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Fostering cooperation over the Han river between North and South Korea – Is the UN Watercourses Convention the appropriate instrument?

Laure-Elise Mayard

The United Nations Convention on the Law of the Non-navigational Uses of International Watercourses (UNWC) is a legal framework created by the UN General Assembly to develop cooperation over transboundary water resources.¹ Since its adoption in 1997² to its entry into force in 2014³, the UNWC has been recognised as the result of years of refining the principles of international water law, and as a reflection of compromise between the interests of the various actors involved in transboundary resources regulation and cooperation. It is now legally binding on its 36 parties. It has also a great influence on regional agreements and cases⁴, as well as the customary international law status of its main provisions.⁵ In spite of those elements, the UNWC faces some criticism and ratification has progressed slowly.⁶ One of the issues regarding this framework convention is its potential for adaptation to local specificities, particularly in situations where ‘high politics’ are at play.⁷⁸ As highlighted by the international community, the need for cooperation over transboundary water resources is pressing, thus far only 40% of shared watercourses possess a formal agreement of cooperation or related institution.⁹ Although the framework of the UNWC is generic, cooperation has to be tailored to each situation. It is both legitimate and necessary to consider if the UNWC is the appropriate instrument to achieve

¹Convention on the Law of the Non-navigational Uses of International Watercourses (adopted 21 May 1997, entered into force 17 August 2014) 36 ILM 700 (1997); G.A. Res. 51/229, U.N. GAOR, 51st Sess., 99th mtg., UN Doc A/RES/51/229 (1997) (UNWC)

²UNGA. Res. 51/229, U.N. GAOR, 51st Sess., 99th mtg., UN Doc A/RES/51/229 (1997)

³United Nations Treaty Collection, ‘Chapter XXVII Environment. 12. Convention on the Law of the Non-Navigational Uses of International Watercourses’, available at https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-12&chapter=27&lang=en, last consulted 03/06/17

⁴Gabriel Eckstein, ‘Development of International Water Law and the UN Watercourse Convention’ in Turton and Henwood (eds), *Hydropolitics in the Developing World: A Southern African Perspective* (African Water Issues Research Unit 2002)

⁵Stephen McCaffrey, ‘The UN Convention on the Law of the Non-Navigational Uses of International Watercourses: prospects and pitfalls’ (1998) World Bank Technical Paper 17

⁶Salman M. A. Salman, ‘The United Nations Watercourses Convention Ten Years Later: Why Has its Entry into Force Proven Difficult?’ (2007) 32 *Water International* 1

⁷Patricia Wouters, ‘The legal response to international water conflicts: the UN Watercourses Convention and beyond’ (1999) 42 *German Yearbook of International Law* 293

⁸‘High politics’ understood as ‘those issues of existential importance to the state and which concern its very survival’. For additional information, see Jeremy Youde, ‘High Politics, Low Politics, and Global Health’ (2016) 1 *Journal of Global Security Studies* 157, 157

⁹Flavia Loures and others, *Everything you need to know about the UN Watercourses Convention*, (2015), 5

cooperation in small-scale and bilateral contexts, where 'high politics' dominate.¹⁰ This study will attempt to identify whether the UNWC can develop cooperation in the context of the Han River Basin.

The Han River Basin and its aquifer¹¹ are shared between North and South Korea and became transboundary as a result of the separation of Korea after World War II. Since the creation of these countries, peace has been uncertain despite the Armistice Agreement of 1953, following the Korean War.¹² The relations in the Korean peninsula have been characterized by a lack of cooperation, distrust and seesawed attempts at meeting and agreeing.¹³ The Han River Basin, because of its transboundary position and its importance¹⁴, is at the heart of the tensions. The Han River Basin is partially located in the Demilitarized Zone (DMZ), a 4 km 'buffer' zone between the countries with restricted access over 2km on either side of the border. Beyond the 2 km on each side of the border, the North and South maintain a heavily fortified and militarized zone.¹⁵ An illustration of the tensions between the two Koreas within the Han River Basin, is the 'securisation of water' through the 'Peace Dam' lead by Chun Doo Hwan.¹⁶ The 1987 policy of the former South Korean dictator prompted the construction of the 'Peace Dam' (or counter-dam), south of the Korean border. It was meant as protection from Imnam dam, on the North Korean side of the Han River Basin. The latter has the alleged capacity to retain water from the river and flood Seoul.

The Han River Basin is an interesting case because of its context of political tensions and the critical need for cooperation in transboundary management of the water resources. Interesting features of this small-scale basin include the variety of issues that can arise and the absence of fundamental communication and cooperation over the Basin and in general. Firstly, the definition of the Han River Basin needs to be jointly set to clarify the object and scope of the cooperation. Two parts of the basin hold a special status: the DMZ and the aquifer. The DMZ is a conflictual zone between the two countries and it might make cooperation across the basin challenging. Few studies or regulation by either country have been conducted with regard to the aquifer. There is limited information available on its confined nature. Regarding the management of the basin, the main focus is water quality.¹⁷ Agricultural run-offs and rapid industrialization have contributed to growing levels of pollution, especially for South Korea as most of Seoul's drinking water comes from the Han

¹⁰Peter H. Gleick, 'Conflict and cooperation over fresh water', *Confronting the Challenges of the 21st Century* (World Scientific 2011) 336

¹¹IGRAC (International Groundwater Resources Assessment Centre), UNESCO-IHP (UNESCO International Hydrological Programme), 2015. 'Transboundary Aquifers of the World' [map]. Edition 2015. Scale 1: 50 000 000. Delft, Netherlands: IGRAC, 2015, available at <https://www.un-igrac.org/sites/default/files/resources/files/TBAmap_2015.pdf>, accessed 31/01/17

¹²Agreement Concerning a Military Armistice in Korea (adopted July 27 1953), available at <http://peacemaker.un.org/sites/peacemaker.un.org/files/KP%2BKR_530727_AgreementConcerningMilitaryArmistice.pdf>, accessed 11/08/16 (thereafter referred to as '1953 Armistice Agreement')

¹³Examples are the Kaesong Industrial Complex in North Korea with South Korean implanted industries; the South Korean Ministry of Unification responsible for inter-Korean relations and preparing reunification; or South Korean president Kim Dae Jong's "sunshine policy" in the 1990s towards North Korea.

¹⁴Importance for South Korea and the city of Seoul and Incheon, which are provided with most of their water from the Han River. For additional information, see Hyoseop Woo and Won Kim, 'Floods on the Han River in Korea' (1997) 22 *Water International* 230

¹⁵1953 Armistice Agreement; Ke Chung Kim, 'Preserving Biodiversity in Korea's Demilitarized Zone' (1997) 278 *Science* 242, 242-243

¹⁶Jin-Tae Hwang, 'The Chun Doo-Hwan Authoritarian Regime's Securitisation of Water: The Case of the Peace Dam, South Korea' (2016) 132 *Scottish Geographical Journal* 234, 235

¹⁷Young-Doo Wang and others, 'An Institutional Approach to River Basin Management' (2003) 41 *환경논총* 139

River Basin. Quantitative issues in the Han River Basin are not considered a priority at this time.¹⁸ However, the seasonality of rain levels brings about quantity concerns regarding flooding and drought management, as well as water flow management infrastructure such as dams.¹⁹ Drought and flood management is efficiently dealt with in South Korea through infrastructure and management plans. Conversely, North Korea is not efficiently prepared and is still suffering from the effects of seasonal floods.²⁰ Water structures have been developed (mostly in South Korea) but no agreement has been reached between the two countries regarding the management of the river flow or the structures themselves. Environmental protection is another compelling issue for the Han River Basin, especially regarding the rich biodiversity present in the DMZ which could be at the centre of further study and protection.²¹ However, the hostility surrounding this zone has until now prevented: research to be diligently conducted in this location; and it being promoted as a natural protected park by UNEP.²²

Cooperation between North and South Korea would aim at solving the issues presented above, regarding both qualitative and (foreseeable) quantitative issues of the Han River Basin. The transboundary character of the problem requires a joint solution and would benefit both countries, as well as the water resource itself. The environment would be considered as a neutral non-politicised common interest. Overall peace and cooperation could also result from joint water management. Water cooperation has participated before to wider peace, such as the case of the Jordan River “picnic table” talks from 1953, when Israel and Palestine were still officially at war.²³ Considering these factors, the UNWC presents a wealth of benefits to develop cooperation and address the issues at hand in the Han River Basin, some of which will be presented here.

Firstly, the cornerstones of the UNWC, on basic cooperation between riparian States, require an equitable and reasonable use of the water resources (article 5), the duty to take all appropriate measures to prevent causing of significant harm (article 7) and the duty to cooperate (article 8). The core provisions of articles 5 to 8 are essential to create a basis of cooperation, set basic rights and obligations between the riparian States and protect the transboundary resource concerned. Those articles are again based on a balanced view between different needs, for example between upstream and downstream countries. Cooperation also needs to be defined for the Han River Basin geographically, considering problematic areas such as the DMZ and the aquifer. No clear provision is set by the UNWC regarding geographical cooperation but the language used in article 2 is the result of a balance between restricted space for cooperation and extended basin at the expense of national sovereignty over natural resources. In this context, cooperation is more likely to be achieved through compromise between the two riparians regarding the inclusion of zones such as the DMZ or the aquifer. The UNWC procedural provisions on communication would be efficient in ‘foster[ing], and in some cases even kick-start[ing]’ cooperation.²⁴ Attempts at initiating the notification processes between North and South Korea regarding water flooding from upstream

¹⁸UNESCO, ‘Asia and the Pacific. Republic of Korea the Han River basin’(2009) *The United Nations World Water Development Report 3, Case Study Volume: Facing The Challenges*, 35

¹⁹H. Woo and W. Kim, (13) 230

²⁰UNESCO (18)

²¹UNESCO (18) 35

²²The DMZ was suggested as a natural park by the UNEP and IUCN but North Korea opposed the project due to political reasons. For additional information, see Ke Chung Kim (14) 242-243 ; Arthur H Westing, *From Environmental to Comprehensive Security* (Springer 2013) 91

²³Aaron T Wolf and others, 'Water can be a pathway to peace, not war' (2006) 1 *Navigating Peace* 1, 3

²⁴Alistair Rieu-Clarke, Ruby Moynihan and Bjoern-Oliver Magsig, *UN Watercourses Convention* (user's guide, IHP-HELP Centre for Water Law, Policy and Science (under the auspices of UNESCO) 2012) 134

dams have been minimal and unsuccessful.²⁵ It is however the sign that procedural cooperation has been encouraged and could be framed through the UNWC successfully, despite the challenges it presents. The UNWC can encourage cooperation and communication through good faith negotiations aimed at reducing the distrust amongst the countries.²⁶ Duties to notify and consult are set out in Part III of the UNWC and the duty to regularly exchange data and information in article 9. Other provisions set similar duties regarding specific topics such as the failure of water infrastructures (articles 12 to 19).

Articles 29 to 31 of the UNWC²⁷ are worth mentioning in the specific case of the Han River Basin as they set a minimum communication and cooperation threshold in case of hostility or armed conflict between the riparians. This being a likely possibility, the UNWC ensures the continuity of the cooperation in case their precarious relations deteriorate. The requirements set out in the UNWC appear vague but considering the current level of cooperation, the formulation of duties and time-frames over communication in the UNWC are useful. The UNWC also suggests the establishment of a joint institution for the management of shared water resources to ensure cooperation in a more coordinated way.²⁸ A common institution dedicated to the Han River would be extremely beneficial (*prima facie* based on the de-politicisation and specialisation of such a body). An example of such a promising institution between riparians with conflictual relations is the Permanent Indus Commission, which could inspire the Han River institution.²⁹ It appears that this is not a consideration of the two riparians at this time and attempts at regular meetings to negotiate on broader subjects other than the Han River, have failed.^{30 31} Conveying cooperation also lies in the resolution of possible disputes and the UNWC has dealt with this issue in article 33. The possibilities for dispute settlement offered by article 33 appear appropriate for a low level of trust and can strengthen cooperation, with an independent fact-finding commission and time limits placed on the countries. Various forms of dispute settlement are suggested, as well as the involvement of a third party.

The UNWC can create cooperation by addressing the specific issues faced in the context of the Han River Basin such as, the management of water quality, quantity, floods and droughts, water infrastructure, environmental protection and geographical elements. Article 5 and 7 are key articles dealing with both water quality and quantity issues and other articles are also pushing for cooperation in terms of pollution management.³² Article 21 would help both countries to prevent and reduce pollution to the Han River Basin and tackle water quality issues. The Han River Basin could benefit from the provisions of the UNWC regarding the regulation of the watercourse flow and the communication mechanisms required in case of floods.³³ Considering the seasonality of rains and

²⁵Ministry of Unification of South Korea, 'Inter-Korean Policy Issues, Trade and Economic Cooperation >Timeline', available at <<http://eng.unikorea.go.kr/content.do?cmsid=1793>>, accessed 11/08/16

²⁶Article 3 (5) and 4 (2) UNWC

²⁷Article 29 'International watercourses and installations in time of armed conflict', article 30 on 'indirect procedures' and article 31 on 'data and information vital to national defence or security'.

²⁸Article 8 (2) and 24 UNWC

²⁹Neda A. Zawahri, 'Designing river commissions to implement treaties and manage water disputes: the story of the Joint Water Committee and Permanent Indus Commission' (2008) 33 Water International 464

³⁰E. Talmadge and T-H. Kim, 'South Korea, North Korea hold their first high-level talks in nearly a year' (The Associated Press 22nd August 2015) available at <<http://globalnews.ca/news/2179947/south-korea-north-korea-hold-their-first-high-level-talks-in-nearly/>>, accessed 05/10/2016

³¹Ministry of Unification of South Korea, 'Inter-Korean Policy Issues, Trade and Economic Cooperation >Timeline', available at <<http://eng.unikorea.go.kr/content.do?cmsid=1793>>, accessed 11/08/16

³²Article 21 and 24 UNWC

³³Article 25 and 28 UNWC

the previous lack of notification of water discharge from dams, the UNWC would set an important base for peaceful use of the Han River Basin.³⁴ Similarly, UNWC provisions on water infrastructure, in articles 9, 11 and 26, would be useful since many dams are being built to regulate and exploit the flow of the river. Article 26 is particularly relevant for the Han River Basin and it could avoid disputes due to the deterioration of water infrastructure. Indeed, South Korea has been trying to engage with North Korea regarding noticeable cracks on the Imnam dam, which may result in its collapse. North Korea has so far denied the fragility of the infrastructure and South Korea decided in 1993 to finish the construction of the 'Peace Dam', initially built for political reasons. Part IV of the UNWC regulates the protection of the environment and could help the Han River Basin to preserve the water resource, the surrounding ecosystems and biodiversity, for a sustainable use of the resource.³⁵

Despite the apparent suitability of the UNWC to the Han River Basin issues and needs in terms of cooperation, North and South Korea are not as of now parties to the UNWC. Different ratification scenarios can influence the opportunity of the UNWC to foster cooperation.

In the eventuality that both countries ratify the UNWC, the full range of the provisions would be binding and the UNWC would have its best opportunity at developing cooperation. However, based on North Korea's attitude towards the international community, it seems unlikely to ratify the UNWC. It has proved reluctant even towards the intervention of foreign help with its national environmental issues, including from South Korea.³⁶ Even so, the country has shown some signs of international commitment regarding the environment, by signing the Paris Agreement³⁷ and being a Non-Annex I party to the UNFCCC.³⁸ Considering the gap between the current level of cooperation and the level set by the UNWC, North Korea would be reluctant to commit to the UNWC.

Another possible scenario would consist in one of the two riparian States accessing the UNWC, which is more likely for South Korea on the short-term. A lot of work has already been undertaken in that respect, both by the government and with the support of NGOs promoting State accession to the UNWC.³⁹ As a document of direct authority on its State parties⁴⁰, the ratification of the UNWC by only one country would limit the instrument's potential as a catalyst for cooperation. The territoriality and *inter partes* application of the agreement would limit the actions to the South Korean part of the Han River, thus excluding the DMZ and the 11% proportion of the upstream basin

³⁴Reference to the non-notified discharge of water from an upstream dam in North Korea where 6 South Korean citizens died in 2009. For additional information, see Ji-Hye Jun, 'N. Korea discharges water from dam without notice' (The Korea Times, 06 June 2016) available at

<http://www.koreatimes.co.kr/www/news/nation/2016/07/116_208774.html>, accessed 11/08/16

³⁵McCaffrey (5)

³⁶Interference on environmental matter in North Korea see Kyudok Hong, 'A New Threat Currently Ignored: Need for Inter-Korean Environmental Cooperation' (2006) 20 The Journal of East Asian Affairs 79, 103

³⁷UNFCCC website, 'Paris Agreement –Status of Ratification', available at http://unfccc.int/paris_agreement/items/9444.php, last accessed 05/06/17

³⁸UN Framework Convention on Climate Change (UNFCCC) website, 'List of Non-Annex I Parties to the Convention', available at <http://unfccc.int/parties_and_observers/parties/non_annex_i/items/2833.php>, accessed 27/07/17

³⁹UN Doc A/51/PV.99; Green Cross website, 'Water for life and peace. The UN Watercourses Convention Enters into Force. Major international environmental law development', May 21, 2014, available at <https://www.gcint.org/the-un-watercourses-convention-enters-into-force/>, last accessed 05/06/17

⁴⁰Vienna Convention on the Law of Treaties 23 May 1969

In North Korea.⁴¹ South Korea would be held accountable for its obligation according to the UNWC (likely to set higher standards in terms of good governance and cooperation than in national law). This would, at least at the national level, complement existing efforts by South Korea to implement IWRM as a matter of national policy and other measures taken to manage, protect and preserve the Han River's environment.⁴² If North Korea were not party to the UNWC, the provisions would likely only be unilaterally implemented and would be tantamount to signs of good faith in the transboundary management of the Han River by South Korea. Nonetheless, the ratification by one party could also incentivise the other riparian, here North Korea, to ratify. This was mentioned in the case of Israel and Palestine and was considered unlikely, which could also not be guaranteed in the present case.⁴³ However, North Korea is required to follow Customary International Law (CIL). Several core provisions of the UNWC are broadly considered as CIL⁴⁴, such as article 5, 7 and 8, and should be applicable to North Korea despite not being a party to the UNWC. The imbalance between the legally binding duties of South Korea as a party and North Korea as non-party to the UNWC would not be as great as presented above because CIL would still apply. Yet, the track record of North Korea applying CIL and international law is not formally known and it is possible that even CIL would not be complied with. It can be said that cooperation 'cannot be achieved solely through individual action by each riparian state acting in isolation'⁴⁵ and that whatever benefits unilateral ratification could bring, the resulting cooperation would be partial at best.

Finally, if no riparian becomes a party to the UNWC and its provisions are not legally binding on them, cooperation can however develop through the UNWC's influence and the customary nature of its main provisions. The 2015 SADC protocol⁴⁶ has been revised to take into account the UNWC and explicitly refers to it in its Preamble.⁴⁷ The new 1995 Mekong Agreement also based its provisions on CIL formulated by the UNWC.⁴⁸ It illustrates the possibility for a regional Han River Basin Agreement to be created, which could promote similar provisions as the UNWC with local adaptations. The customary aspect of the UNWC would still lead to a basic level of cooperation between the countries, despite an evident lack of clarity and certainty. The agreement could even be placed more explicitly under the general principles of the UNWC and therefore gain support and clarity. However, the adoption of a local watercourse agreement does not prevent the ratification of the UNWC by the parties and vice versa, which leaves possibilities open for further development of cooperation.

⁴¹Sung Kim, 'Outcomes and Prospects for Integrated Han River Basin Management in Korea', Sustainable Water Resources Research Center, 12th International River symposium 2009, (Brisbane/Australia), available at <http://archive.riversymposium.com/index.php?element=W_S1_GH1_Sung+Kim.pdf>, accessed 11/08/16

⁴²Ministry of Environment of South Korea, 'Master Plan for Water Environment Management (2006-2015)' (last modified 15 June 2015), available at <<http://eng.me.go.kr/eng/web/index.do?menuId=262&findDepth=1>>

⁴³Gabriel Eckstein, 'State of Palestine Accedes to UN Watercourses Convention' (*International Water Law*, 7 January 2015) <<http://www.internationalwaterlaw.org/blog/2015/01/07/state-of-palestine-accedes-to-un-watercourses-convention/>> accessed 1/08/17

⁴⁴McCaffrey (5)

⁴⁵Comment made in relation to Article 5 of the UNWC. For additional information, see McCaffrey (5) 20

⁴⁶Consolidated Text of the Treaty of the Southern African Development Community (date signed 21st October 2015), available at <http://www.sadc.int/files/5314/4559/5701/Consolidated_Text_of_the_SADC_Treaty_-_scanned_21_October_2015.pdf>, last accessed 21/11/17

⁴⁷Amidou Garane, Charles Biney and Eléonore Belemliiga, 'The 1997 United Nations Convention on the Law of Non-navigational Uses of International Watercourses: what contribution to the development of the Water Charter for the Volta Basin?' (2017) *Water International* 1

⁴⁸George E Radosevich and Douglas C Olson, *Existing and emerging basin arrangements in Asia: Mekong River Commission case study* (1999), 2

On several points, the ratification of the UNWC would be beneficial for cooperation in the Han River context. However, cooperation on the Han River Basin can still take place through the UNWC with reliance on its customary nature and indirect influence as a legal framework.