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# Enforcement and the Success of International Environmental Law

MARY ELLEN O'CONNELL\*

*Professor O'Connell discusses the traditional methods used for international law "enforcement," and she argues that international law is generally obeyed. Its enforcement is based primarily on compliance, not enforcement. Accordingly, the author argues against using international enforcement mechanisms to enforce international environmental law. Instead, she posits that domestic courts should be used for international environmental law enforcement; however, certain obstacles, such as sovereign immunity, the doctrine of standing, and the principle of forum non conveniens, must be overcome. Professor O'Connell argues that it may be possible to overcome many of these court-made obstacles to enforcing international law through domestic courts. She notes that, to this end, progress has been made in the area of human rights, especially with respect to war crimes. The author concludes by asserting that, because domestic courts have control over persons and assets, the need for "borrowing" the forum of domestic courts will increase as environmental rules become more directed at those individuals.*

A recent article on international environmental law stated: "There is a flurry of international environmental lawmaking efforts already underway. If these laws are to be successful, however, enforcement mechanisms must be established."<sup>1</sup> International environmental law does have enforcement mechanisms, but it is not wholly surprising that the author seems unaware of them. Most enforcement of international law is not done through enforcement institutions, therefore acts of enforcement are less visible at the international level than at the domestic level. In addition, international law is not enforced as often as domestic law. Does this mean that international law generally, and environmental law in particular, is unsuccessful? The general view is that

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1. Andrew W. Samman, *Enforcement of International Environmental Treaties: An Analysis*, 5 *FORDHAM ENVTL. L.J.* 261 (1993).

international law is a monument to successful laws, without much enforcement. In the particular field of environmental law, some scholars actually argue that international environmental law is *less* well-suited to enforcement than other areas of international law. In other words, emphasizing enforcement could actually make international environmental law less, not more successful.

In this article, I argue that, although international law has enjoyed success with less enforcement to date, times are changing. Certain aspects of international environmental law leave some rules unsuited to coercive enforcement, but other rules are suited to enforcement through the use of domestic enforcement mechanisms. This argument for expanding the use of domestic mechanisms is developed by first reviewing how general international law has been traditionally enforced, then by discussing the nature of contemporary international environmental law and the best approaches to enforcing it. The article concludes by advocating that borrowing from domestic enforcement mechanisms may prove the most successful of all traditional means for enforcement of international environmental law.

Enforcement is defined as “the compelling of obedience to law.”<sup>2</sup> In domestic legal systems, the executive or judiciary enforce the law generally by imposing sanctions on those who disobey the law. Domestic systems may do this by controlling the assets, freedom, or the very existence of law breakers.<sup>3</sup> In contrast to domestic legal systems, the international legal system lacks a fully developed judiciary and executive.<sup>4</sup> Scholars have long discussed whether international law is really a legal system without these major

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2. BLACK'S LAW DICTIONARY 528 (1990).

3. Anthony D'Amato, *Is International Law Really "Law"?* 79 NW. U. L. REV. 1293, 1304 (1984-5). D'Amato writes:

When a person disobeys the law, the law “punishes” him in some way. The possibility of punishment, in turn, is supposed to deter a rational person from violating the law in the first place.

Enforcement thus consists of some form of legally imposed sanction. A monetary fine is an example of a punishment that is not physical. Physical punishments include being deprived of your freedom. . . . In all cases of law violation, the law responds by depriving you of one or more of your entitlements. You have a legal entitlement to liberty; you lose it if you commit a crime punishable by incarceration. You have a legal entitlement to your bank account; you lose it if you failed to pay your taxes or if someone obtains a judgment against you and attaches it . . . . Your bank account can be taken away from you by a bookkeeping entry made in the bank pursuant to a court order.

*Id.*

4. It also lacks the third major institution of most legal systems—a fully developed legislature.

institutions, especially without a mechanism for levying sanctions.<sup>5</sup> This question has been answered to the satisfaction of most scholars of jurisprudence,<sup>6</sup> if not political scientists or lay people. But the argument continues that, even if we can call international law a legal system, it must be an ineffective one, or, in the words of the writer quoted above, an unsuccessful one, if it lacks typical enforcement mechanisms.

This view is based on the presumption that domestic legal systems have compliance because they have enforcement institutions. The law is obeyed due to the presence of these institutions. Moreover, it is assumed that without such institutions, the law would not be obeyed in domestic legal systems. By analogy, the argument asserts that international law is not being obeyed because the international legal system has no comparable enforcement institutions. It is easy to find examples supporting this view.

The natural response to this perceived state of affairs is to propose the development of enforcement institutions for international law comparable to domestic ones. There are some international enforcement institutions already in existence, such as the Security Council, which enforce international peace and security, and others, which will be discussed below. A new institution, the International Criminal Tribunal for the Former Yugoslavia (ICTFY),<sup>7</sup> has been established and has been given the power to enforce international humanitarian and human rights law. It may be that more of such institutions will be formed, including those designed for environmental protection.<sup>8</sup> Although these institutions could improve enforcement, they will never adopt the form of domestic enforcement institutions unless the international legal system becomes the law of a world government, which seems unlikely to occur.

This does not mean, however, that we do not or will not have successful international law. In fact, despite well-known examples of international law violations, most international law is obeyed most of the time, regardless of enforcement institutions. Whether enforcement institutions are the key to

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5. *See, e.g.*, MICHAEL BARKUN, *LAW WITHOUT SANCTIONS: ORDER IN PRIMITIVE SOCIETIES AND THE WORLD COMMUNITY* (1968).

6. *See in particular*, H.L.A. HART, *THE CONCEPT OF LAW* 208-32 (1961).

7. The fact that the ICTFY has the authority to send individuals to prisons, made available by participating states, gives the Tribunal an enforcement capacity not shared by most other international tribunals, in particular, the International Court of Justice. *See* U.N. Security Council Res. 827 (1993), 32 I.L.M. 1203 (1993).

8. There have been a number of proposals for new opportunities to bring suit at the international level for environmental protection. *See, e.g.*, Hague Declaration on the Environment, 28 I.L.M. 1308 (1989); and more recently, Christopher Stone, *Defending the Global Commons*, in *GREENING INTERNATIONAL LAW* 35, 41 (Philippe Sands ed., 1993).

domestic compliance, international law has attracted law observance without similar institutions. International law is *not* widely disobeyed; compliance is achieved despite the lack of domestic-type enforcement institutions.

Accordingly, the analogy to domestic law is false. International law is not the law of a world government. The international system has little in common with unitary government systems. Not surprisingly, it developed a different method of keeping order, adapted to its own characteristics. The international system that emerged from the Peace of Westphalia in 1648<sup>9</sup> was one of sovereign states. The rulers of these states needed a legal system that reflected and supported this fact. Thus, under international law, all states are equal and cannot be subject to the rules, process, or enforcement power of any other state.

Furthermore, the leaders of these new states were not interested in recreating the type of supranational institutions that had finally collapsed with the Holy Roman Empire. Instead, the rules, rule-making, and rule enforcement mechanisms were designed to reflect the coequal legal status of the members of the system. No member could be bound by a rule without its explicit or tacit consent. This lawmaking technique, while having some clear disadvantages, had the major advantage of natural compliance; if a state did not intend to observe an obligation, it need not consent to it in the first place.

In addition, the membership of the system was small, the chief actors were governments, and the activities were conducted at the interstate level. A state's observance or non-observance of a rule was easier to discover at the international level than at the domestic level. It is far easier to detect whether a government is observing the rights of diplomats, observing the integrity of air space or paying U.N. dues than to detect whether people are properly paying their taxes, trespassing on private property, or shoplifting. Therefore, it has been relatively easy to confirm that most international law is observed most of the time.<sup>10</sup>

On those occasions when states did not observe their obligations, the system developed a method of horizontal enforcement. The injured state enforced its own rights through self-help, using force in some cases, and reciprocity in others. Reciprocity could work quite effectively in the early days of international law. The failure to observe a treaty meant the other party

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9. See Leo Gross, *The Peace of Westphalia (1648-1948)*, 42 AM. J. INT'L L. 20 (1948).

10. LOUIS HENKIN, *HOW NATIONS BEHAVE* 47 (2d ed. 1979).

need not observe it. Abuse of State A's diplomat by State B, meant State A could abuse State B's diplomat.<sup>11</sup>

The impact of technology on the interstate system has resulted in some important changes. The development of weapons which have dramatically increased the cost of war resulted in the limitation on the states' use of force to enforcing the right of self defense. In conjunction with this development, states created the Security Council, a supra-national institution with enforcement power. But the Council has authority to enforce the law only against those states threatening international peace and security. The delegates to the drafting conference in San Francisco specifically rejected the proposal that the Security Council become a general law enforcement agency.<sup>12</sup> Deprived of the right to use force and faced with the increasing complexity of the international system, states needed a new form of enforcement. Accordingly, they have resorted increasingly to the use of countermeasures. Indeed, for most of international law, countermeasures are the only mechanism available for enforcement at the international level.<sup>13</sup> But countermeasures may only be used after notice, which implies a period of negotiation and reformation. Moreover, countermeasures must be proportional to the original wrong and limited to bringing the law-breaker into compliance.<sup>14</sup>

The international system has some courts, in particular, the International Court of Justice (ICJ). But most, including the ICJ, have only marginal enforcement capacity or none at all.<sup>15</sup> International law has enforcement mechanisms, though not institutionalized ones, with certain clear, practical limits. In addition, states may not wish to use enforcement against another state. Instead, states may prefer to avoid souring good relations by coercing enforcement.

The case of the former Soviet Union and Chernobyl is a very prominent example of this phenomenon. The states injured by the accident at Chernobyl could have taken enforcement action when the former Soviet Union refused to provide compensation. Leaders of the injured states, however, were far more interested in supporting Mikhail Gorbachev and his Perestroika reforms

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11. LOUIS HENKIN ET AL., *INTERNATIONAL LAW* 18-20 (2d ed. 1987).

12. OSCAR SCHACHTER, *INTERNATIONAL LAW IN THEORY AND PRACTICE*, 227-29 (1993).

13. Mary Ellen O'Connell, *Using Trade to Enforce International Environmental Law: Implications for United States Law*, 1 *IND. J. GLOBAL LEGAL STUD.* 273, 276 (1994).

14. *Id.* at 281-82.

15. I argue that the ICJ can at least enforce its decisions pendent lite, if not its final judgments, in Mary Ellen O'Connell, *The Failure to Observe Provisional Measures of Protection in the Case of Bosnia v. Yugoslavia*, *EUROPA UNION VERLAG* 29 (1994).

and did not wish to pressure him over Chernobyl.<sup>16</sup> Thus, enforcement may not always be used, even though it is legally possible to take measures in response to most breaches.

Enforcement sits on the margins of international law, which remains a compliance-based, not an enforcement-based, system. International law governs a system more akin to an association of corporations than to a domestic system of individuals. Indeed, in this light, it is hard to understand why international law is labeled a “primitive system.”<sup>17</sup> One can argue that a system based on enforcement is far more primitive than one based on compliance.<sup>18</sup>

Of course, corporate associations have less to regulate than associations of modern nation-states. As suggested above, international law has been able to rely on compliance because it is a small system whose members are not pursuing true community life together at the domestic level. But the system is getting larger; the U.N. now has 188 members, up from fifty-four at its founding.<sup>19</sup> In addition, technology is continuing to have an accelerating impact on international law enforcement.

Some scholars are beginning to see the development of community life at the international level and the need to pursue the good life at the global level.<sup>20</sup> The environment is especially implicated by these insights and developments. Accordingly, governments are using international law as the chief tool to

16. Mary Ellen O’Connell, *Enforcing the New International Law of the Environment*, 35 GERMAN Y.B. INT’L L. 293, 315-16 (1992).

17. H.L.A. Hart is one of many who has called international law a primitive system. See HART, *supra* note 6.

18. FRIEDRICH V. KRATOCHWIL, RULES, NORMS AND DECISIONS 256 (1989). The author explains: Traditional international law has understood itself not as a primarily punitive order - at least since Kant, who stressed its unique character, which is . . . captured by Oakshott’s and Nardin’s terms of a “practical association”. Such an association is united by the recognition of rights and practices but is not organized for the pursuit of a common vision of the good life. This means, however, that the social preconditions for the emergence of central enforcement mechanisms are presently simply not given. Such an assertion, however, obviously does *not* entail that certain deeds cannot also become international crimes, which various states can choose, or are even bound, to prosecute. It only means that we had better think of alternatives in enhancing compliance rather than rely once more on the well-worn and misleading domestic analogy. Many of Roger Fisher’s and Norton Moore’s suggestions seem to have better chances than the plans for a proliferation of formal international institutions which are likely to be condemned to inactivity, ineffectiveness, or both.

*Id.*

19. ENCYCLOPEDIA OF THE UNITED NATIONS AND INTERNATIONAL RELATIONS 1035 (Edmund Jan Osmanczyk ed., 2d ed. 1990)

20. Christian Tomuschat, *Obligations Arising for States Without or Against Their Will*, 241 RECUEIL DES COURS D’ACADEMIE DE DROIT INTERNATIONAL [RCADI] 195 (1993).

address this newest international problem. These trends imply a need for new thinking on international law enforcement.

## II. ENFORCEMENT AND INTERNATIONAL ENVIRONMENTAL LAW

As mentioned at the outset, there are arguments against using the few enforcement mechanisms available in international law to enforce international environmental law. Indeed, several reasons support avoiding coercive enforcement. First, for much environmental damage, there is no violation of a prohibitory rule which could lead to the taking of enforcement action. "[T]he largest part of industrial activity which causes pollution is not and should not be held wrongful."<sup>21</sup> Even for many activities that should be held wrongful, the international community has not agreed on a basic conceptual approach to environmental regulation. The attempt to create general binding rules at the Conference on Environment and Development in Rio de Janeiro failed.<sup>22</sup> Instead, "soft law" documents were produced which were not subject to enforcement.<sup>23</sup> Because of the failure at Rio, the only binding rules are still found in the various sectoral treaties and a few principles

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21. Martti Koskenniemi, *Breach of Treaty or Non-Compliance? Reflections on the Enforcement of the Montreal Protocol*, 3 Y.B. INT'L ENVTL. L. 123, 125-26 (1992).

22. See Report of the United Nations Conference on the Human Environment, U.N. Doc. A/CONF. 48/14/Rev.1, U.N. Pub. E. 73, II.A.14, 1973.

23. There is now a sizeable body of literature on "soft law". For one of the first, and still one of the best, articles, see Oscar Schachter, *The Twilight Existence of Non-Binding Agreements*, 71 AM. J. INT'L L. 296 (1977).

The International Law Commission is trying to draft a new convention which will generally regulate the environment. The on-going effort is to determine which activities are unlawful and which are lawful but should nevertheless result in liability. See generally 1985-1995 Y.B. Int'l L. Comm'n.

The Commission faces the same difficulty as was faced at Rio, namely, that the international community lacks both scientific and political consensus on what rules are needed. Scientific understanding is not clear enough in all cases to create a rule or to justify coercive enforcement in support of a rule. To hold a particular state liable for depleting a fish stock, for example, the enforcing state must be certain who is overfishing and that this overfishing is to blame and not disease, loss of habitat, or other causes.

When or if environmental rules are developed, the need for enforcement can be reduced to the extent the rules have a high pull toward compliance. As both Thomas Franck and Roger Fisher have found in comprehensive studies, the clarity of the legal prescription and the purity of its provenance are the strongest indicators of whether an international law rule will be observed.

But making the rules clear for international environmental law may prove particularly tricky. We also lack agreement on priority of values and assignment of obligation. Questions of fact and the meaning of a particular rule in a particular case can be made clearer through dispute-settlement procedures. But most of the new environmental agreements lack voluntary dispute settlement. Thus, until we have clear rules, there is nothing with which to comply or *a fortiori* to enforce. See ROGER FISHER, *IMPROVING COMPLIANCE WITH INTERNATIONAL LAW* (1981); THOMAS FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* (1990).



of customary law. Care must be exercised, even with these, in determining which rules are really binding and, thus, “enforceable” rules.

A second reason against enforcement is that oftentimes either a state responsible for environmental harm is not a party to a relevant treaty, or the treaty places no binding obligation on the state to prevent the damage. For example, the United States is a party to the Long-Range Transboundary Air Pollution Treaty (LRTAP).<sup>24</sup> The treaty itself has no important obligations--the obligations are contained in various protocols. The United States is not a party to the Protocol requiring the reduction of sulphur dioxide release into the atmosphere. Thus, regardless of how much soft coal the United States burns, it has violated no treaty obligation, and no other state may take action to enforce the treaty against the United States.<sup>25</sup>

Another example is protection of the whale population. The dispute over whaling is well-known to all. Many may be unaware that Norway and Japan have filed perfectly legal reservations to the moratorium on whaling and may, therefore, legally catch whales.<sup>26</sup> The three newest multinational environmental treaties, Climate Change,<sup>27</sup> Biodiversity,<sup>28</sup> and Desertification,<sup>29</sup> have no important enforceable obligations to date. As with the LRTAP, diplomats have taken the approach that it is preferable, as a first step, to negotiate “framework” conventions with mere aspirational-type obligations. Subsequently, when governments are more conditioned to the idea, protocols are added, attaching real obligations.

A third argument against enforcement is the tendency in the literature to conflate the fact that the environment is steadily worsening with the view that international environmental rules are not being observed. It is not that states

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24. Convention on Long-Range Transboundary Air Pollution, Nov. 13, 1979, 18 I.L.M. 1442 (entered into force, Mar. 16, 1983).

25. Though one may argue that a sulphur dioxide release that clearly harms another state violates customary international law, and an injured state could take enforcement measures on that basis, such a case would be more difficult to make than responding to a treaty breach. See O'Connell, *supra* note 13, at 303-32.

26. The International Convention for the Regulation of Whaling, Dec. 2, 1946, 161 U.N.T.S. 72, 131 (entered into force Nov. 10, 1948).

27. U.N. Conference on Environment and Development: Framework Convention on Climate Change, May 9, 1992, 31 I.L.M. 849.

28. U.N. Conference on Environment and Development: Convention on Biological Diversity, June 5, 1992, 31 I.L.M. 818.

29. U.N. Convention to Combat Desertification in Those Countries Experiencing Serious Droughts and/or Desertification Particularly in Africa, *opened for signature*, Oct. 14, 1994, U.N. Con. A/AC.241/15/Rev.7, 33 I.L.M. 1328.

are intentionally violating important, substantive environmental protection rules,<sup>30</sup> rather the rules are inadequate to protect the environment.<sup>31</sup>

The available evidence shows that many states are not meeting reporting obligations.<sup>32</sup> However, this is almost always a problem of resources, especially for developing countries, as the number and sophistication of required reports has exploded. States may intend to comply with rules but have difficulty doing so because they lack the financial resources. Providing funds in the environmental area can be increasingly important for gaining compliance. Without proper funding, enforcement measures might be useless. When the problem is due to a lack of resources, there is little point in using coercive enforcement techniques. It is better to use compliance-inducements, such as offers of financial or manpower assistance.

Probably more than any other area of international law except peace-keeping, the environment requires large financial outlays by governments. This is a fourth reason often cited in support of the argument that coercive enforcement will do little to improve the environment. Other international rules, such as those governing human rights, require only negative action by governments. The mandate that governments not torture their prisoners is an example of negative action. Environmental law, however, may require that governments build mass transit to eliminate automobile emissions, or that they forego export dollars by not exporting ivory.

A fifth reason that coercive enforcement may not improve the environment is that it may be useless to employ the typical enforcement device for breach, such as suspension or termination of a treaty, when the interest is protecting the environment. For example, parties to the Montreal Protocol may terminate

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30. Edith Brown Weiss and others are conducting a study of compliance with seven multilateral conventions. When this study is complete, we will have better information about compliance. For this article, newspapers and journals were searched for complaints of non-compliance. No important examples were found, although, in the author's view, France's failure to carry out environmental impact assessment before exploding nuclear weapons at Murora Atoll is a violation of the now existing customary obligation to carry out environmental impact assessment for any major public project with potentially significant impact on the environment, especially outside national jurisdiction. *But see* LAKSHMAN D. GURUSWAMY ET AL., INTERNATIONAL ENVIRONMENTAL LAW AND WORLD ORDER 411 (1994) ("The Adoption of environmental impact assessment at present cannot be considered to be more than a progressive trend of international law; we can hardly say that States consider such a practice legally binding under general international law.") Chernobyl is another example of a violation. *See* KRATOCHWIL, *supra* note 18 and accompanying text.

31. PATRICIA W. BIRNIE AND ALAN S. BOYLE, INTERNATIONAL LAW AND THE ENVIRONMENT 13, 27 (1992).

32. U.S. GEN. ACCOUNTING OFFICE, INTERNATIONAL ENVIRONMENT: INTERNATIONAL AGREEMENTS ARE NOT WELL MONITORED, *microformed on* SuDocs GA/RCED-92-43, B-245764 (1992).

the membership of another party for material breach of the Protocol.<sup>33</sup> It is unlikely that such a sanction would be successful in prodding a breaching party back into compliance.

Finally, induced compliance may have the further advantage in that it comes before, not after the breach of an obligation. In environmental law, the goal is to obtain compliance before the environment is harmed, not after the harm has occurred. Monitoring and reporting are helpful compliance techniques because in a decentralized system, as Oran Young explains, reputation assumes greater importance.<sup>34</sup> “Soft responsibility” based on monitoring and reporting is increasingly used for compliance control, particularly as it ‘allows states that are prepared to co-operate in dealing with a problem to do so without unduly restricting their freedom of action.’<sup>35</sup>

On the other hand, enforcement is also important. In international law, when a significant, persistent violation of a legal rule occurs, “it is doubtful whether such [compliance] procedures suffice to deter or to deal with serious or persistent breaches.”<sup>36</sup> But when the legal obligation is clear, negotiations have been held, positive inducements have been made, and a time to comply is given, coercive enforcement is needed. However, there is no evidence to date that violations of established, substantive rules of international environmental law are frequently occurring. Thus, this paper does not call for a rush to enforcement.

33. Vienna Convention on the Law of Treaties, *opened for signature* May 22, 1969, art. 60.

34. Oran Young, *Compliance in the International System*, in INTERNATIONAL LAW: A CONTEMPORARY PERSPECTIVE 99, 101 (Richard Falk et al. eds., 1985). The author explains:

I have some doubt, however, whether the introduction of some such enforcement mechanisms constitutes a necessary condition for the achievement of compliance under these conditions. Individuals operating in highly decentralized social systems will know that they cannot rely upon a government or some other centralized public authority to maintain order and to preserve the social fabric of the system. Therefore, they are likely to be far more concerned with the social consequences of their behavior than they would be in a centralized system, where such concerns can be allowed to atrophy without causing undue harm, at least in the short run. . . .

In addition, there is no reason to assume that feelings of obligation will be inoperative as a basis of compliance in highly decentralized social systems. . . . On the contrary, obligations may sometimes become even more binding in decentralized social systems than centralized ones because there is no authoritative agency capable of exempting a subject from the force of an obligation under special or extenuating circumstances.

*Id.*

35. Koskenniemi, *supra* note 21, at 127 (quoting Alexandre Kiss, *Present Limits to the Enforcement of State Responsibility for Environmental Damage*, in INTERNATIONAL RESPONSIBILITY FOR ENVIRONMENTAL HARM 3, 12 (Francesco Francioni & Tullio Scovazzi eds., 1991); Patricia Birnie, *International Environmental Law: Its Advocacy for Present and Future Needs*, in THE INTERNATIONAL POLITICS OF THE ENVIRONMENT 51, 54 (Andrew Hurrell & Benedict Kingsbury eds., 1991).

36. Koskenniemi, *supra* note 21, at 127-28.

One can predict that the need for enforcement will increase as environmental law develops more concrete, detailed, and wide-reaching rules. International environmental law already resembles domestic law more than it does other areas of classic international law. The reason is clear: environmental protection has less to do with state-to-state affairs than with the activities of individuals, which are the focus of most domestic law. Due to increased action and technological complexity, the corporate-type world of traditional international law has shifted to the world of local administration. Although much of environmental law continues to primarily rely on compliance inducement, the need for enforcement will undoubtedly increase. But what kind of enforcement will be necessary?

### III. ENFORCEMENT THROUGH DOMESTIC MECHANISMS

All of the enforcement methods available in international law will be appropriate to use at some time in the enforcement of international environmental law. In state-to-state disputes, for example, countermeasures will continue to be the only available method for enforcement.<sup>37</sup> But many issues are not truly state-to-state. As explained above, much environmental law concerns individuals and corporations, for whom it makes sense to use the method of borrowing domestic courts. The thesis of this paper is that this method should be expanded.

Domestic courts already enforce a significant portion of international law. The idea of expanding the use of domestic courts for international environmental law enforcement against citizens and governments of other countries is a more recent and interesting concept. Existing precedents need to be publicized in order for the use of domestic courts in international law enforcement to be accepted as routine, rather than exceptional.<sup>38</sup>

The use of domestic courts makes particular sense in the environmental area because domestic courts tend to focus on the most common polluters--individuals and corporations. The courts' clear authority over assets and persons is necessary for successful enforcement. Most courts can issue injunctions which may prevent environmental damage before it occurs. This

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37. See O'Connell, *supra* note 13, at 276-82.

38. F.A. MANN, *International Delinquencies Before Municipal Courts*, in *STUDIES IN INTERNATIONAL LAW* 336 (1973).

section discusses the positive and negative features of the enforcement of international environmental law by domestic courts.

Domestic courts may enforce international law in several different ways.<sup>39</sup> The most common is in the form of enforcing domestic law that implements international law. A significant portion of international law, as adopted at the international level, can be realized only after it is implemented in domestic law. For example, the Convention on the International Trade in Endangered Species<sup>40</sup> forbids the export and import of certain endangered species. Through domestic law, states that are parties to the convention control their citizens who wish to import or export endangered animals.<sup>41</sup> Thus, after becoming a party to the treaty, many states, through their legislatures, adopt laws which apply to the state's citizens or territory, forbidding the export or import of certain animal species. A court enforcing such laws might not mention the treaty, but the treaty is implicitly being enforced.

Many domestic legal systems also allow the direct enforcement of international law, without prior implementation through the national legislature. Probably the most famous case in the United States demonstrating this principle is *Paquette Habana*.<sup>42</sup> In *Paquette Habana*, U.S. Navy ships arrested Cuban fishing vessels during the Spanish-American War. The Navy then wanted to sell the vessels as prizes of war. The United States Supreme Court held that under international law, fishing vessels cannot be captured as prizes of war.<sup>43</sup> Therefore, the Court ordered the vessels to be returned to their original owners.<sup>44</sup>

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39. This discussion concerns enforcement only. It is possible to implement international law in several ways—both formally through legislatures and informally in a myriad of ways. For example, every time a border is recognized as a legal border, international law is implemented. Governments make such recognitions constantly—when they issue maps, adopt legislation applying within specified borders, station border police, and so on. However, this discussion concerns enforcement, and thus the enforcement mechanisms of states, rather than all ways of complying with international law.

It also concerns enforcement of international law. There are many cases, for example, in which a non-U.S. citizen will be held accountable under U.S. law, or in which a U.S. citizen acting abroad may be held accountable under U.S. law, but these are not cases exemplifying enforcement of international law.

40. Convention on International Trade in Endangered Species of Wild Fauna and Flora, Washington, D.C., Mar. 3, 1973, 12 I.L.M. 1085 (1973).

41. For a description of how this Convention works and how it is implemented in domestic law, see Michelle A. Peters, *The Convention on International Trade in Endangered Species: An Answer to the Call of the Wild?* 10 CONN. J. INT'L L. 169 (1994); SIMON Lyster, INTERNATIONAL WILDLIFE LAW 239 (1985).

42. *Paquette Habana*, 175 U.S. 677 (1900).

43. *Id.* at 708.

44. The Court declared:

International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly

Given the available options, the question arises: Why is there any problem with enforcing international environmental law? Why is not all international law simply enforced by domestic courts? There are few serious difficulties in enforcing domestically implemented international law. However, direct enforcement of international law has proven problematic. Unfortunately, every country has erected barriers to the easy enforcement of international law through the courts.

The doctrine of sovereign immunity is a significant obstacle to the enforcement of international law. This doctrine holds that a state, through its government or top officials, may not be subjected to the judicial process of another state. The principle of sovereign immunity flows from the concept of states being coequal on the international plane. Accordingly, it is unacceptable to place a coequal in the diminished position of being subjected to the courts of another coequal.

In the well-known case of the *Schooner Exchange v. M'Faddon*, Chief Justice Marshall demonstrated how sovereign immunity can be a barrier to enforcement of international law.<sup>45</sup> In that case, United States citizens attached a ship in the Port of Philadelphia in 1812. They claimed the ship had been taken from them illegally by the French navy. Marshall reasoned:

[A public armed ship] constitutes a part of the military force of her nation; acts under the immediate and direct command of the sovereign; is employed by him in national objects. He has many and powerful motives for preventing those objects from being defeated by the interference of a foreign state. Such interference cannot take place without affecting his power and his dignity. The implied license therefore under which such vessel enters a friendly port, may reasonably be construed, and it seems to the Court, ought to be construed, as containing an exemption from the jurisdiction of the sovereign, within whose territory she claims the rights of hospitality.<sup>46</sup>

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presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations.

*Id.* at 700.

45. *Schooner Exchange v. M'Faddon*, 11 U.S. 116 (1812).

46. *Id.* at 144.

The shipowners were not completely without recourse. The U.S. government could have complained to the French, but that option was much more difficult than simply asking the Court to step in and hand over the attached vessel.

Indeed, the historic injustices caused by the doctrine of sovereign immunity have led to the doctrine's steady curtailment. Today, most courts will not grant a foreign state or foreign officials immunity from commercial actions or torts.<sup>47</sup> Recently, U.S. courts took a further step to limit the doctrine of sovereign immunity by ruling that foreign government officials, who may be immune from carrying out actions within their discretionary functions, may not be immune from violations of law, including international law.<sup>48</sup>

This is an important decision with potentially far-reaching effects for enforcing international environmental law. It undermines the view inherent in the traditional doctrine of sovereign immunity that it is undignified for a state, or head of state, to be subjected to the process of domestic courts. If the domestic courts would enforce international law, there should be no indignity since all sovereigns are bound by that law.

U.S. courts believe there is no indignity when sovereigns are subjected to the domestic process for their torts and commercial activities, or for the enforcement of international judgments or arbitral awards.<sup>49</sup> Most domestic courts can hold their own sovereigns accountable to international law. Thus, it is not a stretch to assert that domestic courts are just as capable of holding foreign sovereigns to international law as the sovereign's own courts. Indeed, to take any other view places the concept of sovereignty above that of international law.

It is also important to note that times have changed since Marshall's decision in the *Schooner Exchange*. Marshall clearly agreed with the underlying rationale for sovereign immunity, which is that it could keep states from going to war to prevent "interference" with the state's interests. In the post-Cold War era, the risk of states going to war over a court case involving a violation of international law has been virtually eliminated.

Nevertheless, it is clear that progressive change in the law will take some time before it becomes widespread. There is resistance to the modern trend of abandoning the principle of sovereign immunity. Some argue that sovereign

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47. See, e.g., The Foreign Sovereign Immunity Act of 1976, 28 U.S.C. §§ 1602, 1605 (1976) (amended 1988).

48. See *Hilao v. Estate of Marcos*, 25 F.3d 1467, 1470-72 (9th Cir. 1994).

49. See Mary Ellen O'Connell, *The Prospects for Enforcing Monetary Judgments of the International Court of Justice*, 30 VA. J. INT'L L. 891, 913-40 (1990).

immunity prevents unfairness by parochial state courts.<sup>50</sup> United States citizens can perhaps understand this feeling since U.S. law prevents persons of one state from being sued in another U.S. state. This remains the law even though few citizens can show any particular allegiance to one state or demonstrate any basis to fear discrimination.

Minimizing sovereign immunity is only one mechanism which could be used to reform the courts, thereby permitting effective enforcement of international environmental law more effectively. Other barriers need to be reduced to allow for the direct application of international law to individuals.

One of those barriers is the doctrine of standing. Most countries have standing rules that allow only "injured" parties to bring cases. Often, courts find that persons are not injured by a violation of international law. Furthermore, many courts require that a cause of action be clearly implied in the international legal rule that is allegedly violated. For example, U.S. citizens living in Nicaragua tried to obtain a court order directing President Reagan to stop the United States' illegal military interference, in accordance with a judgment of the ICJ. The Court held that the individuals did not have a cause of action to enforce judgments of the ICJ, even though they were clearly injured by Reagan's failure to comply with the judgment.<sup>51</sup> Thus, the courts used the standing doctrine to preclude the application of international law.

The principle of *forum non conveniens* creates an additional barrier to the enforcement of international law. Many countries require that the forum in which the case is brought be "convenient." The forum hearing the case must have a relation to the case. For many courts, this rules out applying

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50. For international cases, the concern over prejudice was expressed by Dr. Michael Koch of the German Foreign Office:

If you are talking about a German coming to the United States and suing the American Government or an American coming to Germany and suing the German Government before a German court, I think that is unproblematic. If you are talking about an American or a German for that matter suing the German government before an American court, that I find very problematic. And indeed, I find it so problematic that I would say such a thing simply should not be allowed. I would suggest that otherwise you throw out the principle of state immunity, and this would be dangerous in the extreme since it would really, to name but one possible repercussion, make it very difficult to conclude any sort of peace agreement or any sort of contractual agreement between two states because you could always undo it by way of litigation started in another country.

ALLOCATION OF LAW ENFORCEMENT AUTHORITY IN THE INTERNATIONAL SYSTEM 178-79 (Jost Delbrueck ed., 1994) (quoting Dr. Michael Koch).

51. See *Committee of United States Citizens Living in Nicar. v. Reagan*, 859 F.2d 929 (D.C. Cir. 1988).



international law because international law is not the law usually applied by the court and is, therefore, not convenient. Some courts also refuse to decide questions which they consider “political” or which interfere with the executive’s ability to carry out foreign policy. This type of prudential barrier eliminates many international law cases because they inherently touch on foreign affairs.<sup>52</sup>

These and other barriers to enforcing international law through domestic courts are usually affected by the attitudes of the judges themselves.<sup>53</sup> However, through advocacy, it may be possible to overcome many of the court-made obstacles to the enforcement of international law. Significant progress in this direction has been made in the area of human rights, especially in the United States. In both the United States and Europe, and increasingly in South and Central America, international human rights law is being enforced by domestic courts and executives. The enforcement of human rights law inherently relies on domestic mechanisms because the law in this area has become very detailed and is increasingly aimed at individuals. The use of state-to-state compliance or enforcement mechanisms is difficult to refine for the enforcement of these types of rules. The European Court of Human Rights deals only with complaints against governments, not individuals, and does not have enforcement authority. The ICTFY deals with individuals, but relies on states for the enforcement of its decisions. According to Bruno Simma, “No matter how much the progress at the international level is appreciated, the effective implementation and recognition of international norms at the domestic level remains crucial for the full realization of human rights.”<sup>54</sup>

War crimes are the largest group of cases in the human rights category enforced at the international level. Since the end of World War II, the United

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52. For a complete discussion of access to U.S. courts for enforcing international law, see GARY B. BORN & DAVID WESTIN, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS* (2d ed. 1992).

53. Importantly among the “other barriers” is jurisdiction. Every country has its own rules regarding when sufficient contacts exist between the forum and a case to warrant taking jurisdiction. International law provides virtually no concrete rules, but rather, only guidelines regarding when states may take jurisdiction. See HENKIN, *supra* note 11 at 820-56. As a result, international lawyers typically have discussed the problem of courts taking excessive jurisdiction – taking it where the ties are too limited. For our discussion, it is worth noting that some courts limit jurisdiction in a way that can be a barrier for enforcing international environmental law. *Id.* For example, German courts will not base jurisdiction on the mere presence of assets, as was the case in *Hilao v. Estate of Marcos*. However, some states will try war criminals without such ties. See Bruno Simma et al., *The Role of German Courts in the Enforcement of International Human Rights* (forthcoming) (manuscript at 17-18, on file with author). Thus, jurisdiction is a theoretical possibility when a violation of international law exists. However, jurisdiction is a reality in states that do not require ties in order to try war criminals.

54. Simma, *supra* note 53, at 1.

States, Germany, the United Kingdom, Israel, and a number of other states have regularly held trials of individuals aimed at enforcing international human rights standards during war. States have always had the responsibility of ensuring that their own citizens, especially their soldiers, do not commit human rights violations during wartime. Since the Nuremburg and Tokyo Trials, courts have enforced this law against citizens of other states. The ICFTY has renewed the practice of trying war criminals at the international level. However, the first completed trial and sentencing of a war criminal from former Yugoslavia occurred in Denmark, not at the ICTFY<sup>55</sup> This trial was for an act in violation of international law committed against a non-Danish citizen outside of Denmark's territory. Such a case may hold precedential value for future environmental enforcement.

*Hilao v. Estate of Marcos* suggests even further possibilities for enforcing environmental law than do the war crimes cases.<sup>56</sup> In this case, citizens of the Philippines, who were abused or whose relatives were murdered at the hands of Fidel Marcos and his subordinates, successfully brought a class action suit in U.S. District Court for violation of their human rights. The plaintiffs were awarded \$1.2 billion as a class, and the defendants were ordered to assist in revealing the whereabouts of assets, including providing information about accounts in Switzerland.

This judgment overcame many obstacles to the successful enforcement of international law. First, the court found that the Marcos government did not enjoy sovereign immunity for its violations of important rules of international law.<sup>57</sup> Second, the court found no *forum non conveniens* problem because the Marcos family held assets in the United States. Third, the Alien Tort Act provided a cause of action by permitting the Filipino citizens to sue in the United States for violations of international law.<sup>58</sup> The *Hilao* court stated that aliens could sue in the U.S. courts for violations of international law that are "specific, universal and obligatory."<sup>59</sup> This holding is germane because international environmental law could fit within this rubric.

These cases are significant because they show that the possibility for to the plaintiffs. In the war crimes cases, violators of international law were sent to

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55. Refic Saric has been sentenced by Danish courts to eight years in prison. *Bosnischer Muslim beteuert & eine Unschuld*, SÜDDEUTSCHE ZEITUNG, Aug. 12/13, 1995, at 6.

56. *Hilao*, 25 F.3d at 1467.

57. *Id.* at 1471-72.

58. *Hilao*, 25 F.3d at 1475-76 (referring to the Alien Tort Act, 28 U.S.C. § 1350 (1989)).

59. *Id.* at 1475.

prison. These cases demonstrate that when the U.S. government fails to uphold an obligation, the court can order the government to meet its responsibilities. In such situations, the court can hold U.S. government officials in contempt or issue an injunction. These are all classic enforcement tools not available to most international courts. The right to enforce international laws through domestic courts need not be included in a treaty. This right exists as one of the enforcement mechanisms of international law and, as such, it may be used to enforce any rule, treaty, or custom, where the domestic court would otherwise permit it. It is theoretically possible for a treaty to specifically preclude the use of domestic courts, but such clauses have not been used. Even if a treaty has a mandatory dispute settlement provision,<sup>60</sup> only rarely will it include enforcement arrangements. Accordingly, domestic courts are rarely closed out of the enforcement task.

#### IV. CONCLUSION

International law has existed in its modern form for 350 years without domestic-type enforcement institutions. Nevertheless, states and other international actors generally comply with international law and specifically international environmental law. In the increasingly detailed area of environmental law, however, improved enforcement mechanisms can be developed. While countermeasures will continue to be required, the best approach for enforcing most rules which target the behavior of individuals will be “borrowing” the forum of domestic courts.

As environmental rules become more detailed and aim evermore at the activities of persons and corporations, domestic courts will have the advantage of control over persons and assets. Therefore, domestic courts have the ability to effectively enforce environmental rules and support the greater success of those rules in the future.

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60. None of the major recent multilateral environmental conventions include mandatory dispute resolution provisions.