

REFRAMING HUMAN RIGHTS IN SUSTAINABLE DEVELOPMENT

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ABSTRACT

Environmental issues are increasingly complex and difficult to resolve. Human rights may provide an avenue for individuals to gain protection against damage caused by environmental degradation. At the Rio+20 United Nations Conference on Sustainable Development (Rio+20 Conference) in June 2012, a number of human rights were canvassed. *The Future We Want* is the agreement of 193 member states of the United Nations who were represented at the Rio+20 Conference. The final version of *The Future We Want* focuses on poverty eradication and discusses many other important human rights including access to food, water, health, employment and education as well as the procedural rights to participation and access to information. This paper explores ways in which human rights can be reframed in sustainable development as a possible approach to addressing environmental problems. One commentator who has adopted this approach is Linda Hajjar Leib. In her book *Human Rights and The Environment: Philosophical, Theoretical and Legal Perspectives* she proposes a reconfiguration of the human rights system in a way that is inspired by sustainable development. The question addressed in this paper is whether Leib's approach to placing human rights in the context of sustainable development provides a useful framework for addressing environmental problems in international environmental law. It is argued that the concept of the common concern of humankind (CCH) provides a preferable approach to human rights and sustainable development when addressing the complexity of environmental issues in international law.

I. INTRODUCTION

At the present time, there is no recognised right to a healthy environment at international law,¹ although this right is recognised by some countries within their domestic jurisdictions.² This human right to a healthy environment has also been adopted in regional human rights treaties.³ It was anticipated that a right to a healthy environment would be incorporated in the *Declaration of the United Nations Conference on Environment and Development (Rio Declaration)*, but that did not occur.⁴ Instead, the *Rio Declaration* indicates in principle 1 that 'Human beings are at the centre of concerns for sustainable development. They are entitled to

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1 See Fatma Zohra Ksentini, *Review of Further Developments in Fields with which the Sub-Commission has been concerned Human Rights and the Environment*, E/CN.4/Sub.2/1994/9, UN ECOSOC, 46th sess, Agenda Item 4, (6 July 1994) ('Ksentini Report') Annex 1 Draft Principles on Human Rights and the Environment, principle 2 recommends the adoption of a human right to a secure, healthy and ecologically sound environment. However, this recommendation was not adopted. See Patricia Birnie, Alan Boyle and Catherine Redgwell, *International Law and the Environment* (Oxford University Press, 3rd ed, 2009) 115.

2 For example the constitution of South Africa states that 'Every person shall have the right to an environment which is not detrimental to his or her health or well-being' and the constitution of Turkey states 'Every person has the right to live in a healthy, balanced environment.'

3 Additional Protocol to the American Convention on Human Rights art 11, The African Charter on Human and People's Rights art 24.

4 *Declaration of the United Nations Conference on Environment and Development* (14 June 1992) UN Doc A/CONF.151/26 (Volume 1), 31 ILM 874 ('Rio Declaration').

a healthy and productive life in harmony with nature.⁵ This is an anthropocentric approach in which humans are considered of central importance and nature is secondary to these concerns. This perspective is unlikely to achieve emphasis on environmental protection policies because the focus in human rights claims is on human beings, and the implication is that environmental issues are of less importance than the needs of humans. Further, the application of a human right to a healthy environment is a difficult definitional exercise: the standard could vary depending upon whether it is applied in a developing or a developed country. Often, environmental matters can be technical and involve many competing interests, questions of causation, and economic issues, which may not be adequately considered in human rights cases.⁶ So, the development of a separate right to a healthy environment continues to be a controversial topic at international law.⁷

The Report of the World Commission on Environment and Development (Brundtland Report) defines 'sustainable development' as meeting the needs of the present without adversely impacting the needs of future generations:⁸

Sustainable development seeks to meet the needs and aspirations of the present without compromising the ability to meet those of the future. Far from requiring the cessation of economic growth, it recognizes that the problems of poverty and underdevelopment cannot be solved unless we have a new era of growth in which developing countries play a large role and reap large benefits.

Sustainable development includes two key concepts:⁹

The concept of 'needs', in particular the essential needs of the world's poor, to which overriding priority should be given; and the idea of limitations imposed by the state of technology and social organization on the environment's ability to meet present and future needs.

Some controversy surrounds the definition of sustainable development,¹⁰ but this concept does not imply that economic development should continue as usual; rather, that limits should be placed upon economic activity in order to protect the environment.¹¹ In the *Case Concerning the Gabčíkovo-Nagymaros Project* the majority accepted the concept of 'sustainable development and the importance of balancing environmental concerns with development.'¹² International agreements concerning sustainable development have elaborated on action required to achieve progress on this goal.¹³ The three pillars of sustainable development are environmental protection, economic development, and social development; eventually, the aim is to achieve action at the international, national and local levels to promote these three interdependent and mutually reinforcing pillars of sustainable development.¹⁴

Reports about the rate of progress on sustainable development following the adoption of international programs for sustainable development action (since the *Rio Declaration*) indicate that there has been uneven headway on sustainable development.¹⁵ This is due in part to a failure to emphasise the environmental pillar of sustainable development in international

5 Ibid.

6 See Michael Anderson, 'Human Rights Approaches to Environmental Protection: An Overview' in Alan Boyle and Michael Anderson (eds), *Human Rights Approaches to Environmental Protection* (Clarendon Press, 1996) 1, 22.

7 Ibid. See also Birnie, Boyle and Redgwell above n 1, 302.

8 World Commission on Environment and Development, *Our Common Future* (Oxford University Press, Australian edition, 1987) 43 ('Brundtland Report'), 43.

9 Ibid.

10 Birnie, Boyle and Redgwell above n 1, 125.

11 Ibid 55.

12 *Gabčíkovo-Nagymaros Project (Hungary v Slovakia) (Judgment)* [1997] ICJ Rep 7, 75

13 *Agenda 21: Programme of Action for Sustainable Development* United Nations Conference on Environment and Development (UNCED), (1992, United Nations Publication, New York), ('*Agenda 21*'). *Programme for the Further Implementation of Agenda 21* GA Res A/RES/S-19/2, UN GAOR, 19th Special sess, Agenda Item 8 (19 September 1997) <www.un.org/documents/ga/res/spec/ares19-2.htm>. World Summit on Sustainable Development, *Plan of Implementation* <http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/WSSD_PlanImpl.pdf> ('*POI*').

14 *POI* above n 13 [2].

15 *The Future We Want* GA Res 66/288, UN GAOR, 66th sess, Agenda Item 19, (11 September 2012) [19] ('*The Future We Want*').

environmental governance¹⁶ and also a failure to adequately address key global environmental problems.¹⁷

It is more likely that effective global environmental protection will be achieved if legal policy adopts an intrinsic approach to the protection of the environment (one that recognises the value that the environment has itself).¹⁸ This intrinsic view acknowledges the interrelatedness of the natural environment which is worthy of respect in its own right,¹⁹ and acknowledges that human beings are only one part of this natural world.²⁰ Indeed, awareness of environmental problems is increasing in civil society and among governments, and this has already led to a movement away from the anthropocentric view of the environment and towards a more intrinsic approach. This change is indicated in the provisions of *The Future We Want*, which is the agreement of 193 member states of the United Nations who were represented at the Rio+20 Conference on Sustainable Development (Rio+20 Conference) in June 2012. In *The Future We Want*, these states acknowledge the role of human beings as part of nature in the following paragraphs:

We recognize that planet Earth and its ecosystems are our home and that ‘Mother Earth’ is a common expression in a number of countries and regions, and we note that some countries recognize the rights of nature in the context of the promotion of sustainable development. We are convinced that in order to achieve a just balance among the economic, social and environmental needs of present and future generations, it is necessary to promote harmony with nature.²¹

We call for holistic and integrated approaches to sustainable development that will guide humanity to live in harmony with nature and lead to efforts to restore the health and integrity of the Earth’s ecosystem.²²

We acknowledge the natural and cultural diversity of the world and recognize that all cultures and civilizations can contribute to sustainable development.²³

In addition, there is a specific recognition of the intrinsic value in biodiversity in *The Future We Want*²⁴ and an acknowledgement that the oceans and seas are essential components of the Earth’s ecosystem.²⁵ These examples demonstrate a change in perspective by states towards an acceptance of the intrinsic value of the environment. State governments also agreed, in *The Future We Want*, to develop fully functioning green economies in their national jurisdictions to promote sustainable development²⁶ and to make changes to international institutions to strengthen the international environmental governance framework.²⁷

Part II of this article examines the approach to sustainable development and human rights in *The Future We Want*. This is followed, in Part III, by a summary of the key points discussed in Linda Leib’s proposed reconfiguration of sustainable development and human rights. It is argued, and concluded in Part IV, that a more appropriate framework for human rights and

16 Ibid [87].

17 See Organisation for Economic Co-operation and Development (OECD), *OECD Environmental Outlook to 2050*, (OECD Publishing, 2012) 26.

18 See Alfred Rest, ‘New Legal Instruments for Environmental Prevention, Control and Restoration in Public International Law’ (1993) 23 *Environmental Policy and Law* 260, 271.

19 Catherine Redgwell, ‘Life, The Universe and Everything: A Critique of Anthropocentric Rights’ in Alan Boyle and Michael Anderson (eds), *Human Rights Approaches to Environmental Protection* (Clarendon Press, 1996) 71, 72.

20 Ibid 73.

21 *The Future We Want*, above n 13 [39].

22 Ibid [40].

23 Ibid [39]–[41].

24 Ibid [197]. ‘We reaffirm the intrinsic value of biological diversity, as well as the ecological, genetic, social, economic, scientific, educational, cultural, recreational and aesthetic values of biological diversity and its critical role in maintaining ecosystems that provide essential services, which are critical foundations for sustainable development and human well-being.’

25 Ibid [158]. ‘We recognize that oceans, seas and coastal areas form an integrated and essential component of the Earth’s ecosystem and are critical to sustaining it, and that international law, as reflected in the United Nations Convention on the Law of the Sea, provides the legal framework for the conservation and sustainable use of the oceans and their resources.’

26 Ibid [12].

27 Ibid [87].

sustainable development can be developed through the concept of the common concern of humankind (CCH).²⁸ This concept draws attention to the responsibility of state governments to develop environmental principles and international agreements to resolve global environmental problems.

II. THE FUTURE WE WANT: HUMAN RIGHTS

Essentially, there are three pillars of sustainable development – the social, the economic and the environmental pillars.²⁹ The advantages of situating human rights within sustainable development are that they form part of the social pillar, and these social aspects are integrated together with economic and environmental aspects to achieve sustainable development.³⁰ Humans cannot enjoy human rights (such as the right to life) unless they are provided with an adequate environment to live in.³¹ So, it is logical to include human rights within the broader context of sustainable development, because these human rights are unlikely to be achieved in the future unless state governments adopt effective legal frameworks to promote sustainable development and environmental protection.

The *Future We Want* recognises the significance of human rights including the following: poverty eradication;³² access to food;³³ water;³⁴ and health.³⁵ Fundamentally, states reaffirmed the *Universal Declaration of Human Rights*³⁶ as well as other international human rights agreements in *The Future We Want*.³⁷ One of the most important goals discussed in *The Future We Want* is the urgent eradication of poverty as an essential part of achieving sustainable development.³⁸

Two significant human rights are the right of humans to ‘safe, sufficient and nutritious food’³⁹ and the right to water.⁴⁰ The links between environmental protection and human rights are clearly revealed in the application of these two rights as humans cannot survive without healthy food and clean water. In *The Future We Want*, the signatory governments agreed that the human right to safe drinking water and sanitation should be realised for all people.⁴¹ They considered that environmental protection and sustainable management of natural water ecosystems is necessary to achieve this human right.⁴² Pollution and wastewater treatment

28 The word ‘humankind’ has been adopted as the gender-neutral term for ‘mankind’.

29 *POI*, above n 13 [2].

30 See *The Future We Want*, above n 15, [3].

31 Meinhard Doelle, ‘Climate Change and Human Rights; The Role of the International Human Rights in Motivating States to take Climate Change Seriously’ (2004) 1 (2) *Macquarie Journal of International and Comparative Environmental Law* 179, 188. ‘Such claims support the evolution of existing human rights to recognise connections such as the need for a healthy environment as a precondition for the right to life.’

32 *The Future We Want*, above n 15, [105].

33 *Ibid* [108].

34 *Ibid* [119].

35 *Ibid* [138].

36 *Universal Declaration of Human Rights*, GA Res on the Universal Declaration of Human Rights, 217A (III) UNGAOR, 177th plen mtg, UN Doc A/810 (10 December 1948).

37 *The Future We Want*, above n 15, [9].

38 *Ibid* [2]. ‘Eradicating poverty is the greatest global challenge facing the world today and an indispensable requirement for sustainable development. In this regard we are committed to freeing humanity from poverty and hunger as a matter of urgency.’

39 *Ibid* [108]. See *Universal Declaration of Human Rights*, GA Res on the Universal Declaration of Human Rights, 217A (III) UNGAOR, 177th plen mtg, UN Doc A/810 (10 December 1948), art 25, *International Covenant on Economic, Social and Cultural Rights* opened for signature 16 December 1966, 993 UNTS 3, (entered into force 3 January 1976) art 11, *Convention on the Rights of the Child* opened for signature 20 November 1989, 1577 UNTS 3, (entered into force 2 September 1990) art 24(c), *Convention on Elimination of All Forms of Discrimination against Women* adopted 18 December 1979, 1249 UNTS 13, (entered into force 3 September 1981) art 14 para 2 (h), *International Convention on Elimination of All Forms of Racial Discrimination* adopted 21 December 1965, 660 UNTS 195, (entered into force 4 January 1969) art 5(e).

40 *Convention on the Elimination of all forms of Discrimination against Women* adopted 18 December 1979, 1249 UNTS 13, (entered into force 3 September 1981) art 14 para 2(h), *Convention on the Rights of the Child* opened for signature 20 November 1989, 1577 UNTS 3, (entered into force 2 September 1990) art 24 para 2 (c).

41 *The Future We Want*, above n 15, [121].

42 See *ibid* [122].

should be addressed (with international assistance)⁴³ to maintain water quality. Water is crucial to sustainable development and can be integrated in the three pillars of sustainable development – economic, social and environmental.⁴⁴ The human right to water and safe sanitation is also necessary for poverty eradication, the empowerment of women and to maintain human health.⁴⁵

Human health is an indicator for the three pillars of sustainable development.⁴⁶ States explained their commitment to the human right to health in *The Future We Want*:

We are convinced that action on the social and environmental determinants of health, both for the poor and the vulnerable and for the entire population, is important to create inclusive, equitable, economically productive and healthy societies. We call for the full realization of the right to the enjoyment of the highest attainable standard of physical and mental health.⁴⁷

Other human rights mentioned more generally in *The Future We Want* include the human rights of women⁴⁸ and migrants,⁴⁹ rights to employment⁵⁰ and education,⁵¹ as well as procedural rights.⁵² These procedural rights are the rights of the public to information and participation in environmental decision making as well as access to justice – and they are essential to sustainable development as indicated in *The Future We Want*:

We encourage action at the regional, national, subnational and local levels to promote access to information, public participation and access to justice in environmental matters, as appropriate.⁵³

So, these procedural rights form part of sustainable development and promote environmental protection.⁵⁴ Part III outlines two approaches to human rights and the environment. The first is reliance on existing human rights to provide a remedy when the individual's environment is degraded (the 'greening' of human rights), and the second is the classification of the potential development of the human right to a healthy environment as a third-generation human right.

III. HUMAN RIGHTS AND THE ENVIRONMENT

A. Greening Existing Human Rights

Environmental rights can be associated with existing human rights in treaties such as the human rights to life,⁵⁵ health⁵⁶ and private life.⁵⁷ The right to life is set out in article 3 of the *Universal Declaration of Human Rights* as 'Everyone has the right to life, liberty and security of person.'⁵⁸ The *Hague Declaration on the Environment* notes that environmental protection is essential to the operation of the right to life.⁵⁹ Further, as the human right to life is considered to be *jus cogens*,⁶⁰ (a peremptory norm from which no derogation is permitted) an argument

43 Ibid [124].

44 Ibid [119].

45 Ibid [120].

46 Ibid [138].

47 Ibid.

48 Ibid [31].

49 Ibid [151].

50 Ibid[147].

51 Ibid [229].

52 Ibid [99].

53 Ibid.

54 See *Rio Declaration* above n 4, principle 10.

55 *Universal Declaration of Human Rights*, GA Res on the Universal Declaration of Human Rights, 217A (III) UNGAOR ,177th plen mtg, UN Doc A/810 (10 December 1948). art 3, *International Covenant on Civil and Political Rights* opened for signature 16 December 1966, 999 UNTS 171, art 6 (entered into force 23 March 1976).

56 *International Covenant on Economic, Social and Cultural Rights* opened for signature 16 December 1966, 993 UNTS 3, art 12 (entered into force 3 January 1976).

57 Birnie, Boyle and Redgwell above n 1, 282.

58 *Universal Declaration of Human Rights*, GA Res on the Universal Declaration of Human Rights, 217A (III) UNGAOR ,177th plen mtg, UN Doc A/810 (10 December 1948)., art 3.

59 The Hague Declaration (1989) 28 ILM 1308.

60 *Ksentini Report*, above n 1, 44 [172].

can be made that a healthy environment is inseparable from the right to life, and that some features of environmental protection, in circumstances where lives are threatened, may also be *jus cogens*.⁶¹ The right to life has been the subject of litigation in India,⁶² where the courts have drawn on the right to life to encourage the government to take action in areas of environmental concern.⁶³

One of the disadvantages of relying upon the right to life in international law or in national law (if the human right is adopted in the national legal system) is that the enforcement of this right will depend upon an adequate system having been established by governments to enable access to justice and the enforcement of this human right. The other problem is that reliance upon the right to life depends upon a direct threat to life, so there are only limited circumstances in which environmental threats will fall within the application of this human right. The aim is to prevent environmental damage from occurring,⁶⁴ so relying upon a potential legal action when the threat is present may be postponing action to too late a stage for prevention to be possible.

The human right to a private life is protected in the *International Covenant on Civil and Political Rights*.⁶⁵ States that fail to regulate environmental nuisances or neglect environmental protection may infringe upon this human right to a private life.⁶⁶ A large number of cases have been brought before the European Court of Human Rights (ECHR) concerning the right to privacy in the European Convention.⁶⁷ These decisions provide protection to individuals when their right to a private life has been infringed by the failure of the state to regulate environmental nuisances.⁶⁸ Criticism of these decisions include that the approach of the ECHR is too restrictive and human-centred and that it does not encourage the development of a separate environmental right.⁶⁹ Those that gain the benefit of these decisions are individuals and not the broader community— so the ‘duty is not one of protecting the environment, but of protecting humans from significantly harmful environmental impacts’.⁷⁰

Finally, the human right to health enables humans to have a reasonable quality of life. National tribunals have dealt with applications concerning this human right in relation to environmental protection and pollution.⁷¹ However, the outcome of these types of applications focuses on taking measures to protect the health of individuals rather than compelling the remediation of the environmental damage.

There are limitations if existing human rights are relied upon, because without an explicit right to a healthy environment, individuals cannot claim the right to an ecological balance or to the protection of living species.⁷²

B. *Third-Generation Human Rights*

Karel Vasak has classified the right to a healthy environment as a third-generation human right.⁷³ The first-generation rights are civil and political rights and the second generation are economic,

61 W Gormley, *Human Rights and the Environment: The Need for International Co-operation* (Leden Sijthoff, 1976) 43.

62 See *Charan Lal Saha v Union of India* AIR 1990 SC 1480, *Subhash Kumar v Bihar* AIR 1991 SC 420.

63 Michael Anderson, ‘Individual Rights to Environmental Protection in India’ in Alan Boyle and Michael Anderson (eds), *Human Rights Approaches to Environmental Protection* (Clarendon Press, 1996) 200, 217.

64 Linda Leib, *Human Rights and The Environment Philosophical, Theoretical and Legal Perspectives* (Martinus Nijhoff Publishers, 2011) 76.

65 *International Covenant on Civil and Political Rights* opened for signature 16 December 1966, 999 UNTS 171, art 17 (entered into force 23 March 1976).

66 Birnie, Boyle and Redgwell above n 1, 283.

67 1950 European Convention on Human Rights arts 11(2), 21.

68 See *Guerra v Italy* (1998) 26 Eur Court HR 357, *Fadeyeva v Russia* [2005] Eur Court HR 376, *Taskin v Turkey* [2006] 42 Eur Court HR 50.

69 Leib, above n 64, 77.

70 Birnie, Boyle and Redgwell above n 1, 285.

71 For example *Yanomani Community v Brazil*, Inter-American Commission on Human Rights, Brazil, Resolution No. 12/85, Case no. 7615 (1983)

72 Dinah Shelton, ‘The Environmental Jurisprudence of International Human Rights Tribunals’ in Romina Picoletti and Jorge Taillant, (eds) *Human Rights and The Environment* (The University of Arizona Press, 2010) 1,22.

73 Karel Vasak, ‘A Thirty Year Struggle: The Sustained Efforts to Give Force of Law to the Universal Declaration of Human Rights’ (1977) *UNESCO Courier* 29, 32.

social and cultural rights. Third-generation rights are also described as solidarity rights that could bring human rights in touch with the needs of society.⁷⁴ The advantage of describing the human right to a healthy environment as a third-generation right is that solidarity rights can be attributed as group rights or collective rights. There is some doubt about the practicality of describing the right to a healthy environment as a third-generation right. One commentator, Alan Boyle, considers that the arguments in favour of this classification of third-generation human rights are weak.⁷⁵ It has been pointed out that the right to a healthy environment could, in fact, be classified as either a first-, second-, or third-generation right.⁷⁶ So, this classification may not be useful, as a right to a healthy environment could form part of the human rights to life or to privacy – and these are first- and second-generation rights.

Human rights associated with the three pillars of sustainable development should exist within the sustainable development agenda, as indicated in *The Future We Want*, and not prevail over environmental concerns, because many human rights depend upon the presence of an adequate environment before they can be enjoyed. One commentator, Linda Leib, outlines a theory of human rights and the environment that is situated within the sustainable development agenda. This theory is considered in the following section.

C. Leib's Theory

Linda Leib proposes a theory that reconfigures the human rights system.⁷⁷ In addition to the *International Covenant on Civil and Political Rights*⁷⁸ and the *International Covenant on Economic, Social and Cultural Rights*,⁷⁹ Leib suggests there could be a third international covenant concerning environmental rights.⁸⁰ According to Leib, the rights included in this covenant would be: the right to a clean environment; the right to natural resources; the right to water; the right to food; and land rights for indigenous people.⁸¹ Leib focuses on three concepts for her proposal – the right to environment, the right to democracy and the right to development.⁸² The arguments raised by Leib are that these human rights are emerging rights, and that there is potential for these rights to be recognised in the future.⁸³ She defines the right to the environment as ‘not a right to an ideal environment with zero pollution or a right to a pristine nature, but a right to an appropriate degree of environmental protection and conservation necessary for the enjoyment of basic human rights.’⁸⁴ The major difficulty with Leib’s theory is that this definition will vary depending upon what is understood by ‘an appropriate degree’. Further, these three suggested rights could only be considered as emerging rights at international law, and Leib has not adequately addressed the key problems with the emergence of a broad right to the environment. Indeed, the right to a healthy environment has not been implemented at international law because the problems of defining this right, its anthropocentric focus and the issue of how this right could be supervised have not been resolved.⁸⁵

74 See Philip Alston, ‘A Third Generation of Solidarity Rights: Progressive Development or Obfuscation of International Human Rights Law’ (1982) 29 *Netherlands International Law Review* 307.

75 Alan Boyle, ‘The Role of International Human Rights Law in the Protection of the Environment’ in Alan Boyle and Michael Anderson (eds), *Human Rights Approaches to Environmental Protection* (Clarendon Press, 1996) 44, 59.

76 R Pathak, ‘The Human Rights System as a Conceptual Framework for International Law’ in Edith Brown Weiss (ed) *Environmental Change and International Law: New Challenges and Dimensions* (United Nations University Press 1992) 205, 217.

77 Leib, above n 64, 109.

78 *International Covenant on Civil and Political Rights* opened for signature 16 December 1966, 999 UNTS 171, (entered into force 23 March 1976).

79 *International Covenant on Economic, Social and Cultural Rights* opened for signature 16 December 1966, 993 UNTS 3, (entered into force 3 January 1976).

80 Leib, above n 64, 136.

81 Ibid.

82 Ibid 115. According to Leib, ‘...sustainable development as a theoretical and normative framework provides a valid justifications for the human rights approach to concepts of democracy, development and environment.’

83 Ibid 157.

84 Ibid 92.

85 Birnie, Boyle and Redgwell above n 1, 302.

According to Leib, the human rights to democracy, development and the new right to environment could be classified as ‘generalist’ or ‘umbrella’ rights. This generalist approach is focused on the obligations of states to respect, protect and fulfil human rights.⁸⁶ These three obligations ensure the state does not interfere with the ability of individuals to enjoy their human rights, protects these rights from violation, and also provides the conditions for individuals to enjoy their socio-economic rights.⁸⁷

Leib points out that the rights to democracy, development and environment are not generally justiciable but are universal and provide goals that may be associated with other specialist rights.

‘Generalist’ rights belong to a new category of rights, similar to ‘third-generation’ rights, which are universal and collective in nature. In this case, the main rights-holders are people living within each state, although NGOs, government authorities and local communities can represent and act on people’s behalf on the international stage regarding collective interests. The international community as a whole, represented by the UN and its agencies, are the duty-bearers responsible for the realisation of these rights. Generalist rights are designed to provide guidelines and benchmarks to state and non-state actors regarding the implementation of broad goals, such as development, environmental protection and good governance, and to connect all corollary human rights with one another.⁸⁸

So, Leib extends third-generation rights to non-state actors, as they are group rights that are held by private groups, the international community, and states.⁸⁹ She considers that public authorities have the primary responsibility for the right to environment, and that this right could also be the responsibility of transnational corporations and citizens.⁹⁰ In fact, Leib goes further and anticipates that environmental rights can be ‘inferred from the various global environmental treaties and protocols’.⁹¹ The argument is that a breach of a binding legal obligation at international law could be a violation of human rights.⁹² However, this proposition does not sit comfortably with the development of the international environmental treaties and agreements that have not been prepared for adaptation to human rights law.⁹³ According to Boyle:

While the sum of international environmental law may not necessarily be particularly effective in achieving its chosen purposes, there is no reason to think that this would in any way change if approached differently, from a human rights perspective, whatever it might do for human rights. Nor, is it evident that a specifically human rights approach would encourage the participation of states which have not so far been willing to commit themselves to major environmental treaties or policies.⁹⁴

Leib indicates that specialist rights include human rights in the *International Covenant on Civil and Political Rights*⁹⁵ and the *International Covenant on Economic, Social and Cultural Rights*⁹⁶ and states that ‘[t]hey provide rights-holders, individuals and groups with specific entitlements and are justiciable and enforceable in international, regional and national jurisdictions’.⁹⁷ Further, Leib links the generalist right to environment with rights in these two covenants and the rights in the proposed new third covenant on the environment to encompass concepts including development, environment and democracy as an integrative approach to international law and policy.⁹⁸ Leib notes that human rights are common to both areas of

86 Ibid 62.

87 Ibid 62–3.

88 Ibid 161.

89 Ibid 55–6.

90 Ibid 154.

91 Ibid.

92 Ibid 155.

93 Boyle, above n 75, 56.

94 Ibid.

95 *International Covenant on Civil and Political Rights* opened for signature 16 December 1966, 999 UNTS 171, (entered into force 23 March 1976).

96 *International Covenant on Economic, Social and Cultural Rights* opened for signature 16 December 1966, 993 UNTS 3, (entered into force 3 January 1976).

97 Leib, above n 64, 162.

98 Ibid.

environment and development and provide links with the sustainable development agenda.⁹⁹ As a consequence, sustainable development provides an integrative approach to conflicts involving development projects and environmental protection.¹⁰⁰

Leib's view relies upon the human rights actions. Arguably, this reliance is misplaced because these actions may provide limited avenues for justice for individuals and ineffective remedies as far as protection of the environment is concerned. Over time, an extensive legal regime and treaty system has developed to cover human rights concerns. However, many human rights violations continue to occur and often, victims of these abuses may not be able to obtain a remedy. The problem is that the legal system covering human rights issues has a limited capacity to enforce human rights obligations.¹⁰¹ Even in circumstances in which the human rights bodies may be able to intervene in cases where environmental destruction has led to human rights abuses, the primary causes of the abuse may not be remedied because these organisations are not capable of providing remedies to prevent global environmental destruction. Indeed, individual recourse to litigation cannot resolve global environmental challenges. For instance the threat of a class action by small island states affected by climate change against states emitting high levels of greenhouse gases may provide a deterrent, but litigation cannot prevent the environmental deterioration that will occur as a result of climate change because this issue requires international cooperation by all states to urgently take measures to reduce their greenhouse gas emissions.¹⁰² Another difficulty for the small island state is the problem of proof of causation. The small island state may have to prove that there was a causal link between the damage caused to the small island nation and the large amounts of greenhouse gases emitted by a state (or states).¹⁰³ It is very difficult to determine the effects of emissions from an individual state (or from a number of states) because the result of the impact on any small island state will be due to the combined emissions of greenhouse gases from a large number of states, as well as some natural or background levels of emissions. Leib's proposals do not deal effectively with these global environmental dilemmas.

Even in cases where damages are awarded to the victim of the human rights abuse as a result of environmental harm, this remedy may not adequately compensate for loss of environmental quality. Generally, human rights bodies will not necessarily require the polluter to undertake remedial action to repair the environment; they are more likely to provide redress to individual victims.¹⁰⁴ It is also preferable to prevent the environmental damage before it occurs rather than relying on time consuming litigation after the event leaving the environment in a damaged state or possibly with the consequence that irreversible damage has occurred. Damages may not be an adequate remedy where, for instance, there are serious abuses of human rights involving large numbers of people and concerning significant issues such as a lack of fresh water or inability to access food. Leib proposes that injunctive relief may assist as a remedy in human rights cases to prevent ongoing environmental damage,¹⁰⁵ but it would be preferable to have more innovative approaches to encourage compliance with international environmental agreements to avoid the necessity of costly litigation.

Burns Weston and David Bollier argue that the Leib's theory adopts a more coherent structure than is presently available, and they consider that this approach is useful because states need to find a common approach to managing common environmental difficulties.¹⁰⁶ These two commentators suggest that Leib's approach offers a way to ensure that states cooperate

99 See *ibid* 160.

100 *Ibid*. See *Gabčíkovo-Nagymaros Project (Hungary v Slovakia) (Judgment)* [1997] ICJ Rep 7.

101 See Douglas Donoho, 'Human Rights Enforcement in the Twenty-First Century' (2006) 35(1) *Georgia Journal of International and Comparative Law* 1, 5.

102 See Benjamin Harper, 'Climate Change Litigation: The Federal Common Law of Interstate Nuisance and Federalism Concerns' (2006) *Georgia Law Review* 661, 690.

103 William Burns, 'Potential Causes of Action for Climate Change: Damages in International Fora: The Law of the Sea Convention' (2006) 2(1) *The McGill International Journal of Sustainable Development Law and Policy* 27, 99.

104 See Shelton above n 72, 8.

105 Leib, above n 64, 159.

106 Burns Weston and David Bollier, *Ecological Survival, Human Rights, and the Law of the Commons* (Cambridge University Press, 2013) 86.

to remedy environmental problems.¹⁰⁷ However, this approach has difficulties because legal actions on human rights focus on the claims of individuals, and human rights organisations are not instituted with the goal of encouraging state governments to protect the environment.¹⁰⁸ Generally, obligations under human rights law are owed by states to individuals located within their jurisdiction. It is possible for an application to be made to the Human Rights Council based upon the violation of an existing human right (where it is associated with an environmental threat) – but the problem is that even though the Human Rights Council may pass resolutions to address the violation, these resolutions have tended not to be an effective remedy.¹⁰⁹

In addition to the abovementioned problems with Leib's approach, another difficulty is that the human rights perspective cannot avoid the problem of anthropocentricity.¹¹⁰ The determination of human rights questions will not usually involve consideration of protection for ecosystems, species and elements of natural systems. Leib has adopted a weakly anthropocentric approach¹¹¹ to sustainable development, and this approach is now out of date, as *The Future We Want* indicates that state governments are adopting an intrinsic approach to sustainable development. Leib's view is problematic because it does not take the intrinsic view into account. Leib attempts to argue that the human right approach can accommodate a respect for nature,¹¹² and suggests that species and ecosystems could be the subjects of environmental protection under her classification of the rights of nature.¹¹³ However, the difficulty is that human rights are inherently focused on human concerns. A preferable approach is to reframe human rights within sustainable development and adopt the concept of the common concern of humankind, because that concept emphasises the responsibility of states to cooperate and protect the global environment.

D. *The Common Concern of Humankind*

1. *Introduction of the Concept*

The CCH originated as an environmental concept at the time of the international negotiations on the development of an international agreement to deal with the threat of climate change. Originally it was proposed that the protection of the climate could be described as the 'common heritage of mankind'.¹¹⁴ However, the 'common concern of humankind' was adopted as the preferable concept for the protection of the Earth's climate.¹¹⁵

The concept is mentioned in two major international environmental conventions¹¹⁶ as well as in declarations and General Assembly resolutions.¹¹⁷ The repetition of the CCH concept in international agreements indicates that state governments accept the operation of this concept

107 Ibid 87.

108 Birnie, Boyle and Redgwell above n 1, 279.

109 See, for example, Human Rights Council, Resolution 6/8 on Human rights and equitable access to safe drinking water and sanitation (28 September 2007); Human Rights Council, Resolution 6/8 on Adequate housing as a component of the right to an adequate standard of living (14 December 2007); Human Rights Council, Resolution 7/14 on the right to food (27 March 2008).

110 *The Future We Want* above n 15, [39], [40].

111 Leib, above n 64, 121: 'In my opinion, sustainable development is a move away from the strong anthropocentrism of last centuries to the weak anthropocentrism promoted by sustainable development and environmental human rights discussed in this book.'

112 Leib above n 64, 158.

113 Ibid 154.

114 *The Resolution on Protection of Global Climate for Present and Future Generations of Mankind*, GA Res/43/53, UNGAOR, 2nd Comm, 43rd sess, 70th mtg, Agenda Item 48, UN Doc A/RES/43/53 (6 December 1988).

115 Ibid. *Protection of Global Climate for Present and Future Generations of Mankind* GA RES 44/207 UNGAOR, 2nd Comm, 85th mtg, 44th sess, Agenda item 85, UN Doc A/RES/44/207 (22 December 1989).

116 *United Nations Framework Convention on Climate Change*, opened for signature 9 May 1992, 1771 UNTS 107, (entered into force 21 March 1994) preamble. *United Nations Convention on Biological Diversity*, opened for signature 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993) preamble.

117 For example, the *Beijing Ministerial Declaration* adopted at the Ministerial Conference 18–19 June 1991, (1991) 21 *Environmental Policy and Law* 267 states in the preamble para 2 'We affirm that environmental protection and sustainable development is a matter of common concern to humankind, which requires effective actions by the international community and provides an opportunity for global co-operation. Against this background and out of a strong concern for the present and future generations...' See *The Resolution on Protection of Global Climate for Present and Future Generations of Mankind* adopted on 6/12/88, UN Doc A/Res/43/53 (1988) [1]–[2].

and its application in international environmental law. In the *United Nations Framework Convention on Climate Change*, the CCH applies to the conservation of the atmosphere, as climate change is a global problem that requires action by all states if the measures to reduce greenhouse gas emissions are to alleviate the environmental degradation likely to result from the adverse effects of climate change.¹¹⁸ The CCH has also been applied to international concern with the exploitation of natural resources¹¹⁹ and to the conservation of biological diversity in the *United Nations Convention on Biological Diversity*.¹²⁰ This concept can also be applied to environmental problems generally.¹²¹ Similarly, ‘sustainable development’ operates as a principle that requires international cooperation and supervision, so this principle is also an issue of ‘common concern’.¹²² As states have repeated the CCH in a number of different international agreements, this is an indication of the readiness of states to accept its application as a concept in international environmental law (as part of the development of ‘soft law’) even though the legal status of the CCH has not yet been resolved.¹²³

2. CCH and Sustainable Development

The concept of the CCH links sustainable development and intergenerational equity with the operation of the human rights. It has three dimensions: spatial, temporal and social.¹²⁴

In the spatial dimension, ‘common concern’ indicates that the cooperation of all states and all people is required to protect the environment particularly in areas such as the atmosphere that form part of the global commons.¹²⁵ The ‘protection of the atmosphere’ is included in the program of action for sustainable development in *Agenda 21*¹²⁶ and the cooperation of the international community (including state governments, United Nations bodies, intergovernmental and non-governmental organisations and institutions) to take action on sustainable development is an often-repeated topic in *Agenda 21*.¹²⁷ Some of the principles in the *Rio Declaration* also focus on the collaborative role of state governments and all people.¹²⁸ So, action for sustainable development and the operation of the concept of the CCH indicate that states should cooperate and adhere to their commitments to ensure environmental protection even if these environmental problems extend beyond the jurisdictional limits of states.

The second, social dimension emphasises the involvement of all members of society (judicial, government and private businesses, nongovernmental organisations and individuals) who should take action to prevent environmental threats.¹²⁹ This social dimension is evident in *Agenda 21*, as all members of the community are engaged in carrying out this program of action. This view is also indicated in the *Rio Declaration*.¹³⁰ The close links between

118 *United Nations Framework Convention on Climate Change*, opened for signature 9 May 1992, 1771 UNTS 107, (entered into force 21 March 1994) preamble and art 2.

119 Sixth Ministerial Meeting of the Latin American and Caribbean Summit, *Declaration of Brasilia on the Environment* 31 March 1989, A/44/683 Annex, 28 ILM 1311 (1989).

120 *United Nations Convention on Biological Diversity*, opened for signature 5 June 1992, 1760 UNTS 79 (entered into force 29 December 1993) preamble.

121 Commonwealth Heads of Government Conference, *Langkawi Declaration on the Environment* 25 October 1989. *Draft International Covenant on Environment and Development* (IUCN Environmental Law Program and International Council of Environmental Law, 4th ed, 2010) 3 (‘*Draft Covenant*’). According to Article 3 of this draft covenant ‘The global environment is a common concern of humanity.’ (Note this is only a draft document and there is no present prospect of it becoming a treaty.)

122 Birnie, Boyle and Redgwell above n 1, 129.

123 Ibid.

124 ‘Note from the UNEP Secretariat to the Meeting’ in David Attard (ed), *The Meeting of the Group of Legal Experts to Examine the Concept of the Common Concern of Mankind in Relation to Global Environmental Issues* (UNEP, 1991) 37 (‘*Note from the UNEP Secretariat*’).

125 Alfred Rest, ‘Ecological Damage in Public International Law’ (1992) 22 *Environmental Policy and Law* 31, 33.

126 *Agenda 21* above n 13, [9.1]-[9.35].

127 *Agenda 21* above n 13, [9.8(d),] [9.12(a)], [11.5,] [12.10], [13.8], [14.39], [15.7], [16.7], [17.58], [9.7], [20.15], [21.12].

128 *Rio Declaration* above n 4, principles [5], [10] and [27].

129 *Note from the UNEP Secretariat*, above n 124, 37.

130 *Rio Declaration* above n 4, principle 27: ‘States and people shall cooperate in good faith and in a spirit of partnership in the fulfilment of the principles embodied in this Declaration and in the further development of international law in the field of sustainable development.’

sustainable development and the CCH are also apparent from the role of public participation in environmental protection. Individuals, groups and organisations should have access to information about the environment, and people should be able to participate in environmental decision making and have access to justice in the event of an environmental dispute. These participatory rights were included in the *Future We Want*, and are an important part of the process for achieving sustainable development.¹³¹

The third, temporal dimension of the CCH recognises that environmental degradation has implications for present and future generations.¹³² Sustainable development also has a temporal dimension, as indicated in the definition of this concept in the Brundtland Report: the needs of future generations should be considered, so the present generation should live off the income of natural resources rather than the capital.¹³³ The *Rio Declaration* takes into account developmental and environmental needs of present and future generations.¹³⁴ Furthermore, the reference to ‘humankind’ within the CCH concept is a term that connects this concept to present and future generations, and also to the environmental concepts of intergenerational equity and intragenerational equity.¹³⁵ In the legal context, the intertemporal operation of the CCH raises issues of standing in environmental cases, and the question of whether it is appropriate to permit standing to legal representatives of future generations.¹³⁶ Accordingly, the CCH links these key concepts of environmental protection, intergenerational equity and intragenerational equity to sustainable development at international law.

The preferable approach to reframing human rights in sustainable development is to examine the common concern concept, which can be viewed as maintaining a bridge between human rights, sustainable development and environmental protection.¹³⁷ The main reason for this view is that the CCH indicates that the global responsibilities of states extend beyond national jurisdiction and consequently, states are responsible for the sustainable development of global resources.¹³⁸

3. CCH and the Intrinsic View

Another advantage of the CCH is that an intrinsic view of the environment could be adopted through this concept. The CCH can be viewed broadly so that it takes account of the interdependence of all life on Earth. The *Draft International Covenant on Environment and Development* provides that the global environment is a common concern.¹³⁹ This covenant states that the ‘interdependence of the world’s ecosystems and the severity of current environmental problems call for global solutions to most environmental problems.’¹⁴⁰

The intrinsic view recognises that all elements of the environment have value in themselves, independently of human requirements. So, as far as an ecosystem is concerned, the intrinsic view takes into account the rights of all elements of the ecosystem, and these rights could be considered to be collective rights. It is possible to view the CCH as including the granting of rights to natural systems.¹⁴¹ Judge Manfred Lachs, one of the international legal experts who reviewed the CCH concept, indicated that ‘[t]he concept in question embraces rights of the

131 *The Future We Want*, above n 4, [99].

132 *Note from the UNEP Secretariat*, above n 124, 37.

133 *Brundtland Report* above n 8, 43. See the abovementioned definition in footnote 8 of this paper.

134 *Rio Declaration* above n 4, principle 3.

135 Cancado Trindade and David Attard, ‘Report on the Proceedings of the Meeting’ in David Attard (ed), *The Meeting of the Group of Legal Experts to Examine the Concept of the Common Concern of Mankind in Relation to Global Environmental Issues* (UNEP, 1991) 22.

136 *Note from the UNEP Secretariat*, above n 124, 45. See *Re Minors Oposa versus Secretary of the Department of Environment and Natural Resources* 33 ILM 174 (1994).

137 See ‘The Implications of the ‘Common Concern of Mankind’ Concept on Global Environmental Issues’ <http://www.juridicas.unam.mx/publica/librev/rev/iidh/cont/13/doc/doc27.pdf> [22].

138 Birnie and Boyle, above n 1, 130.

139 *Draft International Covenant* above n 121, 39.

140 *Ibid* 40.

141 See Simon Bilderbeek, (ed) *Biodiversity and International Law: The Effectiveness of International Law* (Amsterdam: IOS Press, 1992) 88.

human race as a whole, not only individuals, not even isolated communities are involved, but much more: life on the planet.¹⁴²

According to Christopher Stone, if a habitat is legally protected, that habitat should be granted legal standing to enable it to protect its legal rights.¹⁴³ Legal status can be granted to environmental areas in need of protection; one example is the agreement between the New Zealand government and the Whanganui River, in which the Whanganui River has been given a legal identity to ensure that it is protected in the future.¹⁴⁴ This model could be adapted to provide other environmental areas such as mountains or lakes with standing to ensure their rights are protected. It may be possible to extend this grant of legal status even further, to ensure that the climate system is protected at the international level.

Another avenue to encourage legal protection of the environment, apart from granting legal status to important areas in need of environmental protection (such as whales or significant ecosystems), would be to establish the office of an international ombudsman who could represent the natural environment.¹⁴⁵ The appointment of an international ombudsman to protect the environmental interests of future generations was proposed in the draft version of *The Future We Want*¹⁴⁶ but not adopted in the final agreement. A report on this issue will be undertaken by the Secretary-General.¹⁴⁷ It is possible that the ombudsman could act to protect the interests of future generations by representing them in policy discussions on all issues concerning sustainable development and this official could make recommendations on the development of new international agreements. An ombudsman could help to monitor state compliance with international agreements and encourage states to abide by their international environmental commitments. It is also possible that an ombudsman could be granted standing to represent the interests of future generations in the protection of the environment in international arbitration proceedings. These innovative approaches at the international level, through the concepts of sustainable development and the CCH for protection of the environment, are likely to be more effective than reliance on greening existing human rights.

**4. CCH and Participatory Rights

The CCH links participatory rights to environmental protection in the social dimension of this concept, whereby the public has the right to be informed and take part in environmental decision-making.¹⁴⁸ This enables the development of a decision-making system in which all relevant social interests are considered, including the rights of individuals, future generations, special groups including indigenous peoples and nongovernmental organisations with environmental interests. Integration in sustainable development incorporates consideration of environmental, social, (human rights) and economic aspects of an issue as part of the decision-making process.¹⁴⁹ The concepts of CCH and sustainable development enable integration through participatory processes to enable the public to be informed about environmental problems and to take part in the decision-making processes that determine how best to deal with these issues. Standing in judicial systems enables concerned citizens and nongovernmental organisations

142 (Judge) Manfred Lachs, 'Introduction to the Proceedings of the Meeting' in David Attard (ed), *The Meeting of the Group of Legal Experts to Examine the Concept of the Common Concern of Mankind in Relation to Global Environmental Issues* (UNEP, 1991) 18.

143 See Christopher Stone, 'Should Trees Have Standing? Revisited: How Far will Law and Morals Reach? A Pluralist Perspective', (1985) 59 *California Law Review* 1, 27.

144 Kate Shuttleworth, 'Agreement Entitles Whanganui River to Legal Identity' *The New Zealand Herald* (New Zealand) 30 August 2012. 'Whanganui River iwi have sought to protect the river and have their interests acknowledged by the Crown through the legal system since 1873. They pursued this objective in one of New Zealand's longest running court cases.'

145 Christopher Stone, *The Gnat is Older than Man: Global Environment and Human Agenda* (Princeton University Press, 1993) 84.

146 United Nations, *The Future We Want – Zero Draft of the Outcome Document* (2011) <<http://www.unccd2012.org/index.php?page=view&type=12&nr=324&menu=20>> [57] 'We agree to further consider the establishment of an Ombudsperson, or High Commissioner for Future Generations, to promote sustainable development' (*Draft The Future We Want*).

147 *The Future We Want*, above n 15, [86]. 'We will also consider the need for promoting intergenerational solidarity for the achievement of sustainable development, taking into account the needs of future generations, including by inviting the Secretary-General to present a report on this issue.'

148 See *Note from the UNEP Secretariat*, above n 124, 37.

149 *Agenda 21* above n 13, [8.4].

to have access to take action to prevent environmental harm, and the threat of future legal action may act as a deterrent to those who may cause environmental damage.¹⁵⁰ Consequently, governments should provide opportunities for public participation and access to information, as well as access to justice for environmental matters at the national, regional and local levels. These requirements were recognised in *The Future We Want*.¹⁵¹

When decisions are made concerning sustainable development, human rights claims are only one part of an integration process in which economic and environmental considerations must also be taken into account.¹⁵² The significance of this integration process is that environmental considerations will form a part of economic and development policies.¹⁵³ In fact, at the international level, the broader decision-making process will also take into account other interests such as those of future generations, other states, the commons and conservation.¹⁵⁴ This is the significance of the application of the CCH to the sustainable development framework, where human rights form part of sustainable development. Decision making concerning conflicts that involve competing human rights as well as environmental and economic considerations can adopt this integrative process. But this process for resolving conflicts will not be successful if human rights are given a higher status and are apart from these other considerations. According to Birnie, Boyle and Redgwell there is a

need for integration of human claims within a broader decision-making process, capable also of taking account of competing economic and environmental interests of future generations, other states and the common interest in common spaces and wildlife preservation, in other words, for a balancing of polycentric interests through international cooperation and supervisory institutions. This is a challenging but not impossible task for the relevant international bodies to perform.¹⁵⁵

Governments, judicial and arbitration decision-making may be involved in this process, and provided the decision makers have appropriate expertise and access to information this integration is possible. Clearly, specialist arbitrators and judges who are familiar with the science and environmental issues should be appointed to resolve international environmental disputes in the future.

Another possibility is that states may establish a new more powerful institution with authority to review the action of states on sustainable development agreements.¹⁵⁶ In the draft version of *The Future We Want* the establishment of a Sustainable Development Council that would report directly to the United Nations General Assembly was proposed, but this suggestion was not adopted in the final version.¹⁵⁷ If this proposal is eventually adopted, the Sustainable Development Council could act in a similar role to that of the Human Rights Council. It could receive information from NGOs and environmental organisations or citizens who indicate the failure of a state to adhere to sustainable development action.¹⁵⁸ A Sustainable Development Council could also be given authority to make decisions based upon the integrative process discussed above.

150 *Rio Declaration* above n 4, principle 10.

151 *The Future We Want*, above n 15, [99].

152 See *Agenda 21* above n 13, [8.2].

153 Donald Anton and Dinah Shelton, *Environmental Protection and Human Rights* (Cambridge University Press, 2011) 536.

154 Birnie, Boyle and Redgwell above n 1, 281.

155 *Ibid.*

156 Laura Horn, 'Rio+20 United Nations Conference on Sustainable Development: Is This the Future We Want?' (2013) 9 (1) *Macquarie Journal of International and Comparative Environmental Law* 1, 15.

157 *Draft The Future We Want*, above n 146 [49alt].

158 Second Meeting of the Consultative Group of Ministers or High-level Representatives on International Environmental Governance, *Set of Options for Improving International Environmental Governance* (28–9 October 2009) United Nations Environment Program 9 <<http://unep.org/environmental-governance/Portals/8/documents/IEG-Draft-Report-Rome-final-edited.pdf>>.

IV. CONCLUSION

Human rights are anthropocentric and fail to take into account the interests of the environment from an intrinsic perspective. The problem with focusing solely on human rights actions to solve environmental problems is that this approach promotes human rights of the individual as a priority and cannot ensure adequate protection of the environment. It is preferable to adopt the view that human rights form just one part of the considerations to be taken into account in decision making, along with environmental and economic factors in order to achieve sustainable development.

The key advantages of the adoption of the CCH approach to sustainable development are that human rights form part of the decision-making approach in sustainable development and the intrinsic view can be accommodated in accordance with the approach in the *Future We Want*. The CCH is an existing concept of international environmental law and can be further developed through the adoption of this concept in new international environmental agreements in the future. The application of the CCH and sustainable development may lead to speedier results for environmental protection by encouraging states to strengthen international environmental agreements. The disadvantages of Leib's proposal are that it hinges on the agreement of state governments to adopt a third covenant on right to the environment, and it is unlikely that states would agree to a new covenant on the environment given their reluctance to adopt a human right to a healthy environment at international law. This proposal is also dependent upon human rights actions where the outcome is uncertain, and even if successful, may not provide for remediation of environmental damage. It would be preferable to encourage states to progress international environmental legal concepts such as sustainable development and the CCH through the development of custom at international law so that common legal principles may apply in all states.

The CCH is a broader concept than sustainable development, and it focuses on state responsibility for global environmental protection. The emphasis in the spatial dimension of the CCH is on state cooperation continuing to develop multilateral environmental treaties and improvements to negotiation processes to resolve environmental issues at the international level. From the perspective of the social dimension, the CCH encourages all members of society to be engaged in sustainable development action and to have participatory rights. In the temporal dimension of the CCH, a possibility is that an ombudsman may be appointed at the international level to represent the interests of future generations in the protection of the environment and in the development of future environmental legal policies.

The CCH can also be viewed as incorporating an intrinsic approach that is focused on the protection of the global environment. If this view is adopted, it would be possible to extend this concept so that legal rights could be attributed to significant natural ecosystems or even to the climate system at international law. Some of the greatest problems for environmental protection are climate change, loss of biodiversity and unsustainable use of natural resources. Human rights law cannot assist in resolving the causes of these issues,¹⁵⁹ although human rights claims may draw international attention to the plights of victims affected by environmental damage and provide remedies to these victims. It is preferable to adopt an existing concept in international environmental law, the CCH, because this concept provides a more effective avenue for developing innovative legal models that may assist to protect the global environment.

159 Birnie, Boyle and Redgwell, above n 1, 302.