

Indigenous peoples and local communities' water rights, international law and water security

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Abstract

In this paper converge perspectives of authors from diverse scientific, geographical and indigenous backgrounds. Spanning expressions of Indigenous worldviews enshrined in international Indigenous declarations, international water law and the United Nations development agenda with regard to water security and predominantly concentrating on parts of the Americas, the paper examines examples of instruments, implementation and connections between that appear useful to collectively create a sustainable future of clean and safe water for coming generations and to contribute to meeting the Sustainable Development Goals.

1. The water situation affecting Indigenous peoples

Freshwater challenges, from water scarcity, poor quality, lack of sanitation facilities, to disasters such as floods and droughts, affect some 80% of the world's population living in areas with high water security¹ threats. The lack of access to drinking water of adequate quality and quantity along with the lack of safe sanitation remain among the largest human health problems globally. More than 600 million people lack access to safe drinking water, some 2.5 billion, overwhelmingly in developing countries, have no access to improved sanitation facilities.

At the same time, water resources are under increasingly severe pressure from climate change and other global drivers, such as the prevalent economic development model (growth), urbanization and land-use changes. Climate change alters rainfall patterns, soil moisture, humidity, glacier-mass balance and river flow, water quality and also causes changes to underground water sources. At the same time, floods and droughts are rising in frequency and intensity, exerting further pressure on water resources, with tremendous impact on the natural environment and society. (IPCC 2014)

Poor rural populations are most affected by the lack of water security (Jiménez-Cisneros et al. 2013). While Indigenous peoples account for about 5% of the world's

¹ "The capacity of a population to safeguard access to adequate quantities of water of acceptable quality for sustaining human and ecosystem health on a watershed basis, and to ensure efficient protection of life and property against water related hazards — floods, landslides, land subsidence and droughts." (UNESCO-IHP 2012; Jiménez-Cisneros et al. 2013)

population, estimated over 370 million persons (UNPFII no date), they constitute approximately 15% of the poor. Yet, Indigenous peoples' knowledge systems and traditions have often maintained a sustainable balance with their living environment, including its water, for thousands of years — a capacity that the international community now seeks to reach by “Transforming our world: the 2030 Agenda for Sustainable Development”.

The 2030 Agenda, its Sustainable Development Goals (SDG) and related texts consider Indigenous peoples among the vulnerable groups, included in the repeated pledge of the United Nations (UN) General Assembly's Resolution 70/1 “that no one will be left behind” (United Nations 2015). Their participation in the global consultation process for the 2030 Agenda helped “designing a framework that makes explicit references to Indigenous peoples' rights and development concerns, [...] founded on principles of universality, human rights, equality and environmental sustainability”, as the UN Permanent Forum for Indigenous Issues (UNPFII) has stated (UNPFII 2016). SDG 6, aims to ensure availability and sustainable management of water and sanitation for *all* (6.b). However, it may be questioned if Indigenous people are referred to in the SDGs as much as they should have been, also with regard to the Goals' implementation.

2. Indigenous values and practices and hegemonic international discourse

It is striking that the views of Indigenous peoples often receive comparatively little attention in international water discourse. Indeed, the latter is primarily driven by a techno-scientific and even financial approach. Language of Indigenous peoples, even if using English as a widespread means of expression and in academic context, and worldviews may differ from this discourse. Worldviews and perceptions are of great diversity and described often in a manner displaying personal involvement rather than distant observation or description.

For instance, among many Indigenous peoples of the Americas and other parts of the world, Elders have shared that Water has its own life force, that rivers and streams are the arteries and veins of Mother Earth, and that the oceans are the sacred mat that links all of Life. Indigenous peoples know that water is necessary for the health of all people, plants and animals. Today, most of Mother Earth's lakes and rivers are polluted, and the Pacific Ocean has an ongoing leak of radioactive waste.

Among the billions of people who live without access to clean drinking water and adequate sanitation, many are Indigenous communities. Even in developed countries, Indigenous peoples do not have access to safe, clean drinking water. Despite proven sustainable cultural practices that respect and honour the natural environment, the lived experiences of Indigenous communities are overlooked. In many policies and strategies for action, the scientific world is looked to for both water policy development and climate change adaptation strategies.

From their role as original caretakers and guardians of Mother Earth, Indigenous Peoples have valuable insights for sustainable water practices that could inform and suggest alternatives to current water management and governance systems. E.g. Indigenous peoples have been using sustainable practices for sanitation. These have not been integrated in many local, regional or international programmes as they

do not receive proper technical acknowledgement, because they either remain unknown or are assessed using techno-scientific standards that are culturally biased and may not reflect a given system's value in its specific context.

A growing community of Indigenous leaders from across the regions of Mother Earth are unifying to address the imbalance in humanity's relationship with water. In 1999, at the World Indigenous Peoples Conference on Education in Hilo, Hawai'i, a call was issued to Indigenous peoples to address water issues by organizing an Indigenous-led conference on water: an Indigenous World Forum on Water and Peace (IWFWP) in view to increase the weight of Indigenous peoples on the international water agenda.

Since then, there have been similar calls at the 3rd, 4th, and 5th World Water Fora (Kyoto, Japan, 2003; Mexico City, 2006²; and Istanbul, Turkey 2009), in respective international Indigenous Declarations. Interventions were submitted at UNPFII in New York (2007, 2008, 2009 and 2011), urging all nations' states and all UN agencies concerned with water, to support an Indigenous-led World Forum on Water and Peace. The Secretariat of the 2007 UNPFII included this recommendation in their final report.

Simultaneously to these attempts to influence the discourse of the international water community, Indigenous peoples struggled in very concrete cases for the recognition of their rights.

3. Cases of recognition of Indigenous peoples water rights in national and global contexts

The issue Standing Rock Sioux Tribe (SRST) vs. United States Army Corp of Engineers

In the USA, there is a long history in the federal government's granting of construction of hazardous projects through tribal lands, waters and cultural sites without including the tribes in the decision-making process. SRST has been requesting a full Environmental Impact Study that would allow a formal governmental process taking on board the Tribe's concerns and issues regarding the risks of the pipeline leaking, spills contaminating the Missouri River, and the protection of SRST's cultural resources along the pipeline corridor, as well as other impacts to their hunting and fishing rights.

Basically, this case raises the same concern/issue consistently raised by many Indigenous Peoples around the world (cf. section 5.3 and 5.4 below) who have been calling upon governments worldwide and their water ministers to fully recognize the rights of Indigenous Peoples, including their right to water. The practical recognition of internationally defined rights would give Indigenous Peoples meaningful participation in decision-making on developments that could have impact on the quality and quantity of water that affecting them.

An important point the Indigenous Peoples put forward is for the governments to

² <http://media.knet.ca/node/1952>

recognize and respect the standards of free, prior and informed consent (FPIC), as a minimum standard reflected in the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) (UN 2007). Moreover, the recognition of their right to water should go beyond quantities to be used for drinkable purposes and basic needs to cover the amount of water that would be necessary to promote economic development of communities and to ensure the welfare of their environment.

UNDRIP also articulates the right to water and other human rights. In Articles 11 and 12, the 147 signatories recognize that Indigenous peoples have a right to their culture, spirituality and that free prior and informed consent defines the right to practice this culture. Water is fundamental to Indigenous peoples spiritual lives, which leads to the right to fully participate in any decisions that affect their waters. Article 13 defines the rights to distinct language and education systems that teach Indigenous children how to care for water, in their respective language, because “our language is our law” (H. Waikerepuru, 2001 personal communication with D. Sanderson). Article 18 defines the right to decision-making: Indigenous peoples have a right to full participation in decisions that affect their waters (as in Article 11), and to develop water policies that are guided by their traditions. Article 24 defines the right to health: the need for clean water to have healthy traditional foods and medicines. Preserving the prerequisite for good health will mean a healthy environment for all of life and sound basis for sustainable development practice.

Bolivia has included Indigenous peoples’ rights in its Constitution (Inc. O.U.P. 2009). Bolivia’s President Evo Morales called for a UN Convention on Water at the UN Permanent Forum on Indigenous Issues (2007). Moreover, several countries have recognized that the planet Earth has rights. In 2008, Ecuador became the first nation in the world to recognize the legal rights of nature — of its mountains, rivers, and land (Article 71 of the Ecuadorian Constitution). Rivers have rights: Maori in Aotearoa (New Zealand), have asserted that the Whanganui River is a living being and this knowledge and practice is enshrined by New Zealand law (Tutohu, Whanganui Iwi and the Crown, 2012). The Bolivian Cochabamba Peoples’ Agreement (2012) carried those decisions forth to state that “Mother Earth is a living entity”. In many Indigenous communities, Elders teach that Mother Earth provides all people, plants and animals with everything we need to sustain life. According to the Indigenous world views and the sovereign decisions expressed in the aforementioned documents, the Earth has an inherent right to be free of pollution, and a right for her waters to be protected and sustainably managed.

4. Existing claims by Indigenous peoples and international law

Throughout Indigenous lands and territories of North America, water is considered sacred. Besides being used for drinking, sanitation and for tribal-based livestock and agriculture, it is used in ceremonies and in prayer and serves as a symbol of the interconnectedness of all life. Nearly all Indigenous tribal communities are faced with trade-offs between the use of water for cultural, drinking, agriculture, energy production, and economic development.

The Indigenous peoples of the United States have a unique legal and political relationship that was established early in the country’s history. Indigenous tribes have reserved water rights recognized by the Congress of the United States.

Indigenous Treaties with the US government typically did not specify the tribes' water rights, an issue which the U.S. Supreme Court addressed in its 1908 decision in *Winters v. United States*, 207 U.S. 564 (1908). The Court held that tribal treaties impliedly reserved water rights necessary to meet the purpose of a tribe's reservation.

At international level, it has been recognized that the environment in which Indigenous peoples live provides the water resources indispensable for an adequate standard of living and a dignified life. The Inter-American and the African human rights systems have granted on several occasions collective rights protection to Indigenous groups. (Inter-American Court of Human Rights 2001 para.140 (B), 149 and 151; African Commission on Human and People's Rights 2002, para.63) The Inter-American human rights bodies have rendered important decisions in this respect. In its decision *Xákmok Kásek Indigenous Community v. Paraguay*, the Inter-American Court spoke of the right to use natural resources as part of a right to a decent existence. In the case of the *Xákmok Kásek Indigenous Community*, the Inter-American Court found that the lack of access to water that was apt for human consumption, together with a lack of access to food, health, and education, which are considered the basics for protecting the right to a life with dignity and analyzed together, led to the aforementioned judgment's conclusion that the right to life had been violated. Specifically, the Court stated that compliance "with Article 4, in relation to Article 1(1) of the American Convention, requires not only that no person be deprived of their life arbitrarily (negative obligation), but also that States adopt all appropriate measures to protect and preserve the right to life (positive obligation), under their obligation to ensure the full and free exercise of the rights of all those subject to their jurisdiction" (*Xákmok Kásek Indigenous Community v. Paraguay* case, 2010, para. 187)

Relying heavily on the jurisprudence of the Inter-American human rights system, the African Commission linked the land and water rights with the 1981 African Charter on Human and Peoples' Rights. In the landmark *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya* case, the African Commission considered that access to information and public participation are means for exercising the right to use water resources. The violation of this right includes the failure to properly consult with the concerned Indigenous community, and not having obtained their consent (*Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, 2010, paras. 266-268).

5. Current international texts and declarations particularly relevant to Indigenous peoples water issues

5.1 Conventions

The law of transboundary water resources increasingly sees the management and protection of water resources through the lens of human needs. Both the 1997 *Convention on the Law of the Non-Navigational Uses of International Watercourses* (UN Watercourses Convention) – entered into force in 2014 – and the 2008 *International Law Commission's Draft Articles on the Law of Transboundary Aquifers* contain provisions that refer to human needs. While these instruments do not make

explicit reference to the human right to water, they do promote water access.

Human needs, in particular those of populations that depend on watercourses or aquifers, are to be taken into consideration in applying both the principle of equitable and reasonable use and the obligation not to cause a significant damage. In the case of notification of planned measures, human needs may also be a matter of concern for the potentially affected riparian populations (Boisson de Chazournes, 2013).

The 1997 UN Watercourses Convention states in Article 10 that a conflict between uses of a watercourse must be resolved “with special regard being given to the requirements of vital human needs”. The 2004 *International Law Association Rules on Water Resources* (Berlin Rules) offer a rather comprehensive definition of “human needs”. In Article 3 (20), it is provided that “vital human needs” means water used for immediate human survival, including drinking, cooking and sanitary needs, as well as water needed for the immediate sustenance of a household. However, the scope of this definition only covers the requirements for basic human needs. Other uses such as the water required for economic activities and the protection of ecosystems are not covered. Large energy or mining projects may affect basic human needs and the right to water, reducing the quantity of water and polluting rivers, aquifers or lakes. In these cases, the State has the obligation to ensure to affected people access to justice and remedies. As noted in the General Comment No. 15 on the Right to Water: “Any persons or groups who have been denied their right to water should have access to effective judicial or other appropriate remedies at both national and international levels” (General Comment No. 15 on the Right to Water, 2002, para.55). In this context, it should also be reminded Article 32 of the UN Watercourses Convention stating the obligation for watercourses States to guarantee access to judicial or other mechanisms without discrimination.

The implementation of the principle of equitable and reasonable use of an international watercourse may affect the rights of Indigenous peoples, not taking into account their special needs. It has been asserted that “any form of water utilization which might significantly harm human health and safety would be a violation of the Convention.” (Loures, Rieu-Clarke & Vercambre 2009, 17) Interestingly, among the factors which are relevant to equitable and reasonable utilization, Article 6.1 (b) of the UN Watercourses demands that water is distributed in a fair and reasonable manner, which involves the taking into consideration of the “social and economic needs” of the riparian populations concerned. While this provision does not specify whether future needs are covered, the preamble of the Convention points out that “conservation, management and protection of international watercourses and the promotion of the optimal and sustainable utilization” should take into account “present and future generations.”

Article 5 (2) of the 2008 Draft Articles on Transboundary Aquifers also takes into account vital human needs, but with a different focus, understanding them as a factor to be considered in the equitable and reasonable balancing of interests. Vital human needs are an integral part of the determination of what is equitable and reasonable utilization.

The protection of vital human needs is also acknowledged in regional and river basin instruments. This is the case of the *Protocol on Water and Health to the 1992*

UNECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes, which addresses both national and transboundary water resources. At the basin level, the Senegal and Niger Water Charters, as well as the *Charter of Water for the Lake Chad Basin*, have clearly followed an approach that prioritizes vital human needs, in addition to proclaiming the right to water.

5.2 International Development Agenda

The international development agenda explicitly recognizes the rights of Indigenous peoples and recent texts call upon state parties and partners to implement them. UNPFII considers that 73 out of the 169 SDG targets can be linked to provisions in the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) and International Labor Organization (ILO) Indigenous and Tribal Peoples Convention No. 169. Certain texts specifically address water issues; others include them within a broader range of subjects.

The 2030 Agenda for Sustainable Development declares that “people who are vulnerable must be empowered” and defines specific groups whose needs are reflected by this provision, including Indigenous peoples (United Nations 2015, Art. 23). While Indigenous peoples are among the groups that “should have access to life-long learning opportunities to acquire the knowledge and skills needed to exploit opportunities and to participate fully in society” (ibid., Art. 25), they are not subjects of the Agenda, but embarking as actors on the journey to the 2030 Sustainable Development Goals, alongside “Governments as well as Parliaments, the UN system and other international institutions, local authorities [...] civil society, business and the private sector, the scientific and academic community – and all people”. The “Agenda of the people, by the people, and for the people” (ibid., Art. 52) defines in 17 SDG interwoven guidance for development action until 2030. Water is seen as an issue interlinking the SDGs, inseparable from development.

SDG 2 (end hunger and achieve food security) and 4 (education for all) directly refer to Indigenous peoples. Looking here at SDG 2, its target 2.3 aims to “double the agricultural productivity and incomes of small-scale food producers, in particular women, Indigenous peoples, family farmers, pastoralists and fishers, including through secure and equal access to land, other productive resources and inputs”. Given the widespread consideration of water as a key productive resource for food production, aiming at “secure and equal access” to it, is a strong recognition of the mentioned stakeholders’ rights.

The aforementioned elements tie in with SDG6, “Ensure availability and sustainable management of water and sanitation for all”. Several of its targets refer to “all” or “the needs of [...] those in vulnerable situations”, e.g. 6.1 on universal and equitable access to safe and affordable drinking water; 6.2 on accessing adequate and equitable sanitation and hygiene; 6.4 on addressing water scarcity and substantially reducing the number of people suffering from water scarcity; 6.6 on protecting and restoring water-related ecosystems, including mountains, forests, wetlands, rivers, aquifers and lakes. All relate closely to the living conditions of many Indigenous peoples, and also 6.b, “Support and strengthen the participation of local communities in improving water and sanitation management” reinforce Indigenous peoples’ rights.

The review of progress in implementing SDG at national level “should also draw on

contributions from [...] Indigenous peoples”, *inter alia* (ibid., Art. 79). However, the recognition of Indigenous peoples in goals and targets seems not to be reflected at the level of the indicators currently under construction to monitor the progress of the Agenda’s implementation.

5.3 Indigenous peoples’ laws, declarations and recommendations

Indigenous peoples laws are informed by the laws of nature, and Indigenous peoples’ Original Instructions (Cajete, 2000). The landmark Delgamuukw decision at the Supreme Court of Canada recognizes and enacts the Gitksan peoples’ Indigenous laws (Government of Canada, 1998). In 2014, the Tsilhqot’in asserted their traditional laws regarding water (Tsilhqot’in National Government, 2014).

The Nadleh Whut’en and the Stella’ten Nations were the first to assert their Indigenous water laws in British Columbia. The historic 2014 Supreme Court of Canada ruling that granted a Tsilhqot’in Nation title to their traditional territory in the Interior was cited by the Nadleh Whut’en and the Stella’ten leaders to enact the water laws, requiring higher levels of consultation responsibilities from the government. (Hoekstra, 2016). Their water management policy aims to protect surface waters so they will remain “substantially unaltered in terms of water quality and flow” that includes a systematic evaluation of environmental issues and concerns with each surface water system, including collecting data on historical water quality and cultural use.

In Article I, the United States Constitution excludes states and individuals from Indian affairs stating that only Congress has the power “To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes...” Article VI of the Constitution states that all treaties entered by the United States “shall be the supreme Law of the Land.” In 1789, the United States had already entered nine treaties with different Indian tribes. This provision of the U.S. Constitution states that the federal government’s treaties with Indian tribes are the supreme law of the United States. Tribal groups in the United States are continuing to identify and calling for formal recognition of their water rights. By 2011, of the 566 federally recognized tribes, 29 settlements have resulted in Congressional Acts. Furthermore, Section 518 of the Clean Water Act recognizes the right of tribes to adopt independent water quality standards that aim to protect water for human health, cultural practices and ecological well-being and regulatory authority within the legal boundaries of their nations.

5.4 Indigenous peoples’ declarations and recommendations

Since the beginning of the millennium, several collective Indigenous declarations on water made reference to international texts.

At the 3rd World Water Forum, in Kyoto, Japan, 2003, the Indigenous Peoples’ Plan of Action, stated (Item17): “We endorse and reiterate the ‘Kimberley Declaration and the Indigenous Peoples’ Plan of Implementation on Sustainable Development” which was agreed upon in Johannesburg during the World Summit on Sustainable Development in September 2002. Item 29 of the documents calls ‘on the States to comply with their human rights obligations and commitments to legally binding international instruments to which they are signatories to, including but not limited to, such as the Covenant on Civil and Political Rights, the Covenant on Economic,

Cultural and Social Rights, International Convention on the Elimination of all Forms of Racial Discrimination; as well as their obligations to conventions on the environment, such as the Convention on Biological Diversity, Climate Convention, and Convention to Combat Desertification.’

At the World Water Forum in Mexico (2006), the Indigenous Peoples Declaration reaffirmed the Kyoto declaration and asserted “in all the national and international laws, the right of self determination and the recognition of our territories [and] autonomy in the use and enjoyment of our natural resources such as water, as a human right.”

The 2030 Agenda can respond to a certain extent to the appeal of these declarations to the human right to water, the need for self-determination and the recognition and implementation of Indigenous legal systems, customary laws regarding water. However, it obviously depends on its implementation by Member States.

6. Benefits of integration of Indigenous peoples’ water rights in mainstream water discourse and practice

The integration of indigenous rights in national policies will prevent the risks of conflicts. An approach based on mutual and shared benefits should be promoted. International instruments may pave the way in this direction. However, the willingness and implementation of international commitments remain in the hands of national authorities. Recognizing the experience of Indigenous peoples in sustainable living with and maintaining water and natural systems can deliver keys to sustainable policies and to implementing vital obligations towards sustainable development. IWFWP contributes to implementing the SDGs by drawing on and fostering traditional knowledge and addressing water issues in a holistic way, while addressing climate change, implementing traditional knowledge and ancient laws about water, and promoting clean and renewable energy technologies.

7. Conclusions

Although there is evidence that progress has been made in the recognition of the needs and rights for Indigenous people, we are still far from full implementation of their universally equal and just treatment. Efforts have to be sustained in the domain of water to ensure that (1) Indigenous peoples’ concerns are reflected at the 2030 agenda up to the level of the indicators; (2) water is provided in sufficient quantity and quality for current and futures needs of Indigenous communities: to satisfy immediate needs, enable the expansion of activities if desired and ensure the water needed to protect the ecosystems inhabited, including their functions vital to all humanity.

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