The Silala Dispute: Between International Water Law and the Human Right to Water

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1. Introduction

The dispute between the Republic of Chile and the Plurinational State of Bolivia before the International Court of Justice concerns the legal nature of the Silala river as an international watercourse and the ensuing regime of utilization of its waters. The controversy, which arose in 1999 when Bolivia claimed its exclusive right on the river, has already been described by other authors.¹

The main facts can be briefly summarized as follows. It is undisputed that the river originates in Bolivian territory and that it flows through Chilean territory. Therefore, de facto, the Silala is a watercourse shared by the two countries.

However, according to Chile, the Silala river naturally flows towards Chile due to the natural inclination of the terrain, while in Bolivia’s view, the river has been artificially diverted to Chile.

According to the parties, the consequences of these different positions are irreconcilable. On the one hand, Chile argues that the Silala River system is an international watercourse and thus claims its right to use the river’s waters in accordance with customary international law, 

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QIL, Zoom-in 39 (2017), 23-37
and Bolivia’s subsequent duty to cooperate and to provide timely information on planned measures regarding the river.\(^2\)

On the other hand, Bolivia contends that the Silala River system is not a transboundary watercourse and that its waters are its exclusive right – as they would have been without the man-made diversion of the river’s natural flow. Accordingly, Bolivia says, Chile must pay compensation for its utilization.

Therefore, the legal nature of the Silala, specifically whether it should be considered as an international watercourse or not, appears to be the core point at issue. This is also the focus of contribution of Tamar Meshel. This article aims to look at the dispute from another perspective. After briefly analysing the customary obligations of States vis-à-vis the other riparian States of an international watercourse in section two, section three will recall, and contextualize, the theory of ‘absolute territorial sovereignty’ over water resources. Before concluding, section four will focus on the set of obligations, not yet fully explored, that would follow regardless of the final qualification of the Silala river. The main argument is that the importance attached to the legal nature of the watercourse might be reduced if read in the light of the current evolution of the human right to water.

2. The obligations ensuing from the qualification of the Silala River as an International Watercourse

While the legal architecture for international watercourses is still fragmented,\(^3\) some substantive and procedural principles of customary International Law have come into being\(^4\) and have since been codified by the UN Commission of International Law in the UN Convention on the Law of Non-Navigational Uses of Watercourses (hereinafter ‘Wa-

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The latter, regarded as ‘the constitutive foundations for a legal regime’, is a ‘framework Convention’, which provides rules already included, or likely to be included, in particular transboundary watercourse agreements.

While neither Bolivia nor Chile have ratified the Watercourse Convention, its main provisions are deemed to correspond to customary international rules in the field. A comprehensive and detailed illustration of the rules governing International Water Law is beyond the scope of the present article. Suffice here to mention the core principles that, were the Silala river considered an international watercourse, would apply as customary rules, namely: the equitable and reasonable utilization of watercourses, the obligation not to cause significant harm and the general duty to cooperate, including a duty of information, consultation and negotiation on the measures that may impact other riparian States.

As for the principle of equitable and reasonable utilization, this entails that when utilizing an international watercourse, each watercourse State has to take into account the interests of the other riparian States. Over-utilisation of water resources or their diversion, significantly impairing the needs of neighbouring countries, would be considered inconsistent with the principle of equitable use and therefore prohibited.

6 L Boisson de Chazournes, Fresh Water in International Law (OUP 2013) 27.
The so-called ‘no-harm’ principle requires States to exercise due diligence in the utilization of shared water resources that flow within their territory in order to avoid significant damage to other basin States. Therefore, States should avoid – or prevent private actors from – polluting, reducing or diverting the flow of a watercourse or a lake in a way amounting to an illegal utilization of shared waters.\textsuperscript{11}

The absence of hierarchy between the last two principles has been at the heart of several controversies about whether and to what extent eventual harm may be justified in light of the equitable and reasonable utilization of waters.

In principle, disputes can be prevented by applying the duty to cooperate, which provides that watercourse States are under an obligation to collaborate, consult and negotiate, ‘on the basis of sovereign equality, territorial integrity, mutual benefit and good faith to obtain optimal utilization and adequate protection of an international watercourse’.\textsuperscript{12}

Finally, in the event of a conflict over different uses of watercourses, States are required to take into special regard the \textit{vital human needs} both in determining the equitable utilization of watercourses and in putting in place measures directed at preventing significant harm from being caused to other States.\textsuperscript{13} According to the Statement of Understanding accompanying the Watercourse Convention, in determining vital human needs, ‘special attention is to be paid to providing sufficient water to sustain human life, including both drinking water and water required for production of food in order to prevent starvation’.\textsuperscript{14}

Leb, underlining a process of ‘[c]odification for the protection of vital human needs’, argues for the progressive harmonization of water law and human rights law.\textsuperscript{15} In this vein, another well-known instrument in

\begin{itemize}
\item\textsuperscript{11} Convention on the Law of the Non-Navigational Uses of International Watercourses (n 5) art 7.
\item\textsuperscript{12} ibid art 8(1).
\item\textsuperscript{13} ibid art 10(2).
\item\textsuperscript{14} UNGA Sixth Committee, ‘Report of the Sixth Committee convening as the Working Group of the Whole’, Statements of Understanding Pertaining to Certain Articles of the Convention UN Doc (11 April 1997) A/51/869, para 8.
\end{itemize}
the field, the UNECE Helsinki Convention\textsuperscript{16} – which has been ratified by 41 UNECE Member States and is open to all Members of the United Nations to accede to – has been supplemented by a Protocol that expressly requires States to pursue the aim of providing ‘\textit{[a]ccess to drinking water for everyone}’.\textsuperscript{17}

Likewise, the so-called Berlin Rules on Water Resources, adopted by the International Law Association in order to codify relevant rules in the field, stipulates that in the case of conflicting uses ‘\textit{States shall first allocate waters to satisfy vital human needs}’.\textsuperscript{18} What is more, Article 17 explicitly lays down an individual right of access to water.\textsuperscript{19}

Assuming the international nature of the Silala River system, Chile would be entitled to claim respect for the international customary rights analysed above. This entitlement runs counter to the claim of Bolivia to the use of 100% of the river’s waters, grounded on the alleged domestic nature of the watercourse.

3. \textit{The absolute territorial sovereignty over water resources in the era of the commoditization of water}

Bolivia, maintaining that the Silala River is not an international watercourse, affirms the full sovereignty over the use and exploitation of its waters. The echo of the theory of ‘absolute territorial sovereignty’, also referred as the ‘Harmon doctrine’, in Bolivia’s statements deserves attention and must be contextualized.


\textsuperscript{18} Berlin Rules on Water Resources (n 5) art 14(1).

\textsuperscript{19} ibid art 17(1): ‘Every individual has a right of access to sufficient, safe, acceptable, physically accessible, and affordable water to meet that individual’s vital human needs’. As it will be seen in section 4, this provision corresponds to the definition of the right to water provided for by the International Committee on Economic, Social and Cultural Rights.
According to the so-called ‘Harmon doctrine’, States, in force of the supreme sovereignty over their natural resources, have unilateral rights on the portion of international watercourse within their borders. Needless to say, this theory favours upstream riparians, which would be entitled to utilize, and even divert, water without regard to the implications on other downstream countries.\(^\text{20}\)

The very existence of a rule on ‘absolute territorial sovereignty’ in international law is disputed\(^\text{21}\) and was not even applied by the State that claimed it first. Indeed, States tend to also consider the rights of neighbour States to have their natural resources respected.

In line with the opposing theory of the ‘territorial integrity’ of natural resources, it is affirmed that States’ rights to exploit their own resources must be balanced with the responsibility to ensure that activities within their jurisdiction or control do not cause damage to other States beyond the limits of their domestic jurisdiction.\(^\text{22}\)

In between these two opposing theories, other doctrines – namely the ‘limited territorial sovereignty’\(^\text{23}\) and the ‘community of interests’\(^\text{24}\) – better mirror States’ inclination to find an agreement on the use of the shared water resources.

In the light of the above considerations, a straight claim on the exclusive right to use and exploit the portion of waters of an international river located within its own boundaries would have had few chances to

\(^{20}\) This doctrine was first affirmed in 1895 by the US Attorney General, Judson Harmon, in the context of a dispute between the USA and Mexico over the use of the Rio Grande. In the relevant part, the opinion of the Attorney General Harmon read as follows: ‘The case presented is a novel one. Whether the circumstances make it possible or proper to take any action from considerations of comity is a question which does not pertain to this Department; but that question should be decided as one of policy only, because, in my opinion, the rules, principles and precedents of international law impose no liability or obligation upon the United States.’ (1894-1897) 21 Official Opinions of the Attorneys General of the US 283.

\(^{21}\) McCaffrey doubts that such a doctrine has ever existed in International Law. See SC, McCaffrey, ‘The Harmon Doctrine One Hundred Years Later: Buried, Not Praised’ (1996) 36 Natural Resources J 549.


\(^{23}\) See A Tanzi, M Arcari (n 4) 14.

\(^{24}\) McCaffrey (n 4) 150; Case concerning the Gabčikovo-Nagymaros Project (n 10) para 85.
succeed before the International Court of Justice, while the qualification of the Silala river as a domestic one leaves Bolivia room to assert full sovereignty and a lack of obligation towards neighbour countries.

Against this assumption, the following section will deal with the so-called extraterritorial obligations stemming from the human right to water. Before turning to this point, however, it is worth making a few preliminary considerations.

First, one has to mention the creeping commoditization of water. In the Atacama Desert area, with increasing water shortage, the dispute over the Silala has taken features similar to a commercial dispute and water has been treated as a mere economic good, disregarding its human rights dimension.

Indeed, looking at the facts, the disagreement between the two countries started in 1997 when Bolivia reversed a water concession granted to a Chilean company, Antofagasta (Chili) and Bolivia Railway Company Ltd (FCAB). Subsequently, the dispute in question arose in 2000, when Bolivia granted a concession to a private Bolivia company, DUCTED S.R.L., for the commercialization and exportation of the Silala waters for industrial use and human consumption and, accordingly, DUCTED invoiced the FCAB and a Chilean State-owned mining company, CODELCO, for the use of waters of the Silala in Chile. Finally, it came to a head when, in 2010, Bolivia claimed that Chile should have paid compensation for the utilization of Silala waters over the previous century (the so-called ‘historic debt’).

One may wonder whether the predicted coming crisis of freshwater resources is likely to feed claims of absolute territorial sovereignty over water resources in lieu of a more holistic approach, which respects the

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26 It is noteworthy that Bolivia has included the right to water in its Constitution. See República del Bolivia – Constitución de 2009 (7 February 2009) art 16(1): ‘I. Toda persona tiene derecho al agua y a la alimentación’, Art 20(1): ‘Toda persona tiene derecho al acceso universal y equitativo a los servicios básicos de agua potable’; and (3): ‘El acceso al agua y alcantarillado constituyen derechos humanos, no son objeto de concepción ni privatización y están sujetos a régimen de licencias y registros, conforme a ley’. On the contrary, Chile, has fully divested the water service sector.

equal rights of use of all riparian States and promotes the management of the river as a single unit.

Second, the dispute extends beyond the mere payment for the use of the Silala waters by Chile; it is backed by a political long-lasting controversy between the two countries on the sovereignty over land that provides access to the Pacific Ocean. The claim to the waters of the Silala has been seen as an ‘attempt to compel Chile to return land Bolivia lost’ in the War of the Pacific and to secure Bolivia ‘a sovereign corridor to the Pacific Ocean’.  

In brief, Bolivia’s claim to be entitled to 100% ownership of the Silala waters, with the threat of the coming freshwater crisis, on the one hand, and the aspiration to regain access to the Pacific Ocean, on the other, might seem like a bargaining chip aimed at putting pressure on Chile to enter into negotiation.

4. The extraterritorial application of the right to water

The waters of the Silala River system are used in Chile for industrial purposes as well as for the provision of water supply for human and domestic use. As for the latter, one might wonder whether a State claiming full sovereignty over the use and exploitation of a river could be considered completely unbound from any extraterritorial obligations vis-à-vis people who, while outside its territory, depend on the same waters.

In other words, the question is whether, notwithstanding the lack of clear international status for a particular watercourse, a State has an unlimited right to use its waters irrespective of the extraterritorial consequences its actions might have on other riparian countries and on people living therein.

For the reasons that will be explained below, it is contended that States have extraterritorial obligations deriving from the (emergent) human right to water, regardless the legal nature of the transboundary watercourse.

28 Rossi (n 1) 59; see also Mulligan, Eckstein (n 1) 604.
The legal basis of the extraterritorial obligations stemming from economic, social and cultural rights\(^29\) can be traced back to Articles 55 and 56 of the UN Charter and to the International Covenant on Economic, Social and Cultural Rights (ICCPR), Article 2(1), which states that the full realization of economic, social and cultural rights must be achieved progressively by State Parties, ‘individually and through international assistance and co-operation’ (italics added).

According to the authoritative interpretation of Article 2(1) ICCPR provided for by the Committee on Economic, Social and Cultural Rights (CESCR) ‘international cooperation for development and thus for the realization of economic, social and cultural rights is an obligation of all States’ and ‘the essential role of such cooperation in facilitating the full realization of the relevant rights is further underlined by the specific provisions contained in articles 11, 15, 22 and 23’\(^30\).

In its well-known General Comment No 15,\(^31\) the CESCR has inferred the right to water from Article 11(1), and Article 12 ICESCR, re-


respectively concerning the right to an adequate standard of living, and the right to the ‘highest attainable standard of physical and mental health’.

The human right to safe drinking water has also been recognised and proclaimed by the General Assembly\(^{32}\) and the Human Rights Council.\(^{33}\) It entitles everyone, without discrimination, to have access to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic use.\(^{34}\)

The obligations arising for States from the human right to water may be divided into ‘internal’ obligations, which States hold towards individuals or group of people within their territory and under their jurisdiction, and ‘international’ obligations which they are deemed to perform towards third States (with the limits that will be specified in this section).

In its working paper on the right to access to drinking water and sanitation services, the former Special Rapporteur Guissé stressed the necessity of close cooperation among nations recalling that the obligation of States to cooperate with each other has been enunciated in, \textit{inter alia}: Articles 55 and 56 of the Charter; Article 28 of the Universal Declaration of Human Rights; Article 2(1) of the International Covenant on Economic, Social and Cultural Rights; Article 3 of the Declaration on the Right to Development; paragraph 10 of the Universal Declaration on the Eradication of Hunger and Malnutrition.\(^{35}\)

According to the CESCR, the international obligations ensuing from the right to water can be framed under the umbrella of the duty to cooperate, established by Article 2(1), Articles 11(1), and Article 23 of the CESCR.\(^{36}\)

\(^{32}\) UNGA Res 64/292 ‘The Human Right to Water and Sanitation’ (28 July 2010) UN Doc A/RES/64/292.

\(^{33}\) UNHRC Res 15/9 ‘Human rights and access to safe drinking water and sanitation’ (30 September 2010) UN Doc A/HRC/RES/15/9.

\(^{34}\) General Comment No 15 (n 31) para 2.


\(^{36}\) For an in-depth analysis of the matter, see TS Bulto, \textit{The Extraterritorial
The CESCR further explains that international obligations arising for States with regard to the human right to water consist in the same tripartite division recalled for internal obligations, namely to respect, protect and fulfil.

Under the obligation to respect, a State must ‘refrain from actions that interfere, directly or indirectly, with the enjoyment of the right to water in other countries. Any activity undertaken within the State party’s jurisdiction should not deprive another country of the ability to realize the right to water for persons in its jurisdiction’. It is noteworthy that the Committee emphasizes that ‘water should never be used as an instrument of political and economic pressure’.

The obligation to protect requires States to take steps in order to prevent their own citizens and companies from violating the right to water of individuals and communities in other countries.

Finally, the obligation to fulfil requires States to facilitate the realization of the right to water in other countries ‘[d]epending on the availability of resources (...) for example through provision of water resources, financial and technical assistance, and provide the necessary aid when required’. This obligation does not merely require States to refrain from interfering with the enjoyment of the right to water in third countries, but also establishes a positive duty to act in order to promote the full implementation of the right abroad.

Put in these terms, we disagree with the wide interpretation given by the CESCR concerning the binding nature of the obligation to fulfil. After all, the same CESCR has expressed the obligation to fulfil in careful terms, subjecting its implementation ‘on the availability of resources’. For the same reasons, it is difficult to share the view of those who have argued over the emergence of a duty to cooperate in the management of the world’s water resources as an obligation erga omnes imposable on all States.


Among the violations of the extraterritorial obligations stemming from the human right to water, the former Special Rapporteur on the human right to water has mentioned the denial by Israel of access to water in the Occupied Palestinian Territory, as referred to by two treaty bodies, namely CESCR and the Human Rights Committee.\(^{42}\)

The CESCR, in its concluding observations on the report submitted by Israel, has drawn the attention of the State Party to its General Comment no 15 in order to reiterate its recommendation ‘to ensure the availability of sufficient and safe drinking water and adequate sanitation for Palestinians living in the Occupied Palestinian Territory, including through the facilitation of the entry of necessary materials to rebuild the water and sanitation systems in Gaza’.\(^{43}\)

The Human Rights Committee has also expressed concern about the water shortage affecting the Palestinian population of the West Bank ‘due to prevention of construction and maintenance of water and sanitation infrastructure, as well as the prohibition of construction of wells’ and recommended Israel to ‘allow the construction of water and sanitation infrastructure, and wells’ (italics added).\(^{44}\)

Thus, it can be argued that the extraterritorial obligations inferred from the human right to water, would encompass at least the negative duty to refrain from interfering with the enjoyment of the right to water abroad.

That being said about the human right to water as inferred from Article 11(1) and Article 12 ICESCR by the CESCR, a brief reference must be made to the emergent customary human right to water.

While a complete discussion on the matter of the status and the content of the international right to water falls outside the scope of this article, as far as extraterritorial obligations are concerned, the existence of a customary human right to water establishing a duty to fulfil – name-


\(^{44}\) UNHRC, ‘Consideration of reports submitted by States parties under article 40 of the Covenant. Concluding observations of the Human Rights Committee’ UN Doc CCPR/C/ISR/CO/3 (3 September 2010) para 18.
ly a legally binding obligation to provide assistance to any State for the fulfilment of the right to water⁴⁵ – may be doubted. This sort of obligation is poorly supported by States’ practice, and at times explicitly refuted.⁴⁶

On the contrary, a more nuanced approach seems to correspond better with the current state of development of international law, where ‘the extraterritorial duties to respect and protect human rights have their basis in the jurisprudence of the regional and international human rights instruments’.⁴⁷

Applying these extraterritorial obligations in the context of shared water resources, violations may occur when the use or management of water resources in a State negatively impacts the human and domestic use of water by the population located in another co-riparian State.

The former Special Rapporteur on the human right to water affirmed that ‘[v]iolations of extraterritorial obligations are a growing concern in relation to the rights to water and sanitation, for instance in the context of transboundary water resources’, listing among the instances of violation the case when ‘water contamination or use causes human rights violations in a neighbouring country’.⁴⁸

The obligation to respect would involve the duty to refrain from taking actions over shared waters that are likely to harm the right to water of people subject to the jurisdiction of another riparian State.

Chávarro argues for a mutual strengthening of the extraterritorial obligations deriving from the human right to water and the customary principles of international water law. In particular, by comparing the respective obligations, she contends that the principles of international water law ‘can reinforce the realization of the human right to water in a context where international waters are involved’.⁴⁹ For instance, the

⁴⁹ Murillo Chávarro (n 41) 315 ff.
principle of equitable and reasonable utilization, by requiring States to cooperate for an equitable use of the shared watercourse goes hand in hand with the obligation to fulfil, which in turn demands that States provide the necessary assistance to facilitate the realization of the right to water in other countries. The duty not to cause significant harm is comparable to the obligation to respect and protect, which compels States and people subject to their jurisdiction to refrain from interfering with the enjoyment of the right to water abroad.

The harmonization of the two branches of international law is welcome in the light of this mutual support for strengthening the equitable sharing of water resources and enhancing the implementation of the right to water.

However, this convergence is limited to the case in which the scope of application of the two set of rules coincides. In the opposite case, we contend that where the applicability of the principles of international water laws ends, the extraterritorial application of the human right to water intervenes. In other words, the human right to water has a broader scope of application; it compels States to adopt, or to refrain from adopting, measures within their boundaries that can impact extraterritorially in any State, whether it is co-riparian or not.

Therefore, even when the nature of the watercourse is contested and the applicability of the customary principle of international water law is doubted, due to the external dimension of the human right to water, States should be prevented from adopting measures that can impair the enjoyment of adequate level of water for human and domestic consumption in other countries.

Applying the above considerations to the Silala dispute might bring a new argument into the discussion.

In particular, in the case of conflict between sovereign rights and the human right to water, the latter should prevail to the extent that minimum rights are also guaranteed extraterritorially. A unilateral diversion of the river by Bolivia which prevented the Chilean population from enjoying the right to water, would run counter to the negative obligation to respect, that is to say to refrain from actively jeopardizing the enjoyment of the right to water abroad. To affirm the opposite would amount to denying the core international obligations stemming from the human right to water.
5. Conclusion

Bolivia claims absolute sovereignty on the Silala River and the right to use 100% of its water on the grounds that it is not an international watercourse. Indeed, the debated legal nature of the watercourse entails a dispute over the applicability of the customary principles of international water law on the use of shared water resources.

While acknowledging the significance of the consequences that follow from the clarification of the legal nature of the River, we submit that, in the light of the current evolution of international law, it can be argued that the human right to water limits the States’ right to fully dispose of their water resources in any event.

In particular, the external dimension of the right to water requires States to refrain from assuming decisions over the utilization of their waters that would impair the capacity of other States to provide sufficient water for the domestic and human needs of their population.

Regardless of the legal nature of a watercourse, States must cooperate in order to respect all individuals’ right to water and, where possible, take actions to support its full implementation. These obligations, binding in any circumstances, may relativize the relevance of the legal qualification of the watercourse.