Compliance with UN Watercourses Convention: Half Full or Half Empty?

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The United Nations Watercourses Convention (UNWC) is a broad legal agreement that governs the usage, management and protection of international watercourses between states. Established in May 1997, 106 member states of the UN explicitly supported this convention. Only China, Turkey and Burundi voted against the agreement (Wouters 1999, 27). UNWC has sought to achieve three objectives. First, as an overarching legal instrument, it states the responsibilities and rights of all member states to ensure cooperation between member states over transboundary watercourses. Second, it provides guidance for the subsequent formulation of other bilateral and regional agreements that will govern transboundary water cooperation. Third, it strives to create an equal platform for states to resolve internecine issues peacefully and jointly share the benefits of international watercourses (Loures et al. 2009, 10).

This essay is split into four parts. In the first quarter, I will address the criticism that rule indeterminacy in the UNWC hinders the fostering of compliance amongst member states. Second, the neo-realist stance against the UNWC's effectiveness will be countered with a discussion about the role of legal norms in enforcing provisions. Third, despite the seemingly conflicting language in Articles 5 and 7, my argument will underscore that the UNWC does not institutionalise competition. Instead, the open-ended nature of the language neutralises the apparently divergent objectives outlined in Articles 5 and 7. Fourth, while the success of other regional legal mechanisms like the Indus Water treaty will be acknowledged, it should not underplay the value that the UNWC has had in codifying customary international law and filling pivotal legal gaps in the management of transboundary watercourses. In each one of these four parts, the claims made by the critics to my main argument will be stated prior to providing the responses.

Rule Indeterminacy – A Necessary Evil?

First, the rule indeterminacy and ambiguity over language found in the UNWC might not foster compliance, making inter-state conflict more likely. Rule determinacy in the text of multilateral agreements refers to the capacity of legal language to be clear and transparent with minimal room for interpretive discretion (Franck 1998, 721). The specificity of the text would consolidate the legality of an agreement and provide member states with precise guidelines to comply with (Füller 1964, 63). Article 5 mandates the "equitable and reasonable" usage of watercourses by member states. Nevertheless, there is no clear stipulation of what "equitable" or "reasonable" refers to (Rieu-Clarke and Lopez 2013, 86). In Article 7, states are advised to "exercise due diligence to utilise an international watercourse in such a way as not to cause significant harm to other watercourse states" (UN International Watercourses Convention 1997, Article 7(2)). Open-ended terms like "due diligence" and "significant harm" give member states wide interpretive discretion. Essentially, a riparian state can damage the geopolitical interests of its neighbouring countries and justify its actions on the grounds that "due diligence" was exercised to prevent "significant harm" (Wouters 1999, 19). Thus, without these detailed provisions, the UNWC will struggle to enforce compliance due to two reasons. First, member states cannot consistently and intelligibly determine what they are entitled to do. Second, member states and other governing bodies will need to exercise difficult and possibly contradictory judgement calls on which actions breach international law (Sand 1992, 9). Thus, since there are underlying challenges in complying with the provisions of the UNWC, it does not make inter-state conflict less likely. Conversely, the ambiguous language provides potential aggressors more diplomatic space to contravene international law without any tangible consequences.

Nevertheless, I would like to respond to the criticism of UNWC by offering two rebuttals. Elastic rules might be a requisite trade-off for states to foster consensus (Rieu-Clarke and Lopez 2013, 87). The consolidation of this consensus can potentially limit the possibilities of inter-state conflicts in the long-run. In this regard, critics of the UNWC might be committing the Nirvana or perfect solution fallacy. The UNWC is not a perfect solution or panacea that can resolve the complex issues underpinning transboundary water cooperation. Due to its inherent complexity, the final text of the agreement has to include ambiguous terms like "due diligence", "significant harm", "equitable" and "reasonable". This helps to resolve seemingly irreconcilable differences between member states and accommodate competing interests. While this is not perfect, it helps to bridge differences between the divergent interests of downstream and upstream riparian states. Thus, while the UNWC's text might not be detailed, its ambiguity provides much-needed flexibility to resolve intractable issues in a case by case basis, thereby reducing the eventuality of inter-state conflicts (Franck 1998, 724).

Furthermore, even if there is textual indeterminacy, the entrenched interpretive processes within the UNWC's framework enable states to have the necessary discursive platforms to interact, achieve consensus and mutually comply with the provisions. Articles 3 and 4 within the Convention specify that countries must work collectively by engaging each other before applying or concluding any watercourse activity that could potentially affect other member states (UN International Watercourses Convention 1997, Articles 3 and 4). Similarly, Articles 8 and 24 reinforce each other by recommending states to establish "joint mechanisms or commissions" (UN International Watercourses Convention 1997, Article 8(2)) that foster cooperation. Hence, although textual indeterminacy might be a drawback, compliance can still be fostered by enshrining the importance of consultative discussions in creating mutually agreeable solutions (Rieu-Clarke and Lopez 2013, 87-88).

Normative Enforcement – A New Normal?

Second, I will discuss the enforcement capabilities of the UNWC. Before providing my support for the enforcement mechanisms within the UNWC, it is crucial to consider a criticism from neo-realists. Neo-realists would argue that the UNWC does little to make inter-state conflict less likely since it is not a legally binding agreement. While more than 100 member states are signatories, non-compliance has primarily reputational consequences only. Therefore, the UNWC, like other institutions and agreements are not useful in fostering cooperation (Mearsheimer 1994/95, 7). Furthermore, since the convention has not been ratified by the minimum number of 35 states, there is no central authority to impose a code of conduct (Grieco 1988, 497). Although there is a Dispute Settlement Mechanism that could facilitate conflict mediation, conciliation and the submission of disputes to arbitration by the International Court of Justice, neo-realists would posit that larger states could evade institutional regulations by either not voting in favour of the convention or using the decisive option of force. For instance, China, as an upstream state wanting to advance its interests in the Upper Mekong Basin voted against the Convention. The Chinese Permanent Representative to the United Nations criticised the language in the convention for institutionalising the "imbalance between rights and obligations of the upstream and downstream states" (United Nations General Assembly Press Release 1997). As the state positioned at the acme of the Mekong River Basin, China controls more than 15% of the total river volume discharge. More importantly, China has clout – political, economic, military – over other downstream states in the Mekong region like Laos, Myanmar, Cambodia and Vietnam (Onishi 2007, 526). China could thus be characterised as a hydrohegemon since it has predominant geopolitical power combined with an advantageous riparian position (Zeitoun and Warner 2006, 450). Thus, China is well placed to evade any legal stipulations placed on it by using force unilaterally to settle disputes. Therefore, critics of the UNWC could argue that the legal instrument, due to its limited enforcement capabilities, cannot be effective in containing inter-state conflict.

Nevertheless, a more constructivist approach that focuses on the creation, proliferation and consolidation of legal norms could explain how the UNWC might reduce the probability of inter-state conflict. The fundamental difference between neo-realists and constructivists is that the former narrowly view international law as a static entity that will struggle to resolve the ineluctable issues of an anarchic international system (Brunee and Toope 2002, 113). In contrast, constructivists argue that legal instruments like the UNWC are evolving mechanisms which are conceived through interactive patterns of mutual understanding between member states (Ruggie 1998, 869-70). The UNWC has enshrined legal norms like "equitable and reasonable" and "no-harm" principles through Articles 5 and 7. In the long-run, with increased rhetorical iteration by member states, these legal principles will be strengthened further.

However, it is only through norm proliferation that the legal principles can gain widespread traction. Since the establishment of UNWC, the legal principles of the UNWC have been promulgated through many treaties including the Nile River Basin Cooperative Framework Agreement, Orange-Senqu River Commission Agreement, the Niger Basin Water Charter, Volta Basin Commission and Revised Protocol on Shared Watercourses by the South African Development Commission. Many of these conventions have included key principles found in the UNWC: equitable and reasonable usage of international watercourses, no significant harm to neighbouring states, joint mechanisms to share data and consult other member states (African Minister's Council on Water Executive Committee Meeting Information Briefing 2010, 10). Finally, the legal norms in the UNWC gained significant credibility and were consolidated when it was mentioned implicitly during the Gabcikovo-Nagymoros case between Hungary and Slovakia in September 1997. During the International Court of Justice (ICJ) ruling, it was stated that the latter due to its unilateral actions contravened international law by preventing Hungary from having its equitable and reasonable share of the Danube watercourse's resources. Although there was no explicit reference to the no-harm principle, the emphasis ICJ placed on "equitable and reasonable" use of watercourses strengthened UNWC's legal norms (International Court of Justice 1997, Paragraph 85). As a consequence, constructivists could respond to neo-realists by stating that inter-state conflict can be made less likely through the creation, proliferation and consolidation of legal norms.

Articles 5 & 7 – Conflictual or Complementary?

Third, even if constructivists argue that legal norms are useful in preventing inter-state conflict, critics could contend that the presence of Articles 5 and 7 institutionalise competition between upper and lower riparian states. Throughout the negotiation process, there were conflicts over which of these two legal norms should take precedence if there is a scarcity of resources to meet the requirements of member states. Article 5, due to its focus on the reasonable utilisation of watercourses, was broadly supported by upper riparian states. In contrast, lower riparian states endorsed the no harm principle in Article 7. This was mainly to protect their interests from the watercourse activities of upper riparian states (Salman 2007, 8). The tension between these two Articles institutionalised and cemented the competitive dynamic between the Nile riparian states. For instance, Rwanda and Ethiopia asserted the primacy of the "reasonable and equitable" utilisation principle. Egypt opposed this on the grounds that the principles espoused in Articles 5 and 7 could not have equal importance. Instead, Egypt stressed that the predominant status of the no harm principle was at the crux of any transboundary legal arrangement (Brunnee and Toope 2002, 149-150). The lack of consensus on this issue resulted in some upper and lower riparian states voting against the convention or abstaining. Upper riparian states like Burundi, China and Turkey voted against the convention. Some others like Tanzania and Mali abstained as well (Abseno 2013, 196). Meanwhile, downstream states like Pakistan and Peru also disassociated from the convention by abstaining, citing that their interests were compromised by Article 5 (Salman 2007, 9). Therefore, the UNWC ensconces the lack of consensus on this pivotal issue and institutionalises competition between conflicting member states.

I will respond to the criticism above by stating that the lack of consensus could have a counter effect of potentially creating a cooperative, instead of competitive dynamic between member states. If neither Article 5 nor 7 has pre-eminence, the competing rights of lower and upper riparian states could be neutralised. Since both upstream and downstream states cannot advance their interests convincingly through the UNWC, there will be sufficient ambiguity for states to consult, negotiate and find a diplomatic solution to transboundary issues. Conversely, less ambiguous bilateral treaties like the Egyptian-Sudan agreement of 1959 forced riparian states in the Nile to accept unreasonable propositions. For example, the Egyptian-Sudan agreement of 1959 stipulated that the Nile River's water flow should be directed towards two out of the ten riparian states. This caused discontentment amongst Nile states and crystallised their animosity towards each other (Brunnee and Toope 2002, 147-148). In contrast, after the establishment of the UNWC, the Nile Basin Initiative (NBI) has taken the lead to include the principles of Articles 5 and 7 in their agreement by building on the no significant harm and equitable utilisation principles (Brunee and Toope 2002, 152). Therefore, the lack of agreement on whether Article 5 or 7 should take a pre-dominant position can be useful in reducing inter-state conflict since it enables states to engage each other diplomatically and foster their own regional consensus.

UN Watercourses Convention – Refinement or Revolution?

Fourth, even if the UNWC is a useful mechanism, critics will caution against exaggerating its importance. Even prior to the UNWC, there were successful watercourses agreements, even amongst states with historical animosities like India and Pakistan. For example, the 1960 Indus Water treaty was a landmark agreement that has endured the test of time. With the help of a non-partisan third party, the Indus Water treaty is the cornerstone of transboundary water cooperation despite the incessant military conflicts between the member states over the disputed status of Kashmir. Similarly, water agreements between other South Asian states like Nepal and Bangladesh have also sustained despite the occasional flashpoint (Elhance 2000, 216). Therefore, it could be pointed out that the UNWC does not offer a path breaking alternative. Instead, it is only a supplementary and superfluous feature that adds to the existing mechanisms. Consequently, its importance in making inter-state conflict less likely should not be overplayed.

Still, I have two responses to the aforementioned claim. First, transboundary water cooperation prior to the UNWC was primarily and almost completely based on customary international law. Customary international law focuses on highlighting the legal norms and customs that underpin the legal regime. Nevertheless, without codification into a treaty regime like the UNWC, customary international law has been severely criticised of inconsistency in managing transboundary water disputes. While the UNWC's success also depends on the proliferation and consolidation of legal norms, it minimally enshrines a common transboundary legal framework that informs all member states of their entitlements and responsibilities (Loures et al. 2013, 51-52). So, the codification of customary international law into a more applicable transboundary watercourses legal regime could make inter-state conflict less likely.

Additionally, while the evidence in South Asia is positive, there are still significant gaps in the legal governance of transboundary watercourses issues in other parts of the world including Africa. A neo-liberal institutionalist would argue that the UNWC is a useful legal regime that creates "principles, norms, rules, and decision-making procedures around which actors' expectations converge" (Krasner 1982, 186). Most resources passing through transboundary watercourses in Africa have limited legal protection. In a region rife with ethnic conflict and climate change related challenges, the paucity of transboundary watercourses legal mechanisms could further aggravate inter-state conflict. Therefore, in the African context, the UNWC with other regional agreements like the SADC can increase inter-governmental awareness of transboundary water cooperation. This integrated approach with regional bodies like the East African Community (EAC) and Economic Community of West African States (ECOWAS) can encourage useful dialogue about transboundary watercourses management (African Minister's Council on Water Executive Committee Meeting Information Briefing 2010, 13). This process of collaborating, consulting and sharing data amongst regional partners will be undergirded by the UNWC. Therefore, the UNWC provides the universal legal ballast that can potentially reduce the possibility of inter-state conflict.

Conclusion

To conclude, this essay has through a four part process explained how the UNWC can minimise the risks of inter-state conflict over water resources. The essay began with a justification of how rule indeterminacy was a necessary trade-off to ensure the successful completion of UNWC. Additionally, the interpretive processes entrenched in the UNWC allowed for textual ambiguities to be resolved through joint mechanisms. Second, the importance of legal norms creation, proliferation and consolidation was highlighted in response to claims made by neo-realists. Third, it was clarified that Articles 5 and 7 worked in tandem to balance out the competing interests of upper and lower riparian states. Finally, while recognising the merits of regional treaties, I highlighted the special role played by the UNWC in codifying customary international law and filling the legal lacuna in African transboundary watercourses management. Considering all these arguments, it could be concluded that the UNWC makes inter-state conflicts less likely.

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