

THE ENVIRONMENT: STATE SOVEREIGNTY, HUMAN RIGHTS, AND ARMED CONFLICT

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Environmental protection has never been a high priority of international law, or for that matter of municipal legal systems. But times have changed—at least somewhat. During the last quarter of the twentieth century, interest in and laws pertaining to the natural environment have increased at a remarkable rate, both in municipal legal systems and on the international front.

For example, in 1991, a Protocol was added to the Antarctic Treaty of 1958 for “the comprehensive protection of the Antarctic environment and . . . associated ecosystems.”¹ States parties to the Protocol undertook “to elaborate rules and procedures relating to liability for damage arising from activities taking place in the Antarctic Treaty area and covered by this Protocol,” and to specify such rules and procedures by means of an Annex to the Protocol.² Annex VI was added to the Protocol on June 17, 2005, to flesh out “Liability Arising From Environmental Emergencies.”³ States parties are required to “undertake reasonable preventative measures that are designed to reduce the risk of environmental emergencies and their potential adverse impact,”⁴ and must “establish contingency plans for responses to incidents with potential adverse impacts on the Antarctic environment or dependent and associated ecosystems.”⁵ They must furthermore “take prompt and effective response action to environmental emergencies arising from the activities of [their] operator” in the region.⁶ Strict liability for non-compliance with these obligations vests in the state or non-state operator (not the state itself) who failed to take prompt and effective response action.⁷ Strict liability means that holding a person responsible is not dependent on intent or negligence on his or

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¹ Protocol on Environmental Protection to the Antarctic Treaty art. 2, Oct. 4, 1991, 30 I.L.M. 1455.

² *Id.* art. 16.

³ Annex VI to the Protocol on Environmental Protection to the Antarctic Treaty—Liability Arising from Environmental Emergencies, June 17, 2005, 45 I.L.M. 5.

⁴ *Id.* art. 3(1).

⁵ *Id.* art. 4(1)(a).

⁶ *Id.* art. 5(1).

⁷ *See id.* art. 6(1)–(3).

her part. The sanction attached to non-compliance is confined to the payment of the costs that response action would have generated,⁸ or in the case of a non-state operator, payment of “an amount of money that reflects as much as possible the costs of the response action that should have been taken.”⁹ The money received is paid into a fund established to reimburse states parties for the reasonable and justified costs incurred in taking response action.¹⁰

The focus of this Essay is on current and developing regulation of enforcement measures pertinent to environmental protection in international law, with special emphasis on criminal sanctions. The above example, selected at random for purposes of this Essay, illustrates some of the characteristic attributes of enforcement provisions attending the rules of international law for the protection of the natural environment. For example, drafters seem to avoid state liability and prefer the payment of damages to criminal sanctions.¹¹ While criminal sanctions as a means of enforcement are the rule rather than the exception in municipal environmental regimes, punishments as a mechanism of enforcement are almost entirely absent on the international front—with international humanitarian law being a modest exception to the rule.

This Essay will attempt to trace current developments in international environmental law with reference to four particular themes:

- (a) Tensions between state sovereignty and enforcement of international norms for the protection of the natural environment;
- (b) Protection of the natural environment as a particular manifestation of international human rights law;
- (c) Environmental protection within the confines of the laws and customs of armed conflict; and
- (d) Criminal sanctions as a means of enforcement of international obligations pertaining to the natural environment.

⁸ *Id.* art. 6(2)(a).

⁹ *Id.* art. 6(2)(b).

¹⁰ *Id.* art. 12.

¹¹ Having considered 312 international conventions, Cherif Bassiouni found that only 27 contained language indicating criminal sanction, such as “international crime” or “crime under international law,” and that “indirect enforcement” of treaty-based obligations that are backed by criminal sanctions is invariably the rule. See M. CHERIF BASSIOUNI, A DRAFT INTERNATIONAL CRIMINAL CODE AND DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL TRIBUNAL 50 (1987).

A recurring theme will emerge that potent implementation procedures, and in particular enforcement through the threat of punishment, are on the whole not highly developed in international environmental law. We might pause at the outset to consider why that is so. I would venture to suggest that at least part of the problem derives from inadequate advocacy of particular environmental concerns prior to the sanctioning of protection mechanisms. I argue in particular that the absence of elaborate promotion strategies, before resorting to protection, enhances trepidation in regard to means of enforcement on the part of those who might fall prey to retributory action.

The Universal Declaration of Human Rights¹² has put international human rights law on a course by which the creation of a set of binding rules develops through two distinct phases. In the initial stage, international law-making agencies focus on promotion and norm creation, to be followed by the second phase of protection or enforcement of those norms. In the case of multinational treaty-based human rights law, the promotion stage is centered upon the drafting of a (non-binding) declaration, while protection finally occurs pursuant to a binding and enforceable convention. The main purpose of resorting to a preceding promotion phase is to create space for novel principles to find their way into the arena of international concerns and be transformed by public debate into generally accepted norms. A declaration phase serves to sensitize the international community to the need for a norm; it opens up the debate and invites discourse on the merits of the matter under consideration; and it seeks to resolve disputes that might arise over the principle, practicability, and formulations attending the pertinent subject matter.¹³ Through the agency of all of these objectives, the declaration phase attempts to establish a sufficient measure of acceptance of the final product among a cross-section of the international community. This acceptance allows a convention to emerge that will be of present interest, will be taken seriously, and will work. Conventions not adequately seasoned by prior promotion might sacrifice the essential attributes of a considered and feasible substance, wide acceptance, and viable enforcement mechanisms. Their pertinence and execution furthermore may be crippled by packages of extensive reservations, understandings, and declarations attached to many of the instruments of ratification.

¹² Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948).

¹³ M. GLEN JOHNSON & JANUSZ SYMONIDES, *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: A HISTORY OF ITS CREATION AND IMPLEMENTATION 1948-98*, at 33-38 (1998).

Prematurely conceived conventions seem to be the rule rather than the exception as far as the international protection of the natural environment is concerned. Environmental conventions are seldom preceded by non-binding declarations; and while this phenomenon might be understood, in a positive sense, to underscore the urgency of environmental matters regulated by the conventions, it also tends to render the bark of the conventions worse than their bite.

I. PROTECTION OF THE ENVIRONMENT AND STATE SOVEREIGNTY

The erosion of state sovereignty in international law, including international environmental law, has become a matter of profound concern to government officials who seem to persist in the view that every man is the master in his own house.¹⁴ States, the main actors in the making of international law, entertain profound trepidation whenever limitations upon the free exercise of political authority, or infringements on the national power base, are being negotiated with large numbers of their counterparts.

Particularly critical in this regard are the nature and confines of those norms of international law that seemingly restrict state action or seek to burden the repositories of political power within national jurisdictions with an obligation to control the behavior of their subjects. More precisely, these norms oblige states to preserve the environment irrespective of the effects that their action or behavior might have on neighboring states or on regions beyond the borders of national states.¹⁵ It has come to be accepted that the sovereign powers of states over the territories under their control are no longer absolute and the limitations pertaining to state sovereignty include an evolving category of internationally imposed prescriptive demands that reflect global concerns, in the interest of present and future generations, for the preservation and restoration of a clean and healthy environment.¹⁶ In this context, too, the sovereign powers of states in respect of the territories under their control are, in a word, no longer absolute.

The rules of international law pertaining to the environment may, with a view to their impact on state sovereignty, be classified into three categories:

¹⁴ See J.D. van der Vyver, *State Sovereignty and the Environment in International Law*, 109 SALJ 472, 472-76 (1992).

¹⁵ *Id.* at 472.

¹⁶ See *id.* at 487, 492-94.

First, there are environmental concerns in respect of regions of the globe that do not fall within the sovereign jurisdiction of any state but rather constitute the common heritage of all people,¹⁷ a contemporary version of the Roman law concept of *res omnium communes*.¹⁸ Critical concerns under this heading include the destruction of living resources of the high seas,¹⁹ pollution of the atmosphere or the seas,²⁰ destruction of the ozone layer,²¹ and harmful exploitation of the Antarctic region²² or in the exploration of outer space.²³

Secondly, there are rules of international law addressing environmental issues in inter-state relations—that is to say, where acts of, or committed in, State A have a detrimental effect on the environment in State B.²⁴ Article 30

¹⁷ The notion of “the common heritage of mankind” derives from the Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, Beyond the Limits of National Jurisdiction, G.A. Res. 2749 (XXV), at 24, U.N. GAOR, 25th Sess., 1933d plen. mtg., U.N. Doc. A/RES/2749 (Dec. 17, 1970). The principle of restraining activities in certain regions of the universe in the interest of present and future generations has also been recognized in other conventions and treaties. See, e.g., Geneva Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 82; Antarctic Treaty, Dec. 1, 1959, 12 U.S.T. 794, 402 U.N.T.S. 71; Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Jan. 27, 1967, 18 U.S.T. 2410, 610 U.N.T.S. 205; United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397.

¹⁸ For a discussion of the common heritage of humankind and its relationship to the Roman law concept of *res omnium communes*, see J.D. van der Vyver, *The Étatisation of Public Property*, in *ESSAYS ON THE HISTORY OF LAW* 261, 283–86 (D.P. Visser ed., 1989).

¹⁹ See, e.g., Convention on Fishing and Conservation of the Living Resources of the High Seas, Apr. 29, 1958, 559 U.N.T.S. 285.

²⁰ See, e.g., United Nations Conference on the Human Environment, Stockholm Declaration and Action Plan princ. 7, U.N. Doc. A/CONF.48/14/Rev.1 (June 16, 1972) [hereinafter Stockholm Declaration] (“States shall take all possible steps to prevent pollution of the seas by substances that are liable to create hazards to human health, to harm living resources and marine life, to damage amenities or to interfere with other legitimate uses of the sea.”); Int’l Law Comm’n [ILC], Draft Articles on State Responsibility art. 19(3)(d), in *Report of the International Law Commission on the Work of its Forty-Eighth Session 6 May–26 July 1996*, 51 U.N. GAOR Supp. (No. 10) at 131, U.N. Doc. A/51/10 (1996), reprinted in [1996] 2 Y.B. Int’l L. Comm’n 60, U.N. Doc. A/CN.4/SER.A/1996/Add.1 [hereinafter Draft Articles on State Responsibility] (condemning “a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas” as an international crime).

²¹ See, e.g., Vienna Convention for the Protection of the Ozone Layer, Mar. 22, 1985, 1513 U.N.T.S. 293; Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, S. TREATY DOC. NO. 100-10 (1988), 1522 U.N.T.S. 29.

²² See Antarctic Treaty, *supra* note 17; Protocol on Environmental Protection to the Antarctic Treaty, *supra* note 1.

²³ See Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, *supra* note 17.

²⁴ For an example, see the Convention on Early Notification of a Nuclear Accident, Sept. 26, 1986, 1439 U.N.T.S. 275, which likely was prompted by the Chernobyl disaster in the Soviet Union, which commenced on April 26, 1986.

of the 1974 Charter of Economic Rights and Duties of States contains the following directive that applies in this regard:

The protection, preservation and enhancement of the environment for the present and future generations is the responsibility of all States. All States shall endeavour to establish their own environmental and developmental policies in conformity with such responsibility. The environmental policies of all States should enhance and not adversely affect the present and future development potential of developing countries. All States have the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction. All States should co-operate in evolving international norms and regulations in the field of the environment.²⁵

Particular problems often arise in respect of (inter-state) shared natural resources. The salient principle of law, *sic utere tuo ut alienum non laedas* (use what is yours so as not to injure others), has been lucidly articulated in Principle 3 of the 1978 Draft Principles of Conduct in the Field of the Environment for the Guidance of States in the Conservation and Harmonious Utilization of Natural Resources Shared by Two or More States:

1. States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

...

3. Accordingly, it is necessary for each State to avoid [to] the maximum extent possible . . . the adverse environmental effects beyond its jurisdiction of the utilization of a shared natural resource so as to protect the environment, in particular when such utilization might:

- (a) cause damage to the environment which could have repercussions on the utilization of the resource by another sharing State;
- (b) threaten the conservation of a shared renewable resource;

²⁵ Charter of Economic Rights and Duties of States, G.A. Res. 3281 (XXIX), art. 30, U.N. Doc. A/9631 (Dec. 12, 1974); *see also* Stockholm Declaration, *supra* note 20; RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 601 (1987).

(c) endanger the health of the population of another State.

Without prejudice to the generality of the above principle, it should be interpreted, taking into account, where appropriate, the practical capabilities of States sharing the natural resource.²⁶

A third area of contention concerning the environment relates to acts or conditions within the boundaries of a particular state that adversely affect the ecosystem of that state without directly or immediately having an effect on any other state.

The question to be considered in this regard is whether international law has come to the point where, in the interest of humanity, it requires sovereign states to abide by internationally prescribed standards of nature conservation and environmental protection, irrespective of the effects that failure to uphold those standards might have on other states.

There is indeed a clear tendency in international law to impose general restrictions pertaining to the environment on all governments of the world.²⁷ Lothar Gündling argues that responsibility to future generations in respect of the environment should entail legal duties.²⁸ He asserts that such duties imposed upon states should require the adoption of policies “at both the national and international levels” aimed at, among other things, “a preventive (precautionary) environmental policy,” reduction of environmental pollution to a minimum, and the development of technologies that do not harm the environment.²⁹ It is submitted that the international public order has indeed crossed, or is at least rapidly in the process of crossing, this Rubicon.

When the United Nations, for example, “[d]eplores environmental pollution by ionizing radiation from the testing of nuclear weapons,”³⁰ its concerns are not confined to cross-border contamination. The Stockholm Declaration likewise did not confine its directives to inter-state or trans-border

²⁶ U.N. Env't Programme, *Report of the Intergovernmental Working Group of Experts on Natural Resources Shared by Two or More States: Draft Principles of Conduct in the Field of the Environment for the Guidance of States in the Conservation and Harmonious Utilization of Natural Resources Shared by Two or More States*, princ. 3, U.N. Doc. UNEP/IG.12/2 (1978).

²⁷ See, e.g., *id.*

²⁸ Lothar Gündling, *Our Responsibility to Future Generations*, 84 AM. J. INT'L L. 207, 212 (1990).

²⁹ *Id.*

³⁰ G.A. Res. 3154 A (XXVIII), at 34, U.N. GAOR, 28th Sess., Supp. No. 30, U.N. Doc. A/9030 (Dec. 18, 1973); see also Stockholm Declaration, *supra* note 20, princ. 26 (“Man and his environment must be spared the effects of nuclear weapons and all other means of mass destruction.”).

conflict situations when it emphasized the need to (a) safeguard natural resources of the earth, such as the air, water, land, flora, and fauna (especially representative samples of the animal and plant life);³¹ (b) maintain “vital renewable resources”;³² (c) protect the “heritage of wildlife and its habitat”;³³ (d) preserve non-renewable resources;³⁴ (e) halt the “discharge of toxic substances or of other substances and the release of heat, in such quantities or concentrations as to exceed the capacity of the environment to render them harmless.”³⁵ The Declaration maintained traditional territorial state responsibility when it proclaimed:

In order to achieve a more rational management of resources and thus to improve the environment, States should adopt an integrated and co-ordinated approach to their development planning so as to ensure that development is compatible with the need to protect and improve [the] environment for the benefit of their population.³⁶

The 1982 World Charter for Nature similarly proclaimed in its implementation provisions that “[t]he principles set forth in the present Charter shall be reflected in the law and practice of each State, as well as at the international level.”³⁷

Although these provisions were drafted in normative as opposed to peremptory language and sought to achieve no more than progressive implementation, they reflect a growing international consciousness and a sense of obligation, the *opinio iuris sive necessitate*, which shapes and proclaims the rules of customary international law.³⁸ It is perhaps too early to allocate the status of *obligationes erga omnes* to state responsibility in respect of the environment in cases where neglect would not directly affect any other state, or to conclude that, in those circumstances, curtailment of territorial sovereignty by international norms of environmental protection has already acquired the force of *jus cogens*.³⁹ There can be little doubt, though, that environmental

³¹ Stockholm Declaration, *supra* note 20, princ. 2.

³² *Id.* princ. 3.

³³ *Id.* princ. 4.

³⁴ *Id.* princ. 5.

³⁵ *Id.* princ. 6.

³⁶ *Id.* princ. 13; *see also id.* princs. 14–20 (discussing domestic planning policies and research).

³⁷ World Charter for Nature, G.A. Res. 37/7, ¶ 14, U.N. GAOR, 37th Sess., 48th plen. mtg., Supp. No. 51, U.N. Doc. A/Res/37/7 (Oct. 28, 1982).

³⁸ *See* DAVID J. BEDERMAN, INTERNATIONAL LAW FRAMEWORKS 16–17 (2d ed. 2006).

³⁹ Jan Schneider, *State Responsibility for Environmental Protection and Preservation*, in INTERNATIONAL LAW: A CONTEMPORARY PERSPECTIVE 602, 602–03 (R. Falk, F. Kratochwil & S.H. Mendlovitz eds., 1985). Though commencing his contribution with the general statement that “there is a basic obligation upon states to

dereliction that does have an impact on internationally defined *res omnium communes* violates a peremptory norm of general international law and may be prosecuted as the breach of a duty *erga omnes*. This is probably also true of environmental wrongdoing that causes harm to a state or states other than the one that harbors the perpetrator of such wrongdoing.

II. PROTECTION OF THE ENVIRONMENT AND HUMAN RIGHTS LAW

Including a right to a clean and healthy environment within the overall package of international human rights is quite commendable. For one thing, enforcement mechanisms attending human rights protection have reached a certain level of sophistication, and by driving a wedge between environmental protection and human rights, one would by and large isolate transgressions of multilateral environmental treaties from the special human rights enforcement procedures (reporting, fact-finding operations, inter-state adversarial procedures, individual complaint procedures, and, indeed, criminal sanctions through the agency of municipal criminal justice systems).⁴⁰

The development of an elaborate system of international norms for the protection and preservation of the environment more or less coincided in time with the late 1960s transformation of international human rights law from the initial era of norm creation and promotion to a period of protection.⁴¹ International environmental law indeed was not conceived under the rubric of human rights, but toward the end of the 1970s came to be identified as one of a variety of “third generation” human rights, which have come to be known as solidarity rights.⁴²

protect and preserve the human environment, and in particular to use the best practicable means available to them to prevent pollution and other destructive impacts on both exclusive and inclusive resources,” Schneider nevertheless confined his analysis to state responsibility in respect of the common environment and the environment of other states. *Id.*

⁴⁰ See van der Vyver, *supra* note 14, at 476–85.

⁴¹ For a discussion of this transformation in human rights law, see Roger S. Clark, *Human Rights Strategies of the 1960s Within the United Nations: A Tribute to the Late Kamleshwar Das*, 21 HUM. RTS. Q. 308 (1999).

⁴² The emergence of a third generation of rights was first conceptualized by Karel Vasak in his inaugural address to the First Study Session of the International Institute of Human Rights in Strasbourg, France, in 1969. Those rights include the right to peace; the right to development of disadvantaged sections of a political community or, in the international context, of developing countries; the right to nature conservation and to a clean and healthy environment; the right to share in the common heritage of humankind, and so on. See Philip Alston, *A Third Generation of Solidarity Rights: Progressive Development or Obfuscation of International Human Rights Law?*, 29 NETH. INT’L L. REV. 307, 310–11 (1982); Jack Donnelly, *In Search of the Unicorn: The Jurisprudence and Politics of the Right to Development*, 15 CAL. W. INT’L L.J. 473, 491–92 (1985);

Several international instruments for the promotion of human rights proclaim a distinct right of everyone to a clean and healthy environment.⁴³ In 1994, the Special Rapporteur on Human Rights and the Environment of the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, Fatma Zohra Ksentini, produced a final report, noting, *inter alia*, “a shift from environmental law to the right to a healthy and decent environment”⁴⁴ and proclaiming that this right is capable of immediate implementation by existing human rights bodies.⁴⁵ The report also contained the text of the Draft Principles on Human Rights and the Environment.⁴⁶ In 1995, the Human Rights Commission (since 2006, the Human Rights Council) responded to the report by requesting that it be published in all of the official languages of the United Nations and inviting governments, specialized agencies, and intergovernmental and non-governmental organizations to express their opinions on the report.⁴⁷

As Dinah Shelton has pointed out, “recognition of a full-fledged right to environment” entails certain advantages over an interpretation referring to particular rights of the environment.⁴⁸ It would establish an individual right of action to conserve the environment, and it would open the door for the public to be informed of, and indeed to participate in, decisions relating to the environment.⁴⁹

Stephen P. Marks, *Emerging Human Rights: A New Generation for the 1980s?*, 33 RUTGERS L. REV. 435, 441 (1981); Louis B. Sohn, *The New International Law Protection of the Rights of Individuals Rather than States*, 32 AM. UNIV. L. REV. 1, 61 (1982); Karel Vasak, *A 30 Year Struggle: The Sustained Efforts to Give Force of Law to the Universal Declaration of Human Rights*, UNESCO COURIER, Nov. 1977, at 29.

⁴³ See African Charter on Human and Peoples' Rights art. 24, June 27, 1981, 1520 U.N.T.S. 217; International Covenant on Economic, Social and Cultural Rights art. 12, Dec. 16, 1966, 993 U.N.T.S. 3; European Social Charter art. 11, Oct. 18, 1961, 529 U.N.T.S. 89; Additional Protocol to the Inter-American Convention on Human Rights art. 11, Nov. 14, 1988, 28 I.L.M. 156; Convention on the Rights of the Child art. 24(2)(c), Nov. 20, 1989, 1577 U.N.T.S. 43; Convention Concerning Indigenous and Tribal Peoples in Independent Countries arts. 4(1), 7, 20(3)(b), June 27, 1989, 1650 U.N.T.S. 383 (emphasizing duties of the state to maintain a clean environment, rather than rights of the individual).

⁴⁴ U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm'n on Prevention of Discrimination & Prot. of Minorities, *Review of Further Developments in Fields with Which the Sub-Commission Has Been Concerned, Human Rights and the Environment*, ¶ 22, U.N. Doc. E/CN.4/Sub.2/1994/9 (July 6, 1994) (prepared by Fatma Zohra Ksentini).

⁴⁵ See *id.* ¶¶ 22–24.

⁴⁶ *Id.* Annex I, ¶ 2.

⁴⁷ H.R.C. Res. 1995/14, at 66, U.N. ESCOR, 51st Sess., Supp. No. 4, U.N. Doc. E/CN.4/1995/176 (Feb. 24, 1995).

⁴⁸ Dinah Shelton, *Human Rights, Environmental Rights, and the Right to the Environment*, 28 STAN. J. INT'L L. 103, 117 (1991).

⁴⁹ *Id.*

However, designating the normative foundation of environmental protection as a matter of human rights concern was not altogether endorsed within the ranks of international environmentalists. Skeptics, such as Günther Handl, condemned attempts to conceptualize environmental protection in terms of a generic human right as being “a maximalist position that offers little prospect of becoming reality in the near term while its propagation diverts attention and efforts from other more pressing and promising environmental and human rights objectives.”⁵⁰ Included among his objections is the assumption that construction of environmental protection as a generic human right could make broad environmental policy decisions a central concern of an individual right-based process.⁵¹ He argues that making environmental protection a central concern of an individual right-based process would in turn run the risk of being too narrowly focused and encouraging a piecemeal approach;⁵² that not all human rights forums that would be charged with establishing violations of environmental norms could effectively discharge that duty, since they would lack the expertise expected of environmental specialists and technicians;⁵³ and that the notion of “environmental human rights” would impose on the environment an anthropocentric bias, which offers no guarantees against global degradation and instability of the environment.⁵⁴

In 1986, the U.N. General Assembly cautioned against over-zealously extending the reach of human rights beyond its characteristic meaning and empirical significance.⁵⁵ The Assembly proclaimed Guidelines in Developing International Instruments in the Field of Human Rights, which stipulated that newly conceived international human rights instruments should, *inter alia*:

- (a) Be consistent with the existing body of international human rights law;
- (b) Be of fundamental character and derive from the inherent dignity and worth of the human person;

⁵⁰ Günther Handl, *Human Rights and Protection of the Environment: A Mildly “Revisionist” View*, in HUMAN RIGHTS, SUSTAINABLE DEVELOPMENT AND THE ENVIRONMENT 117, 119 (A. Cancado Trindade ed., 1992).

⁵¹ *Id.* at 133–34.

⁵² *Id.* at 135.

⁵³ *Id.* at 137–38.

⁵⁴ *Id.* at 138; *see also* Alan Boyle, *The Role of International Human Rights Law in the Protection of the Environment*, in HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION 43, 49–57 (Alan Boyle & Michael Anderson eds., 1996).

⁵⁵ G.A. Res. 41/120, at 179, U.N. GAOR, 41st Sess., Supp. No. 53, U.N. Doc. A/41/53 (Dec. 4, 1986).

- (c) Be sufficiently precise to give rise to identifiable and practicable rights and obligations;
- (d) Provide, where appropriate, realistic and effective implementation machinery, including reporting systems;
- (e) Attract broad international support.⁵⁶

There is no indication that the evolving solidarity right to a clean and healthy environment was one of the concerns that prompted this early warning directive.

As indicated, there are, on the one hand, those who regard protection of the natural environment as a distinct human right and, on the other, those who want to segregate environmental concerns from the human rights enclave. An intermediate position is taken by those analysts who hesitate to recognize a specific right to the environment per se and instead seek to pursue environmental protection through other existing human rights, such as the rights to life, suitable working conditions, personal security, an adequate standard of living, health, food, property, and the like.⁵⁷ The 1972 Stockholm Declaration did no more than this when it proclaimed: "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 well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations."⁵⁸ In 1980, the Human Rights Committee—the international body that monitors implementation of the International Covenant on Civil and Political Rights⁵⁹—in effect adopted the same approach when it (impliedly) decided that damage to the environment was a valid cause of action under the Covenant,⁶⁰ even though the Covenant makes no express mention of the environment. The complaint in that case was brought by a Canadian citizen protesting the storage of radioactive waste near the residential area in the town of Port Hope, Ontario, and alleging that the consequent large-scale pollution threatened the lives of present and future generations in violation of

⁵⁶ *Id.*

⁵⁷ See Shelton, *supra* note 48, at 105; Michael R. Anderson, *Human Rights Approaches to Environmental Protection: An Overview*, in HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION 1, 3 (Alan Boyle & Michael Anderson eds., 1996).

⁵⁸ Stockholm Declaration, *supra* note 20, princ. 1.

⁵⁹ International Covenant on Civil and Political Rights, Dec. 16, 1966, S. EXEC. DOC. E, 95-2 (1978), 999 U.N.T.S. 171.

⁶⁰ See, e.g., *E.H.P. v. Canada*, Communication No. 67/1980, *reprinted in* 2 UNITED NATIONS, SELECTED DECISIONS OF THE HUMAN RIGHTS COMMITTEE UNDER THE OPTIONAL PROTOCOL 20 (1990).

Article 6(1) of the Covenant (protecting the inherent right to life of every human being).⁶¹ The complaint was dismissed because domestic remedies had not been exhausted, but that finding in itself implies that the complaint was substantively admissible under the Covenant.⁶² The question of whether the rights of future generations could be vindicated under the Covenant was left open by the Committee.

More recently, the separate opinion of then-Vice President of the International Court of Justice (ICJ), Judge Christopher Weeramantry, in the *Case Concerning the Gabčíkovo-Nagymaros Project*⁶³ also proceeded on the assumption that protection of the environment in international law “is a *sine qua non* for numerous human rights such as the right to health and the right to life itself.”⁶⁴ This case represents an extremely important milestone in the history of international environmental law. It highlighted the significance in international relations of the concept of sustainable development, defined by the court as “[the] need to reconcile economic development with protection of the environment.”⁶⁵ Judge Weeramantry devoted his entire separate opinion to the question of sustainable development as a principle of international law, holding in essence that “development can only be prosecuted in harmony with the reasonable demands of environmental protection.”⁶⁶

The indirect linkage of environmental protection and human rights can be construed as one in which a healthy environment is an essential precondition for the enjoyment of certain human rights, or alternatively, as one implying that a healthy environment constitutes an integral part of the enjoyment of such rights.⁶⁷ However, environmental protection can also signify limitations of certain basic human rights. This may be illustrated with reference to statements made in the judgment of the European Court of Human Rights in the case of *Fredin v. Sweden*.⁶⁸ The petitioner in that case complained about cancellation by the Swedish Government, in violation of his right to property, of a permit granted to him in 1963 for extracting gravel from his land.⁶⁹ The Swedish Government sought to justify revocation of the permit on the basis of

⁶¹ *Id.*

⁶² See Shelton, *supra* note 48, at 113–14.

⁶³ *Gabčíkovo-Nagymaros Project (Hung. v. Slov.)*, 1997 I.C.J. 6 (Sept. 25).

⁶⁴ *Id.* at 91 (separate opinion of Vice-President Weeramantry).

⁶⁵ *Id.* at 78.

⁶⁶ *Id.* at 92.

⁶⁷ Shelton, *supra* note 48, at 112–13.

⁶⁸ *Fredin v. Sweden (No. 1)*, 192 Eur. Ct. H.R. (ser. A) (1991).

⁶⁹ *Id.* at 13, 14.

the Nature Protection Act of 1952 and the Nature Conservation Act of 1964.⁷⁰ The court granted damages to the petitioner not on account of the alleged violation of his property rights, but because his right to judicial review of an administrative decision was not honored by the Swedish authorities.⁷¹ On that issue, the Court noted that “in today’s society the protection of the environment is an increasingly important consideration”⁷² and that the High Contracting Parties enjoy “a wide margin of appreciation with regard both to choosing the means of enforcement and to ascertaining whether the consequences of enforcement are justified in the general interest for the purpose of achieving the object of the law in question.”⁷³

III. PROTECTION OF THE ENVIRONMENT IN SITUATIONS OF ARMED CONFLICT

Although protection of the environment in times of armed conflict has only fairly recently undergone rapid development, one can read norms for the protection of the environment during armed conflict into general principles of humanitarian law that have been on the books since at least the second half of the nineteenth century.⁷⁴ For example, the Declaration of St. Petersburg of 1868 proclaimed “[t]hat the only legitimate object which States should endeavor to accomplish during war is to weaken the military force of the enemy”;⁷⁵ and the standard-setting Hague Convention No. IV of 1907 reminded belligerents that their right to adopt means of injuring the enemy is not unlimited.⁷⁶ The Fourth Hague Convention also proclaimed occupying forces to be no more than “administrator[s] and usufructuar[ies] of public buildings, real estate, forest, and agricultural estates belonging to the hostile State, and situated in the occupied country.”⁷⁷

But the environment is first mentioned by name in the 1977 First Protocol to the Geneva Conventions of 12 August 1949, which provides, “It is

⁷⁰ *Id.* at 8, 9.

⁷¹ *Id.* at 27, 29.

⁷² *Id.* at 25–26.

⁷³ *Id.* at 26.

⁷⁴ See Hans-Peter Gasser, *For Better Protection of the Natural Environment in Armed Conflict: A Proposal for Action*, 89 AM. J. INT’L L. 637, 637–38 (1995).

⁷⁵ Declaration Renouncing the Use in Time of War, of Explosive Projectiles Under 400 Grammes Weight, Nov. 29, 1868, *reprinted in* THE LAWS OF ARMED CONFLICTS 101, 102 (Dietrich Schindler & Jirí Toman eds., 3d ed. 1988).

⁷⁶ Convention (No. IV) Respecting the Laws and Customs of War on Land, Annex, art. 22, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631.

⁷⁷ *Id.* art. 55.

prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.”⁷⁸ The Protocol further provides that “[c]are shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage” and goes on to identify “the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population” as falling within the ambit of that protection.⁷⁹ Attacks against the natural environment by way of reprisal are expressly forbidden.⁸⁰

Principle 24 of the 1992 Rio Declaration on Environment and Development likewise proclaims, “Warfare is inherently destructive of sustainable development. States shall therefore respect international law providing protection for the environment in times of armed conflict and cooperate in its further development, as necessary.”⁸¹ This provision was presumably inspired by the large-scale assault on the environment by Saddam Hussein during the Gulf War of 1990 to 1991.⁸²

The Rio Declaration is not itself a binding document, but the principles expressed in the Declaration concerning the environment can be taken to express a norm of customary international law. The somewhat tardy development of customary norms of international law pertinent to the environment may be gleaned from recent decisions of the ICJ pertaining to weapons of mass destruction.

In 1974, Australia and New Zealand, in separate applications, invited the Court to condemn France for the carrying out of atmospheric nuclear weapon tests in the South Pacific region.⁸³ The court declined to give a judgment in the matter, holding that the dispute was rendered moot by an undertaking of France to refrain from such tests in the future, but it noted that “if the basis of

⁷⁸ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 35(3), June 8, 1977, 1125 U.N.T.S. 3.

⁷⁹ *Id.* art. 55(1).

⁸⁰ *Id.* art. 55(2).

⁸¹ Rio Declaration on Environment and Development, U.N. Doc. A/CONF.151/5/Rev.1 (June 14, 1992).

⁸² For a discussion of Iraq’s deliberate damage to the marine environment and the atmosphere, see Christopher York, *International Law and the Collateral Effects of War on the Environment: The Persian Gulf*, 7 SAJHR 269 (1991).

⁸³ Nuclear Tests Case (Austl. v. Fr.), 1974 I.C.J. 253 (Dec. 20) [hereinafter Australia Case]; Nuclear Tests Case (N.Z. v. Fr.), 1974 I.C.J. 456 (Dec. 20) [hereinafter New Zealand Case].

this Judgment were to be affected, the Applicant could request an examination of the situation in accordance with the provisions of the [ICJ] Statute.”⁸⁴

In 1995, France announced that it would carry out a final series of eight nuclear weapon tests in the South Pacific, commencing in September of that year.⁸⁵ New Zealand brought a further application for an examination of the situation, maintaining that the basis of the 1974 judgment was affected, within the meaning of the ICJ’s above directive, by France’s announcement.⁸⁶ The court again ruled against New Zealand, holding that the 1974 judgment could not serve as the basis for condemning France’s nuclear test program in the South Pacific, since France now intended to execute underground nuclear weapon tests, whereas the 1974 judgment only related to atmospheric tests.⁸⁷ New Zealand’s submission that the rationale of the 1974 judgments, though confined to atmospheric tests, also applied to subterranean nuclear weapon tests because of the risk to the marine environment inherent in both atmospheric and underground nuclear tests, was rejected by the court.⁸⁸ However, the court did note that “the present Order is without prejudice to the obligations of States to respect and protect the natural environment.”⁸⁹

Subsequently, the ICJ received instructions from the U.N. General Assembly for an advisory opinion on the legality under international law of the use of nuclear weapons in armed conflict.⁹⁰ In its judgment of July 8, 1996, the court considered, among other things, the detrimental effects of nuclear explosions on the environment.⁹¹ It held that “States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives” and that “[r]espect for the environment is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality.”⁹² As far as the impact of the use of nuclear weapons on the

⁸⁴ Australia Case, 1974 I.C.J. at 272; New Zealand Case, 1974 I.C.J. at 477.

⁸⁵ Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court’s Judgment of 20 December 1974 in the Nuclear Tests Case (N.Z. v. Fr.), 1995 I.C.J. 288, 289 (Sept. 22).

⁸⁶ *Id.*

⁸⁷ *Id.* at 306.

⁸⁸ *See id.* at 305. The court declined to accept the marine environment argument even though it recognized that New Zealand may “have had broader objectives than the cessation of atmospheric nuclear tests” when it instituted its 1973 application. *Id.*

⁸⁹ *Id.* at 306.

⁹⁰ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 228 (July 8).

⁹¹ *Id.* at 241.

⁹² *Id.* at 242.

environment is concerned, the conclusion of the court was encapsulated in the following dictum:

The Court thus finds that while the existing international law relating to the protection and safeguarding of the environment does not specifically prohibit the use of nuclear weapons, it indicates important environmental factors that are properly to be taken into account in the context of the implementation of the principles and rules of the law applicable in armed conflict.⁹³

The court was equally divided (seven votes to seven) on the question of whether the use of nuclear weapons would in all circumstances violate the norms of international law relevant to armed conflict.⁹⁴ With the deciding vote of the president, it finally endorsed the following general proposition:

[T]he threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law;

However, . . . the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the survival of a State would be at stake[.]⁹⁵

The powerful, environmentally conscious dissent of Judge Weeramantry is of special interest in the context of the present survey. He said, "Nuclear weapons have the potential to destroy the entire ecosystem of the planet. Those already in the world's arsenals have the potential of destroying life on the planet several times over."⁹⁶ The use of, or threat to use, nuclear weapons was excluded from the subject-matter jurisdiction of the International Criminal Court (ICC) largely because of the 1996 ICJ advisory opinion casting doubt as to whether the use of or threat to use such weapons is prohibited in all circumstances as a rule of customary international law.⁹⁷

Enforcement of customary international law pertaining in general to the environment is, of course, another matter. Presumably implementation will

⁹³ *Id.* at 243.

⁹⁴ *Id.* at 266.

⁹⁵ *Id.*

⁹⁶ *Id.* at 454 (Weeramantry, J., dissenting).

⁹⁷ The drafters of the Rome Statute of the International Criminal Court confined the jurisdiction of the ICC to four crimes that had evolved through customary international law: genocide, crimes against humanity, war crimes, and aggression. WILLIAM SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 26 (2d ed. 2004).

depend largely on U.N. Security Council responses, if binding multilateral environmental treaties, such as the 1977 Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques,⁹⁸ are any indication. The 1977 Convention binds states parties “to take any measures . . . to prohibit and prevent any activity in violation of the provisions of the Convention anywhere under its jurisdiction or control,”⁹⁹ and further leaves implementation action in the hands of the Security Council following a complaint lodged with the Council by any state party to the Convention.¹⁰⁰

This state of affairs is not at all satisfactory. According to the U.N. Charter, the Security Council can only authorize mandatory action by member states if violation of the norms for the protection and preservation of the environment constitutes a threat to the peace, a breach of the peace, or an act of aggression.¹⁰¹ The Security Council is admittedly influenced in its decisions by political considerations. To add insult to injury, the veto power of the permanent members of the Council (China, France, Russia, the United Kingdom, and the United States) renders them practically immune from retributory action.

It seems as though the United Nations somewhat belatedly placed its trust in promotion as a means of strengthening protection in this field. As a consequence of the Gulf War, the General Assembly urged “[s]tates to take all measures to ensure compliance with existing international law applicable to protection of the environment in times of armed conflict”; appealed to states to become parties to the international conventions pertinent to environmental protection; encouraged States to incorporate provisions of the concerned conventions into military manuals and to ensure that they are effectively disseminated; and called on the International Committee of the Red Cross (ICRC) to report on activities undertaken with regard to protection of the environment in times of armed conflict.¹⁰² The ICRC thereupon drafted

⁹⁸ Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, May 18, 1977, 31 U.S.T. 333, 1108 U.N.T.S. 151.

⁹⁹ *Id.* art. IV.

¹⁰⁰ *Id.* art. V(3).

¹⁰¹ *See* U.N. Charter art. 39.

¹⁰² Protection of the Environment in Times of Armed Conflict, G.A. Res. 47/37, at 2, U.N. GAOR, 47th Sess., Supp. No. 49, U.N. Doc. A/Res/47/37 (Feb. 9, 1992).

guidelines on the protection of the environment in times of armed conflict,¹⁰³ which governments were encouraged to incorporate into instructions to their armed forces.¹⁰⁴

IV. ENFORCEMENT OF RULES OF LAW FOR PROTECTION OF THE ENVIRONMENT

The 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter¹⁰⁵ may serve to illustrate a general trend when it comes to the enforcement of the rules of international law relevant to protection of the natural environment. It highlights, for example, the precautionary approach to environmental protection in international law,¹⁰⁶ and places emphasis on civil liability—in this instance for the costs of marine pollution.¹⁰⁷ The Protocol mandates states parties to “take effective measures, according to their scientific, technical and economic capabilities, to prevent, reduce and where practicable eliminate pollution caused by dumping or incineration at sea of wastes or other matter.”¹⁰⁸ The Protocol neither excludes criminal sanctions nor affords them any special prominence. Article 10(2) provides in this regard: “Each Contracting Party shall take appropriate measures in accordance with international law to prevent and if necessary punish acts contrary to the provisions of this Protocol.”¹⁰⁹ A similar provision is included in the 1996 International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea.¹¹⁰

¹⁰³ Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict, in The Secretary-General, *Report of the Secretary General, Annex, delivered to the General Assembly*, U.N. Doc. A/49/323 (Aug. 19, 1994).

¹⁰⁴ G.A. Res. 47/37, *supra* note 102, at 2.

¹⁰⁵ 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, Nov. 7, 1996, 36 I.L.M. 7. The Protocol entered into force on March 24, 2006, and it replaced the original convention, adopted in 1972. International Maritime Organization, *Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972*, http://www.imo.org/Conventions/contents.asp?topic_id=258&doc_id=681 (last visited May 18, 2009). The Protocol was updated in 2006 by a series of amendments that were adopted on Nov. 2, 2006 and entered into force on Feb. 10, 2007. *Id.*

¹⁰⁶ *Id.* art. 3(1).

¹⁰⁷ *Id.* art. 3(2).

¹⁰⁸ *Id.* art. 2.

¹⁰⁹ *Id.* art. 10(2).

¹¹⁰ International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea art. 6, May 3, 1996, 35 I.L.M. 1406 (requiring states parties to take appropriate measures to ensure the fulfillment of obligations arising under the Convention, including “the imposing of sanctions”).

Criminal liability of states for international wrongdoing was not contemplated by drafters of these or other environmental conventions. Responsibility of states for wrongful conduct is indeed recognized in international law,¹¹¹ and the remedies sanctioned by international law for such wrongdoing entail both compensatory and punitive elements.¹¹² Corporate liability of states has been recognized in regard to war crimes committed by Germany during World War I and World War II,¹¹³ and leading experts in the field of international criminal law have argued that the principle of collective responsibility for criminal conduct can and ought to be extended.¹¹⁴ According to Cherif Bassiouni, state criminal responsibility would be no more than “a symbolic manifestation by the world community designed to stigmatize internationally violative behavior, irrespective of the merits or effectiveness of such a stigmatization in preventing or controlling internationally violative behavior.”¹¹⁵ However, in the context of human rights and environmental protection, corporate liability of states could mean more than just stigma.

The ILC’s 1996 Draft Articles of State Responsibility included proposals for state criminal liability, which, if they had been retained, would have included retributory action for “[a] serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas.”¹¹⁶ This action would require that the obligation is “so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole.”¹¹⁷ These provisions were omitted from the ILC’s Draft Articles of August 21, 2000.¹¹⁸

In the 2000 Draft Articles, the retributory consequences of an internationally wrongful act of a state are confined to reparation in the form of

¹¹¹ See ANTOINE SOTTILE, *THE PROBLEM OF THE CREATION OF A PERMANENT INTERNATIONAL CRIMINAL COURT* 65–74 (1966).

¹¹² *Id.* at 71.

¹¹³ See *contra* Otto Böhm, *Von Nürnberg nach Den Haag—Erfahrungen mit internationalen Tribunalen*, in *JAHRBUCH MENSCHENRECHTE* 2000, at 109, 110–11 (Gabriele von Arnim et al. eds., Amnesty International 1998) (designating as a particular norm derived from the Nuremberg judgments that state or collective criminal liability is inappropriate).

¹¹⁴ See BASSIOUNI, *supra* note 11, at 47–48.

¹¹⁵ *Id.* at 50.

¹¹⁶ Draft Articles on State Responsibility, *supra* note 20, art. 19(3)(d).

¹¹⁷ *Id.* art. 19(2).

¹¹⁸ ILC, *State Responsibility: Draft Articles Provisionally Adopted by the Drafting Committee on Second Reading*, U.N. Doc. A/CN.4/L.600 (Aug. 21, 2000).

restitution, compensation, and/or satisfaction.¹¹⁹ In the case of “[s]erious breaches of essential obligations to the international community,”¹²⁰ the consequences may include payment of damages and the obligation of all states:

- (a) Not to recognize as lawful the situation created by the breach;
- (b) Not to render aid or assistance to the responsible State in maintaining the situation so created;
- (c) To cooperate as far as possible to bring the breach to an end.¹²¹

State liability has thus come to be centered upon “a sort of civil liability in the international order.”¹²²

The ILC’s Draft Code of Crimes Against the Peace and Security of Mankind underscored *individual* criminal liability,¹²³ which, as far as the environment is concerned, would come upon any individual who, in the case of armed conflict, uses “methods or means of warfare not justified by military necessity with the intent to cause widespread, long-term and severe damage to the natural environment and thereby gravely prejudice the health or survival of the population and such damage occurs.”¹²⁴ Already in preparing the earliest draft of the Code, Special Rapporteur Doudou Thiam noted that endeavors to include states among the perpetrators of international crimes could “border[] on science fiction.”¹²⁵

¹¹⁹ *Id.* arts. 35–40.

¹²⁰ *Id.* pt. 2, ch. III.

¹²¹ *Id.* art. 42(2).

¹²² Pierre-Marie Dupuy, *International Criminal Responsibility of the Individual and International Responsibility of the State*, in 2 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 1085, 1096–97 (Antonio Cassese, Paola Gaeta & John R.W.D. Jones eds., 2002). In a penetrating analysis of state liability, Dupuy further noted that individual (criminal) liability is founded on fault, while the responsibility of states is no longer constituted by mens rea but derives exclusively from the nature of the wrongful act. *Id.* at 1095–96; see Pierre-Marie Dupuy, *Dionisio Anzilotti and the Law of International Responsibility of States*, 3 EUR. J. INT’L L. 139 (1992).

¹²³ ILC, Draft Code of Crimes Against the Peace and Security of Mankind art. 2, in *Report of the Int’l Law Comm’n on the Work of Its Forty-Eighth Session 6 May–26 July 1996*, 51 U.N. GAOR, Supp. (No. 10) at 18, U.N. Doc. A/51/10 (1996), reprinted in [1996] 2 Y.B. Int’l L. Comm’n 17, U.N. Doc. A/CN.4/SER.A/1996/Add.1. The Draft Code of Crimes Against the Peace and Security of Mankind did recognize, as a general principle, the responsibility of States under international law. *Id.* art. 4.

¹²⁴ *Id.* art. 20(g). The work of the ILC in drafting a code of crimes against the peace and security of mankind was never completed and has been replaced by the Statute of the International Criminal Court. See Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter ICC Statute].

¹²⁵ ILC, First Report on the Draft Code of Offences Against the Peace and Security of Mankind, U.N. Doc. A/CN.4/364 (1983), [1983] 1 Y.B. Int’l L. Comm’n 137, U.N. Doc. A/CN.4/SER.A/1983; see also Leila Nadya Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO.

State responsibility for criminal conduct has been emphasized in several recent judgments of international tribunals. In *Bosnia and Herzegovina v. Yugoslavia*, for example, the ICJ rejected a submission of the respondent to the effect that the responsibility of states under the Genocide Convention entails no more than a duty to prevent and punish acts of genocide.¹²⁶ The language of the Genocide Convention, the court found, does not preclude any form of state responsibility; and although the Convention contemplated acts of genocide committed by “rulers” or “public officials,” it does not exclude “the responsibility of a State for acts of its organs.”¹²⁷ In *Prosecutor v. Anto Furundžija*, the International Criminal Tribunal for the Former Yugoslavia (ICTY) proclaimed:

Under current international humanitarian law, in addition to individual criminal liability, State responsibility may ensue as a result of State officials engaging in torture or failing to prevent torture or to punish torturers. If carried out as an extensive practice of State officials, torture amounts to a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, thus constituting a particularly grave wrongful act generating State responsibility.¹²⁸

Criminal sanctions as an enforcement mechanism for environmental-specific malpractice are almost nonexistent in international law.¹²⁹ Instead, conventions currently in force that deal with the environment, and which vest international obligations in a state to refrain from conduct rendered unlawful by the conventions, make special allowance for inter-state dispute resolution.¹³⁰ The 1988 Convention against Illicit Traffic in Narcotic Drugs

L.J. 381, 404 (2000); Leila Sadat Wexler, *The Proposed Permanent International Criminal Court: An Appraisal*, 29 CORNELL INT'L L.J. 665, 680 n.88 (1996).

¹²⁶ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yug.), 1996 I.C.J. 595, 616 (July 11, 1996); see also Convention on the Prevention and Punishment of the Crime of Genocide art. 9, Dec. 9, 1948, S. TREATY DOC. NO. 81-15, 78 U.N.T.S. 277 (1948) (referring to “the responsibility of a State for genocide or for any of the other acts enumerated in article 3,” which includes genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide, and complicity in genocide).

¹²⁷ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, 1996 I.C.J. at 616.

¹²⁸ Prosecutor v. Anto Furundžija, Case No. IT-95-17/1-T, Judgement, ¶ 142 (Dec. 10, 1998).

¹²⁹ See Johan D. van der Vyver, *The Criminalisation and Prosecution of Environmental Malpractice in International Law*, 23 SAYIL 1 (1998); Lynn Berat, *Defending the Right to a Healthy Environment: Toward a Crime of Geocide in International Law*, 11 B.U. INT'L L.J. 327, 341–42 (1993) (calling for the development of criminal sanctions for environmental-specific offenses).

¹³⁰ See, e.g., Convention on Assistance in the Case of a Nuclear Accident or Radiological Emergency art. 13, Sept. 24, 1986, S. TREATY DOC. NO. 100-4(B) (1987), 1457 U.N.T.S. 133; Convention on Early

and Psychotropic Substances instructs states parties to execute their duty to prevent the illicit cultivation of, and to eradicate, plants containing psychotropic substances with “respect [for] fundamental human rights” and “protection of the environment,”¹³¹ but this instruction has not been given the backing of any enforcement procedures.

Provisions in the Convention on the Law of the Sea relating to the environment also emphasize civil liability,¹³² but they sanction the imposition of monetary penalties for violations of national laws or international rules and standards “for the prevention, reduction and control of pollution of the maritime environment, committed by foreign vessels beyond the territorial sea.”¹³³ In the case of willful and serious acts of pollution within the territorial sea of a particular state, forms of punishment other than monetary penalties are permissible.¹³⁴ Here, again, liability vests in the individual perpetrator, which could of course be a (corporate) legal entity.¹³⁵

In terms of the 1989 Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and Their Disposal, states parties “consider that illegal traffic in hazardous wastes and other wastes is criminal.”¹³⁶ They furthermore undertake to “prevent and punish” conduct in contravention of the Convention,¹³⁷ and to introduce appropriate national or domestic legislation to prevent and punish trans-boundary movement of hazardous wastes and other wastes.¹³⁸

The 1991 Protocol on Environmental Protection to the Antarctic Treaty introduced an interesting novelty with regard to implementation through the threat of criminal sanctions. Having proclaimed a reporting procedure,¹³⁹ and

Notification of a Nuclear Accident, *supra* note 24, art. 11; Convention on Environmental Impact Assessment in a Transboundary Context, Appendix VII, art. 15, Feb. 25, 1991, 1989 U.N.T.S. 309.

¹³¹ Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances art. 14(2), Dec. 20, 1988, S. TREATY DOC. NO. 101-4 (1989), 1582 U.N.T.S. 164.

¹³² See ALEXANDRE KISS & DINAH SHELTON, INTERNATIONAL ENVIRONMENTAL LAW 173 (1991).

¹³³ Convention on the Law of the Sea, *supra* note 17, art. 230(1).

¹³⁴ *Id.* art. 230(2).

¹³⁵ *See id.*

¹³⁶ Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and Their Disposal art. 4(3), Mar. 22, 1989, 1673 U.N.T.S. 126.

¹³⁷ *Id.* art. 4(4).

¹³⁸ *Id.* art. 9(5); *see also* Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa art. 9(2), Jan. 29, 1991, 2101 U.N.T.S. 177.

¹³⁹ Protocol on Environmental Protection to the Antarctic Treaty, *supra* note 1, art. 17.

provision for dispute settlements,¹⁴⁰ the Protocol invites states parties “to elaborate rules and procedures relating to liability for damage arising from activities taking place in the Antarctic Treaty area and covered by this Protocol.”¹⁴¹ A similar provision found its way into the Convention on the Transboundary Effects of Industrial Accidents of 1992.¹⁴² In accordance with the general trend of environmental-specific treaties, it, too, emphasizes prevention rather than cure,¹⁴³ and subjects state responsibility to procedures for the settlement of disputes.¹⁴⁴ But in addition, it procured state party support for “international efforts to elaborate rules, criteria and procedures in the field of responsibility and liability.”¹⁴⁵ These provisions, which have also been mimicked in the Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa,¹⁴⁶ serve as a reminder that the law as to responsibility and liability for international wrongdoing still requires considerable refinement.

In the long term, criminal prosecutions on the international front for wrongdoing in respect of the environment will be confined to the ICC. Offenses in respect of the environment that can be prosecuted in the ICC are confined to transgressions of international humanitarian law, and, more precisely, in international armed conflicts.¹⁴⁷

Taking its lead from the provisions in Protocol I to the Geneva Conventions of 12 August 1949 that provide for the protection of the natural environment in international armed conflicts,¹⁴⁸ the Statute of the International Criminal Court (ICC Statute) included in the subject matter jurisdiction of the Court, “[i]ntentionally launching an attack in the knowledge that such attack will cause . . . widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.”¹⁴⁹

¹⁴⁰ *Id.* arts. 18–20.

¹⁴¹ *Id.* art. 16.

¹⁴² Convention on the Transboundary Effects of Industrial Accidents, Mar. 17, 1992, 2105 U.N.T.S. 460.

¹⁴³ *Id.* Annex IV, art. 6.

¹⁴⁴ *Id.* art. 21.

¹⁴⁵ *Id.* art. 13.

¹⁴⁶ See Bamako Convention, *supra* note 138, art. 12 (providing for an ad hoc organ of experts to draft a Protocol setting out the rules and procedures in the field of liability and compensation for damages resulting from the trans-boundary movement of hazardous wastes in Africa).

¹⁴⁷ ICC Statute, *supra* note 124, art. 8(2)(b)(iv).

¹⁴⁸ See *supra* notes 78–80 and accompanying text.

¹⁴⁹ ICC Statute, *supra* note 124, art. 8(2)(b)(iv).

Compared with its Protocol I counterpart, the ICC Statute contains the additional requirement of the damage to the environment having to be clearly excessive in relation to the concrete and direct overall military advantage anticipated.¹⁵⁰ Protocol I did not single out the crimes involving the natural environment as part of its “grave breaches.”¹⁵¹ Perhaps for that reason, France initially opposed their inclusion in the subject matter jurisdiction of the ICC.¹⁵²

It should be noted, though, that prosecutions in the ICC are subject to numerous jurisdictional and admissibility constraints. Drafters of the ICC Statute accepted from the outset that states will not be subject to the jurisdiction of the ICC.¹⁵³ Only natural persons (individuals, to the exclusion of legal persons) can be brought to trial in the ICC,¹⁵⁴ provided further that the perpetrator was over the age of 18 years at the time the alleged crime was committed.¹⁵⁵ The jurisdiction *ratione temporis* of the ICC is confined to offenses deriving from conduct that occurred after the entry into force of the ICC Statute on June 1, 2002.¹⁵⁶ The exercise of jurisdiction by the ICC is furthermore subject to the principle of complementarity, affording to national criminal justice systems the first right and duty to bring perpetrators of crimes within the jurisdiction of the ICC to justice.¹⁵⁷ The exercise of jurisdiction by the ICC can be triggered by: (a) a state party referral; (b) a Security Council referral; or (c) an investigation conducted *proprio motu* by the Prosecutor.¹⁵⁸ In the case of (a) and (c), the ICC can only exercise jurisdiction if the state in whose territory the alleged crime was committed (the territorial state) or the state of which the suspect is a national (the national state) has accepted the exercise of jurisdiction by the ICC.¹⁵⁹ An investigation *proprio motu* by the

¹⁵⁰ *Id.*

¹⁵¹ See Ensign Florencio J. Yuzon, *Deliberate Environmental Modification through the Use of Chemical and Biological Weapons: “Greening” the International Laws of Armed Conflict to Establish an Environmentally Protective Regime*, 11 AM. U. J. INT’L L. & POL’Y 793, 820–23 (1996).

¹⁵² See Andreas Zimmermann, *Die Schaffung eines ständigen Internationalen Strafgerichtshofes: Perspektiven und Probleme vor der Staatenkonferenz in Rom*, 58 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 47, 67 (1998).

¹⁵³ See LEILA NADYA SADAT, *THE INTERNATIONAL CRIMINAL COURT AND THE TRANSFORMATION OF INTERNATIONAL LAW: JUSTICE FOR THE NEW MILLENNIUM* 185–86, 194 (2002) (noting that the criminal responsibility of states was never “seriously considered”).

¹⁵⁴ ICC Statute, *supra* note 124, art. 25(1).

¹⁵⁵ *Id.* art. 26.

¹⁵⁶ *Id.* art. 25(1).

¹⁵⁷ See *id.* pmbll., arts. 17–19.

¹⁵⁸ *Id.* art. 13.

¹⁵⁹ *Id.* art. 12(2).

Prosecutor must furthermore be authorized by a Pre-Trial Chamber of the ICC.¹⁶⁰

While international concern for the natural environment has become critical, it is almost inexcusable that the delegates at the Rome Conference, where the ICC Statute was adopted, did not see fit to include the environmental-specific offenses in the Statute's list of war crimes committed in armed conflicts not of an international character.

V. FINAL OBSERVATIONS

It has been said that regulation in international law of matters pertinent to the environment "is cause for limited celebration, considerable disappointment, and some concern."¹⁶¹ Environmentalists have proposed all kinds of institutions and procedures for the international protection of the natural environment. On one end of the spectrum is the suggestion of a "managing secretariat, along with an adjudicative body"¹⁶² with a mandate "to develop a mechanism to ensure compliance with these standards, to deter deviation therefrom, and to allocate responsibility for wrongdoing."¹⁶³ On the other is a proposed "international environmental body [a standing tribunal] which would consider crimes of geocide."¹⁶⁴ Some have suggested that a "Fifth Geneva Convention" for the protection of the environment in times of armed conflict would be in order,¹⁶⁵ while others have emphasized that the right to a healthy environment "must swiftly be recognized as *jus cogens*."¹⁶⁶

The ICC Statute has taken it about as far as current international law would permit, even though it stopped short of extending the reach of the ICC in regard to environmental protection beyond the arena of war crimes, and only

¹⁶⁰ *Id.* art. 15.

¹⁶¹ Mark A. Drumbl, *Waging War Against the World: The Need to Move from War Crimes to Environmental Crimes*, 22 *FORDHAM INT'L L.J.* 122, 135 (1998).

¹⁶² *Id.* at 149.

¹⁶³ *Id.* at 123–24.

¹⁶⁴ Berat, *supra* note 129, at 347. Berat defines "geocide" as

the intentional destruction . . . of the global ecosystem, via killing members of a species; causing serious bodily or mental harm to members of the species; inflicting on the species conditions of life that bring about its physical destruction in whole or in part; and imposing measures that prevent births within the group or lead to birth defects.

Id. at 343.

¹⁶⁵ Yuzon, *supra* note 151, at 842–45.

¹⁶⁶ Berat, *supra* note 129, at 338–39 (emphasis added).

war crimes committed in international armed conflicts at that.¹⁶⁷ However, the fact that it included an environmental-specific war crime in the jurisdiction of the ICC is an achievement in its own right, given the fact that Protocol I did not elevate such a crime to the level of grave breaches.

It should be noted, finally, that what in the past was considered acceptable collateral damage to the natural environment might no longer be acceptable.¹⁶⁸ Contemporary technologies of precision targeting must surely place serious constraints on the extent to which damage to the environment may be justified as necessary side effects of an attack upon a legitimate military target. In evaluating collateral damage to the natural environment caused by the NATO bombing campaign of March 24 to June 9, 1999, against the then-Federal Republic of Yugoslavia, a Committee established by the ICTY observed: "It is difficult to assess the relative values to be assigned to the military advantage gained and harm to the natural environment, and the application of the principle of proportionality is more easily stated than applied in practice."¹⁶⁹ The Committee noted, however, that "[e]ven when targeting admittedly legitimate military objectives, there is a need to avoid excessive long-term damage to the economic infrastructure and natural environment with a consequential adverse effect on the civilian population."¹⁷⁰

However, environmental concerns should go well beyond anxieties over destruction of the natural environment in times of armed conflict. We live in a time of climate change and global warming, caused in major part by technological and industrial development founded almost exclusively on economic incentives and considerations of national self-interest. Based on these incentives, development has rendered the global environment extremely fragile and endangered. The 1992 Rio Earth Summit sought to counteract the negative impact of economic progression by coining the slogan "sustainable development" and orchestrating, at least in theory, near-universal acceptance of its decree. Stated negatively, sustainable development opposes advancement that causes environmental degradation.

¹⁶⁷ See Drumbl, *supra* note 161, at 136.

¹⁶⁸ Richard Desgagné, *The Prevention of Environmental Damage in Time of Armed Conflict: Proportionality and Precautionary Measures*, 3 Y.B. INT'L HUMANITARIAN L. 109, 116–17 (2000).

¹⁶⁹ ICTY, *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, ¶ 19 (June 13, 2000), available at <http://www.un.org/icty/pressreal/nato061300.htm>.

¹⁷⁰ *Id.* ¶ 18.

Creating within the rank and file of the international community an awareness of, and even a commitment to addressing, the dangers we might face in the years to come is not enough to preserve the natural environment for future generations. When development is challenged by considerations of immediate economic progress, our instinctive human desires for a comfortable living here and now tend to blur our vision of the world to be. And even though the international community might agree on the ends to be achieved, opinions as to the means for attaining those ends seem to vary quite considerably. Perhaps for that reason, the political leadership of many of the world's superpowers has adopted a lame-duck approach to converting nice-sounding commitments into de facto action.

This regrettably also applies to U.S. political leadership; that is, at least, the leadership of yesteryear. Until recently, Nobel Prize Laureate Al Gore's call for, and California Governor Arnold Schwarzenegger's attempts to implement, programs to reduce harmful carbon emissions remained voices shouting in the wilderness. President Barack Obama has committed himself to changing this situation by pledging to make America more energy independent, to slash carbon emissions by focusing on alternative sources such as wind and solar systems, and most importantly, to cooperate with other nations on climate change. Whether the United States will become a party to future international treaties designed to achieve such objectives, particularly while countries like China and Russia may not be in a position to do likewise, remains to be seen.