A Reply to Barresi's "Beyond Fairness to Future Generations"

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Paul A. Barresi's thoughtful article, "Beyond Fairness to Future Generations" is a useful contribution to the literature on the subject of intergenerational equity. We reach similar conclusions by different paths of logic. The question is whether this makes any difference. Barresi argues that the focus of intergenerational equity must be on intragenerational equity and individual rights for any theory to be consistent with major Western cultural and legal traditions. The development of the principle of intergenerational equity in the 1990s suggests that it already strikes a deep chord within the major cultural and legal traditions in the world and that it is consistent with Western traditions.

I. THE THEORY OF INTERGENERATIONAL EQUITY

Barresi argues that humans are biologically hard wired to be concerned for future generations. His argument can be extended: Philosophically oriented humans are driven to find a rationale for an instinct that is biologically hard wired and to find universal cultural expression—the concern for future generations. With this we might both agree.

There is a problem, however, in rooting our concern for future generations solely in sociobiology. In biology, a species that does not show concern for future generations will be replaced by another that does. The human species has survived thus far because humans have shown such concern. It is possible, however, that humans could lose this concern and be replaced by another species that does show concern. Barresi's argument offers cold comfort on this point.

The question is whether it makes any difference which line of reasoning is used to arrive at a common conclusion—that intergenerational equity is important. I argue that there are many reasons why people care about future generations. Each generation is theoretically in a position of

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equality with other generations with regard to the entitlement to use environmental resources and the obligation to care for these resources and at the same time serve as a partner with other generations in using and caring for the earth.[1] Moreover, as the most sentient of species, we have a special responsibility to care for the natural system of which we are a part. From this I propose intergenerational rights and obligations, although I acknowledge that it would be possible to follow John Austin's[2] or Hans Kelsen's[3] approach and speak only of obligations to future generations. From intergenerational rights and obligations flow intragenerational rights and obligations for members of the present generation in using and caring for the environment and for cultural resources.[4]

Barresi proposes that intergenerational equity is conceptually a matter of intragenerational equity, individual rights, and intranational equity. This framework is attractive, he contends, because it is acceptable to developed countries without whose support there can be little progress in fostering intergenerational equity. While I acknowledge that intergenerational rights, if viewed as group rights in human rights law, may raise difficulties for certain western, developed countries such as the United States or the United Kingdom,[5] his argument has its own difficulties.

While Barresi is correct that developed countries have caused most environmental damage until now and that they will continue to contribute to long-term environmental problems, such as climate change, nuclear waste, and toxic pollution, this pattern is changing. In the future, it is likely to be the developing countries who will become major contributors to long-term environmental problems. This pattern is already emerging in the rapidly industrializing countries in Asia. This means that, contrary to what Barresi says, it will be very important that the logic path for intergenerational equity be cross-culturally acceptable, which means that it must be based in the various major cultural traditions of the world.

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1. *See* Edith Brown Weiss, *The Planetary Trust: Conservation and Intergenerational Equity*, 11 ECOLOGY L.Q. 495, 499-502 (1984).

2. John Austin identifies a class of absolute duties, which prescribe actions toward parties other than those obliged, who are not determinate persons, such as members generally of society and of humankind at large. No correlative rights attach to the obligations. *See* JOHN AUSTIN, 1 AUSTIN'S JURISPRUDENCE, LECTURES ON JURISPRUDENCE 412-15 (1873).

3. *See* HANS KELSEN, PURE THEORY OF LAW 62 (M. Knight trans., 1969).

4. EDITH BROWN WEISS, IN FAIRNESS TO FUTURE GENERATIONS 99-103 (1989).

5. In Latin American countries, which are within the Western cultural tradition, group rights have been widely accepted in legal scholarship. *See* A.A. Cançado Trindade, *The Contribution of International Human Rights Law to Environmental Protection, with Special Reference to Global Environmental Change*, *in* ENVIRONMENTAL CHANGE AND INTERNATIONAL LAW: NEW CHALLENGES AND DIMENSIONS 284-85 (Edith Brown Weiss ed., 1992).

Barresi prefers to base his concern for future generations on an intragenerational contract between individuals, which only focuses on individual rights. While this may appeal to western legal thought, it does not necessarily appeal to African or Eastern thought. Instead, future generations should have rights as a class. This would not preclude members of the present generation from having individual rights and obligations. When a future generation becomes the living generation, its members acquire individual rights and obligations that are rooted in the relationship that all generations share with each other for the natural system. The contents of the rights flow from this intergenerational relationship: rights of access to use and to benefit from the environment with correlative obligations to care for it. These are individually held rights by members of the present generation, which are consistent with the Western cultural and legal tradition to which Barresi refers.

These intragenerational rights have particular relevance to poor communities across the world. In both developing and industrialized countries, poorer communities often suffer an inordinate share of environmental burdens. This is readily seen in urban neighborhoods which may be dumping grounds for toxic wastes, lack potable water, and be unduly exposed to industrial hazards. Poor rural communities also suffer a disproportionate share of environmental burdens, either because their poverty forces them to exploit forests, soils and other resources unsustainably, or because their resources are exploited and destroyed by other powerful groups, often backed by money and technology from abroad.

Rapid and environmentally unsound economic development may place undue costs on the poor. The poor may be sufficiently better off in the future in that the benefits will outweigh the costs. In practice, however, poor people often suffer environmental burdens disproportionately and do not receive a proportionate share of environmental benefits. Thus, poor communities should be the major champions of sustainable development. The theory of intergenerational equity applied in the intragenerational equity context provides individuals with a right of comparable access to the benefits of the environment and imposes comparable obligations to care for it so that it is passed on, in balance, in no worse condition than it was received. These rights can be implemented by procedural guarantees such as access to relevant

information about environmental dangers and participation in decisions affecting their access and use of the environment.[6]

Barresi argues that intergenerational equity must be based on a contractual theory applicable to individuals within national boundary lines. But the international system is moving away from a hierarchical state-centered system to one that is composed of networks of actors (states, nonstate actors, and individuals) and organized in a nonhierarchical fashion. Twenty years ago, Harold Jacobson observed that while the international system consists of many sovereign centers of decision-making, "effective power is increasingly being organized in a non-hierarchical manner."[7] While states continue as principal actors, their freedom to take decisions unilaterally is increasingly constrained, and nonstate actors are performing increasingly complex tasks, many of which have traditionally been done exclusively by states.

The international system has many actors in addition to states. The 1997-98 Yearbook of International Organizations recorded 6,115 intergovernmental organizations and 40,306 nongovernmental organizations, for a total of 46,421 international organizations.[8] There are many other actors in addition: multinational corporations, ethnic minorities, subunits of national governments, local nongovernmental organizations, ad hoc associations, and illicit transnational actors. New information technologies empower groups other than states to participate in developing and implementing international law. The technologies empower citizens to participate in the process of governance. Pressure groups now form almost instantaneously on the Internet across national boundaries to oppose actions in a particular country. Letter writing campaigns have gone electronic. Moreover, people are migrating from one country to another in increasingly large numbers, whether from economic adversities and human rights atrocities, or to economic and social attractions in a new country. In this setting it seems anachronistic to confine the theory of intergenerational equity to contractual relationships between individuals within a country.

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6. *See* Edith Brown Weiss, *Environmental Equity: The Imperative for the Twenty-First Century*, *in* SUSTAINABLE DEVELOPMENT AND INTERNATIONAL LAW 17, 22-23 (Winfried Lang ed., 1995).

7. HAROLD K. JACOBSON, NETWORKS OF INTERDEPENDENCE: INTERNATIONAL ORGANIZATIONS AND THE GLOBAL POLITICAL SYSTEM 416 (1st ed. 1978).

8. *See* 1 YEARBOOK OF INTERNATIONAL ORGANIZATIONS 1762 (Union of Int'l Assoc. ed., 34th ed. 1997-98).

II. ACCEPTANCE OF THE INTERGENERATIONAL PRINCIPLE

Intergenerational equity is becoming part of international and national jurisprudence. This is reflected in the writings of judges on international and national tribunals, in diverse international legal instruments, and in several institutional proposals that would give effect to the interests of future generations. Sometimes the intergenerational principle refers only to responsibility; at other times it explicitly encompasses rights of future generations.

Since 1993 the issue has been discussed in the jurisprudence of the International Court of Justice (ICJ). In the 1993 case of *Denmark v. Norway*,[9] a maritime boundary delimitation case, Judge Weeramantry noted in his Separate Opinion in the section discussing "Equity Viewed in Global Terms" that "[r]espect for these elemental constituents of the inheritance of succeeding generations dictated rules and attitudes based upon a concept of an equitable sharing which was both horizontal in regard to the present generation and vertical for the benefit of generations yet to come."[10] In a footnote, he indicated that existing uses of equity could be a basis for developing principles of intergenerational equity in international law, and cited *In Fairness to Future Generations*.[11]

The interests of future generations also arose in *1995 Nuclear Test*,[12] in which New Zealand sought to challenge the proposed French underground nuclear tests in the Pacific on the basis of the 1974 judgment in *Nuclear Test*. While the Court declined to assume jurisdiction, since underground rather than atmospheric tests as in 1974 were involved, Judge Weeramantry's dissenting opinion explicitly argued that the court had a duty to protect the rights of future generations:

> This Court must regard itself as a trustee of those [future generations'] rights in the sense that a domestic court is a trustee of the interests of an infant unable to speak for itself . . . . New Zealand's complaint that its rights are affected does not relate only to the rights of people presently in existence. The rights of the people of New Zealand include the rights of unborn posterity. Those are rights which a nation is entitled, and indeed obliged, to protect.[13]

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9. Maritime Delimitation in the Area Between Greenland and Jan Mayen (*Denmark v. Norway*), 1993 I.C.J. 38 (June 1993).

10. Maritime Delimitation in the Area Between Greenland and Jan Mayen (*Denmark v. Norway*), 1993 I.C.J. 38, 277 (June 1993) (separate opinion of Judge Weeramantry).

11. *Id.* at 277 n.1.

12. Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgement of 20 December 1974 in the Nuclear Test (*New Zealand v. France*), 1995 I.C.J. 288 (Sept. 1995) [hereinafter *1995 Nuclear Test*].

13. *1995 Nuclear Test*, 1995 I.C.J. at 341 (Weeramantry, J., dissenting).

Moreover, he observed that the principle of intergenerational equity is "an important and rapidly developing principle of contemporary environmental law . . . which must inevitably be a concern of this Court."[14]

The 1996 Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons[15] raised, as no other case except for *Nuclear Test*, the effects of our actions today upon future generations. For the first time, the Court in the Advisory Opinion explicitly recognized the relevance of future generations. The court noted that "[t]he destructive power of nuclear weapons cannot be contained in either space or time. They have the potential to destroy all civilization and the entire ecosystem of the planet . . . . Further, the use of nuclear weapons could be a serious danger to future generations."[16] In the next paragraph, the Court explicitly noted that the effects on future generations are relevant in applying international law:

> In order correctly to apply to the present case the Charter law on the use of force and the law applicable in armed conflict, in particular humanitarian law, it is imperative for the Court to take account of the unique characteristics of nuclear weapons, and in particular . . . *their ability to cause damage to generations to come*.[17]

Arguably, this implicitly recognized the interests of future generations and our obligation to consider these interests in applying international law, though only here in the context of nuclear weapons.

In a very important step, the Court observed that the environment "represents the living space, the quality of life and the very health of human beings, *including generations unborn*," and declared that the "general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment."[18] The Court explicitly reaffirmed these statements in a 1997 case between Hungary and Slovakia.[19]

The Court, however, did not invoke a principle of intergenerational equity or recognize explicitly the rights of future generations in *1995 Nuclear Test*. Judge Weeramantry took on this task in his dissenting opinion. He forcefully argued that the court, "as the principal judicial

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14. *Id.*

15. Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 35 I.L.M. 809 (1996) [hereinafter Advisory Opinion].

16. *Id.* at 822.

17. *Id.* (emphasis added).

18. *Id.* at 821 (emphasis added).

19. Gabcíkovo-Nagymaros Project (*Hungary v. Slovakia*), para. 53, Sept. 25, 1997, <http://www.icj-cij.org/idocket/ihs/ihsjudgement/ihsjudcontent.html> [hereinafter *Danube*].

organ of the United Nations . . . must, in its jurisprudence, pay due recognition to the rights of future generations. If there is any tribunal that can recognize and protect their interests under the law, it is this Court."[20] Most importantly, Judge Weeramantry noted that "the rights of future generations have passed the stage when they were merely an embryonic right struggling for recognition. They have woven themselves into international law through major treaties, through juristic opinion and through general principles of law recognized by civilized nations."[21] Later in his opinion, Weeramantry observed that "the principle of intergenerational equity" was one of several principles of international law that nuclear weapons violate.[22]

In *Danube*, the ICJ affirmed the "great significance that it attaches to respect for environment," and quoted the *Nuclear Weapons Advisory Opinion* language to the effect that the environment extends to generations unborn.[23] Again, Judge Weeramantry, in an eloquent separate opinion, addressed the environmental and the intergenerational aspects of international law. He argued that the first principle of modern environmental law is "the principle of trusteeship of earth resources" and recognized also the "the principle of intergenerational rights."[24] As his historical review made clear, the ecological practices of different cultures over centuries and the ingrained values of civilizations support both of these principles, which are the cornerstone of intergenerational equity.

During the 1990s, national court litigation, international "soft law" declarations, and reports of expert groups for the United Nations Environment Programme and for the United Nations Commission on Sustainable Development have confirmed the emergence of principles of intergenerational equity.

In a 1993 case before the Supreme Court of the Philippines, a case cited by Barresi, the Court granted standing to forty-two children as representatives of themselves and future generations to protect their right to a healthy environment.[25] The Court found that "[t]heir personality to sue in behalf of the succeeding generations can be based only on the concept of intergenerational responsibility insofar as the right to a balanced and healthful ecology is concerned."[26] The children sued to stop large-scale leasing of original rain forest tracts. Since the decision

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20. Advisory Opinion, *supra* note 10, at 888 (Weeramantry, J., dissenting).
21. *Id.*
22. *Id.* at 905.
23. *Danube*, *supra* note 19.
24. *Id.* at 11, 16, 17 (Weeramantry, J.).
25. Minors Oposa v. Secretary of the Dep't of Envmt. and Natural Resources, 33 I.L.M. 173 (1994).
26. *Id.* at 185.

granting standing, an executive order canceled sixty-five of the original leases, including those in old-growth rain forests.[27] While Barresi refers to this case, he uses it to support his theory on the grounds that it involves individual rights and the protection of future generations within a country. But the Court granted standing to the children to protect the rights of future generations as a class. It found the principle of intergenerational equity embedded in the Philippine Constitution, which protects any member of the present generation who may reside in or pass through the Philippines and future generations as a class. While Barresi is correct that this illustrates a national embodiment of the principle of intergenerational equity, which is highly desirable, it does not preclude the existence of the principle in international law. Indeed both support each other, as national sources of law contribute to the formation of international law, and international law influences the development and application of national law.

There are several recent international legal expert reports which confirm the emergence of the principle of intergenerational equity. Two reports of United Nations expert groups charged with providing a status report on principles of international environmental law identified intergenerational equity as such a principle and linked it with a general principle of equity. The Legal Experts Report for the United Nations Commission on Sustainable Development noted that the principle of intergenerational equity reflected the view that members of the present generation hold the Earth in trust for future generations and at the same time act as beneficiaries entitled to use it for their own benefit.[28] The report highlighted three components of the principle—quality, options, and access to the environment—and observed that these must be comparable across generations.[29] The United Nations Environment Programme Legal Experts Report included the protection of future generations as a component of the principle of equity in international environmental law.[30]

Most recently, the 1997 Resolution of the Institut de Droit International on Responsibility and Liability under International Law for Environmental Damage explicitly recognized the emergence of

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27. *See* Ted Allen, *The Philippine Children's Case: Recognizing Standing for Future Generations*, 6 GEO. INT'L ENVTL. L. REV. 713, 718 n.28 (1994).

28. *See Report of the Expert Group Meeting on Identification of Principles of International Law for Sustainable Development*, Comm. on Sustainable Development, 4th Sess., Background Paper #3, at 12, para. 41-42 (1995).

29. *See id.* at 12, para. 42.

30. *See Final Report of the Expert Group Workshop on International Environmental Law Aiming at Sustainable Development*, U.N. Environment Programme, at 13-14, para. 44-45, UNEP/IEL/WS/3/2 (1996).

intergenerational equity in legal discourse. The Preamble expressly recognized that "international environmental law is developing significant new links with the concepts of intergenerational equity. . .," which is "influencing the issues relating to responsibility and liability."[31] The travaux preparatoires accompanying the resolution refers to the important principles of international law that have been identified as bearing on the issues and observes that "[p]aramount among these emerging principles [is] . . . the concept of intergenerational equity."[32]

There have been other legal developments concerning future generations. For example, in February 1994, experts met under the auspices of the United Nations Education, Science and Culture Organization (UNESCO) and the Cousteau Society to draft the *La Laguna Declaration Universelle des Droits de l'Homme des Generations*, a revised version of which is pending before UNESCO. The Cousteau Society proposed a Bill of Rights for Future Generations and gathered more than 1.5 million signatures for it worldwide. Since 1970, many international environmental agreements have encompassed the protection of future generations in their preambles and provided measures to achieve the agreements' purposes.[33]

These developments suggest that an intergenerational principle of fairness has already struck a deep chord within many different cultural traditions. It builds upon a history of implicit and explicit concern for future generations. To the extent that Barresi's alternative logic path succeeds in bringing about wider and deeper acceptance of both intergenerational and intragenerational equity, it is to be warmly welcomed.

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31. Eighth Commission, Institut de Droit International, Responsibility and Liability under International Law for Environmental Damage, adopted Sept. 4, 1997, Francisco Orrego Vicuña, rapporteur.

32. The Environment, Travaux preparatoires, 67 Annuaire de l'Institut de Droit International 311 (1997).

33. *See, e.g.*, Convention on International Trade in Endangered Species, Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243 (1973); Convention on Biological Diversity, June 5, 1992, 31 I.L.M. 818 (entered into force Dec. 29, 1993); United Nations Framework Convention on Climate Change, May 29, 1992, 31 I.L.M. 849 (entered into force March 21, 1994).