



Présentation / Intervention

2011

Open Access

This version of the publication is provided by the author(s) and made available in accordance with the copyright holder(s).

The Right to Water in a Transboundary Context: Emergence of Seminal Trends

Leb, Christina

How to cite

LEB, Christina. The Right to Water in a Transboundary Context: Emergence of Seminal Trends. In: IWRA XIV World Water Congress. Porto de Galinhas (Brésil). 2011.

This publication URL: <https://archive-ouverte.unige.ch/unige:17460>

The Right to Water in a Transboundary Context: Emergence of Seminal Trends

Christina Leeb

Platform for International Water Law, University of Geneva

40 Boulevard du Pont d'Arve, 1211 Geneva, Switzerland; email: christina.leeb@unige.ch

Abstract

Water is becoming increasingly scarce due to population growth, economic development and climate change. Unequal geographic distribution of freshwater resources puts populations in certain States and regions at particular risk. No longer are individuals living in these areas in the position to satisfy their vital water needs on their own. Legal development has been responding to this human vulnerability. The human right to water is receiving increasing recognition in national legislations and international instruments. Along with growing recognition of the right comes the identification of clear legal contours of State obligations with respect to water availability, access and supply, as well as with respect to protection of these individual water rights. Questions remain however as to whether there exist obligations between States to overcome the imbalance in geographic water distribution. Are “water-rich” States under any obligation to provide the resource to “water-poor” States? What would be the content and the nature of these obligations? These questions are explored here with respect to international cooperation obligations under human rights law as well as with respect to the law of transboundary water resources.

Keywords: human right to water, transboundary waters, international water law

Introduction

Water is becoming increasingly scarce in some regions, notably the Middle East, Sub-Saharan Africa and South East Asia. Three factors play key roles in this disturbing development; climate change, population growth and economic development. Climate change data indicates that water availability will further decrease in the semi arid areas and mid latitudes, making droughts more common in those regions. At the same time, population growth is continuing at a rapid pace. Over the past 70 years global population has tripled. (UNFPA, 2001) Today, world population is at close to 7 billion people, with large agglomerations in water stressed regions such as the Middle East and on the Indian sub-continent. In 2050, world population is expected to reach close to 10 billion. (US Census Bureau, 2011) While water demand is on the rise due to population increase, steady progress in economic development is putting additional stress on the resource. The UNDP Human Development Report from 2006 pointed out that due to continued global industrialization “[w]ater use has been growing much faster than population [...]” (UNDP, 2006) While population tripled over seven decades, water use due to industrial development grew by a factor of six. (UNFPA, 2001) As a consequence, the impact of population growth and economic development on water demand will be felt much harder than the impact of climate change on water supply. (Vörösmarty, et al., 2000) Industrial water uses and associated pollution have already led to a number of disputes over basic water supply for human needs at the national level, for example in Canada where extraction of oil sands and deforestation activities have threatened basic human water needs and livelihoods of indigenous populations. (E.g. Human Rights Committee, 1990) Construction of hydraulic infrastructure and filling of dam reservoirs has on occasions temporarily reduced water flows to unsustainable levels for local irrigation needs and thus food supply downstream. Population pressure and industrial development will ultimately determine the relationship between water supply and demand in the coming decades. In combination with climate change, these trends will aggravate regional imbalances in water availability and put basic water supply at risk.

Over time, the development of international law has increasingly taken account of rights and needs of individuals. Human rights law and humanitarian law are primary areas of international law which have the protection of individuals and their needs as their core objective. Other areas of international law have over time integrated interests of individuals into their field of application; in environmental law, for example, individuals have gained certain rights to be heard and to contribute to decision making through the establishment of rules

regarding public participation in environmental impact assessments and in environmental decision making. With respect to the rights of individuals concerning safe water supply and access to water resources, humanitarian and human rights law receive support for the protection of water needs of individuals through principles and norms of international water law.

This paper first outlines the contributions of human rights law to the protection of water needs of individuals. The General Assembly and the Human Rights Council resolutions of 2010, in which these two bodies recognize a human right to water and sanitation, have added a strong affirmative voice to the existence of obligations of States to satisfy basic water needs of their respective populations. The paper then goes on to analyze whether there exist additional human rights obligations according to which States are bound to not only satisfy water rights of their nationals but to also consider rights and needs of individuals located outside their territories. Such extraterritorial and international human right obligations could considerably contribute to the protection of basic water needs in a transboundary context and across regions. Finally, the analysis turns to the law of transboundary water resources. As has happened in other areas, this body of norms has increasingly turned its attention towards needs and interests of individuals. Instruments adopted at the universal and regional level have prepared the ground for this trend, which has been followed up with the recognition of water rights for individuals in a small number of recent agreements at the basin level. While the contours and content of protected rights are not always congruent with human rights obligations, international water law can potentially play a significant role in promoting the aspirations of human rights law and the human right to water in a transboundary context.

The human right to water: from nowhere to be seen into the spotlight of attention

Not initially recognized in an explicit manner

Neither the Universal Declaration on Human Rights (UDHR) nor the two guiding international human rights treaties, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), mention water in their text. The UDHR, adopted in 1948, is the corner-stone of the international human rights system. Adopted in form of resolution by the General Assembly, this document is not binding per se. Yet, the rights stipulated in the UDHR have become legally binding through codification in the ICCPR and the ICESCR. With respect to civil and political rights of the ICCPR, States are under an immediate obligation “to respect and to ensure to all individuals within [their] territory and subject to [their] jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”. (Article 2) The ICESCR imposes a “promotional” or progressive obligation; State Parties agree to “take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of [their] available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.”

It has been argued that the reason for the lack of reference to water in these instruments must have been an oversight because water, just like air, was considered too obvious to mention. (Greatrex, 2004) As a consequence of this “oversight”, an international debate about the existence of human rights obligations with respect to water and on the question whether the human right to water is a self-standing right developed. Other international declarations, such as the 1977 Mar del Plata Action Plan, recognize the existence of a human right to water. Its premise was recalled in Principle No. 4 of the 1992 Dublin Statement on Water and Sustainable Development and Agenda 21 adopted at the UN Conference on the Environment and Development in Rio in 1992; yet, a number of States continued to reject the notion of a self-standing right to water. (Water for the ages, 2008)

Increasingly recognized in instruments and as part of other rights

Even though neither of the Covenants mentions water in their text, both contain rights that are inherently linked to the protection of basic human water needs for drinking and eating, such as the right to life, the right to self-determination, the right to an adequate standard of living, including the right to food, and the right to highest attainable standards of health. Human rights obligations with respect to water have been derived so far primarily from these and other rights and instruments. (CESCR, 2002)

The right to life (Article 6 ICCPR) is a non-derogable right; that is State Parties to the Covenant may not derogate from their obligations with respect to the right to life, even in time of public emergency which threatens the very existence of a State. (Article 4 ICCPR) At the core of the right lies the protection against arbitrary deprivation of life, yet the right and related obligations are not to be interpreted too restrictively. According to General Comment No. 6 of the Human Rights Committee, States have to adopt positive measures to promote life. The right to life must therefore include, at least, the right to water and food in sufficient amounts to secure survival. (HCHR, 2007)

In this context, the right of a people to its own means of subsistence has to be pointed out. This right, which is part of the right to self-determination stipulated in Article 1 of both the ICCPR and the ICESCR, serves to protect basic human needs of peoples. The right to self-determination protects democratic as well as territorial rights; on the one hand, it protects the freedom of people to choose a political and economic system within their territory, and on the other hand it protects their ability to manage their natural resources. Self-determination implies a right for indigenous people to live on their ancestral lands and to manage, or at least to participate in the management of, the resources located on these lands, including water resources. (Gilbert, 2005) As is made clear in the last sentence of Art 1 (2) of the Covenants, the right protects access to means of subsistence and as such functions as legal guarantee for the protection of vital human water needs.

In 2002, the Committee on Economic, Social and Cultural Rights (CESCR) issued General Comment No. 15 on the right to water. In this General Comment, the CESCR confirms the existence of human rights obligations with respect to water, deriving them from other economic, social and cultural rights. Obligations with respect to water have also been integrated into other human rights instruments, such as the 1979 Convention on the Elimination of All Forms of Discrimination against Women (Article 14), the 1989 Convention on the Rights of the Child (Article 24), and later also the 2006 Convention on the Rights of Persons with Disabilities (Article 28). Additionally, regional human rights treaties refer explicitly to human rights obligations with respect to access to water, such as the 1990 African Charter on the Rights and Welfare of the Child (Article 14) and the 2003 Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (Article 15); and a considerable number of States have recognized the right to water in their national constitutions (e.g. Ethiopia, South Africa, Uruguay). The language of General Comment No. 15 suggests that the human right to water should be considered as a self-standing right; this right "entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic use". (CESCR, 2002) The Committee regularly publishes general comments to assist State Parties in fulfilling their human rights and reporting obligations. These comments are considered authoritative interpretations of the Covenant's provisions; however, they are not binding on States Parties. (McCaffrey, 2005) Rather, they unfold their value in practice as sources of interpretation of the content of Covenant obligations; international and national tribunals frequently refer to interpretations developed by the CESCR. (Tignino, 2008; Salman, 2004)

International acknowledgement of its fundamental value

More recently both the General Assembly and the Human Rights Council have recognized the existence of a human right to water. The two resolutions highlight the intention of the international community to accord a high level of protection to the right to water. General Assembly Resolution 64/292 establishes a direct link between the right to water and the right to life and other rights in recognizing that "the right to safe and clean drinking water and sanitation as a human right [...] is essential for the full enjoyment of life and all human rights". Human rights obligations with respect to water underwent a development from not being considered at all in the texts of the earlier human rights instruments to the acknowledgement by the international community that water rights are at the heart of and are indeed fundamental to the fulfillment of all other rights.

International Protection of the Right to Water

International concern for human rights

The protection of human rights and their implementation are obligations that are primarily owed by States to their nationals and individuals under their control; at the same time they also take effect at the international level. The primary relationship between State and individual is mitigated by the fact that States do not exist in isolation but within a society of States. There are instances in which this society has a duty (at least morally) to ensure that individual States are in a position to comply with their human rights obligations. This international concern for the observance of basic human rights standards is expressed in the Charter of the United Nations.

The international community has established the UN system with the objective, *inter alia*, to “achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights....” (Article 1 (3) UN Charter) Human rights have been recognized as an exception to the principle of non-interference in matters of domestic jurisdiction stipulated in Article 2 (7) of the Charter. (De Schutter, 2009) Where massive human rights violations put the maintenance of international peace and security at risk, the international community has vested the UN Security Council with the primary responsibility to intervene. (Article 24 UN Charter) The international society of States acts through organizations and programs of the United Nations System, regional human rights mechanisms and other development organizations to contribute to the progressive realization of human rights. States have assumed general obligations to cooperate in order to achieve universal respect and observance of human rights and improvement of living standards by virtue of being member of the UN. (Articles 55 and 56 UN Charter) International human rights covenants provide for additional extraterritorial and international obligations. ‘Extraterritorial obligations’ have been defined as obligations towards individuals and groups outside a State’s territory. (Künemann, 2004) Whereas obligations of States to seek assistance, to provide assistance or to cooperate with other States in order to put oneself or others into a position to be able to comply with own human rights obligations are referred to as ‘international obligations’. Extraterritorial obligations are owed to individuals, while international obligations concern the legal relationship between States.

Extraterritorial obligations

Both the ICCPR and ICESCR comprise extraterritorial obligations. The human rights obligations enshrined in these two Covenants apply not only to individuals within the territory of a State but also to individuals which are outside a State’s territory and find themselves under the jurisdiction or effective control of this State. The ICCPR makes this clear in the text of its Article 2 (1); “Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant....” The word ‘and’ has to be understood and read as and ‘and/or’ in this context. (Meron, 1995) The ICESCR lacks this definition of territorial and jurisdictional applicability.

The ICJ has confirmed the extraterritorial applicability of both Covenants in its advisory opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*. (ICJ, 2004) Extraterritorial obligations that go beyond jurisdiction and effective control can be derived for few specific cases from the *erga omnes* character of some of the rights, as is the case with the right to self-determination. State parties to the international human rights covenants are under a duty to take positive measures to facilitate this right “not only in relation to their own peoples but *vis-à-vis* all peoples”. (HRC, 1984) Translated into the context of transboundary hydrographic systems, this would mean that States cannot deprive a people in another riparian State of its means of subsistence by, for example, stopping or reducing the flow of a transboundary river to a level where basic water supply is no longer provided for.

International obligations

Art. 2 (1) of the ICESCR additionally establishes international obligations in requiring States “to take steps... through international assistance and cooperation” with a view to progressively realizing Covenant rights. On the one hand, this norm imposes an obligation on a State, which lacks sufficient resources to ensure the satisfaction of the minimum essential levels of ICESCR rights by their own means to seek assistance from other States; and on the other hand, it imposes an obligation on others to provide assistance to those States. (CESCR, 1990) The obligation to provide, however, is limited; it does not extend to a duty of to meet all needs of the State which is seeking assistance. (Craven, 1995) With respect to the question on what kind of assistance has to be provided, it needs to be pointed out that the terms ‘international assistance and cooperation’ are not restricted to the meaning of ‘development assistance’. Nothing in the text of the Article suggests that these obligations only exist between developed and developing countries. Such an interpretation of the Covenant would be too restrictive given and in the light of the breadth of the rights it establishes. Rather these two terms refer to a wide range of joint activities. (Künemann, 2004)

Article 23 ICESCR provides a non-exhaustive description of the range of actions with which the States that ask for assistance as well as those that provide assistance can fulfill their international obligations. They include “the conclusion of conventions, the adoption of recommendations, the furnishing of technical assistance and the holding of regional meetings”. The CESCR elaborated with respect to water in its General Comment No. 15; specifying that “[d]epending on the availability of resources, States should facilitate realization of the right to water in other countries, for example through provision of water resources, financial and technical assistance, and provide the necessary aid when required”. (CESCR, 2002) Both the GA and the HRC resolutions recognizing

the right to water reemphasize this obligation by calling upon “States and international organizations to provide financial resources, capacity-building and technology transfer, through international assistance and cooperation...” In its comment on the right to health the Committee further clarified that “States parties have to respect the enjoyment of the right to health in other countries... [They] should ensure that the right to health is given due attention in international agreements and, to that end, should consider the development of further legal instruments.” (CESCR, 2000) International obligations establish a bridge between human rights law and international water law; international water treaties, as will be discussed below, can be a means to promote the human right to water in the transboundary context. The use of the word ‘should’ in the formulation of the General Comments indicates that the obligations stipulated are not absolute obligations. This underlines to a certain extent the role international human rights obligations play in practice; States have not yet invoked these obligations and have treated them rather as moral and political aims. (Von Tigerstrom, 2007). The adoption of the Millennium Development Goals and funding of international programs for their achievement can be seen as one of the activities that have been taken by the international community to pursue these aims.

Protection of water needs of individuals through international Water Law

International water law is an additional means that can help promote objectives which aim at ensuring access to basic water supply for all. Human water needs receive protection through general principles of international water law; and some recent instruments adopted at the regional and at the basin level include provisions which aim at realization of human rights obligations with respect to water. These agreements confirm a trend towards greater appreciation of the needs of individuals in international law, and the protection of vital human water needs through international water law more specifically.

General principles and consideration of water needs of individuals

Both, the principle of equitable and reasonable utilization as well as the obligation not to cause significant harm have a role in ensuring that the water needs of basin population are taken into account in the management and development of transboundary water resources. The obligation not to cause significant harm applies with respect to actual uses. Basin States are under an obligation to exercise due diligence in the utilization of their territory and of the shared water resources that flow within so as not to cause significant damage in the territory of other basin States. (ILC, 1994) The threshold of ‘significant’ harm is harm that can be measured by objective evidence and that causes a “real impairment of use”. (ILC, 1994) Applying this threshold to the given context this would mean if the water use of a basin State pollutes shared water resources to such an extent that basin population, which exclusively depends on these water resources in another State, can no longer use these waters to satisfy their basic water and food needs this would constitute such ‘significant’ harm. In cases where pollution amounts to such levels that it is no longer safe for the health of the dependent population to drink or to eat fish from these waters, for example, vital human water needs are legally protected by the principle not to cause significant harm.

The principle of equitable utilization equally facilitates protection of basic water needs. Article 5 of the 1997 UN Watercourse Convention and Article 4 of the 2008 ILC Draft Articles on transboundary aquifers formulate the respect of the principle of equitable and reasonable utilization as an obligation of States to take into account the interest of other concerned water system States. (ILC, 1994) This obligation entails a correlative right of other water-system States, within their territory, to an equitable and reasonable share and the benefits thereof. (ILC, 1994) The assessment of whether water uses are equitable and reasonable is done in consideration of the specific hydrologic, climatic, economic and social conditions of each basin. The UN Watercourses Convention (Article 6) and other instruments include representative lists, which provide guidance to States on which factors should be taken into account in determining what constitutes equitable and reasonable utilization in individual basins. These factors include *inter alia* the social and economic needs of concerned basin States, as well as the population dependent on the water system in each State. These two criteria help to ensure that the basic needs of basin populations are taken into account in the process of deciding on water management and use in transboundary water systems.

The criteria on social and economic needs of the dependent basin population is particularly pertinent to address questions that concern the ability of States to satisfy basic human needs for drinking water and for water for food production. Yet, does the legal entitlement to an equitable share of a transboundary water system serve as sufficient guarantee of the satisfaction of basic human needs in each basin State? Authors, who have analyzed this question, slightly differ in their conclusions. According to Bourquain, the principle of equitable and reasonable utilization establishes a legal basis from which an obligation to ensure that sufficient quantities of

water are left in a water course system for the satisfaction of vital human needs of co-riparian populations can be derived. He argues that 'equitable' cannot mean that a threat to human life is allowed. Therefore, the principle contains a prohibition to threaten the life of co-riparian population through over-abstraction of system waters. (Bourquain, 2008) In a differentiated manner, McCaffrey argues that an obligation to ensure that enough water is left in the system for the satisfaction of needs for other co-riparian States does not and cannot exist, because it would be contrary to hydrologic realities of some basins. In those exceptional cases, where there is not enough water to cover the water needs of the basin population of all riparian countries, a State cannot be obliged to deprive its people of vital water supply merely in order to be able to satisfy the needs of the population of another riparian State. (McCaffrey, 1992) An alternative solution has to be found among the riparian States by way of cooperation.

In addition, the interests of basin population as well as the social and economic needs of concerned basin States have to be weighed against other criteria and in the context of the given conditions of the specific water system. Their protection is not automatic and absolute. The principle of equitable utilization does not preclude uses that might impact on the possibility to satisfy basic human needs from the water resources that flow in the shared water system. The availability of other resources and alternatives to existing or planned uses also form part of the factors to be considered in the determination of equitable use. The principle of equitable and reasonable utilization also does not establish a priority of certain uses over others, which would, for example, favor uses to satisfy water needs of individuals. Such priorities exist in the context of regional custom and/or based on treaty provisions, such as in the 1909 Boundary Waters Treaty. With the UN Watercourses Convention there has been a progressive push to accord some priority to the protection of vital human water needs also through general rules agreed at the universal level, and these efforts have been reinforced with the adoption of the 2008 ILC Draft Articles on transboundary aquifers.

Protection of vital human needs

Both, the UN Watercourses Convention as well as the 2008 ILC Draft Articles on groundwater, stipulate that vital human needs need to be given extra attention. "Vital human needs" are defined as the provision of sufficient water to "sustain human life, including both drinking water and water required for production of food in order to prevent starvation". (ILC, 1994) It needs to be pointed out that this definition is not fully congruent with the scope of human rights obligations with respect to food and water, but that it is more limited. It focuses on aspects of sustaining human life with provision of sufficient amounts of water, while human rights law not only considers volumetric requirements but also cultural values and acceptability. (CESCR, 2002) The provisions of the UN Watercourses Convention and the 2008 ILC Draft Articles are however important, because – even though they do not provide the same scope of protection as human rights law – they do promote the protection of the core aspirations of human rights obligations at the transboundary level.

The approaches the two instruments have adopted with respect to the protection of vital water needs differ somewhat. While the UN Watercourses Convention accords priority attention to vital human needs in the case of conflict of water uses, the 2008 ILC Draft Articles give them some priority in the process of assessing equitable and reasonable utilization. Article 10 of the UN Watercourse Convention stipulates the general rule that "in the absence of agreement or custom to the contrary, no use of an international watercourse enjoys inherent priority over other uses". This rule is then qualified in the second paragraph of the Article, which provides that in case of conflict over uses "special regard should be given to the requirements of vital human needs" while resolving the conflict with reference to the equitable use and no significant harm rules. Where a conflict between different uses occurs, this conflict needs to be resolved according to the criteria established by the two principles and special attention should be given to basic water needs of individuals. The provision thus re-emphasizes the importance of the factor of 'social and economic needs' of concerned basin States that is to be considered in determining equitable use. (ILC, 1994)

The approach of the 2008 ILC Draft Articles is different in that it ensures that vital human needs are already accorded a special weight in the process of determining equitable utilization, and not only once a conflict between uses occurs. The 2008 ILC Draft Articles contain the following protective clause in the last sentence of paragraph 2 of Article 5, which lists the criteria to be considered for equitable use; "However, in weighing different utilizations of a transboundary aquifer or aquifer system, special regard shall be given to vital human needs". This protection is arguably somewhat stronger than the protection provided by the UN Watercourses Convention; vital human needs are considered already when determining equitable use and not only once conflict between uses arises. The due consideration of vital human needs early on can prevent such conflicts. The priority for the protection of vital human needs is reinforced also through the refinement of rules regarding

emergency situations (Article 17). Where an emergency occurs due to natural causes or human conduct and jeopardizes vital human needs first, States are for the time of the emergency allowed to take all measures that are necessary to meet these needs, notwithstanding the obligations which might arise from the principle of equitable utilization and the obligation not to cause significant harm. Such a strong protection clause is missing in the corresponding Article 28 of the Watercourses Convention of 1997.

At the same time, it needs to be pointed out that the two provisions in the Watercourse Convention and the 2008 Draft Articles are formulated in a way that is too vague to protect a right to satisfaction of basic human needs for individuals. They give some tentative priority to vital human needs; they require a level of “special regard” to be given to vital human needs and to take those needs into account, yet they do not impose an obligation “to provide” nor do they impose an obligation to satisfy these needs before others. (Bourquain, 2008) While both documents extent codify to a large international customary, not all of their provisions carry these characteristics and are legally binding. The rules concerning the priority status of vital human needs still need to be considered as forming part of progressive legal development; they derive their legitimacy so far from having been adopted by the General Assembly, in the same way as the human right to water. A stronger legal protection of the water rights of individuals is provided through a number of international agreements, which have been adopted at the regional and basin level.

Recent trends of protection through regional and basin agreements

On the regional level, it is the 1999 Protocol on Water and Health to the 1992 UNECE Helsinki Convention which stands out. The protection of vital human needs is part and parcel of the Protocol’s objective to promote human health and well-being. In the first paragraph of the preamble, the Parties to the Protocol express their conviction that “water in quantities, and of quality, sufficient to meet basic human needs is a prerequisite both for improved health and for sustainable development”. The Protocol is in this sense reflective of human rights standards. Equally inherent in the Protocol is the idea of international cooperation. Articles 6 and 11 read together form the basis for an obligation to pursue the aim to provide safe drinking water through international actions. Article 6 outlines national and local actions to be taken by State Parties in order to achieve access to drinking water and provision of sanitation for everyone. And Article 11 establishes an obligation to cooperate and assist each other as appropriate for the achievement of international actions in support of the objectives, as well as to cooperate in the implementation of national and local action upon request. This last provision echoes the international cooperation obligations of Article 2 (1) of the ICESCR.

At the basin level, the priority for human water needs has been established on several occasions in bilateral or multilateral treaties; and in an almost groundbreaking manner, the human right to water has been recognized in (to the knowledge of the author, at least) two basin agreements. The 1909 Boundary Waters Treaty stands out as treaty in its time. In the early 20th century, regional custom in Europe and other continents still accorded priority to navigation; yet in the treaty governing the use of their boundary waters, Canada and the United States agreed to a hierarchy of uses that accords highest priority to the satisfaction of domestic and sanitary water needs. Uses that conflict with or limit these uses are not permitted. Later in 1975, the three lower riparian States of the Mekong River, Cambodia, Laos and Vietnam, also declared their intention to adhere to a priority for domestic and urban water uses in their utilization of the mainstream waters. This intention of the Joint Declaration of Principles for Utilization of the Waters of the Lower Mekong Basin however was not reflected in the 1995 Mekong Agreement; the treaty does not establish any priority between uses. On the other hand, in the 1997 agreement on the utilization and development of the water resources of the Cuareim River Basin, Brazil and Uruguay agreed on a clear priority for drinking water supply to riparian population, including an additional obligation on State organs to augment water supply within their available means.

The Water Charter of the Niger Basin from 2008 and the Senegal Water Charter from 2002 stand out as basin agreements that give priority not only to the satisfaction of vital human needs and but that also recognize at the same time a fundamental human right to safe drinking water. The Niger Basin States consider the right to water as a principle guiding their cooperation in managing the shared resources. (Preamble) The right is defined as the fundamental right to sufficient physically accessible water at affordable cost and of a quality that is acceptable for personal and domestic use of everyone. (Article 1) The Senegal Water Charter recognizes the enjoyment of the right to water in the same manner as an explicit objective of any repartition of the River’s water. (Article 4) The obligation to satisfy vital human needs primes over technical and economic considerations of water allocation. (Articles 6 and 7) In recognizing a fundamental right to drinking water, these treaties go beyond the formulae of the UN Watercourses Convention and the 2008 Draft Articles towards a guarantee of water provision for the satisfaction of vital human needs in a transboundary context.

Conclusion

As pressure on transboundary water systems is increasing and in light of the fact that two out of three people might be living under conditions of “water stress” in 2020 international concern about the satisfaction of basic human water needs has been on the rise. (Lewis, 2009) Rights to water underwent a transformation of not having been explicitly recognized in the texts of international human rights treaties to being recognized as a self-standing human right by the United Nations General Assembly and the Human Rights Council in 2010. Yet, the recognition of legal responsibility to ensure the protection of human rights obligations with respect to water in a transboundary context and across regions lags behind these international resolutions. While water claims have been effectively asserted by individuals against their States by invoking related human rights (e.g. right to adequate living standard and right to self-determination), international cooperation obligations that have been established by the human rights covenants are barely invoked by States. The general principles of international water law provide some support to ensure that the needs of individuals are attended to by riparian States in the process of developing their shared water resources. More effective legal protection still comes from international treaties adopted at the regional and basin level, which accord priority to domestic and sanitary water uses. The Water Charters adopted for the Senegal and Niger River Basins are setting new trends with respect to efforts at the universal level to give priority to vital human water needs; they recognize the human right to water as a right that is protected at the transboundary level.

(Research for this paper was conducted as part of a wider study on cooperation obligations and rights in transboundary water resources management, which is supported by the Swiss National Science Foundation.)

References

- Bourquain K. (2008). *Freshwater Access from a Human Rights Perspective*. Martinus Nijhoff, Leiden
- Committee on Economic, Social and Cultural Rights (CESCR) (2002). *General Comment No. 15, The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)*. UN Doc. E/C.12/2002/11
- Committee on Economic, Social and Cultural Rights (CESCR) (2000). *Substantive issues arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights, General Comment No. 14 (2000), The right to the highest attainable standard of health*. UN Doc. E/C.12/2000/4
- Committee on Economic, Social and Cultural Rights (CESCR) (1990). *The nature of States parties obligations (Art. 2, para.1): 14/12/90, CESCR General Comment 3. (General Comments)*. UN Doc. E/1991/23
- Craven M. (1995). *The International Covenant on Economic, Social and Cultural Rights – A Perspective on its Development*. Clarendon Press, Oxford
- De Schutter O. (2009). The Status of Human Rights in International Law. in Krause C. and Scheinin M. (eds.). *International Protection of Human Rights – A Textbook*. Institute for Human Rights Abo Akademi University, Turku/Abo, Finland
- Gilbert J. (2005). Self-determination. in Smith R. and van den Anker C. (eds.), *The essentials of Human Rights*, Hodder Arnold, London, 317-319
- Greatrex, H. (2004), The Human Right to Water. *Human Rights Research Journal*, 2(1), 1-14
- High Commissioner for Human Rights (HCHR) (2007). *Report of the United Nations High Commissioner for Human Rights on the scope and content of the relevant human rights obligations related to equitable access to safe drinking water and sanitation under international human rights instruments*. UN Doc. A/HRC/6/3

Human Rights Committee (HRC) (1990). *Chief Bernard Ominayak and Lubicon Lake Band v. Canada, Communication, CCPR/C/38/D/167/1984*. UN Human Rights Committee (HRC), 26 March 1990, <http://www.unhcr.org/refworld/docid/4721c5b42.html>

Human Rights Committee (HRC) (1984), *CCPR General Comment No. 12 : The right to self-determination of peoples (Art 1)*, 13 March 1984

Human Rights Council (2010). Resolution 15/9 on *Human rights and access to safe drinking water and sanitation*. UN Doc. A/HRC/RES/15/9

International Court of Justice (2004). Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004. *ICJ Reports 2004*

International Law Commission (ILC) (1994). Draft articles on the law of the non-navigational uses of international watercourses and commentaries thereto and resolution on transboundary confined groundwater. *Yearbook of the International Law Commission, 1994, II* (Part Two), 89-135

Künnemann R. (2004). Extraterritorial application of the International Covenant on Economic, Social and Cultural Rights. in Coomans F. and Kamminga M. (eds.). *Extraterritorial Application of Human Rights Treaties*. Intersentia, Antwerp, 201-231

Lewis L. (2009), "Ecologists warn the planet is running short of water", *TimesOnline*

McCaffrey S. (2005). The Human Right to Water. in Brown Weiss E., Boisson de Chazournes L. and Bernasconi-Osterwalder (eds.). *Fresh Water and International Economic Law*. Oxford University Press, Oxford

McCaffrey S. (1992). A Human Right to Water: Domestic and International Implications. *Georgetown International Environmental Law Review*, **5**(1), 1-24

Meron T. (1995). Extraterritoriality of Human Rights Treaties. *American Journal of International Law*, **89**(1), 78-82

Salman S. (2004). From Marrakech Through The Hague to Kyoto: Has the Global Debate on Water Reached a Dead End? (Part Two). *Water International*, **29**(1), 11-19

Tignino M. (2008). *Le statut de l'eau en temps de conflit armé*. Doctoral Thesis, Graduate Institute of International and Development Studies, Geneva

United Nations (1977). *Rapport de la Conférence des Nations Unies sur l'eau, Mar del Plata, 14-25 mars 1977*. UN Doc. E/CONF.70/29

United Nations Development Program (UNDP) (2006). *Human Development Report 2006 – Beyond Scarcity: Power, poverty and the global water crisis*. Palgrave Macmillan, New York

United Nations Population Fund (UNFPA) (2001). *State of World Population 2001*. United Nations Population Fund, New York

U.S. Census Bureau (2011). *International Data Base*. <http://www.census.gov/ipc/www/idb/worldpopinfo.php>

Von Tigerstrom, B. (2007). *Human Security and International Law – Prospects and Problems*. Hart Publishing, Oxford/Portland

Vörösmarty C., Green P., and Salisbury J. (2000). Global Water Resources: Vulnerability from Climate Change and Population Growth. *Science*, **289**, 284-288

Water for the ages (2008). UN Human Rights Council votes against water as a human right. available at <http://waterfortheages.org/2008/05/11/un-human-rights-council-votes-against-water-as-a-human-right/>