

UN Watercourses Convention- Reconciling “Reasonable and Equitable Utilization” and “Obligation Not to Cause Significant Harm” Principles

MAHAM NAWEED

About the Author

Maham Naweed is an international lawyer who completed her Bachelors of Law from the Lahore University of Management Sciences and her Masters of Law from Yale Law School. Currently, she is the Chair, Lawfare and International Law at the Islamabad Policy Research Institute. Her areas of interest and research expertise include public international law, particularly international human rights law and laws of conflict.

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Abstract

Customary international law on transboundary watercourses has evolved significantly in the past years. A number of international law instruments have been concluded over the years that have significantly impacted the customary international law on transboundary watercourses. Cumulatively, these instruments have gone a considerable way to consolidate the rules governing international watercourses. From these instruments, emerge two main principles; “equitable and reasonable utilization” and “obligation not to cause significant harm”. There is scholarship that says that the two principles can and do exist in harmony with each other. On the contrary, it is asserted that the two principles reinforce each other as opposed to being in tension with each other.

Key Words: International Law, Reasonable and Equitable Utilization, Obligation Not to Cause Significant Harm

I) Introduction

Customary international law consists of the practices of states undertaken out of a sense of legal obligation, that is out of a sense that the practice is required by law. Customary international law results from a general and consistent practice of states that they follow from a sense of legal obligation.

Similar to all other kinds of law, customary international law on transboundary watercourses has evolved significantly in the past years. Water scarcity has had a two-fold impact on the development of customary international law regarding transboundary watercourses. Firstly, due to the growing number of conflicts, jurisprudence of international courts and tribunals has emerged on the issue.¹ Secondly, the United Nations has come up with a body of rules and treaties to regulate transboundary watercourses.

This policy brief will explore the developments in the customary international law on watercourses and evaluate how international law can reconcile the differences in the same.

II) Evolution of International Law on Transboundary Watercourses

A number of international law instruments have been concluded over the years that have significantly impacted the customary international law on transboundary watercourses. In 1966 the Helsinki Rules on the Uses of the Waters of International Rivers (“Helsinki Rules”) were adopted in Finland by the International Law Association

¹ Gabčíkovo-Nagymaros Project, Hungary v Slovakia, Judgment, Merits, ICJ GL No 92, [1997] ICJ Rep 7, [1997] ICJ Rep 88, (1998) 37 ILM 162, ICGJ 66 (ICJ 1997), 25th September 1997, International Court of Justice [ICJ]; Kasikili/Sedudu Island, Botswana v Namibia, Judgment, Merits, [1999] ICJ Rep 1045, ICGJ 57 (ICJ 1999), 13th December 1999, International Court of Justice [ICJ]; Pulp Mills on the River Uruguay, Argentina v Uruguay, Order, Provisional Measures, ICJ GL No 135, [2006] ICJ Rep 113, (2006) 45 ILM 1025, ICGJ 2 (ICJ 2006), 13th July 2006, United Nations [UN]; International Court of Justice [ICJ]; Certain Activities carried out by Nicaragua in the Border Area; Construction of a Road in Costa Rica along the San Juan River, Costa Rica v Nicaragua, Order on Provisional Measures, [2013] ICJ Rep 354, ICGJ 475 (ICJ 2013), 22nd November 2013, United Nations [UN]; International Court of Justice [ICJ]; and, Dispute Over The Status And Use Of The Waters Of The Silala, Chile V Bolivia, Application, Institution Proceedings, [2016], 6th June 2016, International Court of Justice [ICJ]

("ILA").² The Helsinki Rules were the first of their kind and regulated the use of rivers and their connected groundwaters that crossed sovereign bodies.

The Helsinki Rules were then followed by The Campione Consolidation of the ILA Rules on International Water Resources, 1966-1999.³ These did not represent new work, but rather a consolidation of the existing rules on transboundary watercourses. The Campione Consolidated Rules consist of 67 Articles and two Annexes, one on the establishment of an international water resources association, and the other on dispute settlement.

The Campione Consolidation was succeeded by the Berlin Rules on Water Resources which were adopted by the ILA in 2004.⁴ The Berlin Rules spoke in terms of a new paradigm of international water law that focuses on ecological integrity, sustainability, public participation, and minimization of environmental protection principles.

Cumulatively, these instruments have gone a considerable way to consolidate the rules governing international watercourses.

In May 1977 the United Nations Convention on the Non-navigational Uses of International Watercourses ("1977 Convention")⁵ was adopted by the United Nations. This is seen as the primary document that is reflective of customary international law on the non-navigational uses of transboundary watercourses.⁶ This Convention is a framework Convention adopted with a view to ensuring the utilization, development, conservation, management and protection of international watercourses and the promotion of their optimal and sustainable utilization for present and future generations.

² International Law Association, "REPORT OF THE FIFTY-SECOND CONFERENCE", Helsinki, 1966, Pg. 477.

³ Slavko Bogdanović, "International Law of Water Resources: Contribution of the International Law Association (1954-2000)", Martinus Nijhoff Publishers, 20 June 2001- Law, Pg. 83-85

⁴ International Law Association, "Report of the 71st Conference 3 (2004)", 71 ILA 337, 385, 2004

⁵ Adopted by the General Assembly of the United Nations on 21 May 1997. Entered into force on 17 August 2014. *See* General Assembly resolution 51/229, annex, Official Records of the General Assembly, Fifty-first Session, Supplement No. 49 (A/51/49)

⁶ Nahid Islam, "The Law of Non-navigational Uses of International Watercourses: Options for Regional Regime-building in Asia", Kluwer Law International B.V., 1 January 2010- Law, Pg. 128-129

Part I of the Convention defines terms and sets the framework for the conclusion of watercourse agreements between States. Part II provides the general principles that are to guide the Parties in their utilization of watercourses. This includes equitable and reasonable utilization, obligation not to cause significant harm, obligation to cooperate, and regular exchange of readily available data and information. Part III sets out a notification procedure for planned measures which have possible adverse effects on other watercourse States, and Part IV deals with, inter alia, protection and preservation of ecosystems, prevention, reduction and control of pollution, introduction of alien or new species, and protection and preservation of the marine environment. Part V further deals with harmful conditions and emergency situations, and Part VI with international watercourses and installations in times of armed conflict and settlement of disputes.

III) Governing Principles of International Law on Transboundary Watercourses

The 1977 Convention introduced new principles for the management of transboundary watercourses. The two most important ones include “equitable and reasonable utilization”⁷ and “obligation not to cause significant harm”⁸.

⁷ “Convention on the Law of the Non-Navigational Uses of International Watercourses”, New York, 21 May 1997

“Article 5: Equitable and reasonable utilization and participation

1. Watercourse States shall in their respective territories utilize an international watercourse in an equitable and reasonable manner. In particular, an international watercourse shall be used and developed by watercourse States with a view to attaining optimal and sustainable utilization thereof and benefits therefrom, taking into account the interests of the watercourse States concerned, consistent with adequate protection of the watercourse.

2. Watercourse States shall participate in the use, development and protection of an international watercourse in an equitable and reasonable manner. Such participation includes both the right to utilize the watercourse and the duty to cooperate in the protection and development thereof, as provided in the present Convention.”

⁸ “Convention on the Law of the Non-Navigational Uses of International Watercourses”, New York, 21 May 1997

“Article 7: Obligation not to cause significant harm

1. Watercourse States shall, in utilizing an international watercourse in their territories, take all appropriate measures to prevent the causing of significant harm to other watercourse States.

2. Where significant harm nevertheless is caused to another watercourse State, the States whose use causes such harm shall, in the absence of agreement to such use, take all appropriate measures, having

It has been asserted that the principles of equitable and reasonable utilization and obligation not to cause significant harm are the backbone of the 1977 Convention.⁹ At the same time, the two principles have the capacity to be in conflict with one another and hence have the capacity to make the 1977 Convention an ambiguous legal instrument.¹⁰

Reasonable and Equitable Utilization

This is the fundamental doctrine guiding water-sharing for international watercourses. It is interesting to note that this principle only exists in international water law and not in the larger body of international law. This principle aims to ensure a fair apportionment of water while reconciling conflicting interests across international borders, with a goal to provide the maximum benefit to each State. The idea is to balance economic, social and environmental factors in the use of natural resources while taking into account the capacity of the watercourses.

It should be realized that equity is not synonymous with equal and the two should not be confused. The concept of equity is central to international water law. Equity requires that the needs and the interests of states are considered equal and then these interests are weighed in a fair and just manner. The idea is that every interest is equal, and if a state has more to gain from the use of the water, justice requires the water to be divided accordingly.

The International Court of Justice (“ICJ”) has explained that what is equitable (to each riparian) may differ “according to levels of economic development, and economic and cultural traditions”.

due regard for the provisions of articles 5 and 6, in consultation with the affected State, to eliminate or mitigate such harm and, where appropriate, to discuss the question of compensation.”

⁹ Bernard Calas and C. A. Mumma Martinon, “Shared Waters, Shared Opportunities: Hydropolitics in East Africa”, African Books Collective, Nature, 2010, Pg. 42

“The No-Harm rule forms a fundamental rule, while the principle of equitable and reasonable utilization is regarded as the cornerstone of international water law.”

¹⁰ Laurence Boisson de Chazournes, Makane Mbengue, Komlan Sangbana and Mara Tignino, “The Un Convention on the Law of the Non-Navigational Uses of International Watercourses: A Commentary”, Oxford University Press, 13 February 2019, Pg. 114

Moreover, the principle also advocates for optimal use. The aim is to maximize the use of the water body and resources in a way that it provides the maximum benefit to everyone and minimum damage to the river. For instance, Ethiopia has been advocating this optimal use and using it as a basis for the construction of the Renaissance dam on the Nile.

The principle of reasonable and equitable utilization, even if not deliberately, encompasses the community of interest principle within it. International law scholars agree that we cannot talk about optimal utilization, which is a requirement for reasonable and equitable utilization, without looking at the water resource as something that is shared by a community of states.

The reason why the principle of reasonable and equitable utilization gained so much traction with the international community is because it was already being used to divide water in intrastate disputes. One of the main countries who used this principle to divide water amongst its states was the US. However, the US was willing to apply this principle to the division of water internally but was not in favor of applying the same principle when it came to the division of water with Mexico regarding the Colorado River.

International courts and tribunals have also elaborated on this principle. In the Lake Lanoux arbitration between France and Spain, the tribunal, although deciding in France's favor, stated that France was under an obligation to consult and safeguard Spain's rights (this embodied the reasonable and equitable utilization principle).

The second most important case that dealt with the reasonable and equitable utilization principle was the Gabchicovo Nagymarous case which was brought before the ICJ in 1993. The Court decided in Hungary's favor by stating that Slovakia had deprived Hungary of an equitable and reasonable share of the water. The ICJ has used the same principle when dealing with cases regarding fishing rights such as the North Sea Continental Shelf case between Denmark, Germany, and the Netherlands.

Obligation Not to Cause Significant Harm

Unlike the first principle, the obligation not to cause significant harm finds its basis in the prevention of harm principle in international law more generally. Over time

a number of prominent domestic law principles have found their way in international law and have culminated in the no harm principle.

An important ICJ case on the obligation to ensure that a country's actions do not cause harm to another is the Corfu Channel. This case was filed by Albania against the United Kingdom. Brief facts are that British warships passed through the Corfu Channel, in Albanian territorial waters, and were struck by mines causing an explosion. It was the fault of the British Navy because they were sweeping for mines in Albanian territory without permission. Albania filed a case for breach of their sovereignty. The ICJ agreed with Albania that its sovereignty had been breached but said that Albania itself was responsible for the explosion in its waters, and for the damage and loss of human life of UK nationals. The court said that Albania had a responsibility to warn British warships of the danger. This responsibility flowed from the well-recognized obligation under international law on all states to not knowingly allow their territory to be used contrary to the rights of other states.

It is important to note that the no harm principle has existed as part of international law even prior to the formation of the ICJ. The Permanent court of International Justice, which existed before the ICJ dealt with the same issue in a case between France and Turkey, popularly known as the Lotus case. In this case a French ship, called the Lotus, sailed for Istanbul and accidentally hit a Turkish coal ship, destroyed it and killed eight Turkish sailors. When the French ship reached Istanbul, the sailor of the French ship was arrested and put to trial in Turkish courts. France protested against this and stated that Turkey had violated international law by subjecting its citizens to Turkish law. The Court held that there had not been a violation of international law since it only prohibits coercive action by one State in the territory of another. In this case there was no harm done to France and neither was Turkey prohibited from exercising jurisdiction over someone who was responsible for the death of their citizens. Hence, this case brought about the understanding that the harm had to have occurred on the territory of the other state for it to be actionable under international law.

Moving on to international water law, the no-harm principle is at the heart of the several international conventions focusing on the uses, allocation, management and protection of transboundary water resources. What constitutes significant harm under

international law has been the source of a lot of debate amongst the international community. Generally, the level of harm, in order to qualify as 'significant', has to be higher than merely small or trivial. However, it does not have to be severe or substantial.

The 'harm' has to be more than just an 'negative effect' – it has to endanger an existing use by a state, or have a detrimental impact on the environment or the socioeconomic development of the harmed state (e.g. public health, industry, property, agriculture). For instance, in the Lake Lanox case between France and Spain, it was stated that alteration of the flow of water by an upper riparian can qualify as significant harm to a lower riparian State.

Also, obligation not to cause significant harm places upon states the obligation to conduct due diligence. Due diligence has also become a defining factor of the obligation not to cause harm. Due diligence implies that the harm must have been foreseeable for the state of origin on the basis of current knowledge.

The obligation not to cause significant harm, in the context of international water law, has been elaborated upon by the ICJ also. This issue came up in the Pulp Mills case which was a dispute between Argentina and Uruguay concerning the construction of pulp mills on the Uruguay River. With regards to the significant harm principle, the court held that the obligation to prevent transboundary harm is closely related to the duty to carry out an environmental impact assessment. So this added another factor to the obligation not to cause harm.

This environmental aspect of the no harm principle was further elaborated in the San Juan River case. These were actually two cases that dealt with the consequences of the dredging activities carried out by Nicaragua and the construction of a road being made by Costa Rica. The important takeaway from this case was the fact that the ICJ stated its view that "damage to the environment, and/or the loss of the ability of the environment to provide goods and services is compensable under international law". So this case recognized the right of a state to be compensated for harm done by another state to a shared water resource.

Another case dealing with the no harm principle and the environment is the Rainy Rivers Case. The Rainy River is shared between Canada and the United States. By the late 1950s the river had been polluted to an alarming extent by both Canada

and the US. In an attempt to rectify the situation, both countries created an International Joint Commission. This commission laid down the rule that whereas it was accepted that certain activities would cause pollution in a watercourse, such pollution could not be caused by recreational activities of the inhabitants of either country.

The important thing to note is that like the reasonable and equitable utilization principle, the no harm principle also finds its basis in the community of interest theory. This is because the no harm principle is based on the fact that all countries are part of one whole community and so there exists a social contract under which each has an obligation not to do anything that would harm the other. Like in a community, the no harm principle is a reciprocal obligation.

IV) Conflicting Principles of International Water Law

The issue in international water law stems from the conflict between the principles of “reasonable and equitable utilization” and the “obligation not to cause significant harm”. The relationship between these rules has been the cause of much disagreement in the international community. The question remains as to which takes precedence over the other or whether the rights guaranteed by the two have to be balanced on an equal level with each other?

Downstream states tend to favor the no harm principle, as it protects their existing uses from adverse effects caused by upstream developments, while upstream states tend to favour the principle of equitable and reasonable utilization, as it allows for a broader use of the shared resources.

The 1977 Convention tried to avoid the potential difficulties between these two principles by stating that the principle of equitable and reasonable utilization would take priority while at the same time giving the no significant harm rule special status. This basically meant that states were not legally responsible for causing significant harm if they can show that they have taken all appropriate measures to prevent such harm, and their use of an international watercourse is equitable and reasonable.

However, the 1977 Convention did not sit well with some countries and also legal academics. The Berlin Rules, on the other hand, made both principles subject to each other and equal in stature. However, the Berlin Rules did not find their way into customary international law.

As of now, the burden of proof for establishing that a particular use of an international watercourse is equitable and reasonable lies with the state whose use of the watercourse is causing significant harm. So as long as the state causing the harm can show that its use is equitable and reasonable, there is no violation of international law.

The effect of this controversy has been that states have had varied positions on how water needs to be distributed. This diversion leaves room for disputes to emerge that tend to add to the conflict rather than resolve it.

V) Way Forward- Reconciling Principles of International Water Law

There is scholarship that says that the two principles can and do exist in harmony with each other. On the contrary, it is asserted that the two principles reinforce each other as opposed to being in tension with each other.

This understanding stems from the International Law Commission's clarification that "when several norms bear on a single issue they should be interpreted so as to give rise to a single set of compatible obligations".

It is stated that both the no harm and equitable and reasonable utilization principles have been widely acknowledged as belonging to customary international law and usually international law rules do not operate in tension with each other.

From an academic lens, there can be an interpretive difference between the two principles. As already stated, downstream riparians may rely on the no-harm rule and possibly argue that it confers onto them kind of a veto power over the actions of upper riparian. On the other hand, the equitable utilization principle is seen to reinforce arguments by upper-riparians and in a way allow activities that are significantly harmful to lower riparians.

However, this interpretation is too simplistic. This is because international water law is based on the principle of community of interest which has existed prior to the evolution of the idea that riparian states have equal rights and both principles can be understood from the lens of community of interest.

If that is the case, then two principles who find their roots in the same theory cannot be in opposition to each other. Hence, it is argued that both principles give rise to a single set of obligations which are illustrated through the community of interest principle and confirmed by the Permanent Court of International Justice in the River Oder case we've seen earlier.

The new thinking is that from a philosophical angle, an action that would cause significant harm would, in most situations, result in an inequitable and unreasonable use of the watercourse.

Moreover, there are gaps in the obligation not to cause significant harm principle, which are filled in by the reasonable and equitable utilization principle and thus one complements the other. For instance the no harm principle does not take into account multidimensional harm, downstream riparians causing harm to upstream riparians and existing uses in downstream states can affect the ability of upstream states to develop their water resources. There is also increasing debate around the source and impact of harm. While the no significant harm principle builds on harm caused by one state to another state, the sources and victims of harm—and their inter-relationships—are more complex. Harm may not be simply transboundary harm between neighbouring states, but a reflection of multi-level harm that occurs simultaneously. For instance, when the Kosi river barrage collapsed in 2008 in Nepal, with huge damage to communities in both Nepal and India; the actors involved were not only local neighbors across the borders, but also regional and national governments of both countries. Furthermore, harm can be direct and immediate but this is not the case sometimes. The harm can be indirect—where it affects groundwater or causes land alterations and such harm has generally not been included in transboundary agreements. The harm can be even more indirect where it affects water flows through climate change, geoengineering, deforestation.

It is believed that the understanding of significant harm will change over time. The tolerance for harm may be lower today as opposed to the past and will be even

lower in the future. Given the uncertainty of cause–impact relationships, proof of harm becomes even more complicated, and especially proof of harm to future generations will have to be weighed against what is reasonable and equitable.

So the fact that both principles have the capacity to supplement each other brings us to the understanding that the obligation not to cause harm in combination with the equitable and reasonable utilization principles produces a framework for joint dispute prevention and cooperation over transboundary watercourses.

VI) Principles of International Water Law and Indus Waters Basin

The Indus Waters Treaty (“IWT”) is often hailed as a nearly impossible feat that was achieved with the involvement of the World Bank in 1960. India-Pakistan cooperation over this vital resource was a watershed moment in global hydro-diplomacy. Some researchers attribute the breakthrough to the requirements of the time. Pakistan and India needed financial support from the World Bank to expand their irrigated areas and create infrastructure for water storage and transport. The total amount of this contribution was well over \$1 billion (in 1960 rates) through the Indus Basin Development Fund.

Another reason working in favor of this cooperation was the fact that both countries were “water rational.” They had realized that cooperation was a prerequisite for safeguarding their country’s long-term access to the shared resource. In 1960, the political opinion in the two countries was clear. Cooperation was the only way forward, in spite of water scarcity and the competitive use of this limited resource under a hostile environment of mutual distrust. A war over water would not have guaranteed either country’s water supply in the long term.

India and Pakistan’s relationship over the Indus Waters Basin is defined by the IWT. However, the IWT was signed prior to the widespread recognition of the two international law principles discussed above. How then, should the Treaty be interpreted to take into account the evolving jurisprudence of international water law?

The 2013 Kishenganga arbitration sheds some light on the issue. In this case Pakistan was of the view that the development of an Indian hydro-electric project, requiring the diverting of the waters of the river Kishenganga/Neelum was contrary to the IWT, in light of its adverse environmental consequences and its potential impact on the river's water flow. The court recognized the general duty to prevent environmental damage. From this recognition, we can recognize the implicit incorporation of the "obligation not to cause significant harm" to the lower riparian. However, this right had to be balanced with India's "reasonable and equitable utilization" of the watercourse.

Lower and upper riparians of most shared watercourses, like Pakistan and India, generally take opposing views on the relationship between the two concepts. Lower riparians favor the no harm rule because they believe it protects existing uses against impacts resulting from activities undertaken by upstream states. Conversely, upper riparians prefer the equitable and reasonable utilization principle precisely because it provides more scope for states to utilize their fair share of the watercourse for activities that may impact downstream states.

For Pakistan and India, the solution lies in the understanding that for the sustainable development of the transboundary watercourse, both these principles have to operate in tandem with one another. International water law experts, such as Atilla Tanzi, state that there should be no interpretative difference between the two main principles at hand. Instead, they should co-exist according to a harmonious legal relationship that gives rise to a single set of obligations as illustrated through the community of interest principle. As observed by the Permanent Court of International Justice, in the River Oder case,

"[T]he community of interest in a navigable river becomes the basis of a common legal right, the essential features 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."