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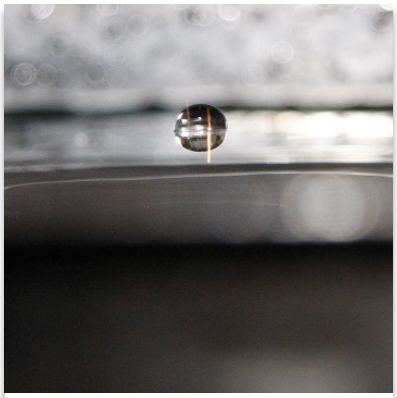

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Sustainable Development Goal 6 as a Game Changer for International Water Law

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Many international lawyers and development practitioners have reservations, induced by legitimate concerns, about the 2015 UN *Sustainable Development Goals* (SDGs).[1] This Reflection proposes that we should take seriously SDG 6 as a normative framework[2] – even if not a legal one - for international freshwater ('water') governance. The global water crisis is urgent[3] and the current regimes and body of rules that often are collectively referred to as 'International Water Law'[4] (IWL), are unequipped to provide a conclusive response. To counter the pressures on the world's water system essentially calls for global mechanisms of long-term preservation and redistribution of water resources, coupled with a framework for balancing the myriad of water usages and interests. That IWL has been unable to provide such a structure, is partially due to factual circumstances. The world's water resources belong to one hydrological system, and yet they are scattered unevenly across national territories. The lack of a comprehensive legal structure for international water governance is also due to certain features of traditional international law, including: (1) the territorial parameter for allocation of authority;

[1] UN Doc. A/RES/70/1, 25 September 2015, *Transforming Our World: The 2030 Agenda for Sustainable Development.*
[2] Here in the sense of 'a system/body of norms and standards (legal or non-legal) to guide action', as the term is employed e.g. by the UN.
[3] http://www.unwater.org/water-facts/scarcity/
[4] L Boisson de Chazournes and M Tignino (eds), *International Water Law*, EE, 2015; the term traditionally refers to law regarding freshwater and is not taken to include International Law of the Sea.

(2) the focus on the state as norm addressee; (3) instances of normative indeterminacy; (4) regime complexes in absence of interstitial norms; and (5) a limited temporal scope.

The following bird's-eye view of IWL and SDG 6 with respect to these five aspects demonstrates how they play out in IWL to create a fragmented landscape, while SDG 6, in contrast, does not suffer from a similar fate. Meanwhile the 'compliance effect' of the SDG 6 policy framework on states and stakeholders does not compare unfavourably to that of water law. Therefore, SDG 6 can be considered a valuable instrument in combatting the global water crisis. As such, it will in turn play a key role in influencing - at least substantively- international water law.

That said, the SDG framework has been widely criticized on several grounds, including the subordination of ecological imperatives to socio-economic growth;[5] the absence of human rights concepts;[6] the economic notion of 'development'; the construal of values as quantifiable goals and targets; the system of indicators that are inevitably reductionist.[7] While these criticisms are relevant, the aim here is not to try and counter them. Rather, the main argument is that in the complex field of water governance the downsides of the SDGs may be offset by the benefits to be gained from SDG 6, as a normative framework in parallel to IWL.

Unlike the earlier MDGs, the SDGs contain a comprehensive policy agenda on water. In particular, SDG 6 aims to 'ensure availability and sustainable management of water and sanitation for all'. This Reflection proceeds on the basis that a degree of normative authority of SDG 6 is undisputed,[8] and refrains from engaging with the theory of sources or with the discourses of 'soft law' or 'informal law'. Likewise it proceeds on the presumption that the framework of SDG 6 brings about practical effects.[9] On the point of normative authority within and outside the law, it is worth noting that the forthcoming report of the *UN Special Rapporteur*

[5] cf L J Kotzé, 'The Sustainable Development Goals: an existential critique alongside three new-millennial analytical paradigms' in D French and L J Kotzé, *Sustainable Development Goals: Law, Theory and Implementation*, EE 2018, 41.
[6] cf K Conca, *The Guardian* 1 Oct 2015.
[7] S Mair et al, 'A Critical Review of the Role of Indicators in Implementing the Sustainable Development Goals' in W Leal Filho (ed), *Handbook of Sustainability Science and Research* (Springer, 2017), 42.
[8] Kotzé, n 5, 64.
[9] cf the Voluntary National Reviews https://sustainabledevelopment.un.org/vnrs/; see also e.g. the prominent role of the SDGs in the 2018 Annual Policy Document of the Dutch Ministry of FA on foreign trade and development https://www.rijksoverheid.nl/documenten/beleidsnota-s/2018/05/18/pdf-beleidsnota-investeren-in-perspectief.

on the Human Rights to Safe Drinking Water and Sanitation, notwithstanding the thematic focus on 'accountability', appears to be construed largely outside any legal framework.[10]

1. The Territorial Factor

The sovereign-territorial paradigm in international law has created a particular set-up of traditional international water law, which in its basic form consists of freedom on the state's own territory coupled with transboundary obligations. This results in a state's full control over the water resources on its territory, which is limited only by the rights to water usage of co-riparian states in their respective territories, and by a general obligation not to cause ('significant') transboundary harm. This situation is reflected, for instance, in the contentious relationship between upstream and downstream states, which remains a structuring dynamic in hydropolitics and water law.[11] Aquifer resources are subject to a similar inter-state framework,[12] which places an added emphasis on the principle of state sovereignty owing to groundwater's historical connection to the doctrine of natural resources.

The territorial factor is mitigated through some specific international regimes, aquifer treaties and river basin treaties.[13] In terms of general mechanisms, however, international law does not have much to offer – this is also something which hampers the implementation of 'the human right to water' (see below). The notions of 'community interest' and 'global public goods', which can potentially capture and conceptualize the world's water resources as a single system, have not been (fully) operationalized in international law. Existing legal doctrines that may counter sovereign-territorial claims are not helpful because water resources cannot be located in any one place, and thus cannot be framed as 'global commons' or as 'common heritage of mankind'. It follows that global problems of redistribution and preservation of water resources must first of all be tackled inside the territories of states. Because of the sovereign-territorial paradigm, few general rules of IWL exist that prescribe action *within* state orders. It is worth noting that the 2004 Berlin Rules on Water Resources, which were drafted by the International Law Association (ILA), included a hard-fought section concerning obligations of states within their own territory. The resulting encroachment on sovereign control over territory led some members of the ILA

[10] http://www.ohchr.org/EN/Issues/WaterAndSanitation/SRWater/Pages/PrincipleOfAccountability.aspx (as at 1 July 2018).
[11] (1997) http://www.unwatercoursesconvention.org/the-convention/
[12] (2008) http://legal.un.org/ilc/texts/instruments/english/draft_articles/8_5_2008.pdf
[13] These are, however, relatively few: e.g. only 106 of the world's 263 international river basins have some type of cooperative management framework.

Water Committee to join forces and issue an unprecedented 'dissenting opinion' to the final report.[14]

In contrast, and interestingly considering the commotion caused by the ILA Berlin Rules, SDG 6 takes the responsibility for water resources in states' domestic jurisdictions as a starting point, thereby creating a genuine bottom-up mechanism for global water governance. Furthermore, the effects of fragmentation are alleviated in a practical sense since the scope of SDG 6 is not limited by territorial boundaries with *Agenda 2030* covering all 193 UN Member States. While SDG 6 does not per se create any legally-binding obligations, it does create a near-universal frame of reference. Incidentally it worth emphasizing that the final version of Agenda 2030 was adopted unanimously, which differs to the 2010 UNGA Resolution that famously 'recognized' the human right to water.[15]

2. Norm Addressees[16]

Traditional IWL instruments are distinctly statist in orientation, which strengthens a system based on 'hydrosovereignty'. Neither conventions nor environmental summits in the 1980's and 1990's adopted the notion of a human right but used the non-legal concept of 'human needs', or in general left room for the 'human factor'.[17]

A genuine paradigm shift happened with the emergence of 'the human right to water' (HRW) that was initially driven by the global water justice movement in response to the private sector.[18] In 2002 the ICESCR Committee expressly inferred the HRW from Articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights.[19] By the time the UN Human Rights Council took up the subject in 2011, the existence of the HRW was nearly universally

[14] http://www.internationalwaterlaw.org/documents/intldocs/ILA_Berlin_Rules-2004.pdf and https://www.internationalwaterlaw.org/documents/intldocs/ILA/ILABerlinRulesDissent2004.pdf
[15] UN Doc A/Res/64/292.
[16] The term is used in the broad sense; for rights-based normative frameworks *individuals* would be designated 'norm addressees', with states (or other actors) as the correlative 'duty-bearers'.
[17] See 1992 Convention (https://www.unece.org/fileadmin/DAM/env/water/publications/WAT_Text/ECE_MP.WAT_41.pdf) and especially 1999 Protocol (https://www.unece.org/fileadmin/DAM/env/documents/2000/wat/mp.wat.2000.1.e.pdf)
[18] SL Murthy, "The Human Right (S) to Water and Sanitation : History , Meaning , and the Controversy Over Privatization," *Berkley Journal of International Law* 31, no. 1 (2013): 89, at 91 ff
[19] http://www2.ohchr.org/english/issues/water/docs/CESCR_GC_15.pdf

accepted, even if the scope and content of concomitant obligations remained "heavily contested".[20]

An obvious benefit of the human rights-approach to water is the potential for a positive transformation of power relations between the various stakeholders. There are also other advantages: a human rights-based claim to water is philosophically strong; it stimulates political activism; it offers a conceptual link to bring local, national and international issues within the same legal framework; and it can have relevant procedural dimensions at national and international levels.[21] But for water governance the human rights-approach also has significant drawbacks and limitations: it offers no tools for technical solutions; it does not address factors of political economy which often underlie a water crisis; it creates procedural rights which are open to abuse by privileged groups; rights-based litigation may substitute other procedures more suited for water issues and environmental damage. Moreover, the human rights-approach may detract from the rights of rivers or the ecosystem at large.

It is fair to say that a complex field such as water governance would need both the inter-state paradigm and the human rights-paradigm for optimal weighing and balancing of needs and interests. However, the emergence of a new norm addressee with the HRW has not created an expanded field of interrelated legal actors but rather a fault-line in international law that is rarely crossed within the framework of one legal reasoning-- as illustrated by the decision of the CESCR Committee not to engage with environmental law for the conceptualization of the HRW.[22] Meanwhile, with IWL leaving room for water as an economic good (and with practice showing continuous incentives for privatization), companies, especially transnational corporations, are increasingly prominent players in water governance. The question of how these private actors are 'bound' by international water law remains complex and unsatisfactory, as it must be achieved through the horizontal effect of human rights and the self-regulation of corporations in the field of corporate social responsibility.

[20] C Clark, "Of What Use Is a Deradicalized Human Right to Water?," *Human Rights Law Review* 17 (2017): 231, at 244

[21] An early account in relation to the environment in *Introduction* by M Anderson in A Boyle and M Anderson, *Human Rights Approaches to Environmental Protection* (Oxford Clarendon Press, 1998).

[22] See E Riedel, 'The Human Right to Water and General Comment No. 15 of the CESCR', in E Riedel and P Rothen (eds) *The Human Right To Water* (2006) 19, at 28: the "issue of environmental protection, […] should not be raised in this specific General Comment, particularly given the breadth of the environmental aspects of water."

In contrast, the normative framework of SDG 6 has an almost open norm addressee. The text does not contain any rights language, in either direct ("all have the right…") or indirect terms ("…state parties recognize the right of all…."). Furthermore, the beneficiaries of SDG 6 are referred to in the broadest terms and range from individuals to water-related ecosystems. Moreover, the prime candidate duty-bearers – the national and international public authorities – have no trace in the text. It is left to the preamble of *Agenda 2030* to state that "[a]ll countries and all stakeholders, acting in collaborative partnership, will implement this plan." Such inclusiveness (which has led the UN to assure on multiple occasions that the SDGs are 'grounded in international human rights law')[23] is not easy to come by in an international law framework. It is likely to prove favourable for effective global water governance, which according to general agreement relies on the engagement of all stakeholders,[24] who recognize the need to commit.

3. Normative Determinacy[25]

Leaving aside specific arrangements, general international water law contains open norms in key places. The law of transboundary watercourse hinges on the idea of 'equitable utilization'. The human right to water has been founded in the 1966 ICESCR, which is famously said to entail primarily 'programmatic rights' with correlative 'obligations of conduct' for states, rather than 'obligations of result'. This said, the risk of programmatic rights being too indeterminate to produce concrete results at grass-roots level has been mitigated to some extent by the doctrine of the 'minimum core content'. A similar mitigating effect can be seen in UN human rights monitoring mechanisms, which reversely engineer increased determinacy into norms through the use of indicators.[26]

This is taken further in SDG 6, which as such consists of six 'outcome targets' and two 'process targets', and entails 'indicators' for monitoring their implementation, as well as 'normative interpretation'.[27] SDG 6's targets have been criticized for being 'vague'; but they have also been challenged for being fully or partially quantifiable. The fact that SDG 6 indicators are geared

[23] https://www.ohchr.org/EN/issues/MDG/Pages/The2030Agenda.aspx
[24] cf Annotated Programme UN HLPF 9-18 July 2018, p 4 (https://sustainabledevelopment.un.org/hlpf/2018)
[25] Determinacy used in a broad sense, as in clarity and specificity of a norm.
[26] UN Human Rights, *Human Rights Indicators - A Guide to Measurement and Implementation*, NY-Geneva 2012
[27] UN Water, *Integrated Monitoring Guide for SDG 6 Targets and global indicators*, latest version 14 VII 2917 (a stated work in progress http://www.unwater.org/publications/sdg-6-targets-indicators/)

towards measuring result rather than conduct has raised concerns, for one because outcome-based and behaviour-based follow-up systems clearly incentivize states and stakeholders in different ways.[28] At the same time, the indicators attached to the SDG targets can be said to generate additional determinacy in cases where the SDG 6 target overlaps with an open-textured water law norm, such as 'equitable use'. From a lawyer's perspective, the current indicator system (which is still developing) arguably pushes an agenda that conceptualizes the targets as creating obligations of result – and for some stakeholders this could be a positive development.

4. Regime Complexes

International law dealing with fresh water is notoriously multifaceted. To legally capture water is a three-fold exercise, which requires: (1) determining the usage of water as a physical substance (such as personal use or farming); (2) legally framing water (such as a 'closed aquifer' or a 'unit of drinking water'); (3) determining the legal regime(s) to be applied. These legal regimes, which are components of 'IWL', have different doctrinal histories – including that of river navigation law, natural resources law, environmental law, energy law and human rights law – and come with different discourses. The combination of variables yields a wide-ranging picture of water governance, both in legal substance and procedure. However, contemporary international (water) law does not itself clarify the interrelation of the different regimes.

SDG 6 on the other hand is founded on an integrated vision. Substantively, the expressed aim of the SDGs is to 'balance the three dimensions of sustainable development: the economic, social and environmental', and they have been drawn up as 'integrated and indivisible'. In this sense SDG 6's approach to water may be considered 'integrated' along the lines of 'Integrated Water Resources Management' (IWRM) as it was originally formulated and advocated in international environmental law as the best possible approach to water governance.[29] After decades in which the IWRM concept was unclear, specifically with respect to state practice, IWRM is explicitly relied on in SDG 6 ('Target 5') and resorted to in the review process as

[28] A Persson, N Weitz and M Nilsson, 'Follow-up and Review of the Sustainable Development Goals: Alignment vs. Internalization', RECIEL 25 (1) 2016, 59, at 63; more generally, i.a. on indicators as *normative statements* see R Urueña, 'Indicators as Political Spaces', 12 IOLR 2015, 1-18.

[29] Notably in the 1992 *Dublin principles* (http://www.un-documents.net/h2o-dub.htm).

illustrated in the UN *High Level Political Forum on Sustainable Developments*.[30] Incidentally, the role of IWRM highlights once again the particular context of IWL. In the context of classic water law that draws on principles such as sovereign control over natural resources, the integrative approach of IWRM projects a highly desirable strategy, whereas in a human rights context, the integration of an economic factor into the equation is frequently seen as a cause for concern.

5. Temporal Factor

The notions of 'sustainability' and 'intergenerational equity' have entered IWL only to the modest extent that environmental law has been considered part of 'international water law'. Otherwise, the temporal dimension plays a limited role in IWL and does not constitute a prominent factor in the balancing of interests regarding the usage of water.

This is clearly different in the case of SDG 6. With sustainability playing a foundational role, the temporal scope of norms changes: obligations now stretch (far) into the future. This leads to a different (even if not necessarily easier) balancing and prioritization of interests that is more in line with contemporary views about responsibility towards future generations. Strengthening a general sustainability requirement in law and policy-making would make a difference; for example, in policy decisions on the extraction of groundwater (which in the Benelux – but not only there - caters for over 90% of the population's demand for water and is pumped at an unsustainable rate). Existing policies, within the parameters of legal rights and privileges, would appear in a different light and would need to be re-considered and re-evaluated.

6. Straddling SDG 6 and IWL

The global water crisis urgently calls for a normative framework geared to global redistribution and long-term preservation of water resources. As set out above, this has long posed a challenge for 'international water law'. Much of the substance of the various areas of IWL that exist in a disconnected manner is brought together and connected conceptually by the framework of SDG 6.[31] Furthermore SDG 6 is comparatively general and inclusive qua norm addressees and qua territorial scope, while at the same time it contains relatively precise norms, because the targets are combined with indicators, and enjoys an expanded temporal scope,

[30] cf Annotated Programme 9-18 July 2018, p 4 (https://sustainabledevelopment.un.org/hlpf/2018) and 2018 Synthesis Report (https://sustainabledevelopment.un.org/content/documents/19901SDG6_SR2018_web_3.pdf)

[31] "…a shared focus on economic, environmental, and social goals is a hallmark of sustainable development and represents a broad consensus…" Jeffrey D. Sachs, "From Millennium Development Goals to Sustainable Development Goals," *The Lancet* 379, no. 9832 (2012), at 2206.

because of the element of ‘sustainability’. Consequently SDG 6 offers a normative framework that is conducive – much more than IWL – to effective global water governance and *actual* ‘Integrated Water Resources Management’ worldwide.

All this is not to argue that the development of IWL should stop. Rather, it is to say that international lawyers should embrace the potential of SDG 6.

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