

## OUR OBLIGATIONS TOWARDS POSTERITY- PHILOSOPHY AND INTERNATIONAL LAW

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*"Many present efforts to guard and maintain human progress, to meet human needs, and to realize human ambitions are simply unsustainable- in both the rich and poor nations. They draw too heavily, too quickly, on already overdrawn environmental resource accounts to be affordable far into the future without bankrupting those accounts. They may show profits on the balance sheets of our generation, but our children will inherit the losses. We borrow environmental capital from future generations with no intention or prospect of repaying. They may damn us for our spendthrift ways, but they can never collect on our debt to them. We act as we do because we can get away with it: future generations do not vote, they have no political or financial power; they cannot challenge our decisions. But the results of the present profligacy are rapidly closing the options for future generations."*

-The Brundtland Report<sup>1</sup>

*"All that seems indispensable in stating the account between the dead and the living is to see that the debts against the latter do not exceed the advances made by the former."*

-James Madison<sup>2</sup>

The depletion and degradation of natural resources by past and present generations has gravely imperilled the conditions necessary for life of future generations of peoples. It is in this context that it is imperative to focus on the discourse concerning the status of future generations. Intergenerational equity, a concept concomitant to that of sustainable development,<sup>3</sup> has made it necessary

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1 The World Commission on Environment and Development, *Our Common Future* 143 (1987).

2 *Letter from James Madison to Thomas Jefferson (4th February, 1790)*, in *Encyclopaedia Britannica, The Annals of America, 1784-1796* 389 (1986).

3 Sustainable development is not to be understood as a fixed state of harmony, but rather a process of change in which the exploitation of resources, the direction of investments, the orientation of technological development, and institutional change are made consistent with future as well as present needs. While this process will neither be easy nor straightforward and necessitates the making of painful choices, in the ultimate analysis, the realisation of sustainable development must rest on political will. *Supra* n.1, p. 8.

for us to realise that humanity has the responsibility and ability to make development sustainable- to ensure that the needs of the present generation are met without compromising the ability of future generations to meet their needs.

The debate on obligations to posterity<sup>4</sup> is one that has been embroiled in deep epistemological controversy, especially since the crux of the discourse focusses on the rights of those of our species yet unborn. The issues raised, while intriguing, are at the same time perplexing. Does the present generation have any obligation towards those who are not yet living? Are the interests of future peoples clearly identifiable? If so, are they unfragmented? Do they have rights and if so, on what basis? Thus, the whole controversy boils down to an ostensibly simplistic proposition- **why should we care?** However, these questions are of the utmost importance and comprise the crux of the profound moral issues posed by the projection of sustainable development into the future of mankind.<sup>5</sup>

### Justice between Generations -Roots in Philosophy

The bulk of recent philosophical discourse has been taken up with the attempt to define our responsibilities in terms of a normative ethical theory. The significance of this approach lies in the fact that an ethical approach can supply adequate criterion to determine whether a proposed action is right or wrong. Such an approach also raises a variety of issues: whether the concept of inter-generational justice makes sense, whether our responsibilities towards posterity can be based on notions of justice and so on. In this context, it is necessary to discuss the salient aspects of the philosophical discourse focussing on our obligations to generations yet unborn, all of which, interestingly, have a sound underpinning in normative ethical theory.

### Rawls and Intergenerational Justice

There are a variety of alternative arguments, which contend that the interests of future generations should be safeguarded. The first variety of arguments can be

4 Prof. Edith Brown Weiss enumerates three different approaches in constructing an environmental obligation to future generations: The "opulent" model, which denies the existence of any such obligation and permits extravagance and waste by the present generation; The "preservationist" model, constituting the other extreme, requiring the present generation to make substantial sacrifices and self-denial to facilitate future generations inheriting a rich environmental legacy; and, the "equality" model, favoured by Weiss himself, which contends that we owe to future generations a global environment in a condition no worse than the one enjoyed by the present generation: Edith Brown Weiss, *In Fairness to Future Generations: International Law, Common Patrimony and Intergenerational Equity* 7 (1989).

5 John Rawls, *A Theory of Justice* (1971). This was the first work which brought the topic of obligations to future generations within the paradigm of modern philosophy. Derek Parfit's *Reasons and Persons* (1984) can be credited with advancing discussion on the topic through counter-arguments.



characterised as being moral in nature. Rawls has been the most frequently cited author<sup>6</sup> in this regard who argues that justice as fairness requires the application of the “**just savings**” principle, calling for a (re) distribution of income and wealth as a result of which the more disadvantaged can improve their situation to a greater extent than the advantaged.

The Rawlsian theory is essentially ‘contractarian’ and belongs to an ethical tradition where moral behaviour is seen as that mutually agreed on by members of society. In other words, moral behaviour is the product of a ‘*social contract*’. The question of justice between generations is addressed by Rawls’ theory of ‘justice as fairness’. Rawls’ claim essentially is that a theory of justice will have to apply to all members, intratemporally or intertemporally.<sup>7</sup> That is to say, it will have to apply not to one group of people, or to one generation, but to all generations. Rawls also enumerates three rights which all generations can claim from their predecessors: all generations have the right to an appropriate rate of capital saving; to the conservation of natural resources and the natural environment; and, to a reasonable genetic policy.

Thus, starting off with the proposition that all generations have equal rights and that no generation has claims superior to that of any other, it is interesting to examine as to how the Rawlsian theory of justice approaches the issue of the rights of future generations and the obligations of every generation towards posterity. In this regard, Rawls postulates the *just saving principle* in an attempt to conceptualise inter-generational justice.<sup>8</sup> According to this principle, every generation is expected to hand over to its immediate posterity a somewhat better situation than that which it inherits.

Anything less than this would be unfair to future generations, anything more would be unfair to the present generation. The ‘just savings’ relates not only to capital, “but also to the knowledge and culture, as well as the techniques and

6 See, P. S. Wenz, *Ethics, Energy Policy and Future Generations* 5 *Envmt.al Ethics* 195 (1983); Emanuel Agius and S. Busuttil (Eds.), *What Future for Future Generations ?* 14 (1994); N. S. Care, *Future Generations , Public Policy, and the Motivation Problem* 4 *Envmt.al Ethics* 195 (1984); E. Partridge, *Why Care about Future Generations?*, in E. Partridge. (Ed.), *Responsibilities to Future Generations* 22 (1981).

7 John Rawls, *A Theory of Justice* 7 (1980).

8 “No generation has stronger claims than any other. In attempting to estimate the fair rate of saving, the persons in the original position ask what is reasonable for members of adjacent generations to expect of one another ... (T)hey try to piece together a just savings schedule by balancing how much at each stage they would be willing to save for their immediate descendants against what they feel entitled to claim of their immediate predecessors.”: *ibid.*, at p. 289.

skills, that make possible just institutions and the fair value of liberty.”<sup>9</sup> Accordingly, defining the principle intergenerational equity in terms of conservation of options, quality and access, the handing over of the earth in no worse condition than that in which it was received<sup>10</sup> would well be justified by Rawls’ theory.<sup>11</sup>

Rawls also alters the motivational assumption that he originally makes regarding the contracting parties. He switches from viewing the parties in the original position as individuals to viewing them along family lines. The logic behind introducing this methodological change is that Rawls reasons that although man’s considered judgement would dictate that earlier generations should save for future ones, self- interested individuals in the original position would disregard any rights of future generations and would choose not to save anything for them. The underlying assumption of the Rawlsian framework is that the only “rational self-interest” which can be relied upon to transcend generations is concern for one’s own children. This parental concern thus becomes the paramount motive for each generation to act justly towards the next.

Emanuel Agius, analysing the shortcomings of the Rawlsian approach, contends that his explanation of intergenerational justice in terms of the just saving principle has restricted transgenerational moral relationships only to overlapping generations.<sup>12</sup> And for this very reason, the Rawlsian approach, enmeshed as it is within the theoretical framework of the social contract cannot offer an adequate ethical framework to underpin the contemporary moral concern for the far distant unborn generations. Thus, it is difficult to disagree with Agius when he contends that the just saving principle can only support obligations corresponding to the rights of the immediate one or two generations; but beyond that, such motivation cannot exist. Any moral concern about the impact of actions with long-term effects, such as those resulting from genetic engineering and nuclear weapons cannot be justified by this limited timescale in the future.

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9 *ibid.*, at p. 288.

10 See, Weiss E. Brown, *In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity* 38 (1994).

11 The logical relationship may not be transmissive in the opposite direction. In fact, Rawls requires more than a mere conservation, than maintaining the earth in no worse condition. His theory implies real capital savings up to a certain point after which a steady state could occur.

12 See, B. Barry, *Justice Between Generations* in P.M. Hacker and Joseph Raz (Eds.), *Law, Morality and Society* 267 (1977); P.S. Wenz, *Ethics, Energy Policy and Future Generations* 5 *Envmt.al Ethics* 201 (1983); and J. Passmore, *Conservation* in E. Patridge (Ed.), *Responsibilities Towards Future Generations* 53 (1980).



In addition to Rawls, others who espouse the moral line of argument include Wenz and Goodin. The Wenzian theory is premised on the equality of generations.<sup>13</sup> He contends that the formal equality of all human beings, including those of future ones, constitutes the basis for their claim to equal protection.<sup>14</sup> Goodin, on the other hand, criticises contractarian theories and argues that another basis for responsibility should be chosen. According to him, the vulnerability of future generations, coupled with the moral duty not to harm forms a concrete basis for our obligations to generations yet unborn.<sup>15</sup>

Agius offers an alternative framework to ground our responsibilities to future generations- that of the emerging concept of *humankind as a collectivity*. According to him, humankind as a collectivity is emerging as the new subject of the right to share the resources of the Earth, to be immune from the effects of atomic radiation, and to enjoy an environment of a quality that will enable people to lead a life of dignity and well-being.<sup>16</sup> International legal documents on ecological and environmental issues are increasingly making references to the term *mankind* in contradistinction to individual persons and groups. This clearly indicates the direction towards which environmental policy is headed.<sup>17</sup> Yet another indication of the notion of mankind as a collectivity is embodied in the concept of *common*

13 Like Agius, he too criticises Rawls for seeking to protect the interests of only their progeny and not that of the generations to be born in the remote future : P.S.Wenz, *Ethics, Energy Policy and Future Generations* 5 *Envmt.al Ethics* 195 (1983).

14 "All human beings are fundamentally equal, in the sense that equal respect ought to be accorded to their interests. This leads formalists to think it morally appropriate that all people be accorded equal benefits and burdens, unless some are shown to be *more* deserving than others are. Since future people are as human as present people, and the epoch in which one exists is not a sign of special desert, the duty of justice must be applied to future people as to those existing presently": *ibid.*, at p. 205.

15 R.E.Goodin, *Protecting the Vulnerable: A Reanalysis of our Social Responsibilities* 177 (1985).

16 Emanuel Agius, *Obligations of Justice Towards Future Generations: A Revolution in Social and Legal Thought*, in Emanuel Agius et al. (Eds.), *Future Generations and International Law* 6 (1998).

17 A few decades ago, an agreement was reached among States that explorations on the moon and other celestial bodies shall be carried out for the benefit of mankind as a whole, and not for that of only some individuals or a particular people or nation. *The Agreement Governing the Activities of States on the Moon and other Celestial Bodies*, 18 I.L.M. 1434 (1979). Article 4, states:

"The exploration and use of the moon shall be the province of all mankind and shall be carried out for the benefit and in the interests of all countries, irrespective of their degree of economic or scientific development. Due regard shall be paid to the interests of present and future generations as well as to the need to promote higher standards of living and conditions of economic and social progress and development in accordance with the Charter of the United Nations."

**heritage**- a concept introduced in international environmental law to regulate the global commons. All resources, which are declared to be part of the common heritage of mankind, are to be managed on behalf of all the countries for the benefit of mankind as a whole.<sup>18</sup> Moreover, present generations are responsible to future generations for their stewardship of this common heritage.<sup>19</sup>

Agius construes every generation as being just one link in an endless chain of generations who collectively form one community, namely that of **humankind**. This concept is a unity since every person, no matter whether living now or in the future, is related culturally and genetically to the rest of the human race.<sup>20</sup> Three main factors which have contributed considerably to this changed notion are detailed hereunder:

- Firstly, it is a self-evident truth that technological power has altered the nature of human activity. Modern technology has the unprecedented power to influence the lives not only of those living, but also of those who will live in the future.
- Secondly, the solidarity between all members belonging to the human race leads to the discovery of the “inter-dependence and inter-relatedness of reality”. Human experience has shown that absolutely nothing in nature exists in isolation and that all phenomena are interdependent. Every action, decision and policy adopted will now have inescapable, far-reaching consequences. Since everything, ranging from culture to genes, will be transmitted to posterity, it is becoming increasingly self-evident that our relations can never be limited to those who live contemporaneously with us, but must inevitably extend in time to future generations.

18 A key ingredient of the concept of the common heritage of mankind is the idea of ‘trusteeship’, proposed for the first time by Malta in the context of the Law of the Sea. The crux of this proposal is that certain resources of the Earth are to be regarded as being the property of future generations as well as that of the present one, and therefore to be used with caution and preserved for posterity. The Maltese proposal is discussed in greater in the latter part of this paper.

19 The idea of humankind as a collectivity which transcends the present generation has also been included in UNESCO’s *Draft Declaration on the Protection of the Human Genome*. This international instrument declares that the human genome should be protected since it is one of the constituent parts of the human heritage which belongs to the human species as a whole.

20 This fundamental change in our conceptions of international environmental law, according to Alexander Kiss, is comparable to the Copernican revolution which proclaimed that the centre of the Universe was the Sun, thereby discrediting the geocentric theory. Drawing on this analogy, it can be said that States are less and less the centre of international relations, the focus now shifting to humankind and its individual representatives, living both now and in the future. Agius, *supra* n.17, pp. 6-7.



- The third reason enumerated for the emerging concept of humankind as a collectivity is that caused by the increasing awareness of the fragility and the finitude of Planet Earth and this has contributed in no small measure to us perceiving ourselves as belonging to one family of mankind.<sup>21</sup>

In addition to the above, another important theoretical justification which is being increasingly advanced is that of the concept of *trusteeship* which postulates that the present generation holds the natural environment and the resources of the planet in trust with rights of use for future generations. In other words, no single generation, past, present or future can claim any preferential or superior rights of access or use.<sup>22</sup>

It may not be possible to elevate any of the above justifications to the rank of the ultimate truth which could explain why the interests of future generations should be protected.<sup>23</sup> What is necessary is for us to realise is that there do exist moral, philosophical, religious and other justifications which must enable us to understand our responsibilities to posterity.<sup>24</sup>

We had deluded ourselves in thinking that the planet contained unlimited resources to exploit, unlimited energies to manipulate, unlimited lands to develop and settle in, and unlimited air and water to cleanse the world of wastes produced

21 *ibid.*, at p. 7.

22 Brown Weiss, *Our Rights and Responsibilities to Future Generations for the Environment* 84 Am. J. Int'l L. 198 (1990). Weiss also points out that this theory of stewardship or trusteeship is one which strikes a deep chord with Islamic, Judaeo-Christian, African and other traditions: "Nearly all human traditions recognise that we, the living, are sojourners on earth and temporary stewards of our resources". Brown Weiss, *In Fairness to Future Generations* 8 Am. J. Int'l L. and Pol. 19 (1992).

He also describes four ways by which the present generation can breach this trust: it can consume the higher quality resources which will inevitably lead to higher real prices in the future; it can cause unacceptable environmental degradation; it can consume resources prior to the discovery of their best use; and, it can exhaust resources, resulting in a narrower range of available resources.

23 In fact, there does exist a fair measure of theories which are critical of the concept of intergenerational justice: See, D. Parfit, *On Doing the Best for Our Children* in M. Bayles (Ed.), *Ethics and Population* 100 (1976) referred to in Anthony D'Amato, *Do We Owe a Duty to Future Generations to Preserve the Global Environment?* 84 Am. J. Int'l L. 190 (1990). Parfit and D'Amato have questioned as to how rights can be ascribed to individuals that do not exist

24 We should cultivate a sense of obligation not to act wastefully or wantonly even when we cannot conceive as to how such acts would make any present or future persons worse off. This approach constitutes an example of deontological ethics in the Kantian sense which asserts that some acts are morally obligatory regardless of their consequences for human happiness. See, Anthony D'Amato, *Do We Owe a Duty of Care to Future Generations?* 84 Am. J. Int'l L. 190 (1990).

by irresponsible populations. Now, the unfortunate and inescapable realisation gradually dawning upon us is that none of these assumptions is true. We have been compelled to revise our place in the biosphere and to realise that the quality of life of future generations is dependent upon translating this new vision and outlook into relevant principles and concrete action.

### Future Generations and International Law

In recent years, bilateral and multilateral agreements, declarations and resolutions have increasingly expressed concern over future generations. These texts have largely made references to the responsibility towards future generations.<sup>25</sup>

The earliest of these treaties has been the Charter of the United Nations.<sup>26</sup> This was soon followed by agreements of a more specialised nature such as the International Convention for the Regulation of Whaling, 1946.<sup>27</sup> The Convention on the Protection and Use of Transboundary Watercourses and International Lakes<sup>28</sup> mentions future generations in the general provisions of Art.2: “*Water resources shall be managed so that the needs of the present generation are met without compromising the ability of future generations to meet their own needs...*”.

The United Nations Conference on Environment and Development: Framework Convention on Climate Change<sup>29</sup>, an agreement which deals primarily with the United Nation’s efforts to contain global warming refers to obligations towards future generations in the following manner, in Art.3: “*The 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.*”

25 It is however to be noted that most of these references are to be found in the introductory or hortatory sections of such documents, for instance, in the preambular paragraphs, rather than in their operative portions. But at the same time, there is no doubt that a responsibility towards future generations does exist and this is amply reflected in the burgeoning number of international agreements and treaties that have been visionary in their conception.

26 The first paragraph of the Preamble begins as follows: “*To save succeeding generations from the scourge of war...*”

27 161 UNTS 72.

28 31 I.L.M. 1312 (1992). This agreement concerns general worldwide water resources and our need to preserve them.

29 31 I.L.M. 849 (1992).



Other important multilateral agreements referring to future generations include the North American Agreement on Environmental Co-operation<sup>30</sup>, the Convention for the Protection of the Marine Environment of the North East Atlantic<sup>31</sup>, the United Nations Conference on Environment and Development, Convention on Biological Diversity<sup>32</sup>, the Agreement Governing the Activities of States on the Moon and other Celestial Bodies<sup>33</sup>, the Convention for the Protection of the Natural Resources and Environment of the South Pacific Region<sup>34</sup>, the Convention for the Protection of the Architectural Heritage of Europe<sup>35</sup>, the Convention on the Conservation of Migratory Species of Wild Animals<sup>36</sup>, the Convention for the Protection of the World Cultural and Natural Heritage<sup>37</sup> and the International Convention for the Regulation of Whaling<sup>38</sup>. In addition to this impressive list, there are also a host of bilateral treaties<sup>39</sup> and International Declarations and Resolutions.

Principle 3 of the Rio Declaration provides an apt summary of the fundamental norm designed to safeguard the interests of future generations. It states: “(t)he

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30 32 I.L.M. 1480 (1993).

31 32 I.L.M. 1069 (1993).

32 31 I.L.M. 818 (1992).

33 18 I.L.M. 1434 (1979).

34 26 I.L.M. 38 (1987). This Treaty embodies some sort of a principle of trusteeship (discussed earlier) when it states, “...conscious of their responsibility to preserve their natural heritage for the benefit and enjoyment of future generations...”.

35 25 I.L.M. 380 (1986).

36 19 I.L.M. 15 (1980).

37 27 U.S.T. 37. This document establishes an Intergovernmental Committee for the Protection of the Cultural and Natural Heritage of Outstanding Universal Value (World Heritage Committee). This document allows each of the participating countries to decide what they have which ought to be protected. Each of the participating countries has an amount of money which they must contribute to the fund:

*“Each State Party to this Convention recognizes that the duty of ensuring the identification, protection, conservation, preservation and transmission to future generations of the cultural and natural heritage referred to in Articles 1 and 2 and situated on its territory, belongs primarily to that State. It will do all it can to this end, to the utmost of its resources and, where appropriate, with any international assistance and co-operation, in particular, financial, artistic, scientific and technical, which it may be able to obtain.”*

38 161 U.N.T.S. 72.

39 Of the bilateral treaties the most recent example is the Treaty on Good Neighbourly Relations and Friendly Co-operation between Hungary and the Slovak Republic, concluded on 19 May 1995, which in Article 9 states that: “The contracting parties, motivated by their interest concerning care for the natural environment and preservation of acceptable living conditions for future generations, shall cooperate in environmental and nature protection, aiming at preventing and reducing environmental pollution, especially as regards trans-frontier pollution.”

*right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations*<sup>40</sup>.” Another document of recent origin to be mentioned in this regard is the Draft International Covenant on Environment and Development.<sup>41</sup> This document has been the result of a five-year effort of an impressive group of leading experts, to devise a comprehensive convention “regulating relations between humankind and nature.”<sup>42</sup> In its Preamble, it recognizes that: “*inter-generational and intra-generational responsibility, as well as solidarity and co-operation among the peoples of the Earth, are necessary to overcome the obstacles of sustainable development*”, and then declares that: “*the freedom of action of each generation in regard to the environment is qualified by the needs of future generations.*”

### **The UN Conference on Environment and Development (UNCED) and Agenda 21**

While the Stockholm Conference on the Human Environment (1972) initiated global awareness about environmental issues, the UNCED affirmed that the twin issues of development and environment were integrally linked and were to be addressed in a balanced and comprehensive manner. The most important operational output of UNCED was perhaps the agreement reached on Agenda 21- a detailed programme of action addressing the major issues affecting the relationship between the environment and the economy. The focus of Agenda 21 extends into the 21st century and reflects a universal concern for integrating environmental issues into an accelerated development process.<sup>43</sup>

The carefully negotiated Preamble of Agenda 21 provides the overall focus and sense of direction of Agenda 21. The Preamble specifies that the intelligent

40 Doc UN A/CONF 151/5 reprinted in P. Sands (Ed.), *Documents in International Environmental Law* 49 (1994).

41 This was produced by the Commission on Environmental Law of IUCN (International Union for Conservation of Nature) - the World Conservation Union in co-operation with the International Council of Environmental Law in March, 1995.

42 As stated in the foreword to the convention, quoting the UN Secretary General's 1990 Report. In fact, there have been a host of other efforts devoted to codifying in some form the rights or interests of future generations, such as the Goa guidelines on Intergenerational Equity, reproduced in Weiss E. Brown, *In Fairness to Future Generations: International Law, Common Patrimony and Intergenerational Equity* 293 (1989); or the “World Declaration on Our Responsibilities Towards Future Generations”, in Emanuel Agius and S. Busuttil, *What Future for Future Generations?* 307 (1994). There is also a wealth of constructive suggestions carried by the quarterly issues of the *Future Generations Journal*.

43 Agenda 21 is not legally binding, yet the fact that it was endorsed by 180 countries highlights the importance assigned to it by the global community, and the high level political commitment to its content.



integration of environmental and developmental concerns will lead to the fulfilment of basic needs, improved living standards for all, better protected and managed ecosystems and a safer, more prosperous future. It is pragmatic when it emphasises that States acting alone cannot achieve this objective. This can be done only by means of a global partnership which would appreciate the need for a balanced and integrated approach to environment and development. The Preamble makes it amply clear that Agenda 21 is a dynamic programme that could evolve over time in response to changing needs and circumstances and that it will be carried out by the various actors as per the capacities and priorities of different countries and regions and the requirements of different situations. In addition to providing the necessary flexibility, these provisions also allow for a subsequent review of Agenda 21 and recognize the importance of preparing the world for the challenges of the next century.

### **The Commission on Sustainable Development**

An important result of the UNCED was the establishment of a 52 member United Nations Commission on Sustainable Development which has begun its onerous task of pursuing the implementation of UNCED recommendations and ensuring that Agenda 21 does not remain an aspiration on paper alone.<sup>44</sup> The very establishment of UNCSD could be regarded, inter alia, as an acknowledgement by States of the pressing need for responsible behaviour in this area. The task orientation of the UNCSD is for the benefit of both present and future generations, in the sphere of environment and development.

### **Intergenerational Equity: Judicial Recognition**

In perhaps the first international decision which has recognized the principles of intergenerational equity, the International Court of Justice in the *Legality of Nuclear Weapons Cases*<sup>45</sup>, stated that “*the use of nuclear weapons would be*

44 The essence of the concept of sustainable development lies in the process of improvement of the quality of human life, doing so within the carrying capacity of supporting eco-systems. In other words, as the report of the World Commission on Environment and Development put it, sustainable development is “a strategy of development which meets the needs of the present without compromising the ability of future generations to meet their own needs.”: The World Commission on Environment and Development, *Our Common Future* 8 (1990).

While the prime focus of the concept of sustainable development is on development and thus on a developmental strategy which meets the needs of the present, the qualification ‘sustainable’ adds an important aspect of also taking into account the implications of present policies and actions for the future and thus for future generations.

45 International Court of Justice, 1996.

*serious danger to future generations. Ionising radiation ha(s) the potential to damage future environment, food and marine ecosystems, and to cause genetic defects and illness in future generations.”*<sup>46</sup>

It is with respect to the question of standing that the principle of future generations is potentially the most useful. The utility of this principle was illustrated in a recent case by the Supreme Court of Philippines, *Minors Oposa v. Secretary of the Department of Environment and Natural Resources (DENR)*.<sup>47</sup> In this case, 44 minors and the Philippine Ecological Network brought an action calling on the defendant to cancel all logging permits in the country, in the context of surveys showing that only 850,000 hectares of virgin oldgrowth rainforest were left in the country.<sup>48</sup> The defendant, by means of raising preliminary objections sought to have the complaint dismissed on the grounds that the petitioners had no cause of action and that the issue raised by them was a *political question* which properly pertained to the legislative or executive branches of government. The novel aspect of the case relates to the fact that the petitioners asserted that they represented their generation as well as generations yet unborn.<sup>49</sup>

The Court in upholding the petition went on to state as follows:

*“We find no difficulty in ruling that they can, for themselves, for others of their generation and for the succeeding generations, file a class suit. Their personality to sue on behalf of the succeeding generations can only be based on the concept of intergenerational responsibility in so far as the right to a balanced and healthful ecology is concerned. Such a right, as hereinafter expounded, considers the rhythm and harmony of nature.”* The Court considered such rhythm and harmony as including, inter alia, the judicious disposition, utilization, management, renewal and conservation of the

<sup>46</sup> At para 35. It is also interesting to note that Judge Weeramantry referred to this principle in his dissent in the Nuclear Tests Case (New Zealand v. France), 1995 ICJ 288. In his dissenting opinion, he stated “...(The Stockholm Declaration) formulated nearly a quarter of a century ago, the principle of ‘a solemn responsibility to protect and improve the environment for present and future generations’ (Principle 1). This guideline sufficiently spells out the approach to this new principle which is relevant to the problem the Court faces of assessing the likely damage to the people of New Zealand. This Court has not thus far had occasion to make any pronouncement on this developing field. The present case presents it with a pre- eminent opportunity to do so, as it raises in pointed form the possibility of damage to generations yet unborn.” See Vikram Raghavan, *Is it Time for an International Court of Environmental Justice*, 7 Stud. Adv 8 (1997).

<sup>47</sup> 33 I.L.M.173 (1994).

<sup>48</sup> This was barely 2.8 percent of the entire land mass of the Philippine archipelago and about 3 million hectares of uneconomical secondary growth forest.

<sup>49</sup> *ibid.*, at p. 185.



country's forest, mineral, land, waters, fisheries, wildlife, offshore areas and other natural resources and that their exploration, development and utilization must be regulated in such a manner so as to be equitably accessible both to present, as well as future generations.

The Court went on to state:

*"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 helpful 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 that right for the generations to come."*

These examples amply illustrate the extent to which the principle requiring the rights of future generations to be taken into account and be protected has already had real practical consequences. While the need to protect the interests of future generations may have been realised, an institutional mechanism to further this goal is yet to be established. In this regard, it is interesting to examine the proposal that there be established a guardian for future generations.

### **Need for a Guardian to Safeguard the Interests of Future Generations**

In preparation for the 1992 Rio Summit (UNCED), the Maltese delegation submitted to the preparatory committee a proposal that the world community should progress, beyond vague, aspirational declarations of obligations and responsibilities towards future generations that are increasingly being reflected in international documents, and actually institute an official guardian to safeguard the interests of posterity.

The proposal argues that just as conventional legal systems worldwide typically provide representation for infants, the mentally impaired, and others who cannot adequately articulate their interests, the world community should provide for "(a)n authorised person (guardian) to represent future generations at various international fora ...whose decisions would affect the future ... to argue the case on behalf of future generations, hence bringing out the long-term implications of proposed actions and proposing alternatives. His role would not be to decide, but to ...plead for future generations (and to counter) the firmly established attitude of our civilization (to discount) the future."<sup>50</sup> This mechanism of guardianship as articulated above would go a long way in giving our responsibilities to future generations "a practical substance and a concrete form."

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<sup>50</sup> Sections 12 and 13 of the Proposal.

With respect to the functions of such a guardian, the proposal contemplates nothing beyond a role of advocacy which would be "...not to decide but to promote enlightened decisions...to put forward arguments on behalf of future generations...at various international fora, particularly the United Nations."<sup>51</sup>

It is possible to further specify and expand the functions of the guardian along the following lines:

- The guardian could appear as a special intervenor- counsel in bilateral and multilateral disputes.
- It could appear before the legislatures and various other policy-making bodies of States and assist in intelligent policy formulation taking into account the pronounced, long-term implications of such actions.
- A guardian could also initiate legal and diplomatic action on behalf of the future generations in appropriate situations<sup>52</sup>, for instance in cases when there exists a threat to a world cultural heritage<sup>53</sup>, and no signatory to the UNESCO Convention for the Protection of the World Cultural and Natural Heritage<sup>54</sup> steps forward and takes up the issue.

In other words, it is possible to empower the guardian to work beyond the framework of the United Nations , even to the extent of acting in a pro-active manner, for instance, by taking up litigation against activities detrimental to the interests of future generations.<sup>55</sup>

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<sup>51</sup> *ibid.*

<sup>52</sup> See, Christopher D. Stone, *Safeguarding Future Generations*, in Emanuel Agius et al (Eds.) , *Future Generations and International Law* 67- 71 (1998). Also see his analogous proposals in Christopher D. Stone, *Healing the Seas Through a Global Commons Trust Fund* in Van Dyke et al (Eds.), *Freedom for the Seas in the 21st Century: Ocean Governance and Environmental Harmony* 173 (1993).

<sup>53</sup> For instance, the Pyramids Plateau.

<sup>54</sup> The convention provides for the "transmission to future generations" of certain artefacts. In terms of its potential role in litigation, see International Center for the Settlement of Investment Disputes: Award in *Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt*, 32 I.L.M. 247 (1993) concerning the Egyptian obligation to protect the Pyramids Plateau raised in unsuccessful defence to suit by contractor whose contract to develop the area was breached by Egypt.

<sup>55</sup> It is also possible for the guardian to engage itself in a plethora of other endeavours. For instance, Hungary's justification for terminating its international obligations to Czechoslovakia to build a joint canal system included the following claim:

"Although the devastation of the natural resources and that of the landscape is significant, the damage is mostly reparable...(but in) the case of forest populations (the adaptation) process is considerably slower and can be measured in terms of centuries. The answer to quick and drastic changes is degradation and decay. For the regeneration of forests living in near- natural



The next issue, logically, would be that focussing on the question as to who or what could make an “ideal guardian”. It is in this context that the Deputy Prime Minister and Minister of Foreign Affairs of Malta, Prof. Guido de Marco, as President to the 45th Session of the General Assembly, proposed the reform of the Trusteeship Council as the body most appropriate to act as trustee of the global commons in the interest of future generations. This reform was advocated as part of the overall revitalisation process necessary to generate a second- generation United Nations.<sup>56</sup>

During this period, some members of the International Law Commission in addressing the issue of harm to the Global Commons had acknowledged the problem of continuous deterioration of the human environment as a serious matter with universal implications which needed to be addressed by the Commission and suggested that “*the Trusteeship Council’s mandate could be changed and be extended to cover the protection of the resources of the global commons.*” The report of the Commission on Global Governance, (Our Global Neighbourhood), among other proposals regarding the reform of the United Nations system, contains a section on the possible reform of the Trusteeship Council on the same lines as stated above.

## Conclusion

The global destruction of tropical rainforests, the mismanagement of renewable and non- renewable energy resources, overpopulation, losses of arable land, extinction of essential genetic resources, accumulation of greenhouse gases,

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*conditions, centuries would be needed at the very best... (Also) several groups of animals have not been fully documented until now. Each year, there are a number of new species found. All of them are of a national value, their preservation for the future generations is a moral obligation.”* See, “*Treaty Concerning the Construction and Operation of the Gabčíkovo-Nagymaros System of Locks and Hungarian Termination of Treaty*”, 32 I.L.M. 1247, 1280 (1993).

Perhaps, in a dispute of this sort, destined for a hearing in the World Court, the guardian could be available as a master to make special findings.

56 In a statement delivered at the University of Genoa, Italy, Prof. Guido de Marco stated that “...*The Charter of the United Nations provides for the Trusteeship Council. To its credit, most of the peoples under trustee administration have practically all acquired their independence. However, the Council can still serve an even more beneficial purpose in the contemporary world... (W)ith a slight correction, this body can be made to function for the commonwealth of man. I suggest that from an administrator of territories, this Trusteeship Council can be converted into a guardian and supervisor of the common heritage of mankind... The resources of the sea and the sea- bed, the climate, the environment- particularly the protection of extra-territorial zones- and the rights of future generations, all these priceless possessions of humanity invoke the creation of such a Council if they are to be handed to future generations. Transforming the Role of the Trusteeship Council-* issued by the Permanent Mission of Malta to the United Nations, New York, March 1995.

and air and water pollution pose a plethora of complex legal, ethical and scientific challenges to the present generation, and potentially catastrophic consequences for the generations to follow, if these challenges are not adequately addressed. The rights of future generations to inherit an eco-system where these challenges have been properly addressed cannot be disputed. It is imperative to devise ways and means of arousing and sustaining amongst the present generation their interest in and towards future generations.<sup>57</sup> However, the imperatives of the nation-state system pose considerable hurdles for protecting the rights of posterity. The proposal for a guardian for future generations, if it is to succeed must take into account all these factors. There is a fundamental norm of equality among generations of the human species in relation to the care and use of the natural system. As a part of the natural system, we have a right to use and enjoy the system but no right to destroy its robustness and integrity so as to adversely affect those who are born after us.

The establishment of an institutional guardian seems to be the best method of safeguarding the interests of future generations. However, the most serious problem with regard to the *modus procedendi* for the establishment of such a guardian is the threat that such a post may pose to State sovereignty. The proposal for the establishment of a guardian does not require States to surrender their sovereignty in certain spheres, but it is palpably in their self-interest to do so. There are many alternate views regarding the manner in which a guardian could operate. Is it possible to have more than one guardian, each with a different but complementary mandate? Alternatively, could the interest of future generations

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57 *The Future Generations Programme* at the Foundation for International Studies, Malta, ever since its inception in 1987 has made pathbreaking attempts in exploring these crucial questions and in attempting to formulate viable programmes of action. It has consistently supported the establishment of a "guardian" to secure and monitor the rights of generations yet unborn. It incorporated this innovative idea in the *World Declaration on our Responsibilities Towards Future Generations* which was unanimously approved at the *International Conference on Future Generations* held in Malta by the Foundation in 1992. Another notable endeavour in this regard took place in 1994 in Malta when a group of international lawyers under the auspices of the Future Generations Programme together with the Future Generations Alliance Foundation of Japan, the Foundation for International Environmental Law and Development at the University of London, and Malta's Ministry for Environment; attempted to explore the conceptual and legal frameworks for the appointment of a guardian to represent the interests of future generations in both regional and international for a. UNESCO, sponsored a meeting of experts organised by the Tricontinental Institute for Parliamentary Democracy and Human Rights at the University of La Laguna, Canary Islands in 1994, Agius *supra* n.19, p. xii.



be better served by actions of NGO's<sup>58</sup>, which to some extent, they already are? An informed debate on these issues will go a long way in furthering our endeavours to safeguard the interests of succeeding generations.

The argument of this paper is not for some utopian system of world government. It is merely for a limited transformation of existing institutions of international law to enable it to effectively cope with changing needs and environments and it is hoped that this will disseminate new insights and proposals on our responsibilities towards future generations and lead many to realise the urgency of acting responsibly now in order to ensure meaningful and sustainable development.

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58 The 1994 Conference of international lawyers in Malta held under the auspices of the *Future Generations Programme* reached a general agreement that non- governmental organisations have a pivotal role to play by raising a critical voice on behalf of future generations and in mobilising communities to involve themselves in formulating policies that would respect the needs of future generations. This creation of a responsible consciousness on behalf of future generations should be an obligation commensurate with the indispensable work that NGO's seek to do in all spheres: Agius, *supra* n.19, p.xii.