Greening International Law

edited by
Philippe Sands

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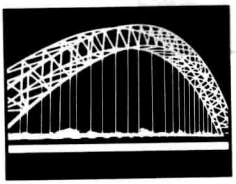

The New Press, New York

Published in the United States by The New Press, New York
Distributed by W. W. Norton & Company, Inc.,
500 Fifth Avenue, New York, NY 10110

Library of Congress Cataloging-in-Publication Data

Greening international law / [edited by] Philippe Sands ; with a foreword by Elizabeth Dowdeswell.
p. cm.
Includes bibliographical references and index.
ISBN 1-56584-169-7
1. Environmental law, International. I. Sands, Philippe, 1960–
K3585.6.G74 1994
341.7'62—dc20 94-22407

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Printed in the United States of America

94 95 96 97 9 8 7 6 5 4 3 2 1

GREENING INTERNATIONAL LAW

DEDICATION

This book is dedicated to past, present and future generations of the Buchholz family; to the memory of Jean-Pierre, Adrien and Alexis Buchholz; and especially to my grandfather, Leon Buchholz, who is and always will be a figure of courage, strength and inspiration for me.

FOREWORD

International responses to global environmental problems are usually founded in law. Law is important because it provides a legitimate basis for action by States and the international community as a whole and translates into legally binding international norms, the dominant international viewpoint on the basic issues of environmental protection. International environmental law represents the juridical articulation of our responses to the threats posed to the integrity of the biosphere and its processes by human activities. A greater recognition has thus been given to environmental law as a tool for promoting sustainable development.

The 1972 Stockholm Conference on the Human Environment was an important watershed in the global environmental awakening. It not only led to the emergence of important legal principles and concepts but also resulted in the establishment of the United Nations Environment Programme (UNEP), an organization which plays a key role in shaping the international legal response to global environmental challenges. Multilateral treaties, agreements and guidelines emerged in such diverse areas as the protection of the marine environment, the prevention of air and water pollution, the conservation of fauna and flora, and the regulation of trade in chemical and toxic substances. The adoption by the UNEP Governing Council in May 1982, of the Montevideo Programme for the Development and Periodic Review of Environmental Law has contributed to the successful negotiation and conclusion of important international legal instruments including those which address the challenges posed by the depletion of the stratospheric ozone layer, transboundary movements of hazardous wastes, climate change, and the loss of biological diversity.

The United Nations Conference on Environment and Development (UNCED) held in Rio de Janeiro in June 1992, has provided fundamental guidance for, and created a new dimension to, future international action in the field of environmental law. Indeed, Chapter 38 of Agenda 21 asks UNEP to take the leading role in international environmental law. In meeting these challenges UNEP will have to consolidate and enhance its legal programme and activities, such as promoting effective implementation of international legal instruments and assessing their adequacy, developing appropriate protocols and guidelines, and elaborating relevant rights and obligations of States. The objective is to reinforce the existing, and to develop new, legal regimes to respond to the imperative of sustainable development. The Programme for the Development and Periodic Review of Environmental Law, adopted by the 17th Governing Council of

UNEP held in May 1993, provides a basis for the relevant activities of the organization in the 1990s.

International environmental law is a rapidly evolving and expanding branch of international law. The development of international environmental law brings in many new and innovative ideas, concepts and principles which constitute an important and unique feature of this branch of international law. Concepts such as common concern of mankind, global partnership, common but differentiated responsibilities, anticipatory and preventive mechanisms, and incentives to compliance, have contributed to the elaboration and adoption of the most recent and significant international legal instruments. A balanced and precise legal formulation of these and other concepts and principles would be beneficial in accommodating the interests of common concern of mankind and those of individual sovereign States in promoting the partnership in the implementation of international legal obligations, in establishing an accurate differentiation of the responsibilities and obligations of States, and in ensuring the application of innovative mechanisms of compliance. All these will greatly contribute to the progressive development of international law.

Legal doctrine has always made important contributions to the understanding and development of law. Doctrinal exposition of emerging concepts and principles facilitates the further development of law. *Greening International Law* traces the evolution of this branch of international law from Stockholm to Rio and examines and reviews its nascent concepts and principles. The book also represents one of the first significant attempts at examining the notion and content of international law of sustainable development. The authors' preoccupation with sustainable development is reflected, in particular, in their analysis of such specific issues as the 'greening' of the Bretton Woods institutions, environment and trade, and environment and economics. *Greening International Law* is an important contribution to the development of international law doctrine and will be of great interest to environmental policy-makers, scholars, and students of international environmental law.

Elizabeth Dowdeswell
UNEP Executive Director
August 1993

ACKNOWLEDGEMENTS

This book is the first volume in a new FIELD/Earthscan series, *International Law and Sustainable Development*, which will address and define the main international legal issues associated with sustainable development and will, I hope, contribute to the progressive development of that new area of law. Many people have contributed in significant ways to the development of the book, which I think of as being among the early fruits of personal and professional contacts and experiences which have taken place over a period of several years. The idea for the book has four sources. David Kairy's edited collection of essays *The Politics of Law* (1981, Pantheon) which is, to my mind, a model of its kind. A lecture given by Phillip Allott in Room No 4 of the Old Schools, Cambridge University, in October 1982 on the subject of law and international society. An essay by Christopher Stone entitled *Should Trees Have Standing?*, which was written in 1972 but which I did not come across until the summer of 1988. And the *Blueprint* series edited by David Pearce and published by Earthscan, of which the first book, *Blueprint for a Green Economy*, is a model for making complex ideas accessible and from which we in the legal community have much to learn. Each has had a profound influence on my work and FIELD's work and this is reflected in the choice of authors and topics.

I am especially grateful to all the authors, for agreeing to submit chapters and for doing so under a tight deadline with such grace and, in the case of at least one, a keen sense of humour. The book has benefited from the support and input of all the administrative and legal staff and interns at FIELD. Louise Rands, my administrative assistant, carried out responsibilities in respect of this book with her usual (amazing) combination of diligence, humour, unflappability and single-mindedness; Kurt Skeete and Jennifer Hunt prepared the tables and index with admirable efficiency at short notice. Jonathan Sinclair Wilson and Jo O'Driscoll at Earthscan provided continuous encouragement in the face of missed deadlines, supplemented by long distance interest and support from the staff of the book's American publisher, The New Press. Lisa Sternlieb and Natalia Schiffrin made helpful editorial input at critical moments.

I would like to gratefully acknowledge the following for permission to reprint previously published material. Blackwell Publishers: Marc Pallemaerts' and Ileana Porras' chapters, in the *Review of European Community and International Environmental Law*, Volume 1, Issue 3, (1992). Reprinted by permission of Blackwell Publishers and the

Foundation for International Environmental Law and Development. *Columbia Journal of Environmental Law*: excerpts from the article 'Environmental Policy for Eastern Europe: Technology-Based Versus Market-Based Approaches' by Richard Stewart, Dan Dudek and Jonathan Wiener, 17 *Columbia Journal of Environmental Law* 1–52 (1992). Published by permission of the *Columbia Journal of Environmental Law* and the Trustees of Columbia University, New York. Also the *Journal of International Affairs*: Philippe Sands' article 'Enforcing Environmental Security: the Challenges of Compliance with International Obligations', in 46 *Columbia Journal of Environmental Affairs* 367–390 (1993). Published by permission of the *Journal of International Affairs* and the Trustees of Columbia University, New York.

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INTRODUCTION

Phillipe Sands

The 'greening' of international law began in the 1880s when the United States tried to prevent British vessels from over-exploiting Pacific fur seals in international waters of the Behring Sea. The dispute was submitted to international arbitration, but the Tribunal upheld British arguments based upon the traditional rights of States to have unfettered access to natural resources of the high seas. The Tribunal did, however, adopt regulations for the 'proper protection and preservation' of fur seals outside jurisdictional limits, which prohibited killing during certain seasons; limited methods and means of fur sealing; and included exceptions for indigenous activities. These regulations have served as an important precedent for the subsequent development of international environmental law.[1]

Recognition that environmental problems transcend national boundaries has resulted in the development of an important new field of international law known as international environmental law. Since the 1893 Tribunal decision, international environmental law has come a long way. It has grown from a body of national and bilateral rules into an area increasingly governed by regional and global obligations, including enforceable standards. Today, *ad hoc* and reactive policy responses by individual States or local communities can no longer effectively address the environmental problems that have grown exponentially with advances in technology, industrialization, and social changes.

Over-exploitation of natural resources, loss of biological diversity, ozone depletion, climate change, acid rain, deforestation, desertification, air and marine pollution, toxic and other waste and overpopulation are but some of the present threats to the planet. Poverty and international debt were added to the official list of the root causes of global environmental degradation, at the United Nations Conference on Environment and Development (UNCED), held in Rio de Janeiro in June 1992. Each of these areas of concern requires international measures, and hence international law and organizations play a central role. Indeed, the combination of scientific evidence about what *needs* to be done, public pressure over what *should* be done, and political action as to what *can* be done, has already led to an explosion of new international laws addressing environmental issues. They have gained increasingly wide acceptance, are increasingly broad in their scope and sophisticated in their approach. The new laws often address issues which, until recently, were thought to lie beyond the range of

environmental legislation and activism.

Nevertheless, it remains necessary to ask, in the face of voluminous collections of international environmental agreements, treaties and political declarations, whether international law has really been 'greened'. The 15 chapters of this book, divided into three parts, identify particular aspects of international law, and consider the extent to which environmental problems have been addressed and acted upon by the international community. This Introduction provides a background for those chapters.

Part One briefly describes the historic development of this emerging area of international law, including the institutional arrangements and traditional legal orders which failed to address environmental challenges. Part Two identifies the emerging framework of basic principles and standards of international environmental law, and the different techniques for implementing them. Part Three identifies some of the critical issues of the coming years, including the challenges faced by an international legal order that seeks to reconcile 'the inherent and fundamental interdependence of the world environment' with the division of land, sea, and air space into sovereign areas of independent States.[2]

PART ONE – INTERNATIONAL ENVIRONMENTAL LAW: THE CONTEXT, SOURCES AND HISTORY

The international legal order

International law and international organizations provide the basis for cooperation and collaboration between various nations in their efforts to protect the local, regional and global environment. Cooperation becomes progressively more complex at each level as new actors and interests are drawn into the legal process: whereas just two States, representing the interests of local fishing communities, negotiated the early fisheries conventions in the middle of the nineteenth century, more than 150 States negotiated the 1992 Climate Change Convention (see Appendix 3). These 150 States brought the entire spectrum of industrial and economic interests to the bargaining table. In both the earliest and the most recent negotiations, however, the overall objective of the international legal order has been to provide a framework within which the various members of the international community (eg States, international organizations, non-governmental entities) may cooperate, establish norms of behaviour, and resolve their differences.

The proper functions of international law are legislative, administrative and adjudicative. Legislation establishes legal principles and rules which impose binding obligations on States and other members of the international

community to conform to certain norms of behaviour and to follow certain required practices. These obligations place limits upon the activities which may be conducted because of their actual or potential impact upon the environment, either within borders, across territorial boundaries, or in the global commons.

The administrative function of international law allocates tasks to the various actors to ensure that the standards of international environmental law are carried out. The adjudicative function aims, in a limited way, to provide mechanisms or fora for the peaceful settlement of differences or disputes that arise among members of the international community over the use of natural resources or the impact of activities upon the environment.

Sovereignty and territory

The international legal order thus regulates the activities of States, international organizations and a broad range of non-governmental actors. States continue to play the primary and dominant role in the international legal order, both as the principal creators of the rules of international law and the principal holders of rights and obligations under those rules. States are sovereign and equal, possessing equal rights and duties as members of the international community, notwithstanding differences of an economic, social or political nature. The sovereignty and equality of States means that each has *prima facie* exclusive jurisdiction over its territory and the natural resources found there, and a corresponding duty not to intervene in the area of exclusive jurisdiction of other States.

The sovereignty and exclusive jurisdiction of the 190 or so States over their territory means, in principle, that they alone may develop policies and laws respecting the natural resources and the environment of their territory, which comprises:

(1) land within its boundaries, including the subsoil;
(2) internal waters, such as lakes, rivers, and canals;
(3) territorial sea, which is adjacent to the coast, including its seabed, subsoil the its resources; and
(4) airspace above its land, internal waters and territorial sea, up to the point at which the legal regime of outer space begins.

States also have more limited sovereign rights and jurisdiction over other areas, including a contiguous zone adjacent to their territorial seas, the continental shelf, its seabed and subsoil, certain fishing zones, and 'exclusive economic zones'.

Apart from these territories, there are certain areas which do not come within the territory and exclusive jurisdiction of any state. These areas, which are sometimes referred to as the 'global commons', include the high

seas and its seabed and subsoil, atmosphere, outer space and, according to a majority of States, the Antarctic.

This straightforward international legal order was a satisfactory organizing structure until national boundaries were permeated by technological developments. Territorial sovereignty does not co-exist comfortably with an environmental order that consists of a biosphere of interdependent ecosystems which do not respect the artificial, territorial boundaries between States. As an ecological matter, if not a legal one, many natural resources and their environmental components are shared: the use by any one State of the natural resources within its territory will invariably have consequences for the use of natural resources and their environmental components in other States.

This is self-evident where, for example, a river runs through two or more countries, or animals migrate between two or more sovereign territories. What is less evident, and has only become apparent in recent years, is that ostensibly innocent activities in one country, such as the release of chlorofluorocarbons (CFCs), can have harmful effects upon the environment in areas far beyond national jurisdiction. Ecological interdependence, therefore, poses a fundamental problem for international law, and demonstrates why international cooperation is indispensable. The challenges for international law in the world of sovereign States are, first, to reconcile the fundamental independence of each State with the inherent and fundamental interdependence of the environment. Second, to protect areas beyond the national jurisdiction of any one State as a result of existing territorial arrangements.

International actors

Although States remain far and away the most important actors, international organizations and non-governmental groups have played a central role in creating the international environmental legal order. Like the human rights field, environmental law has evolved away from the view that international society comprises only a community of States, to one that extends its scope to encompass the persons (both legal and natural) within and among those States. This new perspective is now reflected in many international legal instruments, especially the Rio Declaration on Environmental and Development (see Appendix 2) and Agenda 21 (see Appendix 5), adopted at UNCED, both of which recognize and call for the further development of the role of international organizations and non-governmental actors in virtually all aspects of the international legal process which relates to environment and development.

These various actors have different roles and functions, both as subjects and objects of international environmental law. Their functions and roles include participating in the law-making process; monitoring

implementation, including reporting; and ensuring enforcement of obligations. The extent to which each actor contributes to these processes depends upon the extent of the rights and obligations granted to it by general international law, as well as the rules established by particular treaties and other rules.

States

States are the primary and principal subjects of international law. States adopt and implement international legal principles and rules, create international organizations, and permit the participation of other actors in the international legal process. There are currently 181 member States of the United Nations, and another dozen or so which are not members. Together these comprise developed and developing countries. Developed countries include the 24 member States of the Organization of Economic Cooperation and Development (OECD) and the 11 States which previously formed part of the 'Soviet bloc'. The latter are currently referred to as 'economies in transition'. The rest of the world, comprising some 155 nations, are the developing States which form the Group of 77 (G–77). The G–77 often works as a single negotiating bloc within the United Nations, where States are also arranged into regional groupings, usually for the purpose of elections to United Nations bodies. The five UN groupings are: Latin America and the Caribbean Group, African Group, Asia Group, Western European and others group, and Central and Eastern European Group.

Frequently these rather simple distinctions break down in environmental negotiations as States pursue what they perceive to be vital national interests or strategic alliances. The UNCED negotiations illustrated the extent of the differences that exist between and among developed States and developing States on the particularly contentious issues such as, atmospheric emissions, conservation of marine mammals, protection of forests, institutional arrangements, and financial resources.

International organizations

The international organizations involved in environmental matters make up a complex and unwieldy network at the global, regional, sub-regional, and bilateral levels. It is unlikely that any international organization today would not have some responsibility over international environmental matters. The lack of coordination between international organizations in the environmental field makes it difficult to assess their role by reference to any functional, sectoral or geographic criteria. To help understand their activities and interests they can, however, be divided into three general categories: global organizations under the auspices of, or related to, the United Nations and its Specialized Agencies; regional organizations outside the United Nations system; and organizations established by environmental and other international agreements.

The actual functions of each institution will depend to a great extent upon the powers initially granted to it, and by the practice of the organization. Apart from very specific functions assigned to particular organizations, there are five separate but interrelated legal functions performed by most international organizations.

First, they provide a forum for general cooperation and coordination between States on matters of international environmental management. Second, they play an informational role, receiving and disseminating information, facilitating information exchange, and providing for formal and informal consultation between States, and between States and the organization. The third function is the contribution of international organizations to the development of international legal obligations, including 'soft law' (non-binding acts). International organizations develop policy initiatives and standards, and may adopt rules which establish binding obligations, or which reflect rules of customary law in relation to the development of procedural standards and the establishment of new institutional arrangements. Once environmental and other standards and obligations have been established a fourth function for institutions comes into play in ensuring the implementation of, and compliance with, those standards and obligations. This may take a number of forms, including receiving information from parties or other persons on an informal, *ad hoc* basis, or the regular formal review of reports or communications from parties to international environmental treaties as a means of reviewing progress in implementation. Assisting in implementation can also take place through the provision of formal or informal advice on technical, legal and administrative or institutional matters, including capacity-building. A fifth function is to provide an independent forum, or mechanism, for the settlement of disputes, usually between States.

Non-governmental organizations (NGOs)

Non-governmental organizations have historically played an important role in developing international environmental law, and continue to do so in a variety of ways. They identify issues which require international legal action, frequently participate as observers in international organizations and in treaty negotiations, and make efforts to ensure the national and international implementation of, and compliance with, standards and obligations that have been adopted at the regional and global level. In the past two decades at least six different types of NGOs have emerged as actors in the development of international environmental law: the scientific community; non-profit environmental groups and associations; private companies and business concerns; legal organizations; the academic community; and individuals. The Rio Declaration and Agenda 21 affirm the important partnership role of non-governmental organizations and call for their 'expanded role.'[3]