

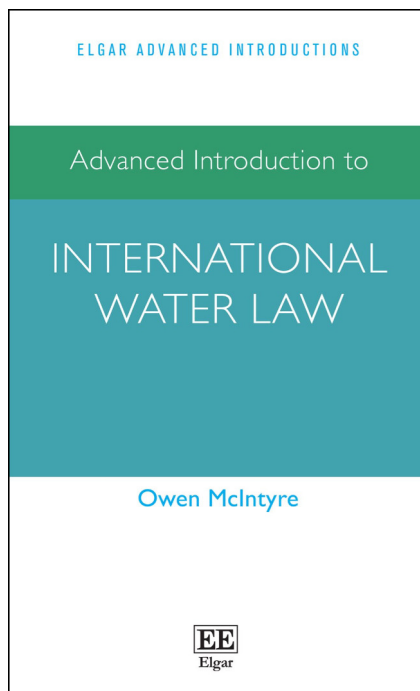
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Advanced Introduction to International Water Law

By: Owen McIntyre

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¹International Water Law has a very long history. Perhaps it is one of the oldest sub-fields of international law. Nevertheless, it received less attention from international law scholars when compared to other sub-fields such as the law of the sea, or the law relating to war and diplomacy. The dramatic changes in the life and economic activities of humans across the globe during and after industrial revolution led to an exponential in-

crease in demand for freshwater for various uses, such as irrigation, drinking water use, industrial use and electricity generation. Ever increasing environmental crises, among other things, further led to confrontational hydro relationships, which in turn led to securitisation of international rivers.

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In some cases, disputes have been decided by international dispute settlement forums, including by the International Court of Justice. Overall, international water law, in the last few decades, has invited the attention of international law scholars, including both descriptive and critical literature.²

Prof. Owen McIntyre's *Advanced Introduction to International Water Law* is an important contribution to the existing literature on international water law. Prof. McIntyre is a scholar particularly known for his contributions on International Water Law and International Environmental Law. There are very few such scholars with deep and nuanced understanding of International Water Law who can author an advanced introduction to International Water Law and Prof. McIntyre is undoubtedly one of them.

This book has been written by keeping a specific set of readers in mind. The Preface section of the book provides a useful guide to readers to limit their expectations from the book. It underlines the scope of the book as a 'comprehensive, entry-level introduction to

² This literature includes: Stephen C McCaffrey, *The Law of International Watercourses* (3rd edn, OUP 2019); Salman M A Salman and Kishor Uprety, *Conflict and Cooperation on South Asia's International Rivers: A Legal Perspective* (The World Bank 2003); Laurence Boisson de Chazournes, *Fresh Water in International Law* (2nd edn, OUP 2021); Francesco Sindico, *International Law and Transboundary Aquifers* (Edward Elgar 2020).

the discrete and rapidly evolving sub-field of international water law' [p. vi]. It further makes it clear that it does not promise an 'ambitious critical reflection' on International Water Law [p. vi]. This book is a useful starting point for those who have not been exposed to International Water Law, but keen to understand it. In this way, students and teachers of international water law, international environmental law and natural resources law will find this book a useful addition to their reading list mainly because of its coverage of all important aspects of International Water Law and its lucid presentation.

The book follows a familiar structure starting with a historical account of International Water Law, followed by key principles or aspects of International Water Law. A potentially non-conventional part of this book from a structural and substantive point of view is the last two chapters discussing International Water Law in its legal convergence context and in its relationship with the Sustainable Development Goals (more precisely SDG-6).

The book begins with what it calls as the 'conceptual setting' where it introduces key concepts that links international waters with concepts of sovereignty and territory. It briefly explains how territorial claims over international rivers eventually gave way to progressive ideas of common concerns, common management and community of interests. This chapter also highlights certain key challenges such as 'treaty proliferation, congestion and fragmentation' and the ensuing issues of 'normative incoherence and inconsistency' [pp. 8-9]. Readers approaching the field for the first time may be surprised to see some of these critical ideas or issues at the beginning of the book. They may find some of these discussions a little too complex. Readers might find it useful to come back to this part once again after completing

the book, to find interesting elements for further scholarly engagements.

The historical account of International Water Law (Chapter 2) describes how it began with a focus on free navigation as an inalienable right of riparian and non-riparian states and over the centuries how it expanded its focus to non-navigational uses of international watercourses. This chapter signposts some of the key instruments (eg Peace of Westphalia 1684) and court cases (eg River Oder case 1929) in this long history of International Water Law. The historical narrative leads to the key legal framework in the contemporary time, that is, the UN Convention on the Law of Non-Navigational Uses of International Watercourses 1997. Much of the following discussions in the book is centered around this single multilateral treaty regime on international watercourses. It is to be noted that this treaty regime is struggling with limited number of state parties.³ However, the book underscores the point that many of the key principles and rules of the treaty are either recognised as part of customary international law or as general principles of international law.

Interestingly, this chapter moves beyond its mandate of historical accounts and discusses 'future implications for international water law'. In a way, the author declares a new phase in the progressive development of International Water Law where environmental dimensions such as environmental flows and ecosystem services take a decisive role in normative developments and interpretations of the rules of International Water Law.

³ For list of parties to the UN Convention on the Law of Non-Navigational Uses of International Watercourses, 1997, see https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=xxvii-12&chapter=27&clang=en.

The final lines of this chapter capture this aspect as ‘the latest, ongoing transition is a response to current and imminent challenges, including the looming water, biodiversity and climate crises. Of course, this shift in the purpose and focus of international water law will inevitably have significant and wide-ranging implications for the normative and institutional structure of this evolving sub-field’ [p. 30].

The historical account of International Water Law appears to be Eurocentric in its focus. The signposted landmarks are mainly, if not fully, European developments. Probably, a history of International Water Law from a global South perspective is yet to be written.

The book devotes distinct chapters to two substantive principles of International Water Law (Equitable and Reasonable Utilization—Chapter 3 and Prevention of Significant Transboundary Harm—Chapter 4) followed by a distinct chapter on procedural rules and principles (Chapter 5). The two key substantive principles together provide two important focuses of International Water Law, that is the right of riparian states to utilise international waters and their obligation to take care of the interests of other riparian states and generally the environment.

Chapter 3 moves beyond a simplified description of the principle of Equitable and Reasonable Utilization and covers futuristic aspects as well. Thus, it emphasises on the ideas of benefit sharing and solidarity among riparian states as important means of giving practical effects to the principle of Equitable and Reasonable Utilization. As the book consistently maintains its approach to highlight environmental dimensions of International Water Law, this chapter underlines water ecosystem concerns as an inherent part of the principle of Equitable and Reasonable Utilization.

The balance of interests among riparian states is further strengthened through the principle of Prevention of Significant Transboundary Harm. Chapter 4 provides a clear account of this principle. It describes the key features of the principle and puts the discussion in the broader context of the principle of due diligence under international law. As described in the previous chapter, it highlights the need for taking the ecosystem approach into account while applying this principle. Thus, in a context of constantly expanding environmental crises, the concept of transboundary harm must include environmental harm and impacts on ecosystem services are to be treated as actionable harm. This chapter underscores the emerging jurisprudence in this regard in the light of the decision of the International Court of Justice in *Costa Rica v. Nicaragua*.⁴

Chapter 4 further elaborates the relationship between the principles of Equitable and Reasonable Utilisation and Prevention of Significant Transboundary Harm. It observes, in the light of relevant provisions of UN Convention on the Law of Non-Navigational Uses of International Watercourses 1997, that International Water Law keeps the latter principle subordinate to the former. The Chapter goes on to observe that this hierarchy has immense support and it is reflective of customary international water law [p. 76]. In other words, it points to a problematic scenario where the principle of equity in the context of International Water Law appears to support and protect prior uses. This may pose problems when it comes to balance the concerns relating to use and protection where usage rights might prevail over protection.

⁴ *Certain Activities Carried Out by Nicaragua in the Border Area* (Costa Rica v Nicaragua), Compensation Judgment, ICJ Reports 2018, p 15.

In this context, the chapter underlines an important emerging trend where legal obligations of states regarding the protection and preservation of international watercourses are increasingly a part of state and treaty practice [p. 84].

Procedural rules are extremely important to International Water Law. They contribute significantly to give effect to the two important substantive principles mentioned above. The obligation not to cause significant harm and obligation to be due diligent are obligation of conduct, not obligation of result. Therefore, in a real-life case scenario, compliance (or no compliance) with procedural rules matters a lot to decide compliance with substantive rules. Even otherwise, procedural rules such as duty to co-operate, duty to exchange information and duty to consult constitute important means of co-operation between riparian states. In this context, Chapter 5 provides a reasonably good overview of key procedural rules under International Water Law.

The effectiveness of procedural rules is dependent on a robust institutional mechanism to facilitate co-operation among riparian states. Transboundary Water Governance is known for co-operative institutional mechanisms and it has a very long history. As Chapter 7 highlights, the Central Commission for Navigation on the Rhine established as an outcome of the 1815 Vienna Congress, was not only the first ever international river basin organisation, but the first ever international organisation [p. 136]. Given the close functional link between procedural rules and institutional mechanisms, it might not be a bad idea to read Chapters 5 and 7 together. Readers may further look closely the existing treaty and institutional mechanisms in different international river basins to understand better how various procedural rules

and processes and institutional mechanisms operate.

Environmental dimensions of International Water Law are a theme running throughout the book. This is understandable and essential in the context of environmental crises we are facing today. Overall, the book underlines the need to read environmental dimensions as an integral part of all substantive and procedural rules and principles of International Water Law. More specifically, Chapter 6 discusses these issues. It highlights the importance of an ecosystem approach towards transboundary water governance. It also highlights the fact that environmental dimensions are becoming increasingly important, for instance, by referring to the recognition of the idea of environmental flow in Kishenganga Arbitration (Pakistan/India) by the Permanent Court of Arbitration⁵ and International Court of Justice's recognition of the obligation to conduct EIA as a requirement under general international law in Pulp Mills case.⁶

International Water Law is much more than the conventional focus on international rivers. It includes transboundary aquifers and linked to norms and principles of International Environmental Law and International Human Rights Law. It interacts and/or overlaps with many other sub-fields of international law (eg International Environmental Law and International Human Rights Law) and policy framework (eg Sustainable Development Goals).

⁵ *Indus Waters Kishenganga Arbitration (Pakistan v India)*, Partial Award, 18 February 2013 (Permanent Court of Arbitration).

⁶ *Case Concerning Pulp Mills on River Uruguay (Argentina v Uruguay)*, ICJ Reports 2010, p. 14.

In this context, this book makes an interesting progressive step by including a chapter on legal convergence (Chapter 8) and another chapter on examining the link between International Water Law and SDG-6 on safe water and sanitation to all (Chapter 9).

These two chapters together provides a good account of the conceptual and functional link between International Water Law on the one hand and related law and policy regimes on the other. For instance, Chapter 8 brings to the forefront the undeniable connection with International Environmental Law and International Human Rights Law, more particularly in the context of the Human Right to Water. Similarly, Chapter 9 underscores the 'synergistic and complementary' relationship between International Water Law and SDG-6 [pp. 195-196].

Prof. McIntyre has done a commendable work by putting together all important rules, principles and aspects of International Water Law in an intelligible manner primarily by keeping beginners in mind. This book will undoubtedly serve that purpose. Nevertheless, an enthusiastic scholarly mind may wish for more analysis on issues, such as transboundary aquifers and human right to water. But, as the Preface clearly says, this book is meant to provide a 'useful jumping-off point for scholars embarking on new research projects in this vibrant and dynamic area' [p. vii].

