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The Dispute over the Status and Use of the Silala River (Chile v. Bolivia): The International Court of Justice Again Declines to Apply International Water Law

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THE DISPUTE OVER THE STATUS AND USE OF THE SILALA RIVER (CHILE V. BOLIVIA): THE INTERNATIONAL COURT OF JUSTICE AGAIN DECLINES TO APPLY INTERNATIONAL WATER LAW

*Joseph W. Dellapenna**

I. INTRODUCTION	73
II. THE SILALA RIVER CASE	74
III. AN INTRODUCTION TO INTERNATIONAL LAW	77
A. <i>The Nature of Law in General</i>	78
B. <i>Is International Law, Law?</i>	80
IV. GENERAL CONVENTIONAL AND CUSTOMARY INTERNATIONAL LAW APPLICABLE TO INTERNATIONALLY SHARED WATERS	83
V. WHAT THE COURT MIGHT HAVE DONE	85
A. <i>The Duty to Cooperate</i>	85
B. <i>The Principle of Equitable Utilization</i>	88
C. <i>The Obligation Not to Cause Significant Harm</i>	94
VI. CONCLUDING OBSERVATIONS	101

I. INTRODUCTION

On December 1, 2022, the International Court of Justice entered a judgment of sorts in the *Dispute over the Status and Use of the Silala River (Chile v. Bolivia)* (hereinafter “*Silala River Case*”).¹ The judgment is remarkable. After more

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¹ *Dispute Over Status and Use of Waters of Silala (Chile v. Bol.)*, Judgment, 2022 I.C.J. 5 (Dec. 1). “Silala” is the Bolivian name for the river; “Silola” is the Chilean name. Chile’s application to the International Court of Justice to initiate the case used the Bolivian name, Silala. Christopher R. Rossi, *The Transboundary Dispute Over the Waters of the Silala/Siloli: Legal Vandalism and Goffmanian Metaphor*, 53 STAN. J. INT’L L. 55, 56 n.1 (2017).

than six years of proceedings,² the Court declined, nearly unanimously, to decide all but one of the issues addressed in the written applications and other pleadings, the memorials, and the oral presentations of the parties. To understand this judgment and what it might portend for the future, this paper briefly summarizes the *Silala River Case* in Part II. Part III explores the sources and content of international law in general. Part IV turns to the content and potential of customary international water. Part V analyzes what the Court might have done. Part VI sets forth some concluding remarks.

II. THE SILALA RIVER CASE

The Río Silala is a small creek that arises from *bofedales* (springs) in the arid Bolivian *altiplano* (highlands) and flows some nine kilometers (about 5.5 miles) with three of the kilometers (about 1.9 miles) in Bolivia before crossing into Chile.³ It joins the Río San Pedro de Inacaliri in Chile that then flows into the Río Loa that flows to the Pacific Ocean.⁴ Before the War of the Pacific (1879–1884), the entire Río Silala was within Bolivia; that war, which pitted Bolivia and Peru against Chile, settled the current international boundaries in the region.⁵

In 1884, and again today, virtually no human settlement can be found in the basin of the Río Silala except for small military bases on each side of the border.⁶ After Chile took possession of Bolivia's Departamento Littoral (Coastal Province) making it Chile's Antofagasta province, the Chilean government promoted the exploitation of the rich mineral resources of the Atacama Desert, most of which were in Antofagasta.⁷ Part of this promotion was the chartering of the Ferrocarril de Antofagasta a Bolivia (Railroad from Antofagasta to Bolivia), a rail line that ostensibly was meant to connect Bolivia to the sea but actually served to export the production of the mines in Chile.⁸ In most global settings the Río Silala, with

² The application in the case was filed on 6 June 2016. Application Instituting Proceedings, Dispute Over Status and Use of Waters of Silala (Chile v. Bol.) ¶ 2 (June 6, 2016), <https://www.icj-cij.org/sites/default/files/case-related/162/162-20160606-APP-01-00-EN.pdf> [<https://perma.cc/5ZKM-5G8X>].

³ Chile v. Bol., 2022 I.C.J. ¶ 28.

⁴ See William E. Rudolph, *The Rio Loa of Northern Chile*, 17 GEOGRAPHICAL REV. 553, 553 (1927).

⁵ See GIORGIO ESPOSITO, *THE WAR OF THE PACIFIC* (2018). Bolivia has never entirely reconciled itself to the new borders. See Annie Murphy, *The Day of the Sea: Bolivia's Dogged Quest to Reclaim its Lost Coastline*, HARPER'S MAG., Feb. 2015, <https://harpers.org/archive/2015/02/the-day-of-the-sea/> [<https://perma.cc/N2DK-75E2>].

⁶ B.M. Mulligan & G.E. Eckstein, *The Silala/Siloli Watershed: Dispute Over the Most Vulnerable Basin in South America*, 27 WATER RES. DEV. 595, 597 (2011). Note that Bolivia has never reconciled itself to the loss of this land with its access to the sea and in 2013 applied to the International Court of Justice for a declaration that Chile was obligated to negotiate with Bolivia over that access. *Obligation to Negotiate Access to Pacific Ocean* (Bol. v. Chile), 2018 I.C.J. 507 (Oct. 1).

⁷ See e.g. Thomas F. O'Brien, *The Antofagasta Company: A Case Study of Peripheral Capitalism*, 60 HISP. AM. HIST. REV. 1 (1980); Manual Mendez et al., *Production of Subterranean Resources in the Atacama Desert: 19th and Early 20th Century Mining/Water Extraction in the Talital District, Northern Chile*, 81 POL. GEOGRAPHY 102194 (2020).

⁸ Mihajlo Vučić, *Silala Basin Dispute—Implications for the Interpretation of the Concept of*

a natural flow of about 200 liters/second (about 50 gallons/second),⁹ would hardly merit a dispute before the International Court of Justice. In the region where it occurs—the Atacama Desert, one of the driest regions of the planet¹⁰—every drop is worth fighting over.

The railroad particularly needed a steady supply of water for the boilers of its steam locomotives.¹¹ In 1908, it obtained a concession from Bolivia to channelize the flow from the springs to the Río Silala to enhance the flow down to Chile where it was used for the trains.¹² Bolivia would later claim that the waters of the springs did not naturally flow across the border,¹³ but would eventually concede that the natural flow did form the Río Silala and that the stream did cross the border.¹⁴ Because of this concession, the Court did not find it necessary to explore the meaning of “international watercourse” in its opinion.¹⁵

The railroad replaced its steam locomotives with diesel locomotives in 1961 but put the water to other uses.¹⁶ The exploitation of the water for other uses was further developed after Chile privatized its waters in the constitution reform of 1980.¹⁷ Bolivia eventually reacted, cancelling the 1908 railroad concession in 1997 on the grounds that the water had ceased being used for the purposes for which the concession had been granted.¹⁸ After cancelling the concession, Bolivia began to threaten to bring a case before the International Court of Justice, both to obtain an order that Chile cease using the water from the Río Silala and that Chile be ordered to pay compensation for the water already used despite negotiations that were carried on for about 12 years.¹⁹ Finally, Chile decided not to wait any longer for Bolivia to act and initiated the suit itself in 2016, seeking a declaration that its use was a lawful use (“equitable and reasonable utilization”) of the waters of the Río Silala.²⁰

The structure and procedures of the International Court of Justice are set forth in the Statute of the International Court of Justice,²¹ adopted as an adjunct to the

International Watercourse, BELGRADE L. REV. OCT. 1, 2017, at 91, 94.

⁹ Rossi, *supra* note 1, at 57.

¹⁰ STEPHANIE COHEN, *THE ATACAMA: THE DRIEST PLACE ON EARTH* (2010); LYNN PEPPAS, *THE ATACAMA DESERT* (2012).

¹¹ Mulligan & Eckstein, *supra* note 6, at 598.

¹² Dispute Over Status and Use of Waters of Silala (Chile v. Bol.), Judgment, 2022 I.C.J. 5, ¶ 29 (Dec. 1).

¹³ *Id.* ¶¶ 32, 34.

¹⁴ *Id.* ¶ 53.

¹⁵ *Id.* ¶ 59.

¹⁶ Rossi, *supra* note 1, at 62.

¹⁷ See CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE [C.P.] art. 24 (1980) (this provision was modified in 2021).

¹⁸ Chile v. Bol., 2022 I.C.J. ¶ 31.

¹⁹ *Id.* ¶¶ 32–38.

²⁰ *Id.* ¶¶ 25–27, 37.

²¹ Statute of the International Court of Justice art. 38 [hereinafter Statute of the I.C.J.].

UN Charter. The Statute, which limits the Court to cases brought by states,²² reveals the roots of Court in international arbitration in two provisions. First, the Court's jurisdiction depends upon explicit consent by the states involved in the litigation, either specifically for the actual litigation or more generally in terms of "compulsory jurisdiction."²³ Second, the Court, which consists of 15 regular judges, no two of whom can be nationals of the same state,²⁴ does not recuse a judge who is a citizen of one of the contending states;²⁵ instead the Statute provides that any participating state that does not have a citizen on the Court is entitled to appoint an *ad hoc* judge to sit on the case.²⁶ This might seem odd, but the premise (normal in arbitration) is that each side should have someone inclined towards their views inside the tribunal when it deliberates.

In the *Silala River Case*, jurisdiction was founded in the Pact of Bogotá by which Bolivia and Chile agreed to litigate their disputes.²⁷ Because neither State had a national on the Court, Chile appointed Bruno Simma (a German) and Bolivia appointed Yves Daudet (a Frenchman) as *ad hoc* judges.²⁸ The appointments do not seem to have affected the outcome because the decision was virtually unanimous, although Judge Simma did deliver a separate opinion to the judgment questioning the Court's reasons for declining to decide the case on its merits.²⁹

The Court follows ordinary adversarial procedures, with written pleadings, followed by written memorials, and finally oral presentations by each side.³⁰ Finally, in April 2022, the Court held hybrid hearings with some participants present in the Court and some appearing remotely.³¹ On two of the days, the Court heard from technical experts on the facts of the case.³² One need not indulge in a detailed analysis of these procedural steps because the Court ultimately declined to decide all but one of the substantive issues raised in those steps.

When the Court rendered its opinion, it took a most peculiar turn. Closely reading Article XXXI of the Pact of Bogotá, the Court found that for it to have jurisdiction there must be an actual dispute between the States involved in the case.³³ While it acknowledged that the two States had both requested a declaration

²² *Id.* art. 34.

²³ *Id.* art. 36.

²⁴ *Id.* art. 3.

²⁵ *Id.* art. 31(1).

²⁶ *Id.* art. 31(2), (3). An *ad hoc* judge does not have to be a citizen of the state that appoints her.

²⁷ American Treaty on Pacific Settlement (Pact of Bogotá) art. XXXI, Apr. 30, 1948, 30 U.N.T.S. 449 [hereinafter Pact of Bogotá].

²⁸ Dispute Over Status and Use of Waters of Silala (Chile v. Bol.), Judgment, 2022 I.C.J. 5, ¶ 6 (Dec. 1).

²⁹ *Id.* (separate opinion by Simma, J.). The only dissent was by Judge Hilary Charlesworth, who was not an *ad hoc* judge.

³⁰ Statute of the I.C.J., *supra* note 21, arts. 39–64.

³¹ Chile v. Bol., 2022 I.C.J. ¶ 20.

³² *Id.* ¶ 22.

³³ *Id.* ¶ 39. The Pact of Bogotá, *supra* note 27, art. XXXI, reads:

of their rights to use the Río Silala under customary international law,³⁴ the Court, by a vote of 15–1,³⁵ found that because the parties eventually agreed on the legal standards to be applied and the undisputed facts of the case, there was, except as to one small point, no actual dispute for the Court to decide.³⁶ The only point of law that the Court reached a conclusion on was that the States are obligated to notify and consult with each other on the use of waters of the Río Silala. Yet the Court concluded that Bolivia has not breached the obligation to notify and consult, incumbent on it under customary international law.³⁷ This left Bolivia and Chile without an actual resolution of their dispute, because the relevant legal standard, “equitable and reasonable utilization,” is open-ended.³⁸ The two States had spent considerable time (six years), money, and effort to end up without really accomplishing anything. The Court left the States to negotiate between themselves over what would be an equitable and reasonable utilization of the Río Silala.³⁹ The remainder of this Essay will explore what the Court might have done.

III. AN INTRODUCTION TO INTERNATIONAL LAW

Before turning specifically to the customary international law applicable to freshwater resources, we should examine the more general question of whether international law is actually “law.” This question often calls to mind a specific model of how law works: a sovereign acting formally to create a highly determinate rule enforced by a policeman.⁴⁰ From this arises the conclusion that the practice of law consists of identifying the commands of an identified sovereign and using those commands to achieve a desired result. By this view, international law is not law, but merely “positive morality,” because there is no sovereign issuing commands or enforcing such commands in international law.⁴¹ To help the reader to understand

In conformity with Article 36, paragraph 2, of the Statute of the International Court of Justice, the High Contracting Parties declare that they recognize in relation to any other American State, the jurisdiction of the Court as compulsory *ipso facto*, without the necessity of any special agreement so long as the present Treaty is in force, in all disputes of a juridical nature that arise among them concerning:

- (a) The interpretation of a treaty;
- (b) Any question of international law;
- (c) The existence of any fact which, if established, would constitute the breach of an international obligation;
- (d) The nature or extent of the reparation to be made for the breach of an international obligation.

³⁴ Chile v. Bol., 2022 I.C.J. ¶¶ 44–45, 50, 60, 61, 66–68, 77, 87, 88, 103–08, 119–24, 138–39, 148–51, 156–59.

³⁵ *Id.* ¶ 163.

³⁶ *Id.* ¶¶ 59 *passim*.

³⁷ *Id.* ¶¶ 118, 128.

³⁸ See *infra* notes 137–60 and accompanying text.

³⁹ Chile v. Bol., 2022 I.C.J. ¶ 129.

⁴⁰ See JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 133, 201 (2d ed. 1861); see also GEORGE L. JACKSON, *BLOOD IN MY EYE* 119 (1972) (“The ultimate expression of law isn’t order, it’s a prison.”).

⁴¹ AUSTIN, *supra* note 40, at 134–42.

the reality of international law, this Part explores the nature of law in general and of international law in particular.

A. The Nature of Law in General

People who live under highly developed national legal systems are probably comfortable with that description of law, yet this model does not really explain what we call “law,” even in such national legal systems. Consider the mundane example of traffic laws. In the United States, nearly everyone drives faster than the official speed limit, and there could never be enough police to compel people to drive at or below that limit. Any attempt to do so would fail, because too many people violate the law. The best that can be achieved is to keep most people driving not very much faster than the official speed limit by targeting those who violate the limit too egregiously. Yet the official limit remains “the law”; no one can avoid conviction for speeding on the basis that the law is not effectively enforced or that the designated speed limit is not actually “the law.”⁴² In contrast, people in the United States seldom drive through red lights (although sometimes they cheat a little). Driving through a red light is more dangerous than speeding and would be suicidal if many did so. If disregarding red lights were as common as speeding, laws on driving through them could no more be enforced than speed limits. When only a few violate a rule, a few police can enforce it. Yet one’s response to another’s driving through a red light is not simply that the act is dangerous. People see driving through a red light as anti-social behavior that should be illegal. As H.L.A. Hart put it, the decision to obey traffic signals, and the sense of moral outrage against those who do not, is legal and not merely moral because drivers refer to the law to explain their actions and thoughts.⁴³

Consider the more subtle situation for contracts. Every developed state has a well-developed and highly technical law of contracts. Business persons, consumers, and others know little or nothing about those technicalities, or, even worse, “know” something that is false. As a result, a study of the contracting process in Wisconsin found that between 60% and 75% of the contracts made in the State between wholesalers and retailers (depending on the industry) were not valid under the State’s law of contracts, largely because of technical errors in contract formation.⁴⁴ Yet business between wholesalers and retailers in Wisconsin did not suffer. The real law of contracts is not the legal formalities of contract formation but the commercial customs of the relevant community. A decision to resort to litigation over a contract signals a far greater problem than mere failure to fulfil a particular promise; it signals a decision to break off all relations and to impede the possibility of entering into future relations with the person being sued.⁴⁵ This truth is embraced in the Uniform Commercial Code when it indicates that there is a contract if “the

⁴² See, e.g., Note, *Laws that are Made to be Broken: Adjusting for Anticipated Noncompliance*, 75 MICH. L. REV. 687 (1977).

⁴³ H.L.A. HART, *THE CONCEPT OF LAW* (1961).

⁴⁴ See Stewart Macaulay, *An Empirical View of Contract*, 1985 WIS. L. REV. 465 (1985).

⁴⁵ See generally Ian R. Macneil, *Relational Contract: What We Do and Do Not Know*, 1985 WIS. L. REV. 483 (1985).

parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy.”⁴⁶ Provisions such as that found in the Uniform Commercial Code can hardly be characterized as “commands of a sovereign” without seriously distorting the function of the legal system. Such rules accept that the parties themselves form a community and within that community create law for themselves. While this truth is seldom explicit in the common law, it is the central tenet of contract law in the Roman-German law tradition.⁴⁷ Such “rules” indicate that the true basis of law is the social sense of legitimacy granted to or withheld from particular conduct, just as it is with speed limits and traffic lights.

The foregoing two paragraphs indicate that the Austinian paradigm that many now think is the “natural way” to think about law does not adequately describe what law is or how it works. The Austinian paradigm is a relatively recent idea that strips the notion of law down to organized coercion, a wholly inadequate notion of what law is and how law operates. As A.L. Goodhart observed, “It is because a rule is regarded as obligatory that a measure of coercion may be attached to it; it is not obligatory because there is coercion.”⁴⁸ Hart sought to explain the origins and functions of law without reliance on a coercion theory of law by positing a “habit of obedience” as the source of law and legitimacy.⁴⁹ A “habit of obedience” hardly seems adequate to capture the sense of legitimacy that underlies law, yet it is closer to the reality of what law is and why it is more effective than a simple notion of command or sanction that are often thought to constitute law. As anthropologist Clifford Geertz concluded, “law” is an organic mechanism whereby certain claims of right are elevated to the status of socially established norms and other claims of right are denied such standing.⁵⁰ When normative judgments are accepted as “law,” generally few violate the norms and those who do pay a higher price than those who violate a mere social or moral convention. The higher price might involve official coercion, but it might also entail other social means of enforcement such as public censure or ostracism as a law breaker.

Wholly informal law functions successfully when persons in a community all know each other and what each is doing. Each depends on the others for a wide range of social support, and each realizes that overreaching too often will cost them the social support needed to survive or thrive. As society becomes larger and social interaction becomes less personal, the complex web of mutual reciprocities that ensures compliance with customary rules breaks down. Formal law, with specialized processes to make and enforce law, arises as a response to that breakdown.⁵¹ Formal

⁴⁶ U.C.C. § 2-204(3) (AM. L. INST. & UNIF. L. COMM’N 2022).

⁴⁷ OTTO KAHN-FREUND ET AL., A SOURCE-BOOK ON FRENCH LAW 315–48 (2d ed. 1979).

⁴⁸ A.L. GOODHART, ENGLISH LAW AND THE MORAL LAW 17 (1953); *see also* HART, *supra* note 43, at 20–25.

⁴⁹ HART, *supra* note 43, at 77–96.

⁵⁰ CLIFFORD GEERTZ, LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY 175 (1983).

⁵¹ *See generally* Joseph W. Dellapenna, *Law in a Shrinking World: The Interaction of Science and Technology with International Law*, 88 KY. L.J. 809 (2000) [hereinafter Dellapenna, *Law in a Shrinking World*]; Eugene Kontorovich, *Inefficient Customs in International Law*, 48 WM. & MARY L.

law provides a means to achieve adequate certainty and predictability of rights and obligations for people in a large and complex society. Certainty and predictability are important values, enabling one to make plans. Formal law also serves the valuable social end of subjecting the state itself to the law.⁵²

B. *Is International Law, Law?*

International law operates in much the same fashion as national law.⁵³ Less than a century ago, the international community was composed of a small number of culturally similar states. Today, changes in the international community have transformed the international legal system from the relatively simple forms of the past to an increasingly diverse and complex community of states drawing upon many different cultural traditions so that the states often no longer understand each other.⁵⁴ In addition to states, the United Nations and other international organizations now count as full players (“legal persons”) in the international legal system.⁵⁵ Rapidly proliferating non-governmental and other official and semi-official participants are also now playing a distinct, albeit subordinate, role.⁵⁶ Even natural and artificial persons (people and corporations) are now recognized to some extent as participants in the international legal community.⁵⁷ These changes created precisely the setting in which to expect the emergence of more formal legal structures.⁵⁸ Still the international legal system remains institutionally underdeveloped and decentralized.⁵⁹ International law, in many respects, may still be called a primitive legal system.⁶⁰

The international legal system generally lacks the superstructure of specialized institutions—executive, legislative, judicial, and administrative—found in modern national legal systems. But to conclude from this that international law is not really law is to confuse particular institutional arrangements with what law really is and how it actually operates. Modern legal systems function in far more complex ways than a simplistic focus on “positive law” suggests—ways that implicate a link to

REV. 859 (2006).

⁵² See generally TOM BINGHAM, *THE RULE OF LAW* (2011).

⁵³ See generally LOUIS HENKIN, *HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY* (2d ed. 1979).

⁵⁴ See Rep. of the Study Group of the Int’l L. Comm’n, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, U.N. Doc. A/CN.4/L.702 (July 18, 2006).

⁵⁵ JOSÉ E. ALVAREZ, *INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS XXX* (2005).

⁵⁶ See generally NGOs IN INTERNATIONAL LAW: EFFICIENCY IN FLEXIBILITY? (Pierre-Marie Dupuy & Luisa Vierucci eds., 2008).

⁵⁷ Dinmukhamed Eshanov, *The Role of Multinational Corporations from the Neoinstitutionalist and International Law Perspectives: The Concept of the Three-Level Game*, 16 N.Y.U. ENV’T L.J. 110 (2008); Andrew Clapham, *The Role of the Individual in International Law*, 21 EUR. J. INT’L L. 25 (2010).

⁵⁸ Dellapenna, *Law in a Shrinking World*, *supra* note 51; Kontorovich, *supra* note 51.

⁵⁹ See generally JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005); ALAN BOYLE & CHRISTINE CHINKIN, *THE MAKING OF INTERNATIONAL LAW* (2007).

⁶⁰ Yoram Dinstein, *International Law as a Primitive Legal System*, 19 N.Y.U. J. INT’L L. & POL’Y 1 (1986).

custom as a primary source of law. If one asks why one obeys a law, and the answer is because the legislature enacted it, why should we care what legislatures enact? If the answer is because the constitution says so, why should we tolerate the rule of the living by the dead? The answer is and must be custom, just as with speed limits, stop lights, and contracts. The absence of formal courts, legislatures, and executives no more indicates an absence of law in the international system than the absence of those institutions indicated the lack of law in pre-industrial societies the world over.⁶¹

International law, unlike many modern national legal systems, has a well-developed theory of when custom forms law—it depends on the behavior and intent of nation states. Customary international law is a set of consistent practices of states undertaken out of a sense that the practice is required by law (*opinio juris sive necessitatus*, often referred to simply as *opinio juris*).⁶² If these two elements combine, law results regardless of how long—or how briefly—the practice has continued. Such customary law is binding because the participating states have expressly or implicitly consented to the rule.⁶³

A fable suggested more than 100 years ago can clarify the process by which custom develops into law.⁶⁴ To put the fable in modern terms, suppose, as a result of global climate disruption, people settle a newly thawed island in two villages. With no road, people initially wander at will from one village to the other. Gradually, most people come to follow a particular path. Perhaps it is the shortest route, or perhaps it is the easiest route, or perhaps it is the route most convenient to the heaviest walkers—walkers whose tread wears a path more decisively into the land. A definite path emerges, and gradually it becomes a road that everyone agrees is the right way to travel from village to village. When, at some point, people begin to object that people who follow other paths are trespassers, we have a legal and not merely a factual claim. If that claim is accepted by people on the island, we have a customary rule of law, even if no one can say precisely when this law took hold.

Customary international law emerges through such a process: a process of claim and counterclaim between states⁶⁵ (and perhaps other international actors). When a state undertakes an action that affects other states, the affected states either acquiesce in the action or take steps to oppose it, usually at first through rhetorical strategies; if the matter is important enough, an objecting state will escalate its opposition, imposing sanctions up to the possibility of military operations. Regardless of which state prevails, over time a pattern of practice emerges that allows one to predict

⁶¹ See, e.g., LAURA NADER, *HARMONY IDEOLOGY: JUSTICE AND CONTROL IN A ZAPOTEC MOUNTAIN VILLAGE* (1990).

⁶² See generally KAROL WOLFKE, *CUSTOM IN PRESENT INTERNATIONAL LAW* (2d rev. ed. 1993).

⁶³ *Id.* at 160–67.

⁶⁴ 1 PITT COBBETT, *LEADING CASES ON INTERNATIONAL LAW* 1–5 (4th ed. 1922).

⁶⁵ Myres S. McDougal & Norbert A. Schlei, *The Hydrogen Bomb Tests in Perspective: Lawful Measures for Security*, 64 YALE L.J. 648, 655–61 (1955); see also G.M. DANILENKO, *LAW-MAKING IN THE INTERNATIONAL COMMUNITY* 75–82 (1993); GOLDSMITH & POSNER, *supra* note 59, at 45–78; WOLFKE, *supra* note 62, at 56–58.

how states will behave. If nothing more were involved, one might ask whether this could properly be called law, yet beginning with the simplest rhetorical strategies and continuing through to outright war, states on both sides of a controversy refer to international law as a primary justification of their claims and their practices.⁶⁶ Diplomats know very well the difference between appeals to law, appeals to morality, and appeals to expedience; they often express these different propositions at appropriate points in their assertions. If states reach a consensus, expressed through an exchange of diplomatic notes or otherwise, about what each state is entitled to do in the circumstances, we have a rule of customary international law.

Just as for national law,⁶⁷ international law rests on the consent of the participants—classically nation states. Other possible bases for international law, such as religious revelation,⁶⁸ natural law,⁶⁹ or the consent of the global population rather than of states,⁷⁰ have not gained traction among governments, international organizations, or international tribunals, and thus are not considered here. Today's international law is increasingly formalistic, taking forms summarized in Article 38(1) of the Statute of the International Court of Justice:

The Court, whose function is to decide in accordance with international law . . . , shall apply:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations;
- d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law⁷¹

⁶⁶ See generally THE ROLE OF LAW IN INTERNATIONAL POLITICS: ESSAY IN INTERNATIONAL RELATIONS AND INTERNATIONAL LAW (Michael Byers ed., 2000).

⁶⁷ See, e.g., DAVID M. ESTLUND, DEMOCRATIC AUTHORITY: A PHILOSOPHICAL FRAMEWORK (2008); ADAM PRZEWORSKI, DEMOCRACY AND THE LIMITS OF SELF-GOVERNMENT (2010).

⁶⁸ See generally C.G. WEERAMANTRY, ISLAMIC JURISPRUDENCE: AN INTERNATIONAL PERSPECTIVE (1988).

⁶⁹ MARK WESTON JANIS, INTERNATIONAL LAW: CASES AND COMMENTARY 62–69 (5th ed. 2008).

⁷⁰ Santiago Villalpando, *The Legal Dimension of the International Community: How Community Interests are Protected in International Law*, 21 EUR. J. INT'L L. 387 (2010); Roozbeh (Rudy) B. Baker, *Customary International Law in the 21st Century: Old Challenges and New Debates*, 21 EUR. J. INT'L L. 173 (2010). See generally MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT (2005).

⁷¹ Statute of I.C.J., *supra* note 21, art. 38.

International water law includes each of these forms of law, and thus, could have been applied to determine the allocations of the right to use water in the *Silala River Case*.

IV. GENERAL CONVENTIONAL AND CUSTOMARY INTERNATIONAL LAW APPLICABLE TO INTERNATIONALLY SHARED WATERS

Two hundred years ago there was virtually no conventional or customary international law on transboundary waters, nor on any other aspect of water management.⁷² In the ensuing two centuries, over two hundred treaties have been signed and entered into force, creating conventional international law for those waters covered by the particular treaties.⁷³ Those treaties, plus the process of claim and counterclaim between states, have created a body of customary international law that applies even in the absence of a binding treaty.⁷⁴

The Institut de Droit International and the International Law Association took the lead in summarizing that customary law in the 1960s.⁷⁵ Following their lead,⁷⁶ the United Nations, working through the International Law Commission, drafted the UN Convention on the Law of Non-Navigational Uses of International Watercourses (hereinafter “UN Watercourses Convention”) to codify the customary law, which was approved by the UN General Assembly in 1997.⁷⁷ The UN

⁷² Owen McIntyre, *The Continuing Evolution of International Water Law*, in 10 ELGAR ENCYCLOPEDIA OF ENVIRONMENTAL LAW: WATER LAW 123, 124–25 (Joseph W. Dellapenna & Joyeeta Gupta eds., 2021) [hereinafter McIntyre, *The Continuing Evolution of International Water Law*].

⁷³ See generally STEPHEN C. MCCAFFREY, *THE LAW OF INTERNATIONAL WATERCOURSES* (3d ed. 2019); Joseph W. Dellapenna, *Treaties as Instruments for Managing Internationally-Shared Water Resources: Restricted Sovereignty vs. Community of Property*, 26 CASE W. RES. J. INT’L L. 27 (1994).

⁷⁴ Joseph W. Dellapenna, *The Customary International Law of Transboundary Fresh Waters*, 1 INT’L J. GLOBAL ENV’T ISSUES 264 (2001) [hereinafter Dellapenna, *The Customary International Law of Transboundary Fresh Waters*]; McIntyre, *The Continuing Evolution of International Water Law*, *supra* note 72, at 125–29.

⁷⁵ Inst. Int’l L., *Resolutions on the Use of International Non-Maritime Waters – Resolutions of Salzburg, Sept. 11, 1961*, 49 ANNUAIRE DE L’INSTITUT DE DROIT INTERNATIONAL 381 (1961); Int’l L. Ass’n Rep. of the Fifty-Second Conf., *Helsinki Rules on the Uses of Water of International Rivers*, 484 (Aug. 1966) [hereinafter *Helsinki Rules*]. See generally Joseph W. Dellapenna, *The Work of International Expert Bodies*, in RESEARCH HANDBOOK ON INTERNATIONAL WATER LAW 26, 27–32 (Stephen C. McCaffrey et al. eds., 2019) [hereinafter Dellapenna, *The Work of International Legal Expert Bodies*].

⁷⁶ G.A. Res. 2669 (XXV), *Progressive Development and Codification of the Rules of International Law Relating to International Watercourses*, at 127 (Dec. 8, 1970). The preamble to the resolution also noted the “valuable work carried out by several international organs, both governmental and non-governmental, in order to further the development and codification of the law of international watercourses.” *Id.*

⁷⁷ Convention on the Law of the Non-Navigational Uses of International Watercourses, *opened for signature* May 21, 1997, 2999 U.N.T.S. 77 [hereinafter UN Watercourses Convention]; see Flavia Rocha Loures et al., *The Authority and Function of the UN Watercourses Convention*, in THE UN WATERCOURSES CONVENTION IN FORCE: STRENGTHENING INTERNATIONAL LAW FOR TRANSBOUNDARY WATER MANAGEMENT 49 (Flavia Rocha Loures & Alistair Rieu-Clarke eds., 2013); Stephen C. McCaffrey, *The Codification of Universal Norms: A Means to Promote Cooperation and Equity?*, in INTERNATIONAL LAW AND FRESHWATER: THE MULTIPLE CHALLENGES 125 (Laurence Boisson de Chazournes et al. eds., 2013) (discussing the drafting process).

Watercourses Convention obtained its 35th ratification in 2014, making it a binding treaty on the ratifying states. Bolivia and Chile have not ratified the Convention, so it cannot apply as conventional law between them.⁷⁸ The Convention has served, however, from the very beginning as evidence of the customary international law binding on all states.⁷⁹ The International Court of Justice reaffirmed this role for the Convention in the *Silala River Case*, as did Bolivia and Chile.⁸⁰

The International Law Association revisited its work on summarizing customary international water law to produce the Berlin Rules on Water Resources (hereinafter “Berlin Rules”) in 2004.⁸¹ While not binding as law, the Association’s work has been widely influential on the practice of states and studies by legal scholars.⁸² In addition, the UN Economic Commission for Europe (“UNECE”) produced two instruments relating to international water law. The first is a binding treaty, the UNECE Convention on the Protection and Use of Transboundary Waters and International Lakes (hereinafter “UNECE Water Convention”)⁸³ of 1992, which has now been opened to ratification by nations around the world,⁸⁴ although only a few non-European states have thus far joined the treaty. This was followed by the non-binding UNECE Model Provisions on Transboundary Groundwaters (hereinafter “UNECE Model Provisions”) of 2014.⁸⁵ There is also the International Law Commission’s Draft Articles on the Law of Transboundary

⁷⁸ Dispute Over Status and Use of Waters of Silala (Chile v. Bol.), Judgment, 2022 I.C.J. 5, ¶ 54 (Dec. 1).

⁷⁹ Gabčíkovo-Nagymaros Project (Hung./Slovk.), Judgment, 1997 I.C.J. 7, ¶ 85 (Sept. 25) (referencing the UN Watercourses Convention as evidence of customary international law).

⁸⁰ Chile v. Bol., 2022 I.C.J. ¶¶ 50, 77, 85, 90, 103–05 (Chile), 79, 85, 90, 106, 108–10 (Bolivia), 92, 95, 96, 113, 115–17 (the Court). Bolivia did reject certain articles of the convention as properly expressive of customary international law. *Id.* ¶¶ 57, 58, 109. The Court concluded that article 11 did not reflect customary international law. *Id.* ¶ 112.

⁸¹ Int’l L. Ass’n Rep. of the Seventy-First Conf., *The Berlin Rules on Water Resources*, 337 (2004) [hereinafter *Berlin Rules*.]

⁸² See Joseph W. Dellapenna, *The Work of International Legal Expert Bodies*, *supra* note 75, at 26, 37–43.

⁸³ Convention on the Protection and Use of Transboundary Watercourses and International Lakes, *opened for signature* Mar. 17, 1992, 1936 U.N.T.S. 269 [hereinafter *UNECE Water Convention*]. See generally Attila Tanzi, *The Global Water Treaties and Their Relationship*, in *RESEARCH HANDBOOK ON INTERNATIONAL WATER LAW* 44 (Stephen C. McCaffrey et al. eds., 2019).

⁸⁴ Amendment to Articles 25 and 26 of the Convention, U.N. Doc. ECE/MP.WAT/14 (Jan. 12, 2004).

⁸⁵ U.N. Econ. Comm’n for Eur., Model Provisions on Transboundary Groundwaters, U.N. Doc. ECE/MP.WAT/40 (2014) [hereinafter *UNECE Model Provisions*].

Aquifers (hereinafter “ILC Aquifers Articles”)⁸⁶ of 2008, although that instrument has not achieved the level of acceptance that the other listed instruments have.⁸⁷

Three basic principles that have attained universal or near universal acceptance among states emerged from these various instruments: the duty to cooperate,⁸⁸ the principle of equitable utilization,⁸⁹ and the obligation not to cause significant harm.⁹⁰ Each of these basic principles deserve brief description, particularly because the International Court of Justice addressed each of these basic principles in the *Silala River Case*. The next section considers what the Court did with the principles of international water law and what it might have done with those principles.

V. WHAT THE COURT MIGHT HAVE DONE

In the *Silala River Case*, the International Court of Justice considered each of the three basic principles of international water law relevant to transboundary waters: the duty to cooperate, the principle of equitable utilization, and the obligation not to cause significant harm. This Part considers each principle and what the Court did with it in turn.

A. *The Duty to Cooperate*

While the duty to cooperate was not made explicit until it was articulated in the UNECE Water Convention of 1992,⁹¹ it was included in the UN Watercourses Convention in 1997⁹² and quickly gained general acceptance.⁹³ A primary purpose

⁸⁶ Draft Articles on the Law of Transboundary Aquifers, [2008] 2 Y.B. Int'l L. Comm'n 19, U.N. Doc. A/CN.4/SER.A/2008/Add.1 [hereinafter *ILC Aquifers Articles*].

⁸⁷ G.A. Res. 63/124, The Law of Transboundary Aquifers (Jan. 15, 2009) (merely recommending that states consider the draft further); Kirstin Conti & Joyeeta Gupta, *Groundwater in International Law*, in 10 ELGAR ENCYCLOPEDIA OF ENVIRONMENTAL LAW: WATER LAW 142, 145–46 (Joseph W. Dellapenna & Joyeeta Gupta eds., 2021); Joseph W. Dellapenna & Flavia Rocha Loures, *Filling Gaps: A Protocol to Govern Groundwater Resources of Relevance to International Law*, in THE UN WATERCOURSES CONVENTION IN FORCE: STRENGTHENING INTERNATIONAL LAW FOR TRANSBOUNDARY WATER MANAGEMENT 270 (Flavia Rocha Loures & Alistair Rieu-Clark eds., 2013); Stephen C. McCaffrey, *The International Law Commission's Flawed Draft Articles on the Law of Transboundary Aquifers: The Way Forward*, 36 WATER INT'L 566 (2011); María Milanés-Murcia, *The Application of the General Principles and Key Obligations to Internationally Shared Groundwater*, in RESEARCH HANDBOOK ON INTERNATIONAL WATER LAW 147, 158–60 (Stephen C. McCaffrey et al. eds., 2019).

⁸⁸ UN Watercourses Convention, *supra* note 77, art. 8; *Berlin Rules*, *supra* note 81, art. 11; UNECE Water Convention, *supra* note 83, art. 2(6); UNECE Model Provisions, *supra* note 85, provs. 3, 4, 9; *ILC Aquifers Articles*, *supra* note 86, art. 7.

⁸⁹ UN Watercourses Convention, *supra* note 77, arts. 5, 6; *Berlin Rules*, *supra* note 81, arts. 12–14; UNECE Water Convention, *supra* note 83, art. 2(2)(c); UNECE Model Provisions, *supra* note 85, prov. 1(2); *ILC Aquifers Articles*, *supra* note 86, arts. 4, 5.

⁹⁰ UN Watercourses Convention, *supra* note 77, art. 7; *Berlin Rules*, *supra* note 81, art. 16; UNECE Water Convention, *supra* note 83, art. 2(1); UNECE Model Provisions, *supra* note 85, prov. 1(1); *ILC Aquifers Articles*, *supra* note 86, art. 6.

⁹¹ UNECE Water Convention, *supra* note 83, art. 2(6); Tanzi, *supra* note 83, at 54.

⁹² UN Watercourses Convention, *supra* note 77, art. 8.

⁹³ *Berlin Rules*, *supra* note 81, art. 11; UNECE Model Provisions, *supra* note 85, provs. 3, 4, 9; *ILC Aquifers Articles*, *supra* note 86, art. 7; see Christina Leb, *Implementation of the General Duty*

of the duty is to ensure that all the riparian states have their interests and their needs, economic and social, considered.⁹⁴ Lack of cooperation among the riparian states leads to inefficient and suboptimal use of water, declines in water quality and environmental degradation, and political tensions in the basin.⁹⁵ Yet stated abstractly, a simple duty to cooperate doesn't resolve very much. The controlling legal instruments therefore undertook to spell out in some detail what forms cooperation must (or should) take.

The UNECE Water Convention, the first to explicitly articulate a duty to cooperate,⁹⁶ focuses mainly on maintaining or improving water quality and says little about sharing waters or their benefits.⁹⁷ Regarding water quality concerns, the Convention provides for cooperation in great detail, including requiring participating states to undertake the joint monitoring and assessment of transboundary waters,⁹⁸ cooperative programs of research and development,⁹⁹ and the exchange of information,¹⁰⁰ to create joint management bodies for the waters of every transboundary water basin,¹⁰¹ and to establish joint warning and alarm systems for "critical situations"¹⁰² with mutual assistance in responding to such critical situations.¹⁰³

The elaborate provisions on cooperation in the UNECE Water Convention make sense in the context of an increasingly integrated European continent with steadily enlarging national obligations, ranging across a broad range of issues.¹⁰⁴ For nations not willing to enter into such far-reaching regional integration in the management of their waters or other aspects of their societies, the provisions of the UNECE Water Convention go too far, particularly in requiring the creation of joint governing bodies for transboundary waters. Thus, the UN Watercourses

to Cooperate, in RESEARCH HANDBOOK ON INTERNATIONAL WATER LAW 95 (Stephen C. McCaffrey et al. eds., 2019).

⁹⁴ CHRISTINA LEB, COOPERATION IN THE LAW OF TRANSBOUNDARY WATER RESOURCES 201–53 (2013).

⁹⁵ See Katherine Hanson, *The Great Lakes Compact and Transboundary Water Agreements*, 34 WIS. INT'L L.J. 668, 697 (2017).

⁹⁶ UNECE Water Convention, *supra* note 83, art. 2(6).

⁹⁷ The only provision that refers to "reasonable and equitable" use (the standard formula for water sharing) is art. 2(2)(c). *Id.* The convention does not elaborate on this general mandate and even that provision speaks only about attending to likely "transboundary impacts." *Id.*

⁹⁸ *Id.* arts. 4, 11.

⁹⁹ *Id.* arts. 5, 12.

¹⁰⁰ *Id.* arts. 7, 13.

¹⁰¹ *Id.* arts. 9–11. See generally David J. Devlaeminck, *River Basin Organizations*, in 10 ELGAR ENCYCLOPEDIA OF ENVIRONMENTAL LAW: WATER LAW 177 (Joseph W. Dellapenna & Joyeeta Gupta eds., 2021).

¹⁰² UNECE Water Convention, *supra* note 83, art. 14.

¹⁰³ *Id.* art. 15.

¹⁰⁴ See Johan G. Lammers, *The Implementation Mechanism and Committee Established Under the UNECE Convention on the Protection of Transboundary Watercourses and International Lakes*, in RESEARCH HANDBOOK ON INTERNATIONAL WATER LAW 319 (Stephen C. McCaffrey et al. eds., 2019).

Convention¹⁰⁵ did not mandate the creation of joint governing bodies for “international watercourses.” But the UN Watercourses Convention did require states to consult on numerous matters where the use of “international watercourses” would have transboundary impacts.¹⁰⁶ To accomplish this, the UN Watercourses Convention provides elaborate rules on the regular exchange of information¹⁰⁷ and consultations on “planned measures.”¹⁰⁸ The UN Watercourses Convention requires cooperation, not mere consultation, regarding protection of the environment¹⁰⁹ and for “emergency situations.”¹¹⁰

The Berlin Rules break new ground in several important respects, including recognizing the extent to which international law applies to wholly domestic water management issues¹¹¹ and groundwater.¹¹² The Berlin Rules, while largely following the UN Watercourses Convention on transboundary water issues, places stronger emphasis on cooperation than the Convention.¹¹³ Arguably these differences represent the evolution of customary international law from where it was when the UN Watercourses Convention was drafted a decade or more earlier.¹¹⁴

The Court in the *Silala River Case* based its one actual legal conclusion on the customary international law duty to cooperate, holding that the parties are obligated to consult and negotiate on the management of the waters of the Río Silala.¹¹⁵ The Court focused its attention on whether the obligations in Articles 11 and 12 of the UN Watercourses Convention reflected customary international law.¹¹⁶ Article 11 provides a general obligation for watercourse states to consult each other and, if necessary, negotiate regarding essentially all planned measures on the watercourse.¹¹⁷ Article 12 is more specific, requiring watercourse states to notify each other of and exchange technical data regarding planned measures that may have a “significant adverse effect” on other watercourse states.¹¹⁸ After extended analysis, the Court

¹⁰⁵ See UN Watercourses Convention, *supra* note 77.

¹⁰⁶ *Id.* arts. 11–19, 21(3), 24, 26.

¹⁰⁷ *Id.* art. 9.

¹⁰⁸ *Id.* arts. 11–19; see also Louis Caffisch, *Prior Notice and Related Issues*, in RESEARCH HANDBOOK ON INTERNATIONAL WATER LAW 109 (Stephen C. McCaffrey et al. eds., 2019); Tanzi, *supra* note 83, at 55–56.

¹⁰⁹ UN Watercourses Convention, *supra* note 77, arts. 21(2), 23, 25, 27; see also Owen McIntyre, *The Contribution of Procedural Rules to the Environmental Protection of Transboundary Rivers in Light of Recent ICJ Case Law*, in INTERNATIONAL LAW AND FRESHWATER: THE MULTIPLE CHALLENGES 239 (Laurence Boisson de Chazournes et al. eds., 2013) [hereinafter McIntyre, *The Contribution of Procedural Rules*].

¹¹⁰ UN Watercourses Convention, *supra* note 77, art. 28.

¹¹¹ *Berlin Rules*, *supra* note 81, arts. 4–9, 17–35.

¹¹² *Id.* arts. 36–42; see Milanés-Murcia, *supra* note 87, at 161 (describing the *Berlin Rules* as “a step forward in international water law”). See generally Conti & Gupta, *supra* note 87.

¹¹³ *Berlin Rules*, *supra* note 81, arts. 9–11, 32–35, 42, 47, 56–67, 71, 73.

¹¹⁴ McIntyre, *The Continuing Evolution of International Water Law*, *supra* note 72, at 132–33.

¹¹⁵ Dispute Over Status and Use of Waters of Silala (Chile v. Bol.), Judgment, 2022 I.C.J. 5, ¶ 118, 128 (Dec. 1).

¹¹⁶ *Id.* ¶¶ 103–29.

¹¹⁷ UN Watercourses Convention, *supra* note 77, art. 11.

¹¹⁸ *Id.* art. 12.

found that Article 11 does not express customary international law,¹¹⁹ but that Article 12 does express customary international law.¹²⁰ The Court went on to find that Bolivia had not violated its obligations to consult, provide information, and negotiate regarding its planned measures for the headwaters of the Río Silala.¹²¹

The Court did not consider the more detailed requirements of the Berlin Rules regarding notice, exchange of information, consultation, and negotiation that the International Law Association has concluded express the current state of customary international law in this regard.¹²² This is hardly a surprise given the failure of the parties to call the Court's attention to the Berlin Rules. Whether such a consideration would have altered the Court's conclusion regarding Article 11 of the UN Watercourses Convention cannot be certain. Yet given the Court's caution in approaching such procedural issues, the Court could have found that, in at least some respects, the Berlin Rules go too far. We can only conclude that the Court missed an opportunity to move the international community of states forward regarding the procedural obligations that are necessary to foster the cooperation that is increasingly recognized at the heart of international water law.¹²³ The Court itself somewhat lamely encouraged the two States to continue their consultations "in order to ensure respect for their respective rights and the protection and preservation of the Silala and its environment."¹²⁴

B. *The Principle of Equitable Utilization*

The principle of equitable utilization is the central principle of international water law. International disputes regarding non-navigational uses of transboundary freshwaters were rare and rather easily resolved before the onset of the industrial era.¹²⁵ When disputes over non-navigational uses of transboundary freshwaters became common, the resulting process of claims and counterclaims focused on surface waters and fell into a predictable pattern. Upper riparian states espoused the theory of *absolute territorial sovereignty*, claiming to be entitled to do as they choose with waters within their boundaries without regard to co-riparian states.¹²⁶ Lower

¹¹⁹ Chile v. Bol., 2022 I.C.J. ¶ 112.

¹²⁰ *Id.* ¶¶ 117, 118.

¹²¹ *Id.* ¶¶ 119–28.

¹²² *Berlin Rules*, *supra* note 81, arts. 56–58.

¹²³ See McIntyre, *The Contribution of Procedural Rules*, *supra* note 109.

¹²⁴ Chile v. Bol., 2022 I.C.J. ¶ 129.

¹²⁵ See generally LUDWIK A. TECLAFF, *THE RIVER BASIN IN HISTORY AND LAW* 75–112 (1967); LUDWIK A. TECLAFF, *WATER LAW IN HISTORICAL PERSPECTIVE* 78–128 (1985).

¹²⁶ See Dellapenna, *The Customary International Law of Transboundary Fresh Waters*, *supra* note 74, at 269–70; Stephen C. McCaffrey, *The Harmon Doctrine One Hundred Years Later: Buried, Not Praised*, 36 NAT. RESOURCES J. 965, 967, 986–87 (1996). The absolute sovereignty approach today draws some force from the UN affirmations of each nation's "permanent sovereignty" over its natural resources, G.A. Res. 626 (VII), Right to Exploit Freely Natural Wealth and Resources, at 18 (Dec. 21, 1952); G.A. Res. 1803 (XVII), Permanent Sovereignty Over Natural Resources, at 15 (Dec. 14, 1962); G.A. Res. 2158 (XXI), Permanent Sovereignty Over Natural Resources, at 29 (Nov. 25, 1966). These resolutions, however, have little relevance to transboundary water disputes. See Tarek Majzoub & Fabienne Quilleré-Majzoub, *Is Water a Natural Resource in International Watercourses?*, 43 ENV'T L. REP. 10358 (2013).

riparian states espoused an opposing theory, *absolute riverine integrity*, under which the lower riparian state demands continuation of the flow of a watercourse from an upstream state without material diminution in quantity or quality.¹²⁷ The utter incompatibility of the two claims means that they cannot both be the customary rule of law, and in fact neither is. Instead, in a process that might take years, the contending states eventually settle on a theory of limited territorial sovereignty, somewhere between absolute territorial sovereignty and absolute riverine integrity: each state may make an *equitable and reasonable use* of the waters flowing through its territory, primarily determined by not interfering with the equitable and reasonable use of co-riparians. This is termed the rule of *equitable utilization*.¹²⁸ A few states have progressed to *community of property* theory under which the waters of a drainage basin are to be developed as a unit, without regard to national boundaries, with the co-riparian states jointly carrying out the development and management of the waters of the shared basin with the benefits derived from cooperative development shared by the states.¹²⁹

Justice Oliver Wendell Holmes of the U.S. Supreme Court provided the most eloquent explanation of the principle of equitable utilization in *New Jersey v. New York*, a dispute between two U.S. states over their shared waters.¹³⁰ The U.S. Supreme Court decides such cases under the label “equitable apportionment” based upon customary international law.¹³¹ He explained the rule in these words:

A river is more than an amenity, it is a treasure. It offers a necessity of life that must be rationed among those who have power over

¹²⁷ Daniel Abebe, *Egypt, Ethiopia, and the Nile: The Economics of International Water Law*, 15 CHI. J. INT’L L. 27, 35–37 (2014); Ryan B. Stoa, *The United Nations Watercourses Convention on the Dawn of Entry into Force*, 47 VAND. J. TRANSNAT’L L. 1321, 1353–58 (2014). See generally Dellapenna, *The Customary International Law of Transboundary Fresh Waters*, *supra* note 74, at 269–70.

¹²⁸ Stephen C. McCaffrey (Special Rapporteur), *Second Rep. on the Law of the Non-Navigational Uses of International Watercourses*, 88, 110–33, U.N. Doc. A/CN.4/399 (Mar. 19, May 12, & May 21, 1986); Dellapenna, *The Customary International Law of Transboundary Fresh Waters*, *supra* note 74, at 270–72; Joseph W. Dellapenna, *International Law’s Lessons for the Law of Lakes*, 40 U. MICH. J.L. REFORM 747, 764–68 (2007); Mohammed S. Helal, *Sharing Blue Gold: The 1997 UN Convention on the Law of the Non-Navigational Uses of International Watercourses Ten Years On*, 18 COLO. J. INT’L ENV’T L. & POL’Y 337, 342–55, 370–78 (2007); Tiyanjana Maluwa, *Towards an Internationalisation of the Zambezi River Regime: The Role of International Law in the Common Management of an International Watercourse*, 25 COMPAR. & INT’L L.J. S. AFR. 20, 26–30 (1992); Anna Schulz, *Creating a Legal Framework for Good Transboundary Water Governance in the Zambezi and Incomati River Basins*, 19 GEO. INT’L ENV’T L. REV. 117, 139–59 (2007).

¹²⁹ JACQUES GANOULIS & JEAN FRIED, *TRANSBOUNDARY HYDRO-GOVERNANCE: FROM CONFLICT TO SHARED MANAGEMENT* (2018); Joseph W. Dellapenna, *The Two Rivers and the Lands Between: Mesopotamia and the International Law of Transboundary Waters*, 10 BYU J. PUB. L. 213, 258–61 (1996).

¹³⁰ 283 U.S. 336 (1931).

¹³¹ See *Kansas v. Colorado*, 185 U.S. 125, 146 (1902). As indicated, the Supreme Court decides these cases based on international law, but in the case of transboundary water disputes there was a small and consistent body of practice emerging in the 19th century for which no one had yet articulated a coherent doctrine. The Supreme Court was perhaps the first institution to articulate such a doctrine or body of theory, terming it “equitable apportionment.” *Id.* Subsequently the International Law Association developed the international version of the doctrine, terming it

it. New York has the physical power to cut off all the water within its jurisdiction. But clearly the exercise of such a power to the destruction of the interest of lower States could not be tolerated. And on the other hand, equally little could New Jersey be permitted to require New York to give up its power altogether in order that the river might come down to it undiminished. Both States have real and substantial interests in the River that must be reconciled as best they may. The different traditions and practices in different parts of the country may lead to varying results but the effort always is to secure an equitable apportionment without quibbling over formulas.¹³²

All legal instruments that summarize or codify the customary international law applicable to transboundary waters adopt the principle of equitable utilization.¹³³ The premise of equitable utilization is that each sovereign state within a water basin has an equal right to use the shared water resources of the basin, but equality of right does not mean equality of usage.¹³⁴ Each state is entitled to an equitable (fair) share of the waters of the basin, or of the benefits of those waters.¹³⁵ More precisely, each riparian state is under an obligation in its use of transboundary waters not to cause unreasonable injury to water uses in other riparian states.¹³⁶ If using transboundary water by or in one riparian state unreasonably interferes with use by or in another riparian state, it is not an equitable and reasonable use of water.

The UN Watercourses Convention, the Berlin Rules, and the ILC Aquifers Articles each provide a list of factors to be considered in determining what is an equitable utilization.¹³⁷ The lists are nearly identical except that the Berlin Rules add “sustainability” and “minimization of environmental harm” as explicit factors to be considered. The full list, as given in the Berlin Rules, reads as follows:

Relevant factors to be considered include, but are not limited to:

a. Geographic, hydrographic, hydrological, hydrogeological,

“equitable utilization.” See *Helsinki Rules*, *supra* note 75, arts. IV, V. Thus, the Supreme Court can be said to both have based its decisions on international law and to have created the relevant legal doctrine.

¹³² *New Jersey*, 283 U.S. at 341–42.

¹³³ UN Watercourses Convention, *supra* note 77, art. 5; *Berlin Rules*, *supra* note 81, art. 12; UNECE Water Convention, *supra* note 83, art. 2(2)(c); UNECE Model Provisions, *supra* note 85, prov. 1(2); *ILC Aquifers Articles*, *supra* note 86, art. 4.

¹³⁴ Stephen M. Schwebel (Special Rapporteur), *Third Rep. on the Law of the Non-Navigational Uses of International Watercourses*, 65, 70, U.N. Doc. A/CN.4/348 (Dec. 11, 1981) [hereinafter Schwebel, *Third Rep.*]; see also OWEN MCINTYRE, ENVIRONMENTAL PROTECTION OF INTERNATIONAL WATERCOURSES UNDER INTERNATIONAL LAW 76–78, 121–53 (2007).

¹³⁵ See, e.g., Elisa Morgera, *The Need for an International Legal Concept of Fair and Equitable Benefit Sharing*, 27 EUR. J. INT’L L. 353 (2016).

¹³⁶ Schwebel, *Third Rep.*, *supra* note 134, at 74.

¹³⁷ UN Watercourses Convention, *supra* note 77, art. 6; *Berlin Rules*, *supra* note 81, art. 13; *ILC Aquifers Articles*, *supra* note 86, art. 5.

- climatic, ecological, and other natural features;
- b. The social and economic needs of the basin States concerned;
- c. The population dependent on the waters of the international drainage basin in each basin State;
- d. The effects of the use or uses of the waters of the international drainage basin in one basin State upon other basin States;
- e. Existing and potential uses of the waters of the international drainage basin;
- f. Conservation, protection, development, and economy of use of the water resources of the international drainage basin and the costs of measures taken to achieve these purposes;
- g. The availability of alternatives, of comparable value, to the particular planned or existing use;
- h. The sustainability of proposed or existing uses; and
- i. The minimization of environmental harm.¹³⁸

Some engineers and scientists insist on reading these criteria as an algorithm whereby one could simply fill in numbers and the allocation would follow automatically.¹³⁹ The rules do not work that way; they require an exercise of judgment.¹⁴⁰ An exercise of judgment, at least in the English language, carries a strong connotation that the result is not dictated in any immediate sense by the factual inputs and legal principles relied on in the exercise of judgment.¹⁴¹ That is certainly true for the principle of equitable utilization.¹⁴² Any attempt to treat the list of relevant factors as an algorithm misses the point entirely. Moreover, considerable evidence indicates that equity is more important than efficiency when

¹³⁸ *Berlin Rules*, *supra* note 81, art. 13(2).

¹³⁹ See, e.g., Feng Yan et al., *Analysis on Equitable and Reasonable Allocation Models of Water Resources in the Lancang-Mekong River Basin*, 29 *WATER INT'L* 114 (2004); Subash Prasad Rai et al., *Novel Approach for Issues Identification in Transboundary Water Management Using Fuzzy C-Means Clustering*, 9 *APPLIED WATER SCI.* 11 (2019); Pieter van der Zaag et al., *Towards Measurable Criteria for the Equitable Sharing of International Water Resources*, 4 *WATER POL'Y* 19 (2002).

¹⁴⁰ See, e.g., Dellapenna, *The Customary International Law of Transboundary Fresh Waters*, *supra* note 74, at 287; Murat Metin Hakki, *Cross-Border Water Conflicts in Mesopotamia: An Analysis According to International Law*, 13 *WILLAMETTE J. INT'L LAW & DISP. RESOL.* 245, 259–67 (2005); Owen McIntyre, *Utilization of Shared International Freshwater Resources—The Meaning and Role of “Equity” in International Water Law*, 38 *WATER INT'L* 112 (2013) [hereinafter McIntyre, *Utilization of Shared International Freshwater Resources*].

¹⁴¹ See Eyal Benvenisti & Haim Gvirtzman, *Harnessing International Law to Determine Israeli-Palestinian Water Rights: The Mountain Aquifer*, 33 *NAT. RES. J.* 543, 548 (1993); C.B. Bourne, *The Right to Utilize the Waters of International Rivers*, 3 *CAN. Y.B. INT'L L.* 184, XXX (1965) [hereinafter Bourne, *The Right to Utilize the Waters of International Rivers*]. For a classic statement of this reality in more general contexts see Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the “Hunch” in Judicial Decision*, 14 *CORNELL L.Q.* 274 (1929).

¹⁴² Dellapenna, *The Work of International Legal Expert Bodies*, *supra* note 75, at 287; Hakki, *supra* note 140, at 259–67 (2005); McIntyre, *Utilization of Shared International Freshwater Resources*, *supra* note 140.

it comes to the allocation of water.¹⁴³ Applying these criteria in actual practice will be difficult and many debatable questions will arise.

The inability to apply the criteria as an algorithm leads some (often scientists or engineers) to conclude that the rules are not legally binding.¹⁴⁴ The listed criteria are not a simple means for resolving international water disputes. The criteria provide general standards by which riparians could predict a probable decision of an impartial tribunal judging an international stream or aquifer dispute.¹⁴⁵ Yet states are reluctant to allow a judicial tribunal—an international court or an arbitral panel—to decide their water allocations.¹⁴⁶ Yet on the two occasions that presented the opportunity for the Court to decide water allocations, including the *Silala River Case*, the International Court of Justice declined to determine each state's share under the principle of equitable utilization, leaving the parties to negotiate the resolution between themselves.¹⁴⁷

In any dispute over internationally shared waters then, the interested states generally will have to negotiate the specific allocation. While the outcome of negotiated solutions is less predictable than a judicial decision,¹⁴⁸ the criteria of

¹⁴³ See David H. Getches, *Colorado River Governance: Sharing Federal Authority as an Incentive to Create a New Institution*, 68 U. COLO. L. REV. 573, 590–607 (1997); Joyeeta Gupta et al., *Re-Imagining the Driver-Pressure-State-Impact-Response Framework from an Equity and Inclusive Development Perspective*, 15 SUSTAINABILITY SCI. 503 (2020); Charles W. Howe, *Water Resources Planning in a Federation of States: Equity Versus Efficiency*, 36 NAT. RES. J. 29 (1996); John F. Klein-Robbenhaar, *Balancing Efficiency with Equity: Determining the Public Welfare in Surface Water Transfers from Acequia Communities*, 36 NAT. RES. J. 37 (1996); Jonathan Lautze & Mark Giordano, *Equity in Transboundary Water Law: Valuable Paradigm or Merely Semantics?*, 17 COLO. J. INT'L ENV'T L. & POL'Y 89, 91 (2006). See generally WATER, PLACE, & EQUITY (John M. Whiteley et al., eds., 2008); Stephen M. Johnson, *Economics v. Equity II: The European Experience*, 58 WASH. & LEE L. REV. 417 (2001); Shi-Ling Hsu, *Fairness Versus Efficiency in Environmental Law*, 31 ECOLOGY L.Q. 303 (2004).

¹⁴⁴ See, e.g., Nadhir Al-Ansari et al., *Geopolitics of the Tigris and Euphrates Basins*, 8 J. EARTH SCIS. & GEOTECHNICAL ENG'G 187, 198 (2018).

¹⁴⁵ See, e.g., Laurence Boisson de Chazournes, *The Permanent Court of International Justice, the International Court of Justice and International Water Law: Versatility in Consistency*, in RESEARCH HANDBOOK ON INTERNATIONAL WATER LAW 285 (Stephen C. McCaffrey et al. eds., 2019); Awn S. Al-Khasawneh, *Do Judicial Decisions Settle Water-Related Disputes?*, in INTERNATIONAL LAW AND FRESHWATER: THE MULTIPLE CHALLENGES 341 (Laurence Boisson de Chazournes et al. eds., 2013); Elizabeth Burleson, *Middle Eastern and North African Hydropolitics: From Eddies of Indecision to Emerging International Law*, 18 GEO. INT'L ENV'T L. REV. 385, 387–409 (2006); Hakki, *supra* note 140, at 257–67.

¹⁴⁶ Among the few international juridical determinations concerning the use water are the Pulp Mills on River Uruguay (Arg. v. Uru.), Judgment, 2010 I.C.J. 14, (Apr. 20); Gabčíkovo-Nagymaros Project (Hung./Slovk.), Judgment, 1997 I.C.J. 7 (Sept. 25); Lake Lanoux Arbitration (Fr. v. Spain), 12 R.I.A.A. 281 (Arb. Trib. 1957); and RAYMOND LAFITTE, EXPERT DETERMINATION: THE INDUS WATERS TREATY 1960 BAGLIHAR HYDROELECTRIC PLANT (India v. Pak.) (2007), [https://mowt.gov.pk/SiteImage/Misc/files/Baglihar%20Expert%20Determination%20\(PDF\).pdf](https://mowt.gov.pk/SiteImage/Misc/files/Baglihar%20Expert%20Determination%20(PDF).pdf) [<https://perma.cc/WUE8-2AEH>].

¹⁴⁷ Dispute Over Status and Use of Waters of Silala (Chile v. Bol.), Judgment, 2022 I.C.J. 5 (Dec. 1); Arg. v. Uru., 2010 I.C.J. 14; Hung./Slovk., 1997 I.C.J. 7.

¹⁴⁸ See generally Shafiqul Islam & Lawrence Susskind, *Using Complexity Science and Negotiation Theory to Resolve Boundary-Crossing Water Issues*, 562 J. HYDROLOGY 589 (2018); McIntyre, *Utilization of Shared International Freshwater Resources*, *supra* note 140.

equitable and reasonable utilization do capture the actual outcome of nearly all the treaties and provide guidance and constraint for future negotiations. The principle of equitable utilization both empowers and limits the ability of states to make claims in their negotiations regarding internationally shared waters.¹⁴⁹ Ultimately, the outcome will reflect the relative power positions of the negotiating states as well as a principled application of legal or technical analysis.¹⁵⁰ Whatever the outcome, some agreement will eventually be reached, for the interested states will realize that they have more to lose from continuing the dispute than from agreeing on an at least minimally acceptable resolution. No better example can be found than the near century of cooperation over water, at first covert and later overt, between the Israelis and the Palestinians.¹⁵¹ The principle of equitable utilization is vague, but the resulting flexibility of the rule of equitable utilization is one of its strengths. In allocating the uses of the waters of international streams or aquifers, flexibility is preferable to rigid norms because each water basin has its own unique physical, economic, social, and political configurations.

In the *Silala River Case*, the Court initially was confronted by sharp disagreements between Bolivia and Chile regarding the full applicability of the principle of equitable utilization,¹⁵² but by the conclusion of the oral presentations the two States both embraced the principle as the guiding rule.¹⁵³ The Court seized upon this convergence by the States regarding the legal principles to conclude that there was no dispute and therefore nothing to decide.¹⁵⁴ While reaffirming the principle of equitable utilization as the basic right of riparian states,¹⁵⁵ and referencing Article 6 of the UN Watercourses Convention as to the relevant factors,¹⁵⁶ the Court once again declined to reach the actual point in controversy—what was each State's equitable and reasonable share of the waters of the Río

¹⁴⁹ See Peter M. Haas, *Do Regimes Matter? Epistemic Communities and Mediterranean Pollution Control*, 43 INT'L ORG. 377 (1989).

¹⁵⁰ See Shakeel Hayat et al., *A Review of Hydro-Hegemony and Transboundary Water Governance*, 24 WATER POL'Y 1723, XXX (2022); Cicely O. Parseghian & Benjamin K. Guthrie, *The Role of Scientific and Technical Experts*, in RESEARCH HANDBOOK ON INTERNATIONAL WATER LAW 301 (Stephen C. McCaffrey et al. eds., 2019); Mark Zeitoun & Jeroen Warner, *Hydro-Hegemony—A Framework for Analysis of Trans-Boundary Water Conflicts*, 8 WATER POL'Y 435 (2006). See generally Charlotte Grech-Madin et al., *Negotiating Water Across Levels: A Peace and Conflict "Toolbox" for Water Diplomacy*, 559 J. HYDROLOGY, 100 (2018); Islam & Susskind, *supra* note 148; McIntyre, *Utilization of Shared International Freshwater Resources*, *supra* note 140.

¹⁵¹ ADAM GARFINKLE, ISRAEL AND JORDAN IN THE SHADOW OF WAR: FUNCTIONAL TIES AND FUTILE DIPLOMACY IN A SMALL PLACE 34–40, 79–83, 116, 163–73 (1992); Clive Lipchin, *Transboundary Management of the Hebron/Besor Watershed in Israel and the Palestinian Authority*, in WATER SCARCITY, SECURITY AND DEMOCRACY: A MEDITERRANEAN MOSAIC 54 (Francesca De Châtel et al. eds., 2014), https://www.gwp.org/globalassets/global/gwp-med-files/news-and-activities/various/gwp-med-final-publication-online_with-cover.pdf [<https://perma.cc/6EC9-E697>]; Vakur Sümer, *A Chance for a Pax Aquarium in the Middle East? Transcending the Six Obstacles for Transboundary Water Cooperation*, 9 J. PEACEBUILDING & DEV. 83 (2014).

¹⁵² Chile v. Bol., 2022 I.C.J. ¶¶ 60, 61, 66, 67 (Chile), 62, 68, 70 (Bolivia).

¹⁵³ *Id.* ¶¶ 64, 69, 71.

¹⁵⁴ *Id.* ¶¶ 65, 75, 76.

¹⁵⁵ *Id.* ¶ 97.

¹⁵⁶ *Id.* ¶ 95.

Silala.¹⁵⁷ While it is true that the 16 judges who participated in the final decision of the case could conceivably have arrived at 16 different answers to that question, the Court has not encountered such difficulties in drawing maritime boundaries based upon “equitable principles.”¹⁵⁸ Why the Court is so reluctant to decide the actual merits of a water dispute is puzzling and is a considerable loss to the international community. Instead, the parties were told to return to negotiations on the question,¹⁵⁹ the resolution of which might require Chile to pay compensation to Bolivia depending on whether the States can reach an agreement on whether Chile has used more than an “equitable and reasonable” share.¹⁶⁰

C. *The Obligation Not to Cause Significant Harm*

The obligation not to cause significant harm, the so-called no-harm rule, derives from the Roman law maxim *sic utere tuo ut non alienum laedas*, “So use your own property as not to injure that of your neighbor.”¹⁶¹ The maxim in international law is stated in the *Trail Smelter Arbitration*:

Under the principles of international law, . . . no State has the right to use or permit the use of its territory in such a manner as to cause injury . . . in or to the territory of another . . . when the injury is of serious consequence and the injury is established by clear and convincing evidence.¹⁶²

State practice supports applying this rule to waters shared internationally, with numerous treaties including promises by each state not to undertake or to allow to be undertaken any works on a water body if the works would cause “any injury” (or words to like effect) to the interests in the other state.¹⁶³

This is a negative conclusion: Do not cause injury. Although the principle generally is referred to as a “no harm rule,” minimal harm is allowed; only “significant

¹⁵⁷ *Id.* ¶¶ 72, 74. For other cases in which the Court declined to make a definitive ruling on the water rights of the contending parties, see *Pulp Mills on River Uruguay* (Arg. v. Uru.), Judgment, 2010 I.C.J. 14 (Apr. 20) and *Gabčíkovo-Nagymaros Project* (Hung./Slovk.), Judgment, 1997 I.C.J. 7 (Sept. 25).

¹⁵⁸ See, e.g., *Continental Shelf (Libya/Malta)*, Judgment, 1985 I.C.J. 13 (June 3); *Delimitation of Maritime Boundary in Gulf of Maine Area* (Can./U.S.), Judgment, 1984 I.C.J. 246 (Oct. 12); *North Sea Continental Shelf* (Den./Neth.), Judgment, 1969 I.C.J. 3 (Feb. 20).

¹⁵⁹ *Chile v. Bol.*, 2022 I.C.J. ¶ 156.

¹⁶⁰ *Id.* ¶¶ 37, 67, 156.

¹⁶¹ *Corfu Channel* (U.K. v. Alb.), Judgment, 1949 I.C.J. 4, 22 (Apr. 9); Schwebel, *Third Rep.*, *supra* note 134, at 92–95; Rep. of the U.N. Conf. on Env’t & Dev., Rio Declaration on Environment and Development, pr. 2, U.N. Doc. A/CONF.151/26/Rev.1 (June 3–14, 1992); Rep. of the U.N. Conf. on the Hum. Env’t, pr. 21, U.N. Doc. A/CCONF.48/14/Rev.1 (June 5–16, 1972); McINTYRE, *supra* note 134, at 89–90, 200; Lucius Cafilisch, *Sic utere tuo ut alienum non laedas: règle prioritaire ou élément servant à mesurer le droit de participation équitable et raisonnable à l’utilisation d’un cours d’eau international?*, in *INTERNATIONALES RECHT AUF SEE UND BINNEGEWÄSSERN: FESTSCHRIFT FÜR WALTER MÜLLER* 29 (1993).

¹⁶² *Trail Smelter* (U.S./Can.) 3 R.I.A.A. 1905 (Apr. 16, 1938 & Mar. 11, 1941); see also *Legality of Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, 241 (July 8).

¹⁶³ See, e.g., Act Regarding Navigation and Economic Co-Operation Between the States of

harm” is prohibited. Something more than *de minimis* harm is required.¹⁶⁴ The question remains whether significant harm is allowed in making an equitable and reasonable use of shared waters. Learned opinion on international water law is nearly unanimous on the primacy of the principle of equitable utilization.¹⁶⁵ When activities in one state cause a quantitative shortfall of water in another state, that problem is properly addressed by applying the principle of equitable utilization.¹⁶⁶ A small but growing group of scholars support the primacy of the no-harm rule, advancing three reasons for their view.¹⁶⁷ First, the rule is said to protect a weaker state against harm inflicted by a stronger co-riparian state. Second, the rule is said to provide a clear line for determining which state is in the wrong. Finally, the rule is to be preferred because the most important current issues in managing shared

the Niger Basin, art. 2, Oct. 26, 1962, 587 U.N.T.S. 9; Concerning Lakes or Courses of Common Waters, Nor.-Swed., art. 11, Oct. 26, 1905, 34 G.F. DE MARTENS, NOUVEAU RECUEIL GÉNÉRAL DES TRAITÉS 711 (2e sér.); Treaty Relating to Boundary Waters Between the United States and Canada, U.K.-U.S., art. II, Jan. 11, 1909, 36 Stat. 2448; Treaty Respecting Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande, Mex.-U.S., art. 17, Feb. 3, 1994, T.S. No. 994.

¹⁶⁴ See K. Sachariew, *The Definition of Thresholds of Tolerance for Transboundary Environmental Inquiry Under International Law: Development and Present Status*, 37 NETH. INT'L L. REV 193 (1990).

¹⁶⁵ Jens Evensen (Special Rapporteur), *First Rep. on the Law of the Non-Navigational Uses of International Watercourses*, 155, 171, 177–78, U.N. Doc A/CN.4/367 (Apr. 19, 1983); Stephen C. McCaffrey (Special Rapporteur), *Third Rep. on the Law of the Non-Navigational Uses of International Watercourses*, 88, 94–95, 130–134, U.N. Doc. A/CN.4/406 (Mar. 30, Apr. 6, & Apr. 8, 1987); Schwebel, *Third Rep.*, *supra* note 134, at 82–85, 103; see also Charles B. Bourne, *The International Law Commission's Draft Articles on the Law of International Watercourses: Principles and Planned Measures*, 3 COLO. J. INT'L ENV'T L. & POL'Y 65, 73–77 (1992); Zeyad Mohammad Jaffal & Moustafa Elmetwaly Kandeel, *Towards a Peaceful Settlement of the Dispute Over the Grand Ethiopian Renaissance Dam on the Basis of the Principles of the Law of International Watercourses*, 12 LAW. Q. 1, 14–18 (2022).

¹⁶⁶ UN Watercourses Convention, *supra* note 77, art. 7(2) (“Where significant harm nevertheless is caused to another watercourse State, the States whose use causes the harm shall, in the absence of agreement to such use, take all appropriate measures, *having due regard for the principles of articles 5 and 6* [equitable utilization], in consultation with the affected State, to eliminate or mitigate such harm and, where appropriate, to discuss the question of compensation.” (emphasis added)); *Berlin Rules*, *supra* note 81, art. 16 (“Basin States, in managing the waters of an international drainage basin, shall refrain from and prevent acts or omissions within their territory that cause significant harm to another basin State *having due regard for the right of each basin State to make equitable and reasonable use of the waters.*” (emphasis added)); see also Günther Handl, *The International Law Commission's Draft Articles on the Law of International Watercourses (General Principles and Planned Measures): Progressive or Retrogressive Development of International Law?*, 3 COLO. J. INT'L ENV'T L. & POL'Y 123, 129–33 (1992); Stephen C. McCaffrey, *An Assessment of the Work of the International Law Commission*, 36 NAT. RES. J. 297, 307–12 (1996); Yong Zhong et al., *Rivers and Reciprocity: Perceptions and Policy on International Watercourses*, 18 WATER POL'Y 803 (2016).

¹⁶⁷ See Tamar Meshel, *Swimming Against the Current: Revisiting the Principles of International Water Law in the Resolution of Fresh Water Disputes*, 61 HARV. INT'L L.J. 135, 163–71 (2020); Tamar Meshel & Moin A. Yahya, *International Water Law and Fresh Water Dispute Resolution: A Cosean Perspective*, 92 U. COLO. L. REV. 509 (2021); Attila M. Tanzi, *The Inter-Relationship Between No Harm, Equitable and Reasonable Utilisation and Cooperation Under International Water Law*, 20 INT'L ENV'T AGREEMENTS 619 (2020); Patricia K. Wouters, *Allocation of the Non-Navigational Uses of International Watercourses: Efforts at Codification and the Experience of Canada and the United States*, 30 CAN. Y.B. INT'L L. 43, 80–86 (1992).

water resources pertain to pollution rather than to allocation and in principle, so it is argued, no pollution should be tolerated.

The conclusion that the no-harm rule is primary does not withstand careful analysis. What harm is “significant” is not an objective determination; it is a matter on which each state will have different views, leading not to clear bright lines but to serious disputes that will, in the end, be negotiated or arbitrated on an equitable basis.¹⁶⁸ The resolution of such a dispute centers not on preventing harm, but on the equitable allocation of benefits and costs.¹⁶⁹ No resolution of an interstate water dispute has ever actually been based upon the proposition, logically derived from a stronger form of a no-harm rule—that upper riparian states can make no significant use of a watercourse for fear of inflicting harm downstream.¹⁷⁰ Nor is it always clear which state is in the weaker position. Normally, one would expect the downstream state to be in the weaker position relative to an upstream state if only because an upstream state has the power to stop the river. If an upstream state dams or diverts the flow, it literally cuts off some or all of the water from a downstream state. Often, however, the “weaker” downstream state is actually the stronger state if it is more developed economically and militarily.¹⁷¹

A stronger version of the no-harm rule would either turn into the discredited absolute riverine integrity rule espoused but not established in international water law,¹⁷² or it would take on the features of the rule of prior appropriation found in the western states of the United States—or both if the beneficiary of the natural flow were also to be the earlier water user.¹⁷³ Treating priority in time as controlling, or even dominant, would replace the balancing of need and interest characteristic of equitable utilization with an absolute rule derived from history rather than from geography and need. Nowhere do the supporters of the primacy of a no-harm rule make clear why temporal priority should be determinative. Giving absolute priority to uses existing at the start of the negotiations destroys any incentive for the “harmed state”—the state with existing uses—to negotiate with a state that seeks to initiate new uses.¹⁷⁴ The no-harm rule thus would hardly be conducive to the developmental equity proclaimed at the United Nations, let

¹⁶⁸ J. BRUHÀCS, *THE LAW OF NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES* 142–43 (1993); Bourne, *The Right to Utilize the Waters of International Rivers*, *supra* note 141, at 83–88; Dellapenna, *The Customary International Law of Transboundary Fresh Waters*, *supra* note 74, at 277–87.

¹⁶⁹ GANOULLIS & FRIED, *supra* note 129; Miguel Solanes, *Legal and Institutional Aspects of River Basin Development*, 17 *WATER INT'L* 116, 120–21 (1992).

¹⁷⁰ Int'l L. Comm'n, Rep. on the Work of Its Forty-Sixth Session, U.N. A/49/10, at 212–13, (1994); BRUHÀCS, *supra* note 168, at 135–39.

¹⁷¹ Joseph W. Dellapenna, *Rivers as Legal Structures: The Examples of the Jordan and the Nile*, 36 *NAT. RES. J.* 217, 245 (1996); Aaron Schwabach, *The United Nations Convention on the Law of Non-Navigational Uses of International Watercourses, Customary International Law, and the Interests of Developing Upper Riparians*, 33 *TEX. INT'L L.J.* 257 (1998); Mark Zeitoun, *The Relevance of International Water Law to Later-Developing Upstream States*, 40 *WATER INT'L* 949 (2015).

¹⁷² See *supra* notes 126–28 and accompanying text.

¹⁷³ Eyal Benvenisti, *Collective Action in the Utilization of Shared Freshwater: The Challenges of International Water Resources Law*, 90 *AM. J. INT'L L.* 384, 403 (1996).

¹⁷⁴ *Id.* at 403.

alone sustainable development.¹⁷⁵ It is no wonder priority of use, while relevant to an equitable allocation of water or its benefits among states, has never been dispositive in international law.¹⁷⁶

Harm to the environment does deserve stronger protection than harm to quantitative uses,¹⁷⁷ although the line between the two kinds of harm may be difficult to draw. By this view, states are required to prevent unreasonable pollution and to cooperate with other states to protect the aquatic environment.¹⁷⁸ In this context, harm should be understood as “environmental damage in general, pollution, negative impact on water resources, restriction in water uses, and negative impact on human health, among others.”¹⁷⁹ Protection of the environment would encompass measures relating to conservation, security, water-related disease, and the protection of ecosystems, as well as technical and hydrological control mechanisms, such as the regulation of flow, floods, pollution, erosion, drought, and saline intrusion.¹⁸⁰

¹⁷⁵ *Id.* at 403–04; Philippe Cullet, *Water Law and Development*, in 10 ELGAR ENCYCLOPEDIA OF ENVIRONMENTAL LAW: WATER LAW 391 (Joseph W. Dellapenna & Joyeeta Gupta eds., 2021); Joyeeta Gupta & Hilmer J. Bosch, *The UN Contribution to Water Law, Environment, Climate Disruption, and the Sustainable Development Goals*, in 10 ELGAR ENCYCLOPEDIA OF ENVIRONMENTAL LAW: WATER LAW 55 (Joseph W. Dellapenna & Joyeeta Gupta eds., 2021); Otto Spijkers, *Sustainability and International Water Law*, in 10 ELGAR ENCYCLOPEDIA OF ENVIRONMENTAL LAW: WATER LAW 214 (Joseph W. Dellapenna & Joyeeta Gupta eds., 2021).

¹⁷⁶ See BRUHÀCS, *supra* note 168, at 132–40; Benvenisti, *supra* note 173, at 408–09, 411; Dellapenna, *The Customary International Law of Transboundary Fresh Waters*, *supra* note 74, at 280; Maluwa, *supra* note 128, at 30–33; Salman M.A. Salman, *Downstream Riparians Can Also Harm Upstream Riparians: The Concept of Foreclosure of Future Uses*, 35 WATER INT’L 350 (2010); Alice Shih & Trevor Stutz, *Sink or Swim: Abrogating the Nile Treaties While Upholding the Rule of Law*, 43 ENV’T L. REP. 10786, 10811–19 (2013); Hillel I. Shuval, *Approaches to Resolving the Water Conflicts Between Israel and Her Neighbors—A Regional Water-for-Peace Plan*, 17 WATER INT’L 133, 136–38, 141–42 (1992).

¹⁷⁷ BRUHÀCS, *supra* note 168, at 194–204; see ANDRÉ NOLLKAEMPER, *THE LEGAL REGIME FOR TRANSBOUNDARY WATER POLLUTION: BETWEEN DISCRETION AND CONSTRAINT* 61–69 (1993); Owen McIntyre, *The Current State of Development of the No Significant Harm Principle: How Far Have We Come?*, 20 INT’L ENV’T AGREEMENTS 601 (2020).

¹⁷⁸ *UN Watercourses Convention*, *supra* note 77, arts 20–28; *Berlin Rules*, *supra* note 81, arts. 22–35.

¹⁷⁹ JIMENA MURILLO CHAVARRO, *THE HUMAN RIGHT TO WATER: A LEGAL COMPARATIVE PERSPECTIVE AT THE INTERNATIONAL, REGIONAL AND DOMESTIC LEVEL* 104 (2015); see also Paulo Canelas de Castro, *The Evolution of International Water Law*, 10 INT’L J. SUSTAINABLE DEV. & PLAN. 894, 895–96 (2015); Ellen Hey & Alberto Quintavalla, *How International Water Law Connects to Environmental Law and Human Rights*, in 10 ELGAR ENCYCLOPEDIA OF ENVIRONMENTAL LAW: WATER LAW 190 (Joseph W. Dellapenna & Joyeeta Gupta eds., 2021); Daphina Misiedjan & Pedi Obani, *The Human Rights to Water and Sanitation*, in 10 ELGAR ENCYCLOPEDIA OF ENVIRONMENTAL LAW: WATER LAW 166 (Joseph W. Dellapenna & Joyeeta Gupta eds., 2021); Anna F.S. Russell, *The Human Right to Water in a Transboundary Context*, in RESEARCH HANDBOOK ON INTERNATIONAL WATER LAW 255 (Stephen C. McCaffrey et al. eds., 2019); Inga T. Winkler, *The Human Right to Water*, in RESEARCH HANDBOOK ON INTERNATIONAL WATER LAW 242 (Stephen C. McCaffrey et al. eds., 2019).

¹⁸⁰ *UN Watercourses Convention*, *supra* note 77, arts. 20–29; *Berlin Rules*, *supra* note 81, arts. 22–35. See generally MCINTYRE, *supra* note 134; Rhett B. Larson, *Water and Security*, in 10 ELGAR ENCYCLOPEDIA OF ENVIRONMENTAL LAW: WATER LAW 44, 50–51 (Joseph W. Dellapenna & Joyeeta Gupta eds., 2021); Owen McIntyre, *Environmental Protection and the Ecosystem Approach*, in RESEARCH HANDBOOK ON INTERNATIONAL WATER LAW 126 (Stephen C. McCaffrey et al. eds., 2019); Julia Talbot-Jones, *Advancing Water Law Through Rights of Nature*, in 10 ELGAR ENCYCLOPEDIA OF

Thus, the International Court of Justice in the *Pulp Mills Case*¹⁸¹ recognized, among other obligations, the substantive obligations of international water law, including the obligation to ensure that the management of the soil and woodlands does not harm the environment of the river or the quality of its waters, the duty to coordinate measures to avoid changing the ecological balance, and the obligation to prevent water pollution and to preserve the environment.¹⁸²

There was considerable debate on the relation of the no-harm rule to equitable utilization in the drafting of the UN Watercourses Convention.¹⁸³ Because the no-harm rule actually prohibits only significant harm, the rule requires determination of whether a use is reasonable under the circumstances—in other words, whether the use represents an equitable utilization.¹⁸⁴ The International Court of Justice in the *Pulp Mills Case* noted that riparian states must consider the balance between economic development and environmental protection because this balance is the basis of sustainable development.¹⁸⁵ This approach should not deny appropriate protection to ecosystems or preclude appropriate regulation of pollution. Generally, the principle of equitable utilization is the appropriate vehicle for protecting internationally shared water resources from pollution or other forms of degradation,¹⁸⁶ so long as fundamental ecological integrity is not compromised.¹⁸⁷ The Convention version of the no-harm rule was redrafted repeatedly until the Convention finally settled on a no-harm rule that clearly subordinated it to the principle of equitable utilization:

ENVIRONMENTAL LAW: WATER LAW 203 (Joseph W. Dellapenna & Joyeeta Gupta eds., 2021).

¹⁸¹ *Pulp Mills on River Uruguay* (Arg. v. Uru.), Judgment, 2010 I.C.J. 14 (Apr. 20).

¹⁸² *Id.* at ¶¶ 159–266 (Apr. 20). See generally Donald K. Anton, Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay) (Judgment) [2010] ICJ Rep. (20 April 2010), 17 AUSTL. INT'L L.J. 213 (2010); McIntyre, *The Contribution of Procedural Rules*, *supra* note 109.

¹⁸³ The debates are reviewed in some detail in Joseph W. Dellapenna, *International Law Applicable to Water Resources Generally*, in WATERS AND WATER RIGHTS § 49.05(a) (Amy K. Kelley ed., 2023).

¹⁸⁴ See Schwebel, *Third Rep.*, *supra* note 134, at 98–107; BRUHÀCS, *supra* note 168, at 129–30, 137–40; Daniel Barstow Magraw, *Transboundary Harm: The International Law Commission's Study of "International Liability"*, 80 AM. J. INT'L L. 305, 322 (1986); Sachariew, *supra* note 164.

¹⁸⁵ *Pulp Mills on River Uruguay* (Arg. v. Uru.), Judgment, 2010 I.C.J. 14, ¶ 177 (Apr. 20); see also Cullet, *supra* note 175; Gupta & Bosch, *supra* note 175.

¹⁸⁶ See, e.g., UNECE Water Convention, *supra* note 83, art. 2(2) (qualifying the obligation to reduce transboundary pollution with an obligation to “ensure that transboundary waters are used in a reasonable and equitable way”); JOHAN G. LAMMERS, POLLUTION OF INTERNATIONAL WATERCOURSES 496–501, 540–43, 580–84, 600 (1984); Magraw, *supra* note 184, at 322.

¹⁸⁷ *Berlin Rules*, *supra* note 81, art. 22; see also UN Watercourses Convention, *supra* note 77, art. 20. See generally Talbot-Jones, *supra* note 180.

Article 7

Obligation not to cause significant harm

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

2. Where significant harm nevertheless is caused to another watercourse State, the States whose use causes such harm shall, in the absence of agreement to such use, take all appropriate measures, having due regard for the provisions of articles 5 and 6, in consultation with the affected State, to eliminate or mitigate such harm and, where appropriate, to discuss the question of compensation.¹⁸⁸

The requirement of “appropriate measures” mandates a consideration of what is appropriate under all the circumstances, including the cost of preventing harm and the feasibility of minimizing harm by redesigning a particular use. The subordination of the obligation to prevent harm to the principle of equitable utilization is made explicit in subsection 2, where the obligation to take “appropriate measures,” as well as the obligation to “discuss compensation,” are subject to “due regard” to the provisions of Articles 5 and 6—in other words, with due regard to the principle of equitable utilization. Given the reality that each state’s actions, if undertaken without regard for the interests of the other state, would inflict harm on the other,¹⁸⁹ one could hardly reach any other conclusion.

The International Law Association in the Berlin Rules took yet another stab at clarifying the relation of harm to equitable utilization:

Article 12

Equitable Utilization

1. Basin States shall in their respective territories manage the waters of an international drainage basin in an equitable and reasonable manner having due regard for the obligation not to cause significant harm to other basin States.

2. In particular, basin States shall develop and use the waters of the basin in order to attain the optimal and sustainable use thereof and benefits therefrom, taking into account the interests of other basin States, consistent with adequate protection of the waters.

¹⁸⁸ UN Watercourses Convention, *supra* note 77, art. 7.

¹⁸⁹ See R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960); see also Dellapenna, *The Customary International Law of Transboundary Fresh Waters*, *supra* note 74, at 283–84; Stoa, *supra* note 127, at 1347–53.

Article 16

Avoidance of Transboundary Harm

Basin States, in managing the waters of an international drainage basin, shall refrain from and prevent acts or omissions within their territory that cause significant harm to another basin State having due regard for the right of each basin State to make equitable and reasonable use of the waters.¹⁹⁰

This formulation largely tracks the language of the UN Watercourses Convention, but with noteworthy changes. Article 12(1) of the Berlin Rules adds “due regard for the obligation not to cause significant harm to other basin States” to the principle of equitable utilization. Article 12(2) further requires states to act “consistent with adequate protection of the waters.” There is no comparable language in Article 5 of the UN Watercourses Convention, although the UN Watercourses Convention does require consideration of the effects of a use on other states as a variable in determining whether a use is equitable and reasonable.¹⁹¹ While these changes elicited considerable discussion within the Water Resources Law Committee of the International Law Association, the actual import of the changes is not entirely clear. Because of the reciprocal nature of injuries in disputes over internationally shared waters,¹⁹² the changes probably do not mean anything more than what they say: An effect on another state must be considered (“due regard”), and states must be wary of causing environmental harm without necessarily foreclosing a conclusion that some significant harm must be borne by one state or the environment in order to accommodate an equitable and reasonable use in another state. The Berlin Rules make a significant change in Article 16 that specifically addresses the obligation to avoid harm; Article 16 makes explicit that the obligation to avoid harm applies both to the actions by the state itself and by others acting within its territory.¹⁹³ Note that Article 16, like Article 7 of the UN Watercourses Convention, applies to all kinds of disputes between states over internationally shared waters, including both quantity and quality issues.

Three chapters of the Berlin Rules, derived from international environmental law and therefore applicable to all waters (national as well as international), address environmental harms.¹⁹⁴ These chapters take in many of the disputes that are

¹⁹⁰ *Berlin Rules*, *supra* note 81, arts. 12, 16 (emphasis added).

¹⁹¹ UN Watercourses Convention, *supra* note 77, art. 6(d).

¹⁹² See *supra* note 189 and accompanying text.

¹⁹³ CHAVARRO, *supra* note 179, at 105. This is the usual understanding of state responsibility in international law.

¹⁹⁴ *Berlin Rules*, *supra* note 81, chs. V (Protection of the Aquatic Environment), VI (Impact Assessments), VII (Extreme Situations); see also *id.* arts. 7 (Sustainability), 8 (Minimization of Environmental Harm), 38 (Precautionary Management of Aquifers), 40 (Sustainability Applied to Aquifers), 41 (Protecting Aquifers). One can trace the sources of each article in the Berlin Rules in Joseph W. Dellapenna, *Sources of the Berlin Rules on Water Resources* (2004), https://www.researchgate.net/publication/304145601_Sources_of_the_Berlin_Rules_on_Water_Resources [https://perma.cc/ZP8U-VAZM]; Canelas de Castro, *supra* note 179, at 895; Daniel Barstow Magraw & Patsorn Udomrithiruj, *Water and Multilateral Environmental Agreements: An Incomplete Jigsaw Puzzle*, in RESEARCH HANDBOOK ON INTERNATIONAL WATER LAW 166 (Stephen C. McCaffrey et al. eds.,

primarily about quality issues. While the Berlin Rules do not spell out the relationship between Article 16 and the other rules, if these other rules accurately summarize the current state of customary international law (as the International Law Association concluded), any agreement or other resolution of a dispute over internationally shared waters must comply fully with both sets of obligations—which ultimately means that the states must comply with whichever standard is stricter on the specific point. Thus states have more discretion in managing the quantitative aspects of a dispute than they have regarding the qualitative or environmental aspects of a dispute,¹⁹⁵ even acknowledging that the two sorts of dispute are not entirely separable.

In the *Silala River Case*, Chile raised the issue of Bolivia's obligation not to harm uses in Chile.¹⁹⁶ Once again, Bolivia initially contested whether that obligation was fully applicable in the case,¹⁹⁷ before finally accepting that it was.¹⁹⁸ Once again, the International Court of Justice found that there was no real disagreement between the parties regarding the applicability of the obligation not to cause significant harm.¹⁹⁹ While the parties did expend considerable effort in arguing the applicability of the obligation, Chile also had requested the Court to determine whether Bolivia had breached that standard.²⁰⁰ The Court concluded that Chile simply had not substantiated its claim of significant harm.²⁰¹ Once again the Court passed on an opportunity to clarify the law on the point.

VI. CONCLUDING OBSERVATIONS

For the third time in a quarter of a century, the *Silala River Case* presented the International Court of Justice with an opportunity to clarify and develop the customary international law applicable to transboundary waters.²⁰² For the third time, the Court stopped at some rather abstract affirmations of the basic principles of international water law without deciding the merits of the controversies before it.²⁰³ The Court's admonition to Bolivia and Chile to return to negotiations²⁰⁴ to resolve the merits is likely to take years before bearing fruit, if it ever does. Perhaps

2019); cf. Alistair Rieu-Clarke, *Transboundary Hydropower Projects Seen Through the Lens of Three International Legal Regimes—Foreign Investment, Environmental Protection and Human Rights*, 3 INT'L J. WATER GOVERNANCE 27, 33–34, 36–41 (2015).

¹⁹⁵ For an argument that such a separation is desirable, so far as possible, see Albert E. Utton, *Which Rule Should Prevail in International Water Disputes: That of Reasonableness or that of No Harm?*, 36 NAT. RES. J. 635 (1996).

¹⁹⁶ Dispute Over Status and Use of Waters of Silala (Chile v. Bol.), Judgment, 2022 I.C.J. 5, ¶¶ 77, 78 (Dec. 1).

¹⁹⁷ *Id.* ¶¶ 79, 80, 84.

¹⁹⁸ *Id.* ¶¶ 81, 84.

¹⁹⁹ *Id.* ¶¶ 85, 86.

²⁰⁰ *Id.* ¶ 77.

²⁰¹ *Id.* ¶ 88.

²⁰² *Id.*; Pulp Mills on River Uruguay (Arg. v. Uru.), Judgment, 2010 I.C.J. 14 (Apr. 20); Gabčíkovo-Nagymaros Project (Hung./Slovk.), Judgment, 1997 I.C.J. 7 (Sept. 25).

²⁰³ Chile v. Bol., 2022 I.C.J. ¶¶ 85, 86, 95, 97, 118, 128.

²⁰⁴ *Id.* ¶¶ 118, 156.

the best example of the failure of this judicial abdication to resolve the dispute is the *Gabčíkovo-Nagymaros Case*²⁰⁵ where the Court simply ignored Hungary's attempt to reopen the case based on its allegation that Slovakia was unwilling to negotiate in good faith.²⁰⁶ The dispute lingers unresolved after 26 years.

Why is the International Court of Justice so unwilling actually to decide cases pertaining to the customary international law applicable to transboundary waters?²⁰⁷ Perhaps the judges of the Court lack confidence in their ability to apply the complex and challenging principles of international water law,²⁰⁸ or perhaps there is some other reason. Part of the problem is the Court has limited its inquiry into the parameters of the customary international law applicable to transboundary waters to the UN Watercourses Convention²⁰⁹ and its own "jurisprudence."²¹⁰ By "jurisprudence," the Court is referencing its caselaw on point. It is true that the Court does not follow the rule of precedent such as in the common law,²¹¹ yet its prior decisions do count as part of the "teachings of the most highly qualified publicists" that are a secondary source of international law.²¹² Given the prestige of the Court and with so few authoritative voices on the topic of international water law, that jurisprudence does and should carry great weight. Yet the Court has not examined other potential teachings (including but not limited to the Berlin Rules²¹³) that could clarify and expand the scope of international water law. This failure might be because of a failure of the agents of the states before the Court to fully develop the relevant materials, but ultimately the responsibility to expound the law falls on the Court and not merely on the agents. The question remains, when will the Court do its job in these cases?

²⁰⁵ Hung./Slovk., 1997 I.C.J. ¶ 140.

²⁰⁶ See generally Gábor Baranyai & Gábor Bartus, *Anatomy of a Deadlock: A Systemic Analysis of Why the Gabčíkovo-Nagymaros Dam Dispute is Still Unresolved*, 18 WATER POL'Y 39 (2016).

²⁰⁷ See Awn S. Al-Khasawneh, *supra* note 145.

²⁰⁸ The Court's opinion refers to the "particular" and "quite special" circumstances of water disputes (as alleged by Bolivia), and chose to dismiss these circumstances as raising a "hypothetical dispute" rather than attempting to resolve the rights and duties of the States under those circumstances. *Chile v. Bol.*, 2022 I.C.J. ¶¶ 157, 160–62.

²⁰⁹ *Id.* ¶¶ 50–58, 77–79, 85, 90–96, 103–17 (citing UN Watercourses Convention, *supra* note 77).

²¹⁰ See *Chile v. Bol.*, 2022 I.C.J. ¶¶ 45, 96, 108, 114–17, 132, 135, 138.

²¹¹ Statute of the I.C.J., *supra* note 21, art. 59.

²¹² *Id.* art. 38(d); see SHABTAI ROSENNE, *THE LAW AND PRACTICE OF THE INTERNATIONAL COURT* 611–19 (2d ed. 1985).

²¹³ *Berlin Rules*, *supra* note 81.