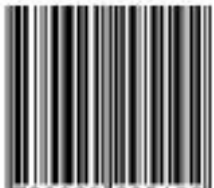
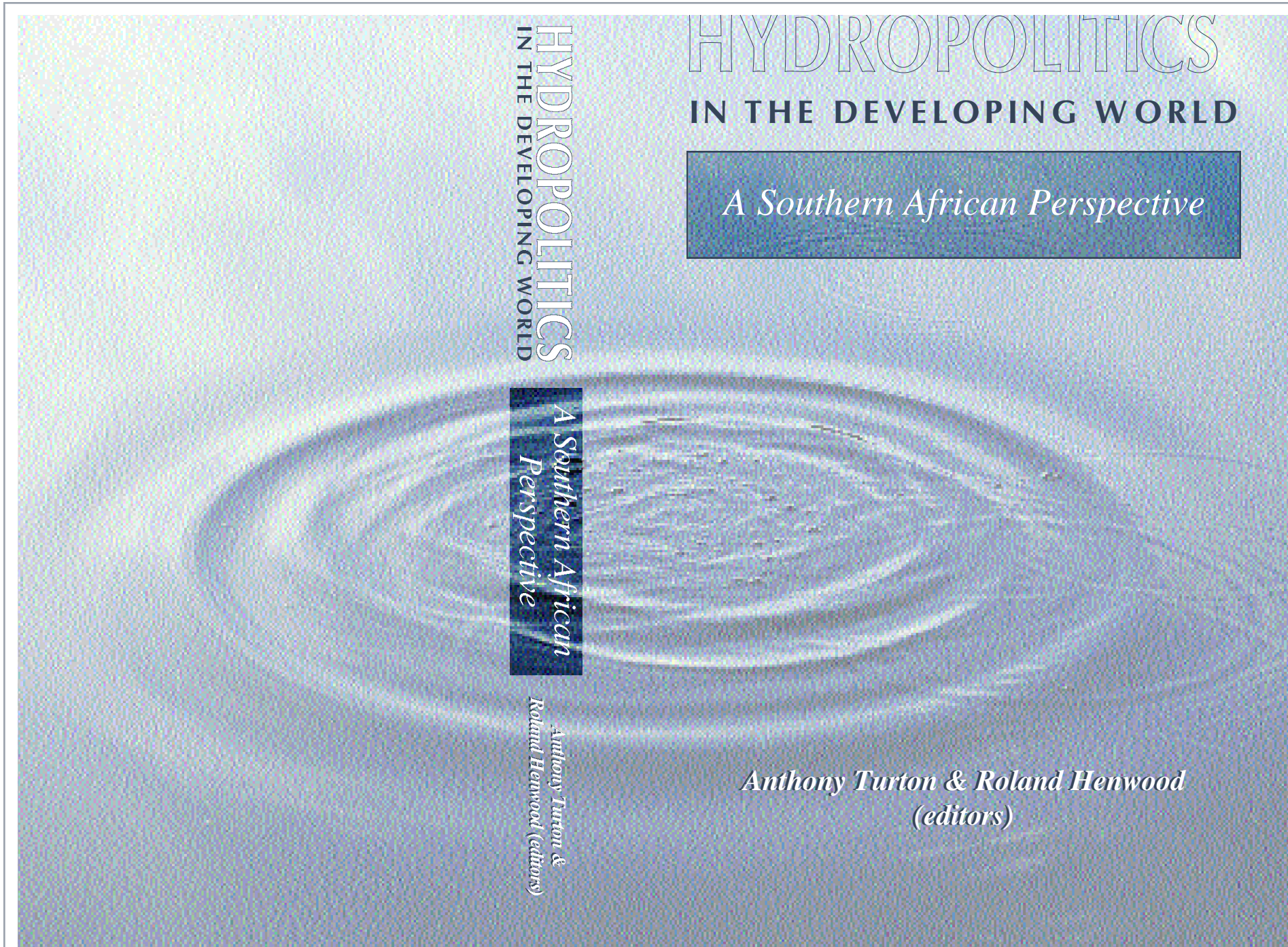


“In the developing world ... the links between water and life are still so clear – resonating in the cry of a sick child, the daily struggle of a mother, or the despair of a farmer ruined by drought or flood,” writes Mikhail Gorbachev in this book. Bringing contributions by a variety of authors together in one volume is part of an attempt to show that hydro politics is a growing discipline in its own right. The prevailing definition of hydro politics is widened to include the elements of scale and range. This is illustrated through a focus on theoretical and legal issues, case studies from Southern Africa and a proposed research agenda. The book is an important addition to the literature on hydro politics.

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HYDROPOLITICS

IN THE DEVELOPING WORLD

A Southern African Perspective

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HYDROPOLITICS IN THE DEVELOPING WORLD: A SOUTHERN AFRICAN PERSPECTIVE

Anthony Turton & Roland Henwood (editors)

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*In the world there is nothing more submissive and weak than water.
Yet for attacking that which is hard and strong nothing can surpass it.*
-Lao Tzu

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Chapter 6 Development of international water law and the UN Watercourse Convention

Gabriel E Eckstein



Introduction

The Convention on the Law of the Non-Navigational Uses of International Watercourses was adopted by the United Nations General Assembly on 21 May 1997 (UN 1997a). It was drafted to articulate and codify the prevailing state practice and *opinio juris* – an action taken out of a sense of legal rather than moral obligation – in the area of international water law. It was designed to serve as a framework for more specific bilateral and regional agreements relating to the use, management and preservation of transboundary water resources. It was also designed to help prevent and resolve conflicts over international water resources, and to promote sustainable development and the protection of global water supplies.

The Convention was adopted by a vote of 103 for and three against, with 27 abstentions and 33 members absent (UN 1997b; see figure 1 for a more complete breakdown of the vote). Although the actual number of votes against the Convention was small, the numbers belie a voting pattern that manifests the complexity of the subject matter, as well as the fragility of the coalition favouring the Convention. Many upper riparian states, for example, voted against passage of the Convention or abstained from the vote, while lower riparian states typically supported its adoption. Many states that abstained or voted against the text contended that the document was not ready for a vote, and noted the lack of consensus on several key provisions, including those governing dispute settlement. Others, both upper and lower riparian states, argued that there was a lack of balance in the Convention's provisions between the rights and obligations of upstream and downstream riparian states (UN 1997b). By 20 May 2000, the end of the signature period, only eight countries had ratified and another ten had signed the document¹ (see figure 2). Clearly, the debate surrounding the UN Convention is a function of the competing interests of states and is political in nature. Especially telling is the fact that it took more than 25 years of continuous work, 13 reports and five special rapporteurs to finalise the text.

This chapter examines the evolution of the UN Convention and analyses the vote on the text of the document in the UN General Assembly. It begins with a brief review of the development of international water law leading up to the creation of the Convention, and follows with an analysis of the diverging interests that, nevertheless, resulted in the adoption of the Convention. Finally, an assessment is presented of the voting and ratification patterns of the Convention, as well as a review of the document's present status.

Background to the UN Watercourse Convention

Modern international water law is the result of an evolutionary process in legal doctrine related to the agricultural and navigational uses of transboundary freshwater

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resources.² Early civilisations, which settled along many of the world's major river basins such as the Nile, Tigris and Euphrates, Indus, Amazon and Mississippi, used the waters for irrigation and flood control, as well as for travel and transportation (Wouters 1997). Over the course of time, many of these communities developed complex rules for the navigation, allocation and use of water. With the growth of travel and commerce, however, navigational rules became pre-eminent over non-navigational uses (see Teclaff 1985).

Prior to the industrial revolution, legal doctrine emphasised that continued transboundary water flow should be ensured and harm to neighbouring states prevented, particularly as water flow related to navigation (Teclaff 1967). Both common law and civil law jurisdictions, for example, observed the doctrine of *sic utere tuo ut alienam non laedas* (use your property in such a manner that it does not injure another). This principle, now considered a part of customary international law, obliges states not to use, or allow the use of their territory in a way that would harm the territory or rights of neighbouring states (Lien 1998; Moermond & Shirley 1987; Caponera 1954). With the advent of industrialisation, however, increased demands on water resources propelled non-navigational water uses to the forefront and engendered innovation in the law as it applied to personal and sporting use, industrial and agricultural purposes, and the conservation, sound allocation and management of limited resources (Lien 1998).

In the early years of industrial development, international water law was manifest primarily in the form of bilateral treaties (Lien 1998). Typically, bordering countries would enter into agreements for the sharing of a river or lake in the context of defining political borders, flood management, reallocating waters for growing populations, diverting river flow for agriculture, and developing new industries (for example, see UN 1963a; 1963b; 1963c). The development of the law, however, also resulted from various international and federal cases concerning these same issues, including, for example, jurisdiction over the River Oder (PCIJ 1929); the development of the River Meuse (Anon 1937); the utilisation of the waters of Lake Lanoux (Anon 1957); as well as the flow and diversion of international rivers (Anon 1927).

Over the years, however, the large variety of issues and cases resulted in considerable incongruity among the laws of transboundary waters, especially where legal principles were devised or interpreted to fit specific interests. Accordingly, a variety of often irreconcilable legal bases emerged as the means for allocating and sharing transboundary water resources. These bases can be divided into five categories:

- absolute territorial sovereignty (Eckstein 1995:67, 73; Lipper 1967:22);³
- absolute territorial integrity (Eckstein 1995:74);⁴
- *sic utere tuo ut alienam non laedas*;
- limited (or restricted) territorial sovereignty (Lien 1998:292);⁵ and
- community of interests theory (Eckstein 1998:80-81).⁶

In an effort to bring uniformity to international water law, the International Law Association (ILA) developed the Helsinki Rules in 1966 (International Law Association 1966:484). Drafted as a comprehensive code for the use of transboundary drainage basins, the rules included provisions on both the navigational and non-navigational uses of transboundary waters. The Helsinki Rules, however, have become best known for their non-navigational guidelines and are often regarded as the predecessor to the UN Convention. Most notable of its provisions are articles IV and V, which set forth the well-

known doctrine of *equitable and reasonable apportionment*, and some of the geographic, hydrological, climatic, historical, social, economic and technical elements assessed when effecting this apportionment. The Helsinki Rules complemented this principle with additional articles providing that no category of use enjoyed any inherent preference over another (article VI), that no state may reserve future uses for itself (article VII), and that existing activities may be presumed equitable and reasonable unless established otherwise (article VII). The Helsinki Rules were later supplemented by the ILA with subsequent resolutions, including the Montreal Rules on Pollution (ILA 1983:13) and the Seoul Complementary Rules (also known as the Seoul Rules on International Groundwaters) (ILA 1987:232). Over the years, these principles have become accepted as bases for negotiations among riparian states over shared waters, and have played an important role in the development and codification of international water law.

Nevertheless, despite their soundness, the Helsinki Rules and their supplementary declarations have received little recognition as official codifications of international water law. While the *raison d'être* of the ILA is the interpretation and codification of international law, the organisation operates as a private NGO and therefore enjoys no official status in the development of international law. Accordingly, the work of the ILA has always been regarded merely as aspirational in nature and not as hard and fast rules for state conduct.

Due to this lack of definitiveness, as well as a result of growing tensions in various water-poor regions, the General Assembly of the United Nations commissioned the International Law Commission (ILC) in 1970 to draft a set of articles to govern the non-navigational uses of transboundary waters (UN 1970). Tasked with the interpretation of international law "with a view to its progressive development and codification" (UN 1970) and operating under the aegis of the UN, the work of the ILC is highly respected as a definitive elucidation of international law. Following lengthy discussions, the ILC completed Draft Articles in 1991, and submitted the text to UN member states for comment (see McCaffrey 1991:703).

The text of the UN Convention

That the Draft Articles took nearly 25 years to prepare is just one indication of the complexity of the issues, and of the importance that states attributed to the subject matter. In October 1996, and again in March/April 1997, the Sixth Committee of the UN General Assembly convened as a Working Group of the Whole to debate the draft text with a view to produce a framework convention. These meetings were quite contentious, raising issues of rights and responsibility and of the scope and applicability of the Convention. The central and recurring issues in the debate included:

- the framework nature of the Convention;
- the implication of the Convention for existing and future treaties; and
- the relationship between the substantive rules of no appreciable harm (article 5) and of equitable and reasonable use (article 7) (Wouters 1997).

The UN Convention is intended to be a framework agreement, flexible and open to a degree of interpretation, designed to accommodate the development of more specific bilateral and multilateral agreements related to the use, management, and preservation of transboundary water resources. Hence, the parties express in the Preamble:

“the conviction that a framework convention will ensure the utilization, development, conservation, management and protection of international watercourses and the promotion of the optimal and sustainable utilization thereof for present and future generations” (UN 1997a; 1997b).

Notably, the Preamble also explains that the Convention takes “into account the problems affecting many international watercourses resulting from, among other things, increasing demands and pollution.” It further acknowledges the “special needs of developing countries” and “the principles and recommendations ... in the Rio Declaration and Agenda 21” (UN 1997a).

Despite this aspirational language that explains the need for a framework convention, concern was voiced by some states that the aim of the Convention had deviated from being a framework agreement. Countries like China, India and Turkey asserted that the structure of the Convention had surpassed its original intent, pointing, in part, to the compulsory provisions regarding the settlement of disputes. India, for example, which abstained from the vote, asserted that “[a]ny procedure for peaceful settlement of disputes should leave the procedure to the parties” (UN 1997b). Likewise, Israel, which also abstained, stated that:

“As a matter of principle, States must settle their disputes peacefully. However, the means of settling a dispute must be left to their agreement. Parties to a dispute must be allowed to choose the mechanism which was most appropriate to their specific needs” (UN 1997b).

The relationship between the UN Convention and existing and future treaties governing specific watercourses is discussed in articles 3 and 4 of the text. Generally, the Convention does not affect existing agreements, although it encourages parties to such agreements to consider harmonising the agreements with the basic principles of the Convention. Moreover, under article 3, the Convention calls on states to apply the Convention’s principles in bilateral and regional agreements, but also to adjust those principles to the particular characteristics and uses of the watercourse that is the subject of the treaty.

The basic contradiction between the need to ‘harmonise’ existing treaties with the Convention’s principles, and the need in future agreements to ‘adjust’ the same principles to particular watercourse characteristics was not lost on UN members. Responding to these provisions, India remarked that “Article 3 had not adequately reflected a State’s autonomy to conclude agreements without being fettered by the Convention” (UN 1997b). Ethiopia, which abstained from the vote, argued that adjusting the principles in future agreements “could undermine the Convention. Specific watercourse arrangements should be adjusted to the Convention, not the other way around” (UN 1997b). While Israel also abstained, it concluded that the Convention did not affect existing agreements: “States had full freedom in negotiating and entering into new agreements, providing those agreements did not adversely affect other States” (UN 1997b).

Undoubtedly, one of the most contentious issues before the Sixth Committee and the UN General Assembly concerned the scope and relationship of the substantive principles contained in articles 5, 6 and 7. A sizeable number of states, including many who voted in favour of the text, objected that, in these articles, the Convention failed to establish a balance between the rights and obligations of upper and lower riparian states.

Article 5 provides that states “shall in their respective territories utilize an international watercourse in an equitable and reasonable manner.” Article 6 provides a non-comprehensive list of factors, relevant to the assessment of water use, which watercourse states must consider when assessing what uses meet the criteria of equitable and reasonable utilisation. Like article V of the Helsinki Rules, these include, among others, geographic, hydrological, climatic, historical, social, economic and technical elements, as well as existing and possible uses, costs and the availability of alternatives. Article 7 provides that watercourse states “shall ... take all appropriate measures to prevent the causing of significant harm to other watercourse States.”

Traditionally, upstream riparian states tended to advocate the doctrine of absolute territorial sovereignty over resources located within their jurisdiction, while lower riparian states favoured the principles of prior appropriation⁷ (or vested rights) and absolute territorial integrity. In contrast, both the equitable and reasonable use and no substantial harm rules require states to consider the interests of other riparian states and incorporate them into their water resource development plans. Following significant debate in the meetings of the Sixth Committee, the text was revised and the principle of equitable and reasonable use was endorsed, including over the principle of no appreciable harm, as the fundamental basis of international water law (ICJ 1998:162; Stec & Eckstein 1997:41).⁸ Article 7 of the Convention now provides that:

“Where significant harm nevertheless is caused to another watercourse State, the States whose use causes such harm shall ... take all appropriate measures, *having due regard for the provisions of articles 5 and 6 ...* to eliminate or mitigate such harm” (UN 1997a; emphasis added).

While this shift suggests increased support for reconciling the various interests of watercourse states in the development of their transboundary waters (Wouters 1997), it overshadows a continued determination by the opposition to prevent the inclusion of more definite obligations in the Convention.

In comments on the text of the Convention, China, Rwanda and Turkey, among others, criticised the Convention for failing to contain language referring to states’ sovereignty over watercourses located within their territory. Tanzania stated that “the delicate balance” between articles 5, 6 and 7 “had been undone by the introduction, in ... article 5, of reference to a demand to take into account the interests of the watercourse States concerned.” Tanzania was concerned that the reference expanded the scope of the Convention beyond its intended purpose, “thus introducing an element of uncertainty” and improperly allowing “some States’ actions [to] remain subject to the consent of others” (UN 1997b). In contrast, Israel “supported the compromise reached on Articles 5, 6 and 7,” although it believed that “[n]either principle should be subservient to the other. The balance between them should be based on the specific case” (UN 1997b).

Review of the vote on the UN Convention

The UN Convention on the Law of the Non-Navigational Uses of International Watercourses was adopted on 21 May 1997. As noted above, the vote on the Convention text was not so clear-cut as to allow for any specific assumption about the strength of the coalition favouring the text or the Convention’s enforceability. In fact, a review of the vote and comments made at the time suggest that many states had and still have strong

misgivings about several of the provisions of the Convention. Moreover, the fact that, to date, only 12 states of the 35 needed for the Convention to enter into force have ratified the document is construed by some not only as waning support, but also that the Convention may not actually have codified the current status of international water law (see Schwaback 1998:258).

Voting results showed that 103 countries voted in favour of the text of the Convention, three against, and 27 states abstained. Another 33 member states were absent from the vote. The count, however, might have been 106 in favour with 26 abstentions. Belgium, which was recorded as abstaining, and Fiji and Nigeria, which were recorded as absent, subsequently announced that they had intended to vote in favour of the UN Convention (UN 1997a). Figure 1 provides a detailed breakdown of the recorded vote in the UN General Assembly.

The three states which voted against the Convention were Burundi, China and Turkey. All three are primarily upper riparian states, two of which – China and Turkey – are engaged in controversial hydro projects. China has been the subject of significant criticism for its Three Gorges Dam project (see Shapiro 1997:148-152), while Turkey has been criticised by its downstream neighbours for its work on the South-Eastern Anatolia Project (also known as GAP), including the Ataturk Dam (see Shaplan 1997; Dellapenna 1996:229-235). Moreover, all three states are significant players in a number of the world's major drainage basins: China controls the headwater of the Mekong River, Turkey supplies the bulk of the water for the Tigris, Euphrates and Araks Rivers, and Burundi is a significant contributor to the Nile and Zaïre Rivers (Anon 1997b). These negative votes suggest the determination of these states to rely on the power of diplomacy rather than on international law for the resolution of current and future disputes.

Of the 166 states recorded in the chronicles of the Convention as voting, abstaining, or absent, 57 do not share freshwater resources with other states. These include 35 island-nations and 22 states that can be categorised as non-riparian, or otherwise without any notable upper or lower riparian geographies (non-riparian states). Given that these states have little or no significant national stake in transboundary waters, their vote can be presumed more of an intellectual or ideological exercise than a matter of personal state interests.⁹

Of the 35 island-states, 23 participated in the vote on the Convention. The vast majority of these – 22 island-states – voted in favour. Cuba was the sole island-nation abstaining. Another 12 island-states were absent from the vote. Of the 22 non-riparian states, all voted in favour of the Convention except Andorra, Monaco and Panama, which abstained. Thus, 41 island and non-riparian states voted for the Convention out of a possible 57 states.

Subtracting the 41 island and non-riparian states which voted for the Convention from the total of 103 results in 62 states which presumably voted favourably because of particular national interests. Of these, a distinct majority, or 53 states, can be categorised as primarily or entirely lower riparian states (24), or countries with both significant lower and upper riparian geographies (29).¹⁰

Hence, lower riparian states and states with both significant lower and upper riparian interests tended to favour the text. Coupled with the fact that the three votes against the Convention and ten of the 27 abstentions were by states with primarily upper riparian

geographies, the vote may bear out the charge made by several states that the text disfavoured upper riparian states and placed greater burdens on them in the context of future development.

Among the 35 high-income nations participating in the vote, 28 voted in favour of the text, six abstained, and one was absent. Of the 131 low, lower-middle and upper-middle states (in prior years, known as developing nations), 75 voted in favour of the text, three voted against, 21 abstained, and 32 were absent. Among the eight high-income island-nations, all except the Bahamas (which was absent) voted in favour of the Convention text. Of the 25 low, lower-middle and upper-middle income island-nations, 14 voted in favour of the text, one abstained, and ten were absent from the vote.

In the context of a watercourse-by-watercourse review, lack of consistency among riparian states appeared to be the norm. With the possible exceptions of rivers in North America, Southern Africa and a few other regions, the vote by most riparian states of major watercourses was divided. In some cases, countries failed to participate in the vote at all, thus leaving the status of the Convention unclear as it might apply to a specific watercourse:

- *Tigris and Euphrates Rivers*: While Syria and Iran backed the Convention, Turkey voted against the text (upstream of both Syria and Iran). Iraq was not recorded as participating in the vote.
- *Nile River*: In a watercourse that traverses the Middle East and North Africa and the sub-Saharan Africa geographic regions, only Kenya and the Sudan voted in favour of the Convention. Seven other riparian states abstained, while Burundi opposed the text outright.
- *Niger and Volta Rivers*: Three states voted in favour, two abstained, and three were absent, including Niger and Nigeria. Chad and the Central African Republic did not participate in the vote.
- *Limpopo River*: Three of the four riparian states – Botswana, Mozambique and South Africa – voted for the text, while the fourth, Zimbabwe, was absent from the vote.
- *Orange River*: All four riparian states – Botswana, Lesotho, Namibia and South Africa – voted for the Convention.
- *Zambezi River*: Angola, Botswana, Malawi, Mozambique and Zambia backed the Convention, while Tanzania abstained, and Zimbabwe was absent.
- *Indus, Ganges, Brahmaputra and Mahakali Rivers*: Nepal and Bangladesh voted in favour of the text, while Pakistan and India both abstained. Bhutan was absent from the vote.
- *Mekong River*: Cambodia, Laos, Thailand and Vietnam voted in favour of the text, while China submitted one of only three votes against the Convention. Myanmar was absent from the vote.
- *Syr Darya, Amu Darya and Aral Sea*: Kazakstan voted for the Convention and Uzbekistan abstained, while Afghanistan, Tajikistan and Turkmenistan were formal absentees. Kyrgyzstan was not recorded as participating.
- *Danube River*: Of ten riparian states, seven voted in favour of the text. Bulgaria abstained, while Yugoslavia (Serbia-Montenegro) and Moldova did not participate in the vote.
- *Rhine River*: While France abstained, and Switzerland is not a member of the UN, the remaining six riparian states voted in favour of the Convention text.

- *Colorado River and Rio Grande*: Both Mexico and the US voted in favour of the Convention.
- *Columbia River*: Both Canada and the US voted in favour of the Convention.
- *Amazon River*: Brazil, Guyana, Suriname and Venezuela backed the Convention, while Bolivia, Peru, Colombia and Ecuador abstained.
- *La Plata and Paraguay Rivers*: Brazil and Uruguay supported the Convention while Argentina, Bolivia and Paraguay abstained.

Overall, a number of conclusions can be drawn from the voting patterns. Generally, lower riparian states and countries with both lower and upper riparian geographies tended to favour the Convention. High-income countries like those of North America and Europe, regardless of their upper or lower riparian geographies, also favoured adoption of the text. Likewise, arid states, especially those in the Middle East, generally backed the Convention. Finally, a large majority of island-nations and non-riparian states also supported the Convention. States that disfavoured the Convention included primarily upper riparian states with low, lower-middle and upper-middle income levels (those historically labelled as developing countries).

The fate of the UN Convention

While the text of the Convention was adopted by a wide margin, the vote conceals the complexity of the subject matter and the intricacies of the state interests at stake. With the exception of most of the island-nations and those with no riparian interests, the votes were clearly factors of diverse economic, geographic and other national interests. As a result, the current status and future of the UN Convention may be somewhat unclear. Most concerning is that riparian states of many of the world's major watercourses, especially those that are the subject of disputes, did not vote consistently in favour of the Convention. Moreover, it is unclear whether enough states in such sensitive watercourses will ratify the agreement.

In fact, five years after its adoption in the UN General Assembly, the Convention is far from entering into force. Article 36(1) of the Convention provides that it shall enter into force upon submission of the 35th instrument of ratification, acceptance, approval or accession with the UN Secretary-General. By April 2002, only 12 states had ratified the Convention: Finland, Hungary, Jordan, Lebanon, Norway, South Africa, Sweden and Syria.¹¹ Another ten states had signed the document, but not yet ratified it: Côte d'Ivoire, Germany, Luxembourg, Namibia, the Netherlands, Paraguay, Portugal, Tunisia, Venezuela and Yemen (see figure 2).

Nevertheless, the vote on the UN Convention also suggests that the text has value as the product of a democratic process and may yet serve as a standard for state practice. Irrespective of the politics and national interests involved, passage of the Convention shows that there is broad agreement in the international community on, at least, the basic principles that govern transboundary water resources. The Convention was negotiated publicly and in the context of an international forum. Moreover, it was adopted by a weighty majority of UN members.

Even if the Convention never enters into force, it carries significant weight and will have influence in the development of other water resource agreements, as well as the resolution of controversies (see McCaffrey 2000:70). For example, prior to its adoption by

the UN General Assembly, the ILC's Draft Articles had already significantly influenced the drafting of other international agreements, including the UN/ECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes (UN 1992), the SADC Protocol on Shared Watercourse Systems (SADC 1995), the Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin (ILM 1995), and the 1991 Protocol on Common Water Resources concluded between Argentina and Chile (Anon 1997a). This trend has continued even after the Convention's adoption as evident in the 1999 Draft Protocol to the 1992 UN/ECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes (UN 1999).

Of particular significance, the Convention was recently referred to by the International Court of Justice (ICJ) in the *Gabcíkovo-Nagymaros* case with the Court also affirming the centrality of the principle of equitable and reasonable utilisation (see ICJ 1998).

In addition, the passage of the Convention strongly suggests that certain principles contained in the text have reached the status of accepted norms of international law regarding the non-navigational uses of international watercourses. Among others, these include the principles of equitable and reasonable use and of no significant harm. Both of these doctrines have substantial independent support in state practice and judicial decisions, as demonstrated by the ILC and the Sixth Committee of the UN in their extensive deliberations (see McCaffrey 2000:71; UN 1992; ILA 1996; Anon 1984; ICJ 1949; PCIJ 1927). Moreover, there is substantial evidence that the principle of prior notification of planned measures has also entered the realm of customary international law (see McCaffrey 2000:70; Barberis 1991:179; UN 1997a).

Ultimately, as noted by Ambassador Tello of Mexico, the Convention "undoubtedly marks an important step in the progressive development and codification of international law" (UN 1997c). This process of legal evolution, however, is a dynamic process that often requires years to develop. Therefore, the Convention's impact and effectiveness are not necessarily dependent upon its ratification. Rather, they are more subject to the degree to which states embrace the principles contained in the text over time. It will also depend on the ability and desire of states to use the Convention's guiding principles as a framework for more specific bilateral and regional agreements. In the words of Franklin D Roosevelt, "There are many ways of going forward, but only one way of standing still."

Notes

- 1 When a state signs an international treaty, such as the UN Convention, it does not necessarily bind such a state to the terms of the treaty. This merely obliges the state not to act in a manner that would defeat the object and purpose of agreement. A treaty becomes binding on a state only after the state has followed its own domestic procedure for approving and implementing an international agreement.
- 2 International water law focuses solely on freshwater law and does not apply to coastal, ocean or seawaters.
- 3 The principle of absolute territorial sovereignty posits that states have the right to unrestrained use of resources within their territories. The principle is also known as the Harmon Doctrine, after US Attorney-General Judson Harmon, who declared in 1895 that, in the absence of established law to the contrary, states are free to exploit resources within their jurisdiction without regard to the extraterritorial effects of such action.
- 4 In direct contrast to absolute territorial sovereignty, absolute territorial integrity provides that lower riparian states have the right to the continuous or natural flow of a river.
- 5 Akin to the principle of *sic utere tuo ut alienum non laedas*, this doctrine holds that a state may use the waters flowing through its territory only to the extent that this does not interfere with the reasonable utilisation of downstream states.

- 6 The theory of community of interests advances the goal of optimal use and development of a transboundary water resource. It seeks to achieve economic efficiency and the greatest beneficial use possible, though often at the cost of equitable distribution and benefit among the states sharing the resource.
- 7 The principle of prior appropriation posits that current uses of water have precedence over future or planned uses.
- 8 This articulation is in line with the recent decision of the International Court of Justice (ICJ) in the Gabčíkovo-Nagymaros case between Hungary and Slovakia. The ICJ confirmed the centrality of the principle when it emphasised the importance of operating the project involved in the case “in an equitable and reasonable manner.”
- 9 It is conceivable that their actions might also be motivated by political relations with states that do have transboundary water interests or concerns. However, such in-depth analysis is beyond the scope of this chapter.
- 10 States with both lower and upper riparian interests are categorised together with those that are predominantly lower riparian states, since the vote suggests that their interests correspond more closely with those of lower rather than of upper riparian states. Of the 43 states with both lower and upper riparian interests, 29 favoured the Convention, seven abstained, and seven were absent. Of the upper riparian states, three voted against the Convention, seven voted in favour, 10 abstained, and 8 did not participate in the vote.
- 11 Lebanon and Sweden officially acceded to the Convention without having signed it.

Figure 1: Detailed breakdown of the recorded vote on the UN Watercourse Convention in the General Assembly

Country	Vote	Upper or Lower Riparian	Economic Level Income*	Geographic Region*
China	Against	Mostly Upper	Lower-Middle	East Asia & Pacific Islands
Turkey	Against	Mostly Upper	Lower-Middle	Eastern Europe & Central Asia
Burundi	Against	Upper	Low	Sub-Saharan Africa
Albania	For	Mostly Lower	Lower-Middle	Eastern Europe & Central Asia
Algeria	For	Neither	Lower-Middle	Middle East & North Africa
Angola	For	Upper & Lower	Low	Sub-Saharan Africa
Antigua & Barbuda	For	Island Nation	Upper-Middle	Latin America & Caribbean
Armenia	For	Upper & Lower	Low	Eastern Europe & Central Asia
Australia	For	Island Nation	High	East Asia & Pacific Islands
Austria	For	Mostly Upper	High	Western Europe
Bahrain	For	Island Nation	Upper-Middle	Middle East & North Africa
Bangladesh	For	Mostly Lower	Low	South Asia
Belarus	For	Upper & Lower	Lower-Middle	Eastern Europe & Central Asia
Botswana	For	Mostly Lower	Lower-Middle	Sub-Saharan Africa
Brazil	For	Mostly Lower	Upper-Middle	Latin America & Caribbean
Brunei Darussalam	For	Neither	High	East Asia & Pacific Islands
Burkina Faso	For	Mostly Upper	Low	Sub-Saharan Africa
Cambodia	For	Upper & Lower	Low	East Asia & Pacific Islands
Cameroon	For	Upper & Lower	Low	Sub-Saharan Africa
Canada	For	Upper & Lower	High	North America
Chile	For	Mostly Lower	Upper-Middle	Latin America & Caribbean
Costa Rica	For	Neither	Lower-Middle	Latin America & Caribbean
Côte d'Ivoire	For	Mostly Lower	Low	Sub-Saharan Africa
Croatia	For	Upper & Lower	Upper-Middle	Eastern Europe & Central Asia
Cyprus	For	Island Nation	High	Eastern Europe & Central Asia
Czech Rep	For	Upper & Lower	Upper-Middle	Eastern Europe & Central Asia
Denmark	For	Neither	High	Western Europe
Djibouti	For	Neither	Lower-Middle	Middle East & North Africa
Estonia	For	Upper & Lower	Upper-Middle	Eastern Europe & Central Asia
Finland	For	Neither	High	Western Europe
Gabon	For	Mostly Lower	Upper-Middle	Sub-Saharan Africa
Georgia	For	Mostly Upper	Low	Eastern Europe & Central Asia
Germany	For	Upper & Lower	High	Western Europe

Country	Vote	Upper or Lower Riparian	Economic Level Income*	Geographic Region*
Greece	For	Upper & Lower	High	Western Europe
Guyana	For	Upper & Lower	Lower-Middle	Latin America & Caribbean
Haiti	For	Island Nation	Low	Latin America & Caribbean
Honduras	For	Mostly Lower	Lower-Middle	Latin America & Caribbean
Hungary	For	Upper & Lower	Upper-Middle	Latin America & Caribbean
Iceland	For	Island Nation	High	Western Europe
Indonesia	For	Island Nation	Low	East Asia & Pacific Islands
Iran	For	Neither	Lower-Middle	Middle East & North Africa
Ireland	For	Island Nation	High	Western Europe
Italy	For	Neither	High	Western Europe
Jamaica	For	Island Nation	Lower-Middle	Latin America & Caribbean
Japan	For	Island Nation	High	East Asia & Pacific Islands
Jordan	For	Lower	Lower-Middle	Middle East & North Africa
Kazakhstan	For	Upper & Lower	Lower-Middle	Eastern Europe & Central Asia
Kenya	For	Upper & Lower	Low	Sub-Saharan Africa
Kuwait	For	Neither	High	Middle East & North Africa
Laos	For	Mostly Lower	Low	East Asia & Pacific Islands
Latvia	For	Mostly Lower	Lower-Middle	Eastern Europe & Central Asia
Lesotho	For	Mostly Upper	Low	Sub-Saharan Africa
Liberia	For	Mostly Lower	Low	Sub-Saharan Africa
Libya	For	Neither	Upper-Middle	Middle East & North Africa
Liechtenstein	For	Neither	High	Western Europe
Lithuania	For	Mostly Lower	Lower-Middle	Eastern Europe & Central Asia
Luxembourg	For	Upper & Lower	High	Western Europe
Madagascar	For	Island Nation	Low	Sub-Saharan Africa
Malawi	For	Mostly Upper	Low	Sub-Saharan Africa
Malaysia	For	Neither	Lower-Middle	East Asia & Pacific Islands
Maldives	For	Island Nation	Lower-Middle	South Asia
Malta	For	Island Nation	Upper-Middle	Middle East & North Africa
Marshall Is	For	Island Nation	Low	East Asia & Pacific Islands
Mauritius	For	Island Nation	Upper-Middle	Sub-Saharan Africa
Mexico	For	Upper & Lower	Upper-Middle	Latin America & Caribbean
Micronesia	For	Island Nation	Lower-Middle	East Asia & Pacific Islands
Morocco	For	Neither	Lower-Middle	Middle East & North Africa
Mozambique	For	Mostly Lower	Low	Sub-Saharan Africa

Country	Vote	Upper or Lower Riparian	Economic Level Income*	Geographic Region*
Namibia	For	Upper & Lower	Lower-Middle	Sub-Saharan Africa
Nepal	For	Mostly Upper	Low	South Asia
Netherlands	For	Mostly Lower	High	Western Europe
New Zealand	For	Island Nation	High	East Asia & Pacific Islands
Norway	For	Upper & Lower	High	Western Europe
Oman	For	Neither	Upper-Middle	Middle East & North Africa
Papua New Guinea	For	Island Nation	Lower-Middle	East Asia & Pacific Islands
Philippines	For	Island Nation	Lower-Middle	East Asia & Pacific Islands
Poland	For	Mostly Lower	Upper-Middle	Eastern Europe & Central Asia
Portugal	For	Mostly Lower	High	Western Europe
Qatar	For	Neither	High	Middle East & North Africa
South Korea	For	Mostly Lower	Upper-Middle	East Asia & Pacific Islands
Romania	For	Upper & Lower	Lower-Middle	Eastern Europe & Central Asia
Russian Fed	For	Upper & Lower	Lower-Middle	Eastern Europe & Central Asia
Samoa	For	Island Nation	Lower-Middle	East Asia & Pacific Islands
San Marino	For	Neither	High	Western Europe
Saudi Arabia	For	Neither	Upper-Middle	Middle East & North Africa
Sierra Leone	For	Mostly Lower	Low	Sub-Saharan Africa
Singapore	For	Neither	High	East Asia & Pacific Islands
Slovak Rep	For	Upper & Lower	Upper-Middle	Eastern Europe & Central Asia
Slovenia	For	Upper & Lower	High	Eastern Europe & Central Asia
South Africa	For	Mostly Upper	Upper-Middle	Sub-Saharan Africa
Sudan	For	Mostly Upper	Low	Middle East & North Africa
Suriname	For	Mostly Lower	Lower-Middle	Latin America & Caribbean
Sweden	For	Upper & Lower	High	Western Europe
Syria	For	Upper & Lower	Lower-Middle	Middle East & North Africa
Thailand	For	Mostly Lower	Lower-Middle	East Asia & Pacific Islands
Trinidad & Tobago	For	Island Nation	Upper-Middle	Latin America & Caribbean
Tunisia	For	Mostly Lower	Lower-Middle	Middle East & North Africa
Ukraine	For	Upper & Lower	Low	Eastern Europe & Central Asia
UAE	For	Neither	High	Middle East & North Africa
UK	For	Island Nation	High	Western Europe
United States	For	Upper & Lower	High	North America
Uruguay	For	Mostly Lower	Upper-Middle	Latin America & Caribbean

Country	Vote	Upper or Lower Riparian	Economic Level Income*	Geographic Region*
Venezuela	For	Upper & Lower	Upper-Middle	Latin America & Caribbean
Viet Nam	For	Mostly Lower	Low	East Asia & Pacific Islands
Yemen	For	Neither	Low	Middle East & North Africa
Zambia	For	Upper & Lower	Low	Sub-Saharan Africa
Andorra	Abstain	Neither	High	Western Europe
Argentina	Abstain	Upper & Lower	Upper-Middle	Latin America & Caribbean
Azerbaijan	Abstain	Mostly Lower	Low	Eastern Europe & Central Asia
Belgium	Abstain	Upper & Lower	High	Western Europe
Bolivia	Abstain	Mostly Upper	Lower-Middle	Latin America & Caribbean
Bulgaria	Abstain	Mostly Lower	Lower-Middle	Eastern Europe & Central Asia
Colombia	Abstain	Upper	Lower-Middle	Latin America & Caribbean
Cuba	Abstain	Island Nation	Lower-Middle	Latin America & Caribbean
Ecuador	Abstain	Mostly Upper	Lower-Middle	Latin America & Caribbean
Egypt	Abstain	Lower	Lower-Middle	Middle East & North Africa
Ethiopia	Abstain	Mostly Upper	Low	Sub-Saharan Africa
France	Abstain	Upper & Lower	High	Western Europe
Ghana	Abstain	Lower	Low	Sub-Saharan Africa
Guatemala	Abstain	Mostly Upper	Lower-Middle	Latin America & Caribbean
India	Abstain	Upper & Lower	Low	South Asia
Israel	Abstain	Mostly Lower	High	Middle East & North Africa
Mali	Abstain	Upper & Lower	Low	Sub-Saharan Africa
Monaco	Abstain	Neither	High	Western Europe
Mongolia	Abstain	Upper	Low	East Asia & Pacific Islands
Pakistan	Abstain	Mostly Lower	Low	South Asia
Panama	Abstain	Neither	Upper-Middle	Latin America & Caribbean
Paraguay	Abstain	Upper & Lower	Lower-Middle	Latin America & Caribbean
Peru	Abstain	Upper & Lower	Lower-Middle	Latin America & Caribbean
Rwanda	Abstain	Upper	Low	Sub-Saharan Africa
Spain	Abstain	Upper	High	Western Europe
Tanzania	Abstain	Upper	Low	Sub-Saharan Africa
Uzbekistan	Abstain	Mostly Upper	Low	Eastern Europe & Central Asia
Afghanistan	Absent	Mostly Upper	Low	South Asia
Bahamas	Absent	Island Nation	High	Latin America & Caribbean
Barbados	Absent	Island Nation	Upper-Middle	Latin America & Caribbean

Country	Vote	Upper or Lower Riparian	Economic Level Income*	Geographic Region*
Belize	Absent	Mostly Lower	Lower-Middle	Latin America & Caribbean
Benin	Absent	Upper & Lower	Low	Sub-Saharan Africa
Bhutan	Absent	Mostly Upper	Low	South Asia
Cape Verde	Absent	Island Nation	Lower-Middle	Sub-Saharan Africa
Comoros	Absent	Island Nation	Low	Sub-Saharan Africa
North Korea	Absent	Upper & Lower	Low	East Asia & Pacific Islands
Dominican Rep	Absent	Island Nation	Lower-Middle	Latin America & Caribbean
El Salvador	Absent	Mostly Lower	Lower-Middle	Latin America & Caribbean
Eritrea	Absent	Mostly Lower	Low	Sub-Saharan Africa
Fiji	Absent	Island Nation	Lower-Middle	East Asia & Pacific Islands
Guinea	Absent	Mostly Upper	Low	Sub-Saharan Africa
Lebanon	Absent	Upper	Upper-Middle	Middle East & North Africa
Mauritania	Absent	Lower	Low	Sub-Saharan Africa
Myanmar	Absent	Mostly Lower	Low	East Asia & Pacific Islands
Niger	Absent	Upper & Lower	Low	Sub-Saharan Africa
Nigeria	Absent	Mostly Lower	Low	Sub-Saharan Africa
Palau	Absent	Island Nation	Upper-Middle	East Asia & Pacific Islands
Saint Kitts & Nevis	Absent	Island Nation	Upper-Middle	Latin America & Caribbean
Saint Lucia	Absent	Island Nation	Upper-Middle	Latin America & Caribbean
St. Vincent & The Grenadine	Absent	Island Nation	Upper-Middle	Latin America & Caribbean
Senegal	Absent	Upper & Lower	Low	Sub-Saharan Africa
Solomon Is	Absent	Island Nation	Low	East Asia & Pacific Islands
Sri Lanka	Absent	Island Nation	Lower-Middle	South Asia
Swaziland	Absent	Mostly Upper	Upper-Middle	Sub-Saharan Africa
Tajikistan	Absent	Mostly Upper	Low	Eastern Europe & Central Asia
Macedonia	Absent	Mostly Upper	Lower-Middle	Eastern Europe & Central Asia
Turkmenistan	Absent	Upper & Lower	Low	Eastern Europe & Central Asia
Uganda	Absent	Mostly Upper	Low	Sub-Saharan Africa
Zaire (DRC)	Absent	Upper & Lower	Low	Sub-Saharan Africa
Zimbabwe	Absent	Upper & Lower	Low	Sub-Saharan Africa

* Note: Economic income level and geographic region categories, except the Western Europe geographic region category, are based on classifications established by the World Bank. The Western Europe geographic region category was created by this author.

Figure 2: Status of the UN Watercourse Convention, 1 August 2002

Party	Signature	Ratification	Acceptance	Accession	Approval
Côte d'Ivoire	25 Sep 1998				
Finland	31 Oct 1997		23 Jan 1998		
Germany	13 Aug 1998				
Hungary	20 Jul 1999				26 Jan 2000
Iraq				9 July 2001	
Jordan	17 Apr 1998	22 Jun 1999			
Lebanon				25 May 1999	
Luxembourg	14 Oct 1997				
Namibia	19 May 2000	29 Aug 2001			
Netherlands	9 Mar 2000		9 Jan 2001		
Norway	30 Sep 1998	30 Sep 1998			
Paraguay	25 Aug 1998				
Portugal	11 Nov 1997				
Qatar				9 Feb 2002	
South Africa	13 Aug 1997	26 Oct 1998			
Sweden				15 Jun 2000	
Syrian Arab Republic	11 Aug 1997	2 Apr 1998			
Tunisia	19 May 2000				
Venezuela	22 Sep 1997				
Yemen	17 May 2000				

Note: Article 36(1) of the UN Watercourse Convention provides that "The present Convention shall enter into force on the ninetieth day following the date of deposit of the thirty-fifth instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations."

The Convention was open for signature from 21 May 1997 until 21 May 2000. States, however, may continue to ratify, accept, approve or accede to the Convention indefinitely.

Chapter 7 From Harmon to Helsinki: The evolution of key principles in international water law

Sackey Akweenda

Introduction

The Harmon Doctrine developed out of a dispute between Mexico and the United States that arose in 1894 and 1895. Mexico protested against the diversion of the Rio Grande in the US to the detriment of existing Mexican users. Mexico contended that:

"the principles of international law would form a sufficient basis for the rights of the Mexican inhabitants of the bank of the Rio Grande. Their claim to the use of the water of that river is incontestable, being prior to that of the inhabitants of Colorado by hundreds of years, and, according to the principles of civil law, a prior claim takes precedence in case of dispute" (Griffin 1895:50).

The US Secretary of State requested Attorney-General Harmon to prepare an opinion on the Mexican contentions. Harmon declared in 1895 that, since the US had sovereignty over the Rio Grande in its territory, international law imposes no obligation upon the US to share the water with Mexico, or to pay damages for injury in Mexico caused by diversion in the US. Significantly, the US government did not comply with the opinion given by Harmon. Instead of implementing the opinion, Mexico and the US jointly established a boundary commission to investigate and report on the Rio Grande dispute. On 25 November 1896, the commission issued a report stating that the only feasible way to regulate the use of the water in order to secure the legal and equitable rights of each state was to build a dam at El Paso. The commission further reported that Mexico had been wrongly deprived of its equitable rights for many years. It recommended that the dispute should be settled by a treaty that divided the use of water equally. Mexico waived all claims for past damages. The treaty was accordingly concluded on 21 May 1906.

The opinion given by Harmon is commonly referred to as the Harmon Doctrine. This is certainly an old opinion on territorial sovereignty. By way of summary, it provides that a state may do as it pleases with the water in its territory without any legal responsibility for the injury it may inflict on states sharing such a basin. This approach has long been obsolete and has been replaced by the principle of equitable utilisation. According to modern international law, a riparian state must refrain from altering, diverting or stopping the flow of a river traversing its territory to the detriment of co-basin states, or from using water in such a manner that it either prevents a co-basin state from enjoying the use of the river in its territory, or causing it any damage or danger (Oppenheim 1955:474-476)

The issue of state sovereignty is clearly implied in these principles. An attempt to define sovereignty was made by Judge Max Huber, the sole arbiter in a case known as Island of Palmas (1928). In this case, the Netherlands and the US agreed to submit to the Permanent Court of Arbitration a dispute concerning sovereignty over the Island of

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