

Memorial on Behalf of South Asian Association for Regional Cooperation (SAARC)

INTERNATIONAL COURT OF JUSTICE

REQUEST FOR AN ADVISORY OPINION CONCERNING FRESHWATER RIGHTS
UNDER INTERNATIONAL LAW IN RELATION TO THE POTENTIAL LEGAL
PERSONALITY OF RIVERS AND THE CLIMATE CRISIS



MEMORIAL FOR SOUTH ASIAN ASSOCIATION FOR REGIONAL COOPERATION
THE 1st WCEL INTERNATIONAL WATER JUSTICE MOOT COURT AT THE
CONFERENCE OF JUDGES AND PROSECUTORS ON WATER JUSTICE DURING THE
8th WORLD WATER FORUM IN BRASÍLIA, BRAZIL

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INDEX OF AUTHORITIES

TREATIES AND OTHER INTERNATIONAL AGREEMENTS

Declaration of Madrid, 20 April 1911

Montevideo Convention on the Rights and Duties of States 1933

The Helsinki Rules on the Uses of the Waters of International Rivers 1966

Convention on the Law of the Non-Navigational Uses of International Watercourses 1997

The Indus Water Treaty

United Nations Convention to Combat Desertification

General Assembly Resolution 63/278, International Mother Earth Day, A/RES/65/164

General Assembly Resolution 07/208, Harmony with Nature, A/RES/70/208

General Assembly Resolution, Sustainable Development and Sustainable Development Goals,
A/68/948

JUDICIAL DECISIONS AND ADVISORY OPINIONS

Mohd. Salim Versus State of Uttarakhand and others. Writ Petition (PIL) No. 126 of 2014

REPORTS

Food and Agriculture Organization of the United Nations, 'Coping with Water Scarcity:
Challenge of the Twenty First Century' (2007)

Guy Hutton, 'Global Costs and Benefits of Drinking-Water Supply and Sanitation Interventions
to Reach the MDG Target and Universal Coverage' (World Health Organization 2012)'

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M Surie and S Prasai, 'Strengthening Transparency and Access to Information on Transboundary Rivers in South Asia' [2015] The Asia Foundation

S. Ayub Qutub and Umesh Parajuli, *Water Conflicts in South Asia: Managing Water Resource Disputes Within and Between Countries of the Region*

United Nations, 'Water Scarcity'

United Nations, 'Water: A Shared Responsibility'

World Wildlife Fund, 'Water Scarcity'

BOOKS, ARTICLES, JOURNALS

Ben Crow and Nirvikar Singh, 'Impediments and Innovation in International Rivers: The Waters of South Asia' [2000] 28(11) World Development 1907-1925

Dinah Shelton, 'Nature as a Legal Person' [2015](22) Vertigo

EL O'donnell and Julia Talbot-Jones, 'Creating Legal Rights for Rivers: Lessons from Australia, New Zealand, and India' [2018] 23(1) Ecology and Society

Jean-Marc Neumann, 'The Universal Declaration of Animal Rights or the Creation of a New Equilibrium Between Species' [2012] 19(1) Animal Law Review

KN Adhikari, 'Conflict and Cooperation on South Asian Water Resources' [2014] 14(2) Islamabad Policy Research Institute Journal 45-62

Lucero Radonic, 'Through the Aqueduct and the Courts: An Analysis of the Human Right to Water and Indigenous Water Rights in Northwestern Mexico' [2017] 84 Geoforum 151-159

LC Pecharroman, 'Rights of Nature: Rivers That Can Stand in Court' [2018] 7(1) Resources

LM Harris and MC Roa-garcía, 'Recent Waves of Water Governance: Constitutional Reform and Resistance to Neoliberalization in Latin America (1990–2012)' [2013] 50 Geoforum 20-30

Michael Kugelman, "Safeguarding South Asia's Water Security", *Seminar*, Issue 626, October

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2011

Peter Rogers, 'Facing the Freshwater Crisis' [2008] 299(2) *Scientific American* 46-53

Ravindra Pratap, 'Building Peace over Water in South Asia: The Watercourses Convention and SAARC' [2018]4(1) *Athens Journal of Law* 7-25

Robert G. Wirsing, Daniel C. Stoll and Christopher Jasparro, *International Conflict over Water Resources in Himalayan Asia*, New York: Palgrave MacMillan, 2013, p. 16

MISCELLANEOUS

Abdullah Al Arif, 'A Research Guide on the South Asian Association for Regional Cooperation (SAARC)

Editorial, 'Rights for Rivers' (*Dawn*, 16 March 2018)

Environmental Foundation Limited, 'Judges and Environmental Law: A Handbook for the Sri Lankan Judiciary' (United Nations Environment Program 2009)

Fahim Zaman, 'International Law on Water Rights' (*Dawn*, 31 October 2016)

Shawahiq Siddiqui, 'UN Watercourses Convention is good for South Asia' (*The third polenet*, 18 August 2014)

I. STATEMENT OF JURISDICTION

The United Nations General Assembly adopted resolution A/RES/72/Water, requesting an advisory opinion from the International Court of Justice (“The Court”) pursuant to Article 65 of the Statute of The Court. In accordance with Article 66, the Court invited all interested State parties entitled to appear before the Court to submit memorials through regional intergovernmental organizations as an efficient way to represent the multiplicity of State interests in the proceedings. Therefore, the South Asian Association for Regional Cooperation (“SAARC”) submits this memorial in answer to the questions presented.

II. PROBLEM PRESENTED

1. Freshwater Rights under International Law in Relation to the Potential Legal Personality of Rivers and the Climate Crisis

Human life depends on water for sustainability. With the onset of a growing climate crisis, the need to preserve water reserves is more concrete than ever before. Global freshwater resources are threatened by rising demands from many quarters. Growing populations need ever more water for drinking, hygiene, sanitation, food production and industry. Climate change, meanwhile, is expected to contribute to droughts.¹ By 2025, according to data released by the United Nations, the freshwater resources of more than half the countries across the globe will undergo either stress—for example, when people increasingly demand more water than is available or safe for use—or outright shortages. By midcentury as much as three quarters of the earth’s population could face scarcities of freshwater.² Many water sources are threatened by faulty waste disposal, releases of industrial pollutants, fertilizer runoff and coastal influxes of saltwater into aquifers as groundwater is depleted. Because lack of access to water can lead to starvation, disease, political instability and even armed conflict, failure to take action can have broad and grave consequences.³

Around 2 billion people, or almost one-fifth of the world’s population, live in areas of scarcity. Another 1.6 billion people, or almost one quarter of the world’s population, face economic water shortage (where countries lack the necessary infrastructure to take water from rivers and aquifers).⁴ With the existing climate change scenario, by 2030, water scarcity in some

¹ Peter Rogers, 'Facing the Freshwater Crisis' [2008] 299(2) Scientific American 46-53

² Ibid

³ Ibid

⁴ Food and Agriculture Organization of the United Nations, 'Coping with Water Scarcity: Challenge of the Twenty First Century' (2007)

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arid and semi-arid places will displace between 24 million and 700 million people.⁵ This will result in the disappearance of wetlands, depletion of productive habitats, and deal irreparable damage to the ecosystem.⁶ The effects will directly impact women's access to sanitation, the health crisis, and the economic standing of many poverty-stricken families that collect water on a daily basis.⁷

Individual countries and regions need to urgently tackle the critical problems presented by water stress. Water has to be treated as a scarce resource, with a far stronger focus on managing demand.⁸ It is proving extremely difficult for many governments to effectively confront the many and intertwined issues concerning water. The task of managing water becomes even more complex when rivers flow from one country to another. The building of cooperative upstream-downstream relationships is becoming increasingly important with close to half of the world's people living in river basins or above aquifers that cross international borders.⁹ International cooperation for improved river management has resulted in a multitude of treaties, compacts, and agreements – governing large international watersheds such as the Mekong and Danube River basins and small catchments such as the San Pedro River basin in the US–Mexico border region. The complexity of factors that results in water scarcity often prompt states to come up with creative solutions, which includes the possibility of granting legal personality to rivers. The SAARC has witnessed this phenomenon in India, with River Ganges being granted the right to legal personality, and looks forward to exploring the connection between conservation of freshwater resources and the right to nature.

⁵ United Nations Convention to Combat Desertification

⁶ World Wildlife Fund, 'Water Scarcity' (*WWF*) <<https://www.worldwildlife.org/threats/water-scarcity>> accessed 3 March 2018

⁷ Guy Hutton, 'Global Costs and Benefits of Drinking-Water Supply and Sanitation Interventions to Reach the MDG Target and Universal Coverage' (World Health Organization 2012)

⁸ United Nations, 'Water Scarcity' (*UN Water*) <<http://www.unwater.org/water-facts/scarcity/>> accessed 4 March 2018

⁹ United Nations, 'Water: A Shared Responsibility' (*UN Water*, World Water Development Report 2006)

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III. IN CONTEXT: South Asian Association for Regional Cooperation

The regional organization South Asian Association for Regional Cooperation was established on December 8, 1985. There were initially seven member states that are mainly located in South Asia, i.e. Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan and Sri Lanka. In April 2007, at the Association's 14th summit, Afghanistan became its eighth member.¹⁰ The SAARC seeks to promote the welfare of the peoples of South Asia, strengthen collective self-reliance, promote active collaboration and mutual assistance in various fields, and cooperate with international and regional organizations. Countries in the SAARC are largely agrarian, hence making water an important bone of contention and subject of bilateral treaties.

South Asia is gradually heading towards a shortfall of water, which is being exacerbated by growing population, industrialization, mismanagement, and lack of cooperation. This region hosts important systems of international watercourses, including the Indus, the Ganges and the Brahmaputra rivers. South Asian countries have taken initiatives to cooperate in development and management of water resources, but have serious issues and disputes in this sector.¹¹

In South Asia, 1.3 billion people depend on a few river systems for their water-related needs.¹² Due to increasing population and phenomenon of climate change, annual water availability in South Asia has plummeted by nearly 70 per cent, since 1950. It has reached from

¹⁰ Abdullah Al Arif, 'A Research Guide on the South Asian Association for Regional Cooperation (SAARC)' (*Hauser Global Law School Program*, June 2015)

<http://www.nyulawglobal.org/globalex/SAARC.html#_Toc421533609> accessed 1 March 2018

¹¹ KN Adhikari, 'Conflict and Cooperation on South Asian Water Resources' [2014] 14(2) *Islamabad Policy Research Institute Journal* 45-62

¹² S. Ayub Qutub and Umesh Parajuli, *Water Conflicts in South Asia: Managing Water Resource Disputes Within and Between Countries of the Region*, Project Implemented by Global Environment and Energy in the 21st Century (GEE-21) and the School of Advanced International Studies, Johns Hopkins University (SAIS), Sponsored by the Carnegie Corporation of New York, 2004.

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around 21,000 cubic metres in 1960s to approximately 8000 cubic metres in 2005.¹³ By 2025, it is being estimated that the combined population of four largest countries - India, Pakistan, China and Bangladesh - depending upon South Asian rivers is going to be about 3.470 billion.¹⁴ If the present water patterns continue, the region could face 'widespread water scarcity' by 2025.¹⁵

Therefore, the SAARC countries are located in a water-stressed region, which highlights an urgent need to discuss techniques for conservation of freshwater, systems of trans-boundary river management and the impact of climate change. While the 16th SAARC Summit did discuss issues of environmental degradation, the States present were silent on the water crisis. Although the South Asian region is not without water sharing arrangements, including treaties, there is a lack of concrete principles of water sharing.¹⁶ And where principles exist,¹⁷ there is a lack of adherence.¹⁸

¹³ Michael Kugelman, "Safeguarding South Asia's Water Security", *Seminar*, Issue 626, October 2011, pp. 15-22

¹⁴ Robert G. Wirsing, Daniel C. Stoll and Christopher Jaspardo, *International Conflict over Water Resources in Himalayan Asia*, New York: Palgrave MacMillan, 2013, p. 16.

¹⁵ Michael Kugelman, "Safeguarding South Asia's Water Security", *Seminar*, Issue 626, October 2011, pp. 15-22

¹⁶ Ravindra Pratap, 'Building Peace over Water in South Asia: The Watercourses Convention and SAARC' [2018]4(1) *Athens Journal of Law* 7-25

¹⁷ Convention on the Law of the Non-Navigational Uses of International Watercourses UN Doc A/RES/51/229 (1997)

¹⁸ None of the SAARC countries are parties to the Watercourses Convention.

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IV. QUESTION 1: UNDER WHAT CIRCUMSTANCES DOES INTERNATIONAL LAW RECOGNIZE THE RIGHTS OF RIVERS AS HAVING LEGAL PERSONALITY?

1.1. Do rivers enjoy legal personality?

A. International Law

Over the last decade, the human right to water has become central to a policy agenda aimed at addressing conflict in situations of perceived water scarcity and competing claims.¹⁹ While references to this policy framework can be found in international treaties and declarations dating back to the 1970s, the first comprehensive definition of the human right to water was put forward in 2002 by the United Nations Committee on Economic, Social and Cultural Rights with its General Comment 15. Explicitly titled *The Right to Water*, this document states that the human right to water is a prerequisite for the realization of other human rights. Since the United Nations' recognition of access to basic water supply as a human right, over forty-five countries have included the right to water as a stand-alone right in their national constitutions.²⁰

Giving personhood rights to bodies of water is a creative water management strategy that combats water scarcity. It has been implemented by New Zealand for the Maori River, and by India for the Ganges and Yamuna Rivers. The concept of nature's rights and legal personality has been proposed in a variety of formulations, from legally enforceable rights, to "biotic rights" as moral imperatives, to human responsibilities and duties towards nature.²¹ Presently, no official international legal instrument takes this approach, albeit the World Charter for Nature

¹⁹ Lucero Radonic, 'Through the Aqueduct and the Courts: An Analysis of the Human Right to Water and Indigenous Water Rights in Northwestern Mexico' [2017] 84 *Geoforum* 151-159

²⁰ LM Harris and MC Roa-garcía, 'Recent Waves of Water Governance: Constitutional Reform and Resistance to Neoliberalization in Latin America (1990–2012)' [2013] 50 *Geoforum* 20-30

²¹ Dinah Shelton, 'Nature as a Legal Person' [2015](22) *Vertigo*

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proclaimed the intrinsic value of nature and a non-governmental Universal Declaration of Animal Rights was proclaimed at UNESCO.²²

The General Assembly (GA) adopted its first resolution on Harmony with Nature in 2010, encouraging Member States to make use of the designated “Mother Earth Day”²³ and including Harmony with Nature as part of the Assembly’s agenda on Sustainable Development. The Assembly, however, did not mention the concept of “rights of nature” per se until the following resolution in 2011;²⁴ in the resolution, the GA, “Noting the first Peoples’ World Conference on Climate Change and the Rights of Mother Earth,” created an interactive dialogue to share national experiences on how to approach and measure sustainable development in harmony with nature.²⁵ These dialogues have been held annually on Mother Earth’s Day (22 April) as a forum where scholars, civil society, and diplomatic representatives have discussed the concept of Harmony with Nature and the Rights of Nature.²⁶ This constant activity and the interest of some countries to further deepen the concept of the rights of nature led the GA in its 2016²⁷ resolution on Harmony with Nature to note that “some countries recognize the rights of nature in the context of the promotion of sustainable development, and express the conviction that, in order to achieve a just balance among the economic, social, and environmental needs of present and future generations, it is necessary to promote harmony with nature.”

²² Jean-Marc Neumann, 'The Universal Declaration of Animal Rights or the Creation of a New Equilibrium Between Species' [2012] 19(1) Animal Law Review

²³ LC Pecharroman, 'Rights of Nature: Rivers That Can Stand in Court' [2018] 7(1) Resources

²⁴ General Assembly Resolution 63/278, International Mother Earth Day, A/RES/65/164, 15 March 2011 <un.org/en/ga/president/65/initiatives/Harmony%20with%20Nature/A-RES-65-164.pdf> accessed on 15 March 2018

²⁵ Ibid

²⁶ LC Pecharroman, 'Rights of Nature: Rivers That Can Stand in Court' [2018] 7(1) Resources

²⁷ (n 24)

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The rest of the international community has slowly followed through with this concept in recent years. In 2014, the G77²⁸ signed the letter “For a New World Order for Living Well,” in which these countries recognized that “Earth and its ecosystems are our home.” In the letter, “some countries recognize the rights of nature in the context of the promotion of sustainable development” and called for a holistic approach to development that may include the recognition of these rights to restore the integrity of the Earth’s ecosystems. The International Union for Conservation of Nature (IUCN), for instance, seeks to move towards the recognition of the rights of nature. The IUCN Programme for 2017–2020 (approved in 2016) states that it “aims to secure the rights of nature and the vulnerable parts of society through strengthening governance and the rights-based approach to conservation.” Doing so sets as part of its Target 6 to “raise awareness of the rights of nature, and the cultural and spiritual values of nature,” and emphasizes the need to “include urban populations and youth in understanding nature’s intrinsic and intangible values” and “to advance rights regimes related to the rights of nature”.²⁹

The existence of this legal and political precedence is sparking actions for the recognition of the rights of nature in other parts of the world, both on national and local levels. Striking examples of this are Ecuador, Bolivia and New Zealand.

B. Regional Law of SAARC

Environment has been an area of concern within the SAARC member states. Therefore, the heads of states of SAARC nations have been reiterating the need of cooperation in this area.

²⁸ General Assembly Resolution 07/208, Harmony with Nature, A/RES/70/208, 14 December 2012. <un.org/ga/search/view_doc.asp?symbol=A/RES/70/208> accessed on 15 March 2018

²⁹ General Assembly Resolution, Sustainable Development and Sustainable Development Goals, A/68/948, 7 July 2014. <[http://www.g77.org/doc/A-68-948\(E\).pdf](http://www.g77.org/doc/A-68-948(E).pdf)> accessed on 15 March 2018

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Some significant headway has also been achieved in this regard over the last two decades.³⁰ A Regional Study on the Causes and Consequences of Natural Disasters and the Protection and Preservation of the Environment was commissioned by the leaders in 1987 and the study was completed in 1991. A Technical Committee on Environment was established in 1992 to examine the recommendations of the regional study, identify measures for immediate action, and to decide on modalities for their implementation.³¹ However, there is no comprehensive framework amongst the SAARC states regarding the rights of nature, or the legal personality of natural resources. India is the only member of SAARC that has recognized the legal personality of its rivers: namely, the Ganges River, and its main tributary, River Yamuna. Being a centrally located state, India is also at the forefront of most disputes relating to water.

C. Domestic Law of SAARC States

(i) India

On 20 March 2017, the High Court of Uttarakhand declared that: “the Rivers Ganga and Yamuna, all their tributaries, streams, every natural water flowing with flow continuously or intermittently of these rivers, are declared as juristic/legal persons/living entities having the status of a legal person with all corresponding rights, duties and liabilities of a living person”. This decision came only days after the New Zealand parliament passed legislation that declared the Whanganui River catchment to be a legal person.³²

The recognition of the Ganges and Yamuna rivers as legal persons was based on the court’s assessment of the status of the rivers as “sacred and revered... central to the existence of half the

³⁰ Abdullah Al Arif, 'A Research Guide on the South Asian Association for Regional Cooperation (SAARC)' (*Hauser Global Law School Program*, June 2015)

³¹ Abdullah Al Arif, 'A Research Guide on the South Asian Association for Regional Cooperation (SAARC)' (*Hauser Global Law School Program*, June 2015)

³² EL O'donnell and Julia Talbot-jones, 'Creating Legal Rights for Rivers: Lessons from Australia, New Zealand, and India' [2018] 23(1) *Ecology and Society*

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Indian population” (Indian Courts 2017:11). The court also argued that the exposure of these “sacred” rivers to environmental degradation was causing the rivers to lose “their very existence [and that this] requires extraordinary measures to be taken to preserve and conserve Rivers Ganga and Yamuna.” The granting of legal standing to the Ganges and Yamuna rivers was not explicitly designed to be integrated with existing legislative frameworks and is instead meant to provide a substantive shift in the way that the rivers are managed and protected in law in India.³³

(ii) Pakistan

While Pakistan does not legally recognize the personality of its rivers, the theory is gaining popularity. In a rally to mark International Rivers Day in Hyderabad, the Pakistan Fisherfolk Forum advanced the view that the River Indus should be recognized as a person. The demand has been made by groups of people whose livelihood is directly tied to the River Indus. These groups will benefit from the improved environmental regulation of the river that comes with legal personality.³⁴

(iii) Other States

In a legal context wherein Paris Agreement has been adopted by United Nations Framework Convention on Climate Change (UNFCCC) which is aimed at the protection of Mother Earth, a living person and a legal entity, it is eminently clear that any interpretation declaring rivers as non-living and non-legal entities cannot be defended and judicially sustained. This treaty has been ratified by India, Nepal and Bangladesh as well.

³³ Ibid

³⁴ Editorial, 'Rights for Rivers' (*Dawn*, 16 March 2018) <<https://www.dawn.com/news/1395573/rights-for-rivers>> accessed 16 March 2018

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Sri Lanka's freshwater resources are threatened due to pollution and over extraction, which affects both the quality and quantity of water.³⁵ The importance of water as a resource has been recognized since independence, with the highest level of state investment being allocated for the development of water resources – therefore, for Sri Lanka, it is of utmost importance to conserve water and have an efficient water management system.

1.2.Under what circumstances should rivers enjoy legal personality?

The official stance of the SAARC on the legal personality of rivers has not yet been fully formed. However, based on the consensus amongst individual states regarding the dire water crisis and the need to conserve freshwater resources, it can be inferred that rivers should enjoy legal personality when conferring such personality will invoke environmental benefits that could not have been obtained otherwise. While such a measure will inadvertently benefit the indigenous tribe that is tied directly to the river, that does not amount to a primary reason for doing so.

³⁵ Environmental Foundation Limited, 'Judges and Environmental Law: A Handbook for the Sri Lankan Judiciary' (United Nations Environment Program 2009)

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V. QUESTION 2: IS INTERNATIONAL WATER LAW ADEQUATE TO RESPOND TO THE GLOBAL CLIMATE CRISIS, WHICH CAUSES SIGNIFICANT DISRUPTION IN THE HYDROLOGIC CYCLE, BY PROVIDING A FRAMEWORK FOR PREVENTING AND RESOLVING DISPUTES AMONG STATES OVER THE PROTECTION FROM POLLUTION AND SHARING OF WATER QUANTITIES FROM TRANSBOUNDARY RIVERS, LAKES, AND AQUIFERS?

A. International Law

International law provides a wealth of precedents on water use rights and obligations for both upper and lower riparians. The customary international law for transboundary fresh water resources provide for equitable utilization; the Madrid Declaration of 1911 says that the regime of rivers and lakes, contiguous or successive, could not be altered by one state to the detriment of a co-riparian without the consent of the other. This law was also an off-shoot of the same customary law.³⁶

Similarly, the Article 2 of Declaration of Montevideo 1933 points that no state may, without the consent of the other riparian state, introduce into water courses of an international character, for industrial or agricultural exploitation of their waters, any alterations which may prove injurious to other interested states.³⁷

Article 4, Chapter 2 of Helsinki Rules 1966 on the Uses of the Waters of International Rivers', adopted by the International Law Association, insists that, "Each basin State is entitled,

³⁶ Fahim Zaman, 'International Law on Water Rights' (Dawn, 31 October 2016) <<https://www.dawn.com/news/1293406>> accessed 27 February 2018

³⁷ Ibid

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within its territory, to a reasonable and equitable share in the beneficial uses of the waters of an international drainage basin”.³⁸

The UN Convention on the Law of the Non-navigational Uses of International Watercourses adopted by General Assembly on May 21, 1997, is the treaty governing shared freshwater resources and is universally applicable to all member states.³⁹

The UN Convention contains 37 articles arranged in seven parts. Yet Article 5, contained in Part II, reflects the principle that is widely regarded as the cornerstone of the Convention, and indeed the law in the field for equitable and reasonable utilisation and participation. It requires that a State sharing an international watercourse with other States utilise the watercourse, in its territory, in a manner that is equitable and reasonable vis-à-vis the other States sharing it.⁴⁰

With the UN Convention having been ratified by 36 states – after 17 years of adoption by the UN General Assembly – it has entered into force on August 17, 2014. While the majority of the countries have opted to remain outside its scope for now, the convention, however, establishes an international legal framework governing cross border watercourses declaring water rights of all riparians as sacrosanct and non-violable.⁴¹

The customary international law, declarations, the Helsinki rules and the UN convention on the subject establishes two important principles for all river basins: one, that the first right

³⁸ Ibid

³⁹ Ibid

⁴⁰ Ibid

⁴¹ Ibid

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over the water of the rivers is that of the people living in the basin, and the second that the shared waters could neither be stopped nor diverted without the consent of the other riparian state.⁴²

B. Trans-boundary Water Management in SAARC

The lack of a desirable normative framework regarding water sharing adds to the problem of water crisis in South Asia. Limitations of the existing water sharing regimes in the South Asian region and their potential to degenerate into conflicts are attributable to a host of factors. The legal and institutional response to trans-boundary water management in South Asia has been skewed, often attributed to hydro-diplomacy that is strongly linked to the geopolitical context characterized by intra-regional power imbalances, mutual hostility and suspicion.⁴³

Another issue that has been at the centre of all water related developments in the region is the securitisation of water data which is the manifestation of other security concerns such as environment, food and energy – with India at the centre stage. Given the history of tensions and disputes between co-riparian countries in the region, hydrological information pertaining to transboundary rivers such as the Indus, Ganges, and Brahmaputra is particularly sensitive and is often considered classified on the grounds of national security.⁴⁴

A number of treaties and agreements between countries on shared international watercourses are often claimed to reflect biased positions and power imbalances. For example, agreements between India and Nepal are contested on the grounds that they are aimed at giving India access and control over Nepal's water.

⁴² Ibid

⁴³ Shawahiq Siddiqui, 'UN Watercourses Convention is good for South Asia' (*TheThirdpole.net*, 18 August 2014) <<https://www.thethirdpole.net/2014/08/18/un-watercourses-convention-is-good-for-south-asia/>> accessed 9 March 2018

⁴⁴ M Surie and S Prasai, 'Strengthening Transparency and Access to Information on Transboundary Rivers in South Asia' [2015] The Asia Foundation

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Similarly, Bangladesh holds India – an upper riparian – responsible for many of its water problems due to its control of lean season flow and release of water during monsoons causing floods in Bangladesh. Four bilateral instruments have been signed between India and Bangladesh, including the 1996 Ganga Treaty. However, disputes over the lean season flow from the Farakka barrage on the Ganga in India continues to strain relations between the two countries.

The famous Indus Water Treaty (IWT) between Pakistan and India is also under serious strain because of the dispute over the Kishanganga Hydroelectric Project built by India.

On the other hand, India has a positive relationship with Bhutan through mutually beneficial water resource management agreements. Bhutan's hydroelectric dam projects have been funded by India, with India being Bhutan's largest customer for hydropower. This agreement reduces the risk of conflict and increases the potential resilience to water scarcity.

VI. CONCLUSION

There has been little regional cooperation in South Asia about the contentious topic of water.⁴⁵ While the SAARC regularly conducts Summits to discuss regional problems, issues related to water conservation are often overlooked as the Summits do not elucidate on bilateral problems between countries. Innovative solutions to the water management crisis can be derived from SAARC's history with this issue. For example:

- (i) Ratification of the UN Watercourses Convention will be beneficial as it embodies an effective yet flexible framework of internationally accepted and endorsed

⁴⁵ Ben Crow and Nirvikar Singh, 'Impediments and Innovation in International Rivers: The Waters of South Asia'[2000] 28(11) World Development 1907-1925

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principles, mechanisms, substantive and procedural rules and guidance to enhance cooperative measures currently in place.

(ii) Bringing third parties, other than governments, into negotiation, design and implementation of cooperative projects⁴⁶.

(iii) Making tentative steps toward limited multilateral discussion.⁴⁷

(iv) Strengthen transparency and access to information about the uses of transboundary rivers.

⁴⁶ Ibid

⁴⁷ Ibid

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