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**IMPLICATIONS OF THE PRINCIPLES OF EQUITABLE AND  
REASONABLE UTILIZATION AND NO-SIGNIFICANT HARM AS THEY  
APPLY TO THE NILE RIVER RIPARIAN STATES**

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**Submitted in Partial Fulfillment of the Requirements for the Degree of  
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**College of Law and Governance Studies**

**(Approval Sheet)**

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**Declaration**

I, the undersigned, hereby declare this thesis is original and the result of my own work and has never been submitted to any other institution. I also declare that any material used in this thesis has been duly acknowledged.

Declared by- Mikias Taye

Signature \_\_\_\_\_

Date \_\_\_\_\_

## **Acknowledgement**

First and foremost, I thank God.

I want to extend my gratitude to my advisor, whose advice and comments contributed a lot to this thesis, and to my classmates. I am also grateful to my mother, brother, sisters and friends for their unwavering support.

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## List of Abbreviation

<b>CFA</b>	Agreement on the Nile River Basin Cooperative Framework
<b>DoP</b>	Declaration of Principles
<b>ENTRO</b>	Eastern Nile Technical Regional Office
<b>GERD</b>	Grand Ethiopian Renaissance Dam
<b>ICJ</b>	International Court of Justice
<b>IIL</b>	Institute of International Law
<b>ILA</b>	International Law Association
<b>ILC</b>	International Law Commission
<b>NBI</b>	Nile Basin Initiative
<b>PCIJ</b>	Permanent Court of International Justice
<b>TECCONILE</b>	Technical Committee for the Promotion of the Development and Environmental Protection of the Nile Basin
<b>UNDP</b>	United Nations Development Programme
<b>UNECE</b>	United Nations Economic Commission for Europe
<b>UNGA</b>	United Nations General Assembly
<b>UNWC</b>	Convention on the Law of the Non-navigational Uses of International Watercourses
<b>WMO</b>	World Meteorological Organization

## **Abstract**

*International watercourses throughout the world have been a source of cooperation and conflict among the states through whose territory they pass. International water law has developed principles that enable all states sharing the watercourse to equitably utilize the water. Two of the fundamental principles governing the non-navigational use of international watercourses among riparian states are the principles of equitable and reasonable utilization and no-significant harm. The issue of which principle should have precedence in their application to the utilization of international watercourses is interpreted divergently among riparian states. The Nile River is one of the most contentious among upper and lower riparian states regarding utilization of the water. As lower riparian states started to utilize the water much earlier than upper riparians, they want to maintain their existing use that allocates them almost all the water. They rely on the argument concerning the precedence of the no-significant harm rule in order to protect their existing use and curb utilization of the water by upper riparians that might affect the water flow they receive. On the other hand, upper riparian states invoke the principles of equitable and reasonable utilization as they are keen to end their exclusion from utilization of the water by challenging the status quo created by lower riparian states. There is neither a comprehensive binding treaty that governs the utilization of the Nile River nor a cooperative framework between all riparian states which enables an equitable utilization of the same. For these reasons, assessing the implication of the principles of equitable and reasonable utilization and no-significant harm in the context of the utilization of the Nile River is the major focus of this thesis. As the major contention over the Nile River concerns the allocation and quantity of the water, the precedence of the principle of equitable and reasonable utilization allows the hitherto excluded riparian states to use the water that passes through their territories, while laying on them the obligation not to cause significant harm to other riparian states.*

## CHAPTER ONE

### 1. INTRODUCTION

#### 1.1. Background

Water is a resource serving life on earth in general and human needs in particular immeasurably. Its use has increasingly become diverse from consumption for everyday livelihood to irrigation, electric power generation and others. Water has also been a source of conflict, more so as its importance has grown over the years. In this regard, international watercourses<sup>1</sup> have been more contentious as they involve the interests of states that are sovereign. As a result of the already existing contention over sharing water among riparian states, international watercourses are difficult to manage. But, on the other hand, international water law has made efforts to avail a mechanism whereby international watercourses are shared in a manner benefiting all those involved and manage disputes that arise during utilization and determine rights and duties of states.<sup>2</sup>

There are four theories that served as a basis for current principles of international water law regarding international watercourse management; absolute territorial sovereignty, absolute territorial integrity, limited territorial sovereignty and community of interests.<sup>3</sup> These theories represent the different interests that exist with regard to the non-navigational utilization of international watercourses. International water law contains some major principles that govern international watercourses. These principles have been incorporated under different international legal instruments. The major principles under international water law on international watercourses are equitable and reasonable utilization, no-significant harm and the duty to

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<sup>1</sup> For this paper, the use of terms (definitions) applied in the Convention on the Law of the Non-navigational Uses of International Watercourses (1997) is adopted: “**Watercourse**” is a system of surface waters and groundwaters constituting by virtue of their physical relationship a unitary whole and normally flowing into a common terminus (Article 2(a)); “**International watercourse**” is a watercourse, parts of which are situated in different states (Article 2(b)), Convention on the Law of the Non-navigational Uses of International Watercourses (hereinafter, UNWC) adopted on 21 May 1997, United Nations, Entered into force on 17 August 2014, <[https://legal.un.org/ilc/texts/instruments/english/conventions/8\\_3\\_1997.pdf](https://legal.un.org/ilc/texts/instruments/english/conventions/8_3_1997.pdf)> accessed 02 February 2023

<sup>2</sup> Stephen C. McCaffrey, *The Law of International Watercourses* (2nd edn, Oxford University Press 2007) 67

<sup>3</sup> Muhammad M. Rahaman, ‘Principles of International Water Law: Creating Effective Transboundary Water Resources Management’, (2009) 1 Int. J. Sustainable Society 209

<[https://www.internationalwaterlaw.org/bibliography/articles/general/Rahaman-2009\\_IWL.pdf](https://www.internationalwaterlaw.org/bibliography/articles/general/Rahaman-2009_IWL.pdf)> accessed 02 February 2023

cooperate. The first two principles are the two most fundamental and highly debated under international water law as a result of the diverging positions they are applied to support and ambiguity over which principle should be given priority whenever they come into conflict in their application for governing the utilization of international watercourses.

In raising the issue of the utilization of international watercourses, one of the most contentious is the Nile River. The Nile River is the longest river in the world, and has eleven riparian states.<sup>4</sup> It is contentious among the riparian states with regard to sharing of the water, especially between Ethiopia, Sudan and Egypt. Egypt and Sudan have always sought to protect their prior use that provides them exclusive use by precluding the rest of the riparian states, including Ethiopia, the largest contributor to the river. There have been several attempts to create cooperation among the Nile River riparian states in order to manage the utilization of the river. But, these efforts have not been able to form an all-inclusive and effective cooperation among the riparian states. The relation between upper and lower riparian states of the Nile River involves issues of utilization, historical relation and hydro-politics.<sup>5</sup>

## **1.2. Statement of the Problem**

International watercourses cross the borders of different states that have their own self-interests in utilizing the water that traverses their territory for several purposes. People use the water for their livelihood, while governments use it for the construction of different large projects crucial for economic development. The increasing population growth and demand fuel competing interests over international watercourses, thereby exacerbating dispute among the states sharing the resource. In this regard, international water law is aimed at regulating international watercourses and managing their utilization among riparian states and resolving disputes. The principles that have developed in international water law govern how international watercourses are to be utilized taking into consideration the existence of two or more states looking to benefit from the resource.

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<sup>4</sup> Nile Basin, Water Resources Atlas, <<http://atlas.nilebasin.org/treatise/the-nile-basin/>> accessed 13 February 2023

<sup>5</sup> Tamar Meshel, 'Swimming against the current: Revisiting the Principles of International Water Law in the Resolution of Fresh Water Disputes', (2020) 61 Harvard Int'l Law J. 139 <<https://harvardilj.org/wp-content/uploads/sites/15/61.1-Meshel.pdf>> accessed 03 February 2023

There is a debate whether the principle of equitable and reasonable utilization should take precedence over the no-significant harm rule or *vice versa* or whether the two principles are complementary.<sup>6</sup> Clearly stating the relation between the two principles, how they determine the relation between riparian states, how they are to be applied and which principle is to be given priority when they come into conflict has been a difficult task for international legal scholars and drafters. In a case where an upper riparian state utilizes an international watercourse within its territory for a purpose it deems crucial in a manner it believes is equitable and reasonable and a lower riparian state is affected by such use, the latter is keen to invoke the no-significant harm rule. Here, whether a riparian state should take into consideration the effects of its equitable and reasonable utilization on other riparian states and halt such use or proceed with its use so long as it's made in an equitable and reasonable manner despite its effect has been at the center of the debate.

Depending on their position within the watercourse, riparian states have diverging interpretation of these principles making the application of the principles under international water law as a tool for availing cooperation and resolving disputes regarding utilization of the shared waters difficult. There are claims that the principle of equitable and reasonable utilization is given priority over the no-significant harm rule. But, there are also those who argue that the no-significant harm rule has precedence over the principle of equitable and reasonable utilization. There are still those that treat the two principles as complementary.

The Nile River is one of the shared water resources in the world which has been highly contentious among its riparian states. Lower riparians, Egypt and Sudan, have for long utilized the Nile River while the rest of the riparian states were significantly excluded from benefiting. They rely on their prior use and agreements rejected by upper riparian states to support their current use that provides them the upper hand in the utilization of the water and prevent utilization upstream. They want to preserve their prior use and are keen to consider use of the river by the other riparian states as causing harm to their interest. For instance, while Ethiopia contributes the largest amount of water to the Nile River, it has not meaningfully utilized the water that passes through its territory. Egypt is keen to keep Ethiopia and other riparian states away from benefiting and utilizing the Nile River, by going as far as threatening to use force if

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<sup>6</sup> *ibid* 141

there transpires a decrease in the flow of water it receives. Ethiopia has recently been involved in the construction of the Grand Ethiopian Renaissance Dam (GERD). The construction of this dam has brought commotion between Ethiopia and the lower riparian states. And, it has been seen as a symbol of ending the inequitable utilization by lower riparian states and assertion by upper riparians of their right to benefit from the water that passes through their respective territories.

The debate regarding the interface between the principles of equitable and reasonable utilization and no-significant harm and the diverging interpretation by riparian states has weakened their role for serving as a tool for resolving disputes. The lack of a definitive interpretation of how the two principles should be applied and their vagueness is an issue faced in discussing the utilization of an international watercourse among riparian states. International water law has not clearly provided for which principle takes precedence over the other. The Nile River basin involves the interests of many states, and the relation between them thus far remains contentious and devoid of any binding agreement or successful cooperation. Equitable utilization of the river remains elusive. Assessing the implications of the application of the two principles to the Nile River riparian states is at the core of this research.

### **1.3. Literature Review**

Much literature available in the area of international water law and international watercourses discusses the principle of equitable and reasonable utilization and no significant harm in relation to their compatibility and dispute concerning utilization and allocation of water.

Teclaff (1967) stated that “water, a universal need, has become in the twentieth century as perhaps never before in history a universal problem”.<sup>7</sup> McCaffrey discussed the development of the law of international watercourses equating it with ‘the evolution of human social organization’ and the increase in the use of fresh water.<sup>8</sup> He gave recognition to the contribution of the law of international watercourses, especially treaties, to defuse disagreements concerning fresh water sharing and encourage cooperation among riparian states.<sup>9</sup>

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<sup>7</sup> Teclaff, cited in McCaffrey (n 2) 64-65

<sup>8</sup> McCaffrey (n 2) 58

<sup>9</sup> *ibid* 57

Salman mentions the differing views taken by upper and lower riparian states that while upper riparian states opt for the principle of equitable and reasonable utilization, lower riparian states choose the no significant harm principle.<sup>10</sup> He believes in the existence of complication between the two principles as a result of qualitative and quantitative assessment of the obligation not to cause significant harm and misconception of some principles of international water law.<sup>11</sup> He takes differences on which principle to adhere to as a cause for most of the existing disputes regarding shared watercourses, and mentions disputes concerning the Nile River basin and the GERD as outcomes of the differing views on the two principles.<sup>12</sup>

Meshel dealt with the ‘need for effective resolution of [fresh water] disputes’.<sup>13</sup> In the hope of guiding states to resolve transboundary freshwater disputes, he proposes a reformulation of the principles of equitable and reasonable utilization and no significant harm and the duty to cooperate.<sup>14</sup> And to showcase the effects of his proposition, he presents the dispute between Ethiopia and Egypt and other such disputes.<sup>15</sup> Meshel also believes that ‘inconsistency and controversy’ between the principle of equitable and reasonable utilization and the no significant harm has forestalled dispute resolution with regard to utilization of shared water resources.<sup>16</sup> He discussed dispute such as those like the GERD and that such disputes “invoke conflicting claims of “historic” uses under the no significant harm principle and “equitable” uses under the equitable and reasonable utilization principle”.<sup>17</sup> For Meshel, the conflicting interpretation of these principles requires their revision.<sup>18</sup> And, he argues that the no significant harm principle

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<sup>10</sup> Salman M. A. Salman, ‘Equitable and reasonable utilization and the obligation against causing significant harm- Are they reconcilable?’ (2021) 115 AJIL 183  
<[https://www.internationalwaterlaw.org/bibliography/articles/Salman/AJIL\\_Unbound\\_Essay\\_Booklet\\_Final\\_2.pdf](https://www.internationalwaterlaw.org/bibliography/articles/Salman/AJIL_Unbound_Essay_Booklet_Final_2.pdf)> accessed 03 February 2023

<sup>11</sup> *ibid*

<sup>12</sup> *ibid*

<sup>13</sup> Tamar Meshel, ‘International Law and Transboundary Fresh Water Resources: A Dispute Resolution Perspective, 73 (2018) (J.S.D. dissertation, University of Toronto) 73  
<[https://tspace.library.utoronto.ca/bitstream/1807/102926/3/Meshel\\_Tamar\\_201811\\_SJD\\_thesis.pdf](https://tspace.library.utoronto.ca/bitstream/1807/102926/3/Meshel_Tamar_201811_SJD_thesis.pdf)> accessed 02 February 2023

<sup>14</sup> *ibid*

<sup>15</sup> *ibid*, iii

<sup>16</sup> Meshel (n 5) 151

<sup>17</sup> *ibid*

<sup>18</sup> *ibid*

should be applied as ‘the guiding principle’ for resolving disputes concerning shared watercourses.<sup>19</sup>

Stoa questions whether the development of international law throughout the years has been successful in resolving the ‘inherent tension’ that exists among upper and lower riparian states, and tends to agree with the conclusion that the two principles are complementary and to be applied together.<sup>20</sup> He describes the Nile River basin as “a classic example of the upstream vs. downstream, equitable use vs. no significant harm dilemma”.<sup>21</sup>

For McIntyre, ‘legal principles governing shared water resources are mainly decided by how states define the concept of sovereignty’.<sup>22</sup> He discussed international freshwater as a source of conflict among states in history, and these conflicts arose as a result of total reliance on water and interdependence of riparian states on the one hand, and the uncertainty regarding international law principles to be applied, on the other hand.<sup>23</sup> Concerning the uncertainty as to the applicable principles, McIntyre is of the view that it has resulted mainly from the irreconcilability of the principles applied to sharing of the water.<sup>24</sup> McIntyre also states the problem regarding enforcing international water rules and principles and the resulting effect whereby states will be encouraged to ignore the law and pursue their national interest.<sup>25</sup>

This research will discuss the two fundamental international water law principles, their interface and implications when applied to the Nile River riparian states, whose relation regarding utilization of the water continues to be contentious.

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<sup>19</sup> *ibid*

<sup>20</sup> Ryan B. Stoa, ‘The United Nations Watercourses Convention on the Dawn of Entry into Force’, (2014) 47 *Vand J Transnat’l L.* 1349, 1369  
<<https://scholarship.law.vanderbilt.edu/cgi/viewcontent.cgi?article=1242&context=vjtl#page=33&zoom=auto,-11,48>>  
accessed 07 February 2023

<sup>21</sup> *ibid* 1353

<sup>22</sup> Owen McIntyre, ‘International Water Law: Concepts, Evolution and Development’, in Anton Earle, Anders Jägerskog and Joakim Öjendal (eds), *Transboundary Water Management* (earthscan, 2010), 59  
<[https://www.researchgate.net/publication/259977770\\_International\\_Water\\_Law\\_Concepts\\_Evolution\\_and\\_Development/link/57f7de8a08ae8da3ce591154/download](https://www.researchgate.net/publication/259977770_International_Water_Law_Concepts_Evolution_and_Development/link/57f7de8a08ae8da3ce591154/download)> accessed 07 February 2023

<sup>23</sup> *ibid*

<sup>24</sup> *ibid*

<sup>25</sup> *ibid* 60

#### **1.4. Research Questions**

1. What is the normative status of the principle of equitable and reasonable utilization and no-significant harm under international law?
2. What is the interface between these principles? In particular, is there a normative hierarchy between the two principles? If so, which one has precedence? If not, how would one mediate between the competing implications?
3. What possible implications do these principles have in regulating the conflicting interests of the upper and lower riparian states of the Nile River?
4. What possible effects will the application of these principles have in governing the existing and future utilization of the Nile River?

#### **1.5. Objectives**

##### **1.5.1. General Objective**

To determine what effects the principle of equitable and reasonable utilization and no significant harm have on Nile River riparian states and how relations and utilization of the river will be affected as a result of application of these principles.

##### **1.5.2. Specific Objectives**

- To examine the effects of the relationship between the two principles and their place under international law over the utilization of the Nile River;
- To determine outcomes of the application of the two principles over riparian states of the Nile River;
- To assess how these principles determine the interests of upper and lower riparian states;
- To analyze how the application of the two principles serves in the resolution of disputes between the Nile River riparian states.

#### **1.6. Methodology**

This research is a doctrinal research, and as such it tries to examine and analyze the principles of equitable and reasonable utilization and no-significant harm under international water law, their interface, application and implication for the Nile River riparian states. This research aims to examine the implications of the principles of equitable and reasonable utilization and no significant harm. The development of international water law and international legal instruments relating to non-navigational international watercourses is first analyzed since those legal

instruments grew out of the need to provide solution to the contentious relation between states over the utilization of international watercourses. And, through time principles developed that were later incorporated in multilateral and bilateral agreements between watercourse states in order to allow all to benefit and deter conflict. The application of the principles of equitable and reasonable utilization and no-significant harm between watercourse states having diverging interests over the utilization of an international watercourse is difficult. There exists a debate whether the principle of equitable and reasonable utilization has priority over the principle of no significant harm or *vice versa* or whether the two principles complement each other. It is imperative to grasp the development of the two principles and their relationship, including their status under international water law, in order to analyze their implication.

This research also adopts a qualitative research methodology. What is “equitable and reasonable utilization” is vague in trying to apply it to cases on the ground by states. On the other hand, what is “significant harm” is open to manipulation by a state looking to curb development efforts by other states sharing the water. In order to understand the meaning and scope of the two principles, their interface and to examine the diverging interpretations applied to the principles by upper and lower riparian states under international water law and the implication of absence of a definitive interpretation of the two principles under international water law, it is imperative that international legal instruments are looked into. Determining the implication of these principles as they apply to the Nile River riparian states being the main objective of this research, discussion of the prior and current relation between the Nile River and the relation between the riparian states will enable the clear understanding of the effects of the incorporation of the two principles within the basin and their application on the riparian states. Both primary sources such as treaties and cases, and secondary sources, such as books and journal articles are used. The research is desk-based and internet is used in order to access different journals, articles and other resources useful for the Study.

### **1.7. Scope of the Study**

This research is limited to studying the implications of the principles of equitable and reasonable utilization and the no significant harm when applied to the Nile River riparian states.

### **1.8. Limitations of the Study**

Lack of access to a wide range of materials is a limitation to this research.

### **1.9. Significance of the Study**

This study discusses the implications of the application of the principles of equitable and reasonable utilization and no-significant harm for the Nile River riparian states. It is beneficial as these are two of the major principles governing the non-navigational utilization of international watercourses, and it lays out possible impacts and effects of these principles. The increasing demand for water and decreasing available water will fuel further disputes over the utilization of the Nile River between the riparian states. As the two principles are invoked divergently by upper and lower riparian states to protect their interests in the utilization of the Nile River, it is imperative that their implications are examined in order to understand what it means to the hitherto contentious relation between the riparian states and the exclusive utilization by lower riparians, how it will change their future relation and how it will impact the river and its utilization.

### **1.10. Structure of the Study**

This research consists of five chapters. Chapter one provides an introduction to the research, laying down background of the study, literature review, statement of the problem, research questions, objectives and methodology of the study. Chapter two discusses the principles of equitable and reasonable utilization and no-significant harm, with initial discussion of the theories of international water law, to help understand the conceptual underpinnings that define the non-navigational use of international watercourses, and development of the law relating to non-navigational use of international watercourses through deliberation on international legal codifications (binding and non-binding) concerning the non-navigational uses of international watercourses, as it enable to fathom the progress made towards the development of the principles under discussion. And, since the divergence regarding the utilization of international watercourses mainly concerns the principles of equitable and reasonable utilization and no-significant harm and their relationship and since they are the major focus of this research, they are discussed along with their status under international law, the determination of which lends legal weight for the subsequent discussions. The third chapter emphasizes the Nile River basin,

discussing the legal and cooperation frameworks, the relation between upper and lower riparian states and their respective claims, in order to determine the existing and current regime of the basin and assess the validity of the claims from international law perspective. Chapter four focuses on the implications of the principles of equitable and reasonable utilization and no-significant harm in their application to the Nile River riparian states. Chapter five provides conclusion and recommendation.

## CHAPTER TWO

### 2. INTERNATIONAL WATER LAW AND THE PRINCIPLES OF EQUITABLE AND REASONABLE UTILIZATION AND NO-SIGNIFICANT HARM

#### 2.1. Introduction

Water has been a source of cooperation and conflict throughout history. This is more so for international watercourses. International watercourses have always been highly disputed as they involve the interests of sovereign states looking to use the resource for different purposes. International watercourses differ from other natural resources in that they are not situated at a certain area but flow through more than one state, making their management difficult.<sup>26</sup> There are 310 international watercourses throughout the world, making up 47.1% of the global earth surface, excluding Antarctica.<sup>27</sup>

Navigation was the major area of emphasis as far as the use of international rivers was concerned.<sup>28</sup> The usage of water for navigational purposes started much earlier in time. And, rules governing navigation over shared water resources dates back to when, in 1804, the Convention Respecting the Navigation of Rhine between the French Empire and the Roman German Empire was signed.<sup>29</sup> Later, the Statute on the Regime of Navigable Waterways of International Concern was adopted in 1921 in Barcelona.<sup>30</sup> But, with the expansion of use of international rivers for other purposes, emphasis widened beyond the navigable part of the river and included waters in the international watercourse.<sup>31</sup>

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<sup>26</sup> McCaffrey (n 2) 67

<sup>27</sup> Melissa McCracken and Aaron T. Wolf, 'Updating the Register of International River Basins of the World', (2019) 35 Int'l J. of Water Resources Dev't. 3  
<[https://transboundarywaters.science.oregonstate.edu/sites/transboundarywaters.science.oregonstate.edu/files/Dabase/Data/register/McCracken\\_Wolf\\_2019.pdf](https://transboundarywaters.science.oregonstate.edu/sites/transboundarywaters.science.oregonstate.edu/files/Dabase/Data/register/McCracken_Wolf_2019.pdf)> accessed 01 March 2023

<sup>28</sup> The Helsinki Rules on the Uses of Waters of International Rivers, ILA, August, 1966, commentary to Article II, <[https://www.internationalwaterlaw.org/documents/intldocs/ILA/Helsinki\\_Rules-original\\_with\\_comments.pdf](https://www.internationalwaterlaw.org/documents/intldocs/ILA/Helsinki_Rules-original_with_comments.pdf)> accessed 01 March 2023

<sup>29</sup> Tuomas Kuokkanen, 'Water Security and International Law', (2017) 20 Potchefstroom ELEC. L. J. 10  
<[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2922983](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2922983)> accessed 20 February 2023; *see also* Central Commission for the Navigation of the Rhine (CCNR), <<https://www.ccr-zkr.org/11020000-en.html>> accessed 20 February 2023

<sup>30</sup> *ibid*; *see also* *ibid* footnote 23 (for a list of agreements over shared water resources for navigation purpose)

<sup>31</sup> McCaffrey (n 2) 49, 50

While managing international watercourses, water scarcity and climate change are some of the problems faced.<sup>32</sup> Such problems further complicate the contentious relation among watercourse states over the utilization of the watercourse. ‘With the increasing use of shared watercourses for various non-navigational purposes, there is a high possibility that a use by one riparian state will come into collision with a use by another riparian state.’<sup>33</sup> In order to govern and manage shared international water resources, international law comes to the fore, as it involves the interest of more than one state and the states concerned are likely to dispute over the resource, as has been the case in several occasions.

There have been several attempts at balancing the competing interests of states in the utilization of international watercourses. Upper riparian states start by claiming that they are entitled to utilize the water as they see it fit for their interests without having a reciprocal obligation to take into consideration the effect of their use on other riparian states.<sup>34</sup> On the other hand, a contrasting claim has been made by lower riparian states that a utilization of water by a riparian state should not affect the flow of water and its prior or existing use.<sup>35</sup>

Throughout the years, principles have developed within international water law as the use of international watercourses has expanded. In governing the utilization of international watercourses, two of the most fundamental principles are the principles of equitable and reasonable utilization and no-significant harm. Upper riparian states invoke the principle of equitable and reasonable utilization, while lower riparian states rely on the no-significant harm rule. Though their relationship remains unclear, they are widely recognized within international water law.

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<sup>32</sup> Alistair Rieu-Clarke, Ruby Moynihan & Bjør-Oliver Magsig, ‘UN Watercourses Convention User’s Guide’, (2012) 27 <[https://www.iucn.org/sites/dev/files/un\\_watercourses\\_convention\\_-\\_users\\_guide.pdf](https://www.iucn.org/sites/dev/files/un_watercourses_convention_-_users_guide.pdf)> accessed 09 March 2023

<sup>33</sup> McCaffrey (n 2) 66, 67

<sup>34</sup> Joseph Dellapenna, ‘International Water Law in a Climate of Disruption’, (2008) 17 Mich. St. U. Coll. L.J. Int’l 68 <[https://www.academia.edu/74730433/International\\_Water\\_Law\\_in\\_a\\_Climate\\_of\\_Disruption](https://www.academia.edu/74730433/International_Water_Law_in_a_Climate_of_Disruption)> accessed 01 March 2023

<sup>35</sup> *ibid* 69

## 2.2. Theoretical Bases of International Watercourse Law

There are four major theories under international water law representing the different interests concerning the non-navigational utilization of an international watercourse among riparian states.<sup>36</sup> These are absolute territorial sovereignty, absolute territorial integrity, limited territorial sovereignty and community of interests.

### 2.2.1. Absolute Territorial Sovereignty

The theory of absolute territorial sovereignty postulates that an upper riparian state has the right to utilize the waters of an international watercourse that passes through its territory without consideration for the interest of other riparian states. According to this theory, an upper riparian state has an absolute right to do what it wants with the water traversing its territory without considering the effects of its use on other riparian state.<sup>37</sup> It was relied upon by upper riparian states as they see it fit for the protection of their interests. It had much acceptance during the nineteenth and early twentieth centuries.<sup>38</sup> This theory is also known as the “Harmon Doctrine”, named after the Attorney General of the United States, Judson Harmon, who made a statement concerning the dispute between Mexico and the US over the utilization of the waters of Rio Grande River.<sup>39</sup>

At present day it is difficult, if not impossible, to present evidence of a state forwarding the conception of absolute sovereignty over a natural resource that flows through its territory into another states’ territory. ‘From state practice it can be seen that states that once relied on absolute sovereignty in the utilization of shared water resources have come to attenuate their position and resorted to reaching agreements with other states sharing the watercourse based on the recognition of the respective rights of co-riparian states to benefit from the watercourse.’<sup>40</sup> The

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<sup>36</sup> McCaffrey (n 2) 57

<sup>37</sup> Dellapenna (n 34) 41

<sup>38</sup> Albert E. Utton, ‘International Water Quality Law’, (1973) 13 Nat Resources J 283

<<https://digitalrepository.unm.edu/nrj/vol13/iss2/8/>> accessed 02 March 2023

<sup>39</sup> McCaffrey (n 2) 112; *see also* Stephen C. McCaffrey, ‘The Harmon Doctrine One Hundred Years Later: Buried, Not Praised’, (1996) 36 NAT. Resources J. 981,982

<<https://digitalrepository.unm.edu/cgi/viewcontent.cgi?article=1774&context=nrj>> accessed 15 March 2023

<sup>40</sup> Rieu-Clarke *et al* (n 32) 102; *ibid* footnote 180 (mentioning India and Pakistan (1950s) and Austria and Germany (1950s); *see also* Helsinki Rules (n 28) 35, commentary to art. IV (for discussion on the recognition of the right of

rejection of absolute territorial sovereignty can also be grasped from subsequent developments within international law of codifications (binding or non-binding) of customary rules and general principles such as the principles of equitable and reasonable utilization and no significant harm, and their wide acceptance, which can be fathomed from incorporation of these principles in numerous bilateral agreements among states.<sup>41</sup>

### 2.2.2. Absolute Territorial Integrity

According to the absolute territorial integrity theory, a watercourse state (upper riparian) cannot use an international watercourse in a way that affects the water flow into another state's territory (lower riparian).<sup>42</sup> Lower riparian states propounded this theory since it supports their interest of protecting their prior use by barring upstream utilization that is deemed a threat to a use they have enjoyed thus far.

The US has also been implicated in connection to the absolute territorial integrity theory, as it was one of the states to invoke the theory, which is quite opposite to the "Harmon Doctrine".<sup>43</sup> The US invoked the nations of the absolute territorial integrity theory in the *Trail Smelter* case. The theory of absolute territorial integrity is the antithesis of the absolute territorial sovereignty theory, and the fate that has befallen the latter has also transpired to the former as it was largely rejected in state practice.<sup>44</sup> McCaffrey has discussed Egypt's protest over development by upper riparian states and Bolivia's position over the Rio Lauca as instances of claims in line with the theory of absolute territorial integrity.<sup>45</sup>

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the other states' right to share in the dispute over the Lauca River between Bolivia and Chile, dispute between Israel and some Arab States over Jordan river basin)

<sup>41</sup> See Draft Articles on the Law of the Non-navigational Uses of International Watercourses Report of the International Law Commission at its forty-sixth Sess. (1994), p. 98, 99, commentary to art. 5 ¶ 13 <[https://legal.un.org/ilc/texts/instruments/english/commentaries/8\\_3\\_1994.pdf](https://legal.un.org/ilc/texts/instruments/english/commentaries/8_3_1994.pdf)> accessed 02 March 2023

<sup>42</sup> McCaffrey (n 2) 126; Rieu-Clarke *et al* (n 32)

<sup>43</sup> McCaffrey (n 2) 127

<sup>44</sup> Mihajlo Vučić, 'Access to Water in the Context of the International Watercourse: A Theory of the Community of Interest', (2019) 67 ANA. PRAV. FAKUL. U. BEO. 76 <<https://www.researchgate.net/publication/335985268>> accessed 20 March 2023; Rieu-Clarke *et al* (n 32)

<sup>45</sup> McCaffrey (n 2) 128, 131

### 2.2.3. Limited Territorial Sovereignty

From the claims forwarded by both theories, it is *prima facie* evident that the riparian states relying on those claims will inevitably come into conflict with each other unless another option is presented for allowing both upper and lower riparian states to benefit from the waters of shared international watercourse while at the same time reducing damage.<sup>46</sup> Both of the above theories were rejected in state practice, leaving the way for a more inclusive and limited use by both sides.<sup>47</sup> Through time, the theory of limited territorial sovereignty has gained acceptance under international practice regarding the quality and quantity of the water shared among riparian states<sup>48</sup>; and the right of riparian states to benefit from an international watercourse in an equitable manner has been enunciated under several international agreements.<sup>49</sup>

As a middle ground between the above two theories, a third theory was forwarded, i.e. limited territorial sovereignty. Contrary to the two incompatible claims, the theory of limited territorial sovereignty has proposed an ‘equitable utilization’.<sup>50</sup> It has been enunciated as a “more balanced” approach “widely accepted as the foundation upon which the law of international watercourses in general, and the UNWC in particular, have evolved”.<sup>51</sup>

According to this theory, ‘each riparian state is equally entitled to use the waters of an international watercourse shared among them, while each having a correlative obligation to respect the right of other riparian states’.<sup>52</sup> It is based on the claim that a state has a sovereign right to utilize the waters of a shared watercourse that traverses its territory subject only to the “limitations” of the obligation not to infringe upon the right of other states to share and benefit from that watercourse.<sup>53</sup> With its notion of using an international watercourse by a riparian state within its territory in a manner that is equitable and reasonable and having the obligation to

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<sup>46</sup> Rieu-Clarke *et al* (n 32) 104

<sup>47</sup> *ibid* 102; Helsinki Rules (n 28) commentary to art. IV

<sup>48</sup> Utton (n 38) 284

<sup>49</sup> For some instances of the recognition of the right of lower riparian states by upper riparian states, *See* Second Report on the Law of the Non-navigational Uses of International watercourses by Mr. Stephen C. McCaffrey, Special Rapporteur, A/CN.4/399, (1986) 110-113 <[https://legal.un.org/ilc/documentation/english/a\\_cn4\\_399.pdf](https://legal.un.org/ilc/documentation/english/a_cn4_399.pdf)> accessed 22 March 2023

<sup>50</sup> Dellapenna (n 34) 69

<sup>51</sup> Rieu-Clarke *et al* (n 32) 103

<sup>52</sup> *ibid*; *see also* *ibid* for discussion of the Meuse River dispute between Netherlands and Belgium of 1856

<sup>53</sup> Vučić (n 44)

respect the right of other riparian states to benefit from or use the shared watercourse equally<sup>54</sup>, the principle of equitable and reasonable utilization is seen by some as a reflection of the limited territorial sovereignty theory.<sup>55</sup>

#### 2.2.4. Community of Interests

The community of interest has its foundation in the notion that states that share the waters of a common watercourse have a common interest in the utilization of that watercourse.<sup>56</sup> It enunciates the shared governance of a shared watercourse.<sup>57</sup> The community of interests came to the fore through the Permanent Court of International Justice (PCIJ), in its judgment to the “case relating to the territorial jurisdiction of the International Commission of the River Oder“ (or *River Oder* case) of 1929. The court stated that:

...when consideration is given to the manner in which states have regarded the concrete situations arising out of the fact that a single waterway traverses or separates the territory of more than one state, and the possibility of fulfilling the requirements of justice and the considerations of utility which this fact places in relief, it is at once seen that a solution of the problem has been sought not in the idea of a right of passage in favour of upstream states, but in that of a community of interest of riparian states. This community of interest in a navigable river becomes the basis of a common legal right, the essential features of which are the perfect equality of all riparian states in the use of the whole course of the river and the exclusion of any preferential privilege of any one riparian state in relation to the others.<sup>58</sup>

The last sentence of the above quotation was also quoted by the International Court of Justice (ICJ) in the “case concerning the Gabčíkovo-Nagymaros Project” (the *Gabčíkovo-Nagymaros Project* case) of 1997, followed by its own statement in the following words:

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<sup>54</sup> Draft Articles (n 41) 48, commentary to art. 5, ¶ 2, p. 97; Rieu-Clarke *et al* (n 32) 104

<sup>55</sup> Rieu-Clarke *et al* (n 32) 104; Vučić (n 44) 77

<sup>56</sup> Vučić (n 44) 77

<sup>57</sup> *ibid*

<sup>58</sup> The Territorial Jurisdiction of the International Commission of the River Oder (“Six Governments”/Polish Republic), Judgment, 1929 P.C.I.J. (ser. A) No.23, (Sep. 10), at 27 <[https://www.icj-cij.org/public/files/permanent-court-of-international-justice/serie\\_A/A\\_23/74\\_Commission\\_internationale\\_de\\_l\\_Oder\\_Arret.pdf](https://www.icj-cij.org/public/files/permanent-court-of-international-justice/serie_A/A_23/74_Commission_internationale_de_l_Oder_Arret.pdf)> accessed 04 April 2023

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 May 1997 on the Law of the Non-Navigational Uses of International Watercourses by the United Nations General Assembly.<sup>59</sup>

And, in the *Gabčíkovo-Nagymaros Project* case, the ICJ finally decided that “Czechoslovakia, by unilaterally assuming control of a shared resource, and thereby depriving Hungary of its right to an equitable and reasonable share of the natural resources of the Danube failed to respect the proportionality which is required by international law”.<sup>60</sup> McCaffrey has taken this decision, which is premised on reference from the *River Oder* case, as evidence of the ability of the community of interests to serve “as a principle that informs concrete obligations of riparian states, such as that of equitable utilization”.<sup>61</sup>

### **2.3. Development of International Law Relating to the Non-navigational use of International Watercourses**

The growing need for water, which continues to be increasingly baffled by population growth, pollution and climate change and the ensuing conflict among states on sharing international watercourses, has necessitated an international attempt at achieving cooperation in order to manage and protect the resource and avoid conflicts.<sup>62</sup> There was an increasing interest throughout the years for using water for other purposes beyond navigation, which, coupled with the lack of international law to govern the interest of states over its utilization, makes its governance difficult, ultimately leading to conflict.<sup>63</sup> As pointed out above, as shared water resources were highly put to use for the purpose of navigation, international law regarding

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<sup>59</sup> The *Gabčíkovo-Nagymaros Project* (Hungary/Slovakia), Judgment, 1997, I.C.J. 7, (Sep. 25), ¶ 85  
<<https://www.icj-cij.org/public/files/case-related/92/092-19970925-JUD-01-00-EN.pdf>> accessed 05 April 2023

<sup>60</sup> *ibid*

<sup>61</sup> McCaffrey (n 2) 150

<sup>62</sup> David J. Lazerwitz, ‘The Flow of International Water Law: The International Law Commission’s Law of the Non-navigational Uses of International Watercourses’, (1993) 1 IND. J. GLOBAL LEGAL Stud. 248  
<<https://www.repository.law.indiana.edu/ijgls/vol1/iss1/12/>> accessed 22 March 2023

<sup>63</sup> Stoa (n 20) 1323; *see also* International Water Law Project,  
<[https://www.internationalwaterlaw.org/documents/intldocs/hydraulic\\_power\\_conv.html](https://www.internationalwaterlaw.org/documents/intldocs/hydraulic_power_conv.html)> accessed 03 March 2023

watercourses was limited to that extent.<sup>64</sup> With the expansion of use of shared water resources for other purposes beyond navigation, the need increased for developing the law in order to incorporate other uses.<sup>65</sup> There are disputes over international watercourses such as the Nile, Indus, Jordan, Mekong, Ganges, Rhine, Danube and Rio Grande rivers, just to name a few.<sup>66</sup> In these and several other shared watercourses, there are diverging views held between upper and lower riparian states on how the resource should be shared and utilized and their respective rights under international law.

There are numerous treaties that form the basis of utilization of international watercourses among riparian states. The existence of treaties can be taken as a developed custom of rejection of the claims represented by the theories of absolute territorial sovereignty and absolute territorial integrity and riparian states recognizing the right of co-riparians to benefit or share from the waters.<sup>67</sup> Whereas the role of treaties has no doubt played a crucial role for the development of the law of international watercourses, the role of non-governmental bodies has been very crucial, in the sense that they helped in the codification of customary rules and general principles and their inclusion in subsequent multilateral and bilateral treaties, and establish their acceptance under international law.

Non-governmental bodies such as the Institute of International Law (IIL) and the International Law Association (ILA) have contributed immensely to the development of international law concerning international watercourses.<sup>68</sup> Of course, rules and resolutions formulated by the IIL and ILA do not have a legally binding effect, but, in the words of Salman, “possess a considerable authority by virtue of the fact that they reflect the established customary principles of international water law”.<sup>69</sup>

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<sup>64</sup> Dante A. Caponera, ‘Patterns of Cooperation in International Water Law: Principles and Institutions’, (1985) 25 NAT. Resources J. 564 <<https://digitalrepository.unm.edu/cgi/viewcontent.cgi?article=2294&context=nrlj>> accessed 01 March 2023

<sup>65</sup> *ibid*; *see generally* McCaffrey (n 2) 57-67

<sup>66</sup> *See generally* *ibid* 257-356 (for discussion on disputed or likely to lead to dispute shared watercourses that are situated in different parts of the world, taking samples of cases)

<sup>67</sup> Dellapenna (n 34) 69, 70

<sup>68</sup> Rieu-Clarke *et al* (n 32) 36

<sup>69</sup> Salman M.A. Salman, ‘The Helsinki Rules, the UN Watercourses Convention and the Berlin Rules: Perspectives on International Water Law’, (2007) 23 Water Resources Dev. 628 <<https://www.internationalwaterlaw.org/bibliography/articles/general/Salman-BerlinRules.pdf>> accessed 09 March 2023

In 1954, following disputes over the sharing of water resources, the ILA started to work towards formulating a law to govern the utilization of international fresh water resources.<sup>70</sup> It adopted the Helsinki Rules in 1966.<sup>71</sup> On the other hand, the International Law Commission (ILC) established with the objective of promoting “the progressive development of international law and its codification”<sup>72</sup>, adopted the Draft Articles on the Non-Navigational Uses of International Watercourses in 1994. It was formulated to “apply to uses of international watercourses and of their waters for purposes other than navigation and to measures of conservation and management related to the uses of those watercourses and their waters”.<sup>73</sup> The Draft Articles formed the basis for the United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses.

On 21 May 1997, the United Nations General Assembly (UNGA) adopted the Convention on the Law of the Non-Navigational Uses of International Watercourses (hereinafter, UNWC).<sup>74</sup> The UNWC was adopted by 103 votes in favour, 26 abstentions and 3 votes against.<sup>75</sup> It was driven by the recognition of the importance of the codification and progressive development of the rules of international law concerning non-navigational uses of international watercourses, and the danger posed on international watercourses as a result of the growing demand for water and increasing pollution.<sup>76</sup>

The UNWC is aimed to be a framework convention that intends to “ensure the utilization, development, conservation, management and protection of international watercourses and the promotion of the optimal and sustainable utilization thereof for present and future generations”.<sup>77</sup> The UNWC is a crucial agreement concerned with the non-navigational use of international

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<sup>70</sup> Charles B. Bourne, ‘The International Law Association’s Contribution to International Water Resources Law’, (1996) 36 NAT. Resources J. 155, 156

<<https://digitalrepository.unm.edu/cgi/viewcontent.cgi?article=1788&context=nrj>> accessed 08 March 2023

<sup>71</sup> Helsinki Rules (n 28)

<sup>72</sup> Establishment of an International Law Commission, UNGA, 123 meeting, 21 November, 1947, art. 1(1)

<<https://digitallibrary.un.org/record/210001#record-files-collapse-header>> accessed 10 March 2023

<sup>73</sup> Draft Articles (n 41) art. 1(1)

<sup>74</sup> UNWC (n 1)

<sup>75</sup> Rep. of the Six Committee convening as the Working Group of the Whole, A/51/PV.99, (May 21, 1997), p. 8 <<https://digitallibrary.un.org/record/234835?ln=en>> accessed 24 March 2023 (*see* also the total number of states that adopted the UNWC can be taken to be 106, since the Secretariat was informed by the delegations of Belgium, Nigeria and Fiji that they intended to vote in favour).

<sup>76</sup> UNWC (n 1) preamble ¶ 3, 4

<sup>77</sup> *ibid* ¶ 5

watercourses, as it is a treaty having universal applicability.<sup>78</sup> And, as an international legal instrument having wide applicability and having codified major principles of international water law, its importance cannot be stressed enough.<sup>79</sup> It entered into force on 17 August 2014.

On the other hand, the ILA agreed to revise the Helsinki Rules in a meeting in 1997, after taking into consideration the existence of change since the Helsinki Rules, and as such the Water Resources Committee of the ILA “undertook to summarize the current state of the relevant customary international law”.<sup>80</sup>

The United Nations Economic Commission for Europe (UNECE) Convention on the Protection and Use of Transboundary Watercourses and International Lakes (hereinafter, UNECE-Water Convention) was adopted on 17 March 1992 in Helsinki, Finland.<sup>81</sup> It has entered into force on 6 October 1996.<sup>82</sup> The UNECE-Water Convention was limited to membership from state members of the Economic Commission for Europe, and regional economic integration organizations formed by member states of the Economic Commission for Europe.<sup>83</sup> But, in its amendment adopted through the Decision III/1 of 28 November 2003, member states of the United Nations (UN) were allowed to accede to the UNECE-Water Convention.<sup>84</sup> The amendment entered into force on 6 February 2013.<sup>85</sup>

#### **2.4. Major Principles of International Water Law**

Under international water law, there are three major principles; equitable and reasonable utilization, no significant harm and the duty to cooperate.<sup>86</sup> The principles of equitable and

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<sup>78</sup> Introductory note by Stephen C. McCaffrey, June, 2008, UN, Audio Visual Library of International Law, <<https://legal.un.org/avl/ha/clnuiw/clnuiw.html>> accessed 13 March 2023

<sup>79</sup> Tamar Meshel & Moin A. Yahya, ‘International Water Law and Fresh Water Dispute Resolution: A Cosean perspective’, (2021) 92 U. COLO. REV. 539 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3482185](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3482185)> accessed 04 April 2023

<sup>80</sup> Int’l Law Ass’n, Berlin Conference, Water Resources Law (2004), (hereafter, Berlin Rules), p. 3 <[https://unece.org/fileadmin/DAM/env/water/meetings/legal\\_board/2010/annexes\\_groundwater\\_paper/Annex\\_IV\\_Berlin\\_Rules\\_on\\_Water\\_Resources\\_ILA.pdf](https://unece.org/fileadmin/DAM/env/water/meetings/legal_board/2010/annexes_groundwater_paper/Annex_IV_Berlin_Rules_on_Water_Resources_ILA.pdf)> accessed 11 March 2023

<sup>81</sup> Convention on the Protection and Use of Transboundary Watercourses and International Lakes, as amended, UNECE, done at Helsinki, 17 March 1992, <[https://digitallibrary.un.org/record/787804/files/Conventon\\_text\\_consolidated\\_Eng.pdf](https://digitallibrary.un.org/record/787804/files/Conventon_text_consolidated_Eng.pdf)> accessed 11 March 2023

<sup>82</sup> *ibid*

<sup>83</sup> *ibid* art. 23, art. 25

<sup>84</sup> *ibid*

<sup>85</sup> *ibid*

<sup>86</sup> Meshel & Yahya (n 79) 512

reasonable utilization and no-significant harm are the most fundamental principles. These two principles are frequently raised in the discussion regarding the sharing or allocation of international watercourses among watercourse states.

#### **2.4.1. The Principle of Equitable and Reasonable Utilization**

The principle of equitable and reasonable utilization dictates that in utilizing a shared water resource, a state through whose territory the water passes is entitled to an equitable and reasonable share and lays on it the obligation to take into consideration the right of co-riparian states to share the waters. This is in line with the principle of the sovereign equality of states that, in this context, upholds that “every riparian state has a right to the utilization of the watercourse which is qualitatively equal to the right of the co-riparian states”.<sup>87</sup> And, equitable utilization is not the same as equality of uses.<sup>88</sup>

The principle of equitable and reasonable utilization is a principle well recognized under international law.<sup>89</sup> Under the principle of equitable and reasonable utilization, an upper riparian state’s right to use an international watercourse is respected with a lower riparian state’s right being respectively recognized by obliging the former to refrain from denying it its share.<sup>90</sup> The principle of equitable and reasonable utilization is considered by many as a cornerstone of the law governing international watercourses under international law.<sup>91</sup>

Equitable utilization came to the fore as a balance between the claims of absolute territorial sovereignty and absolute territorial integrity.<sup>92</sup> By requiring the sharing of an international watercourse among riparian states, equitable utilization departed from the two claims forwarded by upper and lower riparian states.<sup>93</sup> As noted by Utton, equitable utilization “prevented the preemptive use of the river by the upper riparian just because it was upstream, and it likewise

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<sup>87</sup> Rieu-Clarke *et al* (n 32) 106

<sup>88</sup> Dellapenna (n 34) 75

<sup>89</sup> McIntyre (n 22) 27

<sup>90</sup> Rieu-Clarke *et al* (n 32) 104

<sup>91</sup> Stephen C. McCaffrey & Mpazi Sinjela, ‘Current Developments: The 1997 United Nations Convention on International Watercourses’, (1998) 92 A.J.I.L. 99 <<https://www.jstor.org/stable/2998069>> accessed 24 March 2023

<sup>92</sup> Alrbert E. Utton, ‘Which Rule Should Prevail in International Water Disputes: That of Reasonableness or that of No Harm’, (1996) 36 Nat Resources J. 638 <<https://digitalrepository.unm.edu/nrj/vol36/iss3/7>> accessed 15 March 2023

<sup>93</sup> *ibid*

prevented the downstream state from exercising a veto over any upstream diversion or use of the river”.<sup>94</sup>

Ascertaining the precise meaning and scope of “equitable and reasonable utilization” is a difficult task. In this regard, the Helsinki Rules, the Draft Articles, the UNWC and the Berlin Rules have made attempts to clarify equitable and reasonable utilization through the enumeration of a non-exhaustive list of factors to be taken into account in determining whether a certain use of a shared water resource is equitable and reasonable.

#### **2.4.1.1. The Principle of Equitable and Reasonable Utilization under International Legal Instruments**

The principle of equitable and reasonable utilization has been incorporated under different international legal codifications and treaties such as the Helsinki Rules, the Draft Articles, the UNWC, the Berlin Rules and the UNECE-Water Convention. The UNWC and UNECE-Water Convention, through its amendment, are the only ones binding on states that ratified them. Stephen C. McCaffrey, in his second report on the law of the non-navigational uses of international watercourses, recognizing the incorporation of the equitable utilization of international watercourses in several agreements between states, remarked that:

“while the language and approach of these agreements vary considerably, their unifying theme is the recognition of the equal and correlative right of the parties to the use and benefits of the international watercourse or watercourses in question”.<sup>95</sup>

The Helsinki Rules, under Article IV, stated 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.

In the commentary to this Article, the principle of equitable and reasonable utilization has been described as a “key principle of international law”.<sup>96</sup> The commentary takes the article as a discarding of the absolute territorial sovereignty theory.<sup>97</sup>

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<sup>94</sup> *ibid*

<sup>95</sup> Stephen C. McCaffrey’s Second Report (n 49) ¶ 76

The Draft Articles, drawn by the ILC as a framework agreement based on the existence of “unity of interest and an interdependence between watercourse states”<sup>98</sup>, provides general principles that apply to international watercourse utilization by watercourse states. Article 5(1) of the Draft Articles lays down the equitable and reasonable utilization of an international watercourse.

“Equitable” and “reasonable” are vague concepts that were discussed during the drafting stage of the Draft Articles.<sup>99</sup> The ILC recognized the “difficulties inherent in the use of the notion of equity”.<sup>100</sup> It noted that:

While the use of such vague notions as “reasonable” and “equitable” was considered necessary when dealing with limitations of territorial sovereignty, it was also considered necessary to avoid confusion by specifying that the right of the territorial states to an equitable and reasonable use of the waters and the obligation not to interfere with the equitable and reasonable uses of others must be concordant.<sup>101</sup>

The principle of equitable and reasonable utilization, as enshrined under Article 5 of the Draft Articles, describes both a right to utilize an international watercourse within its territory in an equitable manner as well as an obligation to use an international watercourse within its territory equitably so as “not to deprive other watercourse states of their respective rights to an equitable utilization”.<sup>102</sup>

Article 5 of the UNWC states that:

Watercourse states shall in their respective territories utilize an international watercourse in an equitable and reasonable manner. In particular, an international watercourse shall be used and developed by watercourse states with a view to attaining optimal and sustainable utilization thereof and benefits therefrom, taking into account

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<sup>96</sup> Helsinki Rules (n 28) commentary to art. IV

<sup>97</sup> *ibid*

<sup>98</sup> Report of the International Law Commission on the work of its thirty-sixth Sess., U.N. GAOR, 39<sup>th</sup> Sess., Supp. No. 10, A/39/10, (1984) p. 95, ¶ 325 <[https://legal.un.org/ilc/documentation/english/reports/a\\_39\\_10.pdf](https://legal.un.org/ilc/documentation/english/reports/a_39_10.pdf)> accessed 04 March 2023

<sup>99</sup> *ibid* p. 94, ¶ 323

<sup>100</sup> *ibid*

<sup>101</sup> *ibid*

<sup>102</sup> Draft Articles (n 41) p. 97, commentary to art. 5 ¶ (2)

the interests of the watercourse states concerned, consistent with adequate protection of the watercourse.

According to Article 6 of the UNWC, which contains a non-exhaustive list of factors, a riparian state is required to utilize an international watercourse in an equitable and reasonable manner by taking in to consideration “all relevant factors and circumstances” that are to be taken cumulatively.<sup>103</sup> On the other hand, Article 12 of the Berlin Rules laid down equitable utilization in the following words:

Basin states shall in their respective territories manage the waters of an international drainage basin in an equitable and reasonable manner having due regard for the obligation not to cause significant harm to other basin states.

Meanwhile, the UNECE-Water Convention in dealing with reasonable and equitable utilization obliges parties to the agreement to take all appropriate measures “to ensure that transboundary waters are used in a reasonable and equitable way, taking into particular account their transboundary character, in the case of activities which cause or are likely to cause transboundary impact”.<sup>104</sup>

Though these binding and non-binding international legal instruments have adopted different wordings while incorporating the principle of equitable and reasonable utilization, the right of watercourse states to utilize the water that passes through their territories in an equitable and reasonable manner is recognized across the board.

#### **2.4.2. No-Significant Harm**

No significant harm is a principle that stipulates the obligation of a state in utilizing a shared water resource within its territory not to cause damage to other states sharing the resource. This principle is founded upon the notion, in general international law of, dictating the “harmless use of territory”, conveyed by the maxim *sic utere tuo ut alienum non laedas*.<sup>105</sup> A riparian state in

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<sup>103</sup> UNWC (n 1) art. 6 (1) & (3)

<sup>104</sup> UNECE-Water Convention (n 81) art. 2 (2) (c)

<sup>105</sup> Report of the International Law Commission on the work of its fortieth Sess., U.N. GAOR, 43<sup>rd</sup> Sess., Supp. No. 10, A/43/10, (1988) p. 35, commentary to art. 8, ¶ (1)

<[https://legal.un.org/ilc/documentation/english/reports/a\\_43\\_10.pdf](https://legal.un.org/ilc/documentation/english/reports/a_43_10.pdf)> accessed 04 March 2023

utilizing an international watercourse within its territory has an obligation not to cause a significant harm to other riparian states. In the *Trail Smelter Arbitration* case, which involved the United States and Canada concerning damage caused in the State of Washington, United States as a result of emission of sulphur dioxide fumes by a company in Trail, British Columbia, Canada, the Tribunal stated in its conclusion that:

Under the principles of international law...no state has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.<sup>106</sup>

In dealing with the no-significant harm principle, Meshel and Yahya stated that “contrary to some popular perception of the no significant harm principle, it is not designed to unilaterally protect against harm caused to a state’s prior uses by the new activities of another state”.<sup>107</sup> For them, the no-significant harm principle is “aimed at striking a balance between one state’s development possibilities and another state’s existing uses by preventing unilateral actions that cause significant harm”.<sup>108</sup> After noting the divergence in the interests of states in the utilization of international watercourses, they stated that this divergence can be balanced through laying obligation of conduct on states instead of result.<sup>109</sup>

The standard that the no-significant harm principle requires is due diligence, imposing the “positive duty to take concrete steps to protect the resource” rather than the “negative duty to avoid harm”.<sup>110</sup> According to McCaffrey, ‘there is scant support in state practice for an obligation of result, i.e., a virtual guaranty that significant harm will not occur’, rather ‘state practice appears to support a due diligence standard’.<sup>111</sup> Thus, ‘what is imposed by the no-significant harm principle on states is the obligation of conduct or due diligence, not result.’<sup>112</sup>

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<sup>106</sup> Trail Smelter case (United States/Canada), Reports of International Arbitral Awards, 16 April 1938 and 11 March 1941, at 1965 <[https://legal.un.org/riaa/cases/vol\\_III/1905-1982.pdf](https://legal.un.org/riaa/cases/vol_III/1905-1982.pdf)> accessed 15 March 2023

<sup>107</sup> Meshel & Yahya (n 79) 543

<sup>108</sup> *ibid* 543, 544

<sup>109</sup> *ibid* 544

<sup>110</sup> *ibid*

<sup>111</sup> Stephen C. McCaffrey, ‘An Assessment of the Work of the International Law Commission’, (1996) 36 NAT. Resources J. 310 <<https://digitalrepository.unm.edu/nrj/vol36/iss2/5/>> accessed 24 March 2023

<sup>112</sup> Meshel & Yahya (n 79) 544

The obligation of conduct or diligence thereby lays on a state the “positive duty to take concrete steps to protect the resource”.<sup>113</sup>

#### **2.4.2.1. No-Significant Harm under International Legal Instruments**

The no-significant harm principle has been incorporated under different international water law codifications and treaty law. Under the Helsinki Rules, the prohibition against causing significant is just one factor to be considered among many in the utilization by a state of an international watercourse in an equitable and reasonable manner.<sup>114</sup> Further, a separate provision, Article X, obliges a state using an international drainage basin to prevent water pollution “which would cause substantial injury in the territory of a co-basin state, in line with the principle of equitable utilization”.<sup>115</sup> In determining what “substantial injury” is within the context of Article X, the commentary thereto states that “not every injury is substantial”.<sup>116</sup>

Regarding the obligation not to cause significant harm, the Draft Articles stipulated that “watercourse states shall exercise due diligence to utilize an international watercourse in such a way as not to cause significant harm to other watercourse states”.<sup>117</sup>

Whereas, the UNWC, under Article 7, articulated the obligation not to cause significant harm as follows:

Watercourse states shall, in utilizing an international watercourse in their territories, take all appropriate measures to prevent the causing of significant harm to other watercourse states.

The Berlin Rules, while recognizing the right of a basin state to manage<sup>118</sup> the waters of an international drainage basin within its territory in an equitable and reasonable way, obliges it not to cause significant harm to co-riparian states.<sup>119</sup>

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<sup>113</sup> *ibid*

<sup>114</sup> Helsinki Rules (n 28) art. V (2) (k)

<sup>115</sup> *ibid* art. X

<sup>116</sup> *ibid* commentary to art. X

<sup>117</sup> Draft Articles (n 41) art.7 (1)

<sup>118</sup> *See* Berlin Rules (n 80) art. 3 (14)

<sup>119</sup> *ibid* art. 12(1)

Meanwhile, the UNECE-Water Convention obligates parties to the convention “to take all appropriate measures to prevent, control and reduce any transboundary impact”.<sup>120</sup> It especially requires the parties to the convention to take all appropriate measures, being directed by the principles of the precautionary principle, the polluter-pays principle and manage water resources in a manner that serves the needs of present generations while at the same time not “compromising the ability of future generations to meet their own needs”.<sup>121</sup>

## **2.5. The Relationship between the Principles of Equitable and Reasonable Utilization and No-Significant Harm**

All sovereign states through whose territory an international watercourse passes have the right to utilize the waters.<sup>122</sup> Dictated by the principle of the sovereign equality of states, which is recognized under international law, every riparian state is equally entitled to the right to use an international watercourse.<sup>123</sup> In differentiating between an “equal entitlement of use” and “equality of share”, the ILC opined that “the fundamental principle of ‘equality of right’ does not ...mean that each watercourse state is entitled to an equal share of the uses and benefits of the watercourse”.<sup>124</sup> It is equitable utilization that is expected of states sharing an international watercourse. Equity is the governing notion here, and equitable utilization is to be determined by looking into each specific circumstance pertaining to the shared watercourse.<sup>125</sup> This is the reason behind the UNWC Article 6 listing of factors to be taken into account while determining equitability and reasonability of a certain utilization of an international watercourse.<sup>126</sup>

While upper riparian states support the principle of equitable and reasonable utilization, because they see it as a protection for utilizing the water that passes through their territory without being subjected to entirely adhere to a prior use by lower riparian states, lower riparian states adhere to

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<sup>120</sup> UNECE-Water Convention (n 81) art. 2 (1)

<sup>121</sup> *ibid* art. 2(5)

<sup>122</sup> Report of the International Law Commission on the work of its thirty-ninth Sess., U.N. GAOR, 42<sup>nd</sup> Sess., Supp. No. 10, A/42/10, (1987), p. 32 <[https://legal.un.org/ilc/documentation/english/reports/a\\_42\\_10.pdf](https://legal.un.org/ilc/documentation/english/reports/a_42_10.pdf)> accessed 04 March 2023

<sup>123</sup> *ibid*; Draft Articles (n 41) p. 98, commentary to art.5, ¶ (8)

<sup>124</sup> 1987 Report of the ILC (n 122) commentary to art. 6, ¶ (8)

<sup>125</sup> *ibid* commentary to art. 6, ¶ 9

<sup>126</sup> *ibid*

the no-significant harm principle because they deem it as a protection against utilization by upper riparian states and a protection to their prior use.<sup>127</sup>

‘Perhaps debate over which principle should prevail has also been affected by, in addition to the interests of upper and lower riparian states in arguing for the precedence of one over the other, the attachment of the principle of equitable and reasonable utilization to quantity of allocation and no-significant harm’s close ties with water quality, *i.e.*, prevention of pollution.’<sup>128</sup> Utton even suggested for equitable utilization to be applied having precedence in issues concerning water quantity and no significant harm rule to be confined to water quality issues.<sup>129</sup> Dellapenna also noted that, with regard to the allocation of water between riparian states sharing an international watercourse, the principle of equitable utilization is the “primary rule of customary international law”.<sup>130</sup>

Debate over the relation between the two principles and the precedence to be given to the one over the other has been a center of discussion in the codification of principles of international water law and drafting of treaties. One such instance is the lengthy discussions on ILC’s Draft Articles, during which much debate revolved around the issue of whether the principle of equitable and reasonable utilization or no-significant harm should be given precedence when there arises a situation in which the principles conflict with each other.<sup>131</sup>

For Wouters, the Draft Articles treated the no-significant harm principle “as the governing rule of watercourse law”.<sup>132</sup> She arrived at this conclusion after considering that Article 7 sets a test that a state looking to utilize an international watercourse may do so “only where it knows or ought to know that it would not cause significant harm to other states”, laying down the obligation not to cause significant harm.<sup>133</sup> She is of the opinion that the principle of equitable

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<sup>127</sup> McCaffrey & Sinjela (n 91) 101

<sup>128</sup> McCaffrey (n 111) 308

<sup>129</sup> Utton (n 92) 635, 636

<sup>130</sup> Dellapenna (n 34) 86

<sup>131</sup> McCaffrey (n 111) 307

<sup>132</sup> Patricia K. Wouters, ‘An Assessment of Recent Developments in International Watercourse Law through the Prism of the Substantive Rules Governing Use Allocation’, (1996) 36 Nat. Resources J. 424

<https://digitalrepository.unm.edu/cgi/viewcontent.cgi?article=1795&context=nrj> accessed 29 March 2023

<sup>133</sup> *ibid* 423

utilization has been taken by Article 7 as a “mere factor” that is to be taken into account in the event that negotiations are taking place over a significant harm inflicted.<sup>134</sup>

In the commentary to Article 12 of the Berlin Rules, which deals with equitable and reasonable management of an international drainage basin, it is stated that the language employed is aimed at elucidating the contentious relationship between the principles of equitable and reasonable utilization and no significant harm.<sup>135</sup> Accordingly, while utilizing the waters of an international watercourse, a riparian state has the right to do so in an equitable and reasonable manner and bears a correlative obligation (not to cause significant harm).<sup>136</sup>

In the utilization of an international watercourse, while the Draft Articles requires watercourse states to “exercise due diligence” so as “not to cause significant harm to other watercourse states”, the UNWC obliges watercourse states to “take all appropriate measures” in order to forestall the causation of significant harm to other states sharing the waters. The aim of the provision in the Draft Articles, according to the commentary thereto, is “setting forth a process aimed at avoiding significant harm as far as possible while reaching an equitable result in each concrete case”.<sup>137</sup>

The UNWC has stated for both principles; but the principle of equitable and reasonable utilization can be argued to have been given precedence from the reading of Article 7 (2). According to this Article, a state that causes significant harm while utilizing an international watercourse in an equitable and reasonable manner will only be required to “take all appropriate measures” to “eliminate or mitigate such harm” and, if appropriate, compensate the injured state. After taking this into consideration, Dellapenna stated that “the rule of equitable utilization seems unquestionably to be the primary rule with any obligation to prevent harm being subordinated to that primary rule”.<sup>138</sup> According to McCaffrey, the incorporation of sub-Article 2 under Article 7 “strongly suggests that if a state’s use is equitable it should be allowed to continue, even if it causes significant harm to another state”.<sup>139</sup>

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<sup>134</sup> *ibid* 423, 424

<sup>135</sup> Berlin Rules (n 80) commentary to art. 12

<sup>136</sup> *ibid*

<sup>137</sup> Draft Articles (n 41) commentary to art. 7, ¶(1)

<sup>138</sup> Dellapenna (n 34) 74

<sup>139</sup> McCaffrey (n 111)

Concerning the place of the principle of equitable utilization under international law, the ILC stated that:

A survey of all available evidence of the general practice of states, accepted as law, in respect of the non-navigational uses of international watercourses—including treaty provisions, positions taken by states in specific disputes, decisions of international courts and tribunals, statements of law prepared by intergovernmental and non-governmental bodies, the views of learned commentators and decisions of municipal courts in cognate cases--reveals that there is overwhelming support for the doctrine of equitable utilization as a general rule of law for the determination of the rights and obligations of states in this field.<sup>140</sup>

In this regard, the judgment rendered by the ICJ in the *Gabčíkovo-Nagymaros Project* case of 1997 can be regarded as giving recognition to the principle of equitable and reasonable utilization as a fundamental principle in the non-navigational utilization of international watercourses.

Regarding the relationship between the principles of equitable and reasonable utilization and no significant harm, the ILC Special Rapporteur, Stephen C. McCaffrey, opined that as a result of the inability of an international watercourse to assure the satisfaction of the needs of all riparian states, an allocation that is equitable will cause a factual “harm”, while not causing legal “injury”.<sup>141</sup> In other words, since international watercourses lack capacity to serve the needs of all riparian states, even though there is an equitable and reasonable sharing of the uses and benefits of the water, a riparian state might be said to be “harmed” just because its needs were not wholly served.<sup>142</sup>

Upper and lower riparian states have looked to utilize the waters of international watercourses for purposes required by their economic and development needs. Upper riparian states have usually been disadvantaged as they were late to start utilizing the waters, while lower riparians

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<sup>140</sup> Draft Articles (n 41) commentary to art.5, ¶ 10

<sup>141</sup> Report of the International Law Commission on the work of its thirty-eighth Sess., U.N. GAOR, 41<sup>st</sup> Sess., Supp. No. 10, A/41/10, (1986) p. 63, ¶ 240 <[https://legal.un.org/ilc/documentation/english/reports/a\\_42\\_10.pdf](https://legal.un.org/ilc/documentation/english/reports/a_42_10.pdf)> accessed 04 March 2023

<sup>142</sup> *ibid*

have begun using the waters for development purposes much earlier.<sup>143</sup> The ILC, cognizant of this fact, noted that ‘solutions must be envisaged with a view to achieving a balanced regime that would ensure that the freedom of a state to use its watercourse was not unduly restricted and that the freedom of other states from being harmed thereby was adequately safeguarded’.<sup>144</sup> Utton has opined on the place of the two principles under international water law codification by concluding that, while the ILA and the Helsinki Rules give precedence to equitable utilization, the ILC’s Draft Articles present the obligation not to harm as a principal rule. This view is also supported by Wouters.<sup>145</sup>

Equitable utilization is what emerged as a balance between two extreme positions regarding the utilization of international watercourses. The principle of equitable and reasonable utilization aims to guarantee the right of a watercourse state to utilize the water that passes through its territory, while obliging it not to cause significant harm to other watercourse states. The UNWC also made the obligation not to cause significant harm one factor in the determination of equitable and reasonable utilization. It can be concluded that the UNWC gave the principle of equitable and reasonable utilization precedence over the no-significant harm rule from the reading of Articles 5, 6 and 7. Through the principle of equitable utilization and reasonable utilization, upper riparian states’ interest is secured and lower riparian states’ interest is protected.

## **2.6. The Status of the Principles of Equitable and Reasonable Utilization and No-significant Harm under International Law**

Upper riparian states advocated for absolute territorial sovereignty in order to exercise full control over an international watercourse passing through their territory and deny any obligation towards other riparian states was widely rejected in state practice. Likewise, lower riparian states’ claim for absolute territorial integrity has been rejected. The rejection of both claims can be fathomed from their eradication in state practice, except few cases such as the Nile River basin, where the lower riparian states stance on the utilization of the river, to be discussed under

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<sup>143</sup> Joseph W. Dellapenna, ‘The Customary International Law of Transboundary Fresh Waters’, (2001) 1 Int. J. Global Env’tal Issues, 280

<https://www.internationalwaterlaw.org/bibliography/IJGEI/04ijgenvl2001v1n34dellapenna.pdf>> accessed 20 March 2023

<sup>144</sup> 1984 Report of the ILC (n 98) 97, ¶ 339

<sup>145</sup> Wouters (n 132) 420

chapter three, can be likened to absolute territorial integrity. Those claims were shunned with the emergence of equitable utilization as a balanced solution to tame the two extremes.<sup>146</sup> The principles of equitable and reasonable utilization and no-significant harm have been incorporated under different bilateral and multilateral treaties.<sup>147</sup>

The recognition of the principle of equitable and reasonable utilization under international law has been acknowledged by the ICJ in the *Gabčíkovo-Nagymaros Project* case, in which the ICJ considered the act of Czechoslovakia of unilaterally controlling the Danube River as violating international law.<sup>148</sup> On the other hand, there exists a general principle under international law that places a limit upon measures a state takes within its territory that causes injury within another state's territory.<sup>149</sup> This is a principle enunciated in the *Corfu Channel* case, in which the ICJ noted the principle to be a general and well-recognized principle that denotes the obligation of all states "not to allow knowingly its territory to be used for acts contrary to the rights of other states".<sup>150</sup> This principle has also been recognized in the *Trail Smelter Arbitration* case, as already quoted above. This general principle is an expression of the Latin maxim *sic utere tuo ut alienam non laedas* (do not use your property so as to injure the property of another). This is where the no-significant harm rule emanates from, as one principle for the non-navigational use of international watercourses.

Due to the involvement of different state interests, the utilization of international watercourses rests on the agreement between the states involved, bilateral and multilateral treaties, and developed custom and principles under international law. As treaties only bind states that give their consent to be bound by them, it becomes imperative to ascertain what international law has in place where such treaties governing the shared utilization of an international watercourse do

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<sup>146</sup> Dellapenna (n 143) 270

<sup>147</sup> Agreements that uphold equitable utilization of an international watercourse and reject exclusive use includes, Agreement between Spain and France in 1866, The Treaty of Peace, Friendship and Arbitration of 1929 between Haiti and the Dominican Republic, the Treaty between Brazil and Uruguay of 1933, Indus waters Treaty of 1960 between India and Pakistan and Agreement between Denmark and Germany of 1922, Report of the Commission to the General Assembly on the work of the thirty-fourth session, Year book of the ILC, 1982, Vol. II Part One, 78,79, 80 <[https://legal.un.org/ilc/publications/yearbooks/english/ilc\\_1982\\_v2\\_p1.pdf](https://legal.un.org/ilc/publications/yearbooks/english/ilc_1982_v2_p1.pdf)> accessed 10 May 2023

<sup>148</sup> *Gabčíkovo-Nagymaros Project* case (n 59) p. 56 ¶ 85

<sup>149</sup> The Helsinki Rules (n 28) commentary to Article X

<sup>150</sup> The Corfu Channel Case, Judgment of April 9<sup>th</sup>, 1949, ICJ, p.22 <<https://www.icj-cij.org/sites/default/files/case-related/1/001-19490409-JUD-01-00-EN.pdf>> accessed 04 April 2023

not exist. According to Article 38 (1) of the Statute of the International Court of Justice (ICJ), regarded as a source of international law;

the court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states, b) international custom, as evidence of a general practice accepted as law, c) the general principles of law recognized by civilized nations, d) subject to Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.<sup>151</sup>

Where watercourse states are not party to any binding treaty, the utilization of an international watercourse rests on international law and principles that have wide acceptance under international water law. The principles of equitable and reasonable utilization and no-significant harm are among the major principles of international water law. Both principles came to be incorporated within several bilateral and multilateral treaties. Such incorporation can be taken as evidence of the existence of uniform state practice that solidifies the right of watercourse states to utilize the water that passes through their territory and the obligation not to cause significant harm to other watercourse states while doing so.<sup>152</sup> The ILA and IIL, who formulate rules that do not have legally binding force but reflect the established rules of customary international law, and the ILC, are bodies that have codified fundamental principles of international water law. The ILC, whose objective is “the promotion of the progressive development” of customary international law and codify it,<sup>153</sup> was also involved in the incorporation of these principles in codifications. The resolutions by such bodies and the existence of several treaties incorporating the principles under discussion can also serve as evidence for the establishment of the two principles as custom, as they exhibit *opinio juris* and state practice, respectively.<sup>154</sup>

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<sup>151</sup> Statute of the International Court of Justice, 1945 <<https://treaties.un.org/doc/publication/ctc/uncharter.pdf>> accessed 18 May 2023

<sup>152</sup> Dellapenna (n 143) 270

<sup>153</sup> Statute of the International Law Commission, 1947, art. 1(1), art. 24 <<https://legal.un.org/ilc/texts/instruments/english/statute/statute.pdf>> accessed 18 May 2023; Dellapenna (n 143) 268

<sup>154</sup> Dellapenna (n 143) 267

It can be concluded that the principles of equitable and reasonable utilization and no-significant harm have been recognized as rules of customary international law.<sup>155</sup> The recognition of the two principles as established rules of customary international law, which is sourced from uniform state practice and *opinio juris*, means that they bind all states, except those that constantly opposed the creation of such custom.<sup>156</sup> And, where no binding treaty exists, the utilization of an international watercourse is governed by the principles of customary international law.<sup>157</sup>

## Conclusion

Through the development of international water law, the claims for exclusive or absolute use of international watercourses by states excluding the rest has been rejected, and was replaced with equitable utilization. The principles of equitable and reasonable utilization and no-significant harm are interpreted antagonistically by states sharing an international watercourse depending on whether the state is situated upstream or downstream and the existing use they enjoyed. There is also a debate among scholars regarding which principle should have precedence whenever there ensues a conflict over a certain use of the shared water by a riparian state might cause significant harm to other riparians. Upper riparian states, which have mostly been shunned from utilizing the water that passes through their territory, benefit from the principle of equitable and reasonable utilization, as it supports their claim for utilizing the water. On the other hand, lower riparian states rely on the no-significant harm rule, aiming to receive undiminished water flow. The two principles have been included in several bilateral and multilateral treaties, and are recognized as principles of customary international law. And, as such, they are binding in their application to the utilization of international watercourses. The priority of the principle of equitable and reasonable utilization means that a riparian state has the right to utilize the water that passes through its territory while having the obligation to take all appropriate measures not to cause significant harm.

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<sup>155</sup> Attila M. Tanzi, 'The Inter-relationship between No-harm, Equitable and Reasonable Utilization and Cooperation under International Water Law', (2020) 20 Int Environ Agreements 620  
<<https://link.springer.com/article/10.1007/s10784-020-09502-7>> accessed 18 April 2023

<sup>156</sup> ibid 266

<sup>157</sup> Alex Grzybowski, Stephen C. McCaffrey & Richard K. Paisley, 'Beyond international water law: Successfully Negotiating Mutual Gains Agreements for International Watercourses', (2010) 22 Global Business & Dev't Law J. 140 <<https://scholarlycommons.pacific.edu/cgi/viewcontent.cgi?article=1029&context=facultyarticles>> accessed 04 April 2023

## CHAPTER THREE

### 3. BACKGROUND TO THE NILE RIVER BASIN DISPUTES AND NORMATIVE FRAMEWORKS GOVERNING ITS UTILIZATION

#### 3.1. Introduction

International watercourses in different parts of the world have been a bone of contention among states through whose territory they pass. The Jordan River basin, the Nile River basin, and the Euphrates-Tigris River basin are some of the river basins that are highly disputed among the riparian states that share the waters.<sup>158</sup> The Nile River is the longest river in the world, shared by eleven riparian states. It is characterized by the contentious relationship between upper and lower riparian states and by the nearly entire contribution of the former and exclusive utilization of the latter. The Nile River riparian states have diverging positions over how the water should be utilized. While upper riparians want to utilize the water that crosses their territories for their increasing development needs, lower riparians want to keep their prior use intact. But, given the number of riparian states and the increasing predicaments the river faces, not all needs can be fulfilled equally.

There have been bilateral and multilateral agreements among the riparian states. Despite efforts for creating a basin-wide agreement, there still is not a successful one. The agreements range from bilateral agreements between riparian states conferring exclusive utilization of the river to lower riparians by excluding the rest, to multilateral agreements in which most riparian states participated but failed to reach a consensus. In addition to the multilateral agreements among themselves, the riparian states did not sign or ratify the UNWC. The river basin remains without an effective all-inclusive cooperative framework that would enable equitable utilization of the waters of the Nile.

#### 3.2. The Nile River

The Nile River is the longest river in the world having 6,825 km length.<sup>159</sup> The riparian states of the river are Burundi, Democratic Republic of Congo, Kenya, Egypt, Ethiopia, Eritrea, Rwanda,

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<sup>158</sup> See generally Aysegül Kibaroglu, 'Existing Key Water Disputes', Middle East Institute, (2016) 2 <<http://www.jstor.com/stable/resrep17570.5>> accessed 26 May 2023

<sup>159</sup> Christina M. Carroll, 'Past and Future Legal Framework of the Nile River Basin', (1999) 12 Geo Int'l Env'tl. L. Rev. 272

Sudan, South Sudan, Tanzania and Uganda.<sup>160</sup> The Nile River has two main tributaries; the Blue Nile and the White Nile. While the Blue Nile originates from the highlands of Ethiopia, the White Nile emanates from the Equatorial Plateau of East Africa.<sup>161</sup> The Nile River also has other tributaries, such as the Atbara and Sobat, both of which emanate from Ethiopia.<sup>162</sup> Of the Nile river riparian states, Ethiopia contributes the highest amount of water, with 85 percent of the water flowing to the Nile.<sup>163</sup>

Though the longest river in the world, the Nile River has a relatively small content of water when compared to other rivers of comparable size.<sup>164</sup> The river basin is experiencing diminishing water *per capita*.<sup>165</sup> And, one of the problems the river faces is water scarcity.<sup>166</sup> The Nile River has both quantitative and qualitative problems.<sup>167</sup> With regard to its quantity, the semi-aridity and aridity of the region, high evaporation contributes to water scarcity within the basin.<sup>168</sup> On the other hand, increasing population growth and the ensuing urbanization, pollution, increasing agricultural activities and soil erosion are affecting the quality of the water.<sup>169</sup>

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[https://heinonline.org/HOL/Page?public=true&handle=hein.journals/gintenlr12&div=12&start\\_page=269&collection=usjournals&set\\_as\\_cursor=0&men\\_tab=srchresults](https://heinonline.org/HOL/Page?public=true&handle=hein.journals/gintenlr12&div=12&start_page=269&collection=usjournals&set_as_cursor=0&men_tab=srchresults) accessed 26 May 2023

<sup>160</sup> The Nile Story: 15 Years of Nile Cooperation: Making an Impact, May 2015, 10

<https://openknowledge.worldbank.org/handle/10986/23579> accessed 26 May 2023

<sup>161</sup> Information Products for Nile Basin Water Resources Management, Synthesis Report, FAO-Nile Basin Project, 2011, p 4, <<https://www.fao.org/3/i2615e/i2615e.pdf>> accessed 25 May 2023

<sup>162</sup> *ibid*

<sup>163</sup> Jeffrey D. Azarva, 'Conflict on the Nile: International Watercourse Law and the Elusive Effort to Create a Transboundary Water Regime in the Nile Basin' (2011) 25 Temp Int'l & Comp L. J. 457

<https://sites.temple.edu/ticlj/files/2017/02/25.2.Azarva-TICLJ.pdf> accessed 03 May 2023

<sup>164</sup> Synthesis Report (n 161); The Nile Story (n 160); Alice Shih and Trevor Stutz, 'Sink or Swim: Abrogating the Nile Treaties While Upholding the Rule of Law', (2013) 43 Env'tl. L. Rep News & Analysis 10786

[https://heinonline.org/HOL/Page?public=true&handle=hein.journals/elrna43&div=119&start\\_page=10786&collection=usjournals&set\\_as\\_cursor=0&men\\_tab=srchresults](https://heinonline.org/HOL/Page?public=true&handle=hein.journals/elrna43&div=119&start_page=10786&collection=usjournals&set_as_cursor=0&men_tab=srchresults) accessed 25 May 2023; Carroll (n 159) 273

<sup>165</sup> Nile Basin Initiative, Corporate Report 2020, 16

<https://www.nilebasin.org/index.php/information-hub/documents-publications/88-corporate-report-2020/file> accessed 08 May 2023

<sup>166</sup> Kristin Wiebe, 'The Nile River: Potential for Conflict and Cooperation in the Face of Water Degradation', (2001) 41 Nat. Resources J. 742 <<https://digitalrepository.unm.edu/cgi/viewcontent.cgi?article=1597&context=nrij>> accessed 03 May 2023

<sup>167</sup> *ibid*

<sup>168</sup> *ibid*

<sup>169</sup> *ibid*

There are 487.3 million people living in the Nile River riparian states, of which 257 million people live within the river basin.<sup>170</sup> The population within the region is expected to highly increase within the coming few decades.<sup>171</sup> The Nile River riparian states highly depend on agriculture.<sup>172</sup> And, the river provides a crucial source of water for agricultural activities, and also serves as a source of hydro-electric power production.<sup>173</sup> ‘There is lack of access to electricity within a large part of the Nile River riparian states’.<sup>174</sup> As a result, there have been several projects undertaken over the Nile River.<sup>175</sup>

Lower riparian states, Egypt and Sudan, are situated in a region that has small rainfall and depend on agriculture.<sup>176</sup> Though they contribute almost nothing to the river, they demand the continuation of the exclusive utilization of the waters of the Nile River they enjoyed thus far.<sup>177</sup> On the other hand, upper riparian states, such as Ethiopia, have a large number of population that highly relies on agriculture.<sup>178</sup> And as a result of this and other pushing factors such as high development needs, they have an immensely growing demand to use the waters of the Nile River that traverses their territories.

### 3.3. Treaty Regime of the Nile River Basin

#### 3.3.1. The 1929 Agreement

The Government of United Kingdom (in place of its colonies Kenya, Tanzania and Uganda) and the Egyptian Government signed, through the exchange of notes on the use of waters of the Nile

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<sup>170</sup> Nile Basin Water Resources Atlas, ‘Demography, Estimated and Projected Total Population in the Nile Basin Countries’ <<http://atlas.nilebasin.org/treatise/population-distribution-in-nile-basin-countries/>> accessed 08 May 2023; Carroll (n 159) 275

<sup>171</sup> Carroll (n 159) 275

<sup>172</sup> Nile Basin Water Resources Atlas, ‘Farming Systems and Production in Nile Basin, Agriculture Production and Yield, Estimated and Projected Total Population in the Nile Basin Countries’, <<http://atlas.nilebasin.org/treatise/agriculture-production-and-yield/>> accessed 15 May 2023

<sup>173</sup> Synthesis Report (n 161)

<sup>174</sup> Corporate Report 2020 (n 165) 24

<sup>175</sup> See Dante A. Caponera, ‘Conflicts Over International River Basins in Africa, the Middle East and Asia’, (1996) 5 REV. EUR. COMP. & INT’L ENVTL. L. 97 <[https://heinonline.org/HOL/Page?public=true&handle=hein.journals/reel5&div=20&start\\_page=97&collection=usjournals&set\\_as\\_cursor=0&men\\_tab=srchresults](https://heinonline.org/HOL/Page?public=true&handle=hein.journals/reel5&div=20&start_page=97&collection=usjournals&set_as_cursor=0&men_tab=srchresults)> accessed 20 April 2023; Wiebe (n 166) 736, 737, 740, 745 (for different projects conducted over the Nile River)

<sup>176</sup> Synthesis Report (n 161) 5; Azarva (n 163) 462

<sup>177</sup> See Stoa (n 20) 1325

<sup>178</sup> Synthesis Report (n 161) 5

for irrigation, an agreement on 7 May, 1929.<sup>179</sup> Egypt, while expressing its support for an amount of water provided until then, agreed only to the extent that “does not infringe Egypt’s natural and historical rights in the waters of the Nile and its requirements of agricultural extension”.<sup>180</sup> The agreement stated that:

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.<sup>181</sup>

The agreement provided Egypt with entitlement to conduct hydrological study over the Nile River in Sudan.<sup>182</sup> The 1929 agreement also gave Egypt, along with Britain, almost complete control over the Nile River to the exclusion of other riparian states. The 1929 agreement allotted 48 Billiards of cubic meters of annual water to Egypt and 4 Billiards of cubic meters of annual water to Sudan.<sup>183</sup>

### **3.3.2. The 1959 Agreement**

Following Sudan’s independence, and its subsequent rejection of the 1929 agreement, claiming that it does not reflect new developments, Egypt and Sudan concluded a new agreement on 8 November 1959.<sup>184</sup> The impetus for the conclusion of the 1959 agreement was to allow Egypt and Sudan to fully control and utilize the waters of the Nile River through projects, in order to guarantee their “present and future requirements”.<sup>185</sup> The agreement was aimed at extending the limited control of the Nile River provided by the 1929 agreement to an absolute control.<sup>186</sup>

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<sup>179</sup> Exchange of Notes between His Majesty’s Government in the United Kingdom and the Egyptian Government in regard to the Use of the Waters of the River Nile for Irrigation Purposes, Cairo, 7 May 1929 (1929 Agreement), <<http://gis.nacse.org/tfdd/tfdddocs/92ENG.pdf>> accessed 10 April 2023

<sup>180</sup> *ibid* No. 2

<sup>181</sup> *ibid* No.4 (b)

<sup>182</sup> *ibid* No.4 (c)

<sup>183</sup> McCaffrey (n 2) 264

<sup>184</sup> *ibid* 266

<sup>185</sup> United Arab Republic [Egypt] and Sudan, Agreement for the Full Utilization of the Nile Waters, November 8, 1959 (1959 Agreement), p. 64, ¶ 1, 2

Egypt and Sudan entered into this agreement having already secured “acquired rights”- 48 Milliard Cubic Meters per year for Egypt and 4 Milliard Cubic Meters per year for Sudan.<sup>187</sup> They agreed for the construction of projects. The Sudd el Aali (Aswan High Dam) was to be constructed by Egypt, and Sudan was to construct the Roseires Dam and other projects it envisages for realizing usage of its share.<sup>188</sup> And, the benefits from the Sudd el Aali Reservoir were to be divided between the two states.<sup>189</sup> The 1959 agreement allocated 55.5 BCM annual flow to Egypt and gave Sudan 18.5 BCM annual flow.<sup>190</sup>

### 3.3.3. Other Treaties

The 1902 treaty was concluded between Ethiopia and Great Britain (on Sudan’s behalf). The treaty was mainly concerned with the delimitation of the border between Ethiopia and Sudan.<sup>191</sup> Article III of the treaty stipulated that:

His Majesty Emperor Menelik, king of kings of Ethiopia, engages himself towards the Governments of His Britannic Majesty not to construct or allow to be constructed any works across the Blue Nile, Lake Tana or the Sobat, which would arrest the flow of their waters in to the Nile, except with His Britannic Majesty’s agreement and the Government of the Sudan.<sup>192</sup>

This treaty, often raised in rejecting construction of projects emanating from Ethiopia<sup>193</sup>, was rejected by Ethiopia based on the repudiating by Egypt and Sudan of “unequal treaties” entered

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<https://treaties.un.org/doc/Publication/UNTS/Volume%20453/volume-453-I-6519-English.pdf>> accessed 10 April 2023

<sup>186</sup> *ibid* ¶ 3

<sup>187</sup> *ibid* first (1), (2)

<sup>188</sup> *ibid* 66, ¶ 1, 2; Carroll (n 159) 280

<sup>189</sup> *ibid* ¶ 3, 4, 5

<sup>190</sup> Valerie Knobelsdorf, ‘The Nile Waters Agreements: Imposition and Impacts of a Transboundary Legal System’, (2006) 44 *COLUM. J. Transnat’l L.* 629

[https://heinonline.org/HOL/Page?public=true&handle=hein.journals/cjtl44&div=21&start\\_page=622&collection=usjournals&set\\_as\\_cursor=0&men\\_tab=srchresults](https://heinonline.org/HOL/Page?public=true&handle=hein.journals/cjtl44&div=21&start_page=622&collection=usjournals&set_as_cursor=0&men_tab=srchresults)> accessed 09 June 2023

<sup>191</sup> Treaties between the United Kingdom and Ethiopia and between the United Kingdom, Italy and Ethiopia, Relative to the Frontiers between the Sudan, Ethiopia, and Eritrea, signed at Addis Ababa, May 15, 1902, Treaty Series No. 16 <[https://m.marefa.org/images/b/bd/Treaty\\_of\\_Addis\\_Ababa\\_1902.pdf](https://m.marefa.org/images/b/bd/Treaty_of_Addis_Ababa_1902.pdf)> accessed 06 April 2023

<sup>192</sup> *ibid*, art. III

<sup>193</sup> Zeray Yihdego and Alistair Rieu-Clarke, ‘An exploration of fairness in International Law through the Blue Nile and GERD’, (2016) 41 *Water International* 534

<[https://www.researchgate.net/publication/305483038\\_An\\_exploration\\_of\\_fairness\\_in\\_international\\_law\\_through\\_the\\_Blue\\_Nile\\_and\\_GERD/citation/download](https://www.researchgate.net/publication/305483038_An_exploration_of_fairness_in_international_law_through_the_Blue_Nile_and_GERD/citation/download)> accessed 18 April 2023

into by Britain on their behalf that no longer serve their interest.<sup>194</sup> The Ethiopian Government also rejected the treaty in 1957, citing its “right and obligation to exploit its water resources for the benefit of present and future generations of its citizens”.<sup>195</sup>

There were also other bilateral agreements such as the Framework for General Cooperation of 1993 and the Ethio-Sudanese Accord on Peace and Friendship of 1991. The Framework for General Cooperation was signed between Ethiopia and Sudan on July 1, 1993, aiming “to consolidate the ties of friendship, to enhance cooperation between the two countries and to establish a broad base of common interests”.<sup>196</sup> As enshrined under Article 4, the two states agreed that “the issue of the use of the Nile waters shall be worked out in detail through discussions by experts from both sides, on the basis of the rules and principles of international law”. They further agreed that both should “refrain from engaging in any activity related to the Nile waters that may cause appreciable harm to the interests of the other party”.<sup>197</sup>

The Ethio-Sudanese Accord was signed on December 23, 1991.<sup>198</sup> In the accord, the principle of equitable utilization was “conditionally embraced” by Sudan, while both recognized “another canon of international water law which highlights the obligation not to cause appreciable harm to one another”.<sup>199</sup>

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<sup>194</sup> Andualem Eshetu Lema, ‘The United Nations Watercourses Convention from the Ethiopian Context: Better to Join or Stay Out?’, (2015) 4 *Haramaya Law Review* 32  
<<https://www.ajol.info/index.php/hlr/article/view/148616/138118>> accessed 18 April 2023; Joseph W. Dellapenna, ‘Rivers as Legal structures: The Examples of the Jordan and the Nile’, (1996) 36 *Nat Resources J.* 243 <<https://digitalrepository.unm.edu/cgi/viewcontent.cgi?article=1789&context=nrj>> accessed 29 May 2023

<sup>195</sup> Daniel Kendie (1999), Cited in Jutta Brunnée and Stephen J. Toope, ‘The Changing Nile Basin Regime: Does Law Matter?’, (2002) 43 *Harvard Int’l Law J.* 125  
<[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1182962](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1182962)> accessed 08 June 2023

<sup>196</sup> Framework for General Co-operation between the Arab Republic of Egypt and Ethiopia, July 1, 1993, U.N.T.S. Volume 2693, I – No. 47816, preamble, ¶ 1  
<<https://treaties.un.org/doc/Publication/UNTS/Volume%202693/v2693.pdf>> accessed 09 May 2023

<sup>197</sup> *ibid* art. 5

<sup>198</sup> Tadesse Kassa Woldetsadik, ‘The Grand Ethiopian Renaissance Dam and Ethiopia’s Succession in Hydro-legal Prominence: A Script in Legal history of Diplomatic Confront (1957-2013)’, (2015) 9 *MIZAN LAW REV.* 392  
<<https://www.ajol.info/index.php/mlr/article/view/132161>> accessed 03 June 2023

<sup>199</sup> *ibid*

### 3.4. Cooperation Within the Nile River Basin

#### 3.4.1. Hydromet, Undugu and TECCONILE

Though without any success, the Nile River riparian states have made efforts to avail cooperation within the basin. These basin-wide efforts have started in the 1960s, with the formation of the Hydromet project.<sup>200</sup> The Hydromet was formed in 1967 by Burundi, Egypt, Kenya, Rwanda, Sudan, Tanzania and Uganda, along with the United Nations Development Programme (UNDP) and the World Meteorological Organization (WMO).<sup>201</sup> DR Congo and Ethiopia only had an observer status.<sup>202</sup> ‘It was aimed to perform shared hydro-meteorological surveys on the Nile River following the occurrence of flooding.’<sup>203</sup> The Hydromet project came to an end in 1992.<sup>204</sup>

There was also the Undugu (meaning “brotherhood” in Kiswahili), which was formed in 1983, through the suggestion of Egypt.<sup>205</sup> The Undugu included Burundi, DR Congo, Egypt, Rwanda, Sudan and Uganda, while Ethiopia and Kenya were observers.<sup>206</sup> The Undugu was aimed at discussing over the Nile waters, agricultural development, economic cooperation and regional economic development.<sup>207</sup> Its operation came to an end in 1992.<sup>208</sup>

The Undugu was followed by the Technical Committee for the Promotion of the Development and Environmental Protection of the Nile Basin (TECCONILE), which started to operate in

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<sup>200</sup> Salman M.A. Salman, ‘The Nile Basin Cooperative Framework Agreement: A Peacefully Unfolding African Spring?’, (2013) 38 *Water Int’l* 19 <<https://dx.doi.org/10.1080/02508060.2013.744273>> accessed 03 May 2023

<sup>201</sup> Ashok Swain, ‘Challenges for Water Sharing in the Nile Basin: Changing Geo-politics and Changing Climate’, (2011) 56 *Hydrological Sciences J.* 692 <<https://doi.org/10.1080/02626667.2011.577037>> accessed 11 May 2023; Nile Basin Initiative, ‘Our Nile–Our benefits’, November 2020, 11, 12 <<https://www.nilebasin.org/index.php/information-hub/documents-publications/92-our-nile-our-benefits/file>> accessed 17 May 2023

<sup>202</sup> Our Nile–Our benefits (n 201)

<sup>203</sup> *ibid*

<sup>204</sup> Swain (n 201)

<sup>205</sup> Our Nile–Our benefits (n 201); Nile Basin Initiative, ‘A Long River Journey: 20 Years of Cooperation under the NBI’, First Edition, February 2019, 16 <<https://www.nilebasin.org/index.php/information-hub/documents-publications/72-a-long-river-journey/file>> accessed 18 May 2023

<sup>206</sup> Our Nile–Our benefits (n 201)

<sup>207</sup> *ibid*; Dereje Zeleke, ‘The Nile Basin Cooperative Framework Agreement Negotiations and the Adoption of a ‘Water Security’ Paradigm: Flight into Obscurity or a Logical Cul-de-sac?’, (2010) 21 *Eur. J. Int’l Law* 426 <<http://academic.oup.com/legil/article/21/2/421/374199>> accessed 15 June 2023

<sup>208</sup> A Long River Journey (n 198) 16

1993.<sup>209</sup> The TECCONILE was formed by Democratic Republic of Congo, Egypt, Rwanda, Sudan, Tanzania and Uganda.<sup>210</sup> Burundi, Kenya, Eritrea and Ethiopia had an observer status.<sup>211</sup> One of the objectives of the TECCONILE was “to promote the development, conservation and use of the Nile Basin water resources in an integrated and sustainable manner, through basin-wide cooperation for the benefit of all”.<sup>212</sup> The TECCONILE operated until 1999.<sup>213</sup>

### 3.4.2. Nile Basin Initiative

The Nile Basin Initiative (NBI) stands out from other multilateral cooperative frameworks within the Nile River basin because it managed to include all riparian states. It is an intergovernmental partnership that was established on 22 February, 1999.<sup>214</sup> Member states of the NBI are Burundi, Democratic Republic of Congo, Egypt, Ethiopia, Kenya, Rwanda, South Sudan, Sudan, Tanzania and Uganda, while Eritrea has an observer status.<sup>215</sup> One of the objectives of the NBI is “to develop the Nile Basin water resources in a sustainable and equitable way”.<sup>216</sup>

The NBI has three organs: the NBI Secretariat (NILE-SEC), the Nile Equatorial Lakes Subsidiary Action Program Coordinator Unit (NELSAP-CU) and the Eastern Nile Technical Regional Office (ENTRO).<sup>217</sup> It has the shared vision objective “to achieve sustainable socio-economic development through the equitable utilization of, and benefit from, the common Nile Basin water resources”.<sup>218</sup> The NBI has the basic function of facilitating basin cooperation, water resource management and water resource development.<sup>219</sup>

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<sup>209</sup> Our Nile-Our benefits (n 201)

<sup>210</sup> *ibid*

<sup>211</sup> A Long River Journey (n 205) 16

<sup>212</sup> Our Nile-Our benefits (n 201) 12

<sup>213</sup> *ibid*

<sup>214</sup> Nile Basin Initiative, ‘Who We Are’ <<https://www.nilebasin.org/index.php/nbi/who-we-are>> accessed 09 June 2023

<sup>215</sup> *ibid*

<sup>216</sup> *ibid*

<sup>217</sup> Nile Basin Initiative, ‘Our Centers’, <<https://www.nilebasin.org>> accessed 15 June 2023

<sup>218</sup> *ibid*

<sup>219</sup> Nile Basin Initiative, ‘NBI Overview’, 2 <<https://www.nilebasin.org/index.php/information-hub/documents-publications/73-nile-basin-initiative-an-overview/file>> accessed 15 June 2023

### 3.4.3. Cooperative Framework Agreement

The Agreement on the Nile River Basin Cooperative Framework (CFA) took over a decade of process.<sup>220</sup> In the negotiation process on the draft text of the CFA by the Nile Council of Ministers (Nile-COM), the nine states that participated agreed on all but one provision contained therein, i.e., the provision on water security (Article 14(b)).<sup>221</sup>

#### Article 14

Having due regard for 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 cooperative management and development of the 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.<sup>222</sup>

While seven states agreed on the draft text, Egypt and Sudan disapproved it, rather proposing that it be replaced with “Not to adversely affect the water security and current uses and rights of any other Nile Basin State”.<sup>223</sup> Egypt, through this proposed text, aimed to further its long held claim that the 1929 and 1959 agreements bind all riparian states and maintain the *status quo* that provided Egypt and Sudan exclusive share.<sup>224</sup> ‘This was not acceptable for the seven upper riparian states who rejected the proposal as they saw that accepting the proposal by Egypt and Sudan would be approving the applicability of the 1929 and 1959 agreements’.<sup>225</sup> After finalizing their negotiation on the draft text of the CFA in 2007, the Nile-COM decided to refer the reservation on Article 14 (b) to their Heads of States.<sup>226</sup>

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<sup>220</sup> Nile Basin Initiative, ‘Cooperative Framework Agreement’, <<https://nilebasin.org/index.php/8/-nbi/73-cooperation-framework>> accessed 06 June 2023

<sup>221</sup> Adonia Ayebare, ‘A Political Storm over the Nile’, (2010) Int’l Peace Institute 1, 3 <<http://www.jstor.com/stable/resrep09493>> accessed 06 June 2023

<sup>222</sup> *ibid* 3, 4

<sup>223</sup> *ibid*

<sup>224</sup> *ibid*

<sup>225</sup> *ibid*

<sup>226</sup> Nile Basin Initiative, ‘Cooperative Framework Agreement’ (n 220)

But, the referral to the Heads of State and later discussions did not yield any agreed result, Ethiopia, Rwanda, Tanzania, Uganda, Kenya and Burundi signed the CFA on May 14, 2010.<sup>227</sup> This was followed by the ratification of the CFA by Ethiopia (in June 13, 2013), Rwanda (in August 28, 2013), Tanzania (in March 26, 2015) and Uganda (in August 15, 2019).<sup>228</sup> South Sudan joined the CFA in 2012.<sup>229</sup> Since only four states have ratified the CFA, it has not entered into force. And, it will not enter into force until the sixtieth day after the sixth ratification.<sup>230</sup>

According to the CFA, some of the general principles that are to govern the Nile River basin are cooperation, sustainable development, subsidiarity, equitable and reasonable utilization, prevention of the causing of significant harm, the right of the Nile Basin states to use water within their territories, information concerning planned measures, community of interest, peaceful resolution of disputes, and water security.<sup>231</sup> The principle of cooperation, according to Article 3, dictates the relation between the Nile River riparians to be conducted “on the basis of sovereign equality, territorial integrity, mutual benefit and good faith in order to attain optimal utilization and adequate protection and conservation of the Nile River Basin and to promote joint efforts to achieve social and economic development”.<sup>232</sup>

The CFA stipulates equitable and reasonable utilization in the following words:

Nile Basin states shall in their respective territories utilize the water resources of the Nile River System in an equitable and reasonable manner. In particular, those water resources shall be used and developed by Nile Basin States with a view to attaining optimal and sustainable utilization thereof and benefits therefrom, taking into account the interests of the Basin states concerned, consistent with adequate protection of those

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<sup>227</sup> *ibid*

<sup>228</sup> *ibid*

<sup>229</sup> Michael Asiedu, ‘The Construction of the Grand Ethiopian Renaissance Dam (GERD) and Geopolitical Tension between Egypt and Ethiopia with Sudan in the Mix’, (2018) GLOBAL Political Trends Center, 1, 2  
<<http://www.jstor.com/stable/resrep14136>> accessed 26 May 2023

<sup>230</sup> Agreement on the Nile River Basin Cooperative Framework, 2010, art. 43

<<https://nilebasin.org/images/docs/CFA%20-%20English%20%20FrenchVersion.pdf>> accessed 18 May 2023

<sup>231</sup> *ibid* art. 3

<sup>232</sup> *ibid* art. 3 (1)

water resources. Each Basin state is entitled to an equitable and reasonable share in the beneficial uses of the water resources of the Nile River System.<sup>233</sup>

Similar to the UNWC, the CFA provides for a non-exhaustive list of factors for determining equitable and reasonable utilization.<sup>234</sup> Another principle contained in the CFA is the principle of no-significant harm, enshrined under Article 5 (1) in these words:

Nile Basin states shall, in utilizing Nile River system water resources in their territories, take all appropriate measures to prevent the causing of significant harm to other basin states.

But, if significant harm is nonetheless caused, the state that caused such harm should “take all appropriate measures ...to eliminate or mitigate such harm, where appropriate, to discuss the question of compensation”.<sup>235</sup>

#### **3.4.4. Declaration of Principles**

Though the Declaration of Principles (DoP) relates directly to the construction of the GERD project on the Nile River, given its importance and the states involved therein, it is an important agreement. The Declaration of Principles (DoP) on the GERD was signed between Egypt, Ethiopia and Sudan on March 23, 2015.<sup>236</sup> The DoP contains several principles, some of which are the principle of equitable and reasonable utilization, the principle not to cause significant harm, the principle to cooperate on the first filling and operation of the dam, the principle of dam safety, the principle of sovereignty and territorial integrity, and the principle of settlement of disputes.

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<sup>233</sup> *ibid* art. 4 (1)

<sup>234</sup> *ibid* art. 4 (2)

<sup>235</sup> *ibid* art. 5 (2)

<sup>236</sup> Agreement on Declaration of Principles between the Arab Republic of Egypt, the Federal Democratic of Ethiopia and the Republic of the Sudan on the Grand Ethiopian Renaissance Dam Project (GERDP), 23 March 2015 <[https://www.internationalwaterlaw.org/documents/regionaldocs/Final\\_Nile\\_Agreement\\_23\\_March\\_2015.pdf](https://www.internationalwaterlaw.org/documents/regionaldocs/Final_Nile_Agreement_23_March_2015.pdf)> accessed 11 May 2023

The DoP provides for the three states to “take all appropriate measures to prevent the causing of significant harm in utilizing the Blue/Main Nile”.<sup>237</sup> Under paragraph two of this principle, it is provided that:

Where significant harm nevertheless is caused to one of the countries, the state whose use causes such harm shall, in the absence of agreement to such use, take all appropriate measures in consultations with the affected state to eliminate or mitigate such harm and, where appropriate, to discuss the question of compensation.<sup>238</sup>

Here, the phrase referencing the principle of equitable and reasonable utilization, “having due regard for the provisions of articles 5 and 6”, which is enshrined under the UNWC and also contained in the CFA, is left out.<sup>239</sup> Zeleke noted that this elision “effectively removed an essential element of the principle which provides the point of reference for resolution of disputes regarding the legitimacy of a given utilization which might be challenged as causing significant harm-thus blurring the distinction between factual harm and harm constituting legal injury”.<sup>240</sup>

The Fourth principle provides for the principle of equitable and reasonable utilization. Similar to the UNWC and the CFA, the DoP adopted a non-exhaustive list of factors to be considered in order to guarantee equitable and reasonable utilization.<sup>241</sup>

### **3.5. Upper and Lower Riparian States’ Claim**

#### **3.5.1. Upper Riparian States’ Claim**

Upper riparian states of the Nile River basin were not able to meaningfully utilize the water, though they contribute almost all of it. Different factors, such as political problems and economic underdevelopment, have prevented them from benefiting from the river. But, since recent decades they have become increasingly assertive of their right to utilize the waters that cross their respective territories.

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<sup>237</sup> *ibid* principle III

<sup>238</sup> *ibid*

<sup>239</sup> Dereje Zeleke, ‘Declaration of Principles on the Grand Ethiopian Renaissance Dam: Some issues of Concern’, (2017) 11 *Mizan Law Rev.* 271 <<http://dx.doi.org/10.4314/mir.v11i2.1>> accessed 11 May 2023

<sup>240</sup> *ibid* 272

<sup>241</sup> Declaration of Principles (n 236) principle IV

Upper riparian states challenge the claims made by lower riparian states. They reject the 1929 and 1959 agreements since they give exclusive utilization of the river to lower riparians. They also strongly oppose the *status quo*, which is detrimental to their interests. They demand for the equitable utilization of the river, relying on the principle of equitable and reasonable utilization in order to challenge the inequitable use by lower riparian states. Upper riparians argue against the claim by lower riparian states for the application of the no-significant harm rule having precedence over the principle of equitable and reasonable utilization as a way of preventing them from making use of the river for their needs.

A state is a sovereign entity that has the sovereign right to use the natural resources within its territory. A state has the right to development and to utilize the resource within its territory to the advantage of its citizens. The natural resource being a transboundary watercourse that traverses the territory of more than one state couldn't strip off a state its right to utilize it. Where the resource is an international watercourse, international law only places some limitations on the manner of its utilization by obliging the interest of other watercourse states to be taken into account.

The claim of upper riparian states can also be seen from the perspective of fairness. The exclusive use of the waters of the Nile River by lower riparian states to the exclusion of upper riparians, which are the major contributors to the river and are economically underdeveloped, is not only unfair. Upper riparian states are economically underdeveloped and have a high population growth. They have a high demand for water and need to use the water for different purposes. They claim for the application of equitable utilization of the river, upholding their right to utilize the water that traverses their territories and challenge the exclusive use by lower riparians.

### **3.5.2. Lower Riparian States' Claim**

Lower riparian states, Sudan and Egypt, have for long utilized the waters of the Nile exclusively. Egypt claims that the river is its only water source, and is intolerant towards any use by other riparian states that diminishes the water flow. It is keen to label any use of the river upstream as causing harm to its use of the river. Lower riparian states claim for the precedence of the no-significant harm rule over the principle of equitable and reasonable utilization.

Lower riparian states have always sought to reject the claim by upper riparian states to share from the Nile River. They always invoke historical and natural rights. They also raise the 1929 and 1959 agreements, which are rejected by upper riparian states, in order to justify the maintenance of the *status quo* that provides them exclusive benefit from the river. They rely on their prior use to justify the continuation of the exclusive use and curb utilization by the states upstream. Lower riparian states also highly insist on the application of the 1929 and 1959 agreements over the utilization of the Nile River. These agreements are rejected by upper riparian states, and are often cited to show the unfair and inequitable utilization of the waters of the river.

Egypt always invokes its entire dependence on the waters of the Nile River basin to justify the maintenance of the status quo and reject equitable utilization in governing the allocation of water. It claims that utilization of the water by other riparian states, especially those upstream, will cause it harm and considers it as a threat to its existence. The issue of water security is a concern of all riparian states of the Nile River basin. And, as the quality and quantity of water is being highly affected by different factors, the concern of water security is not limited to lower riparian states. But, lower riparian states assert that as a result of their dependence on the Nile River the existing allocation is justified.

### **3.6. International Law and the ‘Nile Treaties’**

The 1929 and 1959 agreements were concluded without the participation of the upper riparian states, and their interests were not included. They have given exclusive share over the Nile River to Egypt and Sudan. Ethiopia does not consider the agreements as binding, and it has expressed its disapproval.<sup>242</sup> The 1929 and 1959 agreements were concluded during a period in which some Nile basin states were under colonial rule.<sup>243</sup>

But, following their independence, they started to reject those agreements as inapplicable.<sup>244</sup> While Upper riparian states reject those agreements<sup>245</sup>, Egypt still claims the applicability of

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<sup>242</sup> Knobelsdorf, (n 190) 630

<sup>243</sup> Carroll, (n 159) 278

<sup>244</sup> *ibid*

those agreements. The states that reject the colonial agreements as invalid base their agreements on the clean slate doctrine of state succession, which propounds that “a new state (the ‘successor’ state) does not succeed to the treaties to which the predecessor state was a party”.<sup>246</sup> There was also the claim on the basis of the Nyerere Doctrine, which rejects the applicability of agreements made while within colonial rule to newly independent states since they never took part in them.<sup>247</sup>

The agreements are also rejected on the basis of the principle of *clausula rebus sic stantibus* (meaning ‘things thus standing’), denotes that the occurrence of a major change allows for the parties to a treaty to forfeit on their obligations under the treaty, and the treaty ceases to be binding.<sup>248</sup> As per this principle, given the vital changes within the Nile River basin, the binding effect of the ‘colonial treaties’ can be challenged.<sup>249</sup> The principle is enshrined under Article 62 of the Vienna Convention on the Law of Treaties.<sup>250</sup> The ‘Nile treaties’ were based on an exclusive utilization by few excluding the vast majority of the riparian states, and thus are inequitable. Those agreements and the claim for their validity in governing current utilization of the Nile River, seen from current developments under international water law, clearly negates the fundamental principles of international water law.

### **3.7. International Water Law vis-à-vis Utilization of the Nile River**

The two antagonistic doctrines regarding the non-navigational use of international watercourses, absolute territorial sovereignty and absolute territorial integrity, have come to be rejected as a result of the development within international law of such principles as equitable utilization.

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<sup>245</sup> Yeheneu Tsegaye, ‘The Nile Basin: From Confrontation to Cooperation’, (2004) 27 Dalhousie Law J. 510 <<https://digitalcommons.schulichlaw.dal.ca/cgi/viewcontent.cgi?article=1868&context=dlj>> accessed 03 July 2023

<sup>246</sup> Patrick Dumberry, ‘State Succession to Bilateral Treaties: A Few Observations on the Incoherent and Unjustifiable Solution Adopted for Secession and Dissolution of States under the 1978 Vienna Convention’, (2015) 28 Leiden J. INT’L L. 13-14 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3126523](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3126523)> accessed 24 April 2023

<sup>247</sup> Carroll, (n 159) 278, 279

<sup>248</sup> Scott O. McKenzie, ‘Egypt’s Choice: From the Nile Basin Treaty to the Cooperative Framework Agreement, an International Legal Analysis’, (2012) 21 Transnational Law & Contemporary Problems 587 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2445962](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2445962)> accessed 13 April 2023

<sup>249</sup> *ibid* 587, 588

<sup>250</sup> Vienna Convention on the Law of Treaties, done on 23 May 1969, entered into force on 27 January 1980, U.N.T.S. vol. 1155 <[https://legal.un.org/ilc/texts/instruments/english/conventions/1\\_1\\_1969.pdf](https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf)> accessed on 06 April 2023

State practice and decision of international courts and arbitral awards show the wide acceptance that equitable utilization has gained and the rejection of exclusive utilization. International water law has progressed to develop principles that enable the equitable utilization of international watercourses, rejecting exclusive use by few watercourse states to the exclusion of the rest.

In this regard, the Nile River has not yet made a progress away from exclusive utilization by a few states towards equitable use by all riparian states. Lower riparian states still demand for their prior use to be respected and the ‘colonial treaties’ that confer them exclusive utilization of the river to be applied. The demand for continuation of exclusive utilization of the Nile River is not supported by international law and goes against the developed principles of customary international law.

The principles of equitable and reasonable utilization and no-significant harm are the two major principles recognized under international law, whose relation and application in times of conflict remains controversial. The interpretation of the two principles and their precise meaning is elusive. The vagueness of the terms “equitable and reasonable” utilization and “significant” harm has made their application in resolving disputes difficult, as they are interpreted divergently according to the interests of the states involved.

The UNWC was membered by none of the Nile River riparian states. It couldn’t resolve the long-standing debate regarding the relationship between the two principles contentious between riparian states. As a framework agreement, its influence can still be seen in the CFA, with its incorporation of basic principles, such as the principles of equitable and reasonable utilization and no-significant harm. The non-membership to the UNWC resulted mainly over reservation over the relationship and balance between the principle of equitable and reasonable utilization and no-significant harm. The lack of binding treaty for the sharing of the river has deprived the basin of a utilization that is beneficial to all riparian states and protection of the river.

### **3.8. The Nile River Riparian States and the UNWC**

There have been attempts at codifying the principles that have developed at different times. There are also multilateral treaties concluded between states concerning the non-navigational uses of international watercourses binding those states that have signed or ratified it. Currently, the two binding international legal instruments in this regard are the UNWC and the UNECE-

Water Convention, the latter as a result of its amendment. Though none of the Nile River riparian states ratified it, the UNWC is a crucial international legal instrument that has been considered by many as an “authoritative statement of customary law”.<sup>251</sup> As a framework agreement, the UNWC is aimed at assisting in the conclusion of regional agreements.<sup>252</sup>

During the adoption of the UNWC, the Nile River riparian states had reflected divergent opinions. Tanzania gave its opinion that the non-exhaustive list of factors for determining if a certain use of an international watercourse is equitable and reasonable under Article 6 involves “a suitable compromise in the context of interests as diverse as those that exist”.<sup>253</sup> Tanzania also expressed its view that the phrase contained in Article 5 sub-article 1 “taking into account the interests of the watercourse states concerned”, has disturbed the “delicate balance” established by Articles 5, 6 and 7 of the Draft Articles.<sup>254</sup> It viewed that this “expands the scope of the parameters established under Articles 6 and 7 and thus ...introduces an element of uncertainty with considerable consequences to Article 6”.<sup>255</sup>

Nile River riparian states that voted in favour of adoption of the UNWC were Kenya and Sudan.<sup>256</sup> Burundi voted against the adoption, whereas Ethiopia, Egypt, Rwanda and Tanzania abstained.<sup>257</sup> Meanwhile, Democratic Republic of Congo and Uganda have not taken part in the voting.<sup>258</sup> All riparian states of the Nile River have neither signed nor ratified the UNWC.<sup>259</sup>

Ethiopia, in explicating the reason for its abstention to the adoption of the UNWC, expressed its view that most of the UNWC’s provisions and, especially, that of Article 7 and those provisions concerning planned measures did not achieve a balance, jeopardizing the interests of upper

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<sup>251</sup> A. Dan Tarlock, ‘Four Challenges for International Water Law’, (2010) 23 TUL. ENVTL L. J. 376  
<<https://journals.tulane.edu/elj/article/view/2257>> accessed 15 February 2023

<sup>252</sup> Carroll (n 159) 283

<sup>253</sup> UNGA, May 21, 1997, A/51/PV.99, Fifty-First Session, 99<sup>th</sup> plenary meeting, p. 3  
<[https://digitallibrary.un.org/record/234835/files/A\\_51\\_PV.99-EN.pdf?ln=en](https://digitallibrary.un.org/record/234835/files/A_51_PV.99-EN.pdf?ln=en)> accessed 21 April 2023

<sup>254</sup> *ibid*

<sup>255</sup> *ibid*

<sup>256</sup> *ibid* 7, 8

<sup>257</sup> *ibid*

<sup>258</sup> *ibid*

<sup>259</sup> See Status of the UNWC, <[https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=XXVII-12&chapter=27&clang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-12&chapter=27&clang=en)> accessed 02 May 2023

riparian states.<sup>260</sup> During the discussion in the Six Committee drafting the UNWC, Ethiopia expressed its view that Article 7(2), stating the obligation not to cause harm, is “insufficiently balanced” with that of the principle of equitable and reasonable utilization as enshrined under Article 5.<sup>261</sup>

One of the focal points of debate in the drafting stage of the UNWC by the UNGA was ‘how to entertain existing treaties and what ramifications the UNWC will have on subsequent agreements’.<sup>262</sup> Ethiopia expressed its belief that all provisions of a watercourse agreements concluded between watercourse states must be in line with the UNWC.<sup>263</sup> In other words, Ethiopia is of the opinion that agreements that contradict with the UNWC must be made consistent with it. But, as enshrined under Article 3, the UNWC made harmonization between agreements entered into by watercourse states and the UNWC optional, i.e., dependent on the willingness of the states concerned.<sup>264</sup>

Egypt, in expressing its reservations to the principles of equitable and reasonable utilization as contained in Article 5, opined that a “link” must be created between the principle of equitable and reasonable utilization and the obligation not to cause significant harm.<sup>265</sup> It also stated that the non-exhaustive list of factors under Article 6 should not replace those under customary international law, and that the obligation not to cause harm as enshrined under Article 7 is not in conflict with that of customary international law.<sup>266</sup> Rwanda, on its part, mentioned “the lack of reference to the sacrosanct principle of the sovereignty of states”, and had reservations on the part concerning planned measures and settlement of disputes.<sup>267</sup>

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<sup>260</sup> UNGA 99<sup>th</sup> plenary meeting (n 246) 9

<sup>261</sup> UNGA 51<sup>st</sup> Session, Summary Record of the First Part of the 62<sup>nd</sup> meeting, Sixth Committee, April 4, 1997, A/C.6/51/SR.62, p. 4 <[https://digitallibrary.un.org/record/242960/files/A\\_C.6\\_51\\_SR.62-EN.pdf?ln=en](https://digitallibrary.un.org/record/242960/files/A_C.6_51_SR.62-EN.pdf?ln=en)> accessed 13 May 2023; Carroll (n 152) 287

<sup>262</sup> Sergei Vinogradov, Patricia Wouters & Patricia Jones, ‘Transforming Potential Conflict into Cooperation Potential: The Role of International Water Law’, PC→CP Series No. 2, UNESCO-IHP, p. 16 <<https://groundwaterportal.net/sites/default/files/Transforming%20Potential%20Conflict%20into%20Cooperation%20Potential%20-%20The%20Role%20of%20International%20Water%20Law.pdf>> accessed 15 June 2023

<sup>263</sup> UNGA 99<sup>th</sup> plenary meeting (n 246) 9, 10

<sup>264</sup> UNGA First Part of the 62<sup>nd</sup> meeting (n 254) 7

<sup>265</sup> UNGA 99<sup>th</sup> plenary meeting (n 246) 10, 11

<sup>266</sup> *ibid* 11

<sup>267</sup> *ibid* 12

All the reservations and opposing views of states expressed during the discussions at the drafting stage on the most principal provisions of the UNWC and the subsequent non-ratification by all Nile River riparian states raise questions on its influence as a framework agreement on other agreements between states sharing international watercourses.<sup>268</sup>

## **Conclusion**

The Nile River is one of the most contentious international watercourses among its riparian states. While upper riparian states assert their right to make an equitable use of the water that traverses their territory, lower riparians are keen to keep their prior use intact and the 1929 and 1959 agreements, rejected by upper riparians, to justify their existing use that gives them exclusive share. There have also been attempts to create basin wide cooperation among the Nile River riparian states. These attempts have still not bore fruit in terms of availing equitable utilization of the Nile River. Lower riparian states are adamant about keeping their prior use intact and demand undiminished amount of water. They treat development over the river by upper riparians as affecting the water flow they receive and causing harm. Upper riparian states, on the other hand, demand that utilization of the river should be equitable. The Nile River basin remains devoid of any binding treaty to govern its utilization among all riparian states. And, none of the riparian states are members of the UNWC, which is a framework agreement heralded as a codification of customary international law. Utilization of the waters of the Nile River remains inequitable, and its riparian states contend over which principle should have precedence.

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<sup>268</sup> See Carroll (n 152) 287

## CHAPTER FOUR

### 4. THE NILE RIVER BASIN AND THE PRINCIPLES OF EQUITABLE AND REASONABLE UTILIZATION AND NO-SIGNIFICANT HARM

#### 4.1. Introduction

The Nile River Basin is marked by diverging interests and inequitable allocation of the water in favour of lower riparians. While the upper riparians contribute nearly all of the water to the river, lower riparians make almost no contribution.<sup>269</sup> The contrast between none contribution and exclusive use by lower riparians and an entire contribution and not a meaningful share by upper riparian's has characterized the Nile River basin for long.

As already discussed, the shared waters are constantly being affected by increasing population growth, climate change and pollution or environmental degradation. Likewise, the Nile River faces these predicaments, which adds fuel to the already existing contention over its utilization.<sup>270</sup> As a result of these factors, the quality of the water is highly affected.<sup>271</sup> Water scarcity is faced by the Nile River, and, as a result, the existing dispute between the riparian states over sharing is exacerbated.

Lower riparian states have been able to use the waters of an international watercourse much earlier in time and appropriate it for different uses such as irrigation and, later, for the production of energy through the construction of colossal hydroelectric projects.<sup>272</sup> In the meantime, upper riparian states have not been able to meaningfully utilize the waters of international watercourses. Upper riparian states have recently started to slightly use the waters of the Nile River for different purposes they deem necessary. This has intensified the tension between upper and lower riparian states.<sup>273</sup>

On the other hand, there is no binding treaty or successful cooperation framework that encompasses all riparian states. Utilization of the waters of the river is mostly conducted unilaterally, as a result of lack of binding treaty and proper mechanisms to consult and negotiate

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<sup>269</sup> See Stoa (n 20) 1355

<sup>270</sup> Carroll (n 159) 270

<sup>271</sup> *ibid*

<sup>272</sup> McCaffrey (n 2) 261

<sup>273</sup> See Stoa (n 20) 1325

over the effects of utilization by a state on other riparian states and on the river. Upper and lower riparian states of the Nile River basin have a diverging stance on how the water should be allocated. And divergence of opinion regarding the application of the principles equitable and reasonable utilization and no-significant harm persists. The UNWC did not become successful in being an international legal instrument that unequivocally solves the controversy that subsists over the relation between the two principles and how they are to be applied. Although none of the Nile River basin riparian states are a party to the UNWC, it is a convention containing rules regarded by many commentators and by the ICJ (in the *Gabčíkovo-Nagymaros Project* case) as part of customary international law<sup>274</sup>, and those rules bind all states.<sup>275</sup> As such, the UNWC can be taken as a vantage point from which to assess the application and implication of the two principles under discussion. In this chapter, the principles of equitable and reasonable utilization and no-significant harm will be discussed in their application to the Nile River riparian states with focus on their implication for the riparian states.

#### **4.2. The Application of the principles of Equitable and Reasonable Utilization and No-Significant Harm to the Nile River Riparian States**

In determining the application of the principles of equitable and reasonable utilization and no-significant harm, one of the complications faced is the vagueness of what “equitable and reasonable” utilization is and how to interpret “significant” harm without it being used by a watercourse state to prevent the utilization of an international watercourse by other watercourse states. The problem becomes much more pronounced when trying to apply them to matters on the ground where there is a highly divergent state interest, complex historical relation and increasing demand for development.<sup>276</sup>

The conflict between the principles of equitable and reasonable utilization and no-significant harm and the difficulty faced in applying these principles to actual cases involving highly divergent interests is visible in the Nile River basin between upper and lower riparian states.

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<sup>274</sup> Yihdego and Rieu-Clarke (n 193) 536; Owen McIntyre, ‘Utilization of Shared International Freshwater Resources-The Meaning and Role of “Equity” in International Water Law’, (2013) 38 *Water International* 112 <[https://www.researchgate.net/publication/259975269\\_Utilisation\\_of\\_Shared\\_International\\_Freshwater\\_Resource\\_s\\_-\\_The\\_Meaning\\_and\\_Role\\_of\\_Equity\\_in\\_International\\_Water\\_Law](https://www.researchgate.net/publication/259975269_Utilisation_of_Shared_International_Freshwater_Resource_s_-_The_Meaning_and_Role_of_Equity_in_International_Water_Law)> accessed 11 July 2023; *Gabčíkovo-Nagymaros Project* case (n 59)

<sup>275</sup> Yihdego and Rieu-Clarke (n 193) 535, 536

<sup>276</sup> Carroll (n 159) 287, 288

Divergence of opinion persists between states regarding which principle should govern the use of international watercourses. The application of the principle of equitable and reasonable utilization to situations where the interests are starkly divergent and the demand for utilization of the water is high and growing requires taking into consideration different factors.

In light of the principle of equitable and reasonable utilization, for instance, as has already been discussed, the different binding and non-binding international water law codifications of the non-navigational use of international watercourses, including the UNWC, have incorporated a list of non-exhaustive factors to be taken into account in determining whether a certain utilization of an international watercourse is equitable and reasonable. The UNWC under Article 6 sub-article 1 lists factors such as the social and economic needs of the watercourse states concerned, the population dependent on the watercourse in each watercourse state, the effects of the use or uses of the watercourses in one watercourse state on other watercourse states and existing and potential uses of the watercourse. And, according to Article 6 sub-article 3, “in determining what is a reasonable and equitable use, all relevant factors are to be considered together and a conclusion reached on the basis of the whole”.<sup>277</sup>

Understanding the divergent interests involved and nature of the resource, i.e., not limited to one place, but traversing the territory of different states, the UNWC has provided for the use of an international watercourse to be “with a view to attaining optimal and sustainable utilization” by “taking into account the interests of the watercourse states concerned”.<sup>278</sup> As the principle of equitable and reasonable utilization is a well-recognized principle of international water law, the Nile River, whose utilization is inequitable, must be shared equitably and be governed by the right of riparian states to equitably utilize the river taking into consideration the interest of other riparian states.

#### **4.2.1. Upper and Lower Riparian States of the Nile River Basin and the Principles of Equitable and Reasonable utilization and No-significant Harm**

The position held by lower riparian states of the Nile River basin for the application of their ‘historic rights’ and the 1929 and 1959 agreements deny the right of other riparian states to

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<sup>277</sup> UNWC (n 1) art. 6 (3)

<sup>278</sup> *ibid* art. 5 (1)

utilize the water, thereby negating the principle of equitable and reasonable utilization. Such position also denies the sovereign right of upper riparian states to make use of the natural resource that traverses their territories. On the other hand, the no-significant harm principle is open to wide and misleading interpretation by states who seek to protect their prior use and deter utilization by other riparian states.

The contention over the Nile River mainly concerns allocation and quantity of the water. Its utilization is characterized by inequitable utilization to the advantage of lower riparian states. Giving priority to the principle of no-significant harm, with its susceptibility to wide interpretation, in situations where there are states, such as upper riparians of the Nile River, that were precluded from utilizing the waters of the river, and are demanding to make an equitable and reasonable utilization, would be to deny the right of a state to utilize the water that passes through their territory. It would also amount to giving lower riparian states control over the development of upper riparians by requiring them to secure the consent of lower riparians before making use of the water. In this regard, Utton opined that:

Adopting the...concept of “no significant harm” originating from transboundary pollution concerns and superimposing it on the question of water quantity allocation as the base principle of international water law would come close to again giving a veto power to downstream states over proposed uses of international streams by upstream states, in contrast to the concept of reasonable or equitable sharing of international water resources required by the doctrine of equitable utilization.<sup>279</sup>

Based on this view, Azarva noted that ‘should the “no significant harm” principle be given primacy in future Nile Basin negotiations, it would create more negative externalities by providing a legal endorsement of Egypt’s claimed veto power over upstream uses and diversions’.<sup>280</sup>

The principle of no-significant harm cannot be used to require for the continuation of prior use to the detriment of other riparian states that want to utilize the shared waters. Allowing Egypt, or lower riparians in general, to rely on the principle of no-significant harm amounts to denying the

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<sup>279</sup> Utton (n 92) 639

<sup>280</sup> Azarva (n 163) 483

other riparian states their equitable share, which is against the established principles of customary international law. It would also mean undermining the territorial sovereignty of a state to use a natural resource while within its territory, so long as the state is making an equitable and reasonable utilization. A state whose use is equitable and reasonable should not be subjected to further scrutiny or be required to secure the consent of a riparian state that seeks to protect its interest. In the *Lake Lanoux arbitration case*, the Tribunal that dealt with the dispute that arose between France and Spain as a result of utilization of the waters of the Lake Lanoux (situated within French territory) noted that;

To admit that jurisdiction in a certain field can no longer be exercised except on the condition of, or by means of, an agreement between two states, is to place an essential restriction on the sovereignty of a state, and such restriction could only be admitted if there is clear and convincing evidence.<sup>281</sup>

The Tribunal also stated that ‘the rule that states may use the hydraulic power of international watercourses only on conditions of a prior agreement between the interested states cannot be established as a custom, even less as a general principle of law’.<sup>282</sup>

Water scarcity is affecting the Nile River, which means that the needs of all riparians cannot be fulfilled according to their needs. The amount of water available must be shared in an equitable and reasonable manner. Requiring undiminished amount of water flow is supported neither by international water law nor by facts on the ground. Ethiopia’s utilization of waters of the Nile River that passes through its territory through the construction of the GERD, for instance, cannot be denied by invoking the principle of no-significant harm, as far as it is made in an equitable and reasonable manner.

The principle of equitable and reasonable utilization would give a foothold for upper riparian states to challenge the existing utilization of the Nile River, which deprives them from their right. The claim of upper riparian states is for an equitable utilization of the river. On the other hand, the application of the no-significant harm does not deter the utilization of the Nile River by

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<sup>281</sup> Lake Lanoux Arbitration (France/Spain), 16 November 1957, Reports of International Arbitral Awards, Vol. XII, 22, 23 <<https://legal.un.org/avl/studymaterials/rcil-africa/2013/Book10.pdf>> accessed 17 March 2023

<sup>282</sup> *ibid* 25

a state, but only requires the state to “take all appropriate measures to prevent the causing of significant harm to other watercourse states”.<sup>283</sup>

Upper riparian states of the Nile River basin have a growing interest in using the water for various needs, including hydro-electric power generation. As the basin is rid of any legally binding agreement or cooperative framework for consultation over utilization of the river, resort to unilateral action for undertaking projects on the river affects the quantity but also the quality of the water. Egypt has been involved in unilateral development of projects based on the Nile River. And, where such unilateral actions become norm, all riparian states within the basin will be injured.

The Nile River faces similar problems as other international watercourses. There are also shared predicaments encountered by lower riparian states because of their geographic location and water scarcity. Their geographic location makes them dependent on utilization upstream as the water reaches their territory after passing through the territory of upper riparian states. They will receive an amount of water that is dependent on the available water and the utilization by upper riparian states, which is required to be made in an equitable and reasonable manner.

As the obligation not to cause significant harm is an obligation of due diligence, a riparian state is required to diligently attempt not to cause significant harm to other riparian states. This can also be fathomed from the reading of sub-article 2 of Article 7 of the UNWC, which states that the ramifications for causing significant harm by states is to “take all appropriate measures, having due regard for the provisions of articles 5 and 6, ...to eliminate or mitigate such harm and, where appropriate, to discuss the question of compensation”.<sup>284</sup> Whereas upper riparian states have the right to utilize the Nile River, the development of international water law has put a limit on this right by requiring the state making the utilization not to cause significant harm to other riparian states. Upper and lower riparian states’ divergent stance over which principle should have precedence and their relationship is thus far one block against agreement from being reached regarding allocation of the water.

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<sup>283</sup> UNWC (n 1) art. 7(1)

<sup>284</sup> UNWC (n 1) art. 7(2)

#### 4.2.2. Challenging Old Claims

The Nile River basin has always been characterized by the antagonistic relationship between upper and lower riparian states. Besides the divergence of opinion over which principle should be given precedence in governing the utilization of the Nile River, the relation between the riparian states is further entangled by the claims of lower riparians for the validity of the 1929 and 1959 agreements and maintenance of their prior use. Egypt has always attempted to justify the existing utilization of the Nile River citing its ‘historical right’, its total dependence on the waters of the river, and the 1929 and 1959 agreements. It also uses threats of using force to bolster its interests and curb utilization by other riparian states. From the drafting stage of the CFA, it can be fathomed that the usual claim by Egypt and Sudan for the applicability of the 1929 and 1959 agreements and their interest in maintaining their existing use is stifling progress and transition from absolute to equitable utilization. But, all these claims relied upon by Egypt have been challenged by upper riparians and are rejected by them as tools for maintaining the *status quo*.

Egypt’s reliance on its prior use and validity of the 1929 and 1959 agreements would entrench its position and interest in maintaining the *status quo*, while leaving the rest of the riparian states that contribute almost all the water to the Nile River without any meaningful share. This would not create a regime that can be maintained, as all states have interest in benefiting from the river. Through the 1929 and 1959 agreements, Egypt and Sudan were given absolute control over the waters of the Nile. In addition, those agreements provided lower riparians with an entitlement over development projects including those upstream.<sup>285</sup>

Egypt, by purporting the validity of the 1929 and 1959 agreements, is advancing its advantageous position to current and future exclusive status it aims to preserve.<sup>286</sup> The application of the principle of equitable and reasonable utilization for the utilization of the Nile River would result in the automatic rejection of the claims that lower riparian states rely on as a basis for the maintenance of the *status quo*. Such rejection would transpire as it is *prima facie*

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<sup>285</sup> Salma H. Shitia, ‘Climate Change, Competition, and Conflict along the River Nile: The Grand Ethiopian Renaissance Dam & Shifting International Water Law’, (2021) 32 Fordham Env’t L REV 555  
<<https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1849&context=elr>> accessed 15 June 2023

<sup>286</sup> Lisa M. Jacobs, ‘Sharing the Gifts of the Nile: Establishment of a Legal Regime for Nile Waters Management’, (1993) 7 Temp Int’l & Comp L J 109  
<[https://heinonline.org/HOL/Page?public=true&handle=hein.journals/tclj7&div=10&start\\_page=95&collection=usjournals&set\\_as\\_cursor=0&men\\_tab=srchresults](https://heinonline.org/HOL/Page?public=true&handle=hein.journals/tclj7&div=10&start_page=95&collection=usjournals&set_as_cursor=0&men_tab=srchresults)> accessed 28 April 2023

evident that the agreements only confer Egypt and Sudan absolute share over the Nile River to the detriment of the rest of the riparian states.

Egypt has repeatedly responded to plans by the other riparian states to use the Nile for development purposes with threats of military action.<sup>287</sup> This is especially the case when Ethiopia initiates such plans.<sup>288</sup> Egypt voiced its opposition with threats of war, by then President of Egypt, Anwar Sadat, to Ethiopia's plan to construct a dam on Lake Tana.<sup>289</sup> President Anwar Sadat further made a statement in 1978 that 'we depend upon the Nile 100 percent in our life, so if anyone, at any moment, thinks to deprive us of our life we shall never hesitate to go to war because it is a matter of life or death'.<sup>290</sup> Egypt has uttered such other threats through its successive presidents and high ranking officials.<sup>291</sup> In 2013, Egyptian President Mohammed Morsi stated that '...all options are open ...the lives of the Egyptians are connected around it ...if it diminishes by one drop then our blood is the alternative'.<sup>292</sup>

The rejection of the *status quo* and the start of assertion of right over the use of the waters of the Nile River can be argued to have been marked as of late by the starting of the construction of the GERD, which is set to be the largest dam in Africa.<sup>293</sup> Construction of the GERD has been underway by Ethiopia since April 2011. It is situated in Ethiopia near the border with Sudan.<sup>294</sup> It will cover a surface area of 1,874 sq. km, with a reservoir having the capability to store 74 m<sup>3</sup>, and will produce 6,000 megawatts.<sup>295</sup> Ethiopia believes that it will provide the energy it needs, and also benefits the other riparian states.

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<sup>287</sup> Wiebe (n 166) 743

<sup>288</sup> *ibid*

<sup>289</sup> *ibid*

<sup>290</sup> *ibid*

<sup>291</sup> *ibid*

<sup>292</sup> BBC, NEWS-Africa, 'Egyptian warning over Ethiopia Nile dam', 10 June 2013

<<https://www.bbc.com/news/world-africa-22850124>> accessed 06 April 2023

<sup>293</sup> Meron Teferi Taye, Tsegaye Tadesse, Gabriel B. Senay and Paul Block, 'The Grand Ethiopian Renaissance Dam: Source of Cooperation or Contention?', (2016) 142 J. Water Resour. Plann. Manage 02516001-1

<[https://www.researchgate.net/publication/305452522\\_The\\_Grand\\_Ethiopian\\_Renaissance\\_Dam\\_Source\\_of\\_Cooperation\\_or\\_Contention](https://www.researchgate.net/publication/305452522_The_Grand_Ethiopian_Renaissance_Dam_Source_of_Cooperation_or_Contention)> accessed 08 June 2023

<sup>294</sup> *ibid*

<sup>295</sup> *ibid*

Egypt and Sudan voiced their opposition to the construction of the GERD, and claimed that it will cause significant harm and affect the water flow.<sup>296</sup> Sudan altered its stance on the GERD, and treated the project as important by taking into account the benefits it would reap from it, though it still has concerns.<sup>297</sup> It has contemplated the benefits it would reap from the projects, such as mitigated evaporation of the water, guarding against flood and increased potential for irrigation.<sup>298</sup> On the other hand, Egypt opposed the decision to construct the GERD.<sup>299</sup> Despite such opposition, Ethiopia went ahead with the project, and later started to fill the dam. Ethiopia is of the opinion that the GERD will not harm other riparian states, rather it will benefit them.<sup>300</sup>

Egypt's stance started to change overtime from seeking to prevent the construction of the project to negotiating over the time for filling the dam and its impacts.<sup>301</sup> In this regard, Shitia noted that 'Egyptian strategy in GERD negotiations has recently shifted from a focus on Egyptian natural and historical rights to an emphasis on the no-harm rule in an attempt to justify circumstantial Egyptian management of the GERD'.<sup>302</sup> This changed stance of Egypt can be taken as one instance showcasing the growing assertiveness of upper riparian states and the future of the basin moving away from exclusive utilization by lower riparians.

Besides the GERD, there is currently other dam construction projects underway based on the Nile River.<sup>303</sup> In this regard, Ethiopia and other upper riparian states are challenging the extant exclusive utilization by lower riparians. Egypt is keen to consider such actions to share from the river as a threat to the invariably unchallenged position it has enjoyed for too long and keep the

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<sup>296</sup> Mahemud Eshtu Tekuya, 'Governing the Nile under Climatic Uncertainty: The Need for a Climate-Proof Basin-Wide Treaty', (2019) 59 Nat. Resources J. 333 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3680303](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3680303)> accessed 05 June 2023

<sup>297</sup> *ibid*; John Mukum Mbaku, 'The Controversy over the Grand Ethiopian Renaissance Dam', (August 5, 2020), Africa in Focus, Brookings <<https://www.brookings.edu/blog/africa-in-focus/2020/08/05/the-controversy-over-the-grand-ethiopian-renaissance-dam/>> accessed 13 March 2023

<sup>298</sup> Zeleke (n 239) 270

<sup>299</sup> Mbaku (n 297)

<sup>300</sup> *ibid*

<sup>301</sup> *ibid*; Eshtu (n 296)

<sup>302</sup> Shitia (n 285)

<sup>303</sup> Edna Udobong, 'The Rising Conflict on the Nile Waters: Understanding its Legal, Environmental, and Public Health Consequences', (2016) 10 LIBERTY U. L. REV. 476 <[https://digitalcommons.liberty.edu/cgi/viewcontent.cgi?article=1202&context=lu\\_law\\_review](https://digitalcommons.liberty.edu/cgi/viewcontent.cgi?article=1202&context=lu_law_review)> accessed 15 June 2023

*status quo*, which it considers would be destabilized and significantly harmed by any utilization by the other riparian states.<sup>304</sup>

The development of international water law and incorporation of fundamental principles in multilateral treaties such as the UNWC, which serve as a framework agreement, have widely established such principles as equitable and reasonable utilization for the manner of use of international watercourses. The most prominent of these principles are equitable and reasonable utilization and no-significant harm, and have been established as part of customary international law. States sharing international watercourses in different parts of the world have incorporated these principles in different bilateral and multilateral treaties. The principle of equitable and reasonable utilization stands to reject utilization only by a few watercourse states denying the rest an equitable share.

The position still held by lower riparian states of the Nile River basin to maintain the inequitable utilization and vehement opposition to any utilization by upper riparian states can well be likened to the theory of absolute territorial integrity. With the principle of equitable and reasonable utilization coming to the fore in governing the utilization of international watercourses, exclusive use was rejected. The divergent interpretation given to the relationship between the principles of equitable and reasonable utilization and no-significant harm and the non-existence of a binding treaty to govern its utilization make the application of the two principles to the Nile River basin a difficult task. But, on the other hand, it is visible that the Nile River is inequitably used by lower riparian states to the detriment of upper riparian states that the no-significant harm rule cannot be used to justify the existing use.

On the other hand, the increasing assertiveness of upper riparian states over utilization of the Nile River, increasing recognition of the equitable utilization of shared water resources and the understanding that all riparian states and the river will be harmed by inequitable use, can propel them to work towards changing the *status quo* to equitable utilization that benefits all. With an effective basin-wide cooperation and consensus over equitable utilization, unilateral developments that ignore the interests of other riparian states would be curtailed, since equitable and reasonable utilization requires taking into consideration the interest of other riparians and

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<sup>304</sup> Carroll (n 159) 290

“adequate protection” of the river.<sup>305</sup> The recognition of the principle of equitable and reasonable utilization for governing the Nile River basin would serve the purpose of denying any future utilization that does not take into consideration the interests of other riparians and protection of the river.

#### **4.2.3. Deterring Conflict-Fostering Cooperation**

Though there were and are attempts, an effective basin-wide cooperation that enables an equitable utilization of the Nile River by all riparian states remains elusive. The attempts at forging cooperation that includes all riparian states for the equitable utilization of the Nile River is challenged by several factors discussed thus far. If both upper and lower riparian states are to serve the growing demand for water and prevent conflict, the equitable utilization of international watercourses that has developed under international water law should govern the utilization of the Nile River. In this regard, the ability of the principles of equitable and reasonable utilization and no-significant harm for solving disputes over sharing of international watercourses has been challenged since states rely on a diverging interpretation and application of the principles. But, one issue that is clear and must be beyond contention is the inequitable utilization of the Nile River that does not take into account the interest of upper riparian states and the archaic stance of lower riparian states regarding allocation of the water. As we have seen, such stance has been outdated as a result of the development of international water law. It has been replaced with equitable utilization.

An *impasse* is not an option as far as international watercourses are concerned, given the growing demand, diminishing available water and other predicaments battering shared water resources. This is particularly more so for the Nile River basin, which is shared by eleven states that have wider economic, social and political problems, lacking an effective and all-inclusive cooperation among the riparian states over utilization. The extant utilization of the Nile River cannot be maintained for long, and, in order to foreclose the unruly regime that might ensue, a shift towards equitable utilization is needed.

Lower riparian states have participated in attempts at creating cooperation and common management of the Nile River. Such participation for cooperation, though not yet fruitful, may

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<sup>305</sup> UNWC (n 1) art. 5 (1)

be taken as a forced acceptance of the inevitability of sharing of the river by the other riparian states. The attempts at cooperation by lower riparian states mainly fail because they enter in order to maintain their positions and impose them over the other riparians and not to negotiate over how every state should benefit. In this regard, the CFA can be taken as an instance, which Egypt and Sudan are keen on using as a platform for securing their prior use and stage their claim for the applicability of the 1929 and 1959 agreements, rather than work for an arrangement for the benefit of all. The reliance on the 1929 and 1959 agreements and the repeated attempt at forcing them on upper riparians is also a destabilizing factor, which has often become obstacle for dialogue.

The principle of equitable and reasonable utilization can serve as a center for discussion on how to utilize the Nile River taking into consideration matters on the ground. In stating for equitable and reasonable utilization, Article 5 sub-article 2 of the UNWC provides for participation “in the use, development and protection of an international watercourse in an equitable and reasonable manner”.<sup>306</sup> The participation incorporates “the right to utilize the watercourse” and “the duty to cooperate”.<sup>307</sup> And, as stated under Article 6 (2), in applying equitable and reasonable utilization, riparian states are required to “enter into consultations in a spirit of cooperation” if it becomes necessary.

On the other hand, the application of the no-significant harm would deter utilization of the Nile River by a riparian state in a manner that causes significant harm to other riparians. In line with cooperation between riparian states, Article 7 (2) of the UNWC requires a riparian state that has caused “significant harm” to “take all appropriate measures, having due regard for the provisions of 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”.<sup>308</sup> As such, cooperation between all the riparian states of the Nile River can become a center for the application of the two principles. The vagueness of the terms “equitable”, “reasonable” and “significant harm” has made the application of the principles more complex and contributed to the divergence of opinion over their relationship. But, the use of such vague terms, whether intentional or not, requires that

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<sup>306</sup> *ibid* art. 5 (2)

<sup>307</sup> *ibid*

<sup>308</sup> *ibid* art. 7 (2)

states the sharing of an international watercourse need to engage with one another through cooperation.

#### **4.2.4. The Future of the Nile River Basin**

Economic underdevelopment characterizes most of the Nile River basin states. This is specially the case of upper riparian states. They are keen to use the waters of the river for development purposes. They have not been able to make use of the Nile River until very recently, though lower riparians still utilize the vast majority of the water. The increasing population and economic growth demands high energy production. In addition, as the states in the Nile River basin still highly depend on agriculture and because of the aridity and semi-aridity of the region, drought is a recurring event. Water is highly needed for irrigation and energy production purposes. In order to produce energy, one of the means states resort to is hydroelectricity, through the construction of large dams. The demand for water will surge as a result of population growth and climate change, exacerbating water scarcity.

As a result of water scarcity, the Nile River cannot provide all riparian states to the fullest of their needs. Exclusive benefit from the Nile River cannot be continuously reaped by one or two states to the exclusion of others. Here, the application of the principle of equitable and reasonable utilization calls for sharing of the waters of the river among all riparian states, not to the fullest of their needs but in a manner that is equitable and reasonable. Egypt's dependence on the waters of the Nile River should not cover the high demand for water in the other riparian states that have high population where other sources of water within their territory does not provide the potential that the waters that feed the Nile River provide. Such factors can be taken into account in determining whether the use by a riparian state is equitable and reasonable, as can be fathomed from Article 6 of the UNWC.

And, the claim by Egypt that it would not exist without the Nile is rejected by some.<sup>309</sup> Egypt has made efforts to technologically advance its irrigation and agricultural systems.<sup>310</sup> Such efforts

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<sup>309</sup> *see* Dereje Zeleke, 'From Tenuous Legal Arguments to Securitization and Benefit Sharing: Hegemonic Obstinacy—The Stumbling Block Against Resolution of the Nile Waters Question', (2010) 4 MIZAN LAW REV. 237 <<https://www.ajol.info/index.php/mlr/article/download/63088/50956>> accessed 10 May 2023

<sup>310</sup> Wiebe (n 166) 743, 744

should decrease Egypt's dependence on the waters of the Nile River and contribute to easing the strained relationship among the riparian states.

Egypt's resolve to invoke the obligation not to cause significant harm, its 'historic' use, the validity of the 1929 and 1959 agreements and keep the discussion lingering, thereby effectively preventing other riparians from utilization of the waters of the Nile River, propels the other riparian states to embark on a unilateral action. On the other hand, a unilateral development by riparian states in different parts of the basin leaves no room for discussion to avert a possible "significant harm" that might be caused to other riparian states.

Though marginal, the riparian states of the basin have undertaken different irrigation and dam projects.<sup>311</sup> Such projects can be expected to increase in the coming years. The stance of lower riparian states to invoke no-significant harm to deny development upstream will not deter upper riparians from exercising their right to utilize the water that crosses their territories. The growing demand for water will increasingly propel them to utilize the water. Without agreement over how to apply the principles of equitable and reasonable utilization and no-significant harm in governing the river basin, the riparian states will increasingly find it difficult to equitably share from the waters of the Nile River. But, with lack of clarity over the application of those principles, all riparian states can benefit from the river equitably. The undertaking of development projects in different parts of the river basin needs to be conducted through a basin-wide consultation over planned measures and their effects. Otherwise, the dispute between the riparian states will be exacerbated; leaving a number of riparian states without any share, and the river itself will be harmed as a result of lack of concerted cooperation for its protection.

One important issue often forgotten in the mist of the conflict over allocation and quantity of water concerning the Nile River is the quality of the water, which is constantly being affected by increasing population growth, environmental degradation and lack of cooperative framework within the basin. Protection of the river's quality requires the contribution of all riparian states. As has been observed by the ICJ in the *Pulp Mills* case between Argentina and Uruguay:

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<sup>311</sup> The Nile Story, Cooperation on the Nile-Bringing Down the Glass Wall, Briefing note 5, May 2015 <<https://nilebasin.org/index.php/information-hub/documents-publications/56-cooperation-on-the-nile-digital/file>> accessed 18 April 2023

*It is by cooperating that the states concerned can jointly manage the risks of damage to the environment that might be created by the plans initiated by one or more of them, so as to prevent the damage...*<sup>312</sup>

The claim by upper riparians for equitable utilization of the Nile River has thus far been rejected by lower riparians. As upper riparians have become increasingly assertive for their right to utilize the waters of the Nile, to which they almost entirely contribute, the inequitable sharing that exists will more likely damage lower riparian states in the future. The claim of upper riparian states is for an equitable utilization of the Nile River, stressing their right, while not denying the right of lower riparian states their right to share. Such stance of upper riparian states is in line with the development of international water law and the principles recognized under international water law. Through the application of the principle of equitable and reasonable utilization, which also requires taking into consideration the interest of other riparian states, not only is the present but also the future of the basin is secured.

## **Conclusion**

The difficulty in properly applying the principles of equitable and reasonable utilization and no-significant harm to the Nile River basin is vividly discernible, given the history and divergent claims hinged upon by the riparian states. The existing utilization within the basin provides lower riparian states the upper hand, while leaving upper riparian states at a disadvantaged position. The claims forwarded by lower riparian states are not supported by international law, which has rejected exclusive utilization of international watercourses. The extant manner of utilization of the waters of the Nile River is manifestly inequitable, and the contention between the riparian states is mainly concerned with allocation and quantity of the water. In this regard, the application of the principle of equitable and reasonable utilization enables the hitherto disadvantaged upper riparian states to use the water that passes through their respective territories without being subjected to veto from lower riparian states. Its precedence over the no-significant harm rule means that upper riparian states' use of the water that causes, for instance a diminished amount of water flow towards lower riparian states will be tolerated so long as such

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<sup>312</sup> Case concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay), ICJ, Judgment, 20 April 2010, ¶ 77 <<https://www.icj-cij.org/public/files/case-related/135/135-20100420-JUD-01-00-EN.pdf>> accessed 26 April 2023

use is made in an equitable and reasonable manner. Utilization of the Nile River requires the cooperation of all riparian states since it is an easy task to determine whether a certain use of the water by a riparian state is equitable and reasonable or significant harm is inflicted.

## CHAPTER FIVE

### 5. CONCLUSION AND RECOMMENDATION

#### 5.1. Conclusion

The importance of water cannot be stressed more enough. Human beings have always sought to control the sources of water, which have often led to conflict. International watercourses have been a source of conflict between states that want to utilize the water that traverses their territories. The states concerned held extreme positions that advance their interests without any regard for the interest of other riparian states. The extreme positions, later rejected in state practice, were replaced with limited territorial sovereignty, i.e., equitable utilization.

Through the application of the principle of equitable and reasonable utilization, the existing utilization of the Nile River by lower riparian states will be rejected in favour of sharing of the water among all the riparian states. Lower riparian states' claim for the maintenance of their 'historic use' and for uninterrupted waterflow is not supported by the principle of equitable and reasonable utilization. An absolute use of the river cannot also be maintained through the application of the no-significant harm rule. Upper riparian states of the Nile River have the right to utilize the water that traverses their territories, while only bearing the limitation on their sovereign right to use the water that obliges them not to cause significant harm to other riparian states. On the other hand, the no-significant harm rule requires a Nile River riparian state to take all appropriate measures not to cause significant harm to the other riparian states.

While the principle of equitable and reasonable utilization exposes the deeply inequitable manner of utilization and archaic nature of the claims made by lower riparian states that do not reflect the established principles of customary international law, the no-significant harm rule obliges riparian states to utilize the water that traverses their territories by taking all appropriate measures to prevent the causation of significant harm to other riparian states. Without a binding treaty or framework for cooperation to govern the utilization of the Nile River, the interest of all riparian states cannot be protected. The divergence of interpretation of the relationship between the principles of equitable and reasonable utilization and no-significant harm has thus far been one factor that keeps the contention over allocation of water lingering. The fact that the Nile River basin lacks a binding treaty that is inclusive of all riparians states means that the principles

that are recognized under customary international law that govern the utilization of international watercourses are the binding principles that are applicable. The principle of equitable and reasonable utilization, as can be evidenced from the manner of its incorporation with the UNWC, has precedence over the no-significant harm rule. The inequitable utilization that persists needs to be rectified with the prior application of the principle of equitable and reasonable utilization, which has emerged as a balance between the two absolute positions that were relied upon, now rejected through the development of international water law.

## **5.2. Recommendation**

Amidst increasing population growth, environmental degradation, pollution and water scarcity, the Nile River does not have enough water to fulfill the needs of all riparian states to the fullest. Not all water needs can be satisfied unless equitable utilization of the water is availed within the basin. The claim by lower riparian states has been a stumbling block for cooperation and agreement over an equitable allocation of the Nile River. The demand for undiminished water flow is inconceivable given the right of other riparian states and the quantity of water available. Upper riparian states' claim for sharing from the Nile River is supported by international law and equity. Lower riparian states' stance is visibly inequitable and runs contrary to the progress made as a result of the development of international water law. It also goes against matters on the ground, where upper riparian states are increasingly asserting their rights to use the water that traverses their respective territories.

The existing allocation of water cannot be disguised by invoking the no-significant harm rule. The divergence of stance over the relationship between the principles of equitable and reasonable utilization and no-significant harm persists, and it has hindered agreement from being reached between the riparian states, as exemplified by their non-membership to the UNWC. The allocation of the water of the Nile River should be based on the principle of equitable and reasonable utilization. Lower riparian states cannot continue to deny any utilization of the water by other riparian states. Since the claim of upper riparian states is based on their sovereign right to use the water that passes through their territories, the only limitation that should be placed is the obligation not to cause significant harm to other riparian states. By making the principle of equitable and reasonable utilization the governing principle, upper riparian states will be able to

use the water that traverses their territories and the interest of lower riparian states will be protected against absolute and inequitable use.

Lower riparian states should recognize the right of upper riparian states to utilize the Nile River and acknowledge the deeply inequitable allocation. Upper riparian states should, on the other hand, utilize the water that passes through their territories by taking into account the interest of lower riparian states and take all appropriate measures not to cause significant harm. All riparian states should consider that, so long as the basin remains devoid of legally binding agreement and a successful cooperative framework, the contentious relationship will be exacerbated. The application of the principle of equitable and reasonable utilization requires cooperation between all riparian states. The quality of the river, which is a concern to all riparian states, must also be considered.

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