



## Introduction

Michael Mason

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**You may cite this version as:**

Mason, M. (2005). *Introduction*. London: LSE Research Online.  
Available at: <http://eprints.lse.ac.uk/archive/00000578>

**First published as:**

Mason, M., *The new accountability : environmental responsibility across borders*. London, UK : Earthscan, 2005, pp. 1-27.

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# The NEW ACCOUNTABILITY

Environmental Responsibility across Borders

MICHAEL MASON

The New Accountability:  
Environmental Responsibility  
Across Borders

# The New Accountability: Environmental Responsibility Across Borders

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Michael R Mason

**EARTHSCAN**

London • Sterling, VA

First published by Earthscan in the UK and USA in 2005  
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ISBN: 1-84407-067 paperback  
1-84407-066-2 hardback

Typesetting by TW Typesetting, Plymouth, Devon  
Printed and bound in the UK by Cromwell Press Ltd, Trowbridge  
Cover design by Yvonne Booth

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Earthscan  
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22883 Quicksilver Drive, Sterling, VA 20166-2012, USA

Earthscan is an imprint of James and James (Science Publishers) Ltd and publishes in association with the International Institute for Environment and Development

A catalogue record for this book is available from the British Library

Library of Congress Cataloging-in-Publication Data

Mason, Michael, 1966–

The New Accountability: environmental responsibility across borders. Michael R. Mason  
p. cm.

Includes bibliographical references and index

ISBN 1-84407-067-0 (pbk) – ISBN 1-84407-066-2 (hardback)

1. Environmental protection–International cooperation. 2. Environmental policy–International cooperation. 3. Environmental responsibility. I. Title.

JZ1324.M37 2005  
333.7–dc22

2004024814

Printed on elemental chlorine-free paper

For Witchuda Damnoenyut

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# Preface

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In contemporary debates about democratic governance, the concept of accountability is hard to avoid. At least from a European perspective, recent innovations in political and administrative decision-making have multiplied opportunities for citizens to hold to account those who exercise governmental authority. Or so we are told. Whether busy modernizing constitutional structures or realigning public services along market-led lines, our political representatives have proclaimed a new era of open and responsive government. Accountability, in these terms, denotes enhanced processes of public oversight and answerability for decision-making involving political authority. In practice it has seen the emergence of an audit culture in which administrative efficiency and service delivery targets are paramount – where citizens become clients and public officials become managers. Nevertheless, it has not been easy to shake off the core political dimension of accountability – that decisions made in our name can be discussed and challenged.

As I write this preface in London, as arguments persist about the legal basis on which my country went to war in Iraq, and as civilian and military casualties rise further, the UK Government mantra of policy transparency sounds particularly hollow. When the United Nations Secretary General Kofi Annan states that the invasion of Iraq was not in conformity with the United Nations Charter, I am expecting something more from my government than the giving of (shifting) reasons, something more than a series of quasi-judicial reviews blunted in their mandates and powers. Actions taking place in the name of the British people are profoundly altering the lives and living conditions of countless others. And these actions are claimed by the UK and US administrations to be motivated, as least in part, by their desire to introduce to Iraq a constitutional system subscribing to principles of democratic accountability. By ignoring international legal constraints on the use of military force and domestically curtailing civil liberties, these governments have exposed how fragile webs of accountability can be. Moreover, the intimate involvement of major transnational companies (such as Bechtel and Halliburton) in the decisions moulding the future of Iraq has also shown how arbitrary it is to exclude private corporations from issues of accountability to affected publics.



This book is preoccupied with overcoming the tendency to think about accountability as only taking place within state borders and only featuring governmental actors. Looking above all at transboundary flows of pollution, its central claim is that processes of public answerability for harm rest most justly on treating all victims (real or potential) with equal respect. That means that both state and non-state producers of significant harm have a moral obligation effectively to consider the interests of all affected parties, whether these parties are fellow co-nationals or foreigners. In the study I employ a non-territorial notion of the ‘public’ to break away from the idea that we need only worry about the harm we cause to those immediately around us (both in space and time). Environmental responsibility – that is, accountability claims entailing claims to redress as well as answerability – should be established in open public discussions about harm and risk, where affected publics become collectively aware of harm received as being attributable to particular decisions or policies. The question of redress, of effective regulatory controls, is crucial to realizing what I label this new (non-territorial) accountability. And in the book I try and show how new accountability norms are informing the campaigning of transnational activist networks and also starting to feature in international environmental regimes. These accountability norms feed into, and are bolstered by, transnational spaces of public communication. In mapping out shared pathways of social and ecological harm, transnational publics cannot avoid thinking about alternative futures.

I want to thank all those who have helped shape my thoughts on these issues, however much this book falls short of the understanding they would likely have forged tackling the same subject matter. At the London School of Economics I have learnt much from discussions and seminars with colleagues in the Department of Geography and Environment, notably my ‘environment cluster’ colleagues – Giles Atkinson, Andy Gouldson, David Jones, Eric Neumayer, Tim Rayner, Judith Rees and Yvonne Rydin. I am much indebted to the Earthscan referees who took time to offer careful, considered feedback on earlier versions of this manuscript. Various parts of the book have also benefited from the comments and suggestions of Andy Dobson, Andrew Linklater, Bryan Norton, Richard Perkins and Derek Wall: my thanks to them all. Chapter 4 features research funded by the British Academy under grant number SG-34522 (2002–3): I acknowledge their valued support. Several chapters have been reworked and revised from arguments first put forward in academic articles: for Chapter 1 this was a paper published in *Transactions of the Institute of British Geographers* (2001), Vol 26, No 4, pp407–29; for Chapter 4 this was a paper published in *Environmental Politics* (2004), Vol 13, No 3, pp566–89; and for Chapter 5 this was an article that appeared in *Marine Policy* (2003), Vol 21, No 2, pp77–98. I’m happy to acknowledge Blackwell Publications, Taylor & Francis and Pergamon Press as the publishers of these papers. Also, I thank Professor Roger Kasperson for allowing me to reproduce the transboundary risk classification figure in the Introduction: the work of

Jeanne and Roger Kasperon rightly holds a leading position in the field of environmental risk management. Lastly, and by no means least, I would like to thank Bill and Michelle Antrobus for so ably transforming my manuscript into this book.

Michael Mason, November 2004.

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# Acronyms and Abbreviations

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BP	British Petroleum
CAFOD	Catholic Fund for Overseas Development
CERES	Coalition for Environmentally Responsible Economies
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
CLC	International Convention on Civil Liability for Oil Pollution Damage
CTE	Committee on Trade and Environment
DSB	Dispute Settlement Body
EC	European Community
ECE	Economic Commission for Europe
ECOSOC	Economic and Social Council
EEZ	exclusive economic zone
EMAS	Eco-Management and Audit Scheme
EMS	environmental management system
EU	European Union
FDI	foreign direct investment
FOEI	Friends of the Earth International
G7	Group of Seven
G8	Group of Eight
GATT	General Agreement on Tariffs and Trade
GRI	Global Reporting Initiative
ICC	Inter-continental Caravan for Solidarity and Resistance
ILC	International Law Commission
IMF	International Monetary Fund
IMO	International Maritime Organization
INGO	international nongovernmental organization
ISO	International Standards Organization
IOPC	International Oil Pollution Compensation Fund
ITOPF	International Tanker Owners Pollution Federation Limited
IUCN	World Conservation Union
LOS	Law of the Sea

MARPOL	International Convention for the Prevention of Pollution from Ships
MEA	multilateral environmental agreement
NATO	North Atlantic Treaty Organization
NGLS	Non-Governmental Liaison Service
NGO	nongovernmental organization
OECD	Organization for Economic Cooperation and Development
OPA	Oil Pollution Act
PGA	People's Global Action Against Free Trade
PSSA	Particularly Sensitive Sea Area
SPS	Agreement on the Application of Sanitary and Phytosanitary Measures
SRI	socially responsible investing
TBT	Agreement on Technical Barriers to Trade
TNC	transnational corporation
TRIPS	Trade-Related Aspects of Intellectual Property Rights
UK	United Kingdom
UN	United Nations
UNCED	United Nations Conference on Environment and Development
UNCTAD	United Nations Conference on Trade and Development
UNEP	United Nations Environment Programme
UNCTC	United Nations Centre on Transnational Corporations
US	United States
USSR	Union of Soviet Socialist Republics
WB	World Bank
WBCSD	World Business Council for Sustainable Development
WWF	Worldwide Fund for Nature
WTO	World Trade Organization

# Introduction

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One of the most influential frames of reference offered in recent years to capture the core challenges facing us in the twenty-first century is the notion of a world risk society. Associated above all with the work of the sociologists, Ulrich Beck (1992, 1999) and Anthony Giddens (2000), a central claim of this model is that contemporary societies across the globe are united in their exposure to (largely unintended) physical threats arising from the far-reaching transformation of material environments and organisms by industrial technologies. More precisely, they contend that these threats are not only unprecedented in their worldwide scope, they also present novel dangers due to the uncertainties of ‘manufactured’ environmental change. Obvious examples here include the extensive but locally indeterminate impact of rising anthropogenic greenhouse gas emissions, the depletion of global biodiversity, the (potential) use of biological, chemical or nuclear weapons, and the dissemination of genetically modified organisms.

Such threats test severely the traditional expectation within Western societies that we can, with some confidence, assess the possibility of injury and loss from anticipated dangers – the conjunction of impact and probability defining the very notion of risk. However, these dangers have historically been localized and tangible – flooding, fire-damage, smog-related ailments, and so on. The world risk society is instead crosscut by transnational and global threats separated in space–time from their sources, sometimes synergistically combining, and portending irreversible effects. Furthermore, heightened social awareness of global environmental risk is both dependent on experts to identify the often invisible parameters of danger, and also rendered insecure by dramatic examples of the limitations of that expertise. Beck and Giddens both emphasize how the active *construction* of global risk through scientific and technological knowledge has become politicized: which competing claims should we believe on risk? Which decision-making authorities can be trusted? To whom can we attribute responsibility for (potential) harm?

The question of responsibility to affected parties for actions generating transnational and global environmental threats is at the heart of this book. According to Beck, a governing logic of the world risk society is ‘organized

irresponsibility' (1999: pp54–8): the difficulties in attributing causes and consequences to actors for catastrophic risks overwhelm conventional risk-assessment capacities and regulatory systems. Political and legal rules of accountability demanding clear pathways of causation and damage founder on complex, collective dangers. Those affected by the incidence or threat of significant harm to human health and ecological sustainability commonly face, it is argued, an onerous burden of proof; first to identify a responsible agent and, second, to express their interests as a form of present or future economic loss understandable to decision-makers.

Like many of the bold generalizations informing the world risk society model, the idea of organized irresponsibility deserves systematic analysis. My contention in this work is that there is indeed an 'accountability deficit' in relation to growing transnational and global hazards. This is evident, above all, in the *spatial mismatch* between national territories of governmental responsibility and transboundary pathways of (potential) harm: the interests of those exposed to environmental dangers often do not correspond with state and corporate priorities. Nevertheless, I claim that there is an emerging set of norms and rules promoting democratic accountability for transnational harm. These transnational obligations constitute what I term a 'new accountability' – modes of moral and legal responsibility owed by state and non-state producers of significant transboundary risk effectively to consider the interests of non-national affected parties. It is, I will show, a responsibility both called for by various nongovernmental activist networks and one also acquiring legal weight within international regimes of harm prevention and liability. In this Introduction I set out briefly the global context of the question of transboundary environmental responsibility, indicating why this prompts us to recast established notions of democratic accountability and risk management.

## **Environmental globalization and democratic accountability norms**

For the proponents of the world risk society notion, the hazards produced by advanced industrialization possess an inherent tendency toward globalization – they are physical impacts of an intensified transnational connectedness involving a range of social, political and ecological forces. Globalization of environmental risk is therefore seen as bound up with wider transformations of modern life, taking in the creation of a world capitalist economy, the changing role of nation-states, the global diffusion of military power, and the invasive reach of machine technologies. Needless to say, social scientists have argued at length about the significance of the various dimensions of globalization, including whether the term itself actually advances understanding of the contemporary world. There seems, at least, to be a widespread

acknowledgement that information and communications technologies have facilitated the ‘rescaling’ of social relationships, such that transnational information networks influence increasingly the experience, value and scope of local events. Depending on access to, and involvement in, global networks of economic and political power, local activities are deemed profitable or loss-making, with or without authoritative force, culturally significant or irrelevant, and so on (Castells, 1996: pp376–418).

No dimension of globalization exhibits the physical consequences of this rescaling more vividly than the transformation of socio-ecological systems: the globalization of environmental degradation – through transboundary pollution, increasing ecological interdependence and the economic pressures on the global commons – has exposed the negative effects of actors displacing environmental costs across or beyond national borders and onto future generations. Above all, this ‘globalization of side effects’ (Mol, 2001: pp71–93) is linked to lengthening chains of capitalist production and consumption, with their substantial transboundary flows of matter and energy. The new pathways of actual and potential harm have, at least initially in Western societies, sparked regional institutional reforms and raised expectations that responsibility for the condition of the biosphere should become more of a focus for international governance regimes. The overarching moral obligation here, justifiable at minimum by a simple imperative of life support, is that producers of harm affecting vital human and ecological interests should be required to defer to those interests. Yet, production and consumption impacts are becoming spatially detached from national legal-regulatory activities – responsible actions may well be distant and diffuse in space–time. What challenges does this present to prevailing accountability norms in liberal democracies?

In the first place, the very notion of political accountability has become *unsettled by shifts in the nature of governance*. Accountability, as traditionally understood in liberal democratic societies, denotes modalities of oversight and constraint on the exercise of state power (Flinders, 2001: pp9–15). It refers to the capacity of citizens to keep in check those who possess public authority through mechanisms compelling these office-holders to give reasons for their actions and, when performance is deemed unsatisfactory, to sanction them by media-enabled protest, legal challenges or, more routinely, the withdrawal of electoral support for the governing party. Now, this dual function of political accountability – answerability and redress – has become clouded by the emergence of decision-making arenas where (sub)national political authorities are increasingly interacting with each other and a wide range of non-state actors. Cross-border environmental harm arising from economic transactions has prompted numerous regulatory efforts, but the sheer diversity and complexity of these (generally issue-specific) policy responses has often made it difficult to determine who is responsible for what to whom. As Newell and Bellour (2002) demonstrate in the development field, the growing role of corporations and nongovernmental organizations (NGOs) in delivering public



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goods in multiple and overlapping jurisdictions has heightened the indeterminacy of political accountability. Significant, often contested, changes in the relative power of state and non-state actors suggest the urgent need to map out anew the lines of responsibility between the authors and addressees of policy decisions.

Secondly, new environmental risks expose the *reactive scope* of political accountability as conventionally understood. In principle, accountability measures should allow citizens to monitor the exercise of public authority in all policy arenas. As John Dunn (1999) observes, though, such is the opacity of most governmental decision-making, that citizens face major informational obstacles in seeking accountability for specific actions. To uncover political complicity in the production of environmental (and other) hazards in particular, affected parties will struggle to identify culpability when the negative consequences arise from economic processes or activities routinely authorized by the state. Investigating expert-based systems of regulatory approval, including their risk-management procedures, presumes a technical competence beyond the ability of most citizens. Not surprisingly then, democratic political accountability becomes more an exercise in assessment and attribution of responsibility *after* damage has taken place, impacting on ordinary life experiences (for example, water or food contamination, the loss of a valued ecosystem). Only then is the policy perhaps altered, the bureaucracy realigned. Of course, as the world risk society theorists caution, we are faced with the possibilities of catastrophic and irreversible harm, which render even more problematic this backward-facing character of political accountability.

Informational obstacles are compounded when, as with many environmental hazards, the distance between responsible actions and threats stretches across national borders. Moreover, even assuming that sources can be pinpointed, those affected often lack the means directly to sanction the political office-holders in the source country. Given that democratic political accountability is tied to the sovereign authority of states, cross-border environmental degradation has, thirdly, triggered an *erosion of the legitimacy of state-based accountability*. Transnational and global ecological risks undermine the credibility of state authority: governments are often unable to prevent externally generated threats to the well-being of their populations, while their diplomatic efforts to hold responsible actors to account through international treaties often falter against competing geopolitical interests and disincentives to unilateral action for collective environmental problems. This 'protection failure' (Jones, 1999: pp217–22) should not be equated with an inexorable decline in state sovereignty: as the case studies in this book illustrate, emerging norms of transnational accountability for environmental harm include new state capacities and responsibilities. However, it does highlight the challenge to the traditional containment of political accountability within domestic borders when, in order to address cross-border threats, states now have to negotiate and share authority with international institutions.

The implication here is the need, fourthly, to *move beyond territorial norms of responsibility*. Democratic political accountability normally presumes a territorial congruence between producers of harm, affected parties and regulatory authorities. Indeed, this rests on the traditional association of political identity with membership of a community territorially defined by the state. For the liberal democracies this has historically been accomplished by the construction of national identities: to have been outside such a community – as a non-national or a distant stranger – is typically to have been accorded little if any legal standing, even as the recipient of harm generated by individuals from that nation-state. Increasing transnational environmental harm reveals the moral injustice of locating accountability duties only among co-nationals. Beck (1999: p16) suggests political responsibility for global risk as a cultural basis for the creation of ‘non-territorial’ communities of shared risk, but offers little elaboration. We can nevertheless identify the emergence of such cosmopolitan norms of accountability within the human rights field, where international duties of criminal and non-criminal responsibility for human rights abuses are designed to promote redress for victims whatever the nationality of the offender (Ratner, 2000). These are supplemented by informal norms of answerability provided by such transnational civil society actors as Amnesty International and Human Rights Watch. In this volume I argue that there is a necessary role for human rights duties in developing accountability norms for transnational environmental hazards.

Lastly, globalization of environmental risk exposes the shortcomings of *democratic accountability norms detached from economic institutions*. The global spread of capitalist market relationships attests to the dominance of organizational forms centred on private ownership of the means of production. Neoliberal arguments, evident in rule-making and arbitration for world trade and investment, maintain that the vigorous defence of private property rights and investment freedoms underpins the welfare gains of economic globalization. Yet although new trajectories of environmental harm are being produced, these claims uphold the traditional liberal democratic principle that business organizations should not routinely be required to account for the negative impacts of their activities on non-shareholder interests. The history of the company form in advanced capitalist countries indicates only limited progress made by unions, interest groups and others in breaching this corporate immunity to public scrutiny. Where regulation has been socially acceptable and politically feasible, this has tended to relate to the negative domestic impacts of businesses in their home countries, rather than the harmful consequences of their production, trade and investment activities overseas. Since the 1990s, pressure has mounted for companies to account for their social and environmental performance in all operating regions (Warren, 2000: pp94–109). So far, new norms of corporate environmental responsibility have been largely confined to voluntary reporting initiatives: however, as shown in Chapter 6, some political and legal inroads have been made by civil society

actors in holding corporations to account for the consequences of their actions in other countries.

In so far as democratic accountability in liberal societies is ultimately addressed to a 'public', it is clear that the five points above unsettle the cardinal organizing principle that members of local and national communities suffering the incidence or threat of significant harm can effectively seek redress through – and against – their political representatives. It becomes apparent to individuals and groups exposed to transnational environmental hazards that these representatives frequently have difficulty even in identifying responsible agents across borders, let alone securing appropriate mitigation and/or compensation. This weakens the moral justification that a democratic government has authority to govern through its exclusive capacity to act in the public interest. Indeed, central to the concept of new accountability is the recognition of transnational publics, composed of individuals who may not necessarily be co-nationals or, indeed, have any contact with one another. Their collective bond arises from the joint exposure to current or threatened environmental harm as consequences caused by the activities of others across political borders, and their common interest is in regulating those activities.

### **Transboundary environmental risk: rescaling assessment and management**

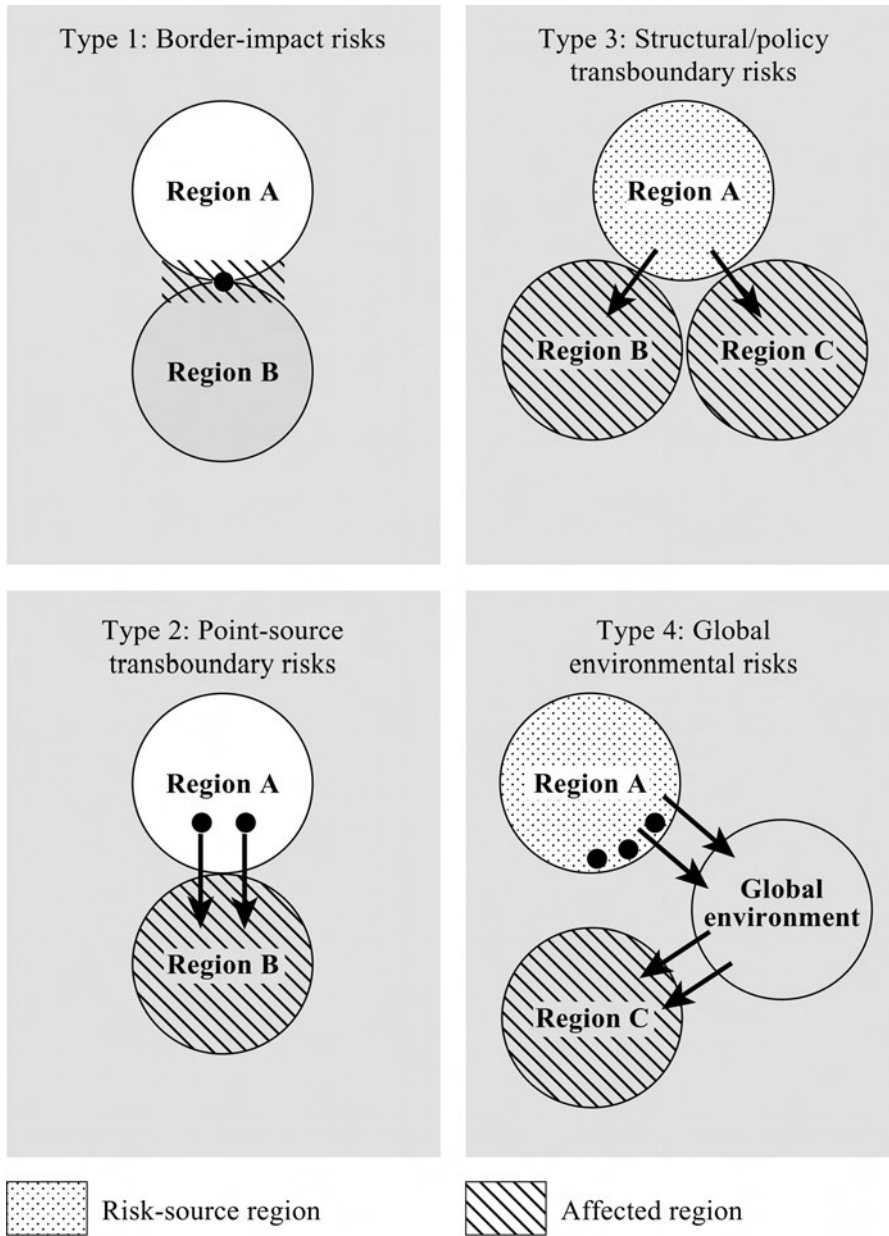
The capacity of affected publics to hold actors accountable for environmental hazards rests on their involvement in open risk communication and the effective incorporation of their interests by those with relevant decision-making authority. It has become widely acknowledged by environmental scientists, though, that this requires a shift from conventional risk assessment and management techniques, where expert-led technical appraisals on the probability of adverse impacts directly feed into top-down regulatory controls. Here, the inclusion of (sub)national publics has routinely consisted of no more than the provision of factual evidence and predictions, often leaving unresolved concerns about institutional performance or value disagreements (Renn and Klinke, 2001: pp247–9). For transnational and global environmental risk, such concerns may well be accentuated: the lack of effective governance regimes highlights the challenge of institutional competence (e.g. for addressing global climate change), while conflicting values and interests are particularly evident where affected parties reside in different jurisdictions from the beneficiaries of activities producing harm (e.g. transboundary air pollution). In these circumstances, it is not surprising that demands for the representation of affected publics are being heard in various arenas for transboundary risk management.

The categories of transboundary risk set out by Jeanne and Roger Kasperson (2001a) provide a valuable starting point for distinguishing transnational and

global affected publics. Within the overarching class of cross-national risks ‘that arise when human activities in one or more nation-states threaten current or future environmental quality, human health, or well-being in at least one other nation-state’ (p 213), their fourfold classification (Figure 1) explicitly incorporates social and economic attributes of risk production and reception (pp 213–16):

- *Type 1, border-impact risks* involve economic and industrial activities in a border region that affect human populations or ecosystems in the border area on both sides of the political boundary. Typical of this type of risk, they claim, is the Gabčíkovo-Nagymaros hydroelectric power scheme impacting a stretch of the Danube River from Slovakia into Hungary: here a protracted dispute between the two countries has centred on the Hungarian concerns about the negative economic and environmental consequences of decreased water supplies.
- *Type 2, point-source transboundary risks* involve one or several clear point sources of potential pollution and accident-related discharges threatening at least one adjoining country or region. Emissions of sulphur dioxide and nitrogen oxides travelling from industrial point sources in the UK and being received as acidifying rain in Scandinavian countries is a familiar example of such transboundary pollution, while the Chernobyl nuclear accident in 1986 exemplifies the incidence of a high-consequence or catastrophic risk event.
- *Type 3, structural/policy transboundary risks* comprise less identifiable and more diffuse pathways of harm *associated* with state policies or the structure of the economy. The pervasiveness of risks in this class is often concealed by their embeddedness in routine systems of transportation, energy use, food consumption and so on. As evident in transnational public anxiety about nuclear waste generation and genetically modified crops, the risks triggered by policy decisions can be challenged. However, the health and environmental ill-effects arising from entrenched policies and economic structures may not be evident in everyday choices even though their cumulative impact can be significant (e.g. respiratory problems aggravated by vehicle emissions, tropical deforestation advanced by land clearances, contaminated beef caused by industrialized agriculture).
- *Type 4, global environmental risks* involve human activities in any given region or country, or set of regions and countries, that register their effects on other areas through changes to globally functioning biogeochemical systems. As the core example of greenhouse gas emissions illustrates, this risk class presents particular difficulties in predicting environmental impacts and has raised strong international disagreements over apportioning responsibility for harm production.

The above classification moves beyond mainstream technical framings of transboundary risks, making conceptual space for the social and political



(Source: Kasperson and Kasperson 2001a: p214)

**Figure 1** *A fourfold classification of transboundary risk*

analysis of risk assessment and management. A key thesis advanced by Kasperson and Kasperson is that risk events ‘interact with psychological, social, institutional, and cultural processes in ways that can heighten or dampen perceptions of risk and shape the risk behaviour of institutions, groups, and individual people’ (2001a: p217). In other words, the experience of biophysical threats of harm is always mediated by social contexts of communication. *Risk amplification* denotes the social intensification of risk signals, whereby various actors, facilitated by favourable cultural, organizational and institutional tendencies, escalate collective concern about potential harm, creating political pressure for risk reduction (e.g. the activities of environmental interest groups). On the other hand, there are also cultural and social propensities allowing certain actors (for whatever reasons) to dilute disquiet about apparent sources or pathways of biophysical harm – this *risk attenuation* serving politically to stall or block regulatory efforts (e.g. the efforts of the industry-led Global Climate Coalition in opposing the Kyoto Protocol on greenhouse gas emissions). For transboundary risks, the claim is that the potential for social amplification or attenuation is heightened by geographical divergences in interests and responsibilities. In a risk-source region, material benefits from productive and consumptive activities generating the threat or incidence of harm across borders are likely to favour social attenuation processes, while in the risk-consequence region(s), the involuntary receipt of risks, divorced from any benefits, is likely to promote social amplification. Kasperson and Kasperson caution that this geopolitical asymmetry in risk communication can be deepened further if the risk-source country and the recipient country share overlays of past conflicts, cultural difference and ongoing distrust (2001a: p211).

The spatio-temporal location of those persons directly affected by transboundary risk and risk events is a crucial determinant in the scope for social amplification and attenuation. A preliminary differentiation of affected publics may be mapped onto the fourfold classification of transboundary risk (2001a: pp234–9):

- Border-impact risks typically have near-term, biophysical impacts concentrated among border inhabitants, with more diffuse extra-regional consequences. Cultural and political differences across jurisdictional boundaries may be exploited in the recipient country by those linking the interests of the directly affected parties to national political agendas, amplifying the perception of threat.
- For point-source transboundary risks, normally it is possible to locate pathways of (potential) harm issuing from discrete sources, enabling at least the identification of proximate affected publics, with other effects rippling out less clearly. Assessment and management are aided by the pronounced risk profile here, although political disputes can still arise from divergent national perceptions of respective costs and benefits.

- The affected publics of structural/policy transboundary risks are widely dispersed within the risk-source country and surrounding border states, extending also through time to future generations for such long-term threats as those posed by nuclear energy and some genetically modified organisms. Construction of a transnational public interest in regulation of these risks faces a significant geopolitical hurdle in the attenuation practices of governments and corporate elites.
- Global environmental risks entail the most diffuse affected publics: the causal links between scattered risk sources and planetary-wide affected parties are remote in space and time. Given the scientific complexities involved in attempting to map pathways of present or future harm in this risk class, social amplification and attenuation processes feed on competing expert interpretations as well as more general differences in societal values.

The acknowledgment of these transnational affected publics requires risk assessment and management explicitly to address the multi-scale effects of human-induced environmental change. For transboundary risk assessment, already attuned to interdisciplinary work on planetary impacts (e.g. global climate change models), the lack of regional or local specificity on ecological and social consequences has been flagged up as a major deficiency for decision-makers (Cash and Moser, 2000: pp112–13). A number of scientific programmes have been established to tackle this shortcoming in environmental risk research: launched in 2001 by a partnership of intergovernmental and nongovernmental organizations, the Millennium Ecosystem Assessment represents perhaps the most ambitious recent programme globally to coordinate multi-scale studies on the consequences of environmental change on human well-being and ecosystem services ([www.millenniumecosystem.org](http://www.millenniumecosystem.org)). An explicit objective is to establish interlinked assessments where local ways of knowing feed into, and are enriched by, non-local scientific appraisals. This participatory approach to knowledge – targeting in the first-phase (2001–2004) impacts of biodiversity loss, wetlands use and desertification – is in line with calls for a ‘sustainability science’ (Kates et al, 2001) aiming to integrate plural methodologies and understandings in the investigation of multi-scale nature–society interactions. Included here are, it is claimed, the needs interpretations of affected publics. Where the proponents of sustainability science press further, converging with the world risk society theorists, is for increased research on the social and political processes shaping human environmental transformations across the planet.

Rescaling risk assessment to meet the challenge of transboundary environmental problems necessarily implies that the information generated for decision-makers integrates the negative effects of socio-ecological processes on affected parties within and across jurisdictions. An emerging framework open to this task is adaptive environmental management, preoccupied with the participatory design and implementation of policy for environmental sustainability. The literature on adaptive management has employed the term

‘panarchies’ to represent the cross-scale effects of environmental degradation caused by human influences (Gunderson et al, 1995; Holling et al, 1998). Panarchical relationships suggest dynamic temporalities and spatialities of environmental change which, by no means absent from natural evolutionary cycles, are nevertheless scaled up by the socio-economic forces of globalization, extending and intensifying transboundary risks. The adaptive management perspective exposes in particular the adverse ecological consequences of technocentric resource extraction and management practices, which are predicated on short-term yield maximization and drastic biophysical simplification. Of crucial relevance for transboundary risk regulation, adaptive management recognizes numerous non-linear feedbacks in biophysical systems, such that the cross-scale effects of human interventions are often uncertain and unpredictable. Given these circumstances, adaptive management proponents advocate incorporating affected publics – and other stakeholders – in ongoing forms of policy experimentation. This is designed to elicit open communication on participants’ values and preferences, rooting management proposals in a democratic problem-solving discourse.

In its implications for transboundary risk governance, the participatory ethos shared by sustainability science and adaptive management uncovers entrenched inequities of risk reception across the world – the question of *differential vulnerability* of affected publics; that is, the susceptibility of their lives and livelihoods to harm (Blaikie et al, 1994). For example, Kaspersen et al (2001: pp263–71) note the various distributional burdens faced by impoverished, ecologically marginal populations as a consequence of past and present fossil fuel emissions by the advanced industrialized countries. From this perspective, the social and ecological conditions of risk bearers are as important as the physical threats they face in determining potential impacts on their well-being. Moreover, the environmental burdens on the most vulnerable are often compounded by wider, enduring inequities in development possibilities and life opportunities. As publics affected by particular transboundary threats, their interests are typically unrepresented or passed over in relevant political and economic decision-making. Democratic accountability for transboundary risk production is rendered more complex – and politically far-reaching – by these considerations: it points in principle beyond individual or group responsibility for discrete acts of (potential) harm production to encompass also the systemic accountability of public and private institutions for producing environmental change and conditions of vulnerability.

### **The new accountability: the structure of the book**

Observing widespread and growing demands for citizen involvement in transboundary risk management, Renn and Klinke (2001: p271) nevertheless



note that ‘the general public as a nongovernmental actor in foreign policy-making has been rather neglected in theoretical studies on international policy-making as well as in practice’. The common coupling of publics to national political communities has prevented an appreciation of expressions of well-being not mediated by states. Nowhere is this more apparent than those instances in which a collective group shares an involuntary fate as recipients of transboundary exposure to current or potential environmental harm. Detached geographically from the territorial jurisdiction in which the material activities producing the risk arise, these affected parties are effectively disenfranchised, as non-nationals, from appealing to the relevant rules of responsibility within that state – rules that, were the harm to be received domestically, typically enable aggrieved citizens in liberal democracies to seek redress.

In this book I elaborate on, and employ, a non-national notion of the public in order to capture the distinctive domain of collective interest-formation constituted by those facing transnational environmental threats. As set out in Chapter 1, the ‘public’ encompasses all those affected by the indirect consequences of material transactions – consequences generated by activities that, having a significant impact on a group not immediately involved in them, are perceived by the latter as adversely affecting their interests and therefore in need of regulation. This concept of the public draws on the formulation of pragmatist philosopher John Dewey (1954): its orientation to joint problem-solving in a world of growing cross-border consequences accords with our central theme. Dewey’s account makes clear that state institutions are responsible for the general regulation of indirect consequences, recognizing, however, that this presents a demanding challenge when the effects are transnational and inter-state regulation is needed. It falls to the respective publics associated with particular transboundary consequences to press for that international cooperation: relevant questions here, as articulated by Cochran (1998: pp267–71), include the conditions by which such affected publics will know themselves as publics, their relationships across issue areas, and of course the nature of their impact on international policy-making.

In Chapter 1 I argue that the notion of affected publics provides the basis for a new understanding of democratic accountability for transboundary harm production. The central claim is that there are no compelling moral reasons why the accountability norms of inclusiveness and equal consideration of interests commonly recognized within liberal democratic states should not be extended to non-national publics affected by cross-border environmental harm. If we accept that, at least in these cases, responsible agents should be answerable to more than co-nationals, then an equitable framework would pull in all affected parties. Rather than territorial (state-centred) terms of reference, the geographical scope of this responsibility is set in principle by open and inclusive public discourse on the perceived harm or risk. Democratic accountability is advanced in so far as producers of harm can be called upon to justify their actions to affected parties and can be sanctioned in some way

for failing to prevent harm across borders received involuntarily. For reasons given in Chapter 1, where the interests of individuals or groups affected by transboundary harm are deemed to be vital (e.g. provision of clean air and water), there is a strong argument for buttressing accountability rules with human rights considerations.

Civil society actors are at the forefront of efforts across the world to redefine democratic accountability norms in favour of transboundary publics. Chapter 2 addresses these advocates for the new accountability, focusing on environmental NGOs and coalition movements. Whether as high-profile groups (e.g. Greenpeace International, Friends of the Earth International, World Wide Fund for Nature) or through advocacy networks (e.g. Third World Network, International Forum on Globalization, Rainforest Action Network), environmentalists have become increasingly adept at monitoring and scrutinizing the ecological footprint of state authorities and private companies, bearing dramatic witness to space–time pathways of environmental harm and seeking explanations from those responsible. Since the mid-1980s, transnational forms of environmentalist mobilization have taken advantage of growing constituent organizations, communications technologies and new channels of influence to enlarge also their repertoire of sanctions – political lobbying, direct action protests, consumer boycotts and so on. However, these activities are by no means uncontested: as I discuss, environmentalist networks face interrogation themselves about the legitimacy of their own claims to represent affected publics.

Norm promotion by transnational activist networks usually entails seeking the support of state actors and intergovernmental organizations to institutionalize the new norms in international rule-making. Chapter 3 finds evidence for transnational accountability norms receiving recognition in global environmental regimes. This is in large part due to the wide-ranging currency of the liberal no-harm principle in international law, reflected in what Andrew Linklater (2001) terms ‘cosmopolitan harm conventions’ – inter-state agreements to regulate injury and distress to others, regardless of nationality. If these are still, above all, associated internationally with human rights law (protecting the vital interests of the individual) and humanitarian law (protecting individuals during armed conflict), harm prevention is also a central tenet of the emerging body of international environmental law. I survey a number of environmental treaties to locate commitments between states to prevent transnational ecological harm. They demonstrate that rules to regulate environmental harm are starting to register, albeit gradually, the interests of transboundary affected publics (not denying of course the political propensity of many state and non-state actors to express national concerns in universal terms). International consensus may be lacking on the precise scope and nature of these transnational obligations, but their presence in numerous issue-specific conventions represents a significant extension of preventative norms to environmental risk and damage.

At the same time, transnational environmental obligations are entering a global geopolitical context in which neoliberal norms of economic globalization – the so-called Washington consensus – still hold substantial sway over the perceived interests of state and private actors. Nowhere is this more evident than in the area of international trade governance, where rules of cross-border market liberalization and access bind the 146 member states of the World Trade Organization (WTO). The consolidated legal force of WTO rule-making and enforcement not only contrasts with the fragmentary reach of multilateral environmental agreements, it also exists in tension with the trade obligations contained in some of these treaties. More generally, environmental NGOs and activist networks have challenged the WTO with neglecting the negative ecological (and social) effects on affected publics of its trade policy-making. Chapter 4 sets out the politically charged accountability questions raised here, which feature the claim that the WTO – and its constituent member states – should be obliged to answer for the extra-territorial environmental impacts of international trade. I outline recent moves by the WTO to become more transparent and increase its engagement with transnational civil society actors. A survey of NGOs participating in regular briefings on the WTO Committee on Trade and Environment identifies shared goals among these actors for institutionalizing modes of environmental accountability at the WTO, which centre on new and strengthened points of civil society access and representation. I argue that the political feasibility of these WTO reform recommendations largely rests on the ability of sympathetic European member states to convince developing-country members that they are not a front for green protectionism.

Ensuring that those responsible for transnational ecological harm are made liable for their actions is a widely accepted principle in international environmental treaties and declarations. However, the reluctance of states to specify liability rules in these legal instruments has called into question the ability of affected interests to seek financial redress from identifiable harm producers. In Chapter 5 I first summarize the protracted efforts of the International Law Commission to codify general rules of liability for activities involving the risk of significant transboundary harm, then turn to the major vehicle for the development of financial accountability for environmental damage – civil liability treaties. Examined in detail is the first civil liability regime to allow environmental damage claims from non-nationals – the international oil pollution liability regime. As discussed, the reliance on civil liability norms for cross-border environmental compensation encounters particular challenges concerning quantification of damage and coverage outside spaces of national jurisdiction – problems encountered in other civil liability regimes. Finally, I identify new trajectories of criminal liability for transnational environmental damage, which may well be the most appropriate instrument to seek redress for harm to extra-territorial spaces.

Legal liability rules for environmental compensation represent an accountability domain in which producers of transboundary harm face binding norms

of answerability and redress. In recent years, a number of environment and development NGOs have campaigned to extend their reach from particular risk-bearing activities to routine corporate behaviour entailing cross-border social and ecological costs. Chapter 6 addresses the topic of corporate accountability for transnational environmental harm, contrasting the ambitious efforts of NGOs to advance civil regulation and foreign direct liability as effective tools of redress for corporate wrongdoing with the growing employment of environmental self-reporting and self-regulation by corporations. The voluntary mechanisms of corporate environmentalism are united by their framing of ecological responsibility in market liberal terms: they articulate ways in which corporate practices address cost-based environmental expectations; for example, in the cross-border greening of supply chains, production technologies and management systems. I examine corporate voluntarism, civil regulation and foreign direct liability as mechanisms of transnational environmental accountability, suggesting finally that there is a need to entrench corporate environmental obligations to affected publics in international law.

Transboundary and global flows of environmental harm, as perceived by affected publics, invoke space–time pathways of responsibility at odds with the territorial boundaries of state sovereignty. Being able to hold actors to account for such harm requires mechanisms for empowering those affected by it to organize themselves and engage politically. Following an overview of the trends toward a new accountability identified in the preceding chapters, the Conclusion pulls out some key pointers on conditions conducive to the formation of democratically organized transnational and global publics. It then considers the prospects for new accountability norms in an unsafe world where powerful states are preoccupied with security concerns. It is necessary, I argue, to consider the exceptional circumstances in which the threat by states to use force for humanitarian goals may need to encompass grave and systematic threats to environmental well-being.

*Chapter 1*

# Transnational Accountability for Environmental Harm: A Framework

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How is accountability for transboundary environmental harm to be determined? On what basis should activities that impose present and future costs outside national borders be regulated? And how should the producers of this harm be made answerable and responsible to affected groups? This chapter is concerned with providing a framework for understanding transnational environmental obligations, relating them to spaces of communication where actors are held to account by affected parties for the negative social and ecological consequences of their actions. Obligations denote legal and moral requirements: the chapter therefore combines an outline of the emergence of accountability duties within international environmental law with a normative justification for addressing the interests of transnational publics.

The governance implications of transnational environmental accountability are most obviously located in the field of planetary environmental management. Since the 1972 United Nations Conference on the Human Environment (the Stockholm Conference), the development of regional and international environmental conventions has become the major vehicle of global ecological governance, generating a complex of loosely connected regimes. Scholars have tended to explain this regime-building within a rational choice model of inter-state cooperation: environmental obligations serve to coordinate governments' responses to collective action problems; that is, situations where private claims on natural resources have generated uncompensated environmental costs across and beyond national borders. In an international arena without an authoritative rule-making body, multilateral environmental treaties bring order and agreement on how common ecological goals can be harmonized with the preferences of sovereign states. According to this preference-based (utilitarian) model of international cooperation, environmental duties are instrumental in reconciling state-centred objectives: the nature of the obligations themselves – and the norms they embody – is of secondary importance.

More recently, social scientists have paid increasing attention to the role and status of norms in global politics (Finnemore and Sikkink, 1998; Risse, 2000). As standards of appropriate behaviour, norms represent shared, evaluative assessments actively shaping actors' interests and identities. Communication on norms is central to the adoption (or rejection) of new obligations as justifiable rules for governing behaviour in a particular issue area. If it is to embrace claims to democratic deliberation, this communication cannot avoid appealing to reasoned arguments that attempt to persuade all affected by the obligation that it is acceptable as a legitimate constraint on their actions. That the legitimacy of social norms depends on meeting the expectation of actors that they can be rationally justified in public interest terms is central to the argument of this chapter. It roots a critical notion of accountability for environmental harm not in strategic bargaining between states, but in the open deliberation on appropriate norms by affected publics.

Of course environmental nongovernmental organizations (NGOs) and activist networks, pursuing ecological goals within and across state borders, are leading organizational platforms for promoting environmental norms. Environmentalism represents, with its life-centred, transgenerational values, perhaps the most important contemporary challenge to neoliberal prescriptions for economic globalization. Against the market expansionist ethos and privileging of private authority of neoliberalism, environmentalism counters with calls for ecologically adaptive, publicly accountable institutions and practices. At the same time, defenders of market-led development paths are questioning strongly the democratic accountability of NGOs and activist coalitions: what is their responsibility to constituent members and groups? How can they claim to represent the concerns of transnational publics? The divisions between private and public interests, between particular and universal constituencies, become part of the politically charged way in which the framing of environmental norms is contested.

Questions of democratic legitimacy thus apply to *all* actors making international or transnational political claims, although the concept of public accountability developed here is oriented towards those networks of power *producing* transboundary and global environmental harm. Following initial comments on transnational relations and state sovereignty, a theoretical formulation of affected publics is set out. Transnational accountability for environmental harm is directed as moral justification to those affected publics, as informed by principles of harm prevention, inclusiveness and impartiality. Moral obligations to protect environmental quality find legal currency in the developing principles of public international law: transnational relations are pulling non-state actors into that legal discourse and practice. At the level of state responsibility are, I claim, those ecological obligations that build on existing rules of harm prevention to promote environmental accountability. Furthermore, I argue that transboundary risks clearly threatening vital conditions of life suggest the need to invoke rights-based environmental obligations consistent with existing multilateral treaties and human rights law.

## Transnational relations and state sovereignty

Within international relations theory, recent debate on transnational relations has taken as its conceptual focus the creation of a cross-boundary political space, diverging from traditional state-centred notions of sovereign territory. *Transnational* relations denote 'regular interactions across national boundaries where at least one actor is a non-state agent or does not operate on behalf of a national government or an intergovernmental organization' (Risse-Kappen, 1995: p3). Their contemporary salience attests to the dramatic growth in nongovernmental actors undertaking transnational practices, notably activist coalitions and transnational corporations whose political influence derives respectively from communicative expertise and economic power. Transnational interactions encompass social, cultural and economic practices as much as political exchanges *per se*: while international relations theorists have fixed onto shifting spatio-temporal contours of governance (Risse-Kappen, 1995; Rosenau, 1997), other social scientists have opened up wider conceptual discussions on transnational flows (e.g. Sklair, 1994; Shapiro and Alker, 1996). As a result, the core political categories at the heart of international relations research in this area have been challenged and deconstructed from many theoretical angles. A full survey of this literature is outside the scope of this chapter: in this section, instead, I address the central concept of state sovereignty, outlining the relationship between territorial conditions of authority and transboundary environmental responsibility.

The most important source of environmental obligations created to limit transboundary ecological harm is public international law. Through the development of legal principles and rules, international environmental law imposes binding obligations on state and non-state actors to conform to specified norms of behaviour. In their *ad hoc* development over the past couple of decades, international legal obligations to protect the environment have, like international law generally, drawn their authority from treaties, customary practice, general legal principles and so-called subsidiary sources, such as court or tribunal decisions and jurisprudence. Furthermore, international environmental obligations also arise from a more diffuse body of 'soft law' comprising legally non-binding, but influential, conference resolutions, declarations and action plans. These soft obligations are an important vehicle for establishing new environmental norms on the world stage, which is why many environmental NGOs are active in lobbying for, and/or participating in, international environmental conferences. By definition, international law recognizes that, in order to become legally binding, environmental norms must be accepted by, and between, states as the only subjects with 'sovereign rights' to decision-making authority within the global political arena – that authority resting on their claim to political autonomy over populations within their territories and the recognition of the equality and independence

of other states. States have the legal responsibility to represent their respective jurisdictions in international environmental negotiations and to implement agreed treaties, as signatories, through their own domestic political and administrative systems (Economy and Schreurs, 1997; Brown Weiss and Jacobson, 1998). They are thus the primary holders of rights and obligations under international law.

If state sovereignty is formally recognized as a core principle of public international law, there is less agreement about the practical currency of this notion in global politics. Stephen Krasner (1999; 2000) claims that breaches of the sovereign state model have long been an enduring characteristic of the international system, whether through voluntary agreements (e.g. human rights accords), contractual arrangements (e.g. conditionality attached to international loans), or straightforward coercion (e.g. economic sanctions) and imposition (e.g. military intervention). In these circumstances, the notion of exclusive state authority and territorial control informs norms and practices which may or may not be adhered to depending on the strategic interests of the states involved: the sovereign state model is a cognitive framework of 'organized hypocrisy' where there is little consistency between the employment of sovereign norms and state actions. Notwithstanding this necessary reminder that state sovereignty is a principle regularly compromised by instrumental motives and actions, it remains a fundamental constitutional parameter of international relations. For global environmental governance, where transnational risk profiles highlight the need for states to agree new obligations on harm prevention, sovereign powers are the only indisputable juridical basis of national and international regulation. However, we can accept that they are being recast or qualified in a more interdependent global community (French, 2001).

The continuation of the state as the principal domain of authoritative law-making and regulation clashes with the farewell to the state in neoliberal representations of globalization (Ohmae, 1995), but is in keeping with a more contextualized understanding of the reconfiguration of political and economic authority in response to transnational economic, socio-cultural and environmental practices (Sassen, 1996; Yeung, 1998). A largely reactive pattern of state responses to transboundary ecological risks has led to numerous regimes of international environmental governance, generating new state obligations. Nevertheless, as Rosenau (1997: pp189–213) observes, these new state responsibilities coexist with a redistribution of authority upwards (to supranational and international bodies), sideways (to transnational activist coalitions and corporations) and downwards (to subnational public authorities and non-state actors). Rosenau employs the term 'frontier' to capture the relational field of political action generated when transnational practices dissolve domestic-foreign boundaries of state authority, pulling in non-state actors (Rosenau, 1997: pp3–11).

Identifying frontiers is a methodological question: one general thesis already informing such empirical work, and already with evidential support from



across a range of policy domains, is that the governance impact of transnational coalitions and actors varies according to domestic state forms and the institutionalization of international cooperation:

*the more cooperative international institutions regulate the inter-state relationship in the particular issue-area, the more channels should transnational coalitions have available to penetrate the political systems and the more should they be able to use international norms to legitimate their demands* (Risse-Kappen, 1995: p3).

For environmental issues, where various regional and international organizations have become the favoured foci for the creation and implementation of governance regimes, environmental NGOs have become increasingly adept at shaping these regimes. Environmentalists have influenced international environmental agreements through international lobbying and the mobilization of public opinion; for example, the key role of a transnational conservation network in creating and monitoring the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) (Princen, 1995); similarly, the environmental NGO campaigns leading to a moratorium on commercial whaling under the 1946 International Whaling Convention and also the 1985 ban on the dumping at sea of radioactive waste under the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (Vogler, 2000). Aided in part by the active encouragement of the United Nations Environment Programme, environmental NGOs also played a significant role in developing parts of the climate and biodiversity conventions agreed at the 1992 United Nations Conference on Environment and Development (UNCED) (Arts, 1998). There are, in addition, emerging opportunities for non-state actors to play an enforcement role in law relating to transnational environmental harm, although their limited legal standing restricts a more proactive compliance role for environmental NGOs in international environmental law.

The transnational accountability of producers of environmental harm demanded by NGOs accumulates evidential support as global environmental monitoring enables the increasingly precise attribution of ecological degradation to particular emission sources. To take transboundary air pollution as an example: in Europe the Cooperative Programme for Monitoring and Evaluating of Long-Range Transboundary Air Pollution is building up consensual knowledge on the emission flows and effects of sulphur dioxide, nitrogen oxides and volatile organic compounds. The critical loads methodology informing this programme gauges harmful environmental effects by integrating emission sources, transport mechanism and receptor exposure conditions (Wettstad, 2000; Albin, 2001: pp82–5). The increasing sophistication of air transport modelling has in recent years enabled the first continent-wide study of dioxin space–time pathways, tracking the long-range

air transport of dioxins from geographical sources in the US, Canada and Mexico to deposition at eight receptor locations in the eastern Canadian Arctic (Commoner et al, 2000). It has also facilitated the mapping of the transnational movement of anthropogenic aerosols over South Asia, offering preliminary findings on how this air pollution is impacting on climate, agriculture and human health (United Nations Environment Programme and Center for Clouds, Chemistry and Climate, 2002).

Of course, it remains necessary to interrogate the theoretical constructs and empirical predictions of such modelling including, as the sociologists of science would insist, the social processes by which the researchers determine their knowledge claims. The scientific framing of regional and global environmental pollution links into the political arena not just at the downstream stage of policy choices shaped by scientific findings, but also at the upstream stage of research question formulation, selection of methods and standards of proof, etc. (Demeritt, 2001). We need to be aware, therefore, of the influence of sovereign state preferences (as well as those of private actors) on the study of transnational environmental flows; for example, national science policy priorities, public and corporate funding criteria, opportunities for interdisciplinary research, and relationships with user groups and citizens. What is clear, as the analysis of transboundary source–receptor relationships for environmental pollution develops, is that territorial alignments of state authority and responsibility have not prevented the transmission across national borders of substantial pollution, and that these pollution loads with their chemical products are having far-reaching impacts on biophysical systems and human health.

### **Affected publics: a critical pragmatist conception**

The adaptive management perspective (see Introduction) exposes the stubborn ecological mismatch between spatial pathways of environmental degradation and the fixed cartography of sovereign nation-states. While regional and international environmental agreements indicate the possibility of limiting or pooling state sovereign powers, they consistently face the difficulty of reconciling transboundary ecological goals with territorial boundaries of authority. Adaptive management proponents recommend ‘de-linking’ environmental decision-making authority from territorial rules of responsibility. As Ward (1998: p83) remarks: ‘ecosystem management, applicable to designated ecological entities, which themselves may cross existing state boundaries, may well require that affected parties share the right to establish rules of conduct to govern behaviour within the ecosystem’.

In the merging of adaptive management with an open process of rule deliberation among all those significantly affected by material practices, there

is a clear debt acknowledged to American pragmatism, notably the ideas of Charles Sanders Pierce and John Dewey (Norton, 1999; Minter and Manning, 1999). The moral responsibility to protect ecological life-support processes here relates to the pragmatist notion of inclusive discourse on the consequences of human action as they unfold across multiple scales (Norton, 1996: p133).

For Dewey the perception of enduring, harmful consequences arising from human activities determines the scope of the public as an associative space of joint problem-solving: 'the public consists of those who are affected by the indirect consequences of transactions to such an extent that it is deemed necessary to have these consequences systematically cared for' (Dewey, 1954: pp15–16). Indirect consequences are those impacting on third parties not directly engaged in the material transactions in question. These might seem to correspond to the economic notion of external costs, which are uncompensated welfare losses to third parties generated by private market transactions (the focus of 'market failure' research in environmental economics). However, there is a crucial theoretical distinction here: Dewey locates the public in the *collective exercise of practical judgment* in any instance where a perceived cluster of indirect consequences is seen to require regulation. In contrast, the economic model, as evident in rational choice formulations of the public interest (e.g. Downs, 1998: pp48–83), identifies the public as that *aggregated set of individual preferences informed* by third-party concerns. While uncompensated economic costs might be one significant valuation of indirect consequences perceived to be harmful by an affected public, the Deweyan process of reasoning about these negative effects is more than a monetary calculus of subjective preferences. It features cooperative communication on why and how these consequences should be controlled.

Daniel Deudney (1998) employs John Dewey's conception of the public in order to counterpoint a 'green sovereignty' to the sovereign state framework. As the adaptive management approach has demonstrated, the cross-scale environmental effects of dominant productive and consumptive practices impact both across state boundaries and extend temporally into the future. For Deudney there is now a transgenerational public to which political and economic institutions should be made ecologically accountable. What he labels *terrapolitan sovereignty* constrains state authority according to the ecological sustainability rules of a mutually agreed planetary constitution, but there is little elaboration on how these norms are operationalized. In an international system unlikely in the foreseeable future to embrace such a radical rewriting of state responsibility rules, I argue that the pragmatist recasting of sovereignty can build on existing norms of democratic governance and accountability. This implies an understanding of the generation of transnational environmental obligations that differs both from the dominant academic perspective on global environmental governance, regime analysis, and 'dissident' postmodern perspectives.

First, regime analysis has indeed centred on the specific principles, norms and decision-making procedures informing actors' interactions in various environmental issue areas, but its institutionalist framework has neglected the intersubjective development of new environmental norms, tending to treat actor preferences as predefined (Hansenclever et al, 1997: pp23–7; Hovden, 1999). International obligations are the outcome of strategic calculations between states, where to cooperate in the creation of new rules is judged to be mutually beneficial for advancing material and symbolic gains. New international rules have been shown by regime theorists to contribute significantly to resolving transboundary environmental problems in certain circumstances, yet the content of these rules escapes critical examination. To be sure, there exists a 'cognitivist' strand of regime theory attuned to how environmental regimes actively shape preferences and identities (Kratochwil, 1989; Hansenclever et al, 1997: pp136–210), although this more sociological take on global environmental cooperation restricts itself largely to the constitution of state-centred interests. There is little sense both of how norms emerge from the dynamic interactions of state and non-state actors, and of how obligations agreed as international legal duties hold at least a claim to legitimacy not solely reducible to instrumental motives.

Second, the pragmatist argument that those responsible for transboundary ecological harm should ultimately be held accountable to all those possibly affected, would seem to find support in the critique of state sovereignty offered by postmodern commentators (Kuehls, 1996, 1998; Luke, 1997, 1999). What Tuathail (1996: pp168–78) labels 'dissident international relations theory' has interrogated modern representations of state sovereignty, notably that inside/outside axis which conventionally separates an uncontested domestic arena of political jurisdiction and citizen identity from anarchic relations between states. Following Walker's (1993) suggestive work in this area, as well as the philosophical thought of Deleuze and Guattari (1987), Thom Kuehls (1996, 38–55; 1998) identifies a *rhizomatic space* of global ecological politics, exemplified by environmental NGOs bringing attention to the trajectories of pollutants across political borders. These activists, he claims, offer a nomadic mode of political representation, vigilantly tracking and witnessing the space-time pathways of environmental harm on behalf of a planetary community of environmental citizens. The postmodern deconstruction of state sovereignty finds geopolitical borders insecure as containers of legitimate power: permeated by transnational social, economic and ecological flows, the territorial coordinates of state authority correspond neither with the multiple scales nor with the complexity of environmental risk. Transnational environmental activists express and expose that spatial disjuncture.

Notwithstanding the valuable interrogation of sovereign norms provided by the above, the postmodern approach falls short of what we need in order to progress political accountability for environmental harm. Its cultural preoccupation with the expression of environmental values has tended to neglect how

affected publics facing threats to their ecological well-being can jointly make claims against responsible parties. These claims for accountability may not be recognized in national or international law, but they have a socially integrative force in so far as they are publicly intelligible to all the relevant parties or, more strongly, actually attract general agreement on causes of harm and forms of redress. The philosophical touchstone for this communicative understanding of environmental accountability is formal pragmatics, which employs ideas about ordinary language use to develop pragmatist ideas on public discourse (Habermas, 1999a). Formal pragmatics identifies a rational potential inherent in everyday communication to the extent that speakers are able to justify their utterances reflexively on the basis of reasons recognized as legitimate by the other parties involved. This ‘rational force’ of ordinary language use rests on the presupposition of communicative accountability adopted by actors when attempting to reach a mutual understanding about something – accountability in the sense that what they say and do is answerable to others in terms of an appeal to reasons which would be deemed justifiable in free, uncoerced dialogue. Habermas (1999a: pp310–11) argues that such reflexive communication (which he labels ‘discourse’) strengthens social bonds by promoting an understanding of the needs and values of others. For socio-environmental relationships, this means an orientation to open, inclusive communication on the nature and scope of the physical interventions we make in the biosphere.

Communicative accountability locates responsibility for actions in a public discourse where, following the pragmatist tradition, participants have a moral obligation to consider the perspectives of all others. Environmental norms, like any others, are justified only when they meet (or could meet) with the approval of all those affected by them, or their representatives, after rationally considering their consequences. This *discourse principle* of public justification (Habermas, 1990: p66; 1996: p459) entails a non-territorial understanding of democratic accountability. The legitimacy of collective decisions with significant transboundary ill-effects rests on their harmonization with the interests of those affected beyond state borders; as would, firstly, be communicated to the decision-makers were these affected publics given the opportunity openly to represent their collective concerns and, secondly, also be fairly and reasonably taken into account in the decision-making. In the next section I argue that it is possible to isolate three moral precepts here – harm prevention, inclusion and impartiality – which serve to delineate communicative spaces of environmental accountability.

State and non-state actors involved in producing transboundary harm face from the notion of communicative accountability a moral challenge to justify their actions according to the interests of affected publics, while activist networks claiming to represent the latter also face interrogation concerning their motivations and capabilities for doing so. For Habermas accountability as a discursive construct is *counterfactual*: it provides a standard of democratic justification with which the rightness of actions can be assessed. While any

communication is embedded in specific social relationships with the participants involved filling out the relevant content, the discourse principle invokes (from the linguistic pragmatics of Pierce) the regulative idea of unconditionality – that further and future voices with better arguments could in principle refute any agreement reached in a particular situation (Habermas, 1987: pp92–96; 1996: pp14–16). In other words, an extended conversation is anticipated by the discourse principle and, within real-world contexts of occluded and unequal communication, serves as a critical benchmark to help identify the opportunities for, and constraints to, the equal participation of all relevant interests. This challenges the modern geopolitical assumption that territorial sovereignty precludes accountability for extra-territorial harm produced by nationals. In order to remain democratically legitimate, (inter)state decision-making authority must facilitate, and engage with, the interest representation of non-national affected publics (Habermas, 1996: pp486–90; 2001: p20).

Given the multiplicity of relevant actors, mapping out the discursive spaces of transnational accountability for environmental harm is by no means precise, addressing contested identifications of affected interests and diverse communicative practices. Cross-territorial information flows, accelerated by electronic communications media, can very quickly ascribe ‘global’ significance to the concerns of affected publics – a state of affairs not lost on environmental NGOs, who actively construct key issues through a variety of rhetorical strategies (Macnaghten and Urry, 1998: pp97–101). Their descriptions of environmental harm as ‘transboundary’ or ‘global’ are often disputed, not only by those alleged to be responsible but also by other self-defined representatives of affected publics (for example, media outlets, NGOs and politicians in the global South). However, communicative accountability does not require unanimity among relevant parties in the attribution of environmental responsibility. As a space for open discourse, transnational environmental accountability is less oriented in practice to universal agreement than to affording more respect to the claims of extra-territorial environmental victims. To accomplish this of course is to recognize the role of power relations in shaping communication. There is little guidance in Habermas’s work as to how affected publics can be empowered and how authorities can be forced to take their interests into account (Kohn, 2000: p425): this question of power is addressed below and, more substantively, in subsequent chapters.

The focus of communicative accountability on open dialogue also invites criticism that key affected parties unable to contribute discursively are unfairly excluded, notably future generations and non-human entities: this violates, it is argued, the commitment to inclusive moral consideration (Skirbekk, 1997; Eckersley, 1999). However, these objections conflate moral discussants with subjects or objects of moral concern. Moral (human) discussants are necessarily the locus for assigning responsibility, but the pragmatist notion of affected interests still leaves the determination of moral standing and concern to the

participants themselves, who are likely to introduce diverse sources of value into the discussion (these may well include the notion that ecological entities have an independent moral worth). Like any other terms these discussants put forward to support or reject transnational environmental obligations, claims about criteria for moral consideration would, in order to seek reasoned support among all those affected by environmental harm or risk, need to demonstrate that they embody and protect common interests. And if consensus is not possible on which interests deserve most protection, recourse is made to fair compromises in line with preserving minimal standards of social and ecological well-being for all (see below on environmental rights). This procedure seems to fall short of a secure ecological rationale for these obligations, but is consistent with a pragmatist focus on multiple forms of valuation in specific problem-solving contexts where ecologically adaptive, democratic development paths are sought (Norton and Steinemann, 2001).

### **Transnational environmental obligations**

Within international law the sovereign right of states to exploit their own resources is constrained by a core principle of environmental responsibility: that states have a general obligation to ensure that activities within their territorial jurisdiction or control do not cause environmental damage to other states or to areas beyond state jurisdiction. This key norm was first set out in a declarative manner as Principle 21 of the Stockholm Declaration on the Human Environment (1972) and restated at the United Nations Conference on Environment and Development by Principle 2 of the Rio Declaration on Environment and Development. Prior to these declarations, the obligation on all states not to cause serious environmental harm to other states already constituted a principle of customary international law (Pisillio-Mazzeschi, 1991). However, the obligation on all states not to cause damage to areas beyond the limits of state jurisdiction and control was only formally confirmed as a general norm in customary international law by the International Court of Justice in 1996 in an advisory opinion on the legality of the threat of use of nuclear weapons (Brown Weiss, 1999). As an obligation *erga omnes* (to the international community as a whole), it arguably empowers states to act on behalf of the international community in holding other states to account for serious extra-territorial environmental harm, regardless of whether specific treaty obligations are applicable or not. While Sands (1995: p154) cautions that states historically have proven unwilling to adopt such a tutelary role, this development nevertheless points to an emerging recognition in international law of environmental protection as a shared obligation deriving from notions of common responsibility.

The overarching obligation on states not to cause transboundary environmental harm nevertheless lacks the commanding authority that would follow

from its universal acceptance by states as entailing a peremptory norm (*jus cogens*) of international law – one that could invalidate treaty rules in conflict with it (Fitzmaurice, 1996: p307). *Jus cogens* norms, such as those prohibiting genocide, torture, forced labour and crimes against humanity, represent the highest international standards by which state and non-state actors can be held legally culpable. Principles generated by international environmental law – including specific norms embedded in multilateral treaties – have not accumulated the global legal authority and currency to qualify as peremptory norms. Furthermore, the continuing concern of many states that the expansion of peremptory norms risks destabilizing treaty relations means that there are significant geopolitical hurdles to such legal promotion for environmental norms (International Law Commission, 1999: para 311). Short of widespread state support in this area, and outside treaty commitments, attempts to consolidate and extend the spatial reach of international environmental principles and rules rest or fall in the short term on the *voluntary* willingness of states to recognize a general obligation not to cause significant transboundary harm wherever in the world that harm takes place (Crawford, 1999: p62; Pevato, 1999: p318).

In the longer term, the gradual erosion of the rule of unanimous consent (i.e. new multilateral rules bind only those states consenting to their application) in international environmental governance may allow norm-making and enforcement binding even on states not in agreement with this general obligation. A significant precedent for non-unanimous but binding changes to environmental treaty rules was set by a majority voting mechanism under the 1987 Montreal Protocol (to the Vienna Convention for the Protection of the Ozone Layer), although member states unhappy with new rules may, after due notice, withdraw from the treaty system altogether. Further progress in non-unanimous changes in international environmental rules may be promoted by the consolidation of multilateral environmental agreements and new, more coordinated, structures of global environmental governance. These changes would enable international rule-making to be more ambitious in setting standards of accountability for transnational environmental harm (see Conclusion).

Whatever the future trajectories of institutional reform in international environmental governance, the concept of transnational environmental accountability presented here already implies a moral space of public discourse, expanding or contracting according to the open identification of affected third parties. With the potential for, and growing incidence of, transboundary environmental harm, that non-territorial space is increasingly cosmopolitan. As Linklater (1998: p84) observes more generally:

*At the very least, causing transnational harm requires a commitment to regard insiders and outsiders as moral equals and it may involve placing the interests of the vulnerable members of other communities before the*