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Fresh Water in International Law

Laurence Boisson de Chazournes



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LAURENCE BOISSON DE CHAZOURNES

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FRESH WATER IN INTERNATIONAL LAW

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Preface and Acknowledgements

This book is the result of a long process. Fresh water has for many years been a topic of profound interest to me in the course of my activities as an academic and practitioner. Studying the treatment of fresh water in international law makes one aware of the complexity involved in the law's protection and management of this natural resource, and of the way in which different bodies of science (earth sciences, hydrology, engineering, meteorology, agronomy, and others) exert their influence on it. International law is an important tool in this respect but even *its* role cannot be defined in the singular. Indeed, various bodies of norms are applicable and have left their mark on the role and modalities of international law as regards fresh water: territorial and boundary regimes, economic law, environmental law, human rights, law of international organizations, etc. The real issue is the consistency and the coherence in the interpretation and application of these sets of norms. A variety of methods and techniques should give effect to them, allowing each to be applied in recognition of the vital nature of water for humans and the environment. The approach adopted in this book is to analyse the origin and scope of the various bodies of international norms, while emphasizing their interconnectedness and necessary adaptation to one another. This approach is accompanied by a detailed analysis of the practice of States and of international organizations, all the while taking into account the activities of the many non-State actors involved in the area of fresh water.

My thinking has also been stimulated by exchanges I have had with several generations of students at the University of Geneva, as well as at other universities in various parts of the world. I have also had the great pleasure of collaborating with PhD students and researchers associated with the Platform for International Water Law,¹ which was launched in 2009 at the Faculty of Law of the University of Geneva. I would, in particular, like to thank Mara Tignino, Senior Researcher at the University of Geneva Faculty of Law, and Christina Leb, currently a counsel with the World Bank Legal Department, for their work as coordinators of the Platform and their cooperation in the research for the present book. I would also like to thank Komlan Sangbana and Brian McGarry for their research assistance, on Chapters 2 and 3 and on Chapters 3 and 7 respectively. Moreover, I express my deep appreciation to Jason Rudall for his great companionship, while he was working on the linguistic editing of the manuscript as well as for helping me with research on certain issues.

I am grateful to the Swiss National Science Foundation (SNSF) that has funded several research projects, enabling researchers of the Platform to make visits, conduct research, and participate in conferences.²

¹ <http://www.unige.ch/droit/eau/index_en.html>.

² Project number 100015_124610, 'Governing water: the contribution of international law on transboundary freshwater resources' (2009–2011) and Project number 100012_138386, 'Non-state actors and the management of international freshwater resources' (2012–2013).

Finally, I am greatly indebted to all, including those mentioned above, who have accompanied me on the fascinating intellectual journey that was the writing of this book.

Preface to the Paperback Edition of *Fresh Water in International Law*

The publication of the paperback edition of *Fresh Water in International Law* reflects the increasing attention drawn by the protection and management of fresh water at the international level. Without water, life could not exist. This fundamental character of water for all human beings and nature has implicated a role for international law in its regulation and has catalyzed the evolution of norms and principles to meet the various demands and challenges associated with water use. Increasing interaction at the international level and a dependency between States in respect of water issues require that effective multilateral water governance schemes are put in place. Treaties and other instruments have been adopted at the universal, regional, and national level in an effort to meet these challenges.

In this context, codification and harmonization endeavours play an important role. The entry into force of the UN Convention on the Law of the Non-navigational Uses of International Watercourses on 17 August 2014 is emblematic of an emerging consensus among States to establish a universal framework for governing the various uses of international watercourses. This framework Convention lays down the constitutive foundations of a legal regime to be further elaborated through more specific instruments. Other corpuses of legal norms, such as international economic law, international environmental law, or international human rights law, bring their contribution to the protection and management of fresh water too. The case law of investment arbitral tribunals, compliance mechanisms provided under multilateral environmental agreements, and of human rights bodies and courts continues to be nurtured by disputes related to water resources. While these various strands of principles and rules are discernible from one another, they are also intertwined. There is a need for coherence among them in their interpretation and application, and to this end various legal avenues and techniques can be of assistance.

Enhanced reflection is necessary in this area and the paperback edition of *Fresh Water in International Law* is a contribution to this endeavour. Indeed, it is only through a better articulation and synthesis of the manifold legal developments that international law can most effectively make its contribution to the protection of an essential natural resource to human beings and nature.

Laurence Boisson de Chazournes
Geneva, November 2014

List of Abbreviations

ABC	Abyei Boundaries Commission
ACP	African, Caribbean and Pacific States
AsDB	Asian Development Bank
BIT	Bilateral investment treaty
BOT	Build-operate-transfer contract
C&SF	Central & Southern Florida Project
CARU	<i>Comisión Administradora del Río Uruguay</i> (Administrative Commission for the River Uruguay)
CBD	Convention on Biological Diversity
CCAI	Climate Change and Adaptation Initiative
CCD	Convention to Combat Desertification
CFC	Chlorofluorocarbon
CHH	Common heritage of humankind
CJEU	Court of Justice of the European Union
CMS	Convention on Migratory Species of Wild Animals
CPWC	Co-operative Programme on Water and Climate
COHRE	Centre on Housing Rights and Evictions
COP	Conference of Parties
CPC	Central Product Classification
CTE	Committee on Trade and Environment
DSU	Dispute Settlement Understanding (WTO)
EBRD	European Bank for Reconstruction and Development
ECHR	European Court of Human Rights
ECOSOC	United Nations Economic and Social Council
EEZ	Exclusive economic zone
EIA	Environmental impact assessment
EU	European Union
FAO	Food and Agriculture Organization
FTA	Free trade agreement
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GEF	Global Environment Facility
GLAAS	UN-Water Global Analysis and Assessment of Sanitation and Drinking-Water
HCFC	Hydrochlorofluorocarbon
HGA	Host Government Agreement
HRC	Human Rights Committee
HS	Harmonized System
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice

ICPDR	International Commission for the Protection of the Danube River
ICSID	International Centre for Settlement of Investment Disputes
ICTY	International Criminal Tribunal for the former Yugoslavia
IDB	Inter-American Development Bank
IDI	<i>Institut de droit international</i>
IFAD	International Fund for Agricultural Development
IFC	International Finance Corporation
IFIs	International financial institutions
IHP	International Hydrological Programme
IISD	International Institute for Sustainable Development
IJC	International Joint Commission
ILA	International Law Association
ILC	International Law Commission
IPCC	Intergovernmental Panel on Climate Change
IUCN	International Union for Conservation of Nature
IWRM	Integrated water resources management
JNA	Yugoslav Peoples' Army
LHWP	Lesotho Highlands Water Project
MAB Programme	UNESCO's Programme on Man and the Biosphere
MDG	Millennium Development Goal
MEA	Multilateral environmental agreement
MERCOSUR	Southern Common Market
MTBE	Methyl tertiary butyl ether
NAFTA	North American Free Trade Agreement
NBI	Nile Basin Initiative
NGO	Non-governmental organization
OCHA	United Nations Office for the Co-ordination of Humanitarian Affairs
ODA	Official Development Assistance
OECD	Organisation for Economic Co-operation and Development
OHCHR	United Nations Office of the High Commissioner for Human Rights
OMVS	<i>Organisation pour la mise en valeur du fleuve Sénégal</i>
OP	Operational Policy
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
POPs	Persistent organic pollutants
RGDIP	<i>Revue générale de droit international public</i>
Rio+20	United Nations Conference on Sustainable Development (2012)
SAB	Great Lakes Science Advisory Board
SADC	Southern African Development Community
SEA	Strategic Environmental Assessment
SFWMD	South Florida Water Management District

SOGED	<i>Agence de gestion et d'exploitation du barrage de Diama</i>
SOGEM	<i>Société de gestion de l'énergie de Manantali</i>
SPLM/A	Sudan People's Liberation Movement/Army
SPS	Agreement WTO Agreement on the Application of Sanitary and Phytosanitary Measures
SNSF	Swiss National Science Foundation
TEIA	Transboundary environmental impact assessment
UN	United Nations
UNDP	United Nations Development Programme
UNECE	United Nations Economic Commission for Europe
UNEP	United Nations Environment Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNFCCC	United Nations Framework Convention on Climate Change
UNICEF	United Nations Children's Fund
UNIDO	United Nations Industrial Development Organization
UNOPS	United Nations Office for Project Services
UNTS	United Nations Treaty Series
US	United States
USACE	US Army Corps of Engineers
VOC	Volatile Organic Compound
WHO	World Health Organization
WQB	Great Lakes Water Quality Board
WSSCC	Water Supply and Sanitation Collaborative Council
WTO	World Trade Organization
WWAP	World Water Assessment Programme
WWF	World Wide Fund for Nature
YILC	<i>Yearbook of International Law Commission</i>

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Introduction: Fresh Water and its Features

I. Water challenges: a contextual overview

The protection and management of fresh water is attracting increasing attention at the international level. In this context, the recent meeting of the Millennium Development Goal to halve by 2015 the proportion of people without sustainable access to safe drinking water is a significant achievement for fresh water governance.¹ Furthermore, the emerging recognition of a right to water is a source of much promise.² Harmonization endeavours in the management of international watercourses are also bearing fruit through the conclusion of agreements and the strengthening of basin commissions and organizations. However, despite the developments made in respect of access to water and water resources management, there remain significant challenges. Indeed, water is neither an inexhaustible resource nor a valueless good in economic terms. This is in spite of the fact that our planet's surface is more than three-quarters covered by water. However, the largest portion of accessible water—around 98 per cent of it³—is neither suitable for human consumption nor fit for use in agricultural or industrial activities as a result of its salinity or frozen state. Fresh water resources, i.e. waters in which the salt content is lower than 3 grams per litre, represent only 2.53 per cent of overall global water resources. Over two-thirds of these fresh water resources (68.7 per cent) are frozen in the polar ice caps, continental ice sheets, and alpine glaciers. Liquid fresh water is primarily found underground (30.1 per cent), whereas surface water in lakes and rivers (0.26 per cent) and atmospheric water content (0.04 per cent) represent only a small volume of overall fresh water resources.⁴

Additionally, while the size of the world's population has tripled over the last century, water consumption has increased by a factor of six. Attempts to increase

¹ WHO and UNICEF, *Progress on Drinking Water and Sanitation: 2012 Update* (Geneva: UNICEF and WHO, 2012). Electronic version available at: <<http://www.unicef.org/media/files/JMPReport2012.pdf>> (accessed 12 November 2012).

² See WHO and UN Water, *GLAAS Report 2012: UN-Water Global Analysis and Assessment of Sanitation and Drinking-Water: The Challenge of Extending and Sustaining Services* [electronic report], <http://apps.who.int/iris/bitstream/10665/44849/1/9789241503365_eng.pdf> (accessed 27 November 2012), 44.

³ World Water Assessment Programme, 'Water for People, Water for Life', *The United Nations World Water Development Report* [online report], <<http://unesdoc.unesco.org/images/0012/001297/129726e.pdf>> (accessed 8 April 2013), 68.

⁴ All statistics in this paragraph from 'Water for People, Water for Life'.