

Sigrid Boysen. ***Die postkoloniale Konstellation: Natürliche Ressourcen und das Völkerrecht der Moderne***. Tübingen: Mohr Siebeck, 2021. Pp. 382. €99,00. ISBN: 978-3-16-157564-8.

‘The times are urgent; let’s slow down.’ This is how Bayo Akomolafe recently summed up his keynote address at a summit of civil society organizations.¹ He implored his audience to think deeper, to drive at more radical proposals for seeing and making the world differently in view of interlocking crises. The argument is well received among those who view international law as part of the problem and who resist reform proposals that, against their liking, buy into too many questionable assumptions and mistaken narratives about the law – about where the law comes from, what it has done and what it can still do. The climate crisis, in particular, has not only raised demands to develop international law but also posed uncomfortable questions about law’s role. Sigrid Boysen’s *The Postcolonial Constellation: Natural Resources and Modern International Law* intervenes to slow us down. She argues convincingly that international lawyers have enlisted the law in quests to curb global warming, but they have done so without having analysed law’s roots.

Boysen now makes up for this lack. She focuses on international environmental law as a gateway for her analysis of international law generally. The law took its present shape – Boysen puts forth as her main thesis – because it helped powerful actors to stabilize economic relations when formal colonial rule dissolved. Environmental law, she argues, has taken over patterns of resource exploitation that existed during colonial rule and, to the present day, continues to subject environmental problems to the logic of the market in a way that locks countries in the global North and South in a tilted relationship.

International law’s origins have been placed within the context of colonialism before, as Boysen knows.² The field of international environmental law has not escaped scrutiny in this regard either, as she also knows.³ But that body of law is often claimed to be of a more recent vintage and to be wired differently. It is one of Boysen’s strongest contributions to not only correct still-prevailing beliefs about international environmental law’s origins but also showcase the problematic theoretical and practical consequences that have so far flown from those beliefs, such as the mistaken (in her view) attribution of interests according to which the North cares about the environment and the South about development (as if Northern development did not happen at the expense of the environment) (at 95).

Moreover, Boysen’s book questions international law’s liberal distinction between politics and economy. For her, this distinction is part of the condition for material inequality to persist under conditions of formal equality and for resource exploitation to continue unabated. Her critique, however, does not lead Boysen to dismiss

¹ See Bayo Akomolafe, available at www.bayoakomolafe.net/post/the-times-are-urgent-lets-slow-down.

² See, in particular, A. Anghie, *Imperialism, Sovereignty, and the Making of International Law* (2005); Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (2011).

³ See, in particular, Mickelson, ‘Beyond a Politics of the Possible: South-North Relations and Climate Justice’, 10 *Melbourne Journal of International Law* (2009) 411; S. Alam et al. (eds), *International Environmental Law and the Global South* (2015).

international law *tout court* but, rather, to stress ambivalences. My main point of critique, in turn, is that those ambivalences tend to get lost in her historical argument and in the structural analysis of present practices – where are the contradictions, resistance, openings? How does the claim of ambivalence hold when international environmental law, as Boysen claims, is devoured with heart and soul by economic imperatives?

Boysen leads into her argument with an acute rereading of the iconic *Trail Smelter* arbitration as a tragedy rather than a foundational moment for environmental protection.⁴ For her, the case stands for the submission of the environment to the economy. Its invocation as a foundational moment is part of the mistaken beliefs held about the law – its self-understanding and dark sides (at 15). Boysen draws out this point in her book's first part on 'Transnational Environmental Law and the Global South—On a Different Genealogy'. She is in good company when she sees colonies as the space for dominant powers to satisfy their thirst for resources (at 30) and international law as the product of the need for justifying imperial expansion (at 32). That imperial impetus was mostly of an economic nature but not only. Boysen also notes how it came with a particular conception of humankind's relationship with nature, which was romanticized and subjected to utilitarian considerations of economic use value. Considerations of sustainability – in the sense of non-destruction to secure lasting use – were pronounced clearly in the 18th and 19th centuries (at 51–52).

Most international environmental layers, however, would point to the 1972 Stockholm Conference and the law's foundation in interests of the international community. It is not true, Boysen insists, that environmental concerns did not exist before. Resource exploitation and environmental degradation were rampant in the 18th and 19th centuries not for the lack of concern – not even for the lack of law– but, rather, in spite of it. Stronger still, international environmental law has played an enabling function – for instance, by limiting liability for damages, stabilizing titles of ownership and accommodating export licenses. Unless this longer and more problematic track record is recognized, arguments in the present miss important lessons. The longer historical view is also important because it recalls the conditions for processes of industrialization in the global North and continuous patterns of consumption-driven resource use. Genealogy, Boysen avers, is not *per se* pathogenesis. But critiques of beliefs about historical origins help expose blind spots and support arguments in the present. For example, Boysen shows how current debates gloss over different historical responsibilities and persistent inequalities in the present. Her extensive critique of the concept of the Anthropocene follows suit.

In closing the book's first part, Boysen picks up ambivalences in the law of resource exploitation and environmental protection. She summarizes, first, that the law institutionalizes, stabilizes and legitimizes a world order that is based on developed

⁴ *Trail Smelter Case (United States v. Canada)*, Awards of 16 April 1983 and 11 March 1941, 3 UNRIIA 1905.

countries' dominance. Second, in her take, the law postulates sovereign equality as an emancipatory promise and, third, serves as a medium for expressing demands of distributive justice. For Boysen, the law is ultimately without alternative for projects of emancipation that want to be politically effective (at 110).

That is a significant normative commitment that risks sliding into acritical affirmation. Immediately, however, the book's second part – 'Politics and "Economy": On the International Legal Form of a Liberal Distinction and Its Consequences' – moves Boysen's argument away from that risk and tunes in to the mostly unsuccessful attempts of turning formal (political) equality into claims of material (economic) improvement. Her focus rests on the perhaps most promising emancipatory moves of the global South as they took shape in claims about the Permanent Sovereignty over Natural Resources (PSNR) and the New International Economic Order. The countries that rallied behind these claims were never quite able to withdraw from the trenchant operation of economic forces, however. Even the United Nations (UN) General Assembly's PSNR Resolution, Boysen points out, provided that '[f]oreign investments freely entered into by, or between, sovereign states shall be observed in good faith' (at 138).⁵ It is a different question to ask what the South would have done with unencumbered sovereignty, and Boysen is far from implying that the South would have championed environmental protection.

Boysen briefly recounts the conceptual history of the principle of common but differentiated responsibilities and respective capabilities, which was once meant to recognize different historical responsibilities but, under US pressure, has turned to focus on countries' current capabilities instead (at 128).⁶ The notion of the common heritage of humankind also once showed a redistributive potential that was then undone – in the context of the UN Convention on the Law of the Sea, this notably happened with the Implementation Agreement on Part XI, which was adopted by the UN General Assembly in 1994 (at 178).⁷

If the book's second part shows the limited possibilities of translating political equality into material betterment, the third part completes the circle with its strong, if not daring, claim expressed clearly in the heading: 'The Environmental Law of the Global Economy'. The law's subordination to the demands of the economy is such, in Boysen's view, that it is plainly false to speak of regime conflicts between the fields of environmental and economic law. Their normative orientation, she claims, is homologous (at 201). She has good arguments on her side as she goes through a series of environmental law instruments and legal developments in trade as well as business and human rights law. She draws out the questionable core idea of commodification that underlies the Reducing Emissions from Deforestation and Forest Degradation Programme and posits that the main point of civil liability conventions has been the reduction of private actors' liability (at 233).

⁵ GA Res. 1803 (XVII), 14 December 1962, lit. 8.

⁶ See also J. Dehm, *Reconsidering REDD+: Authority, Power and Law in the Green Economy* (2021).

⁷ Convention on the Law of the Sea 1982, 1833 UNTS 3; Agreement on the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 1994, 1836 UNTS 3; see also Oude Elferink, 'What If the United Nations Convention on the Law of the Sea Had Entered into Force Unamended: Business as Usual or Dystopia?', in I. Venzke and K. Jon Heller (eds), *Contingency in International Law: On the Possibility of Different Legal Histories* (2021) 215.

Boysen shows specific actors' impact on the development of the law and how they have enacted a market rationality within it. Transnational companies, unsurprisingly, were central to such initiatives. Boysen's analysis is more fine-grained and shows how the competition between different branches of industry has shaped the law (at 273). Contravening high hopes for the activities of non-governmental organizations, she shows how private power and money have seeped into their action. She points to the International Union for Conservation of Nature's (IUCN) compromising partnership with Shell as an example (at 283).

What follows from this analysis for the theory of international law and for the law's legitimacy at present? In her concluding chapter, Boysen discusses theories of constitutionalism, which are particularly prominent in Germany. She marks those theories as 'the genuine international legal ideology of an economically potent middle power' (at 309). As an economy that depends on foreign resources as much as on the export of industrial goods, Germany relies on the development of international environmental and economic law. In the international legal ideology of constitutionalism, Boysen concludes, neo-liberal imperatives have moved from the fields of environmental and economic law to the centre of international law and into its core conception of what it means to be sovereign (at 311). Boysen proposes a different understanding of constitutionalism that leans on theories of contestation developed by Antje Wiener.⁸ Such theories fit well with her view of international law as the medium for articulating distributive demands. But her warning that practices of contestation may denigrate into 'meaningless busy-work that stabilizes the system' (at 315) continues to reverberate as an open question beyond the book's closing. Like other works of perceptive critique, her work ends a little abruptly on the note that practices of contestation must be kept open in order to move beyond the diagnosed pathologies (at 324).

Keeping contestation open, as Boysen also notes, could use ambivalences that are inscribed into the law. While she exposes the dominance of economic imperatives, Boysen also suggests that there are traces of competing concerns in the law. Boysen's critique does not lead her to think that the law, in its present form and shape, is tragically doomed. Commitments to formal equality and universality in international law have allowed claims about inequality to be articulated (at 113). Together with authors from the global South, she does not see an alternative to emancipation through international law even though it entrenches relationships of domination (at 110). But how?

One way to open up practices in the present would be to further explore and trace law's ambivalences. The operation of market rationality in Boysen's work is such, however, that there is little ambivalence left. There are notably no conflicts, in her view, between environmental and economic law. One is reminded of the similar recent wrangling about the relationship of human rights with neo-liberalism.⁹ Those commentators who suggest that environmental law (or human rights) could resist market rationality then risk being reproached for not having fully appreciated economic

⁸ A. Wiener, *Contestation and Constitution of Norms in Global International Relations* (2018).

⁹ Marks, 'Human Rights and Root Causes', 74 *Modern Law Review* (2011) 57; S. Moyn, *Not Enough: Human Rights in an Unequal World* (2018); J. Whyte, *The Morals of the Market: Human Rights and the Rise of Neoliberalism* (2019).

forces' trenchant operation. Boysen seems to be conflicted on this point, both claiming that the law is devoured by economic imperatives and that there is an ambivalence in the law that can still be exploited. In one instance, international environmental law is less about community interest than it is about stabilizing trade relations (at 30); in another, its submission to economic demands is total (at 201). Drawing a parallel to the debates in human rights law, one might further ask whether environmental law has failed 'us' or whether 'we' have failed environmental law. And have 'we', really? The powerful IUCN's partnership with Shell stands for one story, but hard-fought independence and weathered resistance of other activists – one could think of Indigenous resistance against deforestation, for example – would point to another.

Boysen writes in a lucid and unencumbered style, peppered with sharp insights – only some of which I could bring out in this review. She notes, as further examples to the prowess of her work, that the notion of green growth has turned the cause for environmental degradation into a cure (at 63), and she laments that 'environmental law scholarship increasingly splits into an extremely technocratic and a merely normative part, which does not show signs of fatigue when continuously proclaiming ever new universal rights and principles' (at 17). Eying topical debates about anthropocentric conceptions of law, she highlights how the colonial expansion of international law submerged other religious and cultural approaches to the concept of nature (at 33).¹⁰

Boysen's main contributions are threefold. First, in analysing the roots of international environmental law, she goes further back in history, which leads to important repercussions for present debates. Second, she extends existing analyses of the legal and institutional split between political and economic spheres with her focus on the law and governance of natural resources and, third, she lays bare the operation of economic forces in the breadth and depth of specific environmental agreements. Under pressures of the climate crisis, she moves environmental law into the heart of the law. She slows us down to appreciate what the law has done and is doing, if only to then contest the law and move it towards betterment. Future generations, it might be hoped, would then not ask – as has been asked with regard to human rights law – whether international law has failed 'us' or 'we' have failed international law.

Ingo Venzke

*Professor of International Law and Social Justice,
University of Amsterdam, The Netherlands
Fellow, The New Institute, Hamburg, Germany
Email: i.venzke@uva.nl*

<https://doi.org/10.1093/ejil/chac036>

¹⁰ With reference to Jiménez Fonseca, 'Jus gentium and the Transformation of Latin American Nature: One More Reading of Vitoria?', in M. Koskenniemi, W. Rech and M. Jimenez Fonseca (eds), *International Law and Empire: Historical Explorations* (2017) 123.