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A RESPONSE TO ELLIOT RICHARDSON— INSTITUTIONS, DEVELOPING COUNTRIES AND FUNCTION

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I would like to begin by expressing my appreciation to the organizers of this symposium. They have chosen a topic that deals with two of the most important issues facing the world today: environment and development. With Ambassador Richardson, they have chosen as the principal speaker one of America's truly great statesmen, a person who has contributed greatly both to the nation and to the world. It is an honor to follow him.

Ambassador Richardson's remarks are interesting and stimulating. I would like to focus on three themes in those remarks. First, the need for new international institutions and procedures; second, the role and treatment of developing countries; and third, the function of the United Nations Conference on Environment and Development ("UNCED").

With respect to the need for new international institutions and procedures, the question really is what kind of social organizations are required to deal with these very difficult and important issues, namely, environment and development. This complicated question has many aspects. International institutions occur on two levels. The first is the overarching level Ambassador Richardson referred to in speaking of organizations such as the United Nations Environment Programme ("UNEP"). The second level is at a treaty-specific level, that is, international organizations that are set up by individual treaties to deal with a particular subject. Examples of this type of organization include the World Heritage Committee and Secretariat established by the World Heritage Convention¹ and the International Joint Commission established pursuant to the 1909 Boundary Waters Treaty between Canada and the United States.² I should note here that there are hundreds of environmen-

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1. Convention for the Protection of the World Cultural and Natural Heritage, Nov. 16, 1972, art. 8 & 14, 27 U.S.T. 37, T.I.A.S. No. 8226, *reprinted in* 11 I.L.M. 1358 (1992).

2. Treaty Relating to the Boundry Waters and Questions Arising Along the Boundry Between the United States and Canada, Jan. 11, 1909, U.S.-U.K., art. III, 36 Stat. 2448.

tal treaties,³ many of which establish international organizations of one type or another. Environmental protection is an area that is expanding rapidly. It is not an entirely new area, however, and the law in the area is very complicated and quite extensive. It also is far too weak. Thus, I am not defending the international legal system as it applies to the environment. Rather, I am saying that there are many institutions that do not rise to the overarching level of UNEP but which are, nevertheless, important.

International environmental institutions and procedures need to be strengthened in several respects. The first is resources. Consider UNEP, whose activities, most of which are on a worldwide basis, include preventing and controlling international pollution of many types, protecting natural resources, and preserving cultural heritage. UNEP's annual budget is only about \$40 million. That level of funding is simply not acceptable, given the importance and complexity of the issues that UNEP must deal with. The same situation exists with respect to the United Nations Development Programme ("UNDP"). Another respect in which international environmental institutions require strengthening concerns their authority. As Ambassador Richardson has pointed out, no existing international organization has the authority to impose regulatory standards with respect to environmental issues.

At the overarching level, no international organization has the authority to perform many other essential environmental protection functions, either. These functions fall within a wide range, including: identifying problems, e.g., conducting or coordinating basic research to determine what types of environmental issues exist in a particular locale or globally; setting standards for particular pollutants; allocating resources to combat pollution or to preserve natural resources; monitoring compliance with accepted standards; resolving disputes; modifying regimes in light of changed circumstances or changed scientific understanding; and enforcing standards. Treaty-specific institutions, although effective in some situations, do not — even considered together — fill these gaps. The range of functions for which no adequate international regime exists is thus very broad.

There have been some notable successes in terms of delegating authority from nation-states to treaty-specific international organizations. I hasten to add that these are not unqualified successes, but it is important to realize that some authority has been delegated over the last several decades, authority which has occasionally been exercised. For example, the 1946 Whaling Convention allows a

3. See generally, EDITH BROWN WEISS ET AL., *INTERNATIONAL ENVIRONMENTAL LAW: BASIC INSTRUMENTS AND REFERENCES* (Transnat'l Publ. Inc. forthcoming 1991) [hereinafter *BASIC INSTRUMENTS*].

three-quarters majority of the states who are parties to that convention to set standards.⁴ Consequently, there now is a moratorium on killing all types of whales: in 1982 a qualified majority of the states that are parties to that convention imposed the moratorium.⁵ On the other hand, the Whaling Convention regime allows states to object to new rules within 90 days to avoid being bound by them; unfortunately, that occurred with some of the important whaling countries.⁶

Similarly, the Montreal Ozone Protocol allows a two-thirds majority (representing at least 50 percent of the total consumption of the controlled substances of the parties) to change the timetable and the amount of reductions required in chlorofluorocarbons ("CFC"s).⁷ Initially, the Protocol required a 50% reduction in CFC consumption and production by 1999.⁸ Last June in London, the parties agreed to eliminate CFCs completely by the year 2000.⁹ These delegations of authority allow nonunanimous decision making and are essential to avoid veto powers and reduce stalemates in environmental protection. The use of qualified majorities is very common in the business world. Hopefully, it will become more common in the international environmental area as well.

There have also been notable failures or partial failures. The Notification Convention that followed the nuclear power plant disaster at Chernobyl includes dispute settlement provisions that are quite good. However, the United States, the Soviet Union, and other countries have made reservations to those provisions and, thus, are not bound by them.¹⁰ Similarly, the environmental damage recently witnessed in the Gulf War demonstrates that critical environmental norms either are not being followed or do not exist. Thus, there is not a sufficient international regime to deal with environmental threats from military activities.¹¹

One question is how pessimistic or optimistic can we be. In a sense, the story of the last hundred years in international law has been an elaboration of the notion of sovereignty. The reality in this

4. International Convention for the Regulation of Whaling, Dec. 2, 1946, art. V, 62 Stat. 1716.

5. *Id.*, Schedule done 1982.

6. *See id.*, Schedule done 1982, *reprinted in* BASIC INSTRUMENTS, *supra* note 3.

7. Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, art. 2(9)(c), *reprinted in* 26 I.L.M. 1550 (1987).

8. *Id.* art. 2.

9. London Adjustments and Amendments to the Montreal Protocol on Substances that Deplete the Ozone Layer, June 27, 1990, UNEP/Oz. L. Pro. 2/3, *reprinted in* BASIC INSTRUMENTS, *supra* note 3.

10. Convention on Early Notification of a Nuclear Accident, Sept. 26, 1986, art. 11, *reprinted in* 25 I.L.M. 1370 (1986).

11. *See generally* 1991 Proc. Am. Soc. Int'l L. (remarks of Paul C. Szasz).

area, of course, is that states fear to delegate sovereignty to an international organization. Each country must retain control of its own destiny. The United States, in fact, is not the most recalcitrant of countries in this respect. In any event, what has happened over the last hundred years, and most notably since World War II, is that the banner of sovereignty — as giving countries unbridled power to do as they wish — has become less monochromatic. Nations have realized that there are two sides to the concept of sovereignty: just as a country should not be restricted from doing what it wishes, it also should not prevent another country from doing what it wishes. These dual aspects of sovereignty can coexist only if they are in balance with one another. That realization led to the post-World War II prohibition against the aggressive use of force.¹² Sovereignty applies equally in the area of environmental behavior and environmental protection.¹³ We must work very hard for the recognition of this idea of balanced sovereignty. If we do so, I believe we can expect to make significant progress.

Thus far, I have primarily examined the environmental side of "environment and development," and that is really what Ambassador Richardson focused on as well. What about the development side? This, in my view, is the single most important moral question facing us as human beings in this world. There are approximately one billion people who live in what is referred to as "absolute poverty." That means a condition of exposure to the elements, malnutrition, lack of medical care, and illiteracy that is below any reasonable standard of human decency.¹⁴ From a moral point of view, it is indisputable that we cannot allow this condition to continue.

From a practical point of view, the result is also the same. If we desire political stability, energetic international trade, and effective environmental protection, the developing countries must be actively and equitably included. There is really no other realistic conclusion. For example, developing countries already are massive polluters. They are likely to cause more pollution as they strive to increase their standards of living and as their populations increase. Unless we in the industrialized world assist them in dealing, not only with development, but also with the environmental aspect of their economic activities, they will not be able to achieve sustainable development and we will all suffer. Many international environmental regimes already treat developing countries in a manner

12. U.N. Charter, art. 2(4).

13. This is the international-law manifestation of the principle *sic utere tuo ut alienum no laedas* (the duty to exercise one's rights in a manner that does not harm the interests of another).

14. See generally Robert S. McNamara, *Time Bomb or Myth: The Population Problem*, 62 FOREIGN AFF. 1107 (1985).

that takes into account their particular circumstances,¹⁵ and funds have been established to aid environmentally sound development projects.¹⁶ These practices must be made more effective.

I have focused on developing and developed countries. I think it is important to elaborate on another idea that was mentioned several times by the Ambassador, that is, the notion of human rights.¹⁷ In a way, the more appropriate method of viewing environment and development is at the level of human beings, not nation states — not whether the United States' interest is opposed to Brazil's interest, but rather what are all of our interests as human beings in these types of issues. If we do that, it becomes easier to think about sharing resources, sharing technology, and having the kinds of environmental standards that will protect, not only ourselves, but future generations as well. I might note in this regard, that in some respects United States businesses — at least large transnational corporations — are ahead of the United States government. Because international businesses face a variety of environmental and regulatory pressures in their activities, I think many of them have seen the writing on the wall and have begun to bite the bullet. I hope that governments are able to do that as well.

The third theme I want to refer to is the function of UNCED. There is a significant potential downside to UNCED. The potential upsides of UNCED have been talked about by Ambassador Richardson: UNCED focuses attention, mobilizes resources, and places political pressure on countries to do things.¹⁸ But it is very important to be realistic about what is happening. As the Ambassador pointed out, only 70 countries attended the climate change conference that was just held in Washington. What happened to the other one hundred — more than half of the countries in the world? Most of the countries that did not participate are developing countries. They cannot afford to send delegations to Washington. Often they do not even have the expertise to identify their own interests regarding various possible negotiating positions. It is not clear that they will be willing to participate meaningfully in Brazil. It is also not obvious that the 70 countries that went to the climate change conference are going to be willing to do much.

15. Daniel B. Magraw, *Legal Treatment of Developing Countries: Differential, Contextual, and Absolute Norms*, 1 COLO. J. INT'L ENVTL. L. & POL'Y 69 (1990).

16. The Global Environment Facility, established by the World Bank in cooperation with UNEP and UNDP, is an example.

17. Elliot L. Richardson, "Prospects for the 1992 Conference on the Environment and Development: A New World Order," 25 J. MARSHALL L. REV. 1, 10-11 (1991).

18. *Id.* at 11.

It is vitally important that we have realistic expectations about what can emerge from UNCED. In a way, Ambassador Richardson's comments were directed at molding those expectations and leading us to think about what is possible. That reflects the political side of his resume and experience. One thing that I would like to see happen — although I am not giving up on the effort to achieve a framework convention on climate change — is the focus on imagination that Ambassador Richardson began his comments with.

Ultimately, dealing with environmental issues and development issues will require changes in ethics and behavior on all of our parts. It will require a boldness in terms of what we are willing to attempt and what we are willing to sacrifice. These changes require not only that we at this conference realize this need, but also that our children and people everywhere realize it.

One important aspect of UNCED could be to focus on the issue of environmental education. The educational function should include not only children and politicians but also, in a very immediate short-term sense, the media. The media will be at UNCED and will need a story. The easiest story will be that UNCED is a failure, not a constructive part of an ongoing process. If that is what the media communicates, that will be the public perception. Perhaps that would be all right; sometimes it is important to realize that failures exist. But UNCED should not be branded a failure unless that, in fact, turns out to be the case. Making that determination may not be possible until long after UNCED convenes. I am thus concerned about the role of the media and of the perceptions the media creates. We must work very hard at educating the media to have a realistic evaluation.

The final point I wish to make is that we focus here on international efforts. It perhaps goes without saying, but should be said lest we forget it, that the environmental protection and development that we all seek will not occur unless there is action, not only at the international level, but also at the local level. It is also clear that the activities at both levels must be consistent and coordinated; and there must be meaningful public participation at the local level. For example, if environmental rules come from higher levels and are unacceptable at the level of individual behavior, they will not be effective. UNCED must take this reality fully into account.