
Book Reviews

Edith Brown Weiss. **International Law for a Water-Scarce World**. Leiden: Martinus Nijhoff Publishers, 2013. Pp. 344. €150. ISBN: 9789004250406.

Laurence Boisson De Chazournes. **Fresh Water in International Law**. Oxford: Oxford University Press, 2013. Pp. 288. £70. ISBN: 9780199565085.

Pierre Thielbörger. **The Right(s) to Water. The Multi-Level Governance of a Unique Human Right**. Pp. 236. Heidelberg: Springer, 2014. € 103.99. ISBN: 9783642339073.

Water has been a challenging issue over the centuries. From questions of national boundaries and navigation, quite common in the past, to the development of a human right to water, this essential element for human life has always spurred debate among international lawyers, economists, political scientists, geographers, and anthropologists. The reason may be found in the scarcity of water, a phenomenon which affects both developed and developing countries. Much has been written on the topic, but the three books under review significantly contribute to a critical analysis of some pertinent legal issues related to water.¹ The title of each monograph reflects

¹ It is impossible to mention all the outstanding works that have been written on water and on watercourses. As far as the human right to water is concerned see, *inter alia*: Gleick, 'The Human Right to Water', 1 *Water Policy* (1998) 5; McCaffrey, 'The Human Right to Water', in E. Brown Weiss, L. Boisson de Chazournes, and N. Bernasconi-Osterwalder (eds), *Fresh Water and International Economic Law* (2005), at 93; Dubuy, 'Le droit à l'eau potable et à l'assainissement et le droit international', 116 *RGDIP* (2012) 275; Bernstein, 'Freshwater and Human Population: a Global Perspective', in K.M. Krchnak (ed.), *Human Population and Freshwater Resources: U.S. Cases and International Perspectives* (2002), at 149; Fitzmaurice, 'The Human Right to Water', 18 *Fordham Environ'tal L Rev* (2007) 537; Brown Weiss, 'The Evolution of International Water Law', 331 *RCADI* (2007) 167; M. Mancisidor (ed.), *The Human Right to Water: Current Situation and Future Challenges* (2008); Marrella, 'On the Changing Structure of International Investment Law: The Human Right to Water and ICSID Arbitration', 12 *Int'l Community L Rev* (2010) 335; Tanzi, 'Reducing the Gap between International Water Law and Human Rights Law: The UNECE Protocol on Water and Health', 12 *Int'l Community L Rev* (2010) 267; Gavouneli, 'A Human Right to Groundwater', 13 *Int'l Community L Rev* (2011) 305; A. Cahill-Ripley, *The Human Right to Water and its Application in the Occupied Palestinian Territories* (2011); H. Smets (ed.), *Le droit à l'eau potable et à l'assainissement, sa mise en oeuvre en Europe* (2011); SFDI, *L'eau en droit international, Colloque d'Orléans* (2011); de Albuquerque, 'Water and Sanitation are Human Rights: Why does it Matter?', in L. Boisson de Chazournes, C. Ler, and M. Tignino (eds), *International Law and Freshwater: The Multiple Challenges* (2013), at 48; I.T. Winkler, *The Human Right to Water: Significance, Legal Status and Implications for Water Allocations* (2012).

In relation to the law applicable to watercourses see, *inter alia*: Caffish, 'Règles générales du droit des cours d'eau internationaux', 219 *RCADI* (1989) 9; J. Bruhacs, *The Law of the Non-Navigational Uses of International Watercourses* (1993); Caffish, 'The Law of International Waterways and Its Sources', in R.St.J. Macdonald (ed.), *Essays in Honour of Wang Tieya* (1993), at 115; A. Tanzi and M. Arcari (eds), *The United Nations Convention on the Law of International Watercourses: A Framework for Sharing* (2001); S. McCaffrey, *The Law of International Watercourses: Non-Navigational Uses* (2007); L. Boisson de Chazournes and S.M.A. Salmon (eds), *Water Resources and International Law* (2002); Brown Weiss, Boisson de Chazournes, and Bernasconi-Osterwalder (eds), *supra*; L. Boisson de Chazournes, *Freshwater and International Law: The Interplay between Universal, Regional and Basin Perspectives* (2009); M.R. Van der Valk and P. Keenan (eds), *The Right to Water and Water Rights in a Changing World* (2011); L. Boisson de Chazournes and M. Tignino (eds), *Droit international et eau douce* (2013); A. Kibaroglu, A.J. Kirschner, S. Mehring, and R. Wolfrum (eds), *Water Law and Cooperation in the Euphrates Tigris Region: A Comparative and Interdisciplinary Study of International Economic Law* (2013); Boisson de Chazournes, Ler, and Tignino (eds), *supra* (2013).

the purpose of the respective study. Hence, *International Law for a Water-Scarce World* by Brown Weiss starts from the acknowledgement that ‘the fresh water crisis is the new environmental crisis of the 21st century’ (at 1) and provides an integrated analysis of water law, which considers climate implications, river basins, and the availability and quality of fresh water. Boisson De Chazournes’ *Fresh Water in International Law* investigates the status of fresh water in international law. The choice of the titles of the chapters is particularly evocative. Thus, after a chapter on regulation of fresh water use, the book continues with chapters on the ‘Economization’ of the law applicable to fresh water, its ‘Environmentalization’, followed by its ‘Humanization’, and ‘Institutionalization Trends in Fresh Water Governance’, before focusing on dispute settlement mechanisms. The use of the ending ‘-zation’ gives the immediate impression of the evolution of the law on fresh water resources, which now includes several separate but clearly interrelated aspects. The title of the third book, written by Thielbörger, deserves attention for two elements, the first being the letter ‘s’ inside the parentheses and the second being the adjective ‘unique’ used for identifying the human right to water. *The Right(s) to Water: The Multi-Level Governance of a Unique Human Right* pursues a different purpose from the two other books under review which adopt a more comprehensive approach. Thielbörger’s book (based on his doctoral dissertation) studies the human right to water from a comparative and international perspective, emphasizing the complexity of a right which is strictly linked to other rights but constitutes at the same time a right of its own.

The book written by Brown Weiss is the outcome of her lectures at The Hague Academy of International Law in 2007. The author, with her outstanding experience, draws on a huge amount of state practice and jurisprudence to support her findings in the seven ‘thematic’ chapters. Sometimes she goes beyond the legal analysis and makes proposals regarding how the law should address a water crisis. The book starts with the principles of international water law. It is in this first chapter that Brown Weiss presents an account of the interesting historical and legal evolution of principles in the field, which have their roots in the notion of community of interests developed in ancient times by philosophers such as Plato, Ovid, and Virgil, and, in modern times, by the scholar Grotius (at 21). From absolute to restrictive sovereignty, the chapter also outlines the evolution of international law, which should and must answer to new challenges and needs. In order to analyse them, the second chapter provides a refreshingly innovative and stimulating approach, studying water from different perspectives. Brown Weiss suggests that an analysis from an intergenerational perspective should be guided by the notion of ‘sustainable use’ (at 58). Considering water security, the book deals with a topic which is likely to constitute a fertile field of research in the future, namely the commodification of water (at 65). The chapter concludes with the author confirming one of her theses put forward in previous works: fresh water resources are a common concern of humankind. This concept can provide the normative basis for all water-related issues, including the human right to water.

The third chapter is useful for international lawyers because it reveals state practice by classifying more than 2,000 agreements concerning fresh water according to the following criteria: historical trends, evolution in content of the agreements, regional trends. Apart from providing useful data, this chapter demonstrates how the contents of agreements on water have changed over time, starting from boundary demarcation and navigation, which used to be the main concern of states (at 82, an analysis shared by Boisson de Chazournes at 8 ff., in particular at 25), to issues of allocation and use, and integrated approaches to water management. The database, mainly composed of bilateral and regional agreements, also includes international agreements such as the 1997 UN Convention on the law of non-navigational uses of international watercourses. The salient conclusion holds that agreements are ‘living instruments’ in the sense that parties ‘regularly expand and or detail obligations, create implementing instruments or programs, and develop new procedures’ (at 109). The two following chapters are respectively on the settlement of international disputes and on fresh water institutions. The former outlines

the main trends in dispute settlement procedures. Both international and national courts have delivered judgments on water-related issues and the reader can find the entire story of the *Mines de potasse d'Alsace* case concerning the discharge of pollutants into the river Rhine by French potassium mines which became famous because of the 1976 judgment delivered by the Court of Justice of the European Communities (at 149). The latter chapter on fresh water institutions is of great interest as far as concerns the development of international law. After providing the historical evolution of the institutions that over time dealt with water issues, the author outlines the increasing functions of fresh water institutions, like the Rhine and Danube commissions, and focuses on state compliance. The final part of the chapter depicts a recent trend at the international level, namely the frequent adoption of non-binding instruments such as guidelines and voluntary commitments, justified by the view that 'social norms, moral considerations and political pressures can strongly affect [state] behaviour' (at 182). According to the author, non-binding norms 'may prove to be effective in managing demand' (at 189), in particular where monitoring mechanisms assess state compliance. The phenomenon of soft law is common in environmental law, but also in other fields, like financial regulation.²

One chapter of the book is dedicated to the right to water, but the author offers an innovative approach, basing its analysis related to water quantity, quality, and access on an 'intragenerational' and an 'intergenerational' right to water. In this regard, Brown Weiss mainly refers to a perspective of analysis. In other words, as the author clarifies, discussion of a right to water has been focused on the present (intragenerational perspective), but 'the future has important implications for defining and implementing the right' (intergenerational point of view, at 195). Hence, the recurring problem of privatization of public water utilities is investigated as an 'intragenerational' matter and the author concludes that both the public and the private provision of water may entail benefits and shortcomings, bearing in mind that, in any case, public investment, as well as affordable pricing of water is necessary (at 201). An intergenerational perspective takes into account the depletion of the resource and the quality and quantity of water affected by climate change. After analysing the legal basis of the intergenerational right to water, the question whether it should be considered as an independent right or as linked to other already recognized rights, and the question of implementation, the author makes the following proposal: states should either adopt an International Protocol on the Right to Water that 'definitely establishes the right to water to meet basic human needs as a binding human right' (at 241) or states party to the Covenant on Economic Social and Cultural Rights should by decision confirm that the 'adequate standard of living' includes the right to water (at 242). Brown Weiss here reiterates that the availability and quantity of fresh water have become in essence a 'common concern of humankind', which should guide international climate change negotiations, mitigation policies, and policies aimed at implementing the right to water (*ibid.*).³ The book presents a final chapter on 'Water Markets and International Trade Law', which deals with the major issue whether or not water is a commodity. Brown Weiss considers two controversial phenomena, namely, the bulk water transfers and the 'virtual' water transfer (as states become importers or exporters of water-intensive goods and services), and focuses on the GATT system. The author suggests that the WTO should take a decision like the one adopted by Canada, Mexico, and the United States regarding the application of NAFTA to water, acknowledging that water in its natural state is not a good or product (at 270). As awareness of the need to protect water

² See, *inter alia*, Giovanoli, 'The Reform of the International Financial Architecture After the Global Crisis', 42 *Int'l L and Politics* (2009) 81; Verdier, 'The Political Economy of International Financial Regulation', 88 *Indiana LJ* (2013) 1405; E. Avgouleas, *Governance of Global Financial Markets* (2012).

³ The notion of 'common concern of humankind' may support the progressive formation of a human right to water in customary international law: see De Vido, 'The Human Right to Water: From an Inchoate Right to an Emerging International Norm', 2 *Revue Belge de Droit International* (2012) 517, at 563.

for present and future generations has increased at the international level, considerations of rights and access to water for all human beings must be integrated into international trade law.

Boisson de Chazournes' book can be considered a compendium of her prominent work over the years on the evolving issue of water. *Fresh Water in International Law* addresses water, taking into account the diverse challenges that this resource poses to scientists and legal scholars. Using history, state practice, and international law with specific attention to the relation among different sources of law, the book attempts to depict the 'multilateral water governance'. Chapter 2 concerns the regulation of fresh water uses, the beginning of which is located in the 19th century, although some treaties on water date back to ancient times. The author also investigates state practice related to the use of international watercourses and demonstrates that states have over the centuries concluded many treaties on boundary delimitation and on navigation (see also Brown Weiss, at 82). Watercourses were perceived as 'a line of delimitation between segments of land' (at 8). Nonetheless, delimitation issues, which are quite 'technical', may also imply the consideration of riparian populations' human needs, as outlined in some innovative judgments by the International Court of Justice.⁴ It was only in the second half of the 19th century that the first conventions on fishing were adopted and even later, in the 20th century, non-navigational uses were dealt with in international treaties. The author continues to analyse the 1997 UN Convention on the Law of the Non-Navigational Uses of International Watercourses and the 1992 Helsinki Convention on the Protection and the Use of Transboundary Watercourses and International Lakes. A further section of the chapter deals with a less debated but extremely interesting issue. Fresh water includes not only rivers and groundwater, but also transboundary aquifers, ice formations (icebergs and glaciers), and atmospheric fresh water, whose status at the international level is still uncertain. Legal doctrine has considered icebergs, for example, in different ways: as islands, as *res nullius*, or as common heritage of humankind. The author presents the pros and cons of each approach, concluding that icebergs are 'largely dependent on the legal regime of the areas and regions wherein they are located' (at 44). In the final pages of the chapter the author outlines the interplay existing between universal, regional, and basin-specific instruments. While universal norms answer some problematic issues, regional and basin agreements respond to the specificities of a certain area (at 53). A clear example is the 1998 Treaty between Portugal and Spain related to the Luso-Spanish river basins. It is a basin agreement which takes into account the specific characteristics of the area (e.g., the scarcity of water in the Iberian peninsula), and, at the same time, develops some general principles enshrined in the 1997 UN Watercourses Convention (at 50).

'Economization of the law applicable to fresh water', the third chapter of the book, deals with the law regulating economic uses of watercourses, on the one hand, and with international trade and investment law, on the other hand. As to the former, the chapter focuses on the principles governing freedom of navigation and infrastructure projects along watercourses. The obligation to notify states which are potentially affected by a planned construction is considered to be part of customary international law (at 69). Economic aspects related to water have strongly emerged since the 1990s, when private participation in the distribution of water increased. Nevertheless, in the same period, new approaches to water have developed in order to take into account social, cultural, and environmental aspects of water management. The 'mutual supportiveness between economic and non-economic norms', in Boisson de Chazournes' words, is the *fil rouge* of the chapter, which deals with different 'economic' aspects of water. Hence, analysing the relationship between fresh water and international trade, the author acknowledges that the status of water in international trade is uncertain, but she also offers an interesting perspective, considering that the emergence of a human right to water may have some influence both on the recognition of this resource as a public good and on the internationalization of fresh

⁴ E.g., the *Frontier Dispute case (Burkina Faso/Niger)*, Judgment of 16 Apr. 2013.

water regulation (at 96). Water is intricately linked with ecological issues. Pollution, biodiversity, and climate change can affect the quality and quantity of available water. The fourth chapter of the book provides a useful analysis of international and regional agreements and instruments related to environmental protection and the management of transboundary fresh water. Even though the number of legal instruments seems to suggest incoherence and potential conflicts of norms, the author argues that norms established at different levels 'have to be read together, and a systemic interpretation of international law has to be promoted' (at 146). Encouraging systemic interpretation contributes to the improved protection of water resources. To 'humanize' the law applicable to fresh water, a development observed in Chapter 5 of the book, means to include human needs in the management and allocation of water resources. This trend is not completely new if we read the provisions of some international agreements. Nevertheless, the evolution of a human right to water could strengthen this recent development. The author provides insights into the evolution of the right to water at the international level, and she considers other fields of law that could contribute to the affirmation of this right. Cultural protection and water is, for example, a connection of extreme interest. The condemnation by the UNESCO World Heritage Committee of the Ethiopian dam construction projects on the Omo river due to their impacts on tribal peoples living in that area demonstrates that human needs are of the utmost importance in current international law. A human right to water could also constitute a parameter in the evaluation of large infrastructure projects which can harm vulnerable segments of the population (at 168). The author's proposal for an integrated approach should therefore be welcomed.

The two final chapters of the book are respectively dedicated to institutions in water governance and to dispute settlement mechanisms. As for institutions, the starting point is basin organizations and commissions, which date back to the 19th century. These bodies, established with the aim of managing watercourses, are more and more becoming forums for dialogue and cooperation, and they are key actors in the resolution of international disputes. International organizations, such as the UN, UNESCO, the World Bank, also have a role to play in water governance, along with non-state actors whose involvement is necessary in order to address critical water issues (at 189). As far as water-related disputes are concerned, a multiplicity of mechanisms has been used in order to solve a variety of disputes linked to the 'many values of water' (at 198). States have resorted to international tribunals like the Permanent Court of International Justice and then the International Court of Justice, to inter-state arbitration tribunals, to the mechanisms established by international economic organizations (WTO), or to regional courts like the European Court of Justice. The author then focuses on investor-state dispute settlement mechanisms like the ones provided by ICSID and NAFTA, and on human rights procedures, and proceeds to the Aarhus compliance mechanism, which is based on public participation and access to justice. Some trends that the author identifies deserve attention. First, almost all courts have dealt with water issues (at 247). Secondly, the jurisprudence has clarified the legal content of notions and principles, thus contributing to the development of international law. Thirdly, cross-references between courts have paved the way for what the author defines as the approach of 'constructive dialogue'.

Thielbörger's book is divided into three main chapters. The first one deals with the status of the right to water at the international, European, and national levels. The chapter starts with the description of national legal instruments related to water issues in Europe. The author refers to the national legal systems of Germany, Belgium, and France, which are analysed from a comparative perspective. From the analysis, it clearly emerges that in Europe a human right to water is not explicitly recognized and that the jurisprudence of the European Court of Human Rights considered this right through the lens of other rights enshrined in the European Convention on Human Rights. The author argues that Europe does not face severe problems regarding water supply (at 38), but in the EU several resolutions of the European Parliament and the new

European Citizens' Initiative⁵ have raised awareness of the need for a human right to water and for the recognition of water as a public good. The author then looks outside Europe, analysing the legal systems of South Africa and India in a comparative perspective. These two states are quite advanced in the recognition of the right to water: in South Africa it is explicitly mentioned in the constitution; Indian courts have derived the right to water from the constitutional right to life. As far as the human right to water at the international level is concerned, the chapter presents the evolution of the right in international treaties and jurisprudence, focusing on General Comment no. 15 adopted by the UN Committee on Economic Social and Cultural Rights. Regarding the General Comment, Thielbörger discusses the critiques expressed by different authors, eventually concluding that 'even without legal bindingness, [it] has been a milestone on the way to the establishment of a right to water' (at 75). The author also recognizes (at 76) that some elements of state practice or of an 'arising' *opinio juris* are supporting the evolution of a customary human right to water. Among these elements, the author mentions the UN General Assembly resolution adopted on 3 August 2010, the Human Rights Council resolution adopted a few months after the 2010 General Assembly resolution, and the renewal of the mandate of the Independent Expert, whose denomination has been changed to 'Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation'. Individually, these elements are not enough to prove the existence of an international custom. Taken together, however, the author argues, these events are expression of a shared *opinio juris* that has arisen over the years. Using the notion of 'modern custom',⁶ Thielbörger supports the thesis that a strong *opinio juris* in favour of this human right is currently paving the way for state practice, which is still developing (at 86).

The third innovative chapter offers a philosophical approach to the human right to water, starting from Descartes' 'method of doubt'. Accordingly, if objections to the existence of this right can be disproved, the claims in favour of the human right to water can stand (at 95–96). The author demonstrates that all possible objections (he found six related to the three elements water, right, and human) can be rejected. To take account of the complex nature of the human right to water he considers it a 'hybrid' right, hence going beyond the dichotomy self-standing vs. derived right. The author argues that the right to water is a 'right of different layers' (at 119). It means, in Thielbörger's view, that the enforceability of the right to water 'depends on the respective claim as to which part of the right to water is at stake, and thus which procedures and courts are accessible for the individual' (at 120). In other words, water is such a complex issue that the author talks about 'rights to water' having a civil-political or socio-economic nature. The chapter concludes with the analysis of the relationship between the human right to water at the international level and the rights to water enshrined in domestic legal systems. The author applies the famous approach of the European Court of Justice in the *Kadi* case (related to the freezing of assets of alleged terrorists) to water. Thielbörger presents two opposite hypothetical cases. Let us focus on the second one. The author speculates that the protection offered at international level exceeds the level of protection under domestic law, which may provide, for example, the interruption of water supply in the event of non-payment. In that case, 'the human right to water would prevail over conflicting domestic law ... only if it can be seen as part of the UN Charter or of the *ius cogens*', which, the author argues, is the case for a small nucleus

⁵ See <http://ec.europa.eu/citizens-initiative/public/welcome>. The 'Right2Water' initiative has reached more than 1.8 million signatures. The European Commission adopted the Communication COM(2014)177 final on the European Citizens' Initiative, 'Water and sanitation are a human right! Water is a public good, not a commodity!' on 19 Mar. 2014, containing EU past and current actions concerning the human right to water.

⁶ Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation', 95 *AJIL* (2001) 757.

of the right. Furthermore, following the European Court of Justice's reasoning, the restrictive understanding of the right to water at national level would prevail only 'if it [is] part of domestic primary law' (at 129). The theory is intriguing and well-argued. Nonetheless, the legal basis for the individual sanctions against *Kadi* is a UN Security Council resolution. Moreover, the jurisprudence of the European Court of Justice, although extremely interesting and advanced, is 'regional' and it seems difficult to draw from that general 'universal' conclusions.

The final chapter of the book is dedicated to implementation and identifies three crucial elements, namely, independent monitoring (basically the activity of the *Special Rapporteur*), enforcement against the private sector, and collective realization through international means. Privatization is an issue which all three books have investigated, in particular as concerns the nature of water as a tradable good. The conclusion drawn by Thielbörger is that 'water privatization must be done with a view to ensuring basic access also in the case of continued non-payment' (at 151, see also Brown Weiss at 201). After the analysis of ICSID jurisprudence, Thielbörger suggests that states should include the right to access to water in the concession contracts they conclude with private parties (at 164). Even though it is true that states are often in a weaker position than investors, the commitments accepted by the business sector within, for example, the CEO Water mandate at the UN level, should not be forgotten. The author then investigates states' international obligations to respect, to protect, and to fulfil the right to water both from a philosophical and legal perspective. International water assistance implies state extraterritorial obligations such as the transfer of a certain quantity of water to countries that need water. On this point, the author argues that international water assistance means ensuring minimum access to water in all countries as a corollary of the human right to water (for example, assistance following a natural disaster). In the author's words, 'a clearer acceptance of a human right to water in international law would make international obligations with respect to water much more explicit' (at 184).

In sum, all three works under review analyse water through different lenses, but they draw a common conclusion: the importance of including human needs in each discourse on water. Even though the existence and the content of a human right to water seem yet uncertain under international law, the human right to water progressively infiltrates into international acts, international and national judgments, and declarations by states. It is suggested that it be included in concession contracts between states and private actors, that it be formulated as a provision in a bilateral or multilateral treaty, or that it constitute the backbone of guidelines directed to multinational enterprises (we must not forget the effects on drinking water due to contamination by industry). As Catarina de Albuquerque, the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation, has recently explained, 'It is crucial that governments apply a human rights framework to guide their actions. Put simply: Priority must be given to water destined for personal and domestic use.'⁷ This seems to be the only possible way to ensure to all human beings non-discriminatory and affordable access to safe drinking water.

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⁷ C. de Albuquerque, *World Water Day: Put People First in Allocating Scarce Water Resources*, 22 Mar. 2014, available at: www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14427&LangID=E (last accessed 20 August 2014).