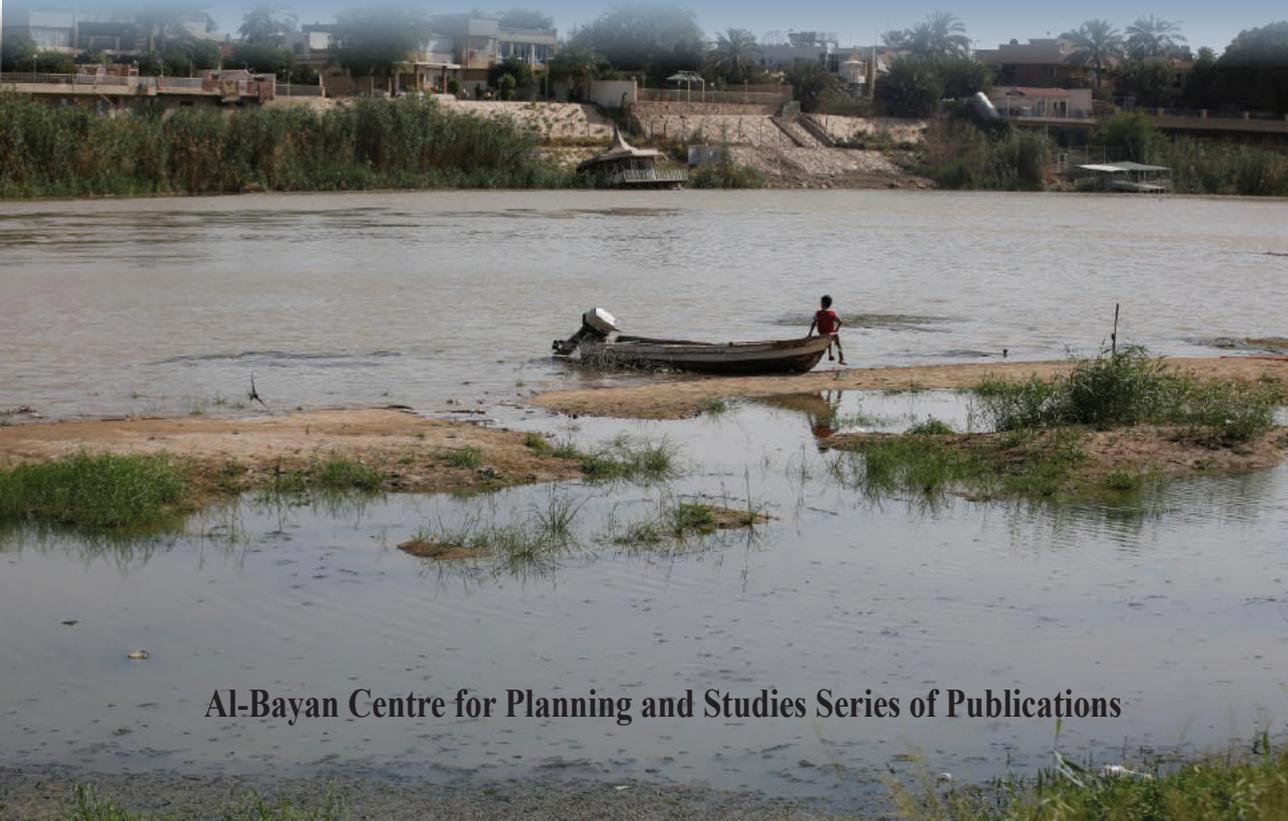


مركز البيان للدراسات والتخطيط
Al-Bayan Center for Planning and Studies



Water Partnerships in International (Transboundary) Watercourses under International Water Law

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Al-Bayan Centre for Planning and Studies Series of Publications

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Water Partnerships in International (Transboundary) Watercourses under International Water Law

By: Aymen AbdulKareem Hussien *

“The history of international water treaties dates as far back as 2500 BC, when the two Sumerian city-states of Lagash and Umma crafted an agreement ending a water dispute along the Tigris River – often said to be the first treaty of any kind.¹”

Today, international water partnerships in the Middle East are, once again, facing huge hurdles because the water requirements of certain countries in the region demand that they engage in the construction of multiple projects along rivers or oblige an upstream country to build dams to meet anticipated water shortages. Examples of such cases include Iraq and Turkey with Ilisu Dam on the Tigris River; Egypt and Ethiopia with the Grand Ethiopian Renaissance Dam (aka the Nahdha Dam) on the Blue Nile. The countries in question went on to construct projects on those rivers to take maximum advantage of available water resources either to irrigate larger areas of agricultural land and/or to build hydropower plants, and in the process also benefiting from the export of excess capacity, or to meet food and energy shortages.

1 UN Water for Life Decade 2005–2015; Transboundary waters; United Nations Department of Economic and Social Affairs (UNDESA) – http://www.un.org/waterforlifedecade/transboundary_waters.shtml

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International Water Partnerships between such countries also face many legal problems, particularly among the countries which share rivers or seas. In the case of seas, the problems relate to territorial waters² or sea borders, as well as the issue of joint navigation or fishing rights. Such matters are determined by a body of international agreements and treaties in accordance with international public law and international customary rules. However, fresh water rivers are a very different matter altogether in terms of treatment under international conventions and treaties and in the way water rights are shared between the upstream and downstream countries along the same river.

Moreover, international laws governing the sharing of water in transboundary rivers between nation-states are subordinate to the will of parties to the conventions or treaties to which they are party; and as such are bound by these articles and terms; but if they are not even a party to these conventions or treaties, in which case they will not be bound by them. A good example is the 1997 United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses [the convention entered into force on August 17, 2014], to which Turkey is not a signatory.

2. Territorial waters: areas of the sea or ocean over which a state has the sovereign right. These rights include: control over fishing zones, navigation and shipping, as well as the exploitation of marine resources and natural water resources. Most coastal states that border on the sea have adopted between 12 nautical miles to several nautical miles limit of territorial waters for their countries. The territorial waters are subject to the international border agreements, so that each country has borders several miles away from its shores. These miles are under state sovereignty and are defined and determined according to treaties.

Iraq feeds on two major rivers, the Tigris and the Euphrates, both of which originate outside its borders. The two rivers account for 98 percent of the surface water supply in Iraq³. The two rivers flow through a series of dams and diversions in Syria and Turkey. Moreover, the Euphrates does not obtain its water from the natural tributaries inside Iraq but is fed on seasonal groundwater from the valleys, unlike the Tigris River, which gets its water through tributaries such as: the Lesser Zab, the Greater Zab, the Khabor, the Diyala River, and al Athaim River. The proportion of transboundary waters which feed or flow into Iraq is 70%⁴.

The problem of sharing the waters of these two rivers between Iraq and Turkey on the one hand, and Syria and Turkey, on the other, is not new. Over the years, there have been several problems that called for the formation of joint committees between the two countries to consider them. Despite the numerous bilateral agreements, Turkey has, more often than not, ignored them. In 1947, Turkey agreed to begin monitoring the two rivers and to share relevant data with Iraq. In 1980, Turkey and Iraq relied on the last agreement to establish a joint technical committee on territorial waters. Two years later, Syria joined this committee⁵; however, no major understandings were reached, save for vague Turkish commitments not to damage the shared waters

3. Barbooti, Evaluation of Quality of Drinking Water from Baghdad, Iraq. *Science World Journal*. 2010.

4. Hassan al Janabi, Iraq's Minister for Water Resources, www.mowr.gov.iq/ar/node/309.

5. Iraqi Ministries of Environment, Water Resources, Municipalities and Public Works, New Eden Master Plan for Integrated Water Resources Management in the Marshlands Area, 2006.

between the countries on the Tigris and Euphrates basins. Iraq's war with Iran, and the subsequent dedication of human and financial resources to that war, meant that the issue of water was neglected for a number of years.

In the 1980s, Turkey soon began a \$32 billion dam project, known as the Güneydouu Anadolu Projesi (or GAP project for short), which built a series of 22 dams, and 19 hydroelectric plants along the Euphrates and Tigris rivers⁶.

As a result of the political and economic developments in the Middle East and specifically regarding the use of international waters for non-navigational purposes, the legal situation at the time was characterised by ambiguity and lack of focus. The General Assembly of the United Nations called upon the International Law Commission to study the law on the use of international watercourses* for non-navigational purposes in order to revise and codify it as befits recent developments in the field⁷. And in 1997 the General Assembly of the United Nations adopted "the Convention on the Law of the Non-Navigational Uses of International Watercourses", a document specifically on the uses of transboundary waters and international conservation, including surface water and groundwater, taking into account the increasing demand for

6. Barbooti, Evaluation of Quality of Drinking Water from Baghdad, Iraq. Science World Journal. 2010.

(*) Article 2 of the 1997 UN Convention defines watercourse as "a system of surface waters and groundwaters constituting by virtue of their physical relationship a unitary whole and normally flowing into a common terminus."

7. www.marefa.org.

water and the impact of human pressure. The United Nations developed a blueprint to help conserve water and manage water resources for present and future generations. The Convention entered into force in August 2014, after Vietnam's ratification, thus acquiring the required number of ratifications as defined in article 36 of the Convention. However, Turkey was notable for its failure to ratify this Convention.

Turkey's position on the 1997 Convention

The reality is that the water situation in Iraq is fast deteriorating, an issue highlighted by government officials responsible for the water portfolio at the Iraqi Ministry of Water Resources and, on several occasions, also by members of the various committees set up by Turkey and Iraq. The Minister for Water Resources, Dr Hassan al Janabi, when raising the issue, stated that "Iraq is the lowest downstream state on the Tigris and Euphrates basins, and is also at the receiving end of all problems affecting water resources in the region."⁸ He pointed out that Turkish activities involving the construction of dams were behind the reduction in Iraq's agreed water quotas; and there were also the increasing water needs in the region to sustain economic development, as well as climate change in the region.

Turkey is currently working on several economic projects aimed at sustainable development. However, Turkey is carrying out these projects at the expense of the joint watercourse countries – Iraq and

8. A press interview with the Iraqi Minister for Water Resources regarding the operation of the Turkish Ilisu Dam project, <http://www.mowr.gov.iq/ar/node/309>

Syria – without paying attention to their negative impact on these two countries, which have previously complained about Turkish practices of constructing dams that seek to secure additional water quotas for new agricultural lands for their food, as well as the construction of hydroelectric power plants to meet energy needs within its territories.

However, by reviewing the legal provisions of several international treaties on water-sharing among watercourse States, we will see that Turkey is violating international law in terms of water-sharing on the one hand and the damage caused by such actions by the Turkish side at the expense of the watercourse States, on the other. It is evident that Turkey is not at all concerned about the tragic consequences flowing from these projects and justifies them by claiming that the majority of the waters originate from within its territory (more than 95% of the Euphrates River and about 43% of the Tigris), and as such it is entitled to use it for its own benefit.

With regard to Iraq and its bilateral agreement with Turkey, the Turkish side has never complied with the water-sharing agreement under the 1946 Treaty signed between the two parties, which obliges Turkey to inform Iraq of any projects it proposes to implement, and likely consequences they will have on the flow of water in these rivers⁹. However, the Turkish side justifies their actions on these rivers on the basis that they improve the flow of water in the rivers, whilst

9. Protocol No. (1) regulating the waters of the Tigris and Euphrates, annexed to the Treaty of Friendship and Good Neighbourliness signed between Iraq and Turkey on 29/3/1946.

not forgetting that Turkey is among the three countries – China and the Republic of Burundi being the other two– who voted against the 1997 United Nations Watercourse Convention in the United Nations General Assembly¹⁰, which provides for equitable and reasonable use of any transboundary watercourse, while ensuring that the activities by a state within its own territories do not inflict any significant damage on the watercourse states sharing waters with it.

Turkey is likely to find itself ultimately dependent on Iraq's goodwill, as well as on other important issues such as oil and trade exchanges between the two countries. Turkey is also likely to find itself in an embarrassing situation with its European neighbours because of its application for EU membership – something that Turkey desires more than the waters of the Tigris and Euphrates – and is often cited as an obstacle to its entry into the EU.

How can Iraq benefit from the 1997/2014 Convention?

Iraq does not currently possess the necessary tools to deal effectively with the water portfolio except through dialogue and by making such agreements as permitted under international law and which avail it of its rights; as well as working through diplomatic channels between the two countries in order to ensure it obtains its pre-determined water quotas.

10. UN International Watercourses Convention 1997, http://legal.un.org/ilc/texts/instruments/english/conventions/8_3_1997.pdf

The Ilisu dam has proved to be the most controversial of all longstanding issues in the water portfolio between the two countries, after Iraq regarded the action by Turkey as a calculated measure to seize water behind this dam, and in the process deepening the water crisis inside Iraqi territory. The situation arose despite past reassurances given to Iraq through Turkey's ambassador in Baghdad, Fateh Yildiz, who said: "Turkey will not take any measures without first reverting to or consulting with neighbouring countries on cooperation and to provide support for any problem between them¹¹."

The decline in the volume of water flowing from the Turkish side into the Tigris and Euphrates rivers, coupled with the below average and low rainfall levels, are precursors to a major environmental disaster that will take the form of the drying up of the marshlands and the migration of the rural farming population¹². Difficulties will also be faced by the people of southern Iraq with the destruction of most of their agricultural land, especially after Iraq had made significant advances in previous years, through investments in agricultural land, to meet some of its needs of wheat, barley and rice, but – because of the ongoing actions by Turkey – will expose these lands to drought, and even render them unfit for agriculture.

11. Turkish Dam Project Threatens Rift with Iraq Over Water Shortages; <https://www.reuters.com/article/us-iraq-turkey-dam/turkish-dam-project-threatens-rift-with-iraq-over-water-shortages-idUSKCN1J11YL>

12. Joost Jongerden, Dam and Politics in Turkey: Utilizing Water, Developing Conflict, Middle East Policy Council.

GAP is a key factor in Turkey's position on how it addresses some of the political issues with its neighbouring watercourse states, but Iraq can, with the aid of the international community, represented by the United Nations and other international organisations, make use of the 1997 Convention to put pressure on Turkey to resolve the water issue; and can also use the trade exchange with Turkey to negotiate with.

We can summarise the important points of the Convention that may be deployed in Iraq's favour and with which to bind Turkey, as follows¹³:

- Articles 5, 6, and 10 provide for the fair and equitable utilisation of water resources between the watercourse States, which require taking into account all relevant factors and circumstances for the quantitative and relative division of the watercourse and its use in a productive and rational manner by all watercourse States.

- Article 21 of the Convention prohibits acts aimed at the diversion of the international watercourse or the diversion and reduction of water runoff and damage to the territory of other States. In addition, the International Court of Justice, in its judgment in 1949 in the "Corfu Strait" case ruled that a State must refrain from causing serious harm to other States when utilising an international watercourse¹⁴.

13. The Convention on Non-Navigational Uses of International Watercourses; <https://mepc.org/dams-and-politics-turkey-utilizing-water-developing-conflict> ; <https://www.marefa.org>

14. <https://gulfnews.com/news/mena/iraq/turkish-dam-project-deepens-anxiety-in-iraq-over-water-shortages-1.2232391>

- Article 8 of the Convention stipulates the obligation to cooperate on the basis of the sovereign equality of watercourse States; to achieve mutual benefits with a view to achieving the optimal use of the international watercourse; disaster prevention, optimal utilisation of the watercourse and consultations on planned inter-State projects, as well as facilitating cooperation on relevant measures and procedures for the peaceful settlement of disputes.

The articles of the Convention established the principle of cooperation between the watercourse States of the common international watercourse and also indicated that international law was a law of cooperation and a means for resolving international disputes and conflicts and urged that it be done on the basis of sovereign equality, mutual benefit and good faith. The Convention also obliges watercourse States to optimize the use of the watercourse, whilst having regard to the interests of other States and without harming or causing harm to their interests.

How Iraq can benefit from this Convention, is by striving for dialogue with neighbouring Turkey and to bind it, in front of the international community, to respecting Iraq's rights and water quotas, as well as undertaking to utilise its water resources in a peaceful and legal manner and to provide adequate protection for the international watercourse. A commitment is also needed from Turkey to work jointly with the other watercourse states on investment programmes and projects of economic benefit to the state, together with the provision of regular

exchanges of information and data on the status of dams and shared basins. Turkey will also be required to set up joint committees with Syria to address any problems that may arise between the respective countries; under the auspices of the United Nations to ensure that the agreements are properly adhered to by the participating countries and constructively applied to the Euphrates and Tigris watercourses in the region.