

Commentary on Securing the Rights of Future Generations in international Law
Judge C.G. Weeramantry, Colombo, summer 2008,

It is my belief that the main resource for developing and advancing international law is customary international law. It is only when this is sufficiently consolidated that treaty law can follow. I have expressed this view very strongly in my writings. e.g. in my article, “The Contemporary Role of Customary International Law”, in, “*Imagining Tomorrow – Rethinking the Global Challenge*”, the collection of essays published to mark the United Nations Millennium Assembly.

There is a rich array of principles of customary international law which can be used for this purpose. They need to be developed both individually and in combination with each other. For example concepts of the right to life, the right to found a family, rights of motherhood and childhood, human dignity, the integrity of the human person, the right to health, the right to food, the right to a pure environment, the duty not to cause irreparable damage to neighbouring states, the precautionary principle, the concept of sustainable development, the concept of duties *erga omnes*, principles of individual responsibility, of trusteeship of earth resources, of intergenerational equity, of planetary responsibility and so forth. A very extensive and powerful list can be completed.

International law, like domestic law, lacks the machinery for the representation of certain interests. Domestic law has sought to address this problem through such procedural innovations as class actions and public interest litigation. Articles such as, ‘Should Trees have Standing?’, by Christopher Stone, written as long ago as 1972 have made their impact through stimulating domestic lawyers to devise new means of representation of interests that have no direct voice within the legal system. Likewise long years ago far thinking jurists like Justice Douglas thought in terms of giving standing to natural objects, like streams and rivers. Why cannot this principle be extended to human beings? To deny this is to foreclose to future generations their rights to the basic fundamentals of civilized existence. Can any legal system allow this, particularly when the violator is fully aware that this will be the result of his or her actions?

On the procedural side we can develop the concept implicit in Article 8 of the Universal Declaration, which gives the right to everyone to an effective remedy for acts violating the fundamental rights granted to him or her. Would not members of future generations have this right? Can we deprive them of it with impunity merely because they are not yet in existence?

Also Article 28 states that everyone is entitled to a national and international order in which the rights and freedoms set forth in the Universal Declaration can be fully resolved. Cannot customary international law develop this concept through the argument that if this is so important to those alive here and now, the underlying concept cannot be given an interpretation which enables the same rights to be shut off to all future generations?

It is time for international law to follow domestic law and devise its own procedural tools for enabling such voiceless interests to be heard. Preeminent among these interests are future generations who at present do not have a locus standi in international law. If international law is to be viewed as a system catering to the needs of civilization, it is a huge lacuna in that system if future generations can be irreparably damaged with regard to absolutely fundamental rights without the legal system giving anyone an opportunity to speak on their behalf.

The concept of intergenerational equity is a step in the correct direction but only a small and inadequate step. It needs to be combined with a procedural mechanism which enables those future generations who are being pillaged and deprived of their birth right to be heard. Customary international law can move in this direction and would be ignoring its basic responsibilities if it did not.

These are all matters to be discussed as the background to the emergence of a crime against future generations. This will help to bring out the culpability of those who knowingly and deliberately perpetrate such damage, shutting their eyes to the irreparable harm and devastation they are causing to generations yet to come.

If the half life of some of the radio active elements that are being tinkered with in the commitment of some of these crimes is 24,000 years, can any responsible legal system permit such acts to be committed, which will so grievously affect a thousand generations to come?

The international legal system at one stage protected only the privileged few among the nation states and disregarded the rights of the rest of humanity. We now deem that to be a travesty of what international law should stand for. We are today using international law in a much more heartless fashion, for we think only of those who are alive here and now and shut our eyes to the rest of the vast family of humanity who are yet to come and to whom we owe a sacred duty. This is a “sacred trust of civilization” if ever there was one.

Strangely, this point of view has not thus far been strongly urged in the international legal system and this is an area *par excellence* which customary international law must enter. The principles that have to be evolved will commend themselves to the universal conscience of mankind and once formulated will be difficult to resist.

The duty thus lies heavily on academics and those who are concerned with the human future to develop existing concepts, to evolve new ones and to raise the public consciousness to a level where it would be said, “Of course this is a Crime”.

This involves also a heavy public education element. There will be an important need to alert the global public to the urgency of these.

These are just a few comments of a very general nature, which may set the background to the more detailed discussions that will take place.