CLIMATE CHANGE AND THE FUTURE ROLE OF THE CONCEPT OF THE COMMON CONCERN OF HUMANKIND

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Climate change poses a serious threat to the Earth’s environment particularly if tipping points are breached and irreversible changes occur. Cooperative action by all states is required to achieve effective mitigation of greenhouse gases (GHGs) and ensure that the adverse impacts of climate change are adequately addressed. Collective action is seen through the operation of the concept of the common concern of humankind (CCH) as all states have responsibilities to take action to prevent the adverse effects of climate change on behalf of the international community. It is argued in this article that the CCH concept operates as a guiding norm concerning the protection of the atmosphere.

The first section of this article discusses the findings about the CCH concept at the Legal Experts Meeting. The next section examines the views of legal commentators who consider that the CCH invokes legal implications for states and discusses the potential for further implications as a result of the links between the CCH concept with intragenerational and intergenerational equity. It will also be argued in this article that there is potential for extension to the legal implications from the concept of CCH in the United Nations Framework Convention on Climate Change (UNFCCC) to cover state responsibility for climate change displaced people and the interests of future generations.

I INTRODUCTION

Climate change poses a serious threat to the Earth’s environment particularly if tipping points are breached and irreversible changes occur. The Intergovernmental Panel on Climate Change (IPCC) Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change (WG II Contribution to the Fifth Assessment Report of the IPCC) when assessing the risks of climate change stated that there are great risks if the temperature increases globally by four degrees Celsius or more (above preindustrial levels) including severe impacts on ecosystems, significant species extinction and lack of food security.1

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1 Intergovernmental Panel on Climate Change (IPCC), ‘Summary for Policymakers’ in Climate Change 2014: Impacts, Adaptation, and Vulnerability. Part A: Global and Sectoral Aspects Contribution of Working Group II to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change
If the rate and extent of climate change is limited, the risks of adverse impacts of climate change can be decreased and potential dangerous tipping points may be avoided. Cooperative action by all states is required to ensure effective mitigation of greenhouse gases (GHGs) is achieved and the adverse impacts of climate change are adequately addressed. Collective action is demonstrated through the operation of the concept of the common concern of humankind (CCH) as all states have responsibilities to take action to prevent the adverse effects of climate change on behalf of the international community. This discussion about the duties of states to cooperate when taking action on climate change is timely, as states are in the process of negotiating a new international agreement on climate change in 2015 (and in force by 2020). There is evidence that state negotiations for the 2015 draft agreement are continuing to be influenced by the CCH concept. These negotiations have focussed on wording that climate change is a common challenge which requires collective action. It is likely the word ‘collective’ will be included in the final text. The term ‘collective action’ is also mentioned in the provisions on transparency and global stocktaking in the 2015 draft agreement. These provisions are likely to impact state governments and their reporting requirements on actions taken to meet their proposed commitments under the agreement consequently, increasing state reliance on international cooperation to deal with the threat of climate change. It is argued in this article that the CCH concept shapes the development of the 2015 draft agreement and operates as a guiding norm concerning the protection of the atmosphere.

The commencing statement of the preamble to *United Nations Framework Convention on Climate Change (UNFCCC)* focuses on the CCH, ‘acknowledging that change in the Earth’s climate and its adverse effects are a common concern of humankind...’. This article explores the legal implications flowing from the operation of the CCH in the *UNFCCC*. The implications of the concept of ‘common concern’ and its application to international environmental law were first debated at ‘The Meeting of the Group of Legal Experts to Examine the Concept of the Common Concern of [Hu]mankind in relation to Global Environmental Issues’ (Legal Experts Meeting) at the University of Malta in December 1990. This debate occurred two years prior to the United Nations Conference on
Environment and Development (UNCED) which introduced the *Declaration of the United Nations Conference on Environment and Development (Rio Declaration)* and *Agenda 21: Programme of Action for Sustainable Development (Agenda 21).* Two significant environmental conventions were adopted at the UNCED conference with the goals of facilitating protection of the atmosphere and conserving biological diversity. These conventions are the UNFCCC and the *United Nations Convention on Biological Diversity (CBD).* The concept of common concern of humankind (CCH) is included specifically in the preamble of both of these conventions to emphasise the global responsibility of states to assist in the sustainable development of climate change and biological diversity. It is possible that the CCH can be extended as a guiding norm to the protection of the global environment, or to specific areas including the protection of Antarctica, the prevention of desertification and space pollution.

The Legal Experts Meeting noted in its conclusions that the common concern of humankind was not a rule of law but could become customary law and develop as a principle of law in the future. Clearly, there has been further progress on the application of this concept over time because many states are parties to the UNFCCC and the *Kyoto Protocol to the Framework Convention on Climate Change* (Kyoto Protocol) leading to increased state actions to reduce greenhouse gas emissions.

The Note from UNEP Secretariat to the Legal Experts Meeting predicted that further development of the CCH is required in order for this concept to lead to legal implications:

Joint efforts of governments, scientific community, scholars and public opinion are of crucial importance for the concept of ‘common concern of [hu]mankind’ does not rest as just a vague political formula, which could be used to legitimize lack of concrete actions by simply declaring an environmental concern. Only based on such efforts the concept may acquire necessary legal validity, thus transforming in a source of wide range of action-orientated

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binding obligations. The development of the concept of ‘common concern of [hu]mankind’ would be not only of theoretical significance, but in the first place of practical viability of international lawmaking processes currently on the agenda.17

Given the prediction of the UNEP Secretariat that the CCH should lead to a ‘wide range of action orientated binding obligations’, it is likely that some of these legal implications have now been accepted by states due to the widespread ratification (resulting in almost universal acceptance) of the UNFCCC.

The first section of this article discusses the findings about the CCH concept at the Legal Experts Meeting. The next section examines the views of legal commentators who consider that the CCH invokes legal implications for states. This concept implies a duty by states to cooperate on climate change action and arguably, this duty to cooperate could extend to the fulfilment by states of commitments made in international agreements on climate change and to a responsibility to ratify subsequent agreements to the UNFCCC.

The following sections examine the potential for further implications as a result of the links between the CCH concept with intragenerational and intergenerational equity. Concepts at international law may be viewed as ‘guiding norms that are implemented by principles’,18 this relationship is clear from the interaction of the CCH concept with other principles of international environmental law. It will also be argued in this article that there is potential for extension to the legal implications from the concept of CCH to cover state responsibility for climate change displaced people and the interests of future generations.

The conclusions of this Legal Experts Meeting about the CCH concept are summarised in the next section to set out the views that the legal experts held when they investigated this concept and the following sections discuss how the CCH has developed after this meeting.

II LEGAL EXPERTS MEETING ON CCH

The three dimensions of the CCH concept are pointed out in the Note from the UNEP Secretariat to the Legal Experts Meeting.19 First, the spatial dimension of the CCH involves the cooperation of all states when responding to the environmental threat because the subject of the concern is of significance to the international community.20 Second, the temporal dimension results from the long-term effects of major environmental problems, like climate change that affect the rights and obligations of present and future generations.21 Thirdly, the social dimension of the CCH requires the engagement of all sectors of society including judicial and governmental organisations, business, nongovernmental organisations (NGOs), civil society and individuals.22 Indeed, the CCH may also be viewed as a broad and holistic concept that can apply to all global environmental threats.23

17 ‘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 University of Malta, Malta 13-15 December 1990 (UNEP, 1991) 36, 47 (‘Note from the UNEP Secretariat to the Meeting’).
19 Note from the UNEP Secretariat to the Meeting, above n 17, 37.
20 Ibid.
21 Ibid.
22 Ibid.
23 Ibid 43.
The commentators at the Legal Experts Meeting considered the potential for a broad application of the CCH to the environment. They noted the connection between the CCH and the precautionary principle and links in the temporal dimension of the CCH to present and future generations through intragenerational and intergenerational equity. Views were also expressed at the Legal Experts Meeting about the relationship between the concepts of the CCH and the traditional doctrine of sovereignty of states and the implications for human rights at international law. These issues are considered in the following paragraphs.

The commentators at the Legal Experts Meeting considered that the CCH could apply to environmental problems generally as well as to other areas of international law. The implication of ‘concern’ when applied to environmental protection is that a state has responsibilities to the whole of the international community that are *erga omnes* because all states have legal standing to protect the environment.25

States have obligations to the international community concerning global environmental issues, such as climate change, because these issues are not confined to the domestic jurisdiction of states.26 The International Court of Justice (ICJ) decision in the *Barcelona Traction Case (Second Phase)* considered that in certain circumstances states owe obligations to the international community as a whole, and where these commitments are important, states have *erga omnes* obligations or a legal interest in protecting these rights.27 In the *Case Concerning the Gabčíkovo-Nagymaros Project*, Judge Weeramantry considered that international environmental law should take into account ‘the global concern of humanity as a whole.’28 Even though there is potential for the *erga omnes* doctrine to permit states to have standing on behalf of the international community in cases of serious environmental degradation, there is some uncertainty about how this doctrine would apply.29

The Note from the UNEP Secretariat at the Legal Experts Meeting indicated that as the adverse effects on the environment often become evident only after a long period of time, states should adopt the precautionary approach to environmental threats.30 The precautionary approach is preferable when dealing with serious environmental threats, because preventative action can be taken action before serious damage occurs. The application of the CCH concept shows that global responsibilities are to be carried out by states with a view to the precautionary approach when addressing the threat of climate change.

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24 Ibid 30.
25 *Barcelona Traction Case, Light and Power Co Ltd (Belgium-Spain) (Second Phase)* ICJ Rep (1970) 3, [33]; Birnie, Boyle and Redgwell, above n 12, 131.
27 *Barcelona Traction Case, Light and Power Co Ltd (Belgium-Spain) (Second Phase)* ICJ Rep (1970) 3, [32].
30 *Note from the UNEP Secretariat to the Meeting*, above n 17, 46.
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change.\textsuperscript{31} This is also evident from the adoption of the precautionary principle in the\textit{UNFCCC}.\textsuperscript{32}

The Legal Experts Meeting considered the CCH could apply to succeeding generations and to the concept of intergenerational rights, even though it is difficult to perceive of generations as subjects at international law.\textsuperscript{33} The CCH is a different concept from the common heritage of humankind, which applied to the exploitation of resources in the seabed beyond jurisdiction,\textsuperscript{34} to resources on the moon,\textsuperscript{35} but not to climate change.\textsuperscript{36} The CCH concept indicates that all states have an interest in ecological protection rather than an internationalisation of ownership of resources.\textsuperscript{37} Indeed, the CCH focuses on the responsibilities of states to protect the environment rather than on the division of property.

The legal commentators at the Legal Experts Meeting considered the equitable sharing of burdens is an essential part of the CCH because the burden is on developed countries to take responsibility for their share of contributions to the emissions of GHGs to the atmosphere during the past and in the present.\textsuperscript{38} So, the application of the CCH in the\textit{UNFCCC} involves the consideration of intragenerational equity and the equitable balancing of responsibilities between developed and developing countries.\textsuperscript{39}

The CCH provides a balance between the concept of sovereignty of states and the necessity for global legal protection of the atmosphere and biological diversity. Limitations to the reliance upon state sovereignty in areas subject to environmental protection were also noted in the\textit{Declaration of the United Nations Conference on the Human Environment}.\textsuperscript{40} The focus of the CCH concept is on the erosion of the traditional doctrine of sovereignty because state responsibility for environmental protection of the atmosphere is global and not confined to the area of jurisdiction of the individual state.\textsuperscript{41} The international agreements concerning legal protection of the atmosphere require states to take national measures as well as international measures in cooperation with other countries.\textsuperscript{42} This erosion of sovereignty continues to occur as a result of the negotiations for the 2015 draft agreement as more onerous obligations for mitigation of GHGs and reporting by states are likely to be introduced.\textsuperscript{43}

Finally, the Legal Experts Meeting considered that ‘A bridge between human rights protection and environmental protection should be established by the fundamental right to

\textsuperscript{31} Birnie, Boyle and Redgwell, above n 12, 130.
\textsuperscript{32} \textit{UNFCCC} art 3(3).
\textsuperscript{33} Conclusions of the Meeting, above n 15, 29.
\textsuperscript{36} Conclusions of the Meeting, above n 15, 30.
\textsuperscript{37} Birnie, Boyle and Redgwell, above n 12, 198.
\textsuperscript{38} Ibid 130-131, Conclusions of the Meeting, above n 15, 30-31.
\textsuperscript{39} Birnie, Boyle and Redgwell, above n 12, 133.
\textsuperscript{40} \textit{Declaration of the United Nations Conference on the Human Environment (Stockholm)} UN Doc A/CONF/48/14/REV.1 principle 21.
\textsuperscript{41} Birnie, Boyle and Redgwell, above n 12, 131.
\textsuperscript{42} Dupuy and Vinuales, above n 18, 86.
\textsuperscript{43} 2015 Draft Agreement, above n 5, arts 3,9.
life and health in their wide dimension'. The link between the two areas of international law, human rights and environmental protection is clear because human rights are likely to be violated if the environment is degraded. Arguably, the relationship between CCH and human rights can be applied to state protection of the human rights of people that are impacted as a result of the adverse effects of climate change.

The strength of the links between the CCH and the precautionary principle as well as the concept of common but differentiated responsibilities provide arguments in favour of a duty by states to take action to cooperate on climate change in a timely manner. The views of three academic commentators who consider that the CCH has legal implications are considered in the next section, which is followed by a discussion of the duty to cooperate in the UNFCCC.

III CCH AND LEGAL IMPLICATIONS

The application of CCH to the adverse impacts of climate change results in legal implications similar to those conclusions set out in the abovementioned Legal Experts Meeting. In this section, the views of Michael Bowman, Jutta Brunnée and Frank Biermann are discussed to determine what legal consequences flow from the CCH.

In summary, the ‘reasonably specific legal consequences’ of the common concern of humankind explained by Bowman are as follows:

1) States must take into account the interests of the community in the subject matter of the concern.
2) The subject matter of the concern is a matter not just for domestic concern but for the international agenda.
3) States should establish an appropriate international forum and a body of rules and principles to provide a normative framework.
4) These obligations are *erga omnes* so all states can demand compliance with these rules and principles.
5) The ‘common concern’ implies states will have responsibilities and there will be entitlements on the part of the international community.
6) As the international community arguably now encompasses states as well as intergovernmental organisations and civil society, the views of all of the members of the international community should be taken into account when international arrangements about the subject matter of the concern are debated.

Bowman adds the last point to reflect the changing nature of the international community as there has been more involvement in by intergovernmental organisations and civil society

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44 *Conclusions of the Meeting*, above n 15, 32.
48 Bowman, above n 46, 503.
49 Ibid.
post 1990 (when the Legal Experts Meeting took place). Certainly, Bowman’s conclusions support the predictions of the commentators at the Legal Experts Meeting and emphasise the duty of states to develop a legal framework for the subject matter of the concern.

Jutta Brunnée also identifies similar features to the Legal Experts Meeting which she considers are common to CCH regimes. The concept of common concern of humankind can be viewed as ‘requiring, all states to cooperate internationally to address the concern.’ In order to determine whether a customary framework exists, Brunnée distinguishes the following common features from a number of different CCH regimes:

1) There are limits to state action because the CCH focusses on certain resources that are deteriorating beyond the limits of jurisdiction and within jurisdiction that are of common concern.
2) This concept has the potential to apply erga omnes obligations to areas in need of global environmental protection.
3) The CCH can be viewed as requiring states to cooperate to protect the area of common concern.
4) The CCH is linked to intragenerational equity through the principle of burden sharing. So the CCH has links to the concept of common but differentiated responsibilities.

Frank Biermann also discusses the application of the CCH and advocates that this concept could form part of customary law. Biermann considers the CCH could redefine the sources of international law when it applies to climate change because the threat to the Earth’s atmosphere is very serious. Potentially, the development of existing customary law (through the application of the CCH concept) could lead to the emergence of a rule where states are required to mitigate GHGs.

There is a rule of customary international law that states should not cause transboundary pollution to other states, where the standard is one of due diligence. An international standard on emission measurement, if established in a treaty or by an international institution, could give effect to the due diligence requirement. If a state or a group of states delay their participation in international agreements on climate change, or fail to comply with their commitments to reduce emissions, these states (free riders) may have the advantage of the benefits of high carbon activities and could rely on others to incur greater costs of emission reductions. Biermann argues that international standards of emission

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50 Brunnée, above n 47, 566.
51 Ibid.
52 Ibid.
53 Ibid.
54 Ibid.
55 Ibid.
56 Frank Biermann, Saving the Atmosphere: International Law, Developing Countries and Air Pollution (Peter Lang, 1995).
57 Ibid 86-87.
58 Trail Smelter Arbitration 33 AJIL (1939) 182; Rio Declaration, above n 10, principle 2; Birnie, Boyle and Redgwell, above n 12, 143.
59 Birnie, Boyle and Redgwell, above n 12, 147-148.
60 Ibid 149.
limitation should apply to states even if they are not parties to the international agreement. Indeed, the operation of the CCH could lead to free rider states becoming obliged to comply with international standards.\(^{62}\)

May countries thus lawfully oppose any standards of diligent conduct to which all other nations adhere - if 'common concerns of humankind' are at stake?\(^ {63}\)

It is submitted that one of the implications of the notion of 'common concern' is a revised notion of the theory of the sources of international law; in the era of global climate change, this may prove to be necessary in the effort to adjust the international legal order from the independent nation States of the nineteenth century to the necessities of the progressively interdependent 'world society' of the twenty-first century'...

Those new rules will certainly infringe on the sovereignty of the persistently objecting States, which will be forced to comply with standards of diligent conduct regarding the environment to which they have not agreed...

The traditional doctrines are thus to be redefined, in order to allow a rule to enter into the corpus of general or customary law even if some States persistently object.\(^ {65}\)

So, Biermann extends the arguments to rules of customary international law in cases of serious environmental damage such as to the threat to the atmosphere from climate change and as a consequence of customary law and the application of the CCH, the obligations to mitigate GHGs extends to all states.

State conduct in conformance with the rule and *opinio juris* (the understanding that the acceptance of the rule is due to an acceptance of legal obligation by states) are both necessary to constitute a rule of customary law. A key difficulty with the determination of whether an environmental rule has formed part of international custom is the long time period of state practice required for *opinio juris*.\(^ {64}\) This is because international environmental law is a relatively recent phenomenon so it is difficult to establish consistent state practice over a period of time. Biermann argues that the long period of time should not apply to the development of customary rules that relate to severe environmental threats, as there would not be adequate time to prevent serious environmental damage from occurring.\(^ {65}\) Arguably, the development of customary law could lead to a rule, requiring adherence by states to international agreements on GHG reduction. Indeed, it is likely that these changes are already occurring through the development of the law-making role of the Conference of the Parties (COP) to the *UNFCCC*.\(^ {66}\)

Brunnée has similar views to Bowman and considers that legal implications follow as a result of the application of the CCH concept. The view of Brunnée that the CCH could require states to address the subject matter of the concern is appropriate in the circumstances of climate change.\(^ {67}\) The provisions in the *UNFCCC* indicate that it is the responsibility of states to cooperate at the international level to address the adverse effects of climate change and this duty is discussed in the next section.

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\(^{62}\) Biermann, above n 56, 87.

\(^{63}\) Ibid 86-87.

\(^{64}\) The Statute of the International Court of Justice art 38.

\(^{65}\) Biermann, above n 56, 85.


\(^{67}\) Brunnée, above n 47, 566.
At international law states have a general duty to cooperate.68 There are additional duties in international environmental law for state cooperation to protect the Earth’s environment,69 to develop the international law of sustainable development,70 and these duties are specified in the Rio Declaration.71

The link between the CCH and the duty to cooperate is apparent in provisions of the CBD where ‘the conservation of biological diversity is a common concern of humankind’.72 Parties to the CBD are under a duty to cooperate to conserve biological diversity in areas beyond the limits of their jurisdiction and on issues of mutual concern.73 The emphasis on cooperation is also evident in a number of articles in the CBD.74 Similarly, parties to the UNFCCC acknowledge that the most extensive cooperation of all countries is necessary to deal with the threat of climate change and carry out a suitable international response to this threat.75 So, in the context of climate change, parties to the UNFCCC have a duty to cooperate, and guidance about what constitutes the action necessary for fulfilling this duty is set out in the provisions of this convention.

There are also a number of general duties for example, parties to the UNFCCC are under a duty to cooperate to support an open economic system that provides sustainable growth for all parties, enabling them to address the problem of climate change.76 Parties are to support research and observation particularly in developing countries and should cooperate to improve the capacity of developing countries to participate in data collection.77

The list of commitments in the UNFCCC is prefaced in the introduction to article 4, by general wording ‘taking into account their common but differentiated responsibilities and their specific national and regional development priorities, objectives and circumstances.’78 The parties agree that they shall publish national inventories of GHG emissions and measures to mitigate and adapt to climate change and provide this information to the COP.79 Parties shall promote and cooperate concerning the following commitments:

- the transfer of technologies that reduce GHG emissions
- the conservation of sinks of GHGs
- in preparation for adaptation to the effects of climate change
- in research related to climate and the development of data related to the climate system
- in exchange of relevant information on the climate system and climate change
- in education and training about climate change.80

68 Charter of the United Nations, 26 June 1945, Can TS 1945 No 7 art 1(3).
69 Rio Declaration, above n 10, principle 7.
70 Ibid principle 27.
71 Ibid principles 5, 13, 24.
72 CBD preamble.
73 Ibid art 5.
74 Ibid arts 8(m), 12(c), 13(b), 16 (5), 28(1).
75 UNFCCC preamble [6].
76 Ibid art 3(5).
77 Ibid art 5.
78 Ibid art 4.
Even though the terms in the *UNFCCC* are very broad, the word ‘shall’ in the introduction to article 4 indicates that the commitments made by the parties are obligatory. So, it is clear that the parties have a duty to cooperate on these matters and in fact, the common concern of humankind requires cooperation on the part of the parties to take action to address the adverse impacts of climate change. The commitments in article 4 of the *UNFCCC* are also closely linked to the concept of common but differentiated responsibilities. So, developed country parties to the *UNFCCC* are required to make additional commitments including to adopt policies on mitigation of GHGs.\(^{81}\) Indeed, the parties have extensive requirements to fulfil their duty of cooperation under the provisions of the *UNFCCC* and these are supplemented in the provisions of the *Kyoto Protocol*.

According to *Kyoto Protocol*, parties in Annex I to the *UNFCCC* have responsibilities to cooperate to achieve the objectives of GHG emission reductions set out in article 2, to exchange and share information on the policies and methods of reducing GHG emissions,\(^{82}\) There are provisions on the transfer of technology relevant to climate change where parties are to cooperate on finance for the transfer of environmentally sound technology to developing countries.\(^{83}\) Parties are to collaborate in scientific research, and observations.\(^{84}\) Further, parties are to cooperate in the development of education and training programs, national capacity building and access to information on climate change.\(^{85}\) Even though these provisions are broadly worded,\(^{86}\) the expectation in the wording of these multilateral agreements is that parties will act to further the objectives of these international agreements for the benefit of the international community.

If there is law-making intention with the support of a large majority of states or where there is consistent and widespread state practice over a period of time, these events may lead to the emergence of customary law.\(^{87}\) So the duty to cooperate as set out in the general commitments in the *UNFCCC* and *Kyoto Protocol* is arguably customary law, however these duties are not very clearly expressed and it would be difficult to ascertain whether a specific breach of this general duty to cooperate in this convention and protocol has occurred because the wording of these provisions tends to be discretionary and this is likely to be the case as a result of the negotiations for the next international agreement on climate change.

The duty to cooperate is also likely to be a key aspect of the negotiations for the 2015 draft agreement which echoes concepts from the preceding agreements. Although the wording is not finalised it is possible that the parties will agree to take urgent action and cooperate to achieve the objective of the *UNFCCC* to reduce the increase in global average temperature.\(^{88}\) There are other areas where cooperative action is likely to form part of this agreement including approaches to mitigation and adaptation, finance, technology, research

\(^{81}\) Ibid art 4(2)(a).
\(^{82}\) *Kyoto Protocol* art 2(1)(b).
\(^{83}\) Ibid art 10(c).
\(^{84}\) Ibid art 10(d).
\(^{85}\) Ibid art 10(e).
\(^{86}\) Sumudu Atapattu, ‘Climate Change, Differentiated Responsibilities and State Responsibility: Devising Novel Legal Strategies for Damage Caused by Climate Change’ in Benjamin Richardson et al (eds), *Climate Law and Developing Countries* (Edward Elgar Publishing Inc, 2009) 37, 41.
\(^{87}\) Birnie, Boyle and Redgwell, above n 12, 25.
\(^{88}\) 2015 *Draft Agreement*, above n 5, art 2.
and development, support for capacity of developing countries and transparency.\textsuperscript{89} These approaches to international cooperation are similar to those in the earlier agreements, the \textit{UNFCCC} and the \textit{Kyoto Protocol}.

Customary rules apply to the global atmosphere however, it is difficult to determine the extent to which these rules can force states to make climate change action a priority, or require that states comply with international standards on mitigation.\textsuperscript{90} It is arguable that the application of the CCH together with the precautionary principle change this position in circumstances where states are required to stop increasing emissions until it can be determined that no serious harm will occur.\textsuperscript{91} So, arguably, there could be a duty on the part of states to cease increasing emissions.

The general duty to cooperate in the \textit{UNFCCC}, the operation of the precautionary principle and the legal implication flowing from the CCH that states have the responsibility to develop a legal framework to deal with the threat of climate change, imply that states also have a duty to ratify subsequent international agreements to the \textit{UNFCCC}. Due to the severity of the consequences of climate change, it is preferable that states should negotiate and ratify more detailed international agreements on the reduction of GHG emissions, together with an effective compliance system.

The issue of intragenerational equity is also linked to the CCH concept and to the question of how to involve developing states in climate change action. The advantage for developing states, when they contribute to action to implement the \textit{UNFCCC}, is they may be eligible for assistance from the international community to take action against the impacts of climate change.\textsuperscript{92} The issue of the role of equity in the concept of common but differentiated responsibilities and links to the CCH concept are explored in the next section.

V \hspace{1em} INTRAGENERATIONAL EQUITY AND COMMON BUT DIFFERENTIATED RESPONSIBILITIES

‘Intragenerational equity’ in the context of international law, takes into account equity (the notion of justice and fairness) both within states and between states.\textsuperscript{93} These concerns about equity are in set out in the principles of the \textit{UNFCCC} as parties should protect the climate for present and future generations.\textsuperscript{94} Factors to be taken into account in order to achieve intergenerational and intragenerational equity, include ‘common but differentiated responsibilities’ and that ‘developed countries should take the lead’.\textsuperscript{95}

The concept of common but differentiated responsibilities is included in a number of international environmental agreements including the \textit{Rio Declaration}.\textsuperscript{96} Given the extensive ratification of the \textit{UNFCCC} and the \textit{Kyoto Protocol to the United Nations Framework Convention on Climate Change (Kyoto Protocol)},\textsuperscript{97} it is arguable that there is a general acceptance by states of ‘common but differentiated responsibilities’ as applied to

\begin{itemize}
\item \textsuperscript{89} Ibid arts 3, 4, 6, 7, 8, 9.
\item \textsuperscript{90} Birnie, Boyle and Redgwell, above n 12, 340.
\item \textsuperscript{91} Ibid.
\item \textsuperscript{92} Bowman, above n 46, 504.
\item \textsuperscript{93} Diana Shelton ‘Equity’ in Daniel Bodansky, Jutta Brunnée and Ellen Hey (eds), \textit{The Oxford Handbook of International Environmental Law} (Oxford University Press, 2007) 639, 640.
\item \textsuperscript{94} \textit{UNFCCC} art 3(1).
\item \textsuperscript{95} Ibid.
\item \textsuperscript{96} \textit{Rio Declaration}, above n 10, principle 7.
\item \textsuperscript{97} \textit{UNFCCC, Status of Ratification of the Kyoto Protocol} above n 16.
\end{itemize}
global environmental protection of the atmosphere. However, the legal status of the concept, ‘common but differentiated responsibilities’ is uncertain. One commentator, Philippe Cullet argues that this concept is part of international environmental law and should be included in trade and economic international agreements. Jutta Brunnée considers that even though the concept of common but differentiated responsibilities is referred to in many treaties, it is hard to determine whether this concept is part of customary international law because there is much controversy about the interpretation of this concept. Birnie, Boyle and Redgwell view this concept as a general principle rather than a rule of customary law.

Even though the legal status remains unclear, as the concept of common but differentiated responsibilities has been included in the provisions of the UNFCCC, this concept will be influential in the negotiations for the 2015 international agreement on climate change. If developed countries consider that developing states should actively participate in achieving GHG mitigation, developed countries should take the lead. Two key elements of the sharing of burdens are, first, the duty of states to protect the environment for the benefit of present and future generations and, secondly, the differentiated responsibilities of states. Principle three of the UNFCCC draws attention to the necessity to take into account the particular circumstances of developing countries especially those that are most vulnerable and bear a heavy burden under this convention. The next section explores the interrelationship between the concepts of CCH and common but differentiated responsibilities.

VI COMMON BUT DIFFERENTIATED RESPONSIBILITIES AND CCH

The notion of ‘common’ in ‘common but differentiated responsibilities’ is similar to that of ‘common’ in CCH and this common responsibility involves protection of the environment not only within the jurisdiction of the state but also responsibility at regional and international levels. There are two additional aspects to common but differentiated responsibilities, first, the application of different standards for developing states and secondly, the transfer of technology and financial assistance from developed states. A state’s historical contribution to the development of a particular environmental problem may also be taken into account (including the past high contribution to levels of greenhouse gas emissions by developed countries). So, the link between the CCH and common but differentiated responsibilities indicates the capacity of developing states to address the threat, will be taken into account when determining the degree to which commitments can

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98 Birnie, Boyle and Redgwell, above n 12, 132.
99 Shelton, above n 93, 657.
101 Brunnée, above n 47, 567.
102 Birnie, Boyle and Redgwell, above n 12, 27.
103 Dupuy and Vinuales above n 18, 75.
104 Colitt, Onur above n 6, 11.
105 UNFCCC art 3(1).
106 UNFCCC art 3(2).
108 Birnie, Boyle and Redgwell, above n 12, 133.
109 See UNFCCC preamble. Conclusions of the Meeting, above n 15, 30.
be achieved and the timetabling for the implementation of commitments by developing countries to UNFCCC. The level of commitments by developing states may be dependent upon actions by developed states to contribute finance and technical assistance.\textsuperscript{110}

The operation of the CCH concept shows there should be a sharing of burdens by states to take into account intragenerational equity.\textsuperscript{111} Philippe Cullet also notes the requirement for cooperation between developed and developing countries when dealing with the problem of global warming (taking into account their differing responsibilities) is reflected in the concept of common concern.\textsuperscript{112}

So, the emphasis on state cooperation to deal with the threat of climate change reinforces the concept of common but differentiated responsibilities, because developed states have the responsibility of providing financial and technological assistance to assist developing states implement their commitments in accordance with the provisions of the UNFCCC.\textsuperscript{113} These responsibilities on the part of developed states are discussed in the following section.

1 UNFCCC and Common but Differentiated Responsibilities

Developed states, parties to the UNFCCC should contribute financial assistance,\textsuperscript{114} provide technological transfer\textsuperscript{115} and agree to take the lead by substantially reducing GHG emissions and promoting GHG sinks and reservoirs.\textsuperscript{116} The carrying out of these responsibilities by developed parties is important for two reasons, first, developed states should provide financial assistance and transfer of technology as agreed in UNFCCC otherwise, developing countries, may lack the capacity to mitigate emissions of GHGs, leading to a failure of the parties to the UNFCCC to achieve stabilisation of GHG emissions.\textsuperscript{117} Secondly, if high GHG emitting developed countries fail to take the lead and reduce their GHG emissions, it is likely that the objective of the UNFCCC will not be achieved.\textsuperscript{118}

Many developing countries and countries vulnerable to climate change, lack financial means and are limited in their capacity to manage adaptation and mitigation action. One of the key barriers is the lack of access to technology which could assist with more effective mitigation and adaptation actions. Provisions in the UNFCCC encourage the transfer of technology to developing countries,\textsuperscript{119} however, there have been problems implementing these provisions because of a failure to agree on their meaning and the difficulty of determining the technology requirements for these countries.\textsuperscript{120} Another problem is the lack of clarity about the classification of ‘developed’ and ‘developing’ states and these countries could be further

\textsuperscript{110} Brunnée, above n 47, 567.


\textsuperscript{112} Cullet, above n 100, 169.

\textsuperscript{113} UNFCCC art 4(5)

\textsuperscript{114} Ibid art 4(3).

\textsuperscript{115} Ibid art 4(5).

\textsuperscript{116} Ibid art 4(2).

\textsuperscript{117} Ibid art 4(7).

\textsuperscript{118} Ibid art 2.

\textsuperscript{119} Ibid art 4 (1)(c), 4(3), 4(7), 4(8), 4(9).

\textsuperscript{120} Siobhan McInerney-Lankford, Mac Darrow and Lavanya Rajamani, Human Rights and Climate Change (The World Bank, 2011) 62.
differentiated. Developing countries (such as India, China and Brazil) with large populations and the ability to successfully industrialise, due to their increasing GHG emissions, should be placed in a different category to other states in the next climate change agreement.\textsuperscript{121}

The \textit{Kyoto Protocol} also contains provisions promoting the transfer of technology and provision of finance for the technology required by developing country parties.\textsuperscript{122} Recently, three additional organisations have been established to facilitate these objectives: the Technology Transfer Mechanism, the Green Climate Fund and the Warsaw International Mechanism for Loss and Damage (WIM).

2 \textit{The Technology Mechanism}

The Technology Transfer Mechanism facilitates technology transfer to developing countries and is composed of two organisations, the Technology Executive Committee (TEC) and the Climate Technology Centre and Network (CTCN).\textsuperscript{123} The TEC reviews technology needs, identifies procedures for enabling the transfer of technology and barriers to technology transfer. In response to the request from developing countries, the CTCN may provide technological assistance, the opportunity to develop technology projects for mitigation of GHGs or for adaptation to climate change.\textsuperscript{124} The CTCN also fosters appropriate climate change strategies to reduce GHG emissions or promote appropriate adaptation strategies.\textsuperscript{125}

Another major development is the agreement by states to raise more funds to assist developing countries to take action on climate change and to support a new financial assistance institution, the Green Climate Fund.

3 \textit{The Green Climate Fund}

The Climate Fund operates independently of the Global Environmental Facility (established in 1991) which provided funding to assist developing countries with projects relating to climate change as well as for other areas of environmental concern such as loss of biodiversity and the deterioration of land.\textsuperscript{126} Developed countries are seeking to raise funds of US $100 billion (from a variety of sources including public and private) by 2020 to assist developing countries.\textsuperscript{127} A major part of this funding will pass to the Green Climate Fund for adaptation initiatives.\textsuperscript{128} The goal of the Green Climate Fund is to assist developing countries mitigate greenhouse gas emissions and adapt to climate change impacts with special regard to developing countries that are particularly vulnerable to the impacts of

\textsuperscript{121} Atapattu, above n 86, 42.
\textsuperscript{122} Kyoto Protocol arts 3(14), 10(c), art 11(2)(b).
\textsuperscript{123} UNFCCC, Subsidiary Body for Implementation, Joint Annual Report of the Technology Executive Committee and the Climate Technology Centre and Network for 2013, 39\textsuperscript{th} Sess, FCCC/SB/2013/1 (11-16 November 2013) [6]-[7].
\textsuperscript{124} Ibid [8].
\textsuperscript{125} Ibid.
\textsuperscript{127} UNFCCC, Conference of the Parties, Report of the Conference of the Parties on its sixteenth session, held in Cancun from 29 November to 10 December 2010, 16\textsuperscript{th} Sess, Addendum Part Two, FCCC/CP/2010/7/Add.1 (15 March 2010) [98]-[99].
\textsuperscript{128} Ibid [100].
climate change. Developing countries may be able to apply for funds to support mitigation or adaptation action, transfer of technology, capacity building and the preparation of national reports on climate change including national adaptation plans (NAPs), nationally appropriate mitigations actions (NAMAs) and national adaptation plans of action (NAPAs).

These developments in financial assistance have been actioned as a result of the application of the ‘common but differentiated responsibilities’ principle in the UNFCCC. The same objective led to the establishment of the WIM.

4 The Warsaw International Mechanism for Loss and Damage

The WIM was established in November 2013 to assist developing countries that are particularly vulnerable to climate change impacts. The aim is to strengthen support for these countries and improve the administration of financial support. The executive guides the functions of this mechanism and reports to the COP of the UNFCCC. There are limitations on the operation of this mechanism because of the difficulties of assessment of damage for countries vulnerable to climate change and because of the lack of consultation amongst states about how to deal with the issue of compensation for those countries that are likely to suffer serious damage, even though their GHG emissions are low.

The establishment of these three international mechanisms indicates that collective action by states is necessary to transfer finance and technology and deal with issues of loss resulting from the impacts of climate change. These international initiatives further erode the traditional doctrine of sovereignty of states and provide evidence of the operation of the CCH concept.

It is possible that common but differentiated responsibilities will be incorporated in the 2015 draft agreement depending upon the terms agreed to by the negotiating states. The provisions which may be influenced by the balancing of common but differentiated responsibilities include those dealing with nationally determined contributions to GHG mitigation, programs containing measures to mitigate climate change and articles concerning adaptation and transparency.

130 Ibid [35]-[36].
133 Ibid.
134 Ibid.
Generally, countries identify the areas at risk of loss or damage from climate change through the development of reports such as NAPAs. Limited annual budgets and lack of institutional development render long term planning for climate change impacts by countries vulnerable to climate change a very challenging task. Losses may not be manageable at the country level and trust funds may be inadequate because impacts from climate change are increasing as a faster rate than originally anticipated.

Some long term impacts affecting countries that are vulnerable to the slow-onset impacts of climate change are difficult to address in future planning because of lack of knowledge about the implications of these events and potential tipping points. Damage resulting from impacts such as ocean acidification, sea level rise and the permanent loss of biological diversity are long term and may result in permanent loss for future generations. Methods for dealing with slow onset events include:

- land zoning; integrated water management; integrated coastal zone management; utilizing indigenous and community knowledge; transferring and sharing risk through the possible development of new types of insurance measures; using financial instruments such as social and environmental bonds; and enhancing regional collaboration, such as integrated regional coastal management and integrated water resource management, among others.

Some small island developing nations have been unable to access insurance because of high premiums and the failure by insurance companies to cover assets in these countries for climate change events. Small island developing nations have requested that an international mechanism be set up to deal with some of these specific issues concerning loss and damage. The focus on the ability of individual countries to prepare themselves, is inadequate. Serious climate change impacts may create a multiplying effect upon the region extending to the international community, leading to the necessity of international action.

Unfortunately, the WIM does not address the degree of assistance that should be provided by developed countries to help developing countries that are vulnerable to the effects of climate change. Lack of financial resources is a problem for developing countries as there are costs involved in the preparation of the risk assessment of likely damage as well as addressing the actual losses to the country. Even more significant issues have not been adequately considered, for example if sea water inundates a country, what are the

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137 UNFCCC, Subsidiary Body for Implementation, Report on the Regional Expert Meetings on a Range of Approaches to Address Loss and Damage Associated with the Adverse Effects of Climate Change, including Impacts Related to Extreme Weather Events and Slow Onset Events, 37th Sess, FCCC/SBI/2012/29 (26 Nov- 1 Dec 2012) [54].
138 Ibid [35].
139 Ibid [24].
140 Ibid [28].
141 Ibid [42].
142 Ibid [79].
143 Ibid [78].
implications of loss of a country’s sovereignty, or losses to the economic region. These questions are matters of international concern because states that have been high GHG emitters are the primary cause of these problems.

Philippe Cullet considers that ‘common but differentiated responsibilities’ reflects a ‘sense of partnership’ by states when addressing global environmental threats. So, the involvement of developing states in mitigation of GHGs depends upon these equitable considerations and the contributions to mitigation of GHGs from those developed countries responsible for large amounts of emissions in the past. Indeed, the success of the application of the common concern is likely to depend upon the acceptance of the sharing of burdens in an equitable manner based upon common but differentiated responsibilities. This is evident from the slow progress of negotiations for the next international agreement on climate change. Indeed, the success of these negotiations will depend upon how to resolve problems concerning the differentiated responsibilities of states.

The adoption of the concepts of CCH and common but differentiated responsibilities in the UNFCCC can result in positive action by developed countries to establish institutions that provide financial assistance and transfer of technology to developing countries. However, the issue of compensation also needs to be addressed by states. Unfortunately to-date, developed states have been reluctant to consider this issue. Indeed, one proposal in the 2015 draft agreement is that there be no reference to loss or damage in the agreement. The other, more appropriate alternative, in the 2015 draft agreement is to establish a new mechanism on loss and damage that would build on the work of WIM.

The question is whether the development of an international agreement on climate change liability is possible because it is likely that developed countries would oppose this development. One option is to reverse the burden of proof in climate change cases before an international environmental arbitration tribunal or the ICJ. So, states with high levels of GHG emissions could be obliged to prove that their high levels did not cause damage. Another suggestion is for states to adopt 1992 (the year when states became aware of the implications of high levels of GHG emissions that could lead to changes in climate) because of the international recognition of the threat of climate change in 1992. As a consequence of the international recognition of the threat of climate change in 1992, states could be liable for

145 UNFCCC, Subsidiary Body for Implementation, Report on the Regional Expert Meetings on a Range of Approaches to Address Loss and Damage Associated with the Adverse Effects of Climate Change, including Impacts Related to Extreme Weather Events and Slow Onset Events, 37th Sess, FCCC/SBI/2012/29 (26 Nov- 1 Dec 2012)[27].
146 Cullet, above n 100, 178.
148 Trindade and Attard, above n 111, 23. ‘Some experts regarded sharing of burdens as an important subsidiary principle instrumental in the application of the common concern of mankind concept itself (collective or concerted actions); other experts went further, in expressing the view that the success or failure of the very concept of common concern of mankind would ultimately depend on the recognition or acceptance of the principle of equitable sharing of burdens’.
150 2015 Draft Agreement, above n 5, art 5.
151 Ibid.
152 Atapattu, above n 86, 51.
failing to take actions to reduce their emissions after this date.\textsuperscript{153} Another possibility is to permit low GHG emitting countries adversely affected by climate change to apply for funding from the Green Climate Fund as compensation.\textsuperscript{154}

The concept of common but differentiated responsibilities can be viewed as a framework principle,\textsuperscript{155} and the application of this principle and the CCH concept are likely to influence the development of a compliance mechanism in the next international agreement on climate change as discussed in the following section.

\section*{VIII CHH AND COMPLIANCE}

States have agreed to aim for an overall reduction of GHGs in the atmosphere, to try to prevent the global temperature from increasing by more than 2 degrees Celsius above preindustrial levels.\textsuperscript{156} The difficulty for states is that in order to achieve this objective, greater targets for emission reduction by states than are currently provided in the \textit{Kyoto Protocol} (as extended to 2020) are necessary. There is a lack of certainty about how the question of compliance will be dealt with in future negotiations. At the Working Group in the Durban Platform for Enhanced Action, parties to the \textit{UNFCCC} considered that the goal is to negotiate a strong compliance mechanism with suitable consequences for non-compliance.\textsuperscript{157} It is unclear whether the Compliance Committee operating under the \textit{Kyoto Protocol} will continue to carry out facilitative and enforcement functions after 2020.

The Compliance Committee (established by the COP to the \textit{UNFCCC})\textsuperscript{158} has two branches, the Facilitative Branch and the Enforcement Branch which have different roles. The role of the Facilitative Branch is to give advice to parties and facilitate compliance with their commitments under the \textit{Kyoto Protocol}. On the other hand, the Enforcement Branch examines whether developed countries (and transition countries) are complying with their commitments in the \textit{Kyoto Protocol} and meeting their GHG reduction targets. If a party is not in compliance, the Enforcement Branch can determine that consequences will apply. These consequences include the development of a compliance action plan, suspension from

\begin{flushleft}
\textsuperscript{153} Ibid 52.
\textsuperscript{154} Ibid 54.
\textsuperscript{155} Birnie, Boyle and Redgwell, above n 12, 28.
\textsuperscript{156} UNFCCC, \textit{Warsaw Outcomes} United Nations Framework Convention on Climate Change <http://unfccc.int/key_steps/warsaw_outcomes/items/8006.php> . ‘The most recent climate science shows that human-generated climate change is beyond doubt, but we have a limited time to keep warming to a maximum of under two degrees. However, global greenhouse gas emissions need to peak this decade, and get to zero net emissions by the second half of this century. To achieve this, it is critical that action is taken and coordinated swiftly at all levels: international, domestic, business and finance’.
\textsuperscript{157} UNFCCC Ad Hoc Working Group in the Durban Platform for Enhanced Action, Informal Summary, \textit{Summary of the roundtable under work stream 1 ADP 1, part 2 Doha, Qatar, November-December 2012} Note by the Co-Chairs, ADP.2012.6, (7 February 2013) [33].
\textsuperscript{158} UNFCCC, Conference of the Parties serving as the Meeting of the parties to the Kyoto Protocol, \textit{Report of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol on its first session, held at Montreal from 28 November to 10 December 2005 Addendum Part Two: Action taken by the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol at its first session, 1st Sess. FCCC/KP/CMP/2005/8/Add.3 (2005) 93, art I ‘The objective of these procedures and mechanisms is to facilitate, promote and enforce compliance with the commitments under the Protocol.’ (‘COP Report 2005’).
\end{flushleft}
participating in emissions trading and the penalty of an increase of 1.3 times the level of emission reductions in the next phase of the Kyoto Protocol.\footnote{159}

The Enforcement Branch has made decisions concerning a number of countries that have not been in compliance and many of these issues have been resolved.\footnote{160} However, the consequences only apply to states that have ratified the Kyoto Protocol, so if states fail to ratify or withdraw their ratification, the consequences do not apply.\footnote{161} The withdrawal from international environmental agreements should be prevented because global emission reduction targets are unlikely to be achieved if states can withdraw from their commitments. This failure to effectively reduce GHG emissions could lead to devastating consequences for the Earth’s environment if tipping points are reached and irreversible change to the Earth’s climate occurs.

Meinhard Doelle, Jutta Brunnée and Lavanya Rajamani consider that the Compliance Committee is a more advanced and elaborate enforcement mechanism than compliance systems established in other multilateral environmental agreements.\footnote{162} Even so, some commentators have pointed out that the Compliance Committee has not been effective because the penalties are too weak, and it would be preferable to develop a new framework for compliance in the post-Kyoto agreement.\footnote{163} In any event, as the climate change regime is changing, it is likely that the enforcement procedures will develop to accommodate the new regime.\footnote{164}

There are three proposals in the draft 2015 agreement concerning compliance.\footnote{165} First, a similar institution to the existing Compliance Committee could be established.\footnote{166} There are alternative arrangements to be negotiated by states about the nature and functions of this mechanism if it is established.\footnote{167} The consequences for failure to comply could be a declaration of failure to comply and a request for a compliance action plan; or possibly that advice or assistance or a statement of concern be given. The other alternative is that there are no consequences at all.\footnote{168} The disadvantage of the first option is that there are inadequate penalties for failure to comply. Secondly, an International Tribunal of Climate Justice could be set up to determine issues of non-compliance by developed countries concerning their commitments on mitigation, adaptation, contributions to finance, technology transfer and capacity-building as well as their compliance with transparency provisions in the agreement.\footnote{169} This is a preferable alternative however, it is unlikely that

\footnotesize{\begin{itemize}
  \item 159 Ibid art XV [5].
  \item 160 UNFCCC, \textit{Compliance under the Kyoto Protocol} United Nations Framework Convention on Climate Change <http://unfccc.int/kyoto_protocol/compliance/items/2875.php>. The countries involved were Greece, Canada, Croatia, Bulgaria, Romania, Ukraine, Lithuania and Slovakia.
  \item 161 UNFCCC, \textit{Status of Ratification of the Kyoto Protocol} above n 16. For example, Canada has withdrawn from the Kyoto Protocol.
  \item 164 Doelle, Brunnée and Rajamani, above n 162, 438.
  \item 165 2015 Draft Agreement, above n 5, art 11.
  \item 166 Ibid art 11 option I.
  \item 167 Ibid.
  \item 168 Ibid .
  \item 169 Ibid art 11 option II.}
\end{itemize}}
states will agree to the expansive international supervision imposed in this option. Even so, the possibility of international institutional oversight of state compliance indicates the continuing erosion of the doctrine of sovereignty of states in the area of climate change protection. The third option is the least desirable because the 2015 draft agreement would not include any provisions concerning compliance.\(^{170}\)

Clearly, international agreement on a standard measurement and monitoring of greenhouse gas emissions is required.\(^{171}\) Indeed, it would be difficult to track whether the overall global target can be achieved without international supervision of the efforts by countries to reduce GHG emissions. A stronger international compliance and enforcement mechanism should be established in the future to ensure states adhere to greater emission reductions than they may be willing to make unilaterally.\(^{172}\) The USA and China have agreed to greater reductions,\(^{173}\) however, even these goals are not strong enough to achieve the cuts in emissions required to achieve the international objective.\(^{174}\)

Academic commentators have suggested a number of alternative proposals for the development of a future international climate change compliance system. Lavanya Rajamani proposes the development of a multilateral consultative process relying upon existing provisions in the UNFCCC.\(^{175}\) As it is likely that developing country parties will increase their mitigation commitments in the next international agreements on climate change,\(^{176}\) a multilateral consultative process could facilitate the compliance of developing countries endeavouring to meet their responsibilities.\(^{177}\) Secondly, Rajamani considers that the review and assessment provisions in the UNFCCC could be improved so that they could operate as compliance provisions.\(^{178}\) It may be possible to expand the reporting, review and assessment provisions under the UNFCCC to assist the compliance requirements for developing countries.\(^{179}\)

The difficulty with these two proposals is that there are no provisions for penalties for non-compliance. So, some states could fail to adhere to their mitigation commitments and yet not suffer from the imposition of any sanctions. Further, if the provisions for reporting and review in the UNFCCC are relied upon, it is unlikely to produce a successful outcome because there are no incentives for states to comply with reporting requirements. A more
effective system of compliance is necessary in order to ensure adequate reduction of GHGs occurs, and global targets can be achieved.

Sean Walsh and John Whalley discuss three proposals to improve climate change compliance including trade penalties, enforcing an international treaty through an escrow account and the application of agency rankings.\(^\text{180}\) If trade penalties are imposed, the World Trade Organisation may become involved, however, this organisation has not been established to deal with climate change trade restrictions\(^\text{181}\) so, presumably, amendments to the operation of this institution would be required. An escrow account could be set up so that all countries would be required to pay funds into the account. An international institution could manage the escrow account and would determine whether countries have complied with their obligations.\(^\text{182}\) If a country is not in compliance, the portion of the funds that they contributed will be forfeited and redistributed to other members of the fund who are in compliance.\(^\text{183}\) The question is how would the surplus funds be allocated? Perhaps, it is more appropriate to provide these escrow funds as financial assistance to those developing countries likely to be severely impacted by climate change.

The third suggestion is to provide a system of agency rankings. An international agency could be established to determine compliance with mitigation and adaptation to climate change and could rate each country to assess their degree of compliance.\(^\text{184}\) This rating system could encourage countries to comply because they would be encouraged to compete with other countries to achieve a good ranking. The difficulty with the agency ranking system is that some countries may opt out and free ride on the efforts of other countries that incur the costs and burden of climate change action.

Another proposal is to use trade sanctions as an incentive to ensure compliance.\(^\text{185}\) If large numbers of countries join the next international agreement on climate change, the decision to join is beneficial because countries are only able to trade with those countries that have joined this international agreement.\(^\text{186}\) If a country considers the option to free ride, this country will weigh up the benefits of free riding and is likely to wish to join the international agreement because the benefits from trade with a large number of countries would outweigh the benefits of free riding.\(^\text{187}\) The problem with a consent based approach in international law is only states that ratify international climate change agreements will be bound. This is why the development of customary law through the CCH concept and the duty to cooperate in the \textit{UNFCCC} is important, because states have a duty to develop the legal framework on climate change and this duty extends to the duty to ratify subsequent international agreements to the \textit{UNFCCC}.

It would be possible to adopt a similar (but more complicated) compliance system to the existing Compliance Committee regime, but in order to improve this system in the future,

\(^{180}\) Walsh and Whalley, above n 163, 230-231.
\(^{181}\) Ibid 229.
\(^{182}\) Ibid 231.
\(^{183}\) Ibid.
\(^{184}\) Ibid.
\(^{186}\) Ibid 176.
\(^{187}\) Ibid.
there could be more serious consequences and penalties for failure to comply.\textsuperscript{188} Clearly, innovation is necessary, but if a stronger compliance system is introduced in a future climate change agreement, the threat of onerous consequences could deter some states from ratifying it, unless it is determined that a customary rule provides states are under an obligation to ratify subsequent agreements to the \textit{UNFCCC}.

The links between CCH, intragenerational equity and intergenerational equity show that further action should be taken by states to address international concern about climate change because the human rights of future generations are likely to be adversely impacted particularly in the situation where people are likely to become displaced due to the adverse effects of climate change.

IX  CCH, HUMAN RIGHTS AND DISPLACED PEOPLE

The CCH applies to the protection of the Earth’s atmosphere as well as to the protection of human rights.\textsuperscript{189} Indeed, the impacts of climate change on human rights are of common concern to the international community, however, to date, there has been little progress on the responses necessary at the international level to deal with this problem.\textsuperscript{190} States should reduce the threat of predicted human rights violations,\textsuperscript{191} and those that have ratified \textit{UNFCCC}, have the responsibility to take action to reduce GHG emissions.\textsuperscript{192}

The Human Rights Council \textit{Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights} discusses human rights that could be impacted by the adverse effects of climate change.\textsuperscript{193} It is expected that the consequences of these violations of human rights will be very serious.

In summary, the human rights likely to be affected include the following:

1) The right to life will be impacted because of more frequent extreme weather events due to climate change such as heat spells, storms, fires and droughts that will increase the number of human deaths.\textsuperscript{194} More conflicts will occur including civil war and violence due to the impacts of climate change which will exacerbate the causes of these conflicts.\textsuperscript{195} Lack of food and water resources can also lead to increased mortality.\textsuperscript{196}

\begin{itemize}
\item \textsuperscript{188} Walsh and Whalley, above n 163, 226.
\item \textsuperscript{189} Alexandre Kiss and Dinah Shelton, \textit{International Environmental Law} (Transnational Publications Inc, 2004) 32; McInerney-Lankford, Darrow and Rajamani, above n 120, 24.
\item \textsuperscript{190} Jane McAdam, \textit{Climate Change, Forced Migration and International Law} (Oxford University Press, 2012) 91.
\item \textsuperscript{191} \textit{Universal Declaration of Human Rights}, GA Res on the Universal Declaration of Human Rights, 217A (III) (10 December 1948) UN Doc A/810, preamble paras 1, 2 (‘\textit{UDHR}’).
\item \textsuperscript{192} \textit{UNFCCC}, art 4.
\item \textsuperscript{195} \textit{WG II Summary for Policy Makers}, above n 1, 20.
\item \textsuperscript{196} Ibid 7.
\end{itemize}
2) The right to adequate food will be impacted by the effects of climate change in many countries, particularly in the lower latitudes where increased temperatures, droughts or floods will lead to a deterioration of food systems. Reduced access to food and price increases could occur in many areas. Poor people in regions such as sub-Saharan Africa are likely to be adversely impacted by reductions in crop production and food insecurity.

3) The right to water - it is likely that there will be substantial water loss in dry sub-tropical regions due to the effects of climate change, although at high latitudes water resources are likely to increase. So, more people are likely to suffer from a loss of safe drinking water.

4) The right to health will be affected because the impacts of climate change will lead to an increase of existing health problems, particularly in developing countries.

5) The right to adequate housing will be impacted by increasing air pollution, temperatures, flooding and water scarcity and those living in poor quality housing in urban areas are most likely to be adversely impacted. There is potential for loss of housing and increasing numbers of people living in slums due to displacement.

6) The right to self-determination will be impacted because climate change will lead to sea level rise which threatens the future viability of small island states and low-lying areas where communities are displaced due to inundation of sea water. There will also continue to be adverse impacts on the livelihoods of indigenous groups in the Arctic and Russia. Some indigenous peoples may no longer be able to engage in their traditional way of life and may have to leave their homelands.

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198 WG II Summary for Policy Makers, above n 1, 7.

199 Ibid 14.


The 2015 draft agreement includes respect for human rights in the preamble.\textsuperscript{203} This agreement may include terminology where the overall agreement will be implemented with respect and fulfilment of human rights for all and providing that adaptation action should follow a participatory approach with respect for human rights.\textsuperscript{204}

The \textit{WG II Contribution to the Fifth Assessment Report of the IPCC} states that the impacts of climate change will lead to the displacement of people in the twenty-first century.\textsuperscript{205} The danger increases for people that have inadequate resources for planned migration because these people are at risk of exposure to extreme weather and generally reside in low income developing countries where there is a lack of resources to assist displaced people.\textsuperscript{206} There are large numbers of people who are likely to be displaced by climate change either because of internal displacement (within the boundaries of their home state) or external displacement (where they are forced to cross the border into a neighbouring state).\textsuperscript{207} Estimated numbers of people likely to be displaced as a result of the adverse impacts of climate change range between about fifty million,\textsuperscript{208} or possibly two hundred and fifty million\textsuperscript{209} during the next fifty years, although there is some uncertainty about whether these figures are based upon an accurate assessment.\textsuperscript{210} Impacts of climate change may not necessarily be the only reason for displacement and additional social, economic and environmental causes are likely to influence the decision to move locations.\textsuperscript{211} In any event, increasing numbers of displaced people are a matter of international concern.\textsuperscript{212} So, the problem of displaced people (where climate change is a factor in the decision to relocate) is linked to the concept of the common concern of humankind and could be ameliorated by appropriate international, regional and national and local responses.

Climate change impacts can exacerbate the social and economic circumstances of those at risk of displacement.\textsuperscript{213} Protection of the human rights of climate change displaced people requires the cooperation of all states acting in accordance with the common concern of humankind.\textsuperscript{214} One reason for the plight of climate change displaced people is the failure by states to effectively mitigate GHGs in accordance with sustainable development.\textsuperscript{215} So, the best approach for states is to negotiate for greater reductions in GHG emissions to minimise the numbers of people displaced in the future.

\textsuperscript{203} \textit{2015 Draft Agreement}, above n 5, preamble.
\textsuperscript{204} Ibid arts 2, 4.
\textsuperscript{205} \textit{WG II Summary for Policy Makers}, above n 1, 20.
\textsuperscript{206} Ibid.
\textsuperscript{207} Ibid.
\textsuperscript{210} McAdam, above n 190, 28.
\textsuperscript{211} Ibid 29-30.
\textsuperscript{212} Ibid 92.
\textsuperscript{213} Ibid 20. In this article, ‘climate change displaced people’ refers to people who are displaced, in circumstances where one of the factors causing the displacement is due to the impact of climate change.
\textsuperscript{214} Horn and Freeland, above n 45, 124.
At the international level, there is no specific institution capable of protecting the human rights of climate change displaced people, nor is there an international legal agreement that applies. The *Convention Relating to the Status of Refugees* does not cover people who are displaced in their own home state and remain within the borders of this state.\textsuperscript{216} Even if climate change displaced people cross the border into a neighbouring country, they are not classified as ‘refugees’. It is likely that these people are fleeing not because of circumstances where they have a ‘fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion…’\textsuperscript{217} It may be possible to argue that climate change displaced people are fleeing because of environmental harm but, this reason is unlikely to constitute persecution within the meaning of the *Convention Relating to the Status of Refugees* except perhaps, for very limited circumstances.\textsuperscript{218}

An international agreement could provide for protection of climate change displaced people in the circumstances where they cross borders to migrate.\textsuperscript{219} Some commentators have suggested that the adoption of a protocol to the *UNFCCC*,\textsuperscript{220} or an amendment to the *Convention Relating to the Status of Refugees* could provide protection for climate change displaced people.\textsuperscript{221} Unfortunately, states have been reluctant to engage in debate about the merits of the development of a new treaty concerning climate change displaced people due to the sensitivity of the governments of some states about the likelihood of debate about issues concerning liability and compensation.\textsuperscript{222}

Opportunities are available to discuss policy options through the *UNFCCC* forum in the future because as part of the Cancun Adaptation Framework, the COP to the *UNFCCC* invited parties to adopt measures on climate change displacement and relocation.\textsuperscript{223} Even though the Cancun Adaptation Framework is a non-binding agreement, this statement sets out the importance of the displacement of people and treats this issue as one of adaptation.\textsuperscript{224} So, countries may be able to apply for international adaptation funding to prevent displacement or to provide for relocation of climate change displaced people.\textsuperscript{225}

The situation of climate change displaced people is very complex because of the difficulty of distinguishing those people that are genuinely displaced by climate change events as opposed to those affected by natural disasters.\textsuperscript{226} In 1998, the United Nations Office for

\begin{itemize}
  \item \textsuperscript{216} *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 art 1 (entered into force 22 April 1954).
  \item \textsuperscript{217} Ibid.
  \item \textsuperscript{218} McAdam, above n 190, 43-48.
  \item \textsuperscript{219} McInerney-Lankford, Darrow and Rajamani, above n 120, 64.
  \item \textsuperscript{221} Marei Pelzer, ‘Environmentally Displaced Persons Not Protected: Further Agreement’ (2009) *Environmental Policy and Law* 90, 190.
  \item \textsuperscript{223} UNFCCC, Conference of the Parties, *Report of the Conference of the Parties on its Sixteenth Session, held in Cancun from 29 November to 10 December 2010*, 16\textsuperscript{th} Sess, Addendum Part Two, FCCC/CP/2010/7/Add.1, (15 March 2010) 14(f).
  \item \textsuperscript{224} McAdam, above n 190, 232.
  \item \textsuperscript{225} Ibid.
  \item \textsuperscript{226} McInerney-Lankford, Darrow and Rajamani, above n 120, 64.
\end{itemize}
Coordination of Humanitarian Affairs set out the *Guiding Principles on Internal Displacement* which are available for states planning to provide protection to displaced people within their jurisdiction if a natural or human caused disaster causes the displacement. However, these guidelines are not binding and are not directly related to climate change displacement.\(^{227}\) There have been suggestions that similar guidelines could be developed to cover climate change displacement, called ‘Guiding Principles around Climate Induced Displacement’ which could help states plan for large numbers of displaced people in the future.\(^{228}\) Further, there are opportunities for discussion about international assistance under the *UNFCCC* and the development of proactive approaches for work with humanitarian and environmental organisations.\(^{229}\)

Some countries that are likely to experience large numbers of climate change displaced people are low-lying states and island nations that have contributed very low amounts of GHG emissions. It appears to be particularly inequitable that vulnerable countries should shoulder the burden for climate change displaced people if large GHG emitting countries fail to take adequate steps to limit their GHG emissions. So, this problem is an issue of equity and assistance from developed states should be provided through the application of common but differentiated responsibilities concept.\(^{230}\) It is possible that this issue will be taken into account in the 2015 draft agreement. This new organisation on loss and damage could establish a coordination facility to assist displaced people as a result of severe impacts of climate change.\(^{231}\) The recognition of the plight of displaced people in the 2015 draft agreement indicates that this problem is a matter of common concern and should be dealt with on a cooperative basis by states.

Even though some climate change displaced people may be able to rely upon existing human rights protection at international law, many will be internally displaced in developing countries and will be relying upon the national enforcement of human rights.\(^{232}\) However, human rights protection may not be able to be adequately enforced due to factors such as a lack of resources, inadequate education about human rights or limited access to institutions capable of providing assistance.

It may be possible, at some stage in the future, for states to negotiate the development of a protocol to protect the human rights of climate change displaced people and to ensure that financial assistance is available to help them to relocate. A preferable approach is for states to coordinate the response for large-scale migrations at the international level, to provide a legal framework to support climate change displaced people and to manage migration based upon the sharing of burdens principle, whilst ensuring appropriate allocation of humanitarian assistance and legal protection for human rights through appropriate agencies.\(^{233}\)

The following section explores the link between concepts of CCH, intergenerational equity and trust to protect the interests of future generations.


\(^{228}\) Warner, above n 222, 14.

\(^{229}\) Ibid 15.

\(^{230}\) McAdam, above n 190, 233.

\(^{231}\) *2015 Draft Agreement*, above n 5 , art 5.

\(^{232}\) McInerney-Lankford, Darrow and Rajamani, above n 120, 64.

\(^{233}\) McAdam, above n 190, 236.
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**TRUST FOR FUTURE GENERATIONS**

Future generations are specifically acknowledged in the preamble of the *UNFCCC*.\(^{234}\) Parties are to be guided by the principle that the protection of the climate is for the benefit of present and future generations.\(^{235}\) The link to the common concern of humankind is through the temporal dimension which supports action by states to limit climate change in the interests of present and future generations. Intergenerational equity is also central to the concept of sustainable development.\(^{236}\) The temporal dimension of CCH carries with it the implication of a trust arrangement where the protection of the atmosphere is necessary for the public benefit and future generations would be beneficiaries of the trust.\(^{237}\) So, the trust could be used to improve the legal protection of the environment for future generations.\(^{238}\) The protection of the atmosphere through a trust also gives the atmosphere value and as states are trustees, they have fiduciary responsibilities to protect the atmosphere (the subject matter of the trust).\(^{239}\) So, the trust is a legal device that has the potential to assist the international community of states to address the threat of climate change.\(^{240}\)

Edith Brown Weiss views the trust as a method of benefitting future generations where the present generation (along with future generations) are beneficiaries of the trust.\(^{241}\) The trustees could be an international institution under the supervision of the international community. This institution would undertake to ensure that internationally agreed rules and principles would be applied to the protection of the atmosphere. So, a strong institution is required at the international level, with the power to regulate to protect the atmosphere against the threat of climate change. However no such institution has yet been established.\(^{242}\)

There was an earlier proposal that the UN Trusteeship Council could manage areas in the global commons but this suggestion was not taken up by the international community.\(^{243}\) State responsibility through the common concern of humankind concept includes the international management of the atmosphere by establishing an international institution to

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\(^{234}\) *UNFCCC* preamble (‘Determined to protect the climate system for present and future generations’).

\(^{235}\) Ibid art 3(1).

\(^{236}\) World Commission on Environment and Development, *Our Common Future* (Australian edition, Oxford University Press, 1987) 43 (‘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] contains within it two key concepts:

- 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’).

\(^{237}\) Trindade and Attard, above n 111, 21.

\(^{238}\) Birnie, Boyle and Redgwell, above n 12, 121.


\(^{240}\) Ibid 492.


\(^{242}\) Birnie, Boyle and Redgwell, above n 12, 97.

\(^{243}\) Ibid.
regulate the protection of the atmosphere.²⁴⁴ As a trust for present and future generations. So, arguably, the CCH concept operates to motivate states to change existing institutions and develop new institutions that will provide more effective protection of the Earth’s climate.²⁴⁵

Another approach is through the doctrine of public trust that emerged in the United States of America.²⁴⁶ This doctrine could be applied to the atmosphere.²⁴⁷ Mary Wood develops ‘nature’s trust’ as a device to incorporate the public trust doctrine to protect natural resources including the atmosphere.²⁴⁸ The government of the state acts as the trustee to protect natural resources for present and future generations.²⁴⁹ This application of the trust at the domestic level of jurisdiction could be adapted to the international level where each state has a duty to protect natural resources and act jointly to protect them, particularly where transboundary resources are concerned.²⁵⁰ Ved Nanda and William Ris have applied the public trust doctrine to international environmental law so that states may recommend areas of importance to be placed in a trust which will be protected by an international agency for the benefit of humankind.²⁵¹ The trust could be used to enhance international protection of the atmosphere provided that an international institution is established with effective regulatory and compliance powers. In order for the trust to be effective, future generations would require a representative with legal standing to protect their interests at the international level and this issue is discussed in the next section.

XI REPRESENTATION FOR FUTURE GENERATIONS

Climate change is likely to result in a deterioration of the environment for future generations including the depletion of natural resources, loss of biological diversity and degradation of the quality of the environment.²⁵² Other impacts include lack of food and water due to climate change impacts on agricultural production and water resources as well as rising sea levels leading to inundation of coastal areas.²⁵³ It is becoming urgent to determine what legal protection can be granted to future generations given that climate change impacts are already taking place and are likely become more serious in the future. This section discusses the proposals by the Secretary General of the United Nations (UN) and Edith Brown Weiss for a representative for future generations.

²⁴⁵ Note from the UNEP Secretariat to the Meeting, above n 17, 46-47.
²⁴⁷ Mary Christina Wood, Nature’s Trust Environmental Law for a New Ecological Age (Cambridge University Press, 2014) 149.
²⁴⁸ Ibid 336.
²⁴⁹ Ibid.
²⁵³ Ibid 102.
The report of the Secretary General, *Recent Proposals in Intergenerational Solidarity and the Needs of Future Generations*, discussed four options that could facilitate the representation of future generations at the international level. First, the most effective option would be to appoint a High Commissioner for Future Generations who would promote the interests of future generations amongst states and UN agencies, carry out research and offer advice on these issues. Second, a Special Envoy to the Secretary General for Future Generations could foster intergenerational solidarity and include consideration of these issues in policy making. This envoy would report to the UN General Assembly and to the High-level Political Forum on sustainable development. Another option to ensure policy making takes into account the interests of future generations is to include these matters as a regular agenda item for the High-level Political Forum. Finally, the UN Secretary General could promote inter-agency coordination on issues concerning future generations through the UN organisations to ensure policy consistency.

The role and functions of a High Commissioner would be to be engaged with:

- International agenda-setting and leadership;
- Monitoring, early warning and review;
- Public participation;
- Capacity for innovation at national and sub-national levels;
- Public understanding and evidence; and
- Reporting.

These functions are very broad and fail to take into account the specific problems faced by people from the impacts of climate change such as the serious impacts on human rights of climate change displaced people. It would be preferable to introduce a commissioner for future generations that specialises in climate change and could address issues raised at the international level on behalf of future generations.

A commissioner for future generations could provide assistance for the interests of future generations, if established with functions to collect information about the state of the Earth’s environment and likely threats to its integrity, to warn about hazards, to identify research areas to provide opportunities for discussion and education about these issues. Brown Weiss specifically identifies the advantage of the creation of the office of a climate change commissioner for future generations that could retain a focus on the long term issues arising from climate change and facilitate the involvement of all members of the community including government, private enterprise, individuals and NGOs in the management of climate change.

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255 Ibid [63].
256 Ibid [65].
257 Ibid.
258 Ibid [66].
259 Ibid [67].
260 Ibid [57].
261 Brown Weiss, above n 252,112.
adaptation and mitigation.\textsuperscript{262} Clearly, implementation of climate change law and policies favouring future generations would be more effective if a watchdog, such as a climate change commissioner could report on the international situation on climate change and represent the interests of future generations.

At the international level, questions are raised about whether the rights of future generations to a healthy environment can be protected, whether this protection will cover human rights and whether the rights of future generations are categorised as individual or collective rights.\textsuperscript{263} It is also uncertain if a state can take legal action to represent the rights of future generations. It may be possible for states to bring an action \textit{erga omnes} in circumstances where the human rights of future generations are likely to be adversely affected or where the environment is under threat of severe degradation as in the circumstances where serious adverse impacts of climate change occur.

A representative could be appointed to act on behalf of future generations with standing to represent the interests of future generations in international disputes concerning climate change or the environment.\textsuperscript{264} This could be a role of a climate change commissioner. Or, the governments of states could develop procedures in national legal systems where representation is available to future generations in courts to ensure that their interests are protected as in the case of a class action brought on behalf of the unborn generations.\textsuperscript{265} In the Philippines, Justice Davide considered that the plaintiffs had standing to bring a class suit on behalf of succeeding generations in \textit{Re Minors Oposa v Secretary of the Department of Environment and Natural Resources}.\textsuperscript{266} The judges in this case indicated that every generation has a responsibility to protect the environment for the ensuing generations.\textsuperscript{267} So, standing could be granted to an international climate change commissioner to represent the claims of future generations in ICJ and international environmental arbitration. The difficulty with the present structure of the ICJ is that only states can be parties before this court.\textsuperscript{268} So, it may be more appropriate to encourage climate change disputes to be resolved through the process of international environmental arbitration in the Permanent Court of Arbitration or in a specialised climate change tribunal. The 2015 draft agreement proposed that an International Tribunal of Climate Justice could be established to deal with loss or damage resulting from the impacts of climate change.\textsuperscript{269} It may be possible to expand the range of powers of this tribunal to include representation for future generations on disputes involving climate change that would affect their interests.

\textbf{XII \hspace{1em} CONCLUSION}

Overall, the CCH concept forms the foundation building block for the operation of an environmental regime to protect the atmosphere.\textsuperscript{270} There are links between the CCH and other principles of international environmental law including the precautionary principle and the concepts of intragenerational and intergenerational equity. The links between these

\begin{thebibliography}{99}
\bibitem{262} Ibid.
\bibitem{263} Ibid 109.
\bibitem{264} Birnie, Boyle and Redgwell, above n 12, 121.
\bibitem{265} \textit{Re Minors Oposa v Secretary of the Department of Environment and Natural Resources} (1994) 33 ILM 174.
\bibitem{266} Ibid 187-188.
\bibitem{267} Ibid 185.
\bibitem{268} Statute of the International Court of Justice art 34.
\bibitem{269} 2015 Draft Agreement, above n 5, art 11.
\bibitem{270} See Dupuy and Vinuales above n 18, 53.
\end{thebibliography}
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concepts indicate that there are likely to be further legal implications flowing from the CCH in the future. It is possible to predict that the CCH could apply to states’ responsibility to assist climate change displaced people and to take into account the interests of future generations.

The operation of the CCH concept together with the provisions of the UNFCCC show that states have a responsibility to assist the development of an appropriate legal framework on climate change and to cooperate to mitigate GHGs. The duty to cooperate in the UNFCCC and the common concern of humankind implies that there is a duty for parties to ratify subsequent legal agreements to the UNFCCC which promote state action against the threat of climate change.\(^{271}\) The 2015 draft agreement provides evidence of the focus on collective action by states to protect the atmosphere and further erosion of the traditional doctrine of sovereignty as states are required to undertake accelerated mitigation and adaptation action to deal with the threat of climate change. The evidence of cooperative action and limitations to national sovereignty when states negotiate agreements to deal with the global threat of climate change are consistent with the operation of the CCH concept.

Similarly, as the human rights of climate change displaced people are likely to be seriously impacted by the adverse effects of climate change, these potential violations of human rights are clearly matters of international concern. States have responsibilities under existing international human rights agreements to cooperate on the development of overarching human rights principles and detailed responses for assistance to be given to climate change displaced people.\(^{272}\)

The consequences of the state responsibilities to the international community through the common concern of humankind and the operation of the UNFCCC are that free riding states which refuse to ratify subsequent protocols to the UNFCCC could be liable for additional compensation to those countries that suffer damage due to the impacts of climate change. It may be possible to pass a General Assembly resolution to this effect. Even though the General Assembly resolution would not be legally binding, it may indicate the view of a large number of states and perhaps could be taken into account in legal actions.

Indeed, the prediction for the future is that the CCH will apply to the environment as a whole. Even though the wording of the CCH refers to ‘humankind’ and takes into account the interests of future generations of humans, it can be applied as a holistic concept to ‘life on the planet.’\(^{273}\) The CCH could be expanded to include the elements of nature as well as future generations of humankind. In the future, it may be necessary for natural elements of the Earth (such as the atmosphere) to be represented in order to obtain legal protection.\(^{274}\) This could be achieved by appointing a climate change commissioner who would act in the interests of legal protection for the atmosphere. The functions of this commissioner could include monitoring the levels of reduction of GHG emissions, recommending new multilateral agreements (for example, to cover climate change displaced people), acting as a

\(^{271}\) McAdam, above n 190, 95.

\(^{272}\) Ibid 269.

\(^{273}\) Introduction to the Proceedings of the Meeting, above n 26, 18.

\(^{274}\) Christopher Stone, ‘Defending the Global Commons’ in Philippe Sands (ed), Greening International Law (Earthscan Publications Ltd, 1993) 34, 40.
representative for the atmosphere in environmental disputes and instigating legal or diplomatic action on behalf of the atmosphere in appropriate situations.\textsuperscript{275}

\textbf{POSTSCRIPT}

This article was written prior to the conclusion of negotiations at COP21. These discussions were successful because they resulted in the conclusion of the \textit{Paris Agreement} which will form a legally binding agreement if ratified by 55 states accounting for at least 55\% percent of total world-wide GHG emissions.\textsuperscript{276} The \textit{Paris Agreement} confirms the application of the CCH to the threat of climate change in the preamble. The links between the CCH and human rights and equity are also apparent from the wording of this agreement. According to the preamble of the \textit{Paris Agreement}, the parties acknowledge:

\begin{quote}
that climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity.\textsuperscript{277}
\end{quote}

The commitments to take mitigation and adaptation action are undertaken by all parties to this agreement which is indicative of the operation of the CCH concept as all countries are taking responsibility for climate change action. Further, the action undertaken will be reviewed through a global stocktake to assess ‘collective progress towards achieving the purpose’ of the \textit{Paris Agreement}.\textsuperscript{278} The role of equity and common but differentiated responsibilities continue to apply and different national circumstances will be taken into account when the \textit{Paris Agreement} is implemented.\textsuperscript{279} An overview of the \textit{Paris Agreement} indicates that the CCH continues to operate as a foundation for the operation of an environmental regime to protect the atmosphere.

\begin{footnotes}
\textsuperscript{275} Ibid 39-41. Stone discusses the possibility of a representative on behalf of the oceans. These comments could also be applied to the atmosphere.
\textsuperscript{278} Ibid art 14.
\textsuperscript{279} Ibid art 2.
\end{footnotes}