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WATER AND WAR

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Water is the source of all life, without it nothing can survive. But at the same time, as it is unequally distributed on the planet earth, water may be a rare natural resource when it is not well managed. As a primary building block of life, water has the power to destroy as well as to create. The significance of water manifests itself in the practices and beliefs of many religions. Water washes away impurities, it can make a person clean, externally and spiritually. The sharing of water was one of the first elements in the progress towards communal living, and rivers have always had great cultural and spiritual significance. Rivers have played a critical role in the history of mankind. They have been used for centuries to connect people through their navigable channels. Moreover, the water resources supplied by rivers, satisfying manifold human needs, have promoted the development of the most ancient civilisations along river banks. The historic value of transboundary water systems as part of a people’s or a region’s cultural heritage cannot be ignored when devising means for exploiting or sharing them. In the last few decades, the demand for water and the consequent development of water installations have significantly increased and the vital importance of water and water installations for the health and survival of people has been increasingly recognised. In addition, trends such as climate change or global warming make access to natural resources one of the most important challenges of the twenty first century.

Water in relation to war can be seen from many perspectives and should be analysed under different angles. Water can be the object of international negotiations or may be a cause of war. In time of armed conflict water becomes the means of survival for populations to be protected or indeed, a weapon. But just as war is a destructive and negative phenomenon regardless of its causes such as religion, control over a territory or over resources, relations between water and war, though extremely complex, are mostly seen through the same prism. The former being affected by the latter or being the cause of the latter. A popular myth often heard today, is that the next big wars will be over water. “The waters of the Nile will be the cause of the next war in our region, not politics” said Boutros Boutros Ghali, a former Secretary General of the United Nations.

Having said that, one has to admit that the interaction between water and war is far more complex than it seems and cannot be considered only in negative terms. With the very high numbers of international watercourses which are shared between countries, water and its use is undoubtedly a cause of tension and often strains relations between countries. Water remains a security concern for many countries, it has been used as a weapon in conflicts and water systems have often been targets within conflicts, which have nothing directly to do with water. But it may also foster cooperation. A burning issue remains the question of the status of water during armed conflicts especially one of protection afforded by international law. To build answers to this question, it is necessary to rely on a multidisciplinary approach, each discipline contributing to bringing elements to these debates.

A war, as a disruptive and destructive phenomenon affects the resource itself as well as human beings. History is full of examples, which show that water resources have often been used as means of warfare. In the sixteenth century, during the eighty year war against Spain, the Dutch
flooded their land to protect Alkmaar and Leiden from Spanish troops. This strategy became known as the Dutch Water Line and was used frequently for defence in later years. In 1503, Leonardo de Vinci plotted with Machiavelli to divert the Arno River course in the war between Pisa and Florence. Freshwater resources are also victims of wars. During the war between Serbia and Croatia and the air campaign by the NATO over Kosovo in 1999, the bombing of industrial sites, refineries and other installations caused the release of polluting materials into streams, groundwater and rivers. Destroying hydroelectric power stations can cause water contamination: effects of such contamination last over a long period of time. In 1992, Bosnian Serbs took control of water valves regulating flows from wells that provide more than 80% of the water to Sarajevo. In March 2003, during the Iraqi conflict, following the complete shut-off of all water treatment facilities, residents of Basra were deprived of clean water supplies for several days. In the light of these examples, the question to be addressed is whether international law protects water resources, if it covers the manifold role of water during war or if water is an orphan of war.

The question of the status of water during an armed conflict has always been at debated. The main issue is one of protection. One has to ask whether the body of rules protecting water in time of war is satisfactory or not. It is necessary while considering such a question to bear in mind the many roles water can play during a war. Since ancient times water has been used both as a defence against invading armies and as an offensive weapon. Water is often a target as well as a victim. At the same time, gaining control over water resources or using water as a weapon can become a definite strategy in cases of international as well internal conflicts. Such a diversity of situations explains why it is so difficult to deal with the status of water in armed conflict comprehensively.

Another layer of complexity is added by the technological development of weapons. Such change lead to greater destructive power or to unknown adverse effects, while water itself is highly susceptible of being affected. It is true that “smarter” wars and weapons should be less harmful to water. The improvement of technical targeting processes and the use of more sophisticated weapons could be seen as a progress. However, many examples show adverse effects of such a change in military weaponry. The heated debate over the impact of depleted uranium weapons on health and environment illustrated the issue of the use of weapons and the precautions to be taken in relation to that use. At the heart of the controversy was the effect of depleted uranium dust on water. The World Health Organisation, while not concluding that DU munitions have a dangerous effect in general, pointed out the possible pollution of water. The recent program launched on the Robust Nuclear Earth Penetrator (RNEP), aimed at searching for a more “usable” kind of nuclear bomb and the debate concerning mini nuclear weapons made the issue more poignant. It is necessary to insist on the fact that technical development should be done in order to avoid adverse effects on water or the environment in general. This being said, it does not mean that the outbreak of war leaves water without protection.

Provisions of International Humanitarian Law Protecting Water

During armed conflicts, international humanitarian law regulates the conduct of hostilities and it ensures the protection of victims of war. Since the law of armed conflict is a specialised set of rules; it is within this branch that provisions on water should be found. Four main prohibitions established by international humanitarian law, deal directly or indirectly, with the protection of water in time of international armed conflict. Article 23 of the 1907 Hague Regulations establishes the ban on employing poison or poisonous weapons as well as the ban on destroying or seizing the enemy’s property. The 1977 Protocols to the 1949 Geneva Conventions specify the prohibition on destroying objects indispensable to the survival of the civilian population (Article 54 of the First Protocol and Article 14 of the Second Protocol applicable in time of non-international armed
conflicts) and the ban on attacking works or installations containing dangerous forces such as dams and dykes (Article 56 of the First Protocol and Article 15 of the Second Protocol).

There are other rules, which can incidentally protect water. They are the norms protecting the environment, in particular one may refer to Article 35 of the First Protocol which enounces the prohibition on employing methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment. A controversial issue as to the application of these rules is their high threshold of application. In particular, the term “wide-spread, long-term and severe damage” has not been defined, but it is generally agreed that it establishes a high threshold for the protection of the environment, since the conditions are cumulative. Article 55 of the First Protocol also protects the environment. Articles 35 and 55 of the First Protocol do not duplicate one another; while Article 35 protects the environment from the point of view of methods of warfare, Article 55 concentrates on the survival of the population. The law applicable to internal armed conflicts does not contain any specific rules protecting the environment. However general principles of international humanitarian law such as the principle of proportionality as well as peacetime environmental legislation contribute to the protection of the natural environment during civil conflicts.

The Case of Military Occupation

Further, the importance of water in time of occupation cannot also be neglected. The control over water resources by an occupying power can become a means to strengthen its power over the occupied territory. The ensuing complex problems are further worsened when occupation extends over a long period. The situation of the Palestinian occupied territories is an illustration.

The two principal sources of the international law of belligerent occupation are the Hague Regulations and the Fourth Geneva Convention. The legal principles governing the use of natural resources in occupied territories have to be analysed in the light of the general principles governing belligerent occupation. These principles may prove to be of great help in considering specific problems. In particular one must pay attention to the fact that the occupant merely exercises a de facto authority and it does not have any sovereign rights. Under the Hague Regulations, an occupant cannot claim the ownership of public properties (Article 55). It can use such property in a usufructuary manner, as an administrator but it must protect the “capital” of the property. In principle a “usufructuary” may use the water resources but without detriment to their “capital”. In addition to this, the occupant may use water resources only for the purposes of the occupation itself; it is not allowed to use water to promote its own economy or to pump it into the home country.

In order to safeguard the “substance” of water resources, the occupant may not wantonly dissipate or destroy these resources. In particular, in the case of groundwater resources, the occupant may respect their rate of replenishment. Indeed, under conditions of prudent management groundwater resources are self-replenishing. Conversely, an overexploitation will lead to the permanent degradation of the aquifer.

The boundary between a renewable resource becoming non-renewable represents the absolute limit of usufruct for belligerent occupation. The occupant does not have the right to threaten the “capital” of public property, even for military reasons.

In exercising its powers, the occupant must comply with two basic requirements: fulfilment of its military needs, and respect for the interests of the inhabitants. Scholars still differ as to the primary purpose of the rules applicable to belligerent occupation. However, while military
necessities in some instances may prevail, they should never result in total disregard for the interests and needs of the population.

The Hague Regulations distinguish between public and private property, and between moveable and immovable property (Articles 46, 52, 53 and 55 of the Hague Regulations). Both of these distinctions are important in order to protect water resources in time of occupation. The private or public nature of property in an occupied territory is an important factor in the assessment of the extent to which the occupant can control and expropriate such assets. Legal scholars have taken different approaches: whereas some treat the exploitation of water resources as a private property right enjoyed by the owner of the land, others see water as a public resource. In both cases, however, international humanitarian law protects water resources. The provisions of the Hague Regulations can provide a detailed and nuanced legal framework upon which to examine the responsibility of an occupying power in relation to the freshwater resources of the occupied territory.

Article 53 of the Fourth Geneva Convention prohibits the occupant from destroying either State or private property for any reason other than military necessity. In one sense, since it applies to all types of property, this provision is considerably more restrictive than the corresponding provisions of the Hague Regulations. Nevertheless, the general nature of the Article 53 prohibition raises difficult issues of interpretation. In particular, it seems to be particularly difficult to ascertain at what point an occupant’s water utilisation permitted by the Hague Regulations would ripen into “destruction” of property under the Fourth Geneva Convention.

When the occupant has reservations about the “statehood” of its enemy or there is a collapse in the structure of the occupied state, the principle of permanent sovereignty over natural resources can play an important role. This principle is a customary rule and it is an essential element of the right of self-determination. The control over natural resources is an attribute of sovereignty, which the occupant does not possess. As a result, the full right to use freely natural resources could take place only with the restoration of the sovereignty over the occupied territory. The occupant has the obligation not to interfere with the exercise of permanent sovereignty by the local population. This interpretation is supported by international humanitarian law, which considers that the occupant can be regarded only as an “administrator”.

Whatever the reasons are for war are, parties to a conflict have to comply with rules of international humanitarian law. They are bound by it even if the war is seen to be a “just war”. The latter only concerns the *ius ad bellum* – law concerning the use of force - and cannot support the proposition justify that those fighting a “just war” have more rights or less obligations than those fighting an “unjust war”. International humanitarian law has to be respected independently of any argument of *ius ad bellum*.

**Recourse to Other Norms for the Elaboration of a Complementary Protection**

Apart from these rules of international humanitarian law, it is difficult to identify a proper and autonomous legal framework for protecting water. This is due to the diversity of situations in which water can be affected, but also because of the very manner in which it is treated in international humanitarian law. Water is taken into account only in connection with that body of law’s basic objectives of protecting victims of war and regulating the conduct of hostilities. Even in that perspective, it is viewed only in its capacity as one of man’s basic needs, as a danger, or as part of the natural environment, but never autonomously. Although humanitarian law has always focused on the protection of persons and their property, the application of these rules plays an important part in safeguarding water resources during an armed conflict and during an occupation.
It becomes clear that a holistic approach is required in order to ensure an effective protection of water in times of war. Human rights treaties and treaties providing objective regimes are commonly held to apply during armed conflicts. In this context, the General Comment on the Right to Water adopted last year by the United Nations Committee on Social, Economic and Cultural Rights can be considered. It affirms the obligation for states to refrain “from limiting access to, or destroying water services and infrastructures as a punitive measure” during armed conflicts. This statement points out the progressive convergence between international humanitarian law and human rights law.

Certain environmental treaties, especially those protecting shared natural resources -SNR- (such as watercourses, lakes and groundwaters), may be sufficiently similar to human rights conventions. The main characteristic of the human rights treaties is that they seek to protect a common good in the interest of the community of states as a whole rather than the national interest of the state parties. This feature of human rights conventions is the main reason why state parties cannot suspend or terminate them in wartime.

In this context one should mention the 1996 Advisory Opinion on the Legality of the Use of Nuclear Weapons where the International Court of Justice stated that “the issue is not whether the treaties relating to the protection of the environment are or not applicable during an armed conflict”. The Court ruled that “States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives. Respect for the environment is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality”.

To the extent that the obligations established by water treaties have the aim of protecting environmental goods per se rather than to further the interests of the state parties concerned, they bind belligerent states. Recent water treaties such as the Danube Convention, the Mekong Treaty or the Senegal Water Charter point out clearly that their aim is to serve the protection of the watercourse environment itself rather than the national interest of the state parties.

While the 1997 UN Watercourses Convention states in its Article 29 the applicability of the principles and rules of international humanitarian law to protect international watercourses and related installations, the question remains whether such a Convention still remains in effect even in time of armed conflict. The 1995 Protocol on Shared Watercourse in the SADC Region (Article 1.13) affirms explicitly its continued applicability in wartime.

Questions to Be Addressed: Towards a Comprehensive Approach

This overview of some of the issues related to water and war shed some light on the main issues, which are at stake. While one cannot deny that norms exist to protect and cover the manifold functions of water during an armed conflict, these are limited. The use of other sets of rules such as human rights contribute to the strengthening of the protection of water. It is our view that the improvement of the current system dealing with water issues implies the strengthening of existing institutional mechanisms. Water issues must not only be substantive and procedural, but also institutional – providing suitable mechanisms for ensuring cooperation and sustainable management of water resources.

In the end, the key question is whether the actual state of law and mechanisms in international relations are appropriate to ensure that water issues are correctly addressed and solved.
♦ Is a comprehensive approach to water necessary in order to address all facets of water issues?

♦ Would it be better to use a fragmented approach to consider the many aspects of “blue gold” individually: water as a target, water as a weapon, water as a cause of disputes or water as an essential need?

♦ Would a special Convention dedicated to water, such as the one on the Protection of Cultural Property in the Event of Armed Conflict of 1954, be suitable?

♦ Is the legal regime of occupation defined under The Hague Regulations and the IV Geneva Convention sufficient for ensuring effective protection of water resources?

♦ Should the current debate on the adequacy of international humanitarian law in general address water issues? If so, would it be better to develop the normative framework or focus on the improvement of the implementation of existing rules?

♦ How does the concept of state sovereignty represent a tool for, or an obstacle to, addressing water issues in times of war?

♦ Is it necessary to broaden the debate to the question of water in post-conflict situations?
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