International law[1]

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Three hundred and fifty years ago, the Peace of Westphalia established a new international legal order based on sovereign, independent, territorially defined states, each striving to maintain political independence and territorial integrity. The system was hierarchic, since states controlled everything under them, and based on equality among sovereign states. It reflected a laissez faire philosophy, in which all states were equally free to pursue their own interests, whatever their underlying economic or political differences. As the system of sovereign states found in Europe spread across the globe, so did the international legal system based on it.

The Permanent Court of International Justice articulated the classical view in the famous 1927 S. S. Lotus Case between France and Turkey: "international law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these coexisting independent communities or with a view to the achievement of common aims."

The classical view implicitly adopts the Realist School that states are monolithic bodies and does not treat entities within states, transnational entities, or individuals as important. It relies on binding legal instruments to provide solutions to clearly defined problems and assumes that states comply with their international legal obligations. There is a sharp line between international and domestic law and between public and private international law.

But the international system has been rapidly changing and with it the international legal system. This has important implications for the role of international law in addressing issues of environmental security.

Factors causing change

Two changes in the international system have profound implications for international law and environmental security: the simultaneous push toward integration and fragmentation, and the rise of thousands of organizations and millions of individuals as relevant actors.

As we approach the next century, our world is becoming both more integrated and more fragmented. Evidence of global integration abounds: regional trading units; the European Union; global communication networks such as the worldwide web; and international regimes covering issues ranging from arms control and national security, to trade and banking, to human rights and environmental protection. The spread of financial markets, penetration of industries across borders, information revolution and other rapid technological advances, global environmental problems, and other interdependencies compel greater integration. Global cooperation will be needed to address many problems effectively.

At the same time, nationalism, ethnicity, and the need for personal affiliations and satisfaction push toward fragmentation and decentralization. Less than 10% of the

more than 185 states today are homogeneous ethnically. Only about 50% of the states have one ethnic group that accounts for three-fourths of the population (Nye 1992). Scholars write about the rise of tribalism and the revealed need for community bonds. Increasingly states are relinquishing elements of sovereignty to transnational networks of nonstate actors, but the sense of community (with intense loyalty and identification) that binds the citizens of the state is not being extended to the networks.

A new divide is fragmenting the international system: between states and their nonstate transnational elites, on the one hand, and the ethnic, nationalistic, orthodox religious, dispossessed, and alienated communities on the other.

The emerging international system is structurally nonhierarchic. It consists of networks of states, nonstate actors, and individuals (Jacobson 1979). While states continue as principal actors, their freedom to make decisions unilaterally is increasingly restricted, and nonstate actors are performing increasingly complex tasks. States are still the only actors that can tax, conscript, and raise armies, but the importance of these functions has declined relative to the newly important issues, such as environmental security.

Within the community of sovereign states, by contrast, hierarchy has emerged. At the beginning of this century, there were only 34 states; in 1945 when the United Nations was formed there were 51. Today, there are more than 185 states. While all states are sovereign, they are in fact not equal in their relations with each other, even though the doctrine of sovereign and equal states still prevails in international law. Weighted voting provisions in international organizations, differential legal obligations depending upon economic ability and principles such as "common but differentiated responsibility"—all reflect a more hierarchical community. Thus, within the nonhierarchic international system, there is new hierarchy among sovereign states.

There are many actors other than states today in the international system. The 1995/96 Yearbook of International Organizations records 5668 intergovernmental organizations and 36,054 nongovernmental organizations, for a total of 41,722 international organizations. There are other relevant actors also: multinational corporations, ethnic groups, subnational governmental units, and ad hoc transnational associations. These new transnational elites are interested in particular outcomes and may have extensive resources at their disposal. Indeed the budgets for certain nongovernmental organizations exceed the budgets of members of the European Union, and certainly the United Nations. The new actors are frequently bound together in complex ways that change frequently.

Information technology empowers groups other than states to participate in developing and implementing international law. Political factions and separatists circulate messages through the Internet. Pressure groups now form almost instantaneously on the Internet to oppose actions in a given country, as university students know. International letter writing campaigns have gone electronic.

In the changing structure of international law, states exist in a global civil society that shapes the development of and compliance with international law. The sharp lines between public and private international law are blurring, the rigid divide between international and national law is fading, and the difference between the effectiveness of binding and legally nonbinding instruments in international law in changing behavior is under deserved scrutiny. I have developed these points elsewhere.

To clarify the role of international law in addressing environmental security, three substantive developments are important: the expression of fundamental norms (or values) among peoples to address the growing fragmentation and integration, the rise of international monitoring and tracking regimes for transborder transactions that affect environmental security, and the growing emphasis on compliance with international legal obligations.

Substantive directions

Norms as integrating fragmented communities

International law will bear an unusually heavy challenge in the decades ahead: to provide the norms that connect the many parts of our global society. Political theory tells us that viable communities need shared values, either globally or locally. They need to feel linked to each other. The new transnational elites need to share common values with each other and with the fragmented communities who are not directly part of the elites.

While the numerous decentralized communities could view international law as irrelevant and produced by elites, it is equally plausible that international law will be seen as providing the normative content and a voice for the needs of all groups who feel dispossessed, discriminated against, and deprived of basic human rights. Developments in human rights illustrate this, where television and advances in information technology have brought violations of the norms into living rooms everywhere. In the Helsinki process, international human rights law armed those who were fighting oppression. In central and eastern Europe in the late 1980s and early 1990s, environmental rights provided a rallying cry for those seeking democratic rule. Calls for environmental justice in the United States, calls that will likely be heard around the world, demonstrate the importance of norms in uniting and mobilizing people. Global communications can link disparate groups to express common values and ends.

International monitoring and tracking regimes

Scholars and policy analysts are pointing to unprecedented global threats to environmental security in the decades to come. One response may likely be unprecedented tracking of international transactions and monitoring of compliance with relevant international legal obligations.

Materials increasingly cross national borders, and transactions do so electronically. There may be a need for increased international regulatory tracking of dangerous transactions related to national security but also to environmental security, such as movements of nuclear materials and wastes, trade in chemicals, and transfers of hazardous technologies.[2] As the world becomes more fragmented, this is seen by many as essential for containing growing threats to the security of the planet. Technological advances will make near real-time tracking of transactions and movements of material possible. Highly sophisticated technologies are also available to track national compliance with certain international treaties, such as the Montreal Protocol on Substances That Deplete the Ozone Layer, and to assess their effectiveness. But as international

monitoring and tracking is increasingly invoked to counter threats to environmental security, problems will arise from inroads on national sovereignty, invasions of individual and corporate privacy, and potential vulnerability to renegade actors.

Compliance with international law

Until recently, there has often been little attention to the nuances of compliance with international legal instruments. Traditionally, compliance is viewed hierarchically: governments join treaties and adopt national implementing legislation or regulations, with which domestic units comply. Compliance can be measured in a snapshot.

But, in fact, agreements evolve over time and, most importantly, compliance by countries changes over time and involves processes that cannot be captured by a hierarchical framework. States do not necessarily comply fully with their obligations, either because they lack the capacity or the political will or both. Compliance at the national level involves a dynamic process between governments, secretariats, international organizations (including international financial institutions), nongovernmental organizations, subnational units, and the private sector. Strategies to ensure the desired changes in behavior must be targeted toward *engaging* countries (Brown Weiss and Jacobson, Forthcoming 1998). This requires strategies that affect either their political will or their capacity. Strategies must be tailored to the specific agreements and the characteristic of the country.

It is often assumed that binding legal instruments are preferable to legally nonbinding instruments, since countries comply much better with the former. But there is reason to question this assumption. While binding legal obligations may provide explicitly for sanctions to counter violations, many agreements in areas such as environment rely exclusively, or almost exclusively, on other methods to secure compliance. There is no evidence that compliance with them is less, although for certain areas, such as trade, the threat of sanctions may have a very important deterrent effect. The reasons that induce countries to comply with international legal obligations—predictive and stable patterns of behavior, access to benefits, coordination of national actions, securing or maintaining a level competitive playing field—may also apply to nonlegally binding instruments. Since nonbinding legal instruments are growing much faster than binding ones and will be important for problems of environmental security, this issue needs further exploration and analysis.

Systemic issues: manageability and accountability

The emerging structure of international law raises two important systemic concerns that are particularly relevant for environmental security problems: manageability and accountability.

Manageability: Since World War II, there has been a legalization of the relationship among states. There are now over 33,000 international agreements registered with the United Nations, compared to 61 multilateral treaties recorded between 1918 and 1941. In addition, there are thousands of other international legal instruments not registered with the United Nations, and new rules of customary international law have

emerged. As of 1992, there were over 900 international agreements or important nonbinding legal instruments that were either addressed to environmental issues or contained important environmental provisions. Moreover, thousands of voluntary legal instruments have emerged among states and among nonstate actors. Many of the international agreements have mini-institutions associated with them, with individual secretariats, meetings of parties, and subcommittee activities. This growth in international legal instruments raises the question of whether the international legal system is manageable, both for developed and developing countries.

There are three important aspects to this issue: congestion, capacity overload, and the need for a systematic collection of international law.

• Treaty congestion. Such congestion can easily be seen in the environmental area, with more than 900 relevant international legal instruments. There is great potential for duplication, inconsistencies, and unnoticed but significant gaps. The Biodiversity Convention, Convention on International Trade in Endangered Species, International Tropical Timber Agreement, Desertification Convention, and the Nonbinding Forest Principles overlap in the areas they address. The Biodiversity Convention provides for essentially trumping conflicting provisions in other agreements. Problems of overlap also occur in other areas, e.g. the intersection of the London Convention of 1972 on marine pollution by dumping and the Basel Convention on the Transboundary Movement of Hazardous Wastes.

Moreover, there is considerable duplication in the international system in the sense that international agreements typically have separate secretariats, separate monitoring mechanisms, separate funds for financial and technical assistance, separate scientific advisory bodies, and separate reporting requirements. While there are legitimate reasons why this may be desirable, nonetheless there are also reasons to query whether the system can be made more efficient without sacrificing the specific needs of each agreement or the responsiveness of the institutional arrangements to the parties of each agreement.

The issue also arises in the context of dispute settlement, where there are increasingly multiple forums available for settling particular disputes. For example, oceans issues may go to the new Law of the Sea Tribunal or to the International Court of Justice, or other dispute settlement bodies attached to a particular agreement. Different bodies may give differing interpretations on similar issues, such as the validity of jurisdictional reservations to judicial settlement (as in the Turkish case before the European Court of Human Rights and the decisions of the International Court of Justice). This, in turn, may encourage forum shopping. In contrast to national legal systems, there is no international body that serves as the ultimate body of appeal.

But the proliferation of international agreements and forums for settling disputes also has a very positive implication: that more actors, both state and nonstate, are acting under the rule of law and are resolving disputes peaceably according to "the rule of law." International law is becoming central to community concerns across the world, and will be central to environmental security, in part because there are more international legal instruments defining its content in more subject areas and more forums available to resolve disputes. From this perspective, a hierarchy for determining law authoritatively might stifle the attractiveness of peacefully settling disputes by imposing costly and time-consuming procedures, or by discouraging creative resolutions.

Similarly, the solution to treaty congestion is not necessarily to forego negotiating new agreements, but rather to ensure that the highway on which the treaties operate is efficient.

• Capacity overload. The growing number of international agreements also raises a different aspect of treaty congestion: namely, capacity overload on governments at the national level and on nongovernmental organizations and other nonstate actors. The costs in time and resources in negotiating international agreements can be high. Four or five intergovernmental negotiating sessions of one to two weeks each during less than two years, as in the Framework Convention for Climate Change, place large demands on countries to staff and fund participants. The demands affect all countries, but are particularly severe for those countries with limited resources. While countries have sometimes established trust funds to help developing countries to participate in the negotiations, this remains unusual. Interested nongovernmental organizations and industry coalitions face similar time and resource demands. In part, the tendency to conclude nonbinding legal instruments among governments or voluntary codes in the private sector, which may require less time and fewer resources, reflect these pressures.

• Systematic collection of law. Finally, there is a growing need to develop a systematic collection of international law (Sohn 1995). It is difficult today to find all the relevant sources of law in any field of international law. Certainly to meet threats of environmental security, it would be useful to be able to locate relevant law. The information revolution can be helpful in providing the technology with which to compile and monitor the commonly held body of international law. We need to explore building a computerized data base that would include judicial and arbitral decisions from fora in specialized fields as well as important national court decisions bearing on international law. Information technology may also facilitate the chronicling of state practice to determine the development of rules of customary international law and otherwise help to maintain a consistent, commonly held body of international law and to monitor changes in it.

Accountability. States have always been accountable to each other as sovereign independent states for assuring compliance with international law. Moreover, states, in exercising their powers to tax, conscript, and form armies, for example, are accountable to their citizens in democratic governments. However, the many nonstate actors are not yet routinely or fully accountable for their actions. Many are constructive in their influence; others not. Their sheer number poses congestion problems.

On the one hand, participation by nonstate actors in the international legal system greatly enhances accountability in the intergovernmental system, because it can give a voice to citizens who would otherwise be unrepresented, ensure that actions taken meet local needs, counter effects of high-level governmental corruption, and therefore produce outcomes that maximize human welfare efficiently. Technology makes information readily accessible to groups and individuals across the world and empowers them. It can make governments and international organizations more transparent and accountable. In international environmental law, nonstate actors are now prominent participants, either formally or informally, in international negotiations,

conferences of parties, monitoring measures, and other strategies.

On the other hand, nonstate actors are not subject to direct public accountability. Some nongovernmental organizations are membership based and accountable to their members, while others are loosely accountable to their funders, who may be dispersed. Spurious information, unrelenting pressures for special interest pleading outside the intergovernmental forum, unlimited demands for transparency, and similar concerns mean that pressures are building for at least informal guidelines of appropriate conduct. It may be in the best interest of leading nongovernmental organizations, who have contributed much to developing and implementing international law, to take the lead on this issue.

A second major issue of accountability stems from the emerging transnational standards and management practices being developed, largely in the private sector for the private sector, such as the ISO 14000 series, Responsible Care for the chemical industrial, and ecolabels for certain products. In most parts of the world, industries and corporations are accountable through the market system. Thus, nonstate actors should eventually find that consumer preferences both drive and limit what they can do. But accountability through the marketplace is tenuous and works imperfectly.

A major function of international law is to provide a process for legitimating norms. It is, therefore, important to construct processes for legitimating the norms developed by transnational industrial actors. Otherwise, no matter how wise the norms may be, they will not be acceptable in the long run. This may often mean giving a voice to governments and to the public in developing the norms, whether they be environmental management standards, ecolabels, or banking practices. The industrial sector may resist because the situation is moving too fast for meaningful consultation or because other actors are believed to be not sufficiently well informed and therefore could corrode and delay the process. In some cases, transparency of the process and public monitoring of the results may be sufficient to legitimate the norms. But unless the process for developing the norms is viewed as legitimate, the norms, even if sound, may ultimately not be accepted by the broader community.

As we address the many issues included within the rubric of environmental security, we will face an international legal structure that is changed from the classical form and that reflects the rise of a global civil society. It engages new actors and enlists important new resources, although to be sure it also raises new dangers. Just as environmental security has expanded our view of security, so is this emerging international legal structure better suited to the complicated international security problems that we face in the next century.

References

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Endnotes

1. This paper is based on the lecture, "The Changing Structure of International Law," delivered by the author as the Inaugural Lecture for the Francis Cabell Brown Professor of International Law, May 23, 1996. The lecture will appear in a book edited by Jessica Mathews, to be published by the Council on Foreign Relations. A modified version of the lecture is included in Mankind and the Environment: Papers in honor of Alexandre Kiss (Frison Roche, Paris, France, 1998)

2. John Steinbrunner has articulated a need for tracking for national security reasons in his research at the Brookings Institution. See unpublished remarks, Georgetown University Law Center, March 1996.