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## The Watercourses Convention, Hydro-hegemony and Transboundary Water Issues

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### ABSTRACT

The 2014 entry into force of the UN Watercourses Convention of 1997 could institutionalise water law globally, thereby countering hydro-hegemonic approaches. However, since the Convention is out of date; has been ratified by only 36, mostly downstream countries; does not require amendments of pre-existing treaties; and has no Conference of the Parties to ensure that it becomes a living treaty, its actual influence in addressing the evolving problems in transboundary river basins remains minimal. Nevertheless, it is not unimaginable that with an appropriate follow-up to this Convention, it could be converted into a living and relevant framework convention in the future.

### KEYWORDS

Transboundary watercourses;  
UN Watercourses  
Convention; hydropolitics;  
hydro-hegemony

More than 250 river basins are transboundary and they are subject to hundreds of agreements. Some countries fall completely within transboundary basins;<sup>1</sup> some countries fall partially into transboundary basins and thus fall only partially within transboundary river basin regimes; others are torn between their responsibilities as a basin state to share water with other basin states and their own responsibilities to share water with the drier parts of their own countries.

Transboundary water issues can be divided into three categories. There are transboundary rivers with adequate water, where the primary issue is water pollution, as in much of Europe. There are transboundary rivers with water quantity problems, which fluctuate from too much water resulting in flooding to too little water leading to stress in hydro relations between countries, as in many developing countries. There are transboundary rivers where countries are struggling with boundary issues, as in Costa Rica and Nicaragua.

There are also at least three more issues that affect transboundary relations. First, there is the challenge of definitions – do transboundary rivers include watersheds or are they limited to watercourses; do they include all water channels or are they limited to the main international water channel; do they include enclosed groundwater flows; do they include a more holistic understanding of the global water system, and do they take the relationship

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<sup>1</sup>For example, Slovakia, Belarus, Central African Republic, Zimbabwe, Botswana, Burkina Faso, Hungary, Austria, Switzerland, Zambia, Nepal, Uganda, Bhutan, Serbia, Congo, Armenia and Liechtenstein. CIA, *World Factbook 2010* (26 February 2016), <https://www.cia.gov/library/publications/the-world-factbook>; Oregon State University, *Transboundary Freshwater Dispute Database*.

with land use into account? Second, water has many ecosystem services – many of which have scarcely been taken into account in the development of transboundary agreements. Third, there is uncertainty in the way in which climate variability and climate change will influence transboundary water flows. Climate-proofing transboundary water relations is still in its infancy.

Against this background, this article looks at the entry into force in 2014 of the 1997 United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses<sup>2</sup> to analyse if and how it will change hydro relations between countries. It does so by first examining how riparian countries have historically dealt with each other. It then looks at the way in which the Watercourses Convention aims to institutionalise certain kinds of behaviour in relation to riparian relations. This leads to an analysis of the key research question and some conclusions. In analysing the Watercourses Convention, an ideal typical approach has been taken to understanding how states cooperate, distinguishing, but nuancing, the differences between a power based, rational actor, collective action approach and an institutional approach focusing on social practice. The former argues that states have utilitarian interests and protect their narrowly defined interests, while the latter argues that states become institutionalised through formalised rules that they adopt to take a broader perspective of their national interests and to act in accordance with their rules.<sup>3</sup>

## Hydro-hegemony and institutionalisation of relations

### *Transboundary water principles*

The three sources of international law include customary law, treaties and principles. In the absence of a global treaty applicable to all countries, customary law and principles dominate water law. Water law has five principles in relation to sovereignty: Limited territorial sovereignty is the key principle that has emerged from the demand of some states to have absolute territorial sovereignty (the right to do what they like with waters in their jurisdiction, mostly claimed by upstream countries) and others to have absolute integrity of state territory (the absolute right to receive waters of the same quality and quantity as before, mostly claimed by downstream countries).<sup>4</sup> A second principle is the ‘no-harm’ principle which requires states not to injure others.<sup>5</sup> The obligation to peacefully address disputes is the third principle. A fourth principle is the idea of historic rights – that states may claim the water they have always been using.<sup>6</sup> Such claims are made on river basins where one party is significantly more advanced than the other party/parties and has used more water in the past: Egypt claims this in relation to upstream Nile riparians<sup>7</sup> and South Africa in relation to Mozambique on the Incomati River.<sup>8</sup> A fifth principle, although contested, is

<sup>2</sup>UN Convention on the Law of the Non-Navigational Uses of International Watercourses, UN Doc. No. A/51/869, New York, 21 May 1997. Now ratified by 36 countries: Benin, Burkina Faso, Chad, Ivory Coast, Denmark, Finland, France, Germany, Greece, Guinea Bissau, Hungary, Iraq, Ireland, Italy, Jordan, Lebanon, Libya, Luxembourg, Montenegro, Morocco, Namibia, Netherlands, Niger, Nigeria, Norway, Palestine, Portugal, Qatar, South Africa, Spain, Sweden, Syria, Tunisia, UK, Uzbekistan, and Vietnam.

<sup>3</sup>Young, “Behavioural Effects of Environmental Regimes”.

<sup>4</sup>Dellapenna, “Customary International Law”.

<sup>5</sup>Trail Smelter Arbitration, (United States v. Canada), 16 April 1938, 11 March 1941, 3 R.I.A.A. 1907, 1941.

<sup>6</sup>Brunnée and Toope, “Changing Nile Basin Regime”.

<sup>7</sup>Saleh, “Hydro-hegemony Nile Basin”; Sanchez and Gupta, “Recent Changes in Nile Basin”.

<sup>8</sup>Dellapenna, “Rivers as Legal Structures”.

the need to share transboundary waters equitably and this has been incorporated in some bilateral and regional treaties.

Although there is no global water law binding on all, there are several hundred agreements on transboundary river basins worldwide, which aim to institutionalise cooperation in the related basins.<sup>9</sup> A key regional law is the 1992 UN Economic Commission of Europe (UNECE) Convention on the Protection and Use of Transboundary Watercourses and International Lakes.<sup>10</sup> It has now been opened to global signatures and competes with the Watercourses Convention, but also has only 41 parties thus far.

### **Water and wars**

The customary law principles and treaties mentioned above aim to enhance cooperation between countries. Despite such treaties, the significance of water for national survival and economic growth implies that in regions of scarce water resources vis-à-vis demand, there are growing tensions. Such tensions exist, for example, between the riparians of the Indus, Jordan,<sup>11</sup> Ganges,<sup>12</sup> Nile, Mekong, Euphrates and Tigris, Zambesi, Kura Araks, Niger and Uruguay Rivers, as well as of the Aral Sea. Some of these tensions are purely regional in character, but some spill over not only to nearby countries but also to countries far away. The US, for example, sees its security interests threatened by tensions on the Indus, Nile, Jordan, Ganges and Tigris rivers as well as in the Aral Sea region.<sup>13</sup>

While most of these tensions are diplomatic, increasingly there has been speculation about whether the combination of increased demand and changing water flow quantity and quality could lead to an inflammable cocktail igniting water wars in different parts of the world. Global leaders like Ismail Serageldin<sup>14</sup> and Kofi Annan have warned of such a possible future scenario, building on scholarly literature over conflicts on water<sup>15</sup> caused by specific combinations of physical (shortage, maldistribution) and human factors,<sup>16</sup> possibly exacerbated by the impact of climate change.<sup>17</sup> Such potential conflicts can be seen as an argument to both securitize water and to prevent sharing of such water resources. Riparian countries of the Okavango, Nile and Mountain Aquifer are increasingly securitizing water.<sup>18</sup> For example, Fischhendler explains that empirical evidence in these and other basins shows that there is increasing securitization and that such securitization manifests itself in (a) the militarization of water infrastructure, such as when the military guard wells and dams, (b) the institutionalisation of water issues within peace treaties, as in those concerning Israel and Palestine, (c) the militarization of water discourses which excludes civil society and NGOs from participating, as when securitization of water leads to high-level secret

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<sup>9</sup>Oregon State University, *Atlas of International Freshwater Agreements*.

<sup>10</sup>UNECE. *Convention on the Protection and Use of Transboundary Watercourses and International Lakes*, UN Doc E/ECE/1267, New York, 17 March 1992.

<sup>11</sup>See, for example, Sabel, "Jordan Basin".

<sup>12</sup>See, for example, Islam, *Ganges Water Dispute*.

<sup>13</sup>US Department of State, *Global Water Security*.

<sup>14</sup>Serageldin, "Water: Conflicts set to Arise".

<sup>15</sup>Gleick, *Water in Crisis*.

<sup>16</sup>Tignino, "Water, International Peace, and Security"; Villiers, *Water*.

<sup>17</sup>Schwartz and Randall, *Abrupt Climate Change Scenario*.

<sup>18</sup>Turton, "Hydropolitical Dynamics"; Mason, *From Conflict to Cooperation*; Katz and Fischhendler, "Spatial and Temporal Dynamics".

discussions, and (d) the creation of narratives about the urgency to deal with this issue which can lead to the suspension of the rule of law.<sup>19</sup> The increasingly perceived shortage of water in different regions of the world, increasing military control over water infrastructure, the possibility of using water as a weapon in flooding lands to prevent enemy invasions or to spread waterborne diseases, and the use of geo-engineering to prevent clouds from crossing over to other jurisdictions could be possible security risks of the future.

### ***Water, sovereignty and hydro-hegemony***

On the other hand, others argue that water has more often than not led to cooperation;<sup>20</sup> that countries fight over identity, not water;<sup>21</sup> and that international treaties help to institutionalise cooperation.<sup>22</sup> However, the absence of globally binding law on transboundary water resources raises the question of whether sovereignty and hydro-hegemony play a key role in the way regional and global agreements are negotiated, interpreted and implemented. Hydro-hegemony refers to the way in which sovereign states with water-related power control water politics. This does not mean that only upstream countries have control over water. Downstream countries like Egypt can also have control over water through the legal instrument of historical use-related rights. Power can also be economic, military and political, in addition to being geographical and/or legal in nature.

The hydro-hegemony literature<sup>23</sup> argues that even though legal scholars would like to think that transboundary relations are governed by limited territorial sovereignty, in fact the actual negotiations and interpretations of transboundary agreements are influenced by power asymmetries and different types of conflict and geography (upstream/downstream). This leads to the use of sovereign power to force others to agree to treaties, the use of coercion and manipulation to change how people perceive and construct the problem. Realist scholars argue that in situations of power asymmetry and contestations over water, hydro-hegemony theory can help explain 'cooperative' outcomes. These theories are rooted in power-based theories of international cooperation.

### ***Institutionalisation and counter hydro-hegemony***

Institutionalists and regime theorists, however, argue that cooperation can become institutionalised over time and countries become socialised into observing key 'fair' principles of law.<sup>24</sup> Treaties can help to reduce transaction costs, show that cooperation is more beneficial than non-cooperation, and lead to orderly predictable rules.<sup>25</sup> International law can help in such a process by gradually eroding the effect of power and hegemony on international agreements. Given that the influence of international legal principles is growing and that the UN Watercourses Convention has recently entered into force, one could argue

<sup>19</sup>Fischhendler, "The Securitization of Water Discourse".

<sup>20</sup>Wolff, "Conflict and Cooperation International Waterways".

<sup>21</sup>Kalpajian, *Identity, Conflict and Cooperation*.

<sup>22</sup>Keohane, *After Hegemony*.

<sup>23</sup>Zeitoun and Warner, "Hydro-hegemony – A Framework for Analysis"; Zeitoun and Allan, "Applying Hegemony and Power Theory"; Cascão, "Ethiopia – Challenges to Egyptian Hegemony"; Cascão, "Changing Power Relations"; Cascão and Nicol, "Against the Flow"; Mirumachi, *Transboundary Water Conflicts*.

<sup>24</sup>See, for example, Junne, "Beyond Regime Theory".

<sup>25</sup>Keohane, *After Hegemony*.

that the legitimacy of certain principles (e.g. absolute territorial sovereignty) will be called into question, while that of others will gain in value (e.g. limited territorial sovereignty). Institutionalists and regime theorists claim that institutionalisation can counter hegemony. This does not mean that power politics does not influence treaty negotiation, but once a treaty has been adopted, it more often than not tends to shape state interests and state behaviour and leads to more and more cooperation as treaties give rise to rule-compliant behaviour and have a life of their own.<sup>26</sup> The process, however, is not always smooth. A key factor is the role of leadership – structural (using different sources of power), directional (demonstrating that it is possible) and instrumental (developing winning coalitions) – in promoting international collaboration for the good of all.<sup>27</sup>

## **The Watercourses Convention**

### ***Background – the Helsinki Rules***

Although water law has evolved over the centuries, the first formal epistemic community on water is the legal community: The International Law Association, established in 1873, has long worked on water-related issues to promote the institutionalisation of water principles. In 1966, it adopted the Helsinki Rules on the Uses of International Rivers<sup>28</sup> as a non-binding code of conduct for states to follow. It covered drainage basins and included pollution, and issues related to navigation, timber floating, and dispute prevention procedures. It made the first effort at counter-hegemonic strategies by introducing equity criteria for shared use of the river basin and inspired the content of the global Watercourses Convention and the regional Mekong agreement.<sup>29</sup> The Watercourses Convention, which unlike the Helsinki Rules does not focus on drainage basins and only on watercourses, was adopted in the United Nations General Assembly in May 1997 by 103 countries, following thirty years of development by the International Law Commission to reflect the state of customary water law. In that sense, the historic evolution of this Convention is very different from the more modern environmental treaties, for example on climate change, which are negotiated by an intergovernmental negotiating committee where power politics is an integral part of the initial negotiation process. However, the text was reworked by the Sixth Committee of the General Assembly (the ‘Legal Committee’) before being put to the vote; only three countries voted against it (Burundi, China and Turkey). Over the years, there has been considerable debate on the language of the Treaty even though much of it originates from the Helsinki Rules.<sup>30</sup>

### ***Addressing sovereignty and hydro-hegemony***

The Watercourses Convention attempted to deal definitively with the issue of sovereignty by not referring to absolute territorial sovereignty and instead referring to ‘sovereign equality’ and ‘territorial integrity’, which gave each riparian state an equal status and recognised

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<sup>26</sup>Young, “Behavioural Effects of Environmental Regimes”.

<sup>27</sup>Grubb and Gupta, “Leadership”.

<sup>28</sup>ILA, “The Helsinki Rules”.

<sup>29</sup>McCaffrey, *Law of International Watercourses*.

<sup>30</sup>Salman, “Watercourses Convention Ten Years Later”.



explicitly the rights of the downstream state: “Watercourse States shall cooperate on the basis of sovereign equality, territorial integrity, mutual benefit and good faith in order to attain optimal utilization and adequate protection of an international watercourse”.<sup>31</sup>

It questioned the idea of absolute territorial sovereignty by clearly recognising a series of factors that would need to be taken into account in sharing the waters of transboundary rivers equitably, namely: “(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”.<sup>32</sup> Furthermore, it clearly stated that watercourse States should not cause substantial harm to other states and that, if they did they should compensate them for the harm caused.<sup>33</sup>

### ***Addressing key river basin issues***

The Watercourses Convention also addressed some other key issues signalled in the first half of the last century. For example, a key issue emerging from the conflict between Egypt, Sudan and the remainder of the upstream countries on the Nile was that Egypt and Sudan claimed the waters of the Nile under the ‘historical uses’ principle, which could be proved by the agreements between Egypt and Sudan made in colonial and post-colonial times. This led to the adoption of Article 4 of the Watercourses Convention, which requires that all riparians affected by a watercourse agreement should be party to it. In addition, given that there were already so many different bi- and multilateral agreements between riparian states, Article 3 states that the Convention does not rewrite existing agreements, but merely requires states to consider harmonizing existing agreements with the provisions of the Convention. Another key issue since early Islamic times is the idea of priority of use: states should specify in advance of a drought which uses have priority over others. Despite the fierce debate regarding assigning priority to basic human needs, the Convention ultimately concluded that no use of water has inherent priority over other uses (Article 10).

Since data regarding watercourses is critical to its governance, the Convention calls on states to share such data (Article 9), unless such data is vital to national security (Article 31). Similarly, since infrastructural works could lead to major changes in watercourses, parties are required to inform and consult each other with regard to planned measures (Articles 11-19). Part IV of the Convention has some key principles regarding the preservation of freshwater and marine ecosystems, or reducing pollution and not introducing alien species (Articles 20-23). There are some articles on joint management, regulation and protection of installations (Articles 24-26), and the responsibility to deal with emergency situations (Articles 27-28) and armed conflict (Articles 29-32). Article 33 deals with the peaceful resolution of disputes.

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<sup>31</sup>UN Watercourses Convention, Article 8(1).

<sup>32</sup>UN Watercourses Convention, Article 6(1).

<sup>33</sup>UN Watercourses Convention. Article 7.



The Watercourses Convention thus reflects attempts at codifying the state of customary international water law, but with its own emphasis. It undermines the role of absolute sovereignty by making provisions for (a) sharing water equitably between countries, and between present and future uses, (b) ensuring state responsibility for substantial harm caused to others, (c) taking into account how planned measures may impact on water uses, (d) requiring environmental protection of water ecosystems; and (e) ensuring that all riparians are included in an agreement that may concern them. The Watercourses Convention clearly also countered historic rights by talking also of future uses of water. Additionally, it tried to pre-empt the possibility of war or the use of water for security goals by promoting a series of measures for ensuring the peaceful resolution of disputes as well as measures regarding emergencies and armed conflict. It thus progressively developed international water law.

At the same time, the Convention text made serious concessions to the hydro-hegemony during the negotiations. By focusing only on watercourses and not river basins, it limited the control of the regime to the water as opposed to the land in watersheds. It did not immediately require that existing agreements, with their allocation of rights and responsibilities, would no longer be valid. It did not specify which weights would be applied to which criteria for water allocation. It did not include a series of ambient or emission standards for water or rules regarding life within water bodies. As concerns data exchange, it allowed that some data can be kept secret because of defence and security considerations and merely asked states to protect water bodies during armed conflict.

In promoting equitable water sharing and joint management and regulation bodies, the Convention intended to pave the way for riparian countries to come together through a system of shared administrative law that would gradually replace adversarial state relations in inter-state treaties.

## **Does the Watercourses Convention counter hydro-hegemony?**

### ***Global challenges***

The Watercourses Convention remained a paper tiger for 17 years. With its recent entry into force in 2014, does the Convention provide a real and definitive blow to hydro-hegemony? Is it ready to face the water challenges of the 21st century? Today, transboundary water issues can no longer be seen as separate problems affecting only river basins; they are affected by changes in the global hydrological cycle, climate change, and large-scale trade in virtual water.<sup>34</sup> Equally, access to water and sanitation services, pollution of water bodies worldwide and the cumulative effect of infrastructures (e.g. dams) on water life are all adding to the global dimension of water problems.

### ***Challenge to hydro-hegemony: too few parties***

Although, in theory, the text of the Watercourses Convention challenges some of the primary storylines of hydro-hegemony, the relatively few parties that have ratified the Convention implies that the challenge to hydro-hegemony remains very partial.

Although all UN states can join the Watercourses Convention, it has only 36 parties to it. In Asia, only Uzbekistan (on the Aral Sea) and Vietnam (downstream on the Mekong)

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<sup>34</sup>Vörösmarty *et al.*, "What Scale for Water"; Pahl-Wostl *et al.*, "The Global Water System".

have ratified the Convention. In the Middle East, the downstream countries of Syria and Iraq on the Euphrates and Tigris have ratified the agreement, but Turkey the upstream country has yet to do so. This part of the world has had water institutions since the time of the Mesopotamian civilisation.<sup>35</sup> On the Jordan, shared by Lebanon, Israel, Palestine, Jordan and Syria (racked by conflict),<sup>36</sup> only Israel has not ratified the agreement. Qatar, which does not share a transboundary surface water body, has also ratified it. In Africa, on the Volta, only Burkina Faso, Ivory Coast and Benin have ratified out of the riparian states which include Mali, Togo and Ghana; on the Niger, Niger, Benin and Nigeria have ratified but not the upstream countries of Guinea and Mali; none of the Nile or Congo riparians have ratified the agreement. In Europe, Denmark, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Luxembourg, Montenegro, Netherlands, Norway, Portugal, Spain, Sweden, and UK have ratified the agreement, but this does not say much as these countries have several sets of overlapping institutional agreements with each other on a series of economic, ecological and social issues, meaning that their cooperation already is heavily institution-alised. No South American country has ratified the agreement. No major upper riparians or countries claiming historical water rights in stressed transboundary water regions of the world have ratified the Convention; they clearly wish to retain their sovereign rights over their river basins.

Even though the Convention clearly states that it does not rewrite past relations and thus does not threaten past rights and responsibilities acquired with respect to transboundary agreements, upstream countries and others clearly feel threatened by the follow-up paragraph in the Convention which requires countries to think about harmonising their agreements with the provisions of the Convention. Article 3(2) reads: “Notwithstanding the provisions of paragraph 1, parties to agreements referred to in paragraph 1 may, where necessary, consider harmonizing such agreements with the basic principles of the present Convention.”

### ***Substantively out-dated***

In the end, the Convention reflects the transboundary water issues of the first half of the 20<sup>th</sup> century and is seriously out of date.<sup>37</sup> First, the definition of watercourses is very limited: it does not include the drainage basin or watershed, or enclosed transboundary groundwaters or aquifers (which required a new set of Draft Articles presently before the UN General Assembly); and it makes little reference to the use of green water as a possible substitute for blue water.<sup>38</sup> One could even go a step further to argue that such a Convention may need to go beyond addressing just transboundary waters to cover several other issues, such as water quality within riparian states (as does, for example, the 1979 Ramsar Convention on Wetlands<sup>39</sup>), fresh waters in all states as their use and abuse is intimately linked through human if not hydrological systems; the conjunctive use of ground and surface waters in integrated water resource management, as does the ILA's revised, legally non-binding,

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<sup>35</sup>Kornfeld, “Mesopotamia”.

<sup>36</sup>Sabel, “Jordan Basin”.

<sup>37</sup>Dellapenna and Gupta, “Global Law on Water”.

<sup>38</sup>Blue water refers to the water in surface and ground water; green water refers to the rainfall that is stored in the soil and then used by plants – it does not flow into surface and groundwater systems.

<sup>39</sup>UN Ramsar Convention on Wetlands of International Importance especially as Waterfowl Habitat, Ramsar 2.2.1971, as amended by the Paris Protocol of 3.12.1982 and the Regina amendments of 28.5.1987.

academic codification of water law in the 2004 Berlin Water Rules;<sup>40</sup> and perhaps even the relationship between water and land.

Second, its claim of no priority of use has been overtaken by the UN General Assembly and the UN Human Rights Council's adoption of the human right to water and sanitation,<sup>41</sup> which is increasingly being seen as part of customary international water law.<sup>42</sup> Third, it deals very superficially with pollution issues: it does not adopt the precautionary principle, the polluter pays principle, the sustainable development principle, licensing, best available technologies, environment impact assessments or best environmental practices as does, for example, the ECE Water Convention of 1992. Nor does it try to protect the four different ecosystem services of water, namely its supporting functions in circulating essential nutrients, its regulating functions such as cleaning water and reducing the risk of flooding, its provisioning functions of providing fish, food and navigation routes and its cultural functions in meeting the aesthetic, religious and cultural needs of people.<sup>43</sup> It also does not proactively aim to protect the biodiversity in fresh water and aquatic systems as do, for example, the Conventions on Biological Diversity (1992)<sup>44</sup> and Wetlands (1979). Fourth, the Watercourses Convention, which was adopted five years after the United Nations Framework Convention on Climate Change (1992),<sup>45</sup> ignores the implications of climate change on the world's water regime. This is very problematic as climate change is likely to change precipitation patterns drastically, leading to melting glaciers, temporarily rising water flows in rivers and rising sea levels which cause saltwater inundation in ground waters. These effects will significantly affect fresh water flows while increasing dependence on ground waters.<sup>46</sup>

### **No institutional bodies**

The Watercourses Convention was not drafted as a framework convention with the likelihood of follow-up protocols. Nor were any institutional bodies established under the Convention – bodies that can link up with the latest scientific knowledge or monitor the implementation of the Convention. This affects the ability of the Convention to be a living, dynamic treaty able to adapt to changing knowledge and circumstances as are, for example, the Climate Convention and the UNECE Water Convention.

### **The rise of sustainability, security and the return to sovereignty**

The need to see water as part of a global natural (hydrological), and anthropogenic (climate change, trade) system has led many to discuss the need to ensure a globally sustainable system. At the same time, sustainability is increasingly being reconstructed as a security

<sup>40</sup>The ILA, "The Berlin rules on water resources" were adopted in 2004 by the International Law Association, a scholarly body. It revised the previous codification of water rules in the Helsinki Rules of 1966 and included the new issues that should be covered by international water law including issues of scope, management of waters, special rules regarding internationally shared waters, the rights of persons, the protection of the aquatic environment, impact assessments, extreme situations, ground water, navigation, protection of waters and water installations during war or armed conflict, state responsibility, legal remedies and settlement of international disputes.

<sup>41</sup>UNGA Res. 64/292; UNHRC Res. 15/9.

<sup>42</sup>Obani and Gupta, "Evolution of Right to Water and Sanitation".

<sup>43</sup>Hayat and Gupta, "Ecosystem Services of Different Colours Water".

<sup>44</sup>UN, *Convention on Biological Diversity*, 5 June 1992, Rio de Janeiro. In force since 29 December 1993.

<sup>45</sup>UN, *Framework Convention on Climate Change*, 9 May 1992, New York. In force since 24 March 1994.

<sup>46</sup>IPCC, *Climate Change* 2013.

issue at multiple levels of governance.<sup>47</sup> The risk of crossing planetary boundaries or tipping points in managing fresh water and fresh water ecosystems raises the issue of planetary security.<sup>48</sup> The need to prioritise water issues at national and transboundary level has led some to redefine water as a security issue as a way to move it up the national agenda.<sup>49</sup> Some scholars also discuss the issue of the global lack of poor people's access to water and sanitation services as a human security challenge. Global movements of people because of reduced access now and as a consequence of climate change in the future are also being seen as security challenges.<sup>50</sup> Sustainability issues are gradually being redefined as security issues in order to ensure that greater priority is given to them.<sup>51</sup>

Yet, this is a very dangerous trend as security has a very specific meaning in national and international politics and is closely linked to sovereignty. Thus, an inappropriately borrowed discourse can lead to a return to discussions on sovereignty.<sup>52</sup> Sovereign states can revert back to the claim that as water is critical to their survival, socially, economically and ecologically, they are unwilling to share the water – the securitization argument. We can already see this in the International Law Commission's Draft Articles on Transboundary Aquifers of 2006, where sovereignty over groundwater is treated more in line with sovereignty over national oil reserves than in line with sovereignty regarding transboundary waters. The text states: "Each aquifer State has sovereignty over the portion of a transboundary aquifer or aquifer system located within its territory. It shall exercise its sovereignty in accordance with international law and the present draft articles" (Draft Articles, Article 3). It also reiterates that "Nothing in the present draft articles obliges a State to provide data or information vital to its national defence or security" (Draft Articles, Article 19).<sup>53</sup>

## Conclusion

What is increasingly becoming clear is that transboundary water issues will become more and more complex, with climate change and globalization exacerbating quality and quantity issues along river basins worldwide. In customary international water law, countries claimed absolute territorial sovereignty, absolute integrity of state territory and historical water rights as ways in which to guarantee their access to water resources. However, water has also been a force for bringing countries together and there have been efforts at institutionalising collaboration and cooperation in most of the watercourses around the world.<sup>54</sup> Since the 1960s there have been efforts at ensuring the development of common rules for institutionalising relations between water riparians. The Watercourses Convention, which took some thirty years to write, another seven to adopt and yet another 17 to enter into force is a concrete step in the institutionalisation of water relations. With its emphasis on equitable sharing and no harm, and its call for transboundary water organisations, it

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<sup>47</sup>Pahl-Wostl *et al.*, *Handbook on Water Security*.

<sup>48</sup>Cf. Rockstrom *et al.*, "A Safe Operating Space"; Galaz *et al.*, "Planetary Boundaries".

<sup>49</sup>Græger, "Environmental Security?"; Baldwin, "The Concept of Security"; Schwartz and Randall, *Abrupt Climate Change Scenario*.

<sup>50</sup>Myers, "Environment and Security"; Homer-Dixon, "Environmental Scarcities and Violent Conflict".

<sup>51</sup>Fischhendler and Katz, "The Use of 'Security' Jargon".

<sup>52</sup>Gupta *et al.*, "Water Sovereignty and Security".

<sup>53</sup>ILC, Draft Articles on the Law of Transboundary Aquifers, UN Doc. A/61/10, New York, 2006.

<sup>54</sup>Oregon State University, *Transboundary Freshwater Dispute Database*.

challenges hydro-hegemonic approaches and promotes peaceful resolution of water issues. This is *prima facie* a key step forward.

However, the entry into force of the Watercourses Convention is, in itself, not enough. This is because: (a) it was outdated in content even before it entered into force; (b) while having made a number of concessions to hydro-hegemonies, it has not yet been successful in seducing them to ratify the Watercourses regime (the Convention has only been ratified by about one-fifth of the world's countries, not including any hydro-hegemon on a water-scarce basin); (c) it has a clause that prevents its retroactive application to existing international treaties on water bodies; and (d) it does not establish any organisation and, as such, is not a living framework convention that can be regularly updated in relation to the latest scientific evidence and issues raised by the parties. These shortcomings make it difficult for it to influence substantially global policies on water.

Yet, having said that, one could argue that there is nothing to stop the parties from amending or developing some kind of follow-up to this treaty (even though this is not provided for in the Convention itself) to give it the teeth it needs. This would involve (a) updating its contents and giving it a more framework-like character; (b) making it more attractive for all parties to participate in it, either through incentives or disincentives;<sup>55</sup> (c) ensuring that, since all watercourses will need to have new rules dealing with the impacts of climate change, if not other aspects like virtual water trade, such new amendments are in line with an updated Watercourses Convention; and (d) establishing new bodies under the Convention to enable the Convention to be revised as and when new science and new knowledge becomes available, and to monitor the implementation of the provisions of the Convention.

Given the current reluctance of states to ratify the Watercourses Convention let alone develop it further, such a process needs a champion; regime theorists have argued that international collaboration requires some country, organisation or person to lead the process. Such leadership could be structural, using incentives derived from power to steer other countries in a specific direction; instrumental, using diplomatic skills to form coalitions that lead to consensus; and/or directional,<sup>56</sup> using a combination of ideas and demonstrating through unilateral implementation that it is possible for countries to gain more from pooling their sovereignty in water issues than in taking a nationalistic stand. Such leadership could focus on either strengthening the Watercourses Convention itself, or making better links between it and, for example, the Climate Change, Wetlands and other Conventions.

A possible leader could be UN Water (the body established by the UN in 2003 to coordinate water issues), some international NGO that wishes to promote this issue as the International Union for the Conservation of Nature (IUCN) did for the Convention on Endangered Species, or the UNECE secretariat. The UNECE secretariat already functions as the secretariat for their Water Convention and Protocol and wants to lead in relation to the Watercourses Convention as well. The UNECE Convention is well developed in terms of environmental aspects which are the key issues facing European countries and could be complemented by emphasis on the equity issues in the Watercourses Convention which are

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<sup>55</sup>Some international treaties like the Climate Convention include incentives such as financial assistance, technology transfer, and capacity building; other treaties like the treaty on Ozone Depleting Substances include disincentives such as trade restrictions. Sometimes incentives are used in the negotiating process by linking different issue areas.

<sup>56</sup>Grubb and Gupta, "Leadership".

the key issues facing many river basins in the South. Thus the future of the Watercourses Convention and its implications for stressed transboundary river basins depends largely on whether there are champions willing to develop wise leadership strategies in this field to promote pooled sovereignty so as to enhance institutional cooperation and challenge hydro-hegemonic approaches. Such leadership is not just desirable, it is essential to promote sustainable global water governance.

## Notes on contributor

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