BOOK REVIEWS

Fresh Water in International Law. By LAURENCE BOISSON DE CHAZOURNES. Oxford University Press, Oxford, 2013. 288 pp. £70.00 (hardback).

Water scarcity is increasingly becoming an issue of global concern, as population growth, increased water usage, pollution and climate change exert strain on available water resources. It is in this light that international lawyers have, in recent years, turned greater attention towards the regulation of freshwater and its uses. Nonetheless, the international legal regime governing the uses of fresh water leaves much to be desired. The core of this regime, the 1997 United Nations Convention on the Law of Non-Navigational Uses of International Watercourses¹ (which only just obtained the requisite 35 ratification for it to come into force in May of this year), has come under intense criticism for its vagueness and indeterminacy.²

Boisson de Chazournes' *Fresh Water in International Law* is a timely and valuable contribution to this field. It comprehensively covers all aspects of the international legal regime governing the use of fresh water, eschewing the traditional dichotomy between navigational and non-navigational uses (13-25) and analysing the disparate legal regimes governing different sources of fresh water, including transboundary river systems (26-36), transboundary aquifers (37-39), ice formations (39-46), as well as atmospheric fresh water (46-48). In its eight chapters, *Fresh Water in International Law* methodically and incisively analyses relevant hard-law and soft-law instruments, case-law, State practice and doctrine in different areas of international law that are relevant to the management and use of fresh water resources, and it accomplishes this in an integrated and holistic manner. This sets the book apart from the volume co-edited by the author with Leb and Tignino and published only a year earlier

¹ Hereinafter UN Watercourses Convention or UNWC. Not yet in force. Adopted on 21 May 1997, UN DOC A/RES/51/229

² See e.g. A Wolf, 'Criteria for Equitable Allocations: The Heart of International Water Conflict', (1999) 23 *Natural Resources Forum* 3; L Caflisch 'Regulation of the Uses of International Watercourses' in MA Salman and L Boisson de Chazournes (eds), *International Watercourses—Enhancing Cooperation and Managing Conflict*, (1998), 16; JW Dellapena, 'The Customary International Law of Transboundary Fresh Waters' (2001) 1 *Int J of Global Environmental Issues* 264, 288; A Al-Khasawneh 'Do judicial decisions settle water-related disputes?' in L Boisson de Chazournes, C Leb and M Tignino (eds), *International Law and Freshwater. The Multiple Challenges*, (2012), 341, 357

under a very similar title, which investigates the same areas of international law but as discrete categories.³

Chapter 1 discusses the unique physical characteristics of fresh water and their implications for the legal regulation of its uses. The following five chapters explore the evolution of the law governing freshwater under five principal trends: (1) *regulation* of the different sources and uses of fresh water, which has occurred at three levels: the universal, the regional and the basin-specific; (2) the *economization* and commodification of fresh water; (3) the *environmentalization* of fresh water; (4) the *humanization* of fresh water; and (5) the *institutionalisation* of fresh water through the proliferation of basin commissions and other governance mechanisms. The book therefore underscores the complexity and multiplicity of legal regimes governing the use of fresh water and how these regimes interact to form a corpus of principles for the management of fresh water resources. Chapter 7 discusses international dispute settlement mechanisms, highlighting the growing number of adjudicatory mechanisms engaged in the resolution of water-related disputes. Finally, chapter 8 offers some insights into the future development of the law governing fresh water resources. For limitations of space, this review will focus on two important themes that emerge from Boisson de Chazournes' discussion: (1) the legal characterisation of water and the theoretical underpinnings of the international regulatory regime, and (2) the intersection between international investment law and the human right to water.

Chapter two - on 'regulation' of fresh water - analyses the legal aspects of various uses of fresh water, such as navigation, irrigation, energy production, fishing and other human needs. Presented as though it were relatively uncontroversial, the discussion of the theoretical underpinnings of the different regimes for the regulation of fresh water exposes a point that is underexplored in the literature, namely that these theoretical foundations differ depending on the source of fresh water and its use. Water is sometimes understood as a resource appurtenant to land (subject to the principles of sovereignty and title to territory, which are akin to real property rights in domestic law). At other times, it is regulated under the notions of restricted sovereignty, *res communis* or even *res nullius*. This dichotomy is pertinent in the regulation of water as a liquid, solid (ice) or gas (clouds). For example, in the case of boundary rivers separating two opposite States, the principle of sovereignty becomes paramount: the river is divided in accordance with the median line or geographical thalweg, taking into account traditional rights

³ L Boisson de Chazournes, C Leb and M Tignino (eds), *International Law and Freshwater. The Multiple Challenges*, New Horizons in Environmental and Energy Law (2012).

(8-13). Fishing activities are subject to the principle of 'shared natural resources' (which is derived from the principle of 'permanent sovereignty over natural resources'). The principles of sovereignty of aquifer States and of 'shared natural resources', similarly, proved formative in the development of the law governing the use of confined groundwater (transboundary aquifers) (38). These principles have recently been codified by the International Law Commission (ILC) in the non-binding Draft Articles on the Law of Transboundary Aquifers. Finally, regional human rights mechanisms have considered the 'right to water' as a property right.

In stark contrast, within the context of navigation, the principle of sovereignty gives way to the freedom of navigation (with its regional variations) and the 'community of interest' doctrine, which is based on the concept that all riparian States have a common legal right to utilise the entire navigable course of a transboundary river (14-16). The 'community of interests' doctrine – derived from the Roman law principle of *res communis* – has also been extended to the non-navigational uses of fresh water. The work of the ILC on the topic of Non-Navigational Uses of International Watercourses, which culminated in the adoption of the 1997 UNWC, eschewed traditional theories based on competing sovereignty over the water in a transboundary river, adopting instead the notion of restricted sovereignty based on the principles of 'equitable and reasonable use' and 'no-harm' (20-21, 30). This applies to a transboundary river as well as connected groundwater. In fact, the 'shared natural resources' principle was completely discarded from the ILC's draft articles in light of its links to the concept of sovereignty.⁴

Equally, Boisson de Chazournes highlights that a number of different doctrinal approaches exist for the legal regulation of fresh water in its solid and gaseous states. Traditionally, glacial formations were not considered fresh water resources but were rather understood as an element of sovereignty and territory (and hence treated as mineral resources). For example, icebergs are generally governed by the UN Convention on the Law of the Sea,⁵ with the implication that icebergs in the territorial sea fall under the sovereignty of the coastal State while those in the exclusive economic zone are governed by the principles on exploitation of mineral resources. Icebergs in the high seas are *res nullius* and are therefore theoretically open to appropriation by all States. Icebergs

⁴ See J Evensen, 'Second Report on the law of non-navigational uses of international watercourses', (1984) ILC *Ybk* 1984/II(1), 110, para 48. See also, 'Summary records of the meetings of the thirty-ninth session of the ILC', 2002nd meeting, 22 May 1987, ILC *Ybk* 1987/I, para 9 (Beesley).

⁵ 10 December 1982, UNTS 1833 (1994).

in the Antarctic Ocean, however, are subject to a special legal regime under the Protocol of Madrid on Environmental Protection to the Antarctic Treaty. Under this regime, icebergs cannot be subjected to exploitation activities permissible in relation to mineral resources (42). A second doctrinal approach treats icebergs as islands whereas a third approach views icebergs through the prism of the common heritage of mankind doctrine (as a resource that can only be utilised for peaceful objectives, while the benefits of exploitation must be shared 'equitably') (42-43).

Similarly, doctrine has approached the legal regulation of atmospheric fresh water (in the form of clouds) under the competing theories of property rights (sovereignty over clouds in the airspace above the territory of a State), *res communis* (clouds are 'objects that belong to all') and *res nullius* ('the first to seize them has the right to exploit them'). The *lex lata* approach is to consider clouds *res nullius*; however, this remains an underexplored area of law (46-48).

Boisson de Chazourne's analysis of these disparate legal regimes exposes the theoretical confusion of the *corpus juris* governing the management and use of fresh water resources. This is exacerbated by the lack of a single legal instrument that governs all uses of fresh water in its different forms. The ambiguity inherent in the legal characterisation of water has important implications. For example, if flowing water were to be approached under the prism of sovereignty, it would be subject to prescriptive rights, which protect the earliest user. Under the principles of *res communes* and restricted sovereignty, however, water would be considered common property or would be subject to the principle of 'equitable and reasonable use'. As for water in its solid form, approaching it from a sovereignty lens complicates its legal regulation as different legal regimes apply to the different regions and spaces where ice forms (41). For this reason, several sources of freshwater have remained unregulated by international water law. As an example, glaciers are regulated under the UNWC only to the extent that they form part of a transboundary river 'system', whereas 'fossil glaciers' which do not flow into a river are not legally regulated (even though they often traverse international boundaries). In other words, international water law only recognises glaciers as an accessory attached to the international hydrographic system through the water cycle (46). This plurality in the conception of the nature of water rights at the inter-State level complicates efforts to devise legal norms and principles to regulate the uses of fresh water globally.

A second theme that emerges in *Fresh Water in International Law* is the interaction between international human rights law, on the one hand, and international investment law, on the other, in relation to fresh water. Boisson

de Chazournes addresses these two areas of law in two discrete chapters titled 'Humanization of the Law Applicable to Freshwater' (chapter 5) and 'Economization of the Law Applicable to Fresh Water' (chapter 3). Although these chapters indicate that there is some overlap in the application of these different areas of law to the use of fresh water (156), more can be done to highlight the intersection between them.

Boisson de Chazournes states, rather optimistically, that recent developments have witnessed the 'emergence and consolidation of a right to water' (6). She highlights that the law relevant to the management of fresh water - initially conceived in the context of inter-State relations - is increasingly concerned with how a State manages and distributes water within its own boundaries. Specific global and regional instruments, such as the 1997 UNWC, the transboundary aquifers Draft Articles and the 1992 Helsinki Convention on the Protection and Use of Transboundary Watercourses and International Lakes⁶ prioritise vital human needs over other uses of a watercourse (147). The UN General Assembly and Human Rights Council reaffirmed the human right to water, which includes access to safe drinking water and sanitation (149). Boisson de Chazournes states that although this right has been recognised, it suffers from ineffective implementation (153). Throughout this discussion, however, the normative challenges to the right to water are underemphasised. The right to water is not explicitly recognised in the 'International Bill of Rights', and is only mentioned briefly in the context of adequate living conditions under article 14(2) of the Convention on the Elimination of Discrimination Against Women and in the context of the right to health under article 24(2) of the Convention on the Rights of the Child. Although the Committee on Economic, Social and Cultural Rights has issued General Comment 15, which recognises the human right to water as derived from the rights to an adequate standard of living and highest attainable standard of health, placing the 'right to water' under the rubric of economic, social and cultural rights allows States to construe it as a right that is to be progressively realised.⁷ These challenges are not apparent in Boisson de Chazournes' analysis.

The 'right to water' seems, at first blush, to be fundamentally at odds with the concept of 'privatization' of water services. It is in this area that the intersection between international human rights law and international investment law in the regulation of fresh water is particularly prominent. In investment disputes,

⁶ Adopted 17 March 1992, entered into force 6 Oct 1996, 1936 UNTS 269

⁷ See H L Bray, 'ICSID and the Right to Water: An Ingredient in the Stone Soup' (2014) 29(2) *ICSID Review* 474, 477.

States often try to justify particular measures against investors through an alleged conflict between a State's human rights obligations and its obligations under a bilateral or regional investment treaty. ICSID tribunals have repeatedly found, however, that measures to protect the ecology or to respect the human right to water do not trump a host State's investment obligations.⁸ Since 2006, and in response to a dispute regarding the distribution of water and sewage services, *amicus curiae* have been allowed in proceedings before ICSID. This indicates a growing recognition of the weight of public interest concerns in water-related disputes (221-223).

A multiplicity of other fora provide judicial remedies in cases of the violation of the right to water. The Inter-American Court for Human Rights, for example, has enforced the right to water of indigenous peoples' under the right to property and the right to life (175, 229-230). Other regional human rights mechanisms have also addressed the right to water 'through a teleological interpretation of [their] constitutive instruments' (228), effectively stretching the limits of their jurisdiction to cover water-related disputes. In addition, States are increasingly resorting to the International Court of Justice and to inter-State arbitration under the auspices of the Permanent Court of Arbitration to resolve water-related disputes. This has not yet lead to conflicting or incoherent jurisprudence. In any case, Boisson de Chazournes argues that potential conflicts could be mitigated through resort to principles such as *lis pendens*, *res judicata* and *forum non-conveniens* (246).

Aptly titled 'Looking Ahead', the eighth and final chapter of *Fresh Water in International Law* pulls together all the themes discussed in the previous chapters, taking a novel approach to the regulation of fresh water as an integrated whole rather than through the prism of different areas of international law. Boisson de Chazournes accomplishes this well, exposing the multifaceted nature of water governance and highlighting the importance of interdisciplinary approaches. By thoroughly analysing all aspects of the international regulation of water, including recent developments that have eroded the state-centricity of this regulatory regime, *Fresh Water in International Law* is an important resource for all those seeking to understand the fundamentals of what might be termed 'international water law'.

⁸ See e.g. *Suez, Sociedad General de Aguas de Barcelona SA and Vivendi Universal SA v Argentine Republic*, ICSID Case No ARB/03/19, Decision on Liability (30 July 2010) para 252; *Azurix Corp v Argentine Republic*, ICSID Case No ARB/01/12 (14 July 2006), para 261; *Metaclad v United Mexican States*, ICSID Case No ARB(AF)/97/1, Award (30 August 2000), para 103-III.

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The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital. By KATE MILES. Cambridge University Press, Cambridge, 2013. 464 pp. £75.00 (hardback).

The success of history writing is judged, like any other social activity, in terms of its intention, its performance and its effects. The intensity of the conceptual debate about the writing of history, which continues to the present day, reflects the historian's understanding of the social significance of history writing. To defend one's own idea of history writing is to defend the history that one writes. For a historian to modify a society's idea of its own past is to succeed in justifying that historian's own idea of history.

Allott, 'International Law and the Idea of History'¹

As any legal discipline matures, its students begin to realize that the road travelled may reveal as much about their subject as the road ahead. This is as much the case for international law as for any other legal system. As a relatively young field, international law's attempts to grapple with its own origin myths have materialized relatively recently² but what the history of international law lacks in terms of its own history it has made up for in explosive growth.

One sub-discipline that has thrived through international law's engagement with its past has been the so-called Third World Approaches to International Law (TWAIL). Broadly speaking, TWAIL functions as a 'broad dialectic of opposition to international law' that seeks to expose its subject as 'a predatory system that legitimizes, reproduces and sustains the plunder and subordination of the

¹ Philip Allott, 'International Law and the Idea of History' (1999) 1 *JHIL* 1, 16.

² The leading periodical in the field, the *Journal of the History of International Law* was only founded in 1999. This may be compared with, *inter alia*, *Revue d'Histoire du Droit* (founded 1918), the *American Journal of Legal History* (founded 1957) and the *Journal of Legal History* (founded 1980). However, sustained calls for further research into the history of international law were made by leading international lawyers as early as 1902: see e.g. Lassa Oppenheim, 'The Science of International Law: Its Task and Method' (1908) 2 *AJIL* 313, 313–14. More generally, see Martti Koskenniemi, 'A History of International Law Histories', in B Fassbender & A Peters (eds), *The Oxford Handbook of the History of International Law* (2012) 943.