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## **The Normative and Institutional Evolution of the Convention**

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### **1 Introduction**

Cooperation over transboundary waters is a complex issue, closely interconnected with a variety of aspects, which are in most cases external to the water domain. These factors include broader political issues - such as security and economic integration -, requirements for the protection of human health and well-being, growth and development of water dependent sectors such as energy, agriculture and fisheries, transport and tourism, as well as environmental integrity and biodiversity needs. This is why adaptation to mutable conditions and responsiveness to emerging challenges are crucial for an efficient cooperation.

The 1992 UN/ECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes (hereinafter referred to as the Convention)<sup>1</sup> has important features that allow responding to the multifaceted and evolving nature of cooperation and management issues. Among such attributes, two stand out above the others. The first one is the holistic definition of the scope of the Convention, which recognizes that water is at the core of development and requires Parties to look into water-related effects on human health and safety, flora, fauna, soil, air, water, climate, landscape, historical monuments or other

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\* The views expressed in the article are those of the author and do not necessarily represent the views of the United Nations or its Member States.

<sup>1</sup> Convention on the Protection and Use of Transboundary Watercourses and International Lakes, March 17, 1992, 31 ILM (1992) p. 1312.

physical structures, or the interaction among these factors, as well as effects on the cultural heritage or socio-economic conditions resulting from alterations to those factors.<sup>2,3</sup> The second prominent feature is the framework nature of the Convention, built around the Meeting of the Parties, thanks to which the Parties - and the non-Parties as well - cooperate, benefit from collective technical and legal assistance and further develop the provisions of the Convention. The power vested in the Meeting of the Parties in this respect is particularly wide-ranging.<sup>4</sup> Article 17 entrusts the Meeting of the Parties with the review of the Convention's implementation, and to this end provides for the Meeting of the Parties to '[c]onsider and undertake any additional action that may be required for the achievement of the purposes of [the] Convention'.<sup>5</sup>

The Parties to the Convention have taken advantage of such flexibility and openness of the Convention. They have adopted subsequent protocols and soft-law instruments in the form of guidelines and recommendations that further develop the principles and requirements of the Convention and assist them in implementation.<sup>6</sup> They have also repeatedly renewed the institutional setting under the Convention and developed specific activities to address the diverse and compound nature of the issues within its scope.

In light of the above, the Convention has greatly evolved since its adoption, both from the normative and institutional perspective. The common thread of such evolution has been the focus on the implementation of the Convention and its ability to actively face the challenges linked to the practical application of its provisions. Along this thread, one can identify two

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<sup>2</sup> Art. 1, para. 2

<sup>3</sup> See below, Chapter 8 on "The Scope of the Water Convention", M. Fitzmaurice and P. Merkouris.

<sup>4</sup> Art. 17, para. 2

<sup>5</sup> Art. 17, para. 2

<sup>6</sup> See the *Protocol on Water and Health*, MP.WAT/2000/1, the *Protocol on Civil Liability and Compensation for Damage caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters*, ECE/MP.WAT/11-ECE/CP.TEIA/9, and the *Guide to Implementing the Convention*, ECE/MP.WAT/39.

main drivers of change. On the one hand, externally driven political, economic and legal causes, while on the other hand elements resulting from the natural evolution of cooperation over transboundary waters (following the same path often shared among riparian countries).

However, it proves impossible to make a clear-cut distinction between entirely internal and purely external drivers, as internal dynamics within the Convention are obviously influenced by external factors and, vice-versa, the latter can only be taken up as long as the needed internal level of maturity within the Convention allows so. With such a caution, this chapter will illustrate through a series of examples how the Convention has evolved from the normative and institutional points of view responding both to ‘mostly external’ and mostly internal’ drivers.

## **2 Opening of the Convention**

An analysis of such evolution is particularly interesting in view of the forthcoming opening of the Convention for accession by countries outside the region of the United Nations Economic Commission for Europe (UN/ECE) following the Convention’s amendment on 28 November 2003 and the amendment’s entry into force on 6 February 2013. Such analysis should provide indications on how the Convention could and should continue to evolve to be relevant and useful for an extended, global membership.

The opening of the Convention itself is a major step in its evolution and will be a main driver of future developments. It is also a good example how much internal and external factors need to be combined to trigger change. As a matter of fact, the external driver of the opening has been the growing political awareness of the importance of transboundary cooperation for security and peace, coupled with the recognition that, in a globalized world, the effects of water use and conflicts are not only local. Unquestionably everyone benefits from peace, security and

sustainable water management, as stressed by the preambular paragraph of Decision III/1, through which the Meeting of the Parties amended the Convention.<sup>7</sup>

At the same time, the adoption of the amendment was only possible thanks to the experience acquired by Parties in the Convention's implementation and the consolidation of Parties' awareness of the role of the Convention and of its multilateral framework.<sup>8</sup>

### **3 External drivers of evolution: political and economic trends, legal developments and critical events**

#### **3.1** *Creation of new frontiers in the pan-European region and enlargement of the European Union*

Since the Convention adoption in 1992, the pan-European region has gone through a profound geopolitical transformation. In 1992, UNECE counted 43 members compared to 56 today, and the European Union (EU) counted 12 members compared to today's 28.

With the dissolution of the Soviet Union and some other countries in Central and South-Eastern Europe, new frontiers cut through the region and newly independent States had to cooperate with their neighbours to protect and manage transboundary waters, which were previously national ones. The Convention has served as a model for the main substantive and procedural obligations of such bilateral or multilateral agreements, which either refer specifically to the Convention as their 'parental' instrument or adopt its terminology and various provisions. Among these instruments, there are the 1994 Convention on Cooperation for the Protection and Sustainable Use of the Danube River, the 1996 Convention on the International Commission for the Protection of the Oder against Pollution and, most recently,

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<sup>7</sup> Decision III/1 - Amendment to the Water Convention, adopted by the Meeting of the Parties at its third session. (Madrid, 28 November 2003), ECE/MP.WAT/14

<sup>8</sup> See also, *The Global Opening of the 1992 Water Convention*, ECE/MP.WAT/43.

the 2012 Treaty on Cooperation in the Field of Protection and Sustainable Development of the Dniester River Basin, as well as, a multitude of bilateral agreements such as the ones on Estonian-Russian, Kazakh-Russian, Russian-Ukrainian, Czech-Slovak, Hungarian-Croatian, and Slovak-Polish transboundary waters. In South-Eastern Europe, the 2002 Framework Agreement on the Sava River Basin is a notable illustration as it was the first regional agreement since the Dayton Peace Agreement ended the war in the former Yugoslavia in 1996.<sup>9</sup>

The conclusion of specific agreements is one of the main obligations of the Convention. In accordance with Article 9, Riparian Parties, i.e. Parties to the Convention that border the same transboundary waters, have to enter into specific ‘bilateral or multilateral agreements or other arrangements ... or adapt existing ones ...in order to define their mutual relations and conduct regarding the prevention, control and reduction of transboundary impact’.<sup>10</sup> Therefore, also countries that were not affected by the geopolitical changes of the 1990s, have developed new agreements or revised the existing ones on the basis of the Convention. Examples of such agreements include the 1998 Convention on Cooperation for the Protection and Sustainable Use of Waters of the Spanish / Portuguese River Basins (Albufeira Convention), the 1999 Convention on the Protection of the Rhine, and the agreements on the rivers Meuse and Scheldt.

Many of the new agreements – such as the 2012 Dniester Treaty – have been facilitated by UN/ECE itself, other international organizations partnering with it and/or by the Parties to the Convention. Thus, the Convention has not only influenced the normative content of the numerous instruments, but it has also provided an organizational framework facilitating the international law-making process in the region.

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<sup>9</sup> See *Capacity for Water Cooperation in Eastern Europe, Caucasus and Central Asia*, ECE/MP.WAT/32; A. Rieu Clarke, *International Law and Sustainable Development: Lessons from the Law of International Watercourses*, IWA, 2005; Laurence Boisson de Chazournes, *Fresh Water in International Law*, Oxford University Press, 2005.

<sup>10</sup> See below, Chapter 19 on “The Obligation of the Riparian Parties to Cooperate”, P. Wouters and C. Leb.

Such law-making process is a major characteristic of the Convention's regime, and it will probably continue its development. One can expect that with the accession of countries outside the UNECE region, such process will further increase as many transboundary waters worldwide are not covered by any agreement, or the agreements in place are not in accordance with the Convention nor adequate to respond to the existing cooperation challenges. On the base of recent developments under the Convention, one can also expect that future agreements will be more and more holistic and comprehensive, addressing not only purely water management issues but also the dominant sectorial uses of water and the benefits derived thereof.

The process of enlargement of the European Union has been another key political driver for the work under the Convention. In the 1990s and early 2000s, the Convention has supported the step-by-step approximation of the Central and Eastern European countries that acceded to the EU in the 2004 and 2007 enlargements. It has provided an important platform for the building of capacity and the exchange of experience between old and new EU member States.<sup>11</sup> Activities from that period aimed, among other, at transferring the approaches of the EU Water Framework Directive.<sup>12</sup> The EU Water Framework Directive has also influenced the interpretation of the Convention: many of the soft-law instruments, guidelines and recommendations developed under the Convention were inspired by the Directive and based on the experience of EU Parties with its implementation.

After the 2004 EU enlargement, the focus of the Convention was progressively shifted eastward, with emphasis on promoting implementation in countries of South-Eastern Europe

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<sup>11</sup> Vision for the future of the Convention on the Protection and Use of Transboundary Watercourses and International Lakes, adopted by the Meeting of the Parties at its sixth session (Rome, 28-30 November 2012), ECE/MP.WAT/37/Add.2.

<sup>12</sup> Directive 2000/60/EC of the European Parliament and of the Council of 23 October 2000 establishing a framework for Community action in the field of water policy [2000] OJ L 327/1.

and Eastern Europe, the Caucasus and Central Asia. Also in this case, and particularly through the work under the EU Water Initiative, the Convention has offered a platform for exchange between the Western and the Eastern parts of the region and for the progressive approximation of policies and approaches.<sup>13</sup>

With the global opening of the Convention, the potential for exchange between countries and regions will multiply. This should lead to positive cross-fertilization, in particular at the regional level. In the ‘Vision for the future of the Convention on the Protection and Use of Transboundary Watercourses and International Lakes’, adopted by the Meeting of the Parties at its sixth session in November 2012 (2012 Vision), Parties have identified other United Nations Regional Commissions as key partners, thereby signifying the importance of building bridges across regions.<sup>14</sup>

### **3.2** *Critical events*

Beside geopolitical factors, the Convention’s evolution has been affected by the major water-related events that occurred in the pan-European region, thus triggering normative and institutional responses.

One example is the reaction to the Baia Mare accident. On 30 January 2000, in the northern Romanian town of Baia Mare, a mine tailings dam burst releasing over 100,000 cubic metres of cyanide and heavy metal contaminated water into the Sasar, which successively flew into the Lopus, Somes and Tisza rivers. After two weeks, the contaminated water reached the Danube and then continued on, eventually reaching the Black Sea.

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<sup>13</sup> See *Strengthening Water Management and Transboundary Water Cooperation in Central Asia: the Role of UNECE Environmental Conventions*, ECE/MP.WAT/35, available at [http://www.unece.org/fileadmin/DAM/env/water/publications/documents/Water\\_Management\\_En.pdf](http://www.unece.org/fileadmin/DAM/env/water/publications/documents/Water_Management_En.pdf).

<sup>14</sup> See *Vision for the future of the Convention on the Protection and Use of Transboundary Watercourses and International Lakes*, para 26., ECE/MP.WAT/37/Add.2.

The contamination affected the populations and economy of the countries in the basin. The accident highlighted the shortcomings of the existing regimes on civil liability and the inadequacy of the legal remedies available to the victims of transboundary pollution. As a result, joint efforts were undertaken under the auspices of the Water Convention and the Convention on the Transboundary Effects of Industrial Accidents.<sup>15</sup> In July 2001, a joint special session of the governing bodies of the two conventions launched an intergovernmental negotiating process and created a special working group entrusted with the task of preparing a protocol to both conventions. The Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters (Civil Liability Protocol) was finally adopted at the fifth Ministerial Conference “Environment for Europe”, held in May 2003 in Kiev (Ukraine).<sup>16</sup>

Another example of response to accidents is the work triggered by the catastrophic floods of 2002 in Central Europe that killed dozens, dispossessed thousands, and caused damage of billions of euros. The Convention responded with a major normative progress: the development, between 2003 and 2006, of the Model Provisions on Transboundary Flood Management by the Convention’s Flood Task Force and the Legal Board. The Model Provisions on Transboundary Flood Management were adopted at the fourth session of the Meeting of the Parties in 2006.<sup>17</sup> They are meant to be used as part of either a general bilateral or multilateral normative instrument on transboundary water issues, or a flood-specific one among riparian States, in order to address transboundary flood prevention, protection and mitigation and enhance preparedness thereto.<sup>18</sup>

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<sup>15</sup> *Convention on the Transboundary Effects of Industrial Accidents*, Helsinki 17 March 1992, ECE/CP.TEIA/15/Add.1.

<sup>16</sup> See below, Chapter 23 on “The 2003 Kiev Protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Transboundary Waters”, P. Daskalopoulou Livada and A. Kolliopoulos.

<sup>17</sup> *Model Provisions on Transboundary Flood Management*, ECE/MP.WAT/2006/4.

<sup>18</sup> See below, Chapter 25 on “Transboundary Effects of Floods”, A. Kolliopoulos.

### 3.3 *Influence of regional and global legal developments*

The Convention has also evolved as a response to relevant legal developments at the regional and global levels. A significant example is the second set of model provisions developed under the Convention: the Model Provisions on Transboundary Groundwaters.<sup>19</sup> The development of these model provisions is linked to the draft articles on the law of transboundary aquifers of the United Nations prepared by the International Law Commission (ILC), which were commended to the United Nations Member States by the General Assembly in 2008 (and subsequently in 2011 and 2013).<sup>20</sup> The elaboration of the ILC draft articles induced the Meeting of the Parties at its fifth session in 2009 to mandate the Legal Board and the Working Group on Integrated Water Resources Management to prepare a preliminary study on the application of the principles of the Convention to transboundary groundwater.<sup>21</sup>

The study highlighted the need for further normative guidance addressing the highly specific issues concerning the implementation of the Convention with respect to groundwaters, due to their distinguishing features - in particular, the difficulty of their identification and their vulnerability in case of pollution, which cannot easily be mitigated or reduced.

As a result, a core group on groundwater composed of technical and legal experts was created in order to develop the Model Provisions, which were subsequently adopted by the Meeting of the Parties at its sixth session in November 2012. The Model Provisions provide guidance on the application of the Convention to transboundary groundwaters and are meant

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<sup>19</sup> *Model Provisions on Transboundary Groundwaters*, ECE/MP.WAT/40, available at [http://www.unece.org/fileadmin/DAM/env/water/publications/WAT\\_model\\_provisions/ece\\_mp.wat\\_40\\_eng.pdf](http://www.unece.org/fileadmin/DAM/env/water/publications/WAT_model_provisions/ece_mp.wat_40_eng.pdf).

<sup>20</sup> UNGA, *Report of the International Law Commission*, 2008, A/63/10), available at [http://legal.un.org/ilc/texts/instruments/english/draft%20articles/8\\_5\\_2008.pdf](http://legal.un.org/ilc/texts/instruments/english/draft%20articles/8_5_2008.pdf)

<sup>21</sup> *Workplan for 2010-2012*, adopted by the Meeting of the Parties at its fifth session, ECE/MP.WAT/29/Add.

to support the Parties negotiating bilateral or multilateral agreements on transboundary groundwaters, as well as domestic legislators.<sup>22</sup>

The General Assembly, at its 68<sup>th</sup> session, has noted with appreciation the fact that elements of the ILC draft articles had been employed in the Model Provisions on Transboundary Groundwaters.<sup>23</sup>

The development of both model provisions under the Convention illustrate proves its capacity of adaptation from the institutional point of view. Both instruments required multidisciplinary approaches, in particular to bring together legal and water management experts. To adequately respond to such challenge and to enhance cooperation, the Meeting of the Parties has required different existing bodies (the Flood Task Force and the Legal Board, in the first case, and the Legal Board and the Working Group on Integrated Water Resources Management, in the second) to cooperate and jointly develop the two products. This approach will be certainly followed again in the future given the growing complexity of water cooperation issues (and the growing awareness thereof), intertwined with various legal, economic, social, political and environmental dimensions.

The Convention has also evolved under the influence of the legal and institutional developments in the UNECE region. In particular, there is a strong relationship with the other four UNECE multilateral environmental agreements: the 1979 Convention on Long-range Transboundary Air Pollution, the 1991 Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention), the 1992 Convention on the Transboundary Effects of Industrial Accidents (Industrial Accidents Convention) and the 1998 Convention on

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<sup>22</sup> See below, Chapter 28 on “The International Water Law Process and Transboundary Aquifers: the 2012 UNECE Model Provisions on Transboundary Groundwaters”, A. Tanzi and A. Kolliopoulos.

<sup>23</sup> Resolution adopted by the General Assembly on 16 December 2014, 68/118. The law of transboundary aquifers (A/RES/68/118).

Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention). The Water Convention is both complemented by and contributes to the implementation of the other UNECE Conventions.<sup>24</sup>

The significant synergy between these tools in terms of their substantive scopes, obligations and commitments has resulted in a variety of joint activities and documents, such as the “Water management: Guidance on public participation and compliance with agreements”, developed in 2000 by a group of experts under the auspices of the Water Convention and largely triggered by the adoption of the Aarhus Convention in 1998. Further examples are the 2006 Guidelines on the Safety of Pipelines endorsed by the governing bodies of both the Water Convention and the Industrial Accidents Convention at their respective fourth meetings. Most notably, the Water Convention and the Industrial Accidents Convention have a common subsidiary body: the Joint Expert Group on Water and Industrial Accidents.<sup>25</sup>

#### **4 Progressive development of the Convention internally driven**

Even if the above-mentioned developments have been mainly driven by external dynamics and events, origins can also be tracked to the internal process of evolution of the Convention.

For instance, a strong foundation for the elaboration of the Model Provisions on Transboundary Groundwaters were the findings of the First Assessment of Transboundary

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<sup>24</sup> See below, Chapter 6 on “The Water Convention and other UNECE Environmental Treaties”, O. McIntyre.

<sup>25</sup> The Joint Expert Group on Water and Industrial Accidents is an ad hoc organ established in 1998 by the Parties to the Convention on the Transboundary Effects of Industrial Accidents and the Parties to the Convention on the Protection and Use of Transboundary Watercourses and International Lakes. Its tasks include: drafting guidelines for establishing model cross-border contingency plans, developing safety guidelines for (off-site) pipelines, facilitating the exchange of information on the functioning of alarm and notification systems, developing safety guidelines and good practices for crisis management on transboundary waters.

Rivers, Lakes and Groundwaters in the UNECE region<sup>26</sup> which clearly underlined the gaps in cooperation over transboundary groundwaters. Without such a background, the ILC draft articles preparation would have probably not been enough to trigger the development of the model provisions.

The 'internal' evolution and dynamics of the Convention have, in many respects, mirrored the traditional evolution of cooperation over transboundary waters between riparian countries. Such cooperation evolves by progressive steps. Countries traditionally start by tackling common priority issues and the experience and findings acquired in dealing with such issues normally elicit cooperation over additional aspects. This expansion in both scope and depth of cooperation is mostly due to a common enhancement of the understanding of the issues among riparians and to the growing of mutual trust.<sup>27</sup>

This also explains how the evolution of the Convention has been driven 'from the inside'. The experience gained by each country in its direct implementation of the Convention has fed the collective experience of the Meeting of the Parties. At the same time, the collective experience gathered with the multilateral activities under the Convention has strengthened the collective awareness and prompted further normative and institutional development of the Convention.

#### **4.1** *Guidelines on monitoring and assessment*

Monitoring and assessment are fundamental for the management of water resources, the development of policies and the implementation of measures. Moreover, at the

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<sup>26</sup> *Our Waters: Joining Hands Across Borders - First Assessment of Transboundary Rivers, Lakes and Groundwater*, UN/ECE,, 2007, available at [http://www.unece.org/fileadmin/DAM/env/water/blanks/assessment/assessmentweb\\_full.pdf](http://www.unece.org/fileadmin/DAM/env/water/blanks/assessment/assessmentweb_full.pdf)

<sup>27</sup> See *Two Decades of Cooperation on Water: Declarations and Recommendations by the Economic Commission for Europe*, ECE/ENVWA/2.

transboundary level, there is the need for a common basis for decision-making, which requires comparable information and harmonized assessment methods. Therefore, joint monitoring and assessment is often one of the first areas of cooperation among riparians. Similarly, a great focus in the Convention's early times has been devoted to joint monitoring and assessment of transboundary waters.

Consistent with the nature of a framework instrument, the focus of the early work on monitoring and assessment has been to further develop and make operational the general principles and requirements contained in articles 4 and 11 of the Water Convention. This was done through the development of a number of soft-law instruments in the forms of guidelines and strategies that provided clear and precise parameters of the actions required from the Parties. Such soft law instruments include, namely, the 1996 Guidelines on water-quality monitoring and assessment of transboundary rivers, the 2000 Guidelines on monitoring and assessment of transboundary rivers, the 2000 Guidelines on monitoring and assessment of transboundary groundwaters, the 2002 Guidelines on Monitoring and Assessment of Transboundary and International Lakes, and the 2006 Strategies for monitoring and assessment of transboundary rivers, lakes and groundwaters.<sup>28</sup>

#### **4.2**    *Protocol on Water and Health*

The protection of human health is one primary objective of the Water Convention. This clearly appears in its article 1, in which negative effects on human health are the first listed among the transboundary impacts that the Convention aims to prevent, control and reduce. The importance of the protection of human health was also reemphasized in the Helsinki

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<sup>28</sup> All the above guidelines and strategies are available at <http://www.unece.org/env/water/publications/pub.html>.

Declaration, adopted by the Meeting of the Parties to the Convention at its first session in 1997.

In the Declaration, Parties drew their vision on the outcome of the Convention implementation:

As a result of this cooperation, we are convinced that transboundary waters in this region will be used in a sustainable way to the benefit of all countries. We firmly believe that the conditions of these waters will improve, since we are committed to cutting pollution, improving the quality of aquatic ecosystems, protecting human health and safety, and making the best sustainable use of water.<sup>29</sup>

However, the Convention's provisions on this matter are not detailed. As a consequence, 'to complement the Convention with further measures to strengthen the protection of public health'<sup>30</sup>, the Parties decided to develop a supplementary protocol: the 1999 Protocol on Water and Health. The Protocol was adopted in 1999 and entered into force in 2005.

The main aim of the Protocol is to protect human health and well-being by better water management, including the protection of water ecosystems, and by preventing, controlling and reducing water-related diseases. The Protocol is the first international agreement of its kind adopted specifically to attain an adequate supply of safe drinking water and adequate sanitation for everyone, and effectively protects water used as a source of drinking water.

The Protocol very well illustrates the open and inventive approach that Parties have in respect to the normative evolution of the Convention, as it departs in many respects from traditional protocols.

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<sup>29</sup> The Helsinki Declaration, annex I of the report of the first Meeting of the Parties, ECE/MP.WAT/2.

<sup>30</sup> Paragraph 8 of the Protocol on Water and Health preamble.

First of all, the scope of the Protocol is different from the Convention's one, as it covers both national and transboundary waters, as well as different typologies of water compared to the Convention, such as '[c]oastal waters which are used for recreation or for the production of fish by aquaculture or for the production or harvesting of shellfish', '[e]nclosed waters generally available for bathing', '[w]ater in the course of abstraction, transport, treatment or supply' and '[w]aste water throughout the course of collection, transport, treatment and discharge or reuse'<sup>31</sup> Secondly, countries do not need to be a Party to the Convention to ratify or accede to the Protocol, which it is not only serviced by UNECE but by a joint secretariat of UNECE and the Regional Office for Europe of the World Health Organisation.<sup>32</sup>

#### **4.3** *From policy guidance to activities on the ground and sharing of experience*

The evolution of the Convention has not been limited to the development of binding and non-binding instruments. Once the necessary guidance was available, Parties have turned to their direct implementation on the ground and to the dissemination of results for the mutual learning.

The work on monitoring and assessment is a good illustration of such general pattern. After adopting the different guidelines, Parties put in place a system of pilot projects on monitoring and assessment in a number of transboundary rivers, lakes and groundwaters. The pilot projects aimed to assist riparian countries to establish and implement joint programmes for monitoring and assessing the conditions of their shared waters by using the approach set out in the guidelines. The pilot programmes thus allowed to test the guidelines and guided their further revision. An important element of the pilot programme was the exchange of experience

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<sup>31</sup> Protocol on Water and Health, Article 3, MP.WAT/2000/1

<sup>32</sup> See below, Chapter 24 on "The Water Convention and the Human Right to Access to Water: The Protocol on Water and Health", O. McIntyre and A. Tanzi.

among pilots to allow mutual learning as well as the broader sharing of such experience to all Parties through the Convention's subsidiary bodies.

#### 4.4 *Work on adaptation to climate change*

The work on adaptation to climate change is another good illustration of the capacity of the Convention to evolve in order to deal with new challenges. The response in this area is also particularly representative of the Convention's approach.

The legal text of the Convention does not make any explicit reference to climate change. However, Parties recognized that water resources are vulnerable and can be strongly affected by climate change, with wide-ranging consequences for human societies and ecosystems. As both water and climate change issues are not confined to national borders, risks and challenges are a common concern. Consequently cooperation to adapt to climate change in transboundary basin is crucial to avoid conflict arising from competition over dwindling water resources and to prevent the risk of countries taking unilateral measures with possible negative effects on their riparians. In light of these considerations, the Meeting of the Parties, at its fourth session (Bonn, Germany, 2006), decided to assist Governments in adapting to climate change in transboundary basins by elaborating a Guidance on Water and Adaptation to Climate Change. The Guidance prepared by the Task Force on Water and Climate under the Convention<sup>33</sup>, in close cooperation with the Task Force on Extreme Weather Events under the Convention's Protocol on Water and Health was adopted at the fifth session of the Meeting of the Parties (Geneva, 10-12 November 2009). The Guidance provides step-by-step advice for the development of sound adaptation strategies. It thereby supports countries in their

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<sup>33</sup> *Guidance on Water and Adaptation to Climate Change*, 2009 ECE/MP.WAT/30.

implementation of the Convention and its Protocol on Water and Health in the context of climate change.

Once again, Parties did not stop at the development of this soft law instrument. As a next step, as of 2012, they decided to support the Guidance implementation through a series of pilot projects.<sup>34</sup> In this case too, the work was not only focused on the different basins themselves but also aimed at transferring experience between basins and at learning from each other. Such platform for the exchange of experience was so attractive and unique that it soon became one of the first Convention's activities drawing participation from countries outside the UNECE region.<sup>35</sup>

#### *4.5 Assessing progress: from assessing level of implementation to assessing outcome of implementation*

The Convention's evolution has been driven from the inside by the common needs and challenges encountered by Parties and non-Parties. Such needs and challenges emerged during meetings of the Convention's subsidiary bodies (Bureau, working groups, task forces, etc.), training, and capacity building events, as well as through assessment carried out through questionnaires. There is a long tradition of surveys under the Convention to investigate its level of implementation among Parties, gaps and needs. For instance, in the first intersessional period, the Convention's Working Group reviewed through a questionnaire the implementation of provisions in Part II of the Convention. The results of the review and the deriving recommendations were presented to the Meeting of the Parties at its second session (The Hague, 23-25 March 2000) and guided the next programme of work adopted at the same

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<sup>34</sup> Some examples include the Pilot project on the Chu Talas Basin, shared by Kazakhstan and Kyrgyzstan, implemented by the United Nations Development Programme (UNDP), UNECE and the Organization for Security and Cooperation in Europe (OSCE); the Pilot project on the Dniester Basin, shared by the Republic of Moldova and Ukraine, implemented by OSCE, UNECE and the United Nations Environment Programme (UNEP).

<sup>35</sup> See below, Chapter 26 on "Water and climate change", D. Tarlock and V. Tzatzaki.

session.<sup>36</sup> Several other surveys were carried out on different issues such as: monitoring and assessment and implementation of the relevant guidelines (during the second intersessional period); the reduction of accidental pollution risks and the implementation of the conclusions and recommendations of the Seminar on the Prevention of Chemical Accidents and Limitation of their Impact on the Transboundary Waters in Central and Western Europe (Hamburg, Germany, 4-6 October 1999) (during the third intersessional period); countries' needs in relation to adaptation to climate change and measures already undertaken (during the fourth intersessional period).

Such surveys have been a useful tool to identify common challenges and trigger or guide the development of activities under the Convention. But a major evolution on how the Meeting of the Parties monitors implementation of the Convention occurred in 2003 when the Meeting of the Parties at its third session decided to prepare the first assessment of the status of transboundary waters in the pan-European region.<sup>37</sup>

This was a fundamental change in perspective as the Meeting of the Parties started measuring the outcome of the Convention's implementation, not only how the Convention is implemented. Obviously, such assessment proved being an extremely more complex exercise, but also a very valued one, as it is proved by the fact that also non-Parties actively took part in the initiative. Two assessments of the status of transboundary rivers, lakes and groundwaters in the UNECE region were produced (in 2007 and 2011, respectively). Also within this exercise, the methods of work under the Convention evolved greatly.

From the institutional perspective it is noteworthy to mention that while the first assessment was the sole responsibility of the Convention's Working Group on Monitoring and Assessment,

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<sup>36</sup> Report of the Meeting of the Parties on its second session, ECE/MP.WAT/5.

<sup>37</sup> See ECE/MP.WAT/15/Add.2, programme area 3.3.

the preparation of the second one was overviewed by both the Working Group on Integrated Water Resources Management and the Working Group on Monitoring and Assessment. This proves once again the will to embrace and promote a holistic approach to water management and cooperation.

#### *4.6 Strengthening compliance and implementation*

The preparation of regular assessments of the status of transboundary waters and the recent activities to strengthen implementation and compliance are two sides of the same coin: two main highways adopted by Meeting of the Parties to continuously and progressively further cooperation on the ground.

In the area of implementation and compliance, a first major step was the development and adoption at the fifth session of the Meeting of the Parties (Geneva, 10-12 November 2009) of the Guide to Implementing the Water Convention. The Guide was prepared in response to requests for clarification of the legal, technical and economic implications of accession to the Convention. The Guide was developed under the auspices of the Legal Board and the Working Group on Integrated Water Resources Management, through a broad participatory approach bringing together legal and water experts from both Parties and non-Parties to the Convention, together with non-governmental organizations and academia. The Guide provides a comprehensive commentary to the Convention's provisions, providing explanations of the legal, procedural, administrative, technical and practical aspects of the Convention's requirements, coupled with illustrative examples. The Guide was updated in 2013 to reflect the opening of the Convention for accession to countries outside the UNECE region.<sup>38</sup>

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<sup>38</sup> Guide to Implementing the Convention, ECE/MP.WAT/39.

While elaborating the Guide, reflections also started on the need to provide the Convention with a mechanism able to address problems related to implementation and possible differences on interpretation. As stated in the document by the Chair of the Legal Board submitting such proposal to the fifth session of the Meeting of the Parties:

At the present stage of the Convention's evolution, the establishment of a mechanism to support implementation and compliance based on the experience of similar mechanisms under other conventions and on the work carried out so far under the Convention, as well as the Guide to implementing the Convention [...], would seem to be a natural step forward.<sup>39</sup>

Thus at the same time as adopting the Guide to Implementing the Water Convention, the Meeting of the Parties entrusted the Legal Board 'to prepare a proposal on the objectives, structure, tasks, functions, measures and procedures of an institutional and procedural mechanism to facilitate and support implementation and compliance'<sup>40</sup>.

Such proposal was adopted at the sixth session of the Meeting of the Parties, when the Convention's Implementation Committee was established.<sup>41</sup> The creation of the Committee is a bold decision by the Meeting of the Parties, undoubtedly constituting the latest major evolution of the Convention from the institutional point of view. Even though it is too early to appraise the impact of the Committee, its potential to provide a unique forum for the prevention of disputes and conflicts is certainly astounding. It can thus be hoped that countries will take advantage of such opportunity.

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<sup>39</sup> Facilitating and supporting implementation and compliance: A needed step in the Convention's evolution. Note by the Chairperson of the Legal Board, ECE/MP.WAT/2009/3.

<sup>40</sup> Report of the Meeting of the Parties on its fifth session, ECE/MP.WAT/29.

<sup>41</sup> Report of the Meeting of the Parties on its sixth session, ECE/MP.WAT/37.

Within the same track to strengthen implementation and compliance, Parties to the Convention are currently carrying out

an analysis on the needs for reporting under the Convention, taking into account the capacity of countries and other relevant reporting mechanisms. Such analysis will serve as a basis for the possible elaboration of the scope and modalities of a reporting mechanism to be submitted for possible adoption by the Meeting of the Parties at its seventh session.<sup>42</sup>

Reporting obligations are not foreseen in the legal text of the Convention and the wish of Parties to investigate the need and usefulness of such mechanism is most recent - and certainly not the last –evidence of the extreme capacity of evolution of the Convention to respond to Parties (and non-Parties) needs and challenges.

## **5 Conclusions**

The aptitude of the Convention to evolve in order to meet new challenges is one of its main strengths. Parties are deeply aware of this aspect, which has been stressed, together with other achievements, in the 2012 Vision.

It is therefore to be expected that the Convention will continue to evolve in the future. The opening of the Convention to countries outside the UNECE region will certainly be a main source of transformation, providing new ‘external’ and ‘internal’ drivers.

In this respect, it is important to note that so far the Convention and its Parties have had an extremely inclusive and engaging approach *vis-à-vis* non-Parties, actively involving them in the Convention’s work almost as much as Parties. On the one hand, this openness and

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<sup>42</sup> Programme of work for 2013–2015, adopted by the Meeting of the Parties at its sixth session, programme area 1.4, ECE/MP.WAT/37/Add.1.

cooperative spirit has brought tremendous results, not only in terms of increased membership, but also in terms of strengthening the capacity of non-Parties. On the other hand, the needs of non-Parties have shaped the Convention's work and evolution, which has somehow anticipated the needs of future Parties. One can imagine that the approach with regard to non-UNECE countries will be consistent with how the Convention and its Parties have behaved so far towards non-Parties in the UNECE region. Thus, future work under the Convention will quite rapidly reflect needs, aspirations and challenges of countries outside the UNECE region. While global membership of the Convention will take time to achieve, the Convention's institutional and normative framework could rather soon be that of a global instrument.