
INTERNATIONAL WATERCOURSES LAW: ITS UNIVERSAL APPROACH TOWARDS HARMONIOUS UTILISATION OF TRANSBOUNDARY WATERCOURSES

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ABSTRACT

Managing transboundary watercourses raises significant challenges to the countries that share them as international watercourses began to be used other than navigational needs. This third characteristic justifies water's high worth and scarcity by making it the most desired and used resource in the world. International watercourses have historically been governed based on a variety of customary and theoretical ideas that vary by place. These principles include equitable usage, protection, and nonconflictual sharing. The United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses, as well as other international agreements, have codified these doctrines, philosophies, and concepts, and they currently make up the current regulations control the management of shared waterways. The administration of international watercourses is currently governed by doctrines, theoretical norms, and conventional standards. This article seeks to make a thorough examination of these concepts. The 1997 New York Framework Convention, which was ratified on May 21 and became effective in 2014, is used for this purpose.

Keywords: International watercourses law, principles, codification, riparian states, sustainable development

Introduction:

Ancient river taming initiatives were carried out by monarchs or deities thousands of years ago in the major basins of the Nile, Tigris-Euphrates, Indus, Yellow, and Yangtze rivers. This practise has its roots even further back in mythology. Hydraulic engineering was advanced by the so-called irrigation or fluvial civilizations in these basins to a degree that was unmatched or surpassed until modern times. They also had highly developed data collection techniques and an understanding of how different water systems interacted with one another. Dams, canals, and dikes must be kept in good condition in order to avoid flooding from damaging lower-lying land, according to numerous ancient sources. They demonstrate that engineers, planners, and administrators were aware of the value of using water gauges and other measuring tools to learn about the behaviour of streams in upper basins, the need to make diversions far enough upstream of lands to be irrigated, and the necessity of making trade-offs between uses and activities in order to improve the efficiency of the entire water control system. The fluvial civilizations' dependence on water control occasionally led to collaboration between states, but more frequently it resulted in political consolidation and expansion by a one power running the entire river basin, with a focus on securing upstream lands. Construction of larger and improved reclaiming and irrigation techniques was frequently spurred by unification. On the other hand, when empires disintegrated into smaller entities, the development of water resources was severely hampered since Water management at the basin's core level had failed.¹

The sheer number of watercourse-related bilateral and multilateral agreements and their use evidence the lengths States have gone to ensure water access. An index of treaties relating to fresh water that was prepared by the Food and Agriculture Organisation (FAO) of the United Nations (UN) lists more than 2.000 international instruments in this area. Through the development of these instruments and other examples of State practice, certain customary legal principles concerning the international use of water resources that have been shared developed. Building on the principles that have emerged from State practice, the UN recently instituted a multilateral treaty concerning fresh water. The UN Convention on the Law of the Non-navigational Uses of International Watercourses ("the Convention"), adopted by the General Assembly on 21 May 1997, can now be considered the leading statement of international law

¹ Teclaff L.A, (1996), "Evolution of the River Basin Concept in National and International Water Law", 36 Nat. Resources J. 359.

regarding the development and protection of shared water resources. The main general concepts outlined and developed in the Convention are the principle of "equitable utilisation", the principle of "no significant harm".

The principle of "Equitable and Reasonable Utilization":

Each country must utilise international watercourses on its land in a way that is rational and ensures that its requirements are satisfied devoid of jeopardising those of adjacent countries if the "equitable and reasonable use" of water concept is to be upheld. Fresh water is a precious and finite resource. As such, States sharing water resources have needed to develop water-sharing arrangements that show consideration for their joint and separate needs. Based on this requirement, State practice has given rise to the doctrine of equitable utilisation of shared water resources. The principle of equitable utilisation, simply put, means that "each basin State is entitled to a reasonable and equitable share in the beneficial use of shared water". This idea is founded on the basic principle of the sovereign equality of States. One of the rights that a State claims by virtue of its sovereignty is the right to use the waters that are within its territories.²

This standard, which is regarded as a standard of customary international law, is specifically mentioned in Article 2.2 of the Helsinki Convention from 1992 and is also covered in the New York Convention (Article 5). Although the principle of "equitable and reasonable utilisation" is expressed in general terms, in order to apply it, governments must take into account both the demands and uses of the Countries of the stream as well as elements unique to an international watercourse. The doctrine of limited sovereignty has this idea as a corollary. All of the following documents, including the Berlin Rules (Article 13), Helsinki Rules of 1966 (Article IV), Helsinki Convention of 1992 (Article 2.2), and the New York Convention on the Law of Non-Navigational Uses of International Watercourses³ (Article 2.2), contain provisions that confirm this (Article 5). A country's ability to use discretion is somewhat constrained by "limited territorial sovereignty", generally construed, primarily because of the "sic utere tuo ut alienum non laedes" principle.⁴ Based on each country's requirement for water resources, the notion is founded on the concept of sovereign concession between countries. It is clear why the

² Nicholson S. (2001), "Water Scarcity, Conflict, and International Water Law: An Examination of the Regime Established by the UN Convention on International Watercourses", 5 N.Z. J. Envtl. L. 91.

³ Trung H.Q., Salatikoye Y.D., Bibi B., (2019), "Modern Rules Governing the Peaceful Management of International Watercourses: From Doctrines And Theories To Conventional Principle", International Journal of Environment and Pollution Research, Vol.7.

⁴ Sievers E.W., (2002), "Transboundary Jurisdiction and Watercourse Law: China, Kazakhstan, and the Irtysh", 37 Tex. Int'l L.J. 1.

principle was inferred now. Since its usage is dependent on particular circumstances for each watershed, the shared use of the resource among the states does not necessarily imply an equal distribution of the basin's waters. The following criteria are listed in Article 6 as those to be taken into account for each basin:⁵

1. To use an international watercourse in an "equitable and reasonable" manner as defined by article 5 involves taking into account all pertinent conditions, such as:
 - (a) Geographic, hydrographic, hydrological, climatic, ecological, and other factors of a natural character.
 - (b) The social and economic needs of the watercourse States concerned.
 - (c) The population dependent on the watercourse in each watercourse State.
 - (d) The effects of the use or uses of the watercourses in one watercourse State on other watercourse States.
 - (e) Existing and potential uses of the watercourse.
 - (f) Conservation, protection, development, and economy of use of the water resources of the watercourse and the costs of measures taken to that effect.
 - (g) The availability of alternatives, of comparable value, to a particular planned or existing use.⁶

The principle was first considered in the case of **Kansas v. Colorado [206 US 46 (1907)]**

- The court decided that Kansas, the lower riparian and previous user, was ineligible to sue Colorado for diverting water to Kansas from the Arkansas River.
- The court weighed the evident harms and enormous benefits to Colorado before making its ruling and discovered that: "equality of right and equity between the

⁵ Trung H.Q., Salatikoye Y.D., Bibi B., (2019), "Modern Rules Governing the Peaceful Management of International Watercourses: From Doctrines And Theories To Conventional Principle", International Journal of Environment and Pollution Research, Vol.7.

⁶ <https://www.internationalwaterlaw.org/bibliography/upreti/upreti-book.pdf>

two States forbids any interference with the present withdrawal of water in Colorado for purposes of irrigation".

The "equitable and reasonable utilisation" principle has been incorporated into a number of international watershed agreements, including the 1995 Southern African Development Community (SADC) Protocol on Shared Watercourse Systems, the 1995 Mekong River Basin Agreement, and the 2008 Water Charter of Niger River Basin, which reworded the principle as follows:⁷ "equitable and reasonable participation and utilization", (article 4). In the event of disputes between the riparian states of the watercourse, the New York Convention accords the "fulfilment of the essential human requirements" priority when utilising the water resources of a basin (Article 10). State practise, international codification, and legal rulings all provide strong support for the notion of equitable and reasonable participation and usage. In fact, the International Court of Justice found that the appropriation of 80% of the waters of a river shared by two States is unfair in the instance of the Gabčíkovo-Nagymaros Dam (decision of 1997, CIJ, Hungary/Slovakia). This principle's fundamental nature is thus a result of the ICJ's legal precedent.

The principle of the "Obligation Not to Cause Significant Harm":

The maxim serves as the basis for the need not to significantly damage others.: "Sic utere tuo ut alienum non laedas" (The idea of "Equality of Sovereignty" between countries in General International Law is perfectly aligned with this therefore use your own so as not to injure another)⁸. In fact, it is commonly acknowledged that one of the fundamental tenets of international law is the prohibition against doing great harm. The doctrine of limited sovereignty is also presented in this principle in some ways. Some contend that those who practise water law must see the pollution problem as a broad one. Duty of "due diligence", a responsibility born by states to defend the rights of riparian states in the union. No Country being adjacent to a global watershed may utilise the water supplies of the river or lake on its land in a way that endangers other Countries in the same basin, their environment, their health, or even the safety of their populations, according to the rule of the obligation to not cause significant harm. Thus, the principle is stated as follows in Article 7 of the Convention:

⁷ Trung H.Q., Salatikoye Y.D., Bibi B., (2019), "Modern Rules Governing the Peaceful Management of International Watercourses: From Doctrines And Theories To Conventional Principle", International Journal of Environment and Pollution Research, Vol.7.

⁸ Ibid.

1. Watercourse Countries must take all necessary precautions to prevent seriously hurting other watercourse Countries while utilizing an international watercourse on their soil.
2. However, in the event that another watercourse Country suffers significant harm as a result of a country's use of that watercourse, that country shall, in the lack of agreement regarding that use, take all necessary measures, taking into account the provisions of articles 5 and 6, in consultation with the affected State. This idea has been codified in a number of contemporary international legal documents that were motivated by the United Nations Framework Convention on Non-navigation Uses of Watercourses. It is important to remember that the principle was initially stated in the 1966 Helsinki Rules (Articles V, X, XI, XXIX), then it was ratified in the 1992 UN-ECE Convention (Articles 2.1, 2.3, 2.4, and 3), and lastly it was incorporated into the New York Convention on the Law of Non -navigation uses of Watercourses. Thus, the notion is essentially codified in all conventions, other agreements, or current international legal frameworks governing the use of shared watercourses.⁹ This is the case with the revised Convention establishing ANB of October 29, 1987 (Article 4), the 1995 Southern African Development Community (SADC) Protocol on Shared Watercourse Systems (Article 2), the 1995 Mekong River Basin Agreement (Articles 3.7 and 8), and the Water Charter of the Niger Basin of 2008 (Article 5), which states: "States Parties shall ensure that activities in their territory cannot cause harm to other States Parties in accordance with Article 4 of the Revised Convention Establishing the Niger Basin Authority."¹⁰ It should also be noted that the principle is supported by a number of contemporary international environmental conventions and declarations, including the 1992 Convention on Biological Diversity, the 1992 Stockholm Declaration of the United Nations Conference on the Human Environment, and the 1992 United Nations Conference on Environment and Development (Principles 2,4,13,24). (Articles 3). It should be kept in mind that numerous court rulings, including one by the International Court of Justice in the matter of the Pulp Mills on the Uruguay River between Argentina and Uruguay, have given special consideration to this issue. In its ruling on the Gabcikovo-Nagymaros case on September 25, 1997, the ICJ brought up the matter of the duty not to inflict great injury.¹¹

⁹ Ibid.

¹⁰ Ibid.

¹¹ Ibid.

The General Duty of Cooperation

The earth has about 300 river basins and several aquifers that straddle international borders. This must urge states to act together to ensure proper management of these transboundary basins within the context of sustainable development. The riparian Countries of these watercourses must advance a spirit of collaboration based on "good faith" amongst them in order to ensure the best and most sustainable development and usage as well as the most effective and efficient protection of international watercourses.¹² The common nature resource feature that shows an international watercourse makes the question of cooperation significant.

As per Herbert Smith, (2002): "The first principle is that every River system is naturally an indivisible physical unit and that as such hit should be so developed as to render the greatest possible service to the whole human community which serves". The duty to collaborate is a customary procedural rule that is enshrined in Article 8 of the "New York Convention", which reads as follows: "Watercourse States shall cooperate on the basis of sovereign equality, territorial integrity, mutual benefit and good faith with a view to achieving the optimal use and protection of the international watercourse".

The International Court of Justice (ICJ) claims in the Gabcikovo-Nagymaros case that effective and harmonious cooperation between States is essential to managing transboundary waterways. "The re-establishment of the joint regime will also optimally reflect the concept of joint use of shared water resources to achieve the different objectives mentioned in the treaty and, in accordance with article 5, paragraph 2, of the New York Convention ..." It should be recalled that the riparian Countries of an international watercourse are required to proceed with prior notification and consultation within the framework of the intended measures as part of the general duty to cooperate.¹³ This general duty of cooperation outlined in Article 8 of the 1997 New York Convention takes many forms, such as "joint mechanisms or commissions" (Articles 8 and 24), "regular exchange of "information" (Articles 9) between riparian states on the condition of the shared watercourse or the issue of "notification of planned measures," among others (from Articles 11 to 19). The duty to inform is subject to the duty of prior consultation, which entails discussions aimed at settling differences of opinion between the State proposing the project and the State whose territory it will affect. It should be noted that

¹² Ibid.

¹³ Ibid.

the 1992 UN-ECE Convention, which comes before the New York Convention, embraced the principle after it was initially stated in the 1966 Helsinki Rules (Articles V, X, XI, and XXIX). All conventions and other international legal agreements or procedures that have been adopted today in relation to the uses of shared watercourses essentially entrench the principle. This is the case for the revised Convention establishing the African National Base of October 29, 1987 (Article 4), the 1995 Protocol of the Southern African Development Community (SADC) on the Shared Watercourse Systems (Article 2), the 1995 Mekong River Basin Agreement (Articles 3.7 and 8), and the Water Charter of the Niger Basin of 2008.¹⁴

The principle of “Peaceful Settlement of Disputes”:

One of the fundamental tenets of international water law is the notion of conflict resolution in relation to the use and preservation of shared water resources. According to this idea, if there is a dispute between riparian states, those states must work together to find a peaceful settlement. The principle advises the parties to the conflict to adhere to the methods for resolving conflicts peacefully set forth by international law, namely mediation, conciliation, and negotiation. The States under investigation may also, for instance, file a dispute with a basin organisation, seek third-party arbitration, or dispute should be brought to the International Court of Justice. States, however, are free to select the dispute resolution process. According to some authors, this decision is challenging because it necessitates the agreement of all parties involved. The 1997 UN Convention, which offers a novel form of resolution that unilaterally launches a process of investigation in case of a conflict, however, lessens the difficulties of obtaining the approval of all parties. (Article 33.3). The responsibility of Countries sharing an international watercourse is principally based on Article 2(3) of the United Nations Charter. In addition, Stephen C. Mc CAFFREY brought up the similar issue of the peaceful resolution of conflicts resulting from the use of shared watercourses in his sixth report. In addition to the New York Convention, the following international conventions and agreements also uphold the principle: the UNECE Water Convention of 1992 (Article 22, Annex IV), the Niger Basin Water Charter of 2008, (Article 29, Chapter IX), Protocol of 1995 of the Southern African Development Community (SADC) on Shared Watercourse Systems (Article 7), Agreement on Cooperation for the Sustainable Development of the Mekong River Basin of 1995 (Articles 18.C, 24.F, 34, 35), Cooperation Convention for the Protection and Sustainable Use of the

¹⁴ Ibid.

Danube (Article 24), Convention for the Protection of the Rhine 1999 (Article 16).¹⁵

Integrated water resource management:

Holistic or integrated management, which has come to be connected with sustainable development, is another idea that is now extremely often used but has no clear definition. According to the 1992 Dublin Statement on Water and Sustainable Development, "effective management of water resources requires a holistic approach, linking social and economic development with preservation of natural ecosystems and also linking land and water uses across the entire catchment area or groundwater aquifer." The Statement unequivocally endorses the river basin as a unit for planning, management, environmental protection, and the settlement of water disputes. "Although it emphasizes the preparation and implementation of integrated management plans, however, it does not specify what integrated management means". Additional information was provided by the experts who submitted freshwater resource suggestions for the 1992 United Nations Conference on Environment and Development in Rio de Janeiro. They described integrated water resources management as based on "water as an integral part of the ecosystem, a natural resource and an economic good, the quantity and quality of which determines its utilization." They stressed that "integrated water resources management should be carried out at the catchment basin or sub-basin level, taking into account existing interlinkages between surface and ground waters. Furthermore, they outlined four principal objectives to be pursued. Two years later, the United Nations Commission on Sustainable Development also recommended integrated management, mobilization and use of water resources in a holistic manner, and urged that special attention be given to the integrated management and conservation of river and lake basins, nationally, internationally and at all appropriate levels." But the Commission did not specify its terms, unlike the Dublin Statement. The International Law Commission, on the other hand, adhered to a far more restricted and cautious vocabulary. The ILC's supplemental provisions described management as

- (a) planning the sustainable development of an international watercourse, and
- (b) otherwise promoting rational and optimal utilization, protection and control of the watercourse.

¹⁵ Ibid.

"This was a considerable departure from an earlier draft which defined "joint institutional management" as including "planning of sustainable, multi-purpose and integrated development of international watercourse(s) (systems)." and the obligation for States to co-operate and exchange information.

Conclusion:

The UN Convention on the Law of the Non-navigational Uses of International Watercourses ("the Convention"), adopted by the General Assembly on 21 May 1997, can now be considered the leading statement of international law regarding the development and protection of shared water resources. It came into force in the year 2014. The main general concepts outlined and developed in the Convention are the principle of "equitable utilisation", the principle of "no significant harm". The duty to collaborate is a customary procedural rule that is enshrined in Article 8 of the "New York Convention". One of the fundamental tenets of international water law is the notion of conflict resolution in relation to the use and preservation of shared water resources. The efficient and effective usage of international watercourses in order to meet the sustainable development of the region is also an important aspect that has been addressed. This convention encourages development, but the ecosystem should not be harmed during the process. Thus, this convention is playing an important role in allowing the international watercourses to be harmoniously utilised by the riparian states.

Reference:

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2. Nicholson S. (2001), “Water Scarcity, Conflict, and International Water Law: An Examination of the Regime Established by the UN Convention on International Watercourses”, 5 N.Z. J. Envtl. L. 91.
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