Book Reviews

Stephen C. McCaffrey, ***The Law of International Watercourses — Non-Navigational Uses.*** Oxford: Oxford University Press, 2001. Pp. xxxii, 514. Major legal instruments, bibliography, index. £65.

Eyal Benvenisti. ***Sharing Transboundary Resources.*** Cambridge: Cambridge University Press, 2002. Pp. xix, 276. Bibliography, index. £47.50.

The Earth's natural resources are not inexhaustible. This truism is highlighted by estimates showing that we may run out of fossil fuels in only a few decades, and that by 2050 up to two-thirds of the world's population could experience serious water shortages. As populations grow, resource consumption is increasing, while per capita availability of vital resources is decreasing. Unsustainable use of water resources, overfishing of the seas, and deforestation of large portions of the Earth's surface add to the increasing pressure on the environment that human life ultimately depends on. The problem of resource scarcity is by no means a new one. However, as states grow more dependent on resources originating outside or straddling their boundaries, they increasingly address the problem through bilateral and multilateral agreements on the regional and universal levels. Scholars and legal experts, too, have become aware of the problem, as witnessed, for instance, by the recent inclusion of the topic of internationally shared natural resources in the International Law Commission's agenda. Two recently published works are devoted to this subject.

In his book *The Law of International Watercourses*, Professor McCaffrey of McGill University endeavours to give a comprehensive survey of the development and the current state of law governing shared water resources. Having served as one of the ILC's Special Rapporteurs on the topic, Professor McCaffrey is one of the leading experts in the field. In a sense, this volume is the result of the author's effort to summarize and consolidate his vast experience in this area. The result is indeed impressive. Not only does the book cover virtually all of the most influential treaty regimes in the field, it also provides for a thorough legal analysis of the major cases. It is therefore an invaluable resource for researchers and scholars.

Having laid the groundwork by assessing the world's water resources and their growing scarcity, and briefly discussing the concept of 'International Watercourse Systems', which is key to the scope *ratione materiae*, Professor McCaffrey first turns to the law's theoretical bases. He reviews in considerable detail the most important schools of thought concerning rights to transboundary waters. Beginning with the 'infamous' doctrine of absolute territorial sovereignty (better known as the *Harmon* doctrine after a former US Attorney-General), and its theoretical counterpart, the doctrine of absolute territorial integrity, he follows the traditional line of reasoning arguing that for reasons both of logic and policy these doctrines are equally objectionable, and have, as a matter of fact, never been recognized in practice. To those doctrines, the author then opposes and discusses the doctrine of limited territorial sovereignty and integrity, which today is widely acknowledged to be the guiding principle.

Certainly, it is to be welcomed that the author devotes broad space (compared with many other works) to another approach, the 'community of interests' doctrine. This notion, according to which all riparians have a common interest in the undivided transboundary water system first emerged in the Permanent Court of International Justice's

1929 judgment concerning the *Commission of the River Oder* and has recently been highlighted anew in the International Court of Justice's *Gabèikovo-Nagymaros* judgment. The author acknowledges the usefulness of the concept as a principle informing concrete obligations of riparian states. Moreover, as the author rightly points out, it reflects modern international water law, as recent treaties rather treat shared watercourses as being *common* to all riparians instead of dividing them among them.

Yet, the analysis stops short of recognizing the concept's full normative value. In fact, the community approach not only takes into account the watercourse system's natural indivisibility more fully than does the doctrine of limited territorial sovereignty and integrity. It also, in terms of policy, gives riparian states incentives for collaborating more closely, e.g. by establishing joint mechanisms with the goal of utilizing transboundary waters in an equitable and sustainable manner. Nevertheless, regrettably, another good opportunity has gone unused to embrace the community approach as a more appropriate doctrinal basis for the current law of shared transboundary resources and a more dynamic starting point for the law's further progressive development.

Part Four may be rightly viewed as the core of the study. An overview of the UN Convention on the Non-Navigational Uses of International Watercourses of 21 May 1997 serves as a starting point for a thorough discussion of current positive international water law. The author puts the Convention's provisions into the context of their negotiation history, without overburdening his account with unduly long references to the lengthy codification process. In the following section, he identifies every state's fundamental rights and obligations regarding international watercourses, discussing at length the two basic substantive norms, i.e. every state's obligation to utilize an international watercourse in an equitable and reasonable manner, and the obligation to prevent harm to other riparian states.

Yet, one of the book's most interesting sections relates to the thorny issue of the mutual relationship between these two obligations. Indeed, the question of the precise balance between these rules is crucial for determining every riparian's share in transboundary waters, and has therefore been one of the most hotly debated problems in the field. While equitable utilization is more favourable towards upper riparians, the no-harm rule tends to entrench lower riparians' already existing uses.

Rightly, the author takes the view that, in case of conflict, equitable utilization trumps the obligation to prevent transboundary harm. Two observations are key to his reasoning: Firstly, the obligation to prevent significant harm is not inherently linked to factual harm, but is rather aimed at preventing legal injury. Therefore, the no-harm obligation's proper function is to safeguard every riparian's *right* to an equitable and reasonable share. Secondly, the obligation not to cause significant harm is not one of result rendering *any* causation of harm unlawful, but one of due diligence. This observation is supported by state practice treating causation of damage as unlawful only to the extent that the resulting allocation of uses is inequitable.

While the equitable utilization and no-harm rules have, in fact, long been established, norms protecting the ecosystems of international rivers relate to a rather recent development. Without doubt, sustainable uses of watercourses and the protection of their ecological integrity need to be strengthened. Nonetheless, it may still be too early to think of these obligations as norms of general international water law. Hence, the author is right to speak of the *emerging* obligation to protect international watercourses and their ecosystems. Other fundamental obligations concern a number of procedural norms revolving around the duty to provide co-riparians with prior notification before engaging in activities possibly entailing significant transboundary harm. They also include the general obligation to cooperate, the duty to exchange data and information on a regular basis, and a duty to conduct impact assessments. Regarding the 'special case' of groundwater, Professor McCaffrey observes that it is

clear from recent treaty practice that groundwaters related to international surface water systems are subject to the same set of rules. Moreover, resolutions of international bodies of experts including the International Law Association and the ILC itself, lend some authority to the view that the use of even confined transboundary groundwaters is governed by these fundamental norms.

In the book's final section the author argues that disputes over international watercourses can be dealt with more effectively by partially conferring the task of enforcing international water law's fundamental rights and obligations to private parties. This can be achieved by applying principles of non-discrimination and equal standing to them. A second avenue for enhanced dispute settlement is an increased reliance on fact-finding commissions and joint bodies of technical experts. Indeed, this serves to depoliticize high-profile international disputes over shared water resources, as past experience with joint institutions shows.

Professor McCaffrey's study provides an accurate, comprehensive, and readable account of the law's present state, its theoretical underpinnings, and its practical impacts. As such, *The Law of International Watercourses* may even become the standard reference for scholarly work on the issue. Yet, the book's one major drawback may be its narrow focus on past legal developments. Remaining inside the traditional conceptual framework, the book largely fails to identify areas where changes in policy and law are required. Nor does the book provide sufficient guidance to policy-makers and negotiators of future agreements.

Indeed, to the extent that questions of policy are addressed, the author's recommendations may prove difficult to implement. Certainly, notions like the integrated management of the global hydrological cycle are intriguing visions. Nevertheless, one may have doubts as to whether this plan might rally support from states any time soon.

Professor Benvenisti of Hebrew University, takes a distinctly different approach. The very starting point of his book, *Sharing Transboundary Resources*, is that the international law of shared natural resources (the book's scope is not confined to water, even though water law clearly informs the author's reasoning) as it currently stands, is plainly inappropriate. Therefore, the norms of existing law do not figure prominently in this book, and it is not until Chapter 7 that they are examined more closely. Put simply, the author argues that positive international law fails to provide an adequate basis for resource allocation and protection. The causes of this failure need to be addressed, not only by changing the interpretation, content and institutions of international law, but even the very process of law-making. Thus, Professor Benvenisti does not ask what the law is, but what the law and institutions regarding shared natural resources ought to be.

At first blush, the author's claim that international law needs to undergo fundamental reform appears quite bold. Yet, his approach has the merit of providing interesting insights into the structural obstacles to efficient resource management, drawing from a broad range of interdisciplinary sources, including game theory, international relations theory and contract law doctrines. Moreover, ways to overcome these obstacles are outlined in a thought-provoking way.

Professor Benvenisti's basic argument is that where natural resources are shared by a limited number of states, cooperation and effective management can and do occur endogenously, even absent a strong normative framework. If cooperation fails to emerge, the causes are to be found in either international law, or the Westphalian state's structure itself. Turning to the latter, the author points out that disputes over transboundary resources should be viewed as being of a transnational, rather than an international nature. Outlining what he calls the transnational conflict paradigm, he argues that riparian states' external policy regarding the use and allocation of shared natural resources is frequently subject to capture by domestic interest groups. Conflicts of interest more often exist between domestic groups, each collaborating with their counterparts in

neighbouring states than between the riparian states as such.

As Professor Benvenisti observes, in the traditional Westphalian system, international law has promoted the interests of these powerful groups by insulating treaty obligations regarding shared naturals resources from democratic scrutiny. Treaties, in particular, are sheltered from judicial review through doctrines of treaty durability and judicial deference. However, the author argues, these structural shortcomings can be addressed by setting up transnational institutions. These institutions, rather than states which are susceptible to pressure from interest groups, the argument goes, should be entrusted with managing shared natural resources. Their tasks should include the coordination of national policies with respect to specific resources, the collection, assessment and dissemination of data, the formulation of policies, and the monitoring of state compliance. At the same time, these institutions would ensure increased democratic scrutiny of government policies by allowing public participation and serving as a forum for democratic deliberation. They should have jurisdiction over entire ecosystems, and the whole range of possible activities pertaining to them.

The author takes the view that this approach would especially benefit disadvantaged groups heavily reliant on the use of shared natural resources, e.g. minorities, indigenous groups and future generations. Discussing the institutions' procedural and structural features, the author draws apparent inspiration from the European Union, suggesting that institutional policies should enjoy supremacy over national policies, while being subject to the principle of subsidiarity. Moreover, he argues that decision-making processes should be designed to reflect notions of flexibility, mutuality and transparency.

While these considerations largely focus on issues of policy and good international governance, international law as such is dealt with in Chapters 7 and 8. In this regard, Professor Benvenisti distinguishes two main currents. While the 'philosophy of disengagement' aims at limiting common ownership among riparian states as far as possible, the 'philosophy of integration' holds that common ownership and inclusive management are not only beneficial, but also inevitable. In the author's view, the former approach is embodied in the 1997 UN Watercourses Convention, while the latter was championed by the International Court of Justice in its *Gabèikovo-Nagymaros* judgment. The author forcefully argues in favour of the integrative philosophy, as it promotes beneficial policies including negotiation instead of adversarial dispute settlement, vague standards (such as equitable utilization) instead of hard and fast rules (such as the no-harm rule), and common ownership and management instead of exclusive entitlements, thus ensuring sustainable and equitable outcomes. In his view, strong transnational institutions will permit periodic adjustments of shares. At the same time, providing for increased public participation, representation of minorities, and subsidiarity will enhance transboundary ecosystems management. As the author rightly points out, the ICJ, in *Gabèikovo-Nagymaros*, endorsed this approach by reading these principles and policies into the rather ambiguous and cautious provisions of the 1997 UN Convention. According to Professor Benvenisti, the Court has, in fact, assumed a 'judicial-legislative' role with the quiet consent of the international community by using the Convention as a vehicle for progressively developing international environmental law. He argues that the Court's use of customary international law as a proxy for treaty law helps to achieve efficient outcomes. Therefore, in instances of market failure, i.e. inefficient regimes, international courts should seize the opportunity to change the equilibrium by creating new rules. He is of the view that the international judiciary is called upon for a more proactive stance, as what he calls the 'orthodox test of custom — practice and *opinio juris*' — is largely irrelevant for the identification of new law today.

This last point may prove controversial. While it is certainly true that international courts often do interpret treaty provisions

quite broadly, the conclusion that courts actually *should* act as 'legislators of Pareto-optimal outcomes' would seem to be at odds with basic notions of positive law. In particular, it seems far from clear that states arguing their cases before international courts would readily admit that the label of customary international law should be used to introduce extra-legal considerations irrespective of precedents in a an open quest for market efficiency. Yet, while not every reader may agree with all of Professor Benvenisti's conclusions, his work provides a broad and thoughtful vision of the policies that should ideally underscore the management of shared transboundary resources.

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