

**EDITH BROWN WEISS, *INTERNATIONAL LAW FOR A WATER-SCARCE WORLD*, LEIDEN, MARTINUS NIJHOFF, 2013**

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*International Law for a Water-Scarce World* is a book by a renowned scholar, Edith Brown Weiss, a Francis Cabell Brown Professor of International Law at Georgetown University in Washington, D.C.

Professor Brown Weiss is the author of many articles published in law reviews and other scholarly journals<sup>1</sup> as well as some fifteen books – most notably *In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity*<sup>2</sup> for which she received in 1990 the Certificate of Merit Award from the American Society of International Law, given to the most creative scholarship in international law in the preceding year, and which has since been translated and published in French, Spanish, Japanese, and Chinese. For her outstanding contribution to the study of international, environmental, and water resources law, Professor Brown Weiss received numerous other awards.

Professor Brown Weiss' latest book, *International Law for a Water-Scarce World*, is a timely attempt to comprehensively address the international law rules and policy concerning water – an area of law of growing importance in the fast changing contemporary world. Published in 2013 as a Hague Academy of International Law monograph, the book is a revised and updated version of a series of lectures delivered by Professor Brown Weiss at The Hague Academy of International Law in 2007<sup>3</sup>. Target audience of the lectures collected in the book were the attendees of The Hague Academy, who, as a rule, are advanced students seeking a deeper understanding of international law. Written in a language sufficiently technical, yet accessible, the book will be of interest to the researchers and professionals specializing in international law, as well as those in other fields. The book may be of particular interest to those interested in governance and policy analysis and development, in both public and non-governmental sectors, as well as academia.

Against the background of the global population growth, strive for perpetual economic development, and projected and potentially calamitous climate change, the author identifies fresh water crisis as the "new environmental crisis of the 21<sup>st</sup> century".<sup>4</sup> The importance and relevance of her subject, convincingly presented

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<sup>1</sup> Most recently, Professor Brown Weiss delivered an inspired keynote presentation entitled "International Law in a Bottom-Up World" (Paper delivered at the 44<sup>th</sup> Annual Conference of the Canadian Council on International Law, Ottawa, 5 November, 2015).

<sup>2</sup> Edith Brown Weiss, *In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity* (United Nations University, 1989).

<sup>3</sup> Edith Brown Weiss, "The Evolution of International Water Law" (2009) 331 Rec des Cours 163.

<sup>4</sup> Edith Brown Weiss, *International Law for a Water-Scarce World* (Leiden: Martinus Nijhoff Publishers, 2013) at 1.

almost nine years ago at The Hague Academy, have not diminished since. If anything, the tacit sense of angst and urgency that Professor Brown Weiss' lectures conveyed then seem even more encompassing today. Overview of the many resounding examples of the fresh water mismanagement across the world support and illustrate Professor Brown Weiss' notion that the traditional legal framework regulating fresh water is increasingly becoming untenable.

Much has been written on different aspects of the water crisis in recent years – not in the least by Professor Brown Weiss herself. Her latest book stands out from this growing genre of writing by its uniquely broad scope and ambitious objectives. The author's goal is to go beyond mere analytical contemplation of the problems that she has identified and to offer workable solutions.

In this book, Professor Brown Weiss contributes significantly to the existing scholarship by taking an innovative, future-based analytical perspective. She argues for both present ("intragenerational"), and future ("intergenerational") right to water<sup>5</sup>. Her main thesis is that fresh water is a resource of "common concern to humankind" – a technical and descriptive term with the potential, in the author's opinion, of becoming a standard setting one. The philosophical and ethical stance contained in the term "common concern to mankind" is the basis for the author's conceptualization of fresh water as a human right. Contours of the normative evolution and subsequent adaptation of the new international water law and policy which Professor Brown Weiss recommends are demarcated by a synergetic correlation of the conceptions outlined above. Her elaborate expose can, perhaps, be summarized as follows: "fresh water as a human right for all, including future generations". The book is a detailed elaboration on how this noble objective is to be accomplished.

The author's starting point is the analytical framework that has already been firmly established and that rests on three organizing principles: the unequal distribution of fresh water availability, depletion of fresh water quantity, and declining quality of fresh water. She reflects on these three aspects of water in a transboundary context and in a historical perspective. Her methodology follows from her perception that the international law concerning water has implications for other legal and policy spaces, such as international trade, foreign investment, national security, health, and human rights. Although predominantly a legal analysis, the methodology is interdisciplinary and includes economic, social, and political sciences. The author uses a variety of sources from numerous jurisdictions – from media reports to legal texts and jurisprudence. Most importantly, the author has compiled, organized, and analyzed, specifically for this book, an impressive database of primary sources comprising more than 2,000 international fresh water agreements.

The book consists of seven chapters, each addressing a different aspect of water law. The book is indexed and contains an extensive and up-to-date bibliography and a list of cases and arbitrations. The text is amply footnoted, and sparsely, but appropriately, supplemented by graphics and tables.

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<sup>5</sup> *Ibid* at 195.

In chapter I, the author categorizes the fundamental theories and doctrines of water law, of which the most historically significant is that of territorial sovereignty of the states over their resources. The notion of a community of interests in water is a relatively new framework. The author notes that conventional legal principles upon which existing water management is based are likely to be insufficient to deal with the water problems in the future, and she argues for further evolution of water law, not only in the area of the right to water as a human right and intergenerational fairness, but also in international trade in water and virtual water as well as water security – to name but a few.

Chapter II is a critical elaboration of future challenges for international water law and the interaction between international and domestic water laws. Whether fresh water is conceptualized by the states as “common concern of humankind” – as the author would have it, or not, has implications for how the anticipated fresh water crisis will be addressed. While the “common concern of humankind” doctrine has never been clearly articulated in any legal document as a legal rule, the author finds evidence that it is gaining significance with the states as a guiding principle.

Chapter III is an analysis of more than 2,000 international agreements concerning fresh water over the last two centuries. Systematic review of these primary sources of water law support the author’s thesis that “while water law is ancient, it also eventually responds to changes in the supply and demand for water, and to economic, social and political change.”<sup>6</sup> Content analyses of these “living instruments”<sup>7</sup> clearly demonstrate evolution from traditional preoccupations for boundary delimitation and navigation to post-modern integrated water management and questions of water allocation and use. Survey of the empirical data from the author’s database of international agreements also reveal interesting historical and regional trends which may be of interest for further research.

Chapter IV offers an insight, supported by case studies, into the trends in international water disputes and an overview of the different methods of solving them, from formal adjudication in international tribunals to arbitration, fact finding, conciliation, mediation and good offices, and negotiation. Increasingly, competing uses of water is a subject matter of disputes internationally. Moreover, disputants increasingly include sub-state public and private actors. The particular nature of water as a substance makes disputes more likely to be “managed”, rather than “settled” and this has broader socio-political and legal consequences.

One of those consequences is the evolution of fresh water international institutions, which is topic of Chapter V. The author notes that, while there is an increase in the scope of institutional activities and a significant number of institutional networks and partnerships worldwide, there is no formal legal organization linking them at the global level. In terms of institutional effectiveness, at a practical level, the author is concerned that some may lack the experience and capacity to face the challenges of technological development to monitor use and quality of fresh water,

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<sup>6</sup> *Ibid* at 50.

<sup>7</sup> *Ibid* at 119.

and suggests stronger support, assistance, information sharing, and cooperation internationally.

Chapter VI explores the right to water from both intragenerational and intergenerational perspectives with sustainable development as a theoretical link between the two. The principle of intergenerational equity is based on the notion that “every generation has both rights and obligations in relation to water”<sup>8</sup>. Next, the author considers the possibility that the right to water may be viewed independently or in conjunction with already recognized human rights. Recognizing the fact that “indigenous peoples have a special relationship to the environment and its natural resources”<sup>9</sup>, the author distinguishes indigenous peoples’ right to water – which would include traditional uses of water in activities with cultural and spiritual dimensions – from the human right to water. Author proposes that states consider an international protocol on the right to water which would establish the right to water as a binding human right, or, alternatively, to affirm the right to water in the existing provisions of human rights instruments.

The final chapter is a study of the controversial question of the commodification of water and the extent to which international trade disciplines apply to transboundary movements of fresh water. The author argues that water in its natural state is neither a good nor a product, and that WTO ought to follow the NAFTA precedent and issue a declaration to that effect. Viewed as a public good, water is not commensurate to other goods and products and cannot be abandoned to the market forces. The author concludes that it is paramount that the international “trade disciplines should not trump other disciplines in addressing international water issues.”<sup>10</sup>

Meticulously researched, this book is a mature work from a forward looking, visionary thinker with a keen awareness of actuality. Professor Brown Weiss undertook a complex task and completed it well. She is equally authoritative when it comes to a detailed analysis of a single term (common *concern*, or common *heritage* of humankind, for example<sup>11</sup>) as she is when it comes to historical overviews spanning cultures and centuries. She writes with an exemplary clarity even when she tackles highly technical issues. The most unique, and perhaps most attractive feature of her personal style as a researcher and a writer is her bold approach to the projections of the future. She states her forecast with courage and confidence which stem from the sound analysis of the past and the present.

To benefit the most from this dynamic and enlightening book, the reader ought to approach it “properly”. A few remarks and reminders regarding the format of the book might be helpful. This is especially important because the format is not inconsequential for the content.

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<sup>8</sup> *Ibid* at 207.

<sup>9</sup> *Ibid* at 231

<sup>10</sup> *Ibid* at 284.

<sup>11</sup> *Ibid* at 71.

The book would more appropriately be called a “collection of essays”. Each of the seven chapters could be read as an independent, free-standing unit. The chapters are both stylistically, and in terms of their content, self-contained. They each tackle a particular theme, research it in all its relevant aspects, and articulate a conclusion. This layout is adhered to without failing and even somewhat mechanically. For instance, Concluding Comments for Chapters I and II are identical, verbatim<sup>12</sup>. The book as a whole does not have a concluding chapter which would unify its content in a neat summary. This omission is probably deliberate and does not necessarily mean that the collection lacks coherency. Indeed, the ideas expressed in the book are part of a very firm and integrated worldview whose origins are clearly discernable in Professor Brown Weiss earlier award-winning writings.

The fragmented format nevertheless requires from the reader a certain amount of effort to identify the main ideas and arguments and to establish the connections between them in order to reconstruct the narrative. That narrative might read as follows.

Our century will witness a global fresh water crisis. Shortages of fresh water in the near future will affect vast areas of the world and a great number of people will not be able to satisfy basic human needs for drinking and sanitation. Professor Brown Weiss holds that, in the era of the Anthropocene, when human beings are overwhelming nature as the most dominant force of change, fresh water availability and quality will be the greatest challenge. The environmental, economic, and political consequences of the fact that the supply of fresh water is unevenly distributed among the countries are very serious.

Legal implications are equally important. Water scarcity will lead to an increase in international disputes regarding competing uses and interests. Therefore, legal instruments and institutional measures to avoid the disputes and procedures to resolve them when they occur will be critical. While water law has developed significantly in the last century, traditional legal paradigms will still be insufficient to address the full complexity of challenges. Traditional legal frameworks focus primarily on the supply side of water management. The author advocates for an evolution in water law which would explicitly address the demand side of the water allocation equation.

Traditionally, legal regulation of water is highly specialized. This, in author’s opinion, is not sustainable. Instead, she proposes that the problem of fresh water should be contextualized and water resources discerned in an integrated way. This approach would broaden the legal discourse regarding water to include interrelated issues such as land use, atmospheric pollution, rising sea levels, competing consumption for agricultural needs and the human consumption in the ever growing urban areas, as well as droughts, floods, and other water-related incidents. The author acknowledges that, due to the stresses over scarcity of good quality fresh water in different areas of the world, potential for conflicts is great and increasing. But she

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<sup>12</sup> *Ibid* at 49, 76.

also explains that, on the other hand, water offers abundant opportunities for cooperation among countries. The author anticipates that the need for international cooperation will lead to a diminishing role of treaties and the traditional institutional infrastructure in favour of less formal and less conventional legal instruments and institutions. Non-binding legal instruments and voluntary governmental or non-governmental commitments might prove to be more effective.

For international water law to evolve in such a way as to be able to successfully address the challenges of our century, it would have to be sufficiently flexible to ensure that human needs for water are adequately met when water quantity quality fluctuate. Water law will have to be able to adapt faster than ever before to scientific and technological developments in the management and monitoring of global water resources. Most importantly, the development of water law will create ties with other areas of international law: international trade, foreign investment, national security, health, and human rights.

Not unlike life-sustaining water which unites everything in nature, so will water law come to permeate other areas of international law. Professor Brown Weiss book demonstrates with utmost clarity that nowhere is our interconnectedness and our interdependence more visible than when it comes to water. Contemplating, even theoretically, the prospect of a loss of this precious resource for which there is no known substitute in nature, reminds us of how vulnerable humanity really is. Our welfare and possibly our very survival will depend on our ability to manage our relations with our natural resources, and with each other. Nowhere, concludes Professor Brown Weiss, "is this more evident than in the field of fresh water".<sup>13</sup> It is therefore vitally important for international fresh water law to become even more integrated into international law generally.

"Fresh water as a human right for all, including future generations" as a political slogan, and as a legal objective might be the road ahead. I disagree with Professor Brown Weiss on a single point: it would not be an evolution, but rather a revolution to have that goal accomplished.

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<sup>13</sup> *Ibid* at 10.