

FRESHWATER ACCESS FROM A HUMAN RIGHTS PERSPECTIVE: A CHALLENGE TO INTERNATIONAL WATER AND HUMAN RIGHTS LAW BY KNUT BOURQUAIN (LEIDEN: MARTINUS NIJHOFF PUBLISHERS, 2008) 258 PAGES. PRICE €90.00 (HARDBACK) ISBN 9789004169548.

In 2000, the *United Nations Millennium Declaration* set the goal of halving the proportion of people who are unable to reach or to afford safe drinking water by the year 2015.¹ Since then, considerable progress has been made in numerous countries.² Nevertheless, the water crisis is nowhere near a global solution. Access to safe drinking water remains uncertain for a majority of people in many countries.³ Population forecasts suggest that an additional 784 million people worldwide must gain access to improved drinking water sources to meet the *Millennium Development Goals*.⁴ In other words, an estimated additional 260 000 people per day should gain access to improved water sources until 2015.⁵ The failures of the 1981–90 Water and Sanitation Decade cast a foreboding shadow on the last stretch towards 2015.⁶

Actions to improve basic universal access to freshwater are now spurred by a sense of greater urgency. At the international level, this has resulted in a fundamental shift regarding water scarcity problems from a development paradigm to a governance approach founded on the rule of law and geared towards the realisation of human rights.⁷ The anticipated results of this shift are

¹ *United Nations Millennium Declaration*, GA Res 55/2, UN GAOR, 55th sess, 8th plen mtg, Agenda Item 60(b), UN Doc A/RES/55/2 (18 September 2000) [19].

² See World Health Organization ('WHO') and United Nations Children's Fund ('UNICEF') Joint Monitoring Programme for Water Supply and Sanitation, *Meeting the MDG Drinking Water and Sanitation Target: A Mid-Term Assessment of Progress* (WHO/UNICEF Report, 2004) 8–11 <http://www.unicef.org/publications/files/who_unicef_watsan_midterm_rev.pdf>.

³ P B Anand, 'Right to Water and Access to Water: An Assessment' (2007) 19 *Journal of International Development* 511, 516.

⁴ WHO and UNICEF Joint Monitoring Programme for Water Supply and Sanitation, *Progress on Drinking Water and Sanitation: Special Focus on Sanitation* (WHO/UNICEF Report, 2008) 24 <http://www.who.int/water_sanitation_health/monitoring/jmp2008.pdf>. Interestingly, assessments of the progress towards *Millennium Development Goals* targets for drinking water are now benchmarked on data from 1990, although nothing in the *United Nations Millennium Declaration* implies that efforts towards the goals set therein were initiated in 1990: at 38. Moreover, Anand indicates that: 'It is highly unlikely that the development target, of halving the proportion of people not having access to adequate sanitation will be achieved': P B Anand, *Millennium Development Goal 7 — An Assessment of Progress with respect to Water and Sanitation: Legacy, Synergy, Complacency or Policy?* (World Institute for Development Economics Research, United Nations University, Research Paper No 2006/01, 2006) 1 <<http://www.eldis.org/vfile/upload/1/document/0708/DOC22213.pdf>>.

⁵ WHO, *Celebrating Water for Life: The International Decade for Action 2005–2015* (WHO Report, 2005) 20 <http://www.who.int/water_sanitation_health/2005advocacyguide.pdf>.

⁶ For a legal perspective on the failures of the Water and Sanitation Decade, see, eg, M Wray Witten, 'Institutional Failure in the Water and Sanitation Decade' (1991) 2 *Colorado Journal of International Environmental Law and Policy* 277.

⁷ Committee on Economic, Social and Cultural Rights, *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: General Comment 15: The Right to Water*, UN ESCOR, 29th sess, Agenda Item 3, UN Doc E/C.12/2002/11 (20 January 2003) [24]. This document is the epitome of this shift towards a human rights-based approach to water and sanitation.

the acceleration of efforts towards achieving access to water and the recognition that freshwater for domestic purposes is a legal entitlement rather than a commodity or service provided on a charitable basis.⁸

The human rights-based approach has been the object of efforts aimed at conceptual clarification.⁹ However, the usefulness of this approach is threatened by confusion and inconsistency resulting from the multiplicity of definitions provided by international development agencies, as well as the blurring of boundaries dividing international and national legal regimes, notably through inadequate distinctions between water rights, the right to water, rights-based approaches and a human rights-based approach.¹⁰

In this context, Knut Bourquain's book, *Freshwater Access from a Human Rights Perspective*, offers a most welcome and timely contribution through its efforts to clarify important aspects of the central issue in current water management practice: how can equity be attained?¹¹ Bourquain's core tenet is that the human rights-based approach ensures that all water management systems guarantee the basic human need for water, and that international water law fails to achieve this objective.¹² He adopts a purely exegetical approach to legal analysis — focusing on global international water law and general international human rights law — based upon the premise that water scarcity is a global concern and international law is the appropriate legal forum to address global issues.¹³ Bourquain's aim is to identify the scope of the human rights-based approach, to clarify its conceptualisation and to suggest improvements to the body of international law studied to better secure the fulfilment of basic

⁸ WHO, *The Right to Water* (WHO Report, February 2003) 9 <http://www.who.int/water_sanitation_health/rtwrev.pdf>.

⁹ See, eg, Emilie Filmer-Wilson, 'The Human Rights-Based Approach to Development: The Right to Water' (2005) 23 *Netherlands Quarterly of Human Rights* 213.

¹⁰ According to Andrea Cornwall and Celestine Nyamu-Musembi, 'Putting the "Rights-Based Approach" to Development into Perspective' (2004) 25 *Third World Quarterly* 1415, 1431:

There is considerable slippage in the discourse of international agencies between talk of 'human rights and development', 'human rights approach to development', 'rights-based approach to development' and so on. Different language may mask broadly similar purposes; similar terms may come to carry vastly different meanings.

For an example of this blur, see Paul Gready, 'Rights-Based Approaches to Development: What Is the Value-Added?' (2008) 18 *Development in Practice* 735. Many publications from international development agencies in the water sector indistinctly interchange 'human rights-based approach' and 'rights-based approach'. This semantic slip has significant consequences in a context where support for a rights-based approach might be cynically construed as support for the rule of law in national jurisdictions where the existing legal framework for water rights marginalises women and the poor.

¹¹ Bourquain structures his *problématique* by acknowledging the water crisis (at 1); advancing that deficient freshwater access does not reflect a 'lack of water or exaggerated demand but documents primarily a problem of allocation' (at 5); and stating that 'irrespective of the water management strategy a society may choose, it will definitely be in need for a corrective in order to assure people's basic need for freshwater' (at 9): Knut Bourquain, *Freshwater Access from a Human Rights Perspective: A Challenge to International Water and Human Rights Law* (2008).

¹² *Ibid* 12, 14.

¹³ While both have their value and importance, it is interesting to compare Bourquain's very horizontal approach, centred on international law, to another PhD thesis published around the same time: Jenny Grönwall, *Access to Water: Rights, Obligations, and the Bangalore Situation* (2008). Grönwall also focuses on the legal dimension of water access for domestic purposes but in a vertical perspective, ranging from a theoretical debate on the Hohfeldian typology to the factual situation the people of Bangalore face everyday.

individual water needs.¹⁴ The work progresses much in the form of a PhD dissertation, reviewing, albeit not completely, the range of relevant primary and secondary sources on the topics addressed.¹⁵

First, the law of international watercourses is assessed from the viewpoint of individual access to water.¹⁶ Bourquain, through his analysis of the *Convention on the Law of the Non-Navigational Uses of International Watercourses* ('*UN Watercourses Convention*'),¹⁷ international customary water law, and, more specifically, the principles of equitable and reasonable utilisation and no harm, argues that these are not adequate to protect basic individual water needs.¹⁸ Bourquain suggests that 'international water law suffers from a general lack of priorities',¹⁹ and finds that 'the provisions [of the *UN Watercourses Convention*] do not obligate states to provide for freshwater access'²⁰ — assertions that may be challenged by international water law experts. Indeed, for an international water lawyer, one would find it difficult to agree with many general assumptions and assertions in Chapter 2.²¹ The initial focus on and summary of the *UN Watercourses Convention* and customary water law appears forced. This area of public international law must be considered within its proper perspective — it hails from the *UN Charter*'s higher-level objectives of maintaining 'international peace and security', and achieving 'international co-operation'.²² Thus, through treaty and state practice, rules evolved that came to govern trans-boundary waters traversing national borders. The core focus in this area of public international law has been the peaceful management of shared resources — as complementary to other rules that might evolve under the law of nations, such as 'promoting and encouraging respect for human rights'.²³ Thus, the origins of the

¹⁴ Bourquain, above n 11, 14–15.

¹⁵ The secondary source materials on public international law and international water law can be supplemented — the discourse on water security, good water governance and the links between international water law and national water law could use more depth: see, eg, Patricia Wouters, 'Water Security: What Role for International Water Law' in Felix Dodds and Tim Pippard (eds), *Human and Environmental Security: An Agenda for Change* (2005) 166.

¹⁶ Bourquain, above n 11, ch 2.

¹⁷ While the Convention is not yet in force, it was adopted by the UN General Assembly on 21 May 1997: GA Res 51/229, UN GAOR, 51st sess, 99th plen mtg, Agenda Item 144, UN Doc A/RES/51/229 (8 July 1997).

¹⁸ Bourquain, above n 11, 50–4. This analysis has been performed on many occasions: in addition to the sources cited by Bourquain, see especially Alistair Rieu-Clarke, *International Law and Sustainable Development: Lessons from the Law of International Watercourses* (2005) 111–15; Ibrahim Kaya, *Equitable Utilisation: The Law of the Non-Navigational Uses of International Watercourses* (2003) 115–19. The interest and novelty of Bourquain's analysis reside in the fact that the author adopts a human rights-based viewpoint, rather than the usual international water law approach.

¹⁹ Bourquain, above n 11, 31.

²⁰ *Ibid* 43.

²¹ For example, Chapter 2 begins: 'International water law is deemed to regulate and manage the use of water resources, to adjust competing uses and to deliver measures of mediation in case of conflict': *ibid* 17. It is difficult to believe that a public international law expert in the field of water would describe the discipline in such a way. The approach suffers from a bluntness that misses out nuances and depth, and perhaps simplifies an area that is more complex. It is this approach that suggests that the work is a published PhD dissertation, rather than a monograph. Nonetheless, the work does invite the reader to reflect on a number of issues.

²² *Charter of the United Nations*, art 1.

²³ *Ibid* art 1(3).

discourse for each of these areas of public international law were quite distinct and must be understood more deeply within this context.

In the following chapters, Bourquain identifies and examines the characteristics, functions and limits of the human rights-based approach within the context of international law.²⁴ This part of the book, which might be perceived as Bourquain's primary reflection on the human rights-based approach to water, notably provides an outline of the scope and justification of positive state obligations in international law to ensure the promotion of equal access to existing water resources. The rather detailed analysis focuses mainly on the *International Covenant on Economic, Social and Cultural Rights*²⁵ and the *International Covenant on Civil and Political Rights*,²⁶ and seeks to identify core rights unaddressed by international water law, such as the rights to life, an adequate standard of living, health, nondiscrimination and equal treatment. These might serve to fill some of the gaps left open by international water law but, upon review, appear unable to address adequately the requirements of a fully-fledged human rights-based access to freshwater.²⁷

As a result of the careful delineation of the scope of study and the adoption of an orthodox position for the advocacy of human rights in international law, *Freshwater Access from a Human Rights Perspective* offers some interesting insights.²⁸ Major conceptual issues are covered, such as the application of human rights instruments to non-state actors;²⁹ human rights universalism and pluralism or cultural relativism;³⁰ and extraterritorial state obligations concerning the basic human need for water.³¹ This bolsters Bourquain's suggestions for improving international law with respect to a human rights-based approach to freshwater access, which can be summarised as follows: increasing the integration between human rights law and international water law; establishing new international treaty law such as a comprehensive Convention for Freshwater; specifying and developing the human rights-based approach to freshwater access by furthering the interpretation of existing law; and supplementing international law with 'soft

²⁴ Ibid ch 3.

²⁵ Opened for signature 19 December 1966, 993 UNTS 3 (entered into force 3 January 1976) ('ICESCR').

²⁶ Opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

²⁷ See, eg, Bourquain, above n 11, 198–203. On this issue, other sources of law examined are *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990); *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981); customary international human rights law; and general principles of international law.

²⁸ The only notable methodological issue that could be raised pertains to the order of Chapters 2 and 3. Why not define the elements of the human rights-based approach to freshwater access (ch 3) and then use the resulting conceptual standards to assess international water law (ch 2)? One possible way of explaining why this switch was not made is that it would have implied defining individual access to freshwater in more than just purely self-referential and abstract terms entirely contained in the field of international human rights law, thereby threatening to vastly broaden the scope of study.

²⁹ Bourquain, above n 11, 106–10.

³⁰ Ibid 111–14.

³¹ Ibid 192–7.

law' and policy instruments to enhance the potency of the human rights-based approach to water.³²

A critical evaluation of *Freshwater Access from a Human Rights Perspective* reveals the underlying recognition of law's fundamental role in addressing the water crisis:

Irrespective of the water management strategy a state or (on the transboundary level) riparian states resolve to adopt, it needs a stringent body of rules as well as capable institutions to implement the strategy and, hence, to execute efficient political and administrative control over the water sector. A legal regime can provide for a coherent framework of enforceable rights and obligations.³³

However, practical considerations such as the implementation of law, effectiveness and compliance are only briefly acknowledged and not discussed.³⁴ This proves to be a significant shortcoming of the work — Bourquain's approach in demonstrating the importance and materiality of a human rights-based approach to water in international law neglects the most critical area of analysis: effectiveness.³⁵ Although terms such as 'effectiveness' and 'efficiency' are used throughout (rather interchangeably), neither concept is defined nor studied from an operational standpoint or theoretical perspective, but simply assumed as a positivist premise.³⁶ Such an approach increases the focus and coherence of the arguments advanced but also avoids crucial questions that could be raised,

³² Ibid ch 5. With respect to fostering the human rights-based approach to water by establishing trans-boundary water management institutions (at 225–8), the generality of the suggestion in an area of international water law that is tremendously detailed and dense significantly detracts from its usefulness. On this issue, Dante Caponera, 'Patterns of Cooperation in International Water Law: Principles and Institutions' (1985) 25 *Natural Resources Journal* 563–88 provides a good, general, but dated introduction. Also to be noted, the suggestion regarding new international treaty law has already been fulfilled in part, as the UN General Assembly adopted by consensus the *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights* on 10 December 2008: GA Res 63/117, UN GAOR, 63rd sess, 66th plen mtg, Agenda Item 58, UN Doc A/RES/63/117 (5 March 2009).

³³ Bourquain, above n 11, 11. See generally Patricia K Wouters et al, 'Sharing Transboundary Waters — An Integrated Assessment of Equitable Entitlement: The Legal Assessment Model' (International Hydrology Programme, United Nations Educational, Scientific and Cultural Organization Technical Document in Hydrology No 74, 2005) <<http://unesdoc.unesco.org/images/0013/001397/139794e.pdf>>.

³⁴ See, eg, Bourquain, above n 11, 14 (fn 50), 205–6. Bourquain's suggestions to improve the international law with respect to the human rights-based approach to water in Chapter 5 focus more directly on such issues, but implementation, compliance and effectiveness are not included as substantial constraints in the exploration of the scope of the human rights-based approach. On the contrary, issues such as resources required from states to realise the basic human access to water are considered insignificant: see especially at 104 and the preceding discussion. The stance with respect to these issues can be accepted if it remains constant throughout the book. However, Bourquain's critique of international water law with respect to the human rights-based access to water focuses particularly on implementation deficiencies: at 42, 52–3. This grates, given the relative strength of the implementation of international water law compared to that of social human rights in *ICESCR*.

³⁵ See, eg, Bourquain, above n 11, 103–4, 107–8. This part of the text aims to establish the existence of compelling positive state obligations with respect to social rights in international human rights law.

³⁶ Tellingly, neither concept is included in the Index.

notably by considering a significant doctrinal trend which persuasively argues that the effectiveness of international human rights treaties is uncertain.³⁷

This leads to additional considerations on the delineation of the domain covered by *Freshwater Access from a Human Rights Perspective*. One challenge in the field of human rights law relates to the inherent tension between an aspiration towards universalism and contextualisation.³⁸ Although this challenge is resolved by Bourquain through a positivist focus on the universal legal validity of general international human rights law, its acknowledgment seems unavoidable.³⁹ Another ubiquitous source of tension in the debate pertaining to the human rights-based approach to water stems from the ambiguous relationship between human rights and legal positivism.⁴⁰ Although specific aspects of this tension are addressed, the underlying challenge caused by the extension of the scope of human rights to philosophy, ethics and policy is not tackled by Bourquain.⁴¹ On the one hand, Bourquain's reflections on the characteristics, function and value of a human rights-based approach to freshwater access (in comparison to policy concepts and soft law) provide a useful and timely differentiation that can resolve some of the confusion created by inconsiderate intrusions of international development in the field of international human rights law. However, claims that the value of the human rights-based approach relies on the provision of rights to make state commitments justiciable still alternate with the assertion that a human rights-based approach to freshwater access also automatically acts as a political concept for water allocation and management.⁴²

By not expressly addressing the underpinnings of these challenges, it is possible to discard the human right to a clean environment and the right to development as irrelevant to a human rights-based access to water because they are not recognised as international legal norms. It also justifies avoiding detailed discussion on regional human rights treaties that could have an impact on basic human access to water. Both omissions exclude issues of significant relevance to

³⁷ See, eg, Oona A Hathaway, 'Do Human Rights Treaties Make a Difference?' (2002) 111 *Yale Law Journal* 1935; Émilie M Hafner-Burton, Kiyoteru Tsutsui and John W Meyer, 'International Human Rights Law and the Politics of Legitimation: Repressive States and Human Rights Treaties' (2008) 23 *International Sociology* 115.

³⁸ This problem is particularly relevant in the context of progressively realised international socioeconomic rights, where the definition of core obligations is a pressing question and justiciability is a priori domestic. According to Katharine G Young, 'The Minimum Core of Economic and Social Rights: A Concept in Search of Content' (2008) 33 *Yale Journal of International Law* 113, 163:

This is because the insurmountable problem for the notion of core obligations is that the particular forms of duties are intrinsically polycentric and cannot be subject to a definitive ranking; that is, the exercising of splitting each cluster into the constituent Hohfeldian elements, and assigning particular clusters as 'core,' is ultimately bound to come undone.

³⁹ See, eg, Bourquain, above n 11, 92, 106, 112–13.

⁴⁰ According to Amartya Sen, 'Human Rights and the Limits of Law' (2006) 27 *Cardozo Law Review* 2913, 2915: 'Is the practical relevance of human rights entirely parasitic on legislation that has actually occurred? This would be hard to accept'.

⁴¹ One insufficient categorisation pertains to the reliance on a differentiation between natural human rights, which would be binding for states because they relate to fundamental human interests (for instance, the rights to life and freedom), and other human interests that need the recognition of states to gain the status of human rights in international law: see Bourquain, above n 11, 80–1. Such a differentiation can be contested from almost any angle.

⁴² See Bourquain, above n 11, 58, 114–15.

the human rights-based access to water.⁴³ Given that these exclusions rely on a delineation of the scope of study that seems debatable at least in part, addressing the impact of human rights not included in general international human rights law on basic human access to water might have been adequate. On the other hand, doing so would have meant confronting what could be perceived as the critical challenges still faced by the human rights-based access to water: the uncontrolled and unmanageable extension of the human rights-based approach to all aspects of water governance;⁴⁴ and the necessary prioritisation between human rights with respect to water.

In conclusion, *Freshwater Access from a Human Rights Perspective* provides an opportunity to revisit in a more robust way the essential aspects of the current debate on equity in the allocation of water resources.⁴⁵ Given the urgent reality of the water crisis, one only wonders if it is justified to refrain from addressing important practical issues based on imperatives of theoretical coherence. However, the work serves as an invitation to more debate in this complex area.

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⁴³ For example, according to *The Right to Development*, GA Res 54/175, UN GAOR, 54th sess, Agenda Item 116(b), UN Doc A/RES/54/175 (15 February 2000) [12(a)], the right to clean water is a human right, fundamental to the full realisation of the right to development. See also *Zander v Sweden* (1993) Eur Court HR (ser A) No 279B, which demonstrates that the right to property under art 6(1) of the *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) can protect the basic human access to water.

⁴⁴ The assertion that ‘the set up of institutions is a means to give human rights effect in legal reality’, followed by the suggestion that ‘[e]quipped with respective powers, transboundary water resource management institutions are able to transform international — and national — human rights obligations of states into water management politics’ (at 227) and the discussion that follows shows a blatant disregard for state practice in both international water law and human rights practice. In this regard, a more rigorous survey of how trans-boundary river basin organisations have functioned, and equally, how international human rights bodies have functioned, would add credibility to these recommendations: see, eg, Patricia Wouters, ‘Universal and Regional Approaches to Resolving International Disputes: What Lessons Learned from State Practice?’ in *The International Bureau of the Permanent Court of Arbitration* (ed), *Resolution of International Water Disputes* (2003) 111.

⁴⁵ Dan Tarlock and Patricia Wouters, ‘Are Shared Benefits of International Waters an Equitable Apportionment?’ (2007) 18 *Colorado Journal of International Environmental Law* 523.

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