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The United Nations Watercourses Convention on the Dawn of Entry Into Force

Ryan B. Stoa*

ABSTRACT

The United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses (Watercourses Convention) entered into force in August 2014. Despite overwhelming support when signed in 1997, the ratification process has been slow. As a binding treaty, the Watercourses Convention provides hope that its provisions will articulate legal principles of transboundary water management capable of promoting cooperation and regional agreements. Despite entry into force, however, global support for the Watercourses Convention is weak, concurrent efforts to develop treaty regimes governing water resources create competition for resources and may obscure understandings of international water law, and the foundational principles of the Watercourses Convention remain ambiguous. A case study of the discordant hydrogeopolitics of the Nile River Basin—perhaps the most significant watercourse lacking a cooperative management agreement—best illustrates these limitations. This Article provides an analysis of international water law and the limitations of the Watercourses Convention, considering the implications of entry into force. While the Watercourses Convention creates a workable framework for negotiating regional agreements, low levels of support from UN member states, competing treaty instruments, and ambiguous legal principles limit the potential impact of the Watercourses Convention.

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I. INTRODUCTION

When the United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses (Watercourses Convention) was presented to the UN General Assembly in 1997, it was met with overwhelming support. One hundred and six countries voted in favor of the Convention, with only three countries opposed.¹ At the time, there was optimism that the Watercourses Convention would provide states with a robust treaty codifying a clear set of customary principles of international water law, and establish a foundation for site-specific regional agreements. The 1990s were a period of significant growth in the international environmental field, with several agreements providing meaningful frameworks for resolving complex environmental challenges, including the Convention on Biological Diversity,² the Convention to Combat Desertification,³ the Framework Convention on Climate Change,⁴ and Kyoto Protocol.⁵ Amidst such efforts, the Watercourses Convention lacked the attention and political capital necessary to build on the

1. G.A. Res. 51/229, at 1, U.N. Doc. A/RES/51/206 (May 21, 1997).

2. All United Nations member states—except the United States and Andorra—are party to the Convention on Biological Diversity, June 5, 1992, 1760 U.N.T.S. 79.

3. All United Nations member states are party to the United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, Oct. 14, 1994, 1954 U.N.T.S. 3.

4. All United Nations member states are party to the United Nations Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 107.

5. All United Nations member states—except the United States, Andorra, Canada, and South Sudan—are party to the Kyoto Protocol, Dec. 11, 1997, 2303 U.N.T.S. 161.

Watercourses Convention's initial support, and therefore did not move quickly towards entry into force. After seventeen years, the Watercourses Convention finally entered into force and attained binding treaty status on August 17, 2014.⁶

Slow progress in the development of binding international water law is not for lack of need. Ninety percent of the world's population lives in a country that contains transboundary surface waters, and two billion people depend on groundwater for their survival.⁷ Meanwhile, most of the world's 563⁸ transboundary watercourses lack a cooperative management framework.⁹ With water serving important needs for domestic and municipal water supply, agricultural irrigation, industrial production, energy development, transportation, recreation, and commercial use, transboundary water resources have the potential to be an escalating source of conflict between states. An international agreement creating a framework for cooperation—while codifying customary rules and norms—presents an opportunity to mitigate conflict and promote cooperation.

The Watercourses Convention, however, has not provided the framework or legal clarity hoped for by its drafters and early supporters. Three dynamics support this conclusion.

First, it is self-evident that ratification of the agreement has been slow, despite a friendly climate for international agreement formation. The pace of ratification may be explained by several inhibiting factors, including treaty congestion and lack of leadership.¹⁰ More problematic is the possibility that the Watercourses Convention's non-binding status is due to a deliberate lack of support from states that originally voted in favor of the

6. *Status of the Convention on the Law of the Non-Navigational Uses of International Watercourses*, UNITED NATIONS TREATY COLLECTION [hereinafter *Status of Watercourses Convention*], <https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XXVII/XXVII-12.en.pdf> [<http://perma.cc/R6SP-X9B5>] (archived Sept. 13, 2014).

7. *See Transboundary Waters: Sharing Benefits, Sharing Responsibilities*, UN-WATER 1 (2008), http://www.unwater.org/downloads/UNW_TRANSBOUNDARY.pdf [<http://perma.cc/5MJU-TS6E>] (archived Sept. 12, 2014) (“[O]ver 90 per cent [of the world's population] lives in countries that share basins.”).

8. *See id.* (noting that many of the world's 263 transboundary lakes and rivers, and 300 transboundary aquifers have “[d]epleted and degraded freshwater supplies” due to poor management and governance).

9. *See id.*; *see also* UN-Water, *Managing Water Under Uncertainty and Risk: The United Nations World Water Development Report 4*, UNITED NATIONS EDUC. SCIENTIFIC AND CULTURAL ORG. 215–16 (2012), <http://unesdoc.unesco.org/images/0021/002156/215644e.pdf> [<http://perma.cc/L89K-E8MA>] (archived Sept. 13, 2014) (explaining that only forty percent of international basins have an agreement in place to cooperatively manage their use).

10. *See* Alistair Rieu-Clarke & Flavia Rocha Loures, *Still Not in Force: Should States Support the 1997 UN Watercourses Convention?*, 18 REV. OF EUROPEAN COMMUNITY & INT'L ENVTL. L. 185, 192–93 (2009).

Watercourses Convention in the General Assembly seventeen years ago.

Second, despite the Watercourses Convention's distinction as the international community's framework freshwater treaty, other legal instruments have emerged in an attempt to fill the gap created by the Watercourses Convention's slow march towards entry into force. The 1992 United Nations Economic Commission for Europe (UNECE) Convention on the Protection and Use of Transboundary Watercourses and International Lakes¹¹ (UNECE Water Convention) was amended in 2003 to allow accession by all UN member states. Meanwhile, the 2008 Draft Articles on the Law of Transboundary Aquifers¹² (Draft Articles) attempts to create its own legal regime for groundwater resources. Both instruments overlap and conflict with the Watercourses Convention in significant ways.

Third, the two foundations of the Watercourses Convention—(1) the right to an equitable use of water resources and (2) the obligation not to cause significant harm to other watercourse states—are inherently in tension with each other, and do not establish meaningful rules for states in conflict over water resources. The principles are considered the foundations of international water law in general,¹³ and provide an impetus for agreement between states primed for cooperation. But the lack of clarity between the principle of equitable use and the principle of no significant harm does not contribute to agreement formation between states in protracted and complex conflicts over water resources, the resolutions of which are undoubtedly a goal of the Watercourses Convention.¹⁴ Instead, these principles can be used to support incompatible positions between upstream and downstream states, taking negotiations further away from an agreement.

Nowhere are the Watercourses Convention's limitations more apparent than in the geopolitical asperity of the Nile River Basin. For centuries, the flow of water in the Nile River has been entirely

11. Convention on the Protection and Use of Transboundary Watercourses and International Lakes, Mar. 17, 1992, 1936 U.N.T.S. 269 [hereinafter *UNECE Water Convention*].

12. GAOR, *The Law of Transboundary Aquifers: Title and Texts of the Preamble and Draft Articles 1 to 19 on the Law of Transboundary Aquifers Adopted, on Second Reading, by the Drafting Committee*, U.N. Doc. A/CN.4/L.724 (May 29, 2008) [hereinafter *Draft Articles*].

13. The principles of equitable use and no significant harm predate the UN Watercourses Convention, are contained in other legal instruments such as the *UNECE Water Convention* and the *Draft Articles*, and are codified in documents enumerating customary international water laws.

14. See *Convention on the Law of the Non-Navigational Uses of International Watercourses*, G.A. Res. 51/229, at 2, U.N. Doc. A/RES/51/229 (July 8, 1997) [hereinafter *UN Watercourses Convention*] (“[A] framework convention will ensure the utilization, development, conservation, management and protection of international watercourses.”).

appropriated or claimed by Egypt and, to a lesser extent, Sudan, due to colonial-era treaties for which justifications are most likely obsolete. But Egypt and Sudan do not merely assert their rights under these treaties; they reinforce those rights by invoking the principle of no significant harm's prohibition on adverse impacts to their allocations. Facing increasing water scarcity, meanwhile, upstream states are increasingly assertive of their rights to an equitable and reasonable utilization of the Nile River's water resources. Unable to resolve the inherent tensions between the two principles, the states have resorted to creating an entirely new legal principle—water security. The definition of water security is disputed and leaves the Nile River Basin without a cooperative management agreement.

There is, however, reason for optimism. With thirty-five member parties, the Watercourses Convention is in force and increasingly relevant. There is reason to believe that many states do not have substantive objections to the text of the Watercourses Convention, and are prepared to accede with the support of international political capital and momentum. Entry into force of the treaty may provide such an impetus. Even if it does not, attaining binding status confers upon the Watercourses Convention, and its principles, a degree of legitimacy that may have been eroding due to its perennial non-binding status. Entry into force may also help stem the tide against the rise of competing legal instruments with overlapping mandates, while forcing states, courts, and scholars to weigh in on the equitable use/no significant harm debate. Increased attention may establish or reinforce a consensus interpretation capable of resolving disputes and fostering cooperation. Finally, while the Nile River Basin provides a disconcerting example of the limitations of international water law, there is evidence that the Watercourses Convention is already providing a framework for cooperation in regions where hydrogeopolitics are not as divisive.

This Article provides an analysis of the Watercourses Convention at a crucial moment in the development of international water law—entry into force of the UN's framework international freshwater treaty. In Part I, a historical review of the development of international water law provides context for the Watercourses Convention's creation and entry into force, as well as the current state of international water law. In Part II, three limitations of the Watercourses Convention are explored in detail: (1) a troubling lack of support for, and pace of, entry into force; (2) competing legal instruments with overlapping mandates; and (3) inherent tensions between the foundational principles of equitable use and no significant harm. In Part III, a case study of the discord over water management in the Nile River Basin highlights the limitations of the Watercourses Convention. Part IV concludes the article by considering the implications of the Watercourses Convention's entry

into force for international water law, the international community, and freshwater resources. This Article argues that while the Watercourses Convention creates a workable framework for negotiating regional agreements, entry into force will not be a panacea for the limitations of the Watercourses Convention. Further support will be needed to develop and reinforce the foundations of international water law.

II. THE HISTORY OF INTERNATIONAL WATER LAW

Water laws have played a role in human society for millennia. Access to water resources is a primary characteristic of the earliest human settlements; rules governing water use may have predated property regimes for land in some areas.¹⁵ Water laws are reflected in traditional Islamic and Jewish religious texts and played a central role in the development of many historically influential cities like Rome, London, and New York City.¹⁶ Many of these early laws were tailored to a particular community or localized water resource, such that water resources have historically been regulated by local, regional, or national institutions and legal instruments.

International water laws, on the other hand, are a relatively recent product. Though treaties that were tangentially related to transboundary water governance occasionally developed early international water law,¹⁷ water resources were historically considered abundant, and allocation schemes were rudimentary and scarcely enforced. In 1966, however, the International Law Association (ILA) convened in Helsinki, Finland, to create the Helsinki Rules on the Uses of Waters of International Rivers (Helsinki Rules).¹⁸ The goal of the rules was to codify customary legal norms and principles, in addition to setting in motion further development of international water law. Given the preliminary nature of the endeavor, the Helsinki Rules were appropriately modest in their ambition, establishing the groundwork for future action and establishing principles of water law that reflected prevailing notions of water resources management.

15. See James Salzman, *Thirst: A Short History of Drinking Water*, 18 YALE J.L. & HUMAN. 94, 99 (Special Issue 2006) (discussing the history of water laws as far back as the Old Testament).

16. See generally *id.* (describing water laws for various cultures and cities).

17. See, e.g., *Convention Relative to the Development of Hydraulic Power Affecting More Than One State, and Protocol of Signature*, 20 AM. J. INT'L L. 145 (1926).

18. See Int'l Law Ass'n, *The Helsinki Rules on the Uses of the Waters of International Rivers*, UNITED NATIONS EDUC. SCIENTIFIC AND CULTURAL ORG. 1 (1966) [hereinafter *Helsinki Rules*], http://webworld.unesco.org/water/wwap/pccp/cd/pdf/educational_tools/course_modules/reference_documents/internationalregionconventions/helsinkirules.pdf [http://perma.cc/3Q67-P3L3] (archived Sept. 13, 2014).

The most significant principle—that of equitable and reasonable utilization of water resources, or “equitable use”—was prevalent in many national legal settings,¹⁹ and by itself did not present controversy. The principle of equitable use in the Helsinki Rules states that “each basin State is entitled, within its territory, to a reasonable and equitable share in the beneficial uses of the waters of an international drainage basin.”²⁰ In other words, states may use water resources as long as their use is reasonable and beneficial. Equitable use has since become a central pillar supporting the international water law regime by stipulating that a basin state (a state whose territory includes any portion of an international watercourse) has a right to beneficial uses of its water resource.

By its nature, however, equitable use is not without its limitations. The Helsinki Rules made clear that while states are entitled to an equitable share of water resources, that share is to be determined by weighing the relevant factors of each particular case, including geography, hydrology, population, past utilization, etc.²¹ Included as an enumerated factor is the “degree to which the needs of a basin State may be satisfied, without causing substantial injury to a co-basin State.”²² In a sense, this provision was the seed that would become the principle of no significant harm. At the time, however, the idea that a state should refrain from using water resources because it may have deleterious impacts on co-riparians was merely a factor to consider in case-specific determinations of what constitutes an equitable use. There was little debate that the principle of reasonable and equitable use of shared water resources represented the heart of the Helsinki Rules.

While the Helsinki Rules provided an important first step in the development of international water law by codifying customary rules and norms, the international community recognized that further progress would come from a binding treaty framework. In 1970, the United Nations General Assembly requested the International Law Commission (ILC) conduct a study of the law of international watercourses with an eye towards codification and treaty formation.²³ The ILC submitted its draft articles, governing surface waters and

19. See Rep. of the Int'l Law Comm'n, 46th Sess., May 2–July 22, 1994, U.N. Doc. A/49/10; 49 U.N. GAOR Supp. No. 10, at 96–100 (1994), reprinted in [1994] 2 Y.B. Int'l L. Comm'n 1, U.N. Doc. A/CN.4/SER.A/1994/Add.1 (Part 2) (“Watercourse States shall in their respective territories utilize an international watercourse in an equitable and reasonable manner.”).

20. *Helsinki Rules*, supra note 18, art. IV.

21. *Id.* art. V(II).

22. *Id.* art. V(II)(11).

23. See Progressive Development and Codification of the Rules of International Law Relating to International Watercourses, G.A. Res. 2669 (XXV)(1), at 88, 25th Sess., U.N. Doc. A/8202 (Dec. 8, 1970) (recommending that the Commission conduct the study “with a view to its progressive development and codification” and swift implementation).

unconfined groundwaters, to the General Assembly in 1994, along with a supplemental resolution governing confined groundwaters.²⁴ The General Assembly continued negotiations for several years before adopting the draft articles in 1997 as the Watercourses Convention by a resolution vote of 106 in favor to three against.²⁵

The Watercourses Convention contains thirty-seven Articles laying down basic norms of international water law.²⁶ The cornerstone of the Watercourses Convention, however, is Article 5, "Equitable and Reasonable Utilization and Participation."²⁷ Echoing the Helsinki Rules, Article 5 reasserts the equitable use principle, while highlighting the concept of equitable participation to encourage states to resolve issues of equitable use jointly and cooperatively.²⁸ The right of states to an equitable and reasonable utilization of a watercourse is thus met with the duty to cooperate in its protection and development.²⁹ Like the Helsinki Rules, Article 6 of the Watercourses Convention enumerates a set of factors to guide determinations of what constitutes an equitable use, including the effects of a use on other watercourse states.³⁰

The Watercourses Convention, however, departs from the Helsinki Rules in one important respect: Article 7 creates a stand-alone obligation not to cause significant harm.³¹ The principle of "no significant harm" imposes a higher standard on basin states by requiring them to refrain from taking actions that would cause substantial damage to another state's water resources. If the damage is unavoidable, the principle requires a state to compensate other states for the damage.³² The no significant harm principle may prevent upstream states from using water resources—even if their use is reasonable and beneficial—if downstream states would be

24. See Stephen C. McCaffrey, *Convention on the Law of the Non-Navigational Uses of International Watercourses*, UN AUDIOVISUAL LIBRARY OF INT'L L., 1-2 (2008), http://legal.un.org/avl/pdf/ha/clnuiw/clnuiw_e.pdf [<http://perma.cc/U78F-YEEJ>] (archived Sept. 12, 2014).

25. The official UN recorded vote was 103 countries in favor; however, Belgium, Fiji, and Nigeria later informed the Assembly they intended to vote in favor of the Convention. FLAVIA LOURES, MARIE LAURE-VERCAMBRE & ALISTAIR RIEU-CLARKE, EVERYTHING YOU NEED TO KNOW ABOUT THE UN WATERCOURSES CONVENTION, WORLD WILDLIFE FUND 24 (2009), available at <http://www.gcint.org/sites/default/files/publication/document/UN-Watercourses-Brochure-Eng.pdf> [<http://perma.cc/JTD2-PWR7>] (archived Sept. 13, 2014); see also Press Release, General Assembly, General Assembly Adopts Convention on Law of Non-Navigational Uses of International Watercourses, U.N. Press Release GA/9248 (May 21, 1997) (detailing the official vote count).

26. UN Watercourses Convention, *supra* note 14.

27. See *id.* art. 5 (listing "[e]quitable and reasonable utilization and participation" as the first general principle).

28. *Id.*; see also *Helsinki Rules*, *supra* note 18, art. IV.

29. UN Watercourses Convention, *supra* note 14, art. 5(2).

30. *Id.* art. 6.

31. *Id.* art. 7.

32. *Id.* art. 7(2).

adversely affected. This can be problematic in cases where, for example, an upstream state decides to make reasonable use of a transboundary river for basic sanitation purposes to the detriment of a downstream state whose prior appropriations are diminished. Accordingly, the no significant harm principle was presumably favored by downstream states, and possibly a deal-breaker for those states during negotiations.

The Watercourses Convention does not articulate a preference between the principles of equitable use and no significant harm, indicating that the principles should be viewed as complementary. To that end, the Watercourses Convention relies on a general obligation to cooperate.³³ Other provisions reinforce this sentiment, as challenges posed by hydrologic installations, pollution, and dispute resolution are to be addressed jointly and cooperatively;³⁴ state actions with possible impacts on the watercourse must be accompanied by notification and consultation procedures.³⁵ These provisions calling on states to cooperate and strike a balance between equitable use and no significant harm on a case-by-case basis may have been sufficient to garner widespread support for the Watercourses Convention in 1997. For reasons explored below, however, state ratifications of the Watercourses Convention have proceeded at a glacial pace, and entry into force took seventeen years.³⁶

Partly as a result of the Watercourses Convention's status in limbo, the ILA reconvened in 2004 to synthesize customary international water law in light of the Watercourses Convention and the development of international environmental laws since the adoption of the 1966 Helsinki Rules. The 2004 Berlin Rules on Water Resources (Berlin Rules)³⁷ contributed several layers to the development of international water law. First, the Berlin Rules extended the applicability of international water laws to waters that were purely national.³⁸ The right of public participation, the obligation to use best efforts to achieve both conjunctive and integrated management of waters, and duties to achieve sustainability and the minimization of environmental harm are

33. *Id.* art. 8.

34. *Id.* arts. 21, 26, 33.

35. *Id.* arts. 11–19.

36. *See Status of Watercourses Convention, supra* note 6 (the Convention was adopted by a General Assembly resolution in 1997 and did not enter into force until 2014).

37. GERHARD LOIBL ET AL., INTERNATIONAL LAW ASSOCIATION BERLIN CONFERENCE (2004) WATER RESOURCES LAW, FOURTH REPORT (2004) [hereinafter BERLIN RULES], available at http://internationalwaterlaw.org/documents/intldocs/ILA_Berlin_Rules-2004.pdf [<http://perma.cc/F474-JHBX>] (archived Sept. 14, 2014).

38. *See id.* art. 1 cmt. (“These Rules address the obligations of customary international law that govern the management of waters within a State as well as transboundary waters.”).

either new or modified principles vis-à-vis the Helsinki Rules and the Watercourses Convention; both restrict their scope to purely international watercourses.³⁹

Importantly, the Berlin Rules maintained the dichotomy between equitable use and no significant harm, but also attempted to resolve the apparent tension between the two principles by incorporating one into the other: "Basin States shall in their respective territories manage the waters of an international drainage basin in an equitable and reasonable manner having due regard for the obligation not to cause significant harm to other basin States."⁴⁰ Reconciling the two principles requires a case-by-case balancing test. Though "vital human needs" are given priority, no other use is per se more preferable than another. Like the UN Watercourses Convention, the Berlin Rules highlight the central role of the duty to cooperate, suggesting that the principle underlies all other principles of international water law.⁴¹ In this context, it is possible to see the duty to cooperate as the third pillar of international water law, without which the pillars of equitable use and no significant harm cannot stand.

Subsequent to the Berlin Rules, and in light of the Watercourses Convention's limited progress, two other legal instruments emerged to fill the void. The first was the UNECE's Convention on the Protection and Use of Transboundary Watercourses and International Lakes (UNECE Water Convention).⁴² The UNECE Water Convention entered into force in 1996, prior to the adoption of the Watercourses Convention.⁴³ Comparatively, the text of the UNECE Water Convention is both more focused on reducing transboundary impacts, and more specific regarding the actions required to do so. While reasonable and equitable use is enumerated as an appropriate measure for ensuring sound water management, its placement in a list of other measures suggests it is on par with environmental protection and restoration of ecosystems.⁴⁴ The UNECE Water Convention has three guiding principles: the precautionary principle, the polluter pays principle, and the principle of generational equity.⁴⁵ The UNECE Water Convention does not

39. See *id.* arts. 5-8, 18 (discussing the principles of international law governing water resources).

40. *Id.* art. 12.

41. See *id.* art. 11 (describing the duty to cooperate as "central to water management").

42. UNECE Water Convention, *supra* note 11.

43. *Id.* at 270 n.1.

44. See *id.* art. 2(2) (showing both principles as subsections under the same article).

45. See *id.* art. 2(5). The UNECE Water Convention describes the three principles as follows:

mention equitable use or no significant harm. Indeed, the UNESCO Water Convention's emphasis on impact mitigation and conservation is a philosophical contrast with the Watercourses Convention's more utilization-minded approach.

Of course, one of the goals of the Watercourses Convention—and international water law generally—is to provide a framework for negotiating regional or site-specific agreements. In that context, the UNECE Water Convention does not compete with the Watercourses Convention as much as it reinforces the principle of subsidiarity and decentralized water management.⁴⁶ The UNECE Water Convention, however, was amended in 2003 to allow ratification and participation from states outside the UNECE region,⁴⁷ thus expanding the potential scope of the UNECE Water Convention to all transboundary watercourses. The amendment entered into force in 2013,⁴⁸ making the UNECE Water Convention a global framework agreement in the same vein as the Watercourses Convention. The UNECE Water Convention, however, has been in force for eighteen years, and is robustly supported with funding and institutions.⁴⁹

The Parties shall be guided by the following principles: (a) The precautionary principle, by virtue of which action to avoid the potential transboundary impact of the release of hazardous substances shall not be postponed on the ground that scientific research has not fully proved a causal link between those substances, on the one hand, and the potential transboundary impact, on the other hand; (b) The polluter-pays principle, by virtue of which costs of pollution prevention, control and reduction measures shall be borne by the polluter; and (c) Water resources shall be managed so that the needs of the present generation are met without compromising the ability of future generations to meet their own needs.

46. See Ryan Stoa, *Subsidiarity in Principle: Decentralization of Water Resources Management*, 10 *UTRECHT L. REV.* 31, 35 (2014) (“While not as explicitly supportive of the principle of subsidiarity, the [UN Watercourses Convention] included as a guiding principle the right of equitable participation”); Jeffrey S. Dornbos, *All (Water) Politics is Local: A Proposal for Resolving Transboundary Water Disputes*, 22 *FORDHAM ENVTL. L. REV.* 1, 15–17 (2011) (asserting that the UN Watercourses Convention, among other international agreements, promotes management at localized levels).

47. See United Nations, Econ. & Soc. Council, Econ. Comm'n for Europe, Amendments to Articles 25 and 26 of the Convention on the Protection and Use of Transboundary Watercourses and International Lakes, U.N. Doc. ECE/MP.WAT/14, Annex, Decision III/1 (Jan. 12, 2004) (“Any other State, not referred to in paragraph 2, that is a Member of the United Nations may accede to the Convention upon approval by the Meeting of the Parties.”).

48. U.N. Secretary-General, Depository Notification, Amendments to Articles 25 and 26 of the Convention on the Protection and Use of Transboundary Watercourses and International Lakes – Entry into Force, U.N. Doc. C.N.639.2012.TREATIES-XXVII.5.b (Nov. 14, 2012).

49. United Nations Economic Commission For Europe, The global opening of the 1992 UNECE Water Convention (Draft Version) at 2, 11 (Aug. 31, 2013), http://www.unece.org/fileadmin/DAM/env/water/publications/brochure/Opening_brochure.pdf [<http://perma.cc/7ECD-3CZC>] (archived Oct. 2, 2014) (discussing the various institutional partners of the convention and the broad acceptance among countries sharing transboundary waters within the jurisdiction of the UNECE).

The second legal instrument to emerge in the wake of the Watercourses Convention addresses transboundary aquifers, or groundwater. In its definition of “watercourses,” the Watercourses Convention excludes confined aquifers, or groundwater that is not hydrologically connected to surface waters.⁵⁰ Lacking a treaty governing all types of groundwater, the UN’s International Law Commission produced the Draft Articles on the Law of Transboundary Aquifers in 2008.⁵¹ The Draft Articles elucidate some relatively uncontroversial principles governing transboundary aquifers (e.g., international and technical cooperation), while reinforcing the principles of equitable use, no significant harm, and cooperation.⁵²

Where the Draft Articles depart from previous understandings of international water law is in Article 3. Article 3 provides that each aquifer state has sovereignty over the portion of a transboundary aquifer or aquifer system located within its territory, in accordance with international law.⁵³ The Special Rapporteur to the ILC indicated that the inclusion of this principle—which does not appear in the Helsinki Rules, Watercourses Convention, or Berlin Rules—was a necessary concession to aquifer states that hold the view that aquifers are analogous to mineral resources and are governed by the principle of territorial sovereignty.⁵⁴ The United Nations’ Sixth Legal Committee convened in 2011 to determine if the Draft Articles were ripe for a binding convention.⁵⁵ The Committee declined to move forward, calling instead for further study and exploration of the topic.⁵⁶ The UN General Assembly considered the Draft Articles again in December 2013, commending the Draft Articles as “guidance” for bilateral or regional agreements, but did not move forward with a convention.⁵⁷ Nonetheless, the creation and continued

50. UN Watercourses Convention, *supra* note 14, art. 2(a).

51. See Draft Articles, *supra* note 12, at 1–2.

52. *Id.* arts. 4–7.

53. *Id.* art. 3.

54. See Chusei Yamada, *Codification of the Law of Transboundary Aquifers (Groundwaters) by the United Nations*, 36 WATER INT’L 557, 562 (2011) (“[E]ach state has sovereignty over the portion of a transboundary aquifer located within its territory.”).

55. U.N. GAOR, 66th Sess., Sixth Comm., 16th mtg. at 2–8, U.N. Doc. A/C.6/66/SR.16 (Feb. 14, 2012); U.N. GAOR, 66th Sess., Sixth Comm., 29th mtg. at 5, U.N. Doc. A/C.6/66/SR.29 (Feb. 7, 2012).

56. General Assembly of the United Nations Legal-Sixth Committee, Sixty-Sixth Session Summary of Work, <http://www.un.org/en/ga/sixth/66/TransAquifer.html> [<http://perma.cc/TW8U-J2D5>] (archived Oct. 2, 2014) (noting that the sixth committee encouraged the “International Hydrological programme of the United Nations Educational, Scientific and Cultural Organization . . . to offer further scientific and technical assistance to the States Concerned.”).

57. See U.N. GAOR, 68th Sess., 68th plen. mtg. at 3, U.N. Doc. A/68/PV.68 (Dec. 16, 2013).

development of the Draft Articles represents the third major legal instrument attempting to govern transboundary water resources.

The corpus of international water law can therefore be summarized as a progressive set of codified customary rules on the one hand, and a group of uncoordinated treaties in various stages of development on the other. The ILA's attempts to develop the field of international water law by codifying customary rules and norms are noteworthy in that the 1966 Helsinki Rules set in motion the conceptualization and development of international water law. The 2004 Berlin Rules, on the other hand, attempted to reinvigorate the field in the wake of the Watercourses Convention's slow progress by articulating the foundational principles of international water law in a way that acknowledges the tensions between them. Less encouraging is the status of the three treaties attempting to create a binding framework for water resources management: the UNECE Water Convention, the Draft Articles, and the Watercourses Convention. The UNECE Water Convention has entered into force and is binding on member parties; its focus and guiding philosophy is one of impact mitigation and conservation. The Draft Articles is the least developed. It notably governs all groundwater, but introduces the principle of territorial sovereignty to a legal field in which that principle had not emerged. The treaty with the most promise as an international water agreement remains the Watercourses Convention. It creates a framework for cooperation by recognizing the principles of equitable use and no significant harm, while calling on states to balance those principles in their own site-specific agreements. While it enjoyed overwhelming initial support, the Watercourses Convention took seventeen years to enter into force after its adoption in the General Assembly. With its newfound status as a binding treaty, the Watercourses Convention is in a critical position. As a binding treaty, the limitations of the Watercourses Convention must be recognized.

III. THE LIMITATIONS OF THE UN WATERCOURSES CONVENTION

On the dawn of entry into force, it is imperative that the international community understands the Watercourses Convention's limitations. Namely: (1) despite entry into force, there remains a troubling lack of support for, and pace of, state ratifications of the Watercourses Convention; (2) parallel treaty instruments with overlapping mandates compete for their position in, and potentially confuse, contemporary understandings of international water law; and (3) inherent tensions between the foundational principles of equitable use and no significant harm are unable to provide meaningful guidance to states in protracted conflicts over water resources.

A. Lack of Support from UN Member States

Ratifications of the Watercourses Convention have been trickling in for seventeen years, with the current total falling far short of the 106 states voting in favor of the Watercourses Convention in 1997.⁵⁸ While entry into force of a broad and consequential international treaty like the Watercourses Convention may require a certain grace period to allow states to accede, at some point the grace period expires, and the lack of contracting states raises questions about the enduring validity of the Watercourses Convention's initially broad support. In the aggregate, the lack of contracting parties might represent a rejection of the substantive principles and signal that customary international water law is not settled. Individually, the discrepancy between the 1997 vote and the number of member parties today suggests that some states may have changed positions, or that their initial support was strong enough to vote in favor of adopting the Watercourses Convention, but not strong enough to ratify it. On the other hand, the slow pace of ratifications could be due to other factors independent of the substantive provisions of the Watercourses Convention that are frustrating efforts to obtain widespread acceptance. It is conceivable that all of the above viewpoints are a contributing factor limiting the impact of the Watercourses Convention.

It is certainly not a resounding endorsement of the Watercourses Convention's role as a codification of customary international water law that only thirty-five states have acceded to the Watercourses Convention over a seventeen-year period. This is especially true since the Watercourses Convention is a framework treaty, modestly intending to articulate understandings of international water law in a way that enables states to apply the law on a case-by-case basis according to the characteristics of their watercourse.⁵⁹ An absence of ratifications may suggest that states disagree with the Watercourses Convention's interpretations of international water law⁶⁰ or, if the

58. Compare *Status of Watercourses Convention*, *supra* note 6 (showing 35 countries to ratify, accept, approve, or accede the UN Watercourses Convention), with LOURES, LAURE-VERCAMBRE & RIEU-CLARKE, *supra* note 25 (explaining the official vote count in favor of the UN Watercourses Convention).

59. See McCaffrey, *Convention on the Law of the Non-Navigational Uses of International Watercourses*, *supra* note 24, at 1 ("It is a framework convention, in the sense that it provides a framework of principles and rules that may be applied and adjusted to suit the characteristics of particular international watercourses.").

60. Even at the time of adoption, the extent to which the UN Watercourses Convention accurately reflected customary international water law was a matter of some debate. See, e.g., Malgosia Fitzmaurice, *Convention on the Law of Non-Navigational Uses of International Watercourses*, 10 LEIDEN J. INT'L L. 501, 503 (1997) (remarking that states party to existing watercourse treaties "felt threatened by the new Convention as constituting a potential danger to existing agreements"); Reaz Rahman, *The Law of International Uses of International Watercourses: Dilemma for*

Watercourses Convention's interpretations are considered accurate, that the field of international water law is not yet appropriately settled.

The Berlin Rules suggest that both may be true. The Berlin Rules contributed several layers to the development of international water law, implying that the Watercourses Convention's interpretation of customary international water law is, at a minimum, incomplete. First, the Berlin Rules extended the applicability of international water laws to waters that were purely national.⁶¹ The right of public participation, the obligation to use best efforts to achieve both conjunctive and integrated management of waters, and duties to achieve sustainability and the minimization of environmental harm are principles either new or modified vis-à-vis the Watercourses Convention.⁶² Second, the Berlin Rules articulate customary international law applicable to groundwater. The Watercourses Convention, while including in its definition of "watercourse" groundwater connected to surface water, excluded confined aquifers from its coverage. Bisecting groundwater in this manner is problematic, in part because an overwhelming majority of the earth's available freshwater is located in aquifers.⁶³ The Berlin Rules include both confined and unconfined aquifers in its definition of "waters," and elucidate principles applicable to both national and international aquifers. As the Berlin Rules are an attempted expression of customary international law, the variations between the principles in the Berlin Rules and those of the Watercourses Convention necessitate that at least one interpretation is inaccurate. Based on the statements made during the discussion of the Watercourses Convention before the General Assembly, there are at least some states⁶⁴ that believe the text of the Watercourses

Lower Riparians, 19 FORDHAM INT'L L.J. 9 (1995); Attila Tanzi, *The UN Convention on International Water-courses as a Framework for the Avoidance and Settlement of Waterlaw Disputes*, 11 LEIDEN J. INT'L L. 441 (1998).

61. See Joseph W Dellapenna, *The Berlin Rules on Water Resources: The New Paradigm for International Water Law*, Address Before the World Environmental and Water Resource Congress (May 21–25, 2006), in WORLD ENVIRONMENTAL AND WATER RESOURCE CONGRESS 2006 at 6 ("The *Berlin Rules* include within their scope both national and international waters to the extent that customary international law speaks to those waters.").

62. See *id.* at 6–7.

63. United Nations World Water Assessment Programme, *Facts and Figures: Managing Water under Uncertainty and Risk*, WORLD WATER DEVELOPMENT REPORT 4, 87 (noting that estimates of the global volume of stored groundwater range from 15.3 to 60 million km³).

64. Turkey, Pakistan, Spain, and China have made such statements. China, for example, believes that territorial sovereignty is a basic principle of international water law. "A watercourse State enjoys indisputable territorial sovereignty over those parts of international watercourses that flow through its territory. It is incomprehensible and regrettable that the draft Convention does not affirm this principle." U.N. GAOR, 51st Sess., 99th plen. mtg. at 6, U.N. Doc. A/51/PV.99 (May 21, 1997).

Convention does not accurately reflect customary international water law.⁶⁵

A second explanation for the lack of ratifications to date is the possibility that initial support—as evidenced by the 106 countries voting in favor of the Watercourses Convention—was not as strong as it appeared. That appeared to be France's concern in 1997. French delegates observed a lack of meaningful engagement from UN member states during negotiations, hastily conducted debates, and a general indifference to a process that could produce a consensus agreement.⁶⁶ If those observations were correct, then it would help explain the high level of support for the Watercourses Convention when that support was relatively non-committal, compared to the low number of states willing to legally bind themselves to it. Initial support may also have been illusory due to the evolving positions taken by states. As domestic politics evolve, decision-makers with their own views on matters of foreign policy come and go. Support for the Watercourses Convention from one administration can be followed by a lack of support from the next. Similarly, for some states the procedural mechanism required to sign a treaty may be different from the one required to ratify it. The United States, for example, famously signed the Kyoto Protocol to the Framework Convention on Climate Change at the direction of the President, but could not ratify the treaty without the consent of the US Senate.⁶⁷

Finally, low levels of ratification from UN member states may have more to do with context than the substantive provisions of the Watercourses Convention itself. As mentioned, the 1990s ushered in a multitude of international environmental agreements, and some states may not have been well equipped to critically evaluate their positions on so many issues or marshal each treaty through the

65. If the UN Watercourses Convention does accurately interpret customary international water law, it is possible that lack of support for the Convention is a critique not of the Convention's articulation of customary law, but of the principles themselves. Under this view, either international water law is insufficiently developed, and therefore not ripe for a binding treaty, or international law is not an appropriate mechanism to manage transboundary water resources in the first place. Since water resources do not respect political boundaries and often pose challenges of an international nature, the notion that international law should not be used to facilitate cooperation has thus far not been a prominent view. Whether or not international water law is adequately developed and ripe for a treaty, however, is further explored below.

66. See U.N. GAOR, 51st Sess., 99th plen. mtg., *supra* note 64, at 8 (stating that France abstained from voting to adopt the Convention because it was “[n]egotiated in haste, it [was] carelessly drafted and imbued with a spirit of partisanship”).

67. See S. Res. 98, 105th Cong. (as passed by Senate, July 25, 1997), which indicates that the Senate did not consent to the accession of the Kyoto Protocol. United Nations Framework Convention on Climate Change, Status of Ratification of the Kyoto Protocol, https://unfccc.int/kyoto_protocol/status_of_ratification/items/2613.php [http://perma.cc/7UU4-9W4C] (archived Sept. 14, 2014).

ratification process.⁶⁸ Accordingly, the attention paid by the international community to climate change and biodiversity may have come at the cost of ignoring international water issues. Along the same lines, states—especially those in the developing world—may not have been aware of the Watercourses Convention, or capable of appreciating the ramifications of its provisions.⁶⁹ If that were the case, delaying ratification would surely be the appropriate response.

Ultimately, each state has its own reasons for not ratifying the Watercourses Convention. Whether because of disagreement with the substantive provisions of the treaty, a change in positions, treaty congestion, or lack of capacity, it is clear that the Watercourses Convention does not enjoy broad support, or sufficient attention, from the international community. The fact that the Watercourses Convention entered into force seventeen years after its adoption in the General Assembly suggests that the Watercourses Convention does not create a framework agreement articulating broadly accepted notions of customary international water law. A renewed commitment could change that, of course, and the pace of ratifications in recent years has increased significantly.⁷⁰ It is possible that since the Watercourses Convention is now in force, the momentum generated will usher in a number of member parties wishing to be part of the latest international agreement. Nonetheless, the legitimacy of international law is derived from its acceptance by international actors, and the low levels of support the Watercourses Convention receives from UN member states is a significant limitation on the Watercourses Convention's ability to contribute to, much less guide, the development of international water law.

B. Competing Treaty Regimes

An unfortunate characteristic of international law is the relatively unstructured nature of lawmaking, which occasionally leads to uncoordinated or inconsistent development of treaty regimes. Such is the case for international water law,⁷¹ where the

68. See Rieu-Clarke & Loures, *supra* note 10, at 192–193 (describing the effects of “treaty congestion,” and suggesting that “[a] country needs sufficient political, administrative, and economic capacity to be able to implement agreements effectively”).

69. See *id.* at 193 (“Another reason why the UN Watercourses Convention has not been widely ratified may relate to lack of awareness and capacity.”).

70. See UN Watercourses Convention, *supra* note 14 (showing sixteen of the thirty-four member parties of the UN Watercourses Convention have ratified since 2010).

71. See Ryan B. Stoa, *Harmonizing International Water Law: Current Challenges And Future Prospects*, 2 LEGAL INSTRUMENTS FOR THE IMPLEMENTATION OF SUSTAINABLE DEVELOPMENT 533, 540 (2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2417031 [<http://perma.cc/Y2GF-PT83>] (archived Sept. 14, 2014) (discussing the uncoordinated nature of international water laws).

Watercourses Convention exists alongside the UNECE Water Convention and the Draft Articles on the Law of Transboundary Aquifers, among other legal instruments. The three instruments were not developed as a complementary package, but rather to address the needs perceived by constituent member states and their institutional objectives. Inevitably, perhaps, their substantive provisions are not harmonious, and create a competition for primacy and acceptance in the international arena.

The UNECE Water Convention is the most direct challenge to the Watercourses Convention's perch atop the international water law landscape. It is nearly identical in scope and subject matter, while distinguishing itself through an eighteen-year history of binding legal status. As an institution, the UNECE is the largest regional commission of the United Nations,⁷² and claims 20 percent of the global human population.⁷³ Its geographic scope is also not limited to developed European states. The United States, Canada, Russia, Israel, and the Central Asian republics and former Soviet bloc are member states.⁷⁴ Having entered into force in 1996, the UNECE Water Convention has had time to develop hard law instruments such as the Protocol on Water and Health⁷⁵ and the Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters.⁷⁶ Guidance documents have been produced on topics such as climate change adaptation,⁷⁷ water management in extreme weather events,⁷⁸ payment for ecosystem services,⁷⁹ flood protection,⁸⁰

72. The UNECE has 56 member states. U.N. ECON. COMM'N FOR EUROPE, Member States and Member States Representatives (Aug. 22, 2014), http://www.unece.org/oes/nutshell/member_States_representatives.html [<http://perma.cc/H2D-9QQS>] (archived Sept. 14, 2014) [hereinafter UNECE Member States].

73. U.N. ECON. COMM'N FOR EUROPE, Geographical Scope, <http://www.unece.org/oes/nutshell/region.html> [<http://perma.cc/WL94-FDUD>] (archived Sept. 21, 2014).

74. UNECE Member States, *supra* note 72.

75. Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes, June 17, 1999, 2331 U.N.T.S. 202.

76. Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes and to the 1992 Convention on the Transboundary Effects of Industrial Accidents, May 21, 2003, U.N. Doc. ECE/MP.WAT/11-ECE/CP.TEIA/9.

77. See U.N. Econ. Comm'n for Europe, Guidance on Water and Adaptation to Climate Change (Oct. 2009), <http://www.unece.org/index.php?id=11658> [<http://perma.cc/3CFZ-CMT7>] (archived Sept. 14, 2014) (discussing the effects of climate change on the world's water resources).

78. See U.N. Econ. Comm'n for Europe, Guidance on Water Supply and Sanitation in Extreme Weather Events (Nov. 2011), <http://www.unece.org/index.php?id=29338> [<http://perma.cc/W7K6-2ECA>] (archived Sept. 14, 2014) (discussing actions that may be taken to protect water supplies in the face of extreme weather events).

groundwater management,⁸¹ and implementation of the UNECE Water Convention itself.⁸² Funding is provided to assist member states with their technical capacities to implement the UNECE Water Convention and cooperate with co-riparians,⁸³ and a multitude of UNECE Water Convention Bodies have been set up to strengthen organizational support structures.⁸⁴ The UNECE Water Convention is both legally binding and institutionally developed, and will likely remain so for the foreseeable future. It is an international water law regime with which the Watercourses Convention must reconcile.

79. See U.N. Econ. Comm'n for Europe, Recommendations on Payments for Ecosystem Services in Integrated Water Resources Management (Aug. 2007), <http://www.unece.org/index.php?id=11663> [<http://perma.cc/BQD-6VEF>] (archived Sept. 14, 2014) (outlining how to improve protection of valuable ecosystems).

80. See U.N. Econ. Comm'n for Europe, Guidelines on Sustainable Flood Prevention (Jan. 2000), <http://www.unece.org/index.php?id=12617> [<http://perma.cc/AL74-2MVV>] (archived Sept. 14, 2014) (outlining actions countries can take to prevent catastrophic flooding events).

81. See U.N. Econ. Comm'n for Europe, Model Provisions on Transboundary Groundwaters (Feb. 2014), http://www.unece.org/env/water/publications/ece_mp_wat_40.html [<http://perma.cc/4MZ7-5F78>] (archived Sept. 21, 2014) (discussing the need for cooperation in managing transboundary groundwaters).

82. See U.N. Econ. & Soc. Council Econ. Comm'n for Europe, Meeting of the Parties to the Convention on the Protection and Use of Transboundary Watercourses and International Lakes, *Integrated Management of Water and Related Ecosystems: Draft Guide to Implementing The Convention*, U.N. Doc. ECE/MP.WAT/2009/L.2 (Nov. 10–12, 2009) (discussing implementation strategies).

83. See, e.g., U.N. Econ. Comm'n for Europe, Projects in Central Asia, <http://www.unece.org/env/water/centralasia.html> [<http://perma.cc/SVV4-NT2X>] (archived Sept. 14, 2014) (outlining assistance available for Central Asia); U.N. Econ. Comm'n for Europe, Projects in the Caucasus, <http://www.unece.org/env/water/caucasus.html> [<http://perma.cc/C6HY-E8H9>] (archived Sept. 14, 2014) (outlining projects between Georgia and Azerbaijan); U.N. Econ. Comm'n for Europe, Projects in Eastern Europe, <http://www.unece.org/env/water/eeurope.html> [<http://perma.cc/R22L-892Y>] (archived Sept. 14, 2014) (discussing the Dniester River project); U.N. Econ. Comm'n for Europe, Projects in South-Eastern Europe, <http://www.unece.org/env/water/seeurope.html> [<http://perma.cc/5TP3-GZDG>] (archived Sept. 14, 2014) (discussing the Drin River Basin project).

84. See, e.g., U.N. Econ. Comm'n for Europe, Meeting of the Parties, http://www.unece.org/env/water/meetings/convention_meeting.html [<http://perma.cc/4J3R-KQ7N>] (archived Sept. 14, 2014) (“The Meeting of the Parties is the main governing body of the Convention.”); U.N. Econ. Comm'n for Europe, Bureau, http://www.unece.org/env/water/convention_bureau.html [<http://perma.cc/EL79-99UU>] (archived Sept. 14, 2014) (discussing the structure of the Bureau of the Meeting of the Parties); U.N. Econ. Comm'n for Europe, International Water Assessment Center, http://www.unece.org/env/water/services/serv_1.html [<http://perma.cc/KWQ7-HHV4>] (archived Sept. 14, 2014) (“The International Water Assessment Centre (IWAC) was established as a collaborative centre of the Convention”); U.N. Econ. Comm'n for Europe, Legal Board, http://www.unece.org/env/water/meetings/legal_board/legal_board.html [<http://perma.cc/JH7B-HNPM>] (archived Sept. 14, 2014) (discussing the purpose of the legal board in handling legal questions derived from the Convention); U.N. Econ. Comm'n for Europe, Implementation Committee, http://www.unece.org/env/water/implementation_committee.html [<http://perma.cc/UYL3-BKJF>] (archived Sept. 14, 2014) (explaining the Committee's duties in overseeing the implementation of the Convention).

When the UNECE Water Convention was adopted in 1992 and entered into force in 1996,⁸⁵ it was not global in scope. Article 23 limited participation to UNECE member states, states with consultative status, and regional economic integration organizations constituting UNECE member states.⁸⁶ Nonetheless, the challenges the UNECE Water Convention set out to address, and the goals it sought to achieve, were nearly identical to those of the Watercourses Convention. Both treaties recognized the importance of transboundary water resources,⁸⁷ the need to abate pollution,⁸⁸ and the role of the treaty in the development of international water law,⁸⁹ while framing the document as a framework agreement facilitating bilateral and multilateral watercourse agreements.⁹⁰ There were—and there continue to be—substantive differences in the approach to achieving these goals, but the subject matter objective of promoting international cooperation over water resources by developing legal principles is essentially the same.

As mentioned above, the geographic scope and inclusiveness of the UNECE region is sufficiently broad that implementation of the UNECE Water Convention and the Watercourses Convention would require some harmonizing of principles or legal interpretation even if the UNECE Water Convention had remained a strictly regional treaty. The 2003 UNECE Water Convention Amendments, however, entered into force in 2013,⁹¹ extending the potential jurisdiction of the treaty to all international waters by allowing any UN member state to accede to the UNECE Water Convention (pending ratification of

85. The UNECE Water Convention was signed in Helsinki, Finland, on March 17, 1992, and entered into force on October 6, 1996. It has been ratified by 38 UNECE member states and the European Union. UNECE Water Convention, *supra* note 11.

86. *Id.* art. 23.

87. *See id.* pmb. (“Mindful that the protection and use of transboundary watercourses and international lakes are important and urgent tasks.”); *see also* UN Watercourses Convention, *supra* note 14, pmb. (“Conscious of the importance of international watercourses and the non-navigational uses thereof in many regions of the world.”).

88. *See* UNECE Water Convention, *supra* note 11, pmb.; UN Watercourses Convention, *supra* note 14, pmb.

89. *See* UNECE Water Convention, *supra* note 11, pmb. (“Conscious of the role of the United Nations Economic Commission for Europe in promoting international cooperation for the prevention, control and reduction of transboundary water pollution and sustainable use of transboundary waters.”); UN Watercourses Convention, *supra* note 14, pmb. (“Considering that successful codification and progressive development of rules of international law regarding non-navigational uses of international watercourses would assist in promoting and implementing the purposes and principles set forth in Articles 1 and 2 of the Charter of the United Nations.”).

90. *See* UNECE Water Convention, *supra* note 11, pmb.; UN Watercourses Convention, *supra* note 14, pmb. (“Recalling also the existing bilateral and multilateral agreements regarding the non-navigational uses of international watercourses.”).

91. Amendments to Articles 25 and 26 of the UNECE Convention, *supra* note 47.

the amendment by all 2003 parties to the UNECE Water Convention).⁹² The 2003 amendments create a mandate for global applicability, and may signal that the UNECE community intends to promote the UNECE Water Convention as the leading instrument of international water law.⁹³

From the perspective of legal compliance, entry into force of the Watercourses Convention should not be unduly problematic for states party to both conventions, but the precise interaction between the treaties appears ambiguous. Article 3(1) of the Watercourses Convention makes clear that it should not be construed to supersede, constrain, or otherwise conflict with existing agreements in force at the time a state becomes party to the Watercourses Convention.⁹⁴ Having entered into force in 1996, the UNECE Water Convention would qualify as an existing agreement for any state that ratified it prior to becoming a member party of the Watercourses Convention. Even if a state ratified the UNECE Water Convention after becoming a member party of the Watercourses Convention, Article 3(3) allows subsequent watercourse agreements to modify or adjust the provisions of the Watercourses Convention to the particular characteristics of the watercourse governed by the watercourse agreement in question.⁹⁵

The permissiveness of Article 3(3) should allow the UNECE Water Convention—and its amendments—to co-exist with the UN Watercourses Convention as far as the Watercourses Convention is concerned, as long as the UNECE Water Convention qualifies as a “watercourse agreement.” That distinction is less clear. When permitting watercourse agreements to modify the Watercourses Convention’s principles, Articles 3(3)–(6) make repeated references to “particular” international watercourses. Article 3(4), for example, stipulates that watercourse agreements must define the waters to

92. *Id.* art. 25(3). Article 25 of the amended text now reads: “Any other State not referred to in paragraph 2, that is a Member of the United Nations may accede to the Convention upon approval by the Meeting of the Parties.” The introductory note to the amended UNECE Water Convention adds that in 2012 the Meeting of the Parties clarified that any future request for accession by non-UNECE states would be considered approved by the Meeting of the Parties. *Id.* at 3.

93. *Id.* at 4. Decision VI/3 allowing accession to the UNECE Water Convention by non-UNECE states expands on the 1992 Preamble by stating that the Meeting of the Parties confirm “the conviction that the Convention on the Protection and Use of Transboundary Watercourses and International Lakes is an effective instrument to support cooperation also beyond the region of the United Nations Economic Commission for Europe (ECE),” and express their intent “to collectively promote river basin cooperation throughout the world, including by offering a global intergovernmental platform for exchange and debate on transboundary water issues and for supporting the implementation of international water law.”

94. UN Watercourses Convention, *supra* note 14, art. 3(1)–(2). Pursuant to Article 3(2), parties to such agreements are invited to consider harmonizing their agreement with the principles of the UN Convention.

95. *See id.* art. 3(3).

which they apply, the acceptable scope being “an entire international watercourse or any part thereof or a particular project, programme or use.”⁹⁶ The UNECE Water Convention does not define the waters to which it applies—being a framework treaty—other than a broad definition of “transboundary waters.”⁹⁷ All transboundary waters in the territorial jurisdiction of UNECE Water Convention member states are subject to the UNECE Water Convention, but it is not clear if that is particular enough to qualify the UNECE Water Convention as a “watercourse agreement” under Article 3 of the Watercourses Convention. Most likely the Watercourses Convention did not envision needing to address a second global framework agreement on transboundary watercourses.⁹⁸

For its part, the UNECE Water Convention is not as accommodating to current and future watercourse agreements. Article 9(1) requires that states enter into bilateral or multilateral agreements that conform to the principles of the UNECE Water Convention, or adapt existing ones “where necessary to eliminate the contradictions with the basic principles of this Convention.”⁹⁹ Again, however, references to particular watercourse agreements suggest that, like the Watercourses Convention, the UNECE Water Convention was created to promote cooperation and development of site-specific agreements.¹⁰⁰ It is not clear how the UNECE Water Convention expects to interact with the Watercourses Convention.¹⁰¹

Naturally, the supremacy of the conventions relative to each other only matters in practice if (1) their provisions overlap, and (2) their provisions are contradictory. Unfortunately, it appears both are the case. Both texts claim jurisdictional authority over transboundary waters.¹⁰² At the same time, the conventions have overlapping

96. *Id.* art. 3(4).

97. UNECE Water Convention, *supra* note 11, art. 1(1).

98. See U.N. GAOR, 51st Sess., 99th plen. mtg., *supra* note 64, at 2. The Meeting Notes for the adoption of the UN Watercourses Convention in 1997 made no mention of the UNECE Water Convention (in force at the time), while the Mexican delegation introduced the resolution by stating that the Convention “undoubtedly marks an important step in the progressive development and codification of international law, the promotion of which is a fundamental responsibility of this Assembly.” *Id.*

99. UNECE Water Convention, *supra* note 11, art. 9(1).

100. See, e.g., *id.* art. 9(2) (discussing the establishment of joint bodies and their duties).

101. See Amendments to Articles 25 and 26 of the UNECE Convention, *supra* note 47 (showing that any mention of the UN Watercourses Convention is conspicuously absent from Decision VI/3 amending the UNECE Water Convention in 2003).

102. See UNECE Water Convention, *supra* note 11, pmbl., art. 1 (discussing how the convention applies to international watercourses); UN Watercourses Convention, *supra* note 14, art. 1 (stating the Convention applies to international watercourses).

provisions on guiding principles,¹⁰³ pollution control,¹⁰⁴ information exchange, notification, consultation,¹⁰⁵ and dispute settlement,¹⁰⁶ among others. A cursory review of those provisions reveals several contradictions. For example, the Watercourses Convention allows for unilateral submission of a dispute to a fact-finding commission if other dispute settlement measures are unsuccessful.¹⁰⁷ The UNECE Water Convention, on the other hand, requires that the mechanism for dispute settlement be mutually acceptable.¹⁰⁸ The Watercourses Convention merely demands cooperation to control pollution,¹⁰⁹ while the UNECE Water Convention requires specific pollution control measures be adopted, such as pollutant discharge limits, permit programs, and environmental impact assessments.¹¹⁰ Most strikingly, the guiding principles of the conventions are not congruent. The Watercourses Convention's primary guiding principles are the right of equitable use, the obligation not to cause significant harm, and the obligation to cooperate.¹¹¹ The principle of cooperation is prevalent throughout the UNECE Water Convention,¹¹² but the pervasive theme of the UNECE Water Convention is impact mitigation, not use.¹¹³ Accordingly, many of its provisions are more targeted and require proactive engagement from member states.

Evidently many states are not overly concerned with the overlap and conflict between the two treaties. Of the thirty-five member parties to the UN Watercourses Convention, fifteen are also member parties of the UNECE Water Convention.¹¹⁴ Implied is that states may either not perceive a jurisdictional overlap or conflicting provisions or, if they do, those concerns are outweighed by some other factor, such as a general desire to promote cooperation over water resources in as many fora as possible. In any case, the effect that the UNECE Water Convention has on the Watercourses Convention is

103. UNECE Water Convention, *supra* note 11, art. 2; UN Watercourses Convention, *supra* note 14, pt. II.

104. UNECE Water Convention, *supra* note 11, art. 3; UN Watercourses Convention, *supra* note 14, art. 21.

105. UNECE Water Convention, *supra* note 11, arts. 6, 10, 13; UN Watercourses Convention, *supra* note 14, pt. III.

106. UNECE Water Convention, *supra* note 11, art. 22; UN Watercourses Convention, *supra* note 14, art. 33.

107. UN Watercourses Convention, *supra* note 14, art. 33(3).

108. *See* UNECE Water Convention, *supra* note 12, art. 22(1).

109. *See* UN Watercourses Convention, *supra* note 14, art. 21(2).

110. *See* UNECE Water Convention, *supra* note 12, art. 3.

111. *See* UN Watercourses Convention, *supra* note 14, arts. 5, 7, 8.

112. *See* UNECE Water Convention *supra* note 11, arts. 2(6), 9 (showing efforts to encourage cooperation).

113. *See id.* art. 2(1) (providing that "[t]he Parties shall take all appropriate measures to prevent, control and reduce any transboundary impact.").

114. Those states are: Denmark, Finland, France, Germany, Greece, Hungary, Italy, Luxembourg, Netherlands, Norway, Portugal, Spain, Sweden, the United Kingdom, and Uzbekistan.

broader than a consideration of overlapping and conflicting provisions. Perhaps more important is the competition created by two framework water treaties in a climate where attention paid—and political capital given—to international environmental agreements is already scarce. There are 193 UN member states, and with thirty-five and thirty-nine member parties, respectively, the Watercourses Convention and the UNECE Water Convention have a long way to go before either treaty represents the majority, much less a consensus, of member states. Understanding the challenge, major international organizations are lining up to support their preferred treaty through advocacy campaigns and donor-funded projects.¹¹⁵ While the spirit and intent behind those ratification efforts are likely harmonious, and some organizations are actively working to harmonize the treaties, there is little doubt that either treaty would receive more attention from the rest of the international community if it were alone in providing a framework for transboundary water cooperation. At this point it is not clear which treaty regime will emerge supreme, but it likely does not bode well for the Watercourses Convention that the UNECE Water Convention is firmly entrenched as a second framework instrument of international water law.

The second treaty regime in competition with the Watercourses Convention is the Draft Articles on the Law of Transboundary Aquifers. The Draft Articles were developed partly as a response to slow progress in ratifying the Watercourses Convention, partly because the Watercourses Convention's jurisdictional scope excludes confined aquifers, and partly because the international community has only recently understood the extent of, and reliance on, groundwater withdrawals.¹¹⁶ Like the UNECE Water Convention, however, the jurisdictional scope of the Draft Articles overlaps with that of the Watercourses Convention, and the overlap implicates provisions that are at odds with each other.

115. The World Wildlife Fund for Nature, for example, is championing the UN Watercourses Convention, while the UNECE is partnering with the European Union and Organization for Economic Cooperation and Development (OECD) to promote the UNECE Water Convention. While these and other organizations are keenly aware of the parallel legal regimes, and in many cases are actively engaged on the issue, the promotion of one treaty will not always synergistically promote the other. *See generally* UN Watercourses Convention, *supra* note 14 (guiding signatories on how to undertake transboundary watercourse management); WWF GLOBAL, http://wwf.panda.org/what_we_do/how_we_work/policy/conventions/water_conventions/un_watercourses_convention/ [<http://perma.cc/4F7V-2W5L>] (archived Sept. 14, 2014) (supporting the UN Watercourses Convention); U.N. Econ. Comm'n for Europe, About the National Policy Dialogues, <http://www.unece.org/env/water/npd.html> [<http://perma.cc/RPX5-SAVW>] (archived Sept. 14, 2014) (discussing different organizations that support the UNECE Water Convention).

116. Yamada, *supra* note 54, at 558–59 (noting that 97% of available freshwater is located in aquifers and that groundwater is the single most extracted raw material in the world).

The Watercourses Convention applies to surface and groundwater systems “constituting by virtue of their physical relationship a unitary whole and normally flowing into a common terminus.”¹¹⁷ While this definition includes most freshwater on earth, it notably excludes groundwater that is not hydrologically connected to surface water, otherwise known as confined aquifers.¹¹⁸ The exclusion provided the ILC an opportunity to develop laws for confined aquifer management that were not articulated in the Watercourses Convention. At some point, however, the scope of the task was broadened to include all aquifers.¹¹⁹ Accordingly, the Draft Articles and the Watercourses Convention both apply jurisdiction to unconfined groundwater systems, which, as mentioned, constitute the majority of available freshwater on earth.¹²⁰¹²¹

Overlapping subject matter is only a problem for the Watercourses Convention if the provisions governing groundwater are incompatible with each other. That appears to be the case in a significant way. The first general principle of the Draft Articles is the sovereignty of aquifer states: “Each aquifer State has sovereignty over the portion of a transboundary aquifer or aquifer system located within its territory. It shall exercise its sovereignty in accordance with international law and the present articles.”¹²² The sovereignty principle is not contained in the Helsinki Rules, the UNECE Water Convention, the Watercourses Convention, or the Berlin Rules, and may reverse over 100 years of development in the field of international water law.¹²³ The Special Rapporteur to the ILC responsible for formulating the Draft Articles insisted at the time that the sovereignty clause was necessary to obtain the support of member states that view aquifers similarly to mineral resources

117. UN Watercourses Convention, *supra* note 14, art. 2(a).

118. See Stephen C. McCaffrey, *The International Law Commission's Flawed Draft Articles on the Law of Transboundary Aquifers: the way forward*, 36 WATER INT'L 566, 567 (2011) [hereinafter *Flawed Draft Articles*]; and McCaffrey, *Convention on the Law of the Non-Navigational Uses of International Watercourses*, *supra* note 24.

119. Compare McCaffrey, *supra* note 118, at 566–69, with Yamada, *supra* note 54, at 558–59 (presenting opposing views on whether this was the intention).

120. See Yamada, *supra* note 54, at 558–59 (discussing how the Draft Articles target groundwater).

121. In considering the definitions of “groundwater” and “aquifer,” a distinction, which the Draft Articles do not appear to draw, can be made between the geologic formation that contains water (aquifer), and the water itself (groundwater). See generally Christine Traversi, *The Inadequacies of the 1997 Convention on International Watercourses and 2008 Draft Articles on the Law of Transboundary Aquifers*, 33 HOUS. J. INT'L L. 453 (2011).

122. Draft Articles, *supra* note 12, art. 3.

123. See McCaffrey, *Flawed Draft Articles*, *supra* note 118, at 570 (discussing the action of US Attorney General Judson Harmon who, in response to claims over the Rio Grande by Mexico, asserted the absolute sovereignty of every nation within its own territory).

governed by the sovereignty principle.¹²⁴ China, for example, was beating the drum of territorial sovereignty over water resources as early as 1997 when it voted against the Watercourses Convention.¹²⁵ Proponents of the principle point to the second sentence of the sovereignty clause—which states that sovereignty will be exercised in accordance with international law—as cause for restraint, but introducing sovereignty into the Law of Transboundary Aquifers reshapes international law on this issue and creates a tripod of interpretational conflict between the principles of sovereignty, equitable use, and no significant harm.¹²⁶

Unlike the UNECE Water Convention, incompatible substantive provisions with the Draft Articles are problematic for the Watercourses Convention because if the Draft Articles enter into force, they will have done so after the Watercourses Convention. If that were the case, Article 30(3) of the Vienna Convention on the Law of Treaties—which states that parties to two treaties with incompatible provisions must follow the provisions of the later treaty—would hold that the Draft Articles supersede the Watercourses Convention with respect to any contradictory provisions.¹²⁷ Not only does that not bode well for the credibility and institutional integrity of the Watercourses Convention, it also creates a degree of uncertainty for states trying to anticipate future water rights.

Fortunately for the Watercourses Convention, the Draft Articles are much further behind on the path to binding treaty status, and appear to lack a critical mass of support needed to move forward with a convention. The United Nations' Sixth Legal Committee met in October and November of 2011 to discuss the potential for a convention on the Draft Articles. States expressed a number of reservations, among them the need to study state practice, clarify terms, focus on water quality, distinguish between arid and non-arid regions, and address conflict states.¹²⁸ Subsequently, the General

124. See Yamada, *supra* note 54, at 562 (explaining the decision calculus of the Special Rapporteur).

125. See U.N. GAOR, 51st Sess., 99th plen. mtg., *supra* note 64, at 6 (“A watercourse State enjoys indisputable territorial sovereignty over those parts of international watercourses that flow through its territory.”).

126. See Draft Articles, *supra* note 12, art. 3. An original author of the Watercourses Convention has expressed concern that the sovereignty clause of the Draft Articles would require a “fundamental re-thinking” of how basic principles of the Watercourses Convention would be applied. See McCaffrey, *Flawed Draft Articles*, *supra* note 118, at 568.

127. See Vienna Convention on the Law of Treaties, art. 30(3), May 23, 1969, 1155 U.N.T.S. 331 (explaining the procedure for dealing with contradictory subsequent agreements).

128. See U.N. GAOR, 66th Sess., Sixth Comm., 16th mtg., *supra* note 55 (discussing committee disagreements).

Assembly adopted resolution 66/104 in December 2011¹²⁹ and resolution 68/118 in December 2013,¹³⁰ both of which note the value of the Draft Articles as guidelines, encouraging states to take them into account when making regional or bilateral arrangements, but do not call for a convention to codify the Law of Transboundary Aquifers.

While it takes time for customary principles to become binding law, it is not clear how, when, or if, the Draft Articles will become part of the greater international water law regime. There is evidence that the Draft Articles are providing a framework for regional groundwater agreements,¹³¹ but at this point entry into force of the Law of Transboundary Aquifers seems remote. Nonetheless, overlaps and conflicts between the Draft Articles and the Watercourses Convention create a dilemma for states forced to invoke or promote the advancement of one instrument at the expense of the other. In particular, the sovereignty principle introduced to the field of international water law by the Draft Articles may serve as ammunition for states seeking to undercut the Watercourses Convention's obligation not to cause significant harm. At the very least, the Draft Articles represent a second treaty regime with overlapping jurisdictional subject matter and conflicting provisions, a development which makes it less likely that states consider the Watercourses Convention the definitive expression of international water law, and accordingly, a treaty worth acceding to.

C. Principles in Tension

The third major limitation of the Watercourses Convention is the fact that its foundational principles—the right of equitable use and the obligation not to cause significant harm—are in tension with each other, and the relationship between them is ambiguous. The right to an equitable and reasonable utilization of a watercourse grants states the authority to make reasonable use of water resources while taking into account the correlative rights of other watercourse states, as well as the long-term sustainability of the resource.¹³² It was first articulated as a customary international law in the Helsinki Rules,¹³³ though various forms of the right to use water resources to fulfill

129. *Shared natural resources (Law of transboundary aquifers): I. General Assembly Action*, INT'L LAW COMM'N, http://legal.un.org/ilc/guide/8_5.htm (last updated Feb. 7, 2012) [<http://perma.cc/X2BW-K76V>] (archived Sept. 14, 2014).

130. See U.N. GAOR, 68th Sess., 68th plen. mtg., *supra* note 57, at 7.

131. See, e.g., Pilar C. Villar & Wagner C. Ribeiro, *The Agreement on the Guarani Aquifer: A New Paradigm for Transboundary Groundwater Management?*, 36 WATER INT'L 646 (2011).

132. See UN Watercourses Convention, *supra* note 14, art. 5(1).

133. See *Helsinki Rules*, *supra* note 18, art. 4 (establishing the right to an equitable use of water resources).

basic human needs have been in place for centuries.¹³⁴ State practice supports the principle as well. A 1994 report of the ILC found overwhelming evidence that equitable use is a general and widely accepted principle of water management.¹³⁵ There is little question that the right to equitable use of a watercourse is an established principle of customary international water law.

The obligation not to cause significant harm, on the other hand, is not as definitive. On its face it requires states to refrain from taking actions that cause significant harm to a watercourse or watercourse state. As applied, however, it can be interpreted to preclude actions that would otherwise be considered reasonable (e.g., municipal water supply) on the basis that significant harm is incurred by a co-riparian watercourse state. The Watercourses Convention attempts to balance that obligation with the right of equitable use by requiring that states take appropriate measures to prevent, mitigate, or compensate for significant harm incurred,¹³⁶ with due regard for the right of equitable use.¹³⁷ While there is historical support for the obligation,¹³⁸ its standing as a coequal principle with the right of equitable use was introduced by the Watercourses Convention.¹³⁹ The Helsinki Rules did not elevate the concept of no significant harm to a stand-alone principle, for example. Instead, the protection was included as an enumerated factor to consider when determining the extent to which a use is equitable.¹⁴⁰ This provision may have been the seed that would grow to become the principle of no significant harm, but the obligation was ultimately a product of negotiations of the Watercourses Convention.¹⁴¹ It is easy

134. See Salzman, *supra* note 15, at 98–103 (exploring the history of water use rights).

135. See Report of the International Law Commission on the work of its forty-sixth session, *supra* note 19, at 98 (“[T]here is overwhelming support for the doctrine of equitable utilization as a general rule of law for the determination of the rights and obligations of States in this field.”).

136. See UN Watercourses Convention, *supra* note 14, art. 7(1) (defining the obligation in Article 7 by stating that “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.”).

137. See *id.* art. 5(2).

138. See Salzman, *supra* note 15, at 101 (explaining that egregious adverse impacts to water resources could be punishable by death under Australian Aboriginal water law, for example).

139. See, e.g., the Seoul Rules on International Groundwaters; Report of the Sixty-Second Conference, INT’L LAW ASS’N, 251 (1987); Robert D. Hayton & Albert E. Utton, *Transboundary Groundwaters: The Bellagio Draft Treaty*, 29 NAT. RESOURCES J. 663, 663–76 (1989) (explaining that some form of the obligation not to cause significant harm may have existed in the customary international law of groundwater management).

140. See Helsinki Rules, *supra* note 18, ch. 2, art. V(II)(11) (discussing the equitability of water use rights).

141. See, e.g., Summary Record of the 61st Meeting of the Sixth (Legal) Committee of the UN General Assembly, U.N. GAOR, 51st Sess., U.N. Doc.

to see why: the best interests of downstream watercourse states are promoted if a robust and enforceable obligation not to cause downstream harm is imposed on upstream states.

Admittedly, if states applied the principles of equitable use and no significant harm as intended by the drafters and champions of the Watercourses Convention, they would operate in fairly elegant harmony. The principles of equitable use and no significant harm are broad enough to address the concerns of downstream and upstream states, and flexible enough to be relevant and applicable in any transboundary watercourse context.¹⁴² Similarly, the other provisions of the treaty—such as the duty to cooperate with co-riparian watercourse states and the duty to mitigate pollution—are strategically open-ended in order to maximize broad appeal and reassure skittish member states that the Watercourses Convention does not expand or contract rights or duties under customary international water law because it is a reflection of customary laws that already exist.¹⁴³

There are several problems with this line of reasoning. First, the Watercourses Convention may not be an accurate reflection of rights and duties under international water law. This would not be surprising since the field of international water law does not appear to be definitively settled. The Helsinki Rules, UNECE Water Convention, Watercourses Convention, Berlin Rules, and Draft Articles each have a unique formulation of the equitable use/no significant harm dilemma, among other variations. The Helsinki

A/C.6/51/SR.61 (Apr. 4, 1997); Summary Record of the First Part of the 62d Meeting of the Sixth (Legal) Committee of the UN General Assembly, U.N. GAOR, 51st Sess., U.N. Doc. A/C.6/51/SR.62 (Apr. 4, 1997) (discussing the rationale of UN Watercourses Convention Drafters).

142. In explaining the interplay between the two principles, Special Rapporteur to the International Law Commission on the UN Watercourses Convention Stephen McCaffrey articulated the following:

[I]f a State believes it has sustained significant harm due to a co-riparian State's use of an international watercourse, it will ordinarily raise the issue with the second State. In the negotiations that follow, articles 5, 6 and 7 in effect provide that the objective is to reach a solution that is equitable and reasonable with regard to both States' uses of the watercourse and the benefits they derive from it. The possibility that the solution may include the payment of compensation, to achieve an equitable balance of uses and benefits, is not excluded.

McCaffrey, *Convention on the Law of the Non-Navigational Uses of International Watercourses*, *supra* note 24, at 3.

143. See Salman M. A. Salman, *Misconceptions Regarding the Interpretation of the UN Watercourses Convention*, in *THE UN WATERCOURSES CONVENTION IN FORCE: STRENGTHENING INTERNATIONAL LAW FOR TRANSBOUNDARY WATER MANAGEMENT* 28, 30 (Flavia Rocha, Loures & Alistair Rieu-Clarke eds., 2013) (explaining the construction of the UN Watercourses Convention).

Rules establish the right of equitable use.¹⁴⁴ The UNECE Water Convention emphasizes impact mitigation.¹⁴⁵ The Watercourses Convention attempts to balance the principles of equitable use and no significant harm as coequals.¹⁴⁶ The Berlin Rules synthesize the two.¹⁴⁷ The Draft Articles throw territorial sovereignty into the mix.¹⁴⁸ The differences between these various constructions may be subtle, but they are meaningful, and illustrate that a consensus articulation of the rights and duties of watercourse states does not yet exist.

The question then is whether or not the Watercourses Convention's formulation of the relationship between equitable use and no significant harm is the correct interpretation, or at least sufficiently approximates the correct interpretation such that its validity endures. Those that believe it does often point to the International Court of Justice's 1997 judgment in the *Gabčíkovo-Nagymaros* case.¹⁴⁹ The *Gabčíkovo-Nagymaros* judgment recognized the Watercourses Convention as the "modern development of international law,"¹⁵⁰ while citing the principle of equitable use as a factor in the decision.¹⁵¹ The case, however, was decided four months after the Watercourses Convention was adopted,¹⁵² when 106 votes in favor of adoption—not to mention the twenty years of work by the ILC that culminated in the convention¹⁵³—would have been highly

144. See *Helsinki Rules*, *supra* note 18, art. IV ("Each basin State is entitled, within its territory, to a reasonable and equitable share in the beneficial uses of the waters of an international drainage basin.").

145. See UNECE Water Convention, *supra* note 11, art. 2(1) ("The Parties shall take all appropriate measures to prevent, control and reduce any transboundary impact.").

146. See UN Watercourses Convention, *supra* note 14, arts. 5–7 (discussing the value placed on each principle by the Convention).

147. See Berlin Rules, *supra* note 37, art. 12 (establishing equitable utilization).

148. See Draft Articles, *supra* note 12, art. 3 ("Each aquifer State has sovereignty over the portion of a Transboundary aquifer or aquifer system located within its territory. It shall exercise its sovereignty in accordance with international law and the present draft articles.").

149. See, e.g., Owen McIntyre & Mara Tignino, *Reconciling the UN Watercourses Convention with Recent Developments in Customary International Law*, in *THE UN WATERCOURSES CONVENTION IN FORCE*, *supra* note 143, at 287; Johan G. Lammers, *Case Analysis: The Gabčíkovo-Nagymaros Case Seen in Particular From the Perspective of the Law of International Watercourses and the Protection of the Environment*, 11 LEIDEN J. INT'L L. 287 (1998).

150. *Gabčíkovo-Nagymaros Project* (Hung./Slovk.), 1997 I.C.J. 53, ¶ 85 (Sept. 25), available at <http://www.icj-cij.org/docket/files/92/7375.pdf> [<http://perma.cc/VYZ4-F5NG>] (archived Sept. 14, 2014).

151. See *id.* (justifying the principle of equitable use).

152. The UN Watercourses Convention was adopted on May 21, 1997. The ICJ rendered its judgment on September 25, 1997.

153. *Convention on the Law of the Non-Navigational Uses of International Watercourses*, UNITED NATIONS AUDIOVISUAL LIBRARY OF INT'L LAW (2008), http://legal.un.org/avl/pdf/ha/clnuiw/clnuiw_ph_e.pdf [<http://perma.cc/8H8X-TDLZ>] (archived Sept. 14, 2014) (providing the vote count for the UN Watercourses Convention).

persuasive. The conspicuous lack of ratifications since the convention was adopted, combined with subsequent developments of international water law (i.e., the Berlin Rules and Draft Articles), calls into question the contemporary veracity of the ICJ's judgment. Furthermore, while the judgment cited the Watercourses Convention, the substantive provision it relied on was the right to equitable use. The judgment does not mention the obligation not to cause significant harm.¹⁵⁴

A second argument supporting the Watercourses Convention as an accurate reflection of international water law rests on the assumption that a treaty is not static when its intention is to provide a framework agreement with intentionally broad provisions.¹⁵⁵ In that sense, the relationship between equitable use and no significant harm, as articulated in the Watercourses Convention, can evolve to reflect contemporary understandings of international water law. That may be true if states see the Watercourses Convention as an evolving document, but given the scrutiny textual language received during and after negotiations,¹⁵⁶ it is not clear that member states intended for their rights and duties under the Watercourses Convention to evolve, especially if a mechanism for interpreting those evolving rights and duties is not expressed.

A final limitation of the relationship between equitable use and no significant harm, as defined in the Watercourses Convention, is that it assumes states are in a cooperative mood. If the principles are intentionally ambiguous so as to give cooperative agreements the maximum amount of flexibility, the unintended consequence is that ambiguity also provides states in conflict with broad parameters within which to reasonably assert their rights.¹⁵⁷ In that sense the Watercourses Convention is useful insofar as it reinforces and legitimizes successfully negotiated watercourse agreements, but less constructive in providing tools to states in protracted disputes. That

154. See Gabčíkovo-Nagymaros Project (Hung./Slovk.), 1997 I.C.J. 53, ¶ 85 (Sept. 25) (explaining the court's rationale).

155. See, e.g., McIntyre & Tignino, *supra* note 149.

156. See, e.g., Summary Records of the 61st and 62d Meetings of the Sixth (Legal) Committee, *supra* note 141; see also U.N. GAOR, 51st Sess., 99th plen. mtg., *supra* note 64 (including comments by a French delegate expressing concerns about the hurried negotiations, noting "the fact that the draft Convention submitted by the Chairman to the Working Group for adoption was not regularly circulated in various languages, resulting in continuing uncertainties with regard to the original text, which was adopted.").

157. See Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), U.N. GAOR, 25th Sess., U.N. Doc. A/RES/25/2625 (Oct. 24, 1970) (explaining that there is a general duty to cooperate under international law that may dissuade states from taking unfounded positions, though the principles of equitable use and no significant harm are broad enough that incompatible positions may both be reasonable—the case of the Nile River Basin discussed below is one example.)

is not an inappropriate trade-off, but it is a limitation nonetheless. A more explicit definition of rights may not resolve disputes between neighbors intent on protecting their short-term interests, but it does provide affected states with legal and diplomatic grounds to protect their water resources.

Despite its limitations, the Watercourses Convention has meaningful strengths as a framework agreement. Most notably, Part III on Planned Measures creates several process-oriented rules on information exchange, notification, and consultation.¹⁵⁸ While some states expressed concern that these provisions would require approval from co-riparian watercourse states for uses of, or actions in, a watercourse,¹⁵⁹ that interpretation exaggerates the practical effects of the planned measures provisions.¹⁶⁰ The provisions for information exchange, notification, and consultation are straightforward, verifiable, not unduly burdensome, and line up seamlessly with the Watercourses Convention's goal of promoting cooperation between watercourse states.¹⁶¹

The same cannot be said, however, for the foundational principles of the Watercourses Convention—the right to equitable use, and the obligation not to cause significant harm. These principles are ambiguously defined, inherently in tension with each other, and broad enough to provide states in conflict over water resources with reasonable arguments to support mutually incompatible positions. These characteristics limit the effectiveness of the Watercourses Convention in providing a meaningful framework for agreement formation. In addition, competing treaty regimes—namely the UNECE Water Convention and the Draft Articles—obscure the state of international water law by promoting overlapping and conflicting principles. The UNECE Water Convention, in particular, creates a parallel framework treaty of international water law that will compete with the Watercourses Convention for member states, resources, and legal supremacy. Finally, the Watercourses Convention suffers from a lack of support from UN member states. Adopted in 1997, seventeen years went by before it became a binding

158. See UN Watercourses Convention, *supra* note 14, pt. III.

159. See, e.g., U.N. GAOR, 51st Sess., 99th plen. mtg., *supra* note 64, at 4–5 (providing a statement from Turkey during the General Assembly resolution adopting the UN Watercourses Convention, which expressed concern that the Convention “creates an obvious inequality between States . . .”).

160. See Salman, *supra* note 143, at 30–32. The provisions enable a notified state to delay the planned measure, but do not create a veto because under Article 13, a notified state has 6 months to investigate the planned measure; if the notified state objects to the planned measure, Article 17(1) requires the states in question to enter into consultations, during which the objecting state can request a 6-month grace period. *Id.*

161. See Alistair Rieu-Clarke & Alexander Lopez, *Factors That Could Limit the Effectiveness of the UN Watercourses Convention Upon its Entry Into Force*, in THE UN WATERCOURSES CONVENTION IN FORCE, *supra* note 143, at 87–92.

treaty. This delay reduced the Watercourses Convention's standing and cast doubt on its contributions to international water law. In the next section, the Water Convention's limitations are brought to light by negotiations over management of the longest river in the world.

IV. LIMITATIONS EXPOSED: THE CASE OF THE NILE RIVER BASIN

Nowhere are the limitations of the Watercourses Convention—and international water law in general—more apparent than in the Nile River Basin.¹⁶² The Nile River Basin is a classic example of the upstream vs. downstream, equitable use vs. no significant harm dilemma. Egypt and Sudan—both downstream states and historically regional hegemony over the Nile River Basin—have long been in conflict with the upstream community of states in the basin, with much at stake. Eleven countries fall within the Nile River Basin, with a total population of 350 million.¹⁶³ Many of these countries have considerable development challenges, and rely on the social, economic, and environmental benefits of the Nile River's water resources; 70 percent of the Nile River Basin's population relies on rain-fed agriculture for their livelihoods.¹⁶⁴ As a result, there has been a reduction in soil fertility and dry season flows, while droughts and floods put vulnerable populations at further risk of food insecurity. Not surprisingly, the Nile River Basin is viewed as one of the most degraded in the world, due to rapid population growth, poverty, natural disasters, political instability, and poor watershed management.¹⁶⁵ In this context, a regional interstate agreement or compact becomes a critical tool for addressing basin-wide water allocations. Unfortunately, the framework for cooperation the Watercourses Convention provides, and the legal principles it promotes, are insufficiently robust to overcome long-standing hydropolitical discord.

Recent events in the Nile River Basin reveal the central role that Nile waters play in high-stakes geopolitical developments. Domestic upheaval in Egypt has weakened the Nile River Basin's regional

162. This section updates, and builds on, Ryan Stoa, *International Water Law Principles and Frameworks: Perspectives from the Nile River Basin*, in NILE RIVER BASIN: ECOHYDROLOGICAL CHALLENGES, CLIMATE CHANGE AND HYDROLOGICAL POLITICS 581 (Assefa M. Melesse, Wossenu Abtey & Shimelis Setegn eds., 2014).

163. Assefa M. Melesse, Seleshi Bekele & P. McCormick, *Introduction: Hydrology of the Niles in the Face of Climate and Land-Use Dynamics*, in NILE RIVER BASIN: HYDROLOGY, CLIMATE AND WATER USE vii, vii (Assefa M. Melesse ed., 2011) ("The Nile river basin is home to approximately 180 million people, while over 350 million live within the 10 riparian states.").

164. *Id.* at xii.

165. *See id.*

hegemon as political factions wrestle for control of the country.¹⁶⁶ Despite rapid domestic political changes resulting in deadly protests and potential human rights violations, however, Egypt's stance towards upstream riparian states of the Nile River Basin has been consistently aggressive, regardless of who holds power in Cairo. Before stepping down amid sustained protests in February 2011, former Egyptian President Hosni Mubarak had received permission from Sudanese President Omar al-Bashir to build an Egyptian air base in Sudan that would be used to conduct bombing raids on Ethiopian hydroelectric facilities on the Nile River.¹⁶⁷ It is believed that Egypt's opposition to an independent South Sudan—as well as Ethiopia's support for independence—was grounded on the assumption that South Sudan would join the upstream bloc of Nile River Basin states.¹⁶⁸ In June 2013, weeks before being deposed by military forces, former Egyptian President Mohammed Morsi made a televised speech to assert that all options were open to ensure that Egypt's water security remained intact despite the Grand Ethiopian Renaissance Dam's construction on the Nile River.¹⁶⁹ If Egypt's Nile River water allocation “diminishes by one drop, then our blood is the alternative,” he declared.¹⁷⁰ Current President of Egypt (and former Army Field Marshall) Abdel Fattah al-Sisi, meanwhile, launched an

166. See generally, e.g., Patrick Kingsley, *Egypt's Spring 2014: Is the Counter-Revolution Now Complete?*, GUARDIAN (Mar. 22, 2014), <http://www.theguardian.com/world/2014/mar/23/egypt-spring-2014-counter-revolution> [<http://perma.cc/UH84-3FM8>] (archived Sept. 14, 2014) (describing “the return of a form of authoritarian rule” to Egypt). Army Field Marshall Abdel Fattah al-Sisi claimed the presidency through national elections held in May 2014. See *Egypt Issues Presidential Election Law*, AL JAZEERA (Mar. 8, 2014), <http://www.aljazeera.com/news/middleeast/2014/03/egypt-presidential-election-law-201438141520330512.html> [<http://perma.cc/LQ7S-R5QX>] (archived Sept. 14, 2014) (reporting on the selection of Marshall Abdel Fattah al-Sisi to the Egyptian Presidency following national elections); Patrick Kingsley & Martin Chulov, *Mohamed Morsi Ousted in Egypt's Second Revolution in Two Years*, GUARDIAN (July 3, 2013), <http://www.theguardian.com/world/2013/jul/03/mohamed-morsi-egypt-second-revolution> [<http://perma.cc/L5W7-A67U>] (archived Sept. 14, 2014) (recounting the removal of Mohammed Morsi from Egypt's Presidency); David D. Kirkpatrick, *Egypt Erupts in Jubilation as Mubarak Steps Down*, N.Y. TIMES (Feb. 11, 2011), <http://www.nytimes.com/2011/02/12/world/middleeast/12egypt.html?pagewanted=all> [<http://perma.cc/AD8M-8PUE>] (archived Sept. 14, 2014) (discussing Mubarak's fall from power).

167. See Noel, *Stratfor Sources Reveal Egypt, Sudan Contingency Plans to Secure Nile Water Resources*, WIKILEAKS PRESS (Aug. 31, 2012), <http://wikileaks-press.org/stratfor-sources-reveal-egypt-sudan-contingency-plans-to-secure-nile-water-resources/> [<http://perma.cc/BJ54-9U22>] (archived Sept. 14, 2014) (outlining Egyptian and Sudanese contingency plans to engage in water resource acquisition).

168. See *id.* (providing a snapshot of the political landscape at the time regarding water resources).

169. See *Egyptian Warning Over Ethiopia Nile Dam*, BBC (June 10, 2013), <http://www.bbc.co.uk/news/world-africa-22850124> [<http://perma.cc/GP5K-HLGA>] (archived Sept. 14, 2014) (discussing Morsi's speech regarding Egypt's water scarcity and security).

170. *Id.*

international diplomatic offensive in February 2014 aimed at neutralizing financial supporters of the Grand Ethiopian Renaissance Dam.¹⁷¹ If there is one issue all political factions in Egypt appear to agree upon, it is staunch opposition to upstream water diversions.

On a basic level, water conflicts in the Nile River Basin can be attributed to two simultaneous realities: (1) upstream states provide virtually all of the total flow of the Nile River Basin's waters;¹⁷² and (2) downstream Egypt and Sudan have historically claimed the entire flow for their use.¹⁷³ While tensions over the Nile's resources go back centuries, contemporary disputes have, at their root, the framework legal imprints of British colonialism. The thrust of most early agreements aimed to maximize downstream flows by preventing upstream states from disturbing the uninterrupted flow of water resources to Egypt without the prior consent of downstream Egypt, Sudan, or the British government. The 1902 Treaty between Ethiopia and the United Kingdom, Relative to the Frontiers between the Anglo-Egyptian Sudan, Ethiopia, and Eritrea, for example, precludes the construction of any project that would alter downstream flows without the prior consent of the British and Sudanese governments.¹⁷⁴ Similarly, the 1929 Nile Waters Agreement between Egypt and Britain (representing Kenya, Uganda, Tanganyika, and Sudan) categorically prohibits any engineering works that could jeopardize the interests of Egypt either by reducing water flows, water levels, or flow schedules.¹⁷⁵ Both treaties invoke literal interpretations of the no-significant harm principle.¹⁷⁶

Upstream states have rejected the legal validity of these agreements by claiming that because the agreements were imposed by British rule and because these upstream states were not party to

171. See Lora Moftah, *Egypt Ramps Up International Campaign as Nile Tensions Heat Up*, BLOUIN BEAT: WORLD (Feb. 28, 2014), <http://blogs.blouinnews.com/blouinbeatworld/2014/02/28/egypt-ramps-up-international-campaign-as-nile-tensions-heat-up/> [<http://perma.cc/M9N-KCWS>] (archived Sept. 14, 2014) (describing Egyptian military action regarding Nile access).

172. See Stoa, *supra* note 163, at vii (highlighting the two major tributaries in Central Africa).

173. See generally Agreement for the Full Utilization of the Nile Waters, Egypt-Sudan, Nov. 8, 1959, 6519 U.N.T.S. 63 (delineating an agreement between Egypt and Sudan for full utilization of the Nile waters).

174. Treaty between Ethiopia and the United Kingdom, Relative to the Frontiers between the Anglo-Egyptian Sudan, Ethiopia, and Eritrea, Eth.-U.K., May 15, 1902.

175. Exchange of Notes between His Majesty's Government in the United Kingdom and the Egyptian Government in Regard to the Use of the Waters of the River Nile for Irrigation Purposes (Nile Waters Agreement), Egypt-U.K., May 7, 1929, available at http://www.internationalwaterlaw.org/documents/regionaldocs/Egypt_UK_Nile_Agreement-1929.html [<http://perma.cc/D99H-X5MC>] (archived Sept. 14, 2014) (discussing the categorical prohibitions resulting from the Nile Waters Agreement).

176. See generally Berlin Rules, *supra* note 37 (providing legal mechanisms for cooperative management of waters and for resolving disputes peacefully).

the agreements, they therefore are not bound by them.¹⁷⁷ Ethiopia rejected the 1902 treaty, for example, because it was not ratified by any of its government bodies.¹⁷⁸ Kenya, Uganda, and Tanganyika/Tanzania invoked the Nyerere Doctrine—giving states two years to renegotiate colonial-era treaties before they become invalid—to reject the 1929 Agreement.¹⁷⁹ Egypt rests on the principle of state succession, which transfers the rights and obligations of a predecessor state to a successor state, to claim that the treaties are still valid.¹⁸⁰ Egypt's argument may have been weakened by the 1978 Vienna Convention on Succession of States in respect of Treaties, which established that newly independent post-colonial states do not inherit the treaty obligations of their colonial predecessors.¹⁸¹ While Egypt is a party to the Vienna Convention, however, Ethiopia is the only upstream treaty member,¹⁸² precluding other upstream states from enjoying its legal provisions. Meanwhile, when Ethiopia signed the 1902 treaty between Ethiopia and the United Kingdom, it was an independent state under the rule of Emperor Menelik II.¹⁸³ Both agreements remain points of contention today.

Tensions reached a head in 1959, when Egypt and Sudan created the bilateral Agreement between the United Arab Republic and the Republic of Sudan for the Full Utilization of the Nile Waters, dividing the entire flow of the Nile River Basin to themselves.¹⁸⁴ The 1959 agreement is understandably rejected by all other riparian states, which assert the principle of equitable use to claim that the agreement is an infringement on their rights under international law (in addition to the fact that they are not parties to the treaty).

177. See Salman M.A. Salman, *The Nile Basin Cooperative Framework Agreement: A Peacefully Unfolding African Spring?*, 38 WATER INT'L 17, 18 (2013) (explaining that treaties concerning the Nile River have "been a source of bitter dispute between Ethiopia and Egypt").

178. See *id.* at 18 ("Ethiopia vehemently rejects this treaty, claiming that it was not ratified by any of the government organs and that the Amharic and English versions of the treaty are different with respect to the said article.").

179. See *id.*

180. See *id.* at 19.

181. See Vienna Convention on Succession of States in Respect of Treaties art. 8, Aug. 23, 1978, 1946 U.N.T.S. 3, 17 I.L.M. 1488 ("The obligations or rights of a predecessor State under treaties in force . . . do not become the obligations or rights of the successor State . . .").

182. See Status of the Vienna Convention on Succession of States in Respect of Treaties, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXIII-2&chapter=23&lang=en (last visited Sept. 21, 2014) [<http://perma.cc/3GFW-W37K>] (archived Sept. 21, 2014) (listing the States party to the Vienna Convention).

183. See Salman, *supra* note 177, at 17.

184. See Agreement for the Full Utilization of the Nile Waters, Egypt-Sudan, *supra* note 173, at 1 ("[T]he River Nile needs projects, for its full control and for increasing its yield for the full utilization of its waters by the Republic of the Sudan and the United Arab Republic . . .").

Up to this point, the international agreements governing water resources of the Nile River Basin heavily favored downstream Egypt and Sudan by asserting the principle of no significant harm to the exclusion of upstream riparian states' potential right to an equitable use of the Nile River Basin's waters. Accordingly, the agreements lacked consensus and legitimacy, and there was little cooperation between the upstream and downstream riparian states on matters of transboundary water resources management. At this point, the creation and adoption of a treaty capable of reconciling the competing principles invoked by upstream vs. downstream states could have played a potentially critical role in resolving the dispute. The Watercourses Convention, however, largely failed to gain acceptance in the Nile River Basin. At present, the Watercourses Convention has not been ratified by a Nile River Basin state.¹⁸⁵ That, in itself, is not a determinative rejection of the Watercourses Convention. States may simply be dragging their feet or focusing on other priorities. The meeting records of the General Assembly resolution, however, reveal a conspicuous lack of support from Nile River Basin states.¹⁸⁶ Egypt, Ethiopia, Tanzania, and Rwanda abstained from the vote, and Burundi was one of only three countries to vote against the resolution.¹⁸⁷ In explaining its abstention, Ethiopia expressed dissatisfaction with the force—or lack thereof—with which the Watercourses Convention establishes the right of equitable use, as well as the text's neutral stance on existing agreements that contravene its principles.¹⁸⁸ Not surprisingly, the Egyptian delegation expressed their concerns that the right of equitable use is not appropriately linked to the prohibition on significant harm.¹⁸⁹ Thus, even at the apex of international support for the Watercourses Convention, its provisions were not palatable to states in the Nile River Basin.

Nonetheless, changes in the environment, support from intergovernmental institutions, and increased assertiveness from upstream states led to a slight, but significant, shift towards a cooperative management framework through bilateral agreements, technical knowledge exchange, and sub-basin level organizations.¹⁹⁰

185. See *Status of Watercourses Convention*, *supra* note 6 (listing the States that are party to the UN Watercourses Convention).

186. See generally U.N. GAOR, 51st Sess., 99th plen. mtg., *supra* note 64 (discussing at length those abstaining from the vote).

187. See *id.*

188. See *id.* at 9–10 (“[Ethiopia] took this position because . . . the text of the Convention . . . falls short of achieving the required balance, in particular safeguarding the interests of upper riparian States such as Ethiopia.”).

189. See *id.* at 10–11 (“[Egypt emphasizes] the need to link [equitable sharing] with the obligations of the States of a given river not to cause significant harm.”).

190. The most illustrative example is the Hydro-meteorological Survey of the Equatorial Lakes project, or Hydromet. Hydromet was created in response to unexpected rainfall and natural disasters in the Nile River Basin. While it provided a

While the regional or technical initiatives had their limitations, they were instrumental in laying the foundation for the Nile Basin Initiative (NBI).¹⁹¹ The NBI—officially established in 1999—is a framework partnership intended to formally convene the Nile River Basin riparian states to engage in dialogue and work towards a permanent and binding management framework.¹⁹² With the enduring participation of ten riparian states (Eritrea is an observer),¹⁹³ the NBI represented a significant shift towards cooperative management of the Nile River Basin.¹⁹⁴ To this day the NBI provides the basin with a robust intergovernmental organization with ongoing programs and administrative institutions.

The guiding philosophy of the NBI is stated in what NBI formally titles its “Shared Vision”: “[T]o achieve sustainable socio-economic development through the equitable utilization of, and benefits from, the common Nile Basin water resources.”¹⁹⁵ The Shared Vision features prominently throughout the NBI’s official documents, programs, and publications, and serves as the tagline of the NBI’s official website. The significance of the Shared Vision should not be understated. It is the de facto mission statement of the most inclusive cooperative management framework of the Nile River Basin to date, and it unequivocally embraces the equitable use principle. Its characterization of the Nile River Basin’s water resources as “common” refutes the notion that Egypt and Sudan have priority use to the entirety of the basin’s flow.

Given the bipolar history of Nile River Basin negotiations, the existence of the NBI should be considered a remarkable achievement.

mechanism for transboundary cooperation, the project was limited to technical experts and knowledge exchange. Other attempts at cooperation included the Undugu Initiative, an Egyptian-led communication forum, and the Technical Cooperation Committee for the Promotion of the Development and Environmental Protection of the Nile (TECCONILE), an initially technical and scientific body which gradually promoted legal and institutional reform. *See generally* Dereje Zeleke Mekonnen, *The Nile Basin Cooperative Framework Agreement Negotiations and the Adoption of a “Water Security” Paradigm: Flight into Obscurity or a Logical Cul-de-sac?*, 21 EUR. J. INT’L L. 421 (2010).

191. *See Nile Basin Initiative: About Us*, NILEBASIN.ORG, <http://nilebasin.org/index.php/about-us/nile-basin-initiative> (last visited Mar. 12, 2014) [<http://perma.cc/T3CM-5JZJ>] (archived Sept. 21, 2014) (“The Nile Basin Initiative is a regional intergovernmental partnership that seeks to develop the River Nile in a cooperative manner . . .”).

192. *See id.* (explaining that the NBI’s objective is “to achieve sustainable socio-economic development through equitable utilization of, and benefit from, the common Nile Basin water resources”).

193. *See id.* (listing the ten riparian states—Burundi, DR Congo, Egypt, Ethiopia, Kenya, Rwanda, South Sudan, The Sudan, Tanzania, and Uganda—and noting that “Eritrea participates as an observer.”).

194. *See generally* Jutta Brunnee & Stephen Toope, *The Changing Nile Basin Regime: Does Law Matter?*, 43 HARV. INT’L L.J. 107 (2002) (discussing how new laws and cooperative regimes have transformed the way the Nile River Basin is being managed).

195. Nile Basin Initiative, *supra* note 191.

It is broadly inclusive of the basin's riparian states, remains active through ministerial and diplomatic engagements and on-the-ground programming, and receives technical and financial support from a diverse donor-base. Ultimately, however, the purpose of the NBI is to create and transition to a binding transboundary management agreement—namely, the Nile Basin Cooperative Framework Agreement (CFA)¹⁹⁶—that formalizes the NBI as an institution and clarifies the relationships and water rights of riparian states. By this measure, the NBI's record is decidedly mixed. While negotiations to conclude the CFA were initiated concurrently with the NBI's establishment, fourteen years later the CFA is at an impasse: seven upstream states have signed the agreement, but the CFA has not entered into force, and it lacks the support of Egypt and Sudan.¹⁹⁷ At the heart of the stalemate are disagreements over legal principles that merely reflect the long-standing disagreements between upstream and downstream riparian states.

On its face, the CFA largely reflects the legal provisions of the Watercourses Convention. Article 4 lays out the provisions of the equitable use principle, as well as a list of factors to be used in determining if a use is equitable and reasonable.¹⁹⁸ Article 5, meanwhile, establishes the principle of no significant harm.¹⁹⁹ Where the Watercourses Convention is silent with respect to the interplay between the two principles (or, at best, relies on the principle of state cooperation to balance competing uses), the CFA makes an attempt at reconciling equitable use and no significant harm by creating a third legal principle: water security.²⁰⁰ The CFA defines water security as “the right of all Nile Basin States to reliable access to and use of the Nile River system for health, agriculture, livelihoods, production and

196. See Agreement on the Nile River Basin Cooperative Framework art. 30 (May 14, 2010) [hereinafter CFA], available at http://www.internationalwaterlaw.org/documents/regionaldocs/Nile_River_Basin_Cooperative_Framework_2010.pdf [<http://perma.cc/H4Z9-8U3E>] (archived Sept. 21, 2014) (“Upon the entry into force of this Framework the Commission shall succeed to all rights, obligations and assets of the Nile Basin Initiative (NBI).”).

197. See Abadir M. Ibrahim, Note, *The Nile Basin Cooperative Framework Agreement: The Beginning of the End of Egyptian Hydro-Political Hegemony*, 18 MO. ENVTL. L. & POL'Y REV. 282, 301–05 (2011) (“It is not clear if the upper riparian states actually expect Egypt to cave in to this pressure, but it is clear that they expect South Sudan and eventually North Sudan to sign the deal.”); Scott O. McKenzie, Note, *Egypt's Choice: From the Basin Treaty to the Cooperative Framework Agreement, An International Legal Analysis*, 21 TRANSNAT'L L. & CONTEMP. PROBS. 571, 584–85 (2012) (“While Egypt's words and actions suggest that it is highly uninterested in signing the CFA, other basin countries have welcomed Egyptian participation.”).

198. See CFA, *supra* note 196, art. 4 (providing boundaries for the equitable use principle and factors useful in making such determinations).

199. See *id.* art. 5 (“Nile Basin States shall . . . take all appropriate measures to prevent the causing of significant harm to other Basin States.”).

200. See *id.* art. 2(f) (establishing Water Security as a key component of the agreement).

environment.”²⁰¹ The application of water security as a legal principle, however, could not be agreed upon.²⁰² Article 14(b) of the CFA initially required states “not to significantly affect the water security of any other Nile Basin State.”²⁰³ Egypt and Sudan, however, required the clause be amended to obligate states “not to adversely affect the water security and current uses and rights of any other Nile Basin State.”²⁰⁴ Essentially, the concept of water security was used as a proxy by upstream states to reinforce the principle of equitable use, and by downstream Egypt and Sudan to affirm their pre-existing claims to the entire flow of the basin based on the no significant harm principle. Disagreement over the appropriate application of the principle of water security—and by extension, the interplay between the principles of equitable use and no significant harm—have led to an impasse in negotiations.

While the dispute over water security is likely the greatest hurdle to full participation, other provisions of the CFA have contributed to the deadlock. Egypt and Sudan have called for robust notification procedures to be incorporated,²⁰⁵ in line with similar provisions of the Watercourses Convention. Upstream states are concerned that notification requirements will be construed as recognition of colonial-era agreements.²⁰⁶ Regarding amendment procedures, upstream states prefer a simple majority requirement, while Sudan and Egypt demand veto power.²⁰⁷ Even the definition of the basin itself is in dispute. Egypt seeks to broaden the definition to include all waters accumulating in the basin area, an interpretation that would render Egypt’s water allocation claims from 66 percent of the river flow—as established in the 1959 Nile Waters Agreement between Egypt and Sudan—to a more reasonable 3 percent.²⁰⁸ The upstream states have yet to accept this interpretation.²⁰⁹

Despite the deadlock, the CFA has been signed by seven countries: Ethiopia, Kenya, Rwanda, Tanzania, Uganda, South Sudan, and Burundi; it has been ratified by two: Ethiopia and

201. *Id.*

202. Interview with Mahmoud Elkhatab, Second Secretary of the Embassy of Egypt in the United States (Feb. 14, 2014).

203. CFA, *supra* note 196, Annex to art. 14(b).

204. Musa Mohammed Abseno, *Nile River Basin, in THE UN WATERCOURSES CONVENTION IN FORCE*, *supra* note 143, at 149.

205. *See* Salman, *supra* note 177, at 22 (“Egypt and Sudan demand that the CFA include explicit provisions on the notification of other riparians of planned measures which may cause significant adverse effects to other riparians.”).

206. *See id.*

207. *See id.* at 23 (“While Sudan and Egypt demand that the CFA be amendable by consensus . . . the other riparians insist that it be amendable by a simple majority of the riparian states . . . with no veto power for any riparian.”).

208. *See id.* at 23 (noting that Egypt would include in the definition “the rain that falls on the entire basin area”).

209. *See id.* (“If Egypt insists on this definition, it will certainly infuriate the other riparians, who consider it absurd.”).

Rwanda.²¹⁰ Further ratifications from Kenya, South Sudan, and Tanzania may be imminent.²¹¹ If the CFA receives the requisite six ratifications to enter into force, the creation of the Nile Basin Commission will be triggered and succeed the NBI. Without the participation of Egypt and Sudan, however, the CFA and Nile Basin Commission will struggle to resolve disputes over water resources in the basin, a reality the ongoing conflict between Egypt and Ethiopia reflects.

With Egypt publically proclaiming the possibility of war over the Nile River Basin's water resources and Ethiopia building momentum for entry into force of an agreement untenable to Egypt and Sudan, prospects for cooperation have never seemed more remote. The dispute centers on the ambiguous relationship between the two foundational principles of the Watercourses Convention, a relationship that lacks clarification and guidance for states in seemingly intractable positions. As the longest river in the world, and arguably the most geopolitically significant river basin lacking a cooperative management agreement, the Nile River Basin's experience with principles of international water law are a telling barometer of the Watercourses Convention's ability to resolve disputes and foster agreement. While it is understood that one of the primary purposes of international water law is to provide a framework for willing states to create their own, more fact-specific regional agreements, the Watercourses Convention has not equipped states in the Nile River Basin with the necessary tools to resolve their disputes. On the contrary, the ambiguous relationship between the principles of equitable use and no significant harm allows states to invoke whichever principle best suits their needs. Downstream states like Egypt and Sudan will emphasize the principle of no significant harm to prevent upstream utilization, while upstream states will emphasize the principle of equitable use to legitimize their diversions.

CFA negotiations have demonstrated that, even when negotiating in good faith, the lack of clarity in international water law and the Watercourses Convention may lead to intractable outcomes. The fact that riparian states of the Nile River Basin felt compelled to create an entirely novel legal concept to resolve the

210. See Yonas Abiye, *Ethiopia: Kenya Closer to Ratifying the CFA Bill On the Nile*, ALLAFRICA.COM (Mar. 15, 2014), <http://allafrica.com/stories/201403170561.html> [<http://perma.cc/8AEL-CB5L>] (archived Sept. 21, 2014).

211. See Abiye, *supra* note 210 (quoting officials who imply a sense of forthcoming ratification); Addis Ababa, *Ethiopia Welcomes Tanzania's Move to Ratify the Nile Treaty*, ALLAFRICA.COM (Oct. 11, 2014), <http://allafrica.com/stories/201410131328.html> [<http://perma.cc/YMT5-5YLF>] (archived Oct. 25, 2014) (discussing Tanzania's prospects). For a discussion of newly independent South Sudan's options under international water law, see Charles L. Katz, Note, *Another Cup at the Nile's Crowded Spigot: South Sudan and its Nile Water Rights*, 44 GEO. J. INT'L L., 1249 (2013).

discrepancies between existing legal principles is an indictment of the pre-existing legal tools available. The concept of water security quickly became a proxy for incompatible positions, an outcome the Watercourses Convention did not prevent. If the principles of the Watercourses Convention are intended to be translated into site-specific regional agreements, the fact that they may presently obscure, rather than clarify, basic rights and obligations of Nile River Basin states does not bode well for the future viability of the Watercourses Convention.

Similarly, if legal principles provide ammunition for states to take hardline negotiating positions, their value added to international disputes is severely diminished. While that may appear to be the case in the Nile River Basin, the influence of historical experience should not be underestimated. Egypt and Sudan's vehement opposition to the principle of equitable use is not simply the product of their status as a downstream state. It is also the consequence of geopolitical supremacy and colonial privileges. Upstream states of the Nile River Basin would be at a significant disadvantage vis-à-vis their downstream neighbors if international water law did not support the idea that a country may make reasonable and equitable utilization of its territory's water resources. In the last ten to twenty years, upstream states have progressively challenged Egypt and Sudan. While economic development, population growth, and environmental uncertainty have contributed to the shift in political dynamics, the continued development and acceptance of customary water laws, such as the equitable use principle, have given upstream states a legitimate legal leg to stand on.

Ultimately, the principle of equitable use is not just a guiding philosophy of international water law but of international environmental laws governing natural resources in general.²¹² States have traditionally supported—and in many cases, vigorously defended—the notion of territorial sovereignty that allows them to utilize natural resources.²¹³ Contemporary understandings of environmental processes have demonstrated the need for cooperation over transboundary resources and incentivized states to manage

212. See Lilian del Castillo-Laborde, *Equitable Utilization of Shared Resources*, MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ A.1 (last updated Jan. 2010), available at <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1583?rskey=Xcwwjj&result=1&prd=EPIL> [<http://perma.cc/M8X4-NMWG>] (archived Sept. 21, 2014).

213. See, e.g., Draft Articles, *supra* note 12, art. 3 ("Each aquifer State has sovereignty over the portion of a transboundary aquifer or aquifer system located within its territory."); UN Convention on the Law of the Sea art. 56, Dec. 10, 1982, 1833 U.N.T.S. 397 ([T]he coastal State has . . . sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources . . .").

resources cooperatively.²¹⁴ But the Egyptian and Sudanese reliance on the no significant harm principle to object to any utilization of water resources by upstream riparian states is likely a misconstruction of the principle. Since the principles of equitable use and no significant harm first appeared side-by-side in the Watercourses Convention, they have remained together in every subsequent major international legal instrument. It is clear that both principles operate in tandem, and ideally should be interpreted as checks on one another. In practice that ideal is not as straightforward.

At present, however, prospects for cooperation in the Nile River Basin appear slim, with upstream states intent on pushing forward with the CFA as presently constructed without the support and participation of Egypt and Sudan.²¹⁵ If the CFA enters into force without the full participation of Nile River Basin states, an element of cooperation will be lost, as the CFA's implementing institution—the Nile Basin Commission—will succeed the NBI and assume the NBI's rights and responsibilities. Consequently, the Nile River Basin will lose its primary mechanism for coordination and transboundary management. Many of the NBI's current programs will presumably transition to the Nile Basin Commission, though how this will proceed without the full participation of Nile River Basin states is unclear. What is clear is that upstream states are asserting their rights under international water law, and are no longer hesitant to publically oppose their downstream counterparts.

Meanwhile, Egypt's reaction to increased pressure from upstream states to assert the principle of equitable use has been invective. After centuries of enjoying nearly complete dominion over the Nile's flow, Egypt and Sudan are facing a new Nile River Basin paradigm. Based on widespread acceptance of the equitable use principle, it is likely that the international community will be sympathetic toward the upstream states, many of which are in low levels of human development and receive heightened attention from donor nations and the international community. Egypt and Sudan are themselves key players, however, in a fragile and evolving Middle East and North African region where major players like the United States and European Union are consumed with explosive geopolitical issues, and are therefore unlikely to spend their diplomatic capital asserting the rights of upstream riparian states to an equitable utilization of the Nile River Basin.

214. See GRAZIA BORRINI-FEYERABEND ET AL., *SHARING POWER: A GLOBAL GUIDE TO COLLABORATIVE MANAGEMENT OF NATURAL RESOURCES* xxviii–xxix (2007) (illustrating the evolution of resource management strategies in a continually globalizing world).

215. See Abiye, *supra* note 210 (“[The States] are all committed to ensuring it is implemented in the shortest time possible, despite some hurdles.”).

At the same time, the conflict over water resources has become sufficiently critical to warrant international attention, a development that may present an opportunity for reconciliation. Following the June 2013 exchange between Egypt and Ethiopia, the African Union and the UN urged cooperation, with UN Secretary General Ban-Ki Moon personally discussing the matter with the leaders of both states.²¹⁶ Former Egyptian Foreign Minister Mohamed Amr made an official visit to Ethiopia on June 17, 2013, to resolve the dispute and negotiate a mutually beneficial agreement.²¹⁷ Those talks, however, may be irrelevant in light of Egypt's rapidly changing political landscape.

As Egypt fights through a period of political transition, talks between Egypt and Ethiopia have been put on hold, with Ethiopia set to increase military spending by fifteen percent,²¹⁸ while Egypt continues its international diplomatic campaign against the Grand Ethiopian Renaissance Dam.²¹⁹ Going forward, it is likely that Egypt's governments, military or otherwise, will maintain long-held legal claims to the Nile River Basin's water resources. In fact, conflict with foreign rivals may be seen as an opportunity for Egyptian leaders to stem the tide of domestic opposition and rally the country in an "us vs. them" dynamic. At this time there is no indication that Egypt will back down from its long-held positions.²²⁰ At the same time, support for the CFA from upstream states is growing stronger.²²¹ If there is a way forward that reconciles these positions, it has not yet emerged.²²² The Watercourses Convention's embrace of

216. See Kirubel Tadese, *Cloud Over Talks on Ethiopia's Nile Dam*, BUSINESSDAY: BDLIVE (June 18, 2013, 9:36 AM), <http://www.bdlive.co.za/africa/africanews/2013/06/18/cloud-over-talks-on-ethiopia-s-nile-dam> [<http://perma.cc/86B-AHDK>] (archived Sept. 21, 2014) ("Egypt and Ethiopia began a sharp exchange of words after Ethiopia . . . started to divert Nile waters . . .").

217. See *id.*

218. See *Ethiopia to Boost Defense Spending Amid Tensions with Egypt Over Nile Dam Development*, STARTRIBUNE (July 3, 2013, 12:35 PM), <http://www.startribune.com/nation/214163921.html> (reporting that Ethiopia was set to boost defense spending by more than 15 percent); Moftah, *supra* note 171.

219. See Moftah, *supra* note 171 ("Egypt's government is undertaking an international diplomatic offensive aimed at thwarting [the dam].").

220. See Interview with Mahmoud Elkhatab, *supra* note 202.

221. See Abiye, *supra* note 210 (discussing the role of the upper riparian states in implementing the CFA and citing signs of optimism).

222. Although a legal solution seems remote, a better understanding of hydrological dynamics may present an opportunity for cooperation. From an integrated water resources management perspective, the primary water uses of the riparian states involved are not incompatible despite the Nile River's limited flows. The Democratic Republic of the Congo, Rwanda, and Burundi rely on waters of the Kagera River Basin—an upper headwater of the Nile—for small-scale domestic water supply and irrigation. Similarly, Tanzania and Kenya rely on the Nile's water resources to satisfy some domestic water supply needs, while Uganda and Ethiopia are focused on hydropower generation. An integrated water resources management framework can regulate and satisfy these uses with minimal downstream effects on Sudan and Egypt.

the principles of equitable use and no significant harm provides little hope of doing so.

The challenge for riparian states of the Nile River Basin is to negotiate a binding legal agreement that effectively defines rights and obligations, while providing a framework for enduring transboundary management and cooperation. The bipolar interpretations of the Watercourses Convention and international water law principles has led negotiations into the unfamiliar issue of water security, a principle that merely serves as a proxy for states to assert their best interests. Nonetheless, the CFA may be more palatable to Nile River Basin states than current political dynamics would suggest. The present form of the agreement has omitted the controversial Article 14(b) water security clause, leaving it to the Nile Basin Commission to resolve.²²³ In addition, amendment procedures were revised to require unanimity for the most essential articles (including the principles of equitable use, no significant harm, and water security),²²⁴ and a two-thirds majority for all other provisions.²²⁵ Finally, while the CFA does not explicitly protect historical allocations of Nile waters, an enumerated factor to consider when determining equity is an existing use. Considering the significant reliance of Egypt's population on Nile water resources, this factor is likely to be heavily weighted when objectively balanced against other factors.²²⁶

If cooperation over the CFA can be achieved, ratifications of the Watercourses Convention may follow soon thereafter. The principles of equitable use, no significant harm, and cooperation over water resources are present in both the CFA and the Watercourses Convention, while donor programs are pushing for and supporting

Sudan partially recognized this possibility when it accepted the conclusion of a member panel tasked with investigating the effects of the dam. The panel's findings included a determination that downstream Egypt and Sudan will not be deleteriously affected, and may even benefit from reductions of siltation and flooding. For a lengthier discussion of the opportunities an understanding of hydrological dynamics present, see generally *Hydropower's Potential and the Region's Rising Energy Demand*, in STATE OF THE NILE RIVER BASIN 2012 163 (2012), available at <http://nileis.nilebasin.org/system/files/Nile%20SoB%20Report%20Chapter%206%20-%20%20Hydropower.pdf> [<http://perma.cc/8XEC-74A8>] (archived Sept. 21, 2014); Tesfa-Alem Tekle, "No political motive" Behind Sudan's Support for Ethiopia's Nile Dam: Ambassador, SUDAN TRIBUNE (Dec. 14, 2013), <http://www.sudantribune.com/spip.php?article49180> [<http://perma.cc/833U-SZ9E>] (archived Sept. 21, 2014).

223. See CFA, *supra* note 196, art. 14(b).

224. See *id.* art. 35(3).

225. See *id.* ("As to proposed amendments to other articles . . . the amendment shall as a last resort be adopted by a two-thirds majority vote of the State Parties . . .").

226. While not the primary argument Egypt relies on to assert its rights, the principle of equitable use is interpreted to support current allocations by emphasizing existing uses by Egypt's large population. Interview with Mahmoud Elkhatab, *supra* note 202.

ratification.²²⁷ Given the primary importance the Nile River Basin has to water strategies of Nile River Basin states, however, it is unlikely that accession to the Watercourses Convention will take place on a regional scale before a consensus CFA is in place.

Ultimately, the CFA represents a binding and legal break from Sudanese and Egyptian hegemony over the Nile River Basin. It may take time for Egypt and Sudan to accept this new paradigm, and the Watercourses Convention's status as a source of the rights and obligations of upstream and downstream states may not be capable of facilitating the transition. Meanwhile, the experience of the Nile River Basin should illuminate that the relationship between the foundational principles of the Watercourses Convention—equitable use and no significant harm—is poorly defined and capable of manipulation. While ambiguity may provide flexibility in some cases, it creates confusion and, at worst, impedes conflict resolution. The Nile River Basin demonstrates that the Watercourses Convention has a long way to go before its provisions can foster cooperation in protracted conflicts.

V. THE UN WATERCOURSES CONVENTION IN FORCE: THE WAY FORWARD

Despite the Watercourses Convention's limitations, there is reason for optimism. Even when the treaty was non-binding, there was evidence that its principles were being applied in bilateral and regional agreements.²²⁸ If the Watercourses Convention serves only as a guidance document, it would still contribute to promoting cooperation over transboundary water resources. Better still, with thirty-five ratifications in hand,²²⁹ entry into force has been achieved,

227. See, e.g., Mūsa Mohammed Abseno, *Regional Brief: The UN Watercourses Convention Global Initiative for East Africa* (June 4, 2013), available at <http://www.unwatercoursesconvention.org/images/2012/10/regional-brief-nile-basin-june-2013.pdf> [<http://perma.cc/R6N-4SKY>] (archived Sept. 21, 2014) (“Some of the most important provisions are the definition of the term ‘watercourse’; principle of equitable and reasonable utilization; the obligation not to cause significant harm; data and information exchange . . .”).

228. See generally The 2002 Charter of Water of the Senegal River, 2002, available at http://iea.uoregon.edu/pages/view_treaty.php?t=2002-SenegalRiverWaterCharter.EN.txt&par=view_treaty_html [<http://perma.cc/6C3R-4KWU>] (archived Sept. 21, 2014) (evidencing that principles of the UN Watercourses Convention are being applied in regional agreements); 2000 Revised Protocol on Shared Watercourses of the Southern African Development Community (SADC), 2000, available at http://www.sadc.int/files/3413/6698/6218/Revised_Protocol_on_Shared_Watercourses_-_2000_-_English.pdf [<http://perma.cc/6AY7-8362>] (archived Sept. 21, 2014); 2008 Niger Basin Water Charter, Apr. 30, 2008.

229. See UN Watercourses Convention, *supra* note 14, art. 36 (“The present convention shall enter into force . . . following the date of deposit of the thirty-fifth

and marks a significant breakthrough for transboundary cooperation over water resources. Moreover, seventeen of the Watercourses Convention's thirty-five member states became parties to the treaty since 2010,²³⁰ suggesting that momentum was building towards entry into force and that momentum may represent a global push towards consensus. Many of the more recent member states—including France, Germany, and the United Kingdom—are active donors of foreign aid and yield influential soft power that could mobilize support for further ratifications. Finally, current member states are predominantly located in Europe, Africa, and the Middle East, increasing the likelihood that all riparians of a watercourse in those regions are party to the Watercourses Convention and will embrace the spirit of cooperation.²³¹

Entry into force is a significant milestone for the Watercourses Convention, with several implications for its future status under international law. First, entry into force makes the principles and provisions of the text binding on member states. Even if watercourse agreements are not immediately executed, the binding nature of the Watercourses Convention could trigger meaningful interaction between co-riparian member parties by making information-sharing, notification, consultation, and dispute settlement provisions mandatory. Subsequently, non-member states will have an opportunity to evaluate the ramifications of the treaty on member states, providing clarity regarding operational and interpretive aspects of the Watercourses Convention. The evaluation period will enable non-member states to be better informed regarding their position on ratification.²³² It may, for example, reassure states that accession to the Watercourses Convention merely creates a framework for further cooperation, instead of dramatically altering existing rights and duties. In addition, concrete applications of the Watercourses Convention's provisions are likely to refine and clarify textual ambiguities. In this sense, the incubation period immediately following entry into force may provide the international community with a better sense of what the Watercourses Convention can, and cannot, do. As yet, the Watercourses Convention's potential has been at least partly constrained by its heretofore non-binding status.

Second, entry into force should allow the Watercourses Convention to re-enter global conversations about collective management of shared resources, prompting the international

instrument of ratification, acceptance, approval, or accession with the Secretary-General of the United Nations.”).

230. See *Status of Watercourses Convention*, *supra* note 6.

231. The corollary to this trend is that no states in East Asia, Southeast Asia, Oceania, South America, or North America have ratified the UN Watercourses Convention. See generally THE UN WATERCOURSES CONVENTION IN FORCE, *supra* note 143.

232. Ending speculation, for example, that Part III of the convention on Planned Measures could grant states a veto over planned measures of other states.

community to collectively reengage with the Watercourses Convention by supporting negotiations, sharing information, and weighing in on each state's interpretations of rights and duties. Even if that engagement is not coordinated in action or unified in opinion, it will serve the interests of the Watercourses Convention if the international community pays attention to transboundary water resources. Taken a step further, institutional mechanisms—such as a conference of the parties—could be established to create guidelines on implementation, develop amendments and protocols, and monitor compliance.²³³ Institutional support has the potential to catalyze state ratifications by funding fora for negotiations and developing a coordinated and global ratification strategy.²³⁴ A joint institution between the Watercourses Convention and the UNECE Water Convention would be particularly helpful in creating synergies and reducing institutional competition between the treaty regimes, and might encourage states party to one treaty to ratify the other.²³⁵

Finally, entry into force bestows on the Watercourses Convention a renewed air of legitimacy that is sorely needed seventeen years after its adoption. If the purpose of the Watercourses Convention is to promote cooperation and watercourse agreements,²³⁶ it must be recognized and accepted as a legitimate instrument of international law. Recognition may already be provided by the thirty-five states that have ratified the convention, but for the rest, entry into force will serve as a reminder that the Watercourses Convention has a role to play and a contribution to make.²³⁷ In that regard, there is still work to do for the Watercourses Convention to attain the widespread support that international environmental treaty contemporaries enjoy.²³⁸ But entry into force is a start, and provides an opportunity

233. See Flavia Rocha Loures & Alistair Rieu-Clarke, *An Institutional Structure to Support the Implementation Process*, in *THE UN WATERCOURSES CONVENTION IN FORCE*, *supra* note 143, at 263.

234. In a manner similar to the UNECE Water Convention's supporting infrastructure, for example. See generally *Projects of Middle Asia*, *supra* note 83; *Meeting of the Parties*, *supra* note 84.

235. It would be a promising sign for both treaties, for example, if the United Kingdom—a UN Watercourses Convention member party—ratified the UNECE Water Convention and if Russia—a UNECE Water Convention member party—ratified the UN Watercourses Convention.

236. See UN Watercourses Convention, *supra* note 14, pmb., pt. III (“Expressing the conviction that a framework convention will ensure the utilization, development, conservation, management and protection of international watercourses . . .”).

237. See Alistair Rieu-Clarke & Alexander Lopez, *Why Have States Joined the UN Watercourses Convention?*, in *THE UN WATERCOURSES CONVENTION IN FORCE*, *supra* note 143, at 36.

238. See, e.g., *supra* notes 2–5 (illustrating robust support for other treaties that are environmental in nature, including the Kyoto Protocol, United Nations Convention to Combat Desertification, and United Nations Framework Convention on Climate Change).

for non-member states to ride the coattails of the Watercourses Convention's entry into force in order to secure domestic support for ratification.

If support for the Watercourses Convention remains low in five to ten years, it is likely that one of the three limitations explored above is responsible. That would be major cause for concern. Lack of support from UN member states due to a change in positions since 1997 may suggest that the Watercourses Convention, as constituted, does not address the needs of watercourse states, or insufficiently reconciles inherent tensions between upstream and downstream states.²³⁹ Alternatively, further development of, and support for, the UNECE Water Convention in contrast with a lack of support for the Watercourses Convention may signal that the UNECE Water Convention is the vehicle best constructed to promote cooperation over water resources. The same can be said for the Draft Articles on the Law of Transboundary Aquifers—if states are enthusiastically promoting the Draft Articles, a preference for sovereign management of groundwater may be implied. Finally, if the right to an equitable use of water resources and the obligation not to cause significant harm continue to incite controversy and prove incapable of providing states in conflict over water resources with the legal principles needed to cooperate, the accuracy with which the Watercourses Convention reflects international water law should be called into question. Alternatively, the tools provided by international water law to promote watercourse agreements should be revisited. And, of course, some combination of all three limitations may be responsible if the Watercourses Convention does not receive widespread support following entry into force. Regardless of the cause, if the Watercourses Convention does not receive the threshold level of support necessary to establish a consensus framework for international water resources management, it will be prudent to monitor and revisit the limitations. There is a dire need for a treaty capable of articulating and upholding international water law in a manner that promotes cooperation between watercourse states. If the Watercourses Convention is not capable of doing so, the international community should evaluate the Watercourses Convention's viability, as well as the foundations of international water law itself.

Thankfully, that time has not yet come. Instead, the Watercourses Convention has been thrust into a new era, enjoying the promise and momentum that comes along with entry into force. While imperfect, the Watercourses Convention provides states with a

239. The UN Watercourses Convention does not, for example, address climate change or other hydrological dynamics that may necessitate review of existing agreements. The need for mechanisms capable of addressing climate change has been gaining increased attention since 1997. See Tim Stephens, *Reimagining International Water Law*, 71 MD. L. REV. 20, 22–24 (2012).

basic framework with which to structure more fact-specific regional agreements. Without a treaty of any kind, states are relying on interpretations of customary international law to legitimize their claims, while looking to other treaty regimes, like the UNECE Water Convention and the Draft Articles, to understand their rights and obligations. A binding agreement should provide a more concrete basis with which to cooperate. While the Watercourses Convention is not a panacea for the multitude of water management challenges the international community faces, and will continue to face in the future, entry into force marks a significant milestone. Despite its limitations, the Watercourses Convention is at the heart of the corpus of international water law, and will inevitably shape its future.