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BOOK REVIEW

McIntyre, O. 2007. Environmental protection of international watercourses under international law. Aldershot, UK: Ashgate Publishing. ISBN: 978-0-7546-7055-1, 380 pages, £ 65.

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Only air is more immediately vital to human survival and thriving than water. Both substances are so ubiquitous that most human communities have treated them as 'free goods' – goods for which users did not acquire a proprietary interest (Cowen, 1991). Even in dry regions, where communities were desperately short of water, the emphasis, at least at the individual level, was on sharing the scarce resource rather than hoarding it. Thus we find embedded in Islamic law – a body of law that arose in one of the driest regions on the planet – a prohibition of the sale of water coupled with an obligation to allow all persons or animals to quench their thirst even from a private well so long as the well owner's immediate needs were met, and an obligation to share irrigation water (Naff, 2009). When rationing or collective action, rather than simple sharing, became necessary, governments undertook to do so through increasingly complex and widening legal regimes (Teclaff, 1985). Obligations regarding pollution tended to be even less developed except when pollution reached crisis proportions.

What worked on the individual or local level through millennia, did not work for nations. Nations confronting water shortages or vulnerable to serious pollution from outside their boundaries created imperial regimes stretching across one or more watersheds, or at least as much of a watershed as was necessary to secure needed water supplies (Wittfogel, 1957). In humid regions such as Europe, where water supplies were ample relative to demand, smaller nation states emerged that were not closely connected to watershed boundaries. In these regions, such water disputes as there were arose over navigation rather than over consumptive uses of the water (Kaeckenbeeck, 1919). Only with the advent of the industrial revolution, particularly with the development of large, public water supply systems for megacities made possible by industrialization and the development of large-scale hydroelectric generation after 1870, did nations in humid regions feel the necessity to develop international legal regimes for their internationally shared water resources (Dellapenna, 2001).

As with individual and community water management, the emergent international regime, which quickly came to be seen as required by customary international law, initially said little or nothing about water quality issues. The emphasis was distinctly on water sharing, through a rule denominated as an obligation on states to make "an equitable and reasonable utilization" of shared water resources, to use the term coined by the codification of customary international law in the *Helsinki Rules* (International Law Association, 1966). Singularly absent from this codification was any real attention to environmental or ecological concerns, with the only article in the *Helsinki Rules* to address pollution doing no more than indicating that nations were expected to behave equitably and reasonably in this regard as well as when deciding how to share the transboundary waters.

The second half of the twentieth century saw separate bodies of customary and conventional international law addressing environmental concerns and human rights parallel to this body of

customary law narrowly focused on the sharing of water (Hannum, 2004; Kiss and Shelton, 2003). When the United Nations General Assembly approved a convention to codify international water law in 1997, the treaty remained firmly rooted in the earlier work of the International Law Association and thus was only slightly more expansive about environmental concerns and said nothing at all about the human rights aspects of water issues (United Nations, 1997). Nor did the convention recognize that increasingly the customary international law addressing environmental and human rights concerns were not limited to internationally shared waters, but increasingly addressed all waters, national and international (International Law Association, 2004).

Owen McIntyre has given us a book that seeks to recast this system of norms into a system that is primarily focused on protecting the environment and ecosystems. While he acknowledges that in fact little was said about environmental concerns in the treaties concerning and discussions of international water law before 1990, he seizes upon the few vague references and the more frequent but often just as vague references in the relevant legal instruments after 1990 to articulate a comprehensive and elaborate theory of environmental protection as being embodied in the concepts of equitable utilization and the avoidance of transboundary harm. Mr. McIntyre concludes that the principle of equitable utilization is the "pre-eminent legal rule" applicable to the use and protection of international watercourses. Indeed, he describes "equity" as the cornerstone of modern international water resources law.

McIntyre attributes its "universal acceptance" to the fact that it is normatively indeterminate, allowing all states to assert whatever interests they favor under the broad mandate of the principle. He provides a full chapter on how to apply the principle of equitable utilization, concluding that, at least as regards water resources, it is "distributive in character". This is indeed consistent with the focus of most international water management treaties, which, as already noted, usually say little beyond vague generalities about the environment, particularly if they were entered into before 1990.

Nonetheless, he argues that the UN General Assembly's inclusion of sustainability as one of its objectives (a "key objective", as he terms it) as well certain specific environmental protection mandates in its codification of the principle of equitable utilization (United Nations, 1997, arts. 5) has conferred a privileged status on environmental or ecological concerns in determining what is an equitable and reasonable utilization of transboundary waters. McIntyre also argues that the rule requiring "appropriate measures" to prevent harm to other states gives a privileged position to environmental protection – despite the clear subordination of the principle of the avoidance of harm to the overriding principle of equitable utilization in the *UN Convention on the Law of Non-Navigational Uses of International Watercourses* (United Nations, 1997, art. 7). McIntyre devotes his longest chapter to developing what he terms the "emerging customary international law" relating to environmental protection, all of which, he contends, derive from the overarching rule relating to the obligation to prevent transboundary harm.

McIntyre also identifies the "notion" of sustainability as having particular significance. It is this notion, he contends, that allows the reconciliation of the international law on the protection of the environment and the international law on the sharing of resources. This places quite a load on a mere notion. McIntyre proposes to resolve the shortcomings of the legal rules and principles by promoting the development of "permanent and technically competent institutional machinery" to manage international watercourses based upon the ecosystem approach. He espouses the procedural rules in the *UN Convention* (United Nations, 1997, arts. 8-19) as providing emerging customary rules binding on states that, at the least, compels them to cooperate, and ideally will lead them to realize the imperative obligation to create basinwide institutional machinery. He does not, however, provide much of an explanation as to why we should expect states to create such institutions when for the most part they thus far have been reluctant to do so except in regions that are ready for extraordinary cooperation. Nor does McIntyre consider the theoretical reasons why this might continue to be the case in the future (Guzman, 2005).

I served as rapporteur on the *Berlin Rules on Water Resources,* the International Law Association's recent attempt to integrate the customary law of water resource sharing with the broader demands of international environmental law and international human rights law (International Law Association 2004). These rules traverse much of the same ground as McIntyre's book and reach many of the same conclusions. McIntyre himself refers to the *Berlin Rules* in his book, but comparing the two demonstrates a few weaknesses in McIntyre's effort.

First, customary international law classically is defined as a practice that states follow out of a sense of legal obligation (Wolfke, 2003). This law can be complex and inelegant, but it has proven to be supple, sophisticated, and successful in many situations (Cohen, 2007). It requires careful attention to what states do and why they do it. McIntyre, however, relies heavily on secondary sources for his propositions regarding customary international law, whether relating to shared water resources or to the environment. While he lists numerous water treaties in a table at the front of the book, a remarkable amount of his study depends not on a close reading of the treaties or other forms of state practice, but on what others have written about the treaties or state practice. This creates an impression that his interpretations depend not on the actual practice of states but on the cabal of academics (*e.g.* Kolb, 2003), a cabal that some fear already claim too much say in determining the content of customary international law.

Understandably, the one treaty that McIntyre does consider at great length is the *UN Convention* (United Nations, 1997). It is the closest we have to a comprehensive consensus on the law of transboundary waters, having been approved by a vote of 103 to 3 in the General Assembly. A number of states additionally indicated that they would have voted for it had their delegation received instructions from their government in time; no state has indicated to the contrary. Yet, the *UN Convention* has thus far – 12 years after its approval by the General Assembly – received only 16 of the 35 ratifications necessary to enter into force (Salman, 2007). This effectively renders the *UN Convention* as merely another non-binding resolution, when there are literally hundreds of international agreements and other forms of state practice that actually embrace most of the principles and rules in the convention. Nowhere does McIntyre consider this problem with the *UN Convention.* Nor does McIntyre deal with the problem the *UN Convention* does not require his favored solution – the creation of basinwide management institutions.

If, as was the case for the *Berlin Rules,* one restricts one's analysis strictly to international agreements and other forms of state practice, one can reach the same conclusions as McIntyre. He does not, however, fully embrace the idea that a pattern of treaties can become a basis for binding international customary law (Raustiala 2005), instead arguing only that the treaties stiffen or codify pre-existing custom. This leaves the reader unsure just how much of what McIntyre proposes really is law, for the real source of the obligations of minimization of environmental harm and sustainability that he supports derive from the numerous and nearly universal treaties on these subjects, along with declarations, resolutions, and the like from international organizations, foreign ministries, and learned societies in several disciplines. For this reason, the *Berlin Rules* was accompanied by an extensive collection of the sources on which it relied, arranged article by article and drawing heavily on actual state practice, primarily in the form of universal, multilateral, and bilateral treaties.

Finally, McIntyre does not seriously consider the true import of attempting to integrate the rules of international environmental law with the rules of international water resource sharing. Nor does he consider the relevance of the growing and increasingly strong body of human rights law. The law of human rights is increasingly relevant to water management, not least in the growing recognition of a human right to water (Salman and McInerney-Lankford, 2004). This failure to consider the human rights dimensions – regarding the right to a voice in decisions affecting one's life and compensation for the deprivation of rights, as well as a human right to water – is rooted in McIntyre paramount focus on the *UN Convention* – a conservative document that says little about the environment and nothing about human rights. This narrow vision is perhaps the reason for the slow pace of ratifications of the *UN Convention,* or perhaps there are other reasons (Salman, 2007).

Because of the limited focus on McIntyre's work – as a commentary on the traditional customary international law of water sharing and the *UN Convention* – he simply misses the most important and most intriguing development in international law relative to water and other resources. Many of the environmental rules (and most of the human rights rules) apply to actions and decisions a state takes wholly within its own territory and not just to actions or decisions that cause transboundary effects. McIntyre, by limiting his analysis to the purely transboundary context, fails to provide a truly important summary of where the international law applicable to water has been, where it is now, and where it is going.

Despite its shortcomings, McIntyre's book deserves to be read. His survey of the literature is comprehensive, careful, and often subtle. His writing is clear and his arguments are often persuasive. Yet despite the evident strengths and importance of his book, it should not be treated as the final word (as of 2007) on the topics he addresses. McIntyre missed a chance to advance our recognition of the reach and importance of modern international law. Instead, he would leave us to cope with the twenty-first century's large and growing global water crisis with the cautious, constrained tools of twentieth century international law, ignoring or at least failing to realize the promise of the legal developments of the last years of the last century.

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