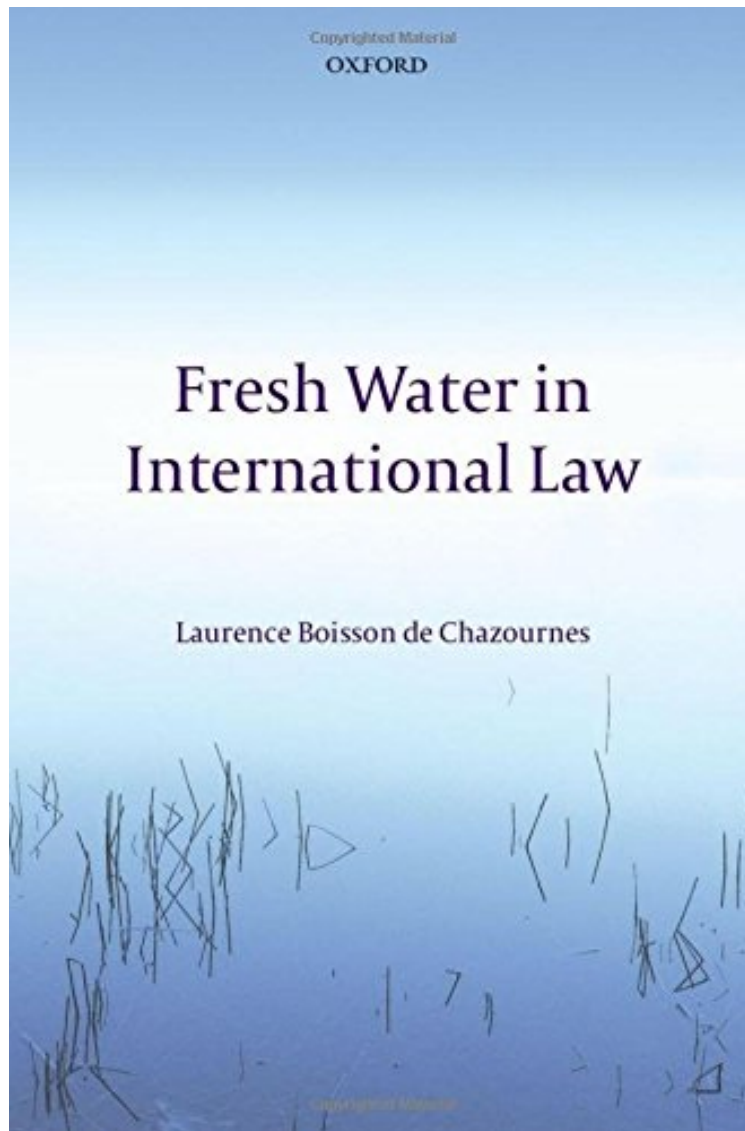


(Mobile library) Fresh Water in International Law

## Fresh Water in International Law

*Laurence Boisson de Chazournes*  
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**Laurence Boisson de Chazournes : Fresh Water in International Law** before purchasing it in order to gage whether or not it would be worth my time, and all praised Fresh Water in International Law:

0 of 0 people found the following review helpful. This is an excellent, well written book that covers its subject matter ...By Itzchak E. Kornfeld This is an excellent, well written book that covers its subject matter thoroughly. It is almost a cliché but also an uncontested fact that fresh water is the source of life. Water is also a fixed resource and resides in a closed system. That is, there has never been any more water than exists today, nor, has there been any less. Geologists

and hydrologists have been aware of this reality for decades; lawyers, however, have only recently begun to recognize this fact. They have also come to appreciate the importance of inter-state or transboundary fresh water bodies. The law of Transboundary Rivers and lakes has over the past century developed from a body that was solely devoted to navigation, allocation and boundary delimitation, to one that has incorporated two new needs: those of human beings to potable water and sanitation, and that of ecosystems. The latter corpus iuris has become particularly important in this new era of the Anthropocene; particularly, given the effects of climate change, recurrent droughts, disappearing polar ice caps, and spasmodic storms. In her recent book, *Fresh Water in International Law*, Professor Laurence Boisson de Chazournes seeks to bridge the historic uses of fresh water, with those that are impacting the world today - and will continue to affect it in the future. In this, her most recent publication on international fresh water, Boisson de Chazournes, cites an alarming fact, given water's finite quantity: while the world's population has increased three-fold over the past century, water consumption has increased six-fold, during the same period. It is this factual predicate that anchors this book. In a globalized world, the transboundary distribution and availability of fresh water - caused by wide-spread droughts and the impacts of climate change - has instigated tragic deaths, the destruction of ecosystems, and hostilities between States. Indeed, international law has struggled for decades to develop a legal framework or regime for dealing with transboundary water both surface and sub-surface. While one can certainly criticize the international legal community for the fact that it has yet to develop a series of all-encompassing norms, there is no question that domestic law also lags far behind. This book maps out these efforts and suggests ways in which internal fresh water law can be improved. Professor Boisson de Chazournes fills a yawning void in the scholarship on the development of the law of international/transboundary fresh water, its regulation and governance. Her very readable book is short. It comprises eight chapters contained in 265 pages clearly written, very readable, providing the reader with an excellent survey of the topic. Moreover, this publication offers readers wishing to learn about the subject of international freshwater, or to enhance their current knowledge, with the most up to date material on the subject. Indeed, this volume would also make an excellent textbook. The book is extremely comprehensive in scope. The author begins by acquainting the reader with freshwater and its characteristics. In the final section of the introductory chapter, we gain a glimpse of her thesis for this book: fresh water is a fundamentally important area of [legal] inquiry. Our increasing interactions on an international level, as well as our dependency on other States in respect of water issues, bring the need for effective multilateral water governance into sharp focus. (p. 5). Consequently, Boisson de Chazournes observes that in order to propose effective solutions to the challenges that water presents, it is necessary to understand that the nature of water governance and its use is multifaceted and requires an analysis that takes the various interests involved into account. (pp. 5-6). The foregoing leads the author to discuss the development of a recent norm: the human right to water, in subsequent chapters. She also examines the contributions of human rights law in affording people access to water and sanitation, as well as the right to water and health. This backdrop sets the stage for the author's discussion of the human needs for water, as well as the increasing rights of the public's participation in decisions concerning fresh water. In the same vein Boisson de Chazournes notes that today some three billion people, comprising 40 per cent of the world's inhabitants, live along 280 international river and lake basins that include two or more States. These basins cover nearly one-half of the Earth's land surface and account for an estimated 60 per cent of global freshwater flow. (p. 3). Of the total number of basins, 180 traverse two States; while the remaining 100 cross at least three. For example, the African continent has sixty international watercourses, eleven of which are shared between four or more riparian States, e.g., the Nile River courses through eleven states, while the Congo flows through nine states. In South America the River is shared by nine countries, in Asia six countries are riparians of the Mekong River and in Europe the Danube River crosses seventeen States. Freshwater, particularly, water that flows across national boundaries or transboundary water has led to the execution of treaties governing navigation, water allocation, and hydro-power, among other uses. For example, within the past decade, we have been witness to the development of two new legal normative regimes: the human right to/for water, and water in the context of humanitarian law. These norms, however, have by no means received universal acceptance. Accordingly, the growth of international law that regulates freshwater has advanced primarily through the conclusion of bilateral and other treaties governing Transboundary Rivers and lakes, and litigation. These are addressed in the book's subsequent chapters. In chapter two, Boisson de Chazournes considers the development and scope of the legal regimes and norms that regulate freshwater. Here, she provides a historical survey of the uses and the law of international watercourses. These include, boundary delimitation, navigation of watercourses, fishing rights, conflict resolution. The author also melds case law into this narrative. For example, she describes two important cases from the International Court of Justice (ICJ) delimitation jurisprudence: the 1999 Judgment in the Kasikili/Sedudu (Botswana v. Namibia) dispute and the 1986 Mali/Burkina Faso judgment. In the prior the Court utilized the thalweg method, which was employed in delimiting territory, by using a river as a reference point, while in the latter case the ICJ used the median line methodology in partitioning of the Mare de Soum and the Mare d'In Abeo. The latter use was in accord with the principles of *uti possidetis*. (pp. 10-11). Boisson de Chazournes next turns her attention to the subject of the harmonization of international water law. Here, she also addresses more recent uses of transboundary watercourses, including power generation and large-scale irrigation, both of which involve planned measures. (p. 20). This chapter similarly provides outlines of two

international conventions that provide a framework for the utilization of international watercourses: the 1997 United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses (Water Convention); and the United Nations Economic Commission for Europe's 1992 Helsinki Convention on the Protection and Use of Transboundary Water Courses and International Lakes (ECE Helsinki). Given that these two conventions have entered into force and have therefore taken on a predominant role in the international law of freshwater, they remain an important thread throughout the book. The Water Convention required thirty-five signatories before it came into effect. On May 19, 2014, Vietnam became the thirty-fifth party to join the convention and on August 17, 2014 the treaty entered into force. Professor Boisson de Chazournes next addresses other sources of fresh water and their legal regimes, if any. These include transboundary aquifers, ice formations, glaciers, and atmospheric freshwater. The author however notes that other than rivers, lakes and other surface waters, and to some extent groundwater, international law has not been concerned with sub-surface water, even if its accessibility may warrant inclusion into the corpus of fresh water law. Indeed, she notes that the international legal community has a growing interest with issues such as water scarcity and the entirety of the suite of water resources. However, international law does not yet consider these water resources to be part of the *res communis*. (pp. 36-37). Moreover, a principal issue in this field is the fact that as of this writing there is little in the development of a unifying legal regime that encompasses all sources of fresh water. Having laid down the foregoing foundation, Boisson de Chazournes builds upon these principles by examining how transboundary water courses fit within the international legal framework. Her first subject is fresh water's economic uses and law applicable to international watercourses. Here, she begins with an exploration of navigation and river or lake based-infrastructure, which includes dams, aqueducts, and docks. This discussion is followed by how water fits within the regimes of international trade and investment law; environmental law and protection of international watercourses; and how multilateral environmental agreements (MEAs) have contributed to the protection and management of freshwater. Boisson de Chazournes then explores three other essential subjects: (1) development assistance, human needs and the right to water; (2) water in times of armed conflicts; and (3) individuals' access to remedies. In this regard, the author once again points out that the law of groundwater is not very well developed. (p. 37) - for example, the Water Course Convention only covers groundwater that is connected to surface water. I note here that geologists consider all groundwater, except for fossil groundwater to be connected to a surface body of water. Nevertheless, international water law has not caught-up to that fact. Thus, the law can be a blunt instrument when it assays this juxtaposition, and in ignoring science, impedes legal inquiry, rather than assisting it. Alternatively, the Helsinki Convention has a wider scope than does the Watercourse Convention, cover[ing] all types of groundwaters (p. 39). Very few treaties or other international instruments deal specifically with groundwater, its uses and ownership. Given this vacuum, in 2008 the International Law Commission (ILC) adopted a set of Draft Articles on the Law of Transboundary Aquifers. Article 3 of these Draft Articles provides that States have sovereignty over the portion of a transboundary aquifer or aquifer system located within its territory and shall exercise its sovereignty in accordance with international law and the present draft articles. (p. 38). Boisson de Chazournes notes that the ILC's Draft Articles provide an integrated approach for managing and protecting groundwater within a basin or catchment area. Chapter three is devoted to the economization of the law of freshwater. Here, the author observes that for millennia watercourses have been utilized for commercial purposes. Some of these uses include navigation, fishing, irrigation and hydroelectricity. Others comprise of water supply, for industrial and domestic uses, and more recently for bottled water. Furthermore, international maritime law has developed over the centuries as a result of the uses that water bodies have been put to. See e.g., A Treaty Regarding Navigational and Hydraulic Works along the River Vistula and San. Chief among these uses is the freedom of navigation; which includes the freedom and security to transport people and goods, in international rivers and lakes, e.g., the Convention Regarding the 1948 Regime of Navigation on the Danube River, and the autonomy to put into port. Indeed, the doctrine of the freedom of navigation is codified in a number of conventions, see e.g., the Helsinki Rules, at Art. 14 (c), and the ILC's Berlin Rules on Water Resources, at Art. 43(5) (c). The author also focuses on the emergence of non-navigational economic facets of fresh water. Here, Boisson de Chazournes heralds a truth that international lawyers have only recently come to progressively realize: that [p]opulation growth, the increasingly critical needs of both developing and industrialized countries, as well as climate conditions, all exacerbate the vital nature of fresh water. (p. 79). These needs include water supply and sanitation in developing and developed States. They also encompass the panoply of issues related to sustainable development. See generally, Principle 4 of the 1992 Dublin Statement on Water and Sustainable Development, provides that [w]ater has an economic value in all its competing uses and should be recognized as an economic good . . . Since water has been a vehicle for commerce for hundreds of years, one might expect that trade and investment in the resource itself would be prevalent. That however is not the case. There are no reported cases that have adjudicated water trade or investment disputes by the World Trade Organization (WTO), including the GATT and GATS regimes, or the North American Free Trade Agreement (NAFTA) rules. Nevertheless, the possibility that a water-rich State may export or be required to export water to a State that is water-poor is a distinct possibility. In chapter four Boisson de Chazournes focuses on the environmentalization of fresh water. Here, the emphasis is on the growing awareness and linkages between the protection of the environment and clean water; and between species diversity and

water. She also highlights the development of norms and principles that have been incorporated into various treaties, and into multilateral environmental agreements (MEAs), whose aim is the protection of fresh water, the environment and various resources. Professor Boisson de Chazournes correctly notes that polluted fresh water leads to habitat degradation and the loss of biodiversity, and affects human health. (p. 109). The critical nature of the latter is demonstrated by the following fact: in 2002, the World Health Organization (WHO) estimated that more than 1.1 billion people worldwide lack clean drinking water and that 2.6 billion people have no sanitation. The WHO also estimated that at least 1.8 million people die annually from diarrheal diseases, including cholera, with children below the age of five, mostly in developing countries, constituting 1.6 million (or 90%) of these deaths. This figure is five times the number of children who die annually from HIV/AIDS. Of the deaths caused by diarrheal disease, 88% are fully ascribed to unsafe water and deficient sanitation. She then focuses on the uptake of oxygen by various nutrients, including nitrates and phosphates, which lead to algal blooms and anoxic conditions for fish and other organisms. The reader's attention is then directed to the issue of contamination of numerous water bodies by fertilizers, pesticides and other man-made chemicals, over the past forty years. For example, in late July and early August 2014, a massive algal bloom in Lake Erie shut down the water supply in Toledo, Ohio, and left over 400,000 people without drinking water. The author also discusses the impacts on fresh water from point source runoff, industrial emissions from developing countries, the loss of diversity in water bodies and the impacts on fresh water from deforestation. Professor Boisson de Chazournes then moves to the critical subject of the linkage between climate change and fresh water. In this section she notes that [a]mong the anticipated consequences, climate change will result in significant variability in weather patterns, changes to precipitation levels, desertification, more frequent storms and a rise in sea levels. (p. 112). One example of these recent storms is Hurricane Sandy. In October, 2012, it hit the northeast U.S., inundating downtown New York City and destroying numerous beach front communities. The impacts of storms, desertification, and climate change are felt across the globe. It is in this context that the author places the development of international environmental law. She discusses a number of instruments, beginning with the 1972 Stockholm Declaration on the Human Environment and succeeding ones, including the 1992 Rio Declaration on Environment and Development, the 1978 United Nations Environment Programme (UNEP) Draft Principles of Conduct in the Field of the Environment for the Guidance of States in the Conservation and Harmonious Utilization of Natural Resources Shared by Two or More States, and the Watercourses Convention, each of which addresses the sharing of water resources. (pp. 117-126). This section is also devoted to a detailed analysis of the Helsinki Rules, the 1997 Watercourses Convention, and the doctrines of equitable and reasonable utilization. That discussion is followed by an introduction to basin-level treaties, which have been contributing to the emergence of universal and regional customary norms. (p. 127). One cited example is the 1998 Treaty between Portugal and Spain on the Cooperation for the Protection and Sustainable Use of the Waters of the Luso-Spanish River Basins. Next, the Boisson de Chazournes undertakes an examination of the role of institutions in developing fresh water instruments. As part of this discussion she addresses the contribution that MEAs have made in the management and protection of fresh water and instruments that have regional reach. These instruments include the bi-lateral Great Lakes Water Quality Agreement (Canada/US), the Convention on Biodiversity, the Convention Concerning the Protection of the World Cultural and National Heritage, among others. Mention is also made of such instruments as the 1992 European Convention on Environmental Impact Assessment in a Transboundary Context (the Espoo Convention). Chapter five is devoted to the humanization of the law of fresh water. In its introductory section Professor Boisson de Chazournes points out that [h]uman needs have permeated the law applicable to fresh water through a variety of avenues. This development has added new contours to existing rules and principles. (p. 147). In this regard Catarina de Albuquerque, the U.N.'s Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation, has maintained that [h]aving access to safe drinking water and sanitation is central to living a life in dignity and upholding human rights. Yet billions of people still do not enjoy these fundamental rights. The chapter also explores the rise of the human right to safe drinking water and sanitation, and the impact of politics and law on that right. Here the author's discussion incorporates the U.N. General Assembly's 2010 resolution recognizing the human right to clean drinking water and sanitation, and the United Nations Committee on Economic, Social and Cultural Rights adopted General Comment No. 15 on the right to water. Paragraph one of the Comment provides that "[t]he human right to water is indispensable for leading a life in human dignity. Likewise, [a]n adequate amount of safe water is necessary to prevent death from dehydration, to reduce the risk of water-related disease and to provide for consumption, cooking, personal and domestic hygienic requirements. One area that has received very little scrutiny is access to water during armed conflicts. Boisson de Chazournes takes on the topic; citing for example the 1977 Additional Protocols to the Geneva Conventions. These protocols provide unambiguous rules for protecting water and sanitation during military hostilities. In concluding this chapter Boisson de Chazournes raises the issue of access to remedies for harms afforded to individuals. Fresh water governance by institutions is the ambit of chapter six. These organizations include the International Danube Commission, the International Joint Commission (Canada/U.S.), and the Mekong River Commission for Sustainable Development, among others. Boisson de Chazournes notes that over time the functions of these bodies has expanded in scope: changing from primarily navigation and fishing to the construction and management of dams and hydroelectric plants, large scale irrigation and more recently environmental

protection. These basin commissions and similar institutions, whether bi-lateral or multi-lateral, foster cooperation between the riparian States that make-up these bodies. Indeed, although many of these institutions have their own idiosyncrasies in how they function, Boisson de Chazournes sees the emergence of a trend towards harmonization. Here, she posits that framework agreements, such as the 1992 Helsinki and 1997 Watercourse Conventions, foster the creation of new basin organizations and commissions. This is particularly true in situations where sustainable development and integrated water management are emerging as key principles that demand State cooperation, which are required in order to develop achievable goals and programs. In concluding this chapter, the author observes that the technical counsel and financial support are key attributes of the governance of international waters. Boisson de Chazournes devotes chapter seven to dispute settlement involving fresh water. This is where hard law is made; norms are developed and where we see the impact of international courts and tribunals on the utilization of fresh water. She notes that [w]ater protection and management issues are playing a growing role in the context of dispute settlement mechanisms and procedures at both the inter-State and non-State actors. (p. 247). Citing the fact that almost all international courts and tribunals have adjudicated disputes involving fresh water, the author provides a comprehensive discussion of the various disputes. The author also reflects upon the efficacy of other mechanisms including claims commissions and negotiated settlements. Indeed, the multiplicity of dispute settlement mechanisms in water related disputes, inter-State dispute settlement mechanics, and third party intervention and negotiation form a good portion of this discussion. Similarly, in an effort to provide complete coverage, the author discusses recent trends in dispute settlement procedures. Part of this effort includes the Permanent Court of Arbitrations 2001 Optional Rules for Arbitration of Disputes relating to Natural Resources and/or the Environment. Finally, a section of this chapter is devoted to disputes involving human rights and water. This discussion incorporates the impact of United Nations treaty bodies and regional human rights institutions, including the case law of various human rights courts, e.g., the European Court of Human Rights, the Inter-American Commission on Human Rights, and the African Commission on Human and Peoples Rights. The author concludes that these human right bodies practice demonstrates the growing importance of human rights-based approaches in regulation of water-related problems. (p. 233). In the final chapter, Boisson de Chazournes looks ahead at trends and prospects. One trend is the rise of the concept of integrated water resources management (IWRM), which includes the planning and management of water resources, both conventional and non-conventional, and land. IWRM takes into account social, economic and environmental factors and integrates surface water, groundwater and ecosystems through which they flow. (p. 250). Moreover, the burgeoning volume of case law, generated by the rise in the number of international courts and tribunals and the expansion of their legal powers, is expanding the reach of water and environmental law. Furthermore, although regulation via treaties has been a prominent feature in the international water law landscape, gaping holes remain. These include a paucity of agreements over interstate groundwater, a number of watercourses, and basin-wide treaties. Negotiations over these waters are required. Nevertheless, although these types of negotiations have moved at a snails pace, the author posits that framework conventions, such as the 1992 Helsinki Convention, the 1997 Watercourses Convention, and the 2008 Draft Articles on the Law of Transboundary Aquifers, have been agreed upon is evidence that protection of fresh water is moving ahead. More importantly the author points out that these instruments are grounded in state practice and accordingly are attempts by the international community to move the regulatory process forward. Indeed, regulation needs to be understood in a broader perspective. It is a carrier of rules and norms often characterized by the concept of internormativity. (p. 252). In the end, international law has been a force for good, and stimulated the integration between the elements and norms that the author addresses in her book. Climate change, droughts, water shortages, and disputes over access to fresh water, will compel States and the international community to address these problems and to develop new norms and add to their legitimization. This book is an excellent step in helping international lawyer and international relations professionals chart the way forward, in the context of fresh water, and should be on the bookshelf of every water, environmental and international law scholar.

This book addresses the diverse ways in which international law governs the uses, management, and protection of fresh water. The international law of fresh water is most comprehensively understood in the light of the different bodies of norms applicable to these varied uses and functions. The regulation of fresh water has primarily developed through the conclusion of treaties concerning international watercourses. Yet a number of other legal regimes also apply to the governance of fresh water. In particular, there has been an increasing recognition of the importance of fresh water to environmental protection. The development of international human rights law and international humanitarian law has also proven crucial for ensuring the sound and equitable management of this resource. In addition, the economic uses of fresh water feature prominently in the law applicable to watercourses, while water itself has become an important element of the trade and investment regimes. These bodies of rules and principles not only surface in an array of dispute settlement mechanisms, but also stimulate wider trends of institutionalization. The book investigates the origin and scope of these bodies of norms as they apply to fresh water, and demonstrates how they connect and adapt to one another, forming an integrated body of international principles. This approach is accompanied by a detailed analysis of the practice of states and of international organizations, taking into account the

activities of the many non-state actors involved in the treatment of fresh water.

"Boisson de Chazournes provides a highly readable account of the multiple roles that international law plays today in managing the stresses relating to freshwater. *Fresh Water in International Law* serves as a good introduction to the current issues in international water law, suitable for the specialist or nonspecialist alike." -Joseph W. Dellapenna, *The American Journal of International Law* About the Author Laurence Boisson de Chazournes, Professor of International Law, University of Geneva Laurence Boisson de Chazournes is Professor of International Law at the University of Geneva. She is an adviser to various international organizations and governments, and has held international assignments as counsel, expert, and arbitrator before the International Court of Justice (ICJ) and other judicial fora.