

The International Law Association's *Berlin Rules on Water Resources* and Their Relevance to Australia

Joseph W. Dellapenna
Villanova University School of Law
dellapen@law.villanova.edu

Rapporteur of the *Berlin Rules on Water Resources*

Water—Our Second Most Vital Resource

- “We are but walking water”
 - Deprive us of air, and we die in minutes
 - Deprive us of water, and we die in days
 - Deprive us of food, and we can go on for weeks or months
 - “Countless millions of people have lived without love, but none without water.”
- Water is our most ubiquitous and most vulnerable resource
 - We (and most plants and animals we need) can only use water of a certain quality (“fresh water”)
 - Water is our most nearly universal solvent—pure water is a manufactured product

The Global Water Crisis

- Human demand for water is expanding exponentially
 - Burgeoning populations
 - Changing patterns of use
 - Only somewhat offset by higher costs
- The supply of water is fixed or declining
 - Pollution
 - Climate change
- Result: 1,000,000,000 cannot obtain safe water for their own needs

Water as an International Resource

- Water - an ambient resource - largely ignores human boundaries
- Approximately 264 river basins - including most larger rivers and home to at least 40% of the world's population - cross boundaries
- Result - the English word "rival" derives from Latin word *rivalis* - people who live on opposite sides of a river

The Last Great Global Climate Change

- The end of the Ice Ages
- Hunter-Gatherers had to choose
 - Migrate
 - Starve
 - Find a new way to survive
- Result: The invention of agriculture
 - Women were first
 - Irrigation brings in the men
 - Cities and civilization follow

Our Water Future

- There is no global water budget
 - Water is abundant in some regions and scarce in others
 - We have limited ability to move water across long distances
 - What about “virtual water”
- Already some regions are in dire straits
 - Arid and semi-arid areas have always been water stressed
 - Today, many more countries and states experience chronic water shortage—the World Bank lists 80 countries where demand already outstrips supplies
- This problem will become sharply more pronounced in the near future

“Water Drives Men to Drink with Their Enemies”

- Cooperation Requires Legal Arrangements
- Examples:
 - The U.S.-Canadian and U.S.-Mexican arrangements
 - The Indus Valley
 - The Jordan Valley
 - The Euphrates Valley

Customary International Law

- Elements of customary international law:
 - A consistent practices by States
 - Out of a sense of legal obligation (*opinio juris*)
- Consider customary law in local settings
 - When does a trail between villages become legally obligatory?
 - Many real world examples
 - In good measure, the common law is customary law

Milestones in International Water Law

- State practice crystallizes for trans-boundary water resources (1900-1950)
- The *Helsinki Rules* approved (ILA, 1966)—soon accepted as the definitive summary
- The *UN Convention on Non-Navigational Uses of International Watercourses* approved by the General Assembly (1997)
- The Gabčíkovo-Nagymoros Decision in the International Court of Justice (1997)—cites the *UN Convention* as evidence of customary international law

Customary Rules of International Water Law

- Only riparian states have a legal claim upon a water resource
- Traditional (competing) theories
 - Absolute Territorial Sovereignty
 - Absolute Riverine Integrity
 - Equitable Utilization

The Codified Customary International Law of Transboundary Waters

- *Helsinki Rules* - equitable utilization is the only rule that matters
- *UN Convention* - major debate regarding the relation of equitable utilization to the "no harm rule"

The Challenge of Current and Future Stresses

- We need to coordinate adequately:
 - International environmental law;
 - International human rights law;
 - International humanitarian law; and
 - International water law
- States are developing a new governing paradigm - joint, basin-wide management (sometimes called "equitable participation")

Why did the International Law Association revise the *Helsinki Rules*?

- The *Helsinki Rules* were nearly 40 years old
- The *UN Convention* might never come into effect
- The *UN Convention* says little or nothing about the issues raised here
- Even when the *UN Convention* does address a point, it provides only a very general framework
- New rules could provide a comprehensive, cogent, and complete summary of all customary international law relevant to water management decisions

The *Berlin Rules*

- Approved by the ILA, 21 August 2004
- The New Paradigm (all waters):
 - Participatory management
 - Conjunctive management
 - Integrated management
 - Sustainability
 - Minimization of environmental harm
- The New Paradigm (internationally shared waters):
 - Cooperation
 - Equitable utilization
 - Avoidance of transboundary harm

Participatory Management

- A right of access to water
- A right to a voice in decisions affecting one's life
- Access to education
- Protection of particularly vulnerable communities
- A right to compensation
- Access to legal remedies

Sustainability and Minimization of Environmental Harm

- Ecological integrity
 - Ecological flows
 - Alien species
 - Pollution prevention or control
 - Hazardous substances
- Prior assessment of impacts
- Precautionary principle
- Least net environmental harm
- Compensation for injuries (“polluter pays”)

International Waters

- International cooperation
 - Exchange of information
 - Notification of programs, projects, or activities
 - Consultations
 - Harmonization and coordination of national policies
 - Establishment of joint management institutions
- Equitable utilization—having “due regard” to the avoidance of harm
 - No *a priori* preferences—except for “vital human needs”
 - Factors to be considered:
 - Natural features;
 - The social and economic needs of the States;
 - Each State’s dependence on the waters in question;
 - The effects of a use or uses in one State upon uses in the other State;
 - The extent of conservation or economy of use in each State;
 - Existing and potential uses;
 - The availability of alternatives to the planned or existing use;
 - The sustainability of proposed or existing uses; and
 - The minimization of environmental harm.
- Avoidance of transboundary harm—having “due regard” to equitable utilization

Groundwater

- Still Little Clear Law on Groundwater
- Must Be Managed Conjunctively with Surface Waters
- Groundwater Generally Subject to the Same Laws as Surface Waters
- Deserves Special Protection because of Its Differing Characteristics

Other Issues Addressed in the *Berlin Rules*

- Navigation
- War and Armed Conflict
- Dispute Resolution

Publication

- Published in the *Report of the Seventy-First Conference of the International Law Association* (Berlin 2004), published by the International Law Association, Charles Clore House, 17 Russell Square, London WC1B 5DR, United Kingdom
- The text is also available at www.ila-hq.org/pdf/Water%20Resources/Final%20Report%202004.pdf