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How does the work of the ILC and the General Assembly on the law of international watercourses contribute towards a legal framework for the Nile Basin?

Abseno, Musa

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Musa Abseno

2009

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**How does the Work of the ILC and the
General Assembly on the Law of
International Watercourses Contribute
towards a Legal Framework for the
Nile Basin?**

Musa Mohammed Abseno

**Submitted In Partial Fulfilment of the
Requirements for the Award of the
Degree of Master of Laws (LL.M.) by
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Signed Declaration for Submission of Postgraduate Thesis

I, the candidate, hereby declare that I am the author of this thesis, and that it has not been submitted for a higher degree. All references cited have been consulted unless otherwise stated, and the list provided.

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I, the supervisor, hereby acknowledge that the conditions of the Ordinance and Regulations have been fulfilled.

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Date:

Thesis Abstract

The purpose of this research to draw out fresh insights on how the work of the International Law Commission (ILC) and the General Assembly of the United Nations (GA) on the law of non-navigational uses of international watercourses has impacted the development of the Nile Cooperative Framework Agreement (NRBCFA).

Chapter 1 introduces a bird's eye view of the genesis of water crises in general and that of the Nile in particular. The Chapter raises the main research question to be dealt with in the limelight of legal imperatives of the work of the ILC and GA.

Chapter 2 seeks to analyze the physical, environmental, political and economic factors in order to demonstrate their positive and negative impacts on the need for a basin wide legal and institutional structure in the Nile.

Chapter 3 looks in to the evolution and current applicable law in the Nile in order to analyze the growth of institutional coordination, while Chapter 4 makes an in-depth analysis of the work of the ILC and the GA in the law of non-navigational uses of international watercourses. The adoption of the UNWCC and the post-adoption status of the convention is also outlined in this Chapter.

Chapter 5 identifies the most controversial legal issues with a comparative analysis of the work of the ILC and the GA and the Nile.

Based on the assessment from the comparative analysis and the work of the ILC and GA and the Nile in resolving contentious issues, Chapter 6 identifies the

findings of the research, while Chapter 7 recaps the essence of the research draws a conclusion that the work of the ILC and the GA in the UNWCC can influence emerging watercourse agreements in the Nile.

ABBREVIATIONS

| | |
|-----------------------------------|--|
| Am. J. Int'l L., Supp. | American journal of International Law Supplement |
| Am. J.I.L. | American Journal of International Law |
| Am. Soc'y Int'l L. Proc. | American Society of International Law Proceedings |
| Ariz. J. Int'l & Comp. L. | Arizona Journal of International and Comparative Law |
| B.C. Int'l & Comp. L.R | Boston College International & Comparative Law Review |
| BCM | Billion Cubic Meters |
| BYB Int'l L | British Year Book of International Law |
| Cana. Y.B. Int'l L | Canadian Year Book of International Law |
| Colo. J. Int'l Env't'l L' & Pol'y | Colorado Journal of International Environmental Law and Policy |
| DRC | Democratic Republic of Congo |
| ENCOM | Eastern Nile Council of Ministers |
| ENTRO | Eastern Nile Technical Regional Office |
| ERU | Equitable and Reasonable Utilization |
| GA | General Assembly |
| GEF | Global Environment Facility |
| Ger.Y.B. Int'l L. | German Year Book of International Law |
| Harv. Int'l Club J. | Harvard International Club Journal |
| Harv. Int'l L.J | Harvard International Law Journal |
| HDR | Human Development Report |
| Helsinki Rules 1966 | Helsinki Rules on the Uses of Waters of International Rivers |
| ICG | International Crises Group |
| ICJ | International Court of Justice |
| IIL | Institute of International Law |
| ILA | International Law Association |
| ILC | International Law Commission |
| ILM | International Legal Materials |
| Int. J. Glob. Envnt'l Iss. | International Journal of Global Environmental Issues |
| Int'l & Comp. L.Q | International & Comparative law Quarterly |

| | |
|---------------|--|
| Int'l L. Rpt. | International Law Report |
| IPPR | Interim Report of the Institute for Public Policy Research |
| J. Int'l Aff. | Journal of International Affairs |
| JMP | Joint Multipurpose Project |
| Kagera-TIWRM | Kagera Transboundary Integrated Water Resources Management Project |
| KBO | Kagera Basin Organization |
| LNTS | League of Nations Treaty Series |
| LRA | Lord Resistance Army |
| MoWR | Ministry of Water Resources |
| Nat R. J. | Natural resources Journal |
| Nat. Res. F | Natural Resources Forum |
| NBI | Nile Basin Initiative |
| NEL-COM | Nile Equatorial Lakes Council of Ministers |
| NEL-CU | Nile Equatorial Lakes Coordination Office |
| NELSAP | Nile Equatorial Lakes Subsidiary Action Program |
| NEL-TAC | Nile Equatorial Lakes Technical Advisory Committee |
| Nile-COM | The Nile Council of Ministers |
| Nile-TAC | Nile Technical Advisory Committee |
| NRBAP | Nile River Basin Action Plan |
| NRBC | Nile River Basin Commission |
| NRBCFA | Nile River Basin Cooperative Framework Agreement |
| P.C.I.J | Permanent Court of International Justice |
| SADC | Southern African Development Community |
| SAP | Subsidiary Action Programme |
| SPLA | Sudan People's Liberation Army |
| SVP | Shared Vision Programme |
| SVP-PAD | Shared Vision Program Project Appraisal |

| | |
|---------------------------|---|
| TECCONILE | Technical Cooperation Committee for promotion of the Development and Environmental Protection of the Nile Basin |
| Temp. Int'l & Comp. L. J. | Temple International & Comparative Law Journal |
| UN Doc. | United Nations Document |
| UNDP | United Nations Development Programme |
| UNEP | United Nations Environment Programme |
| UNGAOR | United Nations General Assembly Official Record |
| UNTS | United Nations Treaty Series |
| UNWCC | Convention on the Law of Non-Navigational Uses of International Watercourses |
| WB | Word Bank |
| WG | Working Group |
| WMO | World Meteorological Organization |
| Y.B. Int'l L. COMM'N | Year Book of International Law Commission |

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1911

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1925

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1929

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1948

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1961

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CHAPTER 1: INTRODUCTION

‘Water for life in the household and water for livelihood through production are two of the foundations for human development. Yet for a long section of humanity these foundations are not in place.’ (Human Development Report, 2006¹)

1.1 Background

As the world population grows exponentially, many now believe that crisis over water resources has become a reality; not because there is little water to serve human needs, but there is lack of proper management to satisfy the needs of billions of people and the environment.²

As stated in a UNEP study, due to population pressure, urban migration, climate change and an increase in resource consumption, water crises encompasses large parts of the world, where both surface and ground water resources are affected in quantity and quality.³ Access to clean water and sanitation is a basic foundation for human existence and progress. According to the 2006 Human Development Report; some 1.1 billion people in the developing world do not have access to a minimal amount of clean water, while 2.6 billion people or half of the population of the developing world are deprived of proper sanitation.⁴ These challenges are compounded by the fact that hundreds of millions rely on international

¹UN Development Program (Human Development Report), ‘*Beyond Scarcity: Power, Poverty, and the Global Water Crises*’ (2006) available at <http://hdr.undp.org/en/media/HDR06-complete.pdf>, accessed 5 October 2008.

² Cosgrove, J. & Rijsberman, R., World Water Vision, ‘*Making Water Everybody’s Business*’, World Water Council, Earthscan Publications Ltd., London, (2000) at xix.

³ In-depth analysis on management challenges, governance, and the environment development could be observed from *Global Environmental Outlook*, available at www.unep.org/geo, accessed 16 October 2008.

⁴ For a detailed human development costs entailed as a result of lack of clean water and sanitation, see Human Development Report 2006, *supra* note 1.

See also the UN World Water Development Report 3, *Water in a Changing World*, World Water Assessment Program, (2009), available at www.unesco.org/water/wwap/, accessed 5 October 2008.

watercourses to sustain their livelihoods, preserve their environments, and generate their economic growth.

More than 263 international watercourses and a large number of transboundary aquifers cover nearly half of the Earth's land-mass.⁵ As a result, two in every five people in the world live in international basins that account for 60% of global river flows.⁶ The use of transboundary water in one state affects its availability in another state, potentially leading to disputes, and sometimes conflicts among states. It is in order to avoid these conflicts and to establish sound transboundary water resources management that the need for international water law becomes imperative.⁷

A body of customary international law and treaties establishing rights and obligations between states over the utilization of shared water resources has evolved in pursuit of this objective. Treaties over international watercourses are 'binding on the states parties and establish their respective rights and obligations, together with the rules of the game that govern their relations.'⁸ The Vienna Convention on the Law of Treaties states the importance of treaties as a source of international law, and as a means of developing peaceful cooperation among nations, whatever their constitutional or social systems.⁹

Quoting the UN Food and Agriculture Organization (FAO), Hamner and Wolf, have established that an estimated 3600 water-related treaties have been adopted between AD 805

⁵ See Human Development Report 2006, *supra* note 1. See also Aaron Wolf's registry on the list of international river basins available at *Oregon University Transboundary Fresh Water Data Base* at www.transboundarywaters.orst.edu/database/, accessed on 17 October 2008.

⁶ *Id.*

⁷ Bruhács, J., '*The Law of Non-Navigational Uses of International Watercourses*', Trans., Zehery, Martinus Nijhoff Publishers, (1993), at 10.

⁸ Vinogradov, S., Wouters, P.K., Jones, P., '*Transforming Potential Conflict in to Cooperation Potential: the Role of International Water Law*', PCCP, Publications, (2003) at 19, available at <http://www.unesdoc.unesco.org/images/0013/001332/133258e.pdf>, accessed 16 November 2008.

⁹ *Vienna Convention on the Law of Treaties*, 8 ILM, 702 (1969), (adopted on May 22, 1969).

and 1984;¹⁰ although only a small number of those treaties are related to non-navigational activities, such as flood management, hydropower, or water allocation. 11 This means, a large number of them deal with international navigation.

The scope of international watercourse treaties ranges from establishing joint basin institutions for multi-purpose joint development to the management of specific activities, such as pollution, as in the case of Convention on the International Commission for the Protection of the Rhine against Pollution (Bern Convention) signed in 1963;¹² sharing of benefits as in the Treaty between the United States of America and Canada Relating to Cooperative Development of the Water Resources of the Colombia River, 17 January 1961;¹³ the construction of works in the Treaty between the Hungarian Republic and Czechoslovak Socialist Republic concerning the Construction and Operation of the Gabčíkovo-Nagymaros system of Locks, signed at Budapest on 16 September 1977¹⁴; navigation in the Convention regarding the Regime of Navigation of the Danube, signed at Belgrade, August 18, 1948¹⁵; or

¹⁰ Hamner, J. H., and Wolf, A., *Patterns in International Water Resources Treaties: The Transboundary Fresh Water Dispute Data Base*, 9 Colo. J. of Int'l Env't L. & Policy (1998), at 158.

¹¹ Id; According to the authors, 145 full and partial texts of treaties on non-navigational uses have been stored at the Transboundary Freshwater Dispute Database, which is available at www.transboundarywaters.orst.edu/database/, accessed on 17 October 2008.

A large number of water treaties are bilateral, even though multilateral accords are increasingly becoming the subject of agreement over major international watercourses. See McCaffrey, S., *The need for flexibility in freshwater treaty regimes*, 27 Nat. Res. Forum, (2003) at 156.

A number of multilateral treaties have emerged in international water basins, such as the 1995 *Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin*; the 1972 *Convention Pertaining to the Creation of the Organization for the Management of the Senegal River*; the 1980 *Convention creating the Niger River Basin Authority*; (See, *International Fresh Water Treatise Data Base*, available at www.transboundarywaters.orst.edu; accessed on 17 October 2008. See also the new *Nile River Basin Cooperative Framework Agreement*, (not yet entered in to force), (copy with the author).

¹² *Convention on the International Commission for the Protection of the Rhine against Pollution* (Bern Convention) signed in 1963. (It was resigned in 1999 with the European Union); *Rhine Action Plan Against Chemical Pollution*, (1987); Action Plan on Flood Defence (1998) - See the Rhine River, Anton Earle, The Water Page, available at www.africanwater.org/rhine_main.htm, accessed 21 October 2008.

¹³ *Treaty between the United States of America and Canada Relating to Cooperative Development of the Water Resources of the Colombia River*, 17 January 1961. Available at: International Fresh Water Treaties Data Base; www.transboundarywaters.orst.edu; accessed on 17 October 2008.

¹⁴ *Treaty between the Hungarian Republic and Czechoslovak Socialist Republic concerning the Construction and Operation of the Gabčíkovo-Nagymaros system of Locks*, Signed at Budapest on 16 September 1977, (Entry in to force on 7 February 1984), 32 ILM 1247.

¹⁵ *Convention regarding the Regime of Navigation of the Danube, signed at Belgrade*, August 18, 1948, (entry in to force 11 May 1948); Act regarding Navigation and Economic Cooperation between the States of the Niger

allocation of water as in Agreement between the Republic of the Sudan and the United Arab Republic of Egypt for the Full Utilization of the Nile Waters, Cairo, 8 November 1959.¹⁶

However, the emergence of the first codified rules of universal application governing the use and protection of international watercourses through the 1997 UN Convention on the law of non-navigational uses of international watercourses (UNWCC) has motivated the need for a basin wide watercourses agreements in many parts of the world.¹⁷ The development of this trend is being observed in Africa, where its shared waters resources account for 85 percent of the continent's water resources.¹⁸ For instance, one corner of the Continent, West Africa alone consists of 28 river basins, where 17 countries of the sub-region share 25 of these rivers.¹⁹ However, despite the relative abundance of water resources, a major decline of rainfall is responsible for 40-60 percent decrease in an average discharge in major rivers such as the Niger, Senegal, and Volta.²⁰ As a result, tensions simmer between countries such as Nigeria and the two upstream states of Niger and Mali over dam development on the Niger River.²¹ The conflict is compounded by population growth, climate change and industrial waste, where among its major rivers the Niger, the third largest in Africa has become the fastest drying river, with its flow falling by 55 percent since the 1980s.²²

Basin, Niamey, 1963, (entry in to force 1 February 1966). Available at International Fresh Water Treaties Data Base; www.transboundarywaters.orst.edu; accessed on 17 October 2008.

¹⁶ *Agreement between the Republic of the Sudan and the United Arab Republic of Egypt for the Full Utilization of the Nile Waters*, Cairo, 8 Nov., 1959, 453 UNTS 66 (1963).

¹⁷ Fitzmaurice, M. & Elias, O., *Watercourse Co-operation in Northern Europe*, T.M.C. Asser Press, The Hague, (2004) at 8.

¹⁸ Madiodio Niase, 'Transboundary River Basins', in Atlas on Regional Integration in West Africa (2006), available at <http://www.oecd.org/dataoecd/41/45/38409569.pdf>, accessed on 20 October 2008.

¹⁹ Madiodio Niase, Africa: *'Recognizing and Coping with Increasing Climate Impacts on Shared Watercourses, Human Security and Climate Change'*, International Workshop, Oslo, 21-23 June 2005, available at www.gechs.org/downloads/holmen/Niase.pdf, accessed on 20 October 2008.

²⁰ Id.

²¹ Id.

²² Story from BBC NEWS: <http://news.bbc.co.uk/go/pr/fr/-/1/hi/world/africa/7375109.stm>, Published: 2008/05/01 01:06:34 GMT

In Southern Africa, 11 rivers that are shared by the SADC member states²³, face threats from climate variability, extreme temperatures, and erratic rain fall pattern and high evaporation.²⁴

Although cooperation over shared watercourses could be described as better developed than in other parts of Africa, tensions still remain high between upstream and downstream countries of the SADC region.²⁵

The other major river facing similar challenges in the East and Northern African sub-continent is the Nile. The Nile River is shared by ten riparian countries that depend on its waters for their livelihoods and economic growth.²⁶ The challenges to the Nile are multifaceted, where major challenges include chronic poverty (except Egypt); political instability; conflict; rapid population growth; environmental degradation; and lack of economic integration.²⁷ In addition, there has been little or no cooperation in the utilization, development, conservation, management, and protection of the water resources of the Nile, as a consequence of colonial treaties, that imposed inequitable water sharing arrangement in the Basin. The absence of a basin-wide legal and institutional arrangement, to replace centuries

²³ The SADC comprises 14 member states; Angola, Botswana, the DRC, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia, and Zimbabwe. Except Seychelles, Mauritius, and the DRC, all share 11 Southern African Watercourses. See, Member States, at www.sadc.in, accessed on 12 October 2008.

²⁴ Ashton, P., 'Avoiding Conflicts over Africa's Water Resources', *Ambio*, J. Human Env't., 31, Issue 3, Royal Swedish Academy of Sciences (May 2002), available at <http://www.ambio.kva.se>, accessed on 12 October, 2008.

²⁵ The 2000 devastating flooding in Mozambique was exacerbated by South African actions up stream, where the later failed to notify downstream Mozambique. Similarly, the relation between Angola, Botswana, and Namibia over the amount of water use from the Okavango River remains sensitive as Angola plans to develop agriculture, water supply, and hydropower in the upper catchments. Such development poses big challenges to Botswana and Namibia, which have already suffered from recurring draught and water shortages.

See Kidd, M. & Quinn, W., 'Public Participation in South African Watercourses', *Water Res.Mgt. & Policy*, in Carl Bruch et al (ed.) *Public participation in the Governance of International Fresh water Resources*, United Nations University Press, Tokyo, (2005), at 156-164.

See also Ashton, P., & Maria, N., 'Public involvement in water management within the Okavango river Basin' in Carl Bruch et al (ed.) *Public participation in the Governance of International Fresh water Resources*, United Nations University Press, Tokyo, (2005) at 156-164.

²⁶ The ten countries that share the Nile River basin are: Burundi, Democratic Republic of Congo (DRC), Egypt, Eritrea, Ethiopia, Kenya, Rwanda, Tanzania, Sudan, and Uganda. Ethiopia, Eritrea, Egypt, and Sudan constitute the Eastern Nile sub-basin, which is based on the Blue Nile and Tekeze Rivers sub-system, while the rest of the Equatorial Lakes countries of the White Nile form the Nile Equatorial, sub-basin. See NBI Countries, available at www.nilebasin.org, accessed on 28 December 2008.

²⁷ See *Project Appraisal Document for the Shared Vision of the Nile Basin Initiative*, World Bank, Document, Report No.26222 (2002), available at <http://www.nilebasin.org>, accessed on 13 October 2008.

of dominance of the use of the resources by downstream Egypt based on the doctrine of ‘historical rights’ continues as the main issue sustaining the current status quo.²⁸

The Nile Basin Initiative (NBI) which was established in 1999 is the first step towards a basin-wide legal and institutional framework arrangement, pending the new Nile River Basin Cooperative Framework Agreement (NRBCFA) and the establishment of a Nile River Basin Commission (NRBC).

The product of a lengthy negotiation among nine Nile Basin countries, the NRBCFA will for the first time lead towards the establishment of a permanent treaty in the Nile. In negotiating the NRBCFA, the Nile Basin States have been able to agree on a number of core legal principles, such as equitable and reasonable utilization; no-significant harm rules. They have also been able to tackle, to a certain degree, more controversial issues on prior notification on planned measures; existing agreements; ‘water security’, and many others.

Taking in to account the above facts, this research examines the extent of influence of the UNWCC in the development of a basin- wide legal framework in the Nile Basin.

This research begins by examining the process of the codification and progressive development of the UNWCC; the remits of the International Law Commission (ILC) and the General Assembly (GA); the debates of States within the process of development and adoption; and the work of the ILC and GA in resolving the most controversial issues. By discussing the process of development of the NRBCFA the research seeks to analyze, to what

²⁸ The doctrine of ‘absolute territorial integrity’ asserts that ‘the upstream may do nothing that affects the natural flow of the river in to the downstream state’, while the absolute territorial sovereignty ‘insists upon the complete freedom of action of the upstream state’. See McCaffrey, S. C., *The Law of International Watercourses: Non-Navigational Uses*, Oxford University Press, (2003), at 128.

On several occasions, threatening statements have been made by Egyptian leaders (Anwar Sadat in 1997), over any activities upstream is based on the justification of the concept of ‘historical or acquired right’. The issue is a central theme that the Egyptian Government seems to pursue in relation to any future agreements. See www.sis.gov.eg/En/Pub/, accessed on 24 October 2008.

extent the work of the ILC and the GA has impacted the resolution of the most controversial issues in the formation of NRBCFA. This will be outlined by analyzing the process surrounding the codification of the UNWCC by the ILC and the GA in complementing basin-wide framework agreements over shared water resources.

1.2 The Research Question

Whilst the above challenges have continued to persist, there is, however, a growing realization among the Nile Basin States that these challenges could be turned into opportunities for a sustainable economy, livelihood, infrastructure, ecosystem development, hydropower, and agriculture.²⁹ However, these benefits cannot be realized on a piecemeal basis. Instead it can only be realized through a joint legal and institutional framework acceptable to all riparians, which ultimately leads to equitable benefits from the resources of the river and contributes to peace and stability in the region.³⁰

Attaining the above objectives in the Nile requires the resolution of a number of controversial legal and institutional issues within the rules of international law, while taking into account the specific characteristics of the Basin. These contentious legal issues have emerged both during the negotiation process of the work of the ILC and the GA, and during the negotiation for the NRBCFA. A comparative analysis in terms of similarities and the extent of influences of one over the other will be considered in this thesis. Ultimately, this study will answer the following research question: ‘what insights can be gathered from an examination of the work

²⁹ Proj. App. Doc., *supra* note 25.

³⁰ As rightly observed by Ana E. Cascão, the final objective of the current negotiation on NRBCFA is ‘to achieve a multilateral framework which will be the foundation of a permanent river basin organization – the Nile Basin Commission (NBC). See Cascão A. E., ‘*Ambiguity as Strategy in Transboundary River Negotiations: The Case of the Nile River Basin*’, Paper Presented at II Nile Basin Development Forum, Khartoum, (November 2008), copy on file with author.

of the ILC and GA on the law of non-navigational uses of international watercourses, in order to develop a basin-wide legal framework for the Nile?’

The pertinence of the question is to demonstrate how the most controversial legal issues that appeared within the Nile Basin were dealt with by the ILC, the GA, and the Sixth Committee (Legal), whilst negotiating the Convention on the Law of the Non-navigational uses of international watercourses (UNWCC)³¹. The research will draw out fresh discovery in the development of basin-wide legal Framework in the Nile Basin.³²

The hypothesis of this research is to exhibit that due to its flexibility, relevance and authoritative nature, the work of the ILC and the GA on the law of non-navigational uses of international watercourses can offer watercourse states a menu of options for negotiating a general legal basin-wide framework beneficial to all riparian states. Although, there are a number of provisions of the NRBCFA that have been influenced by the UNWCC, this thesis will assess only the most controversial provisions of the Framework.

1.3 Justification of the research

There is extensive literature that deals with the issue of the Nile River than any other transboundary rivers in Africa. Most of these literatures have focused on the issues of colonial treaties, hydropolitics and technical matters. It is to be remarked that no study has yet been undertaken examining the current legal and institutional development in the basin from the perspective of the work of the ILC and the GA on the law of non-navigational uses of international watercourses in resolving challenging legal issues in the Nile. As a result, the

³¹ Convention on the Law of Non-Navigational Uses of International Watercourses, May 21, 1997 (not yet in force), *reprinted in* 36 I.L.M. 700 (1997).

³² The Nile River Basin Cooperative Framework, also known as the ‘D3 Project’ is a negotiation process for drafting of an Agreement for the establishment of a permanent legal and institutional framework in the basin. See *Nile River Basin Cooperative Framework, Final Report, Panel of Experts*, 3, Rpt.1.7- March 2000. (On file at Transboundary River’s Affairs Department, Ministry of Water Resources; Ethiopia).

contribution of the ILC and the GA in the process of codification and progressive development of the role of the UNWCC and basic rules governing transboundary water resources in resolving water conflict in Africa and other river basins have been curtailed. This in turn has suppressed not only proper insights as to the extent of contribution of the work of the ILC and the GA in the development of a basin-wide Framework, but what lessons can be learned from the Nile.

By examining the authoritative nature, legal relevance, normative content, and level of influence of the work of the ILC and the GA in the law of non-navigational uses of international watercourses, through the debates of the Sixth Committee (legal); and analyzing core legal issues and how they have been resolved both at the NRBCFA and UNWCC level, this thesis seeks to bring original and comparative work regarding the relevance and influence of a universal convention in the development of a specific basin-wide legal framework in the Nile. It also seeks to draw lessons for future river basin framework negotiations.

1.4 Methodology and structure of the research

By tracing the evolution of UNWCC and analyzing how controversial legal issues in the Nile Basin, mainly the basic principles of equitable and reasonable utilization; factors determining equitable use principle; the no significant harm principle and its relationship to equitable and reasonable utilization; notification of planned measures, existing agreements; and the usage of terminology were approached within the prism of the debates in the ILC and the GA whilst working on the development of the UNWCC.

The above analysis will determine the normative strength of these principles as rules governing the utilization, development, conservation, management and protection of international watercourses, within the prism of the process of work of the ILC and GA, and

debates. The target of the analysis is to draw attention to the value of these principles, as a formative choice in addressing competing interests of watercourse States of the Nile in achieving a basin wide legal framework.

In conducting this study official documents that identified state practice and articulated opinions of States, such as, Reports of the Secretary General on Legal Problems Relating to the Utilization and Use of International Rivers and United Nations General Assembly resolutions on the topic; the series of reports of the ILC, and the work of the Sixth Committee have been consulted. In addition, comments and observations received from governments, session reports, and minutes of discussions, Special Rapporteur's reports, draft articles, commentaries, and the 1997 UNWCC have all been reviewed. Moreover, the draft text of the NRBCFA; Minutes of the Nile Council of Ministers (Nile-COM); the NBI Policy and Strategy document; and NBI Project Documents constituted primary sources of the research.

A literature review of international water law and writings on African transboundary waters have been inspected as secondary source materials, while cases and judicial decisions have been used in underlying specific issues. The thesis is broken down into six chapters. Chapter 1 discusses the scope of the research thesis by introducing a bird's eye view of the genesis of water crises in general and that of Africa and the Nile in particular. This is to emphasize the legal imperatives in solving the current problem facing international watercourses; more specifically from the perspectives of the work of the ILC, GA and the Sixth Committee (Legal), whilst negotiating the Convention on the Law of the Non-navigational uses of international watercourses (UNWCC).

The Chapter expounds justification of the main research question: 'what insights can be gathered from the examination of the work of the ILC and GA on the law of non-navigational

uses of international watercourses, in order to develop a basin-wide legal framework for the Nile? It also offers the underlying hypothesis, and the methodological approach adopted in undertaking the study on how the most controversial legal issues within the Nile Basin have been dealt with by the ILC and the GA.

Chapter 2 examines major factors that might have negative or positive impacts on the development of an all inclusive legal and institutional Framework in the Nile. The Chapter will discuss physical, political, economic, and environmental factors and illustrates how these factors have increased unilateralism, and weakened a spirit for a joint management of the Nile River which resulted in a prolonged conflict and mistrust. In addition, it is shown in this Chapter how this hindered the introduction of accepted norms of international water law in to the Nile. The Chapter will also examine how the same factors can help enhancing the introduction of basic principles of international water law, and thus lead to a better basin wide transboundary water management.

Chapter 3 analyzes existing and current Nile treaties and the extent of their validity. Chapter 4 will review the evolution of the current applicable international law through the work of the ILC and GA in the law of non-navigational uses of international watercourses. In particular, this Chapter will consider the role of the Nile States in the process of the debates, adoption, and post adoption of the UNWCC in order to ensure the realization of the question of water rights as the most important legal issue of the Nile Basin States.

The most controversial legal issues in the Nile are identified and a comparative analysis on the work of the ILC and the GA and the work of the NRBCFA is made under Chapter 5. The issues discussed in this Chapter included the scope and use of terms, existing agreements, the

relationship between ‘equitable and reasonable utilization’ and ‘no-significant harm’, and the issue of notification on ‘planned measures’.

The finding of the research is presented in Chapter 6, where fresh insights and lessons learnt for the Nile River Basin Cooperative Framework Agreement (D3) is demonstrated.

Chapter 7 recaps the content of the research on the work of the ILC and the GA in the UNWCC and its contribution to the NRBCFA. It digests the issues raised in the thesis in a nutshell. Among issues recapitulated in this concluding Chapter is an illustration on how controversial issues can be resolved within the ambit of the UNWCC in the Nile and in future international watercourse agreements.

CHAPTER 2

A NEED FOR A BASIN-WIDE LEGAL FRAMEWORK FOR THE NILE - WHAT IMPACTS?

2.1 Introduction

According to Bourne, ‘the development of international rivers seldom proceeds at the same pace in the States through which it flows. The River Nile affords a good illustration of this: Egypt has for a long time substantially utilized its waters for irrigation; the Sudan has so far made moderate use of them, but is now embarking on a program of agricultural expansion, and the States further upstream, such as Ethiopia, Tanganyika (Tanzania), and Uganda, which supply the waters for the river, have scarcely begun to make use of them. This unequal development of a river can cause great political, economic and legal difficulties.’³³

The seemingly abundant Nile water is under increasing pressure to fulfil the demands of uses both for human and the environment because of the growing population and exclusive resource capture.³⁴ The current state of affairs in the Nile basin, which is based on bilateral and multilateral treaties, could not reduce disputes over water utilization as politics plays an overarching role in the implementation of these agreements. Accordingly, major basin States, such as Egypt and Ethiopia classify their rights to the existing and future uses as a national security issue.³⁵ This chapter will answer the question as to: ‘to what extent physical, socio-

³³ Bourne, C.B., ‘*The Right to Utilize the Waters of International Rivers*’, 3Can.Y.B. Int’l L. (1965), at 187.

³⁴ See *Nile Basin Initiative (NBI) - Background and objective*, available at <http://www.nilebasin.org>, accessed 15 October 2008.

³⁵ According to the *Ethiopian Foreign Affairs and National Security Policy and Strategy* ‘One of the issues that strained relations between Ethiopia and the Middle East was the issue of the waters of the Nile. The Nile had a special place in the thousands-of-years long relationship between Ethiopia and Egypt. The Egyptians have been imposing their will so that no one but themselves would use the waters of the Nile. On the other hand, Ethiopia has struggled to ensure that its rights to the use of the Nile's waters are respected. As Egypt took the mantle of leadership of the Arab world, the subject of the Nile waters began to influence Ethiopia's relations with that region and still continues to do so.’ See the Federal Democratic Republic of Ethiopia; Foreign Affairs and National Security Policy and Strategy; available at www.mfa.gov.et, accessed on 11 November 2008. See

political-economy and environmental factors necessitate a basin-wide framework agreement in the Nile basin?’

The premises of the analysis is that these factors hugely impact the introduction of basic principles of international water law, in particular the work of the ILC and the GA in the resolution of hard-core issues in the NRBCFA, and might hinder the development towards a comprehensive legal and institutional Framework in the Nile.

2.2 Physical aspects of the Nile and implications on a basin-wide legal framework

The physical characteristics of a river have a significant impact on the way States sharing international water courses view their interests and alternatives to cooperative water resources management.³⁶ In relating the physical characteristics of a river such as the bounty or deficiency of supply, the quality, and temporal and spatial variability, to different opportunities and tensions, Sadoff et al point out the importance of geospatial relations.³⁷ According to them, ‘the dynamics between littoral riparians (who reside on the opposite banks...) are likely to be substantially different from sequential riparians (who reside strictly upstream or downstream from one another) in terms of the way in which they view their interests and their alternatives to cooperative water management.’³⁸

Riparian claims of water rights based on hydrography, i.e., from where a river or aquifer originates and how much of that territory falls within a certain State, or on chronology i.e.,

Turton, Anthony, ‘Towards hydro-solidarity: Moving from resource capture to cooperation and alliances’, available at <http://www.up.ac.za/academic/libarts/polsci/awiru>, on the issue of water hydro-political security.

³⁶ Sadoff, C., et al., ‘Share: Managing water across boundaries’, IUCN, Switzerland, (2008), at 17.

³⁷ Id at 17.

³⁸ Id at 17.

(Source: Nile Basin Initiative)

The length of its watercourse is 6,058 kilometres (3,728 miles), while its drainage area coverage is estimated at nearly 3.1 million km², or the equivalent of one-tenth of the continent of Africa.⁴³ The upper catchment of the Luvironza in Burundi, where the Similiki River begins, and later enters Lake Albert is still considered the remotest source of the White Nile at its southern end.⁴⁴ The Blue Nile originates in the highlands of Ethiopia from a small spring called Sakala, and feeds a river known as Little Abbai, which flows in to Lake Tana.⁴⁵ The River Tekeze, (the true upper course of Atbara in Sudan) also originates from the Ethiopian highlands northeast of Lake Tana.

The Blue Nile meets the White Nile at Khartoum to form the main Nile, which then flows 2000km from its confluence to Aswan.⁴⁶ Flowing through a maze of paths bordered by irrigation schemes and canals, the Nile finally trickles into the Mediterranean Sea.⁴⁷

Although the physical characteristics of Nile refer to its geography, hydrology and hydrography of the basin, the most important aspect of the physical factor is related to existing water rights in the Nile in terms of water availability. The constraint of water availability for expansion of agriculture during low flow season has been responsible for the construction of series of dams in the Sudan and Egypt.⁴⁸ In addition, a plan for the overall Nile Control known as the Equatorial Nile Project was proposed for the storage of the Nile

⁴³ Waterbury, J., *Hydro-politics of the Nile Valley*, Syracuse University Press, (1979), at 14.

⁴⁴ *Id.* at 5.

⁴⁵ *Id.* at 19-20.

⁴⁶ *Id.*

⁴⁷ Collins R., *The Waters of the Nile, Hydro-politics and the Jonglei Canal- 1900-1988*, Markus Wiener Publishers, (1996) at 25.

⁴⁸ See Chesworth, P.M., *The history of water use in the Sudan and Egypt*, in Howell and Allan, (Eds.), *The Nile: sharing scarce resource*, Oxford Univ.Press, (1996), at 65. The first Aswan Dam was constructed in 1903 followed by Sennar in 1966, Jebel Aulia in 1937, Roseires in 1966, and Khasm el Girba dams in 1966. See also Abdel Megid, Y., 'The Nile Basin: Lessons from the Past', in Biswas K. ed., *International Waters of the Middle East: from Euphrates-Tigris to Nile*, Oxford Univ. Press, (1994), at 163.

water in the Lake Victoria and Albert, although⁴⁹ it was later abandoned when the Aswan High Dam was constructed in 1963 to secure the availability of the total flow of the waters of the Nile.⁵⁰

Apart from securing water availability, the above development generated legal debates in claims over water rights, where any alteration of the flow of the existing use are considered contravention to the 'acquired rights' of Egypt and Sudan.⁵¹ While Egypt and Sudan seek to maintain the existing flow regime, other riparian States considered such criterion as an acceptance of the division of the Nile between Egypt and Sudan. Under the 1959 agreement the two countries have agreed to allocate 55.5 BCM to Egypt and 55 BCM to Sudan, with the rest 10BCM as average evaporation loss in the reservoir behind the Aswan High Dam.⁵²

Examined within the merits of the UNWCC, the use of exclusive criteria of water flow right as often claimed by Egypt and Sudan casts aside all other relevant criterion of water allocation in determining the use of equitable and reasonable utilization of international watercourse, albeit the physical (natural) characteristics being one of the criteria among many others.⁵³ It also negates the weight to be given to individual factor depending on the importance of such factor when compared with others, while at the same time all the factors

⁴⁹ The Nile Control was advocated by H.E. Hurst, Director General of the Physical Department of the Ministry of Public Works in Egypt in 1946. The plan included a number of regulation and balancing works, as well as a diversion channel at Jonglei in South Sudan, that can control huge amount of water lost in the Sudd swamps. See Howell, P., 'East Africa's water requirements: the Equatorial Nile Project and the Nile Waters Agreement of 1929. A brief historical review', in Howell and Allan (Eds.), *The Nile: sharing a scarce resource*, Oxford Univ. Press, (1996), at83.

Except construction of the Owen Falls Dam, and the start of work on the Joglei, which has been suspended as a result of civil war between North and South Sudan, the whole Nile Control Plan was abandoned due to the near end of British colonial rule, the civil strife in Sudan and the spectre of the High Dam at Aswan. See Collins, *supra* note 15 at 109.

⁵⁰ Chesworth, *supra* note 16 at 65.

⁵¹ Agreement between the Republic of the Sudan and the United Arab Republic of Egypt for the Full Utilization of the Nile Waters, Cairo, 8 Nov., 1959, 453 UNTS 66 (1963).

⁵² Howell, P., 'East Africa's water requirements: the Equatorial Nile Project and Nile Waters Agreement of 1929. A brief historical review', in Howell and Allan, (Eds), *The Nile: sharing a scarce resource*, Cambridge Univ. Press, (1996), at 97.

⁵³ See *Article 6(1)* Convention on the Law of Non-Navigational Uses of International Watercourses, May 21, 1997 (not yet in force), *reprinted in* 36 I.L.M. 700 (1997).

have to be considered together and conclusion to be reached on the basis of a whole, as required by the UNWCC.⁵⁴

The physical aspect as discussed in this chapter demonstrates the competing interests of downstream and upstream States over the issue of prior use v. future use. The complex hydrology of the Nile transcending ten riparian States can either hinder or support the advancement of basin wide cooperation, depending on whether its physical aspect is viewed as a sole criterion overshadowing all the rest of factors, or is considered together with other factors, such as economic and social aspects. In this regard, the NRBCFA, adopts similar criteria to that of the UNWCC, where the physical or natural factors such as geographic, hydrographic, hydrological, climatic, and ecological constituted one set of the of criteria to be considered along with all other factors.⁵⁵ Thus, these physical aspects can be of immense value to all basin states in future basin-wide modalities and procedures for the implementation of new cooperative framework agreement.⁵⁶

⁵⁴ *Id.*, Article 6(3).

⁵⁵ Article 4(2), Nile River Basin Cooperative Framework Agreement (NRBCFA), 5 December 2005 (not yet signed), Copy with Boundary and Transboundary Rivers Affairs Department, Ministry of Water Resources, Ethiopia.

⁵⁶ Output 2, of the NRBCFA under Project D3, recommended the process, methodology and activities which will lead to the determination of equitable and legitimate rights of water use in each riparian country. This part of the recommended objective had never been deliberated by the Panel of Experts (PoE) as required under its term of reference, due to limited time to finalize and review this output; lack of sufficient consultation and information for adequate elaboration of the output; and the need for linkage between the output and the Shared Vision Program- Decision Support System (SVP-DSS) essential for its implementation. The Nile-COM gave no further instruction for its elaboration, and the issue remained pending. It is unlikely that the output will be considered soon, and in its original understanding due to the emerging concept of benefit sharing. See *Nile River Basin Cooperative Framework, Final Report, Panel of Experts*, 3, Rpt.1.7- March 2000. (Copy on file at Transboundary River's Affairs Department, Ministry of Water Resources; Ethiopia).

2.3 Economic and social impacts and implications on developing a basin-wide legal framework

Water is increasingly recognized as an economic good, and therefore, has to be managed efficiently in terms of quantity and quality.⁵⁷ In the Nile basin the importance of water for economic development is has become paramount as water demand has steadily increased in the last two decades. For instance, in Egypt agriculture is the most important part of the nation's psychic since the ancient times, where engravings on the Pharaoh's temples signified the economic value of agriculture as an important source of income, prosperity, food security and a source of employment.⁵⁸ However, the scarcity of fresh water in Egypt has contributed to the decline of water use per capita per annum from 1000 cubic meters to 750 cubic meters, exposing an increasing number of its population to lack of sufficient water supply and sanitation.⁵⁹ Similarly, as a surge in water demand for food security and livelihoods increases upstream, the completion over its utilization has become fierce.

The economic imperative of scarce water resources both upstream and downstream has generated claims of entitlement, not only to existing use by downstream countries such as Egypt and Sudan, but future uses by upper riparian countries. While downstream Egypt still claimed additional water for its new irrigation schemes, industrial and water supply needs for

⁵⁷ Kibaroglu A., *Building A Regime for the Waters of the Euphrates-Tigris River Basin*, Kluwer Law International, London, (2002) at 93.

⁵⁸ See Sileet, T., Abd El Fattah M., Soliman, W., *Impact of the Nile Basin Initiative on the Agricultural Policy of Egypt*, conference paper, water demand management in the Mediterranean progress and policies; Zaragoza, (2007), available at

www.planbleu.org/publications/atelier_eau_saragosse/Agr_10_EG_22_Sileet_final_EN.pdf, accessed 14 December 2008. See also Galal Nasar, 'Water Woes', Al-Ahram Weekly, Issue No.950, June 4-11 (2009), available at : <http://weekly.ahram.org.eg/2009/950/focus.htm>, accessed on 04 July 2009.

⁵⁹ Id.

its growing population,⁶⁰ Sudan also desires to fully use not only its current share under the 1959 agreement, but more water to speed up the implementation of strategic projects.⁶¹

As the populations of the rest of the Basin countries have lived by subsistence agriculture with lack of access to improved water and sanitation due to capacity and finance in the past,⁶² there is now a feeling among upper riparian States that the time has come for a doubled effort to exploit the Nile water resource, which has been denied to them by the prevailing treaty regime established by Egypt and Sudan.⁶³

Therefore, as water becomes an increasingly crucial strategic economic resource for attaining food security, upstream countries such as Ethiopia have put greater value on the Blue Nile sub-basin for irrigated agriculture, watershed management; and hydropower development.⁶⁴

According to Swain, the main challenge in this respect is that riparian States such as Egypt,

⁶⁰ Egypt has totally consumed its existing use, or what it considers its 'rightful allocation of water' under the 1959 agreement. According to Egypt's National Water Resources Plan (NWRP), by 2017 Egypt needs more water to increase the existing 5.5% of the population living outside the Nile Valley and the Delta by 25% through development expansion in the Sinai and Western Desert.

National Water Resources Plan 2017, Arab Republic of Egypt, Ministry of Water Resources and Irrigation, Cairo, Jan. 2005 (on file with the author). Ethiopia contributes 86% of the flow of the Nile measured at Aswan. According to the Minister of Water Resources and Irrigation of Egypt, the seasonal rain in Ethiopia is the main revenue for the new development plan in the new delta, which includes the Toshka Mega Project. *Egypt State Information Service* 2005, available at www.sis.gov.eg/En/EgyptOnline/Economy, accessed 18 November 2008

⁶¹ *Ministry of Irrigation calls for implementation of strategic water projects*, Sudan Vision, 01 June 2004, available at www.sudanvisiondaily.com, accessed 17 November 2008.

⁶² According to Manuel Schiffler, one of the reasons for lower utilization of the Nile waters in some high profile upstream countries such as Ethiopia is the lack of capacity for internal finance and foreign grant or credits for construction. Such grant requires the consent of other riparian States.

See Schiffler, M., 'Conflicts over the Nile or Conflicts on the Nile', in Scheumann and Schiffler, *Water in the Middle East, Potential for Conflicts and Prospects for Cooperation*, Springer, (1998) at 142.

⁶³ Waterbury, J., 'the Nile Basin: National Determinants of Collective Action', Yale University of Press, New Haven & London (2002) at 5.

⁶⁴ The planned projects in Ethiopia, if implemented, may have positive or negative impacts on the balance of existing water utilization in the basin, and might influence the future implementation of the NRBCFA in relation the rules of equitable and reasonable utilization and no-harm.

Ethiopia has embarked on an ambitious 4-5 years plan of study and implementation of 430,000ha irrigation development. Interview with Asfaw Dingamo, Minister of Water Resources of Ethiopia Walta Information Centre, February 09 2008, available at www.waltainfo.com, accessed 10 February 2008. Major projects lined up for pre-feasibility, feasibility, design and construction are four major irrigation and drainage projects; namely, Arjo-Dedesa, Humara, Gumara, Lake Tana –sub basin, and Koga on the Blue Nile and Tekeze. Similarly Baro, Karadobi, Tekeze, and Mandaya constitute the main hydro-power projects on the Blue Nile, Tekeze, and Baro catchments. See *Irrigation and Hydro-power Projects*, Federal Democratic Republic of Ethiopia, Ministry of Water Resources, available at www.mowr.gov.et, accessed on 20 September 2008..

Sudan and Ethiopia view the development of the Nile waters as predominantly State centred, and unilateralist model, rather than a prototype for mutual and active cooperation.⁶⁵

Acceleration in unilateralist economic use could also be a purposeful bid to seize opportunity in advancing actions on the ground before the implementation of NRBCFA, and creating favourable positions in any future water sharing arrangement. Arsano observes that: ‘activities undertaken on a unilateral, non-consultative basis will eminently create further competition for fresh water, narrowing down the chance for a viable legal and institutional mechanism’.⁶⁶ He further elaborates that ‘a continued unilateralist approach with regard to water development is expected, at least in the short run, it is beyond dispute that such a unilateralist approach is conflict laden and incompatible with a more cooperative approach, and may therefore, adversely affect the general welfare of the riparian countries’.⁶⁷

Waterbury posits that a major threat to the downward shift in the Nile water supply results from the logic of big Nile projects in pursuit of economic transformation in the Nile.⁶⁸ According to him, big projects enjoy the support of policy groups that argue on the basis of economies of scale and implementation schedules that represent the most rapid and effective response to the country’s structural problems.⁶⁹

Analysed from a basin wide cooperative point of view, the unilateral project approach in the name of economic transformation, impedes the progress towards a basin-wide legal framework; slowing down and endangering future water allocations; transboundary

⁶⁵ Swain A., ‘*Mission not yet accomplished: Managing water resources in the Nile River Basin*’, 61 J. Int’l Affairs’, (2008), at 207.

⁶⁶ Arsano, Y., ‘*Ethiopia and the Nile, Dilemmas of National and Regional Hydro-politics*’, PhD thesis,- ETH Zurich and Yacob Arsano, (2007), at 32, Full text available at www.isn.ethz.ch, accessed August 05 2008.

⁶⁷ Id.

⁶⁸ Waterbury, *supra* note 32 at 108.

⁶⁹ For instance, Egyptian policy recognizes agriculture, which represents only 17% of the GDP (down from 40% in 1960) as a major economic activity. See National Water Resources Plan 2017, *supra* note 29 at 1.6.

environmental issues: opportunities for benefit sharing through equitable and reasonable utilization: protection and preservation of waters of the Nile basin.⁷⁰ As the unilateral economic drive meant more and more entrenched positions over the resolution of the remaining hard core issues such as the issues of prior notification, water security,⁷¹ as well as lack of a breakthrough in the adoption and implementation of the NRBCFA.

The solution would be a rational economic outlook, based on a joint multi-purpose development approach enabling basin-wide economic, social and environmental benefits for all riparian States. In this regard, the current Joint Multipurpose Program (JMP) in the Eastern Nile Subsidiary Action Program (ENSAP) can be cited as a good start towards basin wide water governance with a functioning legal and institutional mechanism, leading towards joint development activities and ownership of the process.⁷²

As the main objective of the principles incorporated in the NRBCFA, the JMP can provide potential benefits in terms of watershed management through reforestation, erosion control, and ecosystem conservation activities, improved agriculture, forestry and fisheries, biodiversity conservation, and carbon sink. In addition, joint projects such as integrated

⁷⁰ By reducing the high water consumption of sugar cane and rice, 23% of its agricultural water consumption and 24% of its national water withdrawal could be saved. However, according to a recent study commissioned by the Eastern Nile Council of Ministers, the Aswan High Dam is believed to sustain much of its capacity enabling Egypt to still carry on to utilize the current volume of 55.5BCM for more than six decades. However, this assumption has to be supplemented by various measures on the part of Egypt as well as the rest of the basin countries. See More, D. B., & Whittington, D., *Exploring Opportunities for Cooperative Water Resources Development on the Eastern Nile: Risks and Rewards*, Jan. 2008, The Federal Democratic Republic of Ethiopia, Ministry of Water Resources, Addis Ababa (un official copy with the author).

See also Asano, T., Water recycling – A relevant solution? In Valero, J. and Serra, L., *The potential for desalination technologies in meeting the water crises*; and Custodio, E., *The potential for desalination technologies in meeting the water crisis: comments*, in Rogers, Llamas, & Martinez-Cortina, *Water Crises: myth or Reality?* Taylor & Francis Group, London, (2006), at 262, 297, 323.

⁷¹ Whittington, D., Waterbury, J., & Mc Clelland, E., 'Towards a New Nile Waters Agreement', in Ariel Dinar and Edna Tusak Loehman (eds.), *Water Quantity/Quality Management and Conflict Resolution: Institutions, Processes, and Economic Analyses*, Westport, (1995) at 175.

Egypt's strategy has been to encourage upstream states to engage in non-water consumptive issues such as hydropower development, watershed management, and trade, transport, also perceived as benefit sharing. See Waterbury, *supra* note 31 at 75.

⁷² The Eastern Nile Joint Multi-purpose Program (EN-JMP), available at www.ensap.nilebasin.org, accessed on 07 September 2008.

reservoir and river regulation systems can lead to mutual gains from water conservation; hydropower production; power trade; flood control; and sediment management.⁷³

2.4 Environmental impact and its implication in the development of a basin-wide legal framework

The Nile River has a diverse ecosystem ranging from high mountains, tropical forests, wood lands, savannas, and wetlands to arid lands deserts and delta.⁷⁴ Studies indicate that environmental resources of the Nile are subject to a series of threats with significant consequences.⁷⁵ The effect of climate change coupled with human activities is mainly responsible for severe degradation of the environment in the Nile.⁷⁶ Major environmental issues in the basin include, increasing pollution downstream due to excessive and improper utilization of agricultural inputs, and production and service systems.⁷⁷ In addition, deforestation, soil erosion, sedimentation, flood, loss and degradation of wetlands and lakes pose further challenges.⁷⁸

⁷³Art.3 (1) of the NRBCFA provides: ‘The principle of cooperation between states of the Nile River Basin on the basis of sovereign equality, territorial integrity, mutual benefits and good faith in order to attain optimal utilization and adequate protection and conservation of the Nile River Basin and to promote joint efforts to achieve social and economic development.’ See Nile River Basin Cooperative Framework Agreement (BRBCFA), *supra* note 24.

⁷⁴ *Nile Basin Initiative, Shared Vision Program, Transboundary Environmental Analysis*, NBI, GEF, UNDP, WB, (2001), www.nilebasin.org, accessed on 15 November 2008.

⁷⁵ *Id.* at 17.

⁷⁶ *Id.*

⁷⁷ Moustafa, M. ‘*Towards development in the Nile Basin: the fight to combat desertification*’, Proceeding, VIIth Nile 2002 Conference, Addis Ababa, Ethiopia, (June 26-29, 2000), Ministry of Water Resources, Ethiopia, Addis Ababa, at 194. According to Moustafa, in Egypt, the scarcity of water resources and cultivable land are the two important and closely interrelated elements challenging the demographic balances of Egyptian society, which live on 4% of the country’s land mass. The decline of rich fluvial soil since the advent of construction of the Aswan Dam has lead to the use of mass agricultural inputs, while improper utilization on input in production and service system has lead to the pollution of water resources.

⁷⁸ According to a study on transboundary environmental analysis conducted by the NBI in 2001, few forests remain in the Blue Nile in western Ethiopia, while decrease of forest cover declined from 16 percent to 2 percent between 1950s and 1980s. The same study indicates that about half of the Ethiopian highlands in the Blue Nile basin are significantly eroded with 20,000square kilometres of agricultural lands having a top soil less than 10 cm deep; hence insufficient to sustain agriculture. Pollution in Lake Victoria and Kagera has accelerated due to sewage and industrial effluents, while Lake Victoria itself has undergone substantial ecological changes and deteriorating water quality during recent decades. In the lower Nile in Egypt, 13,000 hectares of agricultural land is lost along its banks due to the expansion of settlement outskirts of cities. The Nile Delta

As these challenges are transboundary in nature, there is growing recognition of environmental harm in one part of the basin spills over to neighbouring riparians. Lack of full appreciation of the issue, however, is still evident where environmental concerns are relegated to a secondary level, or where they have been considered as expensive to mitigate, mostly overshadowed by disputes over consumptive water uses and economic based approach or at times as luxury.⁷⁹

The absence of a basin wide legal and institutional framework capable of coordinating transboundary environmental impact has been aggravated by lack of commitment, stakeholder involvement, environmental awareness' institutional capacity, environmental governance; environmental impact assessment (EIA); and proper compensation procedures.

harbours one of the most polluted wetlands in the Nile, where irrigation drainage water, urban waste and industrial effluents have destroyed several forms of aquatic life. The number of fish species has declined from twenty to two or three species. Eutrophication and aquatic weeds, particularly water hyacinth are the greatest threats to the lake and Kagera. See Transboundary Environmental Analysis, supra note 41.

See also Odada, E., et al, '*Mitigation of Environmental problems in Lake Victoria, East Africa: causal Chain and Policy Options Analysis*', 33 *Ambio*, (2004), at 17-18. Available at <http://www.ambio.kva.se>, accessed 12 August 2009.

⁷⁹ Most of environment induced initiatives in the past, such as the Hydrometeorological Survey of the Equatorial Lakes (Hydromet) had been seen with suspicions by major riparian such as Ethiopia, as an attempt to divert attention from the issue of water allocation, while the initiatives themselves failed to include the issue of water allocation as part of integrated approach to the issues of the environment. See Tafesse, T., '*The Nile Question: Hydropolitics, Legal Wrangling, Modus Vivendi and Perspectives*', LIT VERLANG, Hamburg, (2001) at 104-105.

The unilateral and consumptive utilization in the basin fails to give due credence to environmental challenges. Millions of hectares have been put under development in the lower part of the basin, while ambitious plans are underway upstream states. However, there are no voluntary valid assessments on environmental implications of the projects. However, in the last two decades, a shift in position has come, with the advent of the TECCO-NILE, and the NBI. One of the major projects identified by the Action Plan of the TECCO-NILE, and later adopted by the NBI Shared Vision Program is the Nile Transboundary Environmental Action Project, with the objective of providing a strategic framework for environmentally sustainable development of the Nile River Basin and support basin-wide environmental action linked to transboundary issues in the context of the NBI Strategic Action Program. See Nile Basin Initiative Shared, Vision Program, Nile Transboundary Environmental Action Project, available at www.nilebasin.org, accessed December 22 2008.

For details on water utilizations and economic benefits, see Spector, B., *Transboundary Disputes: Keeping Backyards Clean*, in I. William Zartman (ed.), *Preventive Negotiation: Avoiding Conflict Escalation*, Roman and Littlefield Publishers, Inc., (2001) at 206.

Likewise, the lack of proper legal provisions for the protection and preservation of the environment and ecosystem in the Nile has also contributed to the state of affairs.⁸⁰

At international level, the UN Conference on the Human Environment held in Stockholm in 1972⁸¹, and which was followed by the UN Conference on Environment and Development in Rio de Janeiro in 1992⁸², as a first step in the proper development of international environmental law.⁸³ International instruments, and structures set up to advance their implementation at international, regional and local levels have helped in enhancing the proliferation of a number of normative principles in the field of environmental law.⁸⁴

The UNWCC is a late comer on the issue of the environment as it trailed behind the corpus of international environmental conventions. The UNWCC provides both general and specific obligations regarding the protection and preservation of the ecosystem of international watercourses under its Articles 20-28.⁸⁵ The work of the ILC can thus contribute in addressing the transboundary environmental issues. As noted by McCaffrey, '[t]he convention's provisions on pollution...represent a recent effort by the international community to restate, and progressively develop, the law in this field.'⁸⁶ In the Nile Basin, the

⁸⁰ An attempt has been made to address the issue of transboundary environmental issues under one of the seven SVP projects of the NBI. The Nile Transboundary Environmental Action Project was officially launched in 2004, with the objective of providing strategic framework for environmentally sustainable development of the Nile River Basin and supports basin wide environmental actions linked to transboundary issues in the context of the NBI Strategic Action Program. See Nile Transboundary Environmental Action Project (NTEAP), available at <http://nteap.nilebasin.org/>, accessed on 15 November 2008.

⁸¹ UN Conference on the Human Environment, UN GA Res.2581 (XXIV), Jan. 8, 1969, UN Doc. A/Conf.48/14Rev.1., reprinted in 9 I.L.M. 427 (1970); *Decision to convene an UN Conference on the Human Environment*, UN GA Res. 2398(XXIII), Dec. 3, 1998.

⁸² See Declaration of the UN Conference on Environment and Development, Rio de Janeiro, Brazil, June 13, 1992, in Report of the United Nations Conference on Environment and Development, Annex I, U.N. Doc. A/Conf.151/26 (vol.1), reprinted in 31 I.L.M. 876 (1992).

⁸³ Sand, P. H., *Transnational Environmental Law: Lessons in Global Change*, (Kluwer International, The Hague, 1999) at 63.

⁸⁴ Nicholas de Sadeleer, *Environmental Principles: From political slogans to legal rules*, Oxford University Press, (2005) at 266.

⁸⁵ See Articles 20-28, UNWCC, supra note 21.

⁸⁶ McCaffrey, S. C., *The Law of International Watercourses, Non-Navigational Uses*, Oxford University Press, (2003) at 384-85.

adoption of an ecosystem approach under Article 6 of the NRBCFA is the latest example on this front. Article 6 provides:

Nile Basin States shall take all appropriate measures, individually and, where appropriate, jointly, to protect, conserve and, where necessary, rehabilitate the Nile River Basin and its ecosystems, in particular, by:

1. protecting and improving water quality within the Nile River Basin,
2. preventing the introduction of species, alien or new, into the Nile River system which may have effects detrimental to the ecosystems of the Nile River Basin;
3. protecting and conserving biological diversity within the Nile River Basin;
4. protecting and conserving wetlands within the Nile River Basin; and
5. restoring and rehabilitating the degraded natural resource base.

Nile Basin States shall, through the Nile River Basin Commission, take steps to harmonize their policies in relation to the foregoing.

Taking in to account the historical background of the basin, where most of the basin States have been keen to avoid the concept of ‘ecosystem’ and its underlying obligation in the past, the inclusion of this provision can be an indication of a new approach to ecological units of fresh water ecosystems; a concept transcending beyond the natural features of the Nile system, for protection and preservation of the Nile in a state of natural conditions as interpreted in the work of the ILC.⁸⁷

In addition to the above provision Article 11 of the NRBCFA introduces the following clause on ‘prevention and mitigation of harmful conditions’:

‘Nile Basin States shall, individually, and where appropriate jointly through cost sharing by the Nile Basin State or States that may be affected make every effort to take all appropriate measures to prevent or mitigate conditions related to the Nile River system that may be harmful to other Nile Basin States, whether

⁸⁷ See Draft Articles on the law of the non-navigational uses of international watercourses, (with Commentaries) , G.A., Res. 49/52 (Dec. 9, 1994), *reprinted in* [1994] 2 (2) Y.B.Int’l L. Comm’n at 118-119.

resulting from human conduct or natural causes, such as flood conditions, invasive water weeds, water-borne diseases, siltation, erosion, draught or desertification. In implementing this provision, Nile Basin States shall take in to account guidelines to be developed by the Nile River Basin Commission.’⁸⁸

The above mean a comprehensive approach on the issue, and are in line with what the basin States have already begun to address under the NBI- Nile Transboundary Environmental Action Program (NTEAP).⁸⁹

The NRBCFA is, thus, one of several international agreements adopting an ecosystem approach, which is conducive for a joint management of the resources of the Nile.⁹⁰ As increasing number of basin States become parties to international environmental conventions,⁹¹ the inclusion of ecosystem and environmental provisions, similar to the work of the ILC and GA, in the NRBCFA can strengthen a commitment for the harmonization of environmental laws and policies in the Basin and further ensure environmentally sustainable development.

However, the commitment to accept these norms is usually dependent upon the political dynamics of the basin. To what extent the politics influences the development of a basin-wide legal and institutional framework is examined below.

⁸⁸ Article 11, Nile River Basin Cooperative Framework Agreement (NRBCFA), *supra* note 24.

⁸⁹ The NTEAP provided a strategic environmental framework for the management of the transboundary waters and environmental challenges, and recognizes a more effective cooperation in ways that help, improve the quality of life of the inhabitants. See *Nile Transboundary Environmental Action Project (NTEAP)*, *supra* note 48.

⁹⁰ Other basin-wide and regional agreements that adopt this approach include Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin, April 5, 1995 (entered into force April 5, 1995), reprinted in 34 I.L.M. 864 (1995); Protocol on the Sustainable Development of the lake Victoria Basin, November 29, 2003, available at <http://faolex.fao.org/faolex/index.htm>, accessed on 20 November 2007; SADC Revised Protocol on Shared International Watercourses, August 7, 2000 (not yet in force), reprinted in (2001) 40 I.L.M. 321;

⁹¹ Many Nile Basin States are parties a number of environmental treaties. See International Environmental Agreements (IEA), Data Base Project, available at http://iea.uoregon.edu/page.php?query=list_countries.php, accessed on 12 August 2009.

2.5 Political aspects and implications on developing a basin-wide legal framework

According to Le Marquand, ‘the distinguishing feature of international rivers is the politics of their use and management’.⁹² He argues that the hydrology of a river does not change when an international frontier runs across or along it, only the politics.⁹³ According to Peter Rogers, hydro political security as part of the water governance domain has been largely responsible for mistrust and lack of confidence building and sustained entrenched positions in resolving controversial legal issues.⁹⁴ A similar notion has been expressed by Gleick, emphasizing the high politics and the probability of an increase in water related violence in the Middle East region.⁹⁵

The root causes of political tensions and the ensuing conflict in the Nile, as in many interstate conflicts, are environment, religion, ideology, border disputes and economic competition.⁹⁶

The question of why the Nile basin is fraught with past and present political tensions requires deep understanding of the linkages of water issue to civil and political conflicts in the region.⁹⁷

The war in the Congo and the genocide in Rwandan have claimed the lives and dislocation of millions.⁹⁸ Besides a systematic plunder and destruction of vast natural resources of the region by the armies and local militias, with direct and indirect support of regional States and

⁹² LeMarquand, D., ‘*Politics of International River Basin Cooperation and Management*’, 16 Nat. Resources J., (1976), at 883.

⁹³ Id

⁹⁴ Rogers, P., ‘*Water governance, water security and water sustainability*’, in Rogers, P., Llamas, R., and Martinez- Cortina, (Eds), ‘*Water Crises: myth or reality*’ Published by Taylor & Francis/ Balkema (2006) at 22.

⁹⁵ Gleick, P., ‘*Fresh Water Resources and International security*’, in *Conflict Prevention and Resolution in Water Systems*, (ed.) Wolf, A., An Elgar Reference Collection, (2002) at 148.

⁹⁶ Id., at 153.

⁹⁷ Jacobs, M., Lisa, ‘*Sharing the Gifts of the Nile: Establishment of a Legal regime for Nile Waters Management*’, 7 Temp. Int’l & Comp. L. J., 95 (1993), at 118.

⁹⁸ For detailed account of the Rwandan Genocide, see Hintjens, H., ‘*Explaining the 1994 Genocide in Rwanda*’, 37 J. Modern Afr. Studies, (1999).

international conglomerates is unparalleled in African history.⁹⁹ The population of countries in the Nile Equatorial Lakes, namely, the Democratic Republic of Congo, Rwanda, and Uganda have been hugely affected by these conflicts as a result of direct involvement of their States. Likewise, Nile Basin States, such as Tanzania, Burundi, and Kenya have all been indirectly affected by the conflicts.¹⁰⁰

Relations between Uganda and Sudan have been strained following Uganda's accusation of Sudan in sheltering and arming the Lord's Resistance Army (LRA) a rebel group fighting a civil war in northern Uganda.¹⁰¹ Sudan, on the other hand has accused Uganda of basing the Sudan People's Liberation Army (SPLA) in its territory during its struggle to liberate Southern Sudan.

When Ethiopia and Eritrea went to war over a border dispute along the Tekeze basin, in 1998 Ethiopia accused Egypt of supporting Eritrea in the war.¹⁰² In addition, following the assassination attempt on the life of the Egyptian President Hosni Mubarak in Addis Ababa in June 1995, in which Sudan had been implicated, the two countries suspended their quarterly meetings of the Permanent Joint Technical Commission on the Nile (PJTC), which was established under the 1959 treaty.¹⁰³

⁹⁹ International Crises Group, *Conflict history, DR Congo*, available at www.crisisgroup.org, accessed 05 December 2008.

¹⁰⁰ *Id.*

¹⁰¹ See Acker, F., *Uganda and the Lord's Resistance Army: the New Order No One Ordered*, African Affairs, Royal African Society, (2004), available at <http://afraf.oxfordjournals.org/cgi/content/abstract/103/412/335>, accessed 05 December 2008; For a detailed account of the history of the LRA and the proxy war between Uganda and Sudan, See, International Crisis Group, *Conflict history, Uganda*, ICG, available at www.crisisgroup.org, visited on 05 December 2008.

¹⁰² According to a Report by the International Crises Group, following the virtual demarcation of the border between the two countries by the now disbanded Boundary Commission Ethiopia and Eritrea still risks a new war. See *'Beyond the Fragile Peace between Ethiopia and Eritrea: Averting New War'*, International Crises Group (ICG), available at www.crisisgroup.org, accessed 16 December 2008.

¹⁰³ Waterbury, *supra* note 32 at 83.

Civil conflicts have also impacted the development of a basin wide legal framework in the Nile, as observed in Sudan, where resource capture and the expansion of large scale irrigation in the northern Kordofan and Darfur regions precipitated the current Darfur conflict.¹⁰⁴ The issue of water has been cardinal in the Darfur conflict. This was confirmed by the UN Secretary General Ban Ki Moon when he stated that: ‘Darfur is an environmental crisis - a conflict that grew at least in part from desertification, ecological degradation and a scarcity of resources, foremost among them water.’¹⁰⁵

A more challenging conflict to an all inclusive basin wide cooperative arrangement will be the future the status of the Southern Sudan. The Southern Sudan constitutes one-third of Sudanese whole territory¹⁰⁶ and population¹⁰⁷. It drains the White Nile flow and is a home to one of the world’s greatest swamps, that controls the discharge of the Nile waters, the Sudd.¹⁰⁸

Religious pressure and massive expansion of agri-business, the planned diversion of water to the north from the swamps of the south through the Jonglei Canal,¹⁰⁹ are said to have

¹⁰⁴ El Zain, M., ‘*Ruling Elite, Frontier-cast Ideology and Resource Conflicts in the Sudan*’, 3 J. Peace Build. & Devt, (2006), at 41.

¹⁰⁵ Ban Ki Moon, *What I saw in Darfur, Untangling the knots of a complex crisis*, the Washington Post, 14 September, 2007, available at www.un.org/sg/articleFull.asp?TID=68&Type=Op-Ed, accessed 14 June 2008.

¹⁰⁶ Waterbury, supra note 32 at 139.

¹⁰⁷ There has been controversy over the exact number of estimates of population in the South. However, the South claims, it could be between 7 million and 16 million. See Sudan Tribune, 25 May 2007, available at <http://www.sudantribune.com/spip.php?article22019>, accessed on 12 August 2009.

¹⁰⁸ The Sudd has a special significance to Egypt and Sudan in increasing a considerable volume of water flow through the planned construction of the Jonglei Canal. See Collins R., *The Waters of the Nile, Hydro-politics and the Jonglei Canal- 1900-1988*, Markus Wiener Publishers, (1996) at 25.

¹⁰⁹ The Jonglei Canal was a project designed for a hydrological advantage of increasing the volume of water at Aswan. The water was to be transported in a straight 280km canal draining through the Sudd, the second largest swamp in the world, from the from the Sobat to the village of Jonglei with a capacity of delivering. 4.7 BCM at Malakal, before losing some volume through transmission ends up at with additional 3.8BCM water measured at Aswan. See Collins, supra note 74 at 66-102; 312. See also Abel Alier, ‘*Southern Sudan: Too Many Agreements Dishonoured*’, Ithaca Press, Reading, (1990), 214-235.

triggered a resistance movement by the Southerners, and which culminated in to one of the longest civil wars in Africa.¹¹⁰

After 21 years of war, a Comprehensive Peace Agreement (CPA) was signed on the 20th July 2002 between the Government of Sudan and the SPLA, in which Southern Sudan has been given the right to exercise self-determination through a referendum in 2011.¹¹¹

Regarding water resources management, the CPA puts the administration of land and natural resources, including water resources under the mandate of the National Government. Specific matters that placed under the exclusive competence of the National Government included matters concerning the Nile Water Commission, the management of the Nile waters, transboundary waters, and disputes arising from the management of interstate waters between Northern States and Southern States.¹¹² Matters under concurrent legislative and executive competencies of both the National Government and State Governments are electricity generation, water and waste management, as well as environmental management, conservation and protection issues.¹¹³ However, there is a severe lack of coordination on these issues between the South and the North. As partners to the national government, the South's role in the Nile water negotiations is non-existent. There is lack of capacity in its emerging water sector while minimal attention has been given to the water sector itself. In addition lack of proper governance and internal civil unrest may claim some responsibility as well.¹¹⁴ Therefore, the South has is no representation in the NRBCFA negotiation process,

¹¹⁰Waterbury *supra* note 32 at 139.

¹¹¹ The Comprehensive Peace Agreement (CPA) between the Government of the Republic of the Sudan and the Sudan People's Liberation Movement/Sudan People's Liberation Army, Nairobi, January 25, 2005, available at www.sudanarchive.net/cgi-bin/sudan?a=d&d=D11d36, accessed 12 April 2009.

¹¹² Id., CPA, Part V, Schedule A, Paragraph 33.

¹¹³ Id., CPA, Part V, Schedule D Concurrent powers, paragraph 15 and 17.

¹¹⁴ According to the statement of President of South Sudan, there is no coherent regulatory framework to guide utilization and management of water resources in Southern Sudan. See '*Kirr calls on ministries of water resources to coordinate activities*', Sudan Tribune, Wednesday 8 August 2008, available at <http://www.sudantribune.com/>, accessed 23 August 2009.

as the composition of the Sudanese delegation and the participation in the NBI and the NRBCFA activities still remain firmly in the hands of the North. The most important issue in the above relation is the ramifications on the existing treaties as well as the new basin-wide and sub basin arrangement, especially in the event that the South chooses to secede from the rest of Sudan. The status and impact of the 1929 and the 1959 bilateral treaties on the Southern Sudan and across the Nile spectrum can be a major challenge.

Firstly, as an independent State, South Sudan has to adopt a unequivocal position on whether it would be bound by those agreements or demand a new legal arrangement that recognizes the rights of its inhabitants to an equitable use of their resources. The issue may be addressed within the doctrine of state succession.¹¹⁵ The Vienna Convention on Succession of States in Respect of Treaties¹¹⁶ states that, ‘rights and obligations established by a treaty relating to the use or restriction of its use of any territory benefiting any foreign state, group of states or all states and considered as attaching to the territory in question is affected by a succession of states’.¹¹⁷

Whether, water treaties fall within the regime of territorial treaties has not been clearly stipulated in the Convention. In addressing the issue of territorial regimes in Gabčíkovo-Nagymaros Project case, the International Court of Justice (ICJ) declared that article 12 of the Vienna Convention on Succession of States reflected a rule of customary law and confirmed that treaties concerning water rights or navigation on rivers constituted territorial treaties.¹¹⁸

¹¹⁵ According to the Vienna Convention on Succession of States in Respect of Treaties, ‘state succession’ means ‘the replacement of one State by another in the responsibility for the international relations of territory’. *Vienna Convention on Succession of States in Respect of Treaties* 23 August 1978(entered in to force 6 November 1996), UNTS, Vol.1946, at 3.

¹¹⁶ Shaw, M., ‘*International Law*’, 5th ed., Cambridge University Press, (2003), at 863.

¹¹⁷ See Article 12 of Vienna Convention on Succession of States, *supra* note 87.

¹¹⁸ Case Concerning Gabčíkovo-Nagymaros Project (Hun. v. Slovak), September, 25, 1997, 37 I.L.M. 162 (1998).

The above interpretation by the ICJ may in principle lead to a conclusion that according to the Vienna Convention on Succession of States in Respect of Treaties all rights and obligations under existing agreements regarding the Nile waters become binding on the South Sudan.

On the resumption of the construction of the Jonglei Canal, if South Sudan welcomes the canal project, negotiations with Egypt and Sudan on the question of benefits from the project and possible compensation for those that might be affected by the project will be of paramount significance. However, one might argue that the matter falls within the rights and obligations under the law of state succession, as the project itself had been part and parcel of the existing treaties.¹¹⁹

The issue of how South Sudan as a new sovereign entity can become a party to the new NRBCFA depends on its willingness as a sovereign State, notwithstanding the fact it will have no chance of influence over the NRBCFA once it came in to force. Thus, the South can become a party by depositing the instrument of ratification or accession with the African Union (AU) as required under Article 36 of the NRBCFA.¹²⁰ The addition of an eleventh Nile Basin State, wielding immense water and ecological resources, and fertile soil can undoubtedly affect the modalities of the implementation of the new NRBCFA, in which case the implementation will have to take in to account the new geo- political reality in order to

¹¹⁹ Under the 1959 agreement the Jonglei Canal is part of a project to prevent these losses of considerable volumes of the Nile Basin Waters in the swamps of Bahr El Jebel, Bahr El Zeraf, Bahr el Ghazal and the Sobat River, and efforts in order to increase the yield of the River for use in agricultural expansion in the two countries. See section 4, Agreement between the Republic of the Sudan and the United Arab Republic of Egypt for the Full Utilization of the Nile Waters, Cairo, 8 Nov., 1959, 453 UNTS 66 (1963).

Currently Egypt has signed a MoU with the Government of South Sudan for reviewing studies on Jonglei Canal. See Sudan Tribune, '*South Sudan and Egypt agree to cooperate on water resources*', Thursday 10 August 2006, available at <http://www.sudantribune.com/>, accessed 14 June 2008.

¹²⁰ Article 36 provides: 'The present Framework is subject to ratification or accession by all States in whose territory part of the Nile River Basin is situated. The instruments of ratification or accession shall be deposited with the African Union.' See Nile River Basin Cooperative Framework Agreement (NRBCFA), *supra* note 24.

equitably serve the legitimate interests of any future South Sudan as the rest of all other Nile riparian countries.

However, the erratic Nile politics can still continue to influence the legal rights of the South Sudan, Egypt and Sudan; as well as the entire development of the basin-wide legal framework agreement. This can be a challenge in for the implementation of the NRBCFA. Delinking the existing culture of political interference in the basin-wide legal and institutional arrangement can be difficult, as politics has always played a dynamic role in shaping the whole legal process. The positive side in this respect is that a political imperative can be a catalyst towards the establishment of a basin-wide legal framework through constructive engagement of political leaders and opinion makers. In this respect the involvement of Ministers, parliamentarians and a possible Conference of Heads of States can help the attainment of a NRBCFA acceptable by all the Nile Basin States.

CHAPTER 3

THE CURRENT STATUS OF INTERNATIONAL LAW APPLICABLE TO THE NILE

3.1 Introduction

The evolution of a legal framework for the Nile River Basin is strongly linked to colonial agreements, which were designed at the time to secure the flow of water to downstream territories. A number of these agreements have been made between colonial powers themselves as part of boundary treaties or spheres of influence,¹²¹ while other treaties were made by Britain on behalf of its colonial territories.¹²² Britain has also made treaties with independent Nile Basin States. The 1902 agreement with Ethiopia was one of such treaties.¹²³

The Nile basin parlance of the term ‘existing agreements’ is usually used to denote these colonial agreements, which are considered the product of asymmetric relationships among unequal parties. The term ‘existing agreements’ can also apply to post-colonial agreements, such as the 1959 treaty between Egypt and Sudan, the Technical Cooperation Committee for the Promotion of the Development and Environmental Protection of the Nile Basin (TECCONILE), and the Nile Basin Initiative (NBI).¹²⁴

¹²¹ For instance the 1925 Treaty between Italy and Britain regarding Ethiopia had carved out territorial sphere of influence for the two colonial powers. See Okidi, O. ‘History of the Nile and Lake Victoria Basins through treaties’ in Howell & J.A. Allan, (ed.), *The Nile-Sharing a Scarce Resource*, Cambridge Univ. Press, (1994) at 325. Exchange of Notes between the United Kingdom and Italy respecting Concessions for a Barrage at Lake Tsana and railway across Abyssinia from Eritrea to Italian Somali Land. Rome, 20, December, 1925. 50 LNTS 282.

¹²² See Exchange of Notes between His Majesty’s Government in the United Kingdom and the Egyptian Government in regard to the use of the Waters of the River Nile for Irrigation purposes, Cairo, May 7, 1929, available at <http://faolex.fao.org/watertreaties/index.htm>, accessed 16 October, 2008.

¹²³ Treaties between Great Britain and Ethiopia, and between Great Britain, Italy and Ethiopia, relative to the Frontiers between Anglo-Egyptian Sudan, Ethiopia, and Erythraea. Addis Ababa, 15, May, 1902; available at <http://faolex.fao.org/watertreaties/index.htm>, accessed 16 October, 2008.

¹²⁴ The establishment of TECCO-NILE was the first positive step towards a need for an inclusive and substantive dialogue for a basin-wide legal arrangement for the Nile basin. It was on that arrangement that the concept of equitable and reasonable utilization was introduced for the first time to the Nile basin. The idea of a

The NBI is the first basin-wide legal and institutional process, albeit its limited scope a transition for a permanent legal and institutional arrangement of NRBCFA. The NRBCFA is a parallel process of negotiation intended to address basin-wide issues through the adoption of universally recognized set of substantive and procedural rules, most importantly the work of the ILC and the GA on the law of non-navigational uses of international watercourses.

The purpose of this chapter is to analyze the evolution of the provisions of the current status of international law in the Nile and show their significance in the establishment of a permanent legal and institutional framework for the management of shared water resources of the basin. The analysis responds to questions, ‘to what extents do existing agreements positively or negatively influence the progress of the development of international law within the context of the Nile? In particular, to what degree did they impact the development of the NRBCFA?

The rationale is that the development of international law in the Nile is an integral part of a historical, legal and institutional process affecting the positions of the basin States in dealing with complex and prolonged basin-wide legal framework negotiations. The argument is that there is a need not only for the assessment of the legal validity of the current status of international law applicable to the Nile, but also to make proper observations as to the challenges posed by such applicable laws in moving towards a permanent basin-wide legal framework.

basin-wide structure and soft -ware program for confidence building measures, such as transboundary environmental issues and basin-wide legal and institutional framework dialogue (project D3) were formulated the TECCO-NILE, through the NRBAP. See NBI Background, available at <http://www.nilebasin.org/>, accessed on 2 Sep. 2006.

3.2 The evolution and relevance of existing Nile agreements

Most of the Nile treaties aim to secure an diminished flow of the Nile to Egypt and Sudan. The treaties are considered by the rest of the riparian States as impositions, rather than the product of negotiations among equals.¹²⁵ In many respects, therefore, most of these agreements possess no international legal character, partly because of political and military dominance of colonial powers in extracting them.¹²⁶

The contribution of the treaties towards the development of a basin-wide legal framework, therefore, remained insignificant as most of them have been rejected by post independent Nile Basin States.¹²⁷ The main reason for rejection was lack of consideration by the treaties of the rights of upper riparian States of enjoyment of their part of the Nile waters, as recognized under customary international law.¹²⁸ For instance, the 1902 treaty between Britain and Ethiopia incorporates a provision requiring Ethiopia not to interfere with the flow of the Blue Nile or Lake Tana, 'except in consultation with His Britannic Majesty's Government and the

¹²⁵ According to Arsano, Great Britain, France, Italy, Belgium and Germany were all contenders for the control of the Nile to some degree or another. Most of the conflicts between colonial powers and the basin states were usually resolved through coercion, at best by imposed treaties and at worst by force. See: Arsano, Y., *Ethiopia and the Nile, Dilemmas of National and Regional Hydropolitics*, a PhD thesis, ETH Zurich and Yacob Arsano, (2007), available at www.isn.ethz.ch, at 97, accessed 08 March 2008.

According to Kearny and Dalton, the newly independent African States held that prior to the formation of the United Nations, international law was developed by imperialist States to justify and support the policies of imperialism, through 'gin bottle' treaties concluded between colonial powers and local Chiefs. The elevations of such treaties to the status of solemn international agreements suited only the colonial powers. See, Kearney, R.D., and Dalton, R.E., 'The Treaty on treaties', 64 Am. J.I.L., (1970), at 501.

¹²⁶ Bourne, C.B., 'The Right to Utilize the Waters of International Rivers' 3 Can. Y.B. Int'l L. 187 (1965), in Wouters, P., K., ed., *International Water Law – selected writings of Professor Charles B. Bourne*, 25(Kluwer Law International, London, 1997) at 65.

¹²⁷ The rejection of these treaties was not unique to the Nile Basin countries. The intensification of struggle of African States against colonialism, for a free political, economic system, guaranteed by full international legal order safeguarding their sovereignty and permitting them to benefit from various forms of international cooperation. They also wanted to rid themselves of obligations resulting from 'un equal treaties'. See, Piet-Hein, H., 'Principles of International Law Concerning Friendly Relations and Cooperation Among States', 61 Am. J. Int'l L., (1997), at 703.

For the details of two controversial legal theories of the law of treaties; namely, the theory of State succession in respect of treaties, and the principle of *rebus sic stantibus* relating to the rejection of colonial treaties See, Fisseha, Y., 'State Succession and the Legal status of International Rivers', in Zacklin & Caflisch, 'The Legal Regime of International Rivers and Lakes, Martinus Nijhoff Pub., the Hague (1981) at 178).

¹²⁸ Batstone, R.K., 'The Utilization of the Nile Waters', 8 Int'l & Comp. L.Q. (1959) at 527.

Government of the Sudan'.¹²⁹ Similarly, the 1929 treaty between Britain, (the later on behalf of the Sudan and Egypt) provides:

‘save with the previous agreement of the Egyptian Government, no irrigation or power works or measures are to be constructed or taken on the River Nile and its branches, on the lakes from which it flows, so far as all these are in the Sudan or countries under British administration, which would, in such a manner as to entail any prejudice to the interests of Egypt, either reduce quantity of water arriving in Egypt, or modify the date of its arrival, or lower its level.’¹³⁰

Therefore, instead of building a legal regime that takes in to account the interest of most of the Nile basin States, the objective of the above treaties has been to secure strategic interests of the colonial powers through direct control of the Nile Basin territories and through treaties establishing legal regimes.¹³¹

Varying legal arguments have been advanced regarding the validity of existing agreements both by upstream and downstream States. These arguments range from procedural issues of ratification¹³² to substantive principle of equity, raising the issue of retaining rights and privileges to one party, while leaving the others without benefits.¹³³ The doctrine of *rebus sic stantibus* has also been used in challenging the validity of existing treaties.¹³⁴ Okidi quotes Dante Caponera’s observation regarding the validity of

¹²⁹ Treaties between Great Britain and Ethiopia, *supra* note 3.

¹³⁰ The 1929 Exchange of Notes between His Majesty’s Government in the United Kingdom and the Egyptian Government, *supra* note 2.

¹³¹ Brunnee & Toope, ‘*The Changing Nile Basin Regime: Does Law Matter?*’ 43 Harv. Int’l L.J., (2002) at 122.

¹³² See: Okidi, C.O. *supra* note 1 at 167-168.

¹³³ This justification is based on the doctrine of *pactum leoninum*, where one party reserves for itself all the rights and, privileges, leaving the other party without any reciprocal advantage. According to Garriston, ‘the provision in the treaty of 1902 would presumably be linked un to a *pactus leoninus* wherein one party reserves for itself the rights and privileges, leaving the other party without counterpart reciprocal undertaking or compensation. Moreover, Ethiopia would set this analysis in the international political and diplomatic position of Ethiopia...’ See Garriston, A.H., ‘*The Nile River System*’, 54 Am. Soc’y Int’l L. Proc. (1960) at 143.

¹³⁴ The doctrine of *rebus sic stantibus* is a principle of customary international law that provides doctrinal interpretation, where there has been a fundamental change of circumstances since an agreement has been concluded, a party to that agreement may withdraw from or terminate the agreement. According to Article 62 of Vienna Convention on the Law of Treaties;

1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:

Ethiopia's colonial agreements with Great Britain on the following grounds: (a) The agreements ...between Ethiopia and the UK have never been ratified. Customary rights, which might appear from the behaviour between lower riparian States and Ethiopia, would not be binding on the latter country if a purely positivistic approach toward interpretation of the sources of international law would be upheld:

(b) Ethiopia's 'natural rights' in a certain share of the waters in its own territory are undeniable and unquestionable. However, no treaty has ever mentioned them. This fact would be sufficient for invalidating the binding force of these agreements, which have no counterpart in favour of Ethiopia... In Roman law, such a pact would be null and void; it is likewise in international law. This is explainable by the international political conditions of Ethiopia in 1902.

(c) The agreements were signed between Ethiopia and the UK (for Egypt and the Sudan). Since the latter question the validity of their own water agreements...Ethiopia, which had not one single benefit from them, had even greater reason for the claiming of their unfairness and invalidity. The research for new agreements by Egypt and Sudan demonstrates the no violability of these agreements.

(d) The UK in 1935 recognized the annexation of Ethiopian Empire by Italy...UK's recognition of annexation is an act, which invalidated all previous agreements between

a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and

b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty:

a) if the treaty establishes a boundary; or

b) if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty

3. If under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of the treaty. See Article 62 '*Vienna Convention on the Law of Treaties*', 8 ILM, 702 (1969) (adopted on May 22, 1969).

In the Nile context the doctrine was invoked by Sudan with regard to the 1929 Treaty. Immediately after independence Sudan declared the suspension of the 1929 treaty citing fundamental change of circumstances. However, it has to be noted that Sudan and Egypt still see the 1959 agreement was a continuation of the 1929 agreement, which provided for partial use of Nile waters and did not extend to include a complete control of the River waters.

For detailed analysis on the issue of fundamental change of circumstances, see: Elias, T.O., '*The Modern Law of Treaties*', Oceana Publications, Inc., (1974) at 119. See also; Shaw, M., '*International Law*', 5th ed., Cambridge Univ. Press, (2003) at 855. For the applicability of the doctrine in relation to the Nile, see Godana, B. A. '*Africa's Shared Water Resources-Legal and Institutional Aspects of the Nile, Niger, and Senegal River Systems*', London, (1985), at145.

the two governments. Ethiopia has never asked for renewal of the Nile agreements after such recognition.

The above reasons form part of a wide-range of legal arguments raised in order to justify the discontinuity of existing agreements. Although it is difficult to assume that a treaty benefiting only one of the parties is not acceptable under international law, no legal persuasion could easily counter the above reasons for invalidating colonial agreements.

The question of whether existing agreements can continue to work along the new basin-wide NRBCFA is, therefore, a matter of great controversy between the downstream and upstream riparian States. The concept of ‘natural and historical rights’ or ‘acquired rights’, under the 1929 and 1959 treaties are invoked by Egypt who regards it as a praise worthy recognition of its water rights, yet criticized by others as a notion created of a particular political situation then existing, which could hardly be claimed as legal rights under international law.¹³⁵

Whether the notion of ‘historical rights’ constitute legal rights (as prior appropriation rights doctrine) under international law can be addressed by examining, the rulings of the Supreme Court of the United States. According to Batstone, the issue of interstate disputes over prior appropriation in the United States Supreme Court is a water dispute that occurs within the boundaries of a single State, which benefited the United States as a nation irrespective of where the irrigation is carried within its territory.¹³⁶ According to this argument, the Nile is an international River, and the dispute is, therefore, an international dispute, which makes the ground of its application to Egyptian and Sudanese irrigation difficult.¹³⁷

¹³⁵ See: Batstone, *supra* note 8 at 533.

¹³⁶ *Id.* at 541.

¹³⁷ *Id.*, at 542.

The other argument that could be raised regarding the ‘historical rights’ doctrine is, that the concept contradicts the established principles of equitable and reasonable utilization and no significant harm.¹³⁸ Contrary to the provisions under ‘existing treaties’, the modern international water law recognizes the rights and responsibilities of all basin States, without apportioning privileges to one over the other in the utilization, development, conservation and protection of the Nile waters. This notion renders the old treaties incompatible with the new NRBCFA, which fully adopts the principles of equitable and reasonable utilization and no-significant harm. Moreover, the NRBCFA clearly stipulates that ‘existing agreements which are inconsistent with the Framework shall be null and void to the extent of their inconsistency’.¹³⁹

Therefore, the incongruity between the new legal approach and the above treaties, whose legacy has left a competitive legal environment as opposed to a common legal system for the management of basin’s water resources,¹⁴⁰ requires an urgent solution in order to step up the realization of a basin-wide legal framework. On how this inconsistency is to be worked out is a matter to be addressed within the spirit of the NRBCFA, through continued negotiation on the issue by the Nile Basin States.

Firstly, pending the provisions on existing agreements for consideration by the new Nile Basin Commission at a later date can contribute towards the solution of the question of existing agreements. The advantage of this approach is that, not only it can accelerate the endorsement and signature of the NRBCFA, but enables the Basin States to plan joint development projects and access to financing, thereby creating enabling environment for the

¹³⁸ The two principles have been incorporated in the NRBCFA, as leading rules in the new basin-wide legal arrangement. See Articles 3(4&5) and Article 4&5 of the Nile River Basin Cooperative Framework Agreement (NRBCFA), 5 December 2005 (not yet signed), Copy with Boundary and Transboundary Rivers Affairs Department, Ministry of Water Resources, Ethiopia.

¹³⁹ *Id.* Article 14.

¹⁴⁰ Brunnee & Toope, *supra* note 11 at 122.

new NRBC to address the issue of existing agreements. With established and functioning mandate, a better organizational capacity and a new spirit of cooperation, a new international basin organization with basic rules and principles provides a better chance of overcoming the issue of ‘existing agreements’.

The second option may be taking up the issue of existing agreements with an independent body, including the International Court of Justice for a resolution. The danger of this option, as observed by Batstone, is, that ‘if an international tribunal upheld the validity of treaty obligations, this would merely confirm the existing legal deadlock and would not solve the main problem.’¹⁴¹

In the current Nile context, the Nile Basin States have opted to substitute the issue of existing agreements by the concept of ‘water security’ in a bid to withdraw the provisions on existing agreements from the NRBCFA, once agreement on ‘water security’ is achieved. However, as will be observed in subsequent chapters, the issue of existing agreements vis-à-vis the concept of ‘water security’ continues to be a controversial issue.

3.3 The growth of institutional coordination at the basin level

There is little evidence of the existence of general rules governing the creation of basin institutions, such as River Basin Commissions, Committees, Authorities or River Basin Organizations under international law.¹⁴² The development of institutional cooperation in different parts of the world, therefore, emerged gradually, and through State practice.¹⁴³ However, the general regime of navigation had established common legal rights of navigation

¹⁴¹ Batstone, *supra* note 8 at 555-556.

¹⁴² Caponera, D.A., ‘*Principles of Water Law and Administration – National and International*’, 2nd Ed. in Nanni, M., (Ed.), Taylor & Francis, (2007) at 235.

¹⁴³ *Id*

for the flags of riparian States and later non riparians, through the 1921 Barcelona Statute on the Regime of Navigable Waterways of International Concern.¹⁴⁴

Most of the basin institutions in Africa were established after independence, an indication that the establishment of these organizations as emerging spirit of cooperation and the beginning of institutional decision making powers at basin level.¹⁴⁵

In the Nile Basin, the first institutional development emerged with the establishment of the Permanent Joint Technical Committee (PJTC) under the 1959 treaty between Egypt and Sudan.¹⁴⁶ The main functions of PJTC included monitoring the implementation of the 1959 agreement, studying joint activities, and represent the parties with other States in the basin.¹⁴⁷

A sub-basin cooperative attempt has also been made among the Lake Victoria Basin States with the establishment of the Kagera Basin Organization (KBO) in 1977.¹⁴⁸

However, unlike other African river basins, the pace of growth towards a basin wide institution has been very slow and difficult. The following attempts could be cited as some of the emerging basin-wide institutional coordination in the Nile.

¹⁴⁴ Convention and Statute on the Regime of Navigable Waterways of International Concern, 20 Apr., 1921, 7 LNTS at 77.

¹⁴⁵ The post-independence organizations include the Senegal River Basin Organization (OMVS) in 1972; the Niger Basin Authority (NBI) in 1980¹⁴⁵; the Gambia River Basin Development Organization (OMVG) in 1978; Lake Chad Basin Commission (LCBC) in 1964. See The Transboundary Fresh Water Dispute data Base, Oregon State University, available at <http://ocid.nacse.org/tfdd/treaties.php>, accessed 19 March 2009.

¹⁴⁶ Agreement between the Republic of the Sudan and the United Arab Republic of Egypt for the Full Utilization of the Nile Waters, Cairo, 8 Nov., 1959, 453 UNTS 66 (1963).

¹⁴⁷ Id., See Fourth Section on Technical Cooperation between the Two Republics.

¹⁴⁸ Agreement for the Establishment of the Organization for the Management and Development of the Kagera River Basin, Rusumo, Agreement for the Establishment of the Organization for the Management and Development of the Kagera River Basin, Rusumo, Rwanda, 24 August 1977, 1089 UNTS 171; also available at International Fresh water Treaties Data Base www.transboundarywaters.orst.edu, accessed 15 May 2009.

The Hydromet - The Hydromet was able to introduce the concept of data and information exchange on hydro-meteorological Survey of Lake Victoria, Kyoga, and Albert.¹⁴⁹ Although the initiative was geographic- specific and has not covered part of the Blue Nile,¹⁵⁰ it can be considered as the first attempt towards the growth of a basin- wide institutional coordination. It also can be taken as the first process of its kind, which brought together most of the riparian States, although some countries such as Ethiopia participated as an observers.

The Kagera Basin Organization - The Organization for the Management and Development of the Kagera River Basin (KBO) is a classic example of a sub- basin institution in the Nile.¹⁵¹ According to Waterbury, the Kagera Basin Organization (KBO) is one of the most ambitious and coherent river basin organizations in Africa if not the world.¹⁵² Institutionally, its executive organ, the Kagera River Basin Commission is mandated with a considerable power, while its Secretariat had enjoyed greater autonomy. KBO's institutional structure symbolized a comprehensive institution for the management of sub-basin cooperation, and could be replicated at basin-wide level as well.

However, the KBO failed in its functions, mainly, due to political instability in the region, financial constraints, as well as the inherent lack of commitment of member States.¹⁵³ The KOB structure has impacted on strengthening the current sub-basin arrangement of the Nile

¹⁴⁹ The Hydromet was established on 17 August 1967, between Egypt, Sudan, Kenya (participated as observer), Tanzania, and Uganda, with the technical and financial support of United Nations Development Program (UNDP), and the World Meteorological Organization (WMO). Although its scope did not extend beyond data gathering and analysis, the Hydromet, was the first institutional structure set up with the consent of most of the Nile Basin countries. See Waterbury, John, 'The Nile Basin, National Determinants of Collective Action', Yale University Press, (2002) at 76-77.

¹⁵⁰ Arsano, Y., and Tamrat, I., *Ethiopia and the Eastern Nile Basin*, 67 *Aquat. Sci.* (2005) at 19.

¹⁵¹ The Kagera River is shared by Tanzania, Rwanda, Burundi and Uganda, and flows in to Lake Victoria. A formal treaty to establish the organization was signed on 24 August 1977 at Rusumo by Burundi, Rwanda and Tanzania. See *Agreement for the Establishment of the Organization for the Management and Development of the Kagera River Basin*, Rusumo, Rwanda, 24 August 1977, 1089 UNTS 171; also, available at International Freshwater Treaties Database www.transboundarywaters.orst.edu.

¹⁵² Waterbury, *supra* note 29 at 155.

¹⁵³ *Id.*, at 156.

Equatorial Lakes Subsidiary Action Program (NELSAP), where efforts are currently under way to re-establish the Kagera Basin Organization as one of its objectives.¹⁵⁴

The *TECCO-NILE* – The Technical Co-operation Committee for the Promotion of the Development and Environmental Protection of the Nile Basin (TECCONILE) is another basin-wide initiative that for the first time introduced the concept of the right of ‘the determination of the equitable entitlement of each riparian country to the use of Nile waters.’¹⁵⁵ With the exception of few that have chosen to remain observers, the participation of the majority the Nile basin States and its institutional structure signified the basin wide nature of the initiative, and which, later served as a basis for the establishment of the NBI.¹⁵⁶

The most important accomplishment of the TECCONILE is the development of the Nile River Basin Action Plan (NRBAP). The NRBAP was an ambitious plan consisted a number of projects activities, such as integrated water resources management, capacity building, training, regional cooperation, and environmental protection.¹⁵⁷ It was that NRBAP that for

¹⁵⁴ Under the NBI-NELSAP, a project for the establishment of a sustainable framework for joint management of the shared water resources of the Kagera River basin is underway. One of the activities includes a management strategy for the establishment of Kagera River Basin. See: Nile Equatorial Lakes Subsidiary Action Program, Kagera TIWRM Project available at www.nilebasin.org, accessed 04 February 2009.

¹⁵⁵ *The Nile River Basin Action Plan*, (hereinafter referred to as *NRBAP*): Technical Co-operation Committee for the Promotion of the Development and Environmental Protection of the Nile (TECCONILE), May 29, 1995, Nile-Secretariat, Entebbe, Uganda. Copy on file with Boundary and Transboundary Rivers Affairs Department, Ministry of Water Resources, Ethiopia.

¹⁵⁶ Ministers responsible for the water resources of the Nile basin met in Kampala, Uganda, on 7-8 December 1992 and agreed that future cooperation on water resource matters should be pursued, at least for a three year transitional period, under the name Technical Cooperation for the Promotion of the Development and Environmental Protection of the Nile Basin (TECCONILE). The agreement was signed on January 1, 1993 by six countries; namely, Egypt, Sudan, Rwanda, Tanzania, Uganda, and Zaire. Ethiopia, Kenya, Burundi, and Eritrea remained observers.

The two major objectives of the organization were:

- i. to assist participating countries in the development, conservation, and use of the Nile Basin water resources in an integrated and sustainable manner, through basin-wide co-operation for the benefit of all.
- ii. to assist participating countries in the determination of the equitable entitlement of each riparian country to the use of the Nile waters. Six countries have become original members while the rest including Ethiopia remained as observers. However, Ethiopia has remained active participant in the TECCONILE.

¹⁵⁷ The structure of the TECCONILE was composed of the Council of Ministers (COM), which is the highest authoritative body, a Technical Committee (TC) and a Secretariat. Id., *supra* note 35.

the first time introduced a legal and institutional component for the elaboration of a framework for cooperation. The objective of this component was to set clear rules and principles based on equitable utilization which leads to the establishment of a Nile River Basin Organization. This component was the only one that had been agreed for its implementation as project D3 or the Nile River Basin Cooperative Framework Agreement (NRBCFA).¹⁵⁸

The Nile Basin Initiative (NBI) - The Nile Basin Initiative (NBI) was established in 1999 as a transitional basin-wide arrangement pending the creation of a permanent legal and institutional framework.¹⁵⁹ The NBI draws full membership of all the Nile basin States, except Eritrea, which participates as an observer. A policy guideline, which included the principle of sustainable development, efficient water management, and the optimal use of the Nile water resources was adopted.¹⁶⁰

¹⁵⁸ The Nile River Basin Cooperative Frame-work Project was listed under Component D (Regional Cooperation) of the NRBAP, and hence the name D3 was adopted. See Waterbury, *supra* note 32 at 79.

¹⁵⁹ *Agreed Minutes, Extraordinary Meeting of Nile Council of Ministers*, Dar es Salam, United Republic of Tanzania, 22 February 1999, available at www.nilebasin.org, accessed 04 February 2009. The Agreed Minutes adopts a Policy Guideline that comprises a basin-wide cooperation and joint action between the riparian countries, through win-win gains, to target poverty, and promote economic integration. The NBI 'Shared Vision' is intended 'to achieve sustainable socio-economic development through the equitable utilization of, and benefit from, the common Nile Basin water resources'. The concept is adopted from Article 5(1) of the UNWCC, which reads: '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 there from, taking in to account the interests of the watercourse States concerned, consistent with adequate protection of the watercourse.' See *Convention on the Law of Non-Navigational Uses of International Watercourses*-New York, 21 May 1997, reprinted in 36 I.L.M. 700, (1997).

¹⁶⁰ The NBI has two complementary Programs, the Shared Vision Program (SVP), which is a multi-country, multi-sectral, grant funded program of collaborative action. In addition, to the Shared Vision Program (SVP), the NBI contains the Subsidiary Action Program (SAP), which is intended for the implementation of sub-basin and national investment projects that confer mutual benefits to the Basin States. See NBI, Strategic Action Program, Policy Guidelines for the Nile River Basin Strategic Action Program, Brief, May 2001, (NBI-Secretariat); See also: Project Appraisal Document For the SVP of the NBI, (SVP-PAD), W.B. Report No.26222, 2 (Apr. 21, 2003), available at www.nilebasin.org, accessed 04 February 2009.

A formal document that establishes the NBI as a transitional mechanism, the ‘Agreed Minutes’ adopts the principle of equitable use.¹⁶¹ However, apart from a few guidelines the Agreed Minutes does not offer specific rules which define rights and obligations, although attempts have been made to address some of the issues pertaining to rights and obligations through consensus. However, some decisions by the Nile –COM including few major ones have taken considerable time, while others regarding the legal status of the NBI remained unimplemented by most of the countries.¹⁶²

In addition there is no clear position among the Nile Basin States, albeit some isolated statements, on whether the ‘Agreed Minutes’ and other Nile-COM Minutes constitute a treaty under international law.¹⁶³ Article 2 (1-a) of the 1969 Vienna Convention on the Law of Treaties defines a treaty as: ‘international agreement concluded between States in a written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designations.’¹⁶⁴

A treaty may assume different names, such as covenant, agreed minutes, charter, notesverbales; memorandum of understanding, convention and agreement.¹⁶⁵ However, taken on its own merit, the title ‘Agreed Minutes’ can be misleading unless the intention of the

¹⁶¹ The Preamble of the Agreed Minutes sets forth the need to foster an all-inclusive co-operative framework for the development, management and sharing of the Nile waters for the benefit of all; and the desire to set up a new transitional mechanism to advance a Strategic Action Programme for the Nile.’ See Agreed Minutes; *supra* note 39.

Eritrea participates in the NBI as an observer. The reason(s) for this position is not fully clear. However, being a marginal contributor to the Nile watershed, lack of policy, and institutional capacity could be mentioned as few of the reasons.

¹⁶² Minutes of the 9th Annual Meeting of the Nile-COM, 14 Feb. 2002, Cairo, Egypt. (Copy on file with the author).

¹⁶³ In one of the Negotiating Committee meetings, a Ugandan delegate noted that the ‘Agreed Minutes’ constituted a binding international agreement among the Nile Basin States. (Notes on file with the author).

¹⁶⁴ Vienna Convention on the Law of Treaties, 8 I.L.M., 702 (1969) (adopted on May 22, 1969) at 331.

¹⁶⁵ Fitzmaurice, M. ‘*The Identification and Character of Treaties and Treaty Obligations between States under International Law*’, 73 BYB Int’l L., (2003), 148. Contrary to traditional notion, that treaties not concluded in a most solemn manner do not conform with the general principles of conventional law, evolving State practice consistently show the acceptance of agreements in simplified form, such as agreed minutes as treaties with no legal distinction under international law. See: 43 Hamzeh, F.S., ‘*Agreements in Simplified Form: Modern Perspectives*’, B.Y.B.Int’l L., (1968-1969), at 179-180.

parties as to its status is ascertained by examining its form and wordings.¹⁶⁶ It could, therefore, be argued that phrases and wordings included in the ‘Agreed Minutes’, such as ‘the Council of Ministers affirms its commitment’ or ‘the Council of Ministers adopts the foregoing’ denote an intention to conclude an international treaty.¹⁶⁷

The above argument is also supported by the ICJ in *Qatar v. Bahrain*, where the Court deciding on the legal character of certain instruments stated that:

‘... minutes are not a simple record of a meeting, similar to those drawn up within the Tripartite Committee; they do not merely give an account of discussion and summarize points of agreement and disagreement. They enumerate commitments, to which parties have consented. They thus create rights and obligations in international law for the parties. They constitute an international agreement.’¹⁶⁸

It can be deduced from the above discussions that the only major contribution NBI might offer towards the growth of institutional coordination in the Nile is its institutional set up. The NBI structure can be utilized as a legacy of functioning structure and technical and administrative experience for the emerging NRBCA. However, it has little to offer in terms of applicable basic rules governing the rights and obligations of the basin States.¹⁶⁹

The Nile River Basin Cooperative Framework Agreement (NRBCFA) – When in 1996 the Nile-COM agreed to set up a Panel of Experts (PoE) composed of three multi-disciplinary

¹⁶⁶ Austin, A., ‘*The Theory and Practice of Informal International Instrument*’, 35 I.C.L.Q., (1986) at 800.

¹⁶⁷ Schachter holds that, ‘inferences as to the intention of States have to be drawn from the language of the instrument and the attendant circumstances of its conclusion and adoption.’ Schachter Oscar, ‘*The Twilight Existence of Non-binding International Agreements*’, 71 Am. J. Int’l L. J., 296, (1977) at 297.

¹⁶⁸ *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, (Qatar v. Bahrain), Judgment of 1 July 1994;, ICJ Reports, 122 (1994) Para. 29-30.

¹⁶⁹ The NBI lacks a proper set of rules that deals with issues such as data and information exchange, dispute settlement mechanism, among others.

experts, the task given to the PoE was to propose a framework for basin-wide cooperation.¹⁷⁰

One of the first tasks of the PoE was the review of international law relative to international watercourses in order to draw lessons from substantive and procedural provisions of the UNWCC.¹⁷¹

A number of substantive and procedural issues in the UNWCC have been debated throughout the process of NRBCFA negotiations as well. Debates and agreements over most of the basic principles of international law demonstrated the level of impact of the work of the ILC and the GA in the growth of institutional coordination in the Nile. However, in terms of details, the UNWCC provides very little in terms of modalities for setting up a basin institution in the Nile. For instance, on the establishment of joint mechanisms, or commissions, Article 8 of the UNWCC provides:

‘In determining the manner of such cooperation, watercourse States may consider the establishment of joint mechanisms, or commissions, as deemed necessary by them, to facilitate cooperation on relevant measures and procedures in light of experience gained

¹⁷⁰ Specific tasks of the PoE included, *inter alia*:

(i) Reviewing the TECCONILE organization and other relevant basin institutional arrangements and provide recommendations for an appropriate multi-disciplinary Framework for legal and institutional arrangements for water resources development of the Nile River Basin.

(ii) Identification and recommendation to the Council of Ministers the process, methodology, and activities that will lead to the determination of equitable and legitimate rights of water use in each riparian country. See: Final Report, NRBCFP, 3, Rpt.1.7-March 2000, Ministry of Water Resources- Ethiopia.

¹⁷¹ Substantive principles such as equitable and reasonable utilization; the principle of no-significant harm; existing agreements, and planned measures are the most important principles that have been elaborated during the CFA negotiations. The first draft Framework text that consisted of five parts had been the first elaborate work of the PoE, which covered the following parts.

a) Part I, General principles – Provisions on general principles regarding cooperation between Nile Basin States in the protection, use, conservation, and development of the Nile River Basin.

b) Part II, Rights and Obligations - Set of provisions on rights and obligations on the use, conservation, and development of the Nile River.

c) Part III, Institutional Structure –provisions on the establishment of the Nile River Basin Commission.

d) Part IV, Subsidiary Institutions – institutional structures for the subsidiary organs in the sub-basin.

Part V, Miscellaneous Provisions – containing mechanisms for dispute settlement and supplementary instruments, with an annex on Fact Finding Mission. See McCaffrey, S.C., *Report on Principles, Nile River Basin Cooperative Framework Project (D3)*, March 1999, (copy with the author). See also *Nile River Basin Cooperative Framework, Final Report, Panel of Experts*, 3, Rpt.1.7- March 2000, (hereinafter referred to as PoE Report). (Copy on file at Transboundary River’s Affairs Department, Ministry of Water Resources; Ethiopia).

through cooperation in existing joint mechanisms and commissions in various regions.¹⁷²

In a similar manner, Article 24 of the UNWCC requires consultation on the management of an international watercourse, which may include the establishment of a joint management mechanism.¹⁷³

However, unlike the 1966 Helsinki Rules, which provided a more detailed guidance on institutional structures,¹⁷⁴ the UNWCC ‘does not mandate international watercourse States to establish international basin institution’.¹⁷⁵ According to Boisson de Chazournes, ‘The *travaux préparatoires* of the UN Watercourses Convention gives the feeling that there is no real obligation under international law to create such mechanisms and to manage watercourses through them.’¹⁷⁶ This analysis holds true of the Nile basin as well, where difficult negotiations have been conducted on the issues of institutional structures under the NRBCFA.

¹⁷² See Article 8 of the UNWCC *supra* note 39.

¹⁷³ *Id.*, Article 24.

¹⁷⁴ See Articles on water Resources Administration, Helsinki Rules on the Use of waters of *International Rivers, adopted by the I.L.A. at the 52nd Conference, Helsinki, Finland, Aug. 1966, reprinted* in Bogdanović, S., *International Law of water Resources: Contribution of the International Law Association* (1954-200), 89 (Kluwer Law International, The Hague (2001)).

¹⁷⁵ Caponera *supra* note 22 at 235.

¹⁷⁶ Boisson de Chazournes, L., ‘The Role of Diplomatic Means of Solving Water Disputes: A Special Emphasis on Institutional Mechanisms’, in *The International Bureau of the Permanent Court of Arbitration*, (eds.), *Resolution of international water disputes*, (, Kluwer Law International, The Hague, 2002) at 103.

CHAPTER 4

THE WORK OF THE ILC ON THE LAW OF NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES

4.1 Introduction

The Convention on the Law of the Non-navigational Uses of International Watercourses (UNWCC), which was adopted on May 21, 1997, is a product of the work of the ILC and the Sixth (Legal) Committee of the General Assembly (GA).¹⁷⁷ Introducing the work of the ILC and GA requires a brief examination of the concept of international law and the evolution of international law of water resources. The main objective of this Chapter is to inquire the work of the ILC on the law of non-navigational uses of international watercourses, in light of the development of basic principles of international law. The analysis will consider the process of the codification in order to determine the relevance of that experience in solving international watercourses dispute over the Nile in subsequent chapters.

International law - International law governs relations between states.¹⁷⁸ Although states remain the main subjects of international law, modern international law includes international organizations and legal persons as subjects of international law.¹⁷⁹ International law has developed beyond the traditional concept of regulating state relations at times of war and peace,¹⁸⁰ and its progressive expansion continues to provide new legal norms on important issues such as the environment, sustainable development, water resources, climate change,

¹⁷⁷ U.N. Doc. A/RES/51/229/ (1997).

¹⁷⁸ For an overview of key issues relating to international law, see Shaw, M., *International Law*, 5th ed., Cambridge University Press, (2003), at 85; Regarding the theory of State, its progress in its international legal relationships, see, Broms B., 'States', in Bedjaoui (Ed.), *International Law: Achievements and Prospects*, Martinus Nijhoff Publishers, (1991) at 41.

¹⁷⁹ Schermers, H.G., *International Organizations*, in Bedjaoui (Ed.), *International Law: Achievements and Prospects*, Martinus Nijhoff Publishers, (1991) at 67. For an examination of the legal foundation and content of the personality of international organizations and their nature as subjects of international law, see: Rama-Montaldo, M., 'International Legal Personality and Implied Powers of International Organizations', 44 BYB Int'l L., (1970), at 111.

¹⁸⁰ Wallace, R.M.M., *International Law*, (5th Ed. Sweet & Maxwell, London 2005) at 2.

and trade.¹⁸¹ According to Frank Thomas, most of the international norms elicit compliance based on acceptance by sovereign States, and therefore, are obeyed rather than enforced.¹⁸²

International Water Law - International water law is one of the branches of international public law governing relations among states, and has emerged as an identifiable and relatively autonomous body of substantive international rules that govern the use of transboundary waters resources.¹⁸³

Sources of International Water Law - International treaties and conventions are considered the primary sources of international water law.¹⁸⁴ International treaties, both multi-lateral and bilateral, dominate the bulk of the legal agreements of transboundary water resources.¹⁸⁵

¹⁸¹ Danilenko, G.M., *Law Making in the International Community*, Martinus Nijhoff Publishers, (1993) at 1. As observed by Baxter: 'The vast majority of norms which are laid down in international agreements are susceptible of enforcement through well known mechanisms, including resort to international tribunals, and national courts, which ensure respect for these obligations. But there are norm of various degrees of cogency, persuasiveness and consensus, which are incorporated in agreements between States, but do not create enforceable rights and duties. They may be described as 'soft law' as distinguished from the 'hard law' consisting of treaty rules which States expect will be carried out and complied with.' See Baxter, R.R., *International Law in Her Infinite*, 29 Int'l & Comp. L.Q., (1980), at 549.

¹⁸² Franck, T.M., *The Power of Legitimacy among Nations*, Oxford Uni. Press, (1990), at 3. Milena Sterio emphasizes that: '... States are likely more willing to take international law in to account, or to at least try not to disrupt it in a blatant manner. It is a reflection of norm or custom of State behaviour, whereby truly States will obey international law from a sense of legal obligation and from a tradition long standing and uniform practice of doing so.' See Sterio, M. *The Evolution of International Law*, 31 B.C. Int'l & Comp. L.R., (2008), at 245.

¹⁸³ Wouters, P.K., *Universal and Regional Approaches to resolving International Water Disputes: What Lessons Learnt from State Practice?* in International Bureau of the Permanent Court of Arbitration, ed., *Resolution of International Water Disputes*, Kluwer Law International, The Hague, (2003) at 117..

A more comprehensive definition of the term "international water law" has been provided as follows:

'International water law (also known as international watercourse law, international law of water resources) is a term used to identify those legal rules that regulate the use of water resources shared by two or more countries. The primary role of international water law is to determine a state's entitlement to the benefits of the watercourse (substantive rules) and to establish certain requirements for a state's behaviour while developing the resources. See Vinogradov, Wouters & Jones, *supra* Ch 1, note 7 at 20.

¹⁸⁴ There are a number of general conventions applicable at universal and regional level and numerous multi-lateral and bi-lateral treaties and instruments related to specific international watercourses. Art. 38 of the Statute of the International Court of Justice (ICJ), provide the following sources of international law: (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. See Article 38 of the Statute of the International Court of Justice, available at <http://www.icj-cij.org/homepage/index.php?p1=0>, accessed 02 December 2008.

See for example General Treaty of Vienna, 9 June 1815; Convention relating to the Development of Hydraulic Power affecting more than one state and Protocol of Signature- Geneva, 9 December 1923; Convention on the

Treaties are concluded with the intention of creating rights and obligations, or establish relations governed by international law. As binding instruments, treaties regulate the conduct of the contracting parties, while other instruments, such as declarations, recommendations, and resolutions establish rules of recognition and rules of change.¹⁸⁶

Law of Non-Navigational Uses of International Watercourses-New York, 21 May 1997; African Convention on the Conservation of Nature and Natural Resources - Algiers, 15 September, 1968 ; Act of Asuncion on the Use of International Rivers, 3 June 1971; Council of Europe: Draft European Convention for the Protection of International Watercourses against Pollution- Strasbourg, February 1974; Convention on the Protection and Use of Transboundary Watercourses and International Lakes - Helsinki, 18 March 1992; The 1994 Convention on Cooperation for the Protection and Sustainable Use of the Danube River (1994 Danube Convention). Agreement on Cooperation for the Sustainable Development of the Mekong River Basin, (1995); Convention on the Protection of the Rhine, (1998), *reprinted* in Legislative Study 65, Development Law Service, FAO, (Rome, 1998).

Commenting on transboundary water treaties and their nature in relation to disputes and cooperation Wolf notes, that the potential for disputes in international basins, the record of acute conflict over international water resources is historically overwhelmed by the record of cooperation. The last fifty years has seen only thirty five acute disputes, while 157 treaties were negotiated and signed. See Aaron Wolf, *'Healing the Enlightenment Rift: Rationality, Spirituality and Shared Waters'*, 61 J. Int'l Affairs, (2008) for overview on the subject of conflict, cooperation, and treaties data base. Jesse Hamner and Aaron Wolf, citing the UN Food and Agriculture Organization (FAO) point out the existence of more than 3600 water related treaties since AD 805 and 1984, the majority of which deal with some aspect of navigation. According to their account, since 1814, states have negotiated a smaller body of treaties which deal with non-navigational issues of water management, flood control, hydropower projects, or allocations for consumptive or non-consumptive uses in international basins.' See, Hamner, J., & Wolf, A. T., *'Patterns in International Water Resources Treaties: The Transboundary Fresh Water Treaty Data Base'*, 9 Colo. J. Int'l Env't'l L. & Policy., (1998), at 158. See also Dinar, S., & Dinar, A., *'on Recent Developments on the Literature on Conflict Negotiation and Cooperation over Shared International Fresh Waters'*, 43 Nat. Resources J., (2003), at 1217; Giordano, M.A., *'Managing the Quality of International Rivers: Global Principles and Basin Practice'*, 43 Nat. Resources J., 119, (2003); Conca, K., Wu, F., Mei, C., *'Global regime Formation or Complex Institution Building? The Principled Content of International River Agreements'*, 50 Int'l Studies Q., 263, (2006). There is an extensive collection treaty data base at Transboundary Freshwater Dispute Database at Oregon State University, available at <http://www.transboundarywaters.orst.edu/index.html>, accessed 15 March 2009

¹⁸⁵ There are 263 international river basins shared by 145 countries and covering 45.3 per cent of the Earth's land surface. Half of the territories of nearly 100 countries fall within in international river basins. See, Wolf, et al, *'International River Basins of the World'*, 15 Int'l J. of Water Resources Devt, (1999); Wolf A., T., *'Conflict and Cooperation along international waterways'*, 1 Water Policy, (1998), at 251.

¹⁸⁶ Zapatero, P., *'Modern International Law and the advent of special Legal Systems'*, 23 Ariz. J. Int'l & Comp. L., (2005-2006) at 56.

See the following declarations and resolutions; Declaration of the UN Conference on Environment and Development, Rio de Janeiro, Brazil, June, 13, 1992; in Report on the United Nations Conference on Environment and Development, Annex I, U.N. Doc. A/Conf. 151/26 (Vol.1) reprinted in 31 I.L.M. 876 (1992); Agenda 21: *A Program for Action for Sustainable Development*, Rio de Janeiro, Brazil, June 13, 1992, in Report of the United Nations Conference on Environment and Development, Annex II, U.N. Doc., A/Conf. 151/26 (Vol. II), (1992). Agenda 21 states that, 'transboundary water resources and their use are of great importance to riparian States. In this connection, cooperation among those States may be desirable in conformity with existing agreements and/or other relevant arrangements, taking in to account the interests of all riparian states concerned; Ministerial Declaration adopted by Ministers meeting in the Ministerial Session on the International Conference on Fresh Water, Bonn, 4 Dec. 2001, available at www.earthsummit2002.org/ic/, accessed last on 18 March 2009; Bonn Recommendations for Action, Dec. 2001, available at www.water-2001.de/outcome/BonnRecommendations/Bonn_Recommendations.pdf, accessed on 18 March 2009; Ministerial Declaration of the World Water Forum, Kyoto, Japan, adopted on 23 March 200, available at www.waterforum.jp/worldwaterforum3/index.html, last accessed 19 March 2009; Ministerial Declaration of the

In addition to treaties, decisions of the Permanent Court of International Justice (PCIJ) and the International Court of Justice (ICJ) have made significant contributions in the interpretation of principles governing international water law.¹⁸⁷

After the end of the Second World War, disputes over the utilization of international waters intensified in many River Basins, notably between Egypt and Sudan over the Nile; India and Pakistan over the Indus; Israel and Jordan; and between Canada and the United States over the Columbia River.¹⁸⁸

As claims and counter-claims over the use of these and many other rivers intensified, the need for ‘an authoritative statement of international law applicable to the uses of international rivers became imperative’¹⁸⁹ not only as mechanisms for the resolution of disputes ‘but also to provide a set of rules designed to manage [shared] water resources.’¹⁹⁰

^{4th} World Water Forum, Mexico City, Mexico, March 2006, available at www.worldwaterforum4.org.mx/home/nl2_din.asp?cve_art=250, last accessed 19 March 2009.

¹⁸⁷ Art.59 of the Statute of International Court of Justice provides that: ‘The decision of the Court has no binding force except between the parties and in respect of that particular case.’, available at http://www.icj-cijwww/basicdocuments/basicdocuments/basic_statute.htm, accessed 03 October 2007. However, ‘International case law by the IPCJ, ICJ, arbitral tribunals, and decisions of inter-state courts in Federal countries have developed certain principles, usually limited to the resolution of specific disputes. Some of these principles relate to ‘equitable sharing’ or ‘equitable uses’ or of ‘equitable apportionment’ of shared water resources.’ See: Caponera, D.A., ‘*Shared Waters and International Law*’, in Blake & et al, ‘The Peaceful Management of Transboundary Resources’, Graham & Trotman, (International Environmental Law Policy Ser., 1995), at 123.

Some of the high profile cases in this regard include: Case Concerning the Diversion of Water from the River Meuse, (Neth. V. Belg.), [1937] P.C.I.J., available at <http://www.worldcourts.com/pcij/eng/decisions.htm>, accessed 16 March 2009; Case relating to the Territorial Jurisdiction of the International Commission of the River Oder (UK, Czech Rep., Den., Fr., Germany, and Swed. V. Pol.), 1929, P.C.I.J., (ser. A), No.23, (10 Sep.); The decisions on some of these cases introduced important principles, such as the principle of ‘community of interest’ in to the international law arena.

¹⁸⁸ Bourne, B., C., ‘*The International Law Association’s Contribution to International Water Resources Law*’, Natural Resources Journal, 36 [Part 1], (1996) at 115., reprinted in Wouters, P.K. *Selected Writings of Professor Charles B. Bourne*, Kluwer Law International, (1997) at 235.

¹⁸⁹ Id.

¹⁹⁰ Subedi, S., ‘Resolution of International Water Disputes: Challenges for the 21st Century’, in International Bureau of the Permanent Court of Arbitration, ed., *Resolution of International Water Disputes*, The Hague, (Kluwer Law International, 2003) at 47.

The evolution of the work of the ILC goes in tandem with the growing disputes over the right to utilize international waters.¹⁹¹

The International Law Commission (ILC) - Before the commencement of the work of the ILC and the GA, a process of systematic codification of international watercourses had been undertaken by two important non-governmental organizations, the Institute of International Law (IIL) and the International Law Association (ILA).

Three of the resolutions of the IIL are '*the Declaration of Madrid, 20 April 1911 on International Regulations regarding the Use of International Watercourses for Purposes Other than Navigation*', which prohibited alterations of contiguous rivers and streams without the consent of the riparian party, or without legal ground and restricted any utilization of water in a manner that seriously interferes with the utilization by other States or persons. The importance of the resolution was further signified by its recommendation of a permanent joint commission.¹⁹²

The '*Resolution of the Use of International Non-Maritime Waters of Salzburg 11 September 1961*' stipulated prior notice principles¹⁹³, while the '*Athens Resolution on the Pollution of Rivers and Lakes and International Law of 12 September 1979*' incorporates the no-harm rule in relation to pollution of international rivers and lakes.¹⁹⁴

¹⁹¹ Id.

¹⁹² See, English translation, [1974], Y.B. Int'l L.COMM'N, Vol. 2, Part 2, (1976), at 200.

¹⁹³ English translation, [1974], Y.B. Int'l L.COMM'N, Vol. 2, Part 2, (1976), at 202

¹⁹⁴ English translation, [1974], Y.B. Int'l L.COMM'N, Vol. 2, Part 2, (1976), at 200). For more details on the Institute De Droit International, see History, available at http://www.idi-iil.org/idiE/navig_history.html.

The ILA has made a significant contribution towards the codification and development of international water law, in particular, through the adoption of the 1966 Helsinki rules.¹⁹⁵ A number of the Helsinki Rules constitute customary international law, while the evidence of their influence could be gathered from the acceptance by international community as customary international law. One of the basin agreements that incorporated the Helsinki Rules are, the 1975 *Joint Declaration of Principles of Utilization of the Waters of the Lower Mekong Basin*.¹⁹⁶ According to Professor Charles Bourne: '[t]he best evidence of the Helsinki Rules and of their Status as international law is seen in the work of the ILC on international watercourses.' He emphasizes that, the acceptance by the ILC of the rule of equitable utilization as a customary rule of international law had been the result of influence of the Helsinki rules.¹⁹⁷

The International Law Commission (ILC) is a subsidiary organ of the United Nations General Assembly. Its main objective is to promote the progressive development of international law and its codification.¹⁹⁸ A request for the consideration of the codification of the rules relating

¹⁹⁵ See, *Helsinki Rules on the Use of Waters of International Rivers*, adopted by the I.L.A. at the 52nd Conference, Helsinki, Finland, Aug. 1966, reprinted in Bogdanović, S., *International Law of water Resources: Contribution of the International Law Association (1954-200)*, 89 (Kluwer Law International, The Hague 2001).

¹⁹⁶ Available at <http://www.transboundarywaters.orst.edu/database/interfreshreatdata.html>.

¹⁹⁷ See, Bourne, *supra* note 68, at 215-216.

¹⁹⁸ The objective of the ILC emanates from Article 13 of the United Nations Charter, which mandates the General Assembly, 'to encourage the 'progressive development of international law' and its 'codification'. (See, Article 14, UN Charter, available at <http://www.un.org/aboutun/> . Article 15 of the Statute of the ILC defines 'progressive development of international law' as '... the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of states', while 'codification' is defined as: 'the more precise formulation, systematization of rules of international law in fields where there already has been extensive State practice, precedence and Doctrine'. (See, Statute of the ILC, available at, http://www.untreaty.un.org/ilc/texts/instruments/english/statute/statute_e.pdf, last accessed on 21 March 2009). The ILC's elaborate method of work was an ideal tool in its consideration of a topic of the Law of Non-Navigational Uses of International Watercourses, and a greatly contributed as a model for future international watercourse negotiations. The ILC, during its work on the law of non navigational uses of international watercourses appointed Special Rapporteur, as part of the institutional features of the Commission. The Report of the Special Rapporteur, the participation in the consideration of a topic in the plenary, and elaboration of commentaries to draft articles constituted an essential theoretical work in the process of the codification of the UNWCC. States have also contributed at different level of involvement through the provision of the necessary data and information and replies to questionnaires, which were examined by the Special Rapporteur. The active debates at the Sixth Committee, the consideration and approval of the revised draft of the Drafting Committee, adoption of the final draft, recommendation on further action, and submission to the General Assembly all have

to the utilization and use of rivers by the General Assembly was first made by Bolivia in 1959.¹⁹⁹ The issue had not been taken up for study until 1970 when the Government of Finland made a further request to GA. Based on the recommendation by the Sixth Committee the GA decided that the ILC take up the study of the law of non-navigational uses of international watercourses with a view to its progressive development and codification.²⁰⁰

Two reports by the U.N. Secretary General on his investigation regarding legal problems relating to the utilization and use of international rivers constituted an important background in the commencement of the work of the ILC.²⁰¹ Likewise, views from Governments on the report have made even more contribution on how complex legal problems, which are both the concern of upstream and the downstream States, should be handled. Key issues that have been addressed ranged from the question of the scope for the definition of an international watercourse to geographical concept of an international drainage basin.²⁰² For example, States in favour of study of legal aspects of water uses and pollution within the framework of

been important stages in the process of the work of the ILC and the General Assembly. (See, Organization, programme and methods of work of the International Law Commission, available at <http://untreaty.un.org/ilc/ilcintro.htm>, accessed on 21 March 2009).

¹⁹⁹ Bolivia shares Rio del Plata with Argentina, Brazil, Paraguay, and Uruguay. The Rio del Plata is important to the land-locked Bolivia as the only outlet to the Sea. (See, Del Castillo, L., 'Legal regime of the Rio del Plata', 36 Nat. Resources J., (1996), at 224-225). Bolivia also shares Lake Titicaca with Peru. See, treaties at <http://ocid.nacse.org/tfdd/treaties.php>, accessed last 22 March 2009.

At its 842nd Plenary meeting, on 21 November 1959, the General Assembly adopted resolution 1401 (XIV) requesting the Secretary General to prepare and circulate a report on the issue and circulate to member States. See, [1974] 2[2], Y.B. Int'l L. Comm'n 270, UN Doc. A/CN.4/SER.A/1974/Add.1 (Part2). The ILC at its twenty-third session in 1971 decided to include the non-navigational uses of international watercourses in its general program of work, and after two years in 1974 at its twenty-sixth session commenced its work on the subject. See, [1974] 2[2], Y.B. Int'l L. Comm'n 270, UN Doc. A/CN.4/SER.A/1974/Add.1 (Part2).

²⁰⁰ U.N.GAOR, 6th Comm., 25th Sess. (1974) 1225 mtg., at 267.

²⁰¹ See *Legal Problems relating to utilization of international rivers – Report by the Secretary General*, U.N. Doc. A/5409(1963) reprinted in [1974] 2(2), Y.B. Int'l Comm'n, 33; *Supplementary Report by the Secretary General*, U.N. Doc. A/CN.4/274 (1974), reprinted in [1974] 2(2) Y.B. Int'l Comm'n 265.

²⁰² The states that replied to the questionnaire were Argentina, Austria, Barbados, Brazil, Canada, Colombia, Ecuador, Finland, France, Germany, Hungary, Indonesia, Netherlands, Nicaragua, Pakistan, Philippines, Poland, Spain, Sweden, United States of America, and Venezuela. States that replied between 1978 and 1982 were, Libya, Sudan, Swaziland, Yemen, Yugoslavia, Greece, Luxemburg, Syria, Bangladesh, Portugal – See, [1976] 2[1] Y.B. Int'l L. Comm'n, 149-183, UN Doc. A/CN.4/SER.A/1976/Add.1(Part 1); Report of the International Law Commission on the Work of its twenty-sixth session, U.N. GAOR, 29th Sess., Suppl.no.10 (U.N. Doc. A/9610/Rev.1 (1975) at 140-142. For analysis of the views of the Governments on the issues raised in the questionnaire see Kearney, R.,D., *First report on the non-navigational uses of international watercourses*, [1976] 2(1), Y.B. Int'l Comm'n at 184, UN Doc. CN.4/295.

drainage basin, considered a 'river system' as indivisible and a single economic unit led in to the debates of scope of the meaning of the term 'international watercourses'.²⁰³ However, due to serious disagreement the ILC was then compelled to postpone the issue of definition of the scope of the term 'international watercourses' in lieu of consideration of general principles.²⁰⁴

The adoption of the first 33 draft articles in 1991 as 'the first reading of the draft articles as a whole'²⁰⁵ had for the first time introduced the definition of 'international watercourses'; the substantive provisions on equitable and reasonable utilization, and factors relevant to equitable and reasonable utilization; obligation not to cause appreciable harm; general obligation to cooperate; relationship between uses; information concerning planned measures; and a number of other provisions.²⁰⁶ The adoption of these articles was followed by the submission in 1994 by the ILC of revised draft articles on the law of non-navigational uses of international watercourses, to the GA, with recommendations for the elaboration of a convention by the GA or by international conference of plenipotentiaries of states on the basis of the draft articles.²⁰⁷

The 1994 draft articles set up a basis for the elaboration of the rules of international watercourses through ensuing debates by the Working Group (WG) of the Sixth Committee on the codification and development of rules on international watercourses. The revised draft

²⁰³For instance Argentina's position was that the drainage basin concept as defined by the Helsinki Rules and supported by literatures; State practice and judicial decisions should be adopted as the appropriate basis for the study in question. Other countries that that supported the drainage basin concept include Finland and the United States. Countries such as Spain preferred international watercourse. See *Replies of Governments to the Commission's Questionnaire*, [1976] 2[1], Y.B. Int'l L. Comm'n, UN Doc. A/C.4/294 and Add.1 at 152-160.

²⁰⁴ See Report of the International Law Commission on the Work of its Twenty-eighth Session, UN Doc. A/3/10 (1976), reprinted in [1976] 2[2] Y.B. Int'l L' Comm'n 1 at 153 *et seq.* (160-162).

²⁰⁵ See draft articles adopted on the first reading: Report of the international Law Commission on the Work of its Forty-third Session, U.N. Doc. A/46/10 (1991), reprinted in [1991] 2(2) Y.B. Int'l L. Comm'n 1, at 66-70.

²⁰⁶ *Id.* at 66-70.

²⁰⁷ See Draft Articles on the Law of Non-navigational Uses of International Watercourses (UNGA Res. 42/52, 16 December, 1994); See also Draft Articles on the Law of non-navigational Uses of International Watercourses, in Report of the ILC on the Work of its Forty-Sixth Session A/CN.4/SER.A/1994/Add.1 (Part 2) 1996) 49 UNGOAR Supp. No. (10) (1994 ILC Draft Articles), at 210.

had its immediate impact on some of the international watercourses agreements, such as the 1995 SADC Protocol on Shared Watercourse Systems.²⁰⁸

However, the first session of the WG had not been able to agree on major issues such as the relationship between the convention and existing and future agreements; the relationship between equitable and reasonable utilization and no significant harm; and the issue of dispute settlement.²⁰⁹ The WG's failure to resolve these issues at the first session, led to the adoption of a resolution by the GA for convening the second session of the WG. After continuous debates during the second session, the WG was able to deal with unresolved controversial issues through votes on individual articles or groups of articles rather than general consensus and the entire draft convention was then submitted to the GA for consideration and adoption.²¹⁰ The adoption process, the positions and remarks by Governments partly indicated the future prospect of the UNWCC.

4.2 The adoption of the UNWCC

The UNWCC was adopted by the General Assembly on 21 May 1997.²¹¹ The Convention was adopted by 103 countries in favour.²¹² China, Turkey, and Burundi voted against it, while twenty-seven other countries abstained.²¹³

²⁰⁸ The preamble states: 'Bearing in mind the Helsinki Rules on Uses of the Waters of International Rivers and the work of the international Law Commission on the non-navigational uses of international watercourses' See Protocol on Shared Watercourse Systems, <http://www.sadc.int/index/browse/page/158>, Johannesburg, 28 August 1995.

²⁰⁹ See *Report of the WG to the General Assembly on the work of its first session*, U.N. Doc. A/C.6/51/NUW/WG/L.2 (1996).

²¹⁰ U.N.Doc. A/RES/51/206, adopted on the Report of the Sixth Committee, U.N. Doc. A/51/624 (1996).

²¹¹ U.N. Doc. A/RES/51/229/(1997).

²¹² The following countries voted in favour of the Convention: Albania, Algeria, Angola, Antigua and Barbuda, Armenia, Australia, Austria, Bahrain, Bangladesh, Belarus, Botswana, Brazil, Brunei Darussalam, Burkina Faso, Cambodia, Cameroon, Canada, Chile, Costa Rica, Cote d'Ivoire, Croatia, Cyprus, Czech Republic, Denmark, Djibouti, Estonia, Federated States of Micronesia, Finland, Gabon, Georgia, Germany, Greece, Guyana, Haiti, Honduras, Hungary, Iceland, Indonesia, Iran, Japan, Jordan, Kazakhstan, Kenya, Kuwait, Lao Peoples Democratic Republic, Latvia, Lesotho, Liberia, Libya, Liechtenstein, Lithuania, Luxembourg, Madagascar, Malawi, Malaysia, , Maldives, Malta, Marshal Islands, Mauritius, Mexico, Morocco, Mozambique, Namibia, Nepal, Netherlands, New Zealand, Norway, Oman, Papua New Guinea, Philippines, Poland, Portugal,

The convention contains seven parts comprising 37 articles with a further 14 articles pertaining to arbitration appended to the convention. The content of the convention included the definition of the term ‘watercourse’; substantive norms, including the two primary principles; namely, the principle of equitable and reasonable utilization with relevant factors and circumstances for the determining ERU, and the principle of obligation not to cause significant harm,²¹⁴ It also contained procedural rules, both general and specific rules, such as duty to cooperate on issues of data and information exchange, and notification on planned measures.

The adoption of the convention by a majority vote confirmed the strong endorsement of the work of the ILC and the GA on the law of non-navigational uses of international watercourses and the solidification of its universal status. Nevertheless, the reasons behind the few votes against the convention and substantial numbers of abstentions still reflected the dissatisfaction of some watercourse States regarding issues such as the balance between equitable and reasonable utilization and no-significant harm; the framework nature of the convention; and the question of territorial sovereignty over a watercourse. Among those States that voted against the convention, Turkey pointed out that: ‘As a framework convention, the text should have set forth general principles. Instead, the draft went beyond the scope of a framework and established a mechanism for planned measures’.²¹⁵ According to Turkey, it was not appropriate for a framework convention to foresee any compulsory rules regarding the settlement of disputes, a matter which should be left to the discretion of States

Qatar, Republic of Korea, Romania, Russian Federation, Samoa, San Marino, Saudi Arabia, Sierra Leone, Singapore, Slovakia, Slovenia, South Africa, Sudan, Suriname, Sweden, Syria, Thailand, Trinidad and Tobago, Tunisia, Ukraine, United Arab Emirates, United Kingdom, United States, Uruguay, Venezuela, Viet Nam, Yemen, Zambia (Belgium, Nigeria and Fiji joined later).

²¹³ Abstaining: Andorra, Argentina, Azerbaijan, Belgium, Bolivia, Bulgaria, Colombia, Cuba, Ecuador, Egypt, Ethiopia, France, Ghana, Guatemala, India, Israel, Mali, Monaco, Mongolia, Pakistan, Panama, Paraguay, Peru, Rwanda, Spain, United Republic of Tanzania, Uzbekistan.

²¹⁴ See UNWCC, *supra* note 52.

²¹⁵ Press Release G/A 9248, General Assembly adopts Convention on law of non-navigational uses of international watercourses, 21 May 1997.

concerned.²¹⁶ Likewise, lack of reflection of the principle of territorial sovereignty of a watercourse State, and the imbalance between rights and obligations, were raised by China as reasons for its negative vote.²¹⁷

The above objections exhibit the still persisting views of some upstream States that are concerned in being tied up to any future negotiations over their part of international watercourses by a universal instrument prescribing principles and rules in their future agreements that they might be a party to. However, the real reason behind the rejection by China and Turkey can be attributed to resisting any interference in the ongoing hydraulic developments; Turkey's GAP project on the Euphrates and China's successive dam development on the Mekong.²¹⁸

The only Nile Basin country that voted against the convention was Burundi. Although Burundi has not been an active participant in the WG discussions, its vote against the convention could be as a result of a spontaneous reaction in the GA debate, or as mentioned by Prof. McCaffrey: 'have more to do with Egypt's historical concern over activities in the upper Nile Basin.'²¹⁹ However, it is difficult to see the impact of Burundi's vote on the Egyptian historical rights issue.

The reactions of the rest of the Nile Basin States during the adoption of the convention had been mixed. Nile Basin countries that participated in the General Assembly debates were Burundi, Egypt, Ethiopia, Kenya, Rwanda, Sudan, and Tanzania.²²⁰ The Democratic

²¹⁶ Id.

²¹⁷ Id.

²¹⁸ McCaffrey, S. C., *The Law of International Watercourses; Non-navigational Uses*, Oxford University Press, (2003) at 315.

²¹⁹ Id. at 315.

²²⁰ See Press Release, *supra* note 39.

Republic of Congo (then Zaire), Uganda, and Eritrea were absent.²²¹ Out of seven Nile basin States that participated in the GA, only two, Kenya and Sudan, voted in favour of the Convention.²²²

Although they have the right to make their own decisions as sovereign States, the reasons why Sudan and Kenya chose to depart from the rest of the Nile Basin states in their votes in favour of the Convention cannot be easily explained. However, an immediate downstream riparian to both the White Nile and the Blue Nile Sudan is known for moderation, siding with both upstream and down-stream States depending on the merits of the issue, albeit avoiding compromising its interest at the same time.²²³ Moreover, Sudan is known for usually supporting Egypt at international forums dealing with transboundary water resources issues. Its support is partially related on the spirit of the 1959 Nile Agreement with Egypt, where the two countries are expected to adopt joint positions regarding negotiating with a third parties on issues pertaining to the Nile.²²⁴ However, its vote in favour of the Convention may seem unusual or even an indirect exhibit of a challenge to the 1959 agreement. Nevertheless, one should also exercise caution in assuming that Sudan's vote did not elicit Egypt's tacit support, as the latter's abstention itself could be a tactical move rather than a strategic decision.²²⁵

²²¹ Id.

²²² Id.

²²³ For instance, in 1994 during the Sixth Committee's discussion on a draft resolution establishing a 'mandate of the future Working Group for the negotiation of a framework convention on the basis of the ILC draft articles' Sudan voted alongside Ethiopia regarding the fifth preambular paragraph on the actual nature and scope of the future Convention. See Report of the Sixth Committee: U.N. Doc. A/49/748, (1994), at 5, paras.10-15. See also Tanzi, A. & Arcari, M., 'The United Nations Convention on the Law of international Watercourses: A Framework for Sharing', (Kluwer International, London, 2001), at 42.

²²⁴ See Fifth - General Provisions, Agreement between the Republic of the Sudan and the United Arab Republic of Egypt for the Full Utilization of the Nile Waters,(1959), available at: <http://mgd.nacse.org/qml/watertreaty/textdocs/international/58.html>, visited on 20/06/07.

²²⁵ Egypt stated that it did not oppose the adoption of the Convention, rather admired the Framework natures and principles for the use of water. See Press Release *supra* note 39.

Four of the seven Nile Basin States, namely, Egypt, Ethiopia, Rwanda and Tanzania, abstained during the vote in the GA.²²⁶ According to Schwabach, the abstention by Egypt was ‘perhaps most surprising, in light of the view expressed by most of the [upstream] abstainers that the Convention was hopelessly biased against upper riparian.’²²⁷ Thus, while the Convention had been warmly adopted by almost all lower riparian States, the least expectation was that Egypt being the ‘text book of lower riparian’²²⁸ would join ranks with Ethiopia, Rwanda, and Tanzania, which are the upstream States in denying support to the Convention. Egypt stated its reservation on the grounds that:

‘While the Convention contained some new regulations, they did not modify customary international law. The Convention did not prejudice the legal weight of international law; its framework should not affect bilateral or regional agreements or established laws.’²²⁹

However, the Egyptian argument gives no clue as to any valid legal reasoning; instead it can be taken as an attempt to insinuate to the concept of ‘historical rights’. It has also to be noted that the above statement by the Egyptian delegate did not reflect any serious misgivings of the convention; instead it tried to play down the idea that Egypt was not in favour of the convention.²³⁰

The other three abstainers, Ethiopia, Tanzania, and Rwanda are all up-stream States. Tanzania contended that: ‘the draft was the product of a dead-line.’²³¹ However, the crux of Tanzania’s concern was its contention that ‘the ILC’s draft of articles 5, 6 and 7 had been undone by the

²²⁶ U.N. Doc. A/RES/51/229 (1997).

²²⁷ Schwabach, A., ‘*United Nations Convention on the Law on Non-Navigational Uses of International Watercourses, customary Int’l Law, and the Interests of Developing Upper Riparian*’, 33 *Tex. Int’l L.J.* 263(1998)

²²⁸ *Id.*

²²⁹ Statement by Egyptian delegate; See Press Release *supra* note 39.

²³⁰ Schwabach, *supra* note 51 at 263 – 264.

²³¹ See statement by the Tanzanian delegate, Press Release, *supra* note 39.

introduction, in draft article 5, of reference to a demand to take into account the interests of the watercourse States concerned',²³² a notion fairly shared by most upstream States.

The other abstainer, Ethiopia's concern was that: 'the Convention was not balanced, particularly with respect to safeguarding the interest of upper riparian States.'²³³ It claimed that: Article 7 (obligation not to cause significant harm), and Part III (planned measures) of the Convention 'put an onerous burden on upper riparian states.'²³⁴ Ethiopia also expressed its concern on Article 3 regarding existing agreements, contending that: 'the element in Article 3 on adjusting application of the Convention's provisions to the characteristics of a particular watercourse could undermine the Convention.'²³⁵

Ethiopia was in favour of adjustment of specific watercourse arrangements to the convention, not the other way around.²³⁶ It is doubtful whether Ethiopia's position regarding Article 3 indicated its support for the adoption of a uniform body of 'hard' international law governing the non-navigational uses of transboundary watercourses.²³⁷ In order to fully endorse this position, Ethiopia needs to show that its stance on other provisions such as on notification of planned measures conforms to this demand. The plausible argument could be that Ethiopia's view was expressed only in relation to Article 3 and should be understood within the context of that article rather than the spirit of the convention as a whole.

The absence of a majority vote by Nile States in favour of the UNWCC should not be taken as lack of support to the Convention. On the contrary, the observations of statements of all the delegates of the Nile Basin countries were positive indications about the convention and

²³² Id.

²³³ See Statement by the Ethiopian delegate, Press Release *supra* note 39.

²³⁴ Id.

²³⁵ Id.

²³⁶ Id.

²³⁷ Schwabach, *supra* note 51 at 269.

confirmed failure to vote in favour of the convention does not mean an absolute rejection of the spirit of the Convention.²³⁸

Therefore, the assessment of whether the absence of endorsement of the convention by the majority of Nile Basin countries impacted the basin-wide Nile negotiation can be ascertained from the controversial issues that emerged during the negotiations of the new NRBCFA. The same controversial issues that have appeared during the work of the ILC and the GA have ensued during the debates over the NRBCFA, while a number of substantive and procedural principles have been adopted. Therefore, the UNWCC has helped exposing similar important substantive and procedural issues in the process of the development of the NRBCFA and in resolving them.

4.3 Post-adoption support for the UNWCC

Twelve years after its adoption in May 1997 the UNWCC is still not in force, with only 17 countries becoming parties to the Convention, Tunisia being the latest to be a party to the convention on 22 April 2009.²³⁹ Rieu-Clarke and Loures cite three possible reasons for a lower number of contracting States to the convention.²⁴⁰

The first reason is that the adoption of the UNWCC in 1997 has left a gap of half a decade of emergence of a large number of environmental treaties dominating international stages.

²³⁸ For instance, Ethiopia expressed its view that, ‘the Convention might encourage negotiations to ensure equitable utilization and promote cooperation.’ The Tanzanian delegate stated that the draft resolution was of great importance to his country, while Egypt’ expressed the hope that its adoption of the Convention would enhance the Assembly's role in codifying and developing international law, with the aim of promoting international peace and security and upholding the rule of law. See Press Release, *supra* note 91.

²³⁹ See WWF – UN Watercourses Convention, available at http://assets.panda.org/downloads/un_watercourses_convention_ratification_history_1.pdf, accessed 02 August 2009.

²⁴⁰ Rieu-Clarke, A. & Loures, F.R., "Still not in Force: Should States Support the 1997 UN Watercourses Convention?", 18(2) Review of European Community and International Environmental Law, (2009) at 192-193.

Consequently, national States are overburdened by these treaties making most of the States less eager to become parties to the UNWCC.²⁴¹

Secondly, lack of awareness about the convention is widely prevalent in many parts of the regions, most importantly among African river basin States.²⁴² Although there are some positive developments in this area, there are no attempts to build capacity and curricular activities or academic advances in higher education in the field of international water law.²⁴³ The cascading effect at regional and national level, in particular in African transboundary river context, makes the appreciation of the issue of international water law and the UNWCC insignificant.

Moreover, the absence of advocacy and action for change is also one of the reasons for non motivation.²⁴⁴ In this regard one can observe the scant attention accorded to the field of international water law in general and the UNWCC in particular by a large number of international and regional organizations working on the water front.²⁴⁵

The above deficiencies are also critical to the Nile, and can impact for the basin States to become parties to the UNWCC and therefore, have to be addressed with utmost urgency.

²⁴¹ Id. at 192.

²⁴² Id., at 193.

²⁴³ There some initial activities in the Nile Basin under the Applied Training Program. The effort has been minimal and its sustainability has been affected by the transitional nature end of the project. See Applied Training Project, available at www.nilebasin.org, accessed on 09 September 2009.

²⁴⁴ Rieu-Clarke & Loures, supra note 64 at 120.

²⁴⁵ For instance, the United Nations World Water Development Report 3: Water in a Changing World (2009), has been a joint effort of 26 UN agencies and entities which make up UN-Water. See the 3rd United Nations World Water Development Report: Water in a Changing World (2009), available at <http://www.unesco.org/water/wwap/wwdr/wwdr3/>, accessed last on 18 October, 2009.

CHAPTER 5

THE ROLE OF THE WORK OF THE ILC AND GA IN THE DEVELOPMENT AND DRAFTING OF THE NRBCFA

5.1 Introduction

The work of the ILC and the GA on the law of non-navigational uses of international watercourses has been a complex process with the task of attempting to expound what the law is, (*lex lata*) or what it should be, (*lex ferenda*).²⁴⁶ A number of contentious questions on substantive and procedural principles have been raised during the process of the work of the ILC and the GA.

The negotiation for a permanent basin-wide legal and institutional arrangement in the Nile was also characterized by similar contestable issues that divided opinions among the basin States.

This chapter identifies these controversial issues in the work of the ILC and the GA and conducts analysis on their content and posits the legal arguments for resolving contentious issues in the NRBCFA. The most controversial issues that generated great debates both during the work of the ILC and the GA and the negotiations on the NRBCFA were: use of terms; existing and future agreements; equitable and reasonable utilization and its relationship with the obligation not to cause harm; and notification of planned measures.

5.2 Scope and Use of Terms: ‘International Watercourse’

As part of its effort to elaborate applicable rules in relation to the issue of scope regarding the definition of an ‘international watercourse’ and the geographic concept of an ‘international

²⁴⁶ McCaffrey, S.C., ‘*The Law of International Watercourses: Some Recent Developments and Unanswered Questions*’, 17 Den. J. Int’l L., & Pol’y, (1988-1989) at 506.

drainage basin' in 1974, the ILC sent questionnaires to Governments. Government opinions were divided, some favouring the 'watercourse' approach, which is considered restrictive in nature, while others preferred the 'drainage basin' approach.²⁴⁷ The debates in the ILC and the Sixth Committee of the GA in 1976 recognized the critical division between the two of opinions.²⁴⁸

However, there had been attempts by few members of the ILC to restrict the scope of the topic by suggesting that the ILC take up the watercourse, not the water, although there had been no need for creating a distinction in that respect.²⁴⁹ The introduction of a flexible concept of 'international watercourse' by Stephen Schwebel was debated in the ILC and the GA. But the work on the definition was postponed and approved in 1991.²⁵⁰ The UNWWC gives the following meaning to the 'use of terms':

(a) 'Watercourse' means a system of surface waters and ground waters constituting by virtue of their physical relationship a unitary whole and normally flowing in to a common terminus;

(b) 'International watercourse' means a watercourse, parts of which are situated in different States;²⁵¹

The definition establishes a physical relationship between the 'surface water' and 'ground waters', which 'refers to the hydrologic system composed of a number of different

²⁴⁷ Among countries that were in favour of the drainage basin approach were; Argentina, Pakistan, the U.S.A., The Netherlands, Sweden, and Venezuela. A more limited approach was preferred by Brazil, Canada, Colombia, Equator and Austria, See *Replies of Governments to the Commission's Questionnaire*, [1976] 2[1], Y.B. Int'l L. Comm'n, UN Doc. A/C.4/294 and Add.1 at 147.

²⁴⁸ Schwebel, S., *Second report on the law of the non-navigational uses of international watercourses*, [1980], 2(2) Y.B. Int'l L. Comm'n at 159.

²⁴⁹ *Id.*, at 165.

²⁵⁰ Report of the International Law Commission on the work of its Forty-third Session. U.N.Doc. A/46/10 (1991) *reprinted in* [1991] 2(2) Y.B.Int'l L. Comm'n 1, 63-66.

²⁵¹ See Article 2: *Convention on the Law of Non-Navigational Uses of International Watercourses*, May 2, 1997 (not yet in force), *reprinted in* 36 I.L.M. 700 (1977).

components through which water flows, both on and under the surface of the land.’²⁵² Therefore, the impact of use of any part of the system on another part of the international watercourse is recognized in the definition, by calling on ‘the attention of States to the interrelationship between all parts of the system of surface and underground waters that make up an international watercourse’.²⁵³

Another element within the definition of the Convention is the phrase ‘normally flowing in to a common terminus’.²⁵⁴ Special Rapporteur Robert Rosenstock had recommended for the deletion of the term ‘common terminus’ on the grounds that: ‘[t]he notion of ‘common terminus’ does not seem to add anything beyond possible confusion to what is covered by the rest of sub- paragraph, and if retained, the phrase risks creating artificial barriers to the scope of the exercise.’²⁵⁵

It is imperative to raise the question of whether the ‘drainage basin concept’ falls within the contextual interpretation of the meaning of ‘watercourse’ under Article 2(a) of the UNWCC; or in other words, whether the notion of restrictiveness attributed to the concept of ‘international watercourses’ can be dispelled.

The ‘drainage basin’ concept was adopted by the Institute de Droit International and the International Law Association, and since then became part of State practice in some

²⁵² According to the ILC Commentary ‘These components include rivers, lakes, aquifers, glaciers, reservoirs, and canals.’ However, this definition does not include ‘confined ground water’. Draft Articles on the law of the non-navigational uses of international watercourses, (with Commentaries) , G.A., Res. 49/52 (Dec. 9, 1994), *reprinted in* [1994] 2 (2) Y.B.Int’l L. Comm’n at 118-119.

²⁵³ McCaffrey, S.C., ‘The UN Convention on the Law of the Non-navigational Uses of International Watercourses: Prospects and Pitfalls’, in Salman S.M.A. & Boisson de Chazoumes, eds., *International Watercourses - Enhancing Cooperation and Managing Conflict*, Proceeding of the World Bank Seminar, World Bank Technical Paper No.414, (1998), at 18.

²⁵⁴ The phrase ‘normally flowing in to a common terminus’ is modified by the word ‘ normally’, to reflect modern hydrological knowledge as to the complexity of the movement of water. See Draft Articles, *supra* note 7.

²⁵⁵ Rosenstock, R., *First Report on the Law of Non-Navigational Uses of International Watercourses*, [1993] 2[1] Y.B.Int’l L. Comm'n, U.N.Doc., A/CN.4/451 at 179.

conventions and agreements. Examples include Article 1(2) of the UN/ECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes, March 17, 1992.²⁵⁶ In like manner, the 1966 Helsinki Rules on the Uses of Waters of International Rivers defined an ‘‘international drainage basin’’ as: ‘a geographical area extending over two or more States determined by the watershed limits of the system of waters, including surface and ground waters, flowing in to a common terminus’.²⁵⁷

The drainage basin concept is assumed to be incorporated within the ecosystem approach.²⁵⁸ This view is shared by Brunnée and Toope, who held that the drainage basin has the longest relationship to the concept of ecosystem of fresh water.²⁵⁹ The notion is supported by Article 20 of the UNWCC, which provides, ‘Watercourse States shall, individually and, where appropriate, jointly, protect and preserve the ecosystems of international watercourses.’²⁶⁰ The general obligation under this article imposes the duty to cooperate; and is complemented by subsequent specific articles on prevention, reduction and control of pollution; introduction of alien or new species; protection and preservation of marine environment; regulation; management and prevention and mitigation of harmful conditions.²⁶¹ Since the ILC has selected the term ‘ecosystem’ as an alternative to ‘environment’ with a view to avoiding the risk that the latter might be construed to mean to refer only to areas outside the watercourse, one could infer that it also covers land areas.²⁶² Therefore, the meaning of the term

²⁵⁶ See 31 I.L.M. 1312, 1992. Similar provisions exist under Article 1 of Agreement for the Environmentally Sound Management of the Zambezi River System, May 28, 1987, (27 I.L.M. 1109, 1988).

²⁵⁷ See: *Article II, Helsinki Rules on the Uses of Waters of International Rivers*, adopted by the ILA at the 52nd Conference, Helsinki, Finland, August 1966, reprinted in Bogdanović, S., *International Law of Water Resources – Contribution of the International Law Association (1954-200)*, 89 (Kluwer Law International, The Hague 2001).

²⁵⁸ Tanzi, A., & Arcari, M., *The United Nations Convention on the Law of International Watercourses: A Framework for sharing*, (Kluwer Law International, London, 2001) at 60.

²⁵⁹ Brunnée, J., & Toope, J., ‘*Environmental Security and Freshwater Resources: Ecosystem regime Building*’, 91 *Am. J. Int’l L.*, (1997), at 51.

²⁶⁰ See Article 20, UNWCC, *supra* note 6.

²⁶¹ *Id.*, Articles 21-28.

²⁶² Tanzi & Arcari, *supra* note 13, at 60.

‘watercourse’ under Article 2(2) of the Convention includes elements of the drainage basin concept.

In the Nile, the issue of the use of terms has been a subject of controversy as well. Article 2 of the NRBCFA provides:

For the purpose of the present Framework:

1. Nile River Basin’ means the geographical area determined by the watershed limits of the Nile River system of waters;
2. ‘Nile River system’ means the Nile River and the surface waters and ground waters which are related to the Nile River;²⁶³

The term, ‘Nile River basin’ under the above Article adopts a partial meaning of the term ‘international drainage basin’ as defined under the 1966 Helsinki Rules.²⁶⁴ According to this meaning, the Nile watershed limits adopts a distinct economic regional approach in which integrated development of all the resources of the Nile is planned, managed at the basin level, and supervised by the Nile Basin Commission, a body with basin-wide powers.²⁶⁵ This type of management assumes that any impact on any part on the river basin affects the entire river

²⁶³ See Article 2, Nile River Basin Cooperative Framework Agreement (NRBCFA), 5 December 2005 (not yet signed), Copy with Boundary and Transboundary Rivers Affairs Department, Ministry of Water Resources, Ethiopia.

²⁶⁴ Article II, Helsinki Rules on the Uses of Waters of International Rivers, *supra* note 12.

²⁶⁵ The emergence of the concept of drainage basin was the result of interdependence of co-basin states and the decline of the notion of territorial sovereignty in favour of community of interest and good neighbourliness. See: Bourne, C.B. ‘*The Development of International Water Resources: The Drainage Basin Approach*’, in Wouters, P.K., ed., *International Water Law, Selected Writings of Professor Charles B. Bourne*, 1-3 (Kluwer Law International, London, 1997). IIL’s successive conferences in the 1950s and the 1961 Salzburg Declaration have endorsed the integrated basin principle. See; *Utilization of non-maritime international waters, resolution adopted by the Institute of International Law, Salzburg, Austria, Sep.13, 1961*, reprinted in 49Annuaire de l’Institute de Droit International, Vol. II, 38 (1961). For a detailed account, see Teclaff, L. A., ‘*The River Basin Concept in National and International Water Law*’, 36[2], Nat. Resources J. (1996), at 360.

basin system as a whole.²⁶⁶ This interpretation has not been welcomed by some upstream States, particularly Ethiopia, which argued that the concept closes upon sovereign territories of a Basin State, and puts its development activities under duress.²⁶⁷

Explored through contextual interpretation the NRBCFA assumes an ecosystem approach, which may be seen as advancing a drainage basin concept in line with Article 20 of the UNWCC.. Accordingly, Article 3(7) of the NRBCFA provides:

‘The principle that Nile Basin States take all appropriate measures, individually and, where appropriate, jointly, for the protection and conservation of the Nile River Basin and its ecosystems’.²⁶⁸

Under Article 6 the NRBCFA provided;

Nile Basin States shall take all appropriate measures, individually and, where appropriate, jointly, to protect, conserve and, where necessary, rehabilitate the Nile River Basin and its ecosystems, in particular, by:

- (a) protecting and improving water quality within the Nile River Basin,
- (b) preventing the introduction of species, alien or new, into the Nile River system which may have effects detrimental to the ecosystems of the Nile River Basin;
- (c) protecting and conserving biological diversity within the Nile River Basin;
- (d) protecting and conserving wetlands within the Nile River Basin;

²⁶⁶ Rieu Clarke, A.S., ‘*Sustainable Use and the EC Water Framework Directive: From Principle to Practice*’ in Nico Schrijver and Friedl Weiss (Eds), *International Law and Sustainable Development, Principle and Practice*, Koninklijke Brill NY, (2004), at 560.

²⁶⁷ Ethiopia introduced the following note: ‘The use of the expressions “Nile River system” and “Nile River Basin” shall be applied appropriately throughout the Framework text, where “system” should refer to Nile water uses, and impacts, while “Nile River Basin” should be used to refer to territories, conservation and protection issues. See Ethiopia’s Note - Art. 3, NRBCFA, supra, note 18. Ethiopia’s position is a reflection of a perceived impending danger of placing the exploitation and use of a basin State’s natural resources, such as land, mineral resources, plants and animal resources, as well as the development of industry and infrastructure under international obligations, thereby impinging on riparian sovereign right to the use of these resources

²⁶⁸ Id. Article 3(7).

and

(e) restoring and rehabilitating the degraded natural resource base.

Nile Basin States shall, through the Nile River Basin Commission, take steps to harmonize their policies in relation to the foregoing.²⁶⁹

In addition Article 11 sets out:

‘Nile Basin States shall, individually and, where appropriate, jointly through cost-sharing by the Nile Basin State or States that may be affected, make every effort to take all appropriate measures to prevent or mitigate conditions related to the Nile River system that may be harmful to other Nile Basin States, whether resulting from human conduct or natural causes, such as flood conditions, invasive water weeds, water-borne diseases, siltation, erosion, drought or desertification. In implementing this provision, Nile Basin States shall take into account guidelines to be developed by the Nile River Basin Commission.’²⁷⁰

Moreover, Article 1 of the NRBCFA requires;

‘The present Framework applies to the use, development, protection, conservation and management of the Nile River Basin and its resources and establishes an institutional mechanism for cooperation among the Nile Basin States.’²⁷¹

Supported by the above provisions and analysis, it is therefore, possible to conclude that in the Nile context the terms ‘ Nile River Basin’ and ‘Nile River System’ are interrelated and

²⁶⁹ Id., Article 6.

²⁷⁰ Id. Article 11.

²⁷¹ Id. Article 1.

their application incorporates elements of ecosystem cum drainage basin approach, and is compatible with contextual interpretation of the provisions of the UNWCC.²⁷²

5.3 Existing and Future Agreements

The question of the relationship of the Convention to existing and future agreements was one of the most debated issues in the WG. Article 3 (1-3) of the UNWCC provides that:

- 1) In the absence of an agreement to the contrary, nothing in the present Convention shall affect the rights or obligations of a watercourse State arising from agreements in force for it on the date on which it became a party to the present Convention.
- 2) Notwithstanding the provisions of paragraph 1, parties to agreements referred to in paragraph 1 may, where necessary, consider harmonizing such agreements with the basic principles of the present Convention.
- 3) Watercourse States may enter into one or more agreements, hereinafter referred to as ‘watercourse agreements’, which apply and adjust the provisions of the present Convention to the characteristics and uses of a particular international watercourse or part thereof.²⁷³

²⁷² It has to be noted here, that a new guideline introduced by the Nile-COM instructs the use of the term ‘Nile River System’ where there is a reference to utilization of water, and ‘Nile River Basin’, where there is a reference to environmental protection, conservation, or development. Instead of going throughout the text, the above guideline was incorporated as part of the definition of the use of terms under Article 2 of the text. Thus, the chapeau of Article 3, which has been controversial, was amended to read: ‘The Nile River Basin and the Nile River System shall be protected, used, conserved, and developed as applicable in accordance with the following general principles.’ See NRBCFA, *id.* See *Minutes of the Extraordinary Meeting of the Nile-COM*, 21-23 Feb. 2007, Kigali, Rwanda. For a further reading on some of the issues raised, see McCaffrey, S.C., *The Contribution of the UN Convention on the law of the non-navigational uses of international watercourses*, 1 *Int. J. Global Environmental Issue*, (2001) at 251. A recent Article by Dr. Alistair R. Clarke clearly illustrates how different instruments (the 1997 UNWCC; the 2000 EU Water Framework Directive; and the 1992 UN ECE Helsinki Convention) interface within the context of the EU and its member States in covering in land surface waters; transnational waters, coastal and ground waters with little conflict between them. See Rieu-Clarke, A.S., ‘*The Role and Relevance of the UN Convention on the Law of the Non-Navigational Uses of International Watercourses to the EU and its Member States*’, 78 *BYB Int’l L*, (2008) at 397-398, 427. Similar analysis could also be extended to the Nile basin.

²⁷³ Article 3(1-3), UNWCC, *supra* note 6.

The debate over the issue underlined two views. The first view held that existing agreements should not be affected by the new Framework agreement, while the second argument contended that existing watercourse agreements should be superseded by some basic provisions in the Convention, and these provisions should be regarded, not only as codification of existing customary rules, but as rules of *jus cogens*.²⁷⁴ The later argument is supported to some extent by Article 30(3) of the Vienna Convention on the Law of Treaties, which states that:

‘when all the parties to the earlier treaty are parties also to the later treaty, but the earlier treaty is not terminated or suspended in operation...the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.’²⁷⁵

The work of the ILC and GA choosing not to upset thousands of existing treaty regimes, and prescribing rules for future international watercourse treaty formation, adopts a formula based on the ‘framework’ character of the convention, that allows parties to apply and adjust the general principles of the Convention to their specific agreements, avoiding rules that could raise it to the level of *jus cogens*.²⁷⁶ The provision under the UNWCC therefore, does not provide sufficient guideline in solving the relationship between the UNWCC and existing and

²⁷⁴ This view was advanced in the WG by countries such as Ethiopia and Portugal. The current provision of Article 3 of the Convention was introduced after much debate in the Working Group, with the strongest opposition to the Article coming from upper riparian countries such as Ethiopia. In a recorded vote on the article, 36 countries voted in favour, while Ethiopia, Turkey, and France voted against. The abstentions by 21 States were not a negligible number, and indicated the sensitivity and importance of the issue of existing agreements. See Ethiopia's argument on the above issue. G/A-51st Session, Official Records, 7, U.N. Doc. A/C.6/51/SR.13 (1996) para25. See Caflisch, L., ‘Regulation of the Uses of International Watercourses’ in Salman S.M.A. & Boisson de Chazoumes, eds., *International Watercourses - Enhancing Cooperation and Managing Conflict*, Proceeding of the World Bank Seminar, World Bank Technical Paper No.414, (1998), at 10.

²⁷⁵ Vienna Convention on the Law of Treaties, 8 I.L.M., 702, 1969, (adopted on May 22, 1969 at 691).

²⁷⁶ See Caflisch, *supra* note 29 at 11. *Jus cogens* are rules of customary international law which cannot be set aside by treaty or acquiescence but only by the formation of subsequent customary rule of contrary effect.’ *Jus cogens* is a peremptory norm of international law, ‘a norm accepted and recognized by the international community of states as a whole as a norm from no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character. See Brownlie, ‘*Principles of Public International Law*’, Seventh ed. Oxford University Press, (2008), at 511.

future agreements, as the general rules of the UNWCC have been deprived of any derogatory effect.²⁷⁷

In the Nile basin the controversy over the issue of existing and future agreements is more acute than in any other basins in Africa. The failure of the UNWCC to adopt a more derogatory rule has compounded the controversy over the issue of existing and future agreements, for there are no specific provisions providing guidelines towards a solution.

The legal argument over the issue of existing agreements in the Nile Basin has the majority view that supports the *lex posterior* rule²⁷⁸ as provided under Article 14 of the NRBCFA. According to this Article, ‘existing agreements which are inconsistent with the Framework shall be null and void to the extent of their inconsistency.’²⁷⁹

The NRBCFA text is intended to create a balance between existing agreements and the new Framework by allowing the continuation of those provisions which conform to the Framework, while ascertaining the authoritative nature of the new basin wide framework agreement by giving its rules a derogatory effect at the same time.

Egypt and Sudan are against the text and prefer the UNWCC formulation, which leaves the issue to the discretion of contracting parties.²⁸⁰ Therefore, issue of existing agreements remains the main stumbling block for the signature and implementation of the new cooperative framework agreement. However, the controversy around this issue is more of

²⁷⁷ Tanzi, A., & Arcari, *supra* note 13 at 84.

²⁷⁸ Priority of new rules over old rules of the same type is envisaged under Article 14 of the NRBCFA.

²⁷⁹ See Article 14, NRBCFA, *supra* note 18.

²⁸⁰ Note: Egypt and Sudan entered a reservation to this provision and proposed the following alternative provisions: Alternative 1: ‘The Cooperative Framework shall be without prejudice to existing agreements.’ Alternative 2: ‘The present Cooperative Framework is without prejudice to existing agreements. ‘Existing agreements on the Nile River waters will be interpreted taking into account the provisions of this Framework and the rules of general international law.’ See Article 14, Nile River Basin Cooperative Framework Agreement (NRBCFA), *supra* note 18.

historical and political rather than legal.²⁸¹ The Nile basin States thus can still refocus on how to resolve the issue of existing agreement within a legal context of the UNWCC.

Most of the Nile basin countries now have opted for the idea of substituting the provisions of existing agreements under the NRBCFA by a new concept of ‘water security’.²⁸² Despite this fact, the suggestion of this study is that the framework nature of the UNWCC still provides space to continue negotiation in good faith with proper adjustment on the matter of existing and future agreements, taking in to account the peculiar nature of the Nile Basin. This could be handled by a future NRBC along with other issues, such as modalities for equitable and reasonable utilization, and the degree of harm could be tolerated.

5.4 The Relationship between Equitable and Reasonable Utilization (ERU) and No Significant Harm

Equitable utilization - The evolution of the equitable apportionment attained significance in the doctrine of interstate stream conflict of laws, in the decisions of the U.S. Supreme Court.²⁸³ The principle of equitable utilization is now a part of the body of customary international law, a view supported by the ICJ in the Gabčíkovo Nagymaros case.²⁸⁴

²⁸¹The main contention is the issue of the old treaties between Egypt and Sudan, and similar colonial treaties, which accorded entitlements to the two countries and obliges the rest not to carry out activities without the consent of the two downstream states. See *Exchange of Notes between the United Kingdom and Egypt in regard to the Use of the Waters of the River Nile for Irrigation Purposes*, Cairo, May 7, 1929, LNTS, Vol. XCIII, p.43, (1929 July 26, No.2103; *Agreement between the Republic of the Sudan and the United Arab Republic of Egypt for the Full Utilization of the Nile Waters*, Cairo, 8 Nov., 1959, 453 UNTS 66 (1963); See also the current provision on the issue of existing agreements; Article 14, NRBCFA, *supra* note 18.

²⁸²The issue of water security is a new concept and controversial. Egypt and Sudan argue that the new formula must accommodate the existing use enjoyed by the two countries under the 1929 and 1959 agreements. Ethiopia sees this as another way of legitimizing the 1929 and the 1959 agreements over the rest of the basin states. See, *Minutes of the Extraordinary Meeting of the Nile-COM*, 21-23 Feb. 2007, Kigali, Rwanda.

²⁸³ The case in point is *Kansas v. Colorado*, where the Supreme Court of the U.S. stated that ‘One cardinal rule, underlying all the relations of the States to each other is that of equality of rights. Each State stands on the same level with all the rest. It can impose its own legislation on no one of the others, and is bound to yield its own views to none.’ See *Kansas v. Colorado*, 206 US 46, (1907) at 97. See Simms, R.A., ‘*Equitable Apportionment-Priorities and New Uses*’, 29 Nat. Resources J. (1989) at 549.

²⁸⁴The ICJ referred to the 1997 UNWCC to conclude that Czechoslovakia by unilaterally assuming control of a resource deprived Hungary of its ‘right to an equitable and reasonable share of natural resources.’ See Case Concerning Gabčíkovo-Nagymaros Project, (Hung. v. Slovak), Sep. 25, 1997, 37 ILM 162 (1998). See

Article 5 of the UNWCC provides:

(1)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 in to account the interests of the watercourse States concerned, consisted with adequate protection of the watercourse.’

(2)Watercourse States shall participate in the use, development and protection of an international watercourse in an equitable and reasonable manner. Such participation includes both the right to utilize the watercourse and the duty to cooperate in the protection and development therefore, as provided in the present Convention.²⁸⁵

In the same manner Article 4 (1) of the NRBCFA sets out:

‘Nile Basin States shall in their respective territories utilize the water resources of the Nile River Basin in an equitable and reasonable manner. In particular, those water resources shall be used and developed by Nile Basin States with a view to attaining optimal and sustainable utilization thereof and benefits therefrom, taking into account the interests of the Basin States concerned, consistent with adequate protection of those water resources.’²⁸⁶

Both provisions stipulate fundamental rights and duties of States in the utilization of international water courses. However, unlike the UNWCC, the second sentence of Article 4(1) of the NRBCFA provides

Fitzmaurice, M. & Elias, O., ‘*Watercourse Cooperation in Northern Europe*’, T.M.C. Asser Press, The Hague, (2004) at 29.

²⁸⁵ See Article 5, UNWCC, *supra* note 6.

²⁸⁶ See Article 4, NRBCFA, *supra* note 18.

‘Each Basin State is entitled to an *equitable and reasonable share* [emphasis added] in the beneficial uses of the water resources of the Nile River Basin’.²⁸⁷

The UNWCC does not make any reference to the concept of ‘sharing’, although the concept of Shared Natural Resources was debated in the ILC, and later rejected on the ground that it may convey the idea of common or undivided property.²⁸⁸ It seems that the term has been introduced to the Nile from Article IV of the Helsinki Rules, albeit with a different understanding.²⁸⁹ In the Nile context, the introduction of the term ‘share’ is seen by upper riparian States as a guarantee to a ‘volumetric or physical sharing’, of water in order to redress the prevailing historical injustices under the existing agreements.²⁹⁰ Whether the Helsinki Rules supported this understanding is not clear, although it has been suggested that Article IV of the Helsinki Rules on ‘reasonable and equitable sharing’ principle is aimed at providing the maximum benefit to each basin state from the use of the waters with the minimum detriment to each’ bears ‘some resemblance to the concept of optimal utilization under the UNWCC’.²⁹¹

The idea of ‘volumetric water sharing’ is increasingly challenged by the ‘new’ concept of ‘benefit sharing’ making the need for a concrete mechanism on how ‘water sharing arrangement’ under the NRBCFA has to be realized in the Nile more important than ever.²⁹²

²⁸⁷ Id.

²⁸⁸ See *Report of the International Law Commission on the Work of its Thirty-second Session*, U.N. Doc. A/35/10 (1980), reprinted in [1980] 2(2) Y.B. Int’l L. Comm’n 1, 120 *et seq.*

²⁸⁹ Article IV provides: ‘each basin State is entitled, within its territory, to a reasonable and equitable share in the beneficial uses of waters of an international drainage basin’. Helsinki Rules, *supra* note 12.

²⁹⁰ Although ‘volumetric water sharing’ has not been clearly and officially envisaged as a policy, countries such as Ethiopia demanded water sharing as a precondition for cooperating on planned measures. See Ethiopia’s reservation on NRBCFA, Article 8 where it stated that: ‘Ethiopia entered a reservation suggesting that the provision on planned measures should be deleted altogether as it can be covered by Article 7 and the issue of planned measures becomes relevant if and only if a water sharing arrangement acceptable to the basin states is put in place.’ See Article 8, NRBCFA, *supra* note 18.

²⁹¹ Tanzi & Arcari, *supra* note 13 at 105.

²⁹² The new concept of benefit sharing has been a subject of consideration by the NBI, as confusion on the concept vis-à-vis the rule of equitable and reasonable utilization. See Nile Basin Initiative : Benefit Sharing

The term ‘water sharing’ under the UNWCC has been related to the concepts of ‘optimal and sustainable utilisation’ along with the wording ‘taking in to account the interests of the watercourse States concerned’.²⁹³

In a debate in the WG, opinions of the Nile States were divided in favour of and against the introductions of the above phrases.²⁹⁴ However, far from continuing their argument over the issues, the Nile basin States adopted the provision on equitable utilization, which incorporated the above phrases. This is a significant shift from their earlier positions.²⁹⁵

According to the ILC Commentary, the word ‘equitable’ refers to ‘the attainment of optimal utilization and benefits’.²⁹⁶ The Commentary further elaborates ‘the attainment of maximum possible benefits for all watercourse States and achieving the greatest possible satisfaction of all their needs, while minimizing the detriment to, or unmet needs of each.’²⁹⁷ This interpretation could be applied to the NRBCFA as well.

The other important element is the recognition of ecosystem and environmental protection as an essential component of ERU, requiring consistent environmentally sound management of

Framework [BSF] for Nile Basin Countries, available at <http://www.nilebasin.org/>, accessed on 07 September 2009.

²⁹³ See Article 5(1), UNWCC, *supra* note 6.

²⁹⁴ Initially, during the WG debates Ethiopia was against the introduction of the wording ‘taking in to account the interests of the watercourse States concerned’. See Official Records, GA, 51st Session, A/C.6/51/SR.15, 1996, at 65.

²⁹⁵ During the discussion on Article 5 in the WG several States considered it an additional obligatory text, and made part of the article in an attempt to water-down the concept of ‘equitable utilization’, thereby creating imbalance between the right to utilize the watercourse and no harm rule. For the opinion of watercourse states on the issue, see U.N. GAOR, 5., U.N. Doc. A/51/SR.6 [1997], See also Tanzi & Arcari, *supra* note 13 at 108.

²⁹⁶ According to the ILC ‘s Commentary: ‘attaining optimal utilization and benefits does not mean achieving the maximum use, the most technologically efficient use, or the most monetarily valuable use much more short-term gain at the cost of long-term loss. Nor does it implies that the state capable of making the most efficient use of [international watercourse], whether economically, in terms of avoiding waste, or in any other sense-should have a superior claim to the use thereof.’ See *Draft Articles on the law of the non-navigational uses of international watercourses, (with Commentaries)*, G.A., Res. 49/52 (Dec. 9, 1994), reprinted in [1994] 2 (2) Y.B.Int’l L. Comm’n at 26.

²⁹⁷ *Id.*

fresh water resources.²⁹⁸ There are some who argued that the work of the ILC has failed to provide sufficient guidelines on environmental matters forcing watercourse States to look beyond the UNWCC for guidance in the formulation of substantive principles on which to build fresh water agreement based on key elements of ecosystem approach.²⁹⁹

One should however, note that, this view fails to appreciate the degree of attention accorded to the issue of the ecosystem and the environment in the work of the ILC and the GA in the UNWCC.³⁰⁰ Although the work of the ILC and the GA cannot be considered in equal measures with that of universal environmental instruments; because of its framework nature that leaves specific details to watercourse agreements, it however, sufficiently addresses issues pertaining to the environment and ecosystem.³⁰¹

Article 6(1) of the UNWCC lists 'natural factors', which are related to physical characteristics of international watercourses, and 'functional factors' which are associated with economic and social needs.³⁰² Regarding the 'natural factors', a proposal put forward by Ethiopia to include 'water contribution by each watercourse State' as provided under Article V of the Helsinki Rules was not accepted by the Working Group in the process of the debate

²⁹⁸ See Article 5(2), UNWCC, *supra* note 6. Conflicting views appeared with regard to the issues of sustainable utilization and adequate protection, concepts based on eco-system approach. One view insisted for the express reference of the newly emerging principles such as "sustainable management", "precautionary principles", and "eco-system approach" in Articles 5 and 6. This view is countered on the ground that it affects the traditional concept and meaning of equitable utilization, and the effort to establish a balance between Article 5 and Article 7. See General debate on this issue; particularly the proposal by Switzerland and Portugal, and response by Turkey. See U.N. Doc. A/C-6/51/SR.15.

²⁹⁹ See for instance, Brunnee, J., & Toope, S., *Environmental Security and Fresh Water Resources: Ecosystem Regime Building*, 91 Am. J. Int'l L., (1997), at 50.

³⁰⁰ Both the scope of the convention under article 1, and the general obligation on the issue of protection and preservation of the ecosystem under article 20 have sufficiently addressed the issue, bearing in mind that the work has been intended as a watercourse Convention. More over specific provisions on the issue on the issue have been provided under 21-28. See Articles 1, 20-28, UNWCC, *supra* note 6.

³⁰¹ See Protocol for Sustainable Development of Lake Victoria Basin, November 29, 2003, available at <http://faolex.fao.org/> reprinted in (2000) 40IML 321.

³⁰² See Article 6(1), UNWCC, *supra* note 6.

over the UNWCC. However, the Nile basin States have been able to endorse it in the new cooperative framework agreement.³⁰³

Article 6 requires watercourse States to apply all relevant factors and circumstances ‘taking into account ... the utilization of the watercourse in question, the needs and uses of the watercourse States concerned.’³⁰⁴ The factors under Article 6 cover two broad categories. The first category include natural or scientific factors such as: hydrographic, hydrological, climatic, ecological factors , effects of use of other watercourse States, existing and potential uses, conservation measures and availability of alternatives.. The other category comprises of socio-economic factors which include social and economic needs, population dependent on the watercourses.³⁰⁵ This requirement prohibits priority of uses under paragraph 1, while ‘vital human needs’ is considered an essential requirement under paragraph 2 in balancing different needs and uses.³⁰⁶ The term ‘vital human needs’ has been debated as to its exact meaning, with the ILC defining it as ‘the provision of sufficient water to sustain human life, including for drinking and food production in order to prevent starvation’.³⁰⁷

The NRBCFA provides similar factors stipulated under Article 6 of the UNWCC in determining what equitable and reasonable utilization is.³⁰⁸ However, it further adopts

³⁰³ Ethiopia submitted a written proposal for the introduction of water contribution. See U.N. Doc. WG/CRP.28. See also Tanzi and Arcari; *supra* note 13, at 130.

³⁰⁴ See Art. 6(1) (b & c), UNWCC, *supra* note 6. See also Tanzi & Arcari, *id.*, at 121.

³⁰⁵ *Id.*

³⁰⁶ *Id.* See Article 10.

³⁰⁷ ILC Commentary, *supra* note 51 at 110.

³⁰⁸ Article 4, paragraph 2 of the NRBCFA lists the following relevant factors and circumstances, but not limited to:

- a) Geographic, hydrographic, hydrological, climatic, ecological and other factors of a natural character;
- b) The social and economic needs of the Basin States concerned;
- c) The population dependent on the water resources in each Basin State;
- d) The effects of the use or uses of the water resources in one Basin State on other Basin States;
- e) Existing and potential uses of the water resources;

additional factors of ‘water contribution’, and the ‘extent and proportion of the drainage basin’ from the 1966 Helsinki rules.³⁰⁹

The most significant introduction in to the NRBCFA is the concept of ‘assessment’ and ‘monitoring’ of water utilization under Article 4(5-6), where by a Nile Basin State is required, according to its national laws and regulations to keep the status of water utilization in its respective territory under review in light of substantial changes in relevant factors and circumstances.³¹⁰ This provision provides a mechanism of verification of the status of equitable utilization in the Nile, which is critical for ascertaining the flexible implementation of basic principles of equitable and reasonable utilization on the ground.

The implementation requires appropriate national legislation and institutions for conducting the assessment and verification, while at the same time the NRBC is given overall responsibility for facilitating and overlooking such assessment and verification.³¹¹ The assessment and monitoring at basin and national level requires basin states to take up responsibility for harmonization of their national laws and policies. The implementation of this article can therefore, enhance trust and confidence in undertaking monitoring and evaluation of the status of equitable utilization by the countries themselves.

The above objective can be achieved through consultations among the basin States.

Consultation among watercourse States regarding the application of ERU has been provided

f) Conservation, protection, development and economy of use of the water resources and the costs of measures taken to that effect;

g) The availability of alternatives, of comparable value, to a particular planned or use;

h) The contribution of each basin State to the waters of the Nile River System;

i) The extent and proportion of the drainage area in the territory of each Basin State.

³⁰⁹ See Article V (a-b), Helsinki Rules, *supra* note 12.

³¹⁰ See Article 4 (5-6), NRBCFA, *supra* note 18.

³¹¹ *Id.*, Art. 4 (3), NRBCFA The Nile Basin Commission will be responsible for preparation of rules and procedures for the effective implementation of the principle of equitable and reasonable utilization, and to hold consultations with each other regarding the application of equitable and reasonable utilization.

under both instruments.³¹² The consultation is not a negotiation; rather a low profile engagement intended to ‘reduce unilateralism in the assessment of the equitable utilization of an international watercourse, without diminishing the importance of an individual action in the implementation thereof.’³¹³

Obligation not to cause harm - The right to of equitable and reasonable utilization by a watercourse States within its territory imposes a corresponding obligation not to cause harm to other watercourse States. The no-harm principle is related to the maxim; *sic utere tuo ut alienum non laedas* (so use your own as not to harm that of another), and drives from responsibilities of sovereign states regarding their actions or inactions in relation to each other.³¹⁴ In the *Corfu Channel case*, the International Court of Justice found Albania responsible, not because there had been any incriminating evidence directly linking Albania with the action, but because Albania as a sovereign State failed in its obligation to notify ships that operate in the area of impending harm or danger.³¹⁵

Similarly in the *Trail Smelter* arbitration, it was stated that: ‘no State has the right to use or permit the use of its territory in such a manner as to cause injury...to the territory of another or the properties or persons therein.’³¹⁶ The *Lake Lanoux*³¹⁷ and the *Gabcikovo-Nagymaros*³¹⁸ cases also establish important opinions regarding the obligation of watercourse

³¹² See Articles 6(2) of the UNWCC, *supra* note 6.

³¹³ Tanzi & Arcari, *supra* note 13 at 123.

³¹⁴ Schwebel, S., *Third Report on the Law of Non-Navigational Uses of International Watercourses*, [1982] 2(2) Y. B. Int'l L. Comm'n, at 65, U.N. Doc. A/CN.4/348 at 92, Paragraph, 113. See also McCaffrey, S.C., ‘*The Law of International Watercourses: Non-Navigational Uses*’, Oxford University Press, (2003) at 349.

³¹⁵ The *Corfu Channel case* (U.K. vs. Alb.) 1949, ICJ, 4 (Apr.9).

³¹⁶ *Trail Smelter Arbitration* (U.S. v. Can.), 3R.I.A.A. 1905(1945).

³¹⁷ *Lake Lanoux Arbitration* (Fr. v. Spn.) 12U.N.R.I.A.A. 281 (1957).

³¹⁸ *Case Concerning the Gabcikovo-Nagymaros Project* (Hun. v. Slovak.), Sep.25, 1997, 37ILM, 162(1998).

States not to cause harm in the course of their utilization of international watercourses. There are various other international instruments that adopted the principle of 'no harm'.³¹⁹

Article 7 of the UNWCC provides the obligation not to cause significant harm, where:

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 states whose use causes such harm shall, in the absence of agreement to such use, take all appropriate measures, having due regard for the provisions of 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.³²⁰

Pursuant to the above rule, a State may utilize the waters of international watercourse without causing injury to co-basin States.³²¹ Article 7 of the UNWCC and the NRBCFA set forth a process aimed at avoiding significant harm while reaching an equitable result in each concrete case.³²²

Likewise, the obligation not to cause significant harm under Article 5 of the NRBCFA reads:

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

³¹⁹ Principle 21, the Stockholm Declaration of the United Nations Conference on Human Environment of 1972(11 ILM,1972), the Rio Declaration of U.N. Conference on Environment and Development of 1992; the Madrid Resolution of 1911, the 1961 Salzburg Resolution, and 1966 Helsinki Rules by the ILA are some of the important instruments that have incorporated the "no harm" principle.

³²⁰ See Article 7, UNWCC, *supra* note 6.

³²¹ Bourne, B.C., '*International Law and Pollution of International Rivers and Lakes*', in Wouters, P.K., ed., *International Water Law, Selected Writings of Professor Charles B. Bourne*, 112, (Kluwer Law International, London, 1997).

³²² Article 7 UNWCC, *supra* note 6. See also ILC Commentary, *supra* note 51 at 103.

Where significant harm nevertheless is caused to another Nile Basin State, the States whose use causes such harm shall, in the absence of agreement to such use, take all appropriate measures, having due regard for the provisions of Article 4 above, in consultation with the affected State, to eliminate or mitigate such harm and, where appropriate, to discuss the question of compensation.³²³

The NRBCFA requires a Nile Basin State to take all appropriate measures in order to prevent the causing of significant harm to other Basin States, in utilizing the water resources of the Nile Basin in its respective territory, in a similar fashion to that under Article 7 of the UNWCC.³²⁴ Furthermore, it makes ‘causing no significant harm’ an obligation of ‘due diligence’ which a flexible threshold is permitting lawful State activities. Examined within the context of the ILC commentary: ‘...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 not prevented others in its territory from causing that event or has abstained from abating it.’³²⁵

The concept of due diligence under Article 5, paragraph 1 indicates that significant harm is unavoidable; hence, the obligation is that of conduct than of result. Accordingly to this notion, the general rule governing the Nile is that a basin State can be considered legally responsible for causing significant harm, only if it failed to demonstrate that its use is equitable and reasonable; and that it has not taken all appropriate measures to prevent the harm in question.³²⁶

³²³ Article 5, NRBCFA, *supra* note 18.

³²⁴ *Id.*

³²⁵ ILC Commentary, *supra* note 51, at 103.

³²⁶ Rieu-Clarke, A. S., ‘*International Law and Sustainable Development, - Lessons from the Law of International Watercourses*’, IWA Publishing, London, (2005) at 117-118.

The relationship between the principle of equitable and reasonable utilization and no-harm -

The relationship between the two basic principles has been one of the most contentious issues both within the ILC, and the WG of the GA. At the heart of the debate is the question of primacy on equitable and reasonable utilization and no significant harm.³²⁷

Arguing in favour of the primacy of the principle of equitable utilization Prof. Bourne stated that: ‘the Convention does not embody the notion that a project that is admittedly equitable and reasonable cannot be implemented if it will cause significant harm to other watercourse States; nor does it support the notion that a use that causes significant harm is *ipso facto* inequitable and unreasonable, significant harm is subordinate to equitable utilization.’³²⁸

Prof. Stephen McCaffrey provides cautious analysis on the issue. He states that: ‘it is difficult to answer the crucial question of which of the two rules.... takes precedence over the other

³²⁷ Bourne, C.B., ‘*The Primacy of Principle of Equitable Utilization in the 1997 Watercourses Convention*’: 35 *Can. Y. B. Int’l L.*, (1997), at 221. See the following for a detailed account and positions adopted by experts and international lawyers in the field. Fitzmaurice, M., and Loibl, G., ‘*Current State of Development in the Law of International Watercourses*’, in Subedi, S.P., (ed.), *International Watercourses Law for the 21st Century – The Case of the River Ganges Basin*, Ashgate Publishers, (2005), at 25. The difficulty to reconcile the provision on equitable and reasonable utilization and that of significant harm could be gathered not only from the debates at the ILC and the Sixth Committee of the U.N. General Assembly, but also from the positions adopted by the Special Rapporteurs. For instance, Judge Stephen M. Schwebel endorsed the principle of equitable and reasonable utilization, while Judge Jens Evenson made ‘no appreciable harm’ an overriding factor, in determining the legality of a utilization of the waters on international watercourses. Professor Stephen McCaffrey and Mr. Rosenstock adopted the primacy of equitable and reasonable utilization. See: Schwebel, S., *Third Report on the Law of Non-navigational Uses of International Watercourses*, [1982], 2(2) *Y.B. Int’l L. Comm’n*, 65, U.N. Doc. A/CN.4/SER.A/1982/Add.1, at 103.; Evenson, J., *First Report on the Law of Non-navigational Uses of International Watercourses*, [1983], 2(2) *Y.B. Int’l L. Comm’n*, at 155, U.N. Doc. A/CN.4/367 and Corr.1 at 170-171; McCaffrey, C. S., *Fourth Report on the Law of the Non-navigational Uses of International Watercourses*, U.N.GAOR, Int’l L. Comm’n, 40th Sess. at 14, U.N. Doc. A/CN.4/412/Add.2, (1998) – For a detailed discussion of the issue see: Bourne, C.B., *The International Law Commission’s Draft Articles on the Law of International Watercourses: Principles and Planned Measures*, 3 *Colo. J. Int’l Envt’l L. & Pol’y*, 73-75, (1992); Wouters, P.K., ‘*Allocation of Non-navigational Uses of International Watercourses: Efforts at Codification and the Experience of Canada and the United States*’ 30 *Can. Y.B.Int’l L.*, 47, (1992). See also Tanzi, A., ‘*Codifying the minimum standards of the law of international watercourses: remarks on part one and a half*’, 21, *Nat. Resources Forum*, (1997) at 109-110; See also Hayton, R.D., ‘*Observations on the International Commission’s Draft Rules of the Non-navigational Uses of International Watercourses-Articles 1-4*’, 3 *Colo. J. Int’l Envtl. L. & Pol’y* (1992); Rieu-Clarke, *supra* note 81.

³²⁸ Bourne, *supra* note 76 at 230.

under Article 7, in the event they come into conflict.’³²⁹ However, his conclusion holds that the no-harm does not override the principle of equitable and reasonable utilisation.³³⁰

Prof. Patricia Wouters looks at the preference of equitable utilization within the prism of cooperative spirit and points out that: ‘there are important advantages for watercourse States to come to the bargaining table under the umbrella of equitable utilization than with the ‘stick of no harm’.’³³¹

Writing on the same issue, Tanzi and Arcari take the view that: ‘approaching the issue from the perspective of the existence of a conflict between these principles is not correct.’³³² The above observations confirm that the majority of opinions hold the primacy of equitable utilization over that of no significant harm.

The issue of the primacy of equitable and reasonable utilization and no significant harm within the Nile Basin context depends on the geographical position of riparian States. The lower riparian States, in particular Egypt argues that the no significant harm take precedence over the principle of equitable and reasonable utilization. Whether the compelling reason for Egyptian argument is based more on considerations of ‘economic harm’ than ‘environmental harm’ is an issue that require clarification.

³²⁹ McCaffrey, C.S., *supra* note 69, at 308.

³³⁰ *Ibid.*

³³¹ Wouters, P.K., ‘*The Legal Response to International Water Conflicts: The UN Watercourses Convention and Beyond*’, 42, *Ger. Y.B. Int’l L.*, (1999) at 40.

³³² According to them, although ‘there appears to be sufficient authority to the effect that the equitable utilization principle has survived the consolidation of no harm rule ... [on] the other hand, no sufficient practice and authority can be found that substantiate the existence of an exception to the no harm rule to the effect of excluding the use of international watercourse from its scope of application.’ See Tanzi & Arcari; *supra* note 12 at 175-176. The conclusion of the above arguments is that: ‘the normative setting laid down by Articles 5-7 is primarily aimed at providing guidance for mutually agreeable implementation on a case by case basis’, ruling out the question of hierarchy between the two principles. In conclusion one has to clearly bear in mind that the primacy of equitable utilization over no harm rule does not mean to signify the importance of one principle over the other. See Tanzi & Arcari, *supra* note 13 at 179.

Several international declarations including the 1997 UNWCC incorporate the version of the principle of ‘no-significant environmental harm’.³³³ For instance, Principle 21 of 1972 Stockholm Declaration of the United Nations Conference on the Human Environment provides:

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.³³⁴

The above is reaffirmed by the 1992 Rio Declaration on Environment and Development.³³⁵ A number of other international instruments, such as the 1992 Biodiversity Convention³³⁶ and the UNWCC³³⁷ prescribe to ‘no significant environmental harm’.

In the Nile context the issue of the relationship between equitable and reasonable utilization and no significant harm, and the primacy of one over the other has been influenced by the respective geographical positions of the riparian States as upstream or downstream. Accordingly, upstream States argued in favour of precedence of equitable and reasonable utilization over that of no-significant harm, while downstream States held the opposite notion. The later notion strongly advanced by Egypt considers the primacy of no significant harm in relation to ‘economic harm’ rather than ‘environmental harm’. Egypt claims that that is entitled to a 55.5 BCM of water under the 1959 treaty and considers this amount as

³³³ McCaffrey, *supra* note 69.

³³⁴ See Principle 21, Stockholm Declaration *supra* note 74.

³³⁵ See Principle 2, Rio Declaration, *supra* note 74.

³³⁶ See Article 3, U.N. Convention on Biological Diversity, Jun. 5, 1992 (entered into force Dec. 29, 1992) *reprinted in* 31 I.L.M. 822 (1992).

³³⁷ See Articles 20ff, UNWCC, *supra* note 6.

foreclosed.³³⁸ According to Egypt, the 1959 quota is already allocated to its existing economic use, while more water is needed for its new Nile Valley and Delta in the Sinai and Western Desert.³³⁹ Egypt perceives activities upstream may as causing harm to its existing uses, which means that its existing and planned economic benefits can be affected. Therefore, ‘economic harm’ than ‘environmental harm’ has more consideration in the Egyptian argument for precedence of no-significant harm over that of equitable and reasonable utilization. However, as the NRBCFA adopts the principles as enshrined in the UNWCC, any interpretation pertaining to the issue with regard to the UNWCC also applies in the Nile as well. Accordingly, the prevailing notion that the principle of equitable and reasonable utilization takes precedence over the no-harm governs the new Nile agreement.

5.5 Notification of planned measures

Article 12 of the UNWCC requires a Watercourse State to provide timely notification before it implements or permits implementation of planned measures that may have a significant adverse effect upon other watercourse States.³⁴⁰ The procedural articles regarding notification of planned measures are thought to be were less controversial in the ILC and the GA than in the Nile Basin.³⁴¹ This is not to say that it was completely free from controversy; on the contrary, many countries retained serious reservations on the issue.³⁴²

³³⁸ Hefny, M., & Amer, S., ‘Egypt and the Nile Basin’, *Aquatic Sciences*, *Aquat. Sci.* 67 (2005) 42–50, available at <http://www.springerlink.com/content/2ed3elngyb2e352g/>. Accessed 15 April 2010.

³³⁹ *National Water Resources Plan 2017*, Arab Republic of Egypt, Ministry of Water Resources and Irrigation, Cairo, Jan. 2005 (on file with the author).

³⁴⁰ According to Article 12 of the UNWCC, ‘Before a watercourse State implements or permits the implementation of planned measures which may have a significant adverse effect upon other watercourse States; it shall provide those States with timely notification thereof. Such notification shall be accompanied by available technical data and information, including the results of any environmental impact assessment, in order to enable the notified States to evaluate the possible effects of the planned measures.’ See Article 6 UN Watercourses Convention, *supra* note 6.

³⁴¹ McCaffrey, *supra* note 69 at 6 and 406.

³⁴² For instance, Ethiopia and some other countries requested the introduction of the word ‘significant’ in the title of Article 12 in order to avoid inconsistency with its text, which incorporated the word. However, Egypt on the other hand insisted for the deletion of the same word from the text in order to bring it in line with the title of Article 12. Delegates from Turkey, Ethiopia and Rwanda also expressed general reservations during its

McCaffrey holds that the concerns of many countries over the issue of planned measures is an outcome of an erroneous notion based on the physical law, in which harm is perceived to emanate solely from upstream states, a notion, which 'led States to claim, albeit incorrectly, that the convention's prior notification regime is really a prior consent regime, effectively giving the potentially affected State a veto'.³⁴³ Contrary to this notion the rule on notification of planned measures operates both upstream and downstream. As downstream development created 'facts on the ground' and affects the future use of the up-stream States, downstream States have to notify up stream States of such planned measures as well.³⁴⁴

There is no doubt that the above point holds theoretical truth, and no argument could be raised against it in principle. However, empirical evidence shows that there are more upstream phenomena that triggers harm and set in motion the rules of prior notification on planned measures.³⁴⁵ As a result, it is downstream States that usually categorize themselves at the receiving end of physical harm, such as flood, pollution, depletion of fish stock due to upstream activities. Despite this, however, planned measures from downstream States equally affect future developments upstream. The operational meaning of the UNWCC, therefore, conforms to a multifaceted approach; an approach the Nile basin States have recently begun to realize.³⁴⁶

adoption. The time frame of six months and its possible extension was also considered unfair and believed to cause considerable delay on the development of planned measures. Ethiopia also opposed Article 14 on the ground that, 'requiring consent of the notified State, amounted to a veto'. See U.N. Doc. A/C.6/51/SR.20 [1996] at 5, para.18. Turkey made general reservation on Part III of the Convention with the exception of Article 11. See U.N. Doc. A/C.6/51/SR/20 [1996] at 2 and 3; U.N.Doc. A/C.6/51/SR/53[1997], at 8 and 10; U.N. Doc. A/C.6/51/SR.62 {1997} at 12).

³⁴³ McCaffrey, *supra* note 69 at 407.

³⁴⁴ *Id.*

³⁴⁵ Physical phenomenon such as flood, siltation, and pollution are occurrences having their sources upstream.

³⁴⁶ There is a shift of position by Ethiopia, and also by other States to agree on an Interim Procedures on Planned Measures for dealing with exchange of information on planned measures. Minutes of the 15th Nile-COM Meeting, 24-25 June 2007, Nile-SEC, Entebbe, Uganda. (Copy of the document on file with the author)

The procedural duty to give notice has equal normative value with the substantive principles under international law.³⁴⁷ Article 8 of the NRBCFA entirely adopts the provisions of the UNWCC on planned measures.³⁴⁸ Its basic elements lay down procedural rules on the exchange of information, consultation and negotiation regarding possible effects of planned measures on the condition of the Nile River System.³⁴⁹

The NRBCFA adopts the term ‘significant adverse effect’ as a strictest standard, which also avoids any confusion between the procedural principle of planned measures and that of no-significant harm. This is to ensure that the issue of planned measures is not presumed a part of the rule of no-significant harm.³⁵⁰

Apart from being a constituent part of obligations under international law, of which the breach entails consequences, the rationale behind the principle of prior notification on planned measures is to advance cooperation by identifying areas to be addressed by the Watercourse States planning the measures and those that might be affected by such planned activities.³⁵¹

Ethiopia remains the only country retaining a reservation on the issue of notification on planned measures arguing that it is not relevant in the absence of water sharing arrangements.³⁵² The Ethiopian position however, fails to advance a strong legal justification, or an option for some sort of compromise.³⁵³ Ethiopia will have to eventually accept the

³⁴⁷ McCaffrey, *supra* note 69 at 395.

³⁴⁸ See: Article 8, NRBCFA, *supra* note 18.

³⁴⁹ Note: Ethiopia entered a reservation suggesting that *Article 8 should be deleted altogether as it can be covered by Article 7 and the issue of planned measures becomes relevant if and only if a water sharing arrangement acceptable to the basin states is put in place*. See Article 8, Nile River Basin Cooperative Framework Agreement (NRBCFA), *supra* note 18.

³⁵⁰ Tanzi, A., *supra* note 13 at 115-116.

³⁵¹ McCaffrey, *supra* note 69 at 397.

³⁵² See Ethiopian note, NRBCFA, *supra* note 18.

³⁵³ Ethiopia’s contention that the Article should be deleted as it can be covered by the provision on regular exchange of data and information fails to differentiate between data and information exchange, on a regular

provision on information concerning planned measures as the principle is universally endorsed by all other States of the Nile basin and in the UNWCC as representing customary international law.³⁵⁴

Finally, the above comparative analysis indicates that issues relating to the substantive and procedural principle have been more or less similar in their both the work of the ILC and the Nile. It is also important to mention that solutions to a number of contentious issues in the Nile have been influenced by the work of the ILC and the GA in the work of the UNWCC. However, there also have been adjustments within the specific nature of the basin's characteristics. It still remains questionable whether the influence of the work of the ILC and the GA on the UNWCC regarding the issue of existing and future agreements had the same effect as many other issues in the NRBCFA.

basis as part of equitable and reasonable utilization and prevention of insignificant harm and the provision on planned measures, a notification determined by the planning State that its planning may have a significant adverse effect. See Ethiopian reservation, NRBCFA, *supra* note 18. See also McCaffrey; *supra* note 69 at 406-407.

³⁵⁴ Interview with Tefera Beyene, Head, Boundary and Transboundary Rivers Department, MoWR, Ethiopia, 23 January 2009.

CHAPTER 6

THE ROLE OF THE ILC-UNWCC IN IMPLEMENTATION OF THE NRBCFA

6.1 Introduction

This chapter will evaluate the assessment from the analysis of the work of the ILC and GA and the Nile and provide insights by examining lessons from the work of the ILC and GA as a guide to the implementation of the NRBCFA. It encapsulates the answer to the question: ‘what insights can be gathered from an examination of the work of the ILC and GA on the law of non-navigational uses of international watercourses, in order to develop a basin-wide legal framework for the Nile’. In addition to providing an effective framework for resolving controversial issues and establishing a basin-wide institutional mechanism in the Nile, it will be shown in this chapter that the process by which the work of the ILC and GA was conducted affords a guide to the implementation of the NRBCFA.

Moreover, it is argued in this chapter that the participation of States in the work of the ILC and GA lend an understanding of the normative content of basin principles, and this in turn demonstrates the value of the Convention as evidence of the progression of customary international law.

6.2 Mutually agreeable formulas for the implementation of the NRBCF

The work of the ILC and GA has provided guidance for mutually agreeable formulas for the use, development, protection, conservation and management of the Nile River Basin and its resources. The provisions of the UNWCC served in sustaining the general obligation to cooperate and enter in to consultation for the implementation of equitable and reasonable

utilization and the application of factors to equitable and reasonable utilization in the NRBCFA.³⁵⁵

Article 4(6) of the NRBCFA obliges the Nile Basin States to ‘observe the rules and procedures established by the Nile River Basin Commission for the effective implementation of equitable and reasonable utilization.’³⁵⁶ The above general principle adopted from the work of the ILC and the GA helped in the formulation of specific provision on the assessment of the status of water utilization. Accordingly it has been provided in the NRBCFA that: ‘Nile Basin States shall, in their respective territories, according to their national laws and regulations, keep the status of their water utilization under review in light of substantial changes in relevant factors and circumstances.’³⁵⁷

Furthermore, the UNWCC provided procedural rule on issues of general data and information exchange concerning the hydrological, meteorological, hydrogeological and ecological nature on water quality and forecast.³⁵⁸ The provision can enable the future NRBC to develop detailed rules for its implementation by the Nile Basin States.³⁵⁹ In this regard, the recent Road Map of the Nile Basin Agreement on Data and Information Sharing and Exchange that was approved by the Nile Council of Ministers makes key recommendations on the data and

³⁵⁵ Article 8 of the UNWCC provides: ‘Watercourse States shall cooperate on the basis of sovereign equality, territorial integrity, mutual benefit and good faith in order to attain optimal utilization and adequate protection of an international watercourse’. See Article 8, See, Article 1, *Convention on the Law of Non-Navigational Uses of International Watercourses*, May 2, 1997 (not yet in force), reprinted in 36 I.L.M. 700 (1977). Article 3(1) of the NRBCFA sets ‘The principle of cooperation between States of the Nile River Basin on the basis of sovereign equality, territorial integrity, mutual benefit and good faith in order to attain optimal utilization and adequate protection and conservation of the Nile River Basin and to promote joint efforts to achieve social and economic development’. Similarly Article 4(3) requires: ‘In the application of paragraphs 1 and 2 above, the Nile Basin States concerned shall, when the need arises, enter into consultations in a spirit of cooperation.’ See Articles 3(1) and 4(3), *Nile River Basin Cooperative Framework Agreement (NRBCFA)*, 5 December 2005 (not yet signed), Copy with Boundary and Transboundary Rivers Affairs Department, Ministry of Water Resources, Ethiopia.

³⁵⁶ Id. Article 4(6), NRBCFA.

³⁵⁷ Id., Article 4(5).

³⁵⁸ See Article 9, UNWCC, *supra* note 1.

³⁵⁹ See Article 7, NRBCFA), *supra* note 1.

information sharing.³⁶⁰ The work on the road map has been initiated as a result of consensus on the implementation of the provision on data and information sharing in the NRBCFA, which was introduced verbatim from the UNWCC.

The provision on prior notification of planned measures is one of the most important procedural principles in the work of the ILC and GA. It affords a set of detailed procedures on implementation of planned measures including the provision of available technical data and information, and the results of any environmental impact assessment for evaluation.³⁶¹ The introduction of the rules can enhance the implementation of environmental impact assessment through national legislations that help mitigate or prevent adverse effect in the implementation of planned measures in the Nile.³⁶² It also allows Nile basin countries to commit themselves to undertake a comprehensive assessment of the impacts of planned activities and helps conduct audits over measures that may have significant adverse environmental impacts in their own territories and territories of other basin States at the earliest stages of the process.³⁶³ This will speed up the NRBC to consider the harmonization of national legislations in order to develop criteria and procedures for determining whether an activity is likely to have significant adverse environmental impacts.³⁶⁴

The introduction of the concept of ecosystem and mitigation of harmful conditions by the NRBCFA can also advance harmonization of the policies that help implementation of water quality standards; prevention of detrimental effect on the ecosystem by introduction of alien species to their water system; and the rehabilitation of their wetlands and biodiversity

³⁶⁰ Road Map for Development of Nile Basin Agreement on data and Information Sharing and Exchange, (Draft for Discussion), NBI, Water Resources Planning and Management Project, June 2007. (Copy on file with the author).

³⁶¹ See Articles 11-19, UN Watercourses Convention, *supra* note 1.

³⁶² See Article 9, *Nile River Basin Cooperative Framework Agreement (NRBCFA)*, *supra* note 1.

³⁶³ *Id.*, Article 9(1).

³⁶⁴ *Id.*, Article 9(2-4).

conservation.³⁶⁵ In a similar manner, it can elevate effort to address harmful conditions related to the Nile River system that may occur as a result of human conduct or natural causes, such as flood conditions, invasive water weeds, water-borne diseases, siltation, erosion, drought or desertification.³⁶⁶ The elaboration of harmful conditions in line with the rules on the UNWCC can lead to the implementation of these measures by agreeing on guidelines to be developed by the NRBC.³⁶⁷

Travaux préparatoires - The process of the work of the ILC and the *travaux préparatoires* can provide essential guidelines on the practical use and implementation of the NRBCFA. It is important to note that the entire process of the work of the ILC and the GA in the codification of the UNWCC offers a ‘treasure chest’ of knowledge that is not often appreciated by international watercourse States, and in many instances has been under utilized in research related work on the topic of international watercourses law. A huge experience and knowledge gathered through the work of the ILC and the GA can have been tapped by the Nile basin in the process of negotiating the NRBCFA and will still serve in its implementation. In particular it can provide alternative avenues for resolving emerging disputes during the implementation process. The most important *travaux préparatoires* that have to be noted as important inputs in the process of the development of the NRBCFA is that the draft articles of the work of the ILC and GA afforded a treasure-chest to building basin-wide legal and institutional framework in the Nile. Draft Articles on the law of non-navigational uses of international watercourses and commentaries thereto was a text adopted by the ILC and submitted to the GA as part of its session report.³⁶⁸ The ILC commentary extensively elaborated relevant norms on each draft articles. For instance the elaboration of

³⁶⁵ Id., Article 6.

³⁶⁶ Id., Article 11.

³⁶⁷ Id.

³⁶⁸ Commentary to *Draft Articles on the Law of the Non-navigational Uses of International Watercourses*, in *Report of the International Law Commission on the work of its forty-sixth session*, UN GAOR, 49th Sess., Supp., (No. 10), U.N. Doc. A/49/10 (1994), reprinted in [1994] 2(2), Y.B. Int'l L., Comm'n, at 222.

important concepts such as ‘use of terms’ provides analysis on the meaning of the term ‘international watercourse’ from the opinions of experts and delegates during the debates, and international basin experiences from earlier and modern treaties regarding the meaning of ‘watercourse system’ inclusive of ground water.³⁶⁹ In the Nile the meaning accorded to these terms which were debated extensively can be clarified through elaboration in the ILC Commentary.

The Commentary’s details on the principle of equitable and reasonable utilization and no-significant harm and elements constituting ERU, optimal utilization and benefit, the concept of participation and factors relevant to ERU can be of immense value to a future implementation of the NRBCFA.³⁷⁰ In a similar manner, the obligation not to cause significant harm and the notion of ‘due diligence’³⁷¹ could still be used for the development of the process of preparing procedures and modalities for implementation of the principle. In this regard, State practice and major relevant cases, among them the Corfu Channel case, and the Lake Lanoux Tribunal discussed in the Commentary can be an added value in the future of elaboration of these principles in subsequent instrument of the NRBCFA.³⁷²

The Report by the Special Rapporteurs – The Special Rapporteurs have played a critical role in marking out and developing topics, explaining the state of law and proposing new draft articles, preparing reports and elaborating commentaries as well as participating in the debates.³⁷³ The extensive surveys on a wide range of topics ranging from the characteristics

³⁶⁹ Id., see *Commentary*, Article 2 at 90.

³⁷⁰ Id., see *Commentary*, Article 5 at 96.

³⁷¹ Id., see *Commentary*, Article 7 at 102.

³⁷² Id., see *Commentary* on the above and other articles.

³⁷³ See International Law Commission, *Special Rapporteurs*, available at <http://www.un.org/law/ilc/>, accessed last on 17 October 2009.

of water and diversity of watercourses to treaty practices have been of great value in the position of draft texts for the NRBCFA.³⁷⁴

Therefore, the process and *travaux préparatoires* of the work of the ILC and GA, in particular the ILC comments and the reports of the Special Rapporteurs, can provide essential terms of reference, interpretations and practical and theoretical experience on the implementation of NRBCFA.

6.3 An effective basin wide framework for resolving controversial issues

The process by which the work of the ILC and GA was conducted provides an effective framework for resolving controversial issues and establishing basin-wide institutional mechanisms in the Nile. Despite reservations by most of the Nile Basin States, the work of the ILC and the GA on the law of the UNWCC has inspired the development of a basin wide framework in the Nile.³⁷⁵ Due to spatial and temporal nature of State positions on issues pertaining to negotiating international conventions, attitudes have been observed varying depending on the evolving interests of the states concerned.

The positions of the Nile Basin States on the same issues at different times have changed for various reasons, largely due to the increasing influence of the UNWCC. For instance,

³⁷⁴ For instance, the First Report by Stephen Schwebel has dealt with diverse hydrological characteristics of water and the diversity of watercourses, among other topics, (see Schwebel, S., *First Report on the Law of Non-Navigational Uses of International Watercourses*, [1979], 2(2), Y.B. Int'l L. Comm'n, at 143, UN Doc., A/CN.4/320 and Corr.1.), while his Third Report extensively deliberated on almost all principles to be dealt in by the ILC. (See Schwebel, S., *Third Report on the Law of Non-Navigational Uses of International Watercourses*, [1982] 2(2), Y.B. Int'l L. Comm'n, at 65, UN Doc. A/CN.4/348 and Corr.1).

Stephen McCaffrey has described Schwebel's Report as 'a monumental work that contains a wealth of material and a number of thoughtful and forward looking proposals'. See McCaffrey, S.C., 'Background and Overview of the International Law Commission's Study of the Non-Navigational Uses of International Watercourses', 3 *Colo. J. Int'l L. & Pol'y*, (1992) at 18. For more reports by the Special Rapporteurs, see *Reports of the Special Rapporteurs*, available at http://untreaty.un.org/ilc/summaries/8_3.htm, last accessed on 17 October 2009.

³⁷⁵ Arguing along this line, some submit that the UNWCC 'cannot resolve the issues that arise in the Nile Basin. According to this argument, the convention can perpetuate the existing competing views, and fails to offer a sufficiently developed alternative conceptual framework that facilitates the formation of a basin wide regime. Brunnee, J., & Toope, S., 'Environmental Security and Fresh Water Resources: Ecosystem Regime Building', 91 *Am. J. Int'l L.*, (1997), at 122.

Ethiopia has abstained from voting in favour of Articles 5, on equitable and reasonable utilization; Article 6, factors relevant to equitable and reasonable utilization, and Article 7 obligation not to cause significant harm, during discussions held in the Working Group.³⁷⁶ However, it later changed its position by voting in favour of the whole text of the draft.³⁷⁷

By converging their positions on basic principles of equitable and reasonable utilization and no-significant harm the Nile Basin States proved that different positions in the past can gradually come up to consensus and converge to a single position. The convergence means the establishment of an effective and a permanent legal and institutional framework. However, it should also be noted that there are some reservations such as the issue on prior notification on planned measures; change has taken a slow pace but in the right direction. During the WG debates on the issue Ethiopia has expressed its concern on the time frame of six months, its extension, also arguing the issue of consent by notified State as a veto power.³⁷⁸

Therefore, it can be maintained that in light of these facts the Nile Basin States have changed course and addressed a number of controversial issues through the work of the ILC and the GA on the UNWCC in pursuit of the process of the establishment of a basin wide institutional framework.

Specific reference can be made to the two complementary processes in the basin; the Nile Basin Initiative and the Nile River Basin Cooperative Framework (Project D3), which emerged in the 1990s to address the challenges of moving from conflict to cooperation and

³⁷⁶ See U.N. Doc. A/C.6/51/NUW/WG/L.1 (1996); See also U.N. Doc. A/C.6/51/SR.24 (1996).

³⁷⁷ See U.N. Doc. A-C.6-51-SR.62-Add.1.

³⁷⁸ See U.N. Doc. A/C.6/51/SR.20 (1995).

joint development, have both benefited from the work of the ILC and the GA.³⁷⁹ A new insight from the work of the ILC and the GA is reflected in an emerging regional initiative and a participatory process in the Nile both through the provisional arrangement of the NBI, based on a shared vision which includes the principle of equitable utilization,³⁸⁰ and more importantly, the permanent basin-wide institutional mechanism of the NRBCFA.

The Nile River Basin Cooperative Framework Agreement has therefore, allowed Nile states to agree upon an instrument that provides general guidelines, for later implementation through multiple instruments of protocols and annexes.³⁸¹ It also governs the relationship between protocols and the framework itself, including their adoption and amendments.³⁸²

By allowing the procedures for the regulation of the relationships between the framework text and its auxiliary instruments, it minimises future controversies over the hierarchy of existing and emerging instruments. In this regard the NRBCFA sets a good institutional example, providing rights and responsibilities of the Basin States consistent with the objectives of the UNWCC. On the other hand, future auxiliary instruments provide flexibility, dynamism and implementability.

³⁷⁹ Nicol A., *The Nile: Moving beyond Cooperation*, Technical documents in hydrology: PC-CP series, available at <http://www.unesdoc.unesco.org/images/0013/001333/133301e.pdf>, accessed 08 November 2008.

³⁸⁰ The Agreed Minutes is considered a document establishing the NBI, it comprises the a Policy Guideline, which sets principles on equitable and joint utilization, and a Strategic Action Program, which comprises the Shared Vision Program consisting of basin-wide projects, and Subsidiary Action Program, consisting projects intended to implement action on the ground. See Agreed Minutes, *supra* note 39, Ch.3.

³⁸¹ See Articles 43, 34(a), 34(b), 34(c), Nile River Basin Cooperative Framework Agreement (NRBCFA), *supra* note 1.

³⁸² *Id.*

6.4 The Role of Governments can provide guidance in understanding the normative content of basin specific principles

The examination of lessons from the work of the ILC and the GA on the UNWCC needs a closer look at the role of Governments, in particular the involvement of watercourse States in the process of codification and development throughout the work of the ILC and the GA.

A brief observation in this section of the role of States as stakeholders in the process demonstrates how the lessons from the UNWCC could be measured both from the perspectives of their involvement and to what extent the final outcome of the work has served as a guide to resolving contentious issues in negotiating basin wide agreements.

Although the ILC is mandated by the GA to carry out the task of codification and progressive development,³⁸³ the active engagement of watercourse States in the initiation of codification and development of the UNWCC,³⁸⁴ had been initially witnessed by their contribution towards the preparation of the reports by the Secretary General on legal problems relating to the non- navigational uses of international watercourses through provision of their practices and experiences regarding national water legislations, and

³⁸³ Article 1, Statute of the International Law Association, available at http://www.untreaty.un.org/ilc/texts/instruments/english/statute/statute_e.pdf, visited on 2/11/08.

³⁸⁴ The contributions by Bolivia and Finland regarding their proposal and request for urgent action by the General Assembly on the codification of basic rules governing international watercourses is a notable example of states participation and ownership of the process. As stated in the Supplementary Report by the Secretary-General 'At the fourteenth session of the General Assembly, in 1959, a proposal concerning the question of the codification of the rules relating to the utilization and use of international rivers was submitted by the representative of Bolivia to the Sixth Committee during the consideration of the report of the International Law Commission on the work of its eleventh session. In submitting his proposal, the representative of Bolivia pointed out that half the world's arable land remained unworked for lack of water, and that, with the population increasing daily, the problem demanded urgent solution; the utilization of inland waters was not governed by any international statute and the law applied was purely customary, ill defined and lacking in uniformity; there was accordingly a pressing need to undertake a study of the question of the codification of current laws on the utilization and exploitation of international water ways. On 21 November 1959, the General Assembly, on the recommendation of the Sixth Committee, adopted resolution 1401 (XIV)...' Consequently in 1970, the Government of Finland, in a note verbale to the GA, requested the inclusion of an item entitled 'progressive development and codification of the rules of international law relating to international watercourses.' See Legal Problems relating to the utilization and use of international rivers, Para. 4 of GAR 3071 (XXVIII), UN Doc. A/5409*, (1974), Reprinted in [1974] 2(2), Y.B.Int'l Comm'n, at 270, Para 1 & 2

multilateral and bi-lateral treaties.³⁸⁵ Comments and observations by Governments on various issues relating to non-navigational uses on international watercourses have been vital inputs, and formed the basis towards the codification and progressive development of the field.³⁸⁶

Therefore, any analysis of the lessons learnt from the work of the ILC and the GA on the UNWCC should recognize the significant involvement of States in the process. In this regard, the valuable contribution by the majority of the Nile Basin countries at all stages of the process, including the elaboration of the progressive development of the UNWCC, should be noted. Such practice had a profound impact in dealing with a number of difficult issues in the NRBCFA. Consequently, these lessons and experiences shaped the process of the negotiating the NRBCFA, by providing a knowledge base on how issues had been addressed, and which options could be relevant to specific cases in the basin.

Moreover, the introduction by the NRBCFA of the two basic rules of the Convention, the principle of ERU and that of no-significant harm, without modification; the incorporation of the ‘use of terms’ in a manner that reflected the unity of the river basin; and the adoption of notification of planned measures, all bring a new experience and legal tradition in the management of Basin-wide agreement in the Nile, based on experience from state participation in the process of the work of the ILC and GA.

³⁸⁵ The Report by the Secretary General contains information provided by member states regarding their legislations. The report contained 29 bilateral and multilateral treaties from Africa, of which 11 of them are related to Nile Basin states. See *Legal problems relating to the utilization and use of international rivers*, Para. 4 of GAR 3071 (XXVIII), UN Doc. A/5409*, (1974), reprinted in [1974] 2(2), Y.B.Int'l Comm'n, at 33.

³⁸⁶ In 1976 twenty countries gave their general comments and observations to specific questions posed by the ILC. Although non- African States replied at the time, later in 1978 Sudan was the first Nile Basin state to respond to the ILC's questionnaire. Comments and observations were received from many states on the first draft articles of the ILC submitted for consideration to the General Assembly in 1991. See UN Doc. A/CN.4/295 and Add. 1, Reprinted in [1976] 2(1), Y. B. Int'l L. Comm'n at 147, visited on 02/11/08

6.5 Evidentiary authority of the work of the ILC and GA

The work of the ILC and GA and the value of the Convention provide evidence of progression of customary international law. As a product of the work of the ILC - ‘a body responsible for the progressive development of international law and its codification’ – ‘the importance of the rules of the Convention as evidentiary authority is justified on the ground that the Convention largely reflects customary international law.’³⁸⁷ As stated in the decision of the ICJ in the *North Sea Continental Shelf* case: ‘a convention adopted as part of the combined process of codification and progressive development of international law may well constitute, or come to constitute the decisive evidence of generally accepted new rules of international law.’³⁸⁸ There is no doubt that the UNWCC was the result of a combined process of codification and development, and according to the above statement constituted a decisive evidence of generally accepted new rules of international law governing the non-navigational uses of international watercourses.

To this end state practice indicate that a number of principles of the UNWCC have been adopted by an increasing number of international watercourse agreements. For instance, the 1995 agreement on the Cooperation for the Sustainable Development of the Mekong Basin;³⁸⁹ and the 1995 Protocol on Shared Watercourse Systems in the Southern African Development Community Region;³⁹⁰ had their principles adopted from the ILC Draft

³⁸⁷ Hayward, K., ‘Supporting Basin-wide Reforms with an Independent Assessment Applying International Water Law: Case Study of the Dnieper’, 18 *Colo. J. Int’l Envtl. L. & Pol’y* (2007), at 640. See also McCaffrey, supra note 69, Ch. 4, at 315; Wouters, P.K., ‘The Legal Response to International water Conflicts: The UN Watercourses Convention and Beyond’, 42 *Ger. Y.B. Int’l L.* (1999); Rieu-Clarke, A.S., ‘The Role and Relevance of the UN Convention on the Law of the Non-Navigational Uses of International Watercourses to the EU and its Member States’, 78 *BYB Int’l L’*, (2008).

³⁸⁸ *North -Sea Continental Shelf Cases*, (FRG/Dem.; FRG/Neth.), 1969, ICJ 3 (Feb.20).

³⁸⁹ Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin, 05 April 1995, 34 *ILM* (1995) at 864.

³⁹⁰ Protocol on the shared watercourse systems in Southern African *Development Community* (SADC) region, Aug. 28, 1995, available at www.fao.org/docrep/w7414b/w7414b0n.htm, accessed 03 September 2007.

Articles³⁹¹, which later became the rules of the Convention without substantial change. The adoption of the UNWCC has been mentioned as one of the reasons for revisiting the 1995 SADC Protocol and the adoption of the SADC Revised Protocol on Shared Water Resources, which incorporated basic principles of the Convention.³⁹² It is therefore important not to lose sight of the fact that, regardless of whether the UNWCC enters into force, many of its provisions reflect customary international law, that are binding on States regardless of whether or not they are contracting parties to the instrument.

6.6 Reflections on some critique on the work of the ILC

Most of the critics consider the ILC as timid in the rapidly changing areas of international law such as the environment.³⁹³ However, such criticism could be countered on the grounds of the framework nature of the convention and the existence of the corpus of international environmental law, where the issue could also be addressed within that framework.³⁹⁴

The acceptance of a convention by the majority of states who have different interests on issues relating to international watercourses can only be ascertained by a framework convention that addresses those different interests, leaving details including that of the environment to specific agreements by the States themselves.³⁹⁵ There are a large number of international agreements dealing with the issue of the Environment, a few of which included

³⁹¹ Draft Articles on the law of non-navigational uses of international watercourses, [1994] 2[2] Y.B. Int'l L., 89, Doc.A/CN.4/SER.A/1994/Add.1 (part 2).

³⁹² Southern African Development Community (SADC), Revised Protocol on Shared Water Resources, August 7, 2000, 40 ILM 321 (2001).

³⁹³ Caron, D.D., *The Frog that Wouldn't Leap: The international Commission and its Work on International Watercourses*, 3 Colo. J. Int'l Envtl. L. & Pol'y (1992) at 269. See also Brunnée & Toope, *supra* note 21.

³⁹⁴ See McCaffrey, S.C., 'The UN Convention on the Law of the Non-Navigational Uses of international Watercourses: Prospects and Pitfalls', in Salman S.M.A. & Boisson de Chazoumes, eds., *International Watercourses – Enhancing Cooperation and Managing Conflict*, Proceeding of the World Bank seminar, World Bank technical Paper No. 414, (1998), at 27.

³⁹⁵ Salman, S. M.A. & Upreti, K., *Conflict and Cooperation on South Asia's International Rivers: A Legal Perspective*, (Kluwer Law International, London, 2002), at 26.

the Rio Declaration;³⁹⁶ the UN/EC Espoo Convention on Environmental Impact Assessment;³⁹⁷ the Ramsar Convention³⁹⁸; and the 1992 UN/ECE Helsinki Convention³⁹⁹ and many others. The provisions of the work of the ILC on environment supplement the above instruments and similar other international instruments.⁴⁰⁰

The other area where the work of the ILC has been criticised is in its failure to go far enough in providing obligatory rules on the establishment of joint basin institutions for the management of international watercourses.⁴⁰¹ The strong correlation between the optimal regime for international watercourse management and the implementation of substantive and procedural principles⁴⁰² could be effective through the promotion of more detailed guidelines than the existing permissive provision of the convention. However, this does not mean that

³⁹⁶ *Declaration of the UN Conference on Environment and Development*, Rio de Janeiro, Brazil, June 13, 1992, in *Report of the United Nations Conference on Environment and Development*, Annex I, U.N. Doc. A/Conf. 151/26 (vol. 1), reprinted in 31 I.L.M. 876 (1992).

³⁹⁷ *Convention on Environmental Impact Assessment in Transboundary Context*, February 25, 1991 (entered in to force September 10, 1997), reprinted in 30 I.L.M. 800 (1991). Also available at <http://www.unece.org/env/eia/eia.htm>, accessed on 18 October 2009.

³⁹⁸ *Convention on Wetlands of International Importance especially as waterfowl Habitat*, February 2, 1971 (entered in to force December 21, 1975), 996 U.N.T.S.245.

³⁹⁹ *Convention on the Protection and Use of Transboundary Watercourses and International Lakes*, March 17, 1992 (entered in to force October 6, 1996), reprinted in 31 I.L.M. 1312 (1992).

⁴⁰⁰ Tanzi, A. & Arcari, M., *The United Nations Convention on the Law of international Watercourses: A Framework for Sharing*, (Kluwer International, London, 2001), at 204.

⁴⁰¹ Article 24 of the UNWCC provides:

1. Watercourse states shall, at the request of any of them, enter in to consultations concerning the management of an international watercourse, which may include the establishment of a joint management mechanism.
2. For purpose of this article, 'management' refers, in particular, to:
 - a) Planning the sustainable development of an international watercourse and providing for the implementation of any plans adopted: and
 - b) Otherwise promoting the rational and optimal utilization, protection and control of the watercourse. See Article 24, U.N. Watercourses Convention, *supra* note 1.

Based on the above guideline the NRBCFA establishes a Nile River Basin Commission (NRBC), whose purpose and objective is:

- (a) To promote and facilitate the implementation of the principles, rights and obligations provided for in the present Framework
- (b) To serve as an institutional framework for cooperation among Nile Basin States in the use, development, protection, conservation and management of the Nile River Basin and its waters.

To facilitate closer cooperation among the States and peoples of the Nile River Basin in the social, economic and cultural fields. See Articles 15 and 16, Nile River Basin Cooperative Framework Agreement (NRBCFA), *supra* note 1.

⁴⁰² Boisson de Chazournes, L., 'The Role of Diplomatic Means of Solving Water Disputes: A Special Emphasis on Institutional Mechanisms', eds., *Resolution of International Water Disputes*, The International Bureau of the Permanent court of Arbitration, (Kluwer Law International, The Hague, 2002) at 109.

the work of the ILC has to provide mandatory set rules that apply anywhere and everywhere without due regard to specific basin characteristics. As most of the developing countries emerge towards a basin-wide institutional approach a more detailed guideline could facilitate that end.

The most relevant issue to the Nile in respect of the ILC's shortfall is the issue of existing and future agreements. The UNWCC sustains rights and obligations under existing agreements, and leaves the discretion to the parties to harmonize with the basic principles of the Convention.⁴⁰³ The NRBCFA, on the contrary requires existing agreements to conform to the framework, making existing agreements which are inconsistent with the framework null and void to the extent of their inconsistency.⁴⁰⁴ This later provision has drawn strong objections from the two downstream countries, namely, Egypt and Sudan, which wanted the NRBCFA to be without prejudice to existing agreements.⁴⁰⁵ This position favours existing agreements over the Nile to be interpreted taking account, not only the provisions of the NRBCFA, but also the rules of the UNWCC.⁴⁰⁶

As indicated in the previous chapters, the introduction of an alternative new concept of 'water security' as a compromise failed to resolve the issue of existing agreements, leading to seven of the Basin States signing the NRBCFA without Egypt and Sudan.⁴⁰⁷ The legal ramifications of the seven countries signing the agreement with the exclusion of Egypt and Sudan can be that, Egypt and Sudan can continue to argue that the existing treaties still binding. According to Article 59 of the Vienna convention the termination or suspension of the operation of a treaty implied by conclusion of a later treaty becomes effective, among other conditions, if all

⁴⁰³ See Article 3, U.N. Watercourses Convention, *supra* note 1.

⁴⁰⁴ See Articles 3(15) and 14, NRBCFA, *supra* note 1. Egypt and Sudan oppose the Nile Framework articles in favour of the UNWCC version.

⁴⁰⁵ *Id.*

⁴⁰⁶ *Id.*

⁴⁰⁷ Minutes of the Extraordinary Nile Council of Ministers' Meeting, May 22, 2009, Kinshasa, Democratic Republic of Congo. (Courtesy of the MoWR-Ethiopia).

the parties to the earlier treaty become parties to the later treaty.⁴⁰⁸ The political consequences on the other hand are that, old tensions which have eased in the last decade as a result of the NBI process might escalate, with Egypt pulling out from the NBI, aggressively lobbying with international financial institutions in an attempt to block financial backing to new projects upstream, and political destabilization in volatile equatorial regions. Although such measures may not lead to an armed conflict, they however strain the relationship between Egypt and the rest of the Basin States and narrow a chance for a comprehensive basin wide agreement. On the other hand the cooperation between Egypt, Sudan and Ethiopia on the Eastern Nile Subsidiary Action Program (ENSAP) at sub-basin level may not be affected, sustaining a link for some sort of dialogue.

The failure of the UNWCC in providing more specific guidance for promoting emerging basin wide agreements has resulted in a controversy over the issue in the Nile, where a number of issues have remained more critical for a long period of time. The provision of derogatory guidelines on basic issues such as existing and future agreements under the work of ILC would have afforded even more flexible solutions in the Nile and elsewhere.

⁴⁰⁸ See article 59, Vienna Convention on the Law of Treaties, 8 I.L.M., 702 (1969) (adopted on May 22, 1969) at 331.

CHAPTER 7

CONCLUSION

As outlined in the introduction under Chapter 1, the main purpose of this research is to examine how the work of the International Law Commission (ILC) and the General Assembly of the United Nations (GA) on the law of non-navigational uses of international watercourses has impacted the development of the Nile Cooperative Framework Agreement (NRBCFA).

It has been demonstrated in chapter 1 that water is a critical issue in Africa and on the Nile, and, the solution, at least in part, needs to be put within the context of legal imperatives of the work of the ILC and GA.

The thesis then analyzed essential socio-economic, physical, environmental and political factors that impact the need for a basin wide legal and institutional structure in the Nile. The work has shown that the development towards a basin-wide legal and institutional transformation has been under the spell of these factors in varying degrees, and postulated the need for a positive approach in which these factors can be a catalyst in advancing a basin-wide legal framework.

The research proceeded with a critical analysis of the evolution of the current applicable law. The research has demonstrated why the existing Nile agreements have failed to make a significant difference in the cooperation process, while exhibiting that emerging laws provide an appropriate legal basis in the growth of institutional coordination.

International water law is one of the branches of international public law governing relations among states and evolved as a semi independent body of substantive and procedural rules

governing international watercourses. The most important aspect of analysis in this chapter has examined the work of the ILC on the law of non-navigational uses of international watercourses within the premises of the development of international law. Analysis of the process of the codification and progressive development has been conducted and the relevance of the experience of the work of the ILC and GA in solving international watercourses disputes existing in the Nile Basin has been ascertained.

The most controversial legal issues in the work of the ILC and the GA have been the focus of chapter 5 and through in-depth comparative analysis the research was able to show that the issues that appeared controversial in these forums and in the Nile have been similar. Moreover, the research has shown that the solutions to contentious issues in the Nile have been very much influenced by the work of the ILC and the GA in the work of the UNWCC. It also found out that adjustments have been made with respect to some issues such as the issue of existing and future agreements. This study has therefore shown that the work of the ILC and GA has provided, and can continue to provide, a guide in the adoption and implementation of the NRBCFA. It also demonstrated that it can in part provide an effective framework for resolving controversial legal issues and establishing basin-wide legal frameworks more generally.

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