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# *Charting the Hague Academy's Contribution to the Development of International Freshwater Law*

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Legal rules about freshwater<sup>1</sup> use and management are as old as civilization, and the topics covered by the Hague Academy have included water, directly or indirectly, since its inception. The association between water and international law is also long-standing, and, in recent times, international water law has grown into a substantial field. Its ongoing expansion is mirrored in the topics addressed by the Academy, as will be emphasized in this review. Its aim is to highlight the evolution of the important matter of freshwater in international law in the teachings of the Academy and to consider its contribution in the light of developments in other areas such as international jurisprudence, conventional developments, codification efforts and the work of expert organizations.

The review is structured as follows. It begins with a short introduction to the current state of affairs of water and to the challenges of its international component. The following section reviews the range of topics that the Academy has covered since its beginnings until now through two main perspectives – a chronological lens and a topical grouping – and against developments in the other areas of international law. Where relevant, it also reflects on the nature of the contributions. Concluding points complete the review.

## **1 Water Today**

Water is a global, regional and local concern. One easy way to appreciate its current state is to refer to Agenda 2030 and its Sustainable Development Goals (SDGs), as SDG 6 deals with water.<sup>2</sup> Its different indicators signal the problems that the world

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<sup>1</sup> References to water in this review are to freshwater only and not to marine or salt water.

<sup>2</sup> *Transforming Our World: The 2030 Agenda for Sustainable Development*, Doc. A/Res/70/1, 25 September 2015.

is dealing with regarding this important resource: access to water for all; availability of the resource, which is now more complicated because of the impacts of climate change; water quality through the lens of pollution and aquatic ecosystem health; timing of the availability of water; and so forth. Water quality and availability impact numerous vital human activities including food, energy and industrial production and riverine navigation. In addition to these physical challenges, there are widespread governance issues and gaps nationally and internationally. A great majority of the countries in the world share freshwater resources above and below the ground, bringing the matter within the remit of international law, but not all have international legal instruments in place to govern their interactions regarding these resources, notwithstanding applicable customary and conventional rules.<sup>3</sup> Moreover, existing arrangements are not always comprehensive or up to date. For instance, few such instruments provide adequate mechanisms to deal with erratic water availability resulting from climate change or other types of unanticipated events. This is only a brief glimpse into the kinds of issues that worry water governors and users at present.<sup>4</sup> Nevertheless, it indicates why water and the law attached to it matters and, further, highlights the important role of the Academy in clarifying the evolving norms of international water law.

## 2 The Academy and International Water Law Topics

To appreciate the impact of the Hague Academy's contribution to water law, the review proposed in this section is based on two main elements. The first structures the topics according to subject matter and chronology. Topics can relate directly to water by making explicit references to the water body (generally rivers but also lakes and groundwater). Direct water uses are also mentioned, such as navigation, as are specific aspects – for instance, river pollution. Indirect references are made to water law in topics such as natural resources, environmental law and dispute resolution where water is one of the subject matters considered but not exclusively. Chronology is also taken into account, beginning in 1924 with the early work of the Academy and ending, for now, in 2022. These two threads are woven together with chronology initiating and loosely guiding the investigation for practical purposes. The second element also includes other areas of international law that have addressed the topic of international water law to highlight parallel developments. These other areas comprise the jurisprudence of the International Court of Justice (ICJ), the work of the International Law Commission or independent work also carried out by legal scholars.

Before proceeding with the details, the methodology adopted to identify the relevant Hague Academy should be mentioned. The first step was to read through the entire

<sup>3</sup> There are two 'universal' conventions: the Convention on the Law of Non-Navigational Uses of International Watercourses, UN Doc. A/51/869, 21 May 1997 (1997 Convention) and the Convention on the Protection and Use of Transboundary Watercourses and International Lakes 1992, 1936 UNTS 269 (1992 Convention).

<sup>4</sup> For more information, see the websites of UN Water, available at <https://www.unwater.org>; Sustainable Development Goal 6: Clean Water and Sanitation, available at <https://sdgs.un.org/goals/goal6>.

list of courses to immediately identify the relevant titles. To confirm these and identify others that would otherwise not have been immediately identifiable, the website that contains the entire collection of courses was searched using water-related key words in French and in English.<sup>5</sup> However, this was not intended to be a comprehensive and detailed review of all topics including a reference to water. Its intention was to chart the contribution of the Academy in broad strokes.

Volume 2 begins the long association of the Hague Academy with water, though not through a specific reference to water in the title of the course. Rather, it is introduced through the notion of freedom of navigation, addressed by Charles Dupuis in his 1924 course,<sup>6</sup> which includes a chapter about international watercourses and navigable waterways of international concern.<sup>7</sup> Its combination of historical perspectives, general principles and international legal instruments as well as case studies of international rivers in Europe and in Africa sets the tone for later contributions. Part II of Volume 5, also dated 1924, discusses the regime of international rivers as transport communication links,<sup>8</sup> a matter revisited a decade later in 1936 in a full course by Georges De Leneer.<sup>9</sup> In the meantime, two European rivers are the subject of separate courses – the Danube in 1926<sup>10</sup> and the Rhine in 1929<sup>11</sup> – and the general principles of international fluvial law are described by Bohdan Winiarski in 1933.<sup>12</sup> The latter marks the first foray into a broader overview of the law pertaining to international watercourses, a topic that will be re-examined regularly up to today. This active period at the Academy takes place concurrently with developments on international navigational issues: the Convention and Statute on the Regime of Navigable Waterways of International Concern was adopted in Barcelona in 1921,<sup>13</sup> and the *River Oder* case was decided in 1929.<sup>14</sup> This rich contribution to riverine navigation reflects the main concern at the time in regard to international watercourses and a topic of international law since at least 1815 with the establishment of the Rhine Commission following the Congress of Vienna and numerous treaties later on offering ample practice on which to reflect. Notably, the bibliographies at the end of each volume illustrate the extent of the existing scholarship at the time: they are quite brief, and, hence, the courses add substantially to the scholarship on the topic.

<sup>5</sup> The following contains both the keywords and the number of hits for each in English: water 310; freshwater 24; river 225; fluvial 102; hydro 60; waterway 41; watercourse 25; lake 140; groundwater 12; and aquifer 5; in French: eau 312; eaux douces 14; rivière 188; fleuve 177; fluvial 102; voie navigable 69; lac 117; eaux souterraines 25; and aquifère 2.

<sup>6</sup> C. Dupuis, 'Liberté des voies de communication', 2 *Recueil des Cours de l'Académie de Droit International* (RdC) (1924) 127.

<sup>7</sup> *Ibid.*, ch. VI.

<sup>8</sup> M. Bourquin, 'L'organisation internationale des voies de communication', 5 *RdC* (1924) 163.

<sup>9</sup> G. De Leneer, 'Règles générales du droit des communications internationales', 55 *RdC* (1936) 5.

<sup>10</sup> J. Blociszewski, 'Le régime international du Danube', 11 *RdC* (1926) 257.

<sup>11</sup> J. Hostie, 'Le statut international du Rhin', 28 *RdC* (1929) 109.

<sup>12</sup> B. Winiarski, 'Principes généraux du droit fluvial international', 45 *RdC* (1933) 79.

<sup>13</sup> Convention and Statute on the Regime of Navigable Waterways of International Concern, Barcelona 20 April 1921, League of Nations, *Treaty Series* (1921–1922) Vol. 7, 35.

<sup>14</sup> Case Relating to the Territorial Jurisdiction of the International Commission of the River Oder, United Kingdom v Poland, *PCIJ, Series A n.23, ICGJ* 263.

The pace slows down after this active decade, though the scope of issues addressed broadens. There is a gap of about 20 years until the next course in 1953 dedicated to the industrial uses of international rivers.<sup>15</sup> There is then another 15-year break until the legal regime of international rivers is considered again in 1968.<sup>16</sup> Both courses represent a departure from the earlier work of the Hague Academy as they significantly widened the normative scope investigated beyond navigational issues. The 1953 course, taught by Georges Sauser-Hall, investigated the use of hydraulic power, which is accompanied by an overview of the domestic legal status of watercourses. It also included a historical perspective that, unlike earlier ones, acknowledged the Institut de Droit International's 1911 resolution on non-navigational matters relating to international water rivers.<sup>17</sup> Sauser-Hall offers an early attempt to draw general conclusions, acknowledging the challenge of doing so in the face of the diversity of factors in each basin. An interesting point that he makes is about the position of navigation *vis-à-vis* other uses without concluding definitively.<sup>18</sup> This course also marks a turning point in the attention to the uses of rivers: thereafter, navigation loses normative pre-eminence and is no longer the principal subject matter of a course, though sometimes it is integrated.<sup>19</sup> It also mirrors the growing and broader practical and societal interest in water issues as hydropower develops and other problems are caused by increasingly industrialized societies thirsty for more water.

This is illustrated in the next course that focuses on the matter in 1968. In this, Claude-Albert Colliard goes further than previous courses by considering a broader range of issues, ranging from the sharing of water in international basins to fluvial pollution, and introduces the notion of the integrated basin, which became one of the pillars of integrated water resource management, promoted since the end of the 20th century.<sup>20</sup> He also makes reference to the institutional framework that the parties can establish to operationalize their agreements, using the example of the Rhine Commission, amongst others.<sup>21</sup> What is perhaps the most surprising reading through this course is the description of the water challenges faced at the time. The issues seem eerily similar to what one might read today, with alarmist remarks about water scarcity experienced then and expected in the future.<sup>22</sup> The period of this course is a prolific one for international water law. The International Law Association had just adopted the 1966 Helsinki Rules on the Use of the Waters in International Rivers,<sup>23</sup> having

<sup>15</sup> G. Sauser-Hall, 'L'utilisation industrielle des fleuves internationaux', 83*RdC* (1953) 471.

<sup>16</sup> C.-A. Colliard, 'Evolution et aspects actuels du régime juridique des fleuves internationaux', 125 *RdC* (1968) 345.

<sup>17</sup> Résolutions adoptées en ce qui concerne la Règlementation internationale de l'usage des cours d'eau internationaux en dehors de l'exercice du droit de navigation, *Annuaire de l'Institut de Droit International* (1911) Vol. 24, Session de Madrid, 365.

<sup>18</sup> Sauser-Hall *supra* note 15, 518.

<sup>19</sup> See L. Callisch 'Règles générales du droit des cours d'eaux internationaux', 219(7) *RdC* (1989) 104.

<sup>20</sup> Global Water Partnership, 'Integrated Water Resources Management', TAC Background Paper no. 4 (2000).

<sup>21</sup> Colliard *supra* note 16, 125.

<sup>22</sup> *Ibid.*, 347.

<sup>23</sup> International Law Association (ILA), 'Helsinki Rules on the Use of the Waters in International Rivers', reprinted in *Report of the Fifty-second Conference* (1966).

already considered the topic in 1956,<sup>24</sup> which Colliard refers to. Two years later, the United Nations (UN) General Assembly mandated the International Law Commission (ILC) to study the law of non-navigational uses of international watercourses 'with a view to its progressive development and codification'.<sup>25</sup> While the ILC begins its survey on the matter and its codification efforts, none of the Academy courses deal with the topic directly between 1968 and 1989 when international watercourses are again covered.<sup>26</sup> During that period, international waters are a subject addressed within dispute resolution<sup>27</sup> and tangentially in natural resources,<sup>28</sup> or they are covered as a particular aspect such as the regime of the boundary waters between the USA and Canada<sup>29</sup> or river pollution.<sup>30</sup>

International water bodies shared by two or more riparian states raise fundamental issues of international law and have particular significance in certain fields. They have therefore also been referred to in contained passages in some courses: one example is Christian Tomuschat's discussion of the notion of sovereignty and potential restrictions on the freedom of action of a state.<sup>31</sup> He notes in his conclusion on the matter that the formula included in Article 5 of the Convention on the Law of Non-Navigational Uses of International Watercourses (1997 Convention)<sup>32</sup> is designed to satisfy all interests whether upstream or downstream so that the rights of all riparian states are equal rather than one prevailing over the other.<sup>33</sup>

The first time that water is explicitly mentioned, rather than by reference to rivers or watercourses, is in 2008 under the title 'The Evolution of International Water Law'.<sup>34</sup> This is almost two decades after Lucius Caflisch's 1989 review of a wide range of topics attached to rivers, including the theoretical basis for the law of international watercourses, river borders, navigational and non-navigational uses, environmental protection and institutional and dispute resolution. Breaking with that traditional approach, though the lectures also include international watercourses, Edith Brown Weiss addresses in 2008 points not previously explored: the right to water and different elements of international trade law. A noteworthy point is the length of this course compared to those in the volumes of the 1920s and 1930s: it is substantially longer and highlights the significant scholarly developments that the Academy has contributed to

<sup>24</sup> ILA, 'Principles of Law Governing the Uses of International Rivers', reprinted in *Report of the Forty-Seventh Conference* (1956).

<sup>25</sup> GA Res 2669 (XXV), 8 December 1970.

<sup>26</sup> Caflisch *supra* note 19, 21.

<sup>27</sup> R. Bilder, 'The Settlement of Disputes in the Field of the International Law of the Environment', 144 *RdC* (1975) 145 particularly ch. II.

<sup>28</sup> I. Brownlie, 'Legal Status of Natural Resources', 162 *RdC* (1979) 253.

<sup>29</sup> M. Cohen, 'The Regime of Boundary Waters: The Canadian-United States Experience', 146 (1975) 227.

<sup>30</sup> J. Sette-Camara, 'Pollution of International Rivers', 186 *RdC* (1984) 125.

<sup>31</sup> C. Tomuschat, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century', 286 *RdC* (1999) 168.

<sup>32</sup> 1997 Convention, *supra* note 3. This article sets out the principle of equitable and reasonable utilization, which is considered to be the cornerstone of international water law.

<sup>33</sup> Tomuschat, *supra* note 31.

<sup>34</sup> E. Brown Weiss, 'The Evolution of International Water Law', 331 *RdC* (2008) 177.

the topic. Yet, between 1989 and 2008, courses on other topics include, or make reference to, water. Environmental law is, for obvious reasons, one of the key fields that has multiple references to it. Writing from the perspective of the protection of the environment in 2000, Malgosia Fitzmaurice embeds water in her comprehensive review of the legal issues pertaining to that field of international law and also considers the delicate matter of international water resources cooperation.<sup>35</sup> Other angles adopted are the point of view of environmental damage in private international law,<sup>36</sup> the environment, development and resources<sup>37</sup> and sustainable development.<sup>38</sup> This clearly reflects the increasing importance of international environmental law and acknowledges the significant role of water in this context. It broadens and complements the more traditional topics of navigation and uses of watercourses, which often do not address those environmental concerns. Important developments occur concurrently: the 1997 Convention is adopted;<sup>39</sup> the *Gabčíkovo-Nagymaros* dispute between Hungary and Slovakia regarding the River Danube is decided by the ICJ the same year;<sup>40</sup> and the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes comes into force the year before,<sup>41</sup> establishing a very different international legal environment regarding international freshwater resources compared to the one in place until then.<sup>42</sup>

The evolution of the law specifically of international watercourses, last addressed in 1989, returned to the fore in 2022 in Stephen McCaffrey's course.<sup>43</sup> Further 2021 and 2022 courses referred to water via two topics: international law-making in an environmental context, with ample comments on water-related international jurisprudence,<sup>44</sup> and solidarity and community interests where water is a recurring example.<sup>45</sup> It is interesting to note that navigational uses were part of McCaffrey's description of the evolution of the law of international watercourses as well as the non-navigational uses, bringing back to our attention the principle of freedom of navigation as the prevailing standard, which had been so well examined a century earlier. However, one point not yet addressed is the decrease of water in navigable waterways due to prolonged droughts, with the ensuing substantial economic impacts. Groundwater, less visible physically and more challenging to handle, is also included in McCaffrey's course.<sup>46</sup> Notably, in the period between 2008 and 2022, the ICJ dealt with four water-related international disputes,<sup>47</sup> and an international

<sup>35</sup> M. Fitzmaurice, 'International Protection of the Environment', 293 *RdC* (2000) 21.

<sup>36</sup> C. Von Bar, 'Environmental Damage in Private International Law', 268 (1997) 303.

<sup>37</sup> M. Bothe, 'Environment, Development, Resources', 318 *RdC* (2005) 349.

<sup>38</sup> N. Schrijver, 'The Evolution of Sustainable Development in International Law', 329 *RdC* (2007) 231.

<sup>39</sup> 1997 Convention, *supra* note 3.

<sup>40</sup> *Gabčíkovo-Nagymaros Project (Hungary / Slovakia)*, Judgment, ICJ Reports 1997, 7.

<sup>41</sup> And, since 2013, it has been accessible to all countries and not just those of the UN Economic Commission of Europe.

<sup>42</sup> 1992 Convention, *supra* note 3.

<sup>43</sup> S. McCaffrey, 'The Evolution of the Law of International Watercourses', 426 (2022) 257.

<sup>44</sup> A. Boyle, 'International Lawmaking in an Environmental Context', 427 *RdC* (2022) 59.

<sup>45</sup> R. Wolfrum, 'Solidarity and Community Interests: Driving Forces for the Interpretation and Development of International Law', 416 *RdC* (2021) 27.

<sup>46</sup> McCaffrey, *supra* note 43, 300.

<sup>47</sup> The *Pulp Mills* case between Uruguay and Argentina in 2010 (*Pulp Mills on the River Uruguay (Argentina v. Uruguay)*), Judgment, ICJ Reports 2010, 14); two disputes between Nicaragua and Costa Rica joined and

tribunal dealt with one.<sup>48</sup> A point to note here is the role of some of the course authors in these recent disputes, as well as in some of the earlier ones, as counsel or arbitrators.<sup>49</sup> There is therefore a clear link between practice and the teachings of the Hague Academy in this respect for the benefit of its attendees and of the readers of the supporting written materials, as the empirical and theoretical perspectives they present are informed by their practical experience in the application of the subject matter.<sup>50</sup>

### 3 Conclusion

As this whirlwind review has revealed, the Hague Academy has made significant contributions to attempt to tackle the 'wicked'<sup>51</sup> issue of water in a manner that reflects the concerns of the time and contemporary legal developments. Considering the chronological and topical evolution, there is a clear move from a focus purely on fluvial navigation to a much wider range of issues around watercourses and other water bodies and a multiplicity of angles adopted. Fundamental principles, the study of which has emerged after that period, are regularly revisited and added to following conventional and non-conventional developments occurring in parallel and reflecting new concerns such as the environment. This can be charted clearly from the subject matter of the courses. The specific reference to water in the 2008 course is a watershed moment that opens up the topic to many more considerations than those attached to rivers. The question now is how the Academy might continue to broaden the scope to include and reflect on front-line issues being discussed in other fora. The return to watercourses in 2022 somewhat narrows the scope, though the course ends with interrogations about how the impacts of climate change will affect international water law and, particularly, the legal instruments underpinning cooperation in basins around the globe.

What is remarkable is that the Hague Academy has had its finger on an important issue from the beginning. Its early work was one of the few scholarly contributions to address the topic at the time. The bibliographies provided at the end of most of the courses mentioned demonstrate the considerable growth of scholarship on international water law, particularly in the latter part of the 20th century. While the very early contributions on navigation added substantially to scholarly endeavours, this

decided in 2015 (*Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgment, ICJ Reports 2015, 665); and the *Silala* dispute between Chile and Bolivia adjudicated in 2022 (*Dispute over the Status and Use of the Waters of the Silala (Chile v. Bolivia)*, Judgment, ICJ Reports 2022, 614).

<sup>48</sup> *Indus Waters Kishenganga Arbitration, Pakistan v India*, Final Award, ICGJ 478 (PCA 2013).

<sup>49</sup> McCaffrey has been counsel to a party in all of the water-related cases, and Caffisch was arbitrator in the *Kishenganga* dispute, *supra* note 48.

<sup>50</sup> Note also the role of McCaffrey as a rapporteur with the ILC in the preparation of the 1997 Convention, *supra* note 3.

<sup>51</sup> Wicked in the context of water, with which it is often associated, can be understood to be 'a complex problem with no optimal solution'. Damania *et al.* 'Policies to Tame a Wicked Problem', in R. Damiana *et al.* (eds), *Quality Unknown: The Invisible Water Crisis* (2019) 93.

is perhaps less the case today in a much larger body of scholarship on the topic, and researchers have a much greater selection of publications to select from. Another notable point is that the earlier work of the Academy has not attracted as much attention as it could have. This may be because the language of the earlier texts is French, which may have caused scholars unable to read it to overlook them. There may also be the perception that approaches developed in the earlier part of the former century are outdated and no longer relevant to the problems being faced today which require a more forward-looking approach. Perhaps scholars have simply not been aware of the extent of the Hague Academy's contribution and, hence, have overlooked it in their research. One may speculate as to these reasons. However, one of the purposes of this review is to shine new light on this fascinating body of work in the hope that it will inspire others to consider it and take note of the important contributions it has made for more than a century. One may also hope that future contributors will make use of the important platform that is the Academy to present innovative thinking on some aspects of international water law that have received limited attention or been ignored so far, such as the impact on it of climate change and of other uncertain events or the international law for groundwater resources.

This review has charted the way in which the Hague Academy has contributed to the development of international water law and highlighted key aspects of that contribution. Water has been a constant topic of legal regulation and a global concern, which is reflected in the fact that, as a topic of teaching, it spans almost exactly the centenary the Academy is celebrating, thus achieving its objective of concentrating on fundamental and topical issues of international law. It is eminently likely that water will continue to be a topic that the Academy addresses in the course of the next century.