

# NATIONAL ENVIRONMENTAL POLICIES: STATE SOVEREIGNTY AND STATE RESPONSIBILITY

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“The starting point of international relations is the existence of states...each of which...asserts sovereignty in relation to a particular portion of the earth’s surface and a particular segment of the human population.”

*Hedley Bull (The Anarchical Society)*

## Introduction

The relationship between humankind and nature has never been an easy one. As centuries went by, this relationship has not been characterized as one of reciprocal exchanges but as completely determined, influenced, and oriented by only one side: human beings. A French physiologist, Claude Bernard, recognized the complex relational character of environment a century and a half ago when he distinguished the *milieu extérieur* outside the human body from the *milieu intérieur* comprising the body and its interior organs.<sup>2</sup> The *milieu extérieur*, thus, comprises the relations of the human body with all living—and not living things—which are continually interacting in the exterior environment.

As commonly used “environment” means surroundings. According to the dictionary, *environment* is “whatever encompasses; specifically the external and

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<sup>2</sup> Bernard, Claude, *An Introduction to the Study of Experimental Medicine* (Dover: New York, 1957).

internal conditions affecting the existence, growth, and welfare of organisms.”<sup>3</sup> Also, it means “the combination of external physical conditions that affect and influence the growth, development, and survival of organisms.”<sup>4</sup> Thus, *environment* includes both that which environs and whatever is environed—i.e.: the living world or biosphere, including the human species, and the rest of the ecosystem.

Therefore, *environment* denotes the relationship between the environing and the environed. The entities or forces that comprise an external environment do so only in relation to other entities and the forces on which they impact. James E. Lovelock in his book *Gaia: A New Look at Life on Earth* (1979) explains that the advent of life on earth has in fact modified the physical attributes of the planet, making it more hospitable for life. Clearly, *environment* should not be understood as “just those things out there”, but the interactive totality that comprises the planet, its biosphere, the individual species and organisms that live in it, and the human habitat and infrastructure. Lynton Keith Caldwell says that “for millennia humans took their environmental relationship for granted, adapting to external change when necessary. The ‘discovery’ of the planet and the envelope of life that surrounds it occurred in relatively recent times, notably through advances in technologies of measurement, navigation, and observation. These developments permitted the voyages of exploration and discovery undertaken by Western Europeans and contributed to the advancement

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<sup>3</sup> *Funk and Wagnalls New Practical Standard Dictionary I* (New York, 1946), 43.

<sup>4</sup> *The American Heritage Dictionary of English Language IV Ed.* (Houghton Mifflin Company: New York, 2000) 598.

of sciences descriptive of the earth. And so began the conscious effort of humans to understand their environment and very often to modify or attempt to modify it to suit human purposes. But comprehension of the environment is still incomplete. Modern society has not yet learned how to achieve a sustainable relationship with its external environment.”<sup>5</sup>

Human beings tried to modify and adapt the environment according to their needs and sometimes that variation occurred not as a direct consequence but mainly as a secondary effect of human actions and inventions. Jane Lubchenco, the former president of the American Association for the Advancement of Science, warned: “During the last few decades, humans have emerged as a new force of nature. We are modifying physical, chemical, and biological systems in new ways, at faster rates, and over larger spatial scales than ever recorded on Earth. Humans have unwittingly embarked upon a grand experiment with our planet.”<sup>6</sup>

As time went by, different studies proved a variety of influences and impacts from humans on their environment. One of the most important physical geographers, Mary Somerville (1858) emphasized, “Man’s necessities and enjoyments have been the cause of great changes in the animal creation, and his destructive propensity of still greater. Animals are intended for our use, and field-sports are advantageous by encouraging a daring and active spirit in young men; but the utter destruction of some

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<sup>5</sup> Caldwell, Lynton Keith, *International Environmental Policy: From the Twentieth to the Twenty-First Century*, third Edition (Duke University Press: Durham, 1994), 14.

<sup>6</sup> Hayes, Denis, “Mobilizing to Combat Global Warming”, in *World Watch*, March/April 2000, 6.

racers in order to protect those destined for his pleasure, is too selfish, and cruelty is unpardonable: but the ignorant are often cruel. A farmer sees the rook pecking a little of his grain, or digging at the roots of the springing corn, and poisons his neighborhood. A few years later he is surprised to find his crop destroyed by grubs. The works of the Creator are nicely balanced, and man cannot infringe his Laws with impunity.”

“The Earth is the Lord’s” is clearly defining our role on this world. In other words, the world is our trust. We are tenants and we will be held accountable to the Lord for what we do to the earth, to other creatures, and to other human beings. Globalization is not only integrating human beings and peoples more closely, but is also increasingly relating human endeavors to nature. At this present time, more than ever before, the Nation-State is shaping its share on Earth, and it is influencing the environment beyond its national borders. A critical example is the issue of Global Warming, in which states can influence not only their own territory but also the world as a whole. Thus, there is an increasing interest today in regulating that relationship and interdependence, holding nations accountable for the consequences of their policies and activities, as witnessed in a variety of conventions, and general principles of law.

The phenomenon of globalization is weaving nations together, through open trade, and the opening of borders—for the unfettered movement of goods, services, people, foreign investment, and telecommunications—into a fabric of interdependence.

This analysis will take us to a study of state-sovereignty and state-responsibility, as one of the major issues in the current international agenda related to the environment. The focus of this study is, on the one hand, *globalization and interdependence*; and on the other, *sovereignty and the environment*.

Both pillars of the international agenda related to the environment, provide a major field to analyze and understand the role of nations shaping the present and future of our common legacy. For that purpose, we shall start this study setting up the principles and background that nowadays define international law and international responsibility. Those aspects will introduce us in the discussion and analysis of the main two areas of this work. Our major focus is going to be the law of state responsibility, which is related to obligations incurred when a state does act. In other words, the law of state responsibility is about accountability for a violation of international law. If a state violates an international obligation, it bears responsibility for that violation. To say that a violation of an obligation is accountable seems self-evident, but it can also mean two things, according to Rosalyn Higgins: “We say that a person is *accountable* when we mean that he had the intention to perform the acts and/or the mental capacity to understand what he was doing. But the word accountable also carries another overtone—that there is liability for internationally wrongful behavior and that that liability must be discharged.”<sup>7</sup>

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<sup>7</sup> Rosalyn Higgins, “*Accountability and Liability: The Law of State Responsibility*,” in *Problems and Process: International Law and How We Use It* (Oxford: Oxford University Press, 1996), p. 147.

As it had been stated in the recent Summit on Sustainable Development, “Human activities are having an increasing impact on the integrity of ecosystems that provide essential resources and services for human well-being and economic activities. Managing the natural resources base in a sustainable and integrated manner is essential for sustainable development. In this regard, to reverse the current trend in natural resource degradation as soon as possible, it is necessary to implement strategies which should include targets adopted at the national and, where appropriate, regional levels to protect ecosystems and to achieve integrated management of land, water and living resources, while strengthening regional, national and local capabilities.”<sup>8</sup>

We will need the right policies, and a consensus on a set of values and ethics to guide our actions in a consistent and responsible manner. We will also need a wise and creative national commitment and political leadership to help move all nations together—within the dynamism of globalization—towards sustainable development, ensuring the present to guarantee the future of generations to come.

## **I - International law and international obligations *erga omnes***

Public concern about environmental problems heightened in response to a series of disasters with environmental consequences: The 1976 dioxin leak at Seveso in Italy; the 1978 Amoco Cadiz oil spill; the 1979 partial melt-down at the Three Mile

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<sup>8</sup> World Summit on Sustainable Development, *Plan of Implementation: “IV. Protecting and managing the natural resource base of economic and social development,”* (Johannesburg, 5 September 2002), p. 11.

Island nuclear power plant in Pennsylvania; or the 1984 methyl isocyanate gas leak at Bhopal in India (which killed 2,000 and injured 200,000). Probably, one of the biggest disasters was the explosion at the Chernobyl nuclear power station in the then Soviet Ukraine, in 1986, which reminded people of the transboundary nature of pollution (the radiation spread across 21 countries in Europe) and raised questions about state responsibility, accountability and liability.

In international relations as in other social relations, the invasion of the legal interest of one subject of the law by another legal person creates responsibility in various forms determined by the particular legal system. International responsibility is commonly considered in relation to states as the normal subjects of the law, but it is in essence a broader question inseparable from that of legal personality in all its forms. We will not consider here the issue of who may have *locus standi* before international jurisdictions. Rather than that, it seems appropriate to explain what we understand by international obligations and responsibility so as to use those concepts in relation to the environment.

Ian Brownlie says that “Today we can regard responsibility as a general principle of international law, a concomitant of substantive rules and of the supposition that acts and omissions may be categorized as illegal by reference to the rules establishing rights and duties. Shortly, the law of responsibility is concerned with the incidence and consequences of illegal acts, and particularly the payment of

compensation for loss caused.”<sup>9</sup> Basically, the law of state responsibility is about obligations incurred when a state acts in violation of international law. If a state violates an international obligation, it bears responsibility for that breach.

The subject of state responsibility has been immersed in continuous discussions—with no final agreement so far. For example, discussion of the topic continues in the International Law Commission (ILC), a body of experts in international law elected in their individual capacity, that fulfils for the General Assembly of the United Nations the task given to it in Article 13 of the Charter: to “initiate studies and make recommendations for the purpose of ... encouraging the progressive development of international law and its codification.” These two tasks cannot be separated out—codification necessarily entails some development, and such progressive development can encourage the prospects for codification. It is important to note that the question of state responsibility has been on the agenda of the ILC since 1953, and the conclusion of work on this topic is nowhere in sight.

If we look at the basic equation of action+damage=liability, it does not seem so difficult to understand what we mean by “responsibility.” The unresolved work by the ILC shows that even this basic formulation—accountability for internationally wrongful acts—is not leading to a general consensus on the topic. Let’s start from a primary concept: What does it mean to say that a state is “accountable”? To say that a

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<sup>9</sup> Ian Brownlie, *Principles of Public International Law*, IV ed. (New York: Oxford University Press, 1990) p. 433.



violation of an obligation makes one “accountable” seems self-evident. However, this can be interpreted from two perspectives. In domestic law—mostly criminal law—we say that a person is “accountable” when he had the intention to perform the acts and/or he has the mental capacity to understand what he was doing. But the word “accountable” also carries another overtone: that there is a liability for internationally wrongful behavior and that that liability must be discharged. Thus, a state is accountable for a violation of an international obligation.

The previous formulation opens the door to many subsidiary questions. First, what do we mean by the state? Is it individuals who are accountable? Or is it the state *in abstracto*? For whose acts exactly is the state responsible—for formal governmental decisions, or for acts of its employees? Can it ever be responsible for the acts of private persons? And finally, to whom is the state responsible—to individuals living in its own territory or to those living in other countries, who may be directly affected by the harmful effects of its actions; or to other states, who may pursue actions on their own or on behalf of their citizens?

Going back to our initial proposition, it is appropriate to ask: What constitutes a violation of an international obligation? First of all, we have to know about the nature of the obligation before we can determine if it has been violated. Secondly, it is necessary to ask whether intention or malice is needed for a violation to have occurred. Are there circumstances in which acts that would normally be regarded as violations of an international obligation are not such? And when we talk about violations of

international obligations, are we speaking of acts or of omissions also? Another important consideration is that state responsibility entails the proposition that a state must provide redress for its breach of obligation. But what redress? And to whom? Does harm needs to be shown or proved before compensation is due? And, finally, how is compensation to be determined and assessed?

Since an attempt to provide an answer to those questions would go beyond the scope of this study, we would like to leave those questions to the reader for further discussion, analysis and study. We will focus now on the basic concepts of state responsibility. The nature of state responsibility relates both to breaches of a treaty and to other breaches of a legal duty. A similar reference can be found in the expression “international tort”, which is used to describe the breach of duty, which results in loss to another state. However, tribunals and scholars in the juridical realm commonly use the term “international responsibility”. It is noteworthy that responsibility can lie for omissions that constitute a breach of international obligation, as well as for commissions; understanding by the attribution of acts and omissions the “subjective” element, and by the breach of the obligation the “objective” element.

The Draft Articles adopted so far by the ILC, which are not yet a source of international law in the formal sense of the term, provide in Article I: “Every internationally wrongful act by a State gives rise to international responsibility.”

Whereas, Article 3 states:

An internationally wrongful act exists where:

- (a) Conduct consisting of an action or omission is imputed to a State under international law;  
and
- (b) Such conduct in itself or as a direct or indirect cause of an external event constitutes a failure to carry out an international obligation of the State.

In a report on the *Spanish Zone of Morocco Claims*, Judge Huber said: “Responsibility is the necessary corollary of a right. All rights of an international character involve international responsibility. If the obligation in question is not met, responsibility entails the duty to make reparation.” In its judgment in the *Chorzów Factory* proceedings, the Permanent Court stated that: “It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself.”

The reference made earlier in the title of this section, “obligations *erga omnes*” is taken from the Latin expression which means “towards all.” The term “*omnes*” can have a collective or a distributive connotation. As applied to the concept of obligations *erga omnes*, this double connotation raises the issue of whether the international community as such can be bound by obligations *erga omnes* and be the bearer of the corresponding rights of protection. The expression “obligation *erga omnes*” is clearly

described in the Judgment in the *Barcelona Traction* case, which the International Court of Justice delivered on February 5, 1970<sup>10</sup>:

33. When a State admits into its territory foreign investments or foreign nationals, whether natural or juristic persons, it is bound to extend to them the protection of the law and assumes obligations concerning the treatment to be afforded to them. These obligations, however, are neither absolute nor unqualified. In particular, an essential distinction should be drawn between the obligation of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection: they are obligations *erga omnes*.

The above mentioned case draws the distinction between obligations of a State *erga omnes*, obligations of a State which exist towards certain other States under general international law, and obligations of a State which only exist towards a State with which it has entered into “treaty stipulations.” After the *Barcelona Traction* case, references to the concept of obligations *erga omnes* have occurred both in judgments and advisory opinions rendered by the International Court, such as in the context of the *Nuclear Tests*, *Nicaragua*, *East Timor* and *Bosnia-Herzegovina* cases. Relevant materials for the study of the concept can also be found in the practice of States and in the judgments and advisory opinions of other courts; as well as in the international literature. Most often the subject of obligations *erga omnes* has been approached from

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<sup>10</sup> *Barcelona Traction, Light and Power Company, Limited*, Second Phase. Judgment, ICJ Reports 1970, p.32, par.33.

the perspective of a particular area of law, mainly, but not exclusively the law of international human rights.

A relatively new area in which some references to the concept can also be found is in environmental law, which represents a fairly recent development in international relations. While international conventions for the protection of nature and wildlife, and international decisions articulating fundamental principles of environmental law, date back some decades, the turning point for the emergence of an international law of the environment was the United Nations Conference on the Human Environment, which took place in Stockholm in 1972. Actually, it was after this Conference that the expression “international environmental law” entered into widespread use, and that treaties, resolutions and writings relating to the environment started accumulating.

Among some of its conclusions, the Stockholm Conference consecrated the ideas that: (a) the environment is a global entity to be protected in its entirety, and (b) environmental protection is a necessary condition for the promotion of peace, human rights and development.

Similar references have been incorporated in various documents on environmental protection, such as the Declaration on the Human Environment adopted at the Stockholm Conference (1972), the World Charter for Nature approved by the United Nations General Assembly (1982), and the Rio Declaration on Environment and Development adopted by a Conference convened in Rio de Janeiro by the United

Nations (1992) that has been called the “Earth Summit.” An important concept emerging from these documents is that the protection of the environment is related to the promotion of other basic values of the international community, such as development, peace and human rights.

Maurizio Ragazzi explains that, “On several occasions, the concept of obligations *erga omnes* has indeed been referred to, sometimes explicitly sometimes implicitly, in the context of environmental protection.”<sup>11</sup> “Such references,” he argues, “can be found, for example, in the context of proceedings before the International Court, in the work of codification of the International Law Commission on State Responsibility, and in the international literature.” While there is no definitive consensus on including the obligations of States in the field of the environment as “obligations *erga omnes*”, it is clear that the recent developments in the international jurisprudence and doctrine make them a valid and undisputable candidate.

We have to distinguish two aspects of state responsibility regarding the environment: on the one hand, the state has a responsibility to respect the individual and collective rights of the people living in its territory; on the other hand, the state is also responsible to the global community, both human beings or states. Given the connection between the origin of many pollutants of our environment and human beings—acting alone or as a consequence of a governmental decision—applying the

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<sup>11</sup> Maurizio Ragazzi, *The Concept of International Obligations Erga Omnes* (New York: Oxford University Press, 2000) 156.

propositions we have made so far in this section to environmental issues becomes not only appropriate but necessary.

The Earth and the ecosystems it comprises could be symbolized as a “global village” because of the intense interdependence that characterizes its various components and features. The field of international environmental law seeks to reflect and regulate these unique features. However, the international legal order has its own complex history and traditions; its own legislative process; its own reflections of the conceptual antagonism between those who belong to the current of “naturalism” and those who adhere to the “positivist” theory.

Attempting a brief explanation of the concepts, we can say that “naturalism” is the system that assumes that rules of human behavior derive ultimately from sources outside the will of mankind. The “nature” that creates those rules has been argued in classical writings to derive actually from at least three very different sources: physical nature; value-based “morality” or “ethics”; and “divine law”. “Positivism”, on the other hand, is the system preferred by the legislators of modern society. It emphasizes human discretion as the source of law. To the degree that moral values or religious convictions are embodied in rules that a “positivist” would agree deserve to be called rules of “law,” the positivist would tend to emphasize the discretion exercised by the human who pronounces the rule, whether purporting to interpret rules originating outside himself, or simply exercising an authority conferred on him by the political order to interpret the rules of “law,” whatever the ultimate source of those rules.

The constitution of any society rests only in part, if at all, on an exercise of discretion that can be analyzed separately from non-discretionary historical processes. An asserted rule that makes consent to the legal order a constitutive fact is itself either a natural law rule or a rule that rests on prior consent. Today, there is clearly no problem in relating both naturalism and positivism to reality. Moving to the global scene, the international legal order has been characterized as a common law system without a compulsory tribunal. Since there must exist a voluntary submission by the government of a State to the jurisdiction of the International Court of Justice (ICJ), there is no way to exercise power by an independent judicial institution without the approval of the State involved. Therefore, apart from the remedy of the International Court, States can only count on the binding effect of bilateral or multilateral conventions and regimes to sustain their mutual relations.

Closely related to the notions of state responsibility is the international concern with the transnational effects of national activities and the consequent development of international environmental law. Some of the activities that propelled recent international concern are, the pollution of the seas, the air and the soil, climate change, global warming, desertification, population growth, deforestation and the threat to biological diversity arising from indiscriminate consumer demands, among others. Given the particular features of each of those activities, the international community, adopting a sectoral approach, has addressed them each in its context and attempted to



establish for each a particular legal regime, such as in the case of climate change, ozone depletion, deforestation, and biodiversity.

The recent evolution of international law in the area of the environment has consecrated some important principles such as: (1) the principle of the integration of environment and development, (2) the principle of common concern, (3) the principle of common but differentiated responsibility, (4) the principle of cooperation and global partnership, (5) the precautionary principle, (6) the principle of preventing environmental harm, (7) the principle of intergenerational and intragenerational equity, and (8) the “polluter or user pays” principle.

The status and significance of these principles incorporated into international law are of course governed first by the general principles and the law of treaties, custom as a source of international law, and the interaction between them. However, some of those principles are being regarded more as policy postulates than as strict principles of international law giving rise to specific or immediate obligations. In addition to those, we have the principle of sovereign equality and the principle of state responsibility, on which we have already commented.

An important consideration in this field must be given to the link of environmental law and the *land ethic*. The principles of national autonomy, sovereignty, and noninterference with states’ domestic affairs have a prominent role in the normative structure of international law and in the safeguards that each state requests as a committed member of the international legal order. International

environmental agreements have moved toward giving the land separate legal status, although emphasizing that the welfare of humans and interests of nation-states must be priorities.

One of the most important judicial precedents has been set by the arbitration tribunal in the *Trail Smelter* case, which decided that “no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties of persons therein.” The implications of this case and other international legal precedents have led over time to prohibit countries from harming their own ecology when doing so might harm the natural environment of other states. The essential linkage with the *land ethic* is expressed in saying that it is wrong to harm the natural environment.

John Barkdull and Paul Harris argue that, “Eventually we might see protecting the land for its own sake as part of our interests. In that case, following the land ethic would achieve the long-term objective of promoting human welfare and protecting the environment.”<sup>12</sup> From that perspective, shared responsibility should be reaffirmed as the essential pillar of international laws and the guide of our common approach to defend the survival of our planet.

## **II - Globalization and Interdependence**

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<sup>12</sup> Barkdull, John and Paul G. Harris, “*The Land Ethic: A New Philosophy for International Relations*”, *Ethics and International Affairs*, Vol. 12, 1998, p. 175.

If anything seems obvious today, it is that globalization is a new and powerful force that is erasing national borders and linking the world in an unprecedented way. As the world leaders gathered at the U.N. Millennium Summit expressed, globalization means many things to many people. It is not simply the greater movement of goods, jobs and capital across borders, but also includes equally important cultural, environmental and political components. U.N. Secretary General, Kofi Annan, said in that meeting: “globalization is really defining our era.”

The protesters who interrupted the Seattle trade talks in 1999 at the World Trade Organization meeting, and staged encounters at meetings held by the World Bank and the International Monetary Fund, in the last few years, in Washington D.C., make clearly that globalization has become a contentious process. Part of the conflict stems from the fact that the term means vastly different things to different people.

For some countries, mostly in the industrial world, globalization is an opportunity to expand international standards in law, social development, environment and human rights. For others, it signals a broader cultural and social integration spurred by mass communications and the Internet.

The reference to globalization is used here to refer to a broad process of social transformation that encompasses all of the above, including growth in trade, investment, environmental degradation and transboundary pollution, travel, and computer networking. This reference becomes appropriate since it explores the relations between the forces of globalization, the erosion of the nation-states and global environmental protection.

International economic integration is not an ineluctable process. It is only one,

and the best, of many possible futures for the world economy. Governments, and through them their electorates, will have a far bigger say in deciding this future. The protesters are right that governments and companies have it within their power to slow and even reverse the economic trends of the past 20 years. Probably, the main feature that comes out of this phenomenon is the erosion of the nation-state, and that is what makes relevant a brief reference to this aspect in this work.

As a result of a variety of pressures, the modern organization of nations, generally seen as dating from the end of the Thirty Years' War with the Treaty of Westphalia in 1648, is--if not broken down already--certainly going through a period of profound weakening. Since the emergence of modern states several hundred years ago, a cardinal rule of international law has been mutual respect for sovereign borders. When globalizers are claiming today that the Westphalian system is over, one of the major challenges facing the world is to fashion a principled and effective policy to reconcile separatism and statehood, in the light of globalization and interdependence.

The exclusive position of the state as the dominant actor in international relations in time of peace is under challenge. This looks obvious in the light of the deep changes brought by the phenomenon of globalization and interdependence, which deprives states of much of their operational sovereignty, for instance, over their currencies and their budgetary policies. Globalization transfers power from the state to a private global economy--of investors, business people, traders, communication experts, bankers, and speculators—that is largely uncontrolled, since global capitalism is not matched by international regulations and institutions in the way in which national capitalisms were matched by the power of the national states. In recent years, onslaughts by financial investors on European currencies (1992-1993) and on those of

Mexico, Thailand, Malaysia, Indonesia, South Korea, Brazil, Japan, and Russia have exposed the weakness of the state and its financial reserves when faced with such attacks and transfers. The delicate balance between capitalist efficiency and the equity functions of the state has been destroyed because of the weakening of the state and the deficiencies of international governance.

To prove that nation-states are not the primary actors in today's global economy, Kenichi Ohmae refers to the flows of what he calls the 4 "I's" that define it: The first "I"—*investment*—is no longer geographically constrained. Some years ago the flow of cross-border funds was primarily from government to government or from multilateral lending agencies to governments. That's no longer the case. Because most of the money now moving across borders is private, governments do not have to be involved at either end. "The money will go where the good opportunities are." The second "I"—*industry*—is also far more global in orientation today than it was a decade ago. The strategies of modern multinational corporations (MNCs) are no longer shaped and conditioned by reasons of state but, rather, by the desire--and the need--to serve attractive markets wherever they exist and to tap attractive pools of resources wherever they sit. The movement of both investment and industry has been greatly facilitated by the third "I"—*information technology*—that now makes it possible for a company to operate in various parts of the world without having to build up an entire business system in each of the countries where it has a presence. Finally, *individual consumers*--the fourth "I"—have also become more global in orientation. With better access to information about lifestyles around the globe, they are much less likely to want to buy--and much less conditioned by government injunctions to buy—American or French or Japanese products merely because of their national associations. Consumers

increasingly want the best and cheapest products, no matter where they come from. Ohmae concludes that “Because the global markets for all the I’s work just fine on their own, nation-states no longer have to play a market-making role...If allowed, global solutions will flow to where they are needed without the intervention of nation-states.”<sup>13</sup>

Dani Rodrik maintains that, “Open trade can conflict with social contracts that protect certain activities from the relentlessness of the free market. This is a key tension of globalization.”<sup>14</sup> Whether in the area of labor standards, environmental policy, or corruption, differences in domestic policies and institutions have become matters of international controversy, brought to the surface by the phenomenon of globalization.

Trade has been an enormous force for good: Since 1950 the world economy has expanded six-fold to about \$30 trillion of output, and trade has grown 14 fold to about \$5.5 trillion of exports. Countless countries have benefited through higher incomes, better diets and longer life expectancies. No one contends that trade created these benefits single-handedly. But trade helped drive economic modernization by providing ways (imports, international investment) for countries to acquire new products, technologies and management skills. Nor does anyone says that trade is all good and no bad. There are often nasty side effects: like chaotic urbanization, environmental degradation and social tension; and it is also claimed that richer countries’ gains have come at the expense of poorer countries. To quote former Primer Minister of Norway, Gro Harlem Brundtland, “with greater freedom for the market comes greater

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<sup>13</sup> Kenichi Ohmae, *The End of the Nation State*, (New York: Simon & Schuster, 1996) 2-5.

<sup>14</sup> Dani Rodrik, “Sense and Nonsense in the Globalization Debate”, *Foreign Policy* (Summer 1997).

responsibility.”

The globalization of commerce in recent decades has internationalized environmental issues. Since trade in natural resources is soaring, the well-being of people and ecosystems is being considerably affected. The economy of ecological systems causes the exchange of “environmental space” among nations. By its very nature, globalization implies both broadening and deepening. Phenomena that once affected a particular country or region now have broader implications, and must include a larger set of nations and actors.

Some observers see a trend, resulting from the forces of globalization, for international relations defined in terms of power and economics, to be supplemented, if not superseded, by a culturally defined system of world order in which global networks of information, a shared concern over the natural environment, the awareness of the diverse ways in which men and women choose to live their lives, and cross-national efforts at combating poverty, disease, illiteracy and defending against human rights abuses, will come to constitute the “realities” of a new world, of a new human era.

### **III - Sovereignty and the environment**

Following the same path we took in the previous section, we can see that a state’s sovereignty—exclusive authority within its territorial boundaries—seems to be eroded by efforts to address transboundary environmental problems. In the context of global environmental degradation and resource scarcities, sovereignty is generally

thought to confer on states three specific spheres of legitimacy and power: (1) the ability to control territory and the natural resources therein; (2) the right to exploit natural resources, and: (3) the authority to develop and enforce environmental regulations, standards, policies, and priorities in accordance with specific national interests and values.<sup>15</sup> Sovereignty is embedded in the concepts of national interest, national independence, and national security, and is commonly held to reflect “the notion of strength, understood as the state’s capacity to impose its will, whether on its own citizens or other states.”<sup>16</sup> Historically, sovereignty has been used to distinguish between order and anarchy, security and danger, and identity and difference.

Sovereignty implies control of an identifiable geographical space by the state, as the supreme legal and political authority over a physical environment and its inhabitants. As Camilleri and Falk observe, “Within national boundaries, the nation-state is supreme, recognizing no higher authority. Outside the national domain is the rest of the world, also partitioned into sovereign states which deal with each other, at least so far as their sovereignty is concerned, on a basis of equality.”<sup>17</sup> Brownlie contends that, “If international law exists, then the dynamics of state sovereignty can be expressed in terms of law, and, as states are equal and have legal personality, sovereignty is in a major aspect a relation to other states (and to organizations of states)

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<sup>15</sup> These principles of sovereignty are affirmed in Principle 21 of the Stockholm Report of the U.N. Conference on the Human Environment, or “Stockholm Declaration.”

<sup>16</sup> Camilleri and Falk, *The End of Sovereignty? The Politics of a Shrinking and Fragmenting World*, (Aldershot, UK: E. Elgar, 1992), p.11.



defined by law.... The principal corollaries of the sovereignty of states are: (1) a jurisdiction, prima facie exclusive, over a territory and the permanent population living there; (2) a duty of non-intervention in the area of exclusive jurisdiction of other states; and (3) the dependence of obligations arising from customary law and treaties on the consent of the obligor.”<sup>18</sup>

The classic definition of sovereignty given by F.H. Hinsley as “final and absolute authority in a political community”<sup>19</sup> fosters a monolithic conceptualization of sovereignty. Sovereignty is commonly understood as having two dimensions: external and internal. *External sovereignty* refers most narrowly to the state’s legal or constitutional independence vis-à-vis other states. On this reading, sovereignty functions as the gate between domestic politics and international relations. Domestically it refers to the absolute authority within the political community; internationally, it entails the opposite: a situation of anarchy, where no supreme authority exists. Hence, only states can formulate foreign policy and engage in diplomacy; sovereignty here is seen as the objective characteristic that entitles states to engage in international relations. Internal sovereignty is typically understood as the state’s *autonomy* over its own affairs. Essential to internal sovereignty, therefore, is the principle of *nonintervention*. Sovereignty, then, is seen to function as a kind of

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<sup>17</sup> Ibid, 3.

<sup>18</sup> Ian Brownlie, *Principles of Public International Law*, 287.

<sup>19</sup> F.H.Hinsley, *Sovereignty* (New York: Basic Books, 1966), 1.

dividing line between inside and outside, domestic and international, with territorial boundaries serving as the physical expression of that dividing line in nature.<sup>20</sup>

Since sovereignty—the constitutive principle of the nation-state—is premised upon territorial exclusivity, it is assumed that transboundary environmental problems necessarily undermine state sovereignty. In the late twentieth century, with the rise of “global environmental crises,” it has been argued that environmental threats pose a serious problem for sovereignty. The United Nations’ World Commission on Environment and Development, in a widely influential report titled “*Our Common Future*,” put the problem this way: “The physical effects of our decisions spill across national frontiers,”<sup>21</sup> While states may claim sovereignty over the resources and activities within their territories, they have come under increasing pressure to manage their resources according to internationally agreed norms and regimes.

Principle 21 of the Stockholm Declaration articulates this alleged tension between the state’s sovereign right to exploit its own resources and its responsibility not to harm the environment beyond its borders. Consequently, the international community has devised multiple mechanisms and regimes to institutionalize global responsibility. A more radical approach is the Hague Declaration’s proposal for a supranational environmental institution to be granted the authority to make policy in the absence of unanimity.

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<sup>20</sup> See Karen Litfin, *The Greening of Sovereignty in World Politics* (Cambridge: Massachusetts Institute of Technology, 1998), 5-7.

<sup>21</sup> World Commission on Environment and Development, *Our Common Future* (New York: Oxford University Press, 1990), 27.

For Jean-Jacques Rousseau, sovereignty is about the rule of law; government, however, is about “political economy.” Creating a sovereign state demands engaging the art of government to appropriately shape the environment. If we ask the question, what is the relationship between environment and sovereignty? we are implicitly raising the question of government. In *The Anarchical Society* Hedley Bull argues that in order for a political community to be a state it must “possess a government and assert sovereignty in relation to a particular portion of the earth’s surface and a particular portion of the human population.”<sup>22</sup>

Let’s return to the “penetrability thesis” put forth by the World Commission on Environment and Development in *Our Common Future*, that sovereign territorial borders are penetrated by the environmental effects of decisions made elsewhere. In the light of this reality, the WECD maintains that traditional notions of security no longer hold. The belief that states can isolate themselves from this situation and hide behind their territorial borders is a false one. We face a new world, says the WECD, one where state borders are more like permeable membranes than sovereign walls.

As stated before, international environmental regimes are modifying the norms and practices of state sovereignty. Environmental regime provisions modify the degree of authority, autonomy, and control that can be exercised by states. Consequently, they prompt changes in the legal and effective sovereignty of both industrialized and Third World Countries. Even if this reconfiguration of authority, autonomy, and control is

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<sup>22</sup> Hedley Bull, *The Anarchical Society* (New York: Columbia University Press, 1995), p. 8.

experienced by all states, the nature of environmental issues—and the structural position of the states—can mean a difference in how sovereignty is affected for industrialized states and for the Third World states. “In spite of the differences in economic and political power, common property resource issues might allow Third World countries to exercise some modest influence in environmental regime formation and to slow the shift of authority, autonomy, and control to regimes or more powerful actors. Consequently, Third World states might be able to exercise similar influence with regard to the climate change regime, since it addresses a common property resource held in an open-access arrangement. Property and access relations, because of their impact on perceptions of vulnerability and economic interests, are likely to determine the further transformation of these regimes.”<sup>23</sup>

Environmental problems do not respect national boundaries. The nature of transboundary environmental problems has changed over the years. First, the number and scope of transboundary environmental problems has increased. Second, a new category of global environmental issues has emerged. These environmental problems, including climate change, depletion of the ozone layer, and biodiversity loss, among others, are global in the sense that they affect everyone and can only be effectively managed on the basis of cooperation among most, if not all countries in the world. Third, the increasing scale of many regional or local environmental problems now has

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<sup>23</sup> Marian A.L. Miller, “Sovereignty Reconfigured: Environmental Regimes in Third World States”, in Karen T. Lipton, *The Greening of Sovereignty in World Politics*, p. 190.

broader international repercussions. It is said that these problems can undermine the economic base and social fabric of poor and weak states, generate or exacerbate inter- or intra-state conflicts and tensions. As a result, environmental problems can affect political, economic, social, and security interests in diverse parts of the developing or even the industrialized world.

Thus, we see that it is not only the forces of economic globalization, that are modifying state sovereignty, but also global environmental problems. It has been said that the conventional doctrine of sovereignty privileges states' authority over their own resource management, thus allowing states to circumvent environmental regulations that do not coincide with their "national interests." From that viewpoint, the state itself has been considered as the primary source of global environmental degradation and the main obstacle to effective environmental protection. From this state-centric environmental perspective, sovereignty is considered an impediment to concerted international ecological protection, or an underlying cause of the world's environmental woes.

No country can escape the scope of problems such as global warming, the changing climate or the damaged ozone layer. Because these challenges are global in scope, solutions require the cooperation of all state actors. The very nature of global environmental problems can create new power dynamics between developed and developing countries, thereby changing the way in which graduations of power among states are perceived. Transboundary environmental issues also modify the exercise of

sovereignty. Since damage to air sheds, rivers, seas, forests, and animal and plant life often transcends national boundaries, solutions require the cooperation of actors in multiple states.

It is noteworthy that, while cooperation among nation-states has proven to be necessary to address many transboundary environmental issues, virtually all policies must be implemented at the national or local level. There are no international governments, laws, or courts that can enforce binding decisions on sovereign nations (with the partial exception of the European Union). But equally important, actions taken by individual states or actors within states can have major international implications, such as activities that cause transboundary pollution. Thus, the growing interaction between national and international actors and levels of governance is an increasingly important aspect of international environmental policy.

#### **IV - Conclusion**

Throughout the present study we have reviewed the link that can be established—in the environmental realm—between states and their responsibility in case of a violation of international law, as a result of a wrongful act. After considering the norms, principles and customs associated to this subject, we can conclude that further work needs to be done so as to develop a sustainable law of the state responsibility. A few questions can help us in advancing some of our major concerns, such as: What constitutes a violation of an international obligation? First of all, we

have to know about the nature of the obligation before we can determine if it has been violated. Secondly, it is necessary to ask whether intention or malice is needed for a violation to have occurred. Are there circumstances in which acts that would normally be regarded as violations of an international obligation are not such? And when we talk about violations of international obligations, are we speaking of acts or of omissions also? Another important consideration is that state responsibility entails the proposition that a state must provide redress for its breach of obligation. But what redress? And to whom? Does harm needs to be shown or proved before compensation is due? And, finally, how is compensation to be determined and assessed?

To that set of questions—whose answers we hope can be addressed in this Congress—we can add a few more: First, what do we mean by the state? Is it individuals who are accountable? Or is it the state *in abstracto*? For whose acts exactly is the state responsible—for formal governmental decisions, or for acts of its employees? Can it ever be responsible for the acts of private persons? And finally, to whom is the state responsible—to individuals living in its own territory or to those living in other countries, who may be directly affected by the harmful effects of its actions; or to other states, who may pursue actions on their own or on behalf of their citizens?

As stated above, contemporary environmental threats, from global warming and ozone depletion to polluted waters and eroding soils, transcend state boundaries and thus, demand actions that encroach upon state sovereignty. States are being asked to

curtail or alter their development and environmental policies to harmonize with those of their neighbors and, in some instances, the entire international community. The effort to link rights and responsibilities testifies to a common understanding about the problematic nature of state sovereignty as it relates to environmental challenges. Moreover, it reveals a stated normative commitment to restrict the freedom of individual states when one state's actions adversely affect another's. Therefore, the international community has devised mechanisms of governance to institutionalize global responsibility. With them, together with norms and international regimes, the international community has laid the ground for cooperation and consensus in the achievement of common interests and in the defense of mutual concerns, particularly those related to transboundary environmental problems.

The subject studied underscores the importance of the Nation-State, even with its alleged erosion by the undeterrable forces of globalization. No, there can be no coherent commitment by a Nation-State unless it encompasses and relates all the different national policies adopted by its government. No area of government is completely detached from the rest. An all-inclusive viewpoint is needed to tackle one of the most significant challenges we face nowadays: the survival of our planet—and of all its natural species—and the future of mankind. The Plan of Implementation of the World Summit on Sustainable Development, held in September 2002, clearly states that, “Good governance within each country and at the international level is essential for sustainable development. At the domestic level, sound environmental, social and



economic policies, democratic institutions responsive to the needs of the people, the rule of law, anti-corruption measures, gender equality and an enabling environment for investment are the basis for sustainable development. As a result of globalization, external factors have become critical in determining the success or failure of developing countries in their national efforts. The gap between developed and developing countries points to the continued need for a dynamic and enabling international economic environment supportive of international cooperation, particularly in the areas of finance, technology transfer, debt and trade, and full and effective participation of developing countries in global decision-making if the momentum for global progress towards sustainable development is to be maintained and increased.”<sup>24</sup>

A final word must be given to the role future generations should play in our environmental concerns. When a global challenge—like global warming and climate change—has an intergenerational dimension, the sequencing of the generations becomes a crucial consideration. In game-theory terminology, the present generation has a *first-mover advantage* because it gets to choose its play prior to subsequent generations. In other words, it can choose an agenda or a pathway that best serves its own purposes, even though those purposes may be at odds with those of future generations.

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<sup>24</sup> World Summit on Sustainable Development, *Plan of Implementation: “Introduction,”* (Johannesburg, 5 September 2002), p. 1.

Actions adopted by the present generation that reduce the earth's biodiversity or that increase its atmospheric concentration of greenhouse gases are irreversible into the foreseeable future from the viewpoint of its consequences. Other decisions—like the clearing of tropical forests, the depletion of the ozone shield, the release of toxic wastes—may be reversible with time, but not before subsequent generations suffer the adverse consequences. To avoid that, the present generation should consider, in any decision, how it can benefit all subsequent generations. The best approach should take into account the balance shaped in the scope of sustainable development, as stated by Mrs. Gro Harlem Brundtland, former chair of the United Nations Commission on Sustainable Development:

“Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs. It contains within it two key concepts: the concept of ‘needs’, in particular the essential needs of the world’s poor, to which overriding priority should be given; and the idea of limitations imposed by the state of technology and social organization on the environment’s ability to meet present and future needs... Even the narrow notion of physical sustainability implies a concern for social equity between generations, a concern that must logically be extended to equity within each generation.”

The starting point in that conception should be the necessary solidarity and interdependence of all human beings—as individuals and as communities—living in the present and determining part of the future of our planet. Humanity’s intrinsic worth is to be found in the fact that we are made in the image of God. There can be no greater value attached to us. That is why we have the responsibility of protecting the sanctity

of all life, and of championing the well-being of humanity, for the present generation  
and for all generations to come.-

**Mauricio Alice**  
**15 October 2002.**