

# The Time Has Come for a Universal Water Tribunal

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## ARTICLE

### The Time Has Come for a Universal Water Tribunal

TAREK MAJZOUB\* & FABIENNE QUILLERÉ-MAJZOUB\*\*

*Since its inception in 1981, the International Water Tribunal has emerged as a non-governmental body with a multidisciplinary composition and a mandate based on conventional and customary international water law, which holds public hearings in order to address water-related complaints. This Article describes the historical background of the proposed Universal Water Tribunal (“UWT”) and significant difficulties on the horizon facing the proposed Tribunal (including political, practical, and legal-technical considerations). It then summarizes the key factors of such Tribunal and, finally, touches upon the proposed model based on an expanded concept of jurisdiction. The main underlying thesis is that, whereas the traditional model for interstate dispute settlement offers only limited possibilities of redress to non-state actors, the UWT provides them with the opportunity to present their demands before an environmental justice forum.*

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**I. INTRODUCTION**

Climate change<sup>1</sup> presents an historic opportunity to advance the environmental rule of law by establishing a Universal Water

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1. "Following the success of the 2nd International Conference on Water and Climate, the World Water Council, with the support of the CoP22 Chair [announced the organization of the third edition of the event on 2-3 October 2018 in Marseille, France.] The central objective of the meeting is to mobilize and encourage a range of political, institutional, technical, and scientific stakeholders to work together so that water remains an important element of climate discussions within the UNFCCC's 24<sup>th</sup> Conference of the Parties in December

Tribunal (“UWT”) to preserve peace,<sup>2</sup> advance the protection of environment,<sup>3</sup> and reduce transnational illegal immigration<sup>4</sup> and international water disputes.<sup>5</sup>

The idea for such a tribunal is not new, and the efforts to establish it have increased over the years.<sup>6</sup> Most of the precedents (regional or *ad hoc* international tribunals), however, have been created for a single adjudicating purpose and are temporary in nature. But the important legal fact is that they existed, albeit with all the shortcomings and flaws of having been hastily established. Nevertheless, these precedents are the backdrop of international experience which must now ripen into a universal adjudicating structure, designed to apply international water law<sup>7</sup> with consistency and objectivity, and by means of due process.<sup>8</sup> For,

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2018.” *3rd International Conference on Water and Climate*, WORLD WATER COUNCIL (Oct. 3, 2018), <https://perma.cc/7BHK-QHUW>.

2. See Salman M.A. Salman, *International Water Disputes: A New Breed of Claims, Claimants, and Settlement Institutions*, 31 WATER INT’L 2, 2 (2006), <https://perma.cc/58YH-LUWY>.

3. See Alessandra Lehmen, *The Case for the Creation of an International Environmental Court: Non-State Actors and International Dispute Resolution*, 26 COLO. NAT. RESOURCES, ENERGY & ENVTL. L. REV. 179 (2015).

4. See Int’l. Org. for Migration, *Migration, Environment and Climate Change: Assessing the Evidence* (2009); see also Fabienne Quilleré-Majzoub, *Le Droit International des Réfugiés et les Changements Climatiques: Vers une Acceptation de l’Ecoprofugus ?* [International Refugee Law and Climate Change: Towards an Acceptance of the “Ecoprofugus”?], 4 REVUE DE DROIT INTERNATIONAL ET DE DROIT COMPARÉ (REV. D.I. & D.C.) 602 (2009) (Belg.).

5. Global High-Level Panel on Water and Peace, *A Matter of Survival* 11 (2017), <https://perma.cc/MLH7-YN5U> [hereinafter *A Matter of Survival*]; see also Aaron T. Wolf & Jesse H. Hamner, *Trends in Transboundary Water Disputes and Dispute Resolution*, in WATER FOR PEACE IN THE MIDDLE EAST AND SOUTHERN AFRICA 55, 55–66 (2000), <https://perma.cc/5GNZ-784K>.

6. See *infra* Part II.

7. The 1997 United Nations “Convention on the Law of the Non-navigational Uses of International Watercourses” embraces several principles that will likely become the guiding force in managing international watercourses and resolving water conflicts. This Convention is the only treaty governing shared freshwater resources that is of universal applicability. It is a framework convention, in the sense that it provides a framework of principles and rules that may be applied and adjusted to suit the characteristics of particular international watercourses. See FAO, *Sources of International Water Law*, FAO Legis. Study 65 (1998), <https://perma.cc/Z6J4-VUZN>.

8. The establishment of such a tribunal for the more effective prosecution of major trespass to water should not derogate from established standards of due process, the rights of the accused to a fair trial, and the sovereignty of individual nations. See *infra* Part III and Part IV.

above all else, the UWT will be the oracle and guardian of international water law.

This Article will describe the historical background of the UWT and significant difficulties on the horizon facing the proposed Tribunal (including political, practical, and legal-technical considerations). It will then summarize the key factors of such a Tribunal and, finally, touch upon the proposed model based on an expanded concept of jurisdiction.<sup>9</sup> The main underlying thesis is that, whereas the traditional model for interstate dispute settlement offers only limited possibilities of redress to non-state actors (mainly individuals and groups), the UWT provides them with the opportunity to present their demands before an environmental justice forum.

## II. HISTORICAL BACKGROUND

It can be said that the first water tribunal was established in the tenth century in Andalusia, Spain (*Tribunal de las Aguas de la Vega de Valencia*, Water Tribunal of the Valencian Plain)<sup>10</sup>, where eight canal officials<sup>11</sup> judged the following transgressions: water theft in times of scarcity, breakage of channels or walls, pouring too much water into neighboring fields, altering of irrigation turns,

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9. The proposed model is a modest effort at providing a supple source for the study of such a Tribunal.

10. Since there is a dearth of current English sources available to scholars to assist them in gaining a basic understanding of this Water Tribunal, we have resorted to Spanish sources. See VICENTE GINER BOIRA, *EL TRIBUNAL DE LAS AGUAS DE VALENCIA* (1995); JESUS GONZALEZ PEREZ *ET AL.*, *COMENTARIOS A LA LEY DE AGUAS* (1987); VICENTE BRANCHAT, *NOTICIA HISTÓRICA DE LA ANTIGUA LEGISLACIÓN VALENCIANA SOBRE EL RÉGIMEN DE LAS AGUAS PUBLICAS* (1851); ANTONIO GUILLÉN RODRÍGUEZ DE CEPEDA, *EL TRIBUNAL DE LAS AGUAS DE VALENCIA. LOS MODERNOS JURADOS DE RIEGO* (1920); DON FRANCISCO XAVIER BORRULL Y VILANOVA, *TRATADO DE DISTRIBUCIÓN DE LAS AGUAS DEL RÍO TURIA, Y DEL TRIBUNAL DE LOS ACEQUIEROS DE LA HUERTA DE VALENCIA* (1831); D. CIRLO FRANQUET Y BERTRAN, *ENSAYO SOBRE EL ORIGEN, ESPÍRITU Y PROGRESOS DE LA LEGISLACIÓN DE LAS AGUAS* (1864); THOMAS F. GLICK, *IRRIGATION AND SOCIETY IN MEDIEVAL VALENCIA* (1970); VÍCTOR FAIRÉN GUILLÉN, *EL TRIBUNAL DE LAS AGUAS DE VALENCIA Y SU PROCESO* (1988); VICENTE GINER GUILLOT, *EXPOSICIÓN DE DISTINTAS ACTUACIONES DEL TRIBUNAL DE LAS AGUAS DE LA VEGA DE VALENCIA EN DEFENSA DE LOS DERECHOS DE LAS ACEQUIAS QUE LO INTEGRAN Y DOCUMENTOS REFERENTES A TODO ELLO* (1944); JUAN REIG Y FLORES, *TRIBUNAL DE LAS AGUAS DE VALENCIA* (1879); ANTONIO GUILLÉN RODRÍGUEZ DE CEPEDA, *TRIBUNALES DE AGUAS; SU CONSTITUCIÓN Y SU COMPETENCIA. SISTEMAS EFICACES PARA LA EJECUCIÓN DE SUS FALLOS* (1921).

11. See BOIRA, *supra* note 10, at 37.

keeping irrigation ditches dirty, and watering without asking for a turn.<sup>12</sup> If the defendant was found guilty, the President stated the ritual phrase: “This Tribunal hereby convicts you and orders you to pay costs and damages, according to the Ordinances.”<sup>13</sup> Each canal’s ordinance fixed the penalties for different transgressions.<sup>14</sup> No appeals could be made,<sup>15</sup> and sentence and execution were secured by the Channel Official.<sup>16</sup> It had seldom been necessary to resort to ordinary Andalusian tribunals to have Water Tribunal sentences implemented.<sup>17</sup> Since then, a number of similar precedents have taken place<sup>18</sup> and, moreover, a number of

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12. *Id.* at 43.

13. *Id.*

14. *Id.* at 39, 44.

15. *Id.* at 44.

16. Custody and imprisonment were unknown to the Water Tribunal. *See id.* at 50.

17. *Id.* at 43. The Water Tribunal of the Valencian Plain was recognized as an Intangible Cultural Heritage by UNESCO in 2009. *Id.*

18. Water tribunals have been established since the 1960s, although international law scholars have devoted little attention to their contribution so far. *See* Andrew C. Byrnes & Gabrielle Simm, *Peoples’ Tribunals, International Law and the Use of Force*, 36 UNIV. OF S. WALES L. J. 711, 725 (2013), <https://perma.cc/5VNK-TLKS>. The Water Tribunal in South Africa replaced the Water court in 1998. The Water Tribunal is an independent body which has jurisdiction in all the provinces and consists of a chairperson, a deputy chairperson, and additional members. It has jurisdiction over water disputes. Members of the Water Tribunal must have knowledge in law, engineering, water resource management or related fields of knowledge. They are appointed by the Minister on the recommendations of the Judicial Service Commission, the body which chooses judges. *The Courts of South Africa*, WESTERN CAPE GOV., <https://perma.cc/3N24-R3ZV>. In New Zealand, a dedicated Environment Court exists. *See* The Environment Court of New Zealand, *About the Environment Court*, <https://perma.cc/6U47-B6XZ>; MINISTRY OF THE ENVIRONMENT, AN EVERYDAY GUIDE: YOUR GUIDE TO THE ENVIRONMENT COURT, <https://perma.cc/5FBU-VM4A>; Ceri Warnock, *Reconceptualising the Role of the New Zealand Environment Court*, 26 J. OF ENTVL. L. 3, 507–518 (2014). In United States, there are many Water Courts. In Colorado, the Water Right Determination and Administration Act of 1969 created seven water divisions, each of which houses one of the seven major river basins in Colorado. *See* COLO. REV. STAT. § 37-92-201 (2018). There is a special division at the district court level with a district judge, called the water judge, to deal with certain specific water matters principally having to do with adjudication and change in water rights. Water court decisions of the state of Colorado are appealed directly to the Colorado Supreme Court. *See* COLO. REV. STAT. § 13-4-102 (1)(d) (2018). In Wyoming, this activity is initially handled by the executive branch of state government, instead of the judicial branch, under the Board of Control. *See* Wyoming Board of Control Regulations and Instructions, *Chapter VI - Contested*

initiatives for a UWT or some other international mechanism have been developed. The highlights of this historical background are as follows:

#### A. Resolution 2669 (XXV)

On December 8, 1970, the United Nations (“UN”) General Assembly (“GA”) adopted Resolution 2669 (XXV), entitled “Progressive Development and Codification of the Rules of International Law Relating to International Watercourses.”<sup>19</sup> In the Resolution, the Assembly recommended that the International Law Commission (“ILC”) “take up the study of the law of the non-navigational uses of international watercourses with a view to its progressive development and codification.”<sup>20</sup> In fact, the GA had shown that it recognized the importance of this field over ten years earlier, when it adopted Resolution 1401 (XIV) on November 21, 1959, entitled “Preliminary Studies on the Legal Problems Relating to the Utilization and Use of International Rivers.”<sup>21</sup> In Resolution 1401, the Assembly indicated that it was “desirable to initiate preliminary studies on the legal problems relating to the utilization and use of international rivers with a view to determining whether the subject is appropriate for codification.”<sup>22</sup>

Pursuant to the GA’s 1970 Resolution, the ILC began work on the international watercourses topic. Over the course of the next twenty years, the ILC’s work was guided by a succession of five special rapporteurs: Richard Kearney, Stephen Schwebel, Jens Evensen, Stephen McCaffrey, and Robert Rosenstock.<sup>23</sup> Following its usual practice, in 1974, the ILC circulated a questionnaire to

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*Case Procedures*, <https://perma.cc/CVH6-L3XC>. SB 76 divided the Montana Water Court into four divisions according to the geographical drainages of the state. MONT. DEP’T OF NAT. RES., WATER RIGHTS IN MONTANA (2006), <https://perma.cc/W6GR-8Q9F>.

19. G.A. Res. 2669 (XXV), Progressive Development and Codification of the Rules of International Law Relating to International Watercourses, at 127 (Dec. 8, 1970), <https://perma.cc/VDE3-K6YD>.

20. *Id.* ¶ 1.

21. G.A. Res. 1401 (XIV), Preliminary Studies on the Legal Problems Relating to the Utilization and the Use of International Rivers, at 55 (Nov. 21, 1959), <https://perma.cc/UZ4W-RGA2>.

22. *Id.*

23. Special Rapporteurs of the International Law Commission, <https://perma.cc/KKH9-N6S3> (the reports of the ILC’s five special rapporteurs on international watercourses are available on this website).

Members of the UN seeking their views on various issues related to the watercourses topic.<sup>24</sup>

In 1976, the ILC decided that it was not necessary to determine the scope of the expression “international watercourse” at the outset of its work;<sup>25</sup> in fact, the ILC did not define this expression until it adopted on first reading a full set of draft articles on the topic in 1991.<sup>26</sup> The definition adopted in that year is substantially unchanged in the Convention.<sup>27</sup>

## B. International Water Tribunal Foundation

On June 29, 1981, “several Dutch non-governmental organizations formed the International Water Tribunal Foundation to address the resolution of conflicts related to pollution of the Rhine River and of the North Sea.”<sup>28</sup> This unofficial

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24. See *Documents of the Twenty-Sixth Session* [1974] II(1) Y.B. Int'l Comm'n 303, U.N. Doc. A/CN.4/SER.A/1974/Add.1, <https://perma.cc/Y7U4-9EC9>; see also the final text of the questionnaire, as communicated to Member States, in *Documents of the Twenty-Eighth Session* [1976] II(1) Y.B. Int'l Comm'n 147, 149, ¶ 3, U.N. Doc. A/CN.4/SER.A/1976/Add.1, <https://perma.cc/UM9Z-FWF3>; *Report of the Commission to the General Assembly on the Work of its Thirty-Sixth Session* [1984] II(2) Y.B. Int'l Comm'n 82–83, ¶ 262, U.N. Doc. A/CN.4/SER.A/1984/Add.1, <https://perma.cc/Y5UL-LJ5T>.

25. See *Documents of the Thirty-Fourth Session* [1982] II(1) Y.B. Int'l Comm'n 192, U.N. Doc. A/CN.4/SER.A/1982/Add.1, <https://perma.cc/PY38-YS56>; *Documents of the Thirty-Second Session (Excluding the report of the Commission to the General Assembly)* [1980] II(1) Y.B. Int'l Comm'n 153, U.N. Doc. A/CN.4/SER.A/1980/Add.1, <https://perma.cc/7R9Z-5GXM>; *Documents of the Thirty-First (Excluding the Report of the Commission to the General Assembly)* [1979] II(1) Y.B. Int'l L. Comm'n 178, U.N. Doc. A/CN.4/SER.A/1979/Add.1, <https://perma.cc/XD5N-HGRF>; *Documents of the Thirtieth Session (Excluding the Report of the Commission to the General Assembly)* [1978] II(1) Y.B. Int'l L. Comm'n 253, U.N. Doc. A/CN.4/SER.A/1978/Add.1, <https://perma.cc/8S3J-HNGN>; *Documents of the Twenty-Eighth Session (Excluding the Report of the Commission to the General Assembly)* [1976] II(1) Y.B. Int'l L. Comm'n 147, U.N. Doc. A/CN.4/SER.A/1976/Add.1, <https://perma.cc/C2NS-JS9W>. See also *Documents of the Forty-Fifth Session* [1993] II(1) Y.B. Int'l Comm'n 145, U.N. Doc. A/CN.4/SER.A/1993/Add.1, <https://perma.cc/LMM5-W2CY>.

26. See *Documents of the Forty-Third Session* [1991], II(1) Y.B. Int'l Law Comm'n 45, U.N. Doc. A/CN.4/SER.A/1991/Add.1, <https://perma.cc/Q26T-UGEK>.

27. See Stephen C. McCaffrey, *Convention on the Law of the Non-navigational Uses of International Watercourses* (May 21, 1997), <https://perma.cc/BFK2-EE4T>. Submitting a water dispute to arbitration is discussed below when the Convention is examined.

28. See Edith Brown Weiss, *The Evolution of International Water Law*, 331 COLLECTED COURSES OF THE HAGUE ACAD. OF INT'L L. 291 (2009).

tribunal<sup>29</sup> sought to give organizations and individuals the opportunity to bring complaints about water pollution before an independent jury, and also wished to give the alleged polluters an opportunity for defense.<sup>30</sup> In 1983, the International Water Tribunal Foundation (“IWTF”) came officially into being.<sup>31</sup> The IWTF presided over cases pertaining to environmental damage to the Rhine River basin and helped to reinforce environmental policies and strengthen measures against water pollution.<sup>32</sup> Specifically, the IWTF adopted a Declaration regarding the Individual Responsibility for the Protection of the Aquatic Environment.<sup>33</sup>

“Although these judgments were not legally binding and defendants were not punished for their acts, the impact that IWT[F] aimed for was to reveal the realities of the industries to the public. Therefore, IWT[F] indicted defendants in the court of public opinion, whose preferences for better environment and awareness of the importance of environmental protection were the ‘law’ that the IWT[F] hoped to rely on for its cases. Indeed, the independent Jury of IWT[F] judged the cases before the tribunal based on this public law.”<sup>34</sup>

Such judgments make the IWT the first international tribunal through which NGOs and individuals can gain equal footing with

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29. Despite its nomination, the International Water Tribunal Foundation (“IWTF”) is not an international tribunal in the strict sense.

30. INT’L WATER TRIBUNAL FOUND., INTERNATIONAL WATER TRIBUNAL ROTTERDAM 3-8 (1983) [hereinafter IWTF].

31. ANDREW BYRNES & GABRIELLE SIMM, PEOPLES’ TRIBUNALS AND INT’L LAW 238 (2018) (“The International Water Tribunal met in Rotterdam (The Netherlands), from 3 to 8 October 1983, to examine the cases of pollution in the Rhine, the North Sea and the Wadden Sea.”).

32. The IWTF was composed of 9 internationally known experts with various areas of expertise (members of the Jury of the IWTF): Mrs. M. Auken (Denmark), Professor Dr. H. Bick (Federal Republic of Germany), The Earl of Granbrook (United Kingdom), Mrs S. Fernex (France), Dr L. Hartenstein (Federal Republic of Germany), Professor Dr. M. Hirsh (Federal Republic of Germany), Professor Dr. J.H. Kœman (The Netherlands), Dr. R.J. H. Kruisinga (The Netherlands), and Mr. Denis de Rougemont (Switzerland). *IWTF*, *supra* note 30, at Appendix VII-1.

33. José Sette-Camara, *Pollution of International Rivers*, 186 COLLECTED COURSES OF THE HAGUE ACAD. OF INT’L L. 117, 147 (1984).

34. TUN MYINT, GOVERNING INTERNATIONAL RIVERS: POLYCENTRIC POLITICS IN THE MEKONG AND THE RHINE 106 (2012).

states and multinational corporations in water controversies. The unofficial IWTF established a precedent for international water tribunals.

### C. International Water Tribunal

In February 1992, the International Water Tribunal (“IWT”)<sup>35</sup> came officially into being. It held public hearings<sup>36</sup> on cases from Asia,<sup>37</sup> Africa, Latin America, and Oceania regarding water management problems and water pollution disputes.<sup>38</sup>

### D. Efforts of International Law Commission

In 1994, the ILC concluded its work on international watercourses, adopting a complete set of thirty-three draft articles on second reading.<sup>39</sup> The ILC also adopted a companion resolution on confined transboundary groundwater, which recommended that states be guided by the principles contained in the draft articles in regulating this form of groundwater.<sup>40</sup> The ILC submitted its final draft and the resolution to the GA with a recommendation that a convention be elaborated on the basis of the draft articles.<sup>41</sup> On the recommendation of the Sixth (Legal) Committee, in 1994, the GA decided to “convene as a working group of the whole . . . to elaborate a framework convention on the law of the non-navigational uses of international watercourses on the basis of the

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35. Despite its nomination, the International Water Tribunal (IWT) is not an international tribunal in the strict sense. See SECOND INT’L WATER TRIBUNAL, DECLARATION OF AMSTERDAM (1992).

36. See *id.* at 9. The Second International Water Tribunal (IWT II) met from 17 to 21 February 1992, in Amsterdam (The Netherlands). *Id.*

37. See Hatim Kanaaneh et al., *A Human Rights Approach For Access to Clean Drinking Water: A Case Study*, 1 HEALTH HUM. RIGHTS 190 (1995), <https://perma.cc/27SA-66WU>; INT’L WATER TRIBUNAL FOUND., MANAGEMENT 11-76 (1991).

38. See SECOND INT’L WATER TRIBUNAL, *supra* note 35, at 9.

39. See *Draft Articles on the Law of the Non-navigational Uses of International Watercourses and Commentaries Thereto and Resolution on Transboundary Confined Groundwater* [1994], II(2) Y.B. Int’l Law Comm’n, U.N. Doc. A/CN.4/SER.A/1994/Add.1, <https://perma.cc/C3Y9-RNPW>.

40. *Id.* at 138.

41. See *Report of the Commission to the General Assembly on the Work of Its Forty-Sixth Session* [1994], II(2) Y.B. Int’l Law Comm’n 88–89, ¶ 219, U.N. Doc. A/CN.4/SER.A/1994/Add.1 (Part. 2), <https://perma.cc/VK25-4MZB>.

draft articles adopted by the International Law Commission.”<sup>42</sup> The convention was negotiated in the Sixth Committee, convening for this purpose as a “Working Group of the Whole” as contemplated by the Assembly’s 1994 resolution.<sup>43</sup> The Working Group met for three weeks in October 1996 and two weeks in March and April 1997.<sup>44</sup> The “Convention on the Law of the Non-navigational Uses of International Watercourses”<sup>45</sup> was adopted by the GA of the UN on May 21, 1997.<sup>46</sup>

### E. Increase of Global Water-Related Issues

In 1997, as already noted, the GA expressed a positive view on the feasibility of arbitration over “a dispute between two or more parties concerning the interpretation or application of the present Convention.”<sup>47</sup> Since then, the world has been plagued with all sorts of water related problems, producing significant victimization, and as a consequence, a number of regional Conventions on the subject have been adopted but none contained a provision for the establishment of a UWT or some other international mechanism as did the 1997 UN Convention.<sup>48</sup> Once again, the short sightedness of senior government officials prevented the taking of that additional step which many felt to be necessary.

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42. G.A. Res. 49/52, ¶ 3 (Dec. 9, 1994), <https://perma.cc/J5QH-D2SF>.

43. See G.A. Res. 51/206 (Dec. 17, 1996), see also G.A. Res. 51/229 (May 21, 1997).

44. See McCaffrey, *supra* note 27, at 2.

45. See Convention on the Law of Non-navigational Uses of International Watercourses, May 21, 1997, 36 ILM 700, <https://perma.cc/V6BD-C8D6> [hereinafter, Convention] (the Convention contains 37 articles arranged in seven parts: Part I: Introduction; Part II: General Principles; Part III: Planned Measures; Part IV: Protection, Preservation and Management; Part V: Harmful Conditions and Emergency Situations; Part VI. Miscellaneous Provisions; and Part VII: Final Clauses).

46. The Convention entered into force on August 17, 2014. See U.N. Treaty Collection, *Status of the Convention on the Law of Non-navigational Uses of International Watercourses*, <https://perma.cc/4VLR-4FVJ>.

47. See Convention, *supra* note 45. An annex to the Convention sets forth procedures to be followed in the event that states have agreed to submit a dispute to arbitration. *Id.* at 16–18.

48. See e.g., U.N. Econ. Comm. for Europe, *Convention on the Protection and Use of Transboundary Watercourses and International Lakes*, U.N. Doc. ECE/MP.WAT/14 (March 17, 1992) <https://perma.cc/5B6L-Z6NE>.

## F. Central American Water Tribunal

In 1998, the Central American Water Tribunal (“CAWT”) was established.<sup>49</sup> The CAWT extended its activities to cover South America in 2000 and became the Latin American Water Tribunal (“LAWT”).<sup>50</sup> The LAWT is an ethical institution committed to preserving water and to guaranteeing its access for current and future generations, as water is a human right. Since its launching in 1998, the Tribunal has heard 58 contentious cases and delivered 250 advisory opinions. The Tribunal held seven hearings in Latin America: San Jose in Costa Rica (August 2000, March 2004), Mexico City (March 2006), Guadalajara (October 2007), Guatemala (September 2008), and Argentina (2012). It also held, with the support of Heinrich Böll Foundation, a hearing in Istanbul (March 2009) to address the issue of damming the Tigris and Euphrates watercourses. In furtherance of its task, the Tribunal is guided by the following principles: harmonized coexistence with nature, ecological security, water security, and good water governance.<sup>51</sup>

The LAWT therefore embodies features of a peoples’ or citizens’ tribunal as a commission of inquiry that seeks another form of accountability outside state-organised structures. In particular, the LAWT offers expert knowledge to deal with alleged violations of environmental norms relating to water resources

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49. The Brazilian National Water Tribunal, which took place in Florianópolis in 1993, constitutes the immediate model of alternative justice that inspired the creation of the LAWT. See *Fundamentos*, TRIBUNAL LATINOAMERICANO DEL AGUA, <https://perma.cc/MJ67-KWVS>. See also Christian Guy Caubet, *O Tribunal Da Água*, 9 GEOSUL 71 (1994). In several public hearings, the Brazilian tribunal examined the harmful impacts on water systems in Brazil caused by mining, radioactive and agrochemical pollution and the consequence of dam construction. *Id.* at 85.

50. See Carmen Maganda, *The Latin American Water Tribunal and the Need for Public Spaces for Social Participation in Water Governance*, in WATER AND URBAN DEVELOPMENT PARADIGMS: TOWARDS AN INTEGRATION OF ENGINEERING, DESIGN AND MANAGEMENT APPROACHES 687, 689 (Jan Feyen et al. eds., 2009).

51. See *Quiénes Somos*, Tribunal Latinoamericano del Agua, <https://perma.cc/5USU-DKA4>.

and to provide recommendations for the resolution of conflicts over water resources.<sup>52</sup>

### **G. International Water Court**

In 2009, in view of the need for world-wide governance to guarantee universal access to water, the International Water Court was created in Cairo (Egypt).

“If it is evidently acknowledged as an economic asset, the Court declared . . . that the water problem is essentially of a political nature. It was declared to be a social asset, requiring an ‘inverted globalisation’ process based on solidarity and co-operation between countries and regions . . . In the era of interdependence, the creation of this international organisation confirms that water should be the subject of global reconciliation, dialogue and co-operation . . .”<sup>53</sup>

All these global efforts have brought us closer to realizing the expectations of so many who believe that some form of universal adjudication for international water disputes may be forthcoming. But so far, the political will of the world’s leaders has been lacking, and progress toward that goal is slow, though growing.

### **III. POLITICAL, PRACTICAL, AND LEGAL-TECHNICAL CONSIDERATIONS**

The obstacles to the establishment of a UWT fall essentially into three categories:<sup>54</sup> political, practical and, legal-technical. Of these three, the political factor is the most significant, followed by the practical factor, while the legal-technical factor does not pose any serious difficulties.

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52. See Belén Olmos Giupponi, *Assessing the Contribution of the Latin American Water Tribunal and Transnational Environmental Law*, in PEOPLES’ TRIBUNALS & INT’L L. 239 (Andrew Byrnes & Gabrielle Simm eds., 2018).

53. See Vivienne Bennet, *The International Water Court: Towards Universal Access to a Limited Resource*, USA TOMORROW (Mar. 22, 2009), <https://perma.cc/R84F-A3VR>.

54. The significant difficulties on the horizon facing the UWT draw some ideas from the article of M. Cherif Bassiouni, *The Time Has Come for an International Criminal Court*, 1 IND. INT’L & COMP. L. REV. 1, 24–33 (1991).

### A. Political Considerations

The political factor stems essentially from objections generated by those who adhere to a rigid conception of sovereignty (i.e., the theory of absolute territorial sovereignty or “Harmon doctrine,”<sup>55</sup> the doctrine of riparian rights), even though such conceptions have been *dépassé* in so many other areas of international law,<sup>56</sup> particularly with respect to the environmental law embodied in hard and soft law.<sup>57</sup> The real opposition, however, comes from senior government officials who fear two types of situations.

The first is the risk that they can be called to answer for their acts which may constitute violations of international water law and which would be subject to the Tribunal’s jurisdiction.

Since 1988,<sup>58</sup> a number of instances have come to world public attention indicating that senior government officials have engaged in or supported the commission of such international violations as water diversion, water *apartheid*, fraudulent water quality report, and water crimes.<sup>59</sup> While the international community expresses abhorrence of some of these violations and outrage about others, little if anything is done, other than sanctimonious denunciations,

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55. See Stephen C. McCaffrey, *The Harmon Doctrine One Hundred Years Later: Buried, Not Praised*, 36 NAT. RESOURCES J. 549 (1996).

56. See Julie Gjørtz Howden, *Aspects of Sovereignty and The Evolving Regimes of Transboundary Water Management*, 1 NORDIC ENVTL L. J. 43 (2015), <https://perma.cc/5XXN-YKVV>.

57. International water law is a complex topic, which grows increasingly important in a water-scarce world. It helps enable nations to peacefully share an international watercourse and the waters it contains. See generally MARTE JERVAN, *THE PROHIBITION OF TRANSBOUNDARY ENVIRONMENTAL HARM: AN ANALYSIS OF THE CONTRIBUTION OF THE INTERNATIONAL COURT OF JUSTICE TO THE DEVELOPMENT OF THE NO-HARM RULE* (2014), <https://perma.cc/KKH6-883Y>; Owen McIntyre, *The Role of Customary Rules and Principles of International Environmental Law in the Protection of Shared International Freshwater Resources*, 46 NAT. RESOURCES J. 157 (2006).

58. See generally JOYCE R. STARR & DANIEL C. STOLL, *THE POLITICS OF SCARCITY: WATER IN THE MIDDLE EAST* (1988); Joyce R. Starr, *Water Wars*, 82 FOREIGN POLICY 17, 21 (1991).

59. Water crimes are harmful impacts on water systems caused by mining, radioactive and agrochemical pollution and the consequence of dam construction. See generally WATER CRIMES, <https://perma.cc/7YSZ-M24P>.

and occasionally, some condemnatory resolutions by the UN,<sup>60</sup> regional organizations,<sup>61</sup> and other international bodies.<sup>62</sup>

Strange as it may seem, the efforts of senior government officials to shield themselves from any form of international accountability has consistently been the same for as long as there is a record of these occurrences. Their successors and even their political opponents so frequently cover up for them for fear that they too may find themselves in a similar situation, or because they feel that exigencies of water security may warrant it.<sup>63</sup> They invariably argue that their action was necessary in order to protect or save the nation or to advance its vital or national security interests.

Another argument advanced against such a tribunal, as well as another risk perceived by senior government officials, is the apprehension that an international adjudication mechanism can, for purely political reasons, embarrass governments.<sup>64</sup> But surely sufficient safeguards could be developed to prevent such possibilities. Such issues, as well as other legal-technical issues, cannot be raised *a priori* to oppose the realization of the idea. They

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60. See e.g. Human Rights Council, *Information Presented by the Northern Ireland Human Rights Commission*, U.N. Doc. A/HRC/25/NI/5, at 9 (Feb. 27, 2014), <https://perma.cc/4XJE-ZW9K>. “. . . the Committee on Economic, Social and Cultural Rights expressed concern about the cultural impact of the Ilisu dam construction project in Turkey, its primary focus was on forced evictions and it did not specifically mention Kurds amongst the people effected.” *Id.*

61. See e.g. *Motion for a Resolution to wind up the debate on statements by the Council and Commission Pursuant to Rule 110(2) of the Rules of Procedure on Turkey's Progress Report 2009*, Eur. Parl. Doc. PE432.920v01-00 (2010), ¶16, <https://perma.cc/GL6F-R6SK>. The European Parliament was “concerned about the displacement of thousands of people resulting from the construction of the dams,” and urged the Turkish Government “. . . to cease work on the Ilisu dam project . . .” *Id.*

62. See e.g., Amnesty Int'l, *Troubled Waters – Palestinians Denied Fair Access To Water (Israel–Occupied Palestinian Territories)* (2009), <https://perma.cc/HZ2V-NWW2>; Newsletter, U.N. Department for Econ. and Social Affairs, Int'l Rivers and Lakes, Newsletter No. 40 (2003), <https://perma.cc/ETN9-CS2D>.

63. See Marwa Daoudy, *Hydro-Hegemony and International Water Law: Laying Claims to Water Rights*, 10 WATER POL'Y 89, 94 (2008), <https://perma.cc/5VH8-3KK3>; see also Mark Zeitoun & Jeroen Warner, *Hydro-Hegemony – A Framework for Analysis of Trans-Boundary Water Conflicts*, 8 WATER POL'Y 435 (2006), <https://perma.cc/6FW7-75SQ>.

64. See generally ALICE CHOTE, *THE RESOLUTION OF INTERNATIONAL WATERCOURSE DISPUTES: HOW SHOULD STATES APPROACH THE MATTER?* 32 (2013), <https://perma.cc/J4RD-RXDM>.

are valid concerns to be raised in the context of drafting the provisions of a UWT so as to develop appropriate safeguards. It is, therefore, more likely that this argument is raised in order to obfuscate the fact that the former one (to shield senior government officials from international accountability) is the real reason for the opposition to the idea.

### **B. Practical Considerations**

Practical questions are also raised frequently and have a ring of authenticity to them on the one hand and of necessity on the other. Among these questions are: where to locate the UWT; how to select judges; how to secure the presence of the non-state actors to stand trial; how to finance the UWT, etc. These and other practical questions are no different than those which faced the drafters of other international courts. Granted, these tribunals were not set up for purposes of non-state actors' prosecutions and that there are peculiar problems to this type of adjudication, but political sensitivities about all forms of international adjudication are similar. That is why both the PCIJ and the ICJ provide Members of the UN with the choice of voluntary or compulsory submission to jurisdiction.<sup>65</sup> In the case of a UWT having jurisdiction over non-state actors, it would seem that these political sensitivities should be of a lesser nature. The exception to this assumption of jurisdiction would occur when prosecuting senior government officials for major trespass to water having political overtones or which are committed pursuant to state-policy, particularly if the UWT were to have exclusive jurisdiction.

The multilateral convention for a UWT would address these concerns without compromising the basic goals and values sought to be achieved by such a Tribunal. Clearly, other solutions to practical and legal-technical questions could be developed, but the point is that these problems are not as difficult to resolve as some senior government officials claim (i.e., the theory of absolute territorial sovereignty or "Harmon doctrine," the doctrine of riparian rights). They are not, therefore, a valid reason for the refusal of establishing a UWT.

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<sup>65</sup> Statute of the Int'l Court of Justice, art. 36, <https://perma.cc/9WBW-AJXM>.

### C. Legal-Technical Considerations

Legal-technical issues are easily resolvable<sup>66</sup> and some thoughtful models have been developed by the UN, regional organizations, non-governmental organizations (NGOs), and scholars.<sup>67</sup>

## IV. FACTORS TO BE TAKEN INTO ACCOUNT

The most important five factors to be taken into account when designing the proposed UWT include increase in water conflicts, increase in available *fora* for resolving water disputes, the role of mediation and conciliation, multidisciplinary approach, and specificity of water disputes.

### A. Increase in Water Conflicts

The first factor which is readily apparent is that there has been a remarkable increase in the number of conflicts over water use in most states.<sup>68</sup> A year does not go without some major disputes over water.<sup>69</sup> Moreover, the right to water and access to water<sup>70</sup> pose on states obligations of progressive realization as well as immediate obligations.<sup>71</sup>

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66. See *infra* Part IV.

67. Some of these questions are discussed below when the “Proposed Model” is examined.

68. See generally Jerome Delli Priscoli & Aaron T. Wolf, *Managing and Transforming Water Conflicts* 1 (2009); *A Matter of Survival*, *supra* note 5; *Program in Water Conflict Management and Transformation*, COLL. OF EARTH, OCEAN AND ATMOSPHERIC SCIS. AT OR. STATE UNIV., <https://perma.cc/HN35-N43G>.

69. For a historical list of events related to water and conflict, see Peter H. Gleick & Matthew Heberger, *Water Conflict Chronology*, 8 *THE WORLD'S WATER* 173 (2014), <https://perma.cc/BFX9-NECV>.

70. See P.B. Anand, *Right to Water and Access to Water: An Assessment*, 19 *J. INT'L. DEV.* 511 (2007), <https://perma.cc/T8XU-X2YK>.

71. See Press Release, United Nations Meetings Coverage, General Assembly Adopts Resolution Recognizing Access To Clean Water, Sanitation As Human Right, By Recorded Vote of 122 In Favour, None Against, and 41 Abstentions, GA/10967 (July 28, 2010), <https://perma.cc/2F8B-ZC38>. States have the obligation of ensuring the full enjoyment of basic water needs (see Comm. on Econ., Social and Cultural Rights, *General Comment No. 15 (2002): The Right to Water (Arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)*, U.N. DOC. E/C.12/2002/11, at 8–10 (Jan. 20, 2003)), <https://perma.cc/4AXX-3QB5>. If we accept that there is a human right to water,

The failure to make such investments now would certainly set the table for large scale migration of water refugees and water war in the not too distant future. This [is] unthinkable but [a] real possibility because it is happening in 2018 (e.g., one million mainly South Sudanese in Uganda and 250,000 Somalis in northwest Kenya escaping drought, famine and war), to a seemingly increasing degree.<sup>72</sup>

Global warming will result in “aridification” which would negatively impact water supplies, agriculture, and provide conditions that favor increased occurrences of drought (in parts of southeast Asia, eastern coast of Australia, central America, semi-arid areas of Mexico and Brazil, southern Africa, and Mediterranean region).<sup>73</sup>

### **B. Increase in Available *Fora* for Resolving Water Disputes**

The second factor which bears mention is that the available *fora* for resolving disputes has also increased. Four decades ago, national water laws focused almost exclusively on the water tribunal. Scholars imagined that there was not really a great deal more available to applicants. That too has changed, and noticeably so. Indeed, in some cases (particularly in the broad American context), parties involved in a dispute are almost spoiled for choice concerning available *fora*. It is not unusual for an applicant wishing to initiate proceedings to have a range of options, such as water tribunal, arbitration, and the Inter-American Court of Human Rights. The idea that dispute settlement *fora* are not available, whether in the American context or, increasingly, in other parts of the world, no longer holds true. But a revisited (universal) international or regional water tribunal should be created only if a further study could demonstrate this tribunal is

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to what extent does a state have an obligation to guarantee that this right is enjoyed without discrimination (scope, content, nature and monitoring).

72. FREDERIC R. SIEGEL, *CITIES AND MEGA-CITIES: PROBLEMS AND SOLUTION STRATEGIES* 13 (2019).

73. Chang-Eui Park *et al.*, *Keeping Global Warming Within 1.5°C Constrains Emergence of Aridification*, 8 *NATURE CLIMATE CHANGE* 70, 72 (2018), <https://perma.cc/P88R-DQKD>.

the best way to handle the backlog of water cases. It is recommended to create a standard set of rules and regulations for how the water tribunal works, streamline the water adjudication process—i.e., simplified adjudication process for smaller, less complex cases. While adjudication plays important role, mediation and conciliation mechanisms remain a real option. This brings us to another related point, and the central part of the factors to be taken into account: assuming one does get to the place of last resort, how ought an applicant to choose between the different options: mediation, conciliation, and adjudication? There is a great difference between two parties resolving a water conflict/dispute by reference to arbitration, on the one hand, and by judicial settlement, on the other hand.

### C. The Role of Mediation and Conciliation

The third factor deals with the role of mediation and conciliation. The use of such means, it must be said, is not easily ascertainable in the field of water. It is not easy to find out what has happened, when discussions have taken place, where mediation and conciliation have taken place. Necessarily these procedures function outside the glare of public scrutiny. They have to take place *in camera* to be successful. There are numerous examples of successful informal mediation and conciliation involving water disputes.<sup>74</sup>

### D. Multidisciplinary Approach

The fourth factor that emerges is the broad recognition of the importance of a multidisciplinary approach to the settlement of water disputes. Multidisciplinary means combining the disciplines of many different branches of law. One applicant's dispute on the international water law may be another respondent's dispute on the legal heredity of international watercourses accretion and avulsion. Frequently, water disputes do not have a substantive

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74. In light of the tribal settlement in the Arabian Peninsula, the Sheikh (the headman or head of the district) was the architect of the process for resolving most of water disputes. For information about the role of the water Sheikhs, see FRANCESCA DE CHÂTEL, *WATER SHEIKS & DAM BUILDERS: STORIES OF PEOPLE AND WATER IN THE MIDDLE EAST* (2007); see also JOHN CRAVEN WILKINSON, *WATER AND TRIBAL SETTLEMENT IN SOUTH-EAST ARABIA: A STUDY OF THE AFLĀJ OF OMAN* (2013).

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center of gravity which allows them to be characterized as a dispute about this or that aspect of international water law. Particularly in the past two decades, we have learned of the need to cross-fertilize different substantive areas of general international law (principles, rules, and standards). This is one reason why many remain skeptical about the need for a water tribunal because the circumstances in which two parties will agree that a dispute is a water dispute will be few and far between. Disputes about water are inevitably disputes about general international law. This brings us to the last factor.

### **E. Specificity of Water Disputes**

The fifth point that emerges is that each water case, each dispute, necessarily turns on its own specificities—i.e. facts and circumstances. There is no general template that can be applied to the different disputes over water. There is no particular template as to the consequences which the application of particular natural character (geographic, hydrographic, hydrological, climatic, ecological), social and economic needs of each party, existing and potential use of water, and the availability of comparable alternatives to a particular planned or existing use may bring to bear.<sup>75</sup> It would be a mistake to suggest that there is a general template in terms of the application of the rules which may govern a particular dispute.

The five factors we have highlighted, which are not intended to be exhaustive, tend to be the ones around which discussion coalesces when an applicant decides which route to embark upon: mediation, conciliation, or adjudication. Most formal sources of law were never able to surpass the informal sources of law in the field of conflict resolution in water. The role of sustainable international water institutions<sup>76</sup> is more pervasive than ever in deciding the

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75. As disputes relating to the use of water are not purely 'legal,' they are to be addressed in the context of agricultural, economic and political considerations. Judges must be prepared to engage fully with engineers, scientists and economists, as well as the political interests represented by the local communities and the businesses, which are involved in a particular outcome.

76. A point, which bears mention, is that in spite of all its interesting issues and its great practical importance, the topic of ancient sustainable water institutions is a field in which there is a dearth of supplemental sources that are useful to scholars. A few ancient voluminous treaties are available to aid the practitioner in finding answers to difficult questions. But there is no basic source.

extent to which water can be allocated and used for particular purposes.

The establishment of a UWT could admittedly be based on various models presented in the proposals advanced by different organizations (UN,<sup>77</sup> regional organizations,<sup>78</sup> NGOs<sup>79</sup>), and scholarly literature,<sup>80</sup> including, but not limited to:

1. Expanding the jurisdiction of the ICJ to include questions of interpretation and application of conventional and customary international water law, and providing for compulsory jurisdiction under Article 36 of the Statute of the ICJ for disputes between states arising out of these questions;
2. Establishing an international commission of inquiry, either as an independent organ, as part of the UWT or as an organ of the UN. Such a commission would investigate and report on violations of international water law, taking into account existing UN

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The Dutch 'waterschappen,' or water boards, is an example of customary arrangement for water management that has become, *de facto*, legislation. See TAREK MAJZOUB ET AL., STREAMS OF LAW - A TRAINING MANUAL AND FACILITATORS GUIDE ON WATER LEGISLATION AND LEGAL REFORM FOR INTEGRATED WATER RESOURCES 30 (2010); UNESCO, *Irrigators' Tribunals of the Spanish Mediterranean coast: Council of Wise Men of the Plain of Murcia in Spain and the Water Tribunal of the Plain of Valencia*, INTANGIBLE CULTURAL HERITAGE, <https://perma.cc/Z2NT-SVNN>; ÖRJAN WIKANDER, HANDBOOK OF ANCIENT WATER TECHNOLOGY 539–575 (2002).

77. Graziano Sanna, *L'Acqua: Dai Modelli Storici Spunti per Alcune Riflessioni sul Regime e Sulla Tutela Giuridica di un bene Ambientale [Water: From Historical Models Ideas for Reflections on the Regime and on the Legal Protection of an Environmental Good]*, X RIVISTA DI DIRITTO DELL'ECONOMIA, DEI TRASPORTI E DELL'AMBIENTE 429 (2012) (It.), <https://perma.cc/98WC-K8JN>.

78. Org. for Sec. and Co-operation in Eur., *Consolidated Summary*, at 28 (Feb. 11-12, 2002), <https://perma.cc/M4H7-UJ27>.

79. MARISA ARIENZA ET AL., AGUA: PANORAMA GENERAL EN LA ARGENTINA [WATER: OVERVIEW IN ARGENTINA] 19 (2013) (Es.).

80. ASHOK SWAIN, MANAGING WATER CONFLICT: ASIA, AFRICA AND THE MIDDLE EAST 178–179 (2004); see Thomas Coleman, *Who Owns the Water? An Analysis of Water Conflicts in Latin America and Modern Water Law*, 12 INTERSECTIONS (2012), <https://perma.cc/9PGV-DMGC>; Malcolm Langford, *Ambition That Overleaps Itself? A Response to Stephen Tully's Critique of the General Comment on the Right to Water*, 24 NETH. Q. OF HUM. RTS. 433, 446 (2006), <https://perma.cc/7Z3L-C6FQ>; Ian Small et al., *Nor Any Drop to Drink*, 358 THE LANCET 1025 (2001), <https://perma.cc/7LCU-Z8AZ>.

experiences with fact-finding and inquiry bodies which have developed over the years;<sup>81</sup>

3. Establishing a UWT under the auspices of the UN<sup>82</sup> or a beefed up World Water Council,<sup>83</sup> which is already an international multi-stakeholder platform.
4. Establishing a universal water jurisdiction along the lines of the 1997 UN “Convention on the Law of the Non-navigational Uses of International Watercourses;”<sup>84</sup> and
5. Establishing Regional International Water Tribunals.

## V. THE PROPOSED MODEL

This proposed model could be used for a UWT.<sup>85</sup> The highlights of this proposal are as follows:<sup>86</sup>

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81. See J.G. MERRILLS, *INTERNATIONAL DISPUTE SETTLEMENT* 241 (Cambridge Univ. Press 2005); UNITED NATIONS OFFICE OF LEGAL AFFAIRS, *HANDBOOK ON THE PEACEFUL SETTLEMENT OF DISPUTES BETWEEN STATES* 26 (1992); see also WILLIAM I. SHORE, *FACT-FINDING IN THE MAINTENANCE OF INTERNATIONAL PEACE* (1970).

82. See Langford, *supra* note 80.

83. One of the main legacies of the World Water Forum (WWF) held in Brasilia (18 to 23 March 2018), Brazil, was the “Brasília Declaration of Judges on Water Justice.” See *8th World Water Forum, Brasilia Declaration of Judges on Water Justice [10 Principle Declaration]* (March 21, 2018), <https://perma.cc/UBJ4-YCMB>. “For the first time, a group of supreme court justices from different countries debated together in a mock International Water Court of Justice, in an attempt to build consensus on the prioritization of universal access to water and the ‘in dubia pro water’ clause.” Julia Lopes Ferreira, *World Water Forum – Highlights from Brasilia*, UNU GRADUATE STUDENT J., <https://perma.cc/6739-6DFC>.

84. See SERGEI VINOGRADOV ET AL., *TRANSFORMING POTENTIAL CONFLICT INTO COOPERATION POTENTIAL: THE ROLE OF INTERNATIONAL WATER LAW* 29 (2003).

85. This model could be used also for a Regional water Tribunal (*i.e.*, limited in geography to state parties from the region). The Standing Committee of State Parties would explore the need for the establishment of an International Water Tribunal on a universal or regional basis to assist the international community in dealing more effectively with major trespass to water. The proposed model *draws some ideas* from the article of Bassiouni, *supra* note 54.

86. The Organs of the Tribunal would consist of the Standing Committee of State-Parties, the Procuracy, the Tribunal and, the Secretariat.

**A. Standing Committee of State Parties**

1. The Standing Committee of State Parties<sup>87</sup> would consist of one representative appointed by each state party.
2. The Standing Committee would elect by majority vote a presiding officer and alternate presiding officer and such other officers as it deems appropriate.
3. The presiding officer would convene meetings at least twice each year of at least one week duration, each at the seat of the Tribunal, and call other meetings at the request of a majority vote of the Standing Committee.
4. The state parties would hold an annual conference to review the Tribunal's work and the Convention for purposes of amending it whenever needed and to ensure full compliance by the state parties.
5. The Standing Committee would have the power to perform the functions expressly assigned to it under the multilateral convention<sup>88</sup> open to all states, plus any other functions that it determines appropriate in furtherance of the purposes of the Tribunal,<sup>89</sup> but in no way would those functions impair the independence and integrity of the Tribunal as a judicial body.
6. In particular, the Standing Committee may:
  - i. Offer to mediate disputes between state parties relating to the functions of the Tribunal;<sup>90</sup> and

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87. Hereinafter referred to as the "Standing Committee."

88. Hereinafter referred to as the "Convention."

89. The Standing Committee would propose to state parties international instruments to enhance the functions of the Tribunal that are not inconsistent with the Convention.

90. Although adjudication is and should be a last resort, the threat of recourse to a Tribunal may be sufficient to encourage parties to reach an agreement. The mere existence of a Tribunal, which can be seized at the initiative of an applicant, can be enough to bring the parties together into agreement. Similarly, the utility of mediation or conciliation should not be underestimated in terms of its potential, it may be sufficient to bring parties together and dispose of a dispute. This is because parties understand that once they have gone beyond mediation and conciliation, they have, in effect, lost control of the process, and

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- ii. Encourage states to accede to the Convention.
7. The Standing Committee may exclude from participation representatives of state parties that have failed to provide financial support for the Tribunal as required by this Convention, or state parties that failed to carry out their obligations under this Convention.
  8. Upon request by the Procuracy, or by a party to a case presented for adjudication to a chamber of the Tribunal, the Standing Committee may be seized with a mediation and conciliation petition. In that case, the Standing Committee would within 30 days decide on granting or denying the petition, from which decision there is no appeal. In the event that the Standing Committee grants the petition, Tribunal proceedings would be stayed until such time as the Standing Committee concludes its mediation and conciliation efforts, but not for more than one year except by stipulation of the parties and with the consent of the Tribunal.

#### **B. Procuracy**

1. The Procuracy would have as its chief officer, the Procurator, who would be elected by the Standing Committee from a list of at least two nominations submitted by members of the Standing Committee, and would serve for a renewable term of six years, barring resignation or removal by a majority of the Tribunal sitting *en banc* for incompetence, conflict of interest, or manifest disregard of the provisions of this Convention or Rules of the Tribunal.
2. The Procuracy would consist of an administrative division, an investigative division and a prosecutorial

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hence the outcome. Often the mere possibility of such resort may be sufficient to bring about a resolution of a water dispute.

Our hunch is that a significant number of water disputes should be resolved 'in the shadow of the law.' It is hoped that the rate of trial will be generally less than 10 percent.

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division, each headed by a deputy Procurator, and employing appropriate staff.

3. The deputy procurators and all other members of the Procurator's staff would be appointed and removed by the Procuratorat will.
4. The Procurator would receive an annual salary equal to that of the judges.

### C. Tribunal

1. Establishment of the Tribunal
  - i. The Tribunal would be established pursuant to the provisions of the Convention.
  - ii. The state parties to the Convention would agree on the establishment of the Tribunal whose location will be determined by the Convention.
  - iii. The Tribunal would have an independent international legal personality and would sign a host-country agreement with the host-state.<sup>91</sup>
  - iv. The Tribunal, as an international organization, would be granted jurisdiction by the state parties to prosecute certain specified major trespass to water embodied in the Convention.
  - v. The expenses of the Tribunal would be paid on a *pro-rata* basis by the state parties to the convention.
2. Composition of the Tribunal
  - i. The Tribunal would consist of thirteen judges,<sup>92</sup> no two of whom may be nationals of the same state, elected by secret ballot by the Standing Committee from nominations submitted thereto.
  - ii. Judges of the Tribunal would perform their judicial functions in two capacities:
    - i. Sitting with other judges as the Tribunal *en banc*; and

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91. The Tribunal will thus have extra-territoriality for its location and immunity for its personnel.

92. Persons representing diverse backgrounds and experience (5 from Asia, 1 from Europe, 3 from America, 3 from Africa, 1 from Oceania) with due regard to representation of the major international watercourses of the world.

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- ii. Sitting in panels of five on a rotational basis in Chambers.<sup>93</sup>
      - iii. One of the chambers would act as the Inquiry Chamber while the other chambers would be adjudicating chambers.
    3. Appointment of Judges and their Tenure
      - i. Nominees for positions as judges would be persons of high competence, knowledgeable in international water law or environmental law,<sup>94</sup> and of high moral character. Each state party would appoint a judge from the highest judicial offices, or from distinguished members of the bar, or from academia.
      - ii. Elections would be coordinated by the Secretariat under the supervision of the presiding officer of the Standing Committee and would be held whenever one or more vacancies exist on the Tribunal.
      - iii. Judges would be elected for the following terms: four judges for four-year terms, four judges for six-year terms, and five judges for eight-year terms. Judges may be re-elected for any term at any time available.
      - iv. The judges of the Tribunal would elect a President, Vice-President, and such other officers as they deem appropriate. The president would serve for a term of two years.
      - v. A judge would perform no function in the Tribunal with respect to any matter in which he may have had any involvement prior to his election to this Tribunal (agent, counsel, or advocate for one of the parties, or as a member of a national or

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93. The judges would be drawn by lot and sit in rotation on the various chambers.

94. In Colorado, each water division is staffed with a division engineer (appointed by the state engineer), see Daniel S. Young, Duane D. Helton, *Developing a Water Supply in Colorado: The Role of an Engineer*, 3 UNIV. DENV. WATER L. REV. 373 (2000); a water judge (appointed by the Supreme Court), a water referee (appointed by the water judge), and a water clerk (assigned by the district court). *Water Courts*, COLO. JUDICIAL BRANCH, <https://perma.cc/C4XE-XQLE>.

- international court, or of a commission of enquiry, or in any other capacity).
- vi. A judge may withdraw from any matter at his discretion, or be excused by an absolute majority of the judges of the Tribunal for reasons of conflict of interest.
  - vii. Any judge who is unable or unwilling to continue to perform functions under this statute may resign.
  - viii. A judge may be removed for incapacity to fulfill his functions by a unanimous vote of the other judges of the Tribunal.
  - ix. Except with respect to judges who have been removed, judges may continue to discharge their duties until their places have been filled. Though replaced, they would finish any cases which they may have begun.
  - x. No judge may exercise any political or administrative function, or engage in other occupation of a professional nature. However, judges may engage in scholarly activity provided such activity in no way interferes with their impartiality.
  - xi. The judges of the Tribunal, when engaged on the business of the Tribunal, shall enjoy diplomatic privileges and immunities.
  - xii. Each judge of the Tribunal would receive an annual salary equal to that of the judges of the ICJ.
4. Competence of the Tribunal and Applicable Law
- i. The jurisdiction of the Tribunal would be over non-state actors<sup>95</sup> for those major trespass to water specially provided in the Convention, as

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95. The jurisdiction of the ICJ extends only to cases involving governments, and not to non-state actors' cases. David S. Rubinton, *Toward a Recognition of the Rights of Non-States in International Environmental*, 9 PACE ENVTL. L. REV., 475, 477 (1992).

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amended from time to time,<sup>96</sup> or in treaties and conventions in force.<sup>97</sup>

- ii. The Tribunal could have exclusive jurisdiction for some major trespass to water and derivative jurisdiction over others by virtue of a transfer of the proceeding from a state party to the Convention, provided the state party has jurisdiction on the basis of territoriality.<sup>98</sup>
- iii. Nothing, however, precludes the state parties from conferring exclusive jurisdiction for major trespass to water to the Tribunal. Thus, each state party that has original jurisdiction based on territoriality would not lose jurisdiction, but merely transfer the proceedings to the Tribunal.<sup>99</sup>
- iv. The Tribunal *en banc* would, subject to the provisions of this Convention, adopt rules governing procedures before its chambers and the Tribunal *en banc*, and provide for establishment and rotation of chambers.
- v. The Tribunal *en banc* would announce its decisions orally in full or in summary, accompanied by written findings of fact and conclusions of law at the time of the oral decision or within thirty days thereafter, and any judge so

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96. This would permit expanding the list of major trespass to water depending upon need, and also to allow state parties to acquire confidence in the Tribunal.

97. This would not prejudice the power of the Tribunal to decide a case *ex aequo et bono*, if the parties agree thereto.

98. This would avoid the sovereignty problems that some claim would exist if the Tribunal would have exclusive or original jurisdiction. It would also serve to circumvent problems of mandatory national prosecution if the laws of the state where the major trespass to water occurred so require. Transfer of proceedings may also be done in a way that would be similar in legal nature to a change of venue.

This approach, coupled with the possibility of transfer of the offender back to the state where the major trespass to water occurred, would also avoid many domestic legal difficulties.

99. The application of the substantive law of the state where the offence was committed is fair, and would assuage any exacerbated feelings of sovereignty that such a state may have in allowing the Tribunal to prosecute those accused of committing major trespass to water in their territory.

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- desiring may issue a concurring or dissenting opinion.
- vi. Decisions and orders of the Tribunal *en banc* are effective upon certification of the written opinion by the Secretariat, which is to communicate such certified opinion to parties forthwith.
  - vii. The Tribunal *en banc* may, within thirty days of the certification of the judgment, enter its decisions without notice.
  - viii. No actions taken by the Tribunal may be contested in any other forum than before the Tribunal *en banc*, and in the event that any effort to do so is made, the Procurator would be competent to appear on behalf of the Tribunal and in the name of all state parties of this Convention to oppose such action.
5. Prosecution
- i. The Tribunal's Procurator could be assisted by a prosecuting official of the transferring state whose law is to be applied.<sup>100</sup>
  - ii. Prosecution would commence on the basis of a water related complaint brought by a state party (thus supporting state parties' sovereignty). In addition, a state party that does not have subject matter jurisdiction, or that does not wish to bring a water related complaint within its own jurisdiction, may petition the Tribunal's Procurator to inquire into the potential direct prosecution by the Tribunal.<sup>101</sup> In such cases, the request by a state party would be confidential, and only after the Tribunal's Procurator has deemed the evidence sufficient will the case for prosecution be presented to an Inquiry Chamber of the Tribunal *in camera* for its action. In such a situation, the Tribunal's Procuracy and the Inquiry Chamber would be acting as an

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100. This too would reinforce the change of venue approach and prevent the claim that state parties totally relinquished jurisdiction.

101. This relieves a state party from pressures in certain cases.

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international judicial board of inquiry. Once the Inquiry Chamber has decided to allow prosecution, it would authorize the Tribunal's Procurator to issue an indictment.

- iii. The Convention would include provisions on providing the Tribunal with legal assistance (including administrative and judicial assistance) for the procurement of evidence, both tangible and testimonial.
  - iv. By virtue of the Convention, an indictment by the Inquiry Chamber will be recognized by all state parties in much the same way as other forms of recognition of foreign judgments.<sup>102</sup>
6. Conviction
    - i. State parties agree to enforce the final judgments of the Tribunal in accordance with the provisions of this Convention.<sup>103</sup>
  7. Appeal
    - i. The judgment is final and without appeal. In the event of dispute as to the meaning or scope of the judgment, the Tribunal would construe it upon the request of any party.
    - ii. An application for revision of a judgment may be made only when it is based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Tribunal and also to the party claiming revision, always provided that such ignorance was not due to negligence.
  8. Procedure (or Rules of the Tribunal)
    - i. The Tribunal would be authorized to enact rules of practice and material procedures before it.

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102. National legislation could be amended whenever necessary to provide for such recognition.

103. Other states may recognize such a judgment by special arrangement with the Tribunal. This would expand the network of cooperating states to include those states which may not become state parties but who would be willing to cooperate with the Tribunal in some respect.

#### D. Secretariat

1. The Secretariat would have as its chief officer the Secretary, who would be elected by a majority of the Tribunal sitting *en banc* and serve for a renewable term of eight years, barring resignation or removal by a majority of the Tribunal sitting *en banc* for incompetence, conflict of interest, or manifest disregard of the provisions of the Convention or Rules of the Tribunal.
2. The Secretariat would employ such staff as appropriate to perform its chancery and administrative functions, and such other functions as may be assigned to it by the Tribunal that are consistent with the provisions of this Convention and the Rules of the Tribunal.
3. The Secretariat staff would be appointed and removed by the Secretary at will.
4. In particular, the Secretary would twice each year:
  - i. Prepare budget requests for each organ of the Tribunal (Standing Committee, Procuracy, Tribunal, and Secretary); and
  - ii. Make and publish an annual report on the activities of each of the organs of the Tribunal.
5. An annual summary of investigations undertaken by the Procuracy would be presented to the Secretariat for publication, but certain investigations may be omitted where secrecy is deemed necessary, provided that a confidential report of the investigation is made to the Tribunal and to the Standing Committee and filed separately with the Secretariat. Either the Tribunal or the Standing Committee may order by majority vote that the report be made public.
6. The Secretary would receive an annual salary equal to that of the judges.

#### VI. CONCLUSION

We no longer live in a world where narrow conceptions of sovereignty and jurisdiction can stand in the way of an effective

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system based on international cooperation for the prevention and settlement of international water disputes.

Many of the international water disputes for which the Tribunal, whether universal or regional, would have jurisdiction are the logical extension of international protection of environment. Without enforcement, these water rights are violated with impunity. We owe it to our own human and intellectual integrity to reassert the values we believe in by at least attempting to prosecute such offenders. When such a process is institutionalized, it can operate fairly and impartially. We cannot rely on the sporadic episodes of regional and *ad hoc* structures as we did with the Rotterdam and Amsterdam water tribunals. The permanency of a UWT is the best policy for the advancement of the environmental rule of law and for the prevention of transnational illegal immigration and control of international water disputes.

A UWT will surely be established one day. In the meantime, however, we remain with the bitter realization that, if it had existed earlier, it could have deterred non-state actors and thus prevented some victimization. The conscience of senior government officials should be bothered by this prospect, especially when they oppose the idea on the basis that it might infringe on jealously guarded notions of jurisdiction and sovereignty.

It is unconscionable at this stage of the world's history, and after so much human harm has already occurred, that abstract notions of jurisdiction and sovereignty can still shield violators of international water law or that the limited views and lack of vision and faith by senior government officials can prevent the establishment of such needed (universal) international adjudicating structure. States could also explore the possibility of establishing separate international water tribunals of regional or sub-regional jurisdiction in which major trespass to water, and particularly water apartheid, could be brought to trial and the incorporation of such tribunals within the UN system. The time has come for us to think and act in conformity with the values and ideals we profess.

In the light of the above, there is an old adage: *Historia est testis temporum, lux veritatis, vita memoriae, magistra vitae,*

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*nuntiavetustatis*.<sup>104</sup> Looking at the past is essential if states are to actively create promising water future. Nevertheless, states' debates are often mired in syndromes which, unknowingly, cut them off from their celebrated water past.

States can be reactive or choose to be proactive. To do nothing is likely to be an invitation for a dysfunctional dispute settlement mechanism. To be proactive carries awesome responsibilities and can be frightening, but states need to tap their rich water history to reduce the potential for conflict and deliver immediate water benefits.

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104. Translation: "History is the witness of time, the light of truth, the essence of remembrance, the teacher of life, the messenger from times past." Marcus Tullius Cicero (106-43 BC).