Liberty and Prosperity for Future Generations: Intergenerational Equity as Customary International Law

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Abstract

Natural resources are the inherent wealth of a nation. Protection of the environment is a complex responsibility of both the State and the individual. On one hand, the consumption of natural resources is the privilege and liberty of both the government and its citizens; on the other hand, the maintenance of a balanced and healthful ecology is the accountability of every citizen and every government to its youth and future generations.

The principle of intergenerational equity is at the core of sustainable development. It is defined as the obligation of each generation to future generations to “pass on the natural and cultural resources of the planet in no worse condition than received and to provide reasonable access to the legacy for the present condition”. This was seen to have been applied in the Philippines in the popular case of Oposa v Factoran, wherein the Court gave legal standing to the petitioners representing minors and generations yet unborn who were invoking their constitutional right to a balanced and healthful ecology.

The keys to the prosperity of a nation lies within itself in the form of a rich, healthy, and nurtured environment hand-in-hand with an empowered, free youth. Like yin and yang, there is no prosperity without liberty, and no liberty without prosperity. The protection of the environment guarantees the liberty of the people by ensuring that their quality of life is one which gives them the opportunity to live a full life with access and capability to shape and develop natural resources for their own economic growth and prosperity.

This paper argues that the principle of intergenerational equity is ripe for consideration as a customary international law – that there is sufficient state practice and opinion juris on the matter, and that such is the basis for future generations to have legal standing in international courts and tribunals.
OUTLINE

This study is divided into five chapters – Introduction, The Principle of Intergenerational Equity, Legal Status of Intergenerational Equity, Representation of Future Generations, and Recommendation.

Chapter I discusses the background of the study, the gap in international environmental law the Author wishes to give solution to, and the reason as to why such gap needs to be addressed.

Chapter II focuses on the principle of intergenerational equity and introduces such concept as explained by legal luminaries through their works and publications as well as the relation of the said principle to other international environmental law principles such as the precautionary principle, the common heritage principle, and the preventive principle. The Author would also discuss the application of the trust principle in intergenerational equity.

Chapter III proceeds to discuss the legal status of the principle of intergenerational equity and concludes that evidence as to state practice and opinio juris is available and sufficient to say that the principle of intergenerational equity has attained the status of customary international law as well as that such is an obligation erga omnes.

Chapter IV explains how the representation of future generations is a necessary consequence of recognizing intergenerational equity as customary international law.

Chapter V gives place to the Author’s recommendations – a legal framework for courts confronted with the issue of whether to recognize the legal standing of persons representing future generations and the amendment of the PCA Optional Rules for Arbitration of Disputes Relating to the Environment and/or Natural Resources and the legal bases the Author used to conclude the plausibility of his recommendation.
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CHAPTER I: INTRODUCTION

A. Background of the Study

In 2015, a group composed mostly of minors represented by their guardians and a scientist acting as guardian for “future generations” sued the U.S. Government for permitting pollutant activity despite scientific warnings. This case is formally known as Juliana v United States\(^2\) and popularly tagged as #YouthvGov. The Oregon Federal Court denied the Government’s motion to dismiss in 2016, finding that the plaintiffs adequately alleged injury in fact and were able to show a causal link between the alleged harm and the actions of the U.S. government\(^3\), subsequently granting them legal standing.

In showing that their injury was “ongoing and likely to recur” and that such was associated with the conduct of the U.S. government, the plaintiffs alleged that "[t]he present level of CO2 and its warming … are already in the zone of danger"\(^4\) while presenting data showing that for the past 263 years, from 1751 up to 2014, the United States produced more than twenty-five percent of global CO2 emissions\(^5\). The plaintiffs argued that the harm was likely to continue in the future unless the defendants took immediate action\(^6\).

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\(^1\) La Bugal-B’laan Tribal Association, Inc v. Ramos, GR No. 127882, December 1, 2004.
\(^3\) Id at ¶43, 51, 62.
\(^4\) Id at ¶52.
\(^5\) Id at ¶60.
\(^6\) Supra note 4
Last July 30, 2018, the U.S. Supreme Court denied the federal government’s application for a stay. The trial is set to continue October 29, 2018.

The rights of future generations were the center of the 1983 Brundtland Report entitled “Our Common Future”, published by the World Commission on Environment and Development, now known as the “Brundtland Commission” established through the United Nations General Assembly resolution 38/161. According to the Report, for development to be considered “sustainable”, it must be able to “meet the needs of the present without compromising the ability of future generations to meet their own needs.” The concept of sustainable development is present in many international agreements and appears to have four recurring elements, including the need to preserve natural resources for the benefit of future generations – a principle otherwise known as “intergenerational equity”.

Principle 1 of the Stockholm Declaration states that man bears “a solemn responsibility to protect and improve the environment for present and future generations.” The responsibility to protect the environmental rights of future generations can be seen in numerous other treaties and conventions including the Rio Declaration, the World Heritage Convention, and the UN Framework for Convention for Climate Change, among many others.

This intergenerational responsibility was the basis of the Philippine Supreme Court in granting legal standing to minors represented by their parents in the case of Oposa v Factoran. Representation of future generations was the center of the 1983 Brundtland Report entitled “Our Common Future”, published by the World Commission on Environment and Development, now known as the “Brundtland Commission” established through the United Nations General Assembly resolution 38/161. According to the Report, for development to be considered “sustainable”, it must be able to “meet the needs of the present without compromising the ability of future generations to meet their own needs.” The concept of sustainable development is present in many international agreements and appears to have four recurring elements, including the need to preserve natural resources for the benefit of future generations – a principle otherwise known as “intergenerational equity”.

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generations is one of the suggested strategies for the implementation of the principle of intergenerational equity.\textsuperscript{13}

This study aims to prove that the \textit{Oposa} doctrine is not endemic to the Philippine judicial system and that \#YouthvGov – the representation of future generations – is a remedy available in international law.

\textbf{B. Statement of the Problem}

This study will address the issue of whether future generations can be represented in international courts. More particularly, the questions sought to be answered by the Author are whether: (a) the rights of future generations to the environment are recognized in international law under the principle of intergenerational equity, as reflected in numerous domestic laws, international treaties, and reports of international organizations; (b) the principle of intergenerational equity can be considered as a customary international law, in accordance with Article 38 of the ICJ Statute; (c) States can represent their present and future nationals in cases where the principle of intergenerational equity is infringed; and (d) individuals can represent future generations in international human rights courts.

\textbf{C. Significance of the Study}

We often hear that prevention is better than cure. The Author argues that the protection of the environment is an intertemporal duty of the State. It is not bound by linear concept of time. The responsibility of conserving natural resources should not be just for the benefit of the present generation but also for the benefit of succeeding generations. By allowing the representation of future generations in international courts, the present can be made accountable for actions that may not currently harm the present but have detrimental and often irreversible effects on the environmental rights of the unborn.

The principle of intergenerational equity is not meant to be a “cheat code” but rather as an additional layer of protection for the environment by sharpening the sword of the plaintiffs especially in cases where the plaintiffs

\textsuperscript{13} \textit{Infra} note 19, at 119.
cannot show that their rights to the environment are directly being violated, therefore lacking legal standing.

As Philippe Sands puts it – the rights of future generations are “closely associated with the civil and political aspects of the relationship between environmental protection and human rights protection” and that such may be used to “enhance the legal standing of members of the present generation to bring claims, in cases relying upon substantive rules of environmental treaties where doubt exists whether a particular treaty creates rights and obligations enforceable by individuals”\textsuperscript{14}.

The rights of future generations are well recognized in domestic and international law, but what use can it be if such rights cannot be invoked?

We should be able to protect the defend the rights our posterity – protect liberty and prosperity of beyond the domestic arena and into the international sphere. By considering the principle of intergenerational equity as an international custom, states would be legally bound to recognize the rights of future generations to the environment regardless of the principle’s presence in treaty law\textsuperscript{15}.

\textsuperscript{14} P. Sands, \textit{supra} note 10 at 257.
CHAPTER II: THE PRINCIPLE OF INTERGENERATIONAL EQUITY

The principle of intergenerational equity is not only recognized by numerous legal scholars but can also be found embedded in the provisions of several treaties, international agreements, and domestic laws, in the decisions of local and international courts and tribunals, as well as in reports of the U.N. General Assembly\(^{16}\).

In this chapter, the Author will discuss in depth what is intergenerational equity as defined by legal scholars, how it relates to other principles in international law, and how the rights of future generations include rights to representation or legal standing. Coincidentally, literatures written by renowned legal scholars acknowledging intergenerational equity can also be considered as subsidiary means of determining the existence of law as “teachings of the most highly qualified publicists” under Article 38 of the ICJ Statute\(^{17}\).

A. Definition

The principle of intergenerational equity and the rights of future generations was first intensively discussed by Professor Edith Brown Weiss\(^{18}\) in “In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity” and has since then been cited by numerous authors discussing the concept\(^{19}\). Weiss articulated the principle of intergenerational equity as the obligation of each generation to future generations to “pass on the natural and cultural resources of the planet in no worse condition than received and to provide reasonable access to the legacy for the present condition\(^{20}\)”.

\(^{16}\) See succeeding chapters for further discussion.


\(^{18}\) Edith Brown (E.B) Weiss is a Professor of Law at Georgetown University Law Center, Washington, D.C., U.S.A, who carried out a research project on intergenerational equity sponsored by the United Nations University in Tokyo and is one of the members of the Advisory Committee on the Goa Guidelines on Intergenerational Equity.


\(^{20}\) Id.
Differently said, it is the obligation to refrain from causing future harm to the interests of younger people alive today and the interests of generations yet unborn\textsuperscript{21}. 

The representation of future generations is one of the strategies proposed by Weiss to implement intergenerational equity\textsuperscript{22}. Impliedly concurring to the proposed strategy, John Merills recognized the need to consider the position of children\textsuperscript{23} and emphasized that since the “future of humanity depends on maintaining a habitable planet”, the protection of the environment is “crucial to any project for advancing human rights”\textsuperscript{24}. The author then added that for intergenerational rights to be able to perform their function, a standard should be made and should not depend on the guardian’s discretion. Such standard would be formulated in reference to a current assessment of what future generations might need for them to be able to pursue their goals\textsuperscript{25}.

Intergenerational rights were proposed to be regarded as group rights, rather than “individual rights” which “exist regardless of the number and identity of individuals making up each generation.”\textsuperscript{26} Intergenerational equity has three core elements or aspects: (1) conservation of options; (2) conservation of quality; and (3) conservation of access\textsuperscript{27}.

“Conservation of options” simply means that the future generations are also entitled to the diversity of the current natural and cultural resource base. “Conservation of quality” requires that the “planet be passed on in no worse condition than received”. “Conservation of access” mandates that both the current and future generations be able to benefit from or utilize the natural and cultural resources of the planet\textsuperscript{28}. Intergenerational rights derived from these can be infringed by actions that negatively affect the environment 

\textsuperscript{21} Peter Lawrence, \textit{Justice for Future Generations}, in \textit{Environmental Discourses in Public and International Law} 23, 42 (Brad Jessup, Kim Rubenstein eds., 2011).

\textsuperscript{22} \textit{Id} at 119.

\textsuperscript{23} \textit{Id} at 671.

\textsuperscript{24} John G. Merrills, \textit{Environmental Rights}, in \textit{The Oxford Handbook of International Environmental Law} 663, 664 (Daniel Bodansky, Jutta Brunnee, Ellen Hey eds., 2007).

\textsuperscript{25} \textit{Id} at 671-672.

\textsuperscript{26} Supra note 20 at Appendix D, Climate Change, Intergenerational Equity, and International Law 345-51.

\textsuperscript{27} Edith Brown Weiss, \textit{Intergenerational Equity: a legal framework for global environmental change} 9.

\textsuperscript{28} \textit{Id}; see also note 19 at 43-44.
significantly over time with effects that are irreversible or reversible but with unacceptable costs, such as damage to soils to the point that its incapable of supporting life or air pollution inducing significant climate change on a large scale\textsuperscript{29}.

These principles are weaved into numerous domestic laws, treaties, judicial decisions, and publications that promote or support the intergenerational equity doctrine.

\textbf{B. Intergenerational Equity and the Trust Principle}

The concept of intergenerational equity has been around since the late 1800s as an application of the trust principle to issues concerning the environment and other natural resources. In the \textit{Bering Fur Seals Arbitration}, the United States argued, albeit unsuccessfully, that title to property (fur seals in this case) is not given absolutely, but rather merely as “usufruct” and “in trust for the present and future generations of man”\textsuperscript{30}.

“Trust” is defined as “the right, enforceable solely in equity, to the beneficial enjoyment of property to which another person holds the legal title”\textsuperscript{31}. It is originally a private law which has been recognized to have been elevated into a “general principle of law”\textsuperscript{32} by Judge Mcnair in his Separate Opinion in the \textit{South West Africa} case (First Phase)\textsuperscript{33} and has been implicitly referred to by environmental treaties such as the 1946 International Whaling Convention\textsuperscript{34}, the 1968 African Conservation Convention\textsuperscript{35}, as well as the 1972 World Heritage Convention\textsuperscript{36} and several others.\textsuperscript{37}

\textsuperscript{29} E.B. Weiss, \textit{supra} note 27 at 14.
\textsuperscript{30} \textit{See} P.Sands, \textit{see also} note 10, at 256.
\textsuperscript{31} \textit{Trust}, Black’s Law Dictionary (9\textsuperscript{th} ed. 2009)
\textsuperscript{32} Statute of the International Court of Justice art.38(1)(c), (April 18, 1946) [hereinafter known as the I.C.J. Statute]
\textsuperscript{34} International Whaling Convention for the Regulation of Whaling preamble, Dec. 2, 1946.
\textsuperscript{35} African Convention on the conservation of nature and natural resources preamble, (Sept. 15, 1968).
\textsuperscript{36} Convention concerning the Protection of the World Cultural and Natural Heritage, art.1-2, Nov. 16, 1972.
\textsuperscript{37} Treaties, conventions, and declarations protecting the rights of future generations will be further discussed in the succeeding chapters.
The recognition of the concept of planetary trust goes beyond the pages of scholarly works and is found in the opinions of magistrates in domestic courts. In the Philippine case of *Oposa v Factoran*, plaintiffs argued that the acts of the defendant, the Secretary of the Department of Environment and Natural Resources, constituted a “misappropriation and/or impairment of the natural resource property he holds in trust for the benefit of plaintiff minors and succeeding generations”38. A similar argument was used by plaintiffs in a much earlier 1971 case of *Cape May v Macchia* in the United States39 and in the more recent case of *Juliana v U.S.*40 as discussed earlier. Both arguments were favored by their respective courts, consequently granting legal standing to the petitioners representing their generation as well as the succeeding generations in a class suit for the environment41.

Intergenerational equity, as shown above and to be subsequently illustrated in the succeeding chapters below, is closely knit to the principle of trust where the present generation holds the environment “in trust” for future generations.

The succeeding chapters will show that the principle of intergenerational equity is highly recognized in international law and that sufficient evidence establishes such principle as customary international law.

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38 Minors Juan Antonio, Anna Rosario, and Jose Alfonso Oposa et al., v. Fulgencio S. Factoran, Jr. et al., 224 SCRA 792, 799 (1993) (Phil.).
41 Domestic laws and jurisprudence regarding the rights of future generations will be further discussed in the succeeding chapter.
CHAPTER III: LEGAL STATUS OF INTERGENERATIONAL EQUITY

Article 38(1) of the ICJ Statute laid down the primary and subsidiary sources of international law, namely:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

b. international custom, as evidence of a general practice accepted as law;

c. the general principles of law recognized by civilized nations;

d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Customary international law is defined by the International Law Association as “one which is created and sustained by the constant and uniform practice of States and other subjects of international law in or impinging upon their international legal relations, in circumstances which give rise to a legitimate expectation of similar conduct in the future.” 42 International custom is evidenced by the “actual practice and opinio juris of states”43. For customary international law to be proven, actual practice of states should come with the belief that such practice is “rendered obligatory by the existence of a rule of law requiring it”44.

A. State Practice

State practice is manifested through the actions of States either in the local or international setting – by legislation, policy statements, judicial decisions, or participation in treaties, conventions, or adoption of resolutions or reports by the UN General Assembly and other international organizations45.

1. Domestic Laws and Jurisprudence

43 Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, 1985 ICJ Rep. 13, 29, ¶27 (June 3).
Local laws and court decisions have been used by international courts in determining the existence of international custom as evidence of a general practice of law.

As previously discussed, courts in the Philippines and the United States, in the cases of Oposa v Factoran, Cape May v Macchia, and more recently in Juliana v US, have recognized the principle of intergenerational equity and have subsequently granted legal standing to youth and generations yet unborn to sue the government for environmental harm, as represented by their respective guardians.

The U.S. Congress also recognized the rights of future generations to the environment and the responsibility of the present generation to preserve such for them in the 1969 National Environmental Policy Act (NEPA). This provision in NEPA was what the court in Cape May used to justify the legal standing of the plaintiffs representing future generations.

The principle of intergenerational equity was also expressly stated in several laws in Australia such as the Environment Protection Act of 1986 of Western Australia, the Protection of the Environment Administration Act of 1991 of New South Wales, and the Environment Protection and Biodiversity Conservation Act of 1999. These laws provide that according to the principle of intergenerational equity, the present generation “should ensure that the health, diversity, and productivity of the environment is maintained or enhanced for the benefit of future generations.” The environmental rights of future generations were also recognized by law through the principle of ecologically sustainable development as provided in Australian laws.

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47 See also Robinson Township v Commonwealth of Pennsylvania, 83 A.3d 901 (2013) (U.S.). The court held that under the “holistic analytical approach” the protection of the environment from harm or damage and “the maintenance and perpetuation of an environment of quality for the benefit of future generations” should be ensured. The court also recognized that Section 27 of the Pennsylvanian Constitution reserves the right of the people, including future generations, to the common ownership of the state’s public natural resources.
49 Cape May v Macchia, supra note 39.
laws. According to the Nature Conservation Act of 1992 of Queensland, one of the definitions of “ecologically sustainable use” is “ensuring that the benefit of the use to present generations does not diminish the potential to meet the needs and aspirations of future generations”51. The Environment Protection Act of 1993 of South Australia also provides that in order to promote the principles of ecologically sustainable development, “the use, development, and protection of the environment should be managed in a way, and at a rate, that will enable people and communities to provide for their economic, social, and physical well-being and for their health and safety while ‘sustaining the potential of natural and physical resources to meet the reasonably foreseeable needs of future generations’”52.

The Australian judiciary also recognizes the responsibility of the present generation in preserving the environment for future generations. In the case of Willoughby City Council v Minister Administering the National Parks and Wildlife Act, the Australian court held that national parks are “held by the state in trust for the enjoyment and benefit of its citizens, including future generations”, and as such, public officers have the duty to protect and preserve them53.

Although not as explicit as in the Australian laws, the Constitution of the Republic of South Africa has also referred to the principle of intergenerational equity. Article 24 of the said Constitution provides that everyone has the right to “have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures” 54, among others. The preamble of South Africa’s National Environmental Management Act of 1998 also provides for the principle of sustainable development in connection with the environment, among other factors and the requirement that such be integrated “with the planning, implementation and evaluation of decisions” to ensure the development of present and future generations55.In the case of The Director: Mineral Development, Gauteng Region, Sasol Mining v Save the Vaal Environment,

51 Nature Conservation Act 1992 (Qd), s 11.
52 Environment Protection Act 1993 (SA), s 10.
54 S. AFR. CONST., 1996 art. 24(b).
South Africa’s Supreme Court of Appeals cited the Brundlant Report in deciding that the “development which meets the present needs”, through the issuance of mining licenses, should be ensured not to compromise the ability of future generations in meeting theirs, taking into consideration the “enormous damage mining can do to the environment and ecological systems”. South Africa clearly recognizes the obligation of the present generation to preserve the environment for future generations as seen in its Constitution, local laws, and jurisprudence.

Intergenerational equity is also impliedly provided for in New Zealand’s Resource Management Act. Section 5 of the law states that “sustainable management” includes “sustaining the potential of natural and physical resources […] to meet the reasonably foreseeable needs of future generations”. The Environment Act of 1986 establishes the Office of the Parliamentary Commissioner for the Environment, which, among other responsibilities, is tasked to “ensure that, in the management of natural and physical resources, full and balanced account is taken of […] the needs of future generations” (among others). Similar laws establishing an office with similar functions – particularly the protection of the interests of the future generations to the environment – can also be found in Hungary in its 1993 Ombudsman Act, in the United Kingdom (Wales) in its Well-being of Future Generations Act of 2015, and in Malta’s Sustainable Development Act which established the country’s “Guardian for Future Generations”.

Constitutions of several other countries such as Bolivia, Ecuador, Norway, Kenya, Guyana, Papua New Guinea, Germany, and Vanuatu also provide for the principle of intergenerational equity, either expressly or impliedly.

Article 9 of the Bolivian Constitution provides for the preservation of the environment for the “welfare of present and future generations”. Ecuador, through its 2008 Constitution, guarantees a “sustainable model of

56 See supra note 8
60 POLITICAL CONSTITUTION OF THE STATE 2009, art. 9 (Bol.).
development” which “ensures meeting the needs of present and future generations. In the same Constitution, Article 400 also states that Ecuador exercises “sovereignty over biodiversity, whose administration and management shall be conducted on the basis of responsibility between generations”⁶¹. In Norway, the right of future generations to a healthy environment is provided for in Article 112 wherein it states that “[n]atural resources should be made use of on the basis of comprehensive long-term considerations whereby [the right of every person to an environment that is conducive to health and to natural surroundings whose productivity and diversity are preserved] will be safeguarded for future generations as well”⁶². The Constitution of Kenya guarantees that “every person has the right to a clean and health environment”, which includes “the right to have the environment protected for the benefit of present and future generations through legislative and other measures…”⁶³. Article 36 of the Constitution of the Cooperative Republic of Guyana took into consideration the “interests of the present and future generations” in reiterating its duty to protect and make “rational use of its land, mineral and water resources as well as its fauna and flora”⁶⁴. Similar provisions protecting the interests of future generations in the environment is found in the Constitution of Papua New Guinea. Article 4 of the said Constitution states that the country’s natural resources and environment are to be “conserved and used for the collective benefit of [its citizens] and be replenished for the benefit of future generations”, and subsequently calls for the “wise use” of the country’s natural resources “in trust for future generations”⁶⁵. Meanwhile, Article 5 declares that it is the obligation of “all persons in [the] country” to “protect Papua New Guinea and to safeguard the national wealth, resources, and environment in the interests not only of the present generation, but also of future generations”⁶⁶. Article 20a of the Basic Law for the Federal Republic of Germany states that the State shall “protect its natural foundations of life and animals” as it is “mindful also of its responsibility toward future generations”⁶⁷. The Constitution of the Republic of Vanuatu includes the

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⁶¹ CONSTITUTION OF 2008, art. 395, 400 (Ecuador).
⁶² CONSTITUTION OF NORWAY, art. 112.
⁶⁴ CONSTITUTION OF THE COOPERATIVE REPUBLIC OF GUYANA, art. 36.
⁶⁵ CONSTITUTION OF THE INDEPENDENT STATE OF PAPUA NEW GUINEA, 1975, art. 4.
⁶⁶ Id at art.5.
⁶⁷ GRUNDEGESETZ [GG] [BASIC LAW], art.20a, translation at http: http://www.gesetze-im-internet.de/englisch_gg/index.html (Ger.).
protection and safeguarding of the environment for the interests of future generations as one of the state’s fundamental duties.\textsuperscript{68}

The principle of intergenerational equity is also recognized in domestic courts of other countries. In the case of \textit{Peter K Waweru v Republic}, the High Court of Kenya ruled that the principles of sustainable development and intergenerational equity does not only form part of its local laws, particularly the Environment Management and Co-ordination Act, but also of international customary law.\textsuperscript{69}

The principle of intergenerational equity was also recognized by the courts of India in the cases of \textit{State of Himachal Pradesh & Ors. Etc. v Ganesh Wood Products & Ors. Etc., Indian Council for Enviro-Legal Action and others v Union of India others}, and \textit{Soman v Geologist}.

In the case of \textit{State of Himachal Pradesh v Ganesh Wood Products}, the Supreme Court of India agreed with the argument of the Government and held that allowing the establishment of certain wood factories would be “contrary to public interest” and “considerations of sustainable growth and intergenerational equity” and that the “present generation has no right to deplete all the existing forests and leave nothing for the next and future generations”.\textsuperscript{70} The Kerala High Court maintained a similar decision in the case of \textit{Soman v Geologist}. The High Court held that the “basic qualities of the land have to be maintained for the succeeding generations” and that “any developmental activity without considering the rights of future generations is not a sustainable use of land”.\textsuperscript{71} In \textit{Indian Council for Enviro-Legal Action and others v. Union of India}, the court took into its view that the Indian Parliament enacted anti-pollution laws, such as the Water Act, the Air Act, and the Environment (Protection) Act with the intention to “protection and preserve the environment and save it for the future generations” and that non-enforcement of these laws would result into “ecological imbalance and

\textsuperscript{68} \textit{CONSTITUTION OF THE REPUBLIC OF VANUATU}, art.7(d).
\textsuperscript{70} \textit{State of Himachal Pradesh & Ors.Etc. vs Ganesh Wood Products & Ors.Etc, 1996 AIR 149 (1995) (India)}.
\textsuperscript{71} \textit{Soman v. Geologist}, 2004 (3) KLT 577 (India); the court also stated that “if every land owner, driven by profit motive, is to dig his land to win sand, no land except pits will be left for the future generations”.

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degredation of environment, the adverse effect of which will have to be borne by the future generations”72.

The principle of intergenerational equity is also recognized in Sri Lanka in the case of Bulankulama v. Min. of Industrial Development, also known as the Eppawala case. In this case, the petitioners are questioning the proposed agreement of the government with several mining companies concerning the increase of the amount of phosphate deposit to be mined, from 40,000 metric tons per year to 26.1 million metric tons within thirty years (or 870,000 metric tons per year). The court held that the “international standard setting instruments have clearly recognized the principle of intergenerational equity”, and that “[d]ecisions with regard to the nature and scale of activity require the most anxious consideration from the point of view of safeguarding the health and safety of the people, naturally, including the petitioners, ensuring the viability of their occupations, and protecting the rights of future generations of Sri Lankans.”73 It can be loosely inferred from the words of the court that it considers the principle of intergenerational equity as “international custom” by saying that such principle is recognized by “international standard setting instruments”.

In Pakistan, a local agriculturist sued the Government of Pakistan for its “delay and lack of seriousness” to address Climate Change in the case of Ashgar Leghari v Federation of Pakistan. The Lahore High Court, in deciding for plaintiff, held that the constitutional right to life includes the right to a healthy and clean environment which should be read with international environmental principles such as intergenerational equity, among others74.

A similar petition was filed before the Hague District Court in Netherlands in the case of Urgenda Foundation v The State of Netherlands75. Urgenda requested the State to “commit and undertake to reduce CO2 emissions in the Netherlands by 40% by 2020, as compared to the emissions in 1990”76. In deciding in favor of Urgenda, the court stated:

72 Indian Council for Enviro-Legal Action and others v. Union of India others, 1996 AIR 1446 (India).
74 Asghar Leghari v. Federation of Pakistan, W.P. No. 25501/2015.
76 Id at ¶2.5.
the possibility of damages for those whose interests Urgenda represents, including current and future generations of Dutch nationals, is so great and concrete that given its duty of care, the State must make an adequate contribution, greater than its current contribution, to prevent hazardous climate change.

These statutes and national court decisions show the presence of the principle of intergenerational equity in the domestic setting and the affirmation that states have recognized the duty of the present generation to protect and preserve the environment for future generations.

2. Policies of State-Parties in International Disputes

Arguments and official communications by state-parties in disputes constitute in stricto senso state practice\textsuperscript{77}, as such are reflective of State policies.

In the case of \textit{Pulp Mills on the River Uruguay}, both contending State parties, Argentina and Uruguay took into account the principle of intergenerational equity in its oral pleadings. Argentina argued that “an effective application of the principle of prevention and the precautionary principle by Uruguay would have made it possible to comprehend the risks of grave harm and future generations”\textsuperscript{78}. Uruguay, on the other hand, concluded that sustainable development is a “matter of intergenerational equity, requiring that economic development proceed in a manner that integrates protection of the environment, which is the human life-support system on which both present and future generations depend”\textsuperscript{79}.

The Minister of Foreign Affairs of Australia, on behalf of the country, spoke before the ICJ regarding the legality of nuclear weapons and submitted that “[f]uture generations of humanity, innocent in the conflict which may give rise to the use of nuclear weapons, must be afforded protection on the basis of this principle of intergenerational equity” and that

\textsuperscript{77} Arie Trouwborst, Evolution and Status of the Precautionary Principle in International Law 157 (Daniel Bodansky & David Freestone eds., 2002)
the case is an opportunity for the Court, “as guardian of the legal interests of succeeding generation, to recognize and apply this newly emerging principle”\(^\text{80}\). In the same case, the governments of Samoa\(^\text{81}\), Marshall Islands, and the Solomon Islands showed similar concern in the oral proceedings and argued for the protection of future generations against nuclear weapons and its effects on the environment. The Marshall Islands considered the right to life of both present and future generations a fundamental human right and that the use of such weapons would violate said right as well as basic environmental norms\(^\text{82}\). Meanwhile, Solomon Islands, in the same proceeding, subsequently argued that there is a “need to protect and preserve our fragile environment both now and for future generations”\(^\text{83}\).

The Memorial of the Republic of Nicaragua in its dispute against Costa Rica concerning the road along the San Juan River makes mention of the Convention for the Conservation of Biodiversity and the Protection of Wilderness Areas in Central America which was ratified by the six Central American States – namely, El Salvador, Guatemala, Honduras, Panama, and the State-parties in dispute – Costa Rica and Nicaragua. In said memorial, Nicaragua interprets Article 1 of the Convention stating its objective – “to conserve to the maximum extent possible the land-based and coastal-marine biological diversity of the Central American region for the benefit of present and future generation”\(^\text{84}\). This attests the recognition of the intergenerational equity principle not just by Nicaragua through its pleading but also of the States in Central America ratifying the aforementioned Convention,


\(^{83}\) Id at 31, ¶10.

containing in its first article the objective to conserve biodiversity for future generations.

Although not directly citing the principle of intergenerational equity, in the investment arbitration case of *Aven v Costa Rica*, the Republic of Costa Rica, in its Counter-Memorial, argued that the principle of sustainability is a “universally accepted principle” and that such is a “development able to meet the needs of the present without compromising the ability of future generations to meet their own needs.”

In the Comment of the Republic of El Salvador to the Submission of the Amicus Curiae Brief by the Center of International Environmental Law in the case of *Pac Rim Cayman LLC v El Salvador*, El Salvador, agreeing with the *amici*, recognized its obligations under the Stockholm Declaration to protect the environment for current and future generations and that pursuant to such obligations the Republic implemented “a normative framework designed to protect these rights against the risks posed by extractive industries” considering the country’s “high population density and scarcity of water resources.”

From these cases, it is clear that States not only recognize the duty the present generation has towards future generations in protecting and preserving the environment through their local laws and domestic courts, but also have asserted the principle of intergenerational equity in international disputes, showing that these countries not only see such responsibility as its sole intertemporal duty to its constituents, but also as an international obligation. This realization would be further exhibited in the succeeding parts of this chapter showing the behavior of States in international legal instruments.

3. Treaties and Conventions

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86 Pac Rim Cayman LLC v. Republic of El Salvador, ICSID Case No. ARB/09/12, Comment of the Republic of El Salvador to the Amicus Curiae Brief Submission of the Center of International Environmental Law, 6 (September 14, 2014).
Treaties may either codify pre-existing customary international law or crystallize new customs. As recognized by the ICJ in the *Continental Shelf case*, multilateral conventions may “record and define” rules deriving from custom or even actually develop them.

The United Nations Framework Convention on Climate Change (UNFCCC) reiterates the principle of intergenerational equity with regard to the protection of the climate system, providing in Article 3.1, that

> [t]he Parties 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 and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof.

UNFCCC is ratified by all 197 member states of the United Nations including the State of Palestine, Niue, Cook Islands, and the European Union. In 2015, at the 21st session of the Conference of the Parties to the UNFCCC, the Paris Agreement was adopted to intensify global action towards climate change. With currently 195 signatories and 179 state parties, the Paris Agreement in its preamble acknowledges the principle of intergenerational equity as one of the considerations to take into account in when taking action to address climate change.

As previously discussed, the World Heritage Convention, although limited to areas considered as “cultural heritage” as defined by the Convention, also recognizes the duty of each State party to preserve and protect cultural and natural heritage for future generations. The World

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87 *Supra* note 42
88 *Continental Shelf, (Libyan Arab Jamahiriya/Malta), Judgment, 1985 I.C.J Rep. 13, 29, ¶27 (June 3).
91 Paris Agreement preamble, November 4, 2016.
92 Convention concerning the Protection of the World Cultural and Natural Heritage, art.1-2, Nov. 16, 1972
Heritage Convention is ratified by 193 states\textsuperscript{93}. The interests of future generations in connection with the exploration and use of the moon as a common heritage for mankind has also been recognized in the Agreement Governing the Activities of States on the Moon and other Celestial Bodies, otherwise known as the Moon Treaty\textsuperscript{94}. Similar recognition of the duty to protect specific natural resources considered as “heritage” are also provided for in the 1946 International Whaling Convention and the 1968 African Conservation Convention, as discussed above.

Although not primarily related to the environment, the World Health Organization Framework Convention on Tobacco Control, ratified by 181 states\textsuperscript{95}, also provides for intergenerational equity, stipulating as its objective the protection of “present and future generations from the devastating health, social, environmental, and economic consequences of tobacco consumption and exposure to tobacco smoke”\textsuperscript{96}.

The 1973 Convention on International Trade in Endangered Species or CITES recognizes intergenerational equity in its preamble, stating 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 […]”\textsuperscript{97}.

Regional treaties have also provided for the intergenerational responsibility of protecting the environment. The States Parties in the Convention for the Protection of the Mediterranean Sea Against Pollution, also known as the Barcelona Convention, pledged to “take appropriate measures to implement the Mediterranean Action Plan and, further, to pursue the protection of the marine environment and the natural resources of the Mediterranean Sea Area as an integral part of the development process,


\textsuperscript{94} Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, art. 1, Jan. 27, 1967, 18 U.S.T. 2410, 2412.


\textsuperscript{96} World Health Organization Framework Convention on Tobacco Control art.3, February 27, 2005, 2302 U.N.T.S 166.

meeting the needs of present and future generations in an equitable manner\textsuperscript{98} and stated in its preamble that the contracting parties are “[f]ully aware of their responsibility to preserve and sustainably develop this common heritage for the benefit and enjoyment of present and future generations”\textsuperscript{99}. The Barcelona Convention is ratified by 21 Mediterranean countries\textsuperscript{100} as well as the European Union\textsuperscript{101}.

The Aarhus Convention, or the “Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters” by the United Nations Economic Commission for Europe recognizes the principle of intergenerational equity in its preamble and provides for the guarantee of the “rights of access to information, public participation in decision-making, and access to justice in environmental matters” for the protection of “every person of present and future generations to live in an environment adequate to his or her health and well-being”\textsuperscript{102}. The Aarhus Convention is ratified by 47 European states\textsuperscript{103}. This obligation is reaffirmed in 2003 in an additional Protocol to the Aarhus Convention, and subsequently ratified by 38 states\textsuperscript{104}.

Other treaties providing for the intergenerational equity principle include the Convention on Biological Diversity (1992)\textsuperscript{105}, as well as the United

\textsuperscript{98} Convention for the Protection of the Mediterranean Sea Against Pollution art. 4, February 16, 1976, 1105 U.N.T.S 44.
\textsuperscript{99} Id at Preamble.
\textsuperscript{100} These countries are Albania, Algeria, Cyprus, Croatia, Bosnia & Herzegovina, Egypt, France, Greece, Israel, Italy, Lebanon, Libya, Malta, Morocco, Montenegro, Monaco, Slovenia, Spain, Syria, Tunisia and Turkey.
\textsuperscript{105} Convention on Biological Diversity preamble, Dec. 29, 1993, 1760 U.N.T.S 79; the Convention has 196 State-parties up to date.

Although couched in different words or phrases, the principle of intergenerational equity is uniformly recognized in substance in international environmental law and has been widely accepted by almost all states consistently through ratification of or accession to different treaties and conventions.

4. Declarations, Agreements, and other Soft Law Instruments

Soft laws, although non-binding, are expressions of norms, principles, and practices that influence state behavior\textsuperscript{108}. Adoption of instruments such as the \textit{Rio Declaration} and the \textit{Stockholm Declaration}, though not of themselves sources of law, indicates that the principles and ideas embodied therein are of such importance that “particular attention requires to be paid to it”\textsuperscript{109}.

The United Nations Conference on the Human Environment on 1972 was attended by 115 states, 103 of which voted in favor of the Stockholm Declaration\textsuperscript{110}. Its preamble provides that the human environment must be defended and improved for present and future generations, and that such is an “imperative goal for mankind”\textsuperscript{111}. The principle of intergenerational equity can also be read in Principle 2, stating that

The natural resources of the earth, including the air, water, land, flora and fauna and especially representative samples of natural ecosystems, must be safeguarded for the benefit of present and

\textsuperscript{106}United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa preamble, Dec. 26, 1996, 1954 U.N.T.S 3; the Convention has 197 State-parties up to date.

\textsuperscript{107}Int’l Atomic Energy Agency [IAEA], Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management art. 1,4,11, IAEA Doc. INFCIRC/546 (Dec. 24, 1997); the Joint Convention has 80 State-parties up to date.

\textsuperscript{108}Pharmaceutical and Health Care Association of the Philippines v Health Secretary Francisco T. Duque III, et. al, G.R. No. 173034 (October 9, 2007) (Phil.).

\textsuperscript{109}M. Shaw, \textit{see supra} note 17 at 117.

\textsuperscript{110}M. Shaw, \textit{supra} note 17 at 112.

\textsuperscript{111}Stockholm Declaration, \textit{supra} note 11 at preamble
future generations through careful planning or management, as appropriate.\textsuperscript{112}

The Rio Declaration, adopted by the United Nations Conference on Environment and Development (UNCED) in 1992 at the Rio Convention, or what others call the “Earth Summit”, provides that the right to development “must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations”\textsuperscript{113}. Similar concerns for the protection of the environment for future generations is also provided for in Agenda 21\textsuperscript{114} and Statement of Principles for a Global Consensus on the Management, Conservation, and Sustainable Development of All Types of Forests\textsuperscript{115}, also adopted by UNCED at the Earth Summit.\textsuperscript{116}

In 1997, the United Nations Educational, Scientific, and Cultural Organization (UNESCO) adopted the Declaration on the Responsibilities of the Present Generations Towards Future Generations\textsuperscript{117}. The principle of intergenerational equity is well-articulated in the Declaration. In Article 4, the Declaration recognized the responsibility of present generations to “bequeath to future generations an Earth which will not one day be irreversibly damaged by human activity” and that

\[
\text{[e]ach generation inheriting the Earth temporarily should take care to use natural resources reasonably and ensure that life is not prejudiced by harmful modifications of the ecosystems and that scientific and technological progress in all fields does not harm life on Earth.}
\]

\textsuperscript{112} Id at Principle 2.
\textsuperscript{118} Id at art.4.
Article 5 lists certain duties of the present generation for the protection of the environment for future generations, such as striving for sustainable development, ensuring that future generations are not exposed to pollution, preserving natural resources necessary for sustaining human life for future generations, and taking into account possible consequences of major projects for future generations before such are carried out.\(^{119}\)

These instruments, while they are not legally binding, show the consistent recognition of the principle of intergenerational equity by the international community.

5. Practice of International Organizations

As explained by Judge Ammoun of the Barcelona Traction case, resolutions of international organizations and conferences are a manifestation of state practice and that “it cannot be denied, […] that these amount to precedents contributing to the formation of custom.”\(^{120}\) Additionally, *opinio juris* may also be deduced from the attitude of States with regard to these non-binding resolutions and conclusions in conferences\(^{121}\).

The Food and Agriculture Organization (FAO), a specialized agency of the United Nations for eliminating hunger and increasing agricultural productivity, adopted the World Soils Charter in 1981 and its revision in 2015. In its “Guidelines for Action”, the Revised World Soils Charter provides that “[a]ll individuals using or managing soil must act as stewards of the soil to ensure that this essential natural resource is managed sustainably to safeguard it for future generations”\(^{122}\).


\(^{119}\) *Id* at art. 5.


\(^{121}\) *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, Judgment, 1986 I.C.J Rep. 14, 99-100, ¶188 (June 27); see also *supra* note 17 at 115.

inviting Member States to “conduct their activities in recognition of the supreme importance of protecting natural systems, maintaining the balance and quality of nature and conserving natural resources, in the interests of present and future generations” and that man must “acquire the knowledge to maintain and enhance his ability to use natural resources in a manner which ensures the preservation of the species and ecosystems for the benefit of present and future generations”\(^\text{123}\).

The UN General Assembly (UNGA) adopted a resolution on July 27, 2012 entitled “The future we want”, recalling their commitment to “ensure the promotion of an economically, socially and environmentally sustainable future for our plant and for present and future generations” and agreeing to “consider the need for promoting intergenerational solidarity for the achievement of sustainable development while taking into account the needs of future generations”\(^\text{124}\). The UN Secretary General subsequently published a report pursuant to the said resolution. In his report, titled *Intergenerational solidarity and the needs of future generations*, he recognized the wide reference of the rights of future generations in numerous domestic and international legal instruments and proposed the establishment of a high commissioner for future generations which would focus primarily on issues that are of “critical importance to the well-being of future generations”\(^\text{125}\) and that “the breadth and the number of instruments demonstrate that concern for future generations has developed as a guiding principle of international norms”\(^\text{126}\).

The International Law Commission (ILC) and the Human Rights Council (HRC) of UN have similar resolutions and reports advocating the principle of intergenerational equity.

In 2016, the ILC’s report on its sixty-eighth session provided for a draft text of guidelines on the protection of the atmosphere. In Guideline 6, the draft states that “[t]he atmosphere should be utilized in an equitable and


\(^{126}\) *Id* at ¶36.
reasonable manner, taking into account the interests of present and future generations”\textsuperscript{127}. In its commentary, ILC expounds on such and explains that the second part of said Guideline “addresses questions of intra- and intergenerational equity”\textsuperscript{128}.

ILC followed this up on its sixty-ninth session, updating its proposed guidelines for the protection of atmosphere adding the principle of intergenerational equity in its preamble, “[n]oting that the interests of future generations of humankind in the long-term conservation of the quality of the atmosphere should be fully taken into account”\textsuperscript{129}. In the Commission’s commentary, it explained that the preambular paragraph was meant to emphasize the interests of future generations and the goal to “ensure that the planet remains habitable for future generations”\textsuperscript{130}.

The Special Rapporteur on the human right to safe drinking water and sanitation of the UN Human Rights Council devoted attention to the possible impacts of large-investment projects on water quantity and quality for present and future generations in her mission report from Uruguay\textsuperscript{131}. According to her report, Uruguay’s Ministry of Livestock, Agriculture, and Fisheries is “currently funding environmental impact studies to identify potential negative impacts […] that could endanger the enjoyment of the human right to water for present and future generations, with a view to minimizing such impacts.”\textsuperscript{132} The actions of the Special Rapporteur and Uruguay’s Ministry of Livestock show their recognition of the obligation to protect the right to water of future generations – the latter being a manifestation of actual state practice.

In 2017, the Office of the UN High Commissioner for Human Rights published the “Analytical study on the relationship between climate change and the full and effective enjoyment of the rights of the child”. In the report, the High Commissioner expressly mentioned the principle of

\textsuperscript{128} Id at 293.
\textsuperscript{130} Id at 153.
\textsuperscript{132} Id at 8, ¶23.
intergenerational equity as that which “places a duty on current generations to act as responsible stewards of the planet and ensure the rights of future generation to meet their developmental and environmental needs”\textsuperscript{133}. The report also referred to the Committee on the Rights of the Child outlining the general principles of a child rights-based approach which “requires States to take urgent action to mitigate climate change by limiting emissions of greenhouse gases in order to prevent to the greatest extent possible their negative human rights impacts on children and future generations.”\textsuperscript{134} One of the general principles identified by the Committee on the Rights of the Child is the “child’s right to express his or her views” which, along with the other general principles, should take into account the “children’s participation in relevant decision-making processes”, among other considerations.\textsuperscript{135} In this, the Office of the High Commissioner on Human Rights not only acknowledged the principle of intergenerational equity but also the right of children to participate in decision-making.

Finally, in June 2017, the Human Rights Council adopted a resolution on Human Rights and Climate Change which squarely mentions the principle of intergenerational equity and emphasized the importance of implementing measures that will “ensure the highest possible adaptation and mitigation efforts in order to minimize the adverse impact of climate change on present and future generations” in its preamble\textsuperscript{136}.


Decisions of international courts and tribunals, along with teachings of highly qualified publicists, serve as “subsidiary means for the determination of rules of law”. Although international courts do not resort to \textit{stare decisis}, judicial decisions of courts and tribunals are regarded as evidence of the law\textsuperscript{137}.

\textsuperscript{134} Id at ¶33.
\textsuperscript{135} Id at 9, ¶32.
\textsuperscript{137} J. Crawford, supra note 45.
In the *Gabcikovo-Nagymaros Project*, the International Court of Justice took into consideration the “growing awareness of risks for mankind for present and future generations” before concluding that the parties to the case should both look into the effects on the environment of the operation of the subject powerplant\(^ {138}\). In the same case, the Court cited its Advisory Opinion in the case of *Legality of the Threat or Use of Nuclear Weapons* where it stated.

36. [...] it is imperative for the court to take into account of the unique characteristics of nuclear weapons, and in particular their destructive capacity, their capacity to cause untold human suffering, and their ability to cause damage to generations to come\(^ {139}\).

Judge Weeramantry, in his Separate Opinion in the *Gabcikovo-Nagymaros* case, discussed traditional principles where the principle of intergenerational equity, among others, may be extracted. In the Separate Opinion, it was shown that several Buddhist and Islamic teachings, and ancient legal systems and farming methods of different countries commonly took into consideration the interest of future generations to the environment\(^ {140}\). The opinion of Judge Weeramantry was cited by the Supreme Court of Sri Lanka in the *Eppawala* case\(^ {141}\) and was agreed upon by Judge Sir Geoffrey Palmer in the *Request for an Examination* case\(^ {142}\).

The *Request for an Examination* case concerns a dispute between France and New Zealand about nuclear testing in the Pacific. In his Dissenting Opinion, Judge Palmer wrote that “the consequences of these activities need to be carefully analyzed and examined unless we are to imperil those who come after us.”\(^ {143}\) Making reference to Professor Weiss’ book *In Fairness to Future Generations* and her discussion on the principle of intergenerational

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\(^{139}\) *Id* at ¶36.

\(^{140}\) *Id* at 88, 110 (separate opinion by Weeramantry, J).

\(^{141}\) See supra note 73.


\(^{143}\) *Id* at 419, ¶114.
equity, the judge then declared that such is a “concern well known to international law”\(^{144}\).

The principle of intergenerational equity was also discussed by Judge Trindade in the case of *Pulp Mills on the River Uruguay*\(^{145}\) citing the Stockholm Declaration and the UNESCO Declaration on the Responsibilities of the Present Generations Towards Future Generations, as well as the *Gabcikovo-Nagymaros Project* case and the Goa Guidelines on Intergenerational Equity. Judge Trindade also took note of the fact that both contending parties to the case – Argentina and Uruguay – asserted in their arguments the principle of intergenerational equity\(^{146}\). The fact that both state parties to the case recognized the principle of intergenerational equity in their memorials makes the *Pulp Mills* case not only a subsidiary source of law, but an actual avenue of state practice and an evidence of the principle being customary law.

In its Advisory Opinion OC-23/17, the Inter-American Court of Human Rights held, in interpreting Article 11 of the San Salvador Protocol concerning the right to a healthy environment, that

\[ \text{[t]he human right to a healthy environment is a right with both} \]
\[ \text{individual and collective connotations.} \]
\[ \text{In its collective} \]
\[ \text{dimension it constitutes a universal value that is owed to} \]
\[ \text{both present and future generations} \]
\[ \ldots^{147} \text{(emphasis} \]
\[ \text{supplied).} \]

The collective connotation of the right to a healthy environment includes the obligation to future generations – a clear pronouncement of the principle of intergenerational equity.

\(^{144}\) *Id.*


\(^{146}\) *Id* at 181, ¶123.

B. Opinio Juris Sive Necessitatis

As mentioned above, the element of opinio juris in customary international law is the belief that the practice is rendered obligatory by law. The existence of opinio juris can be proven by the practice of states regarding the subject matter. To paraphrase Judge ad hoc Sørensen in his Dissenting Opinion on the North Sea Continental Shelf Cases – where a concept is widely accepted by states, opinio juris need not to be separately proven.

As shown above, treaties, either universal or regional, containing provisions adhering to the principle of intergenerational equity has been consistently ratified and acceded to by almost all states and has even been considered by international courts in their decisions.

As mentioned earlier, resolutions, declarations, and conclusions made by States in the UNGA and other conferences are evidence to the existence of opinio juris. The principle of intergenerational equity, as shown above, is similarly present in such instruments adopted by UN and its agencies, which tells us that not only is there substantial practice of states with regard to the principle of intergenerational equity but also a belief that such practice is owed to an international legal duty to do so.

C. Intergenerational Equity: An International Custom and a Global Obligation

Although the term “intergenerational equity” may not explicitly be mentioned in several of the instruments utilized as evidence of state practice and opinio juris, the three core elements of intergenerational equity – the conservation of access, quality, and options for the benefit of future generations – can clearly be read from such.

In the North Sea Continental Shelf cases, the Court declared that state practice, in order to crystallize into international custom, should both be extensive and virtually uniform. The principle of intergenerational equity, as validated by a vast majority of states in domestic and international laws,

149 Nicar. v. U.S., supra note 121.
150 E.B. Weiss, see supra note 27.
151 North Sea Continental Shelf Cases, supra note 148 at 43, ¶74.
has been consistently reiterated as the obligation or duty of the present to protect the interest of future generations to the environment. From these, we can conclude that the principle of intergenerational equity is indeed customary international law.

Aside from being customary, the responsibility the present generation has towards its posterity with regard to the environment is an obligation *erga omnes*. It is a concern of all States, and accordingly, all States can be held to have a legal interest in their protection\(^{152}\) and according to the ICJ, these obligations can be derived from international instruments of a universal or quasi-universal character\(^{153}\).

In identifying obligations *erga omnes*, one should determine if the obligation is of such importance that it warrants the concern or interest of all States as may be derived either from rules concerning the basic rights of persons, generational international law, or international instruments of a universal or quasi-universal character\(^{154}\).

Examining the provisions in treaties and declarations containing the principle of intergenerational equity, it can clearly be read that they constitute obligations *erga omnes*\(^{155}\). In addition, the fact that States have argued for the protection of the environmental rights of future generations in international courts and these courts and tribunals in their decisions as well as their judges in their respective separate opinions are shown to have applied the principle of intergenerational equity indicates that the responsibility the current generation carries towards the environment for the benefit and in the interest of future generations is that of a universal character.

Hence, not only is the principle of intergenerational equity an international custom, it is also *erga omnes* – a duty and responsibility States owe not just to their own but also to other States as well.

\(^{152}\) Barcelona Traction, *see supra* note 120 at 32, ¶33.
\(^{153}\) *Id* at ¶33-34.
\(^{155}\) *See supra* note 1920.
CHAPTER IV: REPRESENTATION OF FUTURE GENERATIONS

Ubi jus ibi remedium. For every wrong, for every violation of a right, there must be a remedy. As established above, it is customary for States to recognize the right of future generations to the environment and the consequent obligation owed by the present generation to protect and preserve such for them. It follows that all States should recognize the legal standing of States and individuals representing future generations for one cannot have a right without the means to assert it and seek remedy for its violation. The granting of legal standing to representatives of future generations should be considered as the necessary consequence of recognizing the rights of future generations.

One of the strategies proposed by legal scholars for the effective implementation of intergenerational rights and obligations, as iterated in the Goa Guidelines on Intergenerational Equity, is the representation of future generations156. In this Chapter, the Author would discuss the legal possibility of recognizing the legal standing of States and individuals representing future generations.

A. Domestic Application

The cases of Oposa, Cape May, and Juliana best illustrate the application of the principle of intergenerational equity through the granting of legal standing to future generations.

In Oposa, petitioners were minors represented by their parents invoking their right to a balanced and healthful ecology against the issuance of timber licenses by the Department of Environment and Natural Resources. The Supreme Court granted the petitioners legal standing to the petitioners. The Philippine court reasoned that the “rhythm and harmony of nature” should be “equitably accessible to the present as well as future generations”.

156 GOA Guidelines on Intergenerational Equity, adopted by the Advisory Committee to the United Nations University Project on ‘International Law, Common Patrimony, and Intergenerational Equity (Feb. 15, 1988); other proposed strategies include the designation of ombudsmen or commissioners for protecting the interests of future generations, monitoring systems for cultural and natural resources, conservation assessments giving particular attention to long-term consequences, measures to ensure use of renewable resources and ecological systems on a sustainable basis, commitment to scientific and technical research to advance the purposes set out above, and programmes of education and learning at all social levels and age groups especially the young generations.
Supreme Court also added that the assertion of this right by the minors simultaneously constitutes the “performance of their obligation to ensure the protection of that right for the generations to come”\textsuperscript{157}.

20 years prior to \textit{Oposa}, the issue of legal standing of petitioners representing succeeding generations was similarly tackled in the \textit{Cape May} case. The defendants argued that the plaintiffs do not have a specific damage relatable to them; the plaintiffs countered such argument by saying that substantial damage to the environment can be proven if given time for proper documentation. The U.S. court sided with the plaintiffs holding that “the plaintiff, its members, and the class on behalf of whom this action was brought, have special beneficial interests which are subject to injury and damage and which are within the ‘zone of interests’ sought to be protected by National legislation”. Also addressed by the court was the fear that liberalizing the concept of \textit{locus standi} will open the flood gates of litigation; the court held that “if that should be the price for the preservation and protection of our natural resources and environment against uncoordinated or irresponsible conduct, so be it”\textsuperscript{158}.

The principle of intergenerational equity can be used and in fact had been used to justify the standing of the unborn and the representation and appropriate consideration of their rights in courts and tribunals. However, the current state of international environmental law has not yet answered the question regarding the legal standing of future generations in international courts. As the Author previously submitted, the principle of intergenerational equity is well-recognized in international law and has achieved the status of Customary International Law. It should only follow that the persons – the children and future generations – States recognize to have concurrent interests in the environment with the present generation be allowed to stand and be represented for the defense of their own rights.

It is submitted that the rights of future generations to the environment can be asserted by either States or individuals.

\textsuperscript{157} Oposa v Factoran, \textit{supra} note 38 at 803  
\textsuperscript{158} Cape May v Macchia, \textit{supra} note 39.
B. Legal Standing in International Law

Contemporary international law has afforded international legal personality to a wide range of entities – States, international organizations, regional organizations, NGOs, public and private companies, and even individuals\(^{159}\). As was held by the ICJ in the Reparation for Injuries case, “competence to bring an international claim is, for those possessing it, the capacity to resort to the customary methods recognized by international law for the establishment, the presentation, and the settlement of claims”\(^{160}\). The Author submits that people representing future generations should be recognized to have such competence to bring international claims regarding the environment to courts.

International law has moved beyond matters exclusively between States. An “international person” is one that is a “subject of international law and capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims”\(^{161}\). In establishing the United Nations as an entity having legal personality, one could read from the *dictum* of the ICJ, international law with regard to legal personality has been flexible as it evolves to accommodate developments “influenced by the requirements of international life”, and the “progressive increase in the collective activities of States”\(^{162}\).

Through laws, domestic judicial decisions, treaties, positions in international disputes, and other means of exhibiting national policy, States have consistently, and rather overwhelmingly, recognized the obligation of the present generation to preserve the environment for future generations and the rights and interests of the latter to the environment. By necessary implication, such can also be seen as a recognition of the legal existence of a “future generation” which has a corresponding right to have the environment protected. Accordingly, this recognition gives future generations standing to sue before the courts – the “capacity to maintain its rights by bringing international claims”\(^{163}\). It is this “capacity” which the Author would like to

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\(^{159}\) Shaw, *supra* note 17 at 196.


\(^{161}\) Id at 179.

\(^{162}\) Id at 178.

\(^{163}\) Reparations, *supra* note 161.
strengthen by recommending a solution to the physical impossibility of future generations asserting their rights in any court by allowing States and individuals to represent them.

**C. States Representing Future Generations**

For a State to institute an action in international courts on behalf of its citizens, there should exist a “genuine connection” between them. The same is provided for under Article 44 of the Articles of State Responsibility disallowing the invocation of the responsibility of a State where the “claim is not brought in accordance with any applicable rule relating to the nationality of claims.” An exception to this would be obligations *erga omnes*.

In *Barcelona Traction*, with regard to obligations *erga omnes*, the ICJ held that “in view of the rights involved, all States can be held to have a legal interest in their protection.” The Articles of State Responsibility codified such concept in Article 48, providing for the invocation of responsibility by a State other than an injured State, stating that –

1. Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if: (a) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or (b) the obligation breached is owed to the international community as a whole.

2. Any State entitled to invoke responsibility under paragraph 1 may claim from the responsible State: (a) cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 30; and (b) performance of the obligation of reparation in accordance with the preceding articles, in the interest of the injured State or of the beneficiaries of the obligation breached.

...
Paragraph 1(b) was intended to give effect to the Barcelona Traction doctrine regarding obligation *erga omnes*\(^{167}\); thereby entitling each State, as a member of the “international community as a whole” to invoke the responsibility of another State for breaching such obligations\(^{168}\). It is to be noted that the Articles of State Responsibility is also considered customary international law or rather a codification of international custom\(^{169}\). Thus, *locus standi* founded on obligations *erga omnes* is an established international law principle.

As proposed above, the obligation to protect the environment for future generations is *erga omnes*. All States have that certain duty to future generations. Thus, it is only logical that States be allowed to represent not only its constituents, but also future generations in general in environmental disputes\(^{170}\).

The duty of States to future generations is of a universal character, in such a way that it transcends nationality. It stands to reason that States should be granted standing to sue another State for violating international environmental law regardless of whether such claimant State have any nationals injured by the act of the polluter State as long as its basis would be its duty to protect the environment for future generations.

**D. Individuals Representing Future Generations**

Cases involving individuals in international law mostly deals with issues regarding the international protection of human rights\(^{171}\). Children and future generations in courts represented by their guardians is not new in the national setting.

It is submitted that individuals representing children and future generations have legal standing in international courts. Venues such as the

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\(^{168}\)Id at ¶10.


\(^{171}\)Shaw, *see supra* note 17 at 257.
United Nations Human Rights Committee, European Court of Human Rights, Inter-American Court of Human Rights, and the African Court of Human and People’s Rights provide *locus standi* to individuals.

In *E.H.P v Canada*, the petitioner filed an individual communication in the UN Human Rights Committee on her behalf, as the Chairperson of the Port Hope Environmental Group, and also on behalf of present and future generations of Port Hope. While the Committee granted standing to the petitioner and the residents of Port Hope, it declined to give a definite answer to the standing of future generations stating that such is an “expression of concern purporting to put into due perspective the importance of the matter raised in the communication”\(^\text{172}\).

Additionally, as previously discussed, the principle of intergenerational equity was inferred to by the Inter-American Court of Human Rights in one of its advisory opinions regarding the right to a healthy environment\(^\text{173}\).

The representation of future generations in these courts, both by States and individuals, is not a far-fetched idea especially with the precedents seen in the local courts. As affirmed by the UN Committee on Children's Rights, children have the right to participate in relevant decision-making and by granting them legal standing, the interests of succeeding generations may be safeguarded\(^\text{174}\). Accordingly, children and future generations should be given a chance to defend their rights to the environment in court.

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\(^\text{172}\) *E.H.P v. Canada*, UN Doc CCPR/C/OP/1 at 20, ¶8.

\(^\text{173}\) *Supra* note 147.

\(^\text{174}\) *See supra* note 133 at 9,13, ¶¶32,46.
CHAPTER V: RECOMMENDATION

The Author submits two propositions: (a) the creation of a legal framework for courts confronted with the issue of whether to recognize the legal standing of persons representing future generations and (b) the amendment of the Permanent Court of Arbitration (PCA) Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment (hereinafter PCA Environmental Rules).

A. Proposed Legal Framework for the Recognition of the Legal Standing of Representatives of Future Generations in Courts

Considering that the principle of intergenerational equity is customary, all States, as well as courts and tribunals, should be expected to recognize the legal standing of future generations in environmental disputes. In view of this, the Author proposes a legal framework for courts, in any jurisdiction, on how to resolve issues of legal standing involving future generations.

The Author recommends that a court, whether domestic or international, confronted with the issue of whether to recognize the legal standing of persons representing future generations should take into account the following: (a) whether the case involves an environmental dispute or, at least, its resolution or judgment will affect, directly or indirectly, the environment – as may have been argued by either or both parties involved; (b) whether the Claimant has invoked the principle of intergenerational equity as a customary international law; (c) whether there is or will be damage to the environment, taking into account the precautionary principle when determining the possibility of “future damage” to the environment should the questioned act or acts persist.

In determining “future damage” to the environment, it is sufficient that a causal link between the question act or acts and the possibility of environmental damage be established175. This proposal is not without basis. There is no general requirement, at least in international law, that actual or

175 See J. Crawford, supra note 167 at 204, ¶10.
material damage be established before a wrongful act be attributed to a State\textsuperscript{176}.

The same concept can be applied in justifying the recognition of legal standing for representatives of future generations in courts, whether domestic or international. The presentation of evidence by the representatives of future generations that will attest to their claims that the questioned act or acts are detrimental to the environment of future generations should grant them the legal standing to sue on behalf of future generations.

For example, in the case of \textit{Oposa v Factoran}, the Plaintiffs showed scientific evidence that a country’s land area should be utilized in a ratio of 54\% for forest cover and 46\% for agricultural, residential, industrial, commercial and other uses in order to maintain a balanced and healthful ecology and that satellite images taken in 1987 show that the Philippines only had 4\% of its land area for rainforests which used to be 53\% 25 years ago and that the respondent had issued timber license agreements that allowed corporations to cut the an aggregate area of 3.89 million hectares\textsuperscript{177}. Although the plaintiffs did not show that they were directly injured or that there was material or actual damage suffered by them, as discussed earlier, the Supreme Court of the Philippines nevertheless granted legal standing to them as representatives of children and generations unborn\textsuperscript{178}.

Accordingly, by applying the proposed legal framework, States would be able to comply with their international obligation, derived from customary international law, to protect the environment for future generations.

\textbf{B. Proposed Amendment of the PCA Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment}

\textsuperscript{176} \textit{Id} at 84, ¶9, 203, ¶7.
\textsuperscript{177} Oposa, \textit{supra} note 38 at 798.
\textsuperscript{178} \textit{Id} at 802.
The Author recommends the amendment of the PCA Environmental Rules to accommodate the representation of future generations in order for it to admit cases filed before it by children and future generations, represented by their guardians – similar to how the principle of intergenerational equity was applied in the Oposa, Cape May, and Juliana.

The PCA is regarded by some scholars as the preferred forum for international environmental disputes against States as it has the following advantages:

- It is the oldest institution dedicated to settling inter-state disputes with presently having 115 member States; additionally, since it is already an existing institution, there is no need to secure both political will and the large amount of funding to create a separate International Environmental Court.
- It has experience administering purely environmental disputes.
- It is open to a broad range of actors such as States, private parties, and intergovernmental organizations.
- The use of one specific institution and set of arbitration rules could further the coherent, consistent, and directed development of international environmental law\textsuperscript{179}

The PCA Environmental Rules are based on the UNCTIRAL Arbitration Rules which were modified to “reflect the particular characteristics of disputes having a natural resources, conservation, or environmental protection component” and to “reflect the public international law element which pertains to disputes which may involve States and utilization of natural resources and environmental protection issues, and international practice appropriate to such disputes”\textsuperscript{180}, among other reasons. Clearly, the application of the principle of intergenerational equity and the representation of future generations falls squarely with the objectives of the PCA Environmental Rules.


\textsuperscript{180} Permanent Court of Arbitration Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment at Introduction, (2001) [hereinafter PCA Environmental Rules].
Article 1(1) of the PCA Environmental Rules, referring to the PCA Arbitration Rules 2012, allows disputes between States and non-State actors including private parties\textsuperscript{181}. Article 4 allows parties to be represented or assisted by a person or persons of their choice\textsuperscript{182}.

In view of this, the Author proposes that a provision similar to Section 5 of the Philippine Rules of Procedure for Environmental Cases be added to the PCA Environmental Rules. The first part of Rule 2, Section 5 provides that “any Filipino citizen in representation of others, including minors or generation yet unborn, may file an action to enforce rights or obligations under environmental laws”\textsuperscript{183}. The Author recommends that Article 4 of the PCA Environmental Rules for Arbitration be amended accordingly:

Article 4
1. …
2. States, intergovernmental organizations, or private parties, in accordance with Article 1 of the PCA Arbitration Rules 2012, may bring a dispute in representation of others including minors or generations yet unborn to enforce the rights or obligations under international environmental law.

The Author recognizes the limitations of the PCA such as the requirement that both parties must agree to refer the dispute in writing\textsuperscript{184}. The Author supports the proposal of several scholars and commentators that an International Court for the Environment be established to address the limitations of PCA and to provide for a tribunal specialized in international environmental law\textsuperscript{185}. The Author submits that the amendment of the PCA Environmental Rules for Arbitration should be seen as the first step towards a more global application of the principle of intergenerational equity through an institution already existing and recognized by a vast majority of States. The granting of locus standi to people representing future

\textsuperscript{181} Id at art.1(1).
\textsuperscript{182} Id at art. 4.
\textsuperscript{183} Rules of Procedure for Environmental Cases, A.M. No. 09-6-8-SC, Rule 2, §5 (April 13, 2010) (Phil.).
\textsuperscript{184} PCA Environmental Rules, supra note 181.
\textsuperscript{185} Achieving Justice, see supra note 179 at 145.
generations in environmental arbitration may serve as a “model clause” which may pave the way for the recognition of the standing of future generation in other treaties – including that of an International Court for the Environment, should such come into fruition.

25 years have passed since the Philippine Supreme Court gifted the international community with the *Oposa* doctrine – showing the world that it is possible to give voice to the unborn for the protection of the environment – *their* environment. It is time for the representation of future generations to move past domestic boundaries, beyond *Oposa*, and onto international courts, strengthening our rights in order to defend the liberty and prosperity of children.