

Protection of the Human Right to Water Under International Law

The Need for a New Legal Framework¹

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Abstract

The human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses. An adequate amount of safe water is necessary to prevent death from dehydration, to reduce the risk of water-related disease and to provide for consumption, cooking, personal and domestic hygienic requirements.² Indeed, the right to water clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental conditions for survival.³ Thus, the human right to life doesn't have any sense without the right to water and other vital human rights that are a pre-condition for human life. Consequently, the enjoyment of the human right to water is a prerequisite for the enjoyment of other basic human rights such as the right to the highest attainable standard of health and the rights to adequate housing and adequate food etc.⁴ Nevertheless, today in this era of *quasi* irreversible climate changes as well as very extensive increase use of natural fresh water resources, their quantity and quality is significantly decreased. From this perspective, the future of the entire mankind depends mostly in the preservation of world natural water resources. However their preservation requires from mankind a new world approach that would include *inter alia* the following steps: the adoption of a new international treaty on world environmental protection, the establishment of the World Water Authority under UN that would deal with issues such as the protection, management and use of international waters, ICJ shall be empowered with binding jurisdiction to exanimate inter-state disputes over international watercourses, a new international treaty on Arctic shall be adapted at least to address environmental concerns, and finally International Humanitarian Law shall address other environmental protection issues raised by enormous development of weapons destruction power including avoidance of loopholes that allow derogations from these treaties obligations. Certainly, any failure to do so, will undoubtedly lead mankind to future massive wars that shall be mostly fought for water rather than for oil.

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² United Nation's Committee on Economic, Social and Cultural Rights. General Comment No. 15 (2002) The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights). E/C.12/2002/11. 2003. Para. 2.

³ Ibid.

⁴ United Nation's Committee on Economic, Social and Cultural Rights. General Comment No. 14 (2000) on the right to the highest attainable standard of health. E/C.12/2000/4. 2000. Para. 11, 12 15 etc.

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Introduction

The human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses. An adequate amount of safe water is necessary to prevent death from dehydration, to reduce the risk of water-related disease and to provide for consumption, cooking, personal and domestic hygienic requirements.⁵ Indeed, the right to water clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental conditions for survival.⁶ Thus, the human right to life doesn't have any sense without the right to water and other vital human rights that are a pre-condition for human life. Consequently, the enjoyment of the human right to water is a prerequisite for the enjoyment of other basic human rights such as the right to the highest attainable standard of health and the rights to adequate housing and adequate food etc.⁷

Today in our globalized world experiencing significant climate change, and several ongoing armed conflicts, the obligation of states to protect and to fulfill the right to water for all people living under their jurisdictions is becoming everyday harder and harder *inter alia* due to a lack of long-term global strategies and proper international legal framework. While the right to water is now one of the most global concerns, world states are not engaged in a worldwide common action plan, but every state has its own policy that generally doesn't comply with other strategies and most importantly these policies don't comply with the need of the entire humanity for water. The human right to water is most extremely denied to people living in poor countries and in armed conflict areas. Major contributors for this severe situation are primary climate change and armed conflicts. In contradiction, while impact of climate change and powerful weapons and are highly increased in the last decades; the International Law did not experience any significant improvement to address crucial issues such as environment protection in general and particularly climate change, including protection of water resources in armed conflict situations. The urgency for an immediate improvement of environment protection under international law has been raised since the First Gulf conflict with burning of the oil wells and the release of large oil quantities into the water of Gulf and in following with the use radiation elements as part of conventional ammunition. This urgency has led to the argument of the need that international law should adopt new treaties for the protection of environment from climate change and

⁵ Supra 2, at Para. 2.

⁶ Ibid.

⁷ Suprat 4, at Para. 11, 12 15 etc.

from armed conflicts.⁸ However, until now, neither the international community and nor the world's super powers have undertaken any initiative to adapt any international treaty that would address the issue of environment protection during armed conflicts and especially to proper address tremendous climate change is becoming the most serious threat to world environment and especially to water resources. On the other hand, contradictory enough, water is one of the reasons for major world armed conflicts which in the future will not only quantitatively increase but also become increasingly violent.⁹

Today, our world needs more than ever a new international law legal framework on environment protection and consequently water resources from climate change and during armed conflicts as well as on water use and distribution in peace time as a necessary step to prevent future very violent armed conflicts between People since water as a vital resource will continually dwindle in the future as a result of economic development, population growth and a rise in the standard of living.¹⁰

Protection of the human right to water under International Law

The right to water is recognized as one of the most vital human rights and protected under International Law. The first and most important reference to the right to water in international law can be found in the Article 55, para 1, letters a and b of the UN Charter where is foreseen that *“With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: a. higher standards of living, full employment, and conditions of economic and social progress and development; b. solutions of international economic, social, health, and related problems; and international cultural and educational cooperation;”*. This provision has a particular important since the UN Charter is considered as to be *“the Constitution”* of the International Law¹¹. Thus this norm should prevail upon all the rest of other international law norms. It is true that this provision does not include within its text the words *“right to water”*. However, according the interpretation of the United Nation's Committee on Economic, Social and Cultural Rights made in the General Comment No. 15, the terms such as higher standards of living, conditions of economic and social progress and developments, solution of economic, social, health and related problems, does not mean anything without the right to water, which is a prerequisite for their fulfillment. Other important references

⁸ Colonel G.I.A.D. Draper, OBE. (Eds.) Michael A. Meyer and Hilaire Mc Coubrey. *“Reflection on Law and Armed Conflicts”*. Kluwer Law International, Netherlands, Hague 1998, p. 35.

⁹ Helga Haftendorn. *“Water and International Conflict”*. *Third World Quarterly*, Vol. 21, No. 1, (Feb., 2000). Available at <http://www.jstor.org/stable/3993524>. Last access on August 18, 2010. pp. 68.

¹⁰ Ibid.

¹¹ See Thomas Franck. *As cited in Christian Leathley. An Institutional Hierarchy to Combat the Frangmentation of the International Law: Has the ILC Missed an Opportunity?* *International Law and Politics*. Vol. 40:259, pp 277

are made in several international treaties among which the most important are: the Universal Declaration of Human Rights, art. 25, the Geneva Convention Relative to the Treatment of Prisoners of War arts. 20, 26, 29, 46, the Geneva Convention Relative to the Protection of Civilian Persons in Time of War arts. 89, Standard Minimum Rules for the Treatment of Prisoners, arts. 15, 20, the International Covenant on Economic, Social, and Cultural Rights, art 11, the International Covenant on Civil and Political Rights, art 6(1), Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art.54, Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art.14 etc, including several comments of the Committee on Economic, Social and Cultural Rights as well as other soft law sources. In all these documents is well emphasized that the right to water is a vital human right which needs to be protected and fulfilled by states as a prerequisite for the enjoyment of other human rights by people under their jurisdictions. From this perspective, seems that human right to water is fully protected under international law and there is no need for a new legal framework. Nevertheless, current international law for several reasons does not properly address issues such as climate change, water resources use and distribution in peace time that are very crucial for the right to water and above all peace and sustainable development of the entire humanity. International Law so far has failed to address these issues because:

- Existing international treaties dealing with the right to water provide state obligations to protect and fulfill the right to water to the maximum of its available resources, with a view to achieving progressively the full realization of the rights... by all appropriate means, including particularly the adoption of legislative measures.¹² The up to now practice has proven that this clauses has been used as an excuse by many states for their failure to fulfill the right to water;
- Existing international treaties do not foresee enforcement mechanisms, but *de facto* mostly belong to international soft law;
- There are no instruments under international law which would make the accession of states to these treaties legally binding;
- Several powerful states in violation of international law¹³ are invoking the provisions of their internal law as justification for its failure to perform these treaties;
- There are no international treaties worldwide accepted which deal with world water resource use and distribution. It is true that on 21 May 1997, the United

¹² See art.2 of the International Covenant on Economic, Social and Cultural Rights.

¹³ Art. 27 of the Vienna Convention on the Law of Treaties provides that: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty".

Nations General Assembly has adapted the Convention on the Law of the Non-Navigational Uses of International Watercourses, which is the only treaty governing shared freshwater resource that is of universal applicability. This treaty is a framework convention, in the sense that it provides a framework of principles and rules that may be applied and adjusted to suit the characteristics of particular international watercourses.¹⁴ However, first this treaty has not yet entered into force, since it requires the deposit of the thirty-fifth instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations. Until now there are only 16 signatory countries and 19 countries that have ratified it.¹⁵ This means that under these circumstances where there are no legally binding mechanisms which would oblige states to become a party to this treaty, the international law still does not have any legal framework to address the above-mentioned issues. Furthermore, this treaty foresees in art.1 that: *“The present Convention applies to uses of international watercourses and of their waters for purposes other than navigation and to measures of protection, preservation and management related to the uses of those watercourses and their waters.”*; and in art. 2 foresees that *“International watercourse” means a watercourse, parts of which are situated in different States*. As a consequence, the treaty does not provide any protection or legal regime for international waters in general and especially of both North Pole (Arctic) and South Pole (Antarctica) where large amount of fresh water is deposited and where none of world states has legitimate jurisdiction. In addition, the protection of these two areas of globe has a well proven particular importance for the protection of the entire world environment. Under International Law, there is no treaty regulating the status of Arctic, while the Antarctica Treaty¹⁶ has been *de facto* overruled by several states who continuing claim territorial jurisdiction.

Some recommendations and conclusions

The need for a new international legal framework that would properly address environmental protection in general and especially climate change, protection of worldwide water resources and their use and management is evident and immediate. World should stop seeking state or regional solution for a global problem such as environment, climate change and water resources. Recommendation would include *inter alia*:

- A new international treaty on world environmental protection that would accept no derogation at any time under any circumstance from High Contracting Parties.

¹⁴ Stephen C. McCaffrey. <http://untreaty.un.org/cod/avl/ha/clnuiw/clnuiw.html>.

¹⁵ UN Treaty Collection. Available at http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSOnline&tabid=2&mtmsg_no=XXVI112&chapter=27&lang=en#Participants.

¹⁶ Antarctica Treaty entered into force in 1961 and eventually signed by 47 countries.

- Establishment of the World Water Authority under UN which would deal with the protection, management and use of international waters *as well as* Arctic and Antarctica. Its mandate may include imposing of fines against companies as well as state, worldwide legally enforceable for misuse of international waters and imposing of taxes upon users. Incomes collected from taxes shall be used for environmental protection and regeneration of resources. This new UN role would be one among other very important new roles imposed by globalization such as the need for a World Economic Security Body.¹⁷
- International Court of Justice should have binding jurisdiction to exanimate interstate disputes over international watercourses. *Ad hoc* treaties and arbitration tribunals have fail to properly resolve these disputes, since most of them are established sole after a serious class between concerned parties. This step is considerable important taking into account that in comings decades, conflicts over water resources will be significantly increased and become more and more violent.
- A new international treaty on Arctic should be adapted. If such treaty fails to overcome territorial claims of several states, than at least should address other environmental concerns.
- International Humanitarian Law, regardless of very clear clauses included in two additional protocols to the Geneva Conventions, should still address other environmental protection issues raised by enormous development of weapons destruction power including avoidance of loopholes that allow derogations from these treaties obligations.

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¹⁷ See. Jordan DACI, Arta Musaraj. "The Need for a World Economic Security Body: A New Legal Role for the UN". Conference papers collection edited by Miroslav Klusak. International Conference of Young Scholars "*Crucial Problems of International Relations through the Eyes of Young Scholars: A new Era in International Relations*", University of Economic, Prague, Faculty of International Relations. Prague 2011, pp 271.

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