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The long empty canyon: A study of the old/new legal problems of the Nile basin

Shams Al Din Al Hajjaji

American Univeristy in Cairo/ Law Department, Egyptian Public Prosecution Bureau, Egypt

Email address:
salhajjaji@aucegypt.edu

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Abstract: The Nile River Basin witnesses a long history of tension and negotiation among riparian states. There are two legal frameworks govern the Nile Basin. Firstly, the private legal framework reflected in legal history on the Nile. The most legal active period among Nile Basin states was the period between 1890th and 1930th. The legal solutions to the Nile Basin problems came to an end with the end of the colonization in Africa, especially the Nile riparian states. During this period, the tension among liberal states took a different shape. Harmon and Nyerere doctrine were introduced among the riparian states. This led to the refutation of most of the private legal framework from most of the independent states. Thus, riparian states started to explore new legal ground to regulate their relationship. On the other hand, the public legal framework represented in the work of the International Law Association, which started with Helsinki rules in 1966, and the 1997 UN Convention. Many scholars argue that the legal solution is the best one for the Nile question, based on the previous frameworks. However, this note argued that the international legal framework governing the international rivers generally and the Nile specifically cannot offer a solution to the disputes over the water of the Nile. This note discusses both the legal frameworks of the Nile on one hand. On the other hand, it highlights the points of indeterminacy of both frameworks to solve the Nile dilemma. It argues that the solutions of the present and future disputes through legal tools are not enough. This note goes beyond the most proposed recommendation to form a comprehensive treaty as the solution to the riparian problems. It asserts that the law is not a tool to end the states tension, rather than it is a tool to persevere good faith and prevent future dispute. A main role of the extra legal solutions must be played. It based its argument on substantive and formulate dilemma in the previous frameworks.

Keywords: Nile Basin, Egypt, Ethiopia, Sovereignty, Cooperation, Equitable and Reasonable Utilization, No Harm

1. Introduction

The relationship between Egypt and surrounding states is becoming more strained by the day. The demand of lower riparian states is increasing in regards to their share of the Nile water. These rising demands have caused political clashes among the riparian states, especially Egypt and Sudan from the upper riparian, and Ethiopia, Tanzania, and Kenya from the lower riparian states. This tension reached its peak when President Sadat declared that Egypt would be ready to go to war against Ethiopia, if it harms Egypt's interests in Nile water.[1]To maintain the status quo, many scholars proposed a legal solution as one of the strong propositions in this case.[2] However, none of them offered an answer of why or how these states will enter in a new treaty regarding the Nile issues, especially given that some of them persisted on their acquired right to and share of the Nile water. I argue here that the Nile legal frameworks as they are interpreted cannot help the Nile Basin states to enter in a legal agreement unless under the existence of

[1]/ TesfayeTafesse, The Hydropolitical Assessment of the Nile Question: An Ethiopian Perspective, 26 WATER INT'L 1, 2001, 4, See also, JuttaBrunnee and Stephen Troope, The Changing Nile Basin Regime: Does Law Matter?, 43 HARV. INT'L L.REV. 105, 106. [Hereinafter Does Law Matter] See aslo Sadat to Ethiopia: Leave Nile alone or it's war, The Gazette Montréal , Saturday June 7, 1980, http://news.google.com/newspapers?nid=1946&dat=19800607&id=IYkxAAAAIBAJ&sjid=caQFAAAAIBAJ&pg=1030,2287901 Last visit 24/12/2011

[2]/ TakeleSobokaBulto, Between Ambivalence and Necessity: Occlusions on the Path Towards a Basin Wide Treaty in the Nile Basin, 20 COLO. J. INT'L ENVTL. L. &POL'Y 291 2008-2009, 318.[hereinafter Ambivalence and Necessity] See also, Christina M. Carroll, Past and Future Legal Framework of the Nile River Basin, 12 GEO. INT'LENVTL. L. REV. 269, 199-2000, 282.

other factors, whether economic or political.

This paper is concerned with a certain legal occurrence, where there is a need to reach a new legal agreement in response to the existing dispute related to the current legal issues. The argument will be limited to the question of how this dispute affects the formulation of a new law. In other words, the thesis tackles the transition period between the old and new legal systems. The main question here and what I am trying to spread in my thesis is: "Is the existing legal framework fit to be a base for the new legal order of the Nile?" The answer is no, as I presented the Nile Basin states' argument, which they maintained – each from its own perspective- that such an argument is the suitable one. First, I present the Egyptian Legal argument, which is based on the historical and acquired rights of Egypt. Second, I tackle the issue of the Nyerere Doctrine, which leads me to discuss the issue of state succession and conflict between state continuity and state autonomy. Thirdly, I argue that the conflict between Sovereignty and Cooperation in the international water law is inevitable.

2. Overview of the Nile Legal Issues

2.1. Legal Framework of the Nile Basin State

2.1.1. Introduction

The controversial positions of states and scholars' position can be summarized in three main points. First, Egypt and Sudan accept the Nile conventions and consider them as acquired rights.[3] Secondly, Ethiopia, Kenya, and Tanzania refuse both acquired and historical rights, and they consider them to be a colonial conspiracy against the lower riparian states, [4] Thirdly, Congo, Uganda, and Rwanda accept the conventions, albeit after long negotiations with Egypt and Sudan, in order to take personal advantages. [5] Finally, Eritrea is an observer to previous states, and did not have any inclination to join either pole.[6]

2.1.2. 1902 Treaty between Ethiopia and the United Kingdom

In 1902, the King of Great Britain Edward VII and the Ethiopian Emperor Menelik II signed a treaty regarding "the delimitation of the Frontier between Ethiopia and Sudan,"[7] which was part of the Egyptian territory while Egypt was under the British protection. The treaty was drafted both in English and Amharic. It consisted of five articles. While the first two are related to the determination of the boundaries between the two states, the last two articles deal with the future cooperation between the two empires. For the River Nile, article three was the only article dealing with the Nile Water.

2.1.3. 1925 Exchange Note between Italy and the United Kingdom

Between 1919 and 1925, both the British and the Italian governments exchanged notes on building the railroad from Eritrea to the Italian Somaliland. The exchange confirmed the right of both Egypt and Sudan to their share of the Nile water. In return for the exchange, Great Britain asked for the Italian government's recognition of such rights to ensure the execution of the railroad project. Italy has planned to build a railroad that will pass through Ethiopia, and the vicinity of Addis Ababa. The note was to ask the British colony its support to mediate between the Ethiopian government and the Italian Colonist. On the other hand, the British government asserted in the note that building the railroad is attached with the declaration of the Italian colony with the "prior hydraulic rights" of both Egypt and Sudan.[8]

2.1.4. 1929 Exchange Note between Egypt and the United Kingdom

OkothOwrio, a Kenyan scholar, argued that the 1929 note exchange was to "guarantee and facilitate an increase in the volume of water reaching Egypt."[9] However, the rights that this agreement guaranteed to Egypt were also maintained in the previous agreement. Besides, the 1929 Exchange note between Egypt and the United Kingdom ensured the continuity of the assigned share of water that

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[3] Valerie Knobelsdorf, Note: The Nile Water Agreements: Imposition and Impacts of a Transboundary Legal System, 44 COLUM J. TRANSNATL. L. 634. 635

[4] See, Christina M. Carroll, Supra note 2 at 139, DerejeZelekeMekonnen, The Nile Basin Cooperative Framework Agreement Negotiations and the Adoption of a Water Security Paradigm: Flight Into Obscurity or a Logical Cul-de-sac? 21EUR. J. INT'L.2, (2010), [hereinafter The Nile Basin Cooperative Framework Agreement Negotiations], see also, DerejeZelekeMekonnen, Between the Scylla of water security and Charybdis of Benefit Sharing: The Nile Basin Cooperative Framework Agreement- Failed or Just teetering on the Brink?,GO. J. INT' L. 3 (2011), {hereinafter Benefit Sharing], see, TakeleSobokaBulto, Between Ambivalence and Necessity: Occlusions on the Path Toward A Basin – Wide Treaty in the Nile Basin, 20 COLO. J. INT'L ENVIRL. L. &POL'Y 291, (2008-2009) [hereinafter Between Ambivalence and Necessity], JuttaBrunnee. AZIZA MANSUR FAHMI, WATER MANAGEMENT IN THE NILE BASIN: OPPORTUNITIES AND CONSTRAINTS, http://www.isgi.cnr.it/stat/pubblicazioni/sustainable/133.pdf last visit 11/10/2011.

[5] Aaron Schwachach, The United Nation Convention on the Law of Non-Navigational uses of International watercourses, Customary International Law and interest of upper riparian states, 33 TEX. INT' L. J. 257 (1998), 270.

[6] Adams Oloo, The Quest for Cooperation in the Nile Water Conflicts: the Case of Eritrea, 11 AFR. SOC. REV. 95, 2007, 96.

[7] Preamble of the Treaty Between Ethiopia and Great Britain on the Delimitation of the Frontier between Ethiopia and Sudan, United Nations, Legislative Texts and Treaty Provisions Concerning the Utilization of International Rivers for Other Purposes than Navigation, United Nations Legislative Series (ST/LEG/SER.B/12), United Nations publication, 115,116 [hereinafter United Nation Publication].

[8] Exchange of Notes Between the United Kingdom and Italy Respecting Concessions for a Barrage at Lake Tsana and a Railway
Across Abyssinia From Eritrea To Italian Somaliland, Signed at Rome 14 and 20 December 1925, see United Nation Publication
Supra note 7 at 99

[9] OkothOwiro, The Nile Treaty, State Succession and international Treaty Commitments: A case Study of the Nile Water Treaty, http://www.kas.de/wf/doc/kas_6306-544-1-30.pdflast visit 1/4/2012.

reaches Egypt. [10]

Egyptian Scholars argued that the assassination of Sir Oliver Lee Stack, the British governor-general of Sudan, in late 1924 was the reason for concluding such a note.[11] Later, after the 1925 exchange, the British authority in Sudan used this accident to apply pressure on the Egyptian policy in Sudan. It threatened the Egyptian government with increasing areas irrigated with the Nile River water in Sudan, as punishment for murdering Sir Oliver Lee Stack. Hence, the Egyptian government worked to develop a new study of the Nile River water for irrigation purposes.[12] Thus, the notes between Her Majesty's Government in the United Kingdom and the Egyptian Government on the Use of Waters of the Nile for Irrigation were concluded in 1929.

The Note was between the Chairman of the Council of Ministers Mohamed Mahmud Pasha- as a representative of the Egyptian government - and Lord Lloyd from the British government. The first paragraph of the note asserted that "a solution to these problems [irrigation] would not be deferred to a subsequent date when it became possible for the two Governments to come to terms on the status of the Sudan but, regarding the settlement of the present provisions, it expressly reserves every freedom at any negotiations which could precede such an agreement."[13] Egyptian Note sent from the Chairman of the Council of Ministers Mohamed Mahmud Pasha stated that "{t}he present agreement can in no way be considered as affecting the control of the River - this being a problem which will cover free discussions between the two Governments within the framework of negotiations on the Sudan."[14] The second paragraph was reconfirmed later in the 1959 Convention. It asserted its acceptance to the increase of water quantity to Sudan without any "infringement on neither the natural and historical rights of Egypt." [15]

The significance of 1929 Nile water agreement was embedded in three issues. First, Egypt ensured full control of any construction work on the Nile.[16] Based on this fact, the Ethiopian authority was prevented from building a dam on the Lake Tana in 1935.[17] Second, it changed the legal status of the different Nile Basin states. It had fully recognized the principle of equitable utilization. [18] The determination of such utilization is based on finding of a commission.[19] Thirdly, 1929 agreement was a symbol of recognition of "the principle of established rights." Egypt insisted on the recognition of its "natural and historic rights." They have been the most fundamental elements of Egyptian policy approach to the Nile waters.

2.1.5. 1959 Agreement between Egypt and Sudan

The High Dam (1960-1969) was built after months of concluding the agreement between the United Arab Republic and the Republic of Sudan for the full utilization of the Nile Water on November 8th, 1959. This agreement was mainly held for the sake of building the High dam; it determined the Egyptian share in the Nile water regarding the Dam and its lake.[20]

The importance of the 1959 Convention is based on various factors. First, 1959 put a bilateral obligation on both states to negotiate with other riparian states in case of their request to increase their water share. They did not exclude the other riparian states' right to ask for future increases in their own share. Secondly, The Convention was mainly to enhance water utilization for both states. Additionally, it increased the water share of Sudan to compensate for building the high dam; the Egyptian government additionally paid 15 million pounds to the Sudanese government for any damage afflicted on the Sudanese territory form building the dam. Moreover, the Convention helped the two states to form one of the oldest institutional arrangements in the Nile Basin, which is the Permanent Joint Technical Commission for Nile Water (PJTC).

2.2. Institutional Framework of the Nile Basin States

2.2.1. Permanent Joint Technical Commission for Nile Water (PJTC)

The history of institutional arrangement of the Nile Basin started in the early 1950s. In 1959, as a part of the 1959 Convention, Egypt and Sudan formed the Permanent Joint Technical Commission for Nile Water (PJTC). It is considered as one of the oldest arrangements for the Nile Basin. The reason for establishing the Commission was to ensure the technical cooperation for the Nile control projects.[21]

This cooperation tool is a bilateral cooperative one. It did not include any other states from the rest of the Nile Basin except Egypt and Sudan.[22] Both countries stated that for the best interest of the PJTC success, other Nile Basin states shall be involved in another big institutional arrangement. Hence, the result was establishing the HYDROMET project, which paved the road to both UNDUGU and TECCONILE later on. [23]

/[10]/ see United Nation Publication supra note 7 at 115

/ [11] /YunanLabibRizk, Adiwan of Contemporary Life, Al Ahram, http://weekly.ahram.org.eg/2000/503/chrncls.htmlast visit, 1/4/2012. See also AZIZA MANSUR FAHMI, supra note4.

/[12]/ P. P. HOWELL AND J. A. ALLAN, THE NILE: SHARING A SCARCE RESOURCES; A HISTORICAL AND TECHNICAL REVIEW OF WATER MANAGEMENT AND OF ECONOMICAL AND LEGAL ISSUES, Cambridge University Press, (1st ed.), (1994), 538.

/[13]/ United Nation Publication supra note 7 at 101

/[14]/ United Nation Publication, Id at 101

/[15]/ United Nation Publication Id at 101.

/[16] /Supra note 2 at 98.

/[17]/ Econ. & Soc. Commission For Western Asia, Assessment of Legal Aspects of the Management of Shared Water Resources in the ESCWA Region, ¶U.N. Doc. E/ESCW A/ENR/2001/3, (Feb. 22, 2001), 14.

/[18]/ Id at 16

/[19]/ AZIZA MANSUR FAHMI, supra note 4 at 136.

/[20]/ Agreement between the United Arab Republic and the Republic of Sudan for Full Utilization of the Nile Waters, see United Nation Publication supra note 12 at 146.

/[21]/ Art. 4 of 1959 Convention

/[22]/ United Nation Publication Id at 50.

/[23]/Id. at 51.

2.2.2. Meteorological and Hydrological Survey on the Equatorial Lakes HYDRO-MET

The HYDROMET project included Egypt, Sudan, Uganda and Tanganyika.[24] Later on, Burundi, Rwanda and Zaire joined the project, while Ethiopia remained as an observer.[25] This project was a survey to the catchments of Lakes Victoria, Kyoga, and Mobutu SeseSeku (Lake Albert).[26] The aim of the project was to help its members in:

a) Determination of their equitable entitlements to the use of the Nile;
b) Formulation of national water master plans;
c) Development of their capacities and basin-wide information system;
d) Preparation of a basin-wide institutional and legal arrangement;
e) Enhancement of training procedures;
f) Environmental impact assessment and water quality management capacity.[27]

Some writers argue that the HYDROMET project is older than the PJTC.[28]They maintain that in 1950, Egypt agreed to work on a meteorological and hydrological survey on the equatorial lakes with the assistance of Great Britain. [28] However, official establishment of the HYDROMET project was in 1967, eight years after the 1959 Convention.[29] The project took about 35 years until it turned into TECCONILE.

2.2.3. Technical Cooperation Committee for the Promotion of the Development and Environmental Protection of the Nile TECCONILE

The Technical Cooperation Committee for the Promotion of the Development and Environmental Protection of the Nile was established in 1992. Rwanda, former Sudan, Tanzania, Zaire and Egypt established the TECCONILE for a fixed period of three years as a transition period until the establishment of a wide institutional arrangement. Some other Nile Basin states participated in the TECCONILE as observers like Ethiopia and Kenya.[30] The main reason of the establishment of the TECCONILE was to address the Egyptian domination in the previous arrangement, especially in the UNDUGU. [31]Brunnee and Toope saw that the Egyptian technical expertise gave it the upper hand in the previous institutional arrangement. This expertise threatened Ethiopia and Kenya. [32] The TECCONILE was supposed to work for only three years as a transition period before launching the Nile Basin Initiative. However, this period was extended to more than nine years.

2.2.4. UNDUGU: Brotherhood

Another project that many writers did not give due attention was UNDUGU. Egypt was able to convene with Sudan, Uganda and Zaire to form a league called UNDUGU in 1981. UNDUGU means brotherhood in Swahili. The plan was to reorganize this convivial group into a more scientific organization. It was concerned with technical matters that ministers, who were concerned with political affairs, were not very interested in or knowledgeable about.[33]

Mekonnen argued that both the UNDUGU and TECCONNILE paved the road to establish the NBI, which is considered to be a corner stone in the institutional arrangement of the Nile basin. However, many writers challenged this finding. Brunnee and Toope argued that the UNDUGU was an Egyptian initiative as a part of its "hegemonic aspirations." [34] They further stipulated that Egypt "sought to create multi bargaining situations most likely to result in agreement than negotiations purely devoted to water issues."[35]

Additionally, YacobArsano argued that Ethiopia challenged the UNDUGU. He affirmed his argument that Ethiopia declared that UNDUGU had no legal foundation as a legitimate body, and it was ended after the "ministerial meeting in Addis Ababa."[36] However, TakeleSobokaBulto maintained Ethiopia was always against the Egyptian aims of the UNDUGU and TECCONILE, as it was acting in both as an observer. [37] Hence, there is mutual intention from both upper and lower riparian states to take a stand against each other, otherwise, these arrangements would have succeeded.

2.2.5. Nile Basin Initiative

Many writers argued that NBI is the successor of the TECCONILE. [38] They maintained that NBI secretariat is housed in the old TECCONILE buildings. However, there are many differences between the NBI and TECCONILE. First, Ethiopia and Kenya did not join TECCONILE, while both of them are members of NBI. They declared their refutation of the TECCONILE on the bases of it not proviting any "fundamental equitable concerns of water apportionment."[39] Secondly, TECCONILE was to provide states with technical expertise, while NBI is to contribute to poverty alleviation, reverse environmental degradation and

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[24]meaningSalman M. Salman, The New State of South Soudan and the Hydir- Politics of the Nile Basin, 36WATER INT'L154, 159. {hereinafter The New State of South Soudan}.37
[25]/ Econ. & Soc. Commission For Western Asia, Assessment of Legal Aspects of the Management of Shared Water Resources in the ESCWA Region, ¶U.N. Doc. E/ESCW A/ENR/2001/3, (Feb. 22, 2001), 14.18.
[26]/The New State of South Soudan Supra note 23 at 37
[27]/ Supra note 25 at 19
[28]/ Id at 18.
[29]/ Id at 19
[30]/ Does the Law Matter, supra note 1 at 133-134
[31]/ Id at 133-134
[32]/ Does the Law Matter, supra note 1 at 133-134
[33]/ Yosef Yacob, From UNDUGU to the Nile Basin Initiative, An Ending Exercise in Futility, Ethiopia TECOLAHACOS, http://www.tecolahagos.com/undugu.htm last visit 21 May 2012.
[34]/ See Does Law Matter supra note 1 at 133
[35]/ Id..at 133
[36]/ YacobArsano, Ethiopia and the Nile: Dilemmas of National and Regional Hydro politics, (2007), (Ph.D. dissertation, University of Zurich) (on file with author)
[37]/ see Ambivalence and Necessity supra note 1 at 318.
[38]/ Does Law Matter supra note 7 at 108.
[39]/ Id at 134.

promote socio-economic growth in the riparian countries.[40]

The Nile Basin Initiative is a cornerstone in the overall Nile Basin relationship among the Nile basin states. They made such joint effort to "achieve sustainable socio-economic development through the equitable utilization of, and benefit from, the common Nile Basin resources."[41] The Nile Basin Initiative was established on February 22, 1999 in Darussalam, by the Ministers responsible for "Water Affairs of each of the nine Member States." [43] These states are Burundi, the Democratic Republic of Congo, Egypt, Ethiopia, Kenya, Rwanda, Sudan, Tanzania, and Uganda.[42] As of yet, there are no available resources about the membership or the position of South-Sudan.

The significance of NBI was manifested in the attempt to reach a legal solution to the pending issues among the Nile Basin states. After one year of its official work, NBI prepared an "Agreement on the Nile River Basin Cooperative Framework."[43] The agreement was based on the scholarly work in the field of the international water law. It will pave the road to form the "Permanent River Nile Basin Organization" or the "Nile Basin Commission." These arrangements will be concerned with the enforcement of any legal arrangement among the Nile Basin states.

2.3. Pending Legal and Institutional Issues

2.3.1. Legal Issues

It should not be forgotten that the NBI had eventually reached a form of legal arrangement, an agreement on the Nile River Basin Cooperative Framework. Ethiopian scholars argued that such a framework would end the Egyptian hegemony on the Hydro-political aspects of the Nile water. Abadir Ibrahim argued that the new agreement would end the Egyptian hegemony unless upper riparian states use a counter hegemonic strategies, which will based on affect on the flow of the Nile to Egypt.[44] However, such a perspective is more imaginary and lacks fundamental reading of the Agreement. Firstly, even though the Agreement did not answer the main question of States' water share or distribution of water among them, it is based, to a great extent, on the international water law principles. Article 4, paragraph 2, about the Equitable and Reasonable Utilization, is a copy of the successive articles regarding the same issue. There are the works of the Helsinki Rules, the International Law Commission, Draft Articles of the United Nation Convention of Non-Navigational Uses of International Water Course, and the recent development of the International Water Law represented in International Water Law Association conferences.

Furthermore, the new viewpoints have introduced new standards to the principle of equitable and reasonable utilization and participation. Article 4 (2)(h) of the agreement regarding the equitable and reasonable utilization stated that "The contribution of each Basin State to the waters of the Nile River system"[45] as one of the considerable measurement of the equitable utilization principle. This measurement was eliminated during the negotiation of the United Nations Convention on the Law of the Non Navigational Uses of International Watercourses. Additionally, Mekonnen argued that the main reason that kept Egypt and Sudan from joining the Agreement on the Nile River Basin Cooperative Framework was that a new term "water security" had been introduced in the draft.[46] This term led to the suspension of the draft articles, especially that of article 14.[47] Article 14 made the interpretation of both principles of equitable utilization and no harm connected to the water security of the states. Egypt and Sudan did not accept this measure; instead, they proposed to connect the states' water security with "current uses and rights of any other Nile basin state,"[48] which was maintained in article 4 para 2.e "existing and potential uses of the water resources." [49]

Moreover, in April 2010, Egypt maintained – in the *Sharm Al Sheikha* convention among the Nile Basin states - that the new Agreement shall include an article stating the Egyptian "Historical and Natural rights" in the Nile water. The Egyptian Minister of Water and Irrigation Dr. *Hussein El Atafy* made an official statement against the agreement on the Nile River Basin Cooperative Framework. He asserted that this Agreement "violates the agreed upon procedures and does not relieve member states of their commitments to valid previous agreements with Egypt."[50] He further stipulated that " the International Court of Justice considers these rights as enshrined as boarder agreements and those countries cannot change existing and valid agreement under the pretext that they were signed during the era of colonialism."[51]

Thirdly, Article 5 of the Agreement dealt with the principle of 'Obligation not to cause Significant Harm.' It stated that "Nile Basin States shall, in utilizing Nile River

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[40] /see , Claudia Sadoff and David Grey, Beyond the River: The Benefits of Cooperation on International Rivers, 4 WATER POL' 389, 2002, 401, see Nile Basin Initiative ,http://nilebasin.org/newsite/index.php?option=com_content&view=article&id=71%3Aabout-the-nbi&catid=34%3Anbibackground-facts&Itemid=74&lang=enlast visit 10/3/2012 , .

[41] / Samuel Luzi, Mohamed Abdel, MoghnyHamouda, FranziskaSigrist and EvelyneTauchnits, Water Policy Networks in Egypt and Ethiopia, 17 J. ENV.& DEV. 238, 2008, 239. [43] Nile Basin Initiative ,About the NBI, supra note 51 [44] See Does Law Matter supra note 7 at 108.

[42] / See Does Law Matter supra note 7 at 108.

[43] / The Nile Basin Cooperative Framework Agreement, supra note 7.

[44] / Abadier M. Ibrahim, The Nile Basin Cooperative Framework Agreement: The Beginning of the End of Egyptian Hydro-Political Hegemony,18 MO. ENVTL. L. & POL'Y REV 284, 308

[45] / Art.4 par. 2/h

[46] / See The Nile Basin Cooperative Framework Agreement Negotiations, Supra Note 7 at 428.

[47] /Id at 428.

[48] / Id at 428.

[49] / Art.4 para 2/e.

[50] Egypt and its Historical Rights in Nile Water, Egypt State Information Service, http://www.sis.gov.eg/En/LastPage.aspx?Category_ID=1144 last visit 30/10/2012.

[51] /Id.

System water resources in their territories, take all appropriate measures to prevent the causing of significant harm to other Basin States." [52] It also recognized the principle of reparation, as it claimed the right of the injured state which has sustained significant harm to ask for compensation for the act. The second paragraph stated that "{w}here significant harm nevertheless is caused to another Nile Basin State, the States … take all appropriate measures, having due regard to 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."[53]

2.3.2. Institutional Issues (Nile River Basin Commission)

In addition to Nile River Basin, the Commission will succeed the NBI in all its purposes and functions. Article 16 of the Agreement on the Nile River Basin Cooperative Framework dealt with its own new purpose and objective of the Commission. It stated that it has three main objectives:

a) Promote and facilitate the implementation of the principles, rights and obligations of the Agreement
b) Serve as an institutional framework for cooperation among Nile Basin States in the use, development, protection, conservation and management if the Basin and its water
c) Facilitate closer cooperation among states and peoples of the Nile River Basin in Social, economical, and culture fields. [54]

Besides the main objectives and purpose of the Nile River Basin Commission, it was given extra functions in regards to dispute settlements, information exchange, and mutual cooperation. Article 33 of the Agreement on the Nile River Basin Cooperative Framework gives the Nile River Basin Commission a reasonable role in dispute settlement. It urged the states' members to use the Nile River Basin Commission as mediator or conciliator between the quarreled parties.

3. Inadequacy of the Legal Framework of the Nile Basin

3.1. Historical and Acquired Rights

3.1.1. Egyptian Argument

a. Mixing of Historical and Acquired Rights in the Egyptian Legal Literature

Many writers in the field of international water law (Stephen McCafferey, Aziza Fahmy and MufidShehab) have intermixed the historical and the acquired rights. One can say that there is a general confusion in the legal literature of the Nile regarding the Historical and Acquired rights. However, these writers are justified in their perspective, since most related conventions asserted Egypt's historical rights. On the other hand, it is easy to find other writers confusing the two rights. *Adel Aela* declared that the Egyptian right is "Historical Acquired Rights," as one terminology describes the Egyptian rights.[55] Egypt's position has reached a stage that when talking of Egypt's acquired rights is radically connected to its historical rights.

i. Scope of the Egyptian Argument

The structure of the legal argument related to the specific framework is categorized by opposing claims. Every state based its rights on the refutation of the rights of others. Egypt clings to its historical rights of 7000 years of Nile water utilization, as well as its acquired rights in the successive notes and conventions; conversely, Ethiopia refutes such rights.

The Egyptian government argued that its water rights are based on factual and legal bases. For the factual dimension, *Aziza Fahmi* stated that according to the 1959 agreement Egypt only uses "55.5 milliard cubic meters out of total 200 milliard cubic meters of water resources in the Nile basin." [56] She additionally maintained that Egypt "relies totally on the waters of the Nile for its existence, for its survival because it is an arid desert land."[57] Besides, Fahmi further stipulated that Egypt never used and it will never use the "right of veto".[58] She based her argument on "the principle of abuse of right,"[59] the basic principle of State Responsibility that prevents any unreasonable use of the right of veto.[60] Hence, she considered other Nile Basin states' position against the Egyptian Nile share is an "exaggeration."[61]

For the legal dimension, Egypt built its legal argument on the successive legal notes and agreements. All of these maintained that the water should flow to the lower riparian states (Egypt and Sudan). There is no reference to the quantity of water specified to Egypt during such time. In 1929-note exchange, *Mohammed Mahmoud Pasha* asserted the Egyptian historical rights, without any reference to such quantity. The different rules and conventions held a clear position that none of them affect the existing bilateral or other agreements between states by any means. [62] Article 1 of the 1966 Helsinki Accords stated that the "general rules of international law as set forth in these chapters are applicable to the use of the waters of an international drainage basin except as may be provided otherwise by

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/52 /Art. 5 para 1
/53 /Art. 5 para 2
/54/ Art. 16

/55 / MOHAMED SHAWKI ABDEL AEL, EL ANTFA' EL MONSAF BAMAYAH EL ANHAR EL DAWLAYAH: MA' EL ASHARAH ELA NAHR EL NILE, Motada el Kanwan El Dawli, 2010, 17.
/56 /Id 137.
/57 /Id 137.
/58 /Id 137.
/59 /Id 137.
/60 /Id 137.
/61 /Christina M. Carroll, Supra note 2 at 137.
/62 /Kai Wegerich and Oliver Olsson, Later Developers and the Inequality of "equality utilization" and the Harm of "Do no Harm", 35 WATER INT'. 707, 2010, 709.

convention, agreement or binding custom among the basin States.

Article 3 of the United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses, paragraph 1, states that "{I}n 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."[63]

The rules, which were mentioned in the previous articles, are concealed with the general rules in the international law. However, any inequitable agreements, from the perspective of any party, will not be affected by the international water law rules. In the Nile case, these provisions will not affect the agreement of 1929 of between Egypt and Great Britain. Accordingly, Egyptian scholars argue that "Nile basin states had no legal ground to ask to modify any of the Nile River agreements or conventions."

ii. Counter Argument of Historical Rights

On the other hand, other riparian states consider the Egyptian historical rights as a naïve excuse to get the lion's share of the Nile Water.[64] They respond to such an argument as it is considered prejudice to their water rights.[65] For Ethiopia, the counter argument was based on its position against the 1902 Convention on the one hand, and other conventions and notes on the other. For the 1902 Convention between Ethiopia and Great Britain, Ethiopia's position can be summarized in three points. First, the Convention of 1902 between Great Britain and Ethiopia was never ratified. Second, all the previous conventions did not mention the Ethiopian share in the Nile water. Hence, these conventions are not mandatory to Ethiopia. Third, the British Declaration of adding the Ethiopian territory to the Italian colony cancelled all the conventions and agreements between Ethiopia and Great Britain.[66]

Besides, scholars advocating the perspective of the lower riparian states have developed a counter argument against the rest of the Note and conventions. For the 1925 and 1929 Exchange notes between Egypt and Great Britain, they argued that none of the Nile basin States were a member. Egypt only signed this Note with the colonist. In addition to the previous argument, they added to the 1959 Convention between Egypt and Sudan another a concrete counter argument. They argued that Egypt and Sudan did not have the right to distribute the Nile water share without referring to other riparian states.

iii. Newly Independent States Unilateral Declaration

The case of the unilateral declaration made by the Newly Independent state was mentioned in Geneva Convention on Succession of States in respect of Treaties. The case that was mentioned in Article 9 only tackles specific case. It deals with affirmative action of newly independent state to accept the provisions of a agreement or convention, but the case of rejecting such an agreement or convention is remain unregulated.

The first paragraph of Article 9 tackles the case of a unilateral declaration made by the successor state, providing the continuity of a treaty or a convention in favor of its territory. It stated that "Obligations or rights under treaties in force in respect of a territory at the date of a succession of States do not become the obligations or rights of the successor State or of other States Parties to those treaties by reason only of the fact that the successor State has made a unilateral declaration providing for the continuance in force of the treaties in respect of its territory."[67] The second paragraph of Article 9 it consequence of the previous act, it stated "the effects of the succession of States on treaties which, at the date of that succession of States, were in force in respect of the territory in question are governed by the present Convention."[68] This article was reflected in the ICJ judgment in the *Nuclear Test Case*. The ICJ dealt with the unilateral declaration from the French Republic to not participate in any future atmospheric nuclear tests in the South Pacific area.[69] The court stated that "{i}t is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations."[71] Then the court further declared that "When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the Statebeing thenceforth legally required to follow a course of conduct consistent with the declaration."

iv. Tanzanian Argument

The Egyptian government claims that the 1929 Agreement is not only binding on Egypt, but also on Sudan, Uganda, Tanzania, and Kenya, on whose behalf the British signed the 1929 Agreement. However, these states are forced to abide by the Nyerere doctrine for state succession. This doctrine is considered as unique theory in the field of state succession.[70] The two years grace period honored all treaty before its termination.[71]

In 1962, the government of Tanzania sent the governments of Great Britain, Egypt, Kenya, Sudan and Uganda a memorandum regarding the utilization of the River Nile water. Mr. Nyerere sent his statement in the form of an exchange note to the Nile Basin States. Many of

[63] /Art. 3 of UN Convention, 1997

[64] /OkothOwiro, The Nile Treaty, State Succession and international Treaty Commitments: A Case Study of the Nile Water Treaty, http://www.kas.de/wf/doc/kas_6306-544-1-30.pdflast visit 1/4/2012.

[65] /Id

[66] /Supra note 2at 543.

[67] /Art. 9 Vienna Convention

[68] /Art. 9 Vienna Convention

[69] /Alfred Rubin, The International Legal Effects of Unilateral Declarations, 71 Am. J. Int'l L. 1 1977, 2. [71] Nuclear Test (Astralia v. France), Judgement, ICJ, 20 December, 1974, 267.

[70] /Supra note Ошибка! Закладканеопределена. at 181 184

[71] /Problems of State Succession In Africa: Statement of the Prime Minister of Tanganyika, 11 INT'L & COMP. L.Q. 1169 1962, 1211.

the states remained silent towards the content of the Tanzanian memorandum. While Egypt responded, Kenya, Uganda, and Sudan remained silent.

In 1963, the Egyptian government's response was very simple. It did not argue the legality of the declaration; however, it stated that the provision of Exchange of Notes between Her Majesty's Government in the United Kingdom and the Egyptian Government on the use of waters of the Nile for Irrigation would continue to exist until a new convention is drafted.

3.2. Sovereignty versus Cooperation

3.2.1. Conflict between Sovereignty and Cooperation

a. Absolute Sovereignty

In 1898, the Attorney General of the United States declared in his advisory opinion that "the rules, principles, and precedents of international law impose no duty or obligation upon the United States of denying to its inhabitants the use of the water of that part of the Rio Grande lying entirely within the United States, although such use results in reducing the volume of water in the river below the point where it ceases to be entirely within the United States."[72] These words were, according to most of international water legal scholars, the first pillar for Absolute Territorial Sovereignty.[73] It was named after the American Attorney General Judson Harmon. He denied the riparian states' rights over watercourse to allow the flow of water through its territory to other states. Harmon stated that the state department and the United States held no responsibility "for the substantial reduction in Rio Grande water available to Mexico."[76]

The previous theory about absolute territorial sovereignty was taken as a base to allow the "upstream states complete freedom of action with regard to international watercourses within its territory, irrespective of any consequence that might ensue in other countries."[74] Besides, Ethiopian government adopts absolute territorial sovereignty theory. The Ministry of Foreign Affairs in 1978 issued serious of statements, in which it asserts and reserves "all the rights to exploit her natural resources." [75] Harmon Doctrine had become "a potent weapon in the hands of downstream states accusing an upstream state of acting unreasonable."[76]

The theory of absolute territorial integrity is for the sake of lower riparian states. As Stephan McCafferey stated "{w}hile the doctrine of absolute territorial sovereignty insists upon the complete freedom of action of the upstream state, that of absolute territorial integrity maintains the opposite: that the upstream state may do nothing that might affect the natural flow of the water in the downstream state."[77]

It has been argued that this theory was never adopted in any diplomatic settlement, convention or court decision.[78] However, in the Nile case, the lower riparian states, especially Egypt, asserted their legal and historical rights to have a veto power over the utilization of the water of the Nile. This is based on the right of the lower riparian states to claim the right of continued, uninterrupted flow of the water to its territory from the upper riparian states. This theory gives a right to the lower riparian states to the water of the river.[79]

This theory was criticized from various reasons. First, it ignores the equal territorial sovereignty of the state. [80] Stephan McCafferey described both theories as "factually myopic and legally anarchic." McCafferey maintained that both theories "ignore other states' need for and reliance on the waters of an international watercourse, and they deny that sovereignty entails duties as well as rights. As freshwater became increasingly precious and nations of the world ever more dependent, both doctrines became increasingly less relevant and defensible."[81]

Second, different courts and tribunals have declined this theory, as they considered it a prejudice against other states' rights.[82] In *Trail Smelter Case,* a claim of water and air pollution was held against Canada from the United States. The court held Canada responsible "for extraterritorial injury existed as a matter of general international law."[83]

Third, in these two theories, harm is inevitable to either the upstream or the downstream states. The international law principles oblige states not to cause any harm to other states.[84] Both theories violate the general legal rule that "one should use his property in such a manner as not to injure that of another," [85] or *sic uteretuoutalienumnon laedas.* The harm in these theories could mean a change in

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/72 /U.S. Attorney General Harmon, 21 OP. ATT'Y GEN. 274, 281-282 (1898), 274

/73 /Donald J. Chenevert, Application of the Draft Articles The Non-Navigational Uses of International Watercourses to the Water Disputes Involving The Nile River and the Jordan River, 6 EMORY INT'L REV. 459, 1992, 502 STEPHEN C. MACAFFREY, THE LAW OF INTERNATIONAL WATERCOURSES, NON-NAVIGATIONAL USES, Oxford Univeristy Press, (2nd ed.) (July 2007), 115 [hereinafter Law of International Watercourse]at 115

/74 /Id at 115

/75/ Id at 274.

/76 /Id at 118

/77/ Law of International Watercourse supra note 73 at 128.

/78 /BONAYA GODANA, AFRICA'S SHARED WATER RESOURCES LEGAL AND INSTITUTIONAL ASPECTS OF THE NILE, NIGER, AND SENEGAL RIVER SYSTEM, 39, (1985)

/79/ Donald J. Chenevert, Supra note 160 at 502, 83 Donald J. Chenevert, Supra note 160 at 504.

/80/ Donald J. Chenevert, Supra note 160 at 504.

/81/ Law of International Watercourse supra note 73 at 128.

/82 / Margaret J. Vick, International Water Law and Sovereignty: A Discussion of the ILC Draft Articles on the Law of Transboundary Aquifers, 21 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 191 2008, 215.

/83/ Trail Smelter Arbitral Decision (United States v. Canada), 33 A.J.I.L. 182 (1939); 3 Int. Arb. Awards 1905, 1963 (1949).
Mentioned in A.P. Lester, River Pollution in International Law, 57 AM. J. INT'L L 828, 1963, 836.

/84 / Salman M. Salman, The Helsinki Rules, the UN Watercourses Convention and the Berlin Rules: Perspectives on International Water Law, 23 WATER RES. DEV. 625 (2007), 627

/85/ It is the general rule in national and international law, article 5 of the Egyptian civil law asserted such right.

the natural flow of the basin, which could affect the downstream states, or prevent the development of the international watercourse, which could also affect the upstream states.[86] This has happened in the Nile case. While Ethopia builds a dam and starts its way of development, it will decrease the amount of water allocated to Egypt. Conversely, when Egypt maintains its share of the Nile water, it will handicap possibilities of development of Ethiopia.

b. Limited Territorial Sovereignty

Salman argued that the Limited Territorial Sovereignty principle ensures the equality of all riparian states in the use of the international river.[87]McCafferey reluctantly admitted that it is the dominant theory in the field of international water law in determining rights and obligations. (McCafferey:137) The principle of limited territorial sovereignty is based on the fact that: "all riparian states have the right to fully utilize the water of an international river. Besides, states are obliged to ensure that any use will not cause any significant harm to other riparian states. McCafferey described the theory as "{t}he freedom to swing one's fist ends where the other person's nose begins." (McCafferey:137)

The doctrine of Limited Territorial Sovereignty was strongly supported in many cases. The International Court of Justice case*Gabcikovo- Nagymaros* gave considerable weight to the principal of equitable and reasonable utilization of international watercourse. It stated that "Czechoslovakia, by unilaterally assuming control of a shared resource, and thereby depriving Hungary of its right to an equitable and reasonable share of the natural resources of the Danube … failed to respect the proportionality which is required by international law."[88] In the *Corfu Channel* case, the International Court of Justice maintained that, "it is illegal for states to use or permit the use of their territories for acts that would constitute harm to persons or to the environment in other countries."[89]

In *Lake Lanoux Arbitration,* France declared that it would consider Spainish interests in the flow of the water to its territory unaffected by its hydroelectric project. Later on, France modified the amount of water used in the project, which Spain refused to accept. The tribunal answered the following question of whether or not the French act was a violation of the governing treaty and its protocol, which is the Treaty of Bayonne of 1866. The court concluded that "in the general accepted principles of international law, a rule which forbids a State, acting to protect its legitimate interests, from placing itself in a situation which enables it in fact, in violation to its international obligations, to do even serious injury to a neighboring State."

Even with the wide acceptance of the principles of equitable utilization and no harm, major criticism to this doctrine is built on the wide disagreement of the essence of both principles. The detailed relationship between the two principles is complex and challenging.[90] The international failure to reach an agreed text of both principles has deprived the limited territorial sovereignty from its content. As the criticism is directed to the application of the theory in the international water law principles, I shall refer to the next subsection, which deals with these principles.

c. Community Theory

Community Theory is based on the assumption that "the entire river basin is an economic unit, and the rights over the waters of the entire river are vested in the collective body of the riparian states, or divided among them either by agreement or on the basis of proportionality."[91] Even though this theory sounds new, its origins go back to Roman law. (McCafferey:149) Many philosophers wrote about the notion that "water is something to be treated as common property," Grotius wrote: "a river … is the property of the people through whose territory it flows, … the same river viewed as a running water, has remained common property, so that any one may drink or drain water from it."[92]

Community Theory looks for maximum cooperation among states as a must on one hand; while on the other it overlooks the sovereignty principle.[93] The difference between the Community theory and the Limited Territorial sovereignty theory is that the first theory goes beyond the second, through increasing the rights of the collective body of the river concerned.[94]

The idea of the Community theory was presented in the *Territorial Jurisdiction of the International Commission of the River Oder.* Even though this case was mainly about navigational uses, it is worth being presented for the concept of non-navigational uses. If this theory were applicable navigational uses, it would be also appropriate to present it. In the *Commission of River Oder Case*, the permanent Court of International Justice in its decision in 1929 answered the question regarding the jurisdictions of the Oder Commission under Versailles Treaty, within the Polish territory to include also the Warta and Notze Rivers. The court found that Commission jurisdiction was entitled to both rivers.

[86] Law of International Watercourse supra note 73 at 136.

[87] Law of International Watercourse supra note 73 at 627

[88] /(Gabcikovo – Nagymaros) Project (Hungary/ Slovakia), Judgment, ICJ, 25 September 1997, 56

[89] Corfu Channel Case ICJ, mentioned in Valentina OkaruBisant, Institutional and legal Frameworks for Preventing and Resolving Disputes Concerning the Development and Mangement of Africa's Shared River Basins, 9 COLO. J. INT'L ENVTL. L. & POL'Y 331 1998, 352.

[90] Salman M. Salman, The Helsinki Rules, the UN Watercourses Convention and the Berlin Rules: Perspectives on International Water Law, 23 WATER RES. DEV. 625 (2007) at 628

[91] /Id at 627

[92] Hugo Grotius, On the Law of War and Peace, Chapter II the General Rights of Things, Mentioned in McCafferey:150

[93] /Id at 627

[94] BONAYA GODANA, AFRICA'S SHARED WATER RESOURCES LEGAL AND INSTITUTIONAL ASPECTS OF THE NILE, NIGER, AND SENEGAL RIVER SYSTEM, (1985) 137

4. Conflict between Sovereignty and Cooperation in IWL Principles

4.1. Principle of Equitable and Reasonable Utilization and Participation

Articles four to eight in the second chapter of the 1966 Helsinki Rules regulated the principle of equitable and reasonable utilization and participation. It holds the basin states responsible for "a reasonable and equitable share in the beneficial uses of the waters of an international drainage basin."[95] Article five; paragraph one defined the principle of Equitable and Reasonable Utilization and Participation, as "it shall be determined in the light of all the relevant factors in each particular case."[96]

Article five, paragraph two stated that factors are considered in determining the reasonable and equitable share. These factors include but are not limited to geography, hydrology, climate affecting the basin, past utilization of the waters of the basin, and the economic, social, and population needs of each basin state. There is also the comparative costs of satisfying various needs, availability of other resources, avoidance of unnecessary waste in the utilization of waters of the basin, and practicability of compensation to one or more of the co-basin states as a means of adjusting conflicts among uses.[97] On the other hand, the third paragraph of article six did not give any superiority to any of the previous factors over the other. [98]

Fairly similar to what Helsinki rules stated in Article V, the principle was mentioned in article 5 of the UN Convention.[99] The International Law Commission tried to solve the problems that resulted from the conflict between the two principles of sovereignty and international cooperation. Article five introduced the concept of the 'equitable participation', the main reason for which was to affirm that a system of equitable and reasonable utilization and participation cannot be achieved solely through one state. [100]

Article 6 stated the factors that affect the equitable and reasonable utilization and participation of the international basin.[101]This article increased the scope of the application of the equitable and reasonable utilization and participation of the international watercourse. These factors include (a) Geographic, hydrographic, hydrological, climatic, ecological and other factors of a natural character; (b) Social and economic needs of the watercourse states concerned; (c) Populations dependent on the watercourse in each state; (d) Effects of the use or uses of the watercourses in one watercourse state on other watercourse states; (e) Existing and potential uses of the watercourse; (f) Conservation, protection, development and economy of use of the water resources of the watercourse and the costs of measures taken to that effect; and (g) The availability of alternatives, of comparable value, to a particular planned or existing use.[102]

4.2. Principle of Obligation Not to Cause Significant Harm (Sic uteretuoutalienumnon laedas)

One can argue that the Helsinki Rules of 1966 did not identify explicitly in their provisions an independent principle of obligation not to cause significant harm. It was only mentioned as part of the principle of equitable utilization and participation. However, the principle of *no harm* is an old and well-recognized principle in international law. In 1948, the International Court of Justice mentioned the *no harm* principle in the *Corfu Channel* case. Even though this case does not deal with the international watercourse or environmental damage, many scholars of international environmental law use it as an example of legal analysis.[103] In this case, the ICJ maintained "every state's obligation is not to allow knowingly its territory to be used for acts contrary to the rights of other States."[104]

The *no harm* principle is the most debatable in international water law. It is connected to articles 5 and 6, which were adopted during the negotiation process by a vote of 38 to 4, with 22 abstentions.[105] The UN Convention on the Law of the Non Navigational Uses of International Watercourses significantly added the principle of obligation not to cause significant harm to its provisions as an independent principle. Article 7, paragraph one stated that: "{w}atercoursestates shall, in utilizing an international watercourse in their territories, take all appropriate measures to prevent cause of significant harm to other watercourse states."[106]

The second paragraph made an important connection between the *no harm* principle and that of equitable utilization principle. These two principles are complementary. This claim is built on two bases: Firstly, McCafferey argued that the significant harm must be, in some cases, tolerated by harmed states. In many cases, the insignificant harm aims to achieve the overall regime of equitable utilization of the international watercourse. [107] Secondly, the determination of compensation shall be in light of two factors. In the case of a significant harm affecting a certain state, the negotiation to remedy such harm shall be based on the balance between the two

/[95]/ *Art.4, Helsinki Rules, 1966,*
/[96]/ *Art.5 Helsinki Rules, 1966,*
/[97]/ *Art. 6/2 of the UN Convention, 1997.*
/[98] /*Art. 6/3 Id*
/[99]/ *Supra note 175 at 631-632.*
/[100100]/ *Stephan McCaffrey, An Overview of the UN Convention on the Law of the Non- Navigational Uses of International Watercourses, 20 J. LAND RESOURCES & ENVTL. L, 57, 2000, 62*
/[101]/ *Art. 6 of UN Convention, 1997*
/[102]/ *Art. 6 of UN Convention, 1997*
/[103] /*Law of International Watercourse supra note 73 185*
/[104]/ *Corfu Channel Case (United Kingdom and Northern Ireland V. Republic of Albania) I.C.J.1949 of (April 9), 22, Judgement.*
/[105]/ *Law of International Watercourse Supra note 73 at, 62*
/[106] /*Art. 7/1 UN Convention*
/[107] /*Law of International Watercourse supra note 73 at 370*

principles mentioned in articles 5, 6 and 7.[108]

The *no harm* and equitable utilization principles went side by side in more than five places in the UN Convention. Firstly, they were mentioned in the second paragraph of article 10 (relationship between different kinds of uses). Secondly, article 15 dealt with the reply of notification. Thirdly, article 16 tackled the absence of reply to notification. Fourthly, article 17 dealt with consultations and negotiations concerning planned measures. Fifthly, article 19 regulated the urgent implementation of planned measures), all these articles referred to article 5 (Principle of Equitable and reasonable utilization and participation), and article 7 (Principle of obligation not to cause significant harm) as one unit.

Helsinki Rules addressed the *no harm* obligation through the factors for determining the reasonable and equitable utilization. The UN Convention followed the same approach of Helsinki Rules. It separated the *no harm* principle in one article titled "principle of obligation not to cause significant harm" from the equitable utilization principle. The commentary of Article 12 stipulated that the change in the formulation was to "resolve the most debatable issues in the drafting of the UN Convention: the relationship between the principle of equitable utilization and the obligation not to harm another basin state (Article 16)." [109] The current text reflects the right to an equitable and reasonable share of the water of an international drainage basin, in addition to compliance with the equitable and reasonable utilization with the obligation not to cause significant harm to another basin state. [110]

Article 16 dealt with the "Avoidance of Trans-boundary Harm." Article 16 set the states' obligation to "refrain from, and prevent acts or omissions within their territory that cause significant harm to another basin state having due regard for the right of each basin state to make equitable and reasonable use of the waters." This article is just a reflection of the legal rule to "do not use your property so as to injure the property of another."[111] The Commentary of Article 16 refers to the debates regarding the *no harm* principal, and state liability of harm caused from its actions. The commentary looked at the principles as part of the customary law, withdoubt. It stated that "{d}espite the considerable controversy over the application of the "no harm" rule and its relation to the rule of equitable use found in art. 5 of the UN Convention, there actually is little controversy over whether the principle expressed in art. 7 is (sic) part of customary international law." [112]

4.3. Principle of General Obligation to Cooperate

International scholars consider the cooperation principle as an "umbrella term" rather than a strictly legal duty.[113] Any international river can be a source of good relation and cooperation on one hand; while a source of tension and conflict on the other.[114] Tension could result from the use of sovereign states of the international watercourse. In order to preserve the utility of the international watercourse, states shall participate in a cooperative framework.[115] On the other hand, the general principle of international duty to cooperate among states is just a general obligation, as there are no prescribed or specific obligations. [115] There is struggle between the general principle of international duty to cooperate among states - as an international necessity to preserve the existence of the international society- and the principle of sovereignty. States always need to cooperate, to preserve their existence, while reserving their right of sovereignty. The authority of the state ends at a designated point on land, as well as in the water.[116]

It may be argued that the Helsinki Rules of 1966 and their supplements contained many provisions that encourage states to cooperate in the allocation, management, and preservation of internationally shared waters.[117] Nevertheless, the principle of general obligation to cooperate was first introduced as a separate principle in the UN Convention, as article 8 held a general obligation on all riparian states to cooperate in order to reach the maximum benefit of the Basin. The general obligation of cooperation was based on four factors: sovereign equality, territorial integrity, mutual benefit and good faith.[118] The good faith factor was not introduced in early negotiations of the UN Convention.[119] All the three factors are attached to the sovereign state. One of the major contributions of the special rapporteur Mr. Stephan McCaferrey, was introducing the 'good faith' factor,[120] which is currently embedded in many international cases. The *North Sea Continental Shelf* cases maintained that there is an international obligation on states to resolve their delimitation through justice and good-faith.. [121] This obligation mandates reaching a satisfactory result without any prejudice against sovereign states. [122]

Unlike the UN Convention, Article 11 limited the

/[108] /Stephan C. McCaffrey, Introduction, Convention on the Law of the Non-Navigational Uses of International Watercourses, United Nation Audiovisual Library of International Law, untreaty.un.org/cod/avl/ha/clnuiw/clnuiw.htmllast visit 10/3/2012.

/[109]/ International Law Association, Berlin Conference, Water Resources Committee, 71 INT'L L. ASS'N REP. CONF. 334 2004, 362

/[110]/ Id at 362

/[111]/ Id at 362

/[112]/ Id at 363

/[113]/ Id at 361

/[114]/ see Beyond the River, supra note 40 at 389 [115] Id at 391

/[115]/ Supra note 107 at 361

/[116] /Preliminary Report on the Law of the Non-Navigational Uses of International Watercourses, Law of the non-navigational uses of International watercourses, ¶ U.N.Doc. A/CN.4/393 (July 5, 1985) (prepared by Stephen McCaffrey)

/[117]/ Supra note at 107 at 361

/[118] /Art. 8 Id

/[119]/ First report on the law of the non-navigational uses of international watercourses, Law of the non-navigational uses of International watercourses, ¶ U.N.Doc. A/CN.4/367 and Corr.1 (April 19, 1983) (prepared by J. Evensen), 174/108

/[120]/ Stephen McCaffrey, sixth report on the law of the non-navigational uses of international water courses, Special Rapporteur

/[121] / North Sea Continental Shelf (Federal Republic of Germany v. Denmark), 1986, I.C.J. 46/47, Judgement.

/[122]/ Id

cooperation framework to only one factor, 'good faith.'[123] It stated that "{b}asin states shall cooperate in good faith in the management of waters of an international drainage basin for the mutual benefit of the participating states."[124]

5. Conclusion

After the analysis of the legal and institutional frameworks of the Nile Basin, it is hard to rely on such frameworks fora working plan. The future convention or even the current agreement should be founded on the basis of needs, identified and expressed by the various states. Egypt has to fully understand that unilateral action will not be efficient, and that Egypt is not the sole decision maker within the basin states, if it wishes to consume the same amount of the Nile share. The problem of the Nile will only be solved through unanimous agreement to negotiate and reach an understanding. Any other suggested solution, other than the previouslystated, will cost Egypt a tremendous amount of money, time and effort. Despite the fact that the conflict looks legal atface value, it is in fact a conflict of interest. Additionally, if Basin countries had really intended to solvethe problem, they would have relentedand sought international courts and tribunals decades ago. Finally the thesis proposed a simple solution to the problem, which was proposed by the various parties of the problem many times in the past.

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[3] International Law Association, Berlin Conference, Water Resources Committee, 71 INT'L L. ASS'N REP. CONF. 334 2004, 362

[4] Preliminary Report on the Law of the Non-Navigational Uses of International Watercourses, Law of the non-navigational uses of International watercourses, ¶ U.N.Doc. A/CN.4/393 (July 5, 1985) (prepared by Stephen McCaffrey)

[5] First report on the law of the non-navigational uses of international watercourses, Law of the non-navigational uses of International watercourses, ¶ U.N.Doc. A/CN.4/367 and Corr.1 (April 19, 1983) (prepared by J. Evensen), 174/108

[6] North Sea Continental Shelf (Federal Republic of Germany v. Denmark), 1986, I.C.J. 46/47, Judgement

[7] Corfu Channel Case (United Kingdom and Northern Ireland V. Republic of Albania) I.C.J.1949 of (April 9), 22, Judgement

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[10] U.S. Attorney General Harmon, 21 OP. ATT'Y GEN. 274, 281-282 (1898), 274

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[13] JuttaBrunnee and Stephen Troope, The Changing Nile Basin Regime: Does Law Matter?, 43 HARV. INT'L L.REV. 105, 106.

[14] Sadat to Ethiopia: Leave Nile alone or it's war, The Gazette Montréal , Saturday June 7, 1980,*http://news.google.com/newspapers?nid=1946&dat=19800607&id=IYkxAAAAIBAJ&sjid=caQFAAAAIBAJ&pg=1030,2287901* Last visit 24/12/2011

[15] TakeleSobokaBulto, Between Ambivalence and Necessity: Occlusions on the Path Towards a Basin Wide Treaty in the Nile Basin, 20 COLO. J. INT'L ENVTL. L. & POL'Y 291 2008-2009, 318.[hereinafter Ambivalence and Necessity] See also,

[16] Christina M. Carroll, Past and Future Legal Framework of the Nile River Basin, 12 GEO. INT'L ENVTL. L. REV. 269, 199-2000, 282.

[17] Valerie Knobelsdorf, Note: The Nile Water Agreements: Imposition and Impacts of a Transboundary Legal System, 44 COLUM J. TRANSNATL. L. 634. 635

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