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Mihajlo Vučić, PhD*

ACCESS TO WATER IN THE CONTEXT OF THE INTERNATIONAL WATERCOURSE: A THEORY OF THE COMMUNITY OF INTEREST

Securing free and equal access to water for individuals is foremost an objective of international water law. This article analyses the community of interest theoretical framework for the creation and implementation of rules that can achieve this objective. This theory is in line with the natural unity of the watercourse that traverses political borders between states. However, legal doctrine is not unanimous concerning its practical value, state practices largely evade it, and case law only provides declarative support without indicating precise contents of community rights and obligations. It seems that practical application of the community of interest theory is only possible through meticulous and systematic application of positive legal rules based on limited territorial sovereignty theory, in the spirit of joint management and use of common water resources.

Key words: *Community of interest. – Access to water. – International watercourses. – Shared water resources.*

1. INTRODUCTION

Access to water is a vital human need. The United Nations Convention on the Law of the Non-navigational Uses of International Watercourses (UN Watercourses Convention) was the first water-related international agreement introducing the term "vital human needs" which has been defined as "sufficient water to sustain human life, including both

* Research Fellow, Institute of International Politics and Economics, Belgrade, *mihajlovucic@gmail.com*.

drinking water and water required for the production of food in order to prevent starvation".[1] Thus, it seems reasonable to assume that what is intended by using the term "vital human needs" is to give special attention only to the most essential needs in order to prevent death from dehydration or starvation (International Law Commission (ILC), 1994, para. 4, McCaffrey and Rosenstock 1996). In international law, a soft norm of the right to water is currently under formation,[2] based on the much wider approach to vital human needs that can be found in the 2002 General Comment on the Right to Water, attached to the 1966 UN International Covenant on Economic, Social and Cultural Rights, which uses the term "personal and domestic uses", comprising drinking water, personal sanitation, washing of cloths, food preparations, and personal and household hygiene.[3] Following the recognition by the General Comment, on 28 July 2010, the United Nations General Assembly recognized the human right to water and sanitation in Resolution 64/292.[4] It acknowledged that clean drinking water and sanitation are essential for the full enjoyment of life and all human rights. World Health Assembly Resolution 64/24, of May 2011,[5] and Human Rights Council Resolution 18/1,[6] also recognize the right to water and call upon the water and sanitation sector to progressively achieve the full realization of the right to safe drinking water and sanitation for all. The human right to safe drinking water and sanitation continues to be affirmed by the UN Human Rights Council and continues to be observed, particularly by the Special Rapporteurs on the right to safe drinking water and sanitation. The World Bank report on the human right to water extends its normative content beyond the provision of water for drinking purposes to water for

[1] Article 10.1.1, Adopted by the General Assembly of the United Nations on 21 May 1997. Entered into force on 17 August 2014. See General Assembly resolution 51/229, annex, Official Records of the General Assembly, Fifty-first Session, Supplement No. 49 (A/51/49).

[2] Under the term soft norm a large corpus of legal rules in international environmental but also other field of public international law can be described. Those are norms that can influence the conduct of addressees due to its normative value but are lacking liability and enforcement mechanisms to secure compliance (Dunoff, Ratner, Wippman 2015). The term itself might be misleading (Blutman 2010) but has been consistently for a long time.

[3] UN Committee on Economic, Social and Cultural Rights, General Comment No. 15, The Right to Water, International Covenant on Economic, Social and Cultural Rights (29th Session, 26 Nov 2002) UN Doc E/C 12/2002/11.

[4] UN General Assembly Resolution 64/292 "The human right to water and sanitation", adopted 28 July 2010 (A/64/L.63/Rev.1 and Add.1).

[5] World Health Assembly Resolution 64/24 "Drinking-Water, Sanitation and Health", adopted 24 May 2011 (A64/24).

[6] Human Rights Council Resolution 18/1 "The human right to safe drinking water and sanitation", adopted 28 September 2011 (A/HRC/18/L.1).

environmental hygiene and health generally, as well as for growing food (Salman, McInerney-Lankford 2004).

Regardless of the differences in the definition of this term, there is no doubt that sufficient water to sustain human life, including both drinking water and water required for the production of food, in order to prevent starvation, is a *conditio sine qua non* of human life. Thus, if we are speaking of water as a human right, it cannot be denied that every person, without discrimination, should enjoy the freedom of access to adequate quantity and quality of water. At the same time, every person should have, as much as possible, the equality of access to adequate quantity and quality of water.

Is there a sufficient material basis in our world to make this right viable? There is no doubt that enough freshwater in the world exists to meet the existing and future free and equal access of the world's population to it (Gleick 1993, 3–4). These adequate quantities, however, are poorly distributed. In some regions of the world severe drought leads to desertification, while in others heavy floods cause massive pollution of freshwater resources. Global climate patterns provide ample access to water in some regions only during winter seasons, while causing deficit during summer. Climate change leads to unpredictable precipitation patterns in other regions which causes unexpected multi-seasonal droughts. Thus, water allocation to secure free and equal access of individuals to it must take into account all these factual inequalities of access and natural obstacles to the freedom of water use.

Thus, the activity of securing a free and equal access for individuals to freshwater is necessarily conditioned by some idea of redistribution of this natural resource. Such a redistribution process inevitably brings into play the competing priorities of different uses and users. To complicate this equation further, since most water resources traverse political boundaries, these competing priorities often become regional conflicts between riparian states. Therefore, the redistribution rules must become international in nature. This is why international water law plays a crucial role in securing equality and freedom of access to water for all human beings.

However, for international law to be efficient in the quest for securing free and equal access to freshwater resources, its rules that relate to water allocation and use must be informed by a theoretical framework that recognizes this freedom and equality of the interests of individuals. States that have sovereignty over natural resources based on their territory represent the interests of their citizens' needs for water, but from this the conclusion does not automatically follow that international rules for allocation and use of water resources, which are established by states, will faithfully defend these interests. On the contrary, selfish state

interests and half-baked compromises between competing interests can exclude completely, or just partially satisfy the interests of the people on the other side of state border.

The ideal understanding of the international regulation of freshwater would be that, since all human beings need water for their subsistence, it can be said that all freshwater should be shared by the community of human beings. Therefore water should be treated as the common property of mankind. This is, however, not the case in contemporary international relations. The legal status of freshwater resources in international law is a status of so-called common-pool resources, which are partially excludable and rival. (Ostrom 2015, 30–33). This means that only the riparian states enjoy access to them for purposes other than navigation and that their benefits are therefore partly excludable. In contrast to open-access commons, such as high seas fisheries and the electromagnetic spectrum, non-riparians have no access to water resources and cannot benefit from them directly (Benvenisti 1996, 393). The benefits from the use of water resources are an object of rivalry between riparians, since any unit of water diverted or polluted by one of them reduces the quantity and quality available to others. This manner of use of common-pool resources leads to the well-known "tragedy of the commons" syndrome, in which each of the users receives direct benefits from its one-sided use of common resources, while costs of the act are borne by all users (Hardin 1968, 1243), which creates woeful inequalities and restricts freedom of use.

Instead of the "common property of mankind" concept, for water to be accessible to everyone freely and equally it is enough to create a theoretical framework that would take different interests for its use as an integral whole. In other words, instead of trying to balance competing interests, it is preferable to establish joint mechanisms of water use that would eliminate the obstacle of state sovereignty, which defends particular interests. International water law legal doctrine has identified four principal theories of water allocation. These theories are more or less supported by state practices. These are: a) absolute territorial sovereignty, b) absolute territorial integrity, c) limited territorial sovereignty, and d) community of interest theory. Of these four theories, the first two can be described as slightly outdated, rarely used in practice, and completely lacking support in contemporary legal doctrine. First one retains for one riparian state the exclusive right of usage (see more in McCaffrey 1996), while the other excludes all possible uses that would interfere with the natural flow of a watercourse, which virtually renders the water resources useless (Rahaman 2009). Theory of limited territorial sovereignty is based on the assertion that every state is free to use shared watercourses flowing on its territory as long as such utilisation does not prejudice the rights and interests of the co-riparians. It forms the basis of customary international

water law. However, key positive legal rules that have been designed in the framework of this theory, equitable and reasonable utilization, no-harm rule and procedural principle of cooperation, do not eliminate the possibility of legal outcomes in individual cases of water allocation that would disable free and equal access to water.

Free and equal access to water can be optimally secured if water is regarded as an indivisible resource, over which all the users of a particular watercourse share a right of use. This does not mean that every person in the world will be given an equal share in water and that freedom of use can be guaranteed everywhere in the same manner. This means only that water in an international watercourse will be used in the interests of a community that depends on that particular watercourse for its water needs. Thus, the guarantee of a free and equal access is a particular and not a global guarantee, in line with the nature of international water law, which is globally only regulated by framework agreements (the UN Watercourses Convention is the best example of this), but the legally binding rules, which actually provide for access to water resources, are contained in particular watercourse or regional treaties. Therefore, inequalities between different regions in terms of water abundance cannot be erased by any legal theory, since they exist no matter the wishes of legal academics and practitioners. However, what can be secured is the management of water resources that uses these resources in the common interest of users of a particular watercourse.

This article explores the fourth principal theory of water allocation, the community of interest theory, since it is the author's opinion that this theory is the most suitable framework for creation and implementation of rules on water use that satisfy requirements of freedom and equality of access for human beings to water resources on a particular watercourse. This theory is based on the idea that riparian states share a common interest in using the international watercourse. Whereas the doctrine of limited territorial sovereignty merely connotes unilateral restraint, the concept of a community of interests evokes shared governance, joint action across an entire unified system (McCaffrey 2010). At face value, it seems logical that only joint and integral management of the whole watercourse system can ensure optimal use of water and respect of freedom and equality of access to water for all watercourse users. However, as it will be shown, the theory of the community of interest has not exerted a substantial influence on positive international law, and state practices that are inspired by it are sparse (part I). On the other hand, writings of scholars that support the author's theoretical approach are abundant, but the majority are those classical authors who were inspired by natural rights theory and modern environmentalist theory, which means that doctrinal consensus about the practical value of this theory is far from being achieved (part II). Finally,

the jurisprudence of international courts and tribunals – generally a thin corpus of law in this field – has some ground-breaking judgments in favour of this theory to show, however their influence on actual state practices must not be overvalued (part III). It seems then that the only way to implement community of interest theory in positive legal rules is not to transform them completely, but to try to infuse existing norms with its essential meaning in the process of implementation, which is possible since legal norms of general nature in this field are worded in a manner that leaves room for creative interpretation (part IV). At the end of the article the conclusion based on all previous arguments is given.

2. COMMUNITY OF INTEREST IN STATE PRACTICE

Although the topic of this article is about non-navigational use of international watercourses, we will start the analysis with some examples of state practice that relate to navigation on international rivers, since they were historically the first to cause disputes among states over access to water. The first traces of state practices inspired by the community of interest theory in literature are usually connected with U.S. Secretary of State Thomas Jefferson, who wrote a letter to the U.S. President George Washington expressing his legal advice on the matter of the freedom of navigation in the Lower Mississippi River, at the time under sovereignty of the Kingdom of Spain (Vitányi 1979, 30). Jefferson states in his letter that the ocean is free for all the people and rivers for their inhabitants (*ibid*., 31). Jefferson argues in line with the generally accepted position of international legal doctrine at the time, which was founded on the theory of natural rights. That same year French Government adopted a decree upon the opening for navigation of the river Scheldt in which it is stated that watercourses are a common and unalienable property of all the regions through which they flow (Le Fur, Chklaver 1934, 67). All these natural legal ideas stem from the natural phenomenon of the physical unity of the watercourse. There are also other examples of this idea that international rivers are common to all riparians: Treaty of Teschen, signed between Austria and German electoral state of Palatinate of 1779, which states that certain rivers will be common to these two countries if they are situated on their borders (Berber 1955, 23), and the so-called Imperial Recess of 1803 (*Reichsdeputationschauptschluss*) which regulates the status of Rhine from the borders of the Bavarian state to the Swiss border, calling it a common watercourse between the French Republic and the German Empire (*ibid*.). In the same spirit was concluded also the Treaty of 14 May 1811, on the border demarcation between Prussia and Westphalia, which proposes that "although the thalweg of the Elbe is a border between two sovereigns", between themselves, "the river

would always be considered common for both kingdoms for purposes of commerce and navigation" (Vitányi 1979, 37). All examples so far were related to contiguous watercourses, while one example of community of interest approach related to a successive watercourse can be found in the Treaty on Peace and Friendship between France and Batavian Republic of 1795, which was inspired obviously by a French governmental decree on the river Scheldt (*ibid.*, 34). The definition of common watercourses was some 100 years later broadened to include contiguous lakes as well, since in the Treaty of Karlstad from 26 October 1905, signed between Sweden and Norway, Article 4 states that lakes and watercourses that form a border between two countries, or are situated on the territory of both, or flow into named lakes and watercourses, would be considered as common (Berber 1955, 24).

However, these early historical examples of the acceptance of community of interest theory disappear completely from state practice around the turn of the 20th century, and only at the end of this century of creation of positive general international water rules can we find new examples. McCaffrey opines that this is a consequence of natural law theories being suppressed by legal positivism (2010, 152). However, with a change of historical context caused by a development of the law of environmental protection and global move for sustainable development in international relations, many international treaties at the end of the century adopt this approach.

For example, the idea that international watercourses are common goods is strongly expressed in the Protocol on Shared Watercourse Systems in the Southern African Development Community (SADC) Region (1995).[7] This agreement uses the term "shared watercourse system" which is defined in the Article 1 as "a watercourse system passing through or forming the border between two or more basin states". The term "shared watercourse" is very similar to the term community of interests on the watercourse of the riparian states. Article 2 confirms this similarity when it says that members of the development community "undertake to respect and apply the existing rules of general or customary international law relating to the utilisation and management of the resources of shared watercourse systems and, in particular, to respect and abide by the principles of community of interests in the equitable utilisation of those systems and related resources".

[7] Protocol on Shared Watercourse Systems in the Southern African Development Community (SADC) region signed at Johannesburg, 28 August 1995, *http://www.fao.org/docrep/w7414b/w7414b0n.htm*, last visited 20 July 2019. The agreement was prepared and adopted by eleven African countries of this region, including Angola, Botswana, Lesotho, Malawi, Mozambique, Namibia, Eswatini (formerly Swaziland), Zambia, Zimbabwe and Southern Africa. In the meantime a new revised protocol was adopted but still has to be brought into force.

Similar provisions are found in the Agreement between Namibia and South Africa on the Establishment of a Permanent Water Commission (1992). Article 1 of the Agreement states that the objective of the Commission is to "act as technical adviser to the Parties on matters relating to the development and utilisation of water resources of common interest to the Parties". The idea of common interest in the issues regulated by the Agreement is essentially the same as the idea of the community of interest in international watercourse. Obviously some linguistic differences between common interest, community of interest, common rivers or lakes do not change the essence of the idea – that all riparian states must treat the freshwater resources of the international watercourse as a common good. Every treaty, regional or bilateral, that regulates watercourses in the framework of the theory of the community of interest contains at least some of the options. The Agreement between the Federal Republic of Nigeria and the Republic of Niger concerning the equitable sharing in the development, conservation and use of their common water resources even interchangeably uses the terms shared river basins and common water resources.[8] The International Law Commission also uses in its Draft Articles for the UN Watercourses Convention the expression "use of waters that represent a common natural good" (ILC, 1994). To summarise, differences are non-existent, these are all different expressions for one concept, one idea, the idea of the community of interest of watercourse states in the use of its water resources. These water resources are shared, but not physically divided, since that would be impossible due to the nature of water as a physical substance. Shared water resources implies that they are common, and that the whole watercourse is common. Even though the formal legal logic cannot institute a common ownership over them, there exists a community of interest for their use.

So far, we have concentrated on the African continent in presenting state practices, however instances of the community of interest approach are visible in Latin America as well. The Agreement between Bolivia and Peru concerning joint utilization of the waters of Lake Titicaca (1957) states in Article 1 "two countries have joint, indivisible and exclusive ownership over the waters of Lake Titicaca".[9] This is an upgrade of the previous examples since here it is expressly mentioned that the riparians institute joint ownership, although it is not clear from the Agreement

[8] Agreement between the Federal Republic of Nigeria and the Republic of Niger concerning the equitable sharing in the development, conservation and use of their common water resources, done at Maiduguri, 18 July 1990, *http://www.fao.org/docrep/w7414b/w7414b10.htm*, last visited 20 February 2014.

[9] Agreement between Bolivia and Peru concerning a preliminary economic study of the joint utilization of the waters of lake Titicaca, signed at La Paz, on 19 February 1957, *http://www.colsan.edu.mx/ investigacion/aguaysociedad/proyectofrontera/1957.pdf*, last visited 20 April 2014.

whether any specific institute of shared property in the legal sense is created besides the management policy which recognizes a community of interest. However, in the exchange of letters during 1992 and 1993 two states agreed to establish a binational authority to implement a binational master plan for the lake (McCaffrey 2010, 154). This authority is still not operational.

Actually, the only example of a living and functioning joint ownership organization for the management of the international watercourse globally is the Senegal River Basin Development Organization (Organisation pour la Mise en Valeur du fleuve Senegal – OMVS), a regional cooperative management body for the Senegal River which currently includes Guinea, Mali, Mauritania, and Senegal. Created in 1972, following several years of severe drought, the OMVS's common facilities on the Senegal River are operated under a joint, indivisible ownership regime among the riparian states.[10] The riparians share joint responsibility for the management and operation of the two existing dams. This framework has particularly strong implications for financing arrangements.[11] The OMVS Member States jointly guarantee the repayment of principal and interest on any loans made to the organisation for the construction and operation of the common facilities. This "communitisation of interests" within the framework of the OMVS allows water infrastructure to be anchored in one State's territory without hindering other Member States from exercising their rights (Gander 2014). In this sense, the status of the Diama and Manantali, the two dam installations on the watercourse, represents a perfect example of water use cooperation on an international watercourse in order to produce energy, provide drinking water, and allow irrigation and navigation (Schemeier 2012; Kauffman 2015).

Instead of creating joint ownership organization, states have so far concentrated on establishing joint programs for the development of international watercourse systems, without paying attention to political borders. Some of the examples that more prominently accentuate community of interest are the Agreement for the utilization of the Nile waters between former U.A.R. (Egypt as successor) and Sudan.[12] However, other Nile River riparians[13] consider these agreements anachronistic

[10] Convention portant création de l'OMVS, 11 March 1972, Nouakchott.

[11] See Convention relative aux modalités de financement des ouvrages communs, 12 March1982, Bamako.

[12] United Arab Republic and Sudan Agreement For The Full Utilization of the Nile Waters, 8 November 1959, Cairo, *http://internationalwaterlaw.org/documents/regionaldocs/uar_sudan.html,* last visited 20 July 2019.

[13] The Nile River is the longest river in the world covering nearly 7,000 kilometres. It traverses eleven countries in Africa: Burundi, the Democratic Republic of Congo (DRC), Egypt, Eritrea, Ethiopia, Kenya, Rwanda, Sudan, Tanzania, Uganda and South Sudan.

holdovers from the colonial era and want them abrogated and replaced by a new international watercourse legal regime that enhances equity in the allocation of the Nile River's waters. Egypt and Sudan, however, insist that the existing Nile Waters Agreements be maintained or that, in the event a new legal regime is established, Egypt's historical rights – those granted by the original agreements – should be honoured (Adar, Check 2011). Another is the Columbia river treaty between the United States and Canada,[14] which is concentrated on cooperation in the common interest in developing water resources of Columbia for hydropower generation and control of floods, but is rather outdated in view of the development of international environmental considerations from the days when it was concluded (1961) (Firuz 2012, 173).

An interesting legal arrangement that recognizes a common interest in sharing joint water resources is the Yarmouk river agreement between Jordan and Syria,[15] which created a sort of a barter agreement whereupon Syria restricted its right to use the water above the dam in exchange for 75% of the energy generated by a water-powered plant, whereas Jordan obtained greater water rights in exchange for electricity. However, due to Israel's protests and political instability in Syria, the agreement was never fully implemented (Szwedo 2018, 158–159). Similar electricity-for-water arrangements were successfully implemented in the case of the treaty between Switzerland and France on the development of hydropower potential of the river Rhône (Verzijl 1970, 290) or the treaty between the USA and Canada relating to the uses of the waters of the Niagara River.[16]

Finally, a most developed aspect of the implementation of the community of interest theory in international water law are the joint institutional mechanisms for management of shared water resources. More than a hundred international river commissions have been established so far, geographically spread all over the globe, and they all share the purpose of managing day-to-day non-navigational uses of international watercourses (Vučić 2018, 25, fn. 23; Dombrowsky 2007). Their great number and the fact that they were founded by states that intensively use their water resources implies that institutional cooperation is a natural consequence of a great interdependence of riparian states. Numerous

[14] Treaty relating to cooperative development of the water resources of the Columbia River Basin, done 17 January 1961, *http://www.internationalwaterlaw.org/documents/regionaldocs/columbia_river1961.html*, last visited 20 July 2019.

[15] Agreement concerning the utilization of the Yarmouk waters, 3 September 1987, Amman, *http://www.internationalwaterlaw.org/documents/regionaldocs/Jordan-Syria-1987.pdf*, last visited 20 July 2019.

[16] Treaty between the United States of America and Canada relating to the uses of the waters of the Niagara River, signed at Washington, 27 February 1950, *http://www.internationalwaterlaw.org/documents/regionaldocs/niagra1950.html,* last visited 24 July 2019.

and important functions are relegated to these authorities, in some cases they can adopt and even implement plans for the development, use and protection of international watercourses. Although, this is still far from joint ownership, we can agree with Lipper that these international commissions are the best indicator of factual recognition of the community of interest in the state practice (1967, 39).

To conclude this section, although various international agreements recognize the existence of the common interest, or community of interest in the access to water contained in international watercourse, they do not automatically create legal institutes that would transfer this notion to the concept of joint ownership over these resources (with the exception of the case of the OMVS). Rather, they create joint institutional bodies for management of watercourses or joint plans and programs for their development. However, these institutions, in order to effectively realize the community of interest in practice, would have to encompass all the riparians of the particular watercourse, to establish solidarity mechanisms in times of water crisis, and to ensure that their management is safe from the influence of regional hegemons that may subvert their institutional capacity for their own interest and not the communal, therefore preventing the realization of free and equal access to water of all the citizens that depend on the particular watercourse for the satisfaction of their vital human needs.

3. APPROACH OF LEGAL DOCTRINE

One must start with Grotius when one wants to discuss international law and community of interest. In his famous work, he argued for the establishment of joint ownership of the watercourse by the riparians (Grotius 2001, 29). Grotius found roots of the community-of-interests doctrine in Roman law, which treated water resources as *res publicae jure gentium*, not subject to private appropriation or free disposition. Building this notion into natural law, Grotius and other authors reaffirmed the conceptualisation of rivers as “common property”, arising from the physical unity of a river system, seen as a public good in which everyone shares an interest.

Speaking about the opening of the Scheldt to international navigation, Schlettwein states that the river is a God-given joint property of all riparians. None of them has the right to keep for itself exclusively the right of use of such a river, and none can take this right from the others. Even if one is forced by the other to cease the navigation, this would not be legally binding, since it was always unjust to take from someone the right to use an object that was meant by the Creator to be

common property (1785, 11–12). Both authors are influenced by the natural law doctrine which does not discriminate between navigational and non-navigational uses when it comes to community of interests on the watercourse.

In the 19th century, Carathéodory, as another follower of the same school of thought, writes that a nation did not create the river and therefore cannot have exclusive right to use it. In his words, it would be the greatest injustice to purport a theory of usage that would strip other countries of their natural rights to use the river without causing any damage to other riparians' interests whatsoever (2010, 32). However, Carathéodory limits the community of interests to naturally made watercourses, which logically excludes man-made canals. Another weak point of his theory for the purposes of the community of interest is that he actually adopts a limited sovereignty approach, since he expands on the notion of damage and its prevention, as the limits to the otherwise sovereign unilateral use of the river by an individual riparian.

At the beginning of 20th century, Farnham also follows the same stream of thought, stating that the river that flows through the territory of several states forms their common property. It is his opinion that, as a gift of nature to the humanity, a river must not be appropriated by any particular group of people that would unilaterally impose their rights of use on others (1904, 29). Continuing on his work, Lederle, expressly supports the idea of common ownership of international watercourses, but with a slight reserve. He is concerned about the real possibility of implementation of this idea to the hard fact of territorial sovereignty. Therefore, he splits the idea of the community of interest into two legal principles: the principle of joint ownership of flowing water, and the principle of territorial sovereignty over a watercourse. His joint ownership over water resources resembles a vital human needs approach of the UN Watercourses Convention, since he proposes that this regime would regulate the use of water for personal needs (drinking, washing, food preparation), while for other purposes (hydropower production, irrigation, grazing), unilateral use is allowed insofar as it does not cause damage to other riparians (here Lederle stands on the position of limited sovereignty theory) (see more in Lederle 1927, 700).

Huber is of the opinion that analogies with municipal legal institutes, such as Roman property law, are ill-conceived for the conditions of international relations, due to territorial sovereignty obstacle. Therefore, Huber argues not for common ownership over a part of territory-watercourse, but on the equal right of use (1907, 161–162). Of course, we can agree with Huber that analogies are never successful when legal transplantations pass between completely different social realms, but the idea of joint ownership is in essence the idea of joint right of use and

enjoyment of fruits of usage, whereas the third aspect of ownership – disposal – is unimaginable with the ownership of a watercourse itself. However, the disposal of water resources, for example as a measure of redistribution of water resources from water-rich regions to water–scarce regions, should be encouraged if it is done in the common interest of all riparians.

In the second half of the 20th century, specifically in 1985, with the rise of legal positivism in doctrinal thought, Godana was able to argue that the idea of the community of interest was inadequate to be a legal principle of international law that governs watercourses, since its implementation would require a much more developed state of international infrastructure (1985, 49). Just four years after, Caflisch is already more optimistic, arguing about the idea in naissance that common natural resources that lie outside of national jurisdictions should be regarded as a common heritage of mankind, including there already internationalized goods such as the high seas, Moon and other celestial bodies, geostationary orbits and transmission frequencies. Caflisch states that these goods are or should be regulated by international institutions of universal character, in the interests of all the states in the international community. Therefore he implies that the same analogy can be made in relation to international watercourses. Obviously, he continues, riparian states form a certain community that ignores state borders, and a simple division of waters, however equitable, would not guarantee an optimal method of development for the watercourse system. From this flows the idea of "denationalization" of international watercourses and the transfer of authority to manage and use them from the state level to an international organization formed to regulate this management and use. Caflisch opines that treaty regimes that create international river commissions lack the integrative effect to transform international watercourses into a common property of riparian states, and asks whether the joint authority to use the water goods can also be observed as the emanation of the community of interests in practice. He concludes that condominium over a watercourse is inappropriate for another reason. In the case of condominium, every riparian state could veto new uses of a watercourse, which would in effect lead to the theory of absolute integrity's deadlock (Caflisch 1989, 59–61). Therefore, he opts for a community of interest approach, which creates common right of use without instituting common ownership.

The community of interest approach in the legal doctrine is sometimes downplayed as something not truly revolutionary in comparison with existing factual and legal state of affairs. It is said that this theory simply recognizes the situation that exists on the watercourse, that all riparian states have an interest in using it, but does not create in itself any legal obligation to use it in the interests of free and equal access

to water for everyone. Unless there is a treaty established between the riparian parties, which explicitly obligates them to secure free and equal access, it is not at all certain that the simple sense of community between them will lead to optimal solutions of water distribution (see Fitzmaurice, Elias 2004, 14). Therefore, these authors tend to tread a backdoor path to get to the more or less same result. They turn to international environmental influence on water regimes and there find the emanations of the community of interests.

Thus, the so-called ecosystem approach to water management focuses on the whole ecosystem of which a watercourse is just a part. Besides water, the equation also includes the living species and their physical environment connected to water. Therefore, limits on state sovereignty come not from the community of interests in water use but rather from the more general need to protect and conserve the ecosystem itself (see Teclaff 1991, 355–370; Brunée, Toope 1994, 72; McIntyre 2004, 1–14; Tza 2004, 40–46).

There is no doubt that the ecosystem approach to water management creates the need for communal practices, since it further ties the interests of various actors, not just states themselves, but also environmental NGOs, business sector, local communities – basically all societal groups. This modern strand of legal doctrine observes private actors, such as business entities, as actors of equal importance to states in the communal management of water resources and even tries to read this into the provisions of UN Watercourses Convention. They especially accentuate following provisions of the Convention that represent the community of interest among private industrial and commercial sectors from riparian states that use common water resources: (1) prevention, control and reduction of transboundary impact by taking such measures as the application of best available technologies (Article 3.1); (2) consideration of existing lists of industrial sectors or industries and of such hazardous substances in international conventions or regulations, which are applicable in the area covered by the Convention (Article 3.2); (3) protection of information related to industrial and commercial secrecy (Article 8); and (4) exchange of best available technology, particularly through the promotion of the commercial exchange of available technology and of direct industrial contacts and cooperation, including joint ventures (Article 13.4) (Samvel 2018, 6).

4. COMMUNITY OF INTERESTS IN INTERNATIONAL JURISPRUDENCE

Two key decisions of international adjudicatory bodies are especially important for the analysis of the community of interest theory.

First is the decision of the Permanent Court of International Justice in the River Oder case.[17] The background of the case is as follows: the Treaty of Versailles established an international commission to rework international regulations pertaining to the Oder River and its tributaries. Poland disagreed with the commission's assertion of jurisdiction over two tributaries within Polish territory, because the tributaries were found to be "navigable" and to "naturally provide more than one state with access to the sea", however the Court held that jurisdiction extended to navigable tributaries within Polish territory. The Court did not rely on the treaty establishing the international commission in its judgment, since it found that textual analysis of the relevant provisions cannot give the requested answer. Instead it cited principles that regulate international water law in general. Therefore, it reasoned that when one particular watercourse traverses the territory of more than one state, the requisites of justice and necessity require that a simple right of passage through a river. as a limit to territorial sovereignty of the state upon whose territory the passage is requested, is not enough. The optimal solution for free and equal access to the waters of the Oder for all riparian states was in the fact of their community of interests. This community of interests forms a basis for a shared right of access, which excludes any privileges and creates perfect equality.

Although the issue in this case was navigation, it can be interpreted that the Court, in citing general principles of international water law assumed that they would be valid for non-navigational uses of waters as well. The court regarded community of interest as a fact, which is a consequence of the physical unity of the watercourse, as a natural system that traverses political borders and therefore unites territories of various states in one community, dependent on it for its vital needs. The Court also pointed out that community of interest is a requirement not only of the necessity of factual interdependence, but of justice, which relates to our notion that community of interest is the best option for securing free and equal access to water.

The second case is the decision of the International Court of Justice (ICJ) in the Danube Dam case.[18] In 1977 Hungary and Czechoslovakia signed a treaty obligating the states to cooperate in the construction of a system of dams and locks along a section of the Danube River that formed the border between the two countries. Construction commenced in 1978 but progressed slowly due to political and economic transformations in both states. In 1989, Hungary abandoned the project, justifying its decision with claims of changed circumstances and impossibility. In 1993,

[17] Case Relating to the Territorial Jurisdiction of the International Commission of the River Oder, Series A.-No 23, Judgment of 10 September 1929.

[18] Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment of 25 September 1997, I.C.J. Reports 1997, p. 7.

Czechoslovakia peacefully separated into two nations: the Czech Republic and Slovakia. Slovakia assumed its predecessor's responsibilities under the treaty because the planned hydraulic system fell within its territory along the Danube River. After continued negotiations failed, Slovakia devised "Variant C", an alternative plan to complete the project. Under Variant C, Slovakia dammed the Danube and appropriated between 80% and 90% of the river water. The dispute came before the International Court of Justice in 1994 and was decided in 1997. The Court rejected Hungary's claims of changed circumstances and impossibility but also concluded that Slovakia, by putting Variant C into operation and unilaterally taking control of a shared resource, had violated international law and the 1977 Treaty. Ultimately, the Court ordered the parties to "re-establish co-operative administration of what remains of the Project".

The ICJ cited its predecessor in River Oder in regard to the community of interest concept, adding that modern development of international law has confirmed this principle for non-navigational uses of international watercourses. The ICJ found proof for this statement in the adoption of the UN Watercourses Convention. Following the same line of reasoning, the ICJ labelled Slovakia's breach of Hungarian right to equitable and reasonable utilization of common water resources a consequence of its disregard for proportionality. Finally, the remedy ordered by the ICJ was to continue with cooperation, as this is only inevitable since the two countries are in the community of interest, and only joint management can lead to legality of the use of common resource, regardless of their unilateral wishes. Therefore, the ICJ concretised the theory of the community of interest into a practical guide for fulfilling of positive legal obligations, which were conceived as limits to territorial sovereignty in the first place – equitable and reasonable utilization and procedural principle of cooperation.

The ICJ continued to confirm the community of interest doctrine in its decisions in Gulf of Fonseca,[19] and Pulp Mills.[20] However, its arguments fell short of detailing concrete legal rights and obligations. In Gulf of Fonseca the ICJ Chamber concluded that the existence of a community of interest among Honduras, El Salvador, and Nicaragua was "not open to doubt" with regard to sovereignty over the waters of the Gulf of Fonseca. The Chamber deemed a condominium or shared sovereignty arrangement involving Fonseca's waters "almost an ideal juridical embodiment of the community of interest's requirement of perfect equality of user". In Pulp Mills, the Court held a treaty-based commission: "established a real community of interests and rights in the management of the

[19] Land, Island and Maritime Frontier Dispute (El Sal./Hond.: Nicar. intervening), Judgment, 1992 I.C.J. 351, 407 (Sept. 11).

[20] Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, 2010 I.C.J. Rep. 14., 281 (Apr. 20).

River Uruguay and in the protection of its environment". The limited application of the community of interest standard nevertheless mandated that the commission "devise the necessary means to promote the equitable utilization of the river" (see more in Vučić 2017).

5. CONCLUSIONS

The theory of the community of interest is one of the four principal theories for water allocation in the international context. Among those four theories, we argued that the theory of the community of interest is the optimal theoretical framework for the creation and implementation of rules for water allocation that ensure free and equal water access for riparian-states and individuals that depend on the particular watercourse for satisfaction of their vital human need for water.

However, the analysis has shown that the status of this theory in positive international law is subordinate to the dominant position of the theory of limited sovereignty. With the exception of the case of the Senegal River basin and its legal regime, which implements fully community of interest by instituting joint ownership and management over the organization for the use of waters of Senegal, all other treaty regimes are based on limited territorial sovereignty, implementing in their legal regimes cooperation (in the form of joint intergovernmental commissions and programs of management that serve as forums for coordination of competing interests of usage), restraint (rules on prevention of significant transboundary harm from unilateral use), and unilateral utilization (supposed to be equitable and reasonable).

Even though the early doctrinal approach gave primacy to community of interest theory, since it was in accord with natural law concept, legal positivists, always on the alert when state sovereignty is perceived as threatened, discarded this theory as unrealistic since it does not respect the sovereign control of the state over natural resources situated in its territory. Modern theoretical approaches that included environmental considerations in the water allocation procedures, again started promoting community of interest theory, now under the pretext of the ecosystem approach. It remains to be seen how climate change, pollution and population growth, as factors that further endanger freedom and equality of access to water, will influence legal thought. At the moment it can be said that it is a tie between limited sovereignty and community of interest academics.

Jurisprudence for its part strongly encouraged community of interest idea as a fact, which must be taken into account when implementing legal rules for use of international watercourses. However, it found community

of interest already identifiable in general principles of international water law and especially procedural principle of cooperation, without further specifying its contents.

Clearly, the main flaw of the community of interest theory is its vagueness. It is easy to say that the unity of the international watercourse creates a community of interest of the entities dependent on its use for satisfying their vital human needs. The difficult part is to ascertain which precise legal rights and obligations flow from this fact. Free and equal access to water can be cited as one, but what does it entail? A human right to water, basin-specific, enforceable in front of international bodies tasked with management of the international watercourse? This type of right is non-existent in positive international law. Optimal utilization of common water resources, which will enable free and equal access due to all the interests of use being taken as a whole? This is more alike a procedural guarantee of freedom and equality of access, and it can be argued that community of interest theory is exactly that –a joint management system for the purpose of using available resources to maximize satisfaction of the individual needs of water users. It is argued, in this context, that "countries may develop a river basin more efficiently and equitably, if the focus is less on the gallons used by each country and more on the potential or real economic benefits that can be derived from joint management", (Hunter *et al.* 2002, 808). In other words, "if compared to interstate cooperation founded on limited territorial sovereignty, a community of states would be better suited for promoting equitable and reasonable use; the fair sharing of benefits and costs directly or indirectly associated with cooperation; and the effective protection of aquatic and related ecosystems and the services they provide for human development and a healthy environment", (Rocha Loures 2016, 224–225).

Community of interest is not a condominium, but rather a sort of large neighbourhood (Rodgers 1991, 163). These neighbours should not be only limited in their activities concerning common spaces, as the theory of limited sovereignty suggests, but encouraged to work jointly on every aspect of use of common spaces. Additionally, to ensure sustainable use of their common space and free and equal access of every member of their community to it, they must not only strive to maximize the benefits of use for present members of the community, but also take care of the protection and preservation of the common space for the generations to come. This arduous task is only possible in careful and meticulous everyday management and long-term developmental planning in unison among the riparian states.

The theory of the community interest would play the role of theoretical framework for this management and planning, and further inform the application of general legal principles such as equitable and reasonable utilization, no significant harm, co-operational rules

(notification, prior consultations, information exchange, negotiations), protection of the environment. This is the only role community of interest theory can play in the present state of international water law, due to sovereign restrictions, lest other countries take the example of the Senegal River riparians and start instituting real communities for management and planning. Perhaps the lack of water resources due to pollution and draught will eventually lead to this scenario.

REFERENCES

Adar, Korwa G., Nicasius A. Check. 2011. *Comparative Diplomacy, Regional Stability and National Interest: The Nile River and the Riparian States*. Pretoria: Africa Institute of South Africa.

Berber, Fritz. 1955. *Die Rechtsquellen des internationalen Wassernutzungsrechts*. Munich: R. Oldenbourg.

Blutman, László. 2010. In the Trap of a Legal Metaphor. *International and Comparative Law Quarterly* 59(3): 605–624.

Brunnée, Jutta, Stephen J. Toope, 1994. Environmental Security and Freshwater Resources: A Case for International Ecosystem Law. *Yearbook of International Environmental Law* 5: 41–76.

Caflisch, Lucius. 1989. *Règles générales du droit des cours d'eau internationaux*, The Hague: Recueil des Cours.

Carathéodory, Etienne. 2010. *Du Droit International Concernant les Grands Cours D'Eau (1861).* Kessinger Publishing, LLC.

Dombrowsky, Ines. 2007. *Conflict, Cooperation and Institutions in International Water Management*. Cheltenham: Edward Elgar.

Dunoff, Jeffrey L., Steven R. Rather, David Wipmann. 2015. *International Law: Norms, Actors, Processes*. Wolter Kluver.

Firuz, Paul A. 2012. Looking forward: The Columbia River treaty. *Washington Journal of Environmental Law and Policy* 2(1): 170–192.

Fitzmaurice, Malgosia, Olufemi Elias, 2004. *Watercourse Co-operation in Northern Europe – A Model for the Future*. The Hague: Asser Press.

Godana, Bonaya Adhi. 1985. *Africa's Shared Water Resources: legal and institutional aspects of the Nile, Niger and Senegal river systems*. London: Frances Pinter.

Huber, Max. 1907. Ein Beitrag zur Lehre von der Gebietshoheit an Grenzflüssen, *Zeitschriftfiir Välkerrecht und Bundesstaarsrecllt* 1: 12–25.

International Law Commission. 1994. *Draft articles on the law of the non-navigational uses of international watercourses and commentaries thereto and resolution on transboundary confined groundwater*, Yearbook of the International Law Commission, 1994, Vol. II, Part Two.

Rodgers, William H. 1991. *Environmental Law*. West Publishing Company.

Salman, Salman M. A., Siobhán McInerney-Lankford. 2004. *The Human Right to Water. Legal and Policy Dimensions*. World Bank, Law, Justice and Development Series. Washington, DC: World Bank.

Gleick, Peter H., 1993. An Introduction to Global Fresh Water Issues. 3–12 in *Water in Crisis: A Guide to the World's Freshwater Resources*, edited by Peter H. Gleick. New York: Oxford University Press.

Grotius, Hugo. 2001. *The Rights of War and Peace*. Adegi Graphics LLC.

Benvenisti, Eyal. 1996. Collective Action in the Utilization of Shared Freshwater: The Challenges of International Water Resources Law. *American Journal of International Law* 90(3): 384–415.

Ostrom, Elinor. 2015. *Governing the Commons: The Evolution of Institutions for Collective Action*. Cambridge: Cambridge University Press.

Hardin, Garrett. 1968. The Tragedy of the Commons. *Science* 162: 1243–1248.

Hunter, David, James Salzman, Durwood Zaelke. 2002. *International Environmental Law and Policy*. Brill: Martinus Nijhoff.

Kauffman, Gerald J. 2015. Governance, Policy, and Economics of Intergovernmental River Basin Management. *Water Resources Management* 29(15): 5689–5712.

Lederle, Gustav. 1927. Die Donauversinkung. *Annalen des Deutschen Reichs* 1927: 693–717.

Le Fur, Louis, Chklaver Georges. 1934. *Recueil de textes de Droit international public*. Dalloz: Paris.

Lipper, Jerome. 1967. Equitable Utilization. 39–63. *The Law of International Drainage Basins,* ed. Albert Garretson, Robert Hayton, Cecil Olmstead. New York: New York University Law School.

McCaffrey, Stephen. 1996. The Harmon Doctrine One Hundred Years Later: Buried, Not Praised. *Natural Resources Journal* 36: 549–590.

McCaffrey, Stephen, Robert Rosenstock. 1996. The International Law Commission's Draft Articles on International Watercourses: an

Overview and Commentary. *Review of the European Community and International Environmental Law* 5(2): 89–96.

McCaffrey, Stephen. 2010. *The Law of International Watercourses*. Oxford: Oxford University Press.

McIntyre, Owen. 2004. The Emergence of an 'Ecosystem Approach' to the Protection of International Watercourses under International Law. *Review of European Community and International Environmental Law* 13: 1–14.

Rahaman, Muhammad Mizanur. 3/2009. Principles of international water law: creating effective transboundary water resources management. *International Journal of Sustainable Society* 1: 207–223.

Rocha Loures, Flavia. 2016. The Dragon as Part of Transboundary Basin 'Villages': Community of Interests and International Law in China. *Water Law* 24: 220–238.

Samvel, Gor. 2018. Seemingly Connected, Obviously Separate: The Parallel Realities of the UN Global Compact and the Multilateral Regimes in Water Governance. *Laws* 37: 1–14.

Schlettwein, Johann A, 1785. *Die Gerechtigkeit und das allgemeine europäische Staatsinteresse bey dem Streite über die Oeffnung der Schelde und des Ostindischen Handels für die Oesterreichischen Niederlande*. Gießen: Krieger.

Schmeier, Susanne. 2015. *Governing International Watercourses: River Basin Organizations and the Sustainable Governance of Internationally Shared Rivers and Lakes*. London: Routledge.

Szwedo, Piotr. 2018. *Cross-border Water Trade: Legal and Interdisciplinary Perspectives.* Brill: Nijhoff.

Teclaff, Ludwik A., 1991. Fiat or Custom: The Checkered Development of International Water Law. *Natural Resources Journal* 31: 355–370.

Tza, Alejandro. 2004. Developments under Ramsar Convention: Allocation of Water for River and Wetland Ecosystem. *Review of the European Community and International Environmental Law* 13(1): 40–46.

Verzijl, J.H.W., 1970. *International Law in Historical Perspective*. Brill: Nijhoff.

Vitányi, Béla. 1979. *The International Regime of River Navigation*, Alphen aan den Rijn: Sijthoff and Noordhoff.

Vučić, Mihajlo. 2017. Silala Basin Dispute: Implications for the Interpretation of the Concept of International Watercourse. *Annals FLB – Belgrade Law Review.* LXV(4): 91–111.

Vučić, Mihajlo. 2018. *Mehanizmi ostvarivanja načela neuzrokovanja štete u praksi upravljanja međunarodnim vodotokovima*. Beograd: Institut za međunarodnu politiku i privredu.

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