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D. Bodansky, J. Brunnee and E. Hey (eds), The Oxford Handbook of International Environmental Law

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The Oxford Handbooks series is a relatively new publishing initiative providing 'authoritative and state of the art survey[s] of current thinking and research'. In addition to the book under review, Oxford Handbooks have been published in such diverse sub-fields as Legal Studies, Jurisprudence and Philosophy of Law, Comparative Law and International Humanitarian Law. This publishing device seems to be particularly well suited to areas that require (or benefit from) an interdisciplinary approach as the format enables editors to draw together a considerable range of different perspectives thus facilitating broad thematic analysis of the subject in issue. In this vein, the present book seeks to show the mutual benefits to be gained from disciplinary co-ordination and shared understandings. The editors, perhaps rightly, feel that the publication of this Handbook is a testament to the contemporary significance of international environmental law and an indication of the subject's coming of age. However, they are acutely aware of the risk that disciplinary fragmentation will obscure 'unifying themes and cross-cutting challenges'. Consequently, one of the main objectives of the book is to investigate the coherence of the international law relating to the environment. Clearly, subject specialisation has its advantages given the internationalisation of legal fields, the resultant burgeoning literatures and the increasing complexity of their attendant regimes. Indeed, there are good reasons to question whether it is possible to maintain international law's coherence under such conditions, especially in the light of the growing normative interplay between international and national law, 'soft' law and 'hard' law and public and private legal regimes. Against this background, this Handbook 'endeavours to step back and take stock of this growing field as a whole, and to discern its overarching features' (at 4).

In the introductory chapter the editors are eager to show how international environmental law differs from many other areas of international law: the fact that it primarily concerns the regulation of private actors; its close relationship with science and technology; the truly global nature of the task of regulating the environment; its often highly political nature; the relativity of its rights and obligations; and the uncertainty and urgency of environmental

action. Clearly, not all of these characteristics are unique to international environmental law but, arguably, they provide the foundations of a very distinctive sub-field. Nevertheless, it is still legitimate to ask whether international environmental law is merely the application of international law to environmental issues.

The answer to this question appears to depend on one's perspective of the normative content and scope of international environmental law. The extent to which the resolution of environmental issues is a significant part of the *legal* project is one of the underlying themes of the book. Criticisms of traditional international law concentrate on its state-centred nature, it over-reliance on 'hard' sources, such as treaties and customary international law, the limits of its formal adjudicative processes and its relative lack of dynamism (in comparison with major political initiatives). Scholars, such as Stephen Toope (and Benedict Kingsbury) who have been influenced by the international relations ('IR') constructivist school of thought, embrace much more expansive interpretations of the creation and operation of international law. For constructivist scholars, international law is a broad social phenomenon deeply imbued with the shared practices and values of those societies that create and maintain it. Accordingly, the dialogical processes occurring within international society construct the identities, interests and inform the actions of States. From this perspective, international law conditions the prevailing scope of legitimate agency for international actors. Shared normative understandings may be developed through 'hard law' or 'soft law', such as non-binding Declarations, resolutions and recommendations, or by the interplay between the two sources.

In his chapter, 'Formality and Informality', Toope suggests that to focus on formal sources alone is to ignore the capacity of soft sources to shape future behaviour. Moreover, he argues that a commitment to Kelsian formalism 'would render nugatory most of what we currently conceive as the global law of the environment' (at 112). Instead, for Toope: 'Law is a special form of practical reasoning that requires testing in the muck of social interaction. Rules emerge on a continuum with two concurrent scales of measure: aspiration (ideas) and duty (practice)' (at 114). He suggests that international lawyers should not obsess over whether a particular rule or principle is binding or not because '[f]ormal and informal approaches to shaping behaviour are ... inextricably intertwined' (at 114). He claims that, for IR scholars, formality is connected to effectiveness and suggests that international lawyers would do well to consider the effectiveness of a norm rather than its formal status. However, Toope is not prepared to sound the death knell of formalism. He is willing to concede that 'soft law' is not binding but he champions its ability to influence normative developments and to heighten the legitimacy of a particular course of action. For him, formal and informal sources co-exist as sources of law – together they are components of law's relative autonomy from politics – its logics of aspiration and duty.

In contrast, in 'Relationship between International Environmental Law and Other Branches of International Law', Alan Boyle maintains the traditional view that no 'magical' category of international environmental law exists and that 'it is simply a part of international law as a whole' (at 126). His survey veers towards the formalistic end of the spectrum. However, Boyle does recognise an important role for 'soft law' and background concepts, such as sustainable development, within the operation of international law. He views these sources as important interpretive tools which enable courts and decision-makers to apply the law in issue in a contextually sensitive manner. In this respect, Boyle emphasizes the significance of international law at the point of application (as opposed to at the stage of its development).

Further, Boyle demonstrates the extent to which international disputes typically concern legal issues that fall within different 'sub-fields' which then need to be mediated by the tribunal (or decision-maker), a task that can only be accomplished with the assistance of the general principles thereby reinforcing the need to maintain overall coherence.

In his chapter 'Different Types of Norms in International Environmental Law: Policies, Principles and Rules', Ulrich Beyerlin applies Dworkinian jurisprudence to an assessment of international environmental law's normativity. Analysing Dworkin's taxonomy of legal rules, legal principles and policies, he suggests that the category of ''policies' essentially corresponds to 'soft law', which encompasses a wide range of instruments that lack legally binding force but that nonetheless have normative quality in political-moral terms' (at 427). In the context of a discussion about customary international law, Beyerlin concludes that most international environmental law principles remain 'soft' law. He then makes a revealing statement:

> ... it may be asked whether the efficacy of international environmental principles really depends so much on their legal status. If one takes the view, as the author does, that 'soft law' principles are by no means inferior to legal principles but are to be seen on an equal footing with them, there are good reasons for arguing that a principle that is based on international policies or morals, in practical terms, guides states' discretion in virtually the same way as a principle that has become part of customary international law. After all, a principle, be it legal or non-legal in nature, can never automatically entail consequences in the sense that its addressees are unconditionally required to take (more or less clearly defined) action (at 438).

It can be seen from the above quotation that Beyerlin attaches more weight to effectiveness than to questions of legal validity. In this respect he is attempting to reinforce the extent to which international environmental law has sought to draw on political and moral developments. In so doing, he has embraced the blurring of the distinction between law, politics and morality without appearing to appreciate the implications of his approach.

International environmental law's scope is also discussed by Pierre-Marie Dupuy (in 'Formation of Customary International Law and General Principles'). During his examination of the elements required to establish customary international law (*opinio juris* and state practice) he suggests that most scholars assume that a given principle constitutes customary international law without considering whether the principle is established in state practice. He therefore cautions that 'the common belief of scholars does not suffice to make the law!' (at 452). Moreover, Dupuy observes that:

> ... many scholars, quite innocently cite the largest possible number of opinions, treaties, and recommendations in order to convince themselves that not only must a particular rule be recognized by states as compulsory, but also that such is effectively the case in their actual practice. However, mere reiteration in different international documents may well have to be dissociated from what a state actually considers to be binding law in a specific situation (at 453).

Although Dupuy does not underestimate the importance of soft sources as indicators of future legal developments he questions the legal significance attached to such resolutions, guidelines and recommendations. He reminds us of 'the discrepancy that more often than not

remains between what states say and what they actually do' (at 459) and thus the difficulty of identifying customary international law from such sources. Dupuy is keen to acknowledge the growing influence of non-state actors and international civil society in shaping the political agenda on environmental issues as the results of such actions may have legal consequences (the precautionary 'principle' is a good example here). Nevertheless, such normative developments must cross the threshold before they are considered to be international *lex lata*.

Peter Sands recognises (in 'The Evolution of International Environmental Law') that the sheer dynamism that results from confusing law with politics (and other disciplines) reduces international environmental law 'to a mere technique for managing change in the guise of global governance' (at 42) which leaves no distinct role for law to perform. In such circumstances, Sands echoes Koskenniemi's call for a return to international law's culture of formalism as a 'culture of resistance to power, a social practice of accountability, openness and equality' (at 42, quoting M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (Cambridge University Press, Cambridge, 2001) at 500). For Koskenniemi, while modern international law is founded on the countervailing cultures of formalism (legal validity) and dynamism (normativity) its *relative* autonomy from political agendas allows it to remain authoritative (this point is accepted by Toope at 111). The theoretical basis for this intermediate position is difficult to capture. Koskenniemi tries to express its essence through the term 'sensibility' – that traditional international lawyers possess an intuitive understanding of law's parameters which makes them suspicious of the value of joint ventures with scholars from other disciplines. In particular, Koskenniemi's view shows the constructivist interpretation of international (environmental) law to be an incomplete one. The willingness of certain scholars to transform soft sources into international law (or to equate the two) should be questioned. Soft sources should be categorised as the products of institutionally focused political activity at the supra-national level. While they *may* have future legal consequences, they do not constitute international law until they have crossed the threshold into positive international law. To conclude otherwise would be to fail to appreciate international law's *culture* of formalism, and the limits of its existing contribution to the regulation of environmental issues.

The limits of the rights discourse in the environmental context are explored by John Merills in his chapter on 'Environmental Rights'. He considers the way in which rights are used to trump preferences and the complex relationship between law and morality particularly in the spheres of human rights and environmental rights. But Merills shows us that over-reliance on the rights discourse may do more harm than good:

> ... a proliferation of rights and rights-holders not only multiplies the opportunities for rights-holders to come into conflict with each other, but also generates a tension between rights as a basis for actions and other moral considerations. Thus, a society that over-emphasizes legal and moral rights may find it difficult to maintain community values such as cooperation, generosity, and civic duty, which are not identified with the concept of rights (at 668).

Merrills considers basic questions, such as who are rights-holders, showing the problems of allocating rights to future generations (which also raises major ethical problems – see Christopher Stone's chapter 'Ethics and International Environmental Law'); the theoretical difficulties of allocating rights to animals and inanimate objects; the problem of establishing

corresponding obligations; rights indeterminacy and how environmental rights fit within a wider rights framework. Merrills does not attempt to diminish the discourse's contribution to environmental issues rather his sceptical tone is designed to remind us of its limits. He cautions against confusing law and morality in the environmental context (the 'is' with the 'ought'): 'legal rights and rules, and their moral counterparts, make up distinct normative systems, each with their own logic and criteria for identification' (at 677). Accordingly, while moral considerations may inspire the creation of legal rights, the recognition of such rights is a matter for (international) law; it is not the product of a process of analogous moral reasoning.

The Handbook shows that many of international environmental law's core principles are of questionable status and many of the chapters endeavour to establish or clarify their legal status by analytical or contextual surveys. In addition to Beyerlin's chapter, discussed above, good examples of this approach include: 'Sustainable Development' by Daniel Magraw and Lisa Hawke; Jonathan Wiener's 'Precaution' and Dan Tarlock's 'Ecosystems'. Many of the 'key concepts' analysed in these chapters are organising or framework principles. For instance, Vaughan Lowe refers to sustainable development as a meta-principle, which leads Magraw and Hawke to speculate whether Lowe thinks it has attained the status of customary international law. It hard to understand the value of trying to categorise such concepts by reference to the formal sources of traditional international law when their contribution lies at a much more abstract level. This is equally true of Dinah Shelton's chapter on 'Equity', which is based on such a broad interpretation of equity (*ex aequo et bono*) that it is more strongly connected to the notion of political legitimacy than international law.

Broad approaches are unproblematic for Daniel Bodansky. In his chapter, 'Legitimacy', he examines the way in which international law's legitimacy has shifted away from state consent and the principle of legality towards contemporary touchstones such as democracy, transparency, participation, effectiveness and technocracy. Bodansky articulates the 'dilemma' facing international environmental law well. Environmental regulation must be effective if it is to be successful but traditional international law, based on manufacturing consensus between states, is un-wielding and, often, ineffective. Accordingly, could other institutions attract the requisite level of legitimacy to perform the function currently provided by states directly? The penultimate part of the Handbook answers this question in the affirmative. The growing plurality of international regimes, trans-national networks and non-state actors has changed the state's role in relation to the regulation of environmental matters, according to Thilo Marauhn ('The Changing Role of the State'). This is apparent from the proliferation and increasing authority of international institutions concerned with environmental issues and the concomitant rise of a fledgling international civil society. In this respect, international environmental law has, arguably, become the most advanced field of international law. Its rapid development is a consequence of the environmental challenges that confront us. The unparalleled threat of widespread environmental degradation demands new legal approaches to regulating the environment. For scholars such as Steven Ratner (in 'Business') international law's traditional doctrine is not up to the task as it pays insufficient attention to corporate behaviour. Ratner calls for the duties of private sector actors to be reconsidered in such a way that 'companies fit alongside states, international organisations, and non-state entities' (at 827) in an integrated system of legal rights and obligations (this call has been heeded most effectively by the European Union). Nevertheless, the state retains a special place in the regulation of environmental matters particularly in relation to the implementation and enforcement of international environmental law. These issues – which

have typically been overlooked by international environmental law scholars – are pursued pragmatically in the final part of the book.

This Handbook is a welcome addition to the literature on international environmental law. It draws together the views of a number of eminent scholars in the 'sub-field'. Moreover, its inter-disciplinary nature makes it highly informative at another level. It is surely too expensive to be adopted as a core text (and this is not its purposes anyway). Nevertheless, its holistic approach, authoritativeness and its sheer length make it an essential reference book for courses on international environmental law (and related courses). In particular, this book should be commended for the open manner with which it reflects on international environmental law's jurisprudential basis. Some contributors view international environmental law as being strongly connected to general international law and its formal role whereas others perceive it as an interdisciplinary project in which the intermingling of law, politics and morality is justified by reference to the gravity and urgency of the ultimate purpose of protecting the environment. The value of interdisciplinary approaches in the environmental context should not be underestimated. However, legal scholars should be mindful of the limited nature of international law's current contribution to such a cross-cutting project – the integrity and utility of the legal project is damaged by confusing law with politics or morality. As Vaughan Lowe writes:

> International lawyers share ground with others. And this trend will continue. But the most important point is that all of the ground occupied by international law is shared with others who are not lawyers of any description, but men and women in the vast range of other professions and businesses whose cumulative efforts shape the world. Lawyers have a contribution to make. They offer one way of going about resolving some of the most crucial problems that face the world. But it is only one way among many. There are many times when it is much better to call upon a politician, or a priest, or a doctor, or a plumber (*International Law*, (Oxford University Press, Oxford, 2007) at 290).