INTERNATIONAL LEGAL SOURCES AND GLOBAL ENVIRONMENTAL CRISES: THE INADEQUACY OF PRINCIPLES, TREATIES, AND CUSTOM

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I. INTRODUCTION

The deterioration of the earth's physical environment presently represents a phenomenon which international society has never faced before. The current legal and political approach to global environmental crises appears largely inadequate as an effective response to this deterioration. International law, due to its very foundations, is unable to cope with global environmental degradation as it does not provide a clear and compelling direction for states to work collectively toward a common goal.

To investigate specifically why international law is largely inadequate in the face of current environmental crises, it is necessary to explore the main sources, the very roots, of international law. There are three main sources of international law, as identified by article 38, paragraph 1 of the Statute of the International Court of Justice: treaties, customs, and the general principles of law.[1] These three sources are

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1. U. N. CHARTER art. 38, ¶ 1. These three sources, among others, are recognized as the main sources of international law. *See* JOSEPH G. STARKE, INTRODUCTION TO INTERNATIONAL LAW 33 (10th ed. 1989); MICHAEL AKEHURST, A MODERN INTRODUCTION TO INTERNATIONAL LAW 23 (1987); LEO GROSS, SELECTED ESSAYS ON INTERNATIONAL LAW AND ORGANIZATION 27 (1993); U.N. CHARTER art. 2, ¶ 1; PATRICIA BIRNIE & ALAN BOYLE, INTERNATIONAL LAW AND THE ENVIRONMENT 11 (1992); Patricia Birnie, *The Role of International Law in Solving Certain Environmental Conflicts*, *in* INTERNATIONAL ENVIRONMENTAL DIPLOMACY: THE MANAGEMENT AND RESOLUTION OF TRANSFRONTIER ENVIRONMENTAL PROBLEMS 98 (John Carroll ed., 1988) [hereinafter Birnie, *The Role of International Law*]; Patricia Birnie,

unable to create an adequate international response to the rapid devastation of various aspects of the earth's environment. They do not provide a sufficient framework for cooperation and collective environmental action among states. This paper will develop an evaluation of these three international legal sources within the global environmental context and provide a critique of the current international legal system as a guideline of state behavior.

International law may be defined as "that body of law which is composed for its greater part of the principles and rules of conduct which states feel themselves bound to observe, and therefore, do commonly observe in their relations with each other."[2] It is further described as that body "which binds states and other agents in world politics in their relations with one another and is considered to have the status of law."[3] The states which comprise the international system are bound by respective and collective rights and obligations under a structured legal system, and state behavior is constructed around this set of commonly recognized norms and rules. International law "provides a normative framework within which and with reference to which states take their decisions."[4]

Overall, the structure of international law has produced various successful outcomes as states have agreed on a wide range of issues. These range from the size and appearance of air mail stamps to the regulation of export wheat quotas to the elimination of atmospheric nuclear testing, of which most are maintained on a regular basis. Hundreds of bilateral and multilateral treaties covering a diverse range of issues have provided states, and their citizens, with certain expectations regarding the behavior of other states. Though international law, on its own, is never completely successful in any area of international relations, it generally appears to have produced comparatively successful resolutions through wide-spread national compliance.

However, state behavior is still often interpreted within a zero-sum perception. A zero-sum perception is the belief that a state benefits only at the expense of another's loss, and the possibility for collective action to achieve common goals is minimized by the traditional design and structure of the international legal system. The formation of the international legal

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International Environmental Law: Its Adequacy for Present and Future Needs, *in* INTERNATIONAL POLITICS OF THE ENVIRONMENT: ACTORS, INTERESTS, AND INSTITUTIONS 54-61 (Andrew Hurrell & Benedict Kingsbury eds., 1992).

2. STARKE, *supra* note 1, at 3.

3. HEDLEY BULL, THE ANARCHICAL SOCIETY: A STUDY OF ORDER IN WORLD POLITICS 127 (1977).

4. Alan James, *Law and Order in International Society*, *in* THE BASES OF INTERNATIONAL ORDER 71 (Alan James ed., 1973).

framework, as a medium of interstate relations, was a means to restrict random and self-serving action by powerful states. This framework was also designed to relieve uncertainty and tension within the international community, to the end of reducing conflicting situations. International law was developed to regulate the conflicting interests and unilateral behavior of sovereign states. The interest of one state was balanced against the interest of others, the perception being that the interest of each state was inherently different. The establishment of international law was necessary to enable states to advance their own sovereign interests, while attempting to reduce conflict and violent competition between states.

Environmental degradation has created a situation in which immediate competing state interests are not the exclusive factors in legal negotiations as there is an element of potential loss which is held in common, to a certain degree, by all states. Due to this relatively recent and unique situation in international relations, the structure of international law presently appears to be ill-equipped to create effective collective solutions. Indeed, the notion of state sovereignty as a cornerstone of international law hinders the development of collective agreement and global action.

All states now share a common interest that is inherent to their survival, both as sovereign constructs, and also as collections of individuals with a need for the preservation of physical conditions necessary to sustain life. Natural resources, shared by all of humanity, are being eroded away and many regions of the world are now faced with the possibility of irreversible physical, social, and economic destruction. The ability of many states to develop and improve the lifestyles of their citizens will be impeded by the continued abuse of the delicate natural cycle.[5] Yet, the traditional guide for behavior within the international community and the international legal system is inadequate to direct the collective interaction of sovereign states toward a common goal of environmental protection. The very structure of international law appears to be insufficient to respond to the increasing environmental crises that the earth is presently straining under as it struggles to support the demands of its inhabitants. This international legal structure, comprised of the three main sources of international law, will direct the focus of this paper, and it is to the predominant and most inclusive of these legal sources to which this paper now turns.

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5. For a related and detailed discussion of issues concerning environmental degradation and potential international consequences see WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, OUR COMMON FUTURE (1987) [hereinafter WORLD COMMISSION].

II. GENERAL PRINCIPLES

All states vehemently protect their individual sovereignty, and the right to legislate and regulate activities within their own areas of jurisdiction. The general principles of international law are components of an international system which is concentrated upon the supremacy of individual state sovereignty. This system has developed over the past few centuries around a Euro-centric Westphalian perspective. It has now evolved to the level of acceptance of the status quo as being morally right and just. The ability of states to utilize and exploit the physical territory they each occupy, for their own gain, is interpreted in international law as an inherent right of sovereign states. However, the increasing environmentally destructive impact of states' behavior now challenges the traditional structure of sovereignty upon which these legal principles were founded.

The International Court of Justice, as the exclusive global judicial body, is instructed by Article 38(1)(c) of its statute, to further the sources of custom and treaties, to apply "the general principles of law recognized by civilized nations in its decisions."[6] In the context of the global environment, this major source of international law does not seem compatible with necessary cooperative action. The design of the general principles of law in the international system reflects the realist, difficult approach to interstate relations. The main function of these principles is to maintain the internal and external sovereignty of states while attempting to minimize the opportunities for noncompliance with international law. The basic objectives of the general principles of law are to reduce conflict by ensuring the equal rights and responsibilities of all sovereign states. Though the protection of sovereignty appears to be integral to the functioning of the state system, this principle also seems to be increasingly incompatible with the need for collectively addressing global environmental problems. The environment does not fit neatly into the traditional conception of international relations.

It is a common problem with a potentially permanent impact upon all states, and not an issue that can be resolved through the usual legal process of negotiation based exclusively upon the short term, immediate interests of sovereign states. As "the first function of international law has been to identify, as the supreme normative principle of the political organization of mankind [sic], the idea of a society of sovereign states,"[7]

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6. *See* GENNADII M. DANILENKO, LAW-MAKING IN THE INTERNATIONAL COMMUNITY 173 (1993); STARKE, *supra* note 1, at 33.

7. BULL, *supra* note 3, at 140.

this system is unsuitable for collective action which transgresses political boundaries.

The general principles of international law influence the ways in which states choose to act within the international system as they form part of the normative framework of international relations and interstate behavior. The concept of the supremacy of state sovereignty is intertwined with the functioning of international law overall. This creates a unique and seemingly insurmountable dilemma in terms of the global environment, as the adherence to sovereign national interests contrasts with the ability of states to collectively act within the global interest. Separate national, economic, political interests, and the continual desire of states to improve their relative standing in the international community takes precedence over the need for common global action.[8] As states continually work to protect their own interests, divisive barriers to cooperation are continually created. The earth's environment cannot be divided into particular territories over which separate political bodies assume rights and responsibilities, as the consequences of physical environmental degradation in one area of the globe may be observed in another. Yet as this fragmented political system based on the competition of individual state interests is now faced with the impending task of cooperating to solve environmental problems, it seems inadequately equipped to collectively defeat an encroaching common foe.

> On the one hand we have a conception of a world divided into separate, independent communities, delineated clearly in time and space, governed by their own sovereign authority and system of law. On the other hand is a conception of a physical, ecological, and social totality, a single community of humans and other species, ultimately governed equally by natural law.[9]

The supremacy of state sovereignty may be observed within international law, as indicated by the fact that the only subjects of international law are independent sovereign states.[10] States are the only

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8. *See* John Vogler, *Regimes and the Global Commons: Space, Atmosphere, and Ocean*, *in* GLOBAL POLITICS: GLOBALIZATION AND THE NATION-STATE 127 (Andrew G. McGrew et al. eds., 1992).

9. JOSEPH CAMILLERI ET AL., THE END OF SOVEREIGNTY? THE POLITICS OF A SHRINKING AND FRAGMENTING WORLD 172 (1992).

10. Though individuals and private companies may bring proceedings to the European Union's Court of First Instance of the European Court of Justice and individuals may present cases to the Council of Europe's European Court of Human Rights after the exhaustion of all legal avenues within their own state, these are regional bodies and are therefore necessarily

recognized subjects within the international legal system, but they are not the only actors within the international community. Only states may bring claims to the International Court of Justice to seek restitution for environmental damage. Concurrently, only states may be found liable for environmental damage, and asked to pay damages to another state. This principle does not enable all relevant parties to international environmental issues—such as multinational corporations, nongovernmental organizations, or individuals—to be either protected by the regulations of the international legal system or bound by its limitations.[11] Nonstate actors are not included in the creation and implementation of environmental solutions despite the fact that the sustainability of the earth's physical structure is an inherent interest of all global citizens, both immediately and in the long-term perspective. Therefore, if it is not in the immediate best interest of a state to pursue the costly and time-consuming process of international adjudication, sources of environmental degradation will be allowed to continue the erosion of further natural resources unchecked.

Additionally, the global commons—areas of the globe that do not fall within a specified jurisdiction of any one state—cannot be sufficiently protected by the general principles of international law. It is not clear who, if anyone, is responsible for the environmental preservation of these areas; as only states are subjects of international law, then only states may make claims in regard to environmental damage within these areas. As there is little to be gained from furthering a state's national interest by expending national finances to protect a territory which may not be perceived as offering any immediate national benefit, states are reluctant to adopt this course of action. This inevitably leaves the commons, which

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limited in their scope. The International Court of Justice is the exclusive global legal institution, and it solely recognizes states as having the status of legal subjects. *See* L. NEVILLE BROWN & TOM KENNEDY, THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES (4th ed. 1994); MARK W. JANIS & RICHARD S. KAY, EUROPEAN HUMAN RIGHTS LAW (1990).

11. After the Exxon-Valdez oil spill in the Gulf of Alaska occurred on March 24, 1989, all remedies were dealt with domestically, as the environmental damage was limited to American territory and was caused by an American corporation. Additionally, after a BHP tanker created an oil spill off the coast of Tasmania on July 11, 1995, the corporation initially accepted responsibility and began to assist with clean-up operations that were launched by the State Government of Tasmania and the Federal Government of Australia; it later denied any admission of liability, but continued to assist with environmental restoration. As in the former case, environmental damage was limited to domestic territory, caused by an Australian company, and if BHP had not continued to assist with environmental restoration, the Australian government would have been able to seek remedies through its domestic legal system. If either of these incidents had occurred in international territory (the global commons), or if the damage had been caused by a foreign corporation, the measures which may have been taken by either state to seek restitution are uncertain. Under the current system of international law, remedies do not exist whereby multinational corporations may be held legally accountable for environmental damage.

include the high seas, outer space, and the atmosphere, most vulnerable to environmental damage. Though multinational treaties have been negotiated to recognize these areas as shared resources of humankind, and appropriate environmental behavior is outlined for signatory states, specific procedures do not exist as a response to pollution in these common areas. For example, any amendments to state behavior which will further the protection of the Antarctic are limited to the twelve states which originally signed the Antarctic Treaty in 1959, and should another state violate the environmental sanctity of this territory, it is unclear what action would be taken.[12] Overall, international law does not provide relevant guidance as to what course of action must be taken, and by which legal actors, to ensure the preservation of these vast physical areas which are vital to all inhabitants of the earth. Even those principles within international law specifically formulated to encompass environmental protection now appear to be increasingly inadequate. "As ecological problems proliferate, and as the corresponding attention to environmental problems sharpens, the mutually supportive relationship between the state's instrumental role and its claims to exercise sovereign power is more likely to emerge as part of the problem than as part of the solution."[13]

In 1972, the first multilateral environmental conference (the United Nations Conference on the Human Environment) was held in Stockholm, and among its outcomes were the codification of international legal principles specifically related to the global environment.[14] Principles 21 and 22 of the 1972 Declaration on the Human Environment proclaim that states have a sovereign right to exploit resources within their own territories.[15] Simultaneously, states are obligated to ensure that activities within their territories do not inflict damage upon any area outside their respective jurisdictions. Additionally, states are obligated to cooperate in the further development of international environmental law.[16] The notion of the supremacy of state sovereignty within the international system underlies these basic principles of international environmental law.

These principles also reinforce the rule of noninterference in the domestic affairs and jurisdiction of other states as an element of hard international environmental law. Ordinarily, states cannot legally

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12. For a related discussion of the protocols and amendments to the Antarctic Treaty, see David S. Russell, *Protecting a Land Without a Country: The Antarctic Environmental Protocol*, *in* 20 ALTERNATIVES: PERSPECTIVES ON SOCIETY, TECHNOLOGY AND ENVIRONMENT (1993).

13. CAMILLERI ET AL., *supra* note 9, at 182.

14. *See* DANILENKO, *supra* note 6, at 409; BIRNIE & BOYLE, *supra* note 1.

15. *Id.*

16. *Id.*

intervene in the internal functioning of other states. This also includes the protection of environmental resources which may affect the overall balance of the global environment. Sovereign states have the legal right to further development and to pursue policies which are perceived to be in their national interest, despite environmental consequences which may extend beyond political boundaries. Does a state, whose jurisdiction happens to encompass vast amounts of a vital global resource, such as tropical rainforests, have the right to use and exploit that resource for its own national use? Under current international law, it certainly does. The legal maxim of *sic utere tuo ut alienum non laedas* (the good neighborliness principle)[17] ensures that state sovereignty takes precedence over global environmental concerns. "The universal constant of all states—the relation almost universally acknowledged as a general truth—is that of sovereignty over resources. The state's definitive, indisputable and uncontested supremacy over its territory involves a reality which is beyond discussion: permanent sovereignty over the resources of that territory."[18] For example, the newly industrializing countries in Southeast Asia vehemently defend their right to develop, a right, as they point out, that the Western world has already enjoyed. Arguably, if their ability to develop was impeded by environmental concerns the result would be unjust as Western states have previously damaged much of the physical environment through their own quests for industrialization. The principles of international environmental law do not currently include the necessary measures to recognize the development of individual states while preserving the global environment. As a result, the sovereignty of states allows for economic exploitation at the expense of the physical environment.

However, it is indisputable that natural resources are interconnected, and serve to sustain ecological and atmospheric conditions which then enable all species of life, including those of its human inhabitants, to be supported by the earth. It seems undesirable that any one state should be able to control the future of much of the world's population to further its own national interest or economic gain. Yet the principles of international law encourage this situation. "The global environmental trends – loss of species, ozone depletion, deforestation on a scale that affects world climate, and the greenhouse effect itself – all pose potentially serious losses to national economies, are immune to solution by

17. BIRNIE & BOYLE, *supra* note 1, at 89.

18. GEORGE ELIAN, THE PRINCIPLE OF SOVEREIGNTY OVER NATURAL RESOURCES (1979).

one or a few countries, and render geographic borders irrelevant."[19] These increasingly urgent environmental crises challenge the traditional concept of state sovereignty as inherent in the general principles of international law. The ability of individual states to limit the availability of natural resources, which in turn affect the availability of further resources outside political borders, seems irreconcilable with the present need for cooperative environmental preservation and sustainability.

The legal principle of *rebus sic stantibus* may also not be entirely appropriate for the development of international environmental law. According to this doctrine, grounds for withdrawing from, or terminating an agreement will occur if the specific situation which existed at the time the treaty was concluded fundamentally changes in some way.[20] In the context of the global environment, this doctrine could actually work against specific developments within the field of international environmental law. Scientific discoveries and subsequent information are increasing in abundance and are continually evolving to reveal new and varied environmental circumstances. Thus, states may be in a position to use this legal principle to opt out of previous agreements. The interpretation of *rebus sic stantibus* by respective states could create potential loopholes within international law as the continual influx of new information alters the original environmental situation which was in existence when a treaty was first signed. After environmental agreements have been negotiated, it is unclear to what extent the states involved should allow for the specific circumstances to be altered as more scientific knowledge becomes available. Although the exact cause and effect of much global environmental damage is not yet known, this should not be a hindrance to further international cooperation toward ecological protection. Almost all states generally agree that ecological damage is occurring around the world, and that it is possible to reverse this trend. However, international legal principles do not offer concise direction as to how binding the terms and content of environmental agreements should be. The traditional principles of international law were not designed to cope with an international issue that is truly global in nature and that generally falls short of providing an adequate framework in which to combat environmental degradation.

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19. Jessica T. Mathews, *Introduction and Overview* to PRESERVING THE GLOBAL ENVIRONMENT: THE CHALLENGE OF SHARED LEADERSHIP 31 (Jessica T. Mathews ed., 1991).

20. For a more detailed discussion of this doctrine see STARKE, *supra* note 1, at 473-76.

III. TREATIES

The design and implementation of international treaties and agreements within the current framework of international law also appear to be inadequate to tackle the global crises of environmental degradation. The treaty-making procedure is too slow and ineffectual to serve as an effective remedy for the world's rapidly increasing array of environmental problems. The states' traditional diplomatic approach, currently used as a context for the creation of global environmental solutions, is itself a nonconducive framework to effectively develop international environmental law. Instead of formulating urgently needed and explicit global environmental plans, the traditional international legal system is hindered by its continuing realist focus on the supremacy of state sovereignty and its national interest approach to the environment. This creates basic and limited documents which serve only to reiterate the problem, and which postpone necessary action.

> The signing of a convention can "take the heat off" political leaders, allowing symbolic but empty promises to substitute for real improvements. Nations and leaders that have absolutely no commitment to improving environmental quality can sign a convention and claim credit for "doing something" when, in fact, there will be no improvement.[21]

International agreements are introduced and negotiated within the traditional forum of relatively ad hoc diplomatic conferences. After an agreement has been signed, the states concerned then proceed through separate processes of ratification before it becomes legally binding upon its signatories. A treaty does not become legally binding until a specified number of states have completed their national ratification process, and formally agree on the conditions and obligations contained within the treaty.[22] This process is very thorough, and it ensures careful scrutiny by all signatory states, or a specified quota of them, before an agreement becomes binding on members of the international community. The reasoning behind this process is also to guarantee a "measure of reciprocity and to avoid situations where initial compliance by a few

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21. Lawrence Susskind & Connie Ozawa, *Negotiating More Effective International Environmental Agreements*, *in* THE INTERNATIONAL POLITICS OF THE ENVIRONMENT: ACTORS, INTERESTS, AND INSTITUTIONS 147 (Andrew Hurrell & Benedict Kingsbury eds., 1992).

22. For a relevant discussion of the processes of international agreements see Peter Sand, *International Cooperation: The Environmental Experience Preserving the Global Environment*, *in* THE CHALLENGE OF SHARED LEADERSHIP 240 (Jessica T. Mathews ed., 1991).

diligent parties would create disproportionate benefits to the 'free-riders' remaining outside the treaty."[23]

Although this procedure for designing international law is very comprehensive and ensures that a maximum number of states have the opportunity to carefully consider their level of commitment in various issues of international law, it is not an adequate framework in which to create environmental solutions to common global problems. The transnational nature of environmental crises, coupled with the recent level of awareness, creates a unique problem for the traditional framework of international law. In addition, the necessary time frame for this legal process to be carried out is simply too long to offer a viable solution to the impending environmental crises which are rapidly increasing in both intensity and potential areas of impact. Action must be taken immediately to salvage the sustainability of the earth's environment. This complex and prolonged international legal process is a hindrance to rapid agreement and reaction.

Furthermore, international environmental conditions are continually changing and this legal method does not provide a sufficient level of flexibility which may enable individual states to adapt to rapidly changing circumstances. Although protocols to a treaty allow for additions and amendments to be made, this process still requires a level of participation and consensus which impedes states' collective, and timely response to impending environmental problems. The legal requirement of consensus followed by national ratification "creates a built-in time lag, deliberately delaying the effectiveness of international agreements."[24]

A contemporary example of this ineffective legal approach to the global environment is the process and length of time involved in attempting to address pressing environmental issues throughout the 1980s and early 1990s. The World Commission on Environment and Development was created in 1983 by the United Nations General Assembly resolution 38/161,[25] to investigate urgent global environmental problems, and to propose necessary solutions. Four years later, in 1987, the Commission recommended that "the General Assembly commit itself to preparing a universal Declaration and later a Convention on environmental protection and sustainable development."[26] However, it was not until 1992 that the United Nations held a Conference on Environment and Development (UNCED) in Rio de Janeiro. During the five years in between, a series of

23. *Id.*

24. *Id.*

25. WORLD COMMISSION, *supra* note 5, at 352.

26. *Id.* at 333.

PrepCom meetings was held to draft and refine the treaties to be presented for signature at Rio. Three nonbinding documents were produced: (1) the Rio Declaration (which the WCED had specifically recommended); (2) a Statement of Principles for a Global Consensus on the Management, Conservation, and Sustainable Development of all Types of Forests; and (3) Agenda 21, a rhetorically extensive framework for global action. In addition, two binding agreements were produced: the Framework Convention on Climate Change, and the Convention on Biological Diversity.[27] However, after signature of these agreements, states then went through their respective processes of ratification. The Convention on Biological Diversity did not enter into force until December 29, 1993,[28] and the Climate Change Convention entered into force on March 21, 1994,[29] ten and eleven years, respectively, after the initial recognition of a need for global action by the United Nations. States are still continuing to sign and ratify these agreements because not all states collectively welcomed their adoption. By the time most states respond to the action outlined in these treaties, the environmental circumstances will most likely have changed and deteriorated which will require further refinement and adjustment to the contents of the agreements. Obviously, the current treaty-making process is proving to be too arduous and prolonged to offer timely solutions to global environmental problems.

Additionally, the method of international legal formulation which consists of the drafting, signature, and ratification of multilaterally negotiated agreements, followed sometime later by specific protocols, will only produce the most basic level agreements among states. States are reluctant to commit themselves to binding and detailed arrangements, and the international law-making procedures enable them to postpone necessary cooperative environmental action. Most often, the only agreements which can be negotiated between any number of states are those that reflect only the most general and common level of agreement; usually mere recognition of a problem, and the need for future action. These are lowest common denominator agreements, and they comprise the majority of treaties within international environmental law.

> At the convention-drafting stage, the goal is typically to keep discussions at a very general level so that countries will at least agree that some (unspecified) action is needed

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27. *See generally* Sir Geoffrey Palmer, *The Earth Summit: What Went Wrong at Rio?*, 70 WASH. U. L.Q. 1005 (1992) (overviewing the UNCED documents).

28. *Id.*

29. *Id.*

> to solve a problem. At the protocol-drafting stage, the goal is usually to find a formula that everyone can accept.[30]

Lowest common denominator agreements do not offer a sufficient means of solving existing, and preventing further, environmental degradation across the globe. The entire treaty-making process within international law is ill suited for the rapid, and flexible responses necessary to alleviate most environmental problems because it does not force states to negotiate compulsory, timely, and specific means of implementation of policies. This reflects their preferred adoption of "nonbinding resolutions or recommendations which set standards which influence the development of international law at a slower pace, rather than attempting to negotiate immediately binding rules."[31]

IV. CUSTOM

Custom is most often regarded, and legally interpreted, as the prime source of international law. However, it is perceived as increasingly inadequate to deal with the rapidly intensifying demands upon the earth's physical environment. Customary international law does not currently provide states with an adequate framework of reference within which to formulate their national policies and behavior in relation to the devastation of the global environment.

A clear and common understanding regarding expected and appropriate environmental behavior does not exist within the international legal system. The period of time necessary for a practice in international relations to have reached the status of customary law has not yet elapsed in terms of the environment. International legal customs take decades, and sometimes centuries, to evolve into common and accepted practice. In terms of state behavior regarding the global environment, normative practices have not yet had a sufficient amount of time to develop into customary law. This is a relatively new area of international law as the first substantial multilateral recognition of international environmental law occurred only twenty-three years ago at the Stockholm Conference in 1972. Environmental issues, particularly those that are not confined to the area of one state's territorial jurisdiction, are still most often perceived as conflicting situations between immediate national economic interests and long-term environmental regulations. Although most states now recognize the diminishing global environmental structure, a clear environmental custom does not exist within international law because a common

30. SUSSKIND & OZAWA, *supra* note 21, at 150.

31. Birnie, *The Role of International Law*, *supra* note 1, at 109.

established pattern of behavior cannot yet be determined from state interaction.

In determining whether or not a particular practice has become a legal custom, two criteria, material and psychological, must be satisfied. In regard to the material aspect, it must be established that there is frequent recurrence or repetition of the specific international practice among the general community of states.[32] More importantly, the psychological aspect concerns the transition from the common use of a practice into a recognized and mutually accepted international legal norm. When an interstate practice is accepted by the majority of states it acquires the legal status of *opinio juris*, and the recognition of this status is a measure of whether or not a usage is in fact an international custom.[33] States become legally bound by common customs when a certain behavior is generally agreed upon and practiced by the majority of states in the international community.

However, it cannot be established that various practices within the developing realm of international environmental law have become established customs with the common recognition of *opinio juris*, as states continue to refer to their own national interests and their respective domestic legal systems when determining international environmental policies and action. Though the need for collective environmental preservation has basically been acknowledged at the international level through the formulation and construction of various environmental agreements, established collective legal recognition of global environmental practices remains to be seen.

Under international law, states become bound by the laws that they collectively create. Both rights and responsibilities are accepted by states within the international community and within the traditional framework of international law. The law is equally applicable to all sovereign states, and individual states become both protected and obligated by established collective customs. The concept of *jus cogens* reflects the further status of a practice in international law which is intrinsic to the international system, and cannot be broken without cost. "The law of state responsibility also developed the idea of *jus cogens*, or mandatory norms . . . . [Specifically] the *jus cogens* idea was that there are certain norms of such transcending importance that states may not avoid them unilaterally."[34] These peremptory norms of international law exist to protect the overall interests

32. STARKE, *supra* note 1, at 38.

33. *Id.* at 39.

34. John Quigley, *Law for a World Community*, 16 SYRACUSE J. INT'L L. & COM. 18, 19 (1989).

of the global community and to uphold basic human rights. It is a recognized element of international law that *jus cogens* norms are fundamental to the traditional legal system.

Currently, environmental rights and responsibilities are not recognized as having this legal status, despite the fact that global environmental preservation represents an essential interest of all individuals within the entire international society. Sufficient time has not yet passed to enable environmental issues to evolve to this status of international law. The establishment of peremptory norms must develop from a specific practice for an extended period of time by the general majority of states.

Presently, the observation that the interests of the international community, in its entirety, are being adequately protected by customs within international environmental law cannot be made. The degradation of the world's rainforests, the continuing depletion of the atmospheric ozone layer, and the increasing spread of decertification are all evidence that environmental legal customs do not sufficiently regulate the actions of states under international law. The majority of states have not consented to the regulation of the use of various natural resources, and it is a difficult task to discern any definite established environmental practices among states.

> The quest as to whether a rule has the character of *jus cogens* must begin by finding out whether it belongs to general international law. It must be established that the rule is binding upon the great majority of States, in other words, that the international community, by and large, has consented to its content.[35]

Based upon the current state of the earth's physical environment, it would appear that the majority of members of the international community do not regard themselves as being bound by established environmental customary precedent, *opinio juris*, or by the mandatory regulation of national action by *jus cogens* norms.

V. CONCLUSION

Planet earth has never before faced such global environmental crises as it does now, and its inhabitants have never before been so informed as to the damage that has been caused and the action that needs to be taken. The traditional state system is unable to cope with the recent

35. CHRISTOS L. ROZAKIS, THE CONCEPT OF JUS COGENS IN THE LAW OF TREATIES 57 (1976).

and unique global phenomenon of environmental degradation. The relations between sovereign states are governed by rules of legal tradition based upon the necessity to reduce conflict and competition between the worlds political entities. The supremacy of state sovereignty has been documented throughout the international legal tradition, but this system is at odds with formulating collective and cooperative responses to the ecological threats of its own creation.

The three main sources of international law explored in this paper—custom, treaties, and general principles of law—comprise an inadequate international framework as they do not provide states with an appropriate guide with which to respond to a varied and increasing number of global environmental crises. The system of international law, specifically investigated through an explanation of these three components, does not currently provide the members of the world community with a coherent and common direction in terms of the environment. The nature of the interstate, sovereign system prevents an immediate and effective response. "The emergence of an increasingly urgent environmental agenda in the closing years of the twentieth century demonstrates ever more starkly the incongruity between the physical properties of the biosphere and the image of a world partitioned hermetically and immutably, into fixed domains of sovereign authority."[36]

The collection of norms and rules which comprise the sources of international law presently falls short of providing an effective means toward the end of environmental salvation. Effective environmental legal action is incompatible with the general principles of international law. Current legal action is not effectively carried out by the processes of international treaties and not fully incorporated within the recognized source of custom. The issue that must now be urgently addressed by the international society, comprised of a greater range of its members, is how to adapt those traditional principles of international law which reduce conflict and tension to the open coordination of cooperative universal solutions toward environmental sustainability.

There needs to be a greater inclusion of various groups and individuals who have an inherent interest in the sustainability of the earth's environment, motivated either by protection of social, economic, or survival interests. Specifically, multinational corporations and nongovernmental organizations should be given greater recognition, rights, obligations, and responsibilities at the international level of legal

36. CAMILLERI ET AL., *supra* note 9, at 195.

negotiations, as they have a realistic impact on the ecological and social structure of various regions.

The traditional concepts of international law, as explored in these three main sources, should be adapted to reflect the situation of the earth's environment, and the structure of international society as it presently exists. Failing to do so will leave various ecosystems of the earth permanently scarred, and a heavy and unjust burden will be borne by future generations. The damage presently being inflicted on the delicate natural balance of the earth will diminish available resources for years to come, and a collective global response must be undertaken immediately to reverse this pattern of ecological and atmospheric degradation.