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A More Effective International Law or a New "World Law"?— Some Aspects of the Development of International Law in a Changing International System

JOST DELBRÜCK*

INTRODUCTION

Since the end of the Cold War, the international system¹ has been undergoing a thorough change. The rigid bipolar power structure which stabilized the international system for over forty years, but at the same time allowed for little flexibility in the conduct of international relations, has given way to an open, and to some extent, unstable political setting. The sovereign nation-state—called a "concept in decline" years ago²—has experienced a vigorous renaissance. Forming a sovereign nation-state ranks highly with the different nations once forming the Soviet Union, the individual nations of the disintegrating Yugoslavia, and elsewhere. A tendency to reassert national sovereignty can also be observed on the part of the peoples of some of those states which for decades, and with the overwhelming consent of their electorates, have sought integration in supranational organizations such as the European Community (EC).³

These trends are paralleled, however, by the intensified drive of other states and governments for even more cooperation and international institution building with a view to establishing a more stable and peaceful international order. Thus, for instance, we can observe in international relations new lines of cooperation between states which formerly opposed each other or kept

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All translations from German are the author's own unless otherwise indicated.

1. "International system" as used here means the relationship of the nation-state to the international community. For a detailed description of this concept, see I/1 GEORG DAHM ET AL., *VÖLKERRECHT* 11 (2d ed. 1989).

2. *Id.*

3. The changed attitudes of the electorates in Denmark, France, and Germany towards greater integration of the European Community (EC) into a union with a common currency are indicative of this trend of cherishing national sovereignty. See the report on the French referendum on the Maastricht Treaty and public opinion polls in the other states named in Alan Riding, *Relief in Europe*, N.Y. TIMES, Sept. 21, 1992, A1.

themselves at a distance. Furthermore, these forces counteract the new emphasis on national sovereignty by attributing increasing importance to universal and regional international organizations, in particular to the United Nations (UN). Strengthening international organization and institutionalized cooperation is recognized as the key to reaching new stability within the international system.⁴

In the context of the present Essay, it is of special interest to note that the movement towards increased institutionalization of international cooperation has also brought about a new consciousness of the importance of international law as the legal framework of a comprehensive and stable international peace order. Several recent important international events testify to the emergence of a new appreciation of the role and function of international law by the international community of states. For example, the then still-existing Soviet Union and the other Warsaw Pact states renounced the doctrine of a separate "Socialist International Law" existing along with general international law, thus reestablishing beyond doubt the unity of the international legal order.⁵ Furthermore, at the Heads of State meeting of the UN Security Council on January 30, 1992, world leaders impressively called for observing the rule of law in the conduct of international relations and for strict adherence to the law of the UN Charter.⁶ In their respective pronouncements, the Heads of State took up a widespread sentiment among states and governments that the rule of law and law enforcement ought to be given priority in international relations, particularly in the field of international human rights protection.⁷

The same position had been previously supported by the Conference on Security and Cooperation in Europe (CSCE) member-states in two solemn declarations in 1990, the Copenhagen Declaration and the Charter of Paris.⁸ A conspicuous aspect of these events is that all of them, implicitly or even explicitly, signal a growing readiness of the international community to accept

4. The present movement by the governments of the twelve EC member-states towards forging the EC into a union through the Maastricht Treaty and the efforts to institutionalize and strengthen the Conference on Security and Cooperation in Europe (CSCE) are political strategies on point.

5. This new position was reaffirmed by Russian President Boris Yeltsin at the meeting of the Heads of State and Governments of the Members of the Security Council at New York, January 30, 1992. U.N. SCOR, 47th Sess., 3046th mtg. at 45-48, U.N. Doc. S/PV.3046 (1992) [hereinafter Heads of State meeting].

6. *Id. passim*. This commitment to the rule of law and specifically to a strict observance of the UN Charter law constitutes a significant shift in emphasis from the previous, predominantly political, decisionist stance to a more normative approach.

7. *See id. passim*.

8. See the text of the Copenhagen Declaration, in Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, June 29, 1990, 29 I.L.M. 1305 [hereinafter Copenhagen Document], and the text of the Charter of Paris for a New Europe, Nov. 21, 1990, 30 I.L.M. at 190 [hereinafter Charter of Paris].

far-reaching restraint on their sovereignty in favor of implementation and, if necessary, enforcement of the principles and rules of international law. It is quite in line with this new stance that we can also observe a growing consensus as to the foundations and binding force of international law—a prerequisite for a more effective international legal order as the basis of international peace.⁹

In view of these recent developments, ensuing to a large extent from the end of the Cold War and the related decline of ideological divisions in the world, the question is whether the changing perception of the role and functions of international law marks a qualitative leap in the development of international law. Are perceptions of international law changing from an interstate law to a world or global law, or are we simply witnessing a process which, at long last, makes existing international law effective, or rather, more effective?

The complex developments taking place in the international legal order do not allow for easy answers. This Essay attempts a differentiated assessment based on three areas that are particularly indicative of the recent developments: the prohibition of the use of force, international protection of human rights and the environment, and international law enforcement. After examining each of these areas in turn, the final section of this Essay sketches some perspectives on the future nature, role, and importance of international law as the normative framework for the international and national conduct of states as well as international organizations.

I. THE WIDENING SCOPE OF THE PROHIBITION OF THE USE OF FORCE AND OF THE CONCEPT OF THE THREAT TO INTERNATIONAL PEACE

Article 2(4) of the UN Charter comprehensively prohibits the use of force,¹⁰ thereby surpassing the 1928 Kellogg-Briand Pact's prohibition of

9. Theories that international law derives its binding force from the will or consent of states—which are basically making international law subordinate to the will of the states and thereby are actually denying the binding force of this law—are evidently losing ground. For instance, the growing acceptance of the notion of *erga omnes* norms (norms relating to the protection of values deemed indispensable by the international community and therefore binding on all states regardless of their individual consent) in international law is incompatible with the traditional view basing the binding force of international law on state will or consent. For a concise account of the normative foundations of international law, see JOSEPH G. STARKE, INTRODUCTION TO INTERNATIONAL LAW, 18-23 (10th ed. 1989), and I/1 DAHM ET AL., *supra* note 1, at 34-44.

10. Article 2(4) of the UN Charter reads, "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the Purpose of the United Nations." U.N. CHARTER art. 2(4).

going to war as a political means.¹¹ The drafters, however, meant Article 2(4) to apply only to the international use, or threat of use, of force.¹² According to the text and the drafters' intent, Article 2(4) does not cover internal use of force, such as revolutions. In a corresponding construction, the terms "breach of the peace," "aggression," and "threat to the peace," as used in Article 39 of the UN Charter,¹³ were interpreted to relate to the *international* use or threat of use of *military* force. In all but two cases, the Council has adhered to the narrow reading of both Article 2(4) and Article 39.¹⁴ In the post-Cold War era, however, a reinterpretation of the terms "use of force" or "threat of use of force" as used in Article 2(4) and "threat to the peace" as used in Article 39 may begin to answer the question of what impact changes in international politics will have on the nature, future role, and functions of international law.

In the wake of the recent Gulf War, the Security Council found itself faced with the Iraqi government's severe persecution of Iraqi ethnic and religious minorities, namely the Kurds and the Shiites. In view of the military force used against these minorities, particularly the Kurds, which resulted at times in genocide-like losses of life, the Council acted to safeguard the victimized population groups from further oppression. In a resolution dated April 5, 1991, the Council condemned the repression of the Iraqi population, deeming it a threat to international peace and the security of the region.¹⁵

Even absent express references, it is clear from the wording of resolution 688 that it was based on UN Charter Chapter VII and Article 39 in particular. The Council's determination that the consequences of the repression "threaten

11. General Treaty for Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, T.S. No. 796, 94 L.N.T.S. 57.

12. See Albrecht Randelzhofer, *Kommentar zu Art. 2(4) UN Charta [Commentary on Article 2(4)]*, no. 29, in *Die Charta der Vereinten Nationen—Kommentar* 68, 77 (Bruno Simma ed., 1991).

13. Article 39 reads, "the Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42 to maintain or restore international peace and security." U.N. CHARTER art. 39.

14. The UN Security Council determined that the internal situations created by apartheid in South Africa and racism in southern Rhodesia under the Ian Smith Regime constituted a "threat to the peace," although no *international* use of *military* force was imminent. For details, see Jost Delbrück, *A Fresh Look at Humanitarian Intervention under the Authority of the United Nations*, 67 IND. L.J. 887, 894 (1992) (with further references).

15. S.C. Res. 688, U.N. SCOR, 46th Sess., 2982d mtg. at 1-2, U.N. Doc. S/RES/688 (1991). In its operative part, the resolution reads:

1. *Condemns* the repression of the Iraqi civilian population, in many parts of Iraq, including most recently in Kurdish populated areas, the consequences of which *threaten international peace and security in the region*; . . . 2. *Demands* that Iraq, as a contribution to removing the *threat to international peace and security in the region*, immediately end this repression. . . . *Id.* (emphasis on "condemns" and "demands" in original; remainder of emphasis added).

international peace and security"¹⁶ substantively corresponds to Article 39, which empowers the Security Council to determine whether there exists "a threat to or breach of the peace or an act of aggression."¹⁷ Furthermore, in the introductory sentence of the preamble of resolution 688, the Council invoked its obligations and responsibilities for the maintenance of international peace and security, which are set out in detail in Chapter VII of the Charter. Thus, it is evident from the text of the resolution that the Council found that an internal situation—the forcible repression of minorities in Iraq—constituted a threat to *international* peace and security because of its "consequences," that is, its potential escalation into an international conflict.

Less than half a year later, the Security Council confronted the growing violence in the Federal Republic of Yugoslavia, where the constituent republics of Slovenia and Croatia set out to secede from the Federation. When the Security Council became seized of the crisis, the situation in Yugoslavia was characterized by massive military exchanges between the federal people's army and militia forces of the two seceding republics. Although there was no immediate danger of neighboring states becoming involved militarily in the conflict—Yugoslavian federal fighter aircraft intrusions into Austrian air space notwithstanding—the Security Council did not hesitate in classifying the situation as a "threat to international peace and security."¹⁸ On May 30, 1992, the Security Council, again acting under Chapter VII of the Charter, called for a comprehensive trade and air embargo against the Yugoslavian republics of Serbia and Montenegro, which currently constitute the new Federation of Yugoslavia, and for other nonmilitary sanctions.¹⁹ The Security Council recently authorized, in addition to sending a major peace-keeping force with the consent of the parties to the conflict,²⁰ military protection for

16. *Id.* at 1.

17. U.N. CHARTER art. 39.

18. S.C. Res. 713, U.N. SCOR, 46th Sess., 3009th mtg. at 1, 3, U.N. Doc. S/RES/713 (1991). The resolution reads in part:

The Security Council, . . . [d]eeply concerned by the fighting in Yugoslavia . . . [and c]oncerned that the continuation of this situation constitutes a threat to international peace and security . . . [d]ecides, under Chapter VII of the Charter of the United Nations, that all States shall, for the purposes of establishing peace and stability in Yugoslavia, immediately implement a general and complete embargo on all deliveries of weapons and military equipment to Yugoslavia until the Security Council decides otherwise following consultation between the Secretary-General and the Government of Yugoslavia . . .

Id. (emphasis added).

19. S.C. Res. 757, U.N. SCOR, 47th Sess., 3082d mtg. at 3-4, U.N. Doc. S/RES/757 (1992).

20. S.C. Res. 721, U.N. SCOR, 46th Sess., 3018th mtg., U.N. Doc. S/RES/721 (1991). For a brief discussion of the legal implications of this resolution with regard to the role of the UN in internal conflicts, see Mary Ellen O'Connell, *Continuing Limits on UN Intervention in Civil War*, 67 IND. L. J. 909, 909-12 (1992).

convoys transporting humanitarian aid to the civilian population in Bosnia-Herzegovina,²¹ where heavy fighting erupted after that republic's declaration of independence from the Yugoslavian Federation.

In January, 1992, the Security Council, acting under Chapter VII of the UN Charter, decided in resolution 733 "that all States shall, for the purposes of establishing peace and stability in Somalia immediately implement a general and complete embargo on all deliveries of weapons and military equipment to Somalia until the Security Council decides otherwise . . ."²² Furthermore, the Council authorized the dispatch of peace-keeping forces to Somalia to protect the distribution of humanitarian aid to the starving people of that civil-war stricken country.²³

The problem of the protection of minorities in Iraq called for international attention again when reports of massive air raids on the Shiite minority in southern Iraq were received in early fall 1992. The United States, the United Kingdom, and France—after consultation with other governments, particularly the Russian government—proclaimed a "no-fly zone" for Iraqi airplanes south of the 32nd parallel.²⁴ American, British, and French fighter planes immediately instituted enforcement by flying surveillance missions over Iraqi territory at the northern border of the "no-fly zone." No Security Council authorization was sought. The governments of the United States, the United Kingdom, and France evidently deemed Security Council resolution 688 sufficient authority for the action taken;²⁵ a view which seems to be shared by UN Secretary-General Boutros Boutros-Ghali, who approved of establishing the "no-fly zone." Except for a warning by the People's Republic of China against air attacks on Iraq by the surveillance forces, no other Security Council member objected to the action.²⁶ Here again, although by inference

21. S.C. Res. 764, U.N. SCOR, 47th Sess., 3093d mtg. at 2, U.N. Doc. S/RES/764 (1992).

22. S.C. Res. 733, U.N. SCOR, 47th Sess., 3039th mtg. at 2, U.N. Doc. S/RES/733 (1992).

23. *Id.* This dispatch of peace-keeping forces presents a particularly interesting case because such action requires the consent of the state concerned. Since there is no effective Somalian government, but only various factions engaged in civil war, it was hard to establish which political groups engaged in the conflict were to consent to the peace-keeping action. There may still be some doubt as to whether all groups claiming a say in the internal affairs of Somalia have actually been consulted and have given their consent.

24. Michael R. Gordon, *British, French & U.S. Agree to Hit Iraqi Aircraft in the South*, N.Y. TIMES, Aug. 19, 1992, at A1.

25. *Id.* at A1, A6.

26. *Id.* In view of the long time that elapsed between adopting Security Council Resolution 688 and the declaration of the "no-fly zone," there may very well be some doubt as to whether this resolution could, indeed, serve as the legal basis for the enforcement of a "no-fly zone" or whether a new decision by the Security Council should have been sought. But there is little convincing argument for assuming that such new resolution would have had no legal basis in the UN Charter given the broader construction of the term "threat to the peace" the Security Council had applied before. In fact, the

rather than express decision taken, the violence within Iraq was the starting point for an interventionist activity within the framework of a Security Council decision.

In a number of other cases, which, however, did not involve a determination of a "threat to international peace," the Security Council established peace-keeping forces with the consent of the governments concerned. But even so, these cases are of interest in the present context: they all concerned *internal* situations characterized by varying degrees of intensive force used by warring factions resulting in widespread and massive human rights violations. Thus, the Council established peace-keeping forces for Cambodia with a sweeping mandate to supervise and assist the reestablishment of constitutional government and the disarmament of the armies of the warring factions.²⁷ Furthermore, the Council sent peace-keeping forces into El Salvador to ensure observance of human rights by the government and the rebel forces.²⁸

These and other instances indicate that the Council is prepared to construe Article 39 more broadly than it was originally envisaged and applied. The enforcement of the prohibition of the use of force, that is, of Article 2(4), seems also to extend now to *internal* as well as *international* use of force, where this internal use of force at least potentially, or with some reasonable probability, constitutes a threat to international peace and security and/or results in massive human rights violations.²⁹

II. ENHANCEMENT OF INTERNATIONAL PROTECTION OF HUMAN RIGHTS AND INTERNATIONAL PROTECTION OF THE ENVIRONMENT

International protection of human rights has been a major concern of the international community of states, whether at the level of the United Nations

President of the Security Council, British Prime Minister John Major, acting as the UK delegate, emphasized at the meeting of the Heads of State the continued responsibility of the Gulf Coalition states under Security Council Resolution 688 regarding the plight of the Kurdish and Shiite minorities in Iraq. Heads of State meeting, *supra* note 5, at 136-37, 142.

27. For a summary of the complex mandate given to the United Nations in reestablishing constitutional government and supervising the peaceful development in Cambodia, see statement of October 23, 1991, by UN Secretary-General Perez de Cuellar to the Paris Conference on Cambodia, *excerpted in UN Supervisory Powers, Cambodia*, 26 U.N.L. REP. 9 (1991). The UN Transitional Authority in Cambodia was formally established by Security Council Resolution 745 on February 28, 1992. S.C. Res. 745, U.N. SCOR, 47th Sess., 3057th mtg. at 2, U.N. Doc. S/RES/745 (1992).

28. The UN peace-keeping force for El Salvador, which included a military component, was established by Security Council Resolution 693 on May 30, 1991. S.C. Res. 693, U.N. SCOR, 46th Sess., 2988th mtg. at 2, U.N. Doc. S/RES/693 (1991).

29. See also statements to that effect by members of the Security Council during the debate on resolution 713 (1991) declaring the arms embargo on Yugoslavia, *excerpted in Arms Embargo, Imposition During Civil War, Yugoslavia*, 26 U.N.L. REP. 6, 7 (1991).

or at the regional level, and has been characterized by rather dramatic, innovative steps in the enforcement of such rights even prior to the end of the Cold War. Recent years have witnessed further enhancement of the international protection of human rights, which may have a major impact on the way international law will develop. Much the same is true of international protection of the environment.

The post-World War II era has seen the start of international protection of human rights. The UN Charter obligates member states to promote universal respect for human rights and not to discriminate on the basis of race, sex, language, or religion in implementing human rights obligations.³⁰ Based on this broad obligation, the international community has extensively codified classical human rights for the protection of individual fundamental rights and freedoms. In addition, the international community has codified economic, social, and cultural rights directed at improving the economic, social, and cultural conditions of the individual to make the enjoyment of fundamental rights and freedoms more meaningful. More recently, the international community has attempted to define and codify group rights and rights of peoples, so-called "third-generation rights."³¹ These "rights" or standards of achievement are intended to enhance the political, economic, social, and cultural self-determination and development of peoples to ensure the full and equitable participation of all nations, rich or poor, in the international community of states.

A significant and particularly innovative aspect of the large body of conventional and, in part, customary human rights law is that it provides for a variety of enforcement procedures. These procedures are available not only to states, as the traditional actors in the international system, but also to individuals whose rights, guaranteed by specific human rights provisions, have been abridged.³²

This generally positive picture of the innovative features of international human rights law has been obscured and bleakened during the Cold War era by the ideological polarization within the community of states. Time and

30. U.N. CHARTER art. 1(3) and art. 55(c).

31. See Hans Petersmann, *The Right to Development in the United Nations: An Opportunity for Strengthening Popular Participation in Development—Programs and Prospects*, in DES MENSCHEN RECHT ZWISCHEN FREIHEIT UND VERANTWORTUNG 125, 127 (Jürgen Jekewitz et al. eds., 1989).

32. See, for example, the complaint procedures under the Optional Protocol to the International Covenant on Civil and Political Rights, 999 U.N.T.S. 171-86, the Convention on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S. 194, and Res. 1503, U.N. ESCOR, 48th Sess., Supp. No. 1A, at 8, U.N. Doc. E/4832/Add.1 (1970). For a well-documented analysis of procedures for dealing with individual complaints (communications), see LOUIS B. SOHN & THOMAS BUERGENTHAL, INTERNATIONAL PROTECTION OF HUMAN RIGHTS 746-72 (1973).

again such polarization has led to bitter controversies over the true meaning of the human rights codified in binding treaties and the scope of the international authority to enforce human rights law. Except for politically and culturally homogeneous regions such as Western Europe and, to a lesser degree, the Americas, international human rights enforcement remained considerably less effective than was hoped for at the time numerous international human rights instruments were adopted.³³

Since the Cold War's end and the virtual disappearance of the once-powerful notion of a distinct socialist human rights law, new avenues for further elaboration of international human rights law have opened. This is particularly true with regard to establishing a universal consensus on the basic meaning of human rights and fostering acceptance of more effective international human rights enforcement. Human dignity, as the anchor point for the normative validity of international human rights law and as a basic guiding principle for their interpretation and application, has become more firmly established within the international community than ever before. Thus, individual rights and fundamental freedoms are accepted, in principle, along with economic, social, and cultural rights as integral elements of a meaningful protection of human dignity, a concept which had been quite controversial. Although many earlier international human rights instruments contained references to this effect, recent reaffirmations of the value of human dignity and of the rights ensuing therefrom³⁴ are of particular importance in the present context, since they have been pronounced under the auspices of the disappearance of East-West ideological polarization.

The growing acceptance of fundamental human rights, accorded the status of *erga omnes* norms because of their extraordinary importance for the international community, illustrates the changing attitude of states and nations towards the relevance of international law and the improving prospects for more effective international human rights protection. Recognizing *erga omnes* norms in the field of international human rights,³⁵ for example, the prohibi-

33. Though my earlier critical assessment of the achievements in international human rights enforcement still holds in principle, progress has been made in the elaboration and realization of the various complaint procedures on the universal level. See Jost Delbrück, *International Protection of Human Rights and State Sovereignty*, 57 IND. L.J. 567 (1982) (discussing earlier criticism).

34. See, for instance, the declarations by the CSCE member states at Copenhagen and Paris, *supra* note 8 and accompanying text, as well as the statements made by the Heads of States and Governments at the Security Council summit meeting on January 30, 1992, *supra* notes 5-7 and accompanying text.

35. On the notion and enforcement of international *erga omnes* norms, see Jochen A. Frowein, *Die Verpflichtungen erga omnes im Völkerrecht und ihre Durchsetzung*, in *VÖLKERRECHT ALS RECHTSORDNUNG—INTERNATIONALE GERICHTSBARKEIT—MENSCHENRECHTE* 241 (Festschrift Mosler), (Rudolf Bernhardt et al. eds., 1983) (Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, vol. 81). The International Court of Justice introduced the notion of *erga omnes* norms into international

tion of torture and discrimination based on race, sex, political beliefs, and religion, constitutes a major step towards the universalization of the meaning of human rights. Great obstacles lie ahead regarding this universalization process; for instance, cross-cultural and cross-religious disagreements still exist on some of the fundamental values to be embodied in international human rights norms. Recognition of some rights as rights with *erga omnes* effect, however, provides an important basis to continue the necessary international discourse on the scope and meaning of other human rights. At the same time, such recognition increases the international community's responsibility for human rights implementation.

The criteria for legitimate and lawful state conduct in the field of human rights, vis-à-vis individuals and groups under their jurisdiction, are more evident than ever before. Denying responsibility for the implementation and enforcement of international human rights by reason of their alleged indeterminacy or lack of international consensus as to their meaning has become increasingly more difficult. Likewise, the obligation to use international authority for the sake of effective human rights enforcement, and to participate therein, has become more pressing.

Due to the increasing involvement of nations in the protection of the rights of national or ethnic minorities, the present development of international human rights law has taken another decisive turn. Since the end of World War II, there has been an almost total rejection of special protective regimes for minorities. In view of the failure of such regimes established under the auspices of the League of Nations, there was widespread consensus that the former minority regimes should be replaced by a general system of human rights protection for all citizens within given states regardless of their national or ethnic origin. However, the reemergence of national and/or ethnic minorities on the international stage, particularly in Europe after the dissolution of the Soviet Union and the disintegration of Yugoslavia, has now prompted the international community to readdress this thorny issue.

There is a growing awareness that the individual's full personal development depends on the enjoyment of not only individual human rights, but also of the individual's right to live within the ethnic or national community of his or her origin.³⁶ This presupposes the right of respective groups to preserve their cultural heritage and to develop their ethnic or national identity. The right to political, economic, and cultural self-determination, almost exclusively applied in the context of decolonization during the post-war era, has thus

jurisprudence in the Barcelona Traction Case (Belgium v. Spain), 1970 I.C.J. 4 (Judgment of Feb. 5, 1970).

36. See, e.g., Copenhagen Document, *supra* note 8.

reemerged as a universal principle as it was originally conceived at the end of the nineteenth century and during the League of Nations era.³⁷ Apart from the 1966 UN Human Rights Covenants,³⁸ which codified and made binding the right to self-determination, several important, albeit nonbinding, international instruments on the rights of ethnic and national minorities have been drafted in the very recent past.³⁹ Moreover, efforts have been made to secure minority rights in bilateral treaties as between, for instance, Germany and Poland,⁴⁰ and in domestic constitutions.⁴¹

In the past, state sovereignty, protected by the principle of non-intervention⁴² into the internal affairs of states, has proven the staunchest impediment to effective international human rights enforcement. Although the political organs of the United Nations, the Security Council and the General Assembly, established a well-founded interpretation and practice with regard to Article 2(7)—that violations of internationally recognized and protected human rights are not matters essentially within the domestic jurisdiction of the member states—states continued to invoke sovereignty and the non-intervention principle as a political tool to obstruct international human rights protection, particularly when enforcement was at issue. Recently, however, powerful groups of states have indicated an increased willingness to accept even far-reaching restrictions on state sovereignty to make international human rights protection more effective.⁴³

37. For a discussion of the nature of the reemergence of the right to self-determination as a universal principle, see Karl J. Partsch, *Von der Souveränität zur Solidarität: Wandelt sich das Völkerrecht?*, 18 *EUROPÄISCHE GRUNDRECHTE ZEITSCHRIFT* 469, 474 (1991).

38. U.N. Covenant on Economic, Social and Cultural Rights of 1966, 993 U.N.T.S. 3, and U.N. Covenant on Civil and Political Rights of 1966, 999 U.N.T.S. 171.

39. See Copenhagen Document, *supra* note 8; Report of the CSCE Meeting of Experts on National Minorities, July 19, 1991, 30 I.L.M. 1692; CSCE Document of the Moscow Meeting on the Human Dimension, Emphasizing Respect for Human Rights, Pluralistic Democracy, the Rule of Law, and Procedures for Fact-Finding of Oct. 3, 1991, 30 I.L.M. 1670.

40. See Articles 20-22 of the June 17, 1991 treaty between Germany and Poland on good neighborly relations, *reprinted in* 46 *EUROPA ARCHIV* D 320-22 (1991).

41. The joint committee of the Federal Council (Bundesrat) and the Federal Parliament (Bundestag) on revising the German Basic Law is presently working on a provision securing minority rights for the Danish and Serbian national minorities in Germany.

42. This principle is part of customary international law, but it is also provided for in Article 2(7), obligating UN organs not to interfere with matters essentially within the domestic jurisdiction of the member states. However, Article 2(7) also provides for an important exception: when action under Chapter VII is necessary, the principle does not apply. For a closer analysis of the scope and function of Article 2(7), see Delbrück, *supra* note 14, at 891-96.

43. See, for example, the closing statement of the Security Council President at the Heads of State meeting, *supra* note 5.

Recent Security Council enforcement actions regarding the use of force within certain states⁴⁴ have also involved a distinct human rights dimension that obviously played a major role in treating the cases as matters of international concern, thus setting aside the non-intervention principle according to the exception clause of Article 2(7). The CSCE member states and the EC considered themselves legally entitled to intervene, though not militarily, in the Yugoslavian crisis and in other trouble spots in Eastern Europe involving human rights violations. In the final documents adopted at the January 30, 1992, New York meeting of the Heads of States of the Security Council and the November 21, 1990, Paris meeting of the CSCE, participants expressed a strong commitment to take a more restrictive approach to state sovereignty and the principle of non-intervention.⁴⁵

With the exception of the People's Republic of China and a few other states following its example, a large majority of states thus seem willing to favor human rights enforcement at the expense of the protection of their sovereignty by the principle of non-intervention. Yet, there is reason to caution against an overly optimistic assessment of the chances for future international human rights enforcement since there are still major problems relating to the last area to be dealt with here—determining the proper international authority to take enforcement action, including its scope and intensity. Before turning to this complex and vexing problem, however, a brief look at the innovative impulses that international law, in general, has received from the development of international environmental law is appropriate. Because here, too, international enforcement of the law is clearly at issue.

In this Essay, no comprehensive and detailed description of the rich and fast-developing body of international environmental law can be undertaken.⁴⁶ For present purposes, it must suffice to list the major characteristics of international environmental law that demonstrate the innovative trends in this field of law. Traditionally, damage caused to the environment raised international concern only if the damage done in one state originated from another. In such a situation, the state from which the harmful impact on the environment originated had to redress the damage caused, but only if it was substantial. The legal basis for such liability ultimately rested on the principles of the sovereignty and territorial integrity of states. Several

44. See *supra* text accompanying notes 10-29.

45. See Charter of Paris, *supra* note 8; Heads of State meeting, *supra* note 5, at 143.

46. For an informative survey of the purposes and principles of international environmental law, see Rüdiger Wolfrum, *Purposes and Principles of International Environmental Law*, 33 GERMAN YEARBOOK OF INTERNATIONAL LAW [hereinafter GYIL] 308 (1990). For an in-depth analysis of the problems of enforcing international environmental law, see Mary Ellen O'Connell, *Enforcing the New International Law of the Environment*, 35 GYIL (forthcoming 1993).

innovative refinements and expansions of the scope of the law governing state liability for cross-border environmental damage notwithstanding, this repressive rather than preventive type of law, although necessary, was increasingly found inadequate for achieving direct and long-term protection of the environment.

Thus, recent changes in the law have been aimed at prevention and compensation. While compensation for environmental damage traditionally was aimed at monetary satisfaction for material losses caused, the law as applied by courts and tribunals, and as enunciated in a number of major treaty provisions on liability for environmental damages, now provides for compensation aimed at restoring the environment to its status prior to the harmful impact.⁴⁷ As measures to prevent environmental damage, international practice created obligations to consult neighboring states prior to undertaking enterprises potentially harmful to the environment and obligations to exhaust all technological means available to avoid the environmentally harmful effects of given projects. Failure to do so *ipso iure* leads to liability.⁴⁸

But international law did not content itself with these changes. Growing awareness of the size and intensity of the dangers to the environment—besides immediate deterioration of air, soil, and water by pollution, long-term climate changes caused by global warming and depletion of the ozone layer—called for fundamentally different approaches to the future format of international environmental law.⁴⁹ The traditional paradigm of repressive and early-preventive environmental law, based on individual state obligations and liability, was found inadequate in view of the formidable global task of preserving the environment and thereby securing a livable planet for the future.

The new format of international law evolved from the legal regimes governing areas beyond national jurisdiction, such as the high seas, Antarctica, and outer space, the latter two of which have become designated by law as the common heritage of humankind.⁵⁰ Particularly, concern for the protection of the sensitive ecosystem of Antarctica and of the marine environment of the high seas has led to the development of a conceptual framework for the necessary legal regulation of these environments, one

47. See Wolfrum, *supra* note 46, at 317 (providing further references, particularly to the compensation to be paid for pollution of coast lines after tanker accidents).

48. *Id.* at 313.

49. *Id.* at 327-30 (providing a treatment of this aspect of the development of international environmental law).

50. *Id.* at 321-23.

which clearly transcends traditional international law notions of liability of individual states and of the modes of international law enforcement.

The conceptual basis for the law on the environmental protection of Antarctica and the high seas, which is related to areas beyond national jurisdiction, can be located in the commonly shared responsibility of the international community rather than in individual states' liability. What was going to be protected under the emerging new law was the now-recognized *public interest* of the international community, not individual state interests, in the preservation of the environments concerned.⁵¹ It was but a logical consequence of this new perspective that law enforcement was made a responsibility of the international community as distinct from individual states' responsibility and entitlement to law enforcement.

This innovative concept found its first expression in Article 218 of the UN Convention on the Law of the Sea of 1982.⁵² This Article entitles coastal or, more precisely, harbor states to enforce the provisions against oil pollution even if such pollution occurs outside their territorial waters, regardless of the jurisdiction over a flag state's delinquent vessel or the damage suffered by the harbor state itself.⁵³ Shared international responsibility for the preservation of the environment and for the enforcement of relevant international environmental law are the main innovative features now guiding the further development of an international environmental law that meets global environmental challenges such as global warming and ozone layer depletion. In fact, the international community has proceeded with considerable pace towards adopting relevant conventional law. For instance, the Vienna Convention for the Protection of the Ozone Layer was adopted in 1985⁵⁴ and further developed by the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer.⁵⁵ In addition, as recently as June, 1992, states signed conventions on climate change and biodiversity.⁵⁶

51. The notion of protecting public or community interests by norms of international law was recognized by the International Court of Justice in terms of identifying international norms with *erga omnes* effect. See *Barcelona Traction Case* (Belgium v. Spain), 1970 I.C.J. 4, 20 (Judgment of Feb. 5, 1970).

52. See DORIS KÖNIG, DURCHSETZUNG INTERNATIONALER BESTANDS—UND UMWELTSCHUTZVORSCHRIFTEN AUF HOHER SEE IM INTERESSE DER STAATENGEMEINSCHAFT 184-203 (1990); Wolfrum, *supra* note 46, at 326.

53. U.N. Convention on the Law of the Sea, Dec. 10, 1982, art. 218, ¶ 1, 12 I.L.M. 1261, 1319 (Dec. 10, 1982).

54. Vienna Convention for the Protection of the Ozone Layer, May 2, 1985, 26 I.L.M. 1529 (Nov. 1987).

55. Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, 26 I.L.M. 1550 (Nov. 1987).

56. See generally O'Connell, *supra* note 46.

A host of other conventions directed at preventing air and sea pollution preceded these, in many ways, innovative conventions.⁵⁷ Other conventions addressed the pressing problem of the conservation of wildlife.⁵⁸ While this new body of law is directed at the preservation of the natural environment, the underlying concept of international responsibility for the community or public interests involved in the protection of the natural environment was also applied with regard to the cultural environment as an integral part of the human environment as a whole. The 1972 UNESCO Convention Concerning the Protection of World Cultural and Natural Heritage, for instance, by the very wording of its title, hints at the concept of a commonly shared responsibility of the international community.⁵⁹ Nonbinding declaratory statements of the purposes and principles of international protection of the environment also abundantly demonstrate the new approach taken by the international community of states to emphasize the international community's commonly shared responsibility for effectively meeting global environmental challenges.⁶⁰

The almost explosive process of developing international environmental law directed towards meeting community interests and global challenges has not been paralleled, however, by the development of adequate enforcement mechanisms.⁶¹ Vexing problems of legal policy have arisen: which international authorities should decide what constitutes a *global* environmental issue; which protective measures would impose reasonable or unreasonable burdens on the states party to the respective conventions; and, even more importantly, which criteria of reasonableness should be used given the uneven distribution of resources and economic capabilities between industrialized and developing countries? This latter issue was raised in the context of efforts to protect the

57. See Wolfrum, *supra* note 46; O'Connell, *supra* note 46.

58.. See, e.g., Convention on Wetlands of International Importance Especially as Waterfowl Habitat, Feb. 17, 1971, 996 U.N.T.S. 245; Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 27 U.S.T. 1087, 12 I.L.M. 1085.

59. Convention for the Protection of the World Cultural and Natural Heritage, Nov. 16, 1972, 27 U.S.T. 37, 11 I.L.M. 1358.

60. The 1972 Stockholm Declaration, adopted by the United Nations Conference on the Human Environment, contains the first such statement of principle. U.N. Conference on the Human Environment, June 16, 1972, 11 I.L.M. 1416. It was followed by the World Charter for Nature, adopted by the UN General Assembly on October 28, 1982, G.A. Res 37/7, U.N. GAOR, 37th Sess., Supp. 51, at 17, U.N. Doc. A/37/51, reprinted in 60 U.N.Y.B. 1024, U.N. Sales No. E.85.I.1. For further discussion of the conventions and nonbinding instruments mentioned in the text, see Wolfrum, *supra* note 46, at 324-26.

61. Wolfrum, *supra* note 46, at 324.

rainforests, which play an important role in maintaining world climate but are also a major economic resource relied upon by developing countries.⁶²

Besides these hitherto unresolved problems, the new environmental law poses other questions relating to enforcement. The new conventional law on the protection of the ozone layer and the world climate provides for obligations to be implemented in the communal interest for which there are no immediate corresponding rights or compensating benefits. The traditional link between rights and duties and reciprocity as important incentives to adherence to international law does not apply here.⁶³ Implementation of the new law now rests mainly on broad cooperation and a high regard of the international community for the future improvement or preservation of the environment. More concrete enforcement means have yet to be devised and the authorities to be vested with enforcement power have yet to be determined.⁶⁴ Though the quality of enforcement adequate to meet the global challenges in the field of environmental protection may differ from that in the other major areas of international law dealt with here, the problem of determining the proper international enforcement authorities and the scope of international enforcement competence is raised in all areas of law here at issue.

III. THE PROBLEM OF ALLOCATING LAW ENFORCEMENT AUTHORITY IN THE INTERNATIONAL SYSTEM

It is almost banal to repeat that the international legal order lacks a general central law enforcement authority. Enforcement of international norms and obligations in day-to-day international transactions is decentralized, the individual state being its own law enforcement agent. Acceptance and legitimacy of international law, as well as reciprocity, are highly important prerequisites and incentives for general adherence to international law. In individual cases of breach of international law, retorsion, reprisal, and self-defense are available to states to enforce their rights.⁶⁵ The right to recover

62. *Id.* at 329-30 (discussing the implication of the divergent interests of industrialized and developing countries regarding measures protecting the world climate).

63. This Essay follows the interpretation of the relevant conventional law given by Wolfrum, *id.* at 327.

64. For a full discussion on international environmental law enforcement, see O'Connell, *supra* note 46.

65. On international law enforcement, see I/I DAHM ET AL., *supra* note 1, at 90-95. On international human rights enforcement, see R.A. Müllerson, *Monitoring Compliance with International Human Rights Standards*, in CONTROL OVER COMPLIANCE WITH INTERNATIONAL LAW 125 (William E. Butler ed., 1991). With regard to enforcement of international environmental law, see O'Connell, *supra* note 46.

damages suffered due to violation of international law may be added. It is important to note, however, that the present means of law enforcement available to states is considerably more restricted than that provided for in the classical period of international law.⁶⁶

The comprehensive prohibition of the use, or threat of use, of force in international relations has led to two essential restrictions on the system of decentralized international law enforcement. First, reprisals, formerly including the use of force, are now reduced to nonmilitary countermeasures.⁶⁷ Second, the former right of the sovereign state to go to war for purposes of law enforcement (*liberum ius ad bellum*) has been eliminated from the body of international law altogether.⁶⁸ Even the right to self-defense, guaranteed under UN Charter Article 51, has been modified in the sense that it may only be exercised "until the Security Council has taken measures necessary to maintain international peace and security."⁶⁹

Modern international law, as it has evolved particularly after World War II, has centralized international use of force to the extent that military enforcement measures may be applied only under the authority of the UN Security Council or in cases of individual or collective self-defense within the bounds of Article 51. This almost revolutionary change in the international legal order, constituting a far-reaching restriction on state sovereignty, has remained largely unnoticed by the international public because the political and ideological rift between communist and noncommunist states rendered the United Nations largely ineffective. To protect themselves from threats to their territorial integrity and political independence, states have had recourse to institutionalized forms of collective self-defense, such as NATO or the Warsaw Pact, and to unilateral use of force to safeguard their *rights*, at best, or what they considered to be their *vital interests*, at worst.

With the Cold War's end, chances to restore the UN's enforcement machinery, in particular the Security Council, to its originally envisaged role, and even to extend it, have greatly improved. Thus, the Security Council, as the central authority vested with the power to act in cases of violations of international law threatening or actually disrupting peace and international security, has again become the focus of international interest.⁷⁰ The Security

66. The period up to the end of World War I is referred to as the "classical period" of international law. See Wilhelm G. Grew, *History of the Law of Nations: World War I to World War II*, in 7 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 252 (Rudolf Bernhardt ed., 1984) [hereinafter ENCYCLOPEDIA].

67. See Karl J. Partsch, *Reprisal*, in 9 ENCYCLOPEDIA, *supra* note 66, at 330.

68. See *supra* note 11 and accompanying text.

69. U.N. CHARTER art. 51.

70. See O'Connell, *supra* note 20; Delbrück, *supra* note 14, at 887-89 nn.4 & 6.

Council's power under UN Charter Chapter VI to initiate the pacific settlement of disputes, including the right to institute investigations with binding force,⁷¹ to undertake measures of conflict prevention, and to make binding decisions on enforcement measures including the use of force,⁷² appears adequate, in principle, for discharging the task of maintaining or restoring international peace and security. This assessment would seem to be particularly convincing if the Security Council continues to interpret the principle of non-intervention restrictively and to construe the term "threat to peace and international security" broadly as it has done in the recent past.⁷³ For, only by such construction of the UN Charter would the Security Council be able to exercise its jurisdiction regarding the new types of conflict scenarios which increasingly tend to originate from clearly internal situations in given states. Thus, the UN Charter seems to have resolved satisfactorily the problem of allocating international enforcement authority.

However, the allocation of international enforcement authority exclusively to the Security Council is not without problems. First, if the Security Council continues to exercise enforcement authority, it will most likely encounter political obstacles. The political consensus among the five permanent members of the Council obtained during the "hot phase" of the Gulf crisis⁷⁴ cannot be taken as a guarantee that the paralyzing use of the veto power is a matter of the past. The warning by the People's Republic of China that no attacks be made on Iraq by the air forces of the United States, the United Kingdom, and France in the course of enforcing the "no-fly zone," established for the protection of the Shiite minority, highlights the continued fragility of the consensus among the permanent Security Council members. Furthermore, the People's Republic of China has also made it clear that it is not prepared to accept a general restrictive interpretation of the non-intervention principle.⁷⁵ It is an unrealistic and inadequate simplification, therefore, to assume that allocating international enforcement authority exclusively to the Security Council is a cure for all.

71. U.N. CHARTER art. 34.

72. U.N. CHARTER arts. 52-53.

73. See Delbrück, *supra* note 14; see generally *supra* part I.

74. Beginning with Security Council Resolution 660 on August 2, 1990, the five permanent members of the UN Security Council either unanimously endorsed the resolutions on enforcement measures against Iraq or four permanent members voted in favor with the People's Republic of China abstaining, which meant that China did not oppose (veto) the resolutions—an unprecedented consensus among the permanent members in the Council's history of enforcement measures. S.C. Res. 660, U.N. SCOR, 45th Year, U.N. Doc. S/Res/660 (1990), reprinted in THE KUWAIT CRISIS: BASIC DOCUMENTS 88 (E. Lauterpacht et al. eds, 1991).

75. See Heads of State meeting, *supra* note 5.

Given the increasing need for international law enforcement in cases where international peace and security are at stake, one must recognize that the problem of allocating law enforcement authority in the present international system is, indeed, more complex than formerly. The political and geographic diversity of the causes of international conflicts may require reactions other than those by the central authority of the Security Council. Provision must be made for effective international law enforcement in the event of Security Council inaction due to the exercise of the veto power. Under the present conditions of the international system, therefore, there is still a need for some decentralized international law enforcement—short of unilateral military enforcement measures—for cases of threats to international peace and security.

Indeed, the UN Charter has recognized this need, at least to a certain extent. Article 53 provides for the competence of regional arrangements to deal with matters involving international peace and security, including enforcement measures. However, the competence to take enforcement measures depends on an ad hoc authorization by the Security Council. Although it may be politically easier to obtain such authorization, because states outside the region would not get involved, the risk that the authorization may not be given because of the veto power is still present. Thus, the allocation of merely conditional enforcement authority to regional arrangements does not effectively solve the problem inherent in the Charter system.

The present system could be improved if the competence to authorize enforcement action by regional arrangement could also be exercised by the General Assembly. It is established law that the General Assembly has a subsidiary responsibility with regard to the maintenance of international peace and security.⁷⁶ The notion of the General Assembly's subsidiary responsibility could be applied to Article 53 with the result that the General Assembly could authorize enforcement action by regional arrangements. However, this approach would only reduce the number of cases where regional arrangements would be prohibited from enforcement actions due to Security Council inaction. Thus, if the General Assembly falls short of the required two-thirds majority, the crucial cases, where the use of military force is necessary in a

76. See the *Uniting for Peace Resolution*, which recognizes the power of the General Assembly to *recommend* enforcement measures (including the use of force in cases of aggression and breaches of the peace) in case of Security Council inaction due to abuse of the veto power. G.A. Res. 377, U.N. GAOR, 5th Sess., U.N. Doc. GA/RES/377/V (1950). For a concise account of the drafting history of Resolution 377/V, see 1950 U.N.Y.B. 181-95, U.N. Sales No. 1951.I.24. For more details on the constitutional implications of Resolution 377/V, see Jost Delbrück, *Die Entwicklung des Verhältnisses von Sicherheitsrat und Vollversammlung der Vereinten Nationen* (1964) (doctoral dissertation, University of Kiel, Germany).

regional conflict, would still remain unattended by the Charter enforcement system.

As of now, there seem to be no options available to completely close the lacunae in the international law enforcement system in cases of the UN's inaction. Under present Charter law, the use of force other than in self-defense or by authorization of the Security Council and possibly the General Assembly is unlawful. The responsibility of states for the enforcement of international *erga omnes* norms and the responsibility of the community of states for the enforcement of international law protecting public international community interests do not provide a legal basis for military enforcement measures outside the UN Charter's system. This is true even in cases implicating massive and gross violation of human rights (such as genocide or genocide-like acts) or grave crimes against the environment (such as the burning of oil wells or massive oil pollution of water resources). The problem of allocation of international law enforcement authority with regard to threats or breaches of the peace is not yet resolved.

CONCLUSION

The preceding discussion of three important areas of international law relating to vital interests of the international community of states shows the remarkable changes which have occurred in the international legal order and the trends towards even more significant changes. A growing consensus on the foundations of the binding force of international law, the broadening of international responsibility for the maintenance of international peace and security, the international protection of human rights and the environment, as well as the restriction of state sovereignty and the principle of non-intervention indicate the changes the international legal order is undergoing. Do these changes amount to a fundamental change of the nature of international law, that is, a transformation of international law as an interstate order into a new World Law?

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

Some developments, such as the broadening of the Security Council's enforcement authority, the growing acceptance of *erga omnes* norms, and the recognition of a communal responsibility for the implementation of principles protecting essential common values, certainly point in the direction of international law moving away from the hitherto dominant paradigm of

sovereignty. The changes also indicate that international law in an unprecedented way is concerning itself with matters formerly falling exclusively into the realm of domestic jurisdiction, thus taking on the character of a comprehensive legal order similar to the comprehensive domestic or internal legal orders.

In some respects, international law is changing into the "internal law" of a World Community. However, the still-defective system of international law enforcement and the still-persisting role of the paradigm of sovereignty suggest that it would be premature to speak of such a far-reaching change in the nature of international law.

What we are witnessing is, to a large extent, the rather rapid implementation of the post-World War II promises for a world order governed by a more effective international law. But it has also become clear from the preceding analysis that considerable areas of international law still need vigorous development, particularly the legal means of effective law enforcement in a still conflict-ridden world. It is here where international lawyers face their greatest challenges in the years ahead and where creative research and far-sighted international legal education is needed.

