

INTERNATIONAL WATER LAW FOR THE 21ST CENTURY: THE CONTRIBUTION OF THE U.N. CONVENTION *

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ABSTRACT

In May, 1997, the United Nations General Assembly adopted the Convention on the Law of the Non-Navigational Uses of International Watercourses, a treaty that largely codifies the general principles of international water law. While not entirely free from controversy, the Convention has already been influential and will doubtless continue to be well into the 21st century. This paper provides an overview of the Convention, comments on some of its salient provisions, and considers its future influence.

INTRODUCTION

The Convention on the Law of the Non-Navigational Uses of International Watercourses was adopted by the United Nations General Assembly on May 21, 1997.¹ It had been negotiated in a specially convened “Working Group of the Whole” of the Sixth (Legal) Committee of the General Assembly, on the basis of draft articles adopted by the UN International Law Commission (ILC)² after some twenty years work on the project.³ The Convention is a general, framework agreement containing thirty-seven articles, which are divided into seven parts, and an Annex on Arbitration. Its provenance can be traced to a resolution adopted in 1970 by the UN General Assembly calling upon the ILC to study the law of international watercourses with a view to its progressive development and codification.⁴ This short paper will focus on provisions of the Convention that are of particular significance.

OVERVIEW OF THE CONVENTION

The hydrologic scope of the Convention is determined by its definition of the term “international watercourse.” It

is natural to think of this expression as being synonymous with “international river,” but as used in the Convention it is in fact much broader. The definition takes into account that most freshwater is actually underground, and that most of this groundwater is related to, or interacts with, surface water. Thus, for example, pollution of surface water can contaminate groundwater, and vice versa, just as withdrawals of groundwater can affect surface water flows. Article 2 therefore defines “watercourse” as “a system of surface waters and groundwaters constituting by virtue of their physical relationship a unitary whole” This definition calls attention to the interrelationship between all parts of the system of surface and underground waters that make up an international watercourse. Thus it should be clear that an effect on one part of the system will generally be transmitted to other parts. Let us assume, for example, that an aquifer which interacts with a surface stream is intersected by the border between states A and B. Withdrawals of groundwater from that aquifer in country A can affect groundwater levels in state B. They may also affect surface flows in state B to the extent that the aquifer contributes to those flows. Despite the hydrologic futility of excluding this essential part of a watercourse system from legal regulation, the inclusion of groundwater was cited by two states as a reason for their abstentions from the vote on the Convention.⁵

There is another point concerning groundwater, which constitutes by far the largest source of freshwater,⁶ excluding polar ice caps and glaciers – although these are melting at alarming rates. The point is that an important source of groundwater is not covered, at least expressly, by the Convention. That source is so-called “confined” groundwater, also known in some regions as “fossil water.” This is groundwater that does not interact with surface water. It does not receive contributions from the

* This paper draws upon a paper delivered at the Stegner Center’s Fourth Annual Symposium, Where the Rivers Flow: Sharing Watersheds and Boundaries University of Utah, College of Law Salt Lake City, April 16, 1999; “The 1997 United Nations Convention on International Watercourses: Prospects and Pitfalls,” paper delivered at World Bank Seminar on International Watercourses, November, 1997; and *The 1997 United Nations Convention on International Watercourses*, 92 AJIL 97 (1998) (with Mpazi Sinjela).

surface nor does it contribute to surface water flows. While relatively rare, it is an important source of water in some arid regions and is shared by two or more states in certain of them. It is these latter cases, where confined groundwater is intersected by a boundary, that fall outside the Convention's definition of "international watercourse."

The ILC did not see fit to include this form of groundwater within the scope of its draft articles. Instead, at the conclusion of its work on international watercourses it adopted a resolution on confined transboundary groundwater, in which it recommended that states apply the principles contained in its draft articles to this form of groundwater.⁷ The Convention is entirely silent on the matter, the Working Group having accepted the ILC's definition of "international watercourse." This raises the question whether, despite its exclusion from the Convention, confined transboundary groundwater is nevertheless governed by the same fundamental principles – such as equitable utilization and protection against pollution – that apply to international watercourses as defined in the Convention. It seems reasonable to conclude that the same basic principles do apply to this form of groundwater, although the degree of diligence required in the protection of confined groundwater would probably be much higher, given the fact that any pollutants introduced into such aquifers would not escape except through withdrawal of water by humans. The Commission may have been overly cautious in deciding not to include confined transboundary ground water in its draft, even though it came very close to doing so in its resolution on the subject.

The core of the Convention is contained in Part II, General Principles. Part II is introduced by what is perhaps the Convention's most important provision: Article 5, Equitable and Reasonable Utilization and Participation. This article sets forth what many regard as the cornerstone of the law of international watercourses – namely, the principle that a state must use an international watercourse in a manner that is equitable and reasonable vis-à-vis other states that share it. The converse is, of course, also true: States have a right to an equitable share of the uses and benefits of an international watercourse.⁸ The International Court of Justice (ICJ - the "World Court"), in its recent decision in the *Gabčíkovo-Nagymaros* case, confirmed the centrality of this principle when it emphasized the importance of operating the project involved in the case "in an equitable and reasonable manner."⁹ According to Article 5, to be equitable and reasonable the use must also be consistent

with adequate *protection* of the watercourse from pollution and other forms of degradation.

But how does upstream State A, for example, know whether its use of an international watercourse is equitable and reasonable vis-à-vis downstream States B and C? The answer is, this may be a very difficult thing for State A to determine, in the absence of a joint mechanism with States B and C, or a very close working relationship with them. Article 6 of the Convention sets forth a non-exhaustive list of factors to be taken into account in making the determination, and Article 9 requires riparian states to exchange data and information concerning the condition of the watercourse on a regular basis. The Article 6 factors will doubtless be of assistance to State A in making the equitable utilization determination, as will the Article 9 data and information – indeed, it would be nearly impossible for a state to ensure that its use was equitable without data and information from other riparian states. But the principle of equitable utilization is much better suited to implementation through very close cooperation between the states concerned, ideally through a joint commission, or by a court or other third party. After all, the doctrine largely originated in the equitable apportionment decisions of the United States (U.S.) Supreme Court in disputes between U.S. states. This having been said, however, it seems clear that there is no other general principle that can take into account adequately the wide spectrum of factors that may come into play with regard to international watercourses throughout the world.

Thus it is crucial that riparian states cooperate with a view to achieving a regime of equitable and reasonable utilization and participation for an international watercourse system as a whole. Article 8 of the Convention lays down a general obligation to cooperate "in order to attain optimal utilization and adequate protection of an international watercourse." It is interesting to note that the delegations negotiating the Convention attached such significance to cooperation through joint mechanisms that they added a paragraph to Article 8 calling for states to "consider the establishment of [such] mechanisms or commissions"

Returning for a moment to Article 5, that provision also introduces the new concept of equitable participation. The basic idea behind this concept is that in order to achieve a regime of equitable and reasonable utilization, riparian states must often cooperate with each other by taking affirmative steps, individually or jointly, with regard to the watercourse. While this idea is, in effect, a feature of some well-developed cooperative relationships

between river basin countries, it had not been reflected as such in attempts to codify the law in this field until the International Law Commission included it in Article 5. Its acceptance as a part of the Convention is welcome, because it helps to convey the message that a regime of equitable utilization of an international watercourse system, together with the protection and preservation of its ecosystems, cannot be achieved solely through individual action by each riparian state acting in isolation; again, affirmative cooperation will often be necessary. The World Court recognized the utility of this concept, as well as the salience of the Convention itself, when it quoted the entire paragraph of Article 5 that sets forth the obligation of equitable participation in its judgment in the *Gabčíkovo-Nagymaros* case.¹⁰

The most controversial provision of the entire Convention was the obligation not to cause significant harm, set forth in Article 7. At first blush it seems obvious that one state should not cause significant harm to another state, whether through its use of shared water resources or otherwise. But, at least in the case of international watercourses, it is not so simple. Suppose, for example, that – as is often the case – upstream State A historically has not developed its water resources significantly because of its mountainous terrain. The topography of the downstream states on the watercourse, B and C, is flatter, and they have used the watercourse extensively for irrigation for centuries, if not millennia. State A now wishes to develop its water resources for hydroelectric and agricultural purposes. States B and C cry foul, on the ground that this would significantly harm their established uses. How should the positions of State A, on the one hand, and States B and C, on the other – neither of which seems unreasonable on its face – be reconciled?

This question is at the heart of the controversy over Article 7 and its relationship with Article 5 on equitable and reasonable utilization. Much depends upon how the so-called “no significant harm” obligation should be formulated: The International Law Commission's first draft of the article, adopted in 1991, was the essence of simplicity: “Watercourse States shall utilize an international watercourse in such a way as not to cause appreciable harm to other watercourse States.” The Commission's final draft, adopted in 1994, introduced considerable flexibility into the text, in two principal respects. First, it expressly made the obligation one of “due diligence”: “Watercourse States shall *exercise due diligence* to utilize an international watercourse in such a way as not to cause significant harm . . . [etc.]” This made it clear beyond any doubt that the obligation was not in any way absolute, but rather one of due diligence, or best efforts under the circumstances. The second way

in which flexibility was introduced was by adding a lengthy second paragraph, which converted the “no-harm” obligation into what the ILC called “a *process* aimed at avoiding significant harm as far as possible while reaching an equitable result in each concrete case.”¹¹

The UN Working Group that negotiated the Convention made several changes to the ILC's text of Article 7. While scholars will undoubtedly debate the significance of the changes, it does not appear that they change the substance of the article. The deletion of the reference to “due diligence” from paragraph 1 and its replacement with the phrase “take all appropriate measures” is merely saying the same thing in different words. The real fight was over the second paragraph, which squarely raised the issue whether equitable utilization should prevail over the “no-harm” obligation, or vice-versa. The problem may be illustrated using the hypothetical fact situation set out above. If equitable utilization is the controlling legal principle, upstream State A may develop its water resources in a manner that is equitable and reasonable vis-à-vis downstream States B and C, even though that development would cause some significant harm to their established uses. If, on the other hand, the obligation not to cause significant harm is dominant, State A could engage in no development, no matter how equitable and reasonable, that would cause States B and C significant harm, absent their agreement.

To some delegations at the UN negotiations, the ILC's final text – which represents an effort to strike a balance between the two principles – favored equitable utilization too heavily. They argued for a text that more clearly gave precedence to the “no-harm” principle. Other delegations took the opposite position. In their view the basic rule was equitable utilization; at most, any harm to another riparian state should merely be one factor to be taken into account in determining whether the harming state's use was equitable. Perhaps not surprisingly, the compromise formula arrived at in the UN negotiations is a bit like a buffet: there is something in it for everyone. No matter whether one adheres to the equitable utilization or the no-harm school, one can claim at least partial victory. However, close examination of the text of paragraph 2 of Article 7 indicates that it gives precedence to equitable utilization over the no-harm doctrine. The very existence of a second paragraph implicitly acknowledging that harm may be caused without engaging the harming state's responsibility (liability) supports this conclusion. Also indicating a recognition that significant harm may have to be tolerated by a riparian state are the numerous mitigating clauses in paragraph 2. Finally, the proposition that the “no-harm” rule does not enjoy

inherent preeminence is supported by Article 10 of the Convention, which provides that any conflict between uses of an international watercourse is to be resolved “with reference to articles 5 to 7” This would presumably mean that if State A's hydroelectric use conflicts with State B's agricultural use, the conflict is not to be resolved solely by applying the “no-harm” rule of Article 7, but rather through reference to the “package” of articles setting forth the principles of both equitable utilization and “no-harm.”

But in actual disputes, it seems probable that the facts and circumstances of each case, rather than any *a priori* rule, will ultimately be the key determinants of the rights and obligations of the parties. Difficult cases, of which there are bound to be many in the future, are more likely to be resolved by cooperation and compromise, than by rigid insistence on rules of law. This is one of the lessons of the World Court's judgment in the *Gabčíkovo-Nagymaros* case. It is also a proposition that is supported by the fact that many of the next century's international water problems are likely to arise in developing countries, whose water projects will usually require financing by a donor community that will insist on win-win solutions produced through cooperation and compromise rather than zero-sum solutions that may result from mechanical application of rules of law.

Before leaving the “General Principles” chapter of the Convention, an additional word about Article 10 is in order. Originally conceived as a provision that would clearly specify that navigational uses no longer enjoy inherent priority over non-navigational ones – if they ever did – this article now has a much richer texture. In particular, paragraph 2 provides that a conflict between different kinds of uses of an international watercourse is to be “resolved with reference to articles 5 to 7, with special regard being given to the requirements of vital human needs.” The expression “vital human needs” was discussed at some length in the UN negotiations. The final text maintains the ILC's language but a “statement of understanding” of the Working Group, which accompanies the text of the Convention, indicates that: “In determining 'vital human needs,' special attention is to be paid to providing sufficient water to sustain human life, including both drinking water and water required for production of food in order to prevent starvation.” While on its face this proposition seems unassailable, some countries may fear that the concept of “vital human needs” could become a loophole, enabling a state to argue that its use should prevail on this ground when in fact it was highly debatable whether vital human needs were involved at all. But since the “statement of understanding” is based on the ILC's commentary to the

article, which would in any event be relevant to an interpretation of paragraph 2, the “statement” probably adds no new problems.

Part III of the Convention, Planned Measures, contains a set of procedures to be followed in relation to a new activity in one state that may have a significant adverse effect on other states sharing an international watercourse. The fact that the basic obligation to provide prior notification of such changes was accepted as a part of the Convention by most delegations¹² is, in itself, important: it provides further evidence that the international community as a whole emphatically rejects the notion that a state has unfettered discretion to do as it alone wishes with the portion of an international watercourse within its territory.¹³

The system envisaged in Part III essentially provides that a state contemplating a new use or a change in an existing use of an international watercourse that may have a significant adverse effect on other riparian states must provide prior notification to the potentially affected states. Those states are then given six months within which to respond. If they object to the planned use, they are to enter into discussions with the notifying state “with a view to arriving at an equitable resolution of the situation.” This process could take twelve months or longer. If the matter is not resolved to the satisfaction of any of the states concerned, the dispute settlement procedures of Article 33 of the Convention would be applicable.

Part IV of the Convention entitled Protection, Preservation, and Management, contains what might be called the “environmental” provisions of the Convention. While a variety of proposals were made in the UN negotiations for the strengthening of these provisions, in the end only minor changes were made to the ILC's text.

Article 20, Protection and Preservation of Ecosystems, is a simple but potentially quite powerful provision. It says that riparian states have an obligation to “protect and preserve the ecosystems of international watercourses.” Like Article 192 of the United Nations Convention on the Law of the Sea, on which it is modeled, this obligation is not qualified. For example, it does not say that the ecosystems must be protected only if failure to do so may harm another state sharing the watercourse. Since the “ecosystems” of international watercourses include land areas contiguous to them, Article 20 requires that such land areas be maintained in such a way that the watercourses they border are not harmed by, for example, excessive agricultural runoff or other forms of non-point

source pollution. It is likely that this is not an absolute obligation, however.¹⁴ That is, it is probably an obligation to exercise due diligence to protect and preserve watercourse ecosystems. This standard takes into account the sensitivity of the ecosystem as well as the capability of the state involved.

Pollution of international watercourses is addressed specifically in Article 21, Prevention, Reduction and Control of Pollution. That article uses the standard formula – also employed in Article 194 of the Law of the Sea Convention – that riparian states must “prevent, reduce and control” pollution of international watercourses. Unlike Article 20, however, this obligation is qualified. It is triggered only if the pollution “may cause significant harm to other watercourse States or to their environment” Of course, it is at least arguable that pollution that would harm only the environment of the state of origin would have to be controlled pursuant to Article 20.

Article 22 requires riparian states to prevent the introduction of alien or new species into international watercourses. The ecological and economic havoc that such species can wreak is all too well illustrated by the accidental introduction of the zebra mussel into the waters of the Great Lakes region. The mollusk, which arrived in the ballast water of a ship from Europe in the mid-1980s, is responsible for millions of dollars of damage to shipping and other economic activities and threatens potentially disastrous biological harm as well. In a more recent case, in October 1998, California state Fish and Game authorities poisoned Lake Davis to rid it of a voracious introduced species, the northern pike, even though the lake supplies drinking water for surrounding communities. Ironically, the pike survived while native trout were eliminated from the lake. Like Article 21, the obligation contained in Article 22 applies only where significant harm will be caused to other riparian states, but it would seem that this would often be the case given the propensity of non-native species to proliferate and spread.

Article 23 addresses, in a very general way, the problem of marine pollution from land-based sources. Like Article 20, the obligation applies whether or not other states are injured. Article 23 actually goes beyond the problem of pollution, however. Since it requires riparian states to “protect and preserve the marine environment,” it would presumably apply also to such things as the protection of anadromous species and coral reefs.

In a “statement of understanding” the Working Group indicated that Articles 21 to 23 “impose a due diligence

standard on watercourse States.” It is interesting that this statement does not cover Article 20. But, as indicated earlier, the obligation contained in Article 20 is probably also one of due diligence.

“Management” of international watercourses is addressed in Article 24, which provides that states sharing freshwater resources are to enter into consultations, at the request of any of them, concerning the joint management of those resources. This provision is believed by some specialists to be too modest in view of the importance of joint commissions in the management, protection, and development of international watercourses. But while riparians of a particular river may always decide to establish a joint management mechanism, neither the ILC nor the Working Group believed it was appropriate to require the formation of such bodies in a general, framework instrument like the Convention. While this conclusion seems correct, the article could have gone somewhat farther in indicating the concrete forms that institutionalized cooperation between riparian states might take. But some states – and indeed some members of the ILC – were somewhat uncomfortable even with the article as it presently stands, let alone a more specific provision.

The proper construction and maintenance of dams and similar works is dealt with in Article 26, Installations. Since a faulty dam may pose great danger to downstream states, this article requires that a state in whose territory a dam is located maintain it and protect it from forces that may result in harm to other riparian states.

Part V is entitled “Harmful Conditions and Emergency Situations.” It contains one article on each of those topics. The expression “harmful conditions” covers a wide variety of phenomena, such as water-borne diseases, ice floes, siltation, and erosion. Article 27 requires riparian states to take “all appropriate measures” to prevent or mitigate such conditions, where they may be harmful to other states sharing the watercourse. Article 28 deals with “emergency situations.” This term is defined broadly to include both natural phenomena such as floods and those that are caused by humans, such as chemical spills. A state within whose territory such an emergency originates must notify other potentially affected states as well as competent international organizations. It must also take “all practicable measures . . . to prevent, mitigate, and eliminate harmful effects of the emergency.”

Part VI, Miscellaneous Provisions, contains five articles, two of which are of interest for present purposes. Article 32 deals essentially with private remedies for damage

occasioned through the medium of an international watercourse. Entitled “Non-discrimination,” its intent is to ensure equality of access by injured or threatened parties to judicial or administrative procedures in the state of origin of the harm, regardless of the intervening international boundary. The article provoked controversy in the UN negotiations including a proposal that it be deleted. Evidently not all states are yet comfortable with the idea of granting private persons from other (usually neighboring) countries nondiscriminatory access to their judicial and administrative procedures relating to transboundary harm or the threat thereof.

Article 33 on the settlement of disputes was also somewhat controversial, principally because it provides for compulsory fact-finding at the request of any party to a dispute. Any compulsory dispute-settlement procedure is bound to draw strong objection from certain countries,¹⁵ even if all that is compulsory is fact-finding, and even if that only becomes compulsory after negotiations have failed to settle the dispute within six months. In this case their ranks were swelled somewhat by a few upstream states,¹⁶ who were evidently reluctant to surrender whatever leverage their position on an international watercourse confers upon them. Yet facts are of critical significance with regard to the core obligations of the Convention. For example, how can states determine whether their utilization is “equitable and reasonable” under article 5 without an agreed factual basis? And how can a state establish that it has sustained significant harm if the state that is alleged to have caused the harm denies that it has caused it or that any harm has been suffered? The importance of facts in this field is no doubt what led the ILC to depart from its usual practice by including an article on dispute settlement in its draft. Article 33 also provides for states to declare upon becoming parties to the Convention that they accept as compulsory the submission of disputes to the International Court of Justice or to arbitration in accordance with procedures set out in the Annex to the Convention.

TO WHAT EXTENT DOES THE CONVENTION REFLECT INTERNATIONAL LAW?

The Convention would appear to confirm the status in general, or customary international law of three principles: equitable utilization, prevention of significant harm, and prior notification of planned measures. Each of these principles has substantial independent support, as demonstrated in the ILC’s commentary and in the reports of the Commission’s respective special rapporteurs. But the fact that the principles were accepted by a diplomatic conference open to universal participation leaves little doubt as to their status as generally recognized principles

of international law. It is equally clear, however, that the relationship of the equitable utilization and no-harm principles remains controversial. The resolution of this question in the Convention, while not a model of clarity, strongly suggests that the overriding principle is that of equitable utilization. The World Court’s judgment in the *Gabčikovo-Nagymaros* case would appear to support this conclusion. In its judgment, the Court referred on several occasions to the principle of equitable utilization (e.g., to Hungary’s “basic right to an equitable and reasonable sharing of the resources of an international watercourse”).¹⁷ On the other hand, the Court did not once mention the no-harm principle (except in relation to environmental harm generally), despite its having been relied upon heavily by Hungary.

In addition to these principles, the Convention reflects what is probably an emerging principle of customary law in the field of shared freshwater resources; namely, that states must protect the ecosystems of international watercourses. Modern agreements increasingly provide for such protection, reflecting a recognition on the part of states of the importance of safeguarding the integrity of freshwater ecosystems. The protection called for is broad, encompassing not only the water itself, but also land areas that are related to, and influence the health of, aquatic ecosystems. Thus it is important not only to prevent, reduce, and control the pollution of international watercourses, but also to preserve riparian “buffer zones” so that freshwater species and the water itself is not degraded by activities on the land.

OUTLOOK

Ratification of the Convention is proceeding slowly. Thirty-five ratifications are necessary for the agreement to enter into force as to the states that have ratified it. However, even if the Convention never enters into force, it is likely that it will still be of significant value for several reasons, some of which have already been alluded to. First, it was based upon, and hews closely to a draft prepared by the International Law Commission (ILC), the United Nations body responsible for the “progressive development of international law and its codification.”¹⁸ As is its practice, the ILC did not indicate which of the provisions codify the law (i.e., set forth existing rules) and which progressively develop it. But it seems clear that the most important elements of the Convention – equitable utilization, prevention of harm, prior notification – are, in large measure, codifications of existing norms. That the Working Group did not fundamentally alter the approach of the International Law Commission betokens general satisfaction with the ILC’s

efforts at codification and progressive development of the law in this field. The Report of the Working Group to the General Assembly notes: "Throughout the elaboration of the draft Convention, reference had been made to the commentaries to the draft articles prepared by the International Law Commission to clarify the contents of the articles."¹⁹ The Court in the *Gabčíkovo-Nagyymaros* case cited the famous passage in the *River Oder* judgment concerning the "community of interests" of states in a navigable river,²⁰ then said:

"Modern development of international law has strengthened this principle for non-navigational uses of international watercourses as well, as evidenced by the adoption of the Convention of 21 May 1997 on the Law of the Non-Navigational Uses of International Watercourses by the United Nations General Assembly."²¹

In this fascinating sentence, the Court refers to the Convention as "evidence" of the principle of the "perfect equality of all riparian States," notwithstanding that the Convention had not at that time been ratified by a single state. Even the provisions of the Convention that do not reflect current law are likely to give rise to expectations of behavior on the part of riparian states that may, over time,²² ripen into international obligations.

Second, the Convention will be of value even if it does not enter into force because it was negotiated in a forum in which virtually any interested state could participate. It is the only convention of a universal character on international watercourses. The convention was adopted by a weighty majority of countries, with only three negative votes, indicating broad agreement in the international community on the general principles governing the non-navigational uses of international watercourses. These considerations mean that if the Convention does enter into force, it will have significant bearing upon controversies between states, one or more of which is not a party to the Convention. In addition, the Convention may be of value in interpreting other general or specific agreements concerning international watercourses that are binding on the parties to a controversy, whether or not the Convention is itself binding on those parties.²³

Third, even before the Convention's adoption, the ILC's draft articles on which it was based had influenced the drafting of specific agreements. These include the 1995 Protocol on Shared Watercourse Systems in the Southern African Development Community (SADC) Region,²⁴ the 1991 Protocol on Common Water Resources concluded between Argentina and Chile,²⁵ and the 1995 Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin.²⁶ It is likely that with the adoption of the Convention, states negotiating future

agreements will resort to its provisions as a starting point.²⁷

Thus, in the words of Ambassador Tello of Mexico, introducing the draft General Assembly resolution containing the Convention, "This instrument undoubtedly marks an important step in the progressive development and codification of international law . . ."²⁸ It does not go as far as it might have in some areas,²⁹ and goes farther than some states would have liked in others.³⁰ The sponsors of the resolution containing the Convention declared that they were "convinced" that it "will contribute to the equitable and reasonable use of transboundary water resources and their ecosystems, as well as to their preservation, to the benefit of current and future generations," and that it "will contribute to enhancing cooperation and communication among riparian States of international watercourses . . ."³¹ In its resolution first calling for negotiation of a convention, the General Assembly declared its conviction "that successful codification and progressive development of the rules of international law governing the non-navigational uses of international watercourses would assist in promoting and implementing the purposes and principles set forth in Articles 1 and 2 of the [UN] Charter."³² Now that the work has been completed, it seems fair to conclude that the Convention will indeed assist in promoting and implementing those purposes and principles.

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ENDNOTES

¹ The Convention is annexed to U.N. G.A. Res. 51/229, 21 May 1997, adopted by a vote of 103 for and 3 against, with 27 abstentions; reprinted in 36 ILM 700 (1997). See generally Attila Tanzi, *Codifying the Minimum Standards of the Law of International Watercourses: Remarks on Part One and a Half*, 21 NAT. RES. F. 109 (1997); John

Crook & Stephen McCaffrey, *The United Nations Starts Work on a Watercourses Convention*, 91 AJIL 374 (1997); and McCaffrey & Sinjela, *supra* note *.

² REPORT OF THE INTERNATIONAL LAW COMMISSION ON THE WORK OF ITS FORTY-SIXTH SESSION, U.N. GAOR, 49th Sess., Supp. No. 10, p. 197, U.N. Doc. A/49/10 (1994) (hereafter referred to as 1994 ILC Report). See Stephen McCaffrey, *The International Law Commission Adopts Draft Articles on International Watercourses*, 89 AJIL 395 (1995).

³ The ILC included the topic in its general program of work in 1971. It began study of the topic in 1974 with the establishment of a sub-committee and the appointment of the first of five special rapporteurs. See, e.g., 1985 Y.B. INT'L L. COMM'N, vol. 2, pt. 2, p. 68 (1986).

⁴ UNGA Res. 2669 (XXV) of 8 Dec. 1970.

⁵ Verbatim record, 99th plenary meeting, U.N. General Assembly, 21 May 1997, U.N. Doc. A/51/PV.99, pp. 5 (Pakistan) and 12 (Rwanda) (hereafter Verbatim record).

⁶ See generally Stephen McCaffrey, Seventh Report on the Law of the Non-Navigational Use of International Watercourses, [1991] Y.B. INT'L L. COMM'N, vol. 2, pt. 1, p. 45, U.N. Doc. A/CN.4/SER.A/1991/Add.1 (Part 2).

⁷ 1994 ILC Report, *supra* note 2, at 135.

⁸ See Case concerning the *Gabčíkovo-Nagymaros Project* (Hungary/Slovakia), judgment of 25 Sept. 1997, 1997 ICJ 7, para. 78, p. 51.

⁹ *Ibid.*, para. 150, p. 80.

¹⁰ *Ibid.*, para. 147, p. 80.

¹¹ 1994 ILC Report, *supra* note 2, at 103.

¹² Three that did not were Ethiopia, Rwanda, and Turkey. Verbatim record, *supra* note 5, pp. 4-5 (Turkey), 12 (Rwanda) and 9 (Ethiopia). In explaining its negative vote on the Convention, Turkey stated that Part III introduces a "veto." *Id.*, p. 5. While it is true that the articles provide for a *temporary* suspensive effect upon implementation of measures by the planning state (see Articles 13 and 17), no veto is provided for in Part III.

¹³ The doctrine of "absolute territorial sovereignty," which would support such unfettered discretion, has long

been rejected by the state in which it was invented. See Stephen McCaffrey, *The Harmon Doctrine One Hundred Years Later: Buried, Not Praised*, 36 NAT. RES. J. 725 (1996).

¹⁴ But this is not certain, especially in view of the failure of the Working Group to include Article 20 in the group of articles (21-23) that, according to a "statement of understanding," impose only a due diligence obligation.

¹⁵ E.g., China and India. Verbatim record, *supra* note 5, pp. 7 (China) and 9 (India).

¹⁶ E.g., France, Israel, (effectively upstream on the Jordan) and Rwanda. These states, together with China and India, generally maintained that the principle of free choice of means should have been followed in Article 33. Verbatim record, *supra* note 5, pp. 8 (France), 11 (Israel) and 12 (Rwanda). In a separate vote on Article 33 in the Working Group, the following five countries voted in the negative: China, Colombia, France, India and Turkey. The tally was 33 for, 5 against, with 25 abstentions. See U.N. Doc. A/C.6/51/SR.62, at 10, para. 86 (1997).

¹⁷ 1997 ICJ 7, para. 78, p. 54.

¹⁸ UNITED NATIONS, STATUTE OF THE INTERNATIONAL LAW COMMISSION, Art. 1(1), U.N. Doc. A/CN.4/4/Rev.2 (1982).

¹⁹ Report of the Sixth Committee convening as the Working Group of the Whole, U.N. Doc. A/51/869, at 6 (1997), *reprinted in* 36 I.L.M. 719 (1997).

²⁰ *Territorial Jurisdiction of the International Commission of the River Oder, Judgment No. 16, 1929, P.C.I.J., Series A, No. 23*, p. 27.

²¹ 1997 ICJ 7, para. 85, p. 56.

²² How much time depends upon a number of factors, including the intensity of the practice, its generality, etc. It should also be recalled in this connection that norms may develop as a matter of regional or special, as opposed to universal, custom. See generally ANTHONY D'AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW*, ch. 8, pp. 233, et seq. (1971).

²³ While the intent of the parties at the time of a treaty's conclusion obviously cannot be disregarded, developments in the law may be relevant to the treaty's interpretation. See the statement of the ICJ in the *Namibia* Advisory opinion that where matters involved

“were not static but were by definition evolutionary“, the provision in question would be interpreted “within the framework of the entire legal system prevailing at the time of its interpretation.” *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, 1971 I.C.J. Rep. 16, 31, para. 53 (Advisory Opinion of June 21). The conception of international watercourses, and the law governing them, have without question evolved considerably during the present century. See, e.g., Stephen McCaffrey, *The Evolution of the Law of International Watercourses*, 45 AUSTRIAN J. PUB. & INT'L L., p. 87 (1993).

²⁴ Signed at Maseru, Lesotho, 16 May 1995 (copy on file with the author).

²⁵ INTEGRACIÓN LATINOAMERICANA, REVISTA MENSUAL DEL INTAL, Sept.-Oct. 1997, at 116.

²⁶ 5 Apr. 1995, 34 I.L.M. 864 (1995).

²⁷ The convention has had major influence on the development of the law in other fields as well. This is particularly true of the on-going work by the ilc on international liability for injurious consequences arising out of acts not prohibited by international law. Many of the provisions contained in the draft articles on

prevention of transboundary damage from hazardous activities adopted by the ilc on first reading in 1998 follow closely the provisions of the watercourses convention. See report of the international law commission on the work of its forty-eighth session, pp. 18-69, un gaor, 53d sess., supp. 10, un doc. A/53/10 (1998).

²⁸ Verbatim record, *supra* note 5, p. 2.

²⁹ For example, a significant group of delegations believed its provisions concerning pollution and the ecosystems of international watercourses could have been strengthened, as noted above.

³⁰ For example, the provisions of Part III drew fire from some delegations, as noted earlier. However, they were strongly supported by others. That they survived the negotiation process bespeaks their overall balance.

³¹ Verbatim record, *supra* note 5, p. 2.

³² U.N. G.A. Res. 49/52, 9 Dec. 1994, pmbl, U.N.G.A.O.R., 49th Sess., Supp. No. 49, Vol. 1 (pmbl.), U.N. Doc. A/49/49 (1994).