

ALEXANDRE-CHARLES KISS AND THE LAW OF THE ENVIRONMENT

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Alexandre-Charles Kiss (Alex for his friends) was a multi-faceted personality: a gentleman, a warm friend, a legal humanist. His life and work can be seen as a bridge between Hungary and France, between *Mittle-Europa* and Western Europe. They can also be seen as those of a man open to the world, especially to the United States and Japan, but also Latin America and Africa.

Kiss the international law scholar

Alex was a full-fledged international lawyer. He was the pupil of Mme Suzanne Bastid, a domineering figure in the panorama of international law scholars in the mid-twentieth century. His thesis, written under her supervision, was published as a book under the title *L'abus de droit* in 1951 and is still quoted as the most important writing on the subject. His other main contribution to general international law was the monumental *Répertoire de la pratique française de droit international (1961–72)*. The amount of work compressed in it is extraordinary: the similar *Repertories* or *Digests* are the result of the work of teams, while Alex did it alone.

He was attentive to the developments of technology and devoted some essays to space law, than at the beginning of its development. He coedited a book on satellite broadcasting with Abraham Chayes and others in 1973.

Especially, he played a central role in the development of those aspects of international law that are relevant for the life of individuals. His love of nature and the experience of his life of exile, of seeking a new fatherland while not forgetting its own original one, pushed him towards human rights and environmental law.

His contribution to the law of human rights as well as to that of the environment was two-fold. That of the individual scholar, and that of the organizer of research. The lesson of Mme Bastid was decisive for the shaping of Alex Kiss the individual scholar, while the working experience at the CNRS – that formidable French institution that has permitted scholars outside the University system to conduct world class research in the

most diverse fields, including the humanities and law – shaped his qualities as an organizer of research. These qualities were innate in his attitude towards others: always open to listen, always ready to consider new ideas, always giving the same attention and importance to the ideas of young or unknown scholars it gave to well established professors.

The Human Rights Specialist

As environmental law is our main focus, I will be brief on Kiss's contribution to the law of human rights. It includes one short general treatise published in French in 1991 and co-authored by another world class specialist, Tom Buergenthal, now Judge at the ICJ. It also includes a number of shorter essays always to the point.

As an organizer of culture and research, one must recall the role of Alex Kiss in the *Institut des droits de l'homme*. He was the Secretary-General of that Institute from 1980 to 1991. Under his watch Strasbourg became the venue of teaching and scholarly research on human rights, appropriately growing side by side to the European Court and the Council of Europe.

The “father” of international environmental law

Coming now to environmental law, in this field also, the contribution of Alex Kiss, which spans more than three decades, has been that of the scholar and of the organizer. It has been also (perhaps even more than in the field of human rights) that of the apostle. Moreover, on the basis of his recognized qualities, which made him known as the “father” of international environmental law, he played a very relevant role as a practitioner.

As an international lawyer by formation, Kiss was immediately attracted by the international legal dimension of environmental law. He was nevertheless very attentive also to developments of domestic environmental law. This was due in part to his inexhaustible curiosity for legal and social phenomena. It was also due to his view that domestic and international environmental law are not separate – they are a continuum, as environmental law concepts and techniques migrate from the domestic to the international arena, domestic concepts sometimes contributing to the development of international ones, and international concepts contributing to the shaping of domestic environmental law.

The general treatises and the establishment of a new discipline

As early as 1975 Kiss published a general book on international environmental law. It was published in Spanish under the title *Los principios generales del derecho del medio ambiente*. It was the printed version of a course he had taught in the framework of the famous *Cursos del Instituto Francisco de Vitoria* of the University of Valladolid where so many great masters of international law presented their views – often opening new vistas to young Spanish students and scholars in the darkness of the Franco era.

The 1975 Spanish book became the basis of another publication, in English this time: this was the *Survey of Current developments of international environmental law* published in Switzerland at Gland in 1976 by the *Union internationale pour la*

conservation de la nature, under a characteristic dark green carton cover. The same scheme was later followed by Kiss in a French publication, *Droit international de l'environnement* (La documentation française, 1992).

The Spanish and the English language books of 1975 and 1976 gave to the international law of the environment its scholarly structure, its format for the years to come. Most of the now existing one volume treatises of international environmental law, such as those by Birnie and Boyle, by Sands, by Juste Ruiz, follow similar structures and touch on the same subjects. The 1975 and 1976 volumes were the works through which a generation of scholars, including the present writer, were made aware that environmental concerns had to do with a lot more than pollution. We realized that a new full-fledged discipline was there, based on concerns vital for the development of humankind. It was a branch of international law – Kiss did not care very much for now fashionable discussions about “self contained regimes”. It had special characteristics including a number of general principles whose classification in the usual categories of the sources of international law Alex did not care to make. He was much more interested in the substance of the subject as well as in the institutions that could help in giving practical applicability to the rules.

Alex produced a number of general treatises on the international law of the environment all of them being the follow-up, in light of the evolution of the subject, of the seminal ones of 1975 and 1976. Suffice it to quote in French *Droit international de l'Environnement*, published in 1989, with a second edition in 2000 and a third, co-authored by Jean-Pierre Beurier published in 2004; and in English *International Environmental law* (editions in 1991 and 1994); *Manual of European Environmental Law* (editions in 1993 and 1997); and the *Guide to International Environmental Law*, his last book, published in 2007, few months after Kiss's passing away. The last three books – covering more than 15 years of scholarly work – are co-authored by Dinah Shelton, a great scholar on her own that combines, from an American perspective, the same interests of Alex Kiss: general international law, human rights law and environmental law. The combination of their talent has contributed to scholarly world works that are solid points of reference to understand the most complex problems. The last mentioned, the 2007 *Guide*, has a different purpose: that of guiding domestic environmental lawyers, and even more so international and domestic lawyers in general, especially practitioners and judges, through the processes, achievements, and mysteries of international environmental law. In its apparent simplicity this book is a gem to be treasured. Each sentence deserves admiration and reflection.

The common heritage of mankind: idealism and realism

Particular mention is required for the 1982 Hague Lectures of Alex Kiss, entitled *La notion du patrimoine commun de l'humanité*. 1982 was the year in which the UN Law of the Sea Convention was adopted. In it the principle of the common heritage of mankind was proclaimed and applied to mineral resources beyond the limits of national jurisdiction. This incarnation of the concept was far more limited than what

its initial proponent Arvid Pardo had hoped, and nobody suspected that the future would bring future dilutions. Alex Kiss does not hesitate to go beyond the recently approved convention. He puts the common heritage concept in a broad perspective including Antarctica, radio-electric frequencies, outer space, cultural heritage, natural heritage and the environment, the ozone layer, climate, and genetic heritage, apart from the international seabed area. He gives an all-encompassing legal view of these phenomena based on a moral-political point of departure. In his view, the concept of the common heritage “a un contenu égalitaire [...] il tend à atténuer une des contradictions fondamentales du droit international, celle qui oppose l'égalité formelle des Etats à leur inégalité dans la réalité, non seulement en affirmant le droit de chacun de participer aux bénéfices, mais en améliorant les moyens des non favorisés d'y parvenir”(p. 239).

Alex was an idealist and a realist at the same time. He knew very well what was possible in today's world, what States could accept and what they could not. At the same time he believed that ideals can melt mountains and conquer hearts. His study of the common heritage is an eloquent witness to this. With cartesian logic he proceeds to the building of a legal theory based on ideals, being perfectly aware that *Realpolitik* was not in a position to follow. This emerges clearly in the dedication he wrote on the copy of his lectures he gave to the present writer, a then young scholar and friend who at the time happened to be involved in the Law of the sea negotiations and had often exposed his skeptical views to Alex. Alex wrote “Ceux qui croient au ciel et ceux qui n'y croient pas...”. Alex believed in heaven and made a heaven of ideals for us to believe, whatever our appreciation of what is possible and what is not.

The practitioner

In environmental law the wisdom, culture and practical sense of Alex was many times resorted to for practical purposes. I will not mention his participation to the Hungarian team in the dispute at the Hague against Slovakia on the *Gabcickovo-Nagymaros project*. The report of Mr. Szabo deals with this crowning moment of Alex's career as a practitioner. Suffice it for me to recall how he enjoyed this experience, how he saw in it a reparation of the old bruises in his relationship with his mother country that had recently restored his right to citizenship; and how he was happy to transmit all he learned in it to friends and especially to the new generations. I remember with emotion the wonderful lecture he gave, during his involvement in the case, to my class at the University of Milan.

Alex's practical activities were much broader than the *Gabcickovo* case. He was a consultant to numerous international organizations and governments, often in conjunction with other friends and colleagues, in particular his great friend Wolfgang Burhenne whose organizational talents and political savvy often helped in making recourse to Alex necessary.

The organizer of culture and the CEDE

It would be impossible to go into the details of the accomplishments of Alex Kiss as organizer of culture in the field of the international law of the environment. His

presence, often in important positions, has been constant in many prestigious groups and associations. His support has strengthened the development of new branches of international environmental law, as the present speaker could experience when he involved Alex (who, as always, was happy to be involved) in a pioneering study of the international environmental law of mountain areas.

What I am duty-bound to do is to recall the role of Alex Kiss in the European Council of Environmental Law (CEDE). I had the honor to be involved by him from a very early stage of the CEDE, that, perhaps was, among his initiatives, the dearest to his heart. Even though I had at the time not made any particular contribution to environment law, Alex thought I could contribute in the future and trusted me! More than thirty years later, I also had the honor to be indicated by him to the members of the CEDE as his successor.

The CEDE was established in 1974 by a group of scholars of the law of the environment, including Wolfgang Burhenne, Heinhard Steiger, Michel Despax and of course Alexandre Kiss who was its president since the beginning and up to his passing away thirty-three years later. The Council was run for about fifteen years with the support of the Fund for Environmental Studies in Bonn and, after a time in which it enjoyed no funding, was resurrected in 1995 with the support of the Regional Government of Madeira. It is a non-profit scholarly association that aims at having as components scholars (government officials might be invited for information purposes) from all the member States of the European Community.

The approach adopted was, from the beginning, at the same time practical and scholarly. Kiss was happy when discussions on questions of principle arose. He was however also keen to develop ideas in written form that could serve practical purposes, in particular on questions undergoing discussion within the European Community, the Council of Europe, the United Nations including the UNEP. These were the “resolutions” of the CEDE, more than forty documents in the drafting of which Kiss and we, his colleagues, spent many hours in distilling the best sentence or the best translation. It is difficult to assess which were the direct influences of the CEDE resolutions on texts adopted at the official level. There is no doubt that it served as a forum to develop new ideas and to focus on new subjects.

Apart from the resolutions, a number of scholarly publications have been the product, or the by-product, of the activity of the CEDE. Perhaps the most interesting and successful was the book edited by Kiss together with Jean Pierre Beurier and Said Mahmoudi entitled *New Technologies and the Law of the Marine Environment* (Kluwer, 2000). This book sets out contributions at the Conference organized by the CEDE at the Madeira pavillion of the 1998 Lisbon Expo, as an expression of gratitude to the Government of Madeira for its support of the CEDE. Among the many interesting contributions, it must be recalled that in this book are set out some of the very early studies about hydrothermal vents and about the legal regime of genetic resources of the sea beyond the limits of national jurisdiction, a subject that now, a decade later, is widely discussed at the UN and elsewhere.

The CEDE is now undergoing again financial difficulties. While it is hoped that they will be overcome, the members, and the present writer, as the successor of Alex in the presidency, feel under the duty to continue this enterprise, perhaps in other forms.

The “Kiss” conference in Budapest 18 October 2008

The idea of holding the conference in honor of Alex to which the present paper was originally read arose among the members of the CEDE during the sad days following the passing away of Alex Kiss. We thought that – even though the CEDE meetings are held at the seat of the Council in Funchal, Madeira – it would have been appropriate if we moved to Alex’s mother country to honor him and make visible to an audience composed of his compatriots what an enormous impact his thought and action have had all over the world. We are grateful to the CEDE member for Hungary (whom Alex choose with his extraordinary ability to find talent and human qualities) Professor Gyula Bándi and to the political and Academic authorities in Budapest for having permitted to this idea to become reality.