Verão 98
Nº 86 – 2.ª Série
pp. 51-66

The Challenge to International Law: Water Defying Sovereignty or Sovereignty Defying Reality?*

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* Comunicação apresentada ao Seminário Internacional *"O Desafio das Águas: Segurança Internacional e Desenvolvimento Duradouro"*, organizado pelo Instituto da Defesa Nacional, em Lisboa, em 30 e 31 de Março de 1998.

INTRODUCTION[1]

"Water defying sovereignty". With these three words, the organizers of this meeting captured the essence of the challenge that international law faces in dealing with water resources. One dimension of this challenge is immediately obvious. If we proceed from the assumption that sovereignty means full and exclusive control over territory[2], we see that water defies sovereignty in several respects. First and foremost, it moves and thus eludes "full and exclusive" control. It follows that quality and quantity of water within the territory of one state are affected by activities in others, and *vice versa*. This interdependence exists not only between states that physically share a watercourse, but extends to non-riparian states in the same basin and even to marine areas beyond the jurisdiction of any state. And, as we are beginning to acknowledge, impacts on water quality and quantity are intertemporal, affecting the availability of water and environmental conditions in the future.

All of this leads to a second dimension to the challenge highlighted by the panel title. Indeed, it may be said that the challenge to international law is not so much rooted in "water defying sovereignty" as it is rooted in "sovereignty defying reality". I put this in deliberately provocative terms, but we are here at the core of the difficulties international law encounters in dealing with shared water resources. For a variety of reasons, states have permitted international law to reflect only a limited range of the environmental, spatial and temporal interdependencies mentioned above. International water law remains driven by the jealous guarding of sovereignty over water, and defined by a perception of water as a resource to be used and allocated, and as separable from the environment in a larger sense.

My contention is simple: international water law, and states, will not meet the "challenges of the water" until the reality of interdependence is addressed in its full complexity. This means that international environmental law and international water law must become integrated to treat water for what it is: a component of the environment. From this

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2 For a discussion *see* S.M. McCaffrey, "The Harmon Doctrine One Hundred Years Later: Buried, Not Praised" 36 *Natural Resources Journal* 549 at 550-551 (1996) [hereinafter McCaffrey, *Harmon Doctrine*].

integration, in turn, must emerge a concept of sovereignty that reflects rather than defies environmental reality. In brief, I will argue that sovereignty over water must be shaped by principles that promote ecosystem orientation and sustainable development. I will sketch the limitations of the classical law of international watercourses. To explore whether a more appropriate conception of sovereignty over water is developing, I will then survey recent developments, including the 1997 United Nations *Convention on the Law of Non-Navigational Uses of International Watercourses* (*Watercourses Convention*)[3] and the 1997 decision of the International Court of Justice (ICJ) in the *Gabcíkovo-Nagymaros* case[4].

LIMITATIONS OF THE CLASSICAL LAW OF INTERNATIONAL WATERCOURSES

As already suggested, international watercourse law is caught in a paradox. Conceptually, it is built upon an assumption of sovereign rights over water while, in reality, water eludes sovereign control. This tension has shaped the evolution of international water law. To be sure, absolute notions of sovereignty have long since been abandoned[5]. From its earliest days, the approach of international water law has been to deal with the reality of interdependence through concepts articulating the mutual limitation of sovereign rights[6]. These limitations grew in response to the emergence – or recognition – of areas of interdependence. For example, initial limitations to the sovereignty of riparian states were imposed to allow for the freedom of navigation[7]. Early on, the concept of the

3 UN Doc. A/51/869, April 11, 1997. Reprinted in 36 I.L.M. 700 (1997).

4 *Case Concerning the Gabcíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment of 25 September 1997, reprinted in 37 I.L.M. 162 (1997) [hereinafter *Gabcíkovo*].

5 McCaffrey, *Harmon Doctrine*, *supra* note 1, at 588-590, commenting on the United States' repudiation of absolute sovereignty as expressed through the Harmon Doctrine. The general rejection of this doctrine notwithstanding, several upper riparian states continue to rely upon absolute sovereignty arguments. *See e.g.* J.P. Dellapenna, "Surface Water in the Iberian Peninsula: An Opportunity for Cooperation or a Source of Conflict?" 59 *Tennessee Law Review* 803 at 821 (1992).

6 *See* J.P. Dellapenna, "Treaties and Instruments for Managing Internationally-Shared Water Resources: Restricted Sovereignty vs. Community of Property" 26 *Case Western Reserve Journal of International Law* 27 at 36-37 (1994) [hereinafter Dellapenna, 1994].

7 *See* L.A. Teclaff, "Evolution of the River Basin Concept in National and International River Law" 36 *Natural Resources Journal* 359 at 364 (1996).

"community of interest" in a river as giving rise to "a common legal rights" was recognized, albeit only in the context of navigable rivers[8]. The argument that such community concepts should have broader relevance and application was made over the years[9], but has not fundamentally altered the approach of international water law. Indeed, concepts designed to express the unity of shared freshwater, such as "shared natural resource" or "drainage basin", have met with the resistance of states[10]. Rather than define sovereignty in light of environmental unity and as subordinate to the "community of interest", international water law relies upon the balancing of competing interests.

All core rules of international water law can be traced back to such balancing and mutual limitation of sovereign rights. This approach is at the root of the rule that a state's right to use its territory is limited by the duty not to cause significant harm to another state[11]. It also grounds the rule that each state is entitled only to a reasonable and equitable share in the beneficial uses of a transboundary water resource[12]. Finally, it finds expression in various procedural rules, requiring riparian states to consider each others' interests and to provide for information and consultation regarding potential transboundary impacts[13]. When seen from this historical perspective, water law has been reasonably successful in adapting sovereignty to a changing reality. An expanding range of interdependencies has come to be reflected in the balancing of a progressively broader range of sovereign interests, such as those in navigation, various non-navigational uses, and the need for harm prevention[14]. Even environmental interests found some expression in this framework, albeit only to the extent that pollution or environmental degradation affected the sovereign interests

8 *Territorial Jurisdiction of the International Commission of the River Oder*, Judgment No. 16, 1929, P.C.I.J., Series A, No. 23, at 27.

9 But *see infra* note 42 and accompanying text on the broad application of the concept by the ICJ in the *Gabcíkovo* case.

10 *See e.g.* S.M. McCaffrey, "An Assessment of the Work of the International Law Commission" 36 *Natural Resources Journal* 297 at 305 (1996) [hereinafter McCaffrey, *ILC*]; J.L. Wescoat, "Beyond the River System: The Changing Geography of International Water Problems and International Watercourse Law" 3 *Colorado Journal of International Environmental Law and Policy* 301 (1992).

11 J. Brunnée & S.J. Toope, "Environmental Security and Freshwater Resources: A Case for International Ecosystem Law" 4 *Yearbook of International Environmental Law* 41 at 53 (1994) [hereinafter Brunnée & Toope, 1994].

12 *Ibid.* at 53-54.

13 *Ibid.* at 54.

14 *See* Teclaff, *supra* note 6, at 364-365.

of other riparian states as protected by the equitable utilization or no harm rules.

This latter aspect points to several limitations inherent in the focus of the conceptual framework just described on competing sovereign interests. To begin with, environmental harm is not legally relevant as such, but only where it also constitutes injury to sovereign rights[15]. Only then can constraints be placed upon a state's right to use its resources. Secondly, to preserve maximum sovereign freedom of action, international water law has retained a narrow focus on water, avoiding obligations relating to its interaction with the surrounding environment[16]. States' reluctance to embrace the aforementioned concepts of shared natural resource or drainage basin illustrates the point. The narrow focus on the watercourse not only holds in check sovereignty limitations imposed on riparian states, but also limits the range of players to whom any obligations could be owed. Legal interests of non-riparians, whether located in the drainage basin or concerned with pollution of marine areas beyond the jurisdiction of states, are not recognized by water law. A third limitation of the established conceptual framework results from the fact that the mutual limitation approach is premised upon a balancing of contemporary interests[17]. There are no intertemporal rights and obligations to constrain the exercise of sovereign rights to use water where there are impacts on future interests.

This framework no longer reflects environmental reality, neither in space nor in time. The question thus becomes whether international water law can evolve from a system of mutual limitation of competing sovereign rights into one of sovereignty limitation in the common environmental interest. I would argue that the approach that must emerge is not as radically different from the current paradigm as it might appear at first glance. It would not involve a denial of sovereignty over water, or assertion of its "common property" status[18]. Rather, it would extend the existing framework of limitations on sovereign resource use rights and would broaden the range of interests giving rise to limitations, so as to keep international water law in step with growing interdependence.

15 *See* P. Birnie & A.E. Boyle, *International Law and the Environment* at 230-232 (1992).

16 Brunnée & Toope, 1994, *supra* note 10, at 59.

17 *Ibid.* at 55.

18 *See here* Dellapenna, 1994, *supra* note 5, at 40-41, 52.

Thus, what is required is not a qualitative change in sovereignty limitations, but a quantitative one. Clearly, this "quantitative" change is a significant one, meeting with predictable resistance. However, few sovereign interests in water can be secured in the longer term without regard for common – or at least shared – interests in holistic protection of aquatic environments.

AN EMERGING NEW FRAMEWORK FOR INTERNATIONAL WATER LAW

In recent years, international environmental law and policy have produced various concepts that reflect contemporary environmental reality and our growing understanding of ecological interdependence. Of particular interest to the defence community, I presume, is the concept of environmental security. It is a hotly debated concept[19], criticized by some as risking to harden sovereign postures and escalate environmental disputes and conflicts by recasting them as strategic issues[20]. However, whether we like it or not, water *is* a strategic resource[21]. Ecological, economic and human survival are all dependent upon access to water in sufficient quantity and quality[22]. An appropriate understanding of the

19 Influential discussions of the concept include: R. Ullman, "Redefining Security" 8 *International Security* 129 (1983); J. Mathews, "Redefining Security" 63 *Foreign Affairs* 162 (1989); D. Deudney, "Environment and Security: Muddled Thinking" 47 *Bulletin of Atomic Scientists* 22 (1991). In the legal literature, the concept has been discussed by *e.g.* G. Handl, "Environmental Security and Global Change: The Challenge to International Law" 1 *Yearbook of International Environmental Law* 3 (1990); S. Vinogradov, "International Environmental Security: The Concept and its Implementation" in *Perestroika and International Law* 196 (A. Carter & A. Danilenko, eds., 1990); A. Timoshenko, "Ecological Security: Global Change Paradigm" 1 *Colorado Journal of International Environmental Law & Policy* 127 (1990).

20 *See* D. Deudney, "The Case Against Linking Environmental Degradation and National Security" 19 *Millenium* 461 (1990); S. Saad, "For Whose Benefit? Redefining Security" 2 *Ecodecision* 59 (1991).

21 *See e.g.* Anderson, "Water: The Next Strategic Resource" in *The Politics of Scarcity: Water in the Middle East* 2 (J. Starr & D. Stoll, eds., 1988); P. Gleick, "Water and Conflict: Fresh Water Resources and International Security" 18 *International Security* 79 (1993); S. Chou *et al.*, "Water Scarcity in River Basins as a Security Problem" 3 *Environmental Change and Security Project Report* 96 (1997).

22 This is highlighted in UN General Assembly, Resolution A/RES/S-19/2 of the Nineteenth Special Session on Progress Towards Meeting Objectives of the Earth Summit With Annex on a Programme for the Further Implementation of Agenda 21, June 28, 1997, reprinted in 36 I.L.M. 1639 (1997) at 1650 (para. 34) [hereinafter UNGA Res. S-19/2]. *See also* P. LeRoy, "Troubled Waters: Population and Water Scarcity" 6 *Colorado Journal of International Environmental Law & Policy* 299 (1995), who provides several tables listing countries facing water scarcity or water stress in 1990 and 2025 respectively (at 307-309).

concept of environmental security serves to highlight the linkages between human, environmental, economic and strategic issues. I have argued previously for a broad conception of environmental security, one that puts into focus the need for cooperative rather than competitive behaviour[23]. It is important to understand that a meaningful concept of "environmental security" must encompass more than prevention of conflict over environmental degradation. If it is understood that security in the more conventional strategic sense cannot be ensured without security in the environmental sense, the concept of environmental security focuses attention on maintaining the ecological systems human societies depend upon. In other words, priority must be accorded to achieving environmental sustainability.

The notion of sustainable development has gained great currency in international environmental law and policy circles. Despite the concept's ambiguities and problems, it signals at least the beginnings of a significant shift in approach. The ecological context in which human activity occurs is acknowledged, and so is the need to consider the long-term consequences of human actions. While no single understanding of the concept has established itself, a number of legal principles are emerging that flesh out the concept and allow international environmental law to capture a broader range of environmental interests, present and future. Relevant legal principles include intergenerational equity, common concern of humankind, the precautionary principle, and the requirement of environmental impact assessment[24]. It has been argued that what is needed, and what these principles promote, is an ecosystem orientation of international environmental law[25]. I noted earlier that international

23 Brunnée & Toope, 1994, *supra* note 10, at 46 & 52. *And see* W. Lang, "Negotiation in the Face of the Future" 38 *American Behavioural Scientist* 830 at 832 (1995), who uses the concept of "global security" to make this point".

24 A detailed discussion is beyond the scope of this paper. It is provided in Brunnée & Toope, 1994, *supra* note 10 at 65-75. *See also* P. Sands, "International Law in the Field of Sustainable Development: Emerging Legal Principles" in *Sustainable Development and International Law* (W. Lang, ed., 1995) 53, who lists integration, precaution, international equity and equity as principles of sustainable development.

25 For an explicit linking of sustainable development and ecosystem orientation *see* B. Sadler, "Shared Resources, Common Future: Sustainable Management of Canada-United States Border Waters" 33 *Natural Resources Journal* 375 at 391 (1993); M.H. Belsky, "Using Legal Principles to Promote the "Health" of an Ecosystem" 3 *Tulsa Journal of Comparative & International Law* 183 at 200 (1996); D. Tarlock, "International Water Law and the Protection of River System Ecosystem Integrity", 10 *Brigham Young Journal of Public Law* 181 at 185 (1996). *See also* J. Brunnée, & S.J. Toope, 1994, *supra* note 10; and "Environmental Security And Freshwater Resources: Ecosystem Regime Building" 91 *American Journal of International Law* 26 (1997).

environmental law and international water law must evolve from systems of "mutual limitation of competing sovereign rights" into systems of sovereignty limitation in the common environmental interest. An ecosystem orientation of international environmental law promotes this evolution: rights and obligations are defined in environmentally meaningful ways, sovereignty finds its limitations not only in states' rights, but also in what the environment can actually sustain[26].

Unfortunately, the conceptual development that is reshaping international environmental law has not been embraced with the same enthusiasm by international water law. Although both ultimately deal with the same subject matter, human use of an environmental resource, the two bodies of law have remained remarkably separate[27]. The resistance of international water law to principles of international environmental law and to ecosystem orientation is, of course, to be seen very much in the context of concerns over sovereignty losses. Nonetheless, some tentative shifting of conceptual boundaries can be observed.

Non-binding policy documents such as *Agenda 21*, adopted at the 1992 Rio Conference on Environment and Development, have emphasized the need for integrated approaches to sustainable water management, and for national and international legal instruments to further these goals. Indeed, chapter 18 of *Agenda 21* relies upon most of the sustainable development principles mentioned above and makes frequent mention of the need for an ecosystem approach to water management[28]. This perspective was reconfirmed by the UN General Assembly at the 1997 "Rio plus Five" review of the implementation of *Agenda 21*. The General Assembly stressed

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26 A helpful sketch, transferable to international watercourses law, of what an ecosystem approach would require is provided by C. Payne, "The Ecosystem Approach: New Departures for Land and Water, Foreword", 24 *Ecology Law Quarterly* 619 (1997):

> (...) first, and most obviously, taking the ecosystem as the unit to be managed and regulated; second, using multiparty negotiations to involve a broader group of stakeholders than is typical of normal regulatory activities; third, intergrating an adaptive management element, which addresses the dynamic biological and physiscal elements of natural systems; and fourth, creating an effort to create new regulatory tools better able to balance public and private rights (...).

27 On this point, and on the needed integration of the two fields, *see* J. Brunnée, "Pushing the Margins: Bringing Ecosystem Orientation in International Environmental Law into the Law of International Watercourses", in S. Vinogradov and P. Wouters, eds. *Sustainable Management of Transboundary Watercourses: Theory and Practice (Eastern and Western Perspectives)* [forthcoming].

28 *Agenda 21*, ch. 18 on "Protection of the Quality and Supply of Freshwater Resources: Application of Integrated Approaches to the Development, Management and Use of Water Resources", UN Doc. A/CONF.151/26 (Vol. 2) (1992).

the urgent need for "integrated watershed management", considering "pollution and waste, the interrelationship between water and land, including mountains, forests, upstream and downstream users, estuarine environments, biodiversity and the preservation of aquatic ecosystems, wetlands, climate and land degradation and desertification"[29].

Not surprisingly, the 1997 United Nations *Convention on the Law of Non-Navigational Uses of International Watercourses*, intended to provide globally binding rules, is much more reticent[30]. Its firm grounding in the mutual limitation paradigm is reflected in the core principles of equitable utilization (Art. 5) and no harm (Art. 7), and the focus on the international watercourse (Art. 2 (a)&(b)) and the interests of riparian states (Art. 2 (c)). Yet, the language of ecosystem-orientation and sustainability has made inroads into this framework. First, the right to reasonable and equitable utilization of a watercourse has been placed in the context of sustainable use and "adequate protection" of the watercourse[31]. In light of the foregoing discussion of 'ecological reality' and its implications for international water law, Art. 5 of the *Watercourses Convention* nonetheless falls short of what is required. Neither the sustainable use nor the adequate protection criterion is phrased so as to impose obligations upon states[32]. The latter criterion is further limited by the very use of the word "adequate", and by the fact that protection of the "water resources of the watercourse" is merely one of several factors to be weighed in determining reasonable and equitable shares in the use of a watercourse (Art. 6). Although ecological concerns are among these factors, environmental considerations are accorded no priority and can be outweighed by other types of concerns. This approach is entirely consistent with the convention's

29 *See* UNGA Res. S-19/2, *supra* note 21, at 1650 (para. 34(a)). "Strategic Approaches to Freshwater Management" were put on the agenda for the first year of the Multi-Year Work Programme for the Commission on Sustainable Development, 1998-2002. The work programme is contained in an appendix to Resolution S-19/2.

30 Indeed, the convention's very mandate – to provide global rules – arguably placed severe constraints on its ability to promote "progressive development" of international water law.

31 The reference to sustainable use was inserted into Art. 5 during the Sixth Committee process. The final version of the *Draft Articles on the Law of the Non-Navigational Uses of International Watercourses* submitted by the ILC to the UN General Assembly in 1994 did not contain this term. The ILC offered merely a cryptic reference to sustainable development in the commentary to Art. 5. *See* ILC, *Report of the International Law Commission on the Work of its Forty-Sixth Session*, UN GAOR, 49th Sess., Supp No. 10, UN Doc. A/49/10 at 219 (1994) [hereinafter ILC, *Report*].

32 Although the fact that the convention distinguishes between equitable and sustainable use, a distinction that may gain in significance.

mutual limitation approach – on a logic of competing sovereign interests there is indeed no reason to prioritize environmental interests over others. The convention's approach to the no harm rule is similarly ambiguous. The long-standing debate about its relationship to the equitable utilization rule has arguably not been resolved. The convention enshrines a compromise solution. The no harm rules takes priority to the extent that states are barred from justifying a violation of the due diligence obligation to prevent significant transboundary harm by recourse to the equitable utilization principle (Art. 7 (1)). However, where harm is caused despite the exercise of due diligence, it appears that such harm is justifiable where it results from activities remaining within a state's right to reasonable and equitable use (Art. 7 (2)). Although many had argued that significant environmental harm should not be justifiable in this fashion[33], the *Watercourses Convention* chose to apply the same approach to cases involving pollution or other environmental degradation[34].

That said, the convention does contain a number of provisions on the protection and preservation of watercourses that elaborate upon the general regime outlined by Arts. 5 and 7. Article 20 requires watercourse states to "protect and preserve the ecosystems of international watercourses", an obligation intended as a "specific application" of the requirement to use and develop the watercourse "in a manner consistent with the adequate protection thereof" in Art. 5[35]. It is noteworthy that the ecosystem protection obligation is not dependent upon a significant harm threshold[36]. Yet, it is not quite as powerful as it may appear at first glance. By virtue of its connection to Art. 5, it is arguably affected by the

33 *See e.g.* G. Handl, "The International Law Commission's Draft Articles on the Law of International Watercourses (General Principles and Planned Measures): Progressive Development or Retrogressive Development of International Law?" 3 *Colorado Journal of International Environmental Law & Policy* 123 at 131-132 (1992); J. Lammers, "Commentary on Papers Presented by Charles Bourne and Alberto Székely" 3 *Colorado Journal of International Environmental Law & Policy* 103 at 107-108 (1992); A. Nollkaemper, *The Legal Regime for Transboundary Water Pollution: Between Discretion and Constraint* at 68 (1993). The opposite view is held by an equally large number of commentators, including *e.g.* C. Bourne, 3 "The International Law Commission's Draft Articles on the Law of International Watercourses: Principles and Planned Measures, *Colorado Journal of International Environmental Law & Policy* 65 at 92 (1992).

34 For an overview *see* McCaffrey, *ILC*, *supra* note 9, at 307-312.

35 ILC, *Report*, *supra* note 30, at 282 (commentary to Art 20).

36 According to McCaffrey, *ILC*, *supra* note 9, at 313, the ecosystem protection duty in Art. 20 might emerge as one of the most significant contributions to the law of international watercourses. He does allow, however, that the provision "fairly cries out for further elaboration."

aforementioned limitations of the "sustainable use" and "adequate protection" language in that provision. What is more, being deliberately limited to the "ecosystems of the watercourse", Art. 20 introduces at best a "truncated" ecosystem approach, ignoring the interrelationship between water, air and land recognized as essential in *Agenda 21*[37].

Article 21 elaborates upon the general no harm rule and requires watercourse states to "prevent, reduce and control the pollution of an international watercourse that may cause significant harm to other watercourse States or to their environment". The word "may" arguably incorporates the precautionary principle into the *Watercourses Convention*[38]. For the most part, however, the provision serves to integrate already established requirements of the customary no harm rule expressed *inter alia* in principle 21 of the *Stockholm Declation on the Human Environment* into the convention[39]. Article 22 is a further variation on the no harm rule and requires states to prevent the introduction into an international watercourse of alien or new species which may detrimentally affect watercourse ecosystems or cause significant harm to other watercourse states. With respect to the threshold of harm, Art. 22 straddles the approaches Arts. 20 and 21 respectively. While ecosystems are to be protected against all detrimental effects, significant harm is required to trigger obligations vis-à-vis other riparians. Finally, Art. 23 focuses on land-based marine pollution through international watercourses and requires watercourse states to take all measures necessary to protect and

37 *See also* UN General Assembly Resolution S-19/2, *supra* note 21, at 1650 (para. 34), emphasizing the essential role of water in the "preservation of ecosystems", thus endorsing a much broader conception of the term "ecosystem". And Economic Commission for Europe, *Protection of Water Resources and Aquatic Ecosystems, Part One: Guidelines on the Ecosystem Approach in Water Management*, UN Doc. ECE/ENVWA31 (1993) at § 1, recommending that the natural unit for integrated ecosystem oriented water management be the entire catchment area. By contrast, in the commentary to the Draft Articles adopted in 1994, the ILC explained that the term 'ecosystem' was chosen over 'environment' because "the latter term could be interpreted quite broadly, to apply to areas "surrounding" the watercourse that have minimal bearing on the protection and preservation of the watercourse itself" (p. 280). This statement fits uneasily with the ILC's otherwise enlightened understanding of the term 'ecosystem' as "an ecological unit consisting of living and non-living components that are interdependent and function as a community" (p. 280-281). *See* ILC, *Report*, *supra* note 30.

38 Similar wording is used in Art. 22.

39 Reprinted in 11 I.L.M. 1416 (1972). The rule is also reiterated in principle 2 of the *Rio Declaration on Environment and Development*, reprinted in 31 I.L.M. 876 (1992). In its 1996 Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons, I.C.J. Reports 1996*, para. 29., the ICJ confirmed that this rule constitutes a general obligation of states under international environmental law.

preserve the marine environment. Here too, the states' protective duties are therefore more stringent than the general obligation to prevent significant transboundary harm. Article 23 is also the only provision in the convention that acknowledges the impact of watercourse activities beyond the international watercourse and beyond the territories of watercourse states.

What is perhaps most remarkable about the protection and preservation provisions is that, albeit tentatively and subject to the aforementioned qualifications, they move the convention beyond the "mutual limitation" paradigm. The ecosystem protection duties in Arts. 20 and 22, and the duty to protect the marine environment in Art. 23, each arise irrespective of interferences with another riparian's sovereign rights[40]. They are imposed above and beyond the classical obligation, triggered by significant transboundary harm, as enshrined in Art. 21. Articles 20 and 22 therefore seem aimed at protecting a common interest of all watercourse states, while Art. 23 may even be said to protect the interest of the larger international community in marine environmental protection[41]. However, it is not clear to whom the ecosystem and marine environmental protection obligations are owed. It may be said that at least the obligation in Art. 23 must be owed *erga omnes* to all members of the international community. Yet, the convention stops short of explicitly creating rights to mirror these obligations. Thus, given the focus of the convention on international watercourses, states other than watercourse states are clearly not entitled to demand compliance.

Given the constraints under which the International Law Commission and the UN General Assembly's Sixth Committee operate, it is hardly surprising that the *Watercourses Convention* is cautious in reorienting international water law. A sober reading of the convention leads to the conclusion that it may not succeed in pushing international water law towards meeting the "challenges of the water" as outlined earlier. The convention's efforts to integrate the requirements of sustainable

40 Note that Art. 22 contains obligations vis-à-vis other watercourse states alongside the ecosystem protection obligations.

41 Note, however, that this expansion of protective duties is not radically new. Already the wording of principle 21 of the 1972 *Stockholm Declaration* included duties to protect areas beyond jurisdiction of states from harm recognized. The ICJ confirmed the existence of such duties in its 1996 *Nuclear Weapons* Advisory Opinion, *supra* note 38. The relevant passage of the opinion is reproduced *infra* at note 44.

development and ecosystem orientation into water law remain tentative[42]. As a result, the convention risks being outpaced by current developments in customary and treaty law even before its entry into force. Perhaps the best hope for the convention is that the relatively narrow new language it introduces might support increasingly powerful arguments and broader interpretations as ecosystem-orientation in international law gains acceptance.

Indeed, the International Court of Justice, in its 1997 *Gabcíkovo--Nagymaros* decision, sketches out the broad features of the needed reorientation of international law. First, the court underscores that any differences as to the uses of shared watercourses must be addressed cooperatively. It rejects outright the view that any state could "unilaterally assume control of a shared resource" and points to the concept of "community of interest" as conceptual underpinning for cooperative approaches to non-navigational uses of shared fresh water[43]. Secondly, the court places international water law firmly in the context of international environmental law, thereby rejecting the notion that the two fields are separate[44]. Thirdly, the ICJ quotes the following passage from its earlier Advisory Opinion on nuclear weapons:

The environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment[45].

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42 Thus it is not clear that the convention's provisions can actually promote the environmental goals expressed in its preamble. The preamble recalls the principles and recommendations adopted in the 1992 *Rio Declaration on Environment and Development* and in *Agenda 21*. The (future) parties to the convention also express "the conviction that a framework convention will ensure the utilization, development, conservation, management and protection of international watercourses and the promotion of the optimal and sustainable utilization thereof for present and future generations".

43 *Gabcíkovo, supra* note 3, at para. 85.

44 Although treaty issues are ultimately decisive in the case, various passages in the judgment (and the majority of separate and dissenting opinions written by the judges) make reference to international environmental law and the court leaves no doubt as to its applicability to international watercourses.

45 Quoted in *Gabcíkovo, supra* note 3, at para. 53.

This passage confirms that contemporary international law limits states' freedom of action not only to safeguard immediate sovereign interests of other states, but also their interest in the protection of the commons. Fourth, while the court does not endorse Hungary's argument that there were peremptory norms of international environmental law that could override the treaty arrangements with Slovakia regarding the dam[46], various passages in the judgment suggest that certain principles of international environmental law have *erga omnes* effects. For example, the ICJ emphasizes "the great significance that it attaches to respect for the environment, not only for States but also for the whole of mankind"[47]. The court further consideres the safeguarding of ecological balance to be among the "essential interests" of states[48]. Most notably, in putting the spotlight on the concept of sustainable development as an overarching principle, the ICJ implied that the balancing of interests must go not only beyond territorial interests of states, but also beyond present interests:

Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind – for present and future generations – of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past. This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development[49].

In this passage, the ICJ acknowledges that the environment has become a central feature of the reality that shapes the development of international law. What is more, the court emphasizes that environmental interests must be considered alongside, and balanced with, developmental and

46 *Ibid.* at para. 97.

47 *Ibid.* at para. 53. And *see* the Separate Opinion of Vice President Weeramantry, *ibid.* at pp. 215-217, which explores the role of *erga omnes* obligations in *inter partes* proceedings in some detail.

48 This was in the context of Hungary's argument, rejected on the facts, that "ecological necessity" justified its unilateral termination of the treaty. *See ibid.* at paras. 39-59.

49 *Ibid.* at para. 140.

other interests. It indicates that the attendant reorientation of international law, and of the sovereignty limitations it imposes, find expression in the concept of sustainable development. While the ICJ merely hints at the legal effect the concept may have, the Separate Opinion of Vice-President Weeramantry takes this point considerably further. He refers to sustainable development as "more than a mere concept, but as [*sic*] a principle with normative value", and one "likely to play a major role in determining important environmental disputes of the future[50].

CONCLUSION

Rather than reflect the growing range of common environmental interests, the law of international watercourses continues to rely primarily upon competing sovereign rights of riparian states as conceptual devices for the limitation of sovereignty. If international law is to meet the challenges of the water, the principles of ecosystem orientation and sustainable development cannot remain at the periphery, but must move to the conceptual core of international watercourse law. The nature of the challenge is neatly summarized by Christopher Weeramantry, Vice-President of the International Court of Justice, in his Separate Opinion on the *Gabcíkovo-Nagymaros* case:

We have entered an era of international law in which international law subserves not only the interests of individual states, but looks beyond them and their parochial concerns to the greater interests of humanity and planetary welfare. (...) International environmental law will need to proceed beyond weighing the rights and obligations of parties within a closed compartment of individual State self-interest, unrelated to the global concerns of humanity as a whole[51].

50 *Ibid.* at p. 204. He then explains in some detail how the concept might operate to accomplish this and observes, *ibid.* at p. 206, that "it has been recognized that development cannot be pursued to such a point as to result in substantial damage to the environment in which it is to occur. Therefore development can only be prosecuted in harmony with the reasonable demands of environmental protection."

51 *Ibid.*, at pp. 216, 217.