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**SHAPING ECOLOGICAL NORMS FOR THE PROTECTION
OF WATER RESOURCES – COMMENT ON
THE JUDGMENT OF THE INTERNATIONAL COURT
OF JUSTICE IN THE CHILE V. BOLIVIA CASE (DISPUTE
OVER THE STATUS AND USE OF THE WATERS
OF THE SILALA, JUDGMENT OF 1 DECEMBER 2022)**

Abstract: On 1 December 2022, the International Court of Justice (ICJ) issued a judgment in the dispute over the Status and Use of the Waters of the Silala, Chile v. Bolivia (Judgment). The Judgment aroused public interest, but did not bring the expected resolutions in norms of public international law. The status and management of Silala waters is currently primarily influenced by political, economic and capital factors. Economic factors weaken the protection of water resources, contributing to the deepening of the social and ecological crisis. In the face of global warming and climate change, questions about how to deal with sensitive natural resources under international law are more relevant than ever before. Therefore, the need to take into account the holistic context related to the importance of water for human functioning and the entire ecosystem will be emphasized in the course of the article. The author will present arguments indicating that the Silala ruling may provide guidance for the development of international environmental law and the formation of an ecological reference point for the newly emerging field of international water law.

Keywords: international watercourse, ecological norms, International Court of Justice (ICJ), ecological holism,

1. Introduction

The Judgment of the ICJ concerns a dispute over the status of the waters of the Silala and its non-navigational use. A preliminary analysis suggests that the key issue is to determine the legal status of a watercourse located in a transboundary area. In cases of the non-navigational use of international watercourses, the norms of customary law and treaty norms apply. The ICJ delivered a Judgment in a case that has been rooted in a long-standing bilateral dispute between Bolivia and Chile. However, the dispute goes beyond the political and legal aspects or historical conditions that usually determine the cases heard by the ICJ. As will be shown, the dispute between Bolivia and Chile concerns issues that have so far been only signalled in the study of international law and in the case-law of the ICJ. The case undergoing the vote affects the socio-cultural fabric in which the inhabitants of Bolivia and Chile function and the way the indigenous people perceive the natural environment. Traditional views combined with geographical and environmental conditions in the effect shift the reference point from concepts of public international law to regulations of international environmental law, around which these considerations are focused. The analysis in question should also take into account the economic philosophy which affects the functioning of the society in the discussed region, shaping power structures and the choices of decision-makers in environmental matters. Without taking into account the above factors, it is impossible to determine the actual causes laying at the genesis of the dispute between Bolivia and Chile over the Silala waters.

2. Andean Cosmology and Protection of Water Resources

Evo Morales, leader of the leftist political party Movimiento al Socialismo, was the President of Bolivia 2006-2019. The politician comes from the Aymara Indian ethnic group. After taking power, he announced the political transformation of the country from an ecological perspective. Therefore, it should be explained that in Andean culture, nature is identified with Pacha Mama (Mother Earth, Spanish: *Madre Tierra*), considered as a living being. In Andean cosmology, the Earth is the 'foundation for life'.¹ Pacha Mama in

¹ Kaijser, *Who is Marching for Pachamama? An Intersectional Analysis of Environmental Struggles in Bolivia under the Government of Evo Morales*, 17.

the Andean culture consists of 4 elements: earth(Allpa), fire (Nina), water (Yaku), wind (Wayra).² According to the above philosophy, strongly rooted in the views of the indigenous people, all elements of nature are necessary and complement each other. The holistic view in question contains humans and natural resources, including water and river systems. According to indigenous people, rivers also involve a metaphysical element that greatly impacts the social fabric of life. People depend on the river and together this constitutes a part of nature. Taking into account the people's connections with the territory, E. Morales rebranded Bolivia as a 'plurinational state'.³ However, referring to the indigenous narrative, which was supposed to be an alternative to the capitalist vision of the West, did not stop the rivalry for influences, land and natural resources. In Bolivia, like the rest of Latin America, the national economy relies to a large extent on the exploitation and extraction of natural resources. The struggle for natural resources and territory has been at the core of political conflicts since pre-colonial times.⁴

The conflict with the government and corporations is also intensifying in Chile. In 2022, there were several clashes between representatives of the indigenous people of the Mapuche ethnic group with forestry companies, agricultural concerns and Chilean security forces.⁵ At the root of the conflict is the struggle of Mapuche for autonomy and ancestral land, which at the present is owned by companies. In Chile, agriculture and the mining industry consume the largest amounts of water.⁶ The relocation of water resources in Chile takes place on free market principles, therefore non-ecological factors, but marketing indicators, have come to the fore. As a consequence, as Verónica Delgado, José Luis Arumi and Oscar Reicher have pointed out

the groundwater regulations of the Chilean Water Code are insufficient because they look only at quantitative aspects of interest to owners of water rights, but do not serve to protect the quality of the aquifer as a common good.⁷

2 García Álvarez, "Environmental Policies and Pachamama in Ecuador. Theory and Practice in Rafael Correa's Government (2007-2013)", 229.

3 Kaijser, *ibidem*, 11.

4 Kaijser, *ibidem*, 20.

5 *Conflict Barometer 2022*. Heidelberg Institute for International Conflict Research 2023, 103.

6 Ramirez, *Modernization of Chile's Water Code*, 2.

7 Delgado, Arumi, Reicher, "Lessons from Spanish and US Law for Adequate Regulation of Groundwater Protection Areas in Chile, Especially Drinking Water Deposits", 1.

The politicization of the water management system, excessive exploitation of natural resources (extractivism)⁸ and the failure to take into account a cultural perspective of indigenous people regarding the use of water and other natural resources have deepened the socio-environmental conflict.

Due to the predatory economy, many South Americans are threatened by water scarcity. Foreign concerns fight for the exploitation of natural resources, including the managers of the copper mine in the Atacama desert, which is currently located in Chile. Agricultural farms without water are collapsing. Poverty and social exclusion are increasing at a rapid pace. Many areas where mineral resources are extracted do not have access to water. As a result, water is supplied using a technical infrastructure at the expense of local residents and nature. South America holds a significant portion of the world's water resources. The extraction of huge amounts of water by mines causes irrigation channels to dry.

3. The Hydropolitical Context of Silala Waters

The Silala spring is located on the territory of Bolivia. For Bolivians, the Silala has not only hydrological significance, but is an important element of the wider national narrative, being part of many years' long effort to regain access to the Pacific. The dispute over a part of the Atacama desert (Spanish: *Desierto de Atacama*) on the Pacific coast, which originally played out on a diplomatic level, turned into an armed conflict. The war of the Pacific, also called the 'Nitrate War' (1879-1883), resulted in Bolivia losing the province of Litoral to Chile. Thus, Bolivia lost access to the waters of the Pacific Ocean and the coastal region, rich in natural resources. Therefore, it should be noted that before 1883, the Silala basin was located in Bolivia. Currently, the Silala is divided between Bolivia and Chile. It is located in the Atacama Desert, which is one of the driest places on Earth. Water in this region is a scarce resource. Hence, when considering the legal status of the Silala watercourse, it is impossible to disregard the ecological and ecosystemic context. Due to the geographical location, climate and historical conditions, the dispute over Silala waters concerns one of the most naturally and hydropolitically sensitive regions in the world.

8 Botero, Galeano, "Territories in Dispute: Tensions between 'Extractivism', Ethnic Rights, Local Governments and the Environment in Bolivia, Colombia, Ecuador and Peru", 269-290; Smart, "Resistance against Mining Extractivism in Chile", 59-81.

The Chilean Government in response to the Ministry of Foreign Affairs of Bolivia in relation to the Silala emphasized the ‘binational nature of this shared water resource’ [pt. 33⁹]. Water from Silala springs is drained using artificial channels. In Bolivia, the main canal is about 700 m long, and in Chile it runs for seven km. In 1908, the Bolivian authorities issued a permit for the construction of canals running through its territory by a Chilean company ‘Antofagasta (Chile) and Bolivia Railway Company Limited’ (FCAB) [pt. 29]. The water running through them was intended for the mining industry and the power maintenance of steam engines. On 14 May 1997, by Administrative Resolution No. 71/97, the Prefect of the Potosí Department annulled the concession for the exploitation of Silala spring waters. According to the authorities, FCAB was no longer active in Bolivia, and thus the purpose, grounds and scope of the concession expired [pt. 31]. Bolivia claimed that because of its territorial location, it exercises power over the waters of Silala. On this basis, Bolivia derived the right to exercise sovereignty over artificial channels and drainage mechanisms, which was later invoked in the counter-claim (hereinafter: ‘counter-claim A’). According to the Bolivian authorities, the presented arguments also justified their right to make decisions dismantling or modifying the artificial water flow (hereinafter: ‘counter-claim B’) [pt. 26(2), pt. 34, 138]. Chile, however, continued to draw water, claiming that Silala was an international watercourse. The Chilean authorities argued that they had right to use Silala waters because they had the status of a riparian state [pt. 37]. The then President of Bolivia Mr. Evo Morales formulated an allegation of illegal exploitation of water resources by Chile, rejecting the assertion that Silala has the status of an international river [pt. 37]. The exchange of diplomatic notes and negotiations between the parties did not bring results. Similarly, several meetings of the working group on Silala waters, consisting of representatives of Bolivia and Chile, ended in failure.

4. From the Atacama Desert to the ICJ Courtroom

On June 6, 2016 the Government of the Republic of Chile lodged a submission to the ICJ initiating proceedings against the Plurinational State of Bolivia regarding Silala waters. In its application to the ICJ, Chile made

⁹ References to the ICJ judgment in the case of dispute over the Status and use of the Waters of the Silala, Chile v. Bolivia, Judgment of 1 December 2022, are placed in square brackets.

the following claims against Bolivia: a) the Silala River system, including its the subterranean portions, is an international watercourse, the use of which is regulated by customary international law; b) Chile is entitled to the equitable and reasonable use of Silala waters according to customary international law; c) in light of standards of equitable and reasonable use, Chile is entitled to the current exploitation of Silala waters; d) Bolivia is obliged to take all appropriate measures to prevent and control pollution and other forms of harm that could be caused by operating in the immediate vicinity of Silala; e) Bolivia is obliged to consult and notify Chile in a timely notification about planned projects that could adversely affect the state of Silala waters, as well as exchange knowledge and information and carry out environmental impact assessments [pt. 25]. According to Chile, Silala waters are an international watercourse regardless of whether they have a 'natural' or 'artificial' character [pt. 50]. Bolivia, on the other hand, argued that the term 'international watercourse' applied only to watercourses with a natural flow and, therefore, the principles of customary law do not apply in this case. In the course of the proceedings, Bolivia emphasized that Silala's sources are located on its territory, and Chile gained access only thanks to an artificial infrastructure in the form of channels through which water flows thanks to the topographic slope of the terrain.¹⁰ Currently, water from the Silala basin is used in Chile for human consumption and industrial purposes, including the world's second largest open-pit mine in Chuquicamata, where copper is excavated. The threat of water pollution by the mining industry was also raised. The Silala basin is located in the Chilean Atacama Desert, which is located in an area of so-called rain shadow. Difficult climatic conditions combined with the geographical location exacerbate the effect of drought, making this region one of the most arid and inhospitable areas on the planet. Hence, the dispute over Silala between Bolivia and Chile is not only a regional dispute over natural resources and territory, but it is a part of a wider conflict over access to water resources, which currently plays out on a global scale.

10 Hypotheses can be found in the literature according to which the Silala waters flowed naturally from Bolivia towards Chile as a result of alluvial erosion even before the construction of artificial channels. Some researchers incline to the statement that the waters flowed through a canyon located in the Atacama Desert. More about geological and topographic surveys: Mulligan, Eckstein, "The Silala/Siloli Watershed: Dispute over the Most Vulnerable Basin in South America", 598.

In 2006, a draft bilateral agreement between Bolivia and Chile was drawn up to regulate Silala's legal status.¹¹ The contract included the name of the watercourse in Bolivian (Silala) and Chilean (Siloli). The agreement sets out objectives to protect, sustainably develop and operate hydrological systems for 'benefit both countries' (Article 1). At the same time, the 'fragility of the ecosystem of Silala/Siloli was highlighted. For this reason, it was considered necessary to prevent the deterioration of flow conditions and water quality' (Article 4). The document was to become the basis for a long-term agreement (*pro futuro*), in which the percentage share of water freely available to each party was to be determined by way of hydrological surveys conducted with the use of a network of meteorological and hydrometric stations (Article 7-8). In order to settle disputes, the States Parties provided for the possibility of convening the Bolivia-Chile Silala working group, which had been set up two years earlier by the Foreign Offices of both countries (Article 16, item 1). In view of reaching a settlement in the event of a potential dispute, provisions were made for the possibility of applying by mutual agreement to a recognised technical or scientific expert of international renown (Article 16, item 3), or of resorting to arbitration (Article 16, item 6). The document has not been signed, but its analysis allows us to highlight the importance of the protection of water resources as an ecosystem service, a common good and a responsibility for all humanity.

5. The Sources of the Silala River and the International Watercourse

The Silala sources were formed in an area located over 4,500 m above sea level in Bolivia. The river originates from groundwater in the Potosí department near the Chilean border. These are wetlands (*bofedales*), which are divided into southern (Orientales) and northern (Cajones) parts [pt. 28]. The mountainous areas of the Andes border the barren and arid Atacama Desert. It should be noted that the Potosí department is home to the residue of a dried-up salt lake, which is the largest salt flat (Salar de Uyuni) in the world to date. The groundwater that formed the source of Silala came from a melting glacier. Global warming, local conditions, a decrease in rainfall accelerate the disappearance of glaciers in the Andes. The sources of groundwater that gave rise to Silala flow from the pyroclastic rock of a volcanic origin

11 The Initial Agreement on Silala, or Siloli. Document was made on 28 July 2009. The draft preliminary bilateral agreement provided to the media by the Chancellery of the Republic of Bolivia.

(ignimbrite). The specificity of groundwater flow in this region is not yet fully understood to this day. Therefore, the current definition of an ‘international watercourse’ raises numerous question marks.

The treaty of 21 May 1997 had the purpose of cataloguing customary norms concerning the status and use of international watercourses of a non-navigational nature. The Convention on the Law of the Non-navigational Uses of International Watercourses entered into force on 17 August 2014. Bolivia and Chile are not yet parties to the Convention, which makes it difficult to reach a consensus on this issue. According to the Convention, ‘international watercourse’ means a watercourse the parts of which are located in different countries (Article 2, pt. ‘b’).

The general principles concerning international watercourses used for non-navigable purposes are set out in Articles 5 to 10. It is incumbent upon State Parties to use the waters in their territories in an equitable and reasonable manner. This is undertaken on the basis of a reciprocal obligation, i.e. the utilization of international watercourse resources should take into account the interests and mutual benefits of the watercourse states (Article 5, item 1 in the relation to Article 8, item 1). The ICJ has already emphasized several years prior that the principle of an equitable and reasonable participation in natural resources excludes unilateral control over the common resource, depriving other riparian states of their rights.¹² Hence, there is no doubt that the protection of common resources is associated with the need to take integrated actions while respecting the norms of international environmental law. Undertakings in this area extend to harm prevention. The ICJ indicated that this is an obligation of conduct, not an obligation of result [pt. 83]. To this end, an efficient and systematic exchange of information on the state and quality of water should be guaranteed. This also applies to passing on warnings about potential hazards, e.g. industrial or natural disasters. In order to achieve optimal use of the international watercourse, State Parties should cooperate in the spirit of the principle of sovereign equality, territorial integrity and good faith.

In the case of Silala, channels were built in order to bring water. Canals are the work of man, not nature. The existing treaty standards do not provide an unambiguous answer about the definitions of surface waters

¹² *Case concerning Gabčíkovo-Nagymaros Project, Hungary/Slovakia*, ICJ judgment of 25 September 1997, ICJ Reports 1997, pt. 85.

and underground waters.¹³ Hence it should be marked that underground waters in connection to their geological proprieties, may not only flow in another direction than surface waters, but they may also have a different estuary. For this reason, it can often be difficult to identify and establish their boundaries. As can be seen, the terrain, geological structure, atmospheric conditions, effects of anthropogenic activity in a cumulative way make up the regime of water relations, which may escape even the most far-reaching legal regulations.

An attempt to resolve this issue by introducing into the Helsinki Rules on the Uses of the Waters of International Rivers¹⁴ is the concept of 'international drainage basin', which was defined as a geographical area extending over two or more states defined by the watershed limits of the system of waters, including surface and underground waters, flowing to a common terminus (Article II). However, the above definition raised difficulties of interpretation. The definition uses the phrase about the 'the watershed limits of the system of waters', which could shift the reference point from the concept of 'system of waters' to the area in a geographical sense. In border areas, this could give rise to conflicts not only over water resources, but also over the territory of which a given hydrological entity, in this case a catchment area, is a part. As was indicated above, the Silala basin is located in the Atacama Desert, where there are deposits of many mineral resources, including copper ore, gold, silver ore, iron, uranium, nitrate/sodium nitrate. Water is essential for the mining industry. Therefore, a change in the way of understanding not only the term 'basin', but also the term 'river' can be observed.

According to the existing norms in the field of international water law, it is not entirely clear how to qualify a watercourse that has not been created as a result of the forces of nature. In the scientific discourse, there is the term 'manufactured transboundary river'. However, given that it is a human creation subject to property rights and concessions granted in this respect, it cannot be classified as a natural river. In light of the above, another dissonance emerges regarding the term 'river', considering that the current understanding, which is water flowing through the surface of the land in

13 See: Article II, item 3, the Seoul Rules on International Groundwaters. Document was adopted by the International Law Association at the Sixty-Second Conference, Seoul, 1986.

14 International Law Association, The Helsinki Rules on the Uses of the Waters of International Rivers, Helsinki, August 1966 from Report of the Fifty-Second Conference, Helsinki, 14-20 August 1966 (London, 1967).

a grooved riverbed, does not fully reflect hydrogeological conditions, as well as the links and interdependencies between the aquatic ecosystem and other elements of the natural environment. It also does not take into account biotic and abiotic factors that affect the formation of water relations. On the legal basis, the issue indicated herein has not yet been reflected.

There is a fairly consistent position in international law regarding bodies of water of a uniform nature, such as international lakes or seas. However, issues that concern artificial, non-uniform watercourses havenot been thoroughly regulated so far. In addition, the matter is complicated by the fact that in the case of watercourses made by human hands, the objectives that determine their use are usually motivated by economic factors, which simultaneously makes them elusive for the norms of international environmental law. Artificial watercourses are created as a result of interference with the natural environment. In addition, there are environmental impacts as a result of operating and connecting them to the technological infrastructure. Therefore, there is doubtless an urgent need to develop regulations aimed at increasing nature protection standards and preventing excessive transformations of the natural environment resulting in the loss of the biological integrity of aquatic ecosystems. The doctrine of international law indicates that in order to maintain the integrity of ecosystems, respect for the integrity in the biological, physical and chemical dimensions should be guaranteed.¹⁵ These are the premises that are also formulated as regards the protection of the ecological integrity of water sources.

According to the principle of balance, ecological integrity ‘does not require the absolute protection of the natural condition of waters but that measure of integrity necessary for the survival of ecosystems.’¹⁶ However, it should be noted that the river in terms of ecological holism is not only a part of the land with the water system but integrally contributes to a larger whole. In nature, all elements are interrelated and complementary. Hence, the disruption of even one element is not indifferent to the functioning of the ecosystem as a whole.

In this regard, it is worth citing the Convention on the Protection of the Rhine, which points to the need for a comprehensive approach taking

15 International Law Association, Berlin Conference (2004), Water Resources Law, 11.

16 International Law Association, Berlin Conference (2004), Water Resources Law, 11.

into account the natural wealth of the river.¹⁷ Through the use of the term ‘alluvial areas’, attention was drawn to the natural processes that create watercourses. In the above approach, the impact of natural forces and the terrain-shaping activity of rivers was taken into account. Hydrotechnical devices that are constructed on natural rivers should, in this sense, serve to shape water management in a sustainable way.

Ultimately, the treaty was equipped with the concept of a ‘watercourse’ in the sense of a system of surface waters and groundwaters constituting, due to a ‘physical relationship, a unitary whole and normally flowing into a common terminus.’¹⁸ Thus, it was intended to draw attention to the concept of a ‘water system’, and not an area in the sense of a geographical entity. However, this does not prevent the generation of further interpretative dissonances and practical doubts. In this field, utilitarian and economic motives continue to reign instead of ecological factors.

6. Judicial Stream – Decision

Bolivia and Chile in the course of the proceedings declared their willingness to continue to co-operate in the equitable and reasonable use of the Silala waters [pt. 129]. They also agreed that it is an international watercourse to which customary international law on non-navigational use applies. At the same time, they agreed that the above applies to ‘all the waters of the Silala’ [pt. 59]. The parties acknowledged that the artificial channels and drainage mechanisms are located in territory under Bolivia’s sovereignty [pt. 140, 143, 153]. The ICJ does not take into account the potential difference of opinion in the future due to the hypotheticality of the situation [pt. 64]. Nevertheless, when making a possible decision on dismantling the infrastructure, in light of the principle of due diligence, Bolivia should take into account the impact of such a project on the mutual situation of both of the countries through which the Silala flows. Dismantling operations should not cause significant harm. This therefore requires respecting the right to equitable and reasonable utilization of waters by riparian states [pt. 146].

17 The Preamble, the Convention on the Protection of the Rhine, was signed in Bern on 12 April 1999.

18 Article 2(a), Convention on the Law of the Non-navigational Uses of International Watercourses, was adopted by the General Assembly of the United Nations on 21 May 1997. Entered into force on 17 August 2014.

However, when analyzing the dispute, one may get the impression that instead of regulating the proverbial stream, the water was allowed to flow beyond the shoreline. The ICJ may rule only in relation to a concrete case, if an actual dispute between the parties exists at the time of the adjudication [pt. 46, 147, 160]. Whereas in the present case, the ICJ, when examining the pleadings and final submissions of the parties, merely determined whether the parties had reached an agreement in substance regarding a claim [pt. 46]. As a result, this changed the concept of the dispute, introducing uncertainty. The Judgment was accompanied by the Declaration of Judge Hilary Charlesworth, Declaration of Judge Peter Tomka and the Separate Opinion of Judge *ad hoc* Bruno Simma.

The ICJ took the position that the Court was not called upon to give a decision on four claims made by the Republic of Chile, because in final submission they no longer have any object ('a' 15:1 votes, 'b' 15:1, 'c' 15:1, 'd' 14:2), while one claim was unanimously rejected ('e'). In the case of two counter-claims lodged by the Plurinational State of Bolivia, it was found that in the final submission they had lost their object (A-B 15:1), and one was unanimously rejected (C, the alleged need to conclude an agreement for any future delivery to Chile of the 'enhanced flow' of the Silala) [pt. 163] (pt. 1, Declaration of Judge Peter Tomka). However, it should be noted that the convergence of sentences may only be an apparent compatibility. Also, it does not decide on the legal consequences or the sequence of events that may occur in practice. The dispute between Bolivia and Chile touches on much deeper issues than the status of a hydrological entity. Judge Hilary Charlesworth indicated that

the concept of the convergence of positions finds no basis in the Court's jurisprudence (...), and it does not fit the facts of these proceedings well (...). By contrast, if a Judgment identifies the parties' positions as they stand at present but refrains from drawing consequences therefrom with respect to the parties' respective rights and obligations, there remains a risk that the parties might change their positions in the future (pt. 3, 22, Declaration of Judge H. Charlesworth).

In the dispute between Bolivia and Chile, no agreement has been reached for years, and the consequences of the dispute have been felt for decades. Hence, as Judge Bruno Simma stated, the fact that the parties found an agreement before the Court as to the origin of the problem, does not have

to be tantamount to the fact that they agree on how to solve it (pt. 9, Separate Opinion of Judge *ad hoc* B. Simma).

7. Summary – Towards Ecological Norms

In Chile, is an ontology of water in which material, animate, spiritual, and metaphysical elements create a whole united with nature. Water in this approach is closely related to the heritage of ancestors and the traditional lifestyle.¹⁹ On the other hand, in Bolivia, the environment and natural resources are considered the heritage of the Nation ('El medio ambiente y los recursos naturales constituyen patrimonio de la Nación').²⁰ Article 5, item 4 of the Environmental Protection Law (Ley del Medio Ambiente) indicates the role of the optimization and rationalization of the use of water and other natural resources. Nevertheless, currently, the use of water is determined primarily by social and economic factors. Article 10(1) of the Convention of 21 May 1997 mentions 'vital human needs'. The process of making and applying the law continues to be defined by an anthropocentric outlook. Hence, in efforts to protect natural resources, one should appreciate ecological values, which, however, do not mean the depreciation of the value of human beings, but make it clear that people are dependent on the forces of nature. Natural resources should not be used in excess, but to the extent that is necessary for life.

Guidance in this respect can be provided by Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a Framework for Community Action in the Field of Water Policy. In the directive it is indicated that water is not a commercial product, but a heritage, which must be 'protected, defended and treated as such.'²¹ Watercourses have been of existential, historical, cultural, strategic and communicational importance for centuries.

In Bolivia, the mobilisation of social movements stopped the neoliberal vision of privatising water resources several years ago. However, endeavours in this field are not a one-off process, but require increased social awareness,

19 Macpherson, Clark, Weber, Baird, Akhtar-Khavari, Challies, "Evolving Rights to (and of) Water in Chile: a Case for Relationship-Based Water Law and Governance", 24.

20 Article 3, Ley N° 1333, del 27 de abril de 1992, Ley del Medio Ambiente.

21 Pt. (1), Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a Framework for Community Action in the Field of Water Policy [OJ L 327, 22.12.2000].

a favourable political climate and pro-ecological education conducted on a continuing basis. Nevertheless, it should be noted that as a result of action taken, an article was introduced into the Bolivian Constitution, which states that every person has the right to water (Article 16(1)).²² This is a fundamental change in the perception of water resources, which until a few years ago was seen mainly in terms of economic merchandise and commodification. Today, actions are taken to raise awareness of water as a common good necessary for both the existence of nature and human life. By contrast, in Chilean public discourse postulates about pro-ecological water management are now being formulated. Supporters of this option refer to the traditional narrative in which humans should live in harmony with nature. Increasingly more often, references are made to Pacha Mama, considered in Andean culture to be the source and custodian of all life. Chile and Bolivia share a common ontology of water that draws on ancestral heritage and Andean culture. The ICJ judgment in the Silala makes aware that in order to find a solution, effective hydro-diplomacy should also be implemented. Water is not only a natural good, but can also be a resource for cooperation with respect for cultural values of indigenous people. Therefore, a formal analysis is not enough to determine the legal status of Silala waters. Empirical research should be undertaken, which would take into account the hydrological system in connection with the water and land ecosystem as well as its importance for human functioning.

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