

Environment, Politics and Development Working Paper Series

Department of Geography, King's College London

Year 2013

Paper # 53

**Transboundary Water Interactions and the UN Watercourses
Convention: Allocating Waters and Implementing Principles**

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30. Transboundary Water Interactions and the UN Watercourses Convention: Allocating Waters and Implementing Principles¹

Naho Mirumachi, Mark Zeitoun & Jeroen Warner

[a]Introduction

In the last couple of decades, institution-building for the management and governance of international transboundary waters has become a prominent agenda item both at the basin and global level. There has been an increase in the number of international agreements over shared waters.² Global water policy initiatives, including international organizations such as the Global Water Partnership and fora such as the World Water Week, have also increased in number,³ with many focusing on transboundary issues. In the process of institution-building, many discussions and deliberations between basin states and international organizations refer to legal principles. The purpose of this chapter is to explore and discuss the political context in which legal principles – such as those enshrined in the 1997 UN Watercourses Convention (UNWC) – are acknowledged and implemented in the allocation and management of shared waters. The chapter argues that an assessment of how such principles may be used for improved water resources management is possible only through an understanding of the context and nature of transboundary interactions between sovereign basin states.

The chapter first clarifies base assumptions, taking the perspective that legal principles inform the institutional structure of transboundary water management and governance through political processes.

¹ This chapter draws upon previous works by the authors, notably Zeitoun M and Mirumachi N, 'Transboundary Water Interaction I: Reconsidering Conflict and Cooperation' (2008) 8 *International Environmental Agreements: Politics, Law and Economics* 297; and Zeitoun M, Mirumachi N and Warner J, 'Transboundary Water Interaction II: Soft Power Underlying Conflict and Cooperation' (2011) 11 *International Environmental Agreements: Politics, Law and Economics* 159.

² Gerlak AK and Grant KA, 'The Correlates of Cooperative Institutions for International Rivers' in Volgy TJ and others (eds), *Mapping the New World Order* (Wiley-Blackwell Publishers 2009).

³ Varady RG and others, 'Strengthening Global Water Initiatives' (2008) 50(2) *Environment: Science and Policy for Sustainable Development* 18.

These processes help explain why legal principles are effective or ineffective. In this regard, the concept of transboundary water interaction as one of coexisting conflict and cooperation is introduced. Second, power asymmetry and ‘hydro-hegemony’ are introduced as a key lens to help interpret how legal frameworks, such as that of the UNWC, are subject to deliberations in which ‘soft’ power is utilized sometimes alongside ‘harder’, coercive power. Third, in such asymmetric political conditions, the role of UNWC principles is examined using examples from the Ganges-Brahmaputra-Meghna river system, Nile and Euphrates-Tigris river basins. The chapter concludes with a summary argument and policy implications, notably the challenge of applying UNWC principles at the basin level.

[a]Transboundary water interaction at the interface of international politics and law

Legal frameworks, such as the UNWC, are part of the institutional structure of transboundary water resources management and governance between basin states. Basin-wide agreements for river basin management, bilateral agreements on specific water resources development projects and river basin organizations also make up the institutional structure. A constructivist perspective of international relations sees this institutional structure as constructed by actors such as basin states and international organizations focusing on water resources governance, as well as donor agencies funding river basin management or development projects. This institutional structure can in turn influence the kinds of actions taken by the states.⁴ Reus-Smit has argued that examining the interface of international politics and international law is important to understand how legal principles form institutions.⁵ With this argument underpinning this chapter’s analysis, the main focus is to examine not the legal framework or the individual agreements between basin states but the transboundary water interactions that establish and shape the institutions.

Thanks to the ground-breaking development of the Transboundary Freshwater Dispute Database,⁶ studies have identified and analysed specific events relating to water allocation, development and

⁴ Finnemore MJ and Toope S, ‘Alternatives to “Legalization”’: Richer Views of Law and Politics (2001) 55 *International Organization* 743.

⁵ Reus-Smit C, ‘The Politics of International Law’ in Reus-Smit C (ed), *The Politics of International Law* (Cambridge University Press 2004).

⁶ ‘Transboundary Freshwater Dispute Database’ (*Oregon State University*) <www.transboundarywaters.orst.edu/database> accessed 19 Apr 2012.

management in international river basins around the world. However, if we are to understand the interface of politics and legal institutions, focus on the political process of deliberation and negotiation, or on transboundary water interaction, is the crucial next step.

As Zeitoun and Mirumachi pointed out, interaction between states over international transboundary river basins has typically been described as one of either conflict *or* cooperation.⁷ Factors that induce acute conflict or cooperation have been examined. For example, quantitative water scarcity has often been associated with conflict, as seen in the media hype of ‘water wars’.⁸ However, a broader perspective on the factors of conflict or cooperation has been discussed, including geographical conditions, economic interdependency and the type of political regime.⁹ Moreover, policy-oriented studies have indicated that different types of benefits and disbenefits from the use and management of shared waters can lead to conflict and cooperation.¹⁰ However, the conceptual foundation of these studies relies on a linear juxtaposition of conflict and cooperation as two main states of interaction over international transboundary waters. Put differently, conflict and cooperation are seen as opposite ends of a linear scale, which leads to the status of interaction over international transboundary waters being described as either conflictive or cooperative, or more conflictive than cooperative (and vice versa). For example, Sadoff and Grey proposed a linear progression of the state of basins from unilateral action to coordination, to collaboration and ultimately to joint action.¹¹ The Transboundary Freshwater Dispute Database also uses a linear 15 point scale to describe events relating to water in shared basins from ‘formal declaration of war’ to ‘voluntary unification into one nation’.¹²

⁷ Zeitoun and Mirumachi 2008 (n 1) at 298.

⁸ Vidal J, ‘Water Wars Loom as Demand Grows’ (*The Guardian*, 26 Jun 2010)

⁹ Song J and Whittington D, ‘Why Have Some Countries on International Rivers Been Successful Negotiating Treaties? A Global Perspective’ (2004) 40 *Water Resources Research* W05S06; Gerlak and Grant (n 2); Tir J and Ackerman JT, ‘Politics of Formalized River Cooperation’ (2009) 46 *Journal of Peace Research* 623.

¹⁰ Sadoff CW and Grey D, ‘Beyond the River: The Benefits of Cooperation on International Rivers’ (2002) 4 *Water Policy* 389; Phillips D and others, *Trans-boundary Water Cooperation as a Tool for Conflict Prevention and for Broader Benefit-Sharing: Prepared for the Ministry for Foreign Affairs, Sweden* (EGDI Secretariat, Ministry for Foreign Affairs 2006).

¹¹ Sadoff CW and Grey D, ‘Cooperation on International Rivers: A Continuum for Securing and Sharing Benefits’ (2005) 30 *Water International* 420.

¹² Yoffe SB, Wolf AT and Giordano M, ‘Conflict and Cooperation over International Freshwater Resources: Indicators of Basins at Risk’ (2003) 39 *Journal of the American Water Resources Association* 1109 at 1112.

There are also studies which attempt to provide more nuance to this conceptualization. For example, Zawahri added a third category – ‘unstable cooperation’ – as one between conflict and cooperation to exemplify how negotiations over water resources may lead to adverse political situations.¹³ To illustrate that interstate cooperation is a means to ends of issues beyond environmental ones (not to mention water allocation), basin states may engage in ‘coerced cooperation’¹⁴ or ‘tactical functional cooperation’.¹⁵

While these analyses begin to unpack the politics of water resources management at the international level, the linear conceptualization of conflict and cooperation poses two main analytical pitfalls, with subsequent implications for policy particularly when concerned about the interface between politics and international law. The first analytical pitfall of this conceptualization is that the scale aggregates environmental conditions, political relationships and histories, economic capacities, geographical and hydrological features and institutions into incremental measurements. Such aggregation may oversimplify the more complex reality, and importantly, fall short of reflecting how negotiations and deliberations over transboundary water resources do not progress in a linear fashion, and certainly not equally on all issues.

The second pitfall of the ‘either/or’ approach is the inherent normative assumption about conflict and cooperation. The conflict-cooperation scale associates the state of conflict as undesirable and the state of cooperation as desirable. By implicitly assuming that cooperation is the sole target, or in some way ‘better’ than non-cooperation, analysis obfuscates whether the cooperative arrangement is actually improving water governance¹⁶ and/or the stated goal of the arrangement. The ‘either/or’ conceptualization may evaluate the legal framework as a successful output, but not scrutinize whether

¹³ Zawahri NA, ‘Capturing the Nature of Cooperation, Unstable Cooperation, and Conflict over International Rivers: The Story of the Indus, Yarmouk, Euphrates, and Tigris Rivers’ (2008) 8 *International Journal of Global Environmental Issues* 286.

¹⁴ Weintal E, *State Making and Environmental Cooperation: Linking Domestic and International Politics in Central Asia* (MIT Press 2002) at 35.

¹⁵ Sosland JK, *Cooperating Rivals: The Riparian Politics of the Jordan River Basin* (State University of New York Press 2007) at 9.

¹⁶ Kistin EJ and Phillips D, ‘A Critique of Existing Agreements on Transboundary Waters, and Proposals for Creating Effective Cooperation between Co-riparians’ (Third International Workshop on Hydro-Hegemony, London, 12-13 May 2007).

it is effectively contributing to the sustainable management of shared waters, obscuring the understanding of the interface between politics and institutional structures.

The policy implication resulting from use of this conflict-cooperation scale should be considered. Policy derived from the ‘either/or’ analysis may only focus on (a) addressing conflict without specifying what cooperation would entail for the specific basin, or (b) supporting cooperative initiatives without addressing the issues that may be the source of conflict and tensions. For example, the United Nations Development Programme (UNDP) published a report that asserted the importance of ‘promot[ing] and support[ing] cooperation of any sort, no matter how slight’.¹⁷ This approach risks overlooking the fundamental reason water resources have come on to the international agenda between the basin states. Thus, even if policy promotes the principles of the UNWC, such as equitable and reasonable utilization, no significant harm and prior notification, as a guideline for cooperation, discussion on why and how these principles will address the fundamental issues of water allocation and sustainable water resources use in a specific project or specific case may be side-stepped. As such, a policy initiative that undermines the political context in which cooperation or conflict resolution is promoted does not guarantee optimal, improved water use and allocation. It may, in fact, simply serve to delay or perpetuate the conflict – as in the Nile river basin, as we shall see.

The interface of international politics and international law over shared waters may be more usefully examined through the understanding of *coexisting conflict and cooperation*. Within transboundary water interaction, conflict and cooperation coexist in differing intensities. For example, there can be interstate interaction where low intensity conflict coexists alongside high intensity conflict, as in a case where there is an international river basin agreement in place but dispute over parameters of a particular river development project. Conflict does not exclude cooperation and vice versa. While it is not within the scope of this chapter to describe them in detail, new approaches have been proposed to examine coexisting conflict and cooperation. The Transboundary Waters Interaction NexuS (TWINS) provides a historical analysis of the process in which basin states have engaged in

¹⁷ UNDP, *Human Development Report 2006: Beyond Scarcity: Power, Poverty and the Global Water Crisis* (Palgrave Macmillan 2006) at 228.

both conflict and cooperation over time, thus painting a more nuanced and broader picture of transboundary water interactions within a basin.¹⁸ The perspective of coexisting conflict and cooperation helps analyse situations where institution-building efforts are made but without much change in the way water is allocated.

[a]Hydro-hegemony in transboundary water interactions

The focus on transboundary water interaction between states reveals that the political process of developing an institutional structure for water resources management and governance is influenced by actor-specific characteristics. While material conditions such as physical scarcity of water indeed matter, the types of rules and norms (that is, the institutions) that are deliberated, negotiated and accepted are shaped by the basin states themselves. Zeitoun and Warner have argued that power plays an important role in this political process.¹⁹ The authors used the term 'hydro-hegemony' to show that different types of power can be used to determine the process and outcomes of negotiations regarding water resources management and governance. Within basins where there are clear hegemonic relationships,²⁰ a state that has relative power over others, or 'the hydro-hegemon', can enable preferential water allocation through three main strategies: resource capture, integration and containment. The ways in which these strategies are achieved is through a combination of riparian position, capacity for hydraulic development and, importantly, different types of power: coercive (or 'hard') power, bargaining (i.e., agenda-setting power) and ideational (i.e., power over ideas). It is this last aspect of power in particular that concerns this chapter.

¹⁸ See Sojamo S, 'Illustrating Co-Existing Conflict and Cooperation in the Aral Sea Basin with TWINS Approach' in Rahaman MM and Varis O (eds), *Central Asian Waters: Social, Economic, Environmental and Governance Puzzle* (Water & Development Publications, Helsinki University of Technology 2008); Zeitoun and Mirumachi 2008 (n 1); Warner J and van Buuren A, 'Multi-Stakeholder Learning and Fighting on the River Scheldt' (2009) 14 *International Negotiation* 419; Allan JA and Mirumachi N, 'Why Negotiate? Asymmetric Endowments, Asymmetric Power and the Invisible Nexus of Water, Trade and Power that Brings Apparent Water Security' in Earle A, Jägerskog A and Öjendal J (eds), *Transboundary Water Management: Principles and Practice* (Earthscan 2010); Mirumachi N, 'Study of Conflict and Cooperation in International Transboundary River Basins: The TWINS Framework' (PhD thesis, King's College London 2010).

¹⁹ Zeitoun, Mark and Jeroen Warner, 'Hydro-hegemony: A Framework for Analysis of Trans-boundary Water Conflicts' (2006) 8 *Water Policy* 435.

²⁰ As opposed to contexts where there is considerably more parity on paper and in practice, such as the EU, or contexts where formal parity is not even pretended, such as those established by imperial countries upon their empire members – see Zeitoun, Mirumachi and Warner (n 1).

An example of coercive power influencing transboundary interstate interaction is the military force to secure dams and forcibly allocate water resources. Bargaining and ideational power, which can be loosely described as ‘soft’ power, become useful in deliberations and negotiations of water resources allocation and management. Coercive power such as economic sanctions are used, but ‘soft’ power is an equally, if not more, effective way of ensuring compliance through the use of discourse and development of ideas. ‘Soft’ power is employed during formal and informal negotiations, declarations, media reports and rumours, and through the development of persuasive ‘storylines’²¹ that justify the maintenance of the status quo in the way water resources are allocated or managed.

More specifically, ‘soft’ power can be used for distributive or integrative ends.²² Both types of arrangements entail compliance from the other states to the hydro-hegemon's pre-eminence, rule or wishes. However, ‘soft’ power exercised for distributive ends is based upon resistance of or resignation after resistance of the non-hydro-hegemon to the constructed understanding of the status quo of water allocation and management. On the other hand, ‘soft’ power exercised for integrative ends is based upon the non-hydro-hegemon's explicit or implicit *consent* to the proposed water allocation and management. Consent is achieved in this case because the non-hydro-hegemon seemingly benefits, or at least is not worse off compared to challenging the hydro-hegemon.²³ Whether distributive or integrative, ‘soft’ power can change intensities of coexisting conflict and cooperation. Moreover, it can shape the institutional structure through the adoption of certain norms and principles and the rejection of certain rules to suit the interests of the hydro-hegemon.

The Ganges-Brahmaputra-Meghna river system in South Asia is useful to illustrate the use of ‘soft’ power in hegemonic transboundary interactions. There have been landmark agreements on river basin development between the basin's main states: Nepal, India and Bangladesh. Project specific bilateral agreements between India and Nepal have existed since the 1950s. The year 1996 marked a significant milestone in the institutionalization of water resources management in this basin. The

²¹ Hajer MA, *The Politics of Environmental Discourse: Ecological Modernization and the Policy Process* (Oxford University Press 1995).

²² Zeitoun, Mirumachi and Warner (n 1).

²³ Haugaard M and Lentner HH, *Hegemony and Power. Consensus and Coercion in Contemporary Politics* (Lexington Books 2006).

Mahakali Treaty between India and Nepal formally acknowledged the ‘equal partnership’ of the two basin states to develop tributary waters for mutual economic benefit.²⁴ In the same year, the Ganges Treaty formally established water allocation between upstream India and downstream Bangladesh. Here, it is clear that India has been the central player in the institutionalization of the shared waters in the South Asian region. For India, coercive power was not the main means to achieve development on the rivers; the consensual means of establishing bilateral agreements has proved useful.

While the integrative use of ‘soft’ power has established cooperative forms of interaction between the basin states, there are, of course, elements of coexisting conflict. A feature of the institution-building in the Ganges-Brahmaputra-Meghna river system is the development of bilateral treaties as opposed to basin-wide treaties. India has selectively signed bilateral agreements with its upstream and downstream neighbours, and avoided the establishment of a formal basin-wide institutional structure.²⁵ These bilateral agreements have tended to benefit India, to the extent that in the case of Indo-Nepal relations, agreements have been renegotiated. Specifically, the Kosi and Gandak Agreements have been so controversial that clauses were amended to ensure a more explicit acknowledgement of Nepal’s share of economic benefit from hydraulic infrastructure development. Moreover, these bilateral agreements have different approaches to water resources allocation and management. For example, the Mahakali Treaty between India and Nepal specifies an integrated approach to water resources management, while the Ganges Treaty between India and Bangladesh is narrower in scope, focusing on water allocation.²⁶

The South Asian example illustrates that the basin state with the relative power advantage has the choice in determining when to sign up to cooperative initiatives, what kind of institutional structure to promote and who to include and exclude in such institutional structure. This is not to say that the non-hydro-hegemonic states are without any means to challenge the actions of the hydro-hegemon. For

²⁴ Treaty between His Majesty’s Government of Nepal and the Government of India Concerning the Integrated Development of the Mahakali River including Sarada Barrage, Tanakpur Barrage and Pancheshwar Project (signed 12 Feb 1996, entered into force 5 Jun 1997) (1997) 36 ILM 531, Preamble.

²⁵ Crow B and Singh N, ‘Impediments and Innovation in International Rivers: The Waters of South Asia’ (2000) 28 World Development 1907; Brichieri-Colombi S and Bradnock RW, ‘Geopolitics, Water and Development in South Asia: Cooperative Development in the Ganges-Brahmaputra Delta’ (2003) 169 The Geographical Journal 43.

²⁶ Salman SMA and Uprety K, ‘Hydro-Politics in South Asia: A Comparative Analysis of the Mahakali and the Ganges Treaties’ (1999) 39 Natural Resources Journal 295.

example, in an attempt to open up more opportunities for basin-wide dialogue, representatives from Pakistan, Nepal and Bangladesh and India have engaged in track two diplomacy or unofficial deliberative platforms between non-governmental organizations.²⁷ What is important to bear in mind, however, is that the power asymmetry between basin states enables the hydro-hegemon to open up and close down discursive spaces for achieving more sustainable water use or challenging the status quo of water allocation.²⁸ Sovereign states of an international river basin are recognized as being equal under international law, but some of their actions may occur as if unseen by it. Within hegemonic political conditions, certain basin states may thus act as ‘first among equals’ in pursuing their interests in water resources management and governance, selectively utilizing or ignoring the implementation of international law principles such as those of the UNWC, as we shall see. This understanding of the ‘hegemon’s prerogative’ helps with the interpretation of the effectiveness of institutional structures for water resources management and governance and the role of international water law principles, as will be shown in the following section.

[a]The role of legal principles in asymmetric transboundary water interactions

Zeitoun and Jägerskog have suggested that in hegemonic political contexts, there are two ways of achieving sustainable and equitable water resources use and management: levelling the grounds for deliberation and negotiation, and levelling the capacity of states to influence water resources management and governance.²⁹ The former specifically points to ensuring discursive space that allows interests of both the hydro-hegemons and non-hydro-hegemons to be expressed and deliberated. International law and legal frameworks, such as the UNWC, have been suggested as an effective way of ‘levelling the playing field’.³⁰ This is because the UNWC highlights key principles that inform the foundations of an institutional structure for water resources management and governance: equitable

²⁷ Nishat A and Faisal IM, ‘An Assessment of the Institutional Mechanisms for Water Negotiations in the Ganges-Brahmaputra-Meghna System’ (2000) 5 *International Negotiation* 289; Swain A, ‘Environmental Cooperation in South Asia’ in Conca K and Dabelko GD (eds), *Environmental Peacemaking* (Woodrow Wilson Center Press and Johns Hopkins University Press 2002) at 61.

²⁸ Zeitoun, Mirumachi and Warner (n 1).

²⁹ Zeitoun M and Jägerskog A, ‘Confronting Power: Strategies to Support Less Powerful States’ in Jägerskog A and Zeitoun M (eds), *Getting Transboundary Water Right: Theory and Practice for Effective Cooperation* (Stockholm International Water Institute 2009) at 9.

³⁰ *Ibid.*

and reasonable utilization, no significant harm and prior notification (and the concept of ‘shared’ or ‘limited’ sovereignty that accompanies them).³¹ While the ratification of the UNWC by member states has been slow and it has yet to come into force, the UNWC has in some cases had the effect of underlining customary international law in the context of shared natural resources (see Chapters 2 and 4 of this collection).

Three countries voted against the UNWC at the United Nations General Assembly in 1997: China, Turkey and Burundi. While geography is not the sole determinant of water allocation,³² the interests expressed through votes of each of these upstream states (in the Mekong river basin, Euphrates-Tigris river basin and the Nile river basin, respectively) reflects their concerns of being disadvantaged through changed water-use allocation based on the UNWC’s principles. Put differently, existing water allocation may be challenged and upstream plans for water resources development may be criticized as potentially harmful downstream.³³

For Turkey, water resources have been perceived as a way of becoming more self-sufficient by developing the hydropower capacity of the Euphrates-Tigris River basin. The Southeast Anatolia Project (*Güneydoğu Anadolu Projesi – GAP*), consisting of 22 dam projects in the southeast of Turkey, is a prime example of infrastructure development for securing water and hydropower. Successive Turkish governments deny their interventions are doing harm downstream, maintaining that Syria has plenty of water resources but which are not managed effectively,³⁴ and that Turkish projects in fact regulate flood risk. The government of Turkey cited Article 7 of the UNWC regarding ‘no significant harm’ as the reason for its objection to the Convention.³⁵ Like Egypt, Turkey claimed it would not accept the formation of international custom on the basis of the UNWC.³⁶ Successive Turkish

³¹ McCaffrey SC, *The Law of International Watercourses* (2nd edn, Oxford University Press 2007); McIntyre O ‘International Water Law: Concepts, Evolution and Development’ in Earle, Jägerskog and Öjendal (n 18).

³² Zeitoun, Mark and Jeroen Warner, ‘Hydro-hegemony: A Framework for Analysis of Trans-boundary Water Conflicts’ (2006) 8(5) *Water Policy*.

³³ Salman SMA, ‘The United Nations Watercourses Convention Ten Years Later: Why Has its Entry into Force Proven Difficult?’ (2007) 32 *Water International* 1.

³⁴ Yesilkaya T, ‘Hydropolitics: Searching for a Solution for the Water Dispute in the Euphrates-Tigris River Basin’ (International Studies Association South Conference, Miami, Nov 2005).

³⁵ *Ibid.*

³⁶ Tanzi A, ‘The Completion of the Preparatory Work for the UN Convention on the Law of International Watercourses’ (1997) 21 *Natural Resources Forum* 239.

administrations have maintained that the Euphrates and Tigris are Turkish rivers, as they originate in Turkey, and therefore argued that Turkey has absolute sovereignty over them. From these Turkish administrations' perspective, the implicit endorsement of 'limited sovereignty' on transboundary water resources utilization by the UNWC is at odds with its perception of the Euphrates-Tigris waters.

Even if states have voted in favour of the UNWC and international agreements incorporate those principles, power asymmetry acting upon coexisting conflict and cooperation has ensured that their implementation has been a major challenge. For example, drawing on the aforementioned example of Ganges-Brahmaputra-Meghna river system, it has been argued that the UNWC has not been applied by the basin states to provide a coherent understanding of equitable and reasonable utilization.³⁷ The Mahakali Treaty between Nepal and India does incorporate the notion of equitable and reasonable utilization through the operation of the Mahakali River Commission, an organization responsible for the implementation of the treaty.³⁸ In addition, Article 7 of the treaty specifies the maintenance of the natural flow and level of the river and the need for prior agreement to any such changes. This article facilitates the obligation to cause no significant harm,³⁹ and thus in accordance with the spirit, if not letter, of the UNWC and its principles. However, the Mahakali Treaty has not facilitated a swift conclusion to the prolonged decision-making on the Pancheshwar Multipurpose Dam project. This project was planned as a multi-purposed dam on the Mahakali River, a border river between Nepal and India. This project had been at the centre of debate since the 1970s, when both states were developing large-scale infrastructure projects as part of their hydraulic mission.⁴⁰ Water allocation was a contentious issue during the phase of institution-building, with the Nepali government focusing on quantitative allocation while the Indian government argued for sharing benefits, rather than the actual water. While the treaty established an institution to govern the shared waters, project-specific

³⁷ Salman SMA and Uprety K, *Conflict and Cooperation on South Asia's International Rivers: A Legal Perspective* (World Bank 2002).

³⁸ Rahaman MM, 'Principles of Transboundary Water Resources Management and Ganges Treaties: An Analysis' (2009) 25 *International Journal of Water Resources Development* 159.

³⁹ *Ibid.*

⁴⁰ Mirumachi (n 18).

negotiations between the Nepali and Indian governments have been at a deadlock over the determination of ‘mutual benefits’.

Why are global norms such as the UNWC difficult to implement at the basin level? Giordano and Wolf pointed out that local-specific arrangements, rather than global principles, are the preferred path of establishing agreement in international transboundary river basins.⁴¹ Woodhouse and Zeitoun call our attention to further issues with interstate treaties trumping international law. While treaty law explicitly addresses the use of coercion between states in concluding a treaty – Articles 51 and 52 of the Vienna Convention on the Law of Treaties cover ‘Coercion of a representative of a State’ and ‘Coercion of a State by the threat or use of force’ – it does not recognize any expressions of ‘soft’ power.⁴² For this chapter’s exploration, this is a fundamental flaw with international law more generally – it inadequately takes power asymmetry between basin states into account. In hegemonic political conditions where the hydro-hegemon uses ‘soft’ power to determine and establish water use and management practices, international water law is put to the test. As previously discussed, non-hydro-hegemonic states may attempt to use their ability to level the playing field, or to develop their own strategies to counter the hegemony outside of law’s reach.⁴³

Thus, the UNWC principles may or may not be the tools with which basin states establish institutions for water resources management and allocation. Put differently, upstream hegemonic states can use their available water resources to assert power, thereby relying less on legal principles to establish order within the basin. In such cases, soft power is ‘invisible’ to international law (international water law as well as international treaty law), which is equipped to deal only with covert expressions of power. For instance, while the GAP is a Turkish project, its development is bound in wider geopolitical considerations. The project site is in the Kurdish-dominated territory of Turkey and the dams became the target of Kurdish independence struggles. The Syrian government supported the

⁴¹ Giordano MA and Wolf AT, ‘Incorporating Equity into International Water Agreements’ (2001) 14 *Social Justice Research* 349.

⁴² Woodhouse M and Zeitoun M, ‘Hydro-Hegemony and International Water Law: Grappling with the Gaps of Power and Law’ (2008) 10(Supplement 2) *Water Policy* 103.

⁴³ See, e.g., Cascão AE, ‘Political Economy of Water Resources Management and Allocation in the Eastern Nile River Basin’ (PhD thesis, King’s College London 2009).

independence struggles of Kurdish insurgents PKK to force Turkish concessions on water allocation. To counter such strategy, Turkey created alliances with Israel to strengthen military capacity.⁴⁴ The resulting effect is a political climate where water and security issues are linked, with both countries leveraging power of obstruction in one domain to secure concessions from the other. This situation can be seen as an example where the upstream hegemonic state has used its available water resources to gain compliance.

Compliance is important for Turkey because ever since the dissolution of the Ottoman Empire and the foundation of a truncated Republic in 1922, Turkey finds itself in a ‘rough neighbourhood’.⁴⁵ From the Turkish perspective, while maintaining interests when confronting neighbours, it is worth trying to be or be perceived to be a peacemaker of the region rather than exerting power through coercive means. While mooted, Turkey had proposed the ‘Peace Pipeline’ in the late 1980s to transfer water beyond the Euphrates-Tigris river basin to water scarce countries in the Gulf and Eastern Mediterranean region. This international water grid would not only exploit Turkey’s hydro-strategic position in the basin, but also serve to contain water-related claims by neighbours. Water resources are presented as a technical issue, and ‘technical cooperation’ with Syria and Iraq has been stepped up since 1998. Turkey and Syria have increased technical exchange with their respective GAP and GOLD (General Organization for Land Development) projects, both of which involve utilizing water and land resources of the Euphrates river basin. In recent years Turkey has successfully used its ‘soft’ power in an attempt to gain more influence over water resources governance, organising the World Water Forum and encouraging exchange and cooperation within the basin.

While Turkey voted against the UNWC, it has proposed water resources management principles at the basin level that are not incompatible with the principles of the UNWC. In the 1980s, the Turkish government actively proposed a so-called three-staged plan to assess and evaluate land and water resources so that ‘optimum, equitable and reasonable use’ of the Euphrates-Tigris waters could be

⁴⁴ Daoudy M, ‘Asymmetric Power: Negotiating Water in the Euphrates and Tigris’ (2009) 14 *International Negotiation* 359.

⁴⁵ Aydin M, ‘Securitization of History and Geography: Understanding of Security in Turkey’ (2003) 3 *Southeast European and Black Sea Studies* 163.

achieved. While not explicitly adopting the UNWC principle of 'equitable and reasonable use', the Turkish government referred to international law conventions to seek consent from Syria and Iraq.⁴⁶ Though Syria and Turkey have disputed over the Kurdish independence movements, there has been a security and economic cooperation treaty in 1987 with a note for Turkey to guarantee an average water flow of 500m³ per second to Syria. Turkey has made considerable effort to ensure promised amounts crossed the Syrian border, making up for shortages in later periods. In 1990, when Turkey started to fill its enormous Atatürk Dam as part of the GAP, the country did give downstream Syria and Iraq prior notice. Crucially, however, the Turkish government did not confer with them about how to reduce the impact of interrupting the flow of the Euphrates River for a month. While the GAP is now an integrated dam project incorporating environmental and participatory issues, downstream demands are carefully managed on Turkey's terms. These upstream actions reflect international law principles used in a discursive manner to control and manage water resources in an institutional structure that is similar to but different from one established squarely on UNWC principles.

In the case where the hydro-hegemon is downstream, it can use power to secure water resources. Here the UNWC can be used in the process of discursive institution-building; downstream hegemonic states can use 'soft' power legitimized through the legal framework to influence water resources use and management. In the case of the Nile river basin, for over a decade downstream Egypt has been able to maintain its position on the established water allocation throughout related deliberations with eight of the nine upstream states through the Nile Basin Initiative (NBI). In this case, the legal framework has served to maintain the status quo of water allocations that favours Egypt. The 1959 Nile Waters Treaty signed by the Egyptian and Sudanese government allocates flow volumes roughly equivalent to 75% of the Nile flow vis-à-vis Sudan (and consequently excluding an allocation to the rest of the eight states).⁴⁷ Egypt participated in NBI from its establishment in 1999, and was part of the

⁴⁶ Tomanbay M, 'Turkey's Approach to Utilization of the Euphrates and Tigris Rivers' (2000) 22(2) Arab Studies Quarterly 79.

⁴⁷ Tvedt T, *The River Nile in the Age of the British: Political Ecology & the Quest for Economic Power* (IB Tauris 2004).

deliberations that were directly guided by the UNWC.⁴⁸ However, the Egyptian government has repeatedly stalled on developing a basin-specific legal framework that would guide water resources utilization.⁴⁹ Indeed, the final stages of negotiations over the text of the Cooperative Framework Agreement between the Nile basin states came to a halt when Egypt raised its concerns about reallocation of waters (Article 14b).⁵⁰ This example serves to show that legal principles can be one part of the institutional structure, which may justify the hydraulic control of the hydro-hegemon: law ‘unlevelling the playing field’, in other words.

In situations where water is used to secure power and vice versa, ‘soft’ power can shape prioritization or deprioritization of legal principles in allocating and managing water resources management. While non-hydro-hegemons can also promote UNWC principles for institution-building, the examples from the Ganges-Brahmaputra-Meghna river system, Euphrates-Tigris and Nile river basins illustrated the asymmetric transboundary water interactions that determine institution-building. These empirical observations relate to the claims made by Giordano and Wolf about the geographical scale at which water resources are managed: at the basin scale, and not at the global scale.⁵¹ While the UNWC has advanced the global normative understanding of shared waters, the challenge of the UNWC principles guiding equitable and sustainable water resources use for both the hydro-hegemon and non-hydro-hegemon states remains.

[a]Conclusion

The chapter focused on the interface between politics and the principles of international water law to gain a better understanding on the development of institutional structures to manage and govern transboundary waters. It argued that without the understanding of the political context, which gives rise to changing transboundary water interactions between basin states, it is not possible to even begin discussing the utility and effectiveness of the UNWC. Especially as the UNWC is designed as a global, rather than basin-specific, legal framework there are challenges in reconciling the global expectations

⁴⁸ Cascão AE, ‘Changing Power Relations in the Nile River Basin: Unilateralism vs. Cooperation?’ (2009) 2 *Water Alternatives* 245.

⁴⁹ *Ibid.*

⁵⁰ Cascão AE and Zeitoun M, ‘Power, Hegemony and Critical Hydropolitics’ in Earle, Jägerskog and Öjendal (n 18).

⁵¹ Giordano and Wolf (n 41).

and local concerns of water resources allocation and management. The chapter highlighted the importance of considering the asymmetric transboundary water interactions in which hydro-hegemons have various strategies in place to influence the decision-making of water resources management and governance. Specifically, this influence is supported by the use of 'soft' power. This discursive way of gaining compliance impacts both the process and outcome of water negotiations. The principles of international water law are seen as one of several tools by which institutions are built, but as with other such tools, subject to the asymmetric power relations of basin states. It was shown that in asymmetric transboundary interactions even where the principles of the UNWC are acknowledged in cooperative initiatives and basin agreements, the *practice* of these principles remains a very elusive goal. Empirical examples showed that hydro-hegemons have the option to exercise or ignore these principles in practice. Rather than blindly promoting the UNWC as a template for cooperation, policy would benefit from first assessing the political context of transboundary water interactions and then evaluating the ways in which institutions can be, or have been, established. In this context, policy would be providing a range of tools, including the UNWC's principles, upon which negotiations and deliberations can be made between basin states and within river basin organizations and other actors involved in institution-building.