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SOME REFLECTIONS ON LEGAL AND PHILOSOPHICAL FOUNDATIONS OF INTERNATIONAL ENVIRONMENTAL LAW

Abstract

This article examines the legal and philosophical foundations of international environmental law. It analyses the legal regime of the Common Heritage of Mankind (Humankind) (CHM), Common Concern of Mankind (Humankind) (CCM), and the principles of intra- and intergenerational equity. The regime of CHM covers the Moon and other celestial bodies and the "Area" under the 1982 United Nations Convention on the Law of the Sea. The regime of CCM relates to areas such as climate change and biodiversity. Both CHM and CCM are based on a premise that certain areas of human activities are held in common interest for the whole community of States. In this context, the article claims that the underlying, foundational principles of international environmental law have the common theme of intra- and intergenerational equity.

INTRODUCTION

This article is devoted to certain legal and philosophical concepts underlying the foundations of international environmental law, i.e. principles of the common heritage of mankind (humankind) ("CHM") and common concern of mankind (or humankind) ("CCM") and the principle of intergenerational equity. Both concepts include the element of the common interest of the whole community of States. In broad brushstrokes, the concept of CHM relates to certain areas outside the jurisdiction of States, which cannot be appropriated thereby, and whose exploitation serves all mankind. CCM also denotes the areas of interest for the whole community of States, but its implementation remains under States' sovereignty (such as biodiversity or climate change; for more on both concepts, see further below). All these principles have garnered numerous publications and have been analysed in-depth. However, these principles are

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of a dynamic, evolutionary character and it may be said that decisions of international courts and tribunals further developed their character and the scope of application, in particular in relation to international environmental law.[1] Although all these concepts have a broader scope and areas of concern than just international environmental law, they will be analysed here only in relation to international environmental law.

1. COMMON HERITAGE OF MANKIND (HUMANKIND): GENERAL PRINCIPLES

The concept of CHM has been analysed in numerous publications, especially during the negotiations of the 1982 United Nations Convention on the Law of the Sea and the adoption of the 1994 Implementation Agreement.[2]

Baslar, the author of a fundamental monograph on the concept of CHM, was of the view that this concept has philosophical foundations, deriving from natural law.[3] Consent-based traditional rules of international law governing territorial sovereignty and sovereignty over natural resources limit, in his view, the application of the CHM concept. Baslar made several postulates regarding ways to overcome the limitations of this concept. In broad brushstrokes, he suggested the human rights approach to CHM, more specifically the reliance on the third generation of human rights in this respect.[4]

Baslar was of the view that the applicability of the concept of CHM to environmental law had been met with some difficulties, due to different objectives of the concept of CHM and those of environmental protection.[5] One of the main difficulties relating to the applicability of the concept of CHM to environmental law is the different

[1] Such as the Advisory Opinion of the Seabed Dispute Chamber of the International Tribunal on the Law of the Sea on Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, 1 February 2011, available at: http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/adv_op_010211.pdf (last accessed 30 March 2013).

[2] *See e.g.*, K. Baslar, *The Concept of the Common Heritage of Mankind in International Law*, Kluwer Law International, The Hague: 1998; R. Wolfrum, *The Principle of Common Heritage of Mankind*, 43 Zeitschrift für Auslsandishes öffentliches Recht und Völkenrecht 312 (1983); R. Wolfrum, *The Common Heritage of Mankind*, in: Max Planck Encyclopaedia of Public International Law, available at http:// mpepil.com (last updated 2009); Ch. C. Joyner, *Legal Implications of the Concept of the Common Heritage of Mankind*, 35 International and Comparative Law Quarterly 190 (1986); E. Guntrip, *The Common Heritage of Mankind: An Adequate Regime for Managing the Deep Seabed?*, 4(2) Melbourne Journal of International Law 376 (2003); J. Brunnée, *Common Areas, Common Heritage, and Common Concern*, in: D. Bodansky et al (eds.), *The Oxford Handbook of International Environmental Law*, Oxford University Press, Oxford: 2007, pp. 550-574; S. J. Shackelford, *The Tragedy of the Common Heritage of Mankind*, 27 Stanford Environmental Law Journal 101 (2008); J. E. Noyes, *The Common Heritage of Mankind: Past, Present, and Future*, 40 Denver Journal of International Law and Policy 447 (2012).

[3] Baslar, *supra* note 2, p. 319.

[4] *Ibidem*, p. 318.

[5] *Ibidem,* pp. 277-317.

approaches to environmental protection by developed and developing countries. The theoretical approach of developing countries to environmental protection had to be viewed in the context of the New Economic Order which is a branch of the right to development. This approach to CHM has to do with intra-generational justice, i.e. fairness within one generation. The approach of developed States is inter-spatial, based on the concept of sustainable development of resources, for the benefit of present and also future generations, i.e. the concept of intergenerational equity.[6] Another problem relates to the territorial application of CHM. CHM applies to natural non-living resources beyond the areas of territorial jurisdiction of States, whereas within their territory States have sovereignty over their natural resources. Baslar also argues that the core element of CHM, viz. sharing of benefits, has no applicability in relation to the environment, in which sharing of responsibilities and burdens are of a fundamental significance.[7] This argument has been eroded to a certain extent as benefit sharing entered the realm of international environmental law, after the entering into force of the 1992 Convention on Biological Diversity ("CBD")[8] and the signing of the 2010 Nagoya Protocol on Access and Benefit Sharing (see below).[9]

Finally, Baslar observed that in environmental law, CHM is seen as a manifestation of stewardship and fiduciary responsibilities. Therefore the focus is switched from the concept of non-appropriation of territories to stewardship of recourses. This approach is based upon the idea that States as custodians of territories are under the obligation to protect resources under their jurisdiction for the benefit of mankind. Therefore in this context the prohibition of appropriation of natural recourses does not constitute an element of CHM.[10]

The concept of CHM entered into the realm of legal discourse with the 1967 speech of the Maltese ambassador Arvid Pardo to the United Nations, whereby he proposed that the seabed and ocean floor beyond national jurisdiction be considered the common heritage of mankind.

CHM was included in the 1970 United Nations General Assembly Declaration of Principles, which in para. 1 provided as follows: "[s]ea-bed and ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction (hereinafter referred to as the area), as well as the resources of the area, are the common heritage of mankind."[11]

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[6] *Ibidem*, p. 278.

[7] *Ibidem*, pp. 278-279.

[8] Convention on Biological Diversity, 5 May 1992, entered into force 29 December 1993, 1760 UNTS 79. The Convention has currently 193 Parties (as of 30 March 2013).

[9] Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity, concluded on 29 October 2010, not et in force. The Nagoya Protocol will enter into force 90 days after the date of deposit of the fiftieth instrument of ratification.

[10] Baslar, *supra* note 2, p. 279.

[11] Declaration on Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, Beyond the Limits of National Jurisdiction, G.A. Res.2749, UN GAOR, 25th Sess., Supp. No. 28, UN Doc. A/8028, at 24 (17 December 1970).

CHM was also included in two international conventions: the 1979 Moon Treaty[12] and the 1982 UN Convention on the Law of the Sea ("UNCLOS").[13] Article 11 of the Moon Treaty expressly includes the concept of CHM.[14] Article 136 (Part XI) of UNCLOS states that "[t]he Area and its resources are the common heritage of mankind." "Area" is defined as: "[t]he seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction." The Area's resources covered by the CHM concept are "solid, liquid or gaseous mineral resources *in situ* in the Area of beneath the seabed, including polymetallic nodules."

In 1983, Malaysia, proposed at the forum of the General Assembly of the United Nations to consider the regime of the CHM for Antarctica.[15] In 1995, in a letter

[12] Agreement Governing Activities of States on the Moon and Other Celestial Bodies, 5 December 1979, entered into force 11 July 1984, 1363 UNTS 3 (hereinafter "the Moon Treaty").

[13] United Nations Convention on the Law of the Sea, 10 December 1982, entered into force 16 November 1994, 1833 UNTS 397.

[14] Art. 11.1. The moon and its natural resources are the common heritage of mankind, which finds its expression in the provisions of this Agreement and in particular in paragraph 5 or this article.

2. The moon is not subject to national appropriation by any claim of sovereignty, by means of use or occupation, or by any other means.

3. Neither the surface nor the subsurface of the moon, nor any part thereof or natural resources in place, shall become property of any State, international intergovernmental or non-governmental organization, national organization or non-governmental entity or of any natural person. The placement of personnel, space vehicles, equipment, facilities, stations and installations on or below the surface of the moon, including structures connected with its surface or subsurface, shall not create a right of ownership over the surface or the subsurface of the moon or any areas thereof. The foregoing provisions are without prejudice to the international régime referred to in paragraph 5 of this article.

4. States Parties have the right to exploration and use of the moon without discrimination of any kind, on a basis of equality and in accordance with international law and the terms of this Agreement.

5. States Parties to this Agreement hereby undertake to establish an international régime, including appropriate procedures, to govern the exploitation of the natural resources of the moon as such exploitation is about to become feasible. This provision shall be implemented in accordance with article 18 of this Agreement.

6. In order to facilitate the establishment of the international régime referred to in paragraph 5 of this article, States Parties shall inform the Secretary-General of the United Nations as well as the public and the international scientific community, to the greatest extent feasible and practicable, of any natural resources they may discover on the moon.

7. The main purposes of the international régime to be established shall include: (a) The orderly and safe development of the natural resources of the moon; (b) The rational management of those resources; (c) The expansion of opportunities in the use of those resources; (d) An equitable sharing by all States Parties in the benefits derived from those resources, whereby the interests and needs of the developing countries, as well as the efforts of those countries which have contributed either directly or indirectly to the exploration of the moon, shall be given special consideration.

8. All the activities with respect to the natural resources of the moon shall be carried out in a manner compatible with the purposes specified in paragraph 7 of this article and the provisions of article 6, paragraph 2, of this Agreement.

[15] UN Doc. A/C.1/38/PV.2 (19883), 38th Sess., Malaysia abandoned this suggestion in 2005. There were also other suggestions of the use of the concept of CHM, *see e.g.*, A.-Ch. Kiss, *La Notion de Partimonie Commun de la L' Humanité*, 175 Recueil des Cours de l'Academie de Droit International 99 (1982).

addressed to the Secretary-General of the United Nations, Malta suggested the transformation of the Trusteeship Council into an organ guarding global commons and the common concerns in the interests of present and future generations, in order to preserve the environment.[16]

There are several elements of CHM which are recognised in theory and practice of international law. Noyes lists them as follows:

> a prohibition of acquisition of and exercise of jurisdiction over the area and resources therein; the humankind as a whole has the rights to these resources; the area under this regime can only be used for peaceful purposes; protection of natural environment; equitable sharing of benefits deriving from the exploitation of the resources in question, with a particular focus on the interests of developing countries; and the administration of the area under the regime of CHM by a special management regime.[17]

It may be noted that all these elements are debatable and subject to divergent interpretations. Comparisons of this regime to the principle of freedom of high seas are conceptually flawed. Freedom of the high seas presupposes exploitation and acquisition of natural resources therein, which is not permitted under the CHM regime. The advantageous position of developing States prevented developed States from the ratification of UNCLOS. After negotiations between developed States and the Secretary-General of the United Nations, the 1994 Implementation Agreement to Part XI was signed.[18] This Agreement changed provisions concerning the transfer of technology from developed to developing States, stating in Section 5 that it will be effected "on fair and reasonable commercial terms and conditions on the open market, or through joint-venture arrangements" therefore abolishing preferential treatment of developing States in this respect, changing the original provisions of Part XI. Art. 144 of the original Part XI provided that the Authority will "promote and encourage the transfer to developing States of such technology and scientific knowledge so that all States Parties benefit therefrom."

Such a change in the position of developing States may raise a question whether the regime of governing the Area under UNCLOS is still CHM, if one of its constitutive elements (preferential treatment of developing States) has been substantially altered. At least, we may venture a suggestion that perhaps an evolved notion of CHM does not include a special treatment of developing States.

There is also the difference of opinion referring to sharing benefits under the CHM principle by developing States, concerning their possibly preferential status under this regime. For example some writers are of the view that any benefits resulting from the common spaces would be shared internationally and that the

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[16] Letter from the Permanent Representative of Malta to the United Nations Secretary-General (1985), UN Doc. A/50/142, p. 3.

[17] Noyes, *supra* note 2, pp. 450-451.

[18] Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982, 28 July 1994, entered into force 28 July 1996, UN Doc. A/RES/48/263.

preferential treatment of developing States is not a commonly agreed feature of the CHM principle.[19]

Other authors, whilst admitting that benefits derived from common spaces should be shared by States, qualify this statement by suggesting that preferential treatment of developing States derives from the development aid philosophy.[20]

CHM in this article is mainly approached from the point of view of environmental protection. Art. 145 of the LOS Convention states as follows:

Protection of the marine environment:

> Necessary measures shall be taken in accordance with this Convention with respect to activities in the Area to ensure effective protection for the marine environment from harmful effects which may arise from such activities. To this end the Authority shall adopt appropriate rules, regulations and procedures for inter alia:
>
> (a) the prevention, reduction and control of pollution and other hazards to the marine environment, including the coastline, and of interference with the ecological balance of the marine environment, particular attention being paid to the need for protection from harmful effects of such activities as drilling, dredging, excavation, disposal of waste, construction and operation or maintenance of installations, pipelines and other devices related to such activities;
>
> (b) the protection and conservation of the natural resources of the Area and the prevention of damage to the flora and fauna of the marine environment.

It is without doubt that the exploration and exploitation of the Area cannot result in environmental degradation. The question which is altogether different is whether environmental protection is a part of the definition of the concept of CHM.

The views of the doctrine are divided, even sometimes contradictory, on this subject as well. As was noted above, Baslar analysed the fundamental conceptual difficulties related to the question of including environmental protection in the concept of CHM, due to different approaches to this issue by developed States (which adhere to the concept of intergenerational equity) and developing States (which are the proponents of intragenerational equity).[21]

A different approach was taken by other authors who not only acknowledge the rights of future generations but also the applicability of the concept of sustainable development to the obligation of environmental protection in the areas under the regime of CHM, even without a specific reference in the Moon Treaty and UNCLOS.[22] This approach is not shared by other experts in whose view sustainable development is limited to States' territory or areas under their jurisdiction, and they also note that the deep-bed is not mentioned in Agenda 21. They argue that:

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[19] Joyner, *supra* note 2, p. 192.

[20] Wolfrum (1983), *supra* note 2, p. 323.

[21] *See also* R. St. J. Macdonald, who doubted whether intergenerational equity is part of the concept of CHM due this concept immaturity (*The Common Heritage of Mankind*, in: U. Beyerlin et al. (eds.), *Recht Zwischen Umbruch und Bewahrung: Festschrift Für Rudolf Bernhardt*, Springer, Berlin: 1995, p. 153).

[22] Wolfrum, in: Max Planck Encyclopaedia, *supra* note 2, paras. 22-23.

> sustainable development is thus still very much perceived primarily in terms of endogenous economic growth and its linkage to social improvement. When oceans are considered, it is usually from either fisheries/food security perspective or because of concerns relating to marine pollution from ship-based or land based source.[23]

Perhaps the approach which is the most practical and realistic in describing the legal status of certain elements such as environmental stewardship; equal participation; rational use of resources; and equitable sharing of financial and economic benefits, is terming them loosely as the "benefits of mankind", indicating that they are closely related to the concept of CHM, if not actually forming a part of the whole concept.[24] The author of this article shares such an approach to various elements connected with CHM, including environmental protection. Even if environmental protection (stewardship) is not *per se* included in core elements of CHM, it is clear that it is an important question pertaining to the exploration of the Area.

Environmental issues are treated very seriously by the Authority which convened many workshops devoted to them and sponsored many scientific research projects. Examples include the Kaplan Project to study species range and biodiversity in Clarion-Clipperton Zone and formulating a comprehensive environmental management plan for this zone, including a proposal for establishing a representative network of areas of "particular environmental interest" as one of the measures formulated to ensure the effectiveness of protection of the marine environment from the harmful effects of deep seabed mining.[25]

In conclusion of this section, it may be said that environmental matters are one of the "benefits of mankind" closely related to the concept of CHM, even if they do not constitute one of the defining elements of this concept. There are several other concepts which have been enumerated in connection with CHM such as inter- and intra- generational equity and they without any doubt are part and parcel of philosophical and legal foundations of international environmental law (also forming elements of the concept of sustainable development). As noted above, the application of this concept in its entirety to CHM is one of the areas of disagreement in the doctrine of international environmental law. It may be said that the concept of CHM has a potential of enriching the theoretical (legal and philosophical foundations) of international environmental law, especially when the exploitation of the deep seabed will have commenced. Then, the concepts of intra- and inter-generational equity will be further developed.

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[23] D. French, *From the Depths: Rich Pickings of Principles of Sustainable Development and General International Law on Ocean Floor – The Seabed Disputes Chamber 2011 Advisory Opinion*, 26 The International Journal of Marine and Coastal Law 535 (2011).

[24] M. W. Lodge, *The Common Heritage of Mankind*, 27 Journal of Marine and Coastal Law 738 (2012).

[25] The Clarion-Clipperton Zone is an area of the Pacific Ocean stretching between Baja California and Hawaii (approximately 4.4 square kilometres) containing polymetallic nodules.

1.1. Common Concern of Humankind

The concept of CCM, i.e. common concern of humankind, is conceptually different from CHM but is also based on a notion of common interests. The term CCM is used in the CBD (in relation to biological diversity) and in 1992 United Nations Framework on Climate Change ("Climate Change Convention") (in relation to climate change).[26] The first time the term CCM was used occurred in relation to climate change in the Resolution of the United Nations General 43/53, in order to avoid the attributing of the status of the CHM to climate change.[27] In its Preamble, the CBD affirms "that the conservation of biological diversity is a common concern of humankind." The Climate Change Convention acknowledges that "change in the Earth's climate and its adverse effects are a common concern of humankind."

The legal and philosophical bases of CCM are different from those of CHM. The legal regime of resources under the CBD is based on national governance and the access to them is not internationalized in the same way as the access to the resources of the Area. The management of biological resources is not dependent on any international body, such as is the case of deep seabed mining (the Authority).[28] As was noted above, the common feature of CCH and CCM is that the benefits to access to the resource must be shared equitably, but in a much more restricted manner than under the regime of CCM. It was observed as well that such sharing does not change the status of a resource under the CBD.[29] A suggestion has been made that although the questions of managing States' natural resources are under their sovereignty, the regime of CCM legitimises to a limited extent the international interest in States' management of their own resources. This perhaps may give rise to a suggestion that under the regime of CCM each and every State-Party to CBD has standing, even if they are not directly injured States.[30] Therefore, it may be said the permanent sovereignty over natural resources is no longer exclusionary but entails the commitment to act for the good and interests of the whole community at large.[31] One interesting view also differentiated CHM and

[26] United Nations Framework Convention on Climate Change, 9 May 1992, entered into force 21 March 1994, 1771 UNTS 107.

[27] A. Boyle, *The Rio Convention on Biodiversity*, in: M. Bowman & C. Redgwell (eds.), *International Law and the Conservation of Biological Diversity,* Kluwer Law International, London: 1996, p. 39.

[28] *Ibidem*, p. 40.

[29] *Ibidem*.

[30] *Ibidem*; *see also* M. Bowman, *Environmental Protection and Concept of Common Concern*, in: M. Fitzmaurice, D. Ong, P. Merkouris (eds.), *Research Handbook on International Environmental Law*, Edward Elgar Publishing, Cheltenham: 2010, in particular p. 503. Bowman refers to general international law on State responsibility (Article 48 of 2001 Articles on State Responsibility on the basis of which any State to which duty is owed as a member of a group of States for the protection of whose collective interest the duty was established may invoke liability for breach of that duty and call for cessation of a wrongful conduct, even if a State is not injured directly (p. 514).

[31] Bowman, *supra* note 30, p. 40; G. Handl, *Environmental Security and Global Change: A Challenge to International Law*, 1 Yearbook of International Environmental Law 32 (1990); E. Hey, *Global Environmental Law and Global Institutions: a System Lacking 'Good Process'*, in: R. Pierik & W. Werner

CCM on basis that CCM relates to equitable sharing of burdens and costs while CHM is related to allocating rights to use state-free areas, in which the idea of utilisation is greater than protection.[32]

The rationale underlying CCM was also explained as sharing of responsibility for detrimental effects of the deterioration of the environment for the States Parties to Multilateral Environmental Agreements (MEAs) for developing States, for the well-being of individuals in general, and certain groups and for areas beyond national jurisdiction, and the identification of the need for common but differentiated action by States and private sector. It was also suggested that despite the lack of the reference to CCM many of MEAs are in fact based on this principle.[33]

The next question is how CCM contributed to the formulation and development of theories underlying international environmental law. It has contributed to the development and strengthening of the notion of common interest in relation to international environmental law. It relies, however, on a classical principle of sovereignty over natural resources in international law. Nevertheless, its importance should not be underestimated as it refers both to developed and developing States and treats the environment as a common good, in preserving of which all States have an interest.

2. INTRA- AND INTERGENERATIONAL EQUITY

Both intra- and intergenerational equity principles constitute, in the view of the author of this article, foundations of international environmental law and are linked to Common Heritage and Common Concern of Mankind through their relationship with international environmental law. As explained above, they are also elements which are for the "benefits of mankind". The concept of intragenerational equity is firmly imbedded in the notion of CHM and it is inconvertible that developing States enjoy certain preferential treatment in relation to sharing of benefits in the exploration of the Area. It should be noted, however, some of the elements of preferential treatment were modified by the 1994 Implementation Agreement. As was observed above, the position of future generations (intergenerational equity) is debatable within the notion of CHM. In the view of the present author, significant increase in the importance of environmental protection in relation to the activities in the Area, made plausible the inclusion of the interest of future generations in the concept of CHM. There is no doubt, however, that the concept of CCM is directly linked to intra- and intergenerational equity, as such suggestion is supported by the provisions of various

(eds.), *Cosmopolitanism in Context. Perspectives from International Law and Political Theory*, Cambridge University Press, Cambridge: 2010, p. 50.

[32] A.C. Trinidade & D.J. Attard, *The Implications of the 'Common Concern Issues' Concept on Global Environmental Issues*', in: T. Iwama (ed.), *Policies and Law on Global Warming: International and Comparative Analysis*, Tokyo, Environmental Research Center: 1991, p. 10.

[33] Hey, *supra* note 31, p. 50.

MEAs, which make direct invocations to intergenerational equity and are based on the principle of common but differentiated responsibilities, which is a core principle of the intragenerational equity.

It may be that the concept of sustainable development in its entirety is not applicable in relation to CHM but some of its elements, such as intra- and intergenerational equity are. The same applies to CCM, even to a much broader extent.

2.1. Intragenerational Equity

Intragenerational equity is related to the relationship between developed and developing States, i.e. the South/North controversy which is focused on issues of distributive justice and post-colonial legacies and unequal relations of power between developed and developing States.[34] Intragenerational equity is conceptualised in the principle of common but differentiated responsibilities, formulated in Principle 7 of the 1992 Rio Declaration on Environment and Development:

> States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit to sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.

This principle means in practical terms that developed States due to their past and major contributions to the deterioration of the environment, their accumulation of wealth and present financial and technological potential, are obliged to take larger burdens in protection of the environment and also transfer technology and financial resources to developing States. However, developing States have to protect the environment within their means. In order to implement the principle of common but differentiated responsibilities, developing States have grace periods for objectives such as eliminating of certain hazardous substances; certain obligations are only imposed on developed States; and certain duties of developing States are conditional upon actions of developed States, such as transfer of technology and funds from them to developing States. The principle of common but differentiated responsibilities is one of the core principles of sustainable development.[35]

The principle of intragenerational equity, as embodied in common but differentiated responsibilities, is also an expression of solidarity in relation to environmental problems facing the whole of international community, such as climate change and biodiversity decline. From this point of view, intergenerational equity is connected with the principle of common concern of mankind, the core of which is the conflict between sovereignty of States and a desire to protect common interests.[36]

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[34] *Ibidem*, p. 53.

[35] *Ibidem*.

[36] Ph. Cullet, *Common but Differentiated Responsibilities*, in: Fitzmaurice at al. (eds.), *supra* note 30, p. 169.

For the purpose of this article the most important is that there is a link between CHM, CCM and intergenerational equity, as it shows that international environmental law has acquired certain uniformity and continuity, at least in relation to its foundational principles.

2.2. Intergenerational Equity

Intergenerational equity directly links generations to environmental issues. As was explained by Brown Weiss who introduced and elaborated this concept, the use of our natural resources raises at least three kinds of equity problems between generations: depletion of resources for future generations; degradation in the quality of resources; and discriminatory access to use and benefit from resources received from past generations.[37] There is a multitude of ways in which depletion of natural resources may occur. Present generations may deplete a more expensive natural resource, thus making it unavailable (or available at higher price for future generations). Natural resources may also be exploited by present generations' ignorance of their potential economic importance. In some cases, present generations may exhaust certain natural resources by destruction of areas of high biological diversity. Depletion of resources may reduce the diversity of resources available for adapting to climate change and the destruction of forests can result in an increase of global greenhouse emissions.[38] Degradation of the quality of the environment also poses the questions of equity. The quality of natural environment (globally and locally) has been degraded, in particular in the last fifty years. Pollution which degrades many areas of the environment such as marine; air; fresh water, soil; and land affects the uses that future generations can make of the environment and the cost of doing so.[39]

Every generation has the right to use the environment and natural resources. The main problem is finding a balance between the rights of use of present generations and future generations, taking into account such factors as poverty, which may prevent certain communities from equitable sharing in their legacy.[40] Intergenerational equity is formed on the basis of two relationships: the relationship between generations and between human species and natural system. Human species bear the main responsibility for the natural system. The notion of equality is the core of the legal framework connecting generations, in their care and use of the natural system. The concept of intergenerational equity is based on a notion of a partnership between generations themselves and between natural systems and generations. The present generation holds in trust the natural environment for future generations and as its beneficiary with the right to use it. Each generation has an obligation to pass onto future generations the natural environment in

[37] E. Brown Weiss, *Implementing Intergenerational Equity*, in: Fitzmaurice et al. (eds.), *supra* note 30, p. 100.

[38] *Ibidem,* p. 101. *See also* E. Brown Weiss, *In Fairness to Future Generations*, United Nations University and Transnational Publishers, New York: 1989.

[39] Brown Weiss, *supra* note 37, p. 101.

[40] *Ibidem*, p. 102.

a state no worse than it had received from past generations.[41] Brown Weiss distinguished three elements of the principle of intergenerational equity: conservation of diversity of natural and cultural resources (or comparable option); conservation of environmental quality (or comparable quality); and equitable or non-discriminatory access to the earth and its resources. The first principle (conservation of diversity) means that each and every generation has an obligation to conserve the natural and cultural diversity resources as not to restrict the options available to future generations to meet their own needs and satisfy their own values. Conservation of quality means that every generation must maintain the quality of the natural environment so it can be passed onto future generations in no worse condition than inherited from past generations. Equitable access means that each generation has a non-discriminatory right to access and benefit from the natural environment.[42] These principles should meet three criteria. First, they should encourage equality among generations, by introducing the balance in the use of natural resources, i.e. using natural resources in the manner not exclusionary to future generations, on one hand; and no to impose undue burdens of present generation, on the other hand. Secondly, present generation should not interfere with or predict the values of future generation, but rather they should offer flexibility to future generations regarding ways to pursue their own goals and aims. Third, these principles should be reasonably clear as to be applicable in different social and legal systems.[43]

2.2.1. Practical Application of the Theory of Intergenerational Equity

The rights of future generations and as well as the notion of keeping our planet in trust for future generations are not new ideas. Many MEAs and soft law documents drafted many years ago included at least in their preambles the invocation to future generations.[44]

[41] *Ibidem.*

[42] *Ibidem*, p. 103.

[43] *Ibidem*.

[44] *See e.g.*, 1946 International Convention for the Regulating of Whaling (161 UNTS 72): "The Governments (…) Recognising the interest of nations of the world in safeguarding for future generations the great natural resources represented by whale stock"; the 1979 Bonn Convention on the Conservation of Migratory Species of Wild Animals (1651 UNTS 333) 15: "The Contracting Parties (…) Aware that each generation of man holds the resources of the earth for future generations and has an obligation to ensure that this legacy is conserved and, where utilised, is sued wisely"; Convention on International Reade in Endangered Species of Wild Fauna and Flora (8249, 993 UNTS 243): "Recognising that wild fauna and flora in their many beautiful and varied forms are irreplaceable part of natural systems of the earth which must be protected for this and generations to come"; the 1979 Convention on Migratory Species of Wild Animals (1651 UNTS 333): "Recognising that wild fauna and constitute a natural heritage of aesthetic, scientific, cultural, recreational, economic and intrinsic value that needs to be preserved and handled to future generations"; Principle 2 of Stockholm Declaration on Human Environment (11 ILM 1972 1416): "The natural resources of the earth including the air, water, land, and fauna and especially representative samples of natural ecosystems must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate"; Principle 3of the 1992 Rio Declaration on Environment and Development (31 ILM 1992 874); "The right to development must be fulfilled as to equiatably meet developmental and environmental needs of present and future generations."

The question of intergenerational equity was also a subject of national and international law case-law. The classical case concerning the application of this principle is the 1993 *Minors Oposa* claim.[45] It was one of a few cases in which the concept of intergenerational equity was successfully applied, in conjunction, however, with a right to healthful environment as enshrined in the Constitution of the Philippines. The case was originally a civil law action filed in before the court in the Philippines by minors who were the plaintiffs against the Department of Environment and Natural Resources (DENR). The subject matter of the action was a claim to cancel logging permits issued on the basis of the Timber Licensing Agreements (TLAs) and to cease issuing the new ones, as they were the reason for continuing deforestation (they remained effective for 25 years).

The cause of action was the constitutional right to a healthful environment and that the refusal to cancel TLAs was a breach of environmental laws of the Philippines. The plaintiff also claimed that the State should protect citizens in its role as a parent.

The case was rejected by the court of first instance on the grounds of the lack of legal interest and that the cause of action was political not legal. The plaintiff filed a special civil action for *certiorari* and asked the Supreme Court to rescind the order terminating the case. The petitioners added a new element for their pleadings, i.e. that the deforestation affects generational rights of future generations. Therefore, the petitioners pleaded as well on behalf of generations unborn within the context of the right to healthful environment. The Court accepted this argument and stated as follows:

> Each generation has a responsibility to the next to preserve that rhythm and harmony for the full enjoyment of a balanced and healthful ecology (…) The minors' assertion of their right to a sound environment, at the same time, performance of their obligation to ensure the protection of that right for the generations to come.[46]

The Supreme Court supported the petitioners' *locus standi* on the basis of intergenerational rights (responsibility) and the right to a sound environment. However, it has to be said the Judgment was not supported by all Judges. Judge Feliciano in a rather powerful Concurring Opinion raised several legal issues which were pertinent to the case. He observed that the petitioners lack the *locus standi* in this case, as the case class of petitioners was too broad as it: "appears to embrace everyone living in the country whether or now or in the future, it appears to me that everyone who may be expected to benefit from the course of action petitioners see to require respondents to take, is vested with the necessary *locus standi*."[47]

The case is of fundamental importance for the practical implementation of the concept of intergenerational equity. However, in practical terms it has not achieved much as it did not result in cancellation of TLAs; the petitioners did not pursue the

[45] *Minors Oposa v. Secretary of the Department of Environment and Natural Resources (DENR),* Supreme Court of the Philippines, 30 July 1993, 33 ILM (1994), p. 173.

[46] *Ibidem*, p. 185.

[47] Concurring Opinion of Judge Feliciano, pp. 200-201.

case. In fact, one of the assessments of the case was very critical and it was stated as follows: "*Oposa* adds barely anything new either to Philippine jurisprudence or to environmental protection and it has faded from practice of law because it does not strengthen the legal arsenal for environmental protection."[48]

Moreover, it was submitted that the Supreme Court's statement on *locus standi* on the basis of intergenerational equity (to sue for future generations) is not a binding precedent but an *obiter dictum.* It was also argued that the invocation of intergenerational equity in this case was beside the point, as the Supreme Court would have decided this case in exactly the same manner if the children filed a case only on their behalf, not of future generations, due to the fact that:[49] "In cases involving the protection of the environment, the distinction between present and future generations is inconsequential – we cannot protect the rights of future generations without protecting the rights of present."[50]

Another case which is an example of the application of the concept of intergenerational equity is the 2006 *Peter K. Waweru v. Republic of Kenya*, in connection with water pollution from water disposal and sewage. A public Health Officer found out that certain property owners were discharging overflow from their septic tanks to open water. In this case the Court made statements on intra- and intergenerational equity in relation to water:

> … water table and the river courses affected are held in trust by the present generation for future generations. Yes, the intergenerational equity obligates the present generation to ensure that health; diversity and productivity of natural resources are maintained or enhanced for the benefit of future generations. We observe that water table and clean rivers are for this and future generations.[51]

It must be mentioned, however, that national courts were not always willing to apply this concept. There are several examples of national courts of Pakistan or Bangladesh which rejected its application. In Bangladesh, courts rejected the concept of intergenerational equity on the grounds that neither the constitution nor the national legislation of this country specifically mentioned it. For example in *M. Farooque v. Bangladesh and Others*, petitioners submitted that they were representatives not only of their own generation but of the generations to come. This argument was rejected by the Court. The petitioner relied on the *Minors Oposa* case. The court was of the view that minors have *locus standi* in this case based on the right to a healthful environment in the Constitution of Philippines. Such a right did not exist in the Constitution of the Bangladesh.

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[48] D. B. Gatmayan, *Illusion of Intergenerational Equity: Oposa v. Factoran as Pyrrhic Victory*, 15 Georgetown International Environmental Law Review 459 (2003).

[49] *Ibidem*, pp. 459-460.

[50] *Ibidem,* p. 460.

[51] *Peter K. Waweru v. Republic of Kenya*, High Court of Kenya (2006), *HCC* 118-2004, see also on this case: Brown Weiss, *supra* note 37, pp. 107-108.

The concept of intergenerational equity was also applied in international case-law. At the international level, the International Court of Justice ("ICJ") and several of its Judges referred to the concept of intergenerational equity. Judge Weeramantry was a great supporter of this concept. For example, in the *Nuclear Test II* case, he expressed the following views on the role of the Court in the preservation of the rights of future generations:

> [the Court] must regard itself as a trustee of those [intergenerational rights] in the sense that a domestic court is a trustee of the interests of an infant to speak for itself. If the Court is charged with administration of international law, or has already done so, this principle is one which must inevitably be a concern of this Court. This consideration involved is too serious to be dismissed as lacking in importance merely because is no precedent on which it rests.[52]

The Court dealt with this issue in the *Nuclear Weapons Advisory Opinion*:[53]

> [t]he Court recognizes that the environment is under daily threat and that the use of nuclear weapons could constitute a catastrophe for the environment. The Court also recognizes that 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. The existence of 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 (para. 29) (…) Further, the use of nuclear weapons would be a serious danger to future generations. Ionizing radiation has the potential to damage the future environment, food and marine ecosystem, and to cause genetic defects and illness in future generations (para. 36).

Judge Weermantry also supported rights of future generations in the Separate Opinion in the above-mentioned case. He was of the view that:

> [a]t any level of discourse, it would be safe to pronounce that no generation is entitled, for whatever purpose to, inflict such damage on succeeding generations. The Court as the principal organ of the United Nations, empowered to state and apply international law with an authority to match by no other tribunal, must take into consideration the interests of future generations.[54]

There are some other examples of this concept before the ICJ. In the *Gabcikovo-Nagymaros Project* the Court also referred to future generations:

> [o]wing to new scientific insights and to a growing awareness of the risks for mankind – for present and future generations – of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a greater number of instruments during the last two decades.[55]

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[52] *Request for an Examination of the Situation in Accordance with paragraph 63 of the Court's Judgement of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case*, Order of 22 September 1995 (Dissenting Opinion of Judge Weeramantry) [1995] ICJ Rep. 317.

[53] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, ICJ Rep. 1996, p. 226.

[54] Separate Opinion of Judge Weeramantry, p. 429 et seq.

[55] *Case Concerning the Gabcikovo-Nagymaros Project (Hungary v. Slovakia)*, ICJ Rep. 1997, para. 140.

One of the lesser-known cases before the ICJ, the *Nauru* case, is an example of the application of the theory of corrective distributive justice (intergenerational justice and trust). The case related to the Trusteeship Agreement for the territory of Nauru, approved by the General Assembly in 1947. The key provision of this Agreement was to impose an obligation on the Administrative Committee to administer the territory in such a way as to achieve a basic objective of the International Trusteeship system, set out in Art. 76 of the United Nations Charter. Art. 5 of the Agreement made a direct reference to present and future generations of Nauru. It may be said that the depletion of natural resources (which was the subject-matter of the case) interfered with the right of future generations on Nauru:

> the resources were there, but as a result of a deliberate policy they were not made available, and consequently the advances made, for example, in education, were not related to the legal entitlement of the Nauruan community to access to the financial benefits of the phosphate industry. Political and economic advancement would have provided access to those benefits and a proportionate increase in expenditure on education and other services.[56]

In light of the above examples it may be said that the concept of intergenerational equity featured in some of the judgments of the ICJ and in pleadings before it. However, it must be also observed that the statements of the Court relating to this concept, lead to the conclusion that intergenerational equity was not the main focal point of the Court's considerations and was treated as only one of the elements concerning the requirement of environmental protection. There are also several legal issues concerning the representation of generations unborn before national and international courts, which already emerged in the *Minors Oposa* case, primarily relating to the question of *locus standi* before the Supreme Court of the Philippines. The question of standing before international courts raises also serious legal questions. On what legal grounds can the interests of unborn generations be put forward? Is it in the form of surrogates who represent future interests in negotiations; or perhaps trustees with the *locus standi* to represent the interests of future generations in judicial proceedings?[57] There is also a question of legal standing of the trustees. It was suggested that the legal basis may be found in the obligations *erga omnes*. This is based on Art. 48 of the Articles on State Responsibility which provides that a State could invoke responsibility for breaching an obligation established for the protection of a collective interest of the group (including the environment), or that is owed to the international community as a whole. In such a case, a State bringing a claim does not have to suffer an injury directly as a State, as it is required by classical international law.[58] This

[56] *Case Concerning Certain Phosphate Lands in Nauru (Nauru v. Australia), Memorial of the republic of Nauru*, para. 263.

[57] V. Lowe, *Sustainable Development and Unsustainable Arguments*, in: M. Anderson, A. Boyle & D. Freestone (eds.), *International Law and Sustainable Development*, Oxford University Press, Oxford: 1996, p. 27.

[58] Brown Weiss, *supra* note 37, p. 111.

article, however, is a progressive development of international law. Additional difficulties, however, relate to the basis for standing in judicial proceedings, at least before the ICJ, which are currently impossible to circumvent.

It must observed, however, that in the Advisory Opinion of the Seabed Dispute Chamber, a very far reaching statement as to the *locus standi* in the case of CHM (i.e. with respect to the Area) was made:

> [n]o provision of the Convention can be read as explicitly entitling the Authority to make such a claim. It may, however, be argued that such entitlement is implicit in article 137, paragraph 2, of the Convention, which states that the Authority shall act "on behalf" of mankind. Each State Party may also be entitled to claim compensation in light of the *erga omnes* character of the obligations relating to preservation of the environment of the high seas and in the Area. In support of this view, reference may be made to article 48 of the ILC Articles on State Responsibility.[59]

As was noted, this important statement would essentially be confirmation of an *actio popularis* in international environmental law.[60] An even more radical statement argued that:

> While the Chamber's language can be read as hypoticating ("may"), it tends to equate the principle of "common heritage" and environmental protection with the classic examples of *erga omnes* obligations identified by the *Barcelona Traction* and *East Timor* cases – genocide, aggression, slavery, racial discrimination and self-determination.[61]

Therefore it is justified to say that this concept suffers not only from, as it seems, insurmountable procedural problems, but also does not have a clear cut normative content. As Lowe observed, the ensuing duty of States to preserve the environment for future generations is quite fuzzy and lacking ways in which duties would be distributed between States in a manner which would secure the interests of future generations equally in all States. At present, international law does not have such a suitable mechanism. Notwithstanding all these problems, the concept of intergenerational equity is firmly established in international environmental law, it may be said is one of its foundations.

2.2.2. Application of the Concept of Intergenerational Equity by States

It may be mentioned that several Constitutions of States contain invocations to future generations. Some authors are of the view this is the manifestation of the concept

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[59] Advisory Opinion of the Seabed Dispute Chamber, *supra* note 1, para. 180.

[60] D. French, *From the Depths: Rich Pickings of Principles of Sustainable Development and General International Law on the Ocean Floor-The Seabed Disputes Chamber 2011 Advisory Opinion*, 26(4) International Journal of Marine and Coastal Law 525 (2011), p. 546.

[61] D. Anton, R A. Makgill, and C. R. Payne, *Advisory Opinion on Responsibility and Liability for International Seabed Mining (ITLOS Case No. 17): International Environmental Law in the Seabed Disputes Chamber*, available at SSRN, ANU College of Law Research Paper No. 11-06 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1793216&download=yes.

of intergenerational equity.[62] Three types of clauses relating to intergenerational justice are distinguished: general clauses;[63] ecological generational justice;[64] and financial generational justice.[65]

It is interesting to note that some approaches to intergenerational equity are very extensive as they also include the right to a clean environment. It must be stated that several Constitutions already include such a right, e.g. the Constitution of Hungary and of South Africa. The Constitution of South Africa includes both a right to a clean environment and to generational justice. It may be noted that the right to a clean environment in the Constitution of South Arica is directly actionable.

It may be further observed that in the *Minors Oposa* case, the ground for action was both the right to a clean environment and intergenerational equity.

On of the most important aspects of the Brown Weiss' articulation of the concept of intergenerational equity was the suggestion of the appointment of the ombudsman

[62] J. Ch. Tremmel, *Establishing Intergenerational Justice in National Constitutions*, in: J. Ch. Tremmel (ed.), *Handbook of Intergenerational Justice,* Edward Elgar Publishing, Cheltenham: 2006.

[63] *Ibidem*, p. 191. There are several Constitutions with such clauses: e.g. Poland: Preamble to the Constitution: "Recalling best traditions of the First and Second Republic, obliged to bequeath to future generations that is all valuable from our over thousand years' heritage"; Switzerland: Preamble to the Federal Constitution: "In the name of God Almighty! Whereas, we are mindful of our responsibility to wards creation; (…) are conscious of our common achievements and our responsibility to wards future generations"; Estonia: Preamble: "Unwavering in our faith and with unwavering will to safeguard and develop a state (…) which shall serve to protect internal and external peace and provide security for present and future generations; the Estonian people (…) adopted the following Constitution."

[64] Numerous clauses, e.g. Art. 41, clause 1 Argentina: "All inhabitants are entitled to the right to a healthy and balanced environment fit for human development in order that productive activities shall meet present needs without endangering those of future generations; and shall the duty to preserve it. As a first priority environmental damage shall bring about obligations to repair according to law"; Poland, Art. 74, clause 1 of the Constitution: "Public authorities shall pursue policies ensuring ecological security of current an d future generations"; South Africa, Section 10 of the Constitution: "Everyone has the right a) to an environment that is not harmful to their health and well-being; and b) to have the environment protected, for the benefit of present and future generations, though reasonable legislature and other measures that prevent pollution and ecological degradation, promote conservation; and secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development."

[65] The examples are e.g. Estonia, Art. 116: "proposed amendments to the national budget or to its draft, which require a decrease in income, and increase in expenditures, as prescribed in draft national budget, must be accompanied by the necessary financial calculations, prepared by the initiators, which indicate the sources of income to cover the proposed expenditures"; Art. 216, clause 5 of the Constitution: "it shall be neither permissible to contract loans nor provide guarantees and financial sureties which would engender a national public debt exceeding three-fifths of the value of the annual gross domestic product. The method for calculating the value of the annual gross domestic product and national public debt shall be specified by statute"; Germany, Art. 109, clause 2 of the Basic Law: "The Federation and the Länder shall perform jointly the obligations of the Federal Republic of Germany resulting from legal acts of the European Community for the maintenance of budgetary discipline pursuant to Article 104 of the Treaty Establishing the European Community and shall, within this framework, give due regard to the requirements of overall economic equilibrium" and Art. 115: "The borrowing of funds and the assumption of surety obligations guarantees, or other commitments that may lead to expenditures in future fiscal years shall require authorisation by a federal law specifying or permitting computation of the amounts involved."

representing the interests of future generations. This idea appeared to be quite far fetched, if not unworkable at the time. However, certain States set up special organs whose function is the representation of such interests. In 1993, the Government of France established a Council for the Rights of Future Generations, whose task was to consider issues related to nuclear power. This body, however, lapsed when France resumed nuclear testing in the Pacific.[66] Another example is Israel, where its Parliament, the Knesset, established a Commission for Future Generations. This body's function was to assess draft bills that were of particular relevance for future generations, within the area of the environment, natural resources, development, health, the economy, planning and construction, education, quality of life, technology and all matters which were determined by the Knesset's Constitution, Law and Justice Committee as being of particular important consequences for future generations. In practice the Commission dealt in practice with protecting children.[67] In 2007, the Hungarian Parliament enacted legislation establishing an Ombudsman for Future Generations, vested in broad powers, including advising the Parliament on the impact of certain legislation on future generations and intervening to enjoin activities that could have a detrimental impact on future generations.

The above examples show there is a certain degree of concern by States regarding future generations. It may be said, however, that these are not very numerous examples, and one of them (in France) does not exist any more; and the other one (in Israel) is limited. It only protects the rights of existing children and those of the successive generation of children, i.e. "the next baby born tomorrow".[68]

It may be concluded that the concept of intergenerational equity features very prominently in international environmental law, it may be even said that it is a leading concept. However, its normative content and practical application remain ambiguous. It is unclear whether it has acquired a normative content of a principle; or it remains a concept; or perhaps a philosophical theory (see below). Attempts of invoking it before national courts were largely unsuccessful; and before international courts and tribunals, intergenerational equity has not acquired great prominence. Its ambiguous legal content also raises questions of legal standing before courts and tribunals.

2.3. Intergenerational Equity and its Philosophical Background

It is without doubt that the concept of intergenerational equity is firmly rooted in the theory of distributive justice, as embodied in philosophy of John Rawls.[69] His theory of philosophy formed the background of the Brown Weiss' (see above) concept of intergenerational equity, which had become the leading concept of international

[66] Brown Weiss, *supra* note 37, p. 110.

[67] *Ibidem*.

[68] S. Shoham & N.Lamay, *Commission for Future Generations*, in: Tremmel (ed.), *supra* note 62.

[69] *See* J. Rawls, *A Theory of Justice*, Harvard University Press, Harvard: 1971 ("Rawls I"); J. Rawls, *A Theory of Justice* (revised ed.), Harvard University Press, Harvard: 1996 ("Rawls II"); J. Rawls, *Political Liberalism,* Columbia University Press, New York: 1996).

environmental law. Very broadly speaking, Rawls' theory is based on a concept of justice as fairness and of sharing the benefits and burdens in society. Rawls addressed social inequalities in society, the perception of which depends on individuals' characteristics and place in society, so they are biased.[70] Rawls aimed at discarding these biases. What would be a concept of "just society" if people were deprived of their class status, political beliefs, health, and religion; in other words if they operated from behind the "veil of ignorance".[71] His idea was to divorce decision-makers from the sense of their identity, which would involve them being totally ignorant as to their final position, capabilities etc., in short they would find themselves in a "original position". This would enable them to understand in a different light from that derived from a formal equality approach.[72] Rawls introduced the so-called "difference principle" which in broad brushstrokes is based on a premise that individuals behind the "veil of ignorance" would find a fair and equal society if the assignment of benefits would result in just distribution and the eradication of economic inequities, in particular in relation to the least advantaged members of society. The final purpose of equal economic distribution is to make everybody better off.[73] Rawls' theory was originally applied within the context of a State, relating to individuals in a single society. However, it has been observed that this theory can be also useful in inter-state application, although not without certain difficulties. Some of the difficulties related to the fundamentally procedural character of the Rawlsian theory.[74] However, the theory of Rawls can be transferred into international level in environmental matters by "melding Rawlsian approaches to economic justice with environmental regulation" by which "developing nations may have effected a particularly important paradigm shift in international relations and foreign policy."[75] Social justice as an underlying principle of Brown Weiss' theory has an intertemporal dimension, which in fact was also raised by Rawls. In his theory this element appears after a person assumed the "veil of ignorance" (having discarded all prejudices). Not only did Rawls include a time element, but the time element stretched between generations. Intergenerational justice, like Brown Weiss' concept, was based on the "just savings principle", according to which each and every generation has to preserve heritage of previous generations and put aside a suitable amount of capital. As Drumbl observed, generational justice can be applied to the environment:

> If people in their "original position" did not know what generation they would be born to, then persons would take better care of the environment if there were risk that they would be born into a generation whose predecessors had desecrated the environment or emptied it of its recourses. International environmental lawyers have gone one step

[70] Rawls I, pp. 15-19.

[71] *Ibidem,* pp. 136-142.

[72] *Ibidem*.

[73] *Ibidem,* pp. 61, 83.

[74] M. Drumbl, *Poverty, Wealth, and Obligations in International Environmental Law*, 76 Tulane Law Review 903 (2002), pp. 903-905.

[75] *Ibidem*, pp. 903-904.

> further and have applied intergenerational justice as a rationale for global environmental governance. For example, Edith Brown Weiss writes that intergenerational justice encompasses the duties we owe to future generations to maintain a natural environment capable of sustaining life and civilisation at least to the same standard of living enjoyed today.[76]

The application of the theory of Rawls to international environmental law is, however, not without problems. One of the most fundamental issues is the contractarian or reciprocal character of this theory.

In relation to climate change it was phrased in the following manner:

> If reciprocity determines the scope of justice, as writers such as Rawls and Gauthier believe, there seems to be no room for future persons having claims to resources from ancestors – they get what they inherit, and should count themselves lucky to get it![77]

The question of intergenerational equity (or intergenerational justice) concerns the most fundamental issue: what is the character the rights of future generations and what is their scope. Are these rights moral or legal rights? The majority subject adheres to the view that they are moral rights, but there is no unambiguous answer to this question. However, the question become more complex in the case of the rights of future generations enshrined in various constitutions. Are they still moral rights or legal rights, or both? There is a view expressed that in democratic States most legal norms are also moral norms.[78] More questions may follow: what is the definition of these rights and obligations and who decides on their definition?[79]

There are also separate categories of interests and needs of future generations. For example, Art. 4 of the Moon Treaty states that "due regard shall be paid to the interest of present and future generations." The notion of "needs" is contained in the most frequently used definition of Brundland's Report on Sustainable Development (of which intergenerational equity is part and parcel):[80] "development which meets the needs of the present without compromising the ability of future generations to meet their own needs."

The notion of needs was also included by some international environmental agreements, such as the UN Economic Commission for Europe 1992 on the Protection and use of Transboundary Watercourses and International Lakes,[81] which in fact incorporated the Brundland's definition.

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[76] *Ibidem*, pp. 919-920.

[77] E.P. Page, *Climate Change, Justice and Future Generations,* Edward Elgar Publishing Cheltenham: 2006, p. 105.

[78] Tremmel, *supra* note 62, pp. 187-212.

[79] *Ibidem*, pp. 201-203.

[80] The 1987 Report of the World Commission on Sustainable Development (so-called Brundland (she chaired this body) Commission). See also on this: H. Ward, *Beyond the Short Term: Legal and Institutional Space for Future Generations*, 22 Yearbook of International Environmental Law 3 (2011), pp. 7-33.

[81] Convention on the Protection and Use of Transboundary Watercourses and International Lakes, 17 March 1992, entered into force 6 October 1996, 1936 UNTS 269.

The notions of interests and needs of future generations also suffer the same shortcomings as the other elements of it, i.e. the lack of the basic understanding and the ambiguity of what are the interests and needs of future generations and their scope.

CONCLUSIONS

This article analysed some of the foundational principles of international environmental law. It started with an analysis of the concepts of the Common Heritage of Mankind (Humankind), Common Concern of Mankind (Humankind) and Intra- and Intergenerational Equity. The thesis that environmental protection is a part of the definition of CCM remains inconclusive. However, it is incontrovertible that it belongs of the category of "benefits of mankind", which is constituted of the elements not directly forming a part of the definition, but has an important influence on the development of the concept of CHM. The definition of CHM also has to be treated in an evolutionary manner. Environmental considerations have increased in importance since 1982 and therefore their significance to this concept is also greater. It may also be said that this is the idea of common interests of States which underlines both the CHM and CCM concepts. There were certain doubts as to the application of the concept of intergenerational equity within the context of CCM. In the view of the present author, the changes in attitudes concerning environmental law by developing States and the presence of this concept in many MEAs may justify the view that it has become one of the elements of CHM and CCM. There has never been doubt that the concept of intragenerational equity, in particular due to the New Economic Order, was one of the elements of CCM. The concept of the New International Economic Order lost its currency but at present, intragenerational equity is expressed in the principle of common but differentiated responsibilities. The present author therefore submits that the underlying, foundational principles of international environmental law have the common theme of inter and intra generational equity.