'CLEAR AND PRESENT DANGER': A ROLE FOR THE UNITED NATIONS SECURITY COUNCIL IN PROTECTING THE GLOBAL ENVIRONMENT

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[This article examines the international legal basis for, and desirability of, the United Nations Security Council taking action to protect the global environment. It is argued that existing processes, including the use of cooperative mechanisms and recourse to the International Court of Justice, have proved inadequate to deal with major environmental concerns and that an alternative approach is required. The article traces the development of a nexus between international peace and environmental protection and examines the possible benefits and risks of the Security Council putting the international environment on its agenda. After reviewing the possibility of Security Council intervention in three real situations, the article concludes that there is a residual role for the Security Council when incentives fail to achieve international compliance with environmental protection objectives.]

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'Peace, development and environmental protection are interdependent and indivisible.' [1]

I INTRODUCTION

The President of the United Nations Security Council reported on 31 January 1992 that the Council had considered its responsibilities and determined that:

> [t]he absence of war and military conflicts amongst States does not in itself ensure international peace and security. The non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to peace and security.[2]

This comment came less than a year after the Council's statement during the Gulf War concerning Iraq's potential liability for, *inter alia*, environmental harm resulting from Iraq's unlawful invasion of Kuwait.[3] These two statements indicate that the Council may be adopting a broader definition of the concept of 'international peace and security' for the purposes of Chapter VII of the United Nations Charter: one which recognises that major threats to the global environment could be legitimate items for the Council's attention.

The Security Council's apparently emerging interest in the global environment is at once positive and problematic. It could be a positive development because the state-based international legal system has shown itself to be consistently unable to respond to the global nature of major environmental problems through the creation of adequate monitoring and enforcement arrangements.[4] It is, accordingly, tempting to look for a 'higher' authority to determine the appropriate course of action in such matters.[5] However, the continuing 'North/South'

[1] Rio Declaration on Environment and Development, in *Report of the UN Conference on Environment and Development*, Rio de Janeiro UN Doc A/CONF 151/26 (vol 1) 8, principle 25 (1992); 31 ILM 874, 876.

[2] Security Council Summit Statement Concerning the Council's Responsibility in the Maintenance of International Peace and Security, UN Doc S/23500 (1992); 31 ILM 758, 761. See also *Report of the Secretary-General on an Agenda for Peace - Preventive Diplomacy, Peacemaking and Peace-keeping*, UN Doc S/24111 (1992); 31 ILM 953, 957, para 5.

[3] SC Res 687, 46 UN SCOR (2981st mtg), UN Doc S/Res/687 (1991). A succinct, if *ex tempore*, analysis of the major tensions can be found in a comment by Louis Henkin on United Nations responses to environmental issues in Brian Urquhart, Louis Henkin and Richard Butler, 'Yesterday's Politics, Tomorrow's Problems: A World Without the United Nations?' (1995) 20 *Melbourne University Law Review* 16, 27.

[4] Lawrence Susskind, *Environmental Diplomacy: Negotiating More Effective Global Agreements* (1994) 21-2; Lawrence Susskind and Connie Ozawa, 'Negotiating More Effective International Environmental Agreements' in Andrew Hurrell and Benedict Kingsbury (eds), *The International Politics of the Environment: Actors, Interests and Institutions* (1992) 142, 142-3. Hilary French, 'Reforming the United Nations to Ensure Environmentally Sustainable Development' (1994) 4 *Transnational Law and Contemporary Problems* 559, 563-5, presents a table of 'notable accomplishments and remaining challenges'. The enormity of continuing global environmental problems is reflected in the fact that none of the 'accomplishments' listed (in relation to acid rain, depletion of stratospheric ozone, nuclear weapons testing, the pollution of the Mediterranean Sea, whaling, the ivory trade, Antarctic preservation and international hazardous waste trade) has resulted in the problem being 'solved'.

[5] See, eg, Tamara Crockett and Cynthia Schultz, 'The Integration of Environmental Policy and the European Community: Recent Problems of Implementation and Enforcement' (1991) 29 *Co-*

division of the United Nations General Assembly (GA) on the 'environment versus development' question[6] suggests that the Assembly remains unable to achieve an effective consensus in favour of global environmental protection. At the same time, the consent-based jurisdiction[7] and practical limitations associated with remedies available through the International Court of Justice (ICJ) as provisional measures[8] suggest that the ICJ may not be the appropriate forum to resolve environmental disputes. On the assumption that some form of ultimate 'global authority' is necessary to deal with international environmental issues,[9] the involvement of the Council may seem to offer hope that a body with effective power may be able to 'police' at least a limited number of key environmental 'injunctions'. On the other hand, the Council's involvement in environmental issues is problematic, both because its positive statements of concern could be read as limited to environmental damage arising from the exercise of force and because there are issues of legitimacy and procedural effectiveness. There may even be a paradox: new risks to international stability could arise from characterising environmental disputes as threats to international peace and security. Perhaps most problematic at the present time is the Council's apparent inability to deal even passably well with its peacemaking functions in the former Yugoslavia and Rwanda.

This article examines the potential for Security Council involvement in global environmental protection in the context of real environmental problems drawn from Amazonia (where almost all potential environmental problems seem to collide) and the South Pacific. In light of recent local events, it examines the likely effectiveness of any global regime by reference to environmental conflict in Papua New Guinea, as well as the revived problem of French nuclear testing. The article argues that the Council could perform a vital function in relation to a very limited number of threats to the environment which might be characterised as threats to international peace and security. It does not, however, attempt to set out an operational model for future Council intervention in environmental disputes because significant further work on the development of enforceable principles of international environmental law is required. Council involvement need not, and must not, mean military intervention. The Council's Chapter VII powers include a broad range of sanctions short of the application of force.[10] A strong case can be made that the Council's willingness to identify environmental concerns as threats to international peace and security and to establish formal reporting mechanisms under its control would be a powerful signal that environmental concerns are to be taken seriously by the international community. It may be that the Council's mere identification of important environmental issues as

lumbia Journal of Transnational Law 169, 189, arguing that effective environmental protection in Europe requires that environmental policy-making, implementation and enforcement activities be centralised in a special EC body.

6 Reflected in the Rio Declaration on Environment and Development, above n 1, principle 2.

7 Statute of the International Court of Justice art 36.

8 Ibid art 41(1).

9 See below, nn 187-214 and accompanying text.

10 UN Charter art 41.

international agencies such as the United Nations Environment Program (UNEP) to obtain co-operation and compliance from United Nations (UN) member States.

II WHY INVOLVE THE SECURITY COUNCIL? THE ADEQUACY OF ALTERNATIVE ENVIRONMENTAL PROTECTION ARRANGEMENTS

International law has traditionally been described as 'statist', that is, it is predicated on the 'right' of states to act autonomously as a function of their political power, rather than according to any meta-concept of 'justice'.[11] The result has been an international system premised on the voluntary compliance of states with agreed principles which are themselves, in turn, determined by the positive acts of states. This positivist conception of the international legal framework is expressed, for example, in the Statute of the ICJ.[12] In consequence, international law separates issues into those which are susceptible to regulation ('international' issues) and those which are not ('internal' or 'domestic' matters). The dichotomy is embodied in the United Nations Charter.[13] The assertion of the 'sovereign right' to development has been the usual way that states have contended that environmental matters are 'internal' and therefore removed from scrutiny by international law.[14]

The state-centred basis of the system is reflected in the common understanding of the ways in which international law develops. It is, of course, obvious in the process of accepting treaty obligations; states which do not wish to become bound by a treaty simply need not become parties. But the understanding of the process of development of customary international law also reflects the view that states should, in general, be free to act as they wish. The restrictive judicial approach to the finding of binding custom, which requires identification of 'constant and uniform usage practised by the states in question',[15] and the

[11] Karen Knop, 'Re/Statements: Feminism and State Sovereignty in International Law' (1993) 3 *Transnational Law and Contemporary Problems* 293, 296.

[12] See art 36, providing that states may (but need not) recognise the Court's compulsory jurisdiction, conditionally or unconditionally; art 38, providing that the sources of law to be applied by the ICJ are restricted, in general, to treaties (the voluntary acts of specific states), international custom (the voluntary acts of most or all states), and general principles of law (recognised voluntarily by states); and art 59 which provides that the ICJ's decisions are binding only on the parties and only with respect to the matter in dispute and so do not establish 'precedents'.

[13] UN Charter art 2(7).

[14] Declaration on the Right to Development, GA Res 41/128, 41 UN GAOR (97th mtg), UN Doc A/Res/41/128 (1986) art 1; Declaration of the UN Conference on the Human Environment (Stockholm), UN Doc A/CONF.48/14 (1972) in Harald Hohmann (ed), *Basic Documents of International Environmental Law* (1992) vol 1, 21, principle 21; Rio Declaration, above n 1, principle 2. See also Permanent Sovereignty over Natural Resources, GA Res 3171, 28 UN GAOR (2203rd mtg) (1973); Alternative Approaches and Ways and Means Within the United Nations System for Improving the Effective Enjoyment of Human Rights and Fundamental Freedoms, GA Res 37/199, 37 UN GAOR (111th mtg), UN Doc A/37/693 (1982); Declaration on Social Progress and Development, GA Res 2542, 24 UN GAOR (1829th mtg), UN Doc A 7/833, A L/583 (1969); International Development Strategy for the Third United Nations Development Decade, GA Res 35/56, 35 UN GAOR (83rd mtg), UN Doc A/Res/35/56 (1980); and United Nations, *Report of the Secretary-General on the International Discussion of the Right to Development as a Human Right,* UN Doc E/CN.4/1334, (1979). See M Rajan, *Sovereignty Over Natural Resources* (1978) 14-38 for a description of the UN's treatment of permanent sovereignty over natural resources between 1952 and 1977.

[15] *The Asylum Case (Columbia v Peru)* [1950] ICJ Rep 266, 276.

'constant and uniform usage practised by the states in question',[15] and the potential for states to create an exemption for themselves by protest[16] have been instrumental in slowing the development of customary law. The demanding test of conformity, which is used to determine the existence of a customary norm presents problems for the protection of specific areas of global environmental significance. In relation to the protection of tropical rainforests, for example, absolute unanimity about the need for protection on the part of all those states outside the tropical zone would not qualify as the requisite usage *by the states in question*. Moreover, even if a principle of customary law in favour of forest protection could be identified, persistent contrary practice by the states most affected (that is, those states with tropical rainforest within their territory) would, paradoxically, exempt them from the customary 'obligation'.[17]

International law also provides for the development of non-derogable customary obligations. The doctrine of *jus cogens*[18] operates, in theory, to limit the freedom of states to take actions that violate the 'fundamental values of the international community'.[19] One prominent author has suggested that the concept is 'obviously of special relevance to environmental protection',[20] but its utility is questionable. Even accepting that norms of *jus cogens* can apply to matters within the 'domestic jurisdiction' of states,[21] the problem is that the doctrine applies a kind of 'lowest common international denominator' under which only the most generally acknowledged norms will stand as *jus cogens*.[22] To date, there has been no general recognition that environmental protection obligations constitute binding international norms.[23] The principle of *jus cogens* is a particu-

[15] *The Asylum Case (Columbia v Peru)* [1950] ICJ Rep 266, 276.

[16] *Anglo-Norwegian Fisheries Case (UK v Norway)* [1951] ICJ Rep 116.

[17] Ibid.

[18] Codified by *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331, art 53 (entered into force 1980) ('VCLT').

[19] Hilary Charlesworth and Christine Chinkin, 'The Gender of *Jus Cogens*' (1993) 15 *Human Rights Quarterly* 63, 65.

[20] Patricia Birnie, 'International Environmental Law: Its Adequacy for Present and Future Needs' in Hurrell and Kingsbury, above n 4, 51, 59.

[21] The principle of peremptory norms could be seen to underpin the UN Charter art 2(7). This seems to be the conclusion which the Security Council has reached, albeit indirectly, to justify intervention in Somalia, Haiti and the former Yugoslavia: see Michael Glennon, 'Sovereignty and Community After Haiti: Rethinking the Collective Use of Force' (1995) 89 *American Journal of International Law* 70, 72; David Kresock, '"Ethnic Cleansing" in the Balkans: The Legal Foundations of Foreign Intervention' (1994) 27 *Cornell International Law Journal* 203, 214-15; Mark Hutchinson, 'Restoring Hope: UN Security Council Resolutions for Somalia and an Expanded Doctrine of Humaniarian Intervention' (1993) 34 *Harvard International Law Journal* 624, 635; Rajendra Ramlogan, 'Towards a New Vision of World Security: The United Nations Security Council and the Lessons of Somalia' (1993) 16 *Houston Journal of International Law* 213, 242.

[22] For a normative argument asserting that some environmental protection principles are norms of *jus cogens* by virtue of their nature as derivative obligations of a 'right to life', see Melissa Thorme, 'Establishing Environment as a Human Right' (1991) 19 *Denver Journal of International Law and Policy* 301, 332-3.

[23] The list of accepted norms of *jus cogens* is best described as 'modest'. The only norms which receive unanimous recognition are the prohibitions against slavery and piracy. In *Year Book of the International Law Commission* (1966) vol 2, 247-8, the ILC's commentary on art 53 of the VCLT suggested that other examples might include the prohibitions on the use of force, genocide and 'treaties violating human rights, the equality of states or the principle of self-

larly restrictive application of the (already restrictive) rules concerning the development of customary international law, which are themselves a strong conservatising influence. In the context of an international order that has become concerned with environmental issues relatively recently, it is not surprising that the pace of acceptance of emerging customary environmental norms into the international legal framework has been slow. Although the discussion of possible norms of international environmental law has greatly expanded in the last two decades,[24] the present state of the discourse is such that the status and content of the alleged 'norms' remains in dispute.[25]

A *Use of Co-operative Mechanisms*

A related analysis can be applied to the distinction between 'hard' (treaty and customary international) law[26] and two forms of what might be characterised as 'soft' law: non-legally binding statements and declarations such as GA resolutions;[27] and the range of less precisely worded or less specifically obligating instruments, that are legally binding in form, but which in content provide 'only for the gradual acquiring of standards or for general goals and programmed action' without imposing strict obligations on states.[28] The application of the latter mechanisms 'to construct and programme' international relations[29] has obvious appeal in areas such as environmental law where there are widely diverging views held by states, particularly about the appropriate balance between environmental protection and the 'right' of a state to develop its natural resources or otherwise engage in economically profitable conduct.[30] In essence, the claimed benefit of both approaches is their capacity to influence state behaviour and tend toward norm-creation[31] in contexts, such as the negotiation of

determination'. The ICJ accepted that the prohibition on the use of force in UN Charter art 2(4) was a norm of *jus cogens* in *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA)* [1986] ICJ Rep 14, paras 190-3.

24 Compare Ian Brownlie, 'A Survey of International Customary Rules of Environmental Protection' (1973) 13 *Natural Resources Journal* 179, alleging that 'general international law ... contains no rules or standards related to the protection of the environment', with Veit Koester, 'From Stockholm to Brundtland' (1990) 20 *Environmental Policy and Law* 14, 17-18 which discusses 12 principles, several of which are specific to environmental issues, including an obligation to protect the environment and natural resources, the human right to a healthy environment, the principle of equitable utilisation of resources, as well as obligations to inform, consult, co-operate with and warn other states in relation to transboundary environmental problems and to undertake environmental impact assessment and monitoring.

25 See, eg, the discussion in Koester, above n 24.

26 Isabelle Gunning, 'Modernizing Customary International Law: The Challenge of Human Rights' (1991) 31 *Virginia Journal of International Law* 211, 213.

27 Prosper Weil, 'Towards Relative Normativity in International Law?' (1983) 77 *American Journal of International Law* 413, 417 describes these as 'non-law' or 'pre-law'.

28 Christine Chinkin, 'The Challenge of Soft Law: Development and Change in International Law' (1989) 38 *International and Comparative Law Quarterly* 850, 851. On the specific application of these principles to international environmental law, see Pierre-Marie Dupuy, 'Soft Law and the International Law of the Environment' (1991) 12 *Michigan Journal of International Law* 420, 428-31.

29 Chinkin, above n 28, 853.

30 Patricia Birnie and Alan Boyle, *International Law and the Environment* (1992) 26.

31 *Contra* Prosper Weil, above n 27, 414, who argues that the 'substance' of these norms 'is so vague, so uncompelling, that' the duties and rights they create 'all but elude the mind.'

the climate change agreement,[32] where enforceable multi-lateral treaties containing strong measures for environmental protection might not be realistic because of the desire of negotiating states to preserve their prerogatives of sovereignty.[33] These approaches may also be useful for indicating appropriate directions in the development of international law, especially in circumstances where customary international law has either failed to recognise a particular norm or else has tended to adopt a contrary approach.[34]

The increasing use of both forms of 'soft' law for the development of diplomatic and political imperatives has been a useful strategy for identifying environmental objectives.[35] The ultimate difficulty, however, is that such 'obligations' tend to lack the basis necessary for enforcement. This problem afflicts many of the more creative attempts which have been made to respond to international environmental concerns, especially those that reflect the 'North/South' divide. For example, the recognition that the states which have much of the most 'important' territory for environmental purposes within their borders are frequently among the least developed nations with the highest foreign debt[36] (so that their 'economic problems ... aggravate environmental degradation')[37] has been met by the prospect of 'debt-for-nature' swaps, whereby 'areas are set aside and legally protected by a foreign government in exchange for cancellation of a portion of that country's foreign debt.'[38] These transactions typically involve a non-government organisation (NGO) raising finance with which it purchases a discounted portion of the sovereign debt of a less developed country in return for specific environmental management initiatives being undertaken by that country.[39] Recent analyses conclude, however, that such arrangements, even if

[32] Intergovernmental Negotiating Committee for a Framework Convention on Climate Change, UN Doc A/AC.237/18 (Part II)/Add. 1 (1992) art 3 provides a statement of principles by which the Parties 'shall be guided' and which 'should' be applied. Article 4 lists a series of 'commitments' which typically require states to 'develop', 'formulate', 'promote', 'co-operate', 'take into account' and 'communicate' various matters. See also United Nations Conference on Environment and Development: Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests (1992); 31 ILM 881.

[33] Susskind, above n 4, 21; Birnie and Boyle, above n 30, 26-30.

[34] Chinkin, above n 28, 865-6.

[35] See, eg, the discussion of transfrontier environmental harm in Brian Popiel, 'From Customary Law to Environmental Impact Assessment: A New Approach to Avoiding Transboundary Environmental Damage Between Canada and the United States' (1995) 22 *Boston College Environmental Affairs Law Review* 447, 458-9.

[36] Obviously, the structure and effect of foreign debt relationships are politically and theoretically problematic, but a detailed examination is beyond the scope of this article. The genesis of the foreign debt problem of less developed states in international bank lending policies following the 'oil crisis' of the 1970s and the emergence of the debt-exchange response are outlined in Maurizio Minzi, 'The Pied Piper of Debt-for-Nature Swaps' (1993) 14 *University of Pennsylvania Journal of International Business Law* 37, 40-8.

[37] Ibid 38.

[38] Tamara Hrynik, 'Debt-for-Nature Swaps: Effective But Not Enforceable' (1990) 22 *Case Western Reserve Journal of International Law* 141, 141-2.

[39] For a description of the first of these agreements, between Bolivia and Conservation International in 1987: ibid 142-3.

effective,[40] are probably unenforceable.[41] Principles of sovereign immunity at international law would be likely to preclude a national court from adjudicating on a dispute between an NGO from one state and a different debtor-state,[42] while NGOs lack the requisite standing to bring a debtor-state before the ICJ.[43] It is also unlikely that the Security Council would treat the mere refusal of a state to comply with a debt-for-nature agreement as a threat to the maintenance of international peace and security.[44] Similar difficulties apply to other co-operative arrangements, such as the recommendations concerning technology transfer to less developed countries,[45] the application of the precautionary principle,[46] the extension of environmental impact assessment strategies[47] and the obligation to

[40] Opinion on this matter is sharply divided. Minzi, above n 36, 56-62 concludes that the swaps are no substitute for direct financing of conservation programs. On the other hand, Hrynik, above n 38, 162 argues that such programs are 'a very effective way to address both the economic and ecological problems facing these debtor countries.' Similarly positive conclusions are expressed by Jean Terranova, 'Enterprise for the Americas Initiative Act: A Pragmatic Response to Debt and Environmental Crises' (1991) 15 *Suffolk Transnational Law Journal* 153; Julian Juergensmeyer and James Nicholas, 'Debt for Nature Swaps: A Modest but Meaningful Response to Two International Crises' (1990) 5 *Florida International Law Journal* 193, 206-10; and Derek Asiedu-Akrofi, 'Debt-for-Nature Swaps: Extending the Frontiers of Innovative Financing in Support of the Global Environment' (1991) 25 *International Lawyer* 557. Douglas Logsdon, 'Debt-for-Nature Evolves: The Enterprise for the Americas Initiative' (1992) 3 *Colorado Journal of International Environmental Law & Policy* 635, 653, seems to conclude that the main benefit of such programs lies in the educative function of linking debt and environmental degradation.

[41] Hrynik, above n 38, 160-3; Minzi, above n 36, 58-9; Also, see generally the various contributions in 'Restructuring Sovereign Debt – Will There Be New International Law and Institutions?' (1983) 77 *American Society of International Law Proceedings* 312.

[42] The principle of absolute sovereign immunity is expressed in, eg, *The Schooner Exchange v McFaddon* 7 Cranch 116 (1812), a decision of the US Supreme Court. It is possible that the more limited form of immunity, referred to as the 'restrictive theory', could apply to subject a debtor-state to suit, provided that the debt-for-nature transaction could be characterised as an other-than-sovereign act. The restrictive theory has usually been invoked, however, to deal with more clearly commercial/trading activities of states: see, eg, *Trendtex Trading Corporation v Central Bank of Nigeria* [1977] QB 529.

[43] Statute of the International Court of Justice art 34(1).

[44] A distinction is to be made here between the mere 'breach of contract' and the underlying environmental problem, which may well demand the Council's attention.

[45] The principle is embodied in the Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, UN Doc A/AC.241/15/Rev.7 (1994); 33 ILM 1344 art 18; Intergovernmental Negotiating Committee For a Framework Convention on Climate Change, above n 32, art 4(c) and the Convention on Biological Diversity, UN Doc UNEP/Bio. Div/CONF/L.2 (1992) art 16, reprinted in Gunter Hoog and Angela Steinmetz (eds), *International Conventions on Protection of Humanity and the Environment* (1993) 608. It is also reflected in Rio Declaration, above n 1, principle 9. See also the Cartagena Commitment, (1992) 22 *Environmental Policy and Law* 1.

[46] Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal) (1987); 26 ILM 1541 preamble. The Convention on Biological Diversity, above n 45, could be said to embody a precautionary approach, as could the various instruments dealing with impact assessment: see below, n 47, and also Rio Declaration, above n 1, principle 15. The 'precautionary principle' is discussed below, nn 304-11 and accompanying text.

[47] Convention on Environmental Impact Assessment in a Transboundary Context, opened for signature 25 February 1991, 30 ILM 802 (entered into force 1991), especially art 4 and Appendix II; United Nations Convention on the Law of the Sea, opened for signature 10 December 1982, UN Doc A/Conf.62/122 (1982), arts 204-6 (entered into force 1994), 21 ILM 1261 ('UNCLOS'); Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Helsinki), opened for signature 17 March 1992, art 3(h), (entered into force 1992); 31 ILM 1312. See also Popiel, above n 35, 471-3. The obligation is reflected in Rio Declaration, above n 1, principle 17.

warn other states of environmental emergencies.[48] Despite recent attempts to recharacterise the tension between North and South by arguing that 'sovereignty is in fact being transformed as a result of global interdependence',[49] customary international law of the environment seems to be developing even more slowly than the corresponding strategies of international relations, while treaty developments, although extensive, typically lack strictly enforceable obligations.[50]

B *Adjudicative Function of the ICJ*

In 1993, the ICJ created a specialist chamber to deal with environmental disputes. It has not, as yet, been used.[51] Despite the tendency of existing environmental treaties to include dispute resolution procedures (either recourse to the ICJ or arbitration arrangements) almost as a matter of course,[52] state practice suggests that environmental disputes are seldom referred to such independent dispute resolution mechanisms.[53] Rather, they are resolved by *ad hoc* negotiation *inter partes*.[54] A review of the November 1986 Sandoz warehouse spill on the Rhine River, for example, partly attributed the reluctance of the downstream states (which had suffered the damage) to pursue claims against Switzerland to 'political opportunism, and an awareness on the part of the downstream states that their own hands are not entirely clean in the matter of Rhine pollution.'[55] Apart from the question of political will,[56] the state-based,[57] confrontational and

[48] For example, UNCLOS, above n 47, arts 198, 211(7); United Nations, Convention on the Control of Transboundary Movement of Hazardous Wastes and Their Disposal (Basel) (1989), art 13 (entered into force 1992); 28 ILM 657. The obligation is reflected in Rio Declaration, above n 1, principles 18-19.

[49] Ken Conca, 'Rethinking the Ecology-Sovereignty Debate' (1994) 23 *Milennium: Journal of International Studies* 701, 703.

[50] See below n 62 and accompanying text. See also Harold Jacobson and Edith Brown Weiss, 'Strengthening Compliance with International Environmental Accords: Preliminary Observations from a Collaborative Project' (1995) 1 *Global Governance* 119, 131-8.

[51] Robert Jennings, 'The International Court of Justice After Fifty Years' (1995) 89 *American Journal of International Law* 493, 496.

[52] Peter Sand, 'New Approaches to Transnational Environmental Disputes' (1991) 3 *International Environmental Affairs* 193, 194.

[53] Ibid 193, noting that since the *Trial Smelter Arbitration (USA v Canada)* (1941) 3 RIAA 1905, no international dispute adjudication has dealt with 'a genuine environmental problem'. To Sand's treatment of the *Lac Lanoux* and *Gut Dam* arbitrations might be added the *Case Concerning the Gabcikovo and Nagymaros Dams (Slovakia v Hungary)*, which is currently before the ICJ (early proceedings are reported in [1994] ICJ Rep 151). See also Paul Williams, 'International Environmental Dispute Resolution: The Dispute Between Slovakia and Hungary Concerning Construction of the Gabcikovo and Nagymaros Dams' (1994) 19 *Columbia Journal of Environmental Law* 1; and *Case Concerning Certain Phosphate Lands in Nauru (Nauru v Australia) (Preliminary Objections)* [1992] ICJ Rep 240, which was settled before the merits stage. In the last dispute, none of the states alleged to have breached international obligations to Nauru participated in the Commission of Inquiry established by the Government of Nauru in 1986: see Christopher Weeramantry, *Nauru: Environmental Damage Under International Trusteeship* (1992) xiv-v.

[54] Sand, above n 52, 195.

[55] Aaron Schwabach, 'The Sandoz Spill: The Failure of International Law to Protect the Rhine from Pollution' (1989) 16 *Ecology Law Quarterly* 443, 469.

[56] This would, of course, apply equally to questions concerning the Security Council's willingness to act on environmental matters.

bilateral nature of these mechanisms[58] is problematic for environmental protection which, in general, functions through co-operation.

There are two key difficulties, beyond these general questions concerning the willingness of states to submit environmental disputes to third party mediation or adjudication,[59] which prevent the effective use of the ICJ as a forum for preventing damage to the global environment. The first lies in the uncertain legal basis for treating environmental 'obligations' as law; the second is to be found in the limited usefulness of such strategies for dealing with imminent threats to global environmental security.

First, even though the obligation to refrain from causing significant transboundary environmental harm is generally taken to be a norm of customary international law,[60] international law has failed to resolve the tension between the right of a state to develop industry and natural resources and the responsibility not to cause damage to the environment of other states.[61] So, for example, the Rio and Stockholm Declarations contain statements which, in common with most environmental treaties,[62] merely urge states to develop principles of liability and compensation for environmental damage.[63] More problematically, however, the 'obligation' only applies reactively, once the environmental damage has been done.[64] At the same time, it is unclear what state responsibility, if any, flows from failure to discharge the various procedural 'obligations' that may exist at customary international law (for example, consultation, notification, warning and prior consent),[65] and which are by no means uncontroversial.[66] (Indeed, the

57 Birnie and Boyle, above n 30, 154-7, discusses the inadequacies of the state-based requirements of standing and argues that the Statute of the International Court of Justice should be revised to empower international organisations to conduct public interest litigation on environmental matters.

58 Alan Boyle, 'Saving the World? Implementation and Enforcement of International Environmental Law Through International Institutions' (1991) 3 *Journal of Environmental Law* 229.

59 Sand, above n 52, 200 suggests that the time-frame for such resolution may be one that 'few environmental problems today can afford'.

60 Popiel, above n 35, 451-9. See also Rio Declaration, above n 1, principle 2; Stockholm Declaration, above n 14, principle 21; UNCLOS, above n 47, arts 192-4. The principle is usually taken to be supported by the *Trail Smelter Arbitration (USA v Canada)* (1941) 3 RIAA 1905, the *Lac Lanoux Arbitration (France v Spain)* (1957) 24 ILR 101 and the *Corfu Channel Case (UK v Albania)* [1947] ICJ Rep 4. Each of these examples is, however, problematic: the first two because they were decisions taken under arbitration agreements rather than customary international law and the third because its context was very much removed from the question of 'environmental harm' as commonly understood.

61 See Oscar Schachter, 'The Emergence of International Environmental Law' (1991) 44 *Journal of International Affairs* 457, 468, discussing 'qualified duty of prevention in light of conflicting interests'. This tension is reflected in Rio Declaration, above n 1, principle 2 and Stockholm Declaration, above n 14, principle 21. See generally Birnie and Boyle, above n 30, 89-112.

62 See generally the treaties noted in Andronicus Adede, *International Environmental Law Digest* (1994) 189-96.

63 Rio declaration, above n 1, principle 13; Stockholm declaration, above n 14, principle 22.

64 Popiel, above n 35, 459.

65 These obligations are set out with a detailed accompanying commentary in International Law Commission, *Draft Articles on the Law of the Non-Navigational Uses of International Watercourses*, reprinted in (1994) 24 *Environmental Policy and Law* 335. The commentary on draft art 2 casts doubt on whether it is possible to codify even the specific area of international environmental law relating to watercourses and establishes, instead, a set of 'framework principles': ibid 337.

review of the effectiveness of international environmental agreements prepared for the Rio Conference deals in part with the 'obligation' of prior consultation as a developing practice.[67]) On the basis of recent practice, it is probably appropriate to treat such preventive measures as desirable, rather than obligatory.[68]

Secondly, the global objective of environmental protection actions must be prevention of, not *post hoc* compensation for, environmental degradation. The ICJ Statute offers a possible response: the Court has the power to indicate, if appropriate, 'any provisional measures which ought to be taken to preserve the rights' of the parties to a dispute.[69] While there is a jurisdictional requirement, the Court does not engage in a full consideration of jurisdictional issues and has recently relied on a test that requires merely that there be a treaty, optional declaration or principle of customary law that has the potential to ground jurisdiction.[70] Similarly, the failure of the other party to appear is no bar to the awarding of provisional measures, provided that some arguable basis for jurisdiction can be shown.[71] Although the ICJ's capacity to award provisional measures to prevent a breach of international law might seem to be critical for environmental actions, the time required to establish a hearing and make a determination means that provisional measures will not be an effective way of dealing with disputes concerning very imminent environmental threats. For example, on 21 August 1995, New Zealand requested the ICJ to declare that France's (then) proposed series of eight nuclear tests in the South Pacific would constitute a violation of international law 'by introducing radioactive material into the marine environment.'[72] The ICJ announced on 8 September that it would conduct a public sitting on 11 September on the case,[73] but by the time of the ICJ announcement, France had already detonated its first device.[74] Nevertheless, provisional measures could, in principle, be an expeditious approach to a more

66 Birnie and Boyle, above n 30, 133-4.

67 Profullachandra Bhagwati, 'Environmental Disputes' in Peter Sand (ed), *The Effectiveness of International Environmental Agreements: A Survey of Existing Legal Instruments* (1992) 437.

68 See, eg, Popiel, above n 35, 479 which argues strongly that 'first-world' nations should adopt environmental impact assessment as a forward-looking development of the *sic utere* principle.

69 Statute of the International Court of Justice art 41(1).

70 The test, from *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Provisional Measures) (Nicaragua v United States)* [1984] ICJR 169, has been applied in the *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia (Serbia and Montenegro)), (Provisional Measures)*, [1993] ICJ Rep 3 (order of 8 April 1993) and [1993] ICJ Rep 325 (order of 13 September 1993) and the *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v UK)* [1992] ICJ Rep 3; *(Libya v USA)* [1992] ICJ Rep 114. See the discussion in J Merrills, 'Interim Measures of Protection in the Recent Jurisprudence of the International Court of Justice' (1995) 44 *International and Comparative Law Quarterly* 90, 92-100.

71 See, eg, in the *Nuclear Tests Cases (Interim Protection) (Australia v France)* [1973] ICJ Rep 99; *(New Zealand v France)* [1973] ICJ Rep 135, where France's failure to appear was no bar to such an award.

72 ICJ Press Release 539, 'New Zealand Requests World Court to Declare Proposed French Nuclear Tests in South Pacific Constitute Violation of International Law', 21 August 1995.

73 ICJ Press Release 540, 'Public Sitting of World Court to hear Arguments From New Zealand, France on Nuclear Tests in South Pacific', 11 September 1995.

74 The first detonation in the series took place on 6 September 1995. See below, nn 232-49 and accompanying text.

limited range of problems that require a reasonably swift, but not critically urgent, response.[75]

Unfortunately, even if international environmental law does give rise to enforceable obligations, the usefulness of provisional measures in environmental matters may be less than might at first appear. Provisional measures are sometimes thought of as analagous to the domestic interlocutory injunction. By contrast, however, provisional measures are merely 'indicated', not mandatory.[76] So, despite the decision to award interim protection against France in the 1973 nuclear tests cases, France recommenced (underground) testing in 1981.[77] More recently, it could hardly be said that the ICJ's decision concerning the former Yugoslavia stopped the continuing[78] atrocities between the protagonists, despite the Court's order that the

> Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) should immediately, in pursuance of its undertaking in the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December, 1948, take all measures within its power to prevent commission of the crime of genocide [and] ensure that any military, paramilitary or irregular armed units which may be directed or supported by it ... do not commit any acts of genocide.[79]

It has, in consequence, been suggested that awards of provisional measures should be made binding upon the parties,[80] but the suggestion begs the question of enforcement. Although the Security Council is given notice of the measures which have been suggested by the Court,[81] the Council is not an 'enforcement arm' for the ICJ:[82] rather, in the event that a 'party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council'.[83] Assuming that the expression

75 See, eg, the *Nuclear Tests Cases*, above n 71. In that matter, Australia and New Zealand filed their cases on 9 May 1973 and sought interim measures the same day. The interim measures award was made on 22 June 1973 (approximately six weeks after the application). The first of the awards in the *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, above n 70, was made less than three weeks after the application was lodged: Jennings, above n 51, 502.

76 Statute of the International Court of Justice art 41(1).

77 David Harris, *Cases and Materials on International Law* (4th ed, 1991) 398 fn 90.

78 See, eg, Michael Dobbs and Christine Spolar, 'Killing fields haunt Bosnia', *Age* (Melbourne), 30 October 1995, 8 detailing Serbian atrocities associated with the attack on Srebenica in July, 1995.

79 *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, above n 70, para 52.

80 For example, Ben Gaffikin, 'The International Court of Justice and the Crisis in the Balkans: *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia)*' (1995) 17 *Sydney Law Review* 458, 468. Cf Peter Haver, 'The Status of Interim Measures of the International Court of Justice After the Iranian-Hostage Crisis' (1981) 11 *California Western International Law Journal* 515, 518-26 who concludes that 'the fact that the Court's effectiveness depends on its ability to provide interim relief seems to necessitate a finding that interim orders are binding on the parties': 526.

81 Statute of the International Court of Justice art 41(2).

82 Commission on Global Governance, *Our Global Neighbourhood* (1995) 319.

83 UN Charter art 94(2).

'judgment rendered by the Court' extends to orders of provisional measures,[84] the provision confers considerable discretion upon the Council, 'which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.'[85] In consequence, the usefulness of provisional measures for the protection of the environment will depend alternatively on the willingness of the parties to abide by the Court's decision or on the willingness of the Council to treat the failure of a party to perform its obligations as a sufficiently significant matter to warrant enforcement action. In the former case, recent work has noted a paradox: those situations where provisional measures have been effective have been those cases where states have been most willing to co-operate, so that 'interim measures may well be unnecessary'.[86] In the latter case, the effectiveness of the ICJ's jurisprudence concerning provisional measures is clearly secondary to the perception of the Council concerning whether a particular environmental protection issue requires strong enforcement action: that perception, in turn, must raise questions concerning the Council's willingness to perceive environmental disputes as threats to international peace and security.

There is a final problem with the subject matter of environmental disputes that should be mentioned in this context: because provisional measures are awarded to preserve the position of the parties, it is arguable that they will be more easily identified in situations involving well-established legal rights. The cases in which provisional measures have been ordered have related to what might be described as 'absolutes' in international law, such as the prevention of genocide[87] and the territorial integrity of states.[88] By contrast, 'appropriate' environmental protection, as currently understood in international law, is determined by reference to a balancing of rights.[89] Because of this balancing process, it is probable that the ICJ will be less able to determine appropriate measures of interim protection in environmental matters, at least on the present state of international environmental law, without deciding the merits of the case and undertaking a thorough evaluation of the facts in issue.[90] Moreover, it may be difficult to prove the extent to which a particular state is causally responsible for damage to the global ecosystem – it is in the nature of many of the most pressing problems of environmental degradation that they are incremental. It may be just as difficult to quantify or to value the losses incurred by the harmed state. By contrast, it will often be easy

[84] See Ben Gaffikin, above n 80, 468-9, arguing art 94(2) should be amended to eliminate any doubt on this issue.

[85] UN Charter art 94(2).

[86] Merrills, above n 70, 138-9.

[87] *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, above n 70.

[88] *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Provisional Measures)*, above n 70, and the *Case Concerning the Frontier Dispute (Burkina Faso/Mali) (Requests for Indication of Provisional Measures)* [1986] ICJ Rep 3 (order of 10 January 1986).

[89] For example, Rio declaration, above n 1, principle 2; Stockholm declaration above n 14, principle 21.

[90] In this sense, the fact that the Court does not take 'prospects of success' into account at the provisional measures stage (see Merrills, above n 70, 114-16) may be irrelevant in environmental matters.

for a respondent state to argue that a curb on the environmentally suspect practice at issue will have a determinable economic cost, measured in lost production, unemployment and other tangible measures. As a result, provisional measures hearings for environmental damage may be especially susceptible to 'counterclaims'.[91]

C *Advisory Opinions of the ICJ*

The ICJ statute allows the Court to 'give an advisory opinion on any legal question at the request of whatever body may be authorised by or in accordance with the Charter of the United Nations to make such a request.'[92] Advisory opinions, unlike the ICJ's contentious jurisdiction, are not subject to a jurisdictional requirement.[93] These may have a limited role as a preventive mechanism, especially if international environmental organisations like UNEP have standing to seek advisory opinions.[94] The problem, as with provisional measures, is one of compliance: if a state does not abide by the statement of law embodied in an advisory opinion, the matter remains a political issue which, if not resolved, may eventually come before the Security Council.

III Redefining International Peace and Security

The introduction to a recent collection of essays suggests that 'changes in the international system' since the end of the Cold War have made the agenda of security studies 'richer, more varied, and more challenging.'[95] While we may not all share the relish with which the editors apparently greet a whole host of emerging threats to international peace and security, it is certainly true that the decline of superpower competition has enabled world attention to be directed toward a more diverse range of global problems than was previously the case. For example, in 1986 one typical text dealt at great length with 'global economic problems and solutions'[96] and with 'global security problems and solutions':[97] despite the detailed expositions, neither the environment nor the Security Council were discussed.[98] By contrast, the first half of the present decade has been marked by the appearance of a number of books and articles which link issues of world order, global governance and security with environmental protection.[99]

91 See Merrills, above n 70, 141, who notes that ICJ Statute art 41 'in principle at least is equally available to respondents.'

92 Statute of the International Court of Justice art 65(1).

93 See *Western Sahara (Advisory opinion)* [1975] ICJ Rep 12 and *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)* [1971] ICJ Rep 16 for examples of the role of ICJ advisory opinions in what were, in fact, contentious disputes.

94 Birnie and Boyle, above n 30, 157 suggests that this is a possibility.

95 Sean Lynn-Jones and Steven Miller, 'Introduction' in Sean Lynn-Jones and Steven Miller (eds), *Global Dangers: Changing Dimensions of International Security* (1995) 3.

96 R McKinlay and R Little, *Global Problems and World Order* (1986) 91-171.

97 Ibid 172-262.

98 Indeed, neither even appears in the index with a passing reference.

99 See, eg, Commission on Global Governance, above n 82; Lynn-Jones and Miller, above n 95, especially 43-179; Gwyn Prins and Robbie Stamp, *Top Guns and Toxic Whales: The Environ-*

This trend, of course, follows the Brundtland Commission's discussion of global security tensions between environmental objectives and the development objectives of less developed states,[100] and the renewed interest in the potential for collective action by the Council following the Gulf War. This section considers the development of the link between international peace and environmental protection. That link has evolved from a recognition that war can be a cause of environmental destruction (which we now take to be commonplace) to an understanding that environmental issues can be sources of international conflict.

A *The Security Council's Chapter VII Powers*

The Security Council is explicitly given primary responsibility within the UN system for the maintenance of international peace and security by the UN Charter.[101] The Council has a central role in both the Charter's Chapter VI ('Pacific Settlement of Disputes'),[102] and Chapter VII ('Action With Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression')[103] provisions. The determination of what constitutes a 'threat to the peace, breach of the peace or act of aggression'[104] is a matter left to the political processes of the Council,[105] the terms being undefined in the Charter. In the event that the Council determines that such a threat, breach or act exists, the Charter enables the Council to apply measures short of force, usually referred to as 'sanctions'.[106] If

ment and Global Security (1991); Oran Young, *International Governance: Protecting the Environment in a Stateless Society* (1994); Brian Urquhart, 'The UN and International Security After the Cold War' in Adam Roberts and Benedict Kingsbury (eds), *United Nations, Divided World: The UN's Role in International Relations* (2nd ed, 1993) 81, 97; Jacqueline Switzer, *Environmental Politics: Domestic and Global Dimensions* (1994); Ottmar Holl (ed), *Environmental Cooperation in Europe: The Political Dimension* (1994) especially 13-70; Patricia Mische, 'Ecological Security in an Interdependent World' in Richard Falk, Robert Johansen and Samuel Kim (eds), *The Constitutional Foundations of World Peace* (1993) 101; Norman Myers, *Ultimate Security: The Environmental Basis of Political Stability* (1993); Gro Brundtland, 'The Environment, Security and Development' in Stockholm International Peace Research Institute, *SIPRI Yearbook 1993: World Armaments and Disarmament* (1993) 15; Marvin Soroos, 'Global Change, Environmental Security, and the Prisoner's Dilemma' (1994) 31 *Journal of Peace Research* 317; Lakshman Guruswamy, 'Energy and Environmental Security: The Need for Action' (1991) 3 *Journal of Environmental Law* 209; Lakshman Guruswamy, 'Energy and the Environment: Confronting Common Threats to Security' (1991) 16 *North Carolina Journal of International Law and Commercial Regulation* 255.

100 UN Commission on Environment and Development, *Our Common Future* (1987) 334-51: 'Peace, Security Development, and the Environment'.

101 UN Charter art 24(1).

102 Ibid arts 33-8. Note that art 35 enables states (including non-UN members, subject to agreement to abide by the obligation of peaceful settlement) to bring relevant matters to the attention of the General Assembly or of the Security Council, although art 34 gives the Security Council power to investigate such matters on its own initiative.

103 Ibid arts 39-51.

104 Ibid art 39.

105 N D White, *Keeping the Peace: The United Nations and the Maintenance of International Peace and Security* (1993) 34.

106 UN Charter art 41 refers explicitly to measures which 'may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.'

such measures are inadequate, or would prove to be inadequate,[107] the Charter enables the Council to authorise the use of force.[108] The Council's powers are, of course, to be read in the context of the fundamental principle of territorial integrity (state sovereignty) enshrined in article 2(4) of the Charter and also of article 2(7) (which essentially provides that intervention is acceptable under Chapter VII where a threat to the peace has been identified by the Council).

Unlike other UN organs, the Security Council is required 'to be able to function continuously',[109] in recognition of the enormity of its role. The Council includes five permanent members among its 15 members,[110] the remainder being elected by the GA for a term of two years.[111] The permanent members have a power of veto in voting on other than procedural matters[112] and in relation to amendments to the Charter itself.[113] Until the end of the Cold War in 1990, the conflicting interests of permanent members were 'so pervasive ... that the veto effectively debarred the Security Council from taking action or recommending measures of any sort in many areas of the globe.'[114] Although the Charter also provides that 'in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting'[115] — an arrangement presumably intended to encourage peaceful dispute settlement through the Council making recommendations — the practice has been for parties to disputes to disregard the requirement.[116] The difficulty with the arrangement appears to have been that other members of the Council do not challenge such votes,[117] presumably because of a perceived mutual interest in violating the article.

Mechanisms for the Security Council to become involved in environmental conflicts clearly exist. These are available either on the Council's own initiative or in response to the Secretary-General bringing an environmental problem to the attention of the Council as a matter 'which in his opinion may threaten the maintenance of international peace and security.'[118] The Council could, in this sense, be said to have a quasi-legislative authority to determine the content of the scope of threats to international peace and security.[119] This characterisation of the

[107] In other words, there is no strict obligation to attempt to resolve a dispute using measures not involving the use of armed force before the use of force is authorised under ibid art 42.

[108] Ibid.

[109] Ibid art 28(1).

[110] Ibid art 23(1).

[111] Ibid art 23(2).

[112] Ibid art 27(3). Sydney Bailey, *The Procedure of the UN Security Council* (2nd ed, 1988) 7 notes that a practice has developed whereby a permanent member's abstention from voting is not considered to be a veto. Bailey lists the matters which the Council has treated as procedural: 199.

[113] UN Charter art 108.

[114] White, above n 105, 11.

[115] UN Charter art 27(3).

[116] White, above n 105, 11-12.

[117] Ibid 12.

[118] UN Charter art 99. Birnie contemplates that the 'environmental and developmental dimensions' of this task are 'likely to increase': Patricia Birnie, 'Environmental Protection and Development' (1995) 20 *Melbourne University Law Review* 66, 72-3.

[119] Frederic Kirgis Jr, 'The Security Council's First Fifty Years' (1995) 89 *American Journal of International Law* 506, 520.

Council's powers and processes gives rise to questions concerning the interaction between the Council and the ICJ and, specifically, whether the ICJ is able to review the decisions of the Council in a constitutional sense.[120] Although detailed consideration of the matter is beyond the scope of this article, I would argue that while it may be in the long-term interests of the Council and of the UN system as a whole for the Council to be willing to submit to judicial review[121] (and for there to be improved co-operation between the Council and the Court)[122] the ICJ could be expected, at the very least, to allow the Council a wide scope to determine the sphere of its actions. The essence of the Council's role is a capacity for swift action and it would be wholly inappropriate for that capacity to be widely subject to interlocutory examination of the legality of its measures.[123] This is not to suggest that the Council is in some sense a superior body to the ICJ: it is merely to recognise the demarcation between the Council's 'action-oriented political' function and the ICJ's role, which 'is limited to evaluating in strict legal terms disputes or other legal questions submitted to it.'[124]

B *War as a Threat to the Environment*

There is no reference in the UN Charter to the objective of environmental protection. Nevertheless, the link between environmental damage and the conduct of war has resulted in the development of international standards of environmental preservation during armed conflict. Although the jurisprudential basis for a UN objective of environmental protection is at best indirect,[125] the imperative that there be some form of limitation on the uses of the destructive capabilities of nuclear weapons presents a very good reason for trying to discern such a basis. As the destructive capacity of weapons, and the consequent poten-

120 See, eg, Thomas Franck, 'The "Powers of Appreciation": Who is the Ultimate Guardian of UN Legality?' (1992) 86 *American Journal of International Law* 519; Keith Harper, 'Does the United Nations Security Council Have the Competence to Act as Court and Legislature' (1994) 27 *New York University Journal of International Law and Politics* 103.

121 See Matthias Herdegen, 'The "Constitutionalization" of the UN Security System' (1994) 27 *Vanderbilt Journal of Transnational Law* 135, 154-7; Vera Gowland-Debbas, 'Security Council Enforcement Action and Issues of State Responsibility' (1994) 43 *International and Comparative Law Quarterly* 55, 98; Gerald McGinley, 'The ICJ's Decision in the Lockerbie Cases' (1992) 22 *Georgia Journal of International and Comparative Law* 577, 599.

122 Commission on Global Governance, above n 82, 319-23.

123 The question of *post hoc* examination and of advisory opinions, and of the actions of the Council when no imminent threat to international peace and security exists, is quite a different matter. The essence of the view expressed here is that the capacity for effective response by the Council should not be hampered by any process by which its decisions might be 'appealed' prior to implementation. This view is generally consistent with the conclusions adopted by Herdegen, above n 121, 159; Scott Evans, 'The Lockerbie Incident Cases: Libyan-Sponsored Terrorism, Judicial Review and the Political Question Doctrine' (1994) 18 *Maryland Journal of International Law and Trade* 21, 75-6; and Robert Kennedy, '*Libya v United States*: The International Court of Justice and the Power of Judicial Review' (1993) 33 *Virgina Journal of International Law* 899, 923-4.

124 Christian Tomuschat, 'The Lockerbie Case Before the International Court of Justice' (1992) 48 *The Review* 38, 40-1. Tomuschat also expressly supports the ICJ's view 'that Security Council involvement in settling a dispute did not affect its own jurisdiction.'

125 See, eg, Birnie, 'Environmental Protection', above n 118, 68 suggesting that the legal authority for the UN's general activities can be found in UN Charter art 55.

tial for extreme harm to human welfare increased,[126] international law responded by placing limits on the extent to which environmental destruction might be deliberately inflicted as a military strategy or in the pursuance of such a strategy.[127] The 1977 Convention on Environmental Modification Techniques[128] provides that parties to the Convention undertake 'not to engage in military or any other hostile use of environmental modification techniques[129] having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other State Party.'[130] The first of the 1977 Additional Protocols to the 1949 Geneva Conventions[131] adopts similar language,[132] although it has been suggested that the Protocol was directed at the use of chemical weapons and herbicides, rather than 'incidental or collateral damage' in the conduct of conventional warfare.[133] The Protocol also contains specific (if limited) protection for dams, dykes and nuclear power stations.[134] The International Law Commission's draft articles on the Draft Code of Crimes Against the Peace and Security of Mankind would reinforce these provisions by applying principles of individual criminal responsibility to anyone 'who wilfully causes or orders the causing of widespread, long-term and severe damage to the natural environment'.[135] Environmental destruction of the kind inflicted by Iraq during the Gulf War has been specifically described as constituting an international crime for this purpose.[136] In its turn, the draft statute for the proposed international criminal

126 United Nations, *Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques*, annexed to United Nations, Convention on the Prohibition of Military or any other Hostile use of Environmental Medification Techniques, GA Res 72, 31 UN GAOR (96th mtg) UN Doc A/Res/31/72 (1976); 6th preambular paragraph, 16 ILM 88.

127 See generally Birnie and Boyle, above n 30, 127-31.

128 *Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques*, above n 126.

129 Ibid art 2 defines 'environmental modification techniques' very broadly to include 'any technique for changing – through the deliberate manipulation of natural processes – the dynamics, composition or structure of he earth, including its biota, lithosphere, hydrosphere and atmosphere, or of outer space.'

130 Ibid art 1(1).

131 *Protocols Additional to the Geneva Conventions of 12 August 1949*, opened for signature 12 December 1977, UN Doc A/32/144 (1977); 16 ILM 1391, Additional Protocol I (entered into force 1978, ratified by Australia 21 January 1991). As of November, 1994, Australia had outstanding declarations or reservations to arts 5, 44 and 51-4: Commonwealth of Australia, Joint Committee on Foreign Affairs, Defence and Trade, *A Review of Australia's Efforts to Protect and Promote Human Rights* (1994) 32.

132 Overviews of the Protocol can be found in Gerry Simpson, 'Ratifying Protocols I and II to the Geneva Conventions' (1992) 66 *Law Institute Journal* 402; George Aldrich, 'New Life for the Laws of War' (1981) 75 *American Journal of International Law* 764, 777-8.

133 Birnie and Boyle, above n 30, 128.

134 *Protocols Additional to the Geneva Conventions of 12 August 1949*, above n 131, art 56. Birnie and Boyle, above n 30, 128, note that these limited protections are also contained in the second Additional Protocol, which deals with 'internal' armed conflict.

135 International Law Commission, Report on the Draft Articles Adopted at its Forty-third Session, UN Doc A/46/405 (1991); art 26, 30 ILM 1554, 1593. Birnie and Boyle, above n 30, 210 treat the provisions as a 'tentative step', arguing that it is not clear that such a provision reflects customary international law.

136 Paul Szasz in 'Panel Discussion, The Gulf War: Environment as a Weapon' (1991) 85 *American Society of International Law Proceedings* 214, 219.

court would enable the Security Council acting under its Chapter VII powers to refer relevant environmental matters to the court.[137]

These various statements and conventions, of course, all beg the question of who will determine whether an infringement of the applicable international law has occurred. In the course of the Gulf War, however, the Security Council assumed the power to conclude that Iraq had committed such an infringement through, *inter alia*, the bombing of Kuwaiti oil fields, which was condemned by the Pentagon as 'environmental terrorism'.[138] The focus on the environmental effects of the Gulf War is probably explained by the fact that 'environmental targets were deliberately attacked'[139] and by the sheer enormity of the oil dumping into the Persian Gulf.[140] Resolution 687[141] made it clear that Iraq was 'liable under international law for any direct loss, damage (including environmental damage and the depletion of natural resources) or injury to foreign Governments, nationals and corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait'.[142] The resolution also directed the UN Secretary-General to establish a program to implement the decision.[143] Iraq was not at the relevant time a party to the Environmental Modification Convention,[144] and the Resolution clearly indicates that the Council's action is grounded in the unlawfulness of the Iraqi action in invading Kuwait. Although the motivation for the Council's response to Iraq's action does not seem to have directly raised the question of breaches of international environmental law,[145] the Compensation Commission set up under Security Council Resolution 687 has recognised an obligation upon Iraq to compensate for ecological damage, in addition to compensation for clean up costs and for natural resource losses[146] (that is, to compensate for more than merely economic losses).[147] This raises a number of

137 'ILC/46th Session: Major Progress on International Law' (1994) 24 *Environmental Policy and Law* 294, 295.

138 See Luan Low and David Hodgkinson, 'Compensation for Wartime Environmental Damage: Challenges to International Law After the Gulf War' (1995) 35 *Virginia Journal of International Law* 405, 406. See also Bernard Oxman, 'Environmental Warfare' (1991) 22 *Ocean Development and International Law* 433. The damage was not all caused by the one side, so there is more than an element of sophistry in the remark: it may be very difficult in modern warfare 'to distinguish between the results of unintentional versus intentional destruction of the environment': Sebia Hawkins in 'Panel Discussion', above n 136, 221.

139 Low and Hodgkinson, above n 138, 408.

140 Ibid 409 records that final estimates of the size of the spill were three to four million barrels, at least 12 times the extent of the 1989 *Exxon Valdez* spill and rivalling the largest oil spill of all (the 1979 Ixtoc oil well blowout in the Gulf of Mexico).

141 SC Res 687, above n 3.

142 Ibid paragraph 16. Paradoxically, Birnie and Boyle, above n 30, 128 suggests that the Iraqi actions cast 'doubt on the usefulness or general acceptability of the 1977 protocols.' Cf above, nn 132-5 and accompanying text.

143 SC Res 687, above n 3, paragraph 19.

144 Birnie and Boyle, above n 30, 128.

145 The Council debates on SC Res 674, 45 UN SCOR (2951st mtg), UN Doc A/Res/674 (1990) and SC Res 687, above n 3, 'did not raise the issue': Low and Hodgkinson, above n 138, 445 n 287.

146 Low and Hodgkinson, above n 138, 460-6.

147 This is not to say that there are not extensive difficulties associated with the procedure and determinations of the Commission in calculating the quantum of compensation: see ibid *passim*.

issues, including: whether the Council's decision reflects a trend toward a broader conception of international peace and security that takes into account 'environmental security'; whether the Council's involvement in environmental disputes is an appropriate response to any (and if so which) international environmental concerns; and the likelihood of successful environmental protection under Chapter VII of the UN Charter. These matters are the subjects of the remainder of this article.

C *The Environment and International Peace and Security*

Prior to the last decade, environmental tensions were unlikely to be perceived as potential sources of what (traditional) international relations calls 'conflict'. So, despite the major international environmental concerns regarding the future of tropical rainforests generally, and the Amazon Basin in particular,[148] one writer recently described Brazil as 'mercifully free from conflict or confrontation on the international stage.'[149] The prevailing wisdom seems to be that the world's environmental problems should be solved by international co-operation, rather than by enforcement measures, and without the involvement of the Security Council. Indeed, the Council's possible involvement was rejected, in passing, by the two leading speakers on international environmental law at a recent conference held in Melbourne to mark the fiftieth anniversary of the United Nations.[150] One of those speakers has subsequently noted that the

> possibilities of inferring that environmental protection is necessary for the maintenance of international peace and security, that is, that environmental threats can be equated with other threats to international security, such as aggression, and thus can be dealt with by the Security Council under Chapter VII of the Charter, have not been explicitly exploited.[151]

The other speaker has, nevertheless, argued that there is 'a need to explore the possibilities of new institutions for implementation and enforcement'.[152] The general sense that one derives from the literature is that the desirable goal of co-operatively reforming the global environmental agenda remains in tension with a concern that too little is happening to respond to emerging environmental problems, and that what is happening may be happening too slowly.[153] For

148 See below, nn 250-67 and accompanying text.

149 Peter Flynn, *Brazil: Conflict or Conciliation?* (1993) (Conflict Studies No 265) 19.

150 Oral presentations by Patricia Birnie and Ben Boer, papers presented at 'Great Expectations: The United Nations at 50', conducted by University of Melbourne, 28 April 1995.

151 Birnie, 'Environmental Protection', above n 118, 68 (the published version of the oral presentation referred to above, n 150).

152 Ben Boer, 'The Globalisation of Environmental Law: The Role of the United Nations' (1995) 20 *Melbourne University Law Review* 101, 125.

153 See, eg, French, above n 4, 602; Boyle, above n 58, 245; Mische, above n 99, 103-15; and Jonathan Harris, 'Global Institutions and Ecological Crisis' (1991) 19 *World Development* 111. Bo Doos, 'The State of the Global Environment: Is There A Need For an Orderly Retreat' in Otmar Holl (ed), *Environmental Cooperation in Europe* (1994) 33, 34 displays a table comparing the time of international acceptance of currently known environmental issues with the date of their first identification as potential problems: it suggests, *inter alia*, that tropical deforesta-

example, one recent appraisal of the Framework Convention on Climate Change prepared for the Rio Conference notes that many environmentalists consider:

> the set of principles embodied in this document as essentially meaningless since the agreement lacks specific targets or timetables for reducing greenhouse gas emissions or any concrete commitments for financial transfers from developed to developing countries.[154]

The argument for developing and reinforcing a concept of environmental/ecological security[155] proceeds from the recognition that the effects of human action are no longer 'local and temporary' and that, instead, 'the cumulative and largely irreversible effects of human carelessness are global in scale.'[156] One useful definition has been offered by the Warsaw Treaty Organisation, which suggested that 'ecological security' is 'the state of international relations which guarantees the preservation, rational use, reproduction and increase in the quality of the environment.'[157] Another definition which has been offered is that:

> environmental security is ... the condition which exists when governments are able to mitigate the social and political impacts of environmental scarcity of resources, drawing on their own capabilities as well as the capabilities of intergovernmental organizations and non-governmental organizations.[158]

On these views, protection of the international environment is a viable objective, even upon the most positivistic conception of international relations, because of the mutual dependence of states (for the collective survival of their peoples) on responsible environmental management and development activities.[159] In other words, we are linked in mutual self-interest by the 'indivisibility of global biospheric processes'.[160] As a result, environmental depletion is a non-military threat to the life and well-being of societies.[161] On an extreme view,

tion and carbon-dioxide induced climate change were first identified as threats in 1874 and 1896 respectively.

154 James Sebenius, 'Towards a Winning Climate Coalition' in Irving Mintzer and J Amber Leonard (eds), *Negotiating Climate Change: The Inside Story of the Rio Convention* (1994) 277.

155 See Soroos, above n 99, 318-19, for an overview of the rationales which have been offered for use of the concept.

156 James Karr, 'Protecting Ecological Integrity: An Urgent Societal Goal' (1993) 18 *Yale Journal of International Law* 297, 306. This approach is reflected in Commission on Global Governance, above n 82, 29.

157 Warsaw Treaty Organisation, 'The Consequences of the Arms Race for the Environment and Other Aspects of Ecological Security' (declaration of 16 July 1988), cited in A Timoshenko, 'Ecological Security: The International Aspect' (1989) 7 *Pace Environmental Law Review* 151, 153.

158 Richard Moss, 'Resource Scarcity and Environmental Security' in Stockholm International Peace Research Institute, *SIPRI Yearbook 1993: World Armaments and Disarmament* (1993) 27 ('*SIPRI Yearbook 1993*').

159 See generally Lakshman Guruswamy, 'Energy and Environmental Security: The Need for Action' (1991) 3 *Journal of Environmental Law* 209 and Lakshman Guruswamy, 'Energy and the Environment: Confronting Common Threats to Security' (1991) 16 *North Carolina Journal of International Law and Commercial Regulation* 255.

160 Timoshenko, above n 157, 155. See also Gro Brundtland, 'The Environment, Security and Development' in *SIPRI Yearbook 1993*, above n 158, 15, 20.

161 Lothar Brock, 'Peace Through Parks: The Environment on the Peace Research Agenda' (1991) 28 *Journal of Peace Research* 407, 420.

environmental degradation could itself be seen as a form of warfare.[162] Although little hangs on the distinction for present purposes, the Warsaw Treaty Organisation definition is preferable because it specifies normative objectives for environmental protection, whereas the latter definition merely states the condition for the absence of armed conflict.

The case against the Security Council's involvement is premised on the idea that '[d]efining environmental issues in terms of security risks is in itself a risky operation.'[163] The concern is that 'we may end up contributing more to the militarization of environmental politics than to the de-militarization of security politics.'[164] This is not because the urgency of international environmental problems does not warrant attention at the highest level, but rather because their characterisation as a 'security concern' could import all the defects of the present statist machinery of international law as a justification for further centralisation of power 'and even a rationale for armed attack.'[165] While this is clearly a valid point, the extent to which the Council's treatment of 'environmental issues, such as conflicts over resource allocation or pollution, as direct threats to international peace and security': might be a 'risk to world stability'[166] is probably more likely to be a result of the sensitivity with which such disputes are handled than whether or not the Council evinces such an interest. It is beyond the scope of this article to posit a theory of international diplomacy, but it seems likely that the same general principle applies to any attempt by the UN or its subsidiary organs to encourage compliance on a global scale. The answer offered by one subtle analysis is that the potential for the concept to 'be subverted to illegitimate uses' does not delegitimise the use of 'environmental security'; it just means that we should be aware of how it is being applied and why.[167] I would argue that, in particular, we should be wary of strategies which over-eagerly embrace military intervention for 'social ..., environmental, humanitarian and politico-military reasons.'[168]

The use of Security Council Resolution 687 as a valid precedent for a redefinition of international peace and security has been doubted.[169] It should be noted, however, that the Council's consideration of matters of international peace and security since the end of the Cold War is consistent with an expansive definition

[162] Ibid 414-16. See also Jessica Mathews, 'Redefining Security' (1989) 68 (2) *Foreign Affairs* 162.

[163] Brock, above n 161, 420.

[164] Ibid 421.

[165] See Soroos, above n 99, 320.

[166] Catherine Tinker, '"Environmental Security" in the United Nations: Not a Matter for the Security Council' (1992) 59 *Tennessee Law Review* 787, 788.

[167] See Soroos, above n 99, 321. Cf Tinker, above n 166, 796 arguing that 'A broad definition of international peace and security ... opens the door to the possibility of unilateral or regional military response to environmental activity.'

[168] Richard Connaughton, *Military Intervention in the 1990s: A New Logic of War* (1992) 1. At the time of writing, the author was the British Army's retiring Head of Defence Studies and a former professional soldier. See also David Ramsbotham, *The Changing Nature of Intervention: The Role of UN Peacekeeping* (1995) (Conflict Studies No 282) 23 arguing for urgent reform of the UN and the Charter 'to make possible the multifunctional interventions that seem likely to be the norm in the years ahead.'

[169] Birnie, 'Environmental Protection', above n 118, 68; Tinker, above n 166, 789.

of 'security'. In particular, Council resolutions concerning Somalia, Rwanda and Haiti[170] indicate that the Council was willing to respond under Chapter VII to events which did not involve the threat or use of armed force directed outside the territory of the subject states.[171] Although there have been criticisms of the manner in which the Council discharged its task in these situations (based both in the competence of the exercises[172] and in the perceived illegitimacy of delegation of responsibilities to regional forces),[173] there is little doubt that these developments provide a platform for an environmental strategy to be adopted by the Council, if it so chooses. Indeed, if the global dangers posed by environmental degradation have been correctly characterised in common understanding, it may well be that the probability of highly destructive and irreversible transboundary effects will, in time, make it more likely that the Council will intervene in environmental disputes than in 'humanitarian' situations.[174]

D *Measures Short of the Use of Armed Force*

A criticism offered by those who wish to keep environmental issues away from the Security Council is the paradox that 'sending in military troops under United Nations auspices to prevent trees being cut down or to stop the building of a factory using polluting technology is clearly inappropriate and may itself be a threat to international peace and security'.[175] This can be dealt with briefly. In essence, the criticism misconceives the nature of the claim, which is rather that the placing of major environmental issues on the agenda of the Council may assist in encouraging a resolution without recourse to armed intervention. Indeed, the history of the Council has generally been one of reluctance to authorise the use of force as a method of dispute resolution.[176] It is very much a measure of last resort within the United Nations' framework and is likely to remain so.[177] That being said, it would seem to be logically necessary for the Council to be willing to express its collective authority through the use of force in an appropri-

[170] SC Res 794, 47 UN SCOR (3145th mtg), UN Doc S/Res/794 (1992); SC Res 929, 49 UN SCOR (3392nd mtg), UN Doc S/Res/929 (1994); SC Res 940, 49 UN SCOR (3413rd mtg), UN Doc S/Res/940 (1994) respectively.

[171] Glennon, above n 21, 72. See also Hutchinson, above n 21, 625, 632.

[172] Ramlogan, above n 21, 258.

[173] James Rossman, 'Article 43: Arming the United Nations Security Council' (1994) 27 *New York University Journal of International Law and Politics* 227, 238; Jose Alvarez, 'The Once and Future Security Council' (1995) 18 (2) *Washington Quarterly* 5, 7.

[174] See Hutchinson, above n 21, 636-40 for a discussion of the political factors affecting humanitarian operations.

[175] Tinker, above n 166, 794.

[176] Despite the recent spate of authorisations: see Sean Murphy, 'The Security Council, Legitimacy, and the Concept of Collective Security After the Cold War' (1994) 32 *Columbia Journal of Transnational Law* 201, 207, noting that between 1990 and 1993 the average annual number of SC resolutions (more than 60 per year) was approximately four times the average number for the previous 45 years (14 per year - Murphy's figure of 650 resolutions over 45 years does *not* yield an annual average of 11).

[177] See, eg, Sydney Bailey, *The UN Security Council and Human Rights* (1994) xi, noting that the Security Council 'did its best to avoid becoming embroiled' in the human rights issues in Rwanda. The SC has remained similarly reluctant in the former Yugoslavia.

ate case.[178] Representatives of Greenpeace International and from Mexico and Uruguay, who might have been expected to be very wary of an expanded role for the Council, strongly expressed this view at a 1991 conference.[179]

The Security Council has broad scope under the Charter to determine 'what measures not involving the use of armed force are to be employed to give effect to its decisions, and may call upon the Members of the United Nations to apply such measures.'[180] Such methods of coercion, including the use of economic sanctions, could be of some benefit in resolving environmental disputes, especially in those cases where the motive for the harmful activity is to be found in economic development objectives. The claim that sanctions regimes 'punish the citizens of the target state more than its leaders'[181] may be difficult to maintain in respect of developmental uses which, for example, involve the dispossession of indigenous communities[182] or the degradation of the local environment without adequate compensation for residents.[183] The possibility of a connection between the theoretical strategy of the (widely criticised) cultural relativist defences of 'non-Western' formulations of human rights and the 'hands off' arguments of the governments of some less developed states may also warrant further investigation in this context: the claim that the views adopted by the political elite of a State represent the universal views and interests of all members of that State usually serves to mask genuine cultural and political diversity.[184] It may be seen as a kind of 'bad faith' claim[185] invoked to meet an imperative of control.[186] In any event, the mere characterisation of environmental issues as matters for the Council's agenda could, without more, have a significant positive effect on the development and implementation of co-operative environmental regimes.

Another significant problem with some criticisms offered by those who favour keeping the Security Council out of environmental conflicts is that the 'alternative strategies' which they offer frequently seem to be based on a particularly idealised normative conception of international law. Catherine Tinker, for example, argues that the use of the GA, rather than the Council, to further environmental aims 'promotes preventive measures, sustainable development, and the peaceful settlement of disputes',[187] without offering any convincing explanation of why this must (or might) be so. The use of GA mechanisms is

[178] Yoshiko Inoue, 'United Nations' Peace-keeping Role in the Post-Cold War Era: The Conflict in Bosnia-Herzegovina' (1993) 16 *Loyola of Los Angeles International and Comparative Law Journal* 245, 273.

[179] See Simone Bilderbeek (ed), *Biodiversity and International Law: The Effectiveness of International Environmental Law* (1992) 23-4.

[180] UN Charter art 41.

[181] Tinker, above n 166, 794.

[182] For example, the Amazon rainforests: see below, n 261 and accompanying text.

[183] For example, Ok Tedi: see below, nn 215-31 and accompanying text.

[184] See, in the human rights context, the argument of Yash Ghai, 'Human Rights and Governance: The Asia Debate' (1994) 15 *Australian Year Book of International Law* 1, 17.

[185] See Abdullah An-Na'im, 'Book Review: Human Rights and Governance in Africa' (1995) 17 *Human Rights Quarterly* 574, 576; Leslie Macfarlane, *Human Rights: Realities and Possibilities: Northern Ireland, the Republic of Ireland, Yugoslavia and Hungary* (1990) 5.

[186] Ghai, above n 184, 7. See also below n 222, discussing the BHP Ok Tedi advertising campaign.

[187] Tinker, above n 166, 791.

certainly more likely to lead, in the short term, to compromise, as evidenced in the failure to reconcile the conflict between environmental and developmental objectives in principle 2 of the Rio Declaration, but this is hardly an adequate response to the argument that environmental degradation has progressed to such an extent that the superficial attraction of compromise rests in the shadow of an over-arching threat of inevitable, if gradual, annihilation. Similarly, the claims that a 'strong body of international environmental law needs to articulate specific duties, responsibilities and rights' and that '[d]eveloped nations must contribute to the financing and transfer of technology to make global sustainable development a reality'[188] are almost certainly true, but they are merely statements of what *should* occur, and lack a theoretical explanation of how or why it would occur. It is at least as arguable that putting these environmental issues on the Council's agenda will 'firm the resolve' of states to achieve a manageable and practical framework for international environmental protection.

The European Community's involvement in the resolution of the 1995 fisheries dispute between Canada and Spain provides some indication of an emerging recognition that proper management of environmental resources shared between states requires the development of more effective compliance and enforcement measures. In 1994, Canada revised its Coastal Fisheries Protection Act[189] to supplement an existing prohibition against foreign fishing vessels fishing or preparing to fish for 'sedentary species' beyond the limits of Canadian fisheries waters[190] with a prohibition against fishing or preparing to fish in the Convention Area of the Northwest Atlantic Fisheries Organization (NAFO) 'for a straddling stock[191] in contravention of ... prescribed conservation and management measures.'[192] The express basis for the amendments was directly grounded in the language of sustainable development.[193] Although the statute already contained a

[188] Ibid 795.

[189] Revised Statutes of Canada 1985 c C-33. The changes discussed here were all effected by the Coastal Fisheries Protection (Amendment) Act (1994) 42 & 43 Eliz 2, c 14 1994 (Can), which received the royal assent on 12 May 1994.

[190] Ibid s 4(2). Section 4(3) defines 'sedentary species' to mean 'any living organism that is immobile on or under the seabed or is unable to move except in constant physical contact with the seabed or the subsoil'.

[191] 'Straddling stock' means 'a prescribed stock of fish': ibid s 2. Section s 6(b.1) enables the Governor in Council to make regulations 'prescribing as a straddling stock ... any stock of fish that occurs both within Canadian fisheries waters and in the area beyond and adjacent to Canadian fisheries waters.'

[192] Ibid s 5.2. 'Prescribed conservation and management measures' are described further in ibid s 6(b.3).

[193] The introduced 'declaration of purpose' in s 5.1 states: 'Parliament, recognizing (*sic*) (a) that straddling stocks on the Grand Banks of Newfoundland are a major renewable world food source having provided a livelihood for centuries to fishers, (b) that those stocks are threatened with extinction, (c) that there is an urgent need for all fishing vessels to comply in both Canadian fisheries waters and the NAFO Regulatory Area with sound conservation and management measures for those stocks, notably those measures that are taken under the *Convention on Future Multilateral Cooperation in the Northwest Atlantic Fisheries*, done at Ottawa on October 24, 1978, Canada Treaty Series 1979 No 11, and (d) that some foreign fishing vessels continue to fish for those stocks in the NAFO Regulatory Area in a manner that undermines the effectiveness of sound conservation an management measures, declares that the purpose of section 5.2 is to enable Canada to take urgent action necessary to prevent further destruction of those stocks

power of arrest without warrant exercisable against any person suspected of committing an offence,[194] the 1994 amendments introduced a power to 'use force that is intended or is likely to disable a foreign fishing vessel' for the purpose of proceeding with an arrest.[195]

On 3 March 1995, the provisions of the Act prohibiting fishing for Greenland halibut in the NAFO regulatory area were made applicable, by regulation, to Spanish and Portugese vessels[196] and on 9 March the new powers were applied when a Canadian gunboat on the high seas cut the fishing nets of the *Estai*, a Spanish trawler, and boarded the vessel.[197] The action brought Spain[198] and Canada to the brink of an all-out conflict as subsequent talks between the European Union and Canada failed and Spanish vessels headed back to the same fishing grounds.[199] Spain instituted proceedings against Canada in the ICJ on 28 March 1995, alleging that Canada had violated norms of international law, both by challenging 'the very principle of the freedom of the high seas' and by a 'very serious infringement of the sovereign rights of Spain'.[200] The dispute never became a matter of formal concern for the Security Council, but the economic power of the European Commission was instrumental in averting the crisis. By 20 April 1995, Canada and the European Community had adopted an agreement which recognised a 'commitment to enhanced co-operation in the conservation and rational management of fish stocks', but, significantly, immediately went on to stress 'the pivotal role of control and enforcement in ensuring such conservation'.[201] The management mechanism established by the agreement is a hybrid, relying on the NAFO secretariat to control inspections and monitoring of compliance, but leaving it to the domestic law of the states infringed against to establish and enforce penalties.[202] In return for an agreed total allowable catch of halibut and apportionment between Canada and the European Community,

and to permit their rebuilding, while continuing to seek effective international solutions to the situation referred to in paragraph (d).'

194 Ibid s 8.

195 Ibid s 8.1.

196 See Agreed Minute on the Conservation and Management of Fish Stocks, signed 20 April 1995, Canada-European Community, 34 ILM 1260, 1263.

197 Polly Ghazi, Frank Smith and Claire Trevena, 'Fishing Fleets are Raping the Oceans', *Guardian Weekly* (Manchester), 16 April 1995, 8. Ted Warren, the city editor of *The Evening Telegram* in St John's, Newfoundland, suggested that the Spanish crew actually dumped their nets to eliminate the evidence: Ted Warren, 'Fleets that "Scrape Life off the Ocean Bed"', *The European* (London), 17-23 March 1995, 2.

198 It is noteworthy that, despite the intervention of the European Union (EU) in the conflict (ostensibly on Spain's behalf), key members of the EU, including Great Britain, Denmark, Sweden, Finland, Germany and the Netherlands, appear to have been reluctant to place their own commercial relations with Canada at risk by supporting trade sanctions against Canada: see Anne-Elisabeth Moutet and Ian Mather, 'Canada Escapes Sanctions', *The European* (London), 31 March - 6 April 1995, 1.

199 John Carvel and Mark Tran, 'Fishing Row Flares Again', *The Guardian Weekly* (Manchester), 2 April 1995, 4.

200 ICJ Press Release 537, 'Spain Institutes Proceedings Against Canada in World Court for Forcible Boarding of Spanish Fishing Vessel' (29 March 1995) 1.

201 Agreed Minute on the Conservation and Management of Fish Stocks, above n 196, 1262. Annex I to the Agreed Minute, 1264-71, provides for a detailed series of enhanced surveillance and enforcement mechanisms.

202 Ibid 1265-6, 1268.

Canada agreed to repeal the 3 March 1995 regulation[203] and to allow a Spanish fishing vessel to take control of the fish which had been removed from the *Estai*.[204]

Given the continuing international competition for fish stocks, the long-term prospects of the agreement are unclear. Canada has reserved the right to resort to 'gunboat conservation' again,[205] while Spanish fishermen indicated at the time that they intended to ignore the new quotas, 'unless forced to abide by them at gunpoint'.[206] There are also larger questions concerning the preservation of vital environmental resources: in this instance, determining what constitutes a 'sustainable' fish catch. Nevertheless, the agreement limited the immediate threat of conflict, in part by establishing a simplified and strengthened set of more enforceable rules for the management of the shared environmental resource.[207] It is difficult to imagine such a proposal succeeding without the implied threat of significant sanctions being brought to bear by a legitimate transnational power, in this case the European Community. The global authority of the Security Council has the potential to be exercised in exactly this way.

It should also be noted that the involvement of the Security Council in certain limited environmental issues of major global significance need not be a usurpation of the function of other co-operative international institutions, as some writers suggest.[208] It may well be that the GA is (usually) the most appropriate forum for dealing with such issues,[209] but this does not lead inevitably to the conclusion that there can be no role for the Council. Quite clearly, the application of external pressure to force environmental compliance on a state is not appropriate as a basic strategy. It cannot deal with certain inherent structural problems of distribution which are frequently the underlying causes of environmental degradation.[210] Nevertheless, one recent review of the effectiveness of environmental treaties notes, as one of the 'four procedural shortcomings that account for most of the failures of global environmental negotiation', that 'effective monitoring and enforcement arrangements are not implemented'.[211] The same study notes that there 'is not a single instance of a secretariat for a global environmental treaty winning Security Council approval for an embargo, blockade, or armed

[203] Ibid 1263. Annex II, 1271-2, establishes the halibut quotas.

[204] Letter of Jacques Roy, Ambassador, Canadian Mission to the European Union, to Emma Bonino, Commissioner, Commission of the European Communities (April 20 1995): ibid 1278.

[205] John Carvel and Claire Trevena, 'EU and Canada end fishing war', *The Guardian Weekly* (Manchester), 23 April 1995, 1. The authors were referring, presumably, to section D (general provisions) of the Agreed Minute on the Conservation and Management of Fish Stocks, above n 196, 1263-4, which reserves the position of each side as to the legality of the amendments to the Coastal Fisheries Amendment Act.

[206] Carvel and Trevena, above n 205.

[207] Agreed Minute on the Conservation and Management of Fish Stocks, above n 196, Annex I, 1264.

[208] Tinker, above n 166, 788.

[209] Ibid 796.

[210] Andrew Hurrell, 'Brazil and the International Politics of Amazonian Deforestation' in Hurrell and Kingsbury, above n 4, 398, 420-7.

[211] Susskind, above n 4, 7.

intervention in response to even repeated violations of environmental treaties.'[212] Although the study does not argue for such a response, it does recognise that the threat of sanctions could have a deterrent effect, and dismisses the Council as a possible enforcement mechanism on the basis of its past record of ignoring environmental matters, rather than on the basis that it should never intervene.[213] The inescapable issue for those who reject the possibility of involvement of an ultimate enforcement authority like the Council in environmental matters is that many of the present arrangements (which have been so universally criticised) are just those arrangements which states have been willing to accept under a consent-based approach.[214]

IV THREE CASES FOR THE SECURITY COUNCIL?

This section deals with recent events in Papua New Guinea and Tahiti and with the classic problem of the Amazon Basin. Although no specific progression from 'least' to 'most' problematic environmental dispute is implied, the section aims to tease out some of the variations which exist, both in the apparent urgency of environmental concerns raised and in the capacity of the international legal system to respond effectively to those concerns. The purpose of the discussion is to examine the potential for and possible usefulness of Security Council involvement in environmental conflicts.

A *The Effect of Article 2(7): Papua New Guinea*

In Papua New Guinea, questions of regional autonomy and continuing colonial exploitation by foreign corporations have merged with questions of resource management and control to create a volatile mix. Bougainville was seeking autonomy from the newly independent state of PNG even before the granting of independence from Australia on 15 September 1975. The major economic issue in question was the presence in Bougainville of PNG's most valuable natural resource, the copper and gold mine (then) controlled by the Australian company CRA.[215] The 'Bougainville unrest' which resulted from competing claims to sovereignty over the mine's resources included six years of violence which culminated in the closure of the mine.[216] Although the Panguna mine is gone, a civil war continues to rage in Bougainville and the economic effects of the closure and consequent loss of tax revenue have been described as 'disastrous for the PNG economy – increasing its dependence on Ok Tedi'.[217]

Recent publicity in Victoria concerning litigation brought by indigenous peoples over environmental damage caused by the Ok Tedi copper mine, situated

[212] Ibid 110.
[213] Ibid.
[214] Gareth Porter and Janet Welsh Brown, *Global Environmental Politics* (1991) 154.
[215] James Griffin, 'A Precarious Unity', *The Age* (Melbourne), 15 September 1995, 15.
[216] Peter Fries, 'BHP Was Here', *The Australian* (Sydney), 14 September 1995, 9.
[217] Matthew Stevens, 'BHP The Tarnished Australian', *The Weekend Australian* (Sydney), 30 September - 1 October 1995, 21.

near the PNG border with Irian Jaya, suggested that similar events may be likely there. The PNG Government drafted legislation that would make it illegal (in PNG) for anyone to sue the owners of the mine (BHP) for compensation in respect of the environmental damage. Although the International Commission of Jurists condemned the proposed legislation[218] and BHP was found to be in contempt of (the Victorian Supreme) court for its role in the drafting of the legislation,[219] the most graphic condemnation came from Mr Alex Maun, a resident of Ieran village, who presented dead fish from the Fly River at BHP's 1995 Annual General Meeting and 'evoked Bougainville in warning that attempts to block compensation claims could lead to violence.'[220] Despite the threat of civil unrest, BHP's preoccupation appeared to be with the increase in the average grade of ore being mined at Ok Tedi, which had resulted in the project being 'blessed' with a $1.4 billion boost in value.[221] The problems concerning the failure of BHP to provide an environmentally appropriate tailings-dam became the subject of a major advertising exercise by the company.[222] On 11 June, 1996 BHP announced that it had settled the dispute with a package which requires the company to 'investigate the construction of either a tailings dam or pipeline so that no more waste is dumped into the river system'.[223] The Ok Tedi dispute is worthy of special attention because the development commenced relatively recently,[224] and because the negotiations between the developer and the state involved detailed agreements concerning environmental protection arrangements.[225]

From one point of view, the international dimension of the Ok Tedi dispute can scarcely be doubted: the fact that the legal claims for compensation are being handled in Victorian proceedings reflects the status of BHP, a predominantly 'Australian' company,[226] as a transnational corporation and the importance of its

218 Tony Kaye, 'Jurists Condemn Ok Tedi Draft Bill', *The Age* (Melbourne), 15 September 1995, 5.

219 Barry Fitzgerald, 'Ok Tedi Gain for BHP', *The Age* (Melbourne), 28 September 1995, 21.

220 Mathew Stevens and Chip Le Grand, 'BHP Gets a Sniff of Ok Tedi Resentment', *The Australian* (Sydney), 27 September 1995, 1.

221 Fitzgerald, above n 219.

222 One advertisement viewed on Special Broadcasting Service Channel 28 (Melbourne) 8 October 1995 (videotape on file with author) described the tailings-dam as a 'unique engineering problem' which had been encountered nowhere else in the world. The advertisement attested to BHP's resolve to find a solution and concluded with the words: 'BHP: Answers for Ok Tedi, and for our global future'. The advertisement is part of a series in which BHP employees (eg Kipling Uiari and Monica Rau) characterised recent Australian concern about the adverse environmental effects of the mining as an unwanted interference in the sovereign right of the people of PNG to develop their resources and improve their economic, health and social circumstances. This was even more remarkable given that the Australian media attention derives from a class action being brought by about 30,000 people who allege that their lives have been adversely affected by the mining operations. See also the BHP advertisement 'You Wouldn't be Able to Operate an Ok Tedi in Australia, Would You?' carried by the *The Australian* (Sydney), 11 October 1995, 3.

223 Tony Kaye, '$500m Ok Tedi truce for BHP', *The Age* (Melbourne) 12 June 1996, B1.

224 The mine opened in 1984: see William Pintz, 'Environmental Negotiations in the Ok Tedi Mine in Papua New Guinea' in Charles Pearson (ed), *Multinational Corporations, Environment and the Third World: Business Matters* (1987) 35.

225 Ibid 36-9, 47-55.

226 The process whereby the shares of BHP and other transnationals might be controlled at any given time by diverse international investors merely serves to underscore further the global dimensions of the problem.

investment to the PNG Government. In that sense, the dispute has characteristics in common with many of the activities of transnational corporations in less developed countries.[227] Nevertheless, international law would tend to treat the substantive aspects of these disputes as either invisible (in the case of the dispute between the transnational corporations and the local residents opposed to the projects[228]) or matters of 'domestic jurisdiction' (in the case of the tensions between the local residents and the central PNG Government), which are (generally) beyond the purview of the UN.[229] But it is important to note the potential for threats to peace and security that may result from resource conflicts of this type: there was a close link between the uprising in Bougainville and the question of resource exploitation, just as there is a close link between the environmental degradation in the Fly River area below the Ok Tedi mine and the suggestion of a potential for violence. Both are, in a sense, related to the perception of 'rights' held by the local residents. If Sydney Bailey's view that 'more than half the wars in the Third World since 1945 [have] been caused by the perception that human rights were being denied'[230] is valid, this is just the sort of disagreement that could lead to armed conflict. Nevertheless, it is difficult to see the Security Council treating such an event as a threat to international peace and security in which it should intervene. In the absence of a dispute involving the application of, or potential for, force across state boundaries, as might occur if the dispute spilled over into Indonesian territory, it is unlikely that the Council would pay much attention: the history of the Bougainville dispute suggests that the international community will not treat the claim of the indigenous inhabitants of the Fly River area as meriting international condemnation, much less intervention.[231] If events escalate and the Council does take an interest in, for example, a cross-border dispute, it is likely that the principal (and perhaps only) matter of concern for the Council would be to end the application of force: without more, the underlying environmental issues would not trigger Council involvement.

B *The Security Council Veto: Tahiti*

On 6 September 1995, the French Government kept its promise to renew the testing of nuclear weapons in the Pacific by exploding a bomb of a little under 20 kilotonnes at Mururoa Atoll,[232] in clear violation of France's international legal

[227] See Fleur Johns, 'The Invisibility of the Transnational Corporation: An Analysis of International Law and Legal Theory' (1994) 19 *Melbourne University Law Review* 893, 903-4.

[228] Ibid *passim*. By implication, the Commission on Global Governance, above n 82, 3 attributes this phenomenon to the development of the United Nations system prior to the emergence of truly global firms and corporate alliances.

[229] UN Charter art 2(7).

[230] Sydney Bailey, *The UN Security Council and Human Rights* (1994) x, citing Sydney Bailey, *How Wars End* (1982) vol 1, 10.

[231] See above, nn 215-16 and accompanying text. Johns, above n 227, 904-8, argues that the involvement of transnational corporations in affairs of state (especially of less developed countries) infringes the right of self-determination and potentially violates the norm of non-intervention reflected in UN Charter art 2(7).

[232] Karen Middleton and Mathew Gledhill, 'A Stupid Act, says Keating', *The Age* (Melbourne), 7 September 1995, 1.

obligations to protect the marine environment.[233] The response in Papeete was immediate: although there can be little doubt that the concern of the Tahitians who protested in (and rioted and looted) their capital was in part a claim for independence from the French,[234] the trigger for the events was clearly the environmental threat posed by the resumption of testing.[235] France acknowledged this by placing its security forces on alert after detonating its second device on 2 October 1995 at Fangataufa Atoll.[236] The claims of the Tahitians are appropriate subject-matter for international law, and not merely a French 'domestic' concern. Based on the prevailing understanding[237] of the right to self-determination,[238] there are strong grounds for arguing that the continued French presence in the Pacific is an act of colonialism of the kind consistently rejected at international law since 1960.[239] Nor has the political affect of the renewed testing been limited to France's 'sovereign territory'. Widespread international condemnation[240] of the French action recently culminated in the South Pacific Forum breaking off dialogue with France and raising the question of independence for New Caledonia at the UN.[241] In December 1995, a meeting of representatives of 10 Southeast Asian countries (the Philipines, Thailand, Indonesia, Malaysia, Singapore, Brunei, Vietnam, Laos, and Cambodia) voted to declare Southeast Asia to be a

233 The arguments, based primarily on UNCLOS, above n 47, and the Convention for the Protection of the Natural Resources and Environment of the South Pacific Region, opened for signature 25 November 1986, 26 ILM 38, are comprehensively laid out in Concerned International Law and Environmental Law Academics and Lawyers, 'Memorandum on the Legality of the Planned Resumption of Nuclear Testing by France', 6 August 1995, 3-8, appended to a letter to President Jacques Chirac signed by Donald Anton on behalf of 53 eminent international and environmental legal scholars and academics.

234 See, eg, Paul Webster and Mark Beneich, 'Tahiti Erupts After French Nuclear Test', *The Guardian Weekly* (Manchester), 17 September 1995, 1. See also Roger Maynard, 'Freedom Will End Violence: Temaru', *Weekend Australian* (Sydney), 9-10 September 1995, 1.

235 See, eg, the comments by the Australian Minister for Foreign Affairs, Senator Gareth Evans, quoted in Helen Trinca, Cameron Stewart and Roger Maynard, 'France defies protests', *Weekend Australian* (Sydney), 9-10 September 1995, 1. Christian Karembeu (star of the French champion soccer team Nantes in 1994 and a member of the French national team and who hails originally from New Caledonia), now playing with Sampdoria (Genoa) in the Italian league, stated to the press that 'Nature belongs to everybody, it's free and cannot be bought' after the members of his team and their opponents Cremonese warmed up for their 10 September match 'wearing T-shirts carrying the Greenpeace message "No to nuclear tests" on them': 'Players Protest Against French Nuclear Tests', *Australian and British Soccer Weekly* (Glebe, NSW), 12 September 1995, 19.

236 'French Security on Alert in Tahiti', *The Age* (Melbourne), 3 October 1995, 8.

237 France, by contrast, adheres to the geographic fiction that French Polynesia is a part of metropolitan France.

238 Expressed in the UN Charter arts 1(2), 55. The existence of the right is 'well-settled': see Gerry Simpson, 'Judging the East Timor Dispute' (1994) 17 *Hastings International and Comparative Law Review* 323, 333-4.

239 For example, Declaration on the Granting of Independence to Colonial Countries and Peoples, GA Res 1514, 15 UN GAOR (947th mtg) (1960), paras 1, 2 and 5.

240 See the reports in the various newspaper articles noted above. The extent of popular feeling is, perhaps, encapsulated by the photograph of the Swiss national soccer team parading a banner bearing the words 'Stop it Chirac' during the line-up before their European Championship match against Sweden on 6 September, 1995: 'Sport Briefing', *The Age* (Melbourne), 8 September 1995, 27.

241 Don Greenless, Mary-Louise O'Callaghan and Gabrielle Chan, 'Evans calls for UN crackdown on N-arms', *The Australian* (Sydney), 4 October 1995, 1.

nuclear-free zone.[242] Despite the general international concern,[243] France detonated a total of six bombs in a series of tests which continued until late January 1996.[244]

The question of testing nuclear warheads in the South Pacific has more of the character of an 'international' dispute than the situation at Ok Tedi, for a number of reasons. Three of the more important of these are: first, the very presence of the French in the South Pacific is likely to be condemned by the majority of members of the United Nations in favour of a right of self-determination for the local peoples; secondly, although the current testing is underground, so that the obvious transboundary effects complained of by Australia and New Zealand in relation to the atmospheric testing by France in the 1970s are absent, there is considerable international concern over whether underground testing is 'safe' — in the sense that the radiation effects will remain confined[245] and that the explosions themselves do not create significant environmental 'collateral damage';[246] thirdly, there is a widely-held view that nuclear weapons are, of themselves, a global threat to peace and security. These aspects might seem to make French nuclear testing an ideal subject for Security Council action, especially given the ICJ's recent decision not to consider provisional measures on the limited basis that only renewed atmospheric testing would have relevantly affected the basis of the Court's 1974 decision.[247] Two courses of action would be open to the Council: first, by way of recommendations for resolution of the dispute under Chapter VI; secondly, by use of economic and other sanctions against France under Chapter VII (art 42), if necessary. The presence of France as a permanent member of the Council means, of course, that its power of veto will render such collective action by the Council impossible. The problem of self-interest in the Council possibly explains the recommendations which have been made for establishment of an 'environmental security council'[248] or 'a global enviromental legislative body with the power to impose environmental regulation on nation-states.'[249]

[242] Keith Richburg, 'SE Asia Leaders Declare Nuke-Free Zone', *The Guardian Weekly* (London), 24 December 1995, 11.

[243] Adrian Rollins, 'World leaders condemn France', *Sunday Age* (Melbourne), 29 October 1995, 11.

[244] Alex Duval Smith, 'France ends tests with mighty bang', *The Guardian Weekly* (London), 4 February 1996, 1.

[245] See, eg, Bengt Danielsson, 'Poisoned Pacific: The Legacy of French Nuclear Testing' (1990) 46 (March) *Bulletin of Atomic Scientists* 22, 26-8.

[246] Ibid 28 notes that much of the international concern has been focused on the direct radiation questions, at the expense of the health problems which have resulted from the massive disruption to the marine environment. See also Tilman Ruff, 'Bomb Tests Attack the Food Chain' (1990) 46 (March) *Bulletin of Atomic Scientists* 32.

[247] ICJ Press Release 541, 'New Zealand's Request for Examination of Issue Related to 1974 Judgment in Nuclear Tests Case is Denied by World Court' (22 September 1995).

[248] See, eg, Manfred Lachs, 'Institutional Change in the UN System' in Bilderbeek, above n 179, 149.

[249] Proposed by an international conference at the Hague in 1989. The proposal is criticised in Porter and Brown, above n 214, 153-4.

C *A 'Truly' Global Dispute?: The Amazon*

In a recent keynote address, the UN Secretary-General indicated that 'we face urgent problems of scarce resources, environmental degradation and natural disasters'[250] and linked the 'search for development' to the maintenance of international peace.[251] The Amazon Basin is an extreme example of a potential site of environmental conflict, concentrating a number of major international issues in one geographic space. The rainforest is the world's largest tropical moist forest,[252] being more than half the size of Europe.[253] During the wet season, almost 20 percent of 'all the waters disgorged into oceans by all the world's rivers' flows into the Atlantic from the Amazon.[254] It has been estimated that at least ten percent of all the earth's species live in the Amazon.[255]

The usual focus of media attention is on the deforestation of the Amazon Region. As the largest rainforest on earth, the Amazon accounts for more than one third of the world's tropical forest,[256] yet by 1988, 12 percent of Brazilian Amazonia (an area larger than the whole of France) had been cleared.[257] The process of deforestation gives rise to a range of problems. Deforestation has 'local' effects which include loss of soil nutrients through erosion and also increased river run-offs which give rise to consequent changes in the flood cycle (adversely affecting agricultural production).[258] Another 'local' effect is the loss of forest species through the destruction of forest habitat, both because of the 'highly localised distribution of many species' and because many species require large areas of continuous forest to maintain viable populations.[259] Although not directly attributable to deforestation *per se*, illegal trafficking in wildlife magnifies the effect of deforestation on endangered species: one recent report has estimated that 12 million wild animals disappear each year in Brazil as a result of illegal trafficking. The species captured include: parrots, macaws, toucans, spider

250 Boutros Boutros-Ghali, 'The United Nations at Fifty' (1995) 20 *Melbourne University Law Review* 9, 10.

251 Ibid 12.

252 Michael Giaimo, 'Deforestation in Brazil: Domestic Political Imperative - Global Ecological Disaster' (1988) 18 *Environmental Law* 537, 539. See also Daniel Caswell, 'The Promised Land: Analysis of Environmental Factors of United States Investment in and Development of the Amazon Region in Brazil' (1982) 4 *Northwestern Journal of International Law & Business* 517, 520.

253 Georges Landau, 'The Treaty for Amazonian Cooperation: A Bold New Instrument for Development' (1980) 10 *Georgia Journal of International and Comparative Law* 463.

254 Mac Margolis, *The Last New World: The Conquest of the Amazon Frontier* (1992) 17. Karen Schwab, 'Added Hope for the Amazon Rainforest' (1992) 15 *Houston Journal of International Law* 163, 164 notes that at certain times of the year, two-thirds of the world's fresh water is running thorugh the Amazon Basin.'

255 Roger Stone, *Dreams of Amazonia* (1985) 108.

256 Hurrell, above n 210, 400.

257 See Dennis Mahar, 'Deforestation in Brazil's Amazon Region: Magnitude, Rate and Causes' in Gunter Schramm and Jeremy Warford (eds), *Environmental Management and Economic Development* (1989) 89-91.

258 See Philip Fearnside, 'Environmental Destruction in the Brazilian Amazon' in David Goodman and Anthony Hull (eds), *The Future of Amazonia: Destruction or Sustainable Development?* (1990) 179, 181-4.

259 Ibid 187-8.

monkeys, alligators, lizards and jaguars, mostly captured from the Amazon Basin.[260] Finally, the death or loss of cultural identity of tribal peoples is also a major result of deforestation activities.[261]

Apart from the moral questions of biodiversity and the possible extinction of unique forms of life,[262] these consequences have more general effects: the loss of genetic resources from the forests and the loss of the bases for various pharmaceutical products which are derived from forest plant species has an adverse effect on the world's agricultural and medical technology.[263] It has become apparent that deforestation also increases the possibility of new threats to human health.[264] Professor Frank Fenner, a member of the World Health Organisation's Expert Advisory Panel on Viral Diseases since 1965, 'believes that viruses such as Ebola will become increasingly common as humans disrupt natural ecosystems to build dams or cities or to harvest forests.'[265] The effect of population pressure has meant that the encounters between people and exotic disease 'are becoming more frequent and more deadly.'[266] The other major impact of large-scale deforestation is its role in climate change.[267]

The Amazon is not, however, just a potential site of environmental conflict between the developed world and the developing countries who rely on the region for much of their natural resource base. Although we usually associate the Amazon with Brazil,[268] eight[269] countries (Bolivia, Brazil, Colombia, Ecuador, French Guiana, Peru, Surinam and Venezuela) share the region within their

260 'Poachers Deplete Brazil's Wildlife', *The Australian* (Sydney), 7 June 1995, 15. A detailed analysis of the dimensions and intractibility of a similar problem in neighbouring Latin America can be found in Debra Rose, 'The International Conservation of Latin America's Wildlife' (1992) 4 *International Environmental Affairs* 18.

261 On the relation between Amazonian development in Brazil and the continued violence against indigenous (and, indeed, rural) peoples, see Flynn, above n 149, 19-22. The effect of Colombian colonization on indigenous peoples is examined in detail in Peter Bunyard, *The Colombian Amazon: Policies for the Protection of its Indigenous Peoples and Their Environment* (1989) 27-40.

262 Eric Katz and Lauren Oechsli, 'Moving Beyond Anthropocentrism: Environmental Ethics, Development, and the Amazon' (1993) 15 *Environmental Ethics* 49, 53-4 describes instrumental arguments for Amazonian environmental preservation, such as those which follow, as 'seriously flawed', preferring to ground the obligations of protection in what they describe as a 'preservationist obligation'. I agree, but consider that the present postivistic framework of international law and also of international relations is unlikely to give rise to treatment of matters of biotic rights as serious threats to global peace and security in the forseeable future.

263 Fearnside, above n 258, 188-9. See also Karen Schwab, above n 254, 168-9; Haroldo Mattos de Lemos, 'Amazonia: In Defense of Brazil's Sovereignty' (1990) 14 *Fletcher Forum* 301, 302.

264 Schwab, above n 254, 166.

265 Tania Ewing, 'Out of Africa – and Asia', *The Age* (Melbourne), 19 May 1995, 15.

266 Ibid. It should be noted that this characterisation has, in turn, been contested. See, eg, Malcolm Gladwell, 'A Plague of Fear', *The Weekend Australian* (Sydney) 22-3 July 1995, 26, arguing that this is merely an 'ecological parable' and that exposing human populations to these viruses 'is part of the way we tame nature, not the way nature tames us.'

267 Fearnside, above n 258, 184-7. See also Kenton Miller, Walter Reid and Charles Barber, 'Deforestation and Species Loss' in Jessica Matthews (ed), *Preserving the Global Environment* (1991) 78.

268 Indeed, the majority of the Amazon is located within Brazil's borders: see Armando Mendes, 'Major Projects and Human Life in Amazonia' in John Hemming (ed), *Change in the Amazon Basin: Man's Impact on Forests and Rivers* (1985) vol 1, 44.

269 At least one publication adds Guiana to the list: Peter Bunyard, *The Colombian Amazon: Policies for the Protection of its Indigenous Peoples and Their Environment* (1989) 2.

territory.[270] In addition to their interests in the natural resources of the Amazon, these countries have specific interests in the Amazon: Bolivia (which is land-locked) relies on the Amazon for transport;[271] Ecuador, French Guiana and Surinam use the region as 'an outlet for migration and colonization';[272] Brazil,[273] Peru and Venezuela use the Amazon for defence and security purposes;[274] Colombia is developing its Amazon regions in part to integrate its outlying areas.[275] These uses, especially (but not exclusively) the economic developments, give rise to problems similar to those at Ok Tedi, involving the exploitation of local resources and peoples by transnational corporations.[276]

The emerging understanding of the global effects of ecological destruction has given rise in the last two decades to increasing international pressure upon Brazil, as on other countries which have important tropical rainforest areas within their territory, to take account of international interests.[277] Brazil has moved from its fiercely nationalist rejection of international criticism of its environmental practices[278] to a position which recognises the need for environmental protection of the Amazon.[279] Chapter VI of the 1988 Constitution, dealing with environmental issues, 'declares that all Brazilians have a specific right to a sound environment'[280] and creates an obligation to future generations reflecting principles of intergenerational equity.[281] The Constitution imposes private obligations on individuals and corporations, as well as on the Government, and

270 Schwab, above n 254, 170. Ibid 171 displays a table which indicates that the Amazon comprises at least 47% of the total area of each of Bolivia, Brazil, Ecuador and Peru.

271 Landau, above n 253, 470.

272 Schwab, above n 254, 172.

273 The full extent of Brazil's historical development of the Amazon and of its diverse interests in the Region, including rubber-tapping, agriculture, gold-mining, hyrdroelectric dams, highways and the cattle industry, is examined in Mac Margolis, *The Last New World: The Conquest of the Amazon Frontier* (1992). See also Landau, above n 253, 468-70.

274 Schwab, above n 254, 172-3. Landau, above n 253, 466 refers to the original (Western colonial) 'unclearly charted' boundaries in the wild reaches of Amazonia and the resentment over the eventual settlement as 'enhancing what is already a heightened regional sensitivity to security considerations.'

275 Schwab, above n 254, 172-3.

276 See, eg, Caswell, above n 252, 543-8 discussing proposals for extraterritorial regulation of transnational corporations by the United States.

277 See, eg, Edith Weiss, *In Fairness to Future Generations: International Law, Common Patrimony and Intergenerational Equity* (1989) ch 7 arguing that rainforests are part of a 'global commons'.

278 For an account of the Brazilian nationalist response, see Hurrell, above n 210, 403-9. It should be noted that Brazil's former position was consistent with the post-colonial assertion of economic independence in the Resolution on Permanent Sovereignty Over Natural Resources, GA Res 1803, 17 UN GAOR (1194th mtg), UN Doc A/5217 (1962) art 1 (taken to represent customary international law by a number of international arbitration awards, eg, *Texaco Overseas Oil Co v Libyan Arab Republic* (1977) 53 ILR 389; *Kuwait v American Independent Oil Co* (1982); 21 ILM 976; and the *Sedco, Inc v National Iranian Oil Co (Second Interlocutory Award)* (1986) 10 Iran-US CTR 180, 198).

279 Hurrell, above n 210, 409-11.

280 James Bruinsma, 'Brazil Enacts New Protections for the Amazon Rain Forest' (1989) 30 *Harvard International Law Journal* 503.

281 Brazil, Constituicao Federal (1988) ch VI, art 225, cited in Bruinsma, ibid 276. Edesio Fernandes, 'Law, Politics and Environmental Protection in Brazil' (1992) 4 *Journal of Environmental Law* 41, 55-6 reproduces ch VI, art 225 in Portugese and in the author's own translation, which reveals some minor differences of emphasis from Bruinsma's treatment.

specifies the Amazon as a 'national treasure'.[282] The recent establishment of the Pilot Program for the Conservation of Brazilian Rainforests, approved in December 1991, is a further positive development.[283] There is also some evidence that the creation of 'extractive reserves' for the sustainable production of non-timber forest products (for example, rubber) by traditional practices has met with success.[284]

The effect of these changes at the international level has, however, been limited. Brazil's policies continue to be dictated to a large extent by economic imperatives, particularly the international debt problem.[285] It seems that a similar fear of external control can be attributed to each of the signatories of the Treaty for Amazonian Cooperation,[286] which itself might be described as having the sole purpose of reasserting national sovereignty over the Amazon.[287] The Treaty's preamble emphasises the priority of economic development, but does state 'that ... to achieve overall development of their respective Amazonian territories, it is necessary to maintain a balance between economic growth and conservation of the environment'.[288] The Amazon Declaration (Brazil, Ecuador, Peru and Venezuela) of 1989[289] similarly emphasises the dominance of development goals over environmental protection. The effect of this emphasis on development is evident in practice. A recent regional workshop entitled 'Definition of Criteria and Indicators for Sustainability of Amazonian Forests', convened by the Amazon Pact Treaty Secretariat, developed a set of indicators that covers 75 discrete items.[290] The preamble to the Tarapoto Proposal recognises 'the enomous capacity for the creation of wealth of the Amazonian forest, which can and must be used sustainably to the benefit of the respective national economies, with the purpose of overcoming poverty', as well as 'the importance of the

282 Bruinsma, above n 280, 504.

283 See Garo Batmanian, 'The Pilot Progam to Conserve the Brazilian Rainforests' (1994) 6 *International Environmental Affairs* 3.

284 Ken Conca, 'Environmental Protection, International Norms, and State Sovereignty: The Case of the Brazilian Amazon' in Gene Lyons and Michael Mastanduno (eds), *Beyond Westphalia: State Sovereignty and International Intervention* (1995) 147, 167.

285 See Bruinsma, above n 280, 511-13; Hurrell, above n 210, 424-5.

286 Treaty for Amazonian Cooperation, signed 3 July 1978, Bolivia-Brazil-Colombia-Ecuador-Guiana-Peru-Surinum-Venezuela, 17 ILM 1045. An extended analysis of the background to, negotiation and content of the treaty can be found in Landau, above n 253, 470-87. Perhaps a reflection of the pre-occupations of its time, Landau's analysis does not discuss environmental concerns specifically, except as a constraint on development (see Hurrell, above n 210, 469).

287 See, eg, Schwab, above n 254, 179, 195; Caswell, above n 252, 537; Landau, above n 253, 473-4.

288 Treaty for Amazonian Cooperation, above n 286, 4th preambular paragraph.

289 Reprinted in Michael Molitor (ed), *International Environmental Law: Primary Materials* (1991) 88.

290 United Nations Commission on Sustainable Development, *Review of Sectoral Cluster: Land, Desertification, Forests and Biodiversity* (Third Session, 11-28 April 1995, Item 6 of the provisional agenda) E/CN 17/1995/34 10 April 1995. The document consists of a letter dated 6 April 1995 from the Permanent Representative of Peru which annexes the final document from the Tarapato Workshop of 23-25 February 1995. The covering letter indicates that representatives of Bolivia, Brazil, Colombia, Peru, Surinam and Venezuela attended, as did 'technicians' from the UN Food and Agriculture Organization, the European Union and the World Resources Institute (UN Development Programme representatives were present as observers).

Amazonian forest in maintaining world environment processes'.[291] The document as a whole places the socio-economic considerations ahead of the environmental ones (both in order of presentation and in emphasis).[292] Moreover, most of the indicators which might be seen to be relevant measures of the success of environmental protection of the Amazon are equivocal (relying on the concept of sustainability, without expressing how such sustainability might be measured or defined) or inadequately specified (for example, the first indicator under 'Conservation and Integrated Management of Water and Soil Resources' is expressed to be 'Measures for soil conservation'). Perhaps most significantly, only the last seven indicators consider 'Services at the Global Level' and, of these, the first measures '[c]ontribution to satisfying the global demand for sustainably produced timber and non-timber products'.[293]

D *A Role for the Security Council?*

There is general agreement that the present approach to global environmental problems, of which the Amazon is perhaps the quintessential example, has proved to be unsatisfactory in almost all cases.[294] The failure of the Rio Declaration to specify an action plan balancing environmental and developmental needs, and especially the failure to produce a definitive statement on the protection of tropical forests – Patricia Birnie, for example, has dismissed the Forest Principles[295] as 'somewhat weakly-expressed'[296] – has left many commentators with a diminished faith in the capacity of the existing international environmental institutions to meet global preservation objectives.

1 *Making the Environment Part of the 'Main Game'*

If the Security Council assumed an interest in key environmental matters arising in the Amazon, such as the contribution of tropical deforestation to global warming and the loss of biological diversity, it is arguable that this could have the effect of revitalising the agenda of the UN's specialist environmental agencies. It has been noted, for example, that the Commission for Sustainable Development, set up in response to the Rio Conference, 'has no direct route to the General Assembly or Security Council', so that 'its progress is likely to be slow'.[297] The Council's active interest, given the potential for use of its broad coercive powers

[291] Ibid preambular paras 6 and 7.

[292] Considerable effort has been expended elsewhere on developing frameworks for appropriately valuing the adverse environmental effects of development projects in the context of project benefit/cost appraisal: see, eg, J Walter Milon and Jason Shogren, *Integrating Economic and Ecological Indicators: Practical Methods for Environmental Policy Analysis* (1995) *passim.*

[293] Ibid criterion 12, indicator (a).

[294] See above n 153 and accompanying text.

[295] Conference on Environment and Development, above n 32.

[296] Birnie, 'Environmental Protection', above n 118, 97. Alberto Szekely, 'The Legal Protection of the World's Forests After Rio 92' in Luigi Campiglio, Laura Pineschi, Domenico Siniscalco and Tullio Treves (eds), *The Environment After Rio: International Law and Economics* (1994) 65, 69, expresses a similar view, but goes a little further in arguing that 'the failures of Rio in the protection of forests will end up by encouraging their more accelerated destruction.'

[297] Birnie, 'Environmental Protection', above n 118, 99.

under Chapter VII of the UN Charter in an appropriate situation, offers the promise that the work of environmental agencies will be treated with the urgency it demands. The use of sanctions,[298] in particular, has the potential to focus international attention on an environmental 'wrongdoer' state, to deny it access to key resources (which might, in turn, render the activities at the heart of the specific environmental problem nugatory), to send a message to the population of the target state and to create economic incentives for resolving the dispute.[299] As there is evidence that sanctions can only be fully effective if they are co-ordinated on a multilateral basis,[300] the Council's lead in this context is virtually indispensable. Given the paucity of 'hard' law in the international environmental context, the notion that environmental degradation or destruction can constitute an international wrong, except perhaps in the limited context of deliberate military action, requires further exploration and definition. In the context of the present argument, the Council could assume responsibility for the elucidation of global environmental protection objectives. The objectives could be developed by the relevant UN agencies reporting directly to the Council. In the event that Council involvement fails to be directly effective, this approach would at least have the benefit of renewing efforts to develop explicit international standards for environmental protection.

Nor should it be assumed that the environmental 'wrongdoer' in the context of global problems would necessarily be, or only be, the less developed state to which the environmental degradation could be physically sourced. The obligations of developed to less developed states might also become the potential subject of international compliance measures sanctioned by the Security Council, subject to the obvious difficulties concerning exercise of the veto power by a state in its own interests. Moreover, the management of environmental problems by the Council should help to ensure that there is no international policy vacuum[301] which the major economic powers can fill, by, for example, the unilateral application of asset freezes for the purpose of achieving their individual foreign environmental policy goals[302] at the (short-term) expense of the rest of the planet.

2 *Precautionary Action by the Security Council*

This raises the question of establishing some mechanism for determining when the Security Council should act on an environmental issue. The Council's involvement in the Iraq-Kuwait dispute may have been justified directly by Iraq's

298 Under UN Charter art 41.

299 See Murphy, above n 176, 216-17.

300 See generally Edward Mansfield, 'International Institutions and Economic Sanctions' (1995) 47 *World Politics* 575, especially 588-604.

301 There is, of course, a question of the practical application of sanctions. Michael Scharf and Joshua Dorosin, 'Interpreting UN Sanctions: The Rulings and Role of the Yugoslavia Sanctions Committee' (1993) XIX *Brooklyn Journal of International Law* 771, 773, note that the Council's Yugoslavia Sanctions Committee had by the time of that article's publication 'issued over 2,000 communications interpreting the Yugoslavia Sanctions'.

302 Mahvash Alerassool, *Freezing Assets: The USA and the Most Effective Economic Sanction* (1993) 170-3 notes the effectiveness of US asset freezes as an instrument of foreign policy in its disputes with Libya, Nicaragua, Panama, Kuwait and Iraq.

illegal use of force, but the political cause of the intervention is probably to be found in concerns about energy security and the need to preserve a semblance of order in the Middle East. Given the interventionist approach which has been adopted by the Council since that time,[303] it has been suggested in this article that the redefinition of global environmental problems as threats to international peace and security could provide the basis for Council involvement. The principle of precautionary action, recently described as 'the only acceptable path' for dealing with issues of environmental security by the Commision on Global Governance,[304] offers one possible basis for the elaboration of such a mechanism. Principle 15 of the Rio Declaration describes the principle in the following terms: 'Where there are threats of serious or irreversible damage, lack of scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.' The acceptance of the principle is really a recognition that there are limits to scientific certainty in relation to environmental impacts[305] and that the burden of proving that the activity is not harmful should, consequently, be shifted to those who wish to undertake or continue a potentially harmful activity.[306] Although it is probably correct that this 'is not yet a principle of international law',[307] the precautionary principle is better understood as a normative goal than a purported 'principle'.[308] Essentially, the message is that the determination of a 'real' threat to the international environment is a matter of judgment and a question of degree, a point made eloquently in Linda Malone's hypothetical Council discussion concerning the environmental threat posed by inadequately maintained nuclear reactors and weapons.[309] It should be noted, however, that the issue is in no way unique to questions of Council involvement: the same problems apply to the determination of when typically vague environmental co-operation 'obligations' are triggered by environmental threats.[310]

303 See above, nn 170-4 and accompanying text.

304 Commission on Global Governance, above n 82, 83.

305 Edward Christie, 'The Eternal Triangle: The Biodiversity Convention, Endangered Species Legislation and the Precautionary Principle' (1993) 10 *Environmental and Planning Law Journal* 470, 480-2; Walter Rosenbaum, *Environmental Politics and Policy* (2nd ed, 1991) 144-55. But see Faye Duchin and Glenn-Marie Lange, *The Future of the Environment: Ecological Economics and Technological Change* (1994) for a detailed exposition of what scientific modelling of the global environment can achieve.

306 Donald Anton, Jennifer Kohout and Nicola Pain, 'Nationalizing Environmental Protection in Australia: The International Dimensions' (1993) 23 *Environmental Law* 763, 781.

307 Birnie and Boyle, above n 30, 98. The evidence offered by James Cameron and Juli Abouchar, 'The Precautionary Principle: A Fundamental Principle of Law and Policy for Protection of the Global Environment' (1991) 14 *Boston College International and Comparative Law Review* 1 is hardly compelling, consisting as it does of the London Declaration of the Second North Sea Conference, the 1980 Ontario Water Resources Act, a 1988 Canadian case, plus the qualified support contained in three directives of the Council of the European Communities and other international bodies.

308 Andre Nollkaemper, 'The Precautionary Principle in International Environmental Law: What's New Under the Sun?' (1991) 22 *Marine Pollution Bulletin* 107, 110.

309 Linda Malone, 'Discussion in the Security Council on Environmental Intervention in Ukraine' (1994) 27 *Loyola of Los Angeles Law Review* 893, 898-9.

310 Francesco Francioni, 'International Co-operation for the Protection of the Environment: The Procedural Dimension' in Winfried Lang, Hanspeter Neahold and Karl Zemanek (eds), *Environmental Protection and International Law* (1991) 203, 219.

However, because of the potentially far-reaching effects of Council involvement, it would be appropriate for the Council to adopt a narrow construction of the 'precautionary principle' in this context, so as to ensure that it only considers possible action in respect of global environmental harms which would be both substantial and probably irreversible. There is clear evidence to warrant urgent action on a number of key global environmental threats.[311] Obviously, the basis for intervention would need to be elaborated over the course of the Council's involvement in environmental matters.

The Security Council might, for example, act on deforestation in the Amazon Basin as an environmental matter of global concern on a number of grounds. First, Amazonia's geo-political situation, involving eight countries, means that there is a greater than usual need for a co-ordinated transnational response. Secondly, unlike many other regional concerns (for example, trading and military blocs), the global effects of deforestation mean that a purely regional regime managed by less developed countries is not the answer.[312] Thirdly, the need to ensure that the 'North' co-operates with the 'South' in, for example, managing international debt and technology transfer, suggests the need for a co-ordination mechanism with the capacity to require the compliance of all UN members. Fourthly, the urgency of the environmental problems associated with deforestation, and especially the problem of global climate change, indicates the need for a stronger resolve.

3 *Issues for Further Investigation*

There are, without doubt, some considerable problems with the Security Council becoming involved in the resolution and management of the tension between environmental and developmental objectives. The end of the Cold War may mean that the power of the five Permanent Members to veto collective action on matters outside their direct interest is less important than was previously the case, especially in relation to the environmentally degrading activities of some developing countries. However, the presence of some of the world's major polluters among the permanent membership must stand as a potential challenge to the legitimacy of Council action on the environment. A similar challenge would, no doubt, be posed if French nuclear 'tests' in the South Pacific (or Chinese nuclear 'tests', for that matter) were raised with the Council: the Council will need to confine itself to activities which will not lead it into a credibility gap (and there is no guarantee that this will be possible).[313] A related matter concerns the

311 See, eg, Robert Fleagle, *Global Environmental Change: Interactions of Science, Policy and Politics in the United States* (1994) 13-35. Fleagle discusses the evidence concerning the effects of radiatively active gases on climate (ie, global warming), the effects of halocarbon gases on stratospheric ozone depletion, the increasing concentration of chemically active gases and particles in the atmosphere (which gives rise to 'acid rain').

312 See above, nn 286-93 and accompanying text discussing the development emphasis of the Amazon Co-operation Pact parties.

313 Murphy, above n 176, 246-69, discusses the question of 'legitimacy' of Council action in terms of its membership, the 'legality' of its decisions and the perception of its process according to general considerations of 'fairness'.

unrepresentative membership of the Council.[314] In terms of population and regional strategic importance, the absence of developing nations such as India, Indonesia, Nigeria and Brazil (let alone the reconstructed economic powers — Japan and Germany) from permanent membership of the Council is a significant deficit.[315] Without a major revision of membership to reflect the present North/South division in international relations, the Council remains susceptible to criticism for pursuing neocolonial interests.[316] The introduction of environmental interests to the Council's agenda, without an appropriately representative expansion in its membership, would increase the risk of this perception (and also increase the risk of neocolonial policies being realised).

The Security Council will also continue to confront the tension between effective action in protection of the environment and the observance of other fundamental international legal standards, such as the need to minimise the adverse consequences of the mandated activity for the populations of the subject territories.[317] This tension is, perhaps, just a reflection of the inherent problems in taking action to preserve or restore the 'international peace', while also giving effect to basic international obligations, including human rights norms, which are embodied in articles 2(4) (the general prohibition of the use of force for purposes inconsistent with the Charter) and Chapter VII of the UN Charter. The tension is mediated uneasily by article 2(7), which gives rise inevitably to questions concerning when intervention in an otherwise sovereign state is justified.[318] This argument, while not always valid,[319] nevertheless suggests that the Council should err on the side of caution in exercising its coercive powers.[320] Pragmatic considerations also suggest this conclusion: in environmental matters, as in matters concerning human rights, too many governments are implicated in arguable breaches of international law for the current international system to survive routine intervention by the Council.[321]

[314] Ibid 248-9.

[315] Trevor Findlay, 'Multilateral Conflict Prevention, Management and Resolution' in Stockholm International Peace Research Institute, *SIPRI Yearbook 1994* (1994) 13, 21-2; Anne-Marie Slaughter, 'The Liberal Agenda For Peace: International Relations Theory and the Future of the United Nations' (1994) 4 *Transnational Law and Contemporary Problems* 377, 414-15.

[316] Modesto Seara-Vazquez, 'The UN Security Council at Fifty: Midlife Crisis or Terminal Illness?' (1995) 1 *Global Governance* 285, 286-90; Jane Meyer, 'Collective Self-Defense and Regional Security: Necessary Exceptions to a Globalist Doctrine' (1993) 11 *Boston University International Law Journal* 391, 431; Branislav Gosovic, *The Quest for World Environmental Cooperation: The Case of the UN Global Environment Monitoring System* (1992) 258.

[317] Joy Fausey, 'Does the United Nations' Use of Collective Sanctions to Protect Human Rights Violate its Own Human Rights Standards?' (1994) 10 *Connecticut Journal of International Law* 193, 216. See also Tinker, above n 166, 794.

[318] See, eg, Anthony Carty, 'Intervention and the Limits of International Law' in Ian Forbes and Mark Hoffman (eds), *Political Theory, International Relations and the Ethics of Intervention* (1993) 32.

[319] See above, nn 184-6 and accompanying text.

[320] Glennon, above n 21, 72.

[321] Ibid 71.

V CONCLUSION

Lest there be any doubt, two points should be made absolutely clear. First, the best method of encouraging compliance with international environmental law will almost always be to offer incentives, rather than sanctions.[322] The potential role for the Security Council is, therefore, very much a residual one. Secondly, the Council has a broad range of powers short of authorising the use of force and it is to the exercise of these powers and to the Council's general standing as a symbol of international executive authority that the present argument has been primarily addressed.

This article has reviewed the effectiveness of the existing structure of international environmental law and some of the key alternative non-coercive strategies which have been proposed. I have argued that the potential to resolve major global environmental issues may be improved by placing such matters on the agenda of the Security Council. Such issues clearly represent severe threats to international peace and security and fall within the broader framework of security analysis that the Council seems to have adopted since the end of the Cold War. The effectiveness of the Council will be limited by a range of unavoidable factors, including the existence of the veto power and the need to ensure that the Council's response does not serve merely to exacerbate sensitive disputes. Despite these limitations, it has been argued that the Council could play an important role in the management of environmental change through the use of its Chapter VII powers, not least through the signals that Council involvement would give to the world community. The final problem may well prove to be as intractable as it has for other environmental strategies in the context of a consensus based system of world order: it may be that if the political will to involve the Council in environmental issues existed, it would no longer be necessary to do so.[323] What is certain, however, is that we will never know if we do not try.

[322] See Schachter, above n 61, 490.
[323] See Bilderbeek, above n 179, 137.