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## WATER AND THE LAW: TOWARDS SUSTAINABILITY

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In 2011, the IUCN Academy of Environmental Law convened its Annual Colloquium in Mpekweni, South Africa. This book is one of the lasting results of that meeting. Participants felt that there was a 'water crisis' and that lawyers had a role to play in responding to that crisis.

*Water and the Law* is divided into three parts. The first part deals with international water law, the second part with domestic water law and governance, and the third is a bit of a mix: it deals with the right of access to water at both the international and the domestic levels, although it focuses more on the latter than on the former. The main theme of the book is sustainability. In all three parts, the specific legal water framework is assessed on how well it has embraced or absorbed 'sustainability'.

After the editorial introduction (Chapter 1), the keynote speaker at the Colloquium, Patricia Wouters, stresses the importance of international cooperation in the management of shared transboundary water resources (Chapter 2). She persuasively argues that all of international law is ultimately about getting sovereign States to work together to jointly tackle global challenges, and that international water law is no exception. Quite the opposite: because water does not respect sovereign boundaries, States are obligated to jointly manage the watercourse that they share.

The next two chapters relate to the Nile, a very popular case study among international water lawyers. The story is familiar. In 2011, Ethiopia began the construction of a gigantic hydropower dam on the Blue Nile, the Grand Ethiopian Renaissance Dam (GERD). Ethiopia considers the dam essential for its long-term future economic development. The ambition was to complete the construction of the dam by the end of 2018, but for various reasons this deadline was not met. Before the dam can be put into operation, its reservoir needs to be filled with freshwater. The filling of the reservoir will take many years. Most of the territory of downstream Egypt consists of uninhabitable desert. In the middle of the country flows the Nile. It starts small, but when it gets closer to the sea, it widens into an impressive delta. Most of the people in Egypt live near the Nile and are highly dependent on it. Egypt uses the Nile for drinking water, sanitation, irrigation, tourism, electricity (think of Egypt's Aswan Dam) and many other purposes. The Egyptian Nile gets most of its water from the Ethiopian Blue Nile (about 60 percent). On the one hand, Egypt fears that the construction of the Ethiopian dam will significantly decrease the amount of water flowing into the Egyptian Nile. It fears that it can no longer guarantee water security to its population once the dam is filled and subsequently put into

operation. Due to climate change and population growth, the Nile in its current state – that is, before the dam is completed – already fails to provide sufficient water to meet the Egyptian population's immediate water needs. On the other hand, Ethiopia believes that the dam will not significantly affect the flow of the water in the Nile, at least not after the reservoirs of the dam are fully filled. The slower the reservoirs are filled, the less drastic the decrease in flow of the Nile will be. Ethiopia believes that during the filling period, but also afterwards, sufficient quantities of freshwater will flow through the Egyptian Nile.

Habtamu Alebachew discusses international legal perspectives on the utilization of transboundary rivers, testing these perspectives on the Ethiopian dam (Chapter 3). His optimistic and forward-looking chapter argues that both Ethiopia and Egypt can benefit from the Nile, even from the GERD. Emmanuel Kasimbazi paints a gloomier picture (Chapter 4). He looks into the complexities of developing a transboundary water resources management agreement applicable to the Nile. He describes the many efforts of Ethiopia, Egypt, Sudan and South Sudan to come to an understanding relating to the joint management of the Nile. Various colonial treaties had a bearing on the Nile, such as the Treaty between Ethiopia and the United Kingdom, relative to the frontiers between Sudan, Ethiopia and Eritrea (1902); the Exchange of Notes between the United Kingdom and Egypt in Regard to the Use of the Waters of the River Nile for Irrigation Purposes (1929); and the Agreement between the United Arab Republic (Egypt) and the Republic of the Sudan for the Full Utilization of the Nile Waters (1959). But the focus of Kasimbazi's analysis is on the Agreement on the Nile River Basin Cooperative Framework, which was concluded in 2010 between Ethiopia, Rwanda, Tanzania, Uganda, with Kenya and Burundi joining soon after. Egypt, Sudan and South Sudan, however, did not sign this agreement, and the agreement has yet to enter into force. Many things have happened since the book was published in 2014. Most importantly, on 23 March 2015, Egypt, Sudan and Ethiopia concluded a Declaration of Principles on the GERD. This declaration restates the general principles of international water law and governance – for instance, equitable and reasonable use, prohibition to cause transboundary harm and duty to cooperate – and affirms their applicability to the GERD. At the same time, there are reasons to conclude that *plus ça change, plus c'est la même chose*.

The next chapter by Adrien Bodart takes us from Africa to Europe (Chapter 5). It compares the Articles on the Law of Transboundary Aquifers, adopted by the International Law Commission (ILC) at its sixtieth session in 2008, with directives relating to (transboundary) aquifers of the European Union. This is the only chapter in the book that focuses on the link between international and regional – European – law.

The second part of the book begins with a chapter by Douglas Fisher on domestic water law (Chapter 6). Applying a comparative

methodology, Fisher analyses the case law of various domestic courts, to compare how they deal with the link between water and environmental sustainability. He seeks to deduce a jurisprudential model for sustainable water resources governance, but this is not easy, considering the diversity of approaches the author encounters. This comparative chapter is followed by chapters focusing on one particular jurisdiction. Trevor Daya-Winterbottom looks at sustainability, governance and water management in New Zealand (Chapter 7). Mauricio dos Santos, Carolina Dutra, Vladimir Garcia Magalhães and José Carlos da Silva analyse the protection of riparian forests and water resources conservation in Brazil (Chapter 8). Ganesh Keremane, Jennifer McKay and Zhifang Wu zoom in on the Murray–Darling Basin in south-eastern Australia (Chapter 9). Their aim is to see if and how ecologically sustainable development can be achieved in this multi-level water governance regime. Niko Soinen introduces us to the Finnish Water Law (Chapter 10). This is followed by two chapters on domestic water law and climate change. Anita Foerster looks at ways in which water law in south-eastern Australia adapts to climate change (Chapter 11). She takes us back to the Murray–Darling Basin, among others. Marleen van Rijswijk and Imelda Tappeiner look at the Netherlands (Chapter 12). At the end of Part II, we return to Africa, but this time to South Africa. Ramin Pejan, Derick du Toit and Sharon Pollard look at the country's constitutional law principles of progressive realization and reasonableness to evaluate the implementation lags in the South African water management reform process (Chapter 13).

The third and final part of the book consists of only two chapters. Nicola Lugaresi's chapter looks at the right to water and its misconceptions, between developed and developing countries (Chapter 14). Alexander Paterson's chapter addresses indigenous peoples' right to water in protected areas, with a focus on the Central Kalahari Game Reserve (Chapter 15). Lugaresi does address the international recognition of the human right to water briefly, but it would have been welcome if a separate chapter in the book addressed this international right, before looking, from a comparative perspective, at the domestic right to water in different jurisdictions. The focus on indigenous people is, of course, fully justified.

The book is a welcome addition to the existing literature. Perhaps the main theme could have been tackled more directly in some of the chapters. In Part I, for example, one might have expected a theoretical discussion on the (potential) influence of 'sustainability' on the bedrock principles of international water law: the equitable and reasonable use principle, and the no-harm rule.

In essence, 'sustainability' refers to the quality of being able to continue over a period of time. In international law, however, it has a more specific meaning: it refers to a balance between satisfying the needs of present and future generations. This is also how the term is used in international water law. It is relatively easy to link 'sustainability' to the equitable and reasonable utilization principle: the reference to equity can be interpreted as referring both to *intra*-generational equity (equity between different groups of the present generation) and *inter*generational equity (equity between the present and future generations). But it is much more difficult to link 'sustainability' to the no-harm rule, which is still applied, in most cases, in today's relations between two neighbouring States, and not in the relation between the present and future generations.

In Part III, the question one might have expected to be addressed directly in a stand-alone chapter is whether there is something like a *sustainable* human right to water, and if so, how that differs from the *ordinary* human right to water as spelled out in the United Nations General Assembly Resolution A/RES/64/292 on Water and Sanitation adopted in 2010, and in the General Comment 15 on the Right to Water issued by the UN Committee on Economic, Social and Cultural Rights in 2002. One might think that a *sustainable* right to water requires States to ensure that not only present generations enjoy the benefits of water and sanitation, but that future generations are catered for as well. And perhaps the term 'environmental sustainability' itself could have been approached more critically. The term suggests that there are different kinds of sustainability, and that environmental sustainability is but one of them. What other kinds of sustainability might there be in the (inter)national legal discourse that apply to (inter)national water law and governance? One can think of 'social sustainability' or 'economic sustainability'. The former generally refers to the long-term consequences of acts and policies of corporations on their employees, their customers and/or society as a whole. And the latter is mostly used to refer to long-term economic growth. And what does sustainability itself mean, exactly, from the perspective of these authors? Sustainability is the kind of thing everybody embraces and regards as important, but for exactly this reason: nobody knows what it means.

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