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COLLEGE OF LAW AND GOVERNANCE

**UTILIZATION OF TRANSBOUNDARY WATERCOURSES AND THE
CLAIM OF 'HISTORICAL RIGHTS': SPECIAL FOCUS ON THE NILE**

BY: KIDIST EJERSSA

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Utilization of Transboundary Watercourses and the Claim of Historical Rights: Special Focus on the Nile

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DECLARATION

I, **Kidist Ejerssa**, hereby declare that this thesis: 'Utilization of Transboundary Watercourses and the Claim of Historical Rights: Special Focus on the Nile', is original work and has never been submitted for any degree or examination in any other institution. Any secondary information has been duly acknowledged.

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CHAPTER ONE

INTRODUCTION

1.1 Background of the study

British historian Arnold Toynbee influentially posited that the history of civilization was centrally driven by a dynamic process of response to environmental challenges. Difficult challenges provoked exceptional, civilizing responses in ascendant societies, while inadequate responses contributed to stagnancy, subordination, and collapse in declining ones. Prominent among the environmental challenges was water.¹ Indeed, water gave rise to civilizations seven thousand years ago and sustains it still.² Water sustained billions of lives on planet earth as the human race has put it in to a variety of beneficial uses, navigational and non-navigational.

As the world population continues to be propelled towards 9 billion by 2050, and with so many third world inhabitants starting to move up towards consumption, waste generation levels of the one-fifth living in the industrial nation, demand for more fresh water is continuing to soar.³

The challenge is even more pressing when the resource is shared by two or more countries, where by each riparian will come up with varied claims to the use of the resource after certain scheme and basis of utilization and in the end, reaching on a consensus over the manner of utilizing the resource becomes quite difficult.

About 264 of the world's largest river basins – home to about 40 per cent of the world's population – are shared by more than a nation. This reality requires mechanisms to be devised to assure that these waters are managed cooperatively, if water is not to become a major problem for each nation's security.⁴ The present work is concerned with one of such shared water resources in Africa- the Nile River Basin.

¹ Steven Solomon (2011), *Water: The Epic Struggle for Wealth, Power and Civilization*, P. 15.

² Fekri Hassan (2003), Water Management and Early Civilization: From Cooperation to Conflict, *Inst. of Archaeology UCL*, as cited in: Fasil Amdetsion (2008), Scrutinizing the Scorpion Problematique: Arguments in Favour of the Continued Relevance of International Law and a Multidisciplinary Approach to Resolving the Nile Dispute, 44 *Texas International Law Journal*, p. 1.

³ According to the 'World Population Prospects: the 2012 Revision', the world population is expected to project to 8.1 Billion by 2025 and 9.6 Billion by 2050. <<http://esa.un.org/unpd/wpp/index.htm>>, United Nations Department of Economic and Social Affairs, Population Division, Population Estimates and Projection Division, last visited 05 December 2013. Steven Solomon (2011), supra note 1, P. 368.

⁴ Joseph W. Dellapenna (2001), The Customary International Law of transboundary fresh waters, *Int. J. Global Environmental Issues, Vol1 Nos. Issues, Vol. 1, Nos. ¾*, P. 265.

The Nile River and its basin, home to an estimated population of 423million, ensconces over a distinctive geophysical cord connecting eleven sovereign states: Egypt, Sudan, South Sudan, Eritrea, Ethiopia, Kenya, Uganda, Rwanda, Burundi, Tanzania and Congo.⁵ The Nile River is 6,825 km long and its catchment basin covers over three million km². Although the Nile is the longest river in the world, it carries only one thirty-fifth the volume of the Amazon, the second longest river in the world.⁶ This is particularly explained by the low runoff coefficient of the Nile (below 5%) and the fact that about two-fifths of the basin area contributes little or no runoff as it is comprised of arid and hyper arid dry lands.⁷ With the two major tributaries, the Blue Nile and the White Nile, the average annual flow of the Nile is 84 billion cubic meter (BCM) as measured at Aswan. On the average about 85 percent of the water in Lake Nasser (created as a result of the Aswan Dam) comes from the Ethiopian Plateau and the rest is contributed by the East African Plateau system.⁸

Though an international river traversing through more than ten states, the pattern of utilization over the waters of the Nile, however, is clearly tilted towards few states, notably that of Egypt and the Sudan, and this could be broadly attributable to the economic, historical and political antecedent in the basin area.⁹ This has affected the legal and institutional development on the basin and also led to different treaty and non-treaty based user rights claims to the waters of the River. As McCaffrey¹⁰ has put it, while the waters of the Nile have been used by Egyptians for irrigation for some 5000 years, Ethiopia in the Eastern Nile Basin (principally the Blue Nile and Atbara, but also the Sobat), and the states in the upper White Nile Sub Basin have only recently began to make significant use of them. Quoting Garreston¹¹ he further stated that the Nile Basin is perhaps the archetype of the usual historical pattern of international river basin development:

⁵ Tadesse Kassa Woldetsadik (2013), *International Watercourse Law in the Nile River Basin: Three States at a crossroads*, P. 1.

⁶ Christina M. Carroll (1999-2000), Past and Future Legal Framework of the Nile River Basin, 12 *Geo. Int'l Envtl L. Rev.* 269, P. 272-273, downloaded from <<http://henionline.org>>, last visited: Aug. 14, 2013.

⁷ The Nile Basin Initiative, Understanding the Nile, <http://nilebasin.org/index.php/about-us/the-river-nile>, visited March 2014.

⁸ Nile River, (2014), Encyclopedia Britannica Online, Academic Edition, <http://www.britannica.com/EBchecked/topic/415347/Nile-River/37075/Climate-and-hydrology>.

⁹ See generally: John Waterbury (Winter/spring 1997), Is the Status Quo in the Nile Basin Viable? *Brown Journal of World Affairs*, Vol. IV, Issue 1.

¹⁰ Stephen C. McCaffrey (2007), *The Law of International Watercourses: Non-navigational Uses* (2nd ed.), P. 260.

¹¹ Albert H. Garreston (2007), The Nile Basin in International Drainage Basins, as cited in: Stephen C. McCaffrey, (2007), *ibid.*

early and significant development in the delta and lower basin and later-in this instance thousands of years later – development in the upper basin.

The first hydraulic work on the Nile, the Delta Barrage, was constructed in Egypt in the 19th Century. By 1886, the area under perennial irrigation in Egypt was about three million acres; this consumed the entire outflow of the river during the low period. The remaining area, yielding only one crop under basin irrigation, was two million acres at that time. Egypt claims an ‘historical right’ to the water from this period.¹²

The core legal regime regulating the rights of utilization and management of the Nile waters has been constituted through an intricate web of treaties and incompatible set of national legal conceptions organized in the first half of twentieth century. For the most part, the legal schemes projected to address colonial-epoch, strategic political and economic considerations.¹³ Important treaties addressing the Nile include those signed in 1902, 1929 and 1959-the latter two being the most significant and controversial.¹⁴

It is propounded that Egypt, because of its geographical location within the basin, its established uses from time immemorial, the existing agreements and generally accepted principles of international law, claims “historical rights” to a certain amount of water, fixed at 55.5 billion cubic meters per year, under the 1959 agreement.¹⁵ Egypt based its claim on established usage, known also as “senior” or “acquired” rights. An allied rule to this is that of “appreciable harm” which states that no riparian should use its water resource in such a manner as to cause appreciable harm to any other riparian. This latter rule generally protects those with acquired or senior rights, because they have been the first to develop the resource and to have incurred large sunk costs in water storage and delivery.¹⁶ The Egyptian position since 1959 has been that they can discuss anything so long as the 1959 allocation is not called in to question.¹⁷

¹² Dante A. Caponera, Legal Aspects of Transboundary River Basins in the Middle East: The Al Asi (Orontes), The Jordan and the Nile, *Natural Resource Journal*, Vol. 33, P. 652.

¹³ Tadesse Kassa Woldetsadik (2013), *supra* note 5, P. 2.

¹⁴ Fasil Amdetsion (2008), Scrutinizing the Scorpion Problematique: Arguments in Favour of the Continued Relevance of International Law and a Multidisciplinary Approach to Resolving the Nile Dispute, 44 *Texas International Law Journal*, 1, P. 22.

¹⁵ Dante A. Caponera, *supra* note 12, P. 559.

¹⁶ John Waterbury (Winter/spring 1997), *supra* note 9, P. 290.

¹⁷ *Ibid* P. 294

Egypt is particularly sensitive to the possibility of development of tributaries of the upper Nile Basin. Its reliance on the Nile waters over the millennia has led it to believe that it has ‘natural and historical rights’ or ‘acquired rights’ in those waters. This belief is reflected in positions of Egypt in international fora where it contended “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 rivers flow in other countries”.¹⁸

1.2 Problem statement

It is only recently that Ethiopia launched the construction of what finally came to be known as the Great Ethiopian Renaissance Dam (GERD) over the Blue Nile to produce over 6000 Mega Watts of hydroelectric power.¹⁹ This event occasioned the first major effort of large scale use from the river by an upper riparian.

This enterprise by Ethiopia has been received by Egypt as nothing but a national threat to its ‘historically’ sustained use of the floods of the River.²⁰

The Nile has, since time immemorial, supported life in Egypt in contrast to most other riparians. In Egypt, a desert agricultural country, the entire life of the nation has been dependent on the river’s waters. As President Anwar Sadat stated in 1978, “We depend upon the Nile 100 per cent in our life, so if anyone, at any moment, thinks of depriving us of our life, we shall never hesitate to go to war”.²¹

Such long sustained use from the waters of the river by Egypt has led to an intricate set of claim to the continuance of such patterns of use for the time to come. This has been consolidating in to a claim to the waters of the Nile based on *historic/ acquired* rights to shared water resources.

¹⁸ Country Report, Egypt, paper presented at the Interregional Meeting of International River Organizations held at Dakar, 5-14 May 1981, para. 3, as cited in Stephen McCaffery (2007), *supra* note 10, P. 130

¹⁹ Launch of the construction of GERD, April 2, 2011, <http://www.mfa.gov.et/>, visited April 2014

²⁰ Reaction continued, <http://america.aljazeera.com/opinions/2014/2/egypt-disputes-ethiopiarenaissancedam.html> . Egypt demand that Ethiopia suspend construction of its mega-dam on the Nile, further escalating tensions between the two states. Fearing that Ethiopia’s project would reduce the river’s flow, Egypt calls for a halt in construction. Otherwise, it has vowed to protect its “historical rights” to the Nile at “any cost.”

²¹ Arthur Okoth-owiro (2004), *State Succession and International Treaty Commitments: A case Study of the Nile Water Treaties*, occasional papers (East Africa), Konrad Adenauer Stiftung and Law and Policy Research Foundation, P.4.

The claim to historical/natural rights (prior use) constituted a central pillar of downstream rights. The two notions also constituted the doctrinal platform on which the water-sharing schemes and institutional arrangements instituted through the two Nile agreements, concluded in 1929 and 1959, have been premised. The Nile treaties not only made explicit reference to these rights, they also formalized the historical water utilization patterns entrenched in the lower-reaches of the Nile Basin.²² In effect, the 1929²³ and 1959²⁴ water agreements have been claimed by Egypt as giving a legal recognition to the ‘historical right’ of Egypt to the water without any upstream interference. By this claim of ‘historical right’, Egypt and to some extent Sudan, advocate for the uninterrupted flow of the water downstream, thereby opposing to any development activities in the upstream what so ever.²⁵

International law governing non-navigational uses of shared water resources has been mainly developed through claims and counterclaims capitalizing on different theories of water use.²⁶ This shows that the subject has been mainly contained in state practice containing a body of international custom. And all these have further been elaborated and scrutinized by different actors in the field, experts and institutional works.²⁷ To date, part of the 1997 United Nations Convention on the Law of Non-Navigational Use of International Watercourses²⁸ is said to represent the codification and progressive development of the law in the field.²⁹

²²Tadesse Kassa Woldetasdik (2013), supra note 5, P. 120.

²³ Exchange of Notes between his Majesty’s Government in the United Kingdom and the Egyptians Government in regard to the use of the Waters of the Nile River for irrigation purpose, (7 May 1929), Cairo. (Here in after referred to as ‘the 1929 Agreement’)

²⁴ United Arab Republic and the Sudan Agreement for the Full Utilization of the Nile Waters (8 November 1959), (In force 12 December 1959), Cairo, 6519 U.N.T.S. 63, (Here in after referred to as ‘the 1959 Agreement’)

²⁵ By current scheme of utilization over which a historical right is being claimed, we are refereeing to the bilateral apportionment of the water of the River under the two treaties fixed at 55.5 and 18.5 BCM to Egypt and the Sudan respectively.

²⁶ These theories, subjects of scrutiny in the present work, shows an extreme positions on the water use formulae states has relied on depending on the comparative advantage they sought to secure. Contemporary water use principles are said to be the compromised outcome of these positions. They range from the two extreme positions of the *Theory of Absolute Territorial Sovereignty* and that of the *Theory of Absolute Territorial Integrity*, usually capitalized by upper and lower riparian respectively, to the middle ground positions of the *Theory of Limited Territorial Sovereignty* and the *Theory of Community of Interests*.

²⁷ Notable among these being, the works of the *International Law Association (ILA)* which came up with *The Helsinki Rules on the Uses of the Waters of International Rivers*, adopted by the International Law Association at the fifty-second conference, held at Helsinki in August 1966. Report of the Committee on the Uses of the Waters of International Rivers, (here in after referred to as ‘Helsinki Rules’) (revised by the 2004 Berlin Rules on Water Resources) and that of the *Institute of International Law (IIL)*, which on its part has come up with documents such as *the 1911 Madrid Declaration* composing principles that regulate non-navigational use of shared water resources.

²⁸ United Nations Convention on the Law of Non-navigational Uses of International Watercourse (1997), Adopted by the General Assembly of the United Nations on 21 May 1997, General Assembly resolution 51/229, annex,

Contemporary international watercourse law, however, calls for an ‘equitable and reasonable’ use by *all* riparians to a shared water resource, such as the Nile. This, as will be seen in detail, is premised on the *equality* of all riparians and their *equal right* to the waters of the shared river and takes in to account all relevant factors to the particular river basin.³⁰

In a similar line, the rest of Nile riparians have periodically denounced the claim of ‘historical right’ to the Nile for it upholds a monopoly on the water by Egypt and Sudan which in turn is detrimental to their right to an ‘equitable and reasonable share’ from the resources.³¹ In such a setting one would identify incongruent and conflicting stances. It is this situation that this paper presents as a problem calling for investigation.

Though, the principle of equitable and reasonable utilization is one core principle, this paper will also be interested in scrutinizing the claim of ‘historical rights’ over the Nile in light of yet another significantly contending and *allied* rule in international water law- the duty not to cause significant harm. This rule, as will be seen, requires that ‘equitable and reasonable utilization’ of shared water resources should in principle not cause ‘significant harm’ on the interests and rights of co-riparians. In particular, the analysis would be interested as such to what extent the rule ‘encompass’ or perhaps ‘acknowledges’ the protection of water claimed on the basis of ‘historical rights’.

This being as it may, on the other hand, pressured by contemporary international law that any sovereign state has the rights to an ‘equitable and reasonable utilization’ of natural resources traversing its territory; Egypt was part of the Nile Basin Initiative (NBI)³² which works towards the equitable and reasonable utilization of the shared resource among all the riparians. Still in this instance, Egypt has time and again showed resistance to proposals which compromise its old use from the waters. To this end, it has been engaged in a search for legal spaces and political

Official Records of the General Assembly, Fifty-first Session, Supplement No. 49 (A/51/49). (Here in after abbreviated as ‘UNWCC’-United Nations Watercourse Convention). While article 36(1) of the convention puts it that the convention shall enter into force on the ninetieth day following the date of deposit of the thirty-fifth instrument of ratification; on the 19th May 2014 Viet Nam acceded to the UN Watercourses Convention as the 35th country. This means that the Convention will enter into force on the 17th August 2014. See: <http://www.unwatercoursesconvention.org/news/un-watercourses-convention-enters-into-force/> , accessed June 2014.

²⁹ Id., paragraph 2 & 3

³⁰ See: UNWCC, Part Two & Helsinki, Rules chapter two

³¹ John Waterbury (Winter/spring 1997), *supra* note 9, P. 288

³² Nile Basin Initiative (NBI), see *infra* note 107.

avenues to help it ensure continuation of the *status quo*. One such attempt has been evident in the negotiation and adoption processes of the Nile Basin Cooperative Framework Agreement (CFA).³³

In such setting, a different understanding of the concept of the right to ‘water security’ has been put forward by Egypt and the Sudan, unlike the understanding by the rest of the riparians, encompassing the protection of ‘current uses and rights’.³⁴

“The concept has been positively portrayed as a vehicle for the transfusion of ‘constructive ambiguity’ into the CFA, which, in turn, will make it possible to bring closer the divergent views held by the upper and lower riparians. Despite these contentions, the true purport of the concept is said to be perpetuation of the legally anachronistic and non-viable *status quo* under the cloak of water security”.³⁵ The countries are said to have construed ‘water security’ as a codeword for acknowledgement of the special privilege and ownership they claim to have over the Nile waters and hence it is taken as an euphemism for the obscene claim for an explicit approval by other signatories of Egypt’s ‘historic right’ to 55.5 billion cubic metres of Nile Water and a veto over any projects implemented upstream.³⁶

Stated otherwise, the insertion of this new claim in to the discussions is taken as manipulative act of revitalizing the claim of ‘historical rights’ to the Nile waters.³⁷ One important issue to be considered in this paper will be looking in to the essence of ‘water security’ and its link to the claim of ‘historic rights’. This will be an endeavor to look in to its legal standing and implication in a context that is relevant to the understanding of the claim of ‘historical rights’.

³³ Agreement on the Nile River Basin Cooperative Framework (2009), (Not yet in force), (Here in after abbreviated as "CFA")

³⁴ CFA, see article 14 and the annex on article 14(b). The formulation of the rule on ‘water security’ was one of the major issues that prevented the negotiations over the CFA from being concluded in consensus. Article 2(f) of the CFA defined water security as ‘right of all Nile Basin States to reliable access to and use of the Nile River system for health, agriculture, livelihoods, production and environment’.

³⁵ Dereje Zeleke Mekonnen (2010), The Nile Basin Cooperative Framework Agreement Negotiations and the Adoption of a ‘Water Security’ Paradigm: Flight into Obscurity or a Logical Cul-de-sac, *EJIL*, Vol. 21 No. 2, P. 430. See also: Dereje Zeleke Mekonene, (autumn 2010), From Tenuous Legal Arguments to Securitization and Benefit Sharing: Hegemonic Obstinacy – the Stumbling Block against Resolution of the Nile Waters Question, *Mizan Law Review*, Vol. 4 No.2.

³⁶ *Id.*, P. 439.

³⁷ Interview with Dr. Memberetsehay Tadesse (25 June 2013), Director, Ethiopian Justice and Law Research Institute, Ethiopian Radio and Television Agency

This paper will, therefore, mainly engage in the investigation under international (water) law of the essence and status of claims to ‘historical right’ to the use of international rivers in general and the Nile waters in particular.

1.3 Research Questions

The Nile has fascinated philosophers, geographers, historians, engineers and politicians for centuries. In 450 BC Herodotus, known in the west as the ‘father of history’ described Egypt as an acquired country, ‘a gift of the river Nile’.³⁸ Egypt first based its claims to the Nile waters on the concept of acquired rights in 1929, during negotiations in Anglo-Egyptian Sudan. Since then Egypt has consistently relied on this concept.³⁹ This claim to a historical/acquired rights to the waters of the Nile, as noted in the discussions above, essentially calls for the continuation of the status quo which in turn calls for an uninterrupted flow of the water and hence non- interference from upstream.

The major inquiry under this paper will, therefore, be the following: *In light of the contemporary rules and principle providing for the utilization of transboundary water resources and general international law, how authoritative will it be to defend the status quo in the scheme of utilization of the Nile waters based on the concepts of historical user- rights?*

The present work will investigate the international jurisprudential content and credence of the claim to ‘historical right’ to a transboundary water resource in the context of the Nile River. To this effect, inquiries will be made on the place this particular claim will have in case laws and governing principle of international water law.

1.4 Objective of the study

To the agreement of scholar’s literature and evolving legal regime on the rules and principles governing the utilization of transboundary water resources, states are required to bear in mind that every other state likewise has the right to an equitable and reasonable use of a shared resource, which is to be determined on series of processes.

³⁸ Debay Tadesse (November 2008), The Nile: Is it a curse or a blessing? Institute for Security Studies, ISS Papers, P.5

³⁹ Ibid, PP. 13-14

Being heavily dependent on the water flows of the Nile River for a long time, Egypt has been arguing that central place has to be given to her 'historical use' of the river.

With the conviction that this sort of user rights resulted from long entrenched national water rights, policies and conceptions, the present work will primarily have the objective of scrutinizing the nature and validity/status of such of claim under international law in general and international water law in particular.

1.5 Significance of the study

The claim of 'historical/acquired rights' still constitutes the single most important element of up-stream-down-stream discourses on the Nile River. This study is primarily significant for it dwells up on this major and defining element of the dispute over the use of the Nile waters.

To this effect, it will furnish well researched information on the legal relevance and worth of this particular basis of claim over the Nile Waters; shared by more than ten riparians.

1.6 Research methodology and sources of data

A doctrinal legal research methodology will be employed in the writing of this paper. It will also involve a comparative method of studying the different content/topics therein.

Within the sources of international law in general and international water law in particular, a range of documents will be consulted.

The UN Watercourse Convention and the Nile River Basin Cooperative Framework Agreement will be referred in to. With respect to treaties, apart from reference made to treaties concluded with a view to the utilization of other selected river basins, a scrutiny of the major treaties concluded over the Nile River will be made to the extent they highlight on the understanding and proposition of the claim of 'historical rights'. State practices and judicial decisions touching upon the claim of 'historical rights' will also be important sources to be consulted.

In looking in to the respective positions of Nile Basin states, the paper will benefit from the different historical documents, diplomatic exchange and media outlets. Other than this, more reliance on secondary sources such as books and journal articles will be made to discuss the general theoretical and conceptual issues.

1.7 Organization of chapters

Chapter two of the paper will present a brief overview of the development of international watercourse law through state practice and institutional works. It will also look at general principles of contemporary international water law governing utilization of shared water resource. The next chapter will put the context in which ‘historical rights’ over the Nile is being made; the pattern of utilization and legal regimes over the Nile will be presented. Chapter four will deal with the notion of ‘historical rights’ in general and as applying in the Nile context. Then, there will be analysis of the status of the claim of ‘historical rights’ under general international law, case law, institutional works and finally the UN Watercourse Convention.

CHAPTER TWO

INTERNATIONAL WATERCOURSES LAW: DEVELOPMENT, RIPARIAN'S RIGHTS AND OBLIGATIONS

Introduction

Water has been a cause of political tensions between Arabs and Israelis, India and Bangladesh, India and Pakistan, and most riparian states of the Nile Basin. Water is the only scarce resource for which there is no substitute, over which there is poorly developed international law and the need for which is overwhelming, constant and immediate.⁴⁰ Yet, one can appreciate the fact that the regime of international watercourses law has undergone significant progresses in many respects.

This chapter endeavors to provide a foundational understanding of the development and state of international water law in general; within the broader framework of the thesis organization, this presentation furnishes the normative basis and background for the scrutiny of 'historical rights' in the subsequent parts. The discussions on the general principles, rights and duties of states sharing watercourses will also provide a general normative standard in assessing the contents of the state of water law and rights in the Nile Basin, and most notably claims premised on the 'historical rights' conception.

2.1 Brief review of the development of International Watercourses Law

The multi-dimensional uses of international rivers and lakes have been classified, for legal purposes, into navigational and non-navigational uses. The main reason for such a distinction is that a separate set of international rules has emerged for each of the two uses. The rules regulating navigational uses started emerging as early as the beginning of the 19th century. During this early period, navigational uses had assumed greater importance than non-navigational uses, and it was also relatively easier to reach on an agreement on rules regulating such uses.⁴¹ The

⁴⁰ Aaron T. Wolf (1998), Conflict and Cooperation along International Waterways, *A.T. Wolf /Water Policy*, 1, 251-265, P. 251

⁴¹ Salman M. A. Salman (December 2007), The Helsinki Rules, the UN Watercourses Convention and the Berlin Rules: Perspectives on International Water Law, *Water Resources Development*, Vol. 23, No. 4, P. 625.

present section focuses on a brief review of the development and state of legal regulation of non-navigational use of shared water resources.

2.1.1 Early developments

The first attempt to come up with rules governing the non-navigational uses of international rivers was made by the Institute of International Law, an international non-governmental organization. The resultant instrument was the Declaration of Madrid, 20 April 1911.⁴² The statement of reason in the declaration mentions that riparian states with a common stream are in a position of permanent physical dependence on each other which precludes the idea of the complete autonomy of each state in the section of the natural watercourse under its sovereignty. The declaration further stated specific rules of usage over contingent and successive streams. The establishment of joint commissions to handle disagreements on the manner of use was also contemplated.⁴³

The other regulation of such uses is found in the 1919 Peace Treaty of Versailles. The treaty, regulating navigational uses of European Rivers - the Elbe, the Oder, the Niemen and the Danube- also made mention of the regulation of the non-navigational use relating to the Rhine River.⁴⁴

The development and expansion of the industrial revolution itself resulted in speedier and more efficient modes for transportation of goods and materials, and also necessitated other uses of rivers, such as for production of hydropower and establishment of industries. The steady growth in population also rendered other uses, such as domestic uses and irrigation, more demanding and necessary. The Barcelona Convention (Convention and Statute on the Regime of Navigable Waterways of International Concern), which was concluded in 1921, reconfirmed the principle of freedom of navigation, but recognized other uses of rivers as well.⁴⁵

⁴² International Regulation Regarding the Use of International Watercourse for Purposes other than Navigation, Declaration of Madrid, 20, April 1911, <http://www.fao.org/docrep/005/W9549E/w9549e08.htm#fnB139>Text in: *Annuaire de l'Institut de Droit International*, Madrid Session 1911, (Paris 1911) Vol. 24, pp. 365-365, here in after referred to as ' Madrid Declaration'

⁴³ The Madrid Declaration, Statement of Reason, Article I & II

⁴⁴ The Peace Treaty of Versailles (28 June 1919), Article 330 & 331

⁴⁵ Salman M. A. Salman (December 2007), *supra* note 41, P. 626

Two years later, the Geneva Convention (General Convention Relating to the Development of Hydraulic Power Affecting More than One State- 1923) was adopted. The Convention dealt with the right of any riparian state to carry out on its territory any operations for development of hydraulic power that it considers desirable, subject to “the limits of international law”. The adoption of this Convention marked yet another step in the decline of the supremacy of navigation that prevailed throughout the 19th century.⁴⁶ These developments, therefore, served as a basis for further efforts toward devising a legal regulation of diverse uses of transboundary Rivers, heralding the slow but secure decline of the priority traditionally accorded to navigational uses.

2.1.2 Divergent states’ practices

The decline of the primacy of navigational uses was not accompanied by the establishment of official rules for regulating the non-navigational uses of international rivers. Towards the end of nineteenth century and the beginning of twentieth, varying, and to some extent conflicting theories were in existence for addressing the rights and obligations of riparian states over international rivers. These were to a larger extent based on state practice and works of scholars and experts in the field.⁴⁷ The major ones are presented below.

The theory of absolute territorial sovereignty

A typical illustration of this theory is made through the presentation of an official opinion articulated by the United States Attorney General in relation to the dispute between the former and Mexico over the use of the Rio Grande River.

Increased diversion of the Rio Grande waters by farmers in the United States during the last twenty years of the nineteenth century reduced the flow of the river to such an extent as to spark protests by Mexico. It was in response to these protests that the US Department of State requested advice from Attorney-General of the United States on the rights of the two countries under international law. Attorney-General Judson Harmon responded in 1895 with an opinion that has since then become known as the “Harmon Doctrine,” a concept that is virtually synonymous with the ‘theory of absolute territorial sovereignty’. In a portion of the opinion, the Attorney-

⁴⁶ Ibid

⁴⁷ Salman M. A. Salman and Kishor Uprety (2002), Conflict and Cooperation on the South Asia’s International Rivers: A Legal Perspective, *International and National Water Law and Policy Series*, P. 11.

General denied that the general principles of international law imposed any obligation on the United States to restrict its inhabitants' use of the portion of the Rio Grande, within the United States territory, even if that use would cause adverse effect in Mexico,⁴⁸ although the US had to distance itself from a strict application of such theory in the subsequent decades.

According to this theory, therefore, a state has a complete freedom of action with regard to a portion of an international watercourse that is situated within its territory, irrespective of any harmful consequences it may have on the interest of other riparians. This theory is often relied upon by upstream riparians.

The theory of absolute territorial integrity

This theory establishes the right of a riparian to demand continuation of the natural flow of an international river into its territory from upper riparian state, and imposes a duty on that state not to restrict such natural flow of waters to lower riparian countries. At most, this principle tolerates only minimal uses by an upstream state. In essence, this principle is the exact opposite of the principle of absolute territorial sovereignty as it is intended to favor lower-reach states, often by protecting existing uses or prior appropriation.⁴⁹

Such theory may have shattering effects upon upstream states that develop their water resource more slowly than their downstream neighbors; it effectively prohibits any development in an upstream state that adversely affects the flow of the water to states downstream. Taken to an extreme, this would prohibit not only diminutions in quantity or quality (as through large scale irrigation projects), but also dams that do not reduce annual average flows but regularize water levels that formerly raise and fall with seasonal changes.⁵⁰

The theory of limited territorial sovereignty/integrity

The third theory, that of limited territorial sovereignty or limited territorial integrity, asserts that every riparian state has a right to use the waters of the international river, but is under duty to ensure that such use does not harm other riparian states. Accordingly, this principle restricts both

⁴⁸ Stephen C. McCaffrey, (2007), supra note 10, P. 76-77 & 113.

⁴⁹ Salman M. A. Salman, (December 2007), supra note 41, P. 627.

⁵⁰ Stephen C. McCaffrey, (2007), supra note 10, P. 126.

theories discussed above, and asserts the equality of all basin states in the uses of the waters of a transboundary river.⁵¹

Only this theory survived and formed the basis for modern international water law. This is mainly because the other theories fail to take in to account the interests of other riparian countries. This theory, which is based on the equality of all riparian states, encompasses both the right to use the waters of the shared watercourse, as well as the duty not to cause significant harm to other riparian states.⁵²

Accordingly, subsequent development of the law in this field has mainly been based on the concept of the theory of limited territorial sovereignty/ integrity.

2.1.3 Early institutional works by the IIL and ILA

Along the contributions of state practice to development of the law, a huge interest had been evinced by private and intergovernmental organization towards codification and development of rules governing non-navigational uses of international rivers. Notable in this regard are the works of the Institute of International Law (IIL) and the International Law Association (ILA).

Institute of International Law (IIL), founded in 1873, is an important non-governmental organization constituted of international lawyers that produce reports and resolutions on private and public international law. Accordingly, it has undertaken quite important scholarly works toward shaping the governing rules of international watercourses.

The First attempt toward codification of principles and regulation for non-navigational uses of international waters was enunciated by the Madrid Declaration adopted by the Institute of International Law in 1911. The Declaration clearly rejects the principle of absolute territorial sovereignty by imposing certain restrictions on each riparian state, including the requirement of obtaining consent of other riparian states. As such, the Declaration codifies the principle against causing appreciable harm to other basin countries. Under this principle, it may be noted that a state is entitled to use the flow of an international watercourse in its territory but only in such a manner as not to cause appreciable harm to another riparian. This Declaration embodied the

⁵¹ Salman M. A. Salman, (December 2007), *supra* note 41, P. 627.

⁵² *Ibid*

principle of limited territorial sovereignty, but established absolute prohibition against activities that would result in injury to other riparian states.⁵³

The 1961 Salzburg Resolution⁵⁴ and the 1979 Athens Resolution⁵⁵ are yet additional contributions by the institution dealing with different aspects of non-navigational uses of international rivers.

The International Law Association (ILA), a highly-regarded non-governmental organization of legal experts founded in 1873, completed the best known study of the customary international law of transboundary water resources in 1966. The result is known as the Helsinki Rules on the Uses of the Waters of International Rivers. The Helsinki Rules were perhaps the first serious attempt by any international association to codify the entire law of international watercourses. The resulting rules have heavily influenced state practice as well as the efforts of other international associations in examining the law of internationally shared fresh waters.⁵⁶

The most important normative prescription, provided under article IV, of the Helsinki Rules is that each state within an international drainage basin has the right to a reasonable and equitable beneficial uses of the basin waters. According to the ILA, this idea is "a development of the rule of international customary law which forbids states to cause any substantial damage to another state or to areas located outside the limits of national jurisdiction."⁵⁷

The International Law Association also developed what some see as a second principle governing the management of internationally shared water resources, that each nation shall not cause 'substantial damage' to the environment or the natural condition of the waters beyond the limits of the nation's jurisdiction.⁵⁸

⁵³ Madrid declaration (1911), supra note 43, statement of reason

⁵⁴ Resolution on the Utilization of Non-Maritime International Waters (Except for Navigation), adopted by the Institute of International Law at its session at Salzburg, (September 11, 1961), 49 *Annuaire de l'Institut de Droit International* 370 (1961), herein after referred to as 'Salzburg Resolution'

⁵⁵ Resolution on "The pollution of Rivers and Lakes and International Waters", Adopted by the Institute of International Law, September 12, 1979, 58 *Annuaire de l'Institut de Droit International* (1979), at 179, also known as the "Athens Resolution".

⁵⁶ Joseph W. Dellapenna (2001), supra note 4, P. 273.

⁵⁷ David J. Lazerwitz, (1993), The Flow of International Water Law: The International Law Commission's Law of the Non- Navigational Uses of International Watercourses, *Indiana Journal of Global Legal Studies*, Vol. 1, Issue 1, Article 12, P.253, available at : <<http://www.repository.law.indiana.edu/ijgls/vol1/iss1/12>>

⁵⁸ Joseph W. Dellapenna, (2001), supra note 4, P. 274.

Recently, the Helsinki Rules and subsequent resolutions have been revised by the ILA's 2004 Berlin Rules. While the Helsinki Rules are relatively important in the development of international water law, it is worth mentioning that they were drafted by the ILA, a professional organization, and hold no official status internationally. However, the rules have been accorded greater value because subsequent treaties- bilateral and regional- have tended to adopt the guidelines provided by the Helsinki Rules. Over the years, these guidelines have played a significant role in the development and codification of international water law.⁵⁹

2.1.4 The United Nations Convention on the Non-Navigational Uses of International Watercourses

On 8 December 1970, the United Nations General Assembly adopted Resolution 2669 (XXV), entitled "Progressive Development and Codification of the Rules of International Law Relating to International Watercourses".⁶⁰ Under the Resolution, the Assembly recommended that the International Law Commission (ILC) "take up the study of the law of the non-navigational uses of international watercourses with a view to its progressive development and codification."⁶¹

Between this time and submission of the final Draft Articles in 1994, the ILC's experts worked with thirty-two governments through questionnaires and correspondence in drafting the articles.⁶² After considerable discussion on the ILC's drafts, on 21 May 1997, the UN General Assembly adopted the Convention on Non-Navigational Uses of International watercourses, widely identified as the UN Watercourses Convention. For the most part, the Convention codified the principles governing the sharing of international watercourses - building on the 1966 Helsinki Rules,⁶³ but in some areas, it merely tried to develop appropriate rules of the legal regime.

⁵⁹ Muhammad Mizanur Rahaman (2009), Principles of International Water Law: Creating Effective Transboundary Water Resources Management, *Int. J. Sustainable Society*, Vol. 1, No. 3P. 251.

⁶⁰ Progressive Development and Codification of the Rules of International Law Relating to International Watercourses, A/RES/2669(XXV), 1920th plenary meeting, (8 December 1970), here in after referred to as: "Resolution 2669(XXV)"

⁶¹ Resolution 2669 (XXV)

⁶² David J. Lazerwitz, (1993), *supra* note 57, P. 254.

⁶³ Muhammad Mizanur Rahaman, (2009), *supra* note 59, P. 216.

The Convention on the Law of the Non-Navigational Uses of International Watercourses is the only international treaty governing the uses and management of shared freshwater resources. It has been adopted as a framework convention, in the sense that it provides a structure of principles and rules that may be applied and adjusted to suit the characteristics of particular international watercourses.⁶⁴

2.2 Major principles regulating rights and obligations of states sharing watercourses

The UNWCC is a leading universal instrument states and international tribunals refer to as a framework for articulation of rules governing relations over shared transboundary waters. In some measures, the Convention is considered to contain a codification of the primary rules of customary international law in the field.⁶⁵ Though it is difficult to state with precision which provisions of the Convention are restatement of custom, the equitable and reasonable uses, the no harm rule, prior notification and protections of ecosystems are in large measure regarded as codification of norms that already exist or are emerging.⁶⁶ These rules are also at the heart of instruments such as the Helsinki Rule and its revised Berlin Rules, and a number of bilateral and multi-lateral treaties over shared water.

The principle of equitable and reasonable utilization and participation is the primary rule of international law that governs the legality of states' relations in the use of shared watercourses.⁶⁷ The rule has been recognized as a rule of customary international law, consistent with treaty practice –and has its origin in state practice, having evolved, in part, from the jurisprudence of

⁶⁴ Stephen C. McCaffrey, (2008), Convention on the Law of the Non-Navigational Uses of International Watercourses, United Nations Audiovisual Library of International Law, <www.un.org/law/avl> P. 1

⁶⁵ Patricia K. Wouters, et.al, (2005), Sharing Transboundary Waters, An Integrated Assessment of Equitable Entitlement: The Legal Assessment Model, International Hydrological Programme, IHP-VI, Technical Documents in Hydrology, No. 74, UNESCO, P. 17

⁶⁶ Stephen C. McCaffrey (2001), The Contribution of the UN Convention on the Non-Navigational Use of International Water Course, University of Pacific Mc George School of Law, *Intl. J. Global Environmental Issues*, Vol. 1 No. ¾, P. 19

⁶⁷ See: Article 5 and 6 of the UNWCC & Article IV and V of the Helsinki Rules. This was also reconfirmed by the recent International Court of Justice (ICJ) decision on the *Gabcikovo Nagymaros Project* case, case concerning the Gabcikovo-Nagymaros Project(Hungary/Slovakia), Judgment of 25 Sept. 1997, (1997) ICJ.

federal states.⁶⁸ It determines the legitimacy of use by balancing all factors relevant to a particular case and determining from that whether the use is an equitable and reasonable one.⁶⁹

The other equally contending principle governing right of water use is the ‘duty not to cause significant harm’.⁷⁰ The no harm rule, which originated as a general principle of law in interstate relations, in the context of international watercourses, precludes uses that result in significant harm to another state.

When applied, the conflict between the two principles is readily apparent. While the former rule might permit significant harm as a result of an equitable use of the watercourse, the latter would not.⁷¹ The preeminence of either of the principles, and/or their practical application in a given basin, is yet to be settled and this has been a reason often given for not having a binding legal instrument governing water use internationally.⁷²

In the context of the UN Watercourse Convention, it is contended that, though the compromise formula arrived at in the UN negotiations is a bit like a buffet where there is something in it for every one adhering to the equitable utilization or the no harm school, the Convention as a whole seems to have given precedence to the former rule.⁷³ This conclusion is based on a close reading of Articles 5, 6 and 7 of the Convention.

Article 6 enumerates a number of factors for determining equitable and reasonable utilization. Those same factors will also need to be used, with other factors, to determine whether significant harm is caused to another riparian, because harm can be caused by depriving other riparian states of the water flow and thereby affecting their existing uses. Moreover, Article 7 (1) of the Convention obliges watercourse states, when utilizing an international watercourse in their territory, to take all appropriate measures to prevent the causing of significant harm to other

⁶⁸ Patricia K. Wouters, et.al, (2005), supra note 64, P. 21.

⁶⁹ Article 6, UNWCC, The factors to be considered fall into two broad categories: (i) factors of a natural character (hydrographic, hydrological, climatic, ecological, and so forth), and ; (ii) economic and social factors (economic needs, population dependent on watercourse, effects of use on other watercourse States, existing and potential uses, conservation measures, and availability of alternatives).

⁷⁰ See Article 7, UNWCC.

⁷¹ Patricia K. Wouters, (1996), An Assessment of Recent Developments in International Watercourse Law Through the Prism of the Substantive Rules Governing Use Allocation, *Natural Resource Journal*, Vol. 36, P. 419-420.

⁷² See generally: Albert E. Utton, (1996), Which Rule Should Prevail in International Water Dispute: That of Reasonableness or that of No Harm, *National Resource Journal*, Vol. 36,.

⁷³ Stephen McCaffrey (1999), International Water Law for the 21st Century: the Contribution of the U.N. Convention, University of the Pacific Mc George School of Law, P. 13

watercourse states. When significant harm nevertheless is caused to another watercourse state, Article 7 (2) of the Convention requires the state causing the harm to "take all appropriate measures, having due regard to Articles 5 and 6, in consultation with the affected state, to eliminate or mitigate such harm, and where appropriate, to discuss the question of compensation".⁷⁴

It is held, therefore, that a downstream state that was first to develop its water resource could not foreclose latter development by an upstream state by demonstrating that the later development would cause it harm; under the doctrine of equitable and reasonable utilization, the fact that a downstream state was 'first to develop' (and thus had made prior use that would be adversely affected by new upstream use) would be merely one of the number of factors to be taken in to consideration in arriving at an equitable allocation of the use and benefit of the watercourse.⁷⁵

This being said, the principles of equitable utilization and no significant harm each require precision in their application; this occurs on a case-by-case basis. The procedural rules of notification, exchange of information, and consultation assist in this task. Additionally, the general duty to cooperate and the customary obligation that states peacefully settle their disputes encourage watercourse states to settle any contests over water by agreement.⁷⁶

⁷⁴ Article 5, 6 & 7, UNWCC, see also Salman M.A. Salman (March 2007), *The United Nations Watercourses Convention Ten Years Later: Why Has its Entry into Force Proven Difficult?* International Water Resources Association, Water International, Volume 32, No.1 P.10

⁷⁵ Stephen C. McCaffrey, The Law of International Watercourse: Some Recent Developments and Unanswered Questions, *Denv. J. Int'l L. & Pol'y*, vol. 17:3, P. 509, see UNWCC Art. 6, & Helsinki Rules Art. V (II) (4)

⁷⁶ UNWCC (1997), Article 6 (e), see also Patricia K. Wouters, (1996), *supra* note 71, P. 420.

CHAPTER THREE

CONSTITUTION OF THE LEGAL REGIME ON THE NILE BASIN: PLACING THE CLAIM OF 'HISTORICAL RIGHTS' IN CONTEXT

Introduction

Riparian's right to reasonable and equitable utilization of international watercourses in a manner other co-riparian's interest is not adversely affected has been recognized under international water law.

Nevertheless, the legal and factual reality in the Nile witnesses a completely different discourse. Due to a number of factors, the resource was disproportionately put in to series of uses by the Sudan and Egypt. While the geo-political and geographical situation and economic strength of downstream states has enabled them to make the first and extensive use of the water so far, the reality in upstream states displayed quite a complete reverse. This has its ramifications: subsequent institutional, legal and diplomatic discourses on the use of the resource have been extremely oriented in a downstream perspective and interest.

This resulted in position of downstream riparians, notably Egypt, that early utilization of the river which has been the basis for life in the country should be left untouched; they submitted that continued use gives a 'historical right' to utilize the Nile waters without upstream obstruction. Egypt has been keen from early time to conclude international agreements that would guarantee the 'historical entitlement' and uninterrupted flow of the Nile waters and ensure that its interests would not be affected by a drop in the quantity of the water flowing towards it by reasons of any engineering works undertaken by countries in which the resources of the Nile are located or those lying along its sources.⁷⁷

The exchange of letters on 7 May 1929 between the Egyptian Prime Minister and the British High Commissioner included explicit recognition by Britain of Egypt's *natural and historic rights* over the waters of the Nile. A similar notion of *acquired and historic rights* to the waters of the Nile has been 'affirmed' under the 1959 agreement. This same subject has also been a point of discussion during the negotiations leading to the CFA.

⁷⁷ Nathalie Bernard- Maugiron & Baudouin, (ed.) (2002), *Egypt and Its Laws*, P. 381.

With a view to properly grasp the essence of the status quo and context in which the continuation of the same on the basis of the claim of *historic/ acquired rights* over the use of the water is being espoused, the present part of the paper will provide a brief presentation on pattern of utilization on the river and the existing legal and institutional setups.

3.1 Pattern of utilization over the Nile

It is evident that rules and principles of water use applied at the international level benefited from specific basin experiences. The Nile River Basin presents an intertwined and complex legal setting to date; this section does not claim to provide a complete account of the legal regulation of use rights in the Nile Basin. Rather, a succinct presentation of the essence of the major treaties concluded over the use of the river shall be made; this shall be done in light of the principles of water use discussed above and in a manner that puts the context in which the claim of ‘historic rights’ are to be investigated.

Historically, Egypt’s inimitable civilization together with its vulnerable dependence on the Nile to cater an ever-growing domestic and agriculture uses, paved a course to the earliest innovations in irrigation and water management techniques that over time intensified the yields of the river. Adopting a perennial system of irrigation whereby agricultural lands received irrigation water in the whole course of the year through the use of a complex set of cannel connections and barrages on the one hand, and the building of larger dam such as the Aswan High Dam, with the capacity of holding water twice as much the total mean annual floods of the Nile, were featured as important developments.⁷⁸

By 1886, the area under perennial irrigation in Egypt was about three million acres; this consumed the entire natural flow of the river during low period. The remaining area, yielding only one crop under basin irrigation, was two million acres at that time. In 1920, the area under perennial irrigation in Egypt was four million acres, while the area under basin irrigation was 1.6 million acres, making the yearly requirement 30 bcm at Aswan, or 50 bcm at Khartoum.⁷⁹ The

⁷⁸Tadesse Kassa Woldetsadik (2011), Reflecting on Treaty Regimes and Customary Rules of International Watercourse Law Providing for the Utilization of the Nile River Basin Water Resources, University of Oslo, P. 159

⁷⁹Dante A. Caponera, *supra* note 12, P. 652.

UN Economic Commission for Africa estimated that in the 1990's the figure had shot as high as 62 bcm per year, displaying the vast pattern of uses in the lower reaches of the river.⁸⁰

Similarly, Sudanese water resource management, contending with water requirement of its neighbor to the north, had been relatively impressive. Sudan has an elaborate system of irrigation covering a vast area of two million hectares using dams and diesel pumps, principally stretching along the Gezira, Rahad and the New Halfa schemes; the Nile supplies virtually all water: steady irrigation water requirements had been met through the construction of series of facilities inside its own territory: first the Sennar and later the Rosaries dams on the Blue Nile, and the Khashim al Qirbah Dam on the Tekeze- Atbara river, a sub basin of the Nile system.⁸¹ In contrast, Ethiopia, who supplies a substantive amount of the Nile floods every year, as well as the other upper riparian countries have not been able to meaningfully utilize the Nile waters for irrigation or other purposes in their territories; yet, they intend to reserve a share of water for their own future developments.⁸²

Against this hydrology and pattern of utilization, all the bi-lateral and multilateral agreements over the waters of the Nile failed to apportion the river's resources among the riparians.⁸³ A recent, and definitely a diverging experience in this regard is the conclusion of the Nile River Basin Cooperative Framework Agreement - which involved the participation of all the basin states at least in the initial stages. A few of the treaty regimes in the Nile Basin which in some form provided for prior uses or historical rights sentimentalism have been provided in the following sections.

These treaties has been marshaled in such a way to sustain a pattern of existing uses or protect what the two countries regard as their historical entitlements and hence played a role in formalizing and further fortifying the 'historical rights' conception.⁸⁴

⁸⁰ Tadesse Kassa Woldetsadik (2011), supra note 78, p. 161

⁸¹ Id., P. 161.

⁸² Dante A. Caponera, supra note 12, P 655.

⁸³ Takele Soboka Bulto (2008-2009), Between Ambivalence and Necessity in the Nile Basin: Occlusions on the Path towards a Basin-wide Treaty, 20 *Colo. J. Int'l Env'tl. L. & Pol'y* 291, <<http://heinonline.org>>, P. 296.

⁸⁴ Both the 1929 & 1959 agreements have actually played a great role in this regard. As would be seen below, these agreements had specifically rendered as 'historical' and 'acquired' the extensive uses made by downstream countries and gave bilateral treaty recognition thereto.

3.2 Constitution of legal regime on the Nile: placing the claim of ‘historical rights’ in context.

3.2.1 The 1902 Treaty between Ethiopia and the United Kingdom

Originally, the Anglo-Ethiopian Treaty of 1902 was designed to determine the frontier between the Sudan and Ethiopia.⁸⁵ In an annex to this treaty the British, Italian and Ethiopian Governments embodied a number of modifications to the frontier between the Sudan and Eritrea as well as that between Ethiopia and Eritrea.⁸⁶

Concluded in both Amharic and English texts, the treaty containing five articles, explained as its main objective demarcating the boundaries between the stated countries. Article three of the treaty, however, dealt with the issue of the Blue Nile, Baro-Akobo (Sobat) rivers and Lake Tana. The relevant provision of the treaty reads as follows; ‘H.M. the Emperor Menilik II, King of Kings of Ethiopia, engages himself towards the Government of his Britannic Majesty not to construct or allow to be constructed, any work across the Blue Nile, Lake Tana or the Sobat, which would *arrest the flow* of their waters in to the Nile, except in agreement with His Britannic Majesty’s Government and the Government of the Sudan’.⁸⁷

In the ensuing communications between agents of the two states, the word *arrest* surfaced as the most contentious expression of the treaty undertaking; like scores of other accords that were previously concluded, the Amharic and English versions of the treaty appeared to display a notable discrepancy and had been comprehended as entailing disparate obligations. Throughout its tenure as overseer of Egyptian and Sudanese concerns, London deduced from the treaty and pursued its policies on the assumption that Ethiopia had been bound to *completely refrain* from laying any water control on the Nile and its tributaries, the scale of construction or its impact on the sustained flow of the water course notwithstanding; on the other hand, Ethiopia inferred that Emperor Menelik’s pledge, more unequivocally conveyed in the Amharic context, only

⁸⁵The Treaty between Ethiopia and United Kingdom Relative to the Frontiers between the Sudan, Ethiopia, and Eritrea, Addis Ababa, (15 May 1902). (Here in after referred to as ‘The 1902 Nile Water Agreement’)

⁸⁶ Edward Ullendorff (1967), The Anglo-Ethiopian Treaty of 1902, *Bulletin of the School of Oriental and African Studies*, University of London, Vol. 30, No. 3, Fiftieth Anniversary, Volume. p.641.

⁸⁷ Article III, the 1902 Nile Water Agreement.

stipulated duty not to *wholly stop up* the flow of the river without British consent, leaving other, less detrimental uses for irrigational, industrial or domestic purpose to its own discretion.⁸⁸

While the post experience of the states displayed a clear lack of meeting of mind with regard to certain parts of the treaty, the position held by Great Britain in this accord reflected a clear instance of the Great Britain's grander strategy to impose a regime of non-interference with the Nile River flows - and hence protect existing downstream interests through downstream oriented legal machinations.

3.2.2 The Anglo-Egyptian agreement of 1929

The 1929 Nile waters agreement was signed between Egypt and Great Britain (representing its colonies of Sudan, Kenya, Uganda and Tanzania).⁸⁹

The agreement set out the rules for the division of the Nile waters for irrigation by the two parties. The allocation of the annual flow of the Nile was made based on the findings of the Nile Projects Commission, formed in 1920, and the recommendations of a new water commission formed in 1925.⁹⁰

According to the main findings of the Commission, the natural flow of the river should be reserved for the benefit of Egypt from the 19th January to the 15th July (at Sennar).⁹¹ Sudan (at Gezira) was allowed to pump from the 1st August to the 31st December, subject to the progressive scale laid down in paragraph 57 of the findings.⁹² The technical presentation in the report of the Nile commission has been construed as respectively allotting Sudan and Egypt 4 and 48 bcm of the Nile waters annually.⁹³

⁸⁸Tadesse Kassa Woldtasdik (2013) supra note 5, P. 57. See also: Mohammed Abdo (summer 2004), The Nile Question: The Accords on the Water of the Nile and Their Implications on Cooperative Schemes in the Basin, where he summarized the disparity as follows. There was a disagreement on the meaning of the word "arrest" in the Amharic and the English versions. In the Amharic version, the obligation imposed on Ethiopia did not preclude the use of the water. What was prohibited was any scheme which would totally arrest the flow of water. There was no evidence indicating that Ethiopia had acknowledged the meaning of the word "arrest" as to not utilize the water.

⁸⁹ Exchange of Notes between his Majesty's Government in the United Kingdom and the Egyptians Government in regard to the use of the Waters of the Nile River for irrigation purpose, (7 May 1929), Cairo, 'the 1929 Agreement.

⁹⁰ Reports of the Nile Commission, 1925, Annex A, 1929 Agreement, (here in after referred to as 'Report of the Nile Commission 1925')

⁹¹ Report of the Nile Commission, 1925, Chapter IV, Paragraph 88 (a)

⁹² Id., Paragraph 88 (b-f)

⁹³ Tadesse Kassa Woldetadik (2013), supra note 5, pp. 124-125.

Specifically, the agreement gave Egypt a right of monitoring Nile-related developments by the upstream states of Sudan, Uganda, Tanzania and Kenya and to ensure that their actions do not affect the availability of water for Egypt's agricultural projects; likewise, the treaty granted Egypt a veto power over any projects in the named riparian states which it considers harmful to Egypt's interests on the Nile.⁹⁴ Whether or not the agreement created during the colonial era, is still valid remains one of the most serious bones of contention between the downstream and upstream countries.

Upon attaining independence in the early 1960's, Kenya, Uganda and Tanganyika (which was succeeded by Tanzania as a result of the unification of Tanganyika and Zanzibar in 1964) argued that they are not bound by this agreement because they were not parties to it; these countries invoked the Nyerere Doctrine under which the treaties concluded during the colonial era would need to be renegotiated within two years, after which they would lapse if no new agreement was reached; Egypt, on the other hand, invoked the principle of state succession to treaties to support its claim that the 1929 agreement remains valid and binding under customary international law.⁹⁵

3.2.3 The 1959 agreement between Egypt and Sudan

The 1959 agreement for the full utilization of the Nile concluded between now independent Egypt and Sudan is an extension of the 1929 agreement.⁹⁶ It is premised on an understanding that the River Nile needs arrangements for its full control and for increasing its yield with a view to achieving full utilization of its water by the two states. It noted the 1929 agreement provided only for a partial use of the Nile waters, and that it was felt necessary by the parties to look in to ways for complete control of the river. The agreement provided for institutional and legal arrangement in contemplation of full division of the water, new projects required for such utilization and also aspects of technical cooperation.⁹⁷

⁹⁴The 1929 Agreement, Article 4(b), "Save with the previous agreement of the Egyptian Government, no irrigation or power works or measures are to be constructed or taken on the River Nile and its branches, or on the lakes from which it flows, so far as all these are in the Sudan or in countries under British administration, which would, in such a manner as to entail any prejudice to the interests of Egypt, either reduce the quantity of water arriving in Egypt, or modify the date of its arrival, or lower its level".

⁹⁵ Salman M.A. Salman, (2013), The Nile Basin Cooperative Framework Agreement: a peacefully unfolding African spring? *Water International*, 38:1, 17-29, <<http://dx.doi.org/10.1080/02508060.2013.744273>> P. 19

⁹⁶ United Arab Republic and the Sudan Agreement for the Full Utilization of the Nile Waters, (8 November 1959), (In force 12 December 1959), Cairo, 6519 U.N.T.S (The 1959 Agreement), supra note 24.

⁹⁷ The 1959 Agreement, preamble, (Para. 1-3)

The amount of water being used by the two states before obtaining the benefits of the Nile Control Projects and as provided in the 1929 agreement was rendered as *acquired right* of the parties (48 bcm and 4 bcm per year, for Egypt and Sudan respectively).⁹⁸ Full control and increasing yield for the full utilization of Nile waters necessitated the construction of two Nile control projects (Sudd el Aali reservoir at Aswan in Egypt and the Rosaries Dam on the Blue Nile in Sudan).⁹⁹ Then taking the average natural River yield of water at Aswan in the years of the century at 84 bcm, the acquired right of the two states and the losses of over-year estimated at 10 Billiards, net additional water gained as a result of the two project was taken to be 22 bcm per year. This net additional amount of water was then divided in a ratio of 14 ½ and 7 ½ to Egypt and Sudan respectively.¹⁰⁰ From this arrangement therefore Egypt and Sudan acquired a total water amount of 55.5 bcm and 18.5bcm respectively.

The agreement established the Permanent Joint Technical Commission, with an equal number of members from each country, as the institutional mechanism for the joint management of the Nile. While Egypt and Sudan, for the first time, recognized the claims of the other riparian states to a share of the Nile waters, they agreed that if it becomes necessary to hold any negotiations concerning the Nile waters, with any riparian state, that they are to take a unified view and to equally deduct from their share, if such other state's claim to a share from the water is to be accepted.¹⁰¹

Similar to the past agreements, this agreement was only bilateral and did not include any of the other riparian countries of the Nile. Ethiopia, from whom more than 85 percent of the water comes, was not consulted, and no amount of water was allocated for future usage by any of the up-stream countries. It is even less comforting for the other riparian countries (other than Sudan) that all of the Nile's average water flow was divided between the two downstream countries.¹⁰²

In general terms, different arguments have been put forward against both agreements. One relates to the fact that the colonial circumstances under which the agreements were made had changed so fundamentally that they are not valid anymore. This has been implied from similar

⁹⁸ Id., First Article, (1 & 2).

⁹⁹ Id., Second Article, (1 & 2).

¹⁰⁰ Id., Second Article, (3 & 4)

¹⁰¹ Id., Fifth Article, (1 & 2)

¹⁰² Patrick Loch Otieno Lumumba, (2007), The Interpretation of the 1929 Treaty and its Legal Relevance and Implications for the Stability of the Region, *African Sociological Review*, 11, 1, P. 13

arguments in connection with the 1902 treaty wherein the doctrine of *rebus sic stantibus* embodied in customary international law and latter incorporated in the Vienna Convention on the Law of Treaties was employed.¹⁰³ Likewise, it has been contended that the treaties violate one of the most important peremptory norm of international law, namely, that the upper basin states have rights to self-determination and permanent sovereignty over natural resources; this argument states that the treaties violate this principle as they freely give away the natural resources of a previously colonized state without its consent or without any past or future control over its own resources.¹⁰⁴

3.2.4 The Nile River Basin Cooperative Framework Agreement and some lingering issues

Basin-wide negotiations on cooperation over the Nile River was first occasioned on the raising levels of Lake Victoria which eventually led to the establishment of what came to be known as the Hydromet Project in 1967. The process continued and proceeded through the Undugu Group in the 1970s and 1980s; the TECCONILE, and the Nile 2002 Conference series in the 1990s. However, these efforts did not go beyond attempts to improve communication between the Nile riparian states.¹⁰⁵ Cooperation turning into a comprehensive institutional and legal setup was made possible only through the establishment and operation of the Nile Basin Initiative.¹⁰⁶

Since February 1999, the riparian countries of the Nile River basin have been engaged in serious negotiations for a Cooperative Framework Agreement under the auspices of the Nile Basin

¹⁰³Tadesse Kassa Woldetadik (2013), supra note 5, P. 54. See also United Nations Vienna Convention on the Law of Treaties (May 1969), entered in to force 27 January 1980, UN Treaty Series Vol. 1155, P 331. Article 62 provides that “A state can terminate the application of a treaty if a fundamental change of circumstances occurs. This fundamental change exists when the changed circumstances are those that make up the essential grounds on which the states consented to be obligated by the agreement and the change affects the remaining obligations of the parties in a radical way”. This change of circumstance mainly refers to the independence of the then colonized riparian states.

¹⁰⁴Abadir M. Ibrahim, The Nile Basin Cooperative Framework Agreement: The Beginning of the End of Egyptian Hydro-Political Hegemony, *Mo. Env'tl. L. & Pol'y Rev.* Vol. 18, No. 2, P. 297.

¹⁰⁵For a brief account on these institutional developments refer to: Kibrome Mekonnen (January 2011), Water Use and the Quest for Sustainable Development of the Eastern Nile Basin: An International Law Analysis, Thesis Submitted in partial fulfillment of the requirements of the Degree of Masters in Public International Law, Addis Ababa University, School of Law, PP. 45-47.

¹⁰⁶Nile Basin Initiative, (Here in after abbreviated as “NBI”), was officially established by all the Nile Basin states, except Eritrea, at the meeting of their respective ministers of water resources held in Dar-es-Salaam, Tanzania, 22 February 1999, as floor for multilateral talks envisioning to “*achieve sustainable socioeconomic development through the equitable utilization of, and benefit from the common Nile Basin water resource*’. South Sudan has been admitted to the NBI on 5 July 2012. See <<http://www.nilebasin.org>>

Initiative. These negotiations continued for more than ten years and concluded with differences of opinion.¹⁰⁷ In the final legs, the process ran into major difficulties as a result of the hardening of the riparian positions over the fate of colonial treaties, as well as the Egyptian and Sudanese claims of acquired uses and historical rights over the Nile waters.¹⁰⁸

The final form of the Cooperative Framework Agreement was adopted by seven votes to one in May 2009 by the Nile COM during an extraordinary meeting held in Kinshasa.¹⁰⁹ Following the adoption of the CFA, Ethiopia, Kenya, Rwanda, Tanzania and Uganda signed the agreement in May 2010. Burundi joined the group of signatory states in February 2011, bringing the number of signatories to six.¹¹⁰ Ethiopia has gone further in the process and ratified the agreement.¹¹¹

The CFA enunciated a number of rules and principles and rights and obligations of the Nile riparian countries. In specifics, it provided for principles on the protection, use, conservation and development of the Nile Basin. The CFA establishes the principle that each Nile Basin state has the right to use, within its territory, the waters of the Nile River Basin, and lays down a number of factors for determining equitable and reasonable utilization, including the contribution of each basin state to the waters of the Nile River System, and the extent and proportion of the drainage area in the territory of each basin state.¹¹² Stating the obligations of riparian states, the Framework Agreement included provisions requiring the Nile Basin states to take all appropriate measures to prevent the causing of significant harm to other basin states. Besides, it stated that where significant harm nevertheless is caused to another Nile Basin state, the states whose use causes such harm shall, in the absence of agreement to such use, take all appropriate measures, having due regard for the provisions of the CFA on equitable and reasonable utilization, in

¹⁰⁷Yacob Arsano (January 2011), Negotiations for a Nile-Cooperative Framework Agreement, ISS Paper 222, P. 4.

¹⁰⁸ Salman M.A. Salman, (2013), *supra* note 95, P.20.

¹⁰⁹ Yacob Arsano, (January 2011), *supra* note 107, P.5

¹¹⁰ Kidane Kiros Bitsue (September 2012), *The Nile: From Mistrust and Sabre Rattling to Rapprochement*, Institute for Security Studies Paper 238, note 79, P. 6. However, for the CFA to come in to force it awaits the instrument of ratification or accession of six riparian (Article 42, CFA).The most downstream states of Egypt and Sudan are the major ones who has not signed the instrument. The position of these states which put them in variance from the rest of the negotiators is discussed in subsequent paragraphs. Once the CFA enters in to force, the “Nile Basin Commission” will be operational which will start governing the use of the resource based on the agreed rules and principles contained in the CFA (Article 30, CFA).Though straight forward this seems to be, it is difficult to say what will happen to the rights and obligations of states that are not going to be parties to the treaty. This is said to give rise to some difficult legal issues and exacerbate the existing disputes. See: Salman M.A. Salman, *supra* note 116, p. 23

¹¹¹ See: Nile Basin Cooperative Framework Agreement Ratification Proclamation no. 797/2013, (15th July 2013), *Federal Negarit Gazeta*, 19th Year, No. 48.

¹¹² CFA, Article 3

consultation with the affected state, to eliminate or mitigate such harm and, where appropriate, to discuss the question of compensation.¹¹³

It is imperative to highlight a few of the lingering issues among the Nile riparian countries, mainly between Egypt and Sudan on the one hand and the remaining states on the other hand, for not reaching agreement on the CFA. Of interest in this regard is the disagreement over the content of Article 14 on the issue of water security of the Nile Basin states.¹¹⁴

Articles 2, 3(15) and 14 of the CFA dealt with the concept of water security. The first article defined water security as ‘the right of all Nile Basin states to reliable access to and use of the Nile River system for health, agriculture, livelihoods, production and the environment’. The next article put ensuring the water security of Nile Basin states as one of the guiding principles of the CFA. Article 14 requires the basin states to work together to ensure that all states achieve and sustain water security.

The negotiators have not been able to reach an agreement on the precise wording of Article 14(b) of the CFA. An upstream version provided that ‘having due regard to the provisions of Articles 4 and 5, Nile Basin states recognize the vital importance of water security to each of them. The states also recognize that the cooperation management and development of waters of the Nile River System will facilitate achievement of water security and other benefits. Nile Basin states therefore agree, in a spirit of cooperation:

- (a) to work together to ensure that all states achieve and sustain water security;
- (b) *not to significantly affect the water security of any other Nile Basin State.*

A downstream proposal formulated Art 14 to read that the states shall agree ‘not to adversely affect the water security and current uses and rights of any other Nile Basin state’.

The main reason that kept Egypt and Sudan from joining the CFA was this new concept of ‘water security’ which they hoped would be translated to protect existing uses, and hence sustain what they had hitherto advocated as their ‘historical’ entitlements.

¹¹³ CFA, Article 4 &5, respectively.

¹¹⁴ The other disagreements related to issue of planned measures, on the manner of amendment of the CFA and finally on the application of the ‘Nile River Basin’ and the ‘Nile River System’ concepts.

CHAPTER FOUR

THE CLAIM TO 'HISTORICAL RIGHTS' ON THE NILE WATER AND ITS STATUS UNDER INTERNATIONAL LAW

Introduction

States' behavior and actions are generally subjected to various prescriptions of international law so that there would be a peaceful coexistence and smooth interaction. The body of international watercourses law has developed rules and principles sanctioning states' actions in the use of shared rivers. It is now well recognized that all riparian states have a right to an equitable and reasonable use in a shared river - with a corresponding obligation of not causing significant harm against the interests of others. A similar formulation of rights and obligations has also been articulated under the CFA.

Along the downstream Nile, the claim of 'historical rights' has been espoused on multiple occasions so that prior and long established (existing) uses by Egypt, and in some measure - the Sudan, are safeguarded in perpetuity. This approach is generally backed by the natural flows canon - calling for the uninterrupted and natural flow of a watercourse, a claim premised on the absolute territorial integrity doctrine.

In recent diplomatic exchanges, the claim for perpetuation of the status quo in the use of the Nile waters has been espoused by the rationale that Egypt has no other alternative resources than making use of the Nile; this was employed to advocate *historical and acquired right* to use the water.¹¹⁵

Looking in to the unique development of riparian uses over the Nile, the natural endowments and geographical setup prevalent in the basin countries and particularly Egypt, it was claimed that the defense of rights on the basis of historical uses is well backed by international law; the long established use over the Nile River should remain intact and any further talk on equitable use

¹¹⁵The steps being taken by Ethiopia to construct the GERD has resulted in to a series of diplomatic exchanges and reactions at different level among the governments of Ethiopia, Egypt and The Sudan. Egypt has been resounding that her historically guaranteed right to current use of the Nile waters should not be put under any risk of reduction due to this mega project. Ethiopia on the hand maintains that the project is one expression of the exercise of right of the nation to an equitable share from the shared resource.

would have to be made on the ‘unutilized water’ only.¹¹⁶ With a similar tone, it has been contended that ‘historically only Egypt and the Sudan got shares in the water’ and Egypt’s claim of historical rights, ‘confirmed by many agreements...are protected by international law.’¹¹⁷

What is more striking in finding such a stand with in the basin is the particular geographical and political context of the river basin. First, the Nile basin, which covers about one-tenth of the African continent, is widely regarded as the longest river in the world, but shows among the lowest discharge when compared with other large rivers. Second, there has been a great contrast between two groups of riparian states - those which contribute almost all the waters to the Nile but uses none (such as for e.g. Ethiopia) and others which contributes almost nothing to the natural flow but utilizes most of its discharges (for e.g. Egypt). Third, sharing waters of the Nile has become imperative in view of the rapid population growth; the needs of farming economies of the riparian states has turned the Nile waters in to a greatly demanded but scarce commodity.¹¹⁸

The argument for the continuation of the status quo has surfaced in recent initiatives for the re-apportionment of the patterns of use. In contemporary context, however, such claim has been presented differently - through the introduction of the concept of ‘water security and the protection of existing uses’. An attempt will therefore be made to scrutinize the legal standing and implication of the concept of ‘water security’ in a context that is relevant to the understanding of historical rights.

Having examined the backdrop in which ‘historical rights’ is taken as a basis of establishing a right to a sheer amount of the Nile floods; this part of the paper will continue ponder in to the detailed construction of this claim on the Nile. This will be preceded by a presentation on the evolution of such claim and its defining essence generally. Then, this chapter will scrutinize Egypt’s claim of historical rights or prior appropriations on the basis of the relevant principles of

¹¹⁶ Magdy Hefny& Salah El-Din Amer (2004), Egypt and the Nile Basin, Special Feature Article, *Aquatic Science*, 67 (2005) 42–50, in part putting that ‘Egypt has always been aware of the extreme importance of the Nile waters, both for Egypt as well as for all the countries of the Nile Basin. Due to Egypt’s historical dependence on the Nile, cooperation in the Basin needs to be based on the acceptance of Egypt’s acquired rights...’

¹¹⁷ Mahmoud Abu Zied, Egypt’s Former Minister of Water Resources and Irrigation (1999), *Al-Ahram Weekly Online, September Issue 447*, <<http://weekly.ahram.org.eg/1999/447/spec3.htm>>, as cited in Tadesse Kassa (2013), *supra* note 5.

¹¹⁸ Nurit Kliot (1994), *Water Resources and Conflict in the Middle East*, p. 15.

general international law, key case laws, and in light of the expositions of the institutional works of the ILA and IIL. Finally, analysis would be concluded by examining this claim in light of relevant provisions of the UN Watercourse Convention.

4.1 General

4.1.1 Origin of the claim of ‘historical rights’

User right assertions in a national or international setting have been espoused based on varied reasoning. Often, positions held by states internationally stem from jurisprudential developments in national legal settings.

Egypt has conventionally advocated her right to the current uses of the Nile and has repeatedly reminded co-riparian states that its right should not be interfered with. The defining character of such argument prescribes that the country has *long established* and *indissoluble right of use* of the river which gives her ‘*historical and acquired right*’ to a certain amount of the Nile flows. In essence, the fact that the country has first established use on such waters would give her the rights to claim the same in perpetuity. This has hitherto posed serious challenge on the equitable entitlement of the riparian states and the juridical discourse in the Nile basin region in general.

Before looking in to how the historical rights conception has been formulated and perpetuated in the past, it will be imperative to first investigate how similar claims had been presented elsewhere in the world - and particularly in other basins and legal arrangements.

In a broader context of development of water law in the common law legal tradition, the two approaches of ‘*riparianism*’ and ‘*prior appropriation/use*’ have been presented in several literatures. The former mainly provides that all riparian right holders have a right to make ‘ordinary’ use of water flowing in the watercourse which encompasses ‘reasonable use’ of that water for domestic purposes, the watering of livestock and the like.¹¹⁹ It is applied where water was abundant and there were few out-of-stream uses of water. The “reasonable use” interpretation gave each landowner the right to the use of water flowing over the land without diminution or obstruction. When water flows were insufficient to meet all uses, the deficiencies were borne as a common loss, with each user cutting back by the same proportion. The extent to

¹¹⁹ Stephen Hodgson (2008), *Modern Water Rights: theory and practice*, Food and Agricultural Organization (FAO), *FAO*, PP 9 & 11.

which any particular use was allowed was determined by the potential injury to other riparian landowners should that use occur.¹²⁰

The conceptions of ‘historical rights’ ‘acquired rights’ or ‘established rights’ could generally be conceived as derivatives or extensions of the law of prior appropriation.¹²¹ The prior appropriation doctrine was essentially developed in the nineteenth century to serve the practical demands of water users in the arid Western United States. It originated in the customs of miners on federal public lands who accorded the best rights to those who first used water just as they had accorded mining rights to those who first located ore deposits.¹²²

One justification in upholding the system of prior-use is the protection of expectations. Water right users, who have in fact put water to a beneficial use, are said to need clear, consistent rules that do not invite challenges to claimed entitlements. Such a rule would protect their ‘legitimate-backed’ expectations. As a rule for initial assignment of exclusive property right, the rule is also taken to help in avoiding what is referred to as *tragedy of commons*, which features a mal-use in properties held in common.¹²³

4.1.2 Essence of ‘historical rights’

The right of individuals to use water under the prior appropriation system is based on application of a quantity of water to a beneficial use. The date of the appropriation determines the user's priority to use water, with the earliest user having a superior right. If water is insufficient to meet all needs, those who hold the earliest appropriations (senior appropriators) will obtain all of their allocated water; those who appropriated later (junior appropriators) may receive only some, or none, of the water over which they have rights.¹²⁴ Prior use right is to continue to have water as before.¹²⁵

¹²⁰ Daina Dravnieks Apple (2001), *Evolution of U.S. Water Policy: Emphasis on the West*. P. 3

¹²¹ Debay Tadesse, supra note 38, P.14.

¹²² Stephen Hodgson (2008), supra note 119.

¹²³ A. Dan Tarloc (2000), Prior Appropriation: Rule, Principle, or Rhetoric?, *North Dakota Law Review*, Vol. 76:881, pp. 885-886

¹²⁴ Stephen Hodgson, (2008), supra note 119.

¹²⁵ Anthony Scott & Georgina Coustalin (Fall 1995), Evolution of Water Rights, *Natural Resources Journal*, vol. 35, No. P. 852

The miners in Western United States staked a claim to water by physically taking, or “appropriating,” what they needed. Construction of the diversion necessary to take the water served as notice to other miners that the water was being appropriated. The first miners to appropriate water had the best right to continue using it. Subsequent appropriators were required to make do with what was left, if anything. Even if located upstream from a prior user’s diversion works, a subsequent “junior” water user was required to allow enough water to pass to meet the need of the downstream “senior” appropriator.¹²⁶

The basic features of the prior appropriation doctrine are that:¹²⁷

1. The right to use water could be obtained by taking the water and putting it to beneficial use.
2. The right was limited to the amount of water that was beneficially used. First in time was first in right.
3. The water must be used or the right was lost.

The rule’s bedrock principle is that *beneficial use is “the basis, the measure and limit of a water right.”* Most fundamentally, it awards water rights to those who apply water to a specific beneficial use—that is, some purpose that the law regards as productive or useful. This is taken as important because as water rights are measured and limited by beneficial use; no one has a right to waste water—that is, to take more water than needed for the specific use that gave rise to the right, or to use water in a way that would not serve that beneficial purpose.¹²⁸

Many modern physical and behavioral constraints on the rigorous enforcement of priorities are witnessed. All usufruct rights in fugitive resources, such as water, are to some degree correlative because there are inherent limitations on exclusivity. The correlative nature of water rights puts the first limitations on the application of prior use rules. That is, all stream users have strong, if unequal expectation, of the continued enjoyment of a right which cuts against unlimited recognition of priority. The physical nature of water rights creates strong pressures for equitable sharing rules. Again, the strict enforcement of priorities tends to lead to inefficient use practices. The cushion of a senior right combined with the “use it or lose it” rules, abandonment and

¹²⁶ Daina Dravnieks Apple (2001), *supra* note 120, pp. 5-6

¹²⁷ *Id.*, P. 7

¹²⁸ Reed D. Benson (2012), *Alive But Irrelevant: The Prior Appropriation Doctrine in Today’s Western Water Law*, *Colorado Law Review*, Volume 83, Issue 3, pp. 680-681

forfeiture; create powerful incentives to use the maximum entitlement and to forego investments in water conservation infrastructure.¹²⁹

Prior appropriation applies to large as well as small amounts of water, but the larger the block, the less important priorities will be. The larger the block, the easier it is for entitlement holders to absorb proportionate cut backs; or diverting a river in excess of priority.¹³⁰

In prior appropriation, “requirement of ‘beneficial use without waste’ sounds tight, as if water users must carefully husband the resource, using every drop of water completely and efficiently.” The reality is that it has been applied loosely, showing great tolerance for inefficient old practices. “The prohibitions against waste—even the threat of forfeiture for nonuse—are mostly hortatory concepts that rarely result in cutbacks in water use.¹³¹

By allocating so much of the region’s limited water early on, and by giving top priority to the oldest uses, prior appropriation was sure to come under pressure as the West changed during the twentieth century.¹³² Many legal scholars question the functionality of prior appropriation going forward, particularly given increasing populations, severe drought and environmental issues surrounding water. Critics believe the doctrine to be ill-suited to address and balance the diverse interests of water users today.¹³³

4.1.2.1 Application of ‘historical rights’ in the U.S.A.

Appropriative water right has been a subject of interstate water dispute before the United States Supreme Court. In fact, the Court has been able to shape its development and essence through time.¹³⁴

In the *Wyoming vs. Colorado* case, where both states followed in their respective jurisdiction the rule of prior appropriation, the Court applied the rule in an inter-state setting. Wyoming brought

¹²⁹A. Dan Tarloc, (2000), supra note 123, pp. 897 & 902.

¹³⁰ Ibid

¹³¹ Reed D. Benson (2012), supra note 128, p.689

¹³² Id., p 677

¹³³Tiffany Dowell (24 February 2014), The Prior appropriation doctrine,<http://www.progressivecattle.com/news/in-the-news/6100-the-prior-appropriation-doctrine>, accessed 02 June 2014

¹³⁴ Refer to cases: *Wyoming vs. Colorado*, 259 U.S. 419 (1922); *Nebraska vs. Wyoming* 325 U.S. 589 (1945); *Colorado vs. New Mexico (Vermejo I)*, 459 U.S. 176, 184 (1982); and *Colorado vs. New Mexico, remanded to Spec. Master*, (Vermejo II), 467 U.S. 310 (1984)

proceeding against Colorado to restrain that state from diverting water from the Laramie River. The project called for a portion of the diverted water which would normally flow from Colorado in to Wyoming to be transferred through a tunnel in to the Poudre river basin, which lies wholly in Colorado. Wyoming challenged the project on two grounds: first that the Laramie River water could not be rightfully transferred in to another basin, where it could never benefit Wyoming; and second, the proposed diversion would not leave sufficient water to satisfy the many ‘prior uses’ that had been made of it in Wyoming, which were ‘superior in right’ to the Colorado project. Colorado contended the case should be treated “as though the controversy were between independent nations which have absolute dominion of everything within their boundaries, including the waters, specifically invoking the Harmon Doctrine.”¹³⁵

In applying the prior appropriation rule, the Court stated that “the cardinal rule of the doctrine is that priority of appropriation gives superiority of right. Each of these states applies and enforces this rule in its own territory, and it is the one which intending appropriators would naturally turn for guidance...both states pronounce the rule just and reasonable as applied to natural conditions in that region and to prevent any departure from it; the people of both have incorporated the rule into their constitutions. It originated in the custom and usage of people before either state came in to existence, and the courts of both held that their national constitutional provisions are to be taken as recognizing the prior appropriation usage rather than as creating a new rule. These considerations persuade us that its application to such a controversy cannot be other than eminently just for all concerned”.

The practice of the US Supreme Court has been inconsistent because of the multiplicity of rules and customs it applies in each particular case. In fact, in subsequent developments, this rule has in many rulings of the Court evolved in to the concept of *equitable apportionment*. In different proceedings, the Court had stated that a strict application of the rule of prior appropriation might not help much in reaching on just and equitable decision in view of existing uses due to the possible advent of junior appropriation. Hence, a total reliance on the priority of use rule has been adjusted on a number of occasions. The *Nebraska vs. Wyoming* dispute over the North Platte River could be taken as a turning point in this regard.¹³⁶

¹³⁵ Wyoming vs. Colorado, 259 U.S. 419 (1922), modified, 260 U.S. 1 (1922), vacated, 353, U. S. 953 (1957), as cited in Stephen C. McCaffery, *supra* note 13, p. 245

¹³⁶ Nebraska vs. Wyoming, 325 U.S. 589 (1945)

In this proceeding, Nebraska charged that “Wyoming and Colorado were violating the rule of priority of appropriation adopted by the three states, thus depriving Nebraska of water to which it was entitled”. The facts reflected an uneven development of the economies dependent on the river in the three states. Because of the complexity of diversions in the three states along six reaches of the river, protection of the existing economies could not have been accomplished through the strict application of priorities. Priority of appropriation remained the guiding principle, but it had to be varied in order to protect established economies based on junior appropriations.¹³⁷

In light of these considerations, the Court admitted that “if an allocation between appropriation states is to be just and equitable, strict adherence to the priority rule may not be possible”. For example, the court continued, “the economy of a region may have been established on the basis of junior appropriations. So far as possible, established uses should be protected, though the strict application of the priority rule might jeopardize them. Apportionment calls for the exercise of an informed judgment on consideration of many factors. Priority of appropriation is the guiding principle”.¹³⁸

A similar analysis was featured in the Vermejo River dispute between Colorado and New Mexico, both following the rule of prior appropriation.¹³⁹ Colorado sought an equitable apportionment of the waters of the Vermejo River (for proposed new uses), which originates in Colorado and flows into New Mexico. Historically, all of the river's waters have been used exclusively by farm and industrial users in New Mexico.¹⁴⁰ On face of the argument by New Mexico to a senior right that should not be infringed by the proposed new use in Colorado, the Court determined, rejecting a theory of interstate prior appropriation, that a junior use, proved to the satisfaction of the court as reasonably acquired and applied, would be recognized. The Court determined existing uses in New Mexico could be reduced to accommodate new uses in

¹³⁷ Richard A. Simms (Spring 1989), Equitable Apportionment- Priorities and New Uses, *Natural Resources Journal*, vol. 29, PP. 555-556

¹³⁸ *Nebraska vs. Wyoming*, 325 U.S. 589, (1945), page 618.

¹³⁹ *Colorado vs. New Mexico (Vermejo I)*, 459 U.S. 176, 184, (1982), *remanded to Spec. Master*, (*Vermejo II*), 467 U.S. 310 (1984).

¹⁴⁰ *Colorado Vs. New Mexico*, (1984), 467 U.S. 310, syllabus

Colorado. However, Colorado was denied the future apportionment of the water for failure to prove its reasonableness, and not because senior rights might not be infringed at any cost.¹⁴¹

4.1.2.2 Application of the rule in the Indus River

Though conceived under local laws, arguments based on the significance of historically acquired uses and the continued protection of existing uses have also surfaced in discourses on the use of international rivers other than the Nile.

The Indus River which rises in Tibet and flows some 1,800 miles through India and Pakistan to its mouth in the Arabian Sea has been the subject of controversy since the partition of British India into the domains of India and Pakistan on 14 August 1947. The Indus drains an area approximately 350,000 sq. miles and has an annual flow that is twice the Nile and three times that of the Tigris-Euphrates river basins. The civilizations in the Indus basin utilized the river's waters for irrigation since 4,500 years ago. The partition left a portion of the basin in each of the new dominions, with Pakistan receiving the greater share of a canal system and irrigated lands lying in pre-partition Punjab.¹⁴² A dispute over the Indus arose shortly following partition when the East Punjab (in India) cut off supplies essential to existing irrigation in the West Punjab (in Pakistan) for a time and with devastating results.¹⁴³

Though the Indus Water Treaty of 1960 between India and Pakistan resolved the long-running dispute,¹⁴⁴ the two parties have for long quarreled over the start of construction in India of works

¹⁴¹ Margaret J. Vick, *The Law of International Waters: Reasonable Utilization*, *CHI.-KENT J. INT'L & COMP. L.*, Vol. XII, No. 1, P. 172.

¹⁴² Stephen McCaffery, (2007), *supra* note 10, P. 248

¹⁴³ John G. Laylin, (April 28-30, 1960), *Indus River System-Comments*, *Proceedings of the American Society of International Law at Its Annual Meeting (1921-1969)*, Vol. 54 pp. 144-152, available at: <<http://www.jstor.org/stable/25657489>> accessed: March 31, 2014, P. 145

¹⁴⁴ The Indus Water Treaty, signed on September 09, 1960, Karachi, 419 UNTS 126. Brokered by the World Bank, the then International Bank for Reconstruction and Development (IBRD), this agreement was reached after a series of negotiations along which there took place a points of disagreements on constructions made by India and to some extent Pakistan. The agreement finally came up with a formula for the apportionment of the waters. In the main, the agreement allocated the waters of Eastern Rivers (Ravi, Beas and Sutlej and their tributaries) to India. India is under obligation to let flow the waters of the Western Rivers (containing Indus, Jhelum and Chenab and their tributaries which are allocated to Pakistan) except for the some identified non-consumptive and domestic uses. See Articles II and III and the applicable annex. A transition period of ten years was allotted within which supplies necessary for existing irrigation in Pakistan will continue to flow from India until they can be replaced. See Article II (6).

designed to divert for new irrigation in India, supplies essential to maintain existing irrigation in Pakistan.¹⁴⁵

At one point India took the position that ‘both countries have full and exclusive jurisdiction over the management, control and utilization of natural waters available in their territories.’¹⁴⁶ Pakistan characterized the position of India as striking at ‘the very root of Pakistan’s right to historic and legal share in the common river.’¹⁴⁷

Though the Indus Water Treaty was praised in making the Indus valley one of the few success stories in transboundary water conflicts where disagreements were resolved peacefully,¹⁴⁸ provisions in the very treaty,¹⁴⁹ perception of citizens in the respective countries,¹⁵⁰ and recent development added¹⁵¹ would make one think that arguments on the one hand in favour of protecting existing uses which call for unhindered flow of water and those calling for territoriality of power would still remain unabated.

Both in a national and international setting, the basic and defining essence of a ‘historical right’ over a shared water resource has called for the overarching importance of long established and existing uses, and hence urges the free flow of a river downstream. In some measures, this reads

¹⁴⁵ John G. Laylin, (April 28-30, 1960), supra note 144, P. 146.

¹⁴⁶ Richard Baxter, *The Indus Basin in International Drainage Basins*, P.456, as cited in Stephen McCaffery, supra note 13, P.116

¹⁴⁷ Note Verbal, Ministry of Foreign Affairs and Commonwealth Relations, Government of Pakistan, to High Commissioner for India in Pakistan, (16 June 1949), Richard Baxter, supra note 93.

¹⁴⁸ Tesfaye Tafesse (2001), *The Nile Question: Hydro politics, Legal Wrangling, Modus Vivendi and Perspective*, P. 19

¹⁴⁹ Article II (2) of the Indus Water Treaty stated “Nothing in the treaty shall be construed by the parties as in any way establishing any general principle of law or any precedent”. In this regard it is noted that the two countries would revert to their fundamental legal postures in any future water dispute that was not governed by the treaty. See Stephen McCaffery; supra note 13, P. 250.

¹⁵⁰ Ramaswamy R. Iyer, (Jul. 16-22, 2005), *Indus Treaty: A Different View*, Economic and Political Weekly, Vol. 40, No. 29 pp. 3140-3144, <http://www.jstor.org/stable/4416904>, accessed: march 31 2014. Many in India feel that the allocation of 80 per cent of the waters to Pakistan and 20 per cent to India was an unfair settlement accepted by the Indian negotiators; and many in Pakistan argue that the territories that went to India under Partition were historically using less than 10 per cent of the Indus waters, and that the treaty was generous to India in giving it 20 per cent of the waters.

¹⁵¹ There is an ongoing dispute between the two parties on the actions of the India government in building a number of massive dams over the western rivers for production of hydroelectric power, where Pakistan claims are against the purpose and spirit of the very treaty. See: Nosheen and Toheeda Begum, *Indus Water Treaty & Emerging Water Issues*, Abasyn Journal of Social Sciences, vol.4, no. 2. See also: Niharika Mandhana, *Water Wars: Why India and Pakistan Are Squaring off over Their Rivers*, <<http://content.time.com/time/world/article/0,8599,2111601,00.html>>, (16 April 2012), accessed March 2014.

in to what has been characterized as a theory of territorial integrity - often relied upon by lower riparian countries.

4.2 ‘Historical rights’ on the Nile: manifestation of claims

Under this subtopic attempt would be made to present when and under what circumstances Egypt and possibly Sudan had created, formulated and campaigned for historical rights conceptions in the past, in public discourses, diplomacy, bilateral relations and legal settings.

The greater part of Egypt’s territory is desert, lying generally at a much higher level than the river. The small and real Egypt may be literally described as ‘the river, which is Egypt’; meaning the land formed by the deposit of the silt-laden annual floods of the Nile. The Nile has been extensively irrigated in Egypt since antiquity. The combined area of all of the Nile lands in Egypt totals about 7,300,000 feddans (3,066,000 hectares), of which about 5,200,000 feddans (2,184,000 hectares) are under cultivation.¹⁵² Over the decades, such a pattern of vulnerable association between nature and civilization fostered an all-pervading stratum of values and beliefs that composed the mainstay of Egyptian economic and political thinking; at the heart of such system rests a deep-seated ‘proprietary and possessory’ conception.¹⁵³

The expressions calling for the preservation of the status quo on the basis of an argument that the River has for long sustained life in Egypt could be discerned from various accounts of Egyptian scholars and mind set of the ordinary Egyptian citizens.¹⁵⁴ Over the years, Egyptian foreign policy, the most important preoccupation of its external relations, has been crafted with a view to defending the natural flows of the river, the prejudicial effects on upstream interests notwithstanding.¹⁵⁵ Indeed, the downstream insist for a juridical preservation of historical/or

¹⁵² Pierre Crabitès (Dec. 15, 1924), *Egypt, the Sudan and the Nile*, Council of Foreign Relations, Vol. 3, No. 2, pp. 320-330, accessed: 30 October 2012, P. 324.

¹⁵³ Tadesse Kassa Woldetsadik (2013), *supra* note 5, P. 128

¹⁵⁴ One well-known Egyptian writer articulated the external relations of Cairo around the Nile question by arguing that: ‘the first civilization was the fruit of fortunate geographical marriage between Egypt and the Nile, hence if history was a father of Egyptians and Egypt was a Mother of the World the Nile is simply the great, great grandfather of human civilization’, Himdan, Jamal, 1987, ‘*The Character of Egypt*’, Cairo, *Alam Al kotob*, cited in: Hamdy A. Hassan and Ahmad Al Rasheedy, “*The Nile River and Egyptian Foreign Policy*”, *African Sociological Review*, 11, 1, (2007), PP. 25-37.

¹⁵⁵ See generally: Hamdy A. Hassan and Ahmad Al Rasheedy (2007), *The Nile River and Egyptian Foreign Policy*, *African Sociological Review*, 11, 1, PP. 25-37.

natural rights of use could not be regarded as a sporadic phenomena abruptly manifesting under the 1929/1959 treaty arrangements; it evolved steadily and over much longer span of time.¹⁵⁶

The claim for the preservation of acquired or historical rights is allied to one of the obsolete doctrines in international watercourses law -the absolute territorial integrity rule – which called for a natural and uninterrupted flow of shared waters. Egypt is particularly sensitive to the possibility of development of tributaries of the upper Nile basin. In fact, its reliance on the Nile waters over the millennia has led it to believe that it has ‘natural and historical rights’ or ‘acquired rights’ in the waters. This belief is reflected in plenty of international forums where it contended that each riparian country has the full right to maintain the status quo of the rivers flowing on its territory, and that no country has the right to undertake any positive or negative measure that could have an impact on a river’s flow in other countries.¹⁵⁷

A scrutiny of the first formal recognition of concepts of *historical rights* of Egypt requires one to look in to the antecedents in the governance of part of the basin area.¹⁵⁸ In the colonial history of the Nile region, the Battle of Omdurman was fought on September 2, 1898 where the power of Khalifa, the successor of the Mahdi was crushed. Sudan was re-conquered by the British and Egyptian forces which fought in the name of the Khedive, leading to its joint administration. When, on February 28, 1922, Egypt gained its partial independence from Great Britain,¹⁵⁹ the interests of Great Britain turned significantly to the new colony of Sudan. With such developments, the subject of the Nile waters allocation entered a new phase.

This was particularly fueled as a result of economic and political pressures exerted by certain British syndicates over a possibility of launching alternative but competing cotton plantations in Sudan. They already learned of the productive quality of the soil in the Sudan, and plans were shortly floated to develop up to 300,000 feddans (126,000 hectares) of land within a few years, of which a third will require water in the spring of each year. Once the Anglo-Egyptian partnership ceased defacto to administer Sudan (with due regard for the vital interests of Egypt),

¹⁵⁶ TadesseKassa Woldetsadik (2013), supra note 5, P. 12

¹⁵⁷ Country Report, Egypt, paper presented at the Interregional Meeting of International River Organizations held at Dakar, 5-14 May 1981, para. 3, as cited in Stephen McCaffery, supra note 13, P. 130.

¹⁵⁸ See generally: Ludwik A. Teclaff (1967), *The River Basin in History and Law*.

¹⁵⁹ Pierre Crabitès (December 15, 1924), supra note, 152, P. 324.

it was assumed British capital will flow into the Sudan and that these amount of area will gradually extend into millions.¹⁶⁰

Yet, although Sudanese irrigation expanded steadily in the 1920's, the challenges posed by Egypt - who had always been apprehensive of Great Britain's intricate strategies in the region was quite serious, and the diplomatic and political relationship between Egypt and Great Britain was extremely strained. It was against a succession of historical events involving concerns over rising Egyptian nationalism, trailing negotiations over the Nile agreements and the assassination in Cairo of Lee Stack-Governor General of Sudan in 1924, that Lord Allenby, the British Commissioner in Egypt issued his infamous ultimatum on 22 November 1924; he declared the Sudanese Government should freely irrigate an unlimited extent of land along the Gezira, potentially withdrawing greater volumes of the Nile waters.¹⁶¹

An exchange of note which subsequently had to lead to the formal mention of the *Egypt's historical right* to Nile was occasioned by the reaction of Egyptian governor to the above ultimatum.

In a note dated 26 January 1925, Egypt expressed its grievance on the position of Great Britain that the area of land to be irrigated in the Sudan Gezira should be increased from 300,000 feddans (126,000 hectares) to an unlimited extent.¹⁶² The note further put that the measure announced has raised the most serious apprehensions in the country and that the Egyptian government has always maintained that 'this development should in no case be of such a nature as to be harmful to the irrigation of Egypt or to prejudice future projects'. The note concluded by appealing to the Britannic Majesty's Government to 'reconsider the question of the irrigation of the Gezira and to withdraw the instructions'.¹⁶³

In a reply made the same day, the Government of Britain, reminding that it has 'watched over the development of the agricultural well-being of Egypt, that 'however solicitous for the prosperity of the Sudan, have no intention of trespassing upon the *natural and historical rights* of Egypt in the waters of the Nile'. And 'in giving the instructions in question to the Sudan Government, His

¹⁶⁰ Id, p.327

¹⁶¹ Tadesse Kassa Woldetsadik (2013), supra note 5, P. 130

¹⁶² Ziwer Pasha, President of the Council of Ministers, Minister for Foreign Affairs to Lord Allenby, Cairo, January 26, 1925, (Appendix A, Nile River Commission Report), paragraph. 1

¹⁶³ Id., paragraph 4, 5 & 6

Majesty's Government intended that they should be interpreted in this sense.¹⁶⁴ The note further provide that 'an expert committee shall meet not later than the 15th February 1925 for the purpose of examining and proposing the basis on which irrigation can be carried out with full consideration of the interests of Egypt and without *detriment to her natural and historic rights*'.¹⁶⁵

Subsequently, a commission was appointed. A Report of the Nile Commission stated that it was appointed based on the exchange of notes dated 26th January, 1925, in which it was agreed that 'a Commission should be appointed for the purpose of examining and proposing the basis on which irrigation can be carried out with full consideration of the interests of Egypt and without detriment to her natural and historic rights'.

The 1929 Nile water agreement was concluded based on the findings of this commission, which is annexed to it. Under this setting it was agreed that an increase in quantity of water to be used by Sudan should be as it 'does not infringe Egypt's natural and historical rights in the waters of the Nile and its requirements of agricultural extension'.¹⁶⁶

The 1959 agreement therefore regarded as *acquired rights* the allocations made in the 1929 agreement. As a result of the new water control projects on Sudd el Aali reservoir at Aswan in Egypt and the Rosaries Dam on the Blue Nile in Sudan, Egypt and Sudan got an added water of 14 ½ bcm and 7 ½ bcm water respectively.

'Historical rights' and the 'prior use doctrine' have constituted crucial foundations in the formation of the Nile Waters Agreements as well as the subsequent discussions. According to this conception, Egypt and Sudan enjoy unhampered right to the Nile waters that are or have been used currently or in the past years. Egypt continues to insist upon this approach, declaring that upstream riparian states are barred from using Nile waters in a way that limits any established or historical use of the river within Egypt.¹⁶⁷

¹⁶⁴ Lord Allenby, High Commissioner to Ziwer pasha, Appendix A, Nile River Commission Report, Cairo, (January 26, 1925), Paragraph 4

¹⁶⁵ Id., Paragraph 5

¹⁶⁶ The 1929 Agreement, Article 2

¹⁶⁷ Valerie Knobelsdorf, *The Nile Waters Agreements: Imposition and Impacts of a Transboundary Legal System*, 44 *Colum. J. Transnat'l L.* 622, P. 19.

4.2.1 ‘Historical rights’ on the Nile Vs. ‘water security’: revitalizing old claims

As witnessed in other water use negotiations, the upper and lower riparian states in the Nile had controversies over, *inter alia*, the two governing principles of equitable and reasonable utilization (usually favored by the upper riparian countries) and the rule against the causing of significant harm (usually favored by lower reaches of the rivers). In an attempt to address the controversies and differences over these two principles, the CFA introduced the concept of ‘water security’.¹⁶⁸ Despite the inclusion of such a novel conception, however the negotiators had not been able to reach agreement on its exact formulation.

In effect, Article 14 made the interpretation of the principles of equitable utilization and no harm rule connected to the water security of the states. Egypt and Sudan did not accept this measure; instead, they proposed to align the two states’ water security with ‘current uses and rights’, which was obviously objectionable to the upper stream countries.

In any event, the introduction of such a dubious concept, in an instrument already incorporating important principles of international watercourses law, under the pretext of bringing diverging views closer, added no value to the regional legal discourse, causing but a lingering impasse.¹⁶⁹

This being said, the point remains that the quest by Egypt for incorporation of the concept of ‘water security’ basically calls for no less than the maintenance of the status quo as shielded by what it regards is its ‘historical’ entitlement, a right which has found clear expression under the 1929 and 1959 agreements. In contrast, upstream states took a firm stand against any chances of the continuity of the status quo - a momentum much stronger than it was at any time in the past.

From the above, one can conclude that this position on ‘water security’ tells in no more than clear terms that downstream states still persist in further consolidating under a new disguise their *historical and acquired* rights to the Nile waters. The bottom line remains to be that the fateful

¹⁶⁸ Salman M.A. Salman, (2013), *supra* note 95, P. 21. Article 4(f) of the CFA defined water security as ‘Right of all Nile Basin States to reliable access to and use of the Nile River system for health, agriculture, livelihoods, production and environment’.

¹⁶⁹ See generally: Dereje Zeleke Mekonnen (2010), The Nile Basin Cooperative Framework Agreement Negotiations and the Adoption of a ‘Water Security’ Paradigm: Flight into Obscurity or a Logical Cul-de-sac, *EJIL*, Vol. 21 No. 2.

inclusion in the CFA of the concept of ‘water security’ tried in vain to maintain the viability of the status quo and accompanying circumstances.

4.3 Status of ‘historical rights’

4.3.1 Analysis under general international law

Under the sources of general international law are found general/specific conventions, international custom and body of general principles of law as developed by ‘civilized nations’.¹⁷⁰ These norms provide a framework for states to exercise their sovereign right with in their territory and interact with other fellow states. In particular, varied stipulations have been provided bearing impact on how states might have to utilize shared natural resources in general and shared rivers in particular.

As recently as the 1950s, one can perhaps conclude that there was no customary international law on the non-navigational uses of international water resources.¹⁷¹ This assertion is supported by the great diversity of claims and counterclaims of states then in serious conflict over three of the world's major international rivers - the Indus, the Nile and the Columbia. The upstream states generally argued that states had the right to deal with the waters in their territories as they pleased. In the case of the Indus, this argument was in part based on the idea of territorial sovereignty, thus echoing the Harmon doctrine. In the case of the Columbia, the argument was based on the Boundary Waters Treaty of 1909. The downstream states argued they were entitled to receive the flow of the waters undiminished in quantity and quality, thus invoking a riparian rights view of the law that, in practice, would give them veto powers over upstream water uses. In the end, of course, the parties settled the disputes through treaties whose contents discounted the legal principles they had invoked.¹⁷² The stance in the Nile, still a reason for not reaching on an all inclusive agreement on comprehensive utilization and management of its resources, is

¹⁷⁰ See Article 38 of the Statute of the International Court of Justice (ICJ) listing sources of international law it would apply in adjudicating disputes among States.

¹⁷¹ William W. Van Alstyne (1960), International Law and Interstate River Dispute, *California Law Review*, vol. 48, No. 4, pp. 596-622. Available at: <http://www.jstor.org/stable/3478592>, accessed: 31 March 2014. See the discussions on the evolution of customary international law of rivers in pp. 599- 602. See also: Takele Soboka Bulto (2008-2009), supra note 104, pp. 310-311.

¹⁷² Charles B. Bourne (1997), The Primacy of the Principle of Equitable Utilization in the 1997 Watercourse Convention, Notes and Comments, 35 *Ca. Y.B. Int'l L.* 215, p.215, available at: <http://heinonline.org> accessed 14 August 2013.

essentially the downstream countries' argument to a *historical (acquired) and natural rights* of use – mostly grounded on territorial integrity of the flow of the river and protection of existing uses.

However, by the end of 1960's, the principle of reasonable and equitable utilization has been accepted as rule of customary international law, emerging mainly from the intensive studies of the Institute of International Law and the International Law Association.¹⁷³ This was further consolidated in the drafting processes of the UNWCC by the International Law Commission, which took up the study of progressive development and codification of customary rules on the matter.

The underlying message of the reasonable and equitable utilization principle is that a state cannot legally do as it pleases in the use of a river it shares with others. Rather, it has to make a reasonable and equitable use out of the resources.¹⁷⁴ Such use of a resource is to be determined on the basis of the consideration of all relevant factors provided in Article 6 of the UN Watercourses Convention.¹⁷⁵ Hence, no single factor as such, existing or future uses could be singularly treated. An argument calling for a share in a watercourse only on the basis of long established and historical rights, which inevitably required an uninterrupted flow of the same water, loses prominence. The water should be catered to all basin states and on the basis of all the factors listed in the stated provision. This relevant articulation of the UN Watercourses Convention has been stated as a rule of customary international law, and would be binding on riparian countries regardless of treaty ratification.

Apart from the customary international law, there are several declarations of principles pronounced by intergovernmental organizations; most have provided for guiding rules and principles in the exercise of sovereign right of states in the utilization of shared resources.¹⁷⁶

¹⁷³ Id, P. 216

¹⁷⁴ Article IV of the Helsinki Rules provides that 'Each basin State is entitled, within its territory, to a reasonable and equitable share in the beneficial uses of the waters of an international drainage basin.' Article 5(1) of the UNWCC similarly states that 'Watercourse States shall in their respective territories utilize an international watercourse in an equitable and reasonable manner.'

¹⁷⁵ Helsinki Rules (1966), article 5 & UNWCC, article 6.

¹⁷⁶ Look at: *Sources of International Water Law, some General Conventions, Declarations, and Decisions adopted by International Organizations, International Non-Governmental Institutions, International and Arbitral Tribunals, on International Water Resources*, (1998), Food and Agricultural Organizations, (FAO), Legislative Study 65, <ftp://ftp.fao.org/docrep/fao/005/w9549e/w9549e00.pdf>, Development Law Service, FAO Legal Office, Rome.

Among others, the 1972 Declaration of the United Nations Conference on the Human Environment could be cited as very important.¹⁷⁷ The Declaration, containing a number of principles and recommendations, puts the need for a common outlook on principles to inspire and guide peoples of the world in the preservation and enhancement of the human environment.¹⁷⁸ Principle 21 of the Declaration restated that ‘states have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies’.¹⁷⁹ Urging the need for the creation of river-basin commissions or other appropriate machinery for co-operation between interested states ‘in accordance with the Charter of United Nations and Principles of international law’ and giving full consideration to ‘permanent sovereignty of each country concerned to develop its own resources’, the Declaration asserted that this shall be premised on the idea that ‘the net benefits of hydrologic regions common to more than one national jurisdiction is shared equitably by the nations affected’.¹⁸⁰ These principles have been re-affirmed by resolutions of the United Nations General Assembly.¹⁸¹

Likewise, the 1977 United Nations Water Conference at Mar del Plata¹⁸² underlined the necessity for states to co-operate in the case of shared water resources ‘in accordance with the Charter of the United Nations and principles of international law’ and on the basis of ‘the equality, sovereignty and territorial integrity of all states’. In the use, management and development of shared water resources, national policies of states are required to take into consideration ‘the right of each state to an equitable utilization’.¹⁸³

In light of the rules of general international law, every riparian state has been accorded an equal right in exploitation of natural resources in general and shared rivers in particular. All extreme

¹⁷⁷ United Nations, (5-6 June, 1997), *Report of the United Nations Conference on the Human Environment*, A/COMF.48/14 Rev.1 (Stockholm Declaration)

¹⁷⁸ Stockholm Declaration, chapter one, preamble

¹⁷⁹ Stockholm Declaration, Principle 21.

¹⁸⁰ Stockholm Declaration, recommendation 51, (a) & (b) (iii)

¹⁸¹ See: UN General Assembly, (13 December 1973), *Co-operation in the field of the Environment concerning Natural Resources Shared by Two or More States*, Resolution No.3129 (XXVIII), New York. UN General Assembly, (15 December 1978), *Co-operation in the field of the Environment concerning Natural Resources Shared by Two or More States*, Resolution No.33/87, New York

¹⁸² United Nations (March 1977), *Report of the United Nations Water Conference*, Mar del Plata, 14-15 March, (Mar de Plata Declaration)

¹⁸³ Mar de Plata Declaration (March 1977), International cooperation in Development of shared water resources, preamble, paragraph 1 & 2

positions calling for a reservation of the shared waters in exclusivity, such as those propounded under the ‘historical rights’ thesis could not ensure every riparian state’s right to benefit in an equitable and reasonable use of a shared resource.

4.3.2 Analysis under case law

One important avenue where states resort to resolve disagreements involves submission of differences to a third body, such as a court or an arbitral tribunal. The allocation of transboundary water resources among states has been one of the first issues adjudicated at the international level. Important decisions had also been rendered by the United States Supreme Court adjudicating interstate water disputes. As being the jurisdiction from which claim of water right on the basis of prior/senior use originated and developed, a discussion on the jurisprudence of the U.S. Supreme Court is believed to furnish important insights on the issue and hence taken as one point of analysis. The cases discussed below are selected on account of their bearing on the extreme positions of ‘historical rights’ and the protection of ‘established uses’.

Of interest in the context of the present discussion, in the *River Oder Case*¹⁸⁴ the Permanent Court of International Justice (PCIJ) based its judgment on the concept of a ‘community of interest’ of riparian states, and importantly stated that the 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 use of the whole course of the river and the exclusion of any preferential privilege of any riparian state in relation to others.¹⁸⁵

While this dispute concerned a question of navigation, the characteristics of the river that led the Court to draw the above conclusion also supports the proposition that states sharing an international watercourse have a ‘common legal right’ in its non-navigational use as well. The best designation for the determination of common right with regard to such use is the equitable utilization doctrine.¹⁸⁶ This equality of rights of all riparains to use from a shared river has been

¹⁸⁴ Territorial Jurisdiction of the International Commission of the River Oder, (Denmark, Czechoslovakia, France, Germany, the United Kingdom, and Sweden v. Poland), (Sept. 10, 1929), PCIJ Series A, No 23 (Oder case, 1929)

¹⁸⁵ Ibid., Page 27

¹⁸⁶ Stephen McCaffery (2007), supra note 10, pp. 181-182. This proposition has also been evident in the works of Jerome Lipper, Equitable Utilization, in INTERNATIONAL DRAIANG BASINS & Johan G. Lammers, (1998), The Gabčíkovo-Nagymaros Case Seen in Particular From the Perspective of Law of International Watercourses and the Protection of the Environment, 11LEIDEN J. INT’L L, 27

endorsed in the *Gabcikovo-Nagymaros Project* case before the ICJ dealing with the subject in a non-navigational uses context.

The dispute over the *Gabcikovo-Nagymaros Project* case¹⁸⁷ arose out of a 1977 agreement between Hungary and Slovakia (then Czechoslovakia) on the joint construction of two barrages on the Danube River for the purposes of hydroelectricity production, prevention of flooding, and improvement of navigation. The parties undertook an obligation to ensure that the quality of waters of the Danube River was not to be impaired.¹⁸⁸

Relevant to the present discussion and in rendering not proportional the countermeasure taken by the Slovakian government for it resulted in a unilateral control of a shared resource, thereby depriving Hungary of its right to an equitable and reasonable share of the natural resources of the Danube, the Court referred to the *Oder Case* which upheld principles of ‘...the community of interest of riparian’ whose essential feature is ‘the perfect equality of all riparian states’ and decided that ‘modern development of international law has strengthened this principle for non-navigational uses of international watercourses as well, as evidenced by the adoption of the Convention of 21 May 1997 on the Law of the Non-Navigational Uses of International Watercourses by the United Nations General Assembly’.¹⁸⁹

As presented in the preceding sections, states had filed suits before the U.S. Supreme Court calling for the protection of established uses against new uses. While the Court’s decisions may not be consistent owing to the legal basis of the arguments and the role of local custom in each of the different disputes, it could be observed generally that in most adjudications, the Court had held that established uses would have to be compromised in favor of the equality of rights of all riparians to a just and equitable utilization.

The pattern of use and claims of right over the Arkansas River in the USA could be characterized as a contest for the “Nile of America”.¹⁹⁰ In the dispute between Kansas and Colorado,¹⁹¹ Kansas, a downstream state and a prior user, brought a suit to ‘restrain Colorado and certain

¹⁸⁷ *Gabcikovo - Nagymaros Project* (Hungary/Slovakia), Judgments, I.C.J. Reports (1997), p.7

¹⁸⁸ *Id.*, Paragraph 15 & 16

¹⁸⁹ *Id.*, Paragraph 85

¹⁹⁰ See generally: James E. Sherow (1990), *The Contest For the “Nile of America”*: Kansas V. Colorado (1907), *Great Plains Quarterly*, Paper 504

¹⁹¹ *Kansas Vs. Colorado* (1907) 206 US 46

corporations organized under its laws’ from ‘diverting the water of the Arkansas River which affected long held established uses’.¹⁹² In so arguing, it appealed to ‘the rule of the common law that owners of lands on the banks of a river are entitled to the continual flow of the stream’.¹⁹³ In December 1906, S.S. Ashbaugh, an attorney representing Kansas, further told the Court: “our valley dried out and we no longer have our ‘Egypt’”.¹⁹⁴

The Court, in finding against Arkansas, held that ‘ it cannot be denied, in view of all the testimony, that the diminution of the flow of water in the river by the irrigation of Colorado has worked some detriment to the southwestern part of Kansas, and yet, when we compare the amount of this detriment with the great benefit which has obviously resulted to the counties in Colorado, it would seem that *equality of right and equity between the two states* forbids any interference with the present withdrawal of water in Colorado for purposes of irrigation.’¹⁹⁵

Highlighting on a riparian right to undiminished flow of water incidental to ownership of land , which has been one basis of argument by Arkansan, the Court differed in opinion quoting *Clark v. Allaman*, wherein it was held that ‘the use of the water of a running stream for irrigation, after its primary uses for quenching thirst and other domestic requirements, have been sub-served as one of the common law rights of a riparian proprietor’ and that ‘in determining the quantity of land tributary to and lying along a stream which a single proprietor may irrigate, the principle of *equality of right* with others should control...’.¹⁹⁶ It then quoted *Elliot v. Fitchburg Railroad Company* the relevant part of which stated that: ‘the right to flowing water is now well settled to be a right incident to property in the land; it is a right *publici juris*, of such character that, whilst it is common and equal to all through whose land it runs, and no one can obstruct or divert it, yet, as one of the beneficial gifts of providence, each proprietor has a right to a *just and reasonable use* of it, as it passes through his land, and so long as it is not wholly obstructed or diverted, or no larger appropriation of the water running through it is made than a *just and reasonable use*, it cannot be said to be wrongful or injurious to a proprietor lower down. What is such a just and reasonable use may often be a difficult question, depending on various circumstances. ... It is

¹⁹² Id., 206 US 46 Syllabus

¹⁹³ Id.,206 US 46 at 48

¹⁹⁴ Kansas Vs. Colorado, Marshal Murdock’s Testimony, Vol. 1, pp.9-10(location #47936, CSA); and Kansa Vs. Colorado , Oral Arguments of Counsel on Final Hearing, December 17th, 18th , 19th and 20th, 1906, Arguments of S.S Ashbaugh , p. 24 (microfiche card 55, UCLL), as cited in James E. Sherow (1990).

¹⁹⁵ Kansas Vs. Colorado, (1907), 206 U. S. 46 at 113- 114

¹⁹⁶ Id., 206 U. S. 46 at 102-103

therefore to a considerable extent a question of degree; still, the rule is the same, that each proprietor has a right to a reasonable use of it, for his own benefit, for domestic use, and for manufacturing and agricultural purposes."¹⁹⁷

In almost all relations in course of using shared watercourses, the guiding principle has been the *equality of rights*. In this connection, the Court established that ‘one cardinal rule underlying all the relations of the states to each other is that of equality of right; each state stands on the same level with all the rest. It can impose its own legislation on no one of the others, and is bound to yield its own views to no one....’¹⁹⁸

This ‘equality of riparains’ notion is taken as an essential point for it means that no state has inherently superior claim to the use of the watercourse. If, for example, there are two states through which a successive international watercourse flows, the rights of each in the watercourse are equal to those of others. One of them may not destroy the rights of the others by using some or all of the waters of the river, whether that use is prior or subsequent.¹⁹⁹ However, equality of rights, as this was stated in case law and conventions, is not the same as equal share of the common water.

A similar line of analysis has been proffered in the Vermejo River dispute between Colorado and New Mexico.²⁰⁰ The Vermejo River originates in Colorado and flows into New Mexico. Historically, all of the river's waters have been used exclusively by farm and industrial users in New Mexico. Colorado now seeks an apportionment of the waters of the Vermejo River for proposed new uses.²⁰¹ This case, therefore, show an earlier development by a downstream state and new use proposed upstream. While New Mexico contended that the special Master appointed for the purpose erred in not focusing exclusively on the priority of uses along the Vermejo River,²⁰² the Court rejected that contention and held that ‘we recognize that the equities supporting the protection of existing economies will usually be compelling . . . under some circumstances, however, the countervailing equities supporting a diversion for future use in one state may justify the detriment to existing users in another state. This may be the case, for

¹⁹⁷ Id., 206 U. S. 46 at 103-104

¹⁹⁸ Id., 206 U. S. 46 at 97-98

¹⁹⁹ Stephen McCaffery (2007), *supra* note 10, P. 331

²⁰⁰ *Colorado vs. New Mexico* (1984), 467 U.S. 310

²⁰¹ Id., 467 U.S. 310, syllabus

²⁰² Id., 459 U.S. at 181 -182

example, where the state seeking a diversion demonstrates by clear and convincing evidence that the benefits of the diversion substantially outweigh the harm that might result.²⁰³

Consequently, the court held that the matter should be solved under the principles of equitable apportionment, where in prior use would be but one factor.²⁰⁴

According to these cases, an established use that was in existence has been compromised and a reassessment of water allocation has been made along equitable and reasonable principle in the interest of all states concerned. Also the perfect equality of riparians and their equal right to the shared river has been highlighted.

4.3.3 Analysis under institutional works of the IIL and ILA

Extensive studies made by international non-governmental organizations on the normative content of states' rights and obligations in the use of shared watercourse have resulted in highly regarded resolutions which have influenced state practice.²⁰⁵

As early as in 1911, one of the first institutional works was offered by the IIL: the Madrid Declaration. The instrument provided for rules of law to be applied by states on the use of international watercourse for purposes other than navigation. These rules has been premised on one important premise that riparian states with a common stream are in a position of permanent physical dependence on each other which precludes the idea of the complete autonomy of each state in the section of the natural watercourse under its sovereignty.²⁰⁶

Additional rules bearing impact on claims of exclusive user right have also been enunciated in the Salzburg Resolution of 1961 on the use of international non-maritime waters.²⁰⁷ Applying to the use of waters which are part of a river or of a watershed extending upon the territory of two or more states,²⁰⁸ the Resolution provides that such use by any states is limited by the 'right of use by the other states concerned with the same river or watershed'.²⁰⁹ And any dispute with regard to the respective share of water is to be solved through negotiation on the basis of

²⁰³ Id., at 187-188

²⁰⁴ Id., at 181

²⁰⁵ Joseph W. Dellapenna (2001), *supra* note 4, p. 267.

²⁰⁶ Madrid declaration (1911), *supra* note 53, statement of reason, paragraph 1

²⁰⁷ Salzburg Resolution (1961), *supra* note 54

²⁰⁸ Id., article 1

²⁰⁹ Id., article 2

‘equity’, taking into consideration the ‘respective needs of the states’ as well as any other circumstances relevant to the particular case.²¹⁰ Historical rights were not accorded any degree of priority.

A more detailed presentation of the subject matter has been offered under the 1966 Helsinki rules of the ILA.²¹¹ Applying to an international drainage basin²¹², the rules provided for schemes of equitable utilization of these resources, pollution, navigation, timber floating and procedures for the prevention and settlement of disputes.²¹³

Reassuring that every riparian state has a right to use the river, this rule declares that ‘each basin state is entitled, within its territory, to a reasonable and equitable share’.²¹⁴ In composing water shares of each riparian, it stated that there is a need to look in to ‘all relevant factors’ in a particular case.²¹⁵

Accordingly, some eleven factors were listed down, which should be taken in to account in reaching on how shared water is to be used equitably among riparian states.

The weight to be given to each factor is to be determined by its importance in comparison with that of other relevant factors. In determining what the reasonable and equitable share, therefore, all relevant factors are to be considered together and a conclusion reached on the basis of the whole.²¹⁶ The ILA commentary to this article is instructive in this regard: “In short, no factor has a fixed weight nor will all factors be relevant in all cases. Each factor is given such weight as it merits relative to all the other factors. And no factor occupies a position of pre-eminence *per se* with respect to any other factor. Further, to be relevant, a factor must aid in the determination of the social and economic needs of the co-basin States.”²¹⁷

²¹⁰ Id., article 3

²¹¹ Helsinki Rules (1966), *supra* note 9.

²¹² Id. article II. An international drainage is a geographical area extending over two or more States determined by the watershed limits of the system of waters, including surface and underground water, flowing into a common. (article 2)

²¹³ Id., chapter II-IV

²¹⁴ Id., article 4 IV

²¹⁵ Id., article V (1)

²¹⁶ Id., article V (III)

²¹⁷ Commentary to Article 6, ILA Helsinki Rules, in: Patricia Wouters, *The Legal Response to International Water Conflicts: The UN Watercourses Convention and Beyond*, p. 32

One of the factors included in the Helsinki Rules that needs to be considered in determining equitable utilization is ‘past utilization’ of the waters of a basin, including in particular ‘existing utilization’. The Helsinki Rules treat prior appropriation *only* as one element in determining equitable utilization. Clearly, the Rules have established the principle of reasonable and equitable utilization as the cardinal rule of international water law.²¹⁸

Positions such as the one propounded under the ‘historic rights’ claim, calling for a preferential treatment of existing use patterns and the continuation of long established uses are now accorded a reduced significance. It is already established that the right of a riparian state to demand continuation of the natural flow of an international river into its territory from upper riparian states, is an obsolete proposition and has been criticized under contemporary international water law.²¹⁹

The principles under the Helsinki Rules are perhaps among the first enterprises on general codification of the law of international watercourses. Most of the rules have been accepted by the international community as rules of customary international law. The Rules have been referred to or adopted by a number of organizations and countries.²²⁰

4.3.4 Analysis under the 1997 UNWCC

The corpus of international watercourses law, though still young, has developed several guiding principles that govern the use rights of riparian states over shared watercourses. So far, state practice and international initiatives researching in to the subject matter have shown that every riparian is endowed with an inherent right to equitable and reasonable use to the shared water with a corresponding obligation of not causing significant harm.

In this regard, the 1997 UN Watercourse Convention resulting out of the negotiations made towards the codification and progressive development of international law in the area, could be

²¹⁸ Salman M. A. Salman (December 2007), *supra* note 41, p. 630

²¹⁹ *Id.*, p. 627

²²⁰ Charles B. Bourne (1996), The International Law Association’s contribution to International Water Resources Law, *Natural Resources Journal*, 36, pp. 155–216.as cited in Salman M. A. Salman (December 2007), *supra* note 41, p.630

taken as important departing point in analyzing the status of ‘historical rights’ under international water law.²²¹

Similar to the Helsinki rules, the UN Convention put ‘equitable and reasonable utilization’ as one of the core principles of utilization of shared water resources. It stipulated that watercourse states shall in their respective territories utilize an international watercourse in an equitable and reasonable manner.²²²

A corresponding obligation put on riparian states establishes an obligation not to cause significant harm. Hence, ‘watercourse states shall, in utilizing an international watercourse in their territories, take all appropriate measures to prevent the causing of significant harm to other watercourse states’.²²³

According to article 6 of the Convention, utilization of an international watercourse in an equitable and reasonable manner within the meaning of article 5 requires taking into account all relevant factors and circumstances.²²⁴ It could be noted that facts relevant to the claim of historical rights, such as existing use, are taken as important factor in composing what is reasonable and equitable utilization. This being the case, however, no hierarchy or special preeminence has been accorded on any one of the factors under article 6. On the contrary, article 6.3 specifically asserted that ‘the weight to be given to each factor is to be determined by its importance in comparison with that of other relevant factors. In determining the reasonable and equitable use, all relevant factors are to be considered together and a conclusion reached on the basis of the whole’.

As per the ILC commentary on the application of this particular rule, the factors represent only indicative list as the wide diversity of international watercourses and of the human needs they

²²¹ This Convention, to enter in to force in the coming August, is an important document whose rules and principles has received a great support by states of the world and has been referred in to and incorporated in treaties, case laws, and institutional works alike.

²²² UNWCC, article 5(1)

²²³ UNWCC, article 6(1)

²²⁴ These are listed under article 6: (a) geographic, hydrographic, 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 watercourses in one watercourse State on other watercourse States; (e) existing and potential uses of the watercourse; (f) conservation, protection, development and economy of use of the water resources of the watercourse and the costs of measures taken to that effect and (g) the availability of alternatives, of comparable value, to a particular planned or existing use.

serve make it impossible to compile an exhaustive list of factors; still, no priority or weight is assigned to any of factors and circumstances listed since some of them may be more important in certain cases while others may deserve to be accorded greater weight in other cases'.²²⁵

In consequence, a downstream state that was first to develop its water resource could not foreclose latter development by an upstream state by demonstrating that the later development would cause it harm; under the doctrine of equitable and reasonable utilization, the fact that a downstream state was 'first to develop' (and thus had made prior use that would be adversely affected by new upstream use) would be merely one of the number of factors to be taken in to consideration in arriving at an equitable allocation of the use and benefit of the watercourse.²²⁶ Any harm sustained by one state or another, as a result of insufficient / reduced quantity of water, plays only a subsidiary role in the process of equitable allocation.²²⁷

In this regard, of course, one could note that the particular susceptibility of the downstream Nile, whether emanating from hydrological facts or a vulnerable dependence on the provision of the sole watercourse, and the ensuing political and legal expressions articulated to preserve a 'natural rights / historical pattern of prior use' are accommodated, if in some form, under the system of international law. However, caution should be motioned that the conceptual references, proposing to validate downstream claims of rights on the ground of 'extreme dependency' on a watercourse, 'prior or historic uses', or 'unavailability of alternative water resource' could not be considered as standing separately and operating as such under international water law. They are accommodated only within the context of a broader framework of a prevailing principle: the right to equitable and reasonable utilization.²²⁸

The problem with the application of the prior uses doctrine in Nile River Basin is complicated by the significant disparity in the developmental patterns and capacity of the upper and lower riparian states. In addition to Egypt's historical control of the majority of Nile water flows, access to the river's flow has been compounded economic capacity gaps: as Egypt gained access

²²⁵ Report of the International Law Commission on the work of its forty-sixth session (2 May - 22 July 1994), Official Records of the General Assembly, Forty-ninth session, Supplement No. 10, Extract from the Yearbook of the International Law Commission, 1994, vol. II (2), P. 101

²²⁶ Stephen C. McCaffrey (2007), *supra* note 57, P. 509. See UNWCC Art. 6, & Helsinki Rules Art. V (II) (4)

²²⁷ Stephen McCaffery, *supra* note 10, P. 325. See also: Patricia Wouters, *supra* note 217, p.321 where it was stated...existing uses must also be considered in the same vein, *i.e.* as "but one factor," albeit an important one, in the overall assessment of what is reasonable and equitable.

²²⁸ Tadesse Kassa Woldetsadik (2011), *supra* note 78, P. 190

to water, it was able to use the resource to increase overutilization, which in turn augmented access further. The 1997 United Nations Watercourse Convention adheres to the doctrine of “equitable and reasonable” uses, supporting established “prior uses” of the water, but only as long as such uses are reasonable as balanced against the interests of other basin states. In fact, the Helsinki Rules have further stated that “an existing reasonable use may continue in operation unless the factors justifying its existence are outweighed by other factors leading to a conclusion that it can be modified or terminated so as to accommodate a competing incompatible use.” As such, the prior use doctrine in the Nile River Basin would be tempered by considerations of historical inequity and the potential for more reasonable future distribution among basin states.²²⁹ The hard facts have indicated that close to 74 bcm/yr of water of the total annual discharge of 84 bcm is already being withdrawn by only two of the riparian states, Egypt and the Sudan – which therefore need a re-adjustment.

The incompatibility of the concept of historical rights with the foundational principles of ‘equitable and reasonable use’ and the ‘no significant harm’ rules is therefore clearly established. Equitable and reasonable utilization as a principle of customary international law encompasses both a watercourse state's right to a share of the beneficial uses and benefits of an international watercourse's and the correlative obligation not to deprive other watercourse states of their right to an equitable utilization'. The recognition of the rights of use of states in a manner that reconciles their competing interests is thus an important aspect of equitable and reasonable use. The doctrine of ‘historical or acquired rights’ merely allowed one state (Egypt) unlimited rights to the use of the Nile water, while making any other development by other states subject to its consent,²³⁰ and hence, its formulation becomes unacceptable under international watercourses law.

The claim of ‘historical rights’ over the Nile is recognized under international watercourse law only as one of the several factors taken in to account in formulating the right of riparian states. In the context of an ‘existing use’, therefore, it would be imperative to briefly highlight what this conception conveys in contemporary understanding of international law.

²²⁹ Valerie Knobelsdorf, *supra* note 167, P. 20

²³⁰ Musa Mohammed Abseno (2009), The Concepts of Equitable Utilization, no Significant Harm and Benefit Sharing under the Nile River Basin Cooperative Framework Agreement: Some Highlights on Theory and Practice, *The journal of Water Law*, UNESCO IHP-HELP Centre for Water Law, Policy and Science, University of Dundee, Volume 20 Issues 2/3, p. 88.

The first query that comes in connection with existing use is concerned with the legally permitted physical latitude of such utilization: how expansively can an existing use of a riparian enlarge physically and still be considered in the assessment of equitable use determinations.²³¹

The 1997 UNWCC does not provide with in-depth analysis of what exactly ‘existing use’ actually covers. However, the Helsinki Rules, which also take ‘existing use’ as one of the factors in equitable use assessment, lend some hand in this regard. They stated that ‘a use that is in fact operational is deemed to have been an existing use from the time of the initiation of construction directly related to the use or, where such construction is not required, the undertaking of comparable acts of actual implementation’.²³²

Article VIII further qualify the concept of existing use in a context of stipulating the possible role of potential uses of a watercourses. It was stipulated that ‘a basin state may not be denied the present reasonable use of the waters of an international drainage basin to reserve for a co-basin state a future use of such waters’.

More relevant to the present discussion, basin states will not be accorded complete freedom to engage in the utilization of shared river courses simply because no co-riparian had come forward with immediate needs or definite plans for utilization of the same resource; the physical scope of existing uses had been qualified by the insertion of ‘reasonable use’ expression, a steering tenet whose application confines the freedom of states in the utilization of shared resources. Hence, what a basin state may not be denied is not *every use*, but only a present *reasonable use*; a pattern of utilization by a riparian state that imperils another basin state’s prospective opportunities by a pre-emptive appropriation of substantial floods of a stream cannot be considered as a present reasonable use.²³³

For this reason, while states may chose to embark on unlimited scales of exploitation of a communal resource and indeed, more than a few had so undertaken, as such, they engage in such course only at own peril. Not every aspect of such existing use will be eventually protected and in consequence eligible for consideration in equitable uses decisions.²³⁴

²³¹ Tadesse Kassa Woldetsadik (2013), supra note 5, p 243

²³² Helsinki Rules (1966), article VIII(2)(a)

²³³ Tadesse Kassa Woldetsadik (2011), supra note 78, P. 252-253

²³⁴ Id., p. 245

A simple application of the above formulation to the uses status quo in the Nile, justified on the basis of ‘historical rights’ where by the majority of the Nile flood is used by two riparains, calls for re-allocation of the already established patterns along the principles of equitable and reasonable utilization. This is more inevitable in light of the alarming need for growth in the upper reaches of the region and the increase in population growth in many parts of the basin.²³⁵

However, it is underlined that the physical scope of protection to be accorded to the existing Nile use with the unique import of irrigated agriculture has to be seen with caution and balance with the corresponding use potential by other states. In striking equilibrium, hard physical facts relating to relevant issues can provide important indicators on the basis of which riparian entitlements can be worked out; the other relevant factors of equitable use allocation are also to be taken in to account.²³⁶

The second pillar of obligations of watercourse states is the norm prescribing the duty not to cause ‘significant harm’ to co-riparains in any move of utilization of the shared water resource. Article 7 (1) of the UNWCC reads that ‘Watercourse States shall, in utilizing an international watercourse in their territories, take all appropriate measures to prevent the causing of significant harm to other watercourse States’. This principle, often called an ‘allied principle’ to the claim of ‘historical right’ as it is generally said to protect those with acquired or senior rights who first developed the resource and to have incurred large sunk costs in water storage and delivery,²³⁷ is in fact incorporated under the UNWCC and the CFA as well.²³⁸

The reallocation of the Nile floods, which is hitherto subjected to unfettered utilization along the downstream reaches, would result in an appreciable reduction of the amount of water customarily flowing to these states and hence result in some degree of harm. While such harm is recognized, it could be accommodated only within the framework of the principles of equitable utilization.

A chain of international law publicist and the ILC itself had submitted that the principle under article 7 of the UN Watercourses Convention prescribing a duty not to cause significant harm

²³⁵ See the discussion on the regional food security as challenge to the status quo in the Nile in: John Waterbury (Winter/spring 1997), supra note 9, p. 291 & ff.

²³⁶ Tadesse Kassa Woldetsadik (2011), supra note 78, p. 255

²³⁷ John Waterbury (Winter/spring 1997), supra note 9, P. 290.

²³⁸ See article 7 UNWCC & article 5 CFA

prohibits late coming state from causing harm that exceeds a certain threshold. Such level of harm is set within the context of equitable use determination of watercourse state concerned. In other words, a state's utilization of already appropriated waters will involve its international responsibility only when such use exceeds its equitable entitlements; harm inflicted within the limits of the exercise of such rights will not be regarded as infringing the rights of an injured state.²³⁹ As such, already established use in the downstream Nile; to which a 'historical right' has been attached could be subjected to such threshold of harm as may flow from other state's decision to withdraw waters hitherto dedicated in use along equitable and reasonable entitlements.

²³⁹ Tadesse Kassa Woldetsadik (2011), *supra* note 99, P. 256

CHAPTER FIVE

CONCLUSIONS

Claims and counter claims over the use of international watercourses are witnessed to have been espoused in different shape and magnitude. It was through state practice in the move to utilize shared resources that international water law was developed and hold the present shape. As observed, various sovereignty driven claims and counter claims were further elaborated and scrutinized through scholarly works of institutions and individuals.

Riparian right to make an equitable and reasonable use of international rivers, with a corresponding obligation of not causing significant harm on the interest of co-riparians in the process is now well recognized under international water law.

This paper has attempted to investigate in to the single most important element of up-stream-down-stream discourse over the Nile Basin. Common to patterns of development in most international rivers, the Nile is amply put in to use downstream. This is quite significant as ancient civilizations were built along the river bank. Concomitant with this, the downstream polity holds as having 'historical rights' to such water and that any use by other riparians should not in any way hamper its continuing flow downstream. Bilateral agreements and the accompanying geo-politics have been used to continually reinforce such positions.

The major inquiry, therefore, has been as to how authoritative it will be to defend the status quo in the scheme of utilization of the Nile waters based on the concepts of 'historical user- rights'?

The origin and essence of 'historical rights' to water use per se and its application in the context of the Nile Basin has been presented. Evolved from the customs of West America miners, a claim to continue to use a resource as before, for such use has been first/long established is an important feature of the 'historical rights' claim. As applying in the Nile Basin therefore, because Egypt and the Sudan first put in to use the water that flowed in to their territories (containing a substantial flow of the water, as other riparains almost used none) they have an 'historical right' entitling them to the same water with exclusivity and in perpetuity. Pressured by the evolving/evolved state practice recognizing the important concept of 'equitable and reasonable utilization' by all states sharing watercourses, these states have somehow been taking part in

multilateral initiatives with such effect. Despite all these however, and as has been seen in the negotiations leading to the conclusion of the CFA, the claim for such a unique and preeminent status to these historical uses is being surfaced time and again including through such tricky notions like ‘water security’.

Having discussed the development and state of international law governing the non-navigational use of shared rivers which is based on an equitable and reasonable utilization of the resource by all riparians, an examination of the status and hence worth of claim of historical rights under principles of international law in general and international law of non-navigational uses of transboundary watercourse in particular has been undertaken.

The Nile River is the lifeline for Egyptians. Egyptians, however, are not the only people whose civilizations have been influenced significantly and, to a great extent, shaped by the waters of the Nile. There are millions of other people who today owe their very existence to the Nile’s waters. Besides Egyptians, other beneficiaries of the Nile are today found in Sudan, Ethiopia, Kenya, Uganda, Tanzania, Eritrea, Democratic Republic of Congo, Rwanda and Burundi. In today’s Nile River Basin political economy, each of these riparian countries lay some claim to the river’s waters.²⁴⁰

An investigation to the call for such a particular treatment of ‘long established ’or ‘historical use’ to the Nile under varied captions of principles of international law in general, international water law and case laws as been undertaken. Reaffirming the above paragraph that the River Nile is as equally important to the rest of riparians as it is for Egypt and the Sudan, who happen to have already extensively used the river, the results from such investigation revealed that this stance for a singular status to ‘historical right’ is tenable only within the limits of the now governing principles of international water law: equitable and reasonable utilization.

International water law does not consider ‘historical rights’ as a conclusive legal ground of acquisitive prescription.²⁴¹ On the contrary, the volume of prior use in the Nile would merely be one among the numerous factors in the (re)allocation of the this water based on customary

²⁴⁰ Mwangi S. Kimenyi (August 2010), *Turbulence in the Nile: Toward a Consensual and Allocation of the Nile River Waters*, African Growth Initiative at Brookings, Copy Right: The World Bank, P. 2

²⁴¹ Elias N. Stebek (June 2007), *Eastern Nile at Crossroads: Preservation and Utilization Concerns in Focus*, *Mizan Law Review* Vol. 1 No.1, P 49

international law as stated under article 6 of the 1997 UN Watercourses Convention and article 4 of the CFA alike.

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