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The Worst or the Best Treaty? Analysing the Equitable and Reasonable Utilization Principle in the Legal Arrangements of the Helmand River

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Abstract

After protracted conflicts, Afghanistan and Iran agreed on a treaty in 1973 to share the waters of the Helmand River. However, this legal arrangement became a source of controversy over its equitable and reasonable utilization principle. The 1973 Helmand River Water Treaty reflects a history of legal and political controversy and strongly contrasting views, with some labelling it the “worst” treaty and others the “best”. This paper scrutinizes the history of legal arrangements of the Helmand River within its underlying political context to search for evidence of the aforementioned equitable and reasonable utilization principle. The findings indicate that the 1973 Treaty provides a grey space for legality and illegality, being a greatly restricted instrument to uphold the principle of equity. Examination of the principle of equity in the 1973 Treaty contributes to developing constructive controversy over the Helmand River and offers valuable lessons for other international watercourses facing similar challenges.

Keywords: Equitable and reasonable utilization; International Law; Helmand/Hirmand; Afghanistan; Iran

One of many international watercourses confronted with a complex struggle to achieve equity under its historical geopolitical conditions is the Helmand (also known as the Hirmand) River Basin¹ (HRB), shared between Afghanistan and Iran. The Helmand River is the lifeblood of around seven million people, and about one-third of that population live in the river delta, on both sides of the border, one of the poorest regions of these countries. The delta of the HRB, in which the Hamoun wetlands are located, serves as an important source of drinking water and food and provides multiple ecosystem services. The livelihood of the people living around the Hamoun wetlands is highly dependent on the water resources of the Helmand River, which supports activities such as fishing, reed harvesting, and bird hunting. The Hamoun wetlands have already experienced significant

¹ While ‘Hirmand’ is the common name on the Iranian side and is ancient Persian in origin, the term “Helmand” was adopted by British travellers and records of local geography in the 19th century and so is more used in Afghanistan and international literature (see Pirouz MOJTAHED-ZADEH, *Boundary Politics and International Boundaries of Iran* (Florida, USA: Universal Publishers, 2007) at 225.

depletion, seriously threatening the ecosystem and the livelihoods of local communities on both sides of the border.

The utilization of the Helmand River has been a source of tension between Afghanistan and Iran for over the last century.² With the hope of ending a long period of controversy over water sharing, the two countries signed the Helmand River Water Treaty in 1973.³ Notwithstanding this, and with the restoration of the Taliban to power in August 2021, it seems that the water controversies and serious ecosystem concerns following the drought of 2021–2 and water diversion by Afghanistan⁴ have necessarily been abandoned for the sake of broader security issues. Thus, the 1973 Treaty has failed to resolve the water conflict between Afghanistan and Iran. Despite the seemingly cooperative effort to implement the 1973 Treaty, this legal arrangement itself became a source of controversy not only over the interpretation of its content and implementation but also the extent to which equitable and reasonable utilization (ERU) of the Helmand River Basin (HRB) is considered. Both sides blame each other for not respecting the Treaty and its agreed water rights.

Against this backdrop, one interesting observation of the legal evolution concerning the Helmand River is, as is shown later, that all legal arrangements, including the 1973 Treaty, were negotiated for “equitable utilization”. Another more interesting observation is that views on the 1973 Treaty have altered significantly in the eyes of Afghanistan’s officials. Afghanistan’s perspective has changed from one extreme to another. While the Afghan signatory of the Treaty was once known as a “water dealer” and “traitor”, he is now thought of as a “martyr”, and the Treaty is called “the best legal arrangement in the world” in Afghanistan.⁵ However, the views of Iranian officials in supporting the 1973 Treaty have remained almost unchanged, though there have been opposing views, in the same vein as Afghanistan, mainly in public and unofficial opinions. Under these extreme views, there has been a controversial debate over the robustness of the legal and institutional arrangements that govern the Helmand River in addressing the *modern* ERU principle. Both parties insist on the ERU principle in their narratives, discourses, negotiations, and interpretation of the 1973 Treaty; however, it is unclear to what extent their claims and the 1973 Treaty reflect this legal principle, particularly in its modern view. Is the 1973 Treaty “the best” from a legal perspective, as is thought now in Afghanistan?

Given the rival geopolitical setting in the region, almost all legal arrangements over the HRB were negotiated under the shadow of imperial and competing powers. Unsurprisingly, the legal arrangements for the Helmand River express a history of

² For detailed analysis, see Mohsen NAGHEEBY and Jeroen WARNER, “The 150-Year Itch: Afghanistan-Iran Hydropolitics Over the Helmand/Hirmand River” (2022) 15 *Water Alternatives* 551; See also John F. SHRODER and Sher Jan AHMADZAI, *Transboundary Water Resources in Afghanistan: Climate Change and Land-Use Implications* (Netherlands: Elsevier, 2016).

³ *The Afghan-Iranian Helmand River water Treaty*, 13 March 1973, online: https://www.internationalwaterlaw.org/documents/regionaldocs/1973_Helmand_River_Water_Treaty-Afghanistan-Iran.pdf [1973 Treaty].

⁴ See Mohsen NAGHEEBY, “Ashraf Ghani’s ambitions to divert the Helmand River now serve his Enemy, the Taliban: An International Law Perspective” *European Journal of International Law Blog* (13 July 2022) online: *European Journal of International Law Blog* <https://www.ejiltalk.org/ashraf-ghanis-ambitions-to-divert-the-helmand-river-now-serve-his-enemy-the-taliban-an-international-law-perspective>.

⁵ For more detailed information about such claims and assertions, see Mohsen NAGHEEBY and Alistair RIEU-CLARKE, “Water diplomacy in the Helmand River Basin: Exploring the obstacles to cooperation within the shadow of anarchy” in Anoulak KITTIKHOUN and Susanne SCHMEIER, eds., *River Basin Organizations in Water Diplomacy* (Routledge, 2021), 201; For legal analysis, see A. AMINI, S.Z. GHOREISHI, and H. MIANABADI, “Understanding 1973 the Helmand Treaty by Invoking Rules of Interpretation According to Vienna Convention 1969” (2021) 11 *Journal of Water Management and Irrigation* 249, where they analyse the 1973 Treaty based on the 1969 Vienna Convention.

broader geopolitical circumstances and out-of-basin interventions with, as shown later, less attention to equity and the characteristics and concerns of resource owners. Accordingly, the interpretation of legal principles, which States often use as a political tool in global politics, should be carefully placed in their political context. The purpose of this paper, therefore, is twofold – first, to shed light on the politics surrounding the legal water arrangements over the HRB and, second, to elucidate the basic facts in their history, particularly the 1973 Treaty given the *modern* ERU principle, with the hope of contributing to a shared understanding and eventual resolution of the dispute. I do not intend to make recommendations at this stage. However, this paper is a pioneering legal study of the HRB and aims to clarify legal misunderstandings and open avenues for further investigations. The study conducts a qualitative critical research method, arguing for context-specific approaches and going further than simply questioning the centrality of law by questioning “the law, the society and the individuals”.⁶ The paper presents an objective analysis⁷ – that is, independent from international politics and individual subjective intentions by reviewing the facts and assessing the applicable law – to legal arrangements of the Helmand River. The objective approach “centres on the actual text of the agreement and emphasizes the analysis of the words used”.⁸ Considering this, I acknowledge that legal arrangements, including those of the Helmand River, have resulted from a subjective political and legal process. Nevertheless, a practical account of objectivity based on a subjective evaluation of the facts is employed to define the gaps and flaws in past and existing legal arrangements concerning the HRB with regard to the modern ERU principle. This evaluation helps to examine customary criteria for reaching justifiable conclusions over debated and controversial issues in the HRB.

In light of the modern ERU principle, this paper argues that, in addition to the underlying geopolitical circumstances,⁹ the 1973 Treaty can be partly blamed for the failure to reconcile competing interests between Afghanistan and Iran over the Helmand River. The 1973 Treaty is, by its nature, very restricted and needs more space for modern legal principles of equitable and sustainable utilization to cope with existing and future challenges. The paper concludes by arguing that the 1973 Treaty is neither the worst nor the best; it is only a false promise since it provides a grey area where both legality and illegality can occur.

This paper proceeds in five parts. The first part briefly reviews the modern definition and evaluation of the ERU principle and how this legal principle may be treated in practice. The second part presents the general background and enduring controversy over the Helmand River. There are limited considerations of the legal principles of international water law within the political reality. To better understand the reality on the ground, the third part of the study critically examines the political intents hidden behind legal arrangements over the Helmand River to search for any evidence of the ERU principle. In the fourth part, to build on the scarce number of peer-reviewed legal studies on the transboundary waters of Afghanistan, and in particular the HRB,¹⁰ the paper focuses on

⁶ Chris DENT, “A Law Student-Oriented Taxonomy for Research in Law” (2017) 48 *Victoria U Wellington L Rev* 371 at 379.

⁷ See Jingjing WU, “A Perspective of Objectivity in International Human Rights Treaties” (2022) 35 *International Journal for the Semiotics of Law* 369; See also Dennis PATTERSON, “Normativity and Objectivity in Law” (2001) 43 *William & Mary Law Review* 325.

⁸ See Wu, *supra* note 7 at 373.

⁹ See Nagheeby and Rieu-Clarke, *supra* note 5.

¹⁰ See, for example, James C. MCMURRAY and A. Dan TARLOCK, “The Law of Later-Developing Riparian States: The Case of Afghanistan” (2005) 12 *NYU Environmental Law Journal* 711; see also Mohsen NAGHEEBY, Mehdi PIRI D, and Michael FAURE, “The Legitimacy of Dam Development in International Watercourses: A Case Study of the Harirud River Basin” (2019) 8 *Transnational Environmental Law* 247.

the assessment of the 1973 Helmand Treaty concerning the *state-of-the-art* ERU principle to investigate whether it accounts for the equitable criteria and, if so, how it does this. Examination of the principle of equity in the 1973 Treaty contributes to developing constructive controversy between Afghanistan and Iran over the Helmand River. It offers valuable lessons for other international watercourses facing similar challenges. The final part presents the conclusions of this study.

I. The ERU Principle in International Water Law: How It Works and How to Evaluate It

Legal principles of international water law are more often employed from the perspective of the State and closely associated with the concept of sovereignty. Therefore, assessment of the ERU principle requires acknowledging the socio-political context of each international watercourse. This reminds us of the importance of the gap between the theory and practice of international law and legal objectivity *vis-à-vis* political subjectivity.¹¹ International law provides an “argumentative framework” used by States in legal practice to demonstrate the truth of “legal propositions”.¹² Legal rules are assumed to be objective compared to the political interests and preferences of States. To maintain objectivity and avoid political subjectivism, international law must ensure concreteness and normativity by creating distance from actual State behaviour, will, or interest.¹³ Moreover, the law may seem “objective”, but it is largely based on a subjective evaluation of the facts and the credibility of the sources giving rise to them. In discussing the ERU principle as a customary principle of international water law, I acknowledge that it is often *subjectively* applied and practised by States in a legal process. States may reach a consensus on a definition of ERU and how to implement it in their treaty negotiations concerning the specific context of an international watercourse. Considering this, applying international rules, including the ERU principle, is an “artificial creation” and a “reflection of social circumstances”.¹⁴ In this paper, therefore, objectivity matters when investigating the flaws in the legal arrangements of the HRB concerning the customary standards and practices of the ERU principle. One question is whether the agreed ERU principle – if there is one – in legal arrangements of the HRB applies as *lex lata*. Answering this question requires the objectivity of legal judgment that “asserts the existence of a standard independent of the rule which enables rule application in a variety of contexts”.¹⁵ I will briefly present the basic standards to assess the ERU principle and then the struggles to practise it in political reality.

A. Equity in Theory: How to Define and Assess the ERU?

Equity is situated at the heart of transboundary water politics and its conflicts. To avoid conflicts over transboundary water utilization, seek solutions to existing conflicts, and improve equity, the international community establishes principles, rights, and responsibilities for States through international water law, consisting of interrelated substantive and procedural norms. The substantive norms can be listed briefly as ERU, the no-harm

¹¹ Martti KOSKENNIEMI, “The Politics of International Law” (1990) 1 *European Journal of International Law* 4.

¹² See Patterson, *supra* note 7 at 341. Patterson points out that “[o]bjectivism and subjectivism are both attempts to explain the normativity of rule-following. Objectivism searches for the means by which disparate applications of a rule (or concept) can be said to be applications of the ‘same’ standard”.

¹³ See Koskenniemi, *supra* note 11.

¹⁴ *Ibid.*, at 7.

¹⁵ See Patterson, *supra* note 7 at 331.

principle, the duty to cooperate, and the obligation to protect the ecosystem. Of these principles, ERU represents customary international law and is undoubtedly now recognized as the pre-eminent rule on upholding the concept of equity in utilizing an international watercourse.¹⁶

These substantive norms are operationalized through the general obligation to cooperate, which includes rules of procedure, such as the exchange of data and information, prior notification of planned measures, further consultation on the potential effects of such planned measures, and the mechanisms for dispute settlement. The ERU principle is adopted as the main concept, with other substantive principles employed as secondary concepts.¹⁷ Procedural norms are rules on procedures to be followed by concerned parties to fulfil their substantive obligations. These principles form part of the corpus of customary international law, which means they are binding on all States.¹⁸

The International Law Commission (ILC) commentary to its 1994 Draft Articles states that the ERU principle is to be applied only in the case of a “conflict of uses”.¹⁹ In such cases, where the needs of one or more riparian States are not met because of another State’s use of an international watercourse, the ERU principle potentially has an important role in reconciling States’ interests in that watercourse utilization. One question that may arise is how the riparian States should define and agree on the ERU. Without joint management of a shared watercourse, it might be difficult to determine whether it is used equitably and reasonably. The ILC’s commentary explains that equitable use applies only to “reasonable and beneficial” uses of international watercourses.²⁰ Accordingly, after recognizing a “conflict of interests” over the utilization of an international watercourse and deciding that significant harm is caused, States must first determine whether their use is “reasonable and beneficial”.²¹

For this purpose, a “beneficial use” refers to one of economic, social, or cultural value.²² However, if the use, though potentially beneficial, offers a low economic or social value, it may not be considered reasonable. In such cases, it is necessary to estimate the benefit of the use, whether economic, social, or cultural and decide whether that use is reasonable. So, what is a “reasonable” use of an international watercourse?

Studies refer to a “contemporary conception of rationality” for determining what is reasonable.²³ Although what constitutes a “reasonable” use may vary case by case, in many instances, literature takes a reference to the “vital needs” of States and “sustainable” uses when determining reasonableness.²⁴ Therefore, the unsustainable exploitation of water resources would not meet the criteria of reasonable use as declared, for example, by the Sustainable Development Goals of the 2030 United Nations (UN) Agenda for Sustainable Development.²⁵ However, while reasonable use relates to the concepts of

¹⁶ Owen MCINTYRE, “Utilization of Shared International Freshwater Resources – the Meaning and Role of ‘Equity’ in International Water Law” (2013) 38 *Water International* 112.

¹⁷ Alistair RIEU-CLARKE, Ruby MOYNIHAN, and Bjørn-Oliver MAGSIG, *UN Watercourses Convention: User’s Guide* (IHP-HELP Centre for Water Law, Policy and Science under the auspices of UNESCO, 2012). Against this consensus view, Meshel suggests that the “no significant harm” principle should be the guiding principle in resolving freshwater disputes. See Tamar MESHEL, “Swimming Against the Current: Revisiting the Principles of International Water Law in the Resolution of Fresh Water Disputes” (2020) 61 *Harv. Int’l LJ* 135.

¹⁸ Stephen C. MCCAFFREY, *The Law of International Watercourses*, 3rd ed. (Oxford: Oxford University Press, 2019).

¹⁹ See Report of the International Law Commission on the work of its forty-sixth session, UN Doc. A/49/10 (1994) [ILC Report].

²⁰ *Ibid.*

²¹ *Ibid.*

²² Alistair RIEU-CLARKE, *International Law and Sustainable Development* (London: IWA Publishing, 2005).

²³ *Ibid.*, at 106.

²⁴ *Ibid.*

²⁵ *United Nations Millennium Declaration*, GA Res. 55/2, UN Doc. A/Res/55/2 (2000).

rationality and sustainability, other factors concerning the degree of a State's development should be considered. This entails a particularly interesting yet demanding task – estimating the development level of a State and how this may affect its reasonable use of an international watercourse. As the International Law Association's commentary on the Helsinki Rules notes,²⁶ a developing State should be accorded more time to improve its utilization of an international watercourse than developed States. But giving such a priority may cause conflict; for example, setting up a hydroelectric project in one less-developed upstream State when attempting to advance its economy without considering the interests of downstream States. This dilemma leads McIntyre to propose that there should be a proportionate distribution of benefits from using a shared resource.²⁷ This approach could be used to balance legitimate State interests in international watercourses.²⁸ Under this approach, States' current circumstances, including their development level, economic capacity, and needs, should be considered when determining what is "equitable". Against this backdrop, Article 6(1) of the UN Watercourses Convention lists, non-exhaustively, various factors that should be considered when balancing the interests of States and evaluating ERU:

Utilization of an international watercourse in an equitable and reasonable manner within the meaning of Article 5 requires taking into account all relevant factors and circumstances, including:

- (a) Geographic, hydrographic, hydrological, climatic, ecological and other factors of a natural character;
- (b) The social and economic needs of the watercourse States concerned;
- (c) The population dependent on the watercourse in each watercourse State;
- (d) The effects of the use or uses of the watercourses in one watercourse State on other watercourse States;
- (e) Existing and potential uses of the watercourse;
- (f) Conservation, protection, development and economy of use of the water resources of the watercourse and the costs of measures taken to the effect;
- (g) The availability of alternatives of comparable value to a particular planned or existing use.

Accordingly, in conflicts of (reasonable) uses, resolutions are made based on equity after considering all relevant factors and circumstances.²⁹ One important consideration is that vital human needs and the ecosystem of international watercourses should always be protected when establishing a regime for equitable utilization.³⁰ Thus, even though the ERU principle might be open to differing States' interpretations, vital human needs and protection of the ecological system must be guaranteed by law. Such processes must clarify different views on the principles of equitable utilization to provide a common platform

²⁶ See Commentary to the Helsinki Rules on the Uses of the Waters of International Rivers, adopted by the ILA at the 52nd Conference, Helsinki, Finland, Aug. 1966, reprinted in Slavko BOGDANOVIĆ, *International Law of Water Resources – Contribution of the International Law Association* (The Hague: Kluwer Law International, 2001).

²⁷ McIntyre, *supra* note 16.

²⁸ See more in Rieu-Clarke, *supra* note 22. See also Nagheebay, Piri, and Faure, *supra* note 10, for further discussion about the concept of legitimacy.

²⁹ Rieu-Clarke, *supra* note 22; See also McIntyre, *supra* note 16.

³⁰ Alistair RIEU-CLARKE and Christopher SPRAY, "Ecosystem Services and International Water Law: Towards a More Effective Determination and Implementation of Equity?" (2013) 16 *Potchefstroom Electronic Law Journal* 12.

and an accepted norm for all actors. Riparian States need to utilize shared water by considering these factors and taking into account the interests of other riparian States, as well as preserving the ecosystem at the shared watercourse.

B. Equity in Practice

The struggles over applying international legal norms to constrain State behaviour may be seen in many international subject areas, such as trade and human rights, in the context of international waters; for example, the debates over the Indus River Basin,³¹ the Mekong,³² and the Afghanistan dam development. At the end of the 20th century, many international waters in Africa and some in Asia were subject to ill-suited colonial-era arrangements. These political and legal arrangements were designed in ways that mostly favoured imperial interests, leaving the riparian States on their own to align their national interests with ecological reality and continuous socio-economic changes. These arrangements (among them Britain's McMahon arbitration of 1905 for the HRB), in making changes to hydro-political relations to the advantage of some actors above others, represented an inequitable sharing of the waters in question. Consequently, there remains particular importance attached to differences between the theory, as explained above, and the practice of international water law. In reality, politics and sovereignty are crucial drivers of States' wishes to control transboundary waters; the ERU principle may be overshadowed by self-interest and may seem ineffective or meaningless or function in favour of the dominant actors involved.

Eckstein remarks that substantive rules of international water law may be used as a political tool in global politics rather than as a legal regime.³³ He points out that a legal rule may manifest itself differently depending upon whether it is employed for judicial reasons or for State relations. Since the nature of international water negotiations is identified as *ex-ante* (based on predicted or anticipated results), substantive international water laws are subjectively used by actors as tools in a political process to further relations. However, these laws are designed to be applied objectively in an *ex-post* adjudicatory process (based on or decided by actual results).³⁴ Woodhouse and Zeitoun observe that, in practice, States have used these laws to strengthen their negotiating positions, mainly to the advantage of powerful States, despite them being intended to protect the weaker party.³⁵ Thus, they suggest that the role of power asymmetry in legitimizing transboundary water arrangements should be accounted for in "critical" hydro-political studies.

What is significant here is how the ERU principle, which is expected to strike a balance among various social, economic, and environmental interests of different parties, can be interpreted and implemented differently within a complex *political context*. In such unequal conditions, even if equity is the ultimate goal of hydro-political relations, the perception and interpretation of the concept of equity differ from one State to another, often coloured by the dominant power structure and influenced by their interests and identity. As will be shown in this paper, equity in transboundary waters is almost always sacrificed for the sake of the security interests driven by broader geopolitical dynamics.

³¹ Durgeshree RAMAN, "Damming and Infrastructural Development of the Indus River Basin: Strengthening the Provisions of the Indus Waters Treaty" (2018) 8 Asian Journal of International Law 372.

³² Alistair RIEU-CLARKE, "Notification and Consultation Procedures under the Mekong Agreement: Insights from the Xayaburi Controversy" (2015) 5 Asian Journal of International Law 143.

³³ Gabriel ECKSTEIN, "Examples of the Political Character in Water Law" in American Society of International Law, *Proceedings of the 116th Annual Meeting* (Cambridge: CUP, 2008) 364.

³⁴ *Ibid.*

³⁵ Melvin WOODHOUSE and Mark ZEITOUN, "Hydro-hegemony and international water law: Grappling with the gaps of power and law" (2008) 10 Water Policy 103.

Correspondingly, this influences the ability of States to shape and control the “rules of the game”. Therefore, interpreting and implementing legal principles, such as the ERU principle, without acknowledging political intent would be unwise. I follow these lines of thought to analyse the legal arrangements of the HRB in light of the ERU principle.

II. General Background of the Controversy Between Afghanistan and Iran over the Helmand River

The 1,300 kilometres-long Helmand River is an endorheic river that rises in Afghanistan and, after a great distance, reaches Iran to form 55 kilometres of the Afghan-Iranian border (see Figure 1). The Helmand River ultimately ends in the Sistan Delta, where it makes up a large complex of three substantial, interconnected wetlands: Hamoun-e-Puzak, Hamoun-e-Saberi, and Hamoun-e-Hirmand, and, in exceptionally wet years, overflows to the south into the inhabitable Goud-e-Zereh depression.³⁶

The Helmand River, with an average surface water availability of 9,552 million cubic meters (MCM),³⁷ is considered to be the lifeblood of one of the poorest regions in the two riparian States, which, as of 2010, had populations of 5,800,000 in Afghanistan and 1,050,000 in Iran.³⁸ The water resources of the HRB are used extensively for irrigation and are essential for Afghan and Iranian farmers alike. Both States, particularly Afghanistan, with its larger dependent population and lack of infrastructure, struggle to provide drinking water for the people of the HRB. In addition, the Helmand River is a critical resource for sustaining the transboundary Hamoun wetlands, which, from an environmental perspective, are the most important parts of the river delta. Only the Iranian side of the wetlands is listed under the Ramsar Convention, and it was recognized as a United Nations Educational, Scientific and Cultural Organization (UNESCO) Biosphere Reserve in 2016. People residing at the delta of the Helmand River surrounding the Hamoun wetlands are mainly farmers on both sides of the border; however, they may occasionally be involved in fishing, reed harvesting, and bird hunting during times of inundated wetlands. There is also some illegal activity, with the smuggling of opium (from Afghanistan) and fuel (from Iran) using the river crossing at the political border.

The general water controversy over the Helmand River offers a classic example of the challenges between “historical” use and environmental protection on one side of the delta and “nationalism” and development on the other, which are problems that need to be addressed when attempting to promote transboundary water cooperation. As a downstream State, Iran seems eager to cooperate to guarantee its domestic, agricultural, and environmental water demand. By contrast, Afghanistan, as an upstream State, might be

³⁶ From a legal perspective, the Goud-e-Zereh depression, which could arguably be considered a type of wetland, is not considered part of the HRB. It might seem a controversial argument in the context of the HRB, but the compelling reason for this argument rests on the fact that water does not “normally” flow to the Goud-e-Zereh. In an exceptional case of a very wet season (every 25–30 years), the Helmand River may overflow from the Hamouns to Goud-e-Zereh, which is uninhabitable. Concerning the discussion of the 1994 ILC Draft Articles (see ILC Report, *supra* 19 at 90–1, Commentary 6 on Article 2(b)), one may argue that Goud-e-Zereh is not normally connected to the Helmand River; thus, it is not a part of the international Helmand *watercourse*. The significant transboundary dependency of the communities surrounding the Hamoun wetlands in Sistan (Iran) and Nimroz (Afghanistan) supports the argument that Goud-e-Zereh is not connected to the *watercourse*.

³⁷ Vincent THOMAS and Manijeh Mahmoudzadeh VARZI, “A Legal Licence for an Ecological Disaster: The Inadequacies of the 1973 Helmand/Hirmand Water Treaty for Sustainable Transboundary Water Resources Development” (2015) 31 *International Journal of Water Resources Development* 499.

³⁸ Matthew KING and Benjamin STURTEWAGEN, “Making the Most of Afghanistan’s River Basins: Opportunities for Regional Cooperation”, The EastWest Institute (EWI), February 2010.

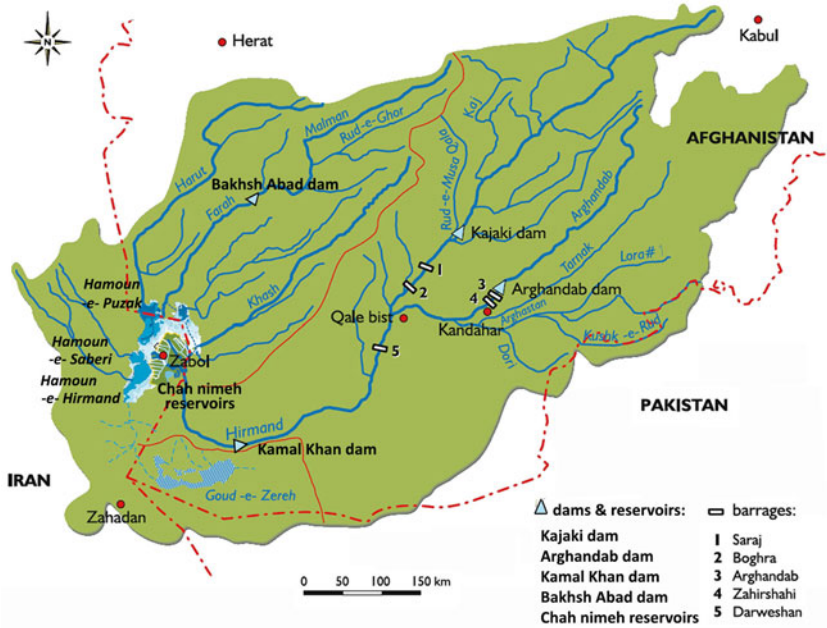


Figure 1. The Helmand River Basin.

reluctant to openly negotiate the use of its transboundary waters before achieving water control and guaranteeing its development and a similarly growing demand.³⁹ From a broader viewpoint of water issues, the Helmand River is divided by political borders, with asymmetric and interdependent socio-economic relations between the riparian States. It is affected by the anarchic nature of geopolitical tensions in the region.⁴⁰ Afghanistan has been a buffer State for superpowers with security interests in the region during the colonial and post-colonial periods. The geopolitical competition for security in Afghanistan has been referred to as the “Great Game” – an apt description for the strategic rivalry and confrontation between superpowers, namely the British and Russian Empires and, later, the United States versus the Soviet Union, as well as between regional powers like India and Pakistan.⁴¹ The following section will examine the history of legal

³⁹ Nagheby and Warner (*supra* note 2) show how efforts – either by Iran or international organizations or even some third parties like Germany and the Netherlands – to create an integrative regional/basin-wide plan for cooperation and management of the Helmand River and for protection of the Hamoun wetlands failed. One important reason for such failure, which may still be operative today, was that some forces in Afghanistan were “sanctioning cooperation with Iran on transboundary waters” (at 566). Afghanistan’s unwillingness to cooperate might also be seen in its refusal of invitations to protect the Hamoun wetlands – e.g., joining the Ramsar Convention and the like. Such non-cooperative acts of Afghanistan, however, could be partly justified by the legal debate over the protection of the environment vs. the need for development. See more details concerning the “politics of cooperation” over the legal arrangements of the Helmand River in Nagheby and Rieu-Clarke, *supra* note 5.

⁴⁰ See Nagheby and Rieu-Clarke, *supra* note 5.

⁴¹ See Nagheby and Warner, *supra* note 2.

water arrangements between Afghanistan and Iran under the rivalry nature of the Great Game to search for evidence of the ERU principle.

III. Placing the Helmand Legal Arrangements in its Political Context

In reviewing the historical context of the HRB and controversies between Iran (or Persia) and Afghanistan in the late 1800s and 1900s, I acknowledge that the customary principle of ERU was not obligatory when the HRB's legal arrangements were made. The principles underpinning the ERU, such as the importance of environmental protection, also differ from what is considered today. Therefore, assessing past legal arrangements as a reference point for current legal controversy and judgement is interesting. It is also interesting to consider how the ERU principle – which became a common reference of both Iran and Afghanistan at some point⁴² – has been implemented in the HRB. This will help determine the gaps and flaws in existing law and resolve the disputes.

A. Goldsmid and McMahon Arbitrations

The first arrangements for water between Afghanistan and Iran were prompted by imperialist rivalry over sovereignty and territorial boundaries in the late 19th century.⁴³ By the end of the Anglo-Persian War (1856–7), and under the rivalry of the Great Game between the British Empire and Russia, the 1857 Treaty of Peace (the Paris Treaty) between Persia and Great Britain was signed. Under its terms, Persia was obliged to relinquish all claims to Herat by acknowledging the independence of Afghanistan under British suzerainty, and Britain agreed to serve as the arbiter of disputes between Persia and Afghanistan “in a manner just and honourable to Persia”.⁴⁴ As a result, in 1872,⁴⁵ a British officer, General Sir Frederic Goldsmid,⁴⁶ acted for Britain in arbitrating a dispute between Iran and Afghanistan over the delimitation of the boundary at the border region of Sistan, where the delta of the Helmand River is located. A decision was made to delineate the main branch of the Helmand River in the delta region, with the principal irrigation areas and the major population at the time remaining on one side of the newly established border. Persia and the supply canals necessary for those Persian irrigations were assigned to the other side of the border, Afghanistan.⁴⁷ The problem with Goldsmid's settlement was the lack of any decision on, or recommendation for, a mechanism for water division between the two newly divided sides. He offered only the general advice: “It is, moreover, to be well understood that no works are to be carried out on either side calculated to interfere with the requisite supply of water for irrigation on the banks of the Helmand.”⁴⁸ Moreover, he did not consider the natural effects of changes in river morphology and their consequent influence on the political border. The result of Goldsmid's arbitration may look unfair to

⁴² In this regard, in January 2016, Afghanistan and Iran signed a Joint Statement *emphasizing* the ERU principle in sharing their transboundary waters over the Harirod River (another shared river between Iran and Afghanistan). See “Iran and Afghanistan Have Released a Joint Statement” *Tasnim News* (7 January 2016), online: *Tasnim News* (Iran) <https://www.tasnimnews.com/fa/news/1394/10/17/964439/>.

⁴³ See Mojtahed-Zadeh, *supra* note 1. See also Benjamin HOPKINS D, “The Bounds of Identity: The Goldsmid Mission and the Delineation of the Perso-Afghan Border in the Nineteenth Century” (2007) 2 *Journal of Global History* 233.

⁴⁴ Mojtahed-Zadeh, *supra* note 1 at 180.

⁴⁵ Note that the first and second Anglo-Afghan wars between the British Empire and the Emirate of Afghanistan occurred from 1839 to 1842 and from 1878 to 1880.

⁴⁶ In some sources, this name is given as Goldsmith.

⁴⁷ Mojtahed-Zadeh, *supra* note 1.

⁴⁸ *Ibid.*, at 248.

Iran as it simply left downstream Iran's serious water allocation concern unresolved with high uncertainty.

Although the question of water allocation remained unanswered in Goldsmid's arbitration, controversies over the Helmand waters in the delta were, apparently, settled locally.⁴⁹ However, further disputes between the two countries occurred in 1896, mainly because the river changed its course at the border area following flooding, after which a severe drought occurred. In 1903, the British assigned Colonel Sir Henry McMahon to demarcate new boundaries and determine water rights. Relating to the water allocation between the two sides, it seems that McMahon first ruled that the Helmand water should be divided *equally* between the two parties in the border area in 1903–4. However, in 1905, McMahon decided to allocate two-thirds of the Helmand water in the delta to Afghanistan and the remaining third to Iran; the water demand of the Hamoun wetlands was neglected in his arbitration (indeed, the environment was not considered an important *issue* at the time).⁵⁰ While both parties accepted the decision relating to political borders, Iran objected to McMahon's compromise on water allocation at that time. While the reasons for McMahon's change are not clear from the literature, the correctness of the arbitration outcome could potentially be questioned since the Iranian side of the boundary was at that time broader, more fertile, and more populous than the Afghan side in the province of Nimroz, even without taking into consideration the needs of the Hamoun wetlands themselves.⁵¹ The arbitration outcome could be interpreted as a deliberate British tactic to keep Afghanistan as a buffer State under their control.

One interesting observation is that, despite the geopolitical shadow cast over the HRB, the idea of equitable utilization was cited as the basis for the first attempts in the 1870s to resolve the water disputes between Afghanistan and Iran over the Helmand River.⁵² However, from a political point of view, allowing Afghanistan potentially complete control of the water while under British suzerainty and serving as a "buffer State" against Russia by separating the major water demand in Persia from the total water supply in Afghanistan meant that the Goldsmid arbitration could be seen to favour Great Britain in the broader scheme of things.⁵³ Therefore, even if it is agreed that the arbitrations were based on equitable considerations, the British imposed, *at best*, a very narrow legal regime of "equitable" utilization by placing the water tap in Afghanistan, apparently to protect their security interest in colonized India, the "jewel in the crown". However, apart from this political interpretation, from a legal perspective, it seems at first glance, as McCaffrey points out, that the Goldsmid arbitration was based on a "no significant harm" principle rather than the ERU principle, as it did not interfere with existing water allocations between Afghanistan and Persia: that is, "*no works are to be carried out on either side*".⁵⁴

Notwithstanding this, it must be put into context to understand and interpret the Goldsmid Award. First, most of the water demand – for irrigation and the population – was on the Persian side.⁵⁵ Second, the award did not explicitly determine water division between the two sides, instead being limited to a general statement on preserving *all* the existing uses and the "requisite supply of water for irrigation" for *both* sides of the Helmand. Accordingly, as McCaffrey and Lammers note, the Goldsmid Award seems to

⁴⁹ See Nagheeby and Warner, *supra* note 2.

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

⁵² McCaffrey, *supra* note 18 at 284; See Johan G. Lammers, *Pollution of International Watercourses: A Search for Substantive Rules and Principles of Law* (Leiden: Brill, 1984) at 505.

⁵³ See more in Hopkins, *supra* note 43.

⁵⁴ McCaffrey, *supra* note 18.

⁵⁵ Mojtahed-Zadeh, *supra* note 1.

have been based principally on the equitable considerations of the time.⁵⁶ However, this semi-colonial and limited view of ERU soon ended in failure because it did not accurately and clearly account for changing circumstances, including the future development interests of Afghanistan and the effects on downstream Iran. Moreover, the arbitration award did not provide a specific solution for parties to deal with times of flood and especially drought – the extreme events that ultimately consigned the arbitration to failure. Legal arrangements of this nature were primarily politically oriented tools designed solely to serve the security interests of the arbitrator. In addition to the lack of sufficient consideration of the ERU principle, these legal arrangements did not sufficiently consider the need for clarity and constancy (or predictability), which are some of the “criteria of legality” described by Brunnée and Toope.⁵⁷

B. The 1973 Helmand Treaty

The negotiations between Afghanistan and Iran over the utilization of the Helmand River continued into the 20th century during the post-colonial period, despite their changing fortunes due to international political competition during the Cold War. In the 1940s, the disputes were revived, particularly after the US-funded Helmand-Arghandab Valley Authority [HAVA] was formed. As part of the “new Great Game”, the United States pursued a similar geopolitical goal as the British had earlier – to maintain Afghanistan as a buffer State – though with the intent of making it a “development” model for the whole world.⁵⁸ The US project in the HRB involved the construction of diversion dams and canals on the river in accordance with contracts made with the Afghans in 1945. Iran opposed the HAVA project and, after experiencing low water flow and drought in the downstream Sistan region, Iran decided to call on the UN Security Council to step into the water disputes with Afghanistan. The United States offered to mediate the Afghanistan-Iran water dispute over the renewed, securitized Helmand River.⁵⁹ However, the fairness of the mediation by the United States could have been tainted by a conflict of interest because they wanted to build the dams and canals for the HAVA project for the Afghan government using a North American company, Morrison-Knudson.

The US proposal was based on creating a “neutral” commission of international experts from “disinterested countries” to study technical aspects of the water allocation problem, aiming to establish an engineering project agreed upon by Afghanistan and Iran.⁶⁰ It was for this reason that Iran and Afghanistan created the Helmand River Delta Commission in 1948. The Commission was established with the sole purpose of recommending “an engineering basis for mutual accord regarding the apportionment of the waters of the Helmand River”.⁶¹ The function of the Delta Commission as a “fact-finding body” was to “collect and study available data”,⁶² including stream flow and natural characteristics (floods and droughts) of the river, past and present uses in the delta area, existing works and plans for new installations, and to develop more scientific methods to use available

⁵⁶ See McCaffrey, *supra* note 18; see Lammers, *supra* note 52 at 505.

⁵⁷ See Jutta BRUNNÉE and Stephen J. TOOPE, “Interactional international law: An introduction” (2011) 3 *International Theory* 307. They say that a legal norm should meet the criteria of legality to generate a “distinctive legal legitimacy and a sense of commitment” (at 308). These features explain how a formally binding treaty on the parties may not create a sense of obligation when the treaty fails to meet the criteria of legality.

⁵⁸ Nagheeb and Warner, *supra* note 2.

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

⁶¹ *Case concerning the Helmand River (Afghanistan v. Iran)*, [1951] Report of the Helmand River Delta Commission: Afghanistan and Iran at 9.

⁶² *Ibid.*, at 4.

waters. But while Afghanistan expressed its satisfaction almost immediately after the Delta Commission published its report, Iran rejected the results. The Iranian rejection was mainly based on disagreement with the report's estimated number of irrigation lands in Sistan, an argument it had similarly made against McMahon's Award.⁶³

Almost twenty years after the failed US arbitration, and again following a severe drought in the downstream part of the river in 1970–1, the two countries finally signed the Helmand River Water Treaty in 1973.⁶⁴ The 1973 Treaty is based on the 1951 Helmand River Delta Commission report that Iran had initially rejected. Many argue that the 1973 Treaty emerged from “hidden” talks during the Cold War and was a “gift” from the United States (and Iran) to Afghanistan to stand against the (Russian) communists.⁶⁵ Forged under such extreme geopolitical rivalry, it is not far beyond expectation that the robustness of the 1973 Treaty is not just deeply flawed; the extent to which the ERU principle is considered also seems to be poor. Consequently, one may argue that the Treaty, at best, contributed to a much shorter “life cycle of norms”, as described by Brunnée and Toope.⁶⁶ This argument merits further investigation.

The Helmand River Delta Commission, from which the 1973 Treaty was inspired, aimed to provide “an equitable apportionment of the waters on the Helmand River”.⁶⁷ In addition, as noted by McCaffrey, the list of indicative factors for fact-finding by the Delta Commission “parallels strikingly the list of factors relevant to equitable utilization contained in Article 6 of the UN Convention”.⁶⁸ However, the 1973 Treaty does not explicitly allude to the principle of ERU, even though it often plays “the lead role” in planned water measures.⁶⁹ Therefore, it is reasonable to raise this paper's core question: to what extent does the 1973 Treaty reflect the criteria of ERU?

IV. Analysis of the 1973 Treaty in Light of the ERU Principle

Article 38 of the Statute of the International Court of Justice outlines international conventions, customary international law, and the general principles of law recognized as the main sources of international law.⁷⁰ Considering these sources, whether the existing formal treaty for the Helmand River accounts for rights and obligations under international law is particularly complex. Neither of the riparian States on the Helmand River is a member of the Watercourses Convention. Despite this, as part of customary law, the ERU principle is binding upon all States and so would be binding on Afghanistan and Iran regarding the utilization of the water resources from the HRB. However, where a treaty exists between States, the treaty may enjoy legal priority above customary international law. Since there are established treaty provisions for the Helmand River, this section will attempt to analyse the Treaty in light of the ERU criteria.

⁶³ Nagheeby and Warner, *supra* note 2.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ Brunnée and Toope, *supra* note 57.

⁶⁷ The Helmand River Delta Commission Report, *supra* note 61 at 10 (emphasis added).

⁶⁸ See McCaffrey, *supra* note 18 at 285.

⁶⁹ McCaffrey remarks that “These principles [no-harm and equitable and reasonable utilization] fit together synergistically, with the former taking the lead role in some situations (e.g., allocation) and the latter in others (e.g., planned measures, pollution)”; see Stephen C. MCCAFFREY, “The 1997 UN Convention: Compatibility and Complementarity” in Attila TANZI et al., eds., *The UNECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes: Its Contribution to International Water Cooperation* (Leiden: Brill Nijhoff, 2015) at 51.

⁷⁰ *Statute of the International Court of Justice*, 26 June 1945, 33 U.N.T.S. 993 (entered into force 24 October 1945), art. 38.

As discussed, the ERU principle is the overarching principle of international water law. It seeks to balance the uses and the protection of international watercourses by considering all relevant circumstances. To utilize a shared watercourse equitably and reasonably, all relevant factors, as listed in Article 6 of the Watercourses Convention, should be analysed diligently by considering the interests of other riparian States. Furthermore, by considering all factors, the principle of ERU not only includes the “blue” and “green” water types of international watercourses and aquifers but also takes notice of the ecosystem and even “virtual” water.⁷¹ The ERU principle applies in a case of a conflict of interests, such as between Afghanistan and Iran in respect of the Helmand River, and “where the quantity or quality of the water is such that all the reasonable and beneficial uses of all watercourse States cannot be fully realized”.⁷² This is clarified by Article 6(1), which declares that “no use of an international watercourse enjoys inherent priority” and that “all relevant factors are to be considered together and a conclusion reached on the basis of the whole”.

A. Content

Of the two competing models of equitable utilization at an international watercourse – one being “classic apportionment”, the other “shared benefits”⁷³ – the former apparently provided the basis of the 1973 Helmand River Water Treaty, leaving riparian States at liberty to unilaterally use their share. However, a decision was made on the fairness of the overall water amount to be used. The 1973 Treaty contained twelve Articles, with two protocols related to Articles VIII and IX. Article I(c) identifies a “normal water year” as the year during which the total volume of water from the 1st of October to the end of September the next year is 5661.71 MCM, as measured and calculated at the hydrometric station of Dehrawud, upstream of the Kajakai Dam. The 1973 Treaty relied on the previous Delta Commission’s recommendations that allocated water primarily for irrigation purposes, which Iran had initially rejected. According to the 1973 Treaty, Afghanistan must supply Iran with an average of 22 cubic meters per second, with an additional 4 cubic meters per second for “goodwill and brotherly relations” in a normal (or above normal) water year.⁷⁴ This amounts to about 820 MCM per year, or only 8.5% of the average surface water availability of 9,552 MCM in the whole basin, or 14% of 5,661.71 MCM as measured at the Dehrawud station, and less than 14% of the overall water demand and requirement in Sistan.⁷⁵ In short, this was less water than any of the previous legal arrangements.⁷⁶ To contend with the conflicts over the Helmand waters and to implement the Treaty’s provisions, Article VIII directs each party to appoint a commissioner and deputy commissioner as part of the Helmand River Commission (HRC). The first protocol of the Treaty sets out the commissioners’ authority and functions.

⁷¹ Patricia WOUTERS, “The Relevance and Role of Water Law in the Sustainable Development of Freshwater: From ‘Hydrosovereignty’ to ‘Hydrosolidarity’” (2000) 25 *Water International* 202.

⁷² Rieu-Clarke and Spray, *supra* note 30 at 18.

⁷³ See A. Dan TARLOCK and Patricia WOUTERS, “Are Shared Benefits of International Waters an Equitable Apportionment?” (2007) 18 *Colorado Journal of International Environmental Law and Policy* 523.

⁷⁴ Article II of the 1973 Treaty, *supra* note 3.

⁷⁵ Thomas and Varzi, *supra* note 37.

⁷⁶ The history of the legal arrangements over the Helmand River shows a significant decline in the water allocation to the Iranian side of the river. For instance, in a very rough calculation, McMahon’s initial decision was to allocate the Helmand water based on a 50/50 split between Iran and Afghanistan, respectively, before it was changed to 30/70. Then, in 1939, both sides agreed on the 1939 Treaty to divide the Helmand water based on a 50/50 split. But later, in 1951, the HRC suggested that about 14 per cent of the Helmand water be allocated to Iran, which also ultimately appeared in the 1973 Treaty. See more in Nagheeb and Warner, *supra* note 2.

Since the core of the Treaty is to agree on Iran's water allocation (for agriculture), Article V gives priority to meeting Iran's water rights based on Articles II, III, and IV of the Treaty. Nevertheless, the challenge is to resolve a paradox in the Treaty since paragraph two of Article V of the Treaty gives almost complete freedom to Afghanistan to utilize the Helmand water (after Iran gets its allocation) subject to the following conditions:

Afghanistan agrees that it shall take no action to deprive Iran totally or partially of its water right to the water of the Helmand River as fixed and delimited by the provisions of Articles II, III and IV of this treaty.

Afghanistan shall retain all rights to the balance of the water of the Helmand River and may make such use or disposition of the water as it chooses.

Iran shall make no claim to the water of the Helmand River in excess of the amounts specified in this treaty, even if additional amounts of water may be available in the Helmand Lower Delta and may be put to a beneficial use by Iran.

Furthermore, some challenges, such as climate change, new developments planned with poor water management schemes, changing socio-economic patterns, and increasing environmental degradation on both sides of the HRB, have not only complicated the management of transboundary waters under the 1973 Treaty but have also hindered the resolution of the conflict towards ERU.

B. The Role of Physical Factors

To start with relevant ERU factors, among other elements, it is important to discuss the physical features of international watercourses – for example, hydrological and geographical characteristics – since these physical features often arise in controversial debates on equitable water allocation, particularly in the case of the Helmand River between Afghanistan and Iran. Physical factors play significant roles in bilateral bargaining between both sides of the HRB. Specific discourses, such as “our country contributes more waters in the flow” or “the river passes a longer way through our lands”, are still used to bargain over the utilization of waters within the modern, “right-based” realm to legitimize certain acts or claims. These discourses are present in the current controversial debate over the case of the Helmand River, resulting in the confrontation of two outdated doctrines of “absolute sovereignty”. Generally, even though geographical and hydrological factors are the first to be set down in most codifications, it would appear from judicial and State practice that they rank low in the hierarchy of factors relevant to equitable utilization.⁷⁷ Concerning these factors, State practice also suggests that “river frontage” has rarely been invoked as a basis for determining an equitable regime for the utilization of an international river.⁷⁸ Besides, the extent of the “drainage area” would appear to lack significance, similar to river frontage.⁷⁹

In some comparable situations, such physical factors play only a *secondary* role in attempts at “equitable utilization”.⁸⁰ In the case of the Colorado River, for instance, which flows through Mexico for just 100 miles (some way less than 10% of its

⁷⁷ Ximena FUENTES, “The Criteria for the Equitable Utilization of International Rivers” (1997) 67 *The British Yearbook of International Law* 337.

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*

1,300-mile total length), the portion of the river flowing through the respective territories of Mexico and the US was never considered as a basis for the allocation of waters.⁸¹ Similarly, in the dispute concerning the Narmada River (central India), the Indian states of Gujarat and Madhya Pradesh hosted 14% and 86% of the drainage basin but were allocated 33% and 67% of its waters, respectively.⁸² Thus, physical factors are undoubtedly given less weight in certain circumstances.⁸³

In the case of the Helmand River, about 85% of its length is in Afghanistan. Thus, some Afghans strongly believe that it is entirely a “national” and “internal” river flowing only in Afghan territory and take this as their bargaining position.⁸⁴ In this regard, Mojtahed-Zadeh points out:⁸⁵

[t]he original problem was that rulers of the British protectorate of Afghanistan at the turn of the twentieth century considered [the] river Hirmand as an internal river of that country, reserving for Afghanistan the right to utilize its water in whatever way it wished.

McMahon’s Memorandum of 25 September 1904 asserts: “The Afghan Government does not admit that there is any water question in dispute, as their geographical position makes them sole owner of the whole Helmand above the Band-i-Sistan”.

In the same vein, some in Iran assert that most water utilization historically occurred downstream of the river (currently located at Sistan on the Iranian side and Nimroz on the Afghan side, surrounding the Hamoun wetlands). However, from a legal perspective, none of these narratives is necessary to allocate the rights to water utilization equitably and reasonably. When surveying all court decisions on transboundary river cases worldwide, the physical factors of shared water basins have mostly been secondary considerations compared with other features; for example, environmental, economic, and social needs. In other words, the primary considerations of equitable utilization revolve around vital human needs, including social and economic needs and the protection of ecosystems, not physical geography.

C. Socio-Economic Factors

Social and economic needs are prominent considerations when determining ERU. The Helmand River plays a significant role in water-scarce regions of both Afghanistan and Iran and has made an essential contribution to the livelihood of the surrounding inhabitants. While Afghanistan, low on the Human Development Index (HDI), sees its water resources as a strategic reserve with which to further its economy and help lift its population out of poverty, Iran needs the same water to safeguard its population’s drinking demand and agricultural activity in Sistan, which has a fragile economy and no other available water. In this case, the 1973 Treaty does not provide a platform for the cooperation, monitoring, or exchange of reliable data with which to examine the social and economic criteria on both sides to estimate how far their utilization is consistent with the ERU principle. As there is no other alternative to the 1973 Treaty, it is difficult to find a clear solution. Examining the 1973 Treaty with the modern understanding of the ERU

⁸¹ *Ibid.*, at 398.

⁸² *Ibid.*

⁸³ *Ibid.*, at 401.

⁸⁴ See, for example, Najib Agha FAHIM, “Why Did a Treaty that Ended a Hundred Years of Conflict Become Controversial Again” *BBC Persian TV* (2019), online: Pargar (BBC Persian TV) <https://www.facebook.com/notes/pargar-bbc-persian-tv/2471442749550394>.

⁸⁵ See Mojtahed-Zadeh, *supra* note 1 at 247.

principle, the 1973 Treaty, which was based on the calculation of the Delta Commission and was limited to the irrigation requirements from the Helmand River, seems to overlook other socio-economic considerations downstream of the basin; for example, the importance of the river for fishing and navigation, but note that some of the dependent population were ignored. Being lower on the HDI than Iran, Afghanistan may have a stronger argument based on social and economic factors. This gives rise to a customary debate on balancing the utilization of water for development/economic prosperity at the upstream, taking into account the needs of the downstream while protecting the ecosystem and vital human rights. Having neglected such important issues, the 1973 Treaty remains static with rigid rules on mere water division, which is not consistent with the ERU principle.

D. Vital Human Needs and Environmental Protection

In the assessment of conditions relevant to the ERU principle, although no use enjoys inherent priority, “special regard” is paid to “vital human needs” in Article 10(2) of the Watercourses Convention. Therefore, if a use threatens the availability of water sufficient to sustain human life consistent with an individual’s right to water, it is considered inequitable.⁸⁶ Additionally, in weighing up considerations relevant to the ERU principle, the protection of an ecosystem finds increasing support. On the obligation to protect the ecosystems of an international watercourse, Article 20 of the Watercourses Convention, as “a simple, but potentially powerful, provision”,⁸⁷ instructs that “watercourse States shall, individually and, where appropriate, jointly, protect and preserve the ecosystems of international watercourses”.

Viewing the case of the Helmand River through the lens of Integrated Water Resources Management and River Basin Management, Thomas and Varzi show how the 1951 Delta Commission, on which, as noted above, the 1973 Treaty was established, underestimated the water demands of the Hamoun wetlands in its calculations.⁸⁸ They observe that the Treaty failed to appreciate the integrity of the “agro-ecological system” in the Sistan Delta. While the Delta Commission considered water for irrigation as “beneficial”, the water entering the Hamoun wetlands was described as “waste water”.⁸⁹ No such specific issue is explicitly stated in the 1973 Treaty, but Article II acknowledges that the total amount of water from the Helmand River to be delivered to Iran by Afghanistan accords with the report of the Helmand River Delta Commission. Accordingly, considering the contemporary importance of environmental protection in defining the ERU principle, the 1973 Helmand Treaty seems to be demonstrably misleading and factually wrong by focusing only on the demand for irrigation water. The water to sustain the wetlands, on which the population of the Sistan (and the delta on both sides of the border) is dependent, was labelled “waste”.

While the 1973 Treaty allows some water for Iran’s irrigation and preserves Afghanistan’s right to unilateral water development, it leaves the ecosystems of the HRB unprotected, the social and economic welfare of the population surrounding the Hamoun wetlands vulnerable, and the sustainability of the whole basin at risk. Consequently, the Treaty could be censured as a breach of the ERU principle in two

⁸⁶ *Convention on the Law of the Non-Navigational Uses of International Watercourses*, Report of 6th Committee convening as the Working Group of the Whole, 11 April 1997, UN Doc A/51/869.

⁸⁷ Rieu-Clarke and Spray, *supra* note 30 at 20.

⁸⁸ Thomas and Varzi, *supra* note 37.

⁸⁹ *Case concerning the Helmand River (Afghanistan v. Iran)*, *supra* note 61 at 111; the Helmand River Delta Commission reports: “It is the judgment of the Commission that very little of this water serves a beneficial purpose.”

important ways: failing to protect vital human needs and the ecosystems of the HRB. The obligation to protect ecosystems is also closely connected to the obligation of maintaining the minimum environmental flow, which is now recognized in general international water law. The obligation of environmental flows, an important feature of ERU, has also received significant support from recent arbitral and judicial decisions; see the case of Kishenganga Arbitration (Pakistan v. India).⁹⁰ The 1973 Treaty does not ensure minimum environmental flows, leaving the downstream ecosystem vulnerable, particularly in times of drought and upstream development in Afghanistan or Iran. This is substantiated by the scientific findings of other studies investigating the role of development at upstream Afghanistan and in the degradation of the Hamoun wetlands, which discovered that dams and, more importantly, massive irrigation expansion, including opium cultivation during the conflict in Afghanistan, had contributed to this deterioration.⁹¹ However, it should be noted that Iran's utilization of the same waters also needs to be considered when studying the degradation of the HRB's ecosystems, particularly the Hamoun wetlands. Several other factors should also be considered to understand better why the Hamoun wetlands are nearly dried up, which includes unsustainable agriculture and extensive canal creation on both sides, Iran's diversion of the Helmand River water to Chahnimeh, massive opium cultivation, and groundwater consumption in Afghanistan.⁹²

The ERU principle is accompanied by a procedural obligation to cooperate and to conduct a transboundary Environmental Impact Assessment of projects before permitting them. Both Afghanistan and Iran argue that their water development is based on the rights afforded to them by the bilateral Treaty and that it complies with the ERU principle. However, the practice of the riparian States of the HRB is dominated by an insistence on unilateral actions without any exchange of data or cooperation on the protection of the Hamoun wetlands.⁹³ The efforts of international organizations, particularly UNESCO, the Ramsar Convention, the UN Development Programme, the UN Environment Programme, and the Global Environment Facility, have failed to create an integrative regional/basin-wide plan for cooperation and management of the Helmand River and the protection of the Hamoun wetlands.⁹⁴ Iran's invitation to register and protect the whole Hamoun wetlands under the Ramsar Convention and the latest proposal in 2020 for conducting a joint study did not receive a positive response from Afghanistan. Therefore, whether Afghanistan or Iran is committed to the Treaty or complies with the ERU principle is unclear.

Iran and Afghanistan have an equal duty to protect and preserve the ecosystems of the HRB and have a shared responsibility for liability and compensation for environmental

⁹⁰ See more in Raman, *supra* note 31. *Indus Waters Kishenganga Arbitration (India/Pakistan)*, Partial Award of 18 February 2013, [1995] P.C.A. Case No. PK-IN 82842; and *Indus Waters Kishenganga Arbitration (India/Pakistan)*, Final Award of 20 December 2013, [2013] P.C.A. Case No. PK-IN 109924.

⁹¹ See Mohammadreza HAJIHOSEINI, Hamidreza HAJIHOSEINI, Saeed MORID, Majid DELAVAR, and Martijn J. BOOIJ, "Impacts of Land Use Changes and Climate Variability on Transboundary Hirmand River Using SWAT" (2020) 11 *Journal of Water and Climate Change* 1695; see also Ameneh MIANABADI, Kamran DAVARY, Hojjat MIANABADI, and Poolad KARIMI, "International Environmental Conflict Management in Transboundary River Basins" (2020) 34 *Water Resources Management* 3445.

⁹² *Ibid.* See also B.J.M. GOES, S.E. HOWARTH, R.B. WARDLAW, I.R. HANCOCK, and U.N. PARAJULI, "Integrated Water Resources Management in an Insecure River Basin: A Case Study of Helmand River Basin, Afghanistan" (2016) 32 *International Journal of Water Resources Development* 3; and M. SHARIFIKIA, "Environmental Challenges and Drought Hazard Assessment of Hamoun Desert Lake in Sistan Region, Iran, Based on the Time Series of Satellite Imagery" (2013) 65 *Natural Hazards* 201.

⁹³ Nagheebay and Rieu-Clarke, *supra* note 5.

⁹⁴ See *supra* note 39 about "sanctioning cooperation with Iran on transboundary waters". See more in Idrees MALYAR, *Transboundary Water Institutions in Developing Countries: A Case Study in Afghanistan* (Oregon State University, 2016).

damage caused by their activities within and beyond their jurisdiction. However, protecting the Hamoun wetlands without the cooperation of Afghanistan (as the main water source) is either unfeasible or inadequate for downstream Iran. In this respect, the 1973 Treaty lacks the essential components to oblige riparian States to cooperate and to give adequate notification of planned works, making it very difficult to apply the ERU principle. Furthermore, even though the 1973 Treaty does not explicitly deal with the responsibilities of both States concerning the human right to water, all States are obliged to respect the human right to water according to their duties (including positive and negative obligations) under international human rights law: this is increasingly recognized by both the international community and authoritative human rights bodies. While there is a debate on whether a substantive universal human right to water exists, some legal scholars believe that under Articles 11(1) and 12(1) of the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR), the human right to water is legally binding. General Comment 15 – adopted in 2002 by the UN Committee on Economic, Social and Cultural Rights (CESCR), which monitors the implementation of the ICESCR – declares that “the human right to water is indispensable for leading a life in human dignity. It is a prerequisite for the realization of other human rights.”⁹⁵ Both Iran and Afghanistan ratified and acceded to the ICESCR. However, given the significant transboundary damage resulting from both States’ activities, the 1973 Treaty is not in line with the obligations to assure the rights of individuals under international human rights law. Accordingly, the current utilization of the HRB is not consistent with established legal principles and practices.

In sum, the 1973 Treaty lacks the potential to tackle the actual water problems within an integrated basin-wide framework and cannot satisfy the interests of both riparian States. The 1973 Treaty is an agreement only for issue-specific water division – that is, irrigation – and it does not meet all the *demands* in the basin, particularly for environmental protection, nor does it reflect a *basin-wide view*. In fact, by ignoring the importance of vital human needs and ecological/environmental protection, the 1973 Treaty does not have the strong legal, institutional, and conventional ability to balance the water control and development requirements in upstream Afghanistan or the ecological demand downstream of the basin. Therefore, the 1973 Treaty seems *ill-equipped* to cope with water conflicts at the Helmand River and is *ill-suited*, being “a matter of misplaced faith in formal rules”,⁹⁶ to guide relations between Afghanistan and Iran for equitable utilization of the HRB.

V. Conclusion

This paper has attempted to reveal how “law” may be misrepresented in political actions, focusing on the ERU principle. In so doing, the paper critically examines the politics underlying the historical legal arrangements for the HRB. The findings indicate that the ERU principle was used as a self-help tool to intensify competition rather than create a collective identity to improve equity over the HRB. In addition, the paper assesses the 1973 Helmand River Water Treaty in terms of the ERU principle, hoping to foster a constructive discussion on improving cooperation over the utilization and protection of the shared water and ecosystem at the HRB between Afghanistan and Iran.

⁹⁵ For the human right to water discussion, see the *International Covenant on Economic, Social and Cultural Rights*. Thorsten KIEFER and Catherine BROLMANN, “Beyond state sovereignty: The human right to water” (2005) 5 *Non-State Actors and International Law* 183. *Rights*, 16 December 1966, 993 U.N.T.S. 3, 6 I.L.M. 360 (entered into force 3 January 1976) [ICESCR]. Committee on Economic, Social and Cultural Rights, *General Comment No. 15: The Right to Water*, 20 January 2003, UN Doc. E/C.12/2002/11 (2003).

⁹⁶ Jutta BRUNNÉE, “Law and Politics in the Nile Basin” in American Society of International Law, *Proceedings of the 116th Annual Meeting* (Cambridge: CUP, 2008) 359.

Based on the analysis presented here, the legal arrangements for the Helmand River and the equity principles are often overshadowed by the security interests of outsiders. Contrary to Afghanistan's ongoing political discourse of representing the 1973 Helmand River Water Treaty as "the best in the world", the Treaty is highly restricted and provides little room for legal principles of equitable and sustainable utilization. Accordingly, its narrow interpretation and lack of consideration for the environment impede the "practice of legality"⁹⁷ at the HRB. At best, the 1973 Treaty only provides a grey space in which both legality and illegality can operate and a narrow line of legal communication to maintain the *status quo*. By referring to this ill-fitting legal arrangement, Afghanistan interprets its recent act of water diversion⁹⁸ as "legal" while Iran considers it "illegal". The question of how the 1973 Treaty could be remedied to create a joint regulation of water (and land) in the whole HRB merits further research.

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⁹⁷ Brunnée and Toope, *supra* note 57.

⁹⁸ See Nagheeby, *supra* note 4.

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