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# **The duty not to cause significant harm under international water law: Its application in the Nile basin**

**Thesis submitted in partial fulfilment of the requirements of the Degree of  
Masters in Public International Law.**

**By:**

**Zewidu Mengesha**

**Advisor: - Dr. Tadesse Kassa**

**February 2014**

**Addis Ababa, Ethiopia**

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**May, 2014**

**Addis Ababa, Ethiopia**

## **Approval Sheet by the Board of Examiners**

**The duty not to cause significant harm under international water law: Its  
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**Advisor: - Dr. Tadesse Kassa**

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**Examiners:-**

1. \_\_\_\_\_

2. \_\_\_\_\_

## DECLARATION

I, **Zewidu Mengesha**, do hereby declare that the thesis ‘The duty not to cause significant harm under international water law: Its application in the Nile basin’ is my original work and that it has not been submitted for any degree or examination in any other institution. Whenever other sources are used or quoted, they have been duly acknowledged.

Name: Zewidu Mengesha

Signature -----

This thesis has been submitted for examination with my approval as university advisor:

Advisor: - Dr. Tadesse Kassa

Signature -----

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## **Acronyms**

ADB - Asian Development Bank

BCM - Billion Cubic Meters

CFA - Cooperative Framework Agreement

FAO - Food and Agriculture Organization

HAD - High Aswan Dam

IDP - Irrigation Development Program

ICJ – International Court of Justice

IIL - Institute of International Law

ILA – International Law Association

ILC - International Law Commission

IWC - International Water Courses

NBI - Nile Basin Initiative

SADC - Southern African Development Community

UK - United Kingdom

UNESCO - United Nations Educational, Scientific and Cultural Organization

UNILC - United Nations International Law Commission

UN – United Nations

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# Chapter One

## Introduction

### 1.1 Background

While utilizing internationally shared water resources, riparian states need laws and principles that regulate how the states in the basin can share and utilize these resources. International water law is important in regulating how a basin's states behave with respect to other states in the same basin. International water law belongs to the field of public international law that deals primarily with the non-navigational uses of international watercourses.<sup>1</sup>

The historical development of international water law has followed closely that of political, economic, technical and social needs. If, in the past, conflicts were primarily related to navigation and small-scale water uses, today they cover a much wider spectrum.<sup>2</sup> Thus the non-navigation use of water includes irrigation, floating, domestic uses, fishing, aquaculture, hydroelectric power production and other industrial uses.<sup>3</sup> How states agree (or disagree) to allocate the rapidly diminishing quantities of quality water resources is an important, perhaps crucial, issue. Attention to the law regarding the allocation of non-navigational uses of international watercourses, however, is of relatively recent origin.<sup>4</sup>

The international community has developed different theories and principles that regulate the utilization of these shared watercourse resources. Though it is not possible to have well-established common laws and principles that regulate for all international water basins, there are a few principles and laws that all international basin states are required to observe and comply with. Especially with the growth of technology, states sharing a drainage basin can affect each

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<sup>1</sup> Richard Paisley (2002), *Adversaries In to Partners: International Water Law and the Equitable Sharing of Downstream Benefits*, Melbourne Journal of International Law, Vol. 3, p. 2

<sup>2</sup> Dante A. Caponera (2007), *Principle of Water law and Administration National and International*, 2<sup>nd</sup> edition, (Taylor & Francis, London, UK,) p. 215 [hereinafter Dante, *Principle of Water law and Administration National and International*].

<sup>3</sup> Id. p. 215

<sup>4</sup> Patricia K. Wouters (1992), *Allocation of the Non-Navigational Uses of International Watercourses: Efforts at Codification and the Experience of Canada and the United States*, University of British Columbia Press, The Canadian Yearbook of International Law, Volume XXX, P.44

other far more seriously than ever before by the utilization of water in their territories. This requires the development of theories and principles that can effectively address this development.

There are several theories, among them the theories of limited territorial sovereignty and limited territorial integrity which were developed with a view towards addressing the inadequacy of old theories. The new theories consist of the assertion that every state is free to use the waters flowing through its territory, on condition that such utilization is not in a position to prejudice the territory or interests of other states.<sup>5</sup> Accordingly, riparian states do have reciprocal rights and obligations in the utilization of the water resources of shared international drainage basins. Different authors, state practice and the jurisprudence in this field have all consecrated these theories, which are generally accepted today.<sup>6</sup> The theory of 'limited territorial sovereignty and integrity' states that sovereignty over shared waters is relative and qualified. Therefore the co-riparians have reciprocal rights and duties in the use of the waters of common rivers.<sup>7</sup>

In the history of the development of international watercourses law, it has been possible to observe that among these theories and principles few have gained more importance and weight than the others. However riparian states still prefer some of the theories and principles over others, and in general, the stand taken by these countries depends on their respective interests. Because of this, upper riparian states are inclined to favor certain principles and theories, such as the theories of absolute territorial sovereignty,<sup>8</sup> whereas the lower riparian states favor principles and theories of territorial integrity that claim the continued, uninterrupted flow of water from the territory of upper riparian states.<sup>9</sup>

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<sup>5</sup> B.A. Godana (1985), *African shared water resources, legal and institutional aspects of the Nile, Niger and Senegal River systems*, A publication of the Graduate Institute of International Studies, Geneva, p.40 [hereinafter Godana, *African shared water resources, legal and institutional aspects of the Nile, Niger and Senegal River systems*].

<sup>6</sup> Id. p.40.

<sup>7</sup> Supra note 2, Dante, *Principle of Water law and Administration National and International* p. 216.

<sup>8</sup> According to this theory, a state is considered to be master of its own territory so that the state may adopt whatever it wishes with regard to watercourse within its territory, i.e., all measures deemed suitable for its national interest, irrespective of their effects beyond its border. Supra note 5, Godana, *African shared water resources, legal and institutional aspects of the Nile, Niger and Senegal River systems*, p.32.

<sup>9</sup> Ibid. p.38.

Basically the sources of law governing international watercourses take either one of two general forms: treaty law or customary international law.<sup>10</sup> If the states sharing an international freshwater resource are not parties to an applicable treaty, their rights and obligations are governed by customary international law. This is due to the fact that international customary law is considered the second most important source of international law.

In contemporary state and institutional practice, two doctrines have attained supremacy. The first entitles riparian states to exploit international watercourses in an equitable and reasonable manner. The second principle cautions states to take appropriate measures in the development of Transboundary Rivers such that significant harm to the stakes of other watercourse states is averted. Today these two principles are indisputably regarded as cornerstones of the regime of international watercourses law.<sup>11</sup>

The duty not to cause significant harm is among a few principles that govern the issue of international watercourses. This principle has obvious connections with the theories of abuse of rights (*abus de droit*, *Rechtsmissbrauch*) and good neighborliness. All these three attempt to reconcile conflicting interests of the states that share common resources.<sup>12</sup> The idea enshrined in the latter two theories (namely the theories of abuse of rights and good neighborliness) has much in common with the principle of the duty not to cause significant harm. However this principle does have its own peculiarities that have developed over time. Throughout its development the normative content and the role played by the principle under international water law differs from time to time, from one instrument to the other, from one regional watercourse agreement to the other and from one bilateral watercourse agreement to another.

The 1997 UN Convention on the Law of the Non-Navigational Uses of International Watercourses (UN Watercourse Convention) is one of the most recent and comprehensive international watercourse agreements with regard to Non-navigational uses of International

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<sup>10</sup> McDaniels, T. L. & R. K. Paisley (1995), *International Water Law, Acceptable Pollution Risk and the Tatshenshini River*, National Resource Journal, Vol 35, No.1, pp. 117-118.

<sup>11</sup> Tadesse Kassa (2013), *International watercourses law in the Nile River Basin: Three States at a Crossroads*, (Routledge Taylor and Francis Group, London/New York), pp. 148-149 [hereinafter Tadesse, *International watercourses law in the Nile River Basin: Three states at a crossroads*].

<sup>12</sup> Stephen McCaffrey (2001), *The law of international water course non navigation use*, Oxford University Press, p. 353 [hereinafter McCaffrey, *The law of international water course non navigation use*].

Watercourses. The convention incorporates this principle under the second part, entitled ‘general principles.’ This implies that the duty not to cause significant harm is among the most important principles regulating issues regarding non-navigational uses of international watercourses.

The application of this principle needs to consider other international water law principles that are important for effective water resource management in international water basins. Among these, the principle of equitable and reasonable utilization is most important. Therefore it is essential to look at how these important principles are utilized together. The fact that each international water basin has its own peculiarities in terms of the hydrographic and hydro political settings do have an effect on the application of the duty not to cause significant harm. Therefore we may need to consider the peculiar nature of the basin concerned. Thus In order to effectively apply the principle in the basin, it is essential to look at the hydrographic setting, hydro politics, and also the patterns of utilization of the resource among the basin states of the Nile River.

The implementation of the principle may be affected by various issues, it is crucial to examine how the past discourse and national policies of the Nile basin states. Beyond this, it is also important to consider the position of the riparian states in the negotiation process of the Nile River Basin Cooperative Framework Agreement. This will enable us to explain the positions of the Nile riparian states with regard to this principle at the negotiation stage.

The application of this principle also requires consideration of all relevant factors that are essential for its effective implementation in that international watercourse. Here also there is a need to investigate and sort out the factors that have an important role in the application of this principle in the Nile basin.

The Nile River Basin Cooperative Framework Agreement did not set out detailed guidelines on how the Nile River Basin Commission should promote and facilitate the implementation of the principles enshrined under this Framework convention, which includes the duty not to cause significant harm. This has its own drawbacks for application of the principle in this basin. Thus

research is required to determine how the duty not to cause significant harm is applied in the Nile basin.

## **1.2 Statement of the Problem**

The duty not to cause significant harm is one of the principles that governs the joint use of international watercourses resources. However how the principle is applied and how it is effectively utilized in conjunction with other principles has been a point of contention. Therefore a proper study of the principle and associated issues is required.

Often it is biased researchers and scholars downstream who write on the principle of the duty not to cause significant harm. For this reason, this principle is primarily understood from one perspective—that of the downstream lower riparian states. Upper riparian academicians and researchers are not observed while they work on the issue; in fact, they focus on the other principles that they believe favor the upper riparian states, such as equitable utilization and the theory of absolute territorial sovereignty. Because of this, the principle has not been examined properly.

The different terminology researchers and academicians use for this principle creates its own difficulty in properly understanding what this principle really means. Here also there is a need to understand the effect of what the principle is called; how the principle is enshrined in different international water law instruments, and case law. Including what the duty not to cause significant harm stands for under international water law; and the relation between the duty not to cause significant harm and the principle of equitable and reasonable utilization.

As this research paper examines the application of this principle in relation to the Nile River basin, the following topics will be addressed:-

As each international water basin has its respective peculiarities in terms of hydrographic and hydro political context, this study will examine the hydrographic and hydro political circumstances of the Nile basin and its effect on the application of the duty not to cause significant harm. The development of Nile water resources also has some sort of connection with the application of the duty not to cause significant harm. Therefore the study will also consider this issue. The different factors considered in the application of this principle in the Nile basin

will also be addressed, and the paper will conclude with an effort to explain and clarify possible factors that should be incorporated as a guideline for the effective application of the principle in the Nile River basin.

### **1.3 Research Questions**

This paper addresses the following research questions:

- What is the duty not to cause significant harm?

One of the obligation under customary international law relating to international watercourse states is; the states sharing freshwater resources is to prevent the causing of significant harm to other watercourse states through activities related to an international watercourse. So what is the duty not to cause significant harm as it stands under international water law? What counts as harm? What must be the nature of harm? What does “significant” mean?

- What are the important considerations in the application of the principle of the duty not to cause significant harm?

Various factors should be considered when applying the duty not to cause significant harm in order to make its application effective in the shared watercourse. What are these factors when the principle is applied in this particular international watercourse?

- Which takes priority, the duty not to cause significant harm or the principle of equitable utilization?

It has proved quite difficult to agree on which of the two principles (equitable and reasonable utilization, and the obligation not to cause harm) should take priority. This issue occupied the ILC throughout its 23 years of work on the convention. Which rule is given primacy, if the need arises?

- How can we apply the principle in the Nile basin states?

Applying the principle in the Nile basin requires an examination of the circumstances of the Nile basin, including the patterns of water resource utilization and the effect of the application of the duty not to cause significant harm in the basin.

- What are the challenges that must be faced when applying this principle?

This study will also try to highlight and clarify possible factors that the proposed guidelines should incorporate for the application of the principle in the Nile basin. The study will focus on the potential problems that riparian states face while applying this principle.

These questions will be further justified by a literature review and analysis.

#### **1.4 Objective of the Study**

The general objective of this study is to examine how the duty not to cause significant harm is developed and used in the international water law regime, and to investigate its application contextually in the Nile River basin.

In more specific terms, the objectives of this study are: To examine how the duty not to cause significant harm is developed under international water law, to explore the major challenges that may be encountered in the application of the duty not to cause significant harm in international water basins, to examine how the duty not to cause significant harm relates to the principle of equitable utilization, to examine the patterns of utilization in the Nile River basin, and to examine factors that need to be considered in the application of the duty not to cause significant harm in the Nile basin states.

#### **1.5 Significance of the Study**

The significance of this study is that it shows how the principle is enshrined in international water law and how it can be applied in the Nile basin states.

In more specific terms, the study will have the following significance;

- It will contribute to the field of knowledge of international water law.
- It serves as a source of information and reference.
- It will promote research in this specific field of study.
- It will contribute to the Nile Basin Commission's deliberation about how best to implement the duty not to cause significant harm rule in the Nile basin.



## **1.6 Research Methodology**

The methodology of this study will employ both primary and secondary sources of international law. In writing this paper, the researcher will limit himself to the primary and subsidiary sources of international law as provided under Article 38 of the International Court of Justice (ICJ) Statute; international conventions, whether general or particular; international custom, as evidence of a general practice accepted as law; the general principles of law and judicial decisions. The commentaries by the International Law Commission will be used to supplement arguments.

The theoretical analysis will be based on existing literature concerning international water law and the Nile basin. The author has also made an effort to conduct interviews and discussions with experts on the Nile issue. Working papers, discussion minutes, books, periodicals and internet sources have been consulted in order to understand Nile riparian states' national policies on the river.

## **1.7 Organization of the Paper**

The paper is organized in four chapters. The first introductory chapter includes background information, a statement of the problem, research questions, and the objective of the study, as well as the scope of the study, methodology, and this section on the organization of the paper.

Chapter two deals with the conceptual framework of the duty not to cause significant harm, in this chapter the principle is assessed in light of international legal instruments and case law that deals with this principle.

Chapter three addresses the interplay between the principles of the duty not to cause significant harm and that of equitable utilization. In this chapter the author will attempt to look the compromising approach in applying these principles in the international water basin.

Chapter four looks at the application of the duty not to cause significant harm in the Nile basin. The study focuses on an examination of the principle and its application in the Nile basin. But due to the fact that most Nile issues involve Ethiopia, which is the source of more than 85% of the Nile's water, and Egypt, which utilizes the lion's share of the water of the Nile, the paper will focus on the eastern Nile basin states. This chapter will also look at patterns of utilization in the

Nile River basin and the position advocated by upper and lower riparian states. In order to examine these positions under international water law, attempt will be to look at the factors that should be considered in the application of the principle, and to discuss the possible problems to be faced in application of this principle. The paper concludes with remarks and recommendations.

## Chapter two

### Conceptual framework of the duty not to cause significant harm

#### Introduction

States sharing freshwater resources have developed basic rules governing the use of these resources through their practice over many years. Some of the rules form part of customary international law, which is a body of unwritten law binding on all states. Countries sharing freshwater may also enter into treaties applying and adjusting rules of customary law to suit their specific situations with regard to the watercourses they share.<sup>13</sup>

Under customary international law, states sharing freshwater resources have an obligation to prevent the causing of significant harm to other states through activities related to an international watercourse. This can also be inferred from Article 7 of the UN Watercourse Convention. As a result, states must take all appropriate measures to avoid such harm and, if it is caused nevertheless, they must do their best to eliminate or mitigate this harm, consistent with their rights and obligations of equitable utilization.<sup>14</sup>

This chapter considers the conceptual framework of the duty not to cause significant harm under international water law, as well as the problems scholars face in studying this principle, including the diverse names used to represent the concept and the variations in meaning expressed in these different names. It will look at the likelihood that downstream riparian states also harm upstream ones. And it will examine the development of this principle under international watercourses law, which is how the duty not to cause significant harm has been enshrined in selected international, regional and bilateral water law instruments, including the Nile River Basin Cooperative Framework Agreement, as well as interstate and intrastate case law. Finally, effort will be made to analyze the normative content of the duty not to cause significant harm.

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<sup>13</sup> Dinar, S.Dinar, McCaffrey & McKinney (2007), *Bridges Over Water: Understanding Transboundary Water Conflict, Negotiation and Cooperation*, vol. 3, World Scientific Publishing Co. Pte. Ltd., pp. 64-65 [hereinafter Dinar et al., *Understanding Transboundary Water Conflict, Negotiation and Cooperation*].

<sup>14</sup> Ibid. p.65.

## 2.1 The duty not to cause significant harm under international water law

The duty not to cause significant harm is one of the basic principles governing international water law issues. This duty is enshrined in various international water law instruments in different facets. There is general agreement that the principle has already achieved the status of customary international law.<sup>15</sup> In contemporary state practice, this principle stands among the few principles that has gained supremacy and come to be regarded as one of the cornerstones of the regime of international watercourse law. Beyond this, the rule has been enumerated in the pronouncements of numerous international governmental and nongovernmental organizations. It has also been referred to in judicial decisions as well as opinions of highly praised jurists.<sup>16</sup>

The obligation “not to cause significant harm” derives from the theory of limited territorial sovereignty. The theory of limited territorial sovereignty stipulates that all watercourse States have an equitable right to the utilization of a shared watercourse but must also respect the sovereignty of other States and their equitable rights of use. This principle is widely accepted as it is one of the principles that serve as the foundation of the law of international watercourses and the UN Watercourse Convention.<sup>17</sup>

Historically, the no-harm rule has been identified with the maxim *sic utere tuo ut alienum non laedas* which means “use your own not to harm that of another”. This has itself been called “a reflection of the sovereign equality of states”. It has been said that this rule “appears to have acquired customary force, as is attested by international practice”. There is indeed little doubt that the *sic utere tuo* or no-harm rule have acquired the status of customary international law and also broadly recognized as a general principle of international law.<sup>18</sup> Experts in international water law state that *sic utere tue* occupies a firm place among the doctrinal bases for the

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<sup>15</sup> Scholars like McCaffrey and Caflisch have concurred that this principle is firmly grounded in customary international law and is a general principle of international law. As noted by Mohammed S. Helal in *Sharing Blue Gold: The 1997 UN Convention on the Law of the Non-Navigational Uses of International Watercourses Ten Years On*, *Colo. J. Int'l Environmental. Law. & Pol'y*, Vol. 18:2, 2007, p. 356.

<sup>16</sup> Well-known experts in the field of international water law, Caflisch, Dellapenna, McCaffrey, Wouters and others have in one way or another discussed that this principle is a basic obligation imposed upon watercourse states. In addition to these experts, the *Trail Smelter arbitration* award and *Corfu Chanel case* may also be cited in this regard.

<sup>17</sup> User's Guide Fact Sheet Series: Number 5, No Significant Harm Rule, available at; <http://www.unwatercoursesconvention.org/documents/UNWC-Fact-Sheet-5-No-Significant-Harm-Rule>, visited 13/12/2013.

<sup>18</sup> *Supra* note 12, McCaffrey, *The law of international water course non navigation use*, p. 349.

obligation of states to avoid appreciable harm to other states, perhaps even more particularly with respect to harm transmitted via international watercourses.<sup>19</sup>

As described above, the duty not to cause significant harm calls for watercourse states to take all appropriate measures to prevent causing significant harm to other watercourse states. The inclusion of this duty in the UN watercourse convention and its placement in the section of the convention entitled “general principle” implies that it is a fundamental obligation in the field.

In its commentary, the International Law Commission (ILC) also reasoned that this reflected the equality of rights and sovereignty of all watercourse states, because, “in the context of the non-navigational uses of international watercourses, this is another way of saying that watercourse states have equal and correlative rights to the uses and benefits of the watercourse.”<sup>20</sup> Thus, states' freedom of action and utilization of international rivers is limited by the reciprocal rights of other states in utilizing shared watercourses. This principle represents a further reflection of the limited territorial sovereignty theory.<sup>21</sup>

While it is clear that one state may not intentionally cause harm to another through, for example, flooding or deliberate releases of toxic pollution, questions are sometimes raised about whether one state's use that reduces the available supply in another state is prohibited by this norm.<sup>22</sup> The principle obliges the watercourse states, when utilizing an international watercourse in their territory, to take all proper measures to avoid causing significant harm to other watercourse states. When significant harm nevertheless is caused to another watercourse state, as provided in the 1997 UN Watercourse Convention, the state causing the harm is required to “take all appropriate measures, having due regard to different factors, in consultation with the affected

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<sup>19</sup> Ibid. p. 350.

<sup>20</sup> ILC, Report of the International Law Commission on the work of its forty-sixth session, As quoted by Mohammed S. Helal (2007), *Sharing Blue Gold: The 1997 UN Convention on the Law of the Non-Navigational Uses of International Watercourses Ten Years On*, *Colo. J. Int'l Environmental Law and Policy*, vol. 18, p.356.

<sup>21</sup> The theory of limited territorial sovereignty is based on the assertion that every co-riparian is free to use the waters of shared rivers within its territory on condition that the rights and interests of all the other co-riparian states are taken into consideration. In this case, sovereignty over shared waters is relative and qualified. The co-riparians have reciprocal rights and duties in the use of the waters of common rivers. Physical unity creates a unique legal unity leading to the formulation of a ‘community of interests,’ and the waters of the shared rivers so become *res communis*. See supra note 2, Dante, *Principle of Water Law and Administration: National and International*, p. 213.

<sup>22</sup> Grzybowski, McCaffrey & Paisley (2010), *Beyond International Water Law: Successfully Negotiating Mutual Gains Agreements for International Watercourses*, *Global Business & Development Law Journal*, vol. 22, p. 142.

State, to eliminate or mitigate such harm, and where appropriate, to discuss the question of compensation”.<sup>23</sup>

## **2.2 Problems associated with understanding the duty not to cause significant harm.**

A proper understanding of this principle is very important to its effective application. However, we may encounter certain problems that could possibly result with a difficulty in understanding this principle. In this part of the paper an attempt will be made to appreciate potential misunderstandings and other problems.

### **2.2.1 Issues related to nomenclature**

It is possible to look at different authorities—conventions and bilateral agreements as well as authors—and observe that different names are being used for this principle. The naming does have some effect on proper understanding of this principle. Though it has been named with different names by which it is titled the following may be mentioned: the no harm rule,<sup>24</sup> the obligation not to cause significant harm<sup>25</sup>, the obligation not to cause unnecessary or unprovoked harm<sup>26</sup>, prohibition of activities that do appreciable harm to other watercourse states (no appreciable harm).<sup>27</sup> These are common terms used to describe this principle.

The framing of the principle as such does have its own effect on understanding of the principle. Each specifies its own degree of harm, especially with regard to the threshold of the prohibited harm. For example, the “*no harm rule*” refers to the fact that activities performed in the watercourse states should not have any effect on other watercourse states. As the nomenclature of the principle is not attached to any threshold of prohibited harm, what is prohibited is any and

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<sup>23</sup> The UN Convention on the Law of the Non-navigational Uses of International Watercourses, adopted by the General Assembly of the United Nations by resolution 51/229, in its Fifty-first Session, on 21 May 1997, not yet in force, Articles 5, 6, 7(1) & 7(2) [herein after UN Watercourse Convention].

<sup>24</sup> Patricia K. Wouters calls the principle by this name, for example, in her article entitled “An Assessment of Recent Developments in International Watercourse Law through the Prism of the Substantive Rules Governing Use Allocation, International Watercourse Law, *Natural Resources Journal*, vol. 36, spring 1996, p. 419.

<sup>25</sup> Contemporary watercourse agreements, including the UN Watercourse Convention and the Agreement on the Nile River Basin Cooperative Framework, prefer to call the principle by this name.

<sup>26</sup> Some scholars in the field—for example, Tadesse, *International watercourses law in the Nile River basin: Three states at a crossroads*, supra note 11, p. 132—use this name. It was also used in the drafting process of the 1997 UN Watercourse Convention.

<sup>27</sup> It is stated that watercourse states shall utilize an international watercourse in such a way as ‘not to cause appreciable harm’ to other watercourse states. Robert Rosenstock, First report on the law of the non-navigational uses of international watercourses, Special Rapporteur, Documents of the forty-fifth session, 1993, Document: - vol. II(1), p. 185, available at: <http://www.un.org/law/ilc/index.htm>.

all harm to the other riparian states by utilization of the shared watercourse. Hence, states are expected to refrain from harming other states in the watercourse in any manner. Injury in this context is somewhat a repetition of the old maxim *sic utere tuo ut non alienum laedas*, which has been understood in a wider perspective and has great effect on the right of utilization of shared waters.<sup>28</sup> This freezes all activities of a watercourse state if it is in a position to harm other watercourse states. But it should be mentioned here that utilization by one watercourse state in one way or another does generally have some sort of harmful impact on the other watercourse states.

The second phrasing which is commonly accepted in contemporary international watercourse law states the principle as “*not to cause significant harm*”. This terminology is enshrined in the UN watercourse convention, as well as the Agreement on the Nile River Basin Cooperative Framework and other contemporary river basin cooperative agreements.<sup>29</sup> It refers to some threshold of prohibited action attached to the so-called harm. The word “*significant*” as a qualifier of the prohibited harm is intended to make the threshold of prohibited harm more certain, avoiding the dual meaning of the term “*appreciable*” as both “*measurable*” and “*significant*”. In the commentary to the draft articles, the Commission pointed out that “*significant*” is not intended to raise the applicable standard. In the ILC understanding, “*significant*” indicates that the harm must be more than simply measurable, but not necessarily “*substantial*”.<sup>30</sup> Therefore what matters is whether the harm is extensive or important enough to merit attention.

The key factor is the level of the harm, which must rise to the level of “*significant*” in order to constitute a violation of this duty. With regard to a watercourse, the United Nations International Law Commission (UNILC) has stated that significant harm occurs where the “*harm exceeds the*

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<sup>28</sup> C. B. Bourne(1965), The Right to Utilize the Waters of International Rivers, University of British Columbia, *the Canadian Yearbook of International Law*, P.191

<sup>29</sup> Regional watercourse agreements like Revised Protocol on Shared Watercourses in the Southern African Development Community (SADC) in Article 3(10)(a) states that; State Parties shall, in utilizing a shared watercourse in their territories, take all appropriate measures to prevent the causing of significant harm to other watercourse States. Done at Windhoek, this 7th day of August 2000, it can be reached at: <http://www.internationalwaterlaw.org/documents/regionaldocs/Revised-SADC-SharedWatercourse-Protocol-2000.pdf>

<sup>30</sup> Maurizio Arcari, The Codification of the Law of International Watercourses: The Draft Articles Adopted by the International Law Commission, P.19, It can be reached at; [http://dspace.unav.es/dspace/bitstream/10171/21504/1/ADI\\_XIII\\_1997](http://dspace.unav.es/dspace/bitstream/10171/21504/1/ADI_XIII_1997) consulted on 10/09/2013.

parameters of what was usual in the relationship between the States that relied on the use of the waters for their benefit.”<sup>31</sup> Though it is not easy to show this threshold clearly, it is indicated that causing harm to another state by utilizing the shared river resource has to have a ‘*significant*’ impact on other watercourse states. This threshold implies that the state actor must be in a position to cause the other riparian states to suffer some degree of harm, and that harm; is not a simple harm on that states rather it linked with some degree of harm that do have an effect on the utilization of that shared resources.

Scholars who study international water law stipulate that in order to qualify as “significant” the level of harm has to be higher than merely perceptible or trivial (which would be considered insignificant), but it could be less than severe or substantial. In this regard the SADC Revised Protocol on Shared Watercourses states that significant harm means “non-trivial harm capable of being established by objective evidence without necessarily rising to the level of being substantial”.<sup>32</sup> It is necessary to prove the existence of a real impairment of a use, with a detrimental impact of some consequence upon the environment or the socioeconomic development of the harmed state (e.g., detriments to public health such as loss of life or personal injury, loss or injury to property and environmental harm).<sup>33</sup> Where such harm has occurred, it is considered to qualify as a significant effect on the watercourse state.

A third phrase used to express this principle is “*the duty not to cause unnecessary or unprovoked harm*”.<sup>34</sup> This indicates that the threshold of harm is not to perform excessive amount of harm beyond what is necessary. So the duty imposed upon the watercourse states is to avoid causing harm beyond what is necessary. This obligation seems a due diligence commitment imposed upon watercourse states. This obligation implies that the state must give due consideration to its activities and imposes an obligation not to act without reason.

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<sup>31</sup> Gabriel E. Eckstein (2007), Commentary on the U.N. International Law Commission’s Draft Articles on the Law of Transboundary Aquifers, *Colombia Journal of international Environmental Law & policy*, Vol. 18:3, P.569

<sup>32</sup> Supra note 29, SADC Revised Protocol on Shared Watercourses, Art.1.

<sup>33</sup> Wouters, Vinogradov, Allan, Jones & R. Clark (2005), *Sharing Transboundary Waters: An Integrated Assessment of Equitable Entitlement: The Legal Assessment Model*, Technical Documents in Hydrology, No. 74, UNESCO, Paris, p. 54 [hereinafter Wouters et al, *Sharing Transboundary Waters: An Integrated Assessment of Equitable Entitlement: The Legal Assessment Model*].

<sup>34</sup> Supra note 11, Tadesse, *International watercourses law in the Nile River basin: Three states at a crossroads*, p. 172.



Another term used to describe this principle is “*no appreciable harm*”. The ILC was in a position to choose this phrasing. In paragraph (4) of his comments on draft article 16 of the Fourth Report, McCaffrey states that with regard to the quantum of harm, “*appreciable harm*” refers to harm that was significant, in other words, not be trivial or inconsequential, but less than “substantial”. The term “harm” was used in the factual sense to mean actual impairment of use, injury to health or property, or a detrimental effect on the ecology of the watercourse.<sup>35</sup> According to the commentary to Article 7 of the draft convention, “‘*appreciable harm*’ embodies a factual standard . . . [It] must be capable of being established by objective evidence.” There must be a real impairment of use, i.e., a detrimental impact of some consequence upon, for example, public health, industry, property, agriculture or the environment in the affected state. “Appreciable” harm is, therefore, that which is not insignificant or barely detectable but is not necessarily “serious”.<sup>36</sup>

While international instruments may be found which purport to prohibit activities that cause any harm whatsoever to another watercourse state, most protect watercourse states only against harm that is of some significance. The qualifying terms vary, but the intent of the instruments employing such terms seems to be to protect the parties against material or significant harm. “Substantial”, “significant”, *sensible* (in French and Spanish) and “appreciable” (especially in French) are the adjectives most frequently employed to modify the term “harm” or its equivalent.<sup>37</sup>

The existence of such variations does have its own drawbacks in properly understanding this principle, and it results in lack of consensus and agreement among riparian states on how to apply the principle in international shared watercourses. In this paper, this principle is identified as “the duty not to cause significant harm” for three reasons: 1) it is contemporarily accepted and utilized in most recent multilateral and regional watercourse agreements; 2) the most important instruments, including the UN watercourse convention of 1997, use this terminology; and 3) the Nile Basin Cooperation Framework Agreement uses much the same terms. For all of these reasons, this principle is so designated with the duty not to cause significant harm although some

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<sup>35</sup> Yearbook of the International Law Commission (1990), Summary records of the meetings of the fortieth session, 9 May-29 July 1988, A/CN.4/SER.A/1988, Volume I, United Nations, New York, p. 123.

<sup>36</sup> Supra note 4, Wouters, p. 48.

<sup>37</sup> Report of the International Law Commission on the work of its fortieth session (9 May-29 July 1988), Document A/43/10, Extract from the Yearbook of the International Law Commission:- Document:-vol. II(2), 1988, p. 36.

variations may be employed; however the connotation is similar unless the context requires other inferences.

### **2.2.2 Possibility of harm by downstream states**

It is commonly believed that it is only upstream riparian states that can harm downstream states by affecting the quantity or quality of water flowing to them. It is not generally realized that downstream riparian can also harm upstream riparian by foreclosing their future uses of water through the prior use of, and the claiming of rights to such water.<sup>38</sup> For this reason, downstream riparian states require that they be notified of any activity upstream to ensure that such activity will not harm their interests. Many believe that this is a unilateral requirement imposed upon the upper riparian countries and does not apply to downstream states. Along this lines of thinking, it is also widely believed that only upstream riparian's can harm downstream riparian's, and not the other way around.<sup>39</sup> But it is also important to note that, contrary to popular belief, in some cases "harm" can be caused by a downstream state to its upstream riparian neighbors. – I.e. by foreclosing the upstream state's future water uses through the prior utilization of such water.<sup>40</sup>

Still, because of this popular belief that it is only upper riparian states that may harm downstream states as a result of the direction of water flow; the principle is often regarded as a duty that is imposed only upon the upper riparian states. Thus the principle of the duty not to cause significant harm is thought only to favor downstream countries. But a close investigation of the principle reveals that it imposes an obligation on both upper and lower riparian states. Each group of riparian states can actually affect, and even harm the other through their activities in shared water basins. Thus a poor upstream country could be precluded from developing the water resources of a shared river in the future if a richer downstream riparian state, without consultation or notification, develops it at present.<sup>41</sup>

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<sup>38</sup> Salman M.A. Salman (2010), Downstream riparians can also harm upstream riparians: the concept of foreclosure of future uses, *Water International* Vol. 35, No. 4, Rutledge Taylor & Francis Group, P.350.

<sup>39</sup> *Ibid*, P.351

<sup>40</sup> *Supra* note 33, Wouters et al, *Sharing Transboundary Waters: An Integrated Assessment of Equitable Entitlement: The Legal Assessment Model*, p. 54.

<sup>41</sup> Salman M.A. Salman (2009), *The World Bank Policy for Projects on International Water Ways: An Historical and Legal Analysis*, Law, Justice and Development series, The World Bank, Washington, DC, p. 116.

As Salman clearly notes, one of the major misunderstandings about international water law is that harm can only be caused by upstream riparian states to those downstream. Based on this defective belief, it is widely thought by a large segment of water resources specialists, both lawyers and non-lawyers that notification is an exclusive right of downstream riparian states, because only upstream states can harm their downstream neighbors. In other words, harm can only “travel” downstream with the flow of the water, and accordingly, downstream riparian states do not need to notify upstream states of any project or activity they are undertaking or plan to undertake because such a project or activity cannot possibly harm the upstream state.<sup>42</sup> But this is a misconception. Harm can also travel upstream due to the acts of downstream countries.

As a matter of general understanding as well as law, this widely held false belief has resulted in the imposition of the obligation not to cause significant harm only upon upstream riparian states.

### **2.2.3 Degree of harm: Qualitative and qualitative considerations**

Harm can be quantitative or qualitative or both. The quantification of harm relates to how far the state concerned is acting contrary to the principle of equitable and reasonable utilization, while the quality of the harm relates to environmental obligations. It is assumed that the significant harm principle tracks similar degrees of harm for every type of harm sustained by watercourse states. However experts contend that a close examination of the subject reveals that the degree of qualitative and quantitative detriment required for “significant” harm differs.

For example, the “no significant harm” rule is preferable in cases involving pollution and other threats to the environment. While a State could conceivably seek to justify an activity resulting in such harm as being an “equitable use,” the “no harm” principle would—at least prima facie—require abatement of the injurious activity.<sup>43</sup>

Article 21(2) of the UN Watercourse Convention sets forth the general obligation of watercourse states to “prevent, reduce and control pollution of an international watercourse that may cause

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<sup>42</sup> Supra note 38, Salman M.A. Salman, p. 351.

<sup>43</sup> Stephen McCaffrey (1988-1989), The Law of International Watercourses: Some Recent Developments and Unanswered Questions, *Denver Journal of International Law and Policy*, vol. 17(2), p. 510.

significant harm to other watercourse States or to their environment”. This sub-article is a specific application of the general principles contained in articles 5 and 7.<sup>44</sup>

From the articulation of the UN watercourse convention, one can see that there seems some sort of difference in the quantitative and qualitative degree of harm that qualifies as “significant”.

A strict obligation is imposed upon watercourse states regarding the issue of environmental pollution. The state concerned is required to take strict due care in all activities. Beyond this, it is stated that “Watercourse States shall, individually and, where appropriate, jointly, prevent, reduce and control the pollution of an international watercourse that may cause significant harm to other watercourse States or to their environment, including harm to human health or safety, to the use of the waters for any beneficial purpose or to the living resources of the watercourse”.<sup>45</sup> This shows the strict standard for the degree of harm with regard to the quality of water in cases of environmental pollution. The duty imposed upon watercourse states is rigorous. However, the threshold for the degree of harm caused in cases of water quantity effects is more flexible.

### **2.3 The duty not to cause significant harm: Development under international watercourses law.**

To understanding the development of the duty not to cause significant harm under international water law, and to develop it further, it is important to look at how this principle is enshrined in different international and regional water law instruments and case law. This section will consider the development of the obligation not to cause significant harm under international water law.

#### **2.3.1 The Institute of International law (IIL)**

The Institute of International Law (IIL) is a scholarly non-governmental organization established in 1873 and working on various fields of international law. This Institute adopts resolutions and

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<sup>44</sup> The law of non-navigational uses of international watercourses, Draft articles and commentaries thereto adopted by the Drafting Committee on second reading: articles 1-33 reproduced in Yearbook of ILC 1994, vol. II (Part Two), Para. 222, A/CN.4/L.493, p. 122.

<sup>45</sup> Supra note 23, see Article 21(2) of the 1997 UN Watercourse Convention. In applying the general obligation of article 7 to the case of pollution, the Commission took into account the practical consideration that some international watercourses are already polluted to varying degrees, while others are not. In light of this state of affairs, it employed the formula "prevent, reduce and control" in relation to the pollution of international watercourses.

rules that aim to codify international law as it exists.<sup>46</sup> It should be clarified that these resolutions and rules do not have formal standing and are not legally binding per se. However, IIL rules and resolutions have considerable authority by virtue of the fact that they reflect the established customary principles of international water law, based on the expertise of respected members of the institution.<sup>47</sup>

The resolutions of the IIL emphasize, and are centered on, the obligation not to cause significant harm to other riparian states. The Institute's first resolution, adopted in 1911, is known as the Madrid Declaration. This resolution established an absolute prohibition against activities that may result in injury to other riparian states.<sup>48</sup>

The Madrid Declaration's Statement of Reason declares that riparian states with a common stream are in a position of permanent physical dependence on each other which precludes the idea of the complete autonomy of each state in the section of the natural watercourse under its sovereignty.<sup>49</sup> This clearly states the interdependence of basin states within internationally shared watercourses and the respective obligation that is imposed upon them for the purpose of avoiding harm to each other. Thus the Madrid Declaration came up with an obligation of basin states to avoid and prohibit activities that may result in injury to other riparian states.

The Madrid Declaration also states that when a stream traverses successively the territories of two or more states, all alterations injurious to the water, including the emptying therein of injurious matter (from factories, etc.), is forbidden.<sup>50</sup> This may be evidence that the idea of

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<sup>46</sup> The Institute of International Law, in French, Institut de Droit International, is a private international organization, established in 1873 in Ghent, Belgium, dedicated to the study, development, and implementation of international law and, through that law, the promotion of international peace. It was formed by 11 international jurists led by Gustave Rolin-Jaequemyns, editor of a prominent legal journal. IIL website available at: <http://www.infoplease.com/encyclopedia/history/institute-international-law.html>, visited on 20/09/13.

<sup>47</sup> Salman M. A. Salman (2007), The Helsinki Rules, the UN Watercourse Convention and the Berlin Rules: Perspectives on International Water Law, Rutledge Taylor & Francis group, *Water Resource Development*, vol. 23, no. 4, p. 628.

<sup>48</sup> Article I of the International Regulation regarding the Use of International Watercourses for Purposes other than Navigation Declaration of Madrid, 20 April 1911, states: "When a stream forms the frontier of two States, neither of these States may, without the consent of the other, and without special and valid legal title, make or allow individuals, corporations, etc. to make alterations therein detrimental to the bank of the other State. On the other hand, neither State may, on its own territory, utilize or allow the utilization of the water in such a way as to seriously interfere with its utilization by the other State or by individuals, corporations, etc. thereof."

<sup>49</sup> International Regulation regarding the Use of International Watercourses for Purposes other than Navigation - Declaration of Madrid, 20 April 1911, Statement of Reason, available at: <http://www.fao.org/docrep/005/w9549e/w9549e08.htm>, last visited 11/18/13.

<sup>50</sup> Ibid, Art. II(2).

absolute prohibition of harm among riparian states with regard to the utilization of internationally shared watercourse resources originated in the declaration.

The second resolution, adopted by the IIL in 1961, is a Resolution on the Use of International Non-Maritime Waters which is commonly known as the Salzburg Resolution. In the preamble part of the resolution it is stated that the obligation not to cause unlawful prejudice to a third party is one of the basic principles governing general relations between neighboring countries. This obligation is one reason that such a resolution is necessary.<sup>51</sup>

Under Article II of the resolution it is also stated that every state has the right to make use of the waters flowing across or bordering its territory, subject to the limitations imposed by international law and, in particular, those laws which result from legal dispositions.

However the right to make use of the waters flowing across or bordering a state's territory is limited by the right of use by the other states concerned with the same river or watershed.<sup>52</sup> The Salzburg Resolution emphasizes states' obligation not to cause harm to other states, but subjected the right of each state to use the waters of the shared river to the right of use by other states. Thus the absolute prohibition of the Madrid Declaration was somewhat relaxed by the Salzburg Resolution.<sup>53</sup> This can be demonstrated by a cumulative reading of Articles III and IV. These provisions reveal that in cases where there is a disagreement with regard to the extent of states' rights of use, the disagreement shall be settled on the basis of equity. Beyond this, it is also stated that states may only proceed with public works or use the waters of a river or watershed in a manner that may affect the possibilities for use of the same waters by other states on condition that the benefit of the advantage to which they are entitled by virtue of Article III is preserved, as well as adequate compensation paid for any losses or damages incurred.<sup>54</sup>

Therefore it is possible to conclude that unlike the Madrid Declaration, the Salzburg Resolution though it prohibits acts that may cause harm to other riparian states, also gives some room by which a certain amount of harm may be tolerated.

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<sup>51</sup> Resolution on the Use of International Non-Maritime Waters, Yearbook of the International Law Institute, vol. 49, II, Salzburg Session, September 1961 (Basle 1961), commonly known as the Salzburg Resolution.

<sup>52</sup> Ibid, Art. II.

<sup>53</sup> Supra note 47, Salman, p. 628.

<sup>54</sup> Supra note 51, Salzburg Resolution, Articles III and IV.

### 2.3.2 The International Law Association (ILA)

The Helsinki Rules were adopted by the International Law Association (ILA) in 1966. These rules were widely accepted and quoted by state governments and scholars, and some of the provisions are considered as reflecting customary international law.<sup>55</sup> The work of the ILA, as reflected in the Helsinki Rules, centers on the principle of equitable and reasonable utilization.<sup>56</sup> The Helsinki Rules do not include a separate article on the obligation not to cause significant harm. The only reference made is to the factor for equitable and reasonable utilization dealing with existing uses as stated under Article V (II) (11).<sup>57</sup>

The Helsinki Rules did not include a clear provision outlawing the instigation of significant harm to other watercourse states in terms of water quantity. Instead, the rules only proscribed the causing of substantial pollution to co-riparian states. But quantitative harm caused to existing uses was included among the factors relevant to the determination of equitable and reasonable utilization.<sup>58</sup> Therefore it is possible to argue that the Helsinki Rules did not give more emphasis to the duty not to cause significant harm than they accorded to the equitable utilization principle.

The other important instrument is the Berlin Rules which were adopted by the ILA in its Berlin Conference in 2004.<sup>59</sup> The Berlin Rules emphasize the obligation to manage the shared watercourse in an equitable and reasonable manner, but this is subject to the requirement of due regard for the obligation not to cause significant harm to other basin states.<sup>60</sup>

The Berlin Rules addressed significant harm separately in article 16,<sup>61</sup> which is titled “Avoidance of Transboundary Harm”. This article sets forth the basic customary law rule that watercourse

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<sup>55</sup> Supra note 38, M.A. Salman, p. 353.

<sup>56</sup> Chapter 2 of the Helsinki Rules, titled “With Equitable Utilization of the Waters of an International Drainage Basin.” It includes the rules containing from Article IV to VIII.

<sup>57</sup> The article states that the degree, to which the needs of a basin state may be satisfied, without causing substantial injury to a co-basin state, is one of the factors which is to be considered in determining what a reasonable and equitable share is within the meaning of article V of the Helsinki Rules.

<sup>58</sup> Mohammed S. Helal (2007), Sharing Blue Gold: The 1997 UN Convention on the Law of the Non-Navigational Uses of International Watercourses Ten Years On, *Colombia journal of international Environmental Law and Policy*, vol. 18, no.2, pp. 355-356.

<sup>59</sup> These rules are quite comprehensive and detailed. They consist of 73 Articles divided into 14 chapters, covering various issues on water resources which go beyond the Helsinki Rules and the UN Watercourse Convention.

<sup>60</sup> Supra note 47, Salman p. 636.

<sup>61</sup> Article 16 of the Berlin Rules states that “Basin States, in managing the waters of an international drainage basin, shall refrain from and prevent acts or omissions within their territory that cause significant harm to another basin State having due regard for the right of each basin State to make equitable and reasonable use of the waters.”

states are required to avoid and prevent significant harm to other states arising from activities of the state or subject to the state's jurisdiction directed at the waters of an international drainage basin.<sup>62</sup> This clearly shows that there is an acknowledgment of the "no significant harm" rule, in contrast with the Helsinki Rules. Beyond this, as Salman clearly states, the Berlin Rules present the two principles as equal.<sup>63</sup> Salman also states that some experts in the field have gone further and indicated that the Berlin Rules actually render the principle of equitable utilization subordinate to the "no significant harm" rule, reversing the established principle of the Helsinki Rules.<sup>64</sup>

### **2.3.3 The International Law Commission (ILC)**

The Helsinki Convention on the Protection and Use of Transboundary Watercourses and International Lakes is the first multilateral treaty relating to watercourse uses since the relatively unsuccessful 1923 Geneva Convention Relating to the Development of Hydraulic Power Affecting more than one State (Geneva Convention).<sup>65</sup> The overall purpose of the treaty, concluded in March 1992, is to limit the transboundary impact arising from the utilization of international waters. Under article 2, the parties are required to "take all appropriate measures to prevent, control and reduce any transboundary impact."<sup>66</sup> Article 3 of this convention also requires that the parties, as far as possible and where appropriate, prevent, control and reduce transboundary impact. The convention provides that the parties are to be guided by "the precautionary principle," "the polluter-pays principle," and the requirement that "water resources shall be managed so that the needs of the present generation are met without compromising the ability of future generations to meet their own needs."<sup>67</sup> From this it is possible to conclude that there is some sort of obligation imposed on member states to conduct activities in watercourses in a manner that does not jeopardize the interest of the other watercourse states.

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<sup>62</sup> International Law Association Berlin Conference, Water Resources Law, Members of the Committee: Fourth Report, Commentaries, 2004, p. 22, available at: [www.internationalwaterlaw.org/documents/intldocs/ILA\\_Berlin\\_Rules-2004](http://www.internationalwaterlaw.org/documents/intldocs/ILA_Berlin_Rules-2004).

<sup>63</sup> Supra note 47, Salman p. 637.

<sup>64</sup> Ibid, p. 637.

<sup>65</sup> Supra note 24, Wouters, p. 425.

<sup>66</sup> Convention on the Protection and Use of Transboundary Watercourses and International Lakes, commonly known as the Helsinki Convention, 17 March 1992, art. 2 (1).

<sup>67</sup> Ibid, Art. 5(a), (b) and (c).



The other important convention in this regard is the 1997 UN watercourse convention. This convention included the obligation not to cause significant harm in article 7, which reads:

1. Watercourse States shall, in utilizing an international watercourse in their territories, take all appropriate measures to prevent the causing of significant harm to other watercourse States.
2. Where significant harm nevertheless is caused to another watercourse State, the State whose use causes such harm shall, in the absence of agreement to such use, take all appropriate measures, having due regard for the provisions of articles 5 and 6, in consultation with the affected State, to eliminate or mitigate such harm and, where appropriate, to discuss the question of compensation.<sup>68</sup>

Article 7(1) of the convention obliges watercourse states, when utilizing an international watercourse in their territory, to take all appropriate measures to prevent the causing of significant harm to other watercourse states.<sup>69</sup> Nevertheless, when significant harm is caused to another watercourse state, article 7(2) requires the state causing the harm to “take all appropriate measures, having due regard to Articles 5 and 6, in consultation with the affected State, to eliminate or mitigate such harm, and where appropriate, to discuss the question of compensation”.<sup>70</sup>

In conclusion, the obligation not to cause significant harm, like the right to equitable and reasonable utilization of an international watercourse, is firmly grounded in customary international law and represents a general principle of law.

The other important work of the ILC on this subject is the law of transboundary aquifers, which was adopted by the United Nations via General Assembly Resolution no. 63/124. This law was adopted with a view to regulation of the effective utilization of transboundary aquifers and aquifer systems.<sup>71</sup> However this thesis focuses only on how the principle of the duty not to cause significant harm was enshrined in draft articles.

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<sup>68</sup> Supra note 23, UN Watercourse Convention, Art 7.

<sup>69</sup> Supra note 47, Salman, p. 633.

<sup>70</sup> Ibid. p. 634.

<sup>71</sup> Draft articles on the Law of Transboundary Aquifers, United Nations, 2008, available at: <http://legal.un.org/ilc/texts/instruments/english/draft%20articles>.

The obligation not to cause significant harm is stipulated in article 6 of this convention. This obligation imposes a duty on aquifer states in utilizing transboundary aquifers or aquifer systems in their territories to take all appropriate measures to prevent the causing of significant harm to other aquifer states or other states in whose territory a discharge zone is located.<sup>72</sup>

It is possible to see shades of the principle of “no significant harm” enshrined in the drafting of these two conventions, which differ primarily insofar as one focuses on transboundary aquifers. The principle obligation spelled out in Draft Article 6 is constructed identically to the analogous obligation found in the UN Watercourse Convention.<sup>73</sup> However, it should not also be overlooked that given that the assessment process for aquifer contamination is more complicated than for surface waters and knowing that aquifers are more vulnerable than surface waters, a lower threshold—e.g., more stringent—may be required than that applied to surface waters.<sup>74</sup>

#### **2.3.4 Selected regional and bilateral watercourse agreements**

This section focuses on regional agreements involving watercourses. It is important to look at how the principle of the duty not to cause significant harm has been enshrined in various regional watercourse agreements. This will help to reveal how different agreements incorporate the principle of the duty not to cause significant harm rule.

The Agreement on Cooperation for the Sustainable Development of the Mekong River Basin, signed on 5 April 1995 at Chiang Rai, Thailand, also incorporates a provision incorporating the duty not to cause significant harm principle under Article 7, entitled “Prevention and Cessation of Harmful Effects”. Under this Article watercourse states are required to make every effort to avoid, minimize and mitigate harmful effects that might occur to the environment—especially concerning the water quantity and quality, the aquatic (eco-system) conditions, and the

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<sup>72</sup> Ibid. Art. 6 (1).

<sup>73</sup> Gabriel E. Eckstein (2007), Commentary on the UN International Law Commission’s Draft Articles on the Law of Transboundary Aquifers, *Colombia Journal of international Environmental Law & Policy*, vol. 18:3, p. 570.

<sup>74</sup> Ibid. pp. 570-571.

ecological balance of the river system—from the development and use of the Mekong River Basin water resources or discharge of wastes and return flows.<sup>75</sup>

The Agreement on Cooperation for the Sustainable Development of the Mekong River Basin goes even further, stating: “Where harmful effects cause substantial damage to one or more riparians from the use of and/or discharge to waters of the Mekong River by any riparian State, the party(ies) concerned shall determine all relative factors, the cause, extent of damage and responsibility for damages caused by that State in conformity with the principles of international law relating to state responsibility, and address and resolve all issues, differences and disputes in an amicable and timely manner by peaceful means as provided in Articles 34 and 35 of this Agreement, and in conformity with the Charter of the United Nations.”<sup>76</sup>

The second regional watercourse agreement that incorporate this principle is the Chad Basin Agreement. Chad basin countries—namely Cameroon, Chad, Niger and Nigeria—by recognizing the need to formulate principles for the utilization of the resources of the Chad basin for economic ends, including harnessing of the waters, agreed to conclude a convention.<sup>77</sup> The four countries bordering Lake Chad established the Lake Chad Basin Commission in 1964. They were joined in 1994 by the Central African Republic. The aims of the commission are to regulate and control the use of water and other natural resources in the basin and to initiate, promote, and coordinate natural resource development projects and research.<sup>78</sup>

Article 5 of the Chad Basin Agreement states that the Member States undertake to refrain from adopting, without referring to the Commission beforehand, any measures likely to exert “a marked influence” either upon the extent of water losses, or upon the form of the annual hydro graph and limnograph and certain other characteristics of the lake, upon the conditions of their exploitation by other border states, upon the sanitary condition of the water resources or upon the biological characteristics of the flora and fauna of the basin.<sup>79</sup> From this regional watercourse

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<sup>75</sup> The Agreement on Cooperation for the Sustainable Development of the Mekong River Basin, done on 5 April 1995 at Chiang Rai, Thailand, Article 7, available at:

<http://www.mrcmekong.org/assets/Publications/agreements/agreement-Apr95>.

<sup>76</sup> Ibid. Articles 34 and 35. These articles deal with Addressing Differences and Disputes, i.e., Resolution by the Mekong River Commission and Resolution by Governments, respectively.

<sup>77</sup> The Preamble to the convention relating to the development of the Chad basin, signed at Fort Lamy on 22 May 1964.

<sup>78</sup> See <http://lakechad.iwlearn.org/about/partners/partnerprofile.2007-02-15.9132809202>, consulted on 02/11/2013.

<sup>79</sup> Supra note.77, Art. 5.

treaty it is possible to observe the inclusion of the duty not to cause harm. According to this article, the degree of the harm has to be “a marked” one.

There are also numerous bilateral treaties that have incorporated this principle with a view to regulating the utilization of international watercourses by the watercourse states concerned. Among these is the 1993 Framework for General Cooperation Between Egypt and Ethiopia, wherein article 5 states: "Each party shall refrain from engaging in any activity related to the Nile waters that may cause appreciable harm to the interests of the other party."<sup>80</sup> This general cooperation agreement states that the two countries are obliged not to engage in activities that may cause appreciable harm to the interests of the other party. This has the connotation of imposing a duty on state parties not to use the water in a way that may possibly result in appreciable harm to the other party of this general cooperation agreement.

In the 1905 Treaty on Common Lakes and Watercourses, Sweden and Norway agreed: “In accordance with the general principles of international law, it is understood that the works mentioned in Article I [diversions, raising or lowering of water levels] cannot be carried out in one of the two states without the consent of the other, in each case where such works, in influencing the waters situated in the other state, would have the effect either of noticeably impairing the use of a watercourse or floating of timber, or otherwise bringing about serious changes in the waters of a region of a considerable area.”<sup>81</sup> This also implies that there is some sort of obligation imposed upon the watercourse states if their activities are in a position to noticeably impair the use of this watercourse.

In one way or another, all of these documents incorporate the duty not to cause harm principle in regional or bilateral watercourse agreements. However, the threshold degree of harm differs from one regional watercourse agreement to another and from one bilateral watercourse agreement to the other.

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<sup>80</sup> Framework for General Cooperation Between Ethiopia and the Arab Republic of Egypt, 1 July 1993, Art. 5.

<sup>81</sup> Herbert A. Smith (1931), *The Economic Uses of International Rivers*, p. 167, as noted in Mohammed S. Helal, *supra* note.58, p. 358.

### 2.3.5 Selected judicial decisions

It is also important to look at how the principle is used in cases that were decided by different international and domestic tribunals. This section will investigate the extent to which this principle is cited in different interstate and intrastate cases.

The decisions of international adjudication bodies, including judgments, arbitral awards, technical opinions and reports, have played a major role in the consolidation of customary rules of international law. This possibility is stressed by the Statute of the International Court of Justice under Art. 38(1)(d) when it declares ‘judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law’. In the realm of international water law, international decisions are scattered landmarks that contribute to building rules of international custom in conjunction with treaties, federal case law, declarations of international organizations, and the doctrine of renowned publicists.<sup>82</sup>

Among the most frequently cited cases with regard to this principle is the Trail Smelter arbitration award of 1949. This case dealt with transboundary pollution from a smelter operating from Trail, British Columbia.<sup>83</sup> In determining the applicable rule of international law, the tribunal decided: “Under the principles of international law, as well as of the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury established by clear and convincing evidence.”<sup>84</sup> Though this case relates to damage caused by one State to the environment of the other, that triggering the legal claim, it is also possible to infer the incorporation of the idea of the duty not to cause significant harm in the decision’s reasoning.

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<sup>82</sup> J.W. Dellapenna, J. Gupta (2008), *The Evolution of the Law and Politics of Water*, Editors. Springer, pp. 333-334.

<sup>83</sup> *Supra* note 58, Mohammed S. Helal, p. 357.

<sup>84</sup> Reports of International Arbitral Awards, Trail Smelter Case (United States and Canada), 16 April 1938 and 11 March 1941, vol, III, p. 1965.

Another decision frequently cited in support of the no-harm doctrine is the *Corfu Channel* case.<sup>85</sup> The facts of this case have little to do with problems related to international watercourses, but rather invoked the court's reference to certain general and well-recognized principles, namely, "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States". This statement bears considerable similarity to the *sic utere tuo* principle, and may be said to be a restatement of that maxim.

In adjudicating a water allocation dispute, the Italian Supreme Court stated that: "If this [State], in the exercise of its sovereign rights is in a position to establish any regime that it deems most appropriate over the watercourse, it cannot escape the international duty... to avoid that, as a consequence of such a regime, other (co-riparian) States are deprived of the possibility of utilizing the watercourse for their own national needs."<sup>86</sup> In this case also, in one way or another, it is possible to see the obligation imposed on other riparian states not to harm other watercourse states in their activities.

### **2.3.6 The Nile River Basin Cooperative Framework Agreement**

In 1998, recognizing that cooperative development holds the greatest prospect of bringing mutual benefits to the region, all Nile basin countries, except Eritrea, jointly established an inclusive transitional mechanism for cooperation until a permanent cooperative framework is established. The Nile Basin Initiative (NBI) was formally launched in February 1999 by the Council of Ministers of Water Affairs of the Nile Basin States.<sup>87</sup> The Nile Basin Cooperative Framework Agreement was drafted in order to regulate the use, development, protection, conservation and management of the Nile River Basin and its resources. The agreement establishes an institutional mechanism for cooperation among the Nile Basin States.<sup>88</sup>

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<sup>85</sup> International Court of Justice, (ICJ) report, *Corfu Channel* case (United Kingdom of Great Britain and Northern Ireland v. Albania), judgment of 9 April 1949 [the factual case involves the laying of mines in Albanian waters that damaged British vessels].

<sup>86</sup> *Socirt d'nergie tlectricque v. Compagnia Imprese Elettriche Liguri*, 64 *Foro It.* 11036 (1939), as cited in Mohammed S. Helal, *supra* note 58, p. 358 [NB: this is an Italian case].

<sup>87</sup> See

[http://www.nilebasin.org/newsite/index.php?option=com\\_content&view=section&id=5&layout=blog&Itemid=68&lang=en](http://www.nilebasin.org/newsite/index.php?option=com_content&view=section&id=5&layout=blog&Itemid=68&lang=en), consulted on 01/12/2013.

<sup>88</sup> Agreement on the Nile River Basin Cooperative Framework, May 2009, Entebbe, Uganda, Art. 1. It has not yet entered into force.

The principle of the duty not to cause significant harm is also enshrined in this Nile Framework Agreement. Article 3(5) states that the principle of preventing the causing of significant harm to other states of the Nile River Basin is among the general principles that regulate how the Nile River System and its waters shall be protected, used, conserved and developed. Beyond this, Article 5 of the same document states; “Nile Basin States shall, in utilizing Nile River System water resources in their territories, take all appropriate measures to prevent the causing of significant harm to other Basin States”.<sup>89</sup> Where significant harm is caused to another Nile Basin State, the State whose use causes such harm shall, in the absence of agreement to such use, take all appropriate measures, having due regard to the provisions of Article 4 which deal with equitable and reasonable utilization, in consultation with the affected State, to eliminate or mitigate such harm and, where appropriate, to discuss the question of compensation.<sup>90</sup> Relevant factors and circumstances that must be taken into account to determine whether the Nile water system resources are utilized in an equitable and reasonable manner are stated in article 4(2) of the convention.

### **2.3.7. Analysis of the normative content of the duty not to cause significant harm**

The duty not to cause significant harm is a due diligence obligation imposed upon watercourse states while utilizing shared watercourse resources. This principle is aimed at avoiding significant harm as far as possible while reaching an equitable result in each case. Optimal use of the finite water resources of an international watercourse is considered in light of the interests of each watercourse state concerned.<sup>91</sup> The theory holds that a state's right to use international waters located on or passing through its territory is not absolute, but is limited by the recognition of similar rights in co-basin states.<sup>92</sup>

Article 7(1) of the UN watercourse convention obliges watercourse states, when utilizing an international watercourse in their territory, to take all appropriate measures to prevent the

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<sup>89</sup> Ibid. Art. 5(1).

<sup>90</sup> Ibid. Art. 5(2).

<sup>91</sup> The law of non-navigational uses of international watercourses, Draft articles and commentaries thereto adopted by the Drafting Committee on second reading: Articles 1-33 reproduced in Yearbook of the International Law Commission 1994, vol. II (Part Two), p. 103.

<sup>92</sup> Supra note 4, Wouters, p. 45.

causing of significant harm to other watercourse states.<sup>93</sup> Nevertheless, when significant harm is caused to another watercourse state, then article 7(2) of the convention requires the state causing the harm to “take all appropriate measures, having due regard to Articles 5 and 6, in consultation with the affected State, to eliminate or mitigate such harm, and where appropriate, to discuss the question of compensation”.<sup>94</sup>

The exclusive competence that a watercourse state enjoys within its territory is not to be exercised in such a way as to cause damage to other watercourse states. To cause such damage would be to interfere with the competence of those other watercourse states over matters within their territories.<sup>95</sup> This duty imposes the obligation that states must exercise due diligence to utilize a watercourse in such a way as not to cause significant harm; and the fact that an activity involves significant harm would not in and of itself necessarily constitute a basis for barring it. A watercourse state can be deemed to have violated its due diligence obligation only if it knew or should have known that the particular use of an international watercourse would cause significant harm to other watercourse states.<sup>96</sup>

In certain circumstances, "equitable and reasonable utilization" of an international watercourse may still involve significant harm to another watercourse state.<sup>97</sup> For example an equitable allocation of the uses and benefits of the waters of an international watercourse might entail some factual "harm", in the sense of unmet needs for one or more States using the watercourse, but not entail a legal "injury" or be otherwise wrongful. This is due to the fact that an international watercourse might not always be capable of fully satisfying the competing claims of all the states concerned. The object of an equitable allocation is to maximize the benefits, while minimizing the harm, to the states concerned. Thus, where there was, for example, insufficient water in a watercourse to satisfy the expressed needs or claims of all of the states concerned, an equitable allocation would inevitably result in their needs or claims not being fully

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<sup>93</sup> Supra note 23, UN Watercourse Convention, Art. 7.

<sup>94</sup> Ibid. Art. 7(2).

<sup>95</sup> Report of the International Law Commission on the work of its fortieth session, 9 May-29 July 1988, Official Records of the General Assembly, Forty-third session, Supplement No. 10, Document A/43/10, p. 35.

<sup>96</sup> Report of the International Law Commission (ILC), the work of its forty-sixth session, UN Doc. A/49/10 (1994) p. 104.

<sup>97</sup> The law of non-navigational uses of international watercourses, Draft articles and commentaries thereto adopted by the Drafting Committee on second reading: Articles 1-33 reproduced in Yearbook of the International Law Commission 1994, vol. II (Part Two), p. 103.



satisfied. In that sense they could be said to be "harmed" by an allocation of the uses and benefits of the watercourse that was, in fact, equitable.<sup>98</sup>

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<sup>98</sup> Report of the International Law Commission on the work of its thirty-eighth session (5 May-11 July 1986), Document A/41/10, Official Records of the General Assembly, Forty-first session, Supplement No.10, Par. 41.

## Chapter three

### The duty not to cause significant harm: Interplay with the equitable and reasonable utilization principle

#### Introduction

This part of the paper will discuss the duty not to cause significant harm and its interplay with the equitable and reasonable utilizations rule. The presentation will also explore lingering issues of preeminence between the two principles which may be crucial in understanding the full scope of riparian rights and obligations in the Nile River basin, particularly in light of the unique patterns of water resources development in the region.

#### 3.1 The principle of equitable and reasonable utilization: An overview

The principle of equitable and reasonable utilization and participation can be seen as one of the most cardinal principles of international watercourses law which emerged in the Helsinki Rules and was further developed under the UN Watercourse Convention (1997). Article 5 of the convention provides for "equitable and reasonable utilization and participation."<sup>99</sup>

The equitable utilization principle may be conceptualized as dividing the entire watercourse among states and other watercourse interests, such as ecological preservation, fisheries, navigation and recreation. Reasonable utilization looks at how water is used to determine if the purpose for which water is being used and the amount dedicated are reasonable under the circumstances.<sup>100</sup> This principle is "born" out of the principle of equitable apportionment. Apportionment is a division of the water among or between states. The legal principle of sovereign equality of states permits each state to use a share of the watercourse based on principles of equity.<sup>101</sup> By contrast, insistence by one state on exclusive sovereign rights over

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<sup>99</sup> Supra note 23, UN Watercourse Convention, Art. 5.

<sup>100</sup> Margaret J. Vick (2009), The Law of International Waters: Reasonable Utilization, *Chi.-Kent Journal of International and comparative Law*, vol. XII, no. 1, p. 145.

<sup>101</sup> Ibid. p. 146.

shared natural resources within its territory runs counter to the claims of other states to rights over the resources within their own territories.<sup>102</sup>

The equitable utilization rule applies specifically to international watercourses; it was developed primarily in the context of proceedings before domestic courts (notably in the United States), and its foundations today lie in customary international law.<sup>103</sup> This principle reflects the emerging view of shared natural resources which favors regulating the use of the international environment so as to manage the resource, as opposed to managing the individual political entity.<sup>104</sup> The principle emphasizes that a state, albeit sovereign, cannot legally do as it pleases with transboundary water resources within its territory. Its essence is that states must act equitably and reasonably in dealing with these waters.<sup>105</sup> Interdependence among utilizations in river basins and international legal interdependence in respect to the protection of interests of all states belonging to that basin can be cited as the core reasons why the international community developed this principle for the utilization of international shared water course resources.<sup>106</sup>

In his treatise on the law of non-navigational uses of international watercourses, Stephen McCaffrey describes equitable utilization as follows: “born from the U.S. Supreme Court’s decisions in interstate apportionment cases beginning in the early twentieth century, and supported by decisions in other federal states, the doctrine of equitable utilization was applied to international watercourses as the basic, governing principle by the International Law Association’s 1966 Helsinki Rules. Its status as the fundamental norm in the field has recently been confirmed by the decision of the International Court of Justice in the case concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)... The 1997 UN Convention also appears to

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<sup>102</sup> Supra note, 5, Godana, *African shared water resources, legal and institutional aspects of the Nile, Niger and Senegal River systems*, P.55

<sup>103</sup> Supra note. 4, Pp.45-46

<sup>104</sup> David J. Lazerwitz (1993), *The Flow of International Water Law: The International Law Commission's Law of the Non-Navigational Uses of International Watercourses*, *Global Legal Studies Journal*, Vol. 1: P.259

<sup>105</sup> Notes and Comments /Notes et commentaries’, *The Primacy of the Principle of Equitable Utilization in the 1997 Watercourses Convention*, *The Canadian Yearbook of International Law* 1997,P.216

<sup>106</sup> The nexus between factual interdependence among utilizations within a given river basin and international legal interdependence in respect of the protection of interests of all states belonging to that basin has been affirmed as the basic premise in the drafting of an international convention on the subject matter. Look First Report on the Law of the Non-navigational Uses of International Watercourses, U.N. Doc. A/CN.4/295 (1976) paragraph 38-39

treat equitable utilization as the overarching principle governing the use of international watercourses, as did the draft articles adopted by the ILC on its second reading in 1994.”<sup>107</sup>

Equitable utilization entails the allocation, sharing and division of the resource and its benefits among riparian states. Equitable use is often referred to as a right to use water resources in a just and reasonable manner; it is not, however, the same as reasonable use.<sup>108</sup>

The 1997 UN Watercourse Convention calls for both equitable and reasonable sharing and for equitable and reasonable utilization. Article 5 of the convention states that watercourse states shall in their respective territories utilize an international watercourse in an equitable and reasonable manner. In particular, an international watercourse shall be used and developed by watercourse states with a view to attaining optimal and sustainable utilization thereof and benefits therefrom, taking into account the interests of the watercourse states concerned, and consistent with adequate protection of the watercourse.<sup>109</sup>

Accordingly, article 5 introduces a new concept of equitable participation. The basic idea behind this concept is that in order to achieve a regime of equitable and reasonable utilization, riparian states must cooperate with each other by taking affirmative steps, individually or jointly, with regard to the watercourse.<sup>110</sup> This means that the principle under the convention adds a concept of participation which empowers, and of course requires, all riparian states to maintain and work towards a process that enhances cooperative and effective utilization of shared water resources.

There is no doubt that a watercourse state is entitled to make use of the waters of an international watercourse within its territory. This right is an attribute of sovereignty and is enjoyed by every state whose territory is traversed or bordered by an international watercourse. Indeed, the principle of the sovereign equality of states results in every watercourse state having rights to the use of the watercourse that is qualitatively equal to, and correlative with, those of other

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<sup>107</sup> Stephen McCaffrey (2007), *The Law of International Watercourses*, 2<sup>nd</sup> edition, Oxford University Press, pp. 384-385.

<sup>108</sup> When we talk about reasonable use we are referring to how far the utilization of the river is rational. Even if a use of an international watercourse has been identified as reasonable, it might still be challenged when balanced with other uses and examined through the lens of equity.

<sup>109</sup> *Supra* note 23, UN Watercourse Convention, Article 5(1).

<sup>110</sup> *Ibid.* Article 5(2). See also Stephen McCaffrey, The contribution of the UN convention on the law of the non-navigational uses of international watercourses, *International Journal of Global International Issues*, vol.1, nos. 3/4, 2001, p. 253.

watercourse states.<sup>111</sup> This fundamental principle of "equality of right" does not, however, mean that each watercourse state is entitled to an equal share of the uses and benefits of the watercourse. Nor does it mean that the water itself is divided into identical portions. Rather, each watercourse state is entitled to use and benefit from the watercourse in an equitable manner. The scope of a state's right of equitable utilization depends on the facts and circumstances of each individual case, and specifically on a weighing of all relevant factors, as provided in article 6.<sup>112</sup> Article 6 of the convention also provides a non-exhaustive list of factors which shall be considered in the assessment of an equitable and reasonable utilization.<sup>113</sup>

### **3.2 The interplay between the two principles**

In this part of the analysis, the relationship between the two principles will be explored. However the focus is on the interplay as enshrined under the 1997 UN Watercourse Convention. The equitable utilization rule and the principle which prescribes a duty not to cause significant harm constitute the basic principles of international water law. Hence, it is not surprising to see the two principles in agreements regarding the utilization and management of international watercourses. The normative content and the relationship between the principle of equitable utilization and the

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<sup>111</sup> Report of the International Law Commission (ILC) on the work of its forty-sixth session. UN Doc. A/49/10 (1994), p. 98, available at: <http://www.un.org/law/ilc/index.htm>.

<sup>112</sup> Ibid. p. 98.

<sup>113</sup> Supra note 23, UN Watercourse Convention, Article 6. Factors relevant to equitable and reasonable utilization:

1. Utilization of an international watercourse in an equitable and reasonable manner within the meaning of article 5 requires taking into account all relevant factors and circumstances, including:
  - (a) Geographic, hydrographic, hydrological, climatic, ecological and other factors of a natural character;
  - (b) The social and economic needs of the watercourse States concerned;
  - (c) The population dependent on the watercourse in each watercourse State;
  - (d) The effects of the use or uses of the watercourses in one watercourse State on other watercourse States;
  - (e) Existing and potential uses of the watercourse;
  - (f) Conservation, protection, development and economy of use of the water resources of the watercourse and the costs of measures taken to that effect;
  - (g) The availability of alternatives, of comparable value, to a particular planned or existing use.
2. In the application of article 5 or paragraph 1 of this article, watercourse States concerned shall, when the need arises, enter into consultations in a spirit of cooperation.
3. The weight to be given to each factor is to be determined by its importance in comparison with that of other relevant factors. In determining what is a reasonable and equitable use, all relevant factors are to be considered together and a conclusion reached on the basis of the whole.

no harm rule in the field of watercourse law has been defined not only in the UN Watercourse Convention, but also in the works of l'Institut de Droit International (IDI) and the ILA.<sup>114</sup>

The relationship between the principle of equitable utilization, on the one hand, and that of no significant harm rule, on the other, continues to be, a subject of controversy.<sup>115</sup> The unresolved relationship between these two core principles of international water law has allowed states to maintain irreconcilable positions. In brief, the basic approach of international water law has been rooted in these core rules and in the underlying idea of mutual limitation of sovereign rights.<sup>116</sup> Under the principle of equitable utilization, riparian states are entitled to use international watercourses in a “reasonable” and “equitable” manner.<sup>117</sup> What is reasonable and equitable must be determined in each individual case and depends upon various factors, none of which has inherent priority. The mutual limitation approach also dictates that a state’s right to use its territory is limited by the duty not to cause significant harm to another state.<sup>118</sup>

It is necessary that the principle of equitable utilization and the duty not to cause significant harm each require precision in their application. Therefore the issues must be examined on a case by case basis. The procedural rules of notification, exchange of information, and consultation may assist in this task.<sup>119</sup> Additionally, the general duty to cooperate and the customary obligation that states peacefully settle their disputes encourage watercourse states to resolve any contests over water by agreement.<sup>120</sup>

It is worth clarifying in this connection that lower riparian states tend to favor the no harm rule, as it protects existing uses against impacts resulting from activities undertaken by upstream states. Conversely, upper riparian states tend to favor the principle of equitable and reasonable

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<sup>114</sup> Patricia K. Wouters (1996), An Assessment of Recent Developments in International Watercourse Law through the Prism of the Substantive Rules Governing Use Allocation, *International Watercourse Law*, vol. 36, Spring, p. 420.

<sup>115</sup> Supra note 105, Notes and Comments/Notes et commentaries, p. 221.

<sup>116</sup> A.S. Alsharhan and W.W. Wood (2003), *Water Resources Perspectives: Evaluation, Management and Policy*, editor. Elsevier Amsterdam, The Netherlands, p. 106.

<sup>117</sup> Supra note 23, UN Watercourse Convention, Article 5.

<sup>118</sup> Ibid. Article 7 of the 1997 UN Watercourse Convention on the Non navigation use of waters. It should be mentioned that this principle is not only part of international water law but also constitutes a cornerstone of international environmental law (see the 1972 declaration and 1992 Rio Declaration).

<sup>119</sup> Supra note 114, Wouters, p. 420.

<sup>120</sup> Id. p. 420.

utilization, because it provides more scope for states to utilize their share of the watercourse for activities that may impact downstream states.

In the 1983 Report of the International Law Commission on the work of its thirty-fifth session, it is stated: “It was considered essential to emphasize the duty of system States to refrain from uses or activities that might cause appreciable harm to the rights or interests of other system States. It was said that, taken together with article 7, the two articles constituted a legal standard: reasonable and equitable use must not cause appreciable harm.”<sup>121</sup> This clearly shows how the relationships between the two principles are crafted. Beyond this, in the 1984 Report of the ILC on the work of its thirty-sixth session, it is stated that “the new wording provided a more acceptable basis for an equitable international watercourse regime... [O]nce each State received its equitable share in the uses of such waters, it had sovereign powers to use that share provided no injury was done to others.”<sup>122</sup> In his 1986 second report concerning the relationship between the obligation to refrain from causing appreciable harm to other States using an international watercourse, on the one hand, and the principle of equitable utilization, on the other, the Special Rapporteur explained the problem as follows. An equitable allocation of the uses and benefits of the waters of an international watercourse might entail some factual "harm", in the sense of unmet needs, for one or more States using the watercourse, but not entail a legal "injury" or be otherwise wrongful. This is due to the fact that an international watercourse might not always be capable of fully satisfying the competing claims of all the States concerned.<sup>123</sup> The object of an equitable allocation is to maximize the benefits, while minimizing the harm, to the States concerned. Thus, where there is, for example, insufficient water in a watercourse to satisfy the expressed needs or claims of the States concerned, an equitable allocation would inevitably result in their needs or claims not being fully satisfied. In that sense they could be said to be "harmed" by an allocation of the uses and benefits of the watercourse that was, in fact, equitable.<sup>124</sup>

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<sup>121</sup> During that draft Article 7 is Equitable sharing in the uses of an international watercourse system and its waters; whereas Art 9 talks about Prohibition of activities with regard to an international watercourse system causing appreciable harm to other system States. Look Report of the International Law Commission on the work of its thirty-fifth session (3 May-22 July 1983), Document A/38/10, Par. 246.

<sup>122</sup> Report of the International Law Commission on the work of its thirty-sixth session (7 May-27 July 1984), Document A/39/10, Par. 316, available at: <http://www.un.org/law/ilc/index.htm>.

<sup>123</sup> Report of the International Law Commission on the work of its thirty-eighth session (5 May-11 July 1986), Document A/41/10, Par. 240, available at: <http://www.un.org/law/ilc/index.htm>.

<sup>124</sup> Report of the International Law Commission on the work of its thirty-eighth session (5 May-11 July 1986), Document A/41/10, Par. 240, available at: <http://www.un.org/law/ilc/index.htm>.

After a lengthy debate by the Working Group, a compromise regarding the relationship between the two principles was reached. The compromise addressed articles 5 and 6 (equitable and reasonable utilization) and article 7 (obligation not to cause significant harm).<sup>125</sup> The language of article 7 requires the watercourse state that causes significant harm to take measures to eliminate or mitigate such harm "having due regard to articles 5 and 6" which deal with the principles of equitable and reasonable utilization.<sup>126</sup>

Throughout the preparation of the draft articles on the UN Watercourse Convention, the framing of the concept of the duty not to cause significant harm underwent several changes, alternating between the duty not to cause "appreciable" versus "significant" harm. Before article 7 was finalized, it had to pass through lengthy debates, especially with regard to the relationship it has with the principle of equitable utilization.

In its present state under the convention, the principle provides that "watercourse states should, in utilizing an international watercourse in their territories, take all appropriate measures to prevent the causing of significant harm to other states".<sup>127</sup> In the second part, the article provides that where significant harm nevertheless is caused to another watercourse state, "the state whose use causes such harm shall, in absence of agreement to such use, take all appropriate measures having due regard for the provisions of Article 5 and 6, in consultation with the affected state, to eliminate or mitigate such harm and, where appropriate, to discuss the question of compensation."<sup>128</sup>

A central debate in the protracted deliberations of the commission was whether to give precedence to the doctrine of equitable utilization or the "no significant harm" rule. The commission labored to reach an accommodation and produced a compromise that will probably not please anyone—neither the downstream states nor the environmental community that pushed

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<sup>125</sup> Salman M.A. Salman (2007), *The United Nations Watercourses Convention Ten Years Later: Why Has its Entry into Force Proven Difficult?*, *International Water Resources Association Water International*, vol. 32, no. 1, March, p. 6.

<sup>126</sup> *Id.* p. 6.

<sup>127</sup> *Supra* note 23, UN Watercourse Convention, Art. 7(1).

<sup>128</sup> *Ibid.* Art. 7(2).



hard for a “no transboundary harm rule” nor the upstream states and the international water community that advocated for retention of the doctrine of equitable utilization.<sup>129</sup>

### 3.3 Issues of preeminence

The core principles of international water law such as equitable utilization and the obligation not to cause significant harm will not stand alone. This is due to the fact that international rules require the consent of both upper and lower riparian states. For this reason, it is possible to look at the basic principles incorporated into their agreements from two points of view.

Agreement on which of the two rules (equitable and reasonable utilization, and the obligation not to cause harm) takes priority over the other proved quite difficult to attain and the issue occupied the ILC throughout its 23 years of work on the convention. Each rapporteur dealt with the issue differently, equating the two principles or subordinating one principle to the other.<sup>130</sup> The issue was discussed by the Sixth Committee of the United Nations (the Legal Committee), which was convened as the Working Group of the Whole. Sharp differences within the Working Group between the riparian states concerning these two principles dominated the discussion.<sup>131</sup>

International law seems to favor the equitable use principle over the obligation not to cause significant harm. The UN Watercourse Convention incorporates equitable use and significant harm without any indication as to which is preeminent, but scholarly interpretation of the convention’s language—from which the concepts are drawn—assigns primacy to equitable utilization.<sup>132</sup>

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<sup>129</sup> Albert E. Utton (1996), Which Rule should prevail in International Water Disputes: That of Reasonableness or that of No Harm, *Natural Resources Journal*, vol. 36, p. 635.

<sup>130</sup> For example, Special Rapporteur Rosenstock, in his first report in 1993, reversed precedent in favor of the principle of equitable utilization. However, in the 1988 40<sup>th</sup> session it is stated that “[a] watercourse State's right to utilize an international watercourse [system] in an equitable and reasonable manner has its limit in the duty of that State not to cause appreciable harm to other watercourse States. In other words—prima facie, at least—utilization of an international watercourse [system] is not equitable if it causes other watercourse States appreciable harm. Thus a watercourse State may not justify a use that causes appreciable harm to another watercourse State on the ground that the use is ‘equitable’, in the absence of agreement between the watercourse States concerned. See Report of the International Law Commission on the work of its fortieth session, 9 May-29 July 1988, Official Records of the General Assembly, Forty-third session, Supplement No. 10, p. 36. This shows that there seems to have been some sort of priority given to the duty of that State not to cause appreciable harm to other watercourse States.

<sup>131</sup> *Supra* note 38, Salman, p. 354.

<sup>132</sup> Fasil Amdetsion (2012), Where Water is Worth More than Gold: Addressing Water Shortages in the Middle East & Africa by Overcoming the Impediments to Basin-Wide Agreements, SAIS Review, *Johns Hopkins University Press*, vol. 32, no. 1, pp. 169-183.

The issue of preeminence of the equitable use doctrine could also be considered from a different dimension. The principle of equitable utilization, which evolved from early inter-state practice involving watercourses, determines the legitimacy of a use by balancing all factors relevant to a particular case and determining whether the use is an equitable and reasonable one.<sup>133</sup> The “no significant harm” rule, which originated as a general principle of law in inter-state relations, precludes, in the context of international watercourses, uses that result in significant harm to another state.<sup>134</sup> The conflict between the two principles is readily apparent. While the former rule might permit significant harm as a result of an equitable use of the watercourse, the latter would not.<sup>135</sup>

The net effect of the organization of the two principles under the convention, as some have argued, the convention purports to put the obligation not to cause significant harm on a par with the principle of equitable utilization.<sup>136</sup> The implication of article 7 would be that if significant harm is not prevented, it follows the use of the state concerned will be challenged even if it is within the margin of equitable and reasonable utilization. This can be inferred from the specific obligation imposed upon watercourse states to make compensation in cases where the action of the state causes significant harm, the equitability of uses notwithstanding.

Naturally, there cannot be a guarantee that no ‘harm’ will result from the equitable use of an international watercourse. Once it is established that a particular use is equitable and reasonable, it is implied that every effort must have been made not to cause significant harm to another watercourse state (obligation of conduct). No more should be expected of the state that has equitably and reasonably utilized the international watercourse. That is why the primacy of the principle of equitable utilization has been preserved.<sup>137</sup> What is expected from the watercourse state is to make compensation in cases where the other watercourse state has suffered significant harm. Because the convention has stated that where significant harm nevertheless is caused to another watercourse state, the states whose use cause such harm are required to take all appropriate measures to eliminate or mitigate such harm. This means though the states are

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<sup>133</sup> Supra note 114, Wouters, p. 419.

<sup>134</sup> Ibid. pp. 419-420.

<sup>135</sup> Ibid. p. 420.

<sup>136</sup> Fisseha Yimer (1997), An Assessment of the convention on the law of the Non-navigational uses of international uses of international waterways, *Ethioscope*, a periodic magazine published by the Press, Information and Documentation Directorate of the Ministry of Foreign Affairs, vol. 3, no. 2, p. 18.

<sup>137</sup> Id. p. 18.

required to mitigate the harm, so long as the watercourse states' utilization is within the margin of equitable utilization, it seems that they are not required to stop their utilization. What they are required to do is to mitigate the harm by taking all appropriate measures and in case harm is occurring to discuss the question of compensation, depending on the situation.

As mentioned earlier, lower riparian states tend to favor the "no harm" rule, as it is believed that it protects existing uses against the effects of activities undertaken by upstream states. Conversely, upper riparian countries favor the principle of equitable and reasonable utilization, because it provides more scope for states to utilize their share of a watercourse for activities even if these activities may impact downstream states. However, it has also been held widely that every international water basin must be developed so as to render the greatest possible service to the whole community through which it flows, even though that community may be divided by political frontiers.<sup>138</sup>

It is possible to analyze the different stands and attitudes that watercourse states take with regard to how far the UN Watercourse Convention is cited in regard to which rule takes supremacy in cases of conflict. Lucius Caflisch presented an analysis of the convention's formulation, noting that the new formula<sup>139</sup> was considered by a number of lower riparian states to be sufficiently neutral not to suggest a subordination of the no harm rule to the principle of equitable and reasonable utilization. A number of upper riparian states thought just the contrary, namely, that the formula was strong enough to support the idea of subordination of the no harm rule to the principle of equitable utilization.<sup>140</sup>

On the contrary, significant upper riparian states such as Ethiopia and Turkey have, in their explanations of voting during the adoption of the convention, made their position clear on this issue; Ethiopia stated that article 7 was one of the grounds for abstaining on the convention, while Turkey argued that the convention should have established the primacy of the principle of equitable and reasonable utilization over the obligation not to cause significant harm.<sup>141</sup> However, notwithstanding such differing views among states, the prevailing approach, in the

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<sup>138</sup> British Yearbook of International Law, 1930, pp. 195-196, as cited by Mohammad Tufail Jawed, Rights of the Riparian, *Pakistan Horizon*, vol. 17, no. 2 (Second Quarter, 1964), p. 141.

<sup>139</sup> The new language of Article 7 requires the state that causes significant harm to take measures to eliminate or mitigate such harm "having due regard to articles 5 and 6".

<sup>140</sup> *Supra* note 25, Salman, p. 6.

<sup>141</sup> *Supra* note 136, Fisseha, p. 18.

view of many renowned scholars, remains that the convention has subordinated the obligation not to cause significant harm to the principle of equitable and reasonable utilization. This conclusion has been based on a close reading of articles 5, 6 and 7 of the convention.<sup>142</sup>

A careful reading of articles 5, 6 and 7 of the convention should lead to the conclusion that the obligation not to cause significant harm has indeed been subordinated to the principle of equitable and reasonable utilization. Thus, it can be concluded that, much like the Helsinki Rules, the principle of equitable and reasonable utilization is the fundamental and guiding principle of the UN Watercourse Convention.

Many experts in the field of international law also believe that the Watercourse Convention has subordinated the obligation not to cause significant harm to the principle of equitable and reasonable utilization.<sup>143</sup> For example, McCaffrey has argued that a downstream state that was first to develop its water resources could not foreclose later developments by an upstream state by demonstrating that the later development would cause it harm. Under the doctrine of equitable utilization, the fact that the downstream state was “first to develop” (and thus had made prior uses that would be adversely affected by new upstream uses) would be merely one of a number of factors to be taken into consideration in arriving at an equitable allocation of the uses and benefits of the watercourse.<sup>144</sup> The right of late-coming riparians to utilize resources of an international watercourse would still remain qualified by the duty not to cause significant harm, except as may be allowed under equitable utilization of the watercourse concerned.<sup>145</sup>

In his Second Report during the codification of the UN Watercourse Convention, Special Rapporteur McCaffrey also recommended that the no significant harm articulation should be redrafted in such a way as to bring it into conformity with the principle of equitable utilization. He said that the focus should be on the duty not to cause legal injury (by making a non-equitable use) rather than on the duty not to cause factual harm. In the context of watercourses, suffering even significant harm may not infringe on the rights of the harmed state if the harm is within the

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<sup>142</sup> Supra note 25, Salman, p. 6.

<sup>143</sup> Bourne 1997, Caflisch 1998, Paisley 2002, McCaffrey 2007, Salman 2007—all as cited by Salman M.A. Salman, Downstream riparians can also harm upstream riparians: The concept of foreclosure of future uses, *Water International*, vol. 35, no. 4, July 2010, Rutledge Taylor & Francis Group. p. 355.

<sup>144</sup> Stephen C. McCaffrey, The Law of international watercourses: Some recent Developments and Unanswered Questions, *Den. Journal of International Law and Policy*, vol. 17:3 (1989), p. 509.

<sup>145</sup> Supra note 11, Tadesse, p. 257.

limits allowed by an equitable utilization.<sup>146</sup> However, he also recommended in his Fourth Report that, in matters involving pollution harm, the “no appreciable harm” threshold should be the fundamental rule.<sup>147</sup>

Under Article 7(2) of the UN Watercourse Convention, it is stated that where significant harm nevertheless is caused to another watercourse state, the states whose use causes such harm shall, in the absence of an agreement to such use, take all appropriate measures, having due regard for the provisions of articles 5 and 6, in consultation with the affected state, to eliminate or mitigate such harm and, where appropriate, to discuss the question of compensation.

While it is clear that this paragraph does not entirely solve the problem of which rule takes precedence, it strongly suggests that if a state’s use is equitable, it should be allowed to continue, even if it causes significant harm to another state. If such harm is caused, the reformulation suggests that the harming state would be obligated to minimize the harm to the extent possible and to compensate the other state for any unavoidable harm.<sup>148</sup>

However, as Wouters notes, there are some scholars who argue that the obligation not to cause significant harm remains the governing rule under the Watercourse Convention. Most also argue that article 7(2) of the convention reduces the principle of equitable utilization to a mere factor to be considered in consultations where significant harm occurs.<sup>149</sup> Based on the construction of these provisions of the UN Watercourse Convention, therefore, a state must always give “due regard” to the principle of equitable and reasonable utilisation whenever significant harm occurs. However, there is no reciprocal obligation of “due regard” to the principle of no significant harm when states determine that a use or uses are equitable and reasonable. This crucial distinction is what has led many legal scholars to conclude that the duty not to cause significant harm is thus a secondary obligation to the primary principle of equitable and reasonable utilisation.<sup>150</sup>

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<sup>146</sup> McCaffrey, Second Report on the Law of the Non-Navigational Uses of International Watercourses, p. 133, as cited by Wouters, supra note 4, p. 47.

<sup>147</sup> S. C. McCaffrey, Fourth Report on the Law of the Non-Navigational Uses of International Watercourses, UN, international Law Commission, 40<sup>th</sup> Session, UN Doc. A/CN.4/ 412/ Add. 2 (1988).

<sup>148</sup> Stephen C. McCaffrey (1996), An Assessment of the Work of the International Law Commission, *Natural Resources Journal*, vol. 36, p. 312.

<sup>149</sup> Supra note 114, Wouters, pp. 423-424.

<sup>150</sup> User’s Guide Fact Sheet Series: Number 5, No Significant Harm Rule, available at: <http://www.unwatercoursesconvention.org/documents/UNWC-Fact-Sheet-5-No-Significant-Harm-Rule>, visited 13/12/2013.

Though the drafters of the Watercourse Convention took different positions with regard to this principle, it is possible to conclude that interpretation of the UN Watercourse Convention has interpreted the text in a way that does not seem to absolutely prohibit causing significant harm.<sup>151</sup> Instead, the threshold of state obligation is the exercising of “all appropriate measures” to prevent causing such harm.<sup>152</sup>

There may be questions raised concerning the effect of language such as “all appropriate measures”, “best practicable means at their disposal” or “all practical steps”. But this language is generally regarded as reflecting due diligence obligations imposed on the watercourse states.<sup>153</sup> Moreover, quite a number of experts have noted that if the no harm rule took precedence over that of equitable utilization, the effect would be to freeze the right to development of many riparian states.<sup>154</sup> If we give more protection to the state which is already making use of the resources of the international watercourse, irrespective of whether or not other watercourse states have obtained an equitable share in those resources and could militate against a rational balancing of rights and interests in the apportionment of the benefits to be derived from their use, the result would be that the most developed states—generally the first to derive benefit from the watercourse—would be favoured to the detriment of developing states, which would normally be late comers in developing and utilizing international watercourses. Solutions must be envisaged with a view to achieving a balanced regime that would ensure that the freedom of a state to use its watercourse is not already unduly restricted while also adequately safeguarding the freedom from harm of other states.<sup>155</sup>

On the other hand, it should be mentioned here that it is the “no appreciable harm” standard, rather than the principle of equitable use, that is applied in cases of pollution. This is a practical solution, given that pollution must be reduced on all levels, not just balanced in one state against

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<sup>151</sup> The ILC commentary confirms this: “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.” See Report of the International Law Commission on the work of its forty-sixth session, U.N. Doc. A/49/10 (1994), p. 237.

<sup>152</sup> *Supra* note 23, UN Watercourse Convention, Article 21(2) of the 1997 Convention enjoins states to “prevent, reduce and control the pollution of an international watercourse that may cause significant harm to other watercourse States or to their environment, including harm to human health or safety, to the use of the waters for any beneficial purpose or to the living resources of the watercourse...”

<sup>153</sup> *Supra* note 12, McCaffrey, *The Law of International Watercourses: Non navigational Uses*, p. 372.

<sup>154</sup> *Supra* note 43, McCaffrey, p. 509.

<sup>155</sup> Report of the International Law Commission on the work of its thirty-sixth session (7 May-27 July 1984), Document A/39/10, par. 339, available at: <http://www.un.org/law/ilc/index.htm>.

the beneficial uses in another.<sup>156</sup> Use of the waters of an international watercourse that causes significant pollution or any harm to the ecosystem is *ipso facto* unlawful; it is unlawful not because it is in fact unreasonable and inequitable but because it is deemed to be so.<sup>157</sup>

The ILC's position with respect to pollution harm is more stringent than the general rule encapsulated in article 7. Article 21 of the convention contains a solid prohibition of pollution that “may cause significant harm” to the other watercourses.<sup>158</sup> The ILC’s Special Rapporteur concluded on many occasions that “water uses that cause appreciable pollution harm to other watercourse states and the environment could well be regarded as being *per se* inequitable and unreasonable.”<sup>159</sup>

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<sup>156</sup> Supra note 104, p. 260.

<sup>157</sup> Supra note 104, p. 220.

<sup>158</sup> Supra note 23. Article 21(2) states that Watercourse States shall, individually and, where appropriate, jointly, prevent, reduce and control the pollution of an international watercourse that may cause significant harm to other watercourse States or to their environment, including harm to human health or safety, to the use of the waters for any beneficial purpose or to the living resources of the watercourse. Watercourse States shall take steps to harmonize their policies in this connection.

<sup>159</sup> Steven McCaffrey, Fourth Report on the Law of the Non-Navigational Uses of International Watercourses, cited in Y.B. Int'l L. Comm'n at 241, U.N. Doc A/CN.4/412/Add.2 (1988).

## **Chapter four**

### **Application of the duty not to cause significant harm in the context of the Nile River basin**

#### **Introduction**

The application of the principle which prescribes a duty not to cause significant harm under international watercourses law has always been controversial. In the absence of a detailed and universally accepted set of rules, the actual implementation of the principle is bound to be problematic. No comprehensive treaty framework exists to be enforced in all the riparian states in the Nile River basin. What is more, the absence of a unified legal regime and the unique geopolitical setting of the region limit the possibilities for integrated river basin planning and utilization.

Except for the Constitutive Act of the Nile Basin Initiative, which describes the Nile as a shared resource of all the riparian communities and recognizes a common commitment to the equitable utilization of the resource across the basin region, one would note, perhaps with a degree of dismay, that throughout its long history, the Nile had never been the focus of a single legal arrangement. Such an agreement would no doubt acknowledge that all the co-riparian states of the Nile have a right to the water resources, but that such rights are limited by the principle of just and equitable water sharing.<sup>160</sup> In the absence of an inclusive treaty framework, disputants must resort to customary international laws and general principles of law to fill the legal gap not covered by formal agreements.

The Nile River Basin Cooperative Framework Agreement (CFA) provides that while utilizing the Nile River System water resources in their territories, the basin states shall take all appropriate measures to prevent the causing of significant harm to other states. The stipulation

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<sup>160</sup> Nurit Kliot (1994), *Water Resources and Conflict in the Middle East*, Rutledge, London and New York, p. 91 [hereinafter Kliot, *Water Resources and Conflict in the Middle East*].



does not, however, set out clear guidelines which direct the effective application of the principle in the specific context of the basin.<sup>161</sup>

This highlights the need to scrutinize such specifics as the relationship of the rule with other principles of international watercourses law, to identify which scales of utilization or what patterns of use are subjected to the “protected regime” of the “no significant harm” rule, and to analyze how the contemporary setting of international law as well as its evolution addresses the application of the “no significant harm” rule in the general context of river basins.

#### **4.1 The patterns of utilization in the Nile River basin.**

The Nile River is the principal artery of life in Egypt. However, this basic fact does not apply in the same way to the other riparian states. Indeed, the Nile River has shaped the life, habits and culture of Egyptian people over the centuries, and its periodic flooding has constantly renewed the life cycle.<sup>162</sup> The river has brought life-giving waters through the heart of the North African desert for millennia, and has been relied on by farmers and others in Egypt for a long period of time.<sup>163</sup>

Water utilization in modern times began in 1834 when Mohammed Ali attempted to expand the area utilized for summer crops by creating a system of canals in the delta; that year Ali tried to regulate the river by constructing a barrage across the Nile on its bifurcation at the head of the delta. The barrage was intended to raise the level of water, but it was not until 1861 when British engineers completed the construction that the Delta Barrage functioned properly.<sup>164</sup> In fact, a number of factors have contributed to the history of water utilization, management, and development in the Nile basin in the past century. Among those notable factors are the presences

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<sup>161</sup> Article 16(a) of the Nile River Basin Cooperative Framework Agreement states that “[t]he Nile River Basin Commission is mandated with the promotion and facilitation of the implementation of the principles that are enshrined in the Cooperative Framework Agreement of the Nile.

<sup>162</sup> Ancient Egyptian history indicates that the people became used measuring the level of the river and considered this measurement an indication of the economic and civilized conditions of the country. Hamdy A. Hassan and Ahmad Al Rasheedy, The Nile River and Egyptian Foreign Policy Interests, *African Sociological Review* 11(1) 2007, p. 26.

<sup>163</sup> Joseph W. Dellapenna (1994), Treaties as Instruments for Managing Internationally-Shared Water Resources: Restricted Sovereignty vs. Community of Property, *Case W. Res. J. Int'l L.*, vol. 26:027, p. 47.

<sup>164</sup> Klot, Water Resources and Conflict in the Middle East, *supra* note 160, p. 32.

in the basin of British interests during the colonial era and a policy of water security pursued by Egypt in the subsequent decades.<sup>165</sup>

The impending struggles over the waters of the Nile follow the patterns that have been found in river basins worldwide.<sup>166</sup> As is generally the case, development in the Nile basin occurred earlier and faster in the lower basin than in the upper basin. This creates a set of existing users who demand protection for their "prior rights" and a class of disadvantaged potential users upstream who demand developmental equity.<sup>167</sup> In the past, Egypt and Sudan ignored the interests of the upper riparian states and failed to invite them to take part in the planning or construction of major water projects, including the Aswan Dam.<sup>168</sup>

Following the Egyptian failure to implement the Century Storage Project which evolved from several sources,<sup>169</sup> all the riparian states, but especially Egypt, gradually developed their own separate water projects.<sup>170</sup> Egypt has utilized the Nile waters for irrigation for centuries. Agriculture in Egypt is almost entirely dependent on irrigation from the Nile since there is no significant rainfall except in a narrow strip along the Mediterranean coast. The total irrigation area in 1997 was about 8 million *feddan*,<sup>171</sup> which equates to approximately 3.36 million hectares (ha).<sup>172</sup>

The major controlling structures on the Nile in Egypt include the High and Old Aswan Dams and a number of downstream barrages. The Old Aswan Dam was completed in 1902 with a storage volume of about 1 BCM. By increasing the height of the dam, the storage capacity was increased to 5 BCM in 1934. The High Aswan Dam (HAD), upstream of the (Old) Aswan Dam, was completed in 1964, and the Lake Nasser reservoir created by the dam drastically improved the

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<sup>165</sup> Mohammed Abdo (2004), *The Nile Question: The Accords on the Water of the Nile and Their Implications on Cooperative Schemes in the Basin*, p. 46, available at: <http://sam.gov.tr/wp-content/uploads/2012/01/4.-Mohammed-Abdo.pdf>.

<sup>166</sup> Supra note 163, p. 51.

<sup>167</sup> Id. p. 51.

<sup>168</sup> Supra note 160, Kliot, *Water Resources and Conflict in the Middle East*, p. 90.

<sup>169</sup> Basically, the plan envisaged storage of water on the Blue and White Nile from affluent years for use during periods of drought. Although the plan calls for dams to be built in several basin states, its primary aim is to maintain the interests of Egypt.

<sup>170</sup> Supra note 160, Kliot, *Water Resources and Conflict in the Middle East*, p. 37.

<sup>171</sup> Arab Republic of Egypt, Ministry of Water Resources and Irrigation, *National Water Resource Plan for Egypt - 2017*, Cairo, January 2005, pp. 2-31.

<sup>172</sup> NB: 1 *feddan* = 4 200 m<sup>2</sup> = 0.42 ha = 4.2 x 10<sup>-4</sup> x 1 000 ha

regulation of the Nile water.<sup>173</sup> According to a study conducted by the Food and Agriculture Organization (FAO) on “irrigation potential” and actual irrigation by country and river basin, Egypt has irrigation potential of 4,420,000 ha of land within the basin, of which 3,078,000 ha are already in use.<sup>174</sup> Sudan (former Sudan) has made only moderate use of the resource so far, but has been embarking on a program of agricultural expansion. The FAO study indicated that the irrigation potential of Sudan within the basin was an estimated 2,750,000 ha, of which 1,935,200 ha are in use.<sup>175</sup> In 1997, the gross irrigational water requirements in the Nile basin were estimated as standing at 124 BCM per year, of which 19.9 was in Ethiopia, 38.5 in Sudan and 57.4 in Egypt.<sup>176</sup>

The states further upstream, including Ethiopia, Tanzania and Uganda which supply the waters of the river, have only begun to make use of the water very recently. At the close of the last millennium, Ethiopia was irrigating fewer than 200,000 ha of farmland, although a total of 3.7 million ha had been classified as potentially irrigable. This gross underdevelopment of this capacity to grow food and industrial crops spurred the Irrigation Development Program (IDP) to generate a plan to increase irrigation substantially within 15 years (2002–2016).<sup>177</sup> In this regard the irrigation potential in the Nile basin in Ethiopia has been estimated at more than 2.2 million hectares. The irrigated area was about 23,000 hectares in 1989. In the same manner Uganda is in much the same position with other upper riparian states of the Nile. The irrigation potential of Uganda is estimated 202,000 ha of which only 5,550 ha are irrigated.<sup>178</sup> This unequal development of a river can cause great political, economic and legal difficulties in the proper application of the duty not to cause significant harm.<sup>179</sup>

The difference in the pattern of utilization between the upper and lower riparian states has its own effect in the appropriate application of the principle. Sooner or later, the state which has been slow to develop the portion of the river in its territory will need more and more water for domestic and sanitary purposes, for agriculture, for hydro-electric power, for industry and so

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<sup>173</sup> Supra note 171, pp. 2-4.

<sup>174</sup> [www.fao.org/docrep/w4347e/w4347e0k.htm#thenilebasin](http://www.fao.org/docrep/w4347e/w4347e0k.htm#thenilebasin), last visited 3/15/2014.

<sup>175</sup> [www.fao.org/docrep/w4347e/w4347e0k.htm#thenilebasin](http://www.fao.org/docrep/w4347e/w4347e0k.htm#thenilebasin), last visited 3/15/2014.

<sup>176</sup> FAO irrigation potential in Africa, available at: <http://www.fao.org/docrep/w4347e/w4347e00.htm>, last visited 3/19/2014.

<sup>177</sup> Federal Democratic Republic of Ethiopia, Ministry of Water Resources, Water Sector Development Program Main Report, Addis Ababa, October 2002, vol. II, p. 46.

<sup>178</sup> [www.fao.org/docrep/w4347e/w4347e0k.htm#thenilebasin](http://www.fao.org/docrep/w4347e/w4347e0k.htm#thenilebasin), last visited 3/15/2014.

<sup>179</sup> Supra note 28, Bourne, p. 187.

forth.<sup>180</sup> Considering that Egypt's water resources mainly originate beyond its borders, Egypt will campaign to maintain her water security in the Nile River. Despite the fact that the Blue Nile comes from the Ethiopian Highlands and provides almost 85 percent of the Nile water share, Ethiopia has largely been neglected in all Nile water agreements, which date from the twentieth century. Ethiopia, the uppermost riparian state of the Blue Nile basin, protested to Egypt and Sudan when the two countries concluded the 1959 Nile Agreement that divided the Nile waters exclusively between them. Ethiopia has since been objecting to most of the projects undertaken by Egypt and Sudan on the Nile because Ethiopia has realized that those projects could have an effect on its future use of the Nile waters, and its equitable and reasonable share of the resource.<sup>181</sup> However no measures of integrated planning have been applied in the Nile basin. Moreover, since the only multipurpose (and highly consumptive) project, the Aswan High Dam, is located in Egypt (for the sole benefit of Egypt and Sudan), any plan for future utilization of the upper Nile waters, whether in Ethiopia or other upstream states, is interpreted in Egypt as a threat to its very existence.<sup>182</sup>

Economic development is often accompanied by greater diplomatic heft. Egypt can exert its influence on international organizations to block international financing of Nile projects. For instance, Egypt has blocked Asian Development Bank (ADB) funds meant to aid Nile riparian states in their exploitation of the Nile. It has also contributed towards the establishment of the World Bank's Operating Directive 6.50, which conditions disbursement of World Bank funds for the development of projects along internationally shared rivers upon agreement by all riparian states.<sup>183</sup> Thus the inability of upper riparian states to raise the massive amounts required for Nile projects has precluded them from building dams along the river for hydroelectric purposes and irrigation schemes.<sup>184</sup>

For decades, the political turmoil in Ethiopia prevented the country from developing the Nile's waters. If Ethiopia succeeds in stabilizing and undertakes major development projects, however,

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<sup>180</sup> Id. p. 187.

<sup>181</sup> Supra note 125, Salman, p. 9.

<sup>182</sup> Supra note 160, Kliot, *Water Resources and Conflict in the Middle East*, p. 266.

<sup>183</sup> Fasil Amdetsion, *Where Water is Worth More than Gold: Addressing Water Shortages in the Middle East and Africa by Overcoming the Impediments to Basin-Wide Agreements*, *SAIS Review*, vol. 32, no. 1, Winter-Spring 2012, pp. 169-183, published by Johns Hopkins University Press, p. 174.

<sup>184</sup> Id. p. 174.

this picture will change.<sup>185</sup> In fact, Ethiopia's relative political stability and economic strength have led to a realization that more substantial water use is inevitable, because economic growth is more likely and effective planning could be undertaken. The last few years witnessed the Ethiopian economy continuously improving which in turn has led to the implementation of various projects on the Nile River. For instance, Ethiopia announced the commencement of construction of its Grand Renaissance Dam, which will generate 6000 MW of hydro-power, making it Africa's largest hydroelectric plant. This has caused tense diplomatic confrontations between Egypt, Ethiopia and, in some measures, Sudan.

Developmental disparities frequently establish a pattern whereby lower-basin water users have military power to enforce their will, while upper-basin users have the water and the ability to cut it off or contaminate it. The resulting tension can be managed only if the water is controlled in such a way as to assure the equitable participation of all states sharing the basin for their economic developmental activities.<sup>186</sup>

#### **4.2 Application of the no significant harm principle in the Nile River basin**

The application of the principle which prescribes a duty not to cause significant harm could stir difficulty in any given region. Article 7 of the UN Watercourse Convention provides that states have to "take all appropriate measures to prevent the causing of significant harm". If "harm" is caused, article 7(2) also provides that a watercourse state "take all appropriate measures" to eliminate or mitigate such harm.

This duty requires that States exercise due diligence to utilize a watercourse in such a way as not to cause significant harm. However the fact that an activity causes significant harm does not of itself necessarily constitute a basis for barring it. A watercourse state can be deemed to have violated its due diligence obligation only if it knew or ought to have known that the particular use of an international watercourse would cause significant harm to other watercourse states.<sup>187</sup> Sometimes even an equitable allocation of the uses and benefits of the waters of an international watercourse might entail some factual "harm", in the sense of unmet needs, because an

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<sup>185</sup> Supra note 163, Dellapenna, p. 50.

<sup>186</sup> Ibid. p. 51.

<sup>187</sup> ILC, Report of the International Law Commission on the work of its forty-sixth session, U.N. Doc. A/49/10 (1994), p. 104.

international watercourse might not always be capable of fully satisfying the competing claims of all the states concerned. For example, where there is insufficient water in a watercourse to satisfy the expressed needs or claims of the states concerned, an equitable allocation would inevitably result in their needs or claims not being fully satisfied. In that sense they could be said to be "harmed" by an allocation of the uses and benefits of the watercourse, even if that allocation was, in fact, equitable.<sup>188</sup> However, such harms to a watercourse state will not entail a legal "injury" or be otherwise considered a wrongful act of the other riparian states.

Here it is important to consider how far a watercourse state's existing utilization of the Nile is protected. As stated in article VIII of the Helsinki Rules on the Uses of the Waters of International Rivers, an existing reasonable use may continue in operation unless the factors justifying its continuance are outweighed by other factors leading to the conclusion that it be modified or terminated so as to accommodate a competing incompatible use. However no corresponding provision was incorporated into the UN Watercourse Convention or the agreement on the Nile River Basin Cooperative Framework, nor would such an insertion be indispensable in any event. Both instruments prescribed that in deciding the equitability of utilization, an existing use of any basin state, however vital, would not necessarily receive complete protection. In fact, an existing use constitutes only one of the numerous factors considered cumulatively, and as such, it occupies no particular position of pre-eminence.<sup>189</sup> For example, article 6(1)(e) of the UN Watercourse Convention refers to both existing and potential uses of the international watercourse in order to emphasize that neither is given priority, while recognizing that one or both factors may be relevant in a given case.<sup>190</sup>

Hence first appropriators cannot legally presume that entrenched uses in shared river courses will be accorded secure protection in perpetuity. When new users of a resource become "ready to use the waters or to increase an existing use, in this case the entire question of equitable utilization of the waters is opened up for review... and the rights and needs of the various states would be

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<sup>188</sup> Report of the International Law Commission on the work of its thirty-eighth session (5 May-11 July 1986), Document A/41/10, Official Records of the General Assembly, Forty-first session, Supplement No. 10, Par. 41.

<sup>189</sup> Supra note 11, Tadesse, *International watercourses law in the Nile River basin: Three states at a crossroads*, p. 254.

<sup>190</sup> Yearbook of the International Law Commission 1994, *Report of the Commission to the General Assembly on the work of its forty-sixth session*, vol. II, Part Two, United Nations, New York and Geneva, 1997, p. 101.

considered”.<sup>191</sup> This means that the existing use of a state will be maintained if this utilization is in line with the other riparian states interest that has the potential to use that common international watercourse. This implies that in the long term, were the rule of equitable utilization enforced, Egypt and Sudan could be confronted with the risk of losing a great deal of the benefits now enjoyed through prior appropriation of the resource.<sup>192</sup>

However it is true that the material application of the duty not to cause significant harm raises difficult questions. For example, it will be difficult to determine what action is adequate to satisfy the duty of “all appropriate measures” under article 7(1) of the UN watercourse convention. In addition, it is stated that a watercourse state could be required to pay compensation “where appropriate” if it has caused significant harm to another watercourse state. But again, there could be disagreement about when compensation is “appropriate.”<sup>193</sup> Beyond this, the term “harm” is not defined. Does the use of more water by Ethiopia constitute harm to Egypt, for example? Or does “harm” only refer to serious pollution of the waters that would in turn affect a downstream state? There is no adequate guidance about this.<sup>194</sup> Thus the application of the duty not to cause significant harm will pit upstream and downstream states against each other.

#### **4.2.1 Positions advocated by upper and lower riparian states**

The structure of the legal argument related to the specific framework is categorized by opposing claims. Every state bases its rights on the refutation of the rights of others. For example, Egypt holds the view that she has “natural and historic” rights over Nile waters acquired by long usage and recognized by other states such as Great Britain and Sudan, and that the Nile water treaties have been declaratory of international customary law relating to fluvial law.<sup>195</sup>

The lower riparian states have submitted that their water rights cannot be affected by any upstream diminution of the flow of the water based on factual and legal bases. Egyptian scholars

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<sup>191</sup> International Law Association (1966) as cited by supra note 11, Tadesse, *International watercourses law in the Nile River basin: Three states at a crossroads*, p. 254.

<sup>192</sup> Ibid. p. 254.

<sup>193</sup> Christina M. Carroll (1999-2000), Past and Future Legal Framework of the Nile River Basin, *The Georgetown International Environmental Law Review*, vol. 12, p. 289.

<sup>194</sup> Ibid. p. 290.

<sup>195</sup> Arthur Okoth-Owiro (2004), *The Nile Treaty State Succession and International Treaty Commitments: A Case Study of The Nile Water Treaties*, Konrad Adenauer Stiftung and Law and Policy Research Foundation, Nairobi p. 16.

have argued that according to the 1959 agreement, Egypt has been allowed to utilize 55.5 BCM of water.<sup>196</sup> Egypt argues that this constitutes only “55.5 BCM out of total 200 BCM of water resources in the Nile basin,” i.e., about 4 percent of the total precipitation over the Nile basin which is estimated at around 1,600 BCM of water.”<sup>197</sup>

The average annual rainfall in the upper part of the basin is much higher than the rainfall in the lower basin. For example, in Ethiopia the average annual rainfall is 1125 mm, whereas in Egypt it is 15 mm.<sup>198</sup> Therefore on different occasions Egypt has argued that, as a nation of limited endowments, it “relies totally on the waters of the Nile for its survival, because it is an arid desert land.”<sup>199</sup> Egypt has sought to highlight this dearth of precipitation in defending its utilization of the Nile. It has attempted to distinguish between the Nile River and the Nile basin and claims that the Nile basin receives 1,660 BCM<sup>200</sup> of recorded rainfall annually, 85% of which falls in the Ethiopian highlands, with the balance falling in other upstream riparian states. Rather than fixate on its water quota, Egypt contends that upstream countries would be better off focusing their own energies on exploitation of this untapped water supply, much of which is currently lost to seepage and evaporation.

In defense of its existing uses and rights which cannot be subjected to upstream harm, Egypt builds its legal argument on the basis of successive legal notes and agreements. The crux of the argument submits that the Nile waters should flow to the lower riparian states of the Nile (Egypt and Sudan) without any impediment. It considered that changing the present status quo of utilization would violate the duty not to cause significant harm imposed on the Nile basin countries by virtue of the stipulations of international law. Hence the duty not to cause significant harm rule has been proposed and construed as a means for maintaining existing

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<sup>196</sup> In 1959 Egypt and Sudan signed an agreement, “The 1959 Agreement for the Full Utilization of Nile Waters”, which guaranteed that 55.5 BCM per year would flow into Egypt without any hindrance from Sudan. The agreement also allowed Egypt to construct the Aswan Dam for “long term” water needs.

<sup>197</sup> Mr. Marawan Badr, Egyptian Ambassador to Ethiopia, an interview with journalists from the Ethiopian Press Agency focused on issues related to the Ethio-Eritrean border dispute, the Nile waters and peace efforts in Somalia. 23 July 1998, available at: [http://www.geocities.com/~dagmawi/News\\_July23\\_Egypt.html](http://www.geocities.com/~dagmawi/News_July23_Egypt.html).

<sup>198</sup> [www.fao.org/docrep/w4347e/w4347e0k.htm#thenilebasin](http://www.fao.org/docrep/w4347e/w4347e0k.htm#thenilebasin), last visited 3/15/2014.

<sup>199</sup> Shams Al Din Al Hajjaji (2013), The long empty canyon: A study of the old/new legal problems of the Nile basin, *Journal of Water Resources and Ocean Science*, vol. 2, no. 5, p. 146, available at: <http://www.sciencepublishinggroup.com/j/wros>.

<sup>200</sup> Accord or Discord on the Nile? - Part I, Int'l Water Law Project Blog, <http://www.internationalwaterlaw.org/blog/2010/07/26/accord-or-discord-on-the-nile-%E2%80%93-part-i/>, last visited 3/17/2014.



patterns of utilization irrespective of the fact that there is no water allocation agreement among all of the Nile basin states.<sup>201</sup>

From the forgoing, it is plain that downstream countries of the Nile perceive the duty not to cause significant harm rule as a basic guarantee for the historical and acquired rights which they believe have been established through continuous utilization of the resource prior to their upstream counterparts.

On the other hand, the view of the upper riparian states appears to be different. Ethiopia simply does not acknowledge any existing treaty or other obligations preventing it from freely disposing of the Nile waters on its territory. All in all, the upper riparian states do not share the view of the lower riparian states on the perpetual nature of the present regime.<sup>202</sup> Upper riparian states consider the Egyptian defense based on historical rights an excuse to get the lion's share of the Nile water. This argument is considered to be prejudicing their water rights.<sup>203</sup> For example, the Agreement for the Full Utilization of the Nile between Egypt and Sudan, which was signed in 1959, aimed at full utilization of the Nile River only between those two nations. Ethiopia and the East African states were not invited to be part of the 1959 agreement.<sup>204</sup> According to article 34 of the Vienna Convention on the Law of Treaties, "a treaty does not create either obligations or rights for a third State without its consent".<sup>205</sup> Therefore Ethiopia is not bound by this agreement as she is not a party and also objected to this agreement during its negotiation stage in the 1950s. The east African nations object to other agreements on the Nile River. For example, speaking to journalists on February 12, 2002, Energy Minister of Kenya Raila Odinga said that the 1929 Agreement should be renegotiated. He clearly stated that; "The three countries (Kenya, Uganda and Tanzania) were not independent and were under colonial rule. That is what makes the treaty unfair. Why should we be denied the use of our water in the name of conserving it for others

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<sup>201</sup> Interview conducted with His Excellency Ambassador Fisseha Yeimer, Special Legal Advisor for the Minister of Foreign Affairs and former Director General for the international law directorate. December 2013.

<sup>202</sup> Supra note 5, Godana, *African shared water resources, legal and institutional aspects of the Nile, Niger and Senegal River systems*, p. 197.

<sup>203</sup> Supra note 139, p. 147.

<sup>204</sup> However it is possible to come in to the conclusion that the 1959 agreement incorporates possible future claims by other countries of the Nile as this is tacitly acknowledge within the new Agreement of the two states ,i.e., Egypt and Sudan.

<sup>205</sup> Vienna Convention on the Law of Treaties, adopted on May 22, 1969, entered into force on Jan. 27, 1980 [hereinafter Vienna Convention].

downstream?"<sup>206</sup> Similarly, in the matter of the 1929 Nile Waters Agreement, the Government of Tanganyika (now Tanzania), on July 4, 1962, addressed identical notes to the Governments of Britain, Egypt and Sudan, outlining the policy of Tanganyika on the use of the waters of the Nile. The note reads that "from the emergence of Tanganyika as an independent sovereign state in relation to the provisions of the Nile Waters Agreements on the use of the waters of the Nile entered into in 1929 by means of an exchange of Notes between the Governments of Egypt and the United Kingdom. As the result of such considerations, the Government of Tanganyika has come to the conclusion that the provisions of the 1929 Agreement purporting to apply to the countries under British Administration are not binding on Tanganyika. At the same time, however, and recognizing the importance of the waters of the Nile that have their source in Lake Victoria to the governments and people of all riparian states, the Government of Tanganyika is willing to enter into discussions with other interested governments at the appropriate time, with a view to formulating and agreeing on measures for the regulation and division of the waters in a manner that is just and equitable to all riparian states and the greatest benefit to all their peoples."<sup>207</sup> These riparian states adopted the *Nyerere* doctrine ("clean slate" principle) and declared their intention not to be bound by these agreements.<sup>208</sup> The 1978 Vienna Convention on Succession of States in Respect of Treaties, which applies to normal cases of state succession, incorporates the "clean slate" principle into its provisions. Specifically, article 16 of the convention stipulates: "[A] newly independent State is not bound to maintain in force or to become a party to, any treaty by reason only of the fact that at the date of the succession of States the treaty was in force in respect of the territory to which the succession of States relates."<sup>209</sup> In fact, article 11 provides that state succession does not affect "a boundary established by a treaty" or the "obligations and rights established by a treaty and relating to the regime of a boundary."<sup>210</sup> The question of whether the 1929 Nile Waters Agreement falls within the ambit of article 12, an exception to the "clean slate" doctrine, would seem to provide more fertile ground for

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<sup>206</sup> Daily Nation, 13 February 2002, p. 5. As noted by supra note 195, Arthur Okoth-Owiro, p. 15.

<sup>207</sup> Ibid. pp. 14-15.

<sup>208</sup> In this regard, by a communication to the Secretary-General of the United Nations dated March 25, 1964, the Prime Minister of Kenya adopted the *Nyerere* doctrine and declared her intention not to be bound by that treaty.

<sup>209</sup> Vienna Convention on Succession of States in Respect of Treaties, Aug. 23, 1978, Article 16.

<sup>210</sup> Ibid. Art. 11.

disagreement.<sup>211</sup> However, in one way or in another the upper riparian states of the Nile clearly stated that Egypt and Sudan did not have the right to distribute the Nile water share without referring to other riparian states of the Nile basin.

Although specific geographical, political, and economic contexts shape legal discourse, the equitable utilization principle is typically advanced by upper riparians, such as Ethiopia, looking to alter or increase the uses of an international watercourse in their respective jurisdictions. Though Egypt at different time has expressed clearly that every country of the basin has an equitable right to the utilization of the resource of the Nile, she has also taken the position that existing utilization of the riparian states must not be compromised by future utilization of the river basin states of the Nile. Egypt has tended to argue that the right to equitable utilization finds its limitation in the duty not to cause significant transboundary harm.<sup>212</sup> This position aims to protect Egypt's existing utilization of the resource of the Nile.

Upper riparians, in turn, have countered that this argument would amount to a system of prior appropriation and effectively preclude their own development. Therefore, the argument goes, it is the principle of equitable utilization that ultimately takes priority, with downstream harm being merely one factor to be considered in the determination of what is equitable and reasonable.<sup>213</sup> Ethiopia, for example, believes that a Nile agreement should be based on the principle of equitable utilization, and that the "no significant harm" principle should only operate when a state has exceeded its equitable or reasonable use.<sup>214</sup> Egypt, on the other hand, believes that each country has the right to the uninterrupted flow of the river through its territory; any measure that changes the status quo flow is causing significant harm.<sup>215</sup>

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<sup>211</sup> Jeffrey D. Azarva (2011), Conflict on the Nile: International Watercourse Law and the Elusive Effort to Create A Transboundary Water Regime In The Nile Basin, *Temple International & Comparative Law Journal*, vol. 25, p. 473.

<sup>212</sup> Egypt expressed reservations about "making the two principles equivalent" and noted that the "no harm rule" was "the cornerstone of any legal regime on international watercourses". Jutta Brunnee and Stephen J. Toope, *The Changing Nile Basin Regime: Does Law Matter?* vol. 43, no. 1, Winter 2002, pp. 149-150.

<sup>213</sup> Ibid. pp. 149-150. In this regard Ethiopia insisted that according primacy to the no harm rule would render meaningless the right to equitable and reasonable utilization and would disrupt the balance of the regime.

<sup>214</sup> Country paper, Ethiopia, Water Resources Management of the Nile Basin: Basis for Cooperation 9-10 (Feb. 24-27, 1997) (unpublished paper prepared for the Fifth Nile 2002 Conference, on file with Geo, International Environmental Law Rev.).

<sup>215</sup> Supra note 193, p. 290.

And finally, although the Cooperative Framework Agreement includes a provision on the principle of the duty not to cause significant harm, it is noted that there has been disagreement among the riparian states as to the importance of including this rule under this framework convention. Ethiopia, in particular, has constantly argued against inclusion of the principle, understanding that it may jeopardize the interests of upper riparian states that do not utilize the Nile water resources on a par with the downstream countries.<sup>216</sup>

However, the Nile riparian states included the principle of the duty not to cause significant harm under the cooperative framework agreement in much the same way as the UN Watercourse Convention. The reason for the incorporation of this principle has mainly been related to the influence exerted by downstream countries and the willingness of the upper riparian states to acquiesce to such measure as a gesture of developing partnership and trust, but most importantly, there was also a wider perception among all participating states that the principle constitutes a rule of customary international law. But it is interesting to note that though the principle was included, the lower riparian states ultimately decided not to sign the CFA. A further inclusion of the concept of water security under the CFA could as well be cited as a compromise, although, in the end, its exact essence and scope was subjected to different interpretations and hence engendered conflict about proper application of the concept in the basin.<sup>217</sup> Though Nile basin states recognize the vital importance of water security to each of them, no consensus was reached on article 14(b), which reads as follows: “not to significantly affect the water security of any other Nile Basin State, all countries agreed to this proposal except Egypt and Sudan”. Egypt proposed that article 14(b) should be replaced by the following wording: “(b) not to adversely affect the water security and current uses and rights of any other Nile Basin State”.<sup>218</sup> The lower riparian states of the Nile sought to maintain their existing uses through this theory, whereas the upper riparian states insisted that there should not be any privileged protection provided for existing uses but rather that protection should be equally provided for existing and potential uses.

The question here is how we can possibly apply the duty not to cause significant harm with such different positions and attitudes with regard to the definition of the duty now dominating the

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<sup>216</sup> An interview conducted with Ato Fekahmed Negash, the Directorate Director for Boundary and Transboundary River at the FDRE ministry of Water, Irrigation and Energy. October 2013.

<sup>217</sup> Id.

<sup>218</sup> Supra note 88, Art. 14(b).

basin's legal discourse. Evidently, when the application of the duty not to cause significant harm is considered in the specific context of the legal and developmental reality in the Nile basin, one must see and give due consideration to all of the contesting positions taken by the riparian states and evaluate the same in light of the dictates of international watercourses law.

#### **4.2.2 Examination of the positions under international water law**

The framework of international water law has reinforced separate and competitive identities among Nile basin states. It has also served to reinforce self-interested and ultimately unconvincing, legal arguments.<sup>219</sup> It is not uncommon to see a state taking different stands on different occasions in relation to the theories and principles of state sovereignty and international watercourses law. States fundamentally strive to protect their interest in utilizing their share in transboundary water resources. In this regard, the cases which involve the United States of America with Mexico and Canada may be mentioned. The United States Department of State defended its rights on the basis of the theory of absolute territorial sovereignty (i.e., the equivalent of the Harmon Doctrine) in its disputes with Mexico regarding the waters of the Rio Grande. The US submitted that there is no international law which imposes a limitation on riparian states which dictates how the states shall utilize the water resource.<sup>220</sup> The USA is an upper riparian state as the Rio Grande River flows from southwestern Colorado in the United States to the Gulf of Mexico. Having thus set out the legal position as viewed by the United States, the declaration concluded that the US was ready to act "in accordance with high principles of equity and with friendly sentiments which should exist between two neighbors".<sup>221</sup> But after a short period of time, in another case, the US took a position which contradicted its legal position regarding the waters of the Rio Grande. In a dispute with Canada, the US embraced a form of the limited territorial sovereignty or integrity principle. The unresolved relationship between two core principles of international water law, "equitable utilization" and "no significant harm," has allowed watercourse states to maintain irreconcilable positions.<sup>222</sup> As stated earlier, the same is true for the Nile basin countries. While the upper Nile states have

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<sup>219</sup> Jutta Brunnee and Stephen J. Toope (2002), *The Changing Nile Basin Regime: Does Law Matter?* *Harvard International Law Journal*, vol. 43, no. 1, p. 148.

<sup>220</sup> *Supra* note 5. Godana, *African shared water resources, legal and institutional aspects of the Nile, Niger and Senegal River systems*, p. 33.

<sup>221</sup> *Id.* p. 33.

<sup>222</sup> *Supra* note 219, p. 148.

conventionally based their claims on the principle of equitable and reasonable utilization, the lower riparian states have always tried to base their arguments on the duty not to cause harm rule, believing that this principle will preserve pre-existing patterns of utilization of the resources of the Nile River.

While it is not readily apparent from a simple reading of the relevant provisions of the UN Watercourse Convention, it has been widely accepted that the convention has to some degree subordinated the duty not to cause significant harm to the principle of equitable and reasonable utilization. Yet this should in no way be viewed as favoring upstream riparians in all circumstances. The principle of equitable and reasonable utilization, the guiding principle of international law since the Helsinki Rules were issued in 1966, duly recognizes, and is based on, the equality of all the riparians in the use of the shared watercourse.<sup>223</sup>

It is evident that the downstream riparians could be harmed by changes in water quality and quantity caused by uses in upstream locations. However it is much less obvious, and generally not recognized, that the upstream riparians can be harmed by the potential foreclosure of their future use of water caused by the prior use and the claiming of rights by downstream riparians.<sup>224</sup>

All of the agreements made in regard to the water of the Nile are of limited scope in their application. None of them managed to involve all the basin states, and all were concluded mainly to secure and safeguard the interests of the two lower riparian states, particularly Egypt. While these states continue to rely on the 1929 and 1959 agreements in laying claim by adamantly maintaining that the treaties' provisions remain binding, the upper riparian states have made their own position clear. They will not be bound by such treaties.<sup>225</sup> Here we have to note that these treaties are bilateral, which means that they cannot legitimately be perceived to regulate all of the Nile waters and all of the basin states. These instruments approach the problems in the basin in a splintered manner.<sup>226</sup>

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<sup>223</sup> Supra note 125, p. 9.

<sup>224</sup> Id. p. 9.

<sup>225</sup> Supra note 211, p. 470.

<sup>226</sup> Girma Amare, "Nile Waters- Hydrological Cooperation vs. Hydro-politics", as cited by supra note 165, Mohammed Abdo, p. 51.

The lower watercourse states' quests to maintain the status quo, on the one hand, and the need for a new water accord, called for by the upper states, on the other, have jeopardized the potential to reach a mutual agreement about proper application of the duty not to cause significant harm.

If we follow the argument put forward by Egypt, it is possible to reach the conclusion that upstream countries in the Nile basin may be precluded from developing the water resources of the Nile forever. A rational approach would have to be devised to understand how the two apparently conflicting principles operate in real settings, and to identify what scales of existing utilization would be protected, if any, and under what circumstances.

#### **4.2.3 Factors considered in the application of the principle**

The application of the "no significant harm" requires the examination of all the relevant conditions of the watercourse and its riparian states. For example, in applying the equitable use concept in allocating water resources, the question is not what an equitable use is for that particular state, but rather what constitutes equitable use in relation to other states using the same watercourse.

Obviously, the scope of a state's right to equitable use depends upon the facts and circumstances of each individual case, and specifically upon a weighing of several relevant factors. Article 6 of the UN Watercourse Convention specifically provides a non-exhaustive list of factors and circumstances that includes geographic and hydrologic factors, social and economic needs, effects of the use of the watercourse on another state, existing and potential uses, conservation and economic factors, and availability of alternatives.<sup>227</sup> Therefore the principle of equitable utilization does not provide carte blanche authorization to states to utilize the resource as they deem fit. Instead, the objective of the principle is to attain optimal and sustainable utilization thereof by considering all of the factors that are essential to apply the principle.<sup>228</sup>

In the same way, the application of the duty not to cause significant harm requires the consideration of all of the factors that are relevant to its effective application. However there are no clearly stipulated factors under the UN Watercourse Convention or the Nile River Basin Cooperative Framework Agreement (CFA), except that which flows from the combined reading

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<sup>227</sup> Supra note 104, p. 259.

<sup>228</sup> Supra note 58, p. 344.

of articles 5 and 7 of the convention. Therefore an attempt will be made to discuss a few of the factors that may have to be considered in the application of the rule in the Nile River basin—without in any way denying the problematic nature and status of its relationship with the equitable and reasonable use doctrine which has now been settled in the leading literature on international watercourses law.

#### **4.2.3.1 Efforts of the basin states to avoid, minimize and mitigate harm**

The duty not to cause significant harm rule sets limitations on the sovereign freedom of states to exploit their water resources. A state may be held responsible under international law for acts that breach international obligations concerning the use of shared water resources. As the duty “not to cause significant harm” is a due diligence obligation of prevention, rather than an absolute prohibition on transboundary harm, what states are required to do is to take due care to avoid, minimize and mitigate harm. A state’s compliance with this obligation is not dependent solely on harm not being caused, but rather determined by a country’s reasonable conduct in terms of preventative behavior to avoid the harm in question.<sup>229</sup>

Here, what a watercourse state is required to do is to take only those measures of prevention that are deemed appropriate according, for example, to a state’s capabilities. 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 will 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. Therefore “[t]he State may be responsible . . . for not enacting necessary legislation, for not enforcing its laws . . . or for not preventing or terminating an illegal activity, or for not

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<sup>229</sup> This was confirmed by the International Court of Justice decision in the Pulp Mills on the River Uruguay case. See also User’s Guide Fact Sheet Series: Number 5, No Significant Harm Rule, available at; <http://www.unwatercoursesconvention.org/documents/UNWC-Fact-Sheet-5-No-Significant-Harm-Rule>, visited 13/12/2013.



punishing the person responsible for it".<sup>230</sup> The type of harm that needs to be avoided is qualified by the term “significant”—defined as a real impairment of a use, established by objective evidence. For harm to qualify as “significant” it must not be trivial in nature but it need not rise to the level of being substantial; this is to be determined on a case-by-case basis. The “significant” threshold excludes mere inconveniences or minor disturbances that states are expected to tolerate in conformity with the legal rule of “good neighborliness”.<sup>231</sup>

The issue at stake is whether a state may avoid responsibility for causing harm to another riparian state by adopting conduct that could reasonably be expected or required in order to prevent the harm, or whether the responsibility of the state is involved, regardless of its conduct, in any case in which the prohibited harm has taken place.<sup>232</sup>

In fact, the extent to which a basin state has made efforts to avoid, minimize and mitigate harm can be seen from different viewpoints. The first is where watercourse states have suffered significant harm due to a state’s utilization while the utilization of state concerned is within the margin of the equitable and reasonable utilization principle. The second is where a state’s utilization is beyond the equitable uses principle and causes significant harm to the other watercourse states. In cases where a state’s utilization is beyond its equitable entitlement and causes significant harm, the state whose actions cause significant harm would be required to stop its activities. Such activities are clearly prohibited under international customary law, the 1997 UN Watercourse Convention and the Nile River Basin Cooperative Framework Agreement.

But even when a state acts within the margin of its equitable entitlement, it is also important to look at the extent to which the state in question has made an attempt to avoid, minimize and mitigate the possible causing of such harm to other Nile riparian states. If significant harm is caused even after making all appropriate efforts to avoid, minimize and mitigate this harm, the liability which will be imposed upon the watercourse state will be different than it would be if

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<sup>230</sup> Yearbook of the International Law Commission 1994, *Report of the Commission to the General Assembly on the work of its forty-sixth session*, vol. II, Part Two, United Nations, New York and Geneva, 1997, pp. 101-103.

<sup>231</sup> User’s Guide Fact Sheet Series: Number 5, No Significant Harm Rule, available at; <http://www.unwatercoursesconvention.org/documents/UNWC-Fact-Sheet-5-No-Significant-Harm-Rule>, visited 13/12/2013.

<sup>232</sup> Maurizio Arcari, *The Codification of The Law of International Watercourses: The Draft Articles Adopted by the International Law Commission*, pp. 17-18, available at: [http://dspace.unav.es/dspace/bitstream/10171/21504/1/ADI\\_XIII\\_1997](http://dspace.unav.es/dspace/bitstream/10171/21504/1/ADI_XIII_1997).

the state had not exerted such effort. This derives from the due diligence nature of the obligation not to cause significant harm.<sup>233</sup>

#### **4.2.3.2 Existing utilization: Falling within the margin of equitable utilization?**

As touched upon in the preceding paragraph, this can be taken as an important factor requiring serious consideration while applying the duty not to cause significant harm in the Nile basin. Obviously, trans-boundary water resources are the shared amenities of all countries in the basin. No nation will have a monopoly over such waters. However, basin countries shall only use water in an equitable and reasonable manner without affecting the need and desire of other countries. This could be easily undertaken when basin states agree to manage and utilize the water resource among them. Yet water allocation agreements are not easy to achieve.

The Nile basin states may have different views about what constitutes utilization in an equitable and reasonable manner. For example, Egypt in the present days uses the greatest share of Nile water and may consider its utilization equitable because it has no other source of water that can be substituted for the Nile. Ethiopia, on the other hand, may have a different view of what constitutes equitable use. Ethiopia may believe that it is entitled to a greater share of Nile water so long as the country contributes the lion's share of the Nile waters.<sup>234</sup> Though contribution of water from each watercourse state is not a relevant factor for determining equitable utilization under article 6 of the UN Watercourse Convention, the Nile River Basin Cooperative Framework Agreement's article 4(2) (h) states that the contribution of each Basin State to the waters of the Nile River system will be one among other factor in determining equitable utilization among the basin states of the Nile.

As discussed earlier, the application of equitable and reasonable utilization in a particular watercourse does not necessarily prohibit utilization that causes harm unless it exceeds the limits of the using state's equitable share. While the Drafting Committee of the UN Watercourse

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<sup>233</sup> The duty not to cause significant harm is considered to be a due diligence obligation of watercourse states. 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 will not occur. It is an obligation of conduct, not an obligation of result. The obligation entails 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 mitigating it.

<sup>234</sup> Supra note 193, p. 288.

Convention had finally agreed on a text for article 7, it was generally agreed that, in certain circumstances, "equitable and reasonable utilization" of an international watercourse might still involve some significant harm to another watercourse state, so long as the activity was within the parameters permitted by article 5 on reasonable and equitable utilization. It was equally true that the state should not be relieved from the obligation to consider the interests of the other riparian states. That obligation is the exercise of due diligence in the utilization of the watercourse in such a way as not to cause significant harm to other watercourse states.<sup>235</sup> If, despite the equitable and reasonable utilization of the water resource and the exercise of due diligence, significant harm was caused to another watercourse state, the parties should consult, first, to verify that the use of the watercourse was reasonable and equitable; secondly, to check whether some ad hoc adjustments to the utilization could eliminate or minimize the harm; and, finally, in case harm has occurred, to decide whether compensation would be possible for the victim watercourse state.<sup>236</sup>

Thus, even if a state's utilization of the Nile causes significant harm to another watercourse state, if such utilization falls within the margin of equitable and reasonable utilization as permitted under international law, the injuring state will not be required to stop its utilization of the resource. However, an important limitation could perhaps be that in cases where a use entails significant harm to human health and safety, this may be understood to be inherently inequitable and unreasonable.<sup>237</sup> The state where the harm originates may be required to negotiate with the state where the harm is experienced in order to provide the injured state adequate compensation or other relief (for example, a modification in the operation of the activity so as to avoid or minimize future damages).<sup>238</sup>

However the application of this factor remains in question as there are no rules or guidelines that clearly state the water shares of the Nile basin states. As there is no comprehensive water allocation agreement among the riparian states, it is not easy to apply this factor effectively.

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<sup>235</sup> Yearbook of the International Law Commission, *Summary records of the meetings of the forty-sixth session* 2 May-22 July 1994, vol. 1, pp. 167-168.

<sup>236</sup> Ibid. p. 168.

<sup>237</sup> Supra note 232, p. 23.

<sup>238</sup> For these conclusions, see the report of the Working Group on International Liability established by the ILC at its 1996 session, in Report of the International Law Commission on the Work of its Forty-Eight Session, General Assembly Official Records, 51st Session, Supplement. no.10, UN Doc. A/51/10, p.235- 327 (in particular pp. 235-236 and 270-272). As noted by Ibid. pp. 24-25.

Despite the existence of such like water allocation agreement, if the riparian states were able to negotiate with the view of expanding their utilization, the Nile basin states might be able to use the resources fairly. It might be possible to assess the actions of the watercourse states and their utilization of the water, if the basin states were able to come together to negotiate.

#### **4.2.3.3 The type and extent of damage suffered**

In the application of the duty not to cause significant harm, there is a need to assess the extent of damage (harm) suffered by watercourse states through the acts of the other watercourse states. One has to define clearly the extent and type of damage forbidden by the duty not to cause significant harm. It is important to ascertain the threshold at which the harmful consequences of the use of an international watercourse become legally relevant to the application of the rule, and is therefore prohibited.<sup>239</sup>

One determination of the extent of damage depends on the agreement of watercourse states as to the allocation of Nile water among them and a mechanism that clearly stipulates the harms that may be experienced by the other states due to excessive over-utilization of the watercourse states outside the allocated share of water. In order to determine this degree of harm the riparian states of the Nile must clearly stipulate the possible forms of harm and formulate the corresponding degree of harm by providing evaluative parameters.

Although it may require some effort from basin states, it is conceivable that in situations where the harm concerns the quantity of water, the extent of damage could be assessed by specifying the amount of water that the other watercourse states will lose as a result of the acts of the harming state. For example the riparian states of the Nile may agree that if the harming state's utilization causes a loss of X amount of water quantity of the share (or equitable entitlement) of the other watercourse countries, it will be considered to constitute significant harm to the other states.

But the issue at the heart of international water quantity disputes is the fact that there are no comprehensive rules that are internationally accepted for allocating shared water resources or their benefits. This makes it difficult to come up with guidelines. The problem is compounded by the fact that water is a vital resource that is mobile and fluctuates in time and in space, ignoring

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<sup>239</sup> Ibid. p. 17.

political boundaries.<sup>240</sup> Despite all this, it is essential to come up with an allocations agreement or a similar arrangement which indicates in some form the equitable entitlement of each state to the waters or beneficial uses of the shared resource. This would serve to determine how much harm may have been suffered by a watercourse state of the Nile basin through the utilization of the harming state beyond the allocated share or its recognized equitable entitlement.

With regard to harms related to the quality of water, the Nile basin states need an agreement as to what extent of harm will be deemed tolerable and what degree of harm will not. However, it should be mentioned here that assessment of harm relating to quality is complicated and requires a detailed scientific study.

#### **4.2.3.4 Situations that force a state to utilize water beyond its allocated share**

Various circumstances may force a state to utilize the watercourse beyond its presumed entitlement or allocated share of the resources of the Nile. As the nature of the duty not to cause significant harm is a due diligence obligation, it is very important to consider whether the state in question is performing this obligation with due care. Evidently, even when a state performs its activities with due diligence, there may be circumstances that force it to utilize the shared water resource beyond its presumed rights or allocated shares. In such cases, it is important to examine how far the state concerned has exerted efforts to tackle and possibly avoid over-utilization of the resource.

#### **4.2.3.5 Other relevant factors**

In addition to the above list of factors, there may be other relevant issues in the application of the duty not to cause significant harm in the Nile basin. The watercourse states are expected to clearly state how far the factors in question affect the harming state and have influenced it to not comply with its duty not to cause significant harm. Here again, due diligence is required. Therefore, if the state concerned is able to prove that there are factors that prevent it from performing its duty to the other watercourse states, despite fulfillment of the due diligence obligation, these factors may be taken into account. However, this could only happen in cases where the watercourse states or any other organ established for settling such issues—including

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<sup>240</sup> Aaron T. Wolf (1999), Criteria for equitable allocations: The heart of international water conflict, *Natural Resources Forum*, vol. 23(1), pp. 3-30.

the Nile River Basin Commission which will be established to handle such issues—finds that this is a valid and justified act, such that the state in question was forced by that factor not to perform its obligations emanating from this principle. Therefore the duty imposed upon the harming state may be reduced and, if there are damages assessed, the assessed compensation payment may be reduced.

### **4.3 Possible problems in the application of the principle in the basin**

#### **4.3.1 The disagreement with regard to the allocation of the shared water**

A water allocation agreement among basin states is important for effective application of the duty not to cause significant harm. However, it is not easy for the Nile basin states to enter into such an agreement.

The upper riparian states of the Nile basin argue that the “no significant harm” principle must be applied from the perspective that there is no prior right that should be maintained automatically. In operational fact, and on the basis of a correct reading of the pertinent provisions of the UN Watercourse Convention and the CFA, the principle is implemented as if there are no established rights. Even where a pattern of previous utilization exists, this must simply be seen as one factor among many in the allocation of a shared resource among the Nile basin states.

In many international rivers where most of the resource has been utilized by a few countries for a longer period of time, unbalanced development has its own effects on the application of this principle.

#### **4.3.2 Divergence of defining terms**

There is a disagreement among the Nile basin states as to application of the principle. This originates in the states’ divergent views in defining the “no significant harm” rule. The upper and lower riparian states of the Nile want to maintain their respective interests, and for this reason, they define the principle so as to maintain these interests. It is observed the upper riparian states fail to give due regard to the already established rights of the lower riparian states. These countries state that the “no significant harm” rule is not a basis for the maintenance of the states’ historic rights, but rather a duty that will be imposed upon watercourse states after proper allocation of water resources has taken place. Such differences between the upper and lower

riparian states' viewpoints were also enshrined when these states drafted the Cooperative Framework Agreement.<sup>241</sup> Thus the downstream countries are observed to maintain their existing utilization through the concept of water security.

The other divergence in the Nile riparian states' viewpoints relates to the way in which the degree of harm rule is read. There is no specific guideline about the percentage of reduction of the flow of water that amounts to harm with a threshold of "significant". This has its own effect on proper application of the duty not to cause significant harm in the Nile basin.

#### **4.3.3 Weight accorded for each of the factors**

Unless there is agreement among the riparian states of the Nile about how much weight to accord each factor, it will be difficult to them to implement the principle effectively in the basin. Here also the analysis should not be limited to the factors that apply to the duty not to cause significant harm, but rather expanded to look at the factors enshrined in the equitable and reasonable utilization principle. One of the purposes and objectives of the Commission is "to promote and facilitate the implementation of the principles, rights and obligations provided for in the Framework".<sup>242</sup> Therefore the Commission is expected to promote and facilitate a mechanism that will help it to perform this mandate.

After an agreement about equitable and reasonable utilization is reached among the riparian states of the Nile, a standard assessment of weight should be provided for all of these factors so that it is easy to apply the principles. Despite the ease with which this may be stated, it is up to the states of the Nile to come to agreements in this regard. A comprehensive agreement will affect the proper application of the duty not to cause significant harm in the Nile basin.

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<sup>241</sup> At the end of the negotiations, no consensus was reached on article 14(b), which reads as follows: "not to significantly affect the water security of any other Nile Basin State, all countries agreed to this proposal except Egypt and Sudan. Egypt proposed that Article 14(b) should be replaced by the following wording: (b) not to adversely affect the water security and current uses and rights of any other Nile Basin State."

<sup>242</sup> Supra note 88, Art. 16(a).

## Conclusions and Recommendations

### Conclusion

The duty not to cause significant harm is one of the obligations under customary international law relating to international watercourses. This duty stipulates a state sharing freshwater resources must prevent the causing of significant harm to other states through activities related to the shared international watercourse.

The inclusion of this duty in the UN Watercourse Convention and its placement in the section of the convention entitled “general principles” implies that it is one of the fundamental obligations in the field. The principle obliges watercourse states, when utilizing an international watercourse in their territory, to take all appropriate measures to avoid producing significant harm to other watercourse states. When significant harm nevertheless is caused to another watercourse state, the state causing the harm is required to “take all appropriate measures, having due regard to different factors, in consultation with the affected State, to eliminate or mitigate such harm, and where appropriate, to discuss the question of compensation”.

However there are various problems that affect our understanding of the duty not to cause significant harm. These problems include: - issues related to the nomenclature of this principle; the mistaken but commonly held belief that it is only upstream riparian states that can harm downstream states by affecting the quantity or quality of water flow to them; and the threshold degree of harm for qualitative and quantitative water issues. Unless these problems are effectively addressed, they may produce their own negative effects in the proper application of the duty not to cause significant harm.

Throughout its development, the idea of the duty not to cause significant harm has evolved with different connotations, and as a result, the threshold of prohibited harm differs from one international instrument to another, from one regional or bilateral watercourse agreement to the other, and from one watercourse related judicial decision to the other.

As discussed in the previous chapters, the relationship between the principles of equitable utilization, on the one hand, and the duty not to cause significant harm, on the other, has been and continues to be a subject of controversy. The unresolved relationship between these two core



principles of international water law has allowed states to maintain irreconcilable positions. In this connection lower riparian states of the Nile River basin tend to favor the “no harm” rule, believing that it protects existing uses against impacts resulting from activities undertaken by upstream states. Conversely, upper riparian states tend to favor the principle of equitable and reasonable utilization, because it provides more scope for states to utilize their share of the watercourse for activities that may impact downstream states. The conflict between the principle of equitable utilization and the “no significant harm” rule is readily apparent. While the former might permit significant harm as a result of an equitable use of the watercourse, the latter would not.<sup>243</sup>

Naturally, there can be guarantee that some ‘harm’ will not result from the equitable use of an international watercourse. Once it is established that a particular use is equitable and reasonable, it implicitly entails that every effort must have been made not to cause significant harm to another watercourse state (obligation of conduct); no more should be expected of the state which has equitably and reasonably utilized the international watercourse. That is why most scholars on the subject have confirmed the primacy of the principle of equitable utilization. What is expected is that the watercourse state takes all appropriate measures deemed necessary.

If the “no harm” rule took precedence over that of equitable utilization, the effect would be to freeze the right to development of many riparian states through the employ of international watercourses.<sup>244</sup> If we give more protection to the state which is already making use of the resources of the international watercourse, irrespective of whether or not other watercourse states have obtained an equitable share in those resources, this could militate against a rational balancing of rights and interests in the apportionment of the benefits to be derived from watercourse use. The result would be that the most developed states, which have been the first to derive benefit from watercourses, would be favored to the detriment of developing states, which would normally be late comers in developing and utilizing international watercourses.

The application of the principle of the duty not to cause significant harm under international watercourse law remains controversial. In the absence of detailed, legally-binding rules developed with a view to applying the principle in the relevant basin, implementation will be

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<sup>243</sup> Supra note 24, p. 420.

<sup>244</sup> Supra note 43, p. 509.

problematic. This is true for the Nile River basin too. Article 7 of the UN Watercourse Convention provides that states have to “take all appropriate measures to prevent the causing of significant harm”, but this is also difficult to apply practically. If “harm” is caused, article 7(2) provides that a watercourse state “take all appropriate measures” to eliminate or mitigate the harm. But it will be difficult to determine what action is adequate to satisfy the duty to take “all appropriate measures.” Beyond this, the term “harm” is not defined. Does the use of more water by Ethiopia constitute harm to Egypt, for example? Or does “harm” only refer to serious pollution of the waters that would in turn affect a downstream state? There is no adequate guidance here. Thus the application of the duty not to cause significant harm will pit upstream and downstream states against each other.

In order to effectively apply the duty not to cause significant harm in the Nile basin we must see significant harm in more holistic terms and acknowledge that it can emanate from both upper and lower riparian states. The subject requires a detailed study of the basin countries’ interests, including their shared history. The hydro-politics of the Nile is to a great extent based on the colonial history of the Nile basin. After the British gained effective control over Egypt in 1882, they were quick to realize the importance of the Nile River for their continued existence in Egypt. The treaties were concluded mainly by the British colonial government on behalf of Egypt and gave Egypt more rights to the waters of the Nile than other riparian countries. This situation has been replicated by the lower riparian states: Egypt and Sudan.

The unresolved relationship between two core principles of international water law, "equitable utilization" and "no significant harm", has allowed the Nile watercourse states to maintain irreconcilable positions.<sup>245</sup> However it is accepted and recognized that the UN Watercourse Convention has to some degree subordinated the duty not to cause significant harm to the principle of equitable and reasonable utilization. Yet it is tremendously important that this not be viewed as favoring upstream riparians.

Application of the “no significant harm” rule requires the examination of all the relevant conditions of the watercourse and its riparian states. It requires the consideration of various factors that are relevant to effective application in that particular watercourse. These factors

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<sup>245</sup> Supra note 219, p. 148.

might include a basin state's efforts to avoid, minimize and mitigate harm caused by existing utilization; whether current utilization is falling within the margin of equitable utilization; the type and extent of damage sustained; and the situation that forces a state to utilize beyond its allocated share.

For effective application of the duty not to cause significant harm in the Nile basin it is advisable to have a water allocation agreement among the riparian states. However, it has not proved easy for the states to come to such an agreement. The upper riparian states believe that the principle must be applied based on the perspective that there were no prior utilization to be maintained; accordingly the principle should be implemented as if there were no established usage and associated rights. Even where previous utilization exists, it must be seen as only one factor among many in the allocation of the shared watercourse resource among the Nile basin states. In contrast, lower riparian states, and Egypt in particular, seek to maintain their right to existing utilizations based on agreements such as the 1929 and 1959 treaties. Thus the application of the principle is affected by the diverse interest and position of the upper and lower riparian states of the Nile.

## **Recommendations**

In order to effectively apply the duty not to cause significant harm and utilize the water resource of the Nile for their common benefit, the basin states should:

- ❖ Agree to set aside their differences and work together for their common good. The Nile basin states need to agree on how to define the duty not to cause significant harm with regard to the threshold of prohibited harm.
- ❖ Agree on the rules and procedures for the effective implementation of the duty not to cause significant harm in the Nile basin. In cases where the reasonable and beneficial uses of all watercourse states cannot be fully realized, “conflict of uses” results. In such a case, international practice recognizes that some adjustments or accommodations are required in order to preserve each watercourse state's equality of rights. These adjustments or accommodations should be based on equity, and can best be achieved on the basis of specific watercourse agreements. Therefore Nile basin states should negotiate. This will enable them to effectively implement basic principles, including the duty not to cause significant harm.
- ❖ Work towards a water allocation agreement. Though it is not easy to reach such an agreement, it is advisable for the basin states to do so. This will make it possible to effectively apply the duty not to cause significant harm in the basin. Beyond this, it is also recommended that the Nile basin states base their water allocation agreement on a benefit sharing approach rather than a water sharing approach.
- ❖ Clearly stipulate the various factors and circumstances that must be considered in the application of the duty not to cause significant harm in the basin and the weight accorded each of these factors.
- ❖ Come to an agreement on the issue of preeminence, i.e., whether the principle of equitable and reasonable utilization or the obligation not to cause harm takes priority.
- ❖ Cooperate with other states within the basin. For a long period of time Egypt has acted as if the Nile was its own property and has resisted every attempt at further internationalization.

However, the factors are changing which in the past accounted for the primacy given only to Egyptian interests. Therefore, Egypt must cooperate with other riparian states to ensure the optimum use of the resource of the Nile for the benefit of all of the people within the basin.

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