STEWARDSHIP SOVEREIGNTY: THE NEXT STEP IN FORMER PRIME MINISTER PALMER'S LOGIC

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In the past decade, an international environmental agenda has emerged among leading experts and enlightened political leaders both from developed and developing countries.[1] The concept of global commons has been extended from traditionally shared resources such as the oceans and international rivers to activities confined to individual states that threaten to impair global life-support systems.[2] As with all environmental problems, the efforts to better the state of the world's environment are fraught with varying degrees of scientific uncertainty and difficult discounting problems. The initial cost of remedying the problems must be assumed now with our future generations being the beneficiaries. Still, it has proved easier to reach an enlightened consensus on both the economic and ethical framework for global environmental protection than it has been to secure effective cooperation among the nation states to achieve the necessary level of protection.

There are many obvious reasons why both developed and developing countries are unwilling to make short-term sacrifices to achieve long run environmental and societal benefits. The question for international

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1. The development of this agenda is traced in LYNTON K. CALDWELL, INTERNATIONAL ENVIRONMENTAL POLICY: EMERGENCE AND DIMENSIONS (2d ed. 1990).

2. The first attempt at a comprehensive history of global environmentalism is JOHN MCCORMICK, RECLAIMING PARADISE: THE GLOBAL ENVIRONMENTAL MOVEMENT (1989).

environmental lawyers is whether law can contribute to the necessary subordination of short to long-term benefits. Domestic environmental law's function is to mandate these sacrifices (or create incentives to undertake them) and then to fairly distribute the costs.[3] This can be done with varying degrees of success within nation states, but international law is not well-suited to mandate and enforce cross-frontier sacrifices.

The highly centralized nature of international environmental protection ensures that nations will almost inevitably reach consensus on only the lowest common denominator standards and thus will "underinvest" in environmental protection. Since Grotius, international law has been concerned with the establishment of the ground-rules of "civilized" conflict among nations.[4] From the bloody sweep of world history, the aspiration for "civilized" conflict among nations is a noble one. From an environmental perspective, however, the ideal of achieving a slightly less worse human condition must be rejected as inadequate. If the warnings of scientists on such issues as global warming, ozone depletion,[5] and rain forest destruction are correct, we can only aspire to higher standards of national performance. Thus, global environmental protection poses an even more difficult challenge to the international legal system than the effort to limit war.

Former Prime Minister Geoffrey Palmer of New Zealand has concisely outlined the challenges that global environmentalism poses for international law and the international community.[6] These imperatives challenge fundamental assumptions of international law which have remained constant since the Renaissance. I agree with former Prime Minister Palmer that international law and the international law-making process is not well-suited to address environmental imperatives and that we need new law-making and enforcement institutions to formulate global response strategies. However, I think that the problems are even deeper than Professor Palmer suggests. The real

3. *See* Carol M. Rose, *Rethinking Environmental Controls: Management Strategies For Common Resources*, 1991 DUKE L.J. 1 for an evaluation of possible strategies to achieve this objective.

4. J. RANDALL, THE MAKING OF THE MODERN MIND: A SURVEY OF THE INTELLECTUAL BACKGROUND OF THE PRESENT AGE 197-201 (1926) remains a masterful examination of the intellectual origins of modern international law.

5. *See, e.g.*, C. SILVER, ONE EARTH, ONE FUTURE: OUR CHANGING GLOBAL ENVIRONMENT (National Academy Press, 1990).

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

problem with environmental protection at the international level is equally one of substance as it is one of process. New lawmaking institutions such as a United Nations Environmental Protection Council must be supported by a new jurisprudence of international responsibility. This brief comment argues that any new form of international lawmaking must be supported by a new principle of nation-state sovereignty, stewardship sovereignty. As former Prime Minister Palmer recognizes the "key problem in any attempt to deal with the jurisprudential basis of obligation in international law lies in the concept of sovereignty."[7]

Traditional international law is designed to produce the lowest common denominator standards based on longstanding national practice because these are the only norms that can be accepted as law. The eighteenth and nineteenth century triumph of John Locke's idea of constitutional government of limited power changed the theory of international law and robbed it of its power to transcend international relations as practiced by the most powerful nations. Former Prime Minister Palmer appropriately concentrates on the corrosive effects of the legacy of Hobbs, John Austin and H.L.A. Hart on international law, although the roots of skepticism run deep in legal theory. Since the Renaissance, the principal objective of international law has been to confine states to their own borders except when they engage in trade. Positivism is the most important hurdle to an effective international environmental law because it equates a legal system with the presence of a powerful sovereign.[8]

The positivist paradox is simple, but misleading: since no sovereign exists among nations, there can be no law. Positivism equates a legal system with the presence of a powerful sovereign.[9] International law can only exist when individual nation states agree to be bound by specific rules. Custom or the assumption of treaty obligations are therefore the principle sources of international law. Custom is almost hopeless as a source of international environmental law because state practice is to abuse rather than to conserve resources. Treaties offer a more promising avenue since legislation can create as well as recognize

7. *Id.* at 8.

8. The idea of law as a command of the sovereign from Hobbs to Austin is traced in CARL J. FRIEDREICH, THE PHILOSOPHY OF LAW IN HISTORICAL PERSPECTIVE 84-100 (1958).

9. *Id.*

state practice,[10] but the tendency still is to reach the lowest common denominator standard to insure consent to the treaty. For example, even the Antarctic Treaty and the Madrid Protocol on Environmental Protection, which has been hailed as the most stringent international environmental initiative, stops short of full protection.[11] Territorial claims are frozen but still preserved, a new non-territorial sovereignty status for the continent such as *terra nullius* or the common heritage of mankind is not defined and human activities which can cause subtle environmental insults continue.[12]

Although the concept does not make complete environmental sense, the basic juridic unit is the sovereign nation state.[13] Environmental problems cut across national boundaries and many internal exercises of national sovereignty are now understood to affect the entire planet. From relatively simple water pollution conflicts among several European nations to global problems such as climate change and ozone depletion, nation states more often than not impede the adoption of effective technological and institutional responses. In short, claims of exclusive resource sovereignty are environmentally irrational. A state should be judged not by control over its territory, but its global stewardship over that territory.

Institutional responses to international environmental problems lag behind need because the idea of shared resources has historically been seen as a limited exception to exclusive sovereignty. However, the basis of the evolving principles of international environmental law is the notion that resources must be shared both among effected nations and generations. The concept of global commons has expanded from the seas (which were never effectively controlled by nation states), to other resources never controlled by a nation state such as the ozone layer to those clearly controlled by nation states but vital to the global environ-

10. *See Developments in the Law- International Environmental Law*, 104 HARV. L. REV. 1484, 1521-50 (1991).

11. *See* GILLIAM D. TRIGGS ED., THE ANTARCTIC TREATY REGIME (1989).

12. I have relied on Cameron Davis, Breaking the Ice: Proposals for a More Effective Antarctic Environmental Protection Regime (Paper submitted for Seminar in International Environmental Law, Chicago Kent College of Law, Fall, 1991) (Copy on file with author).

13. The source of the modern idea of the nation state is Michiavelli. "*The Prince* is leading towards the period when the interests of a feudal ruler will be *nationalistically* identified, thought to represent one state *as opposed* to other states." KENNETH BURKE, A RHETORIC OF MOTIVES 165 (1950).

mental health such as rain forests. The question is no longer whether sovereignty will be shared but the most effective way to do so.

Most international observers think that now that the bi-polar world has disintegrated, issues such as environmental protection will be one of the central problems of post-cold war international law equivalent to the legal reconstitution of Europe during the Renaissance and Reformation. Unfortunately, international law has been stripped of the Grotian "tradition of progress and idealism."[14] Former Prime Minister Palmer revives this tradition with his proposal for a new international law-making institution. His suggestion is a bold one, but it needs to be completed by new principles of international law. New international law-making must be supported by an ethical principle that redefines the relationship between sovereign states and the environment. As we learn more about the cumulative effects of unsensitive resource use choices, the distinction among such categories as internal choice, transboundary insults, and global commons such as the ocean collapses. It is necessary to modify the idea that once a government gains control over a reasonably defined territory, international law allows it to exercise absolute sovereignty.

Former Prime Minister Palmer's proposed United Nations Environmental Protection Council should be supported by the principle of stewardship sovereignty. Fundamental international law concepts such as national sovereignty and the equality of states would be maintained, but state actions and the redistribution of global wealth would be measured by fidelity to an emerging cluster of environmental norms. Stewardship sovereignty is a standard by which both the actions of international law-making bodies and individual nations can be measured and evaluated. It incorporates the growing idea that sovereignty is limited by the duty to avoid injury to other states[15] and has the flexibility to progress from an aspirational standard to a concrete limitation on state action.

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14. H. LAUTERPACHT, THE GROTIAN TRADITION IN INTERNATIONAL LAW, A CONTEMPORARY PERSPECTIVE 10, 30 (R. Falk, F. Kratochwil and S. Mendlovitz eds. 1985). The need for a radically new perspective to deal with global environmental problems that draws on Grotius' deep intellectual achievements is made by R. Falk, The Grotian Quest, *id.* at 36, 39.

15. The commentary of the issue of state liability is extensive. Good introductions include, Sanford E. Gaines, *International Principles for Transnational Environmental Liability: Can Developments in Municipal Law Help Break the Impasse?*, 30 HARV. INT'L L. J. 311 (1989) and Günther Handl, *Territorial Sovereignty and the Problem of Transnational Pollution*, 69 AM. J. INT'L L. 50 (1975).

Stewardship sovereignty builds upon two jurisprudential traditions within international law, Grotian Idealism and the formulation of the idea of international social contract, and joins them with environmental imperatives to supply a unifying perspective. Former Prime Minister Palmer advocates a similar approach to the legitimacy of international law.[16] If norms of international behavior are to develop, the dead-end principle of an international social contract based on the actual consent of all nation states must be replaced with one based on what Professor Fernando Tesón, following Rawls, has called "rational hypothetical consent."[17]

The idea of limited rather than absolute sovereignty has been slowly developing in the area of the allocation of international rivers and international human rights law and can logically be extended to environmental protection generally. Stewardship sovereignty follows the argument of the distinguished environmental historian Roderick Nash that newly developing theories of environmental ethics represent a logical extension of the triumph of the ideas of human dignity. There is a lively debate among philosophers about the legacy of the Greco-Judeo-Christian tradition. Some see the primary legacy as the idea that man is a despot over nature[18] while others find a much stronger stewardship tradition before the nineteenth century.[19] The debate is important, but what is more important is developing a new ethic that imposes duties of wise resource use across nations and generations as well as the extension of moral standing to non-humans.

Stewardship is an evolving concept, but it contains two core principles. The first is the principle of intergenerational equity articulated by

16. Former Prime Minister Palmer argues that we need "a legislative process which is capable of making binding rules which states must follow, *even when they do not agree*." Palmer, *supra* note 6, at 17 (emphasis added).

17. Fernando R. Tesón, *International Obligation and the Theory of Hypothetical Consent*, 15 YALE J. INT'L L. 84, 109 (1990). Tesón argues we that "[i]f actual consent cannot lay the foundation for international obligation, perhaps we should give special foundational status not to *any* consent, but only to *rational* consent." *Id.* Professor Tesón has elaborated his critique of traditional international law which divorces the issue of state legitimacy from normative principles in Fernando R. Tesón, *The Kantian Theory of International Law*, 92 COLUM. L. REV. 53 (1992).

18. JOHN PASSMORE, MAN'S RESPONSIBILITY FOR NATURE (1974) remains the leading exponent of this position.

19. See ROBIN ATTFIELD, THE ETHICS OF ENVIRONMENTAL CONCERN (2d ed. 1991) for a forceful exposition of this provocative thesis.

Professor Edith Brown Weiss.[20] This standard permits resource exploitation subject to the constraint that we leave the resource in no worse shape than when we started. The second principle is that sustainable rather than unrestrained development must be the norm of the future and follows from intergenerational equity. Stewardship must incorporate the idea of sustainable development[21] to bridge the gap between the developed and developing world. Although sustainable development is still very difficult to conceptualize and implement,[22] it has the potential to coherently integrate economic development, environmental protection, and energy policy.[23]

In the end, both former Prime Minister Palmer and I are seeking to adjust international law to the competition and conflict of the post-Cold War era.[24] Nations have always fought in part over resources, but the pressures in the future may become more intense as scarcity accelerates among nations. If international law is to perform its historic conflict-minimizing function, it must speak directly to how nations use their resources in a way that is both fair and effective. This will provide greater coherence to international environmental lawmaking. Stewardship Sovereignty also reflects the spirit of the Draft Text of a Declaration of Principles for Encouraging Environmentally Responsible Development which will be considered at the Rio de Janeiro United Nations environmental summit in June of 1992.[25]

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20. E. BROWN WEISS, IN FAIRNESS TO FUTURE GENERATION: INTERNATIONAL LAW, COMMON PATRIMONY, AND INTERGENERATIONAL EQUITY (1989).

21. WORLD COMMISSION ENVIRONMENT AND DEVELOPMENT, OUR COMMON FUTURE (1987). *See also* Roseann Eshbach, Comment, *A Global Approach to the Protection of the Environment: Balancing State Sovereignty and Global Interests*, 4 TEMP. INT'L & COMP. L.J. 271 (1990).

22. For an ambitious effort *see* A. EVTEEV, ET AL., ECOLOGICAL SECURITY OF SUSTAINABLE DEVELOPMENT, IN THE FUTURE ROLE OF THE UNITED NATIONS IN AN INDEPENDENT WORLD 162 (J. Renninger ed. 1990). *But see* Ronnie D. Lipschutz, *Wasn't The World Wonderful Resources, Environment, and the Emerging Myth of Global Sustainable Development*, 2 COLO. J. INT'L ENVTL. L. & POL'Y 35 (1991).

23. LESTER R. BROWN et al., STATE OF THE WORLD 1990: A WORLDWATCH INSTITUTE REPORT ON PROGRESS TOWARD A SUSTAINABLE SOCIETY 172 (1990).

24. Symposium, *After the Cold War: International Law in Transition*, 32 HARV. J. INT. L. 321 (1991) (containing useful preliminary speculation about the response of the international legal systems to a non-military agenda). *See* Martii Koskenniemi, *The Future of Statehood*, Symposium, *supra*, at 397 (containing an insightful discussion of the pros and cons of replacing procedural curbs on the traditional *raison d'etat* norm of international law with principles of global justice).

25. N.Y. TIMES, Apr. 5, 1992, at A6.