Managing transboundary rivers in Latin America – could a global convention help?

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Contents

Introduction

On the 17 August 2014, with the entry into force of the UN Watercourses Convention, the international community will be faced with a unique situation: the presence of two global, legally binding instruments concerning the management of transboundary watercourses. The UN Watercourses Convention will stand alongside the UNECE Water Convention, which has recently become open to global membership. While it is unusual to have two such instruments regulating the same issue, it cannot necessarily be said that this is an unfavourable situation; if coordinated effectively, these conventions could make a significant contribution to addressing transboundary water challenges around the world.[1] However, for countries seeking to ratify and implement one, or both, of these conventions, there are a number of questions to consider if the international community hopes to successfully navigate these unfamiliar legal waters.

Foremost among these questions is: why a state should ratify either of these conventions? The ratification of any instrument is never a trivial matter, as the subsequent implementation of the instrument invariably imposes obligations and costs upon the contracting Parties. However, the importance of the issue at hand - the management of transboundary waters - and role that these conventions can play in the development and progression of global water law frameworks are substantial factors that must be considered in answering this question.

Indeed, the ratification of these conventions is not an end unto itself, but gains importance and necessity because of the implications of effective transboundary management, or lack thereof, on humans, our societies and economies, and the natural environment. In an era of rising populations, on-going pollution, and a warming planet, it is possible that the conflicts of the next century will arise between neighbouring watercourse states seeking to ensure adequate access to water of a sufficient quantity and quality to sustain their economic, social and environmental demands. These conflicts may not necessarily escalate into violence, but disputes can lead to heightened tension, regional instability, unilateral actions, economic impositions, and prolonged negotiations. In the resulting absence of a resolution to the dispute and agreement between states, water quality and quantity invariably degrades –with negative consequences on dependent humans and ecosystems.

Yet, it is often said that that a water crisis is actually a crisis of governance. By implementing the necessary legal and institutional frameworks to assist relations between states sharing water resources, the international community can develop the necessary mechanisms for effective water governance in order to avoid future conflict and ensure the conservation and sustainable use of water, to the benefit of all people and the planet. The structure of this governance system can be envisioned as a series of waterfalls: at the top are the overarching global instruments, the UN Watercourses Convention and UNECE Water Conventions, from which flow agreements between regional organizations, basin specific agreements, and finally, national legislation to implement these agreements on the ground.

In seeking to answer the question of why a nation might ratify these conventions, this article will trace the development of these conventions, describe the law of transboundary water as it stands, and discuss the implications of the implementation of these conventions. As these are unchartered waters,

[1] Rieu-Clarke, A. and Kinna, R. (2014) *Can Two Global UN Water Conventions Effectively Co-Exist? Making the Case for a 'Package Approach' to Support Institutional Coordination*. Review of European Community and International Law 23(1) at pp. 1 (*Can Two Water Conventions Coexist?)*

we shall pose some further considerations that must be given some thought as we strive to develop the field of transboundary water law. This article will use transboundary water governance in Latin America as the context to ground this discussion.

A Brief History of Transboundary Water Law

UN Watercourses Convention

The history of the United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses ("UN Watercourses Convention") stretches back over 50 years. In 1959, the UN General Assembly decided to study the legal problems concerning the use of international rivers and whether a legal framework was necessary.[2] In 1963, the UN Secretary General submitted a report discussing these legal problems, and subsequently, the General Assembly recommended that the International Law Commission (ILC) "study the international law of non-navigational uses of international water courses with a view to its progressive development and codification".[3]

In 1970, to address the unsatisfactory state of international water law and combat the increasing pressures on the quantity and quality of international watercourses, the General Assembly commissioned the ILC to draft a set of articles to govern the non-navigational uses of transboundary waters.[4] A testament to the complexity and importance of the issue, the ILC took over 20 years to conduct an in-depth study of existing transboundary water arrangements, current state practice and the progression of international water law to that point.

Around this time, in 1966, the International Law Association (ILA)[5] developed the Helsinki Rules in an effort to bring uniformity to the existing patchwork of inconsistent international water law.[6] These rules introduced a number of notable provisions concerning non-navigational uses of transboundary waters, such as the doctrine of "equitable and reasonable apportionment". However, as the ILA was (and is) a private NGO without official status in the development of international law, these rules were never adopted as official codifications of international law.[7] It is generally thought that the Helsinki Rules influenced the on-going work of the ILC at the time, and these rules are now considered to be the predecessor to the UN Watercourses Convention.[8]

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[2] Rieu-Clarke, A. & Loures, F. (2009) *Still not in force: Should States support the 1997 UN Watercourses Convention*. Review of European Community & International Environmental Law, 18(2) at pp. 7 (*UNWC: Still not in force*); UN General Assembly, *Legal Problems Relating to the Utilisation of International Rivers*, Resolution A/RES/1401(XIV), 21 November 1959

[3] *UNWC: Still not in force,* at pp. 8; UN General Assembly, *Progressive Development and Codification of the Rules of International Law Relating to International Watercourses*, Resolution A/RES/2669(XXV), 4 January 1971

[4] Eckstein, G. (2002). Development of international water law and the UN Watercourses Convention; *Hydropolitics in the developing world: a Southern African perspective*. Pretoria, South Africa: University of Pretoria, African Water Issues Research Unit at pp. 83 *(Development of the UNWC*)

[5] The International Law Association (ILA) is a private international non-government organization that studies and develops international law. Although the ILA has consultative status with some UN agencies, its work is not given official status in the field of international law. In comparison, the International Law Commission (ILC) is a body established by the UN General Assembly for the "progressive development of international law and its codification." As an official entity of the UN, the work of the ILC is considered to be a definitive elucidation of international law. See <www.ila-hq.org> and <legal.un.org/ilc/> for more information on the ILA and ILC, respectively.

[6] *Development of the UNWC*, at pp. 82

[7] *Development of the UNWC*, at pp. 83

[8] *Development of the UNWC*, at pp. 82

After the Draft Articles were adopted by the ILC in 1991, they were considered by UN General Assembly through a Special Committee that was open to all Member States and specialized agencies. On 21 May 1997, the Convention on the Law of the Non-Navigational Uses of International Watercourses was adopted by a majority vote of the General Assembly. It could be said that this inclusive and thorough process culminated in the most authoritative text to date on the current status of the law governing the non-navigational uses of international watercourses.[9]

On the surface, the results of the UN General Assembly vote seem to indicate global support for the Convention: 103 votes for, 3 against, 27 abstentions and 33 absences. As noted in Table 1 below, Latin American countries were also predominantly in favour of the Convention, though there were a number of abstentions. However, the voting results mask a number of contentious issues concerning the scope and relationship of the substantive principles of the text as well as objections from states (both for and against the Convention) that the text failed to establish a balance between the rights and obligations of upper and lower riparian states. This may have been part of the reason why, in 2002, just 5 years after its adoption, the Convention had only received 12 of the necessary 35 ratifications required to enter into force.[10]

1997 UNGA Vote	For	Brazil, Chile, Costa Rica, Guyana, Haiti, Honduras, Mexico, Suriname, Uruguay, Venezuela,
	Against	None
	Abstained	Argentina, Bolivia, Columbia, Ecuador, Guatemala, Panama, Peru
	Absent	Belize, Dominican Republic, El Salvador, Nicaragua
Signature		Paraguay (25 Aug 1998), Venezuela (22 Sep 1997)
Ratification or Adoption		None to date

Table 1. Breakdown of voting, signature and ratification of the UN Watercourses Convention by Latin American countries.[11]

Still, the passage of the Convention was a significant development in international water law. The lengthy drafting process, inclusive UN committee negotiations, and the elaboration of a convention (as opposed to non-binding guidelines) indicated that there was broad recognition by the international community for the need for a legally binding instrument to govern transboundary water resources. The number of votes for the Convention also indicated broad agreement on the basic principles necessary to tackle this issue. Indeed, the ILC's Draft Articles and the subsequent text of the Convention have influenced the drafting of a number of transboundary water agreements in Europe, Africa, Asia and South America.[12] Shortly after its passage, the provisions of Convention were endorsed by the

[9] *UNWC: Still not in force,* at pp. 9
United Nations Treaty Collection (2014) *Convention on the Law of Non-Navigational Uses of International Watercourses*, Article 36(1): "The present Convention shall enter into force on the ninetieth day following the date of deposit of the thirty-fifth instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations" Online:<https://treaties.un.org/doc/Treaties/1998/09/19980925%2006-30%20PM/Ch_XXVII_12p.pdf> *(UN Watercourses Convention)*

[11] Derived from the table in *Development of the UNWC* at pp. 91-96

[12] These agreements included the UNECE Water Convention, the Southern Africa Development Community (SADC) Protocol on Shared Watercourse Systems, the Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin, the 1991 Protocol on Common Water Resources between Argentina and Chile, the 1996 Mahakali Treaty between India and Nepal, the Ganges Water Treaty between India and Bangladesh, and the Nile River Basin Cooperative Framework Agreement.

International Court of Justice in a case between Hungary and Czechoslovakia (as it was then) concerning a dam on the Danube River, and in a case between Argentina and Uruguay, concerning pollution from a pulp mill on the River Uruguay.[13] This acceptance of the text of the Convention into international agreements and jurisprudence suggests that the primary principles of the text, particularly the principle of equitable and reasonable utilization and the obligation not to cause significant harm, have become norms of international law.

In the years that followed, support for the Convention floundered and the addition of new states had been reduced to a trickle; by 2006 only two more states had ratified the Convention, bringing the total to just 14 states. In addition to misunderstandings and uncertainty regarding the text of the Convention, this low rate of contracting states may have been a result of "treaty congestion" caused by the large number of environmental related global agreements and instruments that were concluded in the 1990's, the lack awareness by national governments of the Convention, and the absence of a champion among governments and international organizations to drive the ratification process forward.[14]

Thus, in early 2006, the World Wildlife Fund for Nature (WWF) and number of partners, including governments, international organisations, academics and others, launched the UNWC Global Initiative to reinvigorate global support for the UN Watercourses Convention and accelerate its entry into force.[15] The depth of expertise amongst the partners and their experience in the development of international water law provided the campaign with a strong foundation from which they could raise awareness, build capacity and support countries interested in ratifying the Convention.[16] Their call for ratification was echoed by a number of states, the World Commission on Dams, the UN Secretary-General Advisory Board on Water and Sanitation, panelists at both the 5th and 6th World Water Forums, and UN Treaty Events for the promotion of instruments relating to peace development, and human rights and dignity and justice.[17]

The Global Initiative proved to be successful. Between 2006 and 2014, support for the Convention gained momentum and the remaining 21 states ratified the Convention. On 19 May 2014 Viet Nam became the 35th contracting state.[18] As a result, on 17 August 2014, over half a century in the making, the UN Watercourses Convention will enter into force as a global, legally binding framework for transboundary water governance.

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[13] McCaffrey, S. (2001) *The Law of International Watercourses: Non-Navigational Uses* Oxford University Press, Oxford, U.K. at pp. 325 and 347 (*The Law of International Watercourses*)

[14] *UNWC: Still not in force,* at pp. 21-25

[15] UN Watercourses Convention Online User's Guide (2014) *Importance: The UNWC Global Initiative.* Online: <http://www.unwatercoursesconvention.org/importance/the-unwc-global-initiative/>; World Wildlife Fund (1 June 2008) News *World needs global water agreement now*. Online: <http://wwf.panda.org/about_our_earth/about_freshwater/freshwater_news/?143644/World-needs-global-water-agreement-now>

[16] The UNWC Global Initiative included the WWF, Green Cross International, the IUCN, the UN Secretary-General's Advisory Board on Water and Sanitation, the UNESCO Centre for Water Law, Policy and Science at the University of Dundee, the Global Nature Fund, the University of East Anglia, and the Stockholm Institute of Water and others

[17] *UNWC: Still not in force,* at pp. 31-32

[18] International Water Law Project Blog (2014) Archive for May, 2014 *Watercourse Convention Set to Enter into Force on 17 August 2014* Online: <http://www.internationalwaterlaw.org/blog/2014/05/>; United Nations Treaty Collection (11 July 2014) Ratification status, *Convention on the Non-Navigational Uses of International Watercourses.* Online: <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-12&chapter=27&lang=en>

United Nations Economic Commission for Europe Water Convention

The development of the United Nations Economic Commission for Europe (UNECE) Convention on the Protection and Use of Transboundary Watercourses and International Lakes ("UNECE Water Convention") is not as complicated as that of the UN Watercourses Convention, but had proven to be no less important for regional and global water governance.

In the 1970's and the 1980's, the UNECE and member governments used non-binding international instruments to prevent the degradation and overuse of water resources in their region.[19] These included the 1982 Decision on international cooperation on shared water resources, the 1987 Decision on principles regarding cooperation in the field of transboundary waters and the 1989 Charter on groundwater management.[20] However, the need for a comprehensive and legally binding approach had become apparent, especially given the changing political reality of Europe in the 1990's as new countries and new transboundary watercourses emerged.[21] In 1992, the UNECE Water Convention was adopted as a framework in Helsinki, Finland and subsequently entered into force in 1996. It has since has been strengthened by the adoption two supplementary protocols: the 1999 Protocol on Water and Health and the 2003 Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters.

This convention currently has 40 ratifying parties, almost all the countries sharing transboundary waters in the UNECE region. [22] It was originally designed for states who are members of the UNECE but the success of the Convention has led to the adoption of an amendment in 2003 to open the Convention up to for signature and adoption by non-UNECE members.[23] This amendment entered into force on 3 February 2013, turning the Convention into a global legal framework for transboundary water cooperation. To date, no non-UNECE states have adopted the UNECE Water Convention yet, but it is expected that this process will begin in 2014.

Transboundary Water Law Today

There are a total of 276* international watercourses (both surface rivers and lakes) and around 300 aquifers that provide water and life in 148 countries around the world.[24] These basins cover almost half of the planet's land surface and generate about 60% of global freshwater flow. These basins are home to approximately 40% of the world's population, though 90% of the global population lives in

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[19] Bernardini, F. *The UNECE Water Convention: a Unique Framework to Foster Transboundary Water Cooperation and Security* Online: <http://www.unece.org/fileadmin/DAM/trans/osce/osceunece/misc_Zaragoza.pdf> (*UNECE-WC: A Unique Framework*)

[20] *UNECE-WC: A Unique Framework,* at pp. 2

[21] Giordano, M. and Wolf, A. (2002) *Atlas of International Freshwater Agreements: Historical Developments and Future Opportunities*, at pp.2 Online: http://www.transboundarywaters.orst.edu/publications/atlas/index.html (*Historical Developments of International Freshwater Agreements)*

*Some publications, such as the UN-Water Thematic Paper (see note 28) quote 263 transboundary basins and include both lakes and rivers in that figure. The reason for this discrepancy is unclear; however, regardless of the exact figure, it is clear that there are a large number of shared watercourses.

[22] United Nations Treaty Collection (2014) *Convention on the Protection and Use of Transboundary Watercourses and International Lakes.* Online: <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-5&chapter=27&lang=en> (*UNECE Water Convention*)

[23] UNECE Amendment to Article 25 of the Convention (UN Doc. ECE/ MP.WAT/2003/4, 13 September 2003)

[24] UN Water (2014) *Transboundary Waters* Online: <http://www.unwater.org/topics/transboundary-waters/en/> (*UN Water-Transboundary Water*)

countries that share water.[25] In South America alone, there are 38 shared watercourses, while Central America has a further 29 shared watercourses.[26]

Although there is high potential for conflict over these shared water resources, the historical record demonstrates a trend of cooperative interactions between watercourse states. Since 1948, there have only been 37 incidents of acute conflict over water compared to the creation of approximately 295 new water agreements.[27] Indeed, a number of positive trends have emerged in the past century: cooperation between basin states to focus on the benefits of shared waters; creativity in formulating treaty provisions that meet the unique hydrological political and cultural settings of individual basins; incorporation of provisions that allow for flexibility to respond to changing circumstances; and the integration of water issues with other transboundary issues during negotiations.[28]

However, the current landscape of transboundary water governance is incomplete and outdated in view of today's principles of water management. This has left a number of legal and institutional gaps in the regulation of international watercourses. To date, 158 of the world's 263 international rivers lack any type of cooperative management framework.[29] Where agreements exist, 80% involve only two countries, even though other states may be part of that watercourse.[30] Despite the recent progress noted above, only a minority of these treaties contain substantive references to water quality management, monitoring and evaluation, conflict resolution, public participation, and flexible allocation methods.[31] Further, these treaties tend to have been adopted without reference to each other, fail to incorporate the contemporary principles of international water law and best water management practice, and neglect the significance of establishing a sound procedural system of transboundary water cooperation.[32]

These gaps in the institutional and legal framework leave space for the implementation of a global transboundary watercourse agreement that builds upon the positive trends in transboundary water governance and supplies an effective framework for future cooperative management to flourish.

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[25] *UN Water - Transboundary Water*

[26] United Nations Environmental Programme (2008) *Hydropolitical Vulnerability & Resilience along International Waters: Latin America & the Caribbean,* at pp. 17 & 38. Online: <http://www.unep.org/publications/contents/pub_details_search.asp?ID=4035> (*Hydropolitics in Latin America*)

[27] *Historical Developments of International Freshwater Agreements,* at pp. 3

[28] *Historical Developments of International Freshwater Agreements,* at pp. 6-7

[29] UN Water (2013) *Thematic Paper Transboundary Water: Sharing Benefits, Sharing Responsibilities*, *2008,* at pp. 6 Online: <http://www.unwater.org/downloads/UNW_TRANSBOUNDARY.pdf>

[30] Loures, F., Rieu-Clarke, A., and Vercambe, M. (2008) *Everything you need to know about the UN Watercourses Convention.* World Wildlife Fund. Online: <http://wwf.panda.org/what_we_do/how_we_work/policy/conventions/water_conventions/un_watercourses_convention/> (*Everything you need to know about UNWC)*

[31] *Atlas of International Freshwater Agreements*, at pp. 8

[32] Ziganshina, D. (2011) *The Role and Relevance of the UN Watercourses Convention to the Countries of Central Asia and Afghanistan in the Aral Sea Basin,* World Wildlife Fund, UNESCO Centre for Water Law, Policy and Science. Online: <http://www.internationalwaterlaw.org/bibliography/WWF/index.htmlWF Central Asia> (*UNWC & Central Asia*) at pp. 55

Comparative Description of UN Watercourses Convention and UNECE Water Convention

A number of organizations and scholars have provided comprehensive analyses of the UN Watercourses and UNECE Water Conventions.[33] Therefore, the following section will provide just a brief description and elementary comparison of some selected elements of these conventions, namely the scope, substantive obligations, procedural obligations, the duty to protect watercourse ecosystems, dispute resolution mechanisms, and institutional frameworks.

Scope

While the language used in these conventions is slightly different, the purpose and scope of each is similar. It can be said that both conventions aim to prevent harm to the water of a watercourse that results from uses of the watercourse and activities that take place both inside and outside the actual watercourse, and harm caused by uses of the watercourse to elements of the environment different from the water.[34] Further, as will become evident, these conventions are complementary and mutually reinforcing.

UN Watercourses Convention

The UN Watercourses Convention is a "global instrument to promote the equitable and sustainable development and management of river basins shared by two or more states".[35] It was designed to serve as a framework for more specific bilateral and regional agreements relating to the use, management and preservation of transboundary water resources, to prevent and resolve conflicts over those resources, and to promote sustainable development and the protection of global water supplies.[36]

The UN Watercourses Convention applies to "uses of international watercourses and of their waters for purposes other than navigation".[37] "Watercourses" is narrowly defined in the Convention 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".[38] However, in analysing this definition in the context of the whole text, some scholars suggest that the Convention applies beyond the main body of the river.[39] This line of thought is premised upon Articles 20-23, which make reference to the ecosystem of the watercourse, to "watercourse States or to their environment, including harm to human health or safety, to the use of the waters for any beneficial purpose or to the living resources of

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[33] These include A. Tanzi's "*Relationship between the 1992 UNECE Convention… and the 1997 UN Convention …"*, the UNECE "*Guide to Implementing the Water Convention"*, the "*UN Watercourses Convention User's Guide"*, and Rieu- Clarke and Loure's "*The role and relevance of the UN Convention… to the UE and its Member State".* All are referenced in this article.

[34] Tanzi, A. (2000) *The Relationship between the 1992 UNECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes and the 1997 UN Convention on the Law of the Non Navigational Uses of International Watercourses.* UNECE Task Force on Legal and Administrative Aspects. Online: <http://www.unece.org/index.php?id=12621> at pp 10-11 (*UNECE & UNWC – A Comparison*)

[35] Rieu-Clarke, A., and Loures, F. (2008)*The role and relevance of the UN Convention of the Law of the Non-Navigational Uses of International Watercourses to the UE and its Member States* UNESCO Centre for Water Law, Policy and Science, University of Dundee. Online: <http://www.internationalwaterlaw.org/bibliography/WWF/index.html> (*UNWC & the EU*)

[36] *Development of the UNWC,* at pp. 81

[37] *UN Watercourses Convention* Article 1(1)

[38] *UN Watercourses Convention,* Article 2(a)

[39] These include A. Tanzi, A. Rieu- Clarke and F. Loure, all of whom are referenced in this article.

the watercourse", and the marine environment.[40] In this light, the UN Watercourses Convention would seem to apply to "land based activities that might affect the protection, preservation and management related to an international watercourse".[41] From such a holistic reading of the text, it can be inferred that the Convention has adopted, and is consistent with, an "ecosystem approach" to the regulation of transboundary waters.[42]

Groundwater systems are covered by the UN Watercourses Convention only if they are hydrologically connected to a system of international surface waters, excluding so-called "confined" or "fossil" aquifers.[43] However, ILC Draft Articles on the Law of Transboundary Aquifers[44], adopted by the UN General Assembly in 2008 provides for regulation of all aquifers.[45] It has been suggested that these articles could be adopted as a protocol under the Convention.[46]

Navigational matters are considered where non-navigational water users affect navigation or vice versa, such as through transport vessel pollution.[47]

UNECE Water Convention

The UNECE Water Convention seeks to implement integrated management of shared water resources. The Convention "requires parties to prevent, control and reduce transboundary impact, use transboundary water in a reasonable and equitable way and ensure their sustainable management".[48] The scope of this Convention is broad; it applies to "transboundary waters" which are defined as "any surface or ground waters which mark, cross or are located on boundaries between two or more states".[49] This includes all types of groundwater aquifers.

The text also expressly promotes the "application of the ecosystem approach" thereby including the regulation of transboundary waters and all activities, including those on land, which may influence the condition of those waters.[50]

Substantive Principles

The substantive principles of each convention are the same: the principle of "equitable and reasonable utilization" and the "no –harm rule".

The principle of equitable and reasonable utilization is a norm of international law which finds that watercourse states have a legally protected interest in an equitable share of the uses and benefits

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[40] *UN Watercourses Convention,* Articles 20 and 22; Article 21(2); and Article 23, respectively.
[41] *UNECE & UNWC – A Comparison*, at pp. 7-8; *UNWC & Central Asia,* at pp. 21
[42] *UNWC & the EU,* at pp. 14, 21 and 22
[43] UN Watercourses Convention Online User's Guide (2014) *Frequently Asked Questions,* 13 Online: <http://www.unwatercoursesconvention.org/faqs/> (*UNWC User's Guide, FAQ*)
[44] Text of the *Draft Articles of Transboundary Aquifers* can be found online at: <http://legal.un.org/ilc/texts/instruments/english/draft%20articles/8_5_2008.pdf>
[45] UN General Assembly, *The Law of Transboundary Aquifers,* Resolution A/RES/63/124 (11 December 2008)
[46] *UNWC User's Guide, FAQ* 13
[47] *UNWC User's Guide FAQ* 12
[48] UNECE *The Global Opening of the 1992 Water Convention* at pp. 3 Online: <http://www.unece.org/fileadmin/DAM/env/water/publications/brochure/Brochure_on_opening/Brochure_ECE_ENG_WEB_OK.pdf>
[49] United Nations Treaty Collection (2014) *Convention on the Protection and Use of Transboundary Watercourses and International Lakes,* Article 1(1). Online: <https://treaties.un.org/doc/Treaties/1999/06/19990602%2005-47%20AM/Ch_XXVII_05_ap.pdf> (*UNECE Water Convention)*
[50] *UNECE Water Convention,* Article 3(1)(i); *UNECE & UNWC – A Comparison*, at pp. 10

of an international watercourse.[51] Deprivation of a state's equitable share of these uses and benefits (ie. harm to their legal interest) is prohibited, though factual harm to the watercourse and environment may still be permitted.

The "no-harm rule" is also a norm of international law and provides for a due diligence requirement to avoid harm in a way, and to an extent, that is reasonable in the circumstances.[52] It is not an absolute prohibition on causing harm. Factual harm may include a reduction in quantity of water, pollution, obstruction of fish migration, causing the erosion of banks, interference with flow regime or negative effects on the basin ecosystem. Legal harm may result from new downstream uses that do not have a factual impact on an upstream state but may constrain the scope of subsequent upstream uses.[53]

While both of these principles are included within each convention, the emphasis placed on the two principles is different.[54] The UN Watercourses Convention focuses on the principle of equitable and reasonable utilization; the UNECE Water Convention focuses on the no-harm rule. However, due to the interrelated and complementary nature of these principles, both of these approaches provide effective transboundary water governance.

It must be noted that the principle of equitable and reasonable utilization and the no-harm rule are both principles of international law, and therefore, the obligation of states to comply with them exists even if the UN Watercourses Convention had not entered into force, the UNECE Convention had not become globalized, or if the states are not parties to either of these conventions. However, by the fact of their global nature and codification as "international treaty law", these principles are now more forceful, clearly defined and easier to implement for all states.

UN Watercourses Convention

Article 5 outlines the principle of equitable and reasonable utilization.[55] This principle seeks to reconcile competing uses of the watercourse between basin states and is considered to be the "cornerstone of the Convention".[56] It requires that basin states will utilize and participate in the use, development, and protection of an international watercourse in an equitable and reasonable manner. This participation also includes the duty to cooperate in the protection and development of the watercourse.

Article 6 outlines a non-exhaustive list of factors that are to inform the decision-making process of determining what is equitable and reasonable. These factors are to be considered together and there is no priority given to any of them, though their relative importance may change. Such a determination is necessary in the event of a conflict of uses because states have an equitable (but not *identical*) share in

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[51] *The Law of International Watercourses,* at pp. 329
[52] *The Law of International Watercourses,* at pp. 347
[53] *The Law of International Watercourses,* at pp. 348
[54] *UNWC & the EU,* at pp. 21-22
[55] *UN Watercourses Convention*, Article 5 Equitable and reasonable utilization and participation. 1. Watercourse States shall in their respective territories utilize an international watercourse in an equitable and reasonable manner. In particular, an international watercourse shall be used and developed by watercourse States with a view to attaining optimal and sustainable utilization thereof and benefits therefrom, taking into account the interests of the watercourse States concerned, consistent with adequate protection of the watercourse. 2. Watercourse States shall participate in the use, development and protection of an international watercourse in an equitable and reasonable manner. Such participation includes both the right to utilize the watercourse and the duty to cooperate in the protection and development thereof, as provided in the present Convention.
[56] *UNWC User's Guide, FAQ* 18

the uses and benefits of a watercourse and, as stated in Article 10, no use of a watercourse has priority over another, though "special regard" may be given to "vital human needs".

Article 7 describes the no-harm rule as the "obligation not to cause significant harm".[57] This provision requires basin states to perform their due diligence in order to prevent harm arising as a result of their use of the watercourse. [58] However, this is not an absolute prohibition on causing transboundary harm. Compliance with this provision depends on the country's adequate preventative behaviour to avoid a harm result, not the result itself.[59] Therefore, some harm to a watercourse is possible, as further supported by the inclusion of "effects… on other watercourse states" as just one of a number of factors listed in Article 6. [60] If a state does cause harm, they must consult with the affected state, taking "due regard for… Articles 5 and 6" in order to eliminate, mitigate, or compensate the harm. In effect, the no-harm rule serves to trigger consultations concerning equitable and reasonable use.[61] The term "significant" is used to describe the threshold at which these consultations will occur. What amounts to "significant" is the amount of harm that justifies the affected state in raising the matter with the initiating state and that requires a response from the latter. Naturally, this will depend on the circumstances of a given case.

UNECE Water Convention

The main substantive rule of the UNECE Water Convention is the no –harm rule. This rule is codified in Article 2 and imposes a duty on Parties to take all appropriate measures to avoid causing transboundary impact to watercourse states.[62] "Transboundary harm" is defined in Article 1(2) as "…significant adverse effect on the environment…" which must be determined on a case-by-case basis.[63] Again, the no-harm rule is a due diligence obligation, and the Convention provides detailed guidance in Articles 2 and 3 and in Annexes II ("best environmental practice") and III ("water-quality objectives and criteria") as to the minimum requirements for compliance with this obligation.[64]

The principle of equitable and reasonable utilization is introduced in Article 2(2)(c) as one of four objectives that Parties must pursue in avoiding transboundary impact.[65] This principle should be read in conjunction with the Article 2(5), which requires the management water resources in way that meets the needs of the present generation but does not compromise the ability of future generations to meet their own. The text of the UNECE Water Convention does not elaborate on the operation of the principle of equitable and reasonable utilization, though the *UNECE Guide to Implementing the Water*

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[57] *UN Watercourses Convention*, Article 7 Obligation not to cause significant harm. 1. Watercourse States shall, in utilizing an international watercourse in their territories, take all appropriate measures to prevent the causing of significant harm to other watercourse States. 2. Where significant harm nevertheless is caused to another watercourse State, the States whose use causes such harm shall, in the absence of agreement to such use, take all appropriate measures, having due regard for the provisions of articles 5 and 6, in consultation with the affected State, to eliminate or mitigate such harm and, where appropriate, to discuss the question of compensation

[58] *UNWC User's Guide, FAQ* 21

[59] *UNWC User's Guide, FAQ* 21

[60] *UN Watercourses Convention,* Article 6(d)

[61] *The Law of International Watercourses*, at pp. 365-370

[62] *UNECE Water Convention*, Article 2(1) The Parties shall take all appropriate measures to prevent, control and reduce transboundary harm.

[63] UNECE (2013) *Guide to Implementing the Water Convention,* at pp. 20 Online: <http://www.unece.org/index.php?id=33657> (*UNECE Guide*)

[64] *UNECE Guide,* at pp. 19

[65] *UNECE Water Convention,* Article 2(2)

Convention ("*UNECE Guide"*) points to the UN Watercourses Convention and related commentary as a means to better understand the principle.[66] The *UNECE Guide* also indicates that this principle is "particularly relevant in cases where there is a conflict of uses" (the same purpose that it has in the UN Watercourses Convention), and points to the list of factors in Article 6 of the UN Watercourses Convention for guidance.[67]

Procedural Obligations

Both conventions provide for considerable procedural obligations concerning the process by which riparian states should interact. These procedural obligations include those that concern duties of general cooperation, notification, negotiation, consultation, and the exchange of data and information. These procedural obligations are necessary for states to determine whether their use of a watercourse is equitable and reasonable vis-à-vis the use of another state and are particularly important given that the obligation not to cause harm is an obligation of prevention.[68] Indeed, the substantive obligations of these conventions are best understood as processes, the achievement of which ultimately depends on the fulfilment of these procedural obligations, good faith and on-going cooperation.[69]

UN Watercourses Convention

Although Article 8 of the UN Watercourses Convention provides for a general obligation to cooperate, it is clear throughout the entire text that cooperation is required to achieve effective transboundary water governance. As noted, ensuring equitable and reasonable use and avoiding significant harm require cooperation between states. As such, there are a number of procedural obligations that outline the process by which inter-state dialogue can occur. Contrary to some perceptions, the Convention does not provide any state with a right to veto a proposed watercourse use. This would be immiscible to the cooperative purpose and spirit of the Convention.

Article 4 entitles every state that is located on a watercourse or may be significantly affected by a watercourse activity to participate the negotiations and consultations of relevant watercourse agreements. Article 9 requires the regular exchange of data and information on the condition of the watercourse. Articles 12 to 19 concern the timely notification of planned measures that may have a significant adverse effect upon other watercourse states. Articles 11 and 24 require consultation between parties concerning planned measures and management of a watercourse, respectively.

UNECE Water Convention

The UNECE Water Convention procedural obligations include provisions concerning the obligation to cooperate in the conduct of research and develop related to transboundary impact, the exchange of information, consultations, joint monitoring and assessment, and mutual assistance.[70] These provisions are quite detailed and outline the particular elements that the Parties should consider when fulfilling them. There is no general obligation to cooperate, though Article 9 provides for bilateral and multilateral cooperation regarding agreements, arrangements and joint bodies established between

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[66] *UNECE Guide*, at pp. 22-23
[67] *UNECE Guide*, at pp. 22-23
[68] *The Law of International Watercourses,* at pp. 342
[69] *The Law of International Watercourses,* at pp. 343
[70] *UNECE Water Convention*, Article 6 & 14; 10; 11; and 15, respectively

basin neighbours. This article outlines a number of tasks to be conducted by the joint body, including the "exchange of information on existing and planned uses of water and related installations".[71] This is analogous to the notification requirements in Articles 12-19 of the UN Watercourses Convention.

Protection of Watercourse Ecosystems

The requirement to protect ecosystems of international watercourses appears to be an emerging obligation under general international law.[72] Indeed, it finds expression in international treaty law such as the UN Watercourses and UNECE Water Conventions and a number of regional watercourse agreements. It is also supported by the general duty not to cause harm to the environment, which is norm of international law itself.[73]

UN Watercourses Convention

Article 20 requires states to "individually and…jointly, protect and preserve the ecosystems of international watercourses". Article 21 is a due diligence provision that requires that states prevent, reduce and control pollution before it reaches a level that causes significant harm to other states.[74] Articles 22 and 23 also prescribe due diligence standards to prevent the introduction of alien species and to protect the marine environment, respectively. As noted above, Articles 20 -23 serve to expand the scope of the UN Watercourses Convention to include impacts to the ecosystem of the watercourse, the environment, or human health of another state, as well as the marine environment. This would seem to indicate an "ecosystem approach" to watercourse management and the application of the Convention to the regulation of the wider watercourse basin and land based activities.

Article 21(2) also demonstrates the interplay between the principle of equitable and reasonable utilization and the no-harm rule; a use that causes significant pollution to a state or its environment generally causes significant harm to human health and safety, and would therefore be inherently inequitable and unreasonable.[75] This challenges the common misconception that the Convention imposes a dichotomy between the two principles. The interaction of these principles with this article also implies that the Convention's procedural obligations, which operationalize the substantive obligations, also apply to the prevention, reduction and control of pollution.

UNECE Water Convention

The obligation to protect the environment of an international watercourse is inherent to the general obligation of the UNECE Water Convention to avoid transboundary impact. This is because the definition of "transboundary impact" in part means "any significant adverse effect on the environment" and provides that "[s]uch effects on the environment include effects on….flora, fauna, soil, air, water, climate, [and] landscape…"[76] Further, Article 2(2) requires Parties to take "all appropriate measures….to (b) ensure that ensure that transboundary waters are used in the aim of ecologically sound and rational water management, conservation of water resources and environmental protection…[and]…(d) to ensure conservation and, where necessary, restoration of ecosystems."

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[71] *UNECE Water Convention*, Article 9(h)
[72] *The Law of International Watercourses*, at pp. 392
[73] *The Law of International Watercourses*, at pp. 392
[74] *The Law of International Watercourses,* at pp. 387
[75] *The Law of International Watercourses,* at pp. 386
[76] *UNECE Water Convention*, Article 1(2)

Dispute Resolution

Under both conventions, states must to resort to peaceful means to settle their disputes and may agree to submit them to arbitration or the International Court of Justice (ICJ). This is provided for in Article 33 of the UN Watercourses Convention and Article 22 and Annex IV of the UNECE Water Convention.

However, the UN Watercourses Convention goes further, providing for an impartial fact-finding commission who will provide recommendations for an equitable solution of the dispute. [77] This occurs when a timely resolution of the dispute by negotiation, arbitration or the ICJ cannot be found. The parties must give good faith consideration to the commission's recommendations, but are not obligated to implement them.

Institutional Framework

Both water conventions are framework agreements that encourage the establishment and implementation of basin agreements and management arrangements between watercourse states. However, the manner in which they do so, and the institutional support they provide, is different. The UN Watercourses Convention takes a flexible approach while the UNECE Water Convention contains mandatory obligations.

UN Water Convention

With respect to basin agreements, the UN Watercourses Convention preserves the negotiating and contractual freedom of states. It *recommends* the adjustment of existing agreements to its provisions and *encourages* the application and harmonization of the Convention's basic principles in future treaties.[78] Similarly, with respect to institutional frameworks at the basin level, the Convention provides that states "*may* consider the establishment of joint mechanism or commissions as deemed necessary by them".[79]

Concerning the establishment of an institutional framework to oversee the implementation of the UN Watercourses Convention at the global level, the text of the convention is silent. When the Convention comes into force, it will be for the contracting Parties to decide how to design this framework. A number of possible institutional options have been suggested.[80] The first is the joint implementation of the UN Watercourses Convention along with the UNECE Water Convention under the existing UNECE Water Convention Secretariat, though each convention would have its own Meeting of the Parties. The second option is the creation of a formal institutional framework under the UN Watercourses Convention with a MoP and a secretariat established as an entirely new body or hosted by an existing organization. The third option would be to refrain from creating a formal institutional structure and continuing to use and build upon informal platforms such as the UN Watercourses Convention Global Initiative as a vehicle to expand and implement the Convention.

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[77] *UN Watercourses Convention,* Article 33(3), (4), & (5)
[78] *UN Watercourses Convention,* Article 3(2),(3)
[79] *UN Watercourses Convention,* Article 8(2)
[80] *Can Two Water Conventions Coexist?* at pp. 23-26

UNECE Water Convention

In comparison, the UNECE Water Convention *requires* states to enter into bilateral or multilateral agreements where they do not exist or adapt existing agreements to ensure harmony with the basic principles of the Convention.[81] Contracting Parties are also required to establish joint bodies that are in charge of the management of the basin.[82]

In order to implement and develop the convention's principles, the UNECE Water Convention provides for a global institutional framework.[83] This framework has been operationalized and consists of a Meeting of the Parties, a Secretariat hosted by the UNECE, and a number of subsidiary bodies including working groups, expert groups, task forces, implementation committees and a legal board. It is through these bodies that over the past two decades the UNECE has produced authoritative and practical guidelines on a wide range of water-related issues and developed a wealth of experience managing shared water resources in Europe.[84]

Compatibility of the UN Watercourses Convention and the UNECE Water Convention

As is evident from the section above, there are some differences between the two conventions. In comparison with the UN Watercourses Convention, the scope of the UNECE Water Convention is slightly boarder, it emphasizes the no-harm rule over the principle of equitable and reasonable utilization, and it provides for more detailed and mandatory obligations upon contracting parties. However, it contains less detailed dispute resolution provisions. The UNECE Water Convention has also been in force for almost two decades and has an existing institutional framework with a wealth of experience implementing the provisions and developing guidelines on water governance.

Despite these differences, there are no conflicts between the provisions of each Convention, and in many cases, they complement each other.[85] For example, the list of factors in Article 6 of the UN Watercourses Convention could also be used to guide the operation of the principle of equitable and reasonable utilization in the UNECE Water Convention. The list of legal, administrative, economic, financial and technical measures in the provisions in Article 3 of the UNECE Water Convention could be used to identify the "appropriate measures" as required by the no-harm rule under Article 7 of the UN Watercourses Convention. Furthermore, the experience amassed over the two decades by the Secretariat and Parties of the UNECE Water Convention could provide lessons on how to implement the UN Watercourses Convention.

It is clear that these conventions could be implemented individually or together with equally effective results. Indeed, a number of countries have already ratified one and in some cases, both, of the conventions.[86]. However, some countries may have difficulty complying with the stricter, more detailed provisions of the UNECE Water Convention. Since it would be most beneficial to utilize both of

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[81] *UNWC & the EU,* at pp. 22; *UNECE Water Convention,* Article 9(1)
[82] *UNECE Water Convention,* Article 9(2)
[83] *UNECE Water Convention,* Articles 17 and 19
[84] *Can Two Water Conventions Coexist?* at pp. 23
[85] *UNWC & the EU,* at pp.25
[86] There are 40 states who have ratified the UNECE Water Convention and 35 who have ratified the UN Watercourses Convention. Amongst these parties, there are 14 countries that have ratified both: Denmark, Finland, France, Germany, Greece, Hungary, Italy, Luxembourg, Montenegro, Netherlands, Portugal, Spain, Sweden, and Uzbekistan.

these mutually reinforcing instruments, it has been suggested that ratifying the UN Watercourses Convention is a logical, first step in the progression of transboundary water cooperation.[87] Once this broad and flexible framework is in place, states can work towards acceding to the UNECE Water Convention if they wish. Still, it is important not to construct any sort of hierarchy between the two conventions; states are encouraged to adopt whichever convention suits their needs and capacity. It is important that the international community makes the most of this unique opportunity to advance the course of global transboundary water law, and they are fortunate to have two effective means of doing so.

Common Misunderstandings Concerning the UN Watercourses Convention

The slow uptake of the UN Watercourses Convention was, in part, due to a number of misconceptions amongst the international community concerning the provisions of the Convention, notably the relationship between equitable and reasonable utilization and the no-harm rule and the rights and obligations of upstream and downstream states. Fortunately, in the years since the Convention was approved by the UN General Assembly these misconceptions are slowly being dispelled. While the following section is discussed in the context of the UN Watercourses Convention, the main points are also relevant to the UNECE Water Convention.

The Relationship between the Principle of Equitable and Reasonable Use and the No-Harm Rule

The relationship between the two substantive principles was a divisive issue between states. How did they interact? Which one took precedence? It is now clear that, the principle of equitable and reasonable utilization and the no-harm rule are two sides of the same coin, though the principle of equitable and reasonable utilization will be given prevalence in case of conflict.[88]

The principle of equitable and reasonable utilization provides that watercourse states have legally protected interests in an equitable share of the uses and benefits of an international watercourse. It is not factual harm per se, but injury to this legal interest that is prohibited.[89] That is, harm to a watercourse is permitted where it does not deprive a state of their equitable share of the water. This is point is contemplated by Article 6, which includes transboundary effects as just one of the non-hierarchical factors used to determine equitable and reasonable use, and Article 7(2), which requires the elimination, mitigation or compensation of harm in the event of significant harm to a watercourse state.

Therefore, the no-harm rule it is not an absolute prohibition on harm, but a due diligence requirement to avoid causing harm in a way that is reasonable in the circumstances.[90] It plays a complementary role to the principle of equitable and reasonable utilization, triggering discussions between states when harm occurs.[91] When significant harm occurs, a complaining state must demonstrate that the harm is present and is diminishing their utilization of their equitable share of the watercourse. The state alleged to have caused this harm must then show that it has fulfilled its

[87] *UNWC & the EU,* at pp. 26
[88] *UNWC User's Guide, FAQ* 22
[89] *The Law of International Watercourses,* at pp. 347
[90] *The Law of International Watercourses,* at pp. 347
[91] *The Law of International Watercourses,* at pp. 380

obligation of due diligence to avoid harm. Otherwise, it will be responsible for a breach of its due diligence. If the alleged state has done its due diligence, it must then establish that its use of the watercourse is equitable and reasonable given all the relevant factors. The use will be permitted if, regardless of the harm, it does not deprive the complaining state of their legal interest in an equitable share of the watercourse. Of course, since the obligation to not to cause harm is preventative in nature, this discussion must also take place when a new use is proposed that has the possibility of causing harm.

The Rights and Obligations of Upstream and Downstream States

The position of a particular country along a watercourse tended to coincide with their support for the UN Watercourses Convention and a number of beliefs concerning the interpretation of the text and the rights and obligations of various watercourse states.[92] Downstream states and those with significant upper and lower riparian interests tended to favour the Convention.[93] Upstream states tended otherwise. Downstream states favoured the no-harm rule. Upstream states favoured the principle of equitable and reasonable use. Each group claimed that the Convention favoured the other and they disagreed on which type of watercourse state could cause harm as well as the importance of existing uses. It is important to clarify these misunderstandings to ensure uptake of the Convention by all states, regardless of their location along a watercourse.

Neither the UN Watercourses Convention nor the UNECE Water Convention distinguishes between downstream and upstream states. The UN Watercourses Convention "imposes identical obligations on all watercourse states, irrespective of their location on an international watercourse: all riparian states shall use an international watercourse in an equitable and reasonable manner, prevent significant transboundary harm, protect and preserve freshwater ecosystems, and make use of the procedural system of data sharing, notification, consultations, negotiations, and dispute settlement".[94]

It is intuitive that downstream states can be harmed by the physical impacts of water quality and quantity that are caused by upstream uses. However, upstream states can also be harmed by downstream uses. This occurs by a "foreclosure of uses", which is caused by a prior use of water by downstream states.[95] In the event of a new upstream use, the downstream state would claim to have acquired rights to the water through their prior use and invoke the obligation not to cause harm. This would serve to block all watercourse development and uses of the upstream state.

However, while both upstream and downstream users can harm each other, the idea that a downstream use must necessarily foreclose a future upstream use is no longer tenable. Under the UN Watercourses Convention, "existing and potential uses" are just one of the factors to be considered in determining whether the watercourse is being utilized in an equitable and reasonable manner.[96] These factors are non-hierarchical and considered in the context of the situation. Further, every riparian state has an equal right to an equitable portion of the uses and benefits of the watercourse, irrespective of their location on a watercourse or whether another state had an existing use.[97] This means that a new

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[92] Salman, S. (2010) *Downstream riparians can also harm upstream riparians: the concept of foreclosure of future uses* Water International 35(4): 350-364 (*Upstream and downstream harm*)
[93] *Development of the UNWC,* at pp. 85
[94] *UNWC & Central Asia,* at pp 54
[95] *Upstream and downstream harm,* at pp 351
[96] *UN Watercourses Convention*, Article 6(e)
[97] *The Law of International Watercourses,* at pp. 336

upstream use may be permissible even where existing downstream users fully consume the river's water. The water would have to be reallocated based on what is equitable and reasonable; an existing user would have to demonstrate that the new use would cause harm, while the potential user would have to show that their use is reasonable and equitable vis-à-vis the existing use. Harm to the existing use is permitted, though the elimination, mitigation or compensation of this harm would be necessary. This type of determination underscores the usefulness of the substantive and procedural obligations of the Convention to facilitate dialogue between states.

Practical implications for Latin American countries ratifying the UN Watercourses Convention and the UNECE Water Convention

This section will consider the effects of the entrance into force of the UN Watercourses Convention and the globalization of the UNECE Water Convention and what will happen if countries in Latin American ratify one or both of these treaties. For our purposes, we refer to Latin America as consisting of the countries located on the isthmus of Central America, Mexico, the continent of South America, and the Dominican Republic and Haiti, the only Caribbean island states that have transboundary waters.

Transboundary Water and Governance in Latin America

Latin America is considered to be the richest hydrological region in the world and contains some of its largest rivers. However, the region faces a number of challenges: water resources are not distributed equally amongst a growing population, there are a number of threats exist to water quality and quantity, and most of the river basins are shared between countries. Further, international water cooperation is, for the most part, still developing. As the full extent of potential uses of Latin American watercourses, particularly with respect to irrigation and hydropower, is yet to be realized, it is important that a comprehensive legal framework is put in place to properly manage both current and future uses.

Central America has 29 international rivers basin that account for 37% of the land area.[98] In some instances, such as Belize, a basin can account for up to 65% of the land of a country. Water scarcity is not yet a major issue, though both water quantity and quality are being threatened by dam building, deforestation, land overuse, increasing populations, urban construction processes, and industrial zones. Agricultural uses also constitute a large demand for water. The Negro and Lempa river basins have particular need for attention given to their respective water issues, disputes over uses and environmental degradation.[99] Water governance in Central America is relatively well established at the political level; however, there has been certain reluctance amongst states to develop legally binding instruments and to ratify the global conventions. As such, international water governance in this region is in its early stages; there are only four agreements that attend to the issues of environmental issues in international river basins, and there is only one transboundary area, the Trifinio region within the upper part of the Lempa basin, where an institutional framework has been established.[100]

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[98] *Hydropolitics in Latin America,* at pp. 17
[99] *Hydropolitics in Latin America,* at pp. 31 and 39
[100] *Hydropolitics in Latin America,* at 35 and 41

South America has 38 international water basins that cover almost 60% of the continent and where over 29% of the population resides.[101] Although water is abundant, it is not distributed equally, with 68% of the freshwater resources located in just three basins, the Amazon, La Plata, and the Orinoco, where only 25% of the population live.[102] Ensuring widespread access basic services, managing increasing groundwater use and water pollution, existing and potential hydropower developments, and climate variability are key issues for water governance in this region.[103] Similar to Central America, water governance in South America is not a new concept. Some international river basin organizations, such as those in La Plata and Titicaca have been working together for decades.[104] However, international management is not particularly widespread; only four basins have international treaties – the Amazon, La Plata, Titicaca, and Mirim Lagoon. [105] The first three of these basins also have comprehensive multinational initiatives, comprised of more than two states and covering a number of different sectors, though these are the only such agreements in the region.

To date, no Latin American country has ratified to the UN Watercourses Convention or the UNECE Water Convention. Interestingly, both Paraguay and Venezuela signed the UN Watercourses Convention, but neither went on to ratify it. In light of the vast water resources shared amongst Latin American states and the challenges that face these resources, a framework instrument clarifying the law around utilization and protection of watercourses and supporting international cooperation could be a welcome addition to transboundary water governance in Latin America.

Effects of Adoption of Global Water Conventions on Transboundary Water Governance

The adoption of either the UN Watercourses or UNECE Water Conventions by countries in Latin America will have a number of positive impacts on transboundary water law at the global, regional and local levels.

First and foremost, continued adoption would be a statement of a growing international commitment to address water issues at the global level and strengthen the role of international law in enhancing cooperation between watercourse states.[106] It would also demonstrate a commitment to the rule of law, support policy goals pertaining to international peace, worldwide energy and food security, and sustainable development.[107] Those states that have made such a statement would enter into a community of like-minded states that would be able to share information, knowledge and expertise in implementing good water management practices. This is particularly true for the UNECE Water Convention which has almost two decades of experience and an existing institutional body. Such a community would also soon develop amongst states who have adopted the UN Watercourses Convention.

Adoption would clarify and progressively develop international law. The principle of equitable and reasonable utilization and the no-harm rule are already considered to be norms of international law,

[101] *Hydropolitics in Latin America,* at 46
[102] *Hydropolitics in Latin America,* at 46
[103] *Hydropolitics in Latin America,* at 50-57
[104] *Hydropolitics in Latin America,* at 45
[105] *Hydropolitics in Latin America,* at 58
[106] *UNWC: Still not in force,* at pp. 26
[107] *UNWC: Still not in force,* at pp. 28

and the adoption and entrance into force of the conventions have provided more legitimacy as such. However, the continued adoption and implementation of these conventions will further reinforce the status of these principles, establish the procedural obligations of the convention as international law, and help to define the precise content of these rules.[108]

At the regional and local levels, the conventions could be used to spur on negotiations on regional, basin, and sub-basin agreements. Where agreements already exist, the conventions would supplement and provide guidelines for cooperation and sustainable use, clarifying elements of the existing agreements, and filling gaps where necessary. Where agreements do not exist, the conventions will create a level playing field between states and provide a framework to develop shared governance and negotiate future agreements. In their capacity to promote cooperation, these conventions would also serve as a conflict prevention tool and as a dispute resolution mechanism.[109]

The implementation of a coherent, transparent, and participatory global framework to strengthen policy coordination and the implementation of water related decisions would also support national implementation of other multinational environmental agreements that touch on water issues.[110] For example, both conventions address transboundary pollution, which is a critical issue for biodiversity but is not addressed by the Convention on Biological Diversity.[111] Effective transboundary water management has also been cited as an important means to achieve the Millennium Development Goals.[112]

Global Watercourse Conventions in Latin American: Three Scenarios

The following section will discuss the implications of the adoption of a global watercourse convention in Latin America. A number of scenarios will be considered: the adoption of a convention by two or more states along a watercourse, the adoption by just one country within a shared basin, and the adoption by no countries within a basin.

Ratification by two or more states along a watercourse

The adoption of one, or both, of the conventions by two or more states along a watercourse would describe the ideal scenario envisioned by the authors of this article. Under the UN Watercourses Convention, existing agreements would remain in place and unaltered unless the Parties, between themselves, agreed otherwise.[113] However, the UN Watercourses Convention would perform important roles filling gaps and clarifying obligations in the existing agreements. Under the UNECE Water Convention, Parties are required to eliminate contradictions between existing agreements and the

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[108] *UNWC: Still not in force,* at pp. 29

[109] *UNWC User's Guide, FAQ*,27

[110] *UNWC: Still not in force,* at pp. 23. These conventions include the RAMSAR Convention, the World Heritage Convention, the Convention on Biological Diversity, and the UN Framework Convention on Climate Change and UN Convention to Combat Desertification.

[111] Brels, S., Coates, D., and Loures, F. (2008). T*ransboundary water resources management: the role of international watercourse agreements in implementation of the CBD*. CBD Technical Series no. 40, Secretariat of the Convention on Biological Diversity, Montreal, Canada., at pp. 25

[112] Prince of Orange (2008) *Speech to the 118th Assembly of the Inter-Parliamentary Union, Cape Town*. Online: <http://www.koninklijkhuis.nl/globale-paginas/taalrubrieken/english/speeches/speeches-archive/2008/april/speech-by-the-prince-of-orange-to-the-118th-assembly-of-the-inter-parliamentary-union-cape-town/>

[113] *UN Watercourses Convention*, Article 3

Convention and adhere to the compulsory requirements of the text.[114] Where agreements do not exist, both conventions provide an effective framework for developing agreements, though the obligations of the UNECE Water Convention are generally more detailed and mandatory.

If some states along the watercourse refrained from joining their neighbours in adopting the conventions the provisions of the conventions would not apply to them. However, under the UN Watercourses Convention, it appears that contracting Parties still have an obligation to protect the natural environment of non-contracting states when they are vulnerable to transboundary harm through an international watercourse.[115] This may be inferred from the language of Articles 21(2) and 28 that requires contracting Parties to prevent harm to "other watercourse states" as a result of pollution or an emergency related to an international watercourse.

It is also likely that there would be significant political pressure from the contracting Parties on non-contracting states within a basin to join the convention in order to maximize regional dialogue and the subsequent benefits of comprehensive transboundary water management.

Ratification by only one state in a water basin

In the case where only one of a group of watercourse states in an international basin has adopted a global water convention, the situation is straightforward in some respects and more complicated in others. From a legal perspective, the situation is straightforward: there are no real legal implications. Both the UN Watercourses Convention and UNECE Water Convention are designed to facilitate dialogue and cooperation between states and therefore, they are only effective when two or more states in an international basin have adopted them. Without a reciprocal commitment from neighbouring watercourse states to cooperate and operate by the same principles and procedures, a contracting Party cannot fully implement the provisions of the conventions vis-à-vis the other watercourse states. Still, the clarity provided by the conventions with regard to the principle of equitable and reasonable use and the no-harm rule and related procedures may inform the decisions of states in developing separate basin and regional water agreements.

However, this type of situation may have some effect on the international relations between states within a basin, though these effects are less well understood. In the event of a conflict of uses, a contracting Party complaining of harm might point to the conventions as establishing their case and providing a minimum standard for resolving such disputes. Though codification within the UN Watercourses Convention and UNECE Water Convention, the principle of equitable and reasonable utilization and the no-harm rule have progressed beyond customary international law to become clearly defined international treaty law that is implemented by specific procedures. As more states adopt the conventions, their legitimacy grows. The adoption by a Latin American country would have particular relevance for the legitimacy of these conventions in Latin America, indicating that these conventions can work in Central and South America.

If a resolution is not found by pointing out the usefulness and legitimacy of the principles of the convention, the complaining Party might single out the offending state before the international community, indicating that this state has violated a principle of international law. As a number of members of the international community have already adopted one, or both, of these conventions, and

[114] *UNECE Water Convention*, Article 9
[115] *UNWC User's Guide, FAQ* 10

even more states have watercourse agreements with analogous principles in place, this would place pressure on the offending country to comply with the principles of the convention and cooperate in resolving the dispute.

No ratification by states along a watercourse

If no state along a watercourse were to adopt a watercourse convention, the provisions of the conventions would not apply. However, established principles of international law, many of which have been codified by the conventions, would still apply to the non-contracting state.[116] However, these only apply in the absence of watercourse agreements determining otherwise.

Conclusion

The entrance into the force of the UN Watercourses Convention and the globalization of the UNECE Water Convention present both a unique situation in international law and an opportunity to progressively develop the state of global transboundary water law. These conventions not only have value in their ability to introduce a water governance framework where none currently exist, but they have particular significance where existing agreements have gaps or failings that pose a serious obstacle to cooperation. This includes providing definitions for key terms, clarifying the implementation of substantive principles, and providing an over-arching framework for the entire basin where existing agreements are bilateral.

Furthermore, given that over-use and harm to a watercourse can be difficult to reverse, it makes sense from a management perspective to cooperate with other watercourse users before harm occurs and follow a common set of principles and procedures that promote the optimal use of the watercourse. Disputes and conflicts of uses are also easier to prevent than rectify, reducing the cost to the Parties involved and the impact on those dependant on the watercourse.

In light of the hydrologic wealth of Latin America and the pressures this region may face in coming years, this article concludes by urging the countries of Latin America to continue pursuing their endeavours to develop their water governance arrangements and adopt either the UN Watercourses Convention or the UNECE Water Convention. These conventions are similar and each has its particular strengths, however, both can promote effective transboundary water governance and thus contribute to human and environmental security.

[116] *UNWC User's Guide, FAQ* 16