

# The Cross-fertilization between the Sustainable Development Goals and International Water Law

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*Are the main principles of international water law, as reflected in the Watercourses Convention, sufficiently equipped to motivate States to sustainably manage their freshwater resources? This article suggests that a more pronounced sustainable approach to these principles is desirable. The Sustainable Development Goals might give this 'green' evolution of international water law a further push in the right direction. In this contribution, three elements that could be the focus of this evolution are identified: (i) a sustainable interpretation of the principle of equitable and reasonable utilization of shared watercourses, the no-harm rule and the duty of cooperation; (ii) a commitment to the further development of the ecosystems approach to international water law; and (iii) further emphasis on facilitating public participation in decision making relating to the utilization of international watercourses.*

## INTRODUCTION

Some treaties, regulating the utilization and joint management of a specific transboundary watercourse, pay considerable attention to sustainable development.<sup>1</sup> Some regional legal instruments on water management do so as well.<sup>2</sup> And the same is true for some national water laws<sup>3</sup> and policies.<sup>4</sup> We also see that courts – both

at the international and domestic level – increasingly adopt a sustainable development-oriented approach to international water law.<sup>5</sup> Through this development, the open and largely procedural norms and principles of *general* international water law are interpreted in such a way as to oblige States to embrace a 'green' approach to regulating the use of their freshwater resources.<sup>6</sup> This contribution sets out to examine whether the Sustainable Development Goals (SDGs) can also play a modest role in this ongoing development. In other words, can the SDGs give a further boost to the evolution of general international water law towards a more sustainable development-oriented legal framework?

The underlying idea is that the concrete political commitments relating to water contained in the SDGs – and SDG6 in particular – can add substantive flesh to the otherwise abstract skeleton of general international water law. At the same time, the SDGs will be elevated from purely political commitments to legally relevant obligations when they can be so 'attached' to the norms of international water law. In short, there is potential for true cross-fertilization, with a global legal framework and global environmental policy strengthening each other.

More specifically, there are three ways in which this cross-fertilization can be most successful. The SDGs can be used to motivate States to: (i) interpret and apply the foundational principles of international water law in a sustainable manner; (ii) encourage the further development of the ecosystems approach to international water law; and (iii) use the legal framework of international water law to facilitate public participation at all levels of water governance.<sup>7</sup>

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<sup>1</sup> See, e.g., the Convention on Co-operation for the Protection and Sustainable Use of the River Danube (Sofia, 29 June 1994; in force 22 October 1998), especially Article 2; International Meuse Treaty (Ghent, 3 December 2002; in force 1 December 2006); Guarani Aquifer Agreement (San Juan, 2 August 2010; not yet in force); Agreement between the Government of the Republic of Kazakhstan and the People's Republic of China on Water Quality Protection of Transboundary Waters (Beijing, 22 February 2011); and the Convention on the Sustainable Management of Lake Tanganyika (Dar es Salaam, 12 June 2003), especially Article 5.2. For more examples, see A. Rieu-Clarke, 'The Sustainability Principle', in: A. Tanzi *et al.* (eds.), *The UNECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes* (Brill, 2015), 195.

<sup>2</sup> See, e.g., European Union Directive 2000/60/EC of the European Parliament and the Council Establishing a Framework for the Community Action in the Field of Water Policy, [2000] OJ L327/1.

<sup>3</sup> See, e.g., Water Law of the Central African Republic, Article 2.

<sup>4</sup> See, e.g., the Ghanaian National Water Policy (2007), found at: <<http://www.purc.com.gh/purc/sites/default/files/WATERPOLICY.pdf>>.

<sup>5</sup> See, e.g., ICJ 25 September 1997, *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, [1997] ICJ Rep. 7; ICJ 20 April 2010, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, [2010] ICJ Rep. 14 ('Pulp Mills'); ICJ 16 December 2015, *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, found at: <<http://www.icj-cij.org/docket/files/152/18848.pdf>>.

<sup>6</sup> The 'green' metaphor is borrowed from United Nations Environment Programme (UNEP), *The Greening of Water Law: Managing Freshwater Resources for People and the Environment* (UNEP, 2010).

<sup>7</sup> For an earlier development of these three proposals (published before the adoption of the SDGs), see O. Spijkers, 'The Sustainable Development Goals as Catalyst for the Sustainable Management of Water Resources', 24:3–4 *Journal of Water Law* (2015), 115.

The article starts with an overview of the drafting process of the SDGs, with a focus on input relating to freshwater resource management.<sup>8</sup> This discussion focuses on two relevant work streams: (i) the work stream coordinated by the United Nations (UN) Secretary-General, with input from the world of science (Sustainable Development Solutions Network), business (UN Global Compact), and the global, regional and domestic public at large; and (ii) the more traditional work stream, involving the Open Working Group (OWG) on the SDGs, established by the United Nations General Assembly (UNGA). This Working Group was composed of States, with some input from the 'major groups' representing the particular interests and ideas of women, children and youth, farmers, indigenous peoples, nongovernmental organizations (NGOs), trade unions, local authorities, science and technology, and business and industry.<sup>9</sup> Next, the article discusses the three strategies for success: using the SDGs to give a boost to the green interpretation of the principles of international water law, the ecosystems approach and public participation at all levels of water management.

To delimit the scope of the research, this contribution focuses primarily on the interpretation of the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses ('Watercourses Convention').<sup>10</sup> As mentioned already above, this convention is not the only source of international water law. There are many other multilateral and bilateral water treaties, river basin agreements, as well as customary norms. Furthermore, the Watercourses Convention is not interpreted and applied in a vacuum; other legal developments, such as the maturing of international environmental law, affect the Convention's interpretation and application in various ways. The ambition of this contribution is, however, not to provide a complete and comprehensive analysis of the potential influence of the SDGs on the entire *corpus* of international water law, but rather to depart from the general principles of international water law as reflected in the Watercourses Convention, and see how the SDGs might affect them.

<sup>8</sup> For a more detailed account of the SDG drafting process, see O. Spijkers and A. Honniball, 'Developing Global Public Participation', 17:3 *International Community Law Review* (2015), 219.

<sup>9</sup> See Agenda 21, found in: Report of the UN Conference on Environment and Development (UN Doc. A/CONF.151/26, 14 June 1992).

<sup>10</sup> Convention on the Law of the Non-navigational Uses of International Watercourses (New York, 21 May 1997; in force 17 August 2014) ('Watercourses Convention'). The Convention currently has 36 State parties. For a general introduction and commentary, see A. Rieu-Clarke, R. Moynihan and B.-O. Magsig, *UN Watercourses Convention: User's Guide* (2012).

As this contribution departs from the assumption that the SDGs could have an influence on the interpretation and application of a source of law – the Watercourses Convention is, after all, a treaty – it might be useful to say a few words about the legal status of these goals at the outset.<sup>11</sup> The SDGs are contained in a legally non-binding resolution of the UNGA.<sup>12</sup> From a purely formal point of view, this means no international legal obligations can be based directly on the SDGs. After all, when adopting the SDGs, States did not formally express their consent to be legally bound by these goals and commitments. They were adopted as political aspirations. At the same time, if States are influenced by the SDGs when applying the provisions of the Watercourses Convention, this constitutes relevant subsequent practice in the application of that convention.<sup>13</sup> The SDGs can also be used to affirm an already evolving customary practice. That legally non-binding UNGA resolutions can have this effect was already affirmed by the International Court of Justice in 1996, when it noted that 'General Assembly resolutions can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an *opinio juris*'.<sup>14</sup> It all depends on whether an intention to give them legal value can be derived from the resolution's content and the conditions of its adoption, but also from the way it influences decision making afterwards. Declarations of the General Assembly have had such normative influence in the past. One might think of the Universal Declaration of Human Rights,<sup>15</sup> but also the Rio Declaration on Environment and Development.<sup>16</sup> Even more importantly for the present purposes is the influence that the predecessor to the SDGs, the Millennium Development Goals (MDGs), have had on international

<sup>11</sup> On the legal status of UNGA resolutions in the context of freshwater resource law, see also A. Rieu-Clarke, *International Law and Sustainable Development: Lessons from the Law of International Watercourses* (International Water Association, 2005), at 25–27.

<sup>12</sup> Transforming Our World: The 2030 Agenda for Sustainable Development (UNGA Resolution A/RES/70/1, 21 October 2015) ('Transforming Our World').

<sup>13</sup> Vienna Convention on the Law of Treaties (Vienna, 23 May 1969; in force 27 January 1980).

<sup>14</sup> ICJ 8 July 1996, *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, [1996] ICJ Rep. 226, at paragraph 70.

<sup>15</sup> For a classical and critical exposé, see H. Lauterpacht, 'The Universal Declaration of Human Rights', 25 *British Yearbook of International Law* (1948), 354. For an excellent treatise on what actually happened since its adoption, see J. von Bernstorff, 'The Changing Fortunes of the Universal Declaration of Human Rights: Genesis and Symbolic Dimensions of the Turn to Rights in International Law', 19:5 *European Journal of International Law* (2008), 903.

<sup>16</sup> Rio Declaration on Environment and Development (UN Doc. A/CONF.151/26/Rev.1 (Vol. I), 14 June 1992), Annex ('Rio Declaration'); see J.E. Viñuales (ed.), *The Rio Declaration on Environment and Development: A Commentary* (Oxford University Press, 2015).

(human rights) law.<sup>17</sup> These goals, also adopted in a legally non-binding UNGA resolution, have been used by many States as a basis for their own domestic development frameworks, and they have also been used by the international community – including States, the UN and other international organizations, but also NGOs – to measure progress. It will be interesting to see if the SDGs can have a similar influence on international and domestic water law and policy, and whether the SDGs will be used as tools in the interpretation of international water law in its evolving context.

## WORK STREAM COORDINATED BY THE SECRETARY-GENERAL

The post-2015 process for the adoption of the SDGs began in Rio de Janeiro in 2012. At the UN Conference on Sustainable Development, representatives of the world's States adopted an outcome document entitled 'The Future We Want'.<sup>18</sup> The document noted that the end of the MDGs was near, and that there was thus an urgent need to set new goals for the post-2015 age. The decision was made to focus these goals on *sustainable* development. The outcome document already placed water at the heart of sustainable development.

The drafting of the SDGs was not a State-dominated process. For instance, many non-State actors have contributed ideas related to water in this drafting process. This occurred particularly in the first work stream, led by the UN Secretary-General.

Let us look now at some input that is of particular relevance to the sustainable utilization of freshwater resources. The Sustainable Development Solutions Network, a group of scientists, published a report in the autumn of 2013.<sup>19</sup> The scientists stressed the need for long-term freshwater management strategies, and for

involving various non-State actors, such as local communities and corporations, in the management of freshwater resources. They did not call for a separate water goal, because in their view water resources management was 'a cross-cutting requirement for all goals'.<sup>20</sup> The scientists emphasized the importance of (freshwater) ecosystems, and identified certain key services that such systems provide, including provisioning services (e.g., clean drinking water); regulating services (e.g., a suitable climate and good air quality); and cultural services (e.g., tourism).<sup>21</sup>

The ideas of the business community were brought together by the UN Global Compact.<sup>22</sup> Unlike the scientists engaged in the Sustainable Development Solutions Network, business leaders believed that water and sanitation deserved to have a stand-alone goal, and ought not to be treated as cross-cutting issue. Business also stressed the importance of 'effective management and maintenance of biodiversity, ecosystems and ecosystems services'.<sup>23</sup> The Global Compact published its own list of SDGs, including a separate goal on water and sanitation.<sup>24</sup> This goal was phrased mostly in human rights language, and included a call for securing 'universal access to affordable and safe fresh water'.<sup>25</sup> The business community did not really accept any concrete commitments for itself, although it did propose to look critically at overconsumption, especially in the agricultural sector.<sup>26</sup>

The Secretary-General also established a High-Level Panel of Eminent Persons on the Post-2015 Development Agenda, to assist him in his work. The Panel was co-chaired by the Presidents of Indonesia and Liberia, and the Prime Minister of the United Kingdom. Most of the other members were also politicians or diplomats. The Panel's membership was, however, not restricted to these categories of persons. Civil society was represented, *inter alia*, by a Yemeni journalist and Nobel Prize winner, and the private sector was represented by the Chief Executive Officer of Unilever. These men and women proposed to include a separate SDG on water. Much like the Global Compact, their SDG6 called for universal access to water and sanitation.<sup>27</sup> Their SDG on water was thus a human-rights-oriented goal, and

<sup>17</sup> See in particular, United Nations Development Programme (UNDP), *Human Rights and the Millennium Development Goals: Making the Link* (UNDP, 2007). Much has been written about this link. See, e.g., M. Langford (ed.), *The Millennium Development Goals and Human Rights: Past, Present and Future* (Cambridge University Press, 2013); S. Kuruvilla, 'The Millennium Development Goals and Human Rights: Realizing Shared Commitments', 34:1 *Human Rights Quarterly* (2012), 141; M. von Engelhardt, 'The Millennium Development Goals and Human Rights at 2010: An Account of the Millennium Summit Outcome', 2:3 *Goettingen Journal of International Law* (2010), 1129; Office of the High Commissioner for Human Rights, *Claiming the Millennium Development Goals: A Human Rights Approach* (United Nations, 2008); F. Azzam, 'Reflections on Human Rights Approaches to Implementing the Millennium Development Goals', 2:2 *SUR: International Journal on Human Rights* (2005), 23.

<sup>18</sup> The Future We Want (UNGA Resolution A/RES/66/288, 11 September 2012), Annex.

<sup>19</sup> UN Sustainable Development Solutions Network (SDSN), *An Action Agenda for Sustainable Development, Report for the UN Secretary-General* (UN SDSN, 2014), at x and 19–20.

<sup>20</sup> *Ibid.*, Annex 3 (under Question 25).

<sup>21</sup> *Ibid.*, at 21.

<sup>22</sup> UN Global Compact and the World Business Council for Sustainable Development, *Joint Report to the High-Level Panel of the Post-2015 UN Development Agenda* (2013), found at: <[http://www.unglobalcompact.org/docs/issues\\_doc/development/Joint\\_Report\\_HLP.pdf](http://www.unglobalcompact.org/docs/issues_doc/development/Joint_Report_HLP.pdf)>, at 2.

<sup>23</sup> *Ibid.*, at 4.

<sup>24</sup> UN Global Compact, *Corporate Sustainability and the United Nations Post-2015 Development Agenda* (2013).

<sup>25</sup> *Ibid.*, at 15 (Goal 6).

<sup>26</sup> *Ibid.*, at 10.

<sup>27</sup> UN, *A New Global Partnership, Report of the High-Level Panel of Eminent Persons on the Post-2015 Development Agenda* (UN, 2013), at 17.

not linked explicitly to the sustainable use of freshwater. SDG9, on the sustainable management of natural resources in general, also did not refer explicitly to freshwater resources. It did refer to ecosystem protection, but this was linked mostly to forests.<sup>28</sup>

The Secretary-General also asked for input from his own Advisory Board on Water and Sanitation. This panel was established already in 2004 to oversee the implementation of the MDG on access to safe drinking water (one of the targets of MDG7 on ensuring environmental sustainability). The Secretary-General decided to give the Advisory Board a second life and purpose, and involve them in the SDG process as well. The Advisory Board drafted a concrete suggestion for a SDG on water,<sup>29</sup> and identified sustainable wastewater management, pollution prevention and integrated water resources management as priorities.<sup>30</sup>

The Secretary-General also allowed the public at large to contribute ideas and suggestions. There were global, regional, national and thematic consultations. Most of these consultations took place online. At the global level, people were asked to select six priority issues out of a list of 16 through the *MyWorld* survey.<sup>31</sup> Over 9.7 million votes were cast in March 2016, and access to clean water ranked seventh; the protection of rivers, oceans and forests ranked fourteenth. Of the 16 issues one could choose from, those two had the closest link with sustainable water use.

One of the thematic consultations was on water.<sup>32</sup> Water consultations began in November 2012, and ended with a High-Level Meeting in March 2013.<sup>33</sup> Twitter<sup>34</sup> and Facebook<sup>35</sup> accounts were set up, explicitly intended to involve young people. Much emphasis was put on the importance of access to water, especially at schools.<sup>36</sup> This is in line with the High-Level Panel report referred to earlier. The report that attempted to summarize all the thematic input from various contributors called for 'a transparent, equitable and sustainable balance of water use that satisfies humans [*sic*] needs – economic and social – as

well as ecosystem requirements'.<sup>37</sup> Throughout the report, references were made to the protection of freshwater ecosystems. The report argued that one way to do this was to invest in better water governance, or good water governance. It further noted that the Watercourses Convention and the United Nations Economic Commission for Europe (UNECE) Convention on the Protection and Use of Transboundary Watercourses and International Lakes provided the 'frameworks for cooperation'.<sup>38</sup> This is a clear reference to the potential for cross-fertilization between international water law and the SDG process. By attaching the SDGs to the legal framework of international water law in this way, the goals are elevated from political aspirations to guidelines for the implementation of binding international legal obligations.

The conclusions of the 22 national consultations that were organized by the UN were also brought together in a synthesis report.<sup>39</sup> One of the recommendations was to encourage the development of 'transboundary agreements on the sustainable use and equitable share of transboundary watercourses',<sup>40</sup> making yet another reference to the potential for cross-fertilization of water law and SDGs. Many of the national consultations referred extensively to ecosystem protection and preservation.<sup>41</sup>

The Secretary-General tried to summarize this plurality of opinions in a synthesis report, which was published on 31 December 2014.<sup>42</sup> Very few references to water can be found in this report, but if we look at the formulation of SDG6, which calls for 'ensuring availability and sustainable management of water and sanitation for all', we can see that, at the very least, the term 'sustainable management' is included, meaning that the goal was to be about more than just universal access to safe drinking water for the present generation. The ecosystem goal (SDG15), on the other hand, was again focused on forests rather than freshwater ecosystems. In short, the Secretary-General's report was somewhat of an anti-climax, after all the interesting ideas and proposals put on the table at various stages during the drafting process.

<sup>28</sup> *Ibid.*, at 31 (target 9c).

<sup>29</sup> UN Secretary-General's Advisory Board on Water and Sanitation, *Water and Sanitation for All: Securing our Future, Preserving our Planet* (2013).

<sup>30</sup> UN Secretary-General's Advisory Board on Water and Sanitation, *Hashimoto Action Plan III: Strategy and Objectives through 2015* (2013), at 4.

<sup>31</sup> See <<http://www.myworld2015.org/>>.

<sup>32</sup> UN, *The Post 2015 Water Thematic Consultation, Final Report of the World We Want 2015 Water Thematic Consultation, Facilitated by UN-Water* (2013).

<sup>33</sup> *Ibid.*, at 5.

<sup>34</sup> <<https://twitter.com/WaterPost2015>>.

<sup>35</sup> <<https://www.facebook.com/waterpost2015>>.

<sup>36</sup> UN, n. 32 above, at 11.

<sup>37</sup> *Ibid.*, at 16.

<sup>38</sup> *Ibid.*, at 17–18.

<sup>39</sup> Global Water Partnership, *National Stakeholder Consultations on Water: Supporting the Post-2015 Development Agenda* (Global Water Partnership, 2013).

<sup>40</sup> *Ibid.*, at 16.

<sup>41</sup> See, e.g., the national consultations held in Ghana, Nicaragua, Indonesia, Tanzania, Antigua and Barbuda, Bangladesh and Mozambique. *Ibid.*, at 14 and 28.

<sup>42</sup> *The Road to Dignity by 2030: Ending Poverty, Transforming All Lives and Protecting the Planet. Synthesis Report of the Secretary-General on the Post-2015 Sustainable Development Agenda* (UN Doc. A/69/700, 31 December 2014).

## WORK STREAM OF THE OPEN WORKING GROUP ON THE SDGS

The Open Working Group on the SDGs was the forum for the second work stream, which commenced a bit later, but ran parallel with the first work stream for a considerable time. Membership in this OWG was limited to State representatives of 30 States. To allow for more participation, these seats were all shared. The Netherlands, for example, had to share its seat in the group with Australia and the United Kingdom. The OWG drafted a report which was sent to the UNGA,<sup>43</sup> and on the basis of that report the Assembly adopted the SDGs in the autumn of 2015.

As mentioned above, the second work stream was not entirely closed to non-State participation. Representatives of the UN major groups were granted access to the meetings of the OWG. They could share their ideas and provide comments. However, the actual drafting was left to the State representatives.

The third session of the OWG was devoted to water. To facilitate the work of the OWG, an issues brief on water and sanitation was circulated beforehand.<sup>44</sup> At the meeting, there was consensus on the importance of 'integrated sustainable management of water resources'. What was most remarkable was that the States repeatedly reminded each other of the importance of respect for State sovereignty. In other words, most of the State representatives felt that States should be free to decide for themselves how to exploit and manage 'their' natural resources, and freshwater resources were no exception to this rule.

In June 2014, the OWG published its zero draft of the SDGs, including an SDG6 on ensuring the availability and sustainable management of water and sanitation for all.<sup>45</sup> The ecosystem goal (SDG15) still had no clear reference to freshwater ecosystems.

At the 12th Session of the OWG, the major groups could comment. Some of these last-minute comments actually had quite some influence on the text of the SDGs as finally adopted. For example, Business and Industry,<sup>46</sup>

as well as Women,<sup>47</sup> called for participatory water governance at all levels. The Science and Technology Major Group wanted to encourage action to improve the resilience of water systems to extreme events, including disasters.<sup>48</sup>

The final version of the proposal for the SDGs took these suggestions into account.<sup>49</sup> The OWG had added a call upon all States to 'support and strengthen the participation of local communities for improving water and sanitation management'. Other welcome last-minute changes were made as well. SDG6 made an explicit reference to *freshwater* ecosystems, such as wetlands, rivers, aquifers and lakes. Even SDG15 had an explicit reference to the 'conservation, restoration and sustainable use' also of 'freshwater ecosystems'.

The General Assembly adopted the final version of the SDGs in a resolution in October 2015.<sup>50</sup> Of all the input referred to above, the report of the OWG had clearly been the most influential. Sustainable Development Goal 6, the 'water goal', reads as follows:

- 6.1: By 2030, achieve universal and equitable access to safe and affordable drinking water for all
- 6.2: By 2030, achieve access to adequate and equitable sanitation and hygiene for all and end open defecation, paying special attention to the needs of women and girls and those in vulnerable situations
- 6.3: By 2030, improve water quality by reducing pollution, eliminating dumping and minimizing release of hazardous chemicals and materials, halving the proportion of untreated wastewater and substantially increasing recycling and safe reuse globally
- 6.4: By 2030, substantially increase water-use efficiency across all sectors and ensure sustainable withdrawals and supply of freshwater to address water scarcity and substantially reduce the number of people suffering from water scarcity
- 6.5: By 2030, implement integrated water resources management at all levels, including through transboundary cooperation as appropriate

<sup>43</sup> Report of the Open Working Group of the General Assembly on Sustainable Development Goals (UN Doc. A/68/970, 12 August 2014) ('Report of the OWG').

<sup>44</sup> TST Issues Brief: Water and Sanitation (undated), found at: <<http://sustainabledevelopment.un.org/content/documents/1801tstissueswater.pdf>>.

<sup>45</sup> Open Working Group on Sustainable Development Goals, 'Introduction and Proposed Goals and Targets on Sustainable Development for the Post-2015 Development Agenda' (2 June 2014), found at: <<https://sustainabledevelopment.un.org/content/documents/4528zerodraft12OWG.pdf>>.

<sup>46</sup> Business and Industry, 'Proposed Revisions by Focus Area' (undated), found at: <<http://sustainabledevelopment.un.org/content/documents/10489business.pdf>>.

<sup>47</sup> Women's Major Group, 'Inputs for SDG6', found at: <<http://sustainabledevelopment.un.org/content/documents/10464Karanunanathan.pdf>>; see also Women's Major Group, 'Introduction and Proposed Goals and Targets on Sustainable Development for the Post2015 Development Agenda' (15 June 2014), found at: <<http://sustainabledevelopment.un.org/content/documents/10419women.pdf>>, at 13.

<sup>48</sup> 'Input from the Science and Technology Major Group' (undated), found at: <<http://sustainabledevelopment.un.org/content/documents/10409science.pdf>>.

<sup>49</sup> See Report of the OWG, n. 43 above.

<sup>50</sup> Transforming Our World, n. 12 above.

- 6.6: By 2020, protect and restore water-related ecosystems, including mountains, forests, wetlands, rivers, aquifers and lakes
- 6.a: By 2030, expand international cooperation and capacity-building support to developing countries in water- and sanitation-related activities and programs, including water harvesting, desalination, water efficiency, wastewater treatment, recycling and reuse technologies
- 6.b: Support and strengthen the participation of local communities in improving water and sanitation management.<sup>51</sup>

Also relevant is Goal 15 (Protect, restore and promote sustainable use of ecosystems), whose first target reads:

- By 2020, ensure the conservation, restoration and sustainable use of terrestrial and inland freshwater ecosystems and their services, in particular forests, wetlands, mountains and drylands, in line with obligations under international agreements.<sup>52</sup>

## A 'SUSTAINABLE' INTERPRETATION OF THE FUNDAMENTAL PRINCIPLES OF INTERNATIONAL WATER LAW

How can SDG6 and SDG15 be used to encourage States to embrace a 'green' interpretation of general international water law? The next three sections will aim to address this question, by showing how SDG6 and SDG15 can give a boost to a sustainable interpretation of the key principles of international water law, by looking specifically at the ecosystems approach and by examining public participation.

First, we will look at how the SDGs can serve as catalyst for a 'sustainable' interpretation of water law's fundamental principles. The first such principle is the no-harm principle, which is proclaimed in Article 7 of the Watercourses Convention. Most of the principles referred to below can also be found in similarly worded provisions in the other global legal framework of international water law, the UNECE Convention.<sup>53</sup> For reasons explained in the introduc-

tion, however, the focus here is on the Watercourses Convention.<sup>54</sup>

Article 7 of the Watercourses Convention reads as follows:

Watercourse States shall, in utilizing an international watercourse in their territories, take all appropriate measures to prevent the causing of significant harm to other watercourse States.<sup>55</sup>

This provision can be interpreted in a rather straightforward, and somewhat old-fashioned sense, namely, as obliging States to do their very best – a due diligence obligation – to prevent the utilization of a watercourse within their territory from causing harm to (the environment of) another State.<sup>56</sup> There is another interpretation possible, according to which a State has a more general obligation to prevent harm caused to the watercourse. Such harm might be felt by a neighbouring State, but it could also be felt by the future generations of the same State in which the harm is caused. The International Law Association (ILA) proposed such a no-harm rule already in 2004, in their Berlin Rules. These rules contain a provision obliging States to 'take all appropriate measures to prevent or minimize environmental harm', an obligation that is *not* limited to the prevention of harm caused to another State.<sup>57</sup> Such an expansive interpretation of the no-harm rule, which takes both intergenerational and intragenerational harm into account, cannot be based on a literal reading

<sup>54</sup> Ever since the UNECE Convention was opened for accession to parties outside Europe, much has been written about the relationship between the UNECE and UN Watercourses Convention. See, e.g., A. Tanzi, *The Economic Commission for Europe Water Convention and the United Nations Watercourses Convention: An Analysis of their Harmonized Contribution to International Water Law* (UNECE, 2015); S. McCaffrey, 'The 1997 UN Convention: Compatibility and Complementarity', in: A. Tanzi *et al.*, n. 1 above, at 51; A. Rieu-Clarke, 'A Cure or a Curse? Entry into Force of the UN Watercourses Convention and the Global Opening of the UNECE Water Convention', 8 *Questions of International Law* (2014), 3; A. Rieu-Clarke and Remy Kinna, 'Can Two Global UN Water Conventions Effectively Co-exist?: Making the Case for a "Package Approach" to Support Institutional Coordination', 23:1 *Review of European, Comparative and International Environmental Law* (2014), 15; and UNECE, 'The Global Opening of the 1992 Water Convention' (UNECE, 2013).

<sup>55</sup> Watercourses Convention, n. 10 above, Article 7.

<sup>56</sup> See, e.g., A. Tanzi, n. 54 above, at 28–37; O. McIntyre, *Environmental Protection of International Watercourses under International Law* (Ashgate, 2007), at 87–119; S.C. McCaffrey, 'An Overview of the U.N. Convention on the Law of the Non-navigational Uses of International Watercourses', 20 *Journal of Land, Resources and Environmental Law* (2000), 57, at 62–63; N. Islam, *The Law of Non-navigational Uses of International Watercourses: Options for Regional Regime-building in Asia* (Kluwer Law International, 2010), at 144–155; I. Dombrowsky, *Conflict, Cooperation and Institutions in International Water Management: An Economic Analysis* (Edward Elgar, 2007), at 69–71; S. Paquerot, *Eau Douce: la Nécessaire Refondation du Droit International* (Presses de l'Université de Québec, 2005), at 59–60.

<sup>57</sup> Berlin Rules on Water Resources (International Law Association, 21 August 2004) ('Berlin Rules'), found at: <[http://www.internationalwaterlaw.org/documents/intldocs/ILA\\_Berlin\\_Rules-2004.pdf](http://www.internationalwaterlaw.org/documents/intldocs/ILA_Berlin_Rules-2004.pdf)>, Commentary to Article 8.

<sup>51</sup> *Ibid.*

<sup>52</sup> *Ibid.*

<sup>53</sup> Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Helsinki, 17 March 1992; in force 6 October 1996) ('UNECE Convention'). On the no-harm rule in the UNECE Convention, see A. Tanzi and A. Kolliopoulos, 'The No-Harm Rule', in: A. Tanzi *et al.*, n. 1 above, at 133.

of Article 7 of the Watercourses Convention. It requires some imagination, and the SDGs might form the inspiration for that. The SDGs place the obligations traditionally associated with the no-harm rule in a sustainable development context. For example, the SDG target to reduce pollution (6.3, as cited above) is regarded as a means to improve water quality in a more general sense, and is linked to obligations of recycling and reuse of water. At the same time, it must be acknowledged that there is little support in practice and scholarship for such an intergenerational interpretation of the no-harm rule.<sup>58</sup>

A more promising route to take is to look to the second fundamental principle of international water law, the principle of equitable and reasonable utilization, which is codified as follows in Article 5 of the UN Watercourses Convention:

Watercourse States shall in their respective territories utilize an international watercourse in an equitable and reasonable manner. In particular, an international watercourse shall be used and developed by watercourse States with a view to attaining optimal and sustainable utilization thereof and benefits therefrom, taking into account the interests of the watercourse States concerned, consistent with adequate protection of the watercourse.<sup>59</sup>

This principle can – and has been – interpreted as referring also to the interests of future generations and the environment itself, thus moving beyond the inter-State paradigm of the no-harm rule.<sup>60</sup> A big question is how the obligation of sustainable utilization is linked to the obligation of reasonable and equitable use. The International Law Commission's (ILC) Commentaries to the Draft Articles on the Law of the Non-navigational Uses of International Watercourses do not say anything about the intended meaning of 'sustainable utilization', because the reference to 'sustainable utilization' was added to the provision at the very last moment. After the ILC had produced its Draft Articles in 1994, the UNGA convened a Working Group, with State representatives as its members, to use the ILC's work as basis for the negotiation of a treaty text. It was at this stage that the reference to 'sustainable utilization' was added to Article 5, at the request of the Netherlands and Finland.<sup>61</sup> Much has since been written about the link between equitable and sustainable utiliza-

tion; most scholars hold the view that the latter is included in the former,<sup>62</sup> but some see the two as separate and even clashing obligations.<sup>63</sup> The ILA defined 'sustainable use' in its Berlin Rules as:

The integrated management of resources to assure efficient use of and equitable access to waters for the benefit of current and future generations while preserving renewable resources and maintaining non-renewable resources to the maximum extent reasonably possible.<sup>64</sup>

In this definition, the use of the waters is considered both equitable and sustainable, if and only if the access of both present and future generations to these waters is taken into account. The definition thus uses an interpretation of equity, which includes both intra- and intergenerational equity.

Can the terms 'sustainable utilization' and 'equitable utilization', as used in Article 5, be linked to each other in the way suggested in the Berlin Rules? In other words, can 'equitable utilization' be interpreted as referring not only to intragenerational equity, but also to intergenerational equity? In the latter case, the present generation has to take into account the interests not just of neighbouring States with whom a watercourse is shared, but also with its own future generations. Does this imply that we must look for an equitable apportionment of freshwater between and within generations? Such an intergenerational and thus sustainable interpretation of 'equitable utilization' is not *contra legem*, but it cannot be said that it follows directly from the wording of Article 5. Contrary to the situation with respect to Article 7, when it comes to a 'green' interpretation of Article 5, we find plenty of support, in scholarship and case law, for such an intergenerational interpretation of the equitable use principle.<sup>65</sup>

<sup>62</sup> See, e.g., P. Wouters, 'The International Law of Watercourses: New Dimensions', 3 *Collected Courses of the Xiamen Academy of International Law* (2010), 347, at 401; M. Fitzmaurice, 'The Relationship between the Law of International Watercourses and Sustainable Development', in: M. Fitzmaurice, D.M. Ong and P. Merkouris (eds.), *Research Handbook on International Environmental Law* (Edward Elgar, 2010), 605, at 607; O. McIntyre, n. 56 above, at 315; O. McIntyre, 'The Role of Customary Rules and Principles of International Environmental Law in the Protection of Shared International Freshwater Resources', 46:1 *Natural Resources Journal* (2006), 157, at 160; S. Paquerot, n. 56 above, at 91–120; A. Hilderling, *International Law, Sustainable Development and Water Management* (Eburon, 2004); P. Wouters and A. Rieu-Clarke, 'The Role of International Water Law in Promoting Sustainable Development', 12:5 *Water Law* (2001), 281, at 282; Patricia Wouters, 'The Relevance and Role of Water Law in the Sustainable Development of Freshwater', 25:2 *Water International* (2000), 202, at 205–206.

<sup>63</sup> See, e.g., X. Fuentes, 'Sustainable Development and the Equitable Utilization of International Watercourses', 69 *British Yearbook of International Law* (1998), 119.

<sup>64</sup> Berlin Rules, n. 57 above, Article 3.19.

<sup>65</sup> See especially UNEP, n. 6 above, at 39–43. See also Owen McIntyre, 'The Principle of Equitable and Reasonable Utilisation', in: A. Tanzi *et al.*, n. 1 above, at 146, who comes to the same conclusion regarding the UNECE Convention, even though a textual reading of the UNECE Convention suggests an emphasis on the no transboundary harm principle.

<sup>58</sup> Also UNEP does not seem to call for a detachment of the no-harm rule from its transboundary context. See UNEP, n. 6 above, at 43–47.

<sup>59</sup> Watercourses Convention, n. 10 above, Article 5.

<sup>60</sup> See, e.g., Ellen Hey, *Advanced Introduction to International Environmental Law* (Edward Elgar, 2016), at 58–69; A. Tanzi, n. 54 above, at 19–21 and 42–53; O. McIntyre, n. 56 above, at 53–86; S. Paquerot, n. 56 above, at 55–59.

<sup>61</sup> Summary Records of the 15th Meeting of the Sixth Committee of the UN General Assembly, Held on Tuesday, 8 October 1996 (UN Doc. A/C.6/51/SR.15, 1996), at 2.

Article 6 of the Watercourses Convention complements Article 5, by providing a non-exhaustive list of factors relevant to determining what constitutes equitable and reasonable utilization. There is no explicit reference to future generations or sustainable development in this list, but there is a reference to balancing 'existing and potential uses of the watercourse',<sup>66</sup> which can be interpreted as a reference to future uses, i.e., the utilization of the watercourse by future generations.

Further support for such a 'green' interpretation of water law's fundamental principles can be found in the environmental provisions of the Watercourses Convention, such as Article 20 on the protection and preservation of ecosystems (more on this below); Article 21 on the prevention, reduction and control of pollution; Article 23 on the protection and preservation of the marine environment; and Article 24 on the management of shared watercourses, which includes an obligation of 'planning the sustainable development of an international watercourse'.<sup>67</sup> The latter provision is worth emphasizing, as it is the only one with an explicit mention of 'sustainable development' in the Watercourses Convention. The ILC, responsible for its drafting, explained that the obligation of 'planning the development of a watercourse so that it may be sustained for the benefit of present and future generations [was] emphasized in [Article 24] because of its fundamental importance'.<sup>68</sup>

Of equal importance as the first two principles discussed above, is a third and more procedural principle, the general duty to cooperate. This principle we find codified in Article 8:

Watercourse States shall cooperate on the basis of sovereign equality, territorial integrity, mutual benefit and good faith in order to attain optimal utilization and adequate protection of an international watercourse.<sup>69</sup>

This obligation to cooperate on the basis of respect for each sovereign State's territorial integrity surfaced especially in the OWG discussions on what was to become SDG6, where a balance was sought between ensuring sustainable development as a common global goal and respecting the sovereignty of each State over its 'own' natural resources.

The SDGs can serve as further support for a 'sustainable' interpretation of the general principles of international water law. This can be done in various ways. As suggested above, the reference to 'improv[ing] water

quality by reducing pollution' (target 6.3) can be used to detach the provisions on pollution prevention from their transboundary context. For example, Article 21 of the Watercourses Convention, on the prevention, reduction and control of pollution, is phrased as a further elaboration of the no-harm rule. It obliges States to 'prevent, reduce and control the pollution of an international watercourse that may cause significant harm to other watercourse States or to their environment'.<sup>70</sup> Taking a more sustainable approach, this provision could be interpreted as obliging States also to prevent, reduce and control the pollution of an international watercourse that may cause significant harm to that State's own environment, thereby jeopardizing the interests of that State's own future generations.

Furthermore, many of the targets of SDG6 might be used, by States, as inspiration for the drafting of the joint management mechanisms and plans required of them by Article 24 of the Watercourses Convention. These plans must all aim to ensure the sustainable development of an international watercourse. This rather general and vague obligation can become more concrete through the adoption of the SDGs, and the even more detailed indicators that will be developed subsequently. Indeed, when adopting the SDGs, the UNGA also called upon the development of a global indicator framework for monitoring progress in the implementation of the SDGs.<sup>71</sup> This framework will detail the means of implementation for all targets, including the targets of SDG6 referred to above, such as the target of 'ensuring sustainable withdrawals and supply of freshwater to address water scarcity' (SDG6.4).

The targets of SDG6, in particular the call for 'integrated water resources management at all levels, including through transboundary cooperation as appropriate', may also be used to guide the cooperation envisaged in Article 8. The aim of such cooperation must be to 'attain optimal utilization and adequate protection of an international watercourse'.<sup>72</sup> SDG6, with its targets and indicators, may help States to translate this general aim into more concrete and specific tasks.

But most importantly, we can derive from the 'spirit' of the SDGs a commitment to sustainable water utilization.

## THE FURTHER DEVELOPMENT OF THE ECOSYSTEMS APPROACH IN INTERNATIONAL WATER LAW

Article 20 of the UN Watercourses Convention, concerning freshwater ecosystems, states:

<sup>66</sup> Watercourses Convention, n. 10 above, Article 6.

<sup>67</sup> *Ibid.*, Article 24.

<sup>68</sup> International Law Commission (ILC), 'Draft Articles on the Law of the Non-navigational Uses of International Watercourses and Commentaries Thereto', in: *Yearbook of the International Law Commission* (1994), 2(II), at 125.

<sup>69</sup> Watercourses Convention, n. 10 above, Article 8.

<sup>70</sup> *Ibid.*, Article 21.

<sup>71</sup> *Transforming Our World*, n. 12 above, at paragraph 75.

<sup>72</sup> Watercourses Convention, n. 10 above, Article 8.

Watercourse States shall, individually and, where appropriate, jointly, protect and preserve the ecosystems of international watercourses.<sup>73</sup>

This obligation is not explicitly linked to the obligation to prevent transboundary harm, and thus it could be argued that the obligation to protect and preserve the ecosystem is not owed (only) to the State with whom the ecosystem is shared.<sup>74</sup> An ecosystem was described by the ILC, which is responsible for the preparation of this provision, as an ‘ecological unit consisting of living and non-living components that are interdependent and function as a community’.<sup>75</sup> Article 20 refers to two distinct obligations: States must shield the ecosystems from harm (protection), and they must maintain the ecosystems as much as possible in their natural state (preservation).<sup>76</sup> Article 20 does not explicitly refer to sustainable development, but the ILC made it clear, in its commentary that ecosystems needed protection and preservation in order ‘to ensure their continued viability as life support systems, thus providing an essential basis for sustainable development’.<sup>77</sup>

These obligations can be linked with SDG6.6, obliging States to ‘protect and restore water-related ecosystems, including mountains, forests, wetlands, rivers, aquifers and lakes’; and it rhymes very smoothly with SDG15, which calls upon States to ‘ensure the conservation, restoration and sustainable use of freshwater ecosystems, in line with obligations under international agreements’.

In this way, the SDG process could further trigger the development, and rise to prominence, of the ecosystems approach in international water law. The SDGs thereby complement the evolving scholarship on the ecosystem-based approach to freshwater resources.<sup>78</sup> The ecosystems approach is also developed in the context of the law of the sea

(fisheries management),<sup>79</sup> the law on biodiversity<sup>80</sup> and in a general sense.<sup>81</sup> Of course, these developments also feed into the evolution of the approach as applied to freshwater resources.<sup>82</sup> The same can be said of the various agreements on the protection of ecosystems, many of which are (also) applicable to freshwater ecosystems.<sup>83</sup> It could well begin to replace the more traditional approach, which focuses on the protection of the watercourse itself – defined by the Watercourses Convention as a ‘system of surface waters and groundwaters constituting a unitary whole’<sup>84</sup> – from harm caused by damage done to the surrounding ecosystem. A more modern approach would then focus on the protection of the entire ecosystem, including the land areas.<sup>85</sup> Possibly, Article 20 Watercourses Convention could become the constitutional foundation of a whole new legal regime for the protection of freshwater ecosystems. In this way it can complement the ongoing development of the ecosystems approach in the context of the UNECE Convention’s framework.<sup>86</sup> States party to the UNECE Convention have already adopted a series

<sup>73</sup> Ibid., Article 20.

<sup>74</sup> See also O. McIntyre, n. 56 above, at 301–304; S.C. McCaffrey, *The Law of International Watercourses*, 2nd edn (Oxford University Press, 2007), at 459; S.C. McCaffrey, n. 56 above, at 66. For a different view, see F. Marty, *Managing International Rivers: Problems, Politics and Institutions* (Peter Lang, 2001), at 221–222.

<sup>75</sup> See ILC, n. 68 above, at 118.

<sup>76</sup> Ibid., at 119.

<sup>77</sup> Ibid.

<sup>78</sup> Early scholarly contributions to the development of the ecosystems approach include J. Brunnée and S.J. Toope, ‘Environmental Security and Freshwater Resources: A Case for International Ecosystem Law’, 5 *Yearbook of International Environmental Law* (1994), 41; J. Brunnée and S.J. Toope, ‘Environmental Security and Freshwater Resources: Ecosystem Regime Building’, 91:1 *American Journal of International Law* (1997), 26.

<sup>79</sup> There is just one reference to ecosystems in the United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982; in force 16 November 1994) (UNCLOS), and that is Article 194.5 on measures to prevent, reduce and control pollution of the marine environment. But see also Article 234 UNCLOS on preservation of the ‘ecological balance’ of ice-covered areas. For some examples of recent scholarship, see R. Davis and Q. Hanich, ‘Developing an Equitable and Ecosystem-Based Approach to Fisheries Management’, in: H. Scheiber, J. Kraska and M.-S. Kwon (eds.), *Science, Technology, and New Challenges to Ocean Law* (Brill, 2015), 124; and M. Hammer, ‘The Ecosystem Management Approach: Implications for Marine Governance’, in: M. Gilek and K. Kern (eds.), *Governing Europe’s Marine Environment: Europeanization of Regional Seas or Regionalization of EU Policies?* (Ashgate, 2015), 75.

<sup>80</sup> T. Marauhn and A.-M. Böhringer, ‘An Ecosystem Approach to the Transboundary Protection of Biodiversity’, in: L. Kotzé and T. Marauhn (eds.), *Transboundary Governance of Biodiversity* (Brill, 2014), 90.

<sup>81</sup> For a general treatment of ecosystem governance, see O. Woolley, *Ecological Governance: Reappraising Law’s Role in Protecting Ecosystem Functionality* (Cambridge University Press, 2014).

<sup>82</sup> The expert on the ecosystems approach to freshwater is Owen McIntyre. See, e.g., Owen McIntyre, ‘The Emergence of an “Ecosystem Approach” to the Protection of International Watercourses under International Law’, 13:1 *Review of European Community and International Environmental Law* (2004), 1; O. McIntyre, n. 56 above, at 286–313; Owen McIntyre, ‘The Protection of Freshwater Ecosystems Revisited: Towards a Common Understanding of the “Ecosystems Approach” to the Protection of Transboundary Water Resources’, 23:1 *Review of European Community and International Environmental Law* (2014), 88. See also Jing Lee, *Preservation of Ecosystems of International Watercourses and the Integration of Relevant Rules: An Interpretative Mechanism to Address the Fragmentation of International Law* (Brill, 2014).

<sup>83</sup> For an overview, see UNEP, n. 6 above, at 58–63.

<sup>84</sup> Watercourses Convention, n. 10 above, Article 2(a).

<sup>85</sup> According to some, Article 20 of the Watercourses Convention essentially protects the watercourse itself from harm caused by damage done to the ecosystem. See, e.g., F. Marty, n. 74 above, at 224–225. Others believe Article 20 also obliges States to protect and preserve the land areas of the ecosystem. See, e.g., S.C. McCaffrey, n. 74 above, at 447, 455–458 and 459.

<sup>86</sup> See A. Rieu-Clarke, n. 1 above, at 205–207.

of guidelines on the ecosystems approach to the management of transboundary freshwater resources.<sup>87</sup>

## PUBLIC PARTICIPATION AT ALL LEVELS IN THE SUSTAINABLE MANAGEMENT OF INTERNATIONAL WATERCOURSES

Finally, we will look at public participation in international water law.<sup>88</sup> On this issue, the UN Watercourses Convention is basically silent.<sup>89</sup> The only provision that is remotely relevant is Article 32, on non-discrimination:

Unless the watercourse States concerned have agreed otherwise for the protection of the interests of persons, natural or juridical, who have suffered or are under a serious threat of suffering significant transboundary harm as a result of activities related to an international watercourse, a watercourse State shall not discriminate on the basis of nationality or residence or place where the injury occurred, in granting to such persons, in accordance with its legal system, access to judicial or other procedures, or a right to claim compensation or other relief in respect of significant harm caused by such activities carried on in its territory.

This provision does not provide the injured persons mentioned a right of access to judicial or other procedures; it only obliges a State not to discriminate *if the State voluntarily decides* to provide such procedures.

One may wonder whether there might exist a general obligation under international law, or under international *environmental* law, to allow public participation by stakeholders in decision-making procedures that immediately affect their interests. Principle 10 of the Rio Declaration proclaims a principle of public participation, as follows:

Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to

participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.<sup>90</sup>

In other words, public participation means access to information, participation in decision making and access to justice. Although the Rio Declaration is itself not legally binding, Jonas Ebbesson has convincingly shown what an enormous impact this principle has had on the drafting of agreements in the field of environmental law. Before the Rio Declaration was adopted in 1992, very few environmental agreements referred to public participation. After Rio, almost all of them did.<sup>91</sup> The careful wording of Article 32 of the Watercourses Convention makes it one of the more conservative – or perhaps even old-fashioned – post-Rio treaties in this respect.

It is thus clear that there is a trend towards public participation in environmental decision making. But is there an obligation, under general international law, to facilitate public participation in international law? The ILA suggested there was such an obligation in its Berlin Rules. According to the report, there was a ‘well-established human right for people who are to be affected by decisions to participate in those decisions’.<sup>92</sup> The ILA also examined the application of this principle in the context of international water law, and came up with the following suggestion:

States must assure that persons subject to the state’s jurisdiction and likely to be affected by water management decisions are able to participate, directly or indirectly, in processes by which those decisions are made and have a reasonable opportunity to express their views on programs, plans, projects, or activities relating to waters.<sup>93</sup>

There appears to be no explicit legal basis for such an obligation in international water law; but if the SDGs call upon all States to strengthen equitable, participatory and accountable water governance, then this gives us confidence to interpret Article 32 Watercourses Convention – and similarly worded provisions elsewhere – as implicitly acknowledging an obligation to facilitate public participation in freshwater resources management at the global, regional and domestic level. Again, there is nothing *contra legem* about such interpretation, but a literal reading of Article 32 Watercourses Convention provides little support for it. SDG6.b, calling upon all States to ‘support and strengthen the participation of local communities in improving water and sanitation management’ does point us in the right direction. Together with developments elsewhere –

<sup>87</sup> See UNECE, Recommendations to ECE Governments on Ecosystems-Based Water Management (UN Doc. ECE/CEP/10, 1992); UNECE, Guidelines on the Ecosystem Approach in Water Management (UN Doc. ECE/ENVWA/31, 1993); UNECE, Recommendations on Payments for Ecosystem Services in Integrated Water Resources Management (UN Doc. ECE/MP.WAT/22, 2007); see also UNECE, Reconciling Resource Uses in Transboundary Basins: Assessment of the Water-Food-Energy-Ecosystems Nexus (UN Doc. ECE/MP.WAT/46, 2015).

<sup>88</sup> See generally O. Spijkers and A. Honniball, n. 8 above.

<sup>89</sup> The UNECE Convention does much better on public participation. See Serhiy Vykhryst, ‘Public Information and Participation under the Water Convention’, in: A. Tanzi *et al.*, n. 1 above, 268.

<sup>90</sup> Rio Declaration, n. 16 above, Principle 10.

<sup>91</sup> J. Ebbesson, ‘Principle 10: Public Participation’, in: J.E. Viñuales, n. 16 above, 287.

<sup>92</sup> Berlin Rules, n. 57 above, Commentary to Article 4.

<sup>93</sup> *Ibid.*, Article 18.

many treaties on international environmental law already explicitly refer to public participation,<sup>94</sup> and so does the UNECE Convention,<sup>95</sup> and there are interesting developments in case law<sup>96</sup> – the SDG target, if implemented at the domestic level, may trigger the development of a customary law obligation that is much in line with the public participation principle proposed in the Berlin Rules. The indicators that will be developed to further guide States in the implementation of target 6.b will also be of assistance here.

## CONCLUSION

The Watercourses Convention does not openly, explicitly and unambiguously adopt a ‘green’ approach to international water law. Its interpretation and application thus need to evolve, through a renewed interpretation or modification of the most important principles. The SDGs might give this ‘green’ evolution of international water law a further push in the right direction. In this contribution, three elements that could be the focus of this evolution were identified: first, a sustainable interpretation of the principle of equitable and reasonable utilization of shared watercourses, a sustainable interpretation of the no-harm rule, and a sustainable interpretation of the duty of cooperation; second, a commitment to the further development of the ecosystems approach in international water law; and third, more emphasis on facilitating public participation in decision making relating to the sustainable utilization of international watercourses.

How to move forward? As mentioned above, when adopting the SDGs, the General Assembly asked for the development of a global indicator framework for moni-

toring progress in the implementation of the SDGs. For this purpose, an Expert Group on SDG indicators, composed of Member States, was set up. This Group will also have a role in assisting States with the implementation of these indicators once they have been adopted; and it will use these indicators to report on progress – or lack thereof – towards realizing the SDGs and their targets. When adopting the SDGs, States already committed themselves to this framework of global, regional and national indicators. It is thus not unlikely that the SDG framework – with its goals, targets and indicators – will be used, despite its legally non-binding character, as yardstick for the development of regional and domestic water law and policies, and that it will be used by international organizations, NGOs and States themselves, to measure progress. In this way, the indicators can give some teeth (i.e., in terms of monitoring) to the SDGs, and provide concrete steps towards a green interpretation and application of the relevant provisions of the Watercourses Convention.<sup>97</sup>

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<sup>94</sup> See, e.g., the Convention on Biological Diversity (Rio de Janeiro, 5 June 1992; in force 29 December 1993), Article 14; Cartagena Protocol on Biosafety to the Convention on Biological Diversity (Montreal, 29 January 2000; in force 11 September 2003), Article 23; United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (Paris, 14 October 1994; in force 26 December 1996), Article 10; Stockholm Convention on Persistent Organic Pollutants (Stockholm, 22 May 2001; in force 17 May 2004), Article 10; and the United Nations Framework Convention on Climate Change (New York, 9 May 1992; in force 21 March 1994), Article 4.

<sup>95</sup> UNECE Convention, n. 53 above, Article 16. On this provision, see J. Ebbesson, n. 91 above.

<sup>96</sup> Reference can be made, e.g., to *Pulp Mills*, n. 5 above.

<sup>97</sup> The Expert Group already published a Compilation of Metadata for the Proposed Global Indicators for the Review of the 2030 Agenda for Sustainable Development, also for SDG6; see <<http://unstats.un.org/sdgs/files/metadata-compilation/Metadata-Goal-6.pdf>>.