

ILISU DAM AND LEGAL CONSIDERATIONS IN IRAQ

Policy Paper Presented to the Iraqi Government
on the legal possibilities available to Iraq to respond to the threat posed by the Ilisu Dam.

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1. Executive Summary

The Tigris River is the lifeline of Iraq; it is under threat by the construction of Ilisu dam within Turkey's GAP project in violation of international law. This paper discusses two dimensions of legal possibilities that shall be considered by the Iraqi Government in taking action over the construction of the Ilisu dam. First, that Turkey in building the Ilisu dam is violating international and customary law. Iraq has a related duty to act on behalf of their citizens to redress and remedy the environmental and human rights harms experienced by their citizens, irrespective of where such harms originate. Failure to take action on Ilisu will grant permission to construct future dams on the Tigris River without consulting Iraq. Second, that private investors (companies/banks) working on or financing the dam should be held accountable. The Iraqi government should engage private companies working on Ilisu in an effort to ensure that they are not violating the needs and human rights of downstream users. Action against private companies does not necessarily mean going to court, but can take the form of lawyers seeking to engage and negotiate with them.

Since 2012, the Save the Tigris Campaign, has called for the establishment of a Tigris water crisis group, that includes water and environment experts, government, parliament and civil society representatives to work for immediate negotiations with Turkey to suspend construction of Ilisu until a thorough study is made concerning its impacts on Iraq. The campaign has consulted legal experts and Iraqi academics that have recommended Iraq to seek help from international actors, and other countries that Iraq has good relationships with, or shares mutual treaties and conventions with, to mediate between Iraq and Turkey, and negotiate to preserve Iraq's water interests. Until now, Turkey has manipulated its national laws to exempt Ilisu from complying with the requirement of an EIA, even after the last Turkish court decision in January 2013, which granted an injunction of the project.

Ultimately, if Turkey refuses to hold a dialogue about the Ilisu dam construction, the Iraqi government should hold Turkey accountable to its international legal obligations by exercising its treaty rights to take the matter to the U.N. Security Council, which may in turn decide to request assistance from the International Court of Justice. The legal basis for these recommendations is an analysis of Turkey's violations of its international obligations in relation to the Ilisu dam:

- The environmental impact assessment for the Ilisu dam failed to consider transboundary effects of the dam on the people and environment of Iraq in violation of customary international law.
- The government of Turkey failed to consult with the communities in Iraq directly affected by the dam, in violation of international customary law.
- The decision to approve the Ilisu dam, as proposed, will likely cause adverse harm to neighboring States, in contravention of Turkey's duty to prevent transboundary harms.
- Turkey is violating specific treaty obligations it owes to Iraq relating to shared use of the Tigris.
- The decision to approve the Ilisu dam, as proposed, violates the precautionary principle because the decision fails to address the compelling uncertainties and concerns about the dam's impacts and fails to demonstrate that the proposed mitigation of these impacts is likely to succeed.
- Financial compensation to address the adverse impacts of the dam in other countries

2. Legal Basis for the Recommendations

This paper discusses two dimensions of legal possibilities that shall be considered by the Iraqi Government in taking action concerning the construction of the Ilisu dam. First, that Turkey in building the Ilisu dam is violating international and customary law. Another dimension includes private investors (companies/banks) working on or financing the dam. The Iraqi government should engage private companies that are working on Ilisu in the effort to take into consideration the needs of downstream Iraqis, and ensure that they are not violating the human rights downstream users.

The legal basis for these recommendations is an analysis of Turkey's violations of its international obligations in relation to the Ilisu dam.

2.1 Turkey's violations of its international obligations in relation to the Ilisu dam

2.1.1. The environmental impact assessment for the Ilisu dam failed to consider transboundary effects of the dam on the people and environment of Iraq in violation of customary international law. Governments are required to undertake detailed environmental analyses, known as an environmental impact assessment or EIA¹. The requirement to perform a meaningful EIA is a threshold duty under international law before a government may advance any major development project with likely adverse transboundary impacts to the environment and human populations. This requirement was recently affirmed by the International Court of Justice (ICJ) in its 2010 decision *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*:

[I]t may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource. Moreover, due diligence, and the duty of vigilance and prevention which it implies, would not be considered to have been exercised, if a party planning works liable to affect the régime of the river or the quality of its waters did not undertake an environmental impact assessment on the potential effects of such works.²

The Convention on Environmental Impact Assessment in a Transboundary Context illustrates well-accepted objectives for the EIA such as the need to:

- (1) “give explicit consideration to environmental factors at an early stage in the decision-making process by applying environmental impact assessment ... as a necessary tool to improve the quality of information presented to decision makers so that environmentally sound decisions can

¹ International Energy Agency, *Survey of Existing Guidelines, Legislative Framework and Standard Procedures for EIA of Hydropower Projects. IEA Technical Report*. The International Energy Agency-Implementing Agreement for Hydropower Technologies and Programmes, at 35 (2000).

² *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, at para. 204 (20 April 2010), available at <http://www.icj-cij.org/docket/files/135/15877.pdf>; see also Convention on Biological Diversity, 1760 U.N.T.S. 79, 31 I.L.M. 818, Art. 14, opened for signature 5 June 1992) (hereafter “CBD”) (Article 14 concerns a duty for impact assessment and minimizing adverse impacts); United Nations Conference on Environment and Development, Rio Declaration on Environment and Development, 31 I.L.M. 874 (1992) (hereafter “Rio Declaration”) (stating under Principle 17 that an EIA “shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority.”)

be made paying careful attention to minimizing significant adverse impact, particularly in a transboundary context,”

- (2) “establish[] ... an environmental impact assessment procedure that permits public participation and preparation of the environmental impact assessment documentation,” and
- (3) “undertak[e] [the EIA] prior to a decision to authorize or undertake a proposed activity [like a large dam].”³

The EIA for the Ilisu dam fails to satisfy these requirements.

2.1.2 The government of Turkey failed to consult with the communities in Iraq directly affected by the dam, in violation of customary international law. As explained in the United Nations’ World Charter for Nature, “[a]ll planning shall include ... assessments of the effects on nature of proposed policies and activities; all of these elements shall be disclosed to the public by appropriate means in time to permit effective consultation and participation.”⁴ The international expectation therefore is that any government decision that will significantly impact the environment requires early disclosure of its effects to the public, including affected people in neighboring States, to facilitate reasonably effective participation and consultation in good faith on what the project involves, what will be the local and transboundary effects, whether the project should proceed, and if it does proceed, what mitigation will occur to offset its adverse effects.⁵

Turkey’s public participation and consultation processes for the Ilisu dam did not fully engage key stakeholders in a frank assessment of the impacts of the dam. For instance, the EIA (as flawed as it is) was not prepared in the Arabic language, nor were Iraqi downstream affected people consulted at all. Thus, it is unclear what adverse impacts of the project were disclosed to these stakeholders because such impacts had not yet been fully documented or evaluated in the EIA. The lack of consultation undermined the ability of the affected public to participate in and to consult on the project’s proposed design and potential alternatives, its foreseeable environmental and social impacts, and the proposed actions to mitigate such impacts. People cannot be expected to provide informed comments or to make informed decisions about the potential impacts of a development on their lives unless they have the tools available to them and in their own language to understand these impacts and how they will be mitigated.

2.1.3. The decision to approve the Ilisu dam, as proposed, will likely cause adverse harm to neighboring States, in contravention of Turkey’s duty to prevent transboundary harms. Under international law, Turkey must ensure that activities within its jurisdiction do not cause adverse impacts on the environment of other States.⁶ This principle is grounded in the World Charter for Nature, under

³ Convention on Environmental Impact Assessment in a Transboundary Context, 1989 U.N.T.S. 309, Cls. 7 and Art. 2, paras. 2 and 3, *opened for signature* 25 February 1991. Turkey is not a signatory to this Treaty, but this Treaty does demonstrate views of several States on the function an EIA serves for development projects with known or foreseeable transboundary impacts.

⁴ World Charter for Nature, G.A. Res 37/7, U.N. GAOR, 37th Sess., at 455, Part III, para. 16 (28 October 1982) (hereafter “World Charter for Nature”).

⁵ See also Principle 10 of the Rio Declaration (emphasis added) (stating “[a]t the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on ... activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available...”) and Principle 19.

⁶ *Legality of the Threat or Use of Nuclear Weapons*, at 241–242, para. 29. This principle is also grounded in two closely related theories on the applicable law of a transboundary river – the limited territorial sovereignty theory and

which States shall "[e]nsure that activities within their jurisdictions or control do not cause damage to the natural systems located within other States or in the areas beyond the limits of national jurisdiction,"⁷ and Principle 2 of the Rio Declaration on Environment and Development ("Rio Declaration"), under which "States have ...the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."

While Turkey is one of only a handful of countries that have not ratified the 1997 United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses, this does not mean that Turkey is not bound by those principles set out in the Convention, which reflect general obligations on all states under customary international law. Of particular importance are:

- Article 5(1), which provides that "watercourse states shall in their respective territories utilize an international watercourse in an equitable and reasonable manner";
- Article 7(1), which provides "watercourse states shall, in utilizing an international watercourse in their territories, take all appropriate measures to prevent the causing of significant harm to other watercourse states";
- Article 11, which provides "watercourse states shall exchange information and consult each other and, if necessary, negotiate on the possible effects of planned measures on the condition of an international watercourse"; and
- Article 12, which provides "before a watercourse state implements or permits the implementation of planned measures which may have a significant adverse effect upon other watercourse states, it shall provide those states with timely notification thereof. Such notification shall be accompanied by available technical data and information, including the results of any environmental impact assessment, in order to enable to notified states to evaluate the possible effects of the planned measures."

Thus, Turkey has an obligation to protect against and to prevent damage to the neighboring environments of States and their populations. Applying this reasoning to the Ilisu dam, Turkey lacks authority to dam the Tigris River if that action will externalize adverse impacts on the neighboring government of Iraq without the latter's consent.

2.1.4. Turkey is violating specific agreements with Iraq relating to shared use of the Tigris

In addition to the obligations on Turkey under customary international law, Turkey has entered into specific agreements with Iraq that mandate information sharing and agreement on the shared use of the Tigris:

- a) Article 5 of the 1949 Protocol No.1 ("Relative to the Regulation of the Waters of the Tigris and Euphrates and of their Tributaries") to the 1946 Treaty of Friendship and Neighbourly Relations between Iraq and Turkey states:

the community theory. Under the former, "a State may make use of the waters flowing through its territory to the extent that such use does not interfere with reasonable use of waters by the downstream States." Under the community theory, "the water of a drainage basin should be managed as a unit, without regard to national territorial boundaries. The various co-riparians should manage and develop the drainage basin jointly, and share the benefits derived therefrom." Aaron Schwabach, *The Sandoz Spill: The Failure of International Law to Protect the Rhine from Pollution*, 16 *ECOLOGY L. Q.* 443, 456 and 458 (1989); *see also* William W. Van Alstyne, *International Law and Interstate River Disputes*, 48 *CAL. L. REV.* 596, 616 (1960), *quoting* H.A. SMITH, *THE ECONOMIC USES OF INTERNATIONAL RIVERS*, 150-151 (1931)

⁷ World Charter for Nature, Part III, para. 21(d).

“The Government of Turkey agrees to inform Iraq of any projects relating to protection works it may decide to construct on either river or on its tributaries in order to render such works, as far as possible, serve the interest of Iraq as well as serve the interest of Turkey.”⁸

Of critical importance is that Articles 3 and 5 of the 1946 Treaty further require consultation between the two governments, and if such consultation does not lead to a successful resolution, disputes are to be referred to the U.N. Security Council.⁹

2.1.5. The decision to approve the Ilisu dam, as proposed, violates the precautionary principle because the decision fails to address the compelling uncertainties and concerns about the dam’s impacts and fails to demonstrate that the proposed mitigation of these impacts is likely to succeed. Under the Rio Declaration, governments are to follow Principle 15’s “precautionary approach” “to protect the environment” and “[w]here there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”¹⁰ The government’s decision to approve the Ilisu dam based on the gaps in the EIA (discussed above) contravenes the precautionary principle, especially given that fears have been expressed that Ilisu could severely disrupt the downstream flow of the Tigris to Iraq, affecting communities reliant on seasonal agriculture; and undermining Iraq’s efforts to restore its southern marshes (which were drained by Saddam Hussein in order to punish the Marsh Arabs who live there).

2.1.6. Iraq is entitled to compensation for harms caused by the Ilisu dam.

If the Ilisu dam is built, Iraq is entitled to compensation for any damages experienced within its jurisdiction as a result of the dam. As the ICJ has recognized, “[i]t is a well-established rule of international law that an injured State is entitled to obtain compensation from the State which has committed an internationally wrongful act for the damage caused by it.”¹¹

States also have a related duty to act on behalf of their citizens to redress and remedy the environmental harms experienced by their citizens, irrespective of where such harms originate. This duty is acknowledged by the World Commission on Dams recognizing that “[e]xisting international laws have

⁸ Treaty of Friendship and Neighbourly Relations, quoted in Ministry of Water, “Republic of Iraq, The Ilisu Dam on the Tigris River in Turkey: Negative Impacts on Man and Environment in Iraq and the Legal Rules related to the Tigris and Euphrates waters utilisation,” Baghdad, 2006.

⁹ http://www.internationalwaterlaw.org/documents/regionaldocs/Iraq-Turkey-Friendship_1946.pdf

¹⁰ See also World Charter for Nature, Part II, 11 (emphasis added) (further illustrating this principle “Activities which might have an impact on nature shall be controlled, and the best available technologies that minimize significant risks to nature or other adverse effects shall be used; in particular: (a) Activities which are likely to cause irreversible damage to nature shall be avoided; (b) Activities which are likely to pose a significant risk to nature shall be preceded by an exhaustive examination; their proponents shall demonstrate that expected benefits outweigh potential damage to nature, and where potential adverse effects are not fully understood, the activities should not proceed; (c) Activities which may disturb nature shall be preceded by assessment of their consequences, and environmental impact studies of development projects shall be conducted sufficiently in advance, and if they are to be undertaken, such activities shall be planned and carried out so as to minimize potential adverse effects....”); David A. Wirth, *The Rio Declaration on Environment and Development: Two Steps Forward and One Back, or Vice Versa?*, 29 GA. L. REV. 599, 634 (1995).

¹¹ Gabčíkovo-Nagymaros Project (Hungary/Slovakia) at 81, para. 152; see also Principle 16 of the Rio Declaration (National authorities should “endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.”)

articulated a legal premise for a right to remedy, or reparations which is also reflected in the national legislative frameworks of many countries ... [t]he responsibility for initiating the process of reparation rests with government. The affected people may also file claims with the government” and that “[i]t is the State's responsibility to protect its citizens, including their right to just compensation.”¹² This duty is also reflected in Principle 10 of the Rio Declaration, stating in pertinent part "States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.”¹³

The key to effectuate the right and to fulfill the duty to redress and remedy of environmental harms is for the affected State to document the adverse impacts of the project in its own jurisdiction. This can conceivably be undertaken by commissioning an independent assessment of the current environmental conditions in the project vicinity followed by independent expert analyses as to how those conditions are likely to be altered within a government’s jurisdiction as a result of the dam. The assessment may also include an economic analysis of the potential financial losses attributable to those impacts. This baseline can later be used to measure the environmental and socio-economic impacts that can reasonably be attributed to the dam.

In summary, the duty to protect the Tigris River and the people who rely on it is not limited to Turkey, but includes neighboring governments.

2.1. Private Investors

Private companies and banks should be held accountable for their engagement in projects that fail to comply with international law and violate human rights. The Austrian company Andritz is involved in three mega- dam projects: Ilisu, Belo Monte and Xayaburi dam. Andritz has contracts for 330M Euros in Brazil, 340M Euros in Ilisu, and 340M Euros in Laos. All these projects have negative human rights and environmental implications on our people and resources.

The Austrian company Andritz has continued to provide services and products despite being advised of the human rights and environmental harms resulting from the project, the controversial nature of the dam and despite previous consortiums having been dissolved due to potential human rights violations. Iraqi law provides for the possibility to proceed legally against any private/public entity that causes harm.

There have been several attempts from Turkish groups, and other environmental groups to engage Andritz, all have been unsuccessful. In March 2013, the Save the Tigris Campaign submitted a letter to the Austrian company Andritz. In the letter, the coalition demands, first, that Andritz abide by its Code of Business Conduct and Ethics, expressly its sections describing compliance with laws, regulations and customs, environmental protection and sustainability. Second, that Andritz respects international law and suspends any supply of equipment for Ilisu dam immediately until an independent study can be conducted on its social, economical and environmental consequences. Part of this study, in accordance with environmental impact assessments around the world, should be dedicated to analyzing how to minimize

¹² World Commission on Dams, *Dams and Development: A New Framework for Decision-making*, at 229-230 (November 2000) (internal footnote omitted, emphasis added).

¹³ This is also consistent with Principle 13 of the Rio Declaration, which states: “States shall develop national law regarding liability and compensation for the victims of pollution and other environmental damage. States shall also cooperate in an expeditious and more determined manner to develop further international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction.”

the impact of the dam to the Iraqi people. Third, the coalition urges Andritz to engage with the Turkish government to re-initiate dialogue with riparian states that will ensure an equitable sharing of the waters of the Tigris. Fourth, the demand that further studies be conducted on how to minimize the impact of the dam on the Iraqi people and environment. The campaign received no response from Andritz but is looking for ways to engage the Austrian company in a mediation-process that can serve Iraq.

Austrian attorneys have advised the Save the Tigris Campaign that a claim against Andritz in the national courts of Austria may be viable. Before resorting to a litigation approach, the Campaign believes that the company should be approached through Austrian counsel acting on behalf of affected Iraqis. The most effective way to do this is of course to have the appropriate Iraqi governmental bodies join in and authorize this approach, the goal of which would be to engage the company in discussions to resolve the threatened impacts.

3. Recommendations

1. **Creation of a Tigris Water Crisis Group-** Since 2012, the Save the Tigris Campaign has called for the establishment of a water crisis group, as a response to the ongoing construction of Ilisu and the plans of building other dams on the Tigris. Such a group will focus on immediate responses to threats on the Tigris, and include water and environment experts, government, parliament and civil society representatives to work for immediate negotiations with Turkey to suspend construction of Ilisu until a thorough study is made concerning its impacts in Iraq. The group can be of great help to the National Council for Water, that the Iraqi government is foreseeing, to discuss more general issues regarding water policy in Iraq and relations with the other neighboring countries: Iran, Turkey, and Syria.
2. **Direct negotiation-** Public opinion should be informed about what has been done and what responses we get from Turkey. Negotiations should remind the Turkish partners that Iraq is a strategic economical partner and that water policy is part of any economical or political agreement for the future. Iraq needs to adopt national law or a policy document in this regard.
3. **Mediation between Iraq and Turkey-** Legal experts and Iraqi academics have advised that Iraq should seek help from international actors, and other countries that Iraq has good relationships with, or shares mutual treaties and conventions with, to mediate between Iraq and Turkey, and negotiate to preserve Iraq's water interests. Iraq needs to involve the EU partners since Turkey is planning to be a member of the EU
4. **UN Arbitration and ICJ-** Turkey has manipulated its national laws to exempt Ilisu from complying with the requirement of an EIA. Even though Turkey complies with its national laws, it still violates international law. Ultimately, if Turkey refuses to hold a dialogue about the Ilisu dam construction, the Iraqi government should hold Turkey accountable to its international legal obligations by going to the United Nations Security Council. A letter to the Security Council about the issue can be a good start.
5. **Engaging and negotiating with private investors-** The Austrian company Andritz should be approached through Austrian counsel acting on behalf of affected Iraqis. The most effective way to do this is of course to have the appropriate Iraqi governmental bodies join in and authorize this approach, the goal of which would be to engage the company in discussions to resolve the threatened impacts.