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0521640989 - Sharing Transboundary Resources: International Law and Optimal Resource Use

Eyal Benvenisti

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## Sharing Transboundary Resources

*International Law and Optimal Resource Use*

Why do states often fail to cooperate, using transboundary natural resources inefficiently and unsustainably? Eyal Benvenisti examines the contemporary international norms and policy recommendations that could provide incentives for states to cooperate. His approach is multidisciplinary, proposing transnational institutions for the management of transboundary resources. Benvenisti takes a fresh approach to the problem, considering mismanagement as the link between domestic and international processes. As well, he explores reasons why some collective efforts to develop the international law on transnational ecosystems have failed, while others have succeeded. This inquiry suggests that adjudicators need to be assertive in progressively developing the law, while relying on scientific knowledge more than on past practice. Global water policy issues seem set to remain a cause for concern for the foreseeable future; this study provides a new approach to the problem of fresh water, and will interest international environmentalists and lawyers, as well as international relations scholars and practitioners.

EYAL BENVENISTI is Hersch Lauterpacht Professor of International Law and Director of the Minerva Center for Human Rights at the Hebrew University of Jerusalem. His publications include *The International Law of Occupation* (1993), as well as articles in the *European Journal of International Law*, the *American Journal of International Law*, and the *Michigan Law Review*.

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# Sharing Transboundary Resources

## International Law and Optimal Resource Use

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Eyal Benvenisti

*Hebrew University of Jerusalem*



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For Rivka

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## Acknowledgments

When I started this project almost ten years ago my goal seemed straightforward: I wanted to examine what guidelines international law offered for the resolution of the conflict over the use of the shared freshwater resources in the Middle East. Increasing scarcity on the one hand, and negotiations towards a peaceful settlement of the Arab–Israeli conflict on the other, lent a sense of urgency even to such an academic exercise. But soon I discovered that the basic principles of international law on shared fresh water were disputed, also by the governments in the Middle East, and that therefore negotiators were not significantly constrained by the law. Trying to explain why the law failed to offer shared norms I expanded my initial inquiry and focused on two related questions. The first dealt with substance: just what *ought to be* the law to govern shared fresh water. The second question was institutional: why the protracted efforts to codify the law failed to reduce its ambiguities. In responding to these questions I ventured into new disciplines. The study of hydrology taught me that I should focus on ecosystems rather than on watercourses. The study of game theory and public choice theory permitted me to explore the roots of the failure of collective action in the national, regional, and international arenas. This book is the outcome of this inquiry.

The book is therefore not only about the international law on transboundary ecosystems. It is also about the logic of regional cooperation in the management of such ecosystems, and the potential contribution of international law towards such cooperation. The book also offers a critical analysis of the processes that shape the evolution of international law, and especially on its conscious development by international adjudicators. This theoretical study ultimately yields practical recommendations on how to structure the mechanisms for the management of transboundary resources.

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## xii ACKNOWLEDGMENTS

Some of my initial thoughts on these questions were published as an article “Collective Action in the Utilization of Shared Freshwater: The Challenges of International Water Resources Law,” in the *American Journal of International Law* 384 (1996). An article “Exit and Voice in the Age of Globalization,” that appeared in *Michigan Law Review* 167 (1999), and a book chapter in *The Role of Law in International Politics*, edited by Michael Byers (2000) focused on the interface between international law and domestic politics, an issue that is elaborated here in chapters 3 and 4.

My work benefited from the comments, criticisms, and suggestions of friends and colleagues. They include José E. Alvarez, Andrea Bianchi, Kathryn Comerford, Tsili Dagan, Michael Dorf, George Downs, Robert Ellickson, Celia Fassberg, Ruth Gavison, Zohar Goshen, Alon Harel, Moshe Hirsch, Marcel Kahan, Petros Mavroidis, Georg Nolte, Ariel Porat, Mark Ramseyer, Michael Reisman, Edward Rock, Charles Sabel, Alex Stein, Eyal Zamir, and Andreas Zimmermann. Haim Gvirtzman introduced me to the basics of hydrology. From Eran Feitelson I learnt about conservation and management of scarce resources.

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## Abbreviations

- AJIL – *American Journal of International Law*  
 Am. Ar. Aff. – *American Arab Affairs*  
 Am. Jur. Pol. Sci. – *American Journal Of Political Science*  
 Am. Pol. Sci. Rev. – *American Political Science Review*  
 Ann. Franc. Dr. Int'l – *Annuaire français de droit international*  
 Ann. Inst. Dr. Int'l – *Annuaire de l'institut de droit international*  
 Ariz. J. Int'l & Comp. Law – *Arizona Journal of International and  
 Comparative Law*  
 Austrian J. Publ. Int'l Law – *Austrian Journal of Public International Law*  
 ARIEL – *Austrian Review of International and European Law*  
 Bell J. Econ & Mngm't Sci. – *Bell Journal of Economics and Management  
 Science*  
 Brit. J. Pol. Sci. – *British Journal of Political Science*  
 Brit. Yb. Int'l L. – *British Yearbook of International Law*  
 Brook. J. Int'l L. – *Brooklyn Journal of International Law*  
 Calif. L. Rev. – *California Law Review*  
 Cal. W. Int'l L.J. – *California Western International Law Journal*  
 Cambridge J. of Econ. – *Cambridge Journal of Economics*  
 Can. Yb. Int'l L. – *Canadian Yearbook of International Law*  
 Cardozo L. Rev. – *Cardozo Law Review*  
 Chi. Kent L. Rev. – *Chicago–Kent Law Review*  
 Colo. J. Int'l Eenv't'l L. & Pol'y – *Colorado Journal of International  
 Environmental Law and Policy*  
 Colum. J. Eenv't'l L. – *Columbia Journal of Environmental Law*  
 Colum. J. Trans. L. – *Columbia Journal of Transnational Law*  
 Colum. L. Rev. – *Columbia Law Review*  
 Cornell Int'l L.J. – *Cornell Journal of International Law*  
 Cornell L. Rev. – *Cornell Law Review*

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- Duke Env. L & Pol'y F. – *Duke Environmental Law and Policy Forum*  
 Duke L.J. – *Duke Law Journal*  
 Ecology L.Q. – *Ecology Law Quarterly*  
 Emory Int'l L. Rev. – *Emory International Law Review*  
 Eur. J. Int'l L. – *European Journal of International Law*  
 Fordham L. Rev. – *Fordham Law Review*  
 Georgetown Int'l Env'tl L. Rev. – *Georgetown International Environmental Law Review*  
 Golden Gate U.L. Rev. – *Golden Gate University Law Review*  
 Hague YB Int'l L. – *Hague Yearbook of International Law*  
 Harv. Env'tl. L. Rev. – *Harvard Environmental Law Review*  
 Harv. Int'l L.J. – *Harvard Journal of International Law*  
 Harv. L. Rev. – *Harvard Law Review*  
 Hous. J. Int'l L. – *Houston Journal of International Law*  
 ICLQ – *International and Comparative Law Quarterly*  
 ILM – *International Legal Materials*  
 Ind. L.J. – *Indiana Law Journal*  
 Int'l J. Group. Rts – *International Journal on Group Rights*  
 Int'l L.R. – *International Law Reports*  
 Int'l Org. – *International Organization*  
 Int'l Sec. – *International Security*  
 Israel L. Rev. – *Israel Law Review*  
 J. Conflict Res. – *Journal of Conflict Resolution*  
 J. Econ. Theo. – *Journal of Economic Theory*  
 J. Int'l Aff. – *Journal of International Affairs*  
 J. Int'l Econ. L. – *Journal of International Economic Law*  
 J. Int'l L. Bus. – *Journal of International Law and Business*  
 J. Law & Econ. – *Journal of Law and Economics*  
 J. Law, Econ. & Org. – *Journal of Law, Economics and Organization*  
 J. Leg. Stud. – *Journal of Legal Studies*  
 J. Palestine Studies – *Journal of Palestine Studies*  
 J. Pol'y Analysis & Mgmt. – *Journal of Policy Analysis and Management*  
 J. Pol. Econ. – *Journal of Political Economy*  
 Mich. J. Int'l L. – *Michigan Journal of International Law*  
 Mich. L. Rev. – *Michigan Law Review*  
 Minn. J. Global Trade – *Minnesota Journal of Global Trade*  
 Minn. L. Rev. – *Minnesota Law Review*  
 NAFTA L. & Bus. Rev. Am. – *NAFTA: Law and Business Review of the Americas*  
 Nat. Res. J. – *Natural Resources Journal*

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- Netherlands Yb. Int'l L. – *Netherlands Yearbook of International Law*  
 Nordic J. Int'l L – *Nordic Journal of International Law*  
 Nw. U. L. Rev. – *Northwestern University Law Review*  
 NYU J. Int'l L. & Pol., – *New York University Journal of International Law and Policy*  
 NYU L. Rev. – *New York University Law Review*  
 Pace Env'tl. L. Rev. – *Pace Environmental Law Review*  
 Q. J. Econ. – *Quarterly Journal of Economics*  
 Rev. Belge Dr. Int'l – *Revue belge de droit international*  
 Rev. Gen. Dr. Int'l Pub. – *Revue général de droit international public*  
 Rev. Jur. Env'n't – *Revue Juridique de l'environnement*  
 S. Cal. L. Rev. – *Southern California Law Review*  
 Schweiz. Z. Int'l Europ. R. – *Schweizerische Zeitschrift fuer Internationales und Europaeisches Recht*  
 Stan. Env'tl. L.J. – *Stanford Environmental Law Journal*  
 Stan. J. Int'l L. – *Stanford Journal of International Law*  
 Stan. L. Rev. – *Stanford Law Review*  
 Tex. Int'l L.J. – *Texas Journal of International Law*  
 Trans. Inst. Br. Geogr. – *Transactions of the Institute of British Geographers*  
 U. Chi. L. Rev. – *University of Chicago Law Review*  
 U. Cin. L. Rev. – *University of Cincinnati Law Review*  
 UCLA L. Rev. – *University of Southern California Law Review*  
 U. Col. L. Rev. – *University of Colorado Law Review*  
 U. Denv. Water L. Rev. – *University of Denver Water Law Review*  
 U Pa. J. Int'l Econ. L. – *University of Pennsylvania Journal of International Economic Law*  
 U. Pa. L. Rev. – *University of Pennsylvania Law Review*  
 U. Rich. L. Rev. – *University of Richmond Law Review*  
 U. West. Ontario L. Rev. – *University of Western Ontario Law Review*  
 Va. J. Int'l L. – *Virginia Journal of International Law*  
 Va. L. Rev. – *Virginia Law Review*  
 Vand. L. Rev. – *Vanderbilt Law Review*  
 Wash. & Lee L. Rev. – *Washington and Lee Law Review*  
 Yale HR & Dev. L.J. – *Yale Human Rights and Development Law Journal*  
 Yale J. Int'l L. – *Yale Journal of International Law*  
 Yale L.J. – *Yale Law Journal*  
 Yb. Int'l Env't'l L. – *Yearbook of International Environmental Law*