EQUITABLE UTILIZATION Vs. OUT OF BASIN WATER TRANSFER OF INTERNATIONAL WATERCOURSES: THE CASE OF NILE

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I the undersigned, declared that the thesis is my original work and has not been presented for a degree in any other university and that all sources of material in the thesis have been duly acknowledged.

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Introduction

1. Background of the study

The Nile basin is shared by ten states; however, all these states did not utilize the waters of the basin equitably. The utilization of the waters of the Nile basin is a subject of discussion since long time. Many writers wrote on it advancing the interest of either the lower or upper riparian states, even though the balance tilted in favour of the lower riparian states. Regarding the utilization of the waters of the Nile basin, it is the lower riparian states that established extensive use on the waters of the basin. And the upper riparian states did not utilize the waters of the basin as it should have been. Such non-utilization by the upper riparian states is attributable to many factors, starting from the lack of resource to harness the waters of the basin to the objection of Egypt to the utilization of the waters of the basin by such states. Egypt used to object the utilization of the waters of the basin by the upper riparian states on various grounds. Some times on the ground that the colonial treaties forbids them from doing so and other times by mere threat to use force to safeguard the continued flow of the waters of the Nile to Egypt. Even the lack of available resources for projects for harnessing the waters of Nile in the upper riparian states is partly attributable to the acts of Egypt. Egypt has many personnel in key international financial organizations that could make available the required funds for the upper riparian projects. And such personnel are used to play their role in blocking the funds to such states with a view to make their plans unsuccessful.

Due to these and other factors, Egypt used to benefit from the waters of the Nile alone to the exclusion of almost all the riparian states except Sudan. As such the whole waters of Nile were used by the two lower riparian states which contribute the list, if not nil, to the basin's water. Among the ten riparian states of the Nile, Egypt utilized more water than all the other riparian states combined.[1] And to continue her unilateral utilization, Egypt is undertaking an out of basin water transfer. Such projects have the effect of extending the basin area to areas outside its natural course. In addition to this, the projects will increase the water requirement of Egypt over and above her existing utilization. And such projects pose a great threat to the upper Nile basin

[1] Yacob Arsano cited by Tesfaye Tafesse, The Nile Question: Hydropolitics, Legal Wrangling, Modus Vivendi and Perspectives(2001), p.33

states that did not utilize their equitable share. But such states are determined to engage in activities to realize their equitable and reasonable share in the utilization of the water of the basin. And this will raise the issue of how such projects can be entertained in the present supply of the Nile waters in the face of increasing demand by the upper riparian states to utilize the waters of the basin. Therefore, this paper will focus on the examination of the projects of Egypt in light of equitable utilization of the waters of an international basin. In addition to this, the impact of the projects on future uses of the upper riparian states and the basin itself will be discussed with a view to come up with possible solution for an equitable and reasonable utilization of the waters of the basin for the benefit of all the basin states.

2. Statement of the problem

Now days Egypt is undertaking an ambitious and controversial out–of-basin desert reclamation programs.[2] And these programs require more water than the existing utilization of Egypt. And the programs are out of the basin area. This kind of diversion, without the consent of the other riparian states, is unusual in international watercourses. Regarding these programs, Tesfaye observed that:

> *The Egyptian out –of –basin transfer of the Nile waters through the Toshika and el-salaam projects represent the few cases in the world where water is being diverted from an international river basin by one riparian state to areas outside the basin with out the consent of the coriparian states that share the resources of the basin.*[3]

In addition to this the fact that the programs assumed the existing water utilization by the basin states and they require more water than the existing supply complicates the matter. Because at present, the upper riparian states are not utilizing their equitable share. But such trend will not continue in the future too. And the upper riparian states are undertaking their own programs to utilize the waters of the basin. This in effect, will reduce the water that used to reach Egypt. And

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[2] Tesfaye cited above at note 1, p.51
[3] Id, p.55

such circumstances will make the success of Egypt's program questionable. Because these projects assumed more water or at least constant water supply and the truth is much less water supply than the existing supply.

Therefore, having the above facts in mind, the research is aimed at answering the following and other related research questions:

- Can an out- of- basin transfer of water by a given basin state be undertaken with out the consent of other co-basin states?
- Is out –of- basin water transfer in consonant with the principle of equitable utilization?
- What should be done before an-out-of-basin water transfer is undertaken?
- Are the programs of Egypt compatible with other programs being undertaken by other riparian states?
- What is the implication of Egypt's action?

3. Objective of the Study

In the Nile basin, there is no equitable utilization among the whole basin states. It is in the lower riparian state that an extensive use of the water is established. The upper riparian states are not utilizing the waters of the basin as it should be. And the lower riparian states particularly Egypt is expanding her use. Of course, in most cases, it is common that early and extensive use of the waters of an international water course is found in the lower riparian states. As such in the Nile basin too the lower riparian states have established an extensive use in the Nile basin before the upper riparian states start to utilize it. This happens in most cases where lower riparian states do not have sufficient rainfall that can sustain agriculture. And it is also true in the case of Nile, where there is sufficient rain fall in the upper riparian states where as the lower riparian states have little or no rain that can sustain agriculture. But these days even though there is still rain fall in the upper riparian states, its non-reliability increases the importance of utilizing the waters of Nile.

However, the problem is not regarding who start utilizing the waters of the basin first. But it is the claim that follows the utilization that poses a problem in the Nile basin. The lower riparian states especially Egypt used to claim that the waters of the basin that were used by it be regarded

as its legitimate right and must continue undiminished forever. And this assertion has its own negative impact. Because whenever it utilizes a certain amount of water it argues that it has a right to such amount of water for the future. And the present programs of Egypt should be evaluated from this angle in addition to their appropriateness under the principle of equitable utilization. The other riparian states should see the act of Egypt from this angle. Most importantly Ethiopia is in a desperate need of the waters of the basin to alleviate poverty and secure food self-sufficiency in the basin area. As such a close look at the impacts of the projects of Egypt on her plan is very important.

Therefore the main objective of this thesis is to examine the appropriateness of the project from the perspective of equitable utilization and thereby discuss the impacts of the projects on the equitable utilization of the waters of the Nile basin by the upper riparian states. And after discussing these, appropriate mechanism to handle water utilization of the basin to exact the utmost benefit from the waters of the basin will be proposed.

In general the main objectives of the thesis include but not limited to the following:

- It will examine the appropriateness of the projects of Egypt in light of equitable utilization
- It will examine the impacts of such projects on the utilization of the upper riparian states.
- It will propose a viable solution in consonance with equitable utilization that can solve the problem in the basin.

4. Significance of the Study

As discussed above the main focus of the study is examining the appropriateness of the programs of Egypt under equitable utilization and the impact of the projects on the utilization of the waters by the upper riparian states. And since the projects can have a negative impact on the utilization of the upper riparian states the study could serve as an alarm for the upper riparian states. Ethiopia is the major upper riparian state that desperately needs the waters of the basin to alleviate poverty and secure food self-sufficiency. As such this study could serve as a starting point to evaluate the possible impacts of the projects of Egypt and thereby devise mechanisms to negate the impacts. Therefore this study will be helpful in pin pointing the nature of the projects from international law perspectives and indicate the possible impacts they might entail on the

present and future utilization of Ethiopia. And based on the findings Ethiopians can devise their own mechanisms to mitigate such impacts with a view to freely exercise their right to use the waters of the Nile basin in an equitable and reasonable manner.

5. Limitation of the Study

This study mainly focuses on the programs of Egypt, their relation with equitable utilization and their impact on the programs of other riparian states. As such the research heavily depends on the availability of information regarding the various projects contemplated and being undertaken by the riparian states. But accessing these informations is very difficult for the researcher due to various constraints. More importantly the fact that almost all the programs are unilateral, some of the countries involved kept them confidential. Therefore, it is difficult to get exact information on the issue. Due to this the researcher is forced to proceed with the research by assuming facts and discussing the legal effect of the assumptions. Ofcourse, proceeding with the assumptions does not have a significant difference from dealing with the actual facts. Especially since the research focuses on the legal effect rather than hydrological effects, the non inclusion of the specific figures and projects will not have much impact on the outcome of the research. Despite such limitations, however the researcher has tried to incorporate some specific scenarios based on the available data. But still some of the data are past records that do not reflect the exact situation at present. But in general, with all the limitations, the researcher believes, the research has captured the situation and the impact it will entail on the overall water utilization of the Nile Basin.

6. Research Design and Methodology

As discussed above the purpose of this study mainly focus on the examination of the appropriateness of the programs of Egypt under equitable utilization and their impact on the utilization of the waters of the basin by the upper riparian states. As such the nature of the projects as well as their place in equitable utilization will be discussed. And the nature of the projects of Egypt and that of the other riparian states will be examined with a view to see the compatibility of the projects and the impact they entail to each other. To do that the researcher employ internet and other sources to gather the relevant information on the matter

7. Chapter outline

In this introductory part, the background of the study, the objective, the research problem, the significance of the study and the limitation of the study are included. In Chapter One the theoretical basis of the right of riparian states is discussed with a view to highlight the development of international watercourse law.

In chapter two the legal regime relevant to the Nile Basin is discussed. The various treaties that were concluded by riparian states of the basin are discussed with a view to show the manner of utilization within the basin. In addition to that the trend of utilization of the waters of the basin among the basin states is discussed by focusing on the various claims of the riparian states.
In chapter three the principle of equitable utilization is treated. In this part the place of equitable utilization under customary international law and the 1997 UN Convention of the Law of the Non-Navigational Uses of International Watercourses is discussed.

Chapter four focuses on the programs of Egypt and their relation with equitable utilization. As such the impact and compatibility of the programs of Egypt with the programs of other riparian and water utilization of the basin as a whole are discussed. The things that should be performed before undertaking such projects are also the focus of this chapter with a view to come up with a solution for water utilization of the basin.

CHAPTER ONE
THEORETICAL BACKGROUND

1.1 Theories Regarding the Right of Riparian States over the Waters of an International River

In this part the various theories advanced regarding the right of riparian state to a given international basin will be discussed with a view to show the development of international law on the matter and the persuasiveness of each theory in relation to the other.

1.1.1 The Theory of Absolute Territorial Sovereignty

According to this theory a riparian state is entitled to use the water of a drainage basin which is within its territory in whatever manner it likes with out taking in to account the rights of other riparian states. Accordingly it may freely dispose of waters flowing on its territory but can not claim the continued free and uninterrupted flow of the water from upper-basin states.[1] This theory is chiefly associated with the Harmon Doctrine. This doctrine derives its name from the then American Attorney General Judson Harmon during a dispute between the US and Mexico over the Rio Grande River. The controversy stemmed from diversions of Rio Grande water in the late nineteenth century by farmers and ranchers in Colorado and New Mexico.[2] According to Mexico, these diversions sharply reduced the supply of water to Mexican communities and protested the diversions in October 1895, declaring that the legal claim of those living on its side of the Rio Grande 'to the use of the water of that river is incontestable being prior to that of the inhabitants of Colorado by hundreds of years'.[3] The Secretary of State referred the Mexican Protest to the US Attorney General for an opinion as to, inter alia, whether the diversions in the United States violated Mexico's rights under principles of international law.[4] The Attorney General,Judson Harmon, replied in an opinion of 12 December 1895, and in the portion of the opinion that has become known as the Harmon Doctrine ; the Attorney General denied that the

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[1] B.A Godan, African Shared Water Resources, Legal and Institutional Aspects of the Nile Niger and Senegal River Systems, (1985), P.32
[2] Stephen McCaffrey, The Law of International Water Courese, Non-Navigational Uses, (2001), p.114
[3] Ibid
[4] Ibid

general rules of international law imposed any obligation on the United States territory, even if that use would cause adverse effects in Mexico.[5] Specifically Harmon stated, in part:

> *The fundamental principle of international law is the absolute sovereignty of every nation as against all others, within its own territory....*
>
> *All exceptions to the full and complete power of a nation within its own territories must be traced up to the consent of the nation itself...*
>
> *The immediate as well as the possible consequence of the right asserted by Mexico show that its recognition is entirely inconsistent with the sovereignty of the United States over its national domain...*
>
> *The case presented is a novel one. Whether the circumstances make it possible or proper to take any action from consideration of comity is a question which does not pertain to the Department[of Justice]; but the question should be decided as one of policy only, because in my opinion, the rules principles, and precedents of international law imposes no liability or obligation upon the United States.*[6]

In fact the dispute between the US and Mexico was settled by the 1906 agreement.[7] But we have to note that in this agreement the US did not denounce the Harmon Doctrin as some authorities claim to be, rather it incorporated the doctrine under article 4 and 5.[8]These provisions made it clear that the reservation of certain quantities of water for Mexico was not to be interpreted as a recognition by the United States of a right or valid claim of Mexico and therefore could not henceforth be invoked as a precedent.[9]

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[5] Ibid
[6] 21 Op.Atty.Gen., pp.281-3(1898) Cited by McCafrey, ibid
[7] Ibid
[8] Godana cited above at note 4, p.33
[9] Ibid

In the Nile Basin Ethiopia used to advance the absolute territorial sovereignty theory in relation to the waters of Nile. In an Aide Memoir of 23 September 1957 addressed to diplomatic missions in Cairo, the Government of Ethiopia, after noting that 84 percent of the Nile Waters originate on her territory, declared that:

> *Ethiopia has the right and obligation to exploit the water resources of the empire for the benefit of present and future generation of its citizens...[and]..must, therefore, reassert and reserve now and for the future the right to take all such measures in respect of its water resources and, in particular as regards that portion of the same which is of the greatest importance to its welfare, namely, those waters providing so nearly the entirety of the volume of the Nile, whatever may be the measure of utilization of such waters sought by recipient states situated along the course of that river.*[10]

In general this theory assimilates the waters of an international river flowing through the territory of a state with the properties limited within that state and the proponents of this theory argue that another state acquire rights thereon only with the agreement of the state within which the water flows.[11] Meaning if we adhere to this theory lower riparian state will not have a claim against an upper riparian to let the water flow down stream unless there is an agreement to that effect. The availability of water down stream is at the mercy of the upper riparian states that receive the waters before the lower riparian concerned. And a state is not required to let the water down stream nor have a right to require the upper riparian to let the water as of a right.

[10] Id, pp.35-36
[11] Id, p.32

1.1.2 The Theory of Absolute Territorial Integrity

This theory forbids upper riparian states from interfering with the normal and natural flow of the water of an international river. This theory is the direct opposite of the theory of absolute territorial sovereignty. It espouses the old common law doctrine of water rights whereby a lower riparian (basin state) claims the right to the continued, uninterrupted (or natural) flow of the water from the territory of the upper riparian (basin state).[12] This theory denies the right of upper riparian states in the guise of keeping the normal flow unhampered. The leading proponent of the theory Max Huber wrote:

> *Every state must allow rivers over which it does not exercise unrestricted territorial sovereignty .....to follow their natural course. It may not divert the water to the detriment of one or more of the other states with right to the river, interrupt, artificially increase or diminish its flow.*[13]

This theory favors the lower riparian states. However it seems paradoxical to accept the theory as it leads to an absurd conclusion. Because if we uphold that lower riparian have a right over the waters flowing through the upper riparian states how can we deny such upper riparian the same right as the lower riparian. And the other point that should be borne in mind is that this theory advances the right of the lower riparian states on the waters that are found within the territory of the upper riparian states. But such assertion can not be sustained under international law. Because it will be against the principle of sovereignty to confer a right to a state on a property found within another state's territory by forbidding the latter state from using the property. And it is also impractical because it is difficult to force a state to preserve the water resources found within its territory for the benefit of the down stream states with out deriving any benefit for itself. When we come to the Nile Basin, Egypt used to advocate this theory. And the belief is reflected in positions taken by Egypt in international fora as recently as 1981.[14] In that it stated that:

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[12] Id, p.38

[13] P.K Menon, Water Resource Development of International River with special reference to the Developing World ,International Lawyers, V.9,(1995)p.445

[14] Godana, cited above at note 4, p.39

Each riparian country has the full right to maintain the status quo of the rivers flowing on its territory; it results from this principle that no country has the right to undertake any positive or negative measure that could have an impact on the river's flow in other countries.[15]

Of course, as the lower most riparian to the Nile Basin one should expect such positions. But the paradox is that it is difficult to sense the validity of the argument that denies the peoples near the source the same right as those people found at the outlet of the river.

1.1.3 The Theory of Community of Interest in the Waters

This theory advocates that the waters of an international river is the common property of all the basin states. It envisages a collective right of action by the basin states concerned. This theory is against any unilateral action by a riparian state concerning the utilization of the waters of an interanational river with out the involvement of the other co-basin states.

According to its chief exponent, Henery Farnham,

A river which flows through the territory of several states is their common property and neither state can do any act which will deprive the other of the benefits of those rights and advantages.[16]

The theory stems from the practical consideration that the geography of a river has little if any relationship to the political frontiers which divide it.[17] This theory is very attractive as it bases itself on the nature of international watercourses themselves rather than the states that have

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[15] Country Report, Egypt, Paper Presented at the International Meeting of International River Organizations held at Dakar, 5-14 May 1981, para.3, cited by Godana, ibid

[16] Menon Cited above at note 16, p. 446

[17] Godana cited above at note 4, p.48

control over the territories in which the watercourses pass. It assumes the unity of the watercourse irrespective of the fact that parts of the watercourse are located in the territories of different states. However, this theory cannot hold water without a close cooperation among the basin states involved. And this seems very difficult, if not impossible, in the face of the prevailing realities. States riparian to a given international watercourse usually opt a competitive approach rather than a cooperative approach. Therefore, the practical importance of the theory is very questionable at least in the present circumstances. But there is no doubt that the international community will be driven to this principle as it is the most appropriate theory to deal with question of water utilization of international watercourses and can help watercourse states to come up with a viable option to conserve the water to satisfy the present and future needs of all the watercourse states.

1.1.4 The Theories of Limited Territorial Sovereignty and of Limited Territorial Integrity

The theories of limited territorial sovereignty and of limited territorial integrity are in practice complimentary and even identical and can be considered together.[18] These theories assert that every state is free to use the waters flowing on its territory, on condition that such utilization in no way prejudices the territory or interest of other states.[19] According to this theory the right of a riparian state to an international river is limited by the same right of other riparian.[20]

As opposed to the other theories discussed above the theory of limited territorial sovereignty received much support from the international community. And these days the law regarding the utilization of the waters of international rivers has developed so that all states riparian to a river have equal rights to make reasonable use of its waters.[21] And it is this theory that underlies the concept of equitable utilization which is now considered as the rule of international law regarding water utilization of international watercourses. It is not whether watercourse states

[18] Id, p.40

[19] Ibid

[20] Ibid

[21] Jerome Lipper, The Law of Internaltion Drainage Basins, (1957), P.25

have a right to utilize the waters of an international watercourse but the specific application of the concept that poses a problem. Now days it is easy to convince the international community that a state riparian to an international watercourse has a right to an equitable and reasonable share from the waters of the river. But when we come to the specific entitlement of each basin states to a given international river it is still a controversial issue under international watercourse law.

CHAPTER TWO

THE LEGAL REGIME RELEVANT TO THE NILE BASIN

2.1 INTRODUCTION

As an international river the legal regime of Nile is governed by international law. As such we have to look in to the sources of international law as enshrined under Article 38, paragraph 1 of the statute of the international court of Justice. Therefore, the issue of water utilization of the waters of an international watercourse among the basin states should be resolved on the basis of the sources of international law as indicated in the statute of the International Court of justice. As such the issue of water utilization of the Nile River will be seen in light of the above sources of international law. And we have to look in to international convention that regulates the utilization of the waters of the river among the co-basin states. If there is no such convention we have to resort to international custom binding among the basin states regarding water utilization and if we still do not get a solution we shall resort to the other sources.

2.2 The Legal Regime on the Basis of International Treaties

In this part the manner of utilization of the waters of Nile on the basis of international treaties will be examined. As such the various treaties concluded regarding the utilization of the Nile basin will be discussed. As stated under Article 38 paragraph 1(a) of the statute of the international court of Justice international convention can be either a particular or general. Particular convention is the one which regulates the relations of the concerned states where as general convention relates to those instruments that encompasses many states. Therefore, we have to resort first to a particular convention that is applicable to the Nile basin states before resorting to a general convention applicable to many states even out side the Nile basin on a global basis.

Treaties are by far the most convenient ways of resolving water utilization issues. This is because treaties constitute the most important sources of international law as they require the expressed consent of the contracting parties[1] and they are evidences of law accepted by states parties to

[1] Malcolm N. Shaw, International Law, 4th ed, p.674

them.[2] In the case of dispute, treaties and conventions are the primary evidence of international law, and they are given precedence when in conflict with a provision of customary law.[3] Of course treaties cannot override customary international law rule that attains the status of jus cogens. This is a clear extension of the sovereignty of states. Treaties are deliberately made engagements of states. Unlike customary international rule that can bind a silent state, treaty requires the expressed consent of a state to bind it. As such states need to express their consent to be bound by a certain treaty or convention by ratification, accession or acceptance.

When we come to the Nile basin, there is no treaty that comprises all the basin states or at least the majority of the basin states. When we look in to the treaties concluded regarding the utilization of Nile, all most all the treaties are bilateral and concluded during the colonial era by the then colonial powers on behalf of the dependent territories. And this trend in the Nile basin has precluded an efficient utilization of the waters of the basin among the riparian states. This is a natural extension of the fact that Nile is shared by ten riparian states. And bilateral treaties in basins more than two states can preclude a comprehensive basin wide agreement for the utilization and management of the basin at issue. As stated by one writer that:

> *One who ignores the watershed as the fundamental planning unit, where surface and ground water, quality & quantity are all interrelated, also ignores hydrological reality.*[4]

This indicates that, for a viable solution regarding water utilization among the basin states, all the states involved or traversed by the watercourse should participate and a treaty that binds all at the same time is mandatory. Otherwise even a single state not a party to an agreement made by the rest of the basin state can disturb the balance and make the agreement useless.

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[2] George Schwarzenegger, The Inductive Approach to International Law, Harvard Law Review, V.6, (1946-1947),P.555

[3] Esther Schroeder-Wildberg, The 1997 International Watercourse Convention-Background and Negotiations, p.11 Available at www.hydroaid.it

[4] Jesse H. Hamner and Aaron T. Wolf Patterns in International Water Resource Treaties: The Transboundary Fresh Water Dispute Database Available at http://www.transboundarywaters.orst.edu

As such it is difficult to put the regulation of the utilization of the waters of Nile on the basis of past treaties. However, for a better understanding of the situation in the basin, the major treaties concluded on the Nile are briefly presented below.

2.2.1 The Various Treaties

As has been discussed above there is no single treaty in force among all the basin states concerned. However there are various treaties concluded by different states with respect to the river. Since the 19th century many treaties have been concluded among the basin states. And almost all of the treaties were signed between two or three states. Therefore, in this section those treaties with respect to the waters of the Nile will be briefly discussed.

2.2.1.1 The 1891 protocol between the United Kingdom and Italy

On April 15, 1891, the united Kingdom and Italy signed a protocol for the demarcation of their respective spheres of influence in Eastern Africa.[5] And the issue of the Nile waters was addressed under Article III of the protocol. The Article provided as follows:

> *The Government of Italy undertakes not to construct on the Atbara any irrigation or other works which might sensibly modify its flow in to the Nile.*[6]

2.2.1.2 The 1902 Treaty between the United Kingdom and Ethiopia

The agreement was signed on 15 July 1902 between Ethiopia and the United Kingdom to regulate the frontier between the Sudan and Ethiopia. The issue of the waters of Nile in general and the tributaries found within Ethiopia in particular was addressed under Article 3. The provision of Article 3 provided that:

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[5] Arthur Okoth - Oweiro, The Nile Treaty, State Succession and International Treaty commitments: A case Study of the Nile Water Treaties (2004), Page 6 Available at http://www.kas.de

[6] Ibid

The Emperor Menelik engaged not to construct or allow to be constructed any work across the Blue Nile, Lake Tsana, or the Sobat which would arrest the flow of their waters in to the Nile, except in agreement with the Government of Great Britain and the Government of the Sudan.[7]

2.2.1.3 The 1906 Tripartite Treaty between Britain, Italy and France

On 13 April 1906, the United Kingdom, France and Italy signed a tripartite agreement and set of declarations in London.[8] And the treaty provided under Article 4 that:

In the event of the status quo in Ethiopia being disturbed, France, great Britain and Italy shall make every effort to preserve the integrity of Ethiopia

And should this status not maintained and should one or more of the powers, especially France and Italy carve up portions of the country, particularly the source areas of the Nile waters, the article added at the instance of Britain:

In any case, they shall concert together on the basis of the Agreement enumerated herein in order to safeguard the interest of Great Britain in the Nile basin, more especially as regards the regulation of the waters of the river and its tributaries (due consideration being paid to local interests)[9]

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[7] Wondemneh Tilahun, Egypt's Imperial Aspiration Over Lake Tana and the Blue Nile, (1979), Appendix A.

[8] B.A Godan, African Shared Water Resources, Legal and Institutional Aspects of the Nile Niger and Senegal River Systems, (1985), P.104

2.2.1.4 The 1906 Treaty between the United Kingdom and Congo

On 9 May, 1906 the United Kingdom and the independent state of the Congo concluded a Treaty to Re-define their respective sphere of influence in Eastern and central Africa.[10] And Article III of the Treaty provided:

> *The Government of the Independent State of Congo undertakes not to construct or allow to be constructed any work over or near the Semliki or Isango Rivers, which would diminish the volume of water entering Lake Albert, except in agreement with the Sudanese Government.*

This agreement has given Great Britain the opportunity to secure protection of the interest of the Sudan over waters flowing from the Albert Nile.[11]

2.2.1.5 The 1925 Anglo - Italian Exchange of Notes

In December 1925, there was an exchange of notes between Italy and the United Kingdom by which Italy recognized the prior hydraulic rights of Egypt and the Sudan in the head waters of the Blue Nile and white Nile rivers and their tributaries and engaged not to construct on the head waters any work which might sensibly modify their flow in to the main river.[12]

This exchange was a follow-up of the 1906 Tripartite London Agreement.[13] In this exchange Britain pressed Italy to support it in its efforts to receive concessions from Ethiopia for the construction of a dam at Lake Tana to store water for use down the Blue Nile in times of scarcity, and Italy sought British support for securing control of, and economic influence, over Ethiopia, including the construction of a railway across the Ethiopian heartland to link her colonial designs of Eritrea and Somaliland.[14]

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[9] Id, pp.104-105
[10] Owiro, cited above at note 5, p.7
[11] Godana, p. 105
[12] Owiro, cited above at note 5, p.7
[13] Godana, cited above at note 8, p.105
[14] Ibid

2.2.1.6 The 1929 Nile Water Agreement

The 1929 Nile waters agreement was a result of the exchange of note between Egypt and the British, acting on behalf of the Sudan that took place on 7 May 1929.[15]

By virtue of this agreement, Egypt recognized Sudan's right to water, which is adequate enough for its own development, so long as Egypt's natural and historic rights were protected.[16] Pursuant to this agreement Egypt and the Sudan divided the waters of Nile between themselves. An interesting point from this agreement is the recognition of Egypt regarding the future demand of the sudan. As can be seen from the provision of the agreement Egypt was aware of the increasing demand of the Sudan to utilize the waters of the river in the future. And this can be a good proof for the awareness of Egypt regarding the potential needs of the other riparians that can be brought in to the picture any time in the future. But this awareness couldn't be reflected in the conduct of Egypt. It used to insist in the preservation of the status quo in the other riparian states while it extends the utilization of the waters of the river within her territory.

2.2.1.7 The Anglo-Belgian Agreement of 1934

The agreement was signed between Britain and Belgium on 22 November 1934 in London.[17] While this instrument was focused on the Kagera River system and therefore on the head waters of the Nile, it was not, for the first time in the history of the legal regulation of the Nile Valley, predicated on the mutual water rights and obligations of Egypt and the upper riparian, but regarded solely the water rights of Tanganyika and Rwanda-Burundi.[18]And Article I of the Agreement Provided that:

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[15] Girma Amare, The Imperative Need for Negotiations on the Utilization of the Nile Waters to Avert Potential Crisis, V[th] Alile 2002 conference, February 24-28 (1997) Addis Ababa Ethiopia, p. 288

[16] Ibid

[17] Godana, cited above at note 8, p.118

[18] Ibid

Water diverted from a part of a watercourse situated wholly within either territory shall be returned without substantial reduction to its natural bed at some point before such watercourse flows in to the other territory or at some point before such watercourse forms the common boundary.

2.2.1.8 The 1959 Nile Waters Agreement

The agreement was made between Egypt and the Sudan to the exclusion of other Nile riparian states.[19] In addition to the apportionment of the waters this agreement incorporates an agreement by Egypt and Sudan to the construction by the United Arab Republic of the Sud-el-Aali Reservoir at Aswan as the first of a series of over-year storage schemes on the Nile.[20]

When we come to the main provisions of the agreement, article I provided that:

1. *The quantities of water actualy used by the United Arab Republic until the date of signing this Agreement constitutes their established right prior to the benefits accruing to them through the implementation of the control works reffered to in this agreement. This established right amounts to 48 Milliards of Cubic Meters per year as measured at Aswan*
2. *The quantities of water used at present by the Republic of the Sudan constitute their established right prior to the accruing to them through the implementation of the afformentioned control works. This established right amounts to 4 Milliards of Cubic Meters per year at Aswan*

It is significant that the parties thus felt called up on to incorporate in to the Agreement a specific formulation of established rights in terms of the amounts of water already appropriated. [21]

Like the 1929 Nile agreement, this too divided the Nile waters between the two states despite the fact that the river is shared by ten states.

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[19] Girma, cited above at note 14, p.288
[20] Godana, cited above at note 8, p.186

2.2.1.9 The 1993 Agreement for General Cooperation Between Ethiopia and Egypt[22]

After a long period of exclusion from any agreement regarding the waters of the Nile, Ethiopia became a party to an agreement on the issue in 1993. This agreement is a great departure from the trends in the Nile Which was dominated by the exclusion of upper riparian states particularly, Ethiopia. It is said that the 1993 Agreement was the effort made by authorities of Ethiopia to make the relation ship smooth with neighbouring states. The fact that the two states, Ethiopia and Egypt which are the major supplier and the major user respectiveley, are engaged in negotiation and agreement is a great achievement by itself. However, the main focuss of the agreement was on possible future uses of the waters of the Nile. And it was also negotiated and signed as a framework agreement to establish a set of principles, norms and goals and formal mechanisms for cooperation on the issue. As such it does not impose a major binding bilateral obligation on the parties. But we should not ignore the importance of this agreement as it is the first of its kind to be negotiated and signed by the two countries. And as the only agreement that involves Ethiopia it seems important to say some on the content in the following sentences.

To start with the preamble of the agreement states that cooperation between the two riparian contracting states is necessary to achieve a common economic interest. And when we come to the substantive part of the agreement, most of the provisions refer to international law. Under Article 4 of the agreement for instance, it is stated that the two parties agreed that the issue of the use of the Nile waters shall be worked out in detail through discussion and by experts from both sides, on the basis of rules and principles of international law. And under Article 5 of the agreement it is stated that each party shall refrain from engaging in any activity related to the Nile waters that may cause appreciable harm to the interest of the other party.

In general the agreement only refers to international law and does not try to establish a regime by itself. Therefore, it does not have any legal impact that is not already there under customary international law.

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[21] Ibid

2.2.2 The Status of the Treaties

From the discussion made earlier regarding the various treaties concerning the waters of the Nile, it is clearly discernible that, we can treat the treaties in to two parts. In the first category those treaties that were concluded during the colonial era and the second category comprises those treaties that were concluded after independence. And regarding the former treaties the question of whether such treaties still survive after the independence of states for which the treaties were made or not will be addressed. And regarding the later category the nature and status of the treaties will be assessed.However for convenience the treaties will be examined one by one irrespective of their chronology and category.

2.2.2.1 The 1902 Agreement

As far as the 1902 agreement is concerned, no one can claim a right, which has to be respected by Ethiopia. This is because; the treaty was repudiated by Ethiopia upon restoration of Ethiopian Government after the Italian invasion on account of British recognition of the invasion.[23] This recognition of annexation is an act, which invalidated all previous agreements between the two governments,[24] that is Ethiopia and Great Britain since the recognition of the annexation amounts to denial of sovereignty of Ethiopia, the very sovereignty, respect for which alone, could be held to create legal British interests.[25]

As such as a treaty obligation it does not have any impact on the utilization of the waters of the Blue Nile. Besides this the language of the article to which the issue of Nile provided shows that the question of utilization of the river is not an issue. However, the obligation imposed on Ethiopia had the provision been valid, would only be refraining from constructing or allowing to be constructed a work that would stop the flow of the said rivers. Therefore, we can safely conclude that as far as the 1902 treaty is concerned there is no obligation on the part of Ethiopia that obligates her to respect the right of lower riparian states to the undiminished flow of the

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[22] Frame Work for General Co-operation between The Arab Republic of Egypt and Ethiopia. available at http://faolex.fao.org

[23] Godana, cited above at note 8, p.156

[24] C.O. Okidi, Legal and Policy Regime of Lake Victoria and Nile Basins, Indian journal of international Law, V.20 (1980), P.413

[25] Wondemenh, cited above at note 7, p.56

waters of the rivers that are found within her territory. And this in turn will take us to the conclusion that the 1902 agreement did not have much relevance to the legal regime in the Nile. Besides this the fact that the treaty was between only two of the basin states, it will not take us any farther near to the solution as it did not have legal effect on the rest of the Nile basin states.

2.2.2.2 The 1959 Agreement

The 1959 agreement too was concluded by the two lower riparian states the Sudan and Egypt. These two states made an agreement that divided the waters of the Nile between themselves to the exclusion of the other riparian states. And the other riparian states do not have any right nor any obligation that arise from this treaty. And the only conclusion that can be drawn from the 1959 treaty is that it regulates the share of the two lower riparian states that reaches them after the upper riparian states take theirs. And the share of the upper riparian states and the lower should be decided first. And the question then is, how is the share of each be determined. But there is no treaty that made such apportionmant among the lower and upper riparian states. In any case this agreement too did not establish a legal regime applicable to the utilization of the waters of the Nile basin binding on all the basin states.

2.2.2.3 The Colonial Era Treaties

The various treaties regarding the waters of Nile concluded during the colonial period cannot be considered binding on the present independent states. Because those treaties are not deemed to survive the independence of the territories to which they were concluded. The non surviving status of the treaties regarding the utilization of the Nile waters can be seen from the position of the states concerned towards the treaties. And most importantly the position of the United Kingdom, the prime actor, should be cited here to strengthen the above assertion. On May 18, 1956, in a statement attributed to the joint undersecretary for foreign Affairs, it was stated that the British government regarded the 1929 agreement and other treaties creating a regime over the Nile waters subject to revision, and that it was intended to negotiate new terms on behalf of Kenya, Tanganyika and Uganda.[26] And after this the United Kingdom made a statement that would strengthen its position. The statement was made on August 27, 1959 and reads as follows:

...the territories of British East Africa will need for their development more water than they at present use and will wish their claims for more water to be recognized by other states concerned. Moreover, they will find it difficult to press ahead with their own development until they know what new works down stream states will require on the head waters within British East African Territory. For this reason the United Kingdom government would welcome an early settlement of the whole Nile waters question.[27]

And regarding the position of the then dependent territories after they got their independence their response was the same. They clearly denounced the validity of the various treaties concluded concerning the utilization of the waters of Nile.

In the matter of the 1929 Nile waters Agreement, the Government of Tanganyika, on July 4, 1962 addressed identical notes to the Governments of Britain, Egypt and the Sudan outlining the policy of Tanganyika on the use of the waters of the Nile in the following words:

The Government of Tanganyika, conscious of the vital importance of Lake Victoria and its catchment area to the future needs and interests of the people of Tanganyika, has given the most serious consideration to the situation that arises from the emergence of Tanganyika as an independent sovereign state in relation to the provisions of the Nile waters Agreements on the use of the waters of the Nile entered in to in 1929 by means of an exchange of Notes between the Governments of Egypt and the United Kingdom. As the result of such considerations, the Government of Tanganyika has

[26] Lester, Cited by Owiro cited above at note 5, p.13
[27] Owiro, cited above at note 5, p 13

come to the conclusion that the provisions of the 1929 Agreement purporting to apply to the countries under British Administration are not binding on Tanganyika. At the same time, however, and recognizing the importance of the waters of the Nile that have their source in Lake Victoria to the governments and people of all riparian states, the Government of Tanganyika is willing to enter in to discussion with other interested governments at the appropriate time, with a view to formulating and agreeing on measures for the regulation and division of the waters in a manner that is just and equitable to all riparian states and the greatest benefit to all their peoples'.[28]

2.2.2.3.1 Egypt's Position regarding the validity of the treaties

Egypt holds the view that all the Nile River agreements are by their nature perpetually binding on successor states.[29] In her estimation, these instruments are transmitted to the successor states and may be either amended or abrogated only by consent in accordance with the Vienna Convention on the law of treaties.[30]Egypt further asserts that treaties concluded by European powers acting on behalf of colonized African states continue to be in force by virtue of the law of state succession and because of the territorial nature of the obligations resulting from these treaties.[31]

The other claim of Egypt for the maintenance of the status quo in the Nile and there by derive the bulk of the benefit rests upon a claim of historic right. As such Egypt hold the view that she has "natural and historic" rights over Nile waters acquired by long usage and recognized by other

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[28]Seaton& Maliti, Cited by Oweiro, cited above at note 5, pp.14-15
[29] Oweiro, cited above at note 5, p.16
[30] Ibid
[31] Ibid

states like Great Britain and Sudan, and that the Nile water treaties have been declaratory of international customary law relating to fluvial law. [32]

Some writers also advanced the position of Egypt and regarded the treaties as surviving after independence of the territories. One of such writers is Godana that declared the 1929 agreement as binding on the Nile basin states as follows:

> *Of all the early instruments on the utilization of the Nile waters, only the 1929 agreement, as implemented by a number of subsequent agreements and measures seems to survive. The survival of this particular treaty is unmistakably attested to by available evidence.*[33]

But the available evidences as envisaged by Godana can not establish the binding force of the 1929 treaty on all the Nile basin states so that we can say that the treaty has established a legal regime for the utilization of the waters of the Nile binding on all the basin states. In addition to this the fact that Godana himself had a doubt as to the binding effect of the treaty, it is very difficult to accept his conclusion described above. And his doubt is expressed by himself in the following words:

> *It seems doubtful that the 1929 agreement was seriously regarded or even intended as permanent in the sense that it would bind all successor states in perpetuity.*[34]

Therefore, in the face of such doubt it is paradoxical why he has favoured the binding nature of the 1929 agreement on the Nile basin state. In any case there is also a point to be noted which could strengthen Godana's doubt. It is the fact that the British government concluded the 1929 agreement due to a policy matter as can be seen from the treaty itself. And as stated in the

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[32] Ibid
[33] Godana, cited above at note 8, p.156
[34] Id, p.143

agreement the recognition of Egypt's natural and historic right by Great Britain emanates from a policy matter that aimed at safeguarding the interest of Egypt. And this fact is a sufficient proof that the provisions of the agreement are not intended to bind the Nile basin states, to which the agreement refers, in perpetuity. In addition to this a policy matter is a subject attached to the state itself and cannot pass to the then dependent territories. In any case as discussed starting from the beginning of this section it is difficult to conclude that the colonial era treaties are still binding on the Nile basin states that were dependent territories let alone to bind all the basin states.

The other ground for the non-binding status of the treaties emanates from the conduct of Egypt itself. If one looks in to the conduct of Egypt since the conclusion of the said treaties, it will not be difficult to conclude that Egypt is not in a position to demand others to honor the treaties.

Writing in 1959, Pompe submitted that the upper basin states, already before their independence,

> *Could certainly not be held to the obligations which they undertook towards Great Britain by the aforementioned agreements of which Great Britain as administering power undertook towards Egypt by the 1929 agreement with regard to the construction of works affecting the Nile flow, if Egypt, or for that matter the Sudan were to construct dams which would change the natural conditions of the Nile Basin to the serious disadvantage of the upstream states.*[35]

And as a matter of fact the building of the Owen Falls Dam (resulting in a rise of two and a half meters in the level of Lake Victoria), the Jonglei Canal project and particularly the diversion and piping of Nile waters to Sinai Desert would be conduct that should release the upper riparians from any obligation towards Egypt.[36]

[35]Pompe 1958:287, Godana 1985:146-47 cited by Oweiro cited above at note 5, p19
[36] Oweiro cited above at note 5, pp.19-20

The other point which deserves mentioning to strengthen the lack of treaty regime in the Nile basin that survives the colonial era is the position of Ethiopia at the time and the impact that entails. Ethiopia is an independent state and the colonial treaties do not have any binding effect on her. And as we have discussed earlier, there is no a single treaty that could validly bind Ethiopia regarding the utilization of the waters of Nile. And the fact that Ethiopia is free from any treaty obligation towards the lower riparian states will change the picture. This is because as far as treaty obligation is concerned Ethiopia is free to dispose the waters of Nile within its territory that makes the greater proportion of the Nile water. And such disposition, if any, will disturb the balance. Therefore, making the other upper riparian states, if any, bound by the colonial treaties cannot establish a legal regime in the Nile basin governed by those treaties to the effect that all the basin states are bound by them.

2.3 The Legal Regime on the Basis of Customary International Law

As provided in the statute of the international court of justice presented above the other area, where we look for international legal rules is international custom or customary international law.

In the case of rules of customary international law the collective body of subjects of international law, whose practice accepted by them as law is prerequisite for the creation of any particular rule. International Custom is therefore, a procedure for the creation of general international law.[37] As such for a certain custom to develop among certain states the practice of the states regarding the subject should fulfill the two criterions for the formation of customary international law. These are practice by the states and opinio juris. As such the state concerned should manifest acceptance by a positive or negative act with the belief that doing so is required by law. Therefore, in our case for a custom regarding the utilization of the waters of Nile to develop among the basin states, the states should engage in a certain act with the conscious believe that doing so is required by law or they are entitled to do so under international law. And the states concerned should manifest their position regarding water utilization by themselves as well as the other co-basin states. This in effect will require the examination of the claims of each basin states

[37]Joseph Kunz, The Nature of Customary International law, American Journal of International law, V.47,(1953).p.665

and the response of the other basin states to such claim. Ofcourse for a custom to develop the requirements is a concurrence by the majority of states. International law only demands a general practice, not a unanimous one.[38] But this does not mean that a state which objects to the practice will be bound by the practice accepted by the majority. An objecting state will not be considered a party to such rule and will not be considered bound by the rule. However, the objection of the state should be clear so that its position regarding the practice accepted by the rest can be known. Like treaty law, we can also divide customary international law in to general customary international law having a wide application and regional or particular customary international law having an application limited to a given region or particular states. Regarding the utilization of the waters of international rivers, general customary international law applies to many international basins where as particular customary international law shall apply to a given basin or a certain states to an international basin. And a particular customary international law is not applicable outside the region or places where it has developed. As stated by Guggenheim that:

> *Customary international law can also form a particular law covering only one part of the international community. In this case it is not binding for states out side the spare of validity.*[39]

And Berber goes even further and strengthens the above assertion by saying that:

> *Customary law has thus, just as treaty law, normally only particular, and not a universal validity for a regional sphere of law with out exact proof in the case of every state concerned. It is however, quite impermissible to regard a custom within one legal region as binding for the members of another legal region.*[40]

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[38] Id, p.666
[39] Guggenheim, cited by F.J. Berber, Rivers in International law, (1959),p.153
[40] Berber, cited above at note 32, p.50

And when we see the diversity among the various international basins the validity of Berbers assertion will be very visible. Because each international basin has its own peculiarity that requires special treatment and can only be addressed by the stake holders only. The issue of each international basin should be addressed by the basin states concerned. A mechanism acceptable to a given international basin may not be workable elsewhere. This fact springs from the nature of the issue of water utilization of an international basin itself. There are various geographical factors that determine the quality and quantity of water available in a given international basin. And the states involved in the basin and the relation of each basin state to one another affects the pattern of utilization. As such it would be better if we could find a particular custom that developed among the concerned states. Otherwise it is very difficult to resort to a general customary international law applicable to all international basins. Therefore, it is appropriate to resort first to a particular customary international law applicable to a given international basin, in our case Nile.

Regarding customary international law applicable to the Nile water the available evidences are very scanty and uncertain. However we have to look at the position of the riparian states to ascertain the existence of a customary law among the basin states. Because it is the conduct of the basin states that can show the existence of a certain customary norm that developed among them. In the preceeding discussion it is said that there could be a customary international rule limitted to a certain region. And it is the customary rule limitted to such areas that can appropriately deal water utilization issue of an international water courses as they exhbit their own pecuilarities. And as has been held by the International Court of Justice in the right of passages case that there can be a bilateral (local) customary law.[41] And such special customary law can be developed among states sharing socio-economic or ideological interests, or ultimately, nothing but the interest in the customary rule.[42] This means a customary law can develop among some states that have a common interest on a given issue despite the fact that such states have different understanding and approach to other matters. Therefore, in our case there could be a customary law that develops among the basin states regarding only the utilization of the waters of the basin.

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[41] ICJ Reports 1969, 39, cited by Mark Villiger, Customary International Law and Treaties, (1985), p.33
[42] Ibid

When we come to the issue of wether there is a customary law regarding the utilization of the waters of the Nile basin we have to see whether there is such rule among the watercorse states or not. But searching for a customary law among the basin states regarding the utilization of the waters of Nile could be a little bit difficult. Therefore, to make the matter more simple it is better to start from the holding of others and check whether such holding is warranted under international law or not. As such some argue that the status quo in the Nile is supported by customary international law that developed among the basin states. But such assertion ignores the prevailling fact in the Nile basin. The facts that can prove against this will be ellaborated latter. And here let us discuss the assertion regarding the existence of a customary law that favours the status quo. In this regard there are claim by some regarding the existence of customary law established by the 1929 Nile Waters Agreement. Because in this agreement there is an indication that the natural and historic right of Egypt to the waters of the Nile is recognized by Great Britain.

Here the question is that, does the recognition of Great Britain to a natural and historic right of Egypt to the waters of Nile amounts to recognition of a right under customary international law to be respected by the riparian states? To answer this let us see what is stated in the notes by the British High Commissioner, which forms the 1929 Agreement. In the note it is clearly provided that:

> *4.In conclusion, I would remained your Excellency that, His Majesty's Government in the United Kingdom have already ackonwledged the natural and historical rights of Egypt in the waters of Nile. I am to state that His Majesty's Government in the United kingdom regards the safeguarding of those rights as a fundamental priciple of Biritish policy, and to convey to your Excellency the most positive assurances that the principle and the detailed*

provisions of this agreement will be observed at all times and under any conditions that may arise. [43]

As can be seen from this note, the recognition of Egpt's natural and historic right is a policy matter but not form a consideration of international law. The British government did not consider the right as emanating form international law, but it considerd it as a policy matter. As such Egypt can not claim it as right recognized under international law. In this regard, Berber goes on to say:

.... the treaty regulation of this river did not come about as the explicit or implicit recognition of an obligation under customary international law, but was motivated form consideration of high policy.[44]

Therefore, since policy matters are different form recognitusin of right under international law we can say that the recognition that was comanded by such does not creat a right under customary international law. And the status quo established by the 1929, if at all there is any, can not be supported by any rule under customary international law.

The other point to be cited here is the position of the other ripaian states in the basin towards the claim of the lower riparian states, especially Egypt. And for this purpose examining the position of Ethiopia could be enough. In this regard Ethiopia has expressed its position time and again denying the claim of the lower riparian states to the claim of natural and historic right to the waters of the Nile basin. And to cite one it has aired its objection to the claims of the lower riparians by emphasing her contribution to the waters of the Nile. In an aid memoir of September 23, 1957, circulated to the diplamatic mission at Cairo, the Ethiopian government stated that:

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[43] A Note of the British High commissioner for Egypt to theEgyptain Prime Minister for Foreging Affairs,Cairo May 7, 1929, Repreduced in Gebretsadik Degefu, The Nile, Historical, Legal and Developmental Perspective, A warning for the Twenty-First Century,(2003) Appendix A, P.248

[44] Berber, Cited above at note 38, p.153

...The Imperial Ethiopian Government must, therefore, reassert and reserve now and for the future, the right to take all such measures in respect of its water resources and in particular, as regards that portion of the same which is of the greatest importance to its welfare, namely those waters providing so nearly the entirety of the volume of the Nile, whatever, may be the measure of such waters sought by recipient states situated along the course of that river.

...As in the case of all other natural resources on her territory the utilization by Ethiopia of her resources in water will be effected strictly in accordance with the present and projected needs of her expanding population and economy.

...Following satisfaction of her national requirement, Ethipia will count it a previllage to be able to contribute through her natural resources and measures for the conservation of the same, to the walfare of the in habitants of neighbouring sister nations on the banks of the Nile.[45]

This note is a very decisive proof that the natural and historic right of Egypt is not supported by customary international law. Because, for a customary law to develop among state, the claim of the right by one state should be acknowledge by the other expressely or at least by silence. But in our case the relevant state, Ethiopia, expressely showed her position denying the claim of the lower riparian states. And it is a sufficient proof for the non-existence of a customary law that recognizes the claim of the lower riparian states to a natural and historic right to the waters of Nile.

Nowadys, however, from this extreme position of considering the waters as an exclusive natural resources on her territory, Ethiopia is moving towards the principle of equitable utilization. And

[45] An Aide Memoir of September 23, 1957 Reproduced in Gebretzadik cited above at note 42, Appendix A, PP.256-257

she is trying to ascertain her right for an equitable utilization of the waters of the Nile river. And at the same time all the Nile basin states are trying to establish an equitable sharing arrangement to utilize the waters of the basin, even though there is still a controversy as to how this principle be applied in the basin.

As we have seen above the Nile water issue is dominated by Egypt's claim to a historic right and the denial of such claim by the upper riparian states. Almost all the upper riparian states were declaring their right to use the waters of the rivers found in their territory that contribute to the Nile irrespective of the impact such use might have down stream. And with such claim and counter claim we could not pick a customary rule applicable to the Nile Basin that binds all the basin states. But nowadays the law governing the utilization of the waters of international basins is much developed than it was before. The international community is moving towards the principle of equitable and reasonable utilization of the waters of international watercourses among the basin states. And the Nile basin is not an exception. The Nile basin states are now claiming their right for an equitable share from the waters of the basin.

And the problem in the Nile basin is the specific understanding of the principle of equitable utilization but not the principle itself. And each state favours its own interpretation. Therefore, despite the disagreement regarding the specific application of the principle of equitable utilization the Nile basin states are claiming that the issue of the Nile basin should be resolved on the basis of equitable and reasonable utilization. And this will take us to the examination of equitable utilization, which shall be discussed in the next chapter.

2.4 General principles of Law

As stated in the introduction part the other place where we look in to a solution regarding the utilization of the waters of international watercourses is general principles of law as enshrined in the statute of the International Court of Justice. As stated in the statute these general principles should secure the acceptance of the international community. And they are to be applied where

the International Court of Justice is faced with an issue that cannot be resolved by the application of international conventions or customary international law. And it is common to encounter such issues as the interaction of the international community is increasing. It is with this understanding that the general principles of law are included under article 38 Para. 1 of the statute of the International Court Justice. Berber pointed out this in the following words:

> *The commission of jurists of the League of Nations, which had to draft the statute of the permanent court of international justice, found that international law, if it remained restricted to treaties and customary law, would frequently leave the judge unable to give a decision in a matter brought before him. In order to bridge over as many gaps in the law as possible the commission introduced the general principles of law as a third source.*[46]

As such the general principles of law are to be applied where there is no conventional or customary international law with respect to the issue or the parties concerned. Having said this therefore, let us see what sort of general principles of law can be found concerning the utilization of the waters of international watercourses among the basin states.

With this regard let us start by what Griffin considered as agreed principles of law concerning water utilization of an international river as follows:

> *Except as otherwise provided by treaty or other instruments or customs binding up on the parties, each co riparian state is entitled to a reasonable and equitable share in the beneficial uses of the waters of the drainage basin.*[47]

Eagleton also forwarded what he considered as a general principle of law applicable to the utilization of the waters of an international river in the following paragraph:

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[46] Berber, cited above at note 38, p.50

[47] William L. Griffin, The Use of Waters of International Drainage Basins Under Customary International Law, American Journal of International Law, V. 53 (1959), *P.77*

> *It seems safe then, to state as a general principle of international law that, while each state has sovereign control within its own boundaries, in so far as international rivers are concerned, a state may not exercise that control without taking in to account the effects up on other riparian states.*[48]

Therefore, for the purpose of this work we may consider them as principles of international law on the matter. Ofcourse they are not as such different from what writers consider as customary international law.

2.5 Subsidiary Sources

In addition to the principal sources of international law we have also subsidiary sources as enshrined under Art.38 paragraph 1 of the statute of the International Court of Justice. These sources serve to illuminate some light on the other sources of international law. In this category we have the teachings of the lightly qualified publicists of the various nations and judicial decisions

2.5.1 The Teachings of the Highly Qualified Publicists of the Various Nations

In this category it is better to treat them in groups within their association as well as individually. And the first category we have the works of the International law commission and other international associations. The works of the International Law Commission are of paramount importance in showing what the laws are. Because the International Law commission is a body composed of eminently qualified publicists including many governmental legal advisors whose reports and studies may be used as a method of determining what the law actually is in much the

[48] Clyde Eagleton, The use of International Rivers, Canadian Bar Review, V.33 (1955), P. 1021.

same way as books. [49] And as its primary task is to develop and codify international law, the commission attempts to draft what it considers to be the essence of international practice.[50] And as we all know the ILC has come up with the 1997 UN convention on the law of the Non-Navigational Uses of International Water courses. As such we can consider this Convention as a reflection of what the ILC considers to be the law of international watercourses. And the examination of the convention that will be made in the next chapter assumes the same.

The other body that should be considered as an association of qualified publicist is the International Law Association (ILA). This association has adopted many recommendations and resolutions concerning international law. Regarding the utilization of the waters of international law the association has adopted many resolution and most importantly the Helsinki rules. And even before the adoption of the Helsinki rules the ILA has said so much about the law that regulates the utilization of international rivers.

In 1956 it adopted what it said the law that governs the utilization of the waters of international rivers and provided as follows:

> *While each state has sovereign control over the international rivers within its own boundaries the state must exercise this control with due consideration for its effects upon other riparian.*[51]

And in 1958 the ILA reported that:

> *...It is agreed that there are rules of conventional and customary international law governing the uses of waters of a drainage basin that are within the territories of two or more states.*[52]

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[49] Malcolm N. Shaw, International Law, 4th ed, (1997), pp. 94-95.
[50] Jack Vincent, A Hand book of The United Nations , (1969), P. 117.
[51] Griffin, Cited above at note 46, p.74
[52] Id, p.78

The Inter-American Bar Association also contributed its share for the development of the law regarding international watercourse. In 1957 the plenary session of the Inter-American Bar Association resolved that the following principles among others form part of existing international law:

> *Every state having under their jurisdiction a part of a system of international waters has the right to make use of the waters thereof in so far as such use does not affect adversely the equal right of the states having under their jurisdiction other parts of the system.*[53]

When we come to the individual publicists the position of some of the authorities will be briefly discussed in the following few paragraphs.

To begin with Professor Smith stated that:

> *No state is justified in taking unilateral action to the uses of the waters of an international river in any manner which causes or threatens appreciable injure to the lawful interest of any other riparian state.*[54]

From the wordings of this paragraph we can see that what Smith stated is useful so far as the lawful interest of each basin state is already established but it does not establish a right by itself. However, we should not underestimate its importance, as it is helpful to guide states to conduct in a manner that does not jeopardize the right of others.

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[53] The Tenth conf. Of the Inter-American Bar Ass. No 4 (1957) cited by William Alstyne, International Law and Inter-State River Disputes, Californian Law Review, V. 48,(1960) P. 607

[54] Smith, cited by Alstyne, cited above at note 53, P. 606.

In the same manner Professor Saucer Hall, stated regarding the utilization of the waters of international watercourses as follows:

> *No diversion of a stream, which is of a character to strongly prejudice other riparian or communities whose territories are bordered, by the same stream is permissible.*[55]

And the Latin American publicist Professor Cardona of Mexico remarked that:

> *The internationality of river basins presupposes a combination of rights and duties that are common to the neighboring states .... It follows that the legal order that governs this combination of rights and duties affects the exercise of the territorial sovereignty of each state over its own territory. The principle applicable to this order, and one which is aptly recognized in international law, is that a state may exercise its rights of territorial sovereignty in the form and to the degree that it deems desirable but on the condition that it does not impair the right of a neighboring state.*[56]

And Professor Oppenheim, advertising again to the catch line of tort law, maintained that:

> *An abuse of a right enjoyed by virtue of international law occurs when a state avails itself of its right in an arbitrary manner in such a way as to inflict up on another state an injury which can not be justified by a legitimate consideration of its own advantage ..... The maxim sic uteretuo alienum non laedas... is one of these general principles of law recognized by civilized*

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[55] Hall cited by Alstyne Ibid

[56] El Regimen Juridico de Los Rios Internationals, 56 Revisita de Derecho International 24,26 (La Habana, No. 111,1949), Cited by John Laylin and Renaldo Blanchi, The Role of Adjudication in International River Disputes, the Lake Lanoux Case, American Journal of International Law, V.53, (1959), p. 71

states which the permanent court is bound to apply by virtue of Article 38 of its statute.[57]

From the above observation by the stated publicists we can see that the publicists favour some restriction on the conduct of states to safeguard the same right of other coriparian. But the problem with such assertion is that since the right of riparian states is not established the mere attempt to protect the right of others does not hold water. However, this days the law regarding international water courses seems more developed. And the international community is in favour of equitable and reasonable utilization of the waters of an international watercourse by the basin states. Then once this is established the above principles can be utilized by riparian states to attain equitable utilization.

Let us conclude this part by the observation of John Layin and Renaldo Blanchi regarding the general principles of law as follows:

Only a few of the publicists who have considered this subject maintain the view that riparians have unlimited sovereign rights to use at will the waters in their territory and that the great majority of them come to the conclusion that the essence of international law up on the matter is the principle of mutual rights and obligations between co-riparians in their uses of water of international basins, and in the event of competing uses equitable apportionment of the waters or of their benefits.[58]

[57] Oppenheim, Cited by Alstyne, cited above at note 53, p.606

[58] John Laylin and Renaldo Balanchi, cited above at note 56, p.69

2.5.2 Adjudication

International adjudication on river disputes are very limited. But for the purpose of this study it is important to discuss some of the cases submitted to international adjudication in brief. To begin with in the International Commission of the River Oder case the Permanent Court of International Justice in the course of determining the applicability of the treaty of Versailles to certain navigable tributaries of the River Oder reffered to what it termed "International Fluvial Law in general".[59] And applying this law to the case at hand the tribunal stated that:

> *This community of interest in a navigable river becomes the basis of a common legal right, the essential features of which are the perfect equality of all riparian states in the user[sic]of the whole of the course of the river and the exclusion of any preferential privilege of any one riparian state in relation to the others.*[60]

As we see from the case involved the analysis was made in relation to dispute involving a right to navigation. And the decision was made on the matter. However, both its language and its reasoning make it equally applicable to non-navigational uses.[61] Therefore we can consider this holding equally applicable to issues involving the non-navigational uses of international watercourses.

The other case that involves the utilization of the waters of an international river was the Lake Lanoux case. In the Lake Lanoux Arbitration between France and Spain, the tribunal concluded that not only does current international practice require the safeguarding of the riparian rights of a neighboring state, but "account must be taken of all interests of whatsoever nature, which are liable to be affected by the work undertaken even if that do not correspond to a right".[62]

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[59] PCIJ Ser.A.N26(1929) cited by Jerome Lipper, The Law of Internaltion Drainage Basins, (1957), P.28
[60] Id, p.29
[61] Ibid
[62] Lake Lanoux Arbitration(France V. Spain) Cited by Lipper, ibid

CHAPTER THREE

EQUITABLE UTILIZATION UNDER INTERNATIONAL LAW

3.1 Equitable Utilization Under CustomaryInternational Law

Under the preceeding chapter we have seen that the Nile Basin states are in search of a comprehensive legal arrangemnt for the equitable utilization of the waters of the basin among themselves. They are trying to settle the issue of water utilization on the basis of equitable utilization . Therefore, in this chapter the issue of equitable and reasonable utilization will be discussed with a view to highlight the rights and obligations of watercourse states regarding the utilization of the waters of an international basin and how states should behave in the spirit of equitable utilization. In Chapter one it is said that the limitted territorial sovereignty which underlines equitable utilization is a rule of international law regarding the utilization of the waters of international watercourses. From this we can step in to the discussion of equitable utilization under customary international law. But before that let us substantiate how equitable utilization attains this status. As we all know the development of a rule into customary international law can be inferred from various sources. Here let us breifly discuss points that make us consider equitable utilization a customary rule of international law.

One area where we can gather information regarding international law is governmental pronouncements forwarded on issues of interest. Because government statements constitute valuable evidence of what states believe international law to be.[1] Regarding the matter we need to give due attention to the identity of the states that make the statement rather than their number. Because some times disinterested states may express a position without due regard merly to gain cheap pupularity or to attract the attention of a target state on different matters than an interested state. Therefore, we have to be very cautious in this regard. When we come to governmental pronouncements regarding the utilization of the waters of international rivers we can see what the Dutch Government said far back in 1862. In a letter to the Dutch Ministers in Paris and

[1]Jerome Lipper, The Law of International Drainage Basins (1957), P.24

London regarding the use of the River Meuse by Belgium and Netherlands, the Dutch Government stated that:

> *The Meuse being a river common both to Holland and the Belgium it goes without saying that both parties are entitled to make the natural use of the stream, but at the same time, following general principles of law, each is bound to abstain from any action which might cause damage to the other. In other words, they cannot be allowed to make themselves masters of the water by diverting it to serve their own needs, whether for purpose of navigation or of irrigation.*[2]

The United States, in response for Canada's attempt to divert the Colombia River Waters advanced the theory of limited territorial integrity and in that case the Department of State concluded that:[3]

> 1. *A riparian has the sovereign right to make maximum use of the part of a system of international waters within its jurisdiction, consistent with the corresponding right of each co-riparian.*
> 2. *Riparians are entitled to share in the use and benefits of a system of international waters on a just and reasonable basis.*

The other very important pronouncement was made by Chile, an upper riparian, in a controvercy between Bolivia, a lower riparian to the Lauca River. In this case Chile acknowledged that Bolivia has rights in the waters and further submitted that the relevant principles of the Montevideo Declaration of 1933 may be considered as a codification of the general accepted

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[2] Smith cited by Lipper ,id, p.25
[3] Legal Aspects of the Use of International Waters S.Doc.No.118,85th Cong;2nd Sess. 89-90, cited by Lipper, id, p.26

principles on the matter.[4] The 1933 Montevideo Declaration expressely recognized the equal rights of states riparian to an international river. In this declaration the participating states have agreed that:

> *The states have the exclusive right to exploit for industrial or agricultural purposes, the margin which is under their jurisdiction of the waters of international rivers. This right however, is conditioned in its exercise upon the necessity of not injuring the equal right due to the neighbouring state over the margin under its jurisdiction.*[5]

In the Lake Lanoux Arbitration between France and Spain, the tribunal concluded that not only does current international practice require the safeguarding of the riparian rights of a neighbouring state, but "account must be taken of all interests of whatsoever nature, which are liable to be affected by the work undertaken even if they do not correspond to a right.[6]

From these and other circumstances we can see that most states riparian to an international watercourse agree that the waters of a river should be utilized by all the riparian states in an equitable and reasonable manner. Even in the violent Israel-Arab, despite an occassional retreat dictated by political purposes, each side has recognized the right of the other to an equitable use of the waters.[7]

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[4] Statement by Mr. Stomayor, Minister of Foreign Affairs of Chile to the Council of the Organization of American States cited by Lipper, id, p.28
[5] Seventh International Conf. of American States, cited by Lipper id, p.36
[6] Lake Lanoux Arbitration (France V. Spain) Cited by Lipper, id, p. 29
[7] Lipper, id, p.28

When we come back to the issue of equitable utilization let us start with the definition itself.

> *The doctrine of equitable utilization or apportionment means that each basin state of an internationl drainage basin has a right under general international law to utilize the waters of the basin. It is entitled to a resonable and equitable share in the beneficial uses of the waters of the drainage basin concerned*[8].
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> .....

> *Equitable utilization is the division of the waters of an international river among the coriparian states in accordance with the legitimate economic and social needs of each in such a manner as to achieve the maximum benefit for all with a minimum detriment to each.*[9]

From these definitions we can draw the conclusion that each state riparian to an international river has a right to share from the beneficial uses of the waters of such river under international law. However, nowadays reaching on such conclusion is the simplest one. The central issue these days is not whether a riparian state to an international river has a right to utilize the waters of a river or not but it is the nature and extent of such right which requires examination. Nawadays every body is keen to accept that every state riparian to a given international river is entitled to share on the basis of equitable utilization, but what is the specific share of a given state on the basis of equitable utilization is yet to be ascertained. Of course it is difficult to provide a hard and fast solution regarding equitable utilization. Because a certain pattern of utilization in one international basin which is equitable may not yield the same to other basins.

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[8] B.A Godan, African Shared Water Resources, Legal and Institutional Aspects of the Nile Niger and Senegal River Systems, (1985), P.*50*

[9] Lipper, cited above at note 1, P.62

As can be seen from the above definition, the doctrine of equitable utilization is so general that it is difficult to trace the entitlement of a given state riparian to an international river. Due to this the dectrine of equitable utilization is criticised for being vague. As has been pointed out by Alstyne that:

> *The signal difficulty with the doctrine of equitable apportionment is, however, that the same platiudinous quality which makes it so agreable also makes it disturbingly vague and uncertain.*[10]

He said this due to the fact that equitable utilizaion does not tell the specific share of each basin state from the waters of an international basin. It only says that basin states should utilize the waters of an international water course in an equitable and reasonable manner among themselves. But this nature of equitable utilization is one of its important qualities as it helps to accomodiate many important factors that are relevant for water apportionment. Such factors can be incorporated to a given international basin by the concerned watercourse states. Of course, this nature by itself requires the cooperation of the basin states concerned. Otherwise, it will be difficult to get an equitable apportionment among the watercourse states that can be acceptable to all . And this inturn presuposes a healthy relationship among the basin states which commands respecting the interests of other cobasin states to the beneficial use of the water of the river concerned. However, this fact does not take away the importance of the doctrine as a basis for the formulation of specific rules for a given international basin among the riparian states. As stated by one writer that:

> *Although the area of equitable utilization may not lend itself to the formulation of precise rules, it is neverthless suitable for the formulation of general guiding principles.* [11]

This fact is a natural consequence of the fact that different intrnational basins exhibit different characterstics and the need of each basin states is different. And obviously it is difficult to set a

[10] William Alstyne International Law and Inter-State River Disputes, Californian Law Review, V.47 (1960) P. 596
[11] Smith, the Economic uses of Internation Rivers. (1931) cited by Liper,cited above at note 1, P. 45

specific water apportionment formula for all international basins that can be applied at the same manner. As such equitable utilization can help them in crafting their own mechanisms that can help to implement the general principle on to the ground by taking into account the relevant factors that are specific to the basin concerned on the basis of it. The other aspect of equitable utilization is its flexibility. Regarding this characterstics, Lipper has forwarded the following:

> *In the area of equitable utilization the rules are so flexible and general that it could be argued that they seem more like guides than regulations.*[12]

However, this flexibility is of great importance in the area of international basins. Because since the various international basins require various mechanisms to deal with, the flexibility of equitable utilization will pave the way to accommodate these differences. Therefore flexibility is of great importance. As pointed out by Hyton that:

> *.....the application of equitable principles to sharing in the use of water makes it possible to avoid the earlier, protracted arguments about who own's the water, to abandon the archaic automatic priority of navigation to adjust use preferences in the light of economic and social values, to make room for the later developing states or regions, and to take polluting uses in to account.*[13]

From this argument we can see one of the salient features of equitable utilization of the waters of an international watercourse. The temporal flexibility of the principle is well illustrated by the US Supreme Court's first equitable apportionment decission, Kansas V. Colorado.[14] In that case the court found that Kansas, the lower riparian and prior user, was not entitled to relief against Colorado for the latter's diversions of water from the Arkansas River, which had caused perceptible injury to portions of the Arkansas Valley in Kansas.[15] The court compared the amount of this detriment with the great benefit which has obviously resulted to Colorado and

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[12] Lipper, cited above at note 1, p.66
[13] Hyten cited by Godana cited above at not 8, P.66
[14] US 46 (1907) Cited by Stephen McCaffrey, The Law of International Water Courese, Non-Navigational Uses, (2001), p. 328
[15] Ibid

found that equality of right and equity between the two states forbid any interference with the present withdrawal of water in Colorado for purposes of irrigation.[16] However, the court went on to say;

> *It is obvious that if the depletion of the waters of the river by Colorado continues to increase there will come a time when Kansas may justly say that there is no longer an equitable diversion of benefits, and may rightfully call for relief against the action of Colorado.*[17]

This decision is a very good indicator of the nature of equitable utilization. What is equitable apportionment today may not remain in the future. It is this flexability that is favourable to accommodiate latter developmental needs within a given international basin. Meaning a certain pattern of utilization in a basin may need rearrangement in the future to accommodiate the new utilization. As such the flexible nature of equitable utilization helps to make such new uses a reality in the presence of existing uses. This also indicates that latter developments are usual and are within the ambit of equitable utilization. As such there are no machanical formulas capable of application to all rivers and which, in every case when applied to a specific situation, will provide the correct allocation of the waters between coriparian states and a judicious resoulution of conflicts among various uses of the waters.[18] The doctrine of equitable utilization requires states to take into account the same right of coriparian state while utilizing their share even when such other states are not excercising their right.

But such is not an easy task under the prevailing international relations. Because it requires an assumption of the possible requirement of the other co-riparian(s)to take care of it. This is very difficult if not impossible, especially when there is no communication among the water course states concerned. In addition to this, without an agreement specifying the specific entitlement

[16] Ibid
[17] Ibid
[18] Lipper cited above at note 1, PP. 41-42

respecting the potential demand of others is very difficult given the selfishness of states. Threfore the very nature of equitable utilization requires cooperation among the concerned states. Thus the states at issue should decide the manner of utiliztion among themselves.

At this point it seems desirable to note that equitable utilization does not mean equal division of the waters of an international river among the basin states. However, equitable utiliztion refers only to the equality of the right of each corparian state to a division of the waters on the basis of its economic and social needs, consistent with the corresponding rights of its coriparian states, and excluding from consideration factors unrelated to such needs.[19]

It is one important aspect of equitable utilization. Had equitable utilization been equal division the only problem would have been measuring the amount of the water of the river at issue which is the least difficult task. But, in equitable utilization the equality of the right of the states is not with regard to the amount but regarding the interest with respect to the beneficial uses of the water. Therefore, each state has equal right of say on the waters including the right to decide how much of the water should go to a given state even though such amount would be greater than the share of the former state. The underliying concept in equitable utilization is that all the water states of a given international river have equal right despite the fact that the amount of water that each receive may not be equal.

Equitable utilization is not free from the intricacies brought by riparian states. Most states used to bring various claims to be supported by the principle of equitable utilization. Although most claims are not well founded and even against the principle of equitable utilization itself, states used to argue that such claims are harmonious with equitable utilization. One of such claims mostly advanced by lower riparian states is the issue of priority of right over the waters of an international watercourse and it is presented below.

[19] Id, p.63

3.1.1 Prior Appropriation and Equitable Utilization

One important issue that needs clarification is the relationship between equitable utilization and historic right. Because most of the time lower riparians used to claim a historic right over the waters of the river and argue that such right should be acknowledge by the upper riparians. In effect the lower riparians argue that such amount of water acquired by virtue of historic right, as they claim, cannot be modified. In other words, they used to argue that equitable utilization has to take into account historic right that is established by past utilization.

As to the relationship between equitable utilization and historic right Lipper wrote that:

> *The matter of existing uses is the most controversial aspect of equitable utilization. The doctrine of prior appropriation utilizing the slogan " prior in time prior in right" as its watch word is not part of international law. This is a mechanical doctrine which, in application, is often unrelated to the need, therefore, conflicts with the very foundation up on which equitable utilization is founded.*[20]

As such equitable utilization does not give any veto to a riparian state that started utilizing the waters of the river over latter developments by the other riparian states. This is in line with the previous argument regarding the position of equitable utilization on future developments. As such past utilization and present utilization is a matter to be evaluated at present only taking in to account the present situation and needs of each basin states.

When we come to the Nile basin *per se* the lower riparian states especially Egypt used to advance the same line of argument and claim that it has a historic right over the waters of the Nile, merely because it the first to start utilizing it. But the fact that Egypt has started utilizing the waters of Nile since time immemorial cannot confer upon her any right of veto on it. Because being the first utilizer is a natural consequence due to the fact that Egypt did not have any source of water other than the Nile river that can sustain agriculture while the upper riparians had abundance water resorces at the time. And this fact cannot preclude them from utilizing the

waters when their demand requires to do so. Nile is not created because of Egypt , even though Egypt's servival is highly dependent on it. Therefore, the claim of Egypt for a natural and historic right would simply refer to the fact that in all history Egypt has had to depend on the Nile waters for its survival.[21] This factual circumstances cannot be pleaded to claim a right under international law.

Therefore, equitable utilization recognizes the equality of the right of all riparian states without any preference. Every co-riparian state should respect the corresponding right of others. Moreover the basin states to an international watercourse should cooperate to derive the utmost benefit from the watercourse on the basis of equitable utilization.

3.2 Equitable Utilization Under the 1997 UN Convention on the Law of the Non-Navigational Uses of International Watercourses

In this part we will see the treatment of equitable utilization under the 1997 UN Convention on the Law of the Non-navigational Uses of International Watercourses. As the convention is the first and only global instrument regarding non-navigational uses of international watercourses, it is appropriate to examine it with a view to see the relevance of the convention and its impact on the conduct of states on the matter. In addition to this the fact that the Nile Basin is in search of a legal regime regarding the utilization of the waters of the basin among the basin states makes the discussion of the convention worthwhile. As such the discussion could help to see the importance of the convention for the Nile Basin states in crafting a comprehensive basin-wide agreement for the utilization of the waters of the basin besides pinpointing the salient features of equitable utilization.

[20] Id, p.64

3.2.1 Historical Background of the Convention

Before evaluating the place of equitable utilization under the Convention, it is important to discuss breifly the Convention itself. Hence, in this part first the adoption process of the convention will be discussed with a view to high light the normative value of the convention. And latter the examination of the content will follow.

On December 8,1970 the General Assembly by Resoulution 2996(XXV) commissioned the International Law Commission to take up the study of the non-navigational uses of international water courses with a view to its progressive development and codification.[22] After the discussion in the General Assembly and the resolution to take up the matter, the codification work was started by the International Law Commission. The International Law Commission started the work by nominating a special rapporteur as for each subjects under consideration, who was responsible for editing the draft.[23] And the main preoccupation of the Commission was the question of the equitable apportionment of freshwaters.[24] Then in 1991, after a long time deliberation, the Commission presented a complete set of 32 draft articles on the Law of the Non-navigational Uses of International Watercourses which were founded on the principle of restricted territorial sovereignty.[25] After the draft articles were transmitted to governments for comments and observations, the International Law Commission completed the second reading of the draft articles of the Convention by incorporating the comments and statements given in the debates in the General Assembly in July 1994.[26] After the 1994 draft, the matter was transfered to the sixth committee of the General assembly pursuant to the General Assembly Resolution which provided that:

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[21] C.O.Okidi, Legal and Policy Regime of Lake Victioria and Nile Basins, Indian Jounal of international Law, V-20 (1980), P. 418

[22] Esther Schroeder-Wildberg, The 1997 International Watercourse Convention-Background and Negotiations, p.16, Availableat http://www.hydroaid.it

[23] Cano, The Development of International Law of International Water Resources and the Works of the International Law Commission, Cited by Wildberg, id, p.17

[24] Tanzi Attila, Codifying The Minimum Standards of the Law of International Watercourses: Remarks on part one and a half, cited by Wildberg, Ibid

[25] Barnadat Jorg and Kaplan Aytul, International Water Law: Regulations for Cooperation and the Discussion of the International Water Convention, cited by Wildberg, Ibid

[26] Ibid

> *The sixth committee shall convene as a working group of the whole open to all State Members of the United Nations or members of specialized agencies, for three weeks from 7 to 25 October 1996 to elaborate a framework convention on the basis of the draft articles adopted by the International Law Commission in the light of the written comments and observation of states*[27]

All UN member states were permitted to participate in the working group and therefore, the plenary to discuss the issues consisted of plenipotentiaries from those nations that had an interest in the subject.[28] The procedure to be followed by the working group in elaborating the framework convention emerged from the resolution annex "Methods of work and procedures."[29] And the annex provides that the work shall be distributed between the Working Group and a Drafting Committee.[30] The Working Group was headed by International Law Commission member Prof. Chusei Yamada, Ambassador from Japan whereas Prof. Hans Lammers, Deputy Legal Advisor of the Netherlands Foreign Ministry served as the chairman of the Drafting Committee.[31]

Although all United Nations member states theoretically constituted the inner network of actors, only statements from delegations of fifty four nations that made the factual inner network were recorded in the official Summary Records of the negotiation.[32]During the negotiations of the Convention, the positions of the national delegations were largely shaped by their perception of their country's geographic circumstances as upstream states, downstream states or as states having both interest but the usual regionalism did not have any influence on the results.[33] Such situation is expected as the issue involves more of a national interest than the interest of a group of states that could be categorised as such and advance a common position. The participating states have made a some what uniform grouping on the basis of their riparian position. As such

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[27] GA Res. A/49/52/para.2&3 cited by Wildberg, cited above at note 22, pp.17-18
[28] Id, p. 27
[29] Ibid
[30] Ibid
[31] Ibid
[32] Ibid
[33] Id, p.29

the most important upstream countries were Turkey, Ethiopia, supported by India, China and clearly decernible, France.[34] And on the other hand the core of downstream states were the Netherlands, Portugal, Egypt, Syria and Iraq.[35] The third category comprises the mixed-motive countries which is made up of states that are both upstream and downstream countries on different rivers and others that have main rivers as boarders or share big lakes.[36]

According to its rules of procedure, the Working Group first had to adopt the draft articles on an article-by-article basis and most of the articles of the Convention were adopted without any discussion or after a short statement and without a vote.[37] But, a recorded vote was requested regarding articles 3, 5-7, and 33 plus annex.[38] Thus, the first vote of importance was the separate vote on the package of articles 5-7 in the Working Group and next the draft Convention as a whole followed by the vote taken by the General Assembly on the adoption of the resolution that contained the international water convention.[39] According to the above discription, the vote that took place is summerised as follows:[40]

1. Turkey requested the recorded vote on the articles 5-7 in the Working Group and the package was adopted with 38 affirmative votes, 22 abstaintions and 4 negative votes, namely those of China, France, Tanzania and Turkey.
2. In the Working Group, the draft convention as a whole was adopted by 42 votes in favour, 19 abstention and China, France and Turkey voted against the Convention.
3. On 21st May 1997, the General Assembly adopted the text of the Convention as it was worked out by the sixth committee on the basis of the International Law Commission draft articles from 1994. And when the resolution containing the Convention came before the General Assembly, Turkey requested a recorded vote and was as follows:

- 103 nations, containing bangladish, Czech Republic, Greece, Hungary, Mexico, Netherlands, Portugal, Slovakia, Sudan, Syria and USA voted infavour of it
- 27 nations containing Egypt, Ethiopia, France, India, Isreal, Rwanda and Spain abstained
- 3 nations namely, Burundi, China and Turkey voted against the convention

[34] Ibid
[35] Ibid
[36] Id, p.30
[37] Id, p.32
[38] Ibid
[39] Id, pp.32-33

The most interesting point regarding the 1997 Convention is its nature. The 1997 UN Convention on the Law of the Non-navigational uses of International watercourses, is adopted as a framework convetion.[41] In general a framework convention is intended to establish a set of principles, norms, and goals and formal mechanisms for cooperation on the issue rather than to impose major binding obligations on the parties.[42] As such the parties to the convention are free to choose their own mechanisms to adopt the principles in the Convention to a binding rule, treaties or state practice. Meaning since different watercourses need different arrangments, they have to devise their own mechanism to share the waters of the river concerned. And the purpose of the convention is to serve as a basis for negotiation and guiding principle in formulating such specific water course agreement among watercourse states. This fact is clearly dicernible from the provisions of the Convention itself. Article 3 sub 3 of the Convention provided that:

> *Water course states may enter in to one or more agreements, hereinafter referred to as "Water course agreements", which apply and adjust the provisions of the present convention to the characterstics and uses of a particular international water courses or part thereof.*

From this it is clear that the provisions of the Convention cannot bind states party to it, rather they serve as basis for negotiation and creation of mechanisms to regulate the relations of water course states. As such states are expected to take into account the principles enshrined in the Convention in creating instruments for their common watercourses or to observe the principles in their practice. But here we have to note that some of the provisions of the Convention are already part of customary international law. Therefore, such provisions are binding on states before the Convention enter in to force and also those states which are not party to the Convention.

As to the contribution of the Convention in the overall resolution of water utilization issues in the various international basins, it has to be evalutated whether it has come up with a viable

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[40] Id, p.33
[41] Id, p.11
[42] Ibid

soulution regarding water apportionment among watercourse states. In this regard various scholars aired their opinion on the possible contribution of the Convention and some of them are presented below.

To begin with, Wolf expressed the weakness of the convention by stating that, the convention provides few practical guidelines for allocations, the heart of most water conflicts.[43]
And Biswas by focussing on the voting that has taken place during the adoption of the Convention pointedout that:

> ..... *in all basins with conflicts at least one country voted against the International convention abstained or was absent. Thus its provisions and ratification do not matter at all.*[44]

As opposed to these, Demeter seems optimistic on the matter when he stated that:

> *The fact that all riparians in a certain region need to be a party to the IWC(the convention) hinders its effects as a convention but does not impede its influence as soft law.*[45]

In addition to this, McCafrey and Tanzi expect or already see positive effects.[46] Tanzi, for instance, interprets the wide support of the General Principle of cooperation during the working Group sessions as enhancing the expectation that watercourse problems will be takled in an integrated and coordinated manner through consultation and negotiation.[47] The International Water Convention's (the Conventions) positive effect on interstate cooperation and

[43] Wort.(1998) P.252 cited by Wildberg, cited above at note 22, p.22
[44] Biswas, cited by Wildberg, id, p.22
[45] Demeter, cited byWildberg, ibid
[46] Wildberg, cited above at note 22 p.22
[47] Tanzi cited by Wildberg, Ibid

communication is also supported by Grey and Demeter, who, in terms of a basis for negotiations, called it a very valuable piece of soft law.[48]

For Scheumann and Schiffler, the adoption of the International Water Convention (the Convention) by the General Assembly can be considered a major step forward, because this is the first document showing a large international consensus on the issue.[49] In addition to this the sponsors of the resolution containing the convention additionally declared in the General Assembly that the International Water Convention will contribute to the equitable and reasonable utilization as well as preservation of international watercourses and their ecosystems, to the benefit of current and future generations.[50]

Despite the above supports which hope that the Convention will contribute its share in providing a viable framework for resolving water utiliztion issues, Hey denied the importance of the Convention in accomplishing the hope that others have seen in it. She is of the opinion that the water convention will not have any, but certainly no positive effects.[51] Accordingly she regarded the convention as:

> *Unnecessary for it only specifies that a number of general environmental law obligations apply to international water courses but does not impose on watercourse states obligations that are not already binding upon them by virtue of customay international law.*[52]

It is true that the Convention is not binding on any states party to it because it is not yet ratified, and also will not bind non-party states even after it comes into force. Besides this as it is stated above the Convention will not create any binding obligation on specific matters on states as it is a frame work convention providing guidline principles to be followed by states in their practice

[48] Grey; Demeter, cited by Wildberg, ibid
[49] Scheumann & Schiffler, cited by Wildberg, ibid
[50] MacCaffrey & Sinjela, cited by Wildberg, ibid
[51] Wildberg, cited above at note 22, p.22
[52] Ibid

and guide them in their negotiation to set up rules for their relations regarding water utiliztion of an international watercourse.

However we should not underestimate the importance of the Convention and the pressure it will exert on watercourse states. Eventhough it has not the required legal force to bind states the political impact it will exert should not be ignored. Most scholars share the opinion that this framework Convention is likely to prove of significant value in international water relation even in the case that not enough states ratify the instrument.[53]The fact that the customary rule of equitable utilization is so general that it requires an elaboration increases the importance of the Convention as it tries to come up with some specific criteria to suplement the customary rule. As such the Convention can serve as a point of reference for watercourse states in establishing a legal regime to share the waters of international watercourses. As indicated by Tanzi, the IWC (the convention) can be regarded as representing an essential frame of reference for states irrespective of [its]entry into force.[54]

This assessment relies upon the following reasons, which make it more difficult for states to ignore the convention or challenge its existence:[55]

- The IWC(the Convention) represents the opinion of leading experts in international law for it was based on a draft prepared by the ILC;[56] it is threfore endowed with scientific authority.[57]
- The fact that numerous comments from states have been taken in to account by the International Law Commission when elaborating the instrument[58] and the possibility for virtually every interested state to participate in the negotiations, [59]contribute to the Convention high political authority.[60]
- The Conventions political authority is also enhanced by its adoption in the General Assembly by a great majority of countries indicating broad agreement among states on the general principles set out in the Convention McCafrey says that this implies a significant bearing of the

[53] Id, p.23
[54] Tanzi, cited by Wildberg, ibid
[55] McCaffrey, cited by Wildberg, ibid
[56] Heintze; McCafrey & Sinjela , cited by Wildberg, ibid
[57] Mark E. Villiger, Customary International Law and Treaties, (1997), P.133
[58]Heintze; McCaffrey, cited by Wildberg, cited above at note 22, p.23
[59] McCaffrey & sinjela, cited by Wildberg, ibid
[60] Villiger, cited above at note 57, p.132

International Water Convention, even if it does not enter in to force, on controversies between states one or more of which is not a party to it.[61]

In general despite the fact that the Convention is not yet in force and the fact that it is a frame work Convention, the political impact it will exert on state that share an international water course is understandable.It would be very difficult for a state to ignore the principles enshrined in the Convention as they refelect the consensus of the majority of the international community. As has been said by Wolf at the beginning the Convention did not come up with a practical guidlines for water allocation. As such it makes the Convention no more valuable than what had been under customary international law. But since the convention incorporates many aspects that are pertinent to water utilization issue, its importance is beyond doubt. And the lack of specific provision regarding water apportionment in the Convention is due to the nature of equitable utilization and the nature of water utilization of international watercourses. Because it is difficult if not impossible, to provide a specific rule for all the international basins. However, the Convention brought to the picture many provisions that can supplement equitable utilization that cannot be found under customary international law.

3.2.2 The Status of Equitable Utilization in the Convention

The doctrine of equitable utiliztion is the main focus of the Convention. The Convention bring to the picture equitable utilization and the no-harm rule. The position of states on these two obligations is different. As it is apparent from the concepts themselves, lower riparian states prefer the no-harm rule to take preceedence over equitable utilization and vice versa. Coming back to the Convention, equitable utilization is provided under Article 5 with the title "Equitable and reasonable utilization and participation" and provided as follows:

[61] McCaffrey & Sinjela; Viliger cited by Wildberg, cited above at note 22, p.23

1. *Water course states shall in their respective territories utilize an international watercourse in an equitable and reasonable manner. In particular, an international water course shall be used and developed by water course states with a view to attaining optimal utilization thereof and benefits there from consistent with adequate protection of the water course.*
2. *Water course states shall participate in the use, development and protection of an international water course in an equitable manner. such participation includes both the right to utilize the water course and the duty to cooperate in the protection and development there of, as provided in the present articles.*

It is very clear from the wordings of these provisions, that each riparian state to an international river has an equal right regarding the beneficial uses of the waters of an international basin. The provision also imposes an obligation on the state to respect the same right of the other riparians. Such obligation is a corolary of the fact that all riparian states to an international watercourse have the same right. And such right, in the words of the International Law Commission is stated as follows:

> *A water course state has both the right to utilize an international watercourse in an equitable and reasonable manner and the obligation not to exceed its right to equitable utilization or, in some what different forms, not to deprive other water course states of their right to equitable utilization.....*[62]

And pharagraph 2- talks about the cooperation among water course states in utilizing the waters of an international river. The principle of equitable participation flows from, and is bound up with, the rule of equitable utilization set out in paragraph 1.[63]

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[62] Draft articles On The Law of the Non-Navigational Uses of Internationl Water Courses and Commentaries There to and Resolution on Transboundary Confinded Ground Water [1994]P.97, Available at http://untreaty.un.org

[63] Ibid

After providing the general rule of equitable utilization under Article 5, the Convention provided under Article 6, the factors that should be taken in to account in determining equitable utiliztion. So whether the utilization by a given water course state is equitable will be judged against the factors listed under Article 6. The lists under Article 6 are not exhaustive implying the inclusion of other factors taking in to account the circumstances involved in each international basin.These factors should be considered by every watercourse state to a given international river whenever the utilization of the waters of the river is sought .The factors are listed as follows:

1. utilization of an international watercourse in an equitable and reasonable manner within the meaning of article 5 requires taking in to account all relevant factors and circumstances including :

a. Geographic, hydrological climatic ,ecological and other factors of a natural character;
b. The social and economic needs of the watercourse states concerned;
c. The population dependent on the watercourse in each watercourse state
d. The effects of the use or uses of the watercourse state on other watercourse states;
e. Exsting and potential uses of the watercourse
f. Conservation, protection, development and economy of use of the water resoures of the warer course and the costs of meaures taken to that effect;
g. The availability of alternatives,of comparable value to a particular planned or existing use.

And as provided under subarticle 3 of the same, the weight to be given to each factor is to be determined by its importance in comparison with the other factors and the factors are to be considered together and a conclusion is to be reached on the basis of the whole.

The choice of the International Law Commission for an open ended list is a wise option. Because since different factors are involved in different international water courses, there has to be a room for the inclusion of as many factors as are relevant for the watercourse involved.

3.2.3 The Obligation Not to Cause Significant Harm

The no-harm rule is provided under Article 7 entitled "obligation not to cause significant harm" and states that:

1. Water course states shall exercise due deligence to utilize an international water course in such a way as not to cause significant harm to other water course states.

2. Where, despite the exercise of due deligence, significant harm is caused to another water course state, the state whose use causes the harm shall, in the absence of agreement to such use, consult with the state sufferring such harm over:

a) The extent to which such use is equitable and reasonable taking in to account the factors listed in Article 6;

b) The question of ad hoc adjustments to its utilization, designed to eliminate or mitigate any such harm caused and, where appropriate, the question of compensation.

In this article the Convention imposes an obligation on a water course state to observe due deligence in utilizing the waters of an international water course in an equitable and reasonable manner. As can be seen from the provision itself the central issue under Article 7 is whether a state has exercised due deligence or not in utilizing the waters of an international water course.

And the manner of utiliztion by itself will not be evaluated against this rule. Because what is required of a state is to take due deligence. As such the obligation not to cause significant harm under Article 7 is an obligation of conduct, not an obligation of result.[64] Therefore, it is not whether a harm is caused or not rather it is whether the state exercised due deligence or not that is to be decided by Art. 7.

[64] Id, P.103

3.2.4 The Relation ship between the No harm and Equitable Utilization Obligation

At this point it is important to discuss the relation between equitable utilization and the obligation not to cause significant harm as enshrined in the Convention. In other words the issue that which should prevail in time of conflict, if there is any has to be resolved. Because some times a watercourse state may cause a significant harm on the other riparian while utilizing the waters of an international watercourse on the basis of equitable utilization. And this is the case especially in basins where one state, more importantly a lower riparian, has already established an extensive use of the water. In such cases when the other state starts utilizing its share in conformity with the principle of equitable utilization, necessarily the former state will be affected and more likely a significant harm may occur. Therefore, in such cases there has to be a solution and the solution is whether to let the prior user to suffer or the latter state to stop the use and denied its right to an equitable utilization. So at this point we have to examine the law pertaining to the issue at hand. Under international law the issue is not alien. But before looking at their specific ranking let us see the no harm rule itself. The no harm rule seems to base itself on the maxim sic utere tuo ut alienum non laedas(so use your own as not to harm that of another). But this maxim has to be seen together with the following two maxiums; neminem laedit qui jure suo uritur(he who stands on his own rights injures no one); nemo damnum facit nesi qui id facit quod facere jus non habet(no one is considered as doing damage unless he is doing what he has no right to do).[65] Therefore, we have to see the no harm rule in light of these maxims. As such harm is to be considered when a state inflects on the other state by utilizing the waters of an international watercourse in excess of its legitimate entitlement. Therefore, regarding the utilization of the waters of international watercourses it is not the harm but how such harm is caused, which is the crucial point. As stated by Macafrey;

> *...in the field of international watercourse, it is not the causing of significant harm per se, but the unreasonable causing of such harm that is prohibited.*[66]

[65] McCaffrey, cited above at note 14, p.350

[66] Id, p.370

Therefore, what is important is not whether significant harm is caused or not, but how such harm is caused. And it is only if the causing state is at least negligent in its utilization that resulted in harm that the state is responsible. Otherwise the harm has to be tolerated for the sake of achieving equitable utilization among the water course states. Even going further McCafrey considered the obligation not to cause significant harm as one factor in equitable utilization in the following words:

> *Analytically, this is equivalent to treating harm as but one factor in an equitable utilization determination. Significant harm may have to be tolerated in order to achieve an overall regime of equitable and reasonable utilization.*[67]

This holding is also in consonance with the holding of the international law commission as expressed in its commentary on the draft convention on the law of non-navigational uses of international watercourses. And in that it has provided that:

> *In certain circumstances "equitable and reasonable utilization" of an international watercourse may still involve significant harm to another watercourse state. Generally, in such instances, the principle of equitable and reasonable utilization remains the guiding criterion in balancing the interest at stake.*[68]

In general a state is prohibited from causing significant harm to other watercourse state. And such instance is occurred where it trespasses its equitable utilization quota. However, if significant harm is occurred within the limit of equitable utilization the state in question is not liable for the resulting harm except to consult to avoid the harm if possible. As such since the mere causing of harm is not prohibited as far as the utilization of the state is within the bound of equitable utilization we can not talk of incompatibility. Therefore, far from being incompatible with equitable utilization, the no-harm obligation is a necessary and integral part of the equitable utilization process.[69] And it is equitable utilization that should be taken as a pillar. And the

[67] Ibid
[68] ILC Commentary cited above at note 59, p. 103
[69] McCafrey cited above at note 14, p.350

obligation not to cause significant harm is only a point to be taken in to account while utilizing the waters of an international watercourse in an equitable and reasonable manner.

3.2.5 Other Important Provisions of the Convention

Apart from equitable utilization and the no-harm rule the Convention also embodied some other important provisions which must go together with the main obligations. To mention some the Convention provided the duty to cooperate and exchange of data and information.

Under Article 8 of the Convention captioned "General Obligation to Cooperate", the following provisions are found;

1. 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.
2. In determining the manner of such cooperation water course states may consider the establishment of joint mechanisms or commissions, as deemed necessary by them, to facilitate cooperation on relevant measures and procedures in the light of experience gained through cooperation in existing joint mechanisms and commissions in various regions.

And to make the obligation set under article 8; a reality Article 9 provides the obligation to exchange data and information among watercourse states. This is because, since watercourse states are under a duty to cooperate, they need to know every thing about the situation of the watercourse so that they can perform their obligation based on the data and information communicated to them by their co basin states.

The other more important procedural obligation and which has a special importance to this study is provided under Part II Captioned "Planed Measures". And it is provided under Article 11 as follows:

Information Regarding Planed Measures

> *Watercourse states shall exchange information and consult each other and, if necessary, negotiate on the possible effects of planned measures on the condition of an international watercourse.*

And under Article 12 it is further provided that:

***Notification Concerning Planned Measures with Possible Adverse Effects**:*

> *Before a watercourse state implement or permits the implementation of planned measures which may have a significant adverse effect up on other watercourse states, it shall provide those states with timely notification thereof. Such notification shall be accompanied by available technical data and information, including the results of any environmental assessment, in order to enable the notified states to evaluate the possible effects of the planned measures.*

From these procedural obligations and the substantive obligations discussed above we can see the position of equitable utilization on the conduct of watercourse states. Equitable utilization aims at promoting cooperation among watercourse states so that they can derive the utmost benefit from the waters of the basin concerned. And as such equitable utilization is against unilateral utilization plans designed by a watercourse state without the cooperation of other watercourse states. And is clearly against any unilateral development.

As a concluding remark on the discussion regarding equitable utilization, some points can be mentioned here. Equitable utilization is the fundamental rule governing the use of international watercourses, which depends heavily up on active cooperation among states sharing fresh water resources.[70] This is because equitable utilization is not a one way undertaking but it needs

[70] Id, p. 345

reviewing time and again. The utilization of the waters of a given international watercourse by the riparian states necessarily varies from time to time depending on various circumstances and the states should check each time their utilization against the other. The other point that should be borne in mind is that the available water in a given international watercourse varies from time to time for various reasons including decrease in precipitation and this will have a great impact on the equitable utilization regime of a given basin. And such and other factors put the success of equitable utilization in the hands of effective cooperation among the basin states concerned. And it seems inescapable that implementation of the obligation of equitable and reasonable utilization depends ultimately up on good faith and ongoing cooperation between the states concerned.[71] But in the face of such reality, if watercourse states opt to engage in a unilateral development without due regard to the necessity of cooperation and consultation then they will end up in a failure and inefficient water utilization.

[71] Id, p. 342

CHAPTER FOUR

EQUITABLE UTILIZATION AND OUT-OF-BASIN WATER TRANSFER

4.1 Out of basin Water Transfer in General

An out-of-basin water transfer of an international watercourse can be undertaken through many ways. The water can be carried by a pipe or through huge tankers and transferred to water scares areas from those that have surplus. But for the purpose of this paper an out-of-basin water transfer refers to the diversion of the water from its natural course and take it to some area out side the basin area. And the diversion could be undertaken by a pipe or a canal. And the crucial point is that the water is diverted by deliberate human intervention and flows outside its natural courses, out-of the basin area. In the discussion regarding equitable utilization we have seen the manner of water utilization by the watercourse states. And we have said that equitable utilization requires watercourse states to seek the most efficient way of utilization so as to achieve the maximum benefit for all the basin states with the minimum detriment to each watercourse state. Therefore, any state that planned a new utilization should check its plan against the above consideration before embarking on the plan. Like wise any state that plans an out-of-basin water transfer should take in to account such considerations. Basically watercourse states should also see the corresponding rights and interests of other watercourse states. To do that the cooperation of watercourse states is a sine qua non for the achievement of an equitable utilization among the watercourse states. And we have seen in the preceeding chapter that equitable utilization rules out unilateral action regrding the water of an international water course. Close cooperation among water course states is necessary for an effective equitable utilization of the waters of a given international basin. Equitable utilization is all about satisfying the need of the basin as much as possible. And areas out side the basin is not the concern of equitable utilzation. Therefore, any water course state that plans an out of basin water transfer should proceed within the perview of equitable utilization taking in to account the needs of the basin states and the basin at large.

All water course states to a given international basin have interest on the manner of utilization of the waters of the river by the other water course state. This is because every utilization has an impact on the existing utilizaton as well as future utilization of the other water course states. Because a use that does not affect the interest of the watercourse states today may have a great impact on their future utilization. As such the states should be consulted before such plan that have an impact on their right is realised. Therefore, a state contempleting an out of basin water transfer should asccertain many things before proceeding with its programmes. And in this part some of the task that has to be performed by a watercourse state before proceeding with an out-of-basin water transfer will be discussed with a view to have a clear idea of the impact of an out-of-basin water transfer.

4.1.1 Prerequisite for Undertaking Out-of-Basin Water Transfer

4.1.1.1 Agreement among the Basin States

Equitable utilization underlies not only the need for utilizing the waters of an international river but also the participation of all the basin states concerned. Every state riparian to a given international basin has a say on the fate of the waters of the basin. Even though no state has a right to dictate the other as to how such state should utilize its share of the waters from the basin it has its own say on the share to be allotted to the state in the first place. As has been discussed in the preceding Chapter, the 1997 Convention has incorporated procedural obligations which are necessary for the effective implementation of the substantive obligations. And in the discussion on equitable utilization under customary international law, it is clearly seen that the principle of equitable utilization by nature requires the close cooperation of the stake holders as to how to share the beneficial use of the waters of an international river as effectively as possible. Therefore, it is wise, to import the procedural obligations enshrined in the convention even though the convention has not yet entered in to force nor has any binding effect on the Nile basin. As such any state planning an out-of-basin water transfer need to observe the procedural obligations provided under the convention in addition to the substantive obligations or the customary obligation. This is because as equitable utilization is a general term that needs elaboration and we have no available sets of rules readily available to supplement equitable utilization that can help attain an effective water utilization regime among the riparian states, we have to consider the procedural obligations provided in the convention as they are crafted in line

with the nature of equitable utilization and the demand of international watercourses. Here we need to concretize the obligation and make very visible so that the things that has to be undertaken before proceeding with an out-of-basin water transfer projects can be identified. And for a better understanding of the issues they will be presented below separately.

4.1.1.1.1 Prior Agreement as to the Share

The first thing to be done on the basis of equitable utilization must be to agree on the share of each and the manner of distribution and utilization of the waters of the basin at issue. This is because, as it is discussed in the preceding parts it would be better if equitable utilization is supplemented by a clear agreement among the basin states involved as to the manner of utilization of the waters of the basin for effective and optimal exploitation of the benefits of the basin. And after the share of each state is determined it is up to the state concerned to design its own mechanism for effectively utilizing its share. Here what should be underlined is the fact that each state should come and cooperate in devising the mode of sharing and the manner of utilization of their respective share. This is because, since each international basin exhibits its own peculiarities and the interest of each state involved differ from basin to basin each basin states to a given international basin should come up with their own mechanisms taking in to account the prevailing situation at hand. As such each basin state has a direct say on the amount of water or the manner of utilization by the other watercourse state. And it is this water that is potentially to be used for projects out side the basin area at the expense of the basin areas. In addition to this since equitable utilization is all about utilizing the waters of the watercourse among the basin state any attempt to take the water out of the basin should get the consent of the basin states. Therefore, the co basin states should be consulted with a view to get their consent.

At this point it can be argued that since equitable utilization is a rule by itself it can do the job without a supplementary agreement. But even then the requirement of close cooperation cannot be ignored. Because equitable utilization is not static. And it has to be adjusted time and again by looking at the present and projected needs of the basin. As such the close cooperation of each basin state is imperative if we wish to have a viable equitable utilization regime.

4.1.1.1.2 Agreement on Planned Measures

As discussed above in the previous chapter the convention has set some procedural obligations on watercourse states that have to be meet for the effective realization of the substantive obligations. It is also discussed that these procedural obligations are also important for the realization of equitable utilization as it is a very general concept that need elaboration and such provisions will pave the way to implement it. One of the procedural obligations that has relevance to the discussion is provided under Article 11 of the convention entitled "Information concerning Planned Measures". This provision provided that:

> *Watercourse states shall exchange information and consult each other and, if necessary, negotiate on the possible effects of planned measures on the condition of an international watercourse.*

And this provision is meant to seek prior approval from the notified state regarding the planned measures. This is clearly provided under Article 14(b) which reads:

> *During the period referred to in article 13 (the period in which the notified state should forward its position) the notifying state shall not implement or permit the implementation of the planned measures without the consent of the notified states.*

From the content of these provisions and the sprit of equitable utilization we can say that such obligations pertains with regard to new utilization schemes which were not agreed up on before among the basin states concerned or they were not included on the existing equitable utilization calculation in the basin. And this is also in line with the obligation of prior notification that develops under customary international law. And the Lake Lanoux Arbitration between Spain and France affirms that prior consultation and negotiation constitute a principle of customary law.[1] And in the case that the use of shared resources may involve serious injury to the rights or interests of another state, it is a duty under international law to give prior notice, consult and

[1] Antoinette, International Law, Sustainable Development and Water Management, PP. 62 – 63, Available at www.eburch.nl

negotiate.[2]And this presupposes a need for an agreement among the basin states whenever there is a new plan by one of the co basin states that was not contemplated and agreed upon by the basin states. And for stronger reason an out-of-basin water transfer requires a prior agreement or approval of all the basin states concerned. It is said for a stronger reason because as discussed earlier in this chapter, an out-of-basin water utilization and utilization within the basin have great difference. Regarding utilization within the basin co basin states may compromise their interest to meet the needs of the basin area, but such may not be the case when it comes to an out-of-basin utilization. This is because the states must give priority to the demands of the area within the basin. In any case a state that plans an out-of-basin water transfer program must consult and seek the approval of the other basin states before proceeding with its programs. And in cases where such out-of-basin programs require additional waters than that previously agreed upon by the watercourse states, the need for an agreement is more strengthened.

4.1.1.2 The State should take care of the interest of other co-riparian states

A state that planned a new use should take care of the interest of the other co-riparian states. In the Lake Lanoux Arbitration case between France and Spain concerning the obligation of a state contemplating a new use, the tribunal observed as follows:

> *Consideration must be given to all interests, whatever their nature, which may be affected by the works undertaken, even if they do not amount to a right...*
> *...The Tribunal considers that the upper riparian state, under the rules of good faith, has an obligation to take in to consideration the various interests concerned, to seek to give them every satisfaction compatible with the pursuit of its own interests and to show that it has in this matter, a real desire to reconcile the interests of the other riparian with its own.*[3]

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[2] Birnie and Boyle, cited by Antoinette cited above at note 1, P.63.
[3] 12 UNRIAA p. 281 at p.315 English Translation in [1974], YBIL Comm'n Vol. 2, pt.2, p.198; cited by Stephen McCafrey, The Law of International Water Courese, Non-Navigational Uses, (2001), P.340

As such a state that planned an out-of-basin water transfer programmes must take in to account the interest of the other riparian states. This obligation is in conformity with the sprit of equitable utilization. And even without a specific water apportionment scheme, a state should take care of the interests of its co basin states. And it is possible to attain this within the ambit of equitable utilization. The interest of the co-basin states could be on the availability of the water or the manner of utilization by such state. Because, some times the manner of utilization of the waters of an international watercourse may affect the other riparian states irrespective of whether the amount of water is reduced or not. And to do that, ofcourse, requires a close cooperation among the watercourse states involved. And it is akin to the equitable utilization process itself. The state that planned the new use and the other concerned states should communicate for a productive solution. Otherwise a new use introduced to a given basin can disturb the equitable utilization regime established in the basin. And some times the introduction of new uses to the waters of the basin without due regard to the interest of other riparian states may affect future development upstream.

In addition to the above prerequisites, the following points also should be considered before an out-of-basin water transfers are undertaken.

4.1.1.3 The availability of sufficient water that can accommodate the new use

An out-of-basin water transfer necessarily involves expansion of areas which require additional water from past utilizations. Therefore, before any measure regarding new use is taken, the availability of surplus water for the new use should be ascertained. Ofcourse, there can be options to satisfy the additional water need required for the new uses. This is the case where the state which planned the new use creates mechanisms to increase the efficiency of existing uses so that there could be a water surplus from the existing supply. Therefore, before proceeding with a new plan the availability of sufficient water in excess of the existing uses should be ascertained.

4.1.1.4 The Impact of the New Use on the Watercourse Should be assessed

The other point that should be assessed before proceeding with an out-of-basin water transfer is the impact of the new use on the overall available water within the basin and other impacts it might entail. Because, some times new uses could require more water than the existing uses due to various climatic and hydrologic factors. The amount of water required for a certain economic activity varies from place to place depending on various factors. Therefore, a certain amount of water which was sufficient for a given activity in the existing use may not be sufficient for the new use. As such the state should measure the cost and benefit of the new project before proceeding with an out-of-basin water transfer. The cost benefit analysis should take in to account not only the interest of the state contemplating the out-of-basin water transfer program but also the interest of the other basin states. And more importantly the state should take in to account the interest of the basin as a whole, so that it will proceed only with programs that can yield the maximum benefit to the whole basin. Because some times states may introduce new uses only taking in to account the increase in the existing uses without due regard that such uses might entail on the interest of the other co-basin states. Such new uses could be wasteful as compared to the existing utilization.

4.2 Egypt's Out-of-basin Water Transfer Programmes

In this section the programmes of Egypt will be discussed. The discussion will be made in light of the general discussions made above. Therefore, the description of the projects will be highlighted first, followed by the impacts of the projects and other discussions.

4.2.1 The Programmes

Egypt's out-of -basin water transfer programmes are two, the Toshika and Elsalam. The Toshika project is to pump 10 billion m^3 of water per year from the Aswan High dam reservoir put it in a new canal that will transport this water to a series of new land reclamation projects in the

western desert.[4] In order to realize the Toshka project plan the construction of a pumping station (one of the biggest in the world) and a canal that would be fed by 25 million m^3 of water per day from lake Nasser, eventually carrying 5.5 billion m3 of water a year; and the water will then be put in an 80 km long canal called Zayed, linking the Nile to the new valleys of the kharga, Dakhla and farafra oasis located in the south-western desert.[5] When the project comes to completion by 2017, it would enable the Egyptians to irrigate 168,420 hectares of farm land and to settle 3 million Egyptians away from the banks and flood plains of the Nile Valley in the south western desert.[6]

The El-Salaam project relates to a huge land reclamation project in the Sinai Desert and is labeled the North Sinai Agricultural Development.[7] The canal is planned to leave the Nile 20 Km south of the Damietta distributary on the Nile Delta, passes beneath the Suez Canal by means of underground channels and then moves eastwards for about 242 km to the north Sinai town of El-Arish, which is located only 40 km from the border town of the Gaza strip at Rafah. [8] Once the project winds up it is intended to irrigate 250,000 hectares of the Sinai Desert, resettle 2.2 million Egyptians, set up 37 new urban communities.[9] And the annual water requirement of the project is estimated at 4 billion m^3 [10]

Obviously international law does not support such programs. The law states that, regardless of political boundaries, water from one basin should not be diverted outside the area until all water needs of those living within the catchment or basin area are satisfied. [11]

These projects have raised much issue since their inception. Among others the sustainability of the projects and the question of additional waters they require are the two that attract the attention of many scholars. There are also scholars who consider them as a bargaining chip contemplated by Egypt. Some writers like Whittington and Haynes see the move at the out set as "an attempt to lay claims to additional water supplies which can be relinquished in future

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[4]Dale Whittington, The Implications of Micro Dams Development in Ethiopian Highlands and Egypt's New valley Project for Renegotiating the Nile Water Agreement V[th] Nile 2002 Proceedings, February 24-28 (1997) A.A Ethiopia. p.505

[5] Tesfaye Tafesse, The Nile Question, Hydro Politics, Legal Wrangling, Modus Vivendi and Perspectives, (2001), p.52

[6] Ibid

[7] Id, p.53

[8] Ibid

[9] Id, p.54

[10] Ibid

[11] Elhance cited by Tesfaye cited above at note 5, p.51

negotiations at relatively little cost".[12] Waterbury and Whittington also argued on the same line stating that:

> *... the New valley scheme will be a bargaining chip when and if Egypt is obliged to enter into negotiations with the other Nile riparian over allocation of waters ..... [the creation] of such huge 'fact' will effectively preclude accommodation of the growing needs for water of its neighbors, especially those of Ethiopia.*[13]

This holds true especially when we look back in to the situation in the Nile basin where extensive use of the waters of the river have been placed by Egypt since time immemorial. And Egypt used to claim a natural and historic right over the waters of the Nile basin merely for the fact that it started utilizing it before the other riparian states. And it argues time and again that her past utilization should continue without any reduction in amount. It is partly on this assumption, the assumption that the existing amount continues in the future too, that it defends the new out-of-basin programs by arguing that it will use the existing water supply efficiently. And now the tendency seems that if these projects are finalized and start utilizing the waters of Nile, it is more likely that Egypt will follow the same line of argument, that is such amount of water utilized by the projects should be considered as a natural and historic right.

And as to the nature of the projects Tesfaye rightly puts it in the following paragraph:

> *... In sum, it could be asserted that the Egyptian out-of-basin transfer of the Nile waters through the Toshika and El-Salaam projects represents one of the few cases in the world where water is being diverted from an international river basin by one*

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[12] Whittington and Haynes, K. (1985), Nile Water for whom? Emerging Conflicts in Water Allocation for Agricultural Expansion in Egypt and Sudan "in Beaumont, p. & Mc Lachlan, K.(eds). Agricultural Development in the Middle East". Chichester: John Wiley & sons Ltd, cited by Tesfaye, cited above at note 5, p.54

[13] Waterbury, J. and Whittington D; (1998), "Playing Checken on the Nile? The Implications of Micro dam Development in the Ethiopian Highlands & Egypts New Valley Projects," Natural Resources Forum, Vol. 22. No.3, pp.155 - 163 cited by Tesfaye cited above at note 5, p.54

riparian state to areas outside the basin without the consent of any of the co-riparian states that share the resources of the basin.[14]

The other argument is based on the availability of additional water for the contemplated projects. Regarding this the response of Egypt for the issue is that it can utilize its quota under the 1959 agreement in an efficient manner so as to get surplus for the new programmes and second by using other sources of water such as reusing reclaimed waste water and abstracting ground water.[15] However, this cannot solve the matter sufficiently. Because of the huge investment required to realize the second option and the problem of the share in the 1959 agreement. The 1959 agreement divided the Nile waters between Egypt and Sudan leaving the other riparian states without any share. However such apportionment cannot sustain in the future as the other riparian states start to utilize their share from the waters of the basin. As the 1959 quota of Egypt does not reflect its legitimate share and the legitimate share of Egypt is by far lower that that is apportioned pursuant to the Agreement, trying to effectively utilizing it cannot solve the matter. Even if we assume the quota of Egypt under the 1959 agreement to be valid that will not end the question. At present Egypt has utilized 8 billion m3 of water above her 1959 quota benefiting from 2-3 billion m3 from the unutilized quota of the Sudan on 'loan' basis, an other 2 billions from underground aquifers, and about 4 billions of recycled drainage water.[16] Therefore, if the Sudan come up with its own project and utilize its quota then, Egypt will be left with much less water than it used to be. This in turn will leave the programmes in a very great problem.

Given these facts and other constraints the realization of the project seems unlikely. However, Egypt's ambitious move can be interpreted with certainty as a preemptive move that is designed to create facts on the ground prior to the settlement of outstanding water reallocation issues with other Nile riparian states.[17] As such the Egyptian out-of-basin transfer is transforming the hydro politics of the Nile Basin even into a more complex regional preoccupation.[18]

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[14]Tesfaye cited above at note 5, pp. 54-55
[15] Waterbury & Whittington cited by Tesfaye cited above at note 5, p.53
[16] Tesfaye cited above at note5, p.57
[17] Id, p.58
[18] Ibid

If we see the acts of Egypt in light of the above criterion we can clearly see its flaws. As stated above before moving to a new use the state must see the availability of sufficient waters. But Egypt did it without such consideration to continue being the sole user of the waters of the basin to the exclusion of the other upper riparian states. And such action can indicate the desire of Egypt to pursue unilateral development measures in disregard to the requirement of equitable utilization regarding the issue. As discussed in the preceeding section an agreement regarding the share of the waters is required before proceding an out of basin water transfer. Here one may say that a state can divert a certain amount of water on the basis of equitable utilization leaving sufficient amount for the others equitable entitlement without securing a specific agreement as equitable utilization by it self perform that. But this is true only in principle. When we come to the reality we have to look in to the facts surrounding the case. As we have seen in the discussion concerning the projects, the amount of water estimated for the projects assume additional waters over the existing uses of Egypt. And the existing water utilization of Egypt is on the basis of the 1959 agreement and we have said that the apportionment made under the 1959 treaty did not reflect the equitable share of Egypt and the Sudan. And also the arrangement made under the 1959 agreement does not bind all the Nile basin states as a whole. Therefore, the amount of water presently used by Egypt is not her legal entitlement. And Egypt can not claim such amount of water in the future as a legal entitlement. And since it does not have sufficient water to be used by the existing programs, let alone, additional programs, Egypt should first secure the consent of the other riparian states with a view to ascertain the availability of the waters for the projects.

4.2.2 The Impact of the Programmes on the Utilization of the Waters of the Basin by the Upper Riparian States

The projects of Egypt have also a very great negative impact on the future utilization of the waters of the basin by the other riparian states. As we have said time and again the projects are out side the course of the river. And the effect of these projects will extend the area covered by the basin beyond what it used to be. This in effect increase the demand for more water than the existing demand. And in addition to this the users of the new programmes will claim a right for the continued enjoyment of the waters of the Nile Basin. Then after establishing the use of the water such areas will claim in the future an equitable and reasonable utilization of the waters of the Nile basin. And this will affect the interest of the other basin states, since this will increase the demand without an increase in the supply. This is a clear consequence of the nature of international basin. Because the water right of states down stream emanates from the fact that the river cross the boundaries of the upper riparian to the lower riparian. And this fact is not stranger to the Nile basin states. Egypt claimed the right over the waters of the Nile because the water reached its territory. Therefore these areas will not be exceptions. And once the waters of the river reach there and they established a use, then they will claim it as a right to be respected in the future. As such the act of Egypt in effect is inviting a stranger in to a common meal without the consent of the other parties involved. Every riparian has its own say in the waters of the basin. And the waters of the basin should not be given to a third party with out the consent of those who have a right on it. The extension of the basin area due to the unilateral water diversion of the waters of the Nile by Egypt will have a negative impact on the future utilization of the waters by the other riparian state. Because, the realization of the projects in the present available waters of the basin will create a possible shortage for the future utilization by upper riparian states. In addition to this the fact that the new programmes require an additional water supply over and above the present supply that reachs Egypt will make the situation more severe. Because, when the upper riparian states starts to utilize a substantial amount of water within their equitable share, the amount of water that will reach Egypt will not be sufficient for the contemplated projects. And this may be met by unfavourable response from Egypt. Such utilization by the riparian states may lead even to conflict given the trend of Egypt regarding the waters of the Nile Basin. Therefore, before going in to such unnecessary encounter the Nile Basin States should come and discuss to avoid the potential conflict that can arise due to the

competing utilization with a view to achieve an equitable utilization regime in the Nile Basin. Therefore, such state should have given their consent before such projects were implemented. The action of Egypt that did not secure the agreement of the other riparian states is against the sprit of equitable utilization and does not have any support in international law.

4.2.3 The Compatibility of Egypt's Projects with the Projects of the Upper Riparian States

The other point to be examined with respect to the programs of Egypt is their compatibility with other programs of the basin states. Because, despite the legal impacts they entail the factual situation also deserves evaluation. In addition to this the fact that the upper riparian states are starting utilizing their equitable share and it is not objectionable under equitable utilization strengthens the scenario. And now, therefore, let us see some of the programmes being undertaken by the other riparian states of the Nile Basin by giving more emphasis to the programs of Ethiopia.

4.2.3.1 The Programmes of Ethiopia

A. Micro-dam programs of Ethiopia

Usually the negotiating power of upstream state in an international basin is stronger than their down stream counter parts. However, this is not the case in the Nile basin. And as such Ethiopia's negotiating position in respect of the down stream states, especially Egypt used to be weaker than it should have been. Whittington explained this fact in the following manner:

> *Ethiopia's negotiating position with respect to Egypt is weakened by the absence of facts on the ground, i.e. existing irrigation projects that require the use of the Nile waters.*[19]

But these days the picture is quite different than what Whittington has observed. Ethiopia is on the move to develop micro-dams within the basin so as to utilize the waters of the river for the

[19]Dale Whittington, cited above at note 4,

benefit of her people. And the fact that such projects require lesser finance and the fact that the farmers also can handle by themselves makes the scenario more feasible.

B. Tributaries Development Projects

The other area in which Ethiopia is planning to utilize the waters of Nile is through developing the tributaries of the Blue Nile River. The projects are designed on the tributaries of Blue Nile instead of the main river. Regarding the projects, Yilma Demissie has assessed the various components of the programs and their water requirement. [20] The assessment is made on the basis of the master plan documents of the river basin and other related works carried out in the basin.[21] And the assessment considers 17 irrigation projects that can develop a command area of 220,416 ha of land.[22] Accordingly the total water requirement to fulfill the irrigation projects excluding the losses that could happen at conveyance, distribution and application to the plant was found to be 1.532 Billion Cubic Meters.[23] And if an overall surface irrigation system efficiency of 40% to 70% is assumed, the gross volume of water to be consumed in Ethiopia is estimated within the range of 2.2 BCM to 3.83 BCM per annum.[24] But the impact of these projects on the available waters down stream is very insignificant as compared to the total annual flow of the main river that crosses the boarder. And the reduction of the flow of the water at the boarder due to the implementation of these projects ranges from 5% to 7.7% of the mean annual flow [of] 49.7 BCM.[25] However despite the insignificant amount as compared to the mean annual flow of the river down stream, the implementation of these projects will have a very significant role fore Ethiopia. The irrigation schemes will contribute their share to alleviate poverty and secure food self-sufficiency in the basin and the country at large. In addition to the irrigation these projects can produce a significant amount of hydroelectric powers that can contribute to the development of the country. According to the assessment these projects will have the capacity to irrigate from

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[20] Yilma Demissie, Assessment of Water Demand for Irrigation Development in Abbay Basin (A Case of Tributaries Development Scenario), The Nile Basin Development Forum (NBDF) 2006 Proceedings, Addis Ababa Ethiopia, Vol. I, p. 54

[21] Ibid

[22] Ibid

[23] Id, p.62

[24] Ibid

[25] Ibid

370,000 to 440,000 hectares within the basin and to produce from 26,000 to 28,000 GWh/year hydroelectric powers.[26]

From this we can easily see the benefits of these projects for Ethiopia, irrespective of the impacts such projects might have on the programs down stream. Ofcourse, these projects will not be compatible with the projects contemplated downstream by Egypt. Because as discussed before the projects of Egypt assume the availability of more water in the basin than the existing amount that reaches Egypt or at least an amount equal to the present supply. But the reality is there will not be any additional water supply but rather a substantial decrease due to the water projects in the upper riparian states. And such utilizations are not objectionable by the lower riparian states as they are utilizing their legitimate right on the basis of equitable utilization.

Such projects will require much more water than it used to be. And these waters are to be taken from the tributaries of the Nile river found within the territories of Ethiopia. Such utilization ultimately will reduce the waters of Nile that riches the lower riparian. And the fact that much of the waters of Nile come from Ethiopia make the situation more complex. This fact is clearly observed by Beaver in the following paragraph:

> *If the river Nile were dependent up on The water derived from the lakes plateau and southern Sudan the Ancient and modern civilization of Egypt would never have existed, for the river have no flooding capacity and its volume in lower Egypt would be small indeed for it receives no permanent tributary below Atbara. Fortunately however, its two greatest tributaries the Blue Nile and the Atbara take their rise in the [Abyssinian] Highlands.*[27]

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[26] BCEOM, part 1, Main Report(1998), cited by Yilma Cited above at note 20, p.62

[27] Stanley Beaver cited by Yacob Arsano, Conflict Over the Control of the Nile Waters and Their Impacts on International Politics On the Horn, An Essay Presented to the Department of PSIR College of Social Science AAU, in Partial Satisfaction of the Requirement for the Degree of Bachelor of Arts July (1980) p.8

This gives us a clear picture of the situation in the Nile basin. The fact that the availability of sufficient water in the Nile basin is dependent on the amount of water that originates in Ethiopia increases the importance of Ethiopia and the impacts of her action. And the fact that the programs of Ethiopia are more certain make the situation more complex. Because the Ethiopian programs will be realized in either of the two option. One through realizing its equitable utilization within the ambit of equitable utilization. And the second option is to realize the programs even without respecting the requirements of equitable utilization and engaging in the scramble for the waters of the Nile Basin. And as there is no any treaty that validly bind Ethiopia to respect the continued flow of the waters of the river down stream, the only thing that could bind her is the question of equitable utilization. And if the other riparian states do not observe the requirement of equitable utilization and engage in their own programs there is no reason for Ethiopia to sit idle and see other utilize the waters. But it should follow suit and utilize the waters of the basin, in accordance with its developmental policy irrespective of the measures down stream.And as such any thing to be done down stream should consider the actions of Ethiopia or forecast the possible actions of the country. However, such endeavourer can not be successful without the cooperation of Ethiopia to adjust its water utilizations so as to accommodate the water needs of the lower riparian states

4.2.3.2 The two dam projects of the Sudan

The Sudan had a plan to build two more dams on the Nile River. One of the dams which is called as Merowe is planned to be located on the fourth cataract and is designed to generate 1000 MW of electricity per year while the second one, known by the name of kajbor Dam will be located on the third cataract and is planned to possess an installed capacity of 300 MW of power and to resettle 100,000 people.[28]

From the 1959 share of the Sudan Egypt has been utilizing 2-3 billion m3 of water annually.[29] Therefore if these projects are realized and started utilizing the waters of the Nile the waters to be left to Egypt will diminish even the other riparian states remain within their present

[28] Tesfaye cited above at note 5, p.42
[29] Ibid

insignificant utilization. And this will have a great impact on the plan of Egypt since the projects require additional water than the present supply no matter how this additional water is sought to be secured. Obviously the possible sources of the water are to be secured either by increasing the supply or efficiently utilizing the present supply for the existing uses thereby the surplus secured from such utilization will be used for the new projects. But now the scenario is completely changed. There will not be any additional water assuming the amount of rainfall in the upper riparian will continue as it was for centuries. And regarding effective utilization of the present supply this too will not work. Because as has been discussed the present supply will be reduced by the projects of the Sudan which were not there. In general since the projects of Egypt assumed at least the present supply of Egypt which will not continue in the near future in the face of the projects of the Sudan, they have to be seen again by the programmers.

4.2.3.3 Hydrologic Projects of the Lake Region

For lack of sufficient information that warrants presentation in this work, I could not include the specific projects implemented or contemplated by the equatorial riparian states. However, this does not make much difference for the purpose of the study.

The purpose of illustrating the projects in this area was to show the compatibility of the programs with the programs of Egypt as all are dependent on the waters of the same basin. And this task can be done by a mere assumption of facts. Of course it would have been better had the specific projects and their specific water requirement been identified.

At present the utilization of the waters of the basin by the equatorial basin states is insignificant. And the projects of Egypt assumed the present water utilization by all the basin states and itself. In addition to this Egypt's programs assumed increase in the available water by efficiently utilizing the existing amount of water. Now, therefore, if the equatorial riparian states utilize the waters of the basin more than the present utilization, the problem becomes apparent. And as we have said time and again the upper riparian did not utilize their equitable shares. As such Egypt can not object such utilization on the basis of international law as it is their illegitimate right for an equitable and reasonable utilization of the waters of the basin to which they are riparian states. Therefore, the only thing that can be said is that the projects of Egypt are done without

calculating the available water in the basin. And the purpose of such project can only be a strategy designed by Egypt to show her increased water requirement with a view to strengthen its bargaining position to sustain the existing water supply.

As raised and discussed under chapter three that the causing of harm is not out rightly prohibited so far as the utilization is within the ambit of equitable utilization. This conclusion is pertinent for the present discussion because if the current utilization and the projects in Egypt together with the contemplated and future uses in the upper riparian states will raise the same issue. This is because any use in the upper riparian states will necessarily reduce the waters that reach Egypt. And if all the upper riparian states start utilizing the waters of the river Egypt will face a shortage of water for irrigation in the basin area let alone the out-of-basin projects. And as it is discussed above such utilization by the upper riparian states may not be objectionable. Obviously, it is clear that the upper riparian states did not utilize their equitable share from the waters of the river. And the time will not be far where these states will come up with their own projects to utilize their shares. At this point, then, the projects as well as the overall water utilization of Egypt will collide with the upstream projects. Therefore, it is today that the issue has to be solved. And the share of Egypt has to be ascertained before any of the projects materialized. Then it can utilize its share in accordance with its agricultural and environmental policies. Otherwise the question will be raised in the near future, when each state engages in its own unilateral programs.

4.2.4 The Implication of the Projects of Egypt

As we have seen from the discussion made under the previous sections, the projects of Egypt are being undertaken without the consultation and cooperation of the other riparian states of the basin. Obviously such behaviour will encourage the other basin states to undertake their own programmes without consulting each other. And unilateral development of the waters of an international basin will end up in conflict as a result of the unnecessary competition over the limited supply. And also since unilateral development does not take in to account the measure of utilization by the other co riparian state, it will result in an inefficient utilization of the waters of an international watercourse.

The other consideration to be addressed here is the fact that the riparian states in the basin may view it from different perspectives. Some may think that the behaviour of Egypt regarding the expansion of the programmes as an act aimed at creating facts on the ground and use them as negotiating grounds. And such fear is a reasonable fear in the face of Egypt's common behaviour. It is also supported by many writers that the bargaining power of the upper riparian states in relation to the lower riparian states in the Nile is weakened due to the absence of facts on the ground in the upper riparian states as compared to the lower riparian states. Therefore coupled with past experiences in the basin regarding the claim of Egypt, the upper riparian states may think it as a warning to move to the scramble of the waters of the basin. Because if Egypt materializes such projects as planned and started utilizing the waters by these projects as envisaged, then it will have an effect of increasing the present demand of Egypt. And it will be difficult for the upper riparian states to utilize their share without the unwarranted interference of Egypt.

The other problem these programmes will entail is regarding the future utilization of the upper riparian states. Because if these projects establish the use of the water and continue to use it will have an impact on future developments upstream by making them apparently inequitable. Therefore, taking these and other consideration the only sound option for the upper riparian states could be establishing their demand as soon as possible. And this will not solve the issue of water utilization of the Nile basin. As such the only healthy option for the basin states as a whole is to come together and devise a viable solution that can satisfy the interest of the basin states as a whole. And since the realization of the projects of Egypt is dependent on the possible measures of the upper riparian states, the cooperation of these states is indispensable. Because as we have seen before the projects of Egypt assumed the availability of more water supply in the future more than the present supply or at least the same supply as the present. But this assumption will be beaten due to the act of Egypt itself. As such it will be difficult for Egypt to realize the programes as designed without the cooperation of the other riparian states. Elhance captured the situation in the following words

> *...the implementation of the plans is contingent upon the availability of large amounts freshwater which Egypt currently does not have, nor is it likely to have any time in the foreseeable future*[30]

Therefore, even though the success of the projects is dependent on the acts of the upper riparian states the act of Egypt will trigger an action that will not accelerate the success but the competition for the waters. And it is normal for such states to move on as the past utilizations of Egypt have created many problem on the utilization of these states even though the obstacles are not warranted by international law. Therefore, at this time they may sit and see that such utilization create problems in the future. And it is now that they have to act accordingly.

[30] Elhance, Arun P, Hydropolitics in the Third World:Conflict and Cooperation in International River Basins, cited by Tesfaye cited above at note 5, p.58

Conclusion and Recommendation

Conclusion

From the discussions made it is clear that the programmes of Egypt require a prior agreement among the basin states concerned. Let alone without a prior agreement establishing an equitable utilization regime in the basin, the consent of all the watercourse states concerned is mandatory before undertaking an out-of-basin water transfer, had an equitable utilization regime been established in the basin. This is because; first since equitable utilization is not static but rather changes with time and circumstances it has to be reviewed accordingly. Therefore any equitable utilization regime established by the basin states should be checked before any use is introduced on the existing utilization regime. Second a new use by any watercourse state whether downstream or upstream can affect water utilization in a given basin. Even though the new use by one state may not affect the right of other riparian states at present it will have an impact on the future utilization of such states. This can occur in two ways. One since the waters of the basin may be reduced due to climate change and then the existing water supply reduced even for the existing utilization scheme and such a reduction in supply could make the existing utilization inequitable. The other is that the new use introduced by one state which does not affect the present equilibrium can make future utilization by the other riparian sates inequitable. The underling principle in equitable utilization is negotiation and consultation among the stakeholders, and any new use must secure the consent of the basin states concerned before it is put into use. The other point that should be addressed is the availability of sufficient water to accommodate additional uses over and above the existing utilization schemes. From the discussions made before, it is possible to see the assumption of Egypt regarding the availability of sufficient water to realize the projects. However, the scenario is different in the basin. The waters of Nile which the projects of Egypt aimed to use are desperately needed elsewhere within the basin by the other riparian states. Therefore, since the projects are planned with a wrong assumption as to the amount of water available in the basin the realization of the projects is questionable.

And the fact that the projects are contemplated by the lower most riparian state does not change the scenario. Because such utilization also has its own impact even on the water utilization by the upper riparian states let alone the overall water utilization of the basin. As such the assumption that the manner of utilization by a down stream state cannot trigger a reaction from upper riparian states once an equitable utilization regime is established does not hold much. And such conclusion should be assessed in light of the nature of equitable utilization itself. The doctrine of equitable utilization is flexible and what is an equitable apportionment may change over time.[1] As such since what is equitable apportionment by the riparian states concerned today may not be of the same amount and pattern tomorrow it has to be evaluated at the relevant time and anything that can make possible future action uncontrollable should be avoided today. Therefore, every attempt to introduce new uses should secure the cooperation of all the concerned states to mitigate such and other negative impacts. Any unilateral development of a watercourse is against the sprit of equitable utilization and every state riparian to an international watercourse should work together so as to bring in to the attention of the stakeholders every programmes that aimed at utilizing the waters of the basin. From the nature of equitable utilization it is understandable that a new use have the potential to disturb the equilibrium in the basin. As stated by Mccafrey that:

> *New upstream uses may have physical impacts upon those downstream; and new down stream uses may have legal impacts upon those upstream, because they may alter the equitable balance of uses in such a way as to make subsequent new uses in an upstream state inequitable.*[2]

And it is from this angle too that, the programmes of Egypt should be analysed. Because as we have seen in the discussions made before, the upper riparian states are not utilizing their equitable share from the waters of the basin. And the trend of Egypt is always in the direction of creating the facts that require the waters of the basin and then argue that it has a vested right on the amount of waters used by such projects. Therefore coupled with the above arguments it can

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[1] Stephen Macafney, The Law of International Water Courese, Non-Navigational Uses, (2001), P.328

[2] Id, p.345

be concluded with certainty that the programes of Egypt are aimed not only on increasing the present benefit of Egypt but also at precluding future utilization of the upper riparian states. And such act will definitely trigger a reaction from the upper riparian states. Because from the past experience in the basin they are well aware of the tactics of Egypt that aimed at creating facts on the ground that requires the waters of the basin and then firmly argue for the continuance of such amount of waters. As such the other riparian states will not let these happen again. Rather they may opt to engage in their own unilateral programs irrespective of the impact of such programs on the water utilization of the other riparian states.

In addition to this the act of Egypt is against her own position advanced some time in the past. Here it is important to recall what Egypt has expressed her position regarding the utilization of the waters of international rivers. In its country report presented at an international meeting of International River Organizations held at Dakar in 1981, Egypt argued that:

> *In the absence of treaty stipulations to the contrary each riparian country has the full right to maintain the status quo of the rivers flowing on its territory and that it results from this principle that no country has the right to undertake any positive or negative measure that could have an impact on the river's flow in other countries.*[3]

And if we see this argument together with the present action of Egypt we can clearly see the inconsistency regarding the position of Egypt that aimed at securing the current benefit irrespective of the future impact that may entail. At present Egypt has engaged in unilateral desert reclamation programs that change the status qua in the basin. And such projects definitely have a negative impact on the flow of the waters of the river within the other riparian states. And it is a clear indication that Egypt does not have a consistent position regarding the waters of Nile. Rather her position changes as the situation changes in the basin.

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[3] Country Report, Egypt; Paper presented at the International Meeting of International River Organizations held at Dakar on 5-14, May 1981, par.3, Cited by B.A Godan, African Shared Water Resources, Legal and Institutional Aspects of the Nile Niger and Senegal River Systems, (1985), P.39

In general the programs of Egypt are against the sprit of equitable utilization and can led to an inefficient utilization of the water resource of the basin and thereby led to shortage and ultimately in to a conflict among the watercourse states of the basin. Equitable utilization requires the close cooperation and participation of all the basin states. Any state that plans a new use should the other stake holders. As such Egypt should move towards this direction and secure the consent of the other basin states.

Recommendation

We have seen that in the Nile Basin there is no equitable utilization regime so far. And the upper riparian states are on the move to utilize the waters of the basin and realize their equitable and reasonable share in the waters of Nile. This move coupled with the out-of-basin water transfer programmes of Egypt increases the tension in the basin. And it is time to get ride of the situation and devise a workable mechanism to ascertain an equitable and reasonable utilization of the waters of the basin among the basin states.

Equitable utilization requires the close coopcration and participation of all the basin states. Any state that plans a new use should consult the other stake holders. As such Egypt should move towards this direction and secure the consent and cooperation of the other basin states.
The Nile basin waters can satisfy the interest of all the riparian states if the come together in the sprit of cooperation. As pointed out by one writer that:

> *Nile waters appears to have a convenient unity. If Egypt's diversion attempts were to be brought to a halt, and if policies would allow the over all resource to be considered as a whole, then a number of economically rational and environmentally sensible decisions could be made, which would maximize the returns to the limited water resource of this international river.* [4]

[4] Daniel Kendie, Egypt and the Hydropolitics of the Blue Nile River, Available at http://www.hsu.edu/faculty/afo

We have seen that the Nile Basin states are in search of a legal regime for the utilization of the waters of the basin. And as we can see from the development of international law regarding the non-navigational uses of international watercourses, the waters should be utilized in an equitable and reasonable manner among the watercourse states. And the Nile basin states are also towards the same direction even though they lack a concrete understanding and practical application of the concept. These days they are trying to develop a comprehensive legal framework for an equitable and reasonable utilization of the waters of the basin. And they have established institutions like the Nile Basin Initiative (NBI) to coordinate the efforts of the basin states and develop a legal frame work for the equitable utilization of the waters of the River. And it seems in the right direction in achieving its aim. And therefore, the situation in the Nile Basin should be analyzed with this general consideration. The Nile Basin states' actions should also be evaluated against their common agenda as contemplated within the Nile Basin Initiative.
Such institution should be effectively utilized to bring the desired goal of establishing an equitable utilization regime in the basin. And it has to be utilized in promoting cooperation among the basin states to utilize and manage the water resources for the benefit of the inhabitants of the basin.

Such institutions can facilitate the effort of the basin states and create the plate form for consultation and negotiation. As such the Nile Basin states should use the opportunity to create a basin wide arrangement. And the question of additional water needs by any riparian state can be answered through such arrangements. The other basin states should also come up with their own projects and consult with one another with a view to have a coordinated effort in realizing the projects by establishing an equitable utilization scheme. They should also try not to engage in any negative activity that can be a potential to frustrate cooperation among the basin states.

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Approval Sheet by the Board of Examiners

Equitable Utilization versus Out-of-Basin Water Transfer

International Watercourses: The Case of Nile

By

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Examiners

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Addis Ababa, Ethiopia

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