Keynote
Bringing in Community Interests Under International Environmental Law: Substantive and Procedural Paths

Malgosia Fitzmaurice
Queen Mary University of London, London, Great Britain
m.fitzmaurice@qmul.ac.uk

Introduction 183
I. Community Interests before the International Court of Justice and the International Tribunal for the Law of the Sea 185
1. Community Interests Based on Responsibility of States for Internationally Wrongful Acts 186
2. Community Interests and Intervention in Disputes under International Environmental Law 188
II. Alternative Paths and New Frontiers: Intergenerational Equity and Non-Compliance Procedures 191
1. Intergenerational Equity and Community Interests under International Environmental Law 192
2. Non-Compliance Procedures and the Protection of Community Interests Beyond Judicial Mechanisms 196
Conclusions 198

Introduction

Current innovations in international litigation have raised global awareness that the obligations of States are not confined to bilateral exchanges of reciprocally owed duties. Rather, certain core obligations may be owed all parties to a convention or the international community as a whole, and invoked by any member thereof. With the recent rush of cases instituted under the Genocide Convention by States far removed from the atrocities in question – and the prominent participation of third States in these proceedings – one might think of community interests as a thoroughly modern notion.

Yet this concept is not a recent international law phenomenon. Rather, its foundations were laid by the Permanent Court of International Justice (PCIJ). Indeed, the most important and well-known precedent in this respect is its very first case, *Wimbledon*.[1] Moreover, in the lesser-known *Oscar Chinn* case,[2] two statements were made which were of particular importance for the devel-

1 PCIJ, *Case of the S. S. "Wimbledon"*, Series A, No. 1, judgment of 17 August 1923, 15.
2 PCIJ, *Oscar Chinn*, Series A/B, No. 63, judgment of 12 December 1934, 65.

DOI 10.17104/0044-2348-2025-1-183 ZaöRV 85 (2025), 183-198

opment of the idea of a communitarian interest, i. e. those of Judges Eysinga and Schücking.[3] Judge Eysinga, in particular, referred to the idea that a legal instrument – the Berlin Act – '[present] a case in which a large number of States, which were territorially or otherwise interested in a vast region, endowed it with a highly internationalized statute, or rather a constitution established by treaty, by means of which the interests of peace, those of "all nations" as well as those of the natives, appeared to be most satisfactorily guaranteed. Similar internationalized regimes have been established also in other parts of the world.'[4]

While international courts have been certainly pivotal to the idea of community interests, this contribution aims to show avenues alternative to judicial proceedings which could be undertaken to redress community interests. Turning a closer look at ways in which community interests may be redressed beyond court's proceedings may have the advantage, on the one hand, not to burden a single international jurisdiction with community interest litigation and, on the other, to overcome procedural issues that would render the exercise of jurisdiction difficult in the first place. Since, from a contemporary perspective, there are very few subject-areas of international law which would be more in the centre of the community interests debate than international environmental law, this contribution will particularly focus on this branch of public international law in order to address and analyse substantive and procedural aspects of international litigation exclusively from the point of view of the redress of environmental communitarian interests. Some new avenues in this respect will be suggested.

Certain specific questions arising in this context, but addressed in the preceding contributions to this symposium, will not be discussed, such as the redress of obligations *erga omnes* (*partes*) in disputes concerning e. g., aggression, genocide, racial discrimination, or self-determination.[5] This article also

3 PCIJ, *Oscar Chinn* (n. 2), Separate Opinion of Judge Schücking, 148.

4 PCIJ, *Oscar Chinn* (n. 2), Separate Opinion of Judge van Eysinga, 132-133 (also observing: 'The General Act of Berlin does not create a number of contractual relations between a number of States, relations which may be replaced as regards some of these States by other contractual relations; it does not constitute a *jus dispositivum*, but it provides the Congo Basin with a régime, a statute, a constitution. This régime, which forms an indivisible whole, may be modified, but for this the agreement of all contracting Powers is required. An inextricable legal angle would result if, for instance, it were held that the régime of neutralisation provided for in Article II of the General Act of Berlin might be in force for some contracting Powers while it had ceased to operate for certain others.') See Separate Opinion of Judge van Eysinga (n. 4), 133-34.

5 See summary of the discussion on these topics conducted during the 2023 ASIL meeting: Benjamin Salas Kantor and Massimo Lando, 'Intervention and Obligations erga omnes at the International Court of Justice', Centre of International Law, National University of Singapore, 20 April 2023, <https://cil.nus.edu.sg/blogs/intervention-and-obligations-erga-omnes-at-the-international-court-of-justice/>, last access 19 February 2025.

 DOI 10.17104/0044-2348-2025-1-183

does not address the interaction of community interests with substantive and certain procedural norms of international environmental law (such as the prohibition of transboundary harm, due diligence, and procedural obligations of information and cooperation), as this subject-matter has been discussed in many excellent publications.[6]

I. Community Interests before the International Court of Justice and the International Tribunal for the Law of the Sea

Reliance on obligations *erga omnes* and *erga omens partes* in international adjudication is far from well-defined and established, and has been subject to many controversies.[7] This section will be devoted firstly to communitarian interests based on the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA), in particular Articles 48[8] and 42 (b)(ii).[9] There is no agreement amongst international lawyers as to the form of the application and the procedure regarding these articles in order to redress community interests. This initial analysis will be illustrated with a contentious Judgment of the International Court of Justice (ICJ),[10] and an Advisory

6 E. g. see Jutta Brunnée, 'International Environmental Law and Community Interests. Procedural Aspects', in: Eyal Benvenisti and Georg Nolte (eds), *Community Interests Across International Law* (Oxford University Press 2018), 151-175.

7 Priya Urs, 'Obligations *erga omnes* and the Question of Standing Before the International Court of Justice', LJIL 34 (2021), 505-525; Yoshifumi Tanaka, 'The Legal Consequences of Obligations Erga Omnes in International Law', NJIL 68 (2021), 1-33.

8 Art. 48: 'Invocation of responsibility by a State other than an injured State. 1. Any State other than an injured State is entitled to invoke the responsibility of another State in accordance with paragraph 2 if: (a) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or (b) the obligation breached is owed to the international community as a whole. 2. Any State entitled to invoke responsibility under paragraph 1 may claim from the responsible State: (a) cessation of the internationally wrongful act, and assurances and guarantees of non-repetition in accordance with article 30; and (b) performance of the obligation of reparation in accordance with the preceding articles, in the interest of the injured State or of the beneficiaries of the obligation breached. 3. The requirements for the invocation of responsibility by an injured State under articles 43, 44 and 45 apply to an invocation of responsibility by a State entitled to do so under paragraph 1.'

9 Art. 42b(ii): 'A State is entitled as an injured State to invoke the responsibility of another State if the obligation breached is owed to […] (b) a group of States including that State, or the international community as a whole, and the breach of the obligation: […] (ii) is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation.'

10 ICJ, *Whaling in the Antarctic* (Australia v. Japan: New Zealand intervening), merits, judgment of 31 March 2014, ICJ Reports 2014, 226.

Opinion of the Seabed Disputes Chamber of the International Tribunal on the Law of the Sea (ITLOS).[11]

This section will then join substance to procedure by addressing the ongoing debate as to whether community interests before the ICJ can be effected through intervention under Articles 62[12] and 63[13] of its Statute. The legal characteristics and rules of standing in relation to intervention (in general) and its role in the protection of community interests are very complex (if not obscure) constructs. While they have evolved through judicial practice, many questions remain open to debate and different interpretations.[14]

1. Community Interests Based on Responsibility of States for Internationally Wrongful Acts

In the ARSIWA, James Crawford introduced the notion of 'collective obligations', which were defined as applicable 'between a group of States and have been established in some collective interest'.[15] On this point, *Whaling in the Antarctic* has since come to be seen as a landmark development in the ICJ's jurisprudence. In very broad brushstrokes, the subject matter of the case was Japanese scientific whaling, which was challenged by Australia.[16] In this case, Australia did not assert any violations by Japan of the International Convention for the Regulation of Whaling (ICRW) which would cause direct injury. Japan did not challenge Australia's standing as

11 ITLOS, *Responsibilities and Obligations of States with Respect to Activities in the Area*, advisory opinion of 1 February 2011, ITLOS Reports 2011, 10.

12 Art. 62: 'l. Should a state consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene. 2. It shall be for the Court to decide upon this request.'

13 Art. 63: '1. Whenever the construction of a convention to which states other than those concerned in the case are parties is in question, the Registrar shall notify all such states forthwith. 2. Every state so notified has the right to intervene in the proceedings; but if it uses this right, the construction given by the judgment will be equally binding upon it.'

14 See on these issues the pioneering publications of Brian McGarry in 'Obligations *Erga Omnes (Partes)* and the Participation of Third States in Inter-State Litigation', The Law and Practice of International Courts and Tribunals 22 (2023), 273-300, and Brian McGarry, 'A Rush to Judgment? The Wobbly Bridge from Judicial Standing to Intervention in the ICJ Proceedings', Quest. Int'l. L. 100 (2023), 5-18. See also Salas Kantor and Lando (n. 5).

15 James Crawford, The International Law Commission's Articles on State Responsibility (Oxford University Press 2002), 277.

16 See in depth Malgosia Fitzmaurice, *Whaling and International Law* (Cambridge University Press 2015); Malgosia Fitzmaurice and Dai Tamada (eds), *Whaling in the Antarctic – The Significance and the Implications of the ICJ Judgment* (Brill 2016).)

Applicant in the case.[17] During the oral proceedings, Australia relied on upholding 'its collective interest, an interest it shares with all other parties'.[18]

This has given rise to the presumption that the Court acknowledged that Australia had acted in the collective interest and on that basis engaged Japan's responsibility for the breach of obligations *erga omnes partes*.[19] The Court was silent on this matter. In this respect, McGarry has observed that raising or waiving objection to the Applicant's standing is a matter of party autonomy.[20] By this logic, the Court was not obligated to react to Japan's silence on this matter, and so did not make any such findings implicitly.

In the view of the present author, the *Whaling* case cannot be treated as a beginning of new era in redressing of obligations *erga omnes partes* in international environmental law. We should not forget that as a basis for the jurisdiction of the Court, Australia invoked the provisions of Article 36, paragraph 2 (the 'Optional Clause') of the Court's Statute, referring to the parties' declarations recognising the Court's jurisdiction as compulsory. From a procedural point of view, it was the lack of objection as to the admissibility of the claim which enabled Australia to invoke Japan's responsibility before the Court.

More explicit guidance in this domain has come from the Seabed Disputes Chamber of the ITLOS and its advisory opinion on *Activities in the Area*, which affirmed the *erga omnes* character of the obligations respecting the preservation of the environment of the high seas and the International Seabed Area.[21] The ITLOS has adopted a very radical view that due to the *erga omnes* character of the obligation to preserve the environment, '[e]ach State

17 Chrisitan J. Tams, 'Roads Not Taken, Opportunities Missed: Procedural and Jurisdictional Questions Sidestepped in the Whaling Judgment', in: Malgosia Fitzmaurice and Dai Tamada (eds.), *Whaling in the Antarctic – The Significance and the Implications of the ICJ Judgment* (Brill 2016), 193, 206-209.

18 ICJ, *Whaling in the Antarctic* (Australia v. Japan: New Zealand intervening), oral proceedings, Verbatim Record 2013/18 of 9 July 2013, para 19.

19 Tams (n. 17), 204. See also Priya Urs, 'Guest Post: Are States Injured by Whaling in the Antarctic?', Opinio Juris, 14. August 2014, <https://opiniojuris.org/2014/08/14/guest-post-states-injured-whaling-antarctic/>, last access 19 February 2025.

20 McGarry, 'Obligations Erga Omnes (Partes)' (n. 14), 296-97.

21 ITLOS, *Responsibilities and Obligations* (n. 11), 54, para. 180. Yoshifumi Tanaka, 'Obligations and Liability of Sponsoring States Concerning Activities in the Area: Reflections on the ITLOS Advisory Opinion of 1 February 2011', NILR (60) (2013), 205-230, 223 *et seq*. According to Tanaka, Article 48(1)(b) is designed to give effect to the famous dictum of the ICJ in the *Barcelona Traction* case (wherein the Court found that "[a]n essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations erga omnes".) Tanaka, 'Obligations and Liability' (n. 21), 225.

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'.[22] Such a statement may indicate that States which 'are not directly injured may be entitled to seek, when necessary, the cessation and the assurance of non-repetition of the wrongful act from the state responsible for the internationally wrongful act'.[23] Tanaka in principle agrees with this statement but questions the legal standing of States to obtain satisfaction as a form reparation and to apply third party countermeasures in the absence of direct injury.[24]

2. Community Interests and Intervention in Disputes under International Environmental Law

One of the ways in which States have sought to redress collective interests is to rely on the facility of intervention under Articles 62 and 63 of the ICJ Statute. The earliest example of such a case is *Nuclear Tests*, a dispute at the interface of environmental health and a regional nuclear zone.[25] In this case, Fiji sought to intervene through Article 62, which requires an 'interest of a legal nature which may be affected' by the Court's decision. Despite the characterisation of both these areas (the environment and nuclear regional security) as examples of collective interest, Fiji invoked in its application a direct injury caused by radioactive fall-out.[26]

The Applicants in the *Nuclear Tests* cases (New Zealand and Australia) had submitted a mixture of arguments, relying on direct injury but also community interests.[27] Both Australia and New Zealand showed clear deference to 'specific' interests (i. e. direct injury or other unique interest, as seen in Article 62 practice), while also referring to more general interests in the interpretation of treaty rules (as arise under Article 63 of the Statute).[28]

22 ITLOS, *Responsibilities and Obligations* (n. 11), 54, para. 180.

23 Tanaka, 'Obligations and Liability' (n. 21), 226.

24 Tanaka, 'Obligations and Liability' (n. 21), 127-129.

25 ICJ, *Nuclear Tests* (Australia v. France), merits, judgment of 20 December 1974, ICJ Reports 1974, 253.

26 ICJ, *Nuclear Tests* (New Zealand v. France), Application for Permission to Intervene submitted by the Government of Fiji, 16 May 1973, 149 ('[…] deposited on its territory fresh fission products during the period within which France has conducted those tests. These products constitute a hazard to the health of the people of Fiji and to their environment'). McGarry, 'Obligations Erga Omnes (Partes)' (n. 14), 283.

27 ICJ, *Nuclear Tests* (New Zealand v. France), ICJ Pleadings 1974, Vol. I, 14, 43; *Nuclear Tests* (New Zealand v. France), ICJ Pleadings 1974, Vol. II, 8, 49.

28 McGarry, McGarry, 'Obligations Erga Omnes (Partes)' (n. 14), 283.

Australia asserted that the prohibition of nuclear testing and the duty to observe this prohibition existed at customary international law, and that this involved the same kind of the legal obligation *erga omnes* as existed in relation to the law concerning the basic rights of a human person (as the Court had framed it in *Barcelona Traction*).[29] New Zealand further argued that in consequence the right of States in relation to the observance of the prohibition of nuclear testing corresponds with the duty of each State not to breach the prohibition. The duty is owed by each State to all States. New Zealand argued that this duty follows from the character of obligations *erga omnes*, i. e. that its claim against France related to a right of all States – or the whole of international community – and that such a right is owed to each member of that community on a bilateral basis.[30]

The views of the Judges in this case were very diversified, in particular concerning the question of *locus standi* before the ICJ. Judge Castro was very sceptical in relation to obligations *erga omnes* in general and standing on this basis before the Court. His view is best summed up by stating that the obligations of such a character have to be treated *cum grano salis.*[31] Judge Berwick held a very cautious view, and approached arguments of Australia as to *locus standi* based on community interests as an aspirational rather than existing ground.[32] It is worth noting that he referred, as a necessary condition of Australia's claim, to the existence of a specific legal interest and a corresponding norm of the prohibition of nuclear testing.

Dissenting Judges Oneayama, Dillard, de Arechaga and Waldock expressed a measured and similar approach to Judge Berwick. Without excluding in principle the possibility of common interest litigation, they hinged it on the existence of a substantive norm of customary international law prohibiting nuclear testing, and the existence of a corresponding legal interest.

> 'With regard to the right to be free from atmospheric tests, said to be possessed by Australia in common with other States, the question of "legal interest" again appears to us to be part of the general legal merits of the case. If the materials

29 ICJ, *Barcelona Traction, Light and Power Company, Limited* (Belgium v. France), merits, judgment of 5 February 1979, ICJ Reports 1970, 3 (para. 34).

30 ICJ, *Nuclear Tests* (New Zealand v. France), ICJ Reports 1974, 457. See ICJ, *Nuclear Tests* (New Zealand v. France), Memorial of New Zealand, 20.

31 ICJ, *Nuclear Tests* (n. 30), Dissenting Opinion of Judge de Castro, 372 (387, para. 2).

32 '[…] if a prohibition of the kind suggested by the Applicant were to be found to be part of the customary international law, the precise formulation of, and perhaps limitations upon, that prohibition may well bear on the question of the rights of individual States to seek to enforce it. Thus, the decision and question of the admissibility of the Applicant's claim in this respect may trench upon the merits. There is a further aspect of the possession of the requisite legal interest to maintain this basis of the Applicant's claim which has to be considered.' ICJ, *Nuclear Tests* (n. 30), Dissenting Opinion of Judge Barwick, 391 (437-438).

> adduced by Australia were to convince the Court of the existence of a general rule of international law, prohibiting atmospheric nuclear tests, the Court would at the same time have to determine what is the character and content of that rule and, in particular, whether it confers a right on every State individually to prosecute a claim to secure respect for the rule. In short, the question of "legal interest" cannot be separated from the substantive legal issue of the existence scope of the alleged rule of customary international law. Although we recognize that the existence of a so-called *actio popularis* in international law is a matter of controversy, the observations of this Court in the *Barcelona Traction, Light and Power Company, Limited case* suffice to show that the question is one that may be considered as capable of rational legal argument and a proper subject of litigation before this Court.'[33]

In 1995, the question of community interests returned in the second *Nuclear Tests* case, in relation to the request of Australia to intervene on the basis of Article 62 of the ICJ Statue.[34] Australia in its pleadings to intervene argued that '[t]he legal interest of every member of the international community, even these States not bound by the Judgment are "affected" or *en cause* within the meaning of Article 62 of the Statute'.[35] The Federated States of Micronesia also sought to intervene under Article 62 on the basis of community interests,[36] as well as under Article 63 based on the Noumea Convention.[37]

The above examples of the redress of community interests in international environmental law through intervention in ICJ cases clearly indicate the

33 ICJ, *Nuclear Tests* (n. 30), Opinion of Judges Oneayama, Dillard, de Arechaga and Waldock, para. 117, 370.

34 ICJ, Request for an Examination of the Situation in Accordance with Paragraph 63 of the Courts Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case, order of 22 September 1995.

35 ICJ, Application for Permission to Intervene under Article 62 of the Statue of the Court, ICJ, *Request for an Examination* (n. 34), 20.

36 ICJ, Application for Permission to Intervene under Article 62 and Declaration of Intervention under Article 63 submitted by the Government of the Federated States of Micronesia, ICJ, *Request for an Examination* (n. 34) ('The cultures, traditions and well-being of the peoples of the South Pacific States would be adversely affected by the resumption of French nuclear testing within the region in a manner incompatible with applicable legal norms. New Zealand's request for an indication of further provisional measures is concerned to preserve, pending a decision of the Court: […] all rights owed *erga omnes* (and thus to the Federated States of Micronesia)'); ICJ, Application for Permission to Intervene under Article 62 and Declaration of Intervention under Article 63 submitted by the Government of the Federated States of Micronesia, ICJ, *Request for an Examination* (n. 34) para. 25. The Application of the Republic of Marshall Islands was similarly phrased.

37 ICJ, Application for Permission to Intervene under Article 62 and Declaration of Intervention under Article 63 submitted by the Government of the Federated States of Micronesia, ICJ, *Request for an Examination* (n. 34) para 27.

complex nature (and even to some extent confusion) of presenting a case on behalf of the whole community of States, within the legal parameters of Articles 62 and 63 of the Statute. The opinions of some of the dissenting judges in the 1974 *Nuclear Tests* cases are a very instructive example of on the one hand admitting the possibility of a legal action protecting communitarian interests, and on the other emphasising necessary conditions to do so (i. e., the substantive condition of the existence of the relevant norm in international law, combined with the procedural requirement of the existence of the legal interest). Decades later, the resurrection of these cases presaged much of the debate today regarding the difficulty of framing the protection of community interests within the strict confines of the Statute.[38]

II. Alternative Paths and New Frontiers: Intergenerational Equity and Non-Compliance Procedures

The above considerations regarding substantive and procedural aspects of community interests under international environmental law reflect an area which is not fully developed, and which still raises more questions than answers. The issues of the global environment are at the centre of communitarian interests, but there is an unresolved question as to whether the existing international legal order is fully equipped to deal with such interests. As some authors have observed, the *locus standi* recognised by the Court as deriving from obligations *erga omnes partes* 'cannot necessarily be taken to represent the endorsement of a broader right of standing also in respect of obligations *erga omnes* under customary international law'.[39] Most importantly, the *erga omnes* concept does not obliterate the consensual character of the Court's jurisdiction.

In light of the tenuous nature of litigating community interests before the ICJ, the present section of this article suggests alternative ways to address community interests under international environmental law. As it was above

[38] See further McGarry, McGarry, 'Obligations Erga Omnes (Partes)' (n. 14), 300 ("[T]he premise of intervention in respect of interests held by all States reflects twenty-first century conceptions of international justice and accountability. Articles 62 and 63 of the ICJ Statute, however, have in general remained statutorily and doctrinally anchored in a twentieth century vision of international adjudication. While Article 63 is currently enjoying a period of relative rediscovery, it offers a fairly limited form of participation. The bolder possibilities of Article 62 intervention in public interest litigation, on the other hand, may require the third State to navigate unique conceptual and practical challenges").

[39] Urs, 'Obligations *erga omnes*' (n. 7), 518. In relation to obligation *erga omnes partes*, the Court 'has rejected the suggestion that a reservation to a treaty's compromissory clause is impermissible when it comes to the enforcement of these obligations.' Urs, 'Obligations *erga omnes*' (n. 7), 519.

analysed, the substantive communitarian interests redressed through intervention and obligations *erga omnes* and *erga omnes partes* are not uniformly and universally accepted, and encounter serious problems of a procedural nature. Therefore, it is submitted that there are two alternative approaches which have emerged in international environmental law, as possible different ways to accommodate such interests: intergenerational equity and non-compliance procedures. These substantive and procedural considerations are addressed in turn below.

1. Intergenerational Equity and Community Interests under International Environmental Law

In international environmental law, the principle of intergenerational equity 'implies that a relationship ('inter') exists between generations ('generational') as regards the right, correct or just handling ('equity') of planetary resources'.[40] This concept was notably formulated by Brown Weiss,[41] who defined the term 'future generations' as 'all those generations that do not exist yet. The present generation refers to all those people who are living today. The present generation encompasses multiple generations among those living today, but they are treated collectively as the present generation'.[42] Despite initial criticism of this concept,[43] it has gained acknowledgement and practical application.

The important feature of this concept is the role of private entities which from the very beginning, in particular at the national level, played a crucial role in bringing cases based on intergenerational equity principle. Private entities play a pivotal role in fulfilling interests of community and partaking in globalisation, therefore blurring the dividing line between public and

40 Zena Hadjiargyrou, 'A Conceptual and Practical Evaluation of Intergenerational Equity in International Environmental Law', International Community Law Review (2016), 248-277 (248).

41 Edith Brown Weiss, 'Our Rights and Obligations to Future Generations for the Environment', AJIL 94 (1990), 198-207 (198-199); Edith Brown Weiss, 'Intergenerational Equity', in: Anne Peters (ed.), *MPEPIL* (online edn, Oxford University Press 2025).

42 Brown-Weiss, Intergenerational Equity (n. 41), para. 3.

43 E. g. Vaughan Lowe ('Lowe is of the opinion that 'the principle of intergenerational equity […] is a chimera'. He asked 'Who are the beneficiaries? What are their rights of actions? What are the duties of trustees?' He also noted that it is hard to see what legal content intergenerational equity has and takes the perceived rights of future generations to be merely metaphorical. Lowe argued that the obligations and duties of trustees cannot be enforced.') Vaughan Lowe, 'Sustainable Development and Unsustainable Arguments' in: Alan Boyle and David Freestone (eds), *International Law and Sustainable Development: Past Achievements* (Oxford University Press 1999), 27-28.

private, which may be conceptualised in a theory of 'publicness'.[44] Lo Giacco defines this concept as 'the authority to stand in the name of and for the community, including by defining community interests, rather than self- or particular interests, in a way that secures legitimacy and accountability towards the members of the community'.[45]

This definition falls squarely within the concept of intergenerational equity. It was already exemplified by the first case based on this concept, *Minors Oposa*. This case was filed in the Philippines by minors against the Secretary of State for the Environment, calling for the cancellation of all timber license agreements and for the prevention of new ones. The minors claimed that they were 'entitled to the full benefit, use and enjoyment of the natural resource treasures that is the country's virgin tropical rainforests'. Minors were represented by Philippine Ecological Network (PEN).[46] The children claimed that they represented themselves and generations yet unborn, thereby incorporating intergenerational equity into their suit. Standing was permitted insofar as it accommodated the right to a healthful ecology, as embodied in Sections 15 and 16 of Article II of the Philippine Constitution. The Court held:

> 'Their personality to sue on behalf of the succeeding generations can only be based on […] the right to a balanced and healthful ecology […] every generation has a responsibility to the next to preserve that rhythm and harmony of nature […] Put a little differently, the minors' assertion of their right to a sound environment, constitutes, at the same time, the performance of their obligation to ensure the protection of that right for the generations to come.'[47]

Cases asserting the principle of intergenerational equity then arose in national courts around the world. For example, the Supreme Court of Columbia observed that '[i]n terms of intergenerational equity, the transgression is obvious [because of] the forecast of temperature increase […]; future generations, including children who brought this action, will be directly affected, unless we presently reduce the deforestation rate to zero'.[48] In the Netherlands, the Urgenda Foundation brought suit on behalf of present and

44 This term was introduced by Letizia Lo Giacco, 'Private Entities Shaping Community Interests: (Re)imagining the "Publicness" of Public International Law as an Epistemic Tool', Transnational Legal Theory 14 (2023), 270-306 (274-75).

45 Lo Giacco (n. 44), 275.

46 Minors Oposa v. Secretary of The Department of Environment and Natural Resources (DENR), Supreme Court of the Philippines, 30 July 1993, 33 ILM (1994), 173.

47 *Minors Oposa* (n. 46).

48 STC4360-2018 Number: 11001-22-03-000-2018-00319-01, <https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2018/20180405_11001-22-03-000-2018-00319-00_decision.pdf>, last access 19 February 2025 (cited in Brown Weiss, Intergenerational Equity (n. 41), para. 41).

future generations against the Dutch government for failing to take adequate measures to reduce emission of greenhouse gases.[49]

The principle has been developed in some notable international cases as well. For example, in the aforementioned 1995 *Nuclear Tests* case, Judge Weeramantry in his Dissenting Opinion found:

> 'The case before the Court raises […] the principle of intergenerational equity – an important and rapidly developing principle of international law […] if the damage of this kind alleged had been inflicted on the environment by the people of the Stone Age, it would be with us today […] this is an important aspect that an international tribunal cannot fail to notice. This court must regard itself as trustee of those (intergenerational rights) […] 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.'[50]

In its Advisory Opinion on *Legality of the Threat or Use of Nuclear Weapons*, the full Court held:

> 'The Court recognises that […] the environment […] represents […] the very health of human beings, including generations unborn. The existence of the general obligation of States to ensure that activities within their jurisdiction […] respect the environment of other States or of areas beyond national control is now part of the corpus of international law (para. 29) […] The destructive power of nuclear weapons cannot be contained in either space or time […] the use of nuclear weapons would be a serious danger to future generations. Ionizing radiation has the potential to damage the future environment […] and to cause genetic defects and illness in future generations (para. 35) […] it is imperative for the Court to take account of the unique characteristics of nuclear weapons […] [and] their ability to cause damage to generations to come (para. 36).'[51]

The question arises whether the concept of intergenerational equity has the potential of representing interests of interests community in international judicial proceedings at least as effectively as based on *erga omnes* or *erga omnes partes* grounds. So far, the generational interests were dealt with by judicial bodies within the context of national jurisdiction (such as the *Minors Oposa* case). However, the latest developments in the 2024 *Klimaseniorinen* case[52] before the European Court of Human Rights (ECtHR) indicate that

49 Brown Weiss, Intergenerational Equity (n. 41), para.44.

50 ICJ, *Request for an Examination* (n. 34), dissenting opinion of Judge Weeramantry, ICJ Reports 1995, 317.

51 ICJ, *Legality of the Threat or Use of Nuclear Weapons*, advisory opinion of 8 July 1996, ICJ Reports 1996, 226.

52 ECtHR (Grand Chamber), *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, judgment of 9 April 2024, no. 53600/20, para. 410.

the concept of intergenerational equity may have a potential role to play in representing of community interests, in this particular instance relating to climate change. The ECtHR stated that questions of dealing with climate change 'inevitably involve issues of social accommodation and intergenerational burden-sharing, both in regard to different generations of those currently living and in regard to future generations'.[53]

The further ECtHR observed that

> 'While the legal obligations arising for States under the Convention extend to those individuals currently alive who, at a given time, fall within the jurisdiction of a given Contracting Party. […] it is clear that future generations are likely to bear an increasingly severe burden of the consequences of present failures and omissions to combat climate change (see paragraph 119 above) and that, at the same time, they have no possibility of participating in the relevant current decision-making processes. By their commitment to the UNFCCC, the States Parties have undertaken the obligation to protect the climate system for the benefit of present and future generations of humankind […] This obligation must be viewed in the light of the already existing harmful impacts of climate change, as well as the urgency of the situation and the risk of irreversible harm posed by climate change. In the present context, having regard to the prospect of aggravating consequences arising for future generations, the intergenerational perspective underscores the risk inherent in the relevant political decision-making processes, namely that short-term interests and concerns may come to prevail over, and at the expense of, pressing needs for sustainable policy-making, rendering that risk particularly serious and adding justification for the possibility of judicial review.'[54]

The ECtHR also noted that

> 'Climate change is a polycentric issue. Decarbonisation of the economies and ways of life can only be achieved through a comprehensive and profound transformation in various sectors. Such "green transitions" necessarily require a very complex and wide-ranging set of coordinated actions, policies and investments involving both the public and the private sectors. Individuals themselves will be called upon to assume a share of responsibilities and burdens as well. Therefore, policies to combat climate change inevitably involve issues of social accommodation and intergenerational burden-sharing, both in regard to different generations of those currently living and in regard to future generations.'[55]

---

53 ECtHR, *KlimaSeniorinnen* (n. 52), para. 419.

54 ECtHR, *KlimaSeniorinnen* (n. 52), para. 420. See also Aoife Nolan, 'Inter-Generational Equity, Future Generations and Democracy in the European Court of Human Rights' Klima-Seniorinnen Decision', EJIL:Talk!, 15 April 2024.

55 ECtHR, *KlimaSeniorinnen* (n. 52), para. 419.

In the same case, the ECtHR has acknowledged intergenerational equity as a substantive ground for litigation and the involvement of Non-Governmental Organisations (NGOs). This can lead to true representation of the community through public/private cooperation, with civil society actors standing for community interests.[56]

2. Non-Compliance Procedures and the Protection of Community Interests Beyond Judicial Mechanisms

The concept of publicness – as defined earlier – is also reflected in the development of non-compliance procedures for resolving international environmental disputes outside of the courtroom. Such procedures may provide a forum for input from civil society groups interacting with States, in a more active and efficient manner than is generally possible before traditional international courts.

Since the establishment of a Non-Compliance Committee under the Montreal Protocol in 1992, it has been a common practice of States parties to Multilateral Environmental Agreements (MEAs) to create treaty bodies, called 'Compliance' or 'Implementation Committees' (or both) to determine a State party's compliance with its international obligations. Non-Compliance Procedures (NCPs) may be established in the treaty itself (e. g. The Paris Agreement) or on the basis of so-called 'enabling clauses' in MEAs, which provide for the establishment of such a procedure by a decision of the relevant Conference of Parties (COP). An example of this is found in Article 8 of the Montreal Protocol.[57] However, in a few cases such NCPs have been established without such an authorisation. For example, the NCP in the Basel Convention on Transboundary Movement of Hazardous Wastes was established without an enabling clause in the Agreement.[58]

NCPs are designed to respond to a breach of environmental obligations in the multilateral (not a bilateral) context. The multilateral context is capable of accommodating the type of obligations which are of a character relevant to community interests in a truly satisfactory manner. Environmental obligations, in particular obligations relating to global issues, are not reciprocal in

56 ECtHR, *Klimaseniorinnen* (n. 52), paras 478 ff. See, Lea Raible, 'Priorities for Climate Litigation at the European Court of Human Rights', EJIL: Talk!, 2 May 2024.

57 Montreal Protocol on Substances that Deplete the Ozone Layer of 16 September 1987, 1522 UNTS 3.

58 Convention on the Control of Transboundary Movement of Hazardous Wastes and Their Disposal of 22 March 1989, 1673 UNTS 126.

nature. For this reason, the classical settlement of dispute procedures as envisaged by Article 33 of the UN Charter, which are bilateral in nature, is perhaps less suitable for addressing non-compliance in a multilateral context and remedying non-compliance in respect of global issues such as climate change, the protection of biodiversity, or the ozone layer. Under the Basel Convention, for example, the mechanism's nature is described in the following terms:

> 'The mechanism shall be non-confrontational, transparent, cost-effective and preventive in nature, simple, flexible, non-binding and oriented in the direction of helping parties to implement the provisions of the Basel Convention. It will pay particular attention to the special needs of developing countries and countries with economies in transition, and is intended to promote cooperation between all Parties.'[59]

The concept of NCPs supports the interests of all parties to MEAs. Any concerned state may report non-compliance by one of the parties, thus advancing the interests of the community. In this respect, special mention must be made in relation to the United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (the Aarhus Convention).[60] Not only does the compliance system of the Aarhus Convention provide for very wide involvement by NGOs, but also the whole ethos of this Convention is based on Article 3's general obligation 'to establish and maintain a clear, transparent and consistent framework' for 'public participation'. As to the compliance system itself, NGOs can engage with the Compliance Committee at every step of the way, from the nomination of candidates to post-decision procedures.[61]

The input and participation of NGOs in such processes can certainly be improved.[62] However, even in its current form, the Aarhus Convention and other non-compliance procedures advance the 'publicness' of multilateral dispute settlement – and the protection of community interests – through a more inclusive and arguably more legitimising procedural regime than has proven possible through non-party intervention in international adjudication.

---

59 The Mechanism for Promoting Implementation and Compliance with the Basel Convention, <www.basel.int/TheConvention/ImplementationComplianceCommittee/Mandate/tabid/2296/Default.aspx>, last access 19 February 2025 (Objectives, para. 1).

60 Aarhus Convention, signed 25 June 1998, 2161 UNTS 447.

61 Carolyn Abbot and Maria Lee, 'NGOs Shaping Public Participation Through Law: The Aarhus Convention and Legal Mobilisation', J. Envtl. L. 20 (2023), 1-22 (6).

62 Abbot and Lee (n. 61), 22.

Conclusions

This article has focused on the forms of redressing the environmental interests of the international community. It would appear that the obvious avenue to follow in the case of community interests is Article 48 of ARSIWA. However, the stumbling block is the indispensable institution of State consent to the jurisdiction of an international court. This article has analysed the possible avenues to seek redress for community interests through the relevant procedures of the ICJ and the ITLOS. Especially in relation to the ICJ, it has analysed legal questions and judicial practice in relation to the institution of intervention based on Articles 62 and 63 of the ICJ Statute. This premise raises very many conflicting views, some of them aspirational and not anchored in present judicial practice, which at any rate is not entirely consistent. The legal construct of Article 62, based on a legal interest, is not particularly well suited to redress general (environmental) interests of the international community.

In light of these difficulties, alternatives to the familiar legal bases and institutional frameworks of environmental protection were suggested in this article: intergenerational equity and non-compliance procedures. Intergenerational equity, a concept based on the partnership between generations, is supported and defended in judicial proceedings by NGOs on behalf of civil society. This blurs the divisive line between public and private spheres, giving effect to the idea of 'publicness' in dispute settlement. On a similar basis, non-compliance procedures such as under the Aarhus Convention are an expression of this idea, providing a forum for extensive input from NGOs interacting with States. By giving voice to intergenerational equity, it may be suggested that such mechanisms are more successful, well-tested, and non-controversial avenues for redressing community interests under international environmental law than instituting or intervening in proceedings based on *erga omnes (partes)* obligations.

 DOI 10.17104/0044-2348-2025-1-183