as it has been articulated in critiques (and defenses) of human rights law.<sup>36</sup> However, I will introduce the key schools of human rights critique that are relevant to our inquiry, in order to situate the doctrine of intergenerational equity in its political and legal context.

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<sup>34</sup> The one notable exception, *The African Charter on Human and Peoples' Rights*, 27 June 1981, OAU Doc. CAB/LEG/67/3/Rev.5 (1981), reprinted in 21 I.L.M. 59 (1982) [*African Charter*], has been widely criticized for its attempt to integrate rights and duty/responsibility. See generally Makau Wa Mutua, "The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties" (1995) 35 Va. J. Int'l L. 339 [Mutua, "Banjul Charter"].

<sup>35</sup> Saul, *supra* note 11 at 608.

<sup>36</sup> Ultimately, I will argue that the doctrine of intergenerational equity avoids (rather than resolving) the contest between rights and responsibilities by creating a site of reconciliation for the two paradigms in global environmental governance.



#### 1.4.1 Cultural Relativist Challenges to the Human Rights Paradigm

States and scholars outside the West have criticized the international human rights regime as a Western imperialist project. Some strong cultural relativists dispute the existence of any inherent, “pre-social” human rights independent of cultural values.<sup>37</sup> In this view, international human rights law is seen as yet another colonialist “civilizing mission” in which the West – claiming access to absolute, transcendent Truth – attempts to impose its own culturally specific values on non-Western peoples.<sup>38</sup> Moderate cultural relativists, on the other hand, recognize the reality and validity of cultural difference, but still endorse the existence of an irreducible core of universal human rights.<sup>39</sup>

As the Western-derived system of human rights has been applied worldwide over the past six decades, cross-cultural criticism has become crucially important, both because of the imperative of attaining cultural credibility in diverse settings, and because of the intellectual cross-fertilization available from non-Western schools of thought.<sup>40</sup> The relativist critique has challenged a number of culturally specific and potentially problematic aspects of Western liberalism, notably the primacy of the individual, a belief

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<sup>37</sup> For a summary and critique of this claim see Guyora Binder, “Cultural Relativism and Cultural Imperialism” (1999) 5 Buff. Hum. Rts. L. Rev. 211 at 214 *et seq.*

<sup>38</sup> Mutua, “Metaphor”, *supra* note 31 at 210 (“...the human rights movement is located within the historical continuum of Eurocentrism as a civilizing mission, and therefore as an attack on non-European cultures...”). See also David P. Fidler, “The Return of the Standard of Civilization” (2001) 2 Chi. J. Int’l L. 137 at 139.

<sup>39</sup> Morgan-Foster, “Third Generation Rights”, *supra* note 2 at 70. Jason Morgan-Foster, “A New Perspective on the Universality Debate: Reverse Moderate Relativism in the Islamic Perspective” (2003) 10 ILSA J. Int’l & Comp. L. 35 [Morgan-Foster, “New Perspective”]. See also Dianne Otto, “Rethinking the ‘Universality’ of Human Rights Law” (1997) 29 Colum. Hum. Rts. L. Rev. 1.

<sup>40</sup> Morgan-Foster, “Third Generation Rights”, *supra* note 2 at 67-68.

in the superiority of democratic systems of governance, and the prioritization of rights over responsibility.<sup>41</sup>

#### 1.4.2 Substantive Challenges to the Human Rights Paradigm

In addition to concerns regarding cultural imperialism, a number of commentators both within and outside the West have asserted that human rights are simply ineffective – or even counterproductive – at maximizing human welfare in important areas. Critics from both the left and the right argue that the disproportionate emphasis on rights in Western society has had a negative impact on social relations and human happiness. The argument is that the rights paradigm “emphasizes a selfish separateness rather than the connections that make communal life possible and fulfilling.”<sup>42</sup>

Others assert that the interests underlying certain kinds of rights are actually best protected through the mechanism of duty or obligation, rather than rights. Robert Cover, for example, asserts that the disproportionate emphasis on rights is unproductive because while the individualistic rights paradigm is well-suited to protecting certain kinds of interests (e.g. those pertaining to equality and political participation),<sup>43</sup>

[t]he jurisprudence of rights has proved singularly weak in providing for the material guarantees of life and dignity flowing from the community to the individual. While we may talk of the right to medical care, the right to subsistence, the right to an education, we are constantly met by the realization that such rhetorical tropes are empty in a way that the right to freedom of expression or the right to due process are not. When the issue is restraint upon power it is intelligible to simply state the principle of restraint...The intelligibility of the

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<sup>41</sup> See Sloane, *supra* note 30 at 540.

<sup>42</sup> Philippa Strum, “Rights, Responsibilities, and the Social Contract” in Kenneth W. Hunter & Timothy C. Mack, eds., *International Rights and Responsibilities for the Future* (Westport, Conn.: Praeger, 1996) at 29.

<sup>43</sup> Robert Cover, “Obligation: A Jewish Jurisprudence of the Social Order” (1987) 5 J.L. & Religion 65 at 73.

principle remains because it is always clear who is being addressed - whoever it is that acts to threaten the right in question. However, the "right to an education" is not even an intelligible principle unless we know to whom it is addressed. Taken alone it only speaks to a need. A distributional premise is missing which can only be supplied through a principle of "obligation."<sup>44</sup>

Environmental protection is certainly a "material guarantee of life and dignity flowing from the community to the individual." As a result, if Cover is correct, then the rights paradigm alone is likely inadequate to the task of ensuring global environmental protection.

Ecological ethicists share this suspicion of the capacity for rights to benefit the environment.

#### **1.4.3 Ecological Challenges to the Human Rights Paradigm**

Ecological ethics challenges the human rights paradigm on two primary bases. First, the human rights paradigm is, by definition, inherently anthropocentric. A human rights approach reinforces notions of human separation from nature, and even superiority over the rest of the ecological community.<sup>45</sup> The concern here is that viewing environmental protection through the lens of *human* rights "subjugates all other needs, interests and values of nature to those of humanity",<sup>46</sup> contravening the Deep Ecology notion of "biospherical egalitarianism".<sup>47</sup> Concern with the equality of human and non-human members of the natural world is a central preoccupation of ecological ethics. It is not

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<sup>44</sup> *Ibid* at 71.

<sup>45</sup> See Prudence E. Taylor, "From Environmental to Ecological Human Rights: A New Dynamic in International Law?" (1998) 10 Geo. Int'l Envtl. L. Rev. 309 at 352.

<sup>46</sup> *Ibid.*

<sup>47</sup> See Louis P. Pojman, ed., *Environmental Ethics: Readings in Theory and Application* (Belmont, CA: Wadsworth, 2001) at 147.

limited to the Deep Ecology movement, and in fact was expressed by formative thinkers in the field of ecological ethics, including such icons as Aldo Leopold<sup>48</sup> and Rachel Carson.<sup>49</sup> Thus, the literature of ecological ethics, when it addresses rights at all, tends to focus on the rights of nature and corresponding human duties.<sup>50</sup>

Second, and closely related to challenges targeting the “human” component of human rights, ecological ethicists are also suspicious of “rights” *per se*. Klaus Bosselmann explains: “‘Rights talk’ is not very popular among non-legal ecologists. Deep ecologists and ecofeminists tend to perceive rights as absolute, static, individualistic and deeply embedded in the anthropocentric (male) paradigm.”<sup>51</sup> Ecological critics argue that placing an emphasis on human rights “tend[s] to perpetuate the values and attitudes that

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<sup>48</sup> Leopold perceived humans and non-humans as equal members in the ecological community, and argued that the land ethic would serve to change the role of humans from that of conqueror to that of citizen in the land community. See Aldo, Leopold, *A Sand County Almanac and Sketches Here and There* (New York: Oxford University Press, 1949) at 224-225 [*Sand County Almanac*].

<sup>49</sup> Carson reportedly lamented that:

[Humans] still talk in terms of conquest. We still haven’t become mature enough to think of ourselves as only a tiny part of a vast and incredible universe. Man’s attitude toward nature is today critically important simply because we have now acquired a fateful power to alter and destroy nature. But man is a part of nature, and his war against nature is inevitably a war against himself.

See Rachel Carson, “Obituary April 15, 1964” online:

<<http://www.rachelcarson.org/index.cfm?fuseaction=obituary>>.

<sup>50</sup> Aldo Leopold, for example, exhorted humans to respect the “biotic right” of non-human organisms to exist. See Leopold, *supra* note 48 at 211. Deep Ecology, for its part, emphasizes the intrinsic value of nature, and the corresponding human duty to respect living beings’ “right to live and flourish.” See Arne Naess, “Ecosophy T: Deep Versus Shallow Ecology” in Pojman, *supra* note 47 at 152. Outside the Deep Ecology movement, Professor Christopher Stone advocated for the legal rights of natural objects in his famous 1972 article, “Should Trees Have Standing?” See Christopher D. Stone, “Should Trees Have Standing? – Toward Legal Rights for Natural Objects” (1972) 45 Univ. South. Cal. L. Rev. 450.

<sup>51</sup> Bosselmann, *supra* note 6 at 126.

are at the root of environmental degradation.”<sup>52</sup> Among these causative “values and attitudes” is said to be the separation of rights from responsibilities. Shiva asserts that:

[t]he separation of rights and responsibility is at the root of ecological devastation and gender and class inequality. Corporations that earn profits from the chemical industry, or from genetic pollution resulting from genetically engineered crops, do not have to bear the burden of that pollution. The social and ecological costs are externalised and borne by others who are excluded from decisions and from benefits.<sup>53</sup>

Thus, ecological ethicists tend to see the rights construct as part of the problem, rather than the solution.

### **1.5 The Emergence of Environmental Human Rights**

Despite the significant concerns of ecological ethicists regarding the subjugation of responsibility to rights, and the ongoing international controversy regarding the legitimacy of human rights law itself, the existence of urgent environmental threats to physical and cultural survival has provoked a movement towards a human rights approach to environmental predicaments. Scholars have described at least three possible outputs of the application of human rights to environmental harm: the recognition of environmental deprivations of existing human rights, the entrenchment of procedural environmental rights, and the recognition of a free-standing right to environment.<sup>54</sup>

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<sup>52</sup> *Ibid* at 125.

<sup>53</sup> Vandana Shiva, “Paradigm Shift: Rebuilding true security in an age of insecurity” (2002) *Resurgence*, Issue 214, online: <<http://www.resurgence.org/resurgence/issues/shiva214.htm>>

<sup>54</sup> Terminology varies among authors. In her seminal 1991 article, international law scholar Dinah Shelton described the categories as “human rights”, “environmental rights” and the “right to environment”. See Dinah Shelton, “Human Rights, Environmental Rights, and the Right to Environment (1991) 28 *Stan. L.J.* 103 [Shelton, “Right to Environment”].

### 1.5.1 Environmental deprivations of recognized human rights

Although some advocates of environmental human rights argue for the “reinterpretation” or “expansion” of existing rights,<sup>55</sup> or the recognition of “environmental components” of existing rights,<sup>56</sup> in my view it is more helpful to think in terms of environmental *deprivations* of existing rights. As Judge Weeramantry (of the International Court of Justice) explained in his separate opinion in the Case Concerning the Gabčíkovo-Nagymaros Project:

The protection of the environment is... a vital part of contemporary human rights doctrine, for it is a sine qua non for numerous human rights such as the right to health and the right to life itself. It is scarcely necessary to elaborate on this, as damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments.<sup>57</sup>

The proposition that existing human rights may be violated through severe environmental degradation has been accepted by courts at the international,<sup>58</sup> regional,<sup>59</sup> and domestic<sup>60</sup>

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<sup>55</sup> See e.g. Luis E. Rodriguez-Rivera, “Is the Human Right to Environment Recognized Under International Law? It Depends on the Source” (2001) 12 Colo. J. Int’l Env’tl. L. & Pol’y 1 at 18-19; Shelton, “Right to Environment”, *supra* note 54 at 117.

<sup>56</sup> John Lee, “The Underlying Legal Theory to Support a Well-Defined Human Right to a Healthy Environment as a Principle of Customary International Law” (2000) 25 Colum. J. Env’tl. L. 283 at 291-292.

<sup>57</sup> See *Case concerning The Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, 1997 I.C.J. 7 (Sept. 25), [1998] 37 I.L.M. 162 at 206, cited in Atapattu, *supra* note 8 at 71.

<sup>58</sup> See *Ibid.* See also *EHP v. Canada*, Communication No. 67/1980, in UN, *Selected Decisions of the Human Rights Committee under the Optional Protocol*, (New York: UN, 1990) at 20 (finding that communication regarding environmental threat posed by nuclear storage facility “raises serious issues under article 6(1), “with regard to the obligation of States Parties to protect human life”).

<sup>59</sup> See e.g. *Yanomami Indians v. Brazil* (1985), Inter-Am. Comm. H.R. No. 7615, *Annual Report of the Inter-American Commission on Human Rights: 1985*, OEA/Ser.L.V/II.66/doc.10 rev. 1 (finding violations of the Yanomami people’s rights to life, liberty and personal security as a result of state’s failure to prevent serious environmental damage caused by resource companies); *Oneryildiz v. Turkey*, (2004), 48939/99 Eur. Comm. H.R.D.R. 657 (finding violations of Articles 2 (right to life), and 13 (right to effective remedy for violation of Convention rights) of the Convention, and of Article 1 of Protocol No. 1 (right to peaceful enjoyment of possessions) resulting from preventable methane explosion at a municipal waste dump)); *Taskin and Others v. Turkey* (2004), X Eur. Ct. H.R. (Ser. A) 621 (finding violations of Article 6 and Article 8 resulting from the improper permitting of a polluting gold mine).

levels. Although there is no “hard law” evincing specific state consent to this proposition, states did consent to be bound by the established human rights through the foundational Conventions,<sup>61</sup> and courts appear willing to recognize environmental mechanisms of deprivation just as they would any other.

### 1.5.2 Procedural Environmental Rights

Procedural environmental rights include access to environmental information, meaningful participation in environmental decision-making, and access to legal redress for environmental wrongs (whether procedural or substantive).<sup>62</sup> Although procedural environmental rights involve the application of existing participatory rights<sup>63</sup> to the environmental context, and therefore could have been classified in category (a), most commentators accord such rights their own conceptual category, probably because a substantial specialized body of law has developed regarding participatory rights in the environmental context specifically.

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<sup>60</sup> See Rodriguez-Rivera, *supra* note 55 at 20 and Atapattu, *supra* note 8 at 108 (summarizing domestic court decisions courts in India, Pakistan, several Latin American countries, and the Philippines have similarly found environmental deprivations of the rights to life and/or health enshrined in their respective constitutions).

<sup>61</sup> See *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171 (entered into force 23 March 1976) [ICCPR] and the *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 U.N.T.S. 3 (entered into force 3 January 1976) [Economic and Social Covenant]. Though technically non-binding, the ancestor to the modern human rights system is the *Universal Declaration of Human Rights*, GA Res. 217A (III), UNGAOR, 3d Sess., Supp. No. 13, UN Doc A/810 (1948) at 71 [Universal Declaration].

<sup>62</sup> See Shelton, “Right to Environment”, *supra* note 54 at 117. Shelton and a number of later commentators use the term “environmental rights” to refer to these procedural entitlements. See e.g. Atapattu, *supra* note 23 at 72. I find the use of the facially broad term “environmental rights” to refer to rights that are strictly procedural in nature unduly confusing.

<sup>63</sup> See e.g. *African Charter*, *supra* note 34, arts. 9, 10, 12; *American Convention on Human Rights*, 22 November 1969, O.A.S.T.S. No. 36, 9 I.L.M. 99, arts. 4, 13, 23; *Universal Declaration*, *supra* note 61, arts. 19-21; *European Convention for the Protection of Human Rights and Fundamental Freedoms*, Nov. 4, 1950, Europe T.S. No. 5 [European Convention on Human Rights], arts. 10-11.

For example, Principle 23 of the *World Charter for Nature* states that “[a]ll persons...shall have the opportunity to participate, individually or with others, in the formulation of decisions of direct concern to their environment, and shall have access to means of redress when their environment has suffered damage or degradation.”<sup>64</sup> *Agenda 21* recognized that “one of the fundamental prerequisites for the achievement of Sustainable Development is broad public participation in decision-making.”<sup>65</sup> Principle 10 of the *Rio Declaration on Environment and Development*<sup>66</sup> articulates procedural environmental rights as follows:

Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.<sup>67</sup>

Both *Agenda 21* and the *Rio Declaration* were adopted by at least 178 countries at the 1992 United Nations Conference on Environment and Development,<sup>68</sup> representing widespread state practice arguably giving rise to customary international law.<sup>69</sup>

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<sup>64</sup> *World Charter for Nature*, GA Res. 37/7, UN GAOR, 37th Sess., Supp. No. 51, UN Doc. A/37/51 (1982) pmbl., para. 3(a), at 17, 18.

<sup>65</sup> *UN Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992, Agenda 21*, UN GAOR, 46th Sess., UN Doc A/CONF. 151/26 Vol. III (1992) s. 23.2. online: <<http://www.un.org/esa/sustdev/documents/agenda21/english/agenda21toc.htm>> [*Agenda 21*].

<sup>66</sup> *Report of the UN Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992*, UN Division for Sustainable Development, 1992, UN Doc. A/CONF. 151/26 (Vol. I), Annex 1, online: <<http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm>>

<sup>67</sup> See Dominic McGoldrick, “Sustainable Development and Human Rights: An Integrated Conception (1996) 45 Int’l & Comp. L. Q. 796 at 805.

<sup>68</sup> See UN Department of Economic and Social Affairs, Division for Sustainable Development, online: “Documents” <<http://www.un.org/esa/sustdev/documents/agenda21/index.htm>>.

<sup>69</sup> See Lee, *supra* note 56 at 308-309.



In addition to the substantial body of soft law regarding the existence and content of procedural environmental rights, there is significant binding international law in this area.

Paragraph 8 of Article 3 of the *Espoo Convention on Environmental Impact Assessment in a Transboundary Context*,<sup>70</sup> requires the Parties to:

ensure that the public of the affected Party in the areas likely to be affected be informed of, and be provided with possibilities for making comments or objections on, the proposed activity, and for the transmittal of these comments or objections to the competent authority of the Party of origin, either directly to this authority or, where appropriate, through the Party of origin.

Forty-one countries have ratified or acceded to the Espoo Convention thus far.<sup>71</sup> In Europe, the *Aarhus Convention* has also codified procedural environmental human rights in “hard law” as to the parties thereto.<sup>72</sup> Further, many post-Rio multilateral and bilateral treaties also contain provisions relating to procedural environmental rights.<sup>73</sup>

Thus, procedural environmental rights have been widely recognized in binding international and regional instruments, as well as key non-binding international instruments that may have given rise to a rule of customary international law. Moreover, in many (if not most) cases, procedural environmental rights may also be arrived at through the “environmental deprivation of existing rights” approach. Thus, one way or

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<sup>70</sup> *Convention on Environmental Impact Assessment in a Transboundary Context*, 25 February 1991, 30 I.L.M. 800 at 806.

<sup>71</sup> See UN Economic Commission for Europe, “Espoo Convention on Environmental Impact Assessment (EIA) in a Transboundary Context”, online: UNECE <<http://www.unece.org/env/eia/convratif.html>>.

<sup>72</sup> See *Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters*, 25 June 1998, online: UNECE <<http://www.unece.org/env/pp/documents/cep43e.pdf>>, 38 I.L.M. 517 (1999) [*Aarhus Convention*]. The Aarhus Convention has been ratified by 27 states as well as the European Union. See UN, “Aarhus Convention ratified by the European Community” online: UN in Belarus <<http://un.by/en/news/world/2005/28-02-05-04.html>>.

<sup>73</sup> Alexandre Kiss, “The Right to the Conservation of the Environment” in Piccolotti & Taillant, *supra* note 8 at 37-38. At the national level, 16 countries have constitutional provisions recognizing the right to environmental information.

another, these rights have emerged as binding legal entitlements entailing correlative duties on the part of states.

### 1.5.3 The Right to Environment

“The right to a healthy environment... denotes the identification of a separate, independent human right, not dependent on the existing protected rights recognized in the international covenants.”<sup>74</sup> The human right to environment first appeared on the international legal scene in Principle 1 of the 1972 *Stockholm Declaration on the Human Environment*.<sup>75</sup> Since Stockholm, the human right to environment has been recognized in numerous international reports, communications, and soft law instruments, as well as in national constitutions and domestic judicial decisions. Thus, the draft principles on sustainable development appended to the report of the Brundtland Commission (submitted in 1987) state that “[a]ll human beings have the fundamental right to an environment adequate for their health and well-being.”<sup>76</sup> Similarly, the 1989 Hague Declaration on the Environment, signed by twenty-four states, declared that environmental degradation threatens “the right to live in dignity in a viable global environment.”<sup>77</sup> The following year, the United Nations General Assembly passed Resolution 45/94 “[r]ecogniz[ing] that all individuals are entitled to live in an environment adequate for their health and well-being; and call[ing] upon Member States

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<sup>74</sup> Atapattu, *supra* note 8 at 73.

<sup>75</sup> *Stockholm Declaration on the Human Environment*, 16 June 1972, UN Doc. A/CONF.48/14/Rev.1, 11 I.L.M. 1416 [*Stockholm Declaration*].

<sup>76</sup> R.D. Munro & J.G. Lammers, eds., *Environmental Protection and Sustainable Development, Legal Principles and Recommendations*, adopted by the Experts Group on Environmental Law of the World Commission on Environment and Development (London: Graham & Trotman, 1987) at 25.

<sup>77</sup> *Hague Declaration on the Environment*, 11 March 1989, 28 I.L.M. 1308.

and intergovernmental and non-governmental organizations to enhance their efforts towards ensuring a better and healthier environment.”<sup>78</sup>

At the regional level, two important treaties recognize the right to environment. Article 24 of the *African Charter on Human and Peoples Rights* states that “[a]ll peoples shall have the right to a general satisfactory environment favorable to their development.”<sup>79</sup>

There are more than fifty states party to the Charter, which entered into force on October 21, 1986.<sup>80</sup> In the Americas, the *Additional Protocol to the American Convention on Human Rights in the area of Economic Social and Cultural Rights*<sup>81</sup> (the *Protocol of San Salvador*) recognizes the right to a healthy environment in Article 11. Article 2 requires States to promote the protection, preservation, and improvement of the environment.<sup>82</sup> The Protocol of San Salvador entered into force on November 16, 1999, and thirteen states have now ratified or acceded to the Protocol.<sup>83</sup>

State practice and *opinio juris* with respect to the right to environment may also be seen at the national level. The vast majority of domestic constitutions promulgated since 1970

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<sup>78</sup> *Need to Ensure a Healthy Environment for the Well-Being of Individuals*, GA Res. 45/94 UN GAOR, 45th Sess., Doc. A/RES/45/94 (1990).

<sup>79</sup> *African Charter*, *supra* note 34.

<sup>80</sup> See African Commission on Human and Peoples’ Rights, online: <<http://www.achpr.org/>> 17 November 1988, O.A.S.T.S. 69.

<sup>82</sup> *Ibid.* (“2. The States Parties shall promote the protection, preservation, and improvement of the environment”). This obligation of States to adopt the measures necessary to provide for the rights listed in the Protocol is somewhat limited by the proviso in Article 1, which provides that states’ available resources and degree of development are to be taken into account.

<sup>83</sup> See Organization of American States, “Office of International Law: Multilateral Treaties” online: <<http://www.oas.org/juridico/english/Sigs/a-52.html>>

recognize some form of the right to environment, and/or correlative state duties to protect the environment.<sup>84</sup>

One commentator, often noted for his concerns over proliferation, stated that it "...is largely a moot question now as far as the [existence] of [a right to] environment goes. It's not actually a very helpful debate to ask whether there should be such a right because it is well on its way to recognition whether we want it or not."<sup>85</sup>

Given the evidence surveyed above, it is highly likely that environmental human rights are here to stay. As a result, what is required is a counter-balancing of rights with responsibility in the realm of environment. The doctrine of intergenerational equity is an effective vehicle for accomplishing this balancing.

#### **1.6 The doctrine of Intergenerational Equity – Balancing Rights and Responsibility**

The doctrine of intergenerational equity is a comprehensive policy and legal framework for global environmental governance developed by Professor Edith Brown Weiss in her 1989 book, *In Fairness to Future Generations*.<sup>86</sup> Intergenerational equity as articulated by Weiss integrates rights and responsibility even more profoundly than the "internal limitation" theory discussed above. Weiss integrates rights and responsibility at the level of moral/legal *identity*. She posits the present generation of humans as both beneficiaries of a planetary legacy passed down from the past *and* as trustees of the planetary legacy

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<sup>84</sup> Shelton, "Right to Environment", *supra* note 54 at 128.

<sup>85</sup> Philip Alston, "Creating New Environmental Rights Under International Law: Desirability and Feasibility", in *Human Rights and Environmental Protection: The Vital Link 46 Proceedings from a Workshop held in Sydney, Oct. 1991*, at 47.

<sup>86</sup> Edith Brown Weiss, *In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity* (Tokyo: The United Nations University, 1989) at 20 [Weiss, *In Fairness to Future Generations*].

for future generations.<sup>87</sup> The doctrine recognizes the rights of the present generation to use and enjoy ecological resources and also its obligation to adequately conserve such resources for the future.<sup>88</sup> It validates both the interest of the individual in an adequate quality of life and the value of the inter-temporal world community in which every individual is situated.

The central claim of this Thesis is that the doctrine of intergenerational equity integrates the paradigms of rights and responsibilities, transcends the limitations of each paradigm taken separately, and has the potential to function as a universally acceptable framework for global environmental governance. I will further argue that the presently dominant paradigm of international environmental decision-making, that of sustainable development,<sup>89</sup> is entirely inadequate with respect to the protection of future generations. The sustainable development paradigm eschews the language of both rights and responsibility, lacks any mechanism for effective implementation, and is highly ambiguous as a policy framework. As a result, a return to the rigorous, content-rich, and pragmatic doctrine of intergenerational equity is sorely needed.

Chapter 2 will introduce the doctrine of intergenerational equity as developed by Weiss in *In Fairness to Future Generations*.<sup>90</sup> I will describe the normative premises underlying the doctrine of intergenerational equity, the central components of the doctrine, and the major critiques of Weiss's theory. Chapter 3 will examine the current

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<sup>87</sup> *Ibid* at 3.

<sup>88</sup> *Ibid*.

<sup>89</sup> See Part 3.3.1, *infra*.

<sup>90</sup> Weiss, *In Fairness to Future Generations*, *supra* note 86.

legal status of intergenerational equity in international law, including the relationship between intergenerational equity and other emergent principles of international environmental law (in particular sustainable development, Common but Differentiated Responsibilities, and the right to environment). Chapter 4 examines the European Union as a case study of the implementation (or non-implementation) of intergenerational equity in practice, and Chapter 5 presents a brief conclusion.

I hope to demonstrate throughout that the doctrine of intergenerational equity is a site of reconciliation of rights and responsibility, and a useful legal and policy framework, in global environmental governance.

## 2 THE DOCTRINE OF INTERGENERATIONAL EQUITY

### 2.1 Introduction

#### 2.1.1 Historical Antecedents and Cross-Cultural Analogues

Throughout history, human societies have been concerned with the welfare of future generations. At a minimum, concern with the well-being of one's own progeny is a core evolutionary characteristic "hard-wired" into human (and non-human) organisms.<sup>91</sup> A broader concept of obligation towards future generations more generally also forms part of ethical and legal systems in diverse cultures around the world. Islamic law is perhaps most consistent with contemporary notions of intergenerational equity, conceptualizing Muslims as stewards and trustees of the natural world with duties towards both current and future generations.<sup>92</sup> Similarly, both Judaism and Christianity include notions of collective human ownership of the natural world, entailing environmental stewardship obligations to future generations.<sup>93</sup>

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<sup>91</sup> Charles Darwin, *The Origin of the Species* (Phillip Appleman ed., W.W. Norton & Co., 1975) at 50, cited in Jack B. Weinstein, "Why Protect the Environment for Others?" (2003) 77 St. John's L. Rev. 217 at 222; Shorge Sato, "Sustainable Development and the Selfish Gene: A Rational Paradigm for Achieving Intergenerational Equity" (2002-2003) 11 N.Y.U. Envtl L. J. 503 at 520-521. Philosopher Avner De-Shalit suggests that apart from the genetic drive to care for future generations, humans have an innate psychological tendency to do so, as part of the broader phenomenon of 'self-transcendence'. See Earnest Partridge, *Responsibilities to Future Generations* (Buffalo, Prometheus Books, 1981) at 204 ("One's notion of one's identity extends into the future, including those times subsequent to one's death"), cited in Avner de-Shalit, *Why Posterity Matters* (New York: Routledge, 1995) at 34.

<sup>92</sup> See Azim Nanji, "The Right to Development: Social and Cultural Rights and Duties to the Community" in *Proceedings of the Seminar on Islamic Perspectives on the Universal Declaration of Human Rights*, UN Doc. HR/IP/SEM/1999/1 (PART II Sec. 2), (1999) at 346 (discussing "the concept of custodial trusteeship, expressed in the Qur'an through the notion of the individual's role as khalifah - stewardship - and hence accountability for the way in which such a role is undertaken for the betterment of society, and for future generations" (citing Qur'anic ayah 2:30)). See also Morgan-Foster, "Third Generation Rights", *supra* note 2 at 91-93.

<sup>93</sup> See David Rosen, "Judaism and Ecology" and Emmanuel Agius, "The Earth Belongs to All Generations: Moral Challenges of Sustainable Development" in Emmanuel Agius & Lionel

Streams of African customary law also include a notion of ownership/stewardship of land by the collective, including future generations. One Ghanaian chief has explained that in this conceptualization, "land belongs to a vast family of whom many are dead, a few are living, and a countless host are still unborn."<sup>94</sup> Asian philosophical and religious traditions also include notions of responsibility to future generations,<sup>95</sup> which in some cases are thought to include reincarnations of those currently living.<sup>96</sup> Similarly, in what is now known as North America, Haudenosaunee (or Iroquois) law explicitly requires decision-makers to take into account impacts extending seven generations into the future.<sup>97</sup>

In the West, the civil law tradition in Germany explicitly subjects property ownership to social obligations arguably encompassing an inter-temporal dimension,<sup>98</sup> while Marxism conceptualizes the present generation as mere users, rather than owners, of the land, with

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Chricop, eds., *Caring for Future Generations: Jewish, Christian, and Islamic Perspectives* (Westport, CT: Admantine Press, 1998) at 62 and 103 respectively. Agius cites Genesis 17, 7-8 ("I will maintain my Covenant between Me and you, and your offspring to come...I give the land you sojourn in to you and your offspring to come, all the land as an everlasting possession").

<sup>94</sup> Weiss, *In Fairness to Future Generations*, *supra* note 86.

<sup>95</sup> *Ibid.* at 20.

<sup>96</sup> *Ibid.* See also John M. Peek, "Buddhism, Human Rights, and the Japanese State" (1995) 17:3 Human Rights Quarterly 527, at 529 ("the [Buddhist] theory of dependent origination argues that the existence of each of us is to a significant degree dependent on those who preceded us and those that share this world with us, and that in a like manner those yet to be born are dependent on all those that preceded them. A more forceful reminder of our gratitude to previous generations and of our responsibilities to future generations is hard to come by."); H.H. the Fourteenth Dalai Lama, *My Tibet* (London: Thames and Hudson Ltd., 1990) at 79-80.

<sup>97</sup> *The Great Law of Peace of the Longhouse People (Iroquois League of Six Nations)* Chapter 28 (White Roots of Peace, Mohawk Nation at Akwesasne, Rooseveltown, N.Y. 1973).

<sup>98</sup> See R. Dolzer, *Property and Environment: The Social Obligation Inherent in Ownership* (IUCN, 1976) cited in Weiss, *In Fairness to Future Generations*, *supra* note 86 at 19.



a duty to pass it on in good condition to posterity.<sup>99</sup> Even the American constitutional tradition included recognition of duties to future generations. James Madison and Thomas Jefferson debated the issue of duties to future generations in a famous series of letters, with Jefferson arguing that passing on debt to future generations was an improper form of taxation without representation,<sup>100</sup> and Madison conceding that it is “indispensable in adjusting the account between the dead and the living ... that the debits against the latter do not exceed the advances made by the former.”<sup>101</sup> Thus, some notion of responsibility towards future generations can be found in diverse religious, cultural, and political traditions around the world.

### **2.1.2 The Ascendance of the Present**

Despite the widespread cultural legacy of intergenerational thinking, contemporary legal and political systems in many areas have largely failed to give effect to this tradition of intergenerational concern. In democratic societies throughout the world, the politician’s desire for re-election has privileged short-term thinking in environmental decision-making.<sup>102</sup> Indeed, “[i]n politics, [the concept of] long-term often does not seem to go

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<sup>99</sup> Weiss, *In Fairness to Future Generations*, *supra* note 86 at 20.

<sup>100</sup> Letter from James Madison to Thomas Jefferson (4 February 1790), in James Morton Smith, ed., *The Republic of Letters: The Correspondence Between Thomas Jefferson and James Madison 1776-1826* (New York: Norton, 1995) at 634 [emphasis added].

<sup>101</sup> *Ibid* at 651.

<sup>102</sup> Jorg Chet Tremmel & Martin Viehover, “Standpoint: Can Intergenerational Justice be achieved without improving our democracy?” (2002) 3 *Intergenerational Justice Review* 12, at 12 (“The need to appease the electorate in regular five year or similar intervals means that politicians direct their actions according to the needs and desires of the present citizens-their electorate”).

beyond the next election.”<sup>103</sup> Environmental regulators, in turn, ensure the preeminence of the present through the use of time “discounting” in cost-benefit analysis.<sup>104</sup>

Legal doctrine in many areas also systematically excludes the interests of the future.

Consider, for example, how Western property law treats a landowner who harms her own land (thus depriving future generations of its benefits):

What about the landowner who ruins his own land, eroding its soil or polluting its waters? This we ignore; for where, we ask, is the harm? Not many generations ago the answer would have been obvious: the harm is to the landowner's community, to the land itself, and to the future generations that will live there. But so far has community fallen in our thinking, so self-centered have we become, that today this answer is rarely voiced. Perhaps it is rarely imagined.<sup>105</sup>

The notion of the landowner's freedom (which is subject only to the rights of other existing landowners) is reflected in international law in the principle that states generally have a sovereign right to exploit their own natural resources subject only to a duty to avoid (present) transboundary environmental impacts.<sup>106</sup>

Meanwhile, culture itself has perhaps undergone a shift away from the intergenerational perspective. A detailed analysis of this question would have to occur on a country-by-country and community-by community basis, and is beyond the scope of this Thesis.

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<sup>103</sup> Edward W. Ploman, “Foreward” in Weiss, *In Fairness to Future Generations*, *supra* note 86 at xxvii.

<sup>104</sup> This practice, discussed in greater detail in Part 2.3.5, below, discounts the economic value of future impacts to the point where impacts occurring more than 100 years in the future may essentially be ignored in the decision-making process.

<sup>105</sup> Eric Treyfogle, “Ethics, Community, and Private Land” (1996) 23 Ecology L.Q. 631 at 645.

<sup>106</sup> See generally Franz Xaver Perez, “The Relationship Between Permanent Sovereignty and the Obligation Not to Cause Transboundary Environmental Damage” (1996) 26 *Envtl. L.* 1187; see also Emeka Duruigbo, “Permanent Sovereignty and People's Ownership of Natural Resources in International Law” (2006) 38 *Geo. Wash. Int'l L. Rev.* 33.

However, two modest claims can be made. First, despite the cultural legacy of an intergenerational ethic in some areas of the developing world, the urgency of poverty has surely – and appropriately – created an intense focus on satisfying the immediate needs of existing humans.<sup>107</sup> For the millions of people around the world who lack access to adequate food or shelter, concern for the future environment has likely become a luxury that will have to wait. Secondly (and ironically), even as desperate poverty has pushed the future out of view in some developing areas, Western culture is arguably too busy enjoying its opulence to worry about the future. There is convincing evidence that American culture in particular has adopted a largely present-oriented and individualistic perspective.<sup>108</sup>

Unfortunately for the future, this turn away from responsibility to future generations has occurred just at the moment in history when our capacity to affect them has reached its apex.

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<sup>107</sup> See *United Nations Framework Convention on Climate Change*, 4 June 1992, 31 ILM 849, art. 4(7) (entered into force 21 March 1994) cited in Christopher D. Stone, “Common but Differentiated Responsibilities in International Law” (2004) 98 Am. J. Int’l L. 276 at 295 [Stone, “Differentiated Responsibilities”] (“economic and social development and poverty eradication are the first and overriding priorities of the developing country Parties”); Ruixue Quan, “Establishing China’s Environmental Justice Study Models” (2002) 14 Geo. Int’l Env’tl. L. Rev. 461 at 480 (“[i]n most developing countries...environmental protection is still a ‘luxury good’”); Loubna Farchakh, *The Concept of Intergenerational Equity in International Law* (Montreal: McGill University, Faculty of Law, Institute of Comparative Law, 2003) at 15-16 (discussing the “priority given to poverty”).

<sup>108</sup> See e.g. Christopher Lasch, *The Culture of Narcissism: American Life in an Age of Diminishing Expectations* (New York: Norton, 1979) at 5.

## 2.2 Contemporary Emergence of Intergenerational Equity in the Realm of Environment

In the modern environmental era, the case for recognizing responsibilities towards future generations has taken on a new cogency, as our ability to impact future quality of life, and indeed the very survival of humanity, has reached an unprecedented level.<sup>109</sup> Indeed, Attfield asserts that there is a “serious possibility” than current anthropogenic phenomena (e.g. climate change, the proliferation of nuclear weapons, etc.) could result in the extinction of human beings and most animal species.<sup>110</sup> In the alternative, present human activities could result in an “abysmally low quality of life” for future generations,<sup>111</sup> or in a significant impoverishment in quality of life through decreased biodiversity and/or the depletion of non-renewable resources.<sup>112</sup> As a result of the power of the present generation to unilaterally inflict enormous environmental harm on generations yet

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<sup>109</sup> Rachel Carson recognized this in her seminal 1962 book *Silent Spring*, in which she wrote that “[o]nly within the moment of time represented by the present century has one species – man [sic] – acquired significant power to alter the nature of his world...During the past quarter century, this power has increased to one of disturbing magnitude.” Rachel Carson, *Silent Spring* (New York: First Mariner Books, 2002) at 5. See also paragraph 1 of the Stockholm Declaration on the Human Environment, stating: “In the long and tortuous evolution of the human race on this planet a stage has been reached when, through the rapid acceleration of science and technology, man [sic] has acquired the power to transform his environment in countless ways and on an unprecedented scale.” *Stockholm Declaration*, *supra* note 75. Note, however, that past human societies did have the power to profoundly affect future generations in their local area. In his illuminating examination of failed societies, Jared Diamond describes human-induced environmental disasters that, in some cases, resulted in the total extinction of the peoples involved. Diamond hypothesizes that if we do not alter our current environmental course, a partial collapse (involving a drastic decrease in quality of life rather than total human extinction) may occur. Jared Diamond, *Collapse* (New York: Viking Penguin, 2005).

<sup>110</sup> Robin Attfield “Environmental Ethics and Intergenerational Equity” 41 *Inquiry* 207 at 208-209.

<sup>111</sup> *Ibid.* at 209. Imagine, for example, a global environment so polluted that cancer and other illnesses become virtually universal. For an excellent discussion of the explosion in cancer rates associated with increased exposure to synthetic chemicals in the industrialized world, see Joe Thornton, *Pandora's Poison: Chlorine, Health, and a New Environmental Strategy* (Cambridge, Massachusetts: MIT Press, 2000) at 155-199.

<sup>112</sup> *Ibid.* at 210.

unborn, there is a clear need to address intergenerational relations within international environmental law.

The contemporary international legal community explicitly recognized the imperative of protecting future generations from environmental degradation in the 1972 *Stockholm Declaration on the Human Environment*.<sup>113</sup> Concern for future generations is evident in a number of provisions of the *Stockholm Declaration*, including Principle 1 (recognizing “a solemn responsibility to protect and improve the environment for present and future generations”), Principle 2 (“natural resources...must be safeguarded for the benefit of present and future generations”), Principle 3 (“the capacity of the earth to produce vital renewable resources must be maintained...restored or improved”), Principle 5 (duty to prevent future exhaustion of non-renewable resources), Principle 6 (prevention of serious or irreversible harm caused by pollution), and Principle 11 (environmental policies must not adversely affect present or future development of developing countries).

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<sup>113</sup> *Stockholm Declaration*, *supra* note 75. See e.g. *International Convention for the Regulation of Whaling*, 2 December 1946, 161 U.N.T.S. 72 [*Whaling Convention*] (recognizing in its Preamble the “interest of the nations of the world in safeguarding for future generations the great natural resources represented by the whale stocks”); *African Convention on the Conservation of Nature and Natural Resources*, 15 September 1968, 1001 U.N.T.S. 3 [*African Conservation Convention*] (stating in its Preamble that natural resources should be conserved, utilized and developed “by establishing and maintaining their rational utilization for the present and future welfare of mankind”); *Convention for the Protection of the World Cultural and Natural Heritage*, 16 November 1972, 1037 U.N.T.S. 151 [*World Culture and Natural Heritage*] (providing in Article 4, that “[e]ach State Party to this Convention recognizes that the duty of ensuring the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage...belongs primarily to that State” within its available resources); *Convention on International Trade in Endangered Species of Wild Fauna and Flora*, 3 March 1973, 993 U.N.T.S. 243, 12 ILM 1085 [*CITES*] (recognizing in its Preamble, that “wild fauna and flora in their many beautiful and varied forms are an irreplaceable part of the natural systems of the earth which must be protected for this and the generations to come”).

Although the *Stockholm Declaration* was a major step in establishing inter-generational duties in the realm of environment, it lacked any detailed framework for the balancing of present and future environmental interests. In 1989, Professor Edith Brown Weiss filled this theoretical vacuum with her seminal book, *In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity*.<sup>114</sup> *In Fairness to Future Generations* was the result of a United Nations-sponsored study and was viewed as both a conceptual tool-kit<sup>115</sup> and a “normative call to action”,<sup>116</sup> responding in part to the recent publication of the Brundtland Commission report.<sup>117</sup> Weiss explicitly sought both to make a case for extending fairness to future generations and to provide a conceptual vehicle for getting there. That vehicle is the doctrine of intergenerational equity.

### 2.3 Intergenerational Equity as a Legal Doctrine

Although international legal scholarship and law refer frequently to the “concept” or “principle” of intergenerational equity,<sup>118</sup> Weiss actually articulated a detailed and

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<sup>114</sup> Weiss, *In Fairness to Future Generations*, *supra* note 86. Note that there were antecedents to this work in the literature. See e.g. B. Norton, “Environmental Ethics and the Rights of Future Generations” (1982) 4 *Env’l Ethics* 310.

<sup>115</sup> Weiss, *In Fairness to Future Generations*, *supra* note 86 at xiii.

<sup>116</sup> *Ibid.* at xii.

<sup>117</sup> *Ibid.* at xxv.

<sup>118</sup> *Legality of the Threat or Use of Nuclear Weapons Case*, Advisory Opinion, [1996] I.C.J. Rep. 226 at 455, 502, online: <<http://www.icj-cij.org/icjwww/icses/iunan/iunanframe.htm>> [*Nuclear Weapons*, Advisory Opinion] (Dissenting Opinion of Justice Weeramantry referring to intergenerational equity alternately as a “concept” or “principle”); Young-Gyoo Shim, “Intellectual Property Protection of Biotechnology and Sustainable Development in International Law” (2003) 29 *N.C. J. Int’l L. & Com. Reg.* 157, 216 (describing the “principle of intergenerational equity” as “an element of sustainable development”); Sato, *supra* note 91 at 507 (describing commitment to intergenerational equity as a “guiding principle” of sustainable development as articulated by the Brundtland Commission); Cherie Metcalf, “Indigenous Rights and the Environment: Evolving International Law” (2003-2004) 35 *Ottawa L. Rev.* 101 at para. 86 (describing intergenerational equity as a “core concept in international environmental law”).

coherent legal *doctrine* of intergenerational equity, allowing for a reasoned implementation of the principle of environmental fairness to future generations.

### 2.3.1 Normative Premises

Although the doctrine of intergenerational equity incorporates both rights and responsibilities, Weiss exhibits a communitarian orientation that appears to privilege responsibility to the (inter-temporal) human family as a starting point for the analysis. Weiss argues that “[t]he purpose of human society must be to realize and protect the welfare and well-being of every generation”,<sup>119</sup> citing Edmund Burke’s theory of society as a partnership among generations.<sup>120</sup> The basic normative premise here is that the survival of human beings is a good thing, and indeed gives rise to a moral imperative which Jean Rostand called “the obligation to endure”.<sup>121</sup> Beginning with this notion that human society is an intergenerational partnership whose purpose is to assure the continued survival and well-being of each generation, Weiss next examines a mechanism for establishing a just relationship between generations.

Taking a Rawlsian approach, she suggests a thought experiment in which no generation knows at what time it will be the living generation, how many members it will have, or how many generations there ultimately will be.<sup>122</sup> She argues that a generation in this position “would want to inherit the common patrimony of the planet in as good condition as it has been for any previous generation, and to have as good access to it as previous

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<sup>119</sup> Weiss, *In Fairness to Future Generations*, *supra* note 86 at 23.

<sup>120</sup> E. Burke, *Reflections on the Revolution in France* 139-140 (1790) in *2 Works of Edmund Burke* 368 (London, 1905).

<sup>121</sup> Cited in Carson, *Silent Spring*, *supra* note 109 at 5, 13.

<sup>122</sup> Weiss, *In Fairness to Future Generations*, *supra* note 86 at 23.

generations.”<sup>123</sup> Thus, the central justification for intergenerational equity is the notion of justice. Weiss argues that international law has always been concerned with justice, and that the doctrine of intergenerational equity merely extends this notion further into the inter-temporal dimension.<sup>124</sup>

Weiss identifies four criteria which any theory of intergenerational equity must meet. First, the theory should be equitable among generations, “neither authorizing the present generation to exploit resources to the exclusion of future generations, nor imposing unreasonable burdens on the present generation to meet indeterminate future needs.”<sup>125</sup> Second, principles of intergenerational equity should be value-neutral; “[t]hey must give future generations the flexibility to achieve their own goals according to their own values.”<sup>126</sup> Third, such principles “should be reasonably clear in application to foreseeable situations.”<sup>127</sup> Finally, principles of intergenerational equity “must be generally shared by different cultural traditions and be generally acceptable to different economic and political systems.”

Although perhaps encompassed in the fourth criterion, it is unfortunate that Weiss did not explicitly include the element of fairness between developing and developed nations here. Weiss does address this imperative through the articulation of an intra-generational component in the doctrine of intergenerational equity. However, the absence of an explicit recognition of the unique concerns of developing countries in the framing

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<sup>123</sup> *Ibid.* at 24.

<sup>124</sup> *Ibid.* at 28, 34.

<sup>125</sup> *Ibid.* at 38.

<sup>126</sup> *Ibid.*

<sup>127</sup> *Ibid.*



theoretical criteria may in part explain why the intra-generational element is arguably underdeveloped in Weiss's analysis.<sup>128</sup>

### 2.3.2 Definition and Content of Intergenerational Equity

Taking the constituent terms separately, "equity" as used in the context of Weiss's formulation of intergeneration equity appears to refer primarily to a principle of distributive justice.<sup>129</sup> That is, equity concerns the just allocation of benefits, in this case environmental benefits (and presumably also burdens).<sup>130</sup> "Intergenerational" as used in this context denotes relations between all those currently living, and generations yet unborn, indefinitely into the future.<sup>131</sup> Although the term "intergenerational equity" could be used to refer broadly to distributive justice between or among generations (for example in considering the fairness of leaving future generations with a fiscal debt), the term as used in this Thesis refers to a specifically *environmental* legal doctrine.<sup>132</sup>

The environmental law doctrine of intergenerational equity as articulated in *In Fairness to Future Generations* holds that:

each generation receives a natural and cultural legacy in trust from previous generations and holds it in trust for future generations. This relationship imposes upon each generation certain planetary obligations to conserve the natural and cultural resource base for future generations and also gives each generation certain planetary rights as beneficiaries of the trust to benefit from the legacy of their ancestors. These planetary obligations and planetary rights form the corpus

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<sup>128</sup> See Catherine Redgwell, *Intergenerational Trusts and Environmental Protection* (Manchester: Juris Publishing, 1999) at 109.

<sup>129</sup> *In Fairness to Future Generations*, at 36-37.

<sup>130</sup> *Ibid.*

<sup>131</sup> For an interesting discussion of alternative definitions of "generation" and "intergenerational", see Lawrence B. Solum, "To Our Children's Children's Children: The Problems of Intergenerational Ethics" (2001) 35 *Loy. L.A. L. Rev* 163.

<sup>132</sup> Although the doctrine can and is being used in the domestic context, it includes content (e.g. the duty of states to future foreign nationals) that is distinctly international in character.

of a proposed doctrine of intergenerational equity, or justice between generations.<sup>133</sup>

Weiss identifies three distinct kinds of “equity problems” requiring an intergenerational approach: depletion of resources for future generations, degradation in quality of resources for future generations, and the problem of access to use and benefits of the resources received from past generations.<sup>134</sup> Concomitantly, she elaborates three corresponding “principles” of intergenerational equity.

The first, which she terms “Conservation of Options”, requires the present generation to conserve the diversity of the natural and cultural resource base. This principle does not require the precise preservation of the *status quo*, recognizing both that ecological systems are inherently dynamic (and therefore the content of the biological resource base will inevitably change over time),<sup>135</sup> and that technological advances may create substitutes for certain existing resources or significantly optimize their exploitation.<sup>136</sup> However, the principle requires that “on *balance* the diversity of the resource base be maintained.”<sup>137</sup>

The second principle, “Conservation of Quality”, requires the present generation to pass the planet on to future generations “in no worse condition that that in which it was

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<sup>133</sup> Weiss, *In Fairness to Future Generations*, *supra* note 86 at 3.

<sup>134</sup> *Ibid.* at 6.

<sup>135</sup> *Ibid.* at 41.

<sup>136</sup> *Ibid.* at 42.

<sup>137</sup> *Ibid.* [emphasis in original]

received.”<sup>138</sup> Again, this principle recognizes that the condition of the environment will undoubtedly change, but mandates that its overall quality must be maintained. Given the complexity of the science of ecology, it may fairly be argued that the notion of “overall” global environmental quality is so vague as to be meaningless. In this respect, Weiss concedes that a more detailed framework must be developed for evaluating net impacts on environmental quality.<sup>139</sup>

The third principle, “Conservation of Access”, requires that members of the present generation be provided with equitable rights of access to the planetary legacy, while conserving this access for future generations. Professor Redgewell explains that the principle of Conservation of Access “reflects a basic trust obligation, namely the general duty of a trustee to maintain equality between the beneficiaries, and to act impartially between life tenant (the present generation) and ‘remaindermen’ (future generations).”<sup>140</sup> Weiss argues that the principles of intergenerational equity, and Conservation of Access in particular, require wealthier members of the present generation to assist the poorer members in both carrying out their conservation obligations and enjoying their rights to benefit from the planetary legacy.<sup>141</sup>

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<sup>138</sup> Edith Brown Weiss, “What Obligation Does Our Generation Owe to the Next? An Approach to Global Environmental Responsibility: Our Rights and Obligations to Future Generations for the Environment” (1990) 84 A.J.I.L. 198 at 201-202 [Weiss, “What Obligation”].

<sup>139</sup> Weiss, *In Fairness to Future Generations*, *supra* note 86 at 43, 128-144.

<sup>140</sup> Redgewell, *supra* note 128 at x.

<sup>141</sup> Weiss, *In Fairness to Future Generations*, *supra* note 86 at 45.

Although this approach may be an attempt to preempt developing world concerns with the theory, positing intra-generational equity as a component of inter-generational equity arguably obscures important conflicts between the two. The theory rests on a presumption that it is scientifically *possible* to adequately address present needs throughout the world while still passing on the planet to succeeding generations in no worse condition than that in which it was received.<sup>142</sup> To the extent that this presumption is false, Weiss's attempt to harmonize inter- and intra-generational equity may prove to be problematic. Nonetheless, even if and where we are faced with open conflict between present and future generations, the framework developed by Weiss may be useful in structuring our analysis of the interests that should be taken into account.

Weiss asserts that, "[t]he dual role of each generation as trustee of the planet for present and future generations and as beneficiary of the planetary legacy imposes certain obligations upon each generation and gives it certain rights. These may be called planetary, or intergenerational, rights and obligations."<sup>143</sup>

### 2.3.3 Planetary Obligations

The planetary obligations proposed by Weiss flow directly from the principles of intergenerational equity described above. Thus, the obligations are to conserve diversity, quality, and access.<sup>144</sup> Clarifying these obligations further, Weiss argues that the three

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<sup>142</sup> Consider, for example, the use of DDT to combat malaria in Africa. This practice compromises future health and biodiversity but saves lives and prevents suffering in the present. See Carson, *supra* note 109; David L. Mulliken, Jennifer D. Zambone & Christine G. Rolph, "DDT: A Persistent Lifesaver" 19-SPG Nat. Resources & Env't 3.

<sup>143</sup> Weiss, *In Fairness to Future Generations*, *supra* note 86 at 45.

<sup>144</sup> *Ibid.* at 47.

planetary obligations translate into five specific duties of use. First, the duty to conserve resources requires present generations to conserve both renewable and non-renewable natural resources.<sup>145</sup> Endangered species and unique natural resources may require strict preservation,<sup>146</sup> but generally this planetary duty allows for the sustainable development of resources. Second, the duty to ensure equitable use, defined as “reasonable, non-discriminatory access to the [planetary] legacy”<sup>147</sup> includes both the negative obligation to refrain from infringing on the access rights of other beneficiaries and positive obligations to “assist those who would otherwise be too poor to have reasonable access and use.”<sup>148</sup>

The third duty, the duty to avoid adverse impacts on the environment, flows from responsibilities both to present co-beneficiaries of the planetary trust and future generations.<sup>149</sup> It “emphasizes prevention and mitigation of damage”<sup>150</sup> and implicates procedural environmental rights and duties including notice, information, consultation, and environmental assessment.<sup>151</sup> With respect to environmental assessment in particular, Weiss observes that intergenerational equity requires adequate consideration of long-term impacts.<sup>152</sup>

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<sup>145</sup> *Ibid.* at 50.

<sup>146</sup> *Ibid.* at 51.

<sup>147</sup> *Ibid.* at 55.

<sup>148</sup> *Ibid.*

<sup>149</sup> *Ibid.* at 59-60.

<sup>150</sup> *Ibid.* at 60.

<sup>151</sup> *Ibid.* at 60-61.

<sup>152</sup> *Ibid.* at 63.

The fourth duty articulated by Weiss as a component of planetary obligations is the duty to prevent disasters, minimize damage, and provide emergency assistance.<sup>153</sup> The duty to prevent disasters requires states, *inter alia*, to adopt adequate safety standards for hazardous activities and to monitor such activities.<sup>154</sup> When an environmental disaster does occur, this duty obligates the affected state to minimize environmental damage as much as practicable, and similarly requires non-affected states to provide assistance in order to minimize the damage.<sup>155</sup> Finally, there is the duty to compensate for damage to the environment.<sup>156</sup>

Although planetary obligations theoretically attach to all members of the present generation, the State functions as the guarantor of these obligations.<sup>157</sup> Notably, Weiss argues that planetary obligations are also owed by States to future nationals of *other* states.<sup>158</sup>

#### 2.3.4 Planetary Rights

The content of planetary rights in the doctrine of intergenerational equity mirrors that of planetary obligations. Thus, planetary rights include the right to diversity, quality, and access. Three key observations may be made concerning the unique nature of rights within the doctrine of intergenerational equity. First, in a direct reversal of the traditional human rights paradigm, planetary rights in intergenerational equity are correlative with and possibly even secondary to obligations. “[P]lanetary rights are the *obverse* of the

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<sup>153</sup> *Ibid.* at 70 *et seq.*

<sup>154</sup> *Ibid.* at 71.

<sup>155</sup> *Ibid.* at 74-79.

<sup>156</sup> *Ibid.* at 50.

<sup>157</sup> *Ibid.* at 48.

<sup>158</sup> *Ibid.* at 26-27.

planetary obligations.”<sup>159</sup> Second, planetary rights in Weiss’s formulation have a dual nature. The planetary rights of *future* generations are group rights, not individual rights; these rights should be asserted by a representative for the group as a whole.<sup>160</sup> This qualification appears to be Weiss’s attempt to answer the argument that rights can only attach to an identifiable, existing party.<sup>161</sup>

In contrast, planetary rights crystallize into individual rights within the present generation, though Weiss notes that “the remedies for violations of these rights will often benefit the rest of the generation, and in this sense they may be said to retain their character as group rights.”<sup>162</sup> Third, in keeping with the nature of planetary obligations (which again determines that of the corresponding planetary rights), the State is the guarantor of the planetary rights of both present and future generations.<sup>163</sup>

### 2.3.5 The Time Horizon

If present generations are to take into account the needs of the future, we must determine how far into the future our planning horizon should extend. Cost benefit analysis (an increasingly dominant tool in environmental decision-making)<sup>164</sup> generally applies a discount rate to future environmental (and other) costs and benefits roughly equivalent to

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<sup>159</sup> *Ibid.* at 95 [emphasis added].

<sup>160</sup> *Ibid.* at 96.

<sup>161</sup> *Ibid.* at 96-97. See also Lynda M. Warren, “Opinion” (2005) 7 *Env’tl L. Rev.* 165 at 169-170 (“[i]n law, rights are associated with parties – individuals, corporations, States – and indeed can only exist where there is an identifiable beneficiary”).

<sup>162</sup> Weiss *In Fairness to Future Generations*, *supra* note 86 at 97.

<sup>163</sup> *Ibid.* at 109.

<sup>164</sup> See Frank Ackerman & Lisa Heinzerling, *Priceless: On Knowing the Price of Everything and the Value of Nothing* (New York: The New Press, 2004).

the rate of inflation.<sup>165</sup> Critics argue that “this practice has the ridiculous result that costs and benefits more than thirty years hence are treated as if they had quite miniscule significance, and the interests of generations of more than a hundred years hence as if they had no significance at all.”<sup>166</sup> Thus, cost benefit analysis presumes no obligations to future generations beyond a few decades into the future.

Taking a middle ground, de Shalit argues that “positive obligations” to future generations, that is the affirmative duty to provide resources, “fade away” as future generations become more remote in time.<sup>167</sup> Nonetheless, “[t]o very remote future generations, we [still] have a strong negative obligation...to avoid causing them enormous harm or bringing them death...”<sup>168</sup>

Weiss takes the position that planetary rights inhere to “all generations” without limitation.<sup>169</sup> In theory, if the principles of intergenerational equity are respected, each generation will pass the planet on in as good condition as that in which it was received, and there should be no need for a “cut-off” point in the recognition of planetary rights.

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<sup>165</sup> Attfield, *supra* note 110 at 213.

<sup>166</sup> *Ibid.* There is a rich literature regarding the issue of discounting; see e.g. Erhun Kula, *Time Discounting and Future Generations: The Harmful Effects of an Untrue Economic Theory* (Westport, Conn.: Quorum, 1997); Daniel A. Farber, “From Here to Eternity: Environmental Law and Future Generations” (2003) U. Ill. L. Rev. 289; Emilio Padilla, “Intergenerational equity and sustainability” (2002) 41 Ecological Economics 69.

<sup>167</sup> De-Shalit, *supra* note 91 at 13.

<sup>168</sup> *Ibid.* See also Daniel A. Farber, *Eco-Pragmatism* (Chicago: The University of Chicago Press, 1999) at 161 [Farber, *Eco-pragmatism*] (“the current generation has at least a responsibility to leave later generations the minimum requirements for decent lives, which means avoiding any severe, irreparable environmental damage”).

<sup>169</sup> Weiss, *In Fairness to Future Generations*, *supra* note 86 at 97.



However, there may be substantial practical and psychological barriers to requiring present sacrificial action for the sake of protecting rights far into the future.<sup>170</sup>

### 2.3.6 Development v. Environmental Protection

The doctrine of intergenerational equity as articulated by Weiss explicitly eschews a strictly preservationist model that would require present generations to make undue sacrifices in service of the future good.<sup>171</sup> At the same time, it rejects the opposite of preservationism, the “opulent model”, which presumes that the welfare of future generations is either irrelevant (because their existence is uncertain), or is best served by maximizing the production of financial wealth in the present.<sup>172</sup> As Weiss notes, the latter ignores the reality of ecological limits, including humans’ biological dependence on the rest of the ecosphere for survival.<sup>173</sup> Thus, like the concept of sustainable development, the doctrine of intergenerational equity attempts to strike a balance between use and enjoyment of the earth’s resources by the present, which will invariably result in changes to the ecological status quo, and conservation of adequate natural resources for the future. However, this aspect of the theory again runs into the difficulty of scientific feasibility; it is possible that the only option that can preserve the survival of the planet

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<sup>170</sup> See De-Shalit, *supra* note 91 at 14; Faber, *Eco-pragmatism*, *supra* note 168 at 153-154; Padilla, *supra* note 164.

<sup>171</sup> Weiss, *In Fairness to Future Generations*, *supra* note 86 at 22-24.

<sup>172</sup> *Ibid.* at 23.

<sup>173</sup> *Ibid.* See also, Karen Mickelson & William Rees, “The Environment: Ecological and Ethical Dimensions” in Elaine Hughes *et al.*, eds., *Environmental Law and Policy* (Toronto: Edmond Montgomery Publications, 1998) at 34:

On an infinite planet, it might matter little how far human perceptions of nature departed from the “true” nature of external reality. However, as the scale of the human enterprise approaches that of the ecosphere, it is essential that the internal structure and “variety”, and the behaviour of our management models mirror, or at least acknowledge, the corresponding characteristics of the natural world.

over the next five hundred years is strict preservation, or even preservation plus restoration.<sup>174</sup>

### 2.3.7 Enforcement

In the theory of intergenerational equity, although both rights and duties attach to individuals (and non-State groups of individuals), the State is the primary guarantor of planetary rights and obligations and also acts as “guardian *at litem* for future generations.”<sup>175</sup> Weiss proposes that, in the international arena, appropriate enforcement mechanisms could include the creation of a Planetary Rights Commission analogous to human rights tribunals.<sup>176</sup> She suggests that the jurisdiction of such a body should cover both public bodies and private multinational entities,<sup>177</sup> and should be empowered to take complaints from individual members of the present generation.<sup>178</sup> She suggests further and that individuals and communities would be under a duty to report violations of planetary rights to the appropriate bodies.<sup>179</sup>

Weiss proposes the creation of a correlative body to specifically address planetary obligations, and the obverse planetary rights of future generations – an independent Commission on the Future of the Planet.<sup>180</sup> Commissioners would have “overall responsibility for monitoring compliance with our obligations to future generations and

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<sup>174</sup> Weiss is aware of the difficulty of scientific uncertainty and recommends increased monitoring, research, and development of predictive techniques. See Weiss, *In Fairness to Future Generations*, *supra* note 86 at 43, 128-144.

<sup>175</sup> *Ibid.* at 109.

<sup>176</sup> *Ibid.* at 111.

<sup>177</sup> *Ibid.*

<sup>178</sup> *Ibid.* at 113.

<sup>179</sup> *Ibid.* at 111.

<sup>180</sup> *Ibid.* at 148-150.

for assisting governments and other instrumentalities in meeting these obligations,”<sup>181</sup> while ombudspersons be responsible for identifying risks to future generations, receiving complaints, and educating the public regarding conservation of the planet for future generations.<sup>182</sup>

Weiss further suggests that representatives of future generations should be granted standing in both international and domestic courts.<sup>183</sup>

## **2.4 Critiques and Counter-Arguments**

A rich body of literature has emerged critiquing the theoretical basis for intergenerational equity, marshalling arguments based in ethics, logic, and moral theory.<sup>184</sup> The predominant arguments are as follows:

### **2.4.1 Future Generations Are Incapable of Having Rights**

A number of legal and philosophical commentators have challenged the notion of planetary rights (or rights of any kind) attaching to future generations. One interesting school of thought argues that it is inappropriate and perhaps self-defeating to recognize rights for future generations because our current choices will alter the identity of those

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<sup>181</sup> *Ibid.* at 149.

<sup>182</sup> *Ibid.*

<sup>183</sup> *Ibid.* at 120-121.

<sup>184</sup> See e.g. Wilfred Beckerman & Joanna Pasek, *Justice, Posterity, and the Environment* (Oxford: Oxford University Press, 2001); Paul A. Barresi, “Beyond Fairness to Future Generations: An Intra-generational Alternative” (1997) 11 Tul. Envtl. L.J. 59; Jeffrey M. Gaba, “Environmental Ethics and Our Moral Relationship to Future Generations” (1999) 24 Colum. J. Envtl. L. 249; Graham Mayeda, “Where Should Johannesburg Take Us? Ethical and Legal Approaches to Sustainable Development in the Context of International Environmental Law” (2004) 15 Colo. J. Int’l Envtl. L. & Pol’y 29.

who are ultimately born.<sup>185</sup> “If in exercise of...an alleged duty [to future generations] we commit an act of environmental intervention that denies the opportunity to be born to [certain] individuals, we cannot possibly be making them better off by virtue of our intervention.”<sup>186</sup> Again, this criticism raises difficult questions that may convince some to keep the Pandora’s box of future generations firmly closed.

However, the present generation cannot help but affect the identity of future humans. The “do nothing” approach is itself a decision with substantial implications, and there is no tenable argument for the moral superiority of this alternative. Thus, Mary Anne Warren posits that “our duty to preserve the environment is a duty to the generation that does come into existence, regardless of whether it is the same generation that would have

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<sup>185</sup> Gosseries provides an example:

If I take a car every day to go to my job, this will have two types of relevant consequences. It will have a negative impact on the present and future state of the atmosphere, given that it will increase emissions. However, it will also have an impact on the identity of my future child. For, coming back home earlier or later than if I had taken a bike will also affect the timing of my sexual intercourse. Hence, given the very large number of competing spermatozoa, it is very likely to affect the very identity of the child I will conceive with my beloved.

...

Imagine now a father having to face his daughter. Having grown 17 and having become a green activist, she asks him: “why did you not choose the bike rather than the car? The atmosphere would be much cleaner today! And given your circumstances at that time, you had no special reason not to take the bike!” The father may well answer: “True. Still, had I done so, you would not be here. Since your life in such a polluted environment is still ‘worth living’, why blame me? I certainly did not harm you. Which one of your rights did I violate then?”

Axel Gosseries, “Constitutionalizing Future Rights?” (2004) 2 *Intergenerational Justice Review* 10 at 10-11.

<sup>186</sup> Derek Parfit, “On Doing the Best for Our Children”, in Michael D. Bayles ed., *Ethics and Population* (Cambridge: Schenkman, 1976) cited in Mayeda, *supra* note 184 at 101.

existed had we done nothing.”<sup>187</sup> Similarly, Weiss asserts that “[t]o evaluate whether the interests represented in planetary rights are being adequately protected does not depend upon knowing the number or kinds of individuals that may ultimately exist in any given future generation.”<sup>188</sup>

More fundamental than the “identity challenge”<sup>189</sup> is the argument that because future generations do not yet exist, they simply cannot hold rights:

[T]he fact that future generations will have interests in the future, and may well have rights in the future does not mean that they can have any interests today, that is, before they are born. It may well be that having certain interests implies having certain rights. But future generations do not at this point in time...*have* any interests (emphasis in original).<sup>190</sup>

The argument is undoubtedly attractive from a logical perspective. It is counter-intuitive to conceive of rights belonging to a non-existent entity like unborn future generations. Proponents of rights for future generations answer the “impossibility” claim with the straightforward proposition that future generations can have rights if a critical mass of the present recognizes such rights. This line of thought reflects both a post-modernist recognition of the malleability of rights consciousness, and the positivist assertion that legal rights exist to the extent that they are incorporated into positive law.

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<sup>187</sup> Mary Anne Warren, “Future Generations” in Tom Regan & Donald VanDeVeer, eds., *And Justice for All* (Totowa, NJ: Rowman & Littlefield, 1982) at 139. See also Joel Feinberg, “The Rights of Animals and Unborn Generations” in W. Blackstone, ed., *Philosophy and Environmental Crisis* (Athens, Georgia: University of Georgia Press, 1974) at 148-49 (“The identity of the owners of [future generations’] interests is now necessarily obscure, but the fact of their interest-ownership is crystal clear, and that is all that is necessary to certify the coherence of present talk about their rights”).

<sup>188</sup> Weiss, “What Obligations”, *supra* note 138 at 190.

<sup>189</sup> See Gosseries, *supra* note 185.

<sup>190</sup> Beckerman & Pasek, *supra* note 184 at 21.

Tremmel, for example, observes:

We possess a moral feeling for future generations. Due to this feeling we can ascribe moral rights to future generations. In this sense they do have "rights".

...

[F]uture individuals... "have" moral rights as soon as mankind found [sic] a consensus about that. This becomes more clear when we take a look on how someone gets a legal right. He or she gets it as soon as it is codified by the lawmaker. If the lawmaker would codify rights of future generations, how can anybody renounce that future individuals "have" such rights?<sup>191</sup>

Professor Stone, for his part, argues that even if future generations may not have *moral* rights, we could, "quite intelligibly", accord them legal rights.<sup>192</sup>

Finally (on this point), even if one were to accept that future generations cannot have legal or moral rights in the present, one can still recognize legal *obligations* on the part of the present generation towards future generations.<sup>193</sup> Thus, the notion that present generations are both beneficiaries of a planetary trust handed down from the past and trustees of that legacy for the benefit of future generations remains viable. Similarly, the planetary obligations to conserve biodiversity, quality, and access are untouched by the rights critiques, as are the planetary rights of present generations. Only the planetary rights of future generations are called into question, and the issue is academic if present generations acknowledge an obligation independent of the rights question. In other

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<sup>191</sup> Jorg Chet Tremmel, "Is a Theory of Intergenerational Justice Possible? A Response to Beckerman" (2004) 2 Intergenerational Justice Review 6, at 8.

<sup>192</sup> Christopher D. Stone, *The Gnat is Older Than Man* (Princeton, NJ: Princeton University Press, 1993) at 273 [Stone, *The Gnat*].

<sup>193</sup> These obligations may either be viewed as present obligations correlated with future rights or as "non-correlative duties". See Trakman & Gatien, *supra* note 2.

words, the doctrine of intergenerational equity, with some modifications, remains a viable legal framework irrespective of the “rights of future generations” debate.

#### 2.4.2 The Uncertainty of Future Generations’ Preferences

Beyond the question of rights for future generations, some commentators claim that the formulation of obligations towards future generations is either impracticable or inappropriate because “[q]uite simply, we do not know what the future wants.”<sup>194</sup> The argument is that we cannot have an obligation to protect the interests of future generations, because we cannot ascertain what those interests might be. Moreover, the actions taken by the present generation will shape future preferences, and, in particular future generations will be unlikely to desire a state of environment which they have never known.<sup>195</sup>

The fatal flaw in this argument is that it ignores the biological bottom line of being human. Although human beings living a hundred or a thousand years in the future may have beliefs and preferences that differ substantially (or even radically) from the present, they will most likely still need to breathe air, drink water, and eat.<sup>196</sup> Even if, through massive technological advances, it may one day be possible to replace or synthesize crucial natural resources such as air or water, to gamble on such a possibility would be an

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<sup>194</sup> Gaba, *supra* note 184 at 260.

<sup>195</sup> *Ibid.* at 264.

<sup>196</sup> See Brian Barry, “Justice Between Generations” in PMS Hacker and J. Raz, eds., *Law, Morality, and Society: Essays in Honour of HLA Hart* (Oxford: Clarendon Press, 1977) at 274-75:

[Although] we don’t know what the precise tastes of our remote descendants will be,...they are unlikely to include a desire for skin cancer, soil erosion, or the inundation of all low-lying areas as a result of the melting of the ice-caps. And, other things being equal, the interests of future generations cannot be harmed by our leaving them more choices rather than fewer.

egregious violation of the Precautionary Principle.<sup>197</sup> As Attfield puts it, “future generations...[who] find that they have been deprived by earlier generations of opportunities for satisfying some of their more basic needs, could reasonably criticize their ancestors for failing to facilitate the satisfaction of foreseeable vital interests.”<sup>198</sup>

Some commentators go beyond the argument that future interests are unascertainable, arguing that it is in fact inappropriate – a form of inter-temporal imperialism – for present generations to assess the interests of those yet unborn. Mayeda, for example, argues that intergenerational equity may be used as a means to “import present values and impose these on the future” thus “restrict[ing] the liberty of future generations by binding them to [the present] concept” of the good.<sup>199</sup>

But future generations are invariably bound by the decisions of the present. If we choose, for example, to deforest and desertify vast portions of the planet, future generations will be forced to deal with the resulting constraints on their opportunities. It is simply impossible to stay out of the affairs of future generations. The only question is whether the present generation will consciously consider future interests, or simply allow the future to unfold randomly, with potentially devastating impacts on unborn generations.

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<sup>197</sup> The Precautionary Principle holds that “[w]hen there is substantial scientific uncertainty about the risks and benefits of a proposed activity, policy decisions should be made in a way that errs on the side of caution with respect to the environment and the health of the public.” David Kriebel et al., “The Precautionary Principle in Environmental Science” (2001) *Envtl Health Perspectives* 109, no. 9 at 875. See also James E. Hickey Jr., “Refining the Precautionary Principle in International Environmental Law” (1995) 14 *Vt. Envlt. L. J.* at 423, 425, 437.

<sup>198</sup> Attfield, *supra* note 110 at 212.

<sup>199</sup> Mayeda, *supra* note 186 at 60-61.



### 2.4.3 The Limits on Future-Oriented Altruism

A serious challenge to the credibility of the doctrine of intergenerational equity as articulated by Weiss concerns its long time horizon. As noted above, Weiss argues that planetary rights inhere in all generations. As de Shalit colourfully explains, whether or not this is true in the abstract, the theory underlying international environmental law

should not demand what is absolutely impossible. If people are told they should share natural resources...with people who will be alive six or twelve generations from now, they will at least listen and may even tend to agree. But if they are told that they should share access to [natural resources] with someone in the year 2993 or 3993, the response will probably be "To hell with morality and intergenerational justice! This is ridiculous; such policies do not make any sense because they are inconceivable!"<sup>200</sup>

Barresi agrees, drawing on a compelling socio-biological illustration to which most people can relate:

Our concern for individuals in future generations tends to vary in proportion to the degree to which we perceive those individuals to be genetically related to us. Thus, we tend to care more about our own offspring than about the offspring of our siblings. We tend to care more about the offspring of our siblings than about the offspring of our distant cousins, and so on. We tend to care least about the offspring of people who seem to be the most distantly related to us.<sup>201</sup>

Thus, it may simply be unrealistic to expect to gain widespread support for a paradigm shift based on a notion of responsibility towards an amorphous an undifferentiated body of "future generations" to which present individuals share no particular connection. I concur with de Shalit that it is likely most helpful to employ a planning horizon somewhere between six and twelve generations into the future. Traditional legal rules, such as the Haudenosaunee rule of seven generations, may assist in determining the appropriate guideline. At the same time, the time horizon should be context-specific. In

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<sup>200</sup> De-Shalit, *supra* 91 at 14.

<sup>201</sup> Barresi, *supra* note 184 at 72-73.

particular, it may be appropriate to employ Weiss's indefinite approach to situations raising a risk of catastrophic future harm.<sup>202</sup>

#### **2.4.4 The Intra-Generational Equity Critique**

Mayeda argues that Weiss's doctrine of intergenerational equity inappropriately underemphasizes the moral importance of the past, and, in particular the colonization and marginalization of the developing world by the developed.<sup>203</sup> In a related argument, he asserts that inter-generational equity "undermines the importance of human dignity and the equal worth of all" because it purportedly treats the present generation as a mere means to the end of future generations' happiness.<sup>204</sup> This argument is particularly cogent where, as in developing countries, presently existing humans have urgent, unmet needs.

At first blush, Mayeda's position appears to discount the explicit intra-generational component in Weiss's doctrine of intergenerational equity. His argument fails to address the fact that the doctrine recognizes the present generation's right, as beneficiary of the planetary trust, to use and enjoy its planetary rights. With respect to the moral significance of the past, the doctrine includes a duty on the part of developed countries (largely former colonizers) to assist the developing world (largely former victims of colonization) in accessing the planetary legacy. Thus, one could argue that the doctrine's imposition of present duties is an appropriate response to past injustice. Nonetheless, Mayeda's critiques do point to the relative underdevelopment of intra-generational equity

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<sup>202</sup> See De-Shalit, *supra* 91 at 13.

<sup>203</sup> Mayeda, *supra* note 184 at 54-56.

<sup>204</sup> *Ibid.* at 45.

by Weiss. Indeed, Redgwell points out that *In Fairness to Future Generations* contains only seven explicit references to intra-generational equity.<sup>205</sup>

More profoundly, characterizing intra-generational equity as a *component* of inter-generational equity obscures the real potential for conflict between the present and future. There may indeed be cases in which protecting the rights of future generations would entail treating the present generation as a mere means to the end of future generations' happiness, and present generations in the developing world are disproportionately vulnerable to the diversion of resources into the future.<sup>206</sup> The intra-generational, developing world critique requires that the doctrine of inter-generational equity be interpreted alongside principles such as Environmental Justice (EJ) and Common but Differentiated Responsibilities (CDR). Intergenerational Equity may also need to be refined to address more explicitly those scenarios in which the welfare of the present and that of the future simply cannot co-exist.

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<sup>205</sup> Redgwell, *supra* note 128 at 109.

<sup>206</sup> Barressi also challenges the doctrine of intergenerational equity from the intra-generational perspective, but takes a very different approach from that of Mayeda. Barresi argues that the doctrine of intergenerational equity is an inappropriate tool for achieving environmental protection because it is inconsistent with Western values, and only the wealthy Western nations have the ability to arrest global environmental deterioration. Weiss correctly counters that the success of the concept of intergenerational equity during the 1990s indicates that it does in fact resonate with Western values and, perhaps more importantly, the rapid development of non-Western economies (e.g. China) strongly militates in favor of a legal framework consistent with diverse cultural traditions beyond the West. Barressi, *supra* note 184 at 63-70. Edith Brown Weiss, "Sustainable Development Symposium: A Reply to Barresi's 'Beyond Fairness to Future Generations'" (1997) 11 Tul. Envtl L.J. 89 at 90-91 ["A Reply to Barresi"]. For a summary of other common arguments against duties towards future generations, see Kristin Shrader-Frechette, "Ethical Theory versus Unethical Practice: Radiation Protection and Future Generations" in Robert J. Goldstein, ed., *Environmental Ethics and Law* (Burlington, VT: Ashgate Publishing, 2004) at 603.

Nonetheless, when complemented by EJ and CDR, the doctrine of intergenerational equity remains a cogent and viable legal framework for international environmental law and policy.

## **2.5 The affirmative argument for environmental responsibility to future generations**

Thus far, I have examined the major critiques of the theory of intergenerational equity and concluded that the doctrine remains viable. However, I have intentionally avoided taking a position on the foundational question as to why present generations should be held responsible to the future. In my view this question is, at base, a philosophical one. Its answer depends almost entirely upon the worldview of the inquirer.

From the Rawlsian perspective, fairness to the future flows from the realization that in designing a just society in the absence of information as to one's rank in that society, most of us would choose a system that provided equal opportunity among generations. Democrats may be motivated by a concern for preserving future generations' basic freedom to choose, while faith-based actors may be motivated by notions of a sacred trust, or stewardship obligation, arising from Divine commandment. Humanitarians may simply be compelled to prevent unnecessary human suffering in the future. In my view, the sheer power of present generations to drastically affect future quality of life, the sheer vulnerability of the future to the present, gives rise to moral responsibilities that ought to be incorporated in law.<sup>207</sup>

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<sup>207</sup> See Part 2.2, *supra*.

At the same time, any doctrine that recognizes legal responsibility to future generations must simultaneously recognize the right of the present generation to pursue its own well-being. Recognizing the equal humanity of present and future generations, the doctrine of intergenerational equity allows for the maximization of welfare both now and in the future.

## **2.6 Preliminary Conclusions – IGE as a legal framework for International Environmental Law and Policy**

Kurt Lewin has written that “[t]here is nothing so practical as a good theory.”<sup>208</sup>

Expanding upon the four criteria identified by Weiss (and discussed in Part 2.3.1 herein), I contend that intergenerational equity is a “good theory” to guide environmental law and policy globally for at least six reasons.

First, the application of the doctrine of intergenerational equity would, by definition, accomplish the biophysical imperative of environmental protection. The doctrine requires conservation of both biodiversity and environmental quality, and would result in an adequate quality of life for both present and future generations of humans, as well as generating substantial benefits for non-human members of the ecological community.

Second, the doctrine of intergenerational equity is integrative; it recognizes the legitimacy of multiple claims and provides guidance for resolving potential conflicts between these claims. In this respect, the doctrine explicitly recognizes the rights of

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<sup>208</sup> Quoted in Morton Duestch “Co-operation and Competition” in M. Duestch & P. Coleman, eds., *The Handbook of Conflict Resolution: Theory and Practice* (San Francisco, Josey-Bass, 2000) at 31.

members of the developing world to enjoy equal access to planetary resources, and the duty of the developed world to fund developing nations in meeting their planetary obligations to the future. This aspect of the doctrine should be further developed to address scenarios in which satisfying urgent needs of members of the present, particularly in developing nations, is simply inconsistent with future welfare.

Third, subject to the developing world critique (which is primarily a problem of ambiguity), the doctrine of intergenerational equity is generally reasonable in terms of the sacrifices expected of present generations. "Whatever may be true in the abstract about our duties to future generations, we know that people are willing to make some sacrifices for their descendents, but only within limits. Any practical scheme of environmental protection must function within those limits."<sup>209</sup> By charting a middle ground between preservationism and the opulent model, intergenerational equity meets this criterion.

Fourth, intergenerational equity is a "good theory" because it rooted in, or at least consistent with, major cultural and religious traditions. As Professor Stone has observed, in the absence of effective enforcement mechanisms, "cooperation in the international arena [is] more dependent on a feeling of rightness than on force."<sup>210</sup> Thus, cultural legitimacy across a wide range of societies is a significant advantage in any doctrine of international environmental law. The philosophical and legal roots of intergenerational

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<sup>209</sup> Faber, *Eco-pragmatism*, *supra* note 168 at 153.

<sup>210</sup> Stone, *The Gnat*, *supra* note 192 at 242.

equity in a diversity of cultures and religions also make it possible to imagine a universal, but culturally diversified, application of the doctrine.<sup>211</sup>

Fifth, the doctrine of intergenerational equity is theoretically versatile. Present generations' environmental rights and responsibilities towards future humans under the doctrine of intergenerational equity can co-exist with responsibilities towards an intrinsically valuable natural world. However, the responsibilities of present generations under the doctrine of intergenerational equity are not contingent upon on the recognition of the intrinsic value of nature. Thus, intergenerational equity is a viable doctrine in our current, post-Rio anthropocentric theoretical framework, but can also allow for the evolution of international environmental law towards biocentrism. Indeed, Emmenegger and Tschentscher assert that the emergence of intergenerational equity in international law may actually assist in this process of evolution.<sup>212</sup>

Sixth, and of particular importance for our purposes, intergenerational equity resolves the contest between rights and responsibilities in international environmental law. It answers the concerns of cross-cultural critics who oppose the hegemony of rights over responsibilities in conceptualizations of human relations.<sup>213</sup> Similarly, the doctrine of intergenerational equity meets the more specific concerns of ecological ethicists who argue that the separation of rights from duties is a root cause of environmental

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<sup>211</sup> This is especially important given that, in the coming decades, developing countries in diverse regions all over the world are likely to become more substantial contributors to environmental damage. See Weiss, "A Reply to Barresi", *supra* note 206 at 91-92.

<sup>212</sup> Susan Emmenegger & Axel Tschentscher, "Taking Nature's Rights Seriously: The Long Way to Biocentrism in Environmental Law" (1994) VI:3 *Georgetown Int'l Env't'l L. Rev.* 545 at 562-564.

<sup>213</sup> See Morgan-Foster, "Third Generation Rights", *supra* note 2.

degradation.<sup>214</sup> At the same time, the explicit recognition of rights (present and future, individual and group rights) should allay the concerns of scholars such as Professor Saul, who have feared the potentially oppressive character of legal responsibility.<sup>215</sup>

Finally, unlike the concept of sustainable development,<sup>216</sup> the doctrine of intergenerational equity is reasonably precise. The doctrine as developed by Brown Weiss is systematic, content-rich, and therefore eminently practical.

Having reviewed the theory of intergenerational equity, Chapter 3 will go on to assess its current status in international law.

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<sup>214</sup> See Bosselmann, *supra* note 6 at 125.

<sup>215</sup> See Saul, *supra* note 11.

<sup>216</sup> The relationship between Sustainable Development and intergenerational equity will be discussed in greater detail in the following chapter.



### 3 STATUS OF INTERGENERATIONAL EQUITY IN INTERNATIONAL LAW

#### 3.1 Introduction

Four preliminary observations may be made regarding the international legal status of intergenerational equity. The first is that a number of the components of the doctrine of intergenerational equity as developed by Weiss are already a part of international law.<sup>217</sup>

Under the rubric of planetary obligations, for example, a number of sub-species of the duty to conserve resources are set forth in various international treaties.<sup>218</sup> The duty to prevent disasters is related to the principle of state responsibility,<sup>219</sup> and has been codified in conventions dealing with the transport of hazardous substances.<sup>220</sup> Similarly, the principle of Conservation of Options is codified in the *Convention on Biological Diversity* and *CITES*,<sup>221</sup> and Conservation of Quality is reflected in numerous international treaties (and domestic legislation) governing pollution.<sup>222</sup>

Second, although certain components of the doctrine of intergenerational equity already have independent international legal force, the doctrine as a coherent whole has not been

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<sup>217</sup> See Redgwell, *supra* note 128 at 124.

<sup>218</sup> See Weiss, *In Fairness to Future Generations*, *supra* note 86 at 53, collecting treaties. See also *Convention on Biological Diversity*, 22 May 1992, 1760 U.N.T.S. 79, 31 I.L.M. 822 (entered into force 29 December 1993), online: <<http://www.biodiv.org/convention/articles.asp>> [*Biodiversity Convention*]. But see Redgwell, *supra* note 128 at 124 (she questions the existence of a general duty to conserve outside the specified obligations in particular treaties).

<sup>219</sup> Weiss, *ibid.* at 72.

<sup>220</sup> *Ibid.* See also *Basel Convention on the control of transboundary movement of hazardous wastes and their disposal*, 22 March 1989, 1673 U.N.T.S. (entered into force 5 May 1992)

<sup>221</sup> *Biodiversity Convention*, *supra* note 218, *CITES*, *supra* note 113.

<sup>222</sup> See e.g. *Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter*, 11 I.L.M. (1972) 1358; *Stockholm Convention on Persistent Organic Pollutants*, 40 I.L.M. (2001) 532, *Convention on Long-Range Transboundary Air Pollution*, 1302 U.N.T.S. 217 (1979).etc., citations collected in J. William Futrell, "Multi-Lateral Environmental Agreements" (2006) SL098 ALI-ABA 1 (WL).

incorporated into international law. The doctrine as articulated by Weiss has received some support at the International Court of Justice,<sup>223</sup> in several legal experts' reports, and in one notable soft law instrument, but has not been codified in any binding treaty and has not reached the level of customary international law.<sup>224</sup>

Third, a less specific concept of intergenerational equity, reflecting the core premise that the present generation has an obligation to maintain an adequate environment for future generations, has emerged in numerous international law sources (discussed below). "[A] number of binding and non-binding legal instruments make reference to present and future generations, and there is emerging a general consensus regarding the need to take the interests of future generations into account."<sup>225</sup> Fourth, the doctrine of intergenerational equity is closely related to other emergent norms of international environmental law, including, *inter alia*, sustainable development, the right to environment, and Common but Differentiated Responsibilities.<sup>226</sup>

This chapter will focus on the status of the doctrine of intergenerational equity as a whole, the less specific concept of present environmental duties to future generations, and the relationship between intergenerational equity and other emerging international environmental norms. The starting point for the analysis must be the doctrine of sources.

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<sup>223</sup> See Part 3.2.2, *infra*.

<sup>224</sup> Redgwell, *supra* note 128 at 115.

<sup>225</sup> *Ibid.*

<sup>226</sup> *Ibid.* at 127.

### 3.1.1 A Note on Sources

Article 38 of the Statute of the International Court of Justice recognizes two sources of international law: treaties<sup>227</sup> and customary law as evidenced by a generalized state practice flowing from a perceived legal obligation.<sup>228</sup> The Court may also draw on “the general principles of law recognized by civilized nations”<sup>229</sup> if the issue at hand is not readily resolvable by reference to either treaty or customary law. Judicial decisions and scholarly opinions may be employed as interpretive aids.<sup>230</sup> Classically, both the subjects and objects of international law are states, and the existence of international legal norms is contingent upon state consent.<sup>231</sup>

The emergence of international human rights law in the aftermath of the Second World War introduced the “radical premise that a state’s...internal governance on many significant matters, is subject to the norms of international [law].”<sup>232</sup> Thus, human rights law intruded on traditional values of state sovereignty and concomitantly created a tension in the doctrine of sources.<sup>233</sup> Although human rights were specifically delimited in written declarations and conventions consented to by the States party,<sup>234</sup> the very notion of universal human rights may be conceptually inconsistent with a requirement of

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<sup>227</sup> *Statute of the International Court of Justice*, art. 38(1)(a), online: International Court of Justice <<http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicstatute.htm>> [*Statute ICJ*].

<sup>228</sup> *Ibid.*, art. 38(b).

<sup>229</sup> *Ibid.*, art. 38(c).

<sup>230</sup> *Ibid.*, art. 38(d).

<sup>231</sup> Rodriguez-Rivera, *supra* note 55 at 2-3.

<sup>232</sup> Steiner & Alston, *supra* note 31 at 148.

<sup>233</sup> Sloane, *supra* note 30 at 532.

<sup>234</sup> The foundational Conventions are the *ICCPR*, *supra* note 61 and *Economic and Social Covenant*, *supra* note 61. Though technically non-binding, the ancestor to the modern human rights system is the *Universal Declaration*, *supra* note 61.

state consent.<sup>235</sup> Indeed, human rights are rooted philosophically in the Western traditions of natural law and natural rights, which explicitly hold that universal principles of morality, including certain individual rights, trump human-made law.<sup>236</sup>

In common with human rights law, international environmental law has also challenged the traditions of international law, by drastically increasing the importance of non-binding, or “soft law” approaches.<sup>237</sup> Because of the difficulty and delay involved in reaching consensus on the language of binding environmental treaties, soft law instruments predominate in international environmental law.<sup>238</sup> “The basic role of soft law is to raise expectations of conformity with legal norms, and to create uniformity in the interpretation of these norms.”<sup>239</sup> Soft law can mature into hard law when these “expectations of conformity” bring about state practice (“accepted as law”)<sup>240</sup> or through inclusion in binding conventions, and this has become a significant pattern in international environmental law.<sup>241</sup>

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<sup>235</sup> See Rodriguez-Rivera, *supra* note 55 at 3 (“The protection of an individual’s life and dignity is not an obligation to which states may consent or withhold consent”).

<sup>236</sup> See generally Sloane, *supra* note 30 at 542-543; Rodriguez-Rivera, *supra* note 55 at 5. Note, however, that the notion of non-derogable norms is well known in both international law (through the doctrine of *jus cogens*), and domestic legal systems (through Constitutions or Basic Laws).

<sup>237</sup> Layla A. Hughes, “Foreward: The Role of International Environmental Law in the Changing Structure of International Law” (1998) 10 Geo. Int’l Env’tl. L. Rev. 243 at 246.

<sup>238</sup> *Ibid.*

<sup>239</sup> *Ibid.*

<sup>240</sup> *Statute ICJ*, *supra* note 227 art. 38(b).

<sup>241</sup> See generally Hughes, *supra* note 237. See also Farchakh, *supra* note 105 at 72-77 (discussing the relationship between soft and hard law).

## 3.2 Intergenerational Equity in International Law

### 3.2.1 Inclusion of IGE in International Law Instruments

As Weiss notes, the principle of responsibility towards future generations is not new in international law.<sup>242</sup> Indeed, the *Charter of the United Nations* identifies as one of the UN's purposes "to save succeeding generations from the scourge of war".<sup>243</sup> Concern with the specifically environmental interests of future generations is also reflected in a number of early international law instruments including the *International Whaling Convention*,<sup>244</sup> the *World Heritage Convention*,<sup>245</sup> and the *Convention on International Trade in Endangered Species of Wild Fauna and Flora*.<sup>246</sup> Finally, the 1972 *Stockholm Declaration* introduced the notion of a general environmental duty to future generations.<sup>247</sup>

Since Stockholm, a number of international instruments have recognized environmental responsibilities towards future generations. *Agenda 21*, for example, exhorts governments to create sustainable development strategies with the goal of allowing development while "protecting the resource base and the environment for the benefit of future generations",<sup>248</sup> and acknowledges the interests of future generations in four other provisions.<sup>249</sup> Principle 3 of the *Rio Declaration on Environment and Development*

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<sup>242</sup> Weiss, *In Fairness for Future Generations*, *supra* note 86 at 28.

<sup>243</sup> *Ibid.*

<sup>244</sup> See *Whaling Convention*, *supra* note 113; *African Conservation Convention*, *supra* note 113.

<sup>245</sup> *World Cultural and Natural Heritage*, *supra* note 113.

<sup>246</sup> *CITES*, *supra* note 113.

<sup>247</sup> See *Stockholm Declaration*, *supra* note 75.

<sup>248</sup> *Agenda 21*, *supra* note 65, s. 8.7.

<sup>249</sup> *Ibid.*, s. 8.31 (identifying the need to avoid passing on environmental burdens to future generations as a "fundamental objective"), s. 33.3 (stating that assisting developing countries in

provides that “[t]he right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.” Similarly, Principle 2(b) of the *Forest Principles*<sup>250</sup> provides that “[f]orest resources and forest lands should be sustainably managed to meet the social, economic, ecological, cultural and spiritual needs of present and future generations.” Of particular note for our purposes, the *Aarhus Convention* states in its Preamble, “every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations.”<sup>251</sup>

Language reflecting respect for the interests of future generations may also be found in the Preambles of the 1992 *Convention on the Transboundary Effects of Industrial Accidents*,<sup>252</sup> the 1994 *Convention to Combat Desertification in Those countries Experiencing Drought and/or Desertification, Particularly in Africa*,<sup>253</sup> the 1996 *Habitat*

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implementing Agenda 21 will serve the “common interests of...humankind in general, including future generations”) s. 33.4 (noting that “inaction will narrow the choices of future generations”) and s. 38.45 (acknowledging “the proposal to appoint a guardian for future generations”).

<sup>250</sup> United Nations, *Non-legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests*, A/Conf.151/26, Principle 2d, online: <http://www.un.org/documents/ga/conf151/aconf15126-3annex3.htm>.

<sup>251</sup> *Aarhus Convention*, *supra* note 72.

<sup>252</sup> *Convention on the Transboundary Effects of Industrial Accidents*, 17 March 1992, 2105 U.N.T.S. 460 (entered into force 19 April 2000) [*Transboundary Convention*] (The preamble states that “[the Parties are] mindful of the special importance, in the interests of present and future generations, of protecting human beings and the environment against the effects of industrial accidents”).

<sup>253</sup> 17 June 1994, 33 I.L.M. 1328 (entered into force 26 December 1996) (The Preamble states that “[the Parties] are determined to take appropriate action in combating desertification and mitigating the effects of drought for the benefit of present and future generations”).

*Agenda*,<sup>254</sup> the *Convention on Biological Diversity*,<sup>255</sup> the *Vienna Declaration and Programme of Action*,<sup>256</sup> the *UN General Assembly Millennium Declaration*,<sup>257</sup> the *Johannesburg Declaration on sustainable development*,<sup>258</sup> and the *Johannesburg Judge's Declaration*.<sup>259</sup>

<sup>254</sup> *Istanbul Declaration on Human Settlements*, UN Conference on Human Settlements (Habitat II) in Istanbul, Turkey, June 3-14, Annex 1, UN Doc. A/CONF 165/15 (1996) para. 10 ("In order to sustain our global environment and improve the quality of living in our human settlements, we commit ourselves to sustainable patterns of production, consumption, transportation and settlements development; pollution prevention; respect for the carrying capacity of ecosystems; and the preservation of opportunities for future generations.").

<sup>255</sup> *Biodiversity Convention*, *supra* note 218 pmbl ("Determined to conserve and sustainably use biological diversity for the benefit of present and future generations...")

<sup>256</sup> *Vienna Declaration and Programme of Action*, adopted by the World Conference on Human Rights on 25 June 1993, A/CONF.157/23, para. 11 ("The right to development should be fulfilled so as to meet equitably the developmental and environmental needs of present and future generations").

<sup>257</sup> See *United Nations Millennium Declaration*, GA Res. 55/2, UN GAOR, 55th Sess., UN Doc. A/RES/55/2 (2000) art. 6 (declaring as a "fundamental value", "Respect for Nature: Prudence must be shown in the management of all living species and natural resources, in accordance with the precepts of sustainable development. Only in this way can the immeasurable riches provided to us by nature be preserved and passed on to our descendants"), art. 21 ("We must spare no effort to free all of humanity, and above all our children and grandchildren, from the threat of living on a planet irredeemably spoilt by human activities, and whose resources would no longer be sufficient for their needs").

<sup>258</sup> *World Summit on Sustainable Development*, Johannesburg, S. Afr., Aug. 26-Sept. 4, 2002, *Johannesburg Declaration on Sustainable Development*, PP 1, 8, UN Doc. A/CONF.199/20 [*Johannesburg Declaration*], art. 26 (recognizing that "sustainable development requires a long-term perspective"), art. 37 ("we solemnly pledge to the peoples of the world and the generations that will surely inherit this Earth that we are determined to ensure that our collective hope for sustainable development is realized").

<sup>259</sup> *The Johannesburg Principles on the Role of Law and Sustainable Development* (adopted at the Global Judges Symposium, 18-20 August 2002), online: <<http://www.pnuma.org/deramb/publicaciones/GlobalJu.pdf>>.

We emphasize that the fragile state of the global environment requires the Judiciary ... to boldly and fearlessly implement and enforce applicable international and national laws which...will assist in alleviating poverty and sustaining an enduring civilization, and ensuring that the present generation will enjoy and improve the quality of life of all peoples, while also ensuring that the inherent rights and interests of succeeding generations are not compromised...

The only binding instrument to include responsibilities to future generations in a substantive provision is Article 3(1) of the *United Nations Framework Convention on Climate Change* which provides that:<sup>260</sup>

[p]arties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities...

Article 3 has a chapeau characterizing it as merely one of the principles by which parties should be guided “in their actions to achieve the objectives of the Convention and to implement its provisions”. Professor Redgewell explains that

the clear intention of this wording was to confine the legal consequences of the principles articulated in Article 3 to the Framework Convention on Climate Change...[however] it is doubtful whether article 3 can be ‘ring-fenced’ in this manner. At the very least the Convention may be viewed as beginning the process of defining the obligations of the present generation to absorb the costs of reducing the risk of global warming for future generations.<sup>261</sup>

The prevalence of references to the interests of future generations in the preambles of numerous environmental conventions indicates that some general notion of intergenerational equity has likely emerged at least as a “guiding principle” in the interpretation of binding international environmental law.<sup>262</sup> Taken together with the significant evidence in favour of a customary international law norm of sustainable development,<sup>263</sup> these references support the emergence of a customary norm providing that the present generation has an obligation to future generations to preserve an environment adequate to meet their needs.

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<sup>260</sup> *United Nations Framework Convention on Climate Change*, 9 May 1992, 1771 U.N.T.S. 165 (entered into force 21 March 1994) art. 3 (entered into force 21 March 1994) [FCCC].

<sup>261</sup> Redgewell, *supra* note 128 at 117-188.

<sup>262</sup> See *ibid.* at 123.

<sup>263</sup> See Atapattu, *supra* note 8.



Thus, some progress has been made towards the recognition of a form of intergenerational equity. Indeed, the ubiquity of references to the environmental interests of future generations in treaties and soft law instruments indicates that the notion of environmental responsibility towards the future is becoming firmly entrenched in the international legal order. With the exception of one notable soft law instrument, however, international environmental law has not yet moved beyond this general formulation to recognize the detailed and content-rich doctrine of intergenerational equity articulated by Weiss.

### **3.2.1.1 Declaration on the Responsibilities of the Present Generations Towards Future Generations**

In *In Fairness to Future Generations*, Professor Weiss advocated for the promulgation of an international Declaration of Planetary Obligations and Rights codifying the key elements of the doctrine of intergenerational equity.<sup>264</sup> She recognized that such an instrument would constitute “soft law” but observed that it could lead to the conclusion of binding agreements, and/or the formation of customary international law.<sup>265</sup> Shortly after the publication of *In Fairness to Future Generations*, the Cousteau Society drafted and sought support for an international Bill of Rights for Future Generations. The document

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<sup>264</sup> Weiss, *In Fairness to Future Generations*, *supra* note 86 at 105.

<sup>265</sup> In concert with the preparation of *In Fairness to Future Generations*, the United Nations Advisory Committee on “International Law, Common Patrimony and Intergenerational Equity” adopted the *Goa Guidelines on Intergenerational Equity* (Goa, 15 February, 1988). The Goa Guidelines simply summarize and endorse the principles set out in *In Fairness to Future Generations*, and the Guidelines were signed by the members of the Advisory Committee in their personal capacities. Thus, though worthy of mention, the *Goa Guidelines* have little significance regarding the legal status of intergenerational equity. Indeed, they re-state Weiss’s concession that planetary rights and obligations “will become enforceable as they find expression in customary and conventional international law.” See *ibid.* at para. 6.

declares that “[f]uture generations have a right to an uncontaminated and undamaged Earth” (Art. 1), and that “[e]ach generation, sharing in the estate and heritage of the Earth, has a duty as trustee for future generations to prevent irreversible and irreparable harm to life on Earth and to human freedom and dignity” (Art. 2).<sup>266</sup> In 2001, UN Secretary General Kofi Annan formally accepted a petition from the Cousteau Society in support of the Bill of Rights counting nine million signatures from individuals around the globe.<sup>267</sup>

Interestingly, the Cousteau Society’s document, while linking rights with duties, clearly favours the rights paradigm (as evidenced by its name). One can speculate that, as a Western European-based organization, the Society acted on a presumption that rights are the preeminent means for securing important interests. Whatever the reasons for its existence, the Cousteau Society’s rights-based approach was turned upside down when, in 1993, UNESCO partnered with the Society to further develop the document. Although

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<sup>266</sup> European Cetacean Bycatch Campaign, “Cousteau Society: A Bill of Rights for Future Generations” online: <<http://www.eurocbc.org/page721.html>> The remaining articles in this brief document provide as follows:

Article 3. It is, therefore, the paramount responsibility of each generation to maintain a constantly vigilant and prudential assessment of technological disturbances and modifications adversely affecting life on Earth, the balance of nature, and the evolution of mankind in order to protect the rights of future generations.

Article 4. All appropriate measures, including education, research, and legislation, shall be taken to guarantee these rights and to ensure that they not be sacrificed for present expediencies and conveniences.

Article 5. Governments, non-governmental organizations, and the individuals are urged, therefore, imaginatively to implement these principles, as if in the very presence of those future generations whose rights we seek to establish and perpetuate.

<sup>267</sup> Weiss, “A Reply to Barresi”, *supra* note 206 at 97. See Cousteau Society, “Rights for Future Generations” online: <[http://www.cousteau.org/en/cousteau\\_world/our\\_programs/future\\_generations.php?sPlug=1](http://www.cousteau.org/en/cousteau_world/our_programs/future_generations.php?sPlug=1)>.

records of a 1994 experts meeting retain a focus on the rights of future generations,<sup>268</sup> by 1997, the “rights” of future generations had been replaced by the “needs and interests” of future generations. Again, we can speculate that UNESCO’s legal experts wished to avoid the difficult theoretical problems associated with according rights to future generations.<sup>269</sup>

The final version of the UNESCO General Assembly’s *Declaration on the Responsibilities of the Present Generations Towards Future Generations*<sup>270</sup> incorporates many of the key components of the doctrine of intergenerational equity as articulated by Weiss, but arrives at them through the mechanism of present responsibility, rather than future rights. Article 1 holds present generations responsible for safeguarding the needs and interests of both present and future generations, thus addressing both intra- and inter-generational equity. Article 2 mandates the preservation of future generations’ “freedom of choice”, analogous to the notion of Conservation of Options. Article 3 reflects the “obligation to endure”, discussed in Chapter 2, requiring the present generation to “strive to ensure the maintenance and perpetuation of humankind with due respect for the dignity

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<sup>268</sup> UNESCO, Director-General 1987-1999 (Mayor, F.), “Discours de M. Federico Mayor Directeur general de [l’UNESCO] à la clôture de la réunion d’experts organisée par l’Institut tricontinental de la démocratie parlementaire et des droits de l’homme de l’Université de La Laguna sur les droits des générations futures (La Laguna, 26 février 1994) UNESCO Doc. DG/94/5, online: <<http://unesdoc.unesco.org/images/0009/000963/096321F.pdf>>.

<sup>269</sup> See C. Zanghi, “Pour la protection des générations futures”, in *Boutros Boutros-Ghali. Amicorum, Discipulorumque Liber. Paix, Développement, Démocratie* (Bruxelles: Bruylant, 1998) at 1459-1478.

<sup>270</sup> “Declaration on the Responsibilities of the Present Generations Towards Future Generations” in UNESCO, *Records of the General Conference, 29th session, Paris, 21 October to 12 November 1997*, v.1 (UNESCO: 1998) at 69, online: <<http://unesdoc.unesco.org/images/0011/001102/110220e.pdf>>.

of the human person...” Article 4 corresponds to Weiss’s Conservation of Quality, providing that:

The present generations have the responsibility to bequeath to future generations an Earth which will not one day be irreversibly damaged by human activity. Each generation inheriting the Earth temporarily should take care to use natural resources reasonably and ensure that life is not prejudiced by harmful modifications of the ecosystems and that scientific and technological progress in all fields does not harm life on Earth.

Article 5 mandates sustainable development, pollution prevention, resource preservation, and the consideration of future generations in the assessment of major projects. Article 6 requires the safeguarding of the human genome, while Article 7 requires the preservation of cultural diversity and cultural heritage. Article 8 addresses the planetary rights of the present generation, while steadfastly avoiding the actual language of rights; it states that the present generation “may use the common heritage of humankind...provided that this does not entail compromising it irreversibly”.<sup>271</sup>

Finally, Article 12 takes a rather soft approach to implementation, stating that the UN, states, and non-state actors, “should assume their full responsibilities in promoting, in particular through education, training and information, respect for the ideals laid down in this Declaration, and encourage by all appropriate means their full recognition and

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<sup>271</sup> Articles 9 and 10 address future generations’ right to peace and development respectively. Article 10 also provides that education “should be used to foster peace, justice, understanding, tolerance and equality for the benefit of present and future generations.” Article 11 provides that “present generations should refrain from taking any action or measure which would have the effect of leading to or perpetuating any form of discrimination for future generations.”

effective application.” Earlier references to the formation of an organ to facilitate implementation of the Declaration<sup>272</sup> were removed from the final draft.

Although the UNESCO Declaration is not binding law, UNESCO includes 191 Member States (and six Associate Members), a significant proportion of the international community.<sup>273</sup> Thus, the Declaration provides some evidence of emerging *opinio juris* concerning present environmental duties towards future generations. Perhaps more importantly, the document provides a useful template for the distillation of the doctrine developed over several hundred pages in *In Fairness to Future Generations* into a workable international Declaration.

### **3.2.2 IGE at the ICJ**

Both the doctrine of intergenerational equity as articulated by Weiss, and the more general principle of environmental obligation towards future generations have received significant support at the ICJ. Judge Weeramantry has been the leading proponent of intergenerational equity at the ICJ, but the majority of the Court has also endorsed the principle that present generations have a responsibility to preserve an adequate environment for future generations.

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<sup>272</sup> See UNESCO, *Projet de Declaration sur la Sauvegarde des Generations Futures*, 151st Sess., Annexe, Point 3.5.2, UNESCO Doc. 151EX/18 (1997) at art. 13(3), online: <http://unesdoc.unesco.org/images/0010/001064/106455F.pdf>.

<sup>273</sup> See UNESCO, “The Organization” online: “Member States and Associate State Members” [http://portal.unesco.org/en/ev.php-URL\\_ID=3329&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=3329&URL_DO=DO_TOPIC&URL_SECTION=201.html)

In *Denmark v. Norway*,<sup>274</sup> concerning maritime delimitation between Greenland and Jan Mayen, Judge Weeramantry's separate opinion undertook an exhaustive analysis of equity in international law, including consideration of principles of intergenerational equity. Judge Weeramantry noted specifically that diverse legal traditions around the world have recognized principles of intergenerational equity:

A search of global traditions of equity in this fashion can yield perspectives of far-reaching importance in developing the law of the sea. Among such perspectives deeply ingrained therein, which international law has not yet tapped, are concepts of a higher trust of earth resources, an equitable use thereof which extends intertemporally, the "sui generis" status accorded to such planetary resources as land, lakes and rivers, the concept of wise stewardship thereof, and their conservation for the benefit of future generations. Their potential for the development of the law of the sea is self-evident.<sup>275</sup>

Justice Weeramantry cited *In Fairness to Future Generations* in support of this proposition, and also "for the fact that intergenerational fairness can be addressed under principles of equity in accordance with a long tradition in international law of using equitable principles to achieve a just result."<sup>276</sup>

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<sup>274</sup> *Maritime Delimitation in the Area Between Greenland and Jan Mayen (Denmark v. Norway)*, [1993] I.C.J. Rep. 38. [*Denmark v. Norway*] For helpful discussions of this case, as well as the 1995 Nuclear Test Case, *infra*, and the 1996 Advisory Opinion, *infra*, see Weiss, "A Reply to Barresi", *supra* note 206 at 93-95; Greg Maggio & Owen J. Lynch, "Inter-Generational Equity in Case Law" in *Human Rights, Environment, and Economic Development: Existing and Emerging Standards in International Law and Global Society* (1997), online: Centre for International Environmental Law <<http://www.ciel.org/Publications/olpaper3.html>>.

<sup>275</sup> *Denmark v. Norway*, *ibid.* at para 235. See also para. 240, recognizing that diverse global legal traditions incorporate equitable principles including "[n]otions of...harmony of human activity with the environment, respect for the rights of future generations, and the custody of earth resources with the standard of due diligence expected of a trustee" though these principles "ha[d] yet to be woven into the fabric of international law."

<sup>276</sup> *Ibid.* at 277, n. 11.

Two years after *Denmark v. Norway*, Justice Weeramantry took the opportunity to develop his analysis of intergenerational equity in the Nuclear Tests case 1995.<sup>277</sup> He devoted an entire section of his dissenting opinion to the “Concept of Intergenerational Rights”, and characterized the principle of intergenerational equity as “an important and rapidly developing principle of contemporary environmental law.”<sup>278</sup> Most notably, Justice Weeramantry addressed the role of international tribunals and states in protecting intergenerational rights as follows:

In a matter of which it is duly seised, this Court must regard itself as a trustee of [the] rights [of future generations] in the sense that a domestic court is a trustee of the interests of an infant unable to speak for itself...New Zealand's complaint that its rights are affected does not relate only to the rights of people presently in existence. 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 (emphasis added).<sup>279</sup>

In the 1996 Advisory Opinion on the Legality of the Threat or Use of Nuclear War,<sup>280</sup> both the majority opinion and Justice Weeramantry recognized the interests of future generations. The majority opinion noted that “[t]he destructive power of nuclear weapons cannot be contained in either space or time. They have the potential to destroy all civilization and the entire ecosystem of the planet could be a serious danger to future generations”.<sup>281</sup> The Court went beyond mere recognition of potential future impacts –

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<sup>277</sup> *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Test (New Zealand v. France)*, Order of 22 September 1995, [1995] I.C.J. 288 at 317, online: <<http://www.icj-cij.org/icjwww/icas/inzfr/inzfrframe.htm>>.

<sup>278</sup> *Ibid.* at 341.

<sup>279</sup> *Ibid.* For the majority decision, see ICJ, online: <[http://www.icj-cij.org/icjwww/icas/inzfr/inzfr\\_iorders/inzfr\\_iorder\\_19951022.pdf](http://www.icj-cij.org/icjwww/icas/inzfr/inzfr_iorders/inzfr_iorder_19951022.pdf)>.

<sup>280</sup> *Nuclear Weapons*, Advisory Opinion, *supra* note 118.

<sup>281</sup> *Ibid.* at 244.

explicitly stating that it would actually give consideration to the possible impacts on future generations in interpreting applicable law.

in order correctly to apply to the present case the Charter law on the use of force and the law applicable in armed conflict, in particular humanitarian law, 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.* (emphasis added).<sup>282</sup>

The majority stated that the environment “represents the living space, the quality of life and the very health of human beings, including generations unborn.”<sup>283</sup>

The majority of the ICJ reiterated this intergenerational definition of the environment in the subsequent case of *Hungary v. Slovakia*.<sup>284</sup> In that case, Judge Weeramantry once again endorsed “the principle of trusteeship of earth resources, [and] the principle of intergenerational rights”.<sup>285</sup>

### 3.2.3 IGE in International Experts’ Reports

The doctrine of intergenerational equity as developed by Weiss has received substantial support from the international legal community. The 1995 Legal Experts Report for the United Nations Commission on Sustainable Development devoted a section of its analysis to “equity”, stating that equity “has been invoked as a principle of international

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<sup>282</sup> *Ibid.*

<sup>283</sup> *Ibid.* at 241 [emphasis added].

<sup>284</sup> *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, [1997] I.C.J. Rep. 92 at para. 53, online: <[http://www.icj-cij.org/icjwww/idocket/ihs/ihsjudgment/ihs\\_ijudgment\\_970925\\_frame.htm](http://www.icj-cij.org/icjwww/idocket/ihs/ihsjudgment/ihs_ijudgment_970925_frame.htm)>.

<sup>285</sup> *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, Separate Opinion of Vice-President Weeramantry, [1997] I.C.J. Rep. 92, at Section A.(f), online: <[http://www.icj-cij.org/icjwww/idocket/ihs/ihsjudgment/ihs\\_ijudgment\\_970925\\_frame.htm](http://www.icj-cij.org/icjwww/idocket/ihs/ihsjudgment/ihs_ijudgment_970925_frame.htm)>. Judge Weeramantry included these two concepts in a list of “principles of traditional systems” that should be incorporated into modern environmental law.



law” and that it includes both intergenerational equity and intra-generational equity.<sup>286</sup>

The report adopted Weiss’s definition of intergenerational equity, citing *In Fairness to Future Generations*, and specifically adopted Weiss’s three principles of intergenerational equity: conservation of quality, options, and access.<sup>287</sup> It asserted that “[i]ntergenerational equity is well-known to international law”<sup>288</sup> and cited environmental treaties recognizing duties to future generations, as well as the ICJ’s decision in the 1995 Nuclear Test Case.<sup>289</sup>

The 1996 UNEP Legal Experts Report similarly endorsed intergenerational equity, stating that “[a]n integrated intergenerational equity approach should constitute an underlying part of any sustainable development strategy in international law.”<sup>290</sup> The *travaux préparatoires* for the 1997 Resolution of the Institut de Droit International on Responsibility and Liability under International Law for Environmental Damage characterized the concept of intergenerational equity as “paramount” among emerging principles of international environmental law.<sup>291</sup> Most recently, in a 2005 report on national strategies for sustainable development, the OECD characterized intergenerational equity as “a fundamental principle of sustainable development.”<sup>292</sup>

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<sup>286</sup> *Ibid.* at para. 41.

<sup>287</sup> *Ibid.* at para. 42.

<sup>288</sup> *Ibid.* at para. 46.

<sup>289</sup> *Ibid.* at para. 47.

<sup>290</sup> See U.N. Environment Programme, *Final Report of the Expert Group Workshop on International Environmental Law Aiming at Sustainable Development*, UNEP/IEL/WS/3/2 (1996) 13-14, para. 30, 44-45.

<sup>291</sup> The Environment, *Travaux préparatoires*, 67 *Annuaire de l'Institut de Droit International* 311 (1997).

<sup>292</sup> OECD, *National Strategies for Sustainable Development: Good Practices in OECD Countries*, SG/SD(2005)6 at para. 16 reviewed in UNDSO, *Expert Group Meeting on Reviewing National Sustainable Development Strategies New York, 10-11 October 2005*

### 3.3 Intergenerational Equity and Other Principles of International Environmental Law

Redgewell asserts that although intergenerational equity has not reached the level of customary international law,

a process of ‘creeping intergenerationalisation’ may be observed emanating from two processes. First, there is the ‘spillover effect’ of preambular recognition of future generations in the interpretation and application of substantive treaty provisions. Second, other substantive principles of international environmental law embody an intertemporal dimension.<sup>293</sup>

In Redgewell’s view, there are five principles of international environmental law that have particular relevance to the doctrine of intergenerational equity. These are i) sustainable development, ii) the common heritage of humankind, iii) the principle of custodianship or stewardship, iv) the precautionary principle, and v) the principle of common but differentiated responsibilities.<sup>294</sup> For the purposes of this Thesis, I will focus on the relationship of intergenerational equity with sustainable development, common but differentiated responsibilities, and the right to environment.

#### 3.3.1 IGE and Sustainable Development

Defined by the Brundtland Report<sup>295</sup> as “development that meets the needs of the present without compromising the ability of future generations to meet their own needs,”<sup>296</sup> sustainable development is the preeminent organizing principle in the discourse of

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UNSD/EGM/NSDS/2005/CRP. 9, online:

<[http://www.un.org/esa/sustdev/natlinfo/nsds/egm/crp\\_9.pdf](http://www.un.org/esa/sustdev/natlinfo/nsds/egm/crp_9.pdf)>.

<sup>293</sup> Redgewell, *supra* note 128 at 126.

<sup>294</sup> *Ibid.* at 127.

<sup>295</sup> World Commission on Environmental and Development, *Our Common Future* (New York: Oxford University Press, 1987) [*Brundtland Report*].

<sup>296</sup> *Ibid* at 43.

environmental decision-making worldwide.<sup>297</sup> Put another way, “sustainable development has emerged as an international paradigm for the new millennium in reconciling and integrating the goals of economic development, social development, and environmental protection.”<sup>298</sup> A number of commentators have argued that the principle of sustainable development has now reached the level of customary international law.<sup>299</sup> Despite frequent references to sustainable development in international and national law and scholarship,<sup>300</sup> there are two significant difficulties with the claim that this principle has the force of international law.

First, the concept is notoriously vague.<sup>301</sup> Environmental groups interpret a norm of sustainable development as requiring a high level of environmental protection, while industry views sustainable development as encouraging the exploitation of natural

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<sup>297</sup> See Atapattu, *supra* note 8 at 71 (“almost all recent international environmental instruments make specific reference to [sustainable development] and states seem to have accepted it as a norm which should be taken into account when making decisions on the environment.”)

<sup>298</sup> Ved P. Nanda, “Sustainable Development, International Trade, and the Doha Agenda for Development” (2005) 8 Chap. L. Rev. 53, at 54

<sup>299</sup> See Varamon Ramangkura, “Thai Shrimp, Sea Turtles, Mangrove Forests and the WTO: Innovative Environmental Protection under the International Trade Regime” (2003) 15 Geo. Int'l Env'tl. L. Rev. 677 at 682 (“the last twenty years have brought the acceptance of the principle of sustainable development as a rule of customary international law”); Hari M. Osofsky, “Defining Sustainable Development After Earth Summit 2002” (2003) 26 Loy. L.A. Int'l & Comp. L. Rev. 111 at 112 (noting “international recognition of sustainable development as part of customary international law”) Nicholas A. Robinson, “‘Coming Round the Bend’ - Global Policy Trends and Initiatives” (2005) American Law Institute, SK046 ALI-ABA 179 (WL) at 261 (“there are plentiful indications...of that degree of ‘general recognition among states of a certain practice as obligatory’ to give the principle of sustainable development the nature of customary law”); McGoldrick, *supra* note 67 at 802-803.

<sup>300</sup> See Nanda, *supra* note 298 at 53.

<sup>301</sup> See but see Alhaji B.M. Marong, “From Rio to Johannesburg: Reflections on the Role of International Legal Norms in Sustainable Development” (2003) 16 Geo. Int'l Env'tl. L. Rev. 21 at 44 (noting that “many scholars argue that sustainable development is too vague a concept and too ambiguous in meaning for it to have normative status”).

resources (with environmental mitigation) so as to effectuate the right to development.<sup>302</sup>

“So frequently adopted by so many groups with wildly varying agendas--from the Sierra Club to the coal industry --the term might seem to be well on its way to becoming meaningless.”<sup>303</sup> The difficulty is that the concept of sustainable development lacks a coherent, and sufficiently rigid, legal framework to contain and define its content. Like an amoeba, the concept can morph this way and that, drawn in turn by votes, project financing, positive PR, or regulatory approval.

A second and related problem with the claim that sustainable development has become customary international law is the fact that sustainable development is not, in itself, a normative principle. One could, in theory, be either for or against sustainable development. If the Brundtland Commission’s definition is accepted, then the principle that States (and other actors) *should* or *must* pursue sustainable development is, in effect, a re-statement of the basis premise of intergenerational equity: that present generations have the right to use planetary resources to meet their needs, subject to a duty to preserve adequate resources for future generations. Indeed, the close relationship between sustainable development and intergenerational equity has been widely acknowledged.<sup>304</sup> In the author’s view, a general principle of intergenerational equity – that present generations owe environmental duties to future generations – is wholly integrated with the principle of sustainable development. Thus evidence for the emergence of a

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<sup>302</sup> Patricia Nelson, “An African Dimension to the Clean Development Mechanism” (2004) 32 *Denv. J. Int’l L. & Pol’y* 615 at 615.

<sup>303</sup> *Ibid.*

<sup>304</sup> See e.g. Sato, *supra* note 91 at 504 (“Insofar as its primary purpose is to balance the survival concerns of the future with the needs of the present, the philosophy of sustainable development is highly concerned with intergenerational ethics: mapping out the interdependent relationships, obligations, and expectations of past, present, and future generations.”).

customary international norm of sustainable development is simultaneously evidence of the emergence of this broad principle of intergenerational equity, and *vice versa*.

However, the generic notion that present generations owe some environmental duty to the future may suffer from the same problematic ambiguity as the notion of sustainable development itself.<sup>305</sup>

Whether or not sustainable development constitutes a principle of customary international law, the defects canvassed above also substantially undermine its *utility* as a framework for global environmental governance. Because of the ambiguity of the principle, crucial questions regarding the length of the time horizon, the legal relationship between present and future generations, and the precise content of the duties of use flowing from our environmental obligation to the future, remain unanswered.<sup>306</sup> Similarly, because the principle is not inherently normative, the nature and degree of obligation to pursue sustainable development is undefined. In particular, the principle of sustainable development says nothing about the respective rights and responsibilities of present and

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<sup>305</sup> See Redgwell, *supra* note 128 at 128 (“Even if identified as one possible component of sustainable development, there remains the considerable difficulty in defining the ambit of this concept”).

<sup>306</sup> Consider, for example how Ismail Serageldin of the IBRD interprets sustainable development as permitting the ongoing exploitation of fossil fuels:

We are able to set aside a foolish yet still prevalent view ... that sustainability requires leaving to the next generation exactly the same amount and composition of natural capital as we found ourselves, by substituting a more promising concept of giving them the same if not more, opportunities than we found ourselves ... This immediately opens the door for substituting one form of capital for another ... [I]t is indeed most worthwhile to reduce some natural capital (e.g. reducing the amount of oil in the ground) to invest in increasing human capital (e.g. educating girls)...

Ismail Serageldin, “Sustainability and the Wealth of Nations: First Steps in an Ongoing Journey, Draft Paper Sept. 30, 1995” at 9-10, *World Bank’s Third Annual Conference on Environmentally Sustainable Development, Washington, D.C., Oct. 1995* (Washington, D.C.: World Bank, 1996).

future generations; it fails to mobilize the legal and moral power inherent in these constructs. Finally, the principle of sustainable development does not include any explicit implementation mechanisms.

In contrast to the principle of sustainable development, the doctrine of intergenerational equity is detailed and specific, employs the language of rights and responsibilities, and incorporates specific implementation mechanisms. IGE is therefore far better equipped than sustainable development to guide environmental decision-making around the globe.

### **3.3.2 IGE and Common but Differentiated Responsibilities**

The principle of Common but Differentiated Responsibilities (“CDR”) recognizes that all nations of the world share responsibility for protecting the global environment, but that identical obligations should not be imposed upon developing and developed nations. Instead, the measures required of developing and developed countries should be differentiated in accordance with their respective historical contributions to the problem, as well as their technical and financial ability to respond.<sup>307</sup> CDR approaches have been adopted in a number of important multilateral environmental treaties.<sup>308</sup> As Maggio explains:

The notion of common but differentiated responsibilities is closely linked to intergenerational equity; CDR predicates responsibility for environmental protection on both past consumption of natural resources and present capacity to shoulder the burden of maintaining and improving environmental quality...

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From the standpoint of developing countries, the impact of “common but

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<sup>307</sup> See Mayeda, *supra* note 184 at 33, 50; Stone, “Differentiated Responsibilities”, *supra* note 107 at 276-277.

<sup>308</sup> See Stone, *ibid.* n.1 (collecting references).

differentiated responsibilities is to transform the normative character of financial and technical resource transfers between industrialized and developing countries from the realm of "aid" to the category of international legal obligation.<sup>309</sup>

Intergenerational equity as articulated by Weiss expressly includes a requirement on the part of wealthier nations to assist developing countries to meet their conservation obligations.<sup>310</sup>

The doctrine of intergenerational equity as articulated by Weiss also addresses the concerns embodied in the notion of Environmental Justice,<sup>311</sup> through the requirement that members of the present generation – the beneficiary class of the planetary trust – assist all members of the class to access planetary resources.<sup>312</sup> Given that planetary resources clearly include clean air and water, the doctrine of intergenerational equity would also appear to require that pollution burdens be equitably allocated within the present generation.

### 3.3.3 IGE and the Right to Environment

The right to environment is clearly analogous to the "Planetary Rights" component of the doctrine of intergenerational equity, at least in its individual aspect. The difficulty with the right to environment as it is currently emerging in international law is that it does not

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<sup>309</sup> G.F. Maggio, "Inter/Intra-Generational Equity: Current Applications under International Law for Promoting the Sustainable Development of Natural Resources" (1997) 4 Buff. Envtl. L.J. 161 at 206-207.

<sup>310</sup> Weiss, *In Fairness to Future Generations*, *supra* note 86 at 45. See *contra* Mayeda, *supra* note 184, who sees intergenerational equity as not attending to global inequalities (but note that Mayeda does not explicitly address the aspects of IGE that do appear to do this).

<sup>311</sup> Weiss, *In Fairness to Future Generations*, *supra* note 86 at 45.

<sup>312</sup> *Ibid.* at 27-28.

address the consequences of such a right *for the right holder*.<sup>313</sup> It is clear that a right to environment would impose correlative duties on the state, but not at all clear that the right holder would have an obligation to protect the substance of the right. Under a pure rights-based system, the right holder could exercise her right to environment until and unless her conduct impinged upon the rights of other existing humans. Thus, conduct causing little or no discernible environmental harm in the present, but having the potential to cause severe environmental harm in the future,<sup>314</sup> is not in violation of the right to environment as it is currently developing. The doctrine of intergenerational equity recognizes the right to environment, but balances this right with environmental responsibility to the future.

### **3.4 Intergenerational Equity at the Domestic Level**

#### **3.4.1 IGE in Domestic Case Law**

At least one domestic court has relied on the concept of intergenerational equity in deciding an environmental dispute. In *Oposa v. Factoran*,<sup>315</sup> a group of Philippine children brought an action to quash timber licensing agreements, on behalf of themselves

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<sup>313</sup> Although one early formulation of the right to environment did include recognition of correlative duties to the future, this recognition is largely absent from the formulation of the right to environment as it is now emerging. See Review of Further Developments in Fields with Which the Sub-Commission Has Been Concerned, Human Rights and the Environment: Final Report Prepared by Mrs. Fatma Zohra Ksentini, Special Rapporteur, U.N. ESCOR Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 46th Sess., Agenda Item 4, UN Doc. E/CN.4/Sub.2/1994/9 (1994) (“[a]ll persons have the right to an environment adequate to meet equitably the needs of present generations and that does not impair the rights of future generations to meet equitably their needs”).

<sup>314</sup> Take, for example, the phenomenon of “groundwater mining”, or the unsustainable extraction of groundwater from an aquifer. The present generation may be able to continue to withdraw sufficient drinking water resources for decades or longer, but may ultimately exhaust the aquifer with disastrous results to future generations. See generally Eric Ryan Potyondy “Sustaining the Unsustainable: Development of the Denver Basin Aquifers” (2005) 9 U. Denv. Water L. Rev. 121; Ronald Keiser & Frank F. Skillern, “Deep Trouble: Options for Managing the Hidden Threat of Aquifer Depletion in Texas” (2001) 32 Tex. Tech L. Rev. 249.

<sup>315</sup> 224 SCRA 792 (1993), 33 I.L.M. 173.



and future generations. The court supported the children's standing to sue on behalf of future generations, stating that:

[t]heir personality to sue in behalf of the succeeding generations can only be based on the concept of intergenerational responsibility insofar as the right to a balanced and healthful ecology is concerned. Such a right, as hereinafter expounded, considers the "rhythm and harmony of nature." Nature means the created world in its entirety. Such rhythm and harmony indispensably include, inter alia, the judicious disposition, utilization, management, renewal and conservation of the country's forest, mineral, land, waters, fisheries, wildlife, off-shore areas and other natural resources to the end that their exploration, development and utilization be equitably accessible to the present as well as future generations. 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.<sup>316</sup>

Although the *Oposa* decision is likely too isolated to contribute to the legal status of intergenerational equity, the case provides a useful example of the implementation of intergenerational equity in judicial environmental decision-making.<sup>317</sup>

### 3.4.2 Future Generations in Domestic Constitutions

The domestic Constitutions of twenty-two countries explicitly recognize the environmental interests of future generations.<sup>318</sup> At least sixteen of these provisions were promulgated since 1990, suggesting the evolution of intergenerational equity as an

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<sup>316</sup> *Ibid.* at 802-803.

<sup>317</sup> But see Dante B. Gatmaytan, "The Illusion of Intergenerational Equity: *Oposa v. Factoran* as Pyrrhic Victory" (2003) 15 *Geo. Int'l Envtl. L. Rev.* 457 (arguing that *Oposa* added nothing to Philippine law, which already recognized the environmental rights of future generations, and noting that it did not result in increased environmental protection, since the Supreme Court cancelled no TLAs, and the petitioners abandoned the case once it was remanded for trial).

<sup>318</sup> Albania, Andorra, Argentina, Brazil, East Timor, Eritrea, Georgia, Germany, Ghana, Guyana, Iran, Malawi, Micronesia, Namibia, Norway, Papua New Guinea, Poland, Qatar, South Africa, Uganda, Vanuatu, and Zambia. See Marcello Mollo *et al.*, *Environmental Human Rights Report: Human Rights and the Environment – Materials for the 61<sup>st</sup> Session of the United Nations Commission on Human Rights, Geneva, March 14-April 22, 2005* (Oakland, California: Earthjustice Legal Defense Fund, 2005), A-1.

emergent principle of customary international law since that time. Some domestic constitutional provisions explicitly recognize environmental “rights” of future generations, while others provide for State duties or obligations towards future generations.<sup>319</sup> Germany’s constitution provides, for example, that “the State protects...with responsibility to future generations the natural foundations of life”.<sup>320</sup> In a section entitled “National Goals and Directive Principles”, the constitution of Papua New Guinea expressly calls for “wise use to be made of natural resources and the environment...in the interests of development *and in trust for future generations*”.<sup>321</sup>

Interestingly, and in keeping with the theory of intergenerational equity as articulated by Weiss, some domestic constitutions recognize *non*-State duties towards future generations. Article 225 of Brazil’s constitution, for example, states that “the Government *and the community* have a duty to defend and preserve the environment for...future generations.”<sup>322</sup> The Republic of Vanuatu has taken a unique approach, providing in its constitution that every person has the duty “to himself and his descendants and to others...to safeguard the natural wealth, natural resources and environment in the interests of the present generation and of future generations.”<sup>323</sup>

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<sup>319</sup> For Constitutions see *ibid.* at 86 (Albania and Andorra), 88 (Brazil), 93 (Eritrea), 94 (Georgia and Germany), 95 (Ghana and Guyana), 98 (Malawi), 99 (Namibia), 102 (Qatar), 107 (Uganda).

<sup>320</sup> Constitution of the Federal Republic of Germany (1949), art. 20a. cited in Mollo, *supra* note 318 at 94.

<sup>321</sup> Mollo, *ibid.* at 101.

<sup>322</sup> *Ibid.* at 88 [emphasis added]. See also Article 6(1) Constitution of East Timor cited in Mollo, *Ibid.* at 93 (“All have the right to a humane, healthy and ecologically balanced environment and the duty to protect and improve it for the benefit of the future generations”).

<sup>323</sup> Mollo, *ibid.* at 108.

National constitutional provisions may be evidence of general principles of law common to major legal systems.<sup>324</sup> In the realm of human rights specifically, provisions of national constitutions enacted pursuant to a perceived international legal obligation may also constitute state practice giving rise to customary international law.<sup>325</sup> Constitutional recognition of the environmental rights of future generations and/or present obligations towards them remains the exception rather than the rule. However, the prevalence of intergenerational concern in recently enacted constitutions arguably supports the emergence of a broad principle of environmental responsibility towards future generations as a principle of customary international law.<sup>326</sup>

### 3.4.3 Domestic IGE Implementation Mechanisms

In 2001, the Israeli Knesset passed a law establishing a Commission for Future Generations.<sup>327</sup> The Commission is an “organ of the parliament” with a mandate to review legislation and prevent the introduction of laws that have the potential to negatively effect the “needs and rights of future generations”.<sup>328</sup> The Commission also has the authority to introduce bills for the benefit of future generations.<sup>329</sup> The Israeli Commission for Future Generations considers issues bearing on the environment and natural resources, but also broader social issues bearing on the future including health, education, and technology.<sup>330</sup> Finland’s parliamentary “Committee for the Future”

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<sup>324</sup> See *Statute ICJ*, *supra* note 227 art. 27(c).

<sup>325</sup> See Restatement (Third) of Foreign Relations § 701, cmt. a (1987) at § 701, reporter’s note 1 cited in Lee, *supra* note 56 at 313-316.

<sup>326</sup> See Lee, *supra* note 56 at 339.

<sup>327</sup> Knesset, *The Commission for Future Generations* (Jerusalem: Knesset), online: <[http://www.knesset.gov.il/sponsorship/future/eng/future\\_index.htm](http://www.knesset.gov.il/sponsorship/future/eng/future_index.htm)>

<sup>328</sup> *Ibid.*

<sup>329</sup> *Ibid.*

<sup>330</sup> *Ibid.*

similarly considers future implications of both environmental and non-environmental decision-making.<sup>331</sup>

In 1995, France created a “Council for the Rights of Future Generations”, appointed by the President. However, Jacques Cousteau, its first chairman, resigned in response to France’s resumption of nuclear testing in the Pacific. The Committee has apparently been relatively inactive in the intervening years.<sup>332</sup> Canada, the Netherlands, Norway, Germany, Belgium, Britain, Sweden, Jamaica, Barbados, Dominican Republic all have governmental organs responsible for implementing sustainable development, and/or considering the broader future implications of governmental action.<sup>333</sup>

These initiatives likely constitute state action, perhaps motivated by *opinio juris*, so as to provide evidence of a rule of customary international law. However, the number of states that have adopted implementation measures to effectuate environmental obligations towards future generations is not high enough to justify a claim of generalized state practice.

### **3.5 Preliminary Conclusion on the Legal Status of Intergenerational Equity**

Redgewell concludes that “at best, intergenerational equity may be said to constitute a ‘guiding principle’ in the application of substantive norms, including existing treaty obligations, under international law.”<sup>334</sup> In my view this conclusion is overly cautious. It

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<sup>331</sup> See World Future Council Initiative, “Writings: Local Councils” online: <<http://www.worldfuturecouncil.org/>>.

<sup>332</sup> *Ibid.*

<sup>333</sup> *Ibid.* at 11-15 summarizing the various institutions and their mandates.

<sup>334</sup> Redgewell, *supra* note 128 at 123.

is true that the detailed doctrine of intergenerational equity has not been incorporated into international law, and that the broader principle of environmental obligation towards future generations suffers from significant ambiguity. However, I would argue that, like sustainable development, the principle of intergenerational equity “is neither more vague nor more uncertain than other principles which have been applied and used as principles of customary law.”<sup>335</sup> Given the repeated recognition of environmental obligations towards future generations in the preambles of environmental conventions, in soft law instruments, and in international jurisprudence, there is ample evidence of the emergence of a principle of customary international law providing that the present generation owes a duty to preserve an environment in which future generations’ have the ability to meet their needs.<sup>336</sup>

However, in the end, the question of the legal status of intergenerational equity (like that of sustainable development) may be academic, and will certainly be overshadowed by the issue of implementation. If states adopt intergenerational equity as a guiding principle in the formation of environmental policy, then the doctrine will make a significant impact on inter-temporal environmental quality regardless of its legal status. Conversely, if the international community eventually reaches consensus on the binding nature of

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<sup>335</sup> See Afshin A. Khavari & Donald R. Rothwell, “The ICJ and the Danube Dam Case: A Missed Opportunity for International Environmental Law?” (1998) 22 Melbourne University Law Review 507 at 528.

<sup>336</sup> It must be conceded, however, that neither intergenerational equity nor sustainable development will meet their full potential without the development of a detailed and coherent legal framework. (See Redgwell at 143 (“[f]or a mechanism taking future generations into account effectively to function, it is of critical importance to develop a clear definition”). I have argued that the doctrine of intergenerational equity as articulated by Weiss in *In Future Generations* is an appropriate framework.

intergenerational equity, but states continue to regulate for the short-term, then the recognition of legal status will be largely irrelevant.

The following chapter will examine the extent to which the doctrine of intergenerational equity has (or has not) been operationalized in a regional jurisdiction that is recognized as a world leader in sustainable development – the European Union.

## 4 CASE STUDY: INTERGENERATIONAL EQUITY IN THE EUROPEAN UNION

### 4.1 Introduction

European Union environmental law and policy consistently reflect a general notion of concern for the interests of future generations. However, this concern is largely expressed in the language of sustainable development rather than that of intergenerational equity.<sup>337</sup> Indeed, the EU has explicitly identified sustainable development as the overarching policy governing all of its activities.<sup>338</sup> Concomitantly, it has failed to adopt or implement the comprehensive doctrine of intergenerational equity.<sup>339</sup> This ascendance of sustainable development over intergenerational equity in the EU reflects a broader global trend to the same effect.<sup>340</sup>

In the previous chapter, I argued that the difficulty with sustainable development as a legal principle is that it lacks specificity, normative force (including reference to rights and responsibility), and built-in implementation mechanisms. In contrast, the doctrine of intergenerational equity is specific and detailed, explicitly normative (recognizing both rights and responsibility), and self-executing in the sense that the doctrine as developed

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<sup>337</sup> See notes 355-359, *infra*, and accompanying text.

<sup>338</sup> See, See EC, *Treaty of Amsterdam*, 2 October 1997, [1997] O.J.C. 340/173, online: Official Journal of the European Communities <<http://europa.eu.int/eur-lex/lex/en/treaties/dat/11997D/htm/11997D.html>> (entered into force 1 May 1999) [*Treaty of Amsterdam*], arts.1, 2.

<sup>339</sup> This chapter will consider the EU's compliance with the doctrine of intergenerational equity at the regional level specifically. As explained in *infra*, member states retain concurrent environmental jurisdiction and, in particular, the right to impose more stringent environmental regulation. A country-by-country analysis of member states' conformity with the doctrine of intergenerational equity – while fertile ground for future research – is beyond the scope of this Thesis.

<sup>340</sup> See note 297, *supra*.

by Weiss identifies specific implementation and enforcement mechanisms. As a result, I asserted that the doctrine of intergenerational equity is superior to the principle of sustainable development as a legal framework for global environmental governance. However, the question remains whether systems based in sustainable development may implicitly or incidentally comport with the doctrine of intergenerational equity. If so, then it may be unnecessary to revisit and revive the doctrine as I have proposed.

This chapter will measure EU environmental law and policy against the requirements of the doctrine of intergenerational equity. I conclude that although the EU has implemented some of the constituent components of the doctrine of intergenerational equity, it has largely failed to meet the core procedural and substantive requirements of the doctrine. Given that the EU is a world leader in sustainable development, this finding suggests that even where sustainable development is aggressively adopted and implemented, the model is simply inadequate from the perspective of future generations.

#### **4.2 A note on the legal nature of the European Union**

The European Union is a supra-national entity unique in international law. Although the EU is not a nation-state, member states have ceded a portion of their national sovereignty to the Union through its constituting treaties. The EU as it now exists is the product of a decades-long political and legal process that began after the Second World War, with the 1951 formation of the European Coal and Steel Community ("ECSC") through the Treaty of Paris. The success of the ECSC led to the conclusion of the Treaties of Rome in 1957, forming the European Atomic Energy Community ("EURATOM") and the European



Economic Community ("EEC").<sup>341</sup> Ten years later the three communities consolidated their governing bodies, adopting a single European Commission, Council of Ministers, and European Parliament.

European integration took a significant step forward in 1987 with the adoption of the Single European Act ("SEA"), modifying the Treaty of Rome for the first time.<sup>342</sup> The SEA facilitated the completion of a barrier-free internal market, and altered decision-making procedures in certain areas.<sup>343</sup> In 1992, the Treaty of Maastricht added a common foreign and security policy and cooperation in justice and home affairs to the existing European Community, thus creating the European Union.<sup>344</sup> The Treaties of Amsterdam (1997) and Nice (2001) introduced some modifications to internal governance as well as substantive policy areas, including, in the case of Amsterdam, environmental protection and sustainable development.<sup>345</sup>

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<sup>341</sup> The founding nations were Belgium, West Germany, Luxembourg, France, Italy and the Netherlands. See EUROPA, "The History of the European Union" online: EUROPA The EU at a Glance <[http://europa.eu/abc/history/index\\_en.htm](http://europa.eu/abc/history/index_en.htm)>.

<sup>342</sup> Eugene Regan, "Ireland in Europe: A Legal Perspective" (2001) 29 Int'l J. Legal Info. 219 at 226.

<sup>343</sup> *Ibid* at 227.

<sup>344</sup> See also *ibid.* at 342.

<sup>345</sup> *Treaty of Amsterdam*, *supra* note 338; See further, EUROPA, "The Amsterdam Treaty: a Comprehensive Guide", online: EUROPA <<http://europa.eu/scadplus/leg/en/s50000.htm>>; EC, *Treaty of Nice: Amending the Treaty on European Union, The Treaties Establishing the European Communities and Certain Related Acts*, 10 March 2001, [2002] O.J.C. 325/01, online: Official Journal of the European Communities <<http://europa.eu.int/eur-lex/lex/JOhtml.do?uri=OJ:C:2002:325:SOM:EN:HTML>> (entered into force 1 February 2003). For a comprehensive introduction to European Union Law, see P.S.R.F. Mathijsen, *A Guide to European Union Law*, 8th ed. (London, Sweet and Maxwell, 2004).

Beginning with the compelling goal of ending the cycle of intra-European military conflict,<sup>346</sup> the European Union has grown into a political and economic behemoth, encompassing nearly a half a billion people<sup>347</sup> and forming one of the largest economies in the world.<sup>348</sup>

### **4.3 Why consider the EU as a case study in intergenerational equity?**

Intergenerational Equity is a doctrine of international environmental law concerned with environmental protection on a planetary scale; its tenets are relevant to international, regional and national environmental governance in every corner of the globe. However, I have chosen to focus on the European Union as a case study in the implementation (or non-implementation) of intergenerational equity for the following reasons:

#### **4.3.1 The EU is a successful experiment in regional environmental governance**

Given that the international community has thus far failed to establish effective environmental governance systems at the global level, regional mechanisms are likely to play an increasingly important role in global environmental protection.<sup>349</sup> The European Union is “one of the world’s most advanced examples of international cooperation”<sup>350</sup> in the realm of environment and beyond. Although member states retain a concurrent environmental regulatory competency, the EU has the power to set binding minimum

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<sup>346</sup> *Ibid.* See also Kenneth M. Lord, “Bootstrapping an Environmental Policy from an Economic Covenant: the Teleological Approach of the European Court of Justice” (1996) 29 Cornell Int’l L.J. 571.

<sup>347</sup> EUROPA, “The EU at a glance: Key facts and figures about Europe and the Europeans” online: <[http://europa.eu/abc/keyfigures/index\\_en.htm](http://europa.eu/abc/keyfigures/index_en.htm)>.

<sup>348</sup> The European Union is also one of the two biggest economies in the world (the other being the United States). See European Union, “EU/US Facts & Figures” online: European Union <<http://www.eurunion.org/profile/facts.htm>>.

<sup>349</sup> *Ibid.* at 359-360.

<sup>350</sup> Francesca Bignami, “Transgovernmental Networks vs. Democracy: The Case of the European Information Privacy Network” (2005) 26 Mich. J. Int’l L. 807 at 867.

standards throughout the Union.<sup>351</sup> “The progressive integration of the environmental regimes in the several nations of the EU...provides a remarkable history of governance coordination over a large region.”<sup>352</sup>

#### **4.3.2 The EU is a Global Leader in Sustainable Development**

Despite the absence of any environmental provisions in its founding treaties, environmental protection has been a central issue in the European Community (and later the European Union) since the early 1970s. The 1972 Paris Conference of the Heads of State (held in association with the Stockholm Conference) symbolically adopted

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<sup>351</sup> Goodrich explains:

The [Treaty of Maastricht] explicitly gives the EU legal competence in environmental matters. However, the EU holds this power concurrently with the Member States, which retain authority to regulate the environment until the EU acts. Once the EU acts, it preempts further Member State action, “assum[ing] exclusive competence in the field it has occupied.”

There are two important exceptions to the doctrine of preemption, exceptions that significantly limit the ability of the EU to preempt Member States in the field of environmental regulation. First, Member States may retain and “apply national provisions ... relating to protection of the environment” so long as “they are not a means of arbitrary discrimination or a disguised restriction on trade between Member States.” Second, environmental measures adopted by the Community cannot prevent Member States from maintaining or introducing more stringent measures, so long as such measures are compatible with the EC Treaty. These exceptions ensure that Member States retain significant authority to regulate their own environment, even in the presence of Community measures.

Luke W. Goodrich, “Implementing Environmental Law in the European Union: Lessons from the Bathing Water Directive” (2004) 16 *Geo. Int’l Env’tl. L. Rev.* 301 at 302-304 [internal citations omitted]. See also EUROPA, “Activities of European Union: Summaries of EU legislation: Environment”, online: <<http://europa.eu/scadplus/leg/en/lvb/l28066.htm>> (summarizing EU environmental legislation in the areas of “waste management”, “noise pollution”, “water pollution”, “air pollution and climate change”, “nature conservation”, “natural and technological hazards”, “enlargement” and “international cooperation”).

<sup>352</sup> Nicholas A. Robinson, “Befogged Vision: International Environmental Governance a Decade After Rio” (2002) 27 *Wm. & Mary Env’tl. L. & Pol’y Rev.* 299 at 359.

environmental protection into EC policy.<sup>353</sup> Since then, the EU has accorded preeminent importance to environmental protection, and European environmental law and policy has grown exponentially. Nuno *et al.* have observed that “by [the late 1990s] the EU had some of the most progressive environmental policies in the world.”<sup>354</sup> Indeed, the EU has become an acknowledged world leader in sustainable development.<sup>355</sup>

In addition to leading by example, the EU has also intentionally undertaken the project of actively promoting sustainable development at the international level, through such mechanisms as capacity-building in developing countries, the conclusion of multi-lateral environmental treaties, and other forms of international diplomacy.<sup>356</sup> Further, as “gatekeeper of the internal market...Europe can enforce environmental standards from her trading partners.”<sup>357</sup> Thus, it is reasonable to expect that the treatment of intergenerational equity within the EU will have a significant influence on the doctrine’s implementation in other nations, regions, and at the global level.

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<sup>353</sup> The Declaration states, in part: “Economic expansion is not an end in itself...It should result in an improvement in the quality of life as well as in standards of living. As befits the genius of Europe, particular attention will be given to...protecting the environment so that progress may really be put at the service of mankind.” See E.C. Commission, 6<sup>th</sup> General Report (1972) at 8; see also Shelton, “Right to Environment”, *supra* note 54.

<sup>354</sup> Nuno S. Lacasta, Suraje Dessai & Eva Powroslo, “Consensus Among Many Voices: Articulating the European Union’s Position on Climate Change” (2002) 32 *Golden Gate U. L. Rev.* 351 at 377.

<sup>355</sup> See e.g. Don C. Smith “The European Union’s Commitment to Sustainable Development: Is the Commitment Symbolic or Substantive in the Context of Transport Policy” (2002) 13 *Colo. J. Int’l Envtl. L. & Pol’y* 241 at 244 (“[T]he EU has established a world leadership position with respect to sustainable development”); Hans Somsen, “Editor’s Preface” in Hans Somsen *et al.*, eds., *Yearbook of European Environmental Law: Volume 2* (Oxford: Oxford University Press, 2002) at ii; *The Greening of the European Union?* (London: Sheffield Academic Press, 2001).

<sup>356</sup> See generally EC, *Commission Communication External Action: Thematic Programme For Environment and Sustainable Management of Natural Resources including Energy*, COM(2006) 20, online: <[http://eur-lex.europa.eu/LexUriServ/site/en/com/2006/com2006\\_0070en01.pdf](http://eur-lex.europa.eu/LexUriServ/site/en/com/2006/com2006_0070en01.pdf)>.

<sup>357</sup> Edith Vanden Brande, “The role of the European Union in global environmental politics: green civilian power Europe?” (Ghent, Belgium: Centre for European Studies, 2006) at 3, online: <<http://www.keele.ac.uk/research/lpj/ecprsumschool/Papers/E.BrandeGnCivPower.pdf>>.

Finally, as explained above, because the EU is at the epicenter of sustainable development internationally, the efficacy of EU environmental law and policy is a measure of the efficacy of sustainable development itself.

#### **4.4 Intergenerational Equity in the EU legal order**

##### **4.4.1 IGE in the Treaties**

Although the early constituting treaties did not include any environmental provisions, the European Community undertook an increasingly ambitious environmental regulatory program beginning in the early 1970s. In 1987, the Single European Act introduced a chapter dedicated to the environment, establishing the following as Community objectives: (i) to preserve, protect and improve the quality of the environment; (ii) to contribute towards protecting human health; and (iii) to ensure a prudent and rational utilization of natural resources. Despite the obvious future-oriented nature of concepts such as “preservation”, the SEA made no explicit mention of future generations.

The Treaty of Maastricht (1993) expanded the EU’s explicit environmental competency, setting the Union the task of achieving (*inter alia*), “a harmonious and balanced development of economic activities, [and] sustainable and non-inflationary growth respecting the environment.”<sup>358</sup> The environmental Title in the Treaty of Maastricht also explicitly allowed the Community to enter into international agreements. It further provided that EU environmental policy “shall be based on the precautionary principle and on the principles that preventative action should be taken...” Again, there is a clear

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<sup>358</sup> *Treaty on European Union*, 7 February 1992, online: EUROPA <[http://europa.eu/scadplus/treaties/maastricht\\_en.htm](http://europa.eu/scadplus/treaties/maastricht_en.htm)> (entered into force 1 November, 1993) art.2 [*Treaty of Maastricht*].

future orientation here, but no specific mention of future generations or intergenerational equity.

The Treaty of Amsterdam (1997) for the first time established sustainable development as an EU objective,<sup>359</sup> while reiterating the EU's commitment to a high level of environmental protection.<sup>360</sup> Although the Treaty of Amsterdam did not explicitly mention future generations or intergenerational equity, the concept of sustainable development is virtually synonymous with some concept of concern for future generations.<sup>361</sup> Most recently, an explicit recognition of duties towards future generations was incorporated as Part II of the EU Constitution in December of 2004 – the Charter of Fundamental Rights of the European Union.

#### 4.4.2 IGE in the Charter of Fundamental Rights

The Charter of Fundamental Rights of the European Union was “solemnly proclaimed” by the European Parliament, the Council, and the Commission on December 7, 2000 at Nice.<sup>362</sup> Although the Charter does not have formal legal effect,<sup>363</sup> “the Charter of Fundamental rights has become part of the *acquis communautaire*, not just politically, but

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<sup>359</sup> *Treaty of Amsterdam*, *supra* note 338, arts.1, 2.

<sup>360</sup> *Ibid*, arts. 1, 3c, 100a, 130r(2).

<sup>361</sup> See Part 3.3.1, *supra*.

<sup>362</sup> See European Parliament, “The Charter of Fundamental Rights of the European Union”, online: <[http://www.europarl.europa.eu/comparl/libe/elsj/charter/default\\_en.htm](http://www.europarl.europa.eu/comparl/libe/elsj/charter/default_en.htm)> [*Charter*].

<sup>363</sup> The *Charter* was subsequently incorporated as Part II of the draft EU Constitution in December of 2004. See EC, *Treaty Establishing a Constitution for Europe*, 16 December 2004, [2004] O.J.C. 310/01 at 47, online: <<http://europa.eu.int/eur-lex/lex/JOIndex.do?year=2004&serie=C&textfield2=310&Submit=Search>>. See EUROPA, “A Constitution for Europe” online: <[http://europa.eu/constitution/index\\_en.htm](http://europa.eu/constitution/index_en.htm)>. However, the Constitution does not become binding until ratification by all member states, which appears to be unlikely at this point. See EUROPA, “Ratification of the Treaty establishing a Constitution for Europe” online: <[http://europa.eu/constitution/referendum\\_en.htm](http://europa.eu/constitution/referendum_en.htm)>.

legally.”<sup>364</sup> Indeed, the Charter has been referenced repeatedly by the Commission, the European Parliament, the European Court of First Instance, the Advocates General of the European Court of Justice, and even the European Court of Human Rights.<sup>365</sup> The Charter is significant with respect to the doctrine of intergenerational equity in at least three respects.

First, and in addition to its recognition of the goal of sustainable development, the Preamble to the Charter explicitly accommodates the potential for limitations on the enjoyment of rights in the present as an incident of obligations to future generations. Paragraph 6 of the Preamble states: “Enjoyment of these rights entails responsibilities and duties with regard to other persons, to the human community *and to future generations*.”<sup>366</sup>

Second, certain provisions that could result in conflicts with environmental interests (whether present or future) contain *internal limitations* that allow for environmental protection (potentially including considerations of intergenerational equity). Thus, the Charter protects “freedom to conduct a business *in accordance with Community law and national laws and practices*.”<sup>367</sup> Similarly, the Charter provides that “[t]he use of property may be regulated by law insofar as is necessary for the general interest.”<sup>368</sup>

Third, under the rubric of “Solidarity” rights, Article 97 accords constitutional recognition to environmental interests in the following language:

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<sup>364</sup> Roza Pati, “Rights and Their Limits: The Constitution for Europe in International and Comparative Legal Perspective” (2005) 23 Berkeley J. Int’l L. 223 at 266.

<sup>365</sup> *Ibid.*

<sup>366</sup> *Charter*, *supra* note 362 at pmb1, para. 6.

<sup>367</sup> *Ibid.* art. II-76 [emphasis added].

<sup>368</sup> *Ibid.* art. II-77.

A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.

The requirement of accordance with the principle of sustainable development entails, by definition, protection for the environmental interests of future generations. Combining this provision with the limitations clause in the preamble, the Charter creates a quasi-constitutional structure that could easily accommodate the legislative implementation of the doctrine of intergenerational equity. The language of “solidarity” in Article 97 also echoes that of EU environmental policy documents (discussed below) which explicitly address obligations to future generations.

#### 4.4.3 IGE in the Aarhus Convention

As noted in the previous chapter, the Preamble to the Aarhus Convention states that “every person has the right to live in an environment adequate to his or her health and well-being, and the duty...to protect and improve the environment for the benefit of present *and future generations*.”<sup>369</sup> Again, this is consistent with IGE’s conceptualization of the dual role of the present generation as holders of both Planetary Rights and Planetary Obligations. Although the Aarhus Convention was not an EU initiative,<sup>370</sup> it has been signed and ratified by thirty-nine European states and the EU itself.<sup>371</sup> However, as in the Charter, the recognition of coexisting environmental rights and duties is limited to the non-binding Preamble.

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<sup>369</sup> *Aarhus Convention*, *supra* note 72 [emphasis added].

<sup>370</sup> The Convention was an initiative of the United Nations Economic Commission for Europe (UN/ECE). See *ibid*.

<sup>371</sup> See UNECE, “Aarhus Convention: Parties and Signatories to the Convention” online: <<http://www.unece.org/env/pp/ctreaty.htm>>; See also, *Aarhus Convention*, *supra* note 72.



#### 4.4.4 IGE in EU Environmental Policy Documents

The majority of EU environmental policy documents are framed in the language of sustainable development, implicitly or explicitly incorporating some notion of responsibility to future generations.<sup>372</sup> Sustainable development guides all EU environmental decision-making, and indeed is considered a “fundamental objective of the European Union”.<sup>373</sup> Interestingly, however, recent EU environmental policy documents are actually weaker in their treatment of responsibility to future generations than the policy statements made in the Preambles to the Charter and the Aarhus Convention.

One exception is a 1990 Declaration of the European Council<sup>374</sup> recognizing that “[m]ankind [sic] is the trustee of the natural environment and has the duty to ensure its enlightened stewardship for the benefit of this and future generations...”<sup>375</sup> More recent EU environmental policy documents, however, generally avoid language implicating specific legal obligations to future generations. Instead, the language of sustainable

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<sup>372</sup> See generally EC, *Commission Communication: A Sustainable Europe for a Better World: a European Union Strategy for Sustainable Development: Communication from the Commission of the European Communities to the Gothenburg European Council*, Com(2001)264 final, <[http://eur-lex.europa.eu/LexUriServ/site/en/com/2001/com2001\\_0264en01.pdf](http://eur-lex.europa.eu/LexUriServ/site/en/com/2001/com2001_0264en01.pdf)> [*Sustainable Europe*]; See also EC, *Commission Communication: The 2005 Review of the EU Sustainable Development Strategy: Initial Stocktaking and Future Orientations*” COM(2005) 37 final at 5, online: <[http://eur-lex.europa.eu/LexUriServ/site/en/com/2005/com2005\\_0037en01.pdf](http://eur-lex.europa.eu/LexUriServ/site/en/com/2005/com2005_0037en01.pdf)> [*2005 Review*] (“[The EU] will ensure that the needs of the present and future generations can be met....Sustainable development requires action now...Europeans and all other citizens of the world can count on the Union’s commitment to ensure a sustainable future for all.”)

<sup>373</sup> See *Ibid* at 3.

<sup>374</sup> The European Council consists of the Heads of State or Government of the Member States of the European Union and the President of the European Commission. It is distinct from the Council of the European Union. See EUROPA, “The European Council” online: <[http://europa.eu/european\\_council/index\\_en.htm](http://europa.eu/european_council/index_en.htm)>.

<sup>375</sup> EC, *Declaration by the European Council on the Environmental Imperative*, Dublin, 25 and 26 June, Bull. Eur. Comm. No. 6, [1990] Annex II, point 1.36, at para.20, online: University of Minnesota Human Rights Library <<http://www1.umn.edu/humanrts/environmentaldeclaration.html>>.

development, recognizing a balancing of present and future “needs” predominates.<sup>376</sup>

Certainly the term “intergenerational equity” is virtually absent from EU environmental policy.<sup>377</sup> Indeed, the Council recently excised the terms “Inter- and Intra- generational Equity” from the Commission’s draft of the “Renewed EU Sustainable Development Strategy” in favour of the term “solidarity within and between generations”.<sup>378</sup>

#### **4.5 Conformity with the doctrine of Intergenerational Equity in the EU**

Although the EU has not implemented any generalized environmental legal obligation towards future generations, certain aspects of the doctrine of intergenerational equity have been operationalized in the EU environmental regime. Most notably, the EU has codified the duties of use associated with IGE in its internal law, and is also actively performing the duties towards less developed countries that flow from the doctrine as articulated by Weiss.

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<sup>376</sup> *Sustainable Europe*, *supra* note 372.

<sup>377</sup> A search of the EU’s web-site on July 18, 2006, and limited to documents relating to “Environment”, produced only 2 documents containing the term “intergenerational equity”. The most recent is the Commission’s initial draft of the EU’s Renewed Sustainable Development Strategy, discussed *infra*. The second is a report from the Commission’s Agricultural Directorate-General, “A Framework for Indicators for the Economic and Social Dimensions of Sustainable Agricultural and Rural Sustainable Development” at 6, online:

<[http://ec.europa.eu/agriculture/publi/reports/sustain/index\\_en.pdf](http://ec.europa.eu/agriculture/publi/reports/sustain/index_en.pdf)> (stating that “inter-generational equity might be achievable by applying the rule that resources be allocated in such a way that welfare generated today is not at the detriment of future welfare” and recognizing that “sustainability requires also [sic] *intra*-generation equity” including access to resources). A third document recognizes the need to internalize future externalities, including “intergenerational issues”. See EC, “Expert Workshop on Resource Management Meeting Minutes” (13 July 2000), at 3, online: <<http://ec.europa.eu/environment/enveco/others/ewrm.htm>>.

<sup>378</sup> Compare Council of the European Union, “Renewed EU Sustainable Development Strategy”, Doc. 10117/06 (9 June 2006) at 4 with See EC, *Commission Communication: Draft Declaration on Guiding Principles for Sustainable Development*, COM(2005) 218 final at 5, online: <[http://eur-lex.europa.eu/LexUriServ/site/en/com/2005/com2005\\_0037en01.pdf](http://eur-lex.europa.eu/LexUriServ/site/en/com/2005/com2005_0037en01.pdf)>.

#### 4.5.1 Implementation of Duties of Use

Relying on enabling provisions in the various treaties,<sup>379</sup> the EU has created a comprehensive system of environmental regulation. This system addresses each of the five duties of use arising from IGE's three Planetary Obligations – the obligations to conserve Options (diversity), Quality, and Access.

Under the rubric of the duty to conserve resources, the EU has, among other things, enacted two “powerful pieces of binding legislation”, Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (the Birds Directive)<sup>380</sup>, and Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (the Habitats Directive)<sup>381</sup>. The EU's Biodiversity Strategy calls for an end to the loss of biodiversity within the EU by 2010.

Also related to the duty to conserve, the EU has promulgated a number of directives aimed at the reduction of waste. Directive 94/62/EC, for example, addresses packaging waste,<sup>382</sup> while Directive 2000/53/EC makes vehicle manufacturers responsible for their

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<sup>379</sup> See Noah Vardi and Vincenzo Zeno-Zencovich, “From Rome to Nice: A Historical Profile of the Evolution of European Environmental Law” (2004) 12 Penn St. Envtl. L. Rev. 219; Julie A. Harms, “The European Community's Development of An Environmental Policy: The Treaty of European Union” (1993) 6 Tul. Envtl. L.J. 397; Lord, *supra* note 346.

<sup>380</sup> EEC, *Council Directive 79/409 of 2 April 1979 on the conservation of wild birds* [1979] O.J.L. 103/01, online: <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31979L0409:EN:HTML>> [Birds Directive].

<sup>381</sup> ECC, *Council Directive 92/43 of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora*, [1992] O.J.L. 206/07, online: <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31992L0043:EN:HTML>>.

<sup>382</sup> See e.g. EC, *Council Directive 94/62 of 20 December 1994 ending Directive 85/339/EEC on packaging and packaging waste*, [1994] O.J.L. 365/10, online: <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31994L0062:EN:HTML>>

product from the “cradle to the grave”.<sup>383</sup> The EU has also enacted legislation requiring increased energy efficiency in buildings<sup>384</sup> and other products, and has also invested in the development of renewable energy sources.<sup>385</sup>

With respect to the duty to ensure equitable use, defined as “reasonable, non-discriminatory access to the [planetary] legacy”, the EU has taken an active role in facilitating sustainable development both within the less developed regions of the EU itself, and in the developing world. In fact, the EU and its member states contribute more than half of total development aid worldwide,<sup>386</sup> and this includes financing projects to assist developing countries in sustainably accessing their natural resources.<sup>387</sup>

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<sup>383</sup> EC, *Council Directive 2000/53 of 18 September 2000 on end-of-life vehicles*, [2000] O.J.L. 269/34, online: <[http://eur-lex.europa.eu/LexUriServ/site/en/oj/2000/l\\_269/l\\_26920001021en00340042.pdf](http://eur-lex.europa.eu/LexUriServ/site/en/oj/2000/l_269/l_26920001021en00340042.pdf)>.

<sup>384</sup> EC, *Council Directive 2002/91 of 16 December 2002 on the energy performance of buildings*, [2003] O.J.L. 91/65, online: <[http://eur-lex.europa.eu/smartapi/cgi/sga\\_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=32002L0091&model=guichett](http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=32002L0091&model=guichett)>. See also EEC, *Council Directive 92/42 of 21 May 1992 on efficiency requirements for new hot-water boilers fired with liquid or gaseous fuels*, [1992] O.J.L. 167/017, online: <[http://eur-lex.europa.eu/smartapi/cgi/sga\\_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=31992L0042&model=guichett](http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=31992L0042&model=guichett)>; EEC, *Council Directive 89/106 of 21 December 1988 on the approximation of laws, regulations and administrative provisions of the Member States relating to construction products*, [1989] O.J.L. 40/12, online: <[http://eur-lex.europa.eu/smartapi/cgi/sga\\_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=31989L0106&model=guichett](http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=31989L0106&model=guichett)>.

<sup>385</sup> See European Commission, “Energy: New and Renewable Energies” online: <[http://ec.europa.eu/energy/res/legislation/share\\_res\\_eu\\_en.htm](http://ec.europa.eu/energy/res/legislation/share_res_eu_en.htm)>.

<sup>386</sup> See EUROPA, “2005- a Year in the Life of Europe”, online: <[http://europa.eu/abc/europein2005/cooperation-humanitarian-aid\\_en.htm](http://europa.eu/abc/europein2005/cooperation-humanitarian-aid_en.htm)>. (“The European Union is currently the largest development aid donor in the world, providing more than half of total financial aid. Indeed, it is responsible for 55 % of official development assistance...”).

<sup>387</sup> See e.g. EUROPA, DG Development, “Projects Financed by the environmental budget line in Latin America (1988-1998)”, online: <[http://ec.europa.eu/comm/development/body/theme/environment/LA%2088-98%20\(by%20year\).htm](http://ec.europa.eu/comm/development/body/theme/environment/LA%2088-98%20(by%20year).htm)>.

Regarding the duty to avoid adverse impacts on the environment, the EU has enacted a comprehensive regime of anti-pollution measures,<sup>388</sup> and has undertaken a particularly ambitious regulatory program aimed at arresting climate change. With respect to climate change in particular, “the European Union has adopted an aggressive and proactive approach to meeting its Kyoto obligations, focusing on mandatory laws and regulations.”<sup>389</sup> Consistent with the doctrine of intergenerational equity, the EU’s pollution program “emphasizes prevention and mitigation of damage”. The EU has also codified and operationalized procedural environmental rights including notice, information, consultation, and environmental assessment, consistent with Weiss’s definition of this duty.<sup>390</sup>

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<sup>388</sup> With respect to air, see e.g., EC, *Council Directive 96/62 of 27 September 1996 on ambient air quality assessment and management*, [1996] O.J.L. 296/55, online: <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31996L0062:EN:HTML>>; EC, *Council Directive 99/30 of 22 April 1999 relating to limit values for sulphur dioxide, nitrogen dioxide and oxides of nitrogen, particular matter and lead in ambient air*, [1999] O.J.L. 163/41, online: <<http://eur-lex.europa.eu/Notice.do?val=330242:cs&lang=en&list=393421:cs,261265:cs,330242:cs,414805:cs,333709:cs,334817:cs,233868:cs,324788:cs,326055:cs,324630:cs,&pos=3&page=1&nbl=12&pgs=10&hwords=limit%20values%20for%20sulphur%20dioxide~>>>; EC, *Council Directive 2001/81 of the European Parliament and of the Council of 23 October 2001 on national emission ceilings for certain atmospheric pollutants*, [2001] O.J.L. 309/22, online: <[http://eur-lex.europa.eu/Result.do?RechType=RECH\\_celex&lang=en&code=32001L0081](http://eur-lex.europa.eu/Result.do?RechType=RECH_celex&lang=en&code=32001L0081)>; EC, *Council Directive 2000/69 of 16 November 2000 relating to limit values for benzene and carbon monoxide in ambient air*, [2000] O.J.L. 313/12, online: <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0069:EN:HTML>>; With respect to water, see EC, *Council Directive 2000/60 of 23 October 2000 establishing a framework for Community action in the field of water policy*, [2000] O.J.L. 327/1, online: <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0060:EN:HTML>>.

<sup>389</sup> See EC, Commission, European Climate Change Program, “Executive Summary” in *Second ECCP Progress Report: Can we meet our Kyoto targets?* (EC, April 2003) online: “The European Climate Change Program <<http://ec.europa.eu/environment/climat/eccp.htm>> cited in Cinnamon Carlarne, *Climate Change Policies an Ocean Apart: EU & US Climate Change Policies Compared*” (2006) 14 Penn St. Envtl. L. Rev. 435 at 438.

<sup>390</sup> See Weiss, *In Fairness to Future Generations*, *supra* note 86 at 60-61.

The EU has implemented the duty to prevent disasters, minimize damage, and provide emergency assistance through various pieces of legislation, including those addressing the prevention and mitigation of climate change, marine spills,<sup>391</sup> chemical accidents,<sup>392</sup> nuclear safety,<sup>393</sup> forest fires,<sup>394</sup> and floods.<sup>395</sup> The EU also has in place a comprehensive “Community mechanism for civil protection”<sup>396</sup> designed to provide immediate assistance in cases of imminent or actual disasters, whether natural or human-made.

Finally, with respect to the duty to compensate for damage to the environment, the EU has codified the “polluter-pays principle” since the Treaty of Maastrich (1993). In 2004, it implemented this principle through Directive 2004/35/EC of the European Parliament

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<sup>391</sup> See EUROPA, European Commission, “Official texts relating to Community Cooperation on Marine Pollution” online: Marine Pollution  
<[http://ec.europa.eu/environment/civil/marin/mp02\\_en\\_legislation.htm](http://ec.europa.eu/environment/civil/marin/mp02_en_legislation.htm)> (collecting applicable legislation).

<sup>392</sup> EC, *Council Directive 96/82 of 9 December 1996 on the control of major-accident hazards involving dangerous substances (Seveso II Directive)*, [1997] O.L.J. 10/13 <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31996L0082:EN:HTML>>; EC, *Council Directive 2003/105 of 16 December 2003 ending the Directive 96/82/EC the Seveso II Directive*, [2003] O.J.L. 345/97, online:  
<[http://ec.europa.eu/environment/seveso/pdf/unoff\\_cons\\_version\\_96\\_82\\_incl\\_amend.pdf](http://ec.europa.eu/environment/seveso/pdf/unoff_cons_version_96_82_incl_amend.pdf)>.

<sup>393</sup> See European Commission, “Energy: Nuclear Issues” online:  
<[http://ec.europa.eu/energy/nuclear/legislation/index\\_en.htm](http://ec.europa.eu/energy/nuclear/legislation/index_en.htm)>

<sup>394</sup> See EC, *Commission Regulation 2152/03 of 17 November 2003 concerning monitoring of forests and environmental interactions in the Community (Forest Focus)*, [2003] O.J.L. 324/01, online:  
<[http://europa.eu.int/smartapi/cgi/sga\\_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=32003R2152&model=guichett](http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=32003R2152&model=guichett)>.

<sup>395</sup> EC, *Proposal for a Council Directive COM(2006) 15 final of 18 January 2006 on the assessment and management of floods*, [2006] COD 2005/2006.

<sup>396</sup> See EUROPA, European Commission, “The Community mechanism for civil protection” online: <<http://ec.europa.eu/environment/civil/prote/mechanism.htm>>.

and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage.<sup>397</sup>

As with most environmental regulatory systems, there is a gap between the EU's environmental laws and compliance on the ground; however, the EU does actively, if imperfectly, enforce its environmental legislation throughout the Union.<sup>398</sup> Although a comprehensive evaluation of the efficacy of the EU's environmental regime is well beyond the scope of this Thesis, this brief survey indicates that the EU has at least attempted to implement each of the planetary obligations and duties of use identified in the doctrine of intergenerational equity.

#### 4.5.2 Global Perspective

Recognizing that environmental issues do not respect political borders, the doctrine of intergenerational equity is planetary in scope. Thus, states owe Planetary Obligations to foreign nationals,<sup>399</sup> and have a duty to both assist less developed countries in meeting their own Planetary Obligations,<sup>400</sup> and in exercising their Planetary Rights.<sup>401</sup> EU environmental policy comports with each of these three aspects of IGE. The EU's Renewed Sustainable Development Strategy, for example, directs the EU to "[a]ddress the needs of current generations without compromising the ability of future generations to

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<sup>397</sup> See EC, *Council Directive 2004/35 of 30 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage*, [2004] O.J.L. 143/56, online: <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0035:EN:HTML>>.

<sup>398</sup> See generally EUROPA, European Commission, "Implementation of Environmental Law", online: <<http://ec.europa.eu/environment/law/implementation.htm>>; Elizabeth Hattan, "The Implementation of EU Environmental Law" (2003) 15 J. Env'tl. L. 273.

<sup>399</sup> Weiss, *In Fairness to Future Generations*, *supra* note 86 at 26-27.

<sup>400</sup> *Ibid* at 45.

<sup>401</sup> *Ibid*.

meet their needs in the EU *and elsewhere*.”<sup>402</sup> EU environmental policy documents repeatedly recognize that environmental conduct within the Union impacts present and future generations throughout the world.<sup>403</sup>

With respect to assisting developing countries to meet their environmental obligations, the 2006 “European Consensus on Development” states that the EU “will support the efforts undertaken by its partner countries to incorporate environmental considerations into development, and help increase their capacity to implement multilateral environmental agreements.”<sup>404</sup> The EU has a promising track record in this area. It has supported the principle of Common but Differentiated Responsibilities in international environmental negotiations,<sup>405</sup> and has also provided targeted development aid to allow developing countries to implement environmental protection projects.<sup>406</sup> The EU’s

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<sup>402</sup> *Ibid* [emphasis added].

<sup>403</sup> See e.g. *Sustainable Europe*, *supra* note 372, at 9:

Many EU policies influence prospects for sustainability far beyond the borders of the Union, and EU production and consumption increase the pressure on shared global environmental resources. It is therefore important to ensure that measures we take to move towards sustainable development in Europe contribute towards sustainable development in the rest of the world.

<sup>404</sup> EC, *Joint Statement by the Council and the Representatives of the Governments of the Member States Meeting with the Council, the European Parliament, and the Commission: The European Consensus on Development*, [2006] O.J.C. 46/1, online: <[http://ec.europa.eu/comm/development/body/development\\_policy\\_statement/docs/edp\\_statement\\_oj\\_24\\_02\\_2006\\_en.pdf#zoom=125](http://ec.europa.eu/comm/development/body/development_policy_statement/docs/edp_statement_oj_24_02_2006_en.pdf#zoom=125)>.

<sup>405</sup> See e.g. EC, *The EU Agenda for the World Summit on Sustainable Development*, (Luxembourg: EC, 2002), online: <<http://europa.eu.int/comm/environment/wssd>>; Carlarne, *supra* note 389 at 479. As discussed in Chapter 3 herein, CDR is closely related to intergenerational equity (particularly in its intra-generational aspect) and effectively allows more developed countries to assume a portion of the obligations of less developed countries..

<sup>406</sup> See EUROPA, European Commission, “Funding Instruments for Environment” online: <<http://ec.europa.eu/comm/development/body/theme/environment/Funding.htm>>; See also EC, *Commission Directive 2943/2000 of 7 November 2000 on measures to promote the full integration of the environmental dimension in the development process of developing countries*, [2000] O.J.L. 288/01, online: <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000R2493:EN:HTML>>; and EC, *Commission Regulation 2494/2000 of 15 November 2000 on measures to promote the*



substantial program of development aid also responds to the duty to assist less developed countries in accessing the planetary legacy.<sup>407</sup>

#### **4.6 Divergence from Intergenerational Equity in the EU**

Although some aspects of the EU's environmental regime comport with elements of the doctrine of IGE, EU environmental policy diverges from IGE in at least three important respects: lack of representation for future generations, a short time horizon, and unsustainable environmental outcomes.

#### **4.7 Lack of Representation for Future Generations**

Currently, the European Union does not have any institutional mechanism in place to ensure the adequate representation of future generations. As the Commission has acknowledged, the resulting "absence of a coherent long-term perspective means that there is too much focus on short-term costs and too little focus on the prospect of longer term 'win-win' situations..."<sup>408</sup> Like other democracies, the EU suffers from the "structural problem" of "political short-termism...namely, the tendency to prefer the present and to neglect the future."<sup>409</sup>

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*conservation and sustainable management of tropical forests and other forests in developing countries*, [2000] O.J.L. 288/06, online: <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000R2494:EN:HTML>>.

<sup>407</sup> See e.g. EUROPA, European Commission, "Food: Food Security at the heart of poverty reduction" online: EuropeAid <[http://ec.europa.eu/comm/europeaid/promotion/sectors/article\\_2278\\_en.htm](http://ec.europa.eu/comm/europeaid/promotion/sectors/article_2278_en.htm)> (regarding rural development and food security).

<sup>408</sup> *Sustainable Europe*, *supra* note 372 at 5.

<sup>409</sup> "Declaration of the Young Leader's Congress: Ecological Generational Justice into the Constitution?" in *Young Leaders Congress- Ecological Generational Justice into the Constitutions? Europe's Green Future in the 21st century. Documentation of a Congress Held June 22-26 2005* (2005) 3 Intergenerational Justice Review at 16, online: <[http://www.srzg.de/english/public/files/IJR\\_3\\_2005.pdf](http://www.srzg.de/english/public/files/IJR_3_2005.pdf)>.

However, there is a growing movement within the EU calling for the institutionalization of representation for future generations both nationally and at the European level. In the past decade, a number of activist organizations have arisen in Europe with the mandate of protecting future generations. Hungary, for example, is home to the “eco-political NGO-come-movement”<sup>410</sup> Vedegylet (Protect the Future) which encompasses both well-known intellectuals and a grassroots membership. At the request of Protect the Future, prominent jurist Dr. László Sólyom presented a draft law to the Hungarian legislature in 2000 proposing the establishment of an Ombudsman for Future Generations.<sup>411</sup> When the proposal was not acted upon, Protect the Future established its own independent Ombudsman for Future Generations, who publishes annual reports parallel to those of Hungary’s official Ombudsman.<sup>412</sup> In a similar initiative, the Green Party of England and Wales has appointed a Speaker for Future Generations and is developing a campaign to incorporate a similar officer within the government of the UK.<sup>413</sup>

The Foundation for the Rights of Future Generations (“FRFG”), a pan-European organization based in Germany,<sup>414</sup> is pursuing a campaign for the institutionalization of

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<sup>410</sup> Tracy Wheatley, “Civil candidate becomes Hungary’s new ‘eco-political’ President” *Alternatives* (10 June 2005), online: Alternatives <<http://www.alternatives.ca/article1837.html>>.

<sup>411</sup> Benedek Javor, “Institutional Protection of Succeeding Generations-Ombudsman for Future Generations in Hungary” (2005) 3 *Intergenerational Justice Review* at 34, online: <[http://www.srzg.de/english/public/files/IJR\\_3\\_2005.pdf](http://www.srzg.de/english/public/files/IJR_3_2005.pdf)>

<sup>412</sup> *Ibid.* Remarkably, Dr. Sólyom was elected president of the Republic of Hungary in 2005; his campaign was initiated and supported by Protect the Future. See The Office of the President of the Republic of Hungary, “President László Sólyom”, online: <[http://www.keh.hu/keh\\_en/laszlosolyom.html](http://www.keh.hu/keh_en/laszlosolyom.html)>.

<sup>413</sup> Chit Chong, personal communication, August 10, 2006.

<sup>414</sup> FRFG is supported by a grassroots membership as well as leading international scholars in the area of intergenerational justice. It is both a think-tank and an activist organization, publishing relevant books and the *Intergenerational Justice Review*, as well as coordinating letter-writing campaigns, organizing youth congresses, mobilizing media attention, and engaging in litigation. FRFG’s mandate is broader than the strictly environmental doctrine of intergenerational equity, encompassing issues such as debt, the sustainability of pension systems, education, etc.

representation for future generations.<sup>415</sup> In November, 2005, FRFG and Protect the Future held a panel discussion with Members of the European Parliament regarding representation for future generations in EU governance.<sup>416</sup> Another workshop was held at the European Parliament in the Spring of 2006, at which FRFG proposed specific options for the implementation of intergenerational justice in the EU.

Other major progressive European non-governmental organizations have organized specific events highlighting issues of intergenerational equity. The European Social Forum held in London in October, 2004 (which attracted tens of thousands of activists from across Europe)<sup>417</sup> included a workshop on the Rights of Future Generations. The workshop produced a series of demands, including representation for future generations in government, the judiciary and business.<sup>418</sup>

#### **4.7.1 Short time horizon**

As noted in Chapter 2, the doctrine of intergenerational equity as developed by Weiss posits that the present generation owes environmental obligations to future generations indefinitely into the distant future. At the other end of the spectrum is the position that duties are owed only to the generation immediately succeeding the present one. EU environmental policy documents generally employ the Brundtland Commission's

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However, it places a major emphasis on ecological duties to future generations See The Foundation for the Rights of Future Generations, "Actual" online: <<http://www.srzg.de/english/indengl.htm>>.

<sup>415</sup> *Ibid.*

<sup>416</sup> The Foundation for the Rights of Future Generations, *Short Report*, (22 November 2005) online: <[http://www.srzg.de/english/downloads/short\\_report.pdf](http://www.srzg.de/english/downloads/short_report.pdf)>

<sup>417</sup> "New Politics Takes a Bow" *The Guardian* (18 October 2004), online: <<http://www.ukesf.net/en/esf.shtml?x=2247>>.

<sup>418</sup> Chit Chong, "Modern Society Condemned for Exploiting Future Generations" *InterActivist Info Exchange* (15 October 2004), online: <<http://info.interactivist.net/article.pl?sid=04/10/15/1950226&mode=nested&tid=20>>.

definition of sustainable development (“meeting the needs of present generations without compromising the ability of future generations to meet their needs”),<sup>419</sup> leaving the time horizon undefined. However, a review of major policy documents suggests that the EU’s consideration of future environmental impacts extends over a relatively short time period.

A number of key policy documents, for example, refer to the need to protect “our children and grandchildren”, suggesting a very short time frame in ecological terms.<sup>420</sup>

The Environmental Action Programmes, which drive EU environmental legislation and funding activities, address a 10-year planning horizon.<sup>421</sup> Even the *European Environment Outlook*, a document prepared by the European Environmental Agency (“EEA”) for the express purpose of modeling future environmental scenarios, largely limits its time horizon to the year 2020.<sup>422</sup> Finally, the EU does employ cost-benefit

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<sup>419</sup> See *Brundtland Report*, *supra* note 295.

<sup>420</sup> See e.g. EC, *Environment 2010: Our Future, Our Choice*, 6<sup>th</sup> EU Environment Action Programme (Luxembourg: Office for Official Publications of the European Communities, 2001) at 3 (stating that the “starting point” for the programme is the question “What kind of environment do we want our children and grandchildren to inherit?”); *Sustainable Europe*, *supra* note 372 at 2 (sustainable development can deliver “a better quality of life for us, for our children, and for our grandchildren”); EC, *Measuring progress toward a more sustainable Europe: Sustainable development indicators for the European Union, Data 1995-2000* (Luxembourg: Office for Official Publications of the European Communities, 2001) at VII [*Measuring Progress*].

<sup>421</sup> See e.g. EC, *Commission Decision 1600/2002 of 10, September 2002 laying down the Sixth Community Environment Action Programme*, [2002] O.L.J. 242/01, online: <<http://ec.europa.eu/environment/newprg/index.htm>>.

<sup>422</sup> See EC, European Environment Agency, *European environment outlook* (Luxembourg: Office for Official Publications of the European Communities, 2005) at 8 [*European environment outlook*]. The report lists other existing comprehensive European-scale and global environmental scenarios, none of which extends beyond the year 2100. The EEA’s own 1999 projection extended to 2010, while projections by the OECD, World Water Vision, and the United Nations Environment Programme went no further than the year 2030. Work by the Stockholm Environment Institute, the Millenium Ecosystem Assessment, and the World Business Council for Sustainable Development extended to 2050. Only the Intergovernmental Panel on Climate Change has developed a scenario extending to the year 2100.

analysis as one policy tool in environmental decision-making,<sup>423</sup> and in this context discounts future harm.<sup>424</sup> As explained in Chapter 2, discounting has a tendency to seriously undervalue risks of harm that may occur more than a few decades into the future.

#### 4.7.2 Environmental Outcomes

A basic requirement imposed by the doctrine of intergenerational equity is the obligation to pass the planet on to future generations “in no worse condition than that in which it was received.”<sup>425</sup> This requires that patterns of environmental deterioration be halted, and in some cases reversed. Unfortunately, despite the EU’s significant progress in adopting and enforcing progressive environmental law and policy, it has not yet succeeded in achieving this goal in many areas. Although EU environmental law and policy has achieved (and is projected to achieve) some significant improvements in environmental outcomes,<sup>426</sup> the overall trend is one of ongoing environmental deterioration. As the EU’s own web-site explains:

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<sup>423</sup> See e.g. EC, Commission, *CAFE CBA: Baseline Analysis 2000 to 2020: Service Contract for Carrying out Cost-Benefit Analysis of Air Quality Related Issues, in particular in the Clean Air for Europe (CAFÉ) Programme*, AEAT/ED51014/Baseline Scenarios, Issue 5, online: <[http://ec.europa.eu/environment/air/cale/activities/pdf/cba\\_baseline\\_results2000\\_2020.pdf](http://ec.europa.eu/environment/air/cale/activities/pdf/cba_baseline_results2000_2020.pdf)>.

<sup>424</sup> See e.g. EC, Commission, *Recommended Interim Values for the Value of Preventing a Fatality in DG Environment Cost Benefit Analysis* at 2, online: <[http://www.eu.nl/environment/enveco/others/recommended\\_interim\\_values.pdf](http://www.eu.nl/environment/enveco/others/recommended_interim_values.pdf)> (“[i]t is appropriate to value future impacts at a lower rate than contemporaneous impacts. The central discount rate to be used in discounting future impacts is 4% real...”).

<sup>425</sup> Weiss, “What Obligation”, *supra* note 138.

<sup>426</sup> See e.g. *Measuring Progress*, *supra* note 421 at 75 (noting that “[t]here have been significant decreases in the numbers of persons living in households affected by pollution (average annual decline of 4.4 %) and by noise (average annual decline of 5 %) between 1996 and 2000. The implementation of more stringent Community legislation on emissions from industrial plants and motor vehicles, leading to less polluting and noisy road vehicles and limiting noise source levels, appears to be having a positive effect”); *European environment outlook*, *supra* note 423 at 63, (noting, *inter alia*, that air pollution and water use are expected to decline significantly by 2030).

Damage to the environment has been growing steadily worse in recent decades. Every year, some 2 billion tonnes of waste are produced in the Member States and this figure is rising by 10% annually, while CO<sub>2</sub> emissions from our homes and vehicles are increasing, as is our consumption of polluting energy. Natural disasters (floods, droughts and forest fires) are increasing and causing considerable damage to the natural environment and human infrastructure. The consumption of natural resources is also increasing year on year...<sup>427</sup>

Indeed, the EU's "ecological footprint" (a measure of overall natural resource consumption) is currently "more than twice the size of Europe. Europeans now use 4.9 'average' hectares per person, with only 1.8 available. Yearly growth of the [EU's] footprint since 1990 as been 3%".<sup>428</sup>

Thus, the EU has not gone far enough towards realizing the Conservation of future generations' Options or Quality. Increasing levels of development within the EU itself (coupled with its international aid programs) likely make the EU a net contributor to Conservation of Access, but this component of intergenerational equity is meaningless if the remaining two are degraded.

#### 4.8 Conclusion

The EU has adopted a general concept of concern for the environmental needs of future generations, framed in the language of sustainable development, as a guiding policy in its environmental decision-making. The resulting regulatory regime does integrate the rights of the present with responsibility to the future. The EU's model of sustainable development allows the present to use and enjoy the planetary legacy while still

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<sup>427</sup> See EUROPA, "Environment: Introduction" online:  
<<http://europa.eu/scadplus/leg/en/lvb/l128066.htm>>.

<sup>428</sup> EC, *Commission Communication 2005 Environment Policy Review*, {SEC (2006) 218}, COM(2006) 70 final, online: <[http://eur-lex.europa.eu/LexUriServ/site/en/com/2006/com2006\\_0070en01.pdf](http://eur-lex.europa.eu/LexUriServ/site/en/com/2006/com2006_0070en01.pdf)>.

protecting that legacy for the benefit of future generations; it corresponds to Weiss's middle way between preservationism and the opulence model. Also in keeping with the doctrine as developed by Weiss, the EU views its environmental responsibilities (to both present and future) as global in nature.

However, the EU has diverged substantially from the requirements of the doctrine of intergenerational equity in its lack of representation for future generations, short time horizon, and inadequate environmental performance. Despite its promising quasi-constitutional framework, the EU has failed to adopt an environmental policy based on the doctrine of intergenerational equity. This failure has allowed the EU to avoid explicitly addressing crucial questions such as representation and the time horizon.

Furthermore, the failure to adopt a policy framework based on the environmental *rights* of future generations arguably allows for a regime that mitigates harm without actually achieving environmental preservation and restoration.

This case study reinforces my contention that sustainable development is inadequate as a normative principle for the protection of future generations. The EU has embraced the principle of sustainable development perhaps more than any other region in the world, and yet suffers increasing environmental degradation on the ground. The constituting treaties and policy documents repeatedly recite the mantra of respect for "the ability of future generations to meet their needs" and yet fail to provide any representation for future generations or specify how far into the future protection should extend. The doctrine of intergenerational equity, in contrast, provides clear and specific guidance for implementing environmental protection for future generations.

## 5 CONCLUSION

The state of the world today invites a question basic to the human future: by what set of consensual rules for collective human behavior, interacting on a finite planet, can this World be governed to safeguard its stability and continuity?<sup>429</sup>

I have argued (in common with many other scholars) that rights and responsibilities are two dominant governing principles in human societies, and further that the relationship between these two paradigms is hotly contested internationally. Even within the environmental field, ecological ethicists and environmental advocates have disagreed as to the utility and validity of the rights paradigm as it relates to environmental protection. I have further argued that the doctrine of intergenerational equity, as developed by Edith Brown Weiss, effectively integrates the paradigms of environmental rights and responsibility. Moreover, the doctrine of intergenerational equity provides a coherent and practicable set of legal rules to govern human conduct in the area of environment.

Since the publication of *In Fairness to Future Generations*, the notion of environmental responsibility toward future generations has been expressed in international law through "soft law" instruments, preambles to environmental treaties, and state practice in the form of domestic constitutional recognition. However, to a large extent the concept of intergenerational environmental responsibility has been co-opted and diluted through the hegemonic paradigm of sustainable development. In my view, the relative ascendance of sustainable development over the doctrine of intergenerational equity has resulted in at least two significant losses for the international community.

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<sup>429</sup> Lynton K. Caldwell, "Is World Law an Emerging Reality? Environmental Law in a Transnational World" (1999) 10 Colo. J. Int'l Envtl. L. & Pol'y 227 at 229.



First, as argued above, the disproportionate emphasis on the amorphous principle of sustainable development has allowed the international community to neglect the difficult but crucial details of intergenerational environmental justice. The case study of the EU's treatment of intergenerational equity illustrates this point. In sum, having excised the language of rights and responsibility, the principle of sustainable development fails to provide adequate protection to the environmental interests of future generations.

Second, the failure to seriously grapple with the respective environmental rights and obligations of present and future generations has been a missed opportunity for cooperative international environmental governance. Rather than merely eschewing these paradigmatic constructs, as does the principle of sustainable development, the doctrine of intergenerational equity seeks to engage, reconcile, and integrate the powerful language of rights and responsibility. Thus, the doctrine of intergenerational equity presents a unique opportunity to integrate and operationalize foundational cultural, political, and legal premises from diverse cultures.

Nevertheless, it seems clear that sustainable development will likely remain the dominant paradigm for international environmental decision-making for the foreseeable future. However, given the continued dissatisfaction with the ambiguity of the concept, there may be some possibility of reinvigorating the doctrine of intergenerational equity by importing it into the law (and policy) of sustainable development. More specifically, I would assert that the doctrine of intergenerational equity should be viewed as the legal *mechanism*, or *framework*, for achieving the *goal* of sustainable development.

For the reasons discussed in Chapters Two and Three, intergenerational equity constitutes an appropriate and effective legal framework for sustainable development. In particular, the doctrine of intergenerational equity is environmentally protective, integrative, reasonable in terms of the sacrifices expected of present generations, cross-culturally appropriate, theoretically versatile, and consistent with the discourses of both rights and responsibility. It is also sufficiently detailed and robust that it would dispel the existing ambiguity of the concept of sustainable development and provide viable avenues for implementation.

Although it is not necessary to adopt every particular of the doctrine as developed by Weiss, intergenerational equity should at least be understood to include the three Planetary Obligations and Rights (Options, Quality, and Access), the five correlative duties of use,<sup>430</sup> the intra-generational equity component, independent representation for future generations, the application of intertemporal responsibility beyond national borders, and an explicitly defined time horizon. The latter should extend into the remote future for impacts that could cause catastrophic devastation.

In the end, the doctrine of intergenerational equity has the potential to play a significant role in assisting human societies to govern our conduct in a way that preserves the awesome ecological legacy of Planet Earth for the future. In my view, the enormous value of that project is self-evident.

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<sup>430</sup> See Part 2.3.3, *supra*.

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