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Environmental Security in the Twenty-First Century: New Momentum for the Development of International Environmental Law?

Jutta Brunnee*

*McGill University

ENVIRONMENTAL SECURITY IN THE TWENTY-FIRST CENTURY: NEW MOMENTUM FOR THE DEVELOPMENT OF INTERNATIONAL ENVIRONMENTAL LAW?

*Jutta Brunnée**

Over the last decade, environmental degradation and resource scarcity have come to be perceived as threats not only to human well-being and prosperity, but also to international security. The growing potential for conflict over scarce or degraded resources has prompted domestic and international policy-makers to reevaluate the traditional concept of security. It is increasingly recognized that only a broader conception of security can adequately capture the underlying concerns and promote more effective solutions.

Arguably, such a broader conception is inherent in the notion of "environmental security," a term that has been gaining currency. The term should be understood to have two dimensions. On the one hand, in placing emphasis upon the environmental dimension, security means maintaining an ecological balance, at least to the extent necessary to sustain resource supplies and life-support systems. On the other hand, in emphasizing the dimension of security in the traditional sense, the term refers to the prevention and management of conflicts precipitated by environmental decline.

This broader conception of environmental security is crucial because, at least in the long term, security, even in the traditional sense, can be ensured only if security in the environmental sense is emphasized. Only where ecological balance is maintained, resources are protected, and supplies ensured, will the potential for conflict be significantly reduced. Further, focusing on common environmental interests rather than on competing strategic interests will promote international cooperation and, ultimately, security.

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* Professor, Faculty of Law & Institute of Comparative Law, McGill University, Montreal, Canada; Referendar Iuris (Rhineland Palatinate, Germany); LL.M. (Dalhousie University, Canada); Assessor Iuris (Hessen, Germany); Doctor Iuris (Johannes Gutenberg-Universität, Germany).

The emerging concept of environmental security is important also for the future of international environmental law. Only norms and regimes that effectively address ecological concerns and ensure ecological balance can promote environmental security. Therefore, to the extent that the broad conception of environmental security outlined above gains acceptance, international environmental law will receive renewed attention.

Although the twentieth century has witnessed a remarkable development of international law in the environmental field, fresh momentum is required to drive legal development in the next millennium. The concept of environmental security may provide the necessary spark. In highlighting the urgency of existing problems, and in placing environmental threats on equal footing with more traditional security issues, the concept may elevate the development of international environmental law on domestic and international policy agendas.

This Essay sketches some of the evolution of international environmental law and suggests that we will enter the twenty-first century with the building blocks for more effective international environmental protection regimes in place. Notwithstanding the necessarily subjective and impressionistic nature of such an undertaking, the focus is on three interrelated trends that serve to illustrate this assertion. These are: (a) the response of international environmental law to the tension between state sovereignty and ecological interdependence; (b) the evolution toward norms that better meet environmental requirements; and (c) the movement, even by developing countries, towards broader participation in international environmental protection regimes.

Only during the second half of the twentieth century did international environmental law emerge as a distinct field of public international law. A body of customary rules and a multitude of treaty regimes developed in response to concerns about pollution, depletion of natural resources, and threats to ecological balance. The United Nations Conference on the Human Environment, held in Stockholm in 1972, marked the recognition of environmental degradation as an international concern and inspired much legal activity at the national and international levels.

Nonetheless, environmental decline continues and ever more complex, pervasive, and urgent problems emerge. Thus,

when the United Nations Conference on Environment and Development convened in Rio de Janeiro in 1992, much of the optimism generated by the Stockholm Conference had given way to cynicism and doubts as to the international community's commitment to environmental protection. Moreover, as we approach the twenty-first century, many voices question the effectiveness of international environmental law as an instrument of environmental protection. The three trends alluded to above, however, warrant a more positive assessment. In each case, international environmental law has evolved dramatically to respond to the challenges posed.

The first challenge is rooted in the very foundations of public international law. As a legal order built upon the sovereignty of states, international law does not readily accommodate the development of rules and regimes premised upon ecological unity. Initially, limitations on states' rights to exploit their resources or pollute the environment were simply a function of the need to strike a balance between competing sovereign interests. A state's sovereign rights were limited only to the extent that their exercise caused significant environmental harm in the territory of another state. Gradually, however, it was recognized that transboundary pollution affected not only neighboring states, but also had regional or even global implications. Thus, during a second stage of normative development, further sovereignty limitations arose to protect resources, such as the high seas, situated beyond the jurisdiction of any particular state.

Arguably, international environmental law has now entered a third stage of development. Sovereignty limitations that are independent from the traditional requirement of tangible transboundary harm are emerging. Environmental obligations are beginning to limit states' freedom of action so as to protect the ecological interests of other states even where these interests are not directly linked to interferences with sovereign rights. The maintenance of the global climate and the preservation of biological diversity are but two examples of such ecological interests.

This latest stage of normative development is closely connected to the way in which international environmental law has begun to respond to a second major challenge. From an environmental protection perspective, the traditional approach to limiting state sovereignty was ineffective because it relied on an

ecologically irrelevant criterion. Environmental harm was legally relevant only where it coincided with a significant interference with the territorially-based interests of another state. Therefore, much ecologically significant harm triggered no international rights or obligations.

Over the last ten years, international environmental law has taken great strides toward remedying this deficiency. Increasingly, the ambit of rights and obligations is defined to reflect the actual environmental impact of state activity, rather than merely its transboundary impact. Although this reorientation of norms is as yet imperfect, both present and long term ecological requirements are becoming the yardsticks for state conduct. Examples of this tentative evolution are the emergence of such concepts as "sustainable development," "intergenerational equity," and the "precautionary principle." These concepts maintain the focus on human interests in the environment. Nonetheless, they introduce an ecological dimension to the extent that human activity must, irrespective of transboundary impact, respect limits defined by what the environment can sustain.

The emergence of these new obligations is paralleled by the development of rights that are independent of interferences with territorially-based sovereign interests. A case in point is the concept of "common concern of humankind," which is gaining currency in the context of global environmental problems that pose threats to the international community of states as a whole. The concept has found application in treaties limiting state sovereignty to protect both the environment beyond national jurisdictions (e.g., global climate) and globally relevant resources within national jurisdictions (e.g., biodiversity). Thus, states may have to limit their economic development and the exploitation of their natural resources where the vital ecological interests of the community of states are endangered.

Finally, the continuing invasion into the sovereign domain of states is intimately linked to a third challenge to international environmental law. The increasing complexity and pervasiveness of environmental problems mandate the participation of an ever-broader range of states in international environmental protection efforts. In particular, global environmental protection is unthinkable without the participation of developing countries. Promoting this participation poses perhaps the greatest difficulties for effective environmental protection.

In much of the developing world, there is great resistance to new obligations that would further limit nations' rights to develop and to exploit resources. Even where there is basic readiness to participate, economic and technological constraints frequently preclude effective environmental protection efforts. Nonetheless, in the two decades between the Stockholm and Rio Conferences we have witnessed significant changes in approach.

International discourse has moved from the perceived dichotomy "environment vs. development" to a gradual merging of the two, evidenced in the popularity of the concept of "sustainable development." International treaty-making is now fleshing out this concept and a variety of strategies have been employed to promote the balancing of environmental and development interests. These strategies are encapsulated in the notion of "common but differentiated responsibility," which provides the underpinnings for recent global environmental protection treaties and cooperative efforts. The formula acknowledges that states' obligations may differ depending on their responsibility for common environmental problems and their economic and technological ability to take remedial action. Therefore, developing countries may have lesser obligations, or may be required to take protective measures only where they receive financial or technological assistance.

Calibrating a regime according to the "common but differentiated" formula is a time-consuming and complex task. Nevertheless, the formula must play a central role if international environmental protection regimes are to be more equitable and more acceptable to developing countries. For example, limitations on a nation's exploitation of its forests because of a "common concern" over loss of biodiversity or climate change, will be viable only where the rights of the community of states are linked to responsibilities. Industrialized nations may have to provide assistance to developing countries that make sacrifices in the international interest. The extent of such assistance will depend on each country's economic and technological capabilities and on its responsibility for the "common concern," for example, because of past forest depletion or greenhouse emissions.

If international environmental law is to be an effective instrument of environmental protection in the twenty-first century, further progress is necessary in each of the three areas highlighted above. Such progress is difficult, however, in times of

economic constraint. This is particularly true regarding the participation of developing countries. Nevertheless, the emerging perception of environmental decline as a security issue may provide a driving force for renewed efforts at legal development. While much remains to be done, this Essay illustrates that we are moving forward with the groundwork laid and with a crucial evolution in thinking well under way.