

# COULD A CONFLICT OVER THE GUARANI AQUIFER SYSTEM BE JUSTIFIED? PERSPECTIVES FROM JUST WAR THEORY AND INTERNATIONAL LAW

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## FIRST SECTION: INTRODUCTION

Last April, Paraguay ratified the Guarani Aquifer System Agreement (Brazil, 2017), becoming the last of four nations – along with Argentina, Brazil and Uruguay – to grant domestic enforcement to the much-celebrated international treaty (Villar, 2016; Sindico et al., 2018). The Agreement was a landmark on international law involving the governance of natural resources, after around eight years of negotiation to be drafted and roughly another eight years to be duly ratified by all parties. Figure 1 below shows the extension of the aquifer.



Figure 1. The extension of the Guarani aquifer (Borghetti et al., 2004)

However the scenario seems to be more peaceful than ever – or maybe *because* it is the time to figure out the consequences of a potential breach –, we will take this opportunity to promote a reflection on how far Brazil and the other South-American countries could go to protect each one's own interest in a way that is both legally and morally permissible, should an armed conflict arise. The aim here is to discuss the justifiability of this imagined conflict to illustrate how we could make a proper assessment of resource-related conflicts, showing why we may opt for a solution involving pragmatic philosophy.

This paper is divided in five Sections. In this Introduction, we expose a hypothetical problem of cross-border conflict related to the usage of groundwater in South America; in the Second Section, we lay out the premises of modern just war theory (JWT), highlighting the just cause requirement for the justification of conflicts; in the Third Section, we rely on Conway Waddington's criticism to modern JWT to provide us a bridge towards pragmatism in the analysis of war, for a lack of normative guidance is clear in the way JWT is usually formulated; in the Fourth Section, we argue for the pragmatic outlook; and in our Conclusion, we briefly recommend seeing United Nations (UN) legislation not only as a source of law, but as an instrument for reflection on pragmatism in international relations

We should again stress that the improbable character of our supposition – at least while the diplomatic relations of the South-American countries are peaceful – should not misguide readers; this is a topic of the utmost importance since our resources are finite and many parts of the globe already struggle with water-related armed conflicts. The literature on resource-related conflicts even points out to a recent tendency of growth in their number (Waddington, 2012). Also, the topic is important for each one of us has legal and moral responsibility to act humanely towards any other inhabitant of the globe, and by understanding how far one's country could go to protect citizens' interest in a way that is both legally and morally permissible, we may become more prepared to analyze a practical situation from a humanitarian perspective and prevent abuse from authorities.

Finally, as much as we are addressing a mostly STEM-oriented audience for occasion of the 20<sup>th</sup> edition of the *Congresso Brasileiro de Águas Subterrâneas*, we must not forget that philosophy has given birth to science, and theoretical speculation has since become an important tool for both. For this reason, we hope that this paper will provide you material for reflection on humanitarian issues science must tackle.

## **SECOND SECTION: MODERN JWT AND JUSTIFICATION FOR WAR**

JWT informs international law, so it needs to be clarified first. It was developed by many different philosophers since Antiquity, but for brevity's sake we will limit our explanation in this Section to Michael Walzer's modern version of the theory, to proceed to Waddington's criticism in the next Section.

The modern version of JWT is based upon three tenets (McMahan, 2006). First, *jus ad bellum* (i.e., the principles governing the resort to war) and *jus in bello* (i.e., the principles on the conduct of war) deserve separate consideration. Second – which is also an implication of the first tenet –, if a combatant participating in an unjust war behaves according to the moral commands of *jus in bello*, he will have no basis on which to be criticized whatsoever (and both sides' combatants are given equal moral status). And third, combatants are liable to be killed while civilians are not.

In any case, the most important feature of JWT to our discussion is that *jus ad bellum* requires conflicts to be justified. To analyze whether a war is justified, some criteria are observed by modern theorists: military action should have a just cause; it should maintain a relationship of proportionality with that cause; it must be led according to the commands of a legitimate authority; it should have good chances of success; and, finally, it needs to be conducted with the right intention (Waddington, 2012).

Of course, these criteria are rather vague and open to interpretation. Also, JWT was not specifically developed to deal with conflicts over vital natural resources – the formulation of the theory according to the

modern tradition is from a time when conflicts over vital natural resources were fewer and not such pressing issues. It works better for political contends, instead of conflicts with more humanitarian background such as fights to defend a people's right to have access to clean water.

Now, nations seem to be constantly developing new engineering to exploit natural resources, especially water, sometimes even stimulating competition where hydric resources are transnational. This is the core of Waddington's criticism, as I explain in the next Section.

### **THIRD SECTION: WADDINGTON'S CRITICISM**

Waddington claims that water security reveals a prescriptive void in JWT when it comes to wars over natural resources. His worry is that traditional analyses of just cause are unable to account for water-related disputes. When writing about the perils of a prescriptive void in JWT, he affirms: "(...) Central to this is the question of the moral weight and significance, if any, of vital resources, as defined by strategic and human necessity".

The author heavily condemns a position that many governments adopt, namely to claim that they defend "state security" when going to war over resources. The international law principle of domestic sovereignty seems to provide justification for offenses aiming to secure one nation's vital interests, especially since we observe a rapid reduction of water and other resources in most parts of the globe. Besides, water is not only a natural resource with economic value; mostly, it is important because it is essential for everyone's everyday life. For this reason, it seems morally defensible for a government to try to secure water for its citizens.

Water-related conflicts thus have an aura of apparent justifiability that disputes for other less important resources seem to lack. Therefore, Waddington takes up the analysis of the "moral weight of water scarcity". Even if a move in self-defense clearly justifies the use of military force to protect a nation's water resources, it remains to be verified whether a non-military threat to that same nation would justify attack, that is, if the *jus ad bellum* conditions listed in the previous Section could be met in any such case.

Now that we have formulated the problem in need of theoretical investigation, we may stop and propose a situation for analysis in the next Section. Consider a scenario where Argentina, Brazil, Paraguay and Uruguay are having difficulty in defining the limits for each one's allowed extraction. Suppose that Brazil claims that it should have access to a much larger volume of water per year than the other countries, disregarding what could be considered its "fair share" and disregarding the existence of other important hydric sources in its territory, since it has almost four times the number of inhabitants of all other three countries together, but none of the latter agrees on those terms. Should diplomatic relations fail to settle the dispute, would either Brazil or a coalition of Argentina, Paraguay and Uruguay be justified in attacking the other party?

### **FOURTH SECTION: HOW COULD WE EVALUATE THE PERMISSIBILITY OF A CONFLICT FOR THE AQUIFER'S RESOURCES?**

We believe that pragmatism towards moral issues is the philosophical approach recommended to a situation of war for the aquifer's resources, and Waddington eventually comes to the same conclusion in his abstract analysis. We go on to explain why JWT does not provide us an answer and pragmatism should be preferred.

The modern formulation of JWT relies heavily on the just cause criterium for granting conflicts moral permissibility according to *jus ad bellum*. The problem is that while a traditional view sees aggression from another party as the only real just cause, JWT has seen its rules become more flexible, so today even pre-emptive measures can be justified – because the imminence of war is now understood as a situation of such uncertainty that it seems comprehensible that one will want to attack to avoid being hit first.

Looking at the hypothetical conflict pictured in the previous Section, we see that an “absolutist” (as Waddington calls it) approach to JWT does not justify any resource-related war. In that situation, the South-American nations would have to continue the pursuit of negotiations to come to an agreement. However, to take the opposing view and say that such war is justified according to more flexible just cause criteria also goes a long way from saying that Brazil is defending its own sovereign right over its territory and resources.

Pragmatism, on the other hand, could serve as an alternative. This philosophical stream has been much employed in international law to promote a more comprehensive environment for international relations; it is possible to say that the moral framework used for drafting the UN Charter (United Nations, 1945) and many other conventions – including the Guarani Aquifer System Agreement itself – can also be used as a theoretical framework to analyze the justifiability of conflicts over water. Leaving aside the discussion of the relationship between law and morality – which is a theme of passionate debate for many, but that we cannot fit in here nor we believe is indispensable to make our point clear –, as we look at the UN Charter and see that it has a heavy principle content, very few explicit passages containing prohibitions of conduct and great empowerment of the Security Council to decide on the legality or illegality of conflicts, we notice that the international community embraces a pragmatic view on their relations to analyze each individual case in accordance to the UN principles.

## CONCLUSION

We have sought to discourage a one-size-fits-all solution to a potential conflict among the nations in whose territory the Guarani Aquifer is located, and the same pragmatic outlook should be adopted for any transnational groundwater conflict. In fact, this has already been put in practice: international law adopts pragmatism to leave room to all kinds of agreements between nations for the usage of their joint water resources (as long as sovereignty and human rights are respected), so much so that the Agreement on the Guarani Aquifer System that Paraguay just ratified incorporates a reference to the UN International Law Commission Draft Articles on the Law of Transboundary Aquifers in its preamble.

Although our opinion is that JWT cannot just yet be reconciled with water-related conflicts – in disagreement with the title of Conway Waddington’s article many times cited in this paper –, requiring from its defenders a greater theoretical effort than what has been made so far, we do not believe that the prescriptive gap it contains is a reason for panic. Governments and concerned citizens may look to international law to find there principles motivated by humanitarian concern and pragmatism, which they may evoke should conflict become imminent.

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