

Mastergradsoppgave

Jus 398

## **UTILIZATION OF INTERNATIONAL WATERCOURSES:**

**Aspects of the applicable international law and  
practice in the Tigris-Euphrates watercourse**

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# 1 Introduction

## 1.1 *Scope and structure of the thesis*

This thesis focuses on the international law regulating the non-navigational utilization of international watercourses. Its core element is an analysis of the juridical arguments of the parties to the Tigris-Euphrates watercourse in order to determine whether they are in accordance with the applicable international law in this field. The analysis will firstly require an examination of the applicable main principles of international law for the non-navigational uses of international watercourses. By this method I aim to combine a theoretical analysis of the applicable international law with an analysis of the problems in a specific case of high complexity and importance.

The main research question is however whether the legal arguments of the parties to the Tigris-Euphrates watercourse in accordance with the applicable international law.

An international watercourse is any naturally connected system of waters that forms or crosses the border between two or more states.<sup>1</sup> The water of such watercourses will be located within the territories of several states. As for international watercourses in the form of rivers, the available quantity and quality of water in each state is dependent on the utilization of the other watercourse states. When water is consumed by an upstream state, the amount of water flowing into the downstream states decreases. Depending on the utilization, the quality of the water might also well be affected; return flow from agriculture or industry might pollute the water and render it unsuitable for domestic use. Dam projects, irrigation and sales of water as a commercial product also affects the total water supply. Thus the utilization in one part of the watercourse will create consequences for the consummation in other parts. In arid areas of the world, water is a scarce resource and any negative change in the water supply can give fatal results, and also be a source of interregional or international conflict.

It is on this background of high importance to develop international legal principles and regulations for division and utilization of the water in international watercourses in order to avoid conflict and secure a sustainable and equitable development. A vast body of international law in this area exists, and the question is how the rules of international law regulating the utilization of international watercourses should be interpreted in order to create a reasonable and sustainable solution that apportions the water resources equitably between the watercourse states, without deteriorating the watercourse.

This in turn raises questions of sovereignty and jurisdiction; would a restriction of the utilization of the territorial waters be a violation of the sovereignty of the watercourse states? Does the principle of state sovereignty have natural restrictions? Does the jurisdiction of the territory mean ownership to and free usage of its water? Furthermore it reveals the legal tension between the sovereignty as an agent of self-sufficiency, and modern principles for environmental protection and equitable apportionment; does every

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<sup>1</sup> The definition of the term 'international watercourse' is a subject of dispute between Turkey, Iraq and Syria, and will be discussed further in chapter 5.2

watercourse state have a basic legal right to utilize the watercourse? What factors are of importance in determining the allocation of water from an international watercourse, and how should the relevant factors be balanced?

Turkey, Syria and Iraq have yet failed to reach a tripartite agreement concerning the utilization of the Tigris-Euphrates watercourse, and the tension between them is variably high. The main question to be addressed in this regard is how the ruling principles of international water law are commonly interpreted, and whether the Turkish-Syrian-Iraqi perception of these principles is in harmony with the international one. Is the Tigris-Euphrates in fact an international watercourse? May Iraq's ancient uses give an extended right to utilization? Can a Turkish claim for sovereignty be an obstruction for an equitable allocation of the Tigris-Euphrates watercourse?

In the next subchapter follows a brief reflection on water as a subject of dispute. In addition to being a vital human need, water is also a great source to power; both because it ensures development and progress to the states who have good access to it, but also because it may become a valuable currency towards states with a poorer water supply. The subchapter will examine some of the central factors leading to water conflict, and point at the dynamic between watercourse states in order to give a broader perspective on water as a unique source of conflict.

Chapter 2 focuses on the sources of international law, as defined by article 38 of the Statute of the International Court of Justice, and will examine both the specific sources of relevance to the matter in question, and the legal method of international law. In the field of international water law, and especially the law of international watercourses, the legal sources are essentially customary, and the chapter will give a brief presentation of the state practice, judicial decisions and treaty law that are employed in the later analysis. The aim of this chapter is to establish the sources of law and their applicability, in order to create a foundation for the following parts of the thesis.

Further, in chapter 3, follows a short historical background of the legal situation of transboundary watercourses. The first and second part of the chapter gives examples of the development of international law in the field of transboundary watercourses, while the third part is devoted to the political and hydrological situation in the Tigris-Euphrates basin, leading up to the present situation. This chapter will enlighten the earlier stages and positions in international water law and the three parties' common history, in order to establish a wider context for questions debated later in the thesis.

The applicable international law for transboundary watercourses is addressed in chapter 4. Out of the four major theories of water allocation, the discussion in chapter 4 will concentrate on the two theories that are most relevant for the scope of this thesis; the theory of absolute territorial sovereignty, and the theory of limited territorial sovereignty. This examination necessitates a preliminary discussion of the principle of state sovereignty's content and magnitude. The principle is central in international law and a fundamental prerequisite in all bi- and multilateral instruments. Establishing the status of this principle is substantial for the further scrutiny. A main question here is whether sovereignty allows each watercourse state to exploit the water on its territory freely, or if the sovereignty has inherent restrictions.

The theory of absolute territorial sovereignty is only examined briefly, whereas the theory of limited territorial sovereignty undergoes a more thorough analysis. The selection of topics in the chapter is motivated by the arguments of the Tigris-Euphrates riparians that are the subjects of analysis in chapter 5. The main question in chapter 4 is whether the theory of limited territorial sovereignty is applicable international law, and further to explore its essential principles and delimitations. The aim of this chapter is to present both a theoretical and a practical picture of the applicable international law of transboundary watercourses. This also displays the challenges of the principle of equitable utilization as an applicable rule, since it has no immediate content, but must be interpreted according to the factual situation of each conflict.

The establishment of the applicable international rules then induces the analysis of the legal aspects of the Tigris-Euphrates conflict, in chapter 5. Analyses of judicial disputes of the parties, in light of the principal theories and the findings in chapter 4, will reveal whether their arguments are in harmony with international law. In addition to this, the two bilateral water agreements will be examined, and the parties' earlier proposals for the management of the watercourse will be compared. This chapter aims to break up the arguments of the three parties, and see how they relate to the ruling principles. This may give an understanding of the complexity of the management of international watercourses, especially in areas where the dissimilarity between the parties is considerable. It also points on the strengths and weaknesses of international law and the obstacles it encounters in the process of finding peaceful solutions.

Lastly, in chapter 6, the thesis looks briefly at the possible future scenarios for cooperation in the Tigris-Euphrates basin in light of the recent development. The similarities of the riparians are enlightened, as well as the conditions for future cooperation. In addition the chapter tentatively suggests shifting the focus from the sharing of water to the sharing of benefits. The aim of this last unit is to present some new thinking on the possible ways to cooperate over water management.

In the early years of international water law, the main topic of regulation was the navigational rights. This has gradually changed over the years, and the navigational rights are now only a minor part of international water law. Since the topic of the present master thesis is the allotment of rights to consume and utilize a watercourse, the navigational rights will not be debated.

The thesis will neither enter into discussions regarding the *contents* of the international obligation to prevent harm-causing activities to other watercourse states. This principle focuses on the causing of factual harm between watercourse states, while the main topic of the thesis is the causing of legal harm and the principle of equitable utilization. Although a comparison of these two principles rise highly interesting questions, the limitation of the thesis does not allow any entrance into the world of factual harm.

In order to discuss the legal issues, it is essential to understand the factual and legal issues concerning water conflicts, and the particularity of water in this context. The following subchapter will endeavour to present some of the circumstances and causes that may lead to water conflicts.

## 1.2 Background: Water as a subject of dispute

Water is the source of life and conditional to human existence. Both the planet earth and the human body consist mainly of water and it is the one natural resource we are the most dependent of; for domestic use, to cook and clean, in the production of food or industrial goods, and also as an alternative source for power and electricity. But most of all, the human body needs fresh drinking water daily and cannot survive long without it. Out of the total volume of water on the planet, only around 2,5 % is freshwater. Out of this quantity, 70 % is ice and 30 % groundwater. Only mere 0,3 % of the world's water reserve is available to us in lakes and rivers.<sup>2</sup> Corresponding to the population growth, the consumption of available freshwater also increases. Research show that water consumption has grown twice as fast as the population the last century; the world's population grows with roughly 80 million persons a year, while the consummation of fresh water increases with 64 billion m<sup>3</sup> per year.<sup>3</sup> The world's population now appropriates 54 % of the freshwater in rivers, lakes and groundwater resources.<sup>4</sup> Furthermore the water consumption is not apportioned equally; while the 8 % of the world's population that lives in North and Central America consumes 1861 m<sup>3</sup> yearly per capita, the Asian 60 % of the world population consumes merely 519 m<sup>3</sup> yearly per capita.<sup>5</sup>

Around 70 % of the appropriated freshwater is used for irrigation. Climate changes challenges the traditional agricultural production, the temperatures rise, many areas experience less rain, and often the rain carries pollution. Production of food necessitates extensive amounts of water. A human being needs 2-4 litres of drinking water daily, but to produce one person's daily food supply, 2000-5000 litres of water is required.<sup>6</sup> According to the Food and Agriculture Organization of the United Nations, 1 800 million people will be living in areas with *absolute* water scarcity by 2025, and two-thirds of the world's population could be under stress conditions.<sup>7</sup> Thus it is of fundamental importance to reach agreements on the optimal, sustainable and equitable use of international watercourses.

Because of its unique qualities, water differs from other conflict-causing subjects. Firstly, water is a free and fungible natural resource. From nature's side, a river flows freely and unhindered through a geographical landscape. It will often rise in a mountainous area, and flow through various landscapes on its way to the sea. The river is part of a natural ecosystem, contributing to and benefitting from all other resources within this system. When international borders are drawn across the river, and divide it into two or more parts each situated in a separate State, an unnatural delimitation is imposed on the river. When divided into national fragments, the utilization of the water resources becomes subject to national jurisdiction. Gaining the ownership to the water in a specific part of a river may seem strange, since the water flowing through today is not the same water as will be flowing in the same spot tomorrow.

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<sup>2</sup> UN Water, statistics

<sup>3</sup> Worldometers statistics: [www.worldometers.info/water/](http://www.worldometers.info/water/)

<sup>4</sup> Ibid

<sup>5</sup> Data360: [www.data360.org](http://www.data360.org)

<sup>6</sup> Ibid

<sup>7</sup> Ibid

Because of its vital importance to human existence and its central role in the modern industrial society, water is also a considerable source of power. In his famous work “Oriental Despotism” from 1957, German historian Karl August Wittfogel introduced his theory on the evolution of powerful hydraulic societies.<sup>8</sup> He claims that the rise of many oriental societies was linked to their early development and organisation of water resources. The control over watercourses and the channelling of large quantities of water required mass labour, which again had to be coordinated and lead. Wittfogel believes that the organisation of water exploitation lead to the development of bureaucratic governmental structures. This theory seems quite descriptive for the Mesopotamian civilizations, where humans early developed methods to dominate water resources. Irrigation, the action of channelling water from a watercourse and into agricultural fields, was carried out in the area already in the 4<sup>th</sup> or 5<sup>th</sup> century BC.<sup>9</sup> The first known artificial constructed canal, led water from the Tigris River to an irrigated area in Girsu in Southern Iraq.<sup>10</sup> Dams were also constructed to ensure a more stable supply of water, and later also to produce hydropower. Also Egypt has gained power and structural advantages from her early development of the Nile River.<sup>11</sup>

Cooperation is also a decisive factor in water conflicts. Many watercourses are international, either flowing through several states, or on the borders of two or more states. 145 nations have their territory within an international basin.<sup>12</sup> When the water resources are shared between states, the water supply for each state will depend on the other states’ utilization. Unilateral development of a watercourse often leads to exhaustion of the resource and problems of scarcity and pollution. As these problems grow, states experience increasing difficulties of satisfying their demand for water. Barrages and dams are built to secure the water supply in the territory of the states building them. This again leads to an even weaker flow in the river for downstream riparians, and also, in many cases, to a decline of water quality. The factual situation is thus often characterized by two problems; increasing demand for, and decreasing supply of water.

In his article “The Tragedy of the Commons”, Garrett Hardin describes how it is tempting for humans to exploit the commons since it brings a positive utility to each exploiter, while the negative utility is shared by all, and therefore is quite small for each individual agent: “[e]ach man is locked to a system that compels him to increase [his use] without limit – in a world that is limited. Ruin is the destination toward which all men rush, each pursuing his own best interest in a society that believes in the freedom of the commons. Freedom in a commons brings ruin to all”.<sup>13</sup> Although similar in many ways, the situation for transboundary watercourses differs from Hardin’s hypothesis. In the eagerness to secure the water supply for its own population, states exploit the common watercourses and receive a positive utility. But the negative utility - draught, scarcity, pollution, and enfeebled wildlife and vegetation – is not shared by all the riparians, but transferred, in most cases, from the upper riparians to the lower ones. Exploiting a transboundary watercourse freely may therefore be auspicious for an upper riparian, since it brings him a full positive utility,

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<sup>8</sup> Wittfogel, Karl August, *Oriental Despotism: A Comparative Study of Power*, New Haven 1957

<sup>9</sup> Goldsmith, Edvard and Hildyard, Nicholas, *The Social and Environmental Effect of Large Dams: Volume 1, Overview*, Wadebridge 1984, chapter 25.

<sup>10</sup> Ibid

<sup>11</sup> McCaffrey Steven, *The Law of International Watercourses*, Oxford 2007, 2<sup>nd</sup> edition 2010, page 261

<sup>12</sup> Ibid

<sup>13</sup> Hardin, Garrett, “The Tragedy of the Commons”, *Science*, vol. 162 (1968), 1243-1248 (page 1244)

and no consequences. Naturally, such exploitation will trigger reaction from the lower riparian states, and also possibly give rise to conflicts.

The lack of trust amongst the watercourse states is also a factor that can create and increase a conflict over water. As Paul A. Williams describes, states often have difficulties to ascertain whether other states are defensively motivated in their water management or more offensively driven, and thereby “they inherently mistrust each other and prefer to be as self-sufficient as possible”.<sup>14</sup> Williams’ view would be highly relevant in the Middle-East, where water scarcity is evolving and many of the neighbouring states have suffered centuries of territorial rivalry and war. Between old rivalry states, it might be difficult to determine whether a neighbour state is seeking security or power.<sup>15</sup> States may see the precious and hard-won sovereignty as threatened by neighbouring states’ management of a watercourse, both because the downstream state fears a reduction of its own future development possibilities; and also because of the fear of being dependent on the water supply from an upstream state that was more progressive in the development of water management projects. However, in the battle for a secure and sufficient water supply, the states are more likely “to destroy the *resource* than each other”.<sup>16</sup> Trust, cooperation and exchange of information are thereby decisive factors for an equitable and sustainable utilization of an international watercourse.

Already in the 1980’s, United States’ government intelligence services predicted that there were at least 10 places in the world where water, not oil, would be the main subject to conflict and also, possibly, to war; Jordan, Israel, Cyprus, Malta and the Arabian peninsula being some of the countries facing severe water scarcity.<sup>17</sup> Even if this point of view has been acknowledged by many scholars and politicians, others, like Joseph W. Dellapenna, argue that water wars are unlikely because “(w)ater is simply too critical a resource to fight over”.<sup>18</sup> However likely water wars might be, the best way to create trust between the riparians and to avoid war over water is, as the present thesis will show, to achieve a legal agreement on the utilization of a watercourse, concluded by its riparians and based on clear and applicable legal rules.

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<sup>14</sup> Williams, Paul A., “Turkey’s Water Diplomacy: A theoretical Discussion”, *Turkey’s Water Policy*, Kibaroglu et al. (eds), Berlin Heidelberg, 2011, pages 197-214 (page 199)

<sup>15</sup> Ibid

<sup>16</sup> Ibid, page 201

<sup>17</sup> Starr, Joyce R., “Water wars”, *Foreign Policy* (Spring 1991), pages 17-36 (page 17)

<sup>18</sup> Dellapenna, Joseph W., “Rivers as Legal Structures: The Examples of the Jordan and the Nile”, 36 *Natural Resources Journal*, 1996, pages 217-250 (page 220)



## 2 Sources of Law

### 2.1 Introduction

The legal landscape of international water law is multifaceted, with an abundance of agreements and participants. It is widely recognized that article 38 of the statute of the International Court of Justice determines the sources of international law.<sup>19</sup> According to its first paragraph, the court shall apply the sources mentioned in the article while making decisions “in accordance with international law”. The provision further states that rules and principles of international law must derive from international conventions, international custom, general principles of international law, or judicial decisions and teachings of “the most highly qualified publicists”. These are the sources that will be examined in the present chapter.

### 2.2 International conventions

“[I]nternational conventions” in the ICJ status, article 38 litra a, can be “general or particular” and they establish “rules expressly recognized by the contesting states”. A convention is commonly known as an agreement between two or more states, concerning a specific or general subject, where the states in question commit to certain behaviour they would not be legally bound to in absence of the treaty.<sup>20</sup> Concerning the law of international watercourses, only one such convention exists:

#### The United Nations Convention on the Law of the Non-navigational Uses of International Watercourses

On the 21<sup>st</sup> of May 1997, a large majority of the United Nation General Assembly adopted the “United Nation’s Convention on the Law of the Non-navigational Uses of International Watercourses” (hereafter the ‘UNWC’). According to its article 36, the convention only enters into force “on the ninetieth day following the date of deposit of the thirty-fifth instrument of ratification, acceptance, approval or accession”. Since the number of such instruments at present is twenty-five, the UN Convention has not entered into force.<sup>21</sup> This necessitates a discussion of the convention’s relevance for the international community.

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<sup>19</sup> Shaw, Malcolm N., *International Law, fifth edition*, Cambridge 2003, page 66; Cassese, Antonio, *International Law*, Oxford 2001, page 119

<sup>20</sup> Thirlway, Hugh, “The Sources of International Law”, *International Law*, Malcolm D. Evans (ed.), Oxford 2010 pages 95-121 (page 100).

<sup>21</sup> Parties to the convention are at present; Burkina Faso, Denmark, Finland, France, Germany, Greece, Guinea-Bissau, Hungary, Iraq, Jordan, Lebanon, Libyan Arab Jamahiriya, Morocco, Namibia, Netherlands, Nigeria, Norway, Portugal, Qatar, South Africa, Spain, Sweden, Syrian Arab Republic, Tunisia and Uzbekistan (United Nation’s Treaty Collection)

As the large majority of votes in the UN General Assembly witness, the UNWC received broad consent amongst the UN Member States. The convention had also been long negotiated in the International Law Commission (ILC) Working Group, which, according to special rapporteur Steven McCaffrey, was “a forum in which virtually any interested state could participate and [the adopted convention] therefore reflects the views of the international community on the subject”.<sup>22</sup> Due to its large approval in the General Assembly, it seems safe to say that the grand majority of Member States agreed on the general principles of international water law, although the process of its entry into force has been slow.

Additionally, the mandate given to the ILC Working Group by the UN General Assembly was to “take up the study of the law of the non-navigational uses of international watercourses with a view to its progressive development and codification”.<sup>23</sup> The convention is thereby, partly declaratory of pre-existing international custom and partly emerging principles with broad acceptance. As stated in the “North Sea Continental Shelf”-case, “a convention adopted as part of the combined process of codification and progressive development of international law may well constitute, or come to constitute the decisive evidence of generally accepted new rules of international law”.<sup>24</sup> The UNWC is of course binding upon the States who are member to it, according to art. 18 *litra a* of the Vienna Convention on the Law of Treaties. The convention is thereby a binding legal source for Syria who has ratified it, and Iraq who has acceded to it, but has no force, as a *treaty*, for Turkey who voted against it.<sup>25</sup> Nevertheless, the UNWC might be legally binding for Turkey if it is, fully or partly, a codification of international customary law. This question will be debated in chapters 4 and 5.

## 2.3 *International custom*

Customary rules are rules of law that derives from traditional rules of behaviour. They develop subconsciously within a group of actors and eventually reach a level of historical legitimacy.<sup>26</sup> Customary rules, although giving “rise to rules binding on all members of the [international] community”, they also “ultimately rest[...] on consent”.<sup>27</sup> Not only the behaviour of states, but also that of international organisations can create customary international law.<sup>28</sup>

In order to be regarded as “international custom”, according to the ICJ-statute article 38 *litra b*, a rule must be a “general practice accepted as law”. The article thus sets conditions both for the states’ actions and for their conceptions. This duality was articulated by the ICJ

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<sup>22</sup> McCaffrey, 2010, page 376

<sup>23</sup> UN Audiovisual Library of International Law :  
<http://untreaty.un.org/cod/avl/ha/clnuiw/clnuiw.html>

<sup>24</sup> “The North Sea Continental Shelf” case, ICJ, 1969 (dissenting opinion), see also McCaffrey, 2010, page 375

<sup>25</sup> United Nations Treaty Collection, voting records for the UNWC

<sup>26</sup> Shaw, 2003, page 68

<sup>27</sup> Cassese, 2001, page 117

<sup>28</sup> Shaw, 2003, page 78

in the “North Sea Continental Shelf”-cases: “Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a rule of law requiring it [...] The States concerned must therefore feel that they are conforming to what amounts to a legal obligation”.<sup>29</sup> The evaluation thus contains both a practical and a psychological aspect. Consequently, a rule of international custom must be practiced by one state towards one or several other states - or be practiced in such a way that it affects other states, and thereby is capable of provoking a reaction - and the performing state must carry out its action in the belief that it is obliged to do so.<sup>30,31</sup>

The question is hence whether bi- or multilateral treaties concerning the allocation of water from an international watercourse can be considered as expressions of state practice in this regard.

The term ‘state practice’ gives associations to actions or statements made by states, which expresses a legal opinion, and which concerns or is able to provoke a reaction from other states. According to Akehurst, “State practice covers any act or statement by a State from which views can be inferred about international law”.<sup>32</sup> A wide understanding of the term is also used by Thirlway, who declares that “custom grows from action by one subject of law which is either accepted, rejected, or tolerated by the other subjects of international law”.<sup>33</sup> The term ‘state practice’ can thus be interpreted broadly.

Regarding the customary law of international watercourses, the practice between states is essentially expressed through bi- and multilateral treaties that regulates the utilization of a shared watercourse. A bi- or multilateral treaty is clearly both a statement and an act; it expresses a legal opinion and creates duties and rights for the subjects involved. But as these treaties are primarily binding upon the states that are parties to them, a bi- or multilateral treaty can not generate rights or obligations for a third party unless a substantial number of agreements states the same rules and principles and may be seen as an expression of a general conception of the law in the field.

Bi- or multilateral treaties concerning the allocation of water from an international watercourse can thus be considered as expressions of state practice.

Consequently, in order to be relevant as source of customary law, the State practice must be accompanied by *opinio juris*. The legal weight of state practice is proportional to its quantity and frequency.<sup>34</sup> State practice concerning the management of international watercourses is voluminous. As it is impossible to produce and analyze all relevant watercourse treaties, only some of the most distinct and significant agreements will be discussed:

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<sup>29</sup> The “North Sea Continental Shelf”-case, ICJ reports 1969, paragraph 77. Although the court here actually discusses whether a treaty provision may become a rule of customary law, the analysis concerns the nature and creation of customary law in general, and is therefore relevant.

<sup>30</sup> See Thirlway, 2010, page 103

<sup>31</sup> Akehurst claims that it is not “necessary that the State making such statements believes them to be true; what is necessary is that the statements are not challenged by other States”, see Akehurst, Michael, “Custom as a Source of International Law”, *British Journal of International Law*, 1976, pages 1-53 (page 53)

<sup>32</sup> Akehurst, 1976, page 10

<sup>33</sup> Thirlway, 2010, page 104

<sup>34</sup> *Ibid*, page 53

The Indus Waters Treaty, from 1960, where India and Pakistan agree on the utilization of the river and defines the watercourse as a system of rivers, and which also offers important factors for determining the allocation.

The Mahakali Treaty, concluded in 1996, which establishes the framework for a cooperation project between India and Tibet, and provides guidelines for the environmental protection of the watercourse's ecosystem and for the cooperation between the watercourse states.

The Ganges River Treaty was adopted between India and Bangladesh in 1996, and contributes to the present study with factors for distribution and cooperation, especially through the creation of a joint committee.

The Rio Grande treaty is still in force between Mexico and the USA, although several times modified. It was adopted in 1944 and governs the utilization of the border part of the river. Also this treaty offers interesting aspects on the cooperation between the parties, but also differing views on the equality of the watercourse states. The first treaty between the parties, subsequent to the disputes in the late 1800's, was concluded in 1906, and is also relevant for the present study.

#### Syrian-Turkish agreement

During the construction of the Turkish Atatürk Dam on the Euphrates, Turkey and Syria concluded a protocol to secure the flow of the river into Syria. The protocol was signed in 1987, and guarantees a minimum yearly average flow of 500 m<sup>3</sup>/sec crossing their common border. The agreement has been debated between the riparians, both in regards to its obligation and to its applicability. These aspects will be discussed in chapter 5.3.1

#### Syrian-Iraqi Memorandum of Understanding

Subsequent to the Turkish-Syrian agreement, Iraq and Syria adopted a Memorandum of Understanding concerning the provisional division of the water in the Euphrates River that flows into Syria from Turkey. The agreement accords 58 % of the water to Iraq and 42 % to Syria, but the exact quantity of water is dependent on the accomplishment of the Turkish-Syrian agreement. The memorandum is the object of discussion in chapter 5.3.2

## **2.4 Judicial Decisions**

Judicial Decisions are recognized as a source of international law in article 38 litra d of the ICJ-statute, which states that "judicial decisions and the teachings of the most highly qualified publicists of the various nations" are "subsidiary means for the determination of rules of law".

The term "judicial decisions" is not limited to decisions from the ICJ itself, but decisions from other international courts and from municipal courts as well.<sup>35</sup> Nevertheless, article 59

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<sup>35</sup> Shaw, 2003, page 104

of the statute declares that the “decisions of the Court has no binding force except between the parties and in respect of that particular case”. This article emphasizes the role of judicial decisions as a subsidiary source of law.

However, such decisions apply to all states as advisory arguments in resolving water allocation conflicts. They can be of great importance since international courts strive to follow their previous judgements and since national courts and international courts of arbitration quote the judgements of international courts as authoritative decisions.<sup>36</sup> But in a dynamic field like international watercourses, the law will change over time and statements in elder judgement might eventually lose their adequacy. In employing elder judicial decisions as a source of international law, it is thus important to establish their relevance in the modern conception of international water law.

The following three judgements from international courts have played a specific role in the development of the law of international watercourses:

#### The “River Oder”-judgement

In this judgement from 1929, the Permanent Court of International Justice was asked to determine the limits of the jurisdiction of the International Commission of the Oder, namely whether it extended to include two of the rivers tributaries that were situated entirely on Polish territory. The International Commission of the Oder consisted of members from the United Kingdom, Czechoslovakia, Denmark, France, Germany, Sweden and Poland.

The Court concluded that the solution had to be sought in the “community of interests of riparian States”, and further that this “community of interests in a navigable river becomes the basis of a common legal right”.<sup>37</sup> The judgement was one of the first to establish the equality of the watercourse states, and has played a central role in the development of the modern law of international watercourses. The question concerned navigational rights, but has later been acknowledged to express general principles.<sup>38</sup> The central views of this judgement were restated by the ICJ in the “Gabčíkovo-Nagymaros”-judgement in 1997.

#### The “Lake Lanoux”-arbitration

Disagreement arose between France and Spain when France planned a hydroelectric project that would divert water from the Lake Lanoux into the Ariège River in France. The lake is situated near the French-Spanish border, but entirely on French territory. A diversion of water from the lake would reduce the flow of the Carol River flowing from the lake and into Spanish territory, and the project therefore provoked strong Spanish reactions.

The Court of Arbitration (1957) concluded, inter alia, that France had no duty to await Spain’s consent towards the project, as long as the diversion had no significant consequences for the downstream riparian. The arbitration adjudicates the relation between the upstream and downstream riparians, and their duties towards each other.

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<sup>36</sup> Ibid, page 103

<sup>37</sup> “Case Relating to the Territorial Jurisdiction of the International Commission of the River Oder”, PCIJ, 1929, page 27

<sup>38</sup> McCaffrey, 2010, page 150

### The “Gabčíkovo-Nagymaros Project”-judgement

On the 25<sup>th</sup> of September 1997, the International Court of Justice passed its judgement concerning the long lasting dispute between Slovakia and Hungary, over their initially common project on the Danube – the Gabčíkovo -Nagymaros Project. The countries had adopted a co-operational treaty already in 1977, “concerning the construction and operation of the Gabčíkovo -Nagymaros system of locks” on the Danube.<sup>39</sup> The project was situated in both states - Gabčíkovo in Slovakia (at the time Czechoslovakia), and Nagymaros in Hungary.

The court was asked to decide if Hungary was entitled to abandon her international commitment, and also whether Slovakia violated international water law by exploiting the river resources without Hungary’s consent. The judgement refers to the UN convention on the law of the Non-Navigational uses of international watercourses, adopted only months earlier, when it states that the principle of equitable utilization is the ruling principle of the law of international watercourses, and that the Slovakian continuation of the project was a breach of the proportionality of international law. The judgement has great relevance for the present analysis, since it is both recent and declaratory of the roles and rights of the watercourse states.

Teachings of the “most highly qualified publicists” is the last source of international law that is mentioned in the ICJ status art. 38. The present study relies on the views and research of several internationally recognized scholars, and these will be acknowledged when they appear in the text.

Before attacking the legal issues, a short retrospect on the development of international water law and the conflict in the Tigris-Euphrates watercourse will give a useful background for the analysis in chapter 4 and 5:

## **3 Development of International Water Law**

### ***3.1 Development of ancient water law***

As the oldest civilizations we know of were founded on access to water in the river valleys of Mesopotamia, China and Egypt, the world’s oldest legal regulations also concern the access to water. Concluded in the year 3100 BC, the treaty between the ancient

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<sup>39</sup>Gabčíkovo-Nagymaros Project, ICJ, 1997, page 14.

Mesopotamian cities of Lagash and Umma is considered the world's first written treaty. The conflict between the two cities was only one amongst several disputes over water supply, and erupted after Umma violated an earlier division of waters.<sup>40</sup> The treaty was engraved on a stone monument, in the Sumerian language.<sup>41</sup> Apparently, the ruler of Kish, a neighbouring community to the two rivals and probably a regional authority, set the stone and it is said that the treaty even had a clause of arbitration.<sup>42</sup> The parties agreed, through the treaty, to build a new boundary canal for diversion of water from the Euphrates.

The Babylonian king Hammurabi codified the oldest extant laws during his reign from 1792 to 1750 BC. The laws of Hammurabi were not really a pure codification of the existing laws, as Hammurabi viewed himself as a legislator, but rather an expression of legal principles and case law.<sup>43</sup> However, the laws regulate the irrigation of water for agriculture, and also the responsibility of the farmers to maintain the irrigation canals so as not to cause harm to others by flooding or misleading water. Mentioning of larger canals also indicate that the system of diverting water from rivers was organized, and regulated by legal rules.

In ancient Rome, the principle of *aquae pluviae arcendae actio* (action to ward off the water) protected lower properties against diversion of water. The rainwater was seen as a gift from nature, and any action or installation that prevented the rainwater from flowing freely, was seen as illegal. The only exceptions were diversion for agricultural purposes, since this was considered to be the heart and pride of the civilization. The Roman Law thus permitted actions against anyone who caused harm upon someone else by diverting the water or otherwise prevented the water from flowing freely, and receiving water from a higher land was actually viewed as servitude upon the lower land.<sup>44</sup> In this view, both the higher and the lower land had a favourable and a restricted position: the higher land had the advantage of the rainwater flowing on and through it, but was at the same time obliged not to obstruct the flow into the lower land; and the lower land is in its turn benefited from the obligation upon the higher land by receiving the flow of water, but had nevertheless a corresponding servitude to accept the water on its territory.

In these historical examples, the rules and principles of water control relate to private law between citizens. The modern concept of state was not yet established, and the disputes were therefore local and interregional. Nevertheless, as the principles have developed over a long period of time due to the absence of law making powers, they are significant for the modern conception of water law and constitute the basis for the applicable law of international water courses.

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<sup>40</sup> McCaffrey, 2010, page 60.

<sup>41</sup> Nussbaum, Arthur, *A concise history of the law of nations*, New York 1947, page 8.

<sup>42</sup> Ibid

<sup>43</sup> Driver, G. R. and Miles, C. J., *The Babylonian Laws, volume 1*, Oxford 1968, page 48

<sup>44</sup> Burdick, William L., *The Principles of Roman Law and their relation to Modern Law*, New Jersey 1938, page 36.

### 3.2 *Development of modern water law*

The legal philosopher Hugo Grotius, by many considered to be the founder of modern international law, writes in "Rights of War and Peace" that "[r]ivers may be occupied by a country, not including the stream above or that below its own territories. But the waters which wash its lands form an inseparable part of the current, making its way to the main sea. For to constitute the right to property in this channel, it is sufficient that its sides, inclosed by the banks of that territory form its greatest part, and that the river itself compared with the land, makes but a small portion".<sup>45</sup> Further he states that "[r]ivers separating two powers may be occupied by both, to each of whom their use and advantages may be equal".<sup>46</sup> In the case of border rivers, he claims that changes in the river and its original appearance, invites us to consider whether it still is the same river. "For as a river may be entirely destroyed by the erection of dams upon the higher parts of its stream, or by digging of canals, which carry off its waters in another direction: so by the desertation of its old channel, and breaking out for itself another course, it will not continue to be the same river it was before, but will be completely a new one".<sup>47</sup>

A similar view was also brought forward by US Attorney General, Judson Harmon, in the dispute between USA and Mexico regarding the allocation of resources in the Rio Grande from 1895 to 1906. Upon a request from Mexican authorities for an agreement on allocation of the river resources, Harmon wrote an opinion on behalf of the US Department of State, where he concludes that "[t]he immediate as well as the possible consequences of the right asserted by Mexico show that its recognition is entirely inconsistent with the sovereignty of the United States over its own domain" and thus "the rules, principles, and precedents of international law impose no liability or obligation upon the United States".<sup>48</sup> Harmon's opinion asserts that a state is in its full right to exploit the natural resources which lies within its territory at all times, without regard to or responsibility for the consequences that such a use can throw upon other riparian states.

As the consumption of water has increased during the last century, the views on the legal rights to utilization have changed. A great contributor to this was the Permanent Court of International Justice, and their judgement in the "River Oder"-case in 1929. Here the Court stated that the watercourse states had a common legal right to utilize the resources, and established the legal equality between them. This change of conception led to the International Law Association's "Helsinki Rules on the Uses of the Waters of International Rivers" of 1966, which was a codification of the general customary rules that had developed, and which presented the equitable utilization as the ruling principle for the management of international watercourses.<sup>49</sup> The rules were an inducement for the United Nations General Assembly who recommended in a resolution of 1970, that the International Law Commission should start the process of studying and codifying the law of the non-navigational uses of international watercourses.<sup>50</sup> This process led of course to the

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<sup>45</sup> Grotius, Hugo, *The right of war and peace: Including the law of Nature and of Nations*, 1901, page 104

<sup>46</sup> Ibid

<sup>47</sup> Ibid, page 107

<sup>48</sup> McCaffrey, 2010, page 114

<sup>49</sup> International Law Association, *Helsinki Rules on the Uses of the Waters of International Rivers*, Helsinki 1966, article IV

<sup>50</sup> UN Treaty: <http://untreaty.un.org/cod/avl/ha/clnuiw/clnuiw.html>



UNWC of 1997, but was also a source of inspiration for a great number of treaties concerning international watercourses.

### **3.3 Development of water law in Mesopotamia: A short summary of the Tigris-Euphrates conflict**

With a view to the debate over the legal landscape of international watercourses and the analysis of the judicial polemic, it is necessary to provide a short introduction to the factual situation in the Tigris-Euphrates watercourse and between the three riparians.

The Euphrates River is an international river that originates in the mountains of South-Eastern Turkey, and flows through Syria and Iraq where it forms, together with the Tigris River, the Shatt al-Arab which empties into the Persian Gulf. Likewise, the Tigris River is also an international river that springs out in the Turkish mountains, only a few kilometres from the origin of the Euphrates. The Tigris, however, runs directly south where it constitutes the border between Syria and Turkey for 44 kilometres, before flowing into and through Iraq. The Shatt al-Arab is created north of Basra, where the twin rivers meet. The last part of the Shatt al-Arab constitutes the border between Iraq and Iran. However, Iran has not yet expressed any demand for the right to exploit the water of the Shatt al-Arab, as she has several other valuable rivers on her territory. Iran is therefore excluded from the analysis and debate on the Tigris-Euphrates conflict in this thesis.

The Euphrates and its tributaries drains a basin of 444 000 km<sup>2</sup>. 33 % of this lies within Turkey, 19 % in Syria and 46 % in Iraq.<sup>51</sup> The river is 3000 km long, 41 % runs through Turkey, 23 % through Syria and 36 % in Iraq.<sup>52</sup> The annual flow of the Euphrates averages around 32 billion cubic meters annually.<sup>53</sup> The Tigris' drainage basin is 387 000 km<sup>2</sup>, of which 15 % lies in Turkey, 0,3 % in Syria and 75 % in Iraq.<sup>54</sup> The length of the Tigris is 1 850 km, 22 % in Turkey, 1 % in Syria and 77 % in Iraq.<sup>55</sup> At the Shatt al-Arab, the Tigris measures an average of 49 billion cubic metres annually.<sup>56</sup>

The remains of the early civilizations in Mesopotamia were in great part destroyed during the Mongolian invasion in the 13<sup>th</sup> century AD, including the elaborate water management constructions. Later, the Ottoman Empire ruled the whole of Mesopotamia, evoking conflicts between the Arabs and the Turks. Iraq was founded in 1920, but remained under British control until it gained independency in 1932. Syria became a state in 1922, but was ruled by French colonial powers until 1946. The period of the Ottoman Empire was characterized by Turkish suppression and Arab revolt, but the disputes did not concern the

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<sup>51</sup> Kibaroglu, Aysegul, *Building a Regime for the Waters of the Euphrates-Tigris River Basin*, The Hague 2002, page 162

<sup>52</sup> Kliot, Nurit, *Water Resources and the Conflict in the Middle East*, London/New York 1994, page 101

<sup>53</sup> Dellapenna, Joseph W., "The Two Rivers and the Lands Between: Mesopotamia and the International Law on Transboundary Waters", *10 BYU Journal of Public Law*, 1996, pages 213-261 (page 217)

<sup>54</sup> Kibaroglu, 2002, page 162

<sup>55</sup> Kliot, 1994, page 101

<sup>56</sup> Dellapenna, "The two Rivers and the Lands Between", 1996, page 219

rivers, since these were situated fully within the same empire at the time and were not international as today. Although the relationship between the riparians has been marked by mistrust and irredentist claims, some attempts of cooperation have been made:

In 1946, Turkey and Iraq concluded the “Treaty of friendship and neighbourly relations”, in which they, inter alia, agree to cooperate on observation stations on the Tigris River, and that Turkey should allow Iraq to build a dam on Turkish territory. Unfortunately, nothing in this treaty has been put into action.<sup>57</sup> Turkey and Iraq met in 1963, upon Turkey’s planned construction of the Keban Dam, and another meeting took place between Turkey and Syria in 1964, where the topic was both the Keban Dam and Syria’s construction of the Tabqa Dam. In 1965, the first trilateral meeting took place in Baghdad; the parties exchanged technical data regarding their respective dam projects, and discussed the possibility of a Joint Technical Committee (JTC). Since the parties failed to agree on the mandate of the committee, its foundation was delayed until 1972.<sup>58</sup> The committee then met infrequently, and was exclusively concerned with technical questions.

The Turkish Keban Dam was finished in 1974 and the Syrian Tabqa Dam in 1975. The JTC had not succeeded in obtaining a cooperative agreement on the filling of these reservoirs, and both countries finalized their projects individually. In 1980 Turkey announced its ambitious water project - The Southern Anatolian project (GAP) - consisting of 22 dams and 19 power plants on the Tigris-Euphrates watercourse. This development called for the creation of a permanent JTC the same year. The committee’s mandate was to determine the methods and procedures that would help to define the reasonable and appropriate amount of water that each country would need from the watercourse<sup>59</sup>. This JTC stranded after sixteen meetings, when its members failed to agree on whether the Tigris-Euphrates should be considered as one or two watercourses, and over the definition of international and transboundary rivers. These topics are discussed in chapter 5.2.

During the filling of the Atatürk Dam, the major dam of the GAP, the three parties concluded bilateral agreements. Turkey and Syria agreed in “The Turkish-Syrian Protocol of 1987” that Turkey should release a yearly average of 500 m<sup>3</sup>/s from the Euphrates. Later, Syria and Iraq adopted an accord in 1990 dividing the Euphrates water between them. Of the Euphrates water flowing into Syria from Turkey, Iraq was to be granted “58 % as a fixed annual percentage” and Syria the remaining 42 %.<sup>60</sup> These bilateral agreements are the subject of discussion in chapter 5.3.

In later years, Syria and Turkey has agreed to cooperate on water related issues such as draught and flood management, and water quality and they have approved to the construction of a common dam on the Orontes River.<sup>61</sup> No agreement on the rights to and allocation of the water of the Tigris-Euphrates watercourse has so far been concluded. And although small cooperative steps have been taken during the later years, the instable peace

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<sup>57</sup> Treaty of friendship and good neighbourly relations, Iraq and Turkey, 1946, protocol 1 article 3

<sup>58</sup> Kibaroglu, 2002, page 224-225.

<sup>59</sup> Kibaroglu, Aysegul and Scheumann, Waltina, “Euphrates-Tigris River System: Political Rapprochement and Transboundary Water Cooperation”, A Kibaroglu et al (eds) *Turkey’s Water Policy*, Berlin 2011, page 277-299 (page 284)

<sup>60</sup> Joint Minutes between Iraq and Syria, 1990, no. 1

<sup>61</sup> Memorandum of Understanding between the Government of the Republic of Turkey and the Government of the Syrian Arab Republic in the Field of Efficient Utilization of Water Resources and Combating Drought, 2009

situation in the region and the ongoing Turkish constructions on the watercourse makes the need for trilateral agreement even greater.

After this historic and hydrographic review, the thesis will advance to the two main part of the study. Firstly, the determination of the ruling principles of the law of international watercourses:

## **4 Applicable International Law**

### **4.1 Introduction**

Throughout the last centuries, different theories of water allocation have been claimed and disclaimed by States involved in water conflicts. This chapter will present a theoretical analysis of the main theories and the ruling principle of the law of the non-navigational uses of international watercourses, including the relevant factors for their determination.

The view set forth by US Attorney General Harmon in 1895, defending the state's sovereign power and denying any rights to the co-riparians, is commonly called the theory of absolute territorial sovereignty, or the Harmon Doctrine. As McCaffrey describes it, it might have been natural in the late 1800 to argue this way, given the undeveloped state of international law at that time.<sup>62</sup> The theory has historically been claimed by upper riparians in several conflicts, and has been broadly debated. Although it has been considered passé by both theoreticians and international courts, and has hardly ever been reflected in the resolution of actual conflicts, the theory still constructs the basis of Turkey's policy in relation to her co-riparians in the Tigris-Euphrates watercourse.<sup>63</sup> In order to analyze Turkey's juridical arguments in chapter 5, it is necessary to examine the core content of the theory, and its application in modern international water law. However, as the examination will show, the principle has been strongly rejected in international law during the latest century, and the survey will therefore not focus as much on the question of its applicability as on the reasons for its rejection.

The theory of limited territorial sovereignty, on the other hand, acknowledges a state's right to freedom of action within its own territory, but also obliges the states to act with regard to the interests of other riparians. The theory is practiced through the principle of equitable utilization of watercourses, which ensures both the equality of the riparian states in the basic rights to the watercourse, and the actual allotment of water supply.

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<sup>62</sup> McCaffrey, 2010, page 113

<sup>63</sup> Ibid, page 125

As a consequence, no riparian can carry out activities that causes disproportional harm to other riparian states. Equality of rights is a legal protection, and does not necessarily give the watercourse states rights to the same quantity of water, as will be seen in chapter 4.4

At the other end of the scale from absolute sovereignty is the theory of absolute territorial integrity, which, in short, obliges riparian states to refrain from any use of the water that might possibly affect the use of other riparian states. Although France, in the “Lake Lanoux”-case, replaced the amount of diverted water from the lake with an equivalent amount from another river, Spain claimed that the man-made diversion in itself represented a possible threat to Spanish water supply.<sup>64</sup> The Spanish claims are clearly an expression of the theory of absolute territorial integrity, and was rejected by the court of arbitration.

It is probably not surprising that the theory of absolute territorial sovereignty and the theory of absolute territorial integrity frequently have been set forth by riparian states as the basis for their argumentation in water disputes. Of course territorial sovereignty is a favourite of upper riparians, while territorial integrity is preferred by lower riparians. Both theories are based on the consideration of one single watercourse state’s needs and rights, and have thus in common that they are somewhat anarchic.<sup>65</sup>

The fourth theory of water allocation is based on the community of interests, and has roots in Roman law. It considers the watercourse as a resource belonging to all the riparian states, as a common good. Thus, the watercourse states have a common interest in conserving and managing the watercourse in a sustainable and optimal way. This view was expressed in the “River Oder”-judgement. The court considered the river as a common resource committed to a common management where no state enjoyed a privilege over others.<sup>66</sup> This view was restated by the International Court of Justice in the Gabčíkovo-Nagymaros judgement in 1997.

As the absolute integrity, the theory of the community of interests has also met resistance and has not, although often debated, been generally practiced during the last decades. For this reason, and for the sake of limitation, these two latter theories will not be part of the following survey.

The principle of state sovereignty holds a fundamental position in international law; it protects independent states from foreign interference in internal affairs, and must be respected in order to prevent disintegration. The theory of absolute territorial sovereignty and the theory of limited territorial sovereignty are based on different interpretations of the principle’s nature and amplitude. To fully understand the two theories and their practical implementation, it is necessary to examine their content in relation to the principle of territorial sovereignty. The following chapter will first endeavour to determine some aspects and problems of the principle of state sovereignty, where a pivotal question will be whether the principle of state sovereignty is an absolute right, and if a duty to cooperate and to utilize a watercourse in a specific way thus would be a violation of the principle. Subsequently follows an examination of the content and sustainment of the

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<sup>64</sup> “Lake Lanoux”-arbitration, 1957, page 21

<sup>65</sup> Ibid, page 133

<sup>66</sup> “Case relating to the Territorial Jurisdiction of the River Oder”, Permanent Court of International Justice, 1929, page 27

theories of absolute territorial sovereignty and of limited territorial sovereignty, based on an analysis of treaties, judgements and practices. Since the law of international watercourses is a vast subject, the attention in the following chapter is drawn to the aspects of international water law that is relevant for the examination in chapter 5.

## **4.2 Point of departure: The principle of state sovereignty in international law**

The principle of state sovereignty is one of most fundamental principle of international law, and the basis for all international agreements. Every independent state has full sovereignty within its own territory; an inherent right to exert power therein, and to exclude other states from doing the same. As stated by the Permanent Court of Arbitration in the “Island of Palmas Case”: “Sovereignty in the relations between States signifies independence”.<sup>67</sup>

As seen above, sovereignty was strong in Grotius’ thinking, as he states that a river may be occupied by a country, but only the part of the river flowing through its land.<sup>68</sup> By this he seems to say both that the water existing in the river canal at all times is a part of that country’s territory and therefore of its free use, and also that this use is not to be objected by other riparians. Thus the principle of sovereignty is understood at its fullest: a regulation of one riparian state’s use of the water is a violation of its sovereignty. The question is however whether state sovereignty is a rule of international law or whether it is a quality that is proportionate to other legal obligations.

In a river basin, the upper and lower riparian have different geographical access to the watercourse. From nature’s side, the balance between the riparians is accordingly different since the upper riparian can interfere to a crucial degree with the lower riparian’s access to water by diverting or damming the watercourse. For international rivers flowing through several states, the flow of the river thus decreases along the river canal. To its fullest degree, the principle of state sovereignty gives the independent states the right to exploit the natural resources on their territory freely and to their own profit. Such a comprehension of the principle would correspond to the theory of absolute territorial sovereignty, giving the riparian states the right to use watercourses unrestrictedly, without concern of the consequences this may bring to other riparians. Whereas a more progressive interpretation of the principle would allow the riparian states to interfere with or object to each other’s use of water resources. The question is thereby whether the principle of State sovereignty is absolute, or if it has inherent restrictions.

The principle of state sovereignty is expressed in the Charter of the United Nations in article 2 paragraph 7: “Nothing in the present charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state [...]”. The principle of sovereignty is thereby a central principle in the laws of the UN. But its scope is unclear; if one State’s overuse of a watercourse causes, for instance, draught in a neighbour State, the utilization may well be performed *within* the borders of the upstream

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<sup>67</sup> “Island of Palmas”-case, Permanent Court of Arbitration, 1928, page 8

<sup>68</sup> See chapter 3.2

state, but the consequences of the overuse are not *essentially within* the upstream state's jurisdiction. The consequences may not be within its jurisdiction at all, since the performing state has all the advantages from such utilization and proportionally few consequences. Since a natural resource does not follow the borders and territories of sovereign states, the utilization in one state is bound to affect the utilization in other states. This may imply that the principle of sovereignty is, although fundamental, not absolute by nature.

According to Steinberger, both treaty obligations and principles of international law "may, and frequently do, restrict a State's freedom of action and thereby the exercise of its sovereignty, but they do not diminish or deprive it of its sovereignty as a legal status".<sup>69</sup> Steinberger here distinguishes between sovereignty as a legal status, and sovereignty as the right to exert power within its territory. Accordingly, it is only the latter that might be restricted by international obligations. A similar restriction is also expressed in the UN Convention on the Law of the Sea, article 193, which accords its member states the "sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment".<sup>70</sup> The sovereignty, as the state's right to exert power within its territory is here limited in favour of its international obligations. Likewise, the preamble of the UN Climate Change Convention recalls that States have [...] the sovereign right to exploit their own resources pursuant to their own environmental and development policies, and the responsibility to ensure that activities within their jurisdiction and control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction".<sup>71</sup> In these three examples, the extent of the state sovereignty and the freedom to utilize natural resources are restricted, especially if such utilization cause harm to other states.

Furthermore, the Permanent Court of International Justice set forth in the "Lotus"-case that a state "should not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty."<sup>72</sup> The Court thus concludes that sovereignty is a quality that can be restricted by other rules of international law, but is not a rule of law itself. This view is supported by Lauterpacht who claims that law is a regulation of human conduct and thereby an expression of the *limitation of freedom*, whereas sovereignty is a "quality conferred by international law. It cannot, therefore, be either the basis or the source of the law of nations".<sup>73</sup> According to his interpretation, the sovereignty of the states is not a legal right regulated by rules of law, but an underlying quality.

It is however important to recognize that the principle of state sovereignty has a reciprocal nature in regard to the utilization of international watercourses;<sup>74</sup> restrictions on the utilization in an upstream state limits the actual state's sovereignty, while unrestricted usage in an upstream state limits the sovereignty of the downstream state since the potential for water project on its territory will be limited in favour of the upstream state. In

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<sup>69</sup> Steinberger, Helmut, "Sovereignty", in *Encyclopaedia of Public International Law*, Bernhardt, R. (ed), North-Holland 2000, pages 500-521 (page 512)

<sup>70</sup> United Nations Convention on the Law of the Sea, 1982, article 193

<sup>71</sup> United Nations Framework Convention on Climate Change, 1992, preamble; see also United Nations Convention on Biological Diversity, 1992, article 3.

<sup>72</sup> "The Case of the S.S. Lotus", Permanent Court of International Justice, 1927, page 19

<sup>73</sup> Lauterpacht, Hersch, *The Function of Law in the International Community*, Hamden, Connecticut 1966, page 95-96

<sup>74</sup> McCaffrey, 2010, page 387

this view, the management of international watercourse is in large part a “question of reconciling two or more sovereignties.”<sup>75</sup>

Thus, as the examples above show, the principle of state sovereignty is not a rule of international law, and is always submitted to interpretation. The challenge is thereby to find the correct balance in each particular case between the principle of state sovereignty and the rights deriving from the allocation principles.

### **4.3 Historic retrospect: The theory of absolute territorial sovereignty**

#### **4.3.1 Underlying principles**

The theory of absolute territorial sovereignty is to a large degree based on the principle of state sovereignty. Although the theory has not been acknowledged in the international community, it still plays a central part in the Tigris-Euphrates conflict. The following chapter will therefore present an overview of the main contents of the theory and position in international water law.

The infamous opinion of US Attorney General Judson Harmon said that “[t]he fundamental principle of international law is the absolute sovereignty of every nation, as against others, within its own territory... [t]he immediate as well as the possible consequences of the right asserted by Mexico show that its recognition is entirely inconsistent with the sovereignty of the United States over its national domain”.<sup>76</sup>

This is one of the few, but classical, formulations of the principle of full territorial sovereignty. Harmon encircles the nation’s sovereignty and territory so firmly that every matter with crossing interests becomes its adversary. According to Harmon, a mere recognition of Mexico’s rights to the water of the Rio Grande would be inconsistent with the United States’ national sovereignty. In his opinion, the territorial sovereignty is absolute and without restrictions; each State will have the right to exploit the water flowing in its territory, but the theory does not acknowledge that these rights may interfere with another state’s utilization of the watercourse.

Neither does the theory take account of the possible damages such a water policy might cause to other riparian states. In Harmon’s example, the US as the upper riparian would remain rather unharmed by following the theory of absolute territorial sovereignty. But Mexico as a lower riparian would have no guarantees for its water supply from the Rio Grande, both regarding water quality and water quantity. Since some of the Rio Grande’s tributaries rise within Mexican territory, and the lower half of the river forms the border between the two states, it might seem fair that Mexico would be entitled to claim some rights to the river. But according to the theory of absolute territorial sovereignty, these

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<sup>75</sup> Allan, A. J., and Mallat, Chibli, *Water in the Middle East: Legal, Political and Commercial Implications*, New York 1995, page 222

<sup>76</sup> McCaffrey, 2010, page 113-114.

rights would have to be exerted on Mexican territory, without regards to the US' rights or uses. Accordingly, the theory does not balance the total demand for water, and is based solely on geographical regards.

Bousek wrote in 1913 that “a state can consume in its entirety and use without restriction the waters of all kinds to be found within its territory [and] above all, entirely divert a watercourse flowing through its territory or diminish the quantity of water flowing in it”.<sup>77</sup> In Bousek’s view a state is thus in full authority over the water located within its territory at all times. By granting the upper riparian the power to divert the river from its original canal, and thus deprive lower riparians from a share of the water, Bousek expands the theory of absolute territorial sovereignty to its full extent. The theory leaves no room for mitigation of damage, or concern for other riparians. Rather, as Bousek continues: “[o]bjections can indeed be raised by the lower lying state or by interested persons in that state in the negotiations relating to consent in matters of water rights, and the interested persons in other states usually come to realise of their own accord that they have no legal claim to consideration. Should any such consideration take place, it takes place only in the interests of the preservation of good international relations. The decision is however entirely unilateral”. Bousek acknowledges that a practice of territorial sovereignty might cause harm and rise objections among riparians, but rejects any obligation to cooperate or to avoid harm. Any steps in a cooperative direction are voluntarily and motivated by political interests. This is a controversial point of view, since it makes the water supply of downstream states dependent on political will from the upstream state. The water or the rights accorded to downstream states can thereby be considered as a gift from the upstream state, putting the upstream state in a favourable light. As will be seen in the next chapter, this argument has been part of the polemic in the Tigris-Euphrates conflict.

An example of this is found in the first Rio Grande-treaty of 1906; although the United States came to an agreement with Mexico regarding the utilization of the Rio Grande without following Harmon’s opinion, the first treaty between them explicitly states that the agreement “is not to be construed as a recognition by the United States of any claim on the part of Mexico to the said waters” and that the United States did not intend to “concede the establishment of any general principle or precedent by the concluding of [the] treaty”.<sup>78</sup> Even though the United States acknowledges a share of the water to Mexico, and expresses her desire “to provide for the equitable distribution of the water of the Rio Grande for irrigation purposes”, the US does not recognize any legal basis for the Mexican claim for water. The allotment of water from the Rio Grande is thereby motivated by political will and the desire to maintain peaceful neighbourly relations. This harmonizes with Bousek’s description of the theory of absolute territorial sovereignty.

Consequently, the theory of absolute territorial sovereignty generally favours upper riparians, by giving them the right to administer the river resources unilaterally and to their own benefit. But the theory may also protect downstream riparians, for instance in the case of the downstream state constructing obstacles to prevent fish from swimming upstream, or polluting the river to such a degree that all life is extinct. But in the balance of strength between the riparians, according to the theory of absolute territorial sovereignty, any claims or needs of the weaker riparian are dependent on the mercy of the stronger one.

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<sup>77</sup> F. J. Berber, *Rivers in International law*, London 1959, page 15

<sup>78</sup> Convention between the United States and Mexico, Equitable Distribution of the Waters of the Rio Grande, 1906, article IV



### 4.3.2 Claims and counterclaims of absolute territorial sovereignty

India claimed the theory of absolute territorial sovereignty towards Pakistan, prior to the conclusion of the Indus River Treaty. Soon after the partition in 1947 the government in the Indian region of East-Punjab closed the canals supplying water to Pakistan, and claimed that the water would not return until the government in the Pakistan region of West-Punjab “recognized that it had no rights to the water”.<sup>79</sup> The intention of the authorities in Indian East-Punjab was to show Pakistan that India, as an upper riparian, had full freedom to exploit the water within its own territory, and that Pakistan had no right to interfere or complain. The Indian point of view was thus identical to the theory of absolute territorial sovereignty. However, the parties reached a solution based on recognition of mutual rights, and they divided the different rivers of the watercourse between them. In article 7 paragraph 1 of the treaty, the parties “recognize that they have a common interest in the optimum development of the Rivers [*i.e. the complete Indus River basin*], and, to that end, they declare their intention to co-operate, by mutual agreement, to the fullest extent”. By admitting a common interest in the basin, the parties recognize each other’s basic rights to exploit the water. Accordingly they agree to consider the river and its tributaries as one unit, and to co-operate in managing the water allocation in the best manner for both parties and the river’s eco-system.

The dispute over the Ganges River rose after India built the Farakka barrage on the river between 1961 and 1975. The conveyance created a problem for Bangladesh, especially in the dry season, and the country brought the matter to the United Nations General Assembly. In reply of Bangladeshi complaints, India claimed that the Ganges was not an international river because 99 % of its catchment area lay within the Indian borders. And since the river was not international, Bangladesh had no reason to claim any basic rights. This argument slightly differs from the position India took in the Indus-dispute, since she in the present case acknowledges Bangladesh’s rights to utilization *provided* that the river is in fact international. After discussions in the Special Political Committee of the United Nations General Assembly and dialogue between the countries, India accepted the international status of the Ganges River and the parties reached an agreement. In fact India insisted that her views “did not conform to the Harmon doctrine of absolute sovereignty of a riparian State over the waters within its territory, as has been implied in the statement by the representative of Bangladesh”.<sup>80</sup> As McCaffrey notes – the Harmon Doctrine may become an effective weapon for a downstream state accusing an upper riparian of unreasonable utilization.<sup>81</sup> The theory of absolute sovereignty was thus rejected by the parties also here, and the solution was based on equality.

In the “Lake Lanoux”-arbitration between Spain and France, the main question was whether the diversion of the Carol River on French territory was a breach of the agreement between the parties. France intended to replace the diverted water with water from another watercourse, but Spain claimed that such practice violated the agreement, and could present a risk to the Spanish water supply. In her arguments, France did not explicitly claim the theory of absolute territorial sovereignty, but argued that “[t]he sovereignty of

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<sup>79</sup> McCaffrey, 2010, page 289

<sup>80</sup> Ibid, page 117

<sup>81</sup> Ibid

each of the two States on its own territory remains untouched, subject only to the restrictions contained in international instruments in force between them”.<sup>82</sup> France hereby recognizes that the agreements between the parties restricts the territorial sovereignty, but implies at the same time that full sovereignty is the main principle and that restrictions on this sovereignty cannot come from international custom or principles of international law, but only from agreements the parties are explicitly part of. France’s argument thus has elements from the Harmon Doctrine, but acknowledges at the same time that the territorial sovereignty might have restrictions.

In its judgement of the Lake Lanoux conflict, the court of arbitration stated that “[t]erritorial sovereignty plays the part of a presumption. It must bend before all international obligations, whatever their origin, but only before such obligations”. The court found that states had a duty to cooperate and seek agreements concerning the management of transboundary rivers, and that this obligation thus came prior to the territorial sovereignty. The judgement from the court of arbitration thereby indicates that the theory of absolute territorial sovereignty was not a governing principle of international law.

Similarly, William L. Griffin concluded several decades ago that the great majority of publicist on the subject of international water law “come to the conclusion that the essence of international law upon the matter is the principle of mutual rights and obligations between co-riparians in their uses of waters of international basins, and, in the event of competing uses, equitable apportionment of the waters or of their benefits”.<sup>83</sup> He further claims that “riparians possess the right of exclusive jurisdiction and control over the part of a system of international waters in their territory, and these rights reciprocally restrict the freedom of action of the others”.<sup>84</sup> Acknowledgement of mutual rights and restrictions is not in harmony with the unrestricted and unilateral utilization deriving from the Harmon Doctrine. This may indicate that applicable international law had left the doctrine of Harmon already in 1959.

Throughout the latest century few, if any, treaties or international judgements have been based on the theory of absolute territorial sovereignty.<sup>85</sup> Not even in contracts from its country of origin, is the Harmon Doctrine a leading principle. As McCaffrey observes, the theory of absolute territorial sovereignty might have seemed natural in the late 19<sup>th</sup> century, due to the undeveloped state of law at the time. The Harmon Doctrine can hence be seen as a precautionary step in an unsettled juridical landscape, in order to prevent unnecessary acknowledgement of rights. McCaffrey declares the theory at present as “an anachronism that has no place in today’s interdependent, water-scarce world”.<sup>86</sup>

As these examples show, the theory of absolute territorial sovereignty has not been practiced in recent times, and has not enjoyed international recognition. The absolute territorial sovereignty is thereby not expression of customary international law. This chapter has shown that the theory of absolute territorial sovereignty grants more importance to territorial rights than what is accepted in the modern world of international

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<sup>82</sup> “Lake Lanoux”-arbitration, 16. November 1957, page 11 paragraph 2

<sup>83</sup> William L. Griffin, “The Use of Waters of International Drainage Basins Under Customary International Law”, *The American Journal of International Law*, 1959, pages 50-80 (page 69)

<sup>84</sup> *Ibid*, page 78

<sup>85</sup> McCaffrey, 2010, page 125

<sup>86</sup> *Ibid*

commitment. The ideals behind the theory is the protection of the autonomy and independency of the sovereign state, while the contemporary approach, as follows in the next subchapter, emphasizes cooperation and common responsibility.

#### **4.4 The principle of equitable utilization**

The second theory to examine is the theory of limited territorial sovereignty, which is practiced through the principle of equitable utilization. As this principle is generally recognized as the ruling principle of international watercourses, it is more natural to establish its status *before* exploring its contents. In light of the Turkish, Syrian and Iraqi arguments in chapter 5, the following chapter will determine both whether equitable utilization is a principle of customary international law, and thus binding upon all states; and also to determine the general contents of the principle.

The principle of equitable utilization is a concept for the allocation of water in international watercourses, based on the rights and interests of all the watercourse states, and with a clear focus on the sustainable and optimal utilization of the watercourse. The principle thus has two main aspects; firstly, it confirms the equality of the riparian states by according each state a basic right to utilize the watercourse. Secondly, it sets standards for the actual allocation of water. Even if the watercourse states are all granted a basic right to the water, this is not to say that they are all entitled to an equal amount of water. The evaluation of equitable utilization is unique to each watercourse, and depends on a number of individual factors.

##### **4.4.1 Equitable Utilization as customary international law**

In order to be a principle of customary international law, equitable utilization must firstly be subject to a “general practice” for the water distribution in international watercourses, and secondly, this practice must be “accepted as law”, according to article 38 of the ICJ-status.<sup>87</sup>

The first question is accordingly whether equitable utilization of an international watercourse is a “general practice” in the international community.

The International Court of Justice stated in the “North Sea Continental Shelf”-cases that a certain practice could become a general rule in a relatively short period of time, since “a very widespread and representative participation [in the practice] might suffice of itself, provided it included that of the States whose interests were specially affected.”<sup>88</sup> The Court implies that time is a factor in the determination, but also accords great importance to the extent of practice and practicing states. In order to be a “general practice”, the principle must thus be widely practiced, especially between states that are affected by conflicts over international watercourses.

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<sup>87</sup> ICJ Statute art 38, paragraph 1 litra b

<sup>88</sup> “The North Sea Continental Shelf”-cases, ICJ, February 20, 1969, paragraph 73

The principle of equitable utilization is a fundamental principle of the UN Convention on the Law of the Non-Navigational Uses of International Watercourses. The Convention's article 5 declares that watercourse states "shall in their respective territories utilize an international watercourse in an equitable and reasonable manner". In the commentaries to the convention, the International Law Commission characterizes the "well-established rule of equitable utilization" as one of "the fundamental rights and duties of States with regard to the utilization of international watercourses".<sup>89</sup> The commission thus considers the principle to be customary law. Additionally, the mandate given to the ILC from the UN General Assembly was to "take up the study of the law of the non-navigational uses of international watercourses with a view to its progressive development and codification".<sup>90</sup> One of the Convention's principal objectives is thus to codify already existing customary principles of international water law, based on a study of case law. A great majority of states voted in favour of the convention during the General Assembly voting. The Convention's great influence as a text of UN consensus contributes to the conception and practice of the principle of equitable utilization.

When the United States and Mexico concluded their first treaty over the Rio Grande in 1906, they expressed a desire to "provide for the equitable distribution of the waters of the Rio Grande for irrigation purposes".<sup>91</sup> Despite the doctrine of Attorney General Harmon prior to the agreement, the spirit of the negotiations was equitability. This is also reflected in the title of the convention: "Equitable Distribution of the Waters of the Rio Grande". The principle of equitable use was thus present in international agreements at the beginning of the 20<sup>th</sup> century.

In the Mahakali River-treaty between India and Nepal, the parties express in the preamble "the desirability to enter into a treaty on the basis of equal partnership to define their obligations and corresponding rights and duties thereto in regard to the waters of the Mahakali River and its utilization". A treaty on the basis of "equal partnership" confirms the equality between the parties in their basic right to the watercourse, but cannot be interpreted as a quantitative standard. Likewise in the treaty of the Ganges River, India and Bangladesh agrees on finding "a fair and just solution".<sup>92</sup> Although the parties do not use the expression 'equitable utilization', the willingness to find a fair solution is a step in the same direction. The desire from the preamble is strengthened in article 2 paragraph 3, which states that adjustments in the distribution of water in case of extreme scarcity, shall be done "in accordance with the principles of equity, fair play and no harm to either party". When the parties also agree in article 9 to base *future* water sharing treaties on the "principles of equity, fairness and no harm to either party", the principle of equity is central in their accord. The treaty is thereby an expression of state practice in favour of the principle of equity.

The "Gabčíkovo-Nagymaros Project" was a planned dam project on the Danube River, contrived in cooperation between Hungary and Czechoslovakia, later Slovakia. The works started in 1978, but due to massive debate and criticism towards the project's environmental impact, Hungary decided to suspend the works at Nagymaros in may 1989.

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<sup>89</sup> ILC Yearbook 1994 volume II part two, page 96-97.

<sup>90</sup> UN General Assembly Resolution 2669 (XXV), 8. December 1970.

<sup>91</sup> Convention between the United States and Mexico, Equitable Distribution of the Waters of the Rio Grande, 1906, preamble.

<sup>92</sup> Ganges River Treaty, preamble

In October the same year Hungarian authorities decided to completely abandon the project. Slovakia continued its part of the project unilaterally, but chose another method of damming to be able to make the project work on her side of the border. The unilateral damming of the Danube caused serious problems for Hungary, and threatened her water supply. In its judgement, the Court stated that Hungary's withdrawal from the common project could not "mean that Hungary forfeited its basic right to an equitable and reasonable sharing of the resources of an international watercourse".<sup>93</sup> Further the Court found that Czechoslovakia had deprived Hungary of "its right to an equitable and reasonable share of the natural resources of the Danube [... and thereby] failed to respect the proportionality which is required by international law".<sup>94</sup> The Court thus declares that the principle of equitable utilization is a fundamental right of all riparian states, and that a state cannot eliminate or decrease this right on other riparian's behalf. And further, that this balance between the riparian states represents a proportionality which is "required by international law". The International Court of Justice consequently establishes the principle of equitable utilization as a ruling principle, and demonstrates that neglect of this principle constitutes a breach of the applicable international law. According to the ICJ, the principle is both a "general practice" and "accepted as law".

The principle of equitable utilization is frequently employed as a foundation for agreements on the utilization of international watercourses. The UN Convention on the Law of the Sea states in its preamble that a legal order of the seas will promote, inter alia, "the equitable and efficient utilization of their resources".<sup>95</sup> Among the objectives of the UN Convention on Biological Diversity is "the fair and equitable sharing of the benefits arising out of the utilization of genetic resources."<sup>96</sup> The principle is consistent in international environmental law and law concerning natural resources. Being employed as a core principle in several environmental conventions, it creates a standard for the administration of all nature's resources. The regards to the continuity of the environmental laws thus weighs in favour of considering the principle as customary international law.

Consequently, it seems clear that the principle of equitable utilization is a "general practice" in the international community.

The decisive issue is subsequently whether the principle of equitable utilization is "accepted as law" in accordance with art 38 paragraph 1 litra b of the ICJ statute.

As seen in chapter 2.3, *opinio juris* is a belief that the act in question is required by law. According to Akehurst, state practice must be "accompanied by (or consist of) statements that certain conduct is permitted, required or forbidden by international law".<sup>97</sup> As it is difficult to prove that states genuinely believe a practice to be required by law before it can become law, a natural approach is to focus on the statements set forth by the states in connection to the practice. When a state claims that equitable utilization is a principle of customary international law, the pivotal factor, in Akehurst's view, is not necessarily

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<sup>93</sup> Case concerning the Gabčíkovo-Nagymaros Project, ICJ 25<sup>th</sup> September 1997, paragraph 78

<sup>94</sup> Ibid

<sup>95</sup> UN Convention on the Law of the Sea, Preamble, paragraph four

<sup>96</sup> UN Convention on Biological Diversity, article 1

<sup>97</sup> Akehurst, 1976, page 53

whether this state believes its claim to be true or not, but whether it is challenged by other states.<sup>98</sup>

Cassese claims that State practice in its early stages will be “regarded as being imposed by social or economic or political needs (*opinio necessitatis*)”, and if “it does not encounter strong and consistent opposition from other States but is increasingly accepted, or acquiesced in, a customary rule gradually crystallizes”.<sup>99</sup> Hence, Cassese also supports the view that lack of protest against a statement of customary law is sufficient to manifest *opinio juris*.<sup>100</sup>

As seen earlier, the UNWC was intended to codify important principles of international law concerning the non-navigational usage of international watercourses, inter alia the principle of equitable utilization. As the principle was almost unanimously adopted as applicable international law in the UN General Assembly, and received only three contra votes, the protests against the principle have neither been broad nor substantial. On the contrary, the consensus towards the convention and the principle of equitable utilization is so broad and consistent that the three protesting votes hardly can be given any importance. The voting record concerning the UNWC is thereby an expression of *opinio juris* concerning the principle of equitable utilization.

The principle is also one of the core principles in international environmental law, constituting a unifying foundation for the law of natural resources, development and environmental protection, which shows its integrity and accept in the international community.<sup>101</sup>

Another significant proof of *opinio juris* is the “Gabčíkovo-Nagymaros Project”-judgement, where action inconsistent with the principle of equitable utilization entails consequences. The Court stated first that “[m]odern development of international law [had] strengthened this principle [of equitable utilization] for international watercourses”, and since Slovakia’s diversion of the Danube was inequitable, the Court found it unlawful. The principle of equitable utilization is thus presented as a binding rule of international law, and the judgement is an expression of *opinio juris* in favour of the principle.

Conclusively, based on these factors, the principle of equitable utilization is “accepted as law” in accordance with art 38 paragraph 1 litra b of the ICJ statute.

The principle of equitable utilization is thus “general practice accepted as law”, and thereby an applicable principle of international law, binding upon all members of the international community.

Having established the applicability of this principle, it is time to examine its contents:

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<sup>98</sup> Ibid

<sup>99</sup> Cassese, 2001, page 120

<sup>100</sup> See also Kelsey, Hans, *Principles of International Law*, Second edition, New York 1967, page 444

<sup>101</sup> See, inter alia, UN Convention on Biological Diversity, UN Convention on the Law of the Sea, UN Convention on Climate Change and Agenda 21

## 4.4.2 Determining equitability

### 4.4.2.1 Introduction

The literal meaning of “equitable” is ‘fair’, ‘impartial’ or ‘reasonable’, and the expression can describe a system where none of its participants are treated differently from others. The principle entails both the basic right to a watercourse and the actual allotment of the water resources. Similarly, the principle also addresses the sustainable and optimal development of the watercourse, and therefore requires cooperation amongst the involved parties.

Equitable utilization should therefore be interpreted as a concept where all relevant aspects influence each other, and where the correct balance between them will vary from conflict to conflict. The principle embodies both an obligation and a right; it reflects the principle of sovereignty in the sense that a state has the right to an equitable use of a watercourse within its own territory, and correlatively it poses an obligation on the states to use the watercourse in such a way that it does not affect other watercourse state’s equitable use of the same watercourse.<sup>102</sup>

The Laws of Hammurabi can serve as an example here. In § 53 is stated that anyone holding a piece of land in an area where a canal flows “is bound to keep ‘his dyke’ or ‘bank’ ... namely that part of it adjoining his plot, in proper repair and, if a breach is made in it by the water through his neglect and the area is flooded, he must replace the corn thereby destroyed”.<sup>103</sup> This is not an expression of the theory of absolute territorial sovereignty, since it encourages farmers to avoid causing harm upon others, and obliges them to compensate any eventual damage. Neither is it typical of the theory of absolute territorial integrity, since it allows farmers to construct water diverting instruments on their territory, even if they might increase the risk for damage on other’s property. As the rule in Hammurabi’s law allows possible harm-causing activity, but obliges recompense for eventual damage, it clearly considers the riparians as sovereign and equal, and must therefore be seen as an expression of the theory of limited territorial sovereignty.

However, the principle of equitable utilization only protects a watercourse state against *legal* harm from other watercourse states. The protection against *factual* harm is codified in the UNWC article 7, through the obligation not to cause harm to other watercourse states. The legal protection provided by the principle of equitable utilization prohibits a watercourse state to use the watercourse in a manner that limits or hinders the possible use of other watercourses in any unreasonable manner. The utilization of a watercourse will thus not be equitable, if it obstructs another watercourse state’s *rightful use* of the watercourse. The legal right to utilize a watercourse is a proportional right, whose extent depends on the factual situation, protected through the principle of equitable utilization and which can not be infringed without the acceptance of other watercourse states.

The UNWC article 6 contains a list of factors to consider in the determination of equitability. The list is naturally non-exhaustive, since the evaluation of equity “requires taking into account all relevant factors and circumstances”.<sup>104</sup> Other contributing

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<sup>102</sup> ILC Yearbook 1994, volume II part two, page 97

<sup>103</sup> Driver and Miles, 1968, page 152-153

<sup>104</sup> UNWC art. 6 paragraph 1.

components to the analysis can be found in bilateral treaties and case law. By comparing and analyzing these factors, general guidelines for equity appear.

The principle has surely been criticized of being too vague and abstract. Hélène Ruiz-Fabri claims that although the principle may be well established as a customary principle of international law, it does not provide any immediately applicable rule concerning the watercourse states' quantitative or qualitative right to water.<sup>105</sup> In her opinion, the uniform procedures will give a variety of results since the rule may only be mediately applicable and must be interpreted in each individual case. This point of view is of course true, but is such a procedure necessarily negative? Formulation of general *and* precise rules for water allocation would be difficult, because of the natural and circumstantial varieties for each watercourse, but such concrete rules could also easily be inequitable, due to these same differences. Even if the final result is different in each watercourse, it is not necessarily unreasonable. Bearing in mind that the result should reflect the individual situation of a watercourse, and that equitable utilization is a dynamic process the results will inevitably differ, but this does not necessarily make them inequitable.<sup>106</sup>

In the following examination of the contents of the principle of equitable utilization, it is convenient to arrange the factors of equitability into four general categories, bearing in mind that they are each mutually equal; distribution, optimal use, environmental protection and cooperation. All categories contain factors that give directions to the final result. The equitable utilization of the watercourse and therein the actual allotment between the riparian states is thus concluded by balancing the separate factors and categories in a holistic evaluation.

#### 4.4.2.2 Factors concerning distribution

The first category of factors contains elements connected to the present and future utilization of the watercourse. The states' demand for water and their degree of dependency can vary considerably between countries in the same region, on account of the differences in population, climate, the extent of industry and agriculture, and a variety of other reasons. Factors representing demand and actual use are listed in the UNWC's article 6 litra b – “[t]he social and economic needs for the watercourse States concerned” and in litra d – “[t]he population dependent on the watercourse in each watercourse State”. Water demand and dependency also interacts with the degree of development in the states in question – states with poor economy and incomplete water supply to private households may use less water than states with a strong economy and water consuming inhabitants. Contrariwise, the technology in well developed countries may be more advanced, so that the efficiency of water exploitation is better, and less water is needed. These are typical considerations to make regarding the equity of the water distribution.

Existing uses and potential uses also belongs to this category of distribution. An essential point here is that these two factors are listed together in article 6 litra e of the UNWC, “[e]xisting and potential uses of the watercourse”. With this formulation the ILC renounces

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<sup>105</sup> Ruiz-Fabri, Hélène, «Règles coutumières générales et droit international fluvial», *Annuaire français de droit international* vol. 36, 1990, pages 818-841 (page 839)

<sup>106</sup> McCaffrey, 2010, page 404



any priority between them.<sup>107</sup> Planned uses of the watercourse thus have the same weight as existing uses in the determination of equitability. Neither the convention nor the ILC's commentary defines what is meant by "potential uses". It does not seem to be a condition that the "potential" use should be concrete or imminent. A state's economic stability and the need for water will gradually change over time, but sometimes alterations happen quickly. To offer an ensured protection of potential uses, the expression should be interpreted widely. The protection of potential uses must include the protection of a state's present and future *legal right* to utilize the watercourse. One watercourse state cannot rightly consume the entire resource solely for the reason that the other watercourse states are not taking use of their right. To be ensured protection, a potential use of a watercourse must therefore be equitable in relation to both existing uses and other potential uses. This might be better illustrated through the following practical examples:

Many watercourses have been used exclusively by the lower riparians for decades, and conflicts have arisen when an upper riparian has claimed a right to utilize the watercourse.<sup>108</sup> This is the case for the Nile, where Egypt and Sudan have irrigated and utilized the water for several millennia, while upper riparians, as Ethiopia and Uganda, only lately have started to manage the water of the Nile and to claim their legal share of the river resources.<sup>109</sup> An equitable use of the Nile, must therefore take into account the already existing uses by Egypt and Sudan. At the same time, the Egyptian and Sudanese utilisation of the Nile, must not exclude the equitable utilisation or, in this case, the possible future utilisation of the other watercourse states.

In the "Gabčíkovo-Nagymaros Project"-judgement, the ICJ found that Slovakia's unilateral project on the Danube River was a breach of international law. The court cited The Permanent Court of Justice's judgement in the case of the River Oder (1929) in saying that the interests of riparian states to a navigable river is "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". The Court hereby underlines the equality between existing and potential uses and at the same time states the equality between the riparian States. The International Law Association adopted a resolution at its New York conference in 1958, where one of the agreed principles of international law was that "[c]o-riparian states are under a duty to respect the legal rights of each co-riparian state in the drainage basin".<sup>110</sup> The legal rights of the co-riparians refer to the basic rights deriving from international law, and particularly the right to an equitable share of a watercourse. The citation from the International Law Association thus means that each riparian state must develop and consume the watercourse within its territory in such a manner as not to reduce other riparian's access to the same. The degree of both established and potential uses must therefore adjust according to the volume of the watercourse, and the amount of water equitably distributed to each watercourse.

Steven McCaffrey concludes that "[n]ew upstream uses may be permissible even where existing downstream uses fully consume the stream's water" and that this "may be the case, for example, where the benefits of a new use [...] substantially outweigh the harm

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<sup>107</sup> ILC Yearbook, 1994, volume II part two, page 101

<sup>108</sup> As McCaffrey points out – "[d]ownstream countries are usually flatter, and thus better suited to agriculture; upstream countries, generally being more mountainous, had few ways in which to develop their water resources before the advent of large dams and hydroelectric power".

<sup>109</sup> McCaffrey, 2007, page 264-265

<sup>110</sup> Berber, page 42

that might result from it".<sup>111</sup> This corresponds with the ILA's statement above, since a full consummation of the watercourse from a single state, clearly will be a violation of the legal rights of the other states.

#### 4.4.2.3 Factors concerning the optimal use

This second category of factors is devoted to the method of utilization.

One of the aims of the UNWC is that "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".<sup>112</sup> Article 5 thus instructs the watercourse states to pursue an optimal use of the watercourse. The optimal utilization will accordingly mean the ways of usage that gives the best benefit while causing the least harm. The determination of optimal use has two main aspects; the effectiveness of the actual allocation, and the technical adequacy of the utilization.

The category of optimal use contains factors for evaluating the character of the utilization, both the existing and the potential ones. In cases where the consumption of a watercourse is inauspicious or inefficient, the utilisation of the watercourse may also be inequitable, since the consuming state could reduce its utilization by improving its water management system, and thereby increase the amount of water available to the other states. The evaluation of the optimal use of the watercourse is therefore mainly a question of alternatives. If usage *A* is the sole possibility to use the watercourse for purpose *B*, and usage *A* is not harmful to the existing or legal rights of other riparians or to the watercourse's ecosystem, there may be no reason to claim that usage *A* is inequitable. But the existence of alternative methods or uses *C* and *D* gives reason to question the efficiency of the different methods in order to find the most favourable one. This is also stated in the UN Convention article 6 litra g: "[t]he availability of alternatives, of comparable value, to a particular planned or existing use". The request for alternatives is thereby connected to the *actual utilization* of the watercourse, and not to the availability of other water resources. The latter was proposed by Egypt as a factor for determining equity, but was declined by the ILC's working group.<sup>113</sup>

Similarly, it is necessary to evaluate the technology of water exploitation. Water is an increasingly scarce resource, and it is crucial that the water is used as efficiently as possible. Modern technology can provide systems for irrigation and other types of water exploitation that reduces the amount of water extracted from the watercourse without harming the purpose of the utilization. States that employ outdated technology might use excessive amounts of water compared to states with more current methods. In order to be equitable, the utilization must be as efficient as possible in the actual circumstances. Hence, the principle of equitable utilization obliges the watercourse states to achieve the highest qualitative utilization of the resources with the lowest quantitative pressure.

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<sup>111</sup> McCaffrey, 2010, page 396

<sup>112</sup> UNWC article 5 paragraph 1, second sentence.

<sup>113</sup> UN Document A/C.6/51/NUW/WG/CRP.53

#### 4.4.2.4 Environmental factors

Natural and environmental issues constitute the largest category of factors for the evaluation of equitable utilization. It embodies geography, hydrography, hydrology and other natural and environmental factors. Since every watercourse is unique, and the states through which it runs all have different physical attachments to it, these factors are also to be considered individually for each watercourse.

The environmental focus is emphasized in recent judgements on the field of international water law. In the advisory opinion on the “Legality of the threat or use of nuclear weapons”, the ICJ stated that “[t]he existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment”.<sup>114</sup> This view is also acknowledged in the more recent “Case Concerning Pipe Mills on the River Uruguay” between Argentina and Uruguay.<sup>115</sup>

The UNWC article 20 obliges the states to “protect and preserve the ecosystems of international watercourses”. In its commentary, the ILC defines “ecosystem” as an “ecological unit consisting of living and non-living components that are interdependent and function as a community”.<sup>116</sup> Thus the term “ecosystem” is more precise than the term ‘environment’, and embodies factors both outside of and within the watercourse.

The ILC underlines in its commentary to UNWC article 20, that the duty to protect the ecosystem is “a specific application of the requirement contained in article 5 [equitable utilisation]”.<sup>117</sup> Environmental concerns are hence an international obligation, and thereby a central factor in the estimation of equitable utilization of watercourses.

The concept of sustainable use was invented by the Brundtland Commission in 1987, essentially meaning “development that meets the needs of the present without compromising the ability of future generations to meet their own needs.”<sup>118</sup> The concept is now an integrated part of the principle of equitable utilization, through the wording of the UNWC article 5.

In the determination of the equitable utilization and the evaluation of its factors, the river’s ecosystem itself should be considered an independent party. For instance, states A and B agrees on a manner of utilizing the watercourse giving each state an equitable share vis à vis the other state, but which harms the watercourse by polluting it or causing serious and sustainable drought. Even if such utilization may be equitable between the states, it is not equitable towards the watercourse’s natural environment, which ends up paying a very high price. The increasing focus on sustainability and environmental protection accentuates the role of the ecosystem in the distribution and conservation of water resources between states.

Although this ecological factor has been given increasing importance in the last decades, it is seldom mentioned in elder treaties. The Mahakali Treaty obliges India to maintain a certain minimum flow downstream from the Sarada Barrage, in order “to maintain and

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<sup>114</sup> Advisory Opinion, “Legality of the Threat of Use of Nuclear Weapons”, ICJ, 8<sup>th</sup> July 1996, para. 29.

<sup>115</sup> “Case Concerning Pipe Mills on the River Uruguay”, International Court of Justice, 2010, para. 193

<sup>116</sup> ILC 1994 Yearbook volume II part two, page 118

<sup>117</sup> Ibid, page 119

<sup>118</sup> UN Documents; *Our Common Future: Report of the World Commission on Environment and Development*, A/42/417, Chapter 2, paragraph 1.

preserve the river eco-system". Since the original flow of the river has been interrupted by the barrage, India must maintain a minimum flow to prevent a deterioration of the river climate.

In the Indus Treaty, the parties agreed in article IV paragraph II that "any Non-Consumptive Use made by [either of the Parties] shall be so made as not to materially change, on account of such use, the flow in any channel to the prejudice of the other uses on that channel by the other Party under the provisions of this Treaty". Similarly, the Ganges Treaty states in its preamble that one of its aims is to "make the optimum utilisation of the water [...] in the fields of flood management". Since the Ganges River is vulnerable to floods, this is a cardinal concern for both parties. By cooperating in controlling the flow of the river, the parties capacitate the equitable utilization of the river; keeping in mind that flood would cause both factual and legal harm to the involved parties. It is thus clear that any activity from one of the parties causing additional flood, would be inequitable. In such a case, the flood control is a prerequisite for an equitable distribution of the watercourse.

The geography of the watercourse and the watercourse states, may also contribute to the evaluation of equity. A transboundary watercourse is hardly ever positioned equally within the territory of each watercourse state. If there are considerable geographic differences, these might be reflected in the actual allotment of water rights. This is also the case for hydrological factors, such as contribution and water flow.

Adding contribution as a factor for evaluation of equity in article 6 was proposed to the ILC working group by India, but ultimately declined. However the ILC states in its commentary that "contribution to the watercourse by each watercourse state" is amongst the "hydrological" factors in the evaluation of equity.<sup>119</sup> The "hydrographic" factors relate more to the properties of the watercourse, its description, mapping and measurement.<sup>120</sup>

#### **4.4.2.5 Factors concerning cooperation**

The fourth category of factors addresses the collaboration between the watercourse states in the management of the watercourse.

Inherent in the principle of equitable utilization lays a duty to cooperate and to agree on equitable solutions. The arbitral court stated in the Lake Lanoux-case that "[a] State wishing to do that which will affect an international watercourse cannot decide whether another State's interests will be affected; the other State is the sole judge of that and has the right to information on the proposals".<sup>121</sup> The watercourse states are not the best judges of their individual utilization, and are dependent on each other for a holistic determination.

In order to obtain an optimal, sustainable and equitable utilization of the watercourse as a whole, the riparian states must cooperate in its development and conservation. This is also codified in the UNWC art 8 paragraph 1, stating that "[w]atercourse States shall cooperate on the basis of sovereign equality, territorial integrity, mutual benefit and good faith in order to attain optimal utilization and adequate protection of an international watercourse". Thus, the objective of the cooperation seems to be the achievement of "optimal utilization and adequate protection" of the watercourse. This aim is explicitly

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<sup>119</sup> ILC Yearbook 1994 volume II part two, page 101

<sup>120</sup> Ibid

<sup>121</sup> Lake Lanoux-arbitration, page 15

mentioned in the Indus River Treaty's article VII, where India and Pakistan "recognize that they have a common interest in the optimum development of the Rivers, and, to that end, they declare their intention to co-operate, by mutual agreement, to the fullest possible extent". The parties thereby link the "optimum development" of the river to the cooperation between them.

Brazil, Argentine, Bolivia, Paraguay and Uruguay signed the Treaty of the River Plate Basin in 1969, with the intention to "establish firmer institutional arrangement for the River Plate Basin".<sup>122</sup> The parties are convinced that "joint action will permit the harmonious and balanced development and optimum utilization of the principal natural resources of the region and will ensure the conservation of those resources for future generations if they are utilized rationally".<sup>123</sup> Also here, the cooperation is presented as an instrument *permitting* optimal utilization and conservation of the watercourse.

In the Mahakali Treaty, the parties agree to cooperate in the Pancheshwar Multipurpose Project, prepared by both parties and designed to "produce the maximum total net benefit".<sup>124</sup> By cooperating and sharing the power stations on each side of the border, India and Nepal cooperates in exploiting the resources in the most optional manner. As the above-mentioned treaties show, cooperation is essential for the optimal use and protection of the watercourse, and thus also a central part of the principle of equitable utilization.

The means of cooperation may be divided in two main categories; communication and joint commissions. As for the communication, many international water treaties contain an obligation to exchange information. This could be factual data regarding both the observation of water quality and quantity, or political information about planned projects in the watercourse. However, as stated in the Lake Lanoux-case, consensus between watercourse states is not necessarily a stipulation for commencing unilateral projects on the watercourse.<sup>125</sup> An upper riparian is thus not automatically obliged to seek the approval of the lower riparians before launching a water management project. Still it remains certain that agreement and exchange of information are the most efficient ways to avoid conflicts and to utilize the watercourse equitably.

The UNWC codifies both these types of information exchange. Article 9 obliges the states to exchange data on a regular basis, especially that of "hydrological, meteorological, hydrogeological and ecological nature". And in article 11, the parties are obliged to "exchange information and consult each other and, if necessary, negotiate on the possible effects of planned measures on the condition of an international watercourse". The article expresses a general obligation to communicate, and also to evaluate possible impact on other riparian states.

In the Rhine Treaty, the parties agree in article 5 to "step up their cooperation and to inform one another, particularly regarding actions taken in their territory to protect the Rhine".<sup>126</sup> Likewise, the Indus Treaty presents in its article VI, a list of "data with respect to the flow in, and utilization of the waters of, the Rivers [to be] exchanged regularly between

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<sup>122</sup> Treaty of the River Plate Basin, 23rd April 1969, preamble.

<sup>123</sup> Ibid

<sup>124</sup> Mahakali River Treaty, article 3 paragraph 1.

<sup>125</sup> Lake Lanoux-arbitration, page 25.

<sup>126</sup> Convention on the Protection of the Rhine, 1999, article 5 paragraph 1

the Parties”.<sup>127</sup> The exchange of information will both guide the watercourse states to a more efficient utilization of the watercourse, but also prevent conflict between them.

The second main factor of cooperation is the establishment of a joint watercourse committee. A joint committee consists of representatives from all the watercourse states in different scientific fields, and has consultative power. The joint committee’s mandate is decided by the riparian states, and usually codified in a treaty.

The Mahakali Treaty’s article 9 initiates the organization of the Mahakali River Commission, whose functions are, *inter alia*, to seek information on the structures of the treaty and to make recommendations to the parties about necessary measures, to “provide expert evaluation of projects”, to “co-ordinate and monitor plans of actions arising out of the implementation of [the treaty]”, and to “examine any differences arising between the parties concerning the interpretation and application of [the treaty]”.<sup>128</sup> The commission is thus an independent and competent organ that guides the watercourse states towards the optimal utilization of the watercourse and the preservation and protection of the ecosystem.

Similar joint commissions can be found in a great number of other international watercourse treaties. The joint commission of the Ganges Treaty was created in order to observe and record flow data from certain points along the river, and also to implement the arrangements from the treaty.<sup>129</sup> Similarly, the Indus Treaty founds the Permanent Indus Commission, whose general function is to “establish and maintain co-operative arrangements for the implementation of [the Indus] Treaty [and] to promote co-operation between the Parties in the development of the waters of the River”.<sup>130</sup> Between Mexico and the United States, an International Boundary Commission was established already in 1899, with a mandate to facilitate the realisation of earlier treaties.<sup>131</sup> The commission was retained in the 1944-treaty, and was given the status of an international body, whose duty was to “make provisions for the joint use of international waters” on uses specified in the treaty. A similar commission has also been constituted between the US and Canada, to observe and manage all of their boundary waters, and to resolute watercourse-related disputes.<sup>132</sup> Also the Agreement on the Mekong River basin and the Treaty of the River Plate basin addresses the responsibility of a joint commission.<sup>133</sup>

#### **4.4.2.6 Brief summary**

To summarize, the principle of equitable utilization constitutes a great number of factors, here arranged into four categories. The categories and the factors are interrelated and no

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<sup>127</sup> The Indus Treaty, article VI paragraph 1

<sup>128</sup> The Mahakali River Treaty, article 9.

<sup>129</sup> The Ganges Treaty, articles IV and VII

<sup>130</sup> The Indus Treaty, article VIII

<sup>131</sup> Treaty between the United States and Mexico, 1944, article 2.

<sup>132</sup> McCaffrey, 2010, page 347

<sup>133</sup> Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin, 1995, articles 5, 6 and 21-27; Treaty of the River Plate Basin, article II

factor enjoys priority over another. For instance, the Tigris-Euphrates watercourse is unique with its own geographical and hydrological characteristics, and its riparians also have different needs and patterns of utilization. Evaluating equity is therefore a holistic process, and the following analysis must take into account the features of the Tigris-Euphrates and its relation to its watercourse states.

Having established the status of the principle of equitable utilization as a ruling principle of customary international law, and explored the factors for its determination, it is time to employ these findings in the examination of the situation in the Tigris-Euphrates basin.

## **5 The legal arguments of the parties in the Tigris-Euphrates conflict in comparison with applicable international law**

### ***5.1 Introduction***

In spite of decades of discontinuous negotiation, Turkey, Syria and Iraq have not reached a permanent agreement concerning the utilization of the Tigris-Euphrates watercourse. The three riparian states have had adversary opinions on several aspects of the watercourse and its utilization, amongst them the character of the watercourse, and the rights to exploit its water. Iraq, having hosted the ancient civilizations where irrigation and damming of water first was invented, has claimed historic rights to the Tigris-Euphrates watercourse. Iraq is the lower riparian of both the Tigris and the Euphrates rivers, and being in this vulnerable position, she is anxious to secure her water supply. Syria is both upper and lower riparian on both rivers, and although her geographical share of the Tigris river is minor, she is nevertheless in a different position than Iraq. Syria is also the one state contributing the least to the flow of the twin rivers, and at the same time largely dependent on its water. Since Syria has few tributary rivers to the Euphrates and none to the Tigris, receiving a steady water flow from Turkey is crucial. As the upper riparian of both the rivers, Turkey is in the most favourable position to utilize the watercourse. For a long time, Turkey pleaded the theory of absolute territorial sovereignty, by claiming that the rivers were of free use to her, since they rose within Turkish territory. Protected by this argument, Turkey has launched an ambitious and expensive dam project in Southeastern Anatolia (Güneydoğu Anadolu Projesi, hereafter GAP) containing the construction of 22 dams and 19 hydraulic power plants on the Tigris-Euphrates watercourse. The project will irrigate 1,7 million hectares of land, and cost as

much as 32 billion US \$.<sup>134</sup> The first dam in the project, the Ataturk Dam, was opened in 1992 and the completion of the remaining parts of the project has several times been postponed due to lack of funding. The dams are planned on both rivers, but since the Tigris receives large amounts of water from tributaries on Iraqi territory, the Euphrates will suffer the greatest loss of flow. According to some scholars, the GAP will reduce the Euphrates' flow into Syria with 40 % and into Iraq with 90 %.<sup>135</sup> Although the present thesis does not have the capacity to discuss the equity of the GAP-project per se, it is important to bear in mind its possible consequences for the downstream riparians to the Tigris-Euphrates watercourse, and that these prospects generates much of the tension amongst the three watercourse states.

Nevertheless, the three riparians have, during recent years, managed to cooperate on certain issues related to water management. Turkey and Iraq established their High Strategic Cooperation Council in 2008, and the council had its first meeting in September 2009. The parties have agreed to cooperate in the fields of politics, economy, energy, water, culture and security.<sup>136</sup> A similar council has also been established between Turkey and Syria. Turkey and Iraq have signed a Memorandum of Understanding, where they agree to exchange hydrological and meteorological information and expertise in these fields.<sup>137</sup> And Turkey and Syria have signed different Memorandums of Understanding concerning the construction of a common dam on the Orontes River, the construction of a Syrian pumping station on the Tigris River, and efficient water utilization in general.<sup>138</sup><sup>139</sup> This last Memorandum sets up general rules and guidelines for exchange of information, joint studies and cooperation on draught management.<sup>140</sup> In addition to these agreements, a Joint Technical Committee has been reconvened and has had yearly meetings since 2007. Accordingly, a will to cooperate has evolved during the latest years. But even though the ongoing common projects are related to water efficiency and draught control, none are directly related to the question of rights to and allocation of the Tigris-Euphrates watercourse. Therefore, in the lack of an overall management structure, the potential for conflict and need for applicable legal rules remain present.

In the present chapter, the legal arguments of the three parties will be analyzed and compared to the applicable international law. But it must be made clear that due to the unstable circumstances in the region and the reserved public communication from some of the parties, it has been difficult to keep totally updated on the factual situation.

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<sup>134</sup> Southeastern Anatolia Project Regional Development Administration, GAP homepage; [www.gap.gov.tr](http://www.gap.gov.tr)

<sup>135</sup> Kuk, Christopher and Deese, David, "At the Water's Edge: Regional conflict and cooperation over fresh water", *UCLA Journal of International Law and Foreign Affairs*, no.21 (1996-1997) pages 21-64 (page 47)

<sup>136</sup> Kibaroglu and Scheumann, 2011, page 291-292

<sup>137</sup> Ibid, page 293

<sup>138</sup> "Memorandum of Understanding between the Government of the Republic of Turkey and the Government of the Syrian Arab Republic on Establishment of a Pumping Station in the Territories of the Syrian Arab Republic for Water Withdrawal from the Tigris River", Damascus, 23<sup>rd</sup> December 2009

<sup>139</sup> "Memorandum of Understanding between the Government of the Republic of Turkey and the Government of the Syrian Arab Republic in the field of Efficient Utilization of Water Resources and Combating of Drought", Damascus, 23<sup>rd</sup> December 2009

<sup>140</sup> The Memorandum is general and applies to all watercourses in the two states, but does not mention the Tigris-Euphrates watercourse specifically. It does not regulate *any* question of basic rights or water allocation



Consequently, some of the legal arguments discussed below, may have been withdrawn from the actual debate. Nevertheless, these arguments play an interesting part in the analysis and development of the legal situation in the Tigris-Euphrates conflict.

The following subchapter will look at the basic definitions connected to the watercourse.

## **5.2 Basic definitions**

The disagreements that lead to the rupture of the second Joint Technical Committee in 1993 after 16 meetings, constituted in great part in different definitions of the object of the negotiation.<sup>141</sup> Turkey and Syria regard the Euphrates and the Tigris as forming one single watercourse while Iraq defines them as two separate watercourses. Secondly, Turkey defines the Tigris and the Euphrates as a *transboundary* watercourse, and not an *international* watercourse, and claims thereby that it is “not subject to international rules”, as stated by the former Turkish minister of State, Kamran Inan.<sup>142</sup> The questions in the following are thus naturally if the Tigris and the Euphrates rivers form one or two watercourses, and further, whether they are international or transboundary.

### **5.2.1 The watercourse**

Turkey and Syria agree that the Tigris and the Euphrates rivers must be treated as one single watercourse, and that the total amount of water in *both* rivers must be the basis for discussion of allotment between the riparians. Iraq, on the other hand, claims that the two rivers must be seen as two separate watercourses, and that the discussion of allocation must be restricted to the Euphrates. If the Tigris and the Euphrates constitute one single watercourse, the amount of water to be allotted to each riparian would be calculated from the total supply of both rivers. Since Iraq at present utilizes large parts of the Tigris alone but also is dependent on the water from the Euphrates, a combined calculation could bring serious consequences to the already water scarce country. Iraq’s argument is naturally understandable, although not necessarily legally correct.

In the UNWC, article 2, the term “watercourse” is defined as “a system of surface waters and groundwaters constituting by virtue of their physical relationship a unitary whole and normally flowing into a common terminus”. The phrasing of the article does not restrict the term “watercourse” to single rivers or main rivers, but defines it holistically by including all minor and tributary rivers as well as connected groundwaters. The article thus has a large scope and enframes the watercourse’s ecosystem. The definition also reflects the role of human interference in the watercourse, since intervention in one part of the system usually will influence or bring consequences to other parts of it.

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<sup>141</sup> See chapter 3.3

<sup>142</sup> Bagis, Ali Ishan, “Turkey’s Hydropolitics of the Euphrates-Tigris Basin”, *Water Resources Development*, Vol. 13, No 4 1997, pages 567-581 (page 577)

As seen earlier, the UNWC has not entered into force, and is not considered a source of *conventional* international law. But some of the articles of the convention were codifications of customary international law, and some have later become international custom. The question is therefore firstly whether the UNWC's definition of the term "watercourse" is in correspondence with customary international law, and secondly whether the Euphrates and Tigris rivers form one single watercourse as claimed by Turkey and Syria, or two separate watercourses, as claimed by Iraq.<sup>143</sup>

In order to be considered international custom, the conception of the watercourse as a *system of rivers*, must be the subject of "a general practice" that is "accepted as law".<sup>144</sup>

Chapter three of the Versailles Treaty contains clauses that regulate the usage of specific international rivers. In article 331, parts of the rivers Elbe, Vltava, Oder, Niemen and Danube are declared international rivers, including "all navigable parts of these river systems which naturally provide more than one State with access to the sea".<sup>145</sup> The article refers to the rivers as "river systems", which includes more than just the canal of the main river. The same is done in article 362, where the jurisdiction of the Central Rhine Commission was extended to encompass specific channels, but also "any other parts of the Rhine river system which may be covered by the General Convention".<sup>146</sup> The system of rivers as a unity was thereby practiced in the 1919 peace treaty. Likewise are the "Madrid Declaration" (1911) of the Institute of International law; the "Convention Relating to the Development of Hydraulic Power", adopted by the Conference on Communications and Transit at Geneva 1923; the "Declaration of the Seventh Pan-American Conference on the Industrial and Agricultural Use of International Rivers", adopted at Montevideo in 1933; and the Resolution adopted by the Inter-American Bar Association at Buenos Aires in 1957, all strongly inspired by the concept of the river system.<sup>147</sup>

In the "River Oder"-case, the Permanent International Court of Justice thoroughly refers to the Oder as a *river system*, with reference to the Versailles Treaty. The judgement determines the jurisdiction of the Oder Commission, and by employing the concept of the river system the Court found that the Commission could extend its jurisdiction to include the tributaries to the Oder, even when these tributaries were entirely situated within the territory of one single state. The River System concept thus creates a unity of several rivers and tributaries, without regard to territorial borders, provided that they form a natural whole. Although both the Versailles Treaty and the River Oder judgement concern the freedom of navigation, the conception of the river system is general and thus applicable also for other uses of a watercourse.<sup>148</sup>

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<sup>143</sup> Kibaroglu and Scheumann, 2011, page 284; see also Ahmmad, Yagdar, *Establishing a Legal Framework for the Use and Protection of Iraq's Equitable Right to the Tigris and Euphrates River Basin*, Doctoral Thesis from the University of Dundee, May 2010, page 169

<sup>144</sup> The Statute of the International Court of Justice, art 38 litra b.

<sup>145</sup> Treaty of Versailles, Paris, 1919, article 331

<sup>146</sup> Ibid, article 362

<sup>147</sup> Bourne, Charles B., "International Water Law: Selected Writings of Professor Charles B. Bourne", Patricia Wouters (ed.), London-The Hague-Boston 1997, page 4

<sup>148</sup> The concept of the river system from the Versailles Treaty and the "River Oder"-judgement was employed for non-navigational purposes in the "Gabčikovo-Nagymaros Project"-judgement, ICJ 1997. See also ILC Yearbook 1994, vol. 2 part II, page 91.

The International Law Association proclaimed in 1958 that one of the agreed principles in international law was that a “system of rivers and lakes in a drainage basin should be treated as an integrated whole (and not piecemeal)”.<sup>149</sup> The concept of the system of rivers was thus considered an *agreed principle* of international law in 1958. Another example in favour of the river system is the Indus Waters Treaty, where the title itself reflects a quantity of rivers, naturally assembled in a coherent system; including the main rivers, their tributaries and connecting lakes.<sup>150</sup> Consequently, the six main rivers, which are distributed between India and Pakistan in the treaty, together form a river system with its natural tributaries and lakes. Similarly, the Treaty of the River Plate Basin refers to the whole basin of the River Plate and thus employs a broad definition of a river system.

Teclaff argues that the concept of the river system was perceived already towards the end of the 19<sup>th</sup> century when the water use was intensified, and that the need to treat the rivers as whole systems “becomes clear and urgent under the impact of threatened climate change”.<sup>151</sup> Environmental regards are increasingly important in relation to the present climatic challenges, and while the ecosystem is progressively considered as a part in agreements concerning natural resources, the concept of the river system harmonizes with this development.

The understanding of a watercourse as a system of rivers is thereby a “general practice”. Further, the decisive question is whether this definition has been “accepted as law”.

The record of the 62<sup>nd</sup> meeting of the sixth committee of the UN General Assembly show that there were no objections or reservations to the definition of the term “watercourse” in article 2 litra a of the UN Convention, and that the article was adopted.<sup>152</sup> This shows a broad consensus in the definition of the term “watercourse”, and also indicates *opinio juris*. However, such meeting records should be interpreted with great care since objections or lack of such does not create any binding obligations upon the member states and cannot be interpreted as if they did. The lack of protest against the definition of the term “watercourse” is certainly favourable for the *opinio juris*, but can not be the sole source for it.

A second argument is the fact that the conception of the watercourse as a *system of rivers* has been employed in agreements and treaties for several decades, without any protests or debates regarding its position as law. On the contrary - the concept still is gaining a wider area of application and broader support. In the UNECE’s Convention for the Protection and use of Transboundary Watercourses and International Lakes, the term “transboundary waters” is defined as “any surface or ground waters which mark, cross or are located on boundaries between two or more States”.<sup>153</sup> The Biodiversity convention does not concern watercourses in particular but addresses the protection of ecosystems, which it defines as

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<sup>149</sup> Teclaff, Ludwig A., “The River Basin Concept and Global Climate Change”, *Pace Environmental Law Review*, Spring 1991, pages 355-388, (page 365-366)

<sup>150</sup> Indus Waters Treaty, article 1 paragraph 3 and 8.

<sup>151</sup> Teclaff, 1991, pages 355 and 371.

<sup>152</sup> Except from reservations from Turkey, Ethiopia and Lebanon regarding the inclusion of groundwaters to the definition in litra a, and the Turkish reservation against litra b caused by the lack of “difference between watercourses which marked a border and transboundary watercourses”, A/C.6/51/SR.62, page 6.

<sup>153</sup> UNECE Convention for the Protection and use of Transboundary Watercourses and International Lakes, 1992, article 1 litra 1

“a dynamic complex of plant, animal and micro-organism communities and their non-living environment interacting as a functional unit”.<sup>154</sup> A watercourse and its groundwater and tributaries clearly constitute an important part of an ecosystem, and are included in the holistic definition. The increasing focus on protection of ecosystems and ecosystem-based management of natural resources strengthens the international consensus on the broad definition of the term “watercourse”.

Henceforth, the conception of the watercourse as a system of rivers is a “general practice” and “accepted as law”, and is thereby customary international law.

The second question is accordingly, whether the Euphrates and Tigris rivers form one single watercourse, as Turkey argues, or two separate watercourses, as claimed by Syria and Iraq.<sup>155</sup>

In order to be considered as one single watercourse, the Euphrates and Tigris rivers must “by virtue of their physical relationship [constitute] a unitary whole”, and normally flow “into a common terminus”, according to article 2 of the UNWC. In the Iraqi village al-Qurnah, 74 kilometres northwest of Basrah, the Euphrates and Tigris rivers unite and form one single river, the Shatt-al-Arab. This combined river flows for 200 km on the Iraqi-Iranian border, before emptying into the Persian Gulf. Thus, the Euphrates and Tigris rivers flow into “a common terminus”, as the UNWC advocates in article 2 *litra a*.<sup>156</sup>

Consequently, the decisive issue is whether the rivers constitute a “unitary whole”. In its commentaries to the UNWC, the ILC accentuates that this analysis must be a “matter of common sense and practical judgement”.<sup>157</sup>

The rivers rise in the Turkish mountains, scarcely 30 kilometres from each other.<sup>158</sup> Until their confluence in the Shatt-al-Arab, they have almost completely different basins, only connected by the man-made Thartar Canal in Iraq. Turkey claims that the existence of the canal strengthens the conception of the rivers as one single watercourse.<sup>159</sup> The canal diverts waters from the Tigris, just northwest of Baghdad, and into the Euphrates. It prevents seasonal flooding of Baghdad, and alleviates water shortages in the Euphrates. However, by bringing water from one river to the other, the canal increases the interconnection between the rivers before they unite in the Shatt-al-Arab. In this way, polluted water from the Tigris can affect the water of the Euphrates and its ecosystem. The Thartar Canal thereby clearly strengthens the “physical relationship” between the rivers.

Nevertheless, the ILC states in its commentaries to article 2 that “the fact that two different drainage basins were connected by a canal would not make them part of a single “watercourse” for the purpose of the present articles”.<sup>160</sup> According to the Commission’s intentions, the existence of a connecting canal is not per se sufficient for two rivers to form

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<sup>154</sup> UN Convention on Biological Diversity, article 2

<sup>155</sup> Kibaroglu and Scheumann, 2011, page 284

<sup>156</sup> McCaffrey, 2010, page 324

<sup>157</sup> ILC Yearbook 1994, vol 2 part II, page 91.

<sup>158</sup> Kibaroglu, 2002, page 160

<sup>159</sup> Kibaroglu and Scheumann 2011, page 284

<sup>160</sup> ILC Yearbook 1994, volume II part two, page 90

a single watercourse, but the Thartar Canal must undoubtedly be seen as a factor in favour of considering the Euphrates and Tigris as one watercourse.

Another factor in the discussion is the geography of the rivers. Although the twin rivers rise close to each other, they have completely different basins until they unite in the Shatt-al-Arab. While the Euphrates flows westwards into Syria, and then southeast into and through Iraq, the Tigris flows southwards out of Turkey, marks the border between Syria and Iraq, before it flows southwards through Iraq. The Euphrates River is 3000 km long and united with the Tigris for only the last 190 km of its basin, while the Tigris runs for 1660 km before constituting the Shatt-al-Arab.<sup>161</sup> The rivers thus flow separately for respectively 93,6 % and 89,6 % of their total length. The individuality of the river basins and their geographical independence of each other might be accounted in disfavour of regarding the rivers as a single watercourse.

On the other hand, the two rivers are shared by the same three riparian states. Changes in water quantity or quality in one of the rivers, will automatically affect all three watercourse states, since the demand for water from the other river will increase. In this way, the usages of the two rivers are proportionate and interdependent. As utilization and consequences closely unites the riparians, it may be natural to consider the river as one single watercourse.

Furthermore, besides their individual basins, the rivers have several similarities. Both the Tigris and the Euphrates are exotic rivers, meaning that they start in one climate and end up in a completely different one.<sup>162</sup> Both rivers rise in the wet climate of the Turkish mountains, flow through a dry, flat and hot landscape, before they empty into the sea. Although flowing in parallel beds, the rivers nourish the same type of landscapes in the same riparian states.

Additionally, the twin rivers together laid the foundation of the world's earliest civilizations. The region of Mesopotamia was situated between the Euphrates and the Tigris rivers more than 8000 years ago. These early societies gave birth to agriculture and water management, and local culture and custom were thus created within the frame of the two rivers. And the land in this area had particularly fertile soil, due to the interaction and influence of both rivers. Hence, the historic development in the Mesopotamian region is attributed to the influence of both rivers, and counts in favour of considering the rivers as a single watercourse.

Based on the factors above, the Euphrates and Tigris rivers are to be considered as one single watercourse. The Turkish and Syrian argument is thereby in accordance with international law in this matter, while the Iraqi is not.

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<sup>161</sup> Kliot, 1994, page 100

<sup>162</sup> Hillel, Daniel, *Rivers of Eden, The Struggle for Water and the Quest for Peace in the Middle East*, Oxford 1994, page 92; see also Dellapenna, J, "The Two Rivers and the Land Between" 1996, page 218

## 5.2.2 International or transboundary watercourse?

The second point at issue is whether the Tigris-Euphrates is an *international* watercourse, as claimed by Syria and Iraq, or a *transboundary* watercourse as claimed by Turkey.

In the UNWC article 2 litra b, the term “international watercourse” is defined as “a watercourse, parts of which are situated in different States”. This definition encompasses all watercourses that either forms or crosses a border between states. The preliminary question thereupon is whether the UNWC’s definition of the term “international watercourse” is in consonance with customary international law.

In its earlier days, international water law distinguished between *successive* (also called transboundary) and *contiguous* (also called international) watercourses. The contiguous watercourse formed the border between two or more states, so that the river banks were in two separate states; while the successive watercourse crossed the border between two (or more) states, and the river was thus fully situated within the territory of one state at the time.<sup>163</sup> The representative of Turkey accentuated this distinction at the 62nd meeting of the sixth committee of the General Assembly, by reserving his position on article 2 litra b of the UN Convention as it “did not take account of the differences between watercourses which marked a border and transboundary watercourses”.<sup>164</sup> By “watercourses which marked a border” the Turkish representative clearly refers to *contiguous* (or *international*) watercourses, as opposed to *successive* (or *transboundary*) watercourses. As seen above, the UNWC does not distinguish between contiguous and successive watercourses.

The “Madrid Declaration”, adopted by the Institut de Droit International in 1911, differentiates between these two geographical alternatives.<sup>165</sup> The first article of the declaration regulates watercourses which “forms the frontier of two States”; while “a stream [which] traverses successively the territories of two or more States” is dealt with in article two. In spite of this distinction, the article does not accord broader rights to the riparians of the successive watercourse. On the contrary, whereas the riparians of a contiguous watercourse must seek the consent of the other riparian before launching possibly detrimental projects; the riparians of the successive watercourse must take into consideration the interests of other riparians *and* the watercourse itself, before consuming or utilizing the water. Therefore, in spite of the explicit distinction, the declaration does not largely differentiate in the regulation of the different types of rivers. Although not a formal source of international law, the declaration may be read as an expression of the *opinio juris* in the early 1900’s.

In the International Law Association’s Dubrovnik Resolution (1956) an “international river” is defined as “one which flows through or between the territories of two or more states”.<sup>166</sup> The resolution does not differentiate between the two types of rivers, which may be evidence of a development of the general conception of watercourses. Similarly, in an article from 1959, Griffin explains the concept of the “international watercourse” as a watercourse which “passes successively through the territory of more than one state (successive watercourse) or runs along the boundary of two states (contiguous

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<sup>163</sup> McCaffrey, 2010, page 41

<sup>164</sup> UN document, A/C.6/51/SR.62, paragraph 38

<sup>165</sup> Food and Agricultural Organization of the United Nations’ Legislative Study, “Sources of Water Law”, Rome 1998, page 269

<sup>166</sup> Griffin, 1959, page 74

watercourse)”.<sup>167</sup> Even if the distinction between the two types of watercourses exist, Griffin summons up the applicable international law without making *legal* distinction between them.

Consequently, the UNWC’s definition of an international watercourse was commonly accepted already in the late 1950’s. Adopted treaties do not define the concept of the international watercourse, since a common understanding is the basis of the whole treaty. If one of the States did not consider the actual watercourse as international, it would certainly not conclude a treaty of water management with another riparian State.

McCaffrey argues that the distinction between contiguous and successive watercourses over time has lost its value since “[t]he adverse effects of one state’s pollution of an international watercourse are just as real in another state whether the watercourse be successive or contiguous in character”, which makes the differentiation hard to justify.<sup>168</sup> This view harmonizes well with the ecosystem approach adopted in the UNWC. As the watercourse is nature-made and the state borders are human-made, it makes sense to treat the watercourse as a whole, no matter how it refers to the borders. This also creates continuity and foreseeability in the international legal landscape.

Bearing in mind that 103 states voted in favour of the Convention in the General Assembly, and thus also in favour of its definition of the term “international watercourse”, the definition has been both generally practiced and accepted as law in accordance with article 38 in the ICJ Statute.<sup>169</sup>

The UNWC’s definition of the term “international watercourse” is thereby in consonance with international customary law.

The next question at issue is the whether the Tigris-Euphrates watercourse is an “international watercourse”, in accordance with the UNWC article 2 litra b.

The Euphrates is situated within Turkish, Syrian and Iraqi territory. The Tigris is situated in Turkey and Iraq, and forms the border between both Syria and Turkey, and Syria and Iraq.<sup>170</sup> Both the rivers of the watercourse are thereby partly “situated in different States”.

The Tigris-Euphrates watercourse is an international watercourse, in accordance with the UNWC article 2 litra b.

Accordingly, the Syrian and Iraqi arguments on this matter are in accordance with applicable international law, while Turkey’s arguments are not.<sup>171</sup>

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<sup>167</sup> Ibid, page 77

<sup>168</sup> McCaffrey, 2010, page 44

<sup>169</sup> UNWC voting record;

[http://www.panda.org/what\\_we\\_do/how\\_we\\_work/policy/conventions/water\\_conventions/un\\_water\\_courses\\_convention/](http://www.panda.org/what_we_do/how_we_work/policy/conventions/water_conventions/un_water_courses_convention/)

<sup>170</sup> Kliot, 1994, page 100; Hillel, 1994, page 92

<sup>171</sup> Dellapenna, “The Two Rivers and the Land Between” 1996, page 255-256

However, a new question then rises; namely if Turkey has been a persistent objector to this definition, and thus can be exempt from complying with the customary definition.

In the “Fisheries Case” between the United Kingdom and Norway, the main question was how to determine the Norwegian territorial coastline.<sup>172</sup> Norway had her own historical way of determining the line, while the United Kingdom claimed that Norway had to follow the international ten-mile rule. The International Court of Justice found that the ten-mile rule had not “acquired the authority of a general rule of international law” and that “[i]n any event the ten-mile rule would appear to be inapplicable as against Norway in as much as she has always opposed any attempt to apply it to the Norwegian coast”.<sup>173</sup> The Court thus acknowledged that objections towards the existence of a customary rule might excuse a state from respecting it.

In Fitzmaurice’s view, the court was “not intending here to enunciate any general principle of avoidance of the rules of international law by a process of non-acceptance, but was acceding to part of Norway’s argument concerning her historic rights.”<sup>174</sup> This view is strengthened by the nature of international law, whose “rules [...] are *ipso facto* applicable to all States members of the international community, by virtue of their membership”.<sup>175</sup> The point of departure, according to Fitzmaurice, is that states can not decide freely which rules of international law they will be bound by. A state is thus bound by international law as a consequence of being a member of the international community. Nevertheless, the Court acknowledges in the passage quoted above that Norway had acquired exemption from the rules, since she had been opposed to the rule *from its inception*. Fitzmaurice thus concludes that the “essence of the matter is dissident from the rule *while it is in process of becoming one, and before it has crystallized into a definite and generally accepted rule of law*”.<sup>176</sup>

The pivotal question is thereby whether Turkey has consequently objected to the “international watercourse”-definition before it became applicable customary law.

At the above-mentioned 62<sup>nd</sup> meeting of the Sixth Committee of the UN General Assembly, the draft articles, which later became the UNWC, was debated and adopted. The Turkish delegate expressed his reservation against article 2 paragraph b because it did not “take account of the difference between watercourses which marked a border and transboundary watercourses”.<sup>177</sup> With this statement, the Turkish delegate clearly expresses his disagreement with the definition, together with the intention not to be bound by that specific provision. Later, at the 99<sup>th</sup> plenary meeting of the General Assembly, the Turkish delegate stated that Turkey did not intend to sign the UN Convention, and that “this Convention does not and shall not have any legal effect for Turkey in terms of general and customary international law”. These announcements clearly expresses that Turkey objected to the definition in 1997.

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<sup>172</sup> “Fisheries Case” International Court of Justice, 1951

<sup>173</sup> *Ibid*, page 131

<sup>174</sup> Fitzmaurice, Sir Gerald, “The Law and Procedure of the International Court of Justice, 1951-54: General Principles and Sources of Law”, *British Yearbook of International Law*, 1953, page 1- 70 (page 25)

<sup>175</sup> *Ibid*, page 25

<sup>176</sup> *Ibid*, page 26

<sup>177</sup> A/C.6/51/SR.62, paragraph 38



Disagreement over the characterization of the rivers was also the reason for the break down of the tripartite JTC in 1993. The Committees mandate was to determine methods and procedures that could “lead to a definition of the reasonable and appropriate amount of water that each country would need from both rivers”.<sup>178</sup> The Committee was established between Turkey and Iraq in 1980, and Syria joined in 1983. However, the negotiations came to a stop after 16 meetings. Turkey thus also objected towards the definition during this period.

In 1968, Turkey concluded an agreement with Bulgaria concerning the cooperation of their common rivers; the Meric, Tunca, Degirmendere and Rezve. In the agreement’s preamble, the rivers are said to “intersect or form the frontier between the two countries”, but the rest of its provisions do not distinguish between these two types of watercourses.<sup>179</sup> The Meric and Tunca are flowing into Turkey from Bulgaria, and constitutes the border between Turkey and Greece; while the Degirmendere and Rezve are partly contiguous and partly successive rivers. The fact that the rivers of both kinds are treated equally in the treaty can not be interpreted as a general rejection from Turkey’s side of the importance of differentiation between them. But it shows that Turkey, in this particular relation, has agreed to consider the two types of watercourses equally, and entered into an agreement on the joint management of a group of shared watercourses. The Turkish-Bulgarian agreement can thus not be understood as an argument against the Turkish consistency of the watercourse-definition.

Nevertheless, the first Joint Technical Committee of the Tigris-Euphrates riparians came to an end already in 1965 because of great disaccord about, inter alia, whether the rivers were transboundary or international.<sup>180</sup> Turkey claimed that the rivers were transboundary rivers, while the two other riparians saw them as international. Turkey has thus endured her objections against the lack of distinction between different types of watercourses since, at least, 1965.

Having established Turkey’s history of objection, the question is at what time the present definition of the international watercourse became the applicable international law.

Article 8 of the Final Act of the Congress of Vienna (1815), addresses “[t]he powers whose territories are separated or traversed by the same navigable river”.<sup>181</sup> The two types of rivers are mentioned specifically, acknowledging their different nature. But as in the Madrid-declaration, the distinction does not have any legal importance since the river types are treated equally. Although the Congress of Vienna was occupied with questions of navigation, the provision is relevant as evidence of the conception of watercourses at the time.

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<sup>178</sup> Kibaroglu, 2002, page 227

<sup>179</sup> Agreement between the Peoples Republic of Bulgaria and the Republic of Turkey concerning Co-operation in the Use of the Waters of Rivers Flowing through the Territories of Both Countries, signed October 10. 1968, (entered into force October 26. 1970), preamble paragraph one.

<sup>180</sup> Jouejati, Murhaf, “Water Politics as High Politics: The case of Turkey and Syria”, *Reluctant Neighbour: Turkey’s Role in the Middle East*, Barkey, Henry J., (ed), Washington 1996, page 131-146 (page 136)

<sup>181</sup> McCaffrey, 2010, page 42

Likewise, the Institut de Droit International distinguished in its resolution on “Utilisation of Non-maritime International Waters” (1961), between “water which traverse or border [a state’s] territory” without according any legal importance to the distinction.<sup>182</sup>

The Inter-American Bar Association defined in 1957 an international watercourse as “every water-course or system of rivers or lakes (non maritime waters) which may traverse or divide the territory of two or more states” and concluded that such a system would be called a “system of international waters”.<sup>183</sup> The distinction is thus mentioned, but erased immediately after. Griffin also rejects the distinction between the two types of watercourses when he declares, in 1959, that the “historical concept [of two types of watercourses] is of no utility in the context of uses the effects of which are spread internationally by means of the watercourse itself”.<sup>184</sup> Similarly, the International Law Association defines the term “drainage basin” in its “Helsinki Rules” (1966), as “a geographical area extending over two or more States determined by the watershed limits of the system of waters”. The “Helsinki Rules” thus expands its area of application by employing the concept of the water system, and does not differentiate between contiguous and successive watercourses.

These examples show that the uniform definition of the watercourse was emerging and developing in the 1960’s. When Turkey explicitly resisted accepting this definition in 1965, she was protesting against the definition before it became a clear rule of law.

Turkey objected to the international watercourse-definition before it became applicable international law.

Although Turkey did object, the rule towards which she objected must be seen in its international context. As the rule is a fragment of an international legal body, the practical and legal impact of such objection must be considered holistically, in light of the consequences it may cause to other members of the international community. The last question is thus whether the differences in defining the watercourse-term can have legal significance in this matter.

The ICJ expresses in the “Fisheries Case” that “[t]he delimitation of sea areas has always an international aspect; it cannot be dependent merely upon the will of the coastal state as expressed in its municipal law [...] the validity of the delimitation with regard to other States depends upon international law”. Even if the Court here refers to delimitation of territorial sea areas, the view is relevant for the definition of international watercourses since such a definition also will determine the rights of other states. Additionally, the subject matter for international watercourses is water as a vital resource, while the delimitation of sea territory mainly has economical value. This increases the relevance of the Court’s view for the present matter.

As the Court states, a matter of international law is determined by the rules of international law. The validity of Turkey’s distinction between transboundary and international watercourses thereby depend upon the rules of international law. As seen above, these rules do not support Turkey’s definition.

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<sup>182</sup> Institut de Droit International, Session of Salzburg 1961, article 2 first paragraph

<sup>183</sup> Griffin, 1959, page 73

<sup>184</sup> Ibid, page 77

Similarly, the question of defining a watercourse as transboundary or international has few, if any, practical consequences. Even if the twin rivers rise within Turkish territory, this fact does not give Turkey a right to define them unilaterally in a way that limits the rights of other riparians. Whether called transboundary or international, the rivers flow through other states' territory and gives these states a basic right to an equitable share of the water. The internationality of the watercourse imposes the rules of international law in the field; inter alia the principle of equitable utilization, recognized by Turkey.<sup>185</sup>

The pivotal point for the internationality of watercourses seems to be, according to state practice and judgement from international courts, whether or not they touch other states' territories. When a watercourse is in contact with the territory of more than one state, rights are generated for all these states. There is no legal reason why these rights should be fundamentally different, depending on the geography of the watercourse. As McCaffrey formulates, "it is virtually impossible to justify a legal regime that would, for example, allow unbridled use of successive watercourses but require that contiguous watercourses be utilized in an equitable and reasonable manner."<sup>186</sup>

Defining the Tigris-Euphrates watercourse as an international rather than a transboundary watercourse does not change, either for Turkey, Syria or Iraq, the right to an equitable share of the watercourse. And a differing definition of the term watercourse will thereby not have legal significance in this matter.

Hence, Turkey cannot play the role of the persistent objector towards the commonly accepted definition of the watercourse term.

The Turkish definition of the watercourse term is thus not in accordance with international law.

### **5.3 The written agreements**

Two bilateral agreements have been concluded regarding the allocation of water in the Euphrates River. One agreement between Syria and Turkey, regarding the minimum quantity of water to be released from the Turkish dams and flow into Syria; and one between Syria and Iraq, dividing this amount of water between the two downstream states. Debates have arisen regarding the applicability and relevance of these agreements, and the three riparians have differing opinions on their validity and contents. In this subchapter, the binding force of the agreements will be examined, together with their equitability.

#### **5.3.1 The Syrian-Turkish agreement**

Syria is both an upstream and a downstream riparian to both the Euphrates and the Tigris. While the Euphrates flows through Syria for 710 kilometres of its total length, the Tigris

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<sup>185</sup> Turkey Water Report, Turkish General Directorate of State Hydraulic Works, 2009, page 48

<sup>186</sup> McCaffrey, 2010, page 45

constitutes the north-eastern border between and Syria and Turkey, and Syria and Iraq for total length of 44 kilometres.<sup>187</sup> The Euphrates is the largest river in Syria and her biggest source of renewable freshwater.<sup>188</sup> Due to her position on the watercourse, Syria has earlier alternatively claimed both the theory of absolute territorial integrity and absolute territorial sovereignty as protection for her interests.<sup>189</sup> But after having ratified the UNWC in 1998, Syria endorses the theory of limited territorial sovereignty and the principle of equitable utilization.

In 1987, prior to the filling of the Ataturk dam, Turkey and Syria signed the “Protocol on Matters Pertaining to Economic Cooperation Between the Republic of Turkey and the Syrian Arab Republic”, containing their agreements on matters belonging to several different fields, water being one of them. According to the Protocol’s article 6, Turkey’s obligation of releasing a yearly average of 500 m<sup>3</sup>/s of water should persist “[d]uring the filling up period of the Atatürk Dam reservoir and until the final allocation of the waters of the Euphrates among the three riparian countries”. This time perspective gives the agreement a provisory appearance, especially since the Atatürk dam was opened in 1992. However, the “final allocation of the waters” has not been settled between the three watercourse states, and the agreement is therefore still in force.

Primarily, the question is whether the protocol, fully or partly, can be interpreted as a binding agreement that generates obligations for the two parties.

The name of an agreement may often give an impression of its content and ambitions, but is not in itself decisive. Although the agreement is called “Protocol”, this does not necessarily mean that the agreement is free from obligation.<sup>190</sup> According to the Vienna Convention on the Law of Treaties article 2 litra a, a “treaty” is “an international agreement concluded between States in written form and governed by international law [...]”. The article thus imposes two conditions; the agreement must be written, and also governed by international law. Since the protocol is clearly both written and signed, the pivotal issue is whether its content is “governed by international law”.

The Protocol regulates matters of “Economic Cooperation” between Turkey and Syria. To the extent they are settled in the protocol, these matters are not governed by municipal law. By entering such agreement, the two states withdraw the settled matters from their national jurisdiction and submit them to the rules of international law. In this manner the content of the treaty is “governed by international law”.

The criterion of government by international law also includes the parties’ intention to be bound by the treaty.<sup>191</sup> Such intentions will necessarily be reflected in the wording of each treaty obligation and in the parties’ actions. In the Protocol’s article 6, Turkey has undertaken “to release a yearly average of more than 500 m<sup>3</sup>/sec at the Turkish-Syrian border”. This obligation is concrete and appears to be the result of negotiations. The remaining articles of the treaty are settling intentions, and are not nearly as concrete as the obligation in article 6. Compared to article 9 of the treaty, where the parties agree “in

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<sup>187</sup> Kliot, 1994, page 101

<sup>188</sup> FAO Aquastat’s Country Report on Syria, page 5

<sup>189</sup> Dellapenna, “The Two Rivers and the Land Between” 1996, page 252

<sup>190</sup> Shaw, 2003, page 88

<sup>191</sup> Fitzmaurice, Malgosia, “The practical working of the Law of Treaties”, *International Law*, Evans, Malcolm D. (ed), Oxford 2010, pages 172-200 (page 173)

principle to construct and operate jointly projects in the lands of both countries”, the obligation in article 6 is stringent, countable and manageable. The wording of the article implies a will to be bound by its contents, and article 6 of the protocol is thereby “governed by international law”.

Conclusively, the protocol is, partly, “governed by international law” and thus also an agreement that binds and generates obligations for the two parties.

Secondly, the question is whether the protocol’s article 6 is in harmony with the principle of equitable utilization.

Being provisional, the protocol does not provide any final solutions to the question of allocation in the Tigris-Euphrates watercourse. It does not acknowledge any basic rights to either Syria or Iraq, or take into account the Iraqi use of the river. No other factors of allocation are mentioned, and the agreed quantity of water is not justified or explained in any manner.

However, being negotiated and accepted by the two states, the amount of water released must have been satisfactory for both riparians at the time when the protocol was signed. And bearing in mind that the protocol offers a provisory solution, in anticipation of a permanent allocation, it would be too laborious for the present thesis to analyze whether the agreement still is equitable at present, or whether the needs of the watercourse states has changed so much that the released amount no longer represents an equitable share.

The most proximate conclusion is therefore that the protocol is not in clear disharmony with applicable international law.

### **5.3.2 The Syrian-Iraqi agreement**

Syria and Iraq agreed on a division of the water of the Euphrates River in 1989. The “Joint Minutes” were signed by official representatives from both parties, and later ratified. The agreement allocates the water flowing into Syria from Turkey, and accords 58 % of it to Iraq and 42 % to Syria.<sup>192</sup> The first question is consequently if the agreement is binding upon the two riparian states.

The agreement is “in written form”, according to article 2 litra a of the Vienna Convention on the Law of Treaties. It regulates the allocation of water between the two states, and by signing and ratifying the treaty; the two parties have clearly had the intention of being bound by its provisions. The agreement is thereby also “governed by international law”.

The treaty is binding upon the two riparian states.

Subsequently the point at issue is whether the “Joint Minutes” between Iraq and Syria allocates the water equitably.

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<sup>192</sup> Joint Minutes concerning the provisional division of the waters of the Euphrates River, article 1

Article 1 of the “Joint Minutes” states that the “Iraq water share on the border region between Iraq and Syria is 58 % as a fixed annual total percentage [...] of the water of Euphrates Rivers allowed to pass in Syria through the border with Turkey, and the Syrian share of water is the remainder quantity 42 % of the water of Euphrates River allowed to pass through the border between Turkey and Syria”.

The article does not mention basic legal rights to the watercourse directly, but by agreeing to share the water the parties implicitly acknowledge each others right to utilize the watercourse. This differs from the agreement between Syria and Turkey, where Turkey agrees to let a minimum amount of water flow into Syria. In this latter agreement, the amount of water does not reflect any acknowledgment of rights, and is more an expression of political will. While a 58-42 % division of the river’s flow indicates recognition by Syria, as the upstream state, of the needs and rights of the downstream state. Although not explicitly acknowledging the basic rights to the utilization of the watercourse, the agreement is neither in disharmony with applicable international law.

Like the Syrian-Turkish agreement above, the “Joint Minutes” is also a “provisional division”. As stated in paragraph two of the minutes, the agreement was reached in order to “facilitate the fulfilment of [both parties’] common wish [of] reaching a trilateral agreement with Turkey around the division of the waters of Euphrates River”. The agreement does thereby not establish any definite allocation of the waters. The quantity of water allotted between the two parties will depend on the amount flowing from Turkey into Syria.

As was the case for the Syrian-Turkish agreement, it is difficult to determine whether the actual allocation of the water between Syria and Iraq is equitable.

The most accurate conclusion is thereby that the “Joint Minutes” between Iraq and Syria is not in disharmony with international law.

## **5.4 Views on sovereignty and equitable use**

### **5.4.1 Turkey’s claim for sovereignty**

In the “Turkey Water Report” the Turkish General Directorate of State Hydraulic Works declares that “Turkey is of the view that each riparian country in a transboundary system has the sovereign right to make use of the waters in its territory”.<sup>193</sup> Subsequent to this declaration, the report acknowledges the principles of non-harmful use and equitable utilization, but the principle of state sovereignty seems nevertheless to be the point of departure for Turkey’s water politics. In its conclusion, the report confirms this priority by listing the same three principles in the above-mentioned order. Similarly, the Turkish delegate to the UN General Assembly expressed this view during the UNWC voting, by claiming that the convention did not “make any reference to the indisputable principle of the sovereignty of the watercourse States over the parts of international watercourses

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<sup>193</sup> Turkey Water Report, 2009, page 48

situated in their territory”.<sup>194</sup> Turkey also objected towards this during the adoption of the final version of the draft articles to the convention.<sup>195</sup>

Although the principle of state sovereignty is obvious in international law, Turkey protests against the lack of explicit mentioning of this principle in international agreements. As expressed in the national water report, Turkey ranks the principle of state sovereignty above the principle of equitable utilization. Although it is evident that a claim for sovereignty can hinder the equitable utilization in practice, an interesting question is whether such claim for sovereignty can present a legal obstruction for an equitable allocation of the water of the Tigris-Euphrates watercourse.

As stated in the “Lake Lanoux”-arbitration, a common conception of the principle of state sovereignty is that it “plays the part of a presumption [and must] bend before all international obligations”. In this sense, the territorial sovereignty is central when a matter is unregulated. Sovereignty is a quality granted to sovereign states through international agreement and the same quality is restricted through other obligations. Concluding a treaty is thus a proportional waiver of sovereignty. Hence, the principle of state sovereignty differs in nature from the principle of equitable utilization; sovereignty is presumed where nothing else is agreed, and is negatively delimited, while the principle of equitable utilization is positively delimited.

In the “Treaty for Amazonian Cooperation”, the parties agree in article IV that “the exclusive use and utilization of natural resources within their respective territories is a right inherent in the sovereignty of each state and that the exercise of their right shall not be subject to any restriction other than those arising from International Law”.<sup>196</sup> The principle of sovereignty is here affirmed explicitly as an unrestricted right belonging to all the watercourse states, but the treaty acknowledges that the sovereignty is restricted by principles of international law. The wording of the article implies that principles of international law are positive and perceptible regulations, while the sovereignty is an underlying right and thus negatively defined. The reference to “International Law” in the Amazonian Cooperation-treaty refers to all kinds of international law - also customary principles like the principle of equitable utilization - as accepted restrictions on the state sovereignty. In these two examples, the claim for sovereignty can not present a legal obstruction for the equitable utilization.

By admitting the principle of sovereignty such an explicit priority, Turkey accords it dominance over the principle of equitable utilization, so that the latter must adjust to the first. Turkey thus says that the principle of equitable utilization apply as long as it does not *confine* the principle of state sovereignty in any considerable manner. This order of priority differs from the common conception, since Turkey seems to define the principle of sovereignty positively, as a right that can not be significantly repressed by other principles of international law. As stated by Salman, this “notion indicates a total failure to

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<sup>194</sup> A/51/PV.99, page 5

<sup>195</sup> A/C.6/51/SR.62, page 12

<sup>196</sup> Parties to the Amazonian Cooperation-treaty are Bolivia, Brazil, Colombia, Ecuador, Guyana, Peru, Suriname and Venezuela

comprehend the basic rules of contemporary international water law that have long rejected the principle of absolute territorial sovereignty”.<sup>197</sup>

Interestingly, in the Turkish-Bulgarian cooperation treaty, the sovereignty of the states is not mentioned, and the treaty refers to the cooperation in common water management “for the benefit of the two Contracting Parties” and projects that “will ensure new mutual benefits and conditions for the two Contracting Parties”.<sup>198</sup> The main focus of the treaty is the common management and benefit, in accordance with “the principles of international law and good-neighbourly relations”.<sup>199</sup> Bearing in mind that Turkey is a downstream state on the Meric and its tributary the Tunca, it is interesting to observe that Turkey concluded a treaty that acknowledges equal rights to both the upstream and the downstream state in the utilization of the river. This inconsistency in practice reveals recognition of general principles of international law, and that the refusal to employ these in the Tigris-Euphrates basin may be a question of political will and economic loss.

Conclusively, the principle of equitable utilization and the principle of state sovereignty are different in nature, and the former is a positively defined obligation of international law that has the power to restrict the state sovereignty. When Turkey accepts this understanding towards Bulgaria, it can easily be interpreted as proof of the difficult political and economic aspect of the utilization of international watercourses. Nevertheless, the principle of state sovereignty is a quality that is restricted by other international principles and obligations, and it can thereby not present a legal obstruction for an equitable allocation of the water of the Tigris-Euphrates watercourse

The Turkish emphasis on the supremacy of the state sovereignty is thereby not in accordance with applicable international law.

## 5.4.2 Iraq’s claim for absolute integrity

As the downstream riparian to both the Euphrates and the Tigris, Iraq is in the most vulnerable position to be affected by the utilization of its co-riparians. According to international non-governmental sources Iraq is in the midst of a severe water crisis, experiencing at the same time a steady reduction in available freshwater, and deterioration of water quality.<sup>200</sup> Water projects and increased consummation of water in Turkey and Syria can reduce the flow of the Euphrates in Iraq with as much as 90 %.<sup>201</sup> Return flow from the planned irrigation systems in Turkey and Syria also represents a serious threat to Iraq’s water quality, since nearly half of the water flowing into Iraq from the Euphrates will

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<sup>197</sup> Salman, Salman M. A., “The United Nations Watercourse Convention Ten Years Later: Why Has its Entry Into Force Proven Difficult?”, *Water International*, Vol. 32 No. 1, March 2007, pages 1-15 (page 12)

<sup>198</sup> Agreement between the Peoples Republic of Bulgaria and the Republic of Turkey concerning Co-operation in the Use of the Waters of Rivers Flowing through the Territory of Both Countries, articles 1 and 5

<sup>199</sup> Ibid, preamble, fourth paragraph

<sup>200</sup> UNESCO Office for Iraq: <http://www.unesco.org/new/en/iraq-office>; see also Ahmmad, 2010, pages 44-45

<sup>201</sup> Klot, 1994, page 146



have been in contact with pesticides and fertilizers.<sup>202</sup> Consequently, Iraq is in great need of a trilateral agreement over the utilization of the Tigris-Euphrates watercourse.

Until the 1960's, Iraq was the only riparian who used the water from the twin rivers in any extensive manner. The Turkish and Syrian dam projects in the 1960-70's became a threat to the Iraqi water supply, and were subject to massive protest from the Iraqi authorities.<sup>203</sup> Iraq then claimed the theory of absolute territorial integrity, which protects the lower riparian's interests at the cost of the upper riparians.<sup>204</sup>

As seen earlier, the theory of absolute territorial integrity was rejected in the "Lake Lanoux"-arbitration and has not been given recognition since. The arbitration tribunal concluded that "the rule that States may utilize the hydraulic power of international watercourses only on condition of a *prior* agreement between the interested States cannot be established as a custom, even less as a principle of law". The lower riparian can thus not demand that the upper riparians seek its consent before utilizing the parts of the shared watercourse situated in their territories. As expressed by McCaffrey, this doctrine has not "been accepted sufficiently broadly to amount to a regional, let alone an international custom".

Although not longer claimed by Iraq, the theory of absolute territorial integrity is not in accordance with international custom.

### 5.4.3 Iraq's ancient uses

Another of Iraq's main arguments has been that her ancient uses of the Tigris-Euphrates watercourse generates protected rights of utilization. In the following discussion it must be remembered that Iraq accepted the UNWC in 2001, and is, as one of the 25 parties to the Convention, correspondingly obliged to "refrain from acts which would defeat the object and purpose of [the] treaty", according to The Vienna Convention on the Law of Treaties, article 18 *litra* a. Having accepted the UNWC without any reservations, Iraq must act in accordance with the object and purpose of the convention, including its core principles – equitable utilization and the obligation not to cause harm to other watercourse states. As discussed above, in chapter 4.2, the state sovereignty is not absolute, but restricted, *inter alia*, by the principle of equitable utilization that protects both the watercourse states and the watercourse's ecosystem. Iraq is hence obliged to adjust her conception of sovereignty to harmonize with the equitable apportionment of the other riparians.

Iraq has claimed her ancient usage of the Tigris-Euphrates, which gave birth to the early civilizations, as an argument for special rights to the watercourse.<sup>205</sup> The question here is thus whether Iraq's historical use of the Tigris-Euphrates generates protected right to utilize the watercourse.

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<sup>202</sup> *Ibid*, page 164

<sup>203</sup> *Ibid*, page 108-109

<sup>204</sup> *Ibid*, page 123

<sup>205</sup> *Ibid*, page 116; Hillel, 1994, page 102; see also Turkish Ministry of Foreign Affairs, Department of Regional and Transboundary Waters, *Water Issues Between Turkey, Syria and Iraq*, Ankara, June 1996, page 15

Since no consistent state practice or treaty provision protects historic uses of a watercourse, the question must be explored through other sources of international law.

The UNWC art 6, paragraph one, emphasizes that “all relevant factors and circumstances” must be taken into account, and paragraph three establishes that these relevant factors “are to be considered together and a conclusion reached on the basis of the whole”. The evaluation of equity is thereby unique to every watercourse and its watercourse states, based on the specific circumstances in each case.

In article 6 paragraph one *litra e*, lists “[e]xisting and potential uses of the watercourse” as relevant factors for the determination of equity. The rule thus refers both to the utilization that is established and accustomed, *and* to the prospective or planned utilization. As pointed out by the ILC working group, the reference to both types of uses is done to “emphasize that neither is given priority, while recognizing that one or both factors may be relevant in a given case”.<sup>206</sup> However, by “[e]xisting uses” is clearly meant the *present* utilization of the watercourse, as opposed to the anticipated. Historical uses, on the other hand, are earlier forms of utilization and development of a watercourse, uses that will generally have changed greatly through the centuries. The protection of existing uses is reasonable since a state may face great difficulties if its utilization of a watercourse easily could be hindered or undermined by any project from another watercourse state. “Existing [uses]” in the UNWC article 6 paragraph one *litra e* does thereby not include historical uses, and does not generate any protected rights.

On the contrary, as stated by the ILC, a demand for allocation based on “natural” or “historical” rights “amounts to exercising a veto on the rights of upper riparians to reasonable and equitable shares of the waters of common rivers.”<sup>207</sup> Giving priority to historical uses of a watercourse could thereby cause legal harm to the co-riparians, since it would affect their possibilities to exploit the resources on their territories. A protection and priority of historical uses would thus be inconsistent with the principle of equitable utilization, and accordingly also with customary international law.

McCaffrey points out that downstream countries usually are “flatter, and thus better suited for agriculture” while upstream countries are more mountainous and have had “few ways in which to develop their water resources before the advent of large dams and hydroelectric power”.<sup>208</sup> Consequently, lower riparians generally develop their water resources earlier than upper riparians. This is also the case of the Tigris-Euphrates watercourse. Both rivers rise in a mountainous terrain in the south of Turkey, where the climate is cold and the rivers barely accessible, whereas the watercourse’s landscape in Iraq is flat and warm with fertile soil that accordingly makes it easy to access and utilize the watercourse. Historical utilization is thereby often connected to the watercourse states’ position on the watercourse, and their economic development. But as some claim – the economic development of the watercourses is also highly *dependent* on their ability to utilize the watercourse early. Consequently, a protection of historical uses would encourage a “race to the river” and [reward] the winner with absolute protection,

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<sup>206</sup> ILC Yearbook 1994, volume II part two, page 101

<sup>207</sup> ILC Yearbook 1979, volume II part one, page 164; see also Woldetsadik, Tadesse Kassa, *Reflecting on treaty regimes and customary rules of international watercourses law providing for utilization of the Nile River basin water resources*, Doctoral Thesis, University of Oslo, 2011, page 176

<sup>208</sup> McCaffrey, 2010, footnote 94 on page 397

regardless of the merits of either its use or the potential uses of other states, and regardless of the optimal utilization of the drainage basin as a whole”.<sup>209</sup> These regards thus speak in disfavour of the protection of historical uses in international law.

Nevertheless, historical usage of a watercourse can neither be completely unprotected in international law. This would correspond with the theory of absolute sovereignty, where a State can develop the watercourse freely within its territory, without regard to the prior, existing or potential uses of other watercourse states. As seen in chapter 4.3, this theory has been rejected as a ruling principle of international law. The most reasonable solution is thereby that the protection of historic uses is determined through an evaluation of equitable utilization, in light of the other circumstances and relevant factors.<sup>210</sup>

Iraq’s historical use of the watercourse does not generate protected right to utilize the watercourse.

On this matter, the Iraqi argument is not in accordance with international law.

#### **5.4.4 Turkey’s interpretation of “equitable utilization”**

Although officially acknowledging that the principle of equitable utilization is a ruling principle of international law, Turkey has differing interpretations of its contents. The “Turkey Water Report”, states that “transboundary waters should be used in an equitable, reasonable and optimal manner”.<sup>211</sup> Bearing in mind the Turkish definition of watercourses, this statement concerns watercourses that cross a border. According to the Turkish definition, equitable use means “the efficient and effective utilization of water, including the application of demand management principles, the use of modern water infrastructure and the implementation of water-saving irrigation techniques”.<sup>212</sup> A preliminary question is thereby whether the Turkish interpretation of the term equitable utilization is principally in accordance with the international definition.

As seen earlier, equitable utilization does not mean sharing the watercourse equally between its riparians, but is based on an evaluation of several different factors. The UNWC article 5 also states that a watercourse shall be used and developed “with a view to attaining optimal and sustainable utilization thereof and benefits therefrom”. Optimal and sustainable use of the watercourse is the preeminent measure of equitable utilization. The Turkish definition of equitable utilization as “efficient and effective” utilization of water seems to focus largely on the economic perspective of the utilization, and less on the environmental concerns. The ILC comments in relation to article 5 that attaining optimal utilization and benefits does not refer to “the “maximum” use, the most technologically efficient use or the most monetarily valuable use [but rather] implies attaining maximum possible benefits for all watercourse States and achieving the greatest possible satisfaction for all their needs, while minimizing the detriment to, or unmet needs of, each”.<sup>213</sup> This is

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<sup>209</sup> Ibid, page 397

<sup>210</sup> Ibid, page 399

<sup>211</sup> Turkey Water Report, 2009, page 48

<sup>212</sup> Ibid

<sup>213</sup> ILC Yearbook 1994, volume II part two, page 97

also upheld in article 6, where the “[f]actors relevant to equitable and reasonable utilization” includes hydrological, social, environmental, economical and geographical factors.

The Turkish emphasis on modern water infrastructure and water-saving techniques will contribute to a more optimal utilization of the watercourse, since such technology can reduce the watercourse states’ quantitative use of water without changing their utilization. As Turkey has new and modern dams and water management projects of her own, this claim is mainly addressed to her downstream riparians who “are wasting a lot of water and do not (therefore) need 500m<sup>3</sup>/s”.<sup>214</sup> Efficient utilization is clearly a part of the equitable utilization. But the Turkish interpretation does not mention the sustainable utilization as an aim for the water management. Neither does the Turkish Water Report acknowledge the co-sovereignty of all the watercourse states and the need for cooperation amongst them.

The Turkish focus on economic factors in defining equitable utilization is thus not principally in accordance with the international definition.

Another topic of discussion is the relationship between the principle of equitable utilization and the obligation not to cause harm to other watercourse states. Turkey claims that the principle of equitable utilization has primacy above the no-harm principle. One of Turkey’s main objections against the UNWC was that it not “clearly established the supremacy of the fundamental principle of equitable and reasonable utilization over the obligation not to cause significant harm”.<sup>215</sup>

The pivotal question is therefore if the principle of equitable utilization enjoys such primacy above the obligation not to cause harm to other watercourse states.

An essential difference between these two principles is the interests they protect. The no-harm principle protects a watercourse state against *factual harm* deriving from other states’ utilization of the watercourse. Factual harm can thus be caused by a deterioration of water quality, or a change in water quantity such as draught or flood. The principle of equitable utilization protects the watercourse states against *legal harm* from other watercourse states, as when one state’s use of the watercourse is a hinder for another watercourse state’s actual and potential use of its rightful share of the water resources.

The no-harm principle is codified in art 7 first paragraph of the UNWC, which requires the watercourse states to “take all appropriate measures to prevent the causing of significant harm to other watercourse States”. The wording of the article indicates that the obligation is relative, and subject to analysis. The article does not prohibit all harm causing activities, it merely obliges them to *prevent significant harm* to other watercourse states; and thus acknowledges that certain harm-causing activities *may* be accepted. This point of departure is strengthened in the second paragraph of the article, which regulates the duties of the performing state “[w]hen significant harm nevertheless is caused”. The no-harm principle is thereby not a strict obligation to restrain from harm causing activities, but rather an inducement not to cause significant harm, or as put by the ILC; an “obligation of due diligence”.<sup>216</sup>

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<sup>214</sup> Allan and Malla, 1995, page 208, quoting Tefvik Okyayuz from the Turkish foreign ministry

<sup>215</sup> A/C.6/51/SR.62, page 12

<sup>216</sup> ILC 1994 Yearbook, volume II part two, page 103

If the principle of equitable utilization or the no-harm principle shall have primacy over the other, the superior principle must give a wider protection of the rights of the concerned watercourse state than the other principle does. For instance must the no-harm principle in such a case protect against significant harm deriving from another watercourse state's utilization, although the utilization otherwise would be reasonable and equitable. And the principle of equitable utilization must, in its turn, permit activities that cause significant harm to another watercourse if the utilization on the whole is equitable and reasonable.

One argument in favour of Turkey's view is the reality of the UNWC article 7. When its paragraphs are read combined, the article obliges the watercourse states to take all appropriate measures to prevent the causing of significant harm, but acknowledges at the same time that such harm nevertheless *might* be caused, and that the performing state in such a case must eliminate or mitigate the harm, and "where appropriate, to discuss the question of compensation". When significant harm *in some cases* can be tolerated, the condition must be that the other aspects of the same utilization otherwise is equitable and reasonable, because significant harm could not be tolerated if the utilization causing the harm was inequitable, and the equity of the utilization is thereby a *primary necessity*. The structure and wording of the UNWC may thus indicate a primacy of the principle of equitable utilization above the no-harm principle. Since the obligation not to cause harm is relative and must be determined in relation to each concrete case, it seems to be inter-related to the principle of equitable utilization. As harm may be tolerated under certain circumstances, McCaffrey points at the role of the obligation as a factor in the determination of equitable utilization; "significant harm may have to be tolerated in order to achieve an overall regime of equitable and reasonable utilization".<sup>217</sup>

In the "Gabčíkovo-Nagymaros Project"-case the ICJ was asked to decide whether the Slovakian utilization of the Danube River constituted a breach of international law. As Slovakia continued the project unilaterally, Hungary suffered both factual damage - by being deprived of water, and legal damage - by being deprived of its legal right to the water. However, the Court based its judgement solely on the principle of equitable utilization. After citing the River Oder-judgement and referring to the UNWC, the Court concluded that Slovakia, "by unilaterally assuming control over a shared resource, and thereby depriving Hungary of its right to an equitable and reasonable share of the natural resources of the Danube", had "failed to respect the proportionality which is required by international law".<sup>218</sup> In this manner, the Court employs the obligation not to cause harm as a factor in, or as a complement to, the determination of equitable utilization. The Court does not treat the no-harm obligation as an independent principle equal in strength to the principle of equitable utilization, but rather gives the principle of equitable utilization primacy above the no-harm obligation.

The ILC's Commentary on the draft convention also supports this view. Here the Commission states that the UNWC article 7 sets forth "a process aimed at avoiding significant harm as far as possible while reaching an equitable result in each concrete case".<sup>219</sup> Further, the Commission's approach was based partly on the conclusion that "article 5 alone did not provide sufficient guidance for States in cases where harm was a

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<sup>217</sup> McCaffrey, 2010, page 436

<sup>218</sup> "Gabčíkovo-Nagymaros Project"-case, ICJ 1997, page 56

<sup>219</sup> ILC 1994 Yearbook, volume II part two, page 103

factor". The overall aspiration thus seems to be the equitable result, with the avoidance of significant harm as an important factor on the way.

As shown by the examples above, the principle of equitable utilization may embody the no-harm principle since avoidance of factual harm is an element in determining the equitable. At the same time, the utilization of a watercourse might be equitable *although* significant factual harm is caused. Oppositely, the obligation not to cause harm cannot overrule the principle of equitable utilization. If extensive factual harm is caused to such a degree that the harm-causing utilization is no longer equitable, the no-harm principle is a component in that evaluation. Whereas if the harm is significant but the utilization still equitable due to other factors, the no-harm principle does not have supremacy above the principle of equitable utilization.

However, the legal reality of this argument is doubtful, and might be based on a misconception of the two principles, as argued by Salman.<sup>220</sup> The no-harm principle has, by some, been interpreted as to favour downstream states since it protects their existing uses, while the principle of equitable utilization has been favoured by upstream states since it accords them the right to utilize the watercourse without too much concern for the damage it *might* cause to the downstream states. However, as stated by Salman, a common misconception of international water law in general and the UNWC in particular, is that "harm can only "travel" downstream, and it is not recognized that upstream states can also be harmed by activities by downstream states".<sup>221</sup> But it is important to bear in mind that the principle of equitable utilization protects every watercourse states *legal* right to utilize a watercourse, and that a progressive lower riparian thus can cause harm to a poor upstream riparian by developing and consuming the entire water supply. The upper riparian would thus be excluded from the possibility of developing the watercourse within its territory, and suffer legal harm. This aspect of the principle "creates a clear linkage between the principle of equitable utilization, and the obligation not to cause harm".<sup>222</sup> Consequently, a claim for the supremacy of the principle of equitable utilization above the no-harm principle makes little sense, and could probably not be given any legal importance. Turkey's claim is not mistaken, but legally superfluous.

The principle of equitable utilization enjoys primacy above the no-harm principle. But since the distinction does not evoke any legal consequences for the parties to the Tigris-Euphrates watercourse, it is difficult to determine whether the Turkish argument is in harmony with applicable international law.

Having discussed the problems and disagreements, it is time to look at what the parties proposes as possible solutions to the Tigris-Euphrates situation, and what they actually agree in:

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<sup>220</sup> Salman, 2007

<sup>221</sup> Ibid, page 9

<sup>222</sup> Ibid

## **5.5 The proposed three-stage solutions**

During the first period of the Joint Technical Committee, the three watercourse states set forth plans for solving the disagreement over distribution and management of the Tigris-Euphrates watercourse. Although bearing clear resemblance, the three proposals have basic differences and none of them have been trilaterally accepted. Even though they were set forth two decades ago, the solutions still have interest as reflections of the parties' understanding of the situation and of how the allocation could possibly be managed. This last subchapter of the thesis will therefore analyze and compare the solutions in light of the principle of equitable utilization.

### **5.5.1 Turkey's three-stage plan**

Turkey's proposed solution to the allocation of the Tigris-Euphrates watercourse was first presented for the JTC in 1990, and later during bilateral talks with Syria and Iraq in 1993.<sup>223</sup> The plan is as follows:

“Stage 1 – Inventory studies for Water Resources

- i. To exchange the whole available data (levels and discharges) of the selected gauging stations [...] Experts of the three countries shall agree upon the nomination of the representative meteorological stations in Tigris-Euphrates Basin and exchange data on them as well as the whole available data concerning evaporation, temperature, rainfall, snowfall (if available) on monthly basis for the representative stations.
- ii. To check the above mentioned data
- iii. To measure jointly the discharges at the above mentioned stations in different seasons, if necessary
- iv. To evaluate and correct the measurements
- v. To exchange and check data about the quality of water (if such data is not available, to exchange it after it is obtained)
- vi. To calculate the natural flows at various stations after the estimation of water uses and water losses at various sites.

Stage 2 – Inventory studies for Land Resources

- i. To exchange information concerning soil classification methods and drainage criteria used and practiced in each country.
- ii. To check the soil conditions for projects, planned, under construction and in operation.
- iii. If the studies indicated under item (ii) could not be carried for reasons acceptable to all sides, soil categories shall then be determined to the extent possible.
- iv. To study and discuss the crop-pattern determined according to soil classification and drainage conditions for projects, planned, under construction and in operation.
- v. To calculate irrigation and leaching water requirements based on the studies carried out in the above mentioned items for the projects planned, under construction and in operation.

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<sup>223</sup> Bağış, 1991, page 579

### Stage 3 – Evaluation of water and land resources

- i. To discuss and determine irrigation type and system for the planned projects aiming at minimizing water losses and to investigate the possibility of the modernization and rehabilitation of the projects in operation.
- ii. Based on the project-wise study under item (2 v.) to determine the total water consumption of the whole projects in each country including municipal and industrial water supply, evaporation losses from reservoirs and the conveyance losses in irrigation schemes.
- iii. To set up a simulation model which presents a river system schematically to analyze the water demand and supply balance, considering the possibility of transferring water from the Tigris to the Euphrates.
- iv. To discuss the methods and criteria for determining economic viability of the planned projects".<sup>224</sup>

The Turkish plan is based on the conception of the Euphrates and Tigris as one single watercourse, and that the twin rivers' resources should be analyzed and distributed jointly.<sup>225</sup> The analysis and calculations in the plan is also meant to be monitored by an independent committee.

### 5.5.2 Syria's three stage plan

Syria's solution is similar, but slightly more mathematical than Turkey's:

- “1. Each riparian declare its water demand separately
2. The capacities of both rivers are calculated (in each riparian country)
3. The water is shared according to the stated figures. But if the total demand exceeds the total supply, the exceeding amount should be deducted from the demand of each riparian country”.<sup>226</sup>

Syria considers the Tigris-Euphrates watercourse to be international, and thereby subject to the rules of international law. The Syrian proposal thus also reflects the insistence upon equitable utilization as the ruling principle of international law.

### 5.5.3 Iraq's three stage plan

The Iraqi proposal also bears resemblance to the two others, and is based on a mathematical formula like the Syrian:

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<sup>224</sup> Ministry of Foreign Affairs, Department of Regional and Transboundary waters, *Water issues between Turkey, Syria and Iraq*, Ankara 1996, page 21-22

<sup>225</sup> Ibid

<sup>226</sup> Salman, M., *The Euphrates and Tigris: South Boundary Utilization and Views*, [ftp://ftp.fao.org/agl/iptrid/conf\\_germany\\_04.pdf](ftp://ftp.fao.org/agl/iptrid/conf_germany_04.pdf), page 12



- “1. Each riparian notifies its water demand for each of its completed projects, projects under construction and planned projects
1. Hydrologic data is exchanged on the Euphrates and Tigris waters
2. The JTC calculates the demands of water for projects under operation, then for projects under construction and finally for the planned projects. The determination of needs for these projects shall then be made separately”.<sup>227</sup>

Iraq has earlier been opposed to the conception of the twin rivers forming a single watercourse, and it is not clear whether the plan means to examine the rivers jointly or separately.

#### 5.5.4 Comparison of the plans

In comparing the proposed plans, the object is naturally to estimate whether they are in accordance with the principle of equitable utilization.

A preliminary observation shows that all three plans are based on the needs of the riparian states. Syria’s and Iraq’s plans invite the states to identify their need for water before examining the available resources, while Turkey leaves the determination of needs to an independent committee. However, it may seem particular that all three plans are based on determining the needs of the watercourse states, and not on determining their rights. According to Wolf, this is a common approach in international watercourse treaties. A reason for this may be “that rights are not quantifiable and needs are”.<sup>228</sup> Of course it is easier to reach a concrete distribution of the resources when each state claims its required amount of water. Another probable reason is that the level of mistrust and conflict between the watercourse states urges the states to secure their water supply through stating their actual needs rather than their claimed rights. Evaluation of equity on the basis of the watercourse states’ needs is therefore natural and current in the management of international watercourses.

An important aspect of equitable utilization is that the consummation must be “consistent with adequate protection of the watercourse” and the aim for the “optimal and sustainable utilization” of the watercourse is also part of the equitability.<sup>229</sup> In order to represent an equitable solution, the proposed three-stage plans must take account of this aspect.

Although all three solutions are based on investigation of the available supply, only Turkey seems to encourage a more scrutinous research of the water and land resources, in order to find a justifiable form and degree of utilization. Whereas the Iraqi and Syrian solution suggests a determination of the available resources and an allocation of these between the riparians, the Turkish suggestion additionally seems to preserve the interests of the watercourse itself. In response to the two other plans, Turkish authorities have claimed that “the concept of “sharing the common resources by mathematical formula” represents a complete contradiction with the principle of “equitable utilization” which is the core

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<sup>227</sup> Ibid, page 13

<sup>228</sup> Wolf, A. T., “Criteria for equitable allocations: the heart of international water conflict” *Natural Resources Forum*, no. 23/1999, pages 3-30 (page 10)

<sup>229</sup> UNWC article 5, paragraph 1

exercise in this field.”<sup>230</sup> Although strongly expressed by Turkey, equitable utilization of a watercourse *is* also a sustainable one and this requires the consideration of the interests of both the watercourse *and* the ecosystem in determining the allocation of a watercourse. A determination based solely on the needs of the concerned states through a mathematical formula could cause overuse and exhaustion of the water resources. In this aspect the Turkish proposal harmonizes both with the UNWC’s obligation to protect the watercourse, and also with the global focus on sustainable development, and seems to be closer to applicable international law than the two others.

In the Turkish proposal, the investigation of resources and the determination of consumption will be carried out by a joint body.<sup>231</sup> This will oblige the watercourse states to abandon some of their sovereignty, but secures at the same time a neutral management of resources with focus on the optimal utilization, and not on the maximum benefit for each watercourse state. As set forth in the Turkish plan, optimal utilization also includes rehabilitation and modernization of existing projects to make the consumption more efficient. This approach has been coolly received by the two downstream states, since it would entail great economic challenges for them. However, as the optimal use plays an important part in the determination of equitable utilization, securing the efficiency of existing water management projects is cardinal. The Turkish plan seems more in harmony with the principle of equitable utilization in this particular matter.

Also Iraq suggests the creation of a joint committee in her proposal. But whereas Iraq will charge the committee with the responsibility to determine the allocation of water, Turkey additionally wants the committee to carry out the necessary investigation of the resources. As the following examples will show, both the study of the watercourse and the administration by a joint committee are common ingredients in other international watercourse treaties:

One of the aims of the Rhine-Convention is to achieve a “sustainable development of the Rhine ecosystem” and to ensure “environmentally sound and rational management of water resources”.<sup>232</sup> The convention also accords the Rhine river commission responsibility for preparing “international measuring programmes and studies of the Rhine ecosystem and make use of their results”, to “make proposals for individual measures and programmes of measures” and to “evaluate the effectiveness of the actions decided upon, notably on the basis of the reports of the Contracting Parties and the results of the measuring programmes and studies of the Rhine ecosystem”.<sup>233</sup> Likewise, the Mahakali Treaty ensures the creation of a river commission whose main functions will be to “seek information on and, if necessary, inspect all structures included in the Treaty and make recommendations to both the Parties to take steps which shall be necessary to implement the provision of this Treaty [and] recommendations to both the Parties for the conservation and utilization of the Mahakali River as envisaged and provided for in this Treaty”.<sup>234</sup>

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<sup>230</sup> Ministry of Foreign Affairs, *Water issues between Turkey, Syria and Iraq*, page 18

<sup>231</sup> Kibaroglu, Aysegul, “Water for Sustainable Development in the Euphrates-Tigris River Basin”, paper presented at the 2nd Asia Pacific Association of Hydrology and Water Resources Volume II, July 2004, Singapore, <http://www.gap.metu.edu.tr/html/yayinlar/waterforsustainableAKibaroglu.pdf> (page 5)

<sup>232</sup> Convention on the Protection of the Rhine, 1999, article 3 paragraph 1 and litra e

<sup>233</sup> Ibid, article 8 paragraph 1, litra a, b, and d

<sup>234</sup> Mahakali Treaty, article 9 paragraph 1 and 3 litra a and b

The parties to the Amazonian Cooperation Treaty have also submitted to the “exchange of information and [to] prepare operational agreements and understandings” in order to produce “equitable and mutually beneficial results and achieve also the preservation of the environment and the conservation and rational utilization of the natural resources”.<sup>235</sup> A joint commission is also present in the Mekong River Basin, and its functions are, inter alia, to “regularly obtain, update and exchange information and data necessary to implement [the present agreement]” and “to conduct appropriate studies and assessments for the protection of the environment and maintenance of the ecological balance of the Mekong River”.<sup>236</sup>

The suggestions for a neutral body of administration is thus clearly in harmony with international practice in the field, and with view to the conservation and protection of the watercourse, the scientific study and research should also be carried out by the committee. Conclusively, both the Iraqi and the Turkish suggestion is in harmony with international law in this matter, although Turkey’s plan offers a broader and more sustainable solution.

Yet another factor in the examination of the plans is the available provision of water. It has become clear during the last decades that the water supply in the Tigris-Euphrates watercourse is insufficient for the total demand of the three watercourse states.<sup>237</sup> Since they cannot all satisfy their existing and planned needs, each riparian must reduce its needs in order to meet the available supply. The method of this reduction is the main difference between the Iraqi and the Syrian proposal. Syria suggests that the total amount of available water should be compared to the total amount of water needed by the three states, and if the need exceeds the supply, the exceeding amount should be “deducted from the demand of each riparian country”. The proposal leaves the specific reductions to the appreciation of each watercourse state, which is thereby free to decide whether it will reduce the existing or the potential uses. Although the Syrian proposal is equitable on account of the watercourse states, it does not take into consideration the interests of the watercourse and its ecosystem and can thereby not be in total harmony with the principle of equitable utilization.

Iraq, on the other hand, suggests that the calculation of demand and supply shall be monitored by the JTC, with priority to the projects under operation, before the projects under construction and lastly the planned projects. This order of priority is understandable, since all states would favour the security of their existing water consumption. Turkey makes the same categorization in stage 2 of her plan. However, the UNWC art 6 *litra e* states both “existing and potential uses” as factors in the determination of equitable utilization. According to the ILC, the equality between the uses is meant to “emphasize that neither is given priority, while recognizing that one or both factors may be relevant in a given case”.<sup>238</sup> The ILC thus declines any inherent order of priority between existing and potential uses of a watercourse, but acknowledges that one *may* be more relevant than the other, dependent on the actual situation. A priority of usage would thereby not contradict the principle of equitable utilization, if such an order of priority was acknowledged by all parties. The Iraqi proposal reflects her position on the watercourse, and the threat from the Turkish dam-projects, but it is not in disaccord with the principle of equitable utilization.

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<sup>235</sup> Treaty for Amazonian Cooperation, article 1 and paragraph 1

<sup>236</sup> Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin, 1995, article 24 paragraph B and C

<sup>237</sup> *Ibid*

<sup>238</sup> ILC Yearbook 1994 volume II part two, page 101

In spite of some differences, the three suggestions do not bear any fundamental contradictions. The main dissimilarity between them is the emphasis on independent research and environmental protection. However, none of the three-stage plans are in clear disharmony with the principle of equitable utilization.

The three plans reveal that a will to cooperate does in fact exist between the three watercourse states, along with the idea to manage the watercourse jointly. Common management is thereby a possible solution for an equitable utilization of the Tigris-Euphrates watercourse. This is also one of the themes in the next and last chapter that summons up the findings from chapters 4 and 5, and looks tentatively towards the future.

## 6 Concluding remarks

The three riparian states to the Tigris-Euphrates watercourse agree that the principle of equitable utilization is a ruling principle with regard to the usage of international watercourses. But the parties do not have the same understanding of the contents and extent of the principle, or of its applicability. As the parties disagree on the definition of the Tigris-Euphrates as an international or transboundary watercourse, they also disagree on whether the principle of equitable utilization applies on its utilization.

This is one of the central problems in the Tigris-Euphrates conflict; the three riparians cannot conclude any cooperative allocation agreement because they disagree on the basic principles that should constitute the foundation for such an agreement. And because of the turbulent history in the region, and its increasing water scarcity, the three states are more focused on securing their domestic water supply, than to protect the resource and the mutual benefit. As long as no trilateral agreement exists, the three watercourse states will continue to develop individual water management projects, which will further reduce the amount of water that is available for sharing. The two main ingredients for the future cooperation are therefore *trust* and *agreement on the meaning of the basic principles and definitions*.

To start with the latter, the basic principles and definitions of the law of international watercourses are, as seen above; the definition of the watercourse as a system of waters and the international watercourse as a watercourse that is in physical contact with the territory of more than one state; the principle of equitable utilization as the ruling principle for the allocation of the watercourse, according each watercourse state an equal right to utilize the watercourse, implying a duty to cooperate, and demanding a holistic evaluation of the shared usage based on all relevant factors; in virtue of being a principle of applicable international law, the principle also restricts the sovereignty of the riparian states and their free utilization of an international watercourse on their territory.

These principles and definitions are customary international law, and thereby applicable to all members of the international community. A condition for an agreement between the three states is naturally that they accept these principles and definitions, and let them constitute the basis for the agreement. Turkey must thus accept that the Tigris-Euphrates is an international watercourse, which also implies that the principle of equitable utilization restricts Turkey's freedom to utilize the watercourse on her own territory. And Iraq must accept that the Tigris and the Euphrates rivers together forms one single watercourse and must be treated as a whole. Naturally, these basic understandings are economically disadvantageous for Turkey and Iraq; treating the watercourse as transboundary would give Turkey a larger freedom to exploit its resources, and treating only the Euphrates as an international watercourse would allow Iraq to utilize the Tigris freely and undisturbed. These are not insignificant economic losses, and the states' resistance towards them is understandable. Iraq has for instance utilized the Tigris quite independently for centuries, since the river is mainly situated on Iraqi territory. However, by agreeing on the basic principles, the economic disadvantages will be an important factor in the determination of the equitable utilization, since the definitions would interfere with Turkey's and Iraq's existing uses and potential uses of the watercourse. But in a difficult neighbouring climate, it is difficult to renounce this amount of sovereignty, which brings up the other central ingredient for an agreement, namely *trust*.

Cooperation is fundamental for an equitable utilization of the Tigris-Euphrates watercourse. And successful cooperation requires that the parties trust each other, and that old rivalry and power structures are prevented from influencing the agreement. One possible way to achieve this is by third party-negotiation, as was carried out by the United States towards Jordan and Israel in 1954 through the Johnston Plan, and in the 1994 peace treaty between the same parties.<sup>239</sup> Having a neutral third party to lead the negotiations and witness the agreement, could avoid mistrust among the watercourse states and ensure the fulfilment of the agreement. Nonetheless, the Turkish General Directorate of State Hydraulic Works declares in the Turkey Water Report that due to the particular "social, economic, developmental, cultural and historic aspects" of each transboundary water, "the involvement of third parties cannot be fruitful for the settlement of any disputes".<sup>240</sup> The report further states that mediation is not an option either, because "each country has its own priorities, which would only complicate the situation".<sup>241</sup> Third party negotiation or mediation is of course not an option unless all three parties agree to it.

The other possible way to reach a trustful trilateral agreement is through the Joint Technical Committee. The committee was revived in 2007, and the parties agreed in 2009 to "share data (current and historical) regarding meteorological patterns and water quality in the Tigris and the Euphrates rivers".<sup>242</sup> Although broadly formulated, the parties agree on a *common intention* to cooperate on a technical level. A similar declaration was made by Turkey and Iraq in 2011, namely to "have technical meetings for exchange of experience, data and information without any prejudice to the work within the existing trilateral cooperation framework between Turkey, Iraq and Syria".<sup>243</sup>

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<sup>239</sup> McCaffrey, 2010, page 309-316

<sup>240</sup> *Turkish Water Report*, 2009, page 47

<sup>241</sup> *Ibid*

<sup>242</sup> Kibaroglu and Scheumann, 2011, page 294

<sup>243</sup> Joint statement by the Ministers of Foreign Affairs of the Republic of Turkey and the Republic of Iraq on the Mechanism of the High Level Strategic Cooperation Council, Ankara 13 October 2011, <http://www.mfa.gov.tr/joint-statement-by-the-ministers-of-foreign-affairs.en.mfa>

The mandate for the second JTC, from 1980 to 1993, was to determine “the methods and procedures, which would lead to a definition of the reasonable and appropriate amount of water that each country would need from both rivers”.<sup>244</sup> The present JTC has started more modestly, by agreeing on the exchange of data and meteorological patterns, and maybe would reconsideration of the JTC’s mandate be appropriate. The committee could be a valuable forum for cooperation and coordination, and a means to expand the negotiation beyond the strict allocation of water. The equitable utilization of the Tigris-Euphrates watercourse is a process that extends into several other fields, for instance agriculture, trade, hydropower, reduction of poverty and prevention of waterborne diseases, to mention some. By applying a more horizontal approach, the JTC could be a broader resource management forum, and improve the socio-economic development in the river basin as a whole.<sup>245</sup>

The focus of the watercourse states and of the JTC must be on the progressive development and the mutual interests in the watercourse. A good idea could be, as suggested by Kibaroglu and Scheumann, to shift the attention from the allocation of water to the allocation of benefits.<sup>246</sup> A horizontal and regional perspective on the water management could exploit the resources more optimally and at the same time focus on sustainability and common profit. This would of course ultimately require a solid legal framework, and a renunciation of sovereignty in favour of the common benefit and common management of the watercourse. Although such a regime may seem somehow utopian in light of the present situation, determining the goals and aims of the rising cooperation could spread hope and good-will amongst the riparian states and thus help the trust and progress.

Returning to the main research question and the aim of the thesis, the main observation throughout the examination is that neither Turkey, Syria nor Iraq argues in complete harmony with the applicable international law. All three riparians have some arguments that are in accordance with the common definitions and the principle of equitable utilization, and some arguments that are not within its limits. No state’s claims are in constantly in harmony with the principle.

The most appropriate conclusion is thus that the legal arguments of the parties to the Tigris-Euphrates watercourse are partly in accordance with the applicable international law.

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<sup>244</sup> Kibaroglu, 2004, page 3

<sup>245</sup> See Kibaroglu, 2004; Ahmmad, 2010

<sup>246</sup> Kibaroglu and Scheumann, 2011, page 297

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