

Entry into force of the 1997 UN Watercourses Convention: barriers, benefits and prospects

● Despite widespread support for the UN Convention on the Law of the Non-Navigational Uses of International Watercourses when it was adopted by the United Nations in 1997, it is yet to enter force. **ALISTAIR RIEU-CLARKE** looks at why states should act to bring the Convention into force, with accompanying interviews by **KEITH HAYWARD**.

Following over 50 years of development, the UN Convention on the Law of the Non-Navigational Uses of International Watercourses was adopted on 21 May 1997. To date there are only 16 contracting states to the Convention: Finland, Germany, Hungary, Iraq, Jordan, Lebanon, Libya, Namibia, Norway, Portugal, Qatar, South Africa, Sweden, Syria and Uzbekistan. This is 19 short of the number needed for the Convention to enter into force. Ten years since the Convention's adoption this article considers: firstly, why

widespread state endorsement has so far been lacking; secondly, the potential benefits that entry into force might bring; and finally, the likelihood of the Convention entering into force in the foreseeable future.

Overview of the Convention

The UN Watercourses Convention sets out the basic international norms governing the non-navigational uses of international watercourses. The key aim of the Convention, as provided for in the preamble, is to 'ensure the utilisation, development, conservation, management and protection of

international watercourses and the promotion of the optimal and sustainable utilisation thereof for present and future generations'; whilst 'taking into account the special situation and needs of developing countries'. A balance is struck between upstream and downstream interests, by providing that international watercourses must be utilised in an equitable and reasonable manner, subject to adequate protection of the aquatic ecosystem and of connected terrestrial and marine environments. The Convention also includes a set of procedural rules that deal with matters such as notification of planned measures, exchange of information, consultation and dispute settlement. In addition, the Convention encourages states to establish the appropriate management mechanisms for their international watercourses, and adopt the necessary measures to mitigate the impacts of extreme events.

Relevance of international watercourses and existing governance arrangements

It is difficult to accept that apathy towards the UN Watercourses Convention amongst states might be due to the possible insignificance of international law in the field as compared to other global environmental issues such as oceans, climate change, biodiversity, desertification, wetlands, and so forth. Throughout the world there are 263 international river basins, shared by 145 countries, and representing over half the Earth's land surface. Effective governance of all freshwater resources has been heralded as yielding the greatest potential gain in addressing the current world water crisis. The 2nd UN World Water Development Report, amongst others, even went so far as to describe the world water crisis as 'a crisis of governance'. Governments have widely endorsed the need for improved governance through numerous international policy documents, such as the 2000 Hague

Support for the weakest states: the Convention's contribution

'It is our best shot at two things,' says Professor Patricia Wouters of the UNESCO Centre for Water Law, Policy and Science at the University of Dundee, commenting on what the UN Watercourses Convention offers. The first is its contribution towards achieving 'water for all', particularly in terms of the support it can provide for weaker states. The second is what it offers with respect to regional security, both in terms of providing a framework for state-level cooperation and of helping ensure users get equitable and reasonable use. 'I think the Convention helps us on both of those water security issues,' says Wouters.

Given these potential benefits, Wouters does not believe a lack of clarity over the meaning of the Convention's provisions is the root cause for it not having entered force. 'The people in foreign affairs [ministries] who are responsible for treaty negotiation are too busy and change too often and don't know anything about the Watercourses Convention. And the people in water resources ministries don't know anything about international law, so they don't know anything about the Convention either.' Progress can be made if these gaps can be bridged, which is one aspect of the work of her institution. And she sees a more general need: 'It is now time to have a huge public awareness campaign.'

The Convention is described as a 'framework convention', so there is an expectation that states would build on the Convention with local arrangements. But what would the Convention deliver in its own right?

'The biggest thing is it entitles and obliges everyone to an equitable and reasonable use, so it levels the playing field and provides a flexible substantive rule for... using the water in an operational way,' says Wouters. It contains what she describes as 'pragmatic' procedural rules for approaching how waters might be developed. And it provides a basis for peacefully resolving disputes. 'There are great values in a framework convention because it provides you with the three important cornerstones – the substantive rule, procedural rule and dispute prevention mechanism, and that will always be of use,' says Wouters.

The Convention does not require that river basin organisations are set up. Indeed, Wouters believes this may not always be the best way to proceed, because the poorest states face the greatest problems participating in such institutions. Rather, the Convention would help provide a safeguard for fair treatment. 'It might make up for lack of capacity,' she says.

While Wouters believes there is a need for a publicity campaign, she does not believe that, were the Convention to come into effect, the parties should focus on pushing for wider membership. 'We get back to the resource question, and since I am always worried about the weakest one in the chain, I don't know whether we should be that ambitious.' The focus should instead be on strengthening national legislation, with the aim of getting 'more coherence in building a national water plan'.

'I would start by laying down good national practice,' she says, adding: 'That good state practice will have a ripple effect.' ●

Beyond customary law: reluctance to move beyond the status quo

Stefano Burchi, of the Development Law Service of the UN Food and Agriculture Organisation, highlights an important point about the Convention – that its core principles are what is in fact already law but that it also attempts to go beyond this.

‘There’s no doubt in my mind that the 1997 UN Convention’s core articles reflect the current state of public international law on shared watercourses and lakes,’ he says, adding that the Convention also probably reflects international law generally as far as groundwater is concerned. As far as the core provisions are concerned, he therefore concludes: ‘I do not see much added value to the Convention entering into force or gaining widespread support.’

As for the non-core provisions that go beyond current law, the merit of having the Convention enter force needs to be assessed by ‘a detailed analysis and weighing of the pros and cons of those non-core, innovative provisions of the Convention becoming binding’.

Burchi therefore gives two reasons as to why the Convention has not yet entered force. The first is ‘the perception that, after all, there’s no real need and incentive to sign on to the Convention since its core provisions are already binding as customary international law,’ while the non-core provisions can ‘comfortably’ be seen as representing how the law should be, as long as the Convention is not in force.

The second is, he says, ‘the unwillingness of states to be seen to be ostensibly bound by a potentially divisive legal instrument’. ●

Declaration, and the 2002 Plan of Implementation of the World Summit on Sustainable Development.

While the need for more effective governance arrangements is widely accepted, translating political will into practice has so far proven illusive. Within the context of international watercourses, a 2006 UNEP Global International Waters Assessment study concluded that only one third of the world’s international river basins have established treaties, basin commissions or other forms of cooperative management frameworks. Similarly, a Declaration of African Ministers adopted at the Bonn Conference on Freshwater in 2001 noted that most international river basins in Africa were without any agreements on equitable use or environmental protection, few effective institutional arrangements for consultation or cooperation existed, and procedures for avoiding or resolving international disputes over water were largely lacking. Even where basin agreements exist they often fail to address current water management challenges, or do not include all basin states sharing a particular river basin. A clear example of the latter trend is the 1995 Mekong Agreement, to which both Myanmar and China are not parties. The need for a global instrument to promote and strengthen international law in the field therefore seems both timely and highly relevant.

Work of the ILC and General Assembly

As noted above, the Convention was the culmination of over 50 years’ work on the topic by the UN. The text was drafted by the International Law Commission (ILC) over a 20 year period, and through the leadership of five eminent international lawyers, two of whom went on to become Judges at the International Court of Justice: Richard Kearney, Stephen Schwebel,

Jens Evensen, Stephen McCaffrey and Robert Rosenstock. A draft set of Articles was adopted by the ILC in 1991, then finalised in 1994. At various stages, states were offered the opportunity to comment on the direction of the ILC’s work, and consider whether the proposed articles accurately reflected the current status of international law in the field. In addition, the 1994 ILC draft formed the basis by which states negotiated the final text of the convention within the 6th Committee (Legal) of the General Assembly. The 6th Committee met twice in 1996 and 1997 before the Convention was adopted by an overwhelming vote of 103 states in favour, 26 abstentions, and three votes against (Burundi, China and Turkey). Subsequently, Nigeria and Fiji, who had not voted, and Belgium, who had abstained, informed the UN General Assembly Secretariat that they had intended to vote in favour of the Convention. While there was therefore some opposition to the Convention, the number of states voting in favour of the Convention would infer that there was significant support for the Convention amongst the majority of states within the General Assembly.

Opposition to the Convention

During the negotiation of the Convention, and its subsequent adoption in the General Assembly, a number of issues proved contentious, including the relationship between the Convention and existing watercourse agreements, whether equitable and reasonable utilisation should take precedence over the rule of no significant harm, and if certain dispute settlement mechanisms should be compulsory. These contentious issues, which are well documented in a recent article by Salman Salman for *Water International* (March 2007), may be a

reason why some states have not ratified the Convention.

However, it should also be remembered that a significant number of states voted in favour of the Convention, and only three states voted against it. Even for some states that voted against the Convention or abstained, it could be argued that their subsequent state practice has been in line with the key provisions of the Convention. For example, while China voted against the Convention in 1997, noting that states had ‘indisputable sovereignty over a watercourse which flowed through its territory’, it has subsequently concluded agreements with some of its 15 neighbouring states, such as the 2001 Agreement between Kazakhstan and China on Cooperation in the Use and Protection of Transboundary Rivers, which obliges it to ‘adhere to the principles of equity and rationality, as well as closely cooperate in a sincere, neighbourly, and friendly manner.’ Similarly, Turkey, despite voting against the text in 1997, has expressed a desire to join the European Union (EU). In so doing, Turkey would be subject to the much more stringent provisions of the 2000 EU Water Framework Directive. A further example is Uzbekistan, which abstained in 1997 but has recently acceded to the Convention. At a recent address to the Shanghai Cooperation Organisation, President Islam Karimov noted that adhering to the principles outlined within the UN Watercourses Convention is the only way in which to ensure projects related to the use of water and energy resources within Central Asia can be conducted in an equitable and reasonable manner.

Lack of awareness and ‘treaty congestion’

In some parts of the world the reason why the Convention has not been supported by states may simply be due to the fact that there has been, and remains little awareness of the Convention amongst key governmental organisations. Such a finding was evident from a recent survey of West African states commissioned by GWP–West Africa and the Centre for Water Law, Policy and Science, and supported by WWF–International.

Timing might have played a factor in this regard. The Convention was adopted at the tail end of a time when many multilateral environmental agreements (MEAs) were either being adopted or entering into force. ‘Treaty congestion’ and a lack of a champion may be a key reason why the Convention has not yet entered into force. Such a conclusion would be unfortunate, as in many respects the

UN Watercourses Convention, once in force, could support the implementation of other MEAs. For example, the UN Watercourses Convention directly supports Article 4 of the Climate Change Convention which obliges states to 'cooperate in preparing for adaptation to the impacts of climate change.'

Is there need for a *global* instrument?

A further argument why more states might not have ratified the Convention may be due to the very nature of the instrument. Since its adoption, this *framework* Convention has proved influential on regional, basin specific and bilateral agreements. For example, the member countries of the Southern African Development Community revised their 1995 Protocol on Shared Watercourses Systems in 2000 largely to ensure that its provisions reflected those of the UN Watercourses Convention. Other examples include the 2002 Framework Agreement on the Sava River Basin, the 2003 Protocol for the Sustainable Development of Lake Victoria, the 2004 Agreement on the Establishment of the Zambezi Watercourse

Commission, and the 2007 Convention on the Volta River. The Convention was also endorsed as a reflection of the status of international law in the field by the International Court of Justice in the 1997 Gabčíkovo-Nagymaros case. If the Convention is therefore already being used by states to guide the development of regional, basin specific and bilateral agreements, what additional benefit is there of the Convention entering into force?

Benefits of entry into force

There are a number of advantages of the Convention entering into force. Firstly, entry into force would show that states are strongly committed to addressing the water crisis as global issue. As noted above, while some states have relied on the Convention to formulate regional, basin specific or bilateral agreements, the number of these agreements remains quite low in comparison to the number of international watercourses. Entry into force of the Convention would therefore hopefully increase awareness of the need to strengthen existing agreements and provide the impetus to

establish new agreements where they do not exist.

Secondly, accession to the UN Watercourses Convention by a large number of states could have a positive impact on clarifying and strengthening customary international law in the field. The remit given to the ILC by the General Assembly was to codify and where appropriate progressively develop the law of the non-navigational uses of international watercourses. It is generally accepted in international law that if a widespread and representative number of states agree to be bound by a treaty and apply the provision of the treaty in their state practice, the rules originally found in the treaty may, sometimes even in a short period of time, come to reflect customary international law and therefore indirectly bind the states not party to the Convention.

Unfortunately, non-entry into force may have a negative effect on the development of customary international law in terms of leaving unclear the precise extent of existing customary international law, and also precluding such status to emerging customary international law proposed within the

A call for clarity and a champion

'I'm more upset than pessimistic,' comments Salman Salman, Lead Counsel with the Legal Vice Presidency of the World Bank, speaking about the fact that the UN Watercourses Convention is not yet in force after so much preparatory work and that its future remains unclear.

He makes this statement with reference to a paper about the UN Watercourses Convention that he had published earlier this year* and which he says may have given the impression he is pessimistic about the prospects for the Convention.

In his paper Salman set out six aspects of the Convention about which perceptions and interpretations, some of which he says are inaccurate, have contributed to the slow progress that has been made.

One of these is the relationship between two key provisions in the Convention – the requirement that utilisation of water resources should be equitable and reasonable and the requirement that significant harm should not be caused to others. Upstream states might tend to favour the former principle, believing it better supports their case for proceeding with development. Downstream states might favour the latter, believing it provides better protection from upstream development.

Salman explains that the Convention has subordinated the principle of significant harm to the principle of equitable and reasonable utilisation. This means that harm can justifiably be caused as long as it arises from equitable and reasonable use. But Salman emphasises that this should not be seen as favouring upstream states but as being equally applicable to all. All basin states would be bound by these provisions and, for example, use by a downstream state might be restricted if it forecloses equitable and reasonable use in an upstream state.

Salman also explores concerns around the relationship between the Convention and existing agreements. He believes that some states with agreements in place feel the Convention does not fully recognise these agreements, while other states outside of current agreements feel those agreements should be aligned with the Convention. The Convention recognises existing agreements but at the same time encourages a move towards alignment with the Convention, explains Salman.

Salman concludes in his paper that the 'concerns are based largely on inaccurate interpretations of, and misconceptions about the Convention.'

He also concludes that the Convention 'stands little chance of entry into force and effect'. But he sought to soften what does indeed seem to be a note of pessimism with some final adjustments to his paper, adding that the Convention 'is and will continue to be the most authoritative instrument in the field of International Water Law,' and inserting a new final sentence: 'Clearly, concentrated efforts are urgently needed to address the inaccurate interpretations and perceptions about some of its basis provisions.'

Such a need for 'concentrated efforts' stems from what Salman sees as one of the root problems faced by the Convention. 'I think the main problem with the Convention is that there is no champion; there is no entity to push forward the work,' he tells *Water21*. This is needed because the Convention deals with an unusual resource, one that is finite and essential and one where Salman says there is a perception of a 'zero sum game', where one party gains only at another's expense. 'The implications of this are that countries are more cautious than with other treaties,' he comments.

Most countries who signed up to the Convention did so in the first two or three years after it was completed. 'There was a lot of optimism,' says Salman. Countries signed up because they could see the benefits of doing so. Salman cites Syria which, he says, saw that while the Convention imposes duties, it would also give rights. 'However, you see two tracks... Optimistic ones and then you see the cautious ones,' says Salman. Here he gives the example of his own country, Sudan: 'They were very enthusiastic, but then drew back.'

Hence the need for a champion. 'The Convention was born as an orphan and continues to be an orphan,' says Salman. He notes that WWF in particular is taking a lead in attempting to raise interest. And the lack of formal progress with the Convention at the recent UN Treaty Event gives an indication of the scale of the challenge this represents.

'If it ever enters force, I would suggest that, for example, WWF calls for a Conference of the Parties and establishment of a secretariat – a champion or a guardian – to follow-up on clarifications,' adds Salman. ●

* *The United Nations Watercourses Convention ten years later: why has its entry into force proven difficult?* Salman MA Salman, 2007. *Water International*, 32.1, 1-15.

Current status of 1997 UN Watercourses Convention

State	Signature	Ratification*
Côte d'Ivoire	25 Sep 1998	
Finland	31 Oct 1997	23 Jan 1998 A
Germany	13 Aug 1998	15 Jan 2007
Hungary	20 Jul 1999	26 Jan 2000 AA
Iraq		9 Jul 2001 a
Jordan	17 Apr 1998	22 Jun 1999
Lebanon		25 May 1999 a
Libya		14 Jun 2005 a
Luxembourg	14 Oct 1997	
Namibia	19 May 2000	29 Aug 2001
Netherlands	9 Mar 2000	9 Jan 2001 A
Norway	30 Sep 1998	30 Sep 1998
Paraguay	25 Aug 1998	
Portugal	11 Nov 1997	22 Jun 2005
Qatar		28 Feb 2002 a
South Africa	13 Aug 1997	26 Oct 1998
Sweden		15 Jun 2000 a
Syrian Arab Republic	11 Aug 1997	2 Apr 1998
Tunisia	19 May 2000	
Uzbekistan		4 Sep 2007 a
Venezuela	22 Sep 1997	
Yemen	17 May 2000	

* or Acceptance (A); Accession (a); Approval (AA)

text of the Convention. In addition, codification can help clarify the meaning and content of rules that are already widely accepted as customary international law, such as the obligation to notify of planned measures.

Closely aligned to the previous point is the fact that non-entry into force could be interpreted as an indication that states are opposed to the content of the Convention, even if they voted in favour of the text in 1997; by ratifying or acceding to the Convention states could unequivocally allay this misconception.

Thirdly, entry into force could enhance the Convention's potential to act as a 'level playing field' upon which states can develop more specific laws at the regional, basin and bilateral level. Such a benefit would be particular advantageous where all states within a particular region or basin were party to the Convention. In such a situation,

the UN Watercourses Convention could also play a co-ordinating role in addressing gaps and strengthening existing agreements within a region. The Convention could also serve to resolve potential ambiguities or conflicts between regional or basin specific treaty texts.

Fourthly, a benefit of the Convention entering into force is that it could provide a global focal point by which to strengthen the law of international watercourses. The existence of a global instrument could provide a mechanism by which to exchange experiences and ideas on how best to implement and develop the law of international watercourses. This potential role can be justified by looking at how regional watercourse instruments, such as the 1992 UN ECE Helsinki Convention, have served to implement and develop international law. The 1992 UN ECE

Helsinki Convention, which has been in force for over 10 years, has been particularly successful in strengthening the legal arrangements for the management of the 'new' international watercourses following the break-up of the Soviet Union. While the latter Convention benefits from an institutional structure, which includes a Secretariat and the Meeting of the Parties, there is no reason why parties to the 1997 UN Watercourses Convention – armed with a 'common language' – could not conduct such activities through informal networks, or in the future even amend the Convention in order to establish a more formal global institutional structure consistent and in coordination with other MEAs.

Will the Convention ever enter into force?

Given the abovementioned benefits that entry into force of the Convention might bring what is the likelihood of such an event taking place within the foreseeable future? It would appear that at the global level, the importance of global water issues is gaining greater political currency on the world stage, and cooperation between states over international watercourses is commonly recognised as an important aspect of meeting the Millennium Development Goals.

In addition, the past few years have seen a number of international efforts focussed on raising awareness of the Convention, and urging the ratification or accession of states. In March 2006, the UN Secretary-General Advisory Board on Water and Sanitation launched the Hashimoto Compendium of Actions which, *inter alia*, called upon states to accede to the Convention. A recent Dakar workshop held 20–21 September 2007 and organised by GWP-West Africa, the Centre for Water Law, Policy and Science, and WWF-International resulted in an appeal from representatives from various Ministries in West Africa, along with river basin and sub-regional integration organisations for states to accede to the Convention. WWF-International also conducts a wider initiative to promote accession in other regions of the world. Such global efforts to champion the Convention appear to be having some impact. However, given the increased competition over global freshwater supplies, the likely impacts of climate change, and the fact that it is 10 years since the Convention's adoption, it appears that more needs to be done to promote the benefits of the Convention amongst states, and the relevant international and regional organisations. ●

Useful websites

ILC Analytical Guide to the Law of the Non-navigational Uses of International Watercourses: http://untreaty.un.org/ilc/guide/8_3.htm

WWF UN Conventions Programme:
www.panda.org/about_wwf/what_we_do/freshwater/our_solutions/policy_practice/conventions/index.cfm

UNESCO Centre for Water Law, Policy and Science, University of Dundee:
www.dundee.ac.uk/water

About the author
Dr Alistair Rieu-Clarke is lecturer in international water law at the UNESCO Centre for Water Law, Policy and Science, University of Dundee. Email: a.rieuclarke@dundee.ac.uk.