TABLE OF CONTENTS

NOTES ON CONTRIBUTERS 9

FOREWORD *(Danilo Türk)* 17

INTRODUCTION *(Vasilka Sancin)* 23

I. ENVIRONMENTAL CHALLENGES FROM THE PERSPECTIVE OF SCIENCE 25

INTERNATIONAL ENVIRONMENTAL LAW AND ACCELERATION OF GLOBAL CHANGE *(Lučka Kajfež Bogataj)* 27

THE LAWS OF NATURE ALSO APPLY TO HUMAN SOCIETY *(Alenka Gaberščik)* 41

SEEING THE FOREST BEYOND THE TREES: BALANCING WOOD PRODUCTION AND ECOSYSTEM SERVICES *(Thomas A. Nagel)* 49

ECOSYSTEM APPROACH FOR SUSTAINABLE USE OF COASTAL AND MARINE RESOURCES *(Mitja Bricelj)* 57

II. LEGAL PERCEPTIONS OF OUTER SPACE PROTECTION, BIODIVERSITY AND FORESTS **71**

PROTECTION OF THE ENVIRONMENT IN OUTER SPACE – LEGAL CONSIDERATIONS FOR DEALING WITH THE PROBLEM OF SPACE DEBRIS *(Stephan Hobe)* 73

BEYOND THE PRECAUTIONARY PRINCIPLE: LIMITING THE IMPACTS OF BIOTECHNOLOGY IN AGRICULTURE THROUGH CULTURAL HERITAGE PROTECTION *(Mery Ciacci)* 85

FORESTS: DOES STATE SOVEREIGNTY HINDER THEIR PROTECTION AT THE INTERNATIONAL LEVEL? *(Maša Kovič Dine)* 109

III. HUMAN RIGHTS, PEACE AND SECURITY AND THE ENVIRONMENT **129**

NEW PERSPECTIVES ON CONNECTING HUMAN RIGHTS AND INTERNATIONAL ENVIRONMENTAL LAW *(Anna Riddell)* 131

STATE RESPONSIBILITY FOR CLIMATE CHANGE-INDUCED HUMAN RIGHTS VIOLATIONS *(Margreet Wewerinke)* 157

PEACE OPERATIONS AND THE PROTECTION OF THE ENVIRONMENT *(Vasilka Sancin)* 187

IV. TRANSNATIONAL CORPORATIONS, INDIGENOUS PEOPLES, CLIMATE REFUGEES AND INTERNATIONAL ENVIRONMENTAL LAW **209**

CORPORATE OBLIGATIONS UNDER THE RIGHT TO A HEALTHY LIVING ENVIRONMENT *(Jernej Letnar Černič)* 211

REVISITING THE ELUSIVE NATURE OF INDIGENOUS PEOPLES' RIGHTS UNDER INTERNATIONAL ENVIRONMENTAL LAW *(Ugochukwu Callistus Orazulike)* 235

CLIMATE REFUGEES: THE EMERGENCE OF GAPS AND NEW CHALLENGES FOR INTERNATIONAL LAW *(Stephanie Regna-Gladin)* 259

V. FORMATION AND IMPLEMENTATION OF INTERNATIONAL ENVIRONMENTAL AGREEMENTS 277

THE DUE DILIGENCE PRINCIPLE IN INTERNATIONAL LAW AND ITS RELEVANCE FOR CLIMATE CHANGE LAW *(Hennie Strydom)* 279

THE INTEGRATION OF MULTILATERAL ENVIRONMENTAL AGREEMENTS: HERDING CATS OR BUILDING BRIDGES? *(Richard Caddell)* 301

SURVEYING EMISSIONS TRADING THROUGH A MULTI-LEVEL GOVERNANCE LENS *(Gerard H. Kelly)* 329

FAIRNESS VERSUS EFFICIENCY IN ENVIRONMENTAL LAW: A CALL FOR MORE EFFICIENCY-THINKING *(Germán Gómez Ventura)* 359

VI. ENVIRONMENTAL CONCERNS OF GLOBAL ECONOMY: A LEGAL APPRAISAL 373

GREEN ECONOMY AND ENVIRONMENTAL LAW: A MISMATCH AND WHY BOTHER? *(Jerneja Penca)* 375

ENVIRONMENTAL PROTECTION AND PATENT LAW *(Agnieszka A. Machnicka)* 405

THE CONFLUENCE OF INVESTMENTS AND ENVIRONMENTAL PROTECTION AND THE STATES OBLIGATIONS UNDER INTERNATIONAL LAW: CAN WE REALLY PRIORITIZE PARALLEL STANDARDS IN THE PRACTICE OF INTERNATIONAL LAW? *(Edouard O. Onana)* 421

ENERGY SAVING AND ENERGY EFFICIENCY: AN UNSUSTAINABLE CONFUSION *(Francesca Volpe)* 443

VII. INTERNATIONAL ADJUDICATION AND THE ENVIRONMENT 459

CREATING AN INTERNATIONAL ENVIRONMENTAL COURT – HOW DISTANT A POSSIBILITY? *(Ana Kastelec)* 461

THE PLACE OF SUSTAINABLE DEVELOPMENT IN INVESTOR-STATE ARBITRATION: EXTENDING THE PROTECTED INTERESTS *(Ilze Dubava)* 485

POLICIES UNDERLYING CONFLICT OF LAW CHOICES IN ENVIRONMENTAL LAW *(Ivana Kunda)* 507

VIII. DOMESTIC LEGISLATIONS AND THE ENVIRONMENT 529

CASE LAW OF THE CONSTITUTIONAL COURT OF SLOVENIA AND THE PROTECTION OF THE ENVIRONMENT *(Mirjam Škrk)* 531

RIGHT TO PROPERTY V. ENVIRONMENTAL PROTECTION: A MONTENEGRO PERSPECTIVE *(Ivana Jelić)* 549

THE RIGHT TO ENVIRONMENT IN TURKISH LAW AND JURISPRUDENCE *(Meltem Saribeyoğlu)* 565

INTERNATIONAL LIABILITY AND REDRESS FOR GENETICALLY MODIFIED ORGANISMS AND CHALLENGE FOR CHINA'S BIOSAFETY REGULATION *(Wen Xiang)* 581

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FOREWORD

The international environmental law is a perfect meeting place. Here, some of the oldest principles of law meet the most innovative concepts of international responsibility and cooperation. It is a place where the principle of state sovereignty meets competing requirements which limit a number of environmentally harmful activities – whether foreign or domestic. It is a place where a variety of new, legally defined forms of international cooperation meet in practice and where choices among them need to be made. And, very importantly, it is a place where considerations of law and policy meet and mix on a continuous basis – sometimes happily and sometimes less so.

International environmental law is not a mere "area of law". It affects all areas of law. Some of its sources can be derived from the ancient ethical and legal maxims which permeate law in a very fundamental way - the principle of *sic utere tuo ut alterum non laedes* being a very good example. Some of its current concepts belong to the most innovative ideas in international law, such as the norms relating to environmental impact assessments. Norms and institutions of international environmental law have a profound bearing upon the way of functioning of the basic principles of international law including the principle of responsibility of states and the principle of the duty of states to cooperate with one another in accordance with the Charter of the UN.

The agenda of international environmental law is expanding. However, it has produced only a few finalities and each of its items demonstrates complexity which is difficult to manage only with traditional normative methods, such as international treaties. Hence the necessity to tackle the "contemporary challenges of international

environmental law" on a continuous basis. The present Conference is an attempt to make a contribution in this regard. The structure of its agenda suggests an approach based on a careful selection of priority areas of international environmental law. This allows an in depth discussion with the sense of the necessary details and nuance. On the other hand, it might be appropriate to add a few reflections of a more general nature on (a) the evolution of the international environmental law and (b) on some of the current policy issues cutting across the specific themes to be dealt with by the Conference panels.

The basic premise of international environmental law can be found in the fundamental requirements of ethics. The principle of *sic utere tuo ut alterum non laedes* is as much an ethical principle as it is fundamental for the entire edifice of law. Its practical application has been confirmed time and again notwithstanding the difficulties inherent in the need to ascertain the relevant facts and causal links between environmentally harmful activities and the international responsibility of a territorial state. At the Stockholm Conference of 1972 the entire international community agreed that states have "... the responsibility to ensure that the activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction" (Principle 21). While this pronouncement has to be interpreted in the context of the Declaration as a whole, including its references to sovereignty of states over their natural wealth and resources, it nevertheless confirmed a fundamental legal basis for a variety of norms constituting the contemporary environmental responsibility of states. More recently, in the Advisory Opinion of 1996 (on the question of legality of the threat or use of nuclear weapons), and in the Judgment of 2010 (*Pulp Mills on the River Uruguay (Argentina v. Uruguay)*) the International Court of Justice confirmed the existence of the general legal obligation of states along the lines of the quoted Stockholm Principle.

The question of the nature of this obligation remains a matter of further legal elaboration. International legal instruments have in some areas specified the obligation of states to ensure a specific result and the responsibility of states for the effect. In some other areas the standards of responsibility of states have to be established in accordance with the criteria of due diligence. The work of the International Law Commission and the UN General Assembly is expected to produce a clearer definition of the variety of obligations of states to prevent trans border environmental damage and to reduce the risks involved in the potentially harmful activities. This work remains essential to ensure the necessary coherence of the international legal regime of protection of environment.

It is obvious, however, that a sophisticated legal regime requires more. Development of the international environmental law gave rise to a host of new principles of inter-

national cooperation, some of which confer specific legal obligations upon states. Various international treaties contain obligations ranging from the obligation of notification of environmental threats to the duty to consult on the potential transboundary emissions, and the obligation of environmental impact assessment. International environmental law strengthened the preventive dimension of international cooperation, including through the precautionary principle and the principle of polluter pays, a principle which also plays a preventive role.

Innovation remains the order of the day in the development of substantive norms of international environmental law. Developments in the area of biodiversity offer an example. Following the definition of the three objectives in the 1992 Biodiversity Treaty (conservation of biological diversity, sustainable use of its components and fair and equitable utilization of the benefits arising from genetic resources) further standards are being developed, including, most recently, in the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Utilization (2010). The Protocol sets out a number of obligations for the state parties with regard to the access to genetic resources as well as to benefit sharing and compliance. The Protocol is an example of a recent success in the global environmental legislation. However, it leaves important questions to be resolved later, in the process of its implementation. The question of the Protocol's effect on the situation of indigenous peoples, their land rights and their role in the protection of biodiversity remains open. It will probably have to be dealt with by other policy and legal instruments. Traditional farming as a means of protection of the natural environment and biodiversity must not be adversely affected by other, seemingly more efficient ways of the use of genetic resources. The international trade law and the law of intellectual property have to be sensitive to this need. Further innovation is called for.

The spirit of innovation which permeated the evolution of international environmental law has given rise to a number of new international instruments, including a large number of international treaties. This has led to concerns about normative coherence, given the existing »treaty congestion«. However, environmental law is not the only example of exuberance of international normative development. A similar process has characterized the dynamic period of standard setting in the field of human rights, roughly in the period between mid 1950s and early 1990s. A gradual shift of emphasis from standard setting to implementation occurred later on. Obviously, this analogy must not go too far. Nevertheless, it is worth reflecting whether standard setting in the field of environmental law can draw similar benefits from its implementation procedures as those known in the law on human rights. Legal thinkers in the field of international environmental law have to ponder the tasks to be accomplished through new substantive norms on the one hand and those which

can be more effectively pursued by means of adequate institutional development and standards of implementation resulting from the work of the relevant institutions.

Innovation has been a major characteristic of the institutional development intended to strengthen the protection of environment. The Stockholm conference of 1972 gave rise to the creation of the United Nations Environment Programme (UNEP), a unique body operating under the authority of the UN General Assembly and ECOSOC. Commission on Sustainable Development, established in 1992 after the Rio Conference sought to provide a forum for policy making and interaction between environmental departments and finance ministries of UN member states. A variety of expert and decision making bodies has been created under international treaties such as the two treaties on protection of the ozone layer, the Climate Change Convention, the Biodiversity Convention and others. The Global Financial Facility (GEF) offered an innovative model of creating synergies between UNEP, UNDP and the World Bank.

However, the exuberance of the institutional development has left some of the fundamental underlying aspirations unfulfilled. For example, the Commission on Sustainable Development was expected to take a comprehensive look at the global issues of sustainable development as a whole and inspire policy-making. Initially, it was expected that the Commission would attract not only environmental experts but also finance ministers and other policy makers in an effective global effort. However, as pointed out in the recent report of the Secretary-General's High Level Panel on Global Sustainability, the Commission developed a rigid sectoral agenda often focusing on specific environmental issues and neglecting broader economic an social aspects of its mandate. Often the Commission was caught in a zero-sum negotiating dynamic over general positions of states which has weakened its standing and reduced its effectiveness. There is a need for institutional innovation. The High-level Panel on Global Sustainability proposed creation of a Global Sustainability Council as a subsidiary body of the General Assembly. It would be tailored along the lines of the Human Rights Council which has replaced the former Commission on Human Rights (which had been, like the existing Commission on Sustainable Development, a subsidiary organ of ECOSOC). Many existing proposals suggest changes related to UNEP. The ideas concerning creation of an international environmental tribunal are being discussed. All these ideas are legitimate. It is important that the institutional development is clearly focused on the basic need to ensure a higher degree of institutional relevance and the corresponding political stature which is necessary to attract decision makers to take part in the work of the future deliberative and decision-making bodies. A multitude of institutions is needed. And above all, a forum of policy makers is equally necessary as it was in 1992.

The normative and institutional developments of the international environmental law have created a complex legal landscape. In addition, some of the recent developments have given rise to new difficulties. The failure of the Copenhagen Summit on Global Warming (2009) to produce a set of globally applicable, binding obligations concerning the emissions of greenhouse gases is a reminder that the normative development may not reach its optimal limits due to fundamental differences among states. Differences regarding their developmental needs and, equally important, their perceived responsibility for the current levels of the harmful greenhouse gas emissions are expected and to some extent legitimate. The developments since 2009 have confirmed that legally binding obligations regarding some of the fundamental issues of environmental protection and sustainable development will be very difficult to arrive at. This is likely to have a long term effect on the evolution of the international environmental legislation.

At the time of writing of these lines (late May, 2012) it appears that the preparatory process for the Rio+20 Summit demonstrates both the difficulty of the tasks at hand and a relatively low level of ambition of the main players. This presents a problem which should be of interest of all, including international lawyers involved in the discussion of the international environmental law. How should the lawyers react to the tendency of refocusing attention of negotiators from the aspiration to produce legal obligations to programmatic concepts such as »goals« and »targets« of sustainable development (such as poverty eradication, sustainable energy for all, resource efficiency and others) which increasingly dominate the current negotiating process? Is the international community adding sophistication or merely restating aspirations or even regressing in its desired objectives? Obviously there is nothing wrong with the states agreeing on policy elements described as goals and targets when they constitute a workable programme of action. But the question remains whether such an approach will suffice. The most demanding areas of international cooperation require international legal regulation, preferably in the form of treaties, or at least in the form of soft law and standards of implementation. International cooperation in the field of protection of environment should be no exception.

An additional reason to consider international legal regulation preferable to purely programmatic concepts lies in the fact that binding obligations of states and other elements of international legal regimes in the field of protection of environment not only define the responsibilities of states but also provide the much needed framework for action by businesses and other actors. Sustainable development and green growth are not only "property" of states but of all actors involved in economic and social development. Business sector needs clarity with regard to environmental standards in order to make their vital contribution to development. States have to provide a solid framework of environmental norms within which green economy can flourish

and sustainable development progress. Can they be sufficiently well expressed in an aspirational and programmatic, non-binding language?

This question is as much relevant to the future of international environmental law as it is to the future of policy making for sustainable development. It is not yet clear whether the existing normative order already allows for a refocusing on the programmatic goals and targets as vehicles of its implementation. This would mean that the existing normative base is sufficiently solid already, admittedly an optimistic assumption. In a less optimistic understanding, such a refocusing would only signify a slowdown in the needed normative evolution. Obviously, the time will tell which of these two interpretations is correct. I hope that the First Contemporary Challenges to International Environmental Law Conference in Ljubljana will give us a good understanding as to where to expect the answer.

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INTRODUCTION

The year 2012 marks the 20th anniversary of the 1992 United Nations Conference on Environment and Development in Rio de Janeiro, and the 10th anniversary of the 2002 World Summit on Sustainable Development in Johannesburg. The idea that lead to the convening of the *First Contemporary Challenges of International Environmental Law Conference* at the Faculty of Law, University of Ljubljana, Slovenia (28th and 29th June 2012), including the publishing of this book, arose out of a general feeling that environmental issues of fundamental concern to humankind should be discussed systematically and continuously all around the globe. This conference and the present publication constitute the first step to create a forum to serve such purposes also in these parts of Europe. The conference is envisaged to take place every two years, giving the experts from all around the world a platform to address challenges and concerns of our shared environment.

The timing of the event was purposely chosen to give the participants of the conference an opportunity to address the outcomes of the Rio+20 Conference, where world leaders, along with thousands of participants from governments, the private sector, NGOs and other groups, will just a week earlier seek answers on how we can reduce poverty, advance social equity and ensure environmental protection on an ever more crowded planet – contributing to a better future. The two themes of the Rio+20 Conference (a green economy in the context of sustainable development poverty eradication and the institutional framework for sustainable development) are well reflected also in the contributions to this book.

Rare are opportunities of professional gatherings where scientists from different areas would gather to discuss environmental challenges in interdisciplinary manner and seek loopholes in each other's perceptions while trying to provide innovative solutions. This book provides an example of such interdisciplinary response to the global environmental challenges where many different aspects have been critically addressed both by international legal experts and environmental scientists.

The first Chapter starts with contributions of natural scientists, ranging from general to more issue specific, and offers an excellent starting point for legal experts to analyze various legal aspects of environmental concerns. The contributions of the second Chapter thus continue with the presentation of some legal environmental perceptions of outer space, biodiversity and forests. The third Chapter recognizes inseparable links between the protection of the environment and respect for human rights and interdependency of environmental protection and management of natural resources with peace and security. Environmental concerns are also reflected in the conduct of transnational corporations, life of indigenous peoples and climate refugees, which are issues covered by Chapter four. Chapter five further deals with formation and implementation of international environmental agreements. Chapter six is devoted to a legal appraisal of environmental concerns of the global economy. International adjudication with nexus to the environment is a theme of Chapter seven, while Chapter eight concludes with presentation of four selected case-studies of domestic legislations and jurisprudence dealing with environmental issues.

This book should be of use and interest alike to academics, practitioners and students both graduate and undergraduate of a fairly wide span of sciences, particularly legal, social and natural.

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