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SPECIAL CONFERENCE ISSUE: NEW THINKING ON SUSTAINABILITY

THIS ISSUE INCLUDES CONTRIBUTIONS BY

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Peter D Burdon	Nathan Ross
Joel Colón-Ríos	Greg Severinsen
Benjamin F Gussen	Linda Sheehan
Catherine J Iorns Magallanes	Gerald Torres
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TE WHARE WĀNANGA O TE ŪPOKO O TE IKA A MĀUI

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SETTING THE SCENE FOR THE "NEW THINKING ON SUSTAINABILITY" CONFERENCE

*Sir Geoffrey Palmer QC**

Opening Address to the "New Thinking on Sustainability" conference held at Victoria University of Wellington in February 2014.

I am delighted that Victoria University of Wellington Centre for Public Law and the German Australian Pacific Lawyers Association have organised a conference revolving around new thinking on sustainability. Such thinking is vitally needed.

It may be worthwhile to trace from whence we have come on the sustainability issue and how well we are doing in implementing it. Clearly, the planet faces serious environmental problems. Many of these cannot be solved at the national level. Neither, it appears, can they be solved at the international level, as matters stand.¹

While I don't want to be alarmist, I do want to suggest that the situation is serious.

At an international level, concern with the environment is relatively recent. New Zealand did not have a Minister for the Environment until 1972 and a proper Ministry to advise upon it until 1986.

In pre-industrial New England, Henry Thoreau retreated for several years to a one-roomed hut on Walden Pond to discover the essential facts of life – observing the changing seasons, the weather, plant growth, trees, the behaviour of animals and the life in the Pond. His book *Walden; or, Life in the Woods*, first published in 1854 was both a study of the qualities of nature and a contemplation of its wonders.²

* Distinguished Fellow, Faculty of Law and New Zealand Centre for Public Law, Victoria University of Wellington; Global Affiliated Professor of Law, University of Iowa; Minister for the Environment 1987–1990.

1 For more material on the global environmental problems see Jonathan C Carlson, Geoffrey Palmer and Burns H Weston *International Environmental Law and World Order* (3rd ed, West, St Paul, 2012) at 283–388.

2 Henry David Thoreau *Walden; or, Life in the Woods* (Ticknor and Fields, Boston, 1854).

I was always myself struck when teaching international environmental law in the United States with Aldo Leopold's *A Sand County Almanac*, first published in 1949, which stressed the fact that "land, then, is not merely soil; it is a fountain of energy flowing through soils, plants and animals", that deserves to be treated with respect and care.³ In 1962 Rachel Carson authored *Silent Spring*, which changed public consciousness about the environment and the impact of humans upon it. Pesticides when introduced to the land do not simply disappear. They leach into the ground water, blow in the wind and poison things other than those at which they were aimed.

The first Earth Day occurred in 1970. Since then the natural environment has been noisily rediscovered. I suggest that the environment, whether local or global, must be understood holistically. Many of the problems are truly global and most of their cures, if there are any, must be applied and administered globally as well.

The list of problems is long: air pollution (including acid rain), bio-diversity loss, chemical pollution, climate change, coral reef degradation and loss, deforestation, desertification and erosion, disease vector spreads and viral pandemics, depletion of the ozone layer, fresh water pollution, nuclear war and war generally, ocean pollution, over fishing, ozone layer depletion, population growth and, terrorism.

The Stockholm Declaration of the United Nations Conference on the Human Environment in 1972 proclaimed a number of important principles relating to the environment.⁴ The first part of principle 1 was seminal:⁵

Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and wellbeing, and he bears a solemn responsibility to protect and improve the environment for present and future generations.

Significant developments began to happen around the world after that Conference.

The United Nations General Assembly adopted the World Charter for Nature in 1982 in the awareness that "mankind is part of nature and life depends on the uninterrupted functioning of natural systems which ensure the supply of energy and nutrients".⁶ Nature was to be respected and not impaired.

3 Aldo Leopold "The Land Ethic, From *A Sand County Almanac*" in Stephen M Wheeler and Timothy Beatley (eds) *Sustainable Urban Development Reader* (Routledge, New York, 2014).

4 "Declaration of the United Nations Conference on the Human Environment" In *Report of the United Nations Conference on the Human Environment A/CONF48/14Rev1* at 3 (1973), (1972) 11 ILM 1416.

5 At 4.

6 *World Charter for Nature* GA Res 37/7, A/Res/37/7 (1982), (1983) 22 ILM 455.

The World Commission on Environment and Development set out principles for environmental protection and sustainable development. The Commission's report issued in 1987, known as the Brundtland Report after its Chair, Norwegian Prime Minister Gro Harlem Brundtland. That report put sustainable development into the international mainstream. The Brundtland Report defined sustainable development as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs".⁷ It contained two key concepts; the concept of needs, and the idea of limitations. Rather than viewing "development" and "environment" as competing values, one to be sacrificed to the other, the Brundtland Report approach the two as inseparable – needs could only be met within the limitations in the environment.

Serious issues exist as to whether this formulation can be regarded as adequate, given the practical problems involved in its implementation. In particular, the political problems tend to revolve around one or the other: the idea that both the environment and development can be accommodated within a single paradigm may be contradictory.

Nevertheless, the Brundtland Report formed the foundation for the Earth Summit held in Rio de Janeiro in 1992. Principle 4 of the Rio Declaration declared that:⁸

In order to achieve sustainable development, environmental protections now constitute an integral part of the development process and cannot be considered in isolation from it.

The core idea was that development must take place within the capacity of the environment and the eco-systems that support it. I was fortunate enough to attend the Conference in Rio de Janeiro in 1992. It was particularly interesting to me because from 1987 and 1990 I was New Zealand's Minister for the Environment. That was the time the Resource Management Act 1991 was developed. The Bill was introduced into the Parliament and advanced. A massive programme of public consultation preceded it. The Act completed its parliamentary passage in the time of my successor in office, the Honourable Simon Upton. He invited me to join the New Zealand delegation to Rio. The Resource Management Act attempted to implement into New Zealand law the concept of sustainable development developed by the Brundtland report. A massive Act containing much process, the Resource Management Act is driven by Part 2, the purpose and principles. The purpose of the Act is to promote "the sustainable management of natural and physical resources".

7 *Report of the World Commission on Environment and Development: Our Common Future* A/42/427 (1987) at ch 2, [1].

8 *Rio Declaration on Environment and Development* A/CONF151/26 vol I (1992), (1992) 31 ILM 874 adopted by the United Nations Conference on Environment and Development at Rio de Janeiro, 13 June 1992.

Despite the optimism that was generated by Rio, I wrote an article published in 1992 in the Washington Law Quarterly entitled "The Earth Summit: What went Wrong at Rio?" Here is the judgment I made then:⁹

Twenty years after Stockholm [the first big international environmental conference], we are deeper in the mire and no closer to getting out. The biggest diplomatic gathering in the history of the world, which more world leaders attended than any international conference before, did not summon up the collective political resolve necessary to deal with the global environmental challenge. Progress was, simply, insufficient, due to a general failure of political will.

Rio produced too little, too late, certainly, Rio had the effect of raising peoples' awareness of the global environmental issues in a way about which we should be optimistic and hopeful. Changing attitudes in education are vitally important in this field. We have had plenty of rhetoric – the time for rhetoric is past. The time for binding international instruments that actually produce change has arrived.^w

Rio conjures up warm visions of exotic romance at Copa Cabana and Ipanema. The occasion was rich in symbolism; everyone wanted something to happen. Perhaps it was a start. But how many new dawns must be endured before real substantive progress is achieved; there were insufficient accomplishments at Rio to make us confident about the future of the global environment.

I suggest that pessimistic as that judgment was, with the wisdom of hindsight it was correct. Indeed, things are worse now than they were then. The Earth Charter was adopted by the Earth Charter Commission in 2000.¹⁰ The Commission thought we were at a critical moment in the earth's history in 2000. What would they think now?

The Millennium Declaration that was unanimously adopted in 2000 included "respect for the environment" and required changes in patterns of production and consumption.¹¹ It contained strong statements about the environment and provided hope for the future of the planet. The Johannesburg Declaration on Sustainable Development in 2002 outlined the challenges well enough and reiterated the commitment "for the achievement of the common goal of sustainable development".¹² But the Declaration lacked specificity and one senses reading it now that ground was being lost even then and the concentration was upon development at the expense of the environment. The environmental language was weak.

9 Geoffrey Palmer "The Earth Summit: What went Wrong at Rio?" (1992) 70 Washington University Law Quarterly 1005 at 1028.

10 Earth Charter Commission *The Earth Charter* (2000).

11 *United Nations Millennium Declaration* GA Res 55/2, A/55/2 (2000).

12 *Johannesburg Declaration on Sustainable Development* A/CONF199/20 (2002) at 1.

The Rio+20 Summit held in Rio in 2012 almost collapsed. Although rescued from that fate, the text that emerged was vague, unambitious and disappointing.¹³ The environment was clearly on the losing side, now that economic recession had set in. This long international retreat from an idea that has merit but that has yet to be successfully implemented seems unfortunate to say the least. The international community now has retreated from the position it adopted at Rio in 1992. As I have said it was clear at that time the 1992 commitments would not be enough.

There are of course many different interpretations and positions within the literature, both environmental and economic, on what is required in policy terms to achieve sustainable development. These positions range from very weak sustainability to weak sustainability and strong sustainability and finally very strong sustainability. The bottom line of sustainability, according to those who have studied it most closely, teaches that profound changes will be needed if we are to sustain the natural and human communities.

We will need big changes in public policy and big changes in individual and social behaviour. These are likely to be politically unpopular and it is understandable that politicians, who face relatively short electoral cycles, will not want to face up to them. The global community seems to lack the political will and determination to tackle many of the problems that confront us and solve them.

We have been wrestling with climate change since the threats were clear in the late 1980s and we have made precious little progress. The last 20 years since Rio have by and large been wasted and it is hard to avoid a growing sense of pessimism. The outlook for our grandchildren appears to be bleak. And the question has to be asked whether the current generation has failed future generations.

It is doubtful that the international legal order is fit for purpose when it comes to dealing with the global environmental challenge. The incubus of outdated ideas about state sovereignty too often prevents progressive and necessary outcomes in a multitude of international environmental negotiations. The cumbersome and largely fruitless negotiations that have been going on for many years over climate change illustrates the problem.

Humankind's destruction and defilement of the natural environment is seriously endangering the continuation of life on this planet. The failure is one of rational ecological governance. When it comes to environmental issues the market fails to capture many of the values and contributions that are at play. The externalisation of environmental and social costs seems to be inevitable in an atmosphere where governments seek endless economic growth. Elementary economics suggests that the polluter should pay so that costs imposed by development are not externalised to the public. But how often does that happen?

Battalions of scientists and economists with their splendid but worrying diversity of views are required to analyse the right questions; but the making of decisions to rectify the problems is required

13 *The Future We Want* GA Res 66/288, A/Res/66/288 (2013).

as well. If politics is the art of the possible then the global environment seems to be testing us beyond the collective means at our disposal. The current proposals to reform the Resource Management Act 1991 amount to a retreat from sustainable development as the touchstone for environmental law in New Zealand.

It is demonstrable that intensification of agriculture, particularly dairy farming in New Zealand has adversely affected many waterways. The idea of weakening the environmental protections that are contained in Part 2 of the Resource Management Act seems a giant step backwards.¹⁴ The hierarchy of values is destroyed. The changes proposed, for which support is not yet available within the Parliament, will reduce the relative importance placed on environmental protection principles. The proposals have been announced publicly in considerable detail.¹⁵ The changes will create and increase the relative importance placed on development principles, they will limit the outstanding natural landscapes that receive protection under the Act, and they will significantly reduce the level of protection given to the habitats of trout and salmon. The changes delete any reference to the "ethics of stewardship", "amenity values", the "quality of the environment" and "the intrinsic value of ecosystems".¹⁶ The changes emphasise the benefits to be gained from the use and development of resources without considering associated costs. It emphasises the benefits of urban development and infrastructure and it prioritises the rights of land owners over the rights of the public to enjoy a clean natural environment. Couple these changes with proposed changes to the water law which threatens to lower water quality in some areas when it has deteriorated markedly in the 22 years we have had the Resource Management Act. I conclude there are concerns indeed with what is going on in New Zealand.

The aim appears to be to purchase economic growth at the expense of the environment. New Zealand certainly has not succeeded so far in decoupling environmental pressures from economic growth and the central purpose of sustainable management in the Act has not been fulfilled at the very time when attempts are being made to weaken the legal tests. The changes proposed to ss 6 and 7 of the Act are much more far reaching than their proponents are prepared to admit. The proposals for changes to freshwater management need to be seen in the context of the government's clear commitment to increasing New Zealand's agricultural outputs through irrigation and intensification of agriculture. That is made abundantly clear in a report from the Ministry of Business Innovation and

14 For a detailed legal analysis of the proposed changes including the changes to freshwater management reforms see Geoffrey Palmer "Protecting New Zealand's Environment: An Analysis of the Government's proposed freshwater management and Resource Management Act 1991 reforms" (September 2013) Fish and Game <www.fishandgame.org.nz>.

15 Hon Amy Adams, Minister for the Environment "Resource Management Law Reform" (speech given to the National Party Conference, 10 August 2013) <www.national.org.nz>. They were, however, never introduced to Parliament since the numbers necessary could not be secured.

16 Resource Management Act 1991, s 7.

Employment.¹⁷ It is plain that the aims articulated in the published material cannot be contained within the paradigm of sustainability. The report of the Parliamentary Commissioner for the Environment has made that glaringly obvious.¹⁸

So the topics that you are exploring are important. We need new ways of looking at these issues because the old ways of looking at them have not solved recognised problems. We have reached the limits of leadership and innovation under present paradigms.

We need new mechanisms of ecological governance that aim to improve the management of natural systems—it will need to be transformative change.¹⁹ The international work on defining human rights to include the right to a clean and healthy environment is an idea that has become widely distributed around the world in a relatively short time.²⁰

Certainly one remedy for our environmental discontents may be to constitutionalise the issue and make environmental protection part of New Zealand's written constitution. I have advocated that in my recently published memoir.²¹ Such provisions do appear in the constitutions of other countries and South Africa is a leading example.

The link between human rights and the environment is palpable and clear. It is likely to become more obvious and more intense in the years ahead. I wish the conference well.

17 See Ministry of Business Innovation and Employment *Business Growth Agenda: Building Natural Resources – Progress Report* (2012).

18 Parliamentary Commissioner for the Environment *Water Quality in New Zealand: Land Use and Nutrient Pollution* (November 2013).

19 Burns H Weston and David Bollier *Green Governance: Ecological Survival, Human rights, and the Law of the Commons* (Cambridge University Press, New York, 2013).

20 David R Boyd *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights and the Environment* (UBC Press, Vancouver, 2012).

21 Geoffrey Palmer *Reform: A Memoir* (Victoria University Press, Wellington, 2013) at 727.

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