FUTURE GENERATIONS AND THE ENVIRONMENT: A RIGHT TO INTERGENERATIONAL EQUITY UNDER INTERNATIONAL LAW?

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Abstract

Climate change is becoming ever more pertinent and its impact ever more devastating. Issues such as deforestation, loss of biodiversity, and desertification are increasingly prevalent, leaving the present generation with numerous problems to contend with. But as climate change intensifies, those who will surely bear an even greater burden are the ones yet to come. Unless some form of equality is established between generations, future generations are likely to find themselves in a precarious and inhospitable environment. It is argued that one way of achieving an intergenerational balance is through a right to intergenerational equity. This article analyses the development and progression of the principle of intergenerational equity in international law. In doing so, the article interrogates the sources of international environmental law as well as international human rights law to determine whether a right to intergenerational equity exists. This analysis finds that no right to intergenerational equity has arisen under international law. Nonetheless, there seems to be a definitive trend toward the realisation of such a right on the international stage. Until such time as there is a right to intergenerational equity, certain institutions and mechanisms could be implemented or relied upon to safeguard the environmental interests of future generations.

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1 Introduction

It has become fairly difficult to deny the scientific evidence surrounding the changes that have been occurring across the globe. The media is saturated with headlines and articles detailing the damaging effects of climate change and the ever-increasing probability of an irreversible environmental cataclysm.[1] Issues such as desertification, deforestation, and loss of biodiversity are becoming more frequent and pronounced.[2] Not only is the present generation likely to face hardships as a result of environmentally damaging conduct, but those who will undoubtedly bear the heavier burden are the generations to come.[3] The health, trade, peace, livelihoods, dignity, and even the life of future generations could be placed at risk if the environment is not protected and used by the present generations in a way that ensures that the interests of future generations are taken into account.

This begs the question, why have states not invoked the law, and specifically, international environmental law to address the matter?[4] The unfortunate reality is that environmental norms and instruments are often not able to do much as many are not enforceable.[5] Coming to the forefront in the international community only fairly recently, international environmental law has not seen the development, in respect of conventions and custom, that most other, relatively older areas of international law have seen.[6] It consists of a vast number of soft-law instruments.[7] The undesirable effect of this is that soft law has no binding legal effect and the norms subsequently lack an enforcement mechanism.[8] Consequently, states often do not adhere to the guidelines or suggestions contained in soft-law instruments as there are no repercussions for non-compliance.[9] Some states simply continue down the path of environmental destruction.

1 See, for example, United Nations 'Only 11 Years Left to Prevent Irreversible Damage from Climate Change, Speakers Warn During General Assembly High-Level Meeting' 28 March 2019 https://www.un.org/press/en/2019/ga12131.doc.htm (accessed 3 February 2020).
2 LE Rodriguez-Rivera 'Is the human right to environment recognized under international law - it depends on the source' (2001) 12 *Colorado Journal of International Environmental Law and Policy* at 6.
3 EB Weiss 'Climate change, intergenerational equity, and international law' (2008) 9 *Vermont Journal of Environmental Law* at 616.
4 Rodriguez-Rivera (n 2) 9.
5 As above.
6 P Sand 'The evolution of international environmental law' in D Bodansky, J Brunnée (eds) *The Oxford Handbook of International Environmental Law* (2007) at 30. It must be noted that there are, nonetheless, quite a few multilateral environmental treaties in force.
7 J Dugard et al *Dugard's international law: A South African perspective* (2018) at 587.
8 As above.
9 Rodriguez-Rivera (n 2) 9.

The adverse effects of climate change and other environmentally damaging activities could effectively be addressed by a right to intergenerational equity. According to Edith Brown Weiss, in her influential contribution on the subject, intergenerational equity provides that the environment is held in common by every generation and requires the present generation to pass the environment on to the future generation in no worse condition as received.[10] A right to intergenerational equity that can be invoked and enforced against states is therefore sorely needed.[11] It is critical that a legally binding and enforceable right that can be implemented is established with effect in order to halt, or at least deter, environmental degradation and to preserve the environment for future generations.[12]

The purpose of this article will be to determine whether a right to intergenerational equity exists under international law. Firstly, the doctrine of intergenerational equity will be briefly set out. This will be followed by an interrogation of the sources of international environmental law as well as human rights law to ascertain whether a right to intergenerational equity has arisen. Thereafter, alternative measures, other than a right to intergenerational equity which could be implemented to safeguard the environmental interests of future generations, will be discussed.

2 Brief overview of the doctrine of intergenerational equity

Before determining whether an intergenerational right to the environment exists in international law, it is necessary to establish what is meant by intergenerational equity. The damage to the present environment has to some degree been combatted under the auspices of various international and domestic legal instruments, but the same cannot be said for the environment in which future generations are to find themselves.[13] Although necessary to ensure the protection of the environment, these laws do not offer much security for future generations.[14] Intergenerational equity provides a solution in that it attempts to strike a balance between the present and future generations.[15] Principles of intergenerational equity are derived from 'each generation's position as part of the intertemporal entity of

10 See, generally, EB Weiss *In fairness to future generations: international law, common patrimony, and intergenerational equity* (1989).
11 S Barrett 'Climate treaties and the imperative of enforcement' (2008) 24 *Oxford Review of Economic Policy* at 245.
12 As above.
13 LM Collins 'Environmental rights for the future: intergenerational equity in the EU' (2007) 16 *Review of European, Comparative & International Environmental Law* at 321.
14 As above.
15 As above.

human society'.[16] Thus, the doctrine of intergenerational equity is premised on the concept that all generations have a shared responsibility towards the environment and to each other.[17]

Intergenerational equity comprises intergenerational rights and intergenerational obligations, also referred to as planetary rights and obligations.[18] The present generation has the right to use the environment available to them. This is, however, accompanied by the obligation to not consume resources to the extent that future generations do not receive enough.[19] Similarly, present generations have a planetary right to access the environmental legacy passed down to them by past generations.[20] This is subject to the obligation that they bequeath the legacy in no worse condition to future generations.[21] Weiss describes this using the idea of a 'planetary trust'.[22] Much like trusts in the ordinary sense are passed down from generation to generation for the benefit of trust beneficiaries, the environment should be passed down from generation to generation, remaining substantively intact.[23]

It must be borne in mind that intergenerational equity is not a purely intergenerational matter, but also has an intragenerational dimension.[24] Indeed, it would be inadequate to constrain intergenerational equity to the relations of generations, *inter se,* as this would result in there being little to no guidance as to how the environmental rights and obligations of the present generation would be determined and implemented.[25] This could result in the exploitative and unfair assignment of intergenerational duties to specific members of the international community whilst other members are allotted all the rights and benefits.[26] In order to avoid this eventuality, intragenerational equity aims to regulate the manner in which the present generation gives effect to intergenerational equity. An example of this is that affluent and technologically advanced states should bear intergenerational burdens and duties and should assist less developed states.[27] Thus, the actions and decisions

16 EB Weiss 'In fairness to future generations and sustainable development' (1992) 8 *American University International Law Review* at 23.
17 Weiss (n 3) 616.
18 EB Weiss 'Intergenerational equity in international law' (1987) 81 *American Society of International Law Proceedings* at 129.
19 Collins (n 13) 323.
20 LM Warren 'Legislating for tomorrow's problems today — dealing with intergenerational equity' (2005) 7 *Environmental Law Review* at 169.
21 As above.
22 Weiss (n 16) 20.
23 Z Hadjiargyrou 'A conceptual and practical evaluation of intergenerational equity in international environment law' (2016) 18 *International Community Law Review* at 251.
24 Hadjiargyrou (n 23) 254.
25 Weiss (n 18) 129.
26 Hadjiargyrou (n 23) 254.
27 Collins (n 13) 323.

taken within a generation have a critical role to play in intergenerational equity.

3 A right to intergenerational equity under international environmental law

Article 38 of the Statute of the International Court of Justice provides that the main sources of international law are: international conventions, international custom, and general principles of law.[28] Judicial decisions and the teachings of publicists are subsidiary sources that aid in the determination and interpretation of the main sources.[29] The primary sources of international environmental law will be investigated to determine the status of intergenerational equity within the international legal system and, where applicable, will be substantiated and elaborated on using subsidiary sources.[30]

3.1 International conventions

The concept of intergenerational equity has been included in a number of environmental conventions.[31] For example, the Preamble to the International Convention for the Regulation of Whaling provides for the 'safeguarding for future generations' of the whale stocks.[32] A further illustration can be found in the Preamble to the Convention on International Trade in Endangered Species of Wild Fauna and Flora which states that wild fauna and flora 'must be protected for this and the generations to come'.[33] Although intergenerational equity is included in these conventions, it is constrained to their respective preambles. This practice is repeated in a number of other environmental treaties.[34] In terms of the rules pertaining to treaty interpretation outlined in Article 31 of the Vienna Convention on the Law of Treaties, the preamble to a treaty is only of interpretive value and is, therefore, not binding.[35] This means that the principle of

28 Statute of the International Court of Justice, (26 June 1945), 33 UNTS 933 (ICJ Statute) Art 38.
29 ICJ Statute (n 28) Art 38(1)(d).
30 As above.
31 Hadjiargyrou (n 23) 262.
32 See the Preamble to the International Convention for the Regulation of Whaling, (2 December 1946), 161 UNTS 72.
33 See the Preamble to the Convention on International Trade in Endangered Species of Wild Fauna and Flora, (3 March 1973), 993 UNTS 243.
34 Treaties which reference intergenerational equity in their preambles include: the Convention on the Conservation of Migratory Species of Wild Animals, (23 June 1979), 1651 UNTS 333; the Minamata Convention on Mercury, (10 October 2013), 55 ILM 582; and the Paris Agreement on Climate Change, (12 December 2015).
35 Vienna Convention on the Law of Treaties, (23 May 1969), 1155 UNTS 331 (1969) Art 31(2) provides that 'the context for the purpose of interpretation of a treaty shall comprise … its preamble'.

intergenerational equity as provided for in these conventions cannot be enforced, and merely serves as an interpretive aid.

An example of a legally binding international environmental law instrument that comprises obligations to future generations is the United Nations Framework Convention on Climate Change (UNFCCC).[36] Reference to future generations is made in the operative text of the convention as opposed to its preamble.[37] Article 3(1) stipulates that 'parties should protect the climate system for the benefit of present and future generations of humankind'.[38] The wording used in Article 3(3), particularly, 'anticipate', indicates a responsibility to future generations since the present generation is expected to take cognisance of the impact that its use of the environment could have.[39]

Even though these principles form part of the text of the Convention, it seems that they themselves are, in effect, not binding.[40] Looking at the *chapeau* to Article 3, it is evident that it is couched in mandatory language through the use of the word 'shall'.[41] However, directly following on that are the words 'be guided' which indicates that the principles in Article 3 are to be used for the purpose of interpretation and implementation.[42] Furthermore, the inclusion of '*inter alia*' to the *chapeau* means that alternative principles to the ones appearing in Article 3 may be used and applied.[43] Thus, given the context of Article 3, it would seem that this provision, albeit binding on its parties, does not provide for a legally enforceable right to intergenerational equity.[44] Article 3 only serves to steer states in the proper direction for the implementation of the treaty.[45]

3.2 Customary international law

To establish whether a rule of customary international law exists requires an investigation into its two components: state practice, or *usus*, and the consent to be bound, or *opinio juris*.[46] *Usus* entails the

36 LM Collins 'Revisiting the doctrine of intergenerational equity in global environmental governance' (2007) 30 *Dalhousie Law Journal* at 123.
37 United Nations Framework Convention on Climate Change, (9 May 1992), 31 ILM 849 (UNFCCC) Art 3.
38 UNFCCC (n 37) Art 3(1).
39 UNFCCC (n 37) Art 3(3).
40 A Boyle 'Some reflections on the relationship of treaties and soft law' (1999) 48 *International and Comparative Law Quarterly* at 908.
41 UNFCCC (n 37) Art 3.
42 D Bodansky 'The United Nations Framework Convention on Climate Change: A commentary' (1993) 18 *Yale Journal of International Law* at 502.
43 As above.
44 Collins (n 36).
45 As above.
46 ICJ Statute (n 28) Art 38(1)(b).

practice of a state that is indicative of a customary international law rule.[47] *Opinio juris* refers to the execution of such state practice with an accompanying psychological belief that there is a legal right or obligation on the state.[48] In the case of *Germany v Italy*, the International Court of Justice provided guidance as to what qualifies as a source of state practice and *opinio juris*.[49] These sources include national laws, assertions made by the state, and claims made before foreign courts.[50] Treaties and soft-law instruments are also sources of state practice.[51] Before a rule of customary international law can be established, the state practice must be of such a nature as to satisfy a threshold test.[52] The practice should be widespread and virtually uniform in order to qualify as customary international law.[53] What follows is a discussion of sources of state practice and *opinio juris*.

3.2.1 National constitutions and court decisions

The Court in *Germany v Italy* made reference to national laws serving as evidence for state practice.[54] This would naturally include the constitution of a nation. At least sixty states have in their respective constitutions a provision endorsing intergenerational equity.[55] These constitutional provisions either place a duty on public authorities to

47 International Law Commission 'Draft Conclusions on the Identification of Customary International Law' *Report of the International Law Commission on the Work of its Seventieth Session*, Supplement No 10, UN Doc. A/73/10 (2018) (Identification of Customary International Law) Conclusion 4.

48 Identification of Customary International Law (n 47) Conclusion 9.

49 *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)* ICJ (3 February 2012) (2012) ICJ Reports (*Jurisdictional Immunities of the State*) para 55.

50 As above.

51 Identification of Customary International Law (n 47) Conclusion 11.

52 Identification of Customary International Law (n 47) Conclusion 8.

53 As above.

54 *Jurisdictional Immunities of the State* (n 49).

55 Constitution of the Republic of Albania (1998) Art 59(e); Constitution of the Principality of Andorra (1993) Art 31; Constitution of the Republic of Angola (2010) Art 39(2); Constitution of the Argentine Nation (1853) Art 41; Constitution of Armenia (1995) Art 48(10); Constitution of Austria (1920), Art 14(5a); Constitution of Belgium (1831) Art 7*bis*; Constitution of the Kingdom of Bhutan (2008) Art 5(1); Constitution of Bolivia (2009) Arts 9(6), 33 & 108(15); Constitution of the Federative Republic of Brazil (1988) Art 225; Constitution of Burundi (2005) Art 35; Constitution of the Republic of Cuba (1976) Art 27; Constitution of the Czech Republic (1993) Charter Of Fundamental Rights And Basic Freedoms; Constitution of the Republic of Timor-Leste (2002) Art 61(1); Constitution of the Republic of Ecuador (2008) Arts 317, 395(1) & 400; Constitution of the Arab Republic of Egypt (2014) Arts 32, 46, 78 & 79; Constitution of Eritrea (1997) Art 8(3); Constitution of the Republic of Fiji (2013) Art 40(1); Constitution of the Fifth French Republic (1958) Preamble; Constitution of the Republic of The Gambia (1996) Art 215(4)(d); Constitution of Georgia (1995) Art 37(4); Basic Law of the Federal Republic of Germany (1949) Art 20(a); Constitution of the Republic of Ghana (1992) Art 36(9); Constitution of Guyana (1980) Art 149J(2); Constitution of Hungary (2011) Art P. (1) & 38(1); Constitution of the Islamic Republic of Iran (1979) Art 50; Constitution of Japan (1946) Art 11; Constitution of Kenya (2010) Art 42(a); Constitution of the Republic of Latvia (1922) Preamble; Constitution of

protect the environment for present and future generations, or they adopt a rights-based approach whereby present and future generations are afforded rights to the environment.[56] Most of these constitutional provisions were enacted fairly recently, no sooner than 2004, indicating that responsibility to future generations is gradually making its way to the forefront and that states are increasingly recognising the principle of intergenerational equity.[57]

Sixty is approximately a third of all states, meaning that the virtually uniform threshold required for state practice has not been satisfied.[58] Although this amount does not meet the threshold requirement, it does provide a great deal of support for the possibility of a customary rule of intergenerational equity in the future. At the very least, it serves as an indication of the general direction that some states are moving towards, which is towards protecting the environmental interests of future generations.

Another source of state practice and *opinio juris* are the decisions of national courts.[59] A domestic case that explicitly dealt with the doctrine of intergenerational equity was the Supreme Court of the Philippines decision of *Oposa v Factoran*.[60] The cause of action, in this case, arose from the negative impact that timber licensing agreements were having on the Philippine environment.[61] The suit was brought as a class action by minor children, assisted by their parents, claiming that the rate of deforestation was causing serious injury and irreparable damage to the present generation as well as to

Lesotho (1993) Art 36; Constitution of the Grand Duchy of Luxembourg (1868) Art 11*bis*; Constitution of Madagascar (2010) Preamble; Constitution of the Republic of Malawi (1994) Art13(1)(iii); Constitution of the Republic of Maldives (2008) Art 22; Constitution of the Kingdom of Morocco (2011) Art 35; Constitution of Moldova (1994) Preamble; Constitution of Mozambique (2004) Art 117(2)(d); Constitution of Namibia (1990) Art 95(1); Constitution of Niger (2010) Arts 35 & 149; Constitution of the Kingdom of Norway (1814) Art 112; Constitution of Papua New Guinea (1975) Art 4(1); Constitution of Poland (1997) Art 74(1); Constitution of Portugal (1976) Art 66(2)(d); Constitution of Qatar (2003) Art 33; Constitution of the Russian Federation (1993) Preamble; Constitution of Seychelles (1993) Preamble; Constitution of the Republic of South Africa (1996) sec 24(b); Constitution of South Sudan (2011) Art 41(2); Constitution of Swaziland (2005) Arts 210(2) & 216(1); Constitution of the Kingdom of Sweden (1974) Art 2; Federal Constitution of the Swiss Confederation (1999) Art 2(4); Constitution of Tajikistan (1994) Preamble; Constitution of Tunisia (2014) Preamble; Constitution of Uganda (1995) XXVII The Environment (i) & (ii); Constitution of Uzbekistan (1992) Preamble; Constitution of the Oriental Republic of Uruguay (1966) Art 47(1)(b); Constitution of Vanuatu (1980) Art 7(d); Constitution of Venezuela (1999) Art 127; Constitution of Zambia (1991) Art 255; Constitution of Zimbabwe (2013) Arts 73(1)(b), 289(e) & 298(c).

56 Collins (n 36) 136.

57 Centre for International Environmental law 'Submission to the UN Special Rapporteur on Human Rights and the Environment' 31 October 2017 https://www.ohchr.org/Documents/Issues/Environment/SREnvironment/Child/CIEL.pdf (accessed 8 August 2020).

58 Identification of Customary International Law (n 47) Conclusion 8.

59 Identification of Customary International Law (n 47) Conclusion 6 & 10.

60 *Oposa v Factoran* 224 SCRA (1993) 792.

61 *Oposa v Factoran* (n 60) 798.

future generations.[62] The Court held that 'their personality to sue on behalf of the succeeding generations can only be based on the concept of intergenerational responsibility'.[63] Furthermore, the Court stated that each generation has a duty to preserve and protect the environment for the next generation.[64] In addition to this case, other national courts have also taken cognisance of, or have applied, the principle of intergenerational equity in their decisions, such as the courts of South Africa,[65] Argentina,[66] India,[67] Kenya,[68] and Australia.[69] Of late there has been a surge of court cases being brought, especially by children, based on intergenerational equity and the protection of future generations in response to concerns over climate change.[70] For example, in *Future Generations v Ministry of the Environment*, 25 children and young adults instituted an action against government officials and municipalities in Colombia alleging that the deforestation of the Colombian Amazon is violating their rights and the rights of future generations.[71] The Supreme Court of Colombia applied intergenerational equity and held that the deforestation did infringe the rights of future generations.[72] Other successful climate change cases include *Urgenda v The Netherlands* and *Leghari v Pakistan* where the courts found that governmental inaction in addressing climate change infringed the rights and duties owed to present and future generations.[73]

Although this new wave of climate change litigation has seen victories for future generations, there have also been unsuccessful cases, often based on a lack of standing. The Court in *Kivalina v ExxonMobil* dismissed an action brought against 22 energy producers

62 *Oposa v Factoran* (n 60) 799.
63 *Oposa v Factoran* (n 60) 803.
64 As above.
65 *Director: Mineral Development, Gauteng Region and Another v Save the Vaal Environment and Others* (1999) 2 All SA 381 (A).
66 *Salas, Dino y otros C/ Salta, Provincial de y Estado Nacional s/ amparo.*, S. 1144. XLIV (2009).
67 *Karnataka Industrial Areas v Sri C. Kenchappa & Ors*, Supreme Court of India, AIR 1996 SC 1350 (2006).
68 *Waweru v Republic of Kenya* (2007) AHRLR 149 (KeHC 2006).
69 *Willoughby City Council v Minister Administering the National Parks and Wildlife Act, Land and Environment Court of New South Wales* (1992) 78 LGERA 19. The Court used the public trust doctrine to find that the Australian government had a duty to protect and preserve national parks for the benefit of future generations.
70 J Setzer & C Higham 'Global trends in climate litigation: 2021 snapshot' 2 July 2021 https://www.lse.ac.uk/granthaminstitute/publication/global-trends-in-climate-litigation-2021-snapshot/ (accessed 9 July 2021).
71 *Future Generations v Ministry of the Environment*, Corte Suprema de Justicia, Sala Civil, STC4360-2018, No. 11001-22-03-000-2018-00319-01 (2018) (*Future Generations*).
72 *Future Generations* (n 71) 37-38.
73 *Urgenda Foundation v Kingdom of the Netherlands*, Hoge Raad, ECLI:NL:HR:2019:2007 (2019); *Leghari v Pakistan* (2015) 25501/201 WP. The Court in *Urgenda* focused more on a duty of care whereas the Court in *Leghari* took a rights-based approach.

for their role in aggravating climate change.[74] According to the Court, the plaintiffs lacked standing as they were unable to show that the flooding of the Kivalina village caused by climate change was attributable to the energy producers as the contributors to climate change (hence the flooding) are manifold.[75] Moreover, in *Juliana v United States*, the Ninth Circuit Court of Appeals dismissed a case instituted by children, with the necessary assistance, requiring the government of the United States to address and mitigate greenhouse gas emissions.[76] The plaintiffs did not succeed in demonstrating redressability and consequently did not have standing.[77]

Albeit a step in the right direction, the reference to intergenerational justice by domestic tribunals still seems to be the exception rather than the rule. Although this would not be enough to satisfy the virtually uniform threshold required for *usus* and *opinio juris*, these decisions offer a blueprint for how intergenerational equity can be applied practically in a judicial setting.[78]

3.2.2 Soft-law instruments

Non-binding instruments, or soft law, are a source of customary international law in that they could assist in establishing the virtually uniform state practice or *opinio juris* needed for a rule of custom.[79] As aforementioned, there are many international treaties in which the interests of future generations are recognised in their preambles. Although preambular provisions are not binding and thus do not encapsulate a right to intergenerational equity in themselves, they do form part of soft law, which means that they could play a role in the development of an emerging rule of customary international law.[80] However, despite the state practice that these provisions may evidence, it is unlikely that any state acted with a sense of legal obligation as a result of a preamble, given its interpretative nature.[81] Thus, the requisite *opinio juris* for a rule of custom is absent.[82]

A further soft-law instrument, namely the Stockholm Declaration, pioneered a generalised approach to preserving the environment for future generations.[83] For instance, Principle 2 stipulates that 'The

74 *Native Village of Kivalina v ExxonMobil Corp.*, 663 F. Supp. 2d 863 (2009) (*Kivalina*).
75 *Kivalina* (n 74) 880-881.
76 *Juliana v United States* No. 18-36082 (2020).
77 *Juliana v United States* (n 76) 30.
78 Collins (n 36) 135.
79 Boyle (n 40) 903.
80 J Anstee-Wedderburn 'Giving a voice to future generations: intergenerational equity, representatives of generations to come, and the challenge of planetary rights' (2014) 1 *Australian Journal of Environmental Law* at 49.
81 As above.
82 Identification of Customary International Law (n 47) Conclusion 9.
83 Collins (n 36) 121.

natural resources of the earth … must be safeguarded for the benefit of present and future generations'.[84] Following Stockholm, the Rio Declaration on Environment and Development provides, in Principle 3, that 'the right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations'.[85] Adopted during the 1992 Rio Earth Summit, Principle 2(b) of the Forest Principles states: 'Forest resources and forest lands should be sustainably managed to meet the … human needs of present and future generations'.[86]

The central tenets of intergenerational equity are encapsulated in the UNESCO Declaration on the Responsibilities of the Present Generations Towards Future Generations.[87] Being a UNESCO declaration, all 193 member states as well as the 11 associate members of UNESCO agree and consent to this declaration.[88] The notion of intergenerational equity can again be seen in the 2002 Johannesburg Declaration on Sustainable Development, where a pledge was made to 'the peoples of the world, and the generations that will surely inherit this earth' in relation to sustainable development.[89]

The multiplicity of soft law incorporating the doctrine of intergenerational equity can establish a compelling case for the doctrine to become a rule of custom.[90] However, a compelling case is the most that it can signify. Due to the intrinsic non-binding nature of soft law, it is unlikely that any state when signing or adopting any of the above soft-law instruments did so with the intention that they were required to do so by law.[91] A vital element in the determination of a rule of customary international law, namely *opinio juris*, is absent and thus no rule of custom can arise in these circumstances.[92] At most, these soft-law instruments indicate an emerging trend of recognising the principle of intergenerational equity.

84 Declaration of the United Nations on the Human Environment, (16 June 1972), UN Doc. A/CONF.48/14/Rev. 1, 11 ILM 1416 (1972) (Stockholm Declaration) Principle 2.
85 UN Conference on Environment and Development, (14 June 1992), UN Doc. A/CONF.151/26 (Vol. I), 31 ILM 874 (1992) (Rio Declaration) Principle 3.
86 United Nations 'Non-legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests', (14 August 1992), UN Doc. A/CONF.151/26 (Vol. III) (1992) Principle 2(b).
87 See, for example, Article 1 which states 'The present generations have the responsibility of ensuring that the needs and interests of present and future generations are fully safeguarded'.
88 Collins (n 36) 127.
89 World Summit on Sustainable Development, Johannesburg Declaration on Sustainable Development, (4 September 2002), UN Doc. A/CONF.199/20 (2002) para 37.
90 Boyle (n 40) 903.
91 Identification of Customary International Law (n 47) Conclusion 9
92 Identification of Customary International Law (n 47) Conclusion 2.

3.2.3 General principles of international law

The final source of international environmental law that will be discussed is 'the general principles of law recognized by civilised nations' provided for in Article 38(1)(c) of the Statute of the International Court of Justice.[93] The application of these principles is regarded as universal meaning all members of the international community should observe them.[94] Notwithstanding their general application, the function of the general principles of law has been described as 'gap-filling', in that they are only invoked in instances where there is a lacuna in either treaty law or international customary law.[95] Thus, it seems that this source does not enjoy the same hierarchal status as conventions or rules of custom, even though international law does not explicitly discriminate between sources.[96] General principles of law that will be addressed are sustainable development, the precautionary principle, and common but differentiated responsibilities.[97]

First, sustainable development, which is defined in the Brundtland Report as 'development that meets the needs of the present generation without compromising the ability of future generations to meet their own needs', shares several similarities with intergenerational equity.[98] The above definition clearly states that the needs of future generations must be taken into account. Sustainable development thus limits the extent to which the present generation can make use of natural resources. This is identical to the conservation of options in terms of intergenerational equity which, likewise, delineates how resources are to be used by the present generation.[99]

Second, the precautionary principle places a duty on states to protect the environment and to take positive steps towards reducing environmental destruction even in instances where the potential damage to the environment is not supported by definitive scientific evidence.[100] There is thus an anticipatory element to this principle as it requires states to take into account the damage that their activities could have on the future environment.[101] This means the

93 ICJ Statute (n 28) Art 38(1)(c).
94 International Law Commission 'First report on general principles of law' Report *of the International Law Commission on the Work of its Seventy-first Session,* UN Doc A/CN.4/732 (2019) (ILC Report on General Principles) at 48.
95 ILC Report on General Principles (n 94) 44.
96 Dugard et al (n 7) 44.
97 M Biddulph & D Newman 'A contextualized account of general principles of international law' (2014) 26 *Pace International Law Review* at 304.
98 World Commission on Environment and Development *Our Common Future* (1987) (Brundtland Report) 43.
99 Weiss (n 18) 129.
100 Biddulph & Newman (n 97) 304.
101 Dugard et al (n 7) 597.

precautionary principle protects future generations as there is an obligation on states to have regard for their interests to the environment. The similarity to intergenerational equity is fairly manifest as it too requires the present generation to respect the environmental interests of future generations.[102]

Third, in terms of the principle of common but differentiated responsibilities, states have, to varying degrees, a shared responsibility to the environment.[103] In other words, all countries are accountable for the well-being of the environment, but the same standard of responsibility is not applied uniformly to developed and developing states.[104] Countries that have contributed a greater deal to environmental degradation should bear a heavier burden in respect of protecting the environment, as well as those states that are wealthier and more technologically advanced than other countries.[105] This corresponds with the principle of conservation of access, in terms of intergenerational equity, which states that the present generation can access the environment provided that it does not consume it to the extent that future generations are no longer able to access the environment and natural resources.[106] The intragenerational dimension of intergenerational equity reflects this general principle since, in terms of intragenerational equity, developed states are vested with planetary obligations whereas developing states are vested with fewer responsibilities and more planetary rights.[107] Furthermore, developed states are required to assist developing states with accessing environmental resources.[108]

As can be seen, various elements of the doctrine of intergenerational equity are reflected in the general principles of international law. The principle of sustainable development is almost identical to the conservation of options which is one of the integral principles of intergenerational equity. The precautionary principle, much like the doctrine of intergenerational equity, protects the interests of future generations to the environment. The principle of common but differentiated responsibilities reflects not one but two aspects of intergenerational equity. Thus, there is strong evidence that the doctrine of intergenerational equity could potentially be recognised as a general principle of international environmental law.

102 Weiss (n 3) 616.
103 Collins (n 36) 133.
104 CD Stone 'Common but differentiated responsibilities in international law' (2004) 98 *American Journal of International Law* at 277.
105 As above.
106 Weiss (n 18) 130.
107 Hadjiargyrou (n 23) 254.
108 Warren (n 20) 169.

4 A right to intergenerational equity under the human rights paradigm

The existence of a right to intergenerational equity in international environmental law seems to be unlikely. However, an investigation into the human rights paradigm could garner more positive results. A human right can be defined as a right bestowed on a human by reason only of the fact that they are human.[109] Since it is fairly certain that future generations, as the present generation, will be human, the link between human rights and intergenerational equity seems to be self-evident. Moreover, environmental law and human rights law have been recognised as being interdependent and indivisible from one another.[110] Thus, the possibility exists for applying human rights law to future generations. Having a human right to intergenerational equity could be greatly advantageous as it would avail the enforcement mechanisms that have developed in respect of human rights law, which are currently absent under international environmental law.[111]

Being a *lex specialis* of international law, the sources of human rights law that will be looked at are international conventions and customary international law.[112]

It must be borne in mind that human rights have been subjected to a fair share of criticism in that they may not be the most appropriate means of protecting the interests of future generations. Of particular importance is the criticism offered by some environmental law scholars.[113] Their critique of the applicability of the human rights paradigm falls on its anthropocentric nature.[114] They believe that since human rights are afforded to humans by virtue of their humanness that there is a rift between the environment and human beings and that the latter finds itself in a position of power over the former.[115] Thus, these scholars argue that vesting nature with protection emanating from the human rights paradigm would inevitably lead to the interests of the environment being made

109 RP Hiskes 'The right to a green future: human rights, environmentalism, and intergenerational justice' (2005) 27 *Human Rights Quarterly* at 1349.
110 *Advisory Opinion OC-23/17 of November 15, 2017, Requested by the Republic of Colombia: The Environment and Human Rights* Inter-American Court of Human Rights (IACrtHR) para 52.
111 LM Collins 'Are we there yet - the right to environment in international and European Law' (2007) 3 *McGill International Journal of Sustainable Development Law and Policy* at 125.
112 ICJ Statute (n 28) Art 38.
113 D Shelton 'Human rights, environmental rights, and the right to environment' (1991) 28 *Stanford Journal of International Law* at 109.
114 As above.
115 PE Taylor 'From environmental to ecological human rights: a new dynamic in international law' (1998) 10 *Georgetown International Environmental Law Review* at 352.

subordinate to the interests of humans.[116] They suggest, in relation to nature and the environment, that the environment itself be given rights and humans be endowed with analogous duties.[117]

However, this proposition has been rebutted to some degree.[118] It is submitted that ecological ethicists have erred when stating that the consequence of bestowing environmental human rights is the division of man from nature.[119] Legal scholars who support the establishment of human rights of an environmental nature state that humans are intrinsically bound together with ecological beings and are, therefore, inseparable from nature.[120] This naturally means that any human right that endorses a human being's interest to live in a clean and healthy environment would, as a matter of course, provide the environment with protection as well.[121]

4.1 International conventions

Given the fact that the international community has only fairly recently begun to concern itself with the well-being of the environment and its protection, international human rights treaties are often devoid of any environmental provisions.[122] Human rights arose fairly soon after the Second World War, whereas environmental rights, it has been argued, began to emerge in the early 1970s with the United Nations Conference on the Human Environment (the Stockholm Declaration).[123] Thus, at the outset, it is anticipated that it is unlikely for a human right seeking to protect the environmental interests of future generations to have arisen under treaty law.

Certain provisions in ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries provide for the protection of the environment of indigenous people.[124] Article 7 states that governments, in conjunction with the relevant indigenous peoples, should devise and implement steps 'to protect and preserve the environments of the territories' where indigenous people live.[125] In addition, Article 7 makes provision for environmental impact assessments that must be carried out together with the people

116 As above.
117 N Gibson 'The right to a clean environment' (1990) 54 *Saskatchewan Law Review* at 13; K Bosselmann 'Human rights and the environment: redefining fundamental principles?' in B Gleeson & N Low (eds) (2001) *Governing for the environment: Global problems, ethics and democracy* at 125; Collins (n 111) 124.
118 Shelton (n 113) 110.
119 As above.
120 As above.
121 Collins (n 111) 124.
122 D Shelton 'Human rights, Health & Environmental Protection: Linkages in Law & Practice' (2002) Health and Human Rights Working Paper Series No 1, 6.
123 Stockholm Declaration (n 84) Principle 1.
124 International Labour Organization (ILO), Indigenous and Tribal Peoples Convention, (27 June 1989), C169 (Indigenous and Tribal Peoples Convention).
125 Indigenous and Tribal Peoples Convention (n 124) Art 7(4).

concerned, and these assessments must be taken into account when development projects are considered by governments.[126] Article 7 ensures that the environmental concerns of indigenous and tribal peoples are heard and it enables them to play an active role in protecting their environment for both present and future generations. Article 15 provides for the protection of indigenous peoples' rights to natural resources located on their land.[127] This provision goes further and stipulates that in the event that ownership of these resources vests in the government, the extent of the prejudice that indigenous people will suffer by way of any exploration of these resources must be taken into account, and, if appropriate, they should either share in the benefits of the exploration or receive compensation for any loss suffered.[128]

On a regional level, two binding human rights conventions provide for a right to the environment.[129] The African Charter on Human and Peoples' Rights (African Charter) provides in Article 24 that: 'All peoples shall have the right to a general satisfactory environment favourable to their development'.[130] Article 11 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (San Salvador Protocol) recognises the right of everyone to a healthy environment and places an obligation on the state to protect and preserve such an environment.[131] From the text of these two articles, it can be seen that a right to the environment is expressed fairly overtly in these two conventions. To determine whether this right has an intergenerational dimension will require employing Article 31 of the Vienna Convention on the Law of Treaties.[132] In terms of Article 31, the ordinary meaning of a word should be attributed to it when interpreting a provision.[133] Neither convention makes any explicit reference to future generations nor intergenerational equity.[134] However, the word 'development', appearing in the African Charter, and 'preservation', from the San Salvador Protocol, are both, in their ordinary meaning, inherently intertemporal and are usually associated with an elapse of time.[135] Thus, it can be argued that these two articles could indeed provide for a human right to

126 Indigenous and Tribal Peoples Convention (n 124) Art 7(3).
127 Indigenous and Tribal Peoples Convention (n 124) Art 15.
128 As above.
129 African Charter on Human and People's Rights, (27 June 1981), CAB/LEG/67/3 rev. 5, 21 ILM 58 (1981) (African Charter); Additional Protocol to the American Convention on Human Rights in the Area of Economic Social and Cultural Rights, (17 November 1988), A-52 OASTS 69 (1998) (San Salvador Protocol).
130 African Charter (n 129) Art 24.
131 San Salvador Protocol (n 129) Art 11.
132 Vienna Convention on the Law of Treaties (n 35) Art 31.
133 As above.
134 African Charter (n 129) Art 24; San Salvador Protocol (n 129) Art 11.
135 As above.

intergenerational equity even though they do not expressly mention one.

Apart from the aforementioned treaties which contain substantive human rights, there are also procedural environmental human rights that play a vital role in environmental protection.[136] These procedural rights encompass aspects such as: following an inclusive approach to the establishment of environmental policy by involving the public in decision-making processes; making environmental information widely available; and the accessibility of legal redress.[137] The significance of environmental procedural rights lies in the fact that they enable public participation in decision-making processes.[138] Since it is the public who has to deal with any potential negative environmental changes, it should have a say in deciding how such changes should be handled or what should be done about them.[139] Making environmental information available and providing for legal redress empowers the public to take an effective stance against environmental destruction and to fight for the interests of future generations.

An example of a provision in a binding treaty that addresses environmental procedural rights is Article 3 of the Espoo Convention on Environmental Impact Assessment in a Transboundary Context.[140] It stipulates that the public must be informed of any activities which may negatively impact their environment and be given the opportunity to object to, or give comments in relation to such activities.[141] At a regional level, the Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters (Aarhus Convention) requires its parties to include the public in decision-making, ensures access to information, and provides for access to justice in environmental matters.[142] This is done, according to Article 1, to 'contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being'.[143] Where the Aarhus Convention applies to European and some Asian states, a similar regional treaty on environmental procedural rights has been

136 Rodriguez-Rivera (n 2) 15.
137 As above.
138 Collins (n 111) 129.
139 As above.
140 Convention on Environmental Impact Assessment in a Transboundary Context, (25 February 1991), 30 ILM 800 (1991) (Espoo Convention) Art 3.
141 Espoo Convention (n 140) Art 3 para 8.
142 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, (25 June 1998), 2161 UNTS 441 (1998) Art 1.
143 As above.

concluded between Latin American and Caribbean states known as the Escazú Agreement.[144] The purpose of the Escazú Agreement, as laid down in Article 1, is the implementation of the rights to environmental information, public participation in environmental decisions, and access to environmental justice in order to safeguard the right to a healthy environment of both the present and future generations.[145] Furthermore, Article 3 of the Escazú Agreement lists intergenerational equity as one of the guiding principles that states need to take into account when undertaking any obligations in terms of the treaty.[146]

4.2 Customary international law

As has been mentioned, a rule of customary international law exists once there is sufficient state practice and *opinio juris*.[147] The relevant sources that will be discussed include national constitutions, national legislation, and soft-law instruments.

4.2.1 National constitutions and legislation

The provisions of domestic constitutions provide evidence of state practice specifically in the realm of human rights given the duty placed on states by human rights law to protect their citizens.[148] As previously mentioned, there are currently at least sixty states that recognise and uphold the principle of intergenerational equity in their constitutions.[149] However, not even a quarter of these constitutions enshrine a right to intergenerational equity, with the majority rather placing an obligation or duty on states to protect the environment for future generations. The German Constitution, for example, provides the following in respect of intergenerational justice: 'Mindful also of its responsibility towards future generations, the state shall protect the natural foundations of life and animals'.[150] In a similar vein, the Constitution of Brazil obliges not only the state but also individuals to protect the environment for the sake of all generations — present and future.[151]

144 Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean, 9 April 2018 (Escazú Agreement).
145 Escazú Agreement (n 144) Art 1.
146 Escazú Agreement (n 144) Art 3(g).
147 Identification of Customary International Law (n 47) Conclusion 2.
148 J Lee 'The underlying legal theory to support a well-defined human right to a healthy environment as a principle of customary international law' (2000) 25 *Columbia Journal of Environmental Law* at 313.
149 See (n 55) for a comprehensive list of national constitutions.
150 Basic Law for the Federal Republic of Germany, 1949 Art 20(a).
151 Constitution of the Federative Republic of Brazil, 2015 Art 225.

In addition to national constitutions, further evidence of state practice can be found in national legislation.[152] New Zealand's Resource Management Act stipulates that, as part of its overarching purpose of sustainable management, regard must be given to future generations so that they too will have the ability to use and enjoy natural resources.[153] Another example of national legislation that recognises intergenerational justice is the National Environmental Management Act of South Africa, which provides that 'everyone has the right to have the environment protected, for the benefit of present and future generations'.[154] The principle of intergenerational equity is also explicitly mentioned in section 3A(c) of Australia's Environment Protection and Biodiversity Conservation Act 1999.[155]

These domestic practices do not seem to be 'sufficiently widespread' and 'general' as is required to meet the threshold for state practice.[156] Stated differently, the inclusion of intergenerational equity in national constitutions and national legislation remains too inconsistent for a rule of customary international law.[157] Although not enough to establish a rule of custom, this could, nonetheless, evidence a developing customary rule.

4.2.2 Soft-law instruments

In terms of soft law, a human right to the environment was first introduced into the realm of international law in 1972 by the Stockholm Declaration.[158] Principle 1 provides for a right to an environment that is conducive to the dignity and well-being of all humans.[159] In addition, and of particular importance, Principle 1 explicitly states that humans have the 'solemn responsibility to protect and improve the environment for present and future generations'.[160] Thus, although there is not an express human right to intergenerational equity, there is at least a recognised responsibility on the present generation to account for the interests of future generations.

Following its debut, this right to the environment, provided for in Principle 1 of the Stockholm Declaration, has appeared in numerous soft-law instruments, international reports, and judicial decisions.[161]

152 Identification of Customary International Law (n 47) Conclusion 6.
153 Resource Management Act 1991 (New Zealand) sec 5(2)(a).
154 National Environmental Management Act 107 of 1998 Preamble.
155 Environment Protection and Biodiversity Conservation Act 1999 sec 3A(c).
156 Identification of Customary International Law (n 47) Conclusion 8.
157 Anstee-Wedderburn (n 80) 50.
158 Rodriguez-Rivera (n 2) 17.
159 Stockholm Declaration (n 35) Principle 1.
160 As above.
161 Collins (n 111) 132.

For example, Annexe 1 of the Report of the Brundtland Commission states that: 'All human beings have the fundamental right to an environment adequate for their health and well-being.'[162] Principle 1 of the Stockholm Declaration is, furthermore, recognised and reiterated by the Brundtland Commission in Chapter 12 of its report.[163] The 1989 Hague Declaration on the Environment likewise links environmental preservation to 'the right to live in dignity in a viable global environment, and the consequent duty of the community of nations *vis-à-vis* present and future generations to do all that can be done to preserve the quality of the environment'.[164] The wording of the Hague Declaration bears a striking resemblance to the Stockholm Declaration in that both tie environmental protection to the human right to dignity and unequivocally endorsed an obligation to future generations.[165] In addition, Resolution 45/94 passed by the General Assembly of the United Nations, apart from reaffirming Principle 1 of the Stockholm Declaration, also stipulates that 'all individuals are entitled to live in an environment adequate for their health and well-being'.[166]

The 1992 Rio Declaration, which is a product of the Conference on Environment and Development, again mimics Principle 1 of the Stockholm Declaration, but not so expressly as the previously mentioned reports and instruments.[167] It provides that: 'Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature'.[168] Looking at the wording of this principle, it seems that there is no recognition of any right.[169] Although no direct reference is made to a right to the environment, it is argued that the essence of what such a right would encompass is indeed represented in the language used in Principle 1.[170] Furthermore, Principle 3 of the Rio Declaration echoes the crucial second part of Principle 1 of the Stockholm Declaration that discusses the obligations towards future generations.[171] Principle 3 states that the 'right to development must

162 Brundtland Report (n 98) 286.
163 Brundtland Report (n 98) 271.
164 Hague Declaration on the Environment, (11 March 1989), 28 ILM 1308 (1989).
165 Hague Declaration on the Environment (n 163); Declaration of the United Nations on the Human Environment (n 84). The Hague Declaration places an obligation on the 'community of nations vis-à-vis present and future generations to do all that can be done to preserve the quality of the environment'. Similarly, the Stockholm Declaration states that all humans have the 'responsibility to protect and improve the environment for present and future generations'.
166 United Nations General Assembly 'Need to ensure a healthy environment for the well-being of individuals' (14 December 1990), UN Doc. A/RES/45/94 (1990).
167 Collins (n 111) 132.
168 Rio Declaration (n 85) Principle 1.
169 Collins (n 111) 132.
170 Lee (n 148) 308.
171 Rio Declaration (n 85) Principle 3.

be fulfilled so as to equitably meet developmental and environmental needs of present and future generations'.[172] Thus, it can be seen that the Rio Declaration essentially repeats Principle 1 of the Stockholm Protocol in Principle 1 and Principle 3.

Of significance is that the Rio Declaration was adopted in the presence of 178 states.[173] Moreover, it has been incorporated into a few soft-law instruments that have similarly been accepted by a large number of states.[174] For example, Principle 2 of the 1994 United Nations Conference of Population and Development, which was signed by 179 states,[175] and Principle 6 of the 1995 World Summit for Social Development, which 186 states assented to.[176] This means that on three subsequent occasions, almost every state adopted Principle 1 of the Stockholm Declaration and, thus, also the environmental protection it attempts to afford to future generations.[177]

Whether this repeated acknowledgement of the environmental interests of future generations by almost the entire international community amounts to a rule of customary international law depends on the intention of the states to be bound.[178] In other words, there needs to be sufficient *opinio juris*. Looking at the wording of these instruments, it becomes apparent that there is no evidence that suggests that states adopted them with a sense of a legal obligation to do so.[179] Therefore, it seems that these provisions are not binding but only amount to mere ambitions. They could at most serve as evidence of an emerging trend leaning towards the establishment of a right to intergenerational equity in terms of international customary law.

5 Alternative means of safeguarding the interests of future generations

At present, it remains contentious whether intergenerational equity has attained binding status in international law. No right seeking to protect the interests of future generations to the environment has

172 As above.
173 Lee (n 148) 308.
174 Lee (n 148) 309.
175 Programme of Action, 13 September 1994, UN Doc. A/CONF.171/13 (1994) Principle 2.
176 Copenhagen Declaration, 14 March 1995, UN Doc. A/CONF.166/9/Annex (1995) Principle 6.
177 Lee (n 148) 309.
178 Identification of Customary International Law (n 47) Conclusion 9.
179 For example, the Principles of the Stockholm Declaration are preceded by the *chapeau* which states that they are 'common convictions'. Similarly, the signatory states to the Rio Declaration 'proclaim' the Principles. The requisite acceptance of state practice as law is clearly absent. See Identification of Customary International Law (n 47) Conclusion 9.

attained customary law status. In the absence of such a right, the question beckons as to how, if it all, future generations can be ensured an environment of a similar standard to that of the present generation. Although a right would be the preferred means for environmental protection given its legal force, there are other potential institutions and avenues to safeguarding the interests of future generations to the environment.

5.1 Commissioner or ombudsman for future generations

An ombudsman or commissioner is an authoritative figure who is ordinarily tasked with investigating and analysing governmental conduct.[180] They check the decisions of the executive in the event that they are unreasonable, and they exercise their powers independently from other bodies.[181] Hence, the role of an ombudsman for future generations can be described along the lines of an 'environmental watchdog, alerting governments and citizens to any emerging threats'.[182]

Comprising of children and those not yet born, future generations do not necessarily possess the ability to voice their concerns about the environment, nor institute legal action in an attempt to curb environmental degradation.[183] They are thus in need of a guardian who will ensure that their interests are taken into account, and who will fight on their behalf should it be required.[184] A commissioner or ombudsman for future generations would exactly fill such a position. They would be able to act as a mouthpiece, through their scrutinising and advisory functions, to ensure that the concerns of future generations are heard and addressed.[185]

The idea of appointing a commissioner for future generations has received a fair bit of attention from the international community.[186] During the preparations for the 2012 United Nations Conference on Sustainable Development, also known as Rio+20, a few proposals were made for the establishment of a commissioner or ombudsman for future generations.[187] For example, the establishment of such an

180 Anstee-Wedderburn (n 80) 52.
181 Hollis 'Old solutions to new problems: providing for intergenerational equity in national institutions' (2010) 14 *New Zealand Journal of Environmental Law* at 49.
182 Brundtland Report (n 98) 273.
183 United Nations General Assembly 'Report of the Secretary-General on intergenerational solidarity and the needs of future generations', (15 August 2013), UN Doc. A/68/322 (2013) (Report of the Secretary-General) para 5.
184 Hollis (n 181) 49.
185 Hadjiargyrou (n 23) 274.
186 Anstee-Wedderburn (n 80) 54.
187 As above.

ombudsman was proposed in the Zero Draft of the outcome document.[188] Paragraph 57 states that: 'We agree to further consider the establishment of an Ombudsperson, or High Commissioner for Future Generations, to promote sustainable development'.[189] This provision has been criticised for taking a casual approach to the establishment of the ombudsman or commissioner, rather than calling for their expeditious appointment.[190] However, the mere recognition of such an important position for an international conference, albeit in the preparation stage, is a positive step towards protecting future generations as it indicates that cognisance is at least taken of future generations.

Furthermore, there have been attempts by a few states to establish an ombudsman of some sort for future generations. In 2001, the Israeli government inaugurated the Commission for Future Generations which was to act as a representative for future generations in Parliament.[191] The Commissioner had the authority to demand information from the government that was not readily available to citizens and, importantly, had the power to intervene in the legislative process in the event that the interests of future generations would be prejudiced.[192] What proved highly advantageous was that since the Commission was an organ of state, it enabled government officials, whose concerns about future generations or related matters would ordinarily have gone by the board, to have their concerns heard, and also circumvented several bureaucratic hurdles in the process.[193] Unfortunately, the Commission only lasted one term and came to an end in 2006.[194] The reasons for its termination were said to have been political and entailed the cost of sustaining such an institution as well as its necessity.[195] Although this commission for future generations undoubtedly had a positive impact through its power of intervention and its role in the distribution of information, it did have its flaws as evidenced by its relatively short existence.[196] Thus, a salient lesson to be learnt from this would be to establish a commission that is independent of the government of a nation and, in particular, free from political influence.

Following the dissolution of the Commission for Future Generations, the Parliamentary Commissioner for Future Generations

188 United Nations 'The Future We Want: Zero Draft' (2012) https://www.icriforum.org/rio20-update-zero-draft-of-outcome-document-now-available/ (accessed 23 April 2020) (Zero Draft).
189 Zero Draft (n 188) para 57.
190 Anstee-Wedderburn (n 80) 58.
191 J Tremmel *Handbook of intergenerational justice* (2006) at 246.
192 Tremmel (n 191) 247.
193 Tremmel (n 191) 261.
194 Report of the Secretary-General (n 183) para 43.
195 Hadjiargyrou (n 23) 274.
196 Hadjiargyrou (n 23) 275.

was instituted by the Hungarian government in 2008.[197] Similar to the Israeli Commission, the Commissioner was vested with the power to collect information, perform investigative functions, provide advice in relation to the interests of future generations, and stay environmentally damaging policies and legislation.[198] In 2012, the Parliamentary Commissioner was incorporated into the more comprehensive Office of the Commissioner for Fundamental Rights, where it now holds the position of Deputy Commissioner.[199] Here again, it can be seen that once created, a commissioner or ombudsman for future generations does not tend to exist for very long. In this case, rather than disbanding, as was the case with the Israeli Commissioner for Future Generations, the Hungarian Parliamentary Commissioner does still play a role but to a lesser extent than before.

In 2016, the Future Generations Commissioner for Wales was established and is the sole ombudsperson for future generations currently in existence.[200] Her primary functions entail, firstly, advising authoritative bodies, including the Welsh government, on matters regarding the interests of future generations and, secondly, liaising with the public on such matters.[201]

From the above, it becomes evident that an ombudsman or commissioner for future generations has the potential to benefit future generations, and it may indeed seem like an attractive mechanism to employ in safeguarding their interests, especially on a national level, as has been attempted by some states. However, in practice, they do not boast exceptional achievement or performance.[202]

5.2 International Court of Justice

Apart from the institution of a commissioner for future generations, the International Court of Justice could come to the aid of future generations. This Court is described as the 'principal judicial organ of the United Nations',[203] and its function is the settlement of disputes through the application of international law.[204] The purpose of the Court is thus to resolve any differences between parties and to

197 Report of the Secretary-General (n 183) para 44.
198 As above.
199 As above.
200 Future Generations Commissioner for Wales https://futuregenerations.wales/team/sophie-howe/ (accessed 23 April 2020).
201 As above.
202 Hadjiargyrou (n 23) 275.
203 ICJ Statute (n 28) Art 1.
204 ICJ Statute (n 28) Art 38(1). This article provides that the function of the ICJ 'is to decide in accordance with international law such disputes as are submitted to it …'.

prevent them from taking matters into their own hands by requiring them to refer their dispute to an independent arbitrator.[205] In addition to adjudicating disputes, the Court also has the power to give advisory opinions to specifically authorised institutions.[206]

The International Court of Justice can be approached to adjudicate a matter concerning the interests of future generations, provided that its jurisdiction is consented to by the parties.[207] Although there has not been a matter before the Court that expressly deals with intergenerational equity as of yet, that has not prevented this institution from acknowledging a duty to future generations in a few dissenting judgments,[208] and an advisory opinion.[209]

One such example is the 1995 *Nuclear Tests* case, in which New Zealand approached the Court in response to a French media statement, which detailed France's intention to execute a series of nuclear tests in the South Pacific region.[210] New Zealand's claim was based on paragraph 63 of the earlier 1974 *Nuclear Tests* case, which required the Court to examine the situation should anything happen that may affect the basis of the 1974 Judgment.[211] According to New Zealand, paragraph 63 entitled it to have the 1974 Judgment (which dealt with France carrying out atmospheric nuclear tests) resumed should France act in such a way that would affect the Judgment.[212] France's intention to execute nuclear tests was interpreted by New Zealand as affecting the basis of the 1974 Judgment. However, the Court, in 1995, dismissed New Zealand's claim as France intended to conduct underground nuclear tests and not the atmospheric nuclear tests on which the 1974 Judgment was based.[213]

In his dissenting opinion, Judge Weeramantry expressly recognised the principle of intergenerational equity.[214] He stated that it is a 'rapidly developing principle of contemporary environmental law'.[215] Furthermore, he acknowledged the Court's responsibility to act as a trustee or guardian for future generations as

205 D Shelton 'Form, function, and the powers of international courts' (2009) 9 *Chicago Journal of International Law* at 557.
206 ICJ Statute (n 28) Art 65.
207 ICJ Statute (n 28) Art 36(1) & (2).
208 *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court S Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v France) Case* (1995) ICJ Reports 288; *Gabčíkovo-Nagymaros Project (Hungary v Slovakia),* Judgment (25 September 1997) (1997) ICJ Reports 7.
209 *Legality of the Threat or Use of Nuclear Weapons,* Advisory Opinion, (8 July 1996) (1996) ICJ Reports.
210 *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Courts Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v France) Case* (1995) ICJ Reports 288 *(Nuclear Tests)* 289.
211 As above.
212 As above.
213 *Nuclear Tests* (n 210) 306.
214 *Nuclear Tests* (n 210) 341 (Dissenting Opinion of Judge Weeramantry).
215 As above.

well as the responsibility of nations themselves to protect the interests of their future generations.[216] He mentions the inherent long-lasting effects of nuclear tests that could be detrimental to future generations, and how the Court and states have a duty to protect future generations from them.[217] Thus, his dissenting opinion provides support for intergenerational equity and highlights its significance. Although such a dissenting opinion is of no force in respect to the case in which it is given, it can have an influence on future decisions in the sense that it may persuade the Court to find in favour of the dissenting judge.[218]

Another case where the interests of future generations were discussed was in *Gabčíkovo-Nagymaros Project*.[219] In its judgment, the Court highlighted the need to balance economic interests with environmental protection and acknowledged that future generations may well be negatively impacted by decisions taken in the present.[220] Judge Weeramantry, in his dissenting opinion, posited that it is a universal duty to protect and preserve the environment.[221] In addition, he refers to the 'trusteeship of earth resources' which entails that humans are to act as guardians of the environment and should protect it.[222] Even though there is no direct reference to intergenerational equity, its essence and objectives are nonetheless reflected in this case. The acknowledgement of the precarious situation that future generations find themselves in, as well as the duty to safeguard the environment for future generations, are central tenets of the doctrine of intergenerational equity.

The International Court of Justice has also given an advisory opinion addressing future generations and the environment.[223] In the *Legality of the Threat or Use of Nuclear Weapons*, the Court gave an advisory opinion on the question posed by the United Nations General Assembly which was: 'Is the threat or use of nuclear weapons in any circumstance permitted under international law?'[224] In its opinion, the Court stated, unequivocally, that nuclear weapons pose a serious

216 As above. Judge Weeramantry stated: '[T]his Court must regard itself as a trustee of those rights in the sense that a domestic court is a trustee of the interests of an infant unable to speak for itself'.
217 As above.
218 *South-West Africa Cases (Ethiopia v South Africa; Liberia v South Africa); Second Phase* (18 July 1966) (1966) ICJ Reports 323 (Dissenting Opinion of Judge Jessup) 325.
219 *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)*, Judgment, (25 September 1997) (1997) ICJ Reports.
220 *Gabčíkovo-Nagymaros Project* (n 219) 78.
221 *Gabčíkovo-Nagymaros Project* (n 219) 110 (Separate Opinion of Vice-President Weeramantry).
222 *Gabčíkovo-Nagymaros Project* (n 219) 103 (Separate Opinion of Vice-President Weeramantry).
223 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, (8 July 1996) (1996) ICJ Reports (*Legality of Nuclear Weapons*).
224 *Legality of Nuclear Weapons* (n 223) 226.

threat to future generations.[225] Nuclear weapons could bring about genetic illnesses in future generations and could also damage the environment and cripple food production.[226] Moreover, the opinion identified that the environment is directly linked to the health of not only the present generation but also 'generations unborn'.[227] Thus, in its advisory opinion, the Court emphatically came to the support of future generations. Despite not having legal force, this opinion elucidated where the International Court of Justice stands in respect of the interests of future generations.

Through its advisory jurisdiction and authoritative decisions, the Court can greatly assist in the development of international environmental law.[228] It is important to note that the Court itself cannot make law, it can only clarify the law.[229] One such example is where the Court is required to decide when a treaty provision has become a rule of custom and is no longer to be considered only as a contractual obligation.[230] In this way, it can confirm the existence of, and give clarity on, a rule of general international law. In addition, the judgments of the Court can be enforced through the United Nations Security Council.[231] Therefore, the International Court of Justice could prove quite beneficial in protecting the environment for future generations.

5.3 Articles on State Responsibility

A further avenue to protect the interests of future generations until a right is established is by employing the Draft Articles on the Responsibility of States for Internationally Wrongful Acts (Draft Articles).[232] The Draft Articles are in essence a codification of that part of international law pertaining to when a state's responsibility will come into play and the consequences that the state will face as a result thereof.[233] They are not centred around primary norms that address the scope of a rule of international law, but rather set out

225 *Legality of Nuclear Weapons* (n 223) 244.
226 As above.
227 *Legality of Nuclear Weapons* (n 223) 241.
228 R Jennings 'The role of the International Court of Justice in the development of international environment protection law' (1992) 1 *Review of European, Comparative & International Environmental Law* at 242.
229 ICJ Statute (n 28) Art 38(1)(d).
230 Jennings (n 228) 241.
231 Jennings (n 228) 243.
232 International Law Commission 'Draft Articles on Responsibility of States for Internationally Wrongful Acts' *Report of the International Law Commission on the Work of its Fifty-third Session*, (2001), Supplement No 10, UN Doc. A/56/10 (Draft Articles on State Responsibility).
233 United Nations *Yearbook of the International Law Commission*, (2001), A/CN.4/SER.A/2001/Add.1 (Part 2) at 31.

secondary norms of state responsibility that detail the attribution of responsibility and the ramifications of such attribution.[234] The Draft Articles, it seems, are not yet of a binding nature, although, as was noted during the seventy-fourth session of the United Nations General Assembly, states have praised them and are in the process of discussing whether the Draft Articles should be included in a binding convention or if they should be adopted by the General Assembly.[235]

Rather than laying down specific rights and duties, the Draft Articles adopt a more generalised approach to the obligations of states, their rights, and the consequences for violating any rights.[236] This general approach is what makes the Draft Articles beneficial to the interests of future generations since it enables new and emerging principles, such as environmental protection and intergenerational equity, to be accounted for and to fall within the protective ambit of the Draft Articles.

To determine whether the Draft Articles are applicable and whether a state can be held responsible requires an assessment of Articles 1 and 2. According to Article 1, a state's international responsibility becomes applicable whenever that state commits an internationally wrongful act.[237] Article 2 gives content to what an internationally wrongful act is by providing that a wrongful act is committed when the state breaches one of its obligations under international law and the conduct is attributable to that state.[238] In other words, for a state to incur responsibility, there must be a breach of an international obligation and that breach must be attributable to the state. Breaches of international law encompass a broad, general spectrum of transgressions, which involve environmental destruction on both a small and large scale.[239] Thus, a state can incur responsibility for an internationally wrongful act that causes damage to the environment.[240]

An example of such an internationally wrongful act is where a state, through the use of its territory, negatively impacts the territory of another state or persons in that state.[241] This is known as the prohibition of transboundary harm or the *sic utere tuo* principle.[242] This principle quite clearly helps achieve the goal of intergenerational

234 As above.
235 United Nations General Assembly 'Responsibility of states for internationally wrongful acts, comments and information received from Governments: Report of the Secretary-General', (12 July 2019), UN Doc. A/74/156 (2019).
236 J Crawford 'The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: A retrospect' (2002) 96 *American Journal of International Law* at 876.
237 Draft Articles on State Responsibility (n 232) Art 1.
238 Draft Articles on State Responsibility (n 232) Art 2.
239 United Nations (n 233) 87.
240 Dugard et al (n 7) 588.
241 *Trail Smelter Arbitration (United States v Canada)* (1938-1941) (1965) 3 UNRIAA.
242 Dugard et al (n 7) 588.

equity as it preserves the environment by prohibiting its destruction through the actions of other states. In the *Corfu Channel* case,[243] the International Court of Justice confirmed the customary status of the prohibition of transboundary harm.[244] Thus, when a state breaches a rule of international law such as the *sic utere tuo* principle, it will incur international responsibility.

Interestingly, the previous 1980 Draft Articles on State Responsibility provided a list of international crimes.[245] One of the stipulated crimes was 'a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas'.[246] This provision was met by a fair amount of criticism from the international community and was subsequently excluded from the current Draft Articles.[247] However, the scope of these crimes has been incorporated into Articles 40 and 41 of the Draft Articles which address state responsibility in relation to peremptory norms of international law.[248] Thus, the possibility exists for there to be an environmental *jus cogens* norm for which state responsibility could be incurred.[249] This would greatly benefit future generations as it is precisely massive pollution of the atmosphere and the sea that destroys the environment which they will eventually inherit. Unfortunately, there is much doubt regarding such a peremptory environmental norm, and it is unlikely that it exists as of yet.[250]

States that do incur responsibility for their internationally wrongful acts will have to deal with the legal consequences of their actions.[251] In terms of the Draft Articles, a state who has been injured can ask for cessation, assurance of non-repetition, and reparations.[252] Cessation and assurance of non-repetition are both aimed at preventing environmental damage and ensuring that such damage does not recrudesce.[253] Reparations can take the form of restitution, compensation, or satisfaction.[254] Restitution, on the one

243 *Corfu Channel Case (United Kingdom v Albania)*, Merits, (09 April 1949) (1949) ICJ Reports 22.
244 Jennings (n 228) 241.
245 International Law Commission 'Draft Articles on State Responsibility' *Report of the International Law Commission on the Work of its Thirtieth Session*, (1980), Supplement No 10, UN Doc. A/35/10 Art 19(3).
246 As above.
247 Crawford (n 236) 875.
248 Draft Articles on State Responsibility (n 232) Arts 40-41.
249 L Kotzé 'Constitutional conversations in the Anthropocene: in search of environmental *jus cogens* norms' (2015) 46 *Netherlands Yearbook of International Law* at 249.
250 As above.
251 Draft Articles on State Responsibility (n 232) Art 28.
252 Draft Articles on State Responsibility (n 232) Arts 30-31.
253 Draft Articles on State Responsibility (n 232) Art 30.
254 Draft Articles on State Responsibility (n 232) Art 34.

hand, entails placing the injured state in the same position that it was in before any environmentally damaging activity occurred.[255] With restitution, the environment is restored to what it was before any activity took place.[256] On the other hand, compensation and satisfaction require the injured state to be compensated for any damage that was inflicted upon its environment.[257] In this instance, the environment remains degraded unless the injured state rehabilitates it itself.

With this in mind, it seems that the Draft Articles would not be the most appropriate mechanism for safeguarding the interests of future generations. The focus is on making amends after the environment has already been damaged and some environmental damage may well be irreversible.[258] In such an event, no amount of reparations will be able to restore the environment to the standard that it was before the harmful act occurred.[259] Nevertheless, the Draft Articles do offer some form of a deterrent to environmental damage by way of legal consequences.[260] States will incur expenses of some form in having to remedy the environmental destruction that they caused.[261] This deterrence factor could indeed be the difference between a state deciding to impair the environment of another state or not. In this way, the environment could be preserved for future generations. Therefore, the Draft Articles on State Responsibility provide an avenue that could ensure the protection of the interests of future generations.

6 Conclusion

From the above, it can be concluded that, as of yet, there is no right to intergenerational equity in international law. Although it seems that a few treaties in the fields of international environmental law and human rights law have endorsed a right to intergenerational equity of some sort, the application of these conventions is constrained to specific regional areas. As for customary international law, the recognition of intergenerational equity in national constitutions, national legislation, and national court decisions remains too limited and inconsistent to establish a rule of custom. However, the large body of soft-law instruments addressing intergenerational equity and the increasing incorporation of the principle in domestic constitutions indicates a definite trend towards

255 Draft Articles on State Responsibility (n 232) Art 35.
256 United Nations (n 233) 96.
257 Draft Articles on State Responsibility (n 232) Arts 36-37.
258 Dugard et al (n 7) 592.
259 As above.
260 As above.
261 Draft Articles on State Responsibility (n 232) Art 28.

the recognition of a rule of custom. Intergenerational equity thus has the potential to develop into a rule of customary international law.

Until such a right becomes a reality, the environmental interests of future generations could be safeguarded by alternative institutions and mechanisms. A commissioner for future generations, the International Court of Justice, and the Articles on the Responsibility of States for Internationally Wrongful Acts are all capable of providing some sort of protection for future generations.