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The 1997 U.N. Watercourses Convention: Retrospect and Prospect

Stephen C. McCaffrey*

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On May 21, 1997, the United Nations General Assembly adopted the Convention on the Law of the Non-Navigational Uses of International Watercourses (Convention or U.N. Convention).¹ The Convention has not yet entered into force, although the number of ratifications is slowly increasing. The fact that it is not in force some ten years after it was concluded has led some to dub the Convention a failure. This brief essay will examine that charge, in light of the Convention's background, its present effect and its future prospects.

I. RETROSPECT

The U.N. Convention was negotiated in the Sixth (Legal) Committee of the General Assembly, which convened for this purpose as a "Working Group of the Whole," during two sessions in 1996 and 1997.² The negotiations, which were

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1. G.A. Res. 51/229, annex, U.N. Doc. A/RES/51/229 (July 8, 1997); Convention on the Law of the Non-Navigational Uses of Internal Watercourses, May 21, 1997, 36 I.L.M. 700 [hereinafter U.N. Convention]; see generally Lucius Caflisch, *La Convention du 21 May 1997 sur l'Utilisation des Cours d'Eau internationaux à des Fins autre que la Navigation*, XLIII ANN. FR. DROIT INT'L 751 (1997); John R. Crook & Stephen C. McCaffrey, *The United Nations Starts Work on a Watercourses Convention*, 91 AM. J. INT'L L. 374 (1997).

2. The two sessions were held Oct. 7-25, 1996, and Mar. 24-Apr. 4, 1997. Only the first session had originally been envisaged but it proved insufficient to complete the work. For the first session, see G.A. Res. 49/52, ¶ 3, U.N. GAOR, 49th Sess., Supp. No. 49, at 293, U.N. Doc. A/RES/49/52 (Dec. 9, 1994); for the second session, see G.A. Res. 51/206, U.N. Doc. A/RES/51/206 (Dec. 17, 1996).

open to all member states of the United Nations, were based on draft articles prepared by the United Nations International Law Commission (Commission or ILC) over the course of twenty years (1974-1994).³ The Commission's work was guided by a succession of five special rapporteurs: Richard D. Kearney (1974-1976), Stephen M. Schwebel (1977-1981), Jens Evensen (1982-1984), the author (1985-1991), and Robert Rosenstock (1992-1994).⁴

The ILC's work was not linear: different approaches were tested and some were rejected, in part as a result of information received through the annual interaction between the Commission and the U.N. General Assembly. The ILC reports to the General Assembly each year on the work it accomplished at that year's three-month session. The reports are debated in the Sixth (Legal) Committee of the General Assembly and the results of these debates are available to the Commission and its special rapporteurs, who take them into account as appropriate in their further work. Thus the ILC does not work in an ivory tower: even before it adopts a complete set of draft articles the ILC's work has been enriched by exposure to the views of governments expressed each year during the debate on the Commission's report.

The ILC's work on this and other topics considered during the same period was influenced to some extent by the fact that it was largely accomplished during the Soviet era.⁵ Since the Soviet Union had a strict policy against third-party dispute resolution or the like,⁶ the era in which the ILC's draft was formulated had consequences for the acceptability of the use of third parties to perform various functions, including: determining equitable allocations; managing international watercourses; settling disputes.

The cornerstone of the law of international watercourses is the principle of equitable utilization.⁷ The first proposal to the ILC of a draft article on this principle was by Stephen M. Schwebel in 1982, at the end of his special rapporteurship.⁸ Entitled "Determination of equitable use," the proposal relied, as

3. Int'l Law Comm'n, *Report of the International Law Commission on the Work of Its Forty-Sixth Session*, U.N. GAOR, 49th Sess., Supp. No. 10 at 197, U.N. Doc. A/49/10 (May 2-July 22, 1994); see Stephen C. McCaffrey, *The International Law Commission Adopts Draft Articles on International Watercourses*, 89 AM. J. INT'L L. 395, 396-398 (1995).

4. The reports of the special rapporteurs are available in the ILC's Yearbooks, in vol. 2, pt. 1, and on the ILC's website, <http://www.un.org/law/ilc/>.

5. The ILC first adopted a complete set of draft articles on international watercourses in July of 1991, during the last stages of the dissolution of the Soviet Union. See Int'l Law Comm'n, *Report of the International Law Commission on the Work of Its Forty-Third Session*, U.N. GAOR, 46th Sess., Supp. No. 10, at 161, U.N. Doc. A/46/10 (April 29-July 19, 1991). For a symposium on the draft articles as adopted on first reading in 1991, see *Draft Report of the International Law Commission on the Work of Its Forty-Third Session: The Law of the Non-Navigational Uses of International Watercourses*, 3 COLO. J. INT'L ENVTL. L. & POL'Y 1 (1992).

6. This statement applies to the Soviet State but not to its state trading agencies, for example, which regularly entered into agreements with western companies containing arbitration clauses.

7. See generally U.N. Convention, *supra* note 1, art. 5; Int'l Law Ass'n, *Report of the Fifty-Second Conference Held at Helsinki—The Helsinki Rules*, art. IV, 52 ILA, CONFERENCE REPORT 484, 486 (1966); STEPHEN C. McCAFFREY, *THE LAW OF INTERNATIONAL WATERCOURSES* 384 (2nd ed. 2007).

8. Stephen M. Schwebel, *Third Report on the Law of the Non-Navigational Uses of International*

the title indicates, on a “determination” that a particular use of the waters of an international watercourse by a state was equitable.⁹ While such a determination would be reached through consultations among the riparian states concerned, at the request of any of them, the concept of a “determination” was unacceptable to the members of the ILC from the Soviet Union and Eastern Europe,¹⁰ whose governments rejected compulsory third-party dispute settlement in general. The proposal was particularly unacceptable to these members because it provided that should consultations fail to produce a determination of equitable use, any state participating in the consultations could invoke the dispute resolution provisions of the draft articles. Thus, some other way had to be found to express the idea that a state’s uses of an international watercourse should be equitable, and to operationalize this obligation.

It was the East German member of the Commission, Professor Bernhard Graefrath, who proposed referring simply to the obligation to use an international watercourse in an equitable and reasonable manner—i.e., the obligation of equitable utilization. If a riparian state believed that another state’s use was not equitable, all of the normal means of resolving the matter would be available, including consultation, negotiation, mediation, and the other means set forth in Article 33 of the United Nations Charter.¹¹ But in the first instance, each state would determine for itself whether it was using the shared fresh water equitably and reasonably, as is the case with other international obligations. Only if another state cried foul would it be necessary to have recourse to the panoply of means of dealing with the difference of views.

II. THE U.N. CONVENTION

Equitable and reasonable utilization ultimately became the cornerstone principle of the U.N. Convention.¹² Yet in the absence of agreement on a particular use, on a quantitative allocation, on water quality, or the like, it will be difficult for a state to determine whether it is using the shared fresh water equitably vis-à-vis other riparian states. This is because equitable use implies a balance: the state must know what is happening on the other end of the scale, as it were, to ensure its use does not throw the regime out of balance. The Convention addresses this need through obligations of regular exchange of data and information (Article 9) and prior notification of planned measures (Articles 11-19). But experience shows this system does not necessarily work well, or at

Watercourses, [1982] 2 Y.B. Int’l L. Comm’n, 65, 90, U.N. Doc. A/CN.4/SER.A/1982/Add.1 (Part 1).

9. *Id.* at 90 (specifically see section 2 of the proposed article 7).

10. The views of these states were strongly represented on the ILC at the time, by such members as Bernhard Graefrath (East Germany/GDR), Nikolai Ushakov (USSR), and Alexander Yankov (Bulgaria). Members of the ILC, who are elected by the General Assembly, serve in their individual capacities as experts on international law, not as representatives of their governments.

11. U.N. Charter art. 33.

12. *See* U.N. Convention, *supra* note 1, art. 5.

least optimally, without a joint mechanism to facilitate the exchange of information and notification.

Thus, joint management is important to effective implementation of equitable utilization. As special rapporteur, I had proposed a rather detailed provision on the subject of joint institutional management of international watercourses.¹³ In the end, this draft was simplified considerably, in part because one cannot speak of an obligation under customary international law to manage an international watercourse jointly with other riparian states. The ILC's version of the provision on management was adopted without change during the negotiation of the U.N. Convention. Article 24 of the U.N. Convention provides as follows:

Article 24

Management

1. Watercourse States shall, at the request of any of them, enter into consultations concerning the management of an international watercourse, which may include the establishment of a joint management mechanism.
2. For the purposes of this article, "management" refers, in particular, to:
 - (a) Planning the sustainable development of an international watercourse and providing for the implementation of any plans adopted; and
 - (b) otherwise promoting the rational and optimal utilization, protection and control of the watercourse.¹⁴

In fact, joint commissions and other management mechanisms have been a feature of most modern watercourse agreements—e.g.:

- The 1995 Mekong Agreement;¹⁵
- The Senegal River regime (1972 OMVS Convention and later agreements¹⁶);
- The 2002 Framework Agreement on the Sava River Basin;¹⁷

13. See Stephen C. McCaffrey, *Sixth Report on the Law of the Non-Navigational Uses of International Watercourses*, [1990] 2 Y.B. Int'l L. Comm'n, 42, 48, U.N. Doc. A/CN.4/SER.A/1990/Add.1 (Part 1).

14. U.N. Convention, *supra* note 1, art. 24.

15. Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin, Apr. 5, 1995, 34 I.L.M. 864, 871-875 (1995).

16. Convention Relative au Statut du Fleuve Senegal [Convention on the Statute of the River Senegal], Mali-Mauritania-Sen., Mar. 11, 1972, LEX-FAOC016004, available at <http://faolex.fao.org/docs/texts/mul16004.doc>; Convention Portant Creation de L'Organisation Pour la Mise en Valeur de Fleuve Senegal [Convention Creating the Organization for the Development of the River Senegal-OMVS], Mali-Mauritania-Sen., Mar. 11, 1972, modified by amendment Nov. 17, 1975, LEX-FAOC016003, available at <http://faolex.fao.org/docs/texts/mul16003.doc>.

17. Framework Agreement on the Sava River Basin, art 15, Dec. 3, 2002, LEX-FAOC045452, available

- The 2003 Protocol for Sustainable Development of the Lake Victoria Basin;¹⁸
- The watercourse agreements concluded between South Africa and its neighbors, including:
 - The 1969 Agreement between South Africa and Portugal in regard to the First Phase of Development of the Water Resources of the Kunene River Basin;¹⁹
 - The 1992 Agreement between Namibia and South Africa on the Establishment of a Permanent Water Commission;²⁰
 - The 1994 Agreement between Angola, Botswana and Namibia on the Establishment of a Permanent Okavango River Basin Water Commission (OKACOM);²¹
 - The 1993 Treaty between South Africa and Swaziland on the Development and Utilization of the Water Resources of the Komati River Basin;²²
- The 1978 Convention relating to the Creation of the Gambia River Basin Development Organisation;²³
- The 2000 SADC (Southern African Development Community) Protocol (14 states);²⁴ and
- The draft Nile River Basin Cooperative Framework Agreement, and the management structure under the existing but provisional “Nile Basin Initiative.”²⁵

One of the great advantages of joint management mechanisms is that they can manage an international watercourse adaptively, in response to changed conditions. A theoretically optimal approach to managing an international

at <http://faolex.fao.org/docs/pdf/mul45452.pdf>.

18. Protocol for Sustainable Development of Lake Victoria Basin, Kenya-Uganda-Tanz., art. 33, Nov. 29, 2003, LEX-FAOC041042, available at <http://faolex.fao.org/docs/pdf/mul41042.pdf>.

19. Agreement between the Government of the Republic of South Africa and the Government of Portugal in Regard to the First Phase of Development of the Water Resources of the Kunene River Basin, Port.-S. Afr., art. 2.2, Jan. 21, 1969, LEX-FAOC015963, available at <http://faolex.fao.org/docs/texts/saf15963.doc>.

20. Agreement on the Establishment of a Permanent Water Commission, Namib.-S. Afr., Sept. 14, 1992, 32 I.L.M. 1147, 1148 (1993).

21. Agreement on the Establishment of a Permanent Okavango River Basin Water Commission (OKACOM), Angl.-Bots.-Namib., art. 1, Sept. 15, 1994, LEX-FAOC017435, available at <http://faolex.fao.org/docs/pdf/mul17435.pdf>.

22. Treaty on Development and Utilisation of the Water Resources of the Komati River Basin, Swaz.-S. Afr., art. 7, March 13, 1992, LEX-FAOC016751, available at <http://faolex.fao.org/docs/texts/bi-16751.doc>.

23. Convention Relating to the Creation of the Gambia River Basin Development Organization, Gam.-Guinea-Sen., art. 3, June 30, 1978, LEX-FAOC015879, available at <http://faolex.fao.org/docs/texts/gam15879.doc>.

24. Revised Protocol on Shared Watercourse Systems in the Southern African Development Community (SADC), art. 5, Aug. 7, 2000, LEX-FAOC015902 [hereinafter Revised SADC Protocol], available at <http://faolex.fao.org/docs/texts/mul15902.doc>.

25. See Nile Basin Initiative, <http://www.nilebasin.org>.

watercourse over time would therefore be simply to (a) lay down in an agreement the basic, general principles governing watercourse relations between the coparticipants; (b) establish a joint commission with a broad mandate for managing the international watercourse;²⁶ and (c) allow the necessary details to be worked out through the joint management mechanism. Of course, whether such an approach would be a practical one in a given situation would largely be a function of the relations of the states concerned.

III. PROSPECT

In considering the future prospects of the U.N. Convention, there are three points I would like to highlight: the significance of the Convention's provenance to its future influence; the existing influence of the Convention and its preparatory work; and in light of this influence, whether there is actually a need for the Convention to come into force.

A. *The Significance of the Convention's Provenance to its Future Influence*

As we have seen, the U.N. Convention was negotiated on basis of a draft prepared by the International Law Commission. The ILC is charged with the codification and progressive development of international law.²⁷ Thus the Convention's most basic and important rules may be regarded largely as a codification of the rules of customary international law governing the use of international watercourses. Many of its provisions—especially those concerning equitable utilization, prevention of significant harm and prior notification of planned measures—may therefore be regarded as binding on states, as codifications of customary rules, even if the Convention never enters into force as a treaty.

B. *The Existing Influence of the Convention and its Preparatory Work*

The fact that the Convention has not yet entered into force has not prevented it, and its preparatory work, from having an influence on cases, negotiations and treaties. Regarding cases, the *Gabčíkovo-Nagymaros Project Case*²⁸ was decided only four months after the Convention was concluded, yet the International Court of Justice referred to the Convention several times in its judgment.

26. This could confer on the body powers to perform functions such as those indicated in Article 24 of the U.N. Convention. See text accompanying note 14.

27. Statute of the International Law Commission, art. 1(1), U.N. Doc. A/CN.4/4/Rev.2 (1982).

28. *Gabčíkovo-Nagymaros Project* (Hung. v. Slov.), 1997 I.C.J. 7 (Sept. 25).

For example, in referring to the “community of interest” concept referred to by the Permanent Court of International Justice in the *River Oder* case,²⁹ the Court stated:

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.³⁰

As to negotiations, the Convention has played a role in the negotiation of treaties such as the 2000 SADC Revised Protocol,³¹ the Senegal River Water Charter,³² and the Nile River Basin Cooperative Framework Agreement.³³ The Convention is also playing a role in the negotiations between the Palestinians and Israelis regarding their shared water resources.³⁴ The influence of the Convention can be seen in treaties that have been concluded in relation to these watercourses—especially the Revised SADC Protocol, which covers the many watercourses in the region of SADC, a community of fourteen states in Southern Africa, but also the Senegal River. In addition, the 1995 Mekong Agreement was in significant part based on the work of the International Law Commission on which the U.N. Convention is based.

C. In light of its Already Existing Influence, Is There a Need for the Convention to Come Into Force?

In light of the past and continuing influence of the U.N. Convention, it could certainly be argued that it is not necessary that the Convention enter into force. The history of state conduct over the past decade in relation to international watercourses strongly suggests that States will continue to base their water-related negotiations on the Convention and that it will continue to have a stabilizing influence on the relations between countries sharing freshwater resources.

On the other hand, the international community, acting through the United Nations, did not content itself—as it could have—with merely taking note of the ILC’s 1994 draft articles on international watercourses, or even with adopting a

29. Territorial Jurisdiction of the International Commission of the River Oder, 1929 P.C.I.J. (ser. A) No. 23, at 27 (Sept. 10).

30. *Gabčíkovo-Nagymaros Project*, 1997 I.C.J. at 56.

31. Revised SADC Protocol, *supra* note 24.

32. See Margaret J. Vick, *The Senegal River Basin: A Retrospective And Prospective Look At The Legal Regime*, 46 NAT. RESOURCES J. 211, 225-226 (2006).

33. See *supra* note 25.

34. See David J.H. Phillips et al., *Factors Relating to the Equitable Distribution of Water in Israel and Palestine*, available at <http://www.nad-plo.org/nego/permanent/water/related/Factors.pdf>.

set of guidelines based on the ILC's draft. It decided instead to convene a special meeting, open to all United Nations member states, to negotiate a treaty on the basis of the ILC's draft articles. The reasons underlying this decision are probably implicit in the resolution by which the General Assembly referred the international watercourses topic to the ILC in 1970: Resolution 2669 (XXV), entitled "Progressive Development and Codification of the Rules of International Law Relating to International Watercourses." In text that could have been written today, the Assembly underlined that: (i) water, owing to the growth of population and to the increasing and multiplying needs and demands of humankind, is of growing concern to humanity; (ii) the available freshwater resources of the world are limited; and (iii) the preservation and protection of those resources are of great concern to all nations.³⁵ The Resolution noted the legal problems relating to the use of international watercourses, and the fact that such use was still based on rules of customary law. It then went on to refer the topic to the ILC for study.

It seems improbable, given the serious concerns identified by the General Assembly and the fact that it emphasized that use of international watercourses was based on customary international law, that the Assembly contemplated that a mere draft would be sufficient to address these areas of need. Thus governments seem to be of the view that it would be desirable for the Convention to enter into force. Finally, once in force, states parties to the Convention could well decide to convene periodic meetings to facilitate dialogue on the management of shared water resources and to consider the adoption of protocols to the Convention as needed. The existence of such a forum could help to provide early warning of potential disputes, prevent them from escalating, and perhaps assist in their resolution. Such conferences of the parties are now standard features of international environmental agreements and have proved their value repeatedly.

IV. CONCLUSION

The United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses has had a remarkable record of influence since its conclusion in 1997. The International Court of Justice relied upon it within a few months of its conclusion and states have had recourse to the Convention and its preparatory work in negotiating treaties relating to international watercourses and have drawn upon the principles—and sometimes even the language³⁶—of the Convention in the treaties themselves. At this writing, sixteen states have ratified the Convention;³⁷ according to Article 36 of the Convention, thirty-five ratifications are necessary for the Convention to enter into force.³⁸ It might be

35. See G.A. Res. 2669 (XXV), ¶ 2, U.N. Doc. A/7991 (Dec. 8, 1970).

36. See in particular Revised SADC Protocol, *supra* note 24.

37. For the Convention's current status, see the U.N. treaty website, <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&id=529&chapter=27&lang=en#1> (last visited Oct. 18, 2008).

38. U.N. Convention, *supra* note 1, art. 36.

thought that interest in ratifying the Convention died when it became clear that it would not enter into force within a few years of its conclusion. The ratification record shows otherwise, however: four states—Germany, Libya, Portugal and Uzbekistan—have ratified the Convention within the past three years, and two of those (Germany and Uzbekistan) did so in 2007. Moreover, there are reports that France has decided to ratify the Convention and that Spain has initiated the ratification process.³⁹ This recent activity may encourage more states to ratify. It thus seems possible that the Convention will enter into force in the coming years. This would be a positive development for states sharing freshwater resources, particularly in this time of growing water scarcity.

39. Personal communication from Fuad Bateh, Legal Adviser, Negotiations Support Unit, Palestinian Authority, to author (Oct. 17, 2008) (on file with author).

