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COMMENTARY

THE LEGAL RESPONSE TO THE WORLD'S WATER CRISIS: WHAT LEGACY FROM THE HAGUE? WHAT FUTURE IN KYOTO?

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Water is vital for the life and health of people and ecosystems and a basic requirement for the development of countries, but around the world women, men and children lack access to adequate and safe water to meet their most basic needs. Water resources, and the related ecosystems that provide and sustain them, are under threat from pollution, unsustainable use, land-use changes, climate change and many other forces.

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1. *Second World Water Forum*, Declaration of the Hague, *Ministerial Declaration of the Hague on Water Security in the 21st Century*, available at <http://www.worldwaterforum.net/index2.html> (last visited June 11, 2001) [hereinafter Ministerial Declaration].

I. WORLD WATER CRISIS

The organizers of the second World Water Forum, held at the Hague, March 17 to 22, 2000, are to be congratulated for successfully focusing the international community's attention on the world's water problems. That a serious water crisis will occur appears certain: nearly 450 million people in 29 countries face water shortage problems now and this is expected to increase to 2.5 billion people by 2050.² In addition, over a billion people do not have access to safe drinking water and sanitation is minimal for half the world's population. Responding to this compelling challenge, politicians from around the world adopted a declaration, entitled *Ministerial Declaration of the Hague on Water Security for the 21st Century*, advocating integrated water resources management.⁴ Supplemental to this, the *World Water Vision* moves forward with the assistance of a new institutional mechanism, the *Framework for Action*.⁵ While we applaud this effort, one important factor is overlooked and under-utilized in the formulation of the global response: water law.

II. RESPONDING TO THE CRISIS

Approximately 6000 people converged on the Hague, including 159 delegations for the parallel Ministerial meeting. The attendees were spoiled for choice when it came to papers, presentations, and entertainment. Unfortunately, the quality of some of these presentations left much to be desired and detracted from the overall, general high calibre of the meeting. For example, the World Water Council's ("WWC") World Water Vision Report, *Making Water Everybody's Business*,⁶ and the World Commission for Water's ("WCW") World Water Vision Report, *A Water Secure World*,⁷ both failed to accurately reflect the international law governing transboundary watercourses. Green Cross International's *National Sovereignty and International Watercourses* report somewhat mitigated this shortcoming. The WCW commissioned the report, which not only favourably refers to the United Nations ("UN") 1997 Watercourses Convention, but also

2. Press Release, World Water Council, The World Water Gap: World's Ability to Feed Itself Threatened by Water Shortage (Mar. 20, 1999), available at <http://www.worldwatercouncil.org/press.htm> (last visited June 11, 2001).

3. Ministerial Declaration, *supra* note 1.

4. *Id.*

5. GLOBAL WATER PARTNERSHIP, TOWARDS WATER SECURITY: A FRAMEWORK FOR ACTION (2000), available at <http://www.gwpforum.org/Library.htm> (last visited June 11, 2001) [hereinafter FRAMEWORK FOR ACTION].

6. WORLD WATER COUNCIL, WORLD WATER VISION: MAKING WATER EVERYBODY'S BUSINESS (2000), available at <http://www.worldwatervision.org/vision.htm> (last visited June 11, 2001).

7. World Water Council, *Reports*, A Water Secure World, at <http://www.worldwatercouncil.org/reports.htm> (last visited June 11, 2001).

accurately discusses relevant international water law.⁸ While it is difficult to imagine a report adding anything innovative to the state sovereignty issue, its strength stems from reference to positive case studies and succinctly accurate statements on international water law.⁹ The report correctly emphasizes that “the management of international watercourses should be determined less by the traditional notion of ‘restricted sovereignty’ than by a positive spirit of co-operation and effective interdependence.”¹⁰

The Global Water Partnership’s *Framework for Action* document, while incomplete in its discussion of international water law, contains positive elements that hold hope for the future.¹¹ For example, it rightly emphasizes the need for legal development and regulatory frameworks for the local, regional, and international implementation of water security.¹² The *Framework for Action* also calls for the development of institutional mechanisms and shared waters agreements in all major river basins by the year 2015.¹³ The document aligns itself with the recommendations in the Green Cross Sovereignty Report, which calls on States to actively pursue the adoption of both the UN Watercourses Convention and the equitable and reasonable utilization principle.¹⁴ However, some obvious confusion exists in the *Framework for Action* that is not present in the Green Cross report, such as the former’s reference to the “no-harm rule” as the primary rule governing international waters.¹⁵ International water law entitles and obligates riparian States to use their international watercourses equitably and reasonably. This rule is codified in Article 5 of the UN Watercourses Convention.¹⁶ This is not a “compromise” principle, as the *Framework for Action* states,¹⁷ but a codified rule of customary international law.

8. GREEN CROSS INTERNATIONAL, NATIONAL SOVEREIGNTY AND INTERNATIONAL WATERCOURSES (2000).

9. *Id.* at 65–98. Case studies discussed include the Ganges, the Aral Sea, the Senegal, the Danube, the Mekong, the Mahakali, the Tigres–Euphrates, and the Nile Basins.

10. *Id.* at 18.

11. FRAMEWORK FOR ACTION, *supra* note 5.

12. *Id.* at 31–35.

13. GLOBAL WATER PARTNERSHIP, TOWARDS WATER SECURITY: A FRAMEWORK FOR ACTION, EXECUTIVE SUMMARY (2000), available at <http://www.gwpforum.org/Library.htm> (last visited June 11, 2001) [hereinafter FFA EXECUTIVE SUMMARY]. “Mechanisms between riparian states in all major river basins should be developed and shared waters agreements formulated by 2015.” *Id.* at 4.

14. FRAMEWORK FOR ACTION, *supra* note 5, at 33.

15. *Id.* at 32.

16. United Nations: Convention on the Law of the Non-Navigational Uses of International Watercourses, May 21, 1997, U.N. Doc. A/51/869 (1997), reprinted in 36 I.L.M. 700, available at <http://www.un.org/law/ilc/texts/nnavfra.htm> (last visited June 11, 2001) [hereinafter 1997 UN Watercourses Convention]. The United National General Assembly passed the resolution containing the 1997 UN Watercourses Convention by a vote of 103 in favour, 3 against and 27 abstentions.

17. FFA EXECUTIVE SUMMARY, *supra* note 13.

III. MINISTERIAL DECLARATION: "WATER SECURITY IN THE 21ST CENTURY"

One of the most important documents from the Hague meeting is the Ministerial Declaration.¹⁸ This instrument identifies the main challenges to achieving water security: meeting basic needs; securing food supply; protecting ecosystems; sharing water resources; managing risks; valuing water; and governing water wisely.¹⁹ Endorsing the "water security" goal, the Declaration identifies, as a primary concern, the need to share water resources "through sustainable river basin management or other approaches."²⁰ The Ministers pledged to set targets and strategies for attaining water security, but, unfortunately, did not adopt targets at the conference.

Interestingly, the Declaration commits governments to working with all stakeholders to develop rules and procedures addressing liability and compensation for damage to water resources resulting from dangerous activities.²¹ The Declaration lists issues the international community must confront at the local, national, regional, and international levels. It calls on the Global Environmental Facility to expand work on national management plans, which have a beneficial impact on international waters.²² However, one major shortcoming of the Declaration is its failure to mention the UN Watercourses Convention. In addition, the Declaration fails to endorse the WCW's and the *Framework for Action's* vision. Some of the delegates attributed these shortcomings to a lack of authorization from their governments. Delegates received both reports only at the meeting; they did not have adequate time to consult with their governments.

IV. WATER LAW: WHAT RELEVANCE?

A number of possible explanations exist for the fact that water law was either absent, inaccurately represented, or had limited presence at the meeting: (i) it bears little or no relevance to the world's water problems; (ii) it is considered too adversarial or controversial to adopt as an integral part of the solution; or (iii) it is not clearly understood. From our experience, the latter appears to be the primary reason.²³ Hopefully, the international community can overcome this obstacle before the meeting of the Third World Water Forum, scheduled for the year 2003 in Kyoto, Japan.²⁴ The January 2002 meeting in Bonn²⁵

18. Ministerial Declaration, *supra* note 1.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. From meetings with Donor agencies, and consultations with governments, as well as discussions with participants of the Dundee annual international and national water law and policy seminar, a concern of public and private sector stakeholders has been a lack of information and understanding of international water law.

24. See The 3rd World Water Forum, available at <http://www.worldwaterforum.org>

and the 2002 mid-year Rio-plus-10 meeting may offer choice opportunities to correct the inadequacies of the Hague.

One move in the right direction is the recognition of the role that water law and lawyers can play in the management of the world's water resources. The Hague meeting underscored the importance of such recognition when it announced that this year's Stockholm Water Prize was awarded to South Africa's Professor Kader Asmal, an eminent lawyer, for his work as the Minister of Water Resources. Professor Asmal was the driving force behind both the adoption of the comprehensive water code in South Africa and the drafting and completion of the Southern Africa Development Community (SADC) Protocol on Shared Watercourses. Professor Asmal has also brought water to more than three million South Africans during his tenure as a minister.

Water law, whether national or international, is relevant at all stages of water resource development and management. One can identify the following three critical stages:

1. **Legal entitlement.** Authorities must identify all stakeholders and devise a mechanism for securing their entitlement. Without these two elements, one cannot enforce access to the resource.
2. **Framework for allocation.** Once the appropriate authorities decide what uses to permit, they must devise a framework for allocation. Ideally, this framework must be flexible, yet predictable, and capable of enforcement.
3. **Compliance, dispute avoidance and dispute settlement.** Once the authorities establish a framework for allocation, it is important that they put mechanisms in place to monitor and enforce compliance with that regime. Also, mechanisms for avoiding and peacefully settling disputes are of the utmost importance.

For each stage, it is critical that the implementing agency adopt an interdisciplinary approach. Hydrologists, engineers, and economists might identify option ranges for the indicators of each stage, but a legal framework will provide the parameters for implementation and ensure the arrangement's stability.

V. THE UN WATERCOURSES CONVENTION: WHAT VIRTUES?

Some of the documents, presentations, and discussions at the World Water Forum criticized the UN Watercourses Convention on numerous counts. Many of these criticisms were unfounded and could serve only to undermine the global attempt to ensure the peaceful

(last visited June 11, 2001).

25. Dublin + 10, referring to the to Dublin Principles adopted in 1992, which advocate integrated water resource management – IWRM. The Dublin Principles are available at <http://www.dundee.ac.uk/law/water> (last visited June 11, 2001). For information about the international freshwater conference discussing the Dublin principles, see <http://www.water-2001.de> (last visited June 25, 2001). For information about the Rio + 10 conference, see <http://www.johannesburgsummit.org> (last visited June 25, 2001).

sharing and protection of transboundary waters. The Convention, adopted on May 21, 1997, was open for signature until May 20, 2000.²⁶ Presently, it has fifteen signatories and seven ratifications. Contrary to the views of many noted "experts," the Convention did not require thirty-five ratifications by May 20, 2000 in order to come into force. As with many other global international treaties, the UN Watercourses Convention will come into force upon acquiring the necessary number of ratifications.²⁷ This could occur at any time and, in fact, is a feasible possibility. However, even if the Watercourses Convention never enters into force, it already has generated considerable influence on States. This influence is apparent in the drafting of new agreements or the diplomatic negotiations between States regarding their shared watercourses. For instance, the drafters of the Southern African Development Community Protocol on Shared Watercourses have rewritten the protocol to include the main provisions of the Convention.²⁸ Additionally, the International Court of Justice underscored the Convention's importance when it referred to a number of its provisions within the *Gabcikovo-Nagymaros* case, a dispute between Hungary and Slovakia over the Danube.²⁹ In any event, many of the substantive rules contained in the Convention reflect customary international law, which binds all States regardless of entry into force of the UN Convention.

Another ill-founded criticism voiced at the Hague meetings was that the Convention failed to meet environmental imperatives, including the new mantra of "sustainable development." The Convention's purpose is to provide a framework for States to define their relations concerning transboundary waters, not to design an environmental conservation package that includes international waters as part of the scheme. In fact, the principle of equitable and reasonable use, along with the mechanisms for operationalizing it, incorporates the notion of sustainable development.³⁰ In addition, this provision allows decision makers to consider all relevant factors in the overall assessment of what qualifies as a legitimate use. It is clear that sustainable development and environmental protection and conservation are relevant factors to be considered in particular circumstances.

The suggestion that the Convention is weak because it does not require that all existing watercourse agreements be consistent with its

26. 1997 UN Watercourses Convention, *supra* note 16, art. 34.

27. 1997 UN Watercourses Convention, *supra* note 16, art. 36.

28. Protocol on Shared Watercourse Systems in the Southern African Development Community (SADC) Region, *available at* <http://www.sadcwscu.org.ls/protocol/protocol.htm> (last visited June 11, 2001).

29. Case Concerning the Gabcikovo-Nagymaros Project (Hungary/Slovakia) (Sept. 25, 1997), *reprinted in part in* 37 I.L.M. 162 (1997), case excerpts *available at* <http://www.icj.law.gla.ac.uk> (last visited June 11, 2001).

30. Article 5 of the 1997 UN Watercourses Convention uses the term "sustainable utilization." Article 24.2.a requires a watercourse State to consult to "plan the sustainable development" of an international watercourse.

provisions fails to recognize the consequences of such a proposition. This requirement would declare some 3000 existing watercourse agreements void upon the Convention's adoption, resulting in unnecessary chaos and confusion. Moreover, it is unlikely that the General Assembly of the United Nations in May 1997 would have adopted the Convention if it had included provisions to this effect. The Convention provides a model upon which to base negotiations for change—relevant to agreements requiring modification.

The strongest element of the Convention is its procedural mechanisms. These mechanisms provide predictable and pragmatic guidelines by which States can lawfully develop their international waters. This is especially important for States that share an international watercourse for which no agreement exists. Participation in the UN Watercourses Convention could enhance the opportunity for co-operation as well as attract international financing for the development of the water resources within the entire basin.

Although the UN Watercourses Convention is not a perfect instrument, it goes a long way toward providing States with a useful framework that facilitates the peaceful development of shared watercourses through substantive and procedural rules. On the substantive side, it places all States on a level playing field. This permits each state to put forth its case based on all factors relevant to its particular needs, emphasizing the equality of riparian States' rights.³¹ It also includes protective provisions regarding the ecosystem.³² On the procedural side, the Convention has many strengths. It offers States pragmatic mechanisms, including exchange of information, consultations, establishment of joint mechanisms, notification for planned measures, and other means aimed at avoiding disputes and attaining agreeable solutions.³³

VI. THE WAY FORWARD: EMBRACING WATER LAW AS PART OF THE RESPONSE

The Third World Water Forum will take place in Kyoto, Japan, in 2003, most likely following a format similar to the Hague meeting. Hopefully, water law will play a more prominent role leading up to the next meeting. To achieve water security, it is important to follow an approach involving "co-operation between different kinds of water users, and between those sharing river basins and aquifers, within a framework that allows for the protection of vital ecosystems from

31. 1997 UN Watercourses Convention, *supra* note 16, arts. 5, 6. This does not necessarily mean equality of share of the waters. For interpretative commentary, see Report of the International Law Commission on the Work of its Forty-sixth Session, U.N. GAOR, 49th Sess., Supp. No. 10, U.N. Doc. A/49/10 (1994), reprinted in Y.B.I.L.C., vol. II, pt. 2, at 88 (1994).

32. 1997 UN Watercourses Convention, *supra* note 16, arts. 7, 20–24.

33. 1997 UN Watercourses Convention, *supra* note 16, arts. 3, 4, 8, 9, 11–19, 30, 32, 33.

pollution and other threats.”³⁴ The means for achieving such cooperation will originate from a number of sources, with politics playing an important role at all stages. However, once authorities agree upon the parameters for cooperation, water law is essential to sustain the cooperation.

Globalization marks the current era, with transnational acts of global commerce blurring national boundaries. What are the rules of law that apply to transactions in this arena that affect water resources? At the national level, the legislature needs to resolve similar issues when revising national legislation. Equally, law plays an important role in private sector participation and privatization. Each of these very different scenarios impacts directly on water resources; water law could determine the terms on which stakeholders are ensured equitable and sustainable access in all events.

Good practices concerning integrated water resources management require input from all disciplines, including the law. As one authority put it, “to achieve water security, water must be made *everybody’s* business.”³⁵

34. FFA EXECUTIVE SUMMARY, *supra* note 13, at 1.

35. The Forum Chairman, HRH The Prince William of Orange, Opening Speech at World Water Forum (Mar. 17, 2000).