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Green Helmets: A Conceptual Framework for Security Council Authority in Environmental Emergencies

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"GREEN HELMETS": A CONCEPTUAL FRAMEWORK FOR SECURITY COUNCIL AUTHORITY IN ENVIRONMENTAL EMERGENCIES

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Although 1995 marks the fiftieth anniversary of the birth of the United Nations, the year also marks the fifth anniversary of a newly revitalized Security Council. In this period of five years, scholarly debate on the Security Council has shifted from what it might do if it could act to what substantive limits, if any, exist on the Security Council's authority to act under the Charter. The legitimacy of the Security Council's authority under the Charter arises both in its initial determination of when it can act and in its determination of the appropriate scope of its actions once it has involved itself in an international dispute. Given the wide ranging scope of situations that might fall within the undefined parameters of a "threat to the peace" under Chapter VII[1] and the even more discretionary language of Chapter VI,[2] it is not surprising that on this anniversary much of the focus for reform of the Council has involved the procedural checks on Security Council decisionmaking — specifically, membership in the Council, voting procedures, and the veto power.[3] Concerns about the legitimacy of Security Council action most often arise when it appears that its decisions are driven by the more powerful veto-holding states of the Security Council, particularly the United States, rather than reflecting a global consensus that Security Council action is necessary or advisable.[4] On the other hand, as Professor David Caron recently noted, there is no denying that the United States' resources are the linchpin to effective implementation of Security Council directives, at least with respect to collective actions.[5]

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1. U.N. CHARTER art. 39.

2. *Id.* art. 34.

3. *See, e.g.*, John M. Goshko, *U.N. Moves Toward Redesign of Security Council*, WASH. POST, Oct. 29, 1995, at A11.

4. *See* David D. Caron, *The Legitimacy of the Collective Authority of the Security Council*, 87 AM. J. INT'L L. 552, 565–66 (1992).

5. *Id.* at 563–65.

New models for membership and reform of the veto are not the only methodologies that can strengthen the perceived legitimacy of Security Council actions. If the overriding concern of the global community is that the Security Council is responsive to the concerns of a select group of states rather than that of the community, another avenue of reform would be to utilize the Security Council more effectively in addressing new *types* of concerns widely shared by the community. One such easily identifiable set of concerns revolves around the threat and effects of environmental disasters. These are concerns that are shared by developed and developing countries alike, although the sense of helplessness in responding adequately to an environmental disaster is perhaps more acutely felt in developing countries.[6]

In 1991, the United Nations Environmental Programme ("UNEP"), in response to mounting disquietude over environmental security, established the United Nations Center for Urgent Environmental Assistance ("UNCUEA") to assess and respond to man-made environmental emergencies in cooperation with other United Nations agencies.[7] In April 1993, the executive director of UNCUEA submitted a report summarizing and evaluating its activities and experiences.[8] On May 21, 1993, UNEP's Governing Council decided to extend the experimental period of UNCUEA until June 1994, during which time the Center was to identify specific needs of countries faced with different types of environmental emergencies, analyze the ability of the United Nations and other organizations to respond, review the major disasters of the last ten years to identify gaps in responses to them, and develop concrete proposals for an enhanced international response capacity focusing on the United Nations system in particular.[9] Following that decision, an advisory meeting of developed and developing countries was held in November 1993 to discuss the future role of the Center.[10] In the course of that meeting there was much discussion of a report based upon responses to a questionnaire that had been sent to all developing countries. The report concluded that many developing countries had no ability to respond to environmental emergencies. In fact, a routine chemical accident in a developed country could escalate to a major disaster in a country with-

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6. *See infra* text accompanying notes 10–15.

7. G.A. Res. 217, U.N. GAOR, 47th Sess., 79th plen. mtg., Agenda Item 77, U.N. Doc. A/RES/46/217 (1992).

8. 1993 U.N.Y.B. 812, U.N. Sales No. E.94.I.1.

9. *Id.*

10. *Advisory Meeting Discusses UN Role in Combatting Environmental Emergencies* HE/834, Nov. 24, 1993 at 1, *available online at* URL <gopher://gopher.undp.org:70/00/uncurr/press_releases/HE/93_11/834> [hereinafter *Environmental Emergencies*].

out the knowledge or equipment to deal with the situation.[11] The report noted anxiety that as industrialization increased throughout the developing world, so would the environmental risks, particularly the risk of chemical disasters. In response to the questionnaire, more than fifty countries said they needed the aid of the United Nations to respond to the growing number of chemical accidents that were polluting water, killing ecosystems, and endangering human health.[12] Most countries said they needed rapid access to information on the dangers of the chemicals to humans and the environment as well as procedures for containing and cleaning up chemical accidents.[13] The case studies and report noted that inappropriate action by poorly informed response teams could actually make matters worse than the original emergency.[14] Although help was available from countries on a bilateral basis, several countries indicated that they simply did not know what assistance was available or whom they should call.[15]

The report also referenced the findings of three independent consultant studies. These independent studies predicted that environmental emergencies were likely to increase in both frequency and magnitude in the developing world as industrialization and population increased.[16] The report determined that the ideal system to cope with accidents was for countries to be self-sufficient. Until that time, however, it emphasized that there was a serious need for practical support from the international community.[17] Alain Clerc, the Center's coordinator, contended that there was a fundamental need for developed countries to show solidarity with the developing world and help them to cope with the inevitable accidents.[18] The Center aimed to fill some of the gaps in communication by extending the twenty-four hour response "switchboard" at the Geneva-based Department of Humanitarian Affairs ("DHA") to allow developing countries to phone the United Nations directly for advice in responding to a chemical emergency.[19] The switchboard would be supplemented with a register of international expertise and specialist equipment from participating developed countries who were prepared to send their resources to a country facing an environmental disaster. The plans of

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11. *Id.*
12. *Id.* at 2.
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.* at 1.
17. *Id.* at 2.
18. *Id.*
19. *Id.*

UNCUEA called for training in chemical emergency management, the provision of manuals in a form suitable for initial response, and encouraging countries to help each other through bilateral agreements.[20] UNCUEA's Geneva-based secretariat would also draw on information coming from other UNEP activities, including the International Register of Potentially Toxic Chemicals ("IRPTC"), the secretariat to the Basel Convention on Transboundary Shipment of Toxic Waste, and programs of the International Program on Chemical Safety ("IPCS").[21] The report noted that there is no targeted United Nations capacity to respond to environmental emergencies on land, and that surely it is not necessary to wait for "another Bhopal" to help the countries who need it most.[22]

On December 21, 1993, on the recommendation of the Second Committee on economic and financial issues, the General Assembly adopted without a vote a resolution inviting governments, related organizations of the United Nations system, and other relevant entities to review their contribution to international cooperative efforts in environmental monitoring and to provide appropriate support for such activities.[23] Despite these calls for expanded United Nations involvement in responding to environmental emergencies, UNCUEA was ultimately dissolved in 1994 and its responsibilities were transferred to a joint UNEP and Department of Human Affairs project, denominated the Joint UNEP/DHA Environment Unit.[24] The first meeting of its Advisory Group on Environmental Emergencies was held in January 1995. A multinational team, organized under the Unit's auspices, assisted Russia in assessing the harm from the massive oil spill in the Republic of Komi.[25]

Momentum for the United Nations' involvement in responding to environmental emergencies is not limited to developing countries. In April 1992, in a follow-up conference to the 1992 United Nations Conference on the Environment and Development, Switzerland advocated the establishment of a "Green Cross" organization to provide assistance in environmental disasters in much the same way as the Red Cross cur-

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20. *Id.*

21. *Continued U.N. Emergency Response Role in Environment Disasters Backed at CONFAB*, Nov. 30, 1993, *available in* LEXIS, Envirn Library, Bnaied File.

22. *Environmental Emergencies*, *supra* note 10, at 3.

23. G.A. Res. 192, U.N. GAOR, 48th Sess., 86th plen. mtg., Agenda Item 99(a), at 2, U.N. Doc. A/RES/48/192 (1993).

24. On-Line Interview with Isabelle Prudon, United Nations Department of Humanitarian Affairs (Dec. 13, 1995) (on file with *Michigan Journal of International Law*).

25. *Id.*

rently does with humanitarian aid.[26] A French news report at the time, however, noted that the Swiss government seemed unlikely to offer the project much backing, and that third world governments might be reluctant to delegate such responsibility for environmental affairs to a developed western nation.[27] In May 1992, Germany and Switzerland (supported by thirteen other countries) proposed the creation of National Environmental Task Forces, called "Green Helmets," to respond to environmental emergencies. This proposal was made at a follow-up meeting of the fifty-two nation Conference on Security and Cooperation in Europe (CSCE) held in Helsinki. Under this proposal, the CSCE countries would set up national environmental task forces that would serve as the basis for coordinated international assistance within the framework of UNCUEA. The CSCE countries would also be obliged to give the Center information on potentially hazardous installations in their own territories. Supporters of the proposal included Bulgaria, Canada, Denmark, Spain, France, Greece, Liechtenstein, Luxembourg, Malta, Poland, Russia, Czechoslovakia, and Ukraine. The Netherlands and Norway also provided their support, but said that the forces should be given even more responsibilities and power than suggested in the proposal.[28]

In March 1989, representatives of twenty-four countries adopted the Hague Declaration.[29] While only evaluating two global threats — global warming and ozone depletion — the Hague Declaration nevertheless asserts that:

> [t]he right to live is the right from which all other rights stem. Guaranteeing this right is the paramount duty of those in charge of all States throughout the world. . . .
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> . . . .
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> Therefore we consider that, faced with a problem the solution to which has three salient features, namely that it is vital, urgent and global, we are in a situation that calls not only for implementation of existing principles but also for a new approach, through the development of new principles of international law including new

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26. *Swiss Environmentalists Would Like to See "Green Cross"*, Agence France Presse, Apr. 5, 1992, *available in* LEXIS, Nexis Library, AFP File.

27. *Id.*

28. *Green Helmets Proposed for Europe*, Agence France Presse, May 20, 1992, *available in* LEXIS, Nexis Library, AFP File.

29. The signatories to the Hague Declaration are the Federal Republic of Germany, the Ivory Coast, Australia, Egypt, Brazil, Spain, Canada, France, Hungary, India, Indonesia, Italy, Japan, Jordan, Kenya, Malta, Norway, New Zealand, Senegal, Sweden, Tunisia, Netherlands, Venezuela, and Zimbabwe. Hague Declaration on the Environment, Mar. 11, 1989, 28 I.L.M. 1308 (1989).

> and more effective decision-making and enforcement mechanisms.[30]

UNEP is hampered by a limited secretariat, a relatively small budget, a headquarters (in Nairobi) distant from most of the agencies it coordinates as well as the United Nations decisionmaking centers in New York and Geneva, and, most importantly for purposes of this analysis, no enforcement powers.[31] Despite the proliferation of multilateral treaties on the environment, there is no collective institutional mechanism to coerce or cajole compliance with the new norms established.

The Security Council has noted its probable jurisdiction and corrective powers over certain environmental conflicts. In a summit meeting of the Council on January 31, 1992, the Council's final declaration provided 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, humanitarian and *ecological* fields may become a threat to peace and security."[32] The analytical dilemma created in advocating an authoritative role for the Security Council in any substantive context other than military conflict is that military conflict, or the threat thereof, is the paradigm upon which the Security Council's authorization was predicated in the drafting of the Charter. Whatever might be gained in perceived legitimacy by having the Security Council activated in an area of universal concern might well be lost if that authority can only be sustained by forced interpretation of already expansive terms. Legitimacy is first and foremost dependent upon the legal predicate for Security Council responsiveness.

In a challenging piece on restructuring the international organizational framework to address international environmental problems, Paul Szasz wrote in 1992 that the argument for assigning to the Security Council those matters related to environmental management, particularly matters dealing with emergency situations or "otherwise serious situations," has two bases. First, critical environmental problems are "security" issues as much as war and peace. Second, the Council is unique in its power to compel states to comply with its decrees or suffer the consequences of sanctions.[33] Finding both premises unpersuasive, Szasz

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30. *Id.* at 1308–09.

31. *See generally* Paul C. Szasz, *Restructuring the International Organizational Framework*, *in* ENVIRONMENTAL CHANGE AND INTERNATIONAL LAW 340, 352 (Edith B. Weiss ed., 1992) [hereinafter ENVIRONMENTAL CHANGE]; Geoffrey Palmer, *New Ways to Make International Environmental Law*, 86 AM. J. INT'L L. 259, 261 (1992).

32. Szasz, *supra* note 31, at 360 n.60 (alteration in original).

33. *Id.* at 359.

first notes that the original meaning of the language of the Charter as to what constitutes a breach of peace or threat to peace does not easily lend itself to addressing environmental emergencies; and that the "classical rules of treaty interpretation require that in dealing with duties or burdens imposed on States Parties to a treaty a strict rather than a liberal construction be applied."[34] Second, he posits that the use of Chapter VII to deal with environmental concerns would be comparable to "using an inappropriate instrument to perform a potentially delicate operation — perhaps it can be pulled off successfully, but it certainly would not be either the surgeon's or the patient's choice."[35] He does, however, concede that utilization of the Security Council may be more practical than a treaty assigning true legislative powers to the United Nations or to a new international organization, or an amendment of the Charter to explicitly address environmental concerns.[36]

Despite the references to Chapter VII in this brief passage, Szasz's focus is on the potential of established United Nations organs to serve normative needs in environmental management. The argument for such legislative power under Article 25 and Chapter VII would be predicated on particular environmentally destructive practices constituting a threat to peace and the authority of the Security Council to forbid all states from engaging in that practice.[37] The "principal difficulty" in his opinion, however, is that the composition and voting system of the Council are not suited to environmental tasks:

> Even aside from the question whether [the Security Council] composition and . . . system are still appropriate even for the functions for which the Council was originally designed, it would seem absurd if at this time this completely different function (i.e. environmental protection) would be subjected to a system in which the five states who were the principal victors in the Second World War (but which do not include two of the most powerful economies, those of Germany and Japan) would have a veto power over environmental enforcement actions. It may indeed by sensible and even necessary that any such compulsory powers not be easily exercised and that therefore one or more states or groups of states should be able to prevent such exercise by a veto, but the states and the particular voting powers that one would assign them would presumably be quite different from those specified in Articles 23 and 27 of the Charter.

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34. *Id.* at 359–60.
35. *Id.* at 360.
36. *Id.*
37. *Id.* at 360 & n.62.

> Consequently, to the extent that a Charter amendment would be required to give the Security Council responsibilities in respect of the enforcement of environmental rules or the prevention of environmental violations, it would seem more sensible, if it is desired to vest such powers in a UN organ, to create a new principle organ for that purpose. . . .
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> On these several grounds, there is no reason to try to involve the Security Council either in the process of environmental legislation or even in considering and debating such issues. Although it is true that the Council enjoys possibly the highest visibility among UN organs, it would seem likely that instead of enhancing environmental issues with its prestige it would find its own role diminished by dealing with matters for which it is clearly unsuited.[38]

In a landmark article also published in 1992, Sir Geoffrey Palmer expressed skepticism about the normative authority of any existing international organization, as presently structured, to deal with environmental matters. He favors creation of a new United Nations organ, although he notes that the procedures for amending the Charter are not "easy" and are further hampered by the veto option.[39] Even in his more modest proposal to create a new specialized United Nations agency, he predicts that "[m]any nations, particularly the most powerful and certainly the United States, are likely to be opposed to creation of such an organization[,] . . . [given the apparent consensus] that the creation of new institutions should be avoided when possible."[40]

In assessing global expectations for the legitimacy of Security Council authority in environmental management, careful distinction should be made between the Security Council's putative authority to act in formulating norms and its authority to recommend or impose remedial or punitive measures on a specific party or parties. The global community's perception of the legitimacy of Security Council action in these formats would inevitably differ. The Security Council's agenda and discussions relative to avoiding or terminating military conflict are driven by specific, concrete events to which the Security Council responds. In devising environmental norms, however, the Security Council would be evaluating certain anti-environmental practices as a general matter and establishing a norm that either recommends that such practices be discontinued under Chapter VI or prohibits the practices under

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38. Szasz, *supra* note 31, at 361.
39. Palmer, *supra* note 31, at 280.
40. *Id.* at 282.

Chapter VII.[41] The difference between the Security Council's normative functioning in environmental management and its more traditional functioning with respect to international peace and security under Chapter VI or Chapter VII would be less an issue of practice and more one of perceived legitimacy. Discussion of a matter in the Security Council may be limited to a single concrete dispute yet result in a general resolution without reference to the specifics of the dispute or to any specific parties. In much the same way, evaluation of the permissibility of environmentally destructive practices would inevitably involve discussion of specific factual circumstances and situations although ultimately resulting in a general normative resolution. The most important question is the willingness of the global community to accept the Security Council's claim to legislative authority, regardless of the substantive context (environmental or otherwise) in which that authority is asserted.

Legitimization of Security Council authority in environmental management can and should begin with the relatively modest, but compelling, proposal that environmental emergencies be absorbed into its sphere of activity. The Security Council was originally devised and organized to function continuously and to respond to international emergencies (although, concededly, with respect to military conflict). Defining what constitutes an "emergency" from an environmental perspective is ordinarily difficult. When is a disaster imminent? What is the interplay between imminency and scientific certainty or lack thereof? In the circumambiency of reformulating the international organizational framework to acknowledge the Security Council's emergency authority, however, an environmental emergency can be presumed to be any action which creates or threatens significant transboundary environmental damage or loss of a vital global resource which cannot be adequately addressed to ensure a safe and healthful environment by any other organization due to time or authority constraints. In this respect, the precedent set by Security Council action in just the past three years has dramatically altered the legal foundations for arguing that the Security Council has legitimate remedial and punitive authority in environmental emergencies. One need look no further than the 1990 Iraqi invasion of Kuwait and the Kuwaiti oil fires to conclude that environmental destruction outside the permissible bounds of the laws of warfare constitutes an act of aggression, breach of peace, or threat to international peace and security.[42]

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41. *See* Szasz, *supra* note 31, at 360 n.62.

42. *See* S.C. Res. 687, U.N. SCOR, 45th Sess., 2981st mtg., U.N. Doc. S/RES/687 (1991). *See also* Linda A. Malone, *Discussion in the Security Council on Environmental*

In the absence of real or threatened military conflict, can environmental destruction be sufficient to trigger the Council's Chapter VII powers? Is a threat to ecological security a threat to international peace and security? As noted earlier, the Security Council has declared that "[t]he absence of war and military conflicts amongst states does not in itself ensure international peace and security[,] . . . non-military sources of instability in the economic, humanitarian and *ecological* fields may become a threat to peace and security."[43] Alexandre Timoshenko makes a compelling argument for recognition of ecological security as a legal principle and the need for relevant improvements in the legal and institutional order to address such concerns, attributing the concept of ecological security to leaders and diplomats from the former Soviet Union and Eastern European countries.[44]

According to Timoshenko, the concept of ecological security provides a needed methodology for environmental protection in several respects:

> Firstly, ecological security makes environmental protection a problem of human survival, reflecting the seriousness of existing and future ecological threats. It gives the problem the highest priority traditionally attributed to security matters. It introduces a new basis for resolving environmental problems — the "forecast-and-prevent" model — instead of the usual "react-and-correct" model. It creates an opportunity to redistribute resources allocated for security in favour of environmental tasks, thus it may help to solve the problem of reconverting the military sector of national economies.
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> Secondly, ecological security envisages that the obligation to create the relevant legal and managerial regime will be placed upon the international community as a whole, which coincides with such general trends in international law as collective responsibilities and obligations *erga omnes*.
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> Thirdly, being a component of the comprehensive security system, ecological security functions in conjunction with other elements (military, political, economic, and humanitarian). This not only creates a needed correlation between ecological security and other global problems, but also conditions the achievement of a synergistic effect.

Intervention in Ukraine, 27 LOY. L.A. L. REV. 893 (1994); Margaret T. Okorodudu-Fubara, *Oil in the Persian Gulf War: Legal Appraisal of an Environmental Warfare*, 23 ST. MARY'S L.J. 123, 216–17 (1991).

43. *See supra* note 32 and accompanying text.

44. Alexandre S. Timoshenko, *Ecological Security: Response to Global Challenges*, *in* ENVIRONMENTAL CHANGE, *supra* note 31, at 413.

> And lastly, the security approach in the environmental field serves to integrate related concerns under a common rubric. Security has often served as a strong motivation for integration. The universal collective security system under the United Nations Charter and regional security systems like NATO or the Warsaw Treaty illustrate this. This integrative force greatly enhances the efficiency of environmental protection. This has been clearly demonstrated by the European Communities.[45]

However appealing this equation of ecological security and military security might be for purposes of Chapter VII, parity of these concerns could lead to expanded assertions of state authority to engage in unilateral or collective measures. Otherwise illegitimate intervention and use of armed force could be cloaked as ecological self-help or self-defense. This would undermine the Charter's restrictive authorization of armed force by states in Article 51.[46] Although recognition of ecological security under Chapter VII does not necessarily open a Pandora's box, the danger of abuse merits consideration of other analytical frameworks.

When environmental degradation seems to threaten international conflict between states or takes place in an ongoing military conflict, there would be no need to resort to a separate notion of ecological security in order to trigger authority in the Security Council under Chapter VII. Furthermore, Article V of the 1977 Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques directs states to file a "complaint" with the Security Council if there is reason to believe the treaty is being violated.[47] States are additionally required to cooperate in any investigation

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45. *Id.* at 432–33. From a political perspective, Timoshenko notes that:

> ecological security can be considered in three dimensions. The first derives from the environmental threat to political and economic stability. The second is based on the assumption that the inter-state disputes, arising from transboundary pollution or abuse of one's right to use shared natural resources, may develop into military conflicts. The third originates from the supposition that overreaching ecological imbalances may cause severe disruption of major natural processes that are indispensible to human existence on the planet.
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> The first two dimensions are primarily of a national and regional scale. The last and the most serious one has global implications. The best available example of the third dimension of ecological security is global climate change.

Id. at 422–23.

46. Nico Schrijver, *International Organization for Environmental Security*, 20 BULL. PEACE PROPOSALS 115, 116 (1989).

47. Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, May 18, 1977, art. V, ¶ 3, 31 U.S.T. 333, 16 I.L.M. 88.

the Security Council initiates,[48] and are presumably subject to the enforcement powers of the Council under Chapter VII for non-compliance.

In the milieu of deliberate environmental destruction or ecocide, the General Assembly has a pivotal role to play. The definition of "aggression" adopted by the United Nations General Assembly in 1974 is confined to the use of military force.[49] Although ecocide may be deemed a threat to peace or breach of peace, such intentional and hostile manipulation of the environment should be added to the list of acts of aggression found in Article 3.

Absent real or potential military conflict, there are many conceivable scenarios in which the state of origin of an environmental disaster might be unwilling to cooperate with the Security Council, thereby exacerbating the transboundary effects of an environmental disaster and jeopardizing the lives of its own populace by refusing to cooperate with the international community in remedial action. In such circumstances, the traditional notion of a threat to international peace and security would not justify invocation of Chapter VII in the absence of an ongoing conflict between states or a realistic threat of such conflict. The concept of ecological security is more compelling in these circumstances because the traditional analysis is deficient. The full implication of recognizing ecological security as a basis for Security Council action merits further consideration of alternative justifications. Once again, recent exercises of the Security Council's Chapter VII powers have resulted in more expansive interpretation of the concept of a "threat to the peace" than previously was the case.

Security Council enforcement action with respect to preservation of human rights and relief efforts is analogous to Security Council enforcement action to protect individuals from environmental catastrophes. For example, the humanitarian mission to Somalia,[50] the economic sanctions and authorization of a multinational force for Haiti,[51] the placement of

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48. *Id.* ¶ 4.

49. G.A. Res. 3314, U.N. GAOR, 29th Sess., 2319th plen. mtg., U.N. Doc. A/RES/3314 (1975). The General Assembly addresses environmental management in its overburdened Second Committee on economic and financial issues. It has issued a resolution giving specific programmatic and administrative guidance to UNEP in preparation for environmental emergencies. G.A. Res. 217, *supra* note 7. Of course, it also convened the 1972 Stockholm Conference on the Human Environment from which UNEP originated and the 1992 Rio United Nations Conference on Environment and Development (UNCED).

50. S.C. Res. 794, U.N. SCOR, 47th Sess., 314th mtg. at 1, U.N. Doc. S/RES/794 (1992).

51. S.C. Res. 841, U.N. SCOR, 47th Sess., 328th mtg. at 1, U.N. Doc. S/RES/841 (1993).

relief operations in Iraqi territory for the Kurdish population,[52] and the establishment of the international criminal tribunals for Rwanda[53] and the former Yugoslavia[54] are examples of humanitarian intervention by the Security Council in order to remedy gross and systematic deprivation of human rights. Gross and systematic deprivation of human rights is no more within the original intent of the term "threat to the peace" than environmental preservation. Although each of these precedents (with the notable exception of Haiti) can be legitimized by pointing to the background conflicts present, such a position would ignore the humanitarian justifications given in the relevant resolutions for the Security Council's actions. These examples indicate that the Security Council members, and the global community, are at least somewhat receptive to a policy-oriented, constitutive approach to interpreting the Charter even when such interpretation expands the obligations and duties of member states and undeniably goes beyond the original intent of the Charter. At the same time, the financial difficulties of the United Nations appear to have increased resistance to creating new organs. These practical considerations make the prospects dim for creation of new organs to protect the environment, intensifying the need for the Security Council to take an expansive and active role within the powers it possesses.

Any analogy to the Security Council's exercise of humanitarian intervention under Chapter VII is complicated by the fact that, under international law, there has yet to be clear and unequivocal recognition of a right to a safe and healthful environment.[55] This lack of recognition

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52. S.C. Res. 688, U.N. SCOR, 45th Sess., 2982d mtg. at 2, U.N. Doc. S/RES/688 (1991), *reprinted in* 30 I.L.M. 858 (1991).

53. S.C. Res. 995, U.N. SCOR, 49th Sess., 3453d mtg. at 2, U.N. Doc. S/RES/995 (1994).

54. S.C. Res. 827, U.N. SCOR, 47th Sess., 3217th mtg. at ¶¶ 1–2, U.N. Doc. S/RES/827 (1993).

55. *See* W. Paul Gormley, HUMAN RIGHTS AND THE ENVIRONMENT: THE NEED FOR INTERNATIONAL COOPERATION (1976); Alexandre Kiss & Dinah Shelton, INTERNATIONAL ENVIRONMENTAL LAW (1991); Gudmundur Alfredson & Alexander Ovsiouk, *Human Rights and the Environment*, 60 NORD. J. INT'L L. 19 (1991); Noralee Gibson, *The Right to a Clean Environment*, 54 SASK. L. REV. 5 (1990); W. Paul Gormley, *The Legal Obligation of the International Community to Guarantee a Pure and Decent Environment: The Expansion of Human Rights Norms*, 3 GEO. INT'L ENVTL. L. REV. 85 (1990); W. Paul Gormley, *The Right to a Safe and Decent Environment*, 28 INDIAN J. INT'L L. 1 (1988); W. Paul Gormley, *The Right of Individuals to be Guaranteed a Pure, Clean and Decent Environment: Future Programs of the Council of Europe*, 1 LEGAL ISSUES OF EUR. INTEGRATION 23 (1975); Gunther Handl, *Human Rights and Protection of the Environment: A Mildly "Revisionist" View*, *in* HUMAN RIGHTS, SUSTAINABLE DEVELOPMENT AND THE ENVIRONMENT 117 (A. Cancado Trindade ed., 1992); Iveta Hodkova, *Is There a Right to a Healthy Environment in the International Legal Order?*, 7 CONN. J. INT'L L. 65 (1991); R.S. Pathak, *The Human Rights*

is particularly troublesome in that whatever authority the Security Council might have under Chapter VII, the scope of its activities is confined by the stated purposes of the United Nations in Article 1.[56] Article 1 explicitly mentions human rights as one of the fundamental purposes of the United Nations, coextensive with the maintenance of international peace and security. Absent a threat to military peace and security or recognition of the concept of ecological security, legitimacy of any Security Council measures to protect the environment on humanitarian grounds will be attenuated so long as there is no explicit and clear recognition of a fundamental right to a safe and healthful environment. It is unfortunate that UNCED did not take this critical step forward.[57] Indeed, the Rio Declaration's repeated proclamation of the sovereign right of a state to exploit its own resources is less supportive of a correlation between environmental preservation and human rights than the earlier Stockholm Declaration.[58]

The inextricability of environmental preservation and human rights, as well as the need for Security Council involvement in environmental management, is well illustrated by the controversy over the execution of environmental activists in Nigeria. As this article was going to press, Nigeria's military government received widespread censure from the global community for hanging nine persons, including the well-known

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System As a Conceptual Framework for Environmental Law, *in* ENVIRONMENTAL CHANGE AND INTERNATIONAL LAW: NEW CHALLENGES AND DIMENSIONS 205 (Edith B. Weiss ed., 1992); Dinah Shelton, *Human Rights, Environmental Rights, and the Right to Environment*, 28 STAN. J. INT'L L. 103 (1991); Dinah Shelton, *The Right to Environment*, *in* THE FUTURE OF HUMAN RIGHTS PROTECTION IN A CHANGING WORLD: FIFTY YEARS SINCE THE FOUR FREEDOMS ADDRESS, ESSAYS IN HONOR OF TORKEL OPSAHL 197 (Asbjorn Eide & Jan Helgesen eds., 1991); Heinhard Steiger et al., *The Fundamental Right to a Decent Environment*, *in* TRENDS IN ENVIRONMENTAL POLICY AND LAW 1 (Michael Bothe ed., 1980); Melissa Thorme, *Establishing Environment as a Human Right*, 19 DENV. J. INT'L L. & POL'Y 301 (1991); Henn-Juri Uibopuu, *The Internationally Guaranteed Right of an Individual to a Clean Environment*, *in* HUMAN RIGHTS IN THE WORLD COMMUNITY: ISSUES AND ACTION 151 (Richard P. Claude & Burns H. Weston eds., 1989); David A. Wirth, *The Rio Declaration on Environment and Development: Two Steps Forward and One Back, or Vice Versa?*, 29 GA. L. REV. 599 (1995); Jennifer A. Downs, Note, *A Healthy and Ecologically Balanced Environment: An Argument for a Third Generation Right*, 3 DUKE J. COMP. & INT'L L. 351 (1993); James T. McClymonds, Note, *The Human Right to a Healthy Environment: An International Legal Perspective*, 37 N.Y.L. SCH. L. REV. 583 (1992); *cf. World Charter for Nature*, U.N. GAOR, 37th Sess., Agenda Item 23, U.N. Doc. A/37/L.4 (1982); *World Charter for Nature Addendum*, U.N. GAOR, 37th Sess., Agenda Item 21, U.N. Doc. A/37/L.4/Add.1 (1982); *see generally* Andrzej Makarewicz, *La protection internationale du droit à l'environnement*, ENVIRONNEMENT ET DROITS DE L'HOMME 77, 79–82 (Pascale Kromarek ed., 1987).

56. U.N. CHARTER art. 1.

57. *See generally* Dinah Shelton, *What Happened to Human Rights at Rio?*, 3 Y.B. INT'L ENVTL. L. 75 (1992); Wirth, *supra* note 55.

58. Wirth, *supra* note 55.

playwright Ken Saro-Wiwa, president of a movement for the survival of the Ogono people.[59] Saro-Wiwa was charged with involvement in the killings of four pro-government traditional chiefs during disturbances against the Anglo-Dutch oil giant Royal Dutch/Shell in May 1994. The Ogonos, an ethnic minority concentrated in southeastern Nigeria, accused the government of allowing the oil-rich communities, farms, and fisheries to be destroyed due to lack of environmental safeguards. Saro-Wiwa stated that "[w]hat Shell has done is to wage ecological war against the Ogoni people."[60] Five days after the executions, the Royal Dutch/Shell group announced that it intended to invest $3.5 billion in a natural gas plant in Nigeria.[61] On December 14, 1995, the General Assembly's Social, Humanitarian and Cultural committee, by a vote of 98 to 12 with 42 abstentions, condemned Nigeria's "arbitrary" execution of the nine activists.[62] The United States and European Union introduced the resolution with nearly sixty additional sponsors.[63] Voting against the resolution were China, which viewed the resolution as illegal interference in the domestic affairs of Nigeria under the guise of human rights, and a number of African countries.[64] At that time, imposition of economic sanctions by the Security Council appeared to be blocked by China's veto power.[65] Unilaterally, the United States banned all military sales to Nigeria, extended a ban on U.S. visas to all members of the military and supporting civilians, and restricted Nigerian United Nations delegates to a twenty-five mile radius of Manhattan.[66] The United States refrained from imposing a unilateral ban on imports of Nigerian crude oil, presumably because the effects would be felt by the population and not the military leaders.[67]

If economic sanctions against Nigeria were placed on the Security Council's agenda, what would constitute the threat to peace? The politically motivated execution of nine individuals, although a denial of

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59. Stephen Buckley, *Nigeria Hangs Playwright, Eight Activists*, WASH. POST, Nov. 11, 1995, at A1.

60. *Id.* at A26.

61. Daniel Southerland, *Shell to Invest In New Nigeria Gas Venture*, WASH. POST, Nov. 16, 1995, at A39.

62. John M. Goshko, *Nigeria Draws U.N. Censure For Executions*, WASH. POST, Dec. 15, 1995, at A30.

63. *Id.*

64. *Id.*

65. *Id.*

66. Thomas W. Lippman, *U.S. Eschews Tough Measures In Wake of Nigeria Hangings*, WASH. POST, Nov. 22, 1995, at A2.

67. *Nations Rule Out Oil Sanctions Against Nigeria*, WASH. POST, Nov. 13, 1995, at A17.

human rights, would not be equivalent to the gross and systematic deprivation of human rights which have been the grounds for humanitarian intervention by the Security Council in the past. If the predicate for economic sanctions is the underlying conflict between the Ogonos and the Nigerian government, that conflict is an "ecological war" as described by Saro-Wiwa. Of course, nothing would preclude the Security Council from characterizing the threat to peace more cautiously as the gross and systematic deprivation of the political rights of the Ogonos in general, just as the undeniable human rights motivation behind sanctions against Southern Rhodesia in 1965 was initially cloaked in the more acceptable justification of potential military conflict. Nevertheless, the Nigerian incident and the Security Council's response (or non-response for that matter) demonstrates the inevitability of environmental disputes being thrust into the Council's province.

The stumbling block to Security Council responsiveness to the Nigerian situation was the objection of the People's Republic of China that humanitarian concerns of any kind would be used to justify Security Council authority. To return to Paul Szasz's comments[68] on the inappropriateness of environmental tasks for the Security Council, the veto power and, more broadly, the composition of the Council are problems which are superimposed on the entire range of issues which might fall within the Council's jurisdiction. To rework his analogy, the problem is not the inappropriateness of the instruments for the operation but the choice of doctors who decide on the patient's course of treatment. In an emergency situation, however, the patient cannot simply wait for the ideal decisionmakers to be assembled and authority to be distributed accordingly. As necessary and preferable as it might have been to have an international criminal court or explicit authorization of humanitarian intervention in Chapter VII, it was necessary for the Security Council to establish *ad hoc* tribunals in Rwanda and the former Yugoslavia and to act in those situations, as well as in Haiti, Somalia, and Iraq. China's restraint in the use of the veto in these precedents provides at least a glimmer of hope for the effectiveness of the Council in addressing environmental emergencies.

Assuming that the Council is authorized to respond to environmental emergencies, what form might the response take? With emergencies, corrective action could be either remedial (as in requiring Iraq to compensate for environmental damage) or punitive (as in imposing economic sanctions on Nigeria). Remedial measures would be those designed to

68. *See supra* note 38.

rectify the effects of a single incident or discontinue a particular practice while punitive measures would be designed to compel discontinuance of environmentally destructive behavior.

For punitive measures, economic sanctions under Article 41[69] would be a likely response to environmental transgressions. Collective imposition of economic sanctions through the Security Council would obviate many of the practical and legal difficulties with the unilateral imposition of trade sanctions. Briefly, unilateral imposition of economic sanctions is permissible, if not prohibited, by the 1947 GATT and Uruguay Round agreements which encompasses 125 countries (excluding, notably, the former Soviet Union and most of the Eastern bloc countries, China and Taiwan). Under the Uruguay Round agreements, environmental measures that are service and product-related are covered by the sanitary and phytosanitary regulations ("SPS Agreement"). In case of a violation of a relevant agreement, objecting states must resort to the Dispute Settlement Understanding ("DSU") procedures of the World Trade Organization ("WTO") for imposition of economic sanctions. This dispute resolution system involves, progressively, direct bilateral negotiation, conciliation, and finally a WTO panel determination with ultimate recourse to the entire WTO on the panel determination. If a state does not comply with an upheld panel determination that invalidated an economic sanction, the restricted state and other parties to the dispute are authorized to retaliate proportionately with trade sanctions. This whole system, from the first bilateral negotiation to a final WTO determination, may take twelve to eighteen months.[70]

As widespread as participation in GATT and the Uruguay Round agreements is, its membership is not as inclusive as the membership in the United Nations, particularly given the notable exceptions mentioned above. Moreover, as expedited as the evaluative process now is under the Uruguay Round agreements, the process still takes too long to correct an environmental emergency that threatens significant and imminent environmental disaster or military conflict. Finally, the procedures only apply to products and, to a much lesser extent, service-related environmental disputes — it does not encompass a wide range of environmental disputes such as transboundary pollution, destruction of or disputes over allocation of a vital environmental resource, or loss of biological diversity. States would still retain the option of unilateral

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69. U.N. CHARTER art. 41.

70. *See generally* Norio Komuro, *WTO Dispute Settlement Mechanism: Coverage and Procedures of the WTO Understanding*, 29 J. WORLD TRADE 5 (1995).

imposition of trade sanctions in accordance with their treaty obligations even if the Security Council did not decide to impose sanctions.

The availability of economic sanctions through the Security Council would be a particularly effective remedy for environmental delinquencies. Whatever effectiveness economic sanctions have in avoiding or terminating military conflict or in remedying human rights violations,[71] economic sanctions are potentially more effective as a deterrent or sanction in the environmental context (at least those that do not themselves involve potential or ongoing military conflict). Military conflict inevitably implicates security interests that defy economic quantification and which continue unaffected by economic deprivation. Economic sanctions for human rights violations often harm only those whose rights they are meant to protect while leaving the offending power structure unchanged. National productivity of any kind at the expense of the environment, however, can be more easily translated into economic terms. Consequently, it is easier to tailor appropriate economic sanctions to deter or to punish the excessive or hazardous exploitation of resources. Although some environmental delinquencies will implicate vital security concerns even in the absence of real or potential military conflict (hazardous plutonium-producing nuclear reactors, for example), a wide range of environmental problems would fall outside of these more troublesome parameters. Moreover, this argument is not meant to suggest that economic sanctions for environmental delinquencies are inappropriate or unworkable in the context of real or anticipated military conflict or when concrete national security concerns are implicated. It is meant only to acknowledge that in such circumstances concerns about the effectiveness of economic sanctions are the same as in a non-environmental context.

Remedial measures by the Security Council could range from recommending that member states provide assistance to alleviate the emergency to requiring the state of origin to monitor, assess, report on, and/or redress the environmental damage through restoration of resources or financial compensation.[72] Although at first glance it might seem unlikely that the use of force under Article 42 would be an appropriate response, there are conceivable scenarios, aside from environmental destruction threatening military conflict or in ongoing military conflict,

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71. Lori F. Damrosch, *Recent Security Council Actions Concerning Internal Conflicts: Economic Sanctions*, ASIL INSIGHT (Am. Soc'y of Int'l L., Washington, D.C.) Jan.–Feb. 1994.

72. For a description of United Nations monitoring and informational activities in environmental emergencies, see *infra* note 79.

in which the use of force might become necessary.[73] Drawing from the *Certain Expenses* case,[74] enforcement action under Chapter VII is characterized by lack of consent. Placement of United Nations or United Nations-authorized personnel — military or technical — in a state without its consent would arguably constitute enforcement action under Chapter VII. It has also been suggested that the Security Council could create subsidiary organs under Chapter VII and Article 29[75] of the Charter to deal with specific disputes, such as global warming,[76] although this methodology is more useful for norm-creating and adjudicatory functions than for responding to emergency situations.[77]

In the event of an environmental disaster in which the victim state or states requests the assistance of the Security Council, the language of Chapter VI ("any dispute, or any situation which might lead to international friction or give rise to a dispute")[78] is even broader and more anticipatory than the term "threat to the peace" under Chapter VII. The Security Council has well established procedures for emergency sessions and in such circumstances could expeditiously recommend to member states provision of emergency assistance. The Security Council could also act as a clearinghouse for such emergency assistance, or designate another organ of the United Nations to supervise in an ongoing capacity

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73. For one such scenario, see Malone, *supra* note 42 (describing investigation by IAEA experts of the conditions at Chernobyl).

74. Certain Expenses of the United Nations, 1962 I.C.J. 150, 164 (July 20).

75. U.N. CHARTER art. 29.

76. Jose L. Fernandez, *Global Warming Legislation: Putting the Carbon Genie Back In the Bottle*, 42 SYRACUSE L. REV. 1095, 1153–54 (1991).

77. The International Court of Justice ("ICJ") is competent to adjudicate all international law disputes, including environmental disputes. The ICJ also has the authority to establish special chambers with specific expertise under Article 26(1). Advisory opinions may also be requested from the ICJ by the General Assembly and Security Council, as well as other duly authorized United Nations organs and agencies. U.N. CHARTER arts. 65, 96. The principal impediments, however, to utilization of the ICJ to resolve environmental disputes, are the difficulty in obtaining jurisdiction over state parties and the time-consuming process of adjudication. *See* Charles E. Di Leva, *Trends in International Environmental Law: A Field With Increasing Influence*, 21 ENVTL. L. REP. 10076, 10078 (1991). It has been suggested that a special environmental court be established by treaty or by the General Assembly. *See id.* at 10081–82. Although a number of ICJ decisions have been influential in the development of international environmental law, the Court now has the first truly environmental case to come before it involving Hungary and Slovakia.

78. U.N. CHARTER art. 34. Consensual utilization of the Security Council for peaceful settlement of environmental disputes under Chapter VI is consistent with the code of guiding principles for peaceful settlement of disputes over shared natural resources adopted by the UNEP Governing Council and the General Assembly. G.A. Res. 186, U.N. GAOR, 34th Sess., Supp. No. 46, at 128, U.N. Doc. A/RES/34/186 (1979); *Draft Principles of Conduct in the Field of the Environment for the Guidance of States in the Conservation and Harmonious Utilization of Natural Resources Shared by Two or More States: Report of the Intergovernmental Working Group of Experts*, U.N. Environment Programme, 6th Sess., Provisional Agenda Item 11, Annex at 13, U.N. Doc. No. UNEP/GC.6/17 (1978).

and coordinate the assistance provided by member states.[79] The recent proposal to establish a rapid deployment force under Article 40[80] could also be utilized as a model for a team of environmental disaster experts "on call" to the Security Council to assist in the interim period during which member states are organizing their own assistance efforts. The creation of such a team would be considerably less expensive than the creation of a new, separate organ.

One limitation that applies to responsive measures under Chapter VI but does not apply to Chapter VII "enforcement measures" is Article 2(7)'s prohibition on intervention in states' domestic jurisdiction.[81] If a state consents to the measures of the Security Council under Chapter VI, then there is no problem of "intervention" under Article 2(7). If, however, the state in which the environmental problem originates is uncooperative, the Security Council, instead of resorting to Chapter VII, might choose to issue precautionary and ameliorative recommendations for emergency response action applicable only in the territory of consenting states, but which could nevertheless be interpreted by the state of origin as "intervention" in its domestic jurisdiction. For example, routine monitoring or exchange of information on the transboundary effects of an environmental disaster, if taken pursuant to a Security Council recommendation that there be such collection and exchange of information, might be objectionable to the state of origin. In this regard, it is relevant to note that Russian counter-intelligence agents recently accused a

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79. With respect to monitoring and information systems, UNEP, pursuant to its Earthwatch Programme, has established the Global Environmental Monitoring System ("GEMS") in which four specialized agencies, the International Union for the Conservation of Nature and Natural Resources ("IUCN"), and over 140 states participate. UNEP is also responsible for INFOTERRA, an international clearinghouse for exchange of environmental information, the International Register of Potentially Toxic Chemicals ("IRPTC"), and the International Programme on Chemical Safety ("IPCS") in conjunction with the International Labor Organization ("ILO") and the World Health Organization ("WHO"). *See* Szasz, *supra* note 31, at 343.

80. Boutros Boutros-Ghali, *An Agenda for Peace, Preventive Diplomacy, Peacemaking and Peace-keeping*, U.N. GAOR, 47th Sess., Agenda Item 10, ¶ 44, U.N. Doc. A/47/277 (1992); John H. Goshko, *Boutros-Ghali Seeks Standby Force to Prevent Massacre in Burundi*, WASH. POST, Feb. 17, 1996, at A22; *see generally* Rosalyn Higgins, *Peace and Security: Achievements and Failures*, 6 EUR. J. INT'L L. 445, 451 (1995); Andrew S. Miller, *Universal Soldiers: U.N. Standing Armies and the Legal Alternatives*, 81 GEO. L.J. 773 (1993).

81. Article 2(7) provides:

> Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

U.N. CHARTER art. 2, ¶ 7.

"[w]estern ecological organization of divulging military secrets and . . . suggested that foreign environmental groups are fronts for espionage."[82]

Environmental disasters with transboundary effects, loss of a vital global resource, or actions in violation of international environmental law can no longer be regarded as matters of "domestic" jurisdiction. An interpretation of "domestic" jurisdiction that excludes environmental disasters with international ramifications is as consistent as the current widespread recognition that "domestic" jurisdiction does not encompass the large scale deprivation of basic human rights.[83] Veto-holding states could block any unwelcome intrusion into what they perceive as their domestic concern. Although other countries would view this power as a drawback to recognizing Security Council competence in environmental emergencies (and rightly so), developing countries in particular could benefit from, rather than be disadvantaged by, Security Council assistance, as the UNCUEA report indicates.[84] Moreover, intervention in a truly domestic matter would in all likelihood fail to receive the required nine votes given the traditional geographical distribution of membership, regardless of whether the Security Council was acting pursuant to Chapter VI or Chapter VII. It should also be noted that the Article 2(7) issue would not arise with respect to areas outside of any state's territory, for example, on the high seas,[85] and, though less clear, in Antarctica.

In the absence of collective United Nations machinery, the opportunity for states to resort to self-help in an abusive and unprincipled way continues. Few authorities question that environmental issues and allocation of scarce natural resources will be a predominant issue on the

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82. Lee Hockstader, *Ecologists Accused of Espionage*, WASH. POST, Oct. 22, 1995, at A26.

83. *See supra* text accompanying notes 50–54.

84. *See supra* text accompanying notes 10–22.

85. On the high seas, the Convention Relating to Intervention on the High Seas in Case of Oil Pollution Casualties and its 1973 Protocol Relating to Pollution by Substances Other Than Oil already authorize states to take necessary measures to protect themselves from grave and imminent danger resulting from maritime casualties. Nov. 29, 1969, 26 U.S.T. 765, 970 U.N.T.S. 212; Nov. 2, 1973, 34 U.S.T. 3407, 13 I.L.M. 605 (1974). Generally acknowledged as reflecting custom, this right of intervention could be the legal foundation for a Security Council recommendation that states exercise the right individually or collectively. The Security Council's authority in dealing with environmental emergencies on the high seas would enhance, not detract from, the new organizational framework for peaceful resolution of certain specified disputes under the 1982 Convention on the Law of the Sea which, as noted earlier with the ICJ, *see supra* note 77, is dependent upon the cooperation of the parties involved and inevitably time-consuming in its process. Moreover, the 1982 Convention lends support to the Security Council's less intrusive utilization of its Chapter VI powers by directing all states in Article 279 to seek peaceful resolution of disputes pursuant to Charter Articles 2(3) and 33(1). By offering the ICJ as one of the four fora for a binding resolution of disputes, the Convention also opens up the possibility of Security Council enforcement of ICJ decisions under Chapter VII, as authorized in Article 94(2) of the Charter.

international agenda for years to come. Unfortunately, as the report from UNCUEA indicates, the threat of future Chernobyls and Bhopals is increasing rather than lessening. However desirable it might be to create a new international organization to deal with environmental management, the likelihood of such an organ at a time of severe budgetary and bureaucratic crisis within the United Nations seems highly unlikely. Whatever potential problems there might be for the Security Council as a norm-creating entity in environmental management, a critical first step in effective environmental regulation is that serious consideration be given to the Security Council as an organ for addressing environmental disasters. The revitalization of the Security Council engenders hope that the international community is sufficiently mature to accept the Council's expansion into environmental management[86] — despite the continuing and pervasive problems with the veto, the Council's membership, and fiscal constraints.

86. *Cf.*, Palmer, *supra* note 31, at 260 ("The Charter itself provides no environmental organ, an omission that would most certainly be rectified if it were being drafted today.").