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World public order of the environment: Towards an international ecological law and organization

UNIVERSITY TORONTO PRESS
Toronto and Buffalo

Toronto Buffalo London
Printed in Canada

Library of Congress Cataloging in Publication Data

Schneider, Jan.
World public order of the environment.
Includes indexes.
1. Environmental law, International. I. Title.
K3585.4.S3 1979 341.7'62 78-11712
ISBN 0-8020-5425-0

Parts of this book, in earlier versions, have appeared in the *Yale Law Journal* and *Yale Studies in World Public Order*. Publication of this volume has been made possible by financial support from the University Consortium for World Order Studies and the Yale Concilium on International Area Studies and by a grant to the University of Toronto Press from the Andrew W. Mellon Foundation. The author wishes also to express most sincere gratitude to the many friends who have been so helpful and supportive throughout.

Foreword

The broadest reference of 'environment,' in common usage, is to 'all the conditions, circumstances, and influences surrounding and affecting the development of an organism or group of organisms.'* The contemporary concern of the peoples of the world about the quality of their environment appropriately extends, in comparable reach, to the whole complex of resources – atmospheres, waters, and landmasses – which both envelops and forms the material base for all their activities in the shaping and sharing of values. The new international law of the environment, as Jan Schneider's book makes clear, is but our inherited international law about the management of resources (potential values) writ large, with emphasis upon emerging contemporary problems.

It is commonplace among the knowledgeable, requiring only brief allusion by Dr Schneider, that all the resources of the earth-space community are knit together in a maze of intimate ecological interdependences – embracing all such features of the material environment as air, climate, topography, soil, geologic structure, minerals, water resources and access to waters, natural vegetation, and animal life – which condition, and in turn are conditioned by, the institutions and practices by which the individual human being seeks to satisfy social, psychological, and bodily needs and demands. Because of inescapable physical, technological, and utilization unities, the resources of the globe, taken as a whole, are today of necessity as sharable, and as requiring of shared management, as are the resources of a single river valley.

It is scarcely less commonplace, as concerned activists continuously remind us, that highly destructive, and sometimes irreversible, damage is being done to all the resources of our global environment at an accelerating rate. Easy to

* *Webster's New World Dictionary* (2d college ed. 1976) s.v. 'environment'

observe, or to anticipate, are the exhaustion of some vital resources, the pollution of all resources, the shrinkage of open spaces, the spoliation of agricultural lands and spread of deserts, the congestion and deterioration of urban areas, the increasingly rapid extinction of many forms of non-human life, and the destruction of natural beauty. Continuing technological advances multiply the potentialities of destructive impact, and a burgeoning population makes cumulative demands upon increasingly strained resources. The Club of Rome needs to be accurate only in minimal degree for us to know that the quality of life for all is intensely threatened.

It is the principal purpose of Dr Schneider in *World Public Order of the Environment* to create, and briefly to illustrate the application of, a comprehensive conceptual framework which will facilitate clarifying and implementing the common interest of humankind in an appropriate and effective international law of the environment. For her, as the book repeatedly emphasizes, there is an ecological dimension, just as there is a human rights dimension, in every human interaction and in every authoritative decision about such interactions. The standpoint she assumes is that of the observer or decision-maker who identifies, not merely with some single parochial community, but with all individual human beings in all their multiple, concentric, and interpenetrating political communities. From this perspective, she finds it necessary to specify in detail the recurrent, factual problems with which authoritative decision-makers must cope in the global management of resources, to postulate certain overriding general community policies for the guidance of such decision-makers, and to engage in a variety of particular intellectual tasks in the detailed specification of such policies.

The public order problems with which Dr Schneider works include those in relation to the allocation of resources, the regulation of use (including both injurious and productive or harmonious uses), the planning and development of resource potentials, and the control of the access of individuals to resources. The authoritative decision problems she categorizes cover the whole of the making and application of general community policy, including the intelligence, promoting, prescribing, invoking, applying, terminating, and appraising functions. She realistically observes that effective power maintains on the global level a comprehensive constitutive process of authoritative decision entirely comparable to that maintained within national communities.

The overriding policy Dr Schneider recommends for postulation by authoritative decision-makers in coping with particular problems about the environment is not that of some simplistic physical conservation of resources in a pristine, untouched state of nature, but rather that of an appropriately con-

serving, economic, and constructive employment of resources in the greater production and wider distribution of all values of human dignity. 'The right of all people in present and future generations,' she writes (page 67), 'to "freedom, equality, and adequate conditions of life in an environment that permits a life of dignity and well-being" is, after all, what our concern with the human environment is about.'

The intellectual tasks Dr Schneider recommends for the clarification and implementation of policies about particular environmental problems are several-fold, including:

1/ the specification in detail, from the perspective of an observer identifying with the whole of mankind, of basic general community policies in terms of costs and benefits in relation to all values;

2/ the survey of past experience, including prior trends in decision, at all levels of community, from local to global, in terms of approximation to clarified policies;

3/ inquiry into the factors that have affected past experience and decisions on particular comparable problems;

4/ the projection of developmental constructs about probable future decisions and conditioning factors in relation to particular problems; and

5/ the invention and evaluation of new alternatives in rules, institutions, and decision for the better securing of clarified policies.

It could scarcely be expected that Dr Schneider would be able to bring the framework of inquiry and intellectual procedures she recommends to bear upon a comprehensive review of, and assessment of recent developments about, all problems in international environmental law. The framework of inquiry created in this book, certainly the first of its reach, will, however, be of extraordinary usefulness in the guidance of future studies, and she makes an illustrative and creative application of that framework to a variety of important contemporary problems, offering specific suggestions about desirable future directions in decision. To her work as a whole* she brings a unique 'insider's' experience in inter-state, inter-institutional, and intra-institutional environmental diplomacy, a broad understanding of the relevant social and physical sciences, an urbane and cosmopolitan wisdom, and a deep sense of commitment. The book she has produced could serve as a basis for communication for concerned individuals of very different backgrounds and skills, including lawyers, scientists, economists, businessmen, bureaucrats, diplomats, and politicians, and will greatly benefit the common interests of both professionals and laymen.

* Dr Schneider has participated in both the United Nations Human Environment and Law of the Sea Conferences. She is a practising lawyer and also has a doctorate in political science.

One of Dr Schneider's most important contributions is in her insistence upon the need, beyond specifically designed programs for the amelioration of particular problems, of a comprehensive and continuous intelligence function about the environmental dimensions of decision. Over one hundred and fifty states get together and try to draft a Law of the Sea 'umbrella treaty,' or an Outer Space agreement, or a New Economic Order – and there are critical environmental implications that must be faced. The Scandinavian countries reach a new Environmental Protection Agreement, coastal states agree on an action plan to protect the Mediterranean Sea and its resources, African states and other concerned countries try to combat desertification problems in the Sahel region – and international environmental implications are both obvious and highly important. Even bilateral problems and efforts to deal with such problems may have far-reaching consequences and precedential value – thus, the United States and Canada make a Boundary Waters or Weather Modification agreement or jointly search the Canadian north for radioactive debris from a fallen Soviet satellite. And so on. Only comprehensive and continuous intelligence can illuminate such problems in common interest.

All who are concerned for the quality and productivity of the global environment, and its constituent resources, must be indebted to Dr Schneider for an invaluable comprehensive map of what hitherto has been wilderness, uncharted waters, and dense fog.

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Preface

Throughout this study, I try to take a comprehensive perspective and search for an overall conceptual framework. At the same time, it is impossible to ignore the exceedingly pressing nature of certain particular environmental problems or the critical time constraints on various options. A compelling sense of urgency is captured in the parable of the lily pond, a French children's riddle recalled in *The Limits to Growth*. The lily plant doubles in size each day; if allowed to grow unchecked, it will cover the pond in thirty days, choking off all other forms of life in the water. So what happens? 'For a long time the lily plant seems small, and so you decide not to worry about cutting it back until it covers half the pond. On what day will that be? On the twenty-ninth day, of course. You have one day to save your pond.'*

This sense of urgency, it follows, is in no way denied or rejected here. There are certain inexorable resource and time constraints limiting decisions and actions by the world public order today, which together have generated the present 'crisis' of the human environment.

But the focus of inquiry here is different. I try, rather, to examine the will and means for dealing with both immediate and long-term environmental problems. International environmental law and organization are viewed as a composite of multiple and interpenetrating decision-making processes, responding to perceived natural and physical limitations and implementing value priorities within the remaining bounds of choice. From analysis of trends in these areas, there appears to be emerging a new world public order of environment and resources; this new order is, however, still in an embryonic stage, and we have far to go towards the goal that I have labelled an 'international ecological law and organization.'

* D. Meadows, D. Meadows, J. Randers, and W. Behrens, *The Limits to Growth* 29 (1972)

Contents

PART ONE

Introduction

1

Ecology and political ecology

Once there was man and only one earth; there is still only one earth.

It is today becoming widely recognized that this planet – or, more expansively, the entire earth-space system – is an ecological unity both in the basic scientific sense and in the interdependencies of the social processes by which mankind uses it. The plants, animals (including *homo sapiens*), and microorganisms that inhabit the planet are united with each other and with their non-living surroundings by a network of complex, interrelated, and interdependent natural and cultural components known as the planetary 'ecosystem,' indivisibly uniting the multitude of subsidiary ecosystems. Within this system, man alone has a dual role: both as natural symbiotic component and as purposive decision-maker choosing among a range of possibilities. Thus, in order to predict or mould future world events, it is essential to investigate the latter as well as the former aspect – to understand political ecology as well as the natural laws that govern the physical environment.

The state of the *milieu* within which political decisions have to be made, it follows, is readily apparent. The more specific ecological unities or interdependencies – physical, engineering, and utilization – of the planetary ecosystem make our whole earth-space environment a single shareable and necessarily shared resource. The emerging scientific perspective is that of 'only one earth,' as set forth by Barbara Ward and Rene Dubos:

> There is a profound paradox in the fact that four centuries of intense scientific work, focused on the dissection of the seamless web of existence and resulting in ever more precise but highly specialized knowledge, has led to a new and unexpected vision of the total unity, continuity and interdependence of the entire cosmos.[1]

The implications of this new vision for political decision-making have been most impressively analysed by Harold and Margaret Sprout, who define the emerging 'ecological perspective' on international politics as follows:

> The ecological way of seeing and comprehending envisages international politics as a *system of relationships* among *interdependent, earth-related* communities that share with one another an *increasingly crowded planet* that offers *finite* and *exhaustible* quantities of *basic essentials* of human well-being and existence.[2]

These understandings of the nature of ecology and political ecology provide the starting point for the present study.

It is also becoming widely recognized that this planet is gravely endangered, and that its rapidly accelerating degradation is reaching a point of no return – a cusp at which we may arrive within perhaps fifty years if strong measures are not taken to halt the forces of degradation and reorient many of our basic patterns of resource use. Rising demands for improved knowledge and more appropriate measures for environmental protection and preservation were dramatically illustrated in the environmental benchmark of 'Stockholm '72.' Three separate environmental conferences took place in that city in that year.[3] The Dai Dong Independent Conference (its name being derived from an ancient Chinese precept: 'For a world in which not only a man's family is his family, not only his children are his children, but all the world is his family and all children are his') met from 1 to 6 June. The official United Nations Conference on the Human Environment, convening 1200 delegates from 113 countries, was the focal event, and it met for two weeks from 5 to 17 June. Finally, the UNCHE was complemented and paralleled by an unofficial meeting organized by various citizens' groups. Although the substantive developments at both the official and the unofficial gatherings disappointed many participants and observers, what happened at Stockholm is most significant in indicating that, at both élite and mass levels, perceptions of ecological factors and consequent demands on the world decision-making processes are becoming more comprehensive and holistic.

Unfortunately, however, these demands are as yet neither sufficiently perceptive nor sufficiently all-embracing. It is still not widely understood that there are ecological dimensions, just as there are human rights dimensions, to all the authoritative decisions taken in all our political communities from local to global and that the rational making of these decisions requires that a comprehensive ecological perspective be brought to bear on all of them. Similarly, there is not yet sufficient realization that beyond the mere infusion of relevant information about ecological unities and common interests into the traditional

flow of decisions, positive and dynamic programs for better protection and more advantageous use of the whole earth-space environment – land masses, oceans, atmosphere, and so on – are crucial. The mere collective understanding that things should be done, in other words, does not necessarily ensure that they can or will be done.

The publicists have not been much more unified and coherent than the politicians in their approach to environmental management problems. There are wide-ranging extremes: from the doomsday politics people, on the one hand, who decry the inescapable predicament of mankind, to the world federalist cheermongers, on the other, who are happily convinced that the so-called 'environmental crisis' is essentially a practical problem of the same order and as susceptible to ordinary techniques of negotiation and functionalist recipes as a host of earlier international difficulties.[4] If the most extreme views of the global environmental situation were fully proved or accepted, there would be no reason for the present work; it would either be irrelevant given the fact of impending and unavoidable disaster or else an unnecessarily arduous and tedious exercise that could have been avoided by letting human nature take its course and world politics follow suit. But, in the face of admittedly incomplete but nevertheless convincing scientific evidence, it is better to heed the warning and assume that there is a real and imminent crisis of global proportions for which immediate and long-term preventive and ameliorative measures must be sought. In this sense, the well-known study of *The Limits to Growth*[5] and several other of the more pessimistic assessments of the situation have been invaluable in issuing a warning and arousing genuine concern.[6] After all, we must take into account not only the probability of being right, but also the possible consequences of being wrong.

This book attempts a broad contextual analysis of the problem. It looks at the ecological or environmental dimension to the 'world public order' or 'international law and organization' – defined here as those features of the world social or political process, including both goal values and implementing institutions, which are protected by law ('law' being used in its broad sense of the expectations and practices of a social or political community). After the dimensions of this public order, a composite of multiple and interpenetrating communities from local to earth-space in scale, have been introduced, the main body of the work presents and evaluates evidence of progress to date in managing the total environment and its various parts. Illustrating this overall analysis are two problem studies, the first expanding upon the regime of state responsibility for environmental protection and preservation, and the second illustrating the organizational problems of resolving environmental disputes.

The evidence to date does show some progress in the evolution in early stages of international environmental law and international environmental organization. Crisis is far from having been averted, however, and it is the purpose of this book to suggest ways of taking greater account of ecology and political ecology, of moving towards an international *ecological* law and organization (the latter term being intended to highlight the interrelationships and interdependencies of resource management).

There is no intent here to marshall evidence either for or against world government in the popular sense of an established, centralized system of administration and policing. I do contend that the present pluralistic world community and public order is beginning to recognize and take account of the ecological dimension to political choices and that this international system can, without centralized coercion, be rendered more ecologically responsive in the future. The argument implies no great love for sovereign states *per se*; they could be superseded by regional or other larger formal agglomerations as the primary focus of power in world politics without basically altering my thesis. Whether or not any degree of federation (or conquest) up to a totally centralized world government is either likely or desirable depends on many military, cultural, and other considerations beyond the scope of this study. How such a government might cope with environmental problems is also beyond the realm of speculation here. My inquiry is slightly more modest. Given the contemporary world public order, how may we preserve and protect the human environment in the calculable future?

2

Environmental public order

The protection and preservation of the earth-space environment is essentially a public order problem, in the sense that it affects the whole global community and its multiple and interpenetrating component communities. There are, of course, innumerable private consequences of environmental policies, but the nature of environmental protection and management measures remains inescapably an issue of public choice, which may require both collective and individual action. The international community has developed an overall world public order or process of authoritative decision for making and implementing choices. The fundamental features of this decision-making process mold and determine the particular decisions comprising the international environmental dimension, while at the same time they are themselves being determined by the latter. Thus, it is necessary to observe the basic parameters of the total international system in order to understand trends in environmental public order. Can we identify the major actors possessing authority and/or control in international environmental decision-making? What is the nature of the interests held by those actors? Is there a logic according to which they act or fail to act to achieve their common interests, and does it suggest ways of reorienting the system to take better account of environmental costs and benefits?

Actors

Although the states-as-sole-actors approach to international politics has long been discredited by practitioners as well as theoreticians of diplomacy, and although the idea of states as sole 'persons' at international law has also been thoroughly undermined,[1] the primacy of the state in contemporary international law and politics remains unchallenged. It has already been remarked