

**GIVING A VOICE TO FUTURE GENERATIONS:
INTERGENERATIONAL EQUITY, REPRESENTATIVES OF GENERATIONS TO COME,
AND THE CHALLENGE OF PLANETARY RIGHTS**

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Faced with unsustainable patterns of development and continuing environmental degradation, advocates for the interests of future generations argue that those interests ought to be recognised at international law. The idea of ‘intergenerational equity’ — of the human species holding the natural and cultural environment of the planet in common with all generations in trust, to be passed to future generations in at least comparable condition to that in which it was received — was given detailed expression by Edith Brown Weiss in 1989 yet it is not recognised as a binding principle of international law, and future generations do not enjoy legally enforceable rights. Despite this, in the lead-up to Rio+20, advocates urged that future generations should be given a voice, through ombudspersons and High Commissioners for Future Generations. These proposals were not embraced by member states, and the Secretary-General was asked instead to prepare a report considering the issue. His report, released in September 2013, contemplates a modest role for any representative of future generations. This article argues that the proposals which emerged at Rio+20 for more inquisitorial representatives, with powers of enforcement, are unlikely to be realised given the many challenges of recognising legal rights for future generations, and that any international representative of future generations will be limited to performing an educative, consultative and advocacy role.

I INTRODUCTION

In September 2013, the Secretary-General of the United Nations delivered a report on the need for promoting intergenerational solidarity for the achievement of sustainable development, taking into account the needs of the future.¹ The report was the culmination of a process that was revived at the 2012 United Nations Conference on Sustainable Development (‘Rio+20’),² in which advocates for future generations challenged the purported failure of the international community to respect the needs of future generations, highlighting continued environmental degradation and unsustainable patterns of

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¹ *Intergenerational Solidarity and the Needs of Future Generations - Report of the Secretary-General*, 68th sess, Agenda Item 19, UN Doc A/68/322 (15 August 2013) (‘*Report of the Secretary-General*’).

² United Nations, *Rio+20* <<http://www.uncsd2012.org/about.html>>.

development, and presented various institutional mechanisms by which intergenerational solidarity may be advanced.³

Humankind possesses the power to cause, and has already caused, great damage to the environment, including resource depletion, ecosystem degradation, pollution, and a continued decline in biodiversity.⁴ Human activity is placing increasing pressure on environmental conditions and is destabilizing environmental systems.⁵ Efforts to reduce humankind's environmental footprint are proving largely ineffective and the short-term thinking that characterises contemporary political decision-making has resulted in an ever-widening gap between necessary protection measures and action.⁶ International environmental law has struggled to respond effectively to contemporary environmental crises, including climate change.⁷ The failure of legal and political systems to assure the integrity of the planet has given rise to a growing concern about the legacy that present generations will leave to the future, prompting many to assert that current generations owe a duty to generations to come and must act, in furtherance of that duty, to ensure the continued enjoyment of the earth and its resources.⁸

While the idea of generations acting as stewards of the earth can be found in many traditions and cultures,⁹ contemporary expression was given to the concept of intertemporal trusteeship of the planet by Edith Brown Weiss in 1989.¹⁰ Her doctrine of intergenerational equity provides that each generation holds the planet on trust, obliged to pass it to all future generations in no worse condition than that which they enjoyed and to provide equal access to its cultural and natural resources.¹¹ This sharing of the earth's resources is achieved through a 'planetary trust', and the grant and imposition of 'planetary rights' and 'planetary obligations'.¹²

While many regard it as incontrovertible that humankind has a responsibility to take account of its actions for the future,¹³ this moral charge has found only limited recognition in law. The idea of taking into account the needs of future generations appears in national laws, constitutions and international instruments — including non-binding declarations, preambles of multilateral environmental agreements and, most notably, the operative

³ See, eg, Halina Ward, Foundation for Democracy and Sustainable Development and World Future Council, *Committing to the Future We Want: A High Commissioner for Future Generations at Rio+20 Discussion Paper* (March 2012) FSDS <<http://www.fdsd.org/reports/>>.

⁴ See United Nations Environment Program, *GEO-5: Global Environment Outlook* (United Nations Environment Program, 2012) 88.

⁵ *Ibid* 26.

⁶ Collins describes the privileging of short-term thinking in environmental decision-making as 'the ascendancy of the present', in which 'the concept of long-term often does not seem to go beyond the next election'. Lynda M Collins, 'Revisiting the Doctrine of Intergenerational Equity in Global Environmental Governance' (2007) 30 *Dalhousie Law Journal* 79, 96.

⁷ See, eg, Klaus Bosselmann, 'Losing the Forest for the Trees: Environmental Reductionism in the Law' (2010) 2 *Sustainability* 2424; Ludvig Beckman, 'Do Global Climate Change and the Interest of Future Generations Have Implications for Democracy?' (2008) 17(4) *Environmental Politics* 610.

⁸ See Collins, above n 6, 97; Lothar Gündling, 'Our Responsibility to Future Generations' [1990] *American Journal of International Law* 207, 212.

⁹ Collins, above n 6, 96.

¹⁰ Edith Brown Weiss, *In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity* (United Nations University, 1989).

¹¹ *Ibid* 21.

¹² *Ibid*.

¹³ See, eg, Wilfred Beckerman, 'The Impossibility of a Theory of Intergenerational Justice' in Joerg Chet Tremmel, *Handbook of Intergenerational Justice* (Edward Elgar Publishing, 2006) 53, 64.

provisions of the *United Nations Framework Convention on Climate Change*.¹⁴ While important, this indeterminate awareness of future generations' interests and incipient commitment to the objective of intertemporal justice does not reflect the intricate principle of intergenerational equity as conceived by Brown Weiss. No comprehensive international legal doctrine of intergenerational equity exists and no binding international instrument has sought to grant to future generations enforceable rights or impose enforceable intergenerational obligations.¹⁵

Although not enjoying legal rights at international law, there have been repeated calls for future generations to be given a voice, including through the establishment of offices to represent the future: to advocate, to intervene in policy-making, and to advise on environmental issues affecting future generations. Proposals for such representatives date back to the 1992 United Nations Conference on Environment and Development ('UNCED'),¹⁶ with more recent proposals being advanced in the lead up to Rio+20.¹⁷ Stakeholders lobbied for national level ombudspersons and an international 'High Commissioner for Future Generations'. Certain of the proposals were ambitious, contemplating an interventionist and enforcement role for the High Commissioner.¹⁸ Ultimately, they were not taken up by the Member States.¹⁹ The subsequent September 2013 report by the Secretary-General, examining intergenerational solidarity and the institutional mechanisms for achieving it, contemplates a modest role for any future generations' representative.²⁰

This article will begin by outlining Brown Weiss' concept of intergenerational equity, with its emphasis on planetary rights and obligations, before contending that intergenerational equity does not exist as a binding legal principle at international law and that future generations do not enjoy legal rights. It will then identify some of the ways in which the needs of future generations may be given expression, examining the recent calls at Rio+20 to establish a High Commissioner, with powers of monitoring and enforcement similar to those enjoyed by the human rights Charter-based and treaty-based bodies. The article will then argue that seeking to enforce purported rights of future generations is problematic, and that the translation of any current awareness of the interests of future generations into legally enforceable rights and obligations is complex and appears unlikely to be taken up by the world's states. This article will argue that, absent legal rights and obligations, a representative for future generations cannot hope to compel or constrain action but should assume an educative, consultative and advisory role — interposing the interests of future generations into decision-making and policy. Although less exacting than the missions proposed by several future generations' advocates at Rio+20, such a role should be embraced, in seeking to ensure that the interests of future generations are not undermined by contemporary wants and needs.

¹⁴ *United Nations Framework Convention on Climate Change*, opened for signature 9 May 1992, 1771 UNTS 107 (entered into force 21 March 1994) ('UNFCCC') art 3.

¹⁵ Collins, above n 6, 120.

¹⁶ See < <http://www.un.org/geninfo/bp/enviro.html>>.

¹⁷ These proposals are discussed in Part III(B) below.

¹⁸ See, eg, Ward above n 3.

¹⁹ Member States agreed, in the outcome document, *The Future We Want*, to 'consider the need for promoting intergenerational solidarity for the achievement of sustainable development, taking into account the needs of future generations, including by inviting the Secretary-General to present a report on this issue'. *The Future We Want*, GA Res 66/288, UN GAOR, 66th sess, Agenda Item 19, UN Doc A/RES/66/288 (11 September 2012, adopted 27 July 2012) para 86.

²⁰ *Report of the Secretary-General*, UN Doc A/68/322.

II THE DOCTRINE OF INTERGENERATIONAL EQUITY

A *The Legacy of Environmental Degradation*

Human kind has caused alarming damage to the environment. Forests are being destroyed, biodiversity is being lost, vast areas of the earth are polluted, and climate change is projected to have a devastating impact on the earth's systems.²¹ Yet the effects of many of these pressures will not be felt by current generations but by generations to come, with present generations possessing an unprecedented ability to influence negatively the lives of future generations through this damning environmental legacy.²² As Rachel Carson wrote in 1962, 'only within the moment of time represented by the present century has one species — man — acquired significant power to alter the nature of this world'.²³

Yet contemporary political institutions are constrained in their ability to respond effectively. Election cycles and the need to give pre-eminence to the voting present have created a 'democratic deficit',²⁴ with powerful incentives to privilege the needs of the present generation and to discount the anticipated impacts of current actions on the future. Awareness of the destructive power of present generations and the inadequacies of short-term thinking has given rise to calls, anchored in notions of equity and justice, for an increased intertemporal regard for future generations within international environmental law.

B *Intergenerational Equity: Earnest Planetary Trust*

The most detailed account of a theory of intergenerational responsibility in environmental matters is the doctrine of intergenerational equity proposed by Brown Weiss.²⁵ Her seminal work, *In Fairness to Future Generations*, represents an innovative effort to address global environmental concerns by transcending temporal boundaries and seeking to bring the future into contemporary decision-making.²⁶ Published in 1989, it was presented both as a conceptual framework²⁷ and a call to action.²⁸

²¹ See United Nations Environment Program, above n 4.

²² Tremmel notes that 'today's generation has the capacity to affect the future more than ever before in the history of mankind'. Joerg Chet Tremmel, 'Establishing Intergenerational Justice in National Constitutions' in Joerg Chet Tremmel, *Handbook of Intergenerational Justice* (Edward Elgar Publishing, 2006) 187, 187.

²³ Rachel Carson, *Silent Spring* (First Mariner Books, 2002) 5.

²⁴ Benedek Jávor, *Giving a Voice to Future Generations*, 1 <<http://www.vedegylet.hu/doc/rights.pdf>>.

²⁵ It is important to note that other models for recognising and accommodating the interests of future generations have been proposed. See discussion in Part III below. This article, however, focuses on the doctrine as outlined by Brown Weiss, with its particular focus on enforceable rights and obligations that are given form through an intergenerational trust.

²⁶ Brown Weiss, above n 10. Brown Weiss has written extensively on intergenerational equity. See, eg, Edith Brown Weiss, 'Climate Change, Intergenerational Equity, and International Law' (2008) 9 *Vermont Journal of Environmental Law* 615; Edith Brown Weiss, 'Our Rights and Obligations to Future Generations for the Environment' (1990) 84 *The American Journal of International Law* 198; Edith Brown Weiss, 'Implementing Intergenerational Equity' in Malgosia Fitzmaurice, David M Ong and Panos Merkouris (eds), *Research Handbook on International Environmental Law* (Edward Elgar Publishing Limited, 2010) 100.

²⁷ Richard Falk, Preface, in *In Fairness to Future Generations* by Brown Weiss, above n 10, xxiii.

²⁸ *Ibid* xxii.

Brown Weiss' theory of intergenerational equity is grounded in diverse cultural and legal traditions²⁹ and draws from many political theorists and philosophers.³⁰ It posits that each generation holds the planet and its natural and cultural resources on trust for future generations, with each generation a trustee of the earth for future generations and a beneficiary of the trust settled by previous generations. This dual role, as both trustee and beneficiary, imposes obligations on each generation — referred to as 'planetary obligations', and affords certain rights — known as 'planetary rights'.³¹ Each generation is subject to planetary obligations to conserve the diversity of the natural and cultural resource base, to maintain the planet's quality, and to provide equitable access to the legacy of the past and conserve future access.³² These planetary obligations are 'integrally linked' with the collective, planetary rights of future generations,³³ derived from their status as beneficiaries. These rights are conceived as intergenerational, group rights, held by one generation as a group in relation to all others — past, present and future.³⁴ Intergenerational equity provides that the natural environment and natural and cultural resources may be used by one generation but this common patrimony must be passed on to future generations in at least comparable condition to that in which it was received.³⁵

By invoking the concept of trusteeship of the earth's resources, Brown Weiss' theoretical framework of rights and obligations promises to humankind the opportunity to afford distributive justice to future generations.³⁶ It is a compelling entreaty for further action. However, while Brown Weiss acknowledged that the doctrine needed to be translated into positive law,³⁷ its formal acceptance has been limited and her elaborate concept has been little advanced as a binding principle at international law.

C *Status of Intergenerational Equity: Lacking Recognition at International Law*

Brown Weiss' theory of intergenerational equity has not enjoyed widespread support at international law. No binding international measure has sought to advance intertemporal legal rights and obligations, and the comprehensive doctrine of intergenerational equity is not currently a principle of customary international law.³⁸ While it is possible to identify a

²⁹ The idea of equity between generations and of stewardship of the earth's resources has its roots in the common and civil law traditions, Islamic law, African customary law, and Asian nontheistic traditions. See Brown Weiss, above n 10, 18.

³⁰ A consideration of the complex philosophical underpinnings for intergenerational equity is beyond the scope of this article. For an interesting discussion of Rawls' ideal observer theory, just savings principle and distributive justice, which are said to explain, in part, intergenerational concerns, see Alexander Gillespie, 'The Rights of Future Generations as a Justification for Environmental Protection' in Alexander Gillespie, *International Environmental Law, Policy and Ethics* (Oxford Scholarship Online, 2000) 114 and M Fitzmaurice, *Contemporary Issues in International Environmental Law* (Edward Elgar Publishing, 2009) 114. See also Jeffrey M Gaba, 'Environmental Ethics and Our Moral Relationship to Future Generations: Future Rights and Present Virtue' (1999) 24 *Columbia Journal of Environmental Law* 249.

³¹ Brown Weiss, above n 10, 21.

³² Referred to as the 'conservation of options', 'conservation of quality', and 'conservation of access'. See Brown Weiss, above n 10, 38.

³³ *Ibid* 45.

³⁴ *Ibid* 96.

³⁵ *Ibid* 97.

³⁶ Solum defines 'distributive justice' as being concerned with sharing the benefits and burdens of social co-operation, and argues that questions of distributive justice are more fundamental to intergenerational justice than corrective justice, presenting questions about the distribution of rights and obligations across generations. Lawrence B Solum, 'To Our Children's Children's Children: The Problems of Intergenerational Ethics' (2001) 35 *Loyola of Los Angeles Law Review* 163, 174.

³⁷ Brown Weiss, above n 10, 103.

³⁸ Collins, above n 6, 120.

concern for future generations in treaties, declarations, and decisions of the International Court of Justice, none embodies Brown Weiss' vision of intergenerational equity grounded in a planetary trust, and the extent of state practice and *opinio juris* is not yet at a level to constitute custom.³⁹

1 National Safeguarding of the Environment for Future Generations

At the national level, numerous legislative instruments seek to protect the environment for the benefit of present and future generations. A number of federal statutes in the United States, for example, make express reference to future generations,⁴⁰ and Australia's *Environment Protection and Biodiversity Conservation Act* also makes reference to the principle of intergenerational equity.⁴¹

A recognition of the needs of future generations has also been codified in various national constitutions, with a number either imposing obligations on states to protect the environment for present and future generations or extending constitutional rights to the environment so

³⁹ This article looks to the sources of international law as set out in the *ICJ Statute*, in particular international conventions and international custom. *Statute of the International Court of Justice* art 38. As to evidence of state practice and belief necessary to establish a customary law principle, see Jan Klabbbers, *International Law* (Cambridge University Press, 2013) 26-30; James Crawford, *Brownlie's Principles of Public International Law* (Oxford University Press, 2012) 24. The ICJ has stated that actions by States 'not only must amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of the rule of law requiring it. The need for such a belief, ie the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*. The States concerned must therefore feel that they are conforming to what amounts to a legal obligation'. *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands) (Judgment)* [1969] ICJ Rep 3, 44 ('*North Sea Continental Shelf Cases*').

⁴⁰ The most important, the 1969 *National Environment Policy Act*, casts the Federal Government as trustee of the environment for succeeding generations. *National Environmental Policy Act of 1969*, 42 U.S.C. § 4321 s 101(a)(1). See International Human Rights Clinic at Harvard Law School, *Models for Protecting the Environment for Future Generations* (October 2008) Human Rights @ Harvard Law, 40 <<http://www.law.harvard.edu/programs/hrp>> for further examples of domestic US statutes protecting future generations.

⁴¹ *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 3 defines 'ecologically sustainable development', which is one of the objectives of the Act, by reference to a number of principles, including the principle of intergenerational equity. Peel criticises the concept of ecologically sustainable development as a 'vague, contradictory concept', claiming that there are very few examples of its effective implementation. She contends that, although 'the development of the [ecologically sustainable development] concept in Australia seems impressive on the surface, there is little underlying substance when it comes to practical implementation'. Jacqueline Peel, 'Ecologically Sustainable Development: More than Mere Lip Service' (2008) 12 *Australasian Journal of Natural Resources Land Policy* 1, 2. The principle of intergenerational equity or references to future generations also appear in various state measures including the *Environment Protection Act 1970* (Vic) which provides in section 1D that 'the principle of intergenerational equity should ensure that the ... environment is maintained or enhanced for the benefit of future generations'; *Environment Protection Act 1986* (WA) s 4A; *Protection of the Environment Administration Act 1991* (NSW) s 6; *Nature Conservation Act 1992* (Qld) s 11; *Environment Protection Act 1993* (SA) s 10; *Nature Conservation Act 2002* (Tas) sch 2 item 2. See also, *National Environmental Management Act 1998* (South Africa) preamble. In New Zealand, the *Resource Management Act 1991* (NZ) s 3 provides that the purpose of the Act includes sustaining resources to meet the 'reasonably foreseeable needs of future generations'. It has been argued that courts in New Zealand have failed adequately to consider the needs of future generations and how best to provide for them in decision-making on environmental matters. Sacha Hollis, 'Old Solutions to New Problems: Providing for Intergenerational Equity in National Institutions' (2010) 14 *New Zealand Journal of Environmental Law* 25, 36.

as to safeguard future generations' interests.⁴² These references remain exceptional, however, and none represents an attempt to concretise the planetary trusts, rights and obligations embodied in Brown Weiss' vision of intergenerational equity.

There has also been exploration of intertemporal justice and intergenerational equity in decisions of national courts. The most celebrated is the decision of the Philippines Supreme Court in *Oposa v Factoran, JR*, in which the petitioners asserted, and the court accepted, that they represented both their own interests and those of future generations.⁴³ This decision is regarded by a number of commentators and scholars as significant, representing a 'future-oriented and progressive step to implement[ing] and enforc[ing] the principle of intergenerational equity and responsibility'.⁴⁴ Houck goes even further, describing the decision as one that changed the Philippines 'in ways from which there would be no return'.⁴⁵ Other commentators contend, however, that the significance of the case has been overstated.⁴⁶

⁴² See, eg, Bolivia's constitution which includes a right to a healthy environment safeguarding the rights of future generation. *Political Constitution of the State 2009* (Bolivia) art 9. Ecuador's constitution provides that 'the State shall exercise sovereignty over biodiversity, whose administration and management shall be conducted on the basis of responsibility between generations'. *Constitution of 2008* (Republic of Ecuador) art 400. Norway's constitution provides for a right to an environment that is conducive to health safeguarded for future generations. *Constitution of Norway 1814* (Norway) art 110(b). South Africa's constitution provides that 'everyone has the right to have the environment protected for the benefit of present and future generations'. *Constitution of the Republic of South Africa 1996* (South Africa) art 24. Kenya's constitution provides for the right to a 'clean and healthy environment ... protected for the benefit of present and future generations'. *The Constitution of Kenya 2010* (Kenya) art 42. The constitutions of Guyana (*Constitution of the Co-operative Republic of Guyana Act 1980* (Guyana) art 36); Papua New Guinea (*Constitution of the Independent State of Papua New Guinea 1975* (Papua New Guinea) art 4); Germany (*Basic Law for the Federal Republic of Germany 1949* (Germany) art 20a); and Vanuatu (*Constitution of the Republic of Vanuatu 1980* (Vanuatu) art 7) impose duties to conserve the environment including for future generations. See Tremmel, above n 22, 192 for a comprehensive list of constitutional provisions that refer to the environment and future generations.

⁴³ *Oposa v Factoran, JR* GR No 101083 July 30, 1993.

⁴⁴ Alfred Rest, 'Implementing the Principles of Intergenerational Equity and Responsibility' (1994) 24 *Environmental Policy and Law* 314, 314.

⁴⁵ While Houck concedes that, given a liberal view of standing in the Philippines, 'the admission of future generations as plaintiffs puts no additional bodies into the courtroom', he argues that 'the recognition of future generations as stakeholders ... challenges a host of assumptions concerning national wealth, the value of future generations, and whether sustainable development is a nice idea or a legal command'. Oliver A Houck, 'Light from the Trees: The Stories of Minors Oposa and the Russian Forest Cases' (2007) 19 *Georgetown International Environmental Law Review* 321, 341. See also, Ma Socorro Z Manguiat and Vicente Paolo B Yu III, 'Maximising the Value of Oposa v Factoran' (2003) 15 *Georgetown International Environmental Law Review* 487, 493.

⁴⁶ Gatmaytan argues that protection of the rights of future generations was 'already inscribed in Philippine law'; the court's decision did not bring about the desired change (ie the cancellation of Timber Licensing Agreements); the court's statement recognising standing to sue for future generations was obiter dictum; a liberal approach has always been adopted in Philippines case law to questions pertaining to standing; and intergenerational equity was 'ultimately useless in the resolution of the case' as the court would have decided the case 'exactly the same way had the children filed the case solely on their own behalf'. Dante B Gatmaytan, 'The Illusion of Intergenerational Equity: *Oposa v Factoran* as Pyrrhic Victory' (2003) 15 *Georgetown International Environmental Law Review* 457, 460. Lowe has characterised the assertion by the named plaintiffs that they 'represent their generations as well as generations yet unborn' as scarcely more than a rhetorical device. He argues that it was not the rights of a future generation that were being enforced, but that the duty of certain members of the present generation was being enforced by other members of the present generation. Vaughan Lowe 'Sustainable Development and Unsustainable Arguments' in A Boyle and D Freestone (eds) *International Law and Sustainable Development: Past Achievements and Future Challenges* (Oxford University Press, 1999) 19, 27.

There has also been a series of decisions of State courts and tribunals in Australia (including the NSW Land and Environment Court, and the Victorian Civil and Administrative Tribunal) concerning the principle of intergenerational equity as set out in legislation.⁴⁷ Courts in India, Kenya, Sri Lanka, and South Africa have mentioned or promoted intergenerational equity in their decisions.⁴⁸

2 International Regard for Future Generations

At the international level, there has been a more modest process of ‘creeping intergenerationalisation’ than that experienced at the national level.⁴⁹ An emerging regard for future generations can be found in treaties, declarations and decisions of the International Court of Justice.

(a) Non-binding Instruments and Treaty References

The international concern to afford justice to future generations in environmental matters emerged in the preparatory meetings to the United Nations Conference on the Human Environment (‘Stockholm Conference’), and the resulting *Stockholm Declaration* expressed the international community’s ‘solemn responsibility to protect and improve the environment for present and future generations’.⁵⁰ In the decades since the Stockholm Conference, a number of non-binding instruments have similarly articulated the need to maintain the natural resources of the earth for future generations.⁵¹

This same concern for future generations heavily influenced the 1992 UNCED and the adoption of the concept of sustainable development, with all three non-binding UNCED instruments making reference to future generations.⁵² The *Rio Declaration on Environment*

⁴⁷ See, eg, *Gray v The Minister for Planning* [2006] NSWLEC 720; *Walker v Minister for Planning* [2007] NSWLEC 741.

⁴⁸ The High Court of Kenya made explicit reference to ‘the important principle of intergenerational equity’ in a 2006 case concerning water pollution. The court stated that ‘the water table and the river courses affected are held in trust by the present generation for future generations’. *Waweru v Republic of Kenya* (2007) AHRLR 149 (KeHC 2006). See discussion in Rajendra Ramlogan, *Sustainable Development: Towards a Judicial Interpretation* (Martinus Nijhoff Publishers, 2011) 222.

⁴⁹ Catherine Redgwell, *Intergenerational Trusts and Environmental Protection* (Juris Publishing, 1999) 186.

⁵⁰ United Nations Conference on the Human Environment, Stockholm, Sweden, 5-16 June 1972, *Declaration*, UN Doc A/CONF.48/14/Rev.1 (16 June 1972) principle 1. There is an intergenerational element in the UN Charter, referring in the preamble to the determination of the peoples of the United Nations to save succeeding generations from the scourge of war. *Charter of the United Nations*, preamble. However, for the reasons identified in Part IV of this article, there are significant challenges to attempting to afford rights to future generations, and international human rights law is generally not regarded as extending rights to future generations.

⁵¹ See, eg, the 1982 *World Charter for Nature* which reaffirms that natural resources must be used in ways that ensure ‘the preservation of the species and ecosystems for the benefit of present and future generations’. *World Charter for Nature*, UN GAOR, 48th mtg, UN Doc A/RES/37/7 (28 October 1982) preamble. See also the *Earth Charter* which contains four ‘broad commitments’ including ‘Secure Earth’s bounty and beauty for present and future generations: (a) Recognize that the freedom of action of each generation is qualified by the needs of future generations; (b) Transmit to future generations values, traditions, and institutions that support the long-term flourishing of Earth’s human and ecological communities’. Earth Charter Commission, *Earth Charter* <<http://www.earthcharterinaction.org/content/pages/Read-the-Charter.html>>

⁵² See *Report of the United Nations Conference on Environment and Development*, UN Doc A/CONF.151/26/REV.1 (Vol. I) (12 August 1992) annex (‘*Rio Declaration on Environment and Development*’) principle 3; *Report of the United Nations Conference on Environment and Development*, UN Doc A/CONF.151/26/REV.1 (Vol. I), (12 August 1992) annex II (‘*Agenda 21*’) [8.7], [8.31], [33.3], [33.4], [38.5]; *Report of the United Nations Conference on Environment and Development*, UN Doc

and Development, which consists of principles designed to govern the environmental practices of states, provides that ‘the right to development must be fulfilled so as to equitably meet the developmental and environmental needs of present and future generations’.⁵³ While certain commentators contend that intergenerational equity forms one of the four ‘recurring elements’ of sustainable development,⁵⁴ the concept does not incorporate Brown Weiss’ ideal of planetary rights and obligations but a more general desire to preserve the environment for the benefit of future generations.

The most comprehensive commitment to future generations and intertemporal equity is found in the UNESCO *Declaration on the Responsibilities of the Present Generations Towards Future Generations*.⁵⁵ The Declaration places on present generations the responsibility for ensuring that the needs and interests of present and future generations are fully safeguarded.⁵⁶ While it incorporates a number of the key components of Brown Weiss’ intergenerational thinking, it eschews the grant of rights to future generations and instead focuses solely on present obligations.⁵⁷

Several environmental treaties, dating to 1946, recognise the need to protect the environment and safeguard it for future generations.⁵⁸ These have included treaties that seek to preserve particular natural resources and assets, such as endangered species,⁵⁹ water

A/CONF.151/26/REV.1 (Vol. I) (12 August 1992) annex III (*Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of all Types of Forests*) principle 2(b).

⁵³ *Rio Declaration on Environment and Development*, UN Doc A/CONF.151/26/REV.1, principle 3. This language draws from the Brundtland Commission’s definition of sustainable development: ‘development that meets the needs of the present without compromising the ability of future generations to meet their own needs’. World Commission on Environment and Development, *Our Common Future*, 42nd sess, UN Doc A/42/25 (1987) Part I [27].

⁵⁴ See, eg, Philippe Sands and Jacqueline Peel, *Principles of International Environmental Law* (Cambridge University Press, 2012), 207. The Secretary-General asserts that ‘fairness between generations is embedded in the concept of sustainable development’. *Report of the Secretary-General*, UN Doc A/68/322, [9].

⁵⁵ UNESCO, *Declaration on the Responsibilities of the Present Generations Towards Future Generations*, 29th sess (12 November 1997) <<http://www.unesco.org/cpp/uk/declarations/generations.pdf>> (*UNESCO Declaration*).

⁵⁶ *Ibid* art 1.

⁵⁷ Cf the draft *Bill of Rights for Future Generations* which preceded the adoption of the *UNESCO Declaration*. It was the result of a process begun in the 1990s by the Cousteau Society. Its opening article declared that ‘future generations have a right to an uncontaminated and undamaged earth’. Cousteau Society, ‘Rights for Future Generations’ <<http://www.cousteau.org/about-us/futuregen>>. See the discussion in Maja Göpel, ‘Intergenerational Environmental Justice: Tackling a Democratic Deficit with Ombudspersons for Future Generations’ (2011) 14 *Effectius Newsletter* 3 <<http://www.worldfuturecouncil.org/library.html>>. See also the *Goa Guidelines on Intergenerational Equity*, which articulate a number of strategies for implementing intergenerational rights and obligations, which ‘will become enforceable as they find expression in customary and conventional law’. *Goa Guidelines on Intergenerational Equity*, adopted by the Advisory Committee to the United Nations University Project on International Law, Common Patrimony and Intergenerational Equity, adopted in Goa, 15 February 1988, reprinted in Brown Weiss, above n 10, 293. The Goa Guidelines summarise and endorse the principles enunciated by Brown Weiss in *In Fairness to Future Generations* and were signed by the members of the Advisory Committee in their personal capacities. Collins concludes that ‘though worthy of mention, the Goa Guidelines have little significance regarding the legal status of intergenerational equity’. Collins, above n 6, 124.

⁵⁸ See, eg, *International Convention for the Regulation of Whaling*, opened for signature 2 December 1946, 161 UNTS 72 (entered into force 10 November 1948) preamble.

⁵⁹ *Convention on International Trade in Endangered Species of Wild Fauna and Flora*, opened for signature 3 March 1973, 993 UNTS 243 (entered into force 1 July 1975) preamble.

resources,⁶⁰ migratory species,⁶¹ and the earth's cultural and natural heritage⁶² for the benefit of present and future generations, and those that seek to address particular threats to human health and the environment.⁶³ Importantly, however, these references to future generations have tended to be confined to the preambles of the various conventions or are otherwise hortatory in nature.⁶⁴

The two binding instruments that were adopted at the UNCED in 1992 represent an advancement in recognising intertemporal environmental concerns. Rather than making only passing reference to future generations in preambular provisions, the *Convention on Biodiversity Diversity* and the *UNFCCC* both refer to future generations in the convention text.⁶⁵ The *UNFCCC* identifies five 'principles' that are intended to guide the states parties in their actions to achieve the Convention's objectives, with the first providing that parties should protect the climate system for the benefit of present and future generations on the

⁶⁰ *Convention on the Protection and Use of Transboundary Watercourses and International Lakes*, opened for signature 17 March 1992, 1936 UNTS 269 (entered into force 6 October 1996) art 2(5)(c). A *chapeau* precedes the principle in paragraph 5(c) that 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. It purports to limit the parties' responsibility to be guided by the principle to the measures that they are required to take under paragraphs 1 and 2 of article 2 of the Convention.

⁶¹ *Convention on the Conservation of Migratory Species of Wild Animals*, opened for signature 23 June 1979, 1651 UNTS 333 (entered into force 1 November 1983) preamble.

⁶² *Convention for the Protection of the World Cultural and Natural Heritage*, opened for signature 16 November 1972, 1037 UNTS 151 (entered into force 17 December 1975) art 4.

⁶³ See, eg, *Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management*, opened for signature 5 September 1997, 2153 UNTS 303 (entered into force 18 June 2001) ('*Joint Convention on Spent Fuel and Radioactive Waste*'). Article 4 requires that states take the appropriate steps to strive to avoid actions that impose reasonably predictable impacts on future generations greater than those permitted for the current generation and aim to avoid imposing undue burdens on future generations. See also, *Minamata Convention on Mercury*, opened for signature 10 October 2013, (not yet in force) preamble. The *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, opened for signature 28 June 1998, 2161 UNTS 441 (entered into force 30 October 2001) also provides, in its preamble, that every person has a duty to protect and improve the environment for future generations. A number of regional agreements make reference to future generations including the Organisation for African Unity, *African Convention on the Conservation of Nature and Natural Resources*, opened for signature 15 September 1968, CAB/LEG/24.1 (entered into force 16 June 1969) art IV, and ASEAN, *Jakarta Declaration on Environment and Development*, date of adoption 18 September 1997 art 5 <<http://www.aseansec.org/6085.htm>>. See *Report of the Secretary-General*, UN Doc A/68/322, [35] for a detailed list of international agreements and declarations that refer expressly to future generations.

⁶⁴ With limited exception including, for example, *Joint Convention on Spent Fuel and Radioactive Waste*. Gardiner explains that '[t]he preamble ... usually consists of a set of recitals. These recitals commonly include motivation, aims, and considerations which are stated as having played a part in drawing up the treaty. ... The recitals in the preamble are not the appropriate place for stating obligations, which are usually in operative articles of the treaty or in annexes. ... [T]he substantive provisions will usually have greater clarity and precision than the preamble; but where there is doubt over the meaning of a substantive provision, the preamble may justify a wider interpretation, or at least rejection of a restrictive one'. Richard K Gardiner, *Treaty Interpretation* (Oxford University Press, 2010) 186. The *Vienna Convention on the Law of Treaties* article 31 states '(1) A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. (2) The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes ...'. *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).

⁶⁵ The *Convention on Biological Diversity* requires parties to pursue strategies for the sustainable use of biodiversity, with 'sustainable use' defined to mean the use of biological diversity in a way that does not lead to its long term decline, 'thereby maintaining its potential to meet the needs and aspirations of present and future generations'. *Convention on Biodiversity Diversity*, opened for signature 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993) ('*Biodiversity Convention*') art 2 and 6. *UNFCCC* art 3.

basis of equity.⁶⁶ The inclusion of these ‘principles’ was, however, resisted by a number of developed nations, led by the United States.⁶⁷

The references to future generations both in the preambles to environmental conventions and the operative provisions of the *UNFCCC* and *Biodiversity Convention* demonstrate a recognition of the interests of future generations in environmental issues. However, they do not represent an attempt to implement, in legal terms, Brown Weiss’ comprehensive doctrine of intergenerational equity. To date, there exists no binding instrument at international law that commits states to protect the rights of future generations and, even those measures that express a desire to safeguard the environment for future generations and to contemplate their needs, do not stipulate what consequences (if any) flow from comprehension of those needs.

(b) Cognisance of Future Generations in International Case Law

The concept of intergenerational equity has been little advanced by the International Court of Justice and no legal dispute decided by the Court has been resolved by reference to the doctrine. However, the Court has made reference to environmental obligations owed to future generations. A small number of dissenting and concurring opinions refer to the principle of intergenerational equity, with Justice Weeramantry a notable advocate of future generations.

Justice Weeramantry’s first reference to the principle appears in his separate opinion in *Maritime Delimitation in the Area between Greenland and Jan Mayen*, in which he refers, in a footnote, to the use of equity as providing a basis for developing principles of intergenerational equity in international law.⁶⁸ In the 1995 *Nuclear Tests* case, two of the dissenting opinions refer to future generations, with Justice Weeramantry characterising intergenerational equity as ‘an important and rapidly developing principle of contemporary environmental law’.⁶⁹ In the later advisory opinion on the *Legality of the Threat or Use of*

⁶⁶ *UNFCCC* art 3.

⁶⁷ It is reported that during negotiations, these countries insisted that, if such a ‘principles’ article were to be included, it should focus specifically on climate change. Bodansky explains that the United States successfully pushed for a number of changes to article 3 in order to limit its legal implications. ‘First, a *chapeau* was added, specifying that the principles are to ‘guide’ the parties in their actions to achieve the objectives of the Convention and to implement its priorities. Second, the term ‘states’ was replaced by ‘parties’. Finally, the term ‘inter alia’ was added to the *chapeau* to indicate that parties may take into account principles other than those in article 3. These three modifications were intended to forestall arguments that the principles in article 3 are part of customary international law and bind states generally. Instead, the principles clearly apply only to the parties and only in relation to the Convention, not the general law’. Bodansky also notes that the United States attempted to remove all references to the term ‘principles’ and, when it failed to delete the term from the title to article 3, it added a footnote stating that ‘titles of articles are intended solely to assist the reader’, intending this to mean that the titles lacked legal significance. Daniel Bodansky, ‘The United Nations Framework Convention on Climate Change: A Commentary’ (1993) 18 *Yale Journal of International Law* 451, 501. See also, Philippe Sands, ‘International Law in the Field of Sustainable Development’ (1995) LXVI *British Year Book of International Law* 303, 337 n 140. Redgwell questions whether it is possible to ‘ring-fence’ article 3 in this way and argues that the Convention may be viewed as ‘beginning the process of defining the obligation of the present generation to absorb the costs of reducing the risk of global warming for future generations’. Redgwell, above n 49, 118.

⁶⁸ *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway) (Judgment)* [1993] ICJ Rep 38, 83 n 3.

⁶⁹ *Request for an Examination of the Situation in Accordance with Paragraph 64 of the Courts Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v France) Case (Judgment)* [1995] ICJ Rep 288, 341 (‘*Nuclear Tests Case*’). In his dissenting opinion, Judge Sir Geoffrey Palmer quotes from *In Fairness*

Nuclear Weapons the majority of the Court refers to the interests of future generations,⁷⁰ with Weeramantry again referring to the ‘principle of intergenerational equity’ in his dissenting opinion.⁷¹ Importantly, the Court did not go so far as to rely on the principle or to expressly recognise rights of future generations. In *Gabčíkovo-Nagymaros Project*, Weeramantry again spoke of the principle of intergenerational equity and of trusteeship of the earth’s resources in his separate opinion.⁷² The majority of the Court made passing reference only to future generations.⁷³

While advocates for future generations might find it encouraging to see the International Court of Justice acknowledge the interests of future generations, there has been no determination by the Court that future generations enjoy rights, except by Justice Weeramantry, in his separate or dissenting opinions. This sporadic regard for the needs of future generations falls considerably short of the demanding doctrine of intergenerational equity.

3 Indeterminate Awareness of Future Generations’ Interests

There currently exists no binding international legal obligation on states to secure environmental conditions for future generations on the basis of equity as contemplated by Brown Weiss. Nor do future generations enjoy self-executing and enforceable rights under international law. While there is some support for the doctrine of intergenerational equity in the International Court of Justice⁷⁴ and in soft law instruments, Brown Weiss’ doctrine — with its attendant planetary rights and obligations — has not been codified and does not represent customary international law.⁷⁵ There are a number of treaty references to future generations but these are expressed in very general terms, and evidence of custom — in terms of the national legislation and constitutions, judicial decisions, treaties and soft law instruments referred to above — do not appear to constitute sufficient state practice or *opinio juris*.⁷⁶ On one view, these references may support a claim that a nascent customary law principle of intergenerational equity is evolving. This does not, however, reflect the elaborate doctrine proposed by Brown Weiss but a more general regard for future generations and a recognition of their interests.⁷⁷

The references to future generations in municipal laws that are discussed above may be taken into account in determining the existence of custom.⁷⁸ However, the evidential value of these measures is arguably affected by the extent to which they are implemented and

to *Future Generations* and identifies the need to carefully analyse the consequences of mankind’s activities ‘unless we are to imperil those who come after us’: at 419.

⁷⁰ *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226, 244.

⁷¹ *Ibid* 233.

⁷² *Gabčíkovo-Nagymaros Project (Hungary v Slovakia) (Judgment)* [1997] ICJ Rep 7, 110.

⁷³ *Ibid* 78.

⁷⁴ With support from Justice Weeramantry, in particular. See above nn 68-72.

⁷⁵ Collins, above n 6, 120.

⁷⁶ See above n 39.

⁷⁷ To the extent that this regard for future generations in environmental matters is one of the elements of sustainable development, some have argued that it already forms part of customary international law. See especially, Justice Weeramantry in *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* (1997) ICJ Rep 7, 86. Cf Lowe, above n 46, 31.

⁷⁸ G M Danilenko, *Law-Making in the International Community* (Martinus Nijhoff Publishers, 1993) 84. *Fisheries Jurisdiction (United Kingdom v Norway)* [1951] ICJ 116.

enforced, rather than remaining ‘on paper’ and exhortative.⁷⁹ There is also evidence of intergenerational concern in a number of national constitutions, yet these remain the exception rather than the rule.⁸⁰ Those constitutional provisions that include references to future generations do not purport to grant rights to future generations or attempt to impose clear obligations owed to future generations. The majority refer to the protection of the environment for present and future generations and, in a number of cases, express this in terms of a right held by present generations.⁸¹ Nevertheless, some commentators look to these provisions as supporting the emergence of a customary law principle of environmental responsibility towards future generations⁸² while others argue that these references should be regarded as general political statements.⁸³

As discussed above, there are numerous international treaties which refer, principally in their preambles, to future generations.⁸⁴ While activities relating to the conclusion of treaties can be regarded as evidence of state practice,⁸⁵ these preambular references do not purport to impose on parties any binding obligations and ‘their character is hortatory in nature’.⁸⁶ The references to future generations that appear in operative provisions of multilateral environmental agreements — in particular, article 3 of the *UNFCCC* — are more compelling evidence of an emerging principle of customary international law.⁸⁷ However, the influence of article 3 of the *UNFCCC* is potentially limited by the efforts made by a number of developed countries to confine the operation of its ‘principles’ to the *UNFCCC*.⁸⁸ The protests of the United States and other nations may indicate that the consensus that is at the core of the development of principles of customary international law may be lacking.⁸⁹

It is necessary to consider whether these references to future generations at the national and international level evidence the stable and consistent participation necessary to establish

⁷⁹ A number of scholars contend that a law that exists on paper only and which is not enforced cannot constitute state practice. See, eg, Karol Wolfke, *Custom in Present International Law* (Martinus Nijhoff Publishers, 1993) 77.

⁸⁰ Collins, above n 6, 137. In addition, the number of states that have established institutional mechanisms to give voice to the interests of future generations (such as ombudspersons or commissioners) is arguably too few to justify any claim of general state practice. See Collins, above n 6, 138.

⁸¹ See above n 42.

⁸² Collins, above n 6, 137.

⁸³ Fitzmaurice, above n 30, 151.

⁸⁴ Further, there is a growing body of non-binding declarations and decisions of international institutions that make reference to the needs of future generations and of preserving the environment for future generations. There is support for the idea that these can constitute evidence of custom, to the extent that they provide indirect evidence of state attitudes. See Brian D Lepard, *Customary International Law: A New Theory with Practical Applications* (Cambridge University Press, 2010) 180.

⁸⁵ Ibid 31-3. *North Sea Continental Shelf Cases* [1969] ICJ Rep 3, 41.

⁸⁶ Fitzmaurice, above n 30, 128.

⁸⁷ It is accepted that a treaty principle can transform into custom. *North Sea Continental Shelf Cases* [1969] ICJ Rep 3, 41.

⁸⁸ See above n 67 and accompanying text.

⁸⁹ As Thirlway observes, ‘one State (or a small group of States) may make it clear from the outset that it or they do not consent to the growth of the customary rule; and in that event, a State in that position will or may be exempted from the application of the new rule. ... The recognition of this possibility emphasises the consensual nature of custom’. Hugh Thirlway, *The Sources of International Law* (Oxford University Press, 2014) 13. Further, the opposition of a sufficient number of states to a developing rule will prevent the rule from coming into existence: at 87. *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226, 255.

sufficient state practice.⁹⁰ The number of states that have adopted national measures is limited and the references to future generations and intergenerational concerns in treaties are inconsistent. Certainly, it is not yet possible to claim the participation of ‘all or almost all states who are going to be bound by the emerging customary normative prescription’,⁹¹ or that the principle has ‘generally been adopted in the practice of States’.⁹² State practice has not been constant and uniform.⁹³

In addition, while there is a growing catalogue of laws, declarations and treaties that use the term ‘future generations’, there is insufficient evidence that the authors of these measures held a belief that their practice was rendered obligatory by the existence of a rule of law requiring it.⁹⁴ As Lowe observed in relation to the concept of ‘sustainable development’, ‘there may be evidence of the frequent use of the term but that is by no means the same as evidence of a general practice accepting the concept as law’.⁹⁵

Perhaps the greatest obstacle to recognising a customary law principle of intergenerational equity is the lack of specificity in the alleged norm. The concept of intergenerational equity (or of a more general intergenerational regard in environmental matters) has received inconsistent treatment in laws and treaties and is inherently vague. This lack of consistency and its indeterminate character are arguably material impediments to elevating this broad concept to a binding legal principle.⁹⁶ What exactly is the content of the rule and what does it require or forbid? How is it to be applied in practice? What does it mean for a state to safeguard the environment for future generations?⁹⁷ Arguably, the concept of responsibility to future generations lacks ‘sufficient, identifiable, normative meaning’, rendering it incapable of giving rise to a norm of customary international law.⁹⁸ For these reasons, Lowe argues that, in normative terms, the principle of intergenerational equity is ‘a chimera’.⁹⁹ It is currently difficult to conclude that the regard for the interests of future generations that

⁹⁰ Danilenko, above n 78, 94. The *ICJ Statute* refers to ‘general practice accepted as law’. *Statute of the International Court of Justice* art 38.

⁹¹ Danilenko, above n 78, 94.

⁹² *Anglo-Norwegian Fisheries Case (United Kingdom v Norway)* [1951] ICJ Rep 116, 128. In the *North Sea Continental Shelf Cases*, the ICJ remarked that state practice must be ‘extensive’. *North Sea Continental Shelf Cases* [1969] ICJ Rep 3, 43.

⁹³ *Asylum Case (Colombia v Peru)* [1950] ICJ Rep 266, 276. *Rights of Passage Over India (Portugal v India)* [1960] ICJ Rep 6, 40.

⁹⁴ *North Sea Continental Shelf Cases* [1969] ICJ Rep 3, 44.

⁹⁵ Lowe, above n 46, 24.

⁹⁶ Peter Lawrence, ‘Justice for Future Generations: Environment Discourses, International Law and Climate Change’ in Brad Jessup and Kim Rubenstein (eds) *Environmental Discourses in Public and International Law* (Cambridge University Press, 2012) 32, 33.

⁹⁷ As Sands notes, ‘evidence of a broad acceptance of the principle [that the activities of present generations are limited by the obligation to take account and safeguard the developmental and environmental needs of future generations] does not however translate easily into prescriptions as to what the principle means in practice’. Philippe Sands, ‘Protecting Future Generations: Precedent and Practicalities’ in Emmanuel Agius, et al (eds), *Future Generations and International Law* (Earthscan Publications Ltd, 1998) 83, 86.

⁹⁸ Lowe, above n 46, 30. In the *North Sea Continental Shelf Cases*, the ICJ observed that ‘it would in the first place be necessary that the provision concerned should, at all events potentially, be of a fundamentally norm-creating character’. The court noted that the ‘very considered, and still unresolved controversies’ as to the exact meaning and scope of the equidistance principle denied it the necessary norm-creating character. *North Sea Continental Shelf Cases* [1969] ICJ Rep 3, 42.

⁹⁹ Lowe, above n 46, 29. See also, Warren who argues that ‘if it is a principle, then surely it is an ethical principle rather than a legal one. Although it has been incorporated in a number of international legal instruments ... references are aspirational and do not elaborate on how the principle is to be implemented or enforced’. Lynda M Warren, ‘Legislating for Tomorrow’s Problems Today – Dealing with Intergenerational Equity’ (2005) 7 *Environmental Law Review* 165, 168.

has been expressed at the national and international level can be viewed as possessing the necessary norm-creating character required to give rise to a principle of customary international law that is binding on states. While it may be argued that humankind should owe an obligation to the future, the nature of any such obligation remains undeveloped. Arguably, it may be characterised as a broad injunction to have regard to the interests of future generations when undertaking, or permitting others to undertake, activities that have an effect on the environment.¹⁰⁰

The view that the broad concept of intergenerational concern in environmental matters exists without the imprimatur of law may be contested by some commentators, who argue that there is evidence of the emergence of a principle of customary international law.¹⁰¹ It is clear, however, that international law has not moved beyond this general concern for future generations to recognising the detailed doctrine of intergenerational equity advanced by Brown Weiss.¹⁰² There is no legally binding international instrument that commits states specifically to the protection of future generations¹⁰³ and the references in laws and treaties do not demonstrate an endorsement of the generational rights perspective proposed by Brown Weiss or support the conclusion that future generations have been afforded justiciable rights under international law.¹⁰⁴ Regrettably, some 25 years after the publication of Brown Weiss' seminal work, the detailed doctrine of intergenerational equity remains an inchoate call to action — a 'cultural value'¹⁰⁵ — with international law having done little to promote the comprehensive doctrine of intergenerational justice as a binding principle.¹⁰⁶

III INSTITUTIONALISATION OF FUTURE GENERATIONS' INTERESTS

Although intergenerational equity does not enjoy the status of a binding legal principle at international law, and Brown Weiss' vision of planetary rights and obligations does not exist in enforceable terms, there have been repeated demands to give a voice to future generations. Commentators have proposed the use of trustees, guardians, ombudspersons, and commissioners to act as representatives for future generations.¹⁰⁷

Brown Weiss couched her doctrine of intergenerational equity in terms of a planetary trust. However, it is not clear, as a matter of law, that a trust form yet exists that can accommodate her notion of trusteeship — unlimited geographically or temporally. Given that the international community of states has shown little interest in proposals that seek to invoke

¹⁰⁰ Lowe, above n 46, 29.

¹⁰¹ See, eg, Collins, above n 6, 138. Collins however concedes that intergenerational equity will not meet its full potential without the development of a detailed legal framework, pointing to Brown Weiss' doctrine in *In Fairness to Future Generations* as an appropriate framework.

¹⁰² Collins, above n 6, 124.

¹⁰³ *Report of the Secretary-General*, UN Doc A/68/322, [36].

¹⁰⁴ P W Birnie and A E Boyle, *International Law and the Environment* (Oxford University Press, 2nd ed, 2002) 90.

¹⁰⁵ *Report of the Secretary-General*, UN Doc A/68/322, [4]. The Secretary-General writes that, 'few would question the responsibilities that the world owes to its children and grandchildren, at least in the moral sense *if not strictly in the law*': at [3] (emphasis added).

¹⁰⁶ Interestingly, Brown Weiss commented in 2010 that 'the international legal community has taken significant steps towards incorporating intergenerational equity into policies, laws and institutions at the international, national and local levels'. Edith Brown Weiss, 'Implementing Intergenerational Equity' in Malgosia Fitzmaurice, David M Ong and Panos Merkouris (eds) *Research Handbook on International Environmental Law* (Edward Elgar Publishing Limited, 2010) 100, 108. She goes on to acknowledge that more is required in order to put in place rights and obligations, and that the advances to which she refers are 'miniscule in relation to the challenges': at 108.

¹⁰⁷ See, eg, International Human Rights Clinic at Harvard Law School, above n 40.

the trustee-beneficiary relationship for future generations,¹⁰⁸ this article will focus on the recent calls for bespoke institutional mechanisms for giving a voice to future generations that featured at Rio+20.¹⁰⁹

A Guardians and Ombudspersons as Spokespersons for Future Generations

In *In Fairness to Future Generations*, Brown Weiss proposed that ‘ombudsmen for future generations’ ‘would be responsible for ensuring that the planetary obligations and rights are observed, for responding to complaints, and for alerting communities to threats to the conservation of our planetary heritage’.¹¹⁰ Brown Weiss urged that such ‘ombudsmen’ be appointed at the international, regional and national level and her idea is enjoying renewed support decades later.

1 Legal Custodian and Advocate for the Interests of Future Generations

Guardians seek to advocate for the best interests of those who are unable to represent themselves.¹¹¹ A guardian for future generations would extend this custodial relationship to those who, for reason of not yet having been born, are incapable of advancing their own interests. A guardian would give a voice to the otherwise silent future, advocating for their best interests, and exercising and enforcing any rights they might enjoy. Christopher Stone has long advocated for the role of the guardian in environmental matters, including the possibility of appointing guardians to secure an effective voice for the environment itself.¹¹²

While guardians advocate for the best interests of those unable to administer their own affairs, an ombudsperson is understood to occupy a more investigative and advisory role. Typically, an ombudsperson is an independent official that acts as a representative of public interests, scrutinising governmental administration and actions, performing an evaluative function, and seeking to ensure legality and fairness in public administration.¹¹³

Brown Weiss contemplated an expansive role for ombudspersons for future generations. She proposed that they would be responsible, at the national level, for ensuring the proper execution of agreements incorporating planetary obligations and rights, and, at the international level, for ‘monitor[ing] compliance with international agreements,

¹⁰⁸ Secretary-General Kofi Annan proposed in 1997 to reconstitute the UN Trusteeship Council ‘as the forum through which member states exercise their collective trusteeship for the integrity of the global environment and common areas, such as the oceans, atmosphere and outer space’. *Renewing the United Nations: A Program for Reform – Report of the Secretary-General*, 51st sess, Agenda Item 168, UN Doc A/51/950 (14 July 1997) [85]. Justice Weeramantry proposed that the International Court of Justice should act as the trustee of intergenerational rights, ‘in the sense that a domestic court is a trustee of the interests of an infant unable to speak for itself.’ *Nuclear Test Case* [1995] ICJ Rep 288, 341.

¹⁰⁹ For a detailed consideration of the use of intergenerational trusts for environmental protection, see Redgwell, above n 49.

¹¹⁰ Brown Weiss, above n 10, 124.

¹¹¹ *Black’s Law Dictionary* defines a guardian as ‘one who has the legal authority and duty to care for another’s person or property, esp. because of the other’s infancy, incapacity or disability’. Bryan A Garner (ed), *Black’s Law Dictionary* (West Publishing, 9th ed, 2009) 774.

¹¹² Christopher Stone, *Should Trees Have Standing: Towards Legal Rights for Natural Objects* (W Kaufmann, 1973) 18.

¹¹³ *Black’s Law Dictionary* defines an ombudsman as ‘an official appointed to receive, investigate, and report on private citizens’ complaints about the government [or] a similar appointee in a nongovernmental organisation’. Garner, above n 111, 1196. See discussion in International Human Rights Clinic at Harvard Law School, above n 40, 15; and Catherine Pearce, ‘Ombudspersons for Future Generations: A Proposal for Rio+20’ (2012) 6 *Perspectives* <<http://www.unep.org/civil-society/DocumentsandResources/Publications/NewPerspectives/tabid/101098/Default.aspx>>.

investigat[ing] alleged violations and publicis[ing] findings'.¹¹⁴ They would also be empowered to respond to citizen complaints and act as 'watchdogs' to alert communities to problems affecting future generations.¹¹⁵

2 Existing National Institutions

A number of institutions exist at the national level for protecting the interests of future generations. Each differs in terms of its structure and the powers enjoyed by the office, but they have tended to be advisory and consultative, playing a more modest role than Brown Weiss' proposed ombudspersons for future generations.

Israel established the first Commission for Future Generations in 2001. The Commission acted as a voice for future generations in policy-making, with broad advisory and investigative powers, reviewing legislation and advising on its effects on future generations.¹¹⁶ The Commission was disbanded in 2007.¹¹⁷

In 2008, Hungary established a Parliamentary Commissioner for Future Generations, with power to review and propose legislation, to investigate complaints, to advocate for future generations' needs and to perform an advisory function. The Commissioner enjoyed significant independence in advocating for the interests of future generations but the office was replaced in 2012 by the Office of the Commissioner for Fundamental Rights, with a Deputy Commissioner charged with protecting future generations' interests.¹¹⁸

Governmental agencies and organs with responsibility for sustainable development and for future generations' interests exist in a number of countries. These include Canada,¹¹⁹ France,¹²⁰ New Zealand,¹²¹ Finland,¹²² Germany¹²³ and Wales.¹²⁴

¹¹⁴ Brown Weiss, above n 10, 125.

¹¹⁵ Ibid 126.

¹¹⁶ For a detailed discussion of the Commission for Future Generations, see Shlomo Shaham and Nira Lamay, 'Commission for Future Generations in the Knesset: Lessons Learned' in Joerg Chet Tremmel, *Handbook of Intergenerational Justice* (Edward Elgar Publishing, 2006) 244.

¹¹⁷ *Report of the Secretary-General*, UN Doc A/68/322, [43].

¹¹⁸ Ibid [44]. See <<http://www.ajbh.hu/en/web/ajbh-en/about-the-office>>.

¹¹⁹ Commissioner for the Environment and Sustainable Development. See <http://www.oag-bvg.gc.ca/internet/English/cesd_fs_e_921.html>.

¹²⁰ Council for Future Generations (lapsed).

¹²¹ Parliamentary Commissioner for the Environment. See <<http://www.pce.parliament.nz/>>.

¹²² Committee for the Future. See <<http://web.eduskunta.fi/Resource.phx/parliament/committees/future.htx>>.

¹²³ Parliamentary Advisory Council on Sustainable Development. See <http://www.bundestag.de/htdocs_e/bundestag/committees/bodies/sustainability/>.

¹²⁴ Commissioner for Sustainable Futures. See <<http://www.cynnalcyrmru.com/commissioner>>. See also, *Well-Being of Future Generations (Wales) Bill*, introduced on 7 July 2014, that establishes a Future Generations Commissioner for Wales, to be an advocate for future generations and who will advise and support specified public authorities in carrying out their duties. <<http://www.assemblywales.org/bus-home/bus-business-fourth-assembly-laid-docs/pri-ld9831-e.pdf?langoption=3&ttl=PRI-LD9831%20-%20Well-being%20of%20Future%20Generations%20%28Wales%29%20Bill>>. For a description of the various national institutions, see *Report of the Secretary-General*, UN Doc A/68/322, [37]-[48]. The Report highlights a number of other institutions and initiatives at the national level including the May 2013 report of the Australian National Sustainability Council, entitled *Sustainable Australia Report 2013: Conversations with the Future*. The core functions of the Council, which was established as an independent, expert body to provide advice on sustainability issues, were subsequently absorbed by the Department of Environment in November 2013. <<http://www.environment.gov.au/resource/sustainable-australia-report-2013-conversations-future>>.

B *Renewed Calls for a Future Generations' Representative at Rio+20*

The idea of a guardian or ombudsperson to speak for future generations is appealing: It offers a way of irrupting future needs into contemporary policies and of countering the short-term thinking that threatens to stymie environmental protection efforts. It allows generations that do not yet exist to hold present generations accountable for their actions and it gives a voice to those yet unborn. While previous proposals to establish such offices have not been successful,¹²⁵ the idea re-emerged in the preparations for Rio+20 — the United Nation's Conference on Sustainable Development, held to mark the 20th anniversary of the 1992 UNCED and the 10th anniversary of the 2002 World Summit on Sustainable Development.¹²⁶ Several stakeholders once again advocated that the international community should establish institutional mechanisms for the representation of generations to come. Proposals were advanced for institutions, at both the national and international level, to safeguard the needs of future generations. They took much of their inspiration from Brown Weiss and from the institutions that exist in national legal systems, and combined elements from the roles of guardian and ombudsperson.

¹²⁵ See, eg, the 1992 proposal made by Malta to the UNCED that the *Rio Declaration on Environment and Development* recognise the responsibility of each generation to provide access in national and international fora to guardians for future generations. *Preparatory Committee for the United Nations Conference on Environment and Development, Working Group III, Principles on General Rights and Obligations*, 4th sess, A/CONF.151/PC/WG.III/L.8/Rev.1/Add.2 (21 February 1992). The proposal was not adopted and *Agenda 21* simply states that UNCED took note of but did not act upon other institutional initiatives, such as the appointment of a guardian for future generations. *Agenda 21*, UN Doc A/CONF.151/26/REV.1, [38.45]. The Experts Group on Environmental Law of the Brundtland Commission also recommended the appointment of an ombudsperson at the international level, charged with protecting the interests of future generations. World Commission on Environment and Development Experts Group on Environmental Law, *Environmental Protection and Sustainable Development: Legal Principles and Recommendations* (Graham & Trotman, 1986) 16. See discussion in Redgwell, above n 49, 86.

¹²⁶ United Nations, *Rio+20* <<http://www.uncsd2012.org/about.html>>.

1 Calls for a National Ombudsperson

The Major Group for Children and Youth,¹²⁷ with support from a number of civil society organisations¹²⁸ and Member States¹²⁹ called for the establishment of national ombudspersons for future generations. Described as ‘independent institutions, working from the heart of government’ and in all areas of policy-making, proponents suggested that ombudspersons should provide ‘an assessment of the long-term impacts of public policies and legislative proposals [and] respond to citizen petitions, investigating claims of environmental crimes and offences and engaging in either conciliation or litigation’.¹³⁰ More controversially, it was proposed that ombudspersons would hold governments accountable ‘if they do not deliver on sustainable development goals’.¹³¹

¹²⁷ Major Group for Children and Youth, *Contribution to the Outcome Document of Rio+20* (1 November 2011) Rio+20 UNCSD <www.uncsd2012.org/comp_mgs.html>.

¹²⁸ Including the Advisory Group on International Environmental Governance (The UNEP Major Groups and Stakeholders), Wildlaw UK, Interfaith Consortium, Earth Charter International, Women’s Major Group, World Future Council, Stakeholder Forum for a Sustainable Future, BOND Development and Environment Group, Environmental Pillar, Eurostep, United Nations Environment Program, and Workers and Trade Unions Major Group. See Advisory Group on International Environmental Governance (The UNEP Major Groups and Stakeholders), *Submission to the UNCSD Bureau as Input to the Zero Draft Outcome Document for the UN Conference on Sustainable Development* (31 October 2011) Rio+20 UNCSD <http://www.uncsd2012.org/comp_mgs.html>; Wildlaw UK, *Submission by Wild Law UK to the United Nations Conference on Sustainable Development* (27 October 2011) Rio+20 UNCSD <http://www.uncsd2012.org/comp_mgs.html>; Interfaith Consortium for Ecological Civilization, *Submission* (31 October 2011) Rio+20 UNCSD <http://www.uncsd2012.org/comp_mgs.html>; Earth Charter International, *Earth Charter International Recommendations for the Zero Draft of the UNCSD (Rio+20) Outcome Document* (1 November 2011) Rio+20 UNCSD <http://www.uncsd2012.org/comp_mgs.html>; Women’s Major Group, *Women’s Major Group Summary Input to “Zero Draft” Outcome Document UN Conference on Sustainable Development (Rio+20)* (1 November 2011) Rio+20 UNCSD <http://www.uncsd2012.org/comp_mgs.html>; World Future Council, *Contribution to Rio+20 Outcomes Theme II, Institutional Framework for Sustainable Development Ombudspersons for Future Generations: Tackling Sustainability Implementation Gaps* (1 November 2011) Rio+20 UNCSD <http://www.uncsd2012.org/comp_mgs.html>; Stakeholder Forum for a Sustainable Future, *Rio+20 Zero Draft Submission* (1 November 2011) Rio+20 UNCSD <http://www.uncsd2012.org/comp_mgs.html>; BOND Development and Environment Group, *UK NGOS’s Joint Rio+20 Narrative* (1 November 2011) Rio+20 UNCSD <http://www.uncsd2012.org/comp_mgs.html>; Environmental Pillar, *Rio+20: Taking Action for a Sustainable Future* (October 2011) Rio+20 UNCSD <http://www.uncsd2012.org/comp_mgs.html>; Eurostep, *Contribution to the Zero Draft of the Outcome Document for Rio 2012* (1 November 2011) Rio+20 UNCSD <http://www.uncsd2012.org/comp_mgs.html>; United Nations Environment Program, *Common Statement by the UN System Chief Executive Board for Coordination (CEB) on the Outcome of the United Nations Conference on Sustainable Development* (1 November 2011) Rio+20 UNCSD <http://www.uncsd2012.org/comp_mgs.html>; International Trade Unions Confederation, *Workers and Trade Unions’ Consolidated Contribution to the United Nations Conference on Sustainable Development* (27 October 2011) Rio+20 UNCSD <http://www.uncsd2012.org/comp_mgs.html>.

¹²⁹ In particular, support was provided by the EU negotiating group. See *HC 172 Outcomes of the UN Rio+20 Earth Summit, Written Evidence Submitted by Alliance for Future Generations to UK Parliament Commons Select Committee* (14 September 2012) <<http://www.publications.parliament.uk/pa/cm201213/cmselect/cmenvaud/writcv/172/m02.htm>> The proposal was also supported by the European Economic and Social Committee, *Opinion of the European Economic and Social Committee Rio+20: Towards the Green Economy and Better Governance* (21 September 2011) Rio+20 UNCSD <http://www.uncsd2012.org/comp_mgs.html>.

¹³⁰ Major Group for Children and Youth, above n 127, 4.

¹³¹ World Future Council, above n 128, 3.

2 Calls for a High Commissioner for Future Generations

A second proposal, for a High Commissioner for Future Generations located within the UN system,¹³² was advanced by the Alliance for Future Generations.¹³³ The proposal was supported by several stakeholders¹³⁴ and reportedly received support from a number of states.¹³⁵

The proposal, the detail of which was set out in several discussion papers,¹³⁶ contemplated an ambitious role for the High Commissioner, acting as a 'mechanism to safeguard long-termism and the needs of future generations at the global level'.¹³⁷ It was proposed that the High Commissioner would initially play an advisory and advocacy role, while developing

¹³² A number of options were proposed for the institutional location of the High Commissioner, which would be established through a General Assembly resolution: (i) as a subsidiary organ of the General Assembly; (ii) as an office of the Secretary-General; (iii) within the Economic and Social Council; or (iv) seated in the High-Level Political Forum. See Marcos Orellana, Catherine Pearce and Yulia Genin, Center for International Environmental Law and World Future Council, *The High Commissioner for Future Generations: The Future We Want* (4 June 2012) World Future Council, 5 <<http://www.worldfuturecouncil.org/library.html>>.

¹³³ The Alliance for Future Generations Rio+20 Working Group, *Rio+20: Open Challenge Paper* (28 October 2011) Rio+20 UNCSD <http://www.uncsd2012.org/comp_mgs.html>. The Alliance for Future Generations currently has 19 member organisations and a number of individual members. Member organisations include the World Future Council and the Foundation for Democracy and Sustainable Development. Alliance for Future Generations, *Our Members* <<http://www.allianceforfuturegenerations.org/our-members/>>.

¹³⁴ Including Major Group for Children and Youth, Advisory Group on International Environmental Governance (The UNEP Major Groups and Stakeholders), Civil Society Reflection Group on Global Development Perspectives, Wildlaw UK, Interfaith Consortium on Ecological Civilisation, Earth Charter International, Women's Major Group, World Future Council, European Youth Forum, Stakeholder Forum for a Sustainable Future, BOND Development and Environment Group, Environmental Pillar, Eurostep, and Workers and Trade Union Major Group. See Major Group for Children and Youth, above n 128; Advisory Group on International Environmental Governance (The UNEP Major Groups and Stakeholders), above n 128; United Nations-NGLS, *Summary Report: Civil Society Consultation on Select Elements of Sustainable Development Governance Conducted by the UN Non-Governmental Liaison Service (UN-NGLS) for the UN Secretary-General's High-Level Panel on Global Sustainability* (13 December 2011) <<http://www.un-ngls.org/gsp/docs/SD%20Governance%20Report%20for%20GSP%20-%20NGLS%2011-2011.pdf>>; Wildlaw UK, above n 128; Interfaith Consortium, above n 128; Earth Charter International, above n 128; Women's Major Group, above n 128; World Future Council, above n 128; European Youth Forum, *Contribution to Outcome Document* (28 October 2011) Rio+20 UNCSD <http://www.uncsd2012.org/comp_mgs.html>; BOND Development and Environment Group, above n 128; Environmental Pillar, above n 128; Eurostep, above n 128; Ward, above n 3; ITUC, above n 128.

¹³⁵ Including the EU negotiating group, with interest from Canada, Australia, Norway and Switzerland. See Stephen Leahy, *Activists Call for Creation of a High Commissioner for Future Generations at Rio+20* (4 June 2012) 2 <<http://www.ipsnews.net/2012/06/activists-call-for-creation-of-a-high-commissioner-for-future-generations-at-rio20/>>. There was also considerable activity to promote the idea of a representative for future generations in the months leading up to Rio+20, including during the Economic Commission for Europe Regional Preparatory Meeting for UNCSD in which calls for an ombudsperson were favoured by a number of delegates. See Economic Commission for Europe, *Report of the Regional Preparatory Meeting for the United Nations Conference on Sustainable Development*, UN ESCOR, Agenda Item 8, UN Doc E/ECE/RPM/2011/2/Add.1 (7 December 2011). See also, the *Declaration of the 64th Annual UN DPI/NGO Conference: Sustainable Societies; Responsive Citizens*, Bonn, Germany, 3-5 September 2011 <<http://www.uncsd2012.org/content/documents/634DPI.pdf>>, calling for the establishment of an ombudsperson at global, national and local levels.

¹³⁶ See, eg, the discussion paper prepared by Halina Ward for the Foundation for Democracy and Sustainable Development and World Future Council. Ward, above n 3. See also the paper prepared for the Center for International Environmental Law and World Future Council by Marcos Orellana, Catherine Pearce and Yulia Genin. Orellana, Pearce and Genin, above n 132.

¹³⁷ Alliance for Future Generations, above n 133.

the normative framework for his or her mission. In this capacity, the High Commissioner would engage in the following:

- International agenda setting and leadership, including advocating, engaging in dialogue, offering advice, and developing proposals for international legal frameworks for protecting future generations;
- Monitoring, early warning and review, including requesting UN agencies to report to the High Commissioner on how they are addressing future generations;
- Promoting public participation;
- Capacity building;
- Enhancing public understanding; and
- Reporting.¹³⁸

It was proposed that, even at this initial stage, the High Commissioner should receive representations, have the ability to investigate complaints, and have the power to request ‘reasoned and public responses from states and international institutions’.¹³⁹ The proponents stated that the responsibilities of the High Commissioner for Human Rights and the High Commissioner for Refugees offered ‘direct inspiration for the powers and responsibilities of a High Commissioner for Future Generations’.¹⁴⁰

Most importantly, however, certain proponents envisaged an important evolution in the function and powers of the High Commissioner, arguing that he or she should be charged with defining the rights and obligations to be enjoyed by future generations and imposed on states, initially through a ‘Peoples Charter’¹⁴¹ and, ultimately, a ‘Framework Convention on Responsibilities Towards Future Generations’.¹⁴² This would allow the High Commissioner to perform an expanded role ‘building on the example of the human rights treaty bodies’, including providing a ‘fully-fledged complaints function’, playing a role in interstate dispute resolution, developing Special Procedures, and imposing obligations on states to cooperate with the High Commissioner.¹⁴³

3 Zero Draft: Express Reference to a Representative, Albeit Deferred

The zero draft of the outcome document that was circulated for negotiation in the lead-up to Rio+20 went some way towards meeting the demands for a representative for future

¹³⁸ Ward, above n 3, 15.

¹³⁹ Ibid 18. See also, the submission of the Advisory Group on International Environmental Governance (The UNEP Major Groups and Stakeholders), which stated that a High Commissioner for Future Generations should have a ‘mechanism to respond to citizens’ petitions’. Advisory Group on International Environmental Governance (The UNEP Major Groups and Stakeholders), above n 128, para 6.

¹⁴⁰ Including the extensive supervisory functions of the High Commissioner for Refugees. Ward, above n 3, 9.

¹⁴¹ ‘The High Commissioner could initiate a process to develop a People’s Charter for Future Generations ... to set out the minimum safeguards that people ... can expect the UN ... to follow to ensure the realisation of the mission embodied in the High Commissioner for Future Generations. ... A People’s Charter for Future Generations would provide a normative basis for the High Commissioner to investigate representations from individuals and civil society.’ Ward, above n 3, 18.

¹⁴² Ward, above n 3, 19. This reflects, in part, the proposal made by Brown Weiss in *In Fairness to Future Generations* for a Declaration of Planetary Obligations and Rights as a ‘first step in formulating soft law’ which ‘could lead to the conclusion of formal agreements or even transformation into customary international law’. Brown Weiss, above n 10, 105.

¹⁴³ Ward, above n 3, 19. Special Procedures, with their thematic and country-specific mandates, are a feature of the UN Charter-based human rights system, not the treaty-based bodies. The inspiration for this element of the proposal appears to be the Human Rights Council. See Ward, above n 3, 9.

generations. It provided, in paragraph 57, that Member States would ‘agree to further consider the establishment of an ombudsperson, or High Commissioner for Future Generations, to promote sustainable development’.¹⁴⁴

The proposed text had two key shortcomings, however. Firstly, it did not call for the immediate establishment of such offices but only that they be furthered considered. This delay was resisted by a number of NGOs and stakeholders.¹⁴⁵ Secondly, concerns were expressed about the role of the office being framed in terms of the promotion of sustainable development. Stakeholders insisted that this was inappropriate and that the representatives should be charged with the promotion of future generations’ interests,¹⁴⁶ presumably fearing that such interests would be lost within the many controversies of the ‘notoriously vague’¹⁴⁷ concept of sustainable development.¹⁴⁸

4 Outcome Document: *The Future [Future Generations Don’t] Want?*

The Rio+20 outcome document, *The Future We Want*, did little to safeguard the interests of future generations. The zero draft’s proposed paragraph 57 did not appear in the final text. Instead there was a more subdued reference to the interests of future generations in paragraph 86, in which Member States agreed to ‘consider the need for promoting intergenerational solidarity for the achievement of sustainable development, taking into account the needs of future generations, including by inviting the Secretary-General to present a report on this issue’.¹⁴⁹ There was no mention of a representative for future generations.

Informal accounts suggest a number of reasons for the inability to secure agreement for an ombudsperson or High Commissioner for Future Generations. Reports suggested that the idea was struck from the document by the Brazilian government, who argued that ‘Cuba and Venezuela would never agree to it’.¹⁵⁰ Others suggested that ‘leaders of less industrialised

¹⁴⁴ *The Future We Want: Zero Draft* (10 January 2012) [57] Rio+20 UNCSD <<http://www.uncsd2012.org/futurewewant.html>>.

¹⁴⁵ NGOs and Major Groups were invited to suggest amendments to the proposed zero draft. Comments were submitted on paragraph 57. The Women’s Major Group, for example, suggested deleting ‘agree to further consider’ and inserting in its place: ‘We call for an ombudsperson for future generations’. Similar amendments were suggested by the Workers and Trade Unions Major Group, and the NGOs group. See Secretariat United Nations Conference on Sustainable Development, *Major Groups’ Comments on Section III Through V, The Future We Want* (Received by 29 February 2012) Rio+20 UNCSD, 31 <http://www.uncsd2012.org/resources_mgscomments.html>.

¹⁴⁶ *Ibid.* See also World Future Council, *The Mandate of a UN High Commissioner for Future Generations* (14 February 2012) Rio+20 UNCSD <<http://www.uncsd2012.org/index.php?page=view&nr=867&type=230&menu=38>>.

¹⁴⁷ Collins, above n 6, 132.

¹⁴⁸ As Horn notes, the implementation of sustainable development ‘has suffered for a lack of political will, financial resources and appropriate policies, methods and regulation’. Laura Horn, ‘Rio+20 United Nations Conference on Sustainable Development: Is This The Future We Want?’ (2013) 9.1 *Macquarie Journal of International and Comparative Environmental Law* 1, 26.

¹⁴⁹ *The Future We Want*, GA Res 66/288, UN GAOR, 66th sess, Agenda Item 19, UN Doc A/RES/66/288 (11 September 2012, adopted 27 July 2012) para 86.

¹⁵⁰ Tim Hall, ‘Future We (Don’t) Want’ on *The Verb* (22 June 2012) <<http://www.theverb.org/future-we-dont-want/>>. The World Future Council lamented the Brazilian ‘coup’ in which Brazil introduced a new text that removed any reference to intergenerational equity and to representatives of future generations (referring to text that was subsequently replaced by paragraph 86). World Future Council, ‘A Set Back in Rio: But a Seed is Planted’ on *Future Justice Blog Post* (22 June 2012) <<http://www.futurejustice.org/blog/blog/a-set-back-in-rio-but-a-seed-is-planted/>>.

nations opposed the proposal, saying it would disrupt their nations' development',¹⁵¹ with India expressing the concern that 'such a proposal may open a Pandora's box with similar demands for other thematic institutions'.¹⁵²

It is disappointing for advocates of future generations' interests that the attempts to secure those interests and to pursue justice through the appointment of representatives failed. However, it is perhaps not surprising that the proposals were defeated, given the very broad powers contemplated, particularly for the High Commissioner. For states concerned to avoid incursions on sovereignty, the references in the discussion papers to the High Commissioner for Human Rights and the High Commissioner for Refugees and the suggested individual complaints mechanisms and state reporting would likely have been particularly unpalatable. It is arguable that a more measured strategy, that spoke only of the consultative and advisory role of the representatives, and that omitted references to the more adversarial aspects of the representatives' missions, might have enjoyed greater support.¹⁵³

5 *The Secretary-General's Moderate Paragraph 86 Report*

On 13 September 2013, the Secretary-General presented the report contemplated by paragraph 86 of *The Future We Want* (the 'Report').¹⁵⁴ The Report outlines several options for advancing intergenerational solidarity, including appointing either a High Commissioner for Future Generations or a Special Envoy, agreeing an agenda item for the High-Level Political Forum, or introducing measures to ensure coordination.¹⁵⁵ The Report recommends these options for Member State consideration, potentially at the second meeting of the newly established High-Level Political Forum (replacing the Commission on Sustainable Development).¹⁵⁶ As outlined by the Secretary-General, a High Commissioner for Future Generations would advocate for intergenerational solidarity – 'highlighting the moral imperative of leaving behind a healthy world in which future generations will live out their lives',¹⁵⁷ undertake research and foster expertise, and offer advice to the UN, its specialised agencies and to states upon request.¹⁵⁸ The Report expressly provides that the

¹⁵¹ Hirohiko Nakamura and Tetsu Kobayashi, *Rio+20: Private Groups Step Up Call to be Heard Before Rio+20* (20 June 2012) <<http://ajw.asahi.com/article/special/rio20/AJ201206200101>>. It was claimed by one commentator that the G77 negotiating group was a 'hindrance' to the establishment of 'a global ombudsman'. Luke Kemp, 'Reviewing Rio: Lessons for the Future' on *The ANU Rio+20 Project* (5 August 2012) <<http://anurio20.blogspot.com.au/>>.

¹⁵² Mira Mehrishi, *Comments by Mira Mehrishi, Additional Secretary, Ministry of Environment, Government of India on the Zero Draft 'The Future We Want'* (25 January 2012) Rio+20 UNCS D <<http://www.uncsd2012.org/content/documents/649india.pdf>>.

¹⁵³ Since Rio+20 there have been further calls for representatives for future generations including at the Budapest Conference of Model Institutions for a Sustainable Future, April 2014, which resulted in the signing of the *Budapest Memorandum* <http://www.kas.de/wf/doc/kas_12857-1442-1-30.pdf?140507135328>.

¹⁵⁴ *Report of the Secretary-General*, UN Doc A/68/322. Prior to the publication of the report, the United Nations Division for Sustainable Development, Department of Economic and Social Affairs organised an Expert Panel on Intergenerational Solidarity on 9 May 2013 to provide an opportunity for stakeholders to exchange views on intergenerational solidarity and future generations, in order to inform continued consideration of the topic. See United Nations Sustainable Development Knowledge Platform 'Expert Panel on Intergenerational Solidarity' <<http://www.sustainabledevelopment.un.org>>.

¹⁵⁵ *Report of the Secretary-General*, UN Doc A/68/322, [62]-[67].

¹⁵⁶ *Ibid.* See United Nations Sustainable Development Knowledge Platform 'High-Level Political Forum' <<http://www.sustainabledevelopment.un.org>>. For an overview of the circumstances surrounding the replacement of the Commission on Sustainable Development with the High-Level Political Forum, and the alternative proposal for a Sustainable Development Council, see Horn, above n 148, 13-16.

¹⁵⁷ *Report of the Secretary-General*, UN Doc A/68/322, [56].

¹⁵⁸ *Ibid* [63].

office would not receive reports from states.¹⁵⁹ Importantly, the Report acknowledges the challenges of defining rights for future generations,¹⁶⁰ and its discussion of the possible role for a representative does not include those functions that would involve the enforcement of purported rights of future generations.

Although possibly politically acceptable and measured in its aspirations, such a representative for future generations bears few of the hallmarks of Brown Weiss' intergenerational equity: there is no role for planetary rights and, to the extent that future generations are given a voice, it is to plead for consideration of their interests. It is a muted voice, unable to compel action and incapable of holding states to account for behaviours that imperil future generations. Importantly, the General Assembly has further developed the format and functions of the High-Level Political Forum. Its mandate includes no mention of future generations,¹⁶¹ and, while early days, there is little sign of a commitment to giving voice to the interests of future generations through the High-Level Political Forum.¹⁶²

¹⁵⁹ Ibid. Described as a 'related option, but with a lighter institutional footprint', the 'Special Envoy' would be a global independent advocate for intergenerational equity; promote and facilitate the inclusion of best practices in policy-making; conduct public advocacy; and report annually to the General Assembly and on request to the High-Level Political Forum. *Report of the Secretary-General*, UN Doc A/68/322, [65]. This option has been criticised by representatives of the World Future Council as the 'role risks being too weak, and since the appointment would be made by the SG, it risks not being legitimately recognised by all MS – it could be marginalised'. Alice Vincent, 'Future Generations at the Decision-Making Table – The U.N. SG Report on Intergenerational Solidarity and Future Generations' (17 December 2013) Think Climate <<http://www.thinkclimate.org.uk>>.

¹⁶⁰ *Report of the Secretary-General*, UN Doc A/68/322, [19].

¹⁶¹ *Format and Organizational Aspects of the High-Level Political Forum on Sustainable Development*, GA Res 67/290, 67th sess, Agenda item 20(a), UN Doc A/RES/67/290 (23 August 2013, adopted 9 July 2013). The records of its inaugural meeting make passing reference only to future generations. The report of the High-Level Political Forum's inaugural meeting says only that 'leaders and other participants echoed that we have a responsibility to future generations'. *The Summary of the First Meeting of the High-Level Political Forum on Sustainable Development*, 68th sess, Agenda Item 19(1), UN Doc A/68/588 (13 November 2013) [15]. The closing statement by Dr John Ashe also contains an explicit reference to future generations: 'This afternoon's discussion illuminated the fact that we can help break out of poverty, achieve universal human development and entrust a healthy planet to future generations'. Dr John Ashe, *Closing Remarks at the Inaugural Meeting of the High Level Political Forum on Sustainable Development*, 24 September 2013 <<http://sustainabledevelopment.un.org/content/documents/3818PGA%20closing%20statement%20FINAL.pdf>>.

¹⁶² The Secretary-General's Report recommends that states may wish to invite the High-Level Political Forum to consider the possible institutional arrangements and mechanisms for promoting intergenerational solidarity at its second meeting in June 2014. *Report of the Secretary-General*, UN Doc A/68/322, [68]. The theme of the second meeting, which took place from 30 June 2014 to 9 July 2014, was expressed as '[a]chieving the Millennium Development Goals and charting the way for an ambitious post-2015 development agenda, including the Sustainable Development Goals'. The 'Integrated Programme' for the meeting did not include a session dedicated to considering the options outlined in the Secretary-General's Report for promoting intergenerational solidarity. Instead there was a moderated dialogue on 'Ideas and trends that can shape the lives of present and future generations', asking 'What critical new trends and ideas will affect future generations? How should they be reflected in the post-2015 development agenda?' and 'What are the new trends and emerging challenges on sustainable development the forum should address?' ECOSOC Bureau, *Integrated Programme*, 26 June 2014, 3 <<http://sustainabledevelopment.un.org/content/documents/Integrated%20Programme.pdf>>. A number of panellists and other participants expressed support for institutional arrangements for intergenerational solidarity. See <<http://www.un.org/News/Press/docs/2014/ecosoc6633.doc.htm>>. As at the date of publication, the High-Level Political Forum appears not to have formally considered the possible institutional arrangements and mechanisms for promoting intergenerational solidarity, as contemplated by the Secretary-General's Report. Further, future generations have featured only briefly in the discussions of the Sustainable Development Goals.

IV WHAT FUTURE FOR FUTURE GENERATIONS?

A *Concretising Future Generations' Rights*

Brown Weiss' doctrine of intergenerational equity is predicated on the enjoyment by future generations of purported planetary rights, integrally linked with planetary obligations. In advocating at Rio+20 for the development of the normative framework for the mission of the High Commissioner — including through an international treaty — proponents of future generations recognised that Brown Weiss' planetary rights and obligations must be crystallised in positive law. For so long as the international community is guided only by an inchoate or moral recognition of the interests of future generations and there are only a very small number of explicit references to future generations in binding international instruments, any representative of those generations will not be competent to perform many of the more adversarial functions contemplated by the Rio+20 proposals.

B *The Difficult Transition to Legal Rights and Obligations*

If future generations are to enjoy active representation at the international level, by representatives empowered to perform supervisory and complaints functions, it is necessary to translate the current, indeterminate regard for future generations into a binding normative framework. However, the challenges associated with such transformation are many. The following section identifies, at a high level, some of the most difficult issues that need to be confronted in converting this concern into legal rights. Arguably, these challenges are so great that such translation is unlikely to be realised, and a more modest set of aspirations in relation to the interests of future generations might be more appropriate.

1 *The Problem with Rights*

Brown Weiss' vision of intergenerational equity is located in a human rights framework. In extending human rights to the environment, to groups, and to generations across time, her model presents a number of intractable problems.

(a) Future Generations Do Not Exist and Cannot Enjoy Rights

On one view, affording rights to individuals who do not exist deforms the very idea of human rights, as without identifiable individuals there can be no rights.¹⁶³ While Brown Weiss counters this concern by characterising future generations' rights as collective or group rights,¹⁶⁴ it is still not clear how rights can be actualised without knowing who they

One of the key outcomes of Rio+20 was the establishment of an intergovernmental process to develop Sustainable Development Goals to build upon the Millennium Development Goals. There have been thirteen sessions of the Open Working Group (charged with presenting a proposal on the Sustainable Development Goals to the General Assembly at its 68th session in September 2014), and a 'Zero Draft', released on 2 June 2014, included express reference to future generations in proposed goal 16.4: 'By 2030 increase inclusive, participatory and representative decision-making at all levels, taking into consideration the interests of present and future generations'. However, this reference does not appear in the final report of the Open Working Group, released on 19 July 2014. Open Working Group on Sustainable Development Goals, *Outcome Document* (19 July 2014) <<http://sustainabledevelopment.un.org/focussdgs.html>>.

¹⁶³ See discussion by Christopher D Stone, 'Safeguarding Future Generations' in Emmanuel Agius, et al, *Future Generations and International Law* (Earthscan Publications Ltd, 1998) 65, 67.

¹⁶⁴ Brown Weiss, above n 10, 96.

are intended to protect.¹⁶⁵ Whether granted to individuals or groups, it is arguably counterintuitive to conceive of rights — that demand protection now and which give rise to corresponding current duties — being enjoyed by an entity or group that does not yet exist.¹⁶⁶ As Beckerman tersely notes, ‘unborn people cannot ‘have’ anything. They do not exist’.¹⁶⁷

A number of commentators have suggested that, given the difficulty of according rights to future generations, the focus of demands for intergenerational justice should shift to imposing legal obligations on present generations without correlative rights.¹⁶⁸ As highlighted above, this was the approach ultimately taken by the drafters of the UNESCO *Declaration on the Responsibilities of the Present Generations Towards Future Generations*, which came out of a process intended to draft a bill of rights for future generations.¹⁶⁹ Brown Weiss did not favour a duty paradigm in *In Fairness to Future Generations*, arguing that rights should be advanced given their greater normative force.¹⁷⁰ It seems likely that many advocates of future generations will similarly find it difficult to resist the ‘radical, transformative power’¹⁷¹ of rights when agitating for intergenerational justice.

(b) No Right to the Environment Exists for Present Generations

The extension of international human rights law to include a right to an environment of a certain quality is contested, with no such right yet appearing in a binding international

¹⁶⁵ In asserting that ‘there is no theoretical reason why legal systems cannot recognise future generations to have claims on the present that can be denominated rights’, Shelton argues that ‘legal systems recognise several types of legal persons that are societal fictions’, such as corporations, and affords them rights. While true, this says nothing of the unique intertemporal challenge of granting rights to future generations. Dinah L Shelton, ‘Intergenerational Equity’ in Rüdiger Wolfrum and Chie Kojima (eds) *Solidarity: A Structural Principle of International Law* (GWU Law School Public Law Research Paper No. 2013-53) 127 n 12 <<http://ssrn.com/abstract=2234144>>.

¹⁶⁶ See Supanich for a discussion of the asymmetry of power and influence among generations that do not overlap. Gary P Supanich, ‘The Legal Basis of Intergenerational Responsibility: An Alternative View – The Sense of Intergenerational Identity’ (1992) 3 *Yearbook of International Environmental Law* 94, 97.

¹⁶⁷ Beckerman, above n 13, 54. See also Lowe, above n 46, 27. There are scholars who contend that it is possible for future generations to be the holders of human rights. Partridge argues that ‘neither temporal remoteness, lack of direct claims, non-actuality, indeterminacy, nor non-reciprocity disqualify future persons from our moral community’ and that ‘we can be assured that the moral categories of rights and corresponding duties, which morally bind us to our contemporaries, can meaningfully be said to bind us to our successors as well’. Ernest Partridge, ‘On the Rights of Future Generations’ in D Scherer (ed) *Upstream Downstream: Issues In Environmental Ethics* (Temple University Press, 1990) 40. See also Joel Feinberg, who contends that to acknowledge the rights of animals and future generations ‘is the very least we can do for members of endangered species (including our own)’. Joel Feinberg, ‘The Rights of Animals and Unborn Generations’ in William T Blackstone (ed) *Philosophy and Environmental Crisis* (University of Georgia Press, 1974) 67. See also the discussion by Bell of human rights and future generations in the context of climate change. Derek Bell, ‘Does Anthropogenic Climate Change Violate Human Rights?’ (2011) 14(2) *Critical Review of International Social and Political Philosophy* 99, 104-10.

¹⁶⁸ See, eg, Collins, above n 6, 111; Beckerman, above n 13, 61. But see Supanich who argues that, instead of appealing to the legal rights of future generations to ground intergenerational equity, the legal basis of generational responsibility ‘lies in the moral-psychological harm to our self-image as members of a species whose situation on this planet is unique’ that results from a failure to act on behalf of the interests of future generations. Supanich, above n 166, 95.

¹⁶⁹ *UNESCO Declaration*, above n 55.

¹⁷⁰ Brown Weiss, above n 10, 45.

¹⁷¹ Conor Gearty, ‘Do Human Rights Help or Hinder Environmental Protection?’ (2010) 1 *Journal of Human Rights and the Environment* 7, 20.

instrument.¹⁷² While a number of national constitutions and regional agreements include a right to a clean environment¹⁷³ there is no human right to the environment at international law and purporting to extend a human right to the environment across time and to grant it to all future generations is extremely problematic.¹⁷⁴

2 *The Problem of Uncertainty*

Contemplating justice for those living in the future requires such extensive speculation and involves so much uncertainty that the very premise of intergenerational equity may be difficult to justify. A representative charged with protecting the interests of future generations would be required to speculate in the performance of almost every aspect of his or her mission.

(a) *What are the Preferences of Future Generations?*

Beyond assuming the continued relevance of basic physiological needs, it is doubtful whether there exists the necessary capacity to gauge the needs of future generations so as to give content to planetary rights or assure their protection.¹⁷⁵ It is impossible to claim any actual knowledge of what the future will demand of our descendants, including what they

¹⁷² See Malgosia Fitzmaurice, 'Environmental Degradation' in Daniel Moeckli, Sangeeta Shah and Sandesh Sivakumaran (eds), *International Human Rights Law* (Oxford University Press, 2010) 622, 624; Fitzmaurice, above n 30, 126.

¹⁷³ More than 90 national constitutions include explicit environmental rights. John H Knox, *Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, 22nd sess, Agenda Item 3, UN Doc A/HRC/22/43 (24 December 2012) [12]. See 'List of Constitutional Provisions Relating to Environmental Rights' in EarthJustice, *Environmental Rights Report 2008* appendix <<http://earthjustice.org/features/human-rights-and-the-environment>>. At the regional level, the first human rights instrument to contain an express guarantee of environmental quality was the *African Charter on Human and Peoples' Rights*. Organization of African Unity, *African Charter on Human and Peoples' Rights*, CAB/LEG/67/3 rev. 5, 21 ILM 58 (27 June 1981) art 24. The right of everyone to live in a healthy environment was later enshrined in the San Salvador Protocol. *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights* OASTS 69, 28 ILM 156 (entered into force 16 November 1999) art 11. Internationally, article 24 of the *Convention on the Rights of the Child* recognizes the right of the child to health, requiring that in taking steps to realize that right states shall take all appropriate measures to combat disease taking into account environmental pollution: a rather indirect recognition of the role of the environment in ensuring the right to health, rather than an explicit recognition of the right to a clean environment. *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 24.

¹⁷⁴ See discussion in Redgwell above n 49, 95-6. A number of commentators have argued that a right to a clean environment is capable of extension to future generations. See, eg, Symonides, who asserts that 'the right to the environment assumes solidarity with other human beings and mankind' and '[t]his solidarity extends to future generations'. Janusz Symonides, 'The Human Right to a Clean, Balanced and Protected Environment' (1992) 20 *International Journal of Legal Information* 24, 29. See also, Melissa Thorne, 'Establishing Environment as Human Right' (1991) 19(2) *Denver Journal of International Law and Policy* 301, 310. Depledge and Carlane acknowledge the complexities inherent in recognising collective rights for future generations but argue that 'the trans-boundary, inter-generational and cross-sectoral nature of climate change creates a strong case for developing a new category of right(s) that recognises that individual human beings are intricately tied to the health of the global commons'. Michael Depledge and Cinnamon Carlane, 'Sick of the Weather: Climate Change, Human Health and International Law' (2007) 9(4) *Environmental Law Review* 231, 239.

¹⁷⁵ Collins counters criticisms that a duty to future generations is impractical because we do not know what the future wants by claiming that this argument ignores the 'biological bottom line of being human' and that future generations will 'most likely still need to breathe air, drink water and eat'. Collins, above n 6, 111. For an interesting discussion of our ability to identify critical resources and predict physiological needs, see Kristian Skagen Ekeli, 'Green Constitutionalism: The Constitutional Protection of Future Generations' (2007) 20(3) *Ratio Juris* 378, 388. Cf Supanich, above n 166, 98.

will need to survive and flourish.¹⁷⁶ Any decisions about those needs become increasingly uncertain the further into the future any representative is required to look.¹⁷⁷ The degree of speculation required is neatly captured by Gillespie who points out that ‘one hundred years ago, it would have been impossible to predict that petroleum or plutonium would be so important to this generation. Accordingly, this generation has no idea of what the essentials of the future will be’.¹⁷⁸

(b) How are Differences in Future Generations’ Interests Accommodated?

Even if it were possible to discern the preferences of future generations, all generations across time do not form an undivided whole, and each generation is not itself homogenous. It is inevitable that conflicts will exist both within generations and between generations.¹⁷⁹ How are these to be resolved within a legal framework of binding rights and obligations?

Arguably, any attempt to ascertain future generations’ interests and to resolve these conflicts is misguided. It is contended by some commentators that attempting to do so is a form of ‘intertemporal imperialism’,¹⁸⁰ with the vagueness of intergenerational equity being used ‘to import present values and impose them on the future’, ‘restrict[ing] the liberty of future generations by binding them to this concept’.¹⁸¹

(c) How Many Generations Should be Considered?

While Brown Weiss contends that intergenerational rights should belong to *all* generations,¹⁸² it is inconceivable that the same environmental conditions and natural resources can be guaranteed to all future generations without distinction and limit, particularly as populations continue to grow.¹⁸³ Given the contemporary ‘pro-growth’ and development paradigm, it might simply be unrealistic to expect current generations to make

¹⁷⁶ See Ekeli, above n 175, 387.

¹⁷⁷ Golding contends that it is possible only to know the wants of future generations when they are closer to the present generations in time. He argues that the present generation should therefore confine its attention to helping immediate posterity. M P Golding, ‘Obligations to Future Generations’ (1972) 56 *Monist* 85, 97-8.

¹⁷⁸ Gillespie, above n 30, 120. Redgwell, however, argues that simply because decision-making with respect to remote future generations cannot be as precise or effective as decision-making that affects the next generation, this does not mean that no attempt should be made. Redgwell, above n 49, 97.

¹⁷⁹ In considering the potential for conflicts between generations, Stone wonders ‘how many scenarios we can identify, with an appreciable degree of confidence, which potentially pit one future generation against another, more remote future generation’. Stone, above n 163, 68.

¹⁸⁰ This term is used by Collins in describing the arguments of other commentators. Collins, above n 6, 112.

¹⁸¹ Graham Mayeda, ‘Where Should Johannesburg Take Us? Ethical and Legal Approaches to Sustainable Development in the Context of International Environmental Law’ (2004) 15(1) *Colorado Journal of International Environmental Law and Policy* 29, 61. Mayeda condemns the ‘essentialist’ position of intergenerational equity, arguing that it ‘ignores the fact that both individuals and states are located within a historically emergent context that has given rise to very unique relationships between particular states, and between individuals in those states’: at 54.

¹⁸² Brown Weiss, above n 10, 97.

¹⁸³ As Kiss and Shelton question, how can the ‘same amount of space, wilderness, clean water, and biological diversity ... be guaranteed to endless generations if they themselves consist of increasingly large numbers of individuals?’ Alexandre Charles Kiss and Dinah Shelton, *International Environmental Law* (Transnational Publishers, 2004) 256. Gillespie notes that an obligation to distant future generations could result in the ‘near seizure of modern society due to the possibly limitless number of future generations and their needs’. Gillespie, above n 30, 121. He argues that realism may suggest that any one generation cannot attempt to share the resources the present generation possesses with the whole of posterity, and that the best that can be hoped for is to make some savings: at 122.

sacrifices in order to preserve the environment and its resources for all posterity.¹⁸⁴ This would seem to suggest that intergenerational equity should be recast so as to limit duties to successive generations only, relying on personal and temporal proximity.¹⁸⁵ Such an approach, however, would be unlikely to promote the material changes needed to address issues such as climate change, the effects of which will be felt for generations to come.¹⁸⁶

(d) What is the Extent of Sacrifice Required of Present Generations?

In affording rights to future generations it is necessary to decide exactly how much of current interests should be sacrificed for the benefit of the future. Such decisions should presumably not be informed by the ‘preservationist model’, which dictates that the present generation does not consume anything but saves all resources for future generations, or the ‘opulent model’, which allows the present generation to consume all that it wants and generate as much wealth as it can.¹⁸⁷ However, there is no consensus about where, between these two extreme positions, the duty to future generations should be fixed.¹⁸⁸ Brown Weiss favours an ‘equality model’ that ‘requires that each generation pass the planet on in no worse condition than it received it and provide equitable access to its resources and benefits’.¹⁸⁹ Arguably, this provides only limited guidance in determining, as a practical matter, what each generation must forgo and assists little in directing how a duty to future generations would be applied in practice, so as to inform contemporary decision-making.¹⁹⁰

Affording enforceable rights to future generations would also require speculation about the likely impacts of today’s actions on future generations and about the future state of the environment.¹⁹¹ To what extent will future generations be better equipped than present generations to respond to environmental problems? How can decision-makers be certain that the choices they make today do not turn out to be irrelevant or ill-conceived?¹⁹²

¹⁸⁴ As Passmore colourfully writes, ‘anything we can do would, over millions of years, be infinitesimal in its effects; not even by reducing our consumption of petrol to a thimbleful apiece could we ensure the availability of a similar quantity to our distant descendants’. John Arthur Passmore, *Man’s Responsibility for Nature: Ecological Problems and Western Traditions* (Duckworth, 1974), 78.

¹⁸⁵ See Gillespie, above n 30, 122.

¹⁸⁶ Ibid.

¹⁸⁷ Brown Weiss, above n 10, 22.

¹⁸⁸ The Secretary-General’s Report offers a narrow conception of the needs of future generations, arguing that ‘rather than seeking to identify and promote what might be the good life for future generations, the focus for policy from a future generations perspective should be guided by avoiding and minimizing harm. Practically, this would mean avoiding irreversible impacts on the ecosystems that provide the basis for human life – today, as well as in the future’. *Report of the Secretary-General*, UN Doc A/68/322, [25].

¹⁸⁹ Brown Weiss, above n 10, 24.

¹⁹⁰ Brown Weiss does set out a number of strategies for implementing the obligations she regards as owed to future generations including sustainable use of resources; maintenance of facilities and services; monitoring of natural and cultural resource diversity and environmental quality; impact assessments; scientific research and technological development; and global learning and education, Brown Weiss, above n 10, 119-20.

¹⁹¹ ‘Parfit’s Paradox’ goes further, positing that present policies will not just affect the wellbeing of generations in positive and negative ways, but they will also determine which persons are born. Derek Parfit, *Reasons and Persons* (Oxford University Press, 1984). For an interesting discussion see Per Ariansen, ‘Beyond Parfit’s Paradox’ in Emmanuel Agius, et al, *Future Generations and International Law* (Earthscan Publications Ltd, 1998) 13.

¹⁹² Ajai Malhotra, ‘A Commentary on the Status of Future Generations as a Subject of International Law’ in Emmanuel Agius, et al, *Future Generations and International Law* (Earthscan Publications Ltd, 1998) 39, 49.

3 *The Problem of Conflicting Imperatives*

Not only is it impossibly demanding to discern and protect the needs of all future generations because of what is unknown (and unknowable), but the potential for conflicts between imperatives makes the grant of enforceable rights to future generations highly problematic.

(a) *Silencing the Present Poor: Intragenerational Concerns*

It is arguably misguided and even unjust to voice deep concern and to require sacrifices for future generations when so many of the present generation live in poverty.¹⁹³ As the Rio+20 outcome document states: ‘Poverty eradication is the greatest global challenge facing the world today’.¹⁹⁴ The failure to achieve equity within the current generation must be, for many, an overriding concern, with the actual needs of ‘strangers in space’ taking precedence over the anticipated needs of ‘strangers in time’.¹⁹⁵ While Brown Weiss’ doctrine of intergenerational equity includes an intragenerational element, it is relatively under-theorised¹⁹⁶ and positioning it as a component of intergenerational equity conceals the risk of conflict between generations.¹⁹⁷ Most significantly, it risks treating present generations as an instrument for securing the well-being of future generations.¹⁹⁸

(b) *Silencing the Environment: The Anthropocentrism of Intergenerational Equity*

Intergenerational equity is resolutely anthropocentric and has been criticised for its ‘species chauvinism’.¹⁹⁹ It positions the environment in instrumental terms, to be preserved and maintained for its enjoyment by present and future humans. Arguably, when considering justice in environmental issues, such an anthropocentric approach — that disavows justice for the non-human natural world and disregards the inherent value of nature — cannot be sustained.²⁰⁰ This has led Shelton to suggest that a third dimension of solidarity needs to be considered, in addition to intergenerational and intragenerational equity: ‘the solidarity of humans with others species, ecosystems and nature as a whole’.²⁰¹

¹⁹³ Ibid 47.

¹⁹⁴ *The Future We Want*, UN Doc A/RES/66/288, para 2.

¹⁹⁵ Christopher Stone asks ‘how do we balance the claims of strangers in space with those of strangers in time?’ Stone, above n 163, 76. Gündling argues that ‘the most difficult challenge to all efforts to define and achieve “intergenerational equity” will turn out to be that we have failed to achieve equity within our own generation’ and that ‘the inequities of the present imply that we simply cannot solve the problems of the future simply by postulating a global collective sacrifice’. Lothar Gündling, ‘Our Responsibility to Future Generations’ (1990) 84 *The American Journal of International Law* 207, 211.

¹⁹⁶ Redgwell notes that there are only seven express references to intragenerational equity in *In Fairness to Future Generations*. Redgwell, above n 49, 109 n 208.

¹⁹⁷ Sands and Peel regard intragenerational equity as forming one of the four recurring elements of sustainable development, together with intergenerational equity, the principle of sustainable use, and the principle of integration. Sands and Peel, above n 54.

¹⁹⁸ See discussion in Collins, above n 6, 115.

¹⁹⁹ Antony D’Amato, ‘Do We Owe a Duty to Future Generations to Preserve the Global Environment?’ (1990) 84 *American Journal of International Law* 190, 196. D’Amato characterises the theory of ‘fairness to future generations’ as an impoverished account of our sense of moral obligation, being too dependent on finding a link to the improvement of the human condition.

²⁰⁰ Redgwell, however, asks whether there may be potential for intergenerational equity to circumvent the ‘theoretical minefield of recognition of rights or interests for animals, plants, species and ecosystems by linking the exploitation of nature with the interests of future generations’. Redgwell, above n 49, 98.

²⁰¹ Shelton, above n 165, 128.

(c) *Conflict with Other Goals*

It is also necessary to consider how a right to the environment enjoyed by future generations could be reconciled with countervailing cultural, economic and developmental concerns, as well as other fundamental human rights. What is the relative value of each and how are they to be balanced so as to assure justice to present and future generations? While there is a balancing required in assuring protection of current human rights and courts have developed tools to manage competing rights and to balance individuals' rights with the public interest,²⁰² the intertemporal nature of intergenerational equity presents a further dimension of likely conflict. A strategy for protecting purported rights of future generations may struggle to design effective mechanisms for taking into account these competing dimensions.

4 *The Problem of Reality*

Bosselmann has written of the 'huge and ever-widening gap between the promise of environmental protection and ecological realities'.²⁰³ He concludes that, when measured 'by their own intentions and purpose descriptions', 'environmental policies and laws ... have not achieved much at all'.²⁰⁴ The international community seems incapable of reaching consensus on how best to tackle critical environmental problems, such as climate change,²⁰⁵ and material impediments arguably exist to individuals making the sacrifices needed to react effectively to the parlous state of the environment.²⁰⁶ It is important to acknowledge that a theory of intergenerational rights and obligations may simply be counter-intuitive and politically unrealistic.

(a) *Making Sacrifices for the Future Does Not Reflect Human Nature*

It is likely that many within present generations, at least in capitalist or Western societies with advanced economies, will be reluctant to sacrifice their current living standards in the name of indistinct future generations and expectations that current generations will be willing to forgo their own needs or desires are increasingly misplaced the more remote the generation.²⁰⁷ One commentator has dismissed the notion as 'sheer hypocrisy', insisting that 'human nature will always prevent us from being completely impartial, cosmopolitan beings who rank the interests of distant people or generations equally with those near and dear to

²⁰² Of particular note is the concept of the margin of appreciation, derived from the practice of the European Court of Human Rights. See for eg *Hatton v United Kingdom* [2003] VIII Eur Court HR 189, 217 in which the Court explained that 'regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and ... the State enjoys a certain margin of appreciation in determining the steps to be taken to ensure compliance with the Convention'. See discussion in Malgosia Fitzmaurice and Jill Marshall 'The Human Right to a Clean Environment- Phantom or Reality? The European Court of Human Rights and English Court Perspective on Balancing Rights in Environmental Cases' (2007) 76 *Nordic Journal of International Law* 103.

²⁰³ Bosselmann, above n 7.

²⁰⁴ *Ibid.*

²⁰⁵ See, eg, Beckman, above n 7.

²⁰⁶ In his study of public attitudes to climate change and how to influence those attitudes, Patchen notes that 'a great many people seem to be little concerned about climate change and little inclined to take personal actions, or to support policies that can counter such change'. Martin Patchen, *Public Attitudes and Behaviour about Climate Change: What Shapes Them and How to Influence Them* (Purdue University Outreach Publication, 2006) 1.

²⁰⁷ Collins writes that 'Western culture is arguably too busy enjoying its opulence to worry about the future. There is convincing evidence that American culture has adopted a largely present-oriented and individualistic perspective'. Collins, above n 6, 97. See also, Supanich, above n 166, 102.

us'.²⁰⁸ Without the potential for reciprocity between generations, it is questionable whether present generations will ever have the requisite motivation to safeguard the interests of future generations.²⁰⁹ Arguably, it is simply inconsistent with human nature to demand that sacrifices be made for distant generations.²¹⁰

(b) Expecting Sacrifices for the Future Does Not Reflect Political Realities

Intergenerational equity arguably ignores political reality and presupposes a political will that simply does not exist — as evidenced by the unsuccessful efforts that have been made at international levels to embed intergenerational equity into contemporary decision-making. It may be unrealistic to expect that governments, 'increasingly distracted by 24/7 media pressures, election timetables and the "urgency of now"'²¹¹ will permit the seizure of current interests for unknown future generations.²¹² Further, the political will needed to realise the vision of intergenerational equity at international law likely does not exist, given the challenge it presents to fundamental international law principles, such as sovereignty²¹³ and international personality.²¹⁴ A proposal for rights for future generations may be politically unmanageable in the current legal and political order.

C Tempering Brown Weiss' Vision: Embracing an Advisory Representative

The doctrine of intergenerational equity poses material challenges for international law, and the translation of Brown Weiss' planetary rights and obligations into legally enforceable norms appears unlikely. It is difficult to foresee how the international community might transition from having regard to the interests of the future, and recognising a general responsibility to future generations, to giving legal expression to a relationship between

²⁰⁸ Beckerman, above n 13, 64.

²⁰⁹ Page writes that 'if reciprocity determines the scope of justice, as writers such as Rawls and Gauthier believe, there seems to be no room for future persons having claims to resources from their ancestors — they get what they inherit, and should count themselves lucky to get it'. Edward A Page, *Climate Change, Justice and Future Generations* (Edward Elgar Publishing, 2006) 105.

²¹⁰ As Gillespie notes, 'the demands of the present more often than not cloud over any intentions of the long-term future'. Gillespie, above no 30, 122. Cf Feinberg, who assumes that 'it is psychologically possible for us to care about our remote descendants, that many of us do in fact care, and indeed that we ought to care'. Feinberg, above n 167, 67.

²¹¹ Oxford Martin Commission for Future Generations, *Now for the Long Term—The Report of the Oxford Martin Commission for Future Generations* (October 2013) 45.

²¹² Tremmel argues that it is 'naïve to hope that politicians will act in the interests of future generations in the same way that they do for those citizens who are alive today'. Tremmel, above n 22, 189.

²¹³ The legal principle of state sovereignty forms part of customary international law and is expressed, inter alia, in article 2 of the UN Charter. See *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America) (Judgment)* [1986] ICJ Rep 14, 111. Article 2(1) *Charter of the United Nations* states that 'The Organization is based on the principle of the sovereign equality of all its Members'. The *Charter of the United Nations* also protects the reserved domain of sovereign States and prohibits intervention in the territory of sovereign States: arts 2(4) and (7).

²¹⁴ See *Reparation for Injuries Suffered in the Service of the United Nations (Advisory Opinion)* [1949] ICJ Rep 174, 178 in which the Court described the doctrine of international personality as sometimes giving rise to controversy, when it was asked whether the United Nations possessed international personality and was therefore capable of availing itself of obligations incumbent on its members. Portman writes that legal personality 'is principally employed to distinguish between those social entities relevant to the international legal system and those excluded from it. There is almost universal agreement that states are international persons. But it is unresolved whether and according to what criteria entities other than states — individuals, international and non-governmental organizations, private corporations — can become international persons and what consequences such international legal status entails'. Roland Portmann, *Legal Personality in International Law* (Cambridge University Press, 2010) 1.

generations that entails legal rights and obligations.²¹⁵ Instead, it might be appropriate for the proponents of future generations' interests to emphasise the morality that Brown Weiss and others situate at the heart of intergenerational equity and to promote the objective of intertemporal equity in states' decision-making.²¹⁶

States could be urged by advocates to embrace the advisory, consultative and educative role for future generations' representatives contemplated by the Secretary-General's Report, rejecting the more intrusive, inquisitorial aspects of the missions proposed at Rio+20.²¹⁷ Such a representative could act as an international advocate and moral persuader, raising public awareness, generating debate, signalling the importance of considering the long term effects of actions, and working to enhance intergenerational solidarity.²¹⁸ The lack of enforceable rights and obligations would, however, act as an important limit on the functions and powers of any representative for future generations. Absent legally enforceable rights and obligations, any continuing calls for enforcement by a representative, including through a complaints mechanism or state monitoring, would be specious. It must be conceded that the effectiveness of any such agitator may potentially be limited, with it all too easy for states to disregard those who attempt to influence through moral pressure and absent a legal mandate.

V CONCLUSION

The Brundtland Commission observed in 1987 that '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'.²¹⁹ As the state of the environment continues to deteriorate, the moral injunction for present generations to reject such short-sighted self-interest and to be cognisant of the interests of future generations is significant. It is critical that the international community embrace intertemporal justice if the needs and interests of future generations are to be given expression. However, to date, the concept of intergenerational equity has not realised binding status at international law, and future generations do not enjoy legally enforceable rights. While this circumscribes the role that any global representative of future generations can play when seeking to irrupt the interests of the future

²¹⁵ Boyle has dismissed Brown Weiss' proposed extension of international environmental law to future generations as 'wildly unrealistic' and 'misplaced utopianism', arguing that 'it is already an intractable task to reconcile the environmental interests of those here and now ... without also embracing the interests of the future'. Alan E Boyle, 'Book Review: In Fairness to Future Generations' (1991) 40.1 *The International and Comparative Law Quarterly* 230, 230.

²¹⁶ See Beckerman above n 13, 61 for an interesting discussion of the moral obligation owed to future generations.

²¹⁷ See eg, presentation made by Catherine Pearce, Director Future Justice, to the High-Level Political Forum on 1 July 2014, during the moderated dialogue on 'Ideas and trends that can shape the lives of present and future generations'. <<http://sustainabledevelopment.un.org/index.php?page=view&nr=872&type=12&menu=1807&template=1042&play=904>>, summarised in the Future Justice Blog: 'Catherine Pearce, Director Future Justice at the World Future Council outlined what a High Commissioner for Future Generations at the UN level could look like: acting as an institutional voice, highlighting the long-term implications of proposed action and present alternatives. The representative, appointed by Member States would be low on administration, high on visibility. It would have a small multi-disciplinary staff, with the power of advocacy: nothing more, nothing less'. Future Justice, 'Blog: Moderated Dialogue at the High Level Political Forum on "Ideas and trends that can shape the lives of present and future generations"' on *Future Justice Blog Posts* (2 July 2014) <<http://www.futurejustice.org/blog/category/blog/>>.

²¹⁸ In parallel, civil society may wish to continue to advocate for the appointment of representatives of future generations at the national level, empowered to play a more interventionist role, particularly in those countries where future generations enjoy protection through a right to a clean environment.

²¹⁹ World Commission on Environment and Development, UN Doc A/42/25, [25].

into present decision-making, it does not defeat entirely the possibility of giving voice to those interests. Rather, a representative of future generations should act as agitator and advisor, emphasising the present generation's relationship, grounded in morality, with future generations and urging policy-makers and governments to apprehend the interests of the future.