

THE QUESTION OF SOURCES OF LAW CONCERNING INTERNATIONAL WATERCOURSES

*Yrd. Doç. Dr. İbrahim KAYA**

INTRODUCTION

Parry explains the practical dimension of the different interpretations of the sources of international law as follows:

“The ultimate purpose of such an enquiry [as to what the sources of international law are] is to find out what international law is. It is an essential preliminary step in that enquiry because, if attention be directed to the wrong sources, it is impossible to discover what international law is or, what is perhaps more important, what is not international law.”¹

The problem facing lawyers is, in fact, to discover where the law is to be found and to assess whether a particular proposition amounts to a legal rule. However, there is an ambiguity in the determination and classification of sources, and in the order of application².

It is intended here neither to indulge in complicated and lengthy doctrinal discussions as to the theory of the sources of international law nor to tell the rules of international watercourses³. This paper will examine how to study the sources of international law in order to find out the rules, both

* Çanakkale Onsekiz Mart Üniversitesi, Biga İktisadi ve İdari Bilimler Fakültesi Öğretim Üyesi

¹ Parry, C., *The Sources and Evidence of International Law*, Manchester University Press, Manchester, 1965, 7.

² Akehurst, M., “The Hierarchy Of The Sources Of International Law” (1974-1975) 47 *British Yearbook of International Law* 273.

³ For the law of international watercourses see Kaya, I., *Equitable Utilization: The Law of the Non-Navigational Uses of International Watercourses*, Ashgate, Aldershot, 2003.

substantive and procedural, of international law, which are applicable in international watercourse disputes⁴.

The examination of the sources of international law usually begins with an assessment of the provisions of Article 38(1) of the Statute of the ICJ⁵. While there is little doubt that Article 38(1) embodies the most important sources of law, the General Assembly resolutions, treaties not yet in force, works of study organizations and principles of equity are becoming increasingly important additional sources of law which do not fit easily into the structure of Article 38(1).

Some writers have made a distinction between formal and material sources⁶. Salmond explains the difference in the following terms:

“A formal source is that from which a rule of law derives its force and validity...The material sources, on the other hand, are those from which is derived the matter, not the validity of the law. The material source supplies the substance of the rule to which the formal source gives the force and nature of law.”⁷

The formal sources confer upon the rules an obligatory character, while the material sources comprise the actual content of the rules⁸.

It has been widely accepted that international treaties, custom and general principles of law are described as the three exclusive law-creating

⁴ See *Ibid.*

⁵ Article 38(1) reads as follows:

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 the rules of law.

⁶ **Schwarzenberger**, G., *A Manual Of International Law*, fourth edition, vol. I, Stevens And Sons Ltd., London, 1960, 23-24.

⁷ **Salmond**, J., *Jurisprudence*, eleventh edition, Sweet and Maxwell, London, 1924, 164.

⁸ **Shaw**, M. N., *International Law*, third edition, Grotius Publications, Cambridge, 1991, 59.

processes while judicial decisions and academic writings are regarded as law-determining agencies which deal with the verification of alleged rules⁹.

A. TREATIES

International law-making in the field of watercourses, which aimed at the avoidance and settlement of interstate disputes originating from the non-navigational uses of international watercourses, has been characterized by the dominance of treaties since the very beginning and, as a consequence, the number of treaties of this kind increased to as many as several hundreds¹⁰. However, the provisions of such treaties are contractual obligations, which are limited to the specific time, space, subject-matter and parties¹¹.

As a general rule, treaty provisions in principle are binding only upon the contracting parties, which expressly give their consent to the obligations created under such arrangements. Therefore, despite some dissenting opinions in theory, it is generally acknowledged that treaties are not a source of international law for third parties. The wording of article 38(1)(a) which defines treaties as “establishing rules expressly recognized by the contesting States” can be taken as evidence confirming the validity of this proposition.

A distinction is made between law-making treaties, i.e., treaties which lay down rules of general application, and treaty contracts (contract-treaties), i.e., treaties which merely regulate limited issues between a few states¹². The number of parties, the explicit acceptance of rules of law, and the declaratory nature of the provisions produce rules that may bind all by laying down rules of general application¹³.

So far no global treaty on the law of international watercourses has entered into force, although the ILC’s study was opened to signature by the UNGA in 1997. The provisions of the Convention on the Law of the Non-

⁹ *Ibid.* and **Schwarzenberger**, *supra*, note 6.

¹⁰ **Bruhacs**, J., *The Law Of Non-Navigational Uses Of International Watercourses*, Martinus Nijhoff, Dordrecht, 1993, 11.

¹¹ **Hayton**, R. D., “The Formation of the Customary Rules of International Drainage Basin Law” in **Garretson**, H. et al., eds., *The Law of International Drainage Basins*, Oceana, New York, 1967, 868.

¹² **Shaw**, *supra*, note 8, 81.

¹³ **Brownlie**, I., *Principles of Public International Law*, fourth edition., Clarendon Press, Oxford, 1995, 12-13 and also **Shaw**, *supra*, note 8, 81.

navigational Uses of International Watercourses (1997 Watercourses Convention) are binding only upon signatories and, to the extent that they represent customary international law, other states.

There is also an ongoing discussion as to whether a global treaty which reflects a general or common interest of mankind binds all states irrespective of their status as non-parties¹⁴. One agrees with Danilenko saying a global treaty capable of binding all states without their specific consent is not accepted in contemporary international law¹⁵. Even if the opposite view is preferred, for the sake of avoiding lengthy discussions, the 1997 Watercourses Convention, which is the most recent attempt for a global watercourses convention, does not satisfy the criteria to be accepted as a global treaty reflecting general and common interests of all mankind. It is clear that international water resources are inherently not “the common heritage of mankind”¹⁶.

There may be provisions of treaties which purport to codify existing rules of customary law, crystallize a developing rule of law or generate rules of law. They might be considered as indirect sources of law¹⁷. In other words, their binding power, as far as non-parties are concerned, derives from their capacity of reflecting or creating customary law. The point which needs to be made clear here is the role played by treaties, especially those regulating the use of a particular watercourse between riparian states as to their capability of being a source of international law. Put differently, can the existence of same or similar provisions in different international watercourse treaties concluded between riparian states for the establishment of water utilization regimes in various international river basins be deemed to have evidentiary value as to the existence of the same customary rule? For example, if many international watercourse treaties require the prior consent of riparian states as a

¹⁴ The trend towards adoption of a treaty expressing general interests and binding upon all has become particularly evident in connection with the adoption of the 1982 United Nations Convention on the Law of the Sea. See The UNCLOS, 1982, UN Doc.A/Conf.62/122 (1982).

¹⁵ **Danilenko**, G. M, *Law Making in the International Community*, Martinus Nijhoff, Dordrecht, 1993, 67.

¹⁶ See for “common heritage of mankind” **Baslar**, K., “The Concept of the Common Heritage of Mankind: A Challenge for Inter-national Law”, Ph.D. Thesis, The University of Nottingham, 1995.

¹⁷ **O’Connel**, D. P., *International Law*, vol. 1, second edition, Stevens, London, 1970, 22.

prerequisite for a water use project by another riparian state, could it be claimed that without the prior consent of riparian states to the same watercourse any water development activity cannot be conducted lawfully?

It is arguable that the existence of numerous bilateral treaties points to the absence of customary rules relating to the same subject-matter¹⁸. Had customary law regulated a subject-matter, there would have been no need for states to enter into specific arrangements in order to regulate the same issue¹⁹. Moreover, many international bilateral water regime agreements contain provisions preventing their application to any other dispute except the one regulated by the agreement itself²⁰. By rendering their provisions inapplicable in other water disputes even between the same parties, these treaties weaken the possibility of their provisions becoming the evidence of international custom, which may be applied in similar water issues all over the world.

B. CUSTOM

Custom constitutes the most fundamental source of international watercourses law, since treaties cover not all international watercourses.

The ICJ described custom as a “constant and uniform usage, accepted as law”²¹. In other words, custom can be defined as those areas of state practice which arise as a result of a belief by states that they are obliged by law to act in the manner described. It can be safely pointed out that custom consists of two elements: state practice and *opinio juris*²².

¹⁸ Okowa, P. N., “Procedural Obligations in International Agreements” (1996) 67 **British Yearbook of International Law** 320 and BOURNE, C. B., “Procedure in the Development of International Drainage Basins: The Duty to Consult and to Negotiate” (1972) 10 **Canadian Yearbook of International Law** 223.

¹⁹ Lauterpacht, H, *The Development of International Law by the International Court of Justice*, Stevens, London, 1958, 377-380 and KOPELMANS, “Custom as a Means of the Creation of International Law” (1997) 68 **British Yearbook of International Law** 127, 136-137.

²⁰ See for example the 1909 Boundary Waters Treaty, 1960 Indus Water Treaty, 1950 Bavaria-Austria Treaty.

²¹ Asylum Case, ICJ Reports 1950, 266.

²² For the view that proposes only the latter is enough to be accepted as custom see Cheng, B., “United Nations Resolutions on Outer Space: Instant International Customary Law” (1965) 5 **Indian Journal of International Law** 36. Nonetheless, the overwhelming majority of writers require both together. See Brownlie, *supra*, note 13, 6-7.

Questions as to the material element of custom have focused mainly in the following issues:

- i) Duration: It was recognized that there is no precise length of time during which a practice must exist, provided that the consistency and generality of a practice are proved²³.
- ii) Uniformity and consistency of the practice: It is clear that major inconsistencies in practice would prevent the existence of a rule of customary international law²⁴. Although complete uniformity is not required, substantial uniformity is necessary. Minor inconsistencies, however, would not prevent the creation of a custom²⁵.
- iii) Generality of the practice: This complements the aspect of consistency of the practice²⁶. The recognition of a particular rule as a rule of international law by a large number of states gives rise to the proposition that the rule is generally recognized, but universality is not required. It is binding on all states, except states which persistently objected to the rule from the date of its formulation²⁷.

Accordingly, it can be argued that the provisions of the 1997 Watercourses Convention which reflect the customary international law on shared watercourses are not binding on those states which voted against the adoption of a resolution to open the convention signature and always opposed to the content of its provisions²⁸.

For evidence of customary international law, Brownlie lists the following as a non-exhaustive list of material sources of custom: diplomatic correspondence, policy statements, press releases, the opinions of official legal advisers, official manuals on legal questions, executive decisions and

²³ North Sea Continental Shelf Cases, ICJ Reports 1969, para. 74.

²⁴ *Supra*, note 21, 276-277.

²⁵ North Sea Continental Shelf Cases, *supra*, note 23 and Nicaragua Case, ICJ Reports 1986, para. 186.

²⁶ **Brownlie**, *supra*, note 13,6.

²⁷ Anglo-Norwegian Fisheries Case, ICJ Reports 1951, 116.

²⁸ *Ibid.*, 131. See for the status of persistent objectors with regard to the material requirements of customary law **Vuiliger**, M. E., *Customary International Law and Treaties*, Martinus Nijhoff, Dordrecht, 1985, 16. See also for the codified law and dissentient states **Thirlway**, H. W. A., *International Customary Law and Codification*, A. W. Sijthoff, Leiden, 1972, especially pages 109-125.

practices, comments by governments on drafts produced by the International Law Commission, state legislation, international and national judicial decisions, recitals in treaties and other international instruments, a pattern of treaties in the same form, the practices of international organs, and resolutions relating to legal questions in the United Nations²⁹.

All the relevant evidence of custom as to where customary law of international watercourses could be found must be examined before reaching a proposition. Opinions of representatives of governments with regard to the ILC's work in the drafting process of the 1997 Watercourses Convention are especially significant to this analysis.

C. GENERAL PRINCIPLES OF LAW

Article 38 (1) (c) of the Statute of the ICJ refers to the "general principles of law recognized by civilized nations". Lauterpacht noted that this provision was first introduced into the Statute of the PCIJ to avoid the problem of "non-liquet"³⁰. The inclusion of paragraph (c) reflected a rejection of the positivist doctrine, according to which international law consists solely of rules to which states have given their consent, as affirming the naturalist doctrine whereby it there appeared to be a gap in the rules of international law recourse could be had to general principles of law, namely natural law³¹.

General principles are regarded in terms of rules accepted in domestic law. Oppenheim expressed the view that "[t]he intention is to authorise the Court to apply the general principles of municipal jurisprudence, in particular of private law, in so far as they are applicable to relations of State"³².

²⁹ *Supra*, note 13, 5.

³⁰ *Supra*, note 19, 166.

³¹ Some argued that paragraph (c) adds nothing to what is already covered by treaties and custom; for these writers, general principles of national law are part of international law only to the extent that they have been adopted by states in treaties or recognised in state practice. See for an example **Tunkin**, G. I., *Theory of International Law*, translated by **Butler** W. E., George Allen & Unwin Ltd., London, 1974, 202. For the discussion about natural law as a source of international law see **Finch**, G.A., *The Sources of Modern International Law*, Carnegie Endowment for International Peace, Washington D.C., 1937, 15-30.

³² **Oppenheim**, L., *International Law A Treatise*, ed. by **Lauterpacht**, H., vol. I, eleventh edition., Longmans, London, 1952, 28. Crane suggests that international community should look to domestic laws, especially of countries with federal systems, for ideas on

The questions arise as to the manner of application of general principles of law. There might be no uniform principles even in the domestic law of a country. For example, the riparian water rights doctrine is applied in states of the US located east of the Mississippi where water is relatively abundant, whereas the prior appropriation doctrine found recognition in the states located west of the Mississippi where water is relatively scarce³³. Different needs and priorities resulted in the prevalence of different rules. This example indicates the difficulty of transferring a municipal law doctrine of water utilization to the sphere of international law that must be applicable all over the world.

Equity is most frequently regarded as coming within the concept of general principles of law³⁴. For international watercourses law equity or equitable principles carry a considerable weight. One of the most famous decisions on equity was that delivered in an international watercourse utilizations dispute: the diversion of water from the Meuse case³⁵. In his individual opinion, Judge Hudson pointed out that what are regarded as principles of equity have long been treated as part of international law³⁶. The ICJ is increasingly referring to “equity”, “equitable principles”, “equitable result”, “equitable and reasonable utilization” when dealing with matters

how to resolve water conflicts. **Crane**, M., “Diminishing Water Resources and International Law: U.S.-Mexico, A Case Study” (1991) 24 **Cornell International Law Journal** 323.

³³ **Sherk**, G. A., “Meetings of Waters: The Conceptual Confluence of the Riparian and Prior Appropriation Doctrines in the United States” paper delivered in the International Conference on Transnational Water Projects: Risks and Opportunities, Dundee University, Scotland, UK, 9-13 June, 1997. For the examination of the application of the doctrine of riparian rights and the doctrine of prior appropriation in the settlement of inter-state disputes originating from the utilisation of the waters of inter-state rivers see **Friedrich**, J. M., “The Settlement of Disputes Concerning Rights to the Waters of Interstate Streams” (1947) 32 **Iowa Law Review** 244.

³⁴ On equity in international law, see **Franck**, T. M., *Fairness in International Law and Institutions*, Clarendon Press, Oxford, 1995, especially 47-80, **AKEHURST**, M., “Equity and General Principles of Law” (1976) 25 **International and Comparative Law Quarterly** 801. For the role of equity in “oiling the wheels of international law” see **Higgins**, R., *Problems and Process*, Clarendon Press, Oxford, 1994, 219-229.

³⁵ PCIJ, Series A/B, no. 70, 73-77, 8 **ILR** 1941, 444.

³⁶ *Ibid.*, 76, 77.

related to utilization of shared natural resources³⁷. In its judgments, equity is regarded as an element of a legal decision.

The use of equitable principles has been marked in the 1982 Law of the Sea Convention and the 1997 Watercourses Convention. The Watercourses Convention provides that international watercourses are to be used in an equitable and reasonable manner³⁸, while under the Law of the Sea Convention conflicts between coastal and other states regarding the exclusive economic zone are to be resolved on the basis of equity and delimitation of the zone between states with opposite or adjacent coasts is to be affected by agreement on the basis of international law in order to achieve an equitable solution³⁹.

D. JUDICIAL DECISIONS

In every consideration of legal problems, decisions or opinions by international dispute settlement bodies have a significant influence. Although a judgment is delivered for the solution of a particular dispute, the legal ground of the decision is what operates as “authority”⁴⁰. Therefore, it is this determinative reasoning of the judgments that renders decisions influential in subsequent negotiations, official positions and judgments of other tribunals, including both municipal and international⁴¹.

1. Decisions of International Tribunals

Article 38(1)(d) includes “judicial decisions...as subsidiary means for the determination of rules of law”. However, this is subject to Article 59 which provides that “[t]he decisions of the Court has no binding force except between parties and in respect of that particular case”. Therefore, there is no binding authority of precedent in international law and judicial decisions are not, strictly speaking, a formal source of law⁴². It can be suggested that cases

³⁷ Gabcikovo- Nagymaros Case, ICJ Reports (1997), Gulf Maine Case, ICJ Reports 1984, 246, Tunisia-Libya Continental Shelf Case, ICJ Reports 1982, 18, North Sea Continental Shelf Cases, ICJ Reports 1969, 3, Fisheries Jurisdiction Cases, ICJ Reports 1951, 116.

³⁸ Article 5, 36 *ILM* 700 (1997).

³⁹ Article 59 and 74, *supra*, note 14.

⁴⁰ Hayton, *supra*, note 11, 854.

⁴¹ Bruhacs, *supra*, note 10, 12.

⁴² Brownlie, *supra*, note 13, 19.

do not make law in international law⁴³. Nonetheless, international case law, as a subsidiary means for the determination of the rules of international law, is referred to and quoted from not only by writers but also by the ICJ itself⁴⁴.

Although the principle of *stare decisis* does not exist in international law, the views expressed in the judgments carry a particular weight⁴⁵. It is accepted that decisions of international tribunals are unbiased and objective⁴⁶. This is partly because of the process of the election of the most qualified judges⁴⁷. In fact they deal with real issues and their decision will result certainly in significant effects on the contesting parties. This significant degree of responsibility adds further weight to their judgment which is lacking in the other subsidiary law-determining agencies⁴⁸. The process of hearings and reasoning also enables parties to bring evidences from different angles and legal systems, therefore an all-round view of the matter would be considered by the judges. It must, however, be borne in mind that how persuasive their judgments are depend on the fullness and cogency of the reasoning offered⁴⁹. In this regard, not only the judgment itself, but also separate and dissenting opinions should be taken into account.

In a number of international watercourse cases, decisions by third party dispute settlement bodies, such as the Permanent Court of International Justice, the International Court of Justice and arbitral tribunals, have brought about some principles which are of interest going beyond the specific cases in which decisions have been rendered. More often than not, such decisions of international tribunals are themselves based on the widely accepted sources of international law in general, and the law of the non-navigational uses of

⁴³ **Harris**, D. J., *Cases and Materials on International Law*, fourth edition, Sweet and Maxwell, London, 1991, 55.

⁴⁴ **Schwarzenberger**, G., *A Manual of International Law*, third edition, Stevens and Sons Ltd., London, 1952, 16-18.

⁴⁵ **Brownlie**, *supra*, note 13, 16 and **Briggs**, H. W., *The Law of Nations*, second edition, Stevens and Sons Ltd., London, 1953, 49.

⁴⁶ **Schwarzenberger**, *supra*, note 44, 18.

⁴⁷ **Padelford**, N. J., "The Composition of the International Court of Justice: Background and Practice" in **Deutsch**, W. K. and **Hoffmann**, S., eds., *The Relevance of International Law*, Schenkman Publishing Company, Cambridge, Massachusetts, 1968, 249.

⁴⁸ **Schwarzenberger**, G., *The Inductive Approach to International Law*, Stevens and Sons Ltd., London, 1965, 24.

⁴⁹ **Schwarzenberger**, *supra*, note 44, 18.

international watercourses in particular. Although a case brought before an international court arises from a dispute regarding rights and obligations of parties under specific agreements, in many cases the courts are requested to decide on the basis of these treaty provisions and rules and principles of general international law, as well as such other treaties as the courts may find applicable⁵⁰. Therefore, their judgments throw light on the rules of international law that might be applicable in present and future disputes. In the Lake Lanoux case, for example, the Court expressly stated that it made some general observations on the nature of the obligations invoked against one party, examining the state practice to find out the necessity for prior agreement⁵¹.

The total numbers of international decisions concerning the law of the non-navigational uses of international watercourses are relatively limited. However, the judgment of the ICJ in the Gabčíkovo-Nagymaros case is crucially useful. On 25 September 1997, the International Court of Justice delivered its judgment in the case concerning the Gabčíkovo-Nagymaros Project⁵². The Gabčíkovo-Nagymaros Project could easily be described as an integrated international watercourse utilization system which provides for hydroelectric production, flood protection, improved navigation, building of roads, and regional development opportunities. Hungary and Czechoslovakia agreed upon the creation of such a water utilisation regime in 1977 by concluding an agreement. As a result of drastic political, economic and social changes which took place after the end of Cold War, particularly in the COMECON countries, the feasibility of benefits which were to be derived from the Gabčíkovo-Nagymaros Project became a matter of dispute between the parties. Environmental implications of the project constituted the essence of the disagreement. Although the case stemmed from a disagreement on the utilization of an international watercourse, it is not easy to conclude that the case is an environmental law case, rather the law of treaties and state succession. However, since the subject-matter of the 1977 Treaty is an international watercourse, the Danube, it was inevitable for the ICJ to make some observations on the law of international watercourses. The judgment is

⁵⁰ See, for example, Article 2 of The Special Agreement of 1993 between Hungary and Slovakia, *supra*, note 37, 6.

⁵¹ 24 *ILR* 127-128 (1957).

⁵² *Supra*, note 37.

also significant in making reference first time to the 1997 Watercourses Convention's some provisions, which are declaratory of customary law.

The experience of maritime delimitation may also throw some light on the equitable utilization of international watercourses, since the principle of equitable utilization is the governing principle of shared natural resources, referring to the possible analogy between them⁵³. Maritime delimitation and international watercourse cases have many features in common. The legal regime responds to unique physical conditions in each case. In the case of maritime delimitation, the continental shelf is the natural prolongation of the land mass beneath the sea and in the case of fresh water, it is the hydrologic cycle of the water which provides a volume of water moving continuously through the states in a watercourse system to the sea. Although physical conditions differ in each case, the need to take them into account is obviously analogous⁵⁴. The unity of deposits of natural resources of the continental shelf is dwarfed by the unity of water in a watercourse⁵⁵. Therefore, the analogy between the nature of the two resource utilizations makes it pertinent to examine the maritime delimitation issues, particularly the cases concerning the maritime delimitation which have been dealt with by the ICJ to a considerable extent, to find out certain similarities. The experience of maritime delimitation throws light not only on the examination of the content of substantive rules of the law of the non-navigational uses of international watercourses, but also on the procedural rules in reaching equitable solutions.

2. Decisions of National Tribunals

Article 38(1) (d) of the Statute is not confined to international judicial decisions. Although not in the same category as international cases, the decisions of national courts may have evidential value as well⁵⁶.

⁵³ **Fuentes, X.**, "The Criteria for the Equitable Utilization of International Rivers" (1996) 67 **British Yearbook of International Law** 341.

⁵⁴ **Schwebel, S. M.**, "Second Report on the Law of the Non-navigational Uses of International Watercourses" (1980) **Yearbook of International Law Commission** 171-172.

⁵⁵ *Ibid.*, 171.

⁵⁶ It should also be noted that decisions of national courts will also form part of state practice for the purposes of deciding on rules of custom.

For the purposes of the present work, the high courts of the federal states are of primary concern among national cases, since there exist many decisions of federal courts on the law of the utilization of interstate watercourses. One may point to decisions by the highest courts of the federal states, like the US, Switzerland and Germany, in their resolution of conflicts between the component units of such countries, as relevant to the development of international law rules in such fields as transboundary water disputes⁵⁷. However, one needs to bear in mind that if any principle of law is to be found only in the decisions of national tribunals and not in other sources of international law, it does not suffice to suggest that this principle is applicable in international watercourse issues.

The high courts of federal states in disputes of water utilization between the members of a federal state sometimes applied international law. German *Staatsgerichtshof*, as an example, expressly accepted the applicability of international law in the *Donauversinkung* case (Wurttemberg and Prussia v. Baden) to a water dispute between the *Lands*. The high court stated that:

“As the dispute was one of public law between States it was impossible to apply the municipal law of a single State. There were in the Constitution no provision bearing upon the dispute. In view of this Court was bound to apply rules of international law the applicability of which, as between members of the German Federation, must be recognised, though to a limited extent...[A]s these [members of federal] States act as independent communities, *i.e.* in matters reserved for their exclusive competence, their relations are governed by international law...”⁵⁸.

⁵⁷ Bains opposes the reliance on the decisions of federal tribunals as evidence of existing law regarding diversion of water from international rivers. He wrote that: “As international law is the product of the sovereign states, the rules of law dealing with the disputes among semi-sovereign states or provinces cannot be accepted as the rules of international law.” **Bains**, J. S., “The Diversion of International Rivers” (1960-61) 1 **Indian Journal of International Law** 45. For more detailed analysis of the differences between the decisions of international and federal courts in the field of international water law see **Berber**, F. J., *Rivers in International Law*, Stevens and Sons, London, 1959, 71-79.

⁵⁸ Annual Digest of Public International Law Cases, Years 1927-28, ed. by **McNair** A. D. and **Lauterpacht**, H., Longmans Green and Co., London, 1931, 130.

In the US, the judicial settlement of controversies between states is a matter for the original jurisdiction of the Supreme Court⁵⁹. The original jurisdiction of the Supreme Court was first invoked in a dispute between states involving waters of an interstate stream for purposes of irrigation in 1902⁶⁰. Until 1945 there had been many cases decided by the Supreme Court. After 1945, the first case decided, in 1982, by the Supreme Court of the US on equitable apportionment is *Colorado v. New Mexico (Colorado I)*⁶¹.

E. STUDY ORGANIZATIONS

Since the law of international watercourses is relatively a new issue, works of international law study organizations have been extremely helpful to international codification efforts.

1. Institut de Droit International

As an international law study organization, the IDI (Institut de Droit International) was initiated to undertake the work in the determination of rules of law in the field by means of adopting a resolution at its Madrid session in 1911 on international regulations regarding the use of international watercourses⁶². In 1961 the IDI adopted a resolution titled "Utilisation of non-Maritime International Waters (except for navigation)", in Salzburg⁶³. In conformity with the acknowledgment of the increasing importance of protection against pollution, the Institut at its Athens session adopted a resolution on "The Pollution of Rivers and Lakes and International Law" in 1979⁶⁴. In assessing the achievements of international scientific organizations

⁵⁹ U.S. Constitution Article III, sec. 2.

⁶⁰ 185 U.S. 125 (1902).

⁶¹ 459 U.S. 176 (1982). Recent U.S. cases on water (*Colorado I* and *II*) are discussed in Fahmy, P. A., "Colorado v. New Mexico II: Judicial Restraint in the Equitable Apportionment of Interstate Waters" (1985) 62 *Denver University Law Review* 857. For a brief review of the Supreme Court decisions see ECCLES, C. H., "Equitable Apportionment: The Supreme Court Parts The Waters" (1986) *Utah Law Review* 399.

⁶² 24 *Annuaire de l'Institut de Droit International* 365-367 (1911), see also Bruhacs, *supra*, note 10, 18.

⁶³ 49 *Annuaire de l'Institut de Droit International* 370-373 (1961), see also Olmstead, C. J., "Introduction" in Garretson, H. et al., eds., *The Law of International Drainage Basins*, Oceana, New York, 1967, 8.

⁶⁴ 58 *Annuaire de l'Institut de Droit International* 198-203 (1979).

dealing with international watercourses, Bruhacs stated that the reports of the IDI have made more progress in elaborating the theoretical basis⁶⁵.

2. The International Law Association and the Helsinki Rules

The International Law Association (ILA) is another non-governmental organization whose activities in the realm of codification of the law of international watercourses deserve a detailed examination. Undoubtedly, among these activities the 1966 Helsinki Rules on the Uses of the Waters of International Rivers has a top priority. They contain some basic but important principles which are useful in determining what the rules of international watercourses law are. The most significant contribution of the Helsinki Rules to the law of international watercourses is the adoption of the term “international drainage basin” which is regarded as the introduction of a holistic approach to the issues of international watercourses. The Helsinki Rules concentrate mainly on equitable utilization of international watercourses, enumerating some relevant factors to be taken into consideration in the establishment of equitable utilization regimes. Another well accepted principle of international water law adopted by the Helsinki Rules is that no type of water use is inherently superior to any other type of water use and whether a certain type of use is reasonable or not has to be determined in the light of relevant factors in each particular case. Water pollution and navigation are also other aspects of international water utilization which are covered and regulated by the Rules. The Helsinki Rules provide for the peaceful settlement of international watercourse disputes by referring to the United Nations Charter⁶⁶.

3. The International Law Commission and Its Draft Articles

The United Nations’ role in the field of codification and development of international law is not limited to its power to adopt resolutions and hold international conferences. It also contributes to the enrichment of international law through the International Law Commission (ILC) which was appointed by the General Assembly as a permanent subsidiary organ in 1947⁶⁷. In 1970, the United Nations General Assembly recommended the ILC to “take up the

⁶⁵ Bruhacs, *supra*, note 10, 19.

⁶⁶ ILA, **Report of the Fifty-second Conference**, held at Helsinki, 1966, 488.

⁶⁷ General Assembly, Resolution 174(II) of 21 November 1947.

study of the law of the non-navigational uses of international watercourses with a view to its progressive development and codification⁶⁸. In 1974, the Commission established a subcommittee which made recommendations to the ILC on how to proceed with the study of the law of international watercourses⁶⁹. After twenty years of serious work, the Commission adopted its first set of Draft Articles leading to a framework convention which provides basic residual principles and procedures⁷⁰. In 1994, the ILC gave a second reading to its Draft Articles⁷¹. The ILC's Draft Articles was thought to lead to the further development of customary international law regarding international watercourses "because of the composition and the prestige of the commission and the nature of the drafting process"⁷². The drafting process included transmission of a questionnaire to member states of the UN concerning a number of issues about international watercourses, responses of governments to the questionnaire, discussion of replies and the special rapporteurs' reports. Finally, the ILC's work has been adopted as the Convention on the Law of the Non-navigational Uses of International Watercourses by the United Nations General Assembly on the 21 May 1997 and opened to signature⁷³.

F. PUBLICISTS' OPINIONS

This category may include particularly rapporteurs of the ILC on the law of international watercourses. Four rapporteurs, namely Rosenstock, McCaffrey, Evensen and Schwebel, submitted their special reports on the subject. Apart from being rapporteurs of the ILC, they are also well known publicists in this issue.

Any work on the law of international watercourses would be incomplete, if there are no references to the publications of Professor Bourne who has

⁶⁸ Resolution 2669(XXV) of 8 December 1970.

⁶⁹ **McCaffrey**, S. C., "Background and Overview of the International Law Commission's Study of the Non-Navigational Uses of International Watercourses" (1992) 3 **Colorado Journal of International Environmental Law and Policy** 18.

⁷⁰ **Magraw**, D. B., "Introduction" (1992) 3 **Colorado Journal of International Environmental Law and Policy** 13 and **McCaffrey**, *supra*, note 69, 23.

⁷¹ **Yearbook of International Law Commission** 1994, vol. II, part 2, 88.

⁷² **Magraw**, *supra*, note 70, 14.

⁷³ Resolution 51/229 of 21 May 1997.

studied the subject since 1960. Even his early works have not lost of their value today.

G. THE UNITED NATIONS GENERAL ASSEMBLY RESOLUTIONS

It is argued that the General Assembly has no legislative authority because no reference could be run in the Statute of the International Court of Justice. On the other hand, there have been attempts to bring resolutions within the ambit of the “sources of law” as contained in Article 38 of the Statute of the ICJ⁷⁴.

The general tendency is to link the legal essence of resolutions with customary law, in so far as a General Assembly resolution can be evidence of customary law because it reflects the opinions of the states voting for it⁷⁵. To put it in another way, the cumulative enunciation of the same guidelines by numerous non-binding texts helps to express the *opinio juris* of the world community⁷⁶. Another attempt is to see resolutions as part of “general principles of law”. In the past, the developing countries asserted that the 1970 Declaration of Principles formed as a principle of international law precisely in the meaning of Article 38(1)(c)⁷⁷.

To sum up, as noted by the ICJ in its advisory opinion in the Legality of the Threat or Use of Nuclear Weapons case, declarations and resolutions adopted by the UN may, in accordance with the conditions which prevailed at their drafting and the degree of support they found in the voting process, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris* which are binding on states, even outside any treaty commitment⁷⁸. A series of resolutions might show the gradual evolution

⁷⁴ See in general Joyner, C. C., “United Nations General Assembly Resolutions and International Law: Rethinking the Contemporary Dynamics of Norm Creation” (1981) 11 *California Western International Law Journal*, 445-478.

⁷⁵ Akehurst, M., *A Modern Introduction to International Law*, Unwin Hyman, Sixth Edition, London, 1987, 38.

⁷⁶ Dupuy, P. M., “Soft Law and the International Law of the Environment” (1991) 12 *Michigan Journal of International Law* 420-435.

⁷⁷ Danilenko, G. M., *Law Making in the International Community*, Martinus Nijhoff, Dordrecht, 1993, 205.

⁷⁸ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Reports 1996, para. 70. The Court found that, although many General Assembly resolutions declared

of the *opinio juris* which is required for the establishment of a new rule⁷⁹. Several UN resolutions on the use of natural resources and cooperation should be examined in any study on international watercourse law.

CONCLUSION

Finding out the rules in any area of international law requires the examination of the sources of law. The law of international watercourses is not an exception. Due to varying approaches and interpretations of the methodological questions in international law, different learned institutions and writers could reach different conclusions by using the same sources with regard to rights and duties of states, depending on their preferences. This is also the case in international watercourses law.

The rules of international law are produced either by means of agreements, which are binding only upon their parties unless they represent customary law, and custom, which binds all. Since all the attempts to conclude a universally applicable treaty on the law of international watercourses have failed so far, the only alternative for finding out the rules on international law in the field is customary law, if there are no treaty provisions between the parties on a particular subject. However, it is not an easy task to reach at concrete conclusions by using customary international law. Judicial decisions, both international and national, writings of publicists and works of international law study organizations are extremely helpful in determining whether a particular proposition amounts to a legal rule, despite the fact that they produce approaches which are far from being controversial.

Customary international law also suffers from an inherent shortcoming: in fact, customary law, by definition, is based upon the practice of states, and, therefore, lags behind developments that dictates the need for legal regulation.

that the use of nuclear weapons would be prohibited as their use would be a violation of the UN Charter, GA resolutions “still fall short of establishing the existence of an *opinio juris* on the illegality of the use of such weapons”, since they have been adopted with substantial number of states abstaining or voting against. *Ibid.*, para. 71.

⁷⁹ *Ibid.*, para 70.