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## **The Human Right to Glaciers: Expanding the International Human Right to Water**

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## **Contribuția doctorandului și masterandului / PhD and Master Candidate's Contribution**

### **The Human Right to Glaciers: Expanding the International Human Right to Water**

*Roxana POPA<sup>1</sup>*

***Abstract:** The aim of this article is to provide a brief but conclusive analysis of the current international legal framework that protects the fundamental right to water. While glaciers constitute one form of water and are partly covered by international conventions, this approach is insufficient given the urgency of the climate crisis and its global impact. While the international right to water has been thoroughly discussed and analysed, academic focus is yet to touch upon glaciers' place in the international legal framework. Due to structural and material differences between liquid water and glaciers, the right to glaciers should be specifically protected under international law, particularly given its interdependence with the widely-recognised fundamental right to water.*

***Key-words:** glaciers; fundamental right; right to water; economic, social and cultural rights.*

#### **I. Introduction**

This paper will show that, while the right to water has gained significant legal importance and is now recognized as an internationally enforceable fundamental right, glaciers and the periglacial environment, or the planet's ice reserves and the surrounding ecosystems, are excluded from laws and regulations related to the right to water. It will be argued that, given their

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importance and contribution to the world's fresh water reserves, the right to water should be expanded to cover and protect glaciers.

To that purpose, the importance of glaciers will firstly be looked at and the currently applicable international legal framework will be analysed, after which the discussion will turn to whether the right to water confers sufficient protection. Lastly, the Argentinian legislative framework that protects glaciers will be analysed, and it will be found that, given its inflexibility, and in order to put an end to climate deterioration, the human rights framework should instead be applied to provide international protection for glaciers.

## II. Glaciers: importance and current legal framework

Glaciers are an essential natural resource which stores the majority of the 2% of the world's water that is fit for human consumption or for agriculture. They provide local environments with water reserves that feed rivers and water tables that are the source of potable water and essential for irrigation and industry. Not only do millions depend on them directly, they are also a great contributor to the Earth's ability to remain cool by absorbing heat.<sup>1</sup> Consequently, glaciers lie at the foundations of the right to water and sanitation, and are essential for the protection of the right to life and health. Moreover, its hindrance would lead to further climate deterioration, which in turn affects the majority of both first and second generation rights.

It is widely believed that glaciers are made up of water in one of its forms, ice, and therefore the legal protection afforded to water would also cover glaciers. However, water in its solid form is substantially different in structure, temperature and mass, and some glaciers survive in a solid state for years, if not hundreds of years, and are not interacted with directly, as opposed to running water. Moreover, glaciers act as a mechanism for the preservation of water.<sup>2</sup> Yet, instead of protecting the ice, the focus is on reducing the causes that lead to its melting, a much more challenging and lengthy process. Protecting and even generating glaciers is possible, and Switzerland has been able to successfully reduce glacier melt by 70

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<sup>1</sup> Jorge Daniel Taillant, *Glaciers: The Politics of Ice*, Oxford University Press, 2015, pp. 24-31.

<sup>2</sup> Jorge Daniel Taillant, "The Human Right to Glaciers", *Journal of Environmental Law and Litigation*, vol. 28(59) (2013), pp. 66-67.

percent.<sup>1</sup> Consequently, through inexpensive solutions, important fundamental rights could be protected in the face of climate change.

Given this urgency and importance, the current international legislative framework, a piecemeal approach, is insufficient. The UN Watercourse Convention<sup>2</sup> includes glaciers in its definition of “a system of surface and groundwaters”,<sup>3</sup> but this only covers glaciers when part of an international watercourse and its implementation is impeded by scientific considerations. Similarly, the ILC considered the creation of a legal regime governing glaciers aimed at the prevention of water pollution,<sup>4</sup> but this would not cover glaciers as individual elements, but an integrated water system.<sup>5</sup>

A different approach was taken by Italy and Switzerland in relation to their land boundary, in which the *sui generis* character of glaciers was recognised: their movement can have an impact on the state boundary line and are similar navigable waters. However, even this approach will not be applicable for all glaciers, only for those across international boundaries.<sup>6</sup> Consequently, while international law is not silent in relation to glaciers,<sup>7</sup> the different approaches adopted do not cover all glaciers, and even those protected do not count as separate actors, but a collective resource. It is, therefore, surprising, given their importance and known deterioration, that the majority of states, as well as the international community, have not adopted a conclusive framework of protection, as simply mapping them onto the current environmental law and human rights law framework is insufficient, particularly given their scientific complexity and that of the intricate ecosystems they support.

### III. Glaciers and the right to water

Globally, the lack of access to water and sanitation are at alarmingly low levels. The right to water, therefore, concerns safe water sources at close

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<sup>1</sup> Julissa Treviño, “This Swiss Town is Protecting its Glaciers with a Blanket”, *Smithsonian Magazine*, 12 March 2018 <<https://www.smithsonianmag.com/smart-news/swiss-town-glacier-blanket-180968451/>> last visited on 13 May 2019.

<sup>2</sup> United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses, 21 May 1997, 12 UNTS 52106, entered into force 17 August 2014.

<sup>3</sup> *Ibid*, Article 2(b).

<sup>4</sup> International Law Commission, *Summary Record of the 1789<sup>th</sup> Session*, UN Doc A/CN.4/SR.1789 (24 June 1983), para. 6.

<sup>5</sup> Laurence Boisson de Chazournes, *Fresh Water in International Law*, Oxford University Press, 2013, p. 44.

<sup>6</sup> *Ibid*, p. 45.

<sup>7</sup> Jennifer Cox, “Finding a Place for Glaciers within Environmental Law: An Analysis of Ambiguous Legislation and Impractical Common Law”, *Appeal: Rev Current L & L Reform*, vol. 21 (2016), p. 30.

proximity to houses, storm water management and waste disposal. Its ultimate aim is to ensure that water becomes free of discrimination and affordable for every household.<sup>1</sup> Thus, the right to water is of extraordinary importance, but it does not concern the source of the water, but its distribution, and is insufficient in its scope to ensure that these goals are met.

The right to water is not listed in the founding human rights instruments, but has gained significant traction, it being, possibly, despite in its early years, the paradigm universal right, as water is the essential condition to sustaining life.<sup>2</sup> However, even if its future goals, the right to water does not address protecting the source of potable water: the 2030 Agenda for Sustainable Development<sup>3</sup>, while an important step in the development of the distribution of water, does not touch upon glaciers, despite aiming for the protection and restoration of water-related ecosystems, such as mountains, forests, wetlands, rivers and lakes.<sup>4</sup>

Thus, the protection of glaciers or their connection to communities affected by climate change is rarely talked about.<sup>5</sup> While the right to water and sanitation is essential, it completely ignores that most of this water comes from isolated but endangered ice bodies in high mountains where most people will never reach.<sup>6</sup> Knowledge of these environments is extremely limited to a group removed from broader nature conservation discussions and, even more so, water management.<sup>7</sup> Consequently, not only are the two areas distinct, but the legal regime applicable to water management does not cover glaciers, which constitute the source of most drinking water.

Nevertheless, the right to water is still new and the necessary characteristics of policy required are evolving,<sup>8</sup> and expanding the scope of this right to cover the preservation of glaciers is a possibility. Domestically, legislation has also been adopted in order to protect glaciers, mainly where mining activities have damaged them, in Argentina, with similar provisions being

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<sup>1</sup> Norbert Brunner et al., “The Human Right to Water in Law and Implementation”, *Laws* vol. 4(1) (2015), pp. 413-414.

<sup>2</sup> The Rt Hon Lady Justice Arden, “Water for all? Developing a Human Right to Water in National and International Law”, *International and Comparative Law Quarterly*, vol. 65(1) (2016), pp. 788-789.

<sup>3</sup> United Nations General Assembly, ‘Transforming our world: the 2030 Agenda for Sustainable Development’, UN Doc A/RES/70/1 (21 October 2015).

<sup>4</sup> *Ibid.*

<sup>5</sup> J.D. Taillant, *Glaciers: The Politics of Ice*, *supra*, p. 300.

<sup>6</sup> J.D. Taillant, *The Human Right to Glaciers*, *supra*, p. 74.

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

<sup>8</sup> *Ibid.*, p. 301.

discussed in Chile and Kyrgyzstan.<sup>1</sup> The next section will focus on the Argentinian instrument, while keeping in mind that not only the content, but also the circumstances of the three projects are highly similar.<sup>2</sup>

#### IV. Glacier law in Argentina

The Argentinian National Glacier Act<sup>3</sup> is the first legislative instrument in the world dedicated to the preservation of glaciers. It takes three important steps to that purpose: it recognizes that glaciers are a public good, it creates a National Glacier Inventory, and prohibits potentially damaging developments, such as mining, from taking place in glacial or periglacial environments.<sup>4</sup> The purpose is to protect these “strategic freshwater reserves for human consumption, for agriculture and as sources for watershed recharge; for the protection of biodiversity; as a source of scientific information and as a tourist attraction. Glaciers constitute goods of public character.”<sup>5</sup> This process proved to be highly informative, as no glacier inventory had ever existed and no account had been taken of anthropogenic activity concerning glaciers in the past. Most Argentinians were not aware of the large number of glaciers (upwards of 25,000) and could only name one.<sup>6</sup> This shows that this instrument had correctly established the fundamental steps needed in order to ensure glacier protection, starting with raising awareness and collecting information.

However, glacier protection laws have been argued to overlook the dynamics of glaciers and prevent or delay actions needed to mitigate hazards, such as artificial drainage of glacial lakes, thereby creating risks for local populations.<sup>7</sup> Moreover, despite having been created to protect water resources, the consistent changes in the periglacial environment caused by climate change were not properly addressed. This means that the long-term impact of such legislation can remain limited, as they can be turned into

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<sup>1</sup> Pablo Iribarren Anacona, “Glacier protection laws: Potential conflicts in managing glacial hazards and adapting to climate change”, *Royal Swedish Academy of Sciences*, vol. 47 (2018), p. 835.

<sup>2</sup> *Ibid.*, p. 839.

<sup>3</sup> Argentine National Congress, Buenos Aires, 30 September 2010: *Minimum Standards Regime for the Preservation of Glaciers and the Periglacial Environment [ANGA]*.

<sup>4</sup> J. Cox, *op. cit.*, p. 34.

<sup>5</sup> J.D. Taillant, *The Human Right...*, *supra*, p. 75.

<sup>6</sup> *Ibid.*, pp. 75-76.

<sup>7</sup> P.I. Anacona, *op. cit.*, p. 835.

static instruments because of their rigidity and due to the challenges posed by changes in the rapidly advancing or retreating glaciers.<sup>1</sup>

For example, the instrument only minimally addresses glacial hazards. Construction other than for scientific research and preventing risk is prohibited by article 6(b), but the actions allowed or prohibited and their risks are not defined. Therefore, an Environmental Impact Statement would be required on a case-by-case basis when a hazard is suspected, yet this process could extend for months or even years during which lives could be put at risk. This same rigidity is likely to unintentionally hinder adaptation to climate change conditions by restricting local communities from altering glacial landscapes. For example, it may be in the best interest of the local communities to use glacial lakes as reservoirs for drinking water due to decreased rainfall and increasing temperatures.<sup>2</sup> Consequently, while aiming to decrease harmful activities, these instruments can restrict necessary changes in glacial environments.

Human rights, on the other hand, rely on flexibility to retain their legitimacy over time in an increasingly diverse and changing society:<sup>3</sup> a great example being the emergence of the right to water itself or the living instrument approach adopted by the European Court of Human Rights that aims to allow its foundational instrument to keep up with present day conditions.<sup>4</sup> Thus, by applying an expanded right to water that would include the protection of glaciers, faced with a hazardous situation, the focus would shift from the short-term protection of glaciers to ensuring the survival of the communities and ecosystems dependent on them, while, at the same time, ensuring the protection of glaciers as *sui generis* actors that sustain these communities.

## V. Conclusion

To conclude, this paper has argued that glaciers, being different from water and not covered by the protection conferred by the right to water, should be expressly protected by the international legal framework. While legislation has been adopted domestically, it has not provided the necessary flexibility that would, on the international level, lead to the improved long-term

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<sup>1</sup> Ibid., p. 839.

<sup>2</sup> Ibid., p. 841.

<sup>3</sup> Seth D. Kaplan, *Human Rights Through Thick and Thin Societies: Universality Without Uniformity*, Cambridge University Press, 2018, p. 29.

<sup>4</sup> Eirik Bjorge, *Domestic Application of the ECHR: Courts as Faithful Trustees*, Oxford University Press, 2015, p. 131.

preservation of not only the most important source of potable water, but also an important resource that contributes to climate stability. Therefore, due to the inherent flexibility of the human rights framework, the right to water should be expanded so as to extend its protection to the preservation of glaciers and glacial ecosystems.

## **Bibliography**

### **Articles**

P. I. Anacona, 'Glacier protection laws: Potential conflicts in managing glacial hazards and adapting to climate change' [2018] 47 Royal Swedish Academy of Sciences

J. Arden, 'Water for all? Developing a Human Right to Water in National and International Law' [2016] 65(1) International and Comparative Law Quarterly

M. Baer and A. Gerlak, 'Implementing the human right to water and sanitation: a study of global and local discourses' [2015] 36(8) Third World Quarterly 1527-1545

D. R. Boyd, 'The Implicit Constitutional Right to Live in a Healthy Environment' [2011] 20(2) Review of European Community & International Environmental Law

N. Brunner and others, 'The human right to water in law and implementation' [2015] 4(1) Laws

C. Clark, 'Of What Use is a Deradicalized Human Right to Water?' [2017] 17 Human Rights Law Review 231-260

J. Cox, 'Finding a Place for Glaciers within Environmental Law: An Analysis of Ambiguous Legislation and Impractical Common Law' [2016] 21 Appeal: Rev Current L & L Reform

A. Khadim, 'Defending Glaciers in Argentina' [2016] 28(1) Peace Review

D. Misiedjan and J. Gupta, 'Indigenous Communities: Analysing their Right to Water under Different International Legal Regimes' [2014] 77(1) Utrecht Law Review

J. D. Taillant, 'The Human Right; to Glaciers' [2013] 28(59) Journal of Environmental Law and Litigation

### **Books**

E. Bjorge, *Domestic Application of the ECHR: Courts as Faithful Trustees* (OUP 2015)

L. Boisson de Chazournes, *Fresh Water in International Law* (OUP 2013)

S. Kaplan, *Human Rights Through Thick and Thin Societies: Universality Without Uniformity* (CUP 2018)

J. D. Taillant, *Glaciers: The Politics of Ice* (OUP 2015)

### **Legislation**

Argentine National Congress, Buenos Aires, 30 September 2010: *Minimum Standards Regime for the Preservation of Glaciers and the Periglacial Environment [ANGA]*



International Law Commission, *Summary Record of the 1789<sup>th</sup> Session*, UN Doc A/CN.4/SR.1789 (24 June 1983)

UNGA 'Transforming our world: the 2030 Agenda for Sustainable Development' UN Doc A/RES/70/1 (21 October 2015)

United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses, 21 May 1997, 12 UNTS 52106

**Websites**

J. Trevino, 'This Swiss Town is Protecting its Glaciers with a Blanket' (Smithsonian, March 12) <<https://www.smithsonianmag.com/smart-news/swiss-town-glacier-blanket-180968451/>>