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ORIGINAL PAPER

The no significant harm principle and the human right to water

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Abstract
Access to water has been recognized as an international human right at least since 2010, when both the United Nations General Assembly and the Human Rights Council adopted resolutions to this effect. The no significant harm principle can be found in the UN Watercourses Convention, and in numerous other global, regional, and watercourse-specific treaties. This paper provides an explanation of how the no significant harm principle and the human right to water supplement each other, by jointly protecting both the State and the individual from significant harm done, by another State, to a watercourse on which they depend. The dispute between Chile and Bolivia relating to the status and use of the Silala waters is used as a case study, to illustrate the way in which these two international legal regimes (international water law and international human rights law) supplement each other.

Keywords Chile · Bolivia · Silala · Human right to water · No significant harm · International water law · Human rights

Abbreviations

CEDAW	Convention on the Elimination of all Forms of Discrimination Against Women
CESCR	Committee on Economic, Social and Cultural Rights
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
FCAB	Ferrocarril de Antofagasta a Bolivia
HRC	Human Rights Council
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ILA	International Law Association
ILC	International Law Commission
UDHR	Universal Declaration of Human Rights
UN	United Nations

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UNGA United Nations General Assembly
WCC Watercourses Convention

1 Introduction

It is a well-established principle in international water law that States "shall, in utilizing an international watercourse in their territories, take all appropriate measures to prevent the causing of significant harm to other watercourse States" [Article 7 Watercourses Convention (WCC)]. This no significant harm principle, although its exact formulation differs, features in many international legal documents and case law, and its status as a principle of customary international water law is undisputed [e.g. Arbitral Tribunal (1957, para. 13), ICJ (1996, para. 29), and ICJ (1997, para. 53)]. What is remarkable, is that it is generally formulated as a principle that only applies *horizontally*, i.e. in the relation between States sharing the same watercourse.

In international human rights law, there exists a human right to safe and clean drinking water. This right is not explicitly mentioned in any of the classical human rights treaties, but it has been derived from a variety of sources, and its existence has been confirmed by various authorities (Sect. 4). Being a human right, it primarily applies *vertically*, i.e. in the relationship between the State and the individuals residing within that State's jurisdiction. And, like all other human rights, it also applies *horizontally*: by concluding international human rights treaties, States make promises to each other with respect to the way they treat individuals within their jurisdiction.

The central question in this paper is whether the no significant harm principle also lends itself to *vertical*, and even *diagonal*, application, and whether the human right to water can also be applied *diagonally*. Diagonal application refers to obligations of a State vis-à-vis individuals situated in another State, under another State's jurisdiction. If States owe the obligation not to cause environmental harm to a watercourse to (1) other States with whom that watercourse is shared (*horizontal*), (2) to individuals residing with the State's jurisdiction (*vertical*), and (3) to individuals residing elsewhere (*diagonal*); then the human right to water can supplement this rule, by allowing individuals to claim a right to an unharmed watercourse vis-à-vis (1) the State in whose jurisdiction they reside (*vertical*) and (2) vis-à-vis other States (*diagonal*). This way, the no significant harm rule and the human right to water supplement each other, by completing the legal picture.

The question that is addressed in this paper is thus the following: in what way do the no-harm principle of international water law and the internationally recognized human right to water supplement each other, by jointly providing legal protection to both the State and the individual from harm caused to a watercourse on which they depend?

This paper fills an important gap in the research, by examining the integration of two legal regimes: international water law and international human rights law. Its added value is in the analysis it provides of the potential and actual cross-fertilization between the internationally recognized human right to water and the no significant harm principle, one of the fundamental principles of international water law. This theme has already been explored in scholarship, in particular by Takele Soboka Bulto, in his doctoral research (Bulto 2014, pp. 127–224; e.g. Kirschner 2011, p. 485). This paper adds to that research, by focussing explicitly on the human right to water and the no-harm rule, and by linking it to a particular case study, the Silala waters.

This paper's methodology begins by describing the ways in which the human right to water *currently* supplements the no significant harm rule. The second part of the paper is normative: it proposes new and innovative ways in which the two might be better integrated. These proposals are brought together in the conclusion.

To make the analysis more concrete, it refers to the dispute between Chile and Bolivia relating to the use of the Silala. On the 6th of June 2016, the Republic of Chile (hereafter "Chile") instituted proceedings against the Plurinational State of Bolivia ("Bolivia") before the International Court of Justice (ICJ) with regard to the dispute concerning the status and use of the waters of the Silala. This paper uses the Silala dispute as case study, but does not in any way purport to analyse or comment on these proceedings currently pending before the ICJ.

After introducing the Silala dispute (Sect. 2), this paper shows why a purely inter-State (*horizontal*) application of the no significant harm principle leaves an important gap (Sect. 3). It then discusses the supplementing force of the human right to water (Sect. 4) and concludes by discussing the actual and potential contribution of the human right to water to fill the gap left by the no significant harm principle (Sect. 5).

I will begin by describing the way in which the present research is delineated. First, I might have looked also at ways in which the human right to water can be supplemented by principles of international water law *other than the no-harm rule*. For example, the human right to water could be linked to the principle of equitable and reasonable utilization, which reads as follows:

> Watercourse states shall in their respective territories utilize an international watercourse in an equitable and reasonable manner. In particular, an international watercourse shall be used and developed by watercourse states with a view to attaining optimal and sustainable utilization thereof and benefits therefrom taking into account the interests of the watercourse states concerned, consistent with adequate protection of the watercourse (Article 5 WCC).

This formulation is taken from the Watercourses Convention, but the same principle is found in many global, regional, and watercourse-specific agreements. Article 5 WCC is generally seen as reflection of customary international law. Article 6 WCC provides a non-exhaustive list of factors relevant to determining what constitutes equitable and reasonable utilization of a transboundary watercourse. Included in this list of factors that States must take into account when using a watercourse they share with another State, are "the social and economic needs of the watercourse states concerned", as well as the needs of "the population dependent on the watercourse in each watercourse state". The former refers to the interests of (other) States, whilst the latter refers to the interests of individuals. Article 6 reminds all States Parties to the Watercourses Convention that "the weight to be given to each factor is to be determined by its importance in comparison with that of other relevant factors", and Article 10 WCC emphasizes that "no use of an international watercourse enjoys inherent priority over other uses". However, there is one exception to this rule, and that is that "special regard [ought to be] given to the requirements of vital human needs". In determining what constitute "vital human needs", the International Law Commission (ILC), which drafted the Watercourses Convention, explained that this meant that "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" (ILC 1997, para. 8). Of course, the focus on satisfying basic water needs of individual people does remind one of the language of international human rights, which generally aims to secure minimum standards for individuals. This link between the principle of equitable

and reasonable utilization and the internationally recognized human right to water, which has been analysed extensively elsewhere, is beyond the scope of the present research. Here, the focus is on the no significant harm rule, which is the topic of the present Special Issue.

Second, there are various aspects of the no-harm rule itself that are not analysed in detail in this paper. This is particularly the case for the procedural dimensions of the no-harm rule. Think of the duty to consult, inform, cooperate, undertake an Environmental Impact Assessment, and so on. These procedural obligations are not unrelated to the no significant harm principle. In fact, they are part of it. And it might be useful, when looking at ways in which the human right to water supplements the no significant harm principle, also to look at the procedural dimension of this supplementation. For example, we could examine what appropriate measures should be put in place to comply with the human right to water, and how these measures may feed into the procedures that should be put in place to comply with the no significant harm rule. One can think of an obligation to undertake an Environmental Impact Assessment, in which the implications of planned projects for the enjoyment of the human right to water need to be taken into account. However, this paper focuses on the ways in which the human right to water supplements the substantive—as opposed to procedural—principle of no significant harm.

Third, I might have looked at ways in which the no significant harm rule can be supplemented by human rights *other than the human right to water* such as the human right to a healthy environment, the human right to health, or the human right to an adequate standard of living. This research is limited to the human right to water, being the human right most explicitly linked to freshwater use.

Fourth, there are various aspects of the human right to water itself that are not analysed in this paper. The human right to water entitles everyone to sufficient, safe, acceptable, physically accessible, and affordable water for personal and domestic uses (CESCR 2003, para. 2; para. 37). All these terms refer to a whole range of aspects, elements or dimensions of this right. None of these is discussed in this paper. Instead, the focus is on international obligations in relation to the right to water, in particular the obligation of States to refrain from interference with the enjoyment of the right to water in other countries.

Fifth, this paper does not purport to paint a comprehensive picture of what happens when a successful integration of the human right to water and the no significant harm rule is implemented, or put into operation on the ground. The aim, rather, is to demonstrate, in a general sense, that there is a gap in the legal protection, and to give some general suggestions on how the proposed integration can fill that gap. The Silala case is used primarily to elucidate the problem, not to paint a picture of the proposed solution put into operation.

2 Facts of the Silala

Before turning to an analysis of the law, let me introduce the Silala case study. The Silala originates in about a hundred small springs in Bolivia. It is contested whether—or how much of—the water from these springs originates in an aquifer whose size and exact location is unknown. The water from these springs merges in an overground flow of fresh water, which runs into Chilean territory. One aspect of the dispute between Chile and Bolivia is whether the water was diverted into Chile artificially—i.e. through canals—or whether this was a natural process, which was only fortified through canals. This difference might determine whether the Silala is an international watercourse, to which general principles of international water law (including the no significant harm principle in its

traditional sense) apply; or whether it is a purely Bolivian spring, whose use is regulated by domestic Bolivian law. In the latter case, it can still be argued that Bolivia owes certain obligations, under international water law, to Chile and, under international human rights law, to Chilean individuals (Sect. 5).

A determination of the status of the Silala waters under international water law is a central element for answering the question which persons have a legal interest in its protection and preservation. Before addressing this question of legal entitlement (Sects. 3–5), I identify which persons—both natural and legal—*actually* depend on the Silala to satisfy their water needs. In Chile, corporate users include *Ferrocarril de Antofagasta a Bolivia* (Antofagasta and Bolivia Railway Company, FCAB) which used the water to service its steam engine locomotives, since it got permission to do so from both countries, in 1906 (Chile) and 1908 (Bolivia). Second, in Antofagasta, the Silala waters are used by various companies for various industrial purposes. And third, there is the Chuquicamata, one of the biggest copper mines in the world, which also draws water from the Silala, and has done so for decades. None of these companies can claim a human right to water under international law; such right pertains to natural persons only. These Chilean companies can initiate proceedings against Bolivia before the local Bolivian courts, alleging breach of contract by Bolivia. Or they might have direct access to international methods of dispute settlement (some form of investor-State dispute settlement), if access to such an international remedy is agreed upon, either by contractual arrangement between the Chilean investor and Bolivia; or, in a general sense, by treaty between the investor's State of nationality (Chile) and the host State (Bolivia).

The Silala waters are also used by local communities. The nearby Chilean communities of Baquedano and Sierra Gorda have been using the Silala for drinking water. The town of Baquedano consists of a couple of streets built around a train station. The town of Sierra Gorda is considerably bigger, with over 10.000 inhabitants. It too is built around a train station. In short, lots of companies and individuals residing in Chile use the Silala, and have done so for almost a 100 years.

The situation is very different in Bolivia. Quetena Chico, the nearest Bolivian community situated around seventy kilometres from the Silala, with approximately 800 inhabitants, does not use the Silala for drinking water or agriculture. In Bolivia, "only a handful of soldiers and stray llamas draw from its headwaters" (Rossi 2017, p. 57). But this is about to change. Bolivia is working on an irrigation system, a hydroelectric plant, a water bottling plant and trout fisheries in the Silala. Bolivian President Morales officially opened the Silala trout farm already in 2013 (Bórquez 2014).

Chile and Bolivia have begun negotiations on the status—transboundary or domestic watercourse—and use of the Silala (Chile 2016, paras. 27–35). In 2010, efforts to negotiate broke down completely. According to Chile, this was because "Bolivia insisted on its proposal to incorporate Chile's "historic debt" as part of a regime of utilization of the waters of the Silala, which was again rejected by Chile" (Chile 2016, para. 33). The "historic debt" refers to an obligation upon Chile to pay compensation to Bolivia for the century-long utilization of the Silala. Due to this disagreement, in recent years both States have deliberately and categorically refused to inform each other of any water management projects planned and/or already undertaken.

Thus, a considerable number of Chilean companies and natural persons (individuals) rely on the Silala waters to satisfy their water needs. New plans of Bolivia to exploit the Silala may jeopardize that. Section 3 explains the conditions under which the Bolivian activities can be qualified as breach of the no significant harm principle. Section 4 explains the conditions under which Bolivian activities can be qualified as breach of the

international human right to water enjoyed by the above-mentioned Chilean individuals. Section 5 makes general remarks on how these two legal regimes interact and complement each other in providing joint and integrated protection to both individuals and the State from harm caused, by another State, to a watercourse on which they rely to satisfy their water needs.

3 No significant harm principle

This section begins by analysing whether the no significant harm principle, as it currently exists in international water law, indeed focuses specifically on providing protection to one State from harm caused by another State (*horizontal* application), instead of (also) providing protection from harm to other (international) legal persons, including individuals (*vertical* and/or *diagonal* application). I conclude that this is indeed largely the case. Section 4 looks at how human rights law can fill this regulatory gap, by providing such individuals with legal protection from significant harm caused, by or in their own State (*vertical*) and by or in another State (*diagonal*), to the watercourse on which they depend to satisfy their basic water needs.

An obligation not to cause significant harm to the neighbouring State can be found in Article 7 WCC, which reflects general customary international water law. Besides the authorities already referred to in the introduction, one can find further support for this proposition in the *Pulp Mills on the River Uruguay* judgment of 2010, in which the ICJ noted that a State is "obliged to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State", and that this obligation "is now part of the corpus of international law relating to the environment" (ICJ 2010, para. 101). This principle can also be found in the other global legal framework of international water law, the UNECE Convention (UNECE 1992), and in various basin specific agreements. Article 7 of the Watercourses Convention reads as follows:

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

This provision obliges States to do their very best—a due diligence obligation—to prevent the utilization of a watercourse within their territory from causing harm to (the environment of) another State (*horizontal* application). It is difficult to conclude, from a literal reading of this provision, that a State also has a more general obligation to prevent harm caused to the watercourse (Bulto 2014, p. 52). Such harm might be felt by a neighbouring State, but it could also be felt by the individuals residing within the State's own territory (*vertical* application), or by individuals residing in a neighbouring State (*diagonal* application), or by corporations situated on either side of the boundary, or even by future generations (*intergenerational* application).

I now apply the no significant harm principle, in its current form (i.e. limited to *horizontal* application only), to the Silala. The no-harm principle protects *the State of* Chile from significant harm. Admittedly, the State of Chile consists of the population residing on Chilean territory, governed and represented by the Chilean government. Thus, companies and individuals residing in Chile are *indirectly* protected via the State protection provided by the no-harm rule. Also, harm caused to the State of Chile ultimately consists of harm

done to Chilean people, companies, or both. However, this misses the point that the no significant harm rule does not protect individual people residing in Chile *directly* from such harm; it does not recognize their independent legal right to such protection.

Chile argued that Bolivia violated the no significant harm principle, *inter alia* by:

> […] refusing to honour Chile's request for information on the construction of a fishpond and other projects in the year 2012. It has also failed to inform Chile about the construction of a military post and housing that may result in effects on the Silala River that adversely impact Chile. Nor is there any evidence that Bolivia has given due consideration to the environmental impact of these installations and their potential effect on the waters of the Silala River that flow towards Chile (Chile 2016, paras. 48–49).

All these activities of Bolivia allegedly cause significant harm to Chile, so it is claimed by the latter. These activities cause harm to the State of Chile, but more directly, to the individuals and companies situated close to the Silala. But Article 7 WCC does not provide these legal persons with any rights they can claim. In other words, Article 7 does not have direct effect; it cannot be invoked, by an injured individual or corporation, against the State of Bolivia, before a—Bolivian or Chilean—domestic court. And there is also no international dispute settlement mechanism which allows corporations or individual persons to initiate proceedings against Bolivia, alleging a violation of Article 7 WCC (or a customary variant of this no significant harm principle).

It could be argued that these companies or persons might ask the Chilean State to complain on their behalf. Chile could indeed provide "diplomatic protection", i.e. it could initiate proceedings against Bolivia before an international dispute settlement mechanism, to secure protection of the rights and interests of these companies or persons, and obtain reparation for the internationally wrongful act inflicted upon them by Bolivia. However, there is no *obligation* for Chile to do so, and this thus makes these persons and companies dependent on Chile's willingness to exercise diplomatic protection.

If the focus is thus exclusively on significant harm caused by one State (Bolivia) to another (Chile), then the individuals that are actually dependent on the Silala find themselves without legal remedy. Without a rule protecting these individuals from harm caused by both States—Bolivian and Chile—there is something missing in the legal framework.

4 Human right to water and its extraterritorial application

Access to water is explicitly mentioned in Article 14 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), Article 28 of the Convention on the Rights of Persons with Disabilities (CRPD), and Article 24 of the Convention on the Rights of the Child (CRC). Article 14 CEDAW obliges States Parties to provide women in rural areas with "adequate living conditions, particularly in relation to […] water supply"; Article 28 CRPD obliges States Parties to recognize the right of persons with disabilities to social protection, and thus to take measures, *inter alia*, "to ensure equal access by persons with disabilities to clean water services". Finally, Article 24 CRC obliges all States Parties to recognize the right of the child to the enjoyment of the highest attainable standard of health, and thus to, *inter alia*, provide all children with "clean drinking-water". None of these provisions, however, refer to a generally applicable human right to water. In fact, the treaties referred to all purport to provide additional protection to particularly vulnerable

groups, i.e. women in rural areas, people with disabilities, and children. It would, of course, be absurd to conclude from this that only women in rural areas, people with disabilities, and children (and not adult men) should be provided with access to water to satisfy their basic needs.

In 2010, Bolivia took the initiative at the United Nations General Assembly (UNGA) of proposing a resolution recognizing a generally applicable international human right to water (Murthy 2013, p. 102). In a passionate speech defending the proposal, the representative of Bolivia addressed the General Assembly as follows:

> The right to drinking water and sanitation is a human right essential to the full enjoyment of life. Safe drinking water and sanitation are not only principal elements or components of other rights, such as the right to an adequate standard of living. The rights to safe drinking water and sanitation are independent rights, which must be recognized as such. It is not enough to urge States to fulfil their human rights obligations relating to access to drinking water and sanitation. It is necessary to call on States to promote and protect the human right to safe drinking water and sanitation (UNGA 2010a, p. 5).

The General Assembly adopted the Bolivian proposal on 28 July 2010, by 122 votes to none, with 41 abstentions. Chile voted in favour. The General Assembly Resolution recognized “the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights” (UNGA 2010b). The Assembly did not see the right to water as derivative right, but as a human right on its own. This is exactly what Bolivia had requested: that the human right to water should be regarded as an independent right, not derived from and dependent on other already existing human rights.

A couple of months later, the Human Rights Council (HRC, “Council”) expressed a different view. Although the International Covenant on Civil and Political Rights (ICCPR) does not refer explicitly to water, a human right to water was derived, by the Council, from Article 6, on the right to life. Article 6 ICCPR simply proclaims that “every human being has the inherent right to life”. If access to water is not guaranteed, people will lose their life. This rather straightforward connection between life and water was recognized by the Human Rights Council in 2010 (HRC 2010). In the same resolution, the Human Rights Council also affirmed that the human right to water could be derived from the right to an adequate standard of living, and from the right to health, as proclaimed in Articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). Article 11 ICESCR obliges all States Parties to “recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions” (note that in those days—1966—treaties were not yet formulated in gender-neutral language). The remainder of the Article provides more detailed provisions on the right to food. Article 12 ICESCR obliges all States Parties to “recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health”. None of these provisions refer to access to water, but the connection is easily made: without access to water, people cannot secure for themselves an adequate standard of living, and they will get ill. This is how the Human Rights Council formulated it:

> [The Council] recalls General Assembly resolution 64/292 of 28 July 2010, in which the Assembly recognized the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights;

> [The Council] affirms that the human right to safe drinking water and sanitation is derived from the right to an adequate standard of living and inextricably related to the right to the highest attainable standard of physical and mental health, as well as the right to life and human dignity (HRC 2010)

This is a little confusing, because the Human Rights Council first recalls the General Assembly's position—that the human right to water is an independent right—and then it affirms its own position—that the human right to water is a derivative right (for a more detailed analysis of this debate, which is not of immediate importance for our research, Chávarro 2015).

The latter view had been developed a few years prior by the United Nations Committee on Economic, Social and Cultural Rights (CESCR, "Committee") in its General Comment No. 15 of 2002. In this Comment, the Committee presented to the world an authoritative recognition of the human right to water, as derived from Articles 11 and 12 ICESCR. The Comment proclaims that everyone is entitled "to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses" (CESCR 2003, para. 2). As mentioned above, Article 11 ICESCR requires of States to "recognize the right of everyone to an adequate standard of living for himself and his family, *including adequate food, clothing, and housing*" (emphasis added). According to the Committee, the word *including* in Article 11 made clear that what followed was not an exhaustive list. And because water is as essential for life as food, clothing and housing, the Committee had no difficulty adding it to that list (CESCR 2003, para. 3). In support, the Committee referred, *inter alia*, to two of its earlier General Comments: one on the right to health, which included "access to safe and potable water and adequate sanitation" (CESCR 2000); and one on the right to housing as established in Article 11 ICESCR, in which the Committee noted that "all beneficiaries of the right to adequate housing should have sustainable access to […] safe drinking water" (CESCR 1991).

If the linkage between water and an adequate standard of living is so obvious, then why does Article 11 ICESCR explicitly refer to food, clothing, and housing, but not to water? Most people would probably prefer water over clothes. To understand this omission, we have to travel back in time, to 1948. Article 11 is inspired by Article 25 of the Universal Declaration of Human Rights of 1948 (UDHR), which proclaims a right of everyone "to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services". It thus also refers to food, clothing, and housing, and not to water (UNGA 1948). Why was water not mentioned in Article 25 UDHR? This is not entirely clear, and there exist different theories and explanations for it. According to Winkler, "water was not perceived to be as scarce as a resource [in the 1940s] as it is today; its availability was taken for granted—water was considered to be available as freely as is the air to breathe" (Winkler 2014, p. 42).

If we apply the internationally recognized human right to water to our case study, then the central question is whether one State (Bolivia) has obligations, based on the international human right to water, vis-à-vis individuals residing in Bolivia (*vertical* application) as well as to individuals residing in Chile (*diagonal* application). The above-mentioned General Comment No. 15 of the Committee is very clear about this latter so-called *extraterritorial application* of the human right to water. Under the heading "international cooperation", it is stated that:

> To comply with their international obligations in relation to the right to water, States parties have to respect the enjoyment of the right in other countries. International

> cooperation requires States parties to refrain from actions that interfere, directly or indirectly, with the enjoyment of the right to water in other countries. Any activities 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 (CESCR 2003, para. 31).

It is generally acknowledged that the human right to water applies extraterritorially (*diagonally*). Léo Heller, UN Special Rapporteur on the Human Right to Water, reiterated, at the 71st session of the United Nations General Assembly, that all "States have obligations to realize the human rights to water", and that "these obligations apply to States within their national territory and can also extend extraterritorially" (Heller 2016). At the same time, much is still unclear with respect to the wider implications of an extraterritorial application of the human right to water. For example, it is unclear whether the reach of such a right extends even beyond shared basins. Of note is also that the extraterritorial application of the human right to water is developed primarily in scholarly opinion [e.g. Kirschner (2011, pp. 483–485), Coomans (2011, esp. pp. 22–29), and Bulto (2014)]; and in a Handbook issued by the UN Special Rapporteur on Water (Albuquerque 2014, p. 27); and in aforementioned General Comment of the United Nations Committee on Economic, Social and Cultural Rights (CESCR 2003, paras. 31, 34 and 35). None of these instruments constitutes a source of international legal obligations.

If there exists a generally applicable international human right to water, recognized by both Chile and Bolivia, which also applies extraterritorially, then Bolivia is under an obligation to use the Silala waters in such a way that it does not interfere with the use of the Silala, by the Bolivians as well as by the Chileans across the border, to satisfy their basic water needs. Admittedly, this right, being a human right, does not provide the Chilean railway and mining companies with any legal protection. Essentially, it only pertains to individuals. Also, the human right to water does not entitle Chilean individuals to take their water from the Silala. If there are alternative sources of water available, then it is at the discretion of the States concerned—Bolivia and Chile—to determine how this right to water can be enjoyed, i.e. which water source to draw from. This is a shared responsibility of Bolivia and Chile.

5 Human right to water and no significant harm principle

The internationally recognized human right to water *currently* already supplements the no significant harm rule of international water law in at least one modest way. The Silala-case study can be used to illustrate this. If the Silala is not an international watercourse, but a domestic Bolivian spring, then international water law (including the no significant harm rule) might not apply fully. But that does not mean that local communities across the border in Chile are without rights vis-à-vis Bolivia. They still enjoy their internationally recognized human right to water (Greco 2017, pp. 30–36). Roberta Greco developed this argument, as follows:

> "[…] 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" (Greco 2017, p. 36).

In casu, this meant the following:

> A unilateral diversion of the [Silala] 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 (Greco 2017, p. 36).

This way, the extraterritorial application of the human right to water supplements the limited protection provided by the no significant harm principle of international water law. As said, it must be admitted that the human right to water does not grant Chilean nationals a right to draw water from the Silala per se (Sect. 4). The freshwater that is needed for the fulfilment of their human right to water could also come from another source. The problem is that the area in which the Silala is situated, is one of the driest areas in the world, and is likely to become even drier due to climate change. In short, there might not be any alternative sources of water available.

I now propose new and innovative ways in which the human right to water and the no-harm rule might be better integrated than they are now. I suggest that the recognition of the international human right to water ought to necessitate an entirely new interpretation of the no-harm principle, allowing for *horizontal*, *vertical* and *diagonal* application.

At the end of the paragraph on "international cooperation" in General Comment 15 quoted above, the Committee added a footnote, in which

> the Committee notes that the United Nations Convention on the Law of Non-Navigational Uses of Watercourses requires that social and human needs be taken into account in determining the equitable utilization of watercourses, that States parties take measures to prevent significant harm being caused, and, in the event of conflict, special regard must be given to the requirements of vital human needs: see articles 5, 7 and 10 of the Convention (CESCR 2003, footnote 25).

No further explanation is provided, but at the very least the Committee suggested there was a link to be made—and further developed—between the duty of international cooperation under the human right to water, and under the no significant harm rule as codified in Article 7 WCC.

This link begs for further evolution. The International Law Association (ILA) took a first step, by proposing a more general variant of the no-harm rule already in 2004, in its Berlin Rules. Article 8 of these Berlin Rules proclaims that, when using a watercourse situated in their territory, "States shall take all appropriate measures to prevent or minimize environmental harm", without adding that the harm must be caused *to another State* (ILA 2004, p. 355). The Commentary to this provision explains that this was a deliberate omission, based on a recognition that "the obligation to minimize environmental harm does not depend upon the harm arising in a transboundary setting" (ILA 2004, p. 355). Article 8 does not specify whose interests the provision then seeks to protect. Does it seek to protect the watercourse itself? The local community that relies on it? The individual person that relies on it? The animals that rely on it? The tree, or ecosystem, that relies on it? All of the above? The many references to human rights treaties in the Commentary make clear that it was done, *inter alia*, to allow for a more human rights-based interpretation of the no significant harm rule: a no-harm rule which also prohibits harm caused by the State *to an individual person* (ILA 2004, pp. 355–358). This would allow for *vertical* and *diagonal* application of the no-harm rule.

Interestingly, Article 8 of the Berlin Rules refers to "environmental harm", instead of "harm" in a general sense. The Commentary to Article 8 makes clear that "this Article

addresses the broad obligation to minimize *environmental* harm, but not other kinds of harm", and this is because "the customary international law dealing with international environmental problems has long made clear that environmental harm deserves special attention different from other kinds of harm generally" (ILA 2004, p. 356). Article 8 is thus to be distinguished from the general obligation not to cause significant harm, which is formulated in Article 16 of the Berlin Rules, as follows:

> Basin States, in managing the waters of an international drainage basin, shall refrain from and prevent acts or omissions within their territory that cause significant harm *to another basin State* having due regard for the right of each basin State to make equitable and reasonable use of the waters (ILA 2004, p. 364).

Unlike the obligation not to cause *environmental* harm, this general rule not to cause significant harm is limited to inter-State application (*horizontal* application). The ILA found support for a prohibition not to cause harm that applies *horizontally* as well as *vertically* and *diagonally* only in the context of international environmental law, not in international law generally.

To support this broader application of the no-harm principle, the Berlin Rules made reference to the ILA New Delhi Declaration of Principles of International Law Relating to Sustainable Development, in which the protection of the natural environment was seen as "the common concern of humankind", and thus not an obligation owed only to neighbouring States. In other words, the obligation to take all appropriate measures to prevent the causing of significant harm done to a watercourse within a State's territory was an obligation *erga omnes*. One could argue that this is thus also an obligation owed to individuals, which brings us to the human right to water (Sect. 4). The New Delhi Declaration did not specifically link the no-harm principle to human rights as this paper does. But it did generally emphasize the importance of regime interaction and integration. The Declaration included a "principle of integration and interrelationship, in particular in relation to human rights and social, economic and environmental objectives", which reads as follows:

> The principle of integration reflects the interdependence of social, economic, financial, environmental and human rights aspects of principles and rules of international law relating to sustainable development as well as of the interdependence of the needs of current and future generations of humankind (ILA 2002, para. 7.1).

I have not yet referred to Article 17 of the Berlin Rules, which contains an explicit formulation of the right of access to water. It proclaims that "every individual has a right of access to sufficient, safe, acceptable, physically accessible, and affordable water to meet that individual's vital human needs" (ILA 2004, p. 365). From the accompanying commentary to Article 17 produced by the ILA, we can conclude that the human right to water applies to "all persons subject to [the State's] jurisdiction or control" (ILA 2004, p. 367). The reference to persons subject to the State's jurisdiction or control—as opposed to a reference to persons within the State's territory—does indicate clearly that the responsibility of States reaches beyond their territorial boundaries (and thus *diagonal* application is permitted). Combined with a no-harm rule which does *not* apply exclusively between neighbouring States (Article 8; ILA 2004, pp. 355–358, and the discussion above), we are basically already provided in the Berlin Rules with a legal framework that integrates the human right to water with the legal framework of international water law. This framework cannot be based on the human right to water alone, not even in its progressive, i.e. *horizontal/vertical/diagonal* application. This is because the human right to water only establishes legal

protection to the individual from interference with the enjoyment of the right to water; we want such legal protection to be provided to the State as well.

It is the task of scholars to assist in the further development and sophistication of this regime integration, as proposed in the ILA New Delhi Declaration of 2002 and its Berlin Rules of 2004. It is important to note that the Berlin Rules are not a source of international law. They were drafted by the International Law Association, which is essentially a global gathering of international law *scholars*. The aim was both to codify existing customary international law, and to make proposals for progressive development of international law. The Rules do not always make clear which part was codification, and which part was progressive development. The challenge, then, is to interpret and apply the no significant harm rule of international water law and the internationally recognized human right to water (especially in its extraterritorial application) in such a way that they complement each other, and jointly provide both the State and the individual with legal protection from harm caused, by another State, to the watercourse on which they depend to satisfy their basic water needs. If this integration is done successfully, it adds a new dimension to the no significant harm rule, which is traditionally applied only at the inter-State level, and it strengthens the extraterritorial dimension of the human right to water, which is traditionally applied predominantly in the relationship between the State and the persons within its jurisdiction.

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