

International law and the waters of the Euphrates and Tigris

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I. INTRODUCTION

"In this new century, water, its sanitation, and its equitable distribution pose great social challenges for our world. We need to safeguard the global supply of healthy water and to ensure that everyone has access to it."¹

United Nations Secretary General Kofi Annan spoke these words regarding World Water Day, which took place March 22, 2001. The event was designed to raise international awareness of the growing global shortage of fresh water.² The United Nations has suggested that around 300 potential water-related conflicts exist worldwide.³ A growing world population and an increasing per-capita demand have created the present tension and the possibility of future conflict over water. In recent years, the world's water consumption has grown 2.5% per year, while its population has grown at half that rate. Fighting over water has been dubbed "the ultimate zero-sum game" because the constantly increasing demand for fresh water is exacerbated by a fixed and limited supply.⁵

The Middle East is one of the regions where a water crisis is most likely to occur.⁶ In the last thirty years, the region's population has doubled, creating an increase in demand in a dry area where water is already a precious commodity.⁷ Use of the Jordan River's waters has been a contentious issue for decades, and water rights continue to be a major point of discussion in Israeli-Palestinian peace negotiations.⁸ The Nile has also seen its share of tension, as Egypt has been attempting to reach a water-sharing agreement with upper riparian neighbors such as Sudan and Ethiopia.⁹

This note will focus on the Euphrates and Tigris River basin, a third Middle East river system in which water rights have become a contentious issue. While the rivers are separate for most of their lengths, it is common to treat them as one hydro-political region, encompassing the states of Turkey, Syria, and Iraq.¹⁰ The World Bank estimates that the total populations of these countries will grow from 96 million in 1995 to 138 million in 2010.¹¹ Water from these rivers has become and will continue to be an increasingly valuable commodity as the populations of its riparian states grow.

The main subject of controversy has been Turkey's increased use of upstream water on both rivers. This practice has fueled criticism from lower riparian states Syria and Iraq, who believe their national security will be seriously threatened if Turkey prevents water from reaching their territories.¹² A recent drought has once again brought this issue to the forefront of discussion between the three countries: Syria and Iraq have demanded that Turkey release more water, while Turkey maintains it does not even have enough for its own purposes.¹³ Despite much rhetoric and many attempts to reconcile the issue, no tripartite agreement on water sharing has ever been reached.¹⁴

A tripartite water-sharing agreement is crucial to resolving the present tension and preventing potential conflict. This note will argue that international law has been insufficient in providing the groundwork for such an agreement. Instead,

any cooperation on these waters will be based on political and economic grounds. Part II gives a brief overview of the geography of the rivers and the sources of their waters. Part III surveys Iraq, Syria and Turkey's past and present projects designed to harvest the rivers' waters. Part IV covers previous controversies over the water and resulting bilateral agreements. Part V gives an overview of the present situation, focusing on Syria and Iraq's increasing cooperation in the face of Turkey's waterworks schemes. Part VI examines the various international law doctrines and codifications on the use of transboundary rivers. This section specifies why international law has not aided in resolving this conflict, and provides a scenario for a possible solution.

II. GEOGRAPHY OF THE EUPHRATES AND TIGRIS

A. THE EUPHRATES

The Euphrates is a relatively small river, draining a large, dry region. Measured in Hit, Iraq, the river annually averages about thirty-two billion cubic meters ("BCM") of water.¹⁵ This average discharge has ranged from 14.9 to 56.4 BCM depending on upstream rainfall.¹⁶ The Euphrates originates in the mountains of eastern Turkey, a relatively moist area where rainfall provides more than 1000 millimeters/year of water,¹⁷ amounting to ninety-eight percent of the river's water.¹⁸ The river then flows south through Turkey and into northwestern Syria, where it gains the remaining two percent of its water.¹⁹ Finally, the Euphrates flows down the length of Iraq, eventually joining the Tigris at the Shatt al-'Arab and pouring into the Persian Gulf. In Iraq, virtually no additional water flows into the river. In fact, as much as seventy percent of the Euphrates water flowing into Iraq evaporates from the desert heat.²

The Tigris originates in the same mountainous region of eastern Turkey as the Euphrates. It flows southward, forming a short stretch of the Turkish-Syrian border and later the Iraqi-Syrian border. The river then turns east across Iraq, eventually joining the Euphrates. Measured at Kut, Iraq, the average annual discharge of the Tigris is thirty-one BCM, with a known range between seventeen and fifty-nine BCM.²¹ A key difference between the two rivers is that the Tigris receives much of its water from tributaries reaching it in Iraq, not Turkey. Some of these rivers flow southwest from the mountains in Iran. This topography results in total water contributions of forty-three percent from Turkey, forty-two percent from Iraq, and nine percent from Iran.²²

The addition of water to the Tigris in Iraq has two significant consequences. First, unlike the Euphrates, the Tigris makes up for evaporation losses and actually gains water as it flows through Iraq.²³ Second, and of more strategic importance, Iraq has more potential control over the Tigris than the Euphrates because Iraq controls much of the water flowing into the Tigris.²⁴ This latter fact is especially true because unlike Turkey, Syria, and Iraq, Iran has thus far not significantly exploited its waters - leaving the Tigris' Iranian tributaries open to Iraqi use once they flow into Iraq.²⁵ Finally, because of its high concentration of sediments and violent nature, the Tigris has historically been less important to agriculture, and therefore less controversial.²⁶

III. USE AND DEVELOPMENT OF THE RIVERS

Historically, Iraq has been the principal user of Euphrates and Tigris water, while Syria and Turkey found sufficient water elsewhere. For thousands of years, use of the rivers was not an issue because Mesopotamia was ruled as a single entity by successive empires.²⁷ However, once the three modern states were created, use of the rivers took on nationalist significance.²⁸ Throughout the 1950s and 1960s, Iraq invested heavily in building barrages and dams along the rivers to harness water for irrigation and hydroelectricity.²⁹ As recently as 1970, Iraq was annually consuming thirty BCM from the two rivers.³³ By contrast, Syria was consuming a total of two BCM and Turkey a meager 820 MCM.³¹ Meanwhile, Syria relied on water from the Orontes River flowing west from Lebanon and the Yarmuk River it shares with Jordan and Israel.³² Similarly, Turkey relied on several smaller rivers in the western region of the country.³³

As the populations of Syria and Turkey have grown, both countries have begun consuming greater amounts of Euphrates and Tigris water. In 1973, Syria completed the Tabqa Dam on the Euphrates, creating Lake Assad, which was designed to store twelve BCM and irrigate 640,000 hectares.³⁴ However, this project has suffered many problems. High levels of gypsum in the soil around Tabqa soon contaminated the water.³⁵ Also, over-pumping caused soil salinization while water seepage caused irrigation canals to collapse.³⁶ As a result, the harvested water can only irrigate about 400,000 hectares.³⁷ Situated in the middle of a desert, Lake Assad is subject to significant evaporation, averaging 630 MCM per year.³⁸ Finally, the water level has fallen in recent years, possibly because of decreased rainfall and increased Turkish use of upstream water.³⁹

The effect of the Tabqa Dam on the Euphrates is minor compared to Turkey's massive ongoing efforts to harness the river's power and water. Turkey first took advantage of its upstream position by completing the Keban Dam on the Euphrates in 1974.⁴⁰ This dam was the first step in the ongoing Southeast Anatolian Project (Güneydogu Anadolu Projesi in Turkish, or the "GAP"), a U.S. \$32 billion effort designed to accelerate the development of one of Turkey's poorest and most volatile regions.⁴¹ The project will eventually include twentytwo dams and nineteen hydroelectric power plants on the Euphrates, Tigris, and their tributaries.⁴² The largest of these, the Ataturk Dam, was completed in 1990, and is the ninth-largest dam in the world.⁴³ When the GAP is completed in 2017, the Turkish government expects the project to irrigate more than 1.7 million hectares of land and generate 27 billion kilowatts of power annually.⁴⁴

Turkey's increased use of the Euphrates and Tigris will decrease the amount of water available to Syria and Iraq, but the exact degree of reduction is difficult to determine. Following the completion of the Tabqa and Keban dams alone, Iraq claimed the flow of the Euphrates had been reduced from 920 to 197 cubic meters per second.⁴⁵ One report estimates the GAP could reduce water flow to Syria by up to forty percent and flow to Iraq could diminish as much as eighty percent.⁴⁶ Another predicts an overall shortage of Euphrates water by 2010 if Turkey

completes the GAP and population growth rates remain stable.⁴⁷ Iraq would presumably bear the worst of this shortage because it is the furthest downstream. Furthermore, as southeastern Turkey becomes increasingly irrigated and cultivated, levels of salinity and pollutants in the water will increase, making the water that reaches the lower riparian countries less useful, especially for irrigation purposes.⁴⁸

Turkish and Syrian waterworks developments have therefore left Iraq in a precarious position. As a country with very little rainfall, it is highly dependent on the Euphrates and Tigris waters flowing in from Turkey and Syria.⁴⁹ Therefore, in

the last twenty years Iraq has significantly increased its efforts to upgrade its water infrastructure. By the late 1980s the country had built several new dams, increasing water storage capacity to about 100 BCM.⁵⁰ Iraq has planned to use this increased storage capacity to irrigate about 1.8 million hectares, generate hydroelectric power and improve drainage of irrigated lands in lower Iraq.⁵¹ In total, these projects would require an annual twenty-five BCM of Euphrates water alone.⁵² Unfortunately for Iraq, Turkey releases only about fifteen BCM annually from the Ataturk Dam⁵³ - and this water must pass through Syria's water system before reaching Iraq. Further reducing the water supply in Iraq, the desert heat causes massive evaporation from the man-made lakes created by the Iraqi dams, totaling 4.5 to 5 BCM annually.⁵⁴

IV. PREVIOUS DISPUTES AND AGREEMENTS OVER THE WATER

Before competition for Mesopotamian waters began, the three riparian states had relatively little difficulty agreeing over water use. During the French mandate over what is now Syria, France and Turkey signed an agreement in 1921 allowing the Syrian city of Aleppo to construct a water-supply system on the Euphrates.⁵⁵ Next, a 1926 treaty between the two states decreed that water disputes would be resolved "on the basis of complete equality."⁵⁶ Similarly, while Iraq was under British mandate, it signed an agreement with Turkey in 1930 in which both sides

promised not to change the flow of the Euphrates without the other's consent.⁵⁷ A 1946 Treaty of Friendship and Neighbourly Relations between Turkey and a newly independent Iraq reaffirmed this principle, stating that Turkey would consult Iraq before it constructed any waterworks project and would strive to satisfy Iraq's needs "as far as possible."⁵⁸ The treaty also authorized Iraq to build waterworks inside Turkey to regulate the rivers and avoid flooding.⁵⁹

Relations deteriorated between the three states in the following decades. The projects contemplated in the 1946 treaty were never built, possibly because Iraq was reluctant to have facilities so key to its survival located outside its borders. Although the treaty is technically still in force, it has apparently fallen into disuse.⁶⁰ Representatives of the three states met in 1965 to discuss water rights, but no agreement was reached.⁶¹ Syria, for one, refused to recognize Iraq's claims that it had vested rights in the rivers' waters.⁶² It continued construction of the Tabqa Dam despite Iraqi protests. Once the dam was completed, Iraq claimed a threat to its national security, and both states moved troops to their shared border.⁶³ While Lake Assad was being filled, Iraq's Euphrates flow was reduced by sixty-seven percent, which resulted in massive crop failures.⁶⁴ Following Soviet and Saudi mediation, the states pulled their troops back, with Syria agreeing to leave sixty percent of Euphrates water for Iraq.⁶⁵ The Tabqa Dam incident led Syria to break off relations with Iraq in 1980 when Iraq began its war with Iran. During the next decades, Syria supported Iran and the Allied Coalition in their wars against Iraq.⁶⁶ Nonetheless, during this period of cold relations, the states managed to modify their water-sharing agreement in 1990, with Iraq receiving fifty-eight percent and Syria forty-two percent of the Euphrates.⁶⁷

Tensions also arose between Syria and Turkey as Turkey made progress on the GAP. In 1983, the water level of the Tabqa Dam dropped, and Syria accused Turkey of stopping water from flowing into Syria.⁶⁸ The states temporarily settled their dispute, agreeing on an informal protocol in 1987 that required Turkey to release an average of 500 cubic meters per second of water.⁶⁹ For its

part, Syria was required to stop Kurdish separatist activities in Syria.⁷⁰ Shortly thereafter, feeling that Syria was not meeting its end of the bargain, Turkey threatened to halt the flow of water. Syria responded on October 21, 1989 by shooting down a Turkish survey plane within Turkey's borders.⁷¹ In early 1990, Turkey completely cut off the flow of the Euphrates for a month to fill the lake behind the newly completed Ataturk Dam. Turkey claimed this action did not violate its agreement with Syria because it had released 750 cubic meters per second in the preceding months.⁷² Syria, however, had been unable to use this additional water because it did not have the capacity to store it. When the water was shut off, Syria suffered a serious water shortage: the Tabqa power station ran at only twelve percent and there was even a shortage of drinking water.⁷³ In an attempt to settle the issue, representatives of the three states met in June 1990. Unfortunately, these meetings collapsed when the states were unable to reach a compromise.⁷⁴

V. RECENT DEVELOPMENTS

The GAP project has alienated Syria and Iraq from Turkey and left the two states in a relatively weak position. In simple terms, the situation can be characterized as follows: Iraq feels it is at the mercy of Turkey and Syria, both of whom have the power to prevent Iraq from obtaining enough water. Syria shares this position because once Turkey completes the GAP it will have such power over both its neighbors.⁷⁵

Syria and Iraq find themselves in a common position for two other strategic reasons. First, they continue to harbor anti-U.S. sentiments that have diminished among several of their neighbors in the region over the last decade.⁷⁶ Jordan and Egypt, for example, have both made significant steps to reach out to the West in recent years. Following the Gulf

War, Saudi Arabia and the other Arabian Peninsula states have also forged closer ties to the United States. Even the new regime in Iran has shown signs that it wishes to improve relations with the United States. Meanwhile, Iraq remains under a United States trade embargo and Syria has not made significant overtures to the West.

Second - and arguably more importantly - Syria and Iraq have become the two most virulently anti-Israel states in the Middle East.⁷⁷ The peace process has normalized Israel's relations with Jordan and Egypt, but Syria still demands the return of the Golan Heights, which Israel seized in 1967.⁷⁸

Meanwhile, Turkey has significantly improved relations with Israel, further alienating Syria and Iraq. Turkey and Israel have been conducting joint military exercises since 1996, understandably raising serious concern among the Arab states.⁷⁹ Recently, Turkey's interest in these endeavors has cooled - the Turks pulled back on a pair of planned projects, but this alone has not eased Arab concerns.⁸⁰ Earlier this year, Israel and Turkey also agreed on a ten-year deal that would send Israel fifty MCM of Turkish water annually. The water will come from the Manavgat River, which flows into the Mediterranean.⁸¹ Although Syria and Iraq have no claim to this water, they see the move as an affront - and a security threat - because they believe Turkey is using too much Euphrates and Tigris water.⁸² A Syrian or Iraqi official might ask Turkey why it is not using Manavgat water domestically instead of selling it, leaving a fair share of Euphrates and Tigris water for Syrian and Iraqi use.⁸³ From an economic perspective, however, the deal makes sense for Turkey because Israel can more easily afford to pay for the water than Syria or Iraq.

For these reasons, a strategic analysis would predict that Syria and Iraq would begin to reconcile their differences and create a common front to oppose Turkey. This has, in fact, been the case in recent years, as Syria and Iraq have normalized relations with each other and jointly criticized Turkey's construction of the GAP. ⁸⁴ Both countries have been actively seeking support from the Arab League by demanding that Turkey consult with them over water rights.⁸⁵ The Arab League issued several resolutions to this effect, claiming that Turkey was allowing too little water to reach its neighbors and that the water coming from Turkey was polluted.⁸⁶ Turkey largely disregarded these claims, citing the fact that Kurdish leader Abudllah Ocalan was residing in Damascus,⁸⁷ despite Syria's 1987 promise to stop supporting the Kurds.

In 2001, Syria and Iraq signed two key bilateral agreements intended to strengthen their alliance. On January 31, 2001, the two states reached a new water-sharing agreement. The details of the agreement have not been publicized, but according to Iraq it covers "a formula for sharing the waters of the Euphrates between Iraq, Syria, and Turkey and an agreement to draw up a formula on sharing the Tigris waters between Iraq and Syria."⁸⁸ It is the first such agreement since 1990, when Syria promised to leave fifty-eight percent of Euphrates water to Iraq. Turkey was invited to participate in the negotiations, but, according to the Iraqi government, never replied.⁸⁹ Also on January 31, Syria and Iraq signed a free-trade agreement reportedly worth U.S. \$1 billion annually.⁹⁰ The agreement includes the reopening of an oil pipeline from Iraq to Syria's Mediterranean coast and will likely be a huge boost to an Iraqi economy suffering from international trade sanctions.⁹¹

It should be noted, however, that recent developments have not been completely one-sided, as there have been some signs that Turkey is willing to cooperate with its lower riparian neighbors. A key event occurred in 1998 when Turkey threatened Syria with military action if Syria continued to shelter Kurdish rebels. Syria agreed to expel Ocalan, who was later captured by Turkey, and the two states signed a security agreement with Syria agreeing to stop supporting the Kurds.⁹²

Following the agreement, the two states began improving relations by holding a series of talks on several bilateral issues including water rights.⁹³ In August, 2001, Syria and Turkey signed an agreement to cooperate on the GAP, although Turkey made no specific commitments regarding the amount of water it would release.⁹⁴ Additionally, in September, the two states signed a second security agreement, which did not touch on water issues but will strengthen bilateral relations.⁹⁵ This newfound spirit of cooperation demonstrates that Turkey is willing to work with its neighbors, but wants to gain something in return - in this

case, Syria's expulsion of Ocalan. As a Syrian official has stated, "Matters are getting better and moving forward with serious steps ... [but Syria is] still looking for a just and reasonable share of water according to international law."⁹⁶

VI. INTERNATIONAL LAW ON THE RIVERS OF MESOPOTAMIA

Before delving into international conventions and theories that apply to the Euphrates and Tigris, it should be reiterated that several bilateral agreements do affect the situation. Under its 1946 agreement with Turkey, Iraq can claim Turkey must consult it regarding the construction of the GAP, and may proceed with the project only insofar as Iraq is not hurt by it, but Turkey treats this agreement as disused.⁹⁷ Generally, Turkey recognizes its pledge to provide Syria with a minimum 500 cubic meters per second of Euphrates water, although sometimes Turkey has ignored this obligation.⁹⁸ This water would total about 15.5 BCM annually.⁹⁹ Under the 1990 Syrian-Iraqi agreement, Syria would receive fortytwo percent of this total, or about 6.5 BCM, and Iraq the remaining nine BCM.¹⁰⁰ These figures assume that the

recent undisclosed Iraqi-Syrian agreement has not drastically changed the shares. No similar agreement has been reached regarding the Tigris; Turkey claims a right to use those waters as it wishes.¹⁰¹

Turkey's position reflects its adoption of the doctrine of absolute territorial sovereignty, one of four major water rights theories.¹⁰² Because there is no binding international law agreement on the subject, scholars have developed theories grounded in customary international law to explain state action.¹⁰³ Absolute territorial sovereignty, also known as the Harmon Doctrine, holds that a state has the right to do whatever it chooses with the waters that flow through its boundaries, regardless of its effect on any other riparian state.¹⁰⁴ Under this doctrine, a lower riparian has no recourse but to hope for cooperation from the upper riparian or threaten military action.¹⁰⁵ Not surprisingly, upper riparians

such as Turkey have been quick to adopt such a position.¹⁰⁶ If this doctrine were to prevail, Turkey would be able to release only as much water to Syria as it wished, using the rest for irrigation or even selling it to other states.¹⁰⁷ Interestingly, Syria has sometimes takes this position with regard to Iraq while criticizing Turkey's stance.¹⁰⁸

Absolute territorial integrity, the common position of lower riparians, is the opposite view of absolute territorial sovereignty. Under this doctrine, an upper riparian may not harness a river if this would harm a lower riparian.¹⁰⁹ Iraq would then have the strongest position, essentially able to veto any Turkish - or even Syrian - plans to build waterworks along the Tigris and Euphrates.¹¹⁰ Such a situation would award a disproportionate share of power to Iraq. Also, as one scholar has pointed out, this doctrine would result in under-utilization of the Tigris and Euphrates because Iraq does not have sufficient demand to use all the waters of both rivers.¹¹¹

Many scholars believe both absolute territorial sovereignty and absolute territorial integrity are untenable as transboundary water-sharing regimes, and neither is generally accepted as a norm of customary international law.¹² A more moderate, albeit complex, approach is that of limited territorial sovereignty, also known as limited territorial integrity. Under this approach, states are free to use their territorial waters so long as this use does not interfere with the "reasonable utilization" of water by other states.¹¹³ The main reason this approach presents complications is that the definition of "reasonable" here is unclear. Nevertheless, this doctrine is beneficial because the rights of the various states are recognized and because it contains reciprocal rights and responsibilities. A key concern regarding the Mesopotamian rivers would be how best to balance Iraq's historic use of the rivers against Turkey's disproportionately large contribution to their waters.¹¹⁴ Such claims would lend support to the reasonableness of either country's use of the water, but unfortunately both claims are likely to draw sharp opposition.

A fourth, more idealistic, approach calls for the management of water by a community. Here, international borders would be ignored and the river basin would be administered as a collective water resource by an international

institutional structure.¹¹⁵ A single state would need cooperation from its coriparians to make any use of the shared water.¹¹⁶ Although this approach would theoretically address the water needs of all the riparian states along the Euphrates and Tigris, it is unlikely that they would be willing to give up their sovereignty in this way. This is especially true in this case because both Syria and Iraq are both ruled by nationalist dictatorships and are relatively isolated from the international community of states.

Although none of these doctrines represents a rule of customary international law, their principles are reflected in two key documents produced by the United Nations on the sharing of transboundary waters. The first of these is the Helsinki Rules on the Uses of the Waters of International Rivers (the "Helsinki Rules"), produced by the International Law Association (the "ILA") in 1966.¹¹⁷ These rules are not binding because the ILA is a non-governmental organization, but they were meant to clarify existing international law and serve as general guidelines for state action.⁸ Several key principles in the Helsinki Rules have direct relevance to the Euphrates-Tigris situation, and will be reviewed below.

Most importantly, the Helsinki Rules opted for the doctrine of limited territorial sovereignty. Article IV states that "each basin State is entitled, within its territory, to a reasonable and equitable share in the beneficial uses of the waters of an international drainage basin."¹¹⁹ The question then arises as to the meaning of the vague term "reasonable and equitable uses." Article V attempts to solve this problem by delineating several factors to be weighed in determining the reasonableness of a state's actions.¹²⁰ These factors are: population, past and existing use, harm to co-riparians, climate, economic and social needs, cost of alternative methods, attainability of other resources, avoidance of waste, geography, hydrology, and possibility of compensation to co-riparians.¹²¹ By specifying these factors, the Helsinki Rules have been helpful in developing a framework for analyzing differing state positions under the doctrine of limited territorial sovereignty.

Two other aspects of the Helsinki Rules are worth noting. First, states must notify downstream riparians before undertaking projects that might affect the flow of the river.¹²² This requirement is reminiscent of the 1946 Iraq-Turkey

agreement, wherein Turkey agreed to notify Iraq before constructing any waterworks project. 123 Second, Article X provides that states must prevent new forms of pollution that would cause "substantial injury" to another state and must take reasonable steps to abate existing pollution.¹²⁴ Interestingly, the rules leave open the question of what should occur when "equitable and reasonable uses" may cause "substantial injury."¹²⁵

Having adopted the doctrine of limited territorial sovereignty, the Helsinki Rules have not been especially useful in the Euphrates-Tigris basin because Turkey has specifically rejected this doctrine.¹²⁶ Nonetheless, Iraq and Syria can use the Rules as ammunition against Turkey's progress on the GAP. Turkey could argue that the GAP is also a "reasonable and equitable" use of the rivers. Syria and Iraq could respond that Turkey's increased use of the basin has caused them "substantial injury" because the water they now receive is increasingly polluted and decreasingly useful for irrigation. Because the Rules leave open which of these principles prevail, they are not especially helpful in ending this argument. Furthermore, Iraq can claim that it has been using the waters for thousands of years, creating an existing use that Article V suggests is "reasonable." Under Article VIII, reasonable existing uses also have preference over other uses, further strengthening Iraq's position. Nonetheless, because the Helsinki Rules have no force, Turkey has not been swayed by its neighbors' reliance on the Rules.¹²⁷

A more recent attempt to explain international law on the subject was made by the United Nations in 1997 when it adopted the Convention on the Law of the Non-Navigational Uses of International Watercourses (the "Convention").¹²⁸ The Convention was based on draft articles proposed by the International Law Commission (the "ILC"), a United Nations body responsible for the progressive development of international law and its codification.¹²⁹ Based on this dual purpose, the ILC draft and the final Convention attempted to codify and develop norms of customary international law.¹³⁰ Like the Helsinki Rules, the Convention does not bind the parties in the Euphrates-Tigris dispute. It does represent the most recent and comprehensive statement of international law on this subject; therefore, a review of its significant principles is merited.

The Convention has some key concepts in common with the Helsinki Rules. Article 5 states that parties shall "utilize an international watercourse in an equitable, reasonable manner."¹³¹ Article 6 then gives the factors to be considered in determining reasonableness, listing the same eleven factors as the Helsinki Rules.¹³² These articles embody the Convention's adoption of the limited territorial sovereignty doctrine, mirroring the Helsinki Rules.

There are two key differences between the Convention and the Helsinki Rules. First, the Convention requires states to "take all appropriate measures to prevent the causing of significant harm to other watercourse states."¹³³ The corresponding provision in the Helsinki Rules prohibits causing "substantial injury."¹³⁴ The difference between these terms is difficult to determine,¹³⁵ and there may be little difference in practice as both are likely to protect downstream states.¹³⁶ It is worth noting that like the Helsinki Rules, the Convention leaves open the question of which takes precedence: "reasonable and equitable use" or avoidance of "significant harm."¹³⁷ A second difference between the two documents is that the Convention does not give any preference to existing use, as do the Helsinki Rules.¹³⁸ This omission weakens Iraq's claim that it had acquired rights to the waters through historical use.¹³⁹

Like the Helsinki Rules, the Convention has not proven especially effective in settling the Euphrates-Tigris issue. This ineffectiveness is largely because Turkey was one of three states that voted against the Convention.¹⁴⁰ The others were Burundi and China, both of which are also upper riparian states.¹⁴¹ Turkey cited three reasons for its rejection. First, Turkey believed the Convention went "far beyond" the scope of an ordinary Convention. Second, Turkey stated the Convention granted too many rights to downstream states, creating an inequality with upstream states. Third, Turkey argued the Convention ignored the principle that states have sovereign rights over the watercourses within their borders.¹⁴² This last point reflects Turkey's continuing reliance on the doctrine of absolute territorial sovereignty, a position that puts it in conflict with the Convention's fundamental premise.

Turkey was correct in arguing that the Convention is slanted toward the rights of downstream states. The requirement of preventing "substantial harm" is meant to protect downstream states from overuse and to prevent pollution of rivers by upstream riparians.¹⁴³ It would be difficult to imagine how a downstream state could use a river in a manner that caused "substantial harm" to an upstream state. Furthermore, the "reasonable and equitable use" requirement curbs the actions of upstream riparians by requiring they take into consideration the needs of lower riparians.¹⁴⁴ From a theoretical standpoint, it is logical that international law would incorporate such provisions in order to protect the rights of weaker states; the rights of stronger states such as Turkey need less protection because a stronger state may simply harvest the water it needs domestically without relying on water flowing in from other states.

Although the Convention is reasonable in this sense, it is hardly surprising that Turkey has rejected it. If it were to accept the Convention, Turkey would give up a large share of the waters it uses and plans to use from the Tigris and Euphrates. Most likely, the GAP would not be permissible under the Convention because of the enormous amount of

water it would withhold from Iraq and Syria. 145 In exchange for such a concession, Turkey would receive the goodwill of its neighbors, and although Turkey would certainly like to improve its relations with Iraq and Syria, this objective is probably outweighed by its desire to improve the development of southeast Anatolia.¹⁴⁶ This is especially true now because Syria and Iraq, even as a newly united front, do not present the military threat they once did. Iraq's military, once the most formidable in the region, was seriously weakened in the Persian Gulf War and the subsequent bombings it has endured. 147 Syria and Iraq also would certainly hesitate before using military force against Turkey, fearing a potential retaliation from its NATO allies. 148 Therefore, although international law supports the doctrine of limited territorial sovereignty, in practice, absolute territorial sovereignty actually governs the Euphrates and Tigris because that is Turkey's position, and Turkey controls the water. 149 For this reason, international law has not significantly aided the resolution of this dispute.

International law has not sufficiently taken into account the political realities of the issue. Traditionally, international law has relied on the principle of reciprocity to gain compliance from states.¹⁵⁰ Because there is no supranational authority to enforce international law, states must be given some incentive to comply. States are inherently self-interested actors that will only surrender sovereign rights if they feel they have enough to gain from doing so.¹⁵¹ In this case, neither the Convention nor the Helsinki Rules provide Turkey with a significant incentive to alter its water-development plans. In all likelihood, Turkey will continue work on the GAP, which it considers a major part of its national development plan.¹⁵²

Despite the harsh reality of the situation, there is some hope for a tripartite agreement on the use of the Euphrates and Tigris. As stated above, even under the doctrine of absolute territorial sovereignty, a downstream state can hope for cooperation from the upstream state.¹⁵³ Syria and Iraq must be able to offer Turkey some economic or political benefit in exchange for such cooperation. Turkey has shown a willingness to cooperate with its neighbors in this way, exemplified by its decision to sell water to Israel and its 1987 agreement to release a minimum amount of water in exchange for Syria ending its support of the Kurds. 154 When Syria expelled Ocalan, thus acceding to Turkish requests, the two countries began to form closer relations.¹⁵⁵

One resource Iraq and Syria have to offer Turkey is oil. Unlike its Arab neighbors, Turkey is rich in water, but has little fossil fuels. 156 One possible solution is for Turkey to trade the water it stores in exchange for oil. It is more efficient to harness the waters of the Euphrates and Tigris in Turkey, as the GAP calls for, because the milder climate there leads to less evaporation than occurs downstream.¹⁵⁷ Turkey has already proposed building what it calls the "Peace Pipeline," a massive project that would carry water into Syria, Iraq, Jordan, and possibly as far as the Arabian Peninsula. 18 The proposal calls for the water to

come from the Ceyhan and Seyhan rivers, which Turkey currently does not use. 159 Although some Arab states have dismissed the project as "propaganda,"¹⁶⁰ given the length of some existing oil pipelines, a water pipeline of this length is not unrealistic. 161 In exchange for delivering clean, fresh water, Turkey could buy the oil it needs.

One obstacle to such a proposal is that current economic sanctions against Iraq prevent Turkey from purchasing Iraq's oil legitimately. Nonetheless, a significant quantity of oil is smuggled across the border, demonstrating that Turkey is certainly interested in Iraq's product.¹⁶² The United States has recently proposed a new plan that would allow Iraq's neighbors to purchase its oil. Iraq would then only be allowed to use the money to import products from those countries. 163 Under this plan, Iraq could sell its oil to Turkey and buy its water in turn.

Unlike the Convention and Helsinki Rules, such a barter system takes into account the political fact that Turkey is in a strategically powerful position with regard to the waters of the Euphrates and Tigris. Other solutions to the conflict may be possible, but, as with the above proposal, they would require that Turkey's downstream neighbors grant some incentive to their upper riparian neighbor. International law has faltered in settling this dispute because it has focused on the concerns of downstream states without providing real incentives for upstream states. Unless changes are made to the international law on transboundary waters, it will continue to provide little guidance in managing or solving the political and economic tensions among the region's riparian states.

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