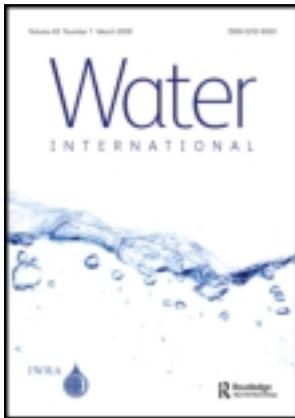


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The UN Watercourses Convention: the *éminence grise* behind cooperation on transboundary water resources

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The indisputable accomplishment of the UN Watercourses Convention (UNWC) is the promotion of general principles of international water law at the universal level. For states sharing freshwater resources, cooperation is indispensable for achieving equitable and reasonable utilization, preventing significant harm and protecting shared ecosystems. The UNWC highlights this importance through the comprehensive codification of cooperation obligations and explicit recognition of the duty to cooperate as one of the general principles of international water law. This article traces the genesis of this recognition and highlights the convention's invaluable contribution in promoting international cooperation in the management of transboundary water resources.

Keywords: UN Watercourses Convention; international water law; general principles; cooperation

Introduction

Phenomena such as the El Niño and La Niña cycles illustrate the way in which the global hydrological cycle interlinks the territories of different states. Moisture that evaporates due to increased temperatures in one region is carried long distances and can affect other regions with torrential rainfall and floods. International watercourses create similar interlinkages, though on a smaller scale: they create interdependencies between states through the surface and groundwater flows connecting their territories. Excessive rainfall in upstream regions can cause floods downstream. In the same way, water abstractions upstream reduce flow available for use downstream. To mitigate the negative impacts and reap the benefits of hydrologic connectivity, states have to cooperate in the management of the watercourses they share.

Over the course of history, states have concluded a large number of international treaties to regulate utilizations of watercourses that may have an impact on the territory of other riparian states. These treaties, which are a direct outcome of cooperation, have led to the crystallization of general principles and customary rules of international water law. The 1997 Convention on the Law of Non-navigational Uses of International Watercourses (UN Watercourses Convention, or UNWC [1997]) is the first legal instrument adopted by states at the universal level that codifies these principles and rules (UN General Assembly, 1997). The UNWC spells out the duty to cooperate as a general principle of international

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water law and interweaves obligations to cooperate with substantive rights and obligations to promote the equitable and reasonable utilization of watercourses and the prevention of significant harm. The adoption of the UNWC marks an important milestone: there remains no doubt that the duty to cooperate is one of the universally recognized cornerstone principles of international water law. This recognition is the legal response to hydrologic interdependence.

This article traces the genesis of the general duty to cooperate as one of the recognized principles of international water law and illustrates its indispensable nature for the implementation of other general principles. By making this relationship visible in its text, the UNWC has made an invaluable contribution to the practice of cooperative management of transboundary freshwater resources.

Genesis of cooperation as a general principle of international water law

Legal principles form a “normative umbrella” that shapes the behaviour of states in their relationships with each other (Riedel, 1997). They reveal themselves in coherent state practice as the general standards which underlie customary rules (Fitzmaurice, 1957). International water treaties are evidence of state practice concerning the cooperative management of shared watercourses. These agreements have informed the codification of the principles and rules of international water law in the UNWC.

Consideration of cooperation in water treaties

States have adopted treaties to regulate their affairs concerning shared waters since the early days of civilization. The first such treaty that is known aimed at ending a dispute over irrigation water. It dates back to around 3100 BC and was concluded between two ancient city-states, Lagash and Umma, in Mesopotamia (Dinar, Dinar, McCaffrey, & McKinney, 2007). Since then, riparian states have adopted a large number of water treaties.

Analysis of the content of these treaties provides some indication of historic trends in the consideration of duties to cooperate in international agreements. To depict some of these trends, 216 treaties concerning international watercourses, concluded between 1900 and 2010, have been reviewed (Leb, 2011).¹ Analyzing these treaties based on when they were concluded, one can tentatively trace the influence of treaty practice on the codification efforts of international water law and vice-versa. Three time periods are distinguished for this purpose:

Period I (1900–1966): Treaties concluded between 1900 and the adoption of the 1966 Helsinki Rules of the International Law Association (ILA, 1967)

Period II (1967–1994): Treaties concluded during the time of elaboration and before the adoption of the Draft Articles on the Law of Non-navigational Uses of International Watercourses (International Law Commission [ILC], 1994) that became the basis for the UNWC.

Period III (1995–2010): Treaties concluded after the customary principles and rules of international water law had been largely identified through the work of the ILC.

Treaty texts have been analyzed with regard to whether they include certain cooperation obligations and whether the broader objectives of equitable use and mutual benefit are referenced. The obligations used for this analysis are: (1) regular information and data exchange; (2) notification of planned measures and emergencies; (3) consultation; (4) the

implementation of joint studies and programs; and (5) the establishment of joint mechanisms and their specific tasks. These duties have been chosen because they contribute to the coordinated use and cooperative management and development of transboundary waters.

The number of treaties analyzed for the three time periods differed: 108 for Period I, 83 for Period II and 25 for Period III. The results are weighed accordingly. Table 1 shows the percentage of treaties in which a specific cooperation obligation and the broader goal of achieving equitable use and mutual benefits are explicitly referred to. The table illustrates that there is a noticeable increase in the number of times treaties include the respective obligations and broader goal across the three time periods. This trend is observable in almost all categories, the only exception being the obligation to notify of planned measures and emergencies between Periods I and II.

The analysis also shows an overall increase in the inclusion of obligations to cooperate in international water treaties over the course of the three periods. This can be and has been interpreted as evidence that states increasingly regard cooperation on shared water resources as a general duty. Much of the work of international expert commissions codifying the rules applicable to the management and use of transboundary freshwater resources refers to this treaty practice; and, as discussed below, such work may have influenced the content of treaties concluded in its aftermath in return.

Recognition of cooperation in earlier codifications of international water law

When preparing the 1994 Draft Articles on the Law of Non-navigational Uses of International Watercourses (ILC, 1994), which became the basis for the UNWC, the ILC drew on earlier codification work carried out by the Institute of International Law (IIL) and the International Law Association (ILA) (UN General Assembly, 1970). The principle of cooperation only gradually made its way into the resolutions concerning the utilization of transboundary water resources adopted by these two expert commissions.

The 1961 Salzburg Resolution of the IIL (1961) and the 1966 Helsinki Rules of the ILA (1967) were the first key reference documents that identified customary rules applicable to the utilization of transboundary water resources. The preamble of the 1961 Salzburg Resolution acknowledges the interdependence of basin states and their common interest in the maximum utilization and rational exploitation of available natural resources (Institute of International Law [IIL], 1961). Cooperation forms the underlying tenor of the document; however, the general duty to cooperate is not spelled out explicitly as a principle of the utilization of non-maritime international water.

Table 1. Cooperation in international water treaties.

	Period I (108 treaties)	Period II (83 treaties)	Period III (25 treaties)
Regular information and data exchange	31.5%	40%	64%
Notification of planned measures and emergencies	36%	30%	52%
Consultation	24%	34%	44%
Joint studies and programs	39%	55.5%	76%
Joint mechanisms	59%	78%	88%
Explicit objective to achieve equitable use and mutual benefits	16%	31%	56%

Similarly, while widely credited for firmly establishing the principle of equitable and reasonable utilization as a general principle of international water law, the 1966 Helsinki Rules refer to cooperation duties only in a relatively marginal manner if compared to later codifications (ILA, 1967). Cooperation obligations such as information exchange, notification, consultation and negotiation are recommended to prevent or settle disputes and to manage timber-floating activities on international rivers. Still missing at that stage of codification was the establishment of a direct link between these obligations and the implementation of equitable and reasonable utilization, and thus the appreciation of the vital importance of cooperation for the achievement of this principle. The content of what equitable and reasonable utilization means in the context of the management of transboundary waters is described in the 1966 Helsinki Rules in more detail than, for instance, in the UNWC; nonetheless, the principle is framed as entitlements of states rather than in terms of duties to participate in the effort to achieve its objective.

Explicit references to the principle of cooperation appear for the first time in the resolutions that were adopted by the ILA and IIL on the topics of flood control and water pollution, respectively. The 1972 ILA Supplementary Rules Applicable to Flood Control spell out a general obligation to cooperation in their Article 2, stipulating that “basin States shall cooperate in measures of flood control in a spirit of good neighborliness, having due regard to their interests and well-being as co-basin States” (ILA, 1974).

There are two subsequent resolutions that reiterate the duty to cooperate, but then with respect to water pollution in international drainage basins: the 1979 IIL Athens Resolution (IIL, 1979) and the 1982 ILA Montreal Rules (ILA, 1982). The latter document, which is more frequently cited in the context of the emergence of cooperation as a principle of international water law, states in its Article 4: “In order to give full effect to the provisions of these Articles, States shall cooperate with the other States concerned” (ILA, 1982). In its commentary, the ILA argued that the duty to cooperate was included in the rules because it was now generally recognized as a fundamental principle (ILA, 1982). The most recent ILA document on this topic, the 2004 Berlin Rules (ILA, 2004), includes a general duty to cooperate that applies to all aspects of the management of waters and reminds states of the mutual benefits that can be achieved through cooperation (Art. 11).

The work of the ILC

This gradual development in recognizing the duty to cooperate as one of the principles of international water law is also reflected in the drafting process of the ILC draft articles, which occurred in parallel and partially in response to the codification efforts carried out by the IIL and ILA. The principle of cooperation was not explicitly considered in the early reports of the drafting process, which began in 1970. The concept was first introduced in the process of codifying implementation obligations related to the principle of equitable and reasonable utilization. In 1981, Special Rapporteur Schwebel proposed a duty of “equitable participation” in the management and development of international watercourses in his third report, to reflect that “conditions and expectations have tended to move the international community to a position of affirmative promotion of cooperation and collaboration with respect to shared water resources” (ILC, 1982, p. 85, para. 85). Together with the right to reasonable and equitable sharing, he argued, comes the duty to participate in the protection and management of the watercourse.

Following the same line of argument, Schwebel’s successor, Special Rapporteur Evensen, included an entire section dedicated to the principle and rules of cooperation in the 1984 version of the draft articles: Chapter III, on Cooperation and Management

in Regard to International Watercourse Systems (ILC, 1984). The chapter stipulated the principle of cooperation and specific cooperation obligations, including consultation, negotiation and prior notification of planned measures. Evensen argued that the “indivisible” nature of watercourses requires interstate cooperation for effective management and utilization, and that the conclusions from the 1977 United Nations Mar del Plata Conference on Water and the 1981 Interregional Meeting of International River Organizations (in Dakar) with regard to the importance of cooperation between riparian states needed to be acknowledged (ILC, 1984). This development reflects the then growing general opinion that cooperation was not just necessitated by hydrologic interdependence but was also a general principle of international water law.

Therefore, the explicit inclusion of the principle of cooperation in the ILC draft articles happened around the same time or shortly after the principle was recognized in the aforementioned IIL and ILA resolutions and seemingly in response to the declarations adopted at two major international conferences.

The article concerning the general duty to cooperate was then moved into Part II (previously Chapter II), on General Principles, in a later version of the draft articles (ILC, 1988). This happened after an in-depth discussion on the legal nature of the duty had taken place among the members of the ILC (1987). The discussion focused on the question of whether the duty to cooperate reflected a general legal obligation or a legal principle. The majority of the ILC members agreed, however, that the norm belonged under “general principles” because of its fundamental character. The inclusion of the general duty to cooperate as one of the general principles acknowledges that this principle represents a guiding norm of international water law and plays a vital role in the implementation of other general principles, such as the principle of equitable and reasonable utilization and the obligation to prevent significant harm.

Cooperation in the UN Watercourses Convention

The UNWC was negotiated in the 6th Committee of the UN General Assembly (UNGA), convening as a working group of the whole, based on the draft articles developed by the ILC. With some adjustments, the text of the ILC draft articles was largely retained. The convention was adopted by the UNGA on 21 May 1997, in Resolution 51/229, by a vote of 103 states in favour, 3 against and 27 abstaining. This makes it today the most authoritative document codifying the rules of international water law. As of February 2013, 29 of the 35 states required for entry into force have deposited their instruments of ratification with the UN Secretary General.

The UNWC is the first legal instrument adopted at the universal level that clearly spells out the general duty to cooperate as a general principle of international water law. The obligation at hand is formulated in Article 8(1) as the duty of “watercourse States [to] 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”. This principle is a general duty in and of itself (Rieu-Clarke, Moynihan, & Magsig, 2012) and it interacts with other general principles. Specific cooperation obligations pervade the articles enabling the implementation of these other principles.

Relationship with other general principles of international water law

The two general principles most frequently cited by authors as cornerstone principles of international water law are equitable and reasonable utilization and the obligation to

prevent significant harm. These principles are included along with the general duty to cooperate in Part II of the UNWC, in Articles 5, 6 and 7, respectively. Part II, furthermore, spells out the obligation to regularly exchange data and information (Art. 9) and the general rule that “in absence of agreement or custom to the contrary, no use of an international watercourse enjoys inherent priority over other uses” (Art. 10).

Cooperation and the principle of equitable and reasonable utilization

The way the principle of equitable and reasonable use is formulated in the UNWC and other treaties leaves significant flexibility in its application. A non-exhaustive list of criteria to be taken into account in the utilization of shared waters is provided in those texts and leaves the weighting of these criteria to be decided on a case-by-case basis, so that decisions can be adapted to the respective basin context. The decision on whether geographic, hydrographic, hydrologic and ecological factors and the conservation and protection of watercourses should, for instance, prevail over the social and economic needs of certain riparian states and the existing and potential future needs and water uses of the population dependent on the watercourse is left to be made in view of the specific circumstances of each case.

The weight that will be attributed to each of these factors is ultimately influenced by value judgments, because equity can mean different things to the individual riparian states. For instance, when the concept of corrective equity is applied to a basin shared by states that find themselves at very different levels of socio-economic development, one may consider that the states that are relatively poorer would be entitled to a significant increase in their water uses to catch up in the development process. On the other hand, if a distributive equity concept is applied, equitable and reasonable use would be understood as granting the states the water uses they need to maintain their current relative levels of socio-economic development (Louka, 2006).

Equitable and reasonable use may mean something different for each basin state, depending on its geographic location in the basin, its strategic interests and the needs of its population. The principle is not specific enough that a state planning or carrying out a new utilization may be able to assess, by itself, whether this use may be acceptable to its co-riparian states in the context of their understanding of equity and reasonableness (Tanzi & Arcari, 2001). The implementing state may not have the necessary information to assess the needs of other basin states and their populations in an objective way. Watercourse states have thus to consult with each other to obtain this information (McCaffrey, 2007).

In contrast to earlier codifications, such as in the 1966 Helsinki Rules, the UNWC explicitly addresses this requirement to cooperate in the implementation of equitable and reasonable use. Both Articles 5 and 6 very specifically talk about the duty of countries to cooperate. Article 5 stipulates an obligation of each state to “participate in the use, development and protection of an international watercourse in an equitable and reasonable manner” and underscores that this participation includes the duty to cooperate. Article 6 urges states to “enter into consultations in a spirit of cooperation” in the application of the principle and the weighing of the relevant factors and circumstances of a given case.

Many other articles of the UNWC interlace cooperation obligations with rights and duties that aim to achieve equitable and reasonable utilization. Examples are the general obligation for information exchange and consultation on the effects of planned measures on the conditions of a shared watercourse (Art. 11); joint protection and preservation of ecosystems (Art. 20); and cooperation to protect and preserve the marine environment, where appropriate (Art. 23). Furthermore, the convention provides for consultations on the

management of international watercourses (Art. 24) and cooperation to respond to needs and opportunities for flow regulation (Art. 25).

Cooperation and the obligation to prevent significant harm

While the role of cooperation in the implementation of the principle of equitable and reasonable utilization is clearly spelled out in the UNWC, the relationship of this general duty to the obligation to prevent significant harm may seem less obvious. Except for a situation where such harm has occurred and states therefore have to enter into consultations to eliminate or mitigate such harm or address questions of compensation, Article 7 does not attribute any specific role to cooperation in its implementation. Indeed, this due-diligence obligation can, in principle, be taken care of by states unilaterally. The obligation consists of employing the same concern a state would usually employ in its own domestic affairs and applying all appropriate measures within its means to avoid significant transboundary harm (ILC, 1994). Yet, cooperation can reveal opportunities on how transboundary harm can be avoided and mutual benefits potentially optimized.

The obligation to notify potentially affected states of planned measures that may have significant adverse impact forms part of the due-diligence obligation to avoid harm. This obligation can become the entry point for a consultation and negotiation process that may lead, for example, to a change in the design of a planned measure in order to reduce potentially harmful effects on other riparian states. The process, which is outlined in much detail in the UNWC (Arts. 12–19), creates the space for cooperation to prevent significant harm and achieve a solution that is accepted as equitable by all concerned parties. Article 17(1) illustrates how these three general principles of international water law interconnect. It stipulates that when a notified state finds that a planned measure would either cause significant harm or not be equitable and reasonable, the “notifying State and the State making the communication shall enter into consultations and, if necessary, negotiations with a view to arriving at an equitable resolution of the situation”.

Other cooperation obligations that intervene in implementing the obligation to prevent significant harm are found in the article on the prevention, reduction and control of pollution (Art. 21) and those related to the protection of ecosystems mentioned above.

Beyond the basic principles considered above, the UNWC, as an instrument, highlights the need for cooperation as a duty cutting across all its substantive rules. The rule that seemingly best reflects the role of the convention in promoting cooperation in the development and management of transboundary water resources is somewhat hidden away in Article 30, in Part VI, on Miscellaneous Provisions. It states that even if “there are serious obstacles to direct contact between watercourse States” (Art. 30) they shall fulfil their respective cooperation obligations through indirect procedures.

Influence of the UN Watercourses Convention on basin management

The elaboration and negotiations of the UNWC arguably exerted some influence on other international water treaties and cooperation in transboundary basins. When drafting articles on a particular issue area, the ILC is in regular contact with international law departments of the governments of all UN member countries, in addition to attracting attention from international lawyers with respect to the issue areas it is working on. Around the time the ILC was in the last phase of preparing the 1994 draft articles, the number of water agreements negotiated and adopted was unusually high; two regional and a number of basin-level instruments were negotiated, including, at the regional level, the UNECE (1992)

Convention on the Protection and Use of Transboundary Watercourses and International Lakes and the (SADC, 1995) Protocol on Shared Watercourse Systems in the Southern African Development Community; and, at the basin level, the Treaty on the Development and Utilization of Water Resources of the Komati River Basin (Kingdom of Swaziland and Republic of South Africa, 1992), the Convention on Cooperation for the Protection and Sustainable Use of the Danube River (ICPDR, 1994), and the Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin (MRC, 1995), among others. This was, of course, also a time when a favourable geopolitical environment opened new opportunities for cooperation, in particular throughout Europe and Central Asia.

While these treaties reflect principles and obligations that were also objects of discussion in the ILC and are included in the UNWC, it may be difficult to discern clearly which of the instruments had a bigger role in informing the other. The influence of the convention on basin-level management can be established more clearly with regard to agreements adopted in transboundary basins of Sub-Saharan Africa. The SADC (2000) Revised Protocol on Shared Watercourses and the SADC (2003) Protocol for Sustainable Development of Lake Victoria Basin, for instance, include the general principles spelled out in the UNWC; the SADC Revised Protocol even incorporates large parts of the UNWC's text.

Furthermore, with the recommendation to establish joint mechanisms, the UNWC promotes the institutionalization of cooperative water resources management and development (Art. 8(2)). Joint commissions or other institutions are important vehicles for cooperation. They provide platforms for dialogue and regular interaction between riparian states at the technical level and at the political or decision-making level. Acknowledging this important role, the convention refers to the "experience gained through cooperation in existing joint mechanisms and commissions in various regions" (Art. 8(2)). In Southern Africa, where the SADC Revised Protocol has retaken large parts of the text of the UNWC and contributed to the subsequent establishment of a number of basin commissions, this has left a noticeable mark on cooperative water resources management.

Conclusion

The drafting process that led to the adoption of the UNWC reflects the development of international water law more generally and highlights that general principles do not emerge on the basis of one instrument alone. There has to be a convergence of state practice, and usually there are an increasing number of instruments that reflect the same general rule in one way or another, before a general principle crystallizes as universally applicable. Just as the principle of equitable and reasonable utilization was not born with the 1966 Helsinki Rules but was based on earlier state practice and jurisprudence (McCaffrey, 2007), the general duty to cooperate emerged as the result of state practice and was integrated into the body of norms of international water law by the way of various parallel codification efforts. Yet the adoption by the UNGA gives the convention, even while not yet in force, particular weight in comparison with other codifications. The UNWC influenced the content of recent water treaties and is likely to continue influencing that of future water agreements. The convention has become the reference document for states in their negotiations with their co-riparians and for jurists advising states in these negotiations.

An indisputable accomplishment of the UNWC is the clarification that the general principles of international water law interact with each other, support each other and depend upon each other in their implementation. The general duty to cooperate is indispensable

for the principles of equitable and reasonable use and informs the prevention of significant harm in transboundary watersheds. In contrast to previous codifications of expert commissions, which stipulate a duty to cooperate with regard to specific activities, the UNWC is the first instrument at the universal level that explicitly establishes cooperation as a general duty that applies to all aspects of water resources management. The principle of cooperation is today firmly established as a general principle of international water law. Given the influence it exerted on treaties adopted in the last two decades and which it continues to exert on negotiations, the UNWC, even while awaiting ratification, has assumed the role of *éminence grise* behind cooperative transboundary water resources management.

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Note

1. The agreements used for this analysis are those available in English, French, German, Italian, Spanish and Portuguese at the International Freshwater Agreements Database of the Institute for Water and Watersheds, Oregon State University (<http://ocid.nacse.org/tfdd/treaties.php>).

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