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Introduction Letters

Distinguished delegates,
Welcome to the ICJ! My name is Alexia, and I will be your ICJ Director. I have studied Law, and currently I am working as a RICS evaluator and consultant. I am a veteran LIMUN-er and more than thrilled to be joining the ICJ team for a second year in a row along with the extremely talented Beata and Enrico! Having joined a lot of MUN organizations in the past, I am currently working as an MUN trainer as well. I believe LIMUN is the most enriching opportunity a Model UNer may enjoy! I invite you to follow the rules or violate them with style.

Best regards,
Alexia

Distinguished delegates,
I would like to welcome you warmly at the LIMUN 2017, and congratulate you on your decision to take part in this remarkable MUN conference! I'm Beáta Bolyová, a 5th year Law student at the Comenius University in Bratislava. We have been working hard, trying to ensure smooth running of the preparation process and our sessions at LIMUN and the whole team is doing their best to prepare an extraordinary and unforgettable conference for you! This guide will provide you with an outline of the topic assigned, although you are encouraged to conduct further indicative research, which will ensure a fruitful and constructive debate during the committee sessions. I hope you find this guide to be a useful starting point and look forward to meeting you soon!
Kind Regards,
Bea
Distinguished delegates,

It is my honour and privilege to introduce you to the ICJ Committee of LIMUN 2017. My name is Enrico Amarante and I am a 5th year Law student specializing in International Law at Bocconi University in Milan, Italy. For this conference, I will have the pleasure to serve as your Assistant Director. You will be called to argue in the interest of your nation or adjudge in light of the Court’s mandate a specific sector of international environmental law. In either case, we expect you to study hard and diligently develop the issues at stake for the overall benefit of international law. We look forward to meet you soon here in London, for challenging legal debates and building meaningful relationships. We remain at your complete disposal for any inquiry you may have at our email address: icj@limun.org.uk!

Best regards,

Enrico
Introduction to the Committee

Constantly asserting its leading role as the legitimate system for resolving disputes in a principled manner, the International Court of Justice is the principal judiciary body of the United Nations.\(^1\) Located in The Hague, the Netherlands, it was established in June 1945 by the Charter of the United Nations and it began working in April 1946. Its roots, however, date back to the Permanent Court of International Justice, the previous world Court of the League of Nations created in 1922. In accordance with international law, the Court has the mandate to settle legal disputes submitted to it by States. Moreover, it may give advisory opinions (thus non-binding) on legal questions referred to it by five authorized organs of the United Nations and to 16 specialized agencies of the United Nations family.\(^2\)

The Court is composed by 15 independent judges, elected regardless of their nationality among persons of high moral character, who possess the qualifications in their respective countries for appointment to the highest judicial offices, or are jurists of recognized competence in international law.\(^3\) Elected for terms of office of nine years by the General Assembly and the Security Council, the judges are meant to represent an equitable geographic distribution to enable the Court to issue its rulings in a credible manner.

Advocates represent the State by performing the duties of submitting written pleadings and delivering oral argument in their defense. There are no conditions for them to enjoy the right of arguing before the International Court of Justice: they only need to be appointed by a government to do so.

\(^1\) Thomas Franck, Fairness in International Law and Institutions, 346 (Oxford University Press, 1995)

\(^2\) Statute of the International Court of Justice, art.38

\(^3\) Statute of the International Court of Justice, art.2
Given the broad range of issues on which it may have jurisdiction, the Court is currently dealing with extremely diverse cases, ranging from territorial delimitations to maritime questions, and from nuclear themes to immunity proceedings.
Case concerning the status and use of the waters of the Silala (Bolivia v. Chile)

Introduction

Although limited to two neighbouring nations, Bolivia and Chile, the dispute over the Silala waters is a fascinating example of the intermingling of historical, political and legal claims ultimately resulting in a judicial resolution. As a matter of fact, many Bolivians symbolically trace back the roots of this debacle to the War of the Pacific (1879-1883), in which Bolivia lost its outlet to the sea in favour of Chile.4 Adding to this the dispute on the Rio Lauca, the vitality of water rights has been a basis for provocative actions and

restatements of sovereign pride, such as the construction of a nearby military facility by Bolivia or the increase in military patrols by Chile.\(^5\) Moreover, political repercussions were present in the form of lack of official diplomatic relations, although ministers of both countries met several times to discuss such issues. There were threats to institute legal proceedings regarding the Silala by Bolivia, which pursued them in 2013 when it brought a complaint to the ICJ against Chile for the Pacific access matter.\(^6\)

The problem faces serious and possibly ground-breaking legal solutions. In any case, the whole matter has to be seen as involving a mixture of substantive obligations and procedural mechanism, typical of environmental legal framework.

Therefore, resolving the issue of the Silala waters might lead to new paths in the politics of the area as well as in international environmental law.

**History of the Problem**

The dispute focuses on water flowing across the Bolivian-Chilean border in the Atacama Desert. The river flows through a canal constructed in the beginning of 20th century by Antofagasta & Bolivia Railway Company, a private railway operating company in the northern provinces of Chile and in Bolivia, which firstly constructed pipelines to bring water for the use of the railroad between Antofagasta (in Chile) and Bolivia, the company eventually became responsible for supplying Antofagasta region with water as well.

The supply was based on a concession granted by a southwestern Bolivian prefecture - the Potosi Department in 1908. However, in 1997, the concession was revoked by the Bolivian government on grounds that the

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waters had long been used for purposes of water utilisation and for mining and sanitation services,\(^7\) therefore differing from the ones originally agreed upon- diesel engines by that time already replaced steam-powered engines, and the Silala waters were no longer needed for the railway purposes.

In 2007, UNEP named the Silala watershed the only “high risk” basin in South America and “one of the most hydro-politically vulnerable basins in the world.”\(^8\)

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**Current Situation**

The political tension between the two States is heightening. In a still ongoing case before the Court, the landlocked State contested to its neighbour the obligation to negotiate a long-claimed access to the Pacific Ocean.\(^9\) In

\(^7\) United Nations Environment Programme, Hydropolitical Vulnerability and Resilience along International Waters: Latin America and the Caribbean (Earthprint, 2007).

\(^8\) Ibid.

\(^9\) ICJ press release, Bolivia institutes proceedings against Chile with regard to a dispute concerning the obligation of Chile to negotiate the “sovereign access of Bolivia to the Pacific Ocean”, available at: http://www.icj-cij.org/docket/files/153/17340.pdf
March 2016, President Morales commented that Bolivia would sue Chile on to settle the claims to the Silala and to adjudge whether the use of waters from past decades by Chile should be compensated.\textsuperscript{10} Moreover, on 8 May 2016, Morales accused Chile of posing a military base 15 km away from the shared border, in the alleged violation of international treaties.\textsuperscript{11}

Bolivian scientists believe, that the water is emitted from an aquifer below the surface and the springs are its natural discharges,\textsuperscript{12} and therefore that the water would not have travelled to Chile without the interference of the railroad company. Hence, the Bolivian point of view is that it can control the flow and/or charge Chile for the use of the water.\textsuperscript{13} Chile, on the other hand, claims that the waters were never diverted from the springs, but that they naturally canalized to form the Silala River. Bolivia and Chile are not able to agree on whether the basin is international or not and have taken hard stances on their positions. Therefore, in the present case, it is of utmost importance to determine the definition of an international watercourse, and see whether the Silala scenario falls within this definition.

**Statement of the Problem and Applicable Law**

**International customary law**

Sources of international law refer to categories of norms, and the relevant rules of recognition of international law defined as rules of international law. Article 38 of the ICJ Statute is widely recognised as


\textsuperscript{13} United Nations Environment Programme, Hydropolitical Vulnerability and Resilience along International Waters: Latin America and the Caribbean (Earthprint, 2007).
authoritative statement of these sources as all UN Member States are *ipso facto* parties to the Statute. According to the art.38(1):

“...The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
b. international custom, as evidence of a general practice accepted as law;
c. the general principles of law recognized by civilized nations;
d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.”

Custom is therefore a well-established source of international law, consisting of two elements: state practice and opinio juris (also known as objective and subjective elements). For a new customary rule to be formed, not only must the acts concerned "amount to a settled practice", but they must be accompanied by the opinio juris.14 If these two elements can be proven, the customary norm becomes binding.

The practise, in general, can be demonstrated in different ways - *what States say* (public statements and domestic legal proceedings and legislative processes) and *what States do* (e.g. relevant behaviour on the domestic or international level - this could mean economic measures, recognition policy, exercise of jurisdiction through national courts and many more). Some of its essential characteristics are consistence, generality, and time, "as evidence of a general practice accepted as law."15 However, "it might be that, even without the passage of any considerable period of time, a very

widespread and representative participation in the convention might suffice of itself, provided it included that of States whose interests were specially affected.”

On the other hand, opinio juris turns mere usage into a rule of customary international law. It is a belief by States that conduct in question is not just convenient, right or in accordance with tradition, but legal obligation. "Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it.”

The 1997 United Nations Convention on the Law of Non-Navigational Uses of International Watercourses in its article 2 explains the water law terminology as follows:

(a) “Watercourse” means a system of surface waters and ground waters constituting by virtue of their physical relationship a unitary whole and normally flowing into a common terminus;
(b) “International watercourse” means a watercourse, parts of which are situated in different States;
(c) “Watercourse State” means a State Party to the present Convention in whose territory part of an international watercourse is situated, or a Party that is a regional economic integration organization, in the territory of one or more of whose Member States part of an international watercourse is situated;
(d) “Regional economic integration organization” means an organization constituted by sovereign States of a given region, to which its member States have transferred competence in respect of matters governed by this Convention and which has been duly authorized in accordance with its internal procedures, to sign, ratify, accept, approve or accede to it.

Therefore, the Watercourses Convention provides a definition of an international watercourse. However, while Chile voted in favour of the Watercourses Convention, Bolivia abstained from the vote and neither has signed or ratified it. Based on these facts, the Convention does not have a binding force on both of the parties and Bolivia did not accept both the definition and the obligations arising from the Convention. The Court’s ruling on whether the Watercourses Convention is an international custom would be a game changer, since if the Court rules that the Convention or its definition is a custom, it would mean that the Court and States are bound by it. It is binding not only to the State Parties to the Watercourses Convention (as they agreed to be bound by it by ratifying it), but also a custom, binding upon every State.

*International water law*

A myriad of transboundary watercourses have been subject to many international agreements throughout history.\(^{18}\)

However, the development and optimal use of shared watercourses was the primary concern in drafting legal provisions. Therefore, international law of watercourses is mainly focused on the allocation of waters among two or more States and what procedural rights and responsibilities are attached to those States. A definition of a watercourse is provided by the Watercourses Convention (as stated above), while it furthermore provides a framework with a set of principles and rules to be applied or adjusted to suit the characteristics of particular international watercourses.

In its article 2(a) and 2(b), this Convention describes a watercourse as a “means a system of surface waters and ground waters constituting by virtue of their physical relationship a unitary whole and normally flowing into a common terminus”. If the watercourse or the parts of it touches two or more states, then it can be claimed

to be international. The Watercourses Convention then enlists numerous principles and rights, concerning the equitable and reasonable utilization and participation, the obligation not to cause significant harm, to cooperate and exchange data and information. Although it is necessary to point out, that the Convention is not yet in force.

Another convention containing the definition of international watercourses – to which neither Bolivia nor Chile is a party to - is the Convention On The Protection And Use Of Transboundary Watercourses And International Lakes of 1992. According to this, a transboundary watercourse is “any surface or ground waters which mark, cross or are located on boundaries between two or more States”. Also called the Water Convention, it mandates the States to prevent, control and reduce transboundary impact, use the waters in an equitable way while enforcing their sustainable management. The applicability of international water law to the Silala case depends most importantly on whether or not the Silala River falls within the scope of an international transboundary watercourse. A manufactured river, in the form of canals or other man-made structure, would not be a subject to the international water law since, by definition, such water bodies are proprietary and subject to the agreements that created them. Although the Watercourses Convention is the only one addressing specifically international watercourses, other set of rules embrace ecological perspectives and environmental concerns. For example, the 2004 ILA Berlin Rules, which focus on basins, points at the integrated management of various resources holistically in the view of a sustainable development and to minimize environmental harm.

**Human right to water**

In 2000, the Member States of the UN signed the Millennium Declaration, which became the basis of the Millennium Development Goals (‘MDGs’). Goal 7, ensuring environmental sustainability, encompassed a target to halve the number of people without sustainable access to safe drinking water by 2015. While the MDGs
regarding drinking water were an important step forward and they were met in general, the regions of Caucasus, Central Asia, Northern Africa, Oceania and sub-Saharan Africa did not meet the drinking water target and up to date, 663 million people still lack access to safe fresh water.

Many Member States as well as expert bodies and UN committees consider the right to water as a part of economic and social rights. The right to water has transitioned from being a part of a more general human right, right to health, to being recognised as a separate human right.

In 2011, the Human Rights Council called on Member States to take up their responsibility ‘to ensure the full realization of all human rights, and must take steps, nationally and through international assistance and cooperation, especially economic and technical, to the maximum of the available resources, to achieve progressively the full realization of the right to safe drinking water’. On 28 September 2011, the Council passed the resolution A/HRC/RES/15/9, which takes the right to safe drinking water a step further and calls upon the States to ensure enough financing for sustainable delivery of water. The human right to water therefore embodies considerable state responsibility and action and is a fundamental human right.

The right to water has been recognised by many UN resolutions, as well as international treaties (as binding sources of international law upon its parties), notably the International Covenant on Economic, Social and Cultural Rights, which was ratified by both Bolivia and Chile provided for a right to "the enjoyment of the

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highest attainable standard of physical and mental health"\textsuperscript{23}, it also states that "each state party undertakes to take steps to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant".\textsuperscript{24} The Committee on Economic, Social and Cultural Rights (an expert body responsible for monitoring the implementation of and compliance with the Covenant), took a step in 2003 by adopting its General Comment No. 15: The Right to Water,\textsuperscript{25} recognising the right to water as a fundamental human right on its own. For example, the Convention on the Elimination of all Forms of Discrimination Against Women\textsuperscript{26} and the Convention on the Rights of the Child\textsuperscript{27} (both binding upon the States in question) recognised this right specifically too, making it well-established in human rights law.

**Positions and Summary of arguments**

It is necessary to emphasise, that while Chile voted in favour of the Watercourses Convention, Bolivia abstained from the vote and neither has signed or ratified it - it is in Chile's best interest for the Watercourses Convention to be proclaimed as international customary law (or at least some of its provisions), to be applicable on Bolivia too - and *vice versa*, Bolivia did not agree to be bound by it itself and therefore objects to this assertion. If the existence of the custom is proven it would be binding, along with the many obligations (such as equitable and reasonable utilisation) arising from it.

Furthermore, Bolivia claims ownership over the Silala River on grounds, that the river originates from springs on its side of the border and that the

\textsuperscript{23}United Nations General Assembly, International Covenant on Economic, Social, and Cultural Rights, 1966, art.12 (also guaranteed by The Universal Declaration of Human Rights, 1948, art. 25).

\textsuperscript{24}United Nations General Assembly, International Covenant on Economic, Social, and Cultural Rights, 1966, art.2.


\textsuperscript{26}Art.14(2)

\textsuperscript{27}Art.24
waters are transported to Chile artificially - therefore de facto denying the existence of a Silala river. Chile bases its ownership claims on grounds that the waters were never redirected from its original channel, but rather that the channel merely enhances the natural flow of the river. Chile argues that the Silala is a transboundary river subject to international water law and Chile does not have to pay for using it, as it had before, subject to a concession agreement with Bolivia. By this logic, the Silala is therefore an international river and, under the Convention (if its provisions are deemed applicable), Chile has the right to a “reasonable and equitable” share of the water.²⁸ Bolivia is claiming that the Watercourses Convention is inapplicable, and even if it was, the Silala river does not fall within its scope. Chile argues that the Watercourses Convention is indeed applicable, and Silala falls within the international watercourse scope.

In any case, if the Court decides that the human right to water is applicable in the present case, Bolivia might be obliged to grant access to the river nevertheless, to secure this fundamental right.

Questions a Judgment Should Answer

A  Could the Convention be accepted as international customary law, and govern the case?

B  Does any definition of an international watercourse apply to the Silala River, and do any obligations arise from it?

C  Regardless of whether the Silala is to be considered an international watercourse or not, does the fundamental human right to water apply in this case?
Further research

- Convention on the Law of the Non-navigational Uses of International Watercourses


- United Nations Human Rights Council, Human rights and access to safe drinking water and sanitation, A/HRC/RES/15/9, 2010

- United Nations Environment Programme, Hydropolitical Vulnerability and Resilience along International Waters: Latin America and the Caribbean (Earthprint, 2007)


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**Agenda & Rules of Procedure**

The agenda for the 2017 conference is available online at

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Since its 17th session last year, LIMUN has introduced changes to its Rules of Procedure. The revised Rules can be accessed here:

http://limun.org.uk/rules