Addis Ababa University

School of Graduate Studies

Faculty of Law

The Significance of the Doctrine of Prior Appropriation in Terms of Equitable Utilization with Particular Emphasis to the Nile Basin

By : Dawit Negash

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Abstract

The doctrine of prior appropriation which basically advocates historical rights is one of the doctrines which have influenced the question of the right to divert the waters of international water courses. This doctrine which may be implemented successfully for determining rights with in one country, its application where the claim for the right to the use of a water course involves nation states is found to be more problematical. The doctrine in its meaning of prior in time is prior in right is no longer considered a controlling principle of international water law. Prior use or existing use which this doctrine held as dispositive, is relegated to the status of one of the relevant factors with the advent of the principle equitable utilization. Despite the general acceptance of the notion that prior uses are merely one of the factors to be considered in the determination of equitable utilization, nation states could not reach at clear agreement on the issue of what weight should be given to existing uses compared to other relevant factors. This arises from the claim of downstream states, which usually are prior users, to the preferential treatment of existing uses. This clashes with the accepted principle of equitable utilization since the later does not recognize hierarchy among the factors to be considered in the determination of what amounts to equitable share. Such a situation is also reflected in the tension between the principle of equitable utilization and the notion of causing no significant harm to other water course states. This controversy which results from the conflicting approaches over the issue of which rule takes precedence stands as one of the most problematic aspect of international water course law. The prevalence of no significant harm rule in its application to water quantity issues presents difficulties on the settlement of controversies over allocation of disproportionately used international water courses by giving, like the doctrine of prior appropriation, complete priority to existing uses. This competes with the principle of equitable utilization which may allow the causing of significant harm so long as it results from a use which is equitable when viewed by taking into account all the relevant factors. The case in the Nile depicts the tension created because of the unresolved conflict between the claim to maintain the status quo and that of equitable allocation of the shared watercourse. The conflict between the claim of Egypt for the absolute protection of prior uses and that of the upstream riparian states for the reallocation of the resource, which is also revealed in the disagreement on the relationship of the two competing principles, has remained at the centre of the controversies over the issue of sharing the Nile waters.

Introduction

Conflicts on the uses of international watercourses, which were, until nineteenth century, primarily related to navigation and small scale uses, nowadays cover much wider range of activities, since the water needed for various purposes such as irrigation, domestic use, fishing, hydroelectric power etc, is in a far larger scale greater in quantity than was true in the former times, and that diversion of water for irrigation or other purposes may have far reaching effects on the use other states intend to make than the use of water for navigation.

The issue which is of paramount importance is not whether a state riparian to international watercourse has a right to utilize the water, for this is not in dispute. What is at issue is the proportion of the water flowing in a tranboundary river to which each state is entitled. One of the problems with respect to the determination of the right of states to use the shared water resources found with in their territory is that of defining the legal limits and conditions with in or under which the basin states may utilize such resources.

This becomes particularly difficult by the fact that the uses of international watercourses are not likely to commence at the same time which creates differing interests between those states who started the use of the watercourse earlier and those states who are late in developing the water resources. The prior users which usually are downstream states are generally interested in maintaining the status quo by precluding the other states from having a share from the water, while those states which are late in developing the resource focus on the initiation of new uses which require the reallocation of existing water rights. The resulting tension raises the question of formulating rules which will balance these conflicting interests so that they can utilize the waters in such a way which is consistent with the rights of all the co-riparian

states. Therefore, it is necessary, in doing so, to determine whether the state that first makes use of the waters thereby acquires any rights with regard to the quantity and quality of the water concerned that cannot be affected by new uses in other riparian states. If the answer is in the affirmative, the difficult problem as to the extent of the right acquired by prior appropriation must be considered.

This becomes more complex if one state uses almost the whole of the shared water resources while the other co-basin state none or very insignificant quantity and after the lapse of many years the non-using state raises the question of sharing the water which will considerably reduce the amount of water used by the other state. Such a situation will be further complicated when the state which is the prior user becomes highly dependent on the water and the other states in the upstream are in desperate need of putting the water to use.

In situations like this, the determination of the right of the state proposing to initiate new use necessarily require the other state to relinquish its claim to a large proportion of the available water resource. If existing use is held to be conclusive, it arrests the development of watercourses according to the requirements of earlier users and favors the more highly developed states to the detriment of their less developed neighbors, since in practice the more developed and resourceful countries have had their water appropriation before less developed states.

Such a settlement obviously does not provide for equitable utilization which is against the idea that a state more advanced economically can take away the rights of a less economically developed state simply because that states time of development is yet to come. However, due to the reluctance of states which have developed their water resource earlier to accept the necessary adjustments of existing allocations, the claim for the protection of existing uses compete with

that of equitable utilization in the attempt to formulate rules that will address the issue of allocation of international watercourses.

This makes patterns of prior uses, the protection of which is claimed on the basis of the doctrine of prior appropriation, the major consideration of international water law besides the claim of states in the upstream. Such a situation is reflected in the case of the Nile basin where the prevailing legal regime for the allocation of the water resources is primarily shaped by the outdated bilateral agreements of the 1929 and 1959 which allocated the largest share to Egypt with the rest to Sudan. These agreements further the claim of Egypt for "Natural and historic right' which is a prior appropriation approach to water allocation. The other riparian states do not recognize the validity of these agreements as well as the claim of Egypt for the absolute right to the protection of prior uses. Therefore the controversy in the basin basically emanates from the clash between the Egyptian claim for 'Natural and historic rights' and equitable allocation arguments of the upstream riparian states like Ethiopia.

CHAPTER ONE

THE DOCTRINE OF PRIOR APPROPRIATION

1.1 Origin and Development

The doctrine of prior appropriation emerged in the 19th century to meet the unique needs of the arid parts the western United States where the water bodies are fewer and less dependable than those available in the east.[1] The major contribution to the evolvement of the doctrine was made by the California miners, with the advent of the great mining industry that followed the discovery of gold in the region six months after the proclamation of the treaty of Guadalupe.[2] The doctrine emerged as a solution for the insufficiency of the available water devised by the miners who resolved the problem by applying the rules which are similar to the system of "priority of possession and control" they adopted to meet the problem of adjusting the right to use the limited number of mines among the multitude of people.[3] The legitimacy of this method of allocation with regard to water was approved by the courts largely because this method had become the established custom of the miners.[4]

The doctrine which was mainly devised in the mining districts of California was extended to farmers and other users, who realized that it was much more appropriate to their needs than the rule of riparian rights, and soon became the governing law of the entire arid west.[5]

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[1] David H. Getches, water law in A nut shell,77(1990); Frank J.Trealease, cases and materials on water law, Resource use and Protection, 24-27 (1974); Anthony Scott, Georgina Coustalin, The Evolution of Water Rights, 35 Nat Resources J.821. 901-907(1995)

[2] Robert Emerelark (Editor in chief), a Treatise on the Law of Waters and Allied Problems, sec.18.1.

[3] Harrison C.Dunning, state Equitable Apportionment of Western water resources, 66.NebL.Rev.76, 77(1987). See also Bonaya Adhi Godana, Africa's shared water resources, legal and institutional aspects of the Nile, Niger and senegal River systems, 52-53 (1985)

[4] See, Dunning, Id.

[5] Frank J. Trealease, cases and materials on water law, resources use and environment protection, 26(1974)

The major step in the development of this doctrine as a principle of inter communal water allocation took place when it is uphold by the supreme court of the united states in a dispute between two states where it is accepted by both of them. In Wyoming V.Colorado, the first case on which the supreme court entered a decree of apportionment in its original jurisdiction, the court which found that the dispute involves states which applied the doctrine of prior appropriation internally held that "the doctrine of prior appropriation, furnishes the only basis which is consonant with the principles of right and equity applicable to such dispute as this is [6]. The court for the first time defined the doctrine of prior appropriation, in interstate context as:

> *To appropriate water means to take and divert a specific quantity there of and put it to beneficial use in accordance with the laws of the state where such water is found, and by so doing to acquire under such laws, as vested right to take and divert from the same source, and to use and consume the same quantity of water annually forever, subject only to the right to prior appropriation*[7]

Side by side with the doctrine of prior appropriation, the court developed the principle of equitable apportionment to accommodate to the varied river systems and needs of riparian states.[8] In the earlier cases the decisions of the court suggested that among states applying the law of prior appropriation, priority of appropriation and equitable apportionment are substantially identical. [9] Later on with the realization that strict adherence to the doctrine of

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[6] Wyoming V.Cololrad, 325 US 589,65 S.Ct 1332, 89 L Ed. 1815(1945). Explaining the fairness of applying such a doctrine the court stated that: "the cardinal rule of the doctrine is that priority of appropriation gives superiority of right. Each of these states applies and enforces this rule in her own territory, and it is the one which intending appropriators naturally would turn for guidance. The principle on which it proceeds is not less applicable to interstate streams and controversies than to other. Both states pronounce the rule just and reasonable as applied to natural conditions in that region and to prevent any departure from it the people of both incorporated it into their constitutions. It originated in the customs and usages of the people before either states came into existence, and the court of both hold that their constitutional provisions are to be taken as recognizing the prior appropriation usage rather than as creating a new rule, These considerations persuade us that its application to such a controvercy as is here present can not be other than eminently just to all concerned". Id.

[7] Arizona V. California, 283 U.S 423,459,75 Ed. 1154,51 sup ct, 522(1931), quoted in Emerclark supra note 2., at, 132.4

[8] R.K Batstone, The utilization of the Nile water, 8 International and comp. L. Quarterly 523542(1959); Clyde Eaglenton, the use of the waters of International rivers, 33 the Canadian Bar Review, 1018 ,1023 (1955)

[9] See Emerciark supra note 2, sec. 132. 4

prior appropriation might be unfair to latter users of a watercourse and block possible beneficial improvement, the court changed the doctrine of equitable apportionment suggesting that priority of appropriation might be modified to replace existing uses with new use of higher economic value.[10]

In Nebraska V.Wyoming,[11] the court departed from the doctrine of prior appropriation explicitly stating the importance of considering criteria other than priority of appropriation to reach at equitable apportionment, despite the fact that all the three states involved in the dispute followed the rule of prior appropriation internally. The court also stated in subsequent decisions, that it is appropriate to consider all the other relevant factors.[12] However, the court generally considered protection of existing uses as a starting point, asserting that existing uses should be accorded higher priority and special consideration in apportionment disputes.[13]

The doctrine of prior appropriation, which was mainly developed by the United States Supreme Court,[14] has been advocated at the international level by downstream states which have had their water appropriation before the other riparian countries.[15] International lawyers representing such downstream states often tried to foreclose the question of intercommunal water allocation on

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[10] See Richard Simms, Equitable apportionment, priorities and New uses, 29 Natural Resources Journal 549, 550-551 (1989)

[11] Nebraska V.Wyoming 5 US 589, (I 945).This was a controversy involving the North platta River to which Nebraska, Wyoming and Colorado were parties. Nebraska initiated action against Wyoming and Colorado claiming that they were violating the rule of prior appropriation depriving Nebraska of water to which it was entitled as recognized in its law.

[12] Colorado V. New Mexico, 459 U.S 176(1982); Colorado V. New Mexico, 467 U.S. 310(1984).

[13] Id

[14] Batston. Supra note 8, at 540(1959)

[15] See Robert D. Scott, Kansas V. Colorado Revistied,52 Am. J. Int'L. 432 ,448(1958). Though the doctrine of prior appropriation was principally developed by the United States supreme court in resolving interstate water disputes, there had been instances of state practice relating to the protection of established existing beneficial uses before the time of such decisions. Netherlands and Prussia agreed in 1816 that "Established rights (in frontier rivers) shall continue to be recognized for the benefit of the same state which presently enjoys them." Belgium and Holland signed a treaty In 1843 in which it is provided that uses of water which exist at this moment on the rivers or other water courses falling on the frontier shall be preserved in their present condition". A Franco-Hispanic Treaty of 1866 provided for the apportionment of frontier waters only after 'deduction is made for lands already under cultivation". see William W.Van Alstyne, International Law and Interstate River Disputes, 48 cal. L,Rev. 596, 620 (1960)

the basis of prior appropriation as applied in the case of Wyoming V.Colorado.[16] However, the united states supreme court decisions in the cases of interstate water disputes gained acceptance on the international level from the perspective of their value to illuminate the way the concept of equitable apportionment had been interpreted since they "showed that the principle of equitable apportionment had superseded both the 'natural flow' doctrine and the prior appropriation doctrine".[17]

1.2 Basic Features

The doctrine of Prior appropriation can be summed up in the maxim "first in time is first in right". It entitles, the state which first puts a watercourse to use to a permanent right to the exclusive use and control of the water to the extent of the amount appropriated that cannot be deprived with out its consent.[18] The protection accorded to prior uses under this doctrine extends only to claims to the waters already appropriated without there being opposing claims during long established use.[19]

This "right" claimed under the doctrine of prior appropriation has been referred by various terms such as "natural" or "Historic' right, "vested right" or "ancient right'.[20] The term "existing use" has been adopted to describe prior appropriation or prior uses. It, however, has a wider meaning as it includes both senior and junior uses so long as they presently exist.[21] Unlike in domestic law where it originated, the doctrine in its application to nation states sharing a watercourse is not primarily concerned with chronological priority or time sequence among uses, but existing uses in general.[22]

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[16] See Scott supra note 14 "

[17] See Year Book of International Law commission, vol, 1(1976) document A/CN. 4/SR. 1406 p.272, para 27; Id. vol . I (1984), A/CN 4/SR.185.5, 244, Para.27. See also Abraham M.Hirsch, Utilization of International Rivers in the Middle East, 50 Am .J .I.L. 83 (1956).

[18] Godana, supra note 3, at 52; Alstyne, Supra note 15, at 618.

[19] See Batstone supra note 8 , at 529 and 544

[20] Jerome Lipper "Equitable utilization; In Garretson, Hayton and Olmstead, Op.cit.15-88, at 50(1967)

[21] Id

[22] Id, at 57, 64

This doctrine favors more developed states to the detriment of the less developed states by ensuring that they are never able to utilize any portion of an international water course without first obtaining the consent of the prior user states which may be affected by such use. The doctrine in its meaning of prior in time is prior in right is no longer considered as controlling under international law. As it will be discussed in detail in the next chapter, "existing uses" which refers to prior appropriations is recognized as one of the factors to be considered in the determination of equitable utilization.

In order for a use to be considered as existing use, it is necessary that implementing works such as the construction of diversion facilities with the intent to appropriate the water for a beneficial use has began.[23] Uses which are in the planning stage are not considered as existing uses, and they are deemed to come to existence from the date of the commencement of construction work or its equivalent in cases where it is not necessary.[24] Construction of diversion facilitates and division of water alone does not amount to appropriation protectable under international law because the protection accorded to existing uses does not extend to uses that are not of a beneficial nature.[25] The requirement of beneficial use exclude uses that are blatantly wasteful which arise from inefficient diversion facilities or the application of unnecessarily large amount of water in a given use.[26]

In addition uses that lack economic and social value, such as one state's diversion of waters for the purpose of harassing another basin state, are not considered as existing uses that will be protected under international law.[27]

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[23] Id. note 187 and accompanying text

[24] Id, note 188 and accompanying note 188. This view is adopted in the international law association's Helsinki rules which states "A use that is in fact operational is deemed to have been an existing use from the time of the intention of construction directly related to the use, or where such construction is not, the undertaking of comparable acts of actual implementation." The 1966 Helsinki Rules on the uses of the Water of International Rivers, August 1966, Art. VIII(2), 52 ILM 484 (1967).

[25] Id at 46

[26] *Id*

[27] The Helsinki Rules, Supra note 24, at cmt.(a) to chapter 2

CHAPTER TWO

THE DOCTRINE OF EQUITABLE UTILIZATION AND PRIOR APPROPRIATION WITH IN THE FRAME WORK OF EXISTING INTERNATIONAL LAW

2.1 The Doctrine of Prior Appropriation within the Context of General International Water Law Theories

Competition for a limited water resource which resulted from growing need and increased utilization of waters has historically led upstream and downstream states to a tendency of controlling the flow of international watercourse by unilaterally determining their share. This generally is manifested in the fundamental disagreement on the legal positions taken by upstream and downstream states to guide their actions which are usually nationalistic versions of that law. Earlier theories of international water law were influenced by notions of watercourse states about their own legal right to the use of the shared watercourses. These theories, which took the form of claims and counterclaims forwarded by states in advancing their own self interest, diverge sharply according to the riparian positions and prior uses of the states making the claim.

The upper most riparian states initially present a claim based on the theory of absolute territorial sovereignty according to which a riparian state can do whatever it chooses with the water flowing through its territory regardless of its effect on other riparian states. This theory is referred as the Harmon doctrine after the U.S attorney general Judson Harmon, who declared this position, regarding a dispute with Mexico concerning the diversion of water of the Rio Grande, arguing that a state has absolute right to the water flowing in its territory.[1] The advocates of this theory claim that an international watercourse

[1] In his comment Harmon stated that "The fact that the Rio Grande lacks sufficient water to permit its use by the inhabitants of both countries does not entitle Mexico to impose

within the territory of a state constitutes part of the public domain of that state upon which it has absolute and exclusive authority and another state cannot acquire right thereon with out the agreement of that state.[2] This theory draws the opposing extreme known as the theory of absolute territorial integrity, favorable to downstream states. In this theory it is claimed that the upper riparian states may not make any use of an international watercourse that affects the quantity and quality of water available to downstream state. It corresponds to the common law theory of natural flow which entitles a riparian to expect the same volume of water continuously flow in to their territory and is agreeable to lower most states as it entitles them to the use of an international watercourse in unaltered state.

The utter incompatibility of these principles led to the emergence of the theory of limited sovereignty and integrity as a solution offered to resolve the conflicting interests of the upper and lower riparian states. This theory is based on the idea that every co- riparian state is free to use the water of shared watercourses flowing on its territory as long as such utilization does not prejudice the rights and interests of the other co- riparian states. This means that the theory is based on the premise that the sovereignty of each state over the water resources with in its territory is limited by the obligation to refrain from infringing up on the reciprocal right of any other riparian state or causing unreasonable injury on such state.

The theory of limited sovereignty and integrity is well accepted in international law and practice. The acceptance of this theory, however, has not put an end to

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restrictions on the USA which would hamper the development of the latter's territory or deprive its inhabitants of an advantage with which nature had endowed it and which is situated entirely with in its territory. To admit such a principle would be completely contrary to the principle that USA exercises full sovereignty over its national territory" quoted in Muhammad Mizanur Rahman, the potentials of international water laws towards achieving integrated Ganges basin management, XII world water congress "water for sustainable development- Towards Innovative solutions" 22-25 November 2005, New Delhi India, P. 174.

[2] Boyana Adhi Godana, Africa's shared water resources, legal and Institutional Aspects of the Nile,Niger and Senegal River systems, 32 (1985).

the prevalent upstream/downstream controversies. This is due to the fact that it leaves unanswered the most controversial question of the scope and nature of limitations that has to be imposed by international law upon state's sovereignty to protect the interests of its co-riparians which opens the door to extreme claim of downstream states, not willing to settle to a lesser use of water than they already has appropriated, to the absolute protection of their prior uses. The conflict between the opposing claims of absolute territorial sovereignty and absolute territorial integrity, therefore, continued in the form of upstream versus first user or historic or acquired rights argument. The fact that the former U.S attorney general Harmon gave his opinion upholding the theory of absolute territorial sovereignty, through which the theory is best known, in response to Mexico's argument which was mainly based on the doctrine of prior appropriation indicated that the claims to the protection of prior uses and that of territorial sovereignty has ever since been major areas of conflict.[3]

Prior appropriation also known as restrictive theory of territorial sovereignty and integrity is one of the theories of international water allocation most commonly advanced by downstream states. This theory does not, ipso facto, favor the upstream or downstream states, as it accords priority of rights according to the commencement of uses. In the context of international watercourse, however, it is advantageous to down stream states, since they are often the earliest in utilizing their water resources. Due to this, the doctrine is invoked by some downstream states side by side with that of absolute territorial integrity[4]. The later claim, however, is also directed against prior users other than lower most riparian states.

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[3] Protesting the diversion of the Rio Grandé in the United States to the detriment of existing uses in Mexico, the later contended that : "... the principles of international law would form a sufficient basis for the right of the Mexican inhabitants of the bank of the Rio Grande. Their claim to the use of the water of that river is incontestable, being prior to that of the inhabitants of Colorado by hundreds of years, and according to the principles of civil law, a prior claim takes precedence in case of dispute". Quoted in william L. Griffin, the use of waters of International Drainage Basins under customary International law, 53 Am.J,Int'l L. 50,50 (1959).

[4] See Charles B. Bourne, International water law, selected writings of professor charles B.Bourne, Editor's forward, in Wouters eds., Kluwer Law international, P.7. (1997) ScottL. Cunningham, Do Brothers Divide Shares Forever?

Prior appropriation differs from absolute territorial integrity in that it may not be claimed unless the water is actually put to a beneficial use and as a result is not necessarily advantageous to lower most riparian states.

Since states usually point to the doctrine of prior appropriation to claim that shared watercourses ought not to be reduced below the level necessary to support preexisting uses, the claim based on this doctrine, in cases where a downstream state utilizes a very high proportion of the total water resources of a basin, is in effect the same with the claim of an absolute territorial integrity of an international river.[5] On the other hand where the state using the water is not the lower most riparian state, the claim to the protection of prior uses corresponds, as against the lower most riparian state or states, with that of the claim to absolute territorial sovereignty.[6] Therefore, the doctrine of prior appropriation practically allows a nation, though to a slightly diminished extent, to retain claims of absolute territorial integrity and sovereignty.[7] Nevertheless it was sometimes considered as constituting the theory of limited territorial sovereignty even in its stringiest aspects[8]

The doctrine of prior appropriation was exerting paramount influence on the question of diverting the water of international watercourses prior to the rise of

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Obstacles To The effective use of intemationalaw In the Euphrates River Basin Water Issues, 21U.J.Int'l econ. L. 131, 156-157(2000).

[5]For this reason, such claims are some times referred as the claim for absolute rigbt to the integrity of an international watercourse on the basis of priority of use. See Joseph W. Dellapena, Rivers as legal strucftres: The Examples of the Jordan and the Nile, 36 Nat. Resources J. 217,247 (1996).

[6] See "water and conflict in Asia?", Report prepared by Asia pacific for security studies, Honolulu, Hawaii, sept.17, 1999.

[7]See Shashank Upadhye, the international water course: An Exploitable Resource For the Developing Nation Under International law?, 8 Cardozo J. Int'l & comp. L. 61, 71-72 (2000); Caroline Spiegel, International water law: the contribution of western United states water law to the united nations convention on the law of the Non Navigable uses of international water courses, 15 Duke J. of comp. and Int'l L. 333, p. 336 (2005); Aaron T. Wolf, 23 National Resources Forum 1,5 (1999).

[8] See year. Book of International law commission, 1986 Vol.II(l), Document A/CN. 4/999 and Add 1 and 2, p.110-lll, para. 92. see also the survey of authorities in support of the principle of prior consent, which is taken as having almost the same meaning with the doctrine of prior appropriation, in Wiiliam W. Van Alstyne, 48 Cal. L. Rev. 596 (1960).

the principle of equitable utilization.[9] The difficulties presented by the doctrine of prior appropriation, in its different manifestations, on the settlement of controversies over allocation issues concerning over appropriated or fully appropriated watercourses prompted the emergence of the principle of equitable utilization[10]. Unlike the doctrine of prior appropriation which settles allocation issues by giving complete priority to existing uses, equitable utilization considers past uses and new demands arising from changing circumstances. Since this may require adjustments of existing allocations, the issue of protection to prior uses still stands as one of the major considerations of international water law.

2.2. Equitable Utilization

2.2.1. General Considerations

With the recognition of the inadequacy of the early theories, equitable utilization is accepted as the only theory that can take in to account the wide range of factors that may come in to play with regard to international watercourses through out the world. Early formulations of the doctrine are to be found in the practices of national courts in connection with the adjudication of disputes with in federal states such as Germany, United States and Italy.[11] In the context of Transboundary waters, equitable utilization arouse as part of or in conformity with the principle of limited territorial sovereignty, precluding the claim of the upstream states for a preemptive use of an international watercourse and the exercise of a veto by downstream states over any upstream diversion and use of watercourse.

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[9] See Godana, supra note 2, at 51

[10] Lucius Caflish, "Regulation of the uses of International watercourses", In salman M.A. Chazourness L.B (eds.), International watercourse Enhancing cooperation and managing conflict. World Bank Technical paper No. 414, the World Bank, Washington DC, 1998.p. 13.

[11] Stephen McCaffrey. The UN convention on the law of the non Navigational uses of international watercourses, Prospects and pitfalls, in Salman and Chzourness Supra note 10, at 20

Modern international law starts with the recognition of the right of all states sharing an international watercourse to an equitable share of the waters. General practice of states in respect of the non navigational uses of international watercourses, including treaty provisions, the 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 resolving disputes between or among states belonging to the same federal state, evidence that there is overwhelming support for the doctrine of equitable utilization as a general guiding principle of law for the non navigational uses of international watercourses.[12]

2.2.2 Equitable Utilization and Equal Rights

At the core of the principle of equitable allocation of shared resources is found the idea that each state is entitled to a fair share of common resource because each state has an equal right to develop the available resource[13]. In the case of Connecticut V the Massachusetts[14], US Supreme Court pointed out that settlement of water disputes on the basis of equality of right should not be rendered to imply that the waters of an international watercourse must be equally apportioned among the states through which it flows. But rather it has to be taken to mean "that the principles of right and equity shall be applied having regard to the equal level or plane on which all the states stand, in point of power and right", under the constitutional system[15].

This principle, which is equally applicable on international plane, emanates from the basic principle of sovereign equality of states since the principle of

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[12] See the discussion of Stephen Mc Caffrey in his 2nd report, year book of International law commission, 1986, Vol. II, A/CN. 41399 and Add. I and 2, para 75-168.

[13] Jarome Lipper, "Equitable Utilization; in Garreston, Hayton and Olmstead. OP.cit 15-85, P.44(1967); year book of international law commission, Vol. 1(1984), A/CN 4/SR. 185.5, para.27; Id. (1994) Vol.II (2), A!CN4/L. 493 and Addl(and Add. 1/con. I and 2), para.8.

[14] Connecticut V. Massachussets, 282 US 5660, at 670-71 (1931). quoted in Stephen MC Caffrey, the law of international watercourse non navigational uses, P331 (2001)

[15] Id.

sovereignty does not imply that a state has an absolute right to dispose of the water, but rather an obligation to recognize the equal sovereignties of the other jurisdictions through which the water flows. Thus, the notion of equality of right of all riparian states is based on the assumption that a state invoking the doctrine of territorial sovereignty and territorial integrity with regard to the exploitation of shared watercourses, must respect the equal claim by the other coriparian states based on the same doctrine. Explaining this idea Oppenheim stated:

> *Territorial supremacy does not give a boundless liberty of action. Thus by customary international law a state is, in spite of its Territorial supremacy, not allowed to alter the natural conditions of its own territory to the disadvantage of the natural conditions of a territory of a neighboring state for instance, to stop or divert the flow of a river which runs from its own into a neighboring territory*[16].

Since rules for the allocation of water are required to solve problems arising in situations where the available water is not enough to satisfy the just needs of all co- riparian states, equality of right is considered from the point of view of not only 'needs' but mainly conflicting needs[17].

The recognition of the equal rights of states, which is taken to mean that all states riparian to an international watercourse are on equal footing with each other regarding their right to the utilization of the water concerned, does not by itself, give a remedy to the problem of apportioning the uses and benefits of transboundary water[18]. However, it is an essential element since it has an import that no state has an inherent superior claim to the use of a watercourse and that none of the states riparian to an international watercourse may deprive the others of their right to the use of the water by appropriating the

[16] Oppenheim, P. 175 as quoted in Mc Caffrey, Id.
[17] Yearbook of international law Commission, 1982, Vol.II (1), A/CN. 4/348 and corr I, para 41. '
[18] See Stephen McCaffrey, supra note 14,

whole or any portion of such waters, irrespective of the fact that they are prior or subsequent to the use of the other state[19].

The recognition of the equality of right which means equal right to an equitable share of the uses and benefits of an international watercourse still leaves unanswered the challenge of reconciling the equal rights of riparian states i.e. the determination of each state's equitable share[20].

2.2.3 General Guiding Principles

Even though equitable utilization is accepted as the principles which chiefly govern the apportionment or allocation of water between states sharing an international watercourse, the precise formulation of the concept has not become possible. This creates difficulty of formulating general principles on the subject. Such difficulty arises from the lack of mechanical formulas capable of application to all rivers and which in every case when applied to a specific situation, will provide the correct solution to the allocation of the water between the co-riparian states and a judicious resolution of conflicts among various uses of waters[21]. The absence of pricise formulas has in turn made it difficult to formulate general principles on the subject. However such difficulty does not extend to the formulation of general guiding principles[22]. There are guiding principles which are good enough as a basis for negotiations by riparian states concerning the determination of whether their respective uses of the watercourse were equitable.

The guiding principles of equitable utilization are the specific contents of the principle of equitable utilization which shows how the principle is to be applied in practice. These include the principle of prior appropriation and all the relevant factors in light of which what amounts to reasonable and equitable

[19] Id
[20] Id
[21] Godana, supra note 2, at 56 (1985).
[22] Lipper, supra note 13, at 41

utilization is determined[23]. It is important that these guiding principles be formulated by taking into account the fact that the problems of each watercourse are likely to be unique and that general rules can be valid in so far as they are feasible in particular situation[24].

The international law association's Helsinki Rules, which applies the doctrine of equitable utilization as the basic governing principle contains, under article V list of criteria which may serve as a convenient point of departure for dealing with the specific contents of the principle of equitable utilization[25]. There is no hierarchy to the factors listed under this article which must be taken into account in defining what is 'reasonable and equitable'. The paramount shift brought about by Helsinki rules is that they address the right to beneficial use of water, rather than to water as such. According to article IV of the rules each basin state is entitled to a reasonable and equitable share of water resources for beneficial uses with in its own territory.

Equitable utilization introduced in article 5 of UN convention on the law of non navigational uses of international watercourse, which contains the principle that a state shall use an international watercourse in a manner that is equitable and reasonable vis-à-vis other states sharing the water course, is of more current significance.[26] The basic rule of equitable utilization expressed in the first sentence of paragraph (1) which is provided in terms of obligation also expresses the correlative right implying that "watercourse state has both the right to utilize an international watercourse in an equitable and reasonable manner and the obligation not to exceed its right to equitable utilization"[27]. The second sentence of this paragraph indicates that the particular objective to be

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[23] Id. P.47
[24] Id p.42 ,
[25] The 1966 Helsinki Rules on the uses of the water of International Rivers. Aug.1966, art-V, 52 ILM 484 (1967).
[26] United nations (UN) convention on the law of the Non- Navigational uses of International watercourses, may21, 1997,36 ILM700.
[27] Year book of International Law Commission, 1994, Vol 11(2) ,A/CN,4/L.493 and Add 1 (and Add. 1/corr..l) and 2, p.101 para2

sought by a watercourse state utilizing an international watercourse equitably is the attainment of optimal utilization and benefits which is taken to imply balancing the needs of watercourse states in such a way that brings maximum possible benefits and while minimizing the detriment to each[28].

The second paragraph of this article puts on watercourse states an obligation to participate in the development and protection of an international watercourse in an equitable and reasonable manner which includes both the right to utilize the watercourse and the duty to cooperate in its protection and development. The provision of this paragraph embodies, the concept of equitable participation, which mainly refers to cooperation between watercourse states through their participation in the development of the watercourse which is essential to achieve the objectives of attaining optimal utilization and benefits set out under paragraph1 [29]. The second sentence of this paragraph implies that the right to utilize an international watercourse includes the right to the cooperation of other watercourse states in maintaining an equitable allocation of the uses and benefits of the watercourse[30]. A non exhaustive list of factors, which are similar to those innumerated in Helsinki rules, are provided under article 6 of the convention in order to facilitate the application of the principle for allocation or reallocation of the uses of international water which is to be achieved by balancing of all factors relevant to each particular case[31]. This rule becomes necessary because the proper application of the rule provided under article 5 which is general and flexible requires taking in to account concrete

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[28] Id.Para.3.

[29] Id Para 5

[30] Id. Para 6

[31] Equitable and Reasonable utilization of International watercourse with in the meaning of article 5 of the convention requires taking into account all the relevant factors and circumstances which includes: a. Geographic, hydrographic, climatic, ecological and other factors of a natural character; b. The social and economic needs of the watercourse states concerned; c. The population dependent on the watercourse in each watercourse state; d. The effect of the use or uses of the watercourse in one watercourse state; e. Existing and potential uses of the watercourse; f. conservation, protection, development and economy of use of the water resources of the watercourse and the costs of measures taken to that effect; g, The availability of alternatives, of comparable value, to a particular planned or existing use.

factors pertaining to the international watercourse in question, as well as the needs and uses of the watercourse states concerned.[32]

The fact that the list of factors in article 6 is not exhaustive is implied by the word "including' in the opening paragraph which provides 'taking into account all relevant factors and circumstances, including.' Regarding the necessity of making the list of factors non exhaustive, it is stated in the commission's report that it is otherwise impossible to compile an exhaustive list of factors that may be relevant to the wide variety of international watercourses and the human needs in specific cases, since "some of the factors listed may be relevant in a particular cases while others may not be, and still other factors may be relevant which are not contained in the list.[33] However, no clue is given as to what the other possible factors could be. In addition no standard is indicated to determine the admissibility of any circumstance or factor forwarded for consideration, which may create unreasonable delay in negotiations.

Concerning the impact of this non exhaustiveness of the list of factors, Beaumont stated:

> *The key word ... 'including".. Implies that the list provided subsequently in 6.1 is not in itself exhaustive. However, no help is given as to what other "relevant factors and circumstances" might be. This is one of the strengths of a framework treaty in so far as it is always possible for a country to enlarge the range of factors to be considered. However, at the same time it is a major weakness as by being so open ended it does permit an almost endless array of items for debate to be introduced by a country which is not keen to reach agreement about the use of transboundary waters*[34]

The provisions of the UN convention also does not provide for guidelines for prioritizing the factors enumerated under article 6 which means that in determining what shares are equitable, no single factor or combination of

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[32] Year Book of International Law commission, supra note 27, p.101, para.1

[33] Id, para. 3

[34] Peter Beaumont, the 1997 UN convention on the law of non navigational uses of international watercourses its strengths and weaknesses from a water management perspective and the need for new workable guidelines, 482(2000)

factors may take precedence over or trump any other factor or factors, though it is suggested in the third paragraph of article 6 that "the weight to be given to each factor is to be determined by its importance" considering it together with all other relevant factors. This, however, still leaves unanswered the question how the importance of a factor vis-ã-vis other factors is to be assessed which makes the application of this article almost impossible in a situation where dispute is likely[35]. Article 10 of the convention provides that 'in the absence of agreement or custom to the contrary, no use ... enjoys inherent priority over other uses...'.

From the dynamic character of the factors enumerated for consideration, which are susceptible to continuous change giving rise to new demands for water, it can easily be deduced that they are not static factors, since an existing water allocation may turn out to be inequitable with changing conditions. Frequent adjustments of shares may be required since relative demands for water change constantly with the economic and social development in each country. The principle of equitable and reasonable use, therefore, imply that all allocations are subject to future adjustment and reallocations must be made whenever an allocation becomes inequitable or unreasonable.[36]

2.3 The Status of the Doctrine of Prior Appropriation under International Law

The issue of the extent of protection that should be given to existing uses is central to any conflict over the allocation of transboundary River. There are two extreme positions on the question of the extent that such prior uses are protected by international law i.e. the view that established or historic uses are entitled to absolute protection and the opposing view that they enjoy no

[35] *Id*

[36] Eyal Benevensti, Collective Action in the Utilization of shared freshwater: The challenges of International Water resources Law, 90 Am. J. Int' L. 384, 410-411(1996).

protection at all. Those who take absolutist position for the protection of existing uses claim that they are entitled to absolute protection because they form vested interests[37]. John Laylin, asserting this principle before the inter American Bar Association in 1957 stated:

> *As a rule, the protection of uses lawful when come into existence, so long as they remain beneficial, has been treated as an absolute first charge upon the water.*
>
> . . .
>
> *in less favored regions, not only are existing uses protected , but as between existing uses those first established ordinarily enjoy a priority over uses established later .*[38]

Vattel has also taken similar position as early as 1858, equating actual appropriation of shared watercourse as a sovereign act which is sufficient to establish, an enduring, legitimate claim:

> *The nation that first established her dominion on one of the banks of the river is considered as being the first possessor of all that part of the river which bounds her territory. If such nation has made any use of the river, as, for navigating or fishing, it is presumed with greatest certainty that she has resolved to appropriate the river to her own use.*[39]

On the other hand, those who reject the doctrine of prior appropriation hold that it is "wasteful and is not conductive to optimum economic development of the river and drainage basin"[40]. They also claim that "since lower riparian use develop first, the application of the doctrine of prior appropriation would have inhibiting effect on the development of the upper regions which would result waste of valuable water"[41]

These two extreme positions are respectively, the theoretical counterparts of absolute territorial integrity and absolute territorial sovereignty[42]. Falling

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[37] See Mohammed, S. Helal, Sharing Blue Gold: the 1997 UN. Convention on the law of the Non- Navigational uses of International Watercourse. Ten years on, 18 Colo. J. Int'l Envtl. L. & Pol'y 337, 371- 372 (2007).

[38] Inter American Bar Association conferences, Principles of law, governing use of international rivers,63,1952) as quoted in Willian W, Van Alstyne, International law and intestate river disputes, 48 cal. L. Rev. 596,618(1960).

[39] " Vattel. The law of Nations 120 (1855) as quoted in Van Alstyne, Id, at 619

[40] See Lipper, supra note 13, at 50-51

[41] Id, at 82

[42] Mccaffrey, supra note 14, at 337

between these two extreme positions is found the view that takes prior appropriation as an important factor that has to be considered in the allocation of water shares, but denounce its dogmatic application as obstruction of progress[43].The two extreme positions just like their theoretical counterparts have not been the basis of the resolution of actual controversies.[44]

Though it is generally agreed that the question of protection to existing uses are not to be disregarded. The acceptance, however, does not extend to placing too much emphasis on this right that would only serve to accord a more advanced state a permanent advantage condemning the later developing neighboring states to undesirable hardships[45]. Explaining the erroneousness of the idea that established or historic uses are entitled to absolute protection, in the context of transboundary waters, Mc Caffrey stated that:

> *The idea is unsound as a matter of both policy and law, it encourages 'race to the river' and rewards the 'winner' with absolute protection, regardless of the merits of either its use or the potential uses of other states, and regardless of the optimal utilization of the drainage basin as a whole. It condemns later developing states typically those in the upstream to permanent underdevelopment almost entirely because of the largely haphazard way in which political boundaries have carved up drainage basin[46].*

Though many of the treaties make mention of protection of existing uses, they do not suggest that there is a rule of international law for the absolute protection of such uses, as they are found to be lacking uniformity among

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[43] Godana, supra note 2, at 60

[44] Mc Caffrey, supra note 14, at 337

[45] R.K. batstone, the utilization of the Nile water, 8 International & comp. L. Quarterly 523, 542 (1959); Upadhye commented that: "the self evident problem with this theory is that it rewards the first user to the detriment of the later user. If the first user is a developed country and the later user is a less developed country, then the less developed country can not use the watercourse to further develop. The theory also fails to consider whether the first user conducted a thorough plan for water allocation or pollution control. .This is different from the reasonable and equitable use principle discussed below, which mandates that certain factors be considered, because there are no obligatory factors used in the consideration. Shashank Upadhye, The international watercourse: An exploitable resource for the developing nation under international law? 8 Cardozo J. International & Comp. L. 61, at 72(2000).

[46] See Mc Caffrey, supra note 14, at 338; Godana supra note 12, at 52

them[47].Whatever may be the degree of differences existing among treaty practices, with regard to the extent of protection accorded to prior appropriation, it can be concluded that "existing uses have at least a qualified right of protection and preservation" or that "the treaties fail to establish that such uses gain absolute protection as vested rights".[48]

The judicial decisions concerning the status of prior appropriation consist mostly of the United States Supreme Court decisions in interstate water apportionment cases. As discussed earlier the court has in its decisions declared that existing use is not entitled to absolute protection. In the case of Kansas V. Colorado, which is the US supreme Court's, first equitable apportionment decision, the court, rejecting the claim of Kansas which is the lower riparian and prior user, held that the later was not entitled to relief against Colorado for it's diversions of water from the Arkansas river[49]. In Nebraska V. Wyoming the court refusing to sanction the strict application of prior appropriation, pointed out that there are other relevant factors to be considered[50]. In the case of Colorado V. New Mexico, the court rejected the two extreme views concerning the right to the utilization of water courses: namely the claim that priority of use is entitled to absolute protection and the argument that the mere fact that the watercourse originates in a particular state automatically entitles such state to a share of the water[51]. The decision illustrated the principle of equitable utilization as entitling each state to an equal right to an equitable portion of the uses and benefits of a shared

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[47] Godana, supra note 2; see also Mc Caffrey, supra note 14; some of these treaties adopt prior appropriation as an absolute. The treaty concluded, in Dec. 1928, between Australia an Czechoslovakia republic, which stated that new rights "in no way prejudice rights already acquired" and the 1929 agreement reached between 'Great Britain and Egypt protecting Egypt's natural and historic right" in the waters of the Nile can be mentioned as examples. Among the treaties ,Which adopt a more flexible approach towards the protection and preservation of existing uses are found the Geneva Convention of 1926 relating to the development of hydro electric power and the united States Canada boundary waters treaty of 1909. the later are in support of the proposition that prior appropriation creates only a qualified right in the user to the protection and preservation of the use, but such right can not preclude future development of the watercourse merely because an existing use may be prejudiced. See Lipper, supra note 13, at 52; Godana, supra note 2, at 60; AT. Wolf, Criteria for equitable apportionment: The heart of international water conflict, natural resources forum, Vol.23, p. 13 (1999).

[48] See Godana, Id

[49] Kansas V. Colorado, 206 US 46(1907).

[50] Nebraska V. Wyoming, 325 US 589 (1945).

[51] Colorado V. New Mexico, 459 US 176, (1982).

between these two extreme positions is found the view that takes prior appropriation as an important factor that has to be considered in the allocation of water shares, but denounce its dogmatic application as obstruction of progress[43].The two extreme positions just like their theoretical counterparts have not been the basis of the resolution of actual controversies.[44]

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[46] See Mc Caffrey, supra note 14, at 338; Godana supra note 12, at 52

watercourse, irrespective of where the water course rises or which states use was prior in time.

Apart from the united states supreme court decisions the cases which has been referred as dealing with prior appropriation is the Helmand River Delta commission and the Rao commission in dispute between Afghanistan and Iran over the Helmand River for irrigation, the commission, composed of members from united states, Chile and Canada, requested to make findings and submit recommendations concluded that:

> *"The traditional beneficial uses which have been established in seistan and chakansur . . . should be recognized. An agreement should be reached that in normal years monthly requirements now established will not be depleted by new upstream uses.*[52]

The rule formulated by the Rao commission, a decade earlier to the Halmond rule, is as fellows:

> *"in the general interests of the entire community inhabiting dry, arid territories, priority may usually have to be given to an earlier irrigation project over a later one-priority of appropriation gives superiority of right*[53].

The rule formulated by the Rao commission, though limited to arid areas and to one use irrigation, is more general as compared to that of the Halmond commission which specifically dealt with the particular context of the case at hand. The Halmond commissions language reflects that, in particular context of the case, the commission felt that the maintenance of existing uses was essential to the equitable utilization of the waters. The Rao commission language does pronounce the prior appropriation doctrine as an absolute since it shows that its application is dictated by the demands of the particular

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[52] Report of the Helmand River Delta commission, Afghanistan and Iran, Feb., 1951, pars. 208, as quoted in *Lipper, supra note 13, at 52*

[53] Indus (Rao) commission Report, Simla, 1941, par. 1071, as quoted in Lipper Supra note 13, at 52

situation i.e. "the general interests of the entire community" not "any abstract enquiry as to who came first."[54]

The two major instruments in the field also acknowledge the importance of prior appropriations merely as one of the relevant factors in the determination of equitable utilization[55].All the above remarks point to the conclusion that existing uses are not absolutely protected under existing international water law but nor are they without protection at all the extent of which is determined by the application of the principle of equitable and reasonable utilization.

Given that prior or existing uses entitle the appropriator only to qualified protection which is determined by the application of the principle of equitable utilization, the question still remains relating to the weight that will be given to prior or existing uses

What equitable utilization initially aims at is the balancing of the various conflicting uses of the co-riparian states. If this becomes impossible under the circumstances and then an effort will have to be made to effect modifications of one or more uses in order to secure the reconciliation of all. In such cases where the reconciliation of conflicting uses, even with minor modification, is not possible one use may be required to give way for other use or uses. It is thus necessary to determine the respective rights of contending parties by taking in to consideration the multitude of factors.

Some hold that the primary unit with which the principle of equitable utilization will work will be existing uses of watercourse which they consider to

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[54]See Lipper, Id, at 13

[55] International law Association Helsinki Rules on the uses of waters of international rivers, supra note 25, article V (2) (d) ,the 1997 UN convention on the uses of International water courses supra note 26 ,article 6 (1) (e).

be particularly significant and are entitled generally to great weight.[56] In support of this view, it is claimed that this approach promotes efficiency and encourages maximum utilization of natural resources, since it provides incentives for long term planning and investment in water projects[57]. This however becomes fair and efficient when it comes to resolving disputes over the use of water between parties with in a single federal state. In such cases the prior appropriators invest a huge sum of money to build the necessary infrastructures with the assumption that the law of the land will protect their interests, considering that to do so, based on equity and fairness ,is the job of the federal government which assumes the legislative authority. According greater weight to existing uses may serve the above mentioned practical purpose, since it would be beneficial to the economy of the federal state in general, regardless of which state has been utilizing the water. When it comes to the use of international watercourses, where the common interest which makes it less important which area is developed is not found, the appropriate application of the principle of equitable utilization would be, especially where existing allocation is grossly unequal, to give priority to the respect of the legitimate claim of states to the equal right to the benefits of the water without requiring the precedence of existing uses in the reallocation of resources. Any state, as Batstone said, "diverting water to which another state has a legitimate claim and knowing that this second state intends at some future date to make use of this water must be held to act at its peril".[58]

The methodology applied by the supreme court of united states in interstate water disputes in order to make adjustments or accommodations, which are to be arrived at on the basis of equity, gives more weight and priority to the protection of existing uses than international standards such as the

[56] Jonathan M. wenig, water and peace : the past , the present , and the future of the Jordan river water - course : An international law Analysis , 27 N. Y. U . J. Int'l L. & pol . 331 ,350-354 (1995) ; Eyal Benvenist and Haim Gvirtzman , Harnessing International law to determine Isreali - palestinean water rights : the mountain Aquifer, 33 nat . Resources J. 543, 547 -549 (1993)

[57] Id.

[58] See Batstone, Supra note 45, at 343-4

formulations adopted by the 1997 convention which put existing uses merely one of the factors in the determination of equitable utilization[59]. The court's methodology clearly shows that while all relevant factors should be considered, existing uses are accorded higher priority and special consideration[60]. It requires that all possible avenues such as conservation measures be exhausted before existing uses are disturbed or terminated and that the benefits accrued through such utilizations significantly outweigh the harm caused by altering existing uses[61]. Conservation is considered as a factor that might make water available to other state proposing to initiate a new use[62].

The claim that in the determination of equitable utilization of a shared watercourse, priority should be given to existing uses is based on the narrowest definition of equitable utilization as a limitation on "one state's use when it threatens to displace existing uses in another state or to preclude another state from making any use of a transboundary river'[63]. This proposition which gives preference to status quo over redistribution has not got general acceptance by states. This is clearly demonstrated by the UN convention which establish the

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[59]See Mohammed Helal, supra note 37, at 371-378; see also Dan Tarlock, Safeguarding International Rivers Ecosystems in Times of Scarcity, 3U. DenV. Water L.Rev.23 1,241(2000)

[60] In colorado V. New Mexico, the court stated that: 'The equities supporting the protection of existing economies will usually be compelling. The harm that may result from disrupting established uses is typically certain and immediate, whereas the potential benefits from a proposed diversion may be speculative and remote. Under some circumstances, however, the countervailing equities supporting a diversion for future use in one state may justify the detriment to existing uses in another state. In the determination of whether the state proposing the diversion has carried this burden, an importantconsideration is whether the existing uses could offset the diversion by reasonable conservation measures to prevent waste. We conclude therefore that the determination of an equitable apportionment of water of the Vermejo River, the rule of priority is not the sole criterion while the equities supporting the protection of established senior uses are substantial. It is also appropriate to consider additional factors relevant to a just apportionment, such as the conservation measures available to both states and the balance of harm and benefit that might result from the diversion sought by Colorado. Colorado V. New Mexico 459 U.S. 176,187-188 (1982)

[61]Id

[62] The court noted that an apportionment of a new use on a fully appropriated river could result from 'clear evidence that a project is far less efficient than.., other projects" and that it "would not protect an inefficient existing use . . . when reasonable conservation measures [by existing users] can offset the reduction in supply due to diversion." Id. at 190.

[63] James C.McMurray and A. Dan Tarlock, The Law of Later Developing Riparian States: The Case of Afghanistan, 12 N.Y.U.ENH.L.J.711,747(2005)

principle that there is no per se rule that prior uses are protected against future uses[64].

The broader definition of equitable utilization which can accommodate the flexibility of the principle is based on the premise that no state has a unilateral right to divert the entire flow of a transboundary river which means that an upstream state cannot claim the entire flow of a river that originates with in its borders and also downstream states cannot prevent the use of such river by upstream states[65]. This does not bar states which are late in developing their shared watercourses from asserting new uses but does not allow them to claim the entire flow of the watercourse.[66]

Under certain circumstances an existing use may be modified in order to accommodate a new use. This is inherent in the flexible character of the principle of equitable utilization the application of which calls for the consideration of many factors. The possible existence of cases where existing uses may prevail does not mean existing uses are superior in rank than all the other relevant factors. The comparative weight to be accorded to the relevant factors depends on what is just and equitable under the circumstances, 'Since some of them may be more important in certain cases while others may deserve to be accorded greater weight in other cases".[67]

2.3.1 Prior Appropriation and No Harm Rule In Relation to Equitable Utilization

The principle that a state should not cause harm to another state through its activities on an international water course has its foundation on the rule expressed with the maxim "sic utere tuo ut alienum non laedas" (so use your

[64] The convention on the law of Non Navigational uses of international watercourses, supra note 26, 1997, article 6(e) and(f)
[65] McMurray and Tarlock, Supra note 63.
[66] Id
[67] Year book of International Law commission, supra note 27, page 97 para.3.

own as not to harm that of another) and the related theories of abuse of right and good neighborliness, which attempt to reconcile apparently conflicting rights of different states in the same territory or shared resources.[68]

The no-harm rule covers the whole aspects of neighborly relations. The allocation of the utilization of shared watercourse and the protection of their environment are the two aspects for which it is particularly relevant.[69] Concerning its origin Caflish said:

> *No harm rule probably originated from the consideration, as in the case of neighboring owners of real property, that neighboring states may not act as they please on their territories. They are not allowed to use or to tolerate the use of their territory for causing damages to their neighbors. This principle which is linked to the concept of abuse of rights and which originated in the sphere of private law appears to be a 'general Principle of law recognized by civilized nations' which by now has also entered the realm of customary international law.*[70]

The 'no harm rule' has some support in state practice. It is included in a number of treaties as in the form of obligations by each state not to undertake any work or permit to be undertaken any work on a river or other water body that would causes harm to the interests of other states.[71] The secretary general of the united nations had expressed the view that "there has been general recognition of the rule that a state must not permit the use of its territory for purposes injurious to the interests of the other states".[72] In trial smelter case, the arbitral panel applied the "No-harm' rule stating that:

> *"Under the principle 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 ... When the injury is of serious consequences and the injury is established by clear and convincing evidence.*[73]

Concerning activities on international watercourses the rule is closely associated with the claim of downstream states, which are usually the prior

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[68] See McCaffrey, supra note 14, at 351
[69] Caflisch, supra note 10, at 12
[70] *Id*
[71] See Joseph W.Dellapena International Journal of Global Environmental Issues, vol. I, No.5, p. 279 (2001)
[72] quoted in year Book of international law 1982 ,Vol . II (1) , A/cn.4/348 and corr.1 , supra note 17, p. 92, para. 112
[73] The Trail Smelter Arbitration (194) International law Report, Vol. 9,pp. 315 as quoted in Dellapena. Supranote71 , at 279

users of international watercourses, to their right to "established" or "historic" uses or their complaint of pollution damage from uses upstream.[74] The question of the relationship between 'no harm" rule and equitable utilization, in its application to the allocation of water resources, should not be viewed as separate from the question relating to the extent to which prior uses are protected under existing international law.

'No harm' rule has resemblance with the natural flow' theory of riparian rights which corresponds to the theory of absolute territorial integrity[75] and is in fact aimed at the protection of established rights claimed by virtue of the doctrine of prior appropriation. The doctrine of prior appropriation which is based on the premise of 'first in time is first in right" in effect means prior users have priority right to the extent of their use which may not be harmed by uses upstream. It can, therefore, be said that pertaining to the allocation of shared water resources no harm rule stands on the doctrine of prior appropriation as there would be no rights to be harmed unless they are claimed to be established by virtue of the doctrine of prior appropriation and there would be no gage to determine the existence of acts which are contrary to good neighborly relations or abuse of right other than the threat to existing uses.

Rights to existing uses or prior appropriations though undoubtedly relevant, as discussed earlier, for equitable allocation, has never been treated as dispositive under international law. Likewise, no harm rule cannot be applicable to protect existing uses absolutely. Established right or existing uses are protected by the 'no-harm' rule only to the extent that they are recognized under existing international law. In other words, the relevance of 'no harm' rule concerning the determination of allocation of water share cannot in any way be greater than the role of prior appropriations. The strict application of 'no harm' rule just like the doctrine of prior appropriation prohibits any development using the shared watercourse in an upper riparian state to the advantage of lower riparian

[74] See Caflisch, supra note 10, at 12-13
[75]See Dellapena, Supra note 71, at 279

states, which usually are the main users of international watercourses, transforming it into another form of the claim to absolute territorial integrity. [76]

No harm rule as qualified to 'no significant harm' has been applied in western US water law in connection with equitable utilization. The maxim 'sic utere tuo ut alienum non leadas' has been interpreted as not imposing strict prohibition of causing harm to others, lest it would otherwise deprive individuals of the legitimate use of their property.[77]This distinction is also appreciated by the UN convention article 7 which limits the prohibition to harm that is significant.

The 1966 Helsinki Rules contains no principle, concerning water quantity issues, which restricts riparians from causing harm to their co-riparian. The no harm rule has been expounded from the perspective of its application to water quality issues, focusing on activities within one state that result in an adverse " transboundary impact "on the balance of ecological or environmental systems in another water basin state.[78] But 'the degree to which the need of a basin state may be satisfied without causing substantial injury to a co- basin state" is mentioned among the relevant factors to be taken into account in the determination of equitable and reasonable share innumerated under article V. This means the principle of equitable and reasonable utilization should be the guiding rule or the harm a given use may inflict on a watercourse state is an element, but not the decisive element, to be considered for measuring equitable and reasonable utilization. This is done so that any new activity involving the use of a fully exploited watercourse would not be prohibited since it would necessarily harm existing uses.[79]

The question of reconciling the claim of an upstream state which has not developed its shared water resources to use such resources on the one hand

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[76] Id.
[77] McCaffrey, supra note 14, at 351
[78] "Transboundary impact" is defined as any significant adverse effect on the environment resulting from a change in the conditions of transboundry water, physical origin of which is situated wholly or in part with in an area under the jurisdication of party. Helsinki Rules supranote25, article 1 paragraph 2.
[79] Caflisch, supra note 10, at 8-9.

and states which have made extensive use of the water resources for a very long time on the other hand is the gist of the controversy over article7 of the UN convention and its relationship with article5 which deals with equitable and reasonable utilization . The controversy relates to the issue whether equitable utilization obligation of article 5 should prevail over the 'no-harm' obligation of article 7 in the event they come into conflict.

The first draft of International law commission (1991) incorporated both equitable utilization and 'no-harm' rules which however subordinates the rule of equitable utilization to the 'no harm' rule suggesting that a state may not cause appreciable harm even in utilizing its equitable share.[80]

The 1994 draft reduces the provision in the original draft which is apparently absolute command to prevent appreciable harm to an obligation to use "due diligence" to avoid significant harm.[81] This provision of the draft has further been revised in the final version replacing the phrase "exercise due diligence" with "take all appropriate measures" and emphasizing the prevention of harm.[82]

In paragraph (1) it states that watercourse states shall take all appropriate measures to prevent the causing of significant harm to other watercourse states. According to paragraph (2), in such a situation where significant harm

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[80] Arcle 5 "Equitable and reasonable utilization and participation" (1)watercourse states 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 utilization thereof and benefits there from consistent with adequate protection in the watercourse. (2) Watercourse states shall participate in the use, development and protection of an international watercourse in an equitable and reasonable manner, such participation includes both the right to utilize the watercourse and the duty to cooperate in the protection and development thereof, as provided in the present articles."
Article 7 "Obligation not to cause appreciable harm" watercourse states shall utilize an international watercourse in such a way as not to cause appreciable ham to other watercourse states.

[81] " Article 7 Obligation not to cause significant harm (1) Watercourse states shall exercise due diligence to utilize all international water course in such a way as not to cause significant harm s)ll to other watercourse states. (2) Where, despite the exercise of due diligence significant harm is caused to another watercourse state, the state whose use cause the harm shall, in the absence of agreement to such use, consult with the state suffering such harm over; (a) the extent to which such use has proved equitable and reasonable taking into account the factors listed in article 6. (b) The question of ad hoc adjustments to its utilization, designed to eliminate or mitigate any such harm caused, and, where appropriate, the question of compensation.'

[82] The convention on the law of non navigational uses of international water courses, supra note26 ,article 7.

was inflicted by one watercourse state on another or on other watercourse states, the state causing it shall, in the absence of agreement, "take all appropriate measures, having due regard for the provisions of article5 and 6, in consultation with the affected state, to eliminate or mitigate such harm and, where appropriate, to discuss the question of compensation".

The provision of this paragraph suggests that equitable and reasonable utilization" may result in appreciable harm to another state. The expression 'appropriate measure' in the first paragraph shows, beyond any doubt that the obligation not to cause significant harm is not an absolute obligation. It only requires the state concerned to exercise due diligence or best effort under the circumstances.

Regarding the scope and content of the obligation to exercise due diligence which is similarly applicable to the obligation to take appropriate measures, international law commission noted in its commentary that:

> *The obligation of due diligence contained in article 7 sets the threshold for lawful state activity. It is not intended to guarantee that in utilizing an international watercourse significant harm would not occur. It is an obligation of conduct, not an obligation of result. What the obligation entails is that a watercourse state whose use causes significant harm can be deemed to have breached its obligation to exercise due diligence so as not to cause significant harm only when it has intentionally or negligently caused the event which had to be prevented or has intentionally or negligently not prevented others in its territory from causing that event or has abstained from abating it.* [83]

The expression "having due regard for" was considered, by some delegations of lower riparian states at the UN negotiations, to be neutral to the extent of not suggesting a subordination of the no-harm rule to the principle of equitable and reasonable utilization.[84] While those of the upper riparian states claim that it was strong enough to suggest the primacy of equitable utilization over the 'no-harm' rule.[85]

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[83] Year Book of International law Supra note 27,p.103, para 4.
[84] See Caflisch, supra note 10,at 15
[85] *Id*

The acknowledgement under article 7 paragraph (2), that harms may be caused without resulting the responsibility of the state whose use cause it and the mitigating clause having due regard to the provisions of article 5 and 6, which indicates that the state whose use cause the harm, in taking measures to eliminate or mitigate it, is required to aim at achieving a result that is equitable and reasonable in the circumstances, support the conclusion that 'no harm rule would not take precedence over equitable utilization in the event the two come in conflict.[86]

Article 10 of the convention also support the proposition that 'no harm' rule does not have primacy over equitable utilization which provides that any conflict arising over the use of an international watercourse is to be resolved "with reference to article 5 to 7". According to the provision of this article, such conflicts are not to be resolved by solely applying the no harm' rule, "But rather through reference to the 'package of articles', setting forth the principles of both equitable utilization and 'no harm' rule". [87]It can therefore be concluded that the 1997 UN convention also treat equitable utilization as the guiding principle and any harm is considered as having subsidiary role in the process of arriving at equitable allocation which means that the prohibition relates not to causing significant harm per se, but rather the infliction of illegal harm which infringes on the ability of co-riparian states to enjoy their legal right to the reasonable and equitable share of an international watercourse. This suggests that harm would not constitute a violation of international law as long as it is caused in the endeavor to achieve equitable and reasonable utilization of an international watercourse.

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[86] Mc Caffrey, supra note 6, at 308; the primacy of equitable utilization over the obligation to prevent harm is made more explicit in article 7 para. (2) where the obligation to 'take appropriate measure', as well as the obligation to discuss compensation, are to be made with "due regard to the provisions of article 5 and 6" which provides for the principle of equitable utilization. See dellapena, supra note 65, at 285.

[87] McCaffrey, supra note 14 at, 308

CHAPTER THREE

THE DOCTRINE OF PRIOR APPROPRIATION AS APPLIED IN THE LEGAL REGIME OF THE NILE BASIN

3.1 Introduction

Nile is a typical instance of an "exotic river" receiving no inflows of tributary water and negligible rainfall for the last 3, 000 kms, steadily losing water, as it crosses the Sahara Desert to the Mediterranean sea.[1] Nearly all the water is derived from rainfall coming from Ethiopian plateau and mountainous hinterland of the great lakes, while the remainder is arid or semi arid regions with minimal water supplies and very large evaporation losses.[2]

The Nile basin has experienced a long period of conflict spanning the ancient Egyptian civilizations, the colonial reign, and continuing to the modern day. The Egyptians who were always concerned that the Nile water may stop reaching them have tried to bring the entire Nile Valley under their rule at numerous instances.[3] The recent declaration by Anuar Sadat that "the only matter that could take Egypt to war is water" suggests that Nile is still the potential source of conflict in the basin.[4]

Colonial history and the strategic concerns of colonial powers have to a significant degree conditioned the political context in the Nile basin. As a colonial protector British had undertook successive initiatives to ensure the uninterrupted flow of the Nile waters to Egypt. After gaining effective control of

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[1] Joseph W. Dellapenna, Rivers as legal structures: the examples of the Jordan and the Nile, 36 Nat. Resources J. 217,238-239(1996).

[2] Dahilon Yassin Mohamoda, Nile Basin Cooperation: A Review of the Litrature, current African Issues No.26, p.7(2003).

[3] See M. EL-Fadel, V. EL— Sayegh, K.EL-Fadel, and D.Khortobthy, The Nile River Basin: A case study in surface water conflict resolution, J. Nat. Resource. Life Sci. Educ. Volume 32, 107 108(2003)

[4] Kristin Wiebe, The Nile river potential for conflict and cooperation in the face of water degradation, 41Nat. Resources J. 731, 733 (2001) see also Niveen Tadros, shrinking water resources: The National security issue of this century, 17 NW. J. Int'l L & Bus. 1091, 1091 (1996-97).

Egypt in 1882, establishing Anglo Egyptian condominium in 1899 and securing the head waters in Kenya and Uganda, the British sought to negotiate treaties with other powers in the region in order to ensure that other states would not change the flow of the Nile".[5]

Realizing the central importance of flow from the Ethiopian highlands to overall Nile water flow, Britain concluded a protocol with the Italian colonialists in 1891 for demarcation of their respective influence in east Africa which included a provision precluding the building of any structures that would impede the flow of the Atbara river in to the Nile. Article 3 of the protocol established that the "government of Italy undertakes not to construct on the Atbara any irrigation or other works which might effectively modify its flow in to the Nile."[6]

In 1902 Britain, acting for Egypt and the Sudan, signed an agreement with Ethiopia concerning the establishment of the boundary between Ethiopia and the Sudan. Under this treaty Ethiopia agreed to seek the consent of Britain prior to beginning any work on the Blue Nile, Lake Tana, or Sobat, that would arrest their flow with out an accord with the then Britain government.[7] Ethiopia Later repudiated the Anglo-Ethiopian agreement of 1902. In Aide Memoir of September 1957, the Ethiopian government asserted that it "has the right and obligation to exploit it's water resources for the benefit of present and future generations of its citizens."[8]

In the December13, 1906 agreement signed to define the interests of Britain, Italy and France in Ethiopia, Italy and France acknowledged the principle of non interference with the flow of the Atbara, Blue Nile, and Sobat Rivers.[9] They agreed to safeguard the benefit of Great Britain and Egypt in the Ethiopia's Nile

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[5] See Christina M. Carrol, past And Future legal frame work of the Nile river Basin, 12 Geo. Intl. Envtl L. Rev. 269, 276 (1999)

[6] quoted in carrol , Id .

[7] Noted in Kefyalew Mekonnen, A New Basis for a viable Nile River Water Alloctaion Agreement, submitted to the 5th Nile 2002 conference Addis Ababa Ethiopia

[8] *Id*

[9] Id, at 4

basin by protecting the regulation of the Nile waters without prejudice to Italian interests.

This treaty denied absolute sovereignty of Ethiopia over its water resource which resulted its immediate rejection by the then Ethiopian government by a notification which indicates that "no country had the right to stop it from using its own water resource".[10]

In may 1906 Britain signed an agreement with the independent state of Congo which was then controlled by Belgium on colonial boundary of the Congo Between Britain and Belgium.[11] The government of the independent state of Congo agreed not to change the flow of the Semliki and Isango Rivers in to Lake Albert without the consent of Britain and the Sudan.[12]

After securing the agreement of states who are in control of the headwaters that they would do noting on the Nile without British consent, the later undertook to extend irrigation in Sudan. When it became apparent that with proper irrigation the Gezira triangle, a strip of land between the Blue and White Nile, could be profitably used for cotton Growing.[13] Plans were made for the construction of storage dams at sennar in Sudan, coupled with the Aswan Dam (Jebel Awlia) on the white Nile.[14] The construction of the Sennar Dam for the irrigation of the Gezira triangle which was awaiting basic infrastructure developments began soon after the fulfillment of this condition in 1931[15] However, the execution of the project was suspended by the outbreak of First World War.[16]

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[10] Id, at 3
[11] Noted in Caroll, supra note 5 at 277
[12] Id
[13] Boyana Adhi Godana, Africa's shared Resources, legal and institutional Aspects of the Nile, Niger and Senegal river systems, 109(1985), see also Ludwik A. Teclaff, The river Basin in history and law, 161(1967).
[14] Id
[15] Id
[16] Id

Strong opposition arose in Egypt to the proposed sennar Dam appropriation of Water in the Sudan after the war which led to the appointment of the Nile Project commission of 1920.[17] The commission approved the plans for the Gezira and the Jebel Awlia projects.[18] As an assurance for the safeguard of Egypt's needs the British high commissioner in Cairo, Lord Allenby, declared an undertaking, in 1920, that the use of irrigation water in the Gezina scheme would not exceed 300,000 feddans.[19] However, this didn't calm the Egyptian apprehensions which was exasperated by the political unrest caused by their contention that the Sudan should be an integral part of Egypt.[20]

In 1924, the Sudanese governor general, Sir Lee Stack, was murdered, while he was in Cairo which was alleged to be committed by the Egyptian nationalists demanding for the incorporation of Sudan into Egypt. The immediate response of the British government was a threat to increase the Sudanese irrigation to an unlimited extent as need may arise, in the ultimatum presented by Lord Allenby, to Egyptian prime minister Ziwar Pasha.[21]

This ultimatum, which was later recanted by the then British foreign secretary.[22] Austin chamberlain, alarmed Egypt which consented to the setting up of an enquiry committee, the Nile commission of 1925, whose report became the basis of the 1929 agreement.[23] The exchange of notes stabilized the

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[17] Id, at 110-111
[18] Id, at 111: Teclaff, supra notes 13
[19] Godana, Supra note 13 at 113
[20] Id, at 113-114
[21] The British ultimatum to Egypt contains the following clause: "His majesty's Government therefore require Egyptian government shall . . . Notify the competent department that the Sudan government will increase the area to be irrigated in the Gezira from 300, 000 feddans to an unlimited figure as need may arise" noted in Godana, supera note 13, at 115
[22] In a statement made in the House of commons on 15 December 1924, Austen chamberlain, the then British foreign secretary, declared: ".....the intention ... to starve Egypt into submission by thirst .... Never entered the mind of Lord Allenby nor the minds of his Majesty's ministers at home ... If we have a friendly Egyptian Government to deal with, who, on their side are loyal to the conditions on which our cooperation is based, we shall envite them to join us in an enquiry as to what water is available for the Sudan after making full allowance for Egypt, and we shall propose to them that the chairman of that commission, on which Egypt and Sudan are respectively represented, shall be drawn from an entirely neutral sources" noted in Berber, river in international law, 95 (1959).
[23] See Godana, supra note 3, at 116

deteriorated political condition for which Britain was willing to pay the price of recognizing the historic rights of Egypt to the waters of the Nile. The Bilateral agreement divided the Nile's water between the two most downstream countries without consulting any of the other concerned parties. Egypt gained overwhelming water rights in this agreement to which it was allocated 48, 000 billion m^3/year and a mere 4 billion m^3/year which approximately is 5% of the river flow to Sudan.

Egypt acknowledged that it was willing to allocate more water for Sudanese development, but only in so far as it did not "infringe Egypt's natural and historical rights in the waters of the Nile and its requirements of agricultural extension"[24] Prior to this agreement Egypt had not recognized any right of Sudan to waters of the Nile.

3.2. The Nile Water Agreements of 1929 and 1959

The 1929 agreement like the other treaties discussed earlier is a product of the colonial period which, however, retains significance for the current legal regime of the basin as it was the starting point of the 1959 agreement. The agreement was formed with the exchange of notes between Great Britain and Egypt in regard to the use of the waters of the river Nile for irrigation purposes. It grew out of the proposal and principles recommended by the 1925 Nile commission, the report of which was explicitly accepted by the parties as the integral part of the agreement. The commission which had been established by an exchange of notes between Great Britain and Egypt in 1925 was charged with "examining and proposing the basis on which irrigation can be carried out in Sudan with

[24] Paragraph 2 of Mohammed pashas Note of may7 1929 which recognized such future right of Sudan to develop its portions of the Nile provided "It is realized that the development of Sudan requires a quantity of the Nile water greater than that so far been utilized by the Sudan. As your Excellency is aware, the Egyptian Government has always been anxious to encourage such development, and will therefore continue the policy and be willing to agree with his majesty's Government upon such increase of this quantity as does not infringe Egypt's natural and historic rights in the waters of Nile and its requirements of agricultural extension, subject to satisfactory assurance to the safeguarding of Egyptian interests as detailed in Later paragraphs of this note".

full consideration of the interests of Egypt and without detriment to her natural and historical rights."[25]

The agreement included the following explicit safeguard to the interests of Egypt:

> *"save with the previous agreement of Egyptian government, no irrigation or power works or measures are to be constructed or taken on river Nile or 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 prejudice to the interests of Egypt either reduce the quantities of water arriving in Egypt, or modify the date of its arrival, or lower its level*[26]

According to paragraph 4(d) of the agreement, any such works were to be administered "Under the direct control of the Egyptian government" and before undertaking such works, that government was to "agree with the local authorities on the measures to be taken for safeguarding local interest". This provision practically gives Egypt a veto on developments in the other riparian countries, without putting any corresponding restrictions on development in Egypt. The agreement, therefore, ultimately preserved Egypt's traditional and historic uses, as well as its view of itself as the primary riparian.

Pressures for the revision of the 1929 agreement started to mount in Sudan due to the political changes and expanding water needs. Even before Sudan became formally independent the Sudanese government demanded for the modification of the agreement which was considered as too restrictive of Sudanese development.[27] In 1955 Sudan made a declaration stating that:

> *"It is important to remember that Sudan was not a party to the Nile waters agreement, which was concluded between the governments of Egypt and Great Britain. The present Sudanese government considers that it was an unjust agreement because it limited the development of irrigation in the Sudan, while leaving Egypt free to develop her irrigation as fast as she*

[25] The 1925 Nile commission's report paragraph 19
[26] Id, paragraph 4 (b)
[27] Teclaff, Supra note 13 at 162

pleased. As a result Egypt has increased her established rights in the waters of the Nile from 40 milliards in 1920 to 48 milliards at the present time. The Sudan does not dispute right which have been established while her hands have been tied, but she claims that the time has come to change the Nile waters agreement.[28]

In 1958, Sudan officially repudiated the 1929 exchange of notes, on the grounds that "economic and technical development since 1929 had rendered these provisions obsolescent.[29] The outcome of Sudan's repudiation was a new treaty ratified in 1959 that settled the most outstanding questions between the two countries. However in contrast to the Sudan's statement repudiating the 1929 agreement as obsolete, the 1959 agreement contains no such references. This can be deduced from the preamble of the 1959 agreement which indicated that the 1929 agreement provided only for the partial use of Nile waters and did not extend to include "the future conditions of a fully controlled water supply"[30]. As Garreston observed, "It would seem quiet clear that the Sudan thereby renounces any claim to the invalidity of the 1929 agreement. Moreover, the full scheme of the 1959 Agreement is clearly an adaptation and extension of the 1929 Agreement."[31]

However, the unilateral characteristic of the 1929 agreement which gave Egypt the right to veto any upstream development works, to undertake works upstream of Egypt with out the consent of the Sudan government, to inspect Sudanese installation and to be accorded with every facility to carry out her programs in Sudan, is not found in the 1959 agreement.
The later incorporates reciprocal consent by the two parties to the construction by the United Arab Republic of the Suddel-Aali reservoir at Aswan and to the construction by the Sudan of the Roseires Dam on the Blue Nile in Sudan.[32]

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[28] Sudan Minstry of Irrigation and Hydrolectric power, the Nile waters question (Khartoum: Government of Sudan survery deparmtnt press 1955) quoted in Joseph Yakob, Tough Talk over a defunct treaty: the case of - the 1929 Nile water agreement, available **at www.Tigrai.org/news/ articles 2004/ the Nile by yakob htm.**
[29] See Carrol,supra note 5 at 279-280
[30] Agreement between the republic of the Sudan and the United Arab Republic for the full utilization of the Nile waters, 1959
[31] Albert H. Garretson, "the Nile Basin, In Garretson, Hayton and olmostead, op. cit. 256 297,287(1967).
[32]The 1959 Nile waters agreement, supra note 30, Article 2(1) and (2)

The agreement recognizes, under article 1, the waters already appropriated by the two parties until the date of its signing, which was considered as equal to the allocated amount under the 1929 accord, as their established right. The full text of the article reads as:

1. *The quantities of water actually used by the united Arab Republic until the date of signing of this agreement constitute their established right prior to the benefits accruing to them through the implementation of the control works referred to in this agreement. This established right amounts to 48 milliards of cubic meters per year as measured at Aswan.*

2. *The quantities of water used at present by the republic of the Sudan constitute their established right prior to the benefits accruing to them through the implementation of the aforementioned control works. This established right amounts to 4 milliards of cubic meters per year as measured at Aswan.*

The accord apportioned the quantities that were unallocated under the 1929 agreement based on the assumed annual flow of 84 billion cubic meters measured at Aswan.[33] Out of the unallocated 32 billion cubic meters, 10 billion cubic meters was assigned to evaporation losses from the reservoir which left 22 billion cubic meters as net profits from the estimated total capacity of the reservoir[34]. The parties agreed to share the surplus 22 billion cubic meters, of which 14.5 go to the Sudan and 7.5 to the United Arab Republic (Egypt) provided that the annual flow remains at 84 billion cubic meters and the evaporative loss from the reservoir does not exceed the estimated 10 billion cubic meters.[35] If the annual flow is in excess of 84 billion cubic meters, the additional surplus is to be equally divided between the two parties.[36] Therefore

[33] Id. Article 2(3)
[34] Id. Article 2(3) and (4)
[35] Id. Article 2(3)
[36] Id Article 2(4)

the agreement assigns 55,500 billion cubic meters per year to Egypt and 18,500 billion cubic meters to Sudan making the latter's share, which had been one twelfth under the 1929 Agreement, one third of the water allocated to Egypt. It was recognized that the net benefit from this allocation "shall be subject to revision by both parties at reasonable intervals to be agreed upon as from the date of operation of the complete Suddel Aali Reservior".[37]

The agreement authorized Sudan to carry out projects for conservation measures in order to increase the natural river supply, by preventing the loss of water in the swamps of the Bahr-el-Gebel Eahr-el-Zaraf, Bahr-el-Ghazal, and the river sobat.[38]

It was also agreed that the benefits drawn from such projects in the southern Sudan and the costs for the construction schemes, shall be shared equally between the two republics.[39] This principle is also incorporated in the 1929 agreement, according to which Egypt is granted extra territorial right of construction of works for the benefit of Sudan.[40] However 1959 agreement clearly grants the Sudan priority in undertaking such projects which however is subject to the qualification that if Egypt has the need of this additional waters before Sudan is ready to utilize them, Egypt is authorized to undertake such project but at its own expense.[41]

It provided that when the need arise for Sudan to make use of the water from the projects, it shall contribute by reimbursing to Egypt "a share of all the expenses in the same proportion as their share in the benefit is to the total

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[37] Id. Article 2(5)
[38] Id Article 3(1)
[39] Id. article 3(1) and (2)
[40] Paragraph 4(d) of the Mohammed pasha's not of may 7, 1929 provides: "in case the Egyptian government decide to construct in the Sudan any Works on the river and its branches, or to take any measures with a view to increasing the water supply for the benefit of Egypt, they will agree beforehand with the local authorities on the measures to be taken for safeguarding local interest. The construction, maintenance and administration of the above mentioned works shall be under the direct control of the Egyptian government".
[41] "The 1959 Nile water agreement, article 3(2)

actual benefit of the scheme provided that the share of either republic shall not exceed one half of the total benefit of the project".[42]

The agreement contained a provision which recognized the water needs of upper riparian states in the anticipation of the fact that their utilization of the water may affect the interests of the two parties to the agreement. The two parties agreed to present a unified view in future negotiations with the upstream riparian states in case they raise a claim to their share in the Nile water[43]. If such negotiation resulted in the construction of any work in the upper riparian states, all the relevant "technical execution details and the working and maintenance arrangements" would be carried on by a Joint commission, representing Egypt and Sudan[44]. This in effect means an upstream state wishing to develop projects along the river would have to obtain not only the approval of Egypt but also mandating technical oversight and contractual supervision.

3.3 The Legal Aspects of the "Natural and Historic Right" Guaranteed in the Nile Agreements

The claim for "natural and historic right" is central to the formation of the Nile waters agreements. It was formulated by George Allenby, who used the term for the first time in the exchange of notes of January 26, 1925 which constituted the Nile commission of the 1925. In his replay to the letter of Egyptian prime Minister, Ahmed Ziwar pasha, inviting British Government to reconsider the question of irrigation in the Sudan, Allenby gave an assurance that the British governments have no intention of trespassing upon the natural and historic rights of Egypt in the waters of the Nile. Allenby's note stated.

> *'I need not remind your Excellency that for forty years, the British Government watched over the development of the agricultural well being of Egypt and I would assure your Excellency at once that the British*

[42] *Id*
[43] Id. Article 5(I)
[44] *Id*

government, however solicitous for the prosperity of Sudan, have no intention of trespassing upon the natural and historic rights of Egypt in the water of the Nile, which they recognize today no less than in the past.[45]

Those rights were given further assurance by the British government in the exchange of notes of May 7, 1929 in which it was stated that safeguarding of the "natural and historic" rights of Egypt is considered as the fundamental principle of British policy.[46]

There is uncertainty with regard to the intention of George Allenby when he used the term "natural and historic right." Issues arise as to whether the term covers right to already appropriated waters or whether it also refers to rights to unappropriated waters. Viewed as a direct reply to the note of Ziwar Pasha asserting the principle of safeguarding the future projects, what George Allenby intended to refer was not only to Egypt's right to the waters for land already under cultivation, but also to such waters which were still unused.[47]

The protection of existing uses under international law extends only to claims to the waters already appropriated on the ground of a lack of opposing claims during long established use[48]. As batstone stated "whatever validity historic or established rights based on long usage have in law, such validity cannot extend beyond the limits of actual usage[49]. "Cory has also pointed out in his separate opinion he delivered in the framework of the 1920 Nile commission report that the doctrine of prior appropriation "recognizes vested rights, but limits these vested right, and does not give to "first appropriator a right of pre-emption upon the un appropriated water supply"[50]. The Britain's extension of priority right to Egypt to unappropriated waters can not, therefore, be taken to lead to the creation of legal right under international law.

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[45] The Exchange of notes of Jan. 26, 1925, printed as appendix A to the 1929 Nile waters Agreement
[46] See Berber, supra note 22 at 94-95
[47] Godana, supra note 13, at 170; see also R.K Batstone, the utilization of the Nile waters, 8 international &comp.L.Q,523,529(1959)
[48] Batstone, Id., at 529 and 544
[49] Id, at 529
[50] Id

The validity of the claim for "natural and historic rights" is also viewed from the point of the content of these rights. Such natural and historic rights as Berber observed, could not be claimed as legal rights under international law, as the agreement was the result of particular and very special political situation.[51]

The assurance given by Lord Lloyd that the British government regarded the principle of safeguarding the natural and historic right, already acknowledged by George Allenby, as the fundamental principle of British policy, show that by using the term the parties meant something fundamentally different from the recognition of a fundamental principle of international law.[52]

This become more apparent when viewed in light of the statements made in the context of the political termoil resulting from the Egyptian claim to the sole possession of the Sudan and the British ultimatum of Egypt presented in the reaction to the assassination of the Sudanese governor general in Cairo. The 1924 British ultimatum to Egypt which contained the threat that the British Sudan Government would increase the irrigated area in Gazira "to unlimited figure as need may arise" implied that the flow of water to Egypt would be reduced by an unspecified amount[53]. As Berber observed "as England would certainly not have threatened a breach of obligation under international law, it is clear that England only delivered a threat to withdraw a political concession made for political reasons"[54] This is clearly revealed by the statement made by the British foreign secretary, Austin chamberlain, in the House of Commons on Dec, 15, 1924, proposing that the British government would give priority to the satisfaction of the water needs of Egypt to that of Sudan, if they had a friendly

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[51] See Berber, supra note 22 at 94-96

[52] In response to Mohammed pashas note, particularly to the statement in paragraph 89 of the annex to 1925 commission report which stated " it is regarded as essential that all established irrigation should be respected in any frture review of the question". Lord L Loyd stated that the government of the United Kingdom regard the safeguarding of the natural and historical rights of Egypt in the waters of the Nile "as a fundamental principle of British policy, and the detail provisions of this agreement will be observed at all times and under any conditions that may arise". Note of Lord LLoyd to Mohammed Muhammad pasha, 7 May 1929, paragraph 4

[53] Berber, supra note 22, at 96

[54] Id

Egyptian government to deal with.[55] This shows that Britain's extension of priority right to Egypt is purely a political matter which cannot have any practical significance as a precedent in international law.

Furthermore, when viewed in light of the particular circumstances attending its establishment[56] and the terms of reference of the 1925 Nile commission, it becomes clear that the commission was not considered to have been a quasi-judicial tribunal "adjudicating impartially between independent states on the basis of existing international law".[57]

The terms of reference set for the 1925 provided in part that the commission was constituted "for the purpose of examining and proposing the basis on which irrigation can be carried out with full consideration of the interests of Egypt and without detriment to her natural and historic rights".[58] The commission is established with the purpose of devising arrangement that would favor the interests of Egypt in precedence to that of Sudanese interests which obviously is not in support of the idea that the commission's proposal were the reflection existing customs.[59] The arrangement contemplated was stated by the commission as:

> *"Interpreting in definite and technical terms the intention of the note quoted in the opening paragraph, where in it was explained that in authorizing extensions of irrigation in the Sudan 'the British government, however solicitous for the prosperity of the Sudan, have no intention of trespassing upon the natural and historic rights of Egypt in the waters of the Nile, which they recognize today no less than in the past'..."*[60]

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[55] Id, at 95-96
[56] See supra notes 21-23.
[57] See Batstone, supra note 48, at 530.
[58] The report of the 1925 Nile commission annexed to the 1929 Nile waters agreement, Paragraph 1.
[59] Godana, supra not 13, at 175
[60] The Report of the 1925 Nile commission, Supra note 58, paragraph 22

The commission which considered itself to have been let free to choose its own ground to decide how far and in what direction its investigations should be carried, and the form which its proposal should take[61], at the outset stated that the commission has not felt as "called upon to attempt a general analysis and definition of the principles underlying the allocation of water supplies between two communities".[62]The commission had also stated at the outset that "it is aware of no generally adopted code or standard practice upon which the settlement of a question of intercommunal water allocation might be based and that the case at hand involved "special factor, historical, political, and technical, which might render inappropriate too strict an application of the principles adopted else where."[63] Then it declared that "having regard to the previous history of the question, the present position as regards development, and the circumstances attending its own appointment" the commission "had decided to approach its task with the object of devising a practical working arrangement which would respect the needs of established irrigation, while permitting such program of extension as might be feasible under present conditions, and those of the near future, without at the same time compromising in any way the possibilities of the more distant future.[64]

The remark of the commission about its ignorance of accepted code or standard in the field, the circumstance which "might render inappropriate too strict application of principles adopted else where and its decision to limit its task to devising a practical working arrangement are contrary to the interpretation of the 'natural and historic right' proposed by the Nile commission as an established legal norm or custom.[65]

Because of the wording of the 1929 agreement, the issues of the claim for "natural and historic rights" have remained to have influence during the later

[61] Id, paragraph 19
[62] Id, paragraph 20
[63] Id, paragraph 21
[64] *Id*
[65] See Godana, supranote 13 at 171-175

developments of the legal regime of the Nile waters[66]. Egypt continues to declare not only that it has such right, but that the legal history of the Nile are in support of its claim[67]. However Great Britain which was the first to recognize the natural and historic rights of Egypt has later on declared concerning her east African territories, that "their position must be safeguarded, and her majesty's government have informed the governments of Egypt and the Sudan that they formally reserve the right to negotiate for a share of the waters of the Nile for these territories at the appropriate time[68]". According to Lauterpacht this reservation of the right to negotiate "may be regarded as relating to the substantive rights of Egypt in Nile waters, in which case it must be considered as an implied rejection of the doctrine of prior appropriation, at least as applied in the case of Wyoming V, Colorado".[69]

The prior appropriation approach to water apportionment which supports Egypt's claim to the majority of the Nile waters was also sanctioned by the 1959 Agreement which explicitly stated that the amount of the Nile waters used by the united Arab republic until this agreement is signed shall be her acquired right before obtaining the benefits of the post 1959 Nile control projects.[70]

The agreement recognizes the waters already appropriated by the two parties under the 1929 accord which amounted to 48 billion cubic meters for Egypt and 4 billion cubic meters for Sudan as their established right. The inclusion of this provision is taken to be an indication that the parties, as Godana observed, felt to incorporate a new formulation of the concept of established right[71]. According to the expression of this article mere use of water is not enough to create a right thereto. It is also essential that such use be approved subsequently by the other interested party as established right of the country

[66] Lisa M. Jacob, shrinking the Gifts of the Nile: establishment of a legal regime for Nile waters Management, 7 Temp. International & comp. L.J. 95, 110(1993)
[67] Id.. see also Godana, supra note 13 at 143-144
[68] Quoted in Batstone, supra note 47,at 543.
[69] Quoted in Stephen Mc Caffrey, the law of international watercourses non navigational use, 241(2001)
[70] The 1959 Nile waters agreement, supra note 31 article 2.
[71] Id

using the water.[72] Therefore according to the language of this article the basis for established rights consists of two elements actual appropriation or use, and approval or acceptance of that actual use or appropriation by both parties as of the date at which the right could be considered to be established.[73]

3.4 The Legal Regime of the Nile Basin in Relation to Equitable Utilization

Despite the continuous attempts at resolving conflicting interests between countries sharing the same watercourse, which have produced comprehensive rules such as the Helsinki rules and the UN watercourse convention, in practice, the country most powerful economically and militarily in the basin has historically imposed a solution that best suites its interest. The case in the Nile basin is a typical instance of such a situation. Equitable utilization, though accepted as the guiding principle of intentional law, has never been the dominant feature of the Nile legal regime. The Agreements regarding the basin formed before contemporary formulation of the equitable utilization principles were primarily based on political, economic and geographic circumstances than on following models of earlier international water agreements.[74]

The early treaties were the product of British colonial interest to preserve their position of control of the Suez canal[75]. The British formulated these treaties aimed at Egyptian claims to the Nile since this was essential to keep Egypt satisfied with their relationship[76]. The positions taken by British and Egypt at the early colonial period treaties were that "Egypt's rights to the Nile were so long established that they should take precedence over all other schemes for use of the Nile"[77]. These early treaties, the tenets and attitudes of which

[72] See Godana supra note 13, at 186
[73] *Id*
[74] Jacobs Supra note 66, at 105
[75] Id
[76] Id
[77] Id

persisted through the developments of the current legal and institutional system operating in the Nile basin, have effectively given weight to Egypt's claims to the undiminished flow of the Nile waters.

The 1929 Agreement which accords to Egypt the largest share of water, perpetuated the idea of "natural and historic" right of Egypt as the deciding factor. It is obvious that the phrasing of the agreement which is in support of the notion that Egyptian needs takes precedence above all upper riparian states is contrary to the doctrine of equitable utilization according to which "all riparian needs should be determined in a balanced manner".

The principle of equitable allocation is also absent in the 1959 agreement which is entirely exclusive and bilateral, with total disregard of the needs or rights of upstream Nile Basin nations[78], though it may be considered more equitable from the perspective of Sudan compared to the 1929 agreement.

Undoubtedly this agreement which is concluded with the purpose of claiming the full control of the Nile waters, by including the portion which is left unallocated by the 1929 accord, is not an approach which will serve the interests of all riparian nations. In order to achieve the full river basin equity, the allocation must be equitable to all riparian states at the same time, which does not necessarily mean equal division among the nations involved.

One commentator has however, argued that the agreement established the principles of equitable utilization as the guiding principle and "the concept of established right and prior appropriation found little recognition, perhaps no

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[78] The 1959 Nile water agreement did not contemplate the equitable allocation of the Nile waters, as entitled by international law, to any other upstream riparian. It merely contemplated that if at any time in the future another riparian states raise a claim for their legitimate share of the waters, Egypt and Sudan would consult one another and reach at one unified view regarding the claim (art 5(2)). This means the agreement posited that the legitimate rights of the other riparians to the equitable share of the water depend on the agreement of the two parties which will not be allowed if one of the two parties declines to acknowledge that the waters should be equitably apportioned as has so far been the case with Egypt consistently asserting its historical right refusing the accommodation of the needs of all the riparians

more than an element to be taken in to consideration in determining what should be equitable share"[79]

However, as discussed earlier, the regime set forth in the 1959 agreement tend to place greater importance to prior uses than is recommended by the accepted rule of international law, which recognizes the principle that existing uses may have to defer to a new use in order to achieve an equitable apportionment of a shared watercourse. This can easily be deduced from the term used in the agreement which implies that water rights are acquired by virtue of the application of the principle of prior appropriation as the only relevant factor rather than prior appropriation as a particularly important factor among others.

The opinions expressed by other Egyptian jurists, around the time of the agreement, arguing that Egypt enjoys "vested rights" over the Nile waters which is absolutely protected by international law and which cannot be diminished under any circumstance by other states, indicated that this was the then position of Egypt incorporated in the agreement.[80] Egypt has expressed this position more recently stating "Each riparian country has the full right to maintain the status quo of the rivers flowing on its territory".[81] This is also

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[79]Sayed Hosni, The 'Nile Regime', revue egyptienne de droit international (Cairo), Vol. 17p.97(1961) quoted in Godana, supra note 13 ,at 240

[80] For example Badr stated that " natural and historic rights are nothing but vested rights resting upon a solid legal basis furnished by the principle of prior appropriation as acknowledged in international and quasi-international disputes. Thus Egypt's right to her present water requirement being fully protected by international law, whether or not they were provided for by the 1929 agreement, and even if that agreement did not exist it must be acknowledged that prior appropriation gives superiority of right" Gamal Moursi Badr," The Nile waters question: background and present development' 15 Egyptian society of international law 97(1959), quoted in Yoseph Yakob, Tough Talk over a defunct treaty: the case of the 1929 Nile water agreement, available at www. tigrai.org/news/Articles2004/The Nile by yakob.htm; Moussa stated that "it is not diputed that international law and organization are founded on respect for acquired natural and historical rights of all parties, as well as respect of existing and acquired economic interests and allowing for their development" Ahmad Moussa, Markaz Misr fi Masal at Miah El-ni [the Egyptian position regarding the issue of the Nile Waters]. 14 Revue Egyptiàn DE Droi international 48(1958), quoted in Mohammed S.Helal, sharing blue gold: The 1997 UN convention the law of the Non navigational uses of international watercourses. Ten years on,18 colo.J. int'l Envtl.L.and pol'y 337,370(2007).

[81]Country report, Egypt, paper presented at the Interregional meeting of International river organizations held at Dakar, 5-14 May 1981, para3, as quoted in McCaffrey, supranot69,at 39

reflected in Egypt's advocacy of the "No harm" rule as put forward under the international law commission's 1991 draft. Egypt has been demanding adherence to the "No harm" rule holding that each country has the right to uninterrupted flow of the river through its territory, and any measure that changes the status quo flow is causing significant harm, [82] which is just another variant of the argument for the protection of prior appropriation claims against the encroachment of other Nile basin countries water rights.

The view of according preferential treatment to existing uses put forward to justify the argument for Egyptian needs taking precedence above all others contradicts the accepted water rights doctrine of equitable utilization under which all riparian needs should be determined in a balanced manner. The principle of equitable utilization which is its foundation principle would require that all relevant factors be considered. The notion that historic use has inherent priority over the remaining uses is rejected by international law and the same applies to the causing of harm to existing uses. Therefore what Egypt can claim is protection for its existing uses under the principle of equitable utilization and the upstream counties such as Ethiopia are entitled to shares in the Nile waters even if that will reduce the amount of water flowing downstream to the extent that may be considered as causing significant harm, if doing so results the most equitable use of the Nile.

3.5. The Implication of Invoking Natural and Historic Rights on Cooperation among Nile Riparian Nations

The rapidly increasing population, environmental degradation, frequent natural disasters such as famine and drought, and growth in industrialization, urbanization etc, are exacerbating water shortage in the Nile basin. These factors increasing the demand for water coupled with the volatile relationship

[82] See carroll, Supra note 5, at 290

between the dominant actors in the basin which is characterized by 'mutual distrust' and competition, indicate the great potential of conflict in the region that point to the urgent need for basin wide cooperation on the management and allocation of the resource.

So far, very little progress has been made towards cooperation in order to achieve lasting solution which eases the political tensions and effectively neutralizes the age old differences among the riparians. The major impediment to progress towards cooperation is the absence of agreement which takes into consideration the interests of all the riparians states. The bilateral treaties constituting the existing legal framework, which are aimed at furthering the claim of natural and historical right, are of such a nature that fosters conflict and competitive behavior making them unfit to deal with the current problems or guide future relations among the riparian states. The Nile basin is , therefore, in desperate need of new legal arrangement which is a prerequisite for the realization of cooperative system in the basin. How to achieve this goal remains an issue of paramount importance in the basin.

With a view to achieve common management and shared allocation of the Nile waters, the riparian states are since 1999 engaged in a cooperative process, the Nile basin initiative (NBI). The NBI, which includes all the Nile states, has been considered as a promising step in paving the way for the renegotiated Nile waters agreement. Unlike the previous efforts towards cooperation on the Nile waters, the NBI has achieved the advantage of broad political support and participation of all the Nile basin states. It, however, is merely a provisional mechanism which, in order to become a permanent institution, needs to have a legal status through the adoption of a comprehensive legal framework. This requires resolving the challenge, as discussed below, it faces due to the conflict of interests between the upstream and downstream states of the basin.

Negotiations for a new legal framework have been running under the auspices of the NBI, managed by the panel of experts formed in 1997 composed of representatives from each Nile basin states and facilitated by external advisors on international law. The aim of the Nile basin cooperative frame work is to assist the basin countries in the establishment of an adequate framework for cooperation that will facilitate the achievement of equitable and legitimate use of the Nile basin water resources

After a prolonged series of negotiations, the riparian states have reached a final draft framework agreement, in 2007, which contains 39 articles.[83] However, they could not reach a consensus on all of the articles. The disagreement occurred on article 14 which introduces the concept of "water security"[84]. The draft has been presented to the concerned governments for consideration and ratification.[85]

The provision of article 14 of the draft which is made public in Ugandan newspaper provides that:

> *"...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 benefits. Nile basin states therefore agree, in a spirit of cooperation, to work together to ensure that all states achieve and sustain water security and not to significantly affect the water security of any other Nile Basin state".* [86]

All states agreed on the provision of this article except Egypt and Sudan which hold the position that the provision must protect and acknowledge the status quo situation they want to maintain. Egypt and Sudan demanded the provision

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[83] The standard (Nairobi, Kenya), 29 June 2007. Similar News was also published in Ethiopian newspaper, Addis Zemen, on July 30, 2008

[84] Id

[85] Id

[86] East African Business week (Kampala, Uganda), 20 August 2007, quoted in Ana Elisa cascao, New Nile Treaty – A threat to the Egyptian Hegemony on the Nile? Unpublished article, king's college university of London-Department of Geography, p. 15 (2008)

of this article be amended by replacing the phrase "not to significantly affect the water security of any other Nile Basin state", with "not to adversely affect the water security and current uses and rights of any other Nile Basin state."[87]

The meaning of the concept "water security" remains a pending issue.[88] But the expression of article 14 implies that it is not at least intended to convey the idea of considering the waters of the basin as a national security issue as was viewed by Egypt aimed at keeping the status quo. According to the provision of article 14, the concept of "water security" favours neither the upstream nor the downstream states which are prior users, as it simultaneously recognizes the right of all basin states to "water security" so long as they do not affect the water security of any other riparian state. The version required by Egypt and Sudan mentioned above, also makes it clear that the concept does not refer to the issue of protection to prior uses.

The discord on the cooperative framework is the culmination of the divergent interests and expectations which has been held by the upstream and down stream states in the outcome of cooperation on the Nile waters. Egypt not wanting any reduction of the current allocation of shares and aimed at securing additional water has been interested in the fields which has nothing to do with the issue of water rights of each reprian state or reallocation of the resources, such as ecological conservation and reforestation of the Ethiopian highlands.[89] Whereas, all the upstream states, particularly Ethiopia, has been focusing mainly on the redistribution of water.[90]

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[87] Cascao, Id

[88] Id

[89] Mohamoda Supra note 2, at 25-26 ; Zewidineh Beyene and Ian L. Wadley, common goods and the common good: Tranboundary natural resources, principled cooperation, and the Nile Basin Intiative, center for African studies –Breslauer symposium on Natural Resource Issues in Africa (Univerity of California, Berkeley), p.33 (2004)

[90] Id.

At the root of these divergent interests and expectations of the riparian states lies, as is also the case with the discord on the framework agreement, the long standing conflict of claims advocated by the upper and lower riparian states with regard to the right to utilize the waters of the Nile, which is reflected in the disagreements on the basic principles of international water law particularly the role of existing uses in the determination of equitable utilization or the tension between no harm rule and equitable utilization claims.

In the Nile basin, which already is over appropriated, the realization of basin wide cooperation depends on agreement of the parties on the issue of reallocation of existing water rights. This is unattainable while the prior users in the basin refuse to refrain from claiming property right to existing allocations. The bargaining positions of Egypt and Sudan in the negotiation of cooperative framework indicates that for the two countries cooperation is acceptable on condition that the current allocation is not to be affected. This position which focuses on the protection of existing uses with total disregard of facilitating new uses in the upstream states is based on the advocacy of no harm rule as initially suggested in the 1991 draft of the international law commission, which is an approach of prior appropriation doctrine. Such claim of entitlement to the current quantity of water use irrespective of the fact that it amounts to preventing the other riparian states from making any use of the water within their territory, allows no room for further negotiation because it lacks flexibility and mutuality necessary to accommodate the varied water requirements of the riparian states and contradicts the very aim of cooperation which is to achieve optimal utilization of the resource on an equitable basis, which implies the balancing of the needs of all the riparian states in such a way that brings maximum possible benefits to each while minimizing the detriment to each, through joint management of the use, development and protection of the resource.

This approach, therefore, leaves the riparian states in adversarial attitude that is not conducive to further cooperation since the other riparian states which are highly disadvantaged by the existing allocation of shares will have no incentive to engage in such a relationship which aims at ensuring that the water resources do not belong to their use. The option open to them would be pursuing their unilateral initiatives which will only work for the continuation of the tensions and conflicts which typify the modern history of the Nile undercutting the development of cooperative outlook in the basin

The effort to achieve cooperation in the Nile basin will succeed only if all the riparian states show their commitment in the framework agreement to ensure the equitable utilization and sustainable management of the waters which mainly requires the readiness to accept alternatives to existing allocations in line with the accepted principles of international law for the utilization of international water courses.

Conclusion

The principle of equitable utilization, which grow as a middle position of reasonableness between the two extreme conflicting claims of absolute territorial sovereignty and absolute territorial integrity cannot be adequately addressed with out taking heed of the third principle prior appropriation which has been closely linked with it from its very inception. The doctrine of prior appropriation, which entitles the state which first utilizes the waters of International River to continue to receive that quality and quantity of water in the future, allows a state, though to a slightly diminished extent, to retain claims of absolute territorial sovereignty and integrity.

This doctrine and its various incarnations has exerted substantial influence on the question of the right to use international water courses. The influence of this doctrine is the outcome of the typical pattern prevailing in international watercourses worldwide. Since development of international watercourses for consumptive uses generally begin earlier and faster in downstream states which creates prior uses the protection of which is claimed by such states and disadvantaged states in the upstream who claim for their equitable share. The fact that an allocation of the equitable share demanded by the upstream states usually requires the reduction of the quantity of water which has been utilized by the downstream states the basic issue in equitable utilization becomes whether and to what extent existing uses in the downstream states must be displaced by new uses in the upstream states. Thus it can be said that international watercourse law evolved as an integration of water law principles of absolute sovereignty, absolute territorial integrity and prior appropriation which finally are coalesced into the balancing principle of equitable utilization.

Although prior appropriation in its meaning of 'prior in time is prior in right' is no longer considered as controlling principle of international water law, existing use is recognized as one of the factors, among others, to be considered in the

determination of equitable utilization which entitles each state riparian to an international watercourse to utilize the watercourse as long as it takes into consideration the legitimate rights and interest of all other riparian states.

Even if concerned nation states always agree that the administration of shared water resources should be governed based on the principle of equitable utilization, they still dispute on what constitutes equitable and reasonable use and its proper application. The disagreement mainly relates to the issue of the determination of the comparative weight that should be attached to each factor to be taken into account in the determination of equitable utilization and particularly the role of existing uses. The wide acceptance of the notion that prior uses are merely one of the factors to be considered in the determination of equitable utilization does not stop the controversy prevailing in the issue of protection to existing uses, since this left open the question what weight should be given to existing uses compared to the other relevant factors. The conflict between the view that a special importance should be attached to existing uses and that it is just one of the factors to be considered in the determination of equitable utilization, is the greatest controversy prevailing in the field of international water law.

The formulation adopted by the 1997 UN watercourse convention reject according any priority to existing uses as they do not suggest that all the other relevant factors be exhausted before threatening existing uses. What shares and uses are equitable and reasonable is to be determined taking in to consideration all the relevant factors, which are not exhaustive to that effect. No single factor or combination of factors may absolutely take priority over any other factor or factors.

This conflict is also reflected in the tension between the apparently competing concepts of "equitable and reasonable" use and "no significant harm" found in the convention. The controversy emanates from the claim that the no

significant harm rule should take precedence over the principle of equitable utilization which in effect means that the principle of equitable utilization should be replaced by no significant harm rule which originally is a principle employed in the context of the duty of one state to prevent appreciable environmental damage to a neighboring state. The application of no significant harm rule in the context of the allocation of shares in international watercourses precludes uses that result in significant harm to another state. On the other hand the principle of equitable utilization might permit significant harm as a result of an equitable use of a watercourse.

Adopting the concept of no significant harm as the base principle of international water law on the question of water quantity, as distinguished from protection of environmental damage would be tantamount to establishing a system of prior appropriation which precludes the application of the principle of equitable utilization. Since concerning the issue of allocations of water rights no harm rule is aimed at the protection of prior uses, in this respect the question of precedence of no significant harm rule over the principle of equitable utilization must be viewed in similar way to that of the status of the doctrine of prior appropriation in international water law. Therefore, it is the principle of equitable utilization that has to take priority, downstream harm being merely one of the factors to be considered.

The 1997 UN water course convention neutralizes these competing approaches under the provisions of article 5, 6 and 7 which deal with the heart of the major controversy in the field. The requirement "to take all appropriate measures to prevent the causing of significant harm to other watercourse states" provided under article 7(1) is merely a duty to make best effort under the circumstances. In addition, article 7 (2) strongly suggests that even if state's use causes significant harm to another watercourse state, it is lawful so long as such use is equitable when viewed in light of article 5 and 6 of the convention. In addition the convention is, as provided in article10, against the idea that existing uses has inherent priority over the remaining uses which also applies to the causing of harm to existing use.

Despite the attempts made to neutralize the two competing approaches, the longstanding conflict between the claim to the maintenance of the status quo and that of reallocation of the shared water resources, continues to influence the practices of states along the Nile basin. The political tension and low intensity conflicts, which has been prevailing in the basin, is the result of the failure to resolve this conflict..

So far the allocation of the waters of the Nile is determined by the claim to "historic and acquired rights" which has mainly served to further the maintenance of the status quo precluding the other states from having their legitimate share of the water. The solution for this problem is found only in the regulation of the use of the resource in such a way that ensures equitable participation of all the basin states. This requires the development of a comprehensive framework legal agreement on the basis of which future cooperation is to proceed. However, as revealed in the recent negotiations over the cooperative framework agreement, the insistence of the downstream states of the basin to the maintenance of the status quo still stands as the greatest obstacle impeding the effort to achieve sustainable cooperation in the Nile basin. The disagreement in the negotiations of the cooperative framework is the outcome of the failure to agree on the fundamental principles of international law by which the use of watercourses are to be regulated.

In the Nile basin, where the existing allocation of shares is grossly unequal, the achievement of viable solution for cooperation requires the agreement of all riparian states on the crucial question of water allocation which necessarily challenges the status quo. In other words, the legal framework can have useful function only if it solves the long standing debate on priority issue, which is also manifested in the clash between the established principle of equitable utilization and the rule of no significant harm, in a manner that allows the true application of the principle of equitable utilization for the allocation of the shared watercourse.

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