

## **Note on Ilisu Dam project/South-eastern Anatolia Project (“GAP”)**

1. In April 2000 we provided a legal opinion to Friends of the Earth, a copy of which is attached. In that opinion we examined the scope of Turkey’s international legal obligations to notify, consult and negotiate with its downstream neighbours about the project for the proposed Ilisu barrage. These obligations arise under the international law on watercourses and under international environmental law and reflect the principle of “good neighbourliness”, as set out in Article 74 of the United Nations (UN) Charter and in the dictum of the ICJ that the principle of sovereignty embodies “the obligation of every state not to allow its territory to be used for acts contrary to the rights of other states”.<sup>1</sup>
2. We understand that there is renewed effort to seek international financial support for the Ilisu barrage, and have been asked by the World Economy, Ecology and Development group (WEED) whether our opinion has materially changed since 2000. It has not. Over the past seven years the rules of international law governing the non-navigational uses of international watercourses have, if anything, been confirmed and strengthened. The draft Articles on State Responsibility have been completed and adopted by the International Law Commission (in 2001), and many of its provisions have since been referred to in case-law as reflecting general international law: see e.g. the recent decision of the International Court in the *Bosnian Genocide* case (26 February 2007) with regard to Article 16 on complicity.
3. We note that Turkey has not signed the 1997 UN 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

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<sup>1</sup> *Corfu Channel Case* (UK v Albania), 1949 ICJ Reps 4, 22.

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 utilise an international watercourse in an equitable and reasonable manner” (emphasis added); Article 7(1), which provides “watercourse states shall, in utilising 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 that “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”.

4. These provisions are underpinned by what the ICJ has referred to as the principle of the “perfect equality of all riparian states”, which extends to “the use of the whole course of the river and the exclusion of any preferential privilege of any one riparian state in relation to the others”<sup>2</sup>. All States, including Turkey, are under a clear legal obligation to *notify*, *consult* and *negotiate* with other riparian neighbours, whether downstream or upstream States.
5. We have been provided with only limited information, and are therefore not able to express a view on the extent to which Turkey has complied with these obligations. Nevertheless, to avoid difficulties it will be prudent for any financial institution that is considering whether to provide support for the project (including in the form of financial guarantees to those investing in the project) to satisfy

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<sup>2</sup> The principle was invoked by the Permanent Court of International Justice in the *Case concerning the Territorial Jurisdiction of the International Commission of the River Oder* See Territorial Jurisdiction of the International Commission of the River Oder, Judgment no. 16, 1929, PCIJ, series A, no.23, page 27.

itself that Turkey has complied with its obligations under the law governing non-navigational uses of international watercourses. In particular, appropriate efforts should be taken to be satisfied that Turkey has provided full information to Syria and Iraq in advance of a decision to proceed, and that Syria and Iraq have been provided with an opportunity to set forth their views and, as necessary, to participate in meaningful and good faith consultations. Such consultations should allow for an exchange of views in which no party has closed its mind as to the concerns of the other.

6. Finally, as expressed in our previous Opinion, the possibility cannot be excluded that a State agency or instrumentality which provides financial support to a project that violates a rule of international law can itself give rise to the international responsibility of the State of which the public body forms a part. This principle is now set forth in Article 16 of the ILC Articles (Aid or assistance in the commission of an internationally wrongful act), which provides:

“A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

- (a) That State does so with knowledge of the circumstances of the internationally wrongful act; and
- (b) The act would be internationally wrongful if committed by that State.”<sup>3</sup>

7. As we indicated previously, the provision of financial support by an agency of a State could constitute aid or assistance in the commission of an internationally wrongful act, namely the violation of rights of notification, consultation and negotiation of a downstream riparian State.

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<sup>3</sup> See also the Commentary to the ILC Article 16 on State Responsibility, available at: [http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf). In its Judgment of 26 February 2007 in the Case Concerning the Application of the Convention on the Prevention and Punishment (Bosnia and Herzegovina v. Serbia and Montenegro), the International Court of Justice stated that Article 16 reflected customary international law: Judgment, para. 420.

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