Book Reviews / Recensions de livres

The Law of International Watercourses, 3rd ed. By Stephen C. McCaffrey. Oxford: Oxford University Press, 2019. 642 + xlv pages.

Vol. 57 [2019], doi: 10.1017/cyl.2020.2

The world is in urgent need of effective international rules to govern the use of freshwater resources shared by two or more states and the resolution of disputes arising from such use. International watercourses — whether rivers, lakes, or aquifers — are unevenly distributed across political boundaries and are increasingly susceptible to depletion and degradation. The increasing shortage of fresh water, coupled with growing consumption demands, have led to inter-state water disputes over allocation and use in practically every part of the world. Moreover, such disputes have proven difficult to resolve due to the complex hydrological and geographical characteristics of fresh water; interconnections with other economic, political, and national security interests; and the relatively weak international legal framework that is currently in place.

First published in 2001, with a second edition in 2007, the third edition of Stephen C. McCaffrey's *The Law of International Watercourses*, made available in 2019, addresses the myriad of issues surrounding international watercourses, inter-state disputes concerning their use, and the law governing both. The new edition provides a much-needed update to the previous work, reflecting the important developments that have taken place in the field over the past decade. These include, among others, the entry into force in 2014 of the *Convention on the Law of the Non-navigational Uses of International Watercourses* (*Watercourses Convention*)[1] as well as recent inter-state freshwater

[1] 21 May 1997, UN Doc A/51/869, (1997) 36 ILM 700 (entered into force 17 August 2014) [*Watercourses Convention*].

disputes submitted to the International Court of Justice (ICJ)[2] and arbitral tribunals.[3] In the third iteration of his book, McCaffrey provides a comprehensive analysis of these developments as well as a useful reminder of the fundamental principles and tenets of the law governing international watercourses. The new edition therefore preserves the book's standing as an authoritative and informative source for students, researchers, and practitioners.

The structure of the book remains largely unchanged from the previous edition, albeit with fourteen instead of fifteen chapters. The chapter omitted was on "International Watercourses as Exclusively National Resources: The 'Harmon Doctrine' in United States Practice," which discussed the origins and status of the "absolute territorial sovereignty" doctrine. This doctrine allows a country to do as it pleases with waters within its boundaries without regard to the interests of other states sharing those waters. It is now discussed briefly in Chapter 4 as one of the "four principal theories" of international watercourse law, although, as McCaffrey notes, it has been debunked both in the practice of the United States and internationally.[4]

The focus of the book also remains unchanged: it is the rules of international law governing the non-navigational uses of international watercourses, covering matters such as irrigation, hydropower production, and domestic uses. However, as in the previous edition, the book dedicates a chapter (now Chapter 5) to the navigational uses of international watercourses, with the word "navigation" being used broadly to refer to "the use of a waterway by humans for the floating of any form of vessel, whether crude raft, papyrus boat, sailing craft, steamship, motorized boat, or any other floating conveyance."[5] Moreover, the focus of the book remains on the rules of international law governing the use of fresh water by states rather than on fresh water itself. Nonetheless, as in the previous edition, McCaffrey dedicates Chapters 1 and 2 to "laying a factual foundation" in order to provide

[2] *Pulp Mills on the River Uruguay (Argentina v Uruguay)*, [2010] ICJ Rep 14; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica)*, [2015] ICJ Rep 665 [*Certain Activities Carried Out by Nicaragua*]; *Dispute over the Status and Use of the Waters of the Silala (Chile v Bolivia)*, "Application Instituting Proceedings Submitted by Chile" (6 June 2016), ICJ Pleadings (currently pending before the ICJ) [*Chile v Bolivia* Application].

[3] *Expert Determination on Points of Difference Referred by the Government of Pakistan under the Provisions of the Indus Waters Treaty*, Executive Summary, Lausanne (12 February 2007), online: *World Bank* <http://siteresources.worldbank.org/SOUTHASIAEXT/Resources/223546-1171996340255/BagliharSummary.pdf>; *Indus Waters Kishenganga Arbitration (Pakistan v India)*, Final Award (20 December 2013), online: *Permanent Court of Arbitration* <https://pcacases.com/web/sendAttach/48>.

[4] Stephen C McCaffrey, *The Law of International Watercourses*, 3rd ed (Oxford: Oxford University Press, 2019) at 99–116.

[5] *Ibid* at 162.

https://doi.org/10.1017/cyl.2020.2 Published online by Cambridge University Press

the reader with a "basic understanding of the characteristics of water and of its importance to humanity."[6] In this regard, Chapter 1 has been updated with a discussion of the growing global water crisis over the past decade, emphasizing the role of climate change, urban population growth, and inefficient water use in this crisis.[7]

Another useful addition to the book is the more detailed discussion of the evolution of the law of international watercourses in Chapter 3. Of most interest is the last section of this chapter, which examines the evolution of this body of law from five different perspectives: the prioritization of conflicting water uses (from navigation to no priorities), the conceptualization of water for the purpose of legal regulation (from surface water channel to a system of waters), state approaches to regulating the use of water (from problem solving to integrated management), the protection of water (from protecting fisheries to protecting fish), and the primacy of the obligation of equitable and reasonable utilization (from "no harm" to equitable utilization).[8] In line with the new edition's focus on recent developments surrounding the *Watercourses Convention*, the chapter concerning this convention (Chapter 8) has also been updated. It now includes a comparative analysis with the *Convention on the Protection and Use of Transboundary Watercourses and International Lakes*[9] as well as a discussion of the *Watercourses Convention*'s coming into force and future prospects.[10] At the same time, the book dedicates relatively limited space to a discussion of the evolving human right to water.[11] A more detailed analysis of this subject, perhaps in a separate chapter, would have been of interest.

With regard to recent developments in the field, both the "Major Cases" and "Selected Case Studies" (Chapters 6 and 7, respectively) have been updated to reflect the rise over the past decade of new inter-state water conflicts as well as the continued intractability of long-standing disputes. The new international cases discussed in Chapter 6 are those concerning the Uruguay and San Juan rivers decided by the ICJ and the arbitral decisions concerning the Indus River, noted above. However, the section on decisions of the Supreme Court of the United States was not updated with more recent inter-state water allocation disputes having now come before that court,[12]

[6] *Ibid* at 4.

[7] *Ibid* at 7–12.

[8] *Ibid* at 87–97.

[9] 17 March 1992, 1936 UNTS 269 (entered into force 6 October 1996).

[10] McCaffrey, *supra* note 4 at 414–42.

[11] *Ibid* at 432–34. See further Malcolm Langford & Anna FS Russell, eds, *The Human Right to Water: Theory, Practice and Prospects* (Cambridge: Cambridge University Press, 2017).

[12] See e.g. *Florida v Georgia*, 138 S Ct 2502 (2018); *Texas v New Mexico*, 138 S Ct 954 (2018).

perhaps because the book was already in press when these cases were heard. The insightful discussion of the leading decisions of this court concerning the American "equitable apportionment" doctrine was retained. However, readers would have also benefited from a more current review of the continued interpretation and application of this doctrine, from which the international water law principle of "equitable utilization" has largely emerged.[13] The case studies included in Chapter 7 remain the same, although some have been updated to reflect recent developments. Most notably, the Nile case study has been updated with a discussion of the Grand Ethiopian Renaissance Dam dispute and the *Agreement on the Nile River Cooperative Framework*.[14] A discussion of more recent developments concerning India and Pakistan's Indus River dispute,[15] as well as of the current renegotiation of the *Canada-United States Columbia River Treaty*,[16] would have also been useful.[17]

Chapters 9–11 of the book set out the "substantive" obligations of the law of international watercourses — namely, the "equitable and reasonable utilization" and "no-harm" principles and the "obligation to protect international watercourses and their ecosystems." Chapter 12 then discusses

[13] McCaffrey, *supra* note 4 at 291.

[14] *Agreement on the Nile River Basin Cooperative Framework*, 14 May 2010, online: <www.nilebasin.org/images/docs/CFA%20-%20English%20%20FrenchVersion.pdf> (not in force). For more on the Grand Ethiopian Renaissance Dam dispute, see e.g. Salman MA Salman, "The Nile Basin Cooperative Framework Agreement: Disentangling the Gordian Knot" in Zeray Yihdego et al, eds, *The Grand Ethiopian Renaissance Dam and the Nile Basin: Implications for Transboundary Water Cooperation* (Abingdon, UK: Routledge, 2019) 45; Habatamu Alebachew, "International Legal Perspectives on the Utilization of Trans-boundary Rivers: The Case of the Ethiopian Renaissance (Nile) Dam" in Michael Kidd et al, eds, *Water and the Law: Towards Sustainability* (Northampton, MA: Edward Elgar, 2014) 66 at 73–74, 80–81; Jenny R Kehl, "Water Security in Transboundary Systems: Cooperation in Intractable Conflicts and the Nile System" in Jean A Cahan, ed, *Water Security in the Middle East: Essays in Scientific and Social Cooperation* (London: Anthem Press, 2017) 39 at 40.

[15] For instance, in 2016, India requested that the World Bank appoint a Neutral Expert to resolve lingering disagreements, and Pakistan requested that it appoint a court of arbitration. World Bank, Press Release, "World Bank Declares Pause to Protect Indus Waters Treaty" (12 December 2016), online: <www.worldbank.org/en/news/press-release/2016/12/12/world-bank-declares-pause-protect-indus-water-treaty>.

[16] *Treaty between Canada and the United States Relating to Cooperative Development of the Water Resources of the Columbia River Basin*, 17 January 1961, Can TS 1964 No 2 (entered into force 16 September 1964).

[17] See Global Affairs Canada, News Release, "Canada and United States Launch Negotiations to Renew Columbia River Treaty" (22 May 2018), online: <www.canada.ca/en/global-affairs/news/2018/05/canada-and-united-states-launch-negotiations-to-renew-columbia-river-treaty.html>; see also United States, Department of State, Bureau of Western Hemisphere Affairs, "Columbia River Treaty Regime" (undated), online: <www.state.gov/columbia-river-treaty>.

https://doi.org/10.1017/cyl.2020.2 Published online by Cambridge University Press

"procedural" obligations, including the obligations to cooperate, notify, consult, and exchange data and information. These chapters continue to provide a valuable introduction to, and discussion of, these fundamental principles. However, the book retains, at least in terms of structure and terminology, the distinction between "substantive" and "procedural" principles. As noted by the American judge on the ICJ in a recent separate opinion,[18] and more generally in past and current scholarship,[19] a more holistic approach to these principles, which views them as integrated and interconnected, is crucial for their effective application.[20]

Finally, Chapters 13 and 14 of the book, dealing with groundwater and dispute avoidance and settlement, respectively, remain largely unchanged from the previous edition. With regard to groundwater, Chapter 13 now includes a short discussion of the current dispute between Chile and Bolivia concerning the Silala River as well as a review of the International Law Commission's 2008 *Draft Articles on the Law of Transboundary Aquifers*.[21] In the context of the Silala River dispute and the definition of "international watercourses" discussed in Chapter 13,[22] it would have been beneficial to also address the potential implications of the argument, raised by Bolivia, that the river is artificial and therefore not international.[23]

McCaffrey's third edition of *The Law of International Watercourses* is an extremely well written, thorough, and accessible guide to the legal frame-

[18] See *Certain Activities Carried Out by Nicaragua*, *supra* note 2 at 785, Separate Opinion of Judge Donoghue ("I do not find it useful to draw distinctions between 'procedural' and 'substantive' obligations, as the Court has done").

[19] See e.g. Attila M Tanzi, "Substantializing the Procedural Obligations of International Water Law between Retributive and Distributive Justice" in Hélène Ruiz Fabri et al, eds, *A Bridge over Troubled Waters: Dispute Resolution in the Law of International Watercourses and the Law of the Sea* (Leiden: Brill-Nijhoff, forthcoming) [on file with reviewer]; Owen McIntyre, "The World Court's Ongoing Contribution to International Water Law: The Pulp Mills Case between Argentina and Uruguay" (2011) 4:2 Water Alternatives 124 at 143.

[20] McCaffrey, *supra* note 4 at 526, does note that "the line separating obligations that are substantive from those that are procedural is not always a clear one … the 'substantive' obligation of equitable and reasonable utilization may itself be thought of as a process; and the 'substantive' obligation not to cause significant harm also serves to trigger a process."

[21] Reproduced in *Report of the International Law Commission: Sixtieth Session (5 May–6 June and 7 July–8 August 2008)*, UN Doc A/63/10 (2008) at para 53.

[22] McCaffrey, *supra* note 4 at 559–61.

[23] Bolivia claims that it has sovereignty over the "artificial channels" and "artificial flow" of the Silala. *Dispute over the Status and Use of the Waters of the Silala (Chile v Bolivia)*, Order of 15 November 2018, [2018] ICJ Rep 703 at 704. Chile, however, claims that the Silala crosses the border from Bolivia to Chile naturally as a result of gravity and that the artificial channels did not alter its natural flow. *Chile v Bolivia* Application, *supra* note 2 at paras 2, 21, 44.

work governing non-navigational uses of international watercourses, disputes arising from such uses, and their resolution. The book remains an essential source of information and analysis on everything fresh water, written by one of the foremost experts in international water law.

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The International Rule of Law: Rise or Decline? Edited by Heike Krieger, Georg Nolte & Andreas Zimmermann. Oxford: Oxford University Press, 2019. 378 + xii pages.

Vol. 57 [2019], doi: 10.1017/cyl.2020.3

Controversial discussion on the state of international law can fairly be called an "academic warhorse," with international law's relevance and influence, and its rise and decline, swinging like a pendulum.[1] *The International Rule of Law: Rise or Decline?* accurately captures the current state of this discussion. It is one outcome from a larger research project of the same title, based in Berlin and Potsdam, that aims to facilitate an intense exchange between international lawyers and political scientists from around the globe. The distinguished contributors to this book provide an insightful and critical examination of international law at a time when there is stress and tension arising from attacks by growing populist movements, the denial of the benefits of multilateralism,[2] and state actions challenging the international peace and war order.[3] The diverse and competing viewpoints and approaches within the collection jointly provide a comprehensive analysis of the topic.

The book contains twenty-two chapters, organized into four parts, providing (1) historical, (2) actor-centred, (3) system-oriented, and (4) justice and legitimacy perspectives on the rise or decline of the international rule of law.

[1] For the coining of the "swing of the pendulum" metaphor, see Josef Kunz, "Swing of the Pendulum: From Overestimation to Underestimation of International Law" (1950) 44 Am J Intl L 135 at 137ff.

[2] See e.g. Eric Posner, "Liberal Internationalism and the Populist Backlash" (2017) 49 Ariz State LJ 795; Philip Alston, "The Populist Challenge to Human Rights" (2017) 9 J Human Rights Practice 1.

[3] One example is the annexation of Crimea by the Russian Federation in 2014. See e.g. Robin Geiß, "Russia's Annexation of Crimea: The Mills of International Law Grind Slowly but They Do Grind" (2015) 91 Intl L Studies 425; Thomas D Grant, "Annexation of Crimea" (2015) 109:1 Am J Intl L 68.