The UN Convention on International Watercourses: Prospects for an Unfinished Agenda for Co-Management

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International law plays an important role in the management of international watercourses. While the rule of law does not in and of itself provide solutions for water utilization, conservation or protection issues, it contributes to the means of finding and reaching solutions to international water problems as well as of avoiding and settling disputes. Until the adoption by the General Assembly in May 1997 of the UN Convention on the Law of Non-Navigational Uses of International Watercourses (hereinafter the UN Convention) and its opening for signature and ratification by UN member States, the international community did not have at its disposal a set of written rules and principles endorsed by a political arena. Up until this time, the Helsinki Rules on the Uses of the Waters of International Rivers, which were adopted in 1966 by the International Law Association were the only set of written rules to be referred to. They, however, had not been endorsed by an inter-state political body but by a non-governmental body and thus lacked the official standing of the UN Convention. In addition, there was a debate as whether they constituted customary law. The UN Convention brought some light in this context allowing for some clarification.

The codification effort initiated in 1970 by the UN International Law Commission (a subsidiary body of the UN General Assembly) took almost three decades. Although it is the result of political compromises among groups of states with different interests, it helped clarify and codify various rules and principles of the regime applicable to international watercourses. The legal and policy framework as it currently stands in the UN Convention, however, is not precise enough, nor sufficiently streamlined and overarching for dealing in a comprehensive and effective manner with co-management issues. Accordingly, there is a need to develop further the policy and legal regime applicable to watercourses.

1. The Adoption of the UN Convention: A Step Forward

The UN Convention constitutes a step forward in the development of international water law as it provides the basic elements of the general architecture for managing international watercourses. The elements of such architecture have been negotiated as to have universal applicability; uncertainties and minimal common denominators are the price to pay for such approach. The UN Convention is not an exception in this respect. Many conventions covering international environmental law or human rights law issues present similar features. One of the virtues of such instruments - also referred to as framework conventions - is to lay down the constitutive foundations for a legal regime. The regime then is further elaborated through additional instruments, such as treaties, protocols, amendments and guidelines.

It should also be noted that when the UN Convention enters into force, the forthcoming bilateral and regional watercourse agreements among parties to the Convention will be negotiated in light of the principles and rules it provides for, taking into consideration the specifics of each river basin. The UN Convention highlights this aspect in stating:

Watercourse States will enter into one or more agreements, hereinafter referred to as "water agreements", which apply and adjust the provisions of the present Convention to the characteristics and uses of a particular international watercourse of part thereof. (Article 3, para. 3)

It is in such contextual and temporal context that the value-added of the UN Convention should be assessed, in the sense that it allows for consolidation and developments based on notions and principles which have been universally defined in a framework instrument. The UN Convention stands on four main pillars and reveals, in fact, the path for an integrated approach:
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management of international watercourses. It is important in this respect to note the increasing role played by water associations.
redress and compensation through such means. It should be complemented by other means for involving the public in the
injury occurred, in granting to such persons, in accordance with its legal systems, access to judicial or other procedures, or a right
intergenerational equity to protect the rights of present and future generations. It is in the common interest of all riparians that an international watercourse be considered as a shared resource and managed in such sustainable manner.
The water sharing principles, i.e. equitable and reasonable use principle and no-harm rule. The UN Convention also enunciates a series of factors to be taken into account for such allocation. The obligation of riparian states to cooperate. According to the UN Convention, such cooperation may be achieved through different means: joint mechanisms and commissions of which riparians are members, regular exchange of information and data and notification of planned measures. The protection of the environment as an integral component of the regime applicable to international watercourses. The promotion of dispute settlement and dispute avoidance mechanisms.

The UN Convention charts a path for an integrated approach that is rather forward looking if we consider that several of its components are not part of the existing inter-state water agreements. In practice, quality and quantity issues are not always dealt with together; fairness in the apportionment of water resources remains a quest in many parts of the world; cooperation and exchange of information need to be strengthened as many countries still consider water data as not being part of the "public domain"; joint institutional mechanisms need to be established; and prevention and dispute avoidance mechanisms remain rather underdeveloped. The UN Convention attempts to address many of these shortcomings; nonetheless, much work still needs to be done for furthering a legal regime conducive to sustainable development of international watercourses and that benefits the populations of all the concerned riparian states.

II. The Next Steps for Promoting Co-Management.

Various steps need to be taken to reinforce the policy and legal regime of international watercourses. First, although a step ahead, the definition of an international watercourse, currently provided by the UN Convention, is not comprehensive enough in an ecosystem perspective. A watercourse is defined as "a system of surface waters and groundwaters constituting by virtue of their physical relationship a unitary whole and normally flowing into a common terminus," and an "international watercourse" as "a watercourse, parts of which are situated in different States". It, therefore, encompasses the main stream of an international river and its tributaries, as well as international lakes and groundwaters which are connected with other parts of an international watercourse. A broader conception, however, would include all waters and lands, which are part of a drainage system. More particularly, all underground waters (i.e. confined aquifers, indirect aquifers, etc.) should be considered as parts of such system. Their links with surface waters should also be fully taken into consideration even though they may present distinct features as compared to surface waters.

The water sharing rules and principles should also be further developed. Currently, there is a risk of status quo because of a lack of prioritization among the principles to be implemented. In addition, there is a need for integrating elements of sustainability for managing the watercourses, especially the perspective of intergenerational equity to protect the rights of present and future generations. It is in the common interest of all riparians that an international watercourse be considered as a shared resource and managed in such sustainable manner.

The collection and exchange of data are key elements for preventing disputes. In this context, the establishment of joint mechanisms and commissions should be further strengthened to promote and establish adequate exchange of information systems. At present, the UN Convention commitment reads as follows:

In determining the manner of such cooperation, watercourse States may consider the establishment of joint mechanisms or commissions, as deemed necessary by them, to facilitate cooperation on relevant measures and procedures in the light of experience gained through cooperation in existing joint mechanisms and commissions in various regions. (Article 8, para. 2)

As can be noted, it is a due diligence-type obligation which does not hold states accountable to any precise outcome. Moreover, efforts should be made so that these institutional settings are opened to all riparians. Elements of flexibility may be needed to allow all riparians - parties or not to an agreement - to be invited to the work and activities to be undertaken by a joint mechanism established within the context of a particular international watercourse system. This would constitute a first step towards their further involvement as parties to an agreement among all riparian states.

The UN Convention is a classical state-oriented instrument, with almost no provisions about the involvement of other stakeholders, and most importantly, the local communities and NGOs. The Convention contains a unique provision dealing with individuals. It ensures access to judicial and other procedures on a non-discriminatory basis and reads as follows:

Unless the watercourse States concerned have agreed otherwise for the protection of the interests of persons, natural or juridical, who have suffered or are under a serious threat of suffering significant transboundary harm as a result of activities related to an international watercourse, a watercourse State shall not discriminate on the basis of nationality or residence or place where the injury occurred, in granting to such persons, in accordance with its legal systems, access to judicial or other procedures, or a right to claim compensation or other relief in respect of significant harm caused by such activities carried on in its territory. (Article 32)

These are important stipulations; in the context of the pollution of the Rhine River, for example, individuals were able to obtain redress and compensation through such means. It should be complemented by other means for involving the public in the management of international watercourses. It is important in this respect to note the increasing role played by water associations. The public can also be involved through hearings, briefings and working groups. Public participation and access to information would raise awareness and increase support for water management policies. In addition, the body law pertaining to human rights
Fifth, the environmental regime should be strengthened to incorporate principles and rules of international environmental law, including the principles enunciated in the Rio Declaration on Environment and Development. A real ecosystem perspective drawing on the dynamics and linkages among freshwater, terrestrial, marine and atmospheric systems should also be further developed.

Sixth, the Convention provides for the classical menu of diplomatic and judicial means of dispute settlement between states with the addition, of a fact-finding commission that can be established at the request of a party. This is an important element as facts are of great importance for managing watercourses. There may be a need, however, for strengthening preventive and dispute-avoidance mechanisms. Lastly, the UN Convention leaves out some important topics. One is the role played by the scientific community in the dispute settlement process and the necessity for fully incorporating it in the decision-making process. The second topic relates to enforcement and to sanctions or compensatory measures that are necessary for ensuring effective compliance with international watercourse agreements. A related question here deals with incentives for countries to get involved in such legal processes. Strengthening the capacity of parties to comply with obligations under the UN Convention or any related agreement is crucial. It has, for example, been incorporated in the World Bank policy on International Waterways. The instrument states:

The Bank recognizes that the cooperation and goodwill of riparians is essential for efficient utilization and protection of the waterway. Therefore, it attaches great importance to riparians' making appropriate agreements or arrangements for these purposes for the entire waterway or any part thereof. The Bank stands ready to assist riparians in achieving this end. In cases where differences remain unresolved between the state proposing the project (beneficiary state) and the other riparians, prior to financing the project the Bank normally urges the beneficiary state to offer to negotiate in good faith with the other riparians to reach appropriate agreements or arrangements.

Diplomatic means, such as consultation, mediation and investigation, may also rely on incentives to spur the state that requires cooperation to adjust its position. As a means of last resort, targeted sanctions could be imposed on such state to compel it to settle its dispute with other riparians.

III. The contribution of the International Court of Justice for the Promotion of Co-Management of International Watercourses.

Some of the needed steps towards effective co-management have been captured by the International Court of Justice (ICJ) in its decision rendered in the case concerning the Gabcikovo-Nagymoros project. One lesson to be drawn from the case is that the rule of law cannot be viewed in static terms. The 1977 treaty concluded between Hungary and Czechoslovakia "concerning the construction and operation of the Gabcikovo-Nagymaros System of Locks" was silent on the subject of environment. The Court, however, held that "the Treaty is not static, and is open to adapt to emerging norms of international law". It further said that "the awareness of the vulnerability of the environment and the recognition that environmental risks have to be assessed on a continuous basis have become much stronger in the years since the Treaty's conclusion".

As to the water sharing principles, the Court stated that international watercourses should be considered as shared natural resources. This notion should result in considering the principle of equitable utilization in the broader context of sustainable development management. A derivative element not yet fully explored, but which deserves attention, is that the apportionment of waters is to be embedded in an ecosystem thinking, taking into consideration the rights of present and future generations.

In addition, the decision of the Court has highlighted that the law of international watercourses is not only comprised of the UN Convention, as important as it may be, but also of other sources of international law, such as the Rio Declaration on Environment and Development. In order to give more effect to this vision for a more holistic regime for international watercourses, the ICJ expressly stated that cooperation between riparians in the management of international watercourses is crucial.

IV. Conclusion

The adoption of the UN Convention constitutes an important step towards the co-management of watercourses. Effective co-management of international watercourses requires, however, further cooperation among the riparians. Such regimes should aim at including all waters as well as lands which are part of a drainage system, or the watershed in the American parlance. They should call for adequate and regular exchange of information and the involvement of various stakeholders and should be embedded in an ecosystem perspective. In this context, the issues of water sharing and water allocation would find their place as "natural flows", metaphorically speaking, of an effective co-management regime with sustainability being central.