



# Book Unit 2 - United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses

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Course: Introductory Course to the International Legal Framework on Freshwater Resources

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# 1. Introduction

The International Watercourses Convention is based on preparatory work done by the United Nations International Law Commission (“ILC”), whose objective is the progressive development of international law and its codification. The ILC’s work on international watercourses was based on a wide variety of sources, including treaties and other forms of state practice, and the work of international organizations. One of these organizations, the International Law Association (“ILA”), adopted an unofficial but influential draft in 1966 entitled the Helsinki Rules on the Uses of the Waters of International Rivers, which helped to clarify the law in the field.

The General Assembly mandated in 1970 to “take up the study of the law of international watercourses with a view to its progressive development and codification.” The ILC adopted a complete set of draft articles in 1994, which was submitted to a Working Group for its finalization in the form of a multilateral agreement. As a result of this process, the International Watercourses Convention was adopted by the General Assembly on 21 May 1997, as an annex to Resolution 51/229. The Convention entered into force in August 2015.

## Customary Law

The International Watercourses Convention contains a number of rules that reflect customary international law, which is binding on all states. Of these rules, the three most fundamental include:

- Obligation to utilize an international watercourse in an equitable and reasonable manner;
- Duty to prevent significant harm to other riparian states; and
- Obligation to provide prior notification of planned measures that might affect other states sharing a watercourse.

The fundamental nature of the principle of equitable utilization was underscored by the International Court of Justice (ICJ) in its 1997 judgment in the *Gabcikovo-Nagymaros Case*. In that decision, the ICJ referred to what it called a state's "basic right to an equitable and reasonable sharing of the resources of an international watercourse".

Two other obligations may be added to the three just mentioned:

- The emerging substantive obligation to protect international watercourses and their ecosystems against degradation; and
- The procedural duty of riparian states to cooperate with each other in their relations concerning shared freshwater resources, a duty that encompasses a variety of forms of cooperation ranging from sharing of data and information to cooperation in the joint management of shared water resources.

Considering the authoritative character of the International Watercourses Convention as a codification of basic principles of international watercourse law, states sharing freshwater resources have referred it as a source of standards governing their relations and as a model for ad hoc agreements regulating specific water bodies.

## 2. Definitions

The International Watercourses Convention defines the term “watercourse” (article 2) as *“a system of surface waters and ground waters constituting by virtue of their physical relationship a unitary whole and normally flowing into a common terminus”* and an “international watercourse” as a watercourse *“parts of which are situated in different States.”*

This definition takes into consideration the reality of the hydrological cycle and suggests the need for states to take into account the physical unity of interconnected surface water and groundwater when managing shared freshwater resources. However it does not apply, strictly speaking, to groundwater that is not connected in some way with surface water, so-called “confined” groundwater.

Nevertheless, the ILC annexed a Resolution on Confined Transboundary Groundwater to the set of draft articles it adopted in 1994, recommending that states be *“guided by the principles contained in the draft articles”* in regulating confined transboundary groundwater. Subsequently the ILC took up the study of the law applicable and to confined transboundary groundwater.

### 3. Principle of equitable utilization and participation

Part II of the International Watercourses Convention contains a number of general principles. The first of these principles is the **principle of equitable utilization and participation** (article 5), which provides:

“1. Watercourse States shall in their respective territories utilize an international watercourse in an equitable and reasonable manner. In particular, an international watercourse shall be used and developed by watercourse States with a view to attaining optimal and sustainable utilization thereof and benefits therefrom, taking into account the interests of the watercourse States concerned, consistent with adequate protection of the watercourse.

2. Watercourse States shall participate in the use, development and protection of an international watercourse in an equitable and reasonable manner. Such participation includes both the right to utilize the watercourse and the duty to cooperate in the protection and development thereof, as provided in the present Convention.”

The principle of equitable utilization, as set forth above, is chiefly concerned with apportionment, or allocation, of water between states sharing an international watercourse. It therefore relates primarily to water use, and thus to water quantity, rather than to water quality. However, as is clear from that text that equitable utilization incorporates the concepts of sustainable use and adequate protection of the watercourse. The ensuing paragraph expresses the duty of states to participate equitably in the use, development and protection of an international watercourse.

## 4. Factors relevant to equitable and reasonable utilisation

The International Watercourses Convention sets forth (article 6) a non-exhaustive list of factors to be taken into account by a state to ensure that its utilization of an international watercourse is equitable and reasonable. These factors include:

- Geographic, hydrographic, hydrological, climatic, ecological and other factors of a natural character;
- Social and economic needs of the watercourse states concerned;
- Population dependent on the watercourse in each watercourse state;
- Effects of the use or uses of the watercourses in one watercourse state on other watercourse states;
- Existing and potential uses of the watercourse;
- Conservation, protection, development and economy of use of the water resources of the watercourse and the costs of measures taken to that effect; and
- Availability of alternatives, of comparable value, to a particular planned or existing use.

The weight to be given to each factor “is to be determined by its importance in comparison with that of other relevant factors”. In determining what is a reasonable and equitable use “all relevant factors are to be considered together and a conclusion reached on the basis of the whole.”

## 5. Obligation Not to Cause Significant Harm

Another fundamental principle governing states' conduct in relation to international watercourses is the obligation not to cause significant harm, set forth in article 7 of the Convention. According to paragraph 1 of that provision, states sharing a watercourse must "in utilizing an international watercourse in their territories, take all appropriate measures to prevent the causing of significant harm to other watercourse States." Paragraph 2 provides that:

"Where significant harm nevertheless is caused to another watercourse State, the States whose use causes such harm shall, in the absence of agreement to such use, take all appropriate measures...to eliminate or mitigate such harm and, where appropriate, to discuss the question of compensation

## 6. General Obligation to Cooperate

The cornerstone of relations between states sharing water resources is cooperation with regard to specific watercourses. This is captured in article 8, according to which states sharing a watercourse must “cooperate on the basis of sovereign equality, territorial integrity, mutual benefit and good faith in order to attain optimal utilization and adequate protection of an international watercourse”, and “may consider the establishment of joint mechanisms or commissions...to facilitate cooperation on relevant measures and procedures in the light of experience gained through cooperation in existing joint mechanisms and commissions in various regions.”

## 7. Regular Exchange of Data and Information

Another form of cooperation is provided for in article 9, according to which states sharing a watercourse should regularly “*exchange readily available data and information on the condition of the watercourse*” and related forecasts, in particular those relating to the hydrological, meteorological, hydrogeological and ecological nature of the watercourse, including its water quality.

If the required information is not readily available, the requested state should “*employ its best efforts to comply with the request,*” although it may condition compliance upon payment of the reasonable costs of collecting and processing the data or information.

## 8. Different Kinds of Uses

The conventions established (article 10) that none of the different categories of uses of the watercourses (e.g., navigation, irrigation, hydroelectric power production, industrial uses and so on) has priority over other kinds of uses in the absence of an agreement or custom to the contrary and it provides that, whenever different uses of an international watercourse conflict with each other, such conflict “*shall be resolved with reference to [the principles of equitable and reasonable utilization and participation and obligation not to cause significant harm], with special regard being given to the requirements of vital human needs.*”

According to a “statement of understanding” adopted by the states that negotiated the UN Convention, “ in determining ‘vital human needs,’ special attention is to be paid to providing sufficient water to sustain human life, including both drinking water and water required for production of food in order to prevent starvation.”

## 9. Planned measures

According to the International Watercourses Convention, a riparian state must provide timely notification to other watercourse States of planned measures which may have a significant adverse effect upon them.

These measures may include, for instance, new irrigation schemes, dams, plants discharging their waste into the stream, etc. to the other riparian states. This will allow the other riparian states to synchronize their existing uses with the new use or to determine whether the new use will cause them harm or will be inequitable. In the latter case, the states concerned will have an opportunity to reach an appropriate resolution before the plans are implemented and it becomes more difficult to do so.

Articles 11-19 of the Convention establish detailed notification procedures for such cases.

## 10. Protection, Preservation and Management

The International Watercourses Convention contains a general obligation and several specific ones relating to the protection and preservation of international watercourses.

The general obligation, set forth in article 20, provides as follows: “*Watercourse States shall, individually and, where appropriate, jointly, protect and preserve the ecosystems of international watercourses*”.

The specific obligations related to pollution, alien species, and the marine environment include that States must “*prevent, reduce and control the pollution of an international watercourse that may cause significant harm to other watercourse States or to their environment, including harm to human health or safety, to the use of the waters for any beneficial purpose or to the living resources of the watercourse...*” (article 21). This may be seen as a specific application of the general obligation to prevent harm reflected in article 7. Furthermore, states are to “take all measures necessary to prevent the introduction of species, alien or new, into international watercourses” (article 22) and to take all measures with respect to an international watercourse that are necessary to protect and preserve the marine environment, including estuaries...” (article 23).

## 11. Harmful Conditions and Emergency Situations

The International Watercourses Convention also contains provisions on the prevention and mitigation of harmful conditions and emergency situations (articles 27 and 28 respectively), dealing with the prevention of such harmful conditions as floods, ice hazards, water-borne diseases, erosion, salt-water intrusion, drought and desertification, and with emergency situations that may be brought on by such phenomena as floods, landslides and industrial accidents.