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### Book Review

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# Book Review

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Ved P. Nanda\* & George Pring,\*\* *International Environmental Law & Policy for the 21st Century* (Transnational Publisher, 2003). Pp. 512. \$125.00.

## Lakshman D. Guruswamy\*\*\*

A welcome addition to the burgeoning scholarship in international environmental law (IEL) and policy, *INTERNATIONAL ENVIRONMENTAL LAW & POLICY FOR THE 21ST CENTURY* ably builds upon the established corpus of existing literature, while enriching the subject with its own analysis. The authors of this treatise, Ved P. Nanda and George Pring, are two experienced law professors and professionals actively engaged in the scholarship, teaching, and practice of IEL.

### I. CONTENT OF THE TREATISE

The treatise is organized under three rubrics. The first serves as an introduction to the subject, the second deals with lawmaking, and the third addresses a number of key issues such as traversing conservation, pollution control, trade and the environment, and human rights and the environment. The introduction covers the familiar sources of IEL in Chapter 1, and then becomes more ambitious in Chapter 2 by addressing

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the fundamental principles of IEL.

Chapters 3–5 cover the second heading: lawmaking. Chapters 3 and 4 explore the early years of international environmental lawmaking, from early twentieth century agreements to the 2002 Johannesburg World Summit on Sustainable Development. Chapter 5 focuses specifically on the role of international environmental institutions and organizations, with a brief evaluation of multinational corporations and other business interests.

Chapters 6–14 form the important core of the treatise. These chapters deal with the substantive IEL on environmental impact assessments (EIAs), preservation, international freshwater resources, international air pollution, the marine environment, hazardous waste, chemicals and technology, biotechnology in agriculture and the Biosafety Protocol to the Convention on Biological Diversity, international trade, and human rights. The authors cover this material in an accomplished, well-researched, balanced, and non-otiose manner. They also use major international environmental conferences such as the Stockholm Conference on the Human Environment, the Rio Conference on Environment and Development, and the 2002 Johannesburg World Summit on Sustainable Development as the lenses through which they examine the substantive corpus of IEL.

## II. TOPICS OF IMPORTANCE

Three topic areas that illustrate the extensive coverage of this treatise are rules and principles, state responsibility, and EIAs.

### *A. Rules and Principles*

In addressing the fundamental principles of IEL, the authors face a challenge: principles do not always give rise to rules, and when they do, the metamorphosis takes time. Rules typically integrate standards and apply definitively to specific factual situations. The application of a rule frequently determines the outcome of a particular controversy.

On the other hand, principles are more abstract, general norms from which specific rules or standards are derived. Principles such as sustainable development or intergenerational equity embody reasons that argue for moving in a particular direction, rather than reaching a specified result. Consequently, principles, unlike rules, do not themselves postulate obligations of result. Instead, principles are the foundations upon which rules incorporating obligations of result are built. Since one principle may offset another, a principle may therefore be only one

among a number of considerations taken into account in reaching a decision.<sup>1</sup>

Article 38 of the Statute of the International Court of Justice (ICJ), which itemizes the laws applied by the ICJ, refers both to "rules" found in treaties and judicial decisions<sup>2</sup> and to "general principles of law recognized by civilized nations."<sup>3</sup> However, the fundamental principles of IEL examined in Chapter 2 are not Article 38(c) principles. Rather, the treatise covers a different species of substantive and procedural principles established by customary international law under Article 38(b).<sup>4</sup>

In light of their symbiotic, dynamic, and yet distinct legal status, it is important when addressing principles to distinguish between soft law generated by principles and hard law created by rules. Such a task, which is hard enough in mature domestic legal systems, becomes more complicated in a horizontal and consensual international legal order.

The authors boldly catalogue a long list of substantive and procedural candidate principles. Procedural principles apply to procedures such as prior notification, consultation and negotiation. Substantive principles include state sovereignty, "good neighborliness" (the duty to cooperate), the no-harm rule, sustainable development, right to development, right to a clean, healthful environment, environmental justice (intergenerational and intragenerational equity), equitable utilization of shared resources, conservation, common heritage of humankind (the "Global Commons"), the common concern of humankind (obligations *erga omnes*), common but differentiated responsibility, the polluter-pays principle, and state responsibility and liability. While the authors do not specifically juxtapose rules with principles, their treatment of the listed principles as candidate or putative principles rather than established rules of law signals their recognition of the difference between putative and established principles and rules.

In addressing the normative character of international law nearly half a century ago, the distinguished international jurist Hersch Lauterpacht was "driven, amidst some feeling of incredulity, to the conclusion that although there is as a rule a consensus of opinion on broad principle . . . there is no semblance of agreement in relation to

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1. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 24–26 (Harvard University Press 1978) (1977).

2. Statute of the International Court of Justice, June 26, 1945, art. 38(1)(a), (d), 59 Stat. 1055, T.S. No. 993.

3. *Id.* art. 38(1)(c).

4. *Id.* art. 38(1)(b).

specific rules.”<sup>5</sup> Time and experience have endorsed and underscored his observation about the ambiguity, obscurity, and uncertainty of international law in general and IEL in particular. This uncertainty applies to some of the principles listed by the authors.

The principles listed in the treatise are a mixed basket of established legal principles, putative or candidate principles, and aspirational or hortatory norms that do not possess legal force. The authors, who recognize the mottled character of these principles, astutely examine each principle in turn before reaching a conclusion about its legal status. For example, the principles of sustainable development, “good neighborliness,” and no-harm have become established as general rules despite uncertainty about their precise meaning. On the other hand, the right to development, a clean, healthful environment, and intergenerational and intragenerational equity do not qualify as full-blown principles of law. Overall, the authors skillfully navigate these difficult waters.

### *B. Legal Accountability*

State responsibility, the primary mechanism for vindicating legal rights in a judicial proceeding, is another principle addressed by the authors. The treatise accurately depicts developments in the law leading to the completion of the final Draft Articles on State Responsibility<sup>6</sup> and the Prevention of Transboundary Harm from Hazardous Activities in 2001.<sup>7</sup> These important efforts merit mention because the work of the United Nations International Law Commission (ILC) on state responsibility and prevention is important to many substantive areas of IEL.

Originally, the ILC divided the subject of state responsibility into two segments: responsibility for harms resulting from violations of international law (state responsibility *stricto sensu*) and international

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5. Hersch Lauterpacht, *Codification and Development of International Law*, 49 AM. J. INT'L L. 16, 17 (1955).

6. *Draft Articles on Responsibility of States for Internationally Wrongful Acts, Report of the International Law Commission on the Work of Its Fifty-third Session*, U.N. GAOR, 56th Sess., Supp. No. 10, at 43, U.N. Doc. A/56/10 (2001) [hereinafter *State Responsibility*], available at [http://www.un.org/law/ilc/texts/State\\_responsibility/responsibility\\_articles\(e\).pdf#pagemode=bookmarks](http://www.un.org/law/ilc/texts/State_responsibility/responsibility_articles(e).pdf#pagemode=bookmarks).

7. *Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, Report of the International Law Commission on the Work of Its Fifty-third Session*, U.N. GAOR, 56th Sess., Supp. No. 10, at 370, U.N. Doc. A/56/10 (2001) [hereinafter *Prevention of Transboundary Harm*], available at [http://www.un.org/law/ilc/texts/prevention/prevention\\_articles\(e\).pdf](http://www.un.org/law/ilc/texts/prevention/prevention_articles(e).pdf).

liability for harms not involving violations of international law.<sup>8</sup> After nearly fifty years of work, the ILC completed and agreed upon a comprehensive set of Draft Articles on State Responsibility in 2001.<sup>9</sup> While this set of Draft Articles constitutes a credible restatement of the law, the ILC's work on liability is only partially complete.

The ILC's twin objectives in undertaking the codification of international liability for non-wrongful acts were (1) to provide compensation to injured states (liability) and (2) to either deter or prevent putatively liable states from undertaking the actions in question, or at least to take adequate measures to minimize the risk of potential harms (prevention).<sup>10</sup> After a faltering start, the ILC focused primarily on the prevention objective, reasoning that "pride of place would be given to the duty to avoid or minimize injury, rather than to the substituted duty to provide reparation for injury caused."<sup>11</sup> The ILC further divided their work on liability into two topics, prevention and liability, and focused primarily on prevention. Pursuant to this decision, the ILC's work on prevention has led to the Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities.<sup>12</sup> Progress on liability has not yet advanced as far. Under these Draft Articles, actions of parties undertaking hazardous activities must be informed by risk analysis and EIAs.<sup>13</sup>

### *C. Environmental Impact Assessments*

Chapter 6, which discusses EIAs, is of particular interest. The authors offer a case study of EIAs illustrating a general phenomenon: states frequently enter into landmark international agreements and practices, driven largely by the momentum of law, regulation, and policies applicable to their own environmental problems. They do so in a world where their own environmental problems, whether arising from air and water pollution, land use or exploitation, are omnipresent. Uniformities of biophysical reactions are part of nature's writ that runs ubiquitously and universally, and the laws of nature can give rise to

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8. LAKSHMAN GURUSWAMY, INTERNATIONAL ENVIRONMENTAL LAW IN A NUTSHELL 81 (2d ed. 2003) [hereinafter NUTSHELL].

9. *State Responsibility*, *supra* note 6.

10. NUTSHELL, *supra* note 8, at 82–83.

11. *Report of the International Law Commission on the Work of Its Thirty-fourth Session*, U.N. GAOR, Supp. No. 10, at 34, U.N. Doc. A/37/10 (1982), reprinted in 2 Y.B. INT'L L. COMM'N 86, U.N. Doc. A/CN.4/SER.A/1982/Add.1 (Part 2) (1982).

12. *See generally Prevention of Transboundary Harm*, *supra* note 7.

13. *Id.* art. 7.

identical biophysical reactions. If, for example, the receiving medium is the same, discharges of wastes or residuals, whether in Los Angeles, Liverpool, Düsseldorf, or Auckland, lead to pollution.

Common biophysical reactions take place regardless of where in the world the environment is abused. If the necessary conditions exist, sulphur dioxide and nitrogen oxide will react and result in acidic deposition in Ruhr, England, or in Raquette, New York. Polychlorinated biphenyls (PCBs) cause cancers in West Virginia in the same way they do in Newcastle upon Tyne, United Kingdom, or Colombo, Sri Lanka.

In responding to these common problems, nation-states have often created common regulatory patterns of control. As a result, EIAs of one kind or another have become ubiquitous features of domestic environmental laws across the world. Chapter 6 addresses these laws by discussing the 1969 U.S. National Environmental Policy Act<sup>14</sup> and examining how many governments worldwide, including the European Union, have adopted EIAs.

An important question that emerges in light of the widespread acceptance of EIAs centers on the absence of any widely accepted treaty requiring EIAs where activities in one nation give rise to transboundary environmental impacts. For example, only forty countries have ratified the Espoo Convention on Environmental Impact Assessment in a Transboundary Context.<sup>15</sup> This lacuna in the law may be filled to the extent that the ILC Draft Articles on Prevention are treated as codifications of existing customary law.

### III. OBITER

The modest caveats that follow do not diminish the strength of this treatise. First, in light of the authors' careful treatment of most other substantive areas of IEL, the treatise surprisingly does not address population. Increasing population growth ranks among the more important, if not the most important, critical causes of environmental pollution and resource depletion assailing the carrying capacity of the earth. Admittedly, it is an almost intractable subject, but is one that cannot be ignored.

Second, the authors do not pay sufficient attention to the concept of

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14. See generally National Environmental Policy Act of 1969, 42 U.S.C.A. §§ 4321-4361 (1969).

15. Convention of Environmental Impact Assessment in a Transboundary Context, Feb. 25, 1991, 30 I.L.M. 733 (entered into force Sept. 10, 1997), available at <http://www.unece.org/env/eia/convratif.html>.



risk assessment. We live in a resource-restricted, risk-ridden, global society and must discover ways to allocate our scarce resources to deal with the most dangerous, as distinct from the more negligible, risks. The question as to whether IEL should be based on scientifically supported technocratic risk assessment or more broadly conceived populist perceptions of risk is a controversial issue. For example, when dealing with genetically modified organisms (GMOs), the Sanitary and Phytosanitary Agreement of the World Trade Organization allows an importing country to ban GMOs only after a scientific risk assessment.<sup>16</sup> The Cartagena Protocol on Biosafety to the Convention on Biological Diversity, on the other hand, allows an importing country to ban a GMO based on the precautionary principle, notwithstanding the results of scientific risk assessment.<sup>17</sup> The ILC, as noted above, has adopted some form of risk analysis in its Draft Articles on Prevention.<sup>18</sup> The role, applicability, and development of risk analysis are very important issues confronting IEL in the twenty-first century.

Third, when contemplating the future direction of IEL, it is difficult to avoid the environmental implications of increasing energy use. The energy demands of the world are increasing rapidly. Some experts forecast that world energy demands will triple in the next forty years.<sup>19</sup> The ability to supply such energy without further assaulting the planet emerges as one of the great environmental challenges of the twenty-first century.

The almost insatiable and legitimate needs of the developing world for cheap and efficient energy, as the treatise points out, will lead to more emissions of carbon dioxide despite the Kyoto Protocol to the United Nations Framework Convention on Climate Change (Kyoto Protocol).<sup>20</sup> Even with full compliance involving enormous expenditure and possible economic downturns, implementation of the Kyoto Protocol will probably lead to temperature reductions of less than one-quarter of one percent by the year 2100.<sup>21</sup> Moreover, it is not possible to reduce the

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16. Lakshman D. Guruswamy, *Sustainable Agriculture: Do GMOs Imperil Biosafety?*, 9 IND. J. GLOBAL LEGAL STUD. 461, 461–62 (2002).

17. Cartagena Protocol on Biosafety to the Convention on Biological Diversity, Jan. 29, 2000, art. 10, 39 I.L.M. 1027.

18. Prevention of Transboundary Harm, *supra* note 7, art. 7.

19. Energy & Environmental Security Initiative, *A New Framework: Post-Kyoto Energy and Environmental Security 2* (2004), available at <http://www.colorado.edu/law/eesi/WP.doc>.

20. See generally Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 11, 1997, U.N. Doc. FCCC/CP/1997/L.7/Add.1.

21. NUTSHELL, *supra* note 8, at 218.

use of hydrocarbons without finding alternative sources of energy.<sup>22</sup> The international community must turn its attention to this pressing question.

#### IV. CONCLUSION

Despite the forgoing observations, this impressive treatise makes a significant contribution to IEL by addressing a difficult cluster of issues and concepts in a balanced and nuanced manner. This comprehensive offering constitutes a significant addition to the jurisprudence on the subject, and is a valuable desk reference for teachers, practitioners, and judges.

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22. Energy & Environmental Security Initiative, *supra* note 19, at 8.