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Perspective

Is World Law an Emerging Reality? Environmental Law in a Transnational World

Lynton K. Caldwell*

Today the environment is a subject of broad public concern, but it is nowhere near the top of popular priorities as indicated by many opinion polls. Nevertheless, before the end of the 21st century, the environment may well be the preeminent public concern. If forces now at work continue unchecked, the effect of human behavior on the sustainability of life on Earth will become the primary concern for all nations and will necessarily broaden the concept of international law. A trans-state universalizing of certain public law principles is occurring in response to the emergence of trends and events impacting progressively upon all people everywhere. Perceived necessity is driving a reformulation of international law that is being legitimized in legal theory.

Globalization of circumstances and issues is a phenomenon of our time that is changing the context of international relations and law.¹ Assumptions regarding the autonomy of national law and sovereignty are beginning to change *in fact*, even though traditional doctrines persist in political and judicial rhetoric. There is a growing mismatch between the conventional law of nations and the need for agreements binding all nations and peoples.

The principal and pervasive forces for change, impinging on the national state system and hence on international law and relations today, ultimately are "environmental," broadly construed. To appreciate the impact and intransigence of environmental forces, it is necessary to rec-

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1. See Alfred C. Aman Jr., *The Globalizing State: A Future Oriented Perspective on the Public/Private Distinction, Federalism and Democracy*, 31 VAND. J. TRANSNAT'L L. 769 (1998). See also Jonathan I. Charney, *Universal International Law*, 87 AM. J. INT'L L. 529 (1993).

ognize the interconnecting, interacting elements that make up nature's Earth and man's World, comprising a total system: in our perspective the human environment. As used here, the word "Earth" refers to the geophysical planet, its atmospheric and electromagnetic outer space environment, and its biosphere. The expression "World" is a cultural artifact of human creation and perception. The Earth existed before the World, and will doubtless abide beyond the demise of the human species, perhaps beyond life itself—resembling the planet Mars. Significant changes in the total system will inevitably cause changes in its parts and, of course, vice-versa. The projected effects of global climate change and increased ultraviolet radiation are obvious examples of these profound changes.

Perception of this Earth-World as a multilinear, multi-loop interactive feedback system has been growing, even though relatively few people see it this way. Governments, international organizations, and non-governmental action groups typically focus on particular issues and developments, with little regard to their broader contexts. Nevertheless, through a significantly anthropogenic and additive process, specific events cumulate to change the environment of the whole. This process is progressively transforming the planet and the *aeconomia* of human kind in what the Council of the Club of Rome has termed "The First Global Revolution."²

I. A GLOBALIZING WORLD OF NATIONS

Law is shaped by both the persistence of custom and the perception of change. Changing perceptions may lead to changes in assumptions, laws, and institutions. But fixed perceptions resist change, adhering to precedent, and when institutionalized, as in law, may create anomalies between legal doctrine and contradictory reality. Law is inherently conservative; its continuity and predictability is presumed to protect the stability of the society it serves. Rapid or radical change risks societal disruption, especially when opinion is divided over the necessity or direction of change and its effect upon established interests and expectations. But when legal doctrines and procedures are overtaken by unprecedented developments, political and legal institutions may be stressed in a dichotomy between adhering to conventional arrangements and adapting to new and evolving circumstances. Adaptation that is too

2. See ALEXANDER KING & BERTRAND SCHNEIDER, THE FIRST GLOBAL REVOLUTION: A REPORT BY THE COUNCIL OF THE CLUB OF ROME (1991).

little and too late may delegitimize convention and open the way to radical restructuring of laws and institutions.

At the end of the 20th century, the world is in unprecedented transition. The adaptability of present institutions to emerging challenges is being widely questioned. In a broadly encompassing context, these areas of challenge—social, ethical, economic, and technological—have environmental implications. However, this assertion is credible only if the *environment* is understood in its holistic dimensions—comprising complex dynamic interrelationships from cosmic to microcosmic, extending beyond ordinary perceived human experience, yet nevertheless interacting with humanity, and thus shaping the parameters of life on Earth.

On Christmas Eve 1968, humans saw, for the first time, the image of the planet Earth in outer space. Through the invisible electromagnetic medium, the Apollo VIII astronauts transmitted a picture of the “Blue Planet” that in 1972 became the symbol of the United Nations Conference on the Human Environment, inspiring its logo “Only One Earth.”³ A visible image now confirmed mathematical postulates. The Earth-island in space would henceforth occupy a conceptual and emotional presence in human affairs. But the full implications of a finite Earth-island have penetrated the human mind slowly and unevenly. New revelations, however dramatic, do not readily erase centuries-old assumptions and behaviors.

The state of the world today invites a question basic to the human future: by what set of consensual rules for collective human behavior, interacting on a finite planet, can this World be governed to safeguard its stability and continuity? This question points to the future of international law: the law of nations. Must nations now accept the implications of a finite Earth and the concept of law binding all inhabitants of Earth—a body of law not only *among* nations, as in conventional international law—but law directly applicable *within* all nations? This eventuality may be unrealistic, but it may be equally unrealistic to believe that a populous world, increasingly interconnected by interests and technologies, can continue to function effectively without certain basic shared responsibilities and obligations. One need not forecast the future in order to conjecture the probability of future changes in political and hence legal relationships among the peoples of the World.

The Apollo VIII image of the Earth confirmed perceptions and concepts of the global environment that had developed over preceding centuries. For some people, this vision of the fragile, finite Earth-island

3. See BARBARA WARD & RENÉ. DUBOS, ONLY ONE EARTH: THE CARE AND MAINTENANCE OF A SMALL PLANET (1972).

in the indifferent immensity of the cosmos was a moving experience—to many, a revelation. It also complemented emerging trends in modern society that are now accelerating. Among these developments, the following six are collectively advancing the globalization of the human environment, thereby forcing the evolution of international environmental policy and law in the years ahead: (1) science and its application in technology; (2) dissemination of information; (3) popular organized action in public affairs; (4) emergence of international environmental organizations; (5) global economic growth; and (6) proliferation of people.

First and fundamental among these is the growth of scientific knowledge and its application through technology. This development has been underway at least since the 17th Century and has been enlarged and elaborated by discoveries regarding the Earth, the cosmos, and the evolution of life. Though knowledge regarding the conditions of life on Earth has greatly increased, humans have been less successful in explaining themselves to themselves. Theories abound, but the human persona is still imperfectly understood in relation to human behavior. Deficiencies in our understanding of human behavior account for much of the ineffectiveness of our laws.

Nevertheless, scientific knowledge and its dissemination have had a defining effect upon many aspects of law and governance. Enumeration of these influences would be redundant, as they have affected almost every aspect of modern life. Science demonstrates the dynamic interconnectedness of Earth, biosphere and sociosphere. It also confirms the limits to life and Earth within which mankind's interests, risks, and futures are encompassed.

Second among these developments, and essential to rapid and widespread dissemination of expanding knowledge, are innovations in communication and transportation. Word of mouth and the typeset page are slow purveyors of information in a world dominated by electronic technology. Though not completely replaced, traditional forms of communication have been significantly displaced; they have been both facilitated and superseded by telecommunication in its multiple forms, by rapid air travel, and by organizations whose purposes include the dissemination of news. Without present technologies of communication and transportation, large world conferences would be infrequent, and like the science and conservation congresses of the 19th Century, would be confined largely to expert participants from scientifically advanced nations. Yet accelerated mobility and communicative celerity are not without risks. A surfeit of information may confuse its evaluation.

Today, information concerning the ozone layer, global climate change, population dynamics, species extinction, limits to growth, finite energy sources, and the incidence of disease is accessible almost instan-

taneously wherever the requisite technology is available. Moreover, that technology is rapidly spreading. From remote-sensing satellites to an unprecedented array of technologies for detecting, describing, measuring, monitoring, and assessing the dynamics of Earth and cosmos, humanity has at its disposal exponentially more information about its environment than was available at the beginning of the 20th century. How it responds to this knowledge may be the determining factor in shaping the course of the 21st Century.

The third development has been an unprecedented expansion of popular participation in public and international affairs. This assertion should, however, be qualified by subject and forum. For example, scientific public opinion polling might be regarded in some measure as an enlargement of the scope of popular participation. More significance should be attached to the increase in the formation, activities, and scope of organized public interest groups, notably on matters relating to environmental policy. Popular participation in environmental policymaking in the United States has been facilitated by the Freedom of Information Act, the National Environmental Policy Act, and by numerous special enactments relating to the public's right-to-know, the environment, natural resources, and public health.

Increased popular participation in national and transnational affairs has a particular significance for environmental law and policy. Prior to the latter half of the 20th century, and notably before the 1972 United Nations Conference on the Human Environment, participation in inter-governmental congresses and conferences was largely restricted to officially-accredited diplomats and experts. Before the era of mass air travel, factors of cost, time, and diplomatic protocol precluded popular attendance at major international conferences. Before the advent of radio and television and the subsequent growth of public interest in international events, coverage of foreign affairs was largely restricted to newspapers employing foreign correspondents. Today, the audience has broadened substantially, and participants are better informed about international issues.

Incentives and opportunity to participate in public decisions affecting well-being and security have thus grown with knowledge and its dissemination. Cause-effect relationships are better understood; for example, disasters transcending national boundaries arouse popular protest when the causes are seen as preventable.⁴ Popular pressure forces governments to respond in ways that formerly would have been considered

4. See, e.g., CHARLES PERROW, *NORMAL ACCIDENTS: LIVING WITH HIGH RISK TECHNOLOGIES* (1984); BARRY A. TURNER, *MAN-MADE DISASTERS* (1978); GILBERT WHITE, *NATURAL DISASTERS: LOCAL, NATIONAL, AND GLOBAL* (1974).

intrusions into the internal affairs of other states (e.g., reaction to trans-boundary air pollution). Popular participation has become more effective as it has become increasingly organized and facilitated through the media of communication and transportation.

Fourth, reinforcing and occurring simultaneously with the aforementioned developments, have been the formation and extension of international organizations concerned specifically with environmental affairs, broadly inclusive in substance and worldwide in scope. Among the various organizations with environmental concerns, two general classes may be distinguished by legal status: one, intergovernmental; the other, nongovernmental. In addition to these, there are hybrid organizations of quasi-official character.

The intergovernmental organizations that are concerned with environmental affairs are largely associated with the United Nations: the Specialized Agencies; the Food and Agriculture Organization; the World Health Organization; the World Meteorological Organization; the United Nations Educational, Scientific and Cultural Organization; the World Bank; the United Nations Environment Programme; the Commission on Sustainable Development; and bodies subsidiary to one or more of these agencies, such as the Global Environmental Facility. Regional intergovernmental organizations such as the Organisation for Economic Cooperation and Development, the Organization of American States, the Organization of African Unity, and the European Union also have environmental agencies and/or agendas.

A special category of intergovernmental regional organizations of international environmental legal significance are river basin authorities and commissions for international rivers, lakes, and seas. These bodies have multiple functions, but environmental affairs have become prominent for most of them.⁵ Established by treaty, these bodies are regionally bounded, but collectively they may be regarded as having global significance. Collectively, these regional rivers, lakes, and seas are part of the Earth's hydrosphere, ultimately joining the globe-encircling ocean. Environmental agreements affecting international straits have gained importance as maritime commerce has increased.⁶

The second category of environmental or environmentally relevant organizations are nongovernmental (NGOs). I am distinguishing these

5. For a summary description of them, see LYNTON KEITH CALDWELL, *INTERNATIONAL ENVIRONMENTAL POLICY: FROM THE TWENTIETH TO THE TWENTY-FIRST CENTURY* (3d ed. 1996) (written with the assistance of Paul Stanley Weiland).

6. Straits have long been subjects of international law. For information most relevant to our purposes here, see the *multivolume INTERNATIONAL STRAITS OF THE WORLD SERIES* (Gerard J. Mangone ed., 1978).

from nongovernmental "for profit" organizations (e.g., multinational business corporations) whose actions have significant environmental impacts as well. Environmental NGOs have multiplied in recent years, and many are frequent adversaries of governments in matters of alleged environmental dereliction. These bodies are characteristically national or regional in origin and status and undertake advocacy, monitoring, and reporting on environmental affairs.⁷ Environmental NGOs have now been formed in all major countries and are beginning to appear in some that are described as "less developed." Some, such as Greenpeace and Friends of the Earth, have expanded from their national bases to worldwide membership. Some international NGOs have specialized scopes and agendas; for example, the Cousteau Society focuses on the health of the oceans, the World Wildlife Fund for Nature on protecting biodiversity.

With the growth of well-informed, active, and influential nonofficial organizations concerned with public and international affairs, the borderline between governmental and nongovernmental organizations is often blurred. Two organizations with quasi-official yet legally nongovernmental character are the World Conservation Union (International Union for the Conservation of Nature and Natural Resources) and the International Council of Scientific Unions. It has never been and is not necessary today to have official political status to influence the initiation and implementation of international environmental law and policy.

Fifth, economic activities, broadly defined, have always affected the environment in diverse and often indirect ways. Historically, economic activities and their environmental effects initially appeared to be largely localized. But many such activities, deforestation and overgrazing in particular, had geographically extended consequences. The siltation of rivers and harbors, the spread of malaria, soil degradation, and desertification all followed from environmentally destructive practices in agriculture, grazing, irrigation, timbering, and mining. In turn, these processes have led to dislocation of economic activities and demographics (e.g., migration of peoples). In the modern era, increased demand on energy resources, the growth of manufacturing, and the need for access to natural materials and to markets stimulated competition among nations. The uneven distribution of many critical resources induced doctrines and practices in the political-economics of mercantilism, international capitalism, and geopolitics. International competition often led to armed conflict over access to materials and markets, but also to the practical necessity of minimal rules of international behavior ex-

7. See THOMAS PRINCEN & MATHIAS FINGER, *ENVIRONMENTAL NGOS IN WORLD POLITICS: LINKING THE LOCAL AND THE GLOBAL* (1994).

pressed in the law of nations—notably through the law of the sea and the law of war.

The origins of modern international law can be found in national responses to needs and interests in trade, commerce and access to natural resources, implemented through treaties and mediated among competing commercial powers, chiefly through maritime law. A consequence of the worldwide expansion of European commerce and resource development in the 19th century was the extension of West European international law throughout the World. European hegemony served the political-economy of mercantilism and propagated a worldwide recognition of international law.⁸ Where state-chartered commercial ventures and exploitation of natural resources were threatened by indigenous disorder or extortion by native rulers, military intervention was invoked, leading thereafter to various forms of political control. The control of military force remains the most obdurate national resistance to the displacement of sovereignty by international law.

A collateral and presently minor result of international economic investment in less-developed countries with unstable governments has been the emergence of private military companies whose actions under contract with governments are on *behalf of* but not legally *of* governments. These may be regarded as anomalies under national and international law. Private corporate security forces, such as the former South Africa-based Executive Outcomes, have been employed to protect natural resource development enterprises (notably gold and diamond mines) and prevent theft of livestock.⁹ However, if sizable areas of threatened natural habitat—tropical rain forests for example—are placed under international protection in the future, the use of security forces independent of the jurisdiction of the host government might be necessary. National laws alone have often proved ineffective in protecting endangered areas, but extragovernmental control, enlisting local support but relying also on nongovernmental international security forces for enforcement, could have implications for national sovereignty and international law.

Prominent today in issues between economics and environment are the actions of multinational corporations and intergovernmental organizations concerned with international trade, investment, and develop-

8. See ARTHUR NUSSBAUM, *A CONCISE HISTORY OF THE LAW OF NATIONS* (rev. ed. 1958).

9. See DAVID SHEARER, *PRIVATE ARMIES AND MILITARY INTERVENTION* (1998). An Associated Press dispatch from Capetown South Africa on December 10, 1998 announced the disbanding of Executive Outcomes. Other private military companies continue however. See *Company Will Make War No More for Africans*, N.Y. TIMES, Dec. 11, 1998.

ment. Among the latter are the World Bank and its associates, the World Trade Organization (WTO), the United Nations Conference on Trade and Development, and the United Nations Industrial Development Organization. A symbiotic relationship has developed between worldwide banking and investing and intergovernmental financial agencies such as the World Bank, the International Monetary Fund, and the governmental and private financial institutions of the United States, West European countries, and Japan. It has been alleged that international economic agreements such as those adopted by the WTO as well as those codified in the North American Free Trade Agreement and in the proposed Multilateral Agreement on Investment (MAI) could constrain national environmental protection efforts. How the MAI would affect existing or future environmental or natural resources protection measures that would diminish returns on international investments raises a major question for international law.¹⁰ The economic, technological, and communications capabilities of the large multinational corporations exceed those of many of the governments in countries in which such corporate entities are major economic actors. Opinions regarding the role and responsibility of international business enterprise and trade with respect to environment and natural resources issues are mixed, and valid generalizations require informed caution. However, it seems highly probable that multinational corporations will be major players in future global environmental affairs, and that their activities will induce responsive provisions in international law.

A sixth development, the unprecedented explosion of human populations in the 20th century, may have a generally unanticipated effect upon international law. The pressure of human activity on the environment has grown with the almost exponential population growth and the proliferation of technology. Although there are various projections of population stabilization in the 21st century, there is no certainty as to when or if it may occur, at what rate, or to factors of cause and consequence. Relevant factors include the differences in conditions among human populations, the sustainable level of the global economy, and the probable effects of population numbers and distribution upon the quality of life and integrity of the biosphere.

Conventional responses to allegations of "overpopulation" have been to deny its reality or attribute associated impoverishment, environmental degradation, and ecological disaster to inequitable distribu-

10. See, e.g., *Trade and the Environment*, COLO. J. INT'L ENVTL. L. & POL'Y 1997 Y.B. 48 (1998); William Crane, Note, *Corporations Swallowing Nations: The OECD and the Multilateral Agreement on Investment*, 9 COLO. J. INT'L ENVTL. L. & POL'Y 429 (1998); RICHARD L. SKLAR, *POSTIMPERIALISM: CONCEPTS AND IMPLICATIONS* (1997).

tion of wealth and opportunity. Many societies have sought relief through the export of surplus population, exemplified in dramatic fiction in the novel *THE CAMP OF THE SAINTS* by Jean Raspail (1975). Under such a scenario, China could reduce the pressures of its more than 1 billion people by exporting half a billion to North America, more than doubling the population of this comparatively "underpopulated" continent or, perhaps more conveniently, China might colonize Siberia. Many governments have either encouraged population growth or have done nothing to moderate it even when, as in some countries, a point of socio-ecological bankruptcy appears to have been reached as, for example, in Haiti, Somalia, and Bangladesh. Population pressure has been and continues to be a major agent of attrition in the natural environment and an inducement to crime, military aggression, and massive migrations of impoverished peoples.

Different nations understand population differently. Considerations of race, religion, politics, ethics, ethnicity, and economic development are factors which obscure a globally accepted perception of overpopulation. If nations were prevented from "exporting" their surplus populations, they might be moved to adopt more containable and sustainable population policies. Presently, however, myopic, misplaced, and often-politicized humanitarian sentiments obstruct this alternative. Long-term consequences are brushed aside by contemporary compassion and lowered labor costs. At some future point, however, international tolerance and accommodation for uncontrolled human reproduction may run out. International law may be invoked to legitimize international control over mass movements of people. Sanctions and incentives may be devised to persuade natal-prone nations to restrain their growth. In effect, a transnational unwritten law of reproductive restraint could potentially emerge. Its possibility should be acknowledged even though its probability is presently **doubtful**.

II. A WORLD LAW OF LIMITS

We have limited knowledge as to the infinity of the cosmos, but the Earth and the World are demonstrably not without end, despite human resistance to this conclusion. Life on Earth requires living within limits, and life in a spaceship is maintained only by simulation of the life-support conditions on Earth. The World is thus bounded by limits, some of which may be extensible; but transgression of the ultimate limits ends in defeat for transgressors.

Globalization of the World by technology and the economy is changing the circumstances in which the historic rules for international

behavior developed. Humanity has created a World in which many of its customary rules, both individual and collective, no longer lead to anticipated results. Rules of personal behavior may be observed tacitly by individuals, but rules governing interactions among individuals, groups, and nations are institutionalized in some form of law. Changes in the human situation on Earth are leading to changes in human expectations and permissible actions, and will almost certainly lead to adaptive changes in the scope, substance, structure, and sanctions of law. Amidst the present divisions of law, we may anticipate some redefinition or extension of legal principles pertaining to actions affecting the environment. Among these are human reproduction and settlement, natural resources exploitation, civil rights and property rights, and collective national responsibility for the environmental future. The eventual consequence of present global trends could be a correspondence among national laws governing those actions with transnational consequences. There would remain a *corpus juris* pertinent to particular national circumstances, but a World Law of principles for actions affecting the people of all nations could be advantageous in an integrated world economy in which traditional assumptions and behaviors are being modified by practical experience and mutual necessities.

Were there a compelling desire in developed countries to safeguard biodiversity and preserve tropical forests or other endangered ecosystems of global significance, a logical but unlikely alternative to undependable preservation by government would be outright nongovernmental or international purchase and policing. The cost would surely be less than the present costs of military expenditures. This action could be a bonanza for cash-poor so-called "developing countries," provided a stabilization of their populations occurs. Whether the implementation of the exchange of "growth" for economic-environmental sustainability would advance the socioeconomic welfare of the recipient nation or further enrich an already overaffluent political elite is uncertain. The Trusteeship Council of the United Nations might be restructured to administer environmental trust areas with the acquiescence of national governments under conventional international law.

III. ENVIRONMENTAL CRIMES

An emerging concern in transnational law in an interrelating world of limits is the willful destruction of environmental values or sustainability. Here the law *of nations* becomes a law *for nations*, notably in cases in which prevention rather than remediation is the only safeguard for health and environment. If the actions of a government threaten the

environmental integrity of its own or other states, or impair the life-support capability of the whole Earth, those actions, if found to be crimes perpetrated directly against the environment, may also be crimes against humanity. The discharge of crude oil into the Persian Gulf and the torching of oil wells in Kuwait by the government of Iraq under the dictatorship of Saddam Hussein have been widely regarded as criminal, as was the chemical defoliation of forests in Vietnam by American armed forces.¹¹ But should governments have a legal responsibility to restrain environmental destruction by uncomprehending people whose actions result in deforestation and destruction of biodiversity, or to refrain from deploying environmental hazards (e.g., explosive mines buried on land or submerged at sea as indiscriminate military strategies)?¹²

The principle that a nation should not permit actions on or from its territory that would harm its neighbors has long been established in international law. The *Trail Smelter Arbitration (U.S. v. Canada)* is a case in point.¹³ The arbitration was a long drawn-out process and ended with a compensatory award to the United States, American farmers having suffered the damage of transboundary air pollution. Today, transnational environmental impacts exceed the scope and hazard of *Trail Smelter*, and "after the fact" arbitration is unlikely to offer an acceptable remedy.

In defense of the environment, humans are the interlocutors; nature does not speak for itself, but the life-support systems of the natural environment are critical to human survival. In addition to crimes directly impacting nature, violence against people—such as scorched earth practices in war, as well as massive indiscriminate use of land mines and weapons of mass destruction—may be regarded as environmental crimes against humanity. A multilateral treaty to establish an international war crimes tribunal was signed in Rome in July, 1998 by 120 nations.¹⁴ The

11. See ENVIRONMENT AND NATURAL RESOURCES POLICY DIVISION, AMERICAN LAW DIVISION & SCIENCE POLICY RESEARCH DIVISION OF THE CONGRESSIONAL RESEARCH SERVICE, *THE ENVIRONMENTAL AFTERMATH OF THE GULF WAR: A REPORT PREPARED FOR THE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS, GULF POLLUTION TASK FORCE* (1992) (available from the US G.P.O); BARRY WEISBERG, *ECOCIDE IN INDOCHINA: THE ECOLOGY OF WAR* (1970); Mark Allen Gray, *The International Crime of Ecocide*, 26 CAL. W. INT'L L.J. 215 (1996).

12. See QUINCY WRIGHT, 2 *THEORIES OF STATE RESPONSIBILITY UNDER INTERNATIONAL LAW, A STUDY OF WAR*, app. § xxxii, 1416–24.

13. See generally *Trail Smelter Arbitration (U.S. v. Can.)*, 3 R.I.A.A. 1905 (1949).

14. See Final Act of the United Nations Diplomatic Conference of Pl on Establishment of an International Criminal Court, A/Conf.IB3/10, July 17, 1988. See also *Point of View: A Political and Moral Responsibility*, UN CHRON. NO. 3, 1998. A preparatory commission has been established to draft rules of procedure.

United States was one of seven in dissent,¹⁵ a position consistent with its previous opposition to environmental protection resolutions adopted by the UN General Assembly. Among the other six negative votes were such "environmentally sensitive" states as China, Libya, Iraq, Iran, and Sudan,¹⁶ unlikely adherents to a world order of public law.

IV. A WORLD LAW FOR ALL NATIONS?

The interactions of modern societies have affected the Earth and the World without regard to formal, systemic, or consensual arrangements for governance of those actions and their destabilizing consequences. Rules for interactions among peoples and nations have been adopted throughout the centuries, notably with respect to the conduct of commerce and war. The growth of scientific knowledge and of technology, extension of information and communication, and the globalization of trade and of numerous anthropogenic transnational environmental hazards have combined toward compelling a broadened interpretation of conventional international law. Albeit without general recognition, a common law for nations is in effect emerging. While the production and disposal of hazardous materials, indiscriminate planting of land mines, commerce in addictive drugs, manufacture and distribution of weapons of mass destruction, and crimes specifically directed against the environment have become issues of international political concern, they have not prompted effective action. There have, however, been calls for a common law of prevention for all nations and for a *de jure* modification of the doctrine of national sovereignty. The principle of obligations or norms *erga omnes* is becoming extensible to the acts of people as well as of governments. Prevention of adverse impacts of people on the global environment may become an obligation of governments. Even so, recognition of these obligations does not assure their observance in practice. In the long-run, coercion by nature through deprivation or disaster across national boundaries may be the impelling factor in creating change.

There are indications of a growing—although oblique—movement toward a more explicit code of international obligations expressed in legal principles declared by international conferences convened by the

15. Gwynne Dyer, *World Court Second Blow for U.S.*, TORONTO STAR, July 24, 1998, available in LEXIS, News Group File.

16. *See id.*

United Nations and its General Assembly.¹⁷ If there is sufficient world-wide consensus for establishing certain standards of conduct and justice for which all governments are accountable, there might emerge a definable law *for* nations, which might be called *World Law*, in distinction to the conventional law *of* nations. This distinction is not clear-cut in theory or in international politics; but experience, and the ramifications of harmful environmental events, are externalizing matters hitherto largely regarded as the internal affairs of states. Increasingly, people look to the international community for relief from abusive action by their own governments and from transnational environmental hazards.

Many transnational environmental issues are not commonly perceived as pertaining to human rights, yet many of them affect the circumstances of all life on Earth. Many involve quality-of-life consequences, recognized as environmental in origin, as cause-effect connections are discovered. Examples include the relationship of CFC aerosols to thinning of the stratospheric ozone layer, the increase of atmospheric CO₂ as it relates to global warming, and the impact of uncontrolled expanding economic development on the loss of biodiversity.

Although preventative measures for the transnational transmission of disease are not new (e.g., national quarantines), epidemiology and medical geography have revealed the environmental etiology of a growing number of hazards to health and well-being. Pandemic diseases hitherto isolated by geography and time are now rapidly transmittable to all parts of the globe. For example, viral diseases isolated in tropical rain forests may be "liberated" by irresponsible development to infect populations thousands of miles away in temperate zones. International treaties now cover transboundary air pollution, oceanic dumping of hazardous substances, and trade in endangered species. The ratified consent of a nation is no longer a requisite for holding it responsible for actions by its nationals or for its dereliction in matters demonstrably harmful to nations generally. Examples of legal and political efforts to establish national responsibility for environment-related activities with international consequences are abundant in the international drug trade. The less than effectual results of these efforts illustrate the difficulty of enforcing laws for the protection of health and the environment in the face of powerful economic and behavioral counterforces.

The interconnectedness of people and nations has now multiplied many times. No human society is immune to invasive forces from which it was once buffered by geographic separation, by limitations of envi-

17. Some of these principles are antecedent to becoming positive international world law. See *INTERNATIONAL SOFT LAW: COLLECTION OF RELEVANT INSTRUMENTS* (W.E. Burhemme ed., 1995).

ronmentally intrusive technology, and by once-limited means of transportation. Ecological and cultural migration and interaction have occurred throughout history, but the world has now experienced an exponential expansion of human population and their interactions, along with the transcontinental migration of numerous plants, animals and microorganisms. As conditions changed over the centuries, human societies adapted their arrangements for living together through changes in governance and in law. In various ways, these adaptations kept an uneven pace with changes in environmental circumstances: social, economic, geographic and ecological. Laws and administrative actions eventually caught up with changing conditions, but often only after behavioral interventions such as controversy and violence, and resignation to environmental impairment and loss. During the 20th century, change has accelerated without precedent, with humanity governed by institutions and laws that may lack responsive adaptability to the scope, substance, and implications of change in today's World.

The extent of the adaptability of modern society to the changing World environment—sociological, ecological, and legal—is yet to be discovered. Although there have been some notable successes in efforts to protect health and the environment, there are also indications of widespread frustration among informed people over the generally deteriorating conditions of the biosphere and the progressive loss of species of animals and plants. Tolerance in many nations is waning for “rogue governments” that degrade their own environments, destroy the future options of their people, and threaten the welfare of their neighbors and, at worst, of the world. In response to informed concern throughout the world, aroused by the organized communication of scientific findings, national commitments to international environmental protection responsibilities have been adopted *pro forma*. The General Assembly of the United Nations and the UN Conferences on the environment (Stockholm 1972; Rio de Janeiro, 1992) have become sources for initiating the universalization of environmental law. Nongovernmental transnational organizations have increasingly become quasi-official participants in UN deliberation.¹⁸

But the full form and extent of international legislative action is still undetermined. For example, it is not yet clear whether or how the jurisdiction of an international criminal court would extend to crimes against the environment or how those crimes would be defined. It is nearly certain, however, that destruction of any part of the planetary life-support system is incompatible with the welfare and even survival of the

18. See Jost Delbrück, *The Role of the United Nations in Dealing with Global Problems*, 4 IND. J. GLOBAL LEGAL STUD. 277 (1997).

World of the approaching 21st century. Standards of national conduct and acceptable methods of mutual coercion would be necessary attributes of world governance, *not* world government, through common or comparable legal principles enforceable as world law. Mutual coercion would be less necessary if mutual values and goals were universalized. The prospect for achieving this consensus is uncertain. We cannot foresee changes in the governance of human society that may be necessary to its future advancement and possibly to its survival. The choice of nations may be between world law for those actions that are global in consequences and the consequences for a humanity incapable of safeguarding its future prospects.

The concept of World Law is not yet conventional, but it is not new. In a 1993 law journal article, Professor Jost Delbrück ventured that "[i]n some respects, international law is changing into the internal law of a World Community."¹⁹ He conjectured that:

A growing consensus on the foundations of the binding force of international law, the broadening of international responsibility for the maintenance of international peace and security, the international protection of human rights and the environment, as well as the restriction of state sovereignty and the principle of non-intervention indicate the changes the international legal order is undergoing. Do these changes amount to a fundamental change of the nature of international law, that is, a transformation of international law as an inter-state order into a new World Law?

The answer would have to be positive if, as a rule, the changes indicated mean that state sovereignty has been reduced to a level where states would be subject to a comprehensive international legal order and enforcement authority, and sovereign discretion of action would constitute the exception in all cases where vital communal interests are at stake.²⁰

It is not unreasonable to surmise that the globalizing forces of scientific findings, of communications broadening foundations for policy-making, institutional adaptation, and the coercion of population pressure and environmental rebound will cumulatively result in a universalizing of certain behavioral responsibilities irrespective of national boundaries. Where appropriate, certain principles of conventional international law may remain in effect. But a new order of World Law *will* emerge in response to the exigencies of the 21st century.

19. Jost Delbrück, *A More Effective International Law or a New "World Law"? Some Aspects of the Development of International Law in a Changing International System*, 68 IND. L.J. 705, 724 (1993).

20. *Id.*

Although it would be premature to declare that world law is now recognized *de jure*, it has already received *de facto* status in multinational interventions in "sovereign states" whose rulers perpetuate crimes against humanity. The establishment of an international criminal court would be a large step toward the legitimization of certain principles of national responsibility and transnational law that overrides claims of national sovereignty. Beyond the court, however, a reliable legitimate means for enforcement would be required for institutionalizing World Laws.

Effective World Law requires general agreement on applicable principles and the will and means to enforce them. These requisites imply institutional provisions for action built into the world order of nations. Efforts toward these conditions are now beginning to emerge, and we cannot foresee the ultimate structure of effective world order. Nor can we be sure that a universalizing trend will be sustained. The interdependencies of a globalized human society suggest an inevitability in a basic legal order for the world if humanity is to avoid self-destruction. Although we may be confident that a world order of law will be achieved, we cannot be certain.

Political events are rapidly overtaking international legal theory.²¹ The 1999 military coercion of the Milosovic regime in Serbia by the NATO coalition of nineteen nations established beyond argument that there are now practical limits to the legitimate sovereignty and inviolable legal territorial integrity of national states. These doctrines had, of course, been breached before, notably in the portions of Poland and Czechoslovakia incident to World War II. Now, however, a community of nations has intervened in the "internal affairs" of a state in which civil conflict, abuse of human rights, crimes against humanity, and massive migration of refugees has threatened the stability of adjacent states, creating unacceptable international tensions.

Are the armed forces of the NATO coalition a forerunner of an established international military capability that could provide the ultimate enforcement of world law? Would the risks inherent in a global "police force" be preferable to indefinite continuation of an Orwellian world of perpetual international conflict?

21. This transition and its chaotic process is effectively summarized by Randall Baker in "Challenges to Traditional Sovereignty," a chapter in a book edited by Paul Collins to be published by John Wiley in late 1999.

