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## The contribution of the UN Convention on the law of the non-navigational uses of international watercourses

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**Abstract:** The 1997 UN Convention on international watercourses helps to clarify the basic standards governing the non-navigational uses of internationally shared fresh water resources. Generally the Convention does not seek to push the law beyond its present contours, but reflects a general consensus regarding the principles that are universally applicable in the field. It provides a starting point for the negotiation of agreements relating to specific watercourses and, in the absence of an agreement, sets basic parameters governing the conduct of riparian states relative to those watercourses. Even where there is an applicable agreement, the Convention may play an important role in the interpretation of that agreement, as in the *Gabcikovo-Nagymaros* case. For these reasons, the success of the Convention does not depend on whether it enters into force. Its influence is more likely to derive from its status as the most authoritative statement of general principles and rules governing the non-navigational uses of international watercourses.

**Keywords:** Environmental protection; equitable utilisation; Harmon doctrine; international watercourse; non-navigational uses of water; no significant harm; planned measures; water law.

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## **1 Introduction**

The Convention of the law of the non-navigational uses of international watercourses was adopted by the United Nations General Assembly on 21 May, 1997 [1]. It had been negotiated in the Sixth (Legal) Committee of the General Assembly, convening itself for this purpose as a ‘Working group of the Whole’, on the basis of draft articles adopted by the UN International Law Commission (ILC) [2] after 20 years’ work on the project [3]. The Convention is a general, framework agreement containing 37 articles which are divided into seven parts. Its most important substantive and procedural provisions are contained in Part II, General Principles, Part III, Planned Measures and Part IV, Protection, Preservation and Management. Also important is Article 33 on the Settlement of Disputes. In the following overview, I will pay particular attention to issues that may be of special significance for this Symposium Issue. In the final section I will briefly consider the extent to which the Convention reflects customary international law.

## **2 The definition of ‘international watercourse’**

Perhaps the most logical starting place is the Convention’s 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 much broader. The definition takes into account the fact that most fresh water is underground, and that most of this groundwater is related to, or interacts with, surface water [4]. Therefore, 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 the attention of states to the interrelationship between all parts of the system of surface and underground waters that form an international watercourse. Thus it should be clear immediately that an effect on one part of the system will generally be transmitted to other parts. Let us assume, for example, that an aquifer is intersected by the border between states A and B. Mining of the groundwater in that aquifer in country A can affect groundwater levels in state B. It may also affect surface flows in state B to the extent that the aquifer contributes to those flows. Nevertheless, the inclusion of groundwater in the Convention was cited as a reason for the abstentions of two states from the vote on the Convention [5]. Finally, it should be noted in this connection that so-called ‘confined’ transboundary aquifers are not within the scope of the Convention. The ILC had decided to exclude such groundwater, which is not related to surface water, from its draft articles. Instead, the Commission adopted a ‘Resolution on confined transboundary groundwater’ which recommended that states “be guided by the principles contained in the draft articles ..., where appropriate, in regulating

transboundary groundwater, ..." [6]. It seems probable that the ILC refrained from including such groundwater within the scope of its draft because most members did not feel there was sufficient state practice relating to this form of groundwater to serve as the basis of legal regulation.

### 3 The relationship of the Convention to other agreements

The relationship of the Convention to agreements concerning specific watercourses is addressed within Articles 3 and 4 of the Convention. Article 3 generally encourages states sharing watercourses to enter into agreements that apply and adjust the provisions of the Convention to the particular characteristics of the watercourse concerned. This is consistent with the 'framework' character of the Convention. While existing agreements remain unaffected by the Convention, parties are called up to 'consider harmonising' those agreements with its 'basic principles' [7]. Not surprisingly, some delegations, such as Ethiopia's, took the position that harmonisation should be required. But given the vast number and variety of existing agreements, such a requirement would have been impractical. However, this does not mean that the principles reflected in the Convention will be insignificant in the *interpretation* of existing agreements.

Article 3 also addresses two further situations. First, where less than all of the states sharing a watercourse enter into an agreement concerning its use, the agreement may not adversely affect use by other states on that watercourse without their consent. The second situation is one in which a riparian state believes the principles of the Convention should govern the watercourse it shares with another state or states. Article 3 provides that in such a case, the states sharing the watercourse must enter into consultations "with a view to negotiating in good faith for the purpose of concluding a watercourse agreement".

Article 4 deals with the rights of riparian states to participate in specific agreements that apply to an entire international watercourse and those that apply "only to a part of the watercourse or to a particular project, program or use". If an agreement is to apply to an entire international watercourse, all states on the watercourse are entitled to participate in the negotiation of, and to become a party to the agreement. Regarding agreements concerning only a part of a watercourse or particular project, a riparian state whose use of the watercourse may be affected by the implementation of a prospective agreement of this kind may participate in consultations relating to the agreement, 'and, where appropriate, in the negotiation thereof in good faith with a view to becoming a party thereto, to the extent that its use is thereby affected'.

### 4 General principles

Part II, General Principles, is the core of the Convention. It is introduced by Article 5, Equitable and Reasonable Utilisation and Participation. This article states 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 sharing the watercourse. Indeed, the International Court of Justice, in its recent decision in the case concerning the Gabcikovo-Nagymaros Project, emphasised the importance of implementing "the multi-purpose programme ... for the use, development and protection of the watercourse [involved in the case] ...in an

equitable and reasonable manner” [8]. 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? This may be very difficult 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 useful to State A in determining equitable utilisation as will the data and information in Article 9; indeed, its use was equitable without data and information from other riparian states. However, it would be nearly impossible for a state to ensure the principle of equitable and reasonable utilisation is more appropriate for implementation through a very close cooperation between the states concerned: ideally through a joint commission, or by a court or other third party, as the doctrine had its origins in decisions of the United States Supreme Court in water disputes between US states. It appears 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 watercourse throughout the world.

This underlines the importance of *cooperation* between riparian states with a view to achieving a regime of equitable and reasonable utilisation 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 utilisation 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 the ILC’s text of 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 utilisation, riparian states must often cooperate with each other by taking *affirmative* steps, individually or jointly, with regard to the watercourse. While this notion 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 utilisation 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 use of this concept is illustrated by the fact that in its judgement in the Gabcíkovo-Nagymaros case the ICJ quoted Article 5, paragraph 2, setting forth the obligation of equitable participation, in support of its decision that the joint regime be re-established as suggested by the treaty involved in the case [9].

The most controversial provision of the entire Convention is undoubtedly the obligation not to cause significant harm, which is set forth in Article 7. This was treated as being closely linked with Articles 5 and 6 throughout the negotiations in the UN. The

three-article package was finally adopted by a vote of 38 to 4, with 22 abstentions.

Initially it seems clear that one state should not cause significant harm to another state, whether through its use of a watercourse or otherwise. However, in the case of international watercourses, it is not so simple. Suppose, for example (as is often the case) that upstream State A has not significantly developed its water resources 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 for irrigation extensively for centuries, if not millennia. State A now wishes to develop its water resources for hydroelectric and agricultural purposes. States B and C object, on the basis 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, be reconciled?

This question is at the heart of the controversy over Article 7 and its relationship with Article 5 on equitable and reasonable utilisation. I will take up each of these points in turn – albeit only briefly. First, as to 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. It provided: “Watercourse States shall utilise an international watercourse in such a way as not to cause appreciable harm to other watercourse states” [10]. 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 utilise an international watercourse in such a way as not to cause significant harm ... [etc.]” [11]. But the insertion of the ‘due diligence’ modifier made it clear beyond any doubt that this was not in any way an *absolute* obligation, 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 paragraph 2, which converted the ‘no harm’ obligation into what the ILC described as “a *process* aimed at avoiding significant harm as far as possible while reaching an *equitable result* in each concrete case” (emphasis added). Paragraph 2 stated that if significant harm was caused, despite the exercise of due diligence, then the states involved must enter into consultations concerning two factors: first, the extent to which the harmful use is equitable and reasonable; and second, whether the harming state should adjust its use to eliminate or mitigate the harm, and “where appropriate, the question of compensation”.

It is clear from the text of the Convention that the ILC’s text was changed by the Working Group. Undoubtedly, scholars will spill much ink over the extent to which the changes have brought significant substantive alternations. I do not believe they have. The deletion of ‘due diligence’ from paragraph 1 and its replacement with ‘take all appropriate measures’ is merely saying the same thing in different words. The real battle in the Working Group was over the second paragraph. The question there was whether equitable utilisation should prevail over the ‘no-harm’ obligation, or vice-versa. To illustrate, allow me to return to our hypothetical fact situation. If equitable utilisation is the controlling legal principle, upstream State A may develop its water resources in an equitable and reasonable manner vis-à-vis downstream States B and C, even though that development would cause 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, without the consent of those states.

To some delegations at the UN negotiations, the ILC’s final text – which represents

an effort to strike a balance between the two principles – favoured equitable utilisation too heavily. They argued for a text that clearly gave precedence to the ‘no-harm’ principle. Other delegations took the opposite view. For them the basic rule was equitable utilisation; 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 compromising formula arrived at in the UN negotiations is a *pot-pourri* containing something for everyone. Regardless of whether one is from the equitable utilisation or the no-harm school, one can at least claim partial victory. However, the better view appears to be that paragraph 2 of Article 7 gives precedence to equitable utilisation over the no-harm doctrine, and is thereby consistent with actual state practice [12]. The very existence of a second paragraph implicitly acknowledging that harm may be caused without engaging the harming state’s responsibility supports this conclusion. Also indicating a recognition that significant harm may have to be tolerated by a watercourse state are the numerous mitigating clauses in paragraph 2, especially the phrase ‘having due regard for the provisions of articles 5 and 6’ – the two equitable utilisation articles. Finally, the proposition that the ‘no-harm’ rule does not enjoy inherent pre-eminence is supported by Article 10 of the Convention, which states 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 utilisation 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 more in the future), will be resolved by cooperation and compromise, not by rigid insistence on rules of law. This is one of the lessons of the World Court’s judgement in the Gabcikovo-Nagymaros case.

Before leaving the ‘General Principles’ part of the Convention, I should say an additional word about Article 10. 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 states that a conflict between different kinds of uses of an international watercourse should 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’ accompanying the text of the Convention indicates that “[i]n 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 the production of food in order to prevent starvation”. This is obviously right. What some countries may fear is 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, which would in any event be relevant to an interpretation of paragraph 2, the ‘statement’ probably adds no new problems.



## 5 Planned measures

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 delegations [13] 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 [14]. In explaining its negative vote on the Convention, Turkey stated that Part III introduces a ‘veto’ [15]. While it is true that under the procedures of Part III a state may have to temporarily suspend its implementation of planned measures (see Articles 13 and 17), no veto is provided for in Part III.

While the Working Group made a number of drafting changes, the essence of the system contained in Part III is unchanged from the ILC’s draft. Essentially it 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 entire process could take twelve months or longer. If the matter is not resolved to the satisfaction of one or more of the states concerned, the dispute settlement procedures of Article 33 would be applicable. A final important point concerning Part III is that it seems clear that, by necessity, it is premised on the assumption that the planning state will conduct an environmental impact assessment to identify possible adverse effects on co-riparian states [16]. Alternatively, unless there was no doubt that the planned project would have adverse transboundary effects, it would be very difficult for the planning state to know whether it had an obligation to notify other states concerning its prospective project.

## 6 Environmental protection

Part IV of the Convention, entitled ‘Protection, Preservation and Management’, contains 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 modelled, 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 riparian state. Since the ‘ecosystems’ of international watercourses include land areas contiguous to them [17], 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’. It is unlikely that this is an absolute obligation, however. It is 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 to

protect it.

Pollution of international watercourses is dealt with in Article 21, 'Prevention, Reduction and Control of Pollution'. After defining the term 'pollution', it 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. There are many illustrations of the importance of this principle. A recent example involves a wholly national watercourse and concerns the poisoning of Lake Davis in northern California by state Fish and Game authorities to rid the lake of an introduced species, the voracious northern pike. This was done even though the lake supplies drinking water for surrounding communities. As with Article 21, the obligation contained in Article 22 applies only where significant harm will be caused to other riparian states.

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. However, Article 23 actually goes beyond the problem of pollution. Since it requires riparian states to 'protect and preserve the marine environment', it would also presumably apply to such things as the protection of anadromous species and coral reefs.

In a 'statement of understanding', the Working Group indicated that Articles 21-23 'impose a due diligence standard on watercourse States'. It is interesting that this statement does not cover Article 20. But, as I have already indicated, I believe Article 20 must also be read to reflect an obligation of due diligence.

In evaluating the 'environmental' provisions of the Convention, it must be understood that this is a universal, framework agreement. Because of this fact, one cannot expect either the level of detail or the degree of protection that one might find in a bilateral or regional instrument [18]. Indeed, a number of proposals were made during the UN negotiations for strengthening and, it was said, 'updating' the provisions of the Convention from an environmental standpoint. Most of these proposals came from Western European delegations, but a few came from other regions, such as Latin America. Very few of these proposals were ultimately accepted. One cannot say, therefore, that stronger environmental provisions are lacking from the Convention because they were not considered during the negotiations. The fact is, they were thought of, and proposed, but simply did not prove to be broadly acceptable to the delegates participating in the Working Group's deliberations. This may be regrettable, but an environmentally stronger text would undoubtedly have received less support, and states may be prepared in the future, as degradation of fresh water supplies increases, to strengthen the Convention's environmental provisions via a protocol.

A second point also relates to the fact that this is a *framework* instrument. As such, it is intended to be supplemented by more detailed agreements concerning specific watercourses shared by two or more countries. The level of protection that might be appropriate for Canada and the USA, for example, might not be found to be suitable by other countries. The Convention provides an appropriate framework for the negotiation of agreements by riparian states reflecting both their circumstances and needs.



Article 24, Management, is a provision believed by many specialists to be too modest in view of the importance of joint commission. But the ILC did not feel it could go any further than this in a general, framework instrument. It was considered that while international law may require riparian states to cooperate with each other, it does not go to the extent that requires them to form joint commissions. I believe the Commission was correct in this assessment, although in my view the article could have gone somewhat further in indicating the concrete forms that institutionalised cooperation between riparian states might take. But some states – and indeed some members of the Commission – were somewhat uncomfortable even with the article as it presently stands, let alone a more specific provision.

## **7 Emergencies**

Part V is entitled ‘Harmful Conditions and Emergency Situations’. It contains one article on each of those topics. ‘Harmful conditions’ refers to such things 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 broadly defined 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 organisations. It must also take “all practicable measures ... to prevent, mitigate and eliminate harmful effects of the emergency”. This article reflects the importance attached to early notification of emergency situations in order to permit other potentially affected states to take protective measures and to help mitigate the effects of the situation. The principle was also recognised in the Rio Declaration adopted at the 1992 Earth Summit [19].

## **8 Private remedies**

Article 32 deals essentially with private remedies and was intended to ensure equal access and non-discrimination so that a party injured or threatened by harm resulting from the use of an international watercourse in another state could have access to judicial or administrative procedures in that state. The article provoked controversy in the UN negotiations, including a proposal that it should be deleted. Evidently, not all states are yet comfortable with the idea of granting private persons from other (usually neighbouring) countries non-discriminatory access to their judicial and administrative procedures relating to transboundary harm or the threat thereof. While this may be surprising in view of certain United Nations declarations [20] and state practice, at least in western countries [21], it seems to be a political reality in certain parts of Asia, Africa and Central Europe.

## **9 Settlement of disputes**

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

(the procedure is in fact closer to conciliation than simple fact-finding). Any compulsory dispute-settlement procedure is bound to draw strong objections from certain countries [22], even if it is only compulsory fact-finding, and even if that only becomes compulsory after negotiations have failed to settle the dispute within six months. The ranks of these ‘automatic objectors’ were swelled somewhat by a few upstream states [23], who were evidently reluctant to surrender whatever leverage their position on an international watercourse conferred upon them. Yet facts are critically significant with regard to the core obligations of the Convention. For example, how can states determine whether their utilisation 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 without 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.

## **10 To what extent does the Convention reflect customary international law?**

Consideration of the Convention would not be complete without briefly looking at the question of the extent to which the Convention reflects rules of customary international law. In my view, it may be said with some confidence that the most fundamental obligations contained in the Convention do indeed reflect customary norms. In the *Gabcíkovo-Nagymaros* judgement the Court quoted the following famous passage from the Permanent Court’s judgement in the *River Oder* case:

“[t]he community of interest in a navigable river becomes the basis of a common legal right, the essential features of which are the perfect equality of all riparian States in the user of the whole course of the river and the exclusion of any preferential privilege of any one riparian State in relation to the others’ (Territorial Jurisdiction of the International Commission of the River Oder, Judgement No. 16, 1929, P.C.I.J., Series A, No. 23, pp. 27).” [24]

The Court then made the following important statement:

“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 and on the Law of the non-navigational uses of international watercourses by the United Nations General Assembly.” [25]

There are two discrete elements of this passage. The first is the Court’s declaration that the ‘[m]odern development of international law’ has ‘strengthened’ the principle of the community of interest in a navigable river ‘for non-navigational uses of international watercourses as well’. Here the Court expressly confirms what most commentators have long asserted, namely, that the above-quoted passage from the *River Oder* case, concerning the concept of the ‘community of interest’, applies to non-navigational uses as well as to navigational ones. This is a highly significant recognition of the idea that all

riparian states have interest in an international watercourse. It thereby constitutes an effective repudiation of the Harmon Doctrine of absolute sovereignty [26]. In the second element of the passage the Court states that the adoption of the 1997 Convention provides evidence of the strengthening of the principle of the community of interest in an international watercourse. The Court thereby ascribes significance to the adoption of the Convention as a confirmation of the development of international law in the direction of requiring that riparian states recognise the rights of other riparians in shared freshwater resources. The Court then applies this doctrine to the case at hand in the next paragraph of its judgement, in which it finds that Czechoslovakia, by unilaterally damming the Danube ('a shared resource') at a point at which it was wholly within Czechoslovak territory, "thereby deprive[ed] Hungary of its right to an equitable and reasonable share of the natural resources of the Danube ..." [27]. This constitutes a strong endorsement of equitable utilisation as a norm of customary international law, and should remove any lingering doubt about the status of that principle.

While the International Law Commission does not take a position whether a particular article or paragraph of one of its drafts is a codification of international law or an effort to progressively develop that law, it seems reasonable to conclude on the basis of state practice that at least three of the general principles embodied in the convention correspond to customary norms. These are the obligations to use an international watercourse in an equitable and reasonable manner, to use such a watercourse in such a way as not to cause significant harm to other riparian states, and to notify potentially affected riparian states of planned measures on an international watercourse [28]. Of course, other provisions of the Convention, such as some of those relating to the environment, are closely related to, or even flow from these principles. To the extent that these provisions are based on the fundamental principles, they too might be said to reflect custom.

An additional word should perhaps be said concerning the status of the 'no-harm' principle in light of the World Court's judgement in the *Gabcikovo-Nagymaros* case. As already indicated, the Court referred several times in its judgement to the right to an equitable and reasonable share of the uses and benefits of an international watercourse [29]. Notable for its absence, except in connection with the environment, was any reference to the 'no-harm' principle. Hungary had relied fairly heavily upon this concept in its pleadings [30], but the Court did not accept its invitation to use it as a basis of its judgement. This does not necessarily mean that the 'no-harm' rule has been significantly weakened; but it strongly suggests that the Court views equitable utilisation to be the basic, guiding principle in the field of international watercourses.

Regardless of its status under customary international law, the 'no-harm' principle continues to play a significant role, *inter alia*, in the efforts of developing countries to develop their shared water resources. This is because the World Bank, which is often asked to finance such development projects, normally requires the consent of other riparian states to a project on an international watercourse before it will process the project [31]. The Bank's internal guidelines utilise the concept of 'appreciable harm' as a criterion for both notification of other riparian states and assessment by the Bank's staff of objections by other riparians to the proposed project [32]. Nowhere in the guidelines is equitable utilisation mentioned. This is understandable, however, since it would usually be considerably more difficult to determine whether a proposed project interfered with equitable utilisation than it would be to determine whether it would cause other riparians harm. On the other hand, the fact that equitable utilisation is not the decisive criterion

means that at least some projects may not go forward for lack of bank loans, that would be consistent with that principle. It is perhaps for this reason that the Bank leaves open the possibility of proceeding with a project even in the face of objections by other riparian states [33].

## 11 Conclusion

The 1997 United Nations convention on International Watercourses helps to clarify the basic, minimum standards governing the non-navigational uses of internationally shared fresh water resources. For the most part, it should be viewed not as an instrument that seeks to push the law beyond its present contours, but as one that reflects a general consensus as to the principles that are universally applicable in the field. It provides a starting point for the negotiation of agreements relating to specific watercourses, and, in the absence of any applicable agreement, sets basic parameters governing the conduct of states riparian to those watercourses. Even where there is an applicable agreement, the Convention may play an important role in the interpretation of that agreement, as in the Gabcíkovo-Nagymaros case. For these reasons, the success of the Convention does not seem to be dependent upon whether it enters into force. Its influence is more likely to derive from its status as the most authoritative statement of general principles and rules governing the non-navigational uses of international watercourses.

## References and Notes

- 1 The Convention is annexed to UN GA Res. 51/229, 21 May 1997, adopted by a vote of 103 for and 3 against, with 27 abstentions. It is reprinted in (1997) *Int. Legal Materials*, Vol. 36, pp.700–720. See generally Tanzi, A. (1997) Codifying the minimum standards of the law of international watercourses: remarks on part one and a half, *Nat. Resources F.*, Vol. 21, p.109; Crook, J. and McCaffrey, S. (1997) The United Nations starts work on a watercourses Convention, *Am. J. Int. L.*, Vol. 91, pp.374–378; and McCaffrey, S. and Sinjela, M. (1998) The 1997 United Nations Convention on international watercourses, *Am. J. Int. L.*, Vol. 92, pp.97–107.
- 2 *Report of the International Law Commission on the work of its forty-sixth session*, UN GAOR, 49th Sess., Supp. No. 10, pp.197, UN Doc. A/49/10 (1994) (1994 ILC Report). See McCaffrey, S. (1995) ‘The International Law Commission adopts draft articles on international watercourses’, *Am. J. Int. L.*, Vol. 89, pp.395–404.
- 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 what would be five special rapporteurs. See, e.g. (1986) *Y.B. Int. L. Comm.*, Vol. 2, pt. 2, p. 68.
- 4 McCaffrey, S. (1991) ‘Seventh report on the law of the non-navigational uses of international watercourses’, 2 *Y.B. Int. L. Comm.*, Vol. 2, pt. 1, pp.45–69, pp.53., paras 22–23.
- 5 Verbatim record, 99th plenary meeting, UN General Assembly, 21 May 1997, UN Doc. A/51/PV.99, pp.5 (Pakistan) and 12 (Rwanda).
- 6 1994 ILC Report, ref. 2, p.326.
- 7 Some delegations believed harmonisation should have been required. See, e.g., the statement of Ethiopia in explaining its vote on the Convention, Verbatim record, 99th plenary meeting, ref. 5, pp.9–10.
- 8 Judgement of 25 September 1997, 1997 ICJ No. 92, para. 150.
- 9 Judgement of 25 September 1997, ref. 8, para. 147.

- 10 *Y.B. Int. L. Comm.* (1991) Vol. 2, pt. 2, p.67.
- 11 *ILC Report* (1994) ref. 2, p.236. It will be noted that the Commission also changed 'appreciable' to 'significant'. I do not regard this as a change in substance, however. Both 'appreciable' and 'significant' mean less than 'substantial' or 'serious' but more than 'slight' or 'minor'. In fact, in my view, even the use of the term 'harm' without any modifier at all would have to be interpreted in the same way, since the law does not concern itself with trifles, in this case, insignificant harm.
- 12 See for e.g. the ILC's commentary to draft article 5, *1994 ILC Report*, ref. 2, p.218; McCaffrey, S. (1988) 'Second report on the law of the non-navigational uses of international watercourses', UN Doc. A/CN.4/399, [1986] *Y.B. Int. L. Comm.*, Vol. 2, pt. 2, pp.87–144, at pp.103–130.
- 13 Three that did not were Ethiopia, Rwanda and Turkey. Verbatim record, 99th plenary meeting, ref. 5, pp.4–5 (Turkey) 9 (Ethiopia) and 12 (Rwanda).
- 14 The doctrine of 'absolute territorial sovereignty', which would support such unfettered discretion, has long been rejected by the state that invented it. See McCaffrey, S. (1996) 'The Harmon Doctrine one hundred years later: buried, not praised', *Nat. Resources. J.*, Vol. 36, pp.659–701.
- 15 McCaffrey, ref. 14, p.5.
- 16 Art. 12, which requires the planning state to provide potentially affected states with 'available technical data and information, concerning the project, including the results of any environmental impact assessment ...', The use of the term 'any' could be interpreted to mean that conducting an environmental impact assessment is optional for the planning state.
- 17 The ICJ recognised this in its judgement in the *Gabcíkovo-Nagymaros* case, where it referred to Czechoslovakia having deprived Hungary 'of its right to an equitable and reasonable share of the natural resources of the Danube – with the continuing effects of the diversion of these waters on the ecology of the riparian area, Judgement of 25 September 1997, ref. 8, para. 85 (emphasis added).
- 18 Compare, e.g. UNECE Convention on the protection and use of transboundary watercourses and international lakes, March 17, 1992, (1992) *Int. Legal Materials*, Vol. 31, pp.1312–1329, which goes considerably further than the UN Convention in this regard.
- 19 Rio Declaration on environment and development, Principle 19, UNCED Doc. A/CONF.151/Rev. 1, June 13, 1992, reprinted in (1992) *Int. Legal Materials*, Vol. 31, pp.874–880.
- 20 The principle of access by aliens is supported by the 1985 GA Declaration on the human rights of individuals who are not nationals of the country in which they live, UN GA Res. 144 (XL) UN GAOR, 40th Sess., Supp.53, p.253. While this resolution is not directly on point, the fundamental policy underlying it would seem to be the same as in the kinds of cases presently under consideration.
- 21 OECD Council Recommendation (1997) C(77)28 of 17 May 1997 on Implementation of a regime of equal right of equal right of access and non-discrimination in relation to transfrontier pollution.
- 22 See for e.g. China and India. Verbatim record, 99th plenary meeting, ref. 5, pp.7 (China) and 9 (India).
- 23 See for 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, 99th plenary meeting, ref. 4, 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.
- 24 Judgement of 25 September 1997, ref. 8, para. 85.
- 25 Judgement of 25 September 1997, ref. 8, para. 85.
- 26 McCaffrey, ref. 14.

- 27 Judgement of 25 September 1997, ref. 8, para. 85.
- 28 This is not the place to make the case for the proposition stated in the text. But the ILC seems to have implicitly accepted that these were presently existing obligations. The principle issue was how they should be defined; this was particularly true of the 'no-harm' obligation of Article 7. See the ILC's commentary to the relevant articles, 1994 ILC Report, ref. 2, pp.218, 236 and 260, respectively.
- 29 Judgement of 25 September 1997, ref. 8, paras. 78 and 85.
- 30 See for e.g. Hungarian Memorial, p.219. Among the many authorities referred to in support of Hungary's argument was the 1991 version of the ILC's Article 7, ref. 10. See Hungarian Memorial, p.223.
- 31 World Bank, projects on international waterways, operational policies, World Bank operational manual., OP 7.50, October 1994. The Bank's operational manual does provide, however, for the possibility of proceeding with a project despite the objects of other riparians. Para. 6.
- 32 World Bank, ref. 31, paras. 3 and 6.
- 33 World Bank, ref. 31, para. 6.