

**UNECE WATER CONVENTION & UN WATERCOURSES CONVENTION:
CAN THEY BE SEEN AS A PACKAGE OF NORMS?**

Mr Rémy Kinna - remykinna@gmail.com

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- *In the August 2014 there will now be two legal framework instruments covering transboundary water issues in force at the global level, namely the 1997 United Nations (UN) Watercourses Convention and 1992 UN Economic Commission for Europe Water Convention.*
- *This development raises questions over the compatibility of both instruments, and **how they might be implemented in a coordinated manner**. A comparative analysis of the text of both instruments demonstrates that there are both **similarities and differences between them; but that they are complementary**.*
- *There is therefore **significant benefit in promoting and implementing the Conventions as a package**.*
- *Three basic institutional options can be envisaged to support this ‘package approach’, each with their strengths and weaknesses. Ultimately, whichever option is chosen, **the ‘package approach’ to the implementation of both Conventions offers the best means by which to strengthen the law of international watercourses**.*

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COMPARING THE TEXTS OF BOTH CONVENTIONS

SCOPE

- The **scopes of both Conventions are largely similar.**
- A **key distinction here concerns their respective treatment of groundwater.** While the UNECE Water Convention applies to all transboundary groundwater – both confined and unconfined, the UN Watercourses Convention only applies to transboundary groundwater that is connected to the surface water.

SUBSTANTIVE NORMS

- Both the UN Watercourses Convention and the UNECE Water Convention **offer a similar package of substantive norms.**
- However, the way in which the **substantive norms are presented differs** between both instruments.
- The **UN Watercourses Convention** places all substantive provisions under the overarching requirement that States **utilize their international watercourses in an ‘equitable and reasonable’ manner.**
- In contrast, the **UNECE Water Convention** does not put the equitable and reasonable principle at its forefront. Rather, the UNECE Water Convention firstly stipulates that States must **‘take all appropriate measures to prevent, control and reduce any transboundary impact’.**
- However, whilst articulated slightly differently, **both Conventions essentially adopt the same ‘package’ of substantive norms that encompass the key principles of equitable and reasonable utilization, the prevention of significant harm, and the protection of ecosystems.**

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COMPARING THE TEXTS OF BOTH CONVENTIONS

PROCEDURAL NORMS

- **Distinction between** the UN Watercourses Convention and the UNECE Water Convention concerns **the treatment of existing and future legal and institutional arrangements.**
- In the **UNWC**, it is clearly stated that the Convention does not affect existing watercourse agreements, although **States are *encouraged* to harmonize such agreements with the provisions of the Convention.**
- By contrast, the **UNECE Water Convention *obliges* States to, where necessary, revise existing arrangements in order to ‘eliminate contradictions’** with the basic principles of the Convention.
- Additionally, the **UNECE Water Convention provides that States also *must* enter into watercourse arrangements where they do not already exist.**
- While these distinctions may appear significant on paper, **in practice they may be mitigated by the UN Watercourses Convention’s consistent emphasis on cooperation.**

DISPUTE AVOIDANCE

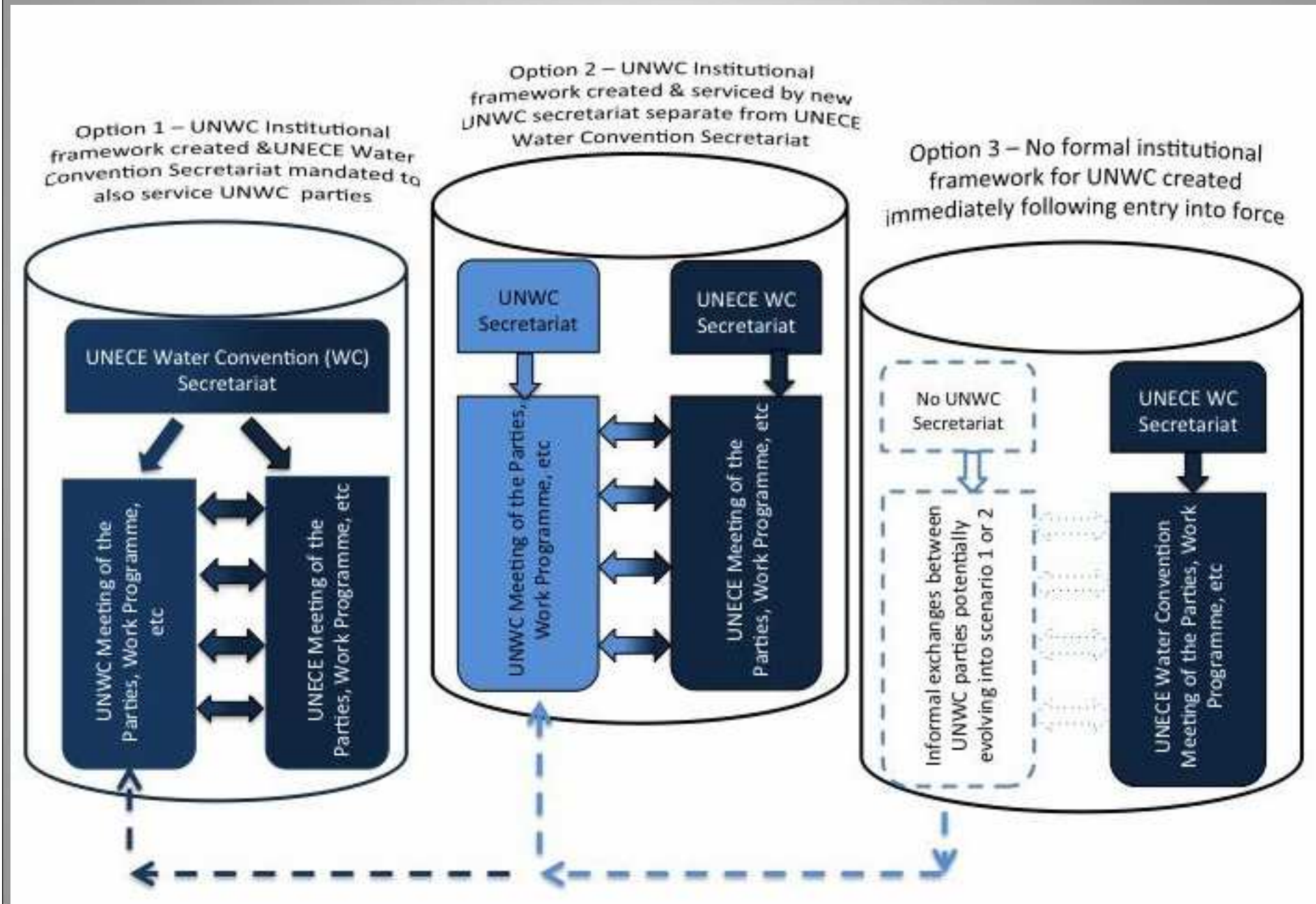
- The **two Conventions provide relatively similar provisions regarding the settlement of disputes.** Under both instruments, States are encouraged to seek a solution to any dispute by negotiation or other means, such as good offices, mediation or conciliation.
- In terms of differences, the **UN Watercourses Convention explicitly provides for a ‘fact-finding commission’ to collect any information relevant to a dispute.**

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Key questions for institutional coordination & implementation

- *How best to **build on synergies, ensure coordination, and avoid duplication** in the implementation of both Conventions?*
- *How can states **capitalise on both the global legitimacy of the UNWC and vast experience under the UNECE Water Convention** towards progressively building an effective, legally mandated, and truly global transboundary water regime?*
- *How might an institutional framework (formal or informal) **address existing water law fragmentation at different scales**, and what are the legal (substantive and procedural) practicalities that must be dealt with to ensure its formation?*
- *What steps would be needed to ensure that the respective parties to these Conventions receive the **political, technical and financial support necessary to facilitate effective implementation**?*

GLOBAL UN WATER CONVENTIONS: OPTIONS FOR COORDINATED IMPLEMENTATION



OPTION 1 – ‘COMBINED’

A formal institutional framework for the UNWC is created and the UNECE Water Convention secretariat is mandated to also service the UNWC parties.

STRENGTHS & OPPORTUNITIES

- Having the **same secretariat service both Conventions is likely to be the most effective means by which to ensure that both instruments develop in a complementary and mutually reinforcing manner.** Compared to options 2 and 3, therefore, a shared secretariat would be best placed to coordinate the respective implementation processes, and avoid further legal fragmentation in the field. This option would therefore enable the coherent development of international water law.
- **A shared secretariat would also offer the most effective and efficient means by which to develop a common strategy for promoting new membership to both Conventions.** Such coordination is crucial given that the lack of a common strategy could lead to states receiving mixed messages on the advantages and disadvantages of both instruments, or feeling overwhelmed with the prospects of joining a second global water treaty. Such mixed messages could jeopardise new membership to one or both Conventions.
- This option would **create a clear entry point and “one-stop shop” for transboundary issues at the global level,** and the technical or legal assistance required.
- Economic efficiencies are likely to be greater than for option 2, given that **it would require less resources and time compared to establishing a completely new secretariat and separate activities for the UNWC.**

OPTION 1 – ‘COMBINED’

A formal institutional framework for the UNWC is created and the UNECE Water Convention secretariat is mandated to also service the UNWC parties.

WEAKNESSES & THREATS

- Unless managed carefully, a **secretariat based in Geneva may be perceived as being less favourable by some countries**. However, the presence in Geneva of the permanent missions of practically all UN Member States would make it easier for developing countries and other states to engage in implementation activities and participate in meetings. In addition, the benefits from various water-related UN and associated offices being located in and around Geneva could prove compelling.
- This option would **require both a formal decision among the parties to the UNECE Water Convention to expand the mandate of their secretariat and an amendment to the UNWC incorporating provisions on governance mechanisms**. Both decisions could take considerable time and resources to secure.

OPTION 2 – ‘PARALLEL’

A formal institutional framework for the UNWC is created and serviced by a new UNWC secretariat, separate from the UNECE Water Convention secretariat.

STRENGTHS & OPPORTUNITIES

- **If hosted by an existing global organisation active in (transboundary) water issues, the UNWC could provide that organisation with a strong *legal* mandate to further its aims and objectives.** Particularly if hosted by an existing water-related institution, the UNWC’s implementation could draw upon that programme’s experience in the implementation of specific MEAs and their effective coordination, including towards fostering synergies between the Rio Conventions on water-related issues.
- The current lack of provisions in the UNWC offers an **opportunity to create entirely new governance mechanisms** for the 21st century.
- As opposed to Option 1, establishing an entirely new UNWC institutional framework would **not require any further changes to the UNECE Water Convention institutional framework.**
- The **UNWC secretariat could be located in a developing country and/or in a region** where there is a strong need to enhance transboundary water arrangements. This could **give added impetus to strengthen transboundary water cooperation** in that country or region.
- **Non-UNECE states could be more attracted to the UNWC with its institutional home being a global body,** rather than a structure associated with the UNECE, which is a regional institution within the UN system.

OPTION 2 – 'PARALLEL'

A formal institutional framework for the UNWC is created and serviced by a new UNWC secretariat, separate from the UNECE Water Convention secretariat.

WEAKNESSES & THREATS

- The establishment of a **formal secretariat and MoP would require all its parties to agree on the adoption of an amendment.** The process for adopting and bringing into force such an amendment could require significant time and resources.
- If such a secretariat were to be **hosted under an existing organization, this would require a decision by the governing body of the organisation in question.** This study has not assessed if and to what extent such a decision would be feasible within potential hosts. In general, the time and resources required to secure a positive decision would vary between different institutions.
- Where the governing body of a potential host is made up of states, considerable effort would likely be required to build widespread or, if required, unanimous support among its members for such an organization to service the UNWC parties.

OPTION 2 – 'PARALLEL'

A formal institutional framework for the UNWC is created and serviced by a new UNWC secretariat, separate from the UNECE Water Convention secretariat.

WEAKNESSES & THREATS

- Irrespective of whether a new formal institutional framework is independent or hosted by an existing institution, **creating two parallel regimes is likely to result in the highest start-up and running costs out of all the three options.**
- **Separate secretariats would increase the effort, time and resources required to coordinate between the UNWC and UNECE Water Convention.** Therefore, achieving effective coordination would pose a greater challenge under Option 2 than under Option 1.
- Demonstrating the benefits of an institutional framework and securing buy-in from states for this option would require time and resources. **It might be easier to demonstrate the benefits of two institutional frameworks serviced by a unified secretariat, as envisaged in Option 1,** given that the UNECE Water Convention regime is already established.
- **Similarly, a less formal arrangement, as described in Option 3 below, might prove more feasible.**

OPTION 3 – ‘STATUS QUO’

No formal institutional framework for the UNWC is created immediately following its entry into force.

STRENGTHS & OPPORTUNITIES

- **No formal institutional framework to support the implementation of the UNWC coincides with the current situation.** This option might therefore be the most acceptable to those parties that ratified the Convention on the basis of there being no formal mechanism in place and thus no need for financial commitments to support such a mechanism.
- **Informal arrangements** – supported by individual or groups of Parties, as well as sympathetic inter-governmental and non-governmental institutions – **could be put in place to support the implementation and development of the UNWC** in the absence of a formal institutional framework. Such an arrangement could build upon and strengthen the activities undertaken through the UNWC Global Initiative, e.g., training and awareness-raising workshops, the 2012 UNWC global symposium, tools such as the user’s guide and its website, and country and regional assessments.
- **Costs of this option would be relatively low and non-structural**, while at the same time providing support for the UNWC’s expansion and implementation.
- This option would **accommodate proposals that have already materialised**, such as the offer by the French Government, at the 6th World Water Forum, **to host a meeting of the parties to the UNWC upon its entry into force.**

OPTION 3 – ‘STATUS QUO’

No formal institutional framework for the UNWC is created immediately following its entry into force.

STRENGTHS & OPPORTUNITIES (continued)

- Through time, and if deemed necessary, such an **informal platform could evolve into a more sophisticated mechanism for implementation and coordination, as envisaged in Options 1 or 2**. A precedent for this can be seen in the evolution of the Ramsar Convention, from the adoption of the original text to the 1982 Protocol and ultimately the 1987 Regina Amendments.
- The **UNWC would remain an authoritative statement of existing and emerging customary international law**, and would likely continue to influence state practice, especially if it progressively gained widespread endorsement.
- If the UNECE Water Convention attained a significant number of ratifications from outside the UNECE region, and complementary informal activities to promote the UNWC were effective, **a global transboundary water regime could still be formed under Option 3**, while avoiding the added (structural) resources required in Options 1 and 2.

OPTION 3 – ‘STATUS QUO’

No formal institutional framework for the UNWC is created immediately following its entry into force.

WEAKNESSES & THREATS

- Parties to the UNWC would not benefit from having in place a formal institutional framework to expand its base. The **absence of an institutional “home” for the UNWC could therefore be seen as a barrier to accelerating its ratification process.**
- The **lack of a mandated structure to oversee the UNWC** could have an impact on its parties, by making it **harder to mobilise potential donors and partners around implementation.** Entry into force of the UNWC as such creates a unique window of opportunity to address this risk.
- It may be **harder to coordinate activities between the UNECE Water Convention and UNWC** when there is no formal institutional framework for the latter instrument.

ALL OPTIONS
Additional points to consider

Specifically, effective coordination would:

- **Allow the UNWC parties to capitalise on 20 years' experience in the implementation of the UNECE Water Convention**, by ensuring that: a) the detailed text and accompanying recommendations, guidelines and model provisions of the latter help inform the interpretation and application of the more general provisions of the former; and b) the experience in setting and maintaining an institutional framework under the latter guides decision-making in this regard under the former.

- **Provide parties to the UNECE Water Convention with the opportunity to exchange experiences with the parties to the UNWC**, particularly in areas where the latter instrument is more detailed, or where UNWC parties were not also parties to the UNECE Water Convention.

- **Enable both Conventions to operate at the global level whilst providing states with some flexibility.** For example, some states may be more willing to join the UNWC as its provisions more closely reflect their existing treaty practice. Similarly, a state that may have recently become a party to either Convention might initially wish to avoid undertaking a further, potentially lengthy, process of accession to another global water convention.

ALL OPTIONS

Additional points to consider

All three options envisage either or both Conventions operating at a truly global level.

However, it is not possible to predict at present whether the UNWC and/or the UNECE Water Convention will eventually enjoy universal ratification by states. Regarding this issue, some vital points to consider are that:

- As mentioned above, the UNWC carries considerable global legitimacy that stems from the open and global process leading up to its adoption. **The acceleration in its ratification process over the last few years and its entry into force sends a strong signal that the Convention is now a central instrument in international water law**, which in itself could trigger renewed interest among states and additional ratifications over the coming years.
- As originally negotiated, the UNECE Water Convention was designed to address transboundary water issues within the UNECE region, and its current membership is dominated by European states. **Non-UNECE states would have to be convinced that the Convention can benefit them. In this regard, the existing legal and institutional *framework* of the UNECE Water Convention is potentially flexible enough to prove relevant across the world's transboundary waters.** Since 2009, non-UNECE members have participated in activities under that Convention; and such activities could be expanded further as more states joined the regime. Parties to the UNECE Water Convention have engaged with other MEAs and global partners (e.g., UNFCCC, UN-Water, GEF and UNESCO). The UNECE has experience in servicing global processes, e.g., in the field of trade and transport, with an active involvement of countries throughout the world.

UNECE WATER CONVENTION & UN WATERCOURSES CONVENTION: ENTRY INTO FORCE OF THE UNWC – WHERE TO FROM HERE?

KEY POINTS TO CONSIDER FOR FUTURE COORDINATION & IMPLEMENTATION

- There are key similarities and differences but collectively - the scope, substantive norms, procedural norms and dispute resolution procedures - **when taken together as a package of norms, make both Conventions generally complementary in nature.**
- **There are many ways in which the UNWC and UNECE Water Convention may evolve** now in terms of formal or informal institutional frameworks, either separately or together, but **several basic options exist which may assist in planning for their future coordination.**
- Whichever method is considered for their separate or joint institutional frameworks and whatever way the development of both Conventions unfolds, **experience from other MEAs shows that coordinating these two conventions will enhance their mutually effective implementation. Hence, we must use this unique window opening now to seize the opportunity for planning this process.**

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Additional Resources

UNWC Online User's Guide – Relationship with UNECE Water Convention

- <http://www.unwatercoursesconvention.org/importance/the-relationship-with-the-unece-water-convention/>

Discussion paper on institutional options for coordinating both Conventions

- <http://www.unwatercoursesconvention.org/documents/discussion-paper-global-un-water-conventions-options-for-coordinated-implementation.pdf>

Rieu-Clarke & Kinna **'Can Two Global UN Water Conventions Effectively Co-exist? Making the Case for a 'Package Approach' to Support Institutional Coordination'** Review of European, Comparative & International Environmental Law, Volume 23, Issue 1, pages 15–31, April 2014

- <http://onlinelibrary.wiley.com/doi/10.1111/reel.12070/abstract>