

The Principle of Intergenerational Equity: to What Extent Does It Concern the Problem of Deforestation?

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List of Abbreviations

COP	Conference of the Parties
ICJ	International Court of Justice
WCED	World Commission on the Environment and Development
SGR on ISNFG	Report of the UN Secretary-General on Intergenerational Solidarity and the Needs of Future Generations
UNFCCC	United Nations Framework Convention on Climate Change
CBDR	Common but Differentiated Responsibilities
CBD	Convention on Biological Diversity
GHG	Greenhouse Gas
PTD	Public Trust Doctrine
UNEP	United Nations Environmental Program
FAO	Food and Agriculture Organisation of the UN
REDD+	Reducing Emissions from Deforestation and Forest Degradation
NGOs	Non-governmental Organisations
HRBA	Human Rights-Based Approach
EU	European Union

1. Introduction

1.1 Problem Formulation

Forests represent a vitally essential and precious natural resource, which sustains life on Earth by providing “an invaluable variety of social, economic and environmental benefits”¹. Forests also have an immensely important meaning for the protection of ecosystems against one of the most serious threats to lives and welfare of millions of human beings – climate change.

Despite rendering so many crucial services, forest resources are not conserved and safeguarded in a proper manner. Unsustainable forest practices lead to the global loss of forest resources worldwide. For instance, the wildfires in the Amazon region have recently been a considerable matter of concern for the whole international society, as “deforestation in the region has soared since President Bolsonaro took office”².

According to the statistical data provided by Brazil’s National Institute for Space Research, in 2021 accumulated Amazon deforestation increased by 22% and reached the highest number since 2006³. Moreover, 13,235 km² of the Amazon rainforest’s area was cleared in the Brazilian Amazon within a year⁴. The numbers cannot be ignored, since deforestation is an intimidating process that causes degradation of the environment and has a detrimental impact on both present and future generations.

The present generation’s failure to halt the rates of wide-spread deforestation and to preserve forest resources will considerably affect the ability of human beings in the future to enjoy their rights and satisfy their needs. Such deteriorating impact may not be visible at the moment, but it will force future generations to “build on what previous generations have left behind”, and this damage will be unavoidable because of deforestation’s dramatic long-term effects⁵. This causal relationship between our actions in the present and their consequences that will become an unbearable burden for future generations reflect the essence of the principle of intergenerational equity.

In order to pass on healthy, sustainable natural resources to generations to come, it is essential that the problem of deforestation is viewed through the prism of intergenerational equity. This will make it possible for policymakers to identify intertemporal risks that their

¹ United Nations, “UN Forum Kicks off in Istanbul with Call to Protect Vital Natural Resource”.

² BBC News, “Brazil's Amazon: Surge in Deforestation as Military Prepares to Deploy”.

³ Butler, “Amazon Deforestation Unexpectedly Surges 22% to Highest Level since 2006”.

⁴ Ibid.

⁵ Davidson, “Wrongful Harm to Future Generations: The Case of Climate Change”, 476.

forest practices may carry, and this knowledge will help to promote the best long-term solutions for the benefits of both present and future generations.

The topic of the present thesis is of great importance and relevance for the sustainability of the planet and well-being of its inhabitants. The welfare and prosperity of those who live today and future generations fully depend “on an urgent and clear break with current trends of environmental decline”⁶, which is tied to forest loss in particular. Inclusion of deforestation on the agenda for the recent 26th meeting of the Conference of the Parties (COP)⁷, global involvement in the course of events aimed at stopping forest fires in the Amazon region, data from climate reports stating that impacts of climate degradation “would be more severe than predicted, with only a narrow chance left of avoiding its worst ravages”⁸ and multiple actions filed against the governments for not preserving forest resources for present and future generations - all these factors speak for the growing awareness of the alarming deforestation problem across the world and the urgent necessity to act.

The research question of this thesis is “*how does the principle of intergenerational equity address the problem of forest loss*”. With respect to this issue, it can be determined that this thesis has the following objectives:

1. to demonstrate how the balance between the interests and needs of generations is affected by the loss of forest resources;
2. to examine the risks posed to future generations by deforestation;
3. to assess whether the existing mechanisms and approaches for halting deforestation are effective and sufficient in intertemporal perspectives;
4. to formulate solutions to the forest loss problem with the application of the intergenerational equity principle.

1.2 Overview of the Structure

This master`s thesis consists of four main chapters. The first chapter presents the research question and reasoning as to why the chosen topic is actual and crucial for analysing. Additionally, it covers the methods applied and the literature used.

⁶ UNEP`s Report, “Making Peace with Nature”, 13.

⁷ Deutsche Welle, “COP26: World Leaders Back Deal to End Deforestation by 2030”.

⁸ Greenfield, “Deforestation Emissions Far Higher than Previously Thought, Study Finds”.

The second part introduces the principle of intergenerational equity as an integral part of sustainable development and reveals the legal and ethical nature of the relationship between past, present and future generations.

In the third chapter the research is based on the examination of international and national environmental instruments, which comprise obligations of duty-bearers towards future generations.

The fourth chapter of the thesis focuses on deforestation, its causes, intertemporal detrimental effects and measures of preventing it in the light of the relevant case law and existing international mechanisms.

The conclusion is the last part of the thesis. It summarizes the findings of the research conducted.

1.3 Methodology and the Sources

This master`s thesis applied qualitative method, which implied examination of various legal instruments, national and international legal cases, as well as notable works of legal experts and scholars. For the purpose of accurate understanding of which place was designated to intergenerational equity in terms of deforestation the research was also based on an interdisciplinary, as well as on interpretive method in conformity with the Vienna Convention on the Law of Treaties⁹. In order to demonstrate the relevance of the topic the present paper to a certain extent adhered to a quantitative method by exploring statistical figures provided by official institutions. Comparative analysis sought to discover the steps taken by the governments to halt deforestation for the benefits of present and future generations and correlated them with those set forth in international legal instruments.

Due to the specificity of the research subject reports of international organizations, non-binding resolutions of international fora and other instruments of “soft law” constituted a major part of the literature analysed. Additionally, the research was based upon consulting primary sources of international law, such as treaties, as well as studying judicial decisions and writings of scholars as secondary sources “for the determination of rules of law” according to art. 38(1) of the Statute of the International Court of Justice (ICJ)¹⁰.

⁹ Vienna Convention on the Law of Treaties.

¹⁰ Statute of the International Court of Justice, art. 38(1).

2. The Principle of Intergenerational Equity as a Core Element of Sustainable Development

2.1 Concise History of the Intergenerational Equity Principle

It is impossible to talk about intergenerational equity out of the context of sustainable development and vice versa, since these two concepts are interrelated, and the former constitutes a basis for the latter. Thus, it is essential to look closer at the definition of sustainable development because this step is mandatory for a better understanding of where the principle of intergenerational equity stems from.

Due to a vast number of approaches to development, cultural and regional diversity it is complicated to distinguish one definition of sustainable development, which would be considered as the most appropriate. Nevertheless, nowadays sustainable development concept represents a vital “part of modern international law by reason not only of its inescapable logical necessity, but also by reason of its wide and general acceptance by the global community”¹¹. It is essential to note that development cannot be described as sustainable, if it does not comprise such crucial concepts like human rights, environmental protection, peace and security etc¹².

Segger notes that the perception of development has considerably changed over the recent decades¹³. It can be asserted that this process is connected with the reassessment of values, recognition of the evident threat to the human survival and the need to manage these hazards. After a range of international documents that ensured environmental protection were adopted, in 1987 the World Commission on the Environment and Development (WCED) prepared a report, *Our Common Future* (the Brundtland Report), which addressed the most significant issues that put at risk further secure existence of mankind.

The Brundtland Report is not the earliest document, which recognizes the importance of developing sustainably and sets forth concerns about the future of mankind. The first legal reference to sustainable development can be found in European laws on forest industry management dated back to the end of the 18th century¹⁴. Henceforth, the concept of developing within certain environmental limits is not new, since it has been taken into consideration and clarified within different institutions for quite some time.

The Brundtland Report is commonly referred to as the most effective instrument, which made the concept of sustainable development “a broad global policy objective”¹⁵. Consequently, it can be concluded that in the modern perspective the international community

¹¹ Separate Opinion of Vice President Weeramantry. *Gabčíkovo-Nagymaros Project* (Hungary v. Slovakia), 95.

¹² Segger, “Sustainable Development in International Law”, 88.

¹³ *Ibid.*

¹⁴ *Ibid.*, 92.

¹⁵ Sands, Peel, *Principles of International Environmental Law*, 9.

acknowledges that the major target of sustainable development constitutes the exploitation of the natural resources and generally treating the environment in such a manner that it does not infringe on the rights and interests of the generations to come.

In the Brundtland Report sustainable development was defined as “development that meets the needs of the present without compromising the ability of future generations to meet their own needs”¹⁶. This specification refers to intergenerational equity, one of the core principles of sustainable development, as it seeks to strike a fair balance between the essential needs of the present generation and the interests of mankind in the future.

It can be seen that the definition described above consists of two major elements –the concept of needs and the limited ability of the environment to satisfy these present and future needs due to the pressure imposed by “the state of technology and social organization”¹⁷. The principle of intergenerational equity was recognized as a measure that would guide the development process in a manner, which would allow to meet the needs and achieve goals not only in the present and for a few following years, but also in the distant future¹⁸ keeping the options open for yet unborn ones and, consequently, preserve intergenerational solidarity.

The text of the Stockholm Declaration 1972 outlines the present and future generations as the recipients of the benefits from the possession of the Earth`s resources, such as “the air, water, land, flora and fauna and especially representative samples of natural ecosystems”¹⁹. This and the following provision contain a corresponding obligation of duty - bearers to protect, improve and safeguard the environment “for the present and the future generations through careful planning or management”²⁰. Despite not being able to legally bind the signatory states to observe its principles, the Stockholm Declaration made a significant contribution to the work aimed at protecting the rights of future generations and safeguarding intergenerational solidarity by paving the way for subsequent documents essential for the development of environmental human rights of the present and future generations both on national and international levels²¹.

Later Organisation for Economic Co-operation and Development in its glossary of statistical terms defined intergenerational equity as “the issue of sustainable development referring, within the environmental context, to fairness in the intertemporal distribution of the

¹⁶ Report of the World Commission on Environment and Development: Our Common Future, para. 27.

¹⁷ Bugge, “1987-2007: “Our Common Future” Revisited”, 7.

¹⁸ Ibid.

¹⁹ Stockholm Declaration, prin. 2.

²⁰ Ibid, prin. 1-2.

²¹ Hiskes, *The Human Right to a Green Future*, 120.

endowment with natural assets or of the rights to their exploitation”²². Future generations form a vulnerable group, since they are neither able to take part in the decision-making process nor to obtain any political power. They are fully dependant on us, as long as their interests are presented and protected just through the ethical concerns of those, who make the decisions today²³. That is why a prominent publicist in the field of human rights and political theory Richard Hiskes argues that the recognition of intergenerational environmental solidarity “carries the urgency it does”²⁴. It can be inferred that the principle of intergenerational justice deters the duty-bearers from abusing the inability of future generations to vote, have any political or financial power and challenge the decisions²⁵.

The concept of intergenerational equity and the reference to the protection of rights and needs of future generations is incorporated in 44 international legal instruments²⁶. Its inclusion is justified by crucial and urgent character of the issues, which the principle of intergenerational equity addresses and the threat of irreversible damage that can be caused if certain measures are not taken²⁷.

As it is said in the 2013 Report of the UN Secretary-General on Intergenerational Solidarity and the Needs of Future Generations (SGR on ISNFG), “the breadth and the number of instruments demonstrate that concern for future generations has developed as a guiding principle of international norms”²⁸, which asserts the idea about the growing significance of the principle of intergenerational equity in the recent decades and especially nowadays.

Comprehensive understanding of the interconnection between biodiversity, climate and human society “provides opportunities to maximize co-benefits and to minimize trade-offs and co-detrimental (mutually harmful) effects for people and nature”²⁹. For these reasons and the necessity to obtain a clear representation of the complexity of the principle of intergenerational equity, it is important to look at it through the prism of different concepts and doctrines, such as environmental human rights and state sovereignty, and it will be done in the following sections of the present thesis.

²² Glossary of Environment Statistics, “Intergenerational Equity”.

²³ Report of the Secretary-General, “Intergenerational Solidarity and the Needs of Future Generations”, para. 5.

²⁴ Hiskes, *The Human Right to a Green Future*, 138.

²⁵ Report of the World Commission on Environment and Development: Our Common Future, para. 25.

²⁶ Center for International Environmental Law, “Submission to the UN Special Rapporteur on Human Rights and the Environment”, 3.

²⁷ Voigt, “Climate Change and the Mandate of Sustainable Development”, 557.

²⁸ Report of the Secretary-General, “Intergenerational Solidarity and the Needs of Future Generations”, para. 36.

²⁹ IPBES-IPCC Report, “Biodiversity and Climate Change”, 21, para. 30.

2.2 The Essence of Intergenerational Equity

A prominent lawyer and legal scholar Edith Brown Weiss distinguishes the following constituent parts of intergenerational equity:

1. options;
2. quality;
3. access³⁰.

The first notion can be explained as a preservation of the diversity of natural ecosystems for the good and interests of future generations, who have a right to operate them for the purposes of meeting their needs. It is alleged that the benefits, to which the present and future generations are entitled to, are not supposed to be identical. However, a fair balance should be observed³¹.

As regards quality, this criterion refers to comparative characteristics of the environment, which the present generation possesses and the future – inherits. It is supposed to be passed on to the following generations “in no worse condition than it was received”³² by us. Each generation can enjoy the freedom of action in relation to the environment and the Earth’s resources, nevertheless this freedom “is qualified by the needs of future generations”³³.

The essence of the last element implies that natural resources must be available on the basis of fair balance and intergenerational non-discrimination. It can be inferred that for the sake of equity the living generation is under the obligation to safeguard the diversity of planetary resources from deterioration as well as to maintain and improve them, so that future generations will not be deprived of access to the same environmental conditions as their predecessors.

Findings and conclusions introduced by Edith Brown Weiss were reaffirmed in the SGR on ISNFG³⁴. Therefore, in terms of both doctrinal provisions proposed by Brown Weiss and international legislation the present generation is appointed to be a beneficiary of the Earth’s resources received from its predecessors as well as a trustee of such natural benefits for future generations³⁵.

³⁰ Brown Weiss, “Climate Change, Intergenerational Equity, and International Law”, 616.

³¹ Slobodian, “Defending the Future”, 571.

³² Birnie, Boyle and Redgwell, *International Law & Environment*, 119.

³³ Draft International Covenant on Environment and Development, art. 5.

³⁴ Report of the Secretary-General, “Intergenerational Solidarity and the Needs of Future Generations”, para. 24.

³⁵ Collins, “Revisiting the Doctrine of Intergenerational Equity in Global Environmental Governance”, 93.

2.3 Relationship Between Generations in Legal and Ethical Terms

Ethical issues of owing a moral obligation towards those, who are yet unborn were subject to cross-disciplinary discussions long time before such topics were brought to political and legal fora³⁶. Intergenerational equity should be taken into consideration in all the dimensions, in which lawmakers and legal scholars look at this concept in order to identify the sphere and boundaries of its application and to acknowledge possible obstacles.

Edith Brown Weiss argues that the principle of intergenerational equity comprises two kinds of relationships³⁷. One is the relationship between the three generations of human beings—past, present and future – who are entitled to enjoy benefits from the environment on a fair level and at the same time are liable to each other for its conservation.

The second is related to the attitude of mankind to the natural system³⁸. Brown Weiss insists that there are some elements of nature, which can impact human beings as well, for instance volcanos or tsunamis. However, despite this fact people are the only actors in this relationship, who have the capacity to influence the system deliberately³⁹. In its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons the ICJ emphasized a deep interconnection between mankind and nature, since “the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn”⁴⁰.

The mitigating measures aimed at addressing the global problem of climate change are in most cases ensured by the concept of intergenerational equity. Without such actions the hazardous impact will continue to grow and upgrade, which in the end would “become more severe and affect future generations disproportionately”⁴¹. The fairness between generations could be preserved if living human beings do not not satisfy their needs “at the expense of generations to come”⁴². Article 3 of the United Nations Framework Convention on Climate Change (UNFCCC) stipulates that the climate system should be protected “for the benefit of present and future generations of humankind, on the basis of equity”, which implies that the parties to the Convention should enact their policies under the auspices of the principle of intergenerational equity⁴³.

³⁶ Report of the Secretary-General, “Intergenerational Solidarity and the Needs of Future Generations, para. 12.

³⁷ Brown Weiss, “Implementing Intergenerational Equity”, 102.

³⁸ *Ibid.*

³⁹ Brown Weiss, “In Fairness to Future Generations and Sustainable Development”, 20.

⁴⁰ Legality of the Threat or Use of Nuclear Weapons, 242, para. 29.

⁴¹ Voigt, “Climate Change and the Mandate of Sustainable Development”, 557.

⁴² Report of the Secretary-General, “Intergenerational Solidarity and the Needs of Future Generations”, para. 10.

⁴³ United Nations Framework Convention on Climate Change, art. 3(1).

Another crucial legal act that identifies a tight connection between the actions of the present generation and their influence on the well-being of human beings in the future is the Paris Agreement. The Preamble of the document designates climate change (as a negative consequence of a failure to develop sustainably) to be “a common concern of humankind”, which should be tackled with the emphasis on the obligations regarding intergenerational equity⁴⁴. The fact that the parties put such wording in the Preamble illustrates the incredible importance of realizing the destructive, hazardous impact of climate change, to which mankind in the present and future is exposed.

Even though it is complicated to speak about the binding character of the Preamble provisions, they have a significant impact on the interpretation of a treaty⁴⁵, because the Preamble comprises the essence of a treaty and clarifications why the state members concluded an agreement. Intergenerational equity is mentioned by the parties as a factor that is connected with the obligations of states and that should be taken into consideration, when the states take actions to address climate change. The above-mentioned concept of the common concern of mankind is generally inextricably linked to the most global and universal environmental challenges, which demand the overall cooperation because their long-lasting adverse effects have a detrimental impact on future generations⁴⁶.

Such issues can be devised only on a global level through international cooperation, as the problem of climate change is “planet-wide in scope”⁴⁷. Thus, it can be concluded that the idea promoting the necessity to protect the Earth’s resources for future generations and restrain a rapid distribution of the diverse threatening effects of climate change reflects the connection of ethical and legal issues included in the concept of intergenerational equity.

According to the SGR on ISNFG, in order to allocate planetary resources on a fair basis, mankind should try to identify the needs of future generations “as precisely as possible”⁴⁸. Yet it is impossible not to agree with Klaus Bosselmann, who introduces an ethical dilemma emerging as a result of the application of the intergenerational equity concept. Indeed, how can humanity know and determine what needs future generations will have?⁴⁹

Bosselman comes to a conclusion that the reasonable solution is to observe a duty of care in order to pass on to future generations the environment and natural resources in the

⁴⁴ Paris Agreement, the Preamble.

⁴⁵ Vienna Convention on the Law of Treaties, art. 31(2).

⁴⁶ Bowling, “The Common Concern of Humankind”, 3.

⁴⁷ Hague Declaration on the Environment, 1309.

⁴⁸ Report of the Secretary-General, “Intergenerational Solidarity and the Needs of Future Generations”, para. 17.

⁴⁹ Bosselmann, *The Principle of Sustainability*, 98.

integrity as we received them⁵⁰. In a recent landmark decision rendered by the Federal Court of Australia it was established that the Minister for the Environment owes Australian children a duty of care when approving any measures, which would have an impact on the environment and consequently, on the rights of present and future generations⁵¹. The applicants insisted that imminent risks and impacts of climate change constitute a serious threat “to the current generation of children and the following generation or two”⁵². The Court analysed national legislation, specifically Environment Protection and Biodiversity Conservation Act and reiterated that the principle of intergenerational equity is one of the key characteristics of “ecologically sustainable development”⁵³.

It was also stated that obliging the Minister to observe a duty of care does not signify that the importance of interests and needs of children and future generations “should necessarily be elevated above the economic interests of today’s adults”. Thus, it can be concluded that a formula elaborated and set forth in the Brundtland Report is maintained - the needs of the present are satisfied “without compromising the ability of future generations to meet their own needs”⁵⁴.

Edith Brown Weiss also emphasizes the issue of unpredictability of the needs of future generations. She does not support the view that if the interests cannot be identified, then future generations are not entitled to the rights, which are subject to protection⁵⁵. Professor Brown Weiss refers to the nature of generational rights, which are not individual. The interests guaranteed by these rights “do not depend upon knowing the kinds of individuals that may exist or the numbers in any given future generation”⁵⁶, since they would be generally relevant and significant for the survival of human beings as biological species⁵⁷.

The perception of the future generation’s ability to possess rights is an aspect of intergenerational equity, which poses a subject matter of multiple disputes among the scholars⁵⁸. In the legal theory rights are supported by corresponding obligations, which implies that obligations cannot emerge by themselves in the absence of a recipient, a rights-holder⁵⁹.

⁵⁰ Ibid.

⁵¹ Sharma by her Litigation Representative Sister Marie Brigid Arthur v Minister for the Environment, para. 513.

⁵² Ibid, para. 67.

⁵³ Ibid, para. 150.

⁵⁴ Report of the World Commission on Environment and Development: Our Common Future, para. 27.

⁵⁵ Brown Weiss, “In Fairness to Future Generations and Sustainable Development”, 24.

⁵⁶ Ibid.

⁵⁷ Report of the Secretary-General, “Intergenerational Solidarity and the Needs of Future Generations”, para. 22.

⁵⁸ Lewis, “Human Rights Duties Towards Future Generations and the Potential for Achieving Climate Justice”, 213.

⁵⁹ Report of the Secretary-General, “Intergenerational Solidarity and the Needs of Future Generations”, para. 19.

Following this rule, some tend to argue that non-existing human beings cannot have rights because they are not born yet, and therefore the present generation shall not be under the obligation to safeguard these rights⁶⁰. By contrast, Laura Westra strongly urges that obligations to future generations should be recognized as non-derogable and viewed as *erga omnes*⁶¹.

The SGR on ISNFG analyses this argument and sets forth the following position – first of all it can be admissible that duties are owed “without the strict requirement of a corresponding rights holder”⁶². One of the examples of such rights and obligations could be the right of future generations “not to be deprived of opportunities owing to the exhaustion of natural resources or not to be harmed by a degraded environment”⁶³. Consequently, it can be inferred that the present generation would be under the obligation to respect, protect and fulfil these rights⁶⁴. The Report also acknowledges the above-mentioned opinion of Edith Brown Weiss regarding the irrelevance of identifying the right-holders, since such rights are not individual, but group rights by their nature⁶⁵.

In frames of the intergenerational equity concept, it is more common to refer only to future generations, when the scholars express their views on discriminatory access and use of resources. However, Brown Weiss asserts that it would also imply inequity if only the needs of future generations are constantly prioritized⁶⁶. Such excessive attention could prevent “the present generation from benefiting from the legacy passed on from previous generations”⁶⁷. Furthermore, the scope of application of intergenerational equity covers the rights and obligations of all three generations – past, present and future, which is why it is essential not to boil down its interpretation exclusively to obligations of the present generation.

The above-mentioned concerns of Bosselmann and Brown Weiss have a fair basis, and there are examples of quite controversial conclusions. For instance, Professor D`Amato replies upon Parfit`s paradox and claims that any interference with the current environmental system, including changes aimed at improving the conditions, would fundamentally affect future generations⁶⁸.

⁶⁰ Feinberg, “The Rights of Animals and Unborn Generations”, 65; Macklin, “Can Future Generations Correctly Be Said to Have Rights?”, 151; De George, “The Environment, Rights, and Future Generations”, 161; Bruneau, “Do We Have Moral Obligations Towards Future People?”, 52.

⁶¹ Westra, *Environmental Justice and the Rights of Unborn and Future Generations*, 136.

⁶² Report of the Secretary-General, “Intergenerational Solidarity and the Needs of Future Generations”, para. 21.

⁶³ Ibid.

⁶⁴ De Schutter, “International Human Rights Law”, 292.

⁶⁵ Report of the Secretary-General, “Intergenerational Solidarity and the Needs of Future Generations”, para. 22.

⁶⁶ Brown Weiss, “Implementing Intergenerational Equity”, 102.

⁶⁷ Ibid.

⁶⁸ D`Amato, “Do We Owe a Duty to Future Generations to Preserve the Global Environment?”, 190.

Specifically, Anthony D`Amato takes as a basis for his analysis findings of Derek Parfit, who asserts that any influence on a yet unborn child would change his/her identity completely, and generally speaking it would be a *different* person⁶⁹. In Parfit`s example a woman “knowingly conceives a handicapped rather than a normal child”, because she did not want to wait until her health condition improved⁷⁰. In Derek Parfit`s opinion, if the woman had waited that disabled baby would not have been born healthy, on the contrary it would not have been born at all, and the woman would have given birth to a totally *different* child. Parfit alleges that being born handicapped was the only option for that child to be born⁷¹.

Professor D`Amato develops this idea and notes that even favourable changes like the reduction of air pollution would result in circumstances when different people are born, not the ones who would have been born if there had not been an intervention in the environment⁷². According to his opinion, a situation when a state seeks to fulfil its obligations towards future generations leads to consequences, when such actions “wipe out the very individuals to whom we allegedly owed that duty”⁷³.

Eventually D`Amato comes to a conclusion that it is better and fairer towards future generations to let them live “in a degraded environment 100 years from now - that is, in an environment we did not act to preserve” than not to be born with the identity they were supposed to have⁷⁴. Such explanation could hardly serve as a justification for not adopting measures aimed at mitigating a hazardous impact of climate change.

The weak side of Professor D`Amato`s theory is in the fact that it puts certain ethical concerns higher than both ethical and legal obligations to pass on to future generations the natural resources “in no worse condition”⁷⁵ than they were received by the present generation. It seems like in the context of D`Amato`s argumentation existing ecosystems and the environment in general are put out of brackets. It is not clear why he does not acknowledge that omissions of the international community in the environmental policy, especially when we approach climate crisis, question the very existence of the present and future generations, even “*different*” ones like he calls them.

It is impossible not to agree with Lothar Gündling, who emphasizes the need to develop on the basis of a global consensus a more concrete understanding of what the

⁶⁹ Parfit, “On Doing the Best for Our Children”, 101.

⁷⁰ Ibid.

⁷¹ Ibid.

⁷² D`Amato, “Do We Owe a Duty to Future Generations to Preserve the Global Environment?”, 191.

⁷³ Ibid

⁷⁴ Ibid, 192.

⁷⁵ Birnie, Boyle and Redgwell, *International Law & Environment*, 119.

relationship between generations imply, exactly what obligations are owed to future generations⁷⁶. Undoubtedly, such a consensus constitutes a prerequisite for the international cooperation of states and their national actions for maintaining the balance between generations by recognizing intergenerational equity as one of the principal guidelines in their policy.

Before getting familiar with legal implications emerging in the context of the breach of the intergenerational equity principle, it is important to understand, which interpretation is used by lawmakers with respect to the term “a generation”. In my opinion the term “future generations” refers not only to yet unborn population, but it also comprises those, who live nowadays but will suffer from intergenerational injustice in the future. This thought could be supported by the position of claimants in the *Dejusticia* case, where it was alleged that deforestation jeopardizes fundamental rights of those “who are young today and will face the impacts of climate change” throughout their lives⁷⁷. Consequently, it could be presumed that the plaintiffs identify themselves as both the present and future generation at the same time.

2.4 Intergenerational v Intragenerational Equity

A notion that is closely connected to the principle of solidarity between generations but should be separated from it - is intragenerational equity. Both principles of inter- and intragenerational equity are the key elements of sustainable development, and the essence of intragenerational equity is expressed in “the concept of needs, in particular the essential needs of the world’s poor, to which overriding priority should be given”⁷⁸. In other words, this principle addresses the problem of imbalance in allocation of wealth between the developed and developing world, as well as prioritizing the needs of the poor layers of society in different parts of the world.

The necessity of providing protection to the vulnerable groups and eradication of poverty, specified in the Rio Declaration⁷⁹ and 2030 Agenda for Sustainable Development⁸⁰, are the key components of the principle of intragenerational equity. In terms of environmental law the concept of intragenerational equity is expressed through the principle of common, but differentiated responsibilities (CBDR) as a measure to oblige the developed world to take a major liability for contributing to a greater extent to global environmental degradation in

⁷⁶ Gündling, “Our Responsibility to Future Generations”, 21.

⁷⁷ *Dejusticia*, “Colombian Youth File the First Climate Change Lawsuit in Latin America”.

⁷⁸ Bugge, “1987-2007: “Our Common Future” Revisited”, 7.

⁷⁹ Rio Declaration, prin. 5-6.

⁸⁰ Transforming our world: the 2030 Agenda for Sustainable Development, the Preamble.

comparison to the developing states⁸¹. It can be asserted that “historical, current and future contributions to environmental degradation are taken within the fold of the CBDR principle”⁸². The other reason why the responsibilities of the developed and developing states should not be common lies in the incomparable capacities, both financial and technological, to respond to environmental challenges⁸³.

Another principle of international environmental law, which is essential for eliminating economic disparities among states is equitable use of natural resources⁸⁴. As it is stated in the Brundtland Report, “no country can develop in isolation from others”⁸⁵, which implies that the developed countries should take into account that if at the moment the economic growth of one developing state does not allow it to get benefits from exploiting certain planetary resources, the former should not overexploit such resources. Otherwise, such actions would result in the intragenerational injustice.

Lothar Gündling argues that the efforts to achieve intergenerational solidarity are challenged by the inability to provide equal access to natural resources or to guarantee sustainable environment within our own generation⁸⁶. It is difficult to contest his findings, since indeed the developing states do not have enough capacity “to bear a disproportionate or abnormal burden”⁸⁷ of processing green transition and introducing sustainable programs by themselves.

Therefore, the economic inequality between these two worlds contributes to the exploitation of natural resources in a manner that does not cover the benefits, which yet unborn human beings are entitled to. Generational poverty, a term referring to a tendency that individuals who were born in poor families will most likely raise their children in the same unsatisfactory conditions⁸⁸. “Parent-to-child transmission of poverty”⁸⁹ forces people to live in the environment with degrading natural resources and turns them into vulnerable groups, which are more significantly exposed to the global threat of climate change⁹⁰.

Without the assistance of the developed countries the goals made under the auspices of intergenerational equity cannot be reached. That’s why article 3 of the UNFCCC assigns a

⁸¹ Rio Declaration, prin. 7.

⁸² Rajamani, *Differential Treatment in International Environmental Law*, 148.

⁸³ Birnie, Boyle and Redgwell, *International Law & Environment*, 133.

⁸⁴ Sands, Peel, *Principles of International Environmental Law*, 219.

⁸⁵ Report of the World Commission on Environment and Development: Our Common Future, para. 52(chapter 1).

⁸⁶ Gündling, “Our Responsibility to Future Generations”, 211.

⁸⁷ United Nations Framework Convention on Climate Change, art. 3.

⁸⁸ Wagmiller, Lee and Adelman, “Childhood and Intergenerational Poverty”.

⁸⁹ Report of the Secretary-General, “Intergenerational Solidarity and the Needs of Future Generations, para. 15.

⁹⁰ Rajamani, *Differential Treatment in International Environmental Law*, 178.

leading role in the protection of the climate system to the developed world⁹¹. Hence, it can be concluded that even though inter – and intragenerational equity are two separate concepts, they are interdependent. Furthermore, they both represent two principal elements of sustainable development⁹², which signifies that its goals cannot be reached if one of these elements is not respected.

⁹¹ United Nations Framework Convention on Climate Change, art. 3.

⁹² Sands, Peel, *Principles of International Environmental Law*, 218.

3. The Nature of Present Generations` Obligations

3.1 The Role of a Right to a Healthy Environment

Human rights and environmental protection are not two separately existing fields of law. It is impossible not to agree with legal scholars, who note that fields of law generally cannot operate in “clinical isolation” from each other⁹³. The state cannot assert that it observes human rights regulations if its development projects do not incorporate provisions on the environmental protection. Needless to say that the protection of the environment represents “a vital part of contemporary human rights doctrine, for it is a sine qua non for numerous human rights such as the right to health and the right to life itself”⁹⁴. This speaks for the relevance of a right to a healthy environment for the execution of obligations of duty-bearers as regards the environmental protection.

It is common to expect that a human right is always ensured by a corresponding obligation of duty-bearers, which are responsible for respecting, protecting and fulfilling such a right⁹⁵. However, the states do not always observe their obligations when pursuing their policies, which results in the violation of the rights of both present and future generations.

I rely on the position of Professor Hiskes, who holds the view that intergenerational environmental solidarity is enforced by the “acceptance of the language and meaning of environmental human rights” that have been internationally recognized across cultures and which the states have agreed upon⁹⁶. Another important factor is the implementation of environmental human rights, associated obligations and standards elaborated in the frames of international institutions in the national law systems. In particular, Hiskes insists on the incorporation of environmental rights as constitutional rights on the national level⁹⁷.

Special Rapporteur on Human Rights and the Environment defines the essence of a right to a healthy environment as “the enjoyment of a safe, clean, healthy and sustainable environment”⁹⁸ and emphasizes the importance of “greening” of the established human rights, as long as this allows to improve the well-being of people all around the globe and let them fully realize their rights⁹⁹. It can be alleged that the needs of present and future generations are ensured to a great extent by a right to a healthy environment.

⁹³ Ibid, 811.

⁹⁴ Separate Opinion of Vice President Weeramantry. *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, 88.

⁹⁵ De Schutter, *International Human Rights Law*, 292.

⁹⁶ Hiskes, *The Human Right to a Green Future*, 119.

⁹⁷ Ibid.

⁹⁸ Knox, “Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment”, para. 1.

⁹⁹ Ibid, para. 12-13.

This thought could be supported on the example of the Norwegian Constitution, which sets forth that “every person has the right to an environment that is conducive to health and to a natural environment whose productivity and diversity are maintained. Natural resources shall be managed on the basis of comprehensive long-term considerations, which will safeguard this right for future generations as well”¹⁰⁰. The text of the document makes it clear that it is impossible to enjoy a right to a healthy environment if the diversity of the Earth resources is not preserved. If the state fails to take measures aimed at the conservation, maintenance and improvement of these resources, then both present and future generations will be deprived of the possibility to satisfy their needs.

3.2 Obligations in National and International Law

The Water Convention provides that the “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”¹⁰¹. As it was mentioned above, Edith Brown Weiss revealed the essence of the principle of intergenerational equity by introducing planetary rights as regards diversity, quality and access to natural resources. If we generalize the duties existing in the context of intergenerational equity, it can be seen that they include an obligation to:

- pass on the Earth resources to the next generation in an as good condition as it was received from the past;
- restore and improve the environment¹⁰².

One of the particular methods to fulfil this obligation is to manage and exploit the resources in a sustainable manner. Specifically, in the Convention on Biological Diversity (CBD) the parties have agreed upon the necessity “to conserve and sustainably use biological diversity for the benefit of present and future generations”¹⁰³. In conformity with the article 10 of the CBD the states are under the obligation to implement conservation policies in the national legislation, take steps in order “to avoid or minimize adverse impacts on biological diversity”, initiate cooperation in the governmental sector with a purpose protect, support develop the sustainability of the natural resources¹⁰⁴. A duty to improve the environment, which

¹⁰⁰ The Constitution of the Kingdom of Norway, art. 112.

¹⁰¹ Convention on the Protection and Use of Transboundary Watercourses and International Lakes art. 2.5(c).

¹⁰² Westra, *Environmental Justice and the Rights of Unborn and Future Generations*, 136.

¹⁰³ Convention on Biological Diversity, the Preamble.

¹⁰⁴ Ibid, art. 10.

was enshrined in the principle 4 of the Stockholm Declaration, is set forth in the CBD as well¹⁰⁵. It includes a positive obligation of the states to work out and adopt measures for the purpose of restoring the elements of biological diversity in areas that were exposed to a detrimental impact¹⁰⁶. Alongside with other duties, article 4 of the Stockholm Declaration contains an obligation to conserve nature, including wildlife¹⁰⁷. The UNESCO World Heritage Convention stresses the general obligation to ensure “the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage”¹⁰⁸.

The Rio Declaration comprises all the above-mentioned obligations of states, furthermore it promotes the idea of the global partnership and international cooperation as the means to fulfil those obligations¹⁰⁹. The parties to the Declaration declared that the process of addressing global environmental challenges should be “based on an international consensus”¹¹⁰.

The industrial states are also expected to “take the lead in combating climate change and the adverse effects thereof” compared to the developing countries¹¹¹. For instance, it implies that the developed states should incur certain commitments necessary for preserving and improving the climate system, such as adopting national policies, limiting the emissions of greenhouse gas (GHG) and protecting sinks and reservoirs that absorb it¹¹².

Another essential obligation assigned to the developed countries is that they should provide the developing states with financial assistance necessary for taking essential steps towards sustainability and reducing GHG emissions¹¹³. This point is especially important, since “responding to this financial need will be a collective investment in the future”¹¹⁴.

Despite a broad number of conventions and other regulative tools in international environmental law referring to future generations, and the actions that should be taken by duty-bearers, there is still a serious obstacle. The gist of this problem is that the existing legal regime concerns a temporal aspect of the states` obligations only to a certain extent. Those references generally are placed in the preambles to the documents and not in the main, operative text

¹⁰⁵ Stockholm Declaration, prin. 4.

¹⁰⁶ Convention on Biological Diversity, art. 10.

¹⁰⁷ Stockholm Declaration, prin. 4.

¹⁰⁸ Convention Concerning the Protection of the World Cultural and Natural Heritage, art. 4.

¹⁰⁹ Rio Declaration, prin. 7.

¹¹⁰ Ibid, prin. 2.

¹¹¹ United Nations Framework Convention on Climate Change, art. 3.

¹¹² Ibid, art. 4(2).

¹¹³ Ibid, art. 4(3).

¹¹⁴ Report of the World Commission on Environment and Development: Our Common Future, para. 94(chapter 12).

containing enforceable mechanisms¹¹⁵. That is why the majority of obligations are still addressed and owed only to the present generation. Therefore, it can be alleged that the execution of the above-mentioned responsibilities does not encompass the needs of human beings in all time dimensions and does not provide long-term benefits.

This subject was elucidated and defended by the German Federal Constitutional Court, which in March 2021 ruled that Germany's Climate Protection Act is insufficient in terms of sustainable development and fails to ensure intertemporal guarantees of fundamental freedoms¹¹⁶. The Court decided that there is a lack of a legal framework necessary for Germany's ability "to safeguard fundamental freedom over time and to spread the opportunities associated with freedom proportionately across generations"¹¹⁷, since the Act in question does not contain regulations of further GHG emissions reduction starting from 2031. In other words, "the more permissible the Climate Change Act is today, the more it reduces the options for future generations"¹¹⁸.

There is no reason to doubt that we can talk about solidarity among generations only if international and national legal instruments recognize the principle of intergenerational equity as a guideline for the policy and behaviour of all states.

3.3 Challenges of the Sovereignty over Natural Resources Doctrine

The issue of the sovereignty over natural resources deserves a special attention because of its deep interconnection with the principle of intergenerational equity, as long as future generations are entitled to the benefits from the resources, which the state is entitled to explore and exploit.

The Charter of Economic Rights and Duties of States sets forth a state's right to "freely exercise full permanent sovereignty including possession, use and disposal over all its natural resources"¹¹⁹. This right is affirmed in principle 2 of the Rio Declaration¹²⁰. However, in terms of the sustainable development concept such ultimate control is limited by the necessity of taking into consideration the rights of future generations, who cannot be deprived of similar benefits from the planetary resources. In the earlier resolution adopted by the UNGA it was

¹¹⁵ Report of the Secretary-General, "Intergenerational Solidarity and the Needs of Future Generations, para. 36.

¹¹⁶ Bundesverfassungsgericht, Order of the First Senate of 24 March 2021 - 1 BvR 2656/18, para. 266.

¹¹⁷ Ibid, para.183.

¹¹⁸ Burianski, Kuhnle, "Reshaping Climate Change Law".

¹¹⁹ Charter of Economic Rights and Duties of States, art. 2.

¹²⁰ Rio Declaration, prin. 2.

declared that exploration and exploitation of environmental resources should be conducted on a condition that the well-being and development interests of the population of the state in question are prevailing¹²¹.

As a response to the sovereignty over natural resources concept could serve the public trust doctrine (PDT), according to which, governmental trustees are under the obligation to safeguard the planetary resources “of special character” as assets, in which the population have a crucial interest¹²². According to Professor Christina Voigt, nowadays the PDT is presented in all states, that is why it can be fairly concluded that it represents “a formidable legal tool available to citizens to enforce sustainable resources management” to protect the unique natural resources for future generations¹²³. The forests in the Amazon region, which are notoriously called “the lungs of the Earth”¹²⁴, should unconditionally be protected under the auspices of the PDT.

3.4 The Meaning of Planetary Boundaries

Another important issue inextricably linked to equity between generations and a fair allocation of natural resources is the limits, within which these generations can operate safely. In order to identify and outline such quotas the scientists from different countries under the guidance of the Stockholm Resilience Centre in 2009 elaborated the whole concept, which was called “Planetary boundaries”. It comprises environmental limits, within which mankind “can continue to develop and thrive for generations to come”¹²⁵. Planetary boundaries address the issues of climate change, ocean acidification, stratospheric ozone depletion, freshwater consumption, land system change (including deforestation) etc.

This concept is essential for achieving the goal of intergenerational equity due to its intertemporal and precautionary character. The reports of the Stockholm Resilience Centre contain the scales for each above-mentioned global environmental problem, where it can be seen how much safe operating space for present and future generations is left. Every time when such a planetary boundary is crossed, a chance of putting mankind at risk of “moving the Earth

¹²¹ United Nations General Assembly Resolution on the Permanent Sovereignty over Natural Resources, art. 1-2.

¹²² Voigt, *Rule of Law for Nature*, 370.

¹²³ Ibid, 370-371.

¹²⁴ United Nations, “Ensuring the ‘Lungs of the Planet’ Keep Us Alive”.

¹²⁵ Stockholm Resilience Centre, “Planetary boundaries”.

System to a state much less hospitable for human civilisation” increases, and the balance between the benefits of present and future generations is upset¹²⁶.

3.5 Application of the Precautionary Principle and Contiguous Obligations

The precautionary principle has a significant importance for the targets of sustainable development, as long as the sphere of its application is not limited exclusively to global environmental concerns but comprises additionally domestic and transboundary harm¹²⁷. Thus, it gives a legal ground to hold the states liable for the past, current and future acts and omissions with respect to the environment.

The reason why the precautionary approach is relevant in the context of intergenerational equity lies in the essence of the former one. The scholars assert that it has particular importance in relation to global, common environmental matters, which require a universal and widespread cooperation because of the seriousness and critical character of such concerns¹²⁸. Since the intergenerational equity principle addresses the most crucial issues involving possible irreversible risks for present and future generations, the precautionary concept assists at solving the problem of identifying the needs of the mankind in the future, obliging the duty-bearers to prevent and control foreseeable risks.

International Law Commission defines due diligence as “the standard basis for the protection of the environment from harm”¹²⁹. It ensures the preservation and non-deterioration of planetary resources, which the present generation will pass on to the descendants.

The previous paragraphs outlined an ethical dilemma on the unpredictability of the values and goals of future generations. According to the position of Edith Brown Weiss, the components of the intergenerational equity concept - options, quality and access – are not intended to oblige the present generation to clearly determine the future needs of humankind¹³⁰. However, mankind should provide generations to come with the flexibility of action¹³¹. Lothar Gündling insists on the significance of taking the precautionary action, since it would allow to avoid predicting the needs of generations to come and assessing the possible level of development and achievements in the field of environmental protection they will have to reach in order to deal with various environmental problems¹³².

¹²⁶ European Commission, “Four of Nine ‘Planetary Boundaries’ Exceeded”.

¹²⁷ Birnie, Boyle and Redgwell, *International Law & Environment*, 136.

¹²⁸ *Ibid.*, 137.

¹²⁹ Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with Commentaries, art. 3.

¹³⁰ Brown Weiss, “Implementing Intergenerational Equity”, 103.

¹³¹ *Ibid.*

¹³² Gündling, “Our Responsibility to Future Generations”, 211.

The relevance of the precautionary concept in the context of sustainable development and thus intergenerational equity as its core element is established in the tools of international environmental law and can be seen, for instance, in the text of the Rio Declaration. Specifically, the states cannot refer to the lack of the scientific certainty as a justification for not taking measures to prevent environmental damage, when “there are threats of serious or irreversible damage”¹³³. The UNFCCC, an essential document for safeguarding interests and aspirations of generations to come, reiterates that the duty-bearers should protect the environment for the benefits of present and future human beings by taking “precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects”¹³⁴.

Accordingly, in its ruling on the Gabčíkovo–Nagymaros dispute the ICJ specified that due “to new scientific insights and to a growing awareness of the risks for mankind - for present and future generations” the states are under the obligation to implement recent methods and standards under the sustainable development concept in their upcoming programs as well as the ongoing projects that were launched in the past¹³⁵. If these conditions are observed, then the risk for the mankind in the future is minimized, and the balance between the needs of generations is preserved. As regards intergenerational equity, the necessity to provide enough protection to “human beings, including generations unborn” was one of the reasonings, why the Court insisted on the application of the precautionary concept¹³⁶.

The enforcement of the precautionary principle implies that the states would take appropriate steps “to prevent or minimize as far as possible the risk of harm”¹³⁷. It could be achieved by adopting certain measures that would identify potential risks for present and future generations, such as conducting the environmental impact assessment (IEA) and monitoring¹³⁸. Philippe Sands and Jacqueline Peel make a remark that emphasis on the duty to implement IEA is found in a considerable number of documents of international institutions¹³⁹, and that it is identified as an “emerging principle of international law”¹⁴⁰. In 1987 United Nations Environmental Program (UNEP) elaborated an incomplete list of the stages that IEA should consist of, and the principles that the states should adhere to while conducting IEA¹⁴¹.

¹³³ Rio Declaration, prin. 15

¹³⁴ United Nations Framework Convention on Climate Change, art. 3.

¹³⁵ Gabčíkovo-Nagymaros Project (Hungary v. Slovakia), Judgment, I. C. J. Reports 1997, para. 140.

¹³⁶ Ibid, 241, para. 29.

¹³⁷ Birnie, Boyle and Redgwell, *International Law & Environment*, 143.

¹³⁸ Ibid.

¹³⁹ Sands, Peel, *Principles of International Environmental Law*, 658.

¹⁴⁰ Ibid, 660.

¹⁴¹ UNEP Goals and Principles of Environmental Impact Assessment.

Despite being set forth in many “soft law” documents, the precautionary principle and consequential obligations constitute “part of the corpus of international law relating to the environment”¹⁴², which means that in case of any violation, whether in the form of an act or an omission, the state would incur liability.

3.6 Obligations of States as regards Procedural Rights

Procedural environmental rights have a crucial meaning for reconciling the issue between the development goals and the rights of present and future generations. In conformity with principle 10 of the Rio Declaration, such rights include participation in the decision-making process, access to information and possibility to seek redress¹⁴³.

Furthermore, these rights were reaffirmed and supported by corresponding obligations of the states within the frames of the Aarhus Convention¹⁴⁴. The reference to the procedural rights guaranteed by the Aarhus Convention in relation to the intergenerational equity principle is relevant, as the Preamble of the document acknowledges the need and necessity “to protect and improve the environment for the benefit of present and future generations”¹⁴⁵. Specifically, the text of the Convention provides the following states` obligations in order to ensure the procedural rights:

1. to allow everyone to have access to environmental information, which means that the state is obliged to make such data available to the public upon a request¹⁴⁶.
2. to collect, disseminate and update environmental information for the members of the public, especially in situations when urgent measures need to be taken in order to avoid the imminent risk of damage to human health or the environment¹⁴⁷;
3. to ensure participation of the public in the decision-making process by informing them “in an adequate, timely and effective manner”¹⁴⁸;

¹⁴² Legality of the Threat or Use of Nuclear Weapons, ICJ Reports (1996), 242, para. 29.

¹⁴³ Rio Declaration, prin. 10.

¹⁴⁴ Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, art. 4-9.

¹⁴⁵ Ibid, the Preamble.

¹⁴⁶ Ibid, art. 4

¹⁴⁷ Ibid, art. 5.

¹⁴⁸ Ibid, art. 6.

4. to endow the public with a right of access to judicial procedures as well as to establish “appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice”¹⁴⁹.

Boyle acknowledges their importance and notes that the “procedural rights are the most important environmental addition to human rights law since Rio Declaration”¹⁵⁰.

The reason why I consider the procedural obligations fundamental is because they provide the prevention or at least mitigation of intergenerational injustice. The following example will illustrate how the procedural rights influenced the initiatives of policymakers concerning rural development and environment. People managed to accomplish a recognition of a new right, which prevented governmental projects from causing environmental degradation or in other words preserved the right of present and future generations to enjoy the planetary resources:

The outcomes of a landmark decision in the case *Baleni v Minister of Mineral Resources* demonstrate the effectiveness of realizing procedural rights. In its ruling the Court established a right “to say no” for traditional communities in South Africa¹⁵¹. The case concerned the right to an active participation in the decision-making procedures of a local community, on whose land mining activities were supposed to take place.

Undoubtedly, such mining processes would have a detrimental impact on the environment of Eastern Cape, for instance it could result in degradation of land and contamination of water, on which the local community is totally dependent. Hence, it becomes clear that in this case development would be in conflict with a right of present and future generations to a healthy and sustainable environment, as long as “the land that comprises the proposed mining area is an important resource and central to the livelihoods and substance of the applicants”¹⁵². In its ruling the Court prohibited any mining process in the region where the local community lives, unless its interests would be considered, and a “full and informed consent” would be obtained¹⁵³.

Yet neither the parties during the litigation nor the Court in its ruling explicitly invoked the principle of intergenerational equity, they rather referred to environmental procedural and indigenous peoples` rights¹⁵⁴. However, I would argue that the present case

¹⁴⁹ Ibid, art. 9.

¹⁵⁰ Boyle, “Human Rights and the Environment: Where Next?”, 616.

¹⁵¹ Rosa Luxemburg Stiftung, “Xolobeni: The Right to Say No!”.

¹⁵² *Baleni v Minister of Mineral Resources*, para. 11.

¹⁵³ Ibid, para. 84(2).

¹⁵⁴ *Baleni v Minister of Mineral Resources*, para. 79-80.

covers the principle of intergenerational equity. If the mining activities had taken place and the planetary resources had been affected, then the needs of future generations would have been compromised. Consequently, the access to these planetary resources, their quality and options would be the key factors in assessing, whether future generations would be able to meet their needs or not. This characteristic constitutes the essence of the principle of intergenerational equity introduced by Edith Brown Weiss¹⁵⁵.

Moreover, the case highlighted a right to development that is guaranteed by a great number of international legal instruments. One of them is the Rio Declaration, which emphasizes that the right to development is supposed to be exercised on a condition to “equitably meet developmental and environmental needs of present and future generations”¹⁵⁶.

Thus, it is fair to conclude that by using their procedural rights to be included and to participate, the local communities conserved the cultural and natural heritage for their descendants and by doing that, stroke a fair balance between the interest of present and future generations.

¹⁵⁵ Brown Weiss, “Climate Change, Intergenerational Equity, and International Law”, 616.

¹⁵⁶ Rio Declaration, prin. 3.

4. Deforestation as a Global Concern for Future Generations

4.1 The Role of the Intergenerational Equity Principle in the Control over Deforestation

4.1.1 The Risks to Present and Future Generations in the Anthropocene

In 2018 during the lecture at the University of Stockholm the eminent proponent of intergenerational equity Edith Brown Weiss¹⁵⁷ listed the most significant threats posed to present and future generations and proclaimed modern time the era of the Anthropocene¹⁵⁸. She characterized this new geological epoch as the period when the influence of the mankind on all planetary resources is enormous and critical, since in shaping the planet human beings became now “the dominant force of nature”¹⁵⁹. It cannot be argued that this impact is detrimental, and irresponsible acts and omissions of duty-bearers lead to destabilization of environment and deterioration of its natural resources.

Wide-spread deforestation represents one of these risk factors. Food and Agriculture Organisation of the UN (FAO) gives the following definition to deforestation – “the conversion of forest to other land uses”¹⁶⁰. Human activities like mining, drilling and cutting down forests “by companies, farmers, and herders who cut down and intentionally burn rainforests”¹⁶¹ to make more space for agricultural purposes are causing harm to environment and destroying forest ecosystems. According to the Global Forest Resources Assessment 2020 prepared by FAO, deforestation has been the cause of the loss of approximately 420 million ha of forest worldwide since 1990¹⁶². The Report says that even though the numbers of the loss have decreased within the recent decade, deforestation still takes place in many regions¹⁶³.

There are multiple reasons why forest resources have a vitally important meaning for both present and future generations. Forests perform various crucial functions, such as:

- absorbing and storing GHG – losing the forests would result in dramatic consequences for the climate and all living and non-living resources, “as it would release large amounts of carbon and destroy a potentially very important natural technology for carbon capture and sequestration”¹⁶⁴. Moreover, as it is stated in the UNEP’s Report,

¹⁵⁷ Bosselmann, *The Principle of Sustainability*, 32.

¹⁵⁸ Brown Weiss, “Intergenerational Equity in a Kaleidoscopic World”, 3.

¹⁵⁹ Ibid.

¹⁶⁰ FAO Global Forest Resources Assessment 2020 - Key findings, 2.

¹⁶¹ IPCC Report, “Climate Change 2022”, 57(chapter 2).

¹⁶² FAO Global Forest Resources Assessment 2020 - Key findings, 4.

¹⁶³ Ibid.

¹⁶⁴ Boyd, “Ways of Seeing in Environmental Law”, 868.

in 2010–2019 deforestation contributed over half of the GHG emissions deriving from land transformation¹⁶⁵;

- representing habitat for indigenous people, who have been living in the forest areas “generating social practices and institutions that have supported livelihoods and cultures for generations”¹⁶⁶ – their rights and rights of their children and grandchildren would be violated as the consequences of deforestation, since they would not be able to enjoy the planetary resources and satisfy their needs, as the forest loss undermines both “forest ecological integrity and ultimately human well-being”¹⁶⁷;
- providing drinking water by sustaining the hydrological cycle – rainfall in the Amazonian rainforests feeds unique ecosystems, which supply human beings with fresh water and maintain quality of life of the population¹⁶⁸;
- being home to numerous living species, whose survival is fully dependant on the presence of trees – deforestation is regarded as the main driver of biodiversity loss¹⁶⁹, and with the increasing amount of destroyed forest areas future generations have fewer chances to enjoy the natural resources, since unsustainable forest practices and the loss of trees also lead to a decrease in biodiversity¹⁷⁰;
- being a valuable resource essential for agricultural activities, economic development, industry and other.

After outlining the general reasons why preservation of forests should be considered as one of the most crucial issues for the mankind, it is essential to define the temporal vulnerabilities that deforestation reveals. First of all, wide-spread deforestation leads to the formidable damage, which would cause severe hardships to future generations. The dramatic loss of biodiversity, exposure of resources of flora and fauna to the risk of extinction, heatwaves and drought, vulnerability of food production and outbreaks of diseases¹⁷¹, destruction of living environment of indigenous communities – are only some of the temporal risks, which deforestation carries. For instance, according to the IPCC Report, “deforestation in tropical and temperate forests can increase local temperatures 0.3° to 2°C”¹⁷², which would affect today`s

¹⁶⁵ UNEP`s Report, “Making Peace with Nature”, 21.

¹⁶⁶ IPCC Report, “Climate Change 2022”, 16(cross-chapter 7).

¹⁶⁷ UNEP`s Report, “Making Peace with Nature”, 71.

¹⁶⁸ Preston, “The Evolving Role of Environmental Rights in Climate Change Litigation”, 156.

¹⁶⁹ Cool Earth, “IPBES Report | Biodiversity Loss is a Social and Ecological Emergency”.

¹⁷⁰ Justdiggitt. “The Consequences of Deforestation”.

¹⁷¹ Cool Earth, “IPBES Report | Biodiversity Loss is a Social and Ecological Emergency”.

¹⁷² IPCC Report, “Climate Change 2022”, 90(chapter 2).

youth and future generations, as well as have a detrimental impact on health, food and water security, livelihoods, safe and adequate housing, social and cultural practices”¹⁷³.

It is predicted that in the temporal perspectives these consequences will be boosted¹⁷⁴, which signifies that future generations will not be able to receive the environment “in no worse condition”¹⁷⁵ than it was passed on to the present generation. Therefore, it becomes evident that “long-term nature of many of these effects indicates significant challenges in relation to intergenerational injustice”¹⁷⁶.

The previous chapter gave a clear representation of different positions regarding the possibility of endowing future generations with human rights. That is why now it would be more appropriate to state that due to deforestation human beings in the future will definitely experience the interference with the enjoyment of their human rights, such as the right to life, health, food, water, an adequate standard of living, self-determination and other¹⁷⁷. Specifically, irreversible consequences of the unsustainable forest practices jeopardize future generations of indigenous people, who risk being substantially restricted in their rights to land and cultural practices¹⁷⁸.

Besides the direct effects of deforestation discussed earlier, there can also be indirect consequences, which are less visible and thus, less predictable. As it was noted in the previous chapter, the problem of unpredictability is inseparable from the notion “future generations”. For these reasons, the conclusion regarding the necessity to apply the precautionary approach to all environmental matters concerning future generations reached earlier should be reiterated. Furthermore, Derek Bell is surely right that non-identity of human beings that will live in the future does not stipulate in any case that they will not have human rights¹⁷⁹. Following this reasoning, it can be inferred that deforestation leads to multiple violations of fundamental human rights of present and future generations.

This conclusion implies that mankind nowadays has a duty to put an end to widespread deforestation, treat forest resources sustainably and promote af- and reforestation, so that a person living in the future will not suffer from violation of his human rights as a

¹⁷³ Lewis, “Human Rights Duties towards Future Generations and the Potential for Achieving Climate Justice”, 209.

¹⁷⁴ Ibid.

¹⁷⁵ Birnie, Boyle and Redgwell, *International Law & Environment*, 119.

¹⁷⁶ Lewis, “Human Rights Duties towards Future Generations and the Potential for Achieving Climate Justice”, 210.

¹⁷⁷ Ibid, 212.

¹⁷⁸ Ibid.

¹⁷⁹ Bell, “Does Anthropogenic Climate Change Violate Human Rights?”, 107.

consequence of decisions made today¹⁸⁰. Inclusion of the value of nature's contributions to human well-being as a global understanding is essential, since it would "provide a better measure of the capacity of current and future generations to achieve and sustain higher living standards and quality of life"¹⁸¹.

4.1.2 International and National Instruments as an Answer to the Threat Posed by Deforestation

References to the protection of forest and its resources for the benefits of present and future generations can be found in global legally binding documents, such as the CBD¹⁸², the United Nations Convention to Combat Desertification¹⁸³ and the World Heritage Convention¹⁸⁴. The UNFCCC¹⁸⁵ and the Paris Agreement¹⁸⁶ as two major binding international instruments for addressing climate change set forth that the parties should take necessary steps for conservation, enhancement and promotion of sustainability of sinks and reservoirs of GHG.

One of the most meaningful achievements under the UNFCCC was the establishment of a special program called Reducing Emissions from Deforestation and Forest Degradation (REDD+). REDD+ is a mechanism creating financial incentives for the developing states for the carbon that is stored in the natural sinks and not released in the atmosphere as a result of cutting down and burning forests¹⁸⁷. The main purpose of such inducements for the developing world is to promote sustainable development in the forest sector and therefore, to preserve the natural resources for future generations¹⁸⁸. A similar approach was implemented through the Forest Law Enforcement, Governance and Trade Action Plan adopted in 2003. The program was worked out to combat deforestation and was based on supporting timber-producing countries, promotion of trade in legal timber and environmentally and socially beneficial public procurement policies etc¹⁸⁹.

Despite the variety of instruments with relevance to forest resources, the consensus among the states on the need to adopt a convention dedicated exclusively to combat deforestation is still absent¹⁹⁰. Nevertheless, international concerns over the global problem of

¹⁸⁰ Ibid.

¹⁸¹ UNEP's Report, "Making Peace with Nature", 31.

¹⁸² Convention on Biological Diversity, art. 10.

¹⁸³ United Nations Convention to Combat Desertification, art. 8(3)(b).

¹⁸⁴ Convention Concerning the Protection of the World Cultural and Natural Heritage, art. 2.

¹⁸⁵ United Nations Framework Convention on Climate Change, art. 4(1)(d).

¹⁸⁶ Paris Agreement, art. 5(1).

¹⁸⁷ Voigt, "Introduction: the Kaleidoscopic World of REDD+", 1.

¹⁸⁸ Maguire, "Designing REDD+ to Be Just", 193.

¹⁸⁹ EU FLEGT Facility, "What is the EU FLEGT Action Plan?".

¹⁹⁰ Sands, Peel, *Principles of International Environmental Law*, 428.

deforestation could not be ignored by the UN Conference on Environment and Development and hence, in 1992 it adopted two “soft law” documents concerning forests – the Agenda 21, which assigns an especially important role to programs and plans aimed at restoring degraded forest areas¹⁹¹, and the Forest Principles that according to Sands and Peel, “provided little by way of legal authority and content”¹⁹².

Further initiatives resulted in the establishment of various panels and institutions for forest management, conservation and sustainable development, such as the Intergovernmental Panel on Forests, the Intergovernmental Forum on Forests, the UN Forum on Forests and the Non-Legally Binding Instrument on All Types of Forests¹⁹³. The weakest side of the above-mentioned instruments for addressing the problem of deforestation was the lack of enforceability and long-term perspectives, the presence of which can be fairly deemed two major factors for both protecting forest resources and achieving intergenerational equity. By virtue of the reasons mentioned above, it can be inferred that current international instruments for reducing deforestation are not sufficient for extending their effect into the future and to comply with the principle of intergenerational equity.

As for the regional legislation, the Protocol on Sustainable Forest Management to the Framework Convention on the Protection and Sustainable Development of the Carpathians could be considered as a good example of applying the principle of intergenerational equity as a means of preserving resources of the forest and averting deforestation. Policymakers have agreed upon determining promotion of “the sustainable management and protection of Carpathian forests for bringing benefits to present and future generations” as the principal objective of the document¹⁹⁴.

The involvement on a national level can be demonstrated on the example of France that in 2017 adopted new regulation regarding the requirements for big businesses, incorporated in France, to provide effective the assessment programs, which would reveal the possible risks of environmental harm or human rights violations during the process of supply¹⁹⁵. These measures were worked out to combat imported deforestation and comply with sustainable development goals¹⁹⁶.

¹⁹¹ Agenda 21, art. 7.51(a)(i).

¹⁹² Sands, Peel, *Principles of International Environmental Law*, 429.

¹⁹³ *Ibid.*, 429-430.

¹⁹⁴ Protocol on Sustainable Forest Management to the Framework Convention on the Protection and Sustainable Development of the Carpathians, art. 1(1).

¹⁹⁵ ClientEarth, “New Laws Are Best Way for EU to Tackle Deforestation”.

¹⁹⁶ *Ibid.*

Although it did not take long to see that the businesses already failed to pursue the enacted policy. In March 2021 environmental activists and indigenous groups from the Amazon region sued a French supermarket chain Casino for not excluding meat products originally coming from the areas that suffered from deforestation from their supply chain¹⁹⁷. The plaintiffs alleged that deforestation occurred in the particular region due to the cattle ranching. Casino continued to sell such meat products, even though deforestation caused severe damage to the lands of the indigenous groups from Brazil and Colombia and had a detrimental impact on their livelihoods¹⁹⁸ that they wanted to maintain, protect and develop for future generations¹⁹⁹.

4.2 Tools to Achieve Intergenerational Solidarity in the Context of Deforestation

4.2.1 Evaluation of the Application of the Intergenerational Equity Concept in Environmental Litigation

After clarifying the risks, which deforestation poses to present and future generations and getting familiar with international and national instruments of forest protection, it is essential to look at the outcomes of most considerable legal cases based on deforestation that included concerns for future generations.

➤ *Minors Oposa v Secretary of the Department of Environment and Natural Resources*

The plaintiffs in this case filed a claim against the forest policy driven by the Government of the Philippines. It was alleged that existing and new timber license agreements contributed to the rapid rates of deforestation in the country²⁰⁰, having an adverse and detrimental impact on environmental conditions and breaching the right of people to a “balanced and healthful ecology in accord with the rhythm and harmony of nature”, guaranteed by the 1987 Constitution²⁰¹. The plaintiffs relied upon the principle of intergenerational equity by declaring that they “represent their generation as well as generations yet unborn”²⁰².

The Supreme Court confirmed that the complaining group could be considered as representatives of future generations and possessed a full right to file this lawsuit on the basis

¹⁹⁷ BBC News, “Amazonian Groups Sue French Supermarket Chain over Deforestation”.

¹⁹⁸ Ibid.

¹⁹⁹ Guardians of the Forest, “Amazon Indigenous Communities and International NGOs Sue Supermarket Giant Casino over Deforestation and Human Rights Violations”.

²⁰⁰ Abate, *Climate Change and the Voiceless*, 61.

²⁰¹ Constitution of the Philippines, art. II(16).

²⁰² *Minors Oposa v Secretary of the Department of Environment and Natural Resources*, 177.

of “the concept of intergenerational responsibility”²⁰³. By recognizing that, the Court reiterated that “every generation has a responsibility to the next to preserve that rhythm and harmony for the full enjoyment of a balanced and healthful ecology”²⁰⁴. The *Minors Oposa* case has a significant meaning also because of the expansion of the concept prescribing, who can have standing in environmental disputes in the Philippines²⁰⁵. Randall S. Abate notes that the traditional wording was quite restrictive because of the perception of material interest²⁰⁶. Therefore, it can be concluded that the recognition of the principle of intergenerational responsibility and equity contributed to the Court’s understanding of national legal notions and development of essential environmental concepts.

The Supreme Court ruled in favour of the plaintiffs and therefore, established that the Department of Environment and Natural Resources of the Philippines was obliged to protect the forests and their natural components from deforestation for the benefits of present and future generations²⁰⁷. Such findings of the Court dismiss ethical and legal doubts of certain scholars regarding the possibility to owe duties to unborn human beings discussed earlier.

➤ *Future Generations v Ministry of the Environment and Others*

In the present case the Supreme Court of Colombia agreed with the complaints submitted by a group of 25 claimants, between 7 and 26 years old, who argued that the State failed to comply with national and international commitments by not taking sufficient and effective measures to halt the rates of deforestation in the Colombian Amazon²⁰⁸. The plaintiffs asserted that rampant deforestation constituted a palpable threat to the full exercise of their fundamental rights to life, health and water because of the threat climate change posed and its hazardous impact that would affect them as adults and for the rest of their lives²⁰⁹.

The similar approach was used in the *Urgenda* case, when the Hague Court of Appeal deemed it unnecessary to establish, whether the plaintiffs could represent the interests of future generations or not²¹⁰. Instead, the Court determined “without a doubt” that if the government does not act to reduce GHG emissions, “the current generation of Dutch nationals, in particular

²⁰³ Ibid, 185.

²⁰⁴ Ibid.

²⁰⁵ Abate, *Climate Change and the Voiceless*, 64.

²⁰⁶ Ibid.

²⁰⁷ *Minors Oposa v Secretary of the Department of Environment and Natural Resources*, 191.

²⁰⁸ Dejusticia, “Colombian Youth File the First Climate Change Lawsuit in Latin America”.

²⁰⁹ Slobodian, “Defending the Future”, 570.

²¹⁰ Ibid, 577.

but not limited to the younger individuals in this group, will have to deal with the adverse effects of climate change in their lifetime”²¹¹.

The Supreme Court of Colombia upheld the position of young claimants and stated that deforestation in the Amazon region indeed caused “short, medium, and long term imminent and serious damage to the children, adolescents and adults who filed this lawsuit, and in general, all inhabitants of the national territory, including both present and future generations”, as it led to CO₂ emissions contributing to climate change²¹². In particular, it was alleged that the dangerous consequences of deforestation would directly affect “future generations, including children who brought this action, unless we presently reduce the deforestation rate to zero”²¹³. By including the young plaintiffs in the notion “future generations”, the Supreme Court of Colombia paved the way to more claims aimed at preventing climate crisis in the Amazon region. Now when the members of the public will not be bewildered by the viewpoints of legal scholars and philosophers, who argue that future generations cannot possess rights and enforce them, protection of the forest and its resources should reach a new level.

The Court`s reasoning was guided by the principle of intergenerational equity, as it was acknowledged that daily actions and behaviours of the present generation affect those, who inherit the planet and “also deserve to enjoy the same environmental conditions that we have”²¹⁴. It can be inferred that the Supreme Court recognized the present generation`s duty to take actions for making it possible for future generations to satisfy their needs²¹⁵. Moreover, the Colombian Government was obliged to protect, conserve, maintain and restore the Colombian Amazon, which was recognized as a “subject of rights” because of the greatest importance the forest represents²¹⁶. Specifically, the State was given an order to work out “short-, medium-, and long-term action” strategy on three governmental levels that would “counteract the rate of deforestation in the Amazon, tackling climate change impacts”²¹⁷.

One of such strategies formulated by the Supreme Court of Colombia was the elaboration of the Intergenerational Pact for the Life of the Colombian Amazon “with the active participation of the plaintiffs, the affected communities, scientific organizations or environmental research groups, and the interested population in general”²¹⁸. The strongest

²¹¹ The State of the Netherlands v Urgenda Foundation, para. 37.

²¹² Future Generations v Ministry of the Environment and Others, para. 34.

²¹³ Ibid.

²¹⁴ Ibid, para. 18.

²¹⁵ Ibid.

²¹⁶ Ibid, para. 45.

²¹⁷ Ibid.

²¹⁸ Ibid.

feature of the approach proposed by the Court is the opportunity to turn this pact into the platform, where both substantive and procedural rights of both generations could be respected.

Unfortunately, in this case the Court's order did not affect governmental policies. After the Supreme Court of Colombia rendered its landmark decision regarding the steps that should be taken in order to preserve the Amazon for present and future generations, environmental non-governmental organisations (NGOs) kept a close eye on how the Government complied with the Court's order. According to the data from April 2019, the rate of deforestation in the Amazon increased, and the former plaintiffs decided to start another action against the Colombian Government²¹⁹. Particularly, they allege that instead of working out strategies for reforestation, the Government proposed development plan allowing deforestation of 800,000 hectares of land within four years²²⁰. Moreover, the Government passed the deadline set by the Court for creation the short-, medium- and long-term action plans, and did not take effective measures to ensure "the active participation of the plaintiffs, the affected communities, scientific organizations or environmental research groups, and the interested population in general"²²¹ in drafting the Intergenerational Pact, as it was ordered by the Supreme Court²²².

The example given illustrates how the lack of supervisory authority can diminish the progress reached during environmental litigation and contribute to intergenerational inequity. That is why it can be inferred that in matters of such fundamental importance, a more effective control over the execution of the Court's decisions should be implemented.

➤ Pending claims

According to the results of the research conducted by Joana Setzer and Delton Carvalho, at least seven different lawsuits were filed in Brazil between 2019 and 2020 to stop deforestation, protect ecosystems and fundamental human rights²²³. The plaintiffs report about the Government's failure to adhere to the national action plans worked out for preventing further deforestation that causes "serious and irreparable damage to the essential core of the

²¹⁹ Dejusticia, "The Colombian Government Has Failed to Fulfil the Supreme Court's Landmark Order to Protect the Amazon".

²²⁰ Ibid.

²²¹ Future Generations v Ministry of the Environment and Others, para. 45.

²²² Dejusticia, "The Colombian Government Has Failed to Fulfil the Supreme Court's Landmark Order to Protect the Amazon".

²²³ Setzer, Carvalho, "IEA v Brazil: Rights-Based Climate Litigation to Protect the Brazilian Amazon".

fundamental right to an ecologically balanced environment of present and future generations”²²⁴ and meeting Brazilian emissions targets ²²⁵.

Complaining parties explicitly refer in their applications to the principle of intergenerational equity as a method “to compel present generations to include the interests of future generations as a measure of action and consideration”²²⁶. They argue that the duty to protect and preserve the environment for present and future generations set forth in the Brazilian Constitution²²⁷ constitutes “explicit, generic, substantive, and positive obligation”, which is legally enforceable²²⁸.

4.2.2 The Role of the Human Rights-Based Approach

The reason why we talk about the Human Rights-Based Approach (HRBA) to environment and its reflection in relations with development is because all these three dimensions are inter-related. HRBA is definitely a broader concept than intergenerational equity. Even though HRBA covers the scope of application of the latter, it cannot replace the principle of intergenerational equity, and they “both can exist simultaneously”²²⁹.

The application of HRBA to the problem of deforestation is relevant for present and future generations, as HRBA implies that human rights standards and principles set forth in international documents and connected with environmental human rights “should guide all development cooperation and programming”²³⁰. It makes it possible for the citizens to express their position, whether one or another governmental program poses a risk to forest resources and, therefore, may affect the enjoyment of fundamental human rights²³¹, since for example local communities are fully dependent on the health and vitality of the forests. In other words, HRBA assist at invoking “the right against a sufficiently well-functioning state”²³², and compel the states to develop sustainably.

HRBA played a significant role in the universal recognition of a human right to a clean, healthy and sustainable environment set forth in the resolution the UN Human Rights

²²⁴ PSB et al. v Brazil, Application, para. 3.

²²⁵ Setzer, Carvalho, “IEA v Brazil: Rights-Based Climate Litigation to Protect the Brazilian Amazon”.

²²⁶ PSB et al. v Brazil, Application, para. 233.

²²⁷ Constitution of the Federative Republic of Brazil, art. 225.

²²⁸ PSB et al. v Brazil, Application, para. 276.

²²⁹ Paré, “Children’s Rights or Intergenerational Equity?”, 153.

²³⁰ United Nations Sustainable Development Group Human Rights Working Group Common Understanding, The Human Rights Based Approach to Development Cooperation Towards a Common Understanding Among UN Agencies.

²³¹ Banketas, Oette, *International Human Rights Law and Practice*, 595.

²³² Broberg, Sano, “Strengths and Weaknesses in a Human Rights-Based Approach to International Development”, 667.

Council adopted in October 2021. Its influence can be clearly seen, since endowing rights-holders with new possibilities for their development and eliminating inequality constitute the key features of HRBA²³³. Despite its non-legally binding character, the resolution in question has fundamental importance for the development of environmental litigation and preservation of natural resources. Firstly, it allows to impart temporal character to the rights of present and future generations and obligations of duty-bearers because of the sustainability component. Secondly, the Preamble of the document reaffirms “that all human rights are universal, indivisible, interdependent and interrelated”²³⁴. With respect to deforestation, it means that it could be enough for indigenous communities to prove that a right to a healthy environment is deeply connected to a right to self-determination to hold the state responsible under the International Covenant on Civil and Political Rights for depriving people of their “own means of subsistence”²³⁵.

The tight bond between the way of living of indigenous communities and nature is emphasized also in the Indigenous and Tribal Peoples Convention, where the suitable land is considered to be the factor necessary “for their present needs and future development”²³⁶. A similar wording can be found in the United Nations Declaration on the Rights of Indigenous Peoples²³⁷. The text of the document specifically indicates that a right to natural resources is ensured by the correspondent responsibility owed to future generations²³⁸. Another manifestation of HRBA can be seen on the example of the recent Resolution that appoints a Special Rapporteur on the promotion and protection of human rights in the context of climate change²³⁹ for the development of rights-based strategies to mitigate further harm from climate crisis.

Nevertheless, HRBA may still be exposed to certain criticism. It is linked to a threat of exclusion of forests as unique ecosystems, homes to numerous living and non-living organisms from issues of global concerns. A. Bansal expresses the view that despite all the advantages and effectiveness, HRBA may lead to extreme anthropocentrism in the questions of protection of the environment²⁴⁰. Expansion of HRBA up to amalgamation of environmental

²³³ Ibid.

²³⁴ Human Rights Council Resolution 48/13, The Human Right to a Safe, Clean, Healthy and Sustainable Environment.

²³⁵ International Covenant on Civil and Political Rights, art. 1(2).

²³⁶ Indigenous and Tribal Peoples Convention, art. 16(4).

²³⁷ United Nations Declaration on the Rights of Indigenous Peoples, art. 25.

²³⁸ Ibid.

²³⁹ Human Rights Council Resolution 48/14, Mandate of the Special Rapporteur on the Promotion and Protection of Human Rights in the Context of Climate Change.

²⁴⁰ Bansal, “Should There Be a Human Rights Approach for Environmental Protection?”, 374.

law and human rights could turn “the environment only into a function of human needs”²⁴¹. Undoubtedly, promotion of sustainability for the benefits of present and future generations and expression of concerns about the full realization of a right to a healthy environment are issues of great importance. However, this approach should not limit the reasons why the deforestation should be prevented exclusively to anthropocentrism.

In comparison to HRBA, the principle of intergenerational equity has a deeper relationship with nature and implies a stronger necessity to protect its components. This thought could be supported by the conclusions of Klaus Bosselmann, who recognizes that Brown Weiss’s concept was never focused only on the welfare of human beings²⁴². He cites Ulrich Beyerlin and agrees that the principle of intergenerational equity comprises the features of both anthropocentric and ecocentric approaches²⁴³. The Colombian Supreme Court’s position that “environmental rights of future generations are based on the ethical duty of the solidarity of the species and on the intrinsic value of nature”²⁴⁴ corresponds to these findings. Reference to the importance of environment as such is what HRBA lacks.

River Atrato case could serve as a good example of how to include concerns of both present and future generations, fundamental human rights and natural resources without creating a hierarchy. The Court establishes that illegal mining deteriorates forest and water resources, which are essential for present and future generations, and consequently, it violates fundamental human rights²⁴⁵. However, it also emphasized that the multiple components of environment as a living entity “are subjects of individual rights, which makes them a new imperative of integral protection and respect on the part of States and societies”²⁴⁶. The Court encourages to develop “ecocentric perspective” of the attitude to environmental protection²⁴⁷, which must allow to apply justice for nature “beyond the human scenario and must allow nature to be subject to rights”²⁴⁸.

The similar approach was used in the decision of Inter-American Court in Indigenous Communities Members of the Lhaka Honhat Association v Argentina. The Court ruled that a right to a healthy environment includes the protection of components of the environment even if it is unclear that any interfering activities pose a risk to people²⁴⁹. Hence, it can be concluded

²⁴¹ Ibid.

²⁴² Bosselmann, *The Principle of Sustainability*, 33.

²⁴³ Ibid.

²⁴⁴ *Future Generations v Ministry of the Environment and Others*, para. 18.

²⁴⁵ *Center for Social Justice Studies et al. v. Presidency of the Republic et al*, para. 9.27.

²⁴⁶ Ibid.

²⁴⁷ Ibid.

²⁴⁸ Ibid, para. 9.31.

²⁴⁹ *Lhaka Honhat Association v Argentina*. Case summary.

that both HRBA and the principle of intergenerational equity are important tools for safeguarding forest resources from deforestation, but the latter one represents a more effective measure due to its more specific and detailed scope of application.

4.2.3 Possible Methods for Preserving Intergenerational Equity in Matters of Forest Protection

The analysis of the environmental litigation confirmed that when the duty-bearers ignore the risks of serious environmental harm and human rights violations by continuing to carry out unsustainable forestry practices that lead to degradation of environmental conditions, they contribute to intergenerational inequity.

Can a particular state be held liable for not preserving the natural resources for the benefits of present and future generations in terms of international law? From an ethical point of view, it can be fairly argued. However, the legal side of the question is more complicated, as long as the principle of permanent sovereignty over natural resources creates certain challenges. As previously mentioned, there are ways to go beyond this concept, but it is still unpredictable, how the tribunal would consider this case.

A possible claimant could for example turn to *erga omnes* doctrine following the recent example of Gambia, which initiated judicial procedure against Myanmar, stating that the Genocide Convention contained such obligations²⁵⁰. Earlier the ICJ determined that an *erga omnes* obligation implies that all the states “have a legal interest in the protection of rights involved”, and that is why the existence of such interest is sufficient to obtain legal standing regarding breaches of the obligation²⁵¹. This mechanism could be used to prevent further deforestation and by doing that protect the rights of present and future generations.

It is also essential to take into consideration that nowadays a panel of legal experts created a definition of “ecocide” in order to turn severe offences against the environment into an international crime that can be prosecuted by the International Criminal Court²⁵². The process of incorporation of ecocide into the Rome Statute is not completed yet, however this tendency speaks for the increased awareness of the consequences of environmental damage and emergence of climate crisis. It is impossible not to support the opinion of Laura Westra, who argues that convicting those who are guilty of environmental crimes against future

²⁵⁰Global Centre for the Responsibility to Protect, “Q&A: The Gambia v. Myanmar, Rohingya Genocide at the International Court of Justice, May 2020”.

²⁵¹ Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal), para. 68.

²⁵² Matrix Chambers, “Panel of Legal Experts, Co-Chaired by Philippe Sands QC, Draw Up Definition of ‘Ecocide’ as an International Crime”.

generations is crucial, but it is way more important not to let these irreversible harms occur²⁵³. This could be achieved by codifying in law regimes prevailing enforceable concepts of inter- and intragenerational equity²⁵⁴.

A more evident and effective means to hold the state accountable would be an attempt to prove the transboundary harm from deforestation, which is prohibited by international law. Claimants could try to demonstrate that a particular state breached the principle, which “is now part of the corpus of international law relating to the environment” by failing to observe the duty “to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State”²⁵⁵.

There are other ways to compel the state to observe its environmental obligations, such as economic inducements, which constitute common practice in the international community. For instance, the European Union (EU) declared that the agreement on free trade between the EU and Mercosur would come into force only after Brazil demonstrates concrete, effective steps aimed at reducing deforestation in the Amazon region²⁵⁶. Undoubtedly, the adoption of this free-trade treaty would be vitally important for Brazil’s economy and development goals. During the COP26 climate summit Brazil joined more than 100 other states and promised “to end and reverse deforestation by 2030”²⁵⁷. However, it is yet unclear how Brazil implements anti-deforestation measures, and how these actions affect the decision of the EU.

A number of states have already demonstrated their readiness to reach intergenerational equity on the national level by appointing special agencies and offices with investigative powers and responsibility to concern the interests of future generations²⁵⁸. For instance, the office of the Future Generations Commissioner for Wales bases its policy on principles crucial for the purposes of achieving intergenerational equity:

1. long-term perspectives that allow to balance “short-term needs with the needs to safeguard the ability to also meet long-term needs”²⁵⁹, which is especially

²⁵³ Westra, *Environmental Justice and the Rights of Unborn and Future Generations*, 137.

²⁵⁴ Ibid.

²⁵⁵ *Pulp Mills on the River Uruguay (Argentina v Uruguay)*, para. 101.

²⁵⁶ Boadle, “EU Diplomats Say It Is Up to Brazil to Save Mercosur Trade Deal”.

²⁵⁷ Rannard, Gillett, “COP26: World Leaders Promise to End Deforestation by 2030”.

²⁵⁸ Anstee-Wedderburn, “Giving a Voice to Future Generations”, 53.

²⁵⁹ Future Generations Commissioner for Wales, “Well-being of Future Generations (Wales) Act 2015”.

significant for “policy domains with an extended timeframe, such as environmental sustainability”²⁶⁰;

2. integration of all public bodies` well-being objectives²⁶¹;
3. collaboration and involvement of population with focus on diversity and common interests, including the interests of yet unborn citizens²⁶²;
4. preventive mechanisms²⁶³.

This advanced regulation can be considered effective given the fact that at COP26 the Commissioner discussed how it “secured fundamental changes to land use planning policy”²⁶⁴.

Other states could follow this example and appoint a commissioner, guardian or an ombudsman for future generations, as it was proposed by Brown Weiss²⁶⁵. Such institution could have multiple functions, such as collecting data regarding deforestation in the country, conducting social research, providing platforms for discussions with participation of vulnerable groups, monitoring of how the government executes courts` decisions involving the interests of future generations etc.

Beckman and Uggla argue that an ombudsman would be a more legitimate fit for the role of a defender of the interests of yet unborn generations than other organs because of the “far-reaching powers to investigate the actions of bureaucrats and public entities”, as well as a “right to visit, inspect, and request information from other state entities”²⁶⁶. Moreover, in particular states ombudsman`s jurisdiction comprises legislative initiative and mandate to start actions against policymakers²⁶⁷. Such prosecutor`s competence would allow a national ombudsman for future generations to protect forest resources from unsustainable practices for the benefits of humans both in the present and future.

The idea of creating an organ responsible for the implementation of intergenerational equity should also be realized on the international level. Particularly, the proposal to create “institution to safeguard the long-term interest and needs of future generations at the global level” was already expressed in the SGR on ISNFG²⁶⁸. It was discussed that the main powers and responsibilities of a high commissioner for future generations would contain:

²⁶⁰ González-Ricoy, Gosseries, “Designing Institutions for Future Generations”, 4.

²⁶¹ Future Generations Commissioner for Wales, “Well-being of Future Generations (Wales) Act 2015”.

²⁶² Ibid.

²⁶³ Ibid.

²⁶⁴ Climate Champions, “Sophie Howe: The World’s First Future Generations Commissioner”.

²⁶⁵ Brown Weiss, “Implementing Intergenerational Equity”, 108.

²⁶⁶ Beckman, Uggla, “An Ombudsman for Future Generations”, 118-119.

²⁶⁷ Ibid, 119.

²⁶⁸ Report of the Secretary-General, “Intergenerational Solidarity and the Needs of Future Generations”, para. 53.

- “international agenda-setting and leadership;
- monitoring;
- early warning and review;
- public participation;
- capacity for innovation at the national and subnational levels;
- public understanding and evidence;
- reporting”²⁶⁹.

In terms of deforestation it can be said that the above-mentioned functions would serve as an effective tool to mitigate the spread of deforestation and prevent the violation of fundamental human rights, since the state would be obliged to communicate data to the international institution and ensure transparency regarding the activities, which cause deforestation. If such arrangements take place, it would be the clear evidence of how effectively the principle of intergenerational equity addresses the global problem of deforestation.

Another measure for conserving forest resources, which is enforced by the principle of intergenerational equity, constitutes the proposal of establishing the Common Heritage Fund²⁷⁰. Its mechanism would be focused on averting “detrimental environmental processes in order to contribute to the long-term protection of the Earth’s environmental treasures”²⁷¹ by placing natural heritage assets under international protection, which speaks for the extension of temporarily rights into the future. Afforestation is considered to be one of the principal targets of financial flows²⁷².

The project would address the aspects of both intra- and intergenerational equity and include the allocation of responsibilities between the beneficiary states (where the planetary resources are located), which would have “to properly balance degradation resulting from the use of natural resources and to take appropriate measures to conserve the designated areas for future generations”²⁷³ and the funding states, whose main task would be to ensure financial assistance for the implementation of environmental programs. Szabó compares the Common Heritage Fund with similar projects and concludes that it represents a more advanced model because its comprehensive framework would allow to move “towards achieving greater equality between industrialized and developing states, without losing sight of the enforcement

²⁶⁹ Ibid, 57.

²⁷⁰ Szabó, “A Common Heritage Fund for Future Generations”, 197.

²⁷¹ Ibid, 198.

²⁷² Ibid.

²⁷³ Ibid, 206.

of the interests of future generations”²⁷⁴, and consequently, to achieve the goal of sustainable development.

The present paper fully supports a remarkable statement of Streck and Schwedeler, who observe that the considerable and increasing number of adopted international documents and the growth of global activity do not entail successful restraining of deterioration of the natural resources²⁷⁵. Specifically, this applies to deforestation. One of the reasons of such failure could be the absence of a legally binding instrument that explicitly addresses the problem of deforestation and renders greater importance to the principle of intergenerational equity by imposing long-term obligations. Optimal outcome would be the application of the same approach that figured in the case analysed in the previous chapter, when the German Federal Constitutional Court determined that current environmental policies lack instruments “to safeguard fundamental freedom over time and to spread the opportunities associated with freedom proportionately across generations”²⁷⁶.

If this idea was implemented in relation to deforestation on the international level, it would help to extend temporarily rights into the future, since the states would be bound by the duty to include provisions on intergenerational equity in their development plans and programs for reducing the loss of forests. What should be borne in mind while drafting a treaty on international level is the essentiality of inclusion of an adequate compliance mechanism, which would assist at overcoming the difficulty of enforcing international law, which is recognized by the scholars²⁷⁷.

Nevertheless, there is a strong counterargument to this proposal manifested by the possible disagreement of the developing world to be bound by challenging intertemporal commitments regarding the preservation of forests. This fair apprehension goes back to the negotiations within the United Nations Conference on Sustainable Development Rio+20, when the concept of establishing organs responsible for representing the interests of future generations was not supported by the developing countries, as they feared it would create obstacles to their national development²⁷⁸.

It is impossible to leave unnoticed ambitious initiatives supported by the Normandy Chair for Peace, a program that was established in 2019 in order to protect the rights of future

²⁷⁴ Ibid, 212.

²⁷⁵ Streck, Schwedeler, “Addressing Drivers of Deforestation and Forest Degradation Through International Law”, 221.

²⁷⁶ Bundesverfassungsgericht, Order of the First Senate of 24 March 2021 - 1 BvR 2656/18, para.183.

²⁷⁷ Streck, Schwedeler, “Addressing Drivers of Deforestation and Forest Degradation Through International Law”, 221.

²⁷⁸ Anstee-Wedderburn, “Giving a Voice to Future Generations”, 59.

generations, peace and environment. One of such projects was launched to seek an Advisory Opinion of the ICJ on the obligations that the states have towards present and future generations regarding the detrimental impact of climate change²⁷⁹. One could argue that this procedure will not create enforceable consequences, since advisory opinions of the Court do not have a legally binding effect²⁸⁰, and thus it will not be able to compel the duty-bearers to protect the forests for the benefits of human beings to come. However, despite being non-binding, advisory opinions “carry great legal weight and moral authority”²⁸¹ and serve as effective instruments for “the clarification and development of international law”²⁸². Involvement of the ICJ would contribute to the global understanding of the rights of future generations and their recognition. That is why it can be inferred that the present initiative represents an important method of rendering greater importance to the necessity to preserve forest resources for generations to come.

As it is fairly noted by Anstee-Wedderburn, the idea of preserving the same natural resources and environmental conditions for all the upcoming generations “without distinction and limit”²⁸³ does not represent a realistic solution, especially taking into account the world’s population growth. Yet at the same time she argues that narrowing the duties of the present generation would not halt the effects of environmental degradation, which would have an impact on human beings to come. In my opinion, it would be feasible to balance these risks by imposing an obligation to prepare long-term plans aimed at reducing deforestation that would be restricted by certain terms but ensured by the duty to renew them. Once the term is expired, the governments should carry out environmental impact assessments, and introduce plans based on those results. It would make it clear to what extent the needs of the present generation should be limited in order to reach intergenerational equity.

Case study proved that environmental activism and NGOs involvement played a crucial role in preserving the balance between generations and conservation of the forest. The possibility to exercise procedural rights makes it possible to tackle environmental challenges and hold the duty-bearers accountable for acts and omissions, which lead to the increasing intergenerational inequity and degradation of forest resources. Therefore, it can be concluded that a key element in the fight against deforestation and intergenerational inequity is greater

²⁷⁹ Normandy for Peace, “Climate Justice”.

²⁸⁰ International Court of Justice. “Advisory Jurisdiction”.

²⁸¹ Ibid.

²⁸² Ibid.

²⁸³ Anstee-Wedderburn, “Giving a Voice to Future Generations”, 64.

participation of population and non-governmental organisations as representatives of future generations in the environmental issues.

Summary and Conclusions

The aim of the research was to indicate *how the principle of intergenerational equity addresses the problem of forest loss*. The research question was clarified through four objectives outlined in the introduction, such as:

- to demonstrate how deforestation affects the balance between the interests and needs of generations;
- to examine the risks posed to future generations by forest loss;
- to assess the effectiveness of the existing mechanisms for halting deforestation in intertemporal perspectives;
- to formulate possible solutions to the deforestation problem.

With respect to the first two objectives of the thesis, the research conducted illustrated that deforestation represents a major impediment to achieving intergenerational equity. It jeopardizes food security, sanitation, conservation of biodiversity, access to clean water, health condition, adequate housing and other issues of fundamental importance because of the long-term destructive impact it causes to ecosystems and millions of their living and non-living resources. All this makes it impossible for the current generation to pass on healthy, sustainable environment to those who will live in the future. That is why deforestation constitutes a hazardous factor both in anthropo- and ecocentric terms. These findings also address the research question. The loss of forest resources due to unsustainable forest practices dramatically decreases the chances of future generations to benefit from the exploitation of the planetary resources in no worse manner than the current generation, since such resources will be passed on to them in a more degraded condition than they were received by us.

As regards the third and fourth objective, the analysis of statistical data on rates of forest loss demonstrated that despite the great variety of international and national instruments, deforestation still happens in many regions around the world. The main reason of the ineffectiveness of the existing mechanisms aimed at halting deforestation and promoting reforestation is their non-binding nature and the absence of intertemporal strategies, which would directly address the problem of forest loss, apply the principle of intergenerational equity as the guiding mandatory policy and provide sufficient monitoring and control over the steps taken by the governments. Moreover, despite the fact that deforestation represents a global problem, the unsustainable activities that drive it take place on the national level. This invokes corruption and pressure on relevant governmental offices²⁸⁴, which leads to issuing mining and

²⁸⁴ Larson, Ravikumar, “Why Is It so Incredibly Hard to Stop Deforestation?”.

logging licences, agricultural expansion and prioritizing political interests over the sustainable sector²⁸⁵.

Additionally, the progress reached within the effective environmental litigation can be cancelled without appropriate mechanisms of supervision. Hence, it can be inferred that the appointment of commissioners for future generations or similar organs on the international and national levels could serve as a worthwhile solution to the problem of preserving the balance between the interests of present and future generations with regards to deforestation. Such balance would be consistent if both present and future generations could rely on equal economic, financial, human, social and environmental stocks, which define the quality of assets and values necessary for maintaining or increasing their well-being at the moment and across generations²⁸⁶.

Furthermore, there are also significant unsettled issues arising out the application of the principle of intergenerational equity to the forest loss. For instance, it pertains to an essential problem of lack of uniformity. The absence of specification, which would indicate how many generations should be considered when the duty-bearers adopt development plans regarding the forest sector creates uncertainty, which either leads to an excessive focus on the interests of future generations and ignorance of the present needs or creates an opposite effect.

Concretization of the duty-bearers` obligations and elimination of vagueness with respect to future generation`s ability to enjoy fundamental human rights are especially crucial for vulnerable groups like indigenous communities, who are vitally dependant on healthy, sustainable forests. Moral recognition of intergenerational equity in the international community is not sufficient for preserving forest resources for the benefits of future generations. Explicit references to the interests of future generations can be found in very few legally binding international and national instruments²⁸⁷. In order to extend temporarily rights into the future, it is essential to establish on the basis of consensus that future generations do have rights that need to be protected.

As regards questions of the unpredictability of the needs of human beings to come and the level of technical and scientific progress in the future that would determine how they would be equipped to respond to environmental problems²⁸⁸, the present paper does not share these concerns. As it was discussed earlier, those who live today do not have to make such

²⁸⁵ Ibid.

²⁸⁶ Carmody, "Considering Future Generations - Sustainability in Theory and Practice".

²⁸⁷ Anstee-Wedderburn, "Giving a Voice to Future Generations", 61.

²⁸⁸ Ibid, 65.

predictions, since it is quite clear that future generations will enjoy the same fundamental human rights as we do. And our only task is to preserve the conditions, which would provide them with opportunities to enjoy such rights. For this purpose, the current policies should rely on the principle of intergenerational equity and the precautionary concept.

Another essential guideline that needs to be taken into consideration in order to achieve the goals of sustainable development is the principle of intragenerational equity. In order not to pass on degraded forest resources, poverty and environmental inequity to mankind in the future, the duty-bearers should put more efforts on eliminating injustice between the developed and developing world. Transfer of advanced technologies, financial flows, international cooperation and assistance on the part of the developed states are the keys to putting an end to intragenerational inequity.

There are numerous signs that deforestation poses an imminent risk to mankind and unique ecosystems, which are incredibly valuable not only because they sustain life of humans but also due to “the intrinsic value of nature”²⁸⁹ itself. Such danger cannot be ignored since there is no time to lose until the environmental crisis reaches the critical point. We have to be ready “to break out of past patterns”, since they do not provide sufficient, effective framework to maintain environmental stability²⁹⁰. Undoubtedly, “the world is unfortunately not what we would like it to be”²⁹¹ but it is a choice of the present generation to either leave it the way it is now and accept intergenerational inequity or make a change and secure a safe, sustainable future for us and generations to come.

²⁸⁹ *Future Generations v Ministry of the Environment and Others*, para. 18.

²⁹⁰ Report of the World Commission on Environment and Development: *Our Common Future*, para. 4(chapter 12).

²⁹¹ *Ibid*, para. 68(chapter 6).

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