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Michael Bowman, Peter Davies and Catherine Redgwell
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PART I

Foundations of international wildlife law

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Chapter 1

The historical evolution of international wildlife law

1. Introduction

It is difficult to obtain a clear understanding of any legal topic without some sense of the chronology of key developments and the wider historical context out of which they emerged. Areas of legal regulation tend to evolve not in a meticulously planned, orderly fashion, but as an unstructured series of responses to perceived problems, and against the backdrop of the social and political realities of the day. Early attempts to regulate whaling and sealing, for example, must be viewed in light of the considerable economic importance such industries once held, which may be difficult to credit from a purely contemporary perspective. More generally, the political emphasis placed on conservation policy and legal regulation has fluctuated significantly over time, reflecting the prevailing preoccupations of the international community during successive eras. This chapter presents a broad overview of the evolution of international wildlife law against the background of such considerations.

2. Early developments

The enactment of national legislation to protect wildlife and the environment generally can be traced back to antiquity, with forestry conservation laws adopted in Babylon in 1900 BC and a law for the establishment of nature reserves promulgated in Egypt in 1370 BC. The use of international legal instruments for this purpose is a much more recent phenomenon, however, dating essentially from the final quarter of the nineteenth century. By this time, the process of colonial expansion had stimulated a great deal of scientific interest, shared to some extent by the general public, in the world's wildlife. The voyages of Charles Darwin, as recorded in his subsequent writings, had proved particularly influential in that regard, and national societies concerned with ornithology and wildlife

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generally began to proliferate in western Europe and the United States. At the same time, the development of heavy industry and the expansion of human settlements began to pose threats to nature on a significant scale.

The inescapable interdependence of national communities with regard to natural resources had become apparent from much earlier times through their shared reliance upon the vast international watercourses, in particular the Rhine and the Danube, that flowed through the territories of many major European powers. Initially, the question of navigation was paramount, but inevitably the issue of water resources also emerged as an important concern.[1] In due course, more overtly environmental issues came to the fore: in 1868, regulations were first adopted concerning the transport of inflammable, corrosive and poisonous substances along the Rhine;[2] and in 1885, a convention was concluded for the regulation of fishing in that river.[3] During that same period, the near destruction of European viticulture by the accidental introduction of the aphid-like insect *Phylloxera vastatrix* prompted the adoption of a succession of treaties to control the spread of plant pests and diseases.[4]

Around the turn of the century, however, there occurred a series of legal developments of much more fundamental significance for present purposes. In 1892, following unsuccessful attempts to regulate exploitation of the North Pacific fur seal fishery by means of bilateral arrangements,[5] the United States and Great Britain (on behalf of Canada) agreed to submit their differences to arbitration.[6] To this day the *Bering Sea Fur Seals* arbitration remains one of the very few instances of judicial or arbitral determination of an international conservation dispute.[7] It was not wholly successful in resolving matters, however, and further treaties regarding the fur seal fishery were concluded in 1911 and subsequently.[8]

[1] See generally S. C. McCaffrey, *The Law of International Watercourses* (Oxford University Press, 2001).
[2] 9 *IPE* 4689. [3] 25 *IPE* 200, following earlier, bilateral, arrangements.
[4] 1881 International Convention Respecting Measures to be Taken against *Phylloxera vastatrix*, 73 *BFSP* 323, and 1889 Additional Convention, 81 *BFSP* 1311.
[5] 1891 Agreement for a Modus Vivendi in Relation to Fur Seal Fisheries in the Bering Sea, 8 *IPE* 3655.
[6] 1892 Treaty Submitting to Arbitration the Questions Relating to the Fur Seal Fisheries in the Bering Sea, 176 *CTS* 447.
[7] (1898) 1 *Moore's International Arbitral Awards* 755.
[8] 1911 Convention for the Preservation and Protection of Fur Seals, 8 *IPE* 3682; 1957 Interim Convention on Conservation of North Pacific Fur Seals, 314 *UNTS* 105, and later amendments.

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Meanwhile, in 1900, the major powers then controlling the continent of Africa adopted the first regional conservation treaty of general scope, the Convention for the Preservation of Wild Animals, Birds and Fish in Africa,[9] which sought to regulate the exploitation of wildlife and encouraged the creation of nature reserves. The convention never formally entered into force, though some parties took steps to implement its provisions within their own jurisdictions.[10] Two years later, following decades of lobbying by the agricultural community, European governments concluded a treaty for the protection of birds which were valued by farmers as predators upon insects and other pest species that diminished crop yields.[11]

Although significant historical milestones in the evolution of international wildlife law, neither of these conventions achieved a great deal in practice, nor could they be judged particularly enlightened by modern standards. First, each resulted, at least in part, from political pressure to protect some particular, narrowly conceived human interest – in the latter case, agricultural productivity; in the former, the preservation of a sufficient supply of wildlife to satisfy the hunting community. This nakedly utilitarian perspective was apparent from the very title of the birds treaty and made explicit in the preamble to the African Convention, which spoke of the conservation of species which were 'useful to man or inoffensive'. This point alone might not be judged too serious a deficiency, since modern concepts of sustainable utilisation are also primarily anthropocentric in character, but the extreme narrowness of their focus was evident in the recognition in both treaties of a category of 'noxious' species (*nuisibles* in the French text), which were not merely excluded from the scope of protection but positively targeted for persecution. Ironically, these species included many which are nowadays recognised to require the very strictest protection, such as eagles and hawks in the birds convention and various crocodiles, snakes and birds of prey under the African treaty. Equally, the agreements in question were deficient in a structural sense, in that they incorporated no institutional mechanisms to ensure their effective implementation. This is scarcely surprising given the generally primitive nature of international treaty arrangements of the day, but time has shown the incorporation of such mechanisms to be vital if international conservation agreements are to prosper in the longer term.

[9] 94 *BFSP* 75. [10] See ibid., introductory note.
[11] 1902 Convention for the Protection of Birds Useful to Agriculture, 102 *BFSP* 969.

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Aside from the absence of institutional machinery within early treaty regimes, this era was also characterised by a dearth of international organisations to service the broader needs of the international community. Following the rapid proliferation of nature conservation societies at the national level, however, and the inevitable trend towards greater international collaboration amongst these groups, a proposal was made at the Eighth International Congress of Zoology for the creation by states of a permanent international organisation in this field.[12] The Swiss conservationist Paul Sarasin was a prominent advocate of this idea, which led to the elaboration in 1913 of an Act of Foundation of a Consultative Commission for the International Protection of Nature,[13] to assume responsibility for collecting and disseminating information on conservation matters. Unfortunately, the outbreak of hostilities in 1914 meant that the commission never commenced its functions, and other ambitious plans for international conservation activities were likewise abandoned.

3. The interwar period

The period between the Great War and the Second World War saw environmental protection slip back down the international agenda,[14] as diplomatic efforts became concentrated upon the restoration and preservation of peaceful relations, alongside urgent labour, maritime and commercial concerns and the continuing problem of trafficking in women and children.[15] The League of Nations devoted some attention to the problem of marine pollution, but declined to make a priority of nature conservation generally. Attempts to activate the pre-war Consultative Commission proved unsuccessful.

It was, in fact, largely at the non-governmental level that the most promising developments were occurring. In 1922, at the prompting of an American ornithologist, T. Gilbert Pearson, the International Committee for Bird Protection (ICBP) was founded to serve as a co-ordinating

[12] See R. Boardman, *International Organisation and the Conservation of Nature* (Macmillan, 1981), pp. 26–30.

[13] 219 *CTS* 32. The Act took the form of a conference resolution; signatories were Argentina, Austria/Hungary, Belgium, Denmark, France, Germany, Great Britain, Italy, the Netherlands, Norway, Portugal, Russia, Spain, Sweden, Switzerland and the US.

[14] On this period generally, see Boardman, *supra* n. 12, pp. 30–5.

[15] For the major multilateral treaties of the period, see M. J. Bowman and D. J. Harris, *Multilateral Treaties: Index and Current Status* (Butterworths, 1984).

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agency for national associations concerned with avian conservation.[16] During the 1920s, the ICBP was instrumental in setting the agenda for the protection of birds internationally and more recently it has re-emerged as a potent force, not least through its involvement in the elaboration and implementation of contemporary conservation treaties.[17] Nevertheless, there remained a need to expand transnational collaboration on a wider front. Following the creation in 1925 of the Netherlands Commission for International Nature Protection, its founder, P. G. van Tienhoven, spearheaded a movement for the creation of an international counterpart through the forum of the International Union of Biological Sciences. This new organisation, which obtained financial support from the Dutch government, was formally constituted in 1934 as the International Office for the Protection of Nature (IOPN). Among the many tasks it identified to foster progress in nature conservation internationally were the collection and dissemination of both scientific studies and legislative texts. Meanwhile, in the United States, the American Committee for International Wild Life Protection (ACIWLP) was established in 1930 as an umbrella group for existing national conservation organisations. The ACIWLP not only provided additional funding for the IOPN, but also helped to maintain international momentum behind the conservation issue when Europe again became distracted by the scourge of war.

The activities of these new non-governmental agencies also served as catalysts for some of the relatively few significant inter-governmental developments which occurred during this period. For example, the colonial powers revisited the question of wildlife conservation in Africa by concluding the 1933 International Convention for the Protection of Flora and Fauna,[18] which was intended to replace the 1900 convention. It was primarily concerned with the creation of protected areas, but also provided for the protection of species listed in an Annex. The concept of 'noxious' species disappeared. Shortly afterwards, the Pan American Union adopted the 1940 Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere.[19] The main emphasis

[16] The ICBP was subsequently renamed the International *Council* for Bird *Preservation* and recently reconstituted as BirdLife International.

[17] As to which, see Chapter 7 below.

[18] 172 *LNTS* 241. Of the colonial powers, Belgium, France (without formally ratifying), Italy, Portugal and the UK became parties, as did Egypt, South Africa, Sudan and (much later) Tanzania amongst African states. Interestingly, the convention was also extended to India (see Articles 1 and 13).

[19] 161 *UNTS* 229. See further Chapter 8 below.

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of this agreement was similarly upon the establishment of protected areas, within which human activities were to be subject to graduated levels of restriction. It also contained provisions for the protection of wildlife generally, especially migratory birds (already the subject of bilateral arrangements between the United States and its immediate neighbours)[20] and species requiring urgent protection. A prominent feature of agreements covering the western hemisphere has been their strong emphasis upon aesthetic considerations as a justification for conservation, always a significant strand in the fabric of North American environmental ethics.[21] Within that region, the United States and Canada once again found themselves resorting to arbitration during this period, this time over the problem of transboundary air pollution.[22]

Other noteworthy developments of the era included the adoption of the 1920 Convention regarding the Organisation of the Campaign against Locusts,[23] and the introduction of the first, faltering efforts to regulate the exploitation of whales. The 1931 Convention for the Regulation of Whaling was followed by further agreements later in the decade,[24] but these treaties suffered from major deficiencies and were soon superseded.

4. The immediate postwar period

Once again, nature conservation was not high on the international agenda in the years immediately following the formal cessation of hostilities in 1945, and relatively few major environmental initiatives occurred during this period. Nevertheless, this was a time of fundamental organisational change for the international community generally, and a number of major institutional innovations proved significant to the cause of environmental protection in the longer term.

The key development was the establishment of the United Nations as the major global political institution, soon followed by the creation of the various specialised agencies, designed to undertake responsibility for the more detailed, technical problems facing postwar international

[20] See further Chapter 7 below. [21] For further discussion, see Chapter 3 below.
[22] *Trail Smelter* Arbitration (1939) 33 *AJIL* 182; (1941) 35 *AJIL* 684.
[23] 4 *IPE* 1642. This topic has also been addressed in many later treaties.
[24] 1931 Convention for the Regulation of Whaling, 155 *LNTS* 349; the 1937 International Agreement for the Regulation of Whaling, 190 *LNTS* 79, and its subsequent protocols.

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society. Although there was no environmental agency as such, several of these new bodies found themselves increasingly preoccupied with environmental questions as time progressed, in particular the Food and Agriculture Organisation (FAO – crop diversity, fisheries conservation), the United Nations Educational, Scientific and Cultural Organisation (UNESCO – habitat conservation), the World Meteorological Organisation (WMO – climate change) and the International Maritime Organisation (IMO – marine pollution).[25] The necessity for some kind of supra-national institution devoted specifically to conservation issues was still keenly felt in some quarters, however, and led to the creation under UNESCO's auspices of the International Union for the Protection of Nature (IUPN), incorporating the earlier IOPN. It was later renamed the IUCN – the International Union for the *Conservation* of Nature *and Natural Resources* – and continues to play a vital role in this field, not least through publication of its *Red List of Threatened Species*, a comprehensive guide to the current conservation status of plants and animals. IUCN is an unusual institution in that, although technically classed as a non-governmental organisation, it numbers governments and government agencies amongst its membership alongside scientific, professional and conservation bodies. In that sense it represents a microcosm of international activity in the environmental field as a whole, where the role of NGOs is particularly prominent and there are now relatively well-established lines of communication and co-operation between the governmental and non-governmental sectors.

The following year, the UN itself demonstrated its concern for conservation issues by convening the first global conference on this question – the 1949 Conference on the Conservation and Utilisation of Resources (UNCCUR).[26] Essentially a 'talking shop' with no mandate to adopt resolutions for substantive action, UNCCUR was nonetheless an indicator of growing recognition of the importance of nature conservation, as well as of its crucial relationship with economic development, which has become such a pervasive theme of international policy in subsequent years. Another significant milestone was the adoption a decade later of the 1959 Antarctic Treaty by the major powers and

[25] On the specialised agencies generally, see P. Sands and P. Klein, *Bowett's Law of International Institutions* (Sweet and Maxwell, 6th ed., 2009) and, for surveys of their current activities in the environmental field, the *Yearbook of International Environmental Law*.

[26] The process was initiated by the Economic and Social Council, one of the six original 'principal organs' of the UN.

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claimants to the southern continent.[27] Although overtly more concerned with scientific co-operation than with environmental protection as such, this agreement laid the foundations for what has come to be known as the Antarctic Treaty System, a network of measures which have become increasingly centred around conservation over the years.[28]

The immediate postwar era was, moreover, not entirely devoid of legal instruments dedicated specifically to conservation objectives. The whaling question was revisited via the 1946 International Convention for the Regulation of Whaling,[29] which, despite its many deficiencies, remains to this day the primary vehicle for the conservation of the larger cetacean species.[30] This was immediately followed by the establishment, usually under the auspices of the FAO, of a number of regional fisheries arrangements.[31] 1950 saw the adoption by various European nations of the International Convention for the Protection of Birds,[32] which was designed to replace the 1902 convention but was again hamstrung from the outset by the failure to incorporate institutional mechanisms for its implementation. The following years witnessed the conclusion of various plant protection agreements,[33] and the first treaty to tackle the pollution of marine ecosystems, specifically that caused by routine discharges of oil in the course of shipping operations.[34] An important manifestation of the early work of the UN's own law reform agency, the International Law Commission,[35] emerged in 1958 in the four Geneva Conventions on the Law of the Sea,[36] though

[27] 402 *UNTS* 71. [28] See further Chapter 11 below. [29] 161 *UNTS* 72.

[30] For further discussion, see Chapter 6 below.

[31] See, e.g., the 1948 Agreement for the Establishment of the Indo-Pacific Fisheries Commission, 120 *UNTS* 59; and the 1949 Agreement for the Establishment of a General Fisheries Council for the Mediterranean, 126 *UNTS* 237.

[32] 638 *UNTS* 186.

[33] See, e.g., the 1951 International Convention for the Protection of Plants and Plant Products, 220 *UNTS* 121 (superseding the old *Phylloxera vastatrix* conventions, *supra* n. 4); and the 1951 Convention for the Establishment of the European and Mediterranean Plant Protection Organisation, *UKTS* no. 44 (1956), Cmd. 9878.

[34] 1954 International Convention for the Prevention of Pollution of the Sea by Oil, 327 *UNTS* 3.

[35] The Commission was established by the UN General Assembly in 1948, acting under Article 13, UN Charter. See further the *Yearbook of the International Law Commission*; I. Sinclair, *The International Law Commission* (Cambridge University Press, 1987); M. Anderson and A. E. Boyle (eds.), *International Law Commission and the Future of International Law* (BIICL, 1998).

[36] 1958 Conventions on (i) the Territorial Sea and Contiguous Zone, 516 *UNTS* 205; (ii) the High Seas, 450 *UNTS* 82; (iii) Fishing and Conservation of the Living Resources of the High Seas, 559 *UNTS* 285; (iv) the Continental Shelf, 499 *UNTS* 311.

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(despite the inclusion of one concerned with fisheries conservation) these are noteworthy more for the absence than for the presence of detailed environmental provision. Growing preoccupation with the potential hazards, as well as benefits, of nuclear power led to the creation in 1956 of the International Atomic Energy Agency (IAEA),[37] followed by various treaties concerned with legal liability and security control in the nuclear field.[38] Two disputes concerning interference with the natural flow of international watercourses were submitted to arbitration.[39] The real heyday of international wildlife law was, however, still to come.

5. The age of environmental awareness

Any attempt to allocate a precise date to the final consolidation of environmental protection, and wildlife conservation in particular, as serious and enduring issues on the global political agenda would plainly be arbitrary. There can, however, be little doubt that it occurred at some point during the 1960s, when a discernible change in the climate of public opinion began to have its effect upon those who wielded political power. Some commentators attribute particular significance to the impact of literary works such as Rachel Carson's *Silent Spring*, published in 1962,[40] though the first stirrings of popular consciousness had already become evident the previous year with the creation of the World Wildlife Fund (WWF),[41] a campaigning and fund-raising organisation closely linked to IUCN. Subsequently, particular incidents captured the headlines and generated major political repercussions, as when, in 1967, the Liberian oil tanker *Torrey Canyon* ran aground off the south-western tip of the United Kingdom, vividly bringing home the threat posed by shipping

[37] See the 1956 Statute of the International Atomic Energy Agency, 276 *UNTS* 3.

[38] See, e.g., the 1957 Convention on the Establishment of a Security Control in the Field of Nuclear Energy, 5 *European Yearbook* 282; 1960 Convention on Third Party Liability in the Field of Nuclear Energy, 8 *European Yearbook* 203, and 1963 Supplementary Convention, 523 *UNTS* 93; 1962 Convention on the Liability of Operators of Nuclear Ships, 1 *IPE* 405; 1963 Vienna Convention on Civil Liability for Nuclear Damage and Optional Protocol, 1963 *UNJYB* 148.

[39] *Lac Lanoux* Arbitration (1957) 24 *ILR* 101 (Spain/France); *Gut Dam* Arbitration (1968) 8 *ILM* 118 (US/Canada).

[40] R. F. Nash, *The Rights of Nature* (University of Wisconsin Press, 1989), p. 78; W. Fox, *Towards a Transpersonal Ecology* (SUNY Press, 1995), pp. 4–5.

[41] The WWF was subsequently renamed the World Wide Fund for Nature, while retaining its original initials.

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