EQUITABLE UTILIZATION OR THE RIGHT TO WATER?
LEGAL RESPONSES TO GLOBAL WATER SCARCITY

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INTRODUCTION

Water, also called the 'world's most precious commodity', is getting scarcer.¹ Today, already 1.1 billion people lack access to clean drinking water. And as a result of population growth, industrialisation, pollution and climate change this number is expected to rise extensively in the next decades. A study for the Stockholm Water Conference in August 2001 showed that severe water shortages could affect one third of the global population by 2025 and will extend well beyond existing arid and semi-arid countries². At the same time, the world is captured by conflicts over water. From Israel to India, from Turkey to Botswana, arguments are going on over disputed water supplies that may soon burst into open conflict. In the Middle East, 5% of the world population survives on 1% of the world's fresh water. For instance, Israel, the Palestinian Territories and Jordan rely on the river Jordan, but Israel controls it and has cut supplies during times of scarcity. This has given rise to much conflict in the past including the 1967 Arab-Israeli war. But more importantly, it is expected to be an important source of conflict in the future as well. In 2002, Kofi Annan argued that "fierce competition for fresh water may well become a source of conflicts and wars in the future". And Britain's then Secretary of Defense John Reid has even listed water wars among the greatest threats facing the world in future decades, including international terrorism, demographic changes and global energy demand.³

¹ M. McCarthy, 'World's Most Precious Commodity is Getting Even Scarcer, THE INDEPENDENT, Tuesday, 28 February 2006.
³ Armed Forces are Put on Standby to Tackle Threat of Wars over Water, THE INDEPENDENT, Tuesday, 28 February 2006.

Hence, providing access to clean drinking water and preventing water wars seems one of the most critical challenges facing governments and the international community at large. Only good water management, both between and within states, can prevent new conflicts from arising and can provide access to clean drinking water to those currently without. At the Kyoto World Water Forum, it was acknowledged that the law should form an integral part of the management of scarce water resources - and should thus be utilized to address the global water problems. The law” in the context of water management, however, could refer to two different legal discourses that are both concerned with the management of scarce water. First, there is “international water law” that is mainly concerned with water management between states. Second, there is “the right to water” that is concerned primarily with the water management within states.

The right to water requires states, at minimum, to “ensure access to the minimum essential amount of water that is sufficient and safe for personal and domestic uses to prevent disease” for its citizens. Based on this obligation, some have challenged if a government is allowed to privatize its water services. Moreover, it is disputed how much governments may charge citizens for essential water provision. The issue of water resource allocation between states, however, falls outside the scope of the right to water, even though this is of crucial importance for its realization.

By contrast, the relations between states are covered by international water law. International water law builds on the principle of ‘equitable utilization’, which requires ‘reasonable and equitable’ sharing of water resources between states. As a result, upstream states that control the water are often required to use less water than they could. Equitable utilization is considered as the cornerstone of international water law and enjoys the status of customary international law.

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6 When speaking of ‘water resources’, this paper often focuses on transboundary rivers. However, a considerable amount of the non-frozen freshwaters consists of groundwater. Groundwater is often shared between two different states as well. Also, just as with rivers, often one of the two states has control over the groundwater. The main difference, however, is that river waters tend to renew themselves, whereas groundwater at some point might be totally consumed. In any case, the same set of legal rules is applicable to both groundwater and transboundary rivers. This paper often uses transboundary rivers as an example which is less technical and easier to grasp for the legal audience. See for an insightful technical account of the issue M. Falkenmark, Water Scarcity - Challenges for the Future in Edward H.P. Brans (et al.), The Scarcity of Water: Emerging Legal and Policy Responses (Kluwer Law International, The Hague, 1995), pp. 21-39.