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Managing Blue Gold: A Comparative Study of Islamic Law and International Water Law

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Abstract

Transboundary rivers do not only cross international borders, they also traverse territories governed by different legal cultures and systems. This opens the question of how these legal systems relate to rules of international water law in order to see the international rules governing the management of shared freshwater resources implemented in the territories of States with different legal traditions. To respond to this question in relation to riparian countries where the Sharia is the predominant legal system, this article discusses the relationship between Islamic guiding principles and principles of international water law governing transboundary river basins. It draws out the similarities and differences of these two legal systems. While maybe not apparent at first sight, the two legal systems have many commonalities. The primary purpose of this paper is to find out what Islamic guiding principles offer for water management in general and transboundary water management in particular. The overall objective is to illustrate the contribution of Islamic law to transboundary river basin management according to international law rules.

Key Words: *Islamic law, international law, transboundary, and water management*

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INTRODUCTION

In the words of professor Louis Henkin from Columbia law School: "Almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time."

International law is a decentralized legal system based on State consent (in the positivists' view) where compliance is primarily voluntary. States comply with principles of international law governing transboundary water management because they view compliance to be in their best interest. However, once they consented to be bound by a particular treaty or failed to become a "persistent objector" to a particular rule of international customary law, compliance becomes compulsory. This is not, however, the case with Islamic law. This legal system, once established, enjoys the strongest enforcement guarantees and compliance is compulsory. Islamic law is a unique centralized legal system where Muslims take the rules from the *Quran*, *Hadiths, Ijma*, and *Qeyas/Aql*.

The difficulty with Islamic water law is to identify rules related to governing transboundary water management. This is because, first, Islamic water law, due to historical reasons, has primarily focused on water management relating to small-scale individual uses, and transboundary issues have not been discussed much in the Islamic legal context. Second, Islamic law does not recognize national boundaries and Islam considers the whole world as one nation. The only imaginary boundary recognized in Islam is the line distinguishing Muslim and Non-Muslim territories. Otherwise, all Muslims living in any part of the world belong to Islamic *Umah* (nation). Thus, there are very few rules, if any, in the Islamic legal sources that directly regulate transboundary river basins.

The predominant Islamic water law doctrine of "surplus water", if applied to transboundary river basins, seems to favor upstream States in a successive river basin. At the same time, the "*la zarar wa la zeraara fil islam*"— the Islamic "no harm" rule as well as the "no one goes thirsty" rule arguably favors downstream States.

Further, under another Islamic rule, called "*Anhar –e A'mmah*" [the public rivers] rule, the water flowing in the large rivers, lakes, aquifers, snowmelt water, rainfall, precipitation, snowcaps, and glaciers are in their natural state and thus common to all. Such waters cannot be owned privately unless the owner invests money and labor to collect or divert such waters. Similarly, under international law, transboundary river basins are considered as shared resources and none of the riparian States can claim sole ownership of such resources. Uses by one country to claim water

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by investing time, money, labor and resources to collect and divert the water as permitted under international law are subject to the principle of equitable and reasonable utilization.

The rules discussed above, put Islamic water law in a seemingly similar situation as the international law on transboundary water resources (hereafter referred to as "international water law") has been viewed by some States and scholars. Some downstream States have argued the doctrine of "equitable and reasonable" utilization under article 5 of the 1997 UN Convention favors upstream States. On the other hand, some upstream States have expressed the view that the "no significant harm" rule under article 7 of the Convention as favoring downstream States.

Yet, the "surplus water" and the "no harm" rules under Islamic law will only apply to transboundary river basins indirectly and only if interpreted so by Islamic scholars, because the Islamic rules with compulsory compliance (the *Quran*, *Hadith*, *Ijma*, and *Qeyas/Aql*) fail to directly address transboundary water management among States. Instead, Islamic law refers the question to local, regional, and international customs and, at times, to the best judgment (wisdom) of the parties involved (cooperation).

This approach is consistent with the international law approach to transboundary river basin management. International water law applies to all riparian countries equally. The principle of equitable and reasonable utilization protects downstream rights in the same manner as it protects those of upstream States. In developing water resources, downstream States have to consider the two-way street of harm; viz. significant downstream water development and use may foreclose future uses of upstream States.[1] The drafters of the United Nations Convention on Non-Navigational Uses of International Watercourses (hereinafter referred to as the "1997 UN Watercourses Convention")[2] deliberately stroke a balance between these two principles in the Convention's text. Additionally, the Convention puts emphasis on the principle of cooperation which encourages States to find a solution acceptable to all States concerned.

1. See S. Salman, 'Downstream riparians can also harm upstream riparians: the concept of foreclosure of future uses' (2010) 34 *Water International* 4, 350-364; S. McCaffrey, *The Law of International Watercourses: Non-Navigational Uses*, 2nd edition (New York: Oxford University Press, 2007), pp. 474f; S. McCaffrey, 'Some Developments in the Law of International Watercourses', in M. Kohen (ed.), *Promoting Justice, Human Rights and Conflict Resolution through International Law – Liber Amicorum Lucius Caflisch* (Leiden: Martinus Nijhoff, 2007), pp. 785-791

2. Convention on the Law of Non-Navigational Uses of International Watercourses, New York, 21 May 1997, UN Doc. A/RES/51/299

IMPORTANCE OF WATER

No doubt, water is one of the most important substances in all cultures, religions, countries, and communities in the world. All life depends on it. Throughout the history of human civilization, writers, poets, novelists, kings, scholars, philosophers, geologists, scientists, and people from all walks of life have been inspired by water. Civilizations began next to rivers. Empires and kings have fought and reconciled over water. Water is the noblest and most necessary substance, and at the same time turns into a creature of destructive force when it causes floods or a large dam fails, or when it stays away during drought periods. Water can be both a life-giver and a life-taker. "Water is a scarce and finite resource with no substitute, and upon which the very existence of life on earth depends".[1] Or as others have put it: "Next to God there is water". [2]

Similarly in the Islamic teaching and culture, water is regarded a very precious and important substance. The word "water" is mentioned in the Quran [Muslims holy book and the first source of Islamic law] 63 times – 59 times in singular form and 4 times as other derivatives. The words "river" and "rivers" are used in the Quran 54 times and the phrase "drinking water" 39 times. In the Quran water is regarded as the source of life and a gift of God. Human beings are called the stewards of such a precious and life-giving resource.[3] Several verses of the Quran talk about water as the source of life. For example, Sura *Anbiya*/30 reads as follows: "Have not those who disbelieve known that the heavens and the earth were of one piece, then we parted them, and we made every living thing of water? Will they not then believe?"[4] And there are other verses in the Quran that talk about water and its importance.[5]

Tradition/Hadith (Sayings of the Prophet) – the second source of Islamic law – equally refers to the importance of water and the way it should be treated and used in several places. For example this Hadith: "He who withholds water in order to prevent the use of pasture, God withholds from him his mercy on the Day of Resurrection,

1. S. M. A. Salman and D. Bradlow, Regulatory Frameworks for Water Resources Management, World Bank Publication, p. 9.
2. The Cadillac Desert - 1. Mulholland's Dream documentary movie. Available at: https://www.youtube.com/watch?v=hkbebOhnCjA
3. J. W. Dellapenna and J. Gupta, The Evolution of the Law and Politics of Water, p. 40.
4. Quran, Anbiya/30, Translation by Pickthall, taken from the Quranic Arabic Corpus, an annotated linguistic resource for the Holy Quran website, available at: http://corpus.quran.com/translation.jsp?chapter=21&verse=30
5. See *Sura Al molk*/30, *Kahf*/41, Jinn/16, *Morsalaat*/27, *Waqiya*/70/ 68-69, *Hajj*/5, *Alnaml*/60, *Baqara*/22, *Nahl*/10, *Zokhrof*/11, *Al Anaa'm*/99, *Qaaf*/9-10, *Anfaal*/11, *Forqaan*/48, *Momenoon*/18, *Zemar*/2, and *AlRa'ad*/17.

[and] excess in the use of water is forbidden even if you have the resources of a whole river, [and] the surplus of a well must not be withheld".[1]

Followers of Islamic teachings consider Islamic Sharia guiding principles as the only path to salvation and regard these teachings as "divine" rules imposed on the faithful of Islam. Islamic Sharia law is not national law created by States but rather a universal/regional law. Therefore, its guiding principles are presumed to enjoy a very strong religious enforcement mechanism, not only in Islamic countries where Sharia law is the national legal order, but also overall by Muslims as individuals.

Water is so important in Islamic teachings that even Islamic Sharia law borrows its name from this substance. The word '*Sharia'* in its most generic sense means a moral path to salvation. In another sense, "*Sharia*" means the path to access pure drinking water. That is why some Islamic scholars argue that, historically, water has been central to Islamic Sharia law despite the fact that hard-and-fast principles of Islamic water law are very few.[2]

In summary, given the importance of water in general and the Islamic tradition, it is therefore not surprising that both Islamic guiding principles and international water law place a strong emphasis on the importance of water as a source of life and its proper and sustainable use.

SOURCES OF WATER LAW

SOURCES OF ISLAMIC LAW

Understanding Islamic water law would be very difficult without discussing and understanding the nature and sources of Islamic law, because these are very different from what we think of as law in the conventional sense of the term. Most people in Western countries think of Islamic law as a legal system with certain features and characteristics that might be very different from their own legal systems – or enacted by legislators. The reality is that this system is very different from other legal systems in the sense that it is a "divine" legal system.

The truth is that Islamic law is not what we think of as the law enacted by a legislature. Islamic law in its conventional sense is a set of rules crafted by God and sent to the Prophet so that he could pass it on to human beings. That is why, in the Islamic law context, the Prophet is not a lawmaker, but is a "messenger" who passes God's messages to human beings. The Arabic word "*rasool*" as well as the Persian

1. Joseph id. (Quoting Bukhari 1983, v.3, bk. 40: 543-544; ibn Qudama 1969, 4: 61-63; Mawardi 1983; 158).
2. Joseph id.

word "*payamber*" that translate as "Prophet" in English, both mean the "messenger" and are frequently used in the Quran to refer to the Prophet Muhammad.

The Quran says: "Muhammad does not speak for himself but he passes on whatever God reveals to him" (*Sura Al Najm*, 3-4).[1] Muslims believe that Quran is the direct word of God revealed to the Prophet Muhammad. Therefore, all sources of Islamic law are centered on finding and establishing God's "command" and "prohibition" *('amr' wa 'nahya')* regarding different questions of individual, social, societal, and political life in the Islamic world. As Islamic law is a set of God-made laws, once established, it enjoys the strongest enforcement incentives and guarantees, since no one can dare to breach God's command.[2]

It is also important to note that, similar to the dictum of the Permanent Court of International Justice in the 1927 *S.S. Lotus* case (France v. Turkey), which states that in international law, whatever is not expressly prohibited is permitted,[3] in Islamic law, too, everything is allowed (*mubah*) unless prohibited.[4] Furthermore, similar to international law, Islamic law allows local or regional customary law to be applied in areas of law or situations not regulated by specific provision. This gives flexibility to the often-rigid nature of the Islamic legal system and mirrors the international legal system which provides for the application of customary international law in the absence of an applicable international treaty.[5] For example, in areas such as trade, governance, politics, dispute resolution, delimitation of boundaries, and transboundary water allocation, where there is no specific provision provided in Islamic law, according to Islamic scholars, this can be addressed by custom (local, regional, and international).[6]

Islamic law scholars have referenced to all four sources of Islamic law (Quran, Sunna, Ijma, and Qeyas) to argue that custom is an important gap-filler in Islamic law. They argue that where there is no explicit rule regarding a particular question in the sources of Islamic law mentioned above, Muslims must consult local or regional

1. Quran, Al Najm/3-4, Translation by Pickthall, taken from the Quranic Arabic Corpus.
2. Mekarem, Introduction to Islamic Law, volume 3, available at: http://makarem.ir/compilation/reader.aspx?mid=68785&catid=6574 [accessed on 25 March 2018]
3. Permanent Court of Int'l Justice, P.C.I.J. (ser. A) No. 10 (1927)
4. There is a Hadith in Islamic law sources that says: "everything is permitted unless proved to be prohibited". This Hadith is quoted in Wasayel, volume 17, p. 87. Available at: http://www.eshia.ir/feqh/archive/text/sobhani/osool/88/881014/
5. Art. 38 Statute of the International Court of Justice, 18 April 1946, available at http://www.icj-cij.org/en/statute [accessed 25 March 2018]
6. Mohammad Nasr Esfahani, Water Rights in Islam, available at: http://www.m-nasr.com/%D8%AD%D9%82-%D8%A2%D8%A8%D8%8C-%D8%AD%D9%82%E2%80%8C%D8%A7%D9%84%D9%86%D9%91%D8%A7%D8%B3#_ftn11

customs to resolve that question. Some of the most important verses of the Quran referenced by Islamic scholars to prove validity of custom is verse 199 of Surat Al A'raaf, verse 78 of Surat Al Haj, verse 110 of Surat Al Emran. There are also numerous hadiths (sayings of prophet) that have been referred to by Islamic scholars to prove that custom is a valid fill-in in Islamic law.[1]

Transboundary water is an area that has not been discussed directly in Islamic legal sources. There is no rule in Islamic legal sources explicitly and directly concerned with transboundary waters. Therefore, this area of the law must be addressed in the light of local, regional, and/or international custom. In the following the four sources of Islamic law or, better, "evidence of God's 'command' and 'prohibition'" are discussed in more detail; (1) the Quran; (2) *Hadiths/Traditions* (*Sunna*); (3) Consensus of Islamic religious law scholars (*Ijma*); and (4) Analogy (*Qeyas*) or Wisdom (*Aql*).

The Quran

The Quran is the first and the most authoritative source of Islamic law. It is the direct word of God revealed to Prophet Muhammad. Hundreds of questions and issues have been discussed and addressed in the Quran. There are a total of 6,660 verses in the Quran. Of these verses, only 500 verses (13%) are Islamic regulatory provisions. Muslims in general view Quran as the Holy Book and attach a lot of spiritual values to it. Islamic Sharia law scholars view the Quran as the Holy Constitution that if interpreted properly can provide an answer to every single question or issue in the world be it social, political, economic, scientific, or whatsoever in nature. Islamic scholars have written volumes of books interpreting Quranic verses. They view the Quran as a "live document" that can be interpreted in an "evolutional" and "progressive" manner. Ordinary Muslims are not permitted to apply the Quran literally; they are considered unable to properly understand the Quran.[2] They must

1. Lailatul Alqadr, Validity of Custom, chapter 7, available at: http://lailatolgadr.ir/?MID=21&Type=News&TypeID=13&id=26772#sthash.ETZ89r8t.dpbs

2. Muslims speaking languages other than Arabic are required to learn how to pray in Arabic. Being able to read the Quran, which is in Arabic, is not mandatory for qualifying to be a Muslim but a great deal of spiritual values are attached to the Quran literacy. Normally, all literate Muslims are able to read ["recite"] the Quran. This is because, the Quran is taught at schools and there is a lot of exposure to the Quran in daily life in a Muslim community. Every Islamic scholar must be able to read Arabic and research in Arabic. Most of Islamic authorities even those written by non- Arabic speakers (Iranins, Afghans, etc.) are in Arabic. A huge portion of mandatory Islamic Sharia law subjects are in Arabic.

apply these provisions as interpreted by Islamic scholars (*Ulema*)[1] and provided to them as simplified practice guidebooks.[2]

Traditions (*Sunna/Hadiths*)

The second source of Islamic law is Traditions. "Traditions" means sayings of Prophet Muhammad (words), his practice (acts and omissions), and his approvals (silence regarding acts and omissions) of the practices in his presence during his lifetime. Islamic scholars argue that the Prophet in his status as the "messenger" of God is under a duty to act and omit as God pleases. He does not speak for himself nor does He act or omit for himself but He acts as God tells him to. Therefore, any practice and omission of the Prophet that can be interpreted as implying a certain generally applicable rule must be considered as a source of Islamic law and therefore evidence of God's intention.[3]

However, it should be noted that, according to Sunni Muslim scholars, "Traditions" as a source of law means words, acts and omissions as well as approvals of Prophet Muhammad only. But Shiite Muslim scholars have a different interpretation of the Traditions. They argue that not only the words, acts, omissions, and approvals of Prophet Muhammad but those of His twelve successors (imams) are also sources of Islamic law. Shiite scholars cite several verses of Quran (for example, *Al ma'eda*/67) and sayings of the Prophet where He says that as long as Muslims refer to the Quran and His successors (*Imams*) for guidance they will not lose the right path to salvation.[4]

Consensus (Ijma)

As a source of Islamic law, "Consensus" means the agreement of all Islamic scholars that live in one time over one or several specific questions of law. The logic behind the authoritativeness of "Consensus" is argued to rely on the fact that if all scholars who live at one time/era agree on something, this agreement will indicate that they are right and it is unlikely that all scholars are mistaken together. However, there

1. The Quran is in Arabic and all Muslims should learn Arabic in order to read the Quran. Only highly qualified Islamic scholars are permitted to translate the Quran. Every translation should be accompanied by the original text. Printing a translation without the original text is crime (felony) in almost of all the Islamic countries. For example, in January 2009 two Afghan citizens were sentenced to 20 years imprisonment for translating the Quran without the original Arabic text. See the link here: https://www.iclrs.org/index.php?pageId=8&linkId=21&contentId=474&blurbId=394
2. Mekarem, id.
3. Id.
4. A'yanu al Shiite, 370/ 1. Available at: http://www.hawzah.net/fa/Article/View/5366/%D8%AD%D8%AF%DB%8C%D8%AB-%D8%AB%D9%82%D9%84%DB%8C%D9%86

is a slight difference between interpretation of "Consensus" provided by Sunni scholars and Shiite scholars. Sunni scholars believe that Consensus is a valid source of law *per se* without any preconditions. But Shiite scholars argue that the Consensus of scholars by itself is not a source of law; it is only considered a source of Islamic law and thus revealing God's opinion if the Consensus implies words, acts, omissions, and approvals of the Prophet Muhammad or one of His twelve successors (*imam*).[1]

Analogy (*Qeyas*) or Wisdom

The fourth important source of Islamic law is analogy according to Sunni Islamic scholars and Wisdom (*aql*) according to Shiite Islamic scholars. Sunni scholars argue that since there are not enough verses in the Quran and Hadiths of Prophet to address all existing and future issues, an efficient way to infer Islamic legal provisions would be to use analogy. For example, in one Islamic guiding principle, a judge is not permitted to issue his judgment while he is angry. Now, the question is: if a judge is not angry but is very hungry, can he issue a judgment? There is no rule in Islamic law about the latter. Based on analogy, one can argue that the reason Islamic law prohibits a judge from entering judgment while angry is because he is under influence of his passions and therefore does not have a stable mind to enter a sound judgment. This influence of passion can be inferred in the case where the judge is hungry too. Therefore, the judge must not enter a judgment when he is hungry because he lacks a sound mind.[2]

On the other hand Shiite scholars argue that if there is no provision in the Quran, Traditions, or Consensus of Islamic scholars regarding a particular case or issue, Islamic scholars are permitted to refer to their wisdom and use their best judgment to address an issue. They further argue that the purpose of Islamic law sources is to find Godly provision(s) regarding a specific issue. If no provision is found in other sources of law and we know that God is the Creator of wisdom, one can infer that God does not act contrary to what is wise. Therefore, in such a situation a sound wisdom can tell us what to do that is not contrary to the "will" of God. However, Sunni scholars are of the view that Islamic law is "the law of obedience" and Muslims must 'follow'what the religion provides.

1. Mekarem, Id.
2. Motahari, Murtaza, book collection, volume 20, analogy, abstract available at: http://www.maaref.porsemani.ir/content/%D8%A7%D8%AC%D8%AA%D9%87%D8%A7%D8%AF-%D9%82%DB%8C%D8%A7%D8%B3%DB%8C

In summary, all rules come from these four sources of Islamic Law, except for issues relating to trade, governance, politics, dispute resolution, etc., where custom has been recognized as authoritative under the Islamic law that applies to these issues. Generally speaking, there is a hierarchy among the sources with the Quran being the first most authoritative source, Traditions second, and Consensus and Analogy (Sunni Muslims) or Wisdom (Shiite Muslims) third and fourth respectively. If no rule is found in these sources regarding a specific question or case, Islamic scholars suggest that such a question must be resolved by local, regional or international customs, depending on the nature of the case.[1]

SOURCES OF INTERNATIONAL LAW

Fortunately, the sources of international law are more straightforward, because article 38(1) of the International Court of Justice (ICJ) Statute stipulates that:

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

International conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

International custom, as evidence of a general practice accepted as law;

The general principles of law recognized by civilized nations;

Subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.[2]

From a comparative perspective, two questions may be discussed regarding sources of international law and Islamic law. The first question is whether there is a hierarchy between sources of international law as listed in article 38(1) of the ICJ Statute? In other words, if a rule of international law applicable to a particular case is found in an international treaty does it prevail another applicable rule found in customary international law? The answer to this question is affirmative; meaning that if a rule applicable to a case is found in a treaty that rule prevails rules of customary international law or rules found in other sources of international law applicable to that case.[3] Similar hierarchy exists among the sources of Islamic law. That is to say, rules

1. Quran, Sura Ibrahim: 4(this verse is interpreted to refer to custom as a source of law).
2. ICJ Statute, Article 38(1).
3. Stephen C. McCaffrey, Understanding International Law, second edition, p 39, 2015, LexisNexis.

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found in the Quran prevails the rules found in the Traditions, Consensus, and/ or Analogy or Wisdom.[1]

The second question that maybe discussed here is what gives the sources of international law and Islamic law legal force? Why are they binding? The answer to this question in the Islamic law context looks to be quite straightforward. In this legal system God is the lawmaker and He is the most powerful authority in the universe. He has created both the universe and the law by which the universe should be ruled and managed. God is the rightful authority and the king of kings to rule the world but He does not desire to exercise this power directly rather he has delegated his authority to mankind as his "vice-regent" or "successor" (*khalifa*). In this context, because, the law comes from God, it is binding force and authoritativeness is undisputed.

In the international law context, however, scholars have expressed different views regarding why rules of international are binding. Sir Henry Maine, the well-known 19th century international law scholar and one of the founding fathers of the "natural law theory" has argued that the legal force of international law has its headwaters in the natural law. He says: " '[t] he grandest function of the Law of Nature was discharged in giving birth to modern International Law…'".[2] The "natural law theory" was the dominant theory of international law until the 20th century when the "positivism" theory overtook it. According to the latter, the answer to the question where the legal force of international law comes from, as professor Stephen C. McCaffrey explains "… is found in the acceptance by states, in their practice, of certain law-creating *processes* as legitimate ways of making law."[3] Professor McCaffrey further explains that:

This theory [positivism] is sometimes more narrowly defined in volunteerist terms as holding that states are bound only by those rules of international law to which they have voluntarily consented. Indeed, both the International Court of Justice and its predecessor have made statements to this effect".[4]

The "statements to this effect" were made by the Permanent Court of International Justice and the International Court of Justice in the Lotus case (France v. Turkey)and the Nicaragua case (Nicaragua v. U.S.) respectively.. In the Lotus case, the Permanent Court stated that " '[t]he rules of law binding upon States … emanate from their own free will…'". Similarly, in the Nicaragua case, the Court stated that

1. Islamic scholars have consensus over this hierarchy among the sources of Islamic Law.
2. Professor Stephen C. McCaffrey, Id, p 35.
3. Id. p 34.
4. Id. p 35.

"in international law there are no rules, other than such rules as may be accepted by the states concerned, by treaty or otherwise'".[1] The important take away from this discussion is that international law is binding on states in one way or the other. The naturalist, positivist, and volunteerist theories of international law do not question the legal force of this branch of law. What these theories are concerned about is in what way and why international law becomes binding on states.

WATER: A SHARED RESOURCE

Under both Islamic law and international water law, water is a common resource that must be shared. In the Quran, water is regarded as the common property of all human beings (54:28)[2] The Quran states that "all that is on Earth" belongs to God and has been subjected to humans (22:65) and that "it is He who has created for you all things that are on Earth" (2:29). The Quran recognizes human beings as *Khalifa*. *Khalī*fa has generally been understood by Muslims to mean "vice-regent" or literally "deputy ruler". In this sense humans are considered stewards or trustees responsible to develop and conserve the Earth and the resources on it.[3]

In an important Hadith, Prophet Muhammad is quoted to have said that: "Muslims have [a] common share in three things: grass (pasture), water and fire (fuel)" (Abu-Dawood 3470).[4] All Muslim scholars agree that, based on the Quran and Hadiths of the Prophet, there is a consensus that water is a common resource for human beings. Muslims are forbidden to waste water, even for holy purposes and prayers. The Prophet has also forbidden his followers from polluting water and urinating in stagnant waters.[5] The Quran requires Muslims not to waste water resources and conserve them.[6]

Similarly in the international law context, there are ample conventions, treaty laws, case law and writings of highly qualified publicists that recognize water as a shared resource and emphasize equitable and reasonable utilization. For example, article 5(1) of the 1997 UN Convention of the Law of the Non-Navigational Uses of International Watercourses (the Convention) states that: "Watercourse States shall in

1. Id.
2. FIIA Report 25/2010 p. 100(quoting Richard C. Foltz, 'Ecology and Religion: Ecology and Islam', in Lindsay Jones (ed.) Encyclopedia of Religion, Second Edition (Detroit: Thomson Gale, 2005), pp. 2651-2654.)
3. Quran, Al Aa'raaf, verse 128.
4. FIIA Report.
5. Id.
6. Id.

their respective territories utilize an international watercourse in an equitable and reasonable manner." The Convention also emphasizes the "adequate protection of the watercourse".[1] Therefore, any claim that the water flowing in any international river belongs to one State is against principles of both Islamic law prescribed in the Quran and Hadith and international law.

WATER RIGHTS IN ISLAMIC LAW

Under Islamic Sharia law, there are three categories of water rights: 1) the human's right to drinking water (*haq ul shufa*); 2) the cattle's' right to drinking water; and 3) the irrigation right to water or water for irrigation (*haq ul majra*). The human's right to drinking water has priority over cattle and irrigation rights. Similarly, the cattle's right to drinking water has priority over the irrigation right.[2] Because water is a shared resource in Islamic law, when using this shared resource, human beings are bound to consider and follow the above-mentioned priorities during any period of water shortage. There is a Hadith that says "no one should go thirsty" and that depriving others from the surplus water is forbidden.[3] This "no one should go thirsty" rule applies even to the privately owned wells and springs. Meaning that the owner of a private well cannot prevent other human beings from drinking water from his well if there is no other source available.

However, once there is enough water for humans and cattle to drink, then water can be used for irrigation. Islamic scholars have not reached a consensus on water rights for irrigation. Instead, they have come up with different views on this issue, particularly in a shortage situation. The following section will discuss the issue in more detail.

Irrigation Water Management in Islamic Law

Under Islamic law, everyone can start developing a tract of land and use water to irrigate his or her land based on priority. Once a piece of land is developed and someone has diverted the water s/he will own that land as well as the water needed and diverted to irrigate it as the "parts and parcel" of the land. This provision is not limited to irrigable land and water but can also apply to all other commons such as grassland, pastures, and deserts.[4]

1. 1997 UN Convention, article 5(1) (2).
2. FIIA Report.
3. Id.
4. Alkafi, Id.

If there was enough water for everyone, everyone would be happy and could use the water. However, if the water is not enough for all, who has priority to use the water?

The Islamic scholars have different opinions on this question. In a shortage situation, there are three main views: 1) the prior appropriation rule (*Qaeda-e Sabaq*); 2) the riparian right or the nearest land to river rule (*Qaeda-e aqrab fal aqrab*); 3) the coin flipping rule (*Qura'a*).[1]

Similar to the "prior appropriation right" in the western United States where water is distributed based on priority among senior and junior users, the Islamic *Qaeda-e Sabaq* or prior appropriation rule is based on 'the first-in-time, first-in-right' principle. This means that everyone is entitled to use water based on priority in time. Therefore, in shortage, the senior user has priority over the junior user and junior user can only use water after the senior has diverted enough water for their use. Interestingly, the junior users cannot start diverting water at the very beginning of the canal if there is no "surplus water" in the river that exceeds the senior users' needs. Junior users can only start using the water after the senior's need is satisfied and the juniors' use does not harm his right.[2]

The second principle that has been discussed by Islamic scholars is *Qaeda-e aqrab fal aqrab* or the riparian rights principle. Based on this principle, when there is plenty of water in the river, lake or spring to satisfy all needs, everyone is entitled to use water based on proximity of their land to the water source in question. For example, imagine A, B, and C are the owners of different tracts of land. A's land is riparian to the river, i.e. located right at the bank of the river. B's land is located behind A's tract and does not touch the river, and similarly C's tract is located behind B's land.

Under the Islamic riparian rights system, in a water shortage A diverts water from the river to the amount that fully satisfies his need and then releases the surplus water to B. B in turn takes the water for his land located right behind A's tract. After B is satisfied, B should release the surplus water to C. C will be the last person who can use water – if there is *any* water left for C. Suppose, however, that A takes the amount needed for his land and as the result no water is left for B's irrigation needs. In such a

1. Shiekh Tousi, Al Mabsoot fil feqh-e Al Imamia, volume 3, p. 283.
2. Mohammad Nasr Esfahani, Id. (quoting Tahrir ul Wasila, Ahya ul Mawat, Question 3). Available at: http://www.m-nasr.com/%D8%AD%D9%82-%D8%A2%D8%A8%D8%8C-%D8%AD%D9%82%E2%80%8C%D8%A7%D9%84%D9%86%D9%91%D8%A7%D8%B3#_ftn11

case, B will go without water and has no right to complain. The same is true for C if no water is left after B's use.[1]

Under the coin-flipping rule (*Qura'a*), some Islamic scholars have argued that the riparian and prior appropriation rules will unjustly deny water from water sources to some users although everyone has the equal right to use the water from a God-given source. They argue that the fact that some users' land is located further from the river or some others have started diverting water earlier in time, that is to say the 'first-in-time, first-in-right' rule, should not deprive the later user or the user whose land is not adjacent to the river from diverting water. They argue this style of allocation is unjust. Instead, they suggest that in times of shortage, the water allocation must be decided by coin- flipping (lottery). In this way, no one will be deprived from water unjustly and everyone will have an opportunity to try her luck at winning the water "lottery".[2]

Of the three viewpoints discussed above, the prior appropriation – *Qaeda-e Sabaq* – appears to be more authoritative and has more backers in the Islamic texts. This is because this principle is more consistent with another well-known Islamic general principle called the " *la zarara wa la zeraara fil Islam*" that literally translates as "no one is allowed to harm himself nor others", or the Islamic "no harm" rule, which will be discussed later in this paper. The two other viewpoints have not been able to achieve significant supporters among Islamic scholars, but are still considered important views.[3]

The question that has yet to be answered in the above scenario where A, B, and C own different tracts of lands successively located next to each other on a riverside, is: Who decides that how much water is 'enough' for A? In other words, in a shortage, what amount of water A is entitled to use? Is there a rule that can decide the amount to be diverted by A or does A have full discretion to use whatever amount A thinks is 'enough'? Islamic law scholars, at some point referring to a Hadiths from the Prophet Muhammad, have tried to specify the maximum amount that can be used by the first user— in this case A. The Hadith says, that 'no more than an ankle depth of water may be taken for irrigation and one ankle depth is sufficient for one season'.[4] Given that different crops and trees need different amount of water, this amount of water mentioned in the Hadiths is said to be applicable in a certain situation or country and not generally applicable to all situations. Therefore, most of Islamic scholars argue

1. Shiekh Tousi, Id.
2. Id.
3. Mohammad Nasr Esphahani, id.
4. FIIA Report, p, 100.

that the amount should be decided by the customary rules applicable in the relevant area or region.[1]

The Islamic "No harm" rule

Application to Domestic Cases

A very important and prominent rule in Islamic Sharia law is the "no harm" rule or *Qaeda –e la zarar*. This rule is formed from a well-known Hadith of the Prophet who said: "*la zarara wa la zeraara fil Islam*" – which literally translates as "in Islam, no one is allowed to harm himself or others". This rule was introduced by the Prophet in a dispute between two Muslims in *Madina* city (modern Saudi Arabia) in the early history of Islam. In the case, a Muslim named *Samra bin Jundab* owned a tree located inside the yard of another man. *Samra* would go inside the yard of the man to water his tree. At a certain point, the man asked *Samra* to knock on the door and ask for permission whenever he wanted to go inside and water his tree. *Samra* refused to do so and argued that he had the right to visit and water his tree at any time without being required to ask for permission from the house owner. The man complained to the Prophet. The Prophet ordered *Samra* to knock on the door and ask for permission of the house owner whenever he wanted to water his tree. *Samra* refused to follow this order. The Prophet ordered the house owner to cut down the tree so that *Samra* would no longer have any right to enter into his yard. When *Samra* objected to the decision and asked why, the Prophet replied, "in Islam, no one is allowed to harm himself or others".[2]

The "no harm" rule is one of the most cited authorities in Islamic Sharia law. This rule has been widely applied to different areas of law including family, personal injury, commercial, and civil liability cases. In addition to the abovementioned case, Islamic scholars in reference to the Islamic "no harm" rule and its general applicability in all relevant circumstances have cited several verses of the Quran and Hadiths of the Prophet. Since water is central to Islamic Sharia law, this rule – though it was based primarily on a property right dispute – can be applied to water rights as well.[3]

Based on the "no harm" rule, any use of a property right or a legal right of any kind by the owner of property is only permissible when such use does not harm other

1. Mohammad Nasr, id.
2. Wiki Ahlolbiat (quoting Kolaini, Al kafi, volume 5, p. 292) available at: http://wiki.ahlolbait.com/%D9%82%D8%A7%D8%B9%D8%AF%D9%87_%D9%84%D8%A7%D8%B6%D8%B1%D8%B1#cite_note-1
3. Sayed Mohammad Kazim Taba Tabayee, Yazdi, *Tukmelat ul Urwatul Wosqa*, volume 1, p. 76.

right holders. In the water law context, this rule – coupled with the "prior appropriation" principle discussed above – only permits new uses if such uses do not harm existing uses. In other words, junior users in a "prior appropriation" (*Qaeda –e Sabaq*) system as well as in the Islamic riparian system (*Qaeda –e Al aqrab fal aqrab*) can only initiate a new use if such a new use in no way harms existing water rights.[1]

Particularly in the context of water use, Islamic scholars have frequently cited a case that is alleged to have been advised by Imam Sadiq, the sixth Imam and the founder of the Shiite Muslim sect. In that case, the owner of a watermill complained to Imam Sadiq and told him that the upstream user who had a water right from a specific stream planned to divert the water through a different channel for irrigation. If this diversion was permitted, the watermill owner would no longer have water to operate his mill because, there would be no water left in the channel on which he had installed his watermill. The plaintiff asked if the upstream user had the right to such a diversion under Islamic law. Imam Sadiq replied, "this man should fear from God's displeasure and should act in a way that does not harm his Muslim brother".[2]

There is plenty of literature in the Islamic authoritative texts regarding *harim* or "part and parcel of land, riverbanks, wells, and springs" that is not permitted to be developed by others. Under the "no harm" rule, one can only dig a new well or a new spring if the new well or spring is located at a certain distance to avoid harm to existing wells and springs.[3] Based on Islamic law, if someone develops a tract of land, constructs a canal, or diverts water to irrigate land, then that person owns that land and it is all "parts and parcel"(usufructuary rights) including the water right. No one is permitted to take away the land and the water right from the developer.[4]

The question is whether the government, municipality, city or county can indirectly deprive land owners of their right to water by constructing large dams, reservoirs and aqueducts that divert water from one place to the other for large irrigation schemes or municipal uses. According to Islamic scholars, under the "no harm" rule, no one – not even the government – is allowed to divert water in such a large scale that it harms small-scale irrigation users.[5]

1. Id.
2. Mohammad Nasr, Id.
3. Depending on the porosity of land, different distances might be required for different wells and springs as harim (parts and parcel of property). Generally, in a well used for drinking water, the distance between two wells should be 20 meters, for irrigation well 30 meters, for springs between 250-500 meters. Anyway, the distances can differ depending on infliction of harm by new wells and springs. Most often local custom is applied to decide the distance and identify if harm is caused by new uses.
4. Mohammad Nasr, Id.
5. Id.

However, there is another major rule in Islamic Sharia law that might be interpreted to allow such a diversion by cities. That rule is the *"aham wa muhim"* rule that literally translates as "the important vs. the more important" rule. This rule is based on Wisdom, and several other Islamic sources (the Quran and Hadith) usually have been cited to support it. Based on this rule, if someone faces a difficult situation where they have to choose between two extreme acts, they should choose the "more important" one. For example, stealing is an illegal act and impermissible. On the other hand, everyone is under a legal duty not to take his or her own life. The person in this scenario can only live if s/he steals food. Thus, the "duty not to steal" in this case is an "important" legal duty but the "duty to save one's own life" is "more important duty" for the purpose of this rule. Therefore, if the person's life can be saved only if she or he steals food, they should ignore the "important duty"– refraining from stealing food, and perform the "more important duty" of saving his or her life.[1]

In the question whether municipalities or cities can construct large dams, reservoirs, and aqueducts to divert water to distant cities and thus deprive small-scale water right holders of their right to use water for irrigation, one might say that under the "important vs. more important" rule, cities are permitted to do so.[2] However, one should note that application of this rule depends upon the context. Because it has been argued that the right to divert water for drinking is one thing, but to fill swimming pools is another. Meaning that all diversions by municipalities are not necessarily for drinking purposes.

Application to Transboundary Cases

So far, we have discussed the Islamic rules regarding water allocation for irrigation in a domestic context. Now one might ask how can these rules be applied to transboundary cases. Whereas these rules are meant to directly apply to domestic uses they may not be suitable to apply to transboundary cases. However, as discussed earlier, Islamic law refers to areas where there is no specific rule in the Quran, Traditions, Ijma, and Aql or Analogy to local or regional customs. Since national borders are not recognized in Islam or such borders did not exist in the early days of Islam when the Prophet was alive, there is no direct rule found in the primary sources of Islamic law applicable to transboundary water issues. Thus, such questions must

1. Mahfil Law Review, Tehran Islamic Studies Center, available at: http://pajoohesh.howzehtehran.com/Files/mahfel.php?idVeiw=1588&level=4&subid=1588
2. Id.

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be, primarily, decided by regional custom and principles of international law.[1] However, since Afghanistan and the countries surrounding it are predominantly Muslim countries with Islam as their established State religion— at least in the case of Islamic Republic of Afghanistan and Islamic Republic of Iran, there is a possibility that Islamic law might offer some easy- to- agree- upon solutions to riparian countries to resolve their transboundary water issues by applying Islamic guiding principles. Islamic law becomes more important when the question of "ownership" of the water resources is an issue in the region. This question will be further discussed in the section below.

THE ISLAMIC "NO HARM" RULE IN THE TRANSBOUNDARY WATER RIGHTS CONTEXT

Assuming that Islamic watercourse States decide to resolve their disputes through Islamic law, for example, Afghanistan and Iran (both Islamic republics) decide to resolve the Helmand and Harirud river basins disputes by applying principles of Islamic law, what principles of Islamic law discussed above might they choose to apply to resolve transboundary water disputes?

Since both rivers involved in the case are successive rivers and originate in Afghanistan, it is very likely that Afghanistan might choose the so-called Islamic 'riparian rule' or the *Qaeda –e aqrab fal aqrab*. This unique principle provides that the land riparian to the river has priority over other lands. Based on this principle Afghanistan has the right to satisfy its use and release the surplus water to Iran in the Helmand case and to Iran and Turkmenistan in the Harirud case. As the principle was discussed, in the Harirud River, which flows from Afghanistan to Iran and then to Turkmenistan, Afghanistan's needs must be satisfied first and the surplus water released to Iran, and after Iran's needs are satisfied then Turkmenistan can use the surplus water. In a shortage, if there is no surplus left in the river after Afghanistan has satisfied its needs, neither Iran nor Turkmenistan has any right to use water based on the Islamic "riparian" principle.[2]

However, Iran and other downstream States are very likely to assert the Islamic "prior appropriation", the "no harm", and in the case of Mashaad, the "no one can go thirsty" rules. This is because downstream States have developed their land and started using the water centuries earlier and claim historical use or prior appropriation of the

1. Mohammad Nasr, Id.
2. The general public in Afghanistan think that this is the right rule that should be applied. The author has inferred this understanding from several discussions he had with Afghan officials and academics.

water. Under both rules – prior appropriation and no harm, new uses initiated by the upstream State – in this case Afghanistan - are not permitted. Because, by starting a new use, Afghanistan would become a junior user and junior users can only start using if their use does not "harm" the established uses of senior users. In other words, Afghanistan must wait until Iran satisfies its needs and only then can Afghanistan use the water, as long as the use does not harm Iran.

Thus, it is not surprising to see that Mohammad Nasr Esphahani, a prominent Iranian Islamic scholar and professor at Esphahan Public University, argues that the "prior appropriation" rule and the "no harm" rule can and should be applied to transboundary water cases under Islamic Sharia law. He argues that under Islamic law and moral principles, if a downstream State has historically used the water and depends on that water, it has appropriated the water right prior to others and therefore is entitled to continue the uninterrupted use. According to Esphahani, if the upstream State initiates a new use, that State can only do so if the new use does not "harm" the existing uses of the downstream State. Otherwise, new uses upstream would be barred by the "no harm" rule under Islamic Sharia law.[1]

The "prior appropriation" and the "riparian" doctrines prescribed by Islamic law are similar in nature to the "prior appropriation" and "riparian rights" doctrines widely applied in the Western United States – particularly the State of California. However, they are very different in some important aspects, the discussion of which is beyond the scope of this paper.[2] A few examples are presented below to highlight some of the differences between the two systems. First, in California "riparian right" to water is an equitable right and riparians are entitled to a "reasonable" share from the river. At times of shortage, riparians will have a "correlative" right to water and must share the pain(shortage) when there is not enough water for everyone. Second, under California "riparian rule" the riparians do not have the right to store water at times when there are plenty of water in the river and use the stored water in times of shortage. Riparians must consider the "natural flow" of the river and avoid interrupting the natural conditions of the river shared by riparians. Third, from the perspective of the State Water Resources Control Board's(SWRCB) permitting system a riparian right holder is not subject to State's permitting system and does not need to acquire permit to use water.[3]

1. Esphahani, Id.
2. For a quick understanding of the two doctrines in the Western United States please read David H. Getches and others, Water Law in a Nutshell, 5th edition, West Academic publishing.
3. Getches, David. Water Law in a Nutshell (4th Ed. 2009

Similarly, the "proior appropriation" right under water laws of California is categorized into pre- 1914 appropriative right and post- 1914 appropriative right. Although both pre- 1914 and post-1914 rights are based on the "first in time, first in right" principle but they are distinct in an important way, i.e. the requirement to get permit from SWRCB. The pre-1914 water right holders are not required to get permit from SWRCB while holders of the post-1914 water rights must obtain permit from SWRCB to use water.[1] Islamic "riparian" and "prior appropriation" principles, lack such detailed regulations. Unlike the system in California where there is a large body of law concerning the two types of water rights (riparian and prior appropriation), in Islamic legal system one does not see such a comprehensive regulatory system. Islamic riparian right to water does not recognize the equitable use principle or the "correlative" share of riparians in times of shortage nor the system speaks of water rights subject to any particular permitting regime. In short, the riparian and prior appropriation rights under California's legal system have extensively developed and are widely practiced while in Islamic legal system, the two principles are not well-developed and remains at their primary stages and, thus, rarely practiced.

As discussed, since the riparian and prior appropriation doctrines primarily regulate domestic water uses, they don't constitute a hard-and-fast Islamic rule that must be applied to transboundary rivers like the Helmand and Harirud Rivers. Instead, under Islamic law, such an issue should be resolved by regional customs.

Professor Esphahani also acknowledges that disputes over water allocation should be resolved by regional custom and, if needed, by international customary law. He points out that in questions where no specific provision is provided in Islamic law, those questions should be resolved by customary law. Trade, commerce, water allocation, and dispute resolution are the areas that Islamic scholars mostly recognize to be governed by customary law because there is no specific provision for them in the Islamic sources.[2]

Of the principles in the Islamic sources for managing water use in the domestic context, the "no harm" rule is fully reflected and expressed by the international law particularly article 7 of the 1997 UN Watercourses Convention. In the international context, downstream States favor the "no harm rule" and typically prefer it over the "equitable and reasonable" utilization rule set forth in article 5 of the Convention. At the international level, international law scholars – like Islamic law scholars –support

1. Id.
2. Esphahani, Id.

the notions of negotiation and cooperation and prefer a win-win solution to the application of often-inflexible legal principles.[1]

There is a famous principle in Islamic law that says "the best approach is the one in the middle of two extremes" (*khair ul omoor- e awsato ha*). This rule has its headwaters in the Quran, Luqman/19 that reads: "And be moderate in your pace and lower your voice…"[2] Islamic scholars have interpreted this verse of the Quran to refer to a generally applicable rule that requires Muslims to choose the moderate approach in every walk of life be it individual, social, political, economic, life-style and commercial transactions.[3] Assuming this rule is applied to negotiations between Islamic countries over transboundary water resources, States are bound to refrain from taking extreme positions. They are under a duty to choose a moderate position, which would be the same as the win-win solution under international law. Further, it is important to note that the word "*adalat*" or "*e'tidal*" in Islamic Law that means "equitable" under international law literally translates as a half way between two extremes in a spectrum. This means exactly the win-win solution approach supported by international law in issues concerning transboundary disputes.[4]

OWNERSHIP OF WATER

One important issue to address, as this is a question frequently raised, is the question of water ownership. Media and individuals frequently state that individual States own the waters flowing in transboundary rivers, in particular with respect to water flow generated in an individual State's territory. They argue that because the water originates in the State's territory, the water belongs to that State. From that perspective, downstream States only deserve the amount of water that drains from their own territories on the other side of the borders or only the surplus waters that flow from upstream.[5] The notion of "surplus water" has its origin in the Islamic law "surplus water" doctrine that prohibits Muslims from withholding surplus water. As discussed earlier in this paper, under the "surplus water" doctrine, Muslims or Islamic States are allowed to use as much water as they need and after their needs are satisfied they are required to release the surplus water to downstream States.

1. Stephen C. McCaffrey, Id. p. 384.
2. Quran, Luqman/19. Translation by Sahih International, available at: https://quran.com/31:19
3. Ayatullah, Naser Makarem Sherazi, Tafsir Nemoone, volume 3, p. 561, 1396(Islamic Calender), Available at: http://dl.shiayan.ir/media/tafsir/quran/makarem/pdf/Makarem-Tafsir-Nemoone-3-(www.shiayan.ir).pdf
4. Author's view.
5. Discussion with individual Afghans in Kabul, Afghanistan, January – March 2017.

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This section will try to shed some light on the issue of the water ownership in Islam. Since water is considered a common property and a gift of God in Islamic law, no one can privately own water in its natural state. However, from the discussions and conclusions by Islamic scholars, three categories of ownership over water have developed. First, if the water is in personal containers, treatment plants, reservoirs or a distribution system, it is considered private property and thus subject to selling and purchasing. Second, if the water is in a lake, stream, spring or well located on a private property it is subject to a restricted private property right. The owner has the right to use, sell or trade the water, but has certain obligations to others. Third, the water flowing in the large rivers, lakes, aquifers, snowmelt water, rainfall, precipitation, snowcaps, and glaciers are in their natural state and thus common to all. Such waters cannot be owned privately unless the owner invests money and labor to collect or divert such waters.[1] Interestingly, the Nile, Euphrates, Tigris, and Amu Darya rivers have been specifically mentioned in Islamic texts as large public rivers (*Anhar –e A'mmah*) that should be used by all communities and cannot be owned by private individuals.[2]

Similarly under international law, transboundary river basins are now considered as shared resources and none of the riparian States is allowed to claim sole ownership of such resources unless the country invests time, money, labor and resources to collect and divert the water as permitted under international law based on the equitable and reasonable utilization rule.[3]

CONCLUSION

Under both Islamic law and international law, water is a shared resource and common to all. Both systems recognize that one single owner [nation] cannot claim a large transboundary river basin. Both Islamic law and international law encourage water management and the importance of certain uses such as domestic use over agricultural and industrial uses. However, the approaches adopted by each legal system to manage transboundary river basins appear to be slightly different in the sense that Islamic water law recognizes a "prior appropriation right" or the so called "historical use" rule while international law emphasizes the "equitable and reasonable" utilization of transboundary watercourses. The concept of "historical use" is not supported very well by the "equitable and reasonable" utilization principle that

1. FIIA Report (quoting Faruqui, 'Islam and Water', p. 12).
2. Id. p 102 (quoting Dien, 'Islam and the Environment', pp. 55-56).
3. The 1997 UN Convention, article 5(1).

lies at the heart of international law governing transboundary water resources. However, one must note that "historical use" is arguably a factor in determining equitable and reasonable utilization under international law.

Despite the fact that these two rules, namely the "prior appropriation right" and the "equitable and reasonable" utilization rules, appear, at hindsight, to put Islamic law and international law in some conflict, however, a closer look at both systems will reveal that these two systems are not only not in conflict in their approach to transboundary water management but they are also very consistent and supportive of each other. This is so for the following reasons.

First, Islamic law ties both its "prior appropriation" and the so-called "riparian rule" to the "no harm" rule that is dominant across all Islamic legal regimes. This means that types of water use by any State regardless of being upstream or downstream must not harm other States. Unlike the controversy among international scholars over whether the "equitable and reasonable" utilization principle under article 5 of the UN Watercourses Convention or the "no significant harm" principle under article 7 of the Convention is predominant, Islamic scholars have achieved consensus that the "no harm" rule always prevails over any other conflicting rules. However one must note that under international law as decided in the Donauversinkung case (Wurttemberg and Prussia v. Baden, 1927), the court said that "a state's exercise of its sovereign rights with regard to international watercourses 'is limited by the duty not to injure the interests of other members of the international community … interests of the State in question must be weighed in an equitable manner against one another'". (McCaffrey, 2007, p 244). In the words of professor Stephen C. McCaffrey, "… the court treats harm (injury) not as an absolute, but as a relative thing". (McCaffrey, 2007, p 244). Therefore, one can argue that both Islamic law and international law weigh the "no harm" rule and the "equitable utilization" against one another and therefore, both systems recognize no preference for any of the said principles.

Second, Islamic scholars take the view that in the absence of binding rules in the Islamic legal regime that directly concern transboundary river basin management, the best approach should be to look to regional or international customs to resolve issues of water allocation. As discussed in this paper, international law scholars also take the view that a rigid legal approach to use of the waters of a transboundary river basin usually does not work and that the best way to resolve such issues is cooperation and negotiation among States involved to achieve an equitable result. These scholars also argue that the "equitable and reasonable" principle is a process that is very flexible,

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producing results that can change over time. When international custom and practice finds cooperation more effective and Islamic law also refers such cases to international custom, there can be no conflict between the two systems.

While one of the important sources of Islamic law is Wisdom in cases where there is no provision found in the Quran and Traditions, sound wisdom and best judgment should bind all States to resolve their issues concerning transboundary water management through cooperation and by applying regional customs and avoiding conflicts that harm the States involved.

In addition, under the Islamic "*la zarar wa la zeraar fil Islam*" or "no harm" doctrine that prohibits States from inflicting harm on themselves and others through conflict over transboundary river basins, States have a duty to cooperate to avoid harm to themselves and others. The three rules we can infer from Islamic law relating to transboundary river basin management are to:

apply regional custom

seek cooperation among States, and

avoid harm to oneself and others.

Similarly, international law always prefers cooperation among States over inflexible legal rules and encourages negotiation among States to arrive at a win-win solution. Therefore, international law and Islamic law principles complement each other and, if interpreted and applied properly, can help a great deal in transboundary dispute resolution.

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