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ANARCHY AND THE LAW OF INTERNATIONAL WATERCOURSES

**Unpacking the role of equitable and reasonable utilisation principle
in the pursuit of water conflict transformation**

M NAGHEEBY

PhD

2021

ANARCHY AND THE LAW OF INTERNATIONAL WATERCOURSES

**Unpacking the role of equitable and reasonable utilisation principle
in the pursuit of water conflict transformation**

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the requirements of the
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THESIS ABSTRACT

This thesis investigates the role of the principle of equitable and reasonable utilisation (ERU), as the core customary principle of international water law, in improving hydro-political relations within anarchic geopolitical setting. By critically analysing the interactions between anarchy and the ERU principle, the study also provides an in-depth understanding of hydro-political relations in the Helmand River Basin between Afghanistan and Iran.

On the theoretical level, while arguing that anarchic geopolitical setting is a critical determinant of shaping hydro-political relations, this study tackles the root causes of the failure to implement the ERU principle within such anarchic environment. Drawing upon the two frameworks of Interactional International Law and Transboundary Waters Interaction Nexus (TWINS), the study introduces the Universe of Hydro-political Relations in order to provide a more nuanced explanation of the complex and interlinked legal and political circumstances surrounding international watercourses. The analysis shows how the interests and identities of states should be more carefully considered together if a “transformation” towards equity is expected in hydro-political relations. The effectiveness of such transformation depends, in part, on the specific anarchic setting. This thesis, therefore, places a theoretical focus on the ERU principle, whether it has normative power to shape state’s interest and identity, its legitimate function to attack symptoms of anarchy and its potential for rendering hydro-political relations equitable and sustainable.

At the case-study level, the study assesses the existing treaty over the Helmand River with regards to the ERU principle. With its limited capacity to address the “life cycle of norms” through interactional international law, the analysis shows that the treaty rarely reflects the notion of equity. Despite limited cooperation between Afghanistan and Iran, both riparian states have continued to unilaterally utilise their shared waters. Within such an anarchic setting, the ERU principle serves rather as a bargaining strategy. While Afghanistan has been developing dams, a lack of a positive response to calls to consider environmental impacts and revive the Hamoun wetlands through mutual cooperation reflects a situation that is reminiscent of the “tragedy of the commons.” However, despite the situation in the basin remaining *ad hoc* for over a century, new developments in cooperation may contribute to creating a shared understanding between Afghanistan and Iran with regard to the utilisation of the Helmand River.

The outcomes of the research will contribute not only to enriching the existing knowledge of complex hydro-political dynamics but will also benefit policymaking on water diplomacy and peace building processes for international waters at the regional and global levels, such as the 2030 UN agenda. At the case study level, the research will provide in-depth and updated analytical insight into the Helmand River Basin which suffers from limited evidence-based research. In addition, it is expected that practical insights from the case study will help build guidelines for use in other transboundary river basins.

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ABBREVIATIONS

CBD	Convention on Biological Diversity
EIA	Environmental Impact Assessment
EU	European Union
FAO	Food and Agriculture Organization of the United Nations
FHH	Framework of hydro-hegemony
GAP	Turkey’s Southeastern Anatolia Project
GDP	Gross Domestic Product
GEF	Global Environmental Facility
GERD	Grand Ethiopian Renaissance Dam
ha	Hectares
HAVA	Helmand and Arghandab Valley Authority
HRB	Helmand River Basin
HRC	Helmand River Commission
ICJ	International Court of Justice/ International Court of Justice Reports
IL	International Law
ILA	International Law Association
ILC	International Law Commission of the United Nations
IR	International Relations
IWRM	Integrated Water Resource Management
MCM	Million Cubic Meters
NATO	North Atlantic Treaty Organisation
RBM	River Basin Management
RBO	River Basin Organisation
TWINS	Transboundary Water Interaction Nexus
UHR	Universe of Hydropolitical Relations
UK	United Kingdom

UN	United Nations
UNDP	United Nations Development Programme
UNECE	United Nations Economic Commission for Europe
UNEP	United Nations Environmental Programme
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
Water Convention	The 1992 UNECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes
Watercourses Convention	The 1997 UN Convention on the Law of the Non-Navigational Uses of International Watercourses
US	United States

PREFACE

Hundreds of birds embark on a perilous journey across seven treacherous valleys in search of a king who can right the wrongs in their world. They are led by the poet Attar, who has been transformed into a sharp-beaked, crested hoopoe. The troubles that spur them into flight — “Anarchy — discontent — upheaval! Desperate fights over territory, water, and food! Poisoned air! Unhappiness!” — are of course all too familiar in our world. — *from The Conference of the Birds – the poem by Farid ud-Din Attar (1145-1221) – translated by Peter Sis*

During my research, I have been witnessing several tragic faces of anarchy in this world; on top of all military invasions, occupations, and wars, it has been the COVID-19 pandemic followed by global political mess and rivalry to respond. However, the pandemic has also uncovered the inequalities and injustice and underlined the world’s fragility. While these dramas may trigger unilateralism and intensify inequalities, they may promote transformation towards equity and sustainability inspired by collective behaviour.

For long time, I have observed such condition of living with inequalities, uncertainties and vulnerability though associated with strong social resilience of people of Sistan (in Iran) and Nimrooz (in Afghanistan) surrounding the Helmand River, who were a big family one time. I observed the painful symptoms of anarchy, the desire for equity and justice, and the image of common identity reflected in the Hamoun Wetlands. I owe much to the Iranian and Afghan people of this region, and I wish I could do something more meaningful for them than this little PhD. While Afghanistan, in particular, has been a case study for many international experts for long time, understanding of the socio-political dynamics of this region remains limited, or rests on ill-founded assumptions. Given the intense rivalry and central importance of ethnic identity, Afghanistan is very difficult and complicated case study for researchers to find the facts on the ground and spot fake and real news. International “experts” and “consultants” come and go without understanding the deep-rooted socio-political nature of Afghanistan.

This brief background is just a part of my long story that led me to do my PhD, and I hope this gives even small contributions to having better understanding of the Helmand River Basin: firstly to promote the quality of the scarce existing research and secondly to produce and support a constructive dialogue for diplomats and politicians. I am very well aware that some, either Iranian or Afghans, may disagree with the conclusion or some parts of the thesis. I am also very well aware that charge of bias is common when writing about contentious issues in particular for those which may somehow subject to strong emotions in both sides. To me (and particularly in socio-political science), even being biased is not a serious problem that I think no one can escape from this but I believe that being fair with critical thinking matters. However, I am happy to receive feedbacks and stand corrected myself.

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I am thankful to the Northumbria University for awarding me with Scholarship, which allowed me to pursue my PhD studies full-time. I would like to thank Gita Gill for her very kind support in my first year of PhD. I am also grateful to Elaine Hall for her encouragement and invitation to create a podcast from my spooky paper on *The ghosts around the coasts* and publish it. I would also like to thank Tony

Ward, Mohamed Elewa Badar, Pushkar Jha and Alan Reed for their support. I am grateful to Sarah Jukes for her administrative support and guidance in Northumbria Graduate School. But, special thanks to the gentleman – having always a smile on face and with a sense of humour – who used to come every late evening to our office for cleaning while having chat together about real life outside office and everyday politics of the UK and glob.

I would particularly like to thank my friends and colleagues, who have supported me to do my PhD by providing me with welcome distractions from my studies and our friendly coffee chats out of the PhD's bubble. While they are too many to list all of them here, I would like to thank Laure-Elise and Giuseppe particularly for their very warm welcome at my first days of joining the university; Hanna, Sam and Mark Gr. whom we were together for the Friends of Palestine Society. Daria for our very nice coffee chats and our wonderful conversations during the difficult times of PhDing with mask! Radin, Emmanuel N., Aaron, Hossein, Emmanuel A., Paolo, Moses, Mark Ga., Hasan I., Payam, Hojjat, Hasan M.. Special thanks to Houshang, Tohid, Ostad, and Mohammad H.H. for their kind continued support and their 'friendship without border'. And, Alireza Najafi, to whom I owe a great debt of thanks for his kindness and support, who left us yet not forgotten.

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Above all, there are no words that can express the debt of deep gratitude I owe to whom he, in the desert with his thirsty lips, gave special and deep meaning to water; the water that never dies.

DECLARATION

I declare that the work contained in this thesis has not been submitted for any other award and that it is all my own work. I also confirm that this work fully acknowledges opinions, ideas and contributions from the work of others.

Any ethical clearance for the research presented in this thesis has been approved. Approval has been sought and granted by the Faculty Ethics Committee on June 8, 2018.

I declare that the Word Count of this thesis is 89,879 words

Name: Mohsen Nagheeby

Signature:

Date:

Introduction. Transforming hydropolitical relations under the myth of anarchy

“We can’t help being thirsty, moving towards the voice of water.”

(Molana - Jalal al-Din al-Rumi)¹

1.1. International waters surrounded by anarchy, politics and law: change is inevitable

Changes of all climatic, socio-economic, political, and legal kinds are becoming an increasing part of everyday life within the anarchic nature of the world politics, shaping not only the interests and identities of everyone but also targeting the inequality condition. If these changes perhaps create clarity and stability in one part of the world, they may cause confusion and uncertainty in another.² Just as building a dam or a small canal on an upstream part of a river may influence downstreamers, a lack of access to water and basic sanitation in a small village of an upstreamer can have an effect on a downstreamer’s use of the same water – causing significant unexpected changes in hydropolitical relations.³ While conflict concerning international waters may evolve over time and tap into the deepest

¹ Molana (or Rumi) poetry book, “Masnavi”, poem no. 837: “We can’t help being thirsty, moving towards the voice of water. Milk drinkers draw close to the mother. Muslims, Christians, Jews, Buddhists, Hindus, shamans, everyone hears the intelligent sound and moves with thirst to meet it”.

هر کجا بوی خدا می آید، خلق بین بی سر و پا می آید؛ ز انک جان ها همه تشنه ست به وی، تشنه را بانگ سقا می آید؛ شیرخوار کرمند و نگران، تا که مادر ز کجا می آید؛ در فراقند و همه منتظرند، کز کجا وصل و لقا می آید؛ از مسلمان و جهود و ترسا، هر سحر بانگ دعا می آید؛ خنک آن هوش که در گوش دلش، ز آسمان بانگ صلا می آید. مولوی- دیوان شمس- غزلیات

² This also reminds a poem by the Persian poet Sa’adi (1210 – 1290): “Human beings are members of a whole, In creation of one essence and soul. If one member is afflicted with pain, Other members uneasy will remain. If you have no sympathy for human pain, The name of human you cannot retain.”

بنی آدم اعضای یک پیکرند، که در آفرینش ز یک گوهرند؛ چو عضوی بدمرد آورد روزگار، دگر عضوها را نماند قرار؛ تو کز محنت دیگران بی غمی، نشاید که نامت نهند آدمی. سعدی- گلستان

The realities of the contemporary world may create an impression of a space in which little seems to make sense. This is exemplified in the “butterfly effect” when a single, apparently very small action, performed by one state in one location, has wide-ranging effects and results in significant changes to another state, a phenomenon which is highly unpredictable. See Shu-Yun Ma, ‘Political Science at the Edge of Chaos? The Paradigmatic Implications of Historical Institutionalism’ [2007] 28 International Political Science Review 57.

³ Such condition has been my own experience for long time that I have been trying hard to heal and relieve the pain from what people of Sistan (in Iran) and Nimrooz (in Afghanistan) have been suffering more than a century. While people in one side of the river may have relatively access to better services for drinking water and irrigating their lands, the other side is struggling with lack of basic water related service due to war, and poor socio-economic circumstances. One side of the border may be seen as “green”, while the other side, in just a few kilometers, may be most barren. This situation, however, is constantly changing in ‘favour’ of one side of the border, for instance, either in times of flood or drought. What is more painful is when you see these people who are now divided by the artificial border had been one time a ‘big family’ and still has many commonalities with each other. In my short experience of being with these lovely people on both sides, I observed the painful symptoms of anarchy, the desire for equity and justice, and the image of common identity reflected in the Helmand waters.

sense of riparian states' identities,⁴ a new interest may emerge through socio-political and economic changes and different perspectives on equity.

Legal and political scholars have been long struggling to find a rational explanation for such changes (or stalemates) and the causes and interactions.⁵ Issues concerning the relations among riparian states over “transboundary” or “international” watercourses⁶ are not exempt from the anarchic nature and essence of changes in world politics, inspiring many scholars to investigate such changes to better understand how to transform hydropolitical relations towards equity– which is the foundation of international water law and central to the attainment of sustainable development.⁷

In seeking to understand the transformation of hydropolitical relations towards equity, two major factors find little or no place in the theoretical discourse surrounding international watercourses: the anarchic geopolitical setting and the *normative* role of legal principles and their interactions and impacts on shaping the interests and identity of states, thus, changing the hydropolitical relations.

While any state can contribute to making a change, no other state has an absolute power to prevent the state in question from acting or entirely controlling the change that results from this action. This state-centric fashion of world politics, represented by the absence of a supra-national authority, is characterised by *anarchy*. Such anarchy, whether labelled as the lack of a central authority in international society, chaos, horizontal relations between sovereign states, or even as “what states make of it”⁸, has been declared a fundamental assumption in international politics. Though the anarchism of international politics may paralyse the political processes in which states seek to control changes to the hydropolitical relations, therewith they can apply their “hegemonic”⁹ or “counter-hegemonic”¹⁰ political strategies. Like anarchy that may influence the interests and identity of states, international water law has also had a particularly *normative* influence over these changes. Though the changes may

⁴ Carrie Menkel-Meadow, ‘The Transformation of Disputes by Lawyers: What the Dispute Paradigm Does and Does Not Tell Us’ [1985] *Mo J Disp Resol* 25.

⁵ Jutta Brunnée and Stephen J Toope, ‘International Law and Constructivism: Elements of an Interactional Theory of International Law’ [2000] 39 *Colum J Transnat'l L* 19.

⁶ In this study, the terms of transboundary/international waters/rivers/watercourses refer to the same: a shared body of fresh water between two or more states. The term “watercourse”, here, is the same as what defined by the 1997 UN Watercourses Convention: “surface water and groundwaters constituting by virtue of their physical relationship a unitary whole and normally flowing into a common terminus”.

⁷ Alistair Rieu-Clarke, *International Law and Sustainable Development* (IWA Publishing 2005).

⁸ Alexander Wendt, ‘Anarchy Is What States Make of It: The Social Construction of Power Politics’ [1992] 46 *International Organization* 391

⁹ See Mark Zeitoun and Jeroen Warner, ‘Hydro-Hegemony—a Framework for Analysis of Trans-Boundary Water Conflicts’ [2006] 8 *Water policy* 435.

¹⁰ Ana Elisa Cascão, ‘Changing Power Relations in the Nile River Basin: Unilateralism Vs. Cooperation?’ [2009] 2 *Water Alternatives*.

not fully bring about an equitable and sustainable platform for the resolution of often long-standing disputes and discrepancies, international law may create a legitimate refuge within the anarchic nature of international water conflicts for states to express their interests and identities. However, while there is a lack of holistic cooperative legal frameworks in many transboundary river basins,¹¹ it might be seen, in anarchic context, that “nothing” can stop the *unilateral* construction of the Grand Ethiopian Renaissance Dam (GERD),¹² or Turkey’s Southeastern Anatolia Project (GAP) all grounded on their own sovereignty’s interests and identity; therefore, many may question the role of international legal norms to effectively influence the behaviour of the actors involved, and consequently transform the hydropolitical relations towards equity under highly-anarchic geopolitical settings.

International law – dedicated to attaining humanity’s fundamental goals of advancing peace, prosperity, human rights, and environmental protection¹³– has sought to reflect on such changes and resolve the complexity associated with international waters in order to render hydropolitical relations equitable and sustainable. But, to what extent and how does this desired goal for change sound achievable and realistic considering the anarchic and geopolitical shadow over international watercourses? Within such complexity, how can different components of water conflict, e.g., technical, social, cultural, legal and political, be introduced more intelligibly to policymakers and to the public without reproducing and amplifying the conflict? How can the interests and identity of parties involved in water conflict – often controversial – be met while achieving an equitable solution? How can changes in hydropolitical relations be predictable? In what circumstances may a change in hydropolitical relations be made by legal norms that produce an equitable outcome?

The purpose of this study, therefore, is to investigate the circumstances in which the evolution and implementation of international water law could be very much a game-changer. Among other legal principles, this study, in particular, aims to consider how and to what extent the equitable and reasonable utilisation principle, the *core* principle of international water law,¹⁴ contributes to the conflict resolution process and changes the nature of hydropolitical relations within the anarchic context of international

¹¹ The global community is mostly concerned by the lack of a holistic, co-operative legal framework for most of the world’s 276 transboundary river basins, which have experienced significant changes in politico-legal terms. UNEP, *Atlas of International Freshwater Agreements*, vol 4 (UNEP/Earthprint 2002) defines 263 basins. However, the United Nations now recognise 276 basins that supply water to 148 countries: See UN Water, ‘Transboundary Waters’ [2013] UN Water (<http://unwater.org/topics/transboundary-waters/en/>).

¹² See APA- Addis Ababa, ‘Nothing can stop Ethiopian dam - PM’ *African Press Agency* (Ethiopia, 22 October 2019) <http://apanews.net/en/news/nothing-can-stop-ethiopian-dam-pm> accessed 11 January 2021. See also BBC, ‘Abiy Ahmed: No force can stop Ethiopia from building dam’ *BBC* (22 October 2019) <https://www.bbc.co.uk/news/world-africa-50144451> accessed 11 January 2021.

¹³ Mary Ellen O’connell, *The Power and Purpose of International Law* (Oxford University Press 2008).

¹⁴ 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/Potchefstroomse Elektroniese Regsblad* 12.

waters.¹⁵ Accordingly, the main research question which guides this study is: “**How and to what extent does the equitable and reasonable utilisation principle (ERU) improve the hydropolitical relations of an international watercourse within anarchic geopolitical settings?**”. In answering this question, the study will also examine whether the ERU principle leads to water conflict transformation. In so doing, it is necessary, therefore, to define what the “transformation” of water conflict means in this study.

Drawing upon the *integration* theories of both disciplines of law and politics, in general, the study analyses the normative linkage between the legal power and political dimensions in the context of international watercourses, and contributes broadly to facilitating dialogue between different disciplines of law and politics in order to synergise anarchy, legal principles of equity and state behaviour. It will be shown how such interactions engage in shaping hydropolitical relations. Therefore, it is expected that such understanding not only will enrich the knowledge on the complex hydropolitical dynamics but also will exploit gaps for strengthening legal analysis and implementations over international watercourses. Ultimately, the study will investigate the interactions between anarchy and the ERU principle by looking at hydropolitical relations in the Helmand River Basin shared between Afghanistan and Iran. This will provide not only in-depth and updated analytical insights concerning the Helmand River Basin, which suffers from limited research based on evidence, but also more general insights for other basins.

The purpose of this study is to further the debate and literature on transboundary water conflict and cooperation by critically examining the role of international water law as a soft power for shaping transboundary water interactions. This task will in itself distinguish the study from its predecessors, which have either focused predominantly on selected aspects of hydropolitics, or have not fully considered the normative influence of law within the context of international watercourses. The outcomes of the research will also have the potential to contribute to policy-making on water diplomacy¹⁶ and peace-building processes for international waters at the regional and global levels. Improving the understanding of political and legal dynamics of hydropolitical relations will enrich

¹⁵ However, “because water is an inter-disciplinary resource, international legal norms cannot by themselves provide resolution to disputes over international watercourses. Equally important is the fact that there can be no resolution of water disputes without international legal norms on international watercourses” (Salman MA Salman and Laurence Boisson de Chazournes, *International Watercourses: Enhancing Cooperation and Managing Conflict: Proceedings of a World Bank Seminar* (The World Bank 1998) p. 119).

¹⁶ Among various definitions, water diplomacy is understood as “the conduct of relationships between riparian states of shared water resources to enhance cooperation between them in relation to the joint management of those resources but with regard to goals beyond the water sector, namely regional stability and peace.” However, the focus of this study is the diplomacy that renders the hydropolitical relations with equity. See, for extensive discussion on the link between water diplomacy and legal institutions, Susanne Schmeier and Zaki Shubber, ‘Anchoring Water Diplomacy—the Legal Nature of International River Basin Organizations’ [2018] 567 *Journal of Hydrology* 114 p. 114.

international agendas related to transboundary water cooperation, such as the 2030 UN agenda, and give a much better match to reality.¹⁷ At the case study level, the research will illustrate the ways for riparian states to strengthen their cooperation. In addition, it is expected that the practical insights from the case study will help build guidelines for use in other transboundary river basins.

1.2. Moving towards water conflict transformation: equity in harmonious conjunction with interest and identity

Policymakers and scholarly studies from various disciplines – e.g. natural science, social science and economics – have sought to analyse and promote the hydropolitical relations around international waters in an equitable and sustainable manner.¹⁸ Such endeavours have been made through a broad range of policies and approaches – from functionalist institutionalism with a focus on depoliticisation to a realist theory of politicisation and securitisation – in order to capture the essence and legacy of international water conflict.¹⁹ However, the development, progress and implementation of policies and approaches have resulted in differing degrees of equity in hydropolitical relations, and in some respects in a confrontation with the interests and identities of riparian states.²⁰

Many such efforts have directed their attention towards “preventive” water diplomacy, or an attempt to “manage” water conflict; and thereby give priority to the avoidance of a high-level political concern among riparian states, an approach which has mostly led, at best, to the “frozen conflict” of an inequitable or a low-level equitable hydropolitical relations.²¹ The fundamental question is whether or not these efforts can resolve water conflict and *transform* hydropolitical relations into equitable and just arrangements, by engaging with the interests and identities of the states involved. Considering the

¹⁷ UN General Assembly, ‘Transforming Our World: The 2030 Agenda for Sustainable Development.(21 October 2015, a/Res/70/1)’ [2015] UN, New York.

¹⁸ For instance, see UNEP/MAP/MED POL, ‘Transboundary Diagnostic Analysis (Tda) for the Mediterranean Sea’ [2005] UNEP/MAP, Athens 228; Claudia W Sadoff and others, *Securing Water, Sustaining Growth* (University of Oxford 2015); Jerome Delli Priscoli and Aaron T Wolf, *Managing and Transforming Water Conflicts* (Cambridge University Press 2009); For more critical analysis see, for instance, Mark Zeitoun and others, ‘Analysis for Water Conflict Transformation’ [2020] 45 *Water International* 365.

¹⁹ For more intensive discussions, see for instance Lei Xie and Jeroen Warner, ‘The Politics of Securitization: China’s Competing Security Agendas and Their Impacts on Securitizing Shared Rivers’ [2021] *Eurasian Geography and Economics* 1; Hussam Hussein, Ahmet Conker and Mattia Grandi, ‘Small Is Beautiful but Not Trendy: Understanding the Allure of Big Hydraulic Works in the Euphrates-Tigris and Nile Waterscapes’ [2020] *Mediterranean Politics* 1; See also Jeroen Warner, ‘Three Lenses on Water War, Peace and Hegemonic Struggle on the Nile’ [2012] 4 *International Journal of Sustainable Society* 173.

²⁰ See for instance Mark Zeitoun and others, ‘Transboundary Water Justice: A Combined Reading of Literature on Critical Transboundary Water Interaction and ‘Justice’, for Analysis and Diplomacy’ [2014] 16 *Water Policy* 174; Mark Zeitoun, Naho Mirumachi and Jeroen Warner, ‘Transboundary Water Interaction II: The Influence of ‘Soft’ power’ [2011] 11 *International Environmental Agreements: Politics, Law and Economics* 159.

²¹ It is worth to note that there are differences between “conflict” and “dispute”, “resolution” and “settlement”, and “conflict resolution” and “dispute settlement”. See Mihir Kanade, ‘Role of International Adjudication in Conflict Resolution and Transformation’ in *The Difficult Task of Peace* (Springer 2020).

inevitability of changes to the status of hydropolitical relations, it is important in this study to distinguish the spectrum between conflict management, resolution and transformation.

Here, conflict management is a set of policies and practices to handle, control or limit the conflict, often regardless of the equitability of the outcome. This approach might help to an extent, particularly in the geopolitical chaos of the basin, where even a minor dispute may escalate into full-blown conflict, by providing a forum for parties to communicate in a legitimate way to at least manage, even if they cannot resolve, their water conflicts. However, existing models of conflict management remain unable to effectively resolve water disputes in anarchic settings. While the frameworks of conflict management “regularly ignore the balance between rationality and spirituality”,²² conflict resolution and transformation emphasise both the understanding of the conflict and working procedurally towards its remedy, *and* assessing the outcomes in terms of justice and equity. Thus, conflict resolution/transformation – procedurally and substantively – is expected to rather reflect respectively fairness and distributive justice in hydropolitical relations –²³ something that may also be supported by international water law.²⁴ In one sense, water conflict management focuses on the efficiency of “dollars per drop” over water conflict resolution that focuses on the equitability or “care per drop”.²⁵

Furthermore, while conflict resolution includes a number of methods to resolve conflict and thereby achieve a level of satisfaction for the concerned parties, conflict transformation emphasises the positions and perceptions of the parties, dealing more with the *reasons* for the conflict in order to engage with the parties and transform their interests, identities and discourses into a collective form. The framework of conflict transformation acknowledges the balance between the quantifiable and the spiritual, or transcendent, and there offers more “effective” negotiations and enhances the transformational process in its spiritual, ethical and moral dimensions.²⁶ Water conflict transformation in fact is much more closely associated with the principles of fairness and justice than the concepts of management and

²² Aaron Wolf argues that “[o]ver time, ‘rationality’ dictated the structure of subsequent paradigms, from economics to science to modernity, to where today we in the North/West are consistently satisfied to ask the ‘what’ without the ‘why’... [that] turn to benefit–cost analyses as decision-making tools, where all factors must be reduced to economic value, explicitly excluding often profound, but intangible, considerations.”; Wolf also notes that “spirituality” is illustrated as “the idealized relationship between self and community, between justice and mercy, and between boundaries and expanse”. See Aaron T Wolf, ‘Spiritual Understandings of Conflict and Transformation and Their Contribution to Water Dialogue’ [2012] 14 *Water Policy* 73 pp. 79-80.

²³ Zeray Yihdego and Alistair Rieu-Clarke explore legitimacy and distributive justice within the context of fairness over international watercourses: Zeray Yihdego and Alistair Rieu-Clarke, ‘An Exploration of Fairness in International Law through the Blue Nile and Gerd’ [2016] 41 *Water International* 528. Borrowing from Thomas Franck (1995), they describe legitimacy as ‘procedural fairness’ and associate distributive justice with substantive principles of international water law: see, e.g., Thomas M Franck and Thomas M Franck, *Fairness in International Law and Institutions*, vol 51 (Clarendon Press Oxford 1995).

²⁴ Zeitoun ‘Transboundary Water Justice’ (n 20) 174.

²⁵ Zeitoun ‘Transboundary Water Justice’ (n 20) 175.

²⁶ Wolf (n 22).

resolution,²⁷ and it seeks a balance between equity and riparian states' interests and identities. In more concrete terms, "conflict transformation is not about making a situation of injustice more bearable, but about transforming the very systems, structures and relationships which give rise to violence and injustice".²⁸

Considering equity *in conjunction* with satisfying the interests and reconstructing the identities of riparian states as part of conflict transformation forces a greater emphasis not only on the evaluation of structural conditions (e.g. the role of the state and systems of governance) and processes of power generation, escalation and distribution, but also on the assessment of outcomes – only then is transformation of conflict expected. This study suggests that conflict transformation, which, in this respect, rests on both attaining equity and social justice and while reconstructing normative foundations for interests and identities, may provide a more nuanced conceptual approach than conflict resolution and conflict management. Certainly, such cognitive transformation influences the power dynamics among the actors involved.²⁹ Indeed, constructive cognitive changes in conflict transformation need to confront power imbalances and challenge the *status quo*.

Based on the above definition, meeting two key interrelated objectives becomes essential for the attainment of water conflict transformation – improving the level of equity in water utilisation among riparian states, while ensuring that the hydropolitical relations correctly satisfies their interests and identities.³⁰ A clear consensus has emerged that international water law makes a significant contribution

²⁷ For related literature, see John Paul Lederach, 'Conflict Transformation in Protracted Internal Conflicts: The Case for a Comprehensive Framework' [1995] *Conflict Transformation* 201; and, see also Hugh MIALL, *Conflict Transformation: A Multi-Dimensional Task. Transforming Ethnopolitical Conflict* (Wiesbaden: VS Verlag für Sozialwissenschaften 2004). For more discussion with specific focus on water conflict, see, for instance, Zeitoun 'Transboundary Water Justice' (n 20); Zeitoun, M., Cascão, A.E., Warner, J., Mirumachi, N., Matthews, N., Menga, F. and Farnum, R., 2017. See also Mark Zeitoun and others, 'Transboundary Water Interaction Iii: Contest and Compliance' [2017] *17 International Environmental Agreements: Politics, Law and Economics* 271.

²⁸ Michelle Parlevliet, 'Rethinking Conflict Transformation from a Human Rights Perspective' [2009] p. 3: "The conflict transformation approach perceives conflict as a catalyst for social change and places primary emphasis on the question of social justice".

²⁹ Veronique Dudouet, 'Transitions from Violence to Peace: Revisiting Analysis and Intervention in Conflict Transformation' [2006] ; See also Veronique Dudouet and Beatrix Schmelzle, 'Human Rights and Conflict Transformation: The Challenges of Just Peace' [2010] ; John P Lederach, *Conflict Transformation. Intercourse* (PA: Good Books 2003).

³⁰ Notwithstanding this, while the different aspects and symptoms of water conflicts all around the world may be similar, they may be rooted in different layers of socio-political context. Water conflict is just one piece of a bigger picture and might show some effects of other underlying issues. The sense of injustice in water conflict may sometimes be a reflection of an act of injustice from a broader geopolitical perspective. In such cases, transformation of water conflict, will not be occurred unless the unjust bases are cured. For instance, water conflicts between Palestine-Israel reflect the broader unjust situation grounded on geopolitical history and occupation of apartheid regime that echo the imperialist ideology. Thus, isolating water conflict from its causes, particularly in such cases, is a false remedy. The fruit of a corrupt and poisonous tree is corrupt. As Christ says, "A good tree cannot bring forth evil fruit, neither can a corrupt tree bring forth good fruit" (Matt. vii. 18). Water

to the global politics surrounding transboundary water conflicts.³¹ International water law can play an important role in advancing hydropolitical relations towards conflict transformation, moving them beyond a state of conflict management alone. Consider, then: how can international water law support water conflict transformation, shed light on equity in hydropolitical relations, and reconstruct actors' interests and identities in a legitimate way, while being applied within a complex geopolitical setting where anarchy reigns supreme in much of the river basin?

1.3. The relevance of international water law in addressing water conflict transformation under the shadow of anarchy

While international water conflicts are still surrounded by state-centric, often coercive and hegemonic compliance strategies, of which relative power determines the outcomes, there has often been a pessimistic "realist" view of the role that international law plays in bringing an equitable resolution, which has not carefully embraced the *normative* power of legal principles in the wider picture.³² International water law, including the customary principles, establish the substantive and procedural "rules of the game" to build the foundations upon which international watercourses can be peacefully utilised.³³ The law of international watercourses provides a framework to guide water conflict resolution within an "anarchical society"³⁴, in which a group of states interacts with one another and are affected by a set of often contrary interests, rules and norms. The anarchic nature of international water conflicts heightens the complexity around international waters, because states may be reluctant to commit to and comply with any law that they believe might decrease their security with potential future adversaries. Anarchy influences the interests and identities of states and thus their behaviour. Anarchy feeds competition and conflict among states, and resultantly destabilises hydropolitical processes by

conflict will not be resolved unless the roots are being treated. Thus, considering equity in water utilisation in conjunction with interest and identity of parties involved goes beyond that only focusing on water issues if transformation is desired. For specific related discussions concerning Palestine-Israel water conflicts, see, for instance, Mark Zeitoun and Muna Dajani, 'Israel is hoarding the Jordan River – it's time to share the water' (*The Conversation*, 19 December 2019) <https://theconversation.com/israel-is-hoarding-the-jordan-river-its-time-to-share-the-water-126906> accessed 11 January 2021. See also Clements Messerschmidt, 'Hydro-Apartheid and Water Access in Israel/Palestine: Challenging the Myth of Water Scarcity' [2013] Mandy Turner and Omar Shweiki, *The Palestinian People and the Political Economy of Development*, London: Routledge.

³¹ Joseph Dellapenna and Joyeeta Gupta, 'Toward Global Law on Water' [2008] 14 *Global governance: A review of multilateralism and international organizations* 437.

³² See for extensive debate, e.g., Oona A Hathaway, 'Between Power and Principle: An Integrated Theory of International Law' [2005] *The University of Chicago Law Review* 469; Shima Findley Baradaran, Michael Nielson, Daniel Sharman, J. C., 'Does International Law Matter?' [2012] 97 *Minn L Rev* 743.

³³ Patricia Wouters, 'The Relevance and Role of Water Law in the Sustainable Development of Freshwater - from "Hydrosovereignty" to "Hydrosolidarity"' [2000] 25 *Water International* 202. See also UNEP (n 11) 12, where it identifies more than 3600 international water treaties dating from ad 805 to 1984, and shows that international water treaties date as far back as 2500 bc when Lagash and Umma resolved a water dispute along the Tigris River through agreement.

³⁴ Hedley Bull, *The Anarchical Society: A Study of Order in World Politics* (4th edn, Columbia University Press 2012).

producing chaos and an inclination for states to strive for security and power, and in general think self-interestedly.³⁵ Yet the anarchic nature of international society is in fact reflected in the concept of sovereignty in international law. Sovereignty is a key term in international water utilisation doctrines. A state has sovereignty over its natural resources as well as the right to develop those natural resources. This being the case, one may ask how international water law can facilitate conflict transformation while states hold sovereignty over their territory.

Within the context of international law, the sovereign right to exploit natural resources should not impose harmful effects on other states. As an accepted principle of international law, recognised by the International Court of Justice (ICJ) and manifested in tribunals on several cases, such as the *Lake Lanoux Arbitration*,³⁶ states have the sovereign right to utilise their natural resources.³⁷ Therefore, unilaterally damming a shared watercourse, for instance, might be justified by the sovereign right of that particular state with “absolute territorial sovereignty”. However, the sovereignty of states is not actually absolute. The scope of its application is limited by specific circumstances.³⁸ The ICJ in the *Gabčíkovo-Nagymaros* case held that the right of a sovereign state to unilaterally build a dam on a stretch of a shared watercourse situated entirely within its territory is still subject to certain limitations. There is, firstly, the duty not to cause “significant” transboundary damage and, secondly, the obligation to respect the “equitable and reasonable utilisation” of a shared watercourse.³⁹ The principle of equitable and reasonable utilisation, which is the focus of this thesis, is the cornerstone of international water law and is further articulated in Article 5 of the 1997 UN Convention on the Law of the Non-navigational Uses of International Watercourses (hereinafter UN Watercourses Convention).⁴⁰ The principle of equitable and reasonable utilisation has the concept of “equity” at its heart. While equity plays a key role in achieving conflict transformation, the anarchic nature of global politics around international waters is recognised as being the main barrier to such transformation, by creating chaos and vulnerability and intensifying the risks to “constructive”⁴¹ forms of conflict and cooperation.

³⁵ However, anarchy, by itself, may be used to question the unfair distribution of power and resources, and may result in conflict transformation.

³⁶ *Lake Lanoux Arbitration (France v. Spain)*, Arbitral Tribunal, 16 Nov. 1957, (1957) 12 *Reports of International Arbitral Awards*, p. 281.

³⁷ See Stephen C. McCaffrey, *The Law of International Watercourses* (Oxford University Press 2019).

³⁸ Yogesh K. Tyagi, ‘Permanent Sovereignty over Natural Resources’ [2015] 4 *Cambridge journal of international and comparative law* 588.

³⁹ See Stephen McCaffrey, ‘The Contribution of the Un Convention on the Law of the Non-Navigational Uses of International Watercourses’ [2001] 1 *International journal of global environmental issues* 250.

⁴⁰ The 1997 Convention on the Law of the Non-navigational Uses of International Watercourses, Annex II, p.207.

⁴¹ Zeitoun (n 18) p. 376 notes that “[l]ike a caterpillar morphing into a butterfly, ‘conflict’ can be a necessary step towards equitable and sustainable transboundary water arrangements. Openly expressed disagreement can be constructive, in other words, when it leads issues onto a stage where they can be dealt with.”

As already mentioned, despite the relevant literature on the concept of water conflict transformation from different views,⁴² its function within the concept of anarchy has received sparse attention in particular from legal scholars. Thus, this is crucial to show that how international water law plays its role in such transformation under the shadow of anarchy. Furthermore, while there is a rich history of discussion the link between international law and politics, it seems there are still numerous shortcomings of analysis of equity in the political context of transboundary waters from legal perspective particularly in situation of a “hydropolitical security complex”⁴³. In one sense, there is still a semantic gap to explore how international water law works in international politics. Hence, there is a need for a “joint discipline” to bridge a gap between international relations theory (IR) and international law (IL) over international waters.⁴⁴ In so doing, this thesis will show that international water law provides a *balanced* approach in an anarchic context which is reflected precisely in the concept of equitable and reasonable utilisation of international watercourse. Therefore, this thesis will examine how the principle of equitable and reasonable utilisation can transform the “self-help” nature emanate from anarchy to a collective interests and identities of riparian states.

1.4. A summary of conceptual framework

The major contributions of this study are two-fold. First, the study will focus on developing an interdisciplinary theoretical framework to analyse hydropolitical relations and international water law, and second, it will provide new insights into the hydropolitical and legal analysis of the Helmand River Basin. This study is therefore an inquiry into the legal and political interactions that have influenced the hydropolitical relations of an international watercourse situated in a complex geopolitical setting, where anarchy reigns supreme across much of the river basin, and where conflict has deep social and political roots associated with the interventions of outsiders. As mentioned before, the research question guiding this study is: How and to what extent does the ERU principle improve the hydropolitical relations of an international watercourse within anarchic geopolitical settings?”. This thesis is accordingly bound by a

⁴² E.g., Zeitoun (n 18); Wolf (n 22).

⁴³ Michael Schulz profitably introduced the “hydropolitical security complex” as “a set of states that are geographically part owners and technical users of a water body, and that consider that water body to be a major national security issue” (See Michael Schulz, ‘Turkey, Syria and Iraq : A Hydropolitical Security Complex’ [1995] *Hydropolitics : conflicts over water as a development constraint* 91). The (neorealist) concept of a hydropolitical security complex was taken up by, among others, Tony Turton for hydropolitics in the Southern African region. Applying the concept to the Euphrates-Tigris basin, Jeroen Warner highlighted the overlay of global political games, claiming “a change in the hegemonic relationships with respect to the global governance of water has ripple effects in the region”. J. F. Warner, ‘Contested Hydrohegemony: Hydraulic Control and Security in Turkey’ [2008] *1 Water Alternatives* 271 p. 277.

⁴⁴ See, for instance, Kenneth W. Abbott, ‘Modern International Relations Theory: A Prospectus for International Lawyers’ [1989] *14 Yale J Int'l L* 335. See also, and in particular, Anne-Marie Slaughter, ‘International Law and International Relations Theory: A Dual Agenda’ [1993] *87 Am J Int'l L* 205, and also Anne-Marie Slaughter, Andrew S. Tulumello and Stepan Wood, ‘International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship’ [1998] *92 Am J Int'l L* 367.

theoretical focus on the ERU principle, its normative power to shape a state's interests and identity, its legitimate function as a remedy to the symptoms of anarchy, and its legal implications for hydropolitical relations as they move towards water conflict transformation (Figure 1). In so doing, the nexus between moderating variable of the ERU principle and independent variable of anarchy, and dependent variable of state behaviour is explored. There are certain other factors that may indirectly impact on the relationship between anarchy, ERU and state behaviour, which will be addressed in this study: geopolitical pressure, institutional support and its contribution of procedural rules, and the robustness of political economy.

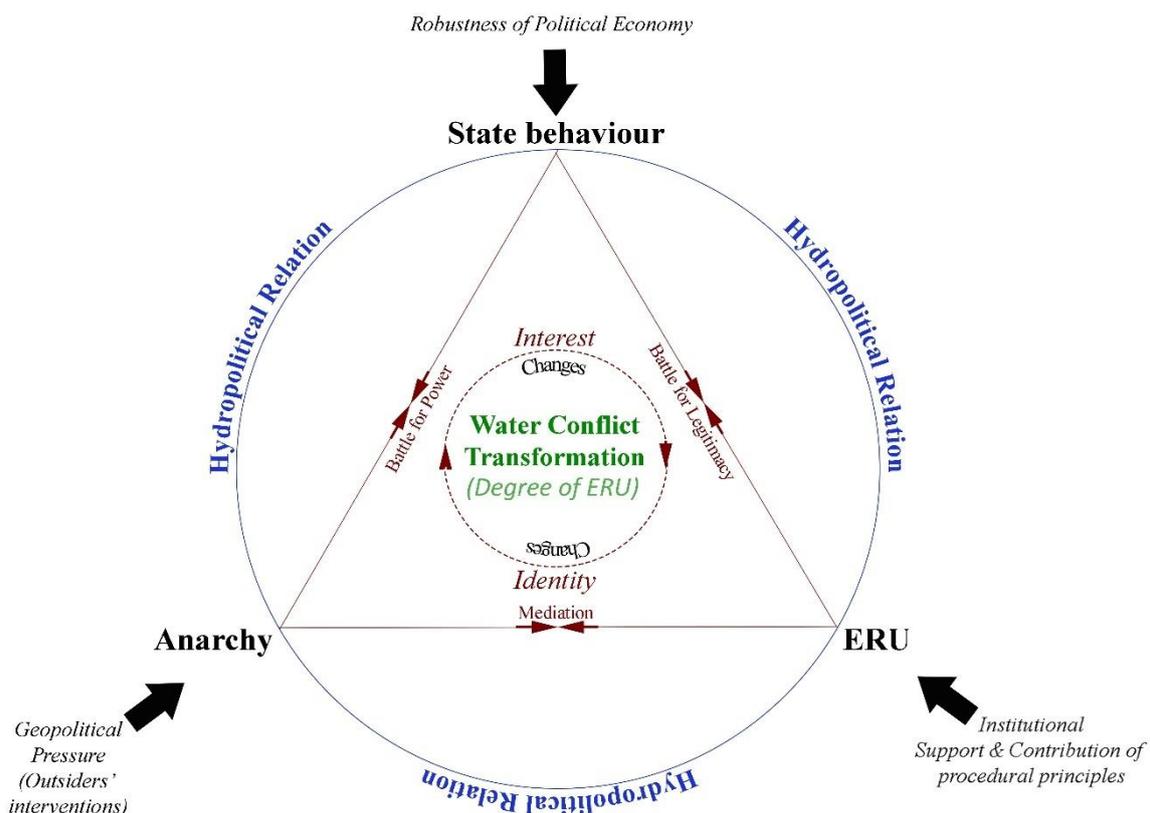


Figure 1. Conceptual Framework

Answering the main research question of this thesis reminds us the preminent broader theoretical question of “*does international law matter in shaping state behaviour? if yes, how?*” that needs to go through different theories of IR and IL, e.g., neorealism, neoliberal institutionalism and constructivism. One key goal and theoretical contribution of this study is, therefore, to bring this question into the context of international watercourses and explore it within an *interdisciplinary* research.

It seems each of such above IR and IL theories will shed lights on some parts of the complex puzzle of state behaviour in world politics and its relation to international law. Each may have a wide range of different analytical findings, differentiated principally by their emphasis on diversity of theoretical variables; for example, actors, power, interests, discourses, and norms/beliefs/values. Consider this,

there is still a theoretical gap between IR and IL reading of the behaviour of states within the anarchic nature of the world politics. In order to bridge such gap between IR and IL, the need for a “joint discipline” has been argued by several political scientists and international lawyers.⁴⁵ By exploring the overlap between different disciplines through institutionalist approach, a set of research agenda has sought to provide a meaningful interpretation of IR and IL approaches to international rules.⁴⁶ Both political scholars and international lawyers have separately engaged in more interdisciplinary scholarship by looking at different paradigms of IR theories: by emphasizing on the value of “regime theory”, Kenneth Abbott took stock of Institutionalism for international lawyers, for instance;⁴⁷ Or, Anne-Marie Slaughter explained Neo-Realism and Institutionalism by focusing on liberal theory;⁴⁸ Constructivism has been explored by Harold Koh and Friedrich Kratochwil.⁴⁹ On the IR side, also, a number of political scholars have illustrated the divisions of IR theories, reviewing Realism⁵⁰, exploring Neo-Realism against Neo-Liberalism⁵¹, criticizing Institutionalism (“arguing that institutions cannot prevent war by changing state behaviour”)⁵², clarifying Liberalism⁵³, and proposing “new thinking” in each category⁵⁴.

However, Slaughter emphasised on the need to moving beyond “canonical narratives” of how the disciplines evolved or interacted with each other. By examining the different uses of IR theories in international legal research, she has sought to critically illustrate how IR theory engage in IL discipline.⁵⁵ Her argument is basically grounded on criticism of international legal scholars who have been rather as passive consumers of IR theory to strengthening their own discipline, calling for “active theorists and problem solver in their own right”. Nevertheless, she examined some efforts of international legal scholars who focused on the role of legal rules to shape the political outcomes, actors

⁴⁵ See Abbott (n 44).

⁴⁶ See, for instance, Robert J Beck, Anthony C Arend and Robert D Vander Lugt, ‘International Rules Approaches from International Law and International Relations’ [1996] ; See also Robert O Keohane, ‘International Relations and International Law: Two Optics’ [1997] 38 Harv Int'l LJ 487.

⁴⁷ See Abbott (n 44).

⁴⁸ See Slaughter ‘A Dual Agenda’ (n 44).

⁴⁹ See Koh (n 288).

⁵⁰ See, for instance, Michael Edward Brown Sean M Lynn and Jones Steven E Miller, *The Perils of Anarchy: Contemporary Realism and International Security* (MIT Press 1995).

⁵¹ See David Allen Baldwin, *Neorealism and Neoliberalism: The Contemporary Debate* (Columbia University Press 1993).

⁵² See John J Mearsheimer, ‘The False Promise of International Institutions’ [1994] 19 International security 5.

⁵³ Andrew Moravcsik, ‘Taking Preferences Seriously: A Liberal Theory of International Politics’ [1997] 51 International organization 513.

⁵⁴ See Michael W Doyle, *New Thinking in International Relations Theory* (Routledge 2018).

⁵⁵ See Slaughter ‘A New Generation’ (n 44).

(e.g. state behaviour) and social structures;⁵⁶ though, too much focus of political scientists on structures and not on process is criticised by legal scholars. Moving beyond, Slaughter arguably proposed a “collaborative research agenda” for an alternative “joint discipline” of IR theoretical paradigms onto IL by mapping three integrated subfields: 1- “international governance theory”⁵⁷ (e.g. Institutionalism) 2- Examining social construction through shared norms (e.g. Constructivism)⁵⁸ and 3- liberal agency theory which focuses on the relationship between international and regional/national law and politics to better mapping state behaviour (e.g. Liberalism) (see Figure 2).

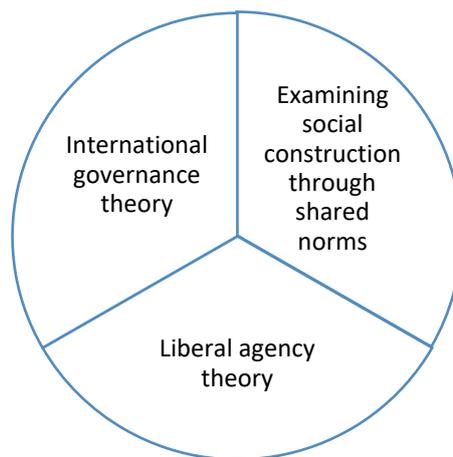


Figure 2. Collaborative IR/IL Research by Slaughter, 1998

In the same vein, Oona A Hathaway suggests “*integrated*” theory of IL, grounded on both political science and legal scholarship, in order to explain the reciprocal relationship between state behaviour and international treaties. Seeking to respond the widespread criticisms to failure of international treaties or IL in today’s crisis, she argues that there are two key factors that influence how treaties shape state behaviour: 1- the role of domestic (intra-national) enforcement mechanisms and 2- “the collateral consequences of treaty membership” (see Figure 3). Hathaway emphasises the necessity of understanding the political interaction between countries emerged from their decision either to commit or to reject treaty in order to figure out how IL influence the state behaviour.⁵⁹

⁵⁶ While some see IL as a patient and IR as the cure, some others see IL as equally professional colleague.

⁵⁷ This is what is described by Abbott (n 44): using rationalist methodology, “it focuses on organizational features, functions and purposes of the structures and institutions ...are situated “above” the level of the states.”

⁵⁸ How norms and discourses impact on actors, identities, interests, social structure and state behaviour (position vs. their interests) in international system.

⁵⁹ See Hathaway (n 32).

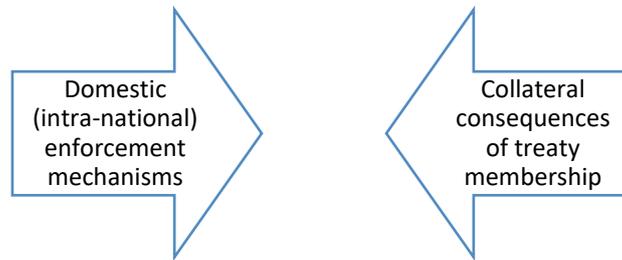


Figure 3. “Integrated” theory of Hathaway, 2005

Hathaway provides considerable insight into the understanding and interpretation of the relationship between IL and state behaviour and the questions as those concerning the nature of international law: What makes states *comply* with international law and what persuades them to *commit* to international law? Do states only obey international law if it is backed by sanctions, or do states obey legal obligations without any enforcement and penalty? The contradictory theoretical perspectives of the nature of international law generally produce two paradoxical lines of thinking; one originating from the “*interest-based*” realist view, and the other from the “*norm-based*” constructivist view. Hathaway argues that both views remain ill-equipped to understand the nature of international law within the political interplay between states’ relationships, “taking an all-or-nothing approach”.⁶⁰ She notes that “it [international law] differs from domestic law in ways that affect - but not eliminate - its ability to influence state behaviour”.⁶¹ International law is generally characterised by its voluntary nature - states are not bound by legal obligation unless they accede to it - and its lack of power to impose rules. International law is a “horizontal legal system”, where it is *assumed* that all the sovereign states are on the same equal level. Hathaway integrates both interest-based and norm-based views to interpret the states’ commitment to and compliance with international treaties where she argues “[c]ommitment and compliance are interwoven”.⁶² She finally concludes that “[i]f the integrated theory contains one overarching lesson, it is this: International law is neither as weak as its detractors suggest nor as strong as its advocates claim. It is not mere window dressing nor is its power similar to that of domestic law. To view international law through either lens is to see international law through a glass darkly.”⁶³

By focusing on the *process of changes*, this study seeks to engage in above effort and contribute to those integrated approaches of understanding the relationship between state behaviour over international watercourses and international legal norms within an anarchic setting. The overarching theoretical foundation supporting this study rests upon entwining insights from both political science and legal scholarship, of the kind introduced by Jutta Brunnée and Stephen J. Toope (2000) in their

⁶⁰ Hathaway (n 32) 487.

⁶¹ Hathaway (n 32) 487.

⁶² Hathaway (n 32) 535.

⁶³ Hathaway (n 32) 535.

concept of “interactional international law”⁶⁴. This general theoretical framework is used to unlock the puzzle of how international law, within a horizontal normative order, and a consent-based system, influences sovereign states’ behaviour. This framework explains how international legal norms function within the context of power – which is, by itself, exercised by self-interested states against one other – and how international legal norms shape the interests and identities of states. The overarching framework thus provides the means for this study to examine the relationship between anarchy, the ERU principle, and state behaviour – which is a by-product of its interest and identity.

In addition to the ERU principle as a substantive customary legal norm, anarchy and power are also interlinked concepts central to this thesis. The hydropolitical relations of an international watercourse is often characterised by a struggle for power to control water resources. Anarchy is another key factor in shaping riparian state behaviour in the course of generating hydropolitical relations, and intensifying the power struggle. While the study examines hydropolitical relations through a constructivist view of the concept of anarchy, a neorealist perspective, where riparian states struggle for power in a highly competitive nature, offers a complement to this study, as examined in Chapter 2. While anarchy differs from the concept of hegemony, the theoretical definition of the concept of power developed by Mark Zeitoun and Jeroen Warner (2006) will guide this research to understand the role of power in shaping hydropolitical relations and its configuration within an anarchic context.⁶⁵ This will, therefore, illustrate on the one hand, how states use the ERU principle in order to attempt to gain power in forms of “bargaining” or “ideational”, and on the other, how the ERU, by itself, has power to influence states’ interests and identity, thus their behaviour.

The exchange between the ERU principle and anarchy within dynamic power relations is expected to result in a change in the hydropolitical relations. The hydropolitical history of all transboundary river basins shows the continuous coexistence of conflict and cooperation within the hydropolitical relations. Naho Mirumachi developed a conceptual approach (Transboundary Waters Interaction Nexus-TWINS) to elaborate the dynamics of co-existing conflict and cooperation over transboundary waters.⁶⁶ TWINS provides a comprehensive understanding of how cooperation or conflict is constructed. More importantly, the approach describes the changes in hydropolitical relations in a historical perspective. Drawing upon TWINS, this study suggests that the change of a hydropolitical relations may be towards the spectrum of water conflict management, conflict resolution and conflict transformation with the goal of promoting the implementation of the ERU principle (Figure 4). Accordingly, the study introduces an analytical framework based on Mirumachi’s TWINS: “the Universe of Hydropolitical

⁶⁴ Brunnée and Toope (n 5).

⁶⁵ Zeitoun and Warner (n 9).

⁶⁶ Naho Mirumachi and John Anthony Allan, *Revisiting Transboundary Water Governance: Power, Conflict Cooperation and the Political Economy* (2007).

Relations”. The anarchic hydropolitical relations of an international watercourse has been constructed within a battle of “lawfare”. Riparian states use international law as a form of soft power to legitimise their preferred water allocation regime. Thus, while claiming over the ERU principle to challenge their rival’s interests, identity and thus behaviour over shared water utilisation in their own favour, the riparian states also seek to legitimise their acts or at least claim that their individual developments are in line with this principle.

Such complex interactions within anarchic context will result in various grades of ERU, from low to high quality. Low equity may simply be an agreement for physical water allocation, which sets out how much water flows from one country to another. Higher equity may be recognised when countries manage shared waters with a whole-basin view, and look at benefit-sharing options (such as hydropower upstream, revenue/flow regulation for agriculture/flood control downstream, and other possibilities), with the aim of approaching water conflict transformation.

This study seeks to analyse how the ERU principle can be greatly involved in constructing persuasive discourse and generating shared understanding among the actors, and accordingly, influencing states’ interests and shaping individual and collective identities. This will guide this thesis to understand how the ERU principle contributes to providing a legal and legitimate basis for making constructive dialogue between riparian states, which is the starting point for decreasing or neutralising the threat of anarchy’s effects.

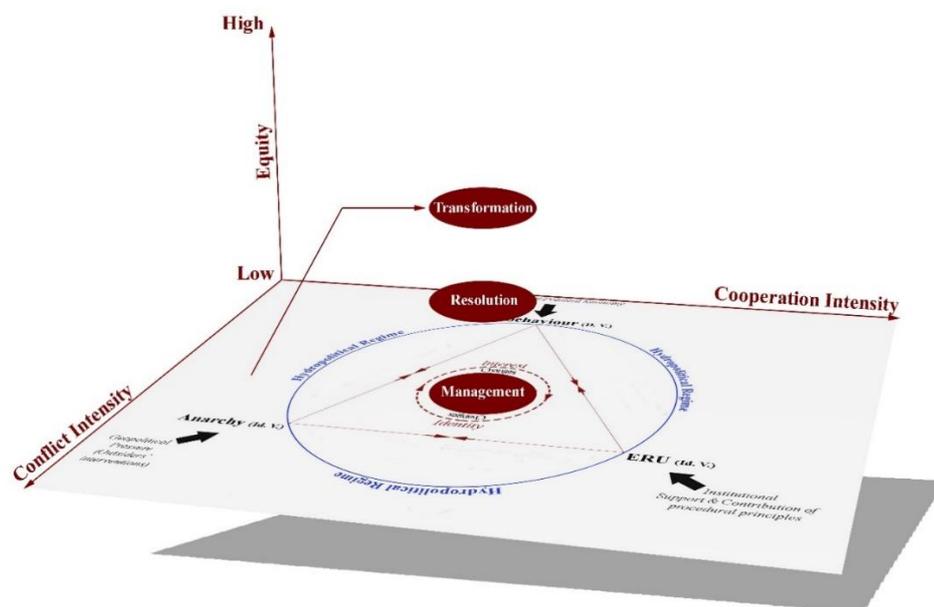


Figure 4. Moving towards water conflict transformation in the Universe (equity in TWINS)⁶⁷

⁶⁷ The other two axes (conflict and cooperation intensity) will be described later in Chapter 5.

1.5. Methodology

The research approach is to develop a theoretical framework to critically analyse the role of legal norms in anarchic hydro-political relations and to explore it through a specific case study. The overarching interdisciplinary approach is adopted to synergise the insights of international law with international relations theory concerning the behaviour of states. In so doing, the theoretical framework of this study, as will be shown later, sits mainly in constructivist epistemology. Focusing on uncovering the normative power of legal principles, the study rests on constructivist perspective of which “systems of shared ideas, beliefs and values also have structural characteristics and exert a powerful influence on social and political action”.⁶⁸ However, the study benefits from applying realist and critical IR theory to hydro-politics to grasp the main points of the complexity of realities surrounded water politics. By recognising the coexistence of conflict and cooperation, the study takes both realist reading of anarchy and what critical hydro-politics literature represents the concept of power in hydro-political relations.

Such integration of different disciplines influences the methodology of the research, the strategies of inquiry and the ways to collect data and analyse information.⁶⁹ From constructivist point of view, knowledge is not as an objective,⁷⁰ but as a social and subjective construction, and that the realities reflect the shadow of the past within a historical context.⁷¹ The methodology and data analysis, therefore, to study the hydro-political relations particularly those in a highly-anarchic geopolitical context where the interactions may often stand in the shadows and actors may often sit behind the dark scenes, facts may be manipulated and data may be exposed as a fake,⁷² should be used with very careful consideration. The study conducts a qualitative critical research method arguing for context-specific approaches in contrast to a one-size-fits-all approach. This will help go further than simply questioning the centrality of law, rather, by questioning “the law, the social and even the individuals that constitute both institutions”.⁷³ Given the complex nature of hydro-political relations and in seeking to answer the

⁶⁸ Christian Reus-Smit, ‘Constructivism’ in Scott Burchill and others (eds), *Theories of International Relations* (Macmillan International Higher Education 2013) p. 217.

⁶⁹ Norman K. Denzin and Yvonna S. Lincoln, *The Sage Handbook of Qualitative Research* (3rd ed., edn, Thousand Oaks : Sage Publications 2005) p. 3.

⁷⁰ Elizabeth Murphy, *Constructivism: From Philosophy to Practice* (ERIC 1997) p. 5. See also Audie Klotz and Cecelia M. Lynch, *Strategies for Research in Constructivist International Relations* (Cecelia Lynch ed, Armonk, N.Y., London : M.E. Sharpe 2014)

⁷¹ Reus-Smit (n 68).

⁷² See, for instance, Mohsen Nagheeb, ‘The Ghosts around the Coasts: Anarchy and Equity in Transboundary River Basins’ [2020] 2(1) *The Student Journal of Professional Practice and Academic Research*.

⁷³ Chris Dent, ‘A Law Student-Oriented Taxonomy for Research in Law 2016 Alta Conference Special Issue’ [2017] 48 *Victoria U Wellington L Rev* 371 p. 379.

main research question, the study will move through the research process shown in Figure 5 including different sub-questions in each phase:

Main research question:

How and to what extent does the equitable and reasonable utilisation principle (ERU) improve the hydropolitical relations of an international watercourse within anarchic geopolitical settings?

Sub-question 1: What is anarchy and its impact on state behaviour?

Sub-question 2: How do legal norms work in anarchic world politics?

Sub-question 3: What are the theoretical underpinnings in hydropolitical relations?

Sub-question 4: What is the ERU principle and how does it place into TWINS framework under anarchic nature?

Guided by above mentioned conceptual framework, and through integrated methodology of document analysis, case study, discourse analysis, ethnographic investigation and participatory observation, it is expected that this study can grasp the complexity of the interrelationship between anarchy and the ERU principle (see Table 1). The main methods for answering the research questions of this study are extensive available document analysis in order to grasp the variety of perceptions and ambitions represented in the case. The document analysis is along with discourse analysis which are important to analyse the historical trajectory of hydropolitical relations in the Helmand River Basin. In so doing, international and national reports, policies and strategies, including governmental and non-governmental, are targeted for analysis of this study. Secondary documents including a large number of scientific articles and books with technical, political and legal basis either in English or in Farsi language are also used to examine the political and legal history of relations over transboundary waters with the focus on the Helmand River. However, the documents should not only be the main official ones, but also classified documents, if available, may give an altogether richer picture of the case. In this study, the available de-classified secret documents including governmental letters of US are used to unpack the hidden agenda over case study. It is also necessary to use critical reading and validation methods for data collection and document analysis in such sensitive topics to provide a richer and fuller picture of the case study.

To better understand the political perspectives, interests, policies and strategies of the key parties concerned with the basin, discourse analysis can help explain the nature of transboundary water interactions and power struggles among the riparian states. Discourse analysis focuses on “how specific identities, practices, knowledge or meanings are produced by describing something in just that way over

another way.⁷⁴ In so doing, the study looks for different types of speech act, from a constructivist point of view,⁷⁵ to analyse the hydropolitical relations – cooperative and conflictive interactions – in the Helmand River Basin. This research employs three categories of speech acts: a) *assertive*, through which something is asserted, as in “our country is experiencing a difficult situation”; b) *directive*, through which something is demanded, as in “we need more water”; and 3) *commissive*, through which something is promised, as in “I will pay my debts”.⁷⁶

Table 1. Methods employed in the research

Main Methods	Data sources	Complementary Methods
1. Document analysis	<ul style="list-style-type: none"> • Peer-reviewed articles and books (in English and Farsi) • National policies and reports published by Afghanistan and Iran’s governments (in English and Farsi) • International organisation (e.g., UN agencies like FAO, UNESCO, UNDP, etc.) • Newspapers, media and websites (in English and Farsi) 	<ol style="list-style-type: none"> 1. Ethnographic investigation (15 years related experience) 2. Participatory observation (including 2018/19 Hydro-Hegemony Conferences at the Hague and the UNECE events in 2019)
2. Discourse analysis		
3. Case study		

Several media sources (e.g. TV programs, online news websites and newspapers) alongside reports and headlines in press releases from international, Afghan (only in Dari-Farsi and English) and Iranian (in Farsi and English) sources during the last decade are used to analyse the related discourses. The political affiliation of these sources is closely examined to critically evaluate their discourses and narratives. This examination was achieved by analysing the patterns of argumentation, searching for the dominant agenda, and studying words and phrases in political linguistic terms in order to find a paradigm that shapes the basin actors’ and key policy makers’ positions, interests and identities. Such discourse analysis of press released concerning the case is conducted along with other methods e.g., document analysis and informal discussion to complement the puzzle of the complex conflict. In addition, the study will benefit from the UN Watercourses Convention and identified factors to analyse the ERU principle in historical legal arrangements of the basin specifically the 1973 Helmand Treaty. The analysis will be complemented by the historical debate surrounding the customary international law on

⁷⁴ Tim Rapley, *Doing Conversation, Discourse and Document Analysis*, vol 7 (Sage 2018) p. 147.

⁷⁵ Nicholas Onuf, ‘Constructivism: A User’s Manual’ in Vendulka Kubálková, Paul Kowert and Nicholas Onuf (eds), *International Relations in a Constructed World* (Routledge 1998).

⁷⁶ Onuf (n 75) p. 66.

other cases and the practice of states, the decisions of the International Court of Justice's (ICJ) and *opinio juris*.

At the case level – which will be explained in full details in next section – this study will benefit participatory observations and ethnographic investigation to provide holistic insights into people's views and actions, as well as an understanding of state interests, identities and discourses. These methods are used as complementary to document analysis and discourse analysis as main methods. Participatory observations during international meetings, conferences and seminars are helpful to get a better sense of reality. In particular, participating at two Hydro-Hegemony Conferences at the Hague in 2018 and 2019 in which there was one special session on the Helmand River, and the UNECE events in 2019 where officials from Afghanistan and Iran represented their country on transboundary waters help this study to complement the insights over the topic. Such observations are helpful to provide better understanding of the positions, interests and perspectives of the different actors. In addition, having over fifteen years of experience in negotiations to promote transboundary water cooperation with the focus on Afghanistan-Iran water relations, a practitioner-oriented approach of the author also gives a realistic view to the hydropolitical complexity and helps to avoid and discover errors of facts and judgments. All in all, growing up Iranian and speaking Farsi (which is common language between Iran and Afghanistan) as my mother tongue have positioned me differently than other non-Iranian or non-Afghan researchers. This is very helpful to better understand and differentiate between behaviour, language, and gestures while I analyse documents and discourses. This also helps to spot errors of fact or interpretation in related documents. I do, however, acknowledge that such positionality impacts my analysis and interpretation.

Notwithstanding this, each methodology has some limitations. In the context of transboundary waters of which the nature is politicised and often sensitive, the data collection and analysis of the discourses and observations might be subject to misunderstanding and misrepresentation. Therefore, as already mentioned, it must be taken into careful attention. The charge of "bias" is also common when writing about contentious issues in particular for those which may somehow subject to emotions. However, being biased in telling a story may not be a serious problem – even no one can escape from it – but being fair and telling the whole story matter. It must be also said at the outset that while the use of interviews may seem appropriate for the case study, they were not used for this research because of security issues in Afghanistan, and difficulties imposed by the Covid-19 pandemic. However, there have been a few rich field studies and interviews conducted by other researchers that this thesis benefits from.

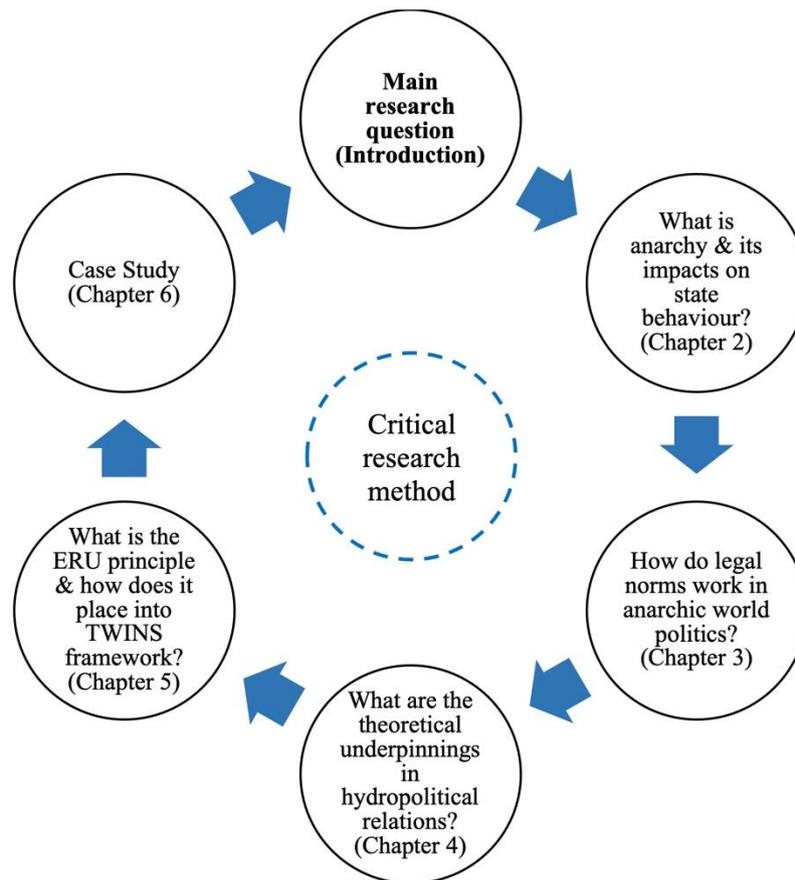


Figure 5. The research process and sub- questions

1.6. Case study

The case of the Helmand/Hirmand⁷⁷ River Basin is used in this study to employ the developed analytical framework of the Universe in order to analyse the hydro-political relations and the impacts of anarchy and the ERU principle. But, why is the Helmand River selected and why is it relevant to the nature of this study and two key conceptual components of anarchy and equity principle? Basically the Helmand River Basin offers a very rich example with a wide variety of different factors needed for this study: e.g., long struggle for change to achieve equity; anarchy is readily apparent; geopolitical rivalry; global security and super powers; power asymmetry; the influence of identity and shadow of the past; and implication of legal principles. Compared to other international watercourses like the Nile and Mekong, the Helmand River Basin is also relatively an extreme case which has been understudied and less accessible.

At the end of the 20th century, amid a complex chaotic world, international waters in most parts of the earth inherited ill-suited colonial-era arrangements. Such political and legal arrangements were drawn

⁷⁷ In Iran this river is called the Hirmard River.

in ways that mostly valued imperial interests, leaving riparian states alone to align their national interests with ecological reality and continuous change. These arrangements – among them the 1925 exchange of notes between Great Britain and Italy concerning Lake Tana,⁷⁸ the 1929 Anglo-Egyptian agreement,⁷⁹ the 1959 bilateral agreement between Egypt and Sudan,⁸⁰ and the 1905 British McMahon arbitration over the Helmand River between Iran and Afghanistan,⁸¹ while making a change in the hydropolitical relations in favour of some actors, reflected in fact an inequitable sharing of the waters in question. Within post-colonial era, international water basins across the world are already beginning to feel the effects of changes within international anarchic system – from different aspects of socio-economic, political and climatic kinds – appeared in their respective policies, interests, identities and discourses of riparian states. Within the 21st century, the changes in the hydropolitical relations have been continuing all around the world, such as in evolution of international water and respective institutions at the global level, or in the Nile, the Euphrates and Tigris, the Aral Sea Basin, the Mekong and so on at the regional level.

The complex struggle to achieve equity when faced with anarchy is readily apparent in the Helmand River Basin. The Helmand River is divided by political borders, with asymmetric and interdependent socio-economic relations between the riparian states, and affected by anarchic nature and geopolitical tensions in the region. Taking a wider perspective extending beyond water issues, Afghanistan is historically a classic example of development and conflict within international and regional geopolitical competitions.⁸² Afghanistan has been a buffer state for superpowers with security interests in the region during both colonial and post-colonial periods. The geopolitical competition for security in Afghanistan has been referred to as the “Great Game”, or the strategic rivalry and confrontation between superpowers, namely the British and Russian Empires and later the US versus the Soviet Union, as well as regional powers like India and Pakistan.

The Helmand River is the only fresh water resources for the population in both Nimrooz province in the southwest of Afghanistan and Sistan region in the southeast of Iran, and is the only river of

⁷⁸ The agreement states “...Italy recognizes the prior hydraulic rights of Egypt and the Sudan... not to construct on the head waters of the Blue Nile and the White Nile”; the agreement that Ethiopia opposed.

⁷⁹ Agreement (1929) *Exchange of Notes Regarding the Use of Waters of the Nile for Irrigation Purposes between Egypt and the United Kingdom* [also called 1929 Nile Water Agreement]. Signed at Cairo, Egypt 7 May 1929.

⁸⁰ Agreement (1959) *Agreement between the Republic of the Sudan and the United Arab Republic for the Full Utilisation of the Nile Waters*. Signed at Cairo, Egypt 8 November 1959. [Online]. Available from: http://www.internationalwaterlaw.org/documents/regionaldocs/uar_sudan.html [Accessed 12 Jan. 2021].

⁸¹ McMahon Arbitration Award (1905) concerning *the question of rights to land and water of Persia and Afghanistan*. Available from: <https://jsumundi.com/en/document/decision/en-helmand-river-cases-award-of-arbitrator-mcmahon-monday-10th-april-1905>. See also Pirouz Mojtahed-Zadeh, *The Small Players of the Great Game: The Settlement of Iran's Eastern Borderlands and the Creation of Afghanistan* (Routledge 2004).

⁸² Nick Cullather, *From New Deal to New Frontier in Afghanistan: Modernization in a Buffer State* (The Cold War as Global Conflict, International Center for Advanced Studies, New York University 2002).

Afghanistan among the others that has a bilateral treaty.⁸³ Both states therefore depend heavily on the river for domestic water supply and agricultural irrigation (See photos in Figure 6 to get a little sense of the environment). 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. The situation in the Hamoun wetlands is compared to the degradation of the Aral Sea.⁸⁴ While no joint fact-finding studies exist, several natural and human-made factors are considered to influence this tragic environmental issue.⁸⁵ Afghanistan as a late developer country focuses on unilateral water development as strategic policy to overcome political and socio-economic failures. In addition to already constructed dams in upper Helmand River Basin (Kajaki Dam (1700 MCM) on the Helmand River and Dahla Dam (478.6 MCM) on Arghandab tributary), Afghanistan's development projects to build dams (Kamal Khan Dam on the Helmand River and the Bakhshabad Dam on the Farah River) and expand irrigation areas cause severe concern in downstream, Iran. Iran has also developed several projects like Chahnimeh reservoirs (1.5 MCM) to manage water resources in order to respond to its drinking (including out-of-basin water transfer to Zahedan) and irrigation water demand, and to control flood. Iran's Sistan is totally dependent on water resources from the Helmand River. Considering the anarchic situation in Afghanistan, Iran while recognising and supporting Afghanistan's right to development is seriously worried about such unilateral and non-cooperative behaviour. This has been making historical disputes between two states associated with outside basin political factors within the context of the Great Game. Therefore, finding an equitable solution for the disputes between the upstream need of economic recovery and downstream demand for drinking, irrigation and ecological purposes is a problematic issue, especially when it faces with the complexity of regional geopolitical anarchy. Dealing with such complexity is becoming more difficult since the water is very sensitive issues in Afghanistan and the elite seeks to make water development as a means to rebuild their national identity. Such way of "securitisation" in Afghanistan makes cooperation over water a taboo subject,

⁸³ There are mainly two rivers that flow from Afghanistan into Iran: the Helmand River and the Hariroud River. The 1973 Helmand River Water Treaty is the only agreement that Afghanistan has signed over all of its transboundary rivers which mainly flow into Central Asia, Iran and Pakistan. Almost all of these rivers are subject to a dispute due to unilateral dam projects in Afghanistan. However, the Helmand has the longest history of controversy, more blended with the geopolitical complexity of the region.

⁸⁴ See, for instance, Matthew King and Benjamin Sturtewagen, *Making the Most of Afghanistan's River Basins: Opportunities for Regional Cooperation* (The EastWest Institute 2010).

⁸⁵ King and Sturtewagen (n 84). See also Z. Vekerdy and others, *History of Environmental Change in the Sistan Basin : Based on Satellite Image Analysis: 1976-2005* (United Nations Environmental Programme (UNEP) 2006); and, Rasoul Kharazmi and others, 'Monitoring and Assessment of Seasonal Land Cover Changes Using Remote Sensing: A 30-Year (1987-2016) Case Study of Hamoun Wetland, Iran' [2018] 190 *Environ Monit Assess Environmental Monitoring and Assessment : An International Journal Devoted to Progress in the Use of Monitoring Data in Assessing Environmental Risks to Man and the Environment* 1; Alireza Najafi and Jabbar Vatanfada, 'Environmental Challenges in Trans-Boundary Waters, Case Study: Hamoun Hirmand Wetland (Iran and Afghanistan)' [2011] 1(1) *International Journal of Water Resources and Arid Environments* 16; Eelco van Beek and others, 'Limits to Agricultural Growth in the Sistan Closed Inland Delta, Iran' [2008] 22 *Irrigation and drainage systems* 131.

creating many misunderstandings in both sides of the river either in times of flood or drought. Moreover, the river basin suffers a lot from a lack of trust, shared understandings and a line of constructive communication to reflect interests and more importantly the inequity and *pains* that people of both sides tolerate. Bound by mutual distrust and frustration, Afghanistan and Iran can do little but argue, which in turn, only causes an accumulation of widespread misunderstandings and the feelings of hate.



Helmand River at the border (water flowing from Afghanistan (left) to Iran (right)) (photo taken by the author in 2017)



Western Army crossing the river in Afghanistan (photo by the US Army in Flickr, 2009)



A vast opium poppy field in upstream, Helmand, Afghanistan (photo published by UN News, 2014)



A farmer and drought in Helmand River (photo taken by the author in 2017)



People caught in flood (photo published in Mehr News Agency in 2019)



Dredging the chanals: local communities enact collective effort to mitigate flood and drought risks. High local resilience and social cohesion in times of disaster surrounding Helmand/Hirmand River (photo published by Tasnim News in 2014)



People waiting long hours to have safe drinking water in Zarang-Nimrooz, Afghanistan (photo published in Tasnim News in 2016)



Children around Hamoun Wetlands asking for international support (photo published by UNDP, 2015)



Hamoun Wetlands (photo published by AftabNews)



Helmand River: the gunners view from a military helicopter as it flies over the Helmand River in Afghanistan (Copyright © 2019 Christian Als)

Figure 6. Photos of the Helmand/Hirmand River

Despite significant swings in the political regime of the region, and while the existing treaty and the Helmand River Commission provide a basis for bilateral cooperation, the story of the Helmand River Basin has remained largely unchanged since the mid-nineteenth century – with one country blaming the other for not respecting the treaty and consequently that country’s “water rights”. The Helmand River offers a classic example of the challenges faced when attempting to foster transboundary water cooperation. The dispute may indeed reflect conflicting views over the river’s political and legal regime, and differing views on the utilisation of shared waters between the riparian states. However, water disputes over the Helmand might more accurately reflect the anarchic symptoms within the basin, and in particular the geopolitical intervention of outsiders in Afghanistan. The persistence of disputes over the Helmand waters between Iran and Afghanistan is arguably for the most part influenced by *geopolitical factors* in the region and the anarchic setting of Afghanistan. This anarchic setting is a by-product of or combined with protracted foreign intervention and military occupation of outside-basin actors. Anarchy has produced a fear among riparian states that their fellow states will make relative gains, and this study examines how international water law can function against such symptoms of anarchy. Closely examining the normative role of the ERU principle in shaping riparian states’ interests and identities, and hence their behaviour, within the geopolitically anarchic nature of the Helmand River provides a more comprehensive approach to illustrating the complex interactions between international law and politics. It is expected that the theoretical analysis over the role of the ERU principle within this highly securitised basin could improve the understanding of the nature of the problem over the Helmand River for policymakers.

1.7. Outline of the thesis

Structurally, the thesis is divided into seven chapters. Following this introduction, Chapter 2 discusses one of the main concepts employed in the thesis, i.e., anarchy. The chapter explains the interpretation of anarchy from different IR theories. By exploring how anarchy and the dominant nature of struggling for power shape state behaviour over international waters, this chapter identifies the challenges and obstacles for water conflict transformation emanating from anarchic nature. While anarchy has been one of the fundamental concepts of international relations theory and international law scholarship, it has yet received particular attention in debates surrounding international watercourses and its influence on legal discourse.

Chapter 3 presents the overarching interdisciplinary theoretical framework. By bridging two disciplines of international law and international relations, this chapter provides a particular perspective, or lens, through which to examine the research question of the study. In so doing, this Chapter first, presents the different theoretical understandings of the linkage between international law and international relations, by way of various international relations disciplines. This chapter, therefore, elaborates how international law influences state behaviour and influences political relations within an anarchic context. This chapter introduces the framework of interactional international law by which the study seeks to analyse the effectiveness of the ERU principle within anarchic context. This will provide the study a theoretical platform to understand how legal norms can influence states' behaviour.

After presenting the overarching framework, Chapter 4 introduces the main theoretical underpinnings of this study for analysing hydropolitical relations. Building upon the existing critical hydropolitical literature, this chapter will emphasise the necessity of special attention to the concepts of equity and identity in hydropolitical studies. This part will provide basic theories for understanding the role of international water law under complex and dynamic hydropolitical processes.

Chapter 5 presents the definition and the methods to identify the ERU principle. In addition, this chapter provides analytical insights to situate the ERU principle into the framework of TWINS. This part contributes to the analysis of operating the ERU principle as bargaining and ideational power in a basin context. Drawing upon the theoretical foundation, Chapter 5 will develop and introduce a conceptual framework, the Universe of Hydropolitical Relations, for critical analysis and assessment of the influence of the ERU principle on transforming hydropolitical relations. This part will define different degrees of equity, from low to high, and illustrates how each degree may be understood in a specific political and legal context. This chapter will also show how from a constructivist point of view various levels of hydropolitical relations are placed in different cultures of anarchy. Considering anarchy's symptoms from a neorealist perspective, and how they are an impedimental to an equitable and sustainable cooperation over shared water utilisation, Chapter 5 also elucidates the normative power of

the ERU principle to relieve anarchy's symptoms and thereby move hydropolitical relations towards water conflict transformation.

Chapter 6 analyses the case study. Through an historical perspective the chapter examines the nexus between the ERU principle, anarchy and state behaviour within a hydropolitical relations, and its legal underpinnings, through the Helmand River Basin. Anarchy is one of the primary elements overshadowing all features of Afghanistan where the main area of the river flows. It is therefore worthwhile to examine the role of international water law and explore how it can alleviate the symptoms of anarchy and lead the hydropolitical relations towards conflict transformation and equity.

Finally, Chapter 7 draws an overall conclusion in order to stress that international water law can be a powerful asset not only for managing tensions and peace-building, but also for promoting an effective hydropolitical relations. Furthermore, this concluding chapter points towards the future prospects of international water law in achieving conflict transformation, by proposing a research agenda for the epistemic community.

Chapter 2. Anarchy and the behaviour of states in world politics

2.1. Introduction

The main research question of this study is: “How and to what extent does the equitable and reasonable utilisation principle (ERU) improve the hydropolitical relations of an international watercourse within anarchic geopolitical settings?”. There is an initial need, therefore, to define “anarchic geopolitical settings” as employed in this study, and explore its impact on state behaviour and hydropolitical relations: What are the key features of anarchic geopolitical settings? What are the effects of anarchy on state behaviour? Who and what shapes hydropolitical relations where riparian states struggle with anarchic geopolitical tensions? While in some cases, strong potential from interdependency and broad cultural, socioeconomic, and political commonalities and rich social capital between riparian states exist (e.g. Iran-Afghanistan), why do states become mired in disputes over transboundary waters? To what extent do riparian states have the ability to reach an equitable solution in anarchic situations? Is equity attainable where conflict has deep social and political roots (e.g. Palestine-Israel), and if so, what type of equitable solution might riparian states hope to achieve? While there is a dearth of critical studies in hydropolitical literatures that consider the influence of anarchy on state behaviour,⁸⁶ the purpose of this chapter is to critically examine the role of anarchy and geopolitical interventions in shaping hydropolitical relations concerning an international watercourse. The study thus acknowledges that context matters in understanding the processes, outcomes and the overarching nature of the interactions between states in shaping their hydropolitical relations.⁸⁷ This follows by this argument that anarchy matters. The study, therefore, will involve an analysis of the impacts and causes of anarchy in the context of cooperation and conflict over international watercourses.

While many different branches of international relations theory can shed light on certain parts of the dynamic complexity of hydropolitical relations, this section of the study builds on a neorealist and constructivist reading of the concept of anarchy to examine when, how, and why riparian states’ habits of rational self-interest are placed above the good of the whole, and, more importantly, for what purpose? In particular, this chapter seeks to explore under what *conditions* riparian states may act strategically in their own self-interest respecting transboundary waters. While “mainstream” hydropolitics literature has mainly endorsed a conflict-cooperation dichotomy and underestimated the role of power in shaping hydropolitical relations, recent “critical” hydropolitics literature has

⁸⁶ See Jeroen Warner and Neda Zawahri, ‘Hegemony and Asymmetry: Multiple-Chessboard Games on Transboundary Rivers’ [2012] 12 Int Environ Agreements International Environmental Agreements: Politics, Law and Economics 215; and Shlomi Dinar, ‘Water, Security, Conflict, and Cooperation’ [2002] 22 Sais Review.

⁸⁷ See also Zeitoun ‘Transboundary Water Justice’ (n 20); and, Hussam Hussein and Mattia Grandi, ‘Contexts Matter: A Hydropolitical Analysis of Blue Nile and Yarmouk River Basins’ [2015] Social water studies in the Arab Region.

demonstrated how riparian states pursue a particular strategy to maintain or challenge the *status quo* within asymmetric power relations and hegemonic dynamics.⁸⁸ Given that power is a major determinant of the behaviour of states concerning hydropolitical relations, however, and in addition, a part of this study, grounded on a neorealist perspective, argues that the *anarchic structure* of international systems should also be taken into account as a key driver in shaping state behaviour. Consequently, this study, rather and in particular, examines *why* the behaviour of riparian states in some transboundary river basins often moves into struggles for power, security, and survival, and *how* state behaviour is shaped under anarchy. In doing so, the study analyses the *circumstances* that lead hydropolitical relations to an intense competition and mutual distrust that create significant obstacles to equitable and sustainable cooperation.

The circumstances in transboundary river basins also play out across different scales – international, regional, and domestic; and there are competing and overlapping networks of actors attempting to influence the outcomes of hydropolitical relations. Resultantly, this study argues that riparian states' political conduct should be understood at the crossroads of *international* anarchy and geopolitical circumstances at the *basin* level, and in the light of existing political forces inside the states, particularly in the case of fragile, vulnerable, and failing states such as Afghanistan. Anarchy can be understood at *an international level*, which may be associated with *regional* geopolitical instability created by the intervention of “outside-of-basin” actors. Moreover, in some cases, the political divide inside one riparian state may not only weaken the state in question, but also result in anarchy and chaos in all diplomatic efforts at *a basin level*. A deeper understanding of these underlying circumstances is necessary to analyse why riparian states get bogged down in disputes without any positive change in their hydropolitical relations, which are often embedded in a highly politicised environment. The highly politicised situation of an international watercourse can be analysed through the notion of “hydropolitical security complex”. Michael Schulz introduced this notion as “a set of states that are geographically part owners and technical users of a water body, and that consider that water body to be a major national security issue”.⁸⁹ Given the hydropolitical security complex and the circumstances at different above-mentioned scales, this study, then, seeks to understand how such an environment is produced and whom do such situations favour. Ultimately, the study will explore how the ERU principle influences such political nature of transboundary river basins.

The arrangement of this chapter is as follows. In the first part (Section 2.2), neorealist assumptions are delineated, after which the meaning of anarchy for the purposes of this study is constructed. This is

⁸⁸ Zeitoun and Warner (n 9). See also Mark Zeitoun and Naho Mirumachi, ‘Transboundary Water Interaction I: Reconsidering Conflict and Cooperation’ [2008] 8 Int Environ Agreements International Environmental Agreements: Politics, Law and Economics 297.

⁸⁹ See Schulz (n 43).

followed by an examination of the consequences of an anarchic setting for the conduct of states. This section will therefore critically evaluate neorealist “self-help” reading to better understand state behaviour and hydropolitical relations that are partly oriented by the anarchic structure of the basin. This kind of mostly imposed anarchic structure, it is argued, creates serious obstacles to equity between riparian states. Then, in addition to this neorealist lens, constructivist reading of the concept of anarchy will be presented in order to capture different circumstances surrounding international watercourses and offer the possibility of transformation in hydropolitical relations. Next, the nature and scale of this study’s analysis are described, and the relationship between international anarchy, regional geopolitics, and domestic anarchy is explained. This leads to a consideration of the function of anarchy within hydropolitical relations. This chapter will therefore not only provide a basic platform to analyse the behaviour of riparian states respecting international watercourses in highly anarchic geopolitical settings, but also illustrate the obstacles with which riparian states are confronted when attempting to adopt equitable legal principles within such settings.

2.2. Making sense of state behaviour under the shadow of anarchy: unravelling the fears

In exploring the “circumstances” that shape riparian state behaviour within hydropolitical relations, while considering the asymmetric power relations between actors, this study argues that one of the main driving forces of riparian states’ behaviour, within an often “highly charged” political environment, is the anarchic nature of the basin. This anarchic setting, which is often a by-product of or combined with protracted foreign intervention of outside-basin actors, results in geopolitical competition for security. Within such circumstances, transboundary river basins get embroiled into wider strategic conflicts where water may become a bargaining chip to achieve broader security interests of foreign interventions. Consequently, this anarchic setting presses riparian states into a struggle for survival during negotiations over transboundary waters, which are essentially imbued with power-seeking, driven by self-interest, heated by the fears of cheating and relative gains, and weakened by uncertainties. In such an externally imposed anarchic environment, the strategic foreign policies of outsiders which give preference to protecting their own interests potentially destroy constructive cooperation between the riparian states and, indeed, potentially damage the rich regional and local social norms and identities of the riparian states.⁹⁰ Therefore, understanding riparian states’ behavioural choices necessitates situating their hydropolitical relations at the crossroads of anarchy, both internationally and within the state, and in geopolitical overlay at the basin level. Such politicised anarchic circumstances and their constraints rationalise riparian states’ behaviour concerning transboundary waters.

⁹⁰ Nagheeby (n 72).

Anarchy is one of the fundamental concepts of IR theory and IL scholarship,⁹¹ and is an idea central to this study. Like many IR concepts, anarchy is perceived differently in the eyes of various IR disciplines. The distinctions rest firstly on how each approach views the anarchic nature (structure) of international politics, and secondly on how they perceive anarchy's influence on the behaviour of states. In this part, the study wears neorealist glasses in order to shed light on the impediments to progress hydropolitical relations. From a neorealist perspective, anarchy naturally makes states fearful, as it creates unease and a feeling that something harmful will or might happen. Such fear may paralyse the cooperative behaviour of states, as neorealists argue, or, in opposition to neorealist thought, may be a driving force behind preparedness and the promotion of cooperation, as liberal institutionalists contend; or it may be just a social construction created through the actions of states, as constructivists maintain.⁹² Neorealists and neoliberal institutionalists assume that anarchy is simply a feature of the international system, irrespective of state actions. Neorealists believe that this pushes states in conflict; neoliberals believe that it pushes states into cooperation. In contrast, constructivists believe that anarchy is not a natural feature that exists as an objective truth, but that anarchy is created through the actions of states. Thus, while states create anarchy, they can also create non-anarchy (e.g. global governance institutions).

The highly politicised transboundary river basins, for instance in Africa, Middle East and South Asia, which are characterised by hydropolitical security complex have often seen decades, if not centuries, of foreign invasions and other forms of outside interventions; inter-state disputes among the basin states; weak – if any – regional institutional frameworks that could manage conflict and guide hydropolitical relations towards equitable and sustainable cooperation; national elites that jockey for power where domestic political dynamics spill over into regional politics; and all this – or some of this – has an impact on the behaviour of states concerning transboundary water resources. The neorealist perspective, as argued here, offers a comparatively intelligible and explicit description of such a state of affairs in which states are confronted with constant uncertainties, and can thus suit the analysis of a highly anarchic geopolitical setting. Therefore, in the context of international watercourses, the rivalry among riparian states, the competition over natural resources, and the intervention of external powers for their own geopolitical interests, might be better explained through the theoretical premises of neorealism. The neorealist theory deployed in this study will reveal that how anarchy is the main explanatory factor of the hydropolitical relations in the Helmand River Basin. This neorealist interpretation of the impact

⁹¹ There has been a tendency in international relations theory to consider anarchy as the cardinal organising category and the fundamental basis of international politics. See more in Helen Milner, 'The Assumption of Anarchy in International Relations Theory: A Critique' [1991] 17 *Rev Int Stud Review of International Studies* 67. See also Seifudein Adem, *Anarchy, Order and Power in World Politics a Comparative Analysis* (Routledge 2019).

⁹² Milner (n 91).

of anarchy on state behaviour is therefore used in this study for testing the conditions of the Helmand River Basin, and challenged later when considering the influence of legal norms.

2.2.1. The assumptions of neorealism in international relations theory

Neorealists not only focus on explaining the behaviour of states within international politics, but also have a vision of world politics and predict the international-political *outcomes* of the interaction between states and the “international system”.⁹³ Thus, in addition to explaining the behaviour of states (units), neorealists seek to find an answer to this question: “What is it that intervenes between interacting units and the results that their acts and interactions produce?”⁹⁴ This study uses neorealist thought to examine and analyse *merely* the multi-causal behaviour of states relating to international watercourses in highly politicised anarchic settings. The outcome of hydropolitical relations, arguably, is context-dependent influenced by the Westphalian anarchic structure (where neorealist can better illustrate it) while socially constructed in time influenced by the “shadow of the past” and “shadow of the future” (where constructivist can better capture it). Therefore, as already mentioned, the study does not argue which of these IR perspectives is the “truer”, but it aims to offer a combined reading of two above mentioned perspectives to provide a fuller picture of the anarchic geopolitical complexity surrounded hydropolitical relations.

Neorealists offer a “systematic” explanation of international politics. The main issue for neorealists is discovering why states in international arena often display similar patterns of behaviour while they differ in their political, social, economic, and ideological views. This similarity in behavioural patterns is also manifested in the behaviour of most riparian states sharing international watercourses – who can be simply classified as upstreamers and downstreamers – and the historical trend within strategic hydropolitical relations. For neorealists, systems theory can provide an answer: “Systems theories explain why different units behave similarly and, despite their variations, produce outcomes that fall within expected ranges”.⁹⁵ Neorealists argue that this similarity must arise out of a *systemic* understanding of international politics: “A system is composed of a structure and of interacting units. The structure is the system-wide component that makes it possible to think of the system as a whole”.⁹⁶ Within this systemic theory, some part of the explanation for behaviours and outcomes is found in the structure of the system. As long as the political structure endures, it produces a similarity in process and

⁹³ For extensive discussions see Kenneth N. Waltz, *Theory of International Politics* (New York, London: McGraw-Hill 1979); and, Hans J. Morgenthau, *Politics among Nations : The Struggle for Power and Peace* (Kenneth W. Thompson and W. David Clinton eds, 7th ed. / revised by Kenneth W. Thompson and W. David Clinton.. edn, Boston : McGraw-Hill Higher Education 2006); John J. Mearsheimer, *The Tragedy of Great Power Politics* (Updated edition.. edn, New York : W.W. Norton & Company 2014).

⁹⁴ Waltz (n 93) p. 79.

⁹⁵ Waltz (n 93) p. 72.

⁹⁶ Waltz (n 93) p. 79.

performance. Thus, similar structures cause similar effects. However, “similarity is not uniformity. Structure operates as a cause, but it is not the only cause in play”.⁹⁷ In this regard, Joseph Grieco summarises the neorealist assumptions as follows.⁹⁸ The first assumption in neorealism is that international politics should be seen as part of an “international system” in which its structure is defined by “anarchy”. This anarchic structure, neorealists argue, manipulates all other features of international relations, e.g. the behaviour of states and the outcomes of this behaviour. International anarchy is the principal driver of states’ motives and positions, and confronting power and security issues impels states towards conflict and competition due to self-interest, rather than cooperation for common interests. Anarchy, being essential to the international structure, is therefore a condition for the possibility of, or a permissive cause of, war, pushing units (states) to rely on “self-help”.

The second assumption is that states are rational and are the major actors in the international system as sovereign entities, autonomous of each other; and because of the anarchic setting, no other structure or society can order relations between them or bind them unless by coercion or their own consent. Third, power is the key and only variable of states’ interests. Only through distribution of the *material* capacity of power can states defend themselves and survive the anarchic setting.

The fourth assumption concerns the neorealist vision of world politics. Neorealists argue that anarchy and the principal goal of survival lead states to compete for power and advance the material interests necessary for their survival. The world, in this sense, is dangerous and especially uncertain, and so from this position, two approaches are predicted by neorealism. Kenneth Waltz argues that “the balance of power” is the key to maintaining peace and stability (defensive realist).⁹⁹ In contrast, John Mearsheimer contends that, in order to guarantee survival amid anarchy, states seek to maximise their relative power and become the strongest – that is, a “hegemon”¹⁰⁰ – which *per se* is the best strategy for a country to pursue (offensive realist).¹⁰¹ In an environment with no hierarchical authority in place, neorealists argue that law and institutions can only be enforced through state power.¹⁰² This particular argument will be contemplated in the next chapter of this thesis. Considering the above-mentioned assumptions, and in

⁹⁷ Waltz (n 93) p. 87.

⁹⁸ Joseph M. Grieco, ‘Realist Theory and the Problem of International Cooperation: Analysis with an Amended Prisoner’s Dilemma Model’ [1988] 50 *The Journal of politics* 600.

⁹⁹ Waltz (n 93).

¹⁰⁰ For neorealism a hegemon is defined “as a state that is so powerful that it dominates all the other states in the system”. See Peter Toft, ‘John J. Mearsheimer: An Offensive Realist between Geopolitics and Power’ [2005] 8 *Journal of International Relations and Development* 381.

¹⁰¹ Toft (n 100).

¹⁰² Waltz (n 93).

order to discuss the neorealist perspective on state behaviour amid anarchy, the next section will define what anarchy means in this study.

2.2.2. What is anarchy from neorealist perspective?

Since Waltz's seminal work on neorealism, *Theory of International Politics* (1979),¹⁰³ the discipline of international relations has been associated with the concept of anarchy.¹⁰⁴ Almost all IR disciplines, even those which challenge his interpretation of its symptoms, assert that the international system is anarchic.¹⁰⁵ Waltz introduces anarchy as the *structure* of the international system.¹⁰⁶ He argues that this structure manipulates all other aspects of international relations, in particular the behaviour of states respecting cooperation.¹⁰⁷ Similarly, for Robert Art and Robert Jervis, "anarchy is the fundamental fact of international relations", and international politics must be understood by comprehending this "fact".¹⁰⁸ Also, Robert Gilpin understood international relations as "a recurring struggle for wealth and power among independent actors in a state of anarchy".¹⁰⁹ First among the characteristics of the international system in John Mearsheimer's study of international politics is anarchy.¹¹⁰ Neorealism, then, presents a pessimistic analysis of the prospects for international cooperation among states in anarchic settings. But what does anarchy mean in neorealist schools of thought, and what definition is

¹⁰³ Waltz (n 93).

¹⁰⁴ Silviya Lechner, 'Why Anarchy Still Matters for International Relations: On Theories and Things' [2017] 13 *Journal of international political theory* 341.

¹⁰⁵ For all IR disciplines – albeit less so for critical scholars – anarchy is taken to be the central criteria of international politics. For neoliberals, like Robert Keohane in *After Hegemony*, anarchy is also the fundamental fact of international politics, though they offer an optimistic vision of how cooperation may take place among anarchy. Robert Axelrod, for example, in *The Evolution of Cooperation* seeks to answer the question, "under what conditions will cooperation emerge in a world of egoists without central authority?" His analysis is shaped by the assumption that anarchy is the essential criteria of international politics, since "today nations interact without central authority". Similarly, Kenneth Oye's edited volume, *Cooperation Under Anarchy* views anarchy as the central condition of world politics, and he proceeds to explain what factors make cooperation possible. For constructivists, anarchy is a way of implementing ideas within the mutually constituted identities of states. They argue that this implication – not anarchy itself – should be the object of analysis of international relations, since "anarchy is what states make of it" through social interactions. Critical theorists of IR, contrastingly, focus on the role of structures such as capitalism and statism, which impose a particular social order in anarchic settings. For critical strands of international relations theory, these capitalist and state group structures, rather than anarchy per se, produce a superordinate social class over subordinate classes in the interests of the informal hierarchy (i.e., hegemony).

See Robert O. Keohane, *After Hegemony : Cooperation and Discord in the World Political Economy* (Princeton : Guildford : Princeton University Press 1984); Robert Axelrod, *The Evolution of Cooperation* (London : Penguin 1990) pp. 3-4; Kenneth A. Oye, *Cooperation under Anarchy* (Princeton University Press 1986)

¹⁰⁶ Waltz (n 93) p. 88.

¹⁰⁷ Waltz (n 93).

¹⁰⁸ In Milner (n 91) p. 68.

¹⁰⁹ In Milner (n 91) p. 68.

¹¹⁰ Mearsheimer (n 93).

used in this thesis to best reflect the predominant nature of international watercourses and in particular the case under study, the Helmand River Basin?

Chaos and lack of order are not what IR scholars mean by the anarchic nature of the international system. For instance, from the English School of IR— different to neorealism, the international system is an “anarchic society”¹¹¹ associated with international order, which includes a pattern of activity implying a common framework of rules and institutions regulating international practices,¹¹² such as international law, diplomacy and sovereignty. In this sense, order is not what the international system lacks, since a set of patterned behaviour exists to promote various goals and norms. However, in some cases involving high geopolitical rivalry, e.g. Afghanistan, it might be an anarchic setting with a clash of orders, which forms a buffer zone between competing powers.¹¹³ For neorealists such as Robert Gilpin, the argument is that “the relationships among states have a high degree of order and that although the international system is one of anarchy (i.e., absence of formal governmental authority), the system does exercise an element of control over the behaviour of states”.¹¹⁴ In neorealist thought, the distribution of power among states creates the means for producing order in international politics – i.e. regularised, predictable patterns of behaviour.¹¹⁵ Here, power is used to create a structure within which the international system is organised. This distribution of power gives order to the system, which might be the formation of either balances of power as Waltz understands or inequalities in power as Robert W. Tucker emphasises.¹¹⁶ Thus, anarchy in international relations theory does not mean a lack of order in the international system.

The nature of world politics being anarchic has two parallel meanings in international relations theory: the lack of an overarching power, such as a world government, in the international system;¹¹⁷ and a horizontal relationship between nominally equal sovereign states to be distinguished from a hierarchical ordering of subordinate and superordinate units.¹¹⁸ This first definition of anarchy – the absence of

¹¹¹ In Lechner ‘Why Anarchy Still Matters’ (n 104) p. 344, 348: “Bull’s theory ... contains other basic concepts such as ‘society’, ‘system’, ‘order’, ‘institutions’ and ‘rules’ as well as statements that interlink such concepts (e.g. that even under anarchy, states recognise as binding common rules and institutions in their mutual dealings) ... Bull’s normatively laden talk of society may appear to clash with Waltz’s scientific vocabulary of falsification, general laws and explanation, but both theorists are of one mind in viewing anarchy as the differentiating tenet of the international system (Waltz) or international society (Bull).”

¹¹² Milner (n 91).

¹¹³ See in this respect, Rein Müllerson, *Dawn of a New Order: Geopolitics and the Clash of Ideologies* (2017).

¹¹⁴ In Milner (n 91) p. 70.

¹¹⁵ In Milner (n 91).

¹¹⁶ In Milner (n 91) p. 70: “Robert W. Tucker ... sees power differentials among Northern and Southern states creating a hierarchy of relations that make for an orderly system.”

¹¹⁷ Lechner *Why Anarchy Still Matters* (n 104); Milner (n 91) pp. 69-70.

¹¹⁸ Lechner ‘Why Anarchy Still Matters’ (n 104).

central government – derives from the concept of a “state of nature” developed by Thomas Hobbes in *The Elements of Law* (1640).¹¹⁹ The state of nature is a hypothetical condition of “statelessness”.¹²⁰ With regard to the first of the aforementioned definitions, Robert Art and Robert Jervis provide an explanation for the anarchic surroundings of international politics:

No agency exists above individual states with authority and power to make laws and settle disputes. States can make commitment and treaties, but no sovereign power ensures compliances and punishes deviations. This – the absence of a supreme power – is what is meant by the anarchic environment of international politics.¹²¹

Compared to domestic politics, which is structured as a hierarchy, international politics lack a formal world or common government.¹²²

Formally, each [state] is the equal of all the others. None is entitled to command; none is required to obey. International systems are decentralised and anarchic. The ordering principles of the two structures are distinctively different, indeed contrary to each other. Domestic political structures have governmental institutions and offices as their concrete counterparts. International politics, in contrast, has been called “politics in the absence of government”.¹²³

Thus, anarchy in its first definition signifies that there is no legitimate overriding authority higher than states. Here, authority or government, as Waltz argues, is associated with the means used to organise how and when force can be employed.¹²⁴ While lack of government may mean the absence of law and a judiciary to enforce it, here it is accompanied by “the absence of a central authority to enforce states’ adherence to promises or agreements”.¹²⁵ Thus, the first definition relates anarchy to a lack of hierarchical rule *enforcement*. Hobbes’s international state of nature is the prevalent analogue of international anarchy today.¹²⁶ The second definition, which is compatible with the first, presents anarchy as an international order. Anarchy, in this sense conceptually linked to *sovereignty*, is the ordering principle of international relations that defines the correspondences between sovereign states.

¹¹⁹ Lechner ‘Why Anarchy Still Matters’ (n 104).

¹²⁰ Silviya Lechner, *Anarchy in International Relations* (Oxford University Press 2017) p. 2.

¹²¹ In Robert Powell, ‘Anarchy in International Relations Theory: The Neorealist-Neoliberal Debate’ [1994] 48 *International Organization* 313 p 330.

¹²² Milner (n 91).

¹²³ Waltz (n 93) p. 88.

¹²⁴ Milner (n 91).

¹²⁵ Milner (n 91) p. 71.

¹²⁶ Lechner *Anarchy in International Relations* (n 120)

Once a state becomes sovereign internally as the highest authority in a realm, then, in this second definition of anarchy, its external relations to other states rest on “sovereign equality”.¹²⁷ Under the Westphalian model of social organisation,¹²⁸ states have complete sovereignty within an anarchical political order.

Both definitions fit in with this interdisciplinary study of international relations and international law, since the former definition is deployed in a neorealist reading of anarchy’s effects on states behaviour, and the latter is, though subject to power relations, intrinsic to international law.¹²⁹ Within the definitions mentioned, anarchy itself is not a bad or good phenomenon; it might be an opportunity or threat to improve cooperation. The implication and outcome of anarchy may be differently assumed in a spectrum of war to peace. This study will benefit from the neorealist lens in understanding the behaviour of riparian states; as already argued, it is a better fit for describing state behaviour as respects international watercourses, the nature of which, in several cases, are highly politicised by geopolitical overlay and anarchy. The next section will define the symptoms of anarchy.

2.2.3. Anarchy over state behaviour: the battle for power, survival and relative gains

Since anarchy is an important concept in international relations and in this study, it is necessary to explore the impact of anarchy on the behaviour of states. This section of the thesis accordingly covers one main part of the conceptual framework concerning “the battle for power” (see Figure 1 in Introduction Chapter), which illustrates the link between anarchy and state behaviour. In so doing, this study adopts a neorealist reading of anarchy to explain the behaviour of states and the impediments to cooperation over international waters. The key question here is, what are the effects of anarchy in shaping state behaviour, and thus hydro-political relations, particularly respecting an international watercourse of a highly politicised nature?

A wide variety of theoretical approaches to study conflict and the possibilities for resolution and cooperation have been adopted by different schools of thought, with the most diverse viewpoints being expressed between neorealists and neoliberal institutionalists.¹³⁰ This chapter does not argue which of the various IR perspectives is right or wrong concerning the analysis of the effects of anarchy. However, by particularly considering the transboundary river basins where geopolitical complexity and the fragile

¹²⁷ Embedded in the UN Charter, Article 2. Lechner (n 120). See also Thomas H Lee, ‘International Law, International Relations Theory, and Preemptive War: The Vitality of Sovereign Equality Today’ [2004] 67 *Law and Contemporary Problems* 147.

¹²⁸ Lechner *Anarchy in International Relations* (n 120) p. 2.

¹²⁹ Lechner ‘Why Anarchy Still Matters’ (n 104).

¹³⁰ Jervis Robert, ‘Realism, Neoliberalism, and Cooperation: Understanding the Debate’ [1999] 24 *International Security* 42.

political system of at least one party overshadow hydropolitical relations entirely, the chapter argues that neorealism is perhaps better positioned to explain riparian states' behaviour.

Anarchic conditions breed competition and mistrust between states, which create obstacles to cooperation. This study, here, compares the perspectives of neorealists and neoliberal institutionalists on anarchic conditions. This is because they have much in common regarding their basic understandings of anarchy, and have been pioneering and remain prominent in the study of cooperation and conflict in international relations, while providing the contrast of pessimistic and optimistic views.¹³¹ These have been conceptualised in the neorealist perspective, which holds that states operate in an anarchic international system dictating certain kinds of priorities and behaviours,¹³² and that the neoliberal idea of “*cooperation under anarchy*”.¹³³

While the neoliberals' proposed solution mainly focuses on the role of an institution in fulfilling the lack of authority in an anarchic world in order to foster cooperation, neorealists think this a “false remedy”.¹³⁴ Without denying the possibility of cooperation, neorealists see cooperation more as a “puzzle” than an “anomaly” in an anarchical context.¹³⁵ That is, although neorealists do not deny the existence of institutions in which cooperation abounds, they argue that institutions are rather tools of statecraft and largely a reflection of state interest. They see world politics as an international anarchic system involving far more complex and unavoidable conflict than neoliberal institutionalists might perceive.¹³⁶

For neorealists, anarchy is a significant impediment to cooperation because it intensifies competition and conflict between states, and institutions lack the capacity to mitigate anarchy's constraining effects on inter-state cooperation.¹³⁷ This study seeks to explore three key features of a neorealist understanding of cooperation in world politics particularly relevant to anarchy-affected international watercourses.¹³⁸

¹³¹ It is worth saying that the newest liberalism agrees with realists perspective over the centrality of states as unitary-rational agents. Also, the new version accepts ‘realism's *emphasis on anarchy to explain state motives and actions*'. However, mainly grounded on interdependence theory and the fact that ‘states in anarchy often face mixed interests’, neoliberals still consider more practical role for international cooperation and the potential of institutions therein. See Grieco (n 98) p. 493.

¹³² Waltz (n 93).

¹³³ Milner (n 91) p. 69.

¹³⁴ Robert (n 130) p. 54.

¹³⁵ Robert (n 130) p. 62.

¹³⁶ Robert (n 130).

¹³⁷ Grieco (n 98).

¹³⁸ For more extensive discussions concerning the three key features of a neorealist understanding of cooperation, see, for instance, Grieco (n 98); Robert (n 130); Milner (n 91); Waltz (n 93).

Firstly, for neorealists, anarchy feeds competition and conflict among states, and resultantly, the *dominant* nature of political processes is striving for *power* and *self-interest*. Such anarchic conditions, from a neorealist perspective, compel states to fight for their *survival* and security to protect themselves. Accordingly, neorealists argue that cooperation becomes difficult to achieve, or as this study maintains, fails to result in conflict transformation, when the willingness of states to cooperate is driven by a struggle for power, self-interest, and survival. On the contrary, neoliberals are *less* concerned about competition for power, survival, and security in anarchy, believing instead that the incentives to cooperate to achieve greater interests outweigh any residual interest to remain foes. This neoliberal thought rests on an assumption that augmenting inter-nation economic relationships increases interdependency among states, and political processes are rather oriented towards “economic growth and social security” than power.¹³⁹ As a result, from a neoliberal perspective, states seek their self-interests in “strictly individualistic terms”, and in a “rational” way; thus, they consider the costs and benefits of their action and the state attempts to “*maximize its individual long-term total payoffs*”.¹⁴⁰ Notwithstanding this, for neorealists, the dominant interest of a state in an anarchic context is not individual, absolute gain, but rather survival in the face of any potential threat from other states. From this point of view, states may wish to cooperate to achieve “noble goals” like justice or economic development, but their efforts will be driven by a power struggle with other states. The struggle for state survival, as a main goal in an anarchic world, leads states to give significant attention to increasing their power and security; and at the least, on maintaining their position in the system (i.e. surviving) by preventing relative increases in their rivals’ power. Thus, striving for a “balance of power” dominates the anarchic setting, as neorealists argue, and it may result either in the inhibition of cooperation or the abuse of cooperation to maintain the *status quo*.

Secondly, from the neorealist perspective, fear of *relative gains* is the main barrier to cooperation that emanates from anarchy. Neoliberals argue that states only “seek to maximize their individual *absolute gains*” particularly in a mixed-interest situation; and therefore, for neoliberals, states mostly fear being cheated out of the outcome of cooperation.¹⁴¹ From this point of view, institutions can assist states to overcome cheating, which is the greatest impediment to cooperation for neoliberals. However, neorealists observe a greater obstacle to cooperation than cheating and deception. They consider states as “positional, not atomistic, in character”.¹⁴² States therefore assess their performance not in isolation but against that of other states, and with attention to their *relative* strengths and weaknesses. With the perspective that states’ foremost interest is in survival and concomitantly relative power dynamics, as

¹³⁹ Grieco (n 98) p. 489.

¹⁴⁰ Grieco (n 98) p. 496.

¹⁴¹ Grieco (n 98) p. 487.

¹⁴² Grieco (n 98) p. 487.

independent actors in an anarchic context, neorealists contend that states are not concerned with absolute but rather *relative* gains from cooperation. Consequently, anarchy for states results not only in a lack of reliable agency to enforce promise but also an absence of “*overarching authority to prevent others from using violence, or the threat of violence, to destroy or enslave them*”; hence anarchy, from the neorealist perspective, produces much more fear and distrust.¹⁴³ Resultantly, the major concern from a neorealist perspective is how the intervention of the neoliberal’s institution and any ensuing cooperation “might produce a more dangerous *potential* foe in the future”.¹⁴⁴ This fear, that “today’s friend may be tomorrow’s enemy”, from the neorealist perspective impels the main goal of states: to prevent others from “achieving advances in their relative capabilities”.¹⁴⁵

Finally, considering the concern of states at survival and relative gains, another obstacle to a sustainable cooperation is the *uncertainty* that stems from anarchy: “States are uncertain about one another’s future *intentions*”; thus, they must give serious attention to any future relative capabilities affected by cooperation. The inability of states within an anarchic setting to predict or control the interests and behaviour of partners foments political uncertainty, and consequently makes states wary when pursuing diplomatic cooperation. Ultimately, while for neoliberal institutionalists the worst possible outcome of failed cooperation in an anarchic situation might be losing the opportunity to make progress, for neorealists, the achievement of cooperation might end in the much greater perceived risk of losing power, independence, or security. In anarchy, from a neorealist perspective, “minds can be changed, new leaders can come to power, values can shift, new opportunities and dangers can arise”.¹⁴⁶ The ensuing “uncertainty results from the inability of states to predict or readily to control the future leadership or interests of partners”. In this way, the uncertainty of states, from a neorealist point of view, pertains again to this question: “which among them could achieve the greatest gains, and would imbalanced achievements of gains affect relative capabilities?”¹⁴⁷

Under these circumstances, states are unwilling to agree to a durable cooperative arrangement, preferring instead “to be more readily able to exit from the arrangement if gaps in gains did come to favour the other”.¹⁴⁸ Further, states behave in a highly cautious, sceptical, and conservative way throughout cooperation. Such a neorealist approach is considered here to be the most appropriate to explain and analyse the behaviour and perception of riparian states over international watercourses, e.g.

¹⁴³ Grieco (n 98) p. 497.

¹⁴⁴ Grieco (n 98) p. 487.

¹⁴⁵ Grieco (n 98) p. 498.

¹⁴⁶ Grieco (n 98) p. 500.

¹⁴⁷ Grieco (n 98) p. 505.

¹⁴⁸ Grieco (n 98) p. 506.

the Helmand River Basin, in the context of anarchy. This, then, will provide basic foundation to examine the role of the ERU principle in shaping and perhaps transforming hydropolitical relations.

In sum, for the analysis of the international relations over transboundary waters, this study adopts the neorealist explanation *merely* for the anarchy's effects on states' behaviour. Neorealists do not focus on the behaviour of states within the international system, but rather on a causal link between states' behaviour and *outcomes*.¹⁴⁹ From this point of view, states in the international system see each other as a threat because there is no authority to protect them: "*In essence, great powers are trapped in an iron cage where they have little choice but to compete with each other for power if they hope to survive.*"¹⁵⁰

2.3. Constructivist reading of anarchy and identity

As already noted, the study uses two neorealist and constructivist lenses to capture the complexity of hydropolitical relations and the relationship between anarchy and the ERU principle. Alexander Wendt developed a constructivist argument to build a bridge between two main IR streams, realism and liberalism.¹⁵¹ In his *Anarchy is what states make of it: the social construction of power politics*, Alexander Wendt argues against neorealist understanding that asserts that self-help is forced onto states by anarchic structure. Wendt argues that a self-help world is socially constructed through process, not structure. By giving more attention to process than structure, Wendt believes that anarchy does not have "logic" apart from the practices through which identities and interests of states are created: "Self-help and power politics are institutions, not essential features of anarchy. *Anarchy is what states make of it.*"¹⁵²

Within this line of thought, this study seeks to examine state's identity in anarchy by bridging constructivist understanding of the state of nature and Waltz's arguments about self-help and relative gains.¹⁵³ In this respect, the study assumes state's identity as a dependant variable which is made through historical and social processes, not given. However, it also accepts that there are structural constraints on how a state's identity is formed. The focus on identity in social sciences has received growing attention in the last decade. A very basic definition of identity could be what Paulin Djité suggests, ie., "identity is the everyday word for people's sense of who they are".¹⁵⁴ Just as Wendt defines

¹⁴⁹ Waltz (n 93).

¹⁵⁰ John J. Mearsheimer, 'Structural Realism' [2013] *International relations theories : discipline and diversity* 77 p. 72.

¹⁵¹ Wendt (n 8).

¹⁵² Wendt (n 8).

¹⁵³ For extensive discussion on the role of identity in anarchy, see Jonathan Mercer, 'Anarchy and Identity' [1995] *International Organization* 229.

¹⁵⁴ Paulin G Djité, 'Shifts in Linguistic Identities in a Global World' [2006] 30 *Language Problems and Language Planning* 1 p. 6.

identity as a subjective quality “rooted in an actor’s self-understanding”, the identity of a state is also one kind of identity as a social and relational conception referring “to the image of individuality and distinctiveness held and projected by the state within particular international contexts”.¹⁵⁵ In this respect, a state’s identity as a source of its behaviour is detected in the state’s foreign policy actions, generating “a specific *value* (a *pro attitude* toward a certain kind of action), which in turn determines a state’s preference for a particular foreign policy option”.¹⁵⁶ Identity, in this line of thought, influences the behaviour of a state by both generating and shaping its interests. Wendt points out that identity “generates motivational and behavioural dispositions” of international actors.¹⁵⁷ Unlike Waltz, who treats an identity as a given to self-interested states in self-help system, Wendt does not see self-help as a fixed component of anarchy. Therefore, a state’s identity and interests could be considered as endogenous rather than exogenous to the state.¹⁵⁸ Such an understanding allows Wendt to suggest an alternate anarchy.

Wendt (1999), then, conceptualises “culture of anarchy” in his *Social Theory of International Politics* in three types of interstate-level social structures: Hobbesian, Lockean and Kantian.¹⁵⁹ Grounded on “identity approaches”, “culture” here means the “socially shared knowledge,” and “knowledge” refers to “any belief an actor takes to be true”.¹⁶⁰ Wendt’s cultures of anarchy are helpful to this study to develop the theoretical framework of the Universe to illustrate how each culture may involve in different degrees of ERU (see Chapter 5). Each culture of anarchy asserts an important role or “distinct posture or orientation of the Self toward the Other with respect to the use of violence” for transformation of states’ identity and interest.¹⁶¹ Within such constructivist perspective, identities and interests of state are constructed as “secondary products” through those “cultural” levels of roles.¹⁶² By examining causal claims of Wendt’s argument, Hidemi Suganami (2002) concludes that “a culture of anarchy is no more than a system-level description of a situation when states share a particular role as their identity”.¹⁶³

¹⁵⁵ See, for instance, Kuniko Ashizawa, ‘When Identity Matters: State Identity, Regional Institution-Building, and Japanese Foreign Policy’ [2008] 10 *International Studies Review* 571 p. 575.

¹⁵⁶ Ashizawa (n 155) p. 571; See also Henry R Nau and Richard C Leone, *At Home Abroad: Identity and Power in American Foreign Policy* (Cornell University Press 2002).

¹⁵⁷ Wendt (n 161) p. 224.

¹⁵⁸ Mercer (n 153).

¹⁵⁹ Wendt (n 8). See also Alexandrov Maxym, ‘The Concept of State Identity in International Relations: A Theoretical Analysis’ [2003] 10 *Journal of International Development and Cooperation* 33.

¹⁶⁰ Wendt (n 8) pp. 140-1. Maxym notes that “[s]ince Wendt assumes states to be unitary actors, the beliefs that comprise cultures of anarchy are shared among states, not among individuals.” Maxym (n 159) p. 35.

¹⁶¹ Alexander Wendt, *Social Theory of International Politics* (Cambridge : Cambridge University Press 1999) p. 258.

¹⁶² Maxym (n 159).

¹⁶³ Maxym (n 159) p. 35.

In a sense, Wendt introduces different anarchic systems in which various distinct cultures of anarchy exist. In each system-level there is a dominant “role relationships”, namely enmity, rivalry and friendship, that shape states’ identities and interests.¹⁶⁴ The Hobbesian culture of anarchy refers to the posture in neorealist fashion as *enemies*, “threatening adversaries who observe no limits in their violence towards each other”.¹⁶⁵ In this level of anarchy, states are constrained to observe cultural norms which might be quite negative: “kill or be killed” norm. The general orientation of Lockean culture of anarchy – which is the neoliberal explanation – is that of *rivals*, “competitors who will use violence to advance their interests but refrain from killing each other”.¹⁶⁶ In such culture of anarchy, “state observes norms because it is in its self-interest”.¹⁶⁷ Finally, states share the role of *friends* in Kantian culture of anarchy, “allies who do not use violence to settle their disputes and work as a team against security threats”.¹⁶⁸ This level of anarchy corresponds to “constructivist hypothesis,” of which the cultural norms are perceived as legitimate by states.¹⁶⁹ Such constructivist understanding of anarchy will be further employed in placing equity in TWINS framework in Chapter 5. The Hobbesian culture is most arguably evident in many international river basins in the world including the Helmand River Basin, though the other levels are also experienced. Therefore, the study seeks to unpack the nature of this level through what is already explained in neorealist perspective which is in accordance to the first degree of Wendt’s cultures of anarchy.

In this regard, the study acknowledges the constructivists’ argument, and in particular Wendt’s, that states are “intentional and corporate actors whose identities and interests are in important part determined by domestic politics rather than the international system.”¹⁷⁰ Therefore, the anarchic nature which neorealists consider as a “fixed” phenomenon is formed by actors that can change over the time. Such culture of anarchy, therefore, can be developed and transformed to another due to change in dominant norms, rules and ideologies. This is where this study finds it place to analyse how and to what extent the ERU principle can contribute to such transformation. Despite their different understanding of international system, neorealists, neoliberalists and constructivists share common explanation of the features of each culture of anarchy. For instance, the Hobbesian culture of anarchy is similar to what neorealists understand from the international ‘self-help’ system characterised with egotism, sovereignty, rationality and power, security and survival struggle. The Hobbesian culture of anarchy

¹⁶⁴ Wendt (n 161) p. 259.

¹⁶⁵ Wendt (n 161) p. 258.

¹⁶⁶ Wendt (n 161) p. 258.

¹⁶⁷ Maxym (n 159) p. 36.

¹⁶⁸ Wendt (n 161) p. 258.

¹⁶⁹ Wendt (n 161) p. 250.

¹⁷⁰ Wendt (n 161) p. 246.

speaks of a self-sustaining system of “the war of all against all” in which actors cannot rely on the help of the others. Hobbes’s interpretation of international relations is shared with neorealist theory, considering that sovereign states are not subject to any higher sovereign authority. Consider this, the study borrows Waltz’s analysis of anarchy and its consequences on state behaviour – that already explained, while remaining loyal to constructivist perception of international system.

This may appear as paradox. However, the aim of this thesis is to provide more pragmatic and critical explanation of contemporary realities of the world politics surrounding international watercourses by engaging in both Waltz and Wendt’s theorisation of international relations. Looking at the “water box” and beyond that from these different theoretical lenses will help discover those parts of the box that have been often neglected. This will help to develop an in-depth understanding of the complexities of hydro-political dynamics and fuller explanation of multi-causal phenomena. The next section will identify the level of analysis and discuss how hydro-political relations at a basin level might be influenced by the international, regional and state levels.

2.4. Merging the different levels of influence: international anarchy, regional geopolitics, and domestic anarchy

One of the chief requisites of this study in analysing international relations and foreign policies surrounded international waters is answering the question of how to examine state behaviour. In so doing, one challenge of the study is determining the level of analysis. From the neorealist perspective, system-level analysis examines state behaviour by looking at the international system. Therefore, state behaviour is the effect of the international system, which is considered the cause. Since characteristics of the structure of the international system imposed upon states cause them to behave conditionally, any change in their behaviour depends heavily on change to the structure.

In Waltz’s systems theory, therefore, some part of the explanation of states’ behaviours and outcomes is to be found in the system’s structure.¹⁷¹ However, “structures as causes” does not mean that states’ national interests – where neorealists contribute – and identities – where constructivists contribute, and the agreements or differences between them in international politics, are without value, power, and influence; but this thesis argues that the complex political structure of the international system influences the priorities of all units, including states, and its nature may influence their behaviour due to other circumstances at different levels, e.g. regionally or domestically. The interplay between the various forces involved in international, regional, and domestic situations may result in the shaping of states’ behaviour. The security interests within international anarchy may spill over into some specific regions and states; resultantly, the political nature of regional and domestic level is *mainly*

¹⁷¹ Waltz (n 93).

overshadowed by the anarchic setting within the international system. Such state of affairs might be much clear in fragile and collapsed states.

Accordingly, a necessary part of this study is to identify the level of analysis. The aim of this study is the examination of legal and political interaction over the behaviour of riparian states at a *transboundary river basin level*. However, the basin level is at an in-between stage, reflecting international, regional and domestic affairs (see Figure 7). It is therefore a requisite to properly consider these inter-connected levels. Alongside an international system with an anarchic structure in which the striving for power is a key variable, there are two unit-level variables that influence world politics and state behaviour: a) geopolitical rivalry at the *regional* level and the role of state location; and b) the anarchy at the *domestic* and intra-state levels where there is a sense of chaos in national authority. This study does not assert that international anarchy alone makes cooperation difficult. International anarchy is everywhere. However, the outcome of political interaction between states differs from place to place. Among many socio-economic and political factors, there are two key variables, which are the focus of this Chapter, that directly intensify the anarchic nature of “self-help”: geopolitics and domestic anarchy. By compounding numerous variables together in the same theories, while clearly defining their relationship, the chances of understanding a multi-level, multicomponent phenomena are greatly increased.¹⁷²

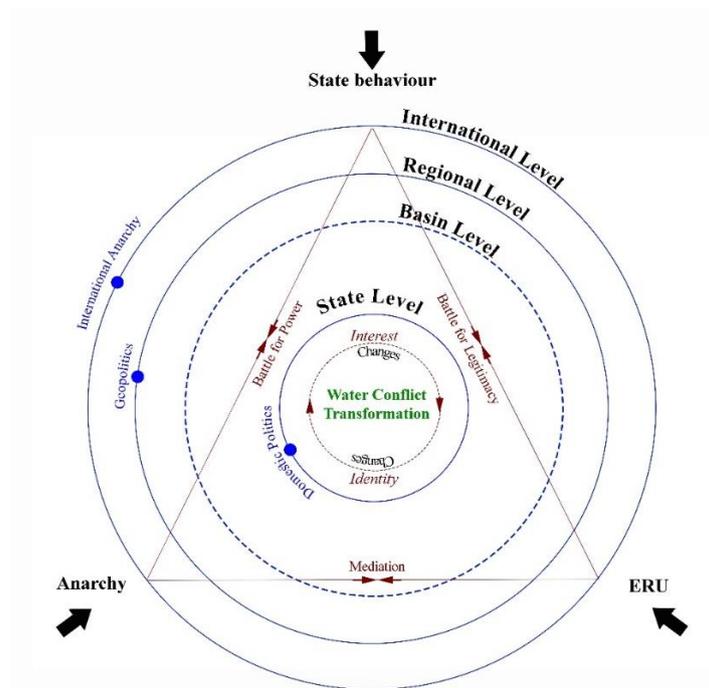


Figure 7. Different levels of influence on transboundary river basins

¹⁷² Toft (n 100).

In addition to the distribution of power capabilities, neorealist scholars (particularly proponents of the offensive realism theory) consider an intermediary variable at the unit level of the systemic theory, that is, the geographic location of states. “Geopolitics”,¹⁷³ therefore, plays a prominent role in the international system of neorealism.¹⁷⁴ By adding geopolitics and state location to the distribution of power, it is possible to estimate the relationship between theories of international politics and theories of foreign policy.¹⁷⁵ This method, originally from Mearsheimer’s offensive realism,¹⁷⁶ can provide a theoretical explanation of both total *international* outcomes – for instance, the prevalence of wars and patterns of alliance-formation – and the behaviour of individual states at the *unit level*.¹⁷⁷ However, neorealism gives priority to causes at the structural level rather than at the unit level to understand world politics.¹⁷⁸ Therefore, geopolitics and state location are wholly subordinate but necessary to the structural distribution of power variable.¹⁷⁹ Thus, the behaviour of states and their respective foreign policy strategies depend on the anarchic nature of the international system and their geographical location.¹⁸⁰ The geographical variable explains the impact of location on state behaviour, exploring when, why, and which states are likely choose a “defensive” approach of balancing power or an “offensive” approach of seeking hegemony. For instance, the closer a state is to its rival the more likely it is to balance and be less concerned about the relative power. However, the separation of a state from its rival with natural barriers or a buffer state leads the state to attempt to maximise its relative power and strive for hegemony.¹⁸¹

Considering geopolitics is also important to the extent that it allows us to add actors from outside the region (or the basin) to the analysis, and to examine the impact of their respective foreign policies on different concerns in a particular region, such as water resources.¹⁸² The examination of the foreign

¹⁷³ “Geopolitics is as a scholarly analysis of the geographical factors underlying international relations and guiding political interactions.” In Saul Bernard Cohen, *Geopolitics : The Geography of International Relations* (2015) p. 15.

¹⁷⁴ Toft (n 100).

¹⁷⁵ Toft (n 100).

¹⁷⁶ Toft (n 100). See also Mearsheimer (n 93).

¹⁷⁷ Toft (n 100).

¹⁷⁸ Toft (n 100).

¹⁷⁹ Toft (n 100).

¹⁸⁰ Toft (n 100).

¹⁸¹ Toft (n 100).

¹⁸² Several studies recognise the importance of geopolitics and its influence on hydropolitical relations, for instance, see Hussam Hussein, ‘Yarmouk, Jordan, and Disi Basins: Examining the Impact of the Discourse of Water Scarcity in Jordan on Transboundary Water Governance’ [2019] 24 *Mediterranean Politics* 269; Adam Davidson-Harden, Anil Naidoo and Andi Harden, ‘The Geopolitics of the Water Justice Movement’ [2007] 11 *Peace, Conflict and Development* 1; Chris Sneddon and Coleen Fox, ‘Water, Geopolitics, and Economic Development in the Conceptualization of a Region’ [2012] 53 *Eurasian Geography and Economics* 143; Frédéric

policies of outsiders, who often compete to take the role of mediator in times of disputes between regional states, is critical to an understanding of the behaviour of states in the region. Outsiders, who are often superpowers, tend to create a false illusion of fear (or overexaggerating a threat) in a region and put regional states' security in imminent jeopardy by presenting a threat greater than exists in reality, all in order to first justify their presence, and second to manipulate the anarchic structure and the regional politics to suit themselves. In this sense, any issue in the region that is linked to outsiders' security interests must be under their control within the broader international context. This outsider-created fear may concern many issues, such as energy, health, poverty, or climate change; and water – which is a critical resource for states – is one of their favourite playgrounds.¹⁸³ Such issues often risk the national security of states, and may also threaten outsiders' security interests. The outsiders may maintain the *status quo*, whether this is chaos or stability in the region, as far as it accords with their security interests. Such this way of foreign policy has been exemplified in the Middle East where outsiders impose their hegemonic order to protect their interests.¹⁸⁴ If regional political activities in respect of these issues threaten the foreign policies of outsiders in the international system, they seek to impose a new set of rules and a regime that work in their own favour. In so doing, they may take advantage of the anarchic structure to create chaos (sometimes by stirring war between regional actors, making a military intervention, staging a proxy war in the region, or supporting coup d'état and the like) and establish a new order (or a regional hegemon in their own favour). This state of affairs, while making hydropolitical relationships in this study more complex, influences all states' behaviour in the region, including any buffer states (for instance, Afghanistan, as the case study of this thesis, struggling for survival between superpowers' geopolitical rivalry), and must therefore be considered in the present analysis. In sum, geopolitical rivalry highlights the importance of considering international anarchy within the context of the regional/basin level, and likely intensifies the competitive atmosphere in which the striving for survival occurs.

Another unit-level variable in this study is “domestic anarchy”, which often gives an unexpected shock to hydropolitical relations within a basin. International conflict and cooperation arguably depend on a state's domestic politics. To merge the different scales of influence, it is necessary to link the systemic level and the domestic level together to capture the influence of not only the foreign intervention on the basin level but also the domestic politics. Robert Putnam in “two-level game theory” pays attention to the role of domestic players in international politics, arguing the state-centric literature is an uncertain

Julien, ‘Hydropolitics Is What Societies Make of It (or Why We Need a Constructivist Approach to the Geopolitics of Water)’ [2012] 4 *International Journal of Sustainable Society* 45; Jan Selby, ‘The Geopolitics of Water in the Middle East: Fantasies and Realities’ [2005] 26 *Third World Quarterly* 329.

¹⁸³ Nagheeby (n 72).

¹⁸⁴ For related interesting discussion see Flynt Leverett and Hillary Mann Leverett, ‘Going to Tehran : Why the United States Must Come to Terms with the Islamic Republic of Iran’ [2014] . See also Philippe Sands, *Lawless World: Making and Breaking Global Rules* (Penguin UK 2006).

foundation for theorizing about how domestic and international politics interact”.¹⁸⁵ Diplomatic interactions, therefore, are interconnected with domestic politics. In a similar approach, the domestic anarchy within collapsed and fragmented states, particularly those where armed rival groups exist, is often connected to the international anarchic system.¹⁸⁶ In the international anarchic system, external relations between states are not chaotic but rather based on a perceived pattern, or “law-like regularities”.¹⁸⁷ In contrast, systemic theory assumes states to be hierarchical sovereigns that govern the internal relationships between sub-state actors. The question is how can we theorise the relationships of countries which are not yet sovereign with a hierarchal system, but are rather perceived as fragmented and collapsed states?¹⁸⁸ In such cases, the government is either too weak or does not exist at all, and faces a struggle against aggressive competition between armed groups inside the country. In recent history there have been several such fragile states and regions, among them Afghanistan, Sudan, Somalia, Iraq, Syria, and the Balkans, where in addition to their “central government” there are other actors, often militias, who not only structure their own relationships internally, but also act “financially and politically in the international system without interference from the state in which [they are] based”.¹⁸⁹ In all of the above-mentioned cases, there are transboundary river basins: respectively, the Helmand, the Nile, the Jubba, the Tigris–Euphrates, and the Danube and Sava rivers. In such cases, other questions concerning the systemic theory arise: Are those fragile states anarchic or hierarchic, and should those “independent” actors be perceived as units in anarchy or as political parties in hierarchy? To answer these questions, Anthony Vinci presents theoretical arguments and provides empirical evidence for applying neorealist systemic theory to the study of fragile states and armed groups.¹⁹⁰

Vinci argues that in cases of collapsed states, the hierarchic system breaks down to “domestic anarchy”. In a domestic anarchy, “multiple autonomous actors exist within a defined territory and relate with each other as equal units”.¹⁹¹ Vinci emphasises that “domestic anarchy is not a separate, ‘closed’ anarchic system, but rather it is ‘open’ and linked with the international system”; thus, autonomous actors inside

¹⁸⁵ Robert D Putnam, ‘Diplomacy and Domestic Politics: The Logic of Two-Level Games’ [1988] *International organization* 427 p. 433. For a practical application of the “two-level game” theory within a case-study analysis, see Hanifeh Rigi and Jeroen F Warner, ‘Two-Level Games on the Trans-Boundary River Indus: Obstacles to Cooperation’ [2020] *22 Water Policy* 972.

¹⁸⁶ Anthony Vinci, ‘Anarchy, Failed States, and Armed Groups: Reconsidering Conventional Analysis’ [2008] *52 International studies quarterly* 295.

¹⁸⁷ Waltz (n 93) p. 116.

¹⁸⁸ For further discussion, see John Van Benthuisen, ‘In-between Anarchy and Interdependence: From State Death to Fragile and Failing States’ [2015] *36 Third World Quarterly* 22 p. 23: “Fragile states lack the authoritative capacity to incorporate population and territory; failing states share this quality but also experience various forms of domestic instability”. See Charles T Call, ‘The Fallacy of the ‘Failed State’ [2008] *29 Third World Quarterly* 1491.

¹⁸⁹ Vinci (n 186).

¹⁹⁰ Vinci (n 186).

¹⁹¹ Vinci (n 186) p. 296.

a fragmented state should be perceived as units in the international system.¹⁹² Within this approach, neorealist systemic theory is expanded in order to theoretically encompass the influence of domestic anarchy on regional geopolitics and the international system.¹⁹³ By doing so, we can describe the relations and behaviour of fragile states through neorealist constructs such as the balance of power or security dilemma. More importantly for the purpose of the thesis, this method can provide a critical insight into how geopolitical interventions take place in such collapsed and fragmented states such as Afghanistan in the Helmand River Basin with the lens of a security dilemma, through which other states – particularly the ones with security concerns in the region – see a beneficial state of affairs that can be exploited for their own advantage, thereby taunting their “enemies” or otherwise agitating them at a regional or international level. Correspondingly, this study argues that the nature of international anarchy is similarly transplanted into the domestic situation of fragile and fragmented states, and consequently, any internal issues become the objective of outsiders and are overshadowed by geopolitical anarchy. The present study follows this line of thought.

In sum, given the merging of international, regional, and domestic politics, this study investigates the impact of anarchy, geopolitical rivalry, and competition between actors over the control and utilisation of transboundary waters at the basin level. Thus, this study offers a framework to analyse hydropolitical relations within both the international and regional contexts, with consideration of the domestic politics and the intervening variables that shape the interactions of the states involved. While the internationally anarchic nature of the competition for power and control over a region is evinced by geopolitical rivalry and the resulting interventions and security dilemmas, it may produce or intensify any existing domestic anarchy inside a regionally fragile state. Such a state of affairs, as this study argues, hinders water conflict transformation. In this thesis, anarchy is understood in the same terms as Waltz and neorealism. The underlying argument is that the behaviour of riparian states over the utilisation of transboundary waters – particularly in a highly politicised environment – is influenced by the anarchic and geopolitical structure of the basin, which is often a by-product of outsiders. In addition to analysis of power, anarchy, this study argues, is a complementary explanation for why “acute conflict does not occur but, at the same time, makes cooperation difficult”.¹⁹⁴ In line with this argument, the study will testify the existence of anarchy’s symptoms – striving for power, survival, and relative gains, and the fear of uncertainties – in the behaviour of riparian states over the Helmand River Basin (see Chapter 6). After conceptualisation of anarchy and in the quest for answering the research question of this study, the next chapter will provide theoretical insights for the linkage between international law and anarchy and

¹⁹² Vinci (n 186) p. 297.

¹⁹³ Vinci (n 186).

¹⁹⁴ Naho Mirumachi, *Transboundary Water Politics in the Developing World* (Taylor & Francis Group 2017) p. 22.

particularly present the overarching framework to understand how legal norms operate in the world politics.

Chapter 3. Placing international law in anarchy: between interest and identity

3.1. Introduction

The underlying theme of the research question that this thesis sets out to examine is defining how *change* in hydropolitical relations may occur by the influence of the ERU principle within an anarchic setting. As Brunnée and Toope note, explaining behavioural changes and the role of law therein is one of the greatest challenges to theories of international relations and law.¹⁹⁵ In order to provide theoretical foundation for this study, it is necessary to inquire into the interdisciplinary relationship between international law and international relations. In a system founded on an anarchic nature, where politics (associated with power and hegemony) and sovereignty are crucial drivers for states' behaviour to control transboundary waters, how does international water law matter? Isn't law rather a source of bargaining or leverage for states to take advantage in favour of their interest, in particular when water has been rather regarded as a matter of national security than as an economic good?¹⁹⁶ Is there a role for law in shaping the interests, identities and behaviour of states over international waters, and accordingly *transforming* the hydropolitical relations, and if so, how?

These are among the questions that a vast scholarly literature has focused on explaining changes and exploring the role of international law in shaping politics of international system. However, the major different theoretical camps in both international relations and international law – rationalists (and legal positivists) and constructivists –¹⁹⁷ disagree fundamentally on how international law matters, works and influences within anarchic world of politics, where, from rationalist view, it is inevitably led to a situation based on striving for power and self-interest. There are still gaps and shortcomings for understanding how international law operates and contributes to changes of relations.¹⁹⁸

¹⁹⁵ Brunnée and Toope (n 5) p.19.

¹⁹⁶ See, for instance, Marwa Daoudy, 'Hydro-Hegemony and International Water Law: Laying Claims to Water Rights' [2008] 10 Water Policy 89.

¹⁹⁷ However, some scholars have criticised the divisions of theories regarding IL and IR. See, for instance, Baradaran (n 32). There is a vast amount of literature focusing on the complex relationship between IR theory and IL from different political perspectives. See also, for instance, Kenneth W. Abbott, 'Modern International Relations Theory : A Prospectus for International Lawyers' [1989] 14 The Yale journal of international law The Yale journal of international law 335. And, particularly, Slaughter 'A Dual Agenda' (n 44), and also, Slaughter 'A New Generation' (n 44).

¹⁹⁸ Slaughter 'A New Generation' (n 44). The need for a "joint discipline" to bridge the gaps between international relations theory and international law have been argued by several political scientists and international lawyers. With particular focus on international water law, Alistair Rieu-Clarke also emphasises on the need to a "nuanced approach" of "multi-level legal analysis" in order to response the former failure of the endeavour to study interdisciplinary issue of the linkage between international legal system and socio-political roots of transboundary water interactions. See, in this respect, Alistair Rieu-Clarke, 'The Role of Treaties in Building International Watercourse Regimes: A Legal Perspective on Existing Knowledge' [2010] 12 Water policy 822.

Interest-based approaches of rationalism (i.e. neorealism and neoliberalism) underestimate the role of international law in world politics. When it comes to the lenses of rationalism, where *anarchy*, *power*, and *self-interest* are the central drivers in world politics, international law is considered meaningless. The legal rules and principles may be overshadowed by the symptoms of anarchy and power struggle, and accordingly seem ineffective or meaningless, or function in favour of states' interests. Notwithstanding this, moving to the contemporary world, there is an apparent paradox in questioning whether or not international law matters. Not only has there been a rapid growth in the number of areas in which international rules appear to play an important role, but states seem to take these rules seriously. It is even argued that, "almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time".¹⁹⁹

Criticising a rationalist emphasis on the role of interest in determining state behaviour, constructivism indicates that what has been the most theoretical gap is a lack of careful attention to the critical role of law, like other social norms, in influencing the *identity* of a state.²⁰⁰ Constructivists argue that rationalists ignore the importance of states' identity in shaping their behaviour. Accordingly, for constructivism, state behaviour and relations are rather influenced by the identity of states, even prior to their interest. Identities, as generator of interests, created by norms, cultures and institutions. Grounded on the normative role of legal rules, international law, therefore, can influence interest and identity of states, hence their behaviour.²⁰¹ This thesis rests on exploring this socio-legal line of theory, and is therefore the primary purpose of this chapter.

Upon these initial premises, the chapter unfolds in four parts. First, the chapter explores the pessimistic view of the role of international law in anarchic world politics, mostly presented by rationalists and legal positivists. Secondly, by questioning the assumptions of those pessimistic views, the chapter reviews in general the preeminent debate of whether international law matters in a system defined by anarchy or not. Third, the chapter sets forth the constructivist theories of understanding international law in world politics to analyse how states comply with international legal rules. By identifying the role of norms, this part of chapter, therefore, examines the question of how international law influences state behaviour and contribute to change. Finally, based on a study of the linkage between international law and international relations, the chapter will present an analytical framework – "interactional international law" developed by Brunnée and Toope – and a methodology through which to examine

¹⁹⁹ Quoted from Louis Henkin in Baradaran (n 32) p.745.

²⁰⁰ Brunnée and Toope (n 5).

²⁰¹ To read more about how "socialisation" influence international relations of a state and why states cooperate when it is not in their power material, see Alastair Iain Johnston, 'Social States : China in International Institutions, 1980-2000' [2014] .

the research questions in the field of transboundary water governance by identifying the normative content of international law.

3.2. Too blind, too paralytic: international law as a “slave” to power and state interest

This section aims to explore those theoretical arguments and their assumptions that question the effectiveness of international law. There are two theoretical perspectives that challenge the significance of international law in the real world.²⁰² One challenge to the standing of international law comes from rationalism in international relations theory, and another developed by legal thinkers known as positivism.

Rationalism comes along with rational choice theory, which is rooted in a theoretical reflection of international relations, particularly neorealism and liberal institutionalism. Rationalism strongly highlights the role of the states as “*rational actors*” in world politics, where anarchy is a structural constraint on state behaviour.²⁰³ Rationalist theories, in general, underestimate the significance of local politics, norms and ethics. Rationalists see international law with no or a highly limited power in influencing state behaviour,²⁰⁴ because world politics is shaped on the basis of rationality assessed, and a state’s foreign policy is assumed through self-interested,²⁰⁵ goal seeking behaviour.²⁰⁶ In addition to the role of interest, (material) power is also assumed as a key driver in the contemporary world, reflecting, most of the time, the visible political figures that significantly supports the international relations neorealist theory.²⁰⁷

Neorealist perspective rests on the observation of competitive *rational* behaviour of states in pursuit of their wills - that may have no proper legal status - within world politics. States behave in what they see as a rational manner, which ultimately depends on self-interest.²⁰⁸ It is a perspective that assumes states to be the principle homogenous actors in the arena of world politics, where they square off for greater power and security.²⁰⁹ Neorealists conceptualise power as material factors, such as military and

²⁰² For a detailed analysis, see Slaughter ‘A New Generation’ (n 44).

²⁰³ Waltz (n 93).

²⁰⁴ See Hathaway (n 32); Baradaran and others also state that “[r]ealists are sceptical about cooperation among nations ... and [believe] that the little cooperation we see is fragile.” Baradaran (n 32) p. 746.

²⁰⁵ Baradaran (n 32).

²⁰⁶ Baradaran (n 32).

²⁰⁷ For instance, Margaret Thatcher, former British Prime Minister, disagreed with the proposed International Criminal Court because it would undermine the West’s ability to use its military power through “customary international law”, which stresses that international law is codified through balance of power and political processes to meet states’ interests. David Armstrong, Theo Farrell and H el ene Lambert, *International Law and International Relations* (2nd ed., edn, Cambridge : Cambridge University Press 2012). See also Sands (n 184).

²⁰⁸ Armstrong (n 207) pp. 77-9.

²⁰⁹ Armstrong (n 207).

economic might, far more than they do non-material factors, such as norms, institutions and international law.²¹⁰ Realism argues that neither moral nor legal principles can constrain states in their struggle to gain power.²¹¹ Thus, from this interpretation, a legal system cannot be “effective” in shaping state behaviour within world politics, because there is no enforcement by a central power.²¹² Neorealist scholars believe that international law has only a very limited role, and one always restricted by prevailing power realities.²¹³ They argue that international law inevitably reflects the interests of powerful states in a way that makes it unlikely that it has the authority to constrain those states.²¹⁴ More recently, sceptical neorealist thinkers argue that the reason for states’ compliance and employing legal rules in their international relations is evidently not because of their commitment to international law, but simply because of the potential for them to be used as legitimate *weapons* for their national interests.²¹⁵ Besides, they conclude that international law is even dangerous in current international system with its anarchical order of power.²¹⁶ In realism, changes in behaviour or adherence to rules and norms are only reflections of underlying material power and interests. Thus, even if this view acknowledges the existence of international law, it ignores the role that legal regimes play in shaping state behaviour and changing relations, and omits them from the story of real world of politics.²¹⁷

Neoliberalists (and in particular liberal institutionalism) offer a far more optimistic view of world politics and cooperation than neorealists (and positivists) in different version of thoughts. However, despite the fact that states are not assumed as neorealists’ homogenous actors, liberal institutionalism²¹⁸ lies at the same roots in rationalist assumptions. Liberal institutionalism considers states’ behaviour in relation to the institutions. Both approaches analyse international relations based on rationalist logics, through which states act to maximise their interests.²¹⁹ Accordingly, an actor’s engagement in institutions does not influence its identity, but only shifts its behaviour in a formal and institutionalised pattern to serve its interests.²²⁰ Therefore, while neoliberal institutionalists admit the role of norms in shaping state behaviour, they treat international law “instrumentally as a signaling device or a product

²¹⁰ Armstrong (n 207).

²¹¹ Shirley V. Scott, *International Law in World Politics : An Introduction* (3rd edition.. edn, Boulder, Colorado : Lynne Rienner Publishers, Inc. 2017).

²¹² Hathaway (n 32).

²¹³ Armstrong (n 207) p. 16.

²¹⁴ Armstrong (n 207) p. 16.

²¹⁵ Armstrong (n 207) p. 16. For instance, US withdrew from the ICJ proceedings in the case of Nicaragua’s complaint.

²¹⁶ Aron Raymond, ‘The Anarchical Order of Power’ [1995] 124 *Daedalus* (Cambridge, Mass) 27.

²¹⁷ Armstrong (n 207).

²¹⁸ Hathaway (n 32).

²¹⁹ Hathaway (n 32).

²²⁰ Brunnée and Toope (n 5) p. 32.

of effective interest projection through explicit negotiation and formal adjudication”.²²¹ In one sense, while neoliberals are open to norms, their understanding, being upon the rationalist approach, lacks “the intersubjective and constitutive ontologies of norms”.²²²

In addition to rationalist debate (reflected in both realism and neoliberal institutionalism) over understandings of the real world, and the relationship between international law and state behaviour, legal positivism has also cast doubt on conceptualisations of the nature of international law, followed by another general question: Is international law really “law”? Positivists, accordingly, argue that international law cannot be understood as “law” because it lacks the essential components, e.g. the capacity for “independent” enforcement, without relying upon sanctions.²²³ The positivist approach, grounded on legal theory, argues that “law properly so-called” is the command of a sovereign backed by coercive sanctions.²²⁴ Positivists argue that international law cannot be considered true law and the respective rules do not have the obligatory character of true law since states deny any sovereign body other than themselves in the international system and states cannot be compelled to take or avoid taking actions against their will.²²⁵

Just as realism gives priority to the role of states, and underestimates the significance of domestic politics, norms and institutions, so legal positivism does.²²⁶ Accordingly, international law includes those rules that states have consented to, either in explicit law-making treaties or in implicit customary law. Moreover, states are the only principal subjects of international law. It is true that some other, non-state actors²²⁷ may create certain legal rules, and international law confers certain principles and rights on them. However, from a positivist point of view, non-state actors are “not truly independent actors in the law-creating process”, because they only received such authority and powers from states.²²⁸ Despite their different interpretation of law, “each was state-fixed, each found temporary solace in the facts of international life such as state practice or national interest, and each took a conservative approach to

²²¹ Jutta Brunnée and Stephen J Toope, ‘Constructivism and International Law’ in Jeffrey L. Dunoff and Mark A. Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge University Press 2012) p 3.

²²² Brunnée and Toope (n 221) p. 3.

²²³ Armstrong (n 207).

²²⁴ Armstrong (n 207).

²²⁵ John Austin noted that “the duties which IL imposes do not have the obligatory character of true law because they are enforced by moral sanctions, by fear on the part of nations” quoted in Armstrong (n 207) p. 9.

²²⁶ However, both are commonly considered as natural opposites: while realism has little room for IL, legal positivists ignore politics and policy in their consideration. Legal positivism mostly informs neoliberalism in IR, but the emphasis here is on the role of state. Armstrong (n 207) p. 75.

²²⁷ For example, many inter-governmental organisations (such as the UN and EU), people and individuals (especially in terms of human rights and international criminal law).

²²⁸ Armstrong (n 207) p. 85.

change.”²²⁹ For the positivist school of international law, the first core principle is the “separability thesis”, which posits that law differs considerably from morality: “Law, simply and strictly so called [is] law set by political superiors to political inferiors.”²³⁰ Accordingly, positivists distinguish “what is international law as opposed to what it should be.”²³¹ The second core principle of positivism considers international law as “a set of binding rules”, which are created with states’ consent, and backed by sanctions.²³² Thus, positivists see a problematic dichotomy between states as sovereign and as subjects of international law, and resultantly they consider international law a closed legal system in the real world offering limited opportunities for states to satisfy their own interests. Like realism, positivism, therefore, questions the role of international law, by amplifying the role of power relation in ruling the contemporary international order.

In sum, for both rationalism and positivism, there is no place for norms and values in their visions of the world – “as a jungle for realists, and as a closed legal system for positivists”.²³³ Both have a common conceptual standpoint from which to offer an essential structure of international politics: the balance of power and the rules of international law restrict the freedom of states to serve their self-interests. International law, here, is limited to consensual rules created by states. Resultantly, *consent* is the main driver of state compliance. In addition, from the neorealist point of view, sanction and coercion are necessary to persuade a state to comply with the rules of international law. In addition to their emphasis on states and consent, both neorealists and positivists agree on a *formal process* of law-making and legal changes, primarily through treaty-law, which is state-dominated (with minor roles played by non-state actors).²³⁴

Notwithstanding the interest-based interpretation of the role of international law in anarchic world politics, rationalist and legal positivist reading cannot justify the rapid development and recent emerging legal pattern in different international watercourses e.g. the Nile and the Mekong, and the evolution of international conventions.²³⁵ Although one may correctly observe, through a neorealist point of view,

²²⁹ G. Simpson, ‘The Situation on the International Legal Theory Front: The Power of Rules and the Rule of Power’ [2000] 11 *European journal of international law* 439.

²³⁰ Armstrong (n 207) pp. 80-2.

²³¹ Armstrong (n 207) p. 82.

²³² Armstrong (n 207) p. 83.

²³³ Armstrong (n 207) p. 306.

²³⁴ Armstrong (n 207) p. 306.

²³⁵ For extensive studies about the evolution of international water law, see 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); Salman MA Salman, ‘The Helsinki Rules, the Un Watercourses Convention and the Berlin Rules: Perspectives on International Water Law’ [2007] 23 *Water Resources Development* 625; Joseph W Dellapenna and Joyeeta Gupta, *The Evolution of the Law and Politics of Water* (Springer 2009); Agriculture Organization of the United Nations. Development Law Service and

that such legal evolution might be a product of Western donors through a hegemonic Western-liberal enforcement, the growing volunteer participation of states in developing international legal principles cannot be fully explained by rationalist perspective alone. If a rationalist view of international law as being meaningless in world politics is to be justified, how can the recent growing of legal instrument in a wide range of political issues be described. Why do states pay so much attention to demonstrating their behaviour as being in compliance with international legal norms (e.g. Ethiopia and Egypt debate over the Nile waters based on legal norms, or in similar way, Turkey and Iraq over the Euphrates and Tigris Rivers, and, Afghanistan and Iran over the Helmand River)? Receiving financial support and dealing with donor conditionalities might be one persuasive reason, but it is not convincing enough. Is international law really meaningless and ineffective within anarchic nature of world politics? The next section analyses these questions.

3.3. The importance of international law: battle for legitimacy within anarchic nature

At a very basic level, international law primarily governs state (juristic person) behaviour and actions through the application of customary and treaty-based rules. Under anarchy, however, international law is generally characterised by its voluntary nature - states are not bound by legal obligation unless they accede to it - and its lack of power to impose rules. International law is *assumed* as a horizontal legal system,²³⁶ where “all the Sovereign States are on the same level and standing on an equal footing”.²³⁷ States are mainly bound to the legal rules if they consent or sign the treaties.²³⁸ There are no authorities to compel states to take particular action. For instance, the International Court of Justice (ICJ) has no jurisdiction or volition over states, unless they consent to co-operate on particular issues. Moreover, this legal system has been criticised as being vulnerable to the influence of powerful states.²³⁹ Thus, international law is accused of being “inaccessible, lacking in effect, too complex to be of practical value and subordinate to power”²⁴⁰, it leads, as argued particularly by realists, to the international

Development Law Service, *Sources of International Water Law*, vol 65 (Food & Agriculture Org. 1998); For discussion of transboundary watercourse disputes, see Tim Stephens and Timothy Stephens, *International Courts and Environmental Protection*, vol 62 (Cambridge University Press 2009). See also Shlomi Dinar, *International Water Treaties: Negotiation and Cooperation Along Transboundary Rivers* (Routledge 2007).

²³⁶ Brunnée and Toope (n 5).

²³⁷ Jean Fried and Jacques Ganoulis, *Transboundary Groundwater Resources: Sustainable Management and Conflict Resolution* (LAP LAMBERT Academic Publishing 2016) p. 64. See also Lee (n 127).

²³⁸ There might be some exceptions, e.g. in case of genocide.

²³⁹ Melvin Woodhouse and Mark Zeitoun, ‘Hydro-Hegemony and International Water Law: Grappling with the Gaps of Power and Law’ [2008] 10 Water Policy 103.

²⁴⁰ Woodhouse and Zeitoun (n 239) p. 105.

community enforcing international rules through power-oriented methods such as sanctions, shaming, and even legitimised use of force.²⁴¹

In practice, the tragedies of armed conflict within recent decades also underpin the sense of international law as being meaningless and ineffective in anarchic world politics. Major military actions and among them the US-led war against “terrorism” in Afghanistan and Iraq respectively in 2001 and 2003, or recently the missile strikes against Syrian government targets by the US, the UK and France in April 2018, or assassinating a high Iranian military official in Iraqi’s territory by the US in January 2020, again initiated controversial debates questioning the applicability of international law in the contemporary world, and the justification of state behaviour under the United Nations Charter.²⁴² There seems to be a consensus that the invasion of Iraq was manifestly illegal, and similar concerns arise regarding the lawfulness of the missile strikes in Syria and murdering Iranian officials.

However, despite many uncertainties concerning the question, “how important is international law” the debates about recent events have shown that states have accepted it as being effectively inseparable from contemporary world politics. For instance, the states in question in above-mentioned military acts against Afghanistan, Iraq, Syria and Iran went to great lengths to counter international criticism and justify their behaviour *within* international legal rules. Arguing based on international law, they insisted on persuading the international community of the legality of their act, by submitting their compliance with legal rules.²⁴³ Such political manoeuvring, aimed at legitimising or delegitimising state behaviour, introduced a new kind of battle, known as “lawfare” rather than warfare.²⁴⁴ Lawfare, the battle for legitimacy, sets a high value on international law and its potential role in the context of international

²⁴¹ Rebecca L Farnum, Stephanie Hawkins and Mia Tamarin, ‘Hydro-Hegemons and International Water Law’ in Alistair Rieu-Clarke, Andrew Allan and Sarah Hendry (eds), *Routledge Handbook of Water Law and Policy* (Routledge 2017). See also Daoudy (n 196); Stephanie Hawkins, ‘Levelling the Playing-Field with International Water Law: Combating Power Asymmetries in the Israel-Palestine Water Conflict’ (University of East Anglia 2014).

²⁴² Michael Schmitt and Chris Ford, ‘The Use of Force in Response to Syrian Chemical Attacks: Emergence of a New Norm?’ [2017] *Just Security* <https://www.justsecurity.org/39805/force-response-syrian-chemical-attacks-emergence-norm/>. See also Marko Milanović, ‘The Syria Strikes: Still Clearly Illegal’ [2018] 15 *EJIL: Talk* <https://www.ejiltalk.org/the-syria-strikes-still-clearly-illegal/>.

²⁴³ Marc Weller, ‘Syria air strikes: Were they legal?’ *BBC* (14 April 2018) <https://www.bbc.co.uk/news/world-middle-east-43766556> accessed 13 January 2021. William Partlett, ‘Does it matter that strikes against Syria violate international law?’ *Pursuit* (16 April 2018) <https://pursuit.unimelb.edu.au/articles/does-it-matter-that-strikes-against-syria-violate-international-law>. Chris Mirasola, ‘Summary: Lawsuit to Release the Legal Justification of Syria Airstrikes’ *Lawfare* (14 February 2018) <https://www.lawfareblog.com/summary-lawsuit-release-legal-justification-syria-airstrikes>.

²⁴⁴ Paul K Huth, Sarah E Croco and Benjamin J Appel, ‘Does International Law Promote the Peaceful Settlement of International Disputes? Evidence from the Study of Territorial Conflicts since 1945’ [2011] *American Political Science Review* 415.

relations, and the ways in which it affects state behaviour demonstrates its potential to constrain and influence international political regimes.

These struggles over applying international legal norms to constrain state behaviour are seen in many other international subject areas, like trade, human right, and in the context of international waters: e.g. the debates over Turkey's Ilisu Dam,²⁴⁵ Ethiopia's Grand Renaissance Dam,²⁴⁶ or Afghanistan dam development²⁴⁷. Such debates end up questioning whether the international legal regime, which can be seemingly openly flouted, is really worth preserving.

In addition, international law has grown significantly through binding and non-binding international legal instruments, and fostered a shared belief within international society that gives greater weight to international law over world politics.²⁴⁸ For instance, the different legal regimes on the use of force, human rights, international crime, and trade and environment have all evolved through custom and treaty-law, demonstrating how international law and politics are integrated in shaping and changing relations. The controversial debates over "globalisation" within the legal framework of the World Trade Organisation (WTO), and discussions over the environmental wellbeing of the earth, particularly with respect to the 2015 Paris agreement on climate change, have made international law an unavoidable and serious influencer within world politics. More importantly, while the Paris agreement has been controversial among states, it merits further research to explore the role of domestic political dynamic in determining states' behaviour.

Moreover, the architecture of global governance is highly dynamic and intermixed with a "rule-based" international order that itself is now complex and far-reaching.²⁴⁹ A political system includes "any persistent pattern of human relationships that involves, to a significant extent, influence, power, or authority", and in which power is not equivalent among actors.²⁵⁰ This could be seen at an international scale. The inequivalent power that shapes the pattern of actors' behaviour results in an asymmetric control of political resources within an anarchic nature.²⁵¹ The study of politics is mostly a querying of

²⁴⁵ See, for instance, Jeroen Warner, 'The Struggle over Turkey's Ilisu Dam: Domestic and International Security Linkages' [2012] 12 *International Environmental Agreements: Politics, Law and Economics* 231.

²⁴⁶ Salman MA Salman, 'The Grand Ethiopian Renaissance Dam: The Road to the Declaration of Principles and the Khartoum Document' [2016] 41 *Water International* 512.

²⁴⁷ Mohsen Nagheeb, 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 Journal* 247.

²⁴⁸ Baradaran (n 32) p. 743.

²⁴⁹ Scott (n 211).

²⁵⁰ Scott (n 211) p.1.

²⁵¹ Scott (n 211).

the distribution of power and the process of determining who gets what, when, how, and why;²⁵² and law is a system of rules providing “*equality of right*”²⁵³ to determine who gets what, when, how, and why. Within such an understanding of the global governance, international relations is entwined with international law, and influences the global distribution of power among states. When considering historical discussions, many scholars suggest that “international law matters more now than ever before”, though global and regional political structures, anarchy and power struggles, along with social and economic criteria, have always played a significant role in determining the content, status and effectiveness of international law.²⁵⁴ Thus, understanding the world politics undoubtedly requires an understanding of international law, and of their interactions.

The goal of this chapter is, in general, to examine the role of international law and its normative interaction within international system. In this respect, contrary to what rationalists claim, the most controversial argument of this study is that legal norms have the potential to influence state behaviour. In so doing, constructivists provide a theoretical foundation for this argument. In constructivism, norms, culture, institutions and identity are at the centre of theoretical analysis over the interest. Constructivists consider the *material* world of states and rational behaviour *only* as part of a *social* world and within a *normative context*. In contrast with rationalists that separate the formation of states’ interests from interaction in society, constructivists claim that identity formation is prior to interest formation.²⁵⁵ Considering that interest is formed not only by material terms but also by non-material, constructivists examine the role of culture, institutions and norms in shaping identity and influencing states’ behaviour.²⁵⁶ Next part will elaborate the constructivist reading of international law in world politics, providing theoretical bases for this thesis to analyse how the ERU principle interacts with anarchy and influences state behaviour in an international watercourse.

3.4. International law and the power of norms: identity as essential function of state behaviour

Scholars from other international relations perspectives, particularly constructivism, have seriously challenged the rationalist readings of international law and politics. Their claims mainly rests, and fundamentally, on critics concerning the rationalist, *interest-based* understanding of the underlying roots and causes of state behaviour, and underestimating the power of principled ideas – ideas that are rather constructed through *normative interaction* among individuals, groups and states than given by

²⁵² Scott (n 211).

²⁵³ Thomas M. Franck, *The Power of Legitimacy among Nations* (New York : Oxford University Press 1990).

²⁵⁴ Armstrong (n 207) p. 299.

²⁵⁵ Brunnée and Toope (n 5).

²⁵⁶ Brunnée and Toope (n 5).

nature.²⁵⁷ While rationalists claim that states' compliance with rules is because of their fear of sanctions and penalties, or losing their reputation or other benefits, or producing costs in case of violating rules, constructivists argue that states comply with rules because they follow norms.²⁵⁸ Another critic is that rationalist approaches, either in realism or neoliberal institutionalism, remain ill equipped to explain how states determine their interests.²⁵⁹ Rational choice theory seems to be circular because the theory defines state behaviour based on its interests, and determines the interests according to the behaviour of state.²⁶⁰ Another critique is that rationalist argument, which claim that states behave based on the "consequentialist" pursuit of self-interest, is not proved by the empirical evidence in states' compliance and commitments to international law.²⁶¹ While defining interest within an analysis of material cost and benefit, such this rationalist theory fails to adequately explain why some countries with the highest cost of compliance and less benefit are sometimes more likely to enter into and abide by treaties.²⁶² Furthermore, despite the fact that states remain the significant actors in the world politics, a number of non-state actors play critical roles in shaping state rights and obligations, and in creating new forms of customary and treaty law.²⁶³

In contrast with the rationalist assumption that states engage only in consequentialist pursuit of self-interest, constructivists argue that states act in accordance with internalised norms.²⁶⁴ Moreover, the norm-based approach argues that actors' interests are not such fixed assets, and rather are "constructed" by and through a dynamic interaction within society.²⁶⁵ In this respect, from constructivist perspective, international law can change a state's interest and accordingly its behaviour. International law, accordingly, can influence a state's behaviour "not by constraining states with a given set of preferences from acting, but by changing their preferences". Thus, as Brunnée and Toope argue, "law is more than a 'formalizer' or a device for creating 'hard' entitlement and enforceable rules."²⁶⁶ Grounded on the *norm-based* constructivist international relations approach, their understanding declares that

²⁵⁷ Hathaway (n 32) p. 481.

²⁵⁸ Baradaran (n 32).

²⁵⁹ Baradaran and others state that "[s]ome perceive rational choice theory to be circular because the theory explains that a state acts the way it does because the state is pursuing its interests, but determines the state's interest according to the actions that a state performs." Baradaran (n 32). P. 754.

²⁶⁰ Baradaran (n 32) P. 754.

²⁶¹ Hathaway (n 32) p. 480.

²⁶² Baradaran (n 32) p. 754: for instance, joining states to human rights treaties while imposing costs and offering no material benefit.

²⁶³ Baradaran (n 32).

²⁶⁴ Hathaway (n 32) p. 481.

²⁶⁵ Hathaway (n 32) p. 481.

²⁶⁶ For further details, see Jutta Brunnée and Stephen J Toope, 'Environmental Security and Freshwater Resources: Ecosystem Regime Building' [1997] *American Journal of International Law* 26.

international law is an “ongoing generative activity”, which involves building and sustaining shared norms and legality. They argue that law undoubtedly has the potential to draw together states’ interests and identities, and thus their behaviours.

Constructivism examines how the world is *socially* constructed. Constructivists argue that ideas – those actors have about the world, and what goes on in it – play a fundamental role in operating “all the way down” to influence other actors and their behaviour in world politics.²⁶⁷ Constructivism focuses on the role of non-instrumental action, including identities and norms, and of a vast range of normative actors in world politics. In the same way, it gives a new perspective on the creation and operation of international law.

The philosophical foundation of this perspective of constructivism in international relations emerges from social and sociological theory. Particularly, constructivism is grounded on a sociological argument of Emile Durkheim and Max Weber, who in their concept of “ideational factors” put forward that “ideas become transformed through social interaction into ‘social facts’ – such as, language, religious beliefs and ethical norms – and that once so established these social facts influence behaviour”.²⁶⁸ The question of how ideas influence behaviour establishes the theoretical underpinning of constructivism; in a sense, ideas make great strides in contextualising social explanations of meaningful action.

While rationalists in international relations, either neorealists or neoliberals, argue that states behave according to their *interests* in order to serve their security and prosperity, constructivists believe that they flow from state *identities*. Constructivism supports the notion that “who we think we are” greatly determines what we want and how we act. Thus, from constructivist perspective, states behave in a way that they perceive of themselves and such perception is being constructed and challenged within the state, regardless of their actual relative material capabilities. As Ted Hopf points out: “In telling you who you are, identities strongly imply a particular set of interests or preferences with respect to choices of action in particular domains, and with respect to particular actors.”²⁶⁹ Rational neorealists and neoliberals explain why states decide to comply with or violate legal rules, or choose war or cooperation with each other based on state interests and material capabilities. However, constructivism problematises these rationalist theories, arguing that they cannot explain the reason for “the content and source of state interests and the social fabric of world politics”.²⁷⁰

²⁶⁷ Wendt (n 161).

²⁶⁸ Armstrong (n 207) p. 100.

²⁶⁹ Ted Hopf, ‘The Promise of Constructivism in International Relations Theory’ [1998] 23 *International Security* 171 p. 175.

²⁷⁰ Jeffrey T Checkel, *The Constructivist Turn in International Relations Theory* (JSTOR 1998) p. 2.

For constructivists, the social structure of world politics includes norms in addition to identities. Shared, challenged and accepted by majority of people and communities as “social facts”, norms are those beliefs about the social and material world that lead actors to behave how they think they can and should in particular circumstances. These beliefs are not only limited to social rules and conventions, but they concern also the physical world and the laws of science. Thus, norms are both shared beliefs among actors that determine what is right, moral and proper²⁷¹, and “beliefs about what is doable and effective”.²⁷² Norms include shared beliefs that “are enacted in social practice, embedded in institutions and embodied in artefacts”.²⁷³ Resultantly, norms are far more than behaviour regulators; beyond that, they serve as factual underpinnings of meaningful action.

There are several possible reasons why actors follow norms or behave in a normative fabric. Since norms hold the dominant belief in a society, they are often supported by sanctions or punishments. Thus, the first reason for actors to follow norms is to avoid such sanctions or being isolated by the society. Secondly, actors may act in accordance with norms in order to serve their self-interests. The third reason addresses norm-compliant behaviour in the absence of any incentives or sanctions (either sticks or carrots), in a way that rationalists cannot explain. In this respect, constructivists focus on the *process* of socialising actors through the following of norms. Armstrong suggests that: “This socialisation process may involve elite learning of new norms, institutionalisation of norms in official policy, community laws and organisational structures, and internalisation of norms in community discourse and culture”.²⁷⁴ While elite learning occurs at a fairly shallow level (it may be led by sanctions or self-interest), institutionalisation is crucial for empowering norms in community practice, and internalisation takes place as a deep learning process in which norms become legitimised and appropriate to actors. If a norm becomes internalised, it will be followed by actors automatically even at the cost of self-interest.²⁷⁵

3.4.1. Norms and international law construction

There has been an emerging critical constructivist approach in international law. Slaughter and others explore constructivism within the two disciplines of international relations and international law. For them, the constructivist approach holds that legal norms “play a *constitutive* role in the formation of actors’ identities and interests and in the structure of the international system itself”.²⁷⁶ Martti

²⁷¹ For example, the use of nuclear weapon being immoral, see Armstrong (n 207) p. 101.

²⁷² Armstrong (n 207) p. 101.

²⁷³ Armstrong (n 207) p. 102.

²⁷⁴ Armstrong (n 207) p. 102.

²⁷⁵ Armstrong (n 207).

²⁷⁶ Slaughter ‘A New Generation’ (n 44) p. 382.

Koskenniemi and Shirley Scott, as constructivists, examine how legitimating discourses strengthen power relations in world politics.²⁷⁷ Both Koskenniemi and Scott seek to search for the power of international law in world politics. In this respect, they can be considered akin to the critical legal studies approach to international law. David Kennedy – a leading scholar of this approach – notes that critical legal studies aim for an in-depth survey, to “concentrate upon discourse and upon the hidden ideologies, attitudes and structures which lie behind discourses, rather than the subject matter of legal talk”.²⁷⁸ Armstrong and others suggest four key contributions of (conventional) constructivists approach to international law:²⁷⁹

First, constructivism focuses on norms – ethical, political and legal – to explain how international law operates in world politics. In contrast to what is being considered within a normative context in legal positivism and realism and also liberalism – that norms are rational in origin and operation – constructivists have a very different view. From this perspective, norms shape the social situations in which the roles of actors and “rules of the game” are defined. Constructivism argues that the logic behind inter-state relations and an actor’s behaviour are rooted in the distribution of identities and interests, not in the distribution of interests and power between actors. Constructivists also have a different notion of norms in comparison with that of legal process theory. Norms are central to both perspectives, and are attributed to social power. However, while legal process scholars seek to control that power to promote norms within a sustainable world public order, constructivism seek to *explain* that power.

Different perspectives on the concept of structure is the second key contribution of constructivism in international law. For realists, it is only the distribution of power in the world system that creates structure. From the positivists’ point of view, international law is a system of legal rules that organises and regulates relations between states. However, material power is also critical for this positivist structure, in that rules operate based on state support (i.e., consent) or sanctions. In contrast to realism and positivism, constructivism examines the *social* structures of world politics. Martha Finnemore, a well-known constructivist scholar, points out that customary international law is like such a social structure; that is, it “exists only when there is a norm”, or simply when *opinion juris* exists and is consistent with state practice.²⁸⁰ In a similar way, Christian Reus-Smit introduces the most detailed constructivist approach to international law as a social structure. Considering international law as

²⁷⁷ Armstrong (n 207). For instance, how the Western powers focus on discourses of security and aggression to discount other powers. Or, how upstreamers and downstreamers often take the discourse with the selected focus on the principle of equitable utilisation and “no harm” rules, respectively, to serve their own interests.

²⁷⁸ Cited in Armstrong (n 207) p. 227.

²⁷⁹ Armstrong (n 207) pp. 107-9.

²⁸⁰ Armstrong (n 207) p. 108.

“fundamental institutions”, which regulate inter-state relations, Reus-Smit observes that these institutions are “generic structural elements of international society”.²⁸¹ The practice of these institutions goes further than the distribution of power and interests in the world system. Reus-Smit’s fundamental institutions lie on a normative structure of the international system as a “constitutional structure”; that is, they include the moral purpose of the state, the norm of sovereignty, and the norm of pure procedural justice.

In addition to contradictory perspectives on the concept of structure, constructivism has a different theoretical lens to examine the concept of agency in the world system. Its conception of agency recognises “the social foundation of state primacy and the role of non-state actors in influencing normative change”.²⁸² Realist and positivist state-centrism focus on material power, which enables states *only* to ignore international law and the role of non-state actors (realism), and to create and break international legal rules (positivism). Constructivist scholars give prominence to the role of the norm of sovereignty in empowering states, highlighting “the social power of states by denaturalising the power that states take for granted”: the power to tax citizens, to control domestic markets and in this study to control natural resources like water.²⁸³ The norm of sovereignty provides legal status to states to legitimise these activities, and thereby achieve these material powers. Constructivism also considers the role of non-state actors in structuring normative changes, specifically by focusing on the *process of changes*.²⁸⁴

Finally, in contrast with rationalism, constructivism recognises the drastic constitutive effects of international law in world politics. From the constructivist perspective, world politics encompasses the interplay of rational and social behaviour. In this respect, norms and identities socially determine rational action, and “norms are in turn often deployed rationally by ‘skilled users of culture’”.²⁸⁵ Stephen Toope points to the *process* of determining norms in which different beliefs and interests are inevitably competing with each other. Thus, world politics includes such norm construction, enactment and change.²⁸⁶ Reus-Smit argues that reason and action in world politics reflect “social identities, actor interests, shared moral principles and preferred means of action”.²⁸⁷ The politics of international law involves all these forms of reason and action through a process of social interaction. Constructivism argues that these social interactions endue actors with the power to transform their identities in world

²⁸¹ Cited in Armstrong (n 207) p. 108.

²⁸² Armstrong (n 207) p. 108.

²⁸³ Armstrong (n 207) p. 108.

²⁸⁴ Mostly observed in human rights, in that the agents from domestic society take part in changing norms.

²⁸⁵ Cited in Armstrong (n 207) p. 109.

²⁸⁶ Cited in Armstrong (n 207) p. 109.

²⁸⁷ Reus-Smit (n 68).

politics. Harold Koh, a constructivist scholar, considers international law “a process of involving transnational networks of governmental and non-governmental actors”²⁸⁸, and this “transnational legal process is normative, dynamic and constitutive”.²⁸⁹ Koh defines three stages in a transnational legal process: first, there is an “interaction” between transnational actors; then, it progresses to the “interpretation” of an international norm; finally, it ends with an “internalisation” of that norm in the sub-national legal system of states. Accordingly, when Koh studies “why do nations obey international law”, he points to “internalised obedience” as the main reason, rather than “enforced compliance”.²⁹⁰ In one sense, constructivists consider international law’s power at a deep level of the normative process that influences and shapes state behaviour.

The constructivist perspective provides this thesis a framework to analyze how the ERU principle influence state’s interest and shape its identity, accordingly its behaviour. The following sub-section explores the fundamental theoretical contributions and concepts of “interactional international law” as developed by Brunnée and Toope, which represent important contributions to this thesis’s study of the role of legal principles in shaping hydropolitical relations.

3.5. Interactional international law: the overarching framework

Understanding the normative role of law in shaping state behaviour is an essential concept central to this study. This study’s main research question is: “How and to what extent does the equitable and reasonable utilisation principle (ERU) improve the hydropolitical relations of an international watercourse within anarchic geopolitical settings?”. After critically reviewing the debate concerning the importance of international law and how it works in the world politics, there is an initial need, therefore, to outline the theoretical explanation of the nexus between legal norms, and interest and identity of states: how do *legal* norms shape identities and persuade states to change their behaviour? This study uses the idea of “interactional international law”²⁹¹ – constructivist conception of international law – to develop an understanding of the nature of legal norms in international waters in order to examine its influence on anarchy and hydropolitical relations towards water conflict transformation.

As already explained, constructivism has the most important contribution in both international relations and international law: offering the insights into the social processes in which international law is created

²⁸⁸ Harold Hongju Koh, ‘Why Do Nations Obey International Law’ [1996] 106 Yale Lj 2599.

²⁸⁹ Koh (n 288) p. 2598-9.

²⁹⁰ Koh (n 288) p. 2598-9.

²⁹¹ For extensive discussion, see Jutta Brunnée and Stephen J Toope, *Legitimacy and Legality in International Law: An Interactional Account*, vol 67 (Cambridge University Press 2010)

and operated.²⁹² First, constructivists provide a complementary explanation of states' behaviour to rationalists. Secondly, because of focusing on interaction, communication, and discourse analysis among actors, constructivism can shed light on legal reasoning and legal justification, and their relationship to legitimacy while other international relations theories cannot. In this respect, constructivism has contributed a great deal to understanding state's compliance with international law and changes in behaviour.²⁹³ The main point is that constructivists focus on the actors' identity formation which is assumed to be relational and generator of actors' interest.²⁹⁴ Identities are constructed through social interaction. Constructivists explain how structure such as institutions, norms, and rules can shape social interactions,²⁹⁵ and foster "shared understanding" among actors by which both the identity and evolution of the structures can be shaped and recast.²⁹⁶

The interactional international law, developed by Brunnée and Toope, connects constructivist approaches to the legal theory of Lon Fuller to better understand the function of legal obligation, and illustrate how shared legal norms emerge and shape social interaction.²⁹⁷ Fuller sees law "as enterprise and a social practice - a continuing challenge rather than a finished product."²⁹⁸ Moreover, law is "a construction dependent upon mutual generative activity", not as hierarchical ordering.²⁹⁹ In order to apply norms in specific context, "relatively stable patterns of expectation", such as shared understanding in constructivism, must emerge through interactions.³⁰⁰ When the rules are broadly congruent with the practices and shared understandings among actors, they are persuasive, and legal systems assumed as legitimate.³⁰¹ The interactive understanding of law is understood by Fuller's concept from two important respects. First, law is considered as a continuing activity, where social and legal norms exist on a continuum.³⁰² This perspective of considering norms on a continuum provide possibility of influence of emerging norms even those do not yet achieve legal status.³⁰³ Second, within the continuum of norms, there are certain factors to distinguish legal norms from other social

²⁹² Brunnée and Toope (n 221) p. 27.

²⁹³ Brunnée and Toope (n 221) p. 27.

²⁹⁴ Wendt (n 8).

²⁹⁵ Jutta Brunnée and Stephen J Toope, 'Interactional International Law: An Introduction' [2011] 3 IT 307 p. 308.
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²⁹⁶ Brunnée and Toope (n 291).

²⁹⁷ Brunnée and Toope (n 291).

²⁹⁸ Jutta Brunnée and Stephen J Toope, 'The Changing Nile Basin Regime: Does Law Matter' [2002] 43 Harv Int'l LJ 105 p. 114.

²⁹⁹ Brunnée and Toope (n 298) p. 114.

³⁰⁰ Brunnée and Toope (n 298) p. 114.

³⁰¹ Brunnée and Toope (n 291).

³⁰² Brunnée and Toope (n 291).

³⁰³ Brunnée and Toope (n 291).

ordering.³⁰⁴ That means when a social norm meets these criteria, then it can be considered as legal norm and expected to have a sense of legality among actors.

Brunnée and Toop suggest three inter-related factors by which legal norms are distinguished: shared understanding, criteria of legality, and a practice of legality (Figure 8).³⁰⁵ In order to generate and maintain the obligatory effect of international law and distinctive legal legitimacy, Brunnée and Toop argue that norms must meet these factors.³⁰⁶ Moreover, they note that commitment to law is promoted and legality is sustained over time if a legal norm can be practiced through these inter-related processes; otherwise, law does not have the obligatory effect.³⁰⁷ Therefore, law is “legitimate”, only when it is generated and maintained through the interactional approach. In sum, interactional law is built in three steps: 1) creation of social legitimacy through shared understanding, 2) providing the criteria of legality for norms in order to create legal legitimacy, and 3) reinforcing the emerging shared understanding and legal norms through a robust practice of legality.³⁰⁸

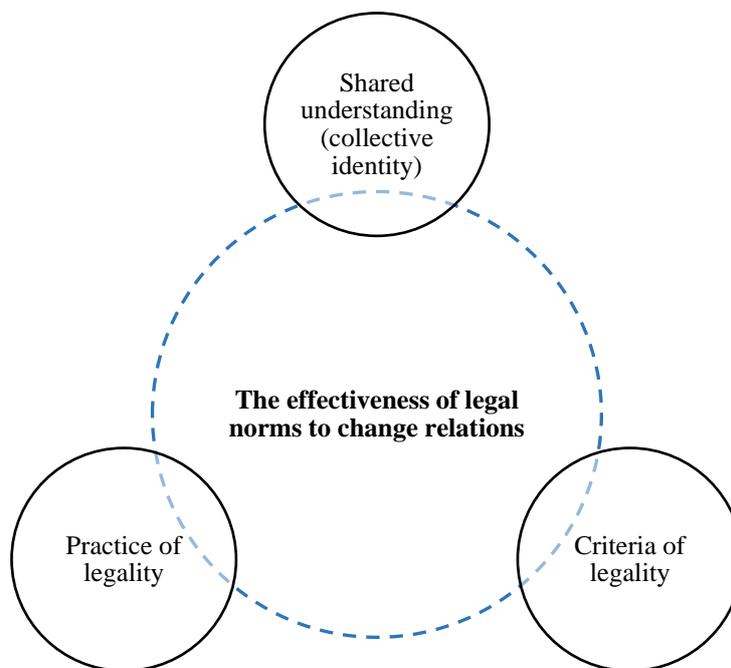


Figure 8. The framework of Interactional International Law

³⁰⁴ Brunnée and Toope (n 291).

³⁰⁵ Brunnée and Toope (n 295).

³⁰⁶ Brunnée and Toope (n 295).

³⁰⁷ Brunnée and Toope (n 295).

³⁰⁸ Brunnée and Toope (n 295).

In addition, interactional international law emphasises the processes of active participation for creating shared understanding. Social actors in this framework are not limited only to states, but other intergovernmental organisations and individuals. Therefore, a law effectively influences states' behaviour and their interactions only if it is "broadly congruent with the practices and patterns in society".³⁰⁹ In this respect, shared understandings are the *underpinnings* of law. However, the enforcement of law and its effectiveness depend to the extent that those shared understandings "be intertwined with distinctive internal qualities of law and practices of legality".³¹⁰ In addition to shared understanding, a legal norm should meet the criteria of legality in order to generate "a distinctive legal legitimacy and a sense of commitment".³¹¹ These features of legality are: generality, promulgation, non-retroactivity, clarity, non-contradiction, not asking the impossible, constancy, and congruence between rules and official action. These features explain how a treaty which is formally binding on the parties may not generate a sense of obligation when the treaty fails to meet the above-mentioned criteria of legality. Therefore, interactional international law provides deep understanding of why a formal rule which fails to meet the legality and practice does not result in state compliance. In Chapter 6 of this thesis, the criteria of legality are practically explained and examined through the analysis of the case study.

In order to study changes in state behaviour and hydropolitical relations of an international watercourse within an anarchic context, the framework of interactional international law will be employed to understand the influence and role of the ERU principle. Considering it merely within formal concept, while there might be a prevailing thought that international water law has little contribution to shaping the hydropolitical relations, interactional understanding of law shows the opposite. Drawing upon this framework of interactional international law, the ERU principle comes to shape the hydropolitical relations of riparian states if it rests on above mentioned three factors of "the life cycle of norms". Interactionalism explains that the process of creation of shared understandings between riparian states about what they want to achieve through the ERU principle, even if it is very time-consuming, is vital necessary to establish an effective regulatory framework.³¹² Therefore, the *effectiveness* of the ERU principle is seen through how it shapes collective identity and how it promotes compliance by producing *persuasive* international discourses about what is legitimate concerning water utilisation of international watercourses. Shared understanding, therefore, is the first crucial step in building interactional law, and

³⁰⁹ Brunnée and Toope (n 291) p. 56.

³¹⁰ Brunnée and Toope (n 291) p. 56.

³¹¹ Brunnée and Toope (n 291) p. 8.

³¹² Brunnée states that "international law's authority derives from the interplay between the three elements of interactional law (grounding in shared understandings, adherence to criteria of legality, and practice of legality)." Jutta Brunnée, 'The Sources of International Environmental Law: Interactional Law' [2017] The Oxford handbook on the sources of international law 960 p. 4.

it creates the platform of knowledge or norms that shape the perception of actors about themselves, their interests and priorities, and their arguments. Creation of shared understanding, unavoidably, requires processes of active participation and cooperation.

The aforementioned constructivist reading of international law will be combined with three cultures of anarchy – already explained in Chapter 2 – and placed into TWINS framework to capture the influence of the ERU principle on conflict and cooperation surrounding international watercourses. This thesis will test this understanding through the historic hydropolitical arrangements of the Helmand river Basin, and influence of international customary law in shaping riparian states' behaviour of the Helmand. The underlying idea is to examine the extent to which the ERU principle can reconstruct the interest and identity of riparian states within a particular set of criteria, and it accordingly has capacity to influence the power relations and anarchy's symptoms and transform water conflict.

Chapter 4. Making sense of hydropolitical relations: theoretical underpinnings

4.1. Introduction

The main original contribution of the thesis, as already explained, lies in its focus on the underlying anarchic geopolitical structure (detailed in Chapter 2), and on the role of legal norms to shape the interests and identities of states within that structure (see Chapters 3). The study attempts to analyse critically hydropolitical relations under anarchic settings. As described in Chapter 2, anarchy plays a crucial role in shaping the behaviour of states and thus the hydropolitical relations concerning transboundary river basins. It is also acknowledged that the behaviour of states and the hydropolitical relations at the basin level must be understood to be at the crossroads between international anarchy, and geopolitical and domestic circumstances at regional and state levels, respectively.

This chapter focuses on understanding hydropolitical relations and defining the accordant theoretical underpinnings of this study. This leads to a consideration of the function of anarchy within hydropolitical relations. This part of the chapter opens with a review of hydropolitical literature concerning the analysis of conflict and cooperation in international watercourses, and distinguishes the approach of this analysis from those precedent studies. Subsequent to this, the chapter provides a discussion of the concept of power, which plays an important role in the analysis of how states utilise legal principles in anarchic settings to their own advantage. This chapter will therefore provide a basic platform to analyse the behaviour of riparian states respecting international watercourses in highly anarchic geopolitical settings, in addition to those already illustrated obstacles in Chapter 2 with which riparian states are confronted when attempting to adopt equitable legal principles within such settings. Expanding the focus of this study by closely examining the geopolitical history of the Helmand River (Chapter 6) provides a more comprehensive approach to the study of its water diplomacy, and illustrates the complex political dimensions and interactions between the riparian states concerned.

4.2. The quest for understanding water conflict and cooperation

The examination of hydropolitical relations over international watercourses, *per se*, while riding on varied theoretical waves, mainly rests on theories of international relations.³¹³ Any theoretical

³¹³ For extensive discussion on theories of international relations concerning international watercourses see, for instance, Kathryn Furlong, 'Hidden Theories, Troubled Waters: International Relations, the 'Territorial Trap', and the Southern African Development Community's Transboundary Waters' [2006] 25 Political Geography 438. Jeroen F Warner and Mark Zeitoun, 'International Relations Theory and Water Do Mix: A Response to Furlong's Troubled Waters, Hydro-Hegemony and International Water Relations' [2008] 27 Political Geography 802. See also Ariel Dinar and others, *Bridges over Water: Understanding Transboundary Water Conflict, Negotiation and Cooperation*, vol 3 (World Scientific Publishing Company 2007). Dinar (n 86). Shlomi Dinar, 'Patterns of Engagement: How States Negotiate International Water Agreements' [2005] .

examination of “hydropolitics”³¹⁴ will centre mainly on four general questions: What is the nature of hydropolitical relations in the context of “water conflict” and/or “water cooperation”? What causes conflict and/or cooperation, and how? What is the relationship between state behaviour and hydropolitical relations? Finally, how can hydropolitical relations be improved and transformed towards equity and justice? Answering these questions requires an understanding of the natures, structures, processes, and outcomes of hydropolitical relations. This in turn requires knowledge of how, when, and in what contextual *condition* states engage in conflict and cooperation over transboundary waters: How conflict and cooperation over sharing waters of an international watercourse may be shaped by considering the influence of anarchy, and what will be the outcome of hydropolitical relations? The analysis may have a wide range of answers, differentiated principally by their emphasis on diversity of theoretical variables; for example, actors, power, interests, discourses, and beliefs. There have been various theoretical frameworks associated with the field of international relations seeking to comprehend how states conduct their behaviour within hydropolitical relations.³¹⁵ From the pessimistic explanation of neorealism to the optimistic view of neoliberal institutionalism, and the cognitive and normative approaches of constructivism and critical theory, all can offer many insights into the issues surrounding transboundary waters.

However, hydropolitical relations should not be treated as a simple version of conflict *or* cooperation over shared waters. Hydropolitical relations rather reflect part of a system of world politics so complex and interconnected, that even critical explanations – those criticising the mainstream approaches – may become part of its machinations. However, compounding different variables and using the various theoretical lenses adopted in this study may offer a fuller picture of the complex constituents of hydropolitical relations that are often ignored: anarchy, geopolitical history, normative power (here the power of legal norms), and the role of identity in shaping states’ behaviour. This multi-component approach prevents this study from treating the complexity of hydropolitical relations in a vacuum.

To get a sense of the interconnected, complex, and dynamic hydropolitical system, the recent hydropolitical disturbances concerning the Nile can be used as an example. In October 2019, Russia offered to mediate a dispute between Egypt and Ethiopia (the latter of which may be considered weak in terms of material power particularly within an *anarchic* setting) concerning the Grand Ethiopian Renaissance Dam (GERD).³¹⁶ A draft agreement was instead proposed by the US, but Ethiopia refused

³¹⁴ The term “hydropolitics” introduced by Waterbury (1979) is politics affected by the water resources. John Waterbury, ‘Hydropolitics of the Nile Valley’ [1979].

³¹⁵ See n 313.

³¹⁶ Vladimir Isachenkov and Cara Anna, ‘Putin courts Africa, offers to mediate Nile dam dispute’ Putin courts Africa, offers to mediate Nile dam dispute’ *AP NEWS* (24 October 2019) <https://apnews.com/article/22ed02597e9a415a9cc5cefe3ab48caf> accessed 13 January 2021.

to sign it, and then skipped talks in Washington, D.C. in late February 2020.³¹⁷ This resulted in an extensive diplomatic tour by Egyptian Minister of Foreign Affairs Sameh Shoukry of Arab, African, and European countries in an effort to shore up support for Egypt in the Nile dam dispute against Ethiopia.³¹⁸ While as recently as 2016 some of Egypt's historical Arab allies, including Saudi Arabia and Qatar, showed a political interest in supporting Ethiopia in dam disputes,³¹⁹ which is argued by some to agitate Egypt,³²⁰ it now seems that they stand again behind Egypt. And, then just recently in October 2020, Ethiopia said that threats of any kind over the dam were “misguided, unproductive and clear violations of international law”, coming after US President Donald Trump's shocking remark to “blow up that dam”.³²¹

Within the historical hydropolitical vicissitudes of the Nile, the behaviour and positions of the riparian states and external actors have seen radical changes in the context of conflict and cooperation over shared waters, which partly reflect the broader *anarchic geopolitical circumstances* of the basin. However, while the current diplomatic efforts of Egypt concerning the Nile dam disputes against Ethiopia remains far from the status of “water war”, it is still too early to foretell whether these shifts in the political atmosphere of transboundary water negotiations will end in equitable and sustainable cooperation. While *legal principles* manifest themselves more than before in political discourses between Egypt and Ethiopia, and cooperation at a technical level exists, *national identities* are also crucial influences on their behaviour. The dam itself has been described as a symbol of the national identity of Ethiopia, a revival of a great nation in defiance of its disregarded rights under former colonial agreements.³²² For Egypt, the dam is contrastingly considered a serious threat to its national security and political survival.³²³ Consequently, the ideological perception of water and its role in building the identity of states (and societies) are the key drivers for the promotion or hampering of cooperation. This

³¹⁷ Africanews, ‘Ethiopia 'disappointed' with US mediation in Nile dam dispute’ *Africanews* (1 March 2020) <https://www.africanews.com/2020/03/01/ethiopia-disappointed-with-us-mediation-in-nile-dam-dispute> accessed 13 January 2021.

³¹⁸ Ayah Aman, ‘Egypt steps up diplomatic action in Nile dam dispute’ *Al-Monitor* <https://www.al-monitor.com/pulse/originals/2020/03/egypt-international-support-ethiopia-nile-dam-dispute.html> accessed 13 January 2021.

³¹⁹ Middle East Eye, ‘Egypt-Gulf relations tested by Saudi visit to Ethiopia dam’ *Middle East Eye* <https://www.middleeasteye.net/fr/news/egyptian-gulf-relations-take-new-dip-after-saudi-delegation-visits-ethiopia-dam-30425904> accessed 13 January 2021.

³²⁰ n 319.

³²¹ Reuters, ‘Ethiopia says it will not cave to 'aggression' in dam dispute’ *Reuters* <https://uk.reuters.com/article/uk-usa-ethiopia/ethiopia-says-it-will-not-cave-to-aggression-in-dam-dispute-idUKKBN2790BY> accessed 13 January 2021.

³²² See, for instance, Ana Elisa Cascão and Alan Nicol, ‘Gerd: New Norms of Cooperation in the Nile Basin?’ [2016] 41 *Water International* 550. See also Hussein “‘Small Is Beautiful but Not Trendy’ (n 19). And, Ramy Hanna and Jeremy Allouche, ‘Water Nationalism in Egypt: State-Building, Nation-Making and Nile Hydro-Politics’ in (Routledge 2018).

³²³ n 322.

multi-causal mix of conflict and cooperation environing international transboundary waters is evident in similarly prominent examples that are generally treated in the same complex way as the Nile: such is the case with the continued presence of contested behaviour amid conflict and cooperation over the Danube (in particular, Gabčíkovo-Nagymaros dispute), Euphrates-Tigris, Indus, Jordan, Mekong, and Helmand rivers, among others.

A potentially significant change in the understanding international water politics has been the redefinition of hydro-political relations as “conflict-cooperation coexistence”.³²⁴ It is desirable to understand the motives of states that are conducive to the co-presence of cooperation and conflict over waters and the impellents behind changes to hydro-political relations. But these motives are in turn determined by a wide range of variables, including national interests, identities and values, internal and external political and economic factors, the geographical position and the physical and hydrological features of the river basin, alternative water resources, and the nature of the international power structure, which determine the respective pay-offs from cooperation and conflict. These constitute the foreign policy of riparian states and thus the hydro-political relations respecting transboundary river basins.

Many substantial studies have been conducted to explore the extent to which freshwater issues affect the likelihood of violence and war, or of peace.³²⁵ From this research, since the 1980s, a controversial debate, largely originating from war and peace and environmental security studies, has arisen in the realm of hydro-politics concerning the conflict-cooperation dichotomy of transboundary waters, with two main groups focusing on the potential of water to either cause conflict or facilitate cooperation.³²⁶ In contrast, over the last decade, interdisciplinary studies, in the field of “critical” hydro-politics, pay attention to the “co-existence” of conflict and cooperation, and explore the political interactions between riparian states and examine the role of *power*, discourses, and strategies in shaping hydro-political relations and states’ behaviour in different river basins.³²⁷ The following sections will

³²⁴ See Zeitoun and Warner (n 9).

³²⁵ For extensive literature review, see, for instance, Mirumachi (n 194). See also Susanne Schmeier, ‘Governing International Watercourses-Perspectives from Different Disciplines: A Comprehensive Literature Review’ [2010] Hertie School of Governance Working Paper. And, Jeroen Warner and others, ‘Transboundary ‘Hydro-Hegemony’: 10 Years Later Hydro-Hegemony 10 Years After’ [2017] 4 WIREs Water Wiley Interdisciplinary Reviews: Water e1242.

³²⁶ For more detailed analysis, see Warner ‘Three Lenses’ (n 19).

³²⁷ For extensive discussion, see Ana Elisa Cascão and Mark Zeitoun, ‘Power, Hegemony and Critical Hydro-politics’ [2010] 27 Transboundary water management principles and practice 42. Among others, see also Zeitoun and Warner (n 9); Jan Selby, ‘Dressing up Domination as ‘Cooperation’: The Case of Israeli-Palestinian Water Relations’ [2003] Review of International Studies 121; Hussam Hussein and Mattia Grandi, ‘Dynamic Political Contexts and Power Asymmetries: The Cases of the Blue Nile and the Yarmouk Rivers’ [2017] 17 International environmental agreements: Politics, law and economics 795; Filippo Menga, ‘Reconceptualizing Hegemony: The Circle of Hydro-Hegemony’ [2016] 18 Water policy 401; Jeroen Warner and Neda Zawahri, ‘Hegemony and Asymmetry: Multiple-Chessboard Games on Transboundary Rivers’ [2012] 12 International

review three main theoretical narratives concerning water conflict and cooperation and then call for the significance of the focus on the concepts of equity and identity in hydropolitical relations.

4.2.1. “Water war” narrative: water as a “causative” or “contributive” factor of “war”

To answer the question, “do disputes over water cause conflict?”, one group of scholars, whose ideas mainly derive from neo-Malthusian and neorealist state-centric *security* theories,³²⁸ regards water as especially *problematic*. This group, which emerged out of the early post-Cold War era, believes that a scarcity of water (and environmental degradation) in unstable political conditions may lead to armed conflict, or “water wars”. Considered in the light of population growth, economic development, and climate change, transboundary waters, mostly within a deterministic approach, have also been seen by this group as a threat to cooperative actions, diplomacy, and international security and stability, making states “vulnerable”.³²⁹

Research into the causal pathway of “water scarcity” to conflict and instability has also found a common basis in what is known in security studies as a defence or “security dilemma”, which has related fields such as “environmental security” and “climate change security”.³³⁰ Most such narratives have been selectively focused on arid and semi-arid regions, mainly the Middle East and North Africa. Accordingly, some scholars argue that competition over a physical scarcity of water resources, which are vital to these “overpopulated” regions, leads to inter-state conflicts, instability, and war. Such “problem-oriented” narratives of “water wars” – which continually appear in conjunction with climate and environmental problems – have also been picked up by some think-tanks, appear a lot in the headlines of several media, drive some foreign policies, and shape politicians’ discourses.³³¹

Thomas Homer-Dixon, while analysing several transboundary rivers, defined the links between different types of natural resources and conflict.³³² He argued that of all situations in which there is insufficiency of some collective means of support for a country or countries, a scarcity of water

Environmental Agreements: Politics, Law and Economics 215; Mohsen Nagheebiy and Jeroen Warner, ‘The Geopolitical Overlay of the Hydropolitics of the Harirud River Basin’ [2018] 18 *International environmental agreements : politics, law and economics* 839.

³²⁸ Neo-Malthusians believe that a natural resource scarcity such as water scarcity makes states vulnerable. Such vulnerability, especially if it depends on outside of their national borders, is perceived as threats, requiring urgent state action. Such actions on shared water resources lead to conflict which is called “water wars”. See Schmeier (n 325).

³²⁹ See Schmeier (n 325).

³³⁰ Jennifer Veilleux and Shlomi Dinar, ‘A Geospatial Analysis of Water-Related Risk to International Security: An Assessment of Five Countries’ [2019] *GeoJournal* 1. See also Dinar (n 86).

³³¹ See Cascão (n 342) for further discussions and some contemporary examples in “water war” narratives.

³³² Thomas F. Homer-Dixon, ‘On the Threshold: Environmental Changes as Causes of Acute Conflict’ [1991] 16 *International Security* 76.

resources is the leading cause of armed conflict within states.³³³ For Homer-Dixon, decreases in quality and quantity of freshwater resources lead to environmental scarcity, that lead to social and economic conflict, which in turn lead to violence.³³⁴ For “water war” narrators, “the world is sinking like the Titanic while the band merrily plays on”.³³⁵ When Malthusian theory is applied to recurring “water crises”, the expectation is that population growth will inevitably outstrip food and water availability, which will likely lead to instability and war.³³⁶ Homer-Dixon then refines his initial argument, and notes that scarcity is “mainly an *indirect* cause of violence and this violence is mainly *internal* to countries.”³³⁷ However, water scarcity plays, in this view, a *significant* role as security threats (“securitisation”)³³⁸ which is prone to violent conflict.

Building upon this, then, the line of Malthusian thought over “water causality” and war, which sees water scarcity more as a threat to security, has developed in response to its numerous critics. Being still influenced by the “water war” discourse, some scholars and water policy analysts seek to answer the query, “How do we prevent water wars?” Rejecting the “water causality” assumption (i.e. water scarcity as the main cause for insecurity), the water “securitisation” trend tends to position water scarcity as a “contributive” element which often interacts with other variables in relation to violence, instability, conflict, and war. The proponents of this interpretation argue that water scarcity is an integral part of security when it threatens the long-term political viability of a state or regime, or when it weakens their capacity to act effectively, which if not remedied, leads to political instability or even war.³³⁹ Violent conflict, in this sense, does not emerge because of water alone. Related scholars, however, blame social and political systems for a rise in water-related tensions because of their failure to provide the basic services of water provision/allocation between actors, and therefore, to resolve water related

³³³ Homer-Dixon, however, in another further research, argued that scarcity is “mainly an indirect cause of violence, and this violence is mainly internal to countries”. Thomas Dixon-Hommer, *Environment, Scarcity and Violence* (New Jersey: Princeton University Press 1999) p. 18.

³³⁴ See n 333.

³³⁵ Quoted in Warner ‘Three Lenses’ (n 19) p. 175.

³³⁶ “Water crisis” has been used to explain the conflicts in Darfur, Sudan, Syria, and Yemen. Such idea has been criticised by some scholars like Jan Selby. See, for instance, Jan Selby, ‘Climate Change and the Syrian Civil War, Part II: The Jazira’s Agrarian Crisis’ [2019] 101 *Geoforum* 260.

³³⁷ Homer-Dixon (n 333) p. 18.

³³⁸ Over the last few decades, growing attention to environmental issues within the political agenda has led to an increased “discursive construction of [these] particular issues as security threat[s]”. The move to “securitisation,” which demands “extraordinary measures in order to deal with that specific challenge,” ultimately results in “depoliticisation” since it represents “a failure to deal with issues of normal politics”. Hussein and Grandi (n 327) p. 797.

³³⁹ For more information, see Veilleux and Dinar (n 330).

disagreements.³⁴⁰ By making a long list of the social, political, geographical, and economic variables that shape national objectives and demands, advocates of this way of thinking also note that the argument “water scarcity causes conflict” must be filtered through a number of variables.³⁴¹

One leading scholar of this contributive approach in the context of international river basins is Peter Gleick. One of Gleick’s contributions has been to present the knowledge that enables a forecast of *when* and *where* conflict and instability are likeliest to occur due to a “water crisis” and environmental degradation, however, in an approach similar to that of Homer-Dixon and from an “environmental security” perspective. While Gleick’s basic assumptions and conclusions are aligned with the neorealist view, his call to find solutions to water “problems” through international law, institutions, and data exchanges may place his ideas in the bounds of liberal institutionalism.

Notwithstanding, many scholars criticise the “water war” narrative together with all versions of the “causative” or “contributive” nature of water scarcity – and those “predictive” or “preventive” – as being not only overly deterministic in their approach but also problematic.³⁴² Jeremy Allouche, for instance, challenges the causality of water scarcity, and notes that disputes arise rather from the allocation of water resources than the water alone.³⁴³ Sceptics of this trend also argue that the deterministic picture of “water causality” of hydropolitics disregards both other local drivers and the importance of geopolitical context.³⁴⁴ Their concern is that water securitisation puts pressure on the existing international order, negatively affecting on other connected global issues, such as terrorism and intercontinental migration. They believe that a biased selection of case studies of this trend has negative effects on understanding the complexities of hydropolitics, by ignoring or undervaluing the presence of cooperative actions. In addition, such a “selective use of evidence and/or the disproportionate and ill-informed attention to specific complex and contested rivers” leads to the over-securitisation of water resources, and sends wrong messages to policy makers.³⁴⁵ Water might be a big card in the both regional and global political settings and games, and even might be used as a military target. Therefore, one gets

³⁴⁰ See, for instance, Peter Gleick, ‘Water Resources, Climate Change, and the Destabilization of Modern Mesopotamia’ in *Water, Security and Us Foreign Policy* (Routledge 2017). Peter Gleick and Charles Iceland, ‘Water, Security, and Conflict’ [2018] Issue Brief: World Resource Institute and Pacific Institute.

³⁴¹ See Veilleux and Dinar (n 330). Peter H. Gleick, *Water and Conflict: Fresh Water Resources and International Security* (President and Fellows of Harvard College and the Massachusetts Institute of Technology 1993).

³⁴² See in this respect, Ana Elisa Cascão and others, *Why Are Water Wars Back on the Agenda? And Why We Think It's a Bad Idea!* (FLOWS. The Water Governance Blog at IHE Delft Institute for Water Education 2018).

³⁴³ Jeremy Allouche, *The Governance of Central Asian Waters: National Interests Versus Regional Cooperation* (2007).

³⁴⁴ See Cascão (n 342).

³⁴⁵ Cascão (n 342).

the impression that water might be mainly a tool of political pressure and control, and not exactly what the countries are “fighting” for.

Even in “contributive” discourses, while they may correctly address the “failure of social and political systems” for a probable water violent conflict, find that their analyses are seriously flawed due to several reasons. The analytical priority of their “multi-causal” models still remains shackled by the *stress* on “water causality” and “war” over other factors. In a sense, that such models of thinking highly give their *attention* to finding a link between “conflict” and water “crisis” in their selected cases may ultimately create an imminent threat even if none exists in reality. Thus, any such undue and exclusive attention misinforms the analysis. The important point is that analysing the causality of water scarcity certainly *must* not distract from addressing the root causes of conflict. One way of capturing the root causes is to examine how these mostly non-violent water conflicts contribute to the broader (international) and geo-political context, and then how we address them. Furthermore, the analysis and interpretation of these multivariables is questionable due to doubts at the accuracy of coding and ambiguity of the terminology used.³⁴⁶ While there might be efforts among this kind of analysis worthy of use as “early-warning tools” to predict conflict and accordingly pre-act before further escalation, they fall into a similar theoretical trap as the causative discourse. Since this alternate paradigm is fixated with “conflict”, “violence”, and “war”, water scarcity is again placed as a *major* factor in their selective “conflict hotspots”.³⁴⁷ Further, the data and sources used are arguably of doubtful credibility in addition to the case studies employed being limited by their partial selection.³⁴⁸ Such a modern, tool-based analysis is in fact unable to account for the realities in local resilience, social solidarity and cultural cohesion of those traditional societies in the selected arid and semi-arid case studies, which often become apparent in times of disaster and conflict.³⁴⁹ As a result, too pessimistic an outlook on water scarcity may even destroy constructive cooperation with regard to transboundary waters and, indeed, damage the socio-economic, multi-level, interdependent norms of the riparian states.³⁵⁰ Such misinformed understandings may result in overly subjective judgements, which appear to mainly serve either the security interests of certain outsiders’ foreign policy agendas or political interests of some groups of insiders, might be highly dangerous in

³⁴⁶ See, for instance, Asit K Biswas and Cecilia Tortajada, *Water Crisis and Water Wars: Myths and Realities* (Taylor & Francis 2019). See also Kristine Eck, ‘In Data We Trust? A Comparison of Ucdp Ged and Acled Conflict Events Datasets’ [2012] 47 *Cooperation and Conflict* 124

³⁴⁷ There have been growing “global” tools for prediction of conflict with the focus on water conflict. For instance, the Dutch government-funded Water, Peace and Security (WPS) has established “global early warning tool” and presented it to the UN Security Council. With selected case studies, with a focus mostly on “South” and invalidated data base, the results may look questionable.

³⁴⁸ See footnote n 346.

³⁴⁹ My personal experience in particular in the regions struggling with poverty like Sistan (in Iran) or Zaranj (in Afghanistan) shows that people relatively deal better with problems like water scarcity and collaborate with each other more than those regions with less problems.

³⁵⁰ See Cascão (n 342).

practice if linked to global politics within international anarchic system, being far from the stated intent to prevent war and bring peace.

4.2.2. “Water peace” narrative: water as a way towards “peace”

This second group, being more optimistic in their outlook, introduce the idea of “water for peace” and the potential for regional hydropolitical cooperation, rather than looking at water as a threat to security.³⁵¹ They assume that conflict over water resources, even in regions where these resources are scant, eventually leads to joint efforts based on a network of common interests and benefit-sharing respecting water.³⁵² Looking at “water crises” as both a threat and opportunity, they believe that an “impeding crisis triggers systems to become more resilient, flexible and sustainable”.³⁵³ Now, the questions shift to: “What explains cooperation between states? Is there an intermediary variable that disrupts the causal relation between scarcity and violence?”³⁵⁴

After having contemplated historical conflicts and theoretical approaches, they believe that water and its specific characteristics hold the potential for regional and international cooperation for shared water resources.³⁵⁵ Aaron Wolf is a well-known, leading scholar in this group. Wolf, in his pioneering historical study, correctly asserted that “war over water is neither strategically rational, hydrographically effective, nor economically viable”.³⁵⁶ Since then, there have been numerous grounds on which the claims by “water war” scholars have been open to challenge. Significant studies in vast numbers and with different focuses have been conducted not only to criticise but also to present the very opposite of what “water war” fans argue.

Many studies have sought to show how technological and diplomatic efforts concerned with the “low politics” of water scarcity could lead to cooperation rather than conflict.³⁵⁷ In addition, when

³⁵¹ See, for instance, Aaron T Wolf, “‘Water Wars’ and Water Reality: Conflict and Cooperation Along International Waterways’ in *Environmental Change, Adaptation, and Security* (Springer 1999).

³⁵² See Claudia W Sadoff and David Grey, ‘Beyond the River: The Benefits of Cooperation on International Rivers’ [2002] 4 *Water policy* 389. See also Claudia W Sadoff and David Grey, ‘Beyond the River: The Benefits of Cooperation on International Rivers’ [2002] 4 *Water policy* 389.

³⁵³ Quoted in Warner ‘Three Lenses’ (n 19) p. 179.

³⁵⁴ Warner ‘Three Lenses’ (n 19) p. 179.

³⁵⁵ See Wolf (n 351). See also David Phillips and others, *Trans-Boundary Water Cooperation as a Tool for Conflict Prevention and Broader Benefit-Sharing* (Ministry for Foreign Affairs Stockholm 2006); Anders Jägerskog, ‘Why States Cooperate over Shared Water: The Water Negotiations in the Jordan River Basin’ (Linköping University Electronic Press 2003).

³⁵⁶ Wolf (n 351) p.261. See also Anthony Turton, ‘Water Wars: Enduring Myth or Impending Reality?’ [2000] Hussein Solomon et Anthony Turton (sous la dir), *Water Wars: enduring myth or impending reality* 165; Lucia De Stefano and others, ‘Tracking Cooperation and Conflict in International Basins: Historic and Recent Trends’ [2010] 12 *Water Policy* 871.

³⁵⁷ Sadoff and Grey (n 352). See also Undala Z Alam, ‘Questioning the Water Wars Rationale: A Case Study of the Indus Waters Treaty’ [2002] 168 *Geographical Journal* 341.

endeavouring to challenge the message that “water scarcity leads to war”, some scholars show that virtual water trade,³⁵⁸ new technologies,³⁵⁹ cultural similarities,³⁶⁰ and benefit-sharing in both water and non-water matters,³⁶¹ are effective ways to reduce water scarcity, and therefore promote cooperation. They understand that, “as much as water may divide groups of people and pit countries against each other, water as the most basic human need appears to mobilise countries [...] toward common thinking and a common agenda”.³⁶² This line of thought, often but not always and mainly through a “solution-oriented” approach, gives the priority to the opportunities that provide “peace” (and equality) over waters regardless of (or with less attention to) equity and fairness. Originated mainly from “western” social justice of utilitarianism,³⁶³ some scholars of this group - and not all - believe that even “bad law is better than no law”. Accordingly, any water related solution that can bring “peace” is likely acceptable and is not labelled unfair or inequitable, even if it does not appear very reasonable.³⁶⁴

In the quest for inducing peace, scholars of the water as peacebuilder idea argue that potential conflict can be replaced by the cooperative potential of shared water resources,³⁶⁵ and provides political benefits and “win-win” outcomes.³⁶⁶ In this regard, Wolf points out that, in spite of the inherent disputes over international waters, some “creative approaches” can bring a positive-sum, i.e., integrative water allocation.³⁶⁷ Claudia Sadoff and David Grey propose four kinds of cooperation benefits (environmental, direct economic, political, and indirect economic) derivable from international rivers.³⁶⁸ They weigh up the benefits of cooperation and costs of non-cooperation over international rivers. They argue that conflict is unlikely to issue from international rivers; rather, international rivers

³⁵⁸ See John Anthony Allan, ‘Virtual Water-the Water, Food, and Trade Nexus. Useful Concept or Misleading Metaphor?’ [2003] 28 *Water international* 106.

³⁵⁹ Wolf (n 351).

³⁶⁰ See, for instance, Jack Kalpakian, ‘Identity, Conflict and Cooperation in International River Systems’ [2018]. See also Lawrence Susskind and Shafiqul Islam, ‘Water Diplomacy: Creating Value and Building Trust in Transboundary Water Negotiations’ [2012] 1 *Science & Diplomacy* 1.

³⁶¹ See n. 356 and n. 357.

³⁶² Quoted in Hubert HG Savenije and Pieter Van der Zaag, ‘Conceptual Framework for the Management of Shared River Basins; with Special Reference to the Sadc and Eu’ [2000] 2 *Water policy* 9 p. 12.

³⁶³ Zeitoun ‘Transboundary Water Justice’ (n 20).

³⁶⁴ Zeitoun ‘Transboundary Water Justice’ (n 20).

³⁶⁵ There was also one programme in UNESCO named PCCP referred the Potential Conflict to Cooperation Potential. “PCCP is an associated programme ... to facilitate multi-level and interdisciplinary dialogues in order to foster peace, cooperation and development related to the management of transboundary water resources” (source: www.unesco.org).

³⁶⁶ Such ideas have been mainly grounded on “interdependency” theory with a focus on the economic value of water. See Sadoff and Grey (n 352); Wolf (n 351).

³⁶⁷ Wolf (n 351). See also Aaron T Wolf, ‘Shared Waters: Conflict and Cooperation’ [2007] 32 *Annu Rev Environ Resour* 241; Jacob D Petersen-Perlman, Jennifer C Veilleux and Aaron T Wolf, ‘International Water Conflict and Cooperation: Challenges and Opportunities’ [2017] 42 *Water International* 105.

³⁶⁸ Sadoff and Grey (n 352).

facilitate peace and cooperation among states. Yoffe and others (2003) provide indicators for analysing the extent of potential risk in an international basin, and identify the degree of conflict or cooperation.³⁶⁹ Grey and Sadoff argue that although achieving basic “water security” may lead to competition over water and form a source of conflict, there have been other regional non-water assets (e.g. roads and energy) that facilitate water cooperation and sustain water security.³⁷⁰ Moreover, Hubert Savenije and Pieter van der Zaag present a conceptual framework, based on integrated water resources management, to turn potential conflicts into constructive cooperation.³⁷¹ Mostafa Dolatyar and Tim Gray, by challenging the “water war” discourses in the Middle East argue that “water scarcity has invariably been a platform for cooperation in the region” and conclude that mutual interests have resulted in more instances of cooperation with regard to water scarcity.³⁷²

These discourses on water cooperation and peace-building originated in parallel with the liberal peace-building paradigm, which have blossomed since the end of the Cold War.³⁷³ In a similar way, some other scholars, working with neoliberal institutionalism, suggest that institutions can promote cooperation among riparian states.³⁷⁴ Susanne Schmeier’s research contributes greatly to our understanding of the effectiveness of River Basin Organisations (RBOs) in improving water resources management.³⁷⁵ Oliver Hensengerth looks at how transboundary water cooperation can be strengthened through participatory governance.³⁷⁶ Furthermore, water law scholars emphasise the role of legal principles and norms to promote institutionalised cooperation.³⁷⁷ Global international Water Law

³⁶⁹ Shim Yoffe, Aaron T Wolf and Mark Giordano, ‘Conflict and Cooperation over International Freshwater Resources: Indicators of Basins at Risk’ [2003] 39 JAWRA Journal of the American Water Resources Association 1109.

³⁷⁰ David Grey and Claudia W Sadoff, ‘Sink or Swim? Water Security for Growth and Development’ [2007] 9 Water policy 545.

³⁷¹ Savenije and Van der Zaag (n 362).

³⁷² Mostafa Dolatyar and Tim S Gray, ‘The Politics of Water Scarcity in the Middle East’ [2000] 9 Environmental Politics 65 p 209. As already described, the fans of “water war” idea have mainly focused on the Middle East and North Africa and particularly Arab-Israeli conflict. Such this likely purposefully selected focus has been criticised by many scholars like Dolatyar and Gray. For extensive debate in this regard, see, for instance, Jan Selby, ‘Oil and Water: The Contrasting Anatomies of Resource Conflicts’ [2005] 40 Government and opposition 200.

³⁷³ And chiefly from functionalist theory. See Karin Aggestam and Anna Sundell-Eklund, ‘Situating Water in Peacebuilding: Revisiting the Middle East Peace Process’ [2014] 39 Water International 10.

³⁷⁴ See, for instance, Jägerskog (355).

³⁷⁵ For extensive discussion, see Susanne Schmeier, *Governing International Watercourses: River Basin Organizations and the Sustainable Governance of Internationally Shared Rivers and Lakes* (Routledge 2013). See also Anoulak Kittikhoun and Susanne Schmeier, *River Basin Organizations in Water Diplomacy* (Routledge 2020).

³⁷⁶ See Oliver Hensengerth, ‘Transboundary River Cooperation and the Regional Public Good: The Case of the Mekong River’ [2009] Contemporary Southeast Asia 326.

³⁷⁷ See, for instance, Eyal Benvenisti, *Sharing Transboundary Resources: International Law and Optimal Resource Use*, vol 23 (Cambridge University Press 2002); Owen McIntyre, ‘The Role of Customary Rules and

frameworks such as the UN Watercourses Convention and the 1992 Water Convention on the Protection and Use of Transboundary Watercourses and International Lakes have also been cited as influencers on transboundary water relations (hereinafter Water Convention).³⁷⁸

This approach underlines the possibility of fostering cooperation and trust-building, beginning in areas of low politics and spreading to matters of high politics. Further stressed is the importance of depoliticising the disputed issues and working, first and foremost, towards cooperation on technical issues and the sharing of scientific knowledge.³⁷⁹ In this view, cooperation on depoliticised issues as the independent variable could positively influence dependent variables like trust, certainty, and confidence among the hostile actors.³⁸⁰ Likewise, some studies have focused on the intra-state level and have illustrated the significance of the impacts of enhancing knowledge and education systems,³⁸¹ and local discourses and identities on hydropolitical relations.³⁸²

4.2.3. “Co-existent” water conflict-cooperation

Inherently emanating from different neorealist or neoliberalist understandings of the concept of “security”,³⁸³ both of the above-mentioned groups theoretically isolate conflict from cooperation by exclusively focusing either on conflict or on cooperation as a result of transboundary water utilisation. This set of dichotomous narratives has been examined specially from the critical perspective. The leading scholarly group among this branch of critical thought belongs to the London Water Research Group, and in particular, Mark Zeitoun, Jeroen Warner, Naho Mirumachi, and Ana Cascão. Zeitoun observes that “not all [water] cooperation is pretty” i.e., leading to equitable water allocation outcomes,³⁸⁴ and it has been contended that focusing overmuch on water war or water peace lacks

Principles of International Environmental Law in the Protection of Shared International Freshwater Resources’ [2006] *Natural Resources Journal* 157; Alistair Rieu-Clarke and Ruby Moynihan, *Transboundary Water Governance and Climate Change Adaptation: International Law, Policy Guidelines and Best Practice Application* (UNESCO Publishing 2015); Dinara Ziganshina, *Promoting Transboundary Water Security in the Aral Sea Basin through International Law* (Martinus Nijhoff Publishers 2014).

³⁷⁸ McCaffrey (n 39); Rieu-Clarke (n 235); Ruby Moynihan and Bjørn-Oliver Magsig, ‘The Rising Role of Regional Approaches in International Water Law: Lessons from the Unece Water Regime and H Imalayan a Sia for Strengthening Transboundary Water Cooperation’ [2014] 23 *Review of European, Comparative & International Environmental Law* 43.

³⁷⁹ Jägerskog (355).

³⁸⁰ Jägerskog (355).

³⁸¹ Léna Salamé and Pieter Van der Zaag, ‘Enhanced Knowledge and Education Systems for Strengthening the Capacity of Transboundary Water Management’ [2010] *Transboundary Water Management: Principles and Practice* 171.

³⁸² Juha I Uitto and Alfred M Duda, ‘Management of Transboundary Water Resources: Lessons from International Cooperation for Conflict Prevention’ [2002] 168 *Geographical Journal* 365. See also Florian Krampe, ‘Water for Peace? Post-Conflict Water Resource Management in Kosovo’ [2017] 52 *Cooperation and Conflict* 147.

³⁸³ Dinar (n 86); Warner ‘Three Lenses’ (n 19).

³⁸⁴ Zeitoun and Mirumachi (n 409) p. 305.

nuance and a critical understanding of hydropolitical dynamics.³⁸⁵ Moreover, there is high risk to make the analysis “apolitical” by the characterisation of water conflict and cooperation on a linear scale.³⁸⁶ In their effort to improve cooperation there is often a tendency to depoliticise water conflict and cooperation and break them down into a series of technological solutions, while being blind to power asymmetry.³⁸⁷

The hydropolitical relations of transboundary river basins across the world have been historically shaped by the continuous co-existence of conflict and cooperation.³⁸⁸ Separation of periods characterised by either conflict or cooperation cannot sketch the full picture of complex hydropolitics. In addition, power, which is the main explanatory factor in the development of hydropolitical relations, is either ignored or focused only on in its material forms by both groups of “water war” and “water peace”. In contrast to the dilemma of conflict-cooperation discourses, Mirumachi in her co-authored article with Allan (2007) argued that conflict and cooperation are co-existent.³⁸⁹ These authors stress that “considering conflict and cooperation as opposing concepts misleadingly simplifies the complexity of interactions”.³⁹⁰

Considering conflict and cooperation separately on a single axis (as in Yoffe and others, 2003) leads one to overlook significant political aspects. For instance, in the case of Palestine and Israel, or Ethiopia and Egypt, both riparians cooperate on technical level and data-sharing, bound by a treaty, while political tensions, which are somehow excluded from discussions, arise from hydropolitical relations.³⁹¹ Criticising such dualism, Zeitoun and Mirumachi say that “[t]he examination of either conflict or cooperation, we argue, refutes the reality of the vast majority of contexts where cooperation and conflict actually co-exist, and perpetuates the paradigm that any conflict is ‘bad’, and that all forms of cooperation are ‘good’”.³⁹² They, for instance, critically examine how treaties that may codify an existing, asymmetrical status quo in favour of hegemon are often seen as a good instance of

³⁸⁵ For instance, Selby in his critical analysis illustrates that how Israel is “dressing up domination as ‘cooperation’” over Palestine’s water rights. See Selby (n 327).

³⁸⁶ See Zeitoun and Warner (n 9); Zeitoun and Mirumachi (n 409).

³⁸⁷ Nagheeby and Warner (n 327) show that how “functionalist” approach of water diplomacy may not be effective.

³⁸⁸ Critical hydropolitics scholars, therefore, mostly prefer to analyse the transboundary water “interactions” than conflict and cooperation as referred by Zeitoun and Mirumachi “to [political] relations of co-existing cooperation and conflicts among communities, groups or states over international or sub-national waters, with a focus here on inter-state interaction” Zeitoun and Mirumachi (n 409) p. 3.

³⁸⁹ Mirumachi and Allan (n 66).

³⁹⁰ Mirumachi and Allan (n 66) p. 4.

³⁹¹ Zeitoun and Mirumachi (n 409); Cascão (n 10).

³⁹² Zeitoun and Mirumachi (n 409) p. 298.

cooperation.³⁹³ Accordingly, they argue that analysis of the power structure dynamic *must* be taken prior to any support of transboundary water arrangements, even the cooperative ones; otherwise, it may misinform policy measures and decisions making processes, and therefore may damage the equitable and sustainable cooperation in the long term. By addressing inequity and power differentials, Zeitoun and Warner point out that treaties can become the source of conflict and uphold what Selby describes as “dressing up domination as cooperation”, as in case, for example, of the Oslo Agreements between Israel and Palestine.³⁹⁴ Accordingly, Mirumachi and Allan recognise the co-existence of conflict and cooperation through a political process and present their concept of “transboundary water interactions”, which they define as the co-existence of conflict and cooperation within a political process, whereby power is the main determinant factor.³⁹⁵ Mirumachi introduces the Transboundary Water Interaction Nexus (TWINS) matrix to analyse the hydropolitical relations within conflictive and cooperative behaviour between riparian states.³⁹⁶ Mirumachi’s TWINS will be detailed later and adopted in this study to analyse equity in hydropolitical relations (see Chapter 5).

With a similar way of thinking, Warner also provides a quite different interpretation of water conflict, by focusing on regime-formation and the role of hegemons therein. He labels this third narrative as “water hegemony”, “one exposing and resisting the hegemony of globalising hydrocapitalism”.³⁹⁷ He looks at “how local forces express global hegemonic struggles”, and argues that “the continued policy discourse of interstate water wars serves a purpose as a hegemonic concept”.³⁹⁸ Drawing upon the critical strands of IR, Warner notes that “the absence of international water wars does not evidence an absence of struggle, but rather that open antagonism is displaced by structural conflict between hegemonic market capitalism and state exploitation dispossessing their marginalised victims”.³⁹⁹ He rightly concludes that, “[n]o matter which hypothesis may prove to be correct, each of the above

³⁹³ See, for instance, Shlomi Dinar and others, ‘Do Treaties Matter? Climate Change, Water Variability, and Cooperation Along Transboundary River Basins’ [2019] 69 *Political Geography* 162; See also Neda A Zawahri, ‘Designing River Commissions to Implement Treaties and Manage Water Disputes: The Story of the Joint Water Committee and Permanent Indus Commission’ [2008] 33 *Water International* 464.

³⁹⁴ Zeitoun and Warner (n 9); Selby (n 327).

³⁹⁵ See footnote n. 388. Mirumachi and Allan (n 66).

³⁹⁶ Mirumachi and Allan (n 66).

³⁹⁷ Warner ‘Three Lenses’ (n 19) p. 174. For extensive discussion on the concept of “hegemony” in transboundary water politics, see, for instance, Zeitoun and Warner (n 9); Jeroen Warner and Neda Zawahri, ‘Hegemony and Asymmetry: Multiple-Chessboard Games on Transboundary Rivers’ [2012] 12 *International Environmental Agreements: Politics, Law and Economics* 215. Filippo Menga, ‘Reconceptualizing Hegemony: The Circle of Hydro-Hegemony’ [2016] 18 *Water policy* 401; J. F. Warner, ‘Contested Hydrohegemony: Hydraulic Control and Security in Turkey’ [2008] 1 *Water Alternatives* 271.

³⁹⁸ Warner ‘Three Lenses’ (n 19) p. 173.

³⁹⁹ Warner ‘Three Lenses’ (n 19) p. 183.

narratives has had serious consequences, globally but also for the basins under review. The three tales [...] are lenses on the same phenomenon, each with considerable explanatory power”.⁴⁰⁰

4.3. Power in hydropolitical relations

Some academics argue that not only do politics influence water-related processes, but also that any activities concerned with water resources influence on politics. Erik Swyngedouw proposes that any social and physical environmental activity (for example, dam construction) may benefit some people, but negatively affects social and physical conditions for others. Thus, these socio-environmental changes lead to a degree of political instability in the society.⁴⁰¹ Swyngedouw considers that “the mobilisation of water (through dams, canals, pipes, and the like) for different uses in different places is a conflict-ridden process [...] and shows how social power is distributed in a given society”.⁴⁰² In this regard, he recognises three significant factors – geographical conditions, technical choices, and politico-legal arrangements– and argues that control over water the inevitable outcome when these three factors are combined. In other words, any hydro-social configuration results from hegemonic political, social, and cultural conditions.⁴⁰³ Thus, political power is recognised by some scholars as a major factor influencing the outcome of transboundary water relations between riparian states; as Swyngedouw expresses it, “when two equal rights meet, power decides”.⁴⁰⁴

Sceptics of the enquiries into the conflict-cooperation dichotomy argue that the dualistic categorisation of hydropolitical relations as good/bad, conflict/cooperation, and war/peace have ignored the role of power and political dynamics involved in water-related issues.⁴⁰⁵ It is asserted that a majority of conflict-cooperation researches underestimate the important role of power as a main factor in shaping the hydropolitical relations between riparians.⁴⁰⁶ These critics point out that even if there is cooperation in a transboundary river basin among the riparians, it does not mean that an equally beneficial, “win-win” situation results for all riparians: the cooperation process may be created in favour of the strongest riparian (hegemon)⁴⁰⁷, and accordingly, cooperation might co-exist with conflict by way of political

⁴⁰⁰ Warner ‘Three Lenses’ (n 19) p. 188.

⁴⁰¹ Erik Swyngedouw, ‘The Political Economy and Political Ecology of the Hydro-Social Cycle’ [2009] 142 *Journal of contemporary water research & education* 56.

⁴⁰² Swyngedouw (n 401) p. 57.

⁴⁰³ Swyngedouw (n 401).

⁴⁰⁴ Swyngedouw (n 401) p. 58.

⁴⁰⁵ Zeitoun and Warner (n 9).

⁴⁰⁶ Zeitoun and Warner (n 9); See also, Zeitoun and Mirumachi (n 409); Cascão and Zeitoun (n 327).

⁴⁰⁷ For instance, it is mentioned by many scholars that even there is cooperation in Nile, Jordan and Euphrates Rivers among riparian states, the water utilisation and allocation is much more in favour of Egypt, Israel and Turkey as hegemon respectively. See Warner ‘Contested Hydrohegemony’ (n 397); and, Ana Elisa Cascão, ‘Ethiopia–Challenges to Egyptian Hegemony in the Nile Basin’ [2008] 10 *Water Policy* 13.

power relations.⁴⁰⁸ They further argue that when some scholars consider power relations, they focus only on economic and military power and consequently ignore other forms of power.⁴⁰⁹ However, in critical hydropolitics, power is a determinant factor in hydropolitical relationships. But what is power in politics as respects transboundary waters?

Politics, in general, has been defined as “who gets what, when, and how”. Politics signifies processes and relationships that engage with power and authority.⁴¹⁰ In political science, power, among other definitions,⁴¹¹ is generally defined as the ability to influence the behaviour of people, norms and institutions. As discussed earlier, power plays an important role in determining the outcome of competition over the control of shared water resources among riparian states, particularly when these resources are scarce; as Zeitoun and Warner observe, “power relations between riparian states are prime determinants of the degree of control over water resources that each riparian attains”.⁴¹²

On this basis, Zeitoun and Warner have also developed the framework of hydro-hegemony (FHH) to analyse power relations among riparian states and the impact of these relations on the control of water resources. Water resources control is referred to strategies and mechanisms to “attain, maintain and consolidate control over shared water resources”.⁴¹³ These strategies are defined by Zeitoun and Warner as 1) “Resource capture”, 2) “Containment” and 3) “Integration”. Resource capture strategy as creating “facts on the ground” refers to technical and physical control of water resources through construction of hydraulic infrastructures (dams, dykes, reservoirs, irrigation networks and like that). Containment strategy refers to the coercive measures (for instance it could be an agreement in favour of hegemon-the powerful state) taken by one riparian usually hegemon in order to prevent the other riparians from developing infrastructures. And finally, integration strategy refers to the incentives and benefits (for instance it could be an agreement with some sort of incentives provided by hegemon for others)

⁴⁰⁸ Zeitoun and Warner (n 9); See also, Zeitoun and Mirumachi (n 409).

⁴⁰⁹ Ana Elisa Cascão points out that “power is not simply about actors’ visible, material capabilities (measured in economic or military terms for example); often more important are the less visible dimensions of power which include their capacity to influence ideas, agendas, discourses, knowledge and institutions”. Ana Elisa Cascão, ‘Political Economy of Water Resources Management and Allocation in the Eastern Nile River Basin’ (University of London 2009) p. 23. See also Sumit Vij, Jeroen Warner and Anamika Barua, *Power in Water Diplomacy* (Taylor & Francis 2020); See also Jeroen Warner and Rens de Man, ‘Powering Hydrodiplomacy: How a Broader Power Palette Can Deepen Our Understanding of Water Conflict Dynamics’ [2020] 114 *Environmental Science & Policy* 283. Warner and de Man analyse the different styles of used by actors in negotiation process over water resources.

⁴¹⁰ Quoted by Harold D Lasswell, *Politics: Who Gets What, When, How* (Pickle Partners Publishing 2018).

⁴¹¹ See the three faces of power (i.e. overt, covert and structural) in Steven Lukes, *Power: A Radical View* (Macmillan International Higher Education 2004).

⁴¹² Zeitoun and Warner (n 9) p. 436.

⁴¹³ Cascão (n 10).

provided by one of the states (usually hegemon) for the other states to encourage compliance with an agreement.⁴¹⁴

Hegemony is a relational process in which different types of power (material and non-material) are exercised. Simultaneously, hegemony is an outcome of material, bargaining and ideational power in combination.⁴¹⁵ As Zeitoun and Warner point, “hegemony at the river level, achieved through water resources control strategies such as resource capture, integration and containment that are enabled by the exploitation of existing power asymmetries”.⁴¹⁶ From among many different definitions of power, Zeitoun and Warner understand power as multi-dimensional. Power not only relates to the visible, material capabilities of actors, such as their economic or military capacity, but also to the less visible, non-material capabilities of actors, including their ability to influence ideas, discourses, knowledge, and institutions. Such multiple aspects of power and their impacts have manifested themselves in hydropolitical relations of many international watercourses like the Nile, Jordan, and Aral Sea Basin, recognising by several scholars.⁴¹⁷ Thus, power is thought of as “emerging from social [and political] processes rather than taken for granted in the form of accumulated material capabilities”.⁴¹⁸

Power is not evenly distributed among the states and actors, which creates asymmetric power relations.⁴¹⁹ The asymmetric distribution of power influences water interactions and, in particular, water allocation. Asymmetrical power greatly contributes to shaping the water flow regime among all riparian states and identifying who gets water and how much.⁴²⁰ Thus, each riparian state struggles to gain power and, accordingly, the capability to control water resources for their own benefit.

Zeitoun and Warner identify four dimensions of power influencing the competition for transboundary water resources: geography (riparian position), material power, bargaining power, and ideational power. The first and second of these are visible, the third and fourth much less so. In these terms, upstream riparians are considered to have power position in terms of geography in comparison with those

⁴¹⁴ Zeitoun and Warner (n 9).

⁴¹⁵ See also Mark Zeitoun and JA Allan, ‘Applying Hegemony and Power Theory to Transboundary Water Analysis’ [2008] 10 *Water policy* 3.

⁴¹⁶ Zeitoun and Warner (n 9) p. 435.

⁴¹⁷ See, for instance, Cascão and Nicol (n 322); See also, Ahmet Conker and Hussam Hussein, ‘Hydropolitics and Issue-Linkage Along the Orontes River Basin: An Analysis of the Lebanon–Syria and Syria–Turkey Hydropolitical Relations’ [2020] 20 *International Environmental Agreements: Politics, Law and Economics* 103; Filippo Menga, *Power and Water in Central Asia* (Routledge 2017); Kai Wegerich, ‘Hydro-Hegemony in the Amu Darya Basin’ [2008] 10 *Water Policy* 71.

⁴¹⁸ Robert W Cox, ‘Social Forces, States and World Orders: Beyond International Relations Theory’ [1981] 10 *Millennium* 126 cited by Cascão (n 409).

⁴¹⁹ Zeitoun and Warner (n 9).

⁴²⁰ Zeitoun and Warner (n 9). See also John Anthony Allan, *Water Security in the Middle East: The Hydro-Politics of Global Solutions* (Columbia University Press 2002).

downstream, albeit the study by Zeitoun and Warner shows that geography rarely plays much of a role in the asymmetric control of water (as for example with Ethiopia in the Nile river basin). Material power refers to economic strength, military and technological development, and access to external political and financial support.⁴²¹ Bargaining power concerns the degree of capacity to influence and control the rules, agenda, the terms of negotiation and agreement by means of providing incentives or producing sanctions. Bargaining power also pertains to the ability of actors to bide their time during negotiation and postpone political decisions.⁴²² Ideational power refers to the “power over ideas”, which includes the ability of an actor to form and influence ideas, knowledge, and discourses.⁴²³

Consider this, there is relatively limited research to examine the linkage between legal principles of international water law and power with some notable exceptions.⁴²⁴ International law is argued to be used as bargaining power in hydropolitical relations.⁴²⁵ This study borrows Zeitoun and Warner’s identification of the concept of power to understand bargaining and ideational power relative to the adoption of legal principles by riparian states. Distinguishing different types of soft power enables this study to investigate the bargaining and ideational function of legal principles in shaping the interests and identities of states in the Helmand River Basin.

4.4. “Equity/identity” orientation: the need for a sharp analytical focus

This study follows the latest critical line of thought by assuming the coexistent of water conflict and cooperation shaped by power relations, which will help analyse the influence of anarchy on state behaviour while exploring how states engage in conflict and cooperation over shared waters. However, in order to *transform* hydropolitical relations, conflict and cooperation respecting transboundary waters, the thesis argues, should be filtered through examining equity and by addressing the identity of riparian states; otherwise they perpetuate the contemporary futile stereotype. In one sense, conflict and cooperation concerning transboundary waters are not only shaped around power asymmetry and the anarchic settings, but also, arguably, influenced by the identity of actors involved and their perceptions about equity. Thus, the study suggests another group thinking of ideas by *emphasising* the important role of equity and identity and the need to bring these concepts into *sharp focus* of analysing hydropolitical relations. The focus on equity and identity aspects of water must be recognised to bring a *paradigm shift* in analysis of transboundary water politics. Such a paradigm shift in focus, in particular

⁴²¹ Zeitoun and Warner (n 9).

⁴²² Zeitoun and Warner (n 9).

⁴²³ Lukes (n 411) p. 28.

⁴²⁴ Farnum (n 241); See also Hawkins (n 241).

⁴²⁵ Zeitoun and Warner (n 9); See also Daoudy (n 196); Woodhouse and Zeitoun (n 239).

from achieving “security and peace”⁴²⁶ to “equity”, will lead policymakers to go through a set of new priorities within the context of “water justice”.⁴²⁷

The critical hydropolitics literature in the third narrative explained in Section 4.2.3 is divided between those focusing on “the geostrategic and political economy nature” by analysing power asymmetry and hegemony,⁴²⁸ and those examining the role of norms, discourses and ideas,⁴²⁹ in shaping hydropolitical relations.⁴³⁰ This study assumes that while the conflict-cooperation dichotomy paradigm is unable to understand the political dynamics of the anarchic structure of hydropolitical relations, it also has limited explanatory potential to explore the different positive and negative roles of legal principles in the context of conflict and cooperation, such as the ERU principle. The anarchic geopolitical settings that reflect global hegemonic struggles and associated with the double standard are seemingly a strange paradox under which riparian states conduct their counter-hegemonic behaviour in the context of cooperation and conflict. Consequently, the single-axis paradigm, by focusing on the outcome, narrowly frames hydropolitical relations, and underestimates the circumstances and driving forces shaping states’ behaviour.

This study, therefore, rejects the causality of water scarcity in the “water war” narrative, and instead argues that it is rather the anarchic geopolitical structure of the transboundary river basin that imposes its nature on riparian states and therewith influences their behaviour in the context of conflict and cooperation. In this line of thought, the behaviour of states is partly generated by a system of imposed forces or structures. In a way, this study argues that conflict and cooperation, mainly and especially in highly-politicised basins, are either symptoms of the nature of a hydropolitical structure or a series of states’ strategic manoeuvres within power relations to respond the structure. If a focus was made on the context of conflict-cooperation, it may make the fatal flaw of missteering the analysis and missing the full picture. Thus, an *overemphasis* on water conflict or cooperation may misguide the analysis of understanding hydropolitical relations targeted from out of “water-box”, identifying causes of state

⁴²⁶ The term “water security” has received global attention, however, there is controversial debate around its definition and the approach to achieve. “Water security” (and in the same line, “environmental security”) in two first narratives of “water war” and “water peace” is similarly grounded on realist perspective, framing it in a deterministic approach as the national security threat.

⁴²⁷ See also Farhana Sultana and Alex Loftus, *Water Politics: Governance, Justice and the Right to Water* (Routledge 2019).

⁴²⁸ Zeitoun and Warner (n 9); Selby (n 327).

⁴²⁹ See for instance, Majed Akhter, ‘The Hydropolitical Cold War: The Indus Waters Treaty and State Formation in Pakistan’ [2015] 46 *Political Geography* 65; Filippo Menga and Naho Mirumachi, ‘Fostering Tajik Hydraulic Development: Examining the Role of Soft Power in the Case of the Rogun Dam’ [2016] 9 *Water Alternatives* 373; See also Jeremy Allouche, ‘The Multi-Level Governance of Water and State Building Processes: A Longue Durée Perspective’ in Kai Wegerich and Jeroen Warner (eds), *The Politics of Water: A Survey* (Routledge 2010).

⁴³⁰ See Jeremy Allouche, ‘Nationalism, Legitimacy and Hegemony in Transboundary Water Interactions’ [2020] 13 *Water Alternatives* 286; See also Hanna and Allouche (n 322).

behaviour, and examining (in)equitable circumstances. In particular, understanding the relationship between water and conflict-cooperation should not distract from the necessity of searching for equity in hydropolitical relations. Critical hydropolitical analysis provides a way of examining the underlying patterns of hydropolitical relations in terms of power asymmetry and (in)equity. Critical hydropolitics scholars see power asymmetry as a main driver to enable or disable the efforts for justice and conflict resolution.⁴³¹ As also noted by Zeitoun and others (2014), hydropolitical analysis rarely grapple with equity and justice issues, nor provide an explicit and firm theoretical underpinning in equity (and social justice) in the international level.⁴³² This study, therefore, seeks to shed light on the concept of equity by analysing the role of the ERU principle in hydropolitical relations.

Given the importance of equity, there is another serious flaw in conflict and/or cooperation narratives that merits further remark. All three narratives mentioned above provide a conceptualisation of hydropolitical relations in the context of conflict-cooperation. However, while this study adopts the latter narrative of co-existent conflict-cooperation, it must be noted that these representations have rarely sought to define exactly what conflict and cooperation means from a philosophical perspective and how they might be interpreted by different states in relation to their identity, ideology, and social orientation. In addition to the influence of structure on state behaviour, the analysis of hydropolitical relations must be considered, this study argues, by taking account of the identity influence.

Marwa Daoudy analysed the interplay between context, identity and policy factors for the Turkish–Syrian relationship to capture the interactions at multiple levels, “specifically relating to the weight of ideational and material factors in determining foreign policy choices.”⁴³³ Daoudy adopted a framework of the “structure-identity nexus” to examine the structural changes at regional and international levels. Moreover, Jeremy Allouche in *Nationalism, Legitimacy and Hegemony in Transboundary Water Interactions* argues that the “analysis of discursive and ideological dimensions of identity and power provides insights into strategies and tactics of water control under conditions of power asymmetries between basin states.”⁴³⁴ Allouche explores the interplay between identity and legitimacy through case

⁴³¹ Zeitoun ‘Transboundary Water Justice’ (n 20).

⁴³² Zeitoun ‘Transboundary Water Justice’ (n 20).

⁴³³ Marwa Daoudy, ‘The Structure-Identity Nexus: Syria and Turkey's Collapse (2011)’ [2016] 29 Cambridge review of international affairs 1074 p. 1075.

⁴³⁴ Allouche (n 430) p. 287; See also Filippo Menga, ‘Building a Nation through a Dam: The Case of Rogun in Tajikistan’ [2015] 43 Nationalities Papers 479; For extensive discussion over the linkage between “regional identity” and conflict around hydropower dams, see Oliver Hensengerth, ‘Regionalism, Identity, and Hydropower Dams: The Chinese-Built Lower Sesan 2 Dam in Cambodia’ [2017] 46 Journal of Current Chinese Affairs 85; Filippo Menga, ‘Domestic and International Dimensions of Transboundary Water Politics’ [2016] 9 Water Alternatives 704.

studies of the Merowe Dam in Sudan, the Rogun Dam in Tajikistan and the Southeastern Anatolia Project (GAP) in Turkey to examine how norms are being shaped at the river basin level.

Moreover, states' interpretations of conflict and cooperation may differ from one basin to another and within the "East-West" or "North-South" dichotomy depending on national identity, ideology, and geopolitical history.⁴³⁵ Likewise, Allouche asks a crucial question: "how do national sentiments about water or rivers shape the nature of transboundary water interactions?"⁴³⁶ Inherently social concepts have different, sometimes even opposite values, meanings, definitions, and understandings between one country to another and generally between the "West" and "East", reflecting their identity and theoretical philosophy, and the ideology behind them.⁴³⁷ Rutgerd Boelens and others assert that "territorial struggles go beyond battles over natural resources as they involve struggles over meaning, norms, knowledge, identity, authority and discourses".⁴³⁸ What "water" by itself means in one place or for certain people may differ in another place or for others, resulting in different attitudes and behaviour concerning water utilisation. For instance, "cooperation" may be understood by riparians of the Danube Basin as a mean to strengthen their national identity, however, the same "cooperation" may be interpreted by Afghanistan – that will be discussed later – as losing national independence. Such different understandings may result in neglecting the important role of identity in relation to the legal norms of water conflict transformation towards equity, and therefore, it is essential to be taken into consideration.

Consider, then, understanding how these definitions might reflect particular cultural values or give a sense of collective identity is significant in order to offer proper solutions in certain regions. When employing a "Western model" of governance,⁴³⁹ it is a tendency to make story "about two worlds called *them* and *us*, where the "us" is the West ... and the "them" is everywhere else".⁴⁴⁰ Within such this cognitive model that is surrounded by cultural constraints, the Western story is "to depict large parts of the world as dangerous places for *us* and *ours*."⁴⁴¹ This is exactly what Gregory Bankoff notices that

⁴³⁵ For general discussion, see, for instance, Rafael X Reuveny and William R Thompson, 'The North-South Divide and International Studies: A Symposium' [2007] 9 *International Studies Review* 556.

⁴³⁶ Allouche (n 430) p. 286.

⁴³⁷ Rutgerd Boelens and others, *Hydrosocial Territories: A Political Ecology Perspective* (Taylor & Francis 2016).

⁴³⁸ Boelens (n 437) p. 1.

⁴³⁹ Hensengerth (n 376). Hensengerth shows that the Western concept of sustainable development does not reflect the governance experiences and development concerns of national governments of the Mekong River Basin.

⁴⁴⁰ Gregory Bankoff, 'Rendering the World Unsafe: 'Vulnerability' as Western Discourse' [2001] 25 *Disasters* 19 p. 20; See also an interesting article related to COVID-19: Steven Friedman, 'COVID-19 has blown away the myth about 'First' and 'Third' world competence' *The Conversation* (13 May 2020) <https://theconversation.com/covid-19-has-blown-away-the-myth-about-first-and-third-world-competence-138464> accessed 16 January 2021.

⁴⁴¹ Bankoff (n 440) p. 20.

how the West renders the world unsafe in order to not only perpetuate its cultural hegemony but also “provide further justification for Western interference and intervention in others’ affairs for *our* and *their* sakes.”⁴⁴² In this sense, for instance, it is argued that the lack of robust institutions to manage water results in heightened risk of conflict between riparian states, mainly in the Global South where water is scarce;⁴⁴³ and the solutions are often, in a similar mindset, offered according to western liberal technical and economic approaches.⁴⁴⁴ However, conflict and cooperation, by definition, might have different values and meanings in the Nile or the Helmand – flowing through traditionally collectivist societies – from what is understood in the Rhine or suchlike industrial, individualistic societies influenced by the Anglo-European liberal regime, for example. However, researchers and policymakers – mostly those with the Western mindset that they are part of the global hegemony – seek to analyse the hydropolitical relations of Eastern basins without realising fundamental social differences. The differences in social resilience and identities, which are often hidden, and only appear in times of violence and conflict, may result in different behaviour in eastern and western societies.⁴⁴⁵ This westernised, hegemonic thinking dismisses variances in knowledge, identity, reasoning, and vision concerning “water” resources. Therefore, conceptualisations of conflict and cooperation (and even of “water” by itself) in different basins that arise from a similar way of thinking (mostly dominated by an Anglo-European knowledge hegemony), and conclude in a single policy, may cause serious misunderstandings of states’ behaviour.⁴⁴⁶

⁴⁴² Bankoff (n 440) p. 20.

⁴⁴³ See, for instance, Aaron T Wolf, Shira B Yoffe and Mark Giordano, ‘International Waters: Identifying Basins at Risk’ [2003] 5 *Water policy* 29.

⁴⁴⁴ See, beyond the scope of this study, but extensive discussion of Frances Cleaver on how Ostrom’s framework of ‘crafting institutions’ is based on concepts that ill-reflect the complexity and diversity of multiple identities in Usangu, Tanzania. Frances Cleaver, ‘Reinventing Institutions: Bricolage and the Social Embeddedness of Natural Resource Management’ [2002] 14 *The European journal of development research* 11.

⁴⁴⁵ With over ten years of experience concerning water management in Sistan, the strong social resilience of the local community has been a significant factor for encouraging people to work together at the time of confronting with “water crisis” which merits further research.

⁴⁴⁶ Additionally, and far more dangerous, is the approach of some western analyses, which are often conducted over previous colonised countries or the regions that have security importance for the West, that are heavily orientated towards broader western security and (geo)political interests, prioritised by the fundamental goal of keeping the West safe. Equity, and the interests and identities of the target regions are, therefore, likely sacrificed for those priorities. The western security priorities have already led to launch a “global” counter-“terrorism” strategy by waging war in Iraq, Afghanistan, Pakistan, Syria, Yemen, Somalia, Libya and the like or engineering/supporting coup d’état to protect the West. As a result, undoubtedly, the related research projects must serve such foreign policy agenda. For instance, the 2017 US Global Water Strategy focuses on water as the core of US foreign policy agenda, to the end of protecting “US national interests”. In similar approaches to that of the United States, countries like the Netherlands, Switzerland, Germany and Sweden have included water as a core foreign policy issue in their national interest. This kind of strategic foreign policy which gives preference to protecting western interests, over the longer term, not only destabilises the target region and perpetuates anarchy’s symptoms, and destroys constructive cooperation with regard to transboundary waters, but also threatens the West’s security by itself. Therefore, such western studies and strategies, in part, potentially damage the socio-economic, multi-level, interdependent norms and identities of the riparian states, and, indeed, equity in the whole basin. See footnote n 835.

This study, therefore, seeks to bring a sharp focus into the equity/identity orientation and calls for further critical analysis of hydropolitical relations within this line of thought. Following this line of thought, Chapter 5 will show how the development of hydropolitical relations occurs towards higher degrees of equity and within three cultures of anarchy. With this backdrop, the study seeks to explain how state's behaviour may reflect related identity formation over the Helmand River and ERU principle. In particular, the study will examine how cooperation and conflict over the Helmand River have been influenced by water related identity which is by itself affected by geopolitical anarchic setting. Capturing the influence of identity formation surrounding transboundary waters in an interconnected international, regional and domestic context will shed lights on the complexity of hydropolitical relations and may answer the question of why cooperation over river basins and application of the ERU principle is stuck in *ad hoc*.

Chapter 5. The Equitable and Reasonable Utilisation principle in anarchic hydropolitical relations

5.1. Introduction

Equitable water allocation has been a particular focus of controversial debate between downstream and early-developing states, who may seek to maintain the *status quo* by justifying it under the concept of “historical water rights” or “existing water rights”,⁴⁴⁷ and upstream and late-developing states who may wish to advance their development projects. The best settings in which to address such conflicts of interest are visualised in the historical issues surrounding transboundary water interactions in the Nile, Jordan, Mekong, Helmand, and Aral Sea Basin. The concept of equity in international transboundary river basins is considered a critical issue within hydropolitical relations. Although equitable and reasonable utilisation of shared waters may not be an overriding concern within one specific anarchic geopolitical setting, where all actors primarily strive for “self-help”, it plays an important role in shaping an overall pattern of hydropolitical relations and riparian states’ interests and identity concerning water conflict and cooperation. Equitable water utilisation might also have various grades, from low to high quality, where low equity may only be subject to unilateral development and very limited level of cooperation with sole objective and high equity may go towards advanced cooperation through an integrated basin-wide approach and even beyond the “water box”.⁴⁴⁸ Such circumstance has arisen from the perception, cognition, and behaviour of riparian states as influenced by anarchic hydropolitical structures and power relations.

Amid the anarchic nature of international politics, which is characterised by a “battle for power”, states exercise their right to sovereignty over their territory. Such anarchic circumstances may compel states to wage “lawfare” against each other, in order to legitimise their behaviour concerning the utilisation of international watercourses. Resultantly, the “battle for power” may manifest itself as a “battle for legitimacy” (see Figure 1) among riparian states, whereby the operation of legal principles through bargaining and ideational power may hinder water conflict transformation. While this may offer a conflicting picture of the complexity of global water security among international anarchy, an important part of obviating this obstacle to transformation is establishing how and to what extent international water law can be employed to prevent or resolve conflicts and provide an effective platform for the

⁴⁴⁷ These are doctrines in the context of water law and particularly under the law of prior appropriation, arguing that the one who is the first person to get the water for its own beneficial use has priority to water allocation. See, for instance, A Dan Tarlock, ‘Prior Appropriation: Rule, Principle, or Rhetoric’ [2000] 76 NDL Rev 881.

⁴⁴⁸ Mirumachi (n 194) p. 33 also points out that, “the management and governance of shared basins need to contend with factors outside of the ‘water box’”.

equitable and sustainable use of international waters – the principle foundations of transboundary water cooperation⁴⁴⁹ – within an often “highly charged” political environment.⁴⁵⁰

The international community, in order to avoid conflicts over transboundary water utilisation – which may partly reflect the anarchic geopolitical overlay (see Chapter 2) – and seek to resolve them, establishes principles, rights, and responsibilities upon states, through a set of interrelated substantive and procedural norms. Of these principles, equitable and reasonable utilisation represents customary international law, and is undoubtedly now recognised as the pre-eminent rule respecting the utilisation of an international watercourse.⁴⁵¹ Accordingly, the equitable and reasonable utilisation of shared watercourses is not only one of the fundamental principles of international water law for upholding the concept of equity,⁴⁵² but also takes a place at the centre of transboundary water politics, where states engage in conflict and cooperation for their own interests and identities.

Although law scholars have sought to identify the concept of “equity” in the context of international water utilisation,⁴⁵³ and some scholars of critical hydropolitics open an avenue to the examination of inequitable circumstances of water allocation through the analysis of power asymmetry while others explore the role of international law in global environmental/water “justice”,⁴⁵⁴ analysis of equity as an important *driver* of states’ behaviour and a principal source of antecedent conflict conditions in hydropolitical relations has received less attention. As discussed in Chapter 4, hydropolitics literature (with a few exceptions)⁴⁵⁵ has focused mainly on the attitudes of conflict and cooperation over water

⁴⁴⁹ Rieu-Clarke (n 7).

⁴⁵⁰ See footnote n 15.

⁴⁵¹ It is reflected in the UN Watercourses Convention and Draft Articles on Transboundary Aquifers. See Joseph W Dellapenna, ‘Treaties as Instruments for Managing Internationally-Shared Water Resources: Restricted Sovereignty Vs. Community of Property’ [1994] 26 *Case W Res J Int’l L* 27; See also Owen McIntyre, *Environmental Protection of International Watercourses under International Law* (Ashgate Publishing, Ltd. 2007).

⁴⁵² For discussion about concept of equity in international law see Owen McIntyre, ‘Utilization of Shared International Freshwater Resources—the Meaning and Role of “Equity” in International Water Law’ [2013] 38 *Water international* 112.

⁴⁵³ See for instance, Ximena Fuentes, ‘The Criteria for the Equitable Utilization of International Rivers’ [1997] 67 *The British Year Book of International Law* 337.

⁴⁵⁴ See, for instance, Zeitoun ‘Transboundary Water Justice’ (n 20). See also Jekwu Ikeme, ‘Equity, Environmental Justice and Sustainability: Incomplete Approaches in Climate Change Politics’ [2003] 13 *Global environmental change* 195; Lyla Mehta and others, ‘Global Environmental Justice and the Right to Water: The Case of Peri-Urban Cochabamba and Delhi’ [2014] 54 *Geoforum* 158; Jess McLean, ‘Water Injustices and Potential Remedies in Indigenous Rural Contexts: A Water Justice Analysis’ [2007] 27 *The Environmentalist* 25; Gordon Walker, ‘Globalizing Environmental Justice: The Geography and Politics of Frame Contextualization and Evolution’ [2009] 9 *Global social policy* 355; Margreet Z Zwarteveen and Rutgerd Boelens, ‘Defining, Researching and Struggling for Water Justice: Some Conceptual Building Blocks for Research and Action’ [2014] 39 *Water International* 143.

⁴⁵⁵ Ikeme (n 454); Mehta (n 454); See also Mark Zeitoun and Karis McLaughlin, ‘Basin Justice: Using Social Justice to Address Gaps in River Basin Management’ in *The Justices and Injustices of Ecosystem Services* (Routledge 2013).

utilisation, ignoring any preceding causes rooted in issues concerning equity and how these shape perceptions, cognitions, and behaviours of riparian states. In addition, while the role of the ERU principle in promoting water resources management has been well-researched,⁴⁵⁶ the questions of how, to what extent, and under what conditions the ERU principle can *mediate* water conflict in anarchic contexts remain unanswered.

This Chapter is situated at the heart of this study's main research question: "How and to what extent does the equitable and reasonable utilisation principle (ERU) improve the hydropolitical relations of an international watercourse within anarchic geopolitical settings?". This is followed with a consideration of two interlinked questions: For what purpose may riparian states adopt the ERU principle in an international watercourse within an anarchic context ("Battle for legitimacy" in Figure 1)? Under what condition may the ERU principle influence riparian states' behaviour within the anarchic hydropolitical relations of an international watercourse in a way that can transform water conflict ("Mediation" in Figure 1)? Answering these questions requires uncovering the power of legal norms and principles in international water law, with a special focus in this study on the ERU principle as a customary norm, and to examine how this principle may influence state behaviour and change hydropolitical relations in certain geographical basins characterised by highly contentious geopolitical settings and anarchy, exemplified by the Helmand River Basin. In so doing, as explained in Chapter 3, this study uses a constructivist reading of international law (i.e. one of interactional international law as presented by Brunnée and Toope), and benefits from neorealist reading of anarchy outlined in Chapter 2 (or Hobbesian culture of anarchy in constructivism) and critical hydropolitics perspective of power described in Chapter 4.

Within these terms, this chapter is structured as follows: First, the chapter provides a general overview of how international water law may be situated and employed in hydropolitical relations. Second, the major political contestations and pressures over international water law will be explored, by illustrating some related heated controversies surrounding, in particular, the right to development, principles of sovereignty and equity, and "securitisation" emerging from anarchic setting. Third, the definition and an assessment of the ERU principle will be given. Forth, the ERU principle will be situated in the Transboundary Waters Interaction NexuS (TWINS) framework in order to develop the Universe of Hydropolitical Relations and explore how coexisting conflict and cooperation may result in differing degrees of equitability. Finally, the possibility of transformation of hydropolitical relations by the influence the ERU principle within interactional international law will be examined.

⁴⁵⁶ See, for instance, Andrew Allan and Alistair Rieu-Clarke, 'Good Governance and Iwrm—a Legal Perspective' [2010] 24 *Irrigation and drainage systems* 239; Rieu-Clarke (n 14); Patricia Wouters, Sergei Vinogradov and Bjørn-Oliver Magsig, 'Water Security, Hydrosolidarity, and International Law: A River Runs through It...' [2009] *Hydrosolidarity, and International Law: A River Runs Through It* 97.

5.2. Situating international water law in hydropolitical relations

As seen in Chapter 3, while the rationalist perspective provides theoretical explanations for why states might comply with rules under anarchic circumstances in particular, constructivists offer additional, profound insight into the normative dimension of states' behaviour.⁴⁵⁷ The norm-based constructivist scholars declare that international law is an "ongoing generative activity", which involves building and sustaining shared norms and legality. They argue that law undoubtedly has the potential to draw together states' interests and identities, and thus their behaviours.

The interpretation and implementation of legal principles without acknowledgement of political intent would be onerous. The controversial issues guide the debate over transboundary water utilisation to the two main principles, these being equitable and reasonable utilisation and sovereignty. Gabriel Eckstein states that substantive rules of international water law have been used rather as a political tool in world politics than as a legal regime.⁴⁵⁸ He shows that a legal rule may manifest differently if it is employed for judicial application 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, they may objectively be applied in an adjudicatory process as *ex post* (based on or decided by actual results).⁴⁵⁹ Eckstein proceeds to argue about different interpretations of terms, for instance groundwater, which are rooted in political interests rather than law or science.⁴⁶⁰ Further, Rene Uruena has pointed out that the three main ways to make law strongly politicised are: a) reasonability, as depicted in the ERU principle; b) "disciplinary neighbours", as interactions among different spheres of international law, such as economic development and human rights or trade issues, with international water law ; and c) the procedural shape, e.g. the self-interpretation of states to prior notification of a project that might have significant adverse effects on other states.⁴⁶¹ Zeitoun and others observed that in practice, law has been used by states to strengthen their negotiating position, mostly to the advantage of the powerful

⁴⁵⁷ See, for instance, Baradaran (n 32).

⁴⁵⁸ Gabriel E Eckstein, *If Water Respects No Political Boundaries, Does Politics Respect Transboundary Waters* (2008).

⁴⁵⁹ This is well understood when comparing the case of Gabcikovo-Nagymaros Project with the negotiations around the Nile basin, for instance.

⁴⁶⁰ That could be argued based on constructivism in IR that that "the structures of human association are determined primarily by shared ideas rather than material forces, and that the identities and interests of purposive actors are constructed by these shared ideas rather than given by nature" (Wendt (n 161) p. 1). This, here, is manifested in that how states purposively emphasise on specific definition of groundwater based on sovereignty doctrine to use legal norms in their own favour, subjectively in *ex ante* political process rather than objectively judicial case.

⁴⁶¹ See Eckstein (n 458) p. 367.

(hegemon), in spite of being intended to protect the weak.⁴⁶² Thus, Zeitoun and others suggested that the role of power asymmetry in the legitimisation of transboundary water arrangements should be considered in critical hydropolitical studies. In this regard, Farnum and others studied the extent of international water law's impact on the hydro-hegemonic water discourses and distribution, through the analysis of interaction between three issues: a) transboundary aquifers; b) virtual water trades; and c) human rights.⁴⁶³ They showed how respective legal principles are as source of bargaining power for states that can be used in "weaker" parties' counter-hegemonic strategy to challenge the *status quo*. Notwithstanding, they argued that "the structural hegemony of international law, created and sustained by powerful states through ideational power, may limit the extent to which bargaining power is effective".⁴⁶⁴

However, there remains particular importance attached to the gap between the theory and practice of international water law, and significantly, how substantive principles of international law can shape state behaviour and restrict their use of power. As already expounded, power and equity should be considered as interrelated concepts in hydropolitical analysis.⁴⁶⁵ Both power and equity are socially constructed phenomena that place at the centre of shaping transboundary water interactions and impacting on the distribution of water, and significantly contribute to the transformation of water conflict. Under the compromise between power and equity, states act and the outcome will emerge. As previously argued, the analysis of power relations and equity should not be performed separately. While the perception of equity is one coloured by the dominant power structure, the interpretation of the concept of equity by itself constrains the use of power and influences the ability of states to shape and control the "rules of the game". The influence of international law on hydropolitical relations was brought to light by Ana Cascão and Mark Zeitoun when they emphasised the significant role of soft power.⁴⁶⁶ While it seems that law in practice often serves the interests of the powerful,⁴⁶⁷ the anarchic

⁴⁶² This could be well described in "Law and order exist for the purpose of establishing justice and when they fail in this purpose they become the dangerously structured dams that block the flow of social progress." (Martin Luther King).

⁴⁶³ Farnum (n 241).

⁴⁶⁴ Farnum (n 241).

⁴⁶⁵ Some researchers state that there has relatively been little attention given to the analysis of the linkage between power and equity or justice processes which "are fundamentally social structural phenomena". See Karen S Cook and Richard M Emerson, 'Power, Equity and Commitment in Exchange Networks' [1978] *American sociological review* 721.

⁴⁶⁶ Cascão and Zeitoun, 'Power, Hegemony and Critical Hydropolitics' (n 327). See also Farnum (n 241).

⁴⁶⁷ Zeitoun 'Transboundary Water Justice' (n 20); Zeitoun and Warner (n 9).

nature of international politics provides a chance of survival for less powerful (e.g. non-hegemonic) states to make use of norms and principles to question or maintain the *status quo*.⁴⁶⁸

This study has described how anarchy is another significant factor in shaping the hydropolitical relations of an international watercourse, alongside asymmetric power relations (Chapter 2). From neorealist perspective (or Hobbesian culture of anarchy), anarchy feeds competition and conflict among states, and resultantly, the dominant nature of hydropolitical relations is striving for power and self-interest (the battle for power). Such anarchic conditions compel states, looking after their own interests and identities, to fight for survival and the security to protect themselves. Anarchy also raises the fear of relative achievements among the riparian states, as they find themselves rivals in transboundary water interactions. This fear is itself affected by the uncertainty of the future that makes states wary when seeking to progress hydropolitical relations towards water conflict transformation. Under these circumstances, states are unwilling to commit to a durable cooperative arrangement, and the outcome of hydropolitical interactions often results in the absence or a low level of equitable and reasonable utilisation.

Power is not measured by material resources alone, e.g. the water resources of one state in the basin. Rather, the extent of one state's influence on shaping the respective views of other states regarding equity is critical. Accordingly, powerful states are those who can exercise ideational power to justify a greater part of the outcome in their own favour. In anarchy, states have different relationships based on their capacity to respond to the symptoms thereof, a capacity reliant on their independence, self-reliance, identity, and political economy. If an unjust situation favours one party, that party fights for a strategic position to reduce the sense of injustice felt by other parties. In this way, other parties behave based on what they perceive as injustice, and they may adopt a different strategy to sustain or change the established state of affairs. Notwithstanding this motive, all of these behaviours depend on how power and the perception of equity shape states' interests and identities.

Anarchy leads hydropolitical relations to be constructed on the battleground of "lawfare" (or the battle for legitimacy). In particular, customary international water law such as the ERU principle operates as bargaining and ideational power in the basin. Thus, while using international water law to their own advantage by challenging their rival's behaviour towards shared water utilisation, the riparian states also affect to legitimise their acts or at least assert that their individual developments are in line with legal principles.⁴⁶⁹ While one party may avail of the ERU principle in order to maintain the *status quo*,

⁴⁶⁸ Zeitoun 'Transboundary Water Justice' (n 20); See also Alistair Rieu-Clarke and Flavia Rocha Loures, 'Still Not in Force: Should States Support the 1997 Un Watercourses Convention?' [2009] 18 *Review of European Community & International Environmental Law* 185.

⁴⁶⁹ States' use of international law as described in Chapter 3 is a component of bargaining power in order to either legitimise their act or challenge the practice of other states. Moreover, states seek to use their ideational power

another may use the same principle to resist and challenge the *status quo* and thereby promote an alternative hydropolitical arrangement in its own interest.⁴⁷⁰ To this end, riparian states seek to control the rules of the game as they pertain to the parameters for identification of specific principle in international water law, in order to increase their bargaining capability to their own benefit.⁴⁷¹ Along the same lines, the principle may serve as ideational power, which can shape behavioural norms. For instance, riparian states may share their goal to achieve ERU, however, they intend to impose and legitimise particular ideas, perceptions, knowledge, and discourses respecting the definition, formation, interpretation, identification, and maintenance of the ERU principle in a way that satisfies their own interests and identities. Therefore, influencing the way in which the ERU is perceived and understood might be one strategic goal of riparian states to use in the form of soft power. Thus, the implementation of the ERU principle cannot be excluded from the analysis of the anarchic political nature bearing on transboundary waters, which causes states to exercise different forms of power. While the ERU principle is unanimously recognised as a customary rule of international law in for instance, South-North relations, the political use of equity in general and the use of the ERU principle in particular are always contentious, and disputed specifically in respect of international cooperation.⁴⁷² This must be noted, however, that in interpretation of the ERU principle, there are certain factors (like physical factors) that are less controversial, at least from a scientific point of view, than others.⁴⁷³

5.3. Political contestations over international water law arising from anarchy: security, development and sovereignty

Anarchic setting of world politics where the nature of “self-help” leads the behaviour of states to focus more on power, security and survival puts too much pressures on the implementation of international law. To better get a sense of respective pressures, in the discussions that follow, the most important

in order to influence international law by their ability to draft, write and create legal ‘rules of the game’. See for instance Joseph W Dellapenna, ‘Water Rights and International Law’ [2003] *The Iraqi Marshlands: A Human and Environmental Study* Clark, P and Nicholson, E(eds), Politico’s, London, UK. See also Farnum (n 241).

⁴⁷⁰ Dellapenna (n 469). See also Woodhouse and Zeitoun (n 239).

⁴⁷¹ See Daoudy (n 196) where she explains how Syrian-Turkish hydropolitical relations are influenced by bargaining power in this sense and using international legal principles as ‘soft’ power.

⁴⁷² For instance, Trilochan Upreti points out that equity as political concept has been used “to get unconditional financial resources from the North” while the North has not seen this as a legally binding concept to help the South. See Trilochan Upreti, *International Watercourses Law and Its Application in South Asia* (Pairavi Prakashan 2006) p. 113; Moreover, the definition, interpretation and the way to implement the ERU principle has been challenged by some scholars. While Aaron Wolf criticises the generality of the UN Watercourses Convention and questions the lack of its practical guidelines for allocation, the ambiguity of related terms to interpret the ERU principle like ‘sustainable development’ and ‘beneficial use’ have been also challenged by others. See Aaron T Wolf, ‘International Water Conflict Resolution: Lessons from Comparative Analysis’ [1997] 13 *International journal of water resources development* 333. See also Dellapenna (n 526); Woodhouse and Zeitoun (n 239).

⁴⁷³ See Fuentes (n 453).

fundamental controversies within the political sphere of international waters that influence legal negotiations will be described. The heated controversies surrounding the utilisation of international watercourses that arises from anarchy can be categorised in three main disagreements concerning the interpretation and understanding of the relation between water and a) security; b) development; and c) sovereignty. Each of these inter-related different category of attitudes leads states to take specific strategy and policy concerning the utilisation of international watercourses. Understanding the root causes of state behaviour from this perspective is necessary for this study to have a better picture of the positions of riparian states of an international watercourse over different respective legal principles.

The first serious concern for a state might be categorised in security issues associated with the struggle for survival in anarchy. Over the last few decades, growing attention to environmental issues within the political agenda has led to an increased “discursive construction of [these] particular issues as security threat[s],” which is associated with the “securitisation” buzzword.⁴⁷⁴ Given the anarchic nature of global politics, while the existing international order mainly rests on the dominant powers’ strategy to maintain “international security” in their own favour, by securing their own national interests, water (alongside climate and environmental) issues also play a more critical role in this expanding process of “securitisation”. This is why the examination of hydropolitical relations simply within a matter of “low politics” and apart from “foreign affairs and state survival” misrepresents the facts.⁴⁷⁵ As discussed in Chapter 4, with their pessimistic narrative of the “water war” of the early 1990s, security and military actors, whose ideas mainly derive from neo-Malthusian and neorealist theories, believe that the scarcity of water (in addition to the negative impacts of climate change and environmental degradation) in unstable political conditions leads to armed conflict. This kind of focus on “a simple dyad of resource scarcity-conflict” to detect “water causality” misleadingly simplifies the complexity and multi-causal nature of the “hydrosocial” interaction.

Water securitisation means that decision-making goes beyond the usual political processes and urgent measures are needed to deal with water issues.⁴⁷⁶ The over-securitisation of water (which is considered a form of radical and superficial sensationalism), especially in international waters, results in the framing of states’ behaviour as a *competitive* form of controlling waters for their own national security while looking at other states as *enemy*, which puts pressure on the existing international order. Consequently, once water becomes a *geostrategic* matter, it proceeds from the foreign policy agendas of super powers, like the US Global Water Strategy,⁴⁷⁷ and ends in the increasingly politicised nature of water. This water is politicised, it can overshadow other issues like migration, ethnic complexity,

⁴⁷⁴ Hussein and Grandi (n 327) p. 797.

⁴⁷⁵ Mirumachi (n 194) p. 8.

⁴⁷⁶ See Barry Buzan and others, *Security: A New Framework for Analysis* (Lynne Rienner Publishers 1998).

⁴⁷⁷ See footnote n 835.

and local stimuli, which are important factors in the geopolitical context and socio-historical interdependency among riparian states.⁴⁷⁸ Some also argue that securitisation makes water “non-negotiable” between parties, by stirring “nationalistic feelings”.⁴⁷⁹ Such securitisation manifests itself in many hydropolitical relations, for instance between Nepal and India over the Ganges tributaries, for instance.⁴⁸⁰

Such a securitised nature emanating from anarchy, with a combination of external forces, creates a “perfect storm”⁴⁸¹ to put high pressure on the legal regime of international waters and hinder its effectiveness to enhance equity. This is where the legal discourses of transboundary river basin also become a place for political battle and shift to an extreme nature of emphasising over the principles relating to “absolute territorial sovereignty” or “absolute territorial integrity” rather than equitable and reasonable utilisation. McCaffrey points out that: “Both doctrines are, in essence, factually myopic and legally “anarchic”: they ignore other states’ need for and reliance on the waters of an international watercourse, and they deny that sovereignty entails duties as well as rights”.⁴⁸² In such impassioned, securitised conditions, international water law is dangerously disregarded by states wishing to meet their *own* geostrategic interests over transboundary waters, these being too far removed from the interests and identity of other parties to provide “equity”. As long as the geopolitical anarchic nature of a transboundary river basin is securitised mostly influenced by destructive role of outside-basin foreign policies, legal discourses are either frozen or merely used to serve self-interest.

Considering two main fears of “relative gains” and “uncertainty” in anarchic context, the second greatest challenge for international water law is making a balance between the right to fair water development among riparian states and reconcile their competing economic, social and environmental interests.⁴⁸³ The emergence of international water law coincided with an era in which most downstream states had already achieved the “hydraulic mission” pursued across international waters.⁴⁸⁴ Irrigation development along the Nile in Egypt in the early 1900s and 1960s, or along the Tigris and Euphrates

⁴⁷⁸ Cascão (n 342); See Nagheeby and Warner (n 327).

⁴⁷⁹ Aysegül Kibaroglu, Anthi D Brouma and Mete Erdem, ‘Transboundary Water Issues in the Euphrates-Tigris River Basin: Some Methodological Approaches and Opportunities for Cooperation’ [2008] *International Water Security: Domestic Threats and Opportunities*.

⁴⁸⁰ Mirumachi (n 194).

⁴⁸¹ e.g., in addition to the above-mentioned ‘over-securitisation’, there are climate change impacts, population growth, urbanisation, ‘poor governance’, the financial crisis, and the new era of the ‘war on terror’, all of which are associated with global energy and food crises. John Beddington, the United Kingdom (UK) Government Chief Scientific Adviser, refers these combined forces to the ‘perfect storm’. Quoted in Bjorn-Oliver Magsig, *International Water Law and the Quest for Common Security* (Routledge 2015) p. 5.

⁴⁸² McCaffrey (n 37) p. 124.

⁴⁸³ Rieu-Clarke (n 7); Tarlock (n 447).

⁴⁸⁴ Mark Zeitoun, ‘The Relevance of International Water Law to Later-Developing Upstream States’ [2015] 40 *Water International* 949.

throughout the 1950s and 1970s, and the illegal damming of Lake Tiberias by Israel in 1950s,⁴⁸⁵ are some examples of the early development of downstream watercourse states/regimes several decades ahead of upstream efforts. While the hydraulic mission provided a way for downstream watercourse states to rule their societies, the dependency on the utilisation of waters led to their vulnerability to upstream water development. Unlike the downstream states, who seek to maintain the *status quo* by justifying it under the concept of “historical water rights” or “existing water rights”,⁴⁸⁶ upstream states advance their development projects by maintaining sovereignty over their territory. However, because the upstream states were expected to take into account the needs of other riparian states in accordance with international law while securing their domestic imperatives (especially economic, social and environmental concerns), they found themselves in a “dilemma”.⁴⁸⁷ In this respect, international water lawyers have long discerned that the states’ practice of unilateral water development and their subsequent maintenance of the status quo have been at the heart of many international water conflicts.⁴⁸⁸ The long-running conflicts in the Nile, Tigris, Euphrates, and Mekong exemplify these unilateral actions. Though the unilateral behaviour of states reflects more the anarchic geopolitical climate, international water law also shoulders some blame for the conflict, due to vagueness in its language, particularly on equitable and reasonable utilisation, which is associated with a lack of enforcement.⁴⁸⁹ Although violations of international law often prevent a unilateral project from getting international finance, it cannot hinder states unilaterally developing the project and legitimising their unilateral water development. The main problem resulting from these unilateral developments is that states seek to nationalise the benefits and internationalise the burden.⁴⁹⁰ Such this unilateralism either in the context of “water security” or “food security” may reflect the “self-help” anarchic nature where states struggle for survival.

The right to development is more robust when supported by the sovereignty principle, which states may wish to interpret it as *absolute* rights over their own natural resources. One main debate over the right to development basically originated from environmental discourses. The debate – still ongoing –

⁴⁸⁵ Clemens Messerschmid and Jan Selby, ‘Misrepresenting the Jordan River Basin’ [2015] 8 Water Alternatives.

⁴⁸⁶ See footnote n. 447.

⁴⁸⁷ Patricia Wouters, ‘The Yin and Yang of International Water Law: China's Transboundary Water Practice and the Changing Contours of State Sovereignty’ [2014] 23 Review of European, Comparative & International Environmental Law 67 p. 74.

⁴⁸⁸ A Dan Tarlock, ‘Four Challenges for International Water Law’ [2010] 23 Tulane Environmental Law Journal 369 p. 372.

⁴⁸⁹ Tarlock (n 488) p. 378. See also Patricia Wouters and others, *Sharing Transboundary Waters: An Integrated Assessment of Equitable Entitlement: The Legal Assessment Model* (International Hydrological Programme (IHP) of the United Nations 2005).

⁴⁹⁰ Benvenisti (n 377); See also Frederick W Frey, ‘The Political Context of Conflict and Cooperation over International River Basins’ [1993] 18 Water international 54; and, Esther Schroeder-Wildberg, ‘The 1997 International Watercourses Convention—Background and Negotiations’ [2002] Working Papers on Management in Environmental Planning Berlin: Technical University.

between pro-development and pro-environment interests suggests recourse to “sustainable development”, ensuring that we “meet the needs of the present without compromising the ability of future generations to meet their own needs.”⁴⁹¹ While the 1992 Rio Declaration on Environment and Development acknowledges the “right to development”, the Rio Conference also points to “sustainable development”. The concept of “sustainable development”, which had been a core feature of Brundtland Report (1987), is an attempt to reconcile the conflict between development and environmental protection.⁴⁹² However, the reality of current global challenges in anarchic context – for example, famines, biodiversity destruction, a potential “development trap” for the “bottom billion”, and global climate change – reveals that the prospect of realising “sustainable development” remains distant.⁴⁹³ Although the right to development has legal limitations imposed by “no-harm rules” and states’ obligation not to cause “significant” harm to other riparian states, the anarchic nature and the fear of uncertainty of future relations may not give satisfactory guarantee concerning the responsibility of securing the probable damage and the socio-economic costs thereof.

The third challenge faced by international water law lies with the concept of sovereignty. Both above concerns and interests of states over security and development issues in an anarchic nature are reflected in the concept of sovereignty which is a fundamental principle of international law and gives states –at least under certain conditions – the right to exercise sovereignty over their territory without interference.⁴⁹⁴ Sovereignty is often the starting point for addressing the utilisation of international waters. This idea holds that a state has sovereignty over its natural resources as well as the right to develop them. Following the post-colonial movement, developing countries claimed the right to (re)assert their sovereignty in light of the principle of permanent sovereignty over their natural resources, in order to compensate for the “unfair” exploitation by the colonisers. The principle of permanent sovereignty provides developing countries with a legal status equal to developed countries, since international law is underpinned by the notion of “sovereign equality”.⁴⁹⁵ However, state sovereignty is not absolute. Sovereignty over natural resources is conditional on regard being paid to the sovereignty to other states. The sovereign right of a state to exploit their own resources is limited by their responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states, or of areas beyond the limits of national jurisdiction. As an accepted principle of international law, recognised by the international court and by tribunals in several cases,

⁴⁹¹ World Commission on Environment and Development, *Our Common Future* (Oxford University Press 1987) p. 43.

⁴⁹² Armstrong (n 207) p 274.

⁴⁹³ Magsig (n 481) p. 2.

⁴⁹⁴ James Crawford and Martti Koskenniemi, *The Cambridge Companion to International Law* (Cambridge University Press 2012); See also Armstrong (n 207).

⁴⁹⁵ Embedded in the UN Charter, Article 2.

such as the *Lake Lanoux arbitration*⁴⁹⁶, states have the sovereign right to utilise their natural resources.⁴⁹⁷ The scope of its application is however limited to specific circumstances.⁴⁹⁸ The ICJ in the *Gabčíkovo-Nagymaros case* held that the right of a sovereign state to unilaterally build a dam on a shared watercourse situated entirely within its territory is still subject to particular limitations. First, there is a duty to take all appropriate measures to prevent the causing of significant transboundary damage and second, a duty to respect the equitable and reasonable utilisation of a shared watercourse.⁴⁹⁹ A riparian state will therefore have the right to build a dam on a shared watercourse, but such a right is limited and the state must comply with its international obligations.

In addition, international water law cannot be based on an interpretation of water as a natural resource over which a state can have absolute sovereignty. Water has always been considered distinct from other natural resources, simply because of the unique dependence of humans on water. The literature concerning international water law therefore refers to a limited, but not to an absolute sovereignty over a shared watercourse.⁵⁰⁰ The contemporary theory of rights and obligations in international water law is defined within Limited Territorial Sovereignty,⁵⁰¹ or to some extent a Community of Interests.⁵⁰² In other words, there is an increasing list of international obligations that limit a sovereign state's power, and accordingly a state cannot exercise their sovereign rights when these rights are limited by their international obligations.⁵⁰³ Therefore, the state in which the watercourse originates will have the basic right to utilise the shared watercourse, but this utilisation must be in compliance with the international

⁴⁹⁶ See footnote n 36.

⁴⁹⁷ See McCaffrey (n 37) p. 111, where he point out that the concept of sovereignty “worked the most mischief.” Also, see, Art. 3 Biodiversity Convention.

⁴⁹⁸ The concept of sovereignty is understood today with “the responsibility that it be exercised in a way that it is not harmful to neighbouring countries.” McCaffrey (n 37) p. 111; See also Chris Armstrong, ‘Against ‘Permanent Sovereignty’ over Natural Resources’ [2015] 14 Politics, Philosophy & Economics 129.

⁴⁹⁹ For extensive discussion, see McCaffrey (n 39).

⁵⁰⁰ Dellapenna (n 451) p. 27; see also Chinthaka Mendis, ‘Sovereignty Vs. Trans-Boundary Environmental Harm: The Evolving International Law Obligations and the Sethusamuduram Ship Channel Project’ [2006] Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, United Nations, New York, NY(USA) 67 2006.

⁵⁰¹ McCaffrey (n 37).

⁵⁰² McCaffrey (n 37); See also Owen McIntyre, ‘The Proceduralisation and Growing Maturity of International Water Law: Case Concerning Pulp Mills on the River Uruguay (Argentina V Uruguay), International Court of Justice, 20 April 2010’ [2010] 22 Journal of Environmental Law 475.

⁵⁰³ C. Armstrong (n 498).

obligations of the state of origin. This balanced approach is precisely reflected in the concept of equitable and reasonable utilisation of the watercourse⁵⁰⁴, which is discussed below.⁵⁰⁵

5.4. The ERU principle in international water law: how it works and how to evaluate it

International water law consists of substantive and procedural norms that are completely interrelated. The substantive norms can be listed briefly as equitable and reasonable utilisation, the no-harm principle, and obligation to protect the ecosystem which are operationalised through the general obligation to cooperate,⁵⁰⁶ including 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.⁵⁰⁷ The equitable and reasonable principle is adopted as the main concept, with the other substantive principles employed as secondary concepts.⁵⁰⁸ Procedural norms set out a binding process by which to facilitate the implementation of substantive obligations. All of these principles form part of the corpus of customary international law, which means that they are binding upon all states.⁵⁰⁹ This argument is supported by decisions of the ICJ in, for instance, the *Gabčíkovo-Nagymaros (Hungary/Slovakia)* case⁵¹⁰, the *San Juan River (Nicaragua v. Costa Rica)* cases⁵¹¹ as well as in *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*.⁵¹²

⁵⁰⁴ See in this respect also Ludovica Chiussi, ‘United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses 1997’ in *Elgar Encyclopedia of Environmental Law* (Edward Elgar Publishing Limited 2017) who argues that the ERU principle mediates between the absolute territorial sovereignty of the upstream state and the absolute territorial integrity of the downstream state to use and consume the waters of the international watercourse.

⁵⁰⁵ See further on this concept of “limited territorial sovereignty” in the framework of international water law, McCaffrey (n 37); and see also Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality*, vol 86 (Cambridge University Press 2011).

⁵⁰⁶ Christina Leb, ‘One Step at a Time: International Law and the Duty to Cooperate in the Management of Shared Water Resources’ [2015] 40 *Water International* 21.

⁵⁰⁷ These core principles have formed the bedrock of bi- and multi-lateral agreements. See Christina Leb, ‘One Step at a Time: International Law and the Duty to Cooperate in the Management of Shared Water Resources’ [2015] 40 *Water International* 21. The principles are also centred on the 2008 ILC Draft Articles on the Law of Transboundary Aquifers (Draft Aquifer Articles) and the Water Convention and also Watercourses Convention.

⁵⁰⁸ Rieu-Clarke (n 235).

⁵⁰⁹ McCaffrey (n 37).

⁵¹⁰ *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment (Merits), 25 Sept. 1977, ICJ Reports (1997), p. 7.

⁵¹¹ *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*; *Construction of a Road in Costa Rica Along the San Juan River (Nicaragua v. Costa Rica)*, ICJ (Dec. 16, 2015).

⁵¹² *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, 20 Apr. 2010, ICJ Reports (2010), p. 14. The support for the principles in international courts and tribunals also include *Jurisdiction of the International Commission of the River Oder (UK, Czechoslovak Republic, Denmark, France, Germany and Sweden v Poland)* (Judgment) [1929] PCIJ (ser A), No 23; *Diversion of Water from the Meuse (The Netherlands v Belgium)* (Merits) [1937] PCIJ (ser A/B), No 70; *Lake Lanoux Arbitration (France v Spain)* (1957) 24 *Int'l L. Rpt.* 101. See Rieu-Clarke (n 7).

The literature with respect to the management of international watercourses has addressed the relationship between substantive and procedural norms.⁵¹³ International water law, and particularly the UN Watercourses Convention, demonstrates a significant correlation between these functions. For example, Zeray Yihdego and Alistair Rieu-Clarke, while describing legitimacy as “procedural fairness”, associate “distributive justice” with substantive principles of international water law.⁵¹⁴ The authors argue that “procedural fairness (legitimacy) and distributive justice (substantive rules), as normative standards, constitute two sides of the same coin, which, in turn, demands that both are considered together when analysing the merits of transboundary treaty frameworks”.⁵¹⁵ Mohsen Nagheeby and others employed this line of thought to examine the international legitimacy of unilateral dam development in an international watercourse, a case between Afghanistan and Iran, from the perspective of international water law.⁵¹⁶

The principles of international water law have been devised to not only alleviate conflicts and resolve probable disputes, but also to respect essential needs and equitably allocate shared waters among the riparian states. To solve the difficulties facing states in utilising shared water resources, several doctrines have been adopted by states and by international instruments.⁵¹⁷ Among them are four theoretical principles – absolute territorial sovereignty (which often favours upstream states),⁵¹⁸ absolute territorial integrity (which often favours downstream states),⁵¹⁹ limited territorial sovereignty (as expressed in the principle of equitable and reasonable utilisation), and common management – which have been used when allocating the assets of watercourses. Of these principles, equitable and reasonable utilisation is the main substantive rule of the law of international watercourses, and represents customary international law.⁵²⁰

⁵¹³ See, for instance, Attila M Tanzi, ‘The Inter-Relationship between No Harm, Equitable and Reasonable Utilisation and Cooperation under International Water Law’ [2020] 20 *International Environmental Agreements: Politics, Law and Economics* 619.

⁵¹⁴ For a detailed discussion, see Yihdego and Rieu-Clarke (n 23).

⁵¹⁵ Yihdego and Rieu-Clarke (n 23) p. 545 (added text inside parentheses).

⁵¹⁶ Nagheeby (n 247).

⁵¹⁷ For more information, see Dinar (n 235). See also Ken Conca, Fengshi Wu and Ciqi Mei, ‘Global Regime Formation or Complex Institution Building? The Principled Content of International River Agreements’ [2006] 50 *International Studies Quarterly* 263.

⁵¹⁸ Based on this doctrine, a state is allowed to unlimitedly use an international watercourse in its territory regardless of the needs and concerns of other watercourse states. See, in general, McCaffrey (n 37).

⁵¹⁹ In sharp contrast with previous doctrine, the doctrine of absolute territorial integrity gives the complete freedom to the downstream state. Based on this doctrine, a state in upstream is prohibited from interfering with the natural flow an international watercourse that might affect the downstream flow. See, in general, McCaffrey (n 37).

⁵²⁰ It is reflected in the UN Watercourse Convention (Article 5) and 2008 Draft Articles on transboundary aquifers (Article 4) and evidenced by international agreements, non-binding instruments, decisions of courts and tribunals, and in the writings of publicists. See for more information Dellapenna (n 451). See also McCaffrey (n 37); Rieu-Clarke (n 7).

The equitable and reasonable utilisation of shared watercourses is one of the fundamental principles of international water law. According to the UN Watercourses Convention, this principle implies that the utilisation of a shared watercourse should take into account a list of factors, which allow the assessment of, and respect for, the interests of all watercourse states involved.⁵²¹ Accordingly, the ERU principle requires the implementation of a regime, under which various aspects of the utilisation of a shared watercourse must be examined to reconcile the substantial interests of all riparian states in the most effective way. In addition, the principle of equitable and reasonable utilisation of a shared watercourse has been expressly considered part of customary international law following the ruling of the ICJ in several cases including the case of the *Gabčíkovo-Nagymaros Project* (which had led to a disagreement between Hungary and Slovakia over construction work on a stretch of the Danube),⁵²² and the *Pulp Mills case (Argentina v. Uruguay)*.⁵²³ This principle is also articulated in Article 5 of the UN Watercourses Convention,⁵²⁴ 1992 Water Convention, and in Article 12 of the Berlin Rules on Water Resources adopted in 2004.⁵²⁵ Hence, there is no doubt that, unless otherwise agreed by riparian states, such states are obliged to use shared watercourses in an equitable and reasonable manner.⁵²⁶ The ILC's commentary to its 1994 Draft Articles states that the ERU principle is to be applied only in the case of a "conflict of uses".⁵²⁷ In such cases where the needs of one or more riparian states are not met as a result of another state's use of an international watercourse, the ERU principle has a potentially important role to play in reconciling states' interests in the utilisation of international watercourses.

The question that may arise is how such equitable and reasonable utilisation should be defined and agreed upon by the riparian states.

5.4.1. How to define and assess the ERU?

As McCaffrey rightly asks, how can an upstream state be sure it is using an international watercourse in an equitable manner?⁵²⁸ It could, particularly in the absence of joint management of a shared

⁵²¹ See Article 5 of the UN Watercourses Convention. See also Rieu-Clarke (n 235).

⁵²² See n 510.

⁵²³ See also other related cases in footnote n 512.

⁵²⁴ Flavia Rocha Loures and Alistair Rieu-Clarke, *The Un Watercourses Convention in Force: Strengthening International Law for Transboundary Water Management* (Routledge 2013).

⁵²⁵ The Berlin Rules on Water Resources were approved by the International Law Association's Water Resources Law Committee in 2004. These Rules set forth customary international law relating to fresh water resources. International Law Association, Report of the 71st Conference 3 (2004); 71 ILA 337, 385 (2004).

⁵²⁶ See for more information, Joseph W Dellapenna, 'The Customary International Law of Transboundary Fresh Waters' [2001] 1 International journal of global environmental issues 264.

⁵²⁷ Report of the International Law Commission on the Work of Its Forty-sixth Session, [1994] 2 Y.B. Int'l L. Comm'n, pt. 2, at 89, UN Doc. A/49110 (1994).

⁵²⁸ McCaffrey (n 39).

watercourse, be difficult to determine whether a shared watercourse is used in an equitable and reasonable manner. What is the relationship between equitable use and reasonable use? Which of them needs to be addressed first in the case of a “conflict of uses”? The ILC’s commentary explains that the rule of equitable use is applied only to those “reasonable and beneficial” uses of international watercourses.⁵²⁹ With this approach, accordingly, after recognising a “conflict of interests” over the utilisation of an international watercourse and deciding that there is a significant harm,⁵³⁰ states must first determine whether their use is “reasonable and beneficial”.

For this purpose, a “beneficial use” refers to those of some economic, social or cultural value.⁵³¹ However, if one use, though potentially beneficial, offers a low economic or social value, it may not be considered reasonable. In such a case, therefore, to evaluate the benefit (economic, social, or cultural value) of one use, it should be considered whether the use in question is reasonable. What, then, is a “reasonable” use of an international watercourse?

Studies make reference to the definition of a “contemporary conception of rationality” for determining what is reasonable.⁵³² Further, although what constitutes a “reasonable” use may vary by case, depending on their particular circumstances, in many instances, literature refers to the “vital needs” of states and “sustainable” uses when determining reasonableness.⁵³³ The unsustainable exploitation of water resources would therefore not fit the criteria of a reasonable use as declared, for example, by the Sustainable Development Goals (SDGs) of the 2030 UN agenda for Sustainable Development.⁵³⁴ However, while what is reasonable use reflects the concept of rationality and also sustainability, other factors concerning the degree of a state’s development should be considered. This entails a particularly interesting yet demanding task: considering the development level of a state and how this may affect its reasonable use of an international watercourse. As the ILA Commentary to the Helsinki Rules notes, a developing state should be expected to have more time to improve its utilisation of an international watercourse than should developed states.⁵³⁵ If so, setting up a hydro-electric project, for instance, in one less-developed upstream state when attempting to advance its economy, without considering the

⁵²⁹ See n 527.

⁵³⁰ See Rieu-Clarke (n 235).

⁵³¹ See Rieu-Clarke (n 7).

⁵³² See Rieu-Clarke (n 7) p. 154; See also Olivier Corten, ‘The Notion of “Reasonable” in International Law: Legal Discourse, Reason and Contradictions’ [1999] 48 *The International and Comparative Law Quarterly* 613 p. 263.

⁵³³ See Rieu-Clarke (n 7).

⁵³⁴ *United Nations Millennium Declaration*, G.A. Res. 55/2, U.N. GAOR, 55th Sess., 8th Plen. Mtg., Agenda Item 60(b), U.N. Doc. A/Res/55/2 (2000) https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_55_2.pdf accessed 19 January 2021.

⁵³⁵ ILA Commentary (n 527) p. 487.

interests of downstream states, may cause conflict. This dichotomy has prompted the course of action proposed by Owen McIntyre, who suggests that there should be a proportionate distribution of benefits from the use of a shared resource.⁵³⁶ This approach could be used to ensure a proportional balancing of legitimate state interests in international watercourses. To develop this avenue, states' current circumstances, development level, economic capacity, and needs should be taken into consideration when determining what is "equitable".⁵³⁷

Article 6(1) of the UN Watercourses Convention lists, non-exhaustively, a number of factors that should be considered when balancing the interests of states and evaluating equitable and reasonable utilisation:

Utilisation 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 that effect;
- (g) The availability of alternatives, of comparable value, to a particular planned or existing use."⁵³⁸

Consequently, in cases of a conflict of (reasonable) uses, the resolution is made on the basis of equity after considering all relevant factors and circumstances. Vital human needs and the ecosystem of

⁵³⁶ McIntyre (n 452).

⁵³⁷ In this respect, for instance, Nepal should get priority over India in the case of the allocation of resources according to the rule of equity. See Thomas M Franck and Dennis M Sughrue, 'The International Role of Equity-as-Fairness' [1992] 81 Geo LJ 563; See also Upreti (n 472) pp 123-4.

⁵³⁸ Article 5 of the 1997 UN Watercourses Convention; For extensive discussion, see Fuentes (n 453); See also, in general, Aaron T Wolf, *Criteria for Equitable Allocations: The Heart of International Water Conflict* (Wiley Online Library 1999).

international watercourses should always be protected when establishing a regime for equitable utilisation.⁵³⁹ Thus, human and ecological security must be guaranteed through a legitimate process. Such a process must clarify different views on the principles of equitable utilisation, to provide a common platform and accepted norm among all actors. Riparian states must therefore utilise shared water by considering these factors and by taking into account the interests of other riparian states, as well as that of ecosystem of the shared watercourse.

For instance, some authors express their concerns about the function of respected factors when assessing equitable and reasonable utilisation in reality.⁵⁴⁰ Moreover, each riparian state may differ in their evaluation of these factors. This can lead to some disagreement among riparian states. Trilochan Upreti alternatively suggests that equitable utilisation is based on fairness and norms of distributive justice.⁵⁴¹ Therefore, the interests of riparian states should be taken into consideration when evaluating these factors. This requires that such evaluation should not be made without particular attention being paid to the special needs of the less-developed states. Furthermore, one may argue that distributional equity requires richer states to provide recourses to poorer states, therewith enabling them to utilise shared watercourses in a more efficient manner.⁵⁴²

Such concerns constitute an important cause of the necessity to implement procedural obligations. Only through an effective implementation of procedural commitments could substantive obligations be fully complied with by riparian states.⁵⁴³ The sovereign right of a state to exploit their own resources is limited by their responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states, or of areas beyond the limits of national jurisdiction. For the purposes of this thesis, and because the weight given to a particular use will ultimately depend on a particular case, Chapter 7 will carefully consider the above-mentioned conditions as they pertain to the Helmand River Basin between Iran and Afghanistan, to assess how these states' interests could be balanced under the ERU principle.

As mentioned, questions concerning the equitable and reasonable utilisation have already found themselves at the heart of debates over many international watercourses. The discussion in Chapter 4 illustrated that the focus of many studies has been on the analysis of the degree of conflict and

⁵³⁹ Rieu-Clarke and Spray (n 14); A Dan Tarlock points out that the ERU principle aims to promote distributive justice to scarce resources among riparian states. See A Dan Tarlock, 'Safeguarding International River Ecosystems in Times of Scarcity' [1999] 3 U Denv Water L Rev 231.

⁵⁴⁰ Dellapenna (n 526).

⁵⁴¹ Upreti (n 472).

⁵⁴² Upreti (n 472) pp.126-8; See also Gabriel Eckstein, *Development of International Water Law and the Un Watercourse Convention* (2002) pp. 84-8.

⁵⁴³ Yihdego and Rieu-Clarke (n 23).

cooperation over international watercourses. However, understanding what degree of equity – low to high – is exercised by states over transboundary water interactions might offer yet more perceptive insights into the transformation of water conflict. The next part will deal with this issue by situating equity in the context of transboundary water interactions. Not only will it show that the concept of equity has something new to offer from legal perspective (i.e., the legal understanding and operation of equity through the ERU principle), it will also suggest that using it as a frame of reference for political issues of transboundary water interaction is beneficial for shedding light on the cause of the conflict or the underlying reasons for its persistence.

5.5. Equity in TWINS

This study has already argued that while hydropolitical relations among riparian states reflect the established power asymmetry, which has itself been well-considered by scholars from the London Water Research Group, geopolitical anarchic structure is a key driver that must also be contemplated (Chapter 2). As discussed in Chapter 4, this study has also reviewed the three narratives which seek to explore the hydropolitical interactions over international watercourses: “water war”, “water peace”, and “water conflict-cooperation coexistence”. While all of these narratives explain the politics of international waters through considerations of the surrounding conflict and cooperation, it is further worth examining what kind of transboundary water interaction exists among riparian states in terms of equity, which is at the heart of transboundary water politics. In addition, the identity of states that influences their interests and their interpretation of equity is a significant factor that merits further attention. Accordingly, equity, alongside identity, also matters in shaping the hydropolitical relations that almost treat as indeterminate from this sense. This study therefore argues that conflict and cooperation respecting transboundary waters should be understood through an examination of equity and by attending to the identity of riparian states. This state of affairs led the study to offer the “equity/identity-oriented” remedy for examining and improving existing hydropolitical relations towards conflict transformation (see Section 4.4).

Given that any conflict is not inherently “bad”, and that all forms of cooperation are not necessarily “good”, the questions remaining unanswered are: how is it possible to assess the water allocation arrangements over international watercourses? What is “bad” cooperation and what is “good” conflict, and for who and why? Can a change in hydropolitical relations will improve those relations in a way that is truly “fair”, and if so, how? To answer these questions, it is argued that the assessment of water allocation arrangement by way of scrutinising the ERU principle is necessary. This is also important to discover how the various shades of equity may shape and evolve the pattern of transboundary water interactions.

Moreover, the interaction between the ERU principle and anarchy within dynamic power relations is expected – in certain circumstances evaluated by interactional international law – to result in a *change* in the hydropolitical relations.⁵⁴⁴ The hydropolitical history of all transboundary river basins shows the *continuous* coexistence of conflict and cooperation within their hydropolitical relations. Mirumachi developed a conceptual approach (Transboundary Waters Interaction NexuS, or TWINS) to elaborate the dynamics of coexisting conflict and cooperation over transboundary waters.⁵⁴⁵ The TWINS offers a comprehensive understanding of how cooperation or conflict is constructed. More importantly, the approach describes the evolution of hydropolitical relations from a historical perspective. The TWINS framework is formed by a matrix of different combinations of conflict intensity in one axis, and cooperation intensity in another, which allows the trajectory of the development of basin hydropolitical relationships in a transboundary river basin to be traced. TWINS is grounded on a constructivist interpretation of riparian interaction, in the sense that “interaction between states is worthy of detailed analysis for its reality-creating effects”.⁵⁴⁶ Interactions in this view “are not static but rather in constant flux, influenced by, and influencing, the broader political context in which they occur”.⁵⁴⁷

This study considers the change of a hydropolitical relationship towards the realm of water conflict management, conflict resolution, and conflict transformation, with the goal of promoting the implementation of the ERU principle. Accordingly, this study offers another dimension to the TWINS matrix by adding a third axis to assess the degree of equity operationalised in hydropolitical arrangements (Figure 9). This newly developed version of the TWINS allows a better understanding of the nature of hydropolitical relations beyond a simply linear conceptualisation of either conflict or cooperation, or “bad/good” interactions. The equity axis is intended to improve the analysis of transboundary interactions and throw light on the way to transform hydropolitical relations within broader anarchic structures, without becoming hindered by too narrow a focus on the “outcomes” (i.e., “bad” conflict and “good” cooperation). Thus could transboundary water interactions/arrangements in every international watercourse basin be characterised by different degrees of equitable and reasonable utilisation, from low to high? The adapted version of the TWINS presented in this study offers the opportunity to ascertain how and to what extent an absence/low/high degree of equity may be experienced in transboundary water arrangements. The developed framework provides a broader scope

⁵⁴⁴ However, it should be emphasised that other factors involved in emerging a change e.g., institutional supports, political economy of states, interdependency issues, and like that.

⁵⁴⁵ Mirumachi and Allan (n 66). Some other scholars developed the TWINS framework from different aspects. See, for instance, Richard Grünwald, Yan Feng and Wenling Wang, ‘Reconceptualization of the Transboundary Water Interaction Nexus (Twins): Approaches, Opportunities and Challenges’ [2020] 45 *Water International* 458.

⁵⁴⁶ Naho Mirumachi, ‘Study of Conflict and Cooperation in International Transboundary River Basins: The Twins Framework’ (King's College London (University of London) 2010) p. 46.

⁵⁴⁷ Mirumachi (n 194) p. 41.

not only for analysts but also for policy-makers to see where certain relations are positioned and the path ahead. This in turn leads to a more spacious understanding of the symptoms of anarchy in hydropolitical relations, helping to better observe why states' behaviour concerning international watercourse utilisation becomes fixed in absent/low levels of equity (i.e., conflict management) without meaningful transformation. The new developed framework is named the Universe of Hydropolitical Relations (UHR).

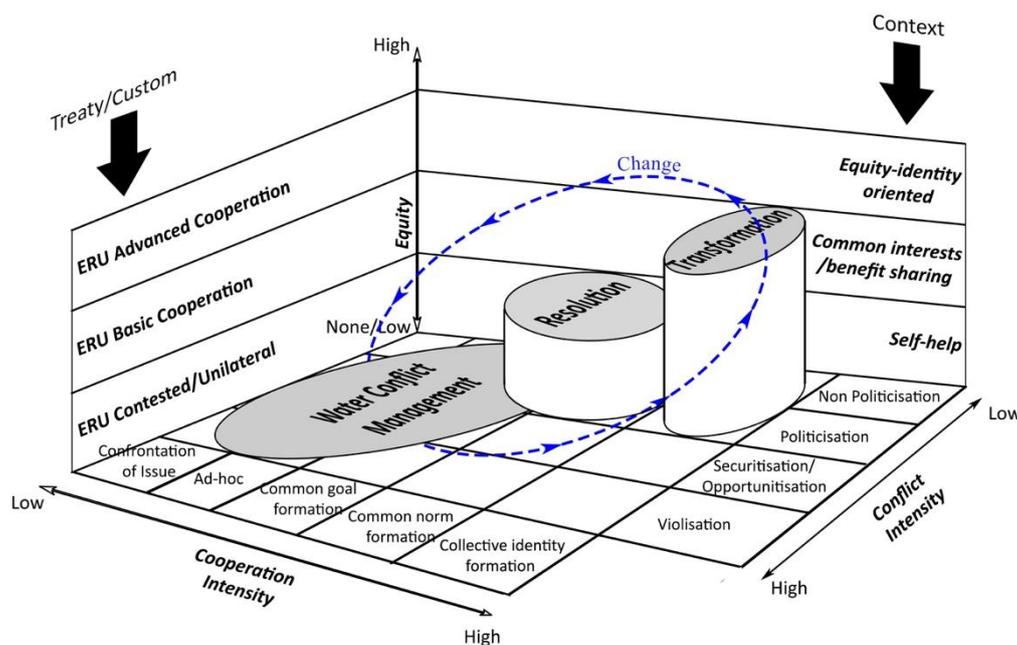


Figure 9. The ERU principle in the TWINS: the Universe of Hydropolitical Relations (UHR)

Note: This diagram illustrates the various levels of ERU that might be expected in the differing intensities of conflict and cooperation over international watercourse (Original TWINS was devised by Naho Mirumachi, 2007).

The different degrees of equity in a treaty and the effectiveness of the ERU customary principle depend heavily on the level of “cooperation” and active participation of actors in the process of decision-making in order to synergise the three factors of “life cycle of norms” – examined in interactional international law (see Section 3.5). From procedural and institutional aspects of international water law, the duty to cooperate is generally accepted as customary international law and is reflected in several regional and international instruments.⁵⁴⁸ The duty of notification is also an autonomous requirement of customary international law (and usually of conventional arrangements) and is equally central to an effective

⁵⁴⁸ Christina Leb, *Cooperation in the Law of Transboundary Water Resources*, vol 102 (Cambridge University Press 2013) pp. 80-2.

implementation of both the principle of equitable and reasonable utilisation and no-harm rule.⁵⁴⁹ The duty is articulated in Article 8 of the UN Watercourses Convention and, as a result, watercourse states are obliged to cooperate on the basis of sovereign equality, territorial integrity, mutual benefit and good faith in order to attain optimal utilisation and adequate protection of an international watercourse. However, international water law, and the duty to cooperate, does not compel states neither to resolve a dispute nor to enter into an agreement. Considering the level of cooperation, the following sections will explain and discuss three possible degrees of equity and respective hydropolitical context in the UHR: “ERU contested/unilateral cooperation”, “ERU basic cooperation”, and “ERU advanced cooperation”.

5.5.1. ERU Contested/Unilateral: a sense of self-help

Content of treaty/custom and compliance with the ERU principle

A situation of non-/low equity may simply be seen as a result of unilateralism, or there might be some limited cooperation of a contested nature, with only an agreement for physical water allocation (i.e., quantitative allocation), which sets out the fixed volume of water to flow from one country to another. This level of equity, which belongs to “water conflict management”, focuses merely on water issues. At this level, material factors (among other factors outlined in Section 5.4.1) of the ERU principle alone are considered to shape a water utilisation arrangement among riparian states, such as the geographic and hydrologic characteristics of international watercourses, the populations of the states (to tackle only drinking-water demand), and perhaps the water-related economic needs (e.g. of the agricultural sector). Even if there is some degree of cooperation on technical issues based on existing signed agreements, riparian states almost always act unilaterally under the terms of their own national policies for the management and utilisation of transboundary waters, and there is little interest in adopting basin-wide approaches to water management. Hydropolitical relations rarely incorporate substantive environmental rights to sustain ecosystem services, instead reflecting mostly the principle of sovereignty.⁵⁵⁰

At this stage of non-/low equity, riparian states’ policies for international watercourses focus more on their substantive “rights” without admitting their legal obligations. Procedural and institutional aspects of international water law, for example the duty to cooperate and the duty of notification – primary requirements of an effective implementation of the ERU principle – are either not adopted or are easily broken, or favour one party (often the hegemon). Data- and information-sharing in international river

⁵⁴⁹ Chiussi (n 504) p. 253.

⁵⁵⁰ See Woodhouse and Zeitoun (n 239) p. 114 where they show that Israel, while recognising ‘Palestinian water rights’ (Oslo II, Article 40) and Jordanian ‘rightful allocations’, and being coincide with the principles of international water law in bi-lateral agreements, “there has been no quantification and implementation of ‘Palestinian water rights’, and attempts to do so have proven unfruitful”.

basins falls short of expectations at this level. In this respect, hydropolitical relations at the point of non-/low equity are often labelled as lacking River Basin Organisations, or any institutional arrangement has a severely narrow mandate.⁵⁵¹ There is generally no set of regular meetings and data and information exchange; and when there is, it is subject to relative power and distrust, and stakeholder participation is at the lowest level. Most of the difficulties encountered in water negotiations at this stage result from the lack of a regional or common water agenda, without which there can be a failure to identify opportunities for constructive basin-wide approaches to cooperation.⁵⁵²

Therefore, in this level of equity, even if there is an account for the indicative list of factors to consider the ERU principle by one riparian state, and respect for the duty to prevent significant harm, it would be arguably subjective and remote in manner. This manifests itself in unilateral approaches to assessing what is 'equitable' or what might constitute 'significant harm', see for example, Mekong dam projects (at least, some of them), Ethiopia's GERD project, or the hydropolitical relations concerning the Aral Sea Basin. One another example of this level of equity might be the legal arrangements of the Indus River between India and Pakistan. While with the support of the World Bank, the Indus Waters Treaty had been established to institutionalise an equitable regime for the utilisation of the Indus waters between India and Pakistan, the treaty has only divided the geographical basin letting states to act unilaterally.⁵⁵³ In this level, a state may utilise an international watercourse unilaterally and in a way that does not affect the ERU right of another watercourse state. In theory, they might therefore be in compliance with international water law, though they would have to notify and consult on any planned measures that are at risk of causing a significant adverse effect to another watercourse state. However, here there is always the risk that a state in not-cooperating, misunderstands when ERU rights of other watercourse states are affected.

Context

In this level, the anarchic symptoms and geopolitical tensions strongly influence states' behaviour, leaving them unwilling to commit to a durable cooperative arrangement.⁵⁵⁴ The dominantly political nature of this level is highly overshadowed by anarchy and geopolitical tensions, emphasising "absolute" sovereignty, self-help, and rivalry, and breeding distrust between the riparian states. The relationships mostly reflect a *Realpolitik* perspective, being characterised by historical border dispute,

⁵⁵¹ See, for instance, Schmeier (n 375); See also Kittikhoun and Schmeier (n 375).

⁵⁵² For instance, in the case of the Senegal River, a limited information exchange concerning the effects of dams between riparian states caused significant negative effects on ecosystems and populations in the basin. See Schmeier (n 375).

⁵⁵³ For more information, see Fuentes (n 453).

⁵⁵⁴ See Kai Wegerich, Jeroen Warner and Cecilia Tortajada, 'The Dark Side of Governance: An Introduction to the Special Issue' [2014] 2 International Journal of Water Governance 1.

regional/domestic conflict and civil war, and foreign interventions. States cooperate at this level of none/low equity only if it is necessary. They may have silent/limited cooperation, should it be in their own interest. They may collaborate on water management, but very conservatively. Water issues are often politically sensitive at this level of non-/low equity. Hydropolitical relations are locked in a zero-sum distributional game in which one party gains what the other loses. As well-presented by Zeitoun and Warner,⁵⁵⁵ there is often “negative/dominative” form of hydro-hegemony – if there is any kind of hydro-hegemony – with consolidated control over water resources “at the expense of its co-riparians and the perpetuation of an un-resolved conflict.” The exercise of power by actors for self-interest alone perpetuates mistrust and anarchy, and negotiation remains at a standstill. “Positive” change in such hydropolitical relations seems to be very slow, and foreigners’ diplomacy often underpins the *status quo* or seeks to manipulate it to suit themselves. The goals of diplomacy are often set to reach any kind of “deal” to maintain “security and peace”, regardless of local opposition or its level of equity.

It is worth noting that, as explained above, a riparian state may act in compliance with international water law to consider the ERU principle either in unilateral or collaborative/joint effort. Consequently, cooperation intensity at this level, as classified in the TWINS, might be expected to be “confrontation of issue”, where “the issue is acknowledged but there is no specific joint action or identification and sharing of goals”.⁵⁵⁶ In addition, this level of equity may appear at two other levels of cooperation intensity in the TWINS: either in “ad-hoc joint action” or in “common goal formation”. This low level of equity, therefore, may result in “joint action but no shared goals”, or there might be a shared goal, but states hold widely divergent opinions on how to approach that goal. In this case, achieving ERU itself might be the “shared goal”, however, it may go through unilateral approach faced with contested views, as will be shown later in the Helmand River Basin (Chapter 7). Amid anarchy, cooperation over utilisation of transboundary waters at this level is mostly of limited extent and without further constructive collaboration. Such cooperation may be well-named with John Galtung’s term “negative peace”.⁵⁵⁷ Thus, such conditions cannot be expected to achieve or implement high ERU with this minimal level of cooperation unless other underlying causes of conflict are tackled.

While there might be some degree of cooperation at this level of non-/low equity, there are likely a number of ongoing conflicts over water utilisation happening concurrently, which are either hidden or controlled. Considering the nature of anarchy, however, these conflicts are often expected to break out and even be escalated in the times of crises like drought, flood, ecological disaster, economic crisis, or

⁵⁵⁵ Zeitoun and Warner (n 9) p. 455.

⁵⁵⁶ Mirumachi (n 546) p. 60.

⁵⁵⁷ See Johan Galtung, ‘Violence, Peace, and Peace Research’ [1969] 6 *Journal of peace research* 167; See also Julie Elkins Watson, ‘Beyond Cooperation: Environmental Justice in Transboundary Water Management’ (Oregon State University 2015).

a unilateral act by one watercourse state. The TWINS level of conflict intensity with this measure of equity might appear as “politicisation”, “securitisation-opportunisation”, or “violisation”.⁵⁵⁸ Water issues at this level may be politicised in the sense that they become part of the political agenda and therefore “part of public policy, requiring government decision and resource allocation”.⁵⁵⁹ Once a water-related concern “is presented as an existential threat, requiring emergency measures and justifying actions outside the normal bounds of political procedure”, it is securitised.⁵⁶⁰ Threats may not be real or already existing, or may be discursively framed to construct a sense of urgency for the purposes of “special” politics when “normal” politics are not sufficient to achieve interests. In this way, an act of speech can potentially deliver a threat and construct urgency.⁵⁶¹ In the case study to be presented later, a securitising speech act concerning the Helmand River Basin is found. At this level of conflict, however, there might also be opportunitising speech acts when “the issue offers such a great chance to improve a situation that it justifies actions outside the normal bounds of political procedure”.⁵⁶² However, since both securitisation and opportunitisation in terms of the TWINS declare an act of emergency, the measures taken in response to them do not necessarily mean an improvement of the situation towards equity. Finally, the highest level of conflict intensity understood by the TWINS is when interaction goes beyond securitisation to the extent that violent action is seen as the necessary response.⁵⁶³ This may happen where “an already securitised issue such as identity becomes a *casus belli* over which blood must run”.⁵⁶⁴ However, as demonstrated by Aaron Wolf and his team at Oregon State University, states have rarely enacted violence against each other because of the utilisation of international watercourses.⁵⁶⁵ In sum, anarchy reigns at this level over the ERU principle, and such inequitable or low equity situations by themselves inflame the symptoms of anarchy within hydropolitical relations. Resultantly, hydropolitical relations often end in deadlock.⁵⁶⁶ As this study will

⁵⁵⁸ Mirumachi deploys securitisation theory – developed by the Copenhagen school – for categorising the conflict intensity of TWINS in which “security is the move that takes politics beyond the established rules of the game and frames the issues either as a special kind of politics or as above politics”. See Buzan (n 476) p. 23.

⁵⁵⁹ Buzan (n 476) p. 23.

⁵⁶⁰ Buzan (n 476) p. 234. Mirumachi (n 194).

⁵⁶¹ Mirumachi (n 194).

⁵⁶² JF Warner, *Water, Wine, Vinegar, Blood: On Politics, Participation, Violence and Conflict over the Hydrosocial Contract* (2004) p. 9.

⁵⁶³ Mirumachi (n 194).

⁵⁶⁴ Quoted in Filippo Menga, ‘Power and Dams in Central Asia’ (Università degli Studi di Cagliari 2014) p. 52.

⁵⁶⁵ Yoffe (n 369).

⁵⁶⁶ This may be similar to what Boris Kabanoff describes as “nondirected conflict”: “It represents behaviour that reflects frustration and resentment; it is detrimental to another party’s interests, but is not deliberately aimed at harming another party’s interests or at a specific conflict issue or remedy.” See Boris Kabanoff, ‘Equity, Equality, Power, and Conflict’ [1991] 16 *Academy of management Review* 416 p. 423.

show, geopolitical anarchy in the Helmand River Basin does not allow the riparian states to cope with each other to constructively cooperate over water resources and transform conflict.

5.5.2. ERU Basic Cooperation: a sense of common interest

Content of treaty/custom and compliance with the ERU principle

In this level, states cooperate at the minimum level necessary to make sure that they co-ordinate their acts on the basis of ERU. This is basically saying, out of all the uses we have (existing/ potential) how do we allocate the waters? States might share basic data to reach such a determination, and may look at benefit-sharing options⁵⁶⁷ (such as upstream hydropower, and revenue/flow regulation for agriculture/flood control downstream). While states may enlarge their share of benefits from transboundary rivers,⁵⁶⁸ this level of equity is still mainly limited to water issues; it does however consider the interests of riparian states from a more comprehensive basin-wide perspective by considering other associated issues outside the “water box”, such as ecosystem protection, land use, and food and energy security.⁵⁶⁹ Water conflict resolution may reside at this level.

Consideration of the ERU principle and the indicative factors at this higher level goes beyond merely accounting for the geography, hydrology, population, and existing agricultural land uses of the basin. Thinking on the larger coffer of benefits – in terms of the economic and social needs of the watercourse states, the ecological factors and protection of the ecosystem, the potential uses of the watercourse, the availability of alternatives, and the efficiency, effects, and costs of the use and development of the watercourse by one state on another – might be helpful when proposing an equitable and reasonable regime of utilisation. In accordance with this, there should be a proportionate distribution of benefits in the use of a shared resource in an equitable manner.⁵⁷⁰ Also, the “basket” of benefits would be maximised in a way beyond what is possible through unilateral action of the preceding level, e.g. through joint infrastructure projects. This maxim could be used to ensure a balancing of the legitimate interests of international watercourse states. To develop this approach, the states’ current circumstances, development level, economic capacity, and needs should be taken into consideration. To ensure

⁵⁶⁷ See, for instance, Ilkhom Soliev and others, ‘Balancing the Discussion of Benefit Sharing in Transboundary Water Governance: Stressing the Long-Term Costs in an Empirical Example from Central Asia’ [2018] 6 International Journal of Water Governance 19; For the categories of benefits, linked to security, economics and the environment, see also Marwa Daoudy, ‘Benefit-Sharing as a Tool of Conflict Transformation: Applying the Inter-Sede Model to the Euphrates and Tigris River Basins’ [2007] 2 The Economics of Peace and Security Journal.

⁵⁶⁸ Sadoff and Grey (n 352); Daoudy (n 567).

⁵⁶⁹ See, for instance, Rebecca L Teasley and Daene C McKinney, ‘Calculating the Benefits of Transboundary River Basin Cooperation: Syr Darya Basin’ [2011] 137 Journal of Water Resources Planning and Management 481.

⁵⁷⁰ McIntyre (n 452); see also Upreti (n 472) pp. 108-9.

effective implementation of ERU, procedural principles of international water law must also be in place. For instance, riparian states often cooperate through established river basin organisations, which carry out common study, monitoring, and data-sharing activities for international watercourses, as well as agree on joint or co-ordinated management plans and basin-wide development scenarios.

Another example of this level of equity that merits further research could be found in the case of Araks (Aras) River Basin and the history of cooperation and benefit-sharing between Armenia and Iran, and Azerbaijan and Iran.⁵⁷¹ Arguably, US-Canada and US-Mexico transboundary water cooperation could also be possible cases to be in this category that merit further study.

Context

This level also accounts for co-existing conflict and cooperation as it bears on the interests of riparian states in transboundary water management. The nature of anarchy is however still playing its role here of leading states to compete for self-interest. However, other factors, like the robustness of the political economy,⁵⁷² can alleviate the situation, and accordingly, the ERU principle can find space to blossom and support states in the creation of a collective interest, and to maximise the benefits that are offered through cooperation vis-à-vis unilateral action. While states share a common goal, the fourth level of cooperation intensity in the TWINS is expected to be represented often here: “common norm formation”. This level of cooperation happens when there is agreed joint action, and common goals and norms among riparian states over the utilisation of an international watercourse. Notwithstanding this, changes of states’ interests in water utilisation or differing views on common norms may bring them into conflict at certain times. Therefore, it is expected that at this level, states experience either a “non-politicisation” or “politicisation” intensity in conflict as categorised by the TWINS. Non-politicisation exists where water issues are not the concern of riparian states, nor are related issues part of the public debate. In such circumstances, the sources of conflict are perceived and the behaviour of states rests on remedying them, rather than underpinning or changing the *status quo* with a zero-sum mindset.

In such an anarchic setting, whether or not there is an established hierarchical order, riparian states, hegemons or non-hegemons alike, may take advantage of the “de-politicisation”, “politicisation”, or “securitisation” of transboundary waters as a discursive tactic to legitimise their actions.⁵⁷³ This may even result in an agreement for sharing waters among riparian states; however, the degree of ERU might

⁵⁷¹ Michael E Campana and others, ‘Science for Peace: Monitoring Water Quality and Quantity in the Kura—Araks Basin of the South Caucasus’ in *Transboundary Water Resources: A Foundation for Regional Stability in Central Asia* (Springer 2008). See also Farideh Mohammad Alipour and Hamed Talebian, ‘Shared Water Resources in Kura-Aras River Basin; the Promoter of Peace in South Caucasia’ [2018] 11 *Central Eurasia Studies* 231.

⁵⁷² Mirumachi and Allan (n 66).

⁵⁷³ See also Zeitoun ‘Transboundary Water Justice’ (n 20).

be very low, as has happened with the Mahakali river (known also as the Sharda or Kali river) between Nepal and India, which joins the Ghaghara river, a tributary of the Ganges.⁵⁷⁴ While the degree of equity in these terms might be legitimised by the prerogatives of hegemon in the context of power asymmetry,⁵⁷⁵ in the anarchic context, nothing can prevent non-hegemons from enforcing their own agenda. In this respect, the geopolitical anarchic setting at the basin may also present a difficult choice that greatly limits the potential to improve hydropolitical relations.

5.5.3. ERU Advanced Cooperation: a sense of collective identity

Content of treaty/custom and compliance with the ERU principle

A higher level of equity is possible when countries manage shared waters as if there were no sovereign borders, and principles of integrated water resources management are adopted with a view to maximising the benefits from the basin and apportion those benefits equitably. Rather than focusing on water sharing *per se*, transboundary water management here rests on the concept of sustainable development⁵⁷⁶ and the principles of “good water governance”,⁵⁷⁷ and finds its place in the established general consensus on broader related issues, particularly peace, security, and economy.

This highest level of equity is subject to broader socio-political, economic, and security factors belonging principally to states’ senses of identity and creation of collective identity in the basin. States constructively cooperate based on commonly agreed policies of the same political agenda, and their cooperation to tackle disputes over water issues goes beyond the shared river. Transboundary water management not only attends to the collective interests of riparian states, but also reflects a shared identity built on their joint concerns within a particular basin. It must be noted at the outset that the creation of collective interests is a prerequisite for the success of transformation.

At this stage of equity, pre-existing regional cooperation mechanisms, grounded on a common regional political and security agenda, persuade states to institutionalise basin-wide joint management. For instance, pre-existing cooperation structures in Europe and southern Africa are conducive to establishing and maintaining transboundary water management institutions.⁵⁷⁸ Even with hegemonies involved and in the context of anarchy, cooperation is likely exercised in compliance with the substantive and procedural principles of international water law.⁵⁷⁹ The Danube which may relatively

⁵⁷⁴ For more information, see Mirumachi (n 194).

⁵⁷⁵ Zeitoun ‘Transboundary water interaction II’ (n 20).

⁵⁷⁶ Rieu-Clarke (n 7).

⁵⁷⁷ Allan and Rieu-Clarke (n 456).

⁵⁷⁸ Schmeier (n 375).

⁵⁷⁹ Woodhouse and Zeitoun (n 239).

reflect a collective identity in European context might be at this stage, in that the ERU principle has room to serve the interests of riparian states in a way to maximise shared benefits and minimise the negative impacts of utilisation.

Context

The highest level of cooperation intensity in the TWINS, “collective identity formation”, can produce a corresponding level of equity, once that collective identity is completely formed. At this level of cooperation, “states do not differentiate between their domestic interests and their collective international interest”.⁵⁸⁰ Anarchy at this level accordingly has less power to manipulate states’ behaviour. States have nevertheless found ways to serve their own interests and identities as part of a collective identity. This level of equity, therefore, occurs when states identify their self-interest, security, and national identity requirements in a common agenda for regional security and socioeconomic development. Achieving this level of course requires that other internal and external factors be promotive to collective identity formation, such as the political economy and broader geopolitical issues.

As with the previous level, water conflict resolution, the conflict intensity here is also expected to manifest in the form of either “non-politicisation” or “politicisation”. However, the root causes of conflict are anticipated to be effectively confronted and resolved at this level of high equity. The previous two levels, water conflict and cooperation are mainly grounded on interest-oriented motivations. As described in Chapter 4, sources of conflict surrounding transboundary waters may be beyond simply material interests, and reflect a lost identity, or emotions and perceptions of a more spiritual nature, which cast shadows of the past.⁵⁸¹ These kinds of water conflicts may be rooted in the colonial past, geopolitical crises, continued occupation/intervention or civil war, ethnic issues, religious and cultural identity, and territorial ideology, all of which are mostly created/escalated by outside-of-basin interventions in the context of anarchy. The Israel-Palestine, Kashmir, and Afghanistan water issues are examples of such conflicts. This high level of equity, if achieved, may accordantly aim for water conflict transformation, mainly reflecting identity-oriented motivations. To transform a water conflict in an equitable and *sustainable* manner, the sources of that conflict should first be considered

⁵⁸⁰ However, a “‘complete’ collective identity formation is rare”. See Mirumachi (n 194) p. 50. See also Wendt (n 8).

⁵⁸¹ Over the past two decades, many scholars demonstrated that “issues of national identity, cultural values and world view are more likely to lead to conflict between states, than are disputes over water”. See Anton Earle, Anders Jägerskog and Joakim Öjendal, ‘Introduction: Setting the Scene for Transboundary Water Management Approaches’ in Anton Earle, Anders Jägerskog and Joakim Öjendal (eds), *Transboundary Water Management: Principles and Practice* (Earthscan 2010) p. 2; In addition, Miriam Lowi and Jay Rothmann show “the relation between water conflicts and non-water-related high politics issues (such as statehood, security or territory), making the solution of water conflicts only possible when high politics issues in the respective basin are solved as well.” See Schmeier (n 325) p. 6.

and remedied. A focus only on common interests in two former levels might be helpful for attaining efficient, optimal, cooperative solutions, perhaps even ones that appear equitable, but with the inherence of human suffering and damaged identity likely being neglected, this singular focus may not provide a sustainable and lasting solution in an anarchic setting, leading to, in a similar way, what has commonly been termed as “Brexit”.⁵⁸²

Therefore, consideration of the ERU principle, in addition to the above-mentioned indicative factors present in earlier levels of equity (e.g., water conflict resolution), is applied to surveying other human rights. General Comment 15 – adopted in 2002 by the UN Committee on Economic, Social and Cultural Rights, and which monitors the implementation of the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR) – declares that “the human right to water is indispensable for leading a life in human dignity. It is a prerequisite for the realisation of *other human rights*”.⁵⁸³ Though adding these human rights dimensions may introduce new layers of complexity to the concept of equity,⁵⁸⁴ focusing only on solutions and benefit-sharing – even if they extend beyond the “water basket” – to resolve water conflict may not be enough to sustain relationships. If the sources of conflict – which are often non-water issues, situated outside of the “water basket” – are left unresolved, there is much potential to damage hydropolitical relations and for them to dramatically descend towards low equity, and thus perpetuate the pattern of non-/low equity.

5.6. Change in hydropolitical relations by the influence of the ERU principle

The original TWINS, while depicting the trajectory of interactions, highlights how power relations shape the evolution of co-existing conflict and cooperation. However, the adapted TWINS, i.e. the UHR, provides a 3-D image of hydropolitical relations and affords the opportunity to bring power and equity together in a single conceptual framework. While the outcome of transboundary water interactions is subject to power asymmetry in the basin, the normative concerns/knowledge about ERU which is subject to change in time can also influence the outcome.

As discussed in Chapter 3, legal principles may support the hegemonic order in anarchic situations lacking central law-creating, determining, and enforcement mechanisms. However, they may also be potentially used to critique a hegemon’s foreign policy and shed light on the inequitable and unfair

⁵⁸² See, for instance, Peter Howley and Muhammad Waqas, ‘National Identity and Brexit’ [2020] Leeds University Business School Working Paper, Forthcoming, Available at SSRN: <https://ssrn.com/abstract=3464210> or <http://dx.doi.org/10.2139/ssrn.3464210>.

⁵⁸³ Emphasised added. New York, NY (US), 16 Dec. 1966, in force 3 Jan. 1976, available at: <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>.

⁵⁸⁴ Paul G Harris, *International Equity and Global Environmental Politics: Power and Principles in Us Foreign Policy* (Routledge 2017).

distribution of resources.⁵⁸⁵ According to the discussion in Chapter 3 concerning the association between legal principles, identity, and anarchy, and drawing upon “interactional international law”, this study argues that competition within a self-help system exists while it is being socially constructed.⁵⁸⁶ Therefore, the notion of why and how states may pursue cooperation or conflict for self-help are constructed through social interactions. Conflictive or cooperative strategies are tactical maneuvers that in realist perspective may reflect the interests, but they may be, even beyond that, shaped by the identities of states from constructivist point of view. Once identities change, so correspondingly does self-interest. In this regard, the power of legal principles, the focus here being the ERU principle as the core customary norm of international water law, represents an important quality that can potentially affect the identity of states, provide a shared understanding of both collective security and a collective definition of “self” among riparian states, and, therefore, change hydropolitical relations. In this respect, Wendt’s cultures of anarchy from constructivist point of view – outlined in Chapter 2 – can be well situated in different levels of equity in UHR (see Figure 10).

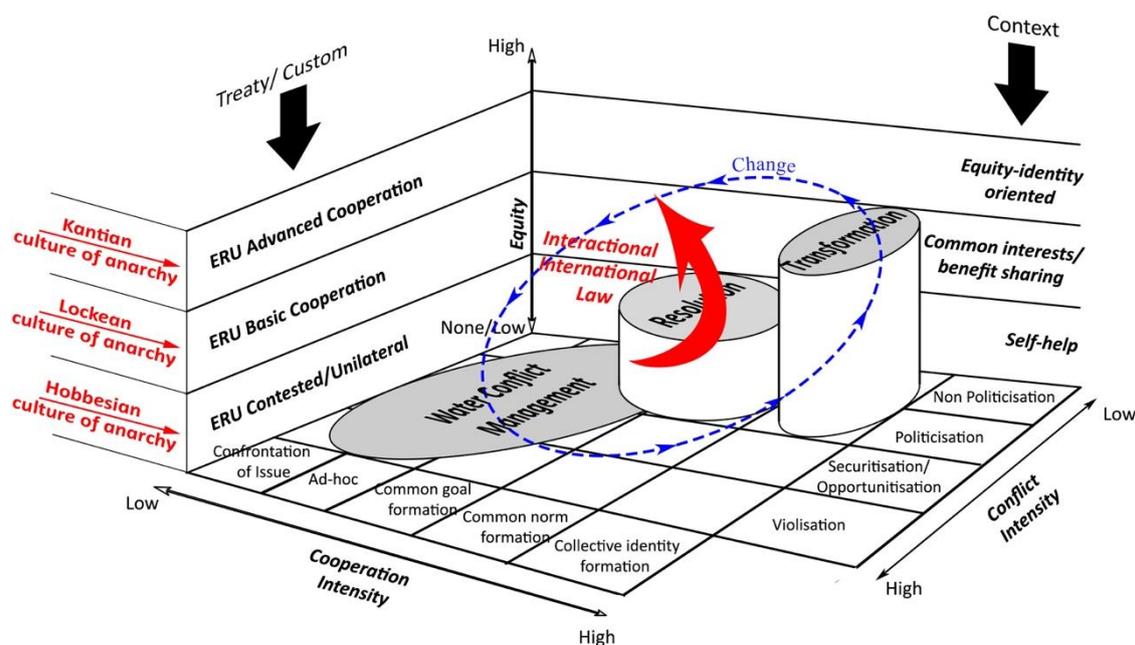


Figure 10. Change in the UHR within anarchy

The lowest level of equity is expected in Hobbesian culture of anarchy where the neorealist reading leads the nature of hydropolitical relations surrounded by “self-help” behaviours. The ERU principle is contested here and may be applied unilaterally. States in such context have a conservative approach, “preferring looser and more flexible ‘framework’ agreements” with far-reaching binding

⁵⁸⁵ See Jean Allain, ‘Anarchy and International Law: The Approaches of Hedley Bull and Noam Chomsky’ [2014] *Review of Contemporary Philosophy* 17.

⁵⁸⁶ Mercer (n 153).

commitments.⁵⁸⁷ A compromise in this sense is seen by its limitation:⁵⁸⁸ weighing up the cost and benefit and in particular the relative gains. The next level is subject to Lockean culture of anarchy which is associated with neo-liberal reading of conflict-cooperation where basic cooperation grounded on common interests and benefit-sharing through establishing formal institutions (RBOs) may be experienced. Finally, the third level, where high equity is expected, Kantian culture of anarchy exists where the ERU principle is rather achieved through creation of collective identity. The “life cycle of norm” in interactional international law and the extent of the effectiveness of the ERU principle in UHR are assumed to be strengthened towards these cultures of anarchy. For practice of legality there needs to be a much improved shared understanding between riparian states, otherwise, transformation of conflict rarely occurs. It is important to consider that such creation of shared understanding is also influenced by power asymmetry and anarchic setting that merits further research. The more cooperation and active communication, the more possibility for initiating shared understanding over the ERU principle among riparian states.

The new equity-based TWINS illuminates the issues at stake and illustrates how the improvement of transboundary water interactions can occur in different intensities of co-existing conflict and cooperation. This can be further useful for better depicting the driving forces involved in promoting or hindering water conflict transformation. At all of the above-mentioned levels of ERU, natural climatic variability, domestic and regional socioeconomic and political circumstances, and global security issues under anarchy may pressure the behaviour of states. Mirumachi’s framework and her analysis of the role of political economy of water-scarce basins (Figure 11) shows close similarity with UHR and its focus on equity principle. As seen in Figure 11, it is argued that “[a]dvanced economies with high GDP levels appear to be able to enjoy high levels of cooperation”. The different levels of political economy depicted in this figure perfectly match with what the UHR categorises hydropolitical relations into different degrees of equity and anarchy.

⁵⁸⁷ Armstrong (n 207) p. 288.

⁵⁸⁸ In author’s experience, a compromise over water issues has been highly inked to other non-water related issues beyond the authority of water negotiators, and particularly, in the case of high anarchy, it must be always checked with outside the negotiation room.

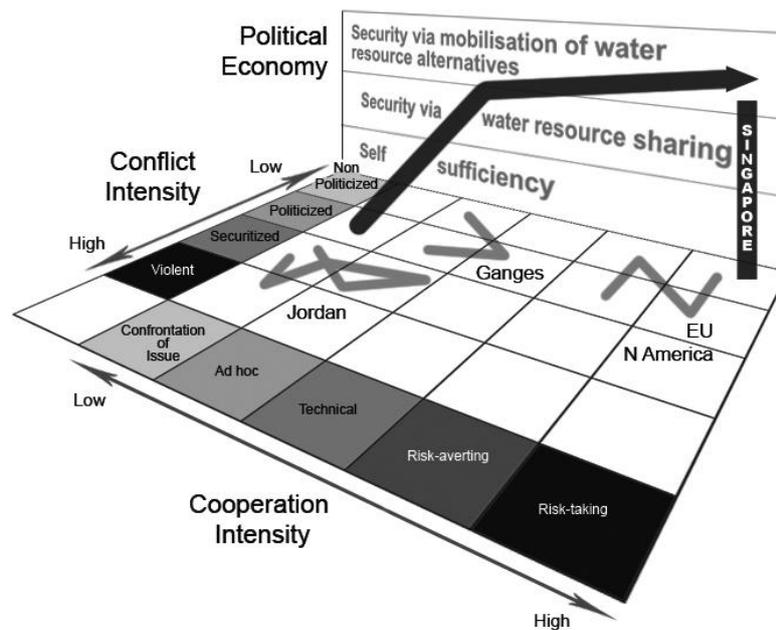


Figure 11. Conflict and cooperation coexist in transboundary relations⁵⁸⁹

A change in the hydropolitical relations of international watercourses towards equity can highly depend on how riparian states deal with the anarchic symptoms and power relations at the basin level. Thus, the extent to which the ERU principle can be effectively operationalised remains subject to anarchic geopolitical settings and power relations. It is argued that while the level of ERU has a direct linkage with the extent to which anarchic-geopolitical settings influence states' behaviour, it has also the potential, by itself, to affect the interest and identity of states, and therefore influence the way that states act in anarchy. This may result in the long-term improvement of hydropolitical relations. Notwithstanding this, such influence of the ERU principle on hydropolitical relations to be effective needs to be evaluated through the framework of interactional international law to examine the creation of shared understanding, the criteria and practice of legality.

5.6.1. Examining the “life cycle of norm” in the ERU principle

Shared understanding

As already discussed, there might be contested debate and confusion about the ERU principle and its implementation between developing and developed states or on its relation to “no-harm” rule. For instance, the right to development versus environmental protection in an international river basin is still a controversial debate, stuck between bargaining position of riparian states for their interests over

⁵⁸⁹ JA Tony Allan and Naho Mirumachi, ‘Why Negotiate? Asymmetric Endowments, Asymmetric Power and the Invisible Nexus of Water, Trade and Power That Brings Apparent Water Security’ in Anton Earle, Anders Jägerskog and Joakim Öjendal (eds), *Transboundary Water Management: Principles and Practice* (Earthscan 2010).

equitable and reasonable utilisation. While there has been a significant effort to level the playing-field by invoking the two core principles of “equitable and reasonable utilisation” and “no-harm rule”, it is far more difficult to get states to accept a breach of these rules, perhaps because the principle of sovereignty still holds sway in anarchic setting, and also these rights conferred in international water law are provided by states’ consent in the world of politics. However, there is a growing broad consensus about the general definition and understanding of an equitable and reasonable utilisation which is laid out and codified in the Water Convention, Watercourses Convention and the 2008 ILC Draft Articles on the Law of Transboundary Aquifers (Draft Aquifer Articles), and are mentioned in several cases of ICJ and regional arbitrations, agreements, and treaties. Considering that the ERU principle is recognised as the pre-eminent rule of international water law,⁵⁹⁰ and the backbone of the UN Watercourses Convention as “a global framework instrument that sets out rules and principles for governing international watercourses”⁵⁹¹, this forms a legal umbrella under which water utilisation rules, states commitments, and compliance mechanisms are defined.

It is also acknowledged that substantive and procedural rules of international water law are bound together in order to achieve “equity” and “fairness”.⁵⁹² As a general rule grounded on the theory of “limited territorial sovereignty”, states are entitled to enjoy equal rights to the utilisation of an international watercourse, but when so doing they are obliged to take all appropriate measures not to cause significant harm to other riparian states. However, the term “significant” can be tricky in practice, for it is declared that “some significant harm may be tolerated – in very limited circumstances – where it can be established to be equitable and reasonable”⁵⁹³. These substantive rules, alongside the procedural rules of international water law, seek to tackle fairness and equity in the utilisation of shared waters.

Underpinning these rules, however, is a set of distinctly discursive issues concerning what constitutes “fairness” in transboundary water interactions. International water law-making has been a long ongoing process for, and in particular, over 38 years, since 1976 to 2014⁵⁹⁴; it provides an opportunity for states to develop the normative framework for legal rules over international waters, a process which is still underway. For instance, the UN Watercourses Convention enables states for deliberation and also encoding the rules of the game by a set of communication processes which were practised in several rounds of talk in the Sixth Committee. This kind of platform enables states to negotiate and agree (or

⁵⁹⁰ Rieu-Clarke (n 7) p. 104.

⁵⁹¹ Rieu-Clarke (n 235).

⁵⁹² Yihdego and Rieu-Clarke (n 23).

⁵⁹³ Rieu-Clarke (n 235) p. 100.

⁵⁹⁴ When ILC started to study international water law to the time of entering into force of the 1997 UN Watercourses Convention.

reject) substantive rules on the utilisation of international waters through these norm-bound talks. The ongoing debates over rules of utilisation of international waters between poor *vs.* rich, developed *vs.* developing *vs.* least-developed, and downstream *vs.* upstream states indicate the importance of state discourse to international water law, and how much this can bring political influence and legitimacy to state behaviour in an international river basin, contributing to the promoting shared understanding of equitable and reasonable utilisation.⁵⁹⁵ The states' discourses also present many controversies, for example those based on the states' perception over sovereignty, right to development, and the like, as discussed in Section 5.3.

The development of international water law, and in particular the entering into force of the UN Watercourses Convention, the opening of the Water Convention, and a commitment under the Sustainable Development Goals (2015) to improve water resources management through transboundary cooperation, provide further opportunities to synergise global- and basin-level processes of shared understanding.⁵⁹⁶ These synergistic processes “foster the ‘cross-fertilisation’ of establishment norms across a range of different cooperative frameworks, and also offer different venues by which to develop a shared understanding of the key legal rules and principles”.⁵⁹⁷ From this point of view, the change in hydro-political interaction with regard to the development of legal rules is highlighted in the Nile river basin, where Egypt, Sudan, and Ethiopia, among other countries, have cooperated to launch the Nile Basin Initiative.⁵⁹⁸ It is further important to notice that the legal incorporation of some states into larger cooperative activities is a kind of political strategy to internationalise the issue and subsequently derive some advantage from it, of which the collaboration of Ethiopia in the Nile Basin Initiative is an example.

Criteria and practice of legality

The characteristics of the ERU principle, in particular the *flexibility* and *vagueness*, and its different roles, ranging from a substantive rule of water allocation to ensuring procedural fairness,⁵⁹⁹ might be the main reason for such above-mentioned debate and confusion concerning the creation of shared understanding. One may say that these features are in conflict with Fuller's criteria of legality in particular ‘clarity’ and ‘non-contradiction’; however, they can be arguably understood under the criteria of ‘generality’ that plays a central role in the ‘promulgation’ of the ERU principle. These features of legality, therefore, have played important role to bring the ERU principle in legal and political practice

⁵⁹⁵ See, for instance, Zeitoun (n. 484).

⁵⁹⁶ Yihdego and Rieu-Clarke (n 23).

⁵⁹⁷ Yihdego and Rieu-Clarke (n 23) p. 509.

⁵⁹⁸ Yihdego and Rieu-Clarke (n 23).

⁵⁹⁹ McIntyre (n 452). McIntyre examines a number of different roles – ranging from a substantive rule of water allocation to ensuring procedural fairness – to discuss the reason for confusion about equity in international water law.

and discourses of riparian states. The development on the notion of the ERU principle and in particular the “authorities guideline function” of the UN Watercourses Convention has significant normative effects on state behaviour, which accordingly may at least lead to the change in states’ discourse. The development of international water law should not be measured, for example, by the number of states joining the global convention. Instead, changes to legal rules and norms which are generally representative of an elite community in possession of scientific authority along with the contribution of states’ opinions have undoubtedly occurred within a gradual social process and practice under which represents the interests and identities of riparian states.

The long history of making customary international water law, and in particular establishing its two main global instruments, has witnessed an ongoing discursive process in which transnational epistemic communities helped to develop scientific knowledge within a normative paradigm shift⁶⁰⁰ and bring it to the public domain. The discursive construction has been done particularly under the influence of NGOs, every year World Water Forums and related conferences and meetings.⁶⁰¹ The discursive construction and shift in legal principles over international water issues, alongside the development of knowledge in other subject areas, provide politicians a conventional pattern to argue through and reconcile their different interests before agreeing to substantive commitments. Legal scholars, in turn, have sought to pinpoint precisely these commitments and make them more “law-like”.⁶⁰² Armstrong and others note that “in the course of any discourse, the arguments engaged in by the participants will lead them towards shared understandings of the facts (‘the external world’), the normative issues involved (the ‘social world’) and their own subjective responses (the ‘inner world’). In one sense, the process of a ‘social construction of reality’ is to encompass “all aspects of ‘reality’ from factual knowledge to normative structures, and from demonstration of political boundaries to rule making”.⁶⁰³ However, discursive practice in constructivism is not in a one-way process. A counter-discourse, for instance against the right to development, has been involved in shaping the ultimate outcome of transboundary legal regimes. It is also important to consider other related discursive patterns around international waters – for instance, the “right for river” or the persisting debate over climate change. The content of international water law rests on this dynamic discursive process, and reflects the underlying political process.

Consider this, the ERU principle is based on the notion that a “community of interest” among all riparian states exists.⁶⁰⁴ While there might be some critics about the lack of “clarity” and “practical guidelines”

⁶⁰⁰ For example, how the Harmon doctrine shifted to the limited sovereignty.

⁶⁰¹ Armstrong (n 207) p. 290.

⁶⁰² Armstrong (n 207) p. 290.

⁶⁰³ Quoted in Armstrong (n 207) p. 290.

⁶⁰⁴ McIntyre (n 452).

for the codification of the ERU principle,⁶⁰⁵ the application of such norm in general and flexible terms is necessary “to accommodate the enormous range of conditions pertaining in different river basins and the diversity of disputes which might arise”.⁶⁰⁶ In addition, some criticise that the formulation of the ERU principle in Article 5 of the UN Watercourses Convention is “a diminution of the right of each state to share a common watercourse” while “focusing too much on procedural questions and not enough on substantive issues”.⁶⁰⁷ However, the ERU principle hugely rests on a normative framework to establish a balance between the legitimate interests of riparian states, and therefore, it is to a certain extent unavoidable for “intense procedural inter-State engagement”.⁶⁰⁸

Such criteria and roles of legality, critically discussed by McIntyre in his *Utilization of Shared International Freshwater Resources—the Meaning and Role of “Equity” in International Water Law*.⁶⁰⁹ Grounded on McIntyre’s discussion, the ERU principle is arguably expected to construct a persuasive discourse and a shared understanding among the actors; Accordingly, this will influence the practice of legality by reshaping states’ interests and creating individual and collective identities. Since active communication among riparian states is significant to promote shared understanding, the ERU principles’ characteristic of flexibility may, arguably, gives states a maximum sense of “freedom” to overcome the anarchic symptoms, in particular uncertainty, and cooperate with each other, while agreeing or disagreeing on how to achieve equitable and reasonable utilisation. Such flexibility also enables courts for issues with disparate claims.⁶¹⁰ The implementation and practice of the ERU principle is procedural in nature, therefore, its initial ambiguity is expected to be removed through constructive participation and states’ practice of those procedural provisions. Accordingly, the ERU principle may meet, at least in part, the criteria of legality, however, the assessment and implementation of this principle predominantly depends on procedural provisions and the riparian states’ practice in each case. Such practice of legality can reinforce the compliance with the ERU principle.

The ERU, therefore, can be expected to contribute to the provision of a legal/legitimate basis for supporting constructive dialogue between riparian states. Such contribution to change, by itself, heavily depends on the level of cooperation and the culture of anarchy in international watercourse basins. It

⁶⁰⁵ McIntyre (n 452); See also Peter Beaumont, ‘The 1997 Un Convention on the Law of Non-Navigational Uses of International Watercourses: Its Strengths and Weaknesses from a Water Management Perspective and the Need for New Workable Guidelines’ [2000] 16 International Journal of Water Resources Development 475; Wolf (n 538).

⁶⁰⁶ McIntyre (n 452) p. 113.

⁶⁰⁷ Dellapenna (n 526) p. 278.

⁶⁰⁸ János Bruhács, *The Law of Non-Navigational Uses of International Watercourses* (Martinus Nijhoff Publishers 1993) p. 159.

⁶⁰⁹ McIntyre (n 452).

⁶¹⁰ See also Upreti (n 472).

should be noted, however, that this is a only starting point for decreasing/neutralising the threat of anarchy's effects, and it forms only one part of a complex puzzle. First, the ERU principle, by providing a forum to maximise the benefits and minimise any difficulties, can potentially change the nature of hydropolitical relations and thereby reduce the intensity of competition by introducing a legitimate alternative for water utilisation. It can alter the actors' identities from rivals to partners, contributing to change the hydropolitical relations from Hobbesian to Kantian. The ERU principle can act as a mediator among riparian states, encouraging them with the promise of some benefit to their rights for shared waters. Resultantly, riparian states will have less concern at survival, relative achievements, and the uncertainty of the future that emanate from anarchic settings. Then can an examination of the ERU principle through an asymmetric power relation help level the playing-field in anarchic settings, and influence state behaviour (interest and identity) in a way that promotes the robustness of equitable and reasonable water utilisation in hydropolitical relations. As mentioned, to make effective use of the ERU principle, additional factors must be considered to meet the requirement of interactional international law, including the procedural and institutional principles of international water law in order to enhance the practice of legality and a sense of legitimacy over states' obligations over equitable and reasonable utilisation of international watercourse. In fact, the extent of the effective influence of the ERU principle on hydropolitical relations partly bears on the culture of anarchy which exists in a basin and the level of cooperation and conflict to overcome anarchic symptoms. In the next chapter, such conceptual and theoretical matter will be applied and practically attested as it operates at the Helmand River Basin.

Chapter 6. The Helmand River Basin: anarchy and the quest for equity

6.1. Introduction

The aim of this chapter is to analyse the selected case study, i.e. the Helmand River Basin which is shared by Afghanistan and Iran, through the theoretical context of this research. First, after giving an overview of the hydrological and geographical characteristics of the case study, the chapter is structured into three main parts. Part I, *Hydropolitics*, will analyse the hydropolitical trajectory and legal institutional history of the Helmand River Basin in order to situate them into the TWINS framework. In so doing, the interests, identity, positions, strategies and power relations of Afghanistan and Iran concerning the water utilisation of the Helmand River will be examined. Part II, *The principle of equitable and reasonable utilisation*, will critically analyse the extent to which the legal arrangements over the Helmand River reflect equitable utilisation, and how Afghanistan and Iran may adopt the ERU principle in order to meet their own interests and control the “rules of the game”. This will be followed by the examination of the ERU principle through interactional international law while placing the hydropolitical relations in the UHR in order to illustrate the effectiveness of transformation of water conflict over the Helmand River. Finally, in Part III, *Anarchy*, the obstacles for such transformation and the reasons for the possible “failing” of the ERU principle will be addressed. In so doing, it will examine how the anarchic nature at the international and domestic level and the geopolitical setting of the Helmand River Basin cast a shadow over hydropolitical relations, and how both riparian states, Afghanistan and Iran, suffer from such a dramatic setting.

6.2. General overview

After protracted conflicts and negotiations, influenced by the geopolitical interaction of the “Great Game”,⁶¹¹ Afghanistan and Iran agreed on a treaty in 1973⁶¹² to share the waters of the Helmand/Hirmand⁶¹³ River. Despite significant swings in the political regime of the region, and while the treaty and the Helmand River Commission (HRC) provide a basis for bilateral cooperation, the story of the Helmand River Basin has remained largely unchanged since the mid-nineteenth century—with each country blaming the other for not respecting the treaty and its “water rights”.

The Helmand River offers a classic example of the challenges faced in fostering transboundary water cooperation. These challenges are evident in the views of the media within both countries. Iran—as an earlier-developing downstream state—asserts a historical right over existing water uses for farming, in

⁶¹¹ The Great Game is a term referring to the strategic rivalry and conflict between the Russian and British empires in the nineteenth century as they sought geopolitical mastery of Afghanistan.

⁶¹² See Annex I for the content of the 1973 Afghan-Iranian Helmand-River Water Treaty.

⁶¹³ In Iran this river is called the Hirmand River.

addition to claiming a basic human right to drinking water and an environmental right to protect the delta's wetlands. Also, while recognising the Afghans' right to development, Iran blames Afghanistan for "not providing the amount of water stated in the treaty for downstream", therefore "violating the treaty". Iran also accuses Afghanistan of "not taking care of the downstream environment", and especially the delta Hamoun wetlands because of its "mismanagement", "inequitable" and "unfair" sharing of water, expanding irrigation lands for opium, and building several dams "without carrying out an Environmental Impact Assessment".⁶¹⁴ In response, Afghanistan - as a late-developing upstream state - while not answering the downstream calls for cooperation over the Hamoun wetlands, claims a right to development in order to overcome severe poverty. However, the views of all Afghanistan's downstream neighbours (including Iran) have rarely been against the act of dam development itself.⁶¹⁵ In fact, what causes confusion for much of the Afghan population is that the criticisms are not over the act of dam construction and development in Afghanistan, but rather about the unilateral and non-cooperative behaviour of Afghanistan for its seemingly ambitious and unclear plans that are apparently built upon the strong conviction of capturing "every drop" of water. There have also been accusations that Iran, by appropriating "more" water than is recognised in the treaty, is, along the same lines, guilty of "mismanagement" and "violating the treaty".⁶¹⁶ Within this historical context of counter-accusations that can be traced back to the 1870s, the sustainability of the entire river basin and in particular of the Hamoun wetlands has fallen victim to increased competition, unilateral water utilisation, and particularly an upstreamer reluctant to cooperate, and there is no sign of significant progress in resolving the dispute.

6.3. Hydrology, geography, and the water development

The 1,300 km Helmand River originates in the Hindu Kush mountains west of Kabul in Afghanistan. Near Qale Bist, the river's major tributary, known as the Arghandab River, joins the Helmand River.⁶¹⁷

⁶¹⁴ Tasnim News, 'Hidden Realities of the Helmand River and the 1973 Treaty' [in Farsi] *Tasnim News* (6 March 2017) <https://www.tasnimnews.com/fa/news/1395/12/16/1346429/> accessed 20 January 2021.

⁶¹⁵ See for extensive discussion on different hydropolitical aspects of Afghanistan, Vincent Thomas, Mujib Ahmad Azizi and Khalid Behzad, *Developing Transboundary Water Resources: What Perspectives for Cooperation between Afghanistan, Iran and Pakistan?* (Afghanistan Research and Evaluation Unit Kabul, Afghanistan 2016). Also, among many official letters sent to Afghanistan, the two joint letters sent by Iran and Turkmenistan inviting Afghanistan for cooperation over the Harirud River (another transboundary river between Iran and Afghanistan) in 2006 and 2010, they did not complain about the dam construction by Afghanistan; However, they expect Afghanistan to join the whole basin cooperation effort. See Nagheebiy and Warner (n 327).

⁶¹⁶ Soltan Mahmoud Mahmoudi, 'Historical Events after the Signing of the Helmand River Water Treaty' [in Farsi-Dari] *8am Daily Newspaper* (16 May 2017) <https://8am.af/x8am/1396/02/26/historical-events-after-the-signing-of-the-treaty-helmand-river/> accessed 20 January 2020.

⁶¹⁷ Matthew King and Benjamin Sturtewagen, 'Making the Most of Afghanistan's River Basins: Opportunities for Regional Cooperation' [2010] EastWest Institute, New York; A Favre and Golam Monowar Kamal, 'Watershed Atlas of Afghanistan' [2004].

Crossing southwest, then north, it forms 55 km of the Afghan-Iranian border, and ultimately ends in the 18,000 km² Sistan⁶¹⁸ delta, where it forms a large complex of three main interconnected wetlands, the Hamoun-e-Puzak, Hamoun-e-Saberi, and Hamoun-e-Hirmand, and subsequently, in exceptionally wet years, overflows to the south into the Gaud-e-Zirreh. While most of the river basin is located in Afghanistan, a large part of the delta, in particular the Hamoun wetlands, is located in Iran (see Figure 12 below for a map of the basin and the main infrastructures and Table 1 for the population of the basin). While the flow of water is east-west in the Helmand River, from Afghanistan to Iran, a major climatological feature of the basin is a high-velocity wind blowing in the opposite direction of the water flow in the early summer, creating an environment referred to as the “most odious place on earth” by 19th century visitors.⁶¹⁹ Locally known as “the winds of 120 days” and with a speed of 130 to 185 Km/hr, it brings a cool breeze to the whole delta in the case of the wet Hamouns, whereas in dried wetlands it causes hot, dry air mixed with sands to move not only around the delta but also towards the source of water, Afghanistan. The winds of 120 days combined with a high temperature is the main natural reason for intense evaporation of the sheets of water in the Hamouns (see Figure 13).⁶²⁰

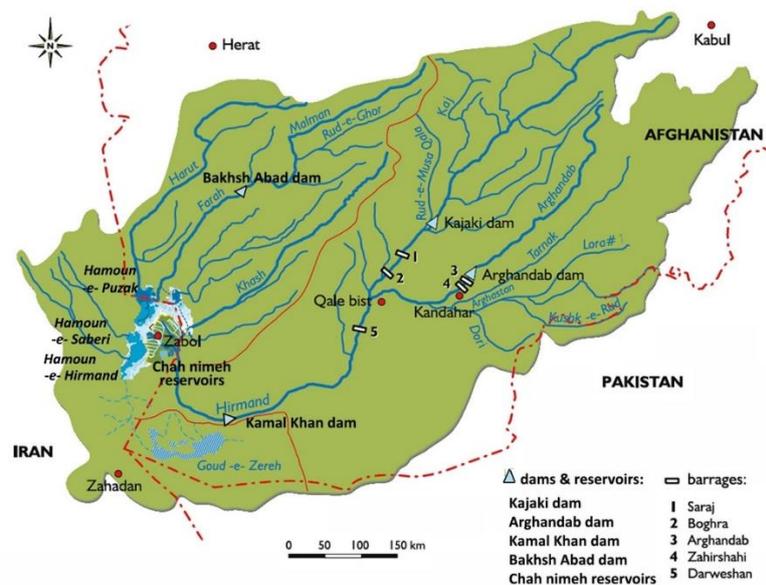


Figure 12. The Helmand River Basin and the main infrastructures⁶²¹

⁶¹⁸ Or it has been seen in some texts as Seistan.

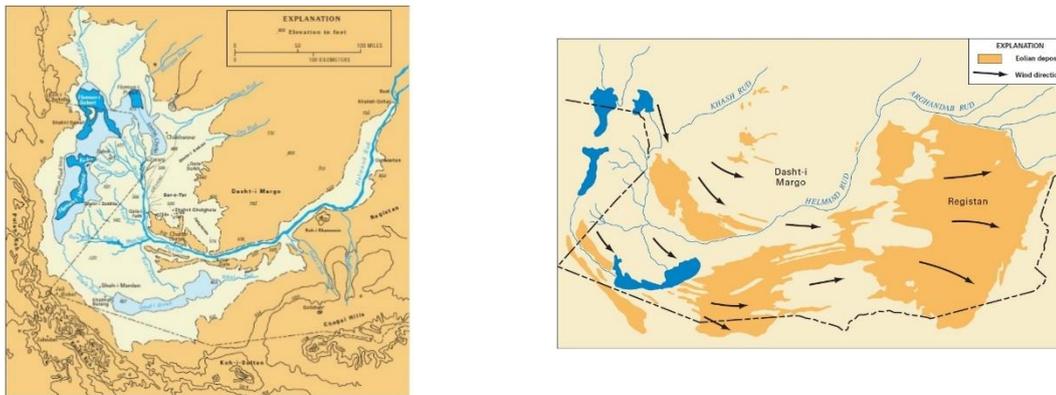
⁶¹⁹ John W Whitney, *Geology, Water, and Wind in the Lower Helmand Basin, Southern Afghanistan* (US Geological Survey 2006).

⁶²⁰ See Najafi and Vatanfada (n 85). See also O Alizadeh-Choobari, P Zavar-Reza and A Sturman, ‘The “Wind of 120 Days” and Dust Storm Activity over the Sistan Basin’ [2014] 143 Atmospheric research 328.

⁶²¹ van Beek (n 85) developed by the author of this study.

Table 2. Population data by country in the Helmand Basin⁶²²

Country Name	Total population living in the basin
Afghanistan	5,800,000
Iran	1,050,000

**Figure 13. The direction of water and wind in the Helmand River Basin⁶²³**

The Helmand River, with an average surface water availability of 9,552 million cubic meter (MCM),⁶²⁴ is considered the lifeblood of one of the poorest regions of the two riparian states. The water resources of the Helmand River Basin are used extensively for irrigation and are crucial for Afghan and Iranian farmers alike. 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. The livelihood of the people living around the Hamoun wetlands is highly dependent on the water resources of the Helmand River, supporting activities such as fishing, reed harvesting, and bird hunting. Only the Iranian side of the wetlands is listed under the Ramsar Convention and was recognised as a UNESCO Biosphere Reserve in 2016.⁶²⁵ Requests by Iran and international bodies for Afghanistan to join the effort to protect the Hamoun wetlands have not yet received a positive response.⁶²⁶ The Hamoun

⁶²² King and Benjamin Sturtewagen (n 617).

⁶²³ Whitney (n 619).

⁶²⁴ 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.

⁶²⁵ While there have been some efforts to invite Afghanistan to join the international campaign to revive the Hamoun wetlands, their participation, so far, has not been forthcoming.

⁶²⁶ There has been special effort to establish cooperation over the Helmand River and protection of the Hamoun Wetlands. For instance, UNEP facilitated several programs of "environmental diplomacy" between two sides by organizing technical meetings in 2005, recommending both parties to share information on water quantity, establish national advisory committees and develop joint restoration projects with the financial support from the Global Environment Facility (GEF). The effort that "has unfortunately been stalled by increasing insecurity in the region". See, for more information, Richard A Matthew, Oli Brown and David Jensen, *From Conflict to Peacebuilding: The Role of Natural Resources and the Environment* (UNEP/Earthprint 2009) p. 27. In addition, within the framework of the Economic Cooperation Organization (ECO) – an intergovernmental organization established in 1985 by Iran, Pakistan and Turkey for the purpose of sustainable socio-economic development of

wetlands, therefore, have gradually diminished, seriously threatening the ecosystem and livelihoods of local communities, which puts public pressure mostly on the Iranian government.

Both Afghanistan and Iran have unilaterally implemented water development projects with the aim of achieving their respective “hydraulic missions” and regulating the Helmand water flow. According to Vincent Thomas and Manijeh Mahmoudzadeh Varzi,⁶²⁷ Afghanistan currently uses surface water mostly for agricultural purposes (with an explosive growth in opium cultivation)⁶²⁸, yet the total irrigable 250,219 ha cannot be irrigated to its full extent while also suffering from a lack of proper infrastructure to secure drinking water. In addition to operating the Kajaki and Dahla Dams since the 1950s, Afghanistan currently plans to develop several other dams like the Kamal Khan—which is upstream near the Iranian border—and increase the storage capacity of the Kajaki Dam in order to expand irrigated areas. A further dam which is under construction is the Bakhsh Abad on the Farah River. The dams are also considered for generating electricity.

Such *unilateral* dam developments and irrigation expansion in Afghanistan, particularly for opium cultivation, along with a silent diplomacy (i.e. calling for a boycott of the talks with neighbouring countries over transboundary water issues) have always attracted sharp criticism from Iran, who blames Afghanistan for not respecting the treaty and downstream rights, and the needs of the Hamoun wetlands in particular. These concerns were expressed by the Iranian President, Hassan Rouhani, at a United Nations (UN)-backed conference on sand and dust storms in Tehran, who showed his deep concern by remarking that “building dams [in Afghanistan]⁶²⁹ without studying environmental aspects is damaging

the member states that was expanded in 1992 to include Afghanistan, Azerbaijan, Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan and Uzbekistan – The first ministerial meeting high-level talks on transboundary environmental management was held in Tehran on 15 December 2002. “Tehran Declaration on Cooperation” as well as a plan of action were agreed among the ECO Member States. The participants agreed on various issues including “harmonization of environmental standards, environmentally sound technologies, urban environmental management, improving Environmental Impact Assessment systems, eco-tourism, establishment of an ECO Environmental College and developing an ECO Environmental Fund.” The participants have given pledges to support Afghanistan “developing and strengthening its environmental authorities and in establishing an Environmental Protection Agency”. See UNEP, *Post-Conflict Environmental Assessment-Afghanistan* (UNEP 2003) p. 102.

⁶²⁷ Thomas and Varzi (n 624).

⁶²⁸ United Nations Office on Drugs and Crime, *Afghanistan Opium Survey 2016: Cultivation and Production* (United Nations Vienna 2016) <https://www.unodc.org/unodc/en/frontpage/2018/May/last-years-record-opium-production-in-afghanistan-threatens-sustainable-development--latest-survey-reveals.html>. The United Nations Office on Drugs and Crime (UNODC) revealed that opium cultivation in Afghanistan hit a peak in 2017, showing a 63 percent increase compared with 2016, and particularly in the fertile Helmand valley where the British and American army fight with Taliban. Considering that the major consumer markets are mainly in Europe, some challenge the US-UK’s “fight” in opium war. See, for instance, Justin Rowlett, ‘How the US military's opium war in Afghanistan was lost’ *BBC* (25 April 2019) accessed 20 January 2021.

⁶²⁹ He also targeted Turkey’s dam development over the Tigris River, in particular the Ilisu Dam.

for the region.”⁶³⁰ In response to these criticisms, Afghanistan argued that, “Iran has no right for water more than the allocated amount in the treaty.”⁶³¹ A few days after Rouhani’s speech, President Ashraf Ghani of Afghanistan said that “water is another major resource for Afghanistan,” and that “we are already investing in dams and irrigation infrastructure to raise agricultural productivity, and as technical designs are completed we will be accelerating investment in this sector that is key for both growth and poverty reduction.”⁶³²

Iran started to develop reservoirs in the early 1980s in order to secure water for the livelihoods of local residents, particularly in harsh times of drought. Four reservoirs known as Chahnimeh were developed for drinking water and the agricultural demands of 120,000 ha. Despite the government’s efforts to conduct several projects to increase efficiency and decrease the total irrigated lands of the Sistan plain, in order to align the water demand with the allocated waters provided for in the treaty,⁶³³ it has not yet fully achieved the desired goals. The operation of the Chahnimeh reservoirs and inefficient agricultural development, in turn, have been criticised by Iranian environmental activists.

In a similar vein, and in response to Iranian concerns, Afghanistan blames Iran for exceeding its allocation of water under the treaty and mismanagement that, the Afghan government argues, negatively affects the Hamoun wetlands. Iran has rejected this accusation and asked Afghanistan to commit to the treaty and cooperate over the protection of the transboundary Hamoun wetlands.

The tragedy of the Hamouns

The ecosystem of the whole Helmand River Basin and in particular the Hamoun wetlands in the delta has been drastically affected by civil war in Afghanistan, mismanagement and inefficient use of water on both sides and massive growth of irrigation and specifically opium cultivation and of course unilateral and noncooperative management of the Basin. While it seems that the irrigation lands have remained constant in downstream Iran, the irrigation areas have expanded considerably in upstream Afghanistan even during civil wars.⁶³⁴ Adding droughts and future infrastructures like the Kamal Khan

⁶³⁰ Dominic Dudley, ‘War of Words Heats up between Iran and Afghanistan over Water Resources,’ *Forbes* (12 July 2017) <https://www.forbes.com/sites/dominicdudley/2017/07/12/iran-afghan-water-dispute/> accessed 20 January 2021.

⁶³¹ Mahmoudi ‘Historical Events after the Signing’ (n 616).

⁶³² Dudley (n 630).

⁶³³ Tasnim News, ‘Organizing and Establishing Rural Cooperative Unions in the New Irrigation Plan of Sistan Plain’ [in Farsi] (8 May 2019) <https://www.tasnimnews.com/fa/news/1398/02/18/2007266/> accessed 20 January 2021.

⁶³⁴ See, for extensive case-study research with the focus on poppy cultivation in Afghanistan, David Mansfield, ‘On the Frontiers of Development: Illicit Poppy and the Transformation of the Deserts of Southwest Afghanistan’ [2019] 1 *Journal of Illicit Economies and Development* 330.

Dam, Bakhshabad Dam and increasing the capacity volume of the Kajaki Dam within the non-cooperative atmosphere of Afghanistan could lead to an environmental and human catastrophe.

In 2000-1, following severe droughts in the region and significant reduction in water flow to the delta, the Hamouns completely dried up (see Figure 14), dramatically affecting the livelihood of the whole population surrounding the wetlands.⁶³⁵

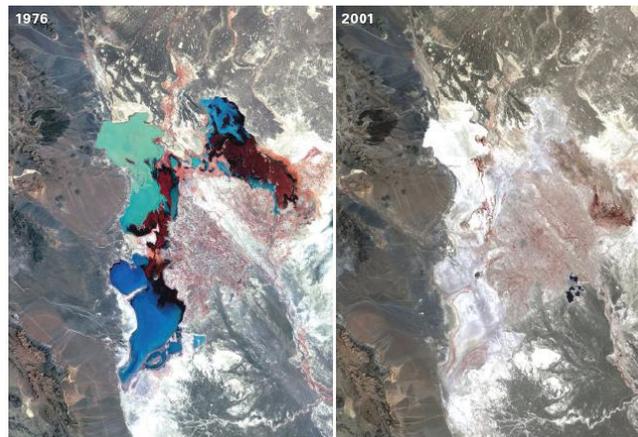


Figure 14. Landsat images of the Sistan delta and Hamouns in 1976 (left) and 2001 (right)⁶³⁶

Part I: Hydropolitics

6.4. Historical trajectory of hydropolitical relations: coexisting conflict and cooperation

The starting point for the discussion over the Helmand River Basin is to examine the question of how the surrounding transboundary water interactions have evolved over time: What is the pattern of relations and what are the main strategies, tactics, and mindset of the riparian states? The historical trajectory of hydropolitical relations between Afghanistan and Iran over the Helmand River Basin has witnessed almost no progress and is full of dead ends and unexpected twists overshadowed by massive political swings (see Table 3 for more detailed information). In such circumstances, both states have

⁶³⁵ The respective reports alarmed that “millions of fish and untold numbers of wildlife and cattle died. Agricultural fields and approximately 100 villages were abandoned, and many succumbed to blowing sand and moving dunes”. See Whitney (n 619); See also Pirouz Mojtahed-Zadeh, ‘Lake Hamun, a Disaster in the Making. Hydropolitics of Hirmand and Hamun’ [1995] United Nations Environment Programme, <http://www.unep.org/jp/ietc/publications/techpublications/TechPub-4/lake1-7.asp>; Najafi and Vatanfada (n 85); Mohammad 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.

⁶³⁶ John Weier, ‘From Wetland to Wasteland. The Destruction of the Hamoun Oasis’ [2002] 13 *Earth Observatory* <https://earthobservatory.nasa.gov/features/hamoun>. The only water body in 2001 remained in Delta is the Chahnimeh reservoir which play key role to provide limited drinking water, while the reports confirmed that the gates of the Kajaki Dam in Afghanistan were closed at the time. Floods which play significant role in such unique freshwater ecosystem located in a closed basin later help partially restore the Hamouns, however, the environmental sustainability has yet remained vulnerable.

sought to serve their own interest and create their own identities as national entities. The long intermittent disputes over utilisation of the water resources of the Helmand River between Afghanistan and Iran dates back to the 1870s when the border was delineated by the British.⁶³⁷ Disputes over the Helmand waters have been heightened in periods of drought (and flood). Table 3 highlights how droughts (either caused by nature or human activities) have also played a crucial role in the history of conflict and cooperation in the Helmand River. Such events have driven legal and political interactions between the countries and influenced the states towards different (collective) behaviours and decision-making.

Studies of the hydropolitical relations over the Helmand River between Afghanistan and Iran still suffer from a lack of critical analysis of the cooperative effort, the role of the HRC, and the effects of the broader geopolitical factors. With the latest positive news about the possible improvement of the cooperative management of the basin between Afghanistan and Iran, it is necessary to shed light on the history of hydropolitical relations between the two countries in order to not only fill the gap in analysis but also provide a better picture of the opportunities and challenges ahead.

⁶³⁷ Pirouz Mojtahed-Zadeh, *Boundary Politics and International Boundaries of Iran: A Study of the Origin, Evolution, and Implications of the Boundaries of Modern Iran with Its I* (Universal-Publishers 2007). See also Pirouz Mojtahed-Zadeh, *The Small Players of the Great Game: The Settlement of Iran's Eastern Borderlands and the Creation of Afghanistan* (Routledge 2004).

Political event in Iran	Legal arrangement over the Helmand River and the Main reservoirs	Political event in Afghanistan
	1872 British Goldsmid Arbitration	
	1878-80	2nd Anglo-Afghan War
	1905 British McMahon Arbitration	
	1919	Afghanistan's independence from British influence
	1939 Bilateral water division Agreement	
The Anglo-Russian occupation of Iran after World War II	1941	
Parliament votes to nationalise the oil, which is owned by the British	1951 US proposed-Delta Commission	
The British- US coup against PM Mossadeq	1952-3 Opening Kajaki & Dahla Dams	General Daud prime minister turns to USSR: Introduces social reforms
Shah's "White Revolution": land reform and socio-economic modernisation	1963	
	1973 Helmand River Water Treaty	Daud seizes power in a coup: declaring a republic and trying to play off USSR against Western powers
	1978	General Daud is killed in a pro-Soviet coup faces US-backed oppositions
The Islamic Republic of Iran is proclaimed following a referendum	1979	USSR invasion of Afghanistan
Iraq's invasion of Iran	1980	
	1982 Opening Chahnimeh reservoirs	
Iran accepts a ceasefire agreement with Iraq	1988	Afghanistan, USSR, US and Pakistan sign peace accords: pulling out USSR
	1996	Taliban seize control of Kabul
	2001	US-led invasion of Afghanistan
	2004 1st Helmand River Commission	Presidential elections: Hamid Karzai is declared winner
US issues new sanctions against Iran, the toughest in 30 years	2007-8	US President Bush sends an extra 4,500 US troops to Afghanistan
	2009	US President Obama sends an extra 4,000 US personnel
World powers reach deal (JCPOA) with Iran on Iranian nuclear activity	2015	
While some sanctions are waived as part of JCPOA, new sanctions are imposed by US	2016	Taliban advance to the outskirts of Lashkar Gah, the capital of Helmand
Re-introducing new sanctions by US	2017 Afghanistan-Iran negotiation for "Comprehensive Strategic Partnership"	US President Trump says he is sending more troops to fight Taliban
US withdraws from JCPOA, while instituting the "highest level" of sanctions	2018	US-Russia dominate competition to influence Afghanistan within negotiation with Taliban
	2019 19 th & 20 th Helmand River Commission	
US assassination of a top Iranian military commander	2020 21 st Helmand River Commission & Kamal Khan Dam ready for opening	More terrorist attacks while US and Taliban sign deal

Table 3. Legal evolutions and infrastructure development in the Helmand River Basin within the main political events⁶³⁸

⁶³⁸ Additional events to be taken into consideration include 1828: Iran's loss of Caucasus to Russia; 1857: Treaty of Paris: Iran's loss of Herat to Great Britain; 1926: crowned Reza Shah Pahlavi; 1933: Zahir Shah becomes king; Major droughts as key drivers in legal and political interactions: 1871; 1902; 1939-40, 1946-7, 1950-1, 1960, 1970-1, 1999-2000-1, 2003-4, and 2007. See Mohsen Nagheebiy 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 2020).

One significant point here is that despite the fact that conflict over the Helmand River has often hit the headlines in media reports and research, relations between Afghanistan and Iran over water issues have been marked by the coexistence of conflict and cooperation, and more often in a cooperative manner. Therefore, regarding the “threats” to the Afghanistan-Iran relations and “escalation of conflict” such alarming reports, arguably as will be shown here, may not accurately reflect the complexity of the political dynamics of the basin. Considering the long history, conflictive events over the Helmand River have often occurred in limited periods of drought and only escalated on a few short occasions in the past 150 years. While conflict has existed in that time, it has often been *controlled* by both sides in a kind of cooperative approach. The reasons for this pattern, as will be elaborated in Section 6.6, may lie in the anarchic geopolitical complexity of the basin. However, as discussed in Chapter 4, not all cooperation is good, while disputes may even lead to improving the arrangement towards equity.⁶³⁹ As we will see here, cooperation over the Helmand River has even resulted in a legal treaty not being effective, leaving the underlying disagreement unresolved. The water conflict, in part, may arguably be more rooted in the “damaged identity” of Afghanistan, which has suffered from a lengthy war and Western invasions. This section describes the history of conflictive and cooperative events concerning the Helmand River Basin, putting them ultimately into the TWINS matrix while discussing the mindset and dominant strategies of the riparian states.

6.4.1. Imperialism and the seeds of conflict: securitising water

There is still a general strong belief that many of the fundamental crises and conflicts in most parts of the world are rooted in the colonial past, being “still in the empire’s shadow”.⁶⁴⁰ Afghanistan which was the buffer state for the British Empire who ruled much of South Asia is one such example.⁶⁴¹ The first arrangements regarding water between Afghanistan and Iran were initiated due to imperialist rivalry over sovereignty and territorial boundaries in the late 19th century. By the end of the Anglo-Persian War (1856-7) and under the rivalry of the Great Game between England and Russia,⁶⁴² the 1857 Treaty of Peace (the Paris Treaty) between Persia and Great Britain was signed. Accordingly, Persia was obliged to relinquish all claims over Herat by acknowledging the independence of Afghanistan

⁶³⁹ As discussed in chapter 4, conflict and cooperation may be understood differently by various actors. As explained by Mark Zeitoun, for instance, the “cooperation versus conflict paradox” is evidenced in the case of the Jordan River Basin. See Mark Zeitoun, ‘Violations, Opportunities and Power Along the Jordan River: Security Studies Theory Applied to Water Conflict’ in *Water Resources in the Middle East* (Springer 2007).

⁶⁴⁰ Roger Hardy, *The Poisoned Well: Empire and Its Legacy in the Middle East* (Oxford University Press 2016); See also Roger Hardy, ‘The Middle East: still in empire’s shadow’ *THE IRISH TIMES* (16 August 2016) <https://www.irishtimes.com/culture/books/the-middle-east-still-in-empire-s-shadow-1.2758098> accessed 20 January 2021.

⁶⁴¹ Nagheebby and Warner (n 327).

⁶⁴² See, for more information, Mansoureh Ebrahimi and Yusoff Kamaruzaman, ‘On Iran’s Eastern Borders: Origins and Consecutive Treaties with the British During the Nineteenth Century’ in Mansoureh Ebrahimi, Masoumeh Rad Goudarzi and Yusoff Kamaruzaman (eds), *The Dynamics of Iranian Borders* (Springer 2019).

under British suzerainty, and Britain agreed to serve as arbiter to resolve disputes between Persia and Afghanistan “in a manner just and honourable to Persia”.⁶⁴³ As a result, in 1872,⁶⁴⁴ British officer, General Sir Frederick. Goldsmid⁶⁴⁵ – on behalf of Britain,⁶⁴⁶ was responsible for arbitrating between Iran and Afghanistan about their dispute over the delimitation of the boundary in Sistan. In this regard, the main branch of the Helmand River in the delta region was defined as the border, with the principle 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.⁶⁴⁷ The problem with Goldsmid's boundary award was the lack of any decision or recommendation about a mechanism for water division between the two new divided sides. In fact, he contented himself with only offering general advice that: “*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*”.⁶⁴⁸ Moreover, he also did not consider the natural impacts of changes in river morphology and accordingly their influences on the political border.

While the question of the allocation of water remained unanswered, the disputes over the Helmand waters in the delta were apparently settled locally without intervention from central authority for thirty years,⁶⁴⁹ and local residents, Afghans and Iranians, worked together using the same water in a cooperative manner. However, further disputes occurred in 1896 between the two countries, mainly because the river changed its course in the border area as a result of flooding, and subsequently a severe drought occurred.⁶⁵⁰ British arbitration once again assigned Colonel Sir Henry McMahon in 1903 to demarcate new boundaries and determine the water rights.⁶⁵¹ Concerning the water allocation between

⁶⁴³ The 1857 Paris treaty (Treaty of Peace) quoted by Mojtahed-Zadeh ‘Boundary Politics and International Boundaries of Iran’ (n 637) p. 180.

⁶⁴⁴ Note that the first and second Anglo-Afghan wars between the British Empire and the Emirate of Afghanistan were from 1839 to 1842 and from 1878 to 1880. Ebrahimi and Kamaruzaman (n 642).

⁶⁴⁵ In some sources, it is mentioned as Goldsmith.

⁶⁴⁶ Based on the 1857 Treaty of Peace between Britain and Persia.

⁶⁴⁷ Mojtahed-Zadeh ‘Boundary Politics and International Boundaries of Iran’ (n 637).

⁶⁴⁸ Mojtahed-Zadeh ‘Boundary Politics and International Boundaries of Iran’ (n 637); For its extensive historical sources concerning the Helmand River Basin controversy, see Oregon Digital at <https://oregondigital.org/catalog?>.

⁶⁴⁹ See, for extensive discussion, Pirouz Mojtahed-Zadeh, ‘Hydropolitics of Hirmand and Hamun’ in Pirouz Mojtahed-Zadeh (ed), *Boundary Politics and International Boundaries of Iran* (Universal Publishers 2006).

⁶⁵⁰ Mojtahed-Zadeh, ‘Hydropolitics of Hirmand and Hamun’ (n 649); See also Mohammad Reza Hafeznia, Pirouz Mojtahedzadeh and Jafar Alizadeh, ‘Hirmand Hydropolitic and Its Effect on the Political Relations of Iran and Afghanistan’ [2006] 10 *The Journal of Spatial Planning* 83; and CIA (n 831).

⁶⁵¹ In this regard, Mojtahed-Zadeh point out that “[t]he original problem was that rulers of the British protectorate of Afghanistan at the turn of the twentieth century considered river Hirmand as an internal river of that country, reserving for Afghanistan the right to utilise 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,*

the two sides, it is said that he first ruled that the Helmand water should be divided *equally* between the two parties in the border area (in 1903-04).⁶⁵² However, in 1905, McMahon decided to allocate two-thirds of the Helmand water in the delta to Afghanistan and one-third to Iran.⁶⁵³ In addition, the Hamouns' water demand was neglected in his arbitration (perhaps environment was not an *issue* at the time).⁶⁵⁴

While the reasons for this change in his decision are not clear from the literature, the arbitration could potentially be questioned since the Iranian side at that time was apparently wider, more fertile and more populous than the Afghan side – district of Nimrooz – even without taking into consideration the needs of the Hamoun wetlands themselves. The arbitration could be seen as a purposeful British tactic to keep the buffer state in their own control. While the Afghans were satisfied with the water award, public opinion from the other side regarding the arbitration was that it was an “unfair” award. In the summer of 1905, when the Helmand waters become significantly low, the opposition Iranian newspapers abroad and the Russian newspapers published letters of complaint from the people of Sistan against McMahon and the British for what they call the “conspiracy” against their water rights.⁶⁵⁵ In particular, the Russians expressed their concern and displeasure to the Iranian Crown Prince about the British arbitration concerning the water rights of the people of Sistan.⁶⁵⁶

Such political issues between the Russians and the British surrounding the Helmand waters could be considered in a bigger geopolitical picture of the region – the Great Game – which will be discussed later, and from this point of view, the unknown reasons behind the change in McMahon's decision may also be derived. While both parties accepted the decision, Iran rejected McMahon's arbitration on water allocation at the time.⁶⁵⁷ The interactions over the Helmand water in these periods may be considered as efforts to provide an *ad hoc* joint action; however, disagreements over water lay at the heart of disputes about land and territory, and any form of appeasement concerning water issues reflected concerns about the loss of sovereign control. Such imperial interventions in these disputes over water within the nature of the Great Game made a complex *securitisation* structure over the Helmand River

as their geographical position makes them sole owner of the whole Helmand above the Band-i-Sistan.” Mojtahed-Zadeh ‘Boundary Politics and International Boundaries of Iran’ (n 637) p. 247.

⁶⁵² Mojtahed-Zadeh ‘Boundary Politics and International Boundaries of Iran’ (n 637).

⁶⁵³ Mojtahed-Zadeh ‘Boundary Politics and International Boundaries of Iran’ (n 637).

⁶⁵⁴ Nagheeby and Rieu-Clarke (n 638).

⁶⁵⁵ Even local people in Sistan attacked the British arbitration headquarters followed by the Iranian government's request for fresh arbitration. See Mojtahed-Zadeh, ‘Hydropolitics of Hirmand and Hamun’ (n 649).

⁶⁵⁶ Mojtahed-Zadeh, ‘Hydropolitics of Hirmand and Hamun’ (n 649).

⁶⁵⁷ Mojtahed-Zadeh, ‘Hydropolitics of Hirmand and Hamun’ (n 649).

in which the matter presented as a threat to the national security of Afghanistan and Iran, requiring urgent action outside the normal political domain (TWINS Sequence 1 in Figure 16).

However, while the question of water division remained officially unsettled, once again there was apparently slightly more cooperation at local level or lack of serious disagreement at state level for almost a further thirty years over the utilisation of the Helmand water. From 1905 to 1930, an annual joint commission of primarily academics, appointed by the two countries, cooperated in jointly measuring and allocating the Helmand water at Band-e Kamal Khan.⁶⁵⁸

6.4.2. Post-colonialism, nationalism, and politicising water

In January 1949, President Harry S. Truman “hit the jackpot of the world’s political emotions” when he proposed a “bold new program... for the improvement... of under-development areas”.⁶⁵⁹ Shifting from the colonial era to the post-colonial era, development and modernisation, as new concepts, became the heart of the new policies of global powers in “new independent states”.⁶⁶⁰ This thinking persuaded the leaders of these newly independent countries to “modernise” and “nationalise” their governmental policies. Development was not simply the best but rather the almost unavoidable option; “there is only one-way traffic in time,” as Jawaharlal Nehru of India observed.⁶⁶¹ Such development and modernity often manifested in dam projects, land reforms and planned cities.⁶⁶² In this regard, a large-scale water project like the development of a dam was recognised “as a child of colonialism,” or a way to reshape and reform the colonised states to control space, water and people and centralise the power.⁶⁶³ This potential to rule people resulted in competition among the different stakeholders of a river to achieve the “hydraulic mission,” with which they can rule the other actors, providing political and geopolitical opportunity for the owners.⁶⁶⁴ Afghanistan and Iran’s leaders at the time were also persuaded to accept such offered development plans as a means of creating and promoting national identity.⁶⁶⁵

In the 1930s, the relationship between Iran and Afghanistan became friendly through the newly centralised government of Reza Shah Pahlavi in Iran and the government of Mohammad Nader Shah and then Mohammad Zahir Shah in Afghanistan. This friendship was apparent in the *commissive* speech

⁶⁵⁸ See CIA (n 831).

⁶⁵⁹ Nick Cullather, ‘Damming Afghanistan: Modernization in a Buffer State’ [2002] 89 *The Journal of American History* 512 p. 513.

⁶⁶⁰ Cullather (n 659) p. 513.

⁶⁶¹ Cullather (n 659) p. 513.

⁶⁶² Cullather (n 659) p. 513.

⁶⁶³ Cullather (n 659) p. 513; See also François Molle, Peter P Mollinga and Philippus Wester, ‘Hydraulic Bureaucracies and the Hydraulic Mission: Flows of Water, Flows of Power’ [2009] 2 *Water alternatives* 328.

⁶⁶⁴ Nagheeby and Warner (n 327).

⁶⁶⁵ Nagheeby and Warner (n 327); See also Cullather ‘From New Deal to New Frontier in Afghanistan’ (n 82).

act of Mohammad Nader Shah regarding a land, dispute stating that “I would leave the decision up to the opinion of His Highness Reza Shah”.⁶⁶⁶ Such a speech of act may be understood as an attempt by both sides to normalise relations. This normalisation resulted in bilateral cooperation in trade and consular relations on several occasions. Amid this promotion of relations, the development upstream caused a shortage of water and thus local protests downstream, resulting in prioritising water issues in bilateral political discussions.⁶⁶⁷ Accordingly, attempts to achieve mutual consensus over the settlement of the Helmand water disputes triggered by such above speech acts from both sides resulted in the conclusion of the 1939 treaty.⁶⁶⁸ Article I of this treaty recognised that “*the governments of Iran and Afghanistan agree to divide in equal shares all waters of the Helmand river which reaches to Band-e Kamal Khan (30 miles from the border inside Afghan territory) between Iran and Afghanistan*”.⁶⁶⁹ The water issues, therefore, took on a *politicised* nature, associated with commissive speech act followed by *ad hoc* joint action (TWINS Sequence 2 in Figure 16).

Despite several rounds of *bilateral* negotiation amid the newly established relations between the two states, the 1939 bilateral treaty also failed to put an end to the disputes, mainly because not all Afghans would consent, though there was significant improvement on McMahon’s water award from the Iranian point of view. It could not create a shared goal or a shared vision between Afghanistan and Iran concerning the utilisation of the Helmand waters, leaving unilateral and fragmented management of the basin. Signing the 1939 treaty was also overshadowed by the political swings in Iran during World War II, which resulted in Reza Shah being exiled in 1941 by the British and the Russians. Accordingly, the disputes were revived again, particularly after the US-funded Helmand-Arghandab Valley Authority (HAVA).⁶⁷⁰ The US pursued a similar geopolitical goal as the British within the “new Great Game” to maintain Afghanistan as a buffer state though with a different strategy of making it a “development” model for the whole world.⁶⁷¹ The Americans’ project in the Helmand River included the construction of diversion dams and canals on the river as a result of contracts they concluded with the Afghans in 1945.⁶⁷²

⁶⁶⁶ Arfa Hassan, ‘Under Five Shahs’ [1964] New York: William (Translated in Farsi by Ahmad Navab Safavi [1377] p. 284).

⁶⁶⁷ Mojtahed-Zadeh, ‘Hydropolitics of Hirmand and Hamun’ (n 649).

⁶⁶⁸ Mojtahed-Zadeh, ‘Hydropolitics of Hirmand and Hamun’ (n 649).

⁶⁶⁹ Mojtahed-Zadeh, ‘Hydropolitics of Hirmand and Hamun’ (n 649) p. 249.

⁶⁷⁰ For more information about HAVA see Ghulam Farouq, ‘The Effects of Local, Regional and Global Politics on the Development of the Helmand-Arghandab Valley of Afghanistan’ (School of Oriental and African Studies (University of London) 1999).

⁶⁷¹ Nagheeby and Warner (n 327).

⁶⁷² Farouq (n 670). However, there are many issues and doubts concerning these projects pointed out in some research in terms of not only technical and economic perspectives but also environmental effects like waterlogging and salinization. See, for instance, Whitney (n 619).

Two major dams associated with HAVA to control flows were enough to cause great uproar in downstream Iran: the Dahla Dam on the Arghandab River (located north of the city of Kandahar, the largest river branch of the Helmand River) with a storage capacity of 478.6 MCM, and the Kajaki Dam on the Helmand River with a storage capacity of 1.7 BCM, over three times greater than the Dahla. These were finally inaugurated in 1952 and 1953, respectively.⁶⁷³ Iran opposed the HAVA project, fearing its negative impact, i.e. a decline in the natural flow of the river to the downstream, although the project was supposed to provide Afghanistan hydroelectric power and increase agricultural productivity.⁶⁷⁴ Despite the development projects still being in the initial stage, the low water flow in 1946 and subsequently a long drought in Sistan in the summer of 1947 were believed by the local population to be a result of the construction activities on these American dams and canals in Afghanistan, reported by the British Consul General of Mashhad as follows:

From Zabol a report has been received that no water from the Helmand has reached the town for a month and that outlying villages have been without it for some three months. The drought-stricken population will not believe that failure of last winter's snow is the reason and they have expressed their intent of crossing into Afghanistan and forcibly release the water on which they depend and which they are convinced the Afghans are illegally stealing or diverting by their new American engineered irrigation scheme in the neighbourhood of Girishk.⁶⁷⁵

Following these events, Iran, whose national security was considered to be being threatened, decided to call on the United Nations Security Council to step into the water disputes with Afghanistan. However, finally, encouraged by the US, Iran renounced its decision.⁶⁷⁶ At this time the US offered to mediate the Afghanistan-Iran water dispute over the renewed *securitised* Helmand River.⁶⁷⁷ However, the validity of the mediation by the US could arguably be considered a conflict of interest, because one American interest was to support their interference by building dams and canals for the HAVA project for the Afghan government via an American company, Morrison-Knudson.

The American proposal was based on the creation of a “neutral” commission of international experts from “disinterested countries” to study technical aspects of the problem concerning water allocation,

⁶⁷³ Whitney (n 619).

⁶⁷⁴ Mojtahed-Zadeh, ‘Hydropolitics of Hirmand and Hamun’ (n 649).

⁶⁷⁵ Mojtahed-Zadeh, ‘Hydropolitics of Hirmand and Hamun’ (n 649) p. 249.

⁶⁷⁶ GR Fakhari, ‘Dispute between Iran and Afghanistan on the Issue of Hirmand River’ [1993] Book, 73pages, published in Kabul.

⁶⁷⁷ One American interest was the fact that an American company Morrison-Knudson had been hired by the Afghan government to build dams and canals of the HAVA project, and therefore, American interest might be threatened by such disputes. See CIA (n 831).

with the aim of establishing an engineering basis for mutual agreement.⁶⁷⁸ Therefore, after several fruitless attempts to resolve the disputes, either by British arbitration or bilateral treaty, Iran and Afghanistan created the Helmand River Delta Commission in 1948 based on an American proposal. Focusing primarily on joint fact-finding, it presented its recommendation for water allocation between the two countries in 1951.⁶⁷⁹ The commission took the same position as McMahon, arguing that the core problem in the delta was actually due to “poorly constructed irrigation canals and unscientific diversion of available water”.⁶⁸⁰ In addition, following the same approach, the commission’s representatives estimated water demands at the time merely for irrigation, livestock and human domestic use, without addressing the environmental requirements of the Hamoun wetlands (perhaps again it was not yet an *issue* at that time). While Afghanistan expressed its satisfaction almost immediately after the commission published its report, Iran rejected the results. The Iranian rejection was mainly based on the disagreement and different views on the estimation of the irrigation lands in Sistan, in a similar argument to that made against McMahon’s award.

Thirty years after the failed 1939 bilateral treaty, negotiations between Afghanistan and Iran still continued, despite experiencing ups and downs due to international political competition between the West and East. During all these years, while the water allocation problem had not been officially settled between Afghanistan and Iran, it is not clear from the literature whether the local people cooperated with each other. The fact is that most of that time the problem of water division did not cause serious conflict (except perhaps in extreme events of drought or flood), due to the willingness of both states to cooperate and improve their relations.⁶⁸¹ After several rounds of negotiations, and despite Iran’s initial rejection of the commission’s report, and once again following a period of severe drought in the downstream part of the river in 1970-1, the two countries signed the Helmand River Water Treaty in 1973.⁶⁸² The agreement centered on previous recommendations that were initially rejected by Iran—namely to 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. This is

⁶⁷⁸ CIA (n 831).

⁶⁷⁹ For an extensive legal and political history of the Helmand River Basin, see Mojtahed-Zadeh, ‘Hydropolitics of Hirmand and Hamun’ (n 649). See also AHH Abidi, ‘Irano-Afghan Dispute over the Helmand Waters’ [1977] 16 *International Studies* 357.

⁶⁸⁰ CIA (n 831) p. 7.

⁶⁸¹ It is also said that there had been some negotiation to make a “package deal” between Afghanistan and Iran for sharing the benefits over water, energy and the Iranian port of Chahbahar. CIA (n 831) p. 11. See also the diaries of Asadollah Alam, the Shah’s minister of court, in 1969 where he notes that Afghanistan was offered to have better access to the Iranian ports at Chabahar and Bandar Abbas along with development assistance instead of providing more water to Iran. See Alam ‘Yad’ dashtha-ye Alam’ (n 690).

⁶⁸² The 1973 Treaty contained twelve Articles along with two protocols related to Articles VIII and IX. Article I(c) identifies a “normal water year”: the year during which the total volume of water from the first of October to the end of the succeeding September, measured and calculated at the hydrometric station of Dehrawud, upstream of Kajakai Dam is 5661.71 MCM. See Annex I.

about 820 MCM per year or only 8.5 percent of the average surface water availability of 9,552 MCM in the whole basin; or 14 percent of 5,661.71 MCM measured at nearby Kajaki Dam, and less than 14 percent of the overall water demand and requirement in Sistan; less water than any of the previous legal arrangements (see Table 4).⁶⁸³ This highly asymmetric water allocation has been one of the major sources of contention up to now with Iran complaining that this amount of water cannot meet the domestic and agricultural needs of one of its poorest areas, as well as the ecological demand of the wetlands. Yet, Afghanistan, itself struggling with poverty and poor living conditions, has repeatedly stated that it crucially needs the same water resources for its socio-economic development particularly for economic recovery after civil war.

Table 4. Water allocation in the Helmand River between Afghanistan and Iran over time*

Name of arrangement	Date	Water allocation (%)	
		Afghanistan	Iran
Goldsmid Arbitration	1872	50	50
McMahon Arbitration	1905	66.7	33.3
Bilateral agreement on Helmand Water Division	1939	50	50
Delta Commission	1951	87.7	12.3
Helmand River Water Treaty	1973	85.5	14.5

* Note that the three first water division are based on water availability at the point of Kamal Khan Dam while the two last ones are at the Kajaki Dam.

In order to address the conflicts over the waters of the Helmand and to implement the provisions of the treaty, Article VIII directs each party to appoint a commissioner and deputy commissioner. The first protocol to the treaty sets out the commissioners' authority and functions.

The signing of the treaty in 1973 (see Figure 15) was widely promoted by the officials of both countries once again through *commissive* speech acts. The Afghan prime minister, Mohammad Musa Shafiq, for instance, stated that the treaty "will solve the Helmand problem" and that "another 100 years of the two nations are [not] wasted on finding a solution for this difficulty." Similarly, the Iranian prime minister, Amir Abbas Hoveyda, pointed out that, "there is no longer any question mark in relations between the two countries."⁶⁸⁴

⁶⁸³ Thomas and Varzi (n 624). See also Hamidreza Hajihosseini and others, 'Hydrological Assessment of the 1973 Treaty on the Transboundary Helmand River, Using the Swat Model and a Global Climate Database' [2016] 30 Water resources management 4681.

⁶⁸⁴ Abidi 'Irano-Afghan Dispute over the Helmand Waters' (n 679) p. 372.



Figure 15. Left: signing the 1973 Helmand River Water Treaty; Right: Covering the respective news by main national media newspaper⁶⁸⁵

However, enthusiasm by the riparian states for the treaty quickly faltered, experiencing an exchange of *assertive* and *directive* speech acts, and did not enter into force until June 1977, when the instruments of ratification were exchanged.⁶⁸⁶ It is strongly claimed by some Afghans that the Helmand River is a “national” and “internal” river flowing in Afghanistan’s sovereignty,⁶⁸⁷ thus the delay in ratification could be explained by the discontent of the Afghan government and parliament, which perceived Afghanistan as acting as a “water dealer,”⁶⁸⁸ and “resented “giving away” what they regarded as precious Afghan water.”⁶⁸⁹ There was also disdain for the treaty by some Iranians who accused their signatory of being a “traitor.”⁶⁹⁰ Iranian views (which still exist) were shaped by the idea that the 1973 treaty emerged from “hidden” talks and was a “gift” from the Shah and Americans to the Afghans to stand against the (Russian) communists.⁶⁹¹ This is not surprising that a headline appears just next to the photo of US-backed signing the 1973 Helmand treaty: “Kosygin [the former Premier of the Soviet Union] arrives in Tehran” (Figure 15). Such superpowers’ footprint will be more elaborated in Part III.

Coming from such a *securitised* nature of water issues overshadowed by the “new” Great Game in the 1950s-1970s, the 1973 treaty was unable to address/create common norms or equity of benefit sharing in the whole basin, and was limited at best to controlling the conflict again through *ad hoc* joint actions

⁶⁸⁵ The Institute for Iranian Contemporary Historical Studies (IICHS) at <http://www.iichs.ir>.

⁶⁸⁶ Abidi ‘Irano-Afghan Dispute over the Helmand Waters’ (n 679).

⁶⁸⁷ See note (n 651).

⁶⁸⁸ Mahmoudi ‘Historical Events after the Signing’ (n 616).

⁶⁸⁹ CIA, *Iran-Afghanistan: Helmand River Dispute Still Sensitive* (The Central Intelligence Agency, CIA Library 1981) declassified report by the US Central Intelligence Agency, “sanitised copy,” approved for release 6 September 2012, doc. no. CIA-RDP08C01297R000100130002-7, 16 December 1981, 1 <https://www.cia.gov/library/readingroom/docs/CIA-RDP08C01297R000100130002-7.pdf>.

⁶⁹⁰ Quoted in Asadollah Alam, *Yad’dashtha-Ye Alam: Virayesh Va Muqaddamah Az Alinaqi Alikhani* (ML: Ibex Publishers 1992) pp.480-1; Or in Asad Allāh ‘Alam, *The Shah and I: The Confidential Diary of Iran’s Royal Court, 1969-1977* (IB Tauris 1991). Asadollah Alam, the former Iranian prime minister and the minister of the Royal Court at the time, shouted at signatories for being “cowards” and “betrayers”.

⁶⁹¹ See Alam ‘Yad’dashtha-ye Alam’ (n 690).

(TWINS Sequence 3 in Figure 16). Maintaining this *status quo* to retain the chaos, as is argued later in Part III may represent the geopolitical complexity of the basin which serves the interests of superpowers.⁶⁹² The treaty remained in abeyance and neither official cooperation between the countries on water related issues nor serious conflict took place for some 20 years due to: 1) the great political upheaval in Afghanistan as a result of the Soviet invasion in 1979, the subsequent civil war, and the US-led invasion of 2001; and 2) the Iranian revolution of 1978-1979, and the subsequent war that Iraq waged against Iran from 1980 to 1988, initiated by the Western-backed Saddam Hussein. Again, during all these years, the water issues between Afghanistan and Iran were apparently abandoned by both sides, leading perhaps to a mix of cooperation and conflict at the local level.

6.4.3. Civil war in Afghanistan, domestic anarchy, and moving back to water securitisation

In 1996 the Taliban seized control of Kabul for five years. Several factors led the water issues in the Helmand River to the highest and most serious level of tension it had ever experienced. First, the relationship between Iran and the Taliban was hostile for a period after the Taliban attacked the Hazara Shi'as in Afghanistan and deteriorated further in 1998 after they killed many Hazaras in Mazar-i-Sharif, the northern Afghan city, and murdered Iranian diplomats and a journalist in the captured Consulate General of Iran.⁶⁹³ Second, there was a long period of extreme drought in the whole region between 1999 and 2001,⁶⁹⁴ during which there was a 98% reduction in water flow to Iran and the whole Hamoun wetlands completely dried up which was associated with a massive displacement from Sistan.⁶⁹⁵ The Taliban was accused of closing the gates of the Kajaki and Dahla dams to put Iran under pressure within the growing political tensions.⁶⁹⁶ Iran, in response, tried to solve the issue using international and regional political channels. Surprisingly, under such apparently insoluble conflict, Iranian efforts resulted in a joint inspection committee of experts from both sides being created to visit the Kajaki dam in July 2000. The joint inspection team viewed the dam with "a considerable amount of water in its reservoir" (1000 MCM water storage at the time), and found that "the main cause of the water blockage was the closure of the gates at the Kajaki dam".⁶⁹⁷ This resulted in Iran sending an official complaint to

⁶⁹² See Nagheeby and Warner (n 327).

⁶⁹³ Mohsen M Milani, 'Iran's Policy Towards Afghanistan' [2006] 60 *The Middle East Journal* 235.

⁶⁹⁴ See, for instance, Kai Wegerich, 'Natural Drought or Human Made Water Scarcity in Uzbekistan' [2002] 2 *Central Asia and the Caucasus* 154.

⁶⁹⁵ UNCT Iran, *Un Inter-Agency Assessment Report on the Extreme Drought in the Islamic Republic of Iran* (2001) <https://reliefweb.int/report/iran-islamic-republic/un-inter-agency-assessment-report-extreme-drought-islamic-republic-iran>.

⁶⁹⁶ Mohammad Reza Hafeznia, Pirouz Mojtahedzadeh and Jafar Alizadeh, 'Hirmand Hydropolitic and Its Effect on the Political Relations of Iran and Afghanistan' [2006] 10 *The Journal of Spatial Planning* 83.

⁶⁹⁷ Letter dated 26 March 2001 from the Permanent Representative of the Islamic Republic of Iran to the United Nations addressed to the Secretary-General, 'The situation in Afghanistan and its implications for international peace and security Environment and sustainable development: water supply and sanitation' A/55/855–

the United Nations in March 2001 about Afghanistan's "blockage of water flow in the Hirmand River, causing irreparable damage to the agriculture and animal husbandry in the Sistan region and the Ham[o]un wetlands in the Islamic Republic of Iran."⁶⁹⁸ The water shortage continued while the second round of joint inspections occurred in early September 2002 – following the US invasion of Afghanistan and during the Transitional Islamic State of Afghanistan and after Iran's President Muhammad Khatami's official visit to Afghanistan – with the same conclusion, followed by Iran's letter to the United Nations in December 2002 asking Afghanistan to comply with the 1973 treaty on the Helmand river.⁶⁹⁹ Therefore, this period once again highlighted the high *securitisation* of water issues that required necessary action out of the realm of normal politics while cooperation only remained *ad hoc* (TWINS Sequence 4 in Figure 16).

6.4.4. Hopes for new era of progressive cooperation: yet lack of shared understanding

Following the period of drought and civil war in Afghanistan, and after the collapse of the Taliban, in the newly progressive atmosphere of friendly relations between Iran and the new Afghan government, the countries held the first meeting of the Joint Committee of Commissioners⁷⁰⁰ (of the HRC) in Tehran in August 2004. These efforts may be seen as a willingness of the two states to scale back the hydropolitical relations from a securitised level which resulted in the beginning of formal cooperation through *ad hoc* actions based on the inherited 1973 treaty (TWINS Sequence 5 in Figure 16). However, triggered by specific incidents e.g., shortage of water and unilateral upstream water development plans, the Helmand River Basin has experienced the same continual fluctuations between politicised and securitised movement, apparently stuck in an endless loop up to now.

Despite reaching an impasse and even the possibility of dissolving the HRC several times, subsequent meetings of the HRC often continued at a rate of around two per year. To date (at the time of writing

S/2001/273 (26 March 2001) <https://digitallibrary.un.org/record/436057?ln=en> p. 2. It also notes that "the flow of water at the hydrometric station at Dehrawud was 46.8 cubic metres per second and that the Kajaki dam had 1 billion cubic metres of water in reserve."

⁶⁹⁸ Letter dated 12 December 2002 from the Permanent Representative of the Islamic Republic of Iran to the United Nations addressed to the Secretary-General, 'Environment and sustainable development' A/57/644–S/2002/1364 (13 December 2002) <https://digitallibrary.un.org/record/481606?ln=ru>. However, "However, a UN investigation found the drought to be the main cause, as the Helmand River was flowing at only 2 per cent of its annual average. In 2002 UNEP was informed that the lower reaches of the Helmand had experienced significant flows for 40 days in spring 2002. However, accusations have been made by local Afghan farmers that none of this water got past the Chanimeh diversion, leading to significant water shortages north of Zaranj, including in the Sistan basin. Nevertheless, Iran has again accused Afghanistan of not honouring the water-sharing agreement. In a gesture of goodwill, waters were released from the Kajaki dam on 25 October 2002. However, the flow stopped ten days later. High-level discussions to resolve the dispute are ongoing between the two countries." UNEP 'Post-Conflict' (n 626) p. 58.

⁶⁹⁹ See n 698.

⁷⁰⁰ Under Article 7 of Protocol No. 1 of the 1973 treaty, the Afghan and Iranian commissioners constitute the "Joint Committee of Water Commissioners." See Annex I.

this thesis), 22 meetings of the HRC have been held in either Iran or Afghanistan. Iranian and Afghan commissaries held their twentieth and twenty first meetings in Kabul and Tehran from 11-12 June 2019 and 17-18 November 2019, respectively, during which there were calls to expand mutual water cooperation to better implement the treaty. The HRC's administrative structure was changed at its nineteenth meeting (5-8 January 2019) by affording the commissioners the higher diplomatic level of deputy ministers; this change may be seen as another attempt to strengthen the role and influence of the HRC.⁷⁰¹ The latest negotiations of the twenty first meeting took progressive steps by mutual agreement to carry out a joint study to determine the places for delivering Iran's water rights,⁷⁰² followed by an agreement on 5 February 2020 to conduct a joint geological survey from the Helmand river in the border area.⁷⁰³ Such progress might seem small, however considering the stiff hydropolitical pattern within its anarchic nature, which will be discussed later, it is actually impressive.

Surprisingly, while there has been very little progress in water relations, cooperation in other issues, especially trade and economic areas, have seen significant growth in parallel to the hydropolitical relations. Following the 2013 signing of a Memorandum of Understanding (MoU) during the time of Afghan President Hamid Karzai, the two states have been engaged in a series of negotiations to conclude a major bilateral strategic cooperation agreement to expand their "cooperation on issues of counter-terrorism, drugs, refugees, economic links and transit trade".⁷⁰⁴ This trend has continued and January 2016 was significant for hydropolitical relations between Iran and Afghanistan, at least on paper, as another MoU was signed between the two countries emphasising the boosting of cooperation in several areas. These included not only trade, transportation, education, health, culture, refugees, and security (which were all aspects of support, help and investment by Iran to Afghanistan) but also, and very importantly for Iran, cooperation over water and environmental conservation. Although the "no-harm" principle was finally removed by Afghanistan from the MoU, which could also be seen as part of the ongoing *battle for legitimacy*, it was seen by the Iranians as very important progress because they were finally able to persuade Afghanistan to agree to at least mentioning and signing water and environmental cooperation on paper. By providing such an incentives package, Iran hoped to improve the cooperation over the Helmand River, particularly to guarantee the Hamouns' water demand beyond the Helmand River Water Treaty. However, Afghanistan views all these incentives as "nothing" v.s. what they

⁷⁰¹ Fars News Agency, 'Tehran, Kabul to Expand Energy, Water Cooperation' *Fars News Agency* (7 January 2019) <http://en.farsnews.com/newstext.aspx?nn=13971017000553>.

⁷⁰² IRNA, 'Tehran-Kabul Agreement on the delivery of Iran's water right' *IRNA* (20 Nov. 2019) <https://www.irna.ir/news/83562735> accessed 21 January 2021.

⁷⁰³ IRNA, 'Joint geological survey from the Helmand river begins after a bout half a century' *IRNA* (5 Feb. 2020) www.irna.ir/news/83661941/ accessed 21 January 2021.

⁷⁰⁴ Ankit Panda, 'Iran, Afghanistan Approach Strategic Cooperation Pact' *THE DIPLOMAT* (22 January 2015) <https://thediplomat.com/2015/01/iran-afghanistan-approach-strategic-cooperation-pact/>.

assume as “strategic resource” in the “water scared” region.⁷⁰⁵ In addition, Afghanistan’s view has been shaped by a belief that Iran, struggling with economic sanctions and seeking not to lose its influence, has no other option than to invest and develop its economic relations with Afghanistan.⁷⁰⁶ Equitable and reasonable utilisation was set out clearly, based on international law (though only for the Harirud River – another transboundary river between Afghanistan and Iran – and not the Helmand) and a joint technical study was assumed to be conducted to consider concerns about the ecosystem condition in the Helmand River Basin, emphasising the implementation of the Helmand River Water Treaty mentioned in the MoU. However, the situation has almost remained a zero-sum game in which Afghanistan has received almost all its incentives and Iran has received almost nothing when it comes to its two main *priorities* i.e. security, and cooperation on water and environmental protection.

Further progress in the relationship was followed by the signing of a trade corridor deal between Iran, India, and Afghanistan to turn the Iranian port of Chabahar into a transit hub which is strategically significant for all three states, particularly Afghanistan as a land-locked country.⁷⁰⁷ Finally, in 2017, and in parallel to a meeting of the HRC, higher-level negotiations between Iran and Afghanistan sought to establish a Comprehensive Strategic Partnership on several issues, including security and water, again with an emphasis on boosting economic cooperation between the countries.⁷⁰⁸ The respective negotiations continued just recently on a visit by Iran’s deputy foreign minister, Abbas Araghchi, to Afghanistan in July 2020 when he emphasised the need to sign a comprehensive document to find common ground for cooperation, and noted the Iranian proposal for conducting a joint study, either bilateral or with an independent international organisation,⁷⁰⁹ though it is not yet clear whether Afghanistan will accept it; at the same time, it seems there are some voices calling for “sanctioning cooperation with Iran on transboundary waters”.⁷¹⁰

⁷⁰⁵ For extensive field study about different actors’ view in Afghanistan about transboundary waters, see Thomas and others (n 615).

⁷⁰⁶ Thomas and others (n 615).

⁷⁰⁷ Al Jazeera, ‘Indian, Iran and Afghanistan sign trade corridor deal’ *Al Jazeera* (24 May 2016) <https://www.aljazeera.com/economy/2016/5/24/indian-iran-and-afghanistan-sign-trade-corridor-deal> accessed 21 January 2021.

⁷⁰⁸ Iran Press, ‘Iran, Afghanistan to Finalize a Comprehensive Cooperation Document’ *Iran Press* (6 January 2019) <http://iranpress.com/iran-i131310> accessed 21 January 2021.

⁷⁰⁹ Syed Zabiullah Langari, ‘Stability of Iran, Afghanistan 'Interconnected': Araghchi’ *TOLONews* (16 JULY 2020) <https://tolonews.com/afghanistan/stability-iran-afghanistan-interconnected-araghchi> accessed 21 January 2021; See also Tehran Times, ‘Iran-Afghanistan’s comprehensive document to be finalized in three months’ *Tehran Times* (17 July 2020) <https://www.tehrantimes.com/news/450125/Iran-Afghanistan-s-comprehensive-document-to-be-finalized-in> accessed 21 January 2021; Iran Press, ‘Tehran and Kabul to accelerate bilateral cooperation’ *Iran Press* (16 July 2020) <https://iranpress.com/content/24141> accessed 21 January 2021.

⁷¹⁰ See for another extensive field study for the analysis of institutional challenges faced by Afghanistan over transboundary water issues Idrees Malyar, ‘Transboundary Water Institutions in Developing Countries: A Case Study in Afghanistan’ (Oregon State University 2016). In this respect, Malyar points out that how, for instance,

In addition to bilateral collaboration on the implementation of the 1973 treaty and in particular Iran's effort to persuade Afghanistan for further cooperation, a number of international organisations particularly UNESCO, Ramsar Convention, UNDP, UNEP and GEF has sought to create an integrative regional/basin-wide plan for cooperation and management of the Helmand River.⁷¹¹ Such efforts have also been welcomed by Germany and the Netherlands who, in 2016, showed their interest in supporting and facilitating the establishment of a whole basin cooperation.⁷¹²

Although the HRC has a separate identity, these broader negotiations are assumed to provide hope as a catalyst to promote strategic collaboration between the countries over some related Helmand problems (and in general transboundary water issues between Afghanistan and Iran) and thus indirectly improve the HRC's performance. However, it is too early to assess the impact of such unfinalised negotiations and analyze how they might overcome impediments that emanate from new waves of anarchy in Afghanistan, such as the re-empowering of the Taliban and the rise of Daesh. While significant progress has occurred in other areas of cooperation e.g., trade, transit, energy and refugees, Iran's concerns relating to the possible decline of waters in delta and environmental degradation have yet remained high there due to the new unilateral water development and construction projects to divert the Helmand waters (and other rivers that irrigate the Hamouns e.g. the Farah River), expanding irrigation lands in the upstream, the continued growth of opium cultivation, with still no meaningful response from Afghanistan to even start a joint study.⁷¹³

the US halts Afghanistan to cooperate over water with Iran. Some Afghans also have very pessimistic view concerning water cooperation with Afghanistan's neighbours before building dams and finalising development project. See also Thomas and others (n 615).

⁷¹¹ See n 626. See also, among others, for instance, DoE and UNDP, *Towards a Solution for Iran's Drying Wetlands: International Technical Round Table on Drying Wetlands* (2014) https://www.ir.undp.org/content/iran/en/home/library/environment_sustainable_development/Towards-a-solution-for-Iran-drying-wetlands-Conclusions-and-Recommendations.html; UNDP, *Restoration and Sustainable Use of the Shared Sistan Basin: A Baseline Situation Analysis* (2005). The last report was produced in furtherance of a UNDP/GEF proposal to ensure the restoration and sustainable use of the Sistan Basin in collaboration with country stakeholders in Afghanistan and Iran; See also UNDP, *Hamoun Wetlands Current Situation and the Way Forward* (2006) <http://www.undp.org/content/dam/iran/docs/News/2014/March%202014/Towards%20a%20solution%20for%20Iran's%20drying%20wetlands/Hamoun%20Wetland/Hamoun%20Info%20Sheet.pdf>. And recently, see Tehran Times, 'Iran, UNDP sign MOU to revive Hamoun wetland' *Tehran Times* (4 April 2020) <https://www.tehrantimes.com/news/446454/Iran-UNDP-sign-MOU-to-revive-Hamoun-wetland> accessed 22 January 2021.

⁷¹² Tehran Times, 'Iran-Germany environmental cooperation to pick up steam' *Tehran Times* (October 7, 2016) <https://www.tehrantimes.com/news/407124/Iran-Germany-environmental-cooperation-to-pick-up-steam> accessed 22 January 2021; Financial Tribune, 'Iran, Netherlands to Expand Environmental Coop.' *Financial Tribune* (22 August 2015) accessed 22 January 2021.

⁷¹³ As mentioned before, not only has Iran officially asked Afghanistan to start a joint study, but also Germany and the Netherlands have also suggested to contribute to resolve the disputes over the Helmand River. Reportedly, their effort to persuade Afghans for cooperation and conducting an international joint study has been yet stuck at the time of writing this thesis.

The current *ad hockery* – disappointing one party while orchestrating unilateral advantage for the other, is perhaps more in favour of Afghanistan than Iran. While the *status quo* swinging from politicisation to securitisation and vice versa may partly reflect the anarchic geopolitical nature – which will be discussed later – both Afghanistan and Iran, have individually sought to influence the circumstances with the use of material, bargaining and ideational power to serve their own national security interests over “controlling” waters.⁷¹⁴

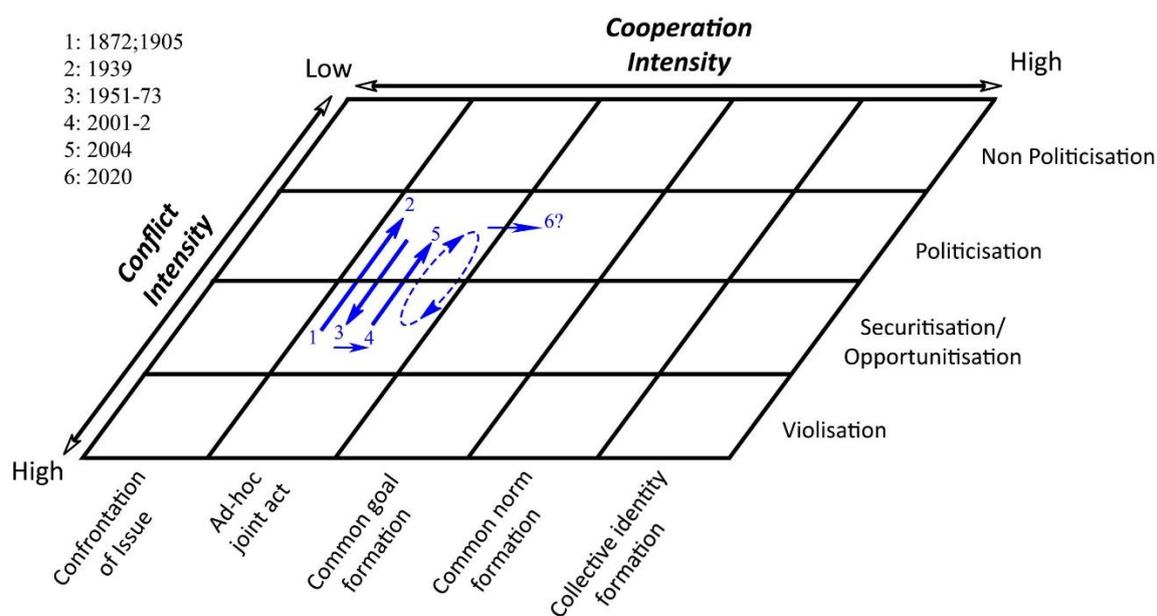


Figure 16. Hydropolitical relations of the Helmand River Basin in TWINS

Although there might be some critics of the 1973 treaty, generally speaking Iran is supportive at a high political level.⁷¹⁵ Similarly, despite decades of skepticism toward the treaty in Afghanistan, it has *just* recently received the same official political support, and has even been described by Sultan Mahmoud Mahmoudi, a former Afghan commissioner, as “the best agreement in the region and the world.”⁷¹⁶ Both countries have recognised that recent activities of the HRC will provide a basis for the creation of a constructive dialogue, not only to implement the provisions of the 1973 treaty but also to ensure the equitable and sustainable management of transboundary waters, including the preservation of the Hamoun wetlands.⁷¹⁷ The disputes, however, have continued in practice while both sides still accuse

⁷¹⁴ Zeitoun and Warner (n 9).

⁷¹⁵ Eghtesad News, ‘Zarif Answered the Question Raised by Parliament Member Regarding Iran’s Helmand Right’ [in Farsi] *Eghtesad News* (6 May 2018) <https://www.eghtesadnews.com/fa/tiny/news-212097> accessed 22 January 2021.

⁷¹⁶ Mahmoudi ‘Historical Events after the Signing’ (n 616).

⁷¹⁷ IRNA, ‘The Helmand [River] Promotes Iran-Afghanistan Cooperation’ [in Farsi], *IRNA* (7 October 2016) <http://www.irna.ir/sb/fa/News/82259662> accessed 22 January 2021.

each other of violating their treaty obligations, and their wishes have remained on paper. Neither a shared goal, nor shared vision nor common norm has been created to address the interests and identity of Iran and Afghanistan over the Helmand River Basin.

The TWINS matrix is used in this research to illustrate what the actual reality of the hydropolitical relations surrounding the Helmand River looks like through over a century of political ups and downs. The results are significantly helpful from both a theoretical and a practical point of view and are beneficial for researchers, policy makers and politicians wishing to get a better sense of the relations. One key finding is that what it has “predicted” in some “frightening statistics” and repeated in reports and the media and by some academics warning “deterioration” and “emerging conflict”⁷¹⁸ or “war/fight over water”⁷¹⁹ is not backed up by facts on the ground and the historical relations between Afghanistan and Iran. It is true that the relations have not significantly improved over water resources while reflecting as high politics for both Afghanistan and Iran, but this has always been overshadowed by other primary Iranian interests like security and stabilisation in Afghanistan. Therefore, both states have preferred to control their controversies over water issues with very limited cooperation. Accordingly, based on the historical evidence, it is most unlikely that the water related controversies between Afghanistan and Iran will go through an uncontrolled path. Another important finding is that the TWINS matrix for tracing the hydropolitical relations over the Helmand River offers an opportunity to better understand how different specific factors, e.g. drought, or a particular development project in upstream, or broader political issues, may lead to cooperative-conflictive relations and change the hydropolitical pattern here, often ending in a formal arrangement. The TWINS analysis is useful not only to illustrate the evolution of hydropolitical relations which here show a frozen cooperation and conflict without a meaningful progress, but can also warn the riparian states and other actors involved that possible severe irreversible damage beyond water relations might emerge if they continue with the same zero-sum pattern of mindset. Furthermore, the TWINS analysis sheds light on the complexity of the current destructive blame game and can potentially predict the future trend of relations over the Helmand River.

While the 1973 treaty stands at the centre of the water negotiations between Afghanistan and Iran, the following critical questions need to be answered in order to understand the political dynamics and the rationale behind states’ behaviour: Why did both countries accept the treaty despite strong national resistance? Why did Iran agree to receive a much lower amount of water than it asked for, and yet maintain it? Why have there been changes in the Afghan government’s views about the treaty from the

⁷¹⁸ See, for instance, WPS, ‘WPS Global Early Warning Tool September 2020 Quarterly Update’ *WPS* (27 October 2020) <https://waterpeacesecurity.org/info/global-tool-update-September-2020> accessed 22 January 2021.

⁷¹⁹ See Stefanie Glinski, ‘God, gas and heroin. Now, the fight’s over water’ *The Los Angeles Times* (6 Feb 2020) <https://www.latimes.com/world-nation/story/2020-02-06/afghanistan-and-iran-battle-over-water-with-spies-bribes-and-threats> accessed 22 January 2021.

“worst” to “best”? Why have the hydro-political relations stalled? Before examining these questions in Part III, it is necessary to understand the interplay between identity, interests, and strategies of the states over the Helmand River.

6.4.5. The states’ identities, interests, and strategies over the Helmand River

In analysing the geopolitical overlay of Afghanistan’s transboundary waters, Nagheeb and Warner (2018) argue that the control and capture of water resources are not solely for economic development but also driven by security interests of actors within and outside the basin; sustainable interventions should therefore acknowledge the geopolitical nature of the basin, as well as the regional interests, identities, and commonalities of all the riparian states. In order to better understand the hydro-political relations of Afghanistan and Iran over time, some key questions should be examined: What are their main strategies, tactics, and mindsets? How do the identities and interests of Afghanistan and Iran shape their hydro-political relations? As discussed in Chapter 3, the behaviour of the states was indirectly determined by their identity.⁷²⁰ States’ identity along with their material power can shape and reshape their interests, and therefore, their foreign policy.⁷²¹ Thus, this identity-behaviour relation is fundamental when analysing hydro-political relations over an international watercourse. State identity provides specific values and attitudes that influences state policymakers’ preferences—which in turn determines a particular foreign policy.⁷²²

In this regard, “water nationalism”, for instance, is one visible strategic approach which reflects a sense of national identity and patriotism in order to justify and legitimise a specific state’s foreign policy towards an international watercourse.⁷²³ Water development may be used to create a national collective identity by one state to “establish its dominance and power over local authority and customs, through the control and management of water resources”.⁷²⁴ This may be achieved “first, through the integration of the water landscape and sites as symbols of national identity (the symbolic landscape aspect), and second, through the territorialisation of water resources (the spatial development aspect)”.⁷²⁵ With this backdrop, the following discussion explores the interplay between the riparian state’s identity, interest and behaviour over the Helmand River. The discussion is mainly grounded on the co-authored article

⁷²⁰ See, for instance, Ashizawa (n 155).

⁷²¹ Ashizawa (n 155).

⁷²² Ashizawa (n 155).

⁷²³ Menga ‘Building a nation’ (n 434); Allouche (n 430).

⁷²⁴ Allouche (n 430) p. 53.

⁷²⁵ Allouche (n 430) p. 53.

on the analysis of the hydropolitical dynamics of Afghanistan and Iran titled *The geopolitical overlay of the hydropolitics of the Harirud River Basin*.⁷²⁶

Afghanistan

The hydropolitical relations of Afghanistan should be seen through its struggle *to build nation state* for a long time since 1850s, and within many wars like Anglo-Afghan wars, Russian invasion, civil war, and US-allied invasion and the continued act of domestic violence up to now. One aspect of nation state building which is particularly evident in Afghanistan is evident in “linking domestic and transboundary water resources to national territory through “water nationalism”, specifically through the use of water-related symbols and slogans.”⁷²⁷ The national identity influencing the hydropolitical relations of Afghanistan with its neighbouring countries is arguably shaped by three factors: Afghanistan is a landlocked country that is hugely dependent on its neighbours to reach the broader economic network; Afghanistan is one of the most invaded countries in the world, suffering greatly from global political rivalry; and finally, as a result of this Afghanistan has lost many opportunities to recover its economy, and has been left with huge levels of corruption and no real hope for the future where the majority of people, unfortunately, locked in poverty while struggling with ethnic tensions. Therefore, Afghanistan may be considered as a failed or fragile state. Considering the social and political analysis in a broader context,⁷²⁸ Afghanistan’s hydropolitics has seen a long and brutal war and foreign interventions in which its identity has been constructed and its interests have been (re)shaped. With such a war imposed identity and fragile society, the main strategic goal of Afghanistan has been “nation-building”, which is defined here as “the set of policies aimed at creating a common national identity and a sense of patriotism and loyalty towards the state”.⁷²⁹ Accordingly, water development through dam building and “water nationalism”, in particular, has been seen as the only way for different groups in power in Afghanistan to not only stay in power and retain legitimacy but also recover their national identity and stabilise the nation. This approach has been much more integrated in the new Afghan government’s policies since Chief Executive Abdullah Abdullah at the time observed at the High-Level Water Conference in Tajikistan on June 9, 2015:

Water is no longer just a natural resource... but it is increasingly becoming a *strategic* resource. We want to use our geography, resource capacity, and regional

⁷²⁶ Nagheeby and Warner (n 327).

⁷²⁷ Allouche (n 430) p. 286.

⁷²⁸ See, for instance, Louis Dupree, ‘Afghanistan in 1983: And Still No Solution’ [1984] 24 Asian Survey 229; See also Zalmay Khalilzad, ‘Anarchy in Afghanistan’ [1997] Journal of International Affairs 37.

⁷²⁹ Menga ‘Building a nation’ (n 434) p. 481.

as well as international obligations to maximise usage of water ... We have made significant strides in order to catch up with national development.⁷³⁰

Accordingly, the Afghan policymakers' attitude towards creating national identity laid particular stress on "water nationalism", which in turn pushed their economic interests above water resources to be shaped "on symbolic and imagined aspects of a nation state's collective territorial sovereignty and geographical identity".⁷³¹ Such an identity-interest nexus surrounding "water nationalism" caused Afghanistan to emphasise unilateral projects on its transboundary waters through a "silent" diplomacy approach and sanction any cooperation over water unless finalizing water development projects.⁷³² Considering the nation-building policy through water development, non-cooperative behaviour of Afghanistan may be seen as bargaining strategies to buy time with the aim at "worsening the opponent's alternatives and affecting mutual perceptions".⁷³³ Afghanistan sees its waters as strategic resources on which the neighbours, what they understand, "highly" depend. With this view, Afghanistan tends to use water, within a very realist perspective, as bargaining tool through a kind of "carrot and stick" approach in order to level off its power relations with neighbours and to seek grant over other issues. This might be very evident in recent tweet of Mr. Amrullah Saleh, first Vice President of Afghanistan, when Taliban was negotiating with Afghanistan's neighbours:

"Amrullah Saleh @AmrullahSaleh2 · Jan 28

Pre @ashrafghani's vision to turn our waters to a credit card & a diplomatic card has gvn Afgh an unprecedented leverage in the region. Not one drop less. Not one drop more. Every drop per agreement is our moto. As an upstream citizen I always took it for granted. Not now."

Moreover, such national strategy based on no-cooperation policy is linked to broader issues concerning anarchy which will be discussed in part III. The role of "outsiders" is, therefore, very significant here. For instance, some "blame the international community, particularly the US, for manipulating the situation and not allowing Afghanistan to resolve its water issue with neighboring states".⁷³⁴ Part III, in particular, will transfer one of the core messages of this study that how the anarchic geopolitical setting

⁷³⁰ Tolo News, 'Abdullah urges regional cooperation at high level water conference' *Tolo News* (9 June 2015) <https://tolonews.com/afghanistan/abdullah-urges-regional-cooperation-high-level-water-conference> accessed 22 January 2021.

⁷³¹ Allouche (n 430) p. 291.

⁷³² See, for instance, Nagheeb and Warner (n 327); Thomas and others (n 615).

⁷³³ Marwa Daoudy, 'Asymmetric Power: Negotiating Water in the Euphrates and Tigris' [2009] 14 *International negotiation* (Hague, Netherlands) 361 p. 365.

⁷³⁴ Malyar (n 710) p. 105.

mostly fueled by outsiders overshadows water diplomacy in the Helmand River Basin and undermines the efforts of riparian states for fostering bilateral cooperation.

Furthermore, water development is one of the foremost security issues for Afghanistan, particularly due to its vulnerable political atmosphere. Since Afghanistan suffers from high political instability, poverty and unemployment, its water resources should contribute significantly to providing economic prosperity and security and rebuilding its “lost” and “damaged” identity. The water itself is seen as sacred property, equivalent to territorial property, shaping part of the national identity. As the former Afghan diplomat, Mahmoud Seighal, commented, “The water has been a *holy* subject in its highest level, particularly when we are talking about transboundary waters”.⁷³⁵ Water nationalism through dam development, therefore, is a source of great national pride. This makes water a very sensitive issue in public, labeling it as a “non-negotiable” issue. Such drivers push Afghanistan to take a position for a unilateral approach towards a complete “resource capture” strategy.⁷³⁶ Such water nationalism grounded on building nation-state while having a vision of national identity at the centre has led the water development in Afghanistan to be challenged by neighboring countries like Iran. This way of tying identity to dam development has also led to smack of sensationalism causing an extreme view in the eyes of public that anyone criticises dam development is considered as an “enemy”. While Afghanistan’s right to water development, particularly dam construction, in itself has not been contested by its neighbours or the international community,⁷³⁷ its emphasis on overambitious unilateral plans, with an unclear agenda for cooperation, causes serious concern in the region, and has attracted criticism by Afghanistan’s neighbours, such as Iran.

It seems those policy makers in Afghanistan with “a narrow view” on water development perceive the existing zero-sum game of the *status quo* as more advantageous in addressing their afore-mentioned interests and identity, ignoring the potential of expanding the benefits of water cooperation.⁷³⁸ Accordingly, despite Afghanistan’s “official” discourse having been changed to “equitable utilisation”, represented in its national policy over transboundary waters,⁷³⁹ its behaviour is still deeply imbued with a warrior stance and built on the “absolute territorial sovereignty” doctrine; and, therefore, it plays a significant role in shaping the country’s identity, discourses, interests and behaviour. The Helmand

⁷³⁵ Tolo News, ‘BA REWAYATE DIGAR: Water resources of Afghanistan’ *Tolo News* (26 August 2013) <https://tolonews.com/mehwar/ba-rewayate-digar-water-resources-afghanistan> accessed 22 January 2021.

⁷³⁶ Zeitoun and Warner (n 9).

⁷³⁷ Thomas and others (n 615) p. 76.

⁷³⁸ Thomas and others (n 615).

⁷³⁹ According to a transboundary policy developed in 2013 with the support of USAID and Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ). However, as pointed out by Thomas and others (n 615), this policy development might be seen to have access to international financial support and not certainly a change in behaviour.

River is still seen by some Afghans as an internal and national river not international, and the right has been only *given* to Iran to utilise the defined fixed amount of water stipulated in the treaty.⁷⁴⁰ Such absolute water sovereignty pushes Afghanistan's leaders to focus on controlling water in its territory to reflect its identity and interests. Controlling water, in turn, is presented as a matter of national pride, giving a sense of power, and symbolising a "victory" against long war.

Under mostly vulnerable, often almost military circumstances, Afghanistan has tended to see cooperation over "its own waters" as a zero-sum security game, "where neighbours are viewed with acrimony, mistrust and suspicion".⁷⁴¹ When considering the riparians' behaviour and discourses with respect to transboundary water interactions, it seems that Afghanistan's leadership and its public believe they lost development opportunities during the Soviet occupation and civil war. They accordingly consider this war-imposed, relatively asymmetric hydraulic and socio-economic situation as an unbalanced power condition in comparison with their neighbours and are afraid of its negative impacts on the negotiation process. In one sense, the Afghan leadership sees little choice but to focus on *realist* policies during the post-conflict period, with the understanding that these could at least compensate for "damaged" identity/"lost" opportunities and delays while helping them to increase the geopolitical value and strengthen their negotiating position. Moreover, some Afghans appear to reason that negotiations may delay their current development projects; thus, they prefer to postpone the negotiations until at least after the completion of their own water control projects. Water politicisation/securitisation favours Afghanistan achieving its defined strategic goals; however, such zero-game strategy negatively affects the management of the whole river basin and the nature of cooperation. In the long term, as will be discussed later, Afghanistan's desired goals may not be achieved since Iran is not waiting for upstream response and has initiated several new projects, such as a desalination plant to transfer water out of the basin, to meet its water demands.

Iran

The identity and interests of Iran concerning the Helmand River are shaped more by the historical value of Sistan which reflects ancient Persia and Zoroastrianism, socio-economic importance, and security issues. The high demand of Sistan for water flowing from Afghanistan and lack of other alternatives ties water issues in Sistan to the national security of Iran. Accordingly, similar to Afghanistan, sensationalism is also observed in Iran's public view that puts pressure on negotiations and the related foreign policy over the Helmand waters. This, in part, causes an incomplete understanding in which the root causes of the water and environmental problems in Iranian side, i.e. Sistan, are overlooked.

⁷⁴⁰ See, for instance, Najib Agha Fahim, 'Why did a treaty that ended a hundred years of conflict become controversial again' in Pargar, BBC Persian TV (Last edited 26 February 2019) <https://www.facebook.com/notes/pargar-bbc-persian-tv/2471442749550394> accessed 22 January 2021.

⁷⁴¹ Thomas and others (n 615) p. 71.

Therefore, it is obvious that in such ill-defined and blurred nature, Iran puts its finger almost often on the other side of the border, Afghanistan, as being responsible for all water and environmental problems.

Notwithstanding this, war and instability in Afghanistan has pushed Iran to prioritise security over other interests.⁷⁴² Considering the broader political and security complexity in the region, Iran has a long-term interest in a stable Afghanistan.⁷⁴³ Iran's interest in security and its willingness to have a stable Afghanistan takes priority over water issues. Within such circumstances, Iran faces an agonising dilemma in which interests over water have often been sacrificed for security and geopolitical issues.⁷⁴⁴ Therefore, despite water development in Afghanistan potentially being a major concern for Iran, the stabilisation of Afghanistan through its development could, in fact, provide a more compelling reason for Iran to support water development. Such supportive policy of stabilisation and development in Afghanistan is evident in massive scale of economic and trade exchange. In such chaotic and insecure environment and bitter rivalry of Afghanistan, where there are many other issues that might be seen a threat to Iran's national security e.g. the rise of Daesh (ISIS) or in the case of extremism, then both sides are largely insensible to water. This, of course, does not mean they ignore the controversies over transboundary water issues.

From a broader perspective, considering the priority of Afghanistan's stability, Iran has shown his forbearance over the chaotic nature of the Great Game. Against this background, Iran, has mainly assumed a functionalist stance in its hydropolitical relations towards Afghanistan, believing that depoliticising water issues can meet their interests in the face of complex geopolitical variables. Considering the historical efforts to establish a platform for benefit-sharing over the transboundary waters since the negotiations of the 1970s – in particular providing additional incentives to Afghanistan to benefit from Chabahar port – Iran has pursued an “integration strategy” to encourage Afghanistan to cooperate. Thus, although they have a unilaterally developed infrastructure, Iran sees urgent cooperation with Afghanistan as a way to firstly diminish the political sensitivity of the basin and secondly to at least decrease the potential damage of Afghanistan water development on downstream. While emphasising the need to implement the 1973 treaty and underlining “human security” and “no-harm” rule, the principle of equitable and reasonable utilisation has been the main discourse of Iran in its water diplomacy towards Afghanistan.⁷⁴⁵ Such an Iranian view for cooperation in a “win-win”

⁷⁴² Nagheeby and Rieu-Clarke (n 638).

⁷⁴³ Thomas and others (n 615); See also Milani (n 693) p. 235 where he notes that “Iran has consistently sought to see a stable and independent Afghanistan, with Herat as a buffer zone and with a Tehran friendly government in Kabul, a government that reflects the rich ethnic diversity of the country”; Kayhan Barzegar, ‘Iran's Foreign Policy in Post-Taliban Afghanistan’ [2014] 37 *The Washington Quarterly* 119.

⁷⁴⁴ Nagheeby and Warner (n 327).

⁷⁴⁵ See Tabnak News, ‘Afghans dry up Mashhad?’ *Tabnak News* (28 October 2013) <http://khabarfarsi.com/ext/6977397> accessed 25 January 2021. See also Shargh Daily News, ‘Khoshki dar

approach through broader collaboration is seen in the tweet below of Dr. Rasoul Mousavi, Director General of West Asia at Iran's ministry of foreign affairs, probably in response to above-mentioned tweet by Mr. Amrullah Saleh:

“rasoul mousavi @rasmou · Jan 29

Independence and non-dependence is the most important goal of the Islamic Revolution. I'm sorry for the officials who chant the slogan of all-round independence from the United States, but do not think about not being dependent on neighboring water!

Water is an arena of cooperation, not a political tool. If nature's water rights are not given, everyone will suffer.”

Similar to what is seen by some Iranians that Afghanistan is responsible for the water and environmental problems in Sistan, within ambiguous nature over the Helmand River, there is a view in Afghanistan that puts the finger on Iran for its attempts to sabotage dam development, though it is not backed up by evidence.⁷⁴⁶ This echoes the highly chaotic and complex controversy that has positioned the Helmand River to be in a state of mutual distrust for centuries, restricted by mutual misunderstandings, illusions and counter-accusations.

Part II: The principle of equitable and reasonable utilisation

6.5. The ERU in the Helmand River Basin at the birth of shared understanding

The previous section of this chapter outlined the trajectory of the hydro-political cooperative-conflictive relations in the Helmand River Basin where the respective interactions between Afghanistan and Iran have remained *ad hoc*. This was followed by an analysis of the hydro-political dynamics and an examination of the respective interests, identities and strategies of Afghanistan and Iran concerning the Helmand River. While Iran's interests and identity have been shaped by historical, socio-economic and national security aspects, for Afghanistan, having been at war, the same river has a rather strategic value

Kamin_e Shargh_e Iran' (28 October 2013) <http://www.sharghdaily.ir/fa/main/detail/23829> accessed 25 January 2021.

⁷⁴⁶ From a *Realpolitik* perspective, it is not far-fetched to assume that the actions or discourses of downstream states are not entirely altruistic when controlling shared waters by upstreamers threatens them. However, the findings of this study show that those few reports and articles in selective media sources concerning such claims have simply reiterated each other with no further sufficient evidence and, not surprisingly, the same root sources of such news could be seriously questionable. For instance, Salaam Times – *sponsored* by The United States Central Command – in a series of reports prepared by *anonymous* writer under the name of “Omar” or “Ali” accused Iran in some of these attacks over dams. Not surprisingly, also, some have given the source of these claims to US Intelligence service, which should be taken by careful attention in this chaotic battlefield. Therefore, apart from broader political reasons and those who might be behind such rumors (which are beyond the scope of this thesis), my interpretation is that such accusations from both sides are rather more connected to the state of deep mutual distrust existed in the basin.

to compensate what they believe as lost opportunities and to recover their damaged identity. In turn, interests and a subjective sense of identity have led Afghanistan and Iran to take specific competitive positions concerning transboundary water utilisation, where the upstream expresses less willingness for cooperation. This has brought about a highly sensitive and irritable condition around transboundary water issues between Afghanistan and Iran and accordingly has not only paralysed the hydro-political relations but also negatively influenced the effectiveness of the ERU principle. In such circumstances, the ERU principle is used as a tool of *self-help* to intensify competition, rather than to create a collective identity over the basin. This part aims to illustrate the role of the ERU principle, if any, in shaping the behaviour of Afghanistan and Iran concerning the Helmand River over time and changing the hydro-political relations towards water conflict transformation.

While it seems that the 1973 treaty failed to resolve the water conflict between Afghanistan and Iran based on the ERU principle, the question, it is essential to ask who/what should be blamed. Should it be the treaty and ERU principle, the riparian states, the underlying circumstances, or something else? The following questions may come after: To what extent has the principle of ERU been considered in legal arrangements over the Helmand River? Does the ERU principle redefine the interests and identities of Afghanistan and Iran and influence the hydro-political relations over the Helmand River Basin, and if so how? Does the ERU principle help or hinder the improvement of relations between Afghanistan and Iran? Given the broader “comprehensive” cooperation between Iran and Afghanistan, could ongoing nascent “promising” hydro-political relations over transboundary waters with common emphasis on the ERU principle be understood as “constructive conflict”⁷⁴⁷ to move to a basin-wide legal framework over the Helmand River, acting in both riparian states’ best interests. Finally, has the ERU principle ever mediated a solution to initiate a constructive dialogue between riparian states, and to decrease the threat of anarchy, or has it failed to do so? In order to respond to these questions, in the second part of this chapter, the discussion will benefit from the framework of interactional international law, as explained in Chapter 3, to engage in analysing the role of the ERU principle in the evolution of the hydro-political relations of the Helmand River over time.

This section’s analysis proceeds in two parts. The first part assesses the legal arrangements and specifically the 1973 Helmand treaty, in light of the ERU principle, to analyse whether it addresses the equitable criteria and, if so, how it does so. Then, the second part focuses on analysing the effectiveness of the ERU principle in changing the hydro-political relations of the Helmand River.

⁷⁴⁷ Zeitoun (n 18) p. 376 where they point out that “[l]ike a caterpillar morphing into a butterfly, ‘conflict’ can be a necessary step towards equitable and sustainable transboundary water arrangements.” See also Mark Zeitoun, Naho Mirumachi and Jeroen Warner, *Water Conflicts: Analysis for Transformation* (Oxford University Press 2020) p 48 that state that constructive conflict, as opposed to destructive cooperation, brings the issues of contention to be laid on the table rather than keeping them aside.

6.5.1. The 1973 Helmand River Water Treaty in light of the ERU principle: promise or peril?

Establishing a legal arrangement on a harmful colonial basis

The historical background of legal arrangements in the Helmand River was outlined in Part I. Despite the geopolitical shadow over the Helmand River, the notion of equitable utilisation was claimed to be the basis of the first attempts in the 1870s to resolve the water disputes between Afghanistan and Iran over the Helmand River.⁷⁴⁸ However, giving the potential of full control of the water to Afghanistan – who was under British suzerainty and served as a “buffer state” against its rival Russia – by separating the major water demand in Persia and the total water supply in Afghanistan – one could understand the Goldsmid arbitration as having been in favour of Great Britain in the bigger picture. The British, in fact, imposed a very narrow legal regime of “equitable” utilisation by putting the water tap in Afghanistan apparently to protect their security interest in the “jewel in the crown”. However, apart from this political interpretation, and from a legal perspective, as McCaffrey pointed out,⁷⁴⁹ at first glance, it seems that the Goldsmid arbitration was based on a “no significant harm” principle rather than the ERU principle in which it may give the priority to prior appropriations (in Persia). Notwithstanding this, to better understand and interpret the arbitration award, it must first be put into context. First, most of the water demand – irrigation and population – was on the Persian side at the time. Second, the arbitral award did not explicitly decide on water division between two sides and was only limited to a general statement to preserve *all* the existing uses and the “requisite supply of water for irrigation” of *both* sides of the Helmand. Accordingly, as McCaffrey and also Johan G. Lammers noted, the Goldsmid award – that was accepted by both parties – seems to have been mainly based on the equitable considerations at the time.⁷⁵⁰ However, such a semi-colonial and narrow view of ERU consideration soon ended in failure because it did not accurately and clearly address changes in circumstances including the future interests of Afghanistan’s development and the impacts on downstream Iran. Moreover, the arbitration did not provide a solution for parties to deal with specific times of flood and particularly drought – the extreme events that ultimately doomed the arbitration to failure. Therefore, this could neither meet the criteria of legality – in particular, clarity and constancy (or predictability) – nor contribute to creating a shared understanding.

⁷⁴⁸ McCaffrey, ‘The Law of International Watercourses’ (n 37) p. 284.

⁷⁴⁹ McCaffrey, ‘The Law of International Watercourses’ (n 37) p. 285.

⁷⁵⁰ McCaffrey, ‘The Law of International Watercourses’ (n 37) p. 284; Johan G Lammers, *Pollution of International Watercourses: A Search for Substantive Rules and Principles of Law* (BRILL 1984) p. 505. In addition, McCaffery argues that the Goldsmid arbitration award seems to give priority to ‘no significant harm’ principle and prior appropriations.

Establishing a legal arrangement on misunderstanding or false representation

The 1973 Helmand River Water Treaty – the only existing accepted arrangement concerning the water dispute over the Helmand River – is based on a report by the Helmand River Delta Commission. As explained before (Section 6.4.2), the Commission was established in 1948 with the sole purpose of recommending “an engineering basis for mutual accord regarding the apportionment of the waters of the Helmand River”.⁷⁵¹ The function of the Delta Commission as a “fact-finding body” was to “collect and study available data” 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 methods for more scientific use of available waters. As also noted by McCaffrey, such a list of indicative factors “parallels strikingly the list of factors relevant to equitable utilisation contained in Article 6 of the UN Convention”.⁷⁵² Key questions, however, are: How much does the 1973 treaty grasp the spirit of the ERU principle in the Helmand River Basin? Can the ERU that was understood in 1973 still be considered equitable from what is interpreted now? Due to misunderstanding and false representation, the findings below demonstrate that the legal results for the utilisation of the Helmand River is the outcome of a process that seems to have been not just deeply flawed but broken; accordingly, at best it contributed to a much shorter “life cycle of norms” than expected in interactional international law.

As shown by Thomas and others, Afghanistan-Iran’s effort to establish a benefit-sharing platform have been shaped around the 1973 treaty, while the HRC has contributed more to a “a dialogue of the deaf”.⁷⁵³ Both riparian states with different rationales have had to finally accept the treaty as it shapes the core reference of their interactions now. Iran views the treaty as a possible catalyst to not only guarantee what was ultimately achieved after 150 years, but also with the hope of developing future cooperation over the Hamoun wetlands. Afghanistan views the treaty as *a means to an end* in maintaining the *status quo* and continuing its unilateral development. Therefore, the treaty has been a “carte blanche” for Afghanistan’s development of the Helmand River,⁷⁵⁴ without the necessity to cooperate for the Hamoun wetlands, at least for now. There have been very few legal peer-reviewed studies in English on transboundary waters of Afghanistan and in particular the Helmand River. Among them,⁷⁵⁵ James C.

⁷⁵¹ Helmand River Delta Commission, *Report of the Helmand River Delta Commission: Afghanistan and Iran* (1951).

⁷⁵² McCaffrey, ‘The Law of International Watercourses’ (n 37) p. 285.

⁷⁵³ Thomas and Varzi (n 624) p. 512.

⁷⁵⁴ Thomas and Varzi (n 624) p. 512.

⁷⁵⁵ For instance, see David Goad, ‘Water Law Be Dammed?: How Dam Construction by Non-Hegemonic Basin States Places Strain on the Customary Law of Transbound Watercourses’ [2019] 35 Am U Int’l L Rev 907; Farnaz Shirani Bidabadi and Ladan Afshari, ‘Human Right to Water in the Helmand Basin: Setting a Path for the Conflict Settlement between Afghanistan and Iran’ [2020] 16 Utrecht L Rev 150; see for extensive discussion on the role of no-harm principle in another geographical area, i.e. Central Asia, for instance, Dinara

McMurray, and A. Dan Tarlock examined how Afghanistan could assert possible claims under “the law of later-developing riparian states”,⁷⁵⁶ and Mohsen Nagheeby, Mehdi Piri D, and Michael Faure examined the international legitimacy of unilateral dam development in an international watercourse, with the focus on the Harirud River.⁷⁵⁷

Between the two competing models of equitable utilisation of an international watercourse e.g., a) “classic apportionment” and b) “shared benefits”,⁷⁵⁸ the 1973 Helmand River Water Treaty was built based on the former, leaving riparian states free to unilaterally use their own share. However, this does not mean that it lacks the ERU principle, and therefore, it needs further investigation. In addition, the 1973 treaty was based on the recommendation of the 1951 Delta Commission which basically allocated water primarily for irrigation purposes. While the Delta Commission considered water for irrigation as “beneficial”, the water entering the Hamouns is described as “waste water”.⁷⁵⁹ Such an issue-specific policy is not explicitly stated in the 1973 treaty, however Article II acknowledges that the total amount of water from the Helmand River to be delivered to Iran by Afghanistan is in accordance with the report of the “Helmand River Delta Commission”. Nevertheless, the challenge is especially interesting since Article V of the treaty (the second paragraph) gives almost complete freedom to Afghanistan to utilise the Helmand water by acknowledging:

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.⁷⁶⁰

Ziganshina and Barbara Janusz-Pawletta, ‘The Principle of No Significant Harm in the Central Asian Context’ [2020] 20 International Environmental Agreements: Politics, Law and Economics 713.

⁷⁵⁶ James C McMurray and A Dan Tarlock, ‘The Law of Later-Developing Riparian States: The Case of Afghanistan’ [2003] 12 NYU Env’tl LJ 711.

⁷⁵⁷ Nagheeby “The Legitimacy of Dam Development” (n 247).

⁷⁵⁸ A Dan Tarlock and Patricia Wouters, ‘Are Shared Benefits of International Waters an Equitable Apportionment’ [2007] 18 Colo J Int’l Env’tl L & Pol’y 523.

⁷⁵⁹ Helmand River Delta Commission (n 751) p. 111 where it asserts that “It is the judgment of the Commission that very little of this water serves a beneficial purpose.”

⁷⁶⁰ See Annex I.

Legally speaking, one critical question is: Does Iran have the right to claim more water for the need of the Hamoun wetlands? Does Afghanistan have an absolute right to utilise water in any way “as it chooses” without taking care of “vital human needs” and the ecosystem of the international watercourse? The Helmand River Delta Commission on which the 1973 treaty is based aimed to provide “an *equitable* apportionment of the waters on the Helmand River”.⁷⁶¹ However, the treaty does not explicitly address the principle of ERU, despite the fact that it plays “the lead role” in planned measures.⁷⁶² It is, therefore, permissible to raise the question: To what extent does the 1973 treaty reflect the criteria of equitable and reasonable utilisation?

Furthermore, some challenges e.g., climate change (as Afghanistan claims),⁷⁶³ new development plans along with poor water management, changing socio-economic pattern, and increasing environmental degradation on both sides of the Helmand River have complicated not only the management of transboundary waters with reference to the 1973 treaty but also the transformation of the conflict towards equitable and reasonable utilisation. While the 1973 Helmand River Water Treaty could possibly provide “positive” potential for bilateral cooperation, this study argues that the treaty alone does not meet the *essential* criteria of an equitable and reasonable utilisation regime. It seems that even such an agreement of fixed amount of water allocation (e.g., 14.5% of total water to downstream, Iran) is “questionable”, at least from the Iranian point of view which claims that it is too far from their socio-economic demands and the need to protect vital ecosystems and their services. Such neglect *alone*, and in addition to the geopolitical and anarchic obstacles – that will be explained later, may also be one reason behind the non-cooperative nature of the Helmand River and a source of conflict, intensifying the symptoms of anarchy. In one sense, this in turn might also explain why long-term constant cooperation with regard to the treaty has not occurred between Afghanistan and Iran or why it remains *ad hoc*. The 1973 treaty lacks the potential to address the actual water problems within an integrated basin-wide framework,⁷⁶⁴ and is unable to reflect the interests and identities of both riparian states. In fact, ignoring the importance of vital human needs and ecological/environmental protection *in particular*, this study shows that the 1973 treaty does not have the strong legal, institutional and

⁷⁶¹ Helmand River Delta Commission (n 751) p. 10 (emphasis added).

⁷⁶² Quoted by Ziganshina and Janusz-Pawletta (n 755) p. 720 that McCaffrey states that “These principles [The 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)”.

⁷⁶³ To respond Iran’s complaint about the decline of water in downstream, Afghanistan claims that it is because of climate change and not its development. However, some studies may reject Afghan’s claim, showing that massive irrigation extension in the upper Helmand in Afghanistan even during war has affected the water flow in the lower Helmand. See, for instance, Mohammadreza Hajihosseini and others, ‘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 and others, ‘International Environmental Conflict Management in Transboundary River Basins’ [2020] 34 Water Resources Management 3445.

⁷⁶⁴ Thomas and Varzi (n 624).

conventional potential to balance the challenges between water control and development in upstream Afghanistan, and specifically the ecological demand downstream of the basin.⁷⁶⁵ Therefore, within this anarchic environment, the 1973 treaty seems, by itself, *ill-equipped* to cope with water conflicts over the Helmand River, and furthermore, it is *ill-suited* and subject to “a matter of misplaced faith in formal rules”,⁷⁶⁶ to guide relations between Afghanistan and Iran.

In order to examine the effectiveness of a treaty in managing conflict and enhancing cooperation over international watercourses, Alistair Rieu-Clarke concluded a number of key factors that need to be taken into consideration.⁷⁶⁷ Rieu-Clarke pointed out that four factors are significant while analysing the role of treaties in promoting the ERU: a) content: “whether certain treaty provisions confer rights and obligation”, b) linkages between treaty provisions e.g., substantive and procedural principles, c) the relationship between treaty at various governance level, and d) the influence of law at global or regional level on treaty.⁷⁶⁸ Considering these factors, this section merely focuses on analysing the content of the 1973 Helmand River Water Treaty according to the criteria as relevant to determining the equitable and reasonable utilisation. In doing so, as explained in Chapter 5, an indicative list of the key factors and circumstances is provided by Article 6 of the 1997 UN Watercourses Convention.

Article 38 of the Statute of the International Court of Justice⁷⁶⁹ outlines international conventions, international customary law and the general principles of law recognised as the main sources of international law. Keeping these sources in mind, the question of whether the existing formal treaty over the Helmand River addresses the rights and obligations under international law is particularly complex in this particular case. Neither of the riparian states to the Helmand River is a member of the UN Watercourses Convention. Furthermore, the 1973 treaty is an agreement only for issue-specific water division, i.e. irrigation, and it neither addresses all the *demands* in the basin, particularly for environmental protection, nor reflects a *basin-wide view*.⁷⁷⁰ Despite this, the ERU principle which

⁷⁶⁵ As discussed before, see for more information, McIntyre (n 377) and Rieu-Clarke and Spray (n 14) that point out that among various factors to define equitable and reasonable utilisation regime, environmental protection of international watercourses has higher significance.

⁷⁶⁶ Jutta Brunnée, *Law and Politics in the Nile Basin* (American Society of International Law Proceedings 2008) p. 361.

⁷⁶⁷ Rieu-Clarke, ‘The Role of Treaties’ (n 198).

⁷⁶⁸ Rieu-Clarke, ‘The Role of Treaties’ (n 198) p. 824.

⁷⁶⁹ San Francisco, CA (US), 26 June 1945, in force 24 Oct. 1945, available at <https://www.icj-cij.org/en/statute>.

⁷⁷⁰ Through quantitative analysis, Neda A. Zawahri and Sara McLaughlin Mitchell explain that fragmented governance is prevalent in multilateral basins like the Indus, Jordan, Euphrates, and Ganges rivers in which establishing a treaty is a by-product of state interest, transaction costs, and distribution of power. They show that most countries in such fragmented governance are reluctant to develop a basin-wide treaty and instead prefer more limited bilateral agreements. See Neda A. Zawahri and Sara McLaughlin Mitchell, ‘Fragmented Governance of International Rivers: Negotiating Bilateral Versus Multilateral Treaties’ [2011] 55 *International Studies Quarterly* 835.

forms part of customary law is binding upon all states, including Afghanistan and Iran over utilisation of water resources of the Helmand River Basin. However, there might be a legal priority over customary international law where a treaty exists between states.⁷⁷¹ Since there are established treaty provisions over the Helmand River, this section will seek to analyse the treaty in light of the ERU criteria.

As discussed in Chapter 5, the ERU principle is the overarching principle of international water law to balance the uses and the protection of international watercourses by considering all relevant factors.⁷⁷² In order to utilise a shared watercourse in an equitable and reasonable manner, all relevant factors as listed in Article 6 of Watercourse Convention should be analysed diligently by taking into account the interests of other riparian states. Furthermore, grounded on a review of all factors, the principle of ERU not only includes the “blue” and “green” water of international watercourses and aquifers, but also addresses ecosystem and even “virtual” water.⁷⁷³ The ERU principle applies in a case of conflict of interest, which is observed in the Helmand River between Afghanistan and Iran, 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 realised”.⁷⁷⁴ Clarified by Article 6(1), “no use of an international watercourse enjoys inherent priority”, and “all relevant factors are to be considered together and a conclusion reached on the basis of the whole”.⁷⁷⁵

To start with, among other factors, it is important to discuss the physical features of international watercourses e.g., hydrological and geographical characteristics first since they often arise in controversial debates on equitable water allocation, particularly in highly-anarchic geopolitical settings. Specific discourses of “our country contributes more waters in the flow” or “the river passes a longer way through our lands”⁷⁷⁶ are still used to bargain over the utilisation of waters within the modern “right-based” realm to legitimise the acts or claims – and are noticed in the case of the Helmand River, resulting in the confrontation of two outdated doctrines of “absolute sovereignty”. Generally, despite the fact that geographical and hydrological factors are the first to be listed in most codifications, it would appear from judicial and state practice that they rank low in the hierarchy of factors relevant to equitable utilisation.⁷⁷⁷ In relation to these factors, state practice suggests that “river frontage” has rarely been invoked as a basis for determining an equitable regime for the utilisation of an international

⁷⁷¹ Crawford and Koskenniemi (n 494).

⁷⁷² Rieu-Clarke and Spray (n 14).

⁷⁷³ Wouters (n 33) p. 204.

⁷⁷⁴ Quoted by Rieu-Clarke and Spray (n 14) p. 18.

⁷⁷⁵ Articles 6(1) of the Watercourses Convention.

⁷⁷⁶ See for more prevalent discourses, see Thomas and others (n 615) and Malyar (n 710).

⁷⁷⁷ For more information, see Fuentes (n 453); See also McIntyre (n 452).

river.⁷⁷⁸ Also, the extent of the “drainage area” would appear to have a lack of significance similar to that of river frontage.⁷⁷⁹

Considering some similar cases, such physical factors play only a *secondary* role in providing “equitable utilisation”.⁷⁸⁰ Regarding the Colorado River, for instance, which flows through Mexico for a mere 100 miles, or less than 10 percent, of its 1,300 mile length, the length of the river flowing through the respective territories of Mexico and the US was never considered as a basis for the allocation of waters.⁷⁸¹ Similarly, Sudan has never been allocated a share in proportion to its 70 per cent of the length of that section of the Nile River vs. Egypt nor possibly Ethiopia in a possible future agreement. In fact, the allocation under the 1959 Agreement for the Full Utilisation of the Nile Waters provided for a ratio of allocation of 1:3 in favor of Egypt.⁷⁸² In the 1959 Agreement between Egypt and the Sudan, it would have been very much in Sudan’s interest to seek to have this factor considered. Similarly, in the dispute concerning the Narmada River (in central India), the two states of Gujarat with 14 percent and Madhya Pradesh with 86 percent of drainage basin were allocated respectively 33 and 67 percent of water.⁷⁸³ Thus, physical factors are undoubtedly accorded less weight in appropriate circumstances.⁷⁸⁴

In the case of the Helmand River, about 85 percent of its length is in Afghanistan, and thus some Afghans strongly believe it is merely a “national” and “internal” river flowing totally in Afghan territory and take this as their bargaining position.⁷⁸⁵ Nevertheless, Iran claims that most of the utilisation of water had historically been in the downstream of the river (currently located at Sistan on the Iranian side and Nimrooz on the Afghan side, all around the Hamoun wetlands). However, from the legal aspect, none of these narratives are necessary to influence on the rights to water utilisation in an equitable and reasonable way. Thus, considering all court decisions on transboundary river cases around the world, the physical factors of shared water basins have mostly been the secondary aspects in

⁷⁷⁸ See Fuentes (n 453).

⁷⁷⁹ Fuentes (n 453).

⁷⁸⁰ Fuentes (n 453); See also McIntyre (n 452).

⁷⁸¹ Fuentes (n 453) p. 398.

⁷⁸² Fuentes (n 453).

⁷⁸³ Fuentes (n 453).

⁷⁸⁴ In addition to what discussed in Chapter 5, Fuentes (n 453) p. 401 states:

“The first thing that must be borne in mind is that the rule of equitable utilisation entails two important principles: the principle that the basin States do not have proprietary rights over the waters of international rivers and the principle of equality between the basin States. The result of the combination of these two principles is that basin States have an equal right to benefit from the waters of an international river traversing their territories regardless of the length of their frontage on the river. Equality of right does not mean that the water will be divided into equal portions, but it means that the ratio between the frontages of the riparian States on the river should not be used as a direct basis for the allocation of water. In other words, equitable utilisation is not a rule to ameliorate a division already effected by nature”.

⁷⁸⁵ See Thomas and others (n 615) and Malyar (n 710); See also Agha Fahim (n 740).

comparison with other factors e.g., environmental, economic, and social needs. In other words, the primary considerations of equitable utilisation were those of dependence for vital human needs and ecosystem protection including social and economic needs, not the physical characters. Notwithstanding this, it might seem that Afghanistan with a *lower* development index than Iran may have the strongest argument based on social and economic factors as well. This causes a classic debate to balance the utilisation of water for development/economic prosperity in the upstream with the needs of the downstream, while protecting the ecosystem and vital human rights.

Social and economic needs are prominent factors in determining ERU. The Helmand River plays a significant role in the water scarce region of both Afghanistan and Iran and has crucially contributed to the livelihood of the surrounding people. While Afghanistan, with the lower development index, sees its water resources as a strategic resource with which to foster its economy and help to lift the population out of poverty,⁷⁸⁶ Iran needs the same water to secure the population's drinking demand and agricultural activity in Sistan with the fragile economy and no other available water. In this case, and considering that there is no cooperation, monitoring and reliable data to examine the social and economic criteria on both sides to determine how their utilisation reflects the ERU principle, it is difficult to reach a clear-cut solution. The 1973 treaty which was established based on the calculation of the Delta Commission, and was merely limited to the irrigation aspect of the Helmand River, seems to be blind to other socio-economic values in the basin, e.g. the importance of the river for fishing and navigation, excluding some parts of the dependent population. Having neglected such important issues, the treaty remains static and with stiff rules.

In the assessment of the relevant factors concerning 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 while the significance of environmental protection is stipulated "with a view to ensuring their long-term viability for future generations" in Article 20.⁷⁸⁷ Therefore, if a use threatens the availability of sufficient water to sustain human life consistent with an individual's right to water, it is considered as inequitable.⁷⁸⁸ In weighing up relevant factors concerning the ERU principle, the protection of an ecosystem finds increasing support.⁷⁸⁹ Concerning the obligation to protect the ecosystems of an international watercourse, Article 20 of the Watercourses Convention, as "a simple, but potentially

⁷⁸⁶ Islamic Republic of Afghanistan, *Afghanistan National Development Strategy 1387 – 1391 (2008 – 2013): A Strategy for Security, Governance, Economic Growth & Poverty Reduction* (Afghanistan National Development Strategy) available at http://www.af.undp.org/content/dam/afghanistan/docs/ANDS_Full_Eng.pdf accessed 26 January 2021.

⁷⁸⁷ Watercourses Convention: Article 6 and 10(1) and 10 (2).

⁷⁸⁸ UNGA, Report of Sixth Committee convening as the Working Group of the Whole (11 April 1997), UN Doc A/51/869 www.un.org/ga/search/view_doc.asp?symbol=A/51/869 accessed 26 January 2021.

⁷⁸⁹ McIntyre (n 377) and Rieu-Clarke and Spray (n 14).

powerful, provision”,⁷⁹⁰ states that a “watercourse states shall, individually and, where appropriate, jointly, protect and preserve the ecosystems of international watercourses”.⁷⁹¹

Looking at the case of the Helmand River through the lens of IWRM and RBM, Vincent Thomas and Manijeh Mahmoudzadeh Varzi in their article titled *A legal licence for an ecological disaster: the inadequacies of the 1973 Helmand/Hirmand water treaty for sustainable transboundary water resources development*, demonstrate how the 1951 Delta commission on which the 1973 treaty was established misunderstood the water demands of the Hamoun wetlands in its calculations.⁷⁹² They showed that the treaty failed to address the integrity of the “agro-ecological system” in the Sistan Delta. They also illustrated how such a misconception of the overall demand could significantly jeopardise the socio-economic and ecological integrity of the Sistan Delta. Accordingly, the 1973 Helmand treaty was “wrongly conceptualised” by focusing merely on irrigation-water demand. The water to sustain the wetlands, on which the population of the Sistan (and the delta in both sides of the border) is critically dependent, was labelled “waste”.⁷⁹³ While the 1973 treaty preserves Afghanistan’s right to unilateral water development and provides determinate amount of water for Iran’s irrigation,⁷⁹⁴ it leaves the ecosystems of the Helmand River unprotected, the social and economic welfare of population surrounding the Hamoun wetlands vulnerable, and the sustainability of the whole basin at risk. Consequently, it could be strongly condemned as a breach of the ERU principle in particular concerning two key factors: protecting vital human needs and the ecosystems of the Helmand River. This is also substantiated by some scientific findings of other studies that investigate the contribution of development in upstream Afghanistan to the degradation of the Hamoun wetlands (not only dams but rather and more importantly massive irrigation expansion including opium cultivation even during war).⁷⁹⁵ However, it should be noted that the utilisation of the same water by Iran also needs to be considered when looking at the degradation of the ecosystems of the Helmand River and in particular the Hamoun wetlands. Under current circumstances where there is lack of cooperation, with Afghanistan reluctant to conduct a common study, such a conclusion may need more careful attention.

The central questions for discussion are: Can the way in which Afghanistan exercises its rights be considered as complying with its obligations under the 1973 treaty and international law? If Afghanistan’s water development is lawful with reference to the provisions of the existing treaty, could

⁷⁹⁰ Quoted in Rieu-Clarke and Spray (n 14) p. 20.

⁷⁹¹ Watercourses Convention: Article 20.

⁷⁹² Thomas and Varzi (n 624).

⁷⁹³ Thomas and Varzi (n 624).

⁷⁹⁴ Thomas and Varzi (n 624) p. 508 point out that the amount of water allocated merely to Iran’s irrigation water demand “represents less than 20% of the integrated system’s overall demand.”

⁷⁹⁵ For extensive technical study, see for instance, van Beek (n 85) and Hajihosseini (n 763).

it be unlawful under customary international law, in particular the ERU principle? Can Afghanistan and Iran's water uses be considered as equitable and reasonable? As already mentioned, neither of the Helmand River riparian states is a member of the Watercourses Convention; however, the ERU principle forms part of customary law and is therefore binding upon all states, including Afghanistan and Iran. The scientific studies, referenced above, show that the shared watercourse is not being utilised in a manner that can be considered equitable and reasonable. By unilaterally developing and utilising the Helmand River and imposing a threat to vital human needs and the ecosystems of the whole basin, Afghanistan's uses, while they may be in line with the treaty, may not be considered as an equitable and reasonable share according to the criteria provided in the Watercourses Convention. By not assessing the impacts of its uses on the downstream ecosystem and dependent vital human needs (potentially causing involuntary displacement and resettlement, and environmental degradation), it could be concluded that Afghanistan has not respected the principle of equitable and reasonable utilisation. Such obligation also includes Iran's water utilisation and its impact on the Hamoun Wetlands. The ERU principle is accompanied by a procedural obligation to cooperate and to conduct a transboundary EIA of projects before permitting them. Afghanistan argues that its water development is based on its right given by the bilateral treaty and complies with the ERU principle. However, by insisting on its unilateral act without having exchange of data with Iran and cooperation over the protection of the Hamoun wetlands, it is not clear if Afghanistan (and Iran) is committed to the treaty, nor complying with the ERU principle. More importantly, Afghanistan has violated the obligation to cooperate and the duty of notification. All in all, it seems that Afghanistan sees the relative benefits of such *status quo* of focusing on unilateralism whether it is lawful or not as being in its own favour, which again may reflect the anarchic nature and will be discussed in the next part.

The essence of the ERU principle is dependent on the creation of shared understanding and a culture of communication between co-riparian states, which would have been possible if the duty of notification had been respected. Such a shared understanding and collective identity may lead to the joint management of the entire river basin and could potentially transform the situation from conflict to equitable and sustainable utilisation with respect to balancing all the interests of the riparian states. On the basis of the analysis presented here, the 1973 treaty, with its legal indications, is likely to remain an empty and false promise with regard to offering an effective remedy for water conflicts between Afghanistan and Iran over the Helmand River and providing a sustainable solution for the whole basin. The 1973 treaty is a by-product of anarchy and, in itself, inflames the anarchic symptoms over the Helmand River. It is very restricted by nature, and barely provides space for legal principles concerning equitable and sustainable utilisation. The treaty may address some aspects of the ERU principle, but its super narrow interpretation and lack of account for the environment causes confusion for "practice of legality" over the Helmand River Basin. The following section will discuss the role of the ERU principle

with regard to the Helmand River and the reasons for its failure to transform the hydro-political relations from interactional international law perspective.

6.5.2. The effectiveness of the ERU principle and the failure for change in the Helmand hydro-political relations

The assessment of the 1973 Helmand treaty in the light of the ERU principle showed the 1973 Helmand treaty to be very narrow in its focus. By ignoring the importance of ecosystem services, the treaty barely addresses the ERU principle, and with its limited scope to allow for modern legal norms, it impedes transformation in the hydro-political relations, pushing merely for water conflict management.

As outlined in Chapter 3, the question of change is considered to be one of the main conceptual challenges in the study of international relations and international law. Despite rationalist reading of law as subordinated to the interests of states, the study picks constructivist theory – i.e. norms can shape social interaction – to see law rather as “generated and molded through interaction and, in turn, as affecting actor behaviour by influencing actor identity, and thereby reconstructing interests.”⁷⁹⁶ Constructivism emphasises the normative or ideational structures as being as important as material structures, and that the identities and interests of states are shaped within the society and through interactions.⁷⁹⁷ From this perspective, “[l]aw is seen as an enterprise and a social practice—a continuing challenge rather than a finished product.”⁷⁹⁸ From the view of interactional theory of law, states are obligated to comply with law only if they perceive law-making to be *legitimate*. Such legal legitimacy is created through three interrelated elements: a) shared understandings, b) criteria of legality, and c) the practice of legality.

Drawing upon the framework of interactional international law, therefore, the ERU principle effectively influences states’ behaviour and their interactions only if it is “broadly congruent with the practices and patterns in society”.⁷⁹⁹ The ERU principle has not been yet put into riparian states’ practice concerning the Helmand water utilisation, and just remained as a paper tiger. In this respect, shared understandings are the *underpinnings* of such effective influence in re-shaping states’ identity and promote the practice of legality. Interactionalism explains that the process of creation of shared understandings and construction of collective identity between riparian states about what they want to achieve through the ERU principle, even if it is very time-consuming, is vital to establish an effective regulatory

⁷⁹⁶ Brunnée and Toope (n 298) p. 113.

⁷⁹⁷ Reus-Smit (n 68) p. 199.

⁷⁹⁸ Brunnée and Toope (n 298) p. 114.

⁷⁹⁹ Brunnée and Toope (n 291) p. 56.

framework.⁸⁰⁰ In turn, the enforcement and effectiveness of the ERU principle depends on the extent to which those shared understandings are “intertwined with distinctive internal qualities of law and practices of legality”.⁸⁰¹ Therefore, the *effectiveness* of the ERU principle is seen through the way in which it shapes collective identity and how it promotes compliance by producing *persuasive* international discourses about what is legitimate concerning water utilisation of international watercourses.

As already shown, within the long history of negotiations between Afghanistan and Iran over the Helmand River, international law has played a significant role in shaping the respective arrangements and discourses while both sides have sought to impose their views and legitimise their behaviour. Clearly, the story of the Helmand River and its 1973 treaty has rather relied on the realist view in which law is used more as a tool of statecraft, mostly reflecting the interests of states. So far, Afghanistan and Iran have been engaged in a *battle for legitimacy* to take advantage of the legal norms in general and the ERU principle, in particular. In the highly anarchic geopolitical nature of the Helmand River Basin, where politics and sovereignty are crucial drivers for states’ behaviour in controlling transboundary waters, international law has been observed as a source of bargaining leverage for states to take advantage of in favour of their interest, in particular when water has been regarded as a matter of national security.

Within the history of hydropolitical relations regarding the Helmand River, Afghanistan as a buffer state, and surprisingly as it has relatively less power, has successfully exploited its geopolitical advantage over Iran in the times of extreme events like droughts. However, it should be noted that Afghanistan has not yet achieved its “hydraulic mission” of complete control of water resources of the Helmand River. Therefore, what Iran has benefited from mostly so far is the uncontrolled waters in Afghanistan, particularly the natural floods. At times of water scarcity, caused by humans or nature, then, Afghanistan has the upper hand in legal bargaining, because it seems that the Helmand treaty gives Afghanistan full right to develop the upstream with no account for the impacts on the downstream ecosystem. Therefore, Afghanistan seeks to legitimise its non-cooperative behaviour by using the treaty as a legal bargaining chip, while Iran’s hands are tied by the treaty.

The Helmand River Basin has demonstrated itself as a “hydropolitical security complex” through long historical complex relations in which, ultimately, both riparian states, upstream Afghanistan and downstream Iran, interestingly, have come up with a common discourse regarding equitable and reasonable utilisation and have declared their willingness to protect the Hamoun wetlands. Although such “improvement” might be potentially vulnerable due to the symptoms of existing and increasing

⁸⁰⁰ Brunnée and Toope (n 291).

⁸⁰¹ Brunnée and Toope (n 291) p. 56.

anarchic geopolitical circumstances, reaching a common view over the ERU principle, while they may have different interpretations, may introduce new ways of thinking and help create a shared understanding of their interests and identities. While the challenges and obstacles emerging from anarchy, i.e. struggle for survival, and fear of relative gains and uncertainties, may push both states to focus on merely the prevailing state-centrism in international law and negatively affects states' commitment to ERU principle, they may also provide – from a broader geopolitical perspective – an opportunity to integrate Afghanistan and Iran to create a collective basin identity over their shared waters and trigger off a basin-wide water cooperation. In this respect, the ERU principle may play a constructive role as a mediator (Figure 1 – Conceptual Framework) to construct a forum for dialogue and shape their behaviour towards transforming water conflict by balancing the interests and addressing the identities of riparian states within the principle of state sovereignty.

A collective identity already existed and was the basis of the “Great Sistan” in its historic sense for decade upon decade, and it served the people along the Helmand River and the Hamoun wetlands pretty well. This collective identity was noted by many scholars,⁸⁰² and also acknowledged in the Delta Commission report: “Here on both sides of the river are kindred people of similar language and with the same customs and living conditions”.⁸⁰³ However, the already existing collective identity was not only damaged by the British arbitral boundary in 1800s and then almost faded by emerging post-colonial “nationalisation” movements in Afghanistan and Iran with the contested efforts to control waters associated with competitive legal nature along with long war in Afghanistan, but also a separate competitive and even egoistic identity has emerged. While there are still high commonalities in social and cultural aspects and even some extent of economic interdependencies, both riparian states “have allowed this artificial line to become a barrier to the simple operation in the joint irrigation of the Delta, which was mutually beneficial to the people in both countries for so long a time”.⁸⁰⁴

As outlined in Part I, while hydropolitical relations seem to remain *ad hoc*, there has been a recent shift in behaviour and a consensus view on the ERU principle regarding the Helmand River and initiating cooperation to revive the Hamoun wetlands. The change in attitude toward cooperation is evidenced by changes in the two riparian states' discourse concerning cooperation over transboundary waters and specifically the utilisation of the Helmand River.⁸⁰⁵ In addition, there have been several attempts that may support the idea of possible shift in Afghanistan's attitude over transboundary water resources

⁸⁰² See for instance, Barzegar (n 743); See also Saeed Shokoohi and Morteza Hajiabadi, ‘Failure of Geopolitical and Geo-Cultural Commonalities to Integrate Iran and Central Asian Countries’ [2018] 14 *Geopolitics Quarterly* 149.

⁸⁰³ Helmand River Delta Commission (n 751) p. 92.

⁸⁰⁴ Helmand River Delta Commission (n 751) p. 92.

⁸⁰⁵ Thomas and others (n 615).

development: specifically the drafting of the Transboundary Water Policy in 2013 and other national regulatory policies like the National Development Strategy Framework, the Climate Change Adaptation Strategy, the Supreme Council of Land and Water, and the Transboundary Water Technical Unit.⁸⁰⁶ The draft policy of transboundary waters was based on the principle of equitable and reasonable use. It should of course, as Thomas and others argue,⁸⁰⁷ be noted that such a change of attitude towards the ERU principle might be merely a change in strategy for legitimising unilateral and noncooperative resource capture and attracting international financial support for their development projects. However, although it might yet be too soon to ensure there is a significant change in behaviour of Afghanistan towards cooperation over transboundary waters, the role of ERU principle to produce persuasive discourse, even if it still emerges as a bargaining position in the battle for legitimacy, is unavoidable. Such change of discourse is also observed on Iran's side. While Iran has struggled to persuade Afghanistan to cooperate over the Helmand River, a recent shift in discourse which is much more oriented towards the ERU principle is clear. Once again, although it might be seen as a policy of *appeasement* by de-emphasising the principle of "no significant harm" and focusing on the ERU principle – on which Afghanistan insists – in order to convince Afghanistan to cooperate, it demonstrates the inevitable role of legal norm and centrality of the ERU principle to influence the hydropolitical relations. The question should be asked as to how the ERU principle, as the core customary international water law, can transform the hydropolitical relations of the Helmand River.

To answer this question, according to interactional international law reasoning, states observe a legal norm not because of their self-interest, but rather by internalising it in their identities. Once a legal norm emerges from shared understandings and is then legitimised, it can shape the identity of a state. The interests of states are ultimately shaped by such identities which themselves may be changed through the process of interaction.⁸⁰⁸ Therefore, building upon constructivist reading, norms matter in international relations due to the indirect causes of states' behaviour by "the construction of collective identities and collective definitions of interests by framing processes that foster mutual

⁸⁰⁶ See Said Shakib Atef and others, 'Water Conflict Management and Cooperation between Afghanistan and Pakistan' [2019] 570 *Journal of hydrology* 875.

⁸⁰⁷ Thomas and others (n 615) p. 70 "This [change of attitude] could particularly be the case for future projects due to the necessity of acquiring funding from international organisations that favour dialogue and mutual agreements prior to finalising the designs of projects." Moreover, Vincent Thomas and Jeroen Warner state that initiating work on a transboundary water policy in 2013 by Afghanistan which was an effort to show signs of good will to donors was much more oriented towards the 'equitable and reasonable' principle, and the 'no significant harm' principle, "which in this case [the Harirud River; another transboundary river between Afghanistan and Iran but almost same controversies] would give room to consider the negative impacts of Afghan dams on downstream Iran", was removed. Vincent Thomas and Jeroen Warner, 'Hydropolitics in the Harirud/Tejen River Basin: Afghanistan as Hydro-Hegemon?' [2015] 40 *Water International* 593 p. 604. See Kai Wegerich, 'The Afghan Water Law: "A Legal Solution Foreign to Reality"?' [2010] 35 *Water International* 298 that shows how the sections within the Afghan water law "mainly play into the hands of the national hydrocracy and please international donors".

⁸⁰⁸ Maxym (n 159).

understanding”.⁸⁰⁹ In one sense, “the social reality of a legal person is to be found in the collectivity: the socially binding self-description of an organised action system as a cyclical linkage of identity and action.”⁸¹⁰ Actors can learn how they see each other through interactions, and their beliefs about themselves can be gradually changed through cooperation, and ultimately, their new, collective identity can be internalised.⁸¹¹

Drawing upon interactional international law, while there are strong commonalities and high socio-economic interdependencies with shared historical and cultural linkage between Iran and Afghanistan, on the issue of water a “constructive” process of interactions has failed to construct shared understandings over transboundary waters, particularly the Helmand River. Accordingly, the identity and interests that have been shaped through this faulty process of interactions – which has been severely affected by the highly-anarchic geopolitical setting – have been either damaged or not been constructed collectively with a strong ability to establish a legitimate legal norm. Therefore, the ERU principle has not yet been internalised through the interactions based on shared understandings but is rather subject to potential abuse through bargaining and ideational power over the Helmand River. With the same reasoning, the historical legal arrangements including the existing 1973 treaty are also grounded in a separate and contradictory understanding of the ERU principle and have thus constructed and reinforced rivalry and separate identities in the Helmand River. However, for Afghanistan the ERU principle appears to be a scapegoat for its unilateral and noncooperative development, while for Iran it may be a way to encourage Afghanistan to cooperate beyond the existing treaty and specifically for the Hamoun wetlands. Thus, as the treaty and the ERU principle have become politicised, the interpretation of them has too become contested. As examined in the previous section, the criteria of legality including clarity, constancy and predictability are not met by the 1973 treaty which is assumed to be grounded in the ERU principle. Moreover, the failure to create a shared understanding has raised serious doubts about the legitimacy of the 1973 treaty. While legal legitimacy depends upon “congruence with underlying social practice and internal characteristics of fair process”,⁸¹² the terms of the 1973 treaty and its fixed water allocation only for irrigation do not reflect the actual demands of the local population in the delta on both sides; instead, it emphasises their separate identities.

In conclusion, drawing upon in-depth analysis of the hydropolitical relations from the legal and political perspectives, the study argues that historical and ongoing hydropolitical relations in the Helmand River Basin have been placed at the very lowest level of equity and in contested/unilateral ERU, while anarchy

⁸⁰⁹ Brunnée and Toope (n 298) p. 145.

⁸¹⁰ Gunther Teubner, ‘How the Law Thinks: Toward a Constructivist Epistemology of Law’ [1990] *Selforganization* 87 p. 88.

⁸¹¹ Brunnée and Toope (n 291).

⁸¹² Brunnée and Toope (n 298) p. 147.

dominates the environment, targeting the interests and identities of the riparian states in the context of “self-help” (Figure 17). Under such circumstances, the 1973 treaty is largely understood as an “imposed” or “zero-sum” regulation by both Afghanistan and Iran, and there is strong feeling that they *have to* adapt themselves to this treaty. The 1973 treaty, in fact, at best reflects a contested ERU – being highly in favour of one side concerning resolving the disputes over the Helmand River, and barely addresses the modern ERU customary principle. However, looking at the Universe of TWINS in Figure 17 and the discouraging position of 150 years of interactions, it is clear that the Helmand River has enormous potential for progress towards higher equity. The lost opportunities in fact are better to be seen not unilaterally but rather from a basin-wide perspective, as it opens more opportunity to increase the possible benefits. Following on from the above analysis, one critical question beyond the legal aspect with must be asked is, why have the 150 years of relations over the Helmand River between Afghanistan and Iran with their strong commonalities and interdependency been doomed to failure? One could argue that there has been very limited chance for legal norms and specifically the ERU principle, among many other drivers,⁸¹³ to influence and change the hydropolitical relations of the Helmand River under such *anarchic circumstances*. This will be discussed in depth in Part III.

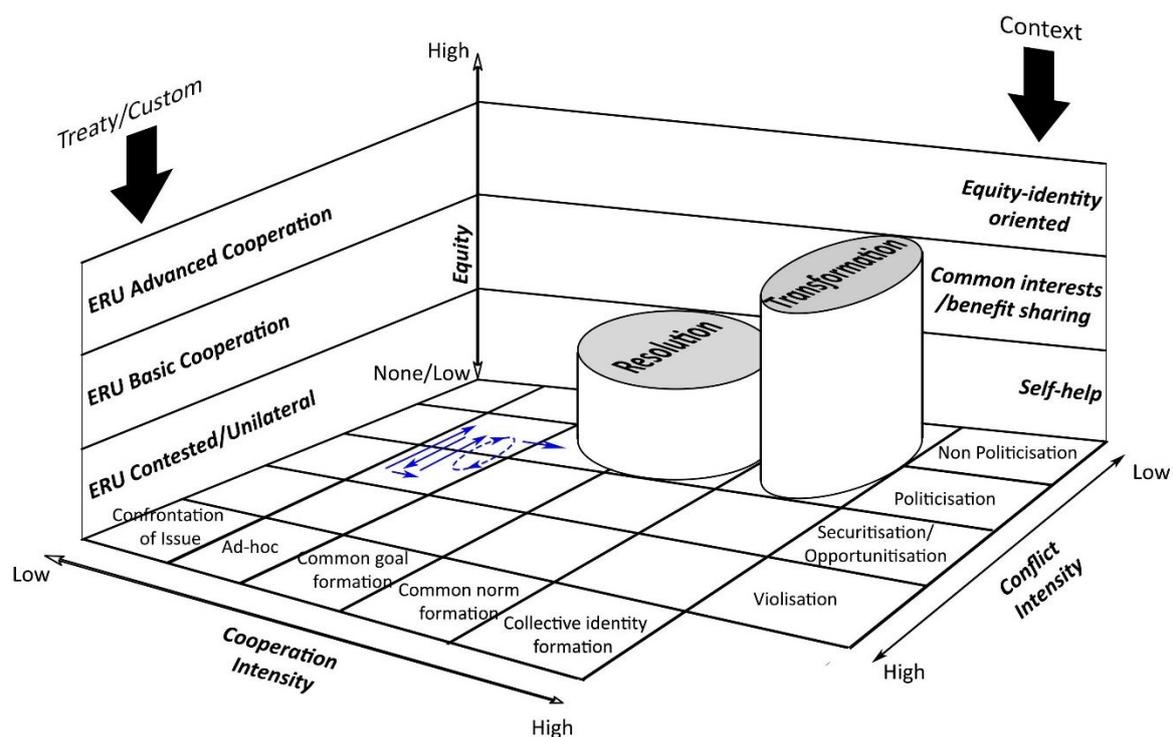


Figure 17. The Helmand River in the UHR (the hydropolitical relations remain at the lowest level of equity)

⁸¹³ Woodhouse and Zeitoun (n 239); Daoudy (n 196).

Part III: Anarchy

6.6. Cooperation under the shadow of anarchy: unravelling the fear of riparian states⁸¹⁴

In order to search for the failure-causing problems of the 1973 treaty and in particular the ERU principle, as the basis of the Helmand legal arrangements and recently agreed term of MoU, the study argues that the historical and broader geopolitical context of an international river basin significantly matter.⁸¹⁵ Active cooperation and participation in law-making processes to be perceived legitimate are necessary. Any impediments to foster cooperation and initiate the first steps for shared understanding obstructs the constructive influence of the ERU principle. Accordingly, the anarchic geopolitical circumstances at the basin level matters to understand the failure of the ERU principle in transforming hydro-political relations, and the rationale behind signing and maintaining the 1973 treaty by Afghanistan and Iran. In so doing, in the third episode will analyse the behaviour of Afghanistan and Iran under highly-anarchic geopolitical setting where riparian states competitively engage in a *battle for power and legitimacy*.

For many years, the HRC, as a diplomatic tool with its almost yearly bilateral meetings, has been increasingly faced with technical, managerial, legal, and political challenges. These severely hamper its ability to perform its primary function of fostering water cooperation. It is therefore important to critically assess the role of the HRC and to identify obstacles that negatively affect its contribution. Thus, a fundamental question that will be addressed through this section is: Why has the dispute over the Helmand remained unchanged despite the establishment of the HRC?

In seeking to examine the factors that hamper the effectiveness of the HRC, much attention in the literature has focused on technical and managerial factors. This focus has emphasised challenges to cooperation such as the conflicts of interest between Afghanistan and Iran over utilisation of shared waters, highly asymmetric socioeconomic patterns, local tensions over water utilisation, climatic and environmental risks, unilateral upstream dam development, mismanagement, and inefficient water uses.⁸¹⁶

However, two major factors have not been well captured in the literature related to the dispute: on the one hand, there is an existing strong potential from interdependency and broad cultural, socioeconomic, and political commonalities between Iran and Afghanistan (which requires further study), and on the other hand, problems caused by the geopolitical complexity of the basin (which is the focus of this

⁸¹⁴ This section has been reviewed and published in a book chapter. See, Nagheeby and Rieu-Clarke (n 638).

⁸¹⁵ Similarly, Hussein and Grandi (n 87) p. 173 also state that “[c]onsidering the broader context is necessary for understanding why the agreements were reached and also, to some extent, why they were not respected.”

⁸¹⁶ See, for instance, van Beek and others (n 85); Najafi and Vatanfada (n 85); Hajihosseini (n 763); Saleh Yousefi and others, ‘Interplay between River Dynamics and International Borders: The Hirmand River between Iran and Afghanistan’ [2017] 586 *Science of the Total Environment* 492.

section). The dispute may indeed reflect conflicting views over the river's political and legal regime, and differing views on the utilisation of shared waters. However, the *persistence* of disputes over the Helmand waters between Iran and Afghanistan and the failure of transformation have been arguably more influenced by *geopolitical factors* in the region and the anarchic setting in Afghanistan.

Only few scholarly peer-reviewed studies (in English) have sought to analyse the key characteristics of the hydropolitical relations between Afghanistan and Iran by illustrating the importance of “human security”,⁸¹⁷ power relations and riparian states' strategies,⁸¹⁸ and in a similar way but focusing on the geopolitical overlay.⁸¹⁹ In similar line of thought to the latest, an in-depth analysis of the impacts of *anarchy* and geopolitical nature on states' behaviour concerning transboundary waters, which has received less attention, is the focus of this study. As argued in this chapter, the anarchic setting, which is a byproduct of protracted foreign intervention and military occupation by the British Empire, the Soviet Union (USSR), the United States, and the North Atlantic Treaty Organisation (NATO), negatively influences the effectiveness of technical and managerial solutions; and as a consequence, limits the performance of the HRC and jeopardises the promotion of shared understanding.

As discussed in Chapter 2, it is necessary to more fully account for the geopolitical shadow of the past and existing political forces in a specific basin when analysing why states get stuck in disputes over transboundary waters. While riparian states may have a chance to manage water conflicts and prevent them from becoming a high-level political concern, the question that remains is: Can they progress their hydropolitical relations from conflict management to conflict resolution, or a transformation in the highly-anarchic geopolitical setting? In analysing anarchy within the Helmand River Basin context, this section will focus on three main obstacles that negatively influence the transboundary water cooperation.

It should be noted at the outset of this section that hydropolitical relations within the Helmand River Basin cannot be fully understood without considering the broader turbulent geopolitical context that was already explored in Episode I. Highly-anarchic geopolitical setting, as argued, casts a shadow over “everything” in Afghanistan and accordingly the Helmand River Basin. The relationship between major political milestones in the region and the adoption and evolution of cooperative arrangements concerning the Helmand River Basin, while meriting further analysis, is outlined in Table 3.

⁸¹⁷ Vahid Sinaee, ‘Hydropolitics and Human Security: Water Cooperation in Relations between Iran, Afghanistan and Turkmenistan’ [2012] 2 Iranian Review of Foreign Affairs 111; There are also some articles in Farsi, for instance, see Morad Kaviani Rad and others, ‘Identifying and Analyzing the Effects of Variables and Indicators Effectively on the Strategic Importance of Harirud for Iran with the Interaction Impact Analysis Approach’ [2019] 19 Journal of Applied researches in Geographical Sciences 1.

⁸¹⁸ Abidi ‘Irano-Afghan Dispute over the Helmand Waters’ (n 679); Thomas and Warner (n 807).

⁸¹⁹ Nagheebby and Warner (n 327).

Rarely has a river experienced such long wars, military invasions, and political swings as the Helmand. A recent UN report describes the political situation of Afghanistan as an “eroding stalemate.”⁸²⁰ The US intervention, now in its nineteenth year, also remains stuck in “strategic limbo.”⁸²¹ Analysts describe the complex politics of Afghanistan as a country where “state collapse, civil conflict, ethnic disintegration and multisided intervention has locked it in a self-perpetuating cycle that may be simply beyond outside resolution.”⁸²² Thus, the situation in Afghanistan, in which most of the Helmand River Basin is located, is reflected in the separation, contention, and fragmentation of authority and power either of the international community or national government. Authority belongs to whoever wins the latest battle. And conflict has deep social and political roots. National authority has limited control over both the behaviour of insiders and outsiders.⁸²³ Despite international efforts to bring peace and stability to the country, chaos and anarchy remain prevalent in Afghanistan, a state “where outsiders come and go without any records kept.”⁸²⁴ And, now, after more than four decades of invasions, civil war and America’s longest war, in which tens of thousands of people have been killed and millions have been displaced, the Afghan government has been excluded by the US in the “peace” negotiations with Taliban in 2020;⁸²⁵ a peace process of which justice is sacrificed.⁸²⁶ This anarchic nature of the political setting in Afghanistan, it is argued, undermines conflict transformation in the Helmand River Basin, and influences the behaviour of both riparian states.

Like Afghanistan, known as a buffer state between superpowers, Iran, as a regional power in the Middle East, has also experienced severe pressure from outsiders, particularly the United States. The Anglo-American coup in 1953 against a new democratic government, supporting Iraq’s 1979 invasion, and imposing economic sanctions during and after the negotiations on a nuclear deal, the recent act of war and terrorism by US against Iran by murdering senior military officials are just a few examples of the

⁸²⁰ UN secretary-general, “Special Report on the Strategic Review of the United Nations Assistance Mission in Afghanistan,” UN doc. A/72/312–S/2017/696, 10 August 2017 <https://digitallibrary.un.org/record/1299019?ln=en> accessed 26 January 2021.

⁸²¹ Michael H. Fuchs, ‘It’s Time to End America’s War in Afghanistan’ *Guardian* (19 August 2018) <https://www.theguardian.com/commentisfree/2018/aug/19/its-time-to-end-americas-war-in-afghanistan> accessed 26 January 2021.

⁸²² Max Fisher and Amanda Taub, ‘Why Afghanistan’s War Defies Solutions’ *New York Times* (24 August 2017) <https://www.nytimes.com/2017/08/24/world/asia/afghanistan-intervention-state-collapse.html> accessed 26 January 2021.

⁸²³ Khalilzad (n 728).

⁸²⁴ Kimberly Zisk Marten, ‘Defending against Anarchy: From War to Peacekeeping in Afghanistan’ [2002] 26 *Washington Quarterly* 35 p. 35.

⁸²⁵ Mujib Mashal, Taliban and U.S. Strike Deal to Withdraw American Troops From Afghanistan’ *The New York Times* (29 Feb 2020) <https://www.nytimes.com/2020/02/29/world/asia/us-taliban-deal.html> accessed 26 January 2021.

⁸²⁶ Ben Saul, ‘Exchanging killers for peace in Afghanistan is wrong — and could have lasting consequences’ *The Conversation* (11 September 2020) <https://theconversation.com/exchanging-killers-for-peace-in-afghanistan-is-wrong-and-could-have-lasting-consequences-145927> accessed 26 January 2021.

attempts of superpowers to assert their influence over Iran. In this respect, the former US National Security Council officials Flynt Leverett and Hillary Mann Leverett highlight that, “[h]egemonic strategies...are inherently expansionist: a state uses military, political, and economic power not just to defend its interests but to bend others into accommodating them.”⁸²⁷

Notwithstanding these influences, Iran shares several key objectives toward Afghanistan with the UN, such as: supporting the peace-building process; reconstruction and development; sanctioning the opium trade; and hosting refugees from Afghanistan, which has the second largest refugee population in the world.⁸²⁸ This becomes more significant when considering that poor water management and noncooperative water development in the Helmand Basin worsen violence, and increase opium cultivation and migration in Afghanistan—factors that all have a negative impact on not only neighbouring countries but also Western countries.

6.6.1. The dominance rivalry: Competition for survival, power, and self-interest

The purpose of this section is to illustrate how the struggle for power and self-interest—largely of non-riparian states—overshadows transformation in the basin. The section focuses primarily on analysing the geopolitical nature and roles of outsiders, and their foreign policies toward Afghanistan.

As already discussed, geopolitical competition in Afghanistan has been dominated by the strategic rivalry and confrontation between superpowers. Regional powers have also become enmeshed in the competition over “influence, power, hegemony and profits.”⁸²⁹ As a result, this anarchic setting has led all involved parties, including Iran and Afghanistan, to compete for power and self-interest in a way that protects their survival. This seemingly unbreakable cycle arguably casts a dark shadow over all economic and social developments in the basin and favours the interests and security of the outsiders, who have pursued different strategies for ruling Afghanistan.

Within the nature of the Great Game, the strategies of the outsiders have highly politicised and securitised water, in line with their own geopolitical interests,⁸³⁰ and therefore hindered water conflict transformation. Not surprisingly, for instance, almost all of the legal arrangements between Iran and Afghanistan over the Helmand River have been negotiated with the support of superpowers. Such was the case with the British-instituted Goldsmid and McMahon arbitrations of 1872 and 1905 respectively. These were followed by the US-proposed Delta Commission of 1951, and, finally, the 1973 treaty. All

⁸²⁷ Flynt Leverett and Hillary Mann Leverett, *Going to Tehran: Why the United States Must Come to Terms with the Islamic Republic of Iran* (Metropolitan books 2013).

⁸²⁸ Milani (n 693).

⁸²⁹ Nagheeby and Warner (n 327).

⁸³⁰ Nagheeby and Warner (n 327).

of these initiatives, and, in particular, the earlier ones, have been described as “the force of dictat” being applied to a local issue as a “bulwark” against Czarist or Russian expansion.⁸³¹ During the Cold War the US government considered the conflict between Iran and Afghanistan over the Helmand River as a political opportunity to bring the countries under its influence in order to protect its broader geopolitical interests in the region, and protect its security against the threat of the USSR. This hegemonic strategy is illustrated by the following 1947 statement by the US Central Intelligence Agency (CIA):

The United States and Great Britain are keenly aware of this Soviet interest, which may threaten the strong traditional British influence in Afghanistan and adjacent areas. It is an important part of American policy in the Middle East that no state in the area shall have its independence and integrity endangered and that American influence be maintained and strengthened wherever possible. A dispute such as the one between Iran and Afghanistan over the Helmand River threatens this policy.⁸³²

Just as political rivalry between outside powers emerges from ideological dispositions, ranging from imperial capitalism to Marxism-Leninism, so too are water development projects influenced by competition between the power and self-interest of countries. As Arthur Schlesinger contended, “[d]ams were the American alternatives to Communist land reform.” The US policy, “wherever possible,” has therefore strategically proposed river authority schemes as solutions to the most stubborn international conflicts, such as in Palestine and Kashmir. An example can be seen in the case of the Helmand and HAVA in Afghanistan, which was established in 1952. HAVA was regarded by the US government as a means to “create a secure political base [against the US’s rival, the USSR].”⁸³³ Thus, the process of signing (or perhaps being forced to sign) the peace agreement over shared waters, the 1973 Helmand River Water Treaty, should be seen through this lens of geopolitical imperialist rivalry among the superpowers of that moment. This is well demonstrated by Asadollah Alam in maintaining that Americans forced the Iranian regime at the time to compromise and provide incentives to Afghanistan over the Helmand waters in order to control growing Soviet influence within the latter country.⁸³⁴

⁸³¹ CIA, *The Helmand Waters Dispute between Iran and Afghanistan* (The Central Intelligence Agency, CIA Library 1964) declassified report, “sanitized copy,” approved for release 16 November 2012, doc. no. CIA-RDP08C01297R000100130005-4, 29 June 1964, 4, <https://www.cia.gov/library/readingroom/docs/CIA-RDP08C01297R000100130005-4.pdf>.

⁸³² CIA, *The Controversy between Iran and Afghanistan over the Helmand River Waters* (The Central Intelligence Agency, CIA Library 1947) declassified report, “sanitized copy,” approved for release 6 September 2012, doc. no. CIA-RDP08C01297R000100130020-7, 24 October 1947, 25, <https://www.cia.gov/library/readingroom/docs/CIA-RDP08C01297R000100130020-7.pdf>. The CIA also noted that “[w]hile the dispute is essentially local it has wider significance as a source of friction between two Middle Eastern states and as a possible means of weakening their ability to resist pressure by the Soviet Union.” See *ibid.*, ii.

⁸³³ Nick Cullather, ‘Damming Afghanistan: Modernization in a Buffer State’ [2002] 89 *The Journal of American History* 512.

⁸³⁴ Alam ‘Yad’ dashtha-ye Alam’ (n 690).

Therefore, it is expected that not only the riparian states' rights to water but also the sustainability of water management within the whole basin, would be sacrificed in favour of superpowers' geopolitical interests.

This influence of outsiders is still exemplified in the 2017 "US Global Water Strategy," which refers to water as at the core of the US foreign policy agenda in Afghanistan, with the aim of protecting "US national interests."⁸³⁵ This kind of foreign policy agenda and intervention by outsiders over the longer term, creates what Alfred McCoy⁸³⁶ calls, a "black hole" of geopolitical instability. Similarly, the 2011 NATO report to the UNSC concerning the construction of the Kamal Khan dam calls for "transnational water agreements."⁸³⁷

This demonstrates how outside powers have highly politicised water development in Afghanistan, potentially at the risk of threatening long-term sustainable and equitable cooperation between the riparian states. This does not mean that national interests, and the agreements or differences between Iran and Afghanistan over the Helmand River – outlined in Section 6.4.5 – are without value, power, and influence, but the reality is that anarchy, and geopolitical rivalry, have severely overshadowed the priorities of the riparian states and led them to strategically focus on power, security, and self-interest for their survival, at least in the period of geopolitical vulnerability. Such anarchic nature also contributes to devastating the identity of states concerning the water cooperation, as seen in the case of Afghanistan.

Thus, on the one hand, within the vulnerable political situation in Afghanistan, the government views development over water resources as a strategic resource, a symbol of nation-building and a way of monopolising power against its national rivals. On the other hand, within an anarchic geopolitical context, water related projects are not solely for socioeconomic development but rather for geopolitical reasons that serve the security interests of all the actors involved. In turn, this situation has seriously impacted transformation. Although there might not now be clear evidence to trace the interventions of

⁸³⁵ US Department of State, *Us Government Global Water Strategy* (US Department of State 2017) https://www.usaid.gov/sites/default/files/documents/1865/Global_Water_Strategy_2017_final_508v2.pdf. In similar approaches to that of the United States, countries like the Netherlands, Switzerland, and Sweden have included water as a core foreign policy issue in their national interest. See Swiss Federal Council, "Global Programme Water Division," <https://www.eda.admin.ch/deza/en/home/sdc/organisation/departments/global-cooperation/global-programme-water-initiatives.html>; Government of the Netherlands, "What does the Special Envoy for International Water Affairs do?" <https://www.government.nl/topics/water-management/waterenvoy>; and Government Offices of Sweden, "International development cooperation," <https://www.government.se/government-policy/multilateral-cooperation/>.

⁸³⁶ Alfred W. McCoy, 'How the Heroin Trade Explains the US-UK Failure in Afghanistan' *Guardian* (9 January 2018) <https://www.theguardian.com/news/2018/jan/09/how-the-heroin-trade-explains-the-us-uk-failure-in-afghanistan> accessed 26 January 2021.

⁸³⁷ UNSC, Quarterly Report to the Security Council on the Operations of the International Security Assistance Force, UN doc. S/2011/760, 7 December 2011, 11, http://www.un.org/ga/search/view_doc.asp?symbol=S/2011/760 accessed 26 January 2021.

outsiders in the hydropolitical relations of the Helmand River Basin, the shadow of the outsiders' past politics has its impact on the respective discourses, behaviour, and the atmosphere of negotiations within the HRC.

6.6.2. The greater fears of relative achievements and cheating

A fear of cheating exists in the Helmand River Basin, though, interestingly, the atmosphere of the negotiations inside the HRC is, according to Jabbar Vatanfada, the former Iranian commissioner, "amicable" most of the time.⁸³⁸ Yet, problems and disputes have persisted, in part because of points of contention such as disagreement over measuring water flow. While there is not a reliable study by the HRC or others to analyze the potential impacts of natural phenomena and human-made development in the Helmand River Basin, lack of common monitoring of the transboundary river by the HRC, a basic core function of any RBO the world over, has bred distrust between the riparian states.

For instance, according to the 1973 treaty, one of the main sticking points concerns Article I(c), which defines a "normal water year."⁸³⁹ This depends on the measurements recorded by the Dehrawud hydrometric station located upstream near the Kajaki Dam. In years when the amount of water is less than a normal water year due to climatic variation, the water allocated to Iran is to be decreased proportionally. Thus, defining a "normal" water year and demonstrating the causes for a probable decline in water flow in upstream Afghanistan are crucial for proper implementation of the treaty. While Iranian officials have repeatedly requested visits to this station for verification of the Afghan reported water flow, particularly during periods of drought, the Afghans have always denied these requests based on "security" reasons.⁸⁴⁰ For their part, Afghans have always criticised Iran for having "hundreds" of water pumps on the river bank and therefore claiming that they are using "more" water than is their right according to the treaty.⁸⁴¹ While Iran claims that the water abstraction by these pumps is "negligible" compared to its 820 MCM water right, a specific project has been conducted to provide water to those river bank farmers in order to remove the pumps, and accordingly ensure compliance with the treaty's obligation.⁸⁴² However, the pumps still abstract water from the river, and Iran claims that its unsuccessful attempts to take out pumps are "the fault of local social resistance farmers."⁸⁴³

⁸³⁸ IRNA (n 717).

⁸³⁹ Article I(c) identifies a "normal water year"—the year during which the total volume of water from the first of October to the end of the succeeding September, measured and calculated at the hydrometric station of Dehrawud, upstream of Kajakai Dam, is 5661.71 MCM. See Annex I.

⁸⁴⁰ Mahmoudi 'Historical Events after the Signing' (n 616).

⁸⁴¹ Mahmoudi 'Historical Events after the Signing' (n 616).

⁸⁴² Tasnim News (n 614).

⁸⁴³ Mahmoudi 'Historical Events after the Signing' (n 616).

These ongoing back-and-forth exchanges have not only damaged the trust between the riparian states, but have also severely heightened the fear of cheating.

The behaviour and concerns of the riparian states of the Helmand River Basin in an anarchic context may also reflect the relative achievements over the utilisation of shared waters. For instance, the continued debate between the reluctant riparian states in relation to these issues of visiting monitoring stations and removing pumps might be understood in terms of a fear of relative gains. Considering the “black hole,” there is perhaps a serious question for the riparian states that: If there is not a minimum guarantee for the future, why would the countries make promises? This critical question forces them to behave very conservatively and cautiously. Perhaps this fear can also be observed in their misleading claims over the dichotomous issues of unilateral development and environmental protection. While Iran has expressed concern about the effects of Afghan dams on its future water utilisation, in particular the downstream ecosystem,⁸⁴⁴ Afghanistan is worried by Iran’s international campaign to protect the Hamoun wetlands.

On the one hand, Iran’s concern might be justified not only because of the fact that an upstream storage dam may potentially provide material power (Afghanistan could essentially control water flows), but also because a dam will give Afghans the upper hand and more capabilities in future negotiations over other issues. The anarchic condition of Afghanistan may also support this interpretation; namely it cannot give a guarantee to Iran about Afghanistan’s compliance with any agreement over water or not abusing the dams by outsiders against its security. Thus, even though dams in Afghanistan may be in line with Iran’s main interests in Afghanistan, such as security and development, Iran’s fear might be justified due to threatening its national security.

On the other hand, Afghan fears over Iranian efforts to make an international campaign to protect the Hamoun wetlands might be interpreted as providing Iran with a greater capability to force Afghanistan—as a late-developing country⁸⁴⁵—to comply with environmental obligations or cut international support for its projects, before using waters for its development. It should, however, be noted that the protection of the Hamoun wetlands might also be beneficial for Afghanistan, but perhaps it is not the priority now; and therefore, Afghanistan might rather express concern about what Iran may achieve by this campaign. This fear may also be traced to Afghanistan’s reluctance to join the Ramsar Convention. As a result, both riparian states may express concern about relative gains, which, in an anarchic setting, may override the pursuit of individual absolute gains.

⁸⁴⁴ Tasnim News (n 614).

⁸⁴⁵ For discussion about the rights and obligations of late developing states in transboundary river basins, see McMurray and Tarlock (n 756). See also Zeitoun (n 484); Nagheeb (n 247).

Despite the presence of the HRC, there has been a serious lack of constructive dialogue between the two parties over relevant problems like the Hamoun wetlands.⁸⁴⁶ Consequently, and considering the absence of mutual trust and faith, the new emerging phase of cordial cooperation may also fade away. Such a fear of relative gains may be evidenced on the one hand by some Afghans, who possess apparent “feelings of inferiority” and have “often given the impression that their duty lay in preventing the devious Iranians from outsmarting them”, and on the other by some Iranians, who “have sometimes behaved as if the Helmand [R]iver were a spigot which the Afghans delight in turning on and off just to spite Iran”.⁸⁴⁷

6.6.3. The uncertainties

The uncertainty of one state over the future intentions of the other can lead to a focus not only on absolute but rather on relative gains from cooperation in order to protect security and survival. This complex security dilemma might be interpreted as explaining why Iran and Afghanistan, while not fully satisfied with the treaty’s provisions and with each other’s compliance with it, might nevertheless not exit. The reason may be arguably justified by a feeling of uncertainty about the future that is very murky and puzzling in an anarchic setting, leaving a state feeling vulnerable and fearful of the other achieving relatively greater gains by leaving the treaty.

This is evident in the discussions related to the implementation of the 1973 treaty. On the one hand, while Iran has expressed concern over the quantity and the mechanisms for allocating water,⁸⁴⁸ an alternative solution has failed to present itself—and perhaps there is a recognition that the status quo, even though it is very far from the actual needs, at least provides some degree of certainty for Iran against Afghanistan, particularly during drought seasons. Thus, Iran’s behaviour might be observed to support the maintenance of the treaty in its own favour while adopting a strategy of persuading Afghanistan to cooperate over the protection of the Hamoun wetlands.

On the other hand, while Afghanistan has not—at least until recently—been satisfied about the treaty,⁸⁴⁹ it maintains it because of a similar fear of uncertainty. It might be interpreted that, first, Afghanistan is afraid that if it leaves the treaty, a new round of negotiations may lead to additional obligations; and, second, Afghanistan perhaps has found some degree of certainty that the treaty gives it the upper hand in current negotiations over the Helmand River. Considering also that withdrawal from the treaty may produce obstacles to attracting international financial support, Afghanistan also strives to influence the

⁸⁴⁶ Tasnim News (n 614).

⁸⁴⁷ Quoted in CIA (n 831) p. 12.

⁸⁴⁸ Tasnim News (n 614).

⁸⁴⁹ Mahmoudi ‘Historical Events after the Signing’ (n 616).

implementation of the treaty for its own interest while not responding to the call for cooperation on the Hamoun wetlands.

Finally, the “black hole” is also observed in the HRC since there is no minimum guarantee of holding the next meeting or fulfilling commitments within the anarchic political turbulence. This is also observed in the lack of confidence in how the representatives of the HRC negotiate and commit. The vulnerability, complexity, and utmost political sensitivity of the issue, along with public pressure, make the respective negotiations for all representatives too risky. These sources of uncertainty affect the behaviour of the two states, influence the outcome of every round of negotiations overseen by the HRC, and form a barrier to equitable and sustainable cooperation and conflict transformation.

6.7. Conclusion

In conclusion, this chapter illustrated the obstacles in the way of conflict transformation in the Helmand River Basin. It shed light on the role of the ERU principle in shaping legal arrangements and influencing hydropolitical relations over time. The assessment of the Helmand treaty with regards to the ERU principle showed that it rarely reflects the notion of equity. The chapter also argued that the 1973 treaty has limited capacity to address the “life cycle of norms” through interactional international law, by its failure to foster shared understanding and meet the criteria of legality. Despite cooperation through the HRC, both riparian states of the Helmand River have continued to unilaterally utilise their shared waters. Within anarchic nature, the ERU principle serves rather for bargaining strategy. While Afghanistan has been developing dams, lack of a positive response to calls to consider environmental impacts and revive the Hamoun wetlands through cooperation reflect a situation that is reminiscent of the “tragedy of the commons.”⁸⁵⁰ Despite the fact that the disputes over the utilisation of the Helmand River between riparian states have been fundamentally of a technical and managerial nature, the disastrous politicisation of the disagreements influenced by the toxic nature of the Great Game has complicated the situation.

A global geopolitical overlay can, therefore, easily be posited on top of a regional (hydro)security complex.⁸⁵¹ The review of the geopolitical history of the Helmand River shows that there is a negative correlation between anarchy and water conflict transformation. Many Western countries, in particular the United Kingdom and United States, have demonstrated continued interest in the Helmand River Basin.⁸⁵² This means that the Helmand River Basin dispute appears both as a symptom of the anarchy

⁸⁵⁰ Quoted in Garrett Hardin, ‘The Tragedy of the Commons’ [1968] 162 Science 1243.

⁸⁵¹ Nagheeby and Warner (n 327); See also See Schulz (n 43).

⁸⁵² The dams in the Helmand River are still protected by the British Army. The basin is under the study of the US Army and major funding is provided by these countries. For instance, the United Kingdom invested £2.8 million over three years (2011/12-2013/14) to the Helmand River Study and Master Plan. See UK Department for

created by competition between non-riparians and as a tool used by outsiders for their own interests in a broader geopolitical context. The consequence is that progress toward transformation is constrained because the outsiders' priorities have served their national interests, without sufficiently paying attention to the interests and identities of the riparian states and without an integrated vision of the whole river basin based on equity and sustainability.

Yet, the continuing anarchy presses both Iran and Afghanistan to struggle for survival in the negotiations conducted through the HRC, which are essentially imbued with power-seeking, driven by self-interest, heated by the fears of cheating and relative gains, and weakened by uncertainties. Despite Iran's call, Afghanistan may consider cooperation over shared water resources as being too risky within the present turbulent geopolitical setting. This confirms that policies and institutions within certain settings, such as the Helmand River Basin, must be applied by paying attention to the impacts of anarchy on states' behaviour in order to better understand the root causes of water conflict.⁸⁵³ However, focusing on *regional* cooperation through broader geo-economic regional integration might not only overcome the symptoms of anarchy but also meet the interests and identity of the parties, that merits further line of research.⁸⁵⁴ If the national interests and identity over transboundary waters are not placed in regional collective identity, there seems little prospect of an water conflict transformation in long term. The recent progress in relations and the general consensus on promoting cooperation over water with reference to the ERU principle may initiate the first steps for creation of shared understanding and collective identity over the Helmand River and transform hydro-political relation towards equitable and sustainable manner.

International Development, *Business Case Intervention Summary. Title: Helmand River Basin Study and Master Plan (Hrbmp)—200870. What Support Will the Uk Provide?* (UK Department for International Development 2011) http://iati.dfid.gov.uk/iati_documents/3755598.odt accessed 26 January 2021. The question is how much their policy and financial support are aligned with the idea of fostering mutual cooperation between riparians on a basin-wide view.

⁸⁵³ Despite the fact that this section argues that the water-related institutions remain unable to effectively address the water disputes in anarchic settings, they play subsidiary roles. Therefore, this chapter does not suggest that the HRC is entirely toothless. In the geopolitical chaos of the basin where even a little dispute may escalate into full-blown conflict, the commission may provide a forum for both states to communicate in a legitimate way to at least manage, even if they cannot resolve, their water conflicts.

⁸⁵⁴ See, for instance, Inomjon Bobokulov, 'Central Asia: Is There an Alternative to Regional Integration?' [2006] 25 *Central Asian Survey* 75.

Concluding Summary: Water never dies

“Look for the answer inside your question” (Molana - Jalal al-Din al-Rumi)

How important is international law, and how can international law change state behaviour, are the key questions emerging not only from academic debates but also from states' practices in the contemporary world. Today, worldwide water scarcity, the threat of climate change, global warming, and environmental degradation have led the United Nations General Assembly (UNGA) to declare 2018-2028 as the International Decade for Action on “Water for Sustainable Development”.⁸⁵⁵ With these complex water-related challenges and threats that globally target human security and future generations while possibly intensifying the competitive atmosphere concerning transboundary waters, implementation of international water law does not seem to have an easy task in promoting hydropolitical relations within the anarchic nature of world politics.

International and regional laws and institutions have sought to address the complexity associated with international waters to resolve conflict and promote cooperation in an equitable and sustainable manner. However, the negotiation, adoption and implementation of the principles and rights of international water law inherently result from a broader (geo)political process, and therefore are subject to the power dynamics between states and other powerful actors and may be subject to the whims of political decision making. From this point of view, it is argued that international water law, as a source of structural, bargaining and ideational power, reflects the balance of power between riparian states. Just as anarchic geopolitical settings partly shape the hydropolitics of transboundary river basins (see Chapter 2), so too are the behaviour of riparian states and hydropolitical relations influenced by the various interpretations and narratives of international water law through political dynamics and power asymmetry. Thus, the interaction between international water law and political dynamics within local, regional, and international socio-political settings must be considered in order to improve hydropolitical relations. Yet, there has been little consideration of how international water law can be applied practically within the political context of the contemporary anarchic world and what the obstacles are. Considering the extensive development in international water law and the complexity surrounding the politics of transboundary waters, there is also a dearth of research on facilitating dialogue between different disciplines in order to synergise legal principles regarding international waters and hydropolitical dynamics. Drawing upon the integration theories of both law and politics, the overarching purpose of this thesis, therefore, has been to investigate the circumstances in which the evolution and

⁸⁵⁵ See International Decade for Action on Water for Sustainable Development, 2018-2028 at <http://www.un.org/en/events/waterdecade/index.shtml> accessed 26 January 2021.

implementation of international water law could effectively contribute to resolving water conflict over an international watercourse to achieve equity.

Furthermore, this offers a critical analysis of the role of equitable and reasonable utilisation, the core customary principle of international water law, in changing hydropolitical relations within the anarchic context of international waters to achieve “water conflict transformation”. Accordingly, the main research question, as defined in the introduction, was: **How and to what extent does the equitable and reasonable utilisation principle (ERU) improve the hydropolitical relations of an international watercourse within anarchic geopolitical settings?”** Seeking to answer this question by synergising anarchy, legal principles of equity and state behaviour, the study’s main original *theoretical* contribution is to develop the understanding of the link between hydropolitics and international water law. In addition, this study also provides an original contribution to the knowledge in relation to *empirical* context with its depth of analysis of hydropolitical and legal relations between Afghanistan and Iran in terms of the Helmand River Basin, as there is currently a lack of relevant scientific and qualitative research in this area.

The overarching theoretical foundation supporting this study, as outlined in Chapter 3, was grounded in the constructivist reading of international law, of the kind introduced by Jutta Brunnée and Stephen J. Toope (2000) in their concept of “interactional international law”. This framework explains how international legal norms can shape the interests and identities of states by sustaining the “life cycle of norms”: shared understanding, criteria of legality and practice of legality. The overarching framework thus provided the means for this study to examine the relationship between anarchy, the ERU principle, and state behaviour – which is a by-product of its interest and identity.

In sum, the research brings a significant contribution to knowledge at theoretical level by engaging in the literature of integration of IR and IL theories and by developing the understanding of the linkage between hydropolitics and international water law. The main original contribution of this thesis lies in its focus on the underlying anarchic geopolitical structure, and on the role of legal norms to shape the interests and identities of states within that structure. By creating a theoretical linkage, it also adds values and extends the TWINS framework and international water law analysis. In addition, the study provides an integrated framework that looks more pragmatic to grasp the realities on the ground and shows that: a) anarchic geopolitical setting matters in shaping state behaviour over international watercourses; b) identity matters in shaping hydropolitical relations; c) a change in relations is subject to both anarchic nature and the creation of collective identity among states; d) life cycle of norms is necessary for the effectiveness of the ERU principle to transform hydropolitical relations in the Universe. While the four points outlined above indicate the *theoretical* contribution of the research, *empirical* contribution to the existing knowledge of the understudied Helmand River Basin is also significant and valuable in this thesis. The study’s original contribution in analysing the role of the ERU

principle in shaping hydropolitical relations over an international watercourse and its application to the Helmand River are summarised in the following sections.

7.1. Change is inevitable

The underlying aim of the study was to understand how a change in hydropolitical relations may occur with the influence of the ERU principle. Relations with regard to utilisation of shared waters are not static, but are subject to change in bio-physical, socio-economic and (geo)political circumstances. Such dynamic changes may influence states' interests and identities or be reflected in new interests and identities. Moreover, a change in the interest and identity of a state may result in a change in hydropolitical relations with other states. To illustrate the changes in hydropolitical relations, the starting point of the study was to define the underpinning assumption by distinguishing the notion of water conflict "transformation", which is set as a benchmark for the improvement of hydropolitical relations between riparian states, from "resolution" and "management". While the conflict management approach is often implemented to control conflict regardless of the equitability of the outcome, the conflict resolution approach aims to achieve a level of satisfaction by providing a fair balance between the parties' different interests. However, water conflict transformation was understood by this study, as set out in the introduction, as an aspect of hydropolitical relations which is much more closely associated with the principles of equity, while reflecting a balance between equity and riparian states' interests and identities together. Such interactions between states' interests and identities and their attitudes, interpretation and practice of equity within an anarchic setting over international watercourse, this study argued, make changes in hydropolitical relations all the time. The change in relations is subject to both anarchic nature and the creation of collective identity among states.

7.2. Anarchy and geopolitical setting matter in shaping states' behaviour concerning transboundary waters

One of the fundamental concepts of international relations theory and international law is anarchy, which has received less attention in the literature concerning international watercourses. By exploring how anarchy and the dominant nature of struggling for power shape the behaviour of states over international waters, Chapter 2 of this study presented a neorealist reading of anarchy and discussed the challenges and obstacles faced by water conflict transformation. The study showed how the complexity around international waters may be intensified by an anarchic environment. While anarchy influences the interests and identities of states and thus their behaviour, it may create circumstances under which states may be reluctant to commit to and comply with any law that they believe might decrease their security with potential future adversaries. Such a nature may provoke riparian states to focus on absolute understanding of sovereignty principle, while using the ERU principle as their own bargaining power. Therefore, the anarchic nature surrounding international waters matters in shaping hydropolitical

relations and might be the main barrier to conflict transformation, by creating chaos and vulnerability and intensifying the risks to “constructive” forms of conflict and cooperation.

The study then went further to employ this concept in understanding the hydropolitical relations of the Helmand River Basin between Afghanistan and Iran. Through an in-depth discussion in Chapter 6, the study demonstrated that there is a negative correlation between anarchy and water conflict transformation – in which equity principle plays a key role – in the Helmand River Basin. By reviewing the geopolitical history of the Helmand River, the study illustrated how the anarchic geopolitical setting of the Helmand River Basin produces fears of relative gains and uncertainties, pressing Afghanistan and Iran to struggle for survival. While there are internal factors to influence the hydropolitical relation, anarchy which is the by-product of outsiders seriously hampers the efforts of the riparian states to improve their relation. Accordingly, to amend Wendt’s argument that “anarchy is what states make of it”, within such nature, one may argue that anarchy is what *outsiders* make of it at the cost of injuring the regional states.

7.3. Identity matters in addressing equitable utilisation of international watercourses

This study built on the critical hydropolitics literature and its focus on the coexistence of water conflict and cooperation shaped by power relations and argued that states’ identities are important in achieving equitable and reasonable utilisation of international watercourses. It therefore gave prominence to the often-ignored factor of the complexity of hydropolitical relations. It showed that it is necessary to sharpen the focus by examining equity and addressing the identity of riparian states in order to “effectively” transform hydropolitical relations. Water conflict and cooperation, in fact, are not only shaped by power asymmetry and anarchic settings; the identity of riparian states and their perceptions about equity may also influence the relevant hydropolitical relations. The complexity of the hydropolitical relations will be more understandable if the study examines what is behind identity of states concerning transboundary waters. Thus, this study suggested another aspect of approaching the subject by emphasising the important role of equity and identity and the need to bring these concepts into sharp focus in analysing hydropolitical relations.

Within the empirical context and by analysing the geopolitical overlay of the Helmand River Basin, the study illustrated how hydropolitical relations have been shaped around coexistent conflict and cooperation. It employed the TWINS matrix and illustrated the actual reality of the hydropolitical relations surrounding the Helmand River. One significant finding, from both the theoretical and the practical points of view, was that the “frightening” future which has been highlighted in some reports and media may not be substantiated by the facts on the ground. However, the Helmand River Basin has experienced continuous fluctuations between politicised and securitised conflict, while the cooperation has been apparently stuck in ‘*ad hockery*’. Notwithstanding this, the study showed that recent efforts to

initiate *strategic* regional cooperation may advance the water cooperation between Afghanistan and Iran.

In addition, by looking at the “shadow of the past”, the study examined how the behaviour of Afghanistan, in particular, as well as Iran, has been affected by their attitudes towards their identities and interests. While the identity of a state reflects its self-understanding constructed through its history, Afghanistan’s identity has been severely affected by long periods of war and invasion by “outsiders”. This identity, along with other factors, leads Afghanistan to symbolise “water nationalism” in order to, in part, recover its “damaged” identity. Therefore, the Afghans may consider that their interests are only met by taking a unilateral approach towards a complete “resource capture” within an anarchic context. This has resulted in Afghanistan’s overemphasis on absolute territorial sovereignty doctrine, probably filtering, and mis-interpreting the ERU principle through such a doctrine. Iran, on the other hand, sees its interests and identities through the historical value of Sistan which reflects ancient Persia and Zoroastrianism, socio-economic importance, and security issues of the region which has seriously suffered from the instability in Afghanistan over the last four decades. While the water of the Helmand river is significantly important for Iran’s Sistan where there is no alternative yet, water has often been sacrificed in relevant negotiations in favour of security issues and the priority of a stable Afghanistan, in view of the anarchic geopolitical turbulence of the region. With this view, Iran’s interests and identities have been approached more through “integration strategy” and proposing broader benefit-sharing to encourage Afghanistan toward water cooperation. From the legal perspective, and with this observation of the complex circumstances and in line with the efforts to create shared understanding, the study showed that Iran has been supportive of the ERU principle without mentioning the “no-harm” principle in the bilateral MoU with Afghanistan, even though the latter may be assumed to be more in line with its interests.

7.4. The Universe of Hydropolitical Relations (UHR): equity in TWINS

In order to complete the different pieces of the puzzle of the main research question, the study placed the ERU principle in the political context of hydropolitical relations. As discussed in Chapter 5, the role of the ERU principle in enhancing water management has been researched, however the circumstances in which the ERU principle is employed by riparian states in an anarchic context remained undeveloped. The study, therefore, moved to analyse the interaction between the ERU principle and anarchy within dynamic power relations of hydropolitical relations, by developing the framework of TWINS based on the different identified degrees of equity. The study suggested an equity dimension to the framework of TWINS and introduced the Universe of Hydropolitical Relations (UHR). In so doing, the study considered the change of a hydropolitical relationship according to three different conditions: a) The ERU Contested/Unilateral, b) the ERU Basic Cooperation and, c) The ERU Advanced Cooperation. The realm of water conflict management, conflict resolution, and conflict transformation, with the goal

of promoting the implementation of the ERU principle could be observed through the different legal conditions of applying treaties and customary principles. Moreover, the study illustrated how each level of equity may manifest itself in three cultures of anarchy from constructivist perspectives. Therefore, the study showed how interactional international law and the “life cycle of norms” in relation with the ERU principle may appear in the UHR framework. To transform hydropolitical relations with the influence of the ERU principle, shared understanding is significant to support the criteria of legality and promote legal legitimacy. Such legal requirements for effective influence of the ERU principle as illustrated in the UHR are mostly expected to bring about water conflict resolution and transformation where there is “less” sense of anarchy.

By analysing the three factors of interactional international law, the study demonstrated that the historical legal arrangements, and in particular the existing 1973 Helmand River Water Treaty, hardly reflect the ERU Basic or Advanced Cooperation. The study showed how the 1973 Helmand treaty neglects the consideration of the ecosystem services, and with its narrow focus on fixed water allocation and limited space to account for modern legal norms, impedes the transformation of hydropolitical relations, and may even intensify the anarchic nature of the Basin. The hydropolitical relations of the Helmand River and its 1973 treaty are observed to have been based on the realist view where law is used more a tool of statecraft. A *battle for legitimacy* to take advantage of the ERU principle is therefore evident in the hydropolitical relations of the Helmand River, which suffers from a lack of shared understanding and collective identity between Afghanistan and Iran. Despite the strong commonalities and high socio-economic interdependencies between the two countries, the study demonstrated that the ERU principle has failed to enhance their hydropolitical relations. The study also drew attention to the fact that the anarchic geopolitical setting in the Helmand River Basin is, in part, to blame for this long-standing failure.

7.5. Policy recommendations and lessons learned

The study demonstrated how anarchy, by producing chaos and vulnerability, negatively affects states’ commitment to the ERU principle. Furthermore, the ERU principle alone cannot be an effective legal remedy for anarchic symptoms, however, the study illustrated how it can make a significant contribution. In particular, by its criterion of flexibility and early promise for a degree of guarantee to benefit the riparian states’ rights over shared waters, the ERU principle can greatly diminish the fears of riparian states regarding cooperation over water and encourage them to initiate a step for a constructive process of collaboration. Through this, and by constructing persuasive discourse and generating shared understanding between the actors, the ERU principle contributes to providing a legitimate basis for constructive dialogue between riparian states and is a starting point from which to decrease/neutralise the threat of anarchic effects. Then, the ERU with its independent explanatory and normative force has a persuasive influence to correct actors’ interest assessment in water utilisation and

consequently prompt state behavioural change and produce shared understanding. Moreover, and significantly, the ERU principle as a customary law has exerted power to influence the identities of states and guide their legal and political discourse by illustrating what counts as persuasive argument. In addition, the ERU principle can make strict adherence to a shared set of legal norms in order to frame a fair, persuasive pattern of water utilisation in the processes of shaping hydropolitical relations.

This study has advanced the understanding of the obstacles faced by international water law within the political context of international watercourses. However, due to some analytical limitations, its findings might be open to challenge. Though it might be argued that state identity may reflect the local norms and interest, the study only focused on hydropolitical relations at state level. While the study considered the international and regional context along with national level of anarchy, domestic politics are significant to draw a more accurate picture of the complexity around hydropolitical relations. In particular, in such cases as the Helmand River Basin, local people on both sides of the transboundary river – Nimrooz in Afghanistan and Sistan in Iran – who still have a strong potential for collective identity should be considered in future studies.

Looking at the trajectory analysis of the hydropolitical and legal relations in the Helmand River Basin, the study's important conclusion is that there is huge capacity for both Afghanistan and Iran to increase their potential benefits through broader geostrategic cooperation. Afghanistan and Iran with their historical shared identities can view the problem of water relations in the broader picture of regional integration by completing each other in their geopolitical and hydropolitical demand. This line of thought merits further research. Environmental degradation threatens the socio-economic resources of Afghanistan and Iran. While protection of vital human need is necessary for both states, environmental issues can serve as an effective platform to enhance dialogue. In current situation, there is serious lack of shared understanding and active participation between Afghanistan and Iran. A forum of constructive participation and dialogue is crucial to not only shared their interests but also, more importantly, reflect the inequity, the pains and harms that both sides are now suffering from them, leaving all of them untouched with many increasing misunderstandings.

The concept of equitable and reasonable water utilisation, on which both Afghanistan and Iran have recently reached consensus, enables parties in principle to search for constructive options, leading to an optimal utilisation of the shared water resource. However, there are still gaps in the knowledge about the practical implementation of the ERU principle in the Helmand River Basin with reference to the interests and identities of Afghanistan and Iran to maximise the benefits and limit the harms. While the basin is experiencing significant changes in all hydrological, socio-economic and political aspects, the question arises, from a pragmatic view, how can the ERU principle adapt to the changes over time? Moreover, there is still an urgent need, particularly for policy makers, to analyse how the provisions of

the 1973 Helmand treaty could be revised and accordingly propose a new legally based agreement on a piece of paper.

Finally, the recent efforts to promote comprehensive strategic collaboration on several issues has brought hope of shifting the unilateral utilisation of the Helmand River into a more integrated and basin-wide perspective, addressing balancing the interests and identities of the whole. Therefore, in order to ensure the security and welfare of the people of the Basin, the strategies of both Afghanistan and Iran in various political, economic and social fields could be integrated based on geopolitical and hydropolitical capabilities, values and characteristics and in particular with the focus on water-energy-food nexus. Both Iran and Afghanistan adopt complementary roles to fulfil their hydropolitical and geopolitical gaps, respectively. This line of thought could be further studied with a question of how the relations of the abovementioned countries could be redesigned through sustainable economic development and environmental protection in the whole region. In practice, political willingness from both Afghanistan and Iran is crucial factor to succeed.

However, within such a turbulent anarchic environment, sustainable solutions will not be reached unless the geopolitical nature of the region and outside interventions can centre on a normative understanding of the regional interests, identities, and commonalities of all the riparian states. The complexities and dynamic nature of world politics show that anarchy is not the only organising category in world politics. Some other factors like hegemony, strategic interdependence and balance of power among actors are as important as anarchy. While ignoring the anarchic nature may cause some conceptual gaps, an exclusive focus on anarchy may also lead to underestimating the ambiguity of the concept. Analysing the relationships among such factors and their impact on hydropolitical relations is necessary. Future research might also be worthy to examine the role of outside-of-basin actors and their strategies in manipulating the hydropolitical relations within a broader political and security context. Similarly, another line of research that merits further consideration would be to examine the link between global hegemonic order and anarchy. How may the hidden liberal capitalism in the world, mainly led by industrial states, and their security and economic interests in other regions, particularly developing and underdeveloped states, affect the different aspects of hydropolitical relations? In particular, it is observed from current “peace-building” processes in Afghanistan that outsiders’ strategies to bring “peace” are doomed to fail, and yet it seems their approaches are far more in favour of their own interests. Changing the geopolitical nature of the region to more regional integration by itself has the inherently significant potential to overcome the geopolitical challenges which separate the people living in the Basin. Certainly, there is strong potential for normative movements to change the game towards water, security and of course, equity and justice for the people of the Helmand River Basin where “water never dies”. Something that needs to be heard particularly by outsiders, in the words of Molana (the famous poet originally from this region) is:

“Listen to the reed and the tale it tells, How it sings of separation...”

ANNEXES

Annex I. 1973 Helmand River Water Treaty

Following is the text of the Afghan-Iranian Helmand River water Treaty:

Afghanistan and Iran, desiring to remove permanently all causes of controversy with respect to the water of the Helmand River and being moved by international comity and by brotherly and neighbourly feelings, and having resolved to conclude a treaty for this purpose, and having named as their Plenipotentiaries:

Afghanistan:

Mohammad Moussa Shaqfiq,
Prime Minister of Afghanistan,
and,

Iran:

Amir Abbas Hoveyda,
Prime Minister of Iran:

Who, after having communicated to one another their respective full powers, found in good and due form, have agreed upon the following Articles:

ARTICLE I

For the purposes of this Treaty,

- a) First of January corresponds to 11 Ma-ghoumay- 11 July- 11 Dey.
First of February corresponds to 12 Salwagha- 12 Dalwa- 12 Bahman.
First of March corresponds to 10 Kab-10 Hout- 10 Esfand.
First of April corresponds to 12 Warray-12 Hamal- 12 Farwardin.
First of May corresponds to 11 Ghwayay- 11 Sawr- 11 Ordibehesht.
First of June corresponds to 11 Ghbargoly- 11 Jawza- 11 Khardad.
First of July corresponds to 10 Chonash- 10 Saratan- 10 Tir.
First of August corresponds to 10 Zamaray- 10 Asad- 10 Tir.
First of September corresponds to 10 Wozhy- 10 Sonbola- 10 Shariwar.
First of October corresponds to 9 Tala- 9 Mizan- 9 Mehr.
First of November corresponds to 10 Larum- 10 Arqab- 10 Aban.
First of December corresponds to 10 Linday- 10 Qaws- 10 Azar.
In leap years the difference of one day shall be taken into consideration according to the Solar Higher calendar.

- b) A “water year” means the period from October first to the end of the succeeding September.
- c) A “normal water year” means the year during which the total flow of water from the first of October to the end of the succeeding September, measured and calculated at the hydrometric station at Dehrawd located on the Helmand River upstream from the entrance to Kajaki Reservoir, is four million five hundred and ninety thousand (4,590,000) acre feet (5661,715 million cubic meters). The amount of monthly flow is norm of determining whether the flow year are indicated in Protocol No 1, annexed to this Treaty.
- d) The hydrometric station at Dehrawud is recognised solely as an instrument for the purpose is that of a normal water year.

ARTICLE II

The total amount of water from the Helmand River to be delivered by Afghanistan to Iran in a normal water year, is limited to an average flow of twenty two cubic meters per second, in accordance with table 10 of the Report of “Helmand River Delta commission”, dated February 28, 1951, with monthly distributions shown in Column 2 of the table in Article III of this Treaty, and an additional amount, which is being granted by Afghanistan to Iran as an expression of goodwill and brotherly relations of an average flow of four cubic meters per second with monthly distributions as shown in Column 3 of the table in Article III, which distributions are proportionate to those in column 2.

ARTICLE III

- a) During a normal water year, or an above normal water year, Afghanistan shall deliver to Iran in the bed of the Helmand River at the places mentioned below, the specific amounts of Helmand River water described and determined in Article II of this treaty according to the monthly distributions specified in Column 4 of the following table:

1 Months	2 Distribution of average flow of water in cubic meters per second on the basis of 22 cubic meters per second in accordance with the “Helmand River Delta Commission Report”	3 Distribution of average flow of water in cubic meters per second on the basis of 4 cubic meters per second as an expression of goodwill	4 Distribution of the average flow of water in cubic meters per second on the basis of the total of Column 2 and 3 of this table, that is 26 cubic meters per second
Oct.	4.23	0.77	5.00
Nov.	10.75	1.97	12.72
Dec.	19.48	3.56	23.04
Jan.	29.35	5.32	36.67
Feb.	66.12	12.04	78.16
March	61.90	11.23	73.13
April	26.30	4.81	31.11
May	7.64	1.39	9.03
June	16.71	3.02	19.73
July	11.61	2.11	13.72
August	7.93	1.44	9.37
Sept.	1.93	0.34	2.32

The places of delivery shall be as follows:

1. At the place where the boundary line crosses the Rude Sistan.
 2. At two other places, where the boundary line is located in the bed of the Helmand River, between boundary pillars number fifty-one and fifty-two. The places shall be fixed by the Commissioners of the two parties, who shall establish the distance and direction of each one of the places in relation to one of the above-mentioned boundary pillars within three months from the date of entry into force of this treaty. The establishment of the two places shall be effective after the approval of the two Governments.
- b) The two parties shall build suitable joint structures and install necessary devices in accordance with plans and specification agreed upon by the two parties, at the places mentioned in paragraph (a) of this Article, so that the amounts of water specified in the Articles of this Treaty may be measured and delivered effectively and accurately in accordance with the provisions of this Treaty.

ARTICLE IV

In years when due to climatic factors, that amount of flow is less than that of a normal water year, and the measured flow figures at the hydrometric station at Dehrawud indicate that the flow of the months previous to the month in question has been less than that of a normal water year, the amounts stated in the Column 4 of the Table in Article III shall be adjusted, for the succeeding months of that water year, in the ratio that the actual flow for the previous months of that water year (in this case from March to the month in question) bears to the same months of a normal water year, and the adjusted amounts shall be delivered to Iran at the places provided in Article III. In the event that in any succeeding month, after the month in question, the hydrometric station at Dehrawud indicates a flow equal to or greater than that of the same month of a normal water year water in that month shall be delivered according to Column 4 of the table of Article III.

ARTICLE V

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.

Article VI

Afghanistan shall take no action to make the water to be delivered to Iran totally unsuitable for agriculture, or to cause it to be polluted by the industrial chemical effluent to such an extent that even after being purified by conventional modern technical methods, still its use remains to be impossible and harmful for domestic purposes.

Article VII

Any type of technical joint structures which are necessary for the purpose of stabilisation of the bed of the Helmand River at the places where the boundary line is located at the bed of the River, can be constructed only after the plans and specifications for such structures have been approved by the parties to this Treaty.

Article VIII

Each party shall appoint a Commissioner and a Deputy Commissioner from among its own nationals, who shall represent their respective countries in the implementation of the provisions of this Treaty. The scope of their authority and their duties and responsibilities are defined in Protocol No 1, annexed to this Treaty.

Article IX

In the event that a difference should develop in the interpretation or application of the provisions of this Treaty, the parties shall endeavor, first, to solve the difference through diplomatic negotiations, secondly through the use of the good offices of a third party. Should neither effort result in a solution the difference shall be submitted to arbitration pursuant to provisions of Protocol No. 2, annexed to this Treaty.

Article X

Afghanistan and Iran agree that this Treaty represents the complete and permanent agreement of the two Countries, that the provisions of this Treaty are valid only within the limitations contents that the Treaty shall not be subjected to any other present future principle or precedent.

Article XI

If extreme drought or force majeure should make the reaching of the water to the Helmand Delta temporarily impossible, the Commissioners of the two parties shall immediately enter into consultation and shall formulate and submit an urgent necessary plan for meeting or minimizing the emergency to their respective Governments.

Article XII

The Treaty shall enter into force on the day of exchange of instruments of ratifications.

In witness whereof the respective Plenipotentiaries have signed this Treaty.

Done in duplicate at Kabul in the Pashto, Dari (Persian) and English languages, the three texts being equally authentic the English text, however, being the only text to which reference shall be made in the event of recourse to the good offices of a third party or arbitration this 13th day of March 1973.

For Afghanistan

Mohammad Moussa Shaqfiq

Prime Minister

For Iran

Amir Abbas Hoveyda

Prime Minister

Following are the texts of the two complementary protocols of the treaty on water from Helmand, signed between Afghanistan and Iran.

PROTOCOL NO. 1

Annexed to the Afghan-Iranian Helmand River Water Treaty relating to the authority and duties of the Commissioners.

ARTICLE 1

The treaty mentioned in this Protocol is the Afghan-Iranian Helmand River Water Treaty between Afghanistan and Iran signed on the 13th of March 1973.

ARTICLE 2

Each of the parties to the Treaty shall appoint a Commissioner and a Deputy Commissioner who shall be nationals of and represent their respective Governments in connection with the implementation of the provisions of the Treaty regarding the delivery to Iran of the amount of water of the Helmand River therein specified.

ARTICLE 3

- (a) The Commissioners shall be appointed from among high ranking officials.
- (b) Each Commissioner in the performance of his duties may utilize the services of two advisers of his nationality.
- (c) The expenses of the Commissioners, their Deputies and their advisers shall be defrayed by their respective Governments.

ARTICLE 4

The Commissioners shall represent their respective Countries on matters related application of, and shall serve as liaison officers between the two countries on matters related to this Protocol.

ARTICLE 5

During any year that the flow of water is less than in a normal water year, as described in Article IV of the Treaty, and the Iranian Commissioner shall seek information as to the flow of water at the hydrometric station at Dehrawud, located on the Helmand River upstream from the entrance to Kajaki Reservoir, the Afghan Commissioner shall put at his disposal the related data registered at that station. Should the Iranian Commissioner so desire, the Afghan Commissioner shall put at his disposal the monthly flow records registered at that station. At the request of the Iranian Commissioner the Afghan Commissioner shall cooperate with him so the Iranian Commissioner may observe and measure the flow of water at Dehrawud station.

Note: The distribution of the monthly flow in a normal year is as follows:

October	154,000	Acre-feet
November	172,000	Acre-feet
December	176,000	Acre-feet
January	178,000	Acre-feet
February	208,000	Acre-feet
March	597,000	Acre-feet
April	1,158,000	Acre-feet
May	1,033,000	Acre-feet
June	441,000	Acre-feet
July	211,000	Acre-feet
August	137,000	Acre-feet
September	125,000	Acre-feet
Total	4,590,000	Acre-feet

ARTICLE 6

The Afghan and Iranian Commissioners shall act jointly in the measurement and delivery of the water at the places of delivery specified in Article III of the Treaty, according to the provisions of the Treaty and this Protocol.

ARTICLE 7

The Afghan and Iranian Commissioners shall constitute the “Joint Committee of Commissioners,” hereinafter, referred to as the “Joint Committee.” This Committee shall endeavor to solve expeditiously, and problem which may arise the performance of its duties under this Protocol. The decisions of the Joint Committee shall be binding within the limits of its authority.

ARTICLE 8

The Joint Committee shall hold regular meetings periodically, as the Joint Committee shall determine. In cases of emergency either Commissioner may call a special meeting of the Joint Committee. The Joint Committee shall hold its regular meetings in Kabul or Zaranj (in Afghanistan) or in Tehran or Zabul (in Iran), as the Joint Committee shall determine. The special meeting of the Joint Committee shall be held at any one of the places mentioned above named in the call for the meeting.

ARTICLE 9

The Commissioners shall submit a report of the activities of the Joint Committee during the preceding water year to their respective Governments prior to the first of November in each year. They may submit in term reports, within the limitation of their duties specified in this Protocol, to their respective Governments at such other time or times as they deem necessary.

ARTICLE 10

- (a) Each of the parties to the Treaty shall appoint a delegation headed by the Minister in charge of matters pertaining to water utilization. The delegations of the two parties shall together constitute the "Committee of Ministers".
- (b) The Committee of Ministers shall meet at the request of one of the Governments. The Committee of Ministers shall have jurisdiction to solve any problem that may arise in the application of this Protocol. The Joint Committee shall be bound to apply the decisions of the Committee of the Ministers.
- (c) Either Commissioner may request his Government to call a meeting of the Committee of Ministers, either in an emergency or when the members of the Joint Committee cannot reach agreement.
- (d) The Joint Committee and the Committee of Ministers shall each determine the procedure of their meetings.

ARTICLE 11

In the event the Committee of Ministers do not reach agreement each party to the Committee shall submit a report to its respective Government in order that the two Governments seek for a solution through diplomatic channels. The decisions made by each committee or decisions reached through diplomatic channels shall not contravene any of the provisions of, and shall be within the limits of the Treaty and this Protocol. Any decision made or action taken by either Committee shall not in any manner whatsoever establish a precedent.

ARTICLE 12

No amendment to, change in, or revision of, this protocol agreed by the parties to the Treaty, shall in any manner whatsoever affect the Treaty, or Protocol No. 2, annexed thereto.

ARTICLE 13

This protocol shall be regarded as an integral part of the Afghan-Iranian Helmand River Water Treaty signed in Kabul on the 13th day of March 1973 and shall be effective beginning with the day of the entry into force of the Treaty.

In witness whereof the respective Plenipotentiaries have signed this Protocol.

Done in duplicate at Kabul in the Pashto, Dari (Persian), and English languages, the three texts being equally authentic, the English text. However, being the only text to which reference shall be made in the event of recourse to the good offices of a third party or arbitration this 13th day of March 1973.

For Afghanistan

Mohammad Moussa Shafiq

Prime Minister

For Iran

Amir Abbas Hoveyda

Prime Minister

PROTOCOL NO. 2

Annexed to the Afghan-Iranian Helmand River Water Treaty relating to arbitration.

ARTICLE 1

The Treaty mentioned in this Protocol is the Afghan-Iranian Helmand River Water Treaty between Afghanistan and Iran signed on the 13th March of 1973.

ARTICLE 2

Any difference which may develop in the interpretation or application of the provisions of the Treaty, which cannot be solved in accordance with Article IX of the Treaty, through diplomatic negotiations or thereafter, through the good offices of a third party, shall be submitted to arbitration.

ARTICLE 3

In the event that either of the parties to the treaty, after having complied with the two procedures first stipulated in Article 2 of this Protocol, shall deem it necessary to refer its difference to arbitration. It shall so advise the other party by the delivery of a diplomatic note, stating the specific point or points of difference and requesting first, the establishment of an Arbitral (fact-finding) Mission in accordance with Article 4 of this Protocol and secondly, if necessary, an Arbitral Tribunal in accordance with the provisions of Article 5 of this Protocol.

ARTICLE 4

Within three months after the receipt of the diplomatic note referred to in Article 3 of this Protocol, the representatives of the two parties shall meet and attempt to agree on the composition of an Arbitral (fact-finding) Mission, and on the manner in which proceedings of the mission are to be conducted. If such mission is created and makes findings and recommendations which are agreed to by the two parties, the case will be considered resolved.

ARTICLE 5

In the event that the parties, pursuant to Article 4 of this Protocol, do not reach agreement on the findings and recommendations of the Arbitral (fact-finding) Mission, the point or points of difference shall be submitted to an Arbitral Tribunal which shall consist of three members and shall be constituted as follows:

- (a) Each party shall appoint one arbitrator, who shall be a national of the party making the appointment.
- (b) The third arbitrator, who shall be preside over the Arbitral Tribunal as Chairman, shall be chosen by agreement of the two parties, within three months of the appointment of the members appointed pursuant to the provisions of paragraph (a) of this Article, should be the third arbitrator not be chosen within three months, the Secretary-General of the United Nations, shall be requested by the parties or one of the parties, to appoint the third arbitrator. The Chairman of the Arbitral Tribunal appointed pursuant to the provisions of this paragraph shall be from nationals of a country with which both Afghanistan and Iran maintain friendly relations, but has no common interest with either Afghanistan or Iran.
- (c) The Arbitral Tribunal shall with the concurrence of the parties adopt such rules for its proceedings as may be deemed expedient and necessary. Such rules shall be in conformity with the provisions of the Treaty, Protocol No. 1, and this Protocol.
- (d) The Arbitral Tribunal shall submit to the two parties a copy of its decision when rendered. Each such decision shall be supported by reasons in writing.
- (e) The decisions of the Tribunal shall be paid by the Government.

ARTICLE 6

Should any member of the Arbitral (fact-finding) Mission under Article 4 or of Arbitral Tribunal under Article 5 of this Protocol, for any reason, cease to serve; he shall be replaced in the same manner he was originally appointed or chosen. In that event, further proceedings shall be resumed at such time as the appointed or chosen member shall have had such opportunity and time as he may reasonably require to acquaint himself with all proceedings which transpired prior to his appointment or choice.

ARTICLE 7

The expenses of each arbitrator shall be paid by the Government which chose the arbitrator and the expenses of the third arbitrator shall be shared equally by the two parties.

ARTICLE 8

No amendment to change in, or revision of this Protocol agreed by the parties to the Treaty, shall in any manner whatsoever affect the Treaty, or Protocol No. 1, Annexed thereto.

ARTICLE 9

This Protocol shall be regarded as an integral part of the Afghan-Iranian Helmand River Water Treaty signed in Kabul on the 13th day of March 1973 and shall be effective beginning with the day of entry into force of the Treaty.

In witness whereof the respective Plenipotentiaries have signed this Protocol.

Done in duplicate at Kabul in the Pashto, Dari (Persian) and English languages, the three texts being equally authentic, the English text, however, being the only text to which reference shall be made in event of recourse to the good offices of a third party or arbitration, this 13th day of March 1973.

For Afghanistan

Mohammad Mousa Shafiq

Prime Minister

For Iran

Amir Abbas Hoveyda

Prime Minister

ANNEX II. 1997 UN Convention on the Law of the Non-Navigational Uses of International Watercourses

The Parties to the present Convention,

Conscious of the importance of international watercourses and the non-navigational uses thereof in many regions of the world,

Having in mind Article 13, paragraph 1 (a), of the Charter of the United Nations, which provides that the General Assembly shall initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and its codification,

Considering that successful codification and progressive development of rules of international law regarding non-navigational uses of international watercourses would assist in promoting and implementing the purposes and principles set forth in Articles 1 and 2 of the Charter of the United Nations,

Taking into account the problems affecting many international watercourses resulting from, among other things, increasing demands and pollution,

Expressing the conviction that a framework convention will ensure the utilization, development, conservation, management and protection of international watercourses and the promotion of the optimal and sustainable utilization thereof for present and future generations

Affirming the importance of international cooperation and good neighbourliness in this field,

Aware of the special situation and needs of developing countries,

Recalling the principles and recommendations adopted by the United Nations Conference on Environment and Development of 1992 in the Rio Declaration and Agenda 21,

Recalling also the existing bilateral and multilateral agreements regarding the nonnavigational uses of international watercourses,

Mindful of the valuable contribution of international organizations, both governmental and non-governmental, to the codification and progressive development of international law in this field,

Appreciative of the work carried out by the International Law Commission on the law of the non-navigational uses of international watercourses,

Bearing in mind United Nations General Assembly resolution 49/52 of 9 December 1994, *Have agreed as follows:*

PART I. INTRODUCTION

Article 1 - Scope of the present Convention

(1) The present Convention applies to uses of international watercourses and of their waters for purposes other than navigation and to measures of protection, preservation and management related to the uses of those watercourses and their waters.

(2) The uses of international watercourses for navigation is not within the scope of the present Convention except insofar as other uses affect navigation or are affected by navigation.

Article 2 – Use of Terms

For the purposes of the present Convention:

(a) “Watercourse” means a system of surface waters and groundwaters constituting by virtue of their physical relationship a unitary whole and normally flowing into a common terminus;

(b) “International watercourse” means a watercourse, parts of which are situated in different States;

(c) “Watercourse State” means a State Party to the present Convention in whose territory part of an international watercourse is situated, or a Party that is a regional economic integration organization, in the territory of one or more of whose Member States part of an international watercourse is situated;

(d) “Regional economic integration organization” means an organization constituted by sovereign States of a given region, to which its member States have transferred competence in respect of matters governed by this Convention and which has been duly authorized in accordance with its internal procedures, to sign, ratify, accept, approve or accede to it.

Article 3 – Watercourse Agreements

(1) In the absence of an agreement to the contrary, nothing in the present Convention shall affect the rights or obligations of a watercourse State arising from agreements in force for it on the date on which it became a party to the present Convention.

(2) Notwithstanding the provisions of paragraph 1, parties to agreements referred to in paragraph 1 may, where necessary, consider harmonizing such agreements with the basic principles of the present Convention.

(3) Watercourse States may enter into one or more agreements, hereinafter referred to as “watercourse agreements”, which apply and adjust the provisions of the present Convention to the characteristics and uses of a particular international watercourse or part thereof.

(4) Where a watercourse agreement is concluded between two or more watercourse States, it shall define the waters to which it applies. Such an agreement may be entered into with respect to an entire international watercourse or any part thereof or a particular project programme or use except insofar as the agreement adversely affects, to a significant extent, the use by one or more other watercourse States of the waters of the watercourse, without their express consent.

(5) Where a watercourse State considers that adjustment and application of the provisions of the present Convention is required because of the characteristics and uses of a particular international watercourse, watercourse States shall consult with a view to negotiating in good faith for the purpose of concluding a watercourse agreement or agreements.

(6) Where some but not all watercourse States to a particular international watercourse are parties to an agreement, nothing in such agreement shall affect the rights or obligations under the present Convention of watercourse States that are not parties to such an agreement.

Article 4 - Parties to watercourse agreements

(1) Every watercourse State is entitled to participate in the negotiation of and to become a party to any watercourse agreement that applies to the entire international watercourse, as well as to participate in any relevant consultations.

(2) A watercourse State whose use of an international watercourse may be affected to a significant extent by the implementation of a proposed watercourse agreement that applies only to a part of the watercourse or to a particular project, programme or use is entitled to participate in consultations on such an agreement and, where appropriate, in the negotiation thereof in good faith with a view to becoming a party thereto, to the extent that its use is thereby affected.

PART II. GENERAL PRINCIPLES

Article 5 - Equitable and reasonable utilization and participation

(1) Watercourse States shall in their respective territories utilize an international watercourse in an equitable and reasonable manner. In particular, an international watercourse shall be used and developed by watercourse States with a view to attaining optimal and sustainable utilization thereof and benefits therefrom, taking into account the interests of the watercourse States concerned, consistent with adequate protection of the watercourse.

(2) Watercourse States shall participate in the use, development and protection of an international watercourse in an equitable and reasonable manner. Such participation includes both the right to utilize the watercourse and the duty to cooperate in the protection and development thereof, as provided in the present Convention.

Article 6 - Factors relevant to equitable and reasonable utilization

(1) 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 that effect;
- (g) The availability of alternatives, of comparable value, to a particular planned or existing use.

(2) In the application of article 5 or paragraph 1 of this article, watercourse States concerned shall, when the need arises, enter into consultations in a spirit of cooperation.

(3) The weight to be given to each factor is to be determined by its importance in comparison with that of other relevant factors. In determining what is a reasonable and equitable use, all relevant factors are to be considered together and a conclusion reached on the basis of the whole.

Article 7 - Obligation not to cause significant harm

(1) Watercourse States shall, in utilizing an international watercourse in their territories, take all appropriate measures to prevent the causing of significant harm to other watercourse States.

(2) Where significant harm nevertheless is caused to another watercourse State, the States whose use causes such harm shall, in the absence of agreement to such use, take all appropriate measures, having due regard for the provisions of articles 5 and 6, in consultation with the affected State, to eliminate or mitigate such harm and, where appropriate, to discuss the question of compensation.

Article 8 - General obligation to cooperate

(1) Watercourse States shall cooperate on the basis of sovereign equality, territorial integrity, mutual benefit and good faith in order to attain optimal utilization and adequate protection of an international watercourse.

(2) In determining the manner of such cooperation, watercourse States may consider the establishment of joint mechanisms or commissions, as deemed necessary by them, to facilitate cooperation on relevant measures and procedures in the light of experience gained through cooperation in existing joint mechanisms and commissions in various regions.

Article 9 - Regular exchange of data and information

(1) Pursuant to article 8, watercourse States shall on a regular basis exchange readily available data and information on the condition of the watercourse, in particular that of a hydrological, meteorological, hydrogeological and ecological nature and related to the water quality as well as related forecasts.

(2) If a watercourse State is requested by another watercourse State to provide data or information that is not readily available, it shall employ its best efforts to comply with the request but may condition its compliance upon payment by the requesting State of the reasonable costs of collecting and, where appropriate, processing such data or information.

(3) Watercourse States shall employ their best efforts to collect and, where appropriate, to process data and information in a manner which facilitates its utilization by the other watercourse States to which it is communicated.

Article 10 - Relationship between different kinds of uses

(1) In the absence of agreement or custom to the contrary, no use of an international watercourse enjoys inherent priority over other uses.

(2) In the event of a conflict between uses of an international watercourse, it shall be resolved with reference to articles 5 to 7, with special regard being given to the requirements of vital human needs.

PART III. PLANNED MEASURES

Article 11 - Information concerning planned measures

Watercourse States shall exchange information and consult each other and, if necessary, negotiate on the possible effects of planned measures on the condition of an international watercourse.

Article 12 - Notification concerning planned measures with possible adverse effects

Before a watercourse State implements or permits the implementation of planned measures which may have a significant adverse effect upon other watercourse States, it shall provide those States with timely notification thereof. Such notification shall be accompanied by available technical data and information, including the results of any environmental impact assessment, in order to enable the notified States to evaluate the possible effects of the planned measures.

Article 13 - Period for reply to notification

Unless otherwise agreed:

(a) A watercourse State providing a notification under article 12 shall allow the notified States a period of six months within which to study and evaluate the possible effects of the planned measures and to communicate the findings to it;

(b) This period shall, at the request of a notified State for which the evaluation of the planned measures poses special difficulty, be extended for a period of six months.

Article 14 - Obligations of the notifying State during the period for reply

During the period referred to in article 13, the notifying State:

(a) Shall cooperate with the notified States by providing them, on request, with any additional data and information that is available and necessary for an accurate evaluation; and

(b) Shall not implement or permit the implementation of the planned measures without the consent of the notified States.

Article 15 - Reply to notification

The notified States shall communicate their findings to the notifying State as early as possible within the period applicable pursuant to article 13. If a notified State finds that implementation of the planned measures would be inconsistent with the provisions of articles 5 or 7, it shall attach to its finding a documented explanation setting forth the reasons for the finding.

Article 16 - Absence of reply to notification

(1) If, within the period applicable pursuant to article 13, the notifying State receives no communication under article 15, it may, subject to its obligations under articles 5 and 7, proceed with the

implementation of the planned measures, in accordance with the notification and any other data and information provided to the notified States.

(2) Any claim to compensation by a notified State which has failed to reply within the period applicable pursuant to article 13 may be offset by the costs incurred by the notifying State for action undertaken after the expiration of the time for a reply which would not have been undertaken if the notified State had objected within that period.

Article 17 - Consultations and negotiations concerning planned measures

(1) If a communication is made under article 15 that implementation of the planned measures would be inconsistent with the provisions of articles 5 or 7, the notifying State and the State making the communication shall enter into consultations and, if necessary, negotiations with a view to arriving at an equitable resolution of the situation.

(2) The consultations and negotiations shall be conducted on the basis that each State must in good faith pay reasonable regard to the rights and legitimate interests of the other State.

(3) During the course of the consultations and negotiations, the notifying State shall, if so requested by the notified State at the time it makes the communication, refrain from implementing or permitting the implementation of the planned measures for a period of six months unless otherwise agreed.

Article 18 - Procedures in the absence of notification

(1) If a watercourse State has reasonable grounds to believe that another watercourse State is planning measures that may have a significant adverse effect upon it, the former State may request the latter to apply the provisions of article 12. The request shall be accompanied by a documented explanation setting forth its grounds.

(2) In the event that the State planning the measures nevertheless finds that it is not under an obligation to provide a notification under article 12, it shall so inform the other State, providing a documented explanation setting forth the reasons for such finding. If this finding does not satisfy the other State, the two States shall, at the request of that other State, promptly enter into consultations and negotiations in the manner indicated in paragraphs 1 and 2 of article 17.

(3) During the course of the consultations and negotiations, the State planning the measures shall, if so requested by the other State at the time it requests the initiation of consultations and negotiations, refrain from implementing or permitting the implementation of those measures for a period of six months unless otherwise agreed.

Article 19 - Urgent implementation of planned measures

(1) In the event that the implementation of planned measures is of the utmost urgency in order to protect public health, public safety or other equally important interests, the State planning the measures may, subject to articles 5 and 7, immediately proceed to implementation, notwithstanding the provisions of article 14 and paragraph 3 of article 17.

(2) In such case, a formal declaration of the urgency of the measures shall be communicated without delay to the other watercourse States referred to in article 12 together with the relevant data and information.

(3) The State planning the measures shall, at the request of any of the States referred to in paragraph 2, promptly enter into consultations and negotiations with it in the manner indicated in paragraphs 1 and 2 of article 17.

PART IV. PROTECTION, PRESERVATION AND MANAGEMENT

Article 20 - Protection and preservation of ecosystems

Watercourse States shall, individually and, where appropriate, jointly, protect and preserve the ecosystems of international watercourses.

Article 21 - Prevention, reduction and control of pollution

(1) For the purpose of this article, “pollution of an international watercourse” means any detrimental alteration in the composition or quality of the waters of an international watercourse which results directly or indirectly from human conduct.

(2) Watercourse States shall, individually and, where appropriate, jointly, prevent, reduce and control the pollution of an international watercourse that may cause significant harm to other watercourse States or to their environment, including harm to human health or safety, to the use of the waters for any beneficial purpose or to the living resources of the watercourse. Watercourse States shall take steps to harmonize their policies in this connection.

(3) Watercourse States shall, at the request of any of them, consult with a view to arriving at mutually agreeable measures and methods to prevent, reduce and control pollution of an international watercourse, such as:

(a) Setting joint water quality objectives and criteria;

(b) Establishing techniques and practices to address pollution from point and non-point sources;

(c) Establishing lists of substances the introduction of which into the waters of an international watercourse is to be prohibited, limited, investigated or monitored.

Article 22 - Introduction of alien or new species

Watercourse States shall take all measures necessary to prevent the introduction of species, alien or new, into an international watercourse which may have effects detrimental to the ecosystem of the watercourse resulting in significant harm to other watercourse States.

Article 23 - Protection and preservation of the marine environment

Watercourse States shall, individually and, where appropriate, in cooperation with other States, take all measures with respect to an international watercourse that are necessary to protect and preserve the marine environment, including estuaries, taking into account generally accepted international rules and standards.

Article 24 - Management

(1) Watercourse States shall, at the request of any of them, enter into consultations concerning the management of an international watercourse, which may include the establishment of a joint management mechanism.

(2) For the purposes of this article, “management” refers, in particular, to:

(a) Planning the sustainable development of an international watercourse and providing for the implementation of any plans adopted; and

(b) otherwise promoting the rational and optimal utilization, protection and control of the watercourse.

Article 25 - Regulation

(1) Watercourse States shall cooperate, where appropriate, to respond to needs or opportunities for regulation of the flow of the waters of an international watercourse.

(2) Unless otherwise agreed, watercourse States shall participate on an equitable basis in the construction and maintenance or defrayal of the costs of such regulation works as they may have agreed to undertake.

(3) For the purposes of this article, “regulation” means the use of hydraulic works or any other continuing measure to alter, vary or otherwise control the flow of the waters of an international watercourse.

Article 26 - Installations

(1) Watercourse States shall, within their respective territories, employ their best efforts to maintain and protect installations, facilities and other works related to an international watercourse.

(2) Watercourse States shall, at the request of any of them which has reasonable grounds to believe that it may suffer significant adverse effects, enter into consultations with regard to:

(a) The safe operation and maintenance of installations, facilities or other works related to an international watercourse; and

(b) The protection of installations, facilities or other works from wilful or negligent acts or the forces of nature.

PART V. HARMFUL CONDITIONS AND EMERGENCY SITUATIONS

Article 27 - Prevention and mitigation of harmful conditions

Watercourse States shall, individually and, where appropriate, jointly, take all appropriate measures to prevent or mitigate conditions related to an international watercourse that may be harmful to other watercourse States, whether resulting from natural causes or human conduct, such as flood or ice conditions, water-borne diseases, siltation, erosion, salt-water intrusion, drought or desertification.

Article 28 - Emergency situations

(1) For the purposes of this article, “emergency” means a situation that causes, or poses an imminent threat of causing, serious harm to watercourse States or other States and that results suddenly from natural causes, such as floods, the breaking up of ice, landslides or earthquakes, or from human conduct, such as industrial accidents.

(2) A watercourse State shall, without delay and by the most expeditious means available, notify other potentially affected States and competent international organizations of any emergency originating within its territory.

(3) A watercourse State within whose territory an emergency originates shall, in cooperation with potentially affected States and, where appropriate, competent international organizations, immediately take all practicable measures necessitated by the circumstances to prevent, mitigate and eliminate harmful effects of the emergency.

(4) When necessary, watercourse States shall jointly develop contingency plans for responding to emergencies, in cooperation, where appropriate, with other potentially affected States and competent international organizations.

PART VI. MISCELLANEOUS PROVISIONS

Article 29 - International watercourses and installations in time of armed conflict

International watercourses and related installations, facilities and other works shall enjoy the protection accorded by the principles and rules of international law applicable in international and non-international armed conflict and shall not be used in violation of those principles and rules.

Article 30 - Indirect procedures

In cases where there are serious obstacles to direct contacts between watercourse States, the States concerned shall fulfil their obligations of cooperation provided for in the present Convention, including exchange of data and information, notification, communication, consultations and negotiations, through any indirect procedure accepted by them.

Article 31 - Data and information vital to national defence or security

Nothing in the present Convention obliges a watercourse State to provide data or information vital to its national defence or security. Nevertheless, that State shall cooperate in good faith with the other watercourse States with a view to providing as much information as possible under the circumstances.

Article 32 - Non-discrimination

Unless the watercourse States concerned have agreed otherwise for the protection of the interests of persons, natural or juridical, who have suffered or are under a serious threat of suffering significant transboundary harm as a result of activities related to an international watercourse, a watercourse State shall not discriminate on the basis of nationality or residence or place where the injury occurred, in granting to such persons, in accordance with its legal system, access to judicial or other procedures, or a right to claim compensation or other relief in respect of significant harm caused by such activities carried on in its territory.

Article 33 - Settlement of disputes

(1) In the event of a dispute between two or more Parties concerning the interpretation or application of the present Convention, the Parties concerned shall, in the absence of an applicable agreement between them, seek a settlement of the dispute by peaceful means in accordance with the following provisions.

(2) If the Parties concerned cannot reach agreement by negotiation requested by one of them, they may jointly seek the good offices of, or request mediation or conciliation by, a third party, or make use, as appropriate, of any joint watercourse institutions that may have been established by them or agree to submit the dispute to arbitration or to the International Court of Justice.

(3) Subject to the operation of paragraph 10, if after six months from the time of the request for negotiations referred to in paragraph 2, the Parties concerned have not been able to settle their dispute through negotiation or any other means referred to in paragraph 2, the dispute shall be submitted, at the request of any of the parties to the dispute, to impartial fact-finding in accordance with paragraphs 4 to 9, unless the Parties otherwise agree.

(4) A Fact-finding Commission shall be established, composed of one member nominated by each Party concerned and in addition a member not having the nationality of any of the Parties concerned chosen by the nominated members who shall serve as Chairman.

(5) If the members nominated by the Parties are unable to agree on a Chairman within three months of the request for the establishment of the Commission, any Party concerned may request the Secretary-General of the United Nations to appoint the Chairman who shall not have the nationality of any of the parties to the dispute or of any riparian State of the watercourse concerned. If one of the Parties fails to nominate a member within three months of the initial request pursuant to paragraph 3, any other Party concerned may request the Secretary-General of the United Nations to appoint a person who shall not have the nationality of any of the parties to the dispute or of any riparian State of the watercourse concerned. The person so appointed shall constitute a single-member Commission.

(6) The Commission shall determine its own procedure.

(7) The Parties concerned have the obligation to provide the Commission with such information as it may require and, on request, to permit the Commission to have access to their respective territory and to inspect any facilities, plant, equipment, construction or natural feature relevant for the purpose of its inquiry.

(8) The Commission shall adopt its report by a majority vote, unless it is a single-member Commission, and shall submit that report to the Parties concerned setting forth its findings and the reasons therefor and such recommendations as it deems appropriate for an equitable solution of the dispute, which the Parties concerned shall consider in good faith.

(9) The expenses of the Commission shall be borne equally by the Parties concerned

(10) When ratifying, accepting, approving or acceding to the present Convention, or at any time thereafter, a Party which is not a regional economic integration organization may declare in a written

instrument submitted to the Depositary that, in respect of any dispute not resolved in accordance with paragraph 2, it recognizes as compulsory ipso facto and without special agreement in relation to any Party accepting the same obligation:

(a) Submission of the dispute to the International Court of Justice; and/or

(b) Arbitration by an arbitral tribunal established and operating, 'unless the parties to the dispute otherwise agreed, in accordance with the procedure laid down in the annex to the present Convention. A Party which is a regional economic integration organization may make a declaration with like effect in relation to arbitration in accordance with subparagraph (b).

PART VII. FINAL CLAUSES

Article 34 - Signature

The present Convention shall be open for signature by all States and by regional economic integration organizations from ... until ... at United Nations Headquarters in New York.

Article 35 - Ratification, acceptance, approval or accession

(1) The present Convention is subject to ratification, acceptance, approval or accession by States and by regional economic integration organizations. The instruments of ratification, acceptance, approval or accession shall be deposited with the Secretary-General of the United Nations.

(2) Any regional economic integration organization which becomes a Party to this Convention without any of its member States being a Party shall be bound by all the obligations under the Convention. In the case of such organizations, one or more of whose member States is a Party to this Convention, the organization and its member States shall decide on their respective responsibilities for the performance of their obligations under the Convention. In such cases, the organization and the member States shall not be entitled to exercise rights under the Convention concurrently.

(3) In their instruments of ratification, acceptance, approval or accession, the regional economic integration organizations shall declare the extent of their competence with respect to the matters governed by the Convention. These organizations shall also inform the Secretary-General of the United Nations of any substantial modification in the extent of their competence.

Article 36 - Entry into force

(1) The present Convention shall enter into force on the ninetieth day following the date of deposit of the thirty-fifth instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations.

(2) For each State or regional economic integration organization that ratifies, accepts or approves the Convention or accedes thereto after the deposit of the thirty-fifth instrument of ratification, acceptance, approval or accession, the Convention shall enter into force on the ninetieth day after the deposit by such State or regional economic integration organization of its instrument of ratification, acceptance, approval or accession.

(3) For the purposes of paragraphs 1 and 2, any instrument deposited by a regional economic integration organization shall not be counted as additional those deposited by States.

Article 37 - Authentic texts

The original of the present Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

IN WITNESS WHEREOF the undersigned plenipotentiaries, being duly authorized thereto, have signed this Convention.

DONE at New York, this twenty-first day of May one thousand nine hundred and ninety-seven.

ANNEX - ARBITRATION

Article 1

Unless the parties to the dispute otherwise agree, the arbitration pursuant to article 33 of the Convention shall take place in accordance with articles 2 to 14 of the present annex.

Article 2

The claimant party shall notify the respondent party that it is referring a dispute to arbitration pursuant to article 33 of the Convention. The notification shall state the subject matter of arbitration and include, in particular, the articles of the Convention, the interpretation or application of which are at issue. If the parties do not agree on the subject matter of the dispute, the arbitral tribunal shall determine the subject matter.

Article 3

(1) In disputes between two parties, the arbitral tribunal shall consist of three members. Each of the parties to the dispute shall appoint an arbitrator and the two arbitrators so appointed shall designate by common agreement the third arbitrator, who shall be the Chairman of the tribunal. The latter shall not be a national of one of the parties to the dispute or of any riparian State of the watercourse concerned,

nor have his or her usual place of residence in the territory of one of these parties or such riparian State, nor have dealt with the case in any other capacity.

(2) In disputes between more than two parties, parties in the same interest shall appoint one arbitrator jointly by agreement.

(3) Any vacancy shall be filled in the manner prescribed for the initial appointment.

Article 4

(1) If the Chairman of the arbitral tribunal has not been designated within two months of the appointment of the second arbitrator, the President of the International Court of Justice shall, at the request of a party, designate the Chairman within a further two-month period.

(2) If one of the parties to the dispute does not appoint an arbitrator within two months of receipt of the request, the other party may inform the President of the International Court of Justice, who shall make the designation within a further two-month period.

Article 5

The arbitral tribunal shall render its decisions in accordance with the provisions of this Convention and international law.

Article 6

Unless the parties to the dispute otherwise agree, the arbitral tribunal shall determine its own rules of procedure.

Article 7

The arbitral tribunal may, at the request of one of the Parties, recommend essential interim measures of protection.

Article 8

(1) The parties to the dispute shall facilitate the work of the arbitral tribunal and, in particular, using all means at their disposal, shall:

(a) Provide it with all relevant documents, information and facilities; and

(b) Enable it, when necessary, to call witnesses or experts and receive their evidence.

(2) The parties and the arbitrators are under an obligation to protect the confidentiality of any information they receive in confidence during the proceedings of the arbitral tribunal.

Article 9

Unless the arbitral tribunal determines otherwise because of the particular circumstances of the case, the costs of the tribunal shall be borne by the parties to the dispute in equal shares. The tribunal shall keep a record of all its costs, and shall furnish a final statement thereof to the parties.

Article 10

Any Party that has an interest of a legal nature in the subject matter of the dispute which may be affected by the decision in the case, may intervene in the proceedings with the consent of the tribunal.

Article 11

The tribunal may hear and determine counterclaims arising directly out of the subject matter of the dispute.

Article 12

Decisions both on procedure and substance of the arbitral tribunal shall be taken by a majority vote of its members.

Article 13

If one of the parties to the dispute does not appear before the arbitral tribunal or fails to defend its case, the other party may request the tribunal to continue the proceedings and to make its award. Absence of a party or a failure of a party to defend its case shall not constitute a bar to the proceedings. Before rendering its final decision, the arbitral tribunal must satisfy itself that the claim is well founded in fact and law.

Article 14

(1) The tribunal shall render its final decision within five months of the date on which it is fully constituted unless it finds it necessary to extend the time limit for a period which should not exceed five more months.

(2) The final decision of the arbitral tribunal shall be confined to the subject matter of the dispute and shall state the reasons on which it is based'. It shall contain the names of the members who have

participated and the date of the final decision. Any member of the tribunal may attach a separate or dissenting opinion to the final decision.

(3) The award shall be binding on the parties to the dispute. It shall be without appeal unless the parties to the dispute have agreed in advance to an appellate procedure.

(4) Any controversy which may arise between the parties to the dispute as regards the interpretation or manner of implementation of the final decision may be submitted by either party for decision to the arbitral tribunal which rendered it.

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