UDC 341.2:[502.171:546.212

CERIF: S150, S151

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SILALA BASIN DISPUTE – IMPLICATIONS FOR THE INTERPRETATION OF THE CONCEPT OF INTERNATIONAL WATERCOURSE

This article deals with the concept of the international watercourse and legal rules that regulate management of shared water resources. It is prompted by the current dispute before the International Court of Justice (ICJ) which raises the question of what is exactly the purpose of these rules and what should be the object of their protection. The interpretation of customary international law in this field points to the conclusion that even an artificially created international watercourse does not preclude the application of international law.

Key words: *Shared water resources. – International watercourses. – ICJ.*

1. INTRODUCTION

The current dispute before the International Court of Justice (ICJ), pertaining the status and the use of waters of the Silala River, may be considered a test for this judicial institution; a test which will prove whether it is capable of legal interpretation that is creative in a way that, without going beyond the limits of the legal norm, takes into consideration the essence of the object of protection of that same norm. The opposing submissions by the parties to the dispute, Bolivia and Chile, present the ICJ with the choice between the conservative application of customary international law in the field of common water resources management and the progressive interpretation, which is incomparably more in touch with the purpose of these rules – to protect these resources and enable their use to the benefit of all potential users.

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To briefly introduce the reader to the subject matter of the dispute, let us begin by noting that the interpretations of the facts by the opposing parties present two, on the surface at least, irreconcilable positions. The Silala (also referred to as Siloli)[1] River system is a watercourse whose surface waters originate in Bolivian territory. Within a few kilometers, it flows overland and across the border into Chilean territory. The surface flows of the Silala River emanate from groundwater springs, which are fed by an aquifer that itself straddles the border between Bolivia and Chile.[2] So far both parties agree on the facts. Now, for the crux of the case, Chile contends that, still within Bolivian territory, these waters flow into a common watercourse, the Silala River, which runs in a south-westerly direction towards Chile due to the natural inclination of the terrain, therefore making the Silala River system an international watercourse, which in turn entitles Chile to use of the river's waters, in accordance with customary international law. Bolivia, on the contrary, contends that the Silala River Basin is not a transboundary watercourse, since the river has been artificially diverted to Chile, which means that Bolivia is entitled to the use of 100% of its water.

How can it happen that two such opposite statement of facts concern an object of nature, such as the watercourse? The answer to this question lies in the legal definition of the watercourse, which falls under the scope of the international legal regime of customary law of international water resources, as reflected by the provisions of the UN Convention on the Law of Non-Navigational Uses of International Watercourses (hereinafter: Watercourse Convention).[3] Article 2 of the Watercourse Convention states that for the purposes of the Convention *"*'Watercourse' means a system of surface waters and groundwaters constituting by virtue of their physical relationship a unitary whole and normally flowing into a common terminus." In the next paragraph of Article 2 is added that "'International watercourse' means a watercourse, parts of which are situated in different States." This has been interpreted by the International Law Commission (ILC) to include rivers and their tributaries, lakes, aquifers, glaciers, reservoirs and canals that receive water from or contribute water to portions of the watercourse situated in other states.[4] There is no doubt that this definition reflects a norm of general customary nature in interna-

[1] Bolivia refers to the water as the Silala; Chile refers to the water as the Siloli, see B. M. Mulligan, G. E. Eckstein, "The Silala/Siloli Watershed: Dispute over the Most Vulnerable Basin in South America", *Water Resources Development* 27/2011, 595.

[2] Dispute over the Status and Use of the Waters of the Silala, *Chile v. Bolivia,* ICJ, Application instituting proceedings, 6 June 2016, 1.

[3] Convention on the Law of the Non-Navigational Uses of International Watercourses (adopted 21 May 1997, entered into force 17 August 2014), UNGA Res 51/229 (21 May 1997), UN Doc A/RES/51/229.

[4] ILC, "Draft articles on the law of the non-navigational uses of international Watercourses (1997)", *Yearbook of the International Law Commission* 2/1994, 2.

tional law,[5] which is of interest to this dispute, since neither Chile nor Bolivia are signatories to the Watercourse Convention. However, as we can see from the wording of the definition, nowhere is it specified that a particular international watercourse must be created solely through natural means. In other words, it is never mentioned that human interference with its flow and origination may leave a particular watercourse outside of the scope of the definition. Neither is it stated that the human interference that changes the nature of a watercourse from a strictly national-bounded to the international one does not qualify it to fall under the scope of this definition. Therefore, the definition for the purpose of this case (and potential future ones) needs some dose of clarification and concretization and thus the ICJ's opportunity to creatively and purposefully execute this task. In this article I will argue why the choice of interpretation of the Silala Basin as an international watercourse would be the only choice in accord with the law. I will first offer an overview of the state of facts and law relevant to the crux of the dispute (part 2). Then, I will offer three different paths which the ICJ can take in interpreting the law to these facts to reach a suggested solution (part 3). Finally, I will argue that this line of reasoning will enhance the process of judicial settlement of water disputes, which has recently gained prominence in international relations, and which will in turn contribute to the protection of shared natural resources and the function of the ICJ itself (part 4).

2. STATE OF FACTS AND LAW CONCERNING THE SILALA DISPUTE

It is quite obvious why the dispute over water resources has occurred in the region with the intensive arid circumstances of the Atacama Desert, between two states that share a history wrought with misunderstandings.[6]

In the War of the Pacific, which was fought between Bolivia and Chile from 1879 to 1883, Bolivia lost access to the Pacific Ocean. The most important territorial loss was its coastal region, rich with mineral

[5] For the purposes of this statement see the analysis by this author in the article M. Vučić, "Pojam međunarodnog vodotoka i problemi njegovog pravnog definisanja", *Pravni život* 9/2016, 457−470. See also more generally about customary nature of these norms J. W. Dellapenna, "The Customary International Law of Transboundary Fresh Waters!", *International Journal of Global Environmental Issues* 1/2001, 264.

[6] Perhaps the most important of these is the War of the Pacific, in which Chile cut Bolivia's access to the Pacific Ocean. Already in the 1970s Glassner noted that Bolivian policy is to link a local watershed issued with wider geopolitical concerns, thus to "become essentially a tool with which the Bolivian government could unite its people on the less dramatic, but much more basic, question of an outlet to the sea", M. I. Glassner, "The Rio Lauca: Dispute over an International River", *Geographical Review* 60/1970, 192–207.

deposits. Part of Silala Basin was also included in this package of territorial losses. As any other conflict in the world, the War of the Pacific was fought primarily for control over the nitrate-bearing mineral, therefore another name – the Saltpeter War. After the war, Chile started to exploit its spoils of war through the excavations of rich saltpeter, gold, silver, and, chiefly, copper mineral deposits. Rail was the only reliable way to carry the minerals to market and steam engines required a constant supply of water, a scarce commodity in the Atacama Desert.[7]

The then English (now Chilean) investment group, FCAB,[8] identified the Silala springs as a potential source of water and requested from the Bolivian local administrative unit of the Prefecture of Potosí permission to use the springs to power their locomotives. In its letter of request, FCAB offered to leave a third of the volume of the Silala for "public use" but Bolivia never exploited the waters, except for possibly the occasional local llama herder and, more recently, the soldiers stationed at the nearby military base.[9] In 1908 the Prefecture of Potosí granted the company free concession to construct canals in Bolivian territory and use the waters of the Silala. This concession was revoked in 1997 by the Bolivian government. The explanation was that the waters had long been used for purposes other than those granted in the concession. Since annulling the 1908 concession, Bolivia has taken a number of potentially provocative actions with respect to the Silala.[10]

On the other hand, despite the absence of official diplomatic relations, the two countries have demonstrated efforts to cooperate on the issue. This cooperation produced a working group which, through several meetings, produced a draft preliminary bilateral agreement on the use of the waters of the Silala.[11] The agreement establishes that Bolivia would be compensated by Chilean users of the waters of the Silala and that "Bolivia is entitled, initially, to fifty percent of the total volume of water of which flows across the border... and that this percentage may be increased in Bolivia's favour, based on the results of joint studies, to be carried out under the agreement".[12]

However, Bolivia rejected the draft bilateral agreement, despite the economically impoverished indigenous community of Quetena Chico and

[7] B. M. Mulligan, G. E. Eckstein, 598.

[8] Ferrocarril de Antofagasta a Bolivia.

[9] B. M. Mulligan, G. E. Eckstein, 598.

[10] *Ibid*.

[11] "The Initial Agreement on Silala, or Siloli", made on 28 July 2009, provided to the media by the Chancellery of the Republic of Bolivia, *https://www.internationalwaterlaw.org/documents/regionaldocs/Silala/SilalaAgreement_English.pdf*, last visited 20 September 2017.

[12] *Ibid*.

the Bolivian Chancellery pushing for its signing. Its government declared Bolivia's sovereign right to the whole flow of the Silala, with an additional request for Chile to pay more than a billion dollars indemnity to Bolivia for unauthorized use of the waters. It was further requested that any negotiation with Chile should guarantee Bolivia access to the Pacific Ocean. As Mulligan and Eckstein note, this latter demand suggests that the issues surrounding the Silala are not entirely water-focused, and that other political and historical interests may be at play.[13]

Thus the dispute has made it to the ICJ. Although this is neither the first dispute involving the two countries before the ICJ,[14] nor the first dispute between Latin American states involving water resources,[15] its innovative feature lies in the prominent role to be played by the law on the use of transboundary water resources for non-navigational purposes. The international law applicable to transboundary water resources is based primarily on three substantive principles and a set of procedural mechanisms for the realization of these principles,[16] all of which are recognized under customary international law and have been codified in the Watercourse Convention.

The first of the substantive principles – equitable and reasonable utilization – is based on the right of every riparian state to an equitable share of the benefits of a transboundary watercourse (meaning river, lake, or aquifer). The correlative obligation of this right is to use the water body equitably and reasonably. Equity and reasonableness are gauged against a variety of factors, which include local hydrological and natural characteristics, social and economic criteria, negative impacts, and the availability of alternatives.[17]

The second principle, called the no-harm principle, is based on the idea that no state can use its territory in a way that can cause harm which is greater than some ordinary nuisance to the territory of another state. Therefore, a riparian state's sovereign right to use transboundary waters within its territory is limited to the extent that it causes significant harm to another riparian state. The obligation of the riparian is of a due dili-

[13] B. M. Mulligan, G. E. Eckstein, 600.

[14] See Obligation to Negotiate Access to the Pacific Ocean *(Bolivia v. Chile).*

[15] Fairy recently the ICJ dealt with water resources issues in three decisions – Construction of a Road in Costa Rica along the San Juan River (*Nicaragua v. Costa Rica*); Pulp Mills on the River Uruguay (*Argentina v Uruguay*); Dispute regarding Navigational and Related Rights (*Costa Rica v. Nicaragua*).

[16] See more on this in: M. Vučić, "Pravičnost i korišćenje zajedničkih vodnih dobara", *Zbornik radova Pravnog fakulteta u Nišu* 75/2017, accepted for publication.

[17] Watercourse Convention, articles 5−6. See also P. Cullet, "Water Law – Evolving Regulatory Framework", *Water Governance in Motion, Towards Socially and Environmentally Sustainable Water Laws* (eds. P Cullet, A. Gowlland-Gualtieri, R. Madhav, U. Ramanathan), Foundation Books, 2010, 27−31.

gence nature – it should try to avoid utilization of shared water resources that flow within its territory that can cause significant damage to other riparian states. This is related not only to the activities of the riparian itself but also to the activities of private actors, which must be prevented from polluting, reducing or diverting the flow of a watercourse or a lake in a way amounting to illegal utilization of shared waters.[18]

The first two principles could be called the "classical law on non-navigational uses of international watercourses". This author is of the opinion that principle of sustainable development, as a kind of an "umbrella" principle is the third material principle on which this legal branch is contemporarily founded. It actually encompasses a variety of material legal principles that have become part of customary international law in the field of environmental protection such as: the polluter pays principle, the environmental impact assessment principle, the obligation not to cause significant harm to the watercourse's environment. It consists also of some procedural duties such as: the duty to cooperate over transboundary waters, to regularly exchange data and information, to provide prior notification of and consult on planned activities related to transboundary waters.[19]

The question whether international water law principles can be applied to the dispute concerning the Silala Basin revolves around its categorization and description. Public international law in the domain of international water resources does not extend to artificial rivers, e.g. canals or other man-made systems. Although there is nothing in the norms of this law to suggest this is the only possible interpretation, international water law has so far been regarded to apply only where a transboundary water resource is determined to be naturally occurring. This is because artificial water resources are proprietary and subject to the agreements that created them. In the case of the Silala Basin, most of the spring flow is captured by artificial channels, constructed by FCAB under its 1908 concession from the Prefecture of Potosi, Bolivia, and which cross into Chile via a principal canal. This would suggest that the water in the canal is subject to the terms of the concession agreement rather than to international water law. However, geological, topographical, and historical evidence indicates that prior to canalization, the Silala springs likely flowed across the Bolivian–Chilean border following approximately the same path as the principal canal, since that canal follows the natural drainage

[18] Watercourse Convention, Article 7. See more in S.C. McCaffrey, *The Law of International Watercourses: Non-Navigational Uses*, Oxford University Press, Oxford 2007, 78.

[19] See the article M. Vučić, Application of the Principle of Sustainable Development to the International Law on Fresh Water Resources", *Social Change in the Global World*, Center for Legal and Political Research, Goce Delčev University, Štip 2016, 79–96.

features of the Silala Basin. The dilemma would then be whether international water law applies to a captured and canalized transboundary river?

Nevertheless, we would like to put an argument for the application of international water law principles even if it is not determined that, prior to the construction of the principal canal, the Silala flowed perennially and naturally across the border in the same location as that canal. The technical evidence that would probably be produced during the discussion in the ICJ will clear the matter in the future and certainly give a stronger support to the arguments presented here. However, in the meantime, the only way for the international water law to become relevant for the dispute is to regard the Silala watercourse as international by nature – meaning transboundary. And here emerges the potential for creative interpretation by the ICJ, which can be structured in several arguments, which will be analyzed in the following part of the article.

3. WINDOWS OF OPPORTUNITY FOR CREATIVE INTERPRETATION

At the start of this part of the discussion I would like to counterclaim one potential critique. One may ask whether the ICJ should at all use creative interpretation for the definition of legal terms – in this case, of the watercourse, in order to reach the conclusion that the Silala watercourse is international by nature. This critique might argue that it is not the task of the ICJ (or any other international court or arbitration) to create legal rules since it is not a subject of international law – it does not have the power to do so. The only possible interpretation would have to remain within the limits of the norm that regulates this issue, and that is the definition of the watercourse, from Article 2 of the Watercourse Convention. But the problem is that Article 2 is silent on this matter and so far no one has really bothered with this question – it has simply not come to the forefront of legal thought, which does not mean that it is unimportant, as we see how a very complex and potentially dangerous international dispute has arisen based on it. To answer this critique, I state that already included in the provisions of the Watercourse Convention which reflect customary law are points of reference for interpretation which are creative only in the measure of systematic interpretation, and not in the meaning of *contra legem* interpretation. The answers are all there, in the letters of other articles which must be interpreted systematically, with Article 2, and in the entire spirit of international water law.

3.1. Connection with transboundary aquifers

Let us start from the definition of the watercourse itself: "'Watercourse' means a system of surface waters and groundwaters constituting by virtue of their physical relationship a unitary whole and normally flowing into a common terminus." Now, this definition by itself offers a first window of opportunity for the ICJ. Opportunity is found in this connection between surface waters and groundwaters. Namely, the waters of the Silala begin as high altitude (over 4,500 m above sea level) wetlands (called *bofedales*) formed by groundwater springs that discharge in Bolivia, near the Bolivian–Chilean border. More than 70 small-volume groundwater springs have been identified in Bolivian territory.[20] The Silala Aquifer is considered a transboundary aquifer, but little is known about the underground flow component. If the aquifer indeed lies in both jurisdictions, the nascent body of international groundwater law may be relevant to the Silala dispute and the allocation and management of the aquifer. Moreover, the aquifer's surface expression (e.g. natural springs) and hydraulic relationship to the Silala watershed may also be implicated in the same governance scheme. What is imparted here is that natural transboundary character of the aquifer, in combination with its natural relation to surface waters of the same system, notwithstanding the artificial transboundary character of this surface part of the system, would still make the whole watercourse system transboundary by nature. This is especially true if the evidence is provided that, prior to the construction of the principal canal, the Silala River flowed perennially and naturally across the border in the same location as that canal.

This argument faces three challenges. Firstly, not all underground water is automatically groundwater, because variances in soil porosity and permeability create obscure clear-cut classifications.[21]

Secondly, it is not clear whether the same rules of customary nature apply to aquifers as to surface waters. International law has only recently turned its attention to the quite disordered legal status of transboundary groundwater,[22] but notable examples have generated formal and consultative arrangements, including the Genevese Aquifer along the French-Swiss border, the Hueco Bolson Aquifer between Mexico and the United States, the Abbotsford-Sumas Aquifer System in West Africa, and the Guarani Aquifer in South America.[23] In 1966, the International Law As-

[20] B. M. Mulligan, G. E. Eckstein, 595−596.

[21] J. W. Dellapenna, "A Primer on Groundwater Law", *Idaho Law Review* 49/2013, 265.

[22] G. E. Eckstein, "Managing Buried Treasure across Frontiers: The International Law of Transboundary Aquifers", *Water International* 36/2001, 573.

[23] C. R. Rossi, "The Transboundary Dispute Over the Waters of the Silala/Siloli", Lecture from the XVI World Water Congress of the International Water Resources Asso-

sociation (ILA) undertook a study of the customary international law on transboundary water resources,[24] and ultimately it produced the Helsinki Rules on the Uses of the Waters of International Rivers.[25] The ILA's Helsinki Rules treated international drainage basins as indivisible hydrologic units, incorporating "the phrase 'equitable utilization' to express the rule of restricted sovereignty as applied to fresh waters."[26] These characterizations reduced distinctions between legal regimes of groundwater and surface water, suggesting that the standard of equitable utilization should apply to surface and subsurface sources straddling international borders.[27] The application of the same legal standard made sense because such ground and surface waters represented the same body of water "moving in differing stages of the hydrologic cycle, and what is today one will tomorrow be the other."[28] Finally, the principle was incorporated into the

ciation, Cancun, Mexico, 2017, *http://wwc2017.iwra.org/congress/resource/ABSID284_ABSID284_Cancun_water_paper.pdf*, last visited 20 September 2017.

[24] Earlier 20th century attempts to codify this law included the Institute of International Law's Madrid Resolution on International Regulations Regarding the Use of International Watercourses for Purposes Other than Navigation (1911) and its Salzburg Resolution on Utilization of Non-Maritime International Waters (Except for Navigation) (1961), but the Helsinki Rules were the most substantively ambitious and covered uses other than those related to navigation. See S.C. McCaffrey, "The Codification of Universal Norms: A Means to Promote Cooperation and Equity?", *International Law and Freshwater: The Multiple Challenges* (eds. L. Boisson *et al*.), Edward Elgar 2013, 125−127.

[25] ILA, "The Helsinki Rules on the Uses of the Waters of International Rivers", (Helsinki Rules) 1966, *http://www.internationalwaterlaw.org/documents/intldocs/Helsinki_Rules_with_comments.pdf*, last visited 20 September 2017.

[26] J. W. Dellapena (2001), 273.

[27] *Ibid.*, 274.

[28] *Ibid*. See also The Helsinki Rules, articles 10 and 13, (commenting on the community of interests standard attaching to equitable utilization of international drainage basins and equal rights relating to navigable rivers). See also a number of cooperative agreements influenced by the Watercourse Convention, including the Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin, 5 April, 1995, *http://www.mrcmekong.org/assets/Publications/policies/agreement-Apr95.pdf,* last visited 20 September 2017; Treaty Between His Majesty's Government of Nepal and the Government of India Concerning the Integrated Development of the Mahakali Barrage Including Sarada Barrage, Tanakpur Barrage and Pancheshwar Project, 12 February 1996, *http://www.internationalwaterlaw.org/documents/regionaldocs/Mahakali_Treaty-1996.pdf,* last visited 20 September 2017. Treaty between the Government of the Republic of India and the Government of the People's Republic of Bangladesh on Sharing of the Ganga/Ganges Waters at Farakka, 12 December, 1996, *http://www.ssvk.org/koshi/reports/treaty_on_farakka_india_bangladesh_4_ganga_river_water.pdf*, last visited 20 September 2017; 1994 Agreement between the Government of the People's Republic of China and the Government of Mongolia on the Protection and Utilization of Transboundary Waters, 29 April 1994, *http://faolex.fao.org/cgibin/faolex.exe?rec_id=012938&database=FAOLEX&search_type=link&table=result&lang=eng&form at_name=@ERALL*, last visited 20 September 2017; Agreement between Syria and Lebanon for the sharing of the Great Southern River basin waters and the building of a joint dam on it, 20 April, 2002, *http://faolex.fao.*

International Law Commission's (ILC) draft articles on transboundary aquifers.[29]

The third obstacle is again related to the poor relations between Chile and Bolivia, which impede scientific inquiry into the hydrological relationship between the underground and surface systems of this basin. It is not enough that developing legal considerations regarding ownership of aquifers are already wrought with environmental, economic, human rights, conflict and governance layers of complexity,[30] but both countries have forestalled efforts to provide scientific opportunity to investigate patterns of alluvial erosion, incidental runoff, intermittent flow and hydrologic connection – all important factors for any reliable analysis.[31] This is without going into what would arise if the facts were to prove that the hydrological basin commingles groundwater and surface water regimes shared by the disputants, which would prompt considerations of a condominium relationship. In private law, such an outcome would test the limits of public policy as a forced cohabitation. In international transboundary water law, which is a part of public international law, the ICJ would be then prompted to impart a new meaning of the evolving notion of community of interest.

3.2. The concept of community of interest

The movement towards a more unified understanding of groundwater and surface water first developed from transboundary surface water concerns. The hallmark case setting this movement into motion was the River Oder Case (1929).[32] Here, the Permanent Court of International Justice (PCIJ) introduced a "new approach" to navigable international watercourses by acknowledging the legal partnership that such watercourses formed between riparians. That partnership required cooperation and the application of an equitable principle, the community of

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org/cgibin/faolex.exe?rec_id=027944&database=faolex&search_type=link&table=result &lang=eng&format_n ame=@ERALL, last visited 20 September 2017.

[29] ILC, Draft Articles on the Law of Transboundary Aquifers, Article 4 (2008), *http://legal.un.org/ilc/texts/instruments/english/draft_articles/8_5_2008.pdf*, last visited 20 September 2017. For a history of the ILC's involvement with transboundary aquifers, see generally C. Yamada, "Codification of the Law of Transboundary Aquifers (Groundwaters) by the United Nations", *Water International* 36/2011, 557–565.

[30] I. Zodrow, "International Aspects of Water Law Reforms", *Water Law for the Twenty-First Century: National and International Aspects of Water Law Reform in India* (eds. P. Cullet *et al.*), Routledge, 2010, 36.

[31] C. R. Rossi, 5.

[32] Territorial Jurisdiction of the International Commission of the River Oder (*UK v. Poland*), Judgment, 1929 P.C.I.J. (ser. A) No. 23, at 5 (Sept. 10) (hereinafter *River Oder Case*).

interest standard.[33] This standard optimized economic uses of an entire river basin while limiting a state's sovereignty by imposing reciprocal limitations on the sovereignty of other states sharing the same basin. The PCIJ concluded this community of interest "becomes the basis of a common legal right, the essential feature of which are the perfect equality of all riparian States in the use of the whole course of the river and the exclusion of any preferential privilege of any one riparian State in relation to the others."[34]

By 1933, the Montevideo Declaration reflected this standard of equality by establishing the principle of prior notice to other interested states regarding plans to harness or alter the use of an international river "which may prove injurious."[35] The PCIJ extended this idea of reciprocal responsibility to circumstances involving alteration of the flow of international watercourses in the famous case involving the Diversion of Water from the River Meuse (1937).[36] A treaty signed in 1863 between two riparians permanently regulated the Meuse River's flow through Belgium and its debouching in the Netherlands, but both countries subsequently and unilaterally modified the treaty's terms by constructing canals that altered the river's flow. The Netherlands sought injunctive relief from Belgium's actions, but the Court sidestepped its claim (and Belgium's counterclaim that the Netherlands's prior actions forced Belgium's hand), and held that neither party had violated the objects and purposes of the 1863 treaty.[37] Instead, it applied the principle of equality, which resulted in a future and negotiated settlement between the parties. In his famous individual opinion, Judge Manley O. Hudson addressed more forthrightly what the equitable understanding of equality implies: "[W]here two parties have assumed an identical or a reciprocal obligation, one party which is engaged in a continuing nonperformance of that obligation should not be permitted to take advantage of a similar non-performance of that obligation by the other party."[38] Hudson's individual opinion essentially recalled the Roman law maxim *inadimplenti non est adimplendum* (he who

[33] L. del Castillo-Laborde, "Case Law on International Watercourses", *The Evolution of the Law and Politics of Water* (eds. J.W. Dellapenna, J. Gupta), Springer, 2008, 319–320.

[34] *River Oder Case*, 27.

[35] Declaration of the Seventh International Conference on the Industrial and Agricultural Use of International Rivers, Art. 2, adopted at Montevideo, on 24 December 1933, *American Journal of International Law* 28/1934, 59–60.

[36] Diversion of the Water from the Meuse, Judgment, P.C.I.J. Series (ser. A/B) 70/1937, at 4 (June 28).

[37] *Ibid.*, 23.

[38] *Ibid.*, J. Hudson, individual opinion, 77.

fails to fulfill his part of an agreement cannot enforce that bargain against the other party).[39]

Back to our story, although it is clear, except for their purported embrace of customary law, that Bolivia and Chile have not assumed reciprocal obligations, this finding may change if they are found to share an aquifer or a river. The ICJ is known to impose a condition of equality between the parties and to require a mutually negotiated equitable accord. Thus, the practice of the court and its structural bias would push it for an interpretation of the watercourse as international if the common ownership of the aquifer is proven.

One problem with this argument is that the status of the community of interest standard in general international law still remains a subject of dispute. Doctrinal treatments vary with regard to conclusions about its maturation into a workable principle,[40] as opposed to an aspirational norm.[41] In case law, its treatment is strengthening, but also marked by notable ambivalence. For example, in the Gulf of Fonseca Case (1992), the ICJ Chamber concluded that the existence of a community of interest among Honduras, El Salvador, and Nicaragua was "not open to doubt" with regard to sovereignty over the waters of the Gulf of Fonseca.[42] The Chamber deemed a condominium or shared sovereignty arrangement involving Fonseca's waters "almost an ideal juridical embodiment of the community of interest's requirement of perfect equality of user".[43] The standard gained prominence in the ICJ's decision in the Pulp Mills Case

[39] C. R. Rossi, *Equity and International Law: A Legal Realist Approach to International Decision Making,* Martinus Nijhoff, Hague 1993, 161 − discussing the offensiveness of one party benefitting from its own illegal action and the *inadimplenti non est adimplendum* principle's close association with the *ex injuria jus non oritur* principle.

[40] B. Vitányi, *The International Regime Of River Navigation*, Springer, 1980, 56, which affirms the historical legal status of the "community of riparians" standard from the 1815 Act of the Congress of Vienna; J. G. Lammers, *Pollution of International Watercourses: A Search for Substantive Rules and Principles of Law*, Martinus Nijhoff, Brill 1984, 506, who affirms the community of interest standard from a review of the practice of states, dating to the Congress of Vienna; P. Wouters, "'Dynamic Cooperation' – The Evolution of Transboundary Water Cooperation", *Water and The Law: Towards Sustainability,* (eds. M. Kidd *et al*.), Edward Elgar, 2014, 62–65, who discusses the emergence of dynamic cooperation as a norm of integrated water resource management.

[41] S. C. McCaffrey, 167–171, notes that a community of interest falls far short of co-ownership, in the absence of an agreement making it so; A. Tanzi, M. Arcari, *The United Nations Convention on the Law of International Watercourses: A Framework for Sharing,* Springer 2001, 21, accentuates the voluntary nature of the community of interest; L. Caflisch, "Règles générales du droit des cours d'eaux internationaux", *Recueil Des Cours* 9/1989, 59–61, does not believe that this concept overcomes the limitations imposed by the rules of territorial sovereignty of states.

[42] Land, Island and Maritime Frontier Dispute (*El Sal./Hond.: Nicar. intervening*), Judgment, 1992 I.C.J. 351, 407 (Sept. 11).

[43] *Ibid*.

(2010), where the Court held a treaty-based commission: "established a real community of interests and rights in the management of the River Uruguay and in the protection of its environment".[44] The limited application of the community of interest standard nevertheless mandated that the commission "devise the necessary means to promote the equitable utilization of the river".[45] As held in the Case Concerning the Gabčíkovo-Nagymaros Project (1997), the unilateral diversion of a shared resource would deprive the other riparian of "its right to an equitable and reasonable share of the natural resource" and violate respect for proportionality (as implied by equality), "which is required by international law".[46] Although not in effect at the time, the Court took notice of the Watercourse Convention, which it claimed strengthened the development of the community of interest standard for non-navigational uses.

As far as primary sources are concerned, the community of interest standard and the principle of equitable utilization have been incorporated into the Cooperative Framework Agreement of the 1999 Nile Basin Initiative,[47] but the references also generated disputes regarding water security and current uses.[48] Other references can be found in the 2002 Senegal River Water Charter,[49] and the 2003 Protocol for Sustainable Development Lake Victoria Basin.[50] Within the Southern African Development Community (SADC), the community of interest standard was included in the 1995 Protocol on Shared Water Course Systems in the SADC Region, but was later retracted.[51]

Integral application of the community of interest principle in the pending case involving the Silala waters may apply even independently

[44] Pulp Mills on the River Uruguay (*Argentina v. Uruguay*), Judgment, 2010 I.C.J. Rep. 14., 281 (Apr. 20).

[45] *Ibid.*

[46] Gabčíkovo-Nagymaros Project (*Hungary v. Slovakia*), Judgment, 1997 I.C.J. 7, 851 (Sept. 25).

[47] Agreement on the Nile River Basin Cooperative Framework, Art. 3(4), (9) opened for signature May 14, 2010, *http://www.nilebasin.org/images/docs/CFA%20-%20English%20%20FrenchVersion.pdf*, last visited 20 2017.

[48] M. S. Kimenyi, J. M. Mbaku, "The Limits of the New 'Nile Agreement'", Brookings: Africa in Focus (28 April, 2015), *https://www.brookings.edu/blog/africa-infocus/2015/04/28/the-limits-of-the-new-nile-agreement/,* last visited 20 September 2017.

[49] Organisation pour la Mise en Valeur Du Fleuve Sénégal, Charte des Eaux du Fleuve Sénégal, pmbl., May 28, 2002, O.M.V.S., *http://lafrique.free.fr/traites/omvs_200205.pdf,* last visited 20 September 2017.

[50] Protocol for Sustainable Development of Lake Victoria Basin, Art. 4(2)(k), 29 November 2003, *http://www.internationalwaterlaw.org/documents/regionaldocs/Lake_Victoria_Basin_2003.pdf*, last visited 20 September 2017.

[51] C. R. Rossi, "The Transboundary Dispute over the Waters of the Silala/Siloli: Legal Vandalism and Goffmanian Metaphor", *Stanford Journal of International Law* 53/2017, 85.

from the aquifer connection. It would be very interesting to see whether the ICJ will be able to draw a parallel with its earlier decision in the Gulf of Fonseca case, since this parallel might enhance the position of the integrationist perspective of customary freshwater law. Although much discussion about the establishment of a community of interest derived from a specific conventional foundation, the ICJ Chamber noted in the Gulf of Fonseca Case that an earlier court, the Central American Court of Justice, had located a community of interest among Honduras, El Salvador, and Nicaragua (which was "not open to doubt") within the imperial and uninterrupted 300-year administrative rule of Spanish Viceroyalties.[52] That same system created the Viceroyalty of Peru, which contained both Bolivia (then known as Alto Peru) and Chile. Interestingly, the Chamber extended the community of interest standard in the Gulf of Fonseca Case to cover a condominium arrangement,[53] which essentially mandated that the coparceners cohabitate the space and craft through negotiated undertakings a managerial system. The rationale proffered by the Chamber clearly favored a pragmatic solution. Divisions of "narrow waters" and historic bays "into separate and unqualified sovereignties" present "great practical difficulties,"[54] as might the division of rivers and aquifers.

3.3. Vital Human Needs

Finally, in the event of a conflict over different uses of watercourses, states are required to take into special regard the vital human needs both in determining the equitable utilization of watercourses and in putting in place measures directed at preventing significant harm from being caused to other states.[55] According to the Statement of Understanding accompanying the Watercourse Convention, in determining vital human needs, "special attention is to be paid to providing sufficient water to sustain human life, including both drinking water and water required for production of food in order to prevent starvation".[56] In the words of one author "[c]odification for the protection of vital human needs ... leads to the progressive harmonization of water law and human rights law".[57] In

[52] Gulf of Fonseca Case (*El Salvador v. Honduras: Nicaragua intervening*), Judgment, 1992 I.C.J. 351, 407 (September 11).

[53] *Ibid.*, 418.

[54] *Ibid.*, 407.

[55] Watercourse Convention, Article 10(2).

[56] UN General Assembly Sixth Committee, "Report of the Sixth Committee convening as the Working Group of the Whole", Statements of Understanding Pertaining to Certain Articles of the Convention UN Doc (11 April 1997) A/51/869, para 8.

[57] C. Leb, "The Right to Water in a Transboundary Context: Emergence of Seminal Trends", *Water International* 37/2012, 648.

this vein, another well-known instrument in the field, the UNECE Helsinki Convention,[58] which has been ratified by 41 UNECE Member States and is open to all Members of the United Nations to accede to, has been supplemented by a Protocol that expressly requires states to pursue the aim of providing "access to drinking water for everyone".[59] Likewise, the Berlin Rules on Water Resources, adopted by the International Law Association in order to codify relevant rules in the field, stipulate that in the case of conflicting uses "states shall first allocate waters to satisfy vital human needs".[60] What is more, Article 17 of the Rules explicitly lays down the individual right of access to water.[61] Thus, it seems that no matter the international nature of the Silala River system, Chile would be entitled to claim respect for the international customary rights analyzed above. This entitlement runs counter to the claim by Bolivia to the use of 100% of the river's waters, grounded on the alleged domestic nature of the watercourse.

4. THE IMPLICATIONS OF CREATIVE INTERPRETATION FOR THE PURPOSE OF THE JUDICIAL FUNCTION OF THE ICJ

The three possible avenues for creative interpretation – aquifer connection, community of interest theory and vital human needs – join together to discard as unfounded the Bolivian claim that the Silala River is not an international watercourse, therefore affirming full sovereignty over the use and exploitation of its waters. The Bolivian claim very much resembles the theory of "absolute territorial sovereignty", also referred as the "Harmon doctrine", which is based on an intention to claim rights over shared resources that are exclusive and not related to any obligations – a view obsolete in the contemporary international system at face value. Needless to say, the Harmon doctrine favors upstream riparians (Bolivia in this case), which would be entitled to utilize, and even divert, waters

[58] Convention on the Protection and Use of Transboundary Watercourses and International Lakes (adopted 17 March 1992, entered into force 6 October 1996) (1992) 31 ILM 1312.

[59] Protocol on Water and Health to the Convention on the Protection and Use of Transboundary Watercourses and International Lakes (adopted 17 June 1999, entered into force 4 August 2005) (18 October 1999) UN Doc MP.WAT/2000/1, Article 6.

[60] ILA, Berlin Rules on Water Resources, adopted by the International Law Association at the Berlin Conference on Water Resources Law on 21 August 2004, *https://www.internationalwaterlaw.org/documents/intldocs/ILA_Berlin_Rules-2004.pdf,* last visited 20 September 2017, Article 14(1).

[61] *Ibid.*, Article 17(1): "Every individual has a right of access to sufficient, safe, acceptable, physically accessible, and affordable water to meet that individual's vital human needs".

without regard to the implications on other downstream countries.[62] In light of the above considerations, a straight claim of the exclusive right to use and exploit the portion of waters of an international river located within its own boundaries would have had few chances to succeed before the ICJ, while the qualification of the Silala River as a domestic one leaves Bolivia room to assert full sovereignty and a lack of obligation towards neighbor countries.[63]

This case proves an old saying that international rivers can be catalytic agents of cooperation on multiple riparian levels and may also enable integration and pragmatic "cross border cooperation beyond the river".[64] But, the other side of this saying claims that "international rivers, without exception, create some degree of tension among the societies that they bind".[65] Be that as it may, the point of this case is that two sovereign parties have sought recourse to international law in the dispute whose solution has been impeded by the historical context of the watershed, the existing diplomatic situation between them, and the lack of an agreement on whether or not the Silala River is an international watercourse.[66] The Silala Basin is designated by security experts as the only "high risk" basin in South America and "one of the most hydropolitically vulnerable basins in the world".[67] On the other hand, the ICJ exists to

[62] This doctrine was first affirmed in 1895 by the US Attorney General, Judson Harmon, in the context of a dispute between the USA and Mexico over the use of the Rio Grande. However, today it is outdated and incompatible with principles of cooperation and good neighbourliness between all states that are members of the UN. Furthermore, McCaffrey doubts that such a doctrine has ever existed in International Law, because even in the dispute in which it originated was not used as the final basis for settlement. See S. C. McCaffrey, "The Harmon Doctrine One Hundred Years Later: Buried, Not Praised", *Natural Resources Journal* 36/1996, 549.

[63] It is doubtful whether Bolivia can claim full sovereignty in one more aspect. While acknowledging the significance of the consequences that follow from the clarification of the legal nature of the River, in light of the current evolution of international law, it can be argued that the human right to water limits the states' right to fully dispose of their water resources in any event. As one author notes: "The waters of the Silala River system are used in Chile for industrial purposes as well as for the provision of water supply for human and domestic use. As for the latter, one might wonder whether a State claiming full sovereignty over the use and exploitation of a river could be considered completely unbound from any extraterritorial obligations vis-à-vis people who, while outside its territory, depend on the same waters", R. Greco, "The Silala Dispute: Between International Water Law and the Human Right to Water", *Questions of International Law* 39/2017, 28.

[64] C. Sadoff, D. Grey, "Beyond the River: The Benefits of Cooperation on International Rivers", *Water Policy* 4/2002, 399.

[65] *Ibid.*, 391.

[66] UNEP, "Hydropolitical Vulnerability and Resilience along International Waters", Nairobi, UNEP Publications, 2007.

[67] *Ibid*.

facilitate the peaceful settlement of disputes. This is an opportunity for the ICJ to clear the substance of the law in the direction which strengthens its object of protection – water resources, but at the same time to encourage a slow but steady trend of states referring transboundary fresh water disputes to the ICJ or to arbitration.[68]

If the argumentation of Bolivia would prevail, this would mean that a watercourse which physically crosses a border between two countries that are not really known for good bilateral relations is left to its exclusive management. This is a solution that might produce further complications in the future, and it certainly does not fall under the category of dispute settlement, but rather dispute prolongation. The physical fact is that the natural resource is shared, thus the legal solution must not ignore this fact of life and hold stubbornly to the narrow interpretation of the notion of the international watercourse which nonetheless does not have any other support in practice or theory other than plain inertia. The ICJ is presented with a great opportunity to settle a dispute and, even more importantly, to create a platform of cooperation for two countries which are sorely in need for cooperative arrangements. And this opportunity would be used just by interpreting the provisions of international water law systematically and creatively, plainly speaking – by thinking outside the box. This is because of the fact that the rules for management of international watercourses are based on cooperation, mutual providing of information, respect for the environment, prevention of harm to any of the riparians, and finally equity and reason – all of which represents the single idea that riparians share an interest in the well being and usefulness of something that is common, no matter how this something came into existence.

5. CONCLUSIONS

Back in 2010, when this author started researching his PhD thesis, which dealt with law of non-navigational uses of international watercourses, the Pulp Mills Case was before of the ICJ as only the second such case at this institution, and the Watercourse Convention was yet to enter into force. Nowadays the ICJ has three pending cases of the same topic and an increase in arbitrations, and interest by legal scholars in this topic is increasing exponentially around the globe. It seems to me that this certainly has to do with the rising awareness of the subjects of international community about the strategic importance of fresh water as a

[68] T. Meshel, "A New Transboundary Fresh Water Dispute before the International Court of Justice", *Water International* 42/2017, 95. She cites a recent example in this regard – the Indus Waters arbitration between India and Pakistan.

resource. In line with this is the fact that a dispute between two countries that otherwise have no shortage of fresh water on their respective territories has arisen concerning a watercourse only 8 km long. And this dispute is even more threatening for international peace and security when regarded in the wider context of the geopolitical game of prestige, which these two countries have been playing for over a century. Whether the decision of the ICJ would contribute to the relaxation of tensions and imply a path towards a future more focused on cooperation than conflict between the parties is unknown at the moment. However, what is obvious is that the legal rules in this field still need to be developed and finely tuned, and there is no better way to do this than to first clarify the basic concepts which these rules use in their legal technique. Therefore, the question of what is an international watercourse, as the primary object of regulation of these rules, comes as the mother of all questions. And this dispute is essentially about that, and it is obvious that the existing rules do not give us a straight answer, but rather the answer must be sought through interpretation, which includes a dose of creativity and awareness of the purpose of the rules. We have demonstrated that various paths of interpretation of these rules lead to the same conclusion which can be summarized as follows:

a) artificially created transboundary watercourses, which flow on the surface, must be regarded as objects of international law if their subsurface parts (groundwaters) – which "by virtue of their physical relationship" constitute "a unitary whole" – still flow naturally over the same border. This is the logical interpretation of the purpose of Article 2 of the Watercourse Convention, which gives a definition of an international watercourse;

b) artificially created transboundary watercourses still can be regarded as objects of international law because the spirit of community of interest, which underlies the customary rules of international law in this field, requires the application of these rules to shared water resources no matter their origin (natural or artificial);

c) even if first two arguments fail to impress the ICJ, there is still the express special status of vital human needs as a factor that determines the equitable utilization of watercourses and measures directed at preventing significant harm from being caused to other states. This factor comes into play even if the evidence prevails that Bolivia can claim ownership of 100% of the surface waters of the Silala Basin, therefore it requires some form of cooperation of the states over the physically shared resource, regardless of its ownership.

Finally, the purpose of the judicial function of the ICJ is to settle international disputes in the interests of international peace and security. Thus, it must take into consideration that the inevitable consequence of adjudicating to Bolivia the exclusive right of management of the Silala watercourse would further aggravate the situation in this region. It would give Bolivia legal grounds for unilateral action, which might not prove to be in the best interest of the people who depend on the Silala water resources, on both sides of the border. On the other hand, creating a cooperative platform on the basis of international legal rules on water resources, might contribute to the promotion of common interests among the riparians and general improvement in their relations. This would in turn lead to general relaxation of the tensions in the region and further establish international law as a vehicle for management of water resources.

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Article history:
Received: 12. 9. 2017.
Accepted: 29. 12. 2017.