

# INTERNATIONAL ENVIRONMENTAL LEGISLATION: IS THE CURE WORSE THAN THE DISEASE?

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It is significant that former Prime Minister Palmer begins his article with a discussion of the nature of international law, for it is my disagreement with him about that nature which dictates the difference in our approaches to solving global environmental problems. Universal consent is the essence of international law. Prior to the emergence of Communist<sup>1</sup> and Third World countries, international law appeared to be on the road to a more Austinian nature.<sup>2</sup> The emergence of highly divergent viewpoints, however, precludes such progress, at least for the foreseeable future.<sup>3</sup> Attempts to create the hoped-for "new world or-

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1. At this time, there are still some Communist countries. However, whether they will affect the shaping of international law in the future is unclear. It is also uncertain whether all of the countries who abandoned communism will remain non-communist. This Article proceeds on the assumption that communism will probably not continue to be a force in the international legal arena.

2. See, e.g., J. Patrick Kelly, *The International Court of Justice: Crises and Reformation*, 12 *YALE J. INT'L L.* 342, 343 (1987) (arguing that the International Court of Justice's compulsory jurisdiction clause was instituted at a time when world leaders hoped to create a world governed by the rule of law).

3. The recent changes in the Communist World, and some evidence of Third World maturation force consideration of the optimistic possibility that a time may come when progress toward a more Austinian international legal system will again be a viable target.

der" are premature. The inevitable result of the international legislation that former Prime Minister Palmer advocates will be the hostile withdrawal of some world participants as they find the process unacceptable.

## I. THE NATURE OF INTERNATIONAL LAW

As former Prime Minister Palmer notes, there are many who do not regard international law as "law."<sup>4</sup> While he does not concede this extreme position, Professor Palmer accepts much of the underlying analysis, and concludes that international law, as it exists today, is too slow and ineffective to respond to environmental challenges.<sup>5</sup> Invoking traditional vertical<sup>6</sup> legal positivist notions,<sup>7</sup> Professor Palmer argues that international law must gain the strength of domestic law. In such analysis, the essence of law is that it has rules as well as identifiable and authoritative lawmaking bodies.<sup>8</sup> One can look to these bodies for the creation of such rules and to officials for proper rule adjudication and enforcement.

Domestic law fits this model well. The legislature can pass almost any law it collectively wishes. Courts are present to adjudicate and

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4. Geoffrey Palmer, *An International Regime for Environmental Protection*, 42 WASH. U. J. URB. & CONTEMP. L. 5, 6 (1992).

5. *Id.* at 7-8.

6. The term "positivism" is used by legal scholars in two senses. One may be described as "vertical" and the other "horizontal." Austin is a positivist in the vertical sense because he defines law as rules imposed by a legislative or judicial authority upon those who must obey the law.

Some international lawyers use the term "positive law" as law made by people of their institutions, in contradistinction to natural law. Positive law, in this sense would include both vertically imposed law and law made by custom and treaty. *See, e.g.,* WILLIAM W. BISHOP, JR., *INTERNATIONAL LAW: CASES AND MATERIALS*, 13 (3d ed. 1971).

Custom and treaty, the primary sources of international law, are more horizontal. They are generated by those who also must obey the law, acting as equals, rather than any higher authority.

7. *See, e.g.,* JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* (1832).

8. Palmer, *supra* note 4, at 7 n.7. Professor Palmer explains that "[J]ohn Austin and the analytical positivists argued that international law is not law properly so called because it lacks both a legislature and sanctions." *See also* Jeffrey L. Harrison & Amy R. Mashburn, *Jean-Luc Godard and Critical Legal Studies (Because We Need the Eggs)*, 87 MICH. L. REV. 1924, 1924 n.4 (1989) ("By legal positivism we mean the view that legal outcomes are driven by adherence to objective principles and pre-existing legal rules.").

ensure that laws are obeyed. It follows, therefore, that we live in a crime-free society where everyone abides by contractual obligations, and nobody ever tortiously injures his or her neighbor. This would be the case if domestic law were absolutely effective, as its proponents imply.

In truth, however, Austin is really concerned with the *appearance of law*. Domestic law is easy to make, even easier to point to, yet highly ineffective. Crime continues, and it is doubtful that the criminal law reduces it. One need only consider the current "war on drugs" to see the nominal law's impotence. Criminals are difficult to identify; they hide among society and thwart prosecutorial efforts. In addition, tremendous delays and costs involved in civil litigation handicap that branch of the law. Only token changes can be found even though American courts have desegregated the nation, its schools, and its workplaces for thirty-five years.<sup>9</sup>

Former Prime Minister Palmer laments the weakness of international law: He explains that "[t]he decision to do anything about breaches of international law will not usually depend on the fact of the breach."<sup>10</sup> Is the "fact of the breach" any more the *sine qua non* of retribution or compensation under the domestic law? Can anyone doubt, for example, that our neighborhoods are still segregated? Domestic lawyers judge law by its appearance. International law is more amorphously created and has less formal enforcement facilities. As a result, international law fails to measure up to domestic standards.

Even assuming for the sake of argument that the appearance of law is the measure of law, the critical legal studies movement is not so impressed with domestic law. Nothing is clear on its face, and interpretation is not a "legal" process.<sup>11</sup> The choice of interpretation is political. As several first year law students say to me every year, "[t]he statute means what the court *wants* it to mean," or, "[t]he court just does what it *wants* to do, and then dresses it up with the explanation." In fact, there are paradigms of legislative interpretation (and of common law analysis for non-statutory questions) that exert some force on judges.

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9. See, e.g., Finis Welch & Audrey Light, *New Evidence on School Desegregation* (U.S. Comm. on Civil Rights 1987).

10. Palmer, *supra* note 4, at 8.

11. See, e.g., Harrison & Mashburn, *supra* note 8, at 1924; Joseph Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1 (1984) (explaining the failures of traditional legal theories). But see Harry T. Edwards, *The Judicial Function and the Elusive Goal of Principled Decisionmaking*, 1991 WIS. L. REV. 837, 838-49 (explaining external pressures felt by judges interpreting law and making decisions).

The "crits" overstate their point. It would be the more naive option, however, to believe that the paradigms of legal analysis *vel non* govern all — or even most — decisions.

Having a written law does not guarantee courts' adherence. The Fourteenth Amendment<sup>12</sup> was almost a hundred years old before *Brown v. Board of Education*.<sup>13</sup> The Establishment Clause<sup>14</sup> seems to have first awakened from its slumber in 1962.<sup>15</sup> The clause seems to be returning to oblivion at the moment, as the Court allows legislative prayer,<sup>16</sup> Christmas displays,<sup>17</sup> and is currently considering public school prayer at graduation ceremonies.<sup>18</sup> In the not-too-distant past, the Free Exercise Clause was given sporadic life<sup>19</sup> after years of disregard. Most recently, however, the Court has held the Clause to be virtually meaningless.<sup>20</sup>

Even in the domestic law context, rights which exist "on paper"

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12. U.S. CONST. amend. XIV.

13. 347 U.S. 483 (1954).

14. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion . . .").

15. See *Engel v. Vitale*, 370 U.S. 421, 431-37 (1962) (mandatory public school classroom prayer violates the Establishment Clause); see also *School Dist. of Abington v. Schempp*, 374 U.S. 203 (1963) (enjoining public school class room Bible reading).

16. *Marsh v. Chambers*, 463 U.S. 783, 793-94 (1983) (upholding the constitutionality of the Nebraska legislature's practice of opening each session with a prayer by a chaplain paid with public funds).

17. *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984) (holding that a city inclusion of a nativity scene in a Christmas display did not violate the Establishment Clause).

18. *Weisman v. Lee*, 908 F.2d 1090 (1st Cir. 1990), *cert. granted*, 111 S. Ct. 1305 (1991).

19. For typical examples of older decisions giving little or no weight to the Free Exercise Clause, see *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944); *Romney v. United States*, 136 U.S. 1 (1889); *Reynolds v. United States*, 98 U.S. 145 (1878). For typical examples of more recent decisions, see *Thomas v. Review Bd.*, 450 U.S. 707, 720 (1981); *Wisconsin v. Yoder*, 406 U.S. 205, 234 (1972).

20. See *Oregon Dept. of Human Resources v. Smith*, 494 U.S. 872 (1990). In *Smith*, the Court held that the Free Exercise Clause does not prevent the application of Oregon's drug use laws to the ceremonial use of peyote by native Americans. In so holding, however, the Court dramatically altered all of its previous Free Exercise Clause analysis. Rather than basing the decision on a special or vital need to stop drug use, the Court simply eliminated Free Exercise protection from any law which is neutral on its face. After *Smith*, only a law which prohibits a religious practice and names that practice as a religious practice would violate the Clause. For example, *Smith's* analysis would still find a law which says, "It shall be a felony to hold a Catholic Mass in this state," to be a violation of the Clause. It is difficult to imagine anything less extreme which would violate the Clause, however, after *Smith*.

have no power over the courts if the society is not ready and willing to embrace them.<sup>21</sup> Leaving aside the fact that courts would not really be able to enforce laws, it is also obvious that having a clear, Austinian source of law (like the Constitution) does not even mean that courts will be bound by its plain language. There is no panacea in having Austinian law.<sup>22</sup>

International law has its primary source in the practice of nations.<sup>23</sup> As a result, international law is conceptually empirical. It has little to do with the appearance of law. If domestic law was described in terms of results, the following would describe the sanctity of contracts:

If the amount of money involved is less than necessary to justify the cost of litigation, contracts are unenforceable. If the amount justifies the cost of litigation, the victim of the breach is likely to settle for only a small fraction of his expectations under the contract in order to avoid having to pay the full cost of litigation and to avoid undue delay. Accordingly, it usually pays to breach contracts if a deal becomes significantly undesirable.

If we stated domestic law with such candor, there might be calls for ways to strengthen domestic law by making it more like international law.

Former Prime Minister Palmer acknowledges the formation of international law from the practice of nations, but he expresses doubt that it is as effective as domestic law, saying, "[i]t is not so easy, however, to develop a coherent theory as to why those rules are binding."<sup>24</sup> The fact that enforcing agents which make international law binding are not Austinian does not mean that they do not exist. Indeed, although

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21. See LARRY BARNETT & EMILY REED, *LAW, SOCIETY AND POPULATION: ISSUES IN A NEW FIELD* (1985). Almost everyone in America pays lip service to integration and freedom of religion, but the sad reality of our society is that "integration" means "integrate the neighborhood *I don't live in*," and "freedom of religion" means "*my* freedom to make you accept my religion." See *id.* at 120-213. The authors present charts drawn from survey responses showing that most of the United States population supports *Brown v. Board of Education* in the abstract. White parents did not generally object to "a few" black children attending their children's schools. However, a majority of the parents objected when asked about their children attending schools "half or more than half" black.

22. See *infra* notes 76-78 and accompanying text exploring the need for more than simply creating "law on the books."

23. See, e.g., *Paquete Habana*, 175 U.S. 677, 700 (1900) (explaining that mutual conduct is the primary source of environmental law); BISHOP, *supra* note 6, at 3-6; G. HACKWORTH, *DIGEST OF INTERNATIONAL LAW* (1940).

24. Palmer, *supra* note 4, at 7.

it would be difficult to quantify and compare objectively, international law is almost certainly by far the more binding of the two.

Unlike individuals, nations cannot hide. The nations of the world are a much smaller and more interdependent group than the domestic population. A thief can break the law and hide; a businessman can break a contract and find other business contacts. The nations of the world are inextricably linked to one another. It is not possible to find another set of nations to do business with. For example, many Third World countries who expropriated the property of foreign investors a generation ago, and questioned the duty to compensate, are now finding it very difficult to attract investment.<sup>25</sup>

## II. MAKING INTERNATIONAL LAW MORE AUSTINIAN

Former Prime Minister Palmer sees three shortcomings of international law which he fears will render it unable to cope with the coming environmental crisis.<sup>26</sup> First, international law lacks true legislative capacity. Since making international law by the practice of nations or by multilateral treaty requires the consent or acquiescence of every relevant nation, the process is too slow and cumbersome. A single significant nation can bring it to a halt. Prime Minister Palmer advocates a true legislative body which would use the will of the majority to bind nations that vote in the negative.<sup>27</sup> Second, international law is said to lack means of having compulsory adjudication.<sup>28</sup> Third, the international community needs an investigatory prosecutor to make the adjudication effective.<sup>29</sup>

I have previously discussed the fact that the lack of courts does not mean that international law lacks enforcement mechanisms. There exists a more subtle form through which the nations of the world can voice displeasure. Diplomatic protests initiate a process that could proceed to the level of sanctions or even the use of force, as in Kuwait. If a violator refuses to bend to the international will, the violator's diplomatic objections are disregarded. The entire process is far too varied and interactive to detail here, yet it clearly works.<sup>30</sup> Nations know that

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25. Further, international sanctions have brought the Union of South Africa's white government to the brink of dissolution.

26. Palmer, *supra* note 4, at 16-17.

27. *Id.* at 14-15.

28. *Id.* at 11

29. *Id.* at 12

30. For some truly excellent insights into the nature of this process, see generally

they will pay a price for violating international law.

As Former Prime Minister Palmer points out, however, much can be learned from the failure to date of the International Court of Justice.<sup>31</sup> The Court is only effective against states that violate international law if the Court has compulsory jurisdiction. Mr. Palmer discusses the United States' withdrawal of its acceptance of compulsory jurisdiction as a result of its controversy with Nicaragua in 1988, and the similar withdrawal of France resulting from the Nuclear Test Case of 1974.<sup>32</sup> Less than a third of the members of the United Nations currently accept the Court's compulsory jurisdiction. Further, that number is not a sign of slow progress toward universal membership. In the earliest days of the United Nations, the relative number of such states was rising, but it reached a high point in 1953,<sup>33</sup> with a slight majority of the United Nations members accepting compulsory jurisdiction.<sup>34</sup> Even then, many of these acceptances were illusory.<sup>35</sup> Since that time, there has been a relatively steady drop in acceptance.<sup>36</sup>

Greater concern lies in the five permanent members of the Security

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ANTHONY D'AMATO, *INTERNATIONAL LAW: PROCESS AND PROSPECT* (1987). See also LOUIS HENKEN, *HOW NATIONS BEHAVE* 47 (2d ed. 1979) ("[A]lmost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.") (emphasis omitted).

31. Palmer, *supra* note 4, at 11-12.

32. *Id.* See also Kelly, *supra* note 2, at 344-48. Professor Kelly also details the similarly disappointing experience of The Permanent Court of International Justice (adjunct to the League of Nations) during its brief period of existence. *Id.* at 344-46.

33. Kelly, *supra* note 2, at 348. The actual number of states accepting the Court's jurisdiction has risen slightly because of the vast increase in nations in the world in recent years, but the relative number has dropped precipitously.

34. *Id.* at 348. In 1934, the Permanent Court of International Justice had 70 percent of the membership of the League of Nations accepting its jurisdiction. *Id.*

35. *Id.* at 351-61 (summarizing the growing practice of placing limitations and conditions as a country's acceptance of the compulsory jurisdiction clause).

36. *Id.* at 349. Further, as Professor Kelly points out in a subsequent article:

One further dose of realism is in order. Respondents in the last eight contentious cases, not based on a voluntary special agreement, have chosen either not to appear at some stage of the proceedings or not to comply. This is not to say that international adjudication is not a valuable dispute resolution technique. It has frequently been successful on an *ad hoc* voluntary basis under article 36(1) of the Court's statute. The United States government has referred several such disputes to the Court in recent years. Rather, compulsory jurisdiction has not worked in practice; indeed it has never been tried.

J. Patrick Kelly, *The Changing Process of International Law and The Role of the World Court*, 11 MICH. J. INT'L L. 129, 142 (1989) (footnotes omitted).

Council.<sup>37</sup> In 1953, only the Soviet Union refused to accept the Court's jurisdiction.<sup>38</sup> Professor Palmer points out that today, Great Britain is the only permanent member of the Security Council that still participates.<sup>39</sup> Actually, it would be fairer to delete Britain from the list as well because its acceptance has been illusory since 1955. Professor Patrick Kelly presents the following well-stated account:

The United Kingdom has developed a technique nearly as useful as termination for avoiding adjudication that it perceives to threaten its interests. It terminates its declaration and substitutes a new one excluding the specific matter in dispute. In October 1955, the United Kingdom terminated a declaration made only five months previously in order to include a new reservation. This reservation was carefully designed to exclude consideration of the Burami dispute with Saudi Arabia. In 1957, the United Kingdom again terminated its declaration in order to add a self-judging reservation concerning national security. This reservation had the effect of insulating its nuclear weapons testing program from challenge.<sup>40</sup>

Rather than lamenting each nation's withdrawal as an isolated sad day in the development of international law, Professor Kelly argues that the steady stream of withdrawals points to a more profound flaw in the very concept of the Court's compulsory jurisdiction.

The Court is not suited to the nature of international law for a number of reasons: first, because so-called zero-sum proceedings — where “winners” and, therefore, corresponding “losers” must be identified — actually interfere with dispute resolution; second, fundamental disagreements exist among nations about governing principles of international law and, most recently, about the process of creating international law.<sup>41</sup> Professor Kelly persuasively argues that recent attempts by the Court to give General Assembly resolutions greater significance can only insure that acceptance of the jurisdiction of the International Court will decrease even further.<sup>42</sup> Although conceived with the best

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37. See Kelly, *supra* note 2, at 349.

38. *Id.* at 348.

39. Palmer, *supra* note 4, at 11.

40. Kelly, *supra* note 2, at 350 (footnotes omitted).

41. See generally Kelly, *supra* note 36; BISHOP, *supra* note 6, at 20-25.

42. Kelly, *supra* note 36, at 155 (“The Court’s process innovation [including General Assembly resolutions as a source of law] clarifies that the exposure of the United States to decisions of the World Court adverse to its conceptions of international law has become far wider than any reservations can cloak.”).

of intentions, the presence of the International Court of Justice's compulsory jurisdiction continually impedes the growth and enforcement of international law.

At the heart of Professor Palmer's international regime for environmental law is a proposal for a true legislative body. All nations must participate, or at least acquiesce, in the process of making law through custom or "practice of law."<sup>43</sup> Treaties, of course, require actual consent through ratification. Legislation, on the other hand, proceeds by vote.<sup>44</sup> It is expected that some number of negative votes will be overruled. Indeed, this is the virtue that Mr. Palmer seeks to achieve because it makes law easier to create.

Mr. Palmer overstates the difficulty of obtaining unanimous consent (or acquiescence) in the international arena. In a comment directed to treaty-making, but no doubt equally applicable to custom and practice, he laments, "[t]here is no obligation on any state to become a party to a particular treaty. That is the first difficulty."<sup>45</sup> This assertion overlooks the role of interdependence in international law. A nation cannot unilaterally ignore the desires of the international community. For example, a country cannot emit transboundary pollution or accelerate the depletion of the ozone layer, without becoming an international outcast as South Africa has for the treatment of its Black majority.

Dynamic tension produces fairness in international law. If the international community asks a country to do more than it can possibly accept, each nation has the ability to dare to incur the costs of being an outcast. This forces compromise and mediation. Over the years, the process has proved itself.

It would be dangerous to set the precedent of international legislation at this time. The existing lack of consensus as to the appropriate content of international law as well as the diverging views of Western and Third World nations. While the European community may hope for multinational legislation, for example, the European community is

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43. See, e.g., Kelly, *supra* note 36, at 143 n.89; MacGibbon, *The Scope of Acquiescence in International Law*, 1954 BRIT. Y.B. INT'L. L. 143.

44. The number of votes required to pass legislation need not be a simple majority. Greater or lesser weight may be given to the votes of different categories of nations. Former Prime Minister Palmer's example from the Montreal Protocol demonstrates this. See Palmer, *supra* note 4, at 15. Also, the Security Council veto is an example of this. U.N. CHARTER art. 27, § 3 (also requiring a vote of nine out of fifteen, higher than a simple majority).

45. Palmer, *supra* note 4, at 11.

a fairly homogeneous group.<sup>46</sup>

Although I am certain many will criticize my view,<sup>47</sup> I believe that many Third World nations have acted with great immaturity in international matters, and I deeply fear trusting their automatic voting majority with important questions. From my own experience at the United Nations, I found that some Third World nations openly boast of their enjoyment when harassing the United States without regard to the merits of the underlying controversy. With exceptions of course, some of these countries often act out of extremely short-term political convenience. A notable example is the recent flip-flop over Israel's alleged "racism."<sup>48</sup>

Professor Palmer describes all of the nations of the world as "co-equal sovereign states."<sup>49</sup> One can certainly debate whether a nation the size of Lebanon is co-equal to the United States. The obvious differences in nations may cause the "one nation - one vote" system to have unrepresentative consequences. In any event, that equality, if it be conceded, does not imply the trust or respect which would justify a grant of legislative power. That trust must be earned.

Thus, while Prime Minister Palmer commends Article 9(c)(2) of the Montreal Protocol,<sup>50</sup> and efforts to strengthen the United Nations,<sup>51</sup> I believe that these are unwise precedents. I doubt if the United Nations would have survived any five-year period of its existence without the

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46. See, e.g., Michael S. Feeley & Peter M. Gilhuly, *Green Law-Making: A Primer on the European Community's Environmental Legislative Process*, 24 VAND. J. TRANS-NAT'L L. 653 (1991) (examining the European community's background and environmental legislative regime).

47. See generally Kelly, *supra* note 36 (portraying Third World views as equally legitimate to traditional views).

48. See John M. Goshko, *U.N. Repeals Resolution Linking Zionism to Racism*, WASHINGTON POST, Dec. 17, 1991, at A1. This incident is even more troubling to me. At a time when Israel was still considered "racist," I had a conversation with a second-level member of the United Nations delegation from an African nation. I would not relate this story if I did not feel it was representative of the Third World views I encountered. I asked why it was racist for Israel to create a Jewish state, and not racist for another country to create an Islamic state. Sixteen years later, I can still recall his reply: "They are Jews. The world doesn't need Jews." Apparently, he did not realize that I was Jewish. I am not prepared to entrust international legislative power to such persons.

49. Palmer, *supra* note 4, at 8.

50. *Id.* at 14-15.

51. *Id.* at 17-18.

saving grace of the five permanent members of the Security Council's veto power.

Ironically, whenever it suits the United States' short-term convenience, the United States has sought to strengthen the United Nations because it appeals to American notions of a world governed by law and order. This tradition began in 1950 when the United States, temporarily assured of an automatic anti-Communist voting majority in the General Assembly, sought to give the General Assembly power to circumvent the Soviet Union's Security Council veto through the "Uniting for Peace" resolution.<sup>52</sup> Subsequently, the admission of a vast number of Third World countries to the General Assembly has meant that the United States now uses the veto as often as Soviet Union/Russia.<sup>53</sup> The United States has come to regret the Uniting for Peace resolution. Notably, Judge Bedjaoui of the International Court has pointed out that the Western nations who now so strenuously oppose giving the General Assembly law-creating powers are the very nations that initiated the transfer of power from the blocked Security Council to the General Assembly in the Uniting for Peace resolution.<sup>54</sup>

Former Prime Minister Palmer states, "[p]olitical decision makers dwell little on theory and even less on jurisprudence. They want something practical that works."<sup>55</sup> The statement is all too true, but I, at least, hope for more. Political decision makers must begin to think of the long-term consequences of their actions. Concerns about the biosphere, however vital, should not replace long-term concern about consequences for the system of international relations. In protecting ourselves from global warming as former Prime Minister Palmer suggests, we may sow the seeds of the destruction of international protection of human rights, the seeds of increasing terrorism, or possibly even the seeds of war. I find these prices far too high.

Much has been made of President Bush's "new world order." I find it interesting that President Bush built up the United Nations' legitimacy and, in the process, sacrificed control over the Kuwait operation

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52. G. A. Reso. 377(V) of 3 November 1950. G.A.O.R. V plenary 347. See generally LOUIS SOHN, *CASES ON UNITED NATIONS LAW* 491-509 (2d ed. 1967) (discussing the United for Peace resolution).

53. See, e.g., Kelly, *supra* note 36, at 147-48 n.116 ("The Security Council voted 11 to 1 (U.S. against) for a resolution condemning the intervention in Grenada as a flagrant violation of international law. . .").

54. MOHAMMED BEDJAOU, *TOWARDS A NEW INTERNATIONAL ECONOMIC ORDER* 178 (1979).

55. Palmer, *supra* note 4, at 9.

for a small amount of political imagery. As a result of international pressure, the advance halted once Kuwait was liberated leaving Saddam Hussein still in power. I fear that the rest of the United Nations may start to expect their assent to be required in the future before the United States can defend a friendly nation.

### III. THE GLOBAL ENVIRONMENT

Environmental problems clearly do traverse national borders. Damage to the ozone layer threatens the world at large, rather than any particular country. Yet the history of international cooperation regarding ozone layer protection has been quite commendable. The 1990 Montreal Protocol amendments require the complete phasing out of all ozone depleting substances by the year 2000.<sup>56</sup> This is the result of the multilateral treaty process in action. Further, new scientific evidence indicates that even the year 2000 may not be soon enough. Accordingly, since Professor Palmer spoke, the United States has taken unilateral action going beyond the treaty through domestic legislation.<sup>57</sup>

Yet, one must concede that the ozone layer problem may be easier to solve than other governmental problems, such as the greenhouse effect, acid rain, hazardous waste, and the environment in space. At the same time, unlike ozone depletion, these problems do not require a solution in such an extremely short time period. The international community, however, has made some progress.

For example, in June of 1992 a worldwide Conference on the Environment and Development will take place. Ambassador Elliot Richardson has written a persuasive article describing the magnitude of the conference and describing potential approaches.<sup>58</sup> Not all solutions will come on such a grand scale. To reduce global warming and acid rain, we must look to the tremendous power of the wind and the tides. Notwithstanding common public perceptions to the contrary, wind and tidal power could easily satisfy all of our electricity needs. The real

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56. Palmer, *supra* note 4, at 14.

57. See Philip J. Hilts, *Senate Backs Faster Protection of Ozone Layer as Bush Re-lets*, N. Y. TIMES, Feb. 7, 1992, at A1. See also Ved P. Nanda, *Global Warming and International Environmental Law — A Preliminary Inquiry*, 30 HARV. INT'L L.J. 375, 390 n.99 (1989) ("The United States took the lead in banning the use of CFCs in aerosols.").

58. See Elliot Richardson, *Prospects for the 1992 Conference on the Environment and Development: A New World Order*, 25 JOHN MARSHALL L. REV. 1 (1991). In a manner quite similar to the series of articles presented here, Ambassador Richardson's article is followed by three articles responding to it. *Id.* at 13-36.

difficulty is overcoming the tyranny of engineers who prefer to build nuclear power plants.<sup>59</sup> I would certainly not look forward to a world where underdeveloped nations are using nuclear power on a large scale. Money-saving corner cutting will mean that virtually all of the Third World reactors will provide their own environmental risks on a scale far greater than global warming. Also, wherever nuclear power plant technology goes, nuclear weapons technology goes.

Acid rain is being attacked with considerable success. Our neighbor, Canada, and our own northeastern states have pressured the federal government, and much has been done through domestic legislation in the United States.<sup>60</sup> This model is promising, and might be used elsewhere in the world. Professor Nanda argues that the Basel Convention is a good start in the area of international hazardous waste export.<sup>61</sup> He identifies the weaknesses that will be subjected to international scrutiny at the 1992 conference. Further, Professor Nanda details the laudable efforts of the World Bank to use its huge development lending fund as a "carrot" to encourage environmentally sound planning.<sup>62</sup> The similar use of other international administrative agencies has begun, and is likely to increase.<sup>63</sup> Nations have also achieved considerable success in protecting the environment (or lack thereof) in space from radioactive materials.<sup>64</sup>

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59. See, e.g., Amory Lovins, *Energy Strategy: The Road Not Taken?*, 55 FOREIGN AFF. 65 (Oct. 1979).

60. Clean Air Act, 42 U.S.C. §§ 7401-7642 (Supp. 1991).

61. See Ved P. Nanda, *International Environmental Protection and Developing Countries' Interests: The Role of International Law*, 26 TEX. INT'L L.J. 497, 507-11 (1991) (discussing international environmental issues). See also Alexandre Kiss, *The International Control of Transboundary Movement of Hazardous Waste*, 26 TEX. INT'L L.J. 521 (1991) (examining how international legal entities have responded to transboundary movement of hazardous waste); Ved P. Nanda & Bruce C. Bailey, *Export of Hazardous Waste and Hazardous Technology: Challenge For International Environmental Law*, 17 DENV. J. INT'L L. & POL'Y 155 (1988) (exploring necessary considerations in addressing international hazardous waste problems).

62. *Id.* at 190-92. The "stick" model would make certain acts illegal in order to encourage environmentally sound planning.

63. See *Symposium: International Development Agencies (IDAs), Human Rights and Environmental Considerations*, 17 DENV. J. INT'L L. & POL'Y 29-154 (1988).

64. See, e.g., Note, *Regulation of the Outer Space Environment Through International Accord: The 1979 Moon Treaty*, 2 FORDHAM ENVTL. L. REP. 173 (1991); Harold C. Manson, *The Impact of International Outer Space Commerce on the Environment*, 26 TEX. INT'L L.J. 541 (1991) (examining potential environmental effects of international space commerce). Overpopulation is also an additional area of global environmental concern. Political and religious tensions may pose a profound obstacle to work in that area, yet some action will become absolutely necessary in the coming century.

#### IV. SOLUTIONS

Traditional international law holds a nation liable for monetary damages caused by pollution generated from within its territory.<sup>65</sup> Doctrines related to monetary liability, however, have shown little progress since Professor Goldie's seminal work on the topic in 1965.<sup>66</sup> No one is interested in receiving "compensation" for the loss of the ozone layer. No one knows how to measure such damage, and how to prove causation.<sup>67</sup> More importantly, we wish to save the environment and do not desire payment for its loss.<sup>68</sup> One can certainly debate whether monetary damages work to deter wrongful or dangerous conduct in the domestic context.<sup>69</sup> In the international context, however, it is difficult to imagine that any deterrent effect would be felt at all.

One mechanism that is likely to help is unilateral legislation. Domestic and international pressure may help to initiate such legislation. We are all citizens of the world, and every step that minimizes environmental harms helps all of us. This option can prove to be quietly effective even though it lacks the international drama of treaties. Certainly, the United States has made great progress towards controlling acid rain and the ozone in this manner.

Another mechanism to combat global warming is currently in use by private, non-governmental organizations such as the Nature Conservancy.<sup>70</sup> These organizations purchase tropical rain forest land.<sup>71</sup>

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65. See *Trail Smelter Arbitration (United States v. Canada)*, 3 Rep. Int'l. Arb. Awards (1905), reprinted in 35 AM. J. INT'L L. 684, 716 (1941). Cf. *Corfu Channel Case, (U.K. v. Albania)* 1949 I.C.J. 4, 22 ("[E]very state [has an] obligation not to allow knowingly [sic] its territory to be used for acts contrary to the rights of other states.").

66. L. F. E. Goldie, *Liability for Damage and the Progressive Development of International Law*, 14 INT'L & COMP. L.Q. 1189 (1965) (discussing liability theories in international law).

67. See Nanda, *supra* note 57, at 382-84 (advocating a new approach to global warming based on cooperation, rather than liability).

68. Professor Nanda explains that "[n]o amount of money will allow a nation to purchase a more favorable weather pattern, a cooler climate, or adequate rainfall." *Id.* at 384.

69. In the area of medical malpractice, for example, there is some evidence that fear of malpractice actions does improve medical care. See BARRY FURROW ET AL., *HEALTH LAW: CASES, MATERIALS AND PROBLEMS* 163-64 (2d ed. 1991). However, the factors which are likely to account for the positive effect of malpractice litigation such as direct personal fear of financial loss combined with present ability to avoid liability by changing conduct, are not present in the international environmental context.

70. See TIME, Feb. 3, 1992, at 59 (advertisement). *But see* Priya Alagiri, Comment,

This can be achieved by outright purchase or, in the case of Third World countries, by the so-called "debt-for-nature swap" technique. There is no reason why only private groups can participate. The nations in the Group of Seven could get together and buy tropical rainforest land to protect it from development.

A third technique, somewhat of an inverse corollary of the debt-for-nature swap, is the use of World Bank development loans. The loans are used as incentives, making loans only for environmentally sound projects, and only to countries that take other specific steps to protect the environment.

A fourth technique for dealing with the various environmental problems is through multilateral treaties. Although one cannot force a nation to sign such a treaty, the international pressure to do so is significant. Even in cases where such treaties constitute a significant restraint on a nation's freedom of choice, multilateral treaties have been substantially successful in tackling environmental problems. These treaties often include not only nation-states, but also non-governmental international bodies such as UNEP (the United Nations Environment Programme) and WMO (the World Meteorological Organization). Hahn and Richards make an excellent case that such multilateral treaties are the best bet for future programs.<sup>72</sup> They demonstrate a clear trend in the growing use of such treaties for environmental concerns and explain that the increase is due to scientific macro-psychological, economic, and political factors.<sup>73</sup> Since 1989, multilateral amendments<sup>74</sup> have dramatically strengthened the Montreal Protocol on the ozone layer. This further demonstrates Hahn and Richard's thesis. The 1992 Conference in Brazil is likely to further demonstrate this

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*Give Us Sovereignty or Give Us Debt: Debtor Countries' Perspective on Debt-for-Nature Swaps*, 41 AM. U.L. REV. 485 (1992).

71. The ultimate fear, however, is that Third World nations might ultimately expropriate such lands and turn them to "productive" use. Bilateral international treaties could help to reduce this possibility, but it is unwise to invest too heavily without some reason to believe that purchased nature preserves will not be expropriated.

72. Robert W. Hahn & Kenneth R. Richards, *The Internationalization of Environmental Regulation*, 30 HARV. INT'L L.J. 421 (1989) (constructing a framework for understanding international environmental agreements and discussing implications for national policy).

73. *Id.* at 424-25. A chart which strongly demonstrates an upward trend in the use of treaties for environmental purposes appears at 425.

74. See Palmer, *supra* note 4, at 14 (describing the 1990 Montreal Protocol amendments).

although that Conference will be more of a catalyst than a formal treaty session.

A fifth strategy — which must be used along with, and as a part of the other strategies — is to keep international attention focused on vital environmental questions. This symposium and Former Prime Minister Palmer's original speech play a role in this process. Of course, the 1992 Conference will play a greater role than our efforts. Also, General Assembly Resolutions, so-called "soft" law or "aspirational" law in the form of declarations and treaties which create no formal obligations, serve this purpose. Professor Palmer and I are of one mind on this point.<sup>75</sup> Having a "hard" law treaty on the books is no substitute for political awareness and vigilance in either the international or domestic arena.

Recent international experience shows that "law on the books" is no substitute for continuing vigilance. For example, Japan, under considerable pressure from other nations, became party to the International Convention for the Regulation of Whaling.<sup>76</sup> Philippe Sands has detailed some of the recent history of Japanese performance under the Whaling Convention:

Even when the offending state is a party to an appropriate convention, there is no guarantee that action will be taken . . .

Article VIII of the Convention provides that notwithstanding any provisions in the Schedule, including established quotas or moratoria, the contracting parties may grant to their nationals a permit authorizing the taking or killing of whales for purposes of "scientific research." The specific conditions to be imposed for such permits are left to the contracting government, which is required only to report to the Whaling Commission that a permit has been granted, and to transmit periodically the results of the scientific research carried out. The Convention contains no definition of the term "scientific research." While the Commission's Scientific Committee is empowered to review and comment upon proposed scientific permits, and to submit recommendations and reports to the full Commission, the Convention fails to endow any such recommendations with binding force.

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75. *Id.* at 14. ("Do not denigrate soft law in the international environmental area — it has its uses."). Professor Palmer shows this through the example of how the Helsinki Declaration of 1989 became the 1990 London amendments to the Montreal Protocol. The London amendments, galvanized by the Helsinki Declaration, require the complete phase out of all ozone depleting chemicals by the year 2000. *Id.*

76. Dec. 2, 1946, 62 Stat. 1716; T.I.A.S. 1849, 161 U.N.T.S. 72 (*entered into force* Nov. 10, 1948).

In 1987, Japan submitted a "scientific research proposal" to the Whaling Commission which called for the taking of 825 minke and 50 sperm whales over a ten-year period. The purpose of the purported "research" was to determine the number of "surplus" whales in order to assess whether the resource could be utilized through resumed commercial whaling. The proposal would require the killing of the whales taken and the "scientific research" was to be financed by the sale of the whale meat.

In June 1987, the Commission's Scientific Committee reviewed the Japanese proposal but failed to reach a consensus on the question of whether Japan's proposed activity constituted "scientific research." However, the Commission voted down the proposal and issued a non-binding recommendation that the "research" should not proceed. Despite the Commission finding that the scientific nature of the research was questionable, Japanese officials announced that the recommendation was not binding and that permits would be granted.

Under the threat of U.S. sanctions, inspired partly by pressure from non-governmental organizations, Japan returned to the Commission with a scaled-back Feasibility Plan, which called for a reduced hunt of 300 minke during the 1987 season. By the time the Commission rejected the "research" proposal as lacking scientific validity, Japan had granted permits, ships had sailed and whales had been taken. Japan has continued to exploit the "scientific research" loophole of Article VIII. On December 17, 1988, Japanese ships set sail for the Antarctic, under the guise of conducting an additional feasibility study, which called for the taking of another 300 minke whales.<sup>77</sup>

Although it is arguable that the only problem here is the lack of a good enforcement mechanism,<sup>78</sup> Professor Kelly's analysis of the World Court as a zero-sum dispute resolution mechanism suggests otherwise. Without vigilance by other nations and groups, Japan would simply ignore sanctions, withdraw from the convention, or place reservations that would make its signature illusory. Legislation, international or domestic, as well as treaties are too facile to solve the global environmental problems that we face today. There is simply no one-shot action we can take that will solve such problems. Only constant vigilance will succeed. Treaties and other formal acts are steps in the process of vigilance, not substitutes for it.

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77. Philippe J. Sands, *The Environment, Community, and International Law*, 30 HARV. INT'L L.J. 393, 409-11 n.76 (1989) (citations omitted).

78. Philippe Sands draws this conclusion. *Id.* at 409-12.

## CONCLUSION

The strength of international law is too often underrated, while the strength of domestic law is conversely overrated. Our naive attraction to Austinian mechanisms is to blame. Austinian analysis focuses on the appearance rather than the reality of law. International law takes its strength from the interdependence of the family of nations. As a result, international law is undoubtedly more effective than domestic law, despite domestic law's more concrete appearance.

In the international context, the premature introduction of Austinian mechanisms, such as true legislative bodies, is likely to have two effects. First, such mechanisms will prove ineffective. "Laws" made without universal consent will not be followed if they are unacceptable to certain nations. Second, and perhaps more importantly, negative reactions by nations to the legislative process itself are likely to undermine the regime of international law.

International law is probably approaching a crucial crossroad in its development. The difficulty in finding agreement on either the content or lawmaking processes of international law, which is the product of the post-World War II emergence of the Communist countries and the Third World countries, may be about to resolve itself. I do not share without qualification the common assumption that Communism is dead. It is still possible for certain negative events to revive our cold war problems to an uncertain extent. This most likely will not occur. Further, if the modest trend among Third World nations towards greater stability and maturity continues, international law could be in a position to become more Austinian in nature within, perhaps, a generation. We are not at that point now, and Austinian development is best left for homogeneous groups of nations like the European Community. A premature lunge into a world-wide legislative procedure could produce disastrous results and destroy the process at a time when it is moving towards readiness for such Austinian mechanisms.

If the time comes when the international community is ready for such Austinian institutions as a judiciary with compulsory jurisdiction and one or more true legislative bodies, these institutions would be welcome improvements to the regime of international law. They would work in addition to, rather than in place of, the vital factor of interdependence. Therefore, the danger is not the Austinian institutions per se, but rather their premature introduction.

In the meantime, existing mechanisms are much more viable than former Prime Minister Palmer admits. A mixture of unilateral legisla-

tion, international administrative action, private or public debt-for-nature exchanges and, undoubtedly most important, multilateral treaties appear to be working well. With greater efforts, these tools will be sufficient to meet the challenge of saving our world environment. However, the key factor is vigilance. Legislation, treaties, and judicial enforcement are not the *sine qua non* of success. If the international community allows the world environment to slip from the political forefront, no combination of Austinian and non-Austinian rules and institutions can succeed.



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