ILA Berlin Conference 2004 - Water Resources Committee Report Dissenting Opinion

(9 August 2004)

We, members of the ILA Water Resources Committee (WRC), do not agree with many aspects of the report that has been submitted by that Committee for consideration at the ILA Berlin Conference of 2004. The reasons for our doing so are set out below.

1. Scope of Study

The ILA began its study of the international law governing transboundary waters in 1954 and has continued this study to the present day. The recent work has been done by the WRC that was established in 1991 with the mandate to review the law as defined in the 1966 Helsinki Rules and subsequent resolutions of the ILA, to harmonize the provisions of these documents, and to revise them as deemed necessary. The report submitted by the WRC for consideration of the Berlin Conference, however, shows clearly that the WRC has not limited its work to international waters but has extended it to national waters. This extension of its mandate was not authorized by the appropriate body of the ILA and is therefore ultra vires.

2. Effect of Inclusion of National Waters

Apart from the question of the legitimacy of the WRC's decision to include purely domestic waters within its terms of reference, the attempt to merge the rules pertaining to national and international waters has not been satisfactory. Stefano Burchi, one of our group, in a letter to the Rapporteur, explained his objection to the inclusion of national waters in the work of the WRC as follows:

"The separation … between the transboundary … and 'all' waters is perforce imperfect, as remnants of transboundary waters are to be found scattered in other chapters of the new rules. There persists as a result an impression of lumping together quite different things … the concept of 'equitabilty' has historically been used in reference to transboundary waters, while the composite triad equity/efficiency/sustainability permeates much current domestic water law thinking and legislative reform."

We endorse his opinion.

3. Treatment of the Principle of "Equitable Utilization"

Equitable utilization, as it has been used in international water law, was defined in Article 4 of the 1966 Helsinki Rules, which provides that a basin state is entitled to an equitable and reasonable share of the beneficial uses of the waters of an international drainage basin. It was thus recognized that a basin state has a right, notto an equal share of the waters of the basin, but to the beneficial uses of those waters. Notwithstanding that the rule of equitable utilization so defined is generally regarded as a rule of customary international law, in the definition of equitable utilization in the report of the WRC under consideration, there is no mention of a right or entitlement of a basin state to share in the beneficial uses of the water, only its duty ("shall") in its territory "to manage the waters of an international drainage basin in an equitable and reasonable manner …" (Article 12), and, in that management, to "refrain from and prevent acts or omissions … that cause significant harm to another State having due regard for the right of each basin state to make equitable and reasonable use of the waters" (Article 16).

The emphasis on this duty of basin States appears throughout the report and indicates that the chief concern of the majority of the WRC was the development of international law to protect the environment; the law on international fresh water was regarded as being incidental to an all-embracing international environmental law. Evidence of this is especially strong in the provisions making the principle of equitable utilization subordinate to the "no harm" rule (see Article 12 and 16). The WRC is not shy in admitting that its aim was the progressive development of customary international environmental law relating to fresh water generally; it stated this explicitly in the third paragraph of Part Two of its report introducing the draft articles.

The rules in the articles proposed by the WRC in its report, then, strike at the fundamental basis of the Helsinki Rules and subsequent resolutions of the ILA; their adoption would abrogate the customary law on equitable utilization as viewed by the ILA since 1966. The rules set out in the WRC Report are also contrary to those affirmed by the ILC in its final report on the Non-

Navigational Uses of International Watercourses, and to those in the 1997 UN Convention, and in the judgment of the International Court of Justice in the Gabcikovo-Nagymoros Case.

4. The Inappropriate Use of the term "shall"

Throughout the draft articles set forth in the report of the WRC, the use of the word "should" has been avoided. No attempt is made to distinguish the obligatory "shall" from the hortatory "should"; that is, rules of law (lex lata) from rules of emerging law (de lege ferenda) or merely desirable rules. The failure to make this distinction detracts seriously from the legal reliability and usefulness of the rules, for several of the rules formulated as mandatory do not properly meet the test for the creation of a customary international law (practice accepted as legally binding – for example, not merely declarations at conferences) and should have been stated in non-obligatory form (should).

It turns out that the WRC knew that it was formulating some propositions as rules of customary international when in fact it did not believe them to be such rules. At page 4 of its report under the heading "Usage Note," there is the following passage: "These Rules both express rules of law as they presently stand and, to a small extent, rules not yet binding legal obligations but which, in the judgment of the Association, are emerging as rules of customary international law. In other words, some of these Rules express the progressive development of the relevant international law." The WRC then justifies this extraordinary passing off as law what is known not to be law in these words:

"Following the recent practice of International Law Commission and reflecting the conclusion of the Committee that such progressively developed Rules will become settled customary international law in the near future, all Rules are expressed as present legal obligations ('shall'), leaving identification of Rules as progressive developments to the commentary."

Incidentally, commentaries on draft articles in the Report that may be adopted, should not be approved; they have not been subjected to close study by the WRC. The commentaries on the 1966 Helsinki Rules were not approved.

It would hardly be proper for the ILA to adopt the rules proposed by WRC as being rules of existing customary international law when the WRC itself is uncertain whether or not these rules are yet law? Is it sufficient to rely on the belief of some members of the WRC that, even if its proposed rules are not law, they will ultimately and inevitably emerge as customary international law? Incidentally, is it accurate to say, as is done in the statement quoted above, that the ILA has made a "judgment" about the emerging rules of international law?

Examples of rules in the report that have little claim to be regarded as obligatory are the following:

-Article 4: Participation by Persons

-Article 5: Conjunctive Management

-Article 6: Integrated Management

-Article 7: Sustainability

-Article 9: Interpretation of these Rules

-Article 18: Public Participation and Access to Information

-Article 20: Protection of Particular Communities

-Article 21: The Right to Compensation

-Article 23: The Precautionary Approach

5. Conclusion

The 1966 Helsinki Rules and the other rules adopted by the ILA in subsequent resolutions on the law governing the waters of international drainage basins have been widely accepted and followed by basin states and are justly regarded as embodying the rules of customary international law. Thus the ILA has contributed greatly to the rational and peaceful development, management, and utilization of these waters. The adoption of the rules now proposed in the Report of the WRC would mark a radical and unwarranteddeparture from existing customary law; it would diminish the influence and reputation of the ILA.

In the light of the above, the Rules on Water Resources set forth in the Report of the WRC should be rejected.

We request that this Dissenting Opinion be made available to those attending the working sessions discussing the WRC Final Report at Berlin and that it be attached to and published in its entirety with the Final Report.

Slavko Bogdanovic, Yugoslav Association for Water Law

Charles Bourne, Professor Emeritus of Law, Chairman of WRC, 1991-2000

Stefano Burchi, Senior Legal Officer, Development Law Service, FAO, Rome

Patricia Wouters, Director, International Water Law Research Institute, University of Dundee

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