

# UN Watercourses Convention User's Guide

## Questions & Answers (including References)

### OVERVIEW OF KEY ISSUES

The United Nations General Assembly adopted the United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses (UN Watercourses Convention) on 21 May 1997, with approving votes of more than one hundred UN Member States and under the sponsorship of thirty-eight governments. The Convention represents the culmination of nearly four decades of work on the topic by the United Nations and its Member States. Counting today 24 contracting states, the Convention requires 35 parties to come into force.

The UN Watercourses Convention establishes a framework for the utilization, development, conservation, management, and protection of international watercourses; whilst promoting optimal and sustainable utilization thereof for present and future generations, and accounting for the special situation and needs of developing countries (Preamble).

This tool attempts to clarify the content of the UN Watercourses Convention with a view to supporting its entry into force and implementation. The answers provided below represent the independent views of the international law experts, practitioners and the principle authors listed in Annex 1. The Q&A is structured in two parts: History and Prospects; and Main Provisions of the Convention and Questions of Interpretation.



Source: <http://www.falriver.co.uk/>

## **I. THE UN WATERCOURSES CONVENTION: HISTORY AND PROSPECTS**

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Q29: What is the Convention's role beyond codifying customary law already binding on states?

Q30: Article 36(1) stipulates that, "[t]he present Convention shall enter into force on the ninetieth day following the date of deposit of the thirty-fifth instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations." What is the difference between the terms "ratification", "acceptance", "approval" and "accession"? The Convention is now closed for signature – what does this mean for states who did not sign and now want to become a contracting party?

## LIST OF ACRONYMS

ECOWAS	Economic Community of West African States
GWP	Global Water Partnership
ICJ	International Court of Justice
ILA	International Law Association
ILC	International Law Commission
MERCOSUR	Common Market of the South
NBI	Nile Basin Initiative
SADC	Southern African Development Community
UN	United Nations
UNDP	United Nations Development Programme
UNECE	United Nations Economic Commission for Europe
UNEP	United Nations Environment Programme
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNFCCC	United Nations Framework Convention on Climate Change
UNGA	United Nations General Assembly
UNSGAB	United Nations Secretary-General's Advisory Board on Water and Sanitation
UNWC 1997	United Nations Convention on the Law of the Non-Navigational Uses of International Watercourse

## **1. THE UN WATERCOURSES CONVENTION: HISTORY AND PROSPECTS**

### **Q1: What was the role of the ILC and the UNGA in the drafting and adoption of the UNWC?**

A1: The work of the UN on the law governing international watercourses began in 1959, with the goal of assessing whether the topic was ripe for codification. In 1970, by resolution 2669 (XXV), the UNGA charged the ILC with the task of advancing the studies on the topic, aiming to promote the codification and progressive development of the law on the non-navigational uses of international watercourses. In 1974, the UNGA recommended that the ILC should continue its study taking into account comments received from Member States. In 1991, after extensive study and consideration of numerous reports of the Special Rapporteurs, substantial information provided by Member States, as well as documents prepared by the Secretariat, the ILC adopted a first set of drafting articles on the law of the non-navigational uses of international watercourses (A/CN.4/L.458). In 1994, after considering additional input from Member States and relevant organizations, the ILC submitted revised draft articles to the UNGA. The UNGA then decided that the Sixth (Legal) Committee would convene as a Working Group of the Whole; open to States Members of the United Nations or members of specialized agencies, to propose a framework convention building upon the 1994 ILC Draft Articles. In 1997, after an additional round of interstate negotiations and legal discussions, the UNGA adopted the UNWC (GA Res.51/229).

The UNGA comprises all 192 Member States of the United Nations, and serves as the main forum for multilateral negotiations and policy-making within the UN system. The ILC exists under the umbrella of the UNGA, and is comprised of legal experts with a mandate to contribute to the codification and progressive development of international law.

#### Relevant Sources

- Progressive development and codification of the rules of international law relating to international watercourses, GA Res. 2669(XXV) (21 July 1971). Available at [http://www.un.org/ga/search/view\\_doc.asp?symbol=A/Res/2669%28XXV%29](http://www.un.org/ga/search/view_doc.asp?symbol=A/Res/2669%28XXV%29)
- Convention on the Law of the Non-Navigational Uses of International Watercourses, GA Res.51/229 (21 May 1997) Available at [http://www.un.org/ga/search/view\\_doc.asp?symbol=A/res/51/229](http://www.un.org/ga/search/view_doc.asp?symbol=A/res/51/229)
- Online Audio Visual Library of the International Law Association: Convention on the Law of Non-navigational uses of International Watercourses. Available at <http://untreaty.un.org/cod/avl/ha/clnuiw/clnuiw.html>

### **Q2: What reasons motivated the development of the UNWC?**

A2: (1) The need to codify and progressively develop, in a convention, the content of customary law, with a view to reducing the potential for interstate conflict over regulatory gaps and uncertainties; (2) the need to address the increasing pressures on the quality and quantity of the waters of international watercourses acknowledging that “the preservation and protection of those water resources are of great importance to all nations”; (3) the need to strengthen the law in support of the goals and principles of the UN, in particular, international peace and security; and (4) the need to better address, through written law, the fragmented system of basin/bilateral treaty practice. As identified by the UNGA in 1970, “despite the great number of bilateral treaties and other regional regulations ... the

use of international rivers and lakes is still based in part on general principles of customary international law” (GA Res. 2669, 127.) In 1994, the decision of the UNGA to elaborate a draft framework convention based on the work of the ILC once again underscored the existence of multiple fragmented watercourse agreements, and highlighted that custom still played a role in guiding the use of international watercourses. For this reason, further clarification of the applicable law through a codification instrument was warranted.

#### Relevant Sources

- Progressive development and codification of the rules of international law relating to international watercourses, GA Res. 2669(XXV) (21 July 1971). Available at [http://www.un.org/ga/search/view\\_doc.asp?symbol=A/Res/2669%28XXV%29](http://www.un.org/ga/search/view_doc.asp?symbol=A/Res/2669%28XXV%29)
- Draft Articles on the law of the non-navigational uses of international watercourses, GA Res. 49/52 (9 Dec. 1994).

### **Q3: Why did negotiations on the Convention’s drafting take so long?**

A3: (1) The nature of the topic required numerous complex studies and 13 reports by the ILC before a first draft text was agreed on and submitted to the UNGA by the ILC; (2) lack of continuity of ILC personnel in charge of drafting the Convention; and (3) it took considerable time for UN members to reach agreement on key contentious issues, e.g., the relationship between the Convention and existing and future water-related agreements; the relationship between the principle of equitable utilization (Art. 5) and the no-harm rule (Art. 7); in the context of watercourse management, what rules should govern environmental protection; and what dispute settlement mechanisms were appropriate in a framework convention.

#### Relevant Sources

- Wouters, Patricia. "The Legal Response to International Water Conflicts: The UN Watercourses Convention and Beyond." *German Yearbook of International Law* 42, (1999): 293-336.

### **Q4: Where does the UNWC get its legal authority from?**

A4: The UNWC is the result of nearly 30 years of legal discussions and political negotiations under the auspices of the UNGA and the ILC. The ILC is the body within the UN system in charge of codifying and progressively developing international law. Formed by renowned legal experts from around the world, the ILC receives wide political acceptability among UN member states. The UNGA adopted the UNWC in 1997, with more than 100 nations voting in its favor and the support of almost 40 sponsoring states. During the drafting and negotiation process, comments from a large number of countries were considered, delegates had opportunities for making statements, and the process was open to participation by virtually all UN member states.

To a large extent, the Convention codifies the already existing customary international water law, particularly the principle of equitable and reasonable use, the no significant-harm rule, and the procedural duty of notification with regard to major planned measures, as well as collateral obligations that derive from those three basic principles, such as pollution prevention and information exchange.

In 1997 – the year of the Convention’s adoption – the ICJ expressly referred to it in justifying a decision in the *Gabcíkovo-Nagymaros* case, between Hungary and Slovakia. Even before the Convention was approved, watercourse agreements were drafted on the basis of the ILC draft articles that informed related interstate negotiations leading up to the Convention’s final text (e.g., the Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin). Additionally, the 1996 Mahakali Treaty, the 1996 Ganges Water Treaty and the 1994 Chinese-Mongolian Agreement which were all signed during the negotiation process of the 1997 Convention, include many of the principles of the draft articles and final Convention. After the Convention’s adoption, the original SADC Protocol on Shared Watercourse Systems was replaced by a second agreement closely modeled on the Convention’s final text. The recent Nile River Basin Cooperative Framework Agreement (NRBCFA) contains general principles and rules that clearly draw from the Convention. In Western Asia, the 2002 Agreement between Syria and Lebanon for the sharing of the waters of the Great Southern River basin refers to the Convention and principles.

#### Relevant Sources

- *Case Concerning the Gabcíkovo-Nagymaros Project Hungary-Slovakia* ICJ, September 25 1997. 37 ILM 162 (1998). Available at <http://www.icj-cij.org>
- Tanzi, Attila, and Maurizio Arcari. *The United Nations Convention on the Law of International Watercourses : A Framework for Sharing*, International and National Water Law and Policy Series. London: Kluwer Law International, 2001.
- Statute of the International Law Commission (1947), available at [http://untreaty.un.org/ilc/texts/instruments/english/statute/statute\\_e.pdf](http://untreaty.un.org/ilc/texts/instruments/english/statute/statute_e.pdf).
- Wouters, Patricia. “The International Law of Watercourses: New Dimensions.” In *Collected Courses of the Xiamen Academy of International Law*, Volume 3, edited by Xiamen Academy of International Law, The Netherlands: Brill Academic, Forthcoming 2011, at 369.

#### **Q5: Why has the process for entry into force of the Convention been slow?**

A5: As of April 2011, the UNWC has 24 contracting states – 11 short of the number required for entry into force as stipulated in Art.36. Arguably, the reasons slowing down the ratification process are, *inter alia*: (1) the Convention is a global treaty that deals with transboundary waters and interstate cooperation. These are sensitive and highly politicized issues; (2) many nations, including those satisfied with existing watercourse agreements or island states with no transboundary waters, may regard a global regulation of international watercourses as not directly relevant to them, and prioritize treaties of immediate national interest; (3) upon its adoption, the Convention did not benefit from a strong champion to lead the ratification process; (4) the 1990s was a decade of “treaty congestion”, with the controversial process for entry into force of the Kyoto Protocol under the UNFCCC dominating the international spotlight; (5) the insufficient attention paid to the Convention following its adoption may have contributed to misunderstanding and low levels of awareness among states and international actors of the Convention’s content and value (e.g., a 2007 survey of West African states found that few ministries responsible for water-related issues were familiar with the Convention); and (6) the unjustifiable fear that the Convention disregards a state’s sovereignty over its territory.

#### Relevant Sources

- Rieu-Clarke, Alistair and Loures, Flavia. "Still Not in Force: Should States Support the 1997 UN Watercourses Convention?" *Review of European Community & International Environmental Law* 18, no. 2 (2009): 185-97.
- Salman, Salman M. A. "The United Nations Watercourses Convention Ten Years Later: Why Has its Entry into Force Proven Difficult?" *Water International* 32, no. 1, (2007): 1-15.

**Q6: Is there enough momentum and international support for the Convention's entry into force?**

A6: Yes, the basic conditions necessary for bringing the Convention into force in the short-term are now in place, including: (1) the identification of champions including the French, Dutch and Swedish Governments, Green Cross and UNSGAB; (2) strongly backed, relevant institutions (WWF, GWP-West-Africa, and the UNESCO Centre for Water Law, Policy and Science in Dundee) are assisting states in assessing the Convention's regional and national value to help inform decision-making by stakeholders; and (3) freshwater is back on top of the international agenda, with a growing perception of the water crisis as a global issue meriting dialogue and governance frameworks at the global level to supplement and reinforce solutions on a basin and local scales.

Relevant Sources

- United Nations Secretary-General's Advisory Board on Water and Sanitation. "Hashimoto Action Plan : Compendium of Actions." New York: UNSGAB, 2006.
- United Nations Secretary-General's Advisory Board on Water and Sanitation. "Hashimoto Action Plan II: Strategy and Objectives through 2012." New York: UNSGAB, 2010.
- Loures, Flavia Roche., Rieu-Clarke, Alistair and Vercambre, Maree. "Everything You Need to Know About the Un Watercourses Convention." Gland, Switzerland: WWF International, 2008.
- UN Watercourses Global Initiative, See <http://www.dundee.ac.uk/water/projects/unwatercoursesconventionglobalinitiative/>

**Q7: Are there any legal implications for the countries who voted in favor of the Convention at the UNGA and for signatories that have not yet deposited instruments of ratification?**

A7: A state that votes in favour of a UNGA resolution, such as the one containing the UNWC, creates an expectation in the international community that it will eventually join such a treaty. While this does not amount to a legal obligation to actually do so, following through with a positive vote does show respect and commitment to the UN system and the international community.

As for signatories, the UNWC is subject to ratification (preceded by signature) or direct accession. In this case, therefore, signature is only a formality and essentially means that state representatives have agreed upon a text which is to be forwarded to their respective governments for the required decision as to acceptance or rejection. Thus, signature of a treaty does not impose any positive legal obligation to ratify; though a state should refrain from signing a treaty if it has no intention to actually ratify it. This is because signing a treaty does indicate the state's intention to take steps to express its consent to be bound by the treaty later on. Its signature has additional meaning in that, in such cases and pending ratification, a state must refrain from acts that would defeat the object and purpose of the treaty, until it made clear its intention not to become a party to the treaty.

Relevant sources:

- Article 18 of the 1969 Vienna Convention on the Law of Treaties, 1155 UNTS 331.
- Aust, Anthony. *Modern Treaty Law and Practice*. 2nd ed. Cambridge: Cambridge University Press, 2007, at 117-121.
- Shaw, Malcolm Nathan. *International Law*. 6th ed. Cambridge: Cambridge University Press, 2008, at 911.

## **II. THE MAIN PROVISIONS OF THE CONVENTION AND QUESTIONS OF INTERPRETATION**

### **Q8: What does the term ‘Watercourse’ mean?**

A8: The term ‘Watercourse’, as expressed in Art. 2(a) of the UNWC, defines the type of waters to which the Convention applies. Through that definition, the Convention highlights the need for an integrated approach to *systems of surface and underground waters*. The Convention thus applies to watercourse systems that cross international boundaries (Art. 2(b)), including major watercourses, their tributaries, and connected lakes and aquifers, even when each of these components are entirely located within a single state. Generally, components of freshwater systems that may fall under the Convention’s scope, when connected to one another, include rivers, lakes, aquifers, glaciers, reservoirs, and canals.

Relevant Sources

- Commentary to the *Draft Articles on the Law of the Non-navigational Uses of International Watercourses, Adopted on Second Reading*, in *Report of the International Law Commission on the work of its forty-sixth session, [1994] 2(2)* Y.B. International Law Commission, at 222, page 3. Available at [http://untreaty.un.org/ilc/documentation/english/a\\_cn4\\_l493.pdf](http://untreaty.un.org/ilc/documentation/english/a_cn4_l493.pdf)

### **Q9: Is there a difference between the concept of an ‘international watercourse’, as defined in the UN Watercourses Convention, and an ‘international drainage basin’, as defined in the 1966 International Law Association’s (ILA) Helsinki Rules?**

A9: The Helsinki Rules define an "international drainage basin" as "a geographical area extending over two or more States determined by the watershed limits of the system of waters, including surface and underground waters, flowing into a common terminus" (Art. II). The scope of the Helsinki Rules has been argued to be more expansive than that of the UN Watercourses Convention. During the drafting of the Convention, the ILC gathered state opinion on whether the concept of an "international drainage basin" should be the appropriate basis for their study. Some states objected to the concept arguing that it could result in regulation not only of the use of the water but also of the land territory. Ultimately, the expression "international watercourse" was chosen by the ILC and supported by states.

The concept of an ‘international watercourse’, as derived from Art. 2(a)-(b), means the Convention applies to ‘watercourse systems’ that cross international boundaries, including major watercourses, their tributaries, and connected lakes and aquifers, even when these components are entirely located within a single state. Generally, components of freshwater systems that may fall under this concept,

when connected to one another, include rivers, lakes, aquifers, glaciers, reservoirs, and canals, wetlands and floodplains.

Leading academics refute the argument that the concept “international watercourses” is less expansive than “international drainage basin”, stating that Art. 1(1), of the Convention “applies to uses of international watercourses and of their waters for purposes other than navigation *and to measures of protection, preservation and management* related to the uses of those watercourses and their waters.” This means that the Convention indirectly applies to land-based activities taking place within the river basin when and to the extent that such activities might be relevant for the use, protection, and management of an international watercourse.

#### Relevant Sources

- *Helsinki Rules on the Uses of the Waters of International Rivers*, International Law Association, Vol. 52, Art. II (1967). Available at [http://webworld.unesco.org/water/wwap/pccp/cd/pdf/educational\\_tools/course\\_modules/reference\\_documents/internationalregionconventions/helsinkirules.pdf](http://webworld.unesco.org/water/wwap/pccp/cd/pdf/educational_tools/course_modules/reference_documents/internationalregionconventions/helsinkirules.pdf). Version including commentary available at: <http://www.whatsonyourplate.msstate.edu/philosophy/helsinki.doc>
- Commentary to the *Draft Articles on the Law of the Non-navigational Uses of International Watercourses, Adopted on Second Reading*, in *Report of the International Law Commission on the work of its forty-sixth session, [1994] 2(2)* Y.B. International Law Commission, at 222, page 3. Available at [http://untreaty.un.org/ilc/documentation/english/a\\_cn4\\_l493.pdf](http://untreaty.un.org/ilc/documentation/english/a_cn4_l493.pdf)
- McCaffrey, Stephen C. *The Law of International Watercourses*. 2nd ed, The Oxford International Law Library. Oxford: Oxford University Press, 2007, 23, 35, 39.
- Salman, Salman M. A. "The Helsinki Rules, the UN Watercourses Convention and the Berlin Rules: Perspectives on International Water Law." *International Journal of Water Resources Development* 23, no. 4 (2007): 625-640.

#### **Q10: What does the term ‘Watercourse State’ mean in practice?**

A10: In order to understand the practical meaning of “Watercourse State” the term must be differentiated from other types of parties to the Convention. “Watercourse State” technically means two things: A State Party to the Convention in whose territory part of an international watercourse is situated; and/or a Party that is a regional economic integration organisation, with at least one Member State in whose territory part of an international watercourse is situated (Art.2(c)). In practice, the primary legal relationships which the Convention governs are between state parties that are riparians of the same international watercourse. This is evident in the numerous references to “Watercourse States” which are applied throughout the Convention’s text to establish various rights and duties. For example Art. 4 stipulates that only co-riparians have the right to take part in the consultations and negotiations for the conclusion of specific international agreements relating to a part or to the whole of an international watercourse.

Another type of contracting party to the Convention includes non-riparian States. However, non-riparian contracting parties do not inherit the same rights and duties to an international watercourse as “Watercourse States”. There is an absence of decisive guidance in the Convention as to what types of limited rights and duties non-riparian contracting parties receive. It is suggested that in the event that an activity carried out in the territory of a non-riparian party causes significant harm to the basin of a watercourse state, the Convention would be of relevance. However, a non-riparian party does not have

any rights to use or develop an international watercourse. Nevertheless, there are indirect benefits of these parties signing the Convention are discussed in Questions 25, 27 and 29.

Finally, the Convention does not apply to non-contracting parties who are situated on an international watercourse. However, where riparian 'other watercourse states' are vulnerable to events taking place within an international watercourse, the Convention makes the exception in its scope by referring to "other states." For example, the pollution provisions in Art. 21(2), combined with the emergency provisions in Art.28, would require Watercourse States to protect the marine environment of an international watercourse especially where pollution or natural causes, such as earthquakes, may cause harm to "other watercourse states". In light of the definition of a "Watercourse State," the rights and duties established by the Convention apply exclusively among parties *and* only to those "other states" sharing an international watercourse when they are vulnerable to transboundary harm through an international watercourse. Additionally, the rules of customary law as codified by the Convention will still apply to non-contracting states.

#### Relevant Sources

- Commentary to the *Draft Articles on the Law of the Non-navigational Uses of International Watercourses, Adopted on Second Reading*, in *Report of the International Law Commission on the work of its forty-sixth session, [1994] 2(2)* Y.B. International Law Commission, at222, p 4-10, available at [http://untreaty.un.org/ilc/documentation/english/a\\_cn4\\_l493.pdf](http://untreaty.un.org/ilc/documentation/english/a_cn4_l493.pdf)
- Tanzi, Attila, and Maurizio Arcari. *The United Nations Convention on the Law of International Watercourses : A Framework for Sharing*, International and National Water Law and Policy Series. London: Kluwer Law International, 2001, p 73-75.

#### **Q11: Can "regional economic integration organizations" be party to the Convention?**

A11: Based on the definition in Art. 2 (d), organizations like the European Union, the Southern African Development Community (SADC), the Economic Community of West African States (ECOWAS), and the Southern Common Market (MERCOSUR), *in theory*, could become parties to the Convention. This, however, would be dependent upon the transfer of competence from the members of that organization in respect of matters governed by the Convention. Moreover, such bodies would have to be authorized to ratify or accede thereto by their members. To date, no regional economic organization has requested permission to become a party to the Convention.

While regional organizations have been included in the Convention's definition of a "watercourse state," nothing in the Convention implies that regional organizations have the status of states in international law. Likewise, it is wrong to assume that a member of those bodies that is not a riparian state could acquire any rights and duties regarding a given international watercourse simply because the regional organization of which that state is a member acceded to the Convention.

Although there is no regional organization which is party to the Convention, membership of regional organisations to other international water related treaties does occur, as in the case of the European Union being part of the Convention on the Protection of the Rhine and the Danube River Protection Convention.

### Relevant Sources

- *Report of the Sixth Committee convening as the Working Group of the Whole*, p.5 (prepared by Chusei YAMADA), UN Doc. A/51/869 (11 April 1997). Available <http://www.un.org/law/cod/watere.htm>

### **Q12: Does the Convention apply to navigational uses of international watercourses?**

A12: Yes, the Convention applies to navigational uses but only in a very limited way. Art. 1 makes clear that the main focus of the Convention is actually on water uses *other than* navigation. However, because the Convention also addresses management and conservation of transboundary watersheds and their ecosystems, navigational matters fall under its umbrella to the extent that other water users may affect navigation or vice-versa (e.g., navigation may cause transboundary freshwater pollution, just as water deviation for other uses may impair the utilization of a river for navigational purposes). Any conflict of interest should be solved according to the principle of equitable and reasonable utilization of an international watercourse.

### Relevant Sources

- UNGA, 3 Nov. 1994, '*Summary Record of the 26th Meeting of the 6th Committee*', U.N. Doc. A/C.6/49/SR.26 (21 Nov. 1994), p.8.

### **Q13: Does the Convention apply to groundwater systems?**

A13: The Convention applies to groundwater systems but only to the extent that an aquifer is connected hydrologically to a system of surface waters, parts of which are situated in different states (Art. 2 (a)(b)). In the preparatory work of the ILC leading up to the adoption of the Convention, agreement could not be reached on whether unconnected groundwater should be included within the scope of the Convention, despite a recommendation by the ILC that transboundary fossil aquifers (also referred to as confined aquifers) should be governed by the same rules as those applicable to international watercourses. In response to this issue, in 2003, the ILC commenced further study on transboundary groundwater, which culminated in the adoption of the Draft Articles on the Law of Transboundary Aquifers in 2008 which applies to transboundary fossil aquifers. The level of inclusion of groundwater systems in the UN Watercourses Convention is important given that the total volume of groundwater represents 97 per cent of our planet's freshwater resources (excluding Antarctica) and yearly consumption of groundwater world-wide is estimated at 900 cubic kilometres, Approximately 12 percent of groundwater has a very low recharge but it is unknown exactly what percentage of this groundwater is from transboundary fossil aquifers and therefore it unknown what percentage of transboundary groundwater is covered by the Convention.

### Relevant Sources

- International Law Commission, '*Draft Articles on the Law of Transboundary Aquifers*', UN Doc. A/CN.4/L.724, 29 May 2008, *Yearbook of the International Law Commission*, Geneva; United Nations Publications, p.19.
- UNGA "The law of transboundary aquifers", UN Doc. A/RES/63/124, 15 January 2009. Available [http://www.un.org/ga/search/view\\_doc.asp?symbol=A/RES/63/124](http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/63/124)
- UNESCO IHP-VI Series on Groundwater, '*Non-renewable groundwater resources: A guidebook on socially sustainable management for water-policy makers*', 2006, Available <http://unesdoc.unesco.org/images/0014/001469/146997e.pdf>

**Q14: What is the relationship between the Convention and the ILC Draft Articles on the Law of Transboundary Aquifers and Aquifer Systems ('ILC Draft Articles')?**

A14: The ILC Draft Articles are a set of international rules that aim to contribute to the codification and progressive development of the law governing transboundary aquifers. In 2006, the ILC adopted the draft articles *on first reading*. These were subsequently revised in 2008, following state commentary and submission to the UN General Assembly negotiation, and eventually adopted by the ILC.

Regarding the shape of this future instrument, it has been proposed that the ILC Draft Articles be adopted as a protocol to the Convention. The ILC Draft Articles build on the Convention and adjust its fundamental principles to the special case of groundwater. Taken together as a binding, coherent, systematic, and global policy framework, the two instruments could underpin cooperative use and management of transboundary freshwater systems. The UNWC has served as the basis for negotiations on the ILC Draft Articles, as the only codified source of international water law adopted at the global level. The work of the ILC on transboundary aquifers is a natural continuation of its own work on the law of the non-navigational uses of international watercourses, however there are some key differences between the two instruments which might pose difficulties for coordination

Relevant Sources

- UNGA "The law of transboundary aquifers", UN Doc. A/RES/63/124, 15 January 2009. Available [http://www.un.org/ga/search/view\\_doc.asp?symbol=A/RES/63/124](http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/63/124)
- UN WWAP Side Publication Series, "Freshwater and International Law: The Interplay between Universal, Regional and Basin Perspectives", 2009, p.4. Available <http://unesdoc.unesco.org/images/0018/001850/185080e.pdf>

**Q15: What is the contractual relationship between the Convention and existing and future watercourse agreements?**

A15: The Convention preserves the contractual freedom of watercourse states. In this sense, the Convention does not affect the rights and duties of states that become parties to it arising from existing freshwater-related agreements (Art. 3(1)). Neither does the Convention impose a duty on states to adopt basin-specific treaties compatible with its provisions where none exist. For example water agreements between Israel and Jordan as part of the 1994 Treaty of Peace would not be affected by the Convention unless the parties agree otherwise. The Convention only *encourages* states to consider harmonizing existing agreements with its basic provisions, as well as to adopt new agreements that *apply and adjust* the Convention to the characteristics and uses of a particular watercourse (Arts 3(2)(3)). Several states have changed their existing water agreements or created new agreements to comply with the Convention. The original SADC Protocol on Shared Watercourse Systems was replaced by a second agreement closely modeled on the Convention's final text. The recent Nile River Basin Cooperative Framework Agreement (NRBCFA) contains general principles and rules that clearly draw from the Convention. In Western Asia, the 2002 Agreement between Syria and Lebanon for the sharing of the waters of the Great Southern River basin refers to the Convention and principles.

### Relevant Sources

- McCaffrey, Stephen. C. *The law of international watercourses*, Oxford, Oxford University Press, 2007.
- Brown Weiss, Edith. "The Evolution of International Water Law." In *Recueil Des Cours, Collected Courses, Tome 331*, edited by Hague Academy of International Law, 163-404. Leiden, the Netherlands: Martinus Nijhoff Publishers, 2009, p.259.

### **Q16: What happens in international watercourses where not all riparians become parties to the UN Watercourses Convention?**

A16: The Convention will only apply to contracting parties, not to all riparians to an international watercourse because the definition of "watercourse state," which is applied throughout the Convention's text to establish various rights and duties, includes only those countries that have ratified or acceded to the Convention (Art. 2(c)). In other words, the Convention confirms that reciprocity is a condition for its applicability, and that the rights and duties established by the Convention apply exclusively among parties. This is standard practice in international law. Yet, established principles of customary international law, many of which are codified by the Convention, apply to all watercourse states, regardless of whether they ratify the convention or not, on a subsidiary basis, i.e., in the absence of watercourse agreements determining otherwise.

### Relevant Sources

- Articles 34-38 of Convention on the Law of Treaties, May 23, 1969 (entered into force Jan. 27, 1980), reprinted in 8 I.L.M. 679 (1969). Available at [http://untreaty.un.org/ilc/texts/instruments/english/conventions/1\\_1\\_1969.pdf](http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf)

### **Q17: How does the Convention apply to partial watercourse agreements, i.e., agreements applicable to a portion of a watercourse or to a specific project or use and not involving all watercourse states?**

A17: Under the UN Watercourses Convention, all watercourse states are entitled to become a party to any agreement that only refers to a portion of the basin or to a specific project or use, if they may be affected by such an agreement. In addition, these agreements cannot adversely affect, to a significant extent, the use of the resource by non-participating riparians without their express consent (Art. 3(4)). Additionally, nothing in such an agreement will affect the rights or obligations of non-participating parties under the UN Watercourses Convention. In other words, these provisions safeguard the rights of states that are not parties to partial agreements, but are parties to the Convention (Art. 3 (6)).

### Relevant Sources

- Salman, Salman M. A. "The United Nations Watercourses Convention Ten Years Later: Why Has its Entry into Force Proven Difficult?" *Water International* 32, no. 1, (2007): p. 5.

### **Q18: Under the Convention, what does the principle of equitable and reasonable use entail?**

A18: The principle of equitable and reasonable utilization is the cornerstone of the Convention and the fundamental doctrine guiding water-sharing in international watercourses. As codified under Art. 5(1), the principle determines that "watercourse States shall in their respective territories utilize an

international watercourse *in an equitable and reasonable manner*. In particular, an international watercourse shall be used and developed by watercourse States *with a view to attaining optimal and sustainable utilization* thereof and benefits there from, *taking into account the interests of the watercourse States concerned, consistent with adequate protection of the watercourse.*"

This principle aims to reconcile conflicting interests across international borders, so as to "provide the maximum benefit to each basin state from the uses of the waters with the minimum detriment to each" (ILA, 1966). Sustainable use reflects the need to balance economic, social, and environmental values in the use of natural resources and to take into account the carrying capacity of international watercourses. Optimal utilization means the most economically feasible and, if possible, the most efficient use.

In pursuing that goal, watercourse states must not act unilaterally in ways that would fail to consider the equitable interests of co-riparian states in the use, management and protection of an international watercourse. States *must* also act in conformity with the *adequate protection* of international watercourses against detrimental conditions such as erosion and pollution. For further discussion on the application of these principles, refer to Question 20.

#### Relevant Sources

- 52<sup>nd</sup> Conference of the International Law Association (ILA), Helsinki, Finland, 14-20 Aug. 1966, *Report of the 52<sup>nd</sup> ILA Conference*, at 487.
- Wouters, Patricia. "The International Law of Watercourses: New Dimensions." In *Collected Courses of the Xiamen Academy of International Law*, Volume 3, edited by Xiamen Academy of International Law, The Netherlands: Brill Academic, Forthcoming 2011, at 369, 390.
- Allan, Andrew. "The Role of Reasonableness in Assessing Equitable and Reasonable Use." *Ympäristöjuridiikka* (Finnish Society of Environmental Law) 01/2009, (2009): 22-36.
- Vinogradov, Sergei, Patricia Wouters, and Patricia Jones. *Transforming Potential Conflict into Cooperation Potential: The Role of International Water Law*. Edited by UNESCO, Technical Documents in Hydrology: Pc-Cp Series. Paris: UNESCO, 2003.

#### **Q19: What does the principle of equitable and reasonable participation require from Watercourse States?**

A19: The principle of *equitable and reasonable* (Art. 5 (2)) derives from the principle of equitable and reasonable use and from the general obligation of watercourse states to cooperate with one another (Art. 8). The Convention requires *affirmative* cooperative action in the use, development and protection of an international watercourse in an equitable and reasonable manner.

Equitable and reasonable participation refers to the *active cooperation and sharing of costs necessary to generate mutual benefits to basin states* from the management, utilization, and protection of international watercourses. According to this principle, where necessary, states will have to do better than simply abstain from interfering with their neighbors' equitable rights to the beneficial uses of an international watercourse. The reference to "utilization" and "benefits" means that states can allocate transboundary waters either volumetrically and/or agree on sharing the benefits from the water use including benefits from hydropower, agriculture, or economic development etc. The 1961 Columbia Treaty between the United States and Canada allocates water according to benefit sharing principles

including hydropower, flood control, and rent distribution. The Nile Basin Initiative has made progress on sharing benefits from the power sector.

#### Relevant Sources

- *Case Concerning the Gabcikovo-Nagymaros Project Hungary-Slovakia* ICJ, September 25 1997. 37 ILM 162
- McCaffrey, Stephen. 'The UN Convention on the Law of the Non-Navigational Uses of International Watercourses: Prospects and Pitfalls', in *International Watercourses-Enhancing Cooperation and Managing Conflict* 77,81 (World Bank Technical Paper No. 414, Salman M. A. Salman & Laurence Boisson de Chazournes eds., 1998) p. 20.
- Wouters, Patricia. and Moynihan, Ruby. 'Benefit Sharing: New Approaches in International Water Law' in Rieu-Clarke, A. and Loures, F. *The UN Watercourses Convention in force: Strengthening international law for transboundary water management*, Earthscan, Forthcoming 2011.
- Phillips, David, et al. *Trans-boundary water cooperation as a tool for conflict prevention and for broader benefit-sharing* Stockholm: EGDI, Ministry for Foreign Affairs, 2006.

#### **Q20: Does the UN Watercourses Convention provide for adequate guidance in the application of the principles of reasonable and equitable use and participation?**

A20: The Convention provides guidance in the application of the cornerstone principle of equitable and reasonable use through Arts 5 - 7. Art. 6 provides a non-exhaustive list of some of the factors that may be relevant in determining what is reasonable and equitable under the circumstances of each case (e.g., the effects of a water use on neighboring states, existing and future uses, watercourse states' social and economic needs, the watercourse's natural conditions, climatic and ecological factors, costs of environmental protection measures, etc.). Just as there is no priority among relevant factors, no type of water use takes precedence over others, unless watercourse states agree otherwise, although uses with respect to vital 'human' and 'environmental' needs may receive special attention as per Arts 10 and 23.

Art. 7 requires that states, "in utilizing an international watercourse in their territories, *take all appropriate measures to prevent the causing of significant harm to other watercourse states*", although some harm may be tolerated if it is deemed equitable and reasonable. Article 6 also makes it clear that the application of these principles is not an isolated step but is a process to be carried out continuously in the context of the overall cooperative arrangements among watercourse states—an ongoing assessment of changing circumstances and potential revision of allocation rights to bring them back in conformity with the principle of reasonable and equitable use.

#### Relevant Sources

- Wouters, Patricia, Sergei Vinogradov, Andrew Allan, Patricia Jones, and Alistair Rieu-Clarke. *Sharing Transboundary Waters : An Integrated Assessment of Equitable Entitlement: The Legal Assessment Model*. Edited by UNESCO, IHP-VI Technical Documents in Hydrology. Paris: UNESCO, 2005.
- McIntyre, Owen *Environmental Protection of International Watercourses under International Law*. Hampshire, UK: Ashgate, 2007.
- Kaya, Ibrahim. *Equitable Utilization: The Law of the Non-Navigational Uses of International Watercourses*, Hampshire, Ashgate, 2003.

## Q21: How should the no-harm rule be interpreted under the Convention?

A21: Art. 7 codifies and clarifies the scope of the *no-harm rule*. It requires that states, "in utilizing an international watercourse in their territories, *take all appropriate measures to prevent the causing of significant harm to other watercourse states.*" This is a due diligence duty of prevention, rather than an absolute prohibition on transboundary harm. A state's compliance with the Convention does not depend on the result itself, but rather on the country's adequate preventive behavior to avoid such a result. Furthermore, countries are required to take only those measures of prevention deemed *appropriate* according, e.g., to a state's capabilities. The type of harm countries must avoid is qualified by the term *significant*. This term excludes mere inconveniences or minor disturbances states are expected to tolerate from one another, in conformity with the rule of good neighborliness.

### Relevant Sources

- 51st Session of the UN General Assembly, 9 Oct. 1996, *Summary Record of the 16th Meeting of the 6th Committee*, U.N. Doc. A/C.6/51/SR.16 (4 Dec. 1996), 12.
- 51st Session of the UN General Assembly, 9 Oct. 1996, *Summary Record of the 17th Meeting of the 6th Committee*, U.N. Doc. A/C.6/51/SR.17 (30 Dec. 1996), 5.
- Wouters, P. "The International Law of Watercourses: New Dimensions." In *Collected Courses of the Xiamen Academy of International Law*, Volume 3, edited by Xiamen Academy of International Law, The Netherlands: Brill Academic, Forthcoming 2011, at 392, 393, 395, 407.
- Salman, Salman M. A. "Downstream Riparians Can Also Harm Upstream Riparians: The Concept of Foreclosure of Future Uses." *Water International* 35, no. 4 (2010): 350-64.

## Q22: What is the relationship between the principle of equitable utilization (Article 5) and the no-harm rule in Article 7?

A22: The principle of equitable utilization and the no-harm rule are intended to be complimentary on the basis that the no-harm rule requires avoidance of harm in a way that is reasonable under the circumstances. However where there is a potential conflict over reconciling the two principles, most scholars interpret the Convention as giving prevalence to the principle of reasonable and equitable use over the no-harm rule. This interpretation is based on two considerations:

- a) The Convention lists factors that may be relevant for determining whether a given water use is reasonable and equitable. Such factors include any transboundary effects resulting from that given use, as well as other existing and potential waters uses. These two factors receive no priority in relation to others. This means that, although transboundary harm deserves special consideration, it remains as another factor to be taken into account among many others for the application of the principle of equitable and reasonable use.
- b) It may be that significant transboundary harm occurs even when a state has taken all appropriate measures to prevent such harm from materializing. In such cases, the Convention requires the harming state to take all appropriate measures to eliminate or mitigate such harm and, where appropriate, to discuss the question of compensation, having due regard for the principle of equitable and reasonable use, and in consultation with the affected state.

The Convention's approach to how the two principles relate to each other is consistent with state practice. This was also the position of the International Court of Justice in the *Case Concerning the Gabčíkovo-Nagymaros Project*. Finally, the general and flexible nature of the reasonable and equitable utilization principle requires that it be complemented by a set of procedural rules for its implementation.

Relevant sources:

- *Case Concerning the Gabčíkovo-Nagymaros Project*, 1997 I.C.J. No. 92 (25 Sep.), Para. 50.
- Salman, Salman M. A. "Downstream Riparians Can Also Harm Upstream Riparians: The Concept of Foreclosure of Future Uses." *Water International* 35, no. 4 (2010): p 354.
- McCaffrey, Stephen C. *The Law of International Watercourses*. 2nd ed, The Oxford International Law Library. Oxford: Oxford University Press, 2007, 407.

**Q23: Does the Convention provide for vital human needs?**

A23: Yes, Art. 10 establishes that, in the case of conflicting uses across international borders, watercourse states must give special regard to vital human needs in solving such a conflict. That is, special attention is to be paid to providing sufficient water to sustain human life, including both drinking water and water required for the production of food in order to prevent starvation.

Relevant Sources

- Commentary to the *Draft Articles on the Law of the Non-navigational Uses of International Watercourses, Adopted on Second Reading*, in *Report of the International Law Commission on the work of its forty-sixth session, [1994] 2(2)* Y.B. International Law Commission, at 222, at 23, available at [http://untreaty.un.org/ilc/documentation/english/a\\_cn4\\_l493.pdf](http://untreaty.un.org/ilc/documentation/english/a_cn4_l493.pdf)

**Q24: Does the Convention consider Environmental Protection?**

A24: The UN Watercourses Convention contains several Articles relating to environmental protection. Art. 20 codifies and develops the general obligation to protect and preserve the ecosystems of international watercourses. The term "ecosystem" is narrower than "environment" and has been defined by the ILC Commentary as "an ecological unit consisting of living and non-living components that are interdependent and function as a community." According to the Commentary, "adequate protection" covers "not only measures such as those relating to conservation, security and water-related disease, but also measures of 'control' in the technical hydrological sense of the term, such as those taken to regulate flow, to control floods, pollution and erosion, to mitigate drought and to control saline intrusion." The obligation to protect ecosystems "requires that watercourse States shield the ecosystems from a significant threat of harm." *Preservation*, according to the Commentary, is applicable in particular to freshwater ecosystems that are in a "pristine or unspoiled condition;" and it requires that these ecosystems "be protected in such a way as to maintain them as much as possible in their natural state."

Art. 20 is a specific application of the requirement contained in Art. 5 that watercourse states are to use and develop an international watercourse in a manner that is consistent with the adequate protection

thereof. Art. 21(2) sets out the obligation of watercourse States to “prevent, reduce and control the pollution of an international watercourse that may cause significant harm to other watercourse States or their environment.” This provision is clearly linked to the obligation contained in Art. 7 not to cause significant harm. In the use of the word “may,” the Article adopts a precautionary approach to transboundary pollution.

Art. 23 establishes the obligation to protect and preserve the marine environment in connection to an international watercourse and Art. 22 provides another aspect of environmental protection including the prevention of the introduction of alien or new species of flora and fauna that may upset the ecological balance of a watercourse and result in significant harm to other watercourse states. Finally, Art. 24 encourages states to establish joint mechanisms to promote rational and optimal utilization and the protection and control of the international watercourse.

Despite the fact that Arts. 6(3), 17 and 10(1) of the Convention provide that no particular factor or use enjoys inherent priority, it has been argued that, “by virtue of their express and detailed inclusion,” the environmental protection Articles enjoy enhanced significance in the Convention.

#### Relevant Sources

- McIntyre, Owen. *Environmental Protection of International Watercourses under International Law*. Hampshire, UK: Ashgate, 2007, 359-362.
- Commentary to the *Draft Articles on the Law of the Non-navigational Uses of International Watercourses, Adopted on Second Reading*, in *Report of the International Law Commission on the work of its forty-sixth session, [1994] 2(2)* Y.B. International Law Commission, at 222, Available at [http://untreaty.un.org/ilc/documentation/english/a\\_cn4\\_l493.pdf](http://untreaty.un.org/ilc/documentation/english/a_cn4_l493.pdf)

#### **Q25: Where regional or watercourse agreements have been adopted, is there any added value of the UN Watercourses Convention?**

A25: Yes, particularly where existing agreements have gaps or failings that may pose a serious obstacle to cooperation. The Convention will not supersede any provisions of existing agreements, but will support and supplement them with the Convention’s provisions if significant gaps are identified (Art. 3). For example, in Southern Asia, the Mahakali Treaty in its Articles 7, 8 and 9(1) includes the principles of equitable and reasonable use and no harm; Article 9(1) provides, “the Mahakali River Commission shall be guided by the principles of equality, mutual benefit and no harm to either Party”. This provision is without supplementary definitions, leaving the precise meaning open to interpretation. The more precise factors to determine equitable and reasonable use as outlined in Art 6. of the UN Convention could fill these gaps in interpretation. A recent UNEP assessment notes that 80 percent of the existing agreements are bilateral, even though there may be more states within the basin. In such cases, if all riparians ratified, the Convention would provide an overarching framework for the entire basin.

#### Relevant sources:

- UNDP, *Protecting International Waters/Sustaining Livelihoods* (2004), p.8. available at [http://www.undp.org/gef/documents/publications/intlwaters\\_brochure2004.pdf](http://www.undp.org/gef/documents/publications/intlwaters_brochure2004.pdf)

- UNEP, *Challenges to International Waters: Regional Assessments in a Global Perspective* (2006), p. 35, *available at* [http://www.giwa.net/publications/finalreport/giwa\\_final\\_report.pdf](http://www.giwa.net/publications/finalreport/giwa_final_report.pdf)
- Rieu-Clarke, Alistair. "The Role of Treaties in Building International Watercourse Regimes: A Legal Perspective on Existing Knowledge." *Water Policy* 12, no. 6 (2010): 822-31.
- Dellapenna, J. *Treaties as Instruments for Managing Internationally Shared Water Resources: Restricted Sovereignty vs. Community of Property*, 26 Case-W. Res. J. Int'l & Comp. L. 27 (1994).

**Q26: What is the relation between the UN Watercourses Convention and the UNECE Water Convention?**

A26: In 1992, the states that are members of the UN Economic Commission for Europe adopted the *Convention on the Protection and Use of Transboundary Watercourses and International Lakes (UNECE Water Convention)*. This Convention is already in force and promotes joint management and conservation of freshwater ecosystems in Europe and neighboring countries. In 2003, its parties adopted unanimously amendments opening the UNECE Water Convention for accession by non-UNECE member states, subject to approval by the Meeting of the Parties.

The UN Watercourses Convention and the UNECE Water Convention are *not* mutually exclusive. Each has a crucial role to play to improve freshwater governance and support interstate cooperation. Unlike the UN Watercourses Convention, the UNECE Water Convention was negotiated exclusively among UNECE Member States. It is thus expected that third states would resist becoming parties to the UNECE Water Convention. In addition, some countries may be reluctant to accept, and unable to comply with, the stricter, more detailed provisions of the UNECE Water Convention. In this sense, ratifying and implementing the UN Watercourses Convention is a first, but extremely important, step, as states prepare to accede to the UNECE Water Convention at a later stage of their cooperation process.

When both the UN Watercourses Convention and the 2003 amendments to the UNECE Water Convention are in effect, it will be important for parties to consider how to coordinate and harmonize implementation, for example, through back-to-back meetings, joint programs of work, cooperation agreements, etc.

Relevant Sources

- UNECE. "The Relationship between the 1992 UNECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes and the 1997 UN Convention on the Law of the Non Navigational Uses of International Watercourse". Geneva: UNECE, 2000. *Available at* <http://www.unece.org/env/water/publications/documents/conventiontotal.pdf>.
- Rieu-Clarke, Alistair, "The Role and Relevance of the UN Convention on the Law of the Non-Navigational Uses of International Watercourses to the EU and Its Member States." *The British Yearbook of International Law* 78, (2008): 389-428. See also <http://www.dundee.ac.uk/media/dundeewebsite/water/documents/unwc/Role%20and%20Relevance.pdf>

**Q27: Would the Convention have a significant impact on conflicts over water?**

A27: The Convention would first serve as a conflict prevention tool, and second, as a dispute resolution and procedure mechanism. The Convention aims to prevent conflict between watercourse states by: (1) addressing legal weaknesses; (2) providing coherent policy guidance; (3) facilitating the work of bilateral and multilateral institutions; (4) fostering and preserving political stability; (5)

establishing a fair level playing field among weaker and stronger riparian states by setting minimum substantive and procedural rules to be followed; (6) incorporating social and environmental considerations into the management and development of international watercourses; (7) providing for regular information exchange and mandatory consultations in various situations, such as planned measures and occurrence of transboundary harm; and (8) encouraging cooperation among all states within a basin.

The Convention serves as a dispute resolution tool by establishing time-bound procedures to which state can resort in the absence of applicable agreements.

#### Relevant Sources

- International Bureau of the Permanent Court of Arbitration, ed. *Resolution of International Water Dispute : Papers Emanating from the Sixth PCA International Law Seminar, November 8, 2002*, The Permanent Court of Arbitration/Peace Palace Papers. London: Kluwer Law International, 2003.
- Dinar, A, et. al, *Bridges over Water - Understanding Transboundary Water Conflict, Negotiation and Cooperation* (World Scientific Series on Energy and Resource Economics, New Jersey: World Scientific, 2007).
- Wouters, Patricia and Moynihan, Ruby. 'Water Security, Legal Frameworks and the UN Convention' in Rieu-Clarke, Alistair and Loures, Flavia Roches. *The UN Watercourses Convention in force: Strengthening international law for transboundary water management*, Earthscan, Forthcoming 2011.

#### **Q28: What are the Convention's dispute settlement mechanisms?**

A28: Article 33 of the Convention offers mechanisms for dispute settlement between watercourse States, including negotiation, good offices, mediation, conciliation, joint watercourse institutions or submission of the dispute to arbitration or to the International Court of Justice. These procedures require the consent of all parties concerned. Where these methods are unsuccessful, any watercourse State that is a party to the dispute can unilaterally invoke the compulsory fact-finding procedure provided for under Art. 33 (3)-(9). The compulsory *fact finding* provision contained in the Convention is considered by some to be more akin to *compulsory conciliation*, since the fact-finding commission's task includes providing 'such recommendation as it deems *appropriate for an equitable solution* of the dispute' (Art. 33 (8)). The recommendations of the commission are not binding on States, which, however, are required to consider in good faith.

#### Relevant Sources

- Sixth Report on the Law of Non-navigational Uses of International Watercourses, S.C. McCaffrey, UN Doc. A/CN.4/427, *Annex II*, in [1990] 11(1) Y.B.I.L.C., p 66-75.
- Wouters, P. "The International Law of Watercourses: New Dimensions." In *Collected Courses of the Xiamen Academy of International Law*, Volume 3, edited by Xiamen Academy of International Law, The Netherlands: Brill Academic, Forthcoming 2011, at 404.

#### **Q29: What is the Convention's role beyond codifying customary law already binding on states?**

A29: Although countries may accept the customary legal status of the principle of equitable and reasonable utilization and the no-harm rule, this does not mean that all states share the same interpretation of these norms' scope, actual meaning, how they relate to each other, and, ultimately,

how they should be implemented in a harmonious manner. The Convention's role in this instance is to provide common ground for interpretation, arrived at after exhaustive discussions. The existence of a minimum standard to be followed by all countries would make them a priori aware of their general rights and obligations. A clearer status of the applicable law through codification is crucial to prevent disputes and thus promotes stability and consistency among riparians. In other words, the Convention does not simply codify customary law, but also clarifies the content and scope of specific rules and principles.

Furthermore, the role of the ILC in drafting the Convention was not only the codification of existing customary international law, but also its progressive development and the crystallization of emerging norms (e.g. ecosystem protection). In addition, the Convention incorporates the rights and obligations that support substantive rules and principles, i.e., procedural rules covering issues like the exchange of data and information, consultations and negotiations, and dispute settlement. Finally, since states have to implement its provisions in their entirety, the Convention serves as an overarching umbrella addressing the multitude of issues arising out of present and future conflicts over water and preventing the parties from following a 'selective' approach regarding the management of international watercourses.

Additionally, in the absence of an effective global framework laying out minimum standards of cooperation, weaker states are in a disadvantageous position to negotiate watercourse agreements with their more powerful counterparts. Furthermore, the ambiguities and abstractness of customary law make it harder for the international community or affected individuals to question joint governmental decisions. This becomes relevant where all co-riparians agree on the implementation of a certain project by one state based on tradeoffs regarding future river development elsewhere or on the sharing of benefits deriving from such a project. In such case, the Convention, more than custom, would inform an analysis of whether the decision conforms to minimum duties related to environmental protection and human rights.

#### Relevant Sources

- Rieu-Clarke, Alistair, and Flavia Rocha Loures. "Still Not in Force: Should States Support the 1997 Un Watercourses Convention?" *Review of European Community & International Environmental Law* 18, no. 2 (2009): 185-97.
- Arevalo, Luis Barrionuevo. "The Work of the International Law Commission in the Field of International Environmental Law." *Boston College Environmental Affairs Law Review* 32, no. 3 (2005): 498-501. Available at: <http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1122&context=earl&sei-redir=1#search=%22The+Work+of+the+International+Law+Commission+on+Shared+Natural+Resources%22>

**Q30: Article 36(1) stipulates that, “[t]he present Convention shall enter into force on the ninetieth day following the date of deposit of the thirty-fifth instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations.” What is the difference between the terms “ratification”, “acceptance”, “approval” and “accession”? The Convention is now closed for signature – what does this mean for states who did not sign and now want to become a contracting party?**

A30: The consent of the states parties to a treaty is a vital factor, since states may (in the absence of a rule being also one of customary law) be bound only by their consent. A state can express this consent in several ways which are detailed below. The Convention was opened for signature by all States and by regional economic integration organizations from 21 May 1997 until 20 May 2000 and is now closed for signature and therefore only those states who signed the Convention can now ratify it.

States who did not sign the Convention can now become contracting parties by accession to the Convention. The differences between these methods are described below, however the resulting legal effect and obligations for those states who become contracting parties by ratification or accession are the same.

*Ratification:* Ratification defines the international act by which a state indicates its consent to be bound to a treaty, and usually follows signature. In the case of multilateral treaties, the usual procedure is for the depositary (here the Secretary-General of the UN) to collect the ratifications of all states and keeping the parties informed about the status. The institution of ratification allows states the necessary time-frame to seek the approval for the treaty required by national law (constitutional control) and to enact relevant legislation to give domestic effect to the treaty (Arts. 2(1)(b), 14(1) and 16 of the 1969 Vienna Convention on the Law of Treaties).

*Acceptance/approval:* The instruments of acceptance or approval have the same legal effect as ratification and consequently express the consent of a state to be bound by a treaty. It is used instead of ratification when constitutional law (national level) does not require the treaty to be ratified by the head of state. (Arts. 2(1)(b), 14(2) and 16 of the 1969 Vienna Convention on the Law of Treaties).

*Accession:* Accession is the method whereby a state, which has not taken part in the negotiations or signed the treaty, subsequently expresses its consent to become a party to that treaty. Generally, accessions occur once a treaty is closed for signature or after its entry into force. (Arts. 2(1)(b), 15 and 16 of the 1969 Vienna Convention on the Law of Treaties).

#### Relevant sources:

- Articles 2(1)(b), 14, 15 and 16 of the 1969 Vienna Convention on the Law of Treaties, 1155 UNTS 331.
- Aust, Anthony. *Modern Treaty Law and Practice*. 2nd ed. Cambridge: Cambridge University Press, 2007, at 103-113.
- Shaw, Malcolm Nathan. *International Law*. 6th ed. Cambridge: Cambridge University Press, 2008, at 910-913.

## ANNEX I

### List of Contributors & Quick Reference List

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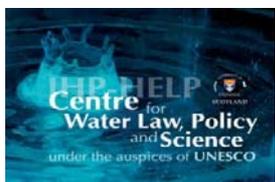
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- Progressive development and codification of the rules of international law relating to international watercourses, GA Res. 2669(XXV) (21 July 1971). Available at [http://www.un.org/ga/search/view\\_doc.asp?symbol=A/Res/2669%28XXV%29](http://www.un.org/ga/search/view_doc.asp?symbol=A/Res/2669%28XXV%29)
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