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Book Review

INTERNATIONAL LAW & THE ENVIRONMENT, by Patricia Birnie, Alan Boyle, and Catherine Redgwell[1]

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THIS BOOK IS THE LATEST EDITION of a seminal work by three of the United Kingdom's most renowned academics in the field of public international law. Although this edition relies heavily on material contained in the previous editions, it has been thoroughly revised and updated. Renewed emphasis is placed on several topics of particular interest to the global community, including climate change, genetically modified organisms and biotechnology, environmental ethics, and environmental governance. This edition is primarily the work of Alan Boyle and Catherine Redgwell. Patricia Birnie, the co-author of the first and second editions, has retired from active participation in the third edition, yet her imprint is quite visible to those of us who have long admired the breadth and clarity of the earlier editions.

In the last three to five years, public fixation with climate change has served as a catalyst for the remarkably rapid expansion in the literature associated with this relatively new discipline of law, which has only existed since the 1960s. As a result, there has been a proliferation of prominent texts on the various aspects of environmental and natural resources law. Environmental law embraces a curious mixture of domestic pollution legislation and a plethora of multilateral environmental agreements that are administered and enforced through a complex and often *ad hoc* system of courts, tribunals, arbitral panels, and directives. It is not a simple discipline, but, rather, one that is increasingly underpinned and interconnected with trade law, human rights law, and, of course, international law. In fact, it is fair to say that, currently, it is the international law arena that

1. (New York: Oxford University Press, 2009) 851 pages.

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provides much of the energy and innovation behind the development of environmental law. It is impossible to practice or teach effectively in this discipline without a reasonably good grasp of public international law principles.

Before delving into the book itself, one might speculate out of curiosity why the authors chose to title the book *International Law & the Environment* rather than *International Environmental Law*. Is it because they wanted to emphasize the way in which environmental issues and concerns have permeated what used to be, primarily, the commercial and human rights-oriented domain of international law governing relations between nation states, or were they specifically trying to avoid conveying the message that this was written from the perspective of environmental law specialists? The answer is provided in the preface to the book by the authors themselves, where they state:

> The book remains primarily an introduction to the general corpus of international environmental law, including the lawmaking and regulatory processes, approached from the perspective of generalist international lawyers rather than specialist environmental lawyers. Experience of international litigation suggests that this is the right way to approach the subject, at least in that context.[3]

This view is not surprising, given that European lawyers and academics tend to be somewhat more international law centered than their American and Australian counterparts, who appear to approach environmental law from a public interest perspective. This certainly appears to be the case when considering the decisions of the Australian and New Zealand courts, particularly those of their specialist planning and environment courts.[4] While this does not in itself detract from the overall ability of the book to provide a comprehensive overview of current trends in the field of international environmental law, the reader must at least be cognizant of the fact that not all of those involved or interested in environmental law will approach the issues from this primarily international

3. "Preface" in Birnie *et al.*, *supra* note 1 at v.

4. The New South Wales' Land and Environment Court has been in operation since 1979, established pursuant to the *Land and Environment Court Act*. See New South Wales Government, Justice & Attorney General (Lawlink), "Land and Environment Court," online: <http://www.lawlink.nsw.gov.au/lec>; New South Wales Government: NSW legislation, "NSW legislation," online: <http://www.legislation.nsw.gov.au/>. Both Australia and New Zealand have established specialist courts that deal specifically with environmental and planning law matters, and, in turn, these courts have developed a highly specialized judiciary as well as specialized environmental law practitioners. Both courts tend to view international law from the perspective of international environmental law.

perspective. Certainly, it can be argued that this is not the only way to structure the subject.

The authors are very experienced scholars, and this is reflected in the organization of the book. It has fourteen chapters and each (with the exception of the first) contains an introduction that provides the reader with a roadmap of the issues to be discussed, as well as a conclusion that summarizes the material that the authors hope the reader has learned from the discussion. By using this approach, the reader—particularly one who is a student—is prepared for the text that follows and, as such, is better able to focus on specific issues that the authors have flagged as important. Prior to the text, the reader is presented with a table of contents, a table of abbreviations and the references used for journals and reports, a comprehensive table of cases, and, finally, a table of major treaties and other instruments. The book concludes with a bibliography and index. In addition, one of the most valuable contributions that has enabled readers to more readily understand the multi-faceted issues underlying the international law principles that are discussed throughout the book is the authors' attention to detail when citing sources, relevant case law, and the commentary of international law scholars.

However, given that the international legal community appears to have an addiction to the use of acronyms, and that many terms commonly used by the community have acquired specific meanings over the years, it would, in my opinion, have been helpful to include a glossary. This would be of particular assistance to students and the less informed, and would alleviate the need to look elsewhere to understand what is meant by the use of a specific term. It is, however, reassuring to see that the authors have chosen to use footnotes rather than endnotes at the end of each chapter. The footnotes provide detailed references that direct the reader to an abundance of sources to enable further research.

The book begins with an overview of the origins of modern international environmental law and policy dating as far back as the *Declaration of the United Nations Conference on the Human Environment* (Declaration), which took place in Stockholm in 1972.[5] As a necessary element of providing the background to this topic, the chapter also provides a short primer on the traditional sources of

5. *Declaration of the United Nations Conference on the Human Environment*, UN EPOR, UN Doc. A/CONF/48/14/Rev.1 (1972).

international law, clarifies the status of United Nations General Assembly resolutions and declarations, introduces the important international law concepts of *hard law* and *soft law*, and discusses the difficulties that arise in transitioning from *soft law* to the binding principles of international law via customary international law. A number of the early International Court of Justice cases responsible for establishing some of the parameters governing international law—and by extension, international environmental law—are introduced and discussed. Although the United Nations, its specialized agencies, and the role of Non-Governmental Organizations (NGOs) are dealt with in chapter two, in my view, it would have been better to provide a more complete historical perspective of the earliest attempts on the part of the international community to embrace conservation within the introductory chapter itself. For example, the authors could have discussed treaties adopted at the turn of the twentieth century for the protection of migratory birds and wildlife.[6]

Given the central role now played by both the United Nations and the World Trade Organization (WTO) in the context of international governance, it is also important to provide a cursory account in the introductory chapter of the establishment of the United Nations in 1945—including the establishment of its subsidiary bodies, such as the Food and Agricultural Organization and the United Nations Educational, Scientific, and Cultural Organization (both of which included some peripheral environmental/conservation provisions). The WTO, which now governs the international community's trade relations, traces its origins to the 1947 *General Agreement on Tariffs and Trade*,[7] and it has had, and continues to have, enormous implications in the development of international environmental law.

The role of NGOs has likewise contributed significantly to the development of international environmental law. The International Union for the Conservation of Nature (once known as the World Conservation Union) is comprised of

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6. See *e.g. Convention between the United States and Great Britain for the protection of migratory birds*, 16 August 1916, 4 IPE 1638 in Bernd Rüster, Bruno Simma & Michael Bock, eds., *International Protection of the Environment: Treaties and Related Documents* (Dobbs Ferry: Oceana, 1975-1983) vol. 4, 1623 [Rüster, Simma & Bock]. The first treaty aimed at protecting wildlife ensured the conservation of wildlife in the African colonies of European states. See *Convention for the preservation of wild animals, birds, and fish in Africa*, 19 May 1900, 4 IPE 1607 in Rüster, Simma & Bock, vol. 4, 1607.

7. *General Agreement on Tariffs and Trade*, 30 October 1947, 55 U.N.T.S. 187 (entered into force 1 January 1948).

both NGOs and governments. Established in 1948, it is one of the oldest conservation organizations, and, arguably, the most influential.[8] The early efforts of the international community prior to the Declaration—albeit sporadic, primarily bilateral as opposed to multilateral, and decidedly unsystematic—nevertheless materially contributed to the development of international environmental law and should have at least been mentioned in an introductory chapter that purports to set the stage for a more detailed substantive discussion. Furthermore, it is somewhat misleading to date the inception of international environmental law to the 1960s and the Declaration. Some leading authors, such as Philippe Sands,[9] are of the opinion that the Declaration marks the end of the second phase in the development of international environmental law. They claim that the first phase predated 1945, while the second phase began with the creation of the United Nations and ended with the Declaration.

The chapters on international governance and the rights and obligations of states concerning the protection of the environment provide an adequate overview of the United Nations and its agencies, and set the stage for a more detailed analysis of the legal implications of the concept of sustainable development in the following chapters. Chapter three also provides a sound discussion of the obligations of nation-states in the context of the principles arising out of the 1992 *Rio Declaration on Environment and Development.*[10]

The sections on transboundary risk and harm, and the conservation of natural resources are both well structured and provide a good platform for later chapters—as do the chapters dealing with non-state actors, environmental rights, liability, and crimes. Up until this point in the book, the focus is on the development and maturing of the international global stage where many, if not most, of the solutions to the serious environmental problems will be found—if solutions are indeed to be found.

As an observer of the major trends in the development of environmental law since the 1960s, the ways in which each decade seems to usher in a new fork in the path of legal developments never ceases to amaze me, especially as

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8. See "International Union for Conservation of Nature," online: <http://www.iucn.org>.

9. Professor of Laws and Director of the Centre for International Courts and Tribunals, University College, London. Philippe Sands, *Principles of International Environmental Law*, 2d ed. (Cambridge: Cambridge University Press, 2003).

10. *Rio Declaration on Environment and Development*, UN GAOR, 3-14 June 1992, Annex 1, UN Doc. A/CONF.151/26 (vol. 1).

the principal actors responsible for regulating polluting activities respond to the ever increasing environmental degradation that is unfolding in front of us.

The 1960s and 1970s saw the introduction of the major elements of a state-based regulatory framework consisting of command and control regulation in the form of clean water, clean air, and contaminated land legislation. (The first clean water legislation in the United States was enacted in the late 1940s, although the more comprehensive amendments occurred in the 1970s).[11] The 1970s also heralded the introduction of environmental impact assessment methodology, with the enactment of the US *National Environmental Policy Act*.[12] In the 1980s, the focus turned to holding corporate management responsible for the environmental regulatory offenses committed by the corporations that they headed. This was done through the introduction of the concept of 'strict liability,' as well as directors' and officers' liability, which could result in personal fines and/or imprisonment. Much attention was garnered by both governments and the courts when they articulated what constituted a 'due diligence defense for such captains of industry in cases concerning vicarious liability.

The late 1980s and the 1990s provided the backdrop for the integration of the interconnection on the environmental stage of trade and the environment, as well as the insertion of human rights as an important element in the environmental equation—particularly in the context of international environmental law. This interconnectedness, particularly in the case of trade and human rights issues—including the right to potable water, a secure food supply, clean air to breathe, the alleviation of poverty, etc.—involves all of the rights that are now widely accepted as underpinning the efforts of all interested stakeholders in finding viable solutions to the global environmental problems that are afflicting all forms of life on this planet. Any text on international environmental law and policy must deal with these trends, and the third edition of this text attempts to place these issues in their proper context.

It is always difficult to decide on an appropriate organizational structure for a book of significant magnitude that is designed to cover diverse topics such as human rights, trade, climate change, law of the sea, conservation of biodiversity, and nuclear energy. All of the topics dealt with in this text could easily be (and often are) the subject of lengthy treatises in their own right. The authors

11. *Federal Water Pollution Control Act (Clean Water Act)*, 33 U.S.C. § 1251-1376 (1948).

12. *National Environmental Policy Act*, 42 U.S.C. § 4321-4347 (1970).

have, in my opinion, selected a methodology that rightly proceeds from developing the general international law framework to the discussion of specific areas for which the international community bears the primary responsibility to address, monitor, and enforce. This edition provides more coverage than earlier editions in the areas of climate change and biodiversity conservation, due to the importance of both in the public psyche in the past five years, and the very real impacts that are now being felt in all corners of the globe. However, the authors should have provided a more expansive treatment of these issues, as many scholars and policy makers feel they are two of the most significant, and pressing, interrelated problems facing the global community.

The book provides a very good overview of the ozone depletion regime,[13] the *United Nations Framework Convention on Climate Change*,[14] and the *Kyoto Protocol*,[15] but lacks an in-depth discussion of where we are headed now that the first Kyoto period has all but expired. However, I recognize that this criticism may be unjustified. The revision of this edition was completed in July 2008, and, since then, the geopolitical landscape has undergone monumental changes that could not have been predicted with certainty. These changes include the landslide election victory of Barack Obama in the United States and the onset of the global financial crisis, two of a number of events that were expected to have a significant impact on the direction of the discussions in Copenhagen in late 2009.

Inasmuch as the book primarily targets final year undergraduate students and postgraduates, including doctoral students of international and environmental law, the structure of the book and its ability to motivate and encourage the student to go beyond the text and test the boundaries of the substantive law is of paramount importance. Much of this has to do with the writing style, academic rigour, insight, and experience of the authors. In this regard, the book scores very high on all counts and will continue to rank as one of the most widely used texts in this area of law.

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13. "United Nations Environment Programme: Conference of Plenipotentiaries on the Global Convention on the Control of Transboundary Movements of Hazardous Wastes – Final Act" (1989) 28 I.L.M. 652.

14. *United Nations Framework Convention on Climate Change*, 9 May 1992, 1771 U.N.T.S. 107 (entered into force 21 March 1994).

15. *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, 11 December 1997, 2303 U.N.T.S. 162 (entered into force 16 February 2005).