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THE HUMAN ENVIRONMENT: PROBLEMS OF STANDARD-SETTING AND ENFORCEMENT

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MAJOR STRATEGIES OF CONTROL AND ENFORCEMENT

The strategy which comes most readily to mind is the global or comprehensive approach. Both from a scientific and organizational viewpoint this makes the best sense. The collection and interpretation of data, and the effectiveness of measures of regulation, are better managed within a pattern which is comprehensive and integral. But a thoroughgoing global approach has implications which need to be considered. The logic of creating a pathology of conservation, environmental control in general, and population management involves major issues concerning the sufficiency of the system of international relations we have. A well-reasoned case can be made for saying that the existing system cannot cope and also for saying that the system we have is positively well-suited to the creation of waste and over-consumption in certain zones of the world, a process dignified by the term "economic development" and buttressed by sermons to the havenots about restraint in general and population control in particular.

If we tackle the environment agenda realistically, then, it should extend to population studies and problems of conservation of all resources: but these items lead on inexorably to sharp political issues relating to appropriate sharing of resources and decisions on priorities.

Thus the global approach may take on a fundamentalist form and there is the risk of frightening governments and others without any compensating advance. We have to accept that the present state system and stock of available types of international institution will continue in the foreseeable future and, therefore, have to be reckoned with. We have to make advances without raising too many issues at once. The best form of comprehensive approach would seem to be to combine specialized responses with certain agencies responsible for co-ordination: and so to have a general strategy which permits sensitive reactions to special problems and local developments.

There is a rather different issue of strategy. The present drive is toward the Stockholm Conference on the Human Environment. In order to establish the importance of an issue, a suitable category or institution is employed. In organizational and publicist terms this is

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inevitable. However, the single category focus or separate agenda approach should not be allowed to detract from certain humdrum points or premises.

In the first place, however many organizations may be created, enforcement involves very considerable reliance upon the application of national legal controls. The arrest and punishment of offenders and the general enforcement of standards are placed in the hands of the agencies of individual states even when the standards are created by international conventions. The better examples of international systems of supervision are dependent upon realistic assumptions about the respective enforcement roles of national and international agencies.

The second humdrum premise is this: much effort is spent deploring the existence of national sovereignties. Yet, as I have just emphasized, much enforcement is reliant on national legal systems. Many inadequacies of enforcement stem from inefficient aspects of *national* legal systems. On the scale of big politics, the persistence of the U.D.I. regime in Southern Rhodesia is a test not only of the efficacy of the U.N. system but also of the United Kingdom system of law and public order. Closer to the subject of protection of the environment, the ineffectiveness of the Convention for the Prevention of Pollution of the Sea by Oil of 1954 is due in part to the inoperation of national legal constraints.

The "effectiveness" of enforcement is a major problem in all legal regulation.

The matters on which the guidance of scientists will be of special value include the selection of environment issues which are (a) urgent and (b) involve situations in which a low incidence of non-compliance would cause irremediable degradation or serious hazards. Examples of this would include the copper needles or dipoles experiment and the mounting of nuclear tests which could activate earthquake zones and fault movements.

The third humdrum premise is the statement that social control is rarely if ever successfully achieved by use of a single program or vehicle. This must be particularly true of the protection of the environment. Thus care should be taken to conserve and develop a variety of techniques. A good number of specialized institutions and techniques exist already and should be made more effective. They should not be overshadowed by new labels. If we are to create new agencies these should be geared to the specialized roles of filling gaps and of co-ordination. Otherwise, we are resorting to the special department approach. By this I am referring to the diversionary and conscience-salving effects of creating a new institution which allows

politicians and others to say that we have "recognized" a particular problem and, in some sense, are dealing with it.

Whatever problems of scale and categories may exist, multilateralism is to be preferred to reliance on the outcome of initiative by States acting individually. Unilateralism may be based upon short term domestic policies and is less likely to be related to a broad-based scientific consensus. Technical and scientific considerations are not merely important in themselves. Presented independently by respected and efficient agencies, such considerations have a beneficial influence on the political process. They can produce mediating and cooling effects. Unilateralism may spark off a generalized dispute with other States and obstruct co-operation in various fields. Functionally, unilateralism is patently inadequate, for example, in tackling pollution in the Baltic or the Great Lakes of North America.

Of course, even multilateral institutions may have a club aspect and it would be unfortunate if agencies were set up exclusively by groups of Western nations or other industrialized nations.

OBSTRUCTIONS AND COMPLICATIONS

The most obvious obstacle to effective international co-operation is, or is commonly said to be, the division of the world into national sovereignties. I have already pointed out that certain issues can be raised relating to the structure of international relations. My own feeling is that the harmful effects of sovereignty are overstated in two respects. First, because the amount of political sovereignty most States have is curtailed in practice by the actual circumstances of international life. The world is littered with examples of the difficulty of drawing a line between the status of partner, ally, subordinate and puppet. Secondly, it is simply not the case that if, for example, Latin America or Africa were federal unions the problems their peoples face would take on a different dimension. One may look at the affairs of the Indian sub-continent. At any rate in our thinking we have to accept the world of formal parcels of sovereignty and try to mould it to the purposes of conservation.

A further complication is the fact that States will often act with a mixture of motives and as a consequence of lobbying and pressures based upon both self-interest and references to the general interest. Perfectly benevolent structures and schemes can be used for purposes collateral to their advertised and ostensible objects. Many claims to fishery conservation zones involve extension of national jurisdiction over areas which the majority of States regard as high seas open to all. In all such cases the conservation objective is linked with problems of reservation of fisheries for Coastal States. Conservation is

thus linked with a claim to divide resources in a particular way. The Canadian Arctic Waters Pollution Prevention Act contains admirable provisions aimed at preventing disasters of the *Torrey Canyon* type in the Arctic area. However, the background to the Act makes clear the fact that Canada is anxious to preclude certain American activities which might challenge Canada's general political and legal interests in the whole area of seas, sealanes, straits and islands.

Some further examples of the relation between neutral rules and special interest may be drawn from the International Labor Organization. The effective application of labor standards and the resulting increase in operation costs is one aspect of the conflict between European and American shipping interests in relation to the use of flags of convenience. In the field of human rights and labor standards there are a number of partly hidden and unresolved issues of capability and economic context: in other words, the possibility that superficially equal legal burdens may fall unequally because of local economic and social conditions. We must face the possibility that in setting conservation standards the same type of problem will occur.

I have already remarked on the reliance which international regulations place upon enforcement through national legal systems. Since this form of mechanics will continue to be used it is necessary to pay attention to the particular inadequacies of state legal systems, apart from the general question of state sovereignty. State regulation may be superficial and concerned with policies which have an independence of any policy of effective exercise of control and jurisdiction. The classical but nonetheless relevant example is that of the national registration of merchant ships under flags of convenience. The *Torrey Canyon* was Liberian registered. The offer of a flag of convenience to foreign owned shipping is normally based upon (a) the fiscal advantages to the flag state; and (b) the low operating costs of vessels not subject to rigorous control in matters of safety and labor standards. Much of the shipping under flags of convenience is American-owned and the national advantages to the United States are well known. They are: low operating costs in face of European competitors, and the existence of a reserve of shipping for use in time of war when requisition may occur in pursuance of existing agreements by American owners of the ships with U.S. Maritime Administration. These problems involving flags of convenience illustrate the difficulties of operating through national enforcement systems precisely in the context of pollution hazards from large tanker fleets.

It is common knowledge that States place some priority on the mechanism of taxation and control of capital movements across frontiers. It is in such areas of interest that States may be expected

to show maximum efficiency in enforcement. Yet in face of multinational companies it is known that the normal fiscal control mechanisms do not work well or at all. The picture is drawn clearly by Christopher Tugendhat in his recent book *The Multinationals* (1971). The total annual sales of General Motors is greater than the individual gross national products of Belgium, Switzerland, Denmark and Austria. The operational capabilities of several hundred corporations taken individually are greater than those of nine-tenths of the States existing today. Such corporations make major economic decisions, decide on resource priorities and evolve new techniques. The issue of control is not merely a matter of the economic power of the large corporations. There is the further problem of tracing the real sources of control and underlying interests.

One point remains in considering the weaknesses of national legal systems as enforcement agencies. Underdeveloped States have low grade administrations barely capable in some cases of carrying the minimal burdens of government. At the same time States may be tempted to ratify regulatory conventions when performance cannot match aspiration. Some States may not even take the trouble to bring their internal law into line with the requirements of the conventions—to which they are formally parties. Clearly there is a connection here with the question of aid and particularly technical aid and advice to underdeveloped States.

The lawyer appears rather as a technician, engineer and mechanic. He can operate only when others, the politicians and economists, have established certain priorities. Many issues of control are intimately bound up with risk and social cost calculations. The consumer and the armed forces in Western societies want cheap petrol and oil supplies. Governments therefore take the key hazard creating decision: cheap bulk oil transport in tankers which by reason of their bulk and small clearance create serious risks, however well designed the ships may be. What we should do is investigate the real social cost, in terms of risks and actual pollution damage, of large tankers and deal with risk creation at the source.

Weapons testing and fishery conservation involve similar risk calculations and national choices. Other types of choice may have to be made. For example, population control and even pollution control may involve measures which infringe or qualify human rights to marry and found a family and to own and enjoy property.

I turn now to a specialized aspect of control and enforcement. Valid controls must be based upon the collection of data and the monitoring of the environment on a day to day basis. This process is straightforward, in the legal sense that there is a liberty to act, in

relation to outer space and the high seas. In the case of the continental shelf, the interests of the coastal State must not interfere with "fundamental oceanographic or other scientific research carried out with the intention of open publication." In the case of research undertaken at the shelf, the consent of the coastal State is required. The general feature of course is that the territory, territorial seas, and airspace above both, are open to monitoring and so on only with the permission of the territorial sovereign. There is the added difficulty that oceanographic and other environmental data may have a military significance.

INTERNATIONAL STANDARDS AND CONTROLS

The nature of standard-setting must vary with the subject matter. Specific activities may be straightforwardly prohibited or prohibited with exceptional powers in emergencies to deviate from the standard. The standard-setting will frequently take the form of requiring parties to a treaty to change their legislation in such a way as to control a particular activity or promote a conserving process. The standards may themselves be programmatic; for example, involving an obligation on the State to take steps "to the maximum of its available resources," "with a view to achieving progressively the realization" of certain purposes.

What if the types of sanction allowed breaches of legal provisions? On the level of State relations, sanctions tend to be confined to a claim for reparation if some damage can be ascribed to the breach, and denunciation or suspension of the treaty depending on the nature of the breach. The essence of the situation is reciprocity, but this can result in a general acquiescence in some level of negligent enforcement. The sanctions applicable to individual operators are varied. Individuals and firms may be punished but there is doubt whether the fines normally imposed amount to more than a tax on profitable risk-taking in most cases. Conditions and standards may be attached to systems of registration or licensing of enterprises or installations, or to provision of development grants or state subsidies. An effective sanction and a simple one at that is refusal of facilities to vessels which do not comply with certain safety standards or are guilty of pollution.

Associated with sanctions are the devices for loss distribution. The United Kingdom Merchant Shipping (Oil Pollution) Act provides for compulsory insurance. International conventions establish a strict or so-called absolute liability for damage caused. The Brussels Convention on Liability of Operations of Nuclear Ships created such liability up to a limit of approximately \$100 million. The Brussels Conven-

tion on Civil Liability for Oil Pollution Damage, signed in 1969, is concerned with compensation to persons who suffer damage caused by pollution resulting from the escape or discharge of oil by ships. The definition of "pollution damage" includes the costs of preventive measures taken by any person after an incident to prevent or minimize pollution damage. The owner of a ship at the time of the incident bears liability for pollution damage though he is exculpated in certain defined cases, for example, if the damage were the consequence of the deliberate act of a third party. A limit is fixed to the owner's liability (Article V, para. 1). While the effect varies, there is little doubt that the need to insure to cover such liabilities is a useful control provided the underwriters take some informed interest in the risk.

The previous experience of international organization has developed a variety of techniques for supervision of the implementation of standard-setting treaty regimes. The experience relates to conventions concerned with labor standards, the work of the I.L.O. in general, fishery conservation arrangements and human rights, in the latter case both within the U.N. system and on a regional basis.

Very commonly provision is made for periodical reports by governments on the implementation within their spheres of competence of the particular convention. The I.L.O. Constitution requires members to make annual reports on measures taken. Another device is the fact-finding body. It sounds simple enough but if the fact-finding is authoritative it can have a general ameliorating effect on a crisis in State relations. Moreover, in many situations action taken without prior investigation of an appropriate type can produce harmful consequences out of proportion to the original incident.

Of particular value are complaints procedures which provide elements both of monitoring and dispute settlement whilst avoiding the cumbersome qualities and sometimes exacerbating effects of full adjudication. Complaints from individuals, non-governmental organizations and governments may provide evidence on which an organ may take appropriate action even when, taken individually, the complaints have no status which would justify or require consideration or action. One may refer to the present and increased powers of the Human Rights Commission in the U.N. system. Complaints by States may be given a formal status. A committee may be given a competence to consider complaints made by States as of right against other States also accepting the jurisdiction of the committee. The object of a complaints procedure is primarily remedial action based upon investigation of some kind rather than a legal contest leading to an award of damages. Judicial supervision of a very formal nature

may be provided for by conferring jurisdiction on the International Court in respect of the subject matter.

Inspection procedures are of particular relevance to protection of the environment. The concept of inspection by an impartial agency is to be found in the Statute of the I.A.E.A. and in the Treaty establishing Euratom. Adversary inspection, or the reciprocal right to investigate the other party investigating suspected violations, appears in the Antarctica Treaty, various conventions concerning high seas fisheries and bilateral agreements for co-operation in the peaceful uses of atomic energy. An organ may have inherent powers of investigation not dependent upon the complaint or initiative of individual governments. Examples are provided by the International Narcotics Control Board and the Councils created by the various international commodity agreements.

A critical feature of enforcement is efficient detection of wrongdoing or abnormality. Existing treaties concerned with oil pollution at sea make no provision for identifying offenders. In the case of major disasters like the wreck of the *Torrey Canyon* there is no problem, but many deliberate or accidental discharges are not always attributable to a particular vessel. In the Oxford Pugwash Study Group a suggestion was made that each load of oil in tankers could be labelled by radio-active tracers in a way which would provide a "signature" in oil found polluting the sea or beaches. At the moment oil can be identified only by reference to its general origin, e.g. that it is from the Venezuelan field. Clearly there is a need for technical work and co-operation leading to detection techniques which treaty provisions could utilize in due course.

Simple pollution situations may lead to the making of an international claim under general international law by the State suffering harm against another State. The possibility of such claims or representations anticipating threats of pollution may lead to a higher standard of care and also to regional forms of pollution control. However, the emphasis must be on planning and prevention and the claims situation is not of particular interest, although it should not be forgotten.

By way of conclusion it must be emphasized that legal standards, procedures and institutions are only effective if the politicians, the administrators and the public are convinced of the importance of protection. As in the case of race relations, legal intervention must be part of a well-developed economic and social program, accompanied by well-informed persuasion.