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SYMPOSIUM ON INTERSTATE DISPUTES OVER WATER RIGHTS

EQUITABLE AND REASONABLE UTILIZATION AND THE OBLIGATION AGAINST CAUSING SIGNIFICANT HARM – ARE THEY RECONCILABLE?

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The relationship between the principle of equitable and reasonable utilization and the obligation against causing significant harm has been the most challenging issue in the long history of the evolution of international water law. The purpose of this essay is to discuss the genesis of the debate on the relationship between the two concepts, present the opposing positions of the different riparians thereon, and clarify how the UN Convention on the Law of the Non-Navigational Uses of International Watercourses has resolved this matter and rendered the two concepts reconcilable.

It should be noted, at the outset, that lower and upper riparians of most shared watercourses 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.[1] Moreover, the relationship between the two concepts is complicated further by differences over the qualitative and quantitative assessment of the obligation not to cause significant harm, and the misunderstandings and misinterpretations of some basic principles of international water law. The less-understood concept of foreclosure of future uses, as discussed later, is one example of such misunderstandings.

As a matter of fact, the different positions of the riparians on the relationship between the two concepts have been the underlying cause of most current disputes on shared watercourses around the globe. The Nile Basin, and the Grand Ethiopian Renaissance Dam (Dam) that Ethiopia is currently constructing on the Blue Nile, are such sharp examples, and the result of the opposing views on the two concepts.[2] Ethiopia contends that it has the right to construct the Dam because it will enable Ethiopia to utilize its equitable and reasonable share of the Nile waters. Egypt, on the other hand, argues that the Dam will cause Egypt significant harm, and that Ethiopia is obliged under international water law not to do so. Although Sudan acknowledged the benefits it will reap from the Dam, it has also identified certain risks of the Dam, and has recently joined Egypt in demanding that Ethiopia should address these risks.

Similarly, the disputes over the uses of the Tigris/Euphrates Basins between Turkey, and Syria and Iraq, as well as those over the Mekong River between China, and Vietnam, Lao Republic, Thailand, and Cambodia, are other

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[1] Salman M.A. Salman, *Freshwater Resources*, in The Oxford Handbook of International Environmental Law, (Lavanya Rajamani & Jacqueline Peel eds., 2021).

[2] Salman M.A. Salman, *The Nile Basin Cooperative Framework Agreement: Disentangling the Gordian Knot*, in The Grand Ethiopian Renaissance Dam and the Nile Basin, Implications for Transboundary Cooperation (Zeray Yihdego et al. eds., 2018).

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examples of such sharp disputes attributable to the contrasting understandings of the two concepts by upstream and downstream riparians.

Genesis of the Debate on the Relationship Between the Two Concepts

Although the debate on the relationship between the two concepts preceded the work of the Institute of International Law (Institute) and the International Law Association (Association), the two scholarly organizations were the first to articulate this relationship. Indeed, their work on international water law evolved largely around the two concepts.

Starting with the Madrid Declaration in 1911, the Institute tilted towards the obligation against causing harm, but gradually began recognizing equitable utilization. On the other hand, the Association established equitable and reasonable utilization as the guiding principle for its work, and included existing uses as one of the factors for determining such equitable utilization in its Helsinki Rules adopted in 1966.

Building on the work of the two organizations, the UN International Law Commission (Commission) started working on the UN Convention on the Law of the Non-Navigational Uses of International Watercourses in 1971, pursuant to the UN General Assembly Resolution 2669 (XXV) (1970). It took the Commission 23 years to complete its work on the draft convention in 1994. During these years, five rapporteurs submitted a total of fifteen reports on the topic. Much of the debate within the Commission on the draft convention involved the relationship between equitable and reasonable utilization and the obligation against causing significant harm, and which one subordinates the other.

While most reports subordinated the obligation not to cause significant harm to the principle of equitable utilization, others equated the two concepts, while a third approach suggested situations where the principle of equitable utilization can subordinate the obligation not to cause harm. The element of due diligence not to cause harm was introduced in this last approach.

Consequently, the issues continued to be debated within the Commission without a clear agreement until the Commission submitted its final draft convention and report to the General Assembly in 1994. On the relationship between the two concepts, the Commission's 1994 report stated that:

> In certain circumstances, "equitable and reasonable utilization" of an international watercourse may still involve significant harm to another watercourse State. Generally, in such instances, the principle of equitable and reasonable utilization remains the guiding criterion in balancing the interests at stake.[3]

The General Assembly referred the draft convention and report with these views to the Sixth Committee convened as the Working Group of the Whole. After lengthy, intense, and heated discussions during the two meetings held in 1996 and 1997, a new compromise language on the relationship between the two concepts was adopted, as reflected in Article 7 of the draft convention.

The new Article 7 did not include a reference to due diligence not to cause significant harm. This was replaced with the requirement that states should take all appropriate measures to prevent the causing of significant harm. The new article dropped the explicit reference to equitable utilization and replaced this with a reference to the provisions of Articles 5 and 6 (which actually deal with equitable utilization and participation) to which due regard would be given. It also added the requirement to eliminate or mitigate harm and, where appropriate, to discuss the question of compensation. The agreed text of Article 7 read as follows:

[3] Int'l Law Comm'n, Report on the Work of Its Forty-Sixth Session, 2 May – 22 July 1994, II(2) Y.B. Int'l L. Comm'n at 103 (1994).

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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 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.

The phrase "having due regard for the provisions of Articles 5 and 6" was accepted by both groups of lower and upper riparians, and thus facilitated approval of the draft Convention by the Working Group. As Lucius Caflisch noted:

> The new formula was considered by a number of lower riparians to be sufficiently neutral not to suggest a subordination of the no-harm rule to the principle of equitable and reasonable utilization. A number of upper riparians thought just the contrary, namely that, that formula was strong enough to support the idea of such subordination.[4]

This compromise agreement on the relationship between equitable and reasonable utilization and the obligation against causing significant harm brought the Convention in line with the Association's Helsinki Rules of 1966. By that time, the Rules had been widely accepted as representing customary international water law.[5] Indeed, the Convention itself, which is a framework convention to be complemented by agreements by the watercourse states, is primarily a codification of the basic principles of customary international water law.[6]

On May 21, 1997, following lengthy discussion of the Commission's draft, as amended by the Working Group, the General Assembly passed Resolution 51/229 adopting the Convention. The Convention was opened for signature on May 21, 1997, and entered into force on August 17, 2014. Thus, it took almost forty-five years since the General Assembly referred the matter to the Commission in 1970 for the process to come to completion.

The Relationship Between the Two Concepts Under the Provisions of the Convention

A number of factors have contributed to the reluctance of many states that voted for the Convention in 1997 to become parties to the instrument.[7] One main factor for this reluctance has been the contrasting interpretations and understandings of the relationship between equitable utilization and the obligation against causing significant harm.

The compromise language regarding the relationship between the two concepts reached by the Working Group facilitated approval of the Convention by the General Assembly in 1997. Nonetheless, some upper riparians continued to consider the Convention to be biased in favor of lower riparians because of its specific mention in a separate article of the obligation not to cause significant harm. On the other hand, a number of downstream states still believe that the Convention favors upstream riparians because it subordinates the no harm rule to the principle of equitable utilization by including a reference in Article 7 to equitable utilization.

[4] Lucius Caflisch, *Regulation of the Uses of International Watercourses*, *in* INTERNATIONAL WATERCOURSES—ENHANCING COOPERATION AND MANAGING CONFLICT 15 (Salman M.A. Salman & Laurence Boisson de Chazournes eds., 1998).

[5] Charles Bourne, *The International Law Association's Contribution to International Water Resources Law*, 36 NAT. RESOUR. J. 155 (1996).

[6] Salman M.A. Salman, *The Helsinki Rules, the UN Watercourses Convention and the Berlin Rules: Perspectives on International Water Law*, 23 INT'L J. WATER RESOUR. DEVEL. 619 (2007).

[7] Salman M.A. Salman, *The United Nations Watercourses Convention Ten Years Later – Why Has Its Entry into Force Proven Difficult?*, 32 WATER INT'L 1 (2007).

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However, the prevailing view among international water law experts is that the Convention has indeed subordinated the obligation not to cause significant harm to the principle of equitable and reasonable utilization. This conclusion is based on a close reading of Articles 5, 6 and 7 of the Convention. Article 6 enumerates seven factors for determining equitable utilization. These factors include (i) "the effects of the use or uses of the watercourse in one watercourse State on other watercourse States," and (ii) "existing and potential uses of the watercourse." Those same factors are also needed, with other factors, to determine whether significant harm is caused to another riparian because harm can be caused by decreasing considerably the water flow to other riparians, thereby affecting their existing uses.

Thus, the two factors for measuring harm have been included as part of the seven factors for determining equitable and reasonable utilization, which confirms the subordination of the obligation not to cause significant harm to the principle of equitable utilization.

Moreover, Article 7(1) of the Convention obliges watercourse states, when utilizing an international watercourse in their territory, to take all appropriate measures to prevent causing significant harm to other watercourse states. When significant harm nevertheless is caused to another watercourse state, then Article 7(2) of the Convention requires the state causing the harm to "take all appropriate measures, having due regard to 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." As stated before, Articles 5 and 6 of the Convention deal with equitable and reasonable utilization. As such, Article 7(2) requires giving due regard to the principle of equitable and reasonable utilization when significant harm has nevertheless been caused to another watercourse state. This is exactly what the Commission concluded and recorded in its last report in 1994, as discussed above. Article 7(1) also indicates that the causing of significant harm may be tolerated in certain cases, such as when the possibility of compensation may be considered.

Accordingly, a careful and integrated reading of Articles 5, 6 and 7 indicates that the obligation not to cause significant harm has indeed been subordinated to the principle of equitable utilization. Hence, it can be concluded that, similar to the Helsinki Rules, the principle of equitable and reasonable utilization is the fundamental and guiding principle of the Watercourses Convention.[8]

This view has been endorsed by the ICJ in the Danube case between Hungary and Slovakia (*Gabčíkovo* case).[9] The case was decided in September 1997, only four months after the Convention was adopted by the General Assembly. In that case the Court emphasized the concept of equitable utilization when it directed that "the multipurpose programme, in the form of a co-ordinated single unit, for the use, development and protection of the watercourse is implemented in an equitable and reasonable manner." The Court did not make any reference to the obligation not to cause harm. The Court emphasized the principle of equitable utilization further by linking it to the concept of equality of all riparian states. It quoted from the 1929 judgment by its predecessor, the Permanent Court of International Justice (Permanent Court), where the Permanent Court stated:

> [The] 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 user of the whole course of the river and the exclusion of any preferential privilege of any one riparian State in relation to the others.[10]

[8] Salman M.A. Salman, *Entry into Force of the UN Watercourses Convention – Why Should It Matter?*, 31 Int'l J. Water Resour. Devel. 31 (2015).

[9] Case Concerning the Gabčíkovo-Nagymaros Project (Hung. v. Slovk.), 1997 ICJ Rep. 7 (Sept. 25).

[10] Case Relating to the Territorial Jurisdiction of the International Commission of the River Oder (U.K., Czechoslovakia, Den., Fr., Ger. & Swed. v. Pol.), 1929 PCIJ (ser. A) No. 23 (Sept. 10).

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However, these interpretations of the subordination of the obligation not to cause significant harm to the principle of equitable utilization do not seem to have convinced some lower riparians to accede to the Convention.

Harm and Notification as Two-Way Matters

The contrasting views and interpretations of the two concepts seem to be compounded further by other misunderstandings regarding which riparian states may actually cause harm to the others, and consequently, from whom notification for planned measures is required.

There is a widely-believed, but inaccurate, notion that only upstream riparians can cause harm to downstream riparians by affecting the quantity and quality of water flows to such downstream riparians. This belief is actually one of the basic misunderstandings about international water law in general, and the Convention in particular. It is based on the notion that harm can only "travel" downstream, with the waters of the shared river.

It is obvious that downstream riparians can be harmed by the physical impacts of water quality and quantity changes caused through use by upstream riparians. However, it is less understood, and not comprehended, that upstream riparians can be harmed by the potential foreclosure of their future uses of water, caused by the prior use and the claims of rights by downstream riparians. This is an important principle of international water law that establishes a clear linkage between the principle of equitable and reasonable utilization and the obligation not to cause harm.[11] The lack of understanding of the concept of foreclosure of future uses has no doubt contributed to the challenges surrounding the relationship between the two concepts, as the current debate over the Nile and the Mekong Basins indicates.

Indeed, this misunderstanding about harm being only a one-way matter has led some lower riparians and experts to argue that notification for planned measures is required solely from upper riparians to lower riparians, and not from both groups of riparians. However, it should be clarified that under international water law, notification for planned measures which may have significant adverse effects is required from all riparians to all other riparians of the shared watercourse, based on the principle that harm is actually a two-way matter.[12]

It is worth emphasizing that, for this reason, the Convention requires notification before "*a watercourse state*" and not before the "*upstream state*," implements the planned measures. Similarly, the Court in the *Gabčíkovo* case used the phrase "depriving *other riparians*" and not "depriving *downstream riparians*."

Concluding Remarks: Cooperation—The Basis of International Water Law

International water law is generally referred to as the law of cooperation. The Watercourses Convention mentions the word "cooperate" and its derivatives fifteen times, and affirms in its preamble the importance of international cooperation and good-neighborliness in this field. It further confirms that cooperation will ensure the utilization, development, conservation, management and protection of international watercourses, and promotion of their optimal and sustainable utilization for present and future generations.

The Convention goes on to require participation in the uses, development, and protection of an international watercourse in an equitable and reasonable manner, and emphasizes that such participation includes both the right to utilize the shared watercourse, and the *duty to cooperate* in its protection and development.

[11] Salman M.A. Salman, *The Obligation Not to Cause Significant Harm*, *in* THE UN CONVENTION ON THE LAW OF THE NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES: A COMMENTARY (Laurence Boisson de Chazournes et al. eds., 2018). *See also* Salman M.A. Salman, *Downstream Riparians Can Also Harm Upstream Riparians – The Concept of Foreclosure of Future Uses*, 35 WATER INT'L 350 (2010).

[12] Salman M.A. Salman, *Notification Concerning Planned Measures on Shared Watercourses – Synergies Between the Watercourses Convention and the World Bank Policies and Practice*, 4.2 BRILL RESEARCH PERSPECTIVES IN INT'L WATER L. (2019). *See also* SALMAN M.A. SALMAN, THE WORLD BANK POLICY FOR PROJECTS ON INTERNATIONAL WATERWAYS – AN HISTORICAL AND LEGAL ANALYSIS (2009).

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Cooperation in good faith between riparian states on the uses, management, and protection of their shared watercourses needs to be translated into a treaty, inclusive of all the riparians of the shared watercourse. Such an instrument should require establishing a basin management organization as a legal entity, endowed with a broad and meaningful mandate. This will need to be followed by joint development projects and programs, such as the Itaipu and Manantali dams, instead of the unilateral schemes that currently dot many of the shared watercourses around the globe.

Consequently, such cooperation would render unnecessary the on-going heated debate and arguments over the rights and obligations of upper and lower riparians, who can cause harm to the other, foreclose their rightful future uses, or who is required to notify whom.

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