REVIEWING THE NILE LEGAL REGIME IN THE LIGHT OF NEW PRINCIPLES OF INTERNATIONAL LAW

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ABSTRACT

This thesis seems to be compendious in terms of the range of international law issues it summoned up. The most notable of those issues are: international watercourse law, state succession, human rights law and the law of treaties. Water is the most essential and fought over resource in the World. Struggles over the allocation of water are framed by legal regimes that encompass the body of established rules. But as values change, novel norms and court rulings can affect already established legal regimes. The history of the Nile River, a shared freshwater resource provides an ideal case study to explore the struggle for control over water and how changes in legal regimes affect water allocation. The Nile River has been a source of life and conflict between the riparian countries in the Nile Basin for centuries.

The fundamental purpose of this study is to review the Nile legal regime in the light of contemporary principles of shared watercourse law. This study provides an ideal analysis of conflict of norms in the Nile legal regime and the outcome of such conflict. It helps determine whether the contemporary principles of international watercourse law have anyway modified the Nile legal regime. Another important purpose of the study is to identify how principles of international watercourse law can be embraced and applied by the Nile Basin States in a cooperative manner. A comparative approach will be undertaken on the Nile legal regime and other regional shared watercourses legal regime, notably, the SADC with the hope that light will be shed on how Nile basin States can equitably utilize the Nile resources in a way that embraces the international principle of cooperation. In essence, it will be interesting to view how the developments in international watercourse law can affect the development of a stable Nile legal regime.

The study starts by examining what constitutes the Nile legal regime. Then it devotes a chapter to discuss the 1929 Nile Agreement which is considered to be the most controversial Agreement. Chapter 3 discusses the fundamental principles of international watercourse law. Chapter 4 discusses whether the principles of international watercourse law can be accommodated by the Agreement by means of interpreting it in the light of those principles. Finally, chapter 5 discusses the future of the Nile legal regime. In this chapter, general propositions are made on the best way forward for the Nile legal regime in a manner that embraces the principle of cooperation in the equitable sharing of the Nile.
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<td>BYIL</td>
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DECLARATION

I declare that this thesis has been composed by myself. It is my own work and it has not been submitted for any other degree or professional qualifications.

E. Ugirashebuja

10 July 2007
INTRODUCTION

1. The Problem

It is a general knowledge that in the present times there is an unprecedented demand for earth's natural resources. This has led to adverse pollution, deforestation which has ultimately led to desertification, food insecurity, famine, and the growing need for freshwater. Evidently, one of the most pressing issues relates to freshwater. After oxygen, water is the next basic necessity of all life on the planet. Many authors have rightly pointed out that unlike other natural resources such as oil, water cannot be substituted by anything. Human beings use water for purposes which include drinking, cooking, washing; industrial purposes such as production of hydro-electric power; irrigation; animal husbandry; and, waste disposal. Despite the basic necessity for water, over 1.1 billion people do not have accessibility to sufficient clean drinking water and 2.4 billion people have no means of accessing the required sanitation.

The high demand for freshwater as a result of population growth and increase in consumption per capita has led to the overexploitation of the resource or even depletion in extreme cases. It is also unfortunate that the freshwater resources are unevenly distributed. For example, 80 percent of Russia's rivers are located in the sparsely populated Siberia. China, with almost a quarter of the world population is only endowed with 6 percent of freshwater resources. In the Nile Region, areas which receive tropical rainfall such as the Democratic Republic of Congo (DRC) are home to surplus freshwater resources, whereas desert areas such as Egypt have to rely solely on the waters of the river Nile for freshwater. Indeed some areas experience sporadic floods as a result of abundance of freshwater and tropical rainfall, while others are prone to drought due to lack of the resource as well as inadequate rainfalls. According to WWDR, over 665,000 people died as a result of 2,557 natural disasters between

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1991 and 2000, 90 percent of which were water related events.\textsuperscript{6} 97 percent of the victims were from developing countries such as those in the Nile region.\textsuperscript{7}

International freshwater resources shared by more than one country form a significant portion of such resources. Over 260 international basins, also referred to as watersheds or catchment areas, are presently shared by more than one country.\textsuperscript{8} Some of the shared watercourses include: the Nile, the Rhine, the Danube, the Plate River, the Indus, the Ganges, the Mekong and the Niger. Africa itself is home to more than seventy shared watercourses.\textsuperscript{9} Such resources are vital for the improvement of the quality of life in as far as growing populations of countries is concerned. The effective use of such resources may lead to development in terms of irrigation, hydroelectric power production, transportation by water, flood control and the protection of the populations’ public health, more especially in developing countries.

As a result of sharing of such freshwater resource, such resources are considered to exceed the scope of individual states. It is widely accepted that states enjoy exclusive sovereignty over the natural resources which straddle over their territories, including national rivers. For a certain period of time, it was accepted that portions of international rivers belonged to the state because “the disposition of the resources was assumed to follow delimitation of sovereignty in spatial terms between States.”\textsuperscript{10} This in fact formed the legal basis for the doctrine of absolute territorial sovereignty, where states were entitled to utilise water resources in their territories without taking into consideration the rights of states beyond their borders. As a result of competing interests in the utilisation of waters, the doctrine of absolute territorial sovereignty was rendered untenable. In the Corfu Channel Case, the ICJ was of the opinion that states are responsible for acts in contravention of international law that occur in their territory and result in injury to other states.\textsuperscript{11} In the Trail Smelter Arbitration, the Tribunal was of the view that “… no state has the right to use or permit the use of its

\begin{itemize}
\item \textsuperscript{6} WWAP, supra note 2 at p. 12.
\item \textsuperscript{7} Idem.
\item \textsuperscript{9} Idem.
\item \textsuperscript{10} I. Brownlie, ‘Legal Aspects of Natural Resources in International Law (Some aspects)’, Recueil des Cours de l’Academie de Droit International de la Haye, Vol. 162, 1979-1, at p. 253.
\item \textsuperscript{11} Corfu Channel Case (UK v. Albania), ICJ, 1949, at 3.
\end{itemize}
territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the cause is of serious consequences..."12 In the Lac Lanoux Arbitration, the Arbitral Tribunal concluded that "... according to the rules of good faith, the upstream State is under the obligation to take into consideration the various interests involved, ..." and to show that in this regard it is genuinely concerned to reconcile the interests of other riparian State with its own."13 As a result of these precedents and the development of international water law, the principle of the absolute territorial sovereignty is not a principle of international watercourse law.14

The other principle which was believed to have been part of international watercourse law was that of absolute territorial integrity. The principle is the exact opposite of the principle of absolute territorial sovereignty. According to this principle, States have a right of an uninterrupted natural flow of an international river from the upper riparian state(s). Whereas the principle of absolute territorial sovereignty favours upper riparian states, the principle of absolute territorial integrity is advantageous to downstream states. For the exact reasons that the principle of absolute territorial sovereignty was rejected i.e. the lack of taking into consideration rights and interests of other riparians, the principle of absolute territorial integrity was not accepted as a principle of international watercourse law.

The third principle associated with international watercourse law is a combination of limited territorial sovereignty and limited territorial integrity. It is a restriction of both principles and requires that every riparian state has a right to utilise the waters of an international watercourse in such a manner that such use does not significantly harm other riparian states. Essentially, the principle establishes the right of every riparian state over the shared watercourse. The principle is what is commonly known nowadays as the principle of "equitable and reasonable utilization". In the River Oder Case, the Permanent Court of International Justice referred to the "principles governing international fluvial law in general". The PCIJ concluded that the

community of interest was applicable to non-navigational uses of shared rivers and that "...the essential features of which are the perfect equality of all riparian states in the use of the whole course of the river and the exclusion of any preferential privileges of any one riparian State in relation to the other." The principle of each riparian state's right to a share of an international watercourse was the basis of the decision of the Tribunal in the Lac Lanoux Arbitration. Indeed the principle of equitable and reasonable utilization is the widely recognised principle governing contemporary international water law and it has its roots in the principles of limited territorial sovereignty and limited territorial integrity. Codification of the principles of international water law by the works of Institute of International Law, the International Law Association and most notably the International Law Commission is largely based on this principle of "equitable and reasonable utilization" as will be discussed in chapter 3 of the present thesis.

Even though, at present, the equitable utilisation of water resources is vital and is widely recognised, there are still problems of determining the optimal utilisation of these resources. The most fundamental problem is the determination of legal limitations and conditions incumbent upon the basin States in the event of development or utilisation of resources of a watercourse. Water utilisation may result in basin wide impacts. Water abstraction, discharge and flow regulation in one state can adversely affect the nature and extent of benefits which may be realised in another basin State. Some States are situated in such a way that they can exploit a given watercourse without any restraint, whereas others because of their position in the basin may encounter unbearable impacts in case of such unrestrained utilisation. This ultimately leads to conflict of interests between riparian States given that watercourses know no political boundaries and straddle from one state to another. Hence, such international watercourses are best regulated by international law.

Any unilateral utilisation of water resources which adversely affects interests of other riparian States might lead to a situation where international harmony, peace and even security are endangered. In 1951 and 1952, Jordan and Syria launched complaints

\[15\] Case Relating to the Territorial Jurisdiction of the International Commission of the River Oder (Great Britain, Czechoslovak Republic, Denmark, France, Germany and Sweden v. Poland), 1929 PCIJ (Ser. A) No. 16, at 27.

\[16\] Supra note 13.
against Israel in the United Nations in relation to the utilisation of the River Jordan. Syria accused Israel of reclaiming the Marshes of Lake Huleh in a manner that infringed her rights.\textsuperscript{17} Jordan on her part alleged that Israel was involved in the blocking of supply of River Jordan as a result of closing the sluice gates, and by abstraction for irrigation purposes.\textsuperscript{18} In the \textit{Gabcikovo-Nagymaros} Case, the dispute involved unilateral utilisation of the waters of Danube in disregard of the Agreement that governed the Parties to the disputes as well as the principles of international shared watercourses.\textsuperscript{19}

In order to avoid the consequences of unilateral utilisation of watercourses, States concerned should muster the necessary will for cooperation. The physical, economic and political factors which affect international shared watercourses strongly require the need for international cooperation with a view of developing and applying principles of international law. Given the importance of the resources of watercourses, the international norm of cooperation is relevant rather than the classical international law of coexistence. Thus, the international law on watercourses as it stands is based on international cooperation rather than what uses or treatments of water are permissible for each riparian state.\textsuperscript{20} This type of cooperation does not aim at solving the problems permanently by establishing the rights and obligations of riparian states in the mode of classical international law of coexistence. The cooperation envisages need for continuous collaboration in the solving of problems which may arise in every watercourse utilisation in an equitable manner. This kind of cooperation suggests that a fourth principle of international water law is emerging that of community of co-riparian states in the waters of an international shared watercourse. This principle views an international watercourse as an economic unit and thus the rights of states over the waters are vested in the collective efforts of riparian states.\textsuperscript{21} However, "nationalism, absence of political will, lack of trust between and among the riparian


\textsuperscript{18} Idem.

\textsuperscript{19} See generally, \textit{Case Concerning Gabcikovo-Nagymaros Project}, (Hungary v. Slovakia), 1997 ICJ Reports.

\textsuperscript{20} For the discussion of the duty to cooperate, see, \textit{infra} chapter 3 of the present thesis.

\textsuperscript{21} See Lipper, \textit{supra} note 14, at p. 13; see also F.J. Berber, \textit{Rivers in International Law}, 1959, at p. 11.
states, and the varying degrees of development of the different basin states, are all factors that could undermine this idealistic principle.  

The legal principles governing cooperation in the utilisation of shared watercourses have been sufficiently developed and established in general international law. As a result, states have become more aware of the importance of embracing such principles in order to improve their utilisation of shared watercourses. Hence, the principles have assumed an unprecedented position in the agenda of states, other international actors as well as the academic fora.

International watercourse law has evolved to such a degree that there are now established norms governing international shared watercourses. The bulk of these norms emanate from customary international law and international documents which will be discussed in the course of the study. These principles include: equitable utilisation, obligation not to cause harm and the duty to cooperate. The main core of the present study is to determine how these principles relate to the Nile legal regime.

2. Scope of the Present Study

The present study focuses on the Nile legal regime. The study will review the Nile legal regime in the light of contemporary principles of international law of shared watercourses. It should be noted that selected aspects of the Nile will be treated. Aspects such as navigation are excluded from the study partly because the Nile is to a large extent not navigable and also because this aspect of international shared watercourses is not problematic in as far as the Nile is concerned. Therefore, the present study will concern itself with the legal regime of the Nile which regulates the non-navigational uses of the River. The question that will be considered is how the regulation of the non-navigational uses of the Nile by its legal regime relates to the wider corpus of international watercourse law.

23 For the discussion of the legal principles of international shared watercourses, see, infra Chapter 3 of the present thesis.
In discussing this question, the 1929 Nile Agreement will be the case study. The reasons for the choice of the 1929 Nile Agreement which is one of the agreements forming the corpus of the Nile legal regime are: first, it has been a source of much controversy amongst the Nile riparian states; second, the outcome of the study of the Agreement will reveal how the other less controversial agreements forming the Nile legal regime relate to the wider corpus of international law.

The present study works on the premises that the 1929 Nile Agreement, just like any other international treaties, must be construed and applied in the context of all other international law (in this case international watercourse law). This other law may fill the lacunae in the agreement, or provide interpretative material, or even amend the 1929 Nile Agreement.

Thus, the study evolves around two themes: first, construing and applying the 1929 Nile Agreement in the context of all international law, more specifically, international watercourse law, be they customary law or other treaties; second, a theme that the contractual freedom of states parties to the Agreement to which norms they want to give preference should be recognised. Applying these themes suggests that the study advocates an examination of the 1929 Nile Agreement in the wider context of international law (more specifically, international watercourse law). Hence, the 1929 Nile Agreement must be reviewed in the light of those other norms as long as they are a representation of the “common intentions” of the parties to the Agreement.

In the Nile legal regime, international watercourse law has been interpreted and applied differently, depending on the interests of different states, as will be discussed in the course of the study. Elements of the principles of absolute territorial sovereignty and absolute territorial integrity are detectable in the claims and counter-claims of the Nile Basin States. The principle of “established, natural and historic rights” has been invoked in the Nile legal regime, but with different interpretations. An extensive discussion of these differences and the position of the legal principles of shared watercourses will be undertaken in the subsequent chapters.
3. The General Overview of the Study

The present study will initially focus on what constitutes the Nile legal regime on non-navigational uses of the waters. Then, it will discuss the contemporary legal norms of shared watercourses with regards to non-navigational uses and how they relate to the Nile legal regime. Thereafter, the study will review how the Nile legal regime can be developed on the basis of established principles of shared watercourse law.

The first chapter will extensively review what constitutes the Nile legal regime. This chapter discusses certain pre-independence agreements forming the regime and the impact of independence on such agreements. A study of state succession will be undertaken with the view of ascertaining how and to what extent the rights and obligations of the old sovereign are inherited by the new sovereign. This discussion will help us to have a big picture of what constitutes the Nile legal regime. The chapter will also discuss the post-colonial agreements.

The second chapter introduces the specific case study that will be used throughout this thesis, namely the 1929 Nile Agreement. An assessment of the Agreement as a part of international law is made in this chapter. Chapter three examines whether the 1929 Nile Agreement accommodates principles of international watercourse law. The chapter discusses the principles governing international watercourse law and how far the 1929 Nile Agreement is in harmony with them. In the discussion of principles of international watercourse law, the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses and the customary international norms governing international shared watercourses will be examined. Further, emerging principles of international shared watercourses will be discussed.

Chapter 4 will discuss whether the principles of international law not in harmony with the 1929 Nile Agreement can be accommodated by the Agreement by means of interpreting, revising or terminating it in the light of those principles. This chapter will apply the international customary norms of interpretation, revision and termination of treaties.
Chapter 5 discusses the future of the Nile legal regime. In this chapter, general propositions are made on the best way forward for the Nile legal regime in a manner that embraces the principle of cooperation in the equitable sharing of the Nile. In order to determine the best way forward for the development of the Nile legal regime, it is pertinent to gain an insight of regime theory. This chapter discusses theoretical issues of regimes - what is a regime? what inspires a regime formation? What are the conditions for regime effectiveness? And, the response of regimes to both internal and external changes. A study of the Southern African Development Community (SADC) legal regime is undertaken in order to see the context of applicability of regime theory in practice as well as to review whether there are lessons to be learnt from the regime which may be pertinent in the determination of the way forward for the Nile legal regime.

4. Importance of the Study

The present section discusses the value of this study. The most fundamental purpose of this study is of course to review the Nile legal regime in the light of contemporary legal principles of shared watercourses. According to Pauwelyn, any legal system has potential for conflict between norms. The reasons for such potentiality in international law are: numerous law-makers at the international scene; the passing of time; numerous lawmakers at the domestic scene; lack of a centralised adjudicator; the shift from law of co-existence to that of cooperation; the effect of globalisation; the emergence of hierarchy of values, and, the increase in judicial settlement of disputes. This study provides an ideal analysis for the conflict of norms in the Nile legal regime and the outcome of such conflict. It helps determine whether the contemporary principles of international watercourse law have in any way changed the Nile legal regime. Another important purpose of the study is to identify how principles of international watercourse law can be embraced and applied by the Nile riparian States in cooperative manner. A comparative approach will be undertaken on the Nile legal regime and other regional shared watercourses legal regime, notably, the SADC with the hope that light will be shed on how Nile basin States can equitably

25 For a detailed discussion of the above reasons for the potentiality of conflict between norms in international law see *id.* at pp. 12-23.
utilize the Nile resources in a way that embraces the international principle of cooperation. In essence, it will be interesting to view how the developments in international watercourse law can affect the development of a stable Nile legal regime.

This study is similar in some aspects to other works on the Nile legal regime in that it discusses the agreements governing the regime. It is also distinct to those works in other aspects. This distinction is what marks the originality of the study. Some of the works were developed at the time when there were no principles of international watercourse law. Others are relatively recent and they discuss the international legal principles.

The most remarkable work on the Nile legal regime was by Godana in a book entitled “Africa’s Shared Water Resources: Legal Institutions Aspects of the Nile, Niger and Senegal River Systems”. The study is similar to Godana’s work in the sense that both describe the Nile legal regime from the colonial times to the most recent times. However, the similarities end here. Godana’s work does not recognise principles of international watercourse law such as that of “community of interests”. As McCaffrey points out, Godana’s book was written at a time when such principles governing international watercourse law had not emerged.26

The new works including those of Brunnéé and Toope tend to review the old legal regime of the Nile and contemporary principles of international law with a view of developing a future legal framework of the Nile.27 These relatively novel works treat the old Nile agreements and the contemporary principles of international watercourse law distinctly. Though the present work reviews both the old Nile agreements, more specifically, the 1929 Nile Agreement and contemporary principles of international watercourse law, it does so in a distinct manner. Instead of treating the Agreement and contemporary norms distinctly, the present study endeavours to review the Agreement in light of those norms. The study poses solemn questions which has never been asked before: have the old Nile agreements (more specifically, the 1929 Nile Agreement),

evolved in such a way that they can be interpreted in the light of contemporary principles of international watercourse law; or have they (the agreements, the 1929 Nile Agreement in particular), been modified by the principles? To put it succinctly, can the two (the archaic Agreement and contemporary principles of international watercourse law) be harmonized, without necessarily having to make a new agreement? If not, then what is the way forward?
CHAPTER 1. OVERVIEW OF THE NILE RIVER

The main objective of this chapter is to trace and illustrate the legal regime of the Nile and its evolution up to the present day. It is true that the Nile has history which goes back to antiquity, but our starting point will begin with the 19th Century European scramble for Africa which extended the international fluvial war to the continent. It is the purpose of this chapter to establish how the transfer of sovereignty inherent in the accession of African States to independence has affected the Nile legal regime. The independence of the Nile Basin Countries raised the issue of state succession with regards to the legal regime governing the Nile established during the colonial era. This chapter will endeavour to establish the fate of the rights and obligations accruing to the Nile legal regime established during the colonial era. Analysis will be made on “other arrangements” outside the ambit of binding treaties and how far they have influenced the Nile legal regime.

1. The Nile River

The Nile extends 10 countries and is considered as the world’s longest river. It covers a length of approximately 6,695 Kilometres (4184 miles). Its basin brings together ten basin states: Burundi, the Democratic Republic of Congo (former Zaire), Egypt, Eritrea, Ethiopia, Kenya, Sudan, Rwanda, Tanzania and Uganda. The river is made up of the Blue and the White Nile, which join in Sudan.

The White Nile is often falsely believed to originate from Lake Victoria. However, the true source is the Kagera River, which is the largest tributary of Lake Victoria. Apart from the Kagera River, there are numerous rivers in Tanzania and Kenya which flow into Lake Victoria. From Lake Victoria, the White Nile flows through Lake

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Kyoga to Lake Albert via the only outlet which is situated at the Owen Falls Dam. It then receives the waters of Semliki River situated in Congo. The White Nile which is also known as Bahr el Jebel, after leaving the Lakes region passes through the Sudd Region in Sudan, where it is joined by the Blue Nile. The Blue Nile originates from the holy spring at the foot of Mount Gish, approximately 167 Kilometres to the South of Lake Tana in Ethiopia. The Blue Nile joins the White Nile at Khartoum. The main Nile is then supplemented by waters of Atabara River from Ethiopia which is the last river to flow into the Nile. Paradoxically, the Blue Nile has a much smaller Basin than the White Nile but it is the major contributor to the River Nile. The Blue Nile contributes fifty nine percent on average whereas the White Nile’s flow accounts for twenty nine percent, thirteen percent is from the Atabara River. However, it is paramount to note that this is not the static contribution of the Nile branches. The flow of the contributors varies depending on the seasons. For example, the contribution of the Blue Nile highly varies depending on seasons. Its contribution is at the peak in August, September and October due to the monsoon season in Ethiopian highlands. During this season, the Blue Nile may provide up to ninety percent of the Nile flow whereas at the peak of the dry season in July, it may account for as little as twenty percent of the Nile flow. On the other hand, the contribution of the White Nile is considered to be reasonably constant throughout the year.

The Nile Basin region is characterised by climatic zones that range from the tropics of the Democratic Republic of Congo to the arid regions of Sudan and Egypt. The region also encompasses countries characterised by sharp variations in size, population and economic standards, as well as water availability and use. The tiny landlocked countries of Rwanda and Burundi sharply contrast with the vast countries of Democratic republic of Congo, Sudan and Egypt. In addition, the heavily populated countries of Rwanda, Burundi and Tanzania are vastly different from the sparsely populated Sudan. The region is home to some of the poorest countries in the world whose per capita income ranges from $90 to $250. The per capita Gross National

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4 Shapland, supra note 1 at p. 59.
5 Idem.
Product (GNP) of Egypt is $1470. As such, the countries of the Nile Basin region are characterised by wide variations in climatic zones, area size, population, and to some extent economic standard. Table 1 shows such variations.

Water availability in the Nile Basin countries also varies as a result of the climate which affects rainfall patterns, as well as the number and size of the river flows in each individual country. The availability of freshwater in cubic meters per capita ranges from 561 in Burundi to 2770 in Tanzania. The annual freshwater withdrawals range from 0.1 cubic meters in Burundi to 55.1 cubic meters in Egypt. The region is home to varying climatic zones which include tropical, semi-arid and arid climatic zones. This makes the zone susceptible to both drought and floods. The desert region receives less than 100mm of rain per annum; the semi arid region receives rain which varies from 100-600 mm per year; while the tropical areas receive rainfall which is more than 1500mm per annum. In general, the area is likely to encounter either unpredictable droughts alternating from lack of rainfall or floods from tropical cyclones. The effects of such droughts can lead to serious social and environmental impacts, bringing famine, disease, land degradation, loss of domestic stock and wildlife, and even loss of life. The effects of droughts can be even more serious. Waterborne diseases which result from deficiency of safe drinking water, or from lack of water for hygiene due to floods or drought have been identified as the main cause of poor health in sub-Saharan Africa. Table 2 shows the variations in availability and use of freshwater resources in the countries of the Nile Basin Region.

The Nile Basin Region also faces the challenge of a steady increase in population. Average population growth for most countries of the region exceeds three percent. Over 90 per cent of the Nile Basin region surface water is used for irrigation. Over 70 per cent of the region’s population depends on agriculture for subsistence. The rapid population growth, coupled with the heavy dependence on irrigation, as well as the increasing utilization of water, will only serve to enhance the pre-existing pressure on the Nile waters due to a larger demand of water. Increased demand will obviously

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8 Idem.
9 World Bank, id., at p.290.
10 Idem.
11 Id., at p. 290-1
lead to decrease in availability of freshwater per capita. This will in turn lead to sharp competition among the Nile Basin countries for the waters of shared rivers. Needless to point out that this will escalate the already existing disputes.

TABLE 1: LAND AREA, POPULATION, GNP, AND GROWTH RATE OF THE NILE BASIN REGION

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Burundi</td>
<td>28</td>
<td>7</td>
<td>100</td>
<td>1.7</td>
</tr>
<tr>
<td>Democratic Republic of Congo</td>
<td>2,345</td>
<td>54</td>
<td>90</td>
<td>0.2</td>
</tr>
<tr>
<td>Egypt Arab Republic</td>
<td>1,001</td>
<td>66</td>
<td>1470</td>
<td>1.1</td>
</tr>
<tr>
<td>Eritrea</td>
<td>118</td>
<td>4</td>
<td>160</td>
<td>6.5</td>
</tr>
<tr>
<td>Ethiopia</td>
<td>1,104</td>
<td>67</td>
<td>100</td>
<td>2.7</td>
</tr>
<tr>
<td>Kenya</td>
<td>580</td>
<td>31</td>
<td>360</td>
<td>-0.2</td>
</tr>
<tr>
<td>Rwanda</td>
<td>26</td>
<td>8</td>
<td>230</td>
<td>6.3</td>
</tr>
<tr>
<td>Sudan</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>Tanzania</td>
<td>945</td>
<td>35</td>
<td>280</td>
<td>3.6</td>
</tr>
<tr>
<td>Uganda</td>
<td>241</td>
<td>23</td>
<td>250</td>
<td>3.6</td>
</tr>
</tbody>
</table>

TABLE 2: FRESHWATER RESOURCES AVAILABILITY, WITHDRAWAL AND ANNUAL USE PERCENT IN THE NILE BASIN COUNTRIES

<table>
<thead>
<tr>
<th>Country</th>
<th>Per Capita Water Availability (cu.m) 1998</th>
<th>Annual Freshwater withdrawals (bilion cu.m.)</th>
<th>Annual Use Percent of Total 1998</th>
</tr>
</thead>
<tbody>
<tr>
<td>Burundi</td>
<td>561</td>
<td>0.1</td>
<td>2.8</td>
</tr>
<tr>
<td>Democratic Republic of Congo</td>
<td>21,134</td>
<td>0.4</td>
<td>0.0</td>
</tr>
<tr>
<td>Egypt Arab Republic</td>
<td>946</td>
<td>55.1</td>
<td>94.5</td>
</tr>
<tr>
<td>Eritrea</td>
<td>2,269</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>Ethiopia</td>
<td>1,795</td>
<td>2.2</td>
<td>2.0</td>
</tr>
<tr>
<td>Kenya</td>
<td>1,031</td>
<td>2.1</td>
<td>6.8</td>
</tr>
</tbody>
</table>
2. The Legal Regime of the Nile

This section traces and describes the evolution of the legal regime of the Nile up to date. While it is true that the Nile has history that dates back to antiquity, the research will be limited in scope and begin with the 19th Century legal agreements introduced as a result of the European scramble for Africa. It is paramount to review the status of the different relevant treaties which governed the Nile prior to the attainment of independence by Basin States. The study of the colonial era treaties is prerequisite since the failure of the Nile Basin States to come up with an extensive and detailed treaty in post-colonial era has led to the continued albeit debatable validity of the legal regime established during the colonial era.

The study uses the term legal regime since most of the Agreements with regards to the Nile River are designed to protect Egypt. In other words, most of the Agreements form a legal regime aimed at protecting Egypt vis-à-vis other Basin states. The term legal regime is loosely construed as principles, norms, rules, and procedures of decision making around which actors converge their expectations in a given issue-area. The issue area here is to a large extent the protection of Egypt’s interests in the waters of the Nile.

(1) Colonial Agreements

The colonial agreements with regard to the Nile regime, form a “complex web of treaty rights obtained by Britain from the upper riparians” to favour the lower

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13 For a detailed discussion of regimes, see, infra, chapter 5 of the present thesis.

riparians and in particular Egypt, which is the lowermost riparian. The Agreements will be discussed in a chronological order.

a. The Protocol of April 15, 1891 between the United Kingdom and Italy

Italy and United Kingdom signed a protocol whose objective was demarcation of their respective spheres of influence in Eastern Africa. Article III of the Protocol clearly protected the Egyptian interests in the waters of the Nile contributed by the Atabara River. The Article expressly provided: “The Government of Italy undertakes not to construct on the Atabara any irrigation which might easily modify its flow into the Nile”. To reciprocate the Italian assurance, the UK recognised Ethiopia as an Italian sphere of influence.

b. The Treaty of 15 May 1902 between the United Kingdom and Ethiopia

On 15th May 1902, Ethiopia and UK (acting on behalf of Egypt and Sudan), signed a Treaty concerning the boundaries between the Anglo-Egyptian Sudan, Ethiopia and British Eritrea. Article III was utterly concerned with the Nile waters originating from Ethiopia as opposed to the objective of the Treaty of frontiers. It stated:

His Majesty the Emperor Menelik II, King of Kings of Ethiopia, Engages himself towards the Government of His Britannic Majesty not to construct or allow to be constructed, any works across the Blue Nile, Lake Tsana or the Sobat, which would arrest the flow of their waters into the Nile except with agreement with his Britannic Majesty's Government and the Government of Sudan.

This Agreement provided for the restriction of the use of waters by Ethiopia until permitted to do so.

c. The Treaty of 9 May 1906 between the United Kingdom and Leopold II, King of Belgians.

On the 9th May 1906, UK and independent State of Congo concluded a Treaty to redefine their Respective Spheres of influence in Eastern and Central Africa,


\[17\] Text in *id.*, p. 112.
modifying another Treaty of 1894, which had earlier defined them. This Treaty provided protection of Sudan interests with regards to waters flowing from Lake Albert. Article III stated:

The Government of Independent State of the Congo undertakes not to construct, or allow to be constructed, any work on or near the Semliki or Isango River, which would diminish the volume of water entering Lake Albert, except in agreement with the Sudanese Government.

This Agreement is another example of a treaty restricting an upstream country utilisation of waters in her territory in favour of a downstream state.

d. The Treaty of 13 April 1906 between the UK, France and Italy

On April 13 1906, a Tripartite Agreement and set of Declarations was signed by UK, France and Italy. It is important to note that this Agreement was concluded after Italy dramatically failed to establish control over Ethiopia. This was a reconfirmation of the requirements of the Protocol of April 15th 1891 and the Agreement of 15 May 1902, which have been reviewed above. Each of the three countries, all competitors in the scramble for Africa, feared losing their sphere of influence to either of the other two. The parties to this Agreement anticipated the possible disintegration of Ethiopia in case of the death of Emperor Menelik, hence they agreed to maintain the status quo with regards to the future of Ethiopia by stating in Article 4 of the Agreement that “in the event of the status quo in Ethiopia being disturbed, France, Great Britain and Italy shall make every effort to preserve integrity of Ethiopia”. In case it was impossible to maintain the status quo and one or more of the powers, especially France and Italy, decided to extend the sphere of influence to any of the portions of the country, particularly the areas which constituted the source of the Nile, the article added after persistent insistence of Britain:

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18 For the Text see, UNLS, supra note 16 at p. 99. For the Text of the 1894 Treaty, see British and Foreign State Papers, Vol. 99, p. 173.
21 The logic of the three powers was that Emperor Menelik’s death due to advanced age and health problems was inevitable, and that since he might die without declaring his successor, the country would fall in turmoil, hence disintegrate; see, Degefu, supra note 13 at p. 105; see also Sorenson M.J., A Study of Anglo-Ethiopian Relations from 1800-1936, unpublished Dissertation, University of Nebraska, 1950, p. 124.
In any case, they shall concert together on the basis of the Agreement enumerated herein to safeguard ... The interests of Great Britain and Egypt in the Nile Basin, more especially as regards the regulation of the waters of that river and its tributaries (due consideration being paid to local interests...).

This Agreement was aimed at protecting the interests of Great Britain and more especially Egypt.

e. The Exchange of Notes between Italy and UK, December 14-20, 1925.

In December 1925, Italy and UK concluded an Agreement by Exchange of Notes at Rome. The Agreement was a follow-up to the abovementioned 1906 Tripartite Agreement of London and re-affirmation of its position. According to Okidi, more than its predecessor, the 1925 Agreement was a classical illustration of how two colonial powers settled among themselves the issue of how to use their influence to benefit from Ethiopia. The process of Notes of Exchange was initiated by the UK, and it stated:

I have the honour under his Majesty’s Principal Secretary of State for Foreign Affairs to request your Excellency’s support and assistance at Addis Ababa with the Abyssinian Government in order to obtain from them a concession to his Majesty’s Government to construct a barrage at Lake Tsana, together with the right to construct and maintain a motor road for the passage of stores, personnel etc., from the frontier of the Sudan to the barrage.

As a quid pro quo the Note made the following concession:

His Majesty’s Government in turn are prepared to support the Italian Government in obtaining from the Abyssinia Government a concession to construct and run a railway from the frontier of Italian Somaliland.

Further the Note stated that:

In the event of His Majesty’s Government, with the valued assistance of the Italian Government, obtaining from the Abyssinian Government, the desired concessions on Lake Tsana, they are also prepared to recognise an exclusive economic influence in the West of Abyssinia and in the whole territory to be crossed by the above mentioned railway. They would further promise to support economic concessions in the above zone. But such recognition and undertaking are subject to the proviso that the Italian government on their side, recognising the prior hydraulic rights of Egypt and Sudan, will engage not to construct on the head waters of the Blue or White Niles or their tributaries or affluent any work which might sensibly modify their flow into the river. It is understood that the above proviso would not preclude a reasonable use of water in question by the inhabitants of the region, even to the extent of constructing dams for hydro-electric power or small reservoirs in minor affluents to store water for domestic purposes, as well as for the cultivation of crops necessary for their subsistence.

Italy acknowledged the British terms with her own Note of 20th December 1925.\textsuperscript{24} Italy made an acceptance of the British Note as an accurate record of the negotiations between the two countries as their common position in the anticipated negotiations with Ethiopia. The final clause of the Exchange of Notes stated that:

\ldots in the event of one of the two Governments securing the concessions sought by them, while the other failed to do so, the Government which had obtained would not relax their most effective efforts to secure a corresponding satisfaction for the other Government concerned, with the object of ensuring that practical execution of the two concessions, should, if possible, be contemporaneous.\textsuperscript{25}

The entry into force of the 1925 Exchange of Notes is highly questionable. The Note was intended to bind Ethiopia (then Abyssinia), in the event of “obtaining from Abyssinian Government, the desired concessions”. However, the desired concessions were not obtained, meaning that the Exchange Note did not enter into force on the part of Ethiopia. There is no state practice that proves that the parties acted as if the Note was in force. It appears improper to consider it as an instrument having contributed to the legal regime of the Nile, even though it undeniably played a historical role in the shaping of the early Nile legal regime.\textsuperscript{26}

\section*{f. The 1929 Nile Waters Agreement}

This Agreement was concluded on the basis of negotiations which took place in the 1920s. A multinational Nile Commission\textsuperscript{27} was established by an Exchange of Notes between Egypt and the United Kingdom in 1925.\textsuperscript{28} The Commission was charged with the responsibility of “examining and proposing the basis on which irrigation can be carried out (in Sudan) with full consideration of interests of Egypt and without detriment to her natural and historical rights”.\textsuperscript{29}

The Governments of the United Kingdom and Egypt adopted the report of 1925 of the Nile Waters Commission as an integral part of the 1929 Nile Waters Agreement.

\begin{footnotes}
\item[25] Idem.
\item[26] Okidi, \textit{supra} note 23 at pp. 415-416.
\item[27] The report of the Nile Commission is annexed to the Note from Mohamed Mahmoud Pasha to Lord Lloyd, 7th May 1929, 93 \textit{LNTS} 44, excerpts reprinted in \textit{Legislative Texts}, Treaty no. 7, p. 100, at p. 102.
\item[28] Exchange of Notes of 26th January 1925 contained in Appendix A to the 1929 Agreement, 93 \textit{LNTS} 44.
\item[29] Report of the Nile, \textit{supra} note 27 at p. 102.
\end{footnotes}
Consequently, the 1929 Nile legal regime resulted from both the Agreement and the Commission’s report. This Agreement stipulated in one of its most important clauses, that construction on the river, its tributaries, or its source that would probably obstruct the Nile’s flow and affect Egypt’s own exploitation of the Nile would be impermissible, except where there is prior consent of Egypt. The Agreement also provides that Egypt has “... natural and historic rights of the Nile...”.

The Commission’s recommendations provided that any works so constructed were to be administered “under the direct control of the Egyptian Government” and, that prior to the undertaking of such works, the Government was to “agree with the local authorities on the measures to be taken for safeguarding local interests.” This provision gave Egypt virtually a “right of veto” on developments in the upper basin states, while no corresponding restrictions were placed with regards to developments in Egypt. The Commission further recognised that despite its endeavour to “find a practical and workable basis for irrigation, and to foresee, and as far as possible to provide for, any difficulties that may arise in future”, challenges could still emerge as to such issues as interpretation or factual issues. The Commission then declared that it wished to “record emphatically the view that neither the elaborate drafting of an agreement nor the provision of special machinery for adjudication should be allowed to obscure the importance of mutual confidence and cooperation in all matters concerning the river and its waters”. It should be recalled that the report of the Nile Commission was annexed to the 1929 Agreement and made an integral part thereof.

The 1929 Nile Waters Agreement is by far the major treaty in as far as the Nile Basin is concerned, since it is the first full scale treaty to deal with the utilisation of the Nile, even though it is by no means exhaustive. As we shall see in the subsequent section, it survived the process of decolonisation.

31 Id., at para 2.
32 Id., at para. 4.
33 Idem.
34 Report of the Nile, supra note 27 at p. 106
35 1929 Agreement, supra note 27 at para. 3.
g. The Supplementary Agreement of 1932

This Supplementary Agreement was concluded as a follow up of the 1929 Agreement. In 1932, Egypt initiated a novel programme of irrigation works, the main purpose of which was the construction of the Jebel Awliya Dam in Sudan, for her own benefits. This she did by concluding the Jebel Awliya Compensation Agreement of 1932. This Agreement stipulated for the construction and maintenance by Egypt of the storage reservoir at Jebel Awliya, three miles upstream from Khartoum on the Blue Nile. The Egyptian Government was responsible to undertake monetary compensation for injury to Sudanese interests as a result of the project. The Agreement further granted Egypt the discretion to raise the Jebel Awliya Dam on condition that she undertook an agreement on additional measures to safeguard local interests and upon remedying the injury.

h. The Anglo-Belgian Agreement of 1934

This Agreement was signed in London between Britain and Belgium. It is considered as the first Agreement not to outline the water rights of Egypt vis-à-vis upper riparians. The Agreement solely focussed on the water rights of Tanganyika (now known as Tanzania), Rwanda and Urundi (now known as Burundi)

Article I of the Agreement stipulates:

Water diverted from part of a Watercourse situated wholly within either territory shall be returned without substantial reduction to its natural bed at some point before such watercourse flows into the other territory or at some point before such watercourse forms the common boundary.

This Agreement expressly allowed utilisation of the water resources provided the countries concerned undertook due diligence to avoid substantial reduction of the amounts of waters flowing into another territory. A quick glance at the Agreement shows that it was to the benefit of Tanganyika which was colonised by Britain at the expense of both the upstream States (Rwanda and Urundi). Definitely, there was a hidden agenda in the Agreement to protect Egypt since Tanzania which is the down

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36 For an extensive discussion of this Agreement, see Mohammed S., Legal Problems of the Nile Control, New York University, Thesis, 1957, pp.148-53.
37 The project was accomplished in 1937 and the Dam has a storage capacity of 2.5 Milliards cubic meters; see, Democratic Republic of Sudan, Control and Use of the Nile Waters in the Sudan, 1975.
38 Id., at p. 24.
39 Text in, UN, Legislative Texts and Treaty Provisions, p. 27.
40 Godana, supra note 14 at p. 118.
stream country with regards to the present Agreement was then bound by the 1929 Agreement which prohibited her from using the waters forming the Nile in her territory unless permitted by Egypt as we earlier saw.

i. The 1952 Owen Falls Agreement

This Agreement was concluded by Exchange of Notes between Egypt and the United Kingdom. It was an Agreement of Construction of the Owen Falls Dam in Uganda, which was still under the British Administration. The Agreement provided that:

The Ugandan Government may take any action at Owen Falls which it considers desirable provided that this action does not entail any prejudice to the interests of Egypt in accordance with the Nile Agreement of 1929 and does not adversely affect the discharge of Waters to be passed through the Dam in accordance with arrangements to be agreed between the two Governments.

The Owen Falls Agreement bestowed upon Egypt the obligation to compensate "appropriately", injury caused to local interests as a result of projects undertaken for her (Egypt's) benefit.

j. The Supplementary Agreement of 1952

This Agreement was concluded between Sudan and Egypt. It outlined the raising of the Sennar reservoir by one meter, for the drawing of 200 Milliards cubic meters of water by Sudan during the restricted period after raising the Jebel Awliya Reservoir by 10 Meters.

The Agreements and measures discussed above form the backbone of the legal regime established for the Nile Basin during the colonial era. A cursory glance at the legal instruments reveal that the regime established and recognised Egypt’s supremacy with regards to the utilisation of the Nile waters at the expense of nine other riparian States. The following section will analyse whether the legal regime survived decolonisation. In this analysis, much emphasis will be laid on the 1929 Agreement, which, as earlier noted, is far much extensive, important and always forms the bone of contention with regards to the Nile Basin States.

42 Idem.
(2) Status of the Colonial Nile Basin Legal Regime

The emergence of the new sovereign and independent States in the Nile Basin in the post Second World War period had a considerable impact on the status of the colonial agreements with regards to the River Nile analogous to other agreements concluded in the colonial era. Further, the seceding of Eritrea from Ethiopia exacerbated the already complex situation. This raised the issue of state succession due to the determination of the vital nature of the future of the Nile Legal Regime vis-à-vis the successor State.

The concept of “State Succession” entails succession in fact (de facto succession) and succession in law (de jure succession).43 De facto succession refers to the literal transfer of territory from one state to another. In other words, de facto succession involves factual situations which result from political evolution leading a territory which was previously placed under the sovereignty of a given state to come to fall under that of another state i.e. “one State ceases to be real in a territory and another takes its place”. It should be noted that such a transfer may involve the territory of one state being annexed, in whole or in part, by another state; one state ceding part of its territory to another; two or more states merging to form a single state; part of a national community seceding from a state, or combining with another existing state; or when a territorial community which was under colonial rule achieves independence by a process of revolution or constitutional evolution.44 De Jure Succession, on the other hand, refers to the succession of one state to the rights and obligations of another state by virtue of extension of its supreme power over territories of the old sovereign. The occurrence of de facto succession is not problematic since it is obvious that it is a transfer of territory. The problem lies with the de jure state succession, since it gives rise to complex legal issues that are only solvable by the law of state succession.

One of the areas of international law which cannot escape the problems accruing to de jure state succession is international water agreements. The pertinent issue to

43 The distinction of the notion of State Succession has been discussed in J. Verzijl, International Law in Historical Perspective, 1974, Vol.VII, p. 3. See also O’ Connell, The Law of State Succession, 1956, p. 3.
44 O’Connell, Idem.
contemplate is the extent to which treaties regarding international rivers such as the Nile survive state succession consequently devolving to the successor states. In order to reflect on this issue, it is pertinent to commence with an inquiry of whether in the first place international law recognises the legal notion of state succession, and what the notion is.

It is noteworthy that the notion of state succession generated three main distinct theories over a period of time. The first theory is the doctrine of universal succession which was championed by Hugo Grotuis in the book Law of Nations.45 This theory holds that all rights and obligations of a predecessor state devolve ipso jure and in toto upon the successor state without any alterations whatsoever. According to this theory, all obligations and rights under treaties (including those with regards to water law), are inherited by successor states. This doctrine has attracted widespread criticism and has been generally discarded.46

The second doctrine is that of Tabula Rasa, also known as “clean slate” doctrine. It was developed on the basis that a successor state exercises sovereignty of its own rather than as a result of transfer of power from its predecessor. In other words successor states do not inherit treaty obligations undertaken by their predecessors.47 This theory enjoyed considerable support in state practice for quite some time.48 The theory is also controversial, since the view of the freedom to choose favourable treaties and reject others is not fair to either the predecessor or third states. Further, many new sovereign states consider themselves bound by certain treaties concluded by predecessor states.

The third theory, the doctrine of Dispositive Treaties, developed as an exception to the doctrine of Tabula Rasa. This doctrine envisages that treaties which are “territorial” in character devolve automatically upon successor states. This theory

45 Id., at p. 7.
48 For State Practice, see, O'Connell, supra note 43 at p. 34.; see also, O'Connell, State Succession in Municipal and International Law, 1967, p. 91.
divided all treaties in a dichotomy of personal treaties and dispositive treaties. Personal treaties deal with political, administrative or economic relations and they are contractual in nature thus personal to the parties. On the other hand, dispositive treaties create “real” rights and obligations. As a result, dispositive treaties are attached to the land, rendering them immune to the change of territorial sovereignty. Jurists argue that since “dispositive”, “real” or “localised” treaties are less contractual in nature and are attached to the territory or form part of rights and obligations in rem, they remain unaffected by change of sovereignty. Examples of treaties which are dispositive in nature include river treaties and treaties of peace and neutrality. The “non-localized” treaties on the other hand are purely contractual in nature and they constitute rights in personam which usually lapse in case of state succession. This theory receives some support in state practice. Numerous devolution agreements were entered into by newly independent states in Africa and Asia to mitigate problems which occur as a result of succession to treaties concluded by the predecessor states. This suggests an implicit consent that some of this treaties are by law binding on successor states.

Some of the decisions of international tribunals support the doctrine. In the Free Zone Case, the Permanent Court of International Justice endorsed the doctrine. It was of the opinion that the Treaty of Turin of 1816, which established the frontier between Switzerland and Sardinia “confer on the creation of the Zone... the character of a treaty stipulation which France was bound to respect as she succeeded Sardinia in sovereignty over that territory”. The Court thus emphasised that the Treaty was territorial in nature and thus had intrinsic dispositive character. In the Temple of Preah Vihear Case, both Parties to the Case and the Court accepted the fact that successor states automatically assume certain obligations and rights affiliated to the territory. In the Gabčíkovo Case, the ICJ was of the view that Article 12 of the

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49 O'Connell, supra note 43 at p. 15.
53 See generally, International Law Association, supra note 51.
54 Order of 6th December 1930, Permanent Court of International Justice, Series A., No. 24, p. 17.
55 Cambodia V. Thailand, ICJ Reports, 1962, p. 6-146.
Vienna Convention on Succession of States in Respect to Treaties reflected a rule of customary international law.\textsuperscript{56} Article 12 states that:

2. A succession of States does not as such affect:
   (a) obligations relating to the use of any territory, or restrictions upon its use, established by a treaty for the benefit of a group of States or of all States and considered as attaching to that territory;
   (b) rights established by a treaty for the benefit of a group of States or of all States and relating to the use of any territory, or to restrictions upon its use, and considered as attaching to that territory.

The International Law Commission, as early as 1972, had come to a consensus that there are treaties which are “dispositive”, “real” or “localised” in character which constitute a special regime of treaties not covered by the general “clean slate” rule.\textsuperscript{57} This doctrine also enjoys an overwhelming support by a vast majority of writers.\textsuperscript{58}

It is contended that there is a category of treaties which create international servitudes, and they are also not affected by change of sovereignty. According to this argument, international servitudes are those rights which are attached to the territory. They are perpetual and are said to be independent of the treaties which created them.\textsuperscript{59} In short, they are said to be “governed by special rules that differ materially from those applicable to conventional arrangements generally”.\textsuperscript{60} Oppenheim in elaborating the nature of servitudes noted that: “Since state servitude, in contradiction with the personal rights (rights in personam) are rights inherent in the object with which they are connected (rights in rem), they remain valid and may be exercised however, the ownership of the territory to which they apply may change”.\textsuperscript{61}

Lauterpacht, in his endeavour to elaborate the concept of international servitudes, pointed out that:


\textsuperscript{58} For a list of writers, see O’Connell, supra note 48 at pp. 13-14.


It cannot be denied that there are in international law relationships which present an analogy to praedial servitudes of the Roman Law or to easements of the common law almost amounting to identity, namely, those relationships in which a part or the whole of the territory of one State is made to serve the economic need, of another... It is submitted that relationships of this kind resemble closely servitudes in private law and that it is convenient to classify them as servitudes such as in international law. Of course, the classification as servitudes carries with it all the implications of a real right; the term itself would otherwise serve no useful purpose.62

On its part, the International Law Commission adopted in its Draft Article 12 on Succession of States in Respect of Treaties a concept of “Other Territorial Regimes” which are considered to be similar to that of “international servitudes”, although it did not employ the term “servitudes”. In its commentary the Commission pointed out the so-called “special treaties” and the regimes they establish.63 The International Law Commission fell short of referring to the notion of international servitudes and did not recognise any legal categorisation of treaties per se and the effects of state succession. Instead, it based its conclusions on state succession, and “moreover was motivated by expediency”.64

During the deliberations by the United Nations Conference on Treaty of Succession of States in Respect of Treaties in 1977 and 1978 in Vienna, a sizeable number of states aired strong doubts with regards to whether it was appropriate to adopt draft article 12, entitled “Other Territorial Regimes”, particularly since there were insufficient legal grounds or precedents. Further, delegates from newly independent states vehemently objected to the Draft Article since they considered that the provision posed a risk of creating so called “international servitudes” in favour of other states in the territory of the successor state which “constituted an endorsement of former colonial situations and were inconsistent with the independent status of successor states” which contradicts the principle of self determination.65

Given the strong objections of representatives during the Conference, a new paragraph 3 was added to article 12. The paragraph read:

Article 12 (3). The provisions of the present article do not apply to treaty obligations of the predecessor State providing for the establishment of foreign military bases on the territory to which the succession of States relates.

Further, a new article on “the permanent sovereignty over natural wealth and resources” was drafted by the informal Consultations Group and later adopted by the Conference as Article 13. It states:

Article 13. The present convention and permanent sovereignty over natural wealth and resources
Nothing in the present Convention shall affect the principles of international law affirming the permanent sovereignty of every State over its natural wealth and resources.

As evidenced by the preceding paragraphs, the concept of “international servitudes” is confusing and highly controversial. This is why the notion deserves deep examination. It is vital to elaborate the concept of “servitude” and further determine its legal status and validity in international relations and more especially in the context of state succession.

The concept of servitudes is “as old as international relations”. However, it has never been generally accepted as a doctrine of international law, as will be illustrated later. According to Oppenheim:

State servitudes are those exceptional restrictions made by treaty on the territory supremacy of a State by which a part or the whole of its territory is in a limited way made perpetually to serve a certain purpose or interest of another State.

In other words international servitudes are rights in foreign territories.

Therefore, it may be asserted that the essential elements of international servitudes are real rights which must: belong to a state; be permanent; make the territory of one state serve the uses and purposes of another state. It is widely believed that international servitudes consist of such international rights and/or obligations as transit, utility of rivers, custom free zones, demilitarized zones, etc. Even though the concept

67 Oppenheim, supra note 60 at p.536; see also, H.D. Reid, International Servitudes in Law and Practice, 1932, p.25, Esgain, supra note 59 at p. 43.
68 Reid, id., at pp.13-19.
"international servitudes" has been commonly talked about in the area of international relations, it has not been generally accepted as a concept of international law.69

The doctrine of international servitudes is a source of enormous controversies. It is widely accepted that each sovereign State is entitled to its own territorial supremacy and integrity.70 The concept of servitudes is incompatible with this fundamental principle of international law.71 This doctrine (of international law) frustrates the sovereign equality of States which in the long run might be incompatible with the general interests of the international community. However, O'Connell opposed this view by pointing out that the concept of sovereignty is not absolute and there is no reason why a State cannot make a limitation on her sovereignty. International order sometimes involves uses of territory to serve the essential interests and purposes of other States.72 The doctrine is also incompatible with another international norm that treaties do not bind non-parties.73 Article 34 of the Vienna Convention on the Law of Treaties stipulates that treaties only bind parties and do not create rights and obligations for third parties (pacta tertis nec nocent nec prosunt) not unless the treaties have crystallised or generate new customary norms.

It has also been widely expressed that there is no evidence that past state practice has adopted or recognised the doctrine of servitude as an integral part of rules of international law.74 There are several examples in which the legal validity of the doctrine of servitudes has been challenged.75 In the North Atlantic Coast Fisheries Case (Great Britain v. United States), the Permanent Court of Arbitration rejected the United States' claim "that the liberties of fishery granted to the United States constitute an international servitude in their favour over the territory of Great

69 Yilma, supra note 64 at p.272.
73 For a discussion of effects of treaties on third parties, see Chinkin C., Third Parties in International Law, 1993, 89-133; see also, A. Boyle & C. Chinkin, The Making of International Law, 2007, p. 238.
74 V. Shepherd (ed.), "Round Table Conference on International Law Problems in Asia", Held under the auspices of University of Hong Kong, 2nd to 6th January 1969, p.81.
75 There are some cases which show evidence of acceptance of international servitudes, see I. Clauss, International Servitudes, 1894, pp. 3-24.
Britain”.76 The Court of Arbitration provided its reasons for objecting United States’ contention in the following words:

The tribunal is unable to agree with this contention:

(a) Because there is no evidence that the doctrine of international servitude was one with which either American or British statesmen were conversant in 1818,

(b) Because a servitude in international law predicates an express grant of a sovereign right and involves an analogy to the relation of a praedium dominans and a praedium serviens; whereas by the Treaty of 1818 one State grants a liberty to fish, which is not a sovereign right but a purely economic right, to the inhabitants of another State;

(c) Because the doctrine of international servitudes in the sense which is now sought to be attributed to it originated in the peculiar and now obsolete conditions prevailing in the Holy Roman Empire, subject at least theoretically and in some respects also practically, to the courts of that Empire their right being, moreover, rather of a civil than of a public nature, partaking more of the character of dominium than of imperium and therefore certainly not a complete sovereignty. And because in contradistinction to this quasi-sovereignty with its incoherent attributes acquired at various times, by various means, and not impaired in its character by being incomplete in any one respect or by being limited in favour of another territory and its possessor, the modern State, and particularly Great Britain, has never admitted partition of sovereignty, owing to the constitution of modern State requiring essential sovereignty and independence;

(e) Because this doctrine being but little suited to the principle of sovereignty which prevails in States under a system of constitutional government such as Great Britain and the United States, has found little if any, support of modern publicists. It should therefore in the general interests of the community of nations and of parties to this treaty, be affirmed by this tribunal only on the express evidence of an international contract...77

In the Report of the Committee of Jurists to the League of Nations Council, regarding the Aaland Islands Question, the acceptance of the doctrine of international servitudes by the international community was disregarded. The Report eloquently stated: “the existence of international servitudes, in the true sense of the term, is not generally admitted” and that “those who maintain that real servitudes, similar to those in civil law, can exist between States, meet the difficulty of naming praedium dominans in relation to the praedium serviens”.78

In the S.S. Wimbledon Case, the Permanent Court of International Justice similarly reaffirmed the same view by pointing out that it was highly controversial to consider that in the field of international law “there really existed servitudes analogous to the servitudes in private law”.79

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77 *Idem.*
From the above discussion, one may point out that a State can voluntarily (by treaty or tacit consent) grant certain international rights to another State(s) but it is not perpetually obliged to respect such rights by virtue of international law i.e. the concept of servitudes, other than stipulations of treaty law. Even though there are instances in which certain treaties survived state succession, it has not been proved that those treaties were succeeded to by successor states as a result of legal obligations other than various reasons such as economic and political interests as well as expediency to continue some of the pre-existing treaties.\textsuperscript{80} It should be noted that the term “servitude” has not been used in the event of state succession.

According to Yilma,\textsuperscript{81} the Vienna Convention on the Law of Treaties is a source of a much more “solid and conventional evidence” that successor states are equal to other states and are not obliged to succeed to any of the treaty obligations of their predecessor states contrary to their free will and consent. The Preamble of the Convention reaffirms that “…the principles of free consent and of good faith and the\textit{ pacta sunt servanda} rule are universally recognised”.\textsuperscript{82} In its articles 6 to 26, the Convention illustrates the various aspects of free consent of States in treaty making. Yilma\textsuperscript{83} further points out that in case of state succession, a successor state is merely a third party\textsuperscript{84} to a treaty between its predecessor and other state(s). Article 34 of the Vienna Convention on the Law of Treaties stipulates that “a treaty does not create either obligations or rights for a third State without its consent”.\textsuperscript{85} There is a possible contradiction between the above principle of international law stipulated in Article 34 of the Vienna Convention on the Law of Treaties and the principle of “dispositive treaties” presented by the Convention with Respect to Succession of Treaties.

The viable conclusion from the foregoing discussion is that there is a category of treaties variously considered to create “localised rights and obligations”\textsuperscript{86}, to be “dispositive” in nature\textsuperscript{87}, or to establish “obligations attached to territory”\textsuperscript{88}, which

\textsuperscript{80} Yilma, supra note 64 at p.275.
\textsuperscript{81} Idem.
\textsuperscript{83} Yilma, supra note 64 at p.275.
\textsuperscript{85} See VCLT.
\textsuperscript{87} O’Connell, supra note 43 at p. 49.
survive the event of state succession and devolve to the successor state. In the case of international boundaries established by treaties, the rule is particularly clear and incontrovertible. The controversial part is whether and to what extent states are bound by treaties regarding international watercourses which were concluded by predecessor states. In other words, are watercourse treaties part of the dispositive treaties? The outcome of this inquiry would lead us to determine whether the Nile Basin States remain bound by the legal regime established by the colonial powers or not. The answer to this inquiry cannot be found in any simplistic process of doctrinal inquiry. For quite sometime this issue attracted diverse debates, more especially with regards to the 1929 Nile Agreement. Authors such as Vali are of the opinion that the Agreement is territorial in character and it ought to be respected by all successor states. On the other hand authors such as Batstone argued that the 1929 Agreement primarily represented political concessions by the British Government so as to have a friendly Egyptian Government to deal with, thus ruling out the possibility that the instrument be placed in the category of “territorial treaties” devolving on all successor states.

The ILC in its Commentary to the 1978 Convention on Succession of States in Respect to Treaties pointed out that the question of determining “territorial treaties” is “at once important, complex and controversial.” The ILC further indicated that “territorial treaties” touched “such major matters as international boundaries, rights of transit on international waterways or over another state, the use of international rivers, demilitarization or neutralization of particular localities”. The ILC clearly manifested that treaties concerning water rights or navigational rivers were commonly regarded as “candidates” for inclusion in the category of territorial treaties. However, the Commission indicated the problems encountered in considering treaties with regards to water rights as territorial treaties. The ILC gave as a major precedent the 1929 Nile Agreement. In the same vein, the Final Report of the International Law Association Committee on Aspects of the Law of State Succession entitled Rapport

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89 Vali, supra note 59 at p. 164.
92 Idem.
93 Id., at p.203. For the whole treaty, see, UN, supra note… at p. 101.
The International Law Association notes that there is lack of precision on what the territorial treaties are, as well as divergent state practice with regards to the so called "territorial treaties". The International Law Association further points out:

*Par conséquent, il ne resort pas à première vue de notre analyse une thèse de la succession automatique aux accords concernant les régimes territoriaux particuliers. On peut soutenir que la succession se limite aux États directement concernés, cette limitation serait conforme au but et à l'objet des accords.*

The International Law Association illustrates that, as a consequence of lack of precision and of the 1978 Convention on Succession of States with respect to treaties on the "other territorial regimes", coupled with lack of uniform state practice, the succession of the so called "other treaties" is not automatic. Succession of those "other territorial treaties" depends on the terms of individual treaties as well as their object and purpose.

On attaining independence, the Nile Riparian States contested in one way or another succession to the 1929 Nile Agreement. On its part, Sudan, upon her independence in 1956, formally declared that she did not consider herself bound by a treaty entered into on her behalf by Britain. However, in 1959 Sudan and Egypt concluded a new Nile Waters Agreement which was considered as a mere revision of the old regime (1929 Agreement). The preamble of the 1959 Agreement stated that:

...whereas the Nile Waters Agreement concluded in 1929 only regulated a partial use of the natural river and did not cover the future conditions of the fully controlled river supply, the two riparians have agreed to the following...

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95 _Id._, at p.25.
This apparently is a renunciation by Sudan of any claim to the extinction of the 1929 Agreement. Moreover, the 1959 Agreement is manifestly "an adaptation and extension" of the 1929 Agreement. With regards to Tanzania, she refused to conclude a devolution agreement with Britain. She extended to her territory a two year grace period after independence (8th December 1963) at which time the agreements entered into by Britain on her behalf could be renegotiated, and all agreements not so renegotiated were to be considered terminated unless otherwise required by international law. Further, in a Note of 4th July 1962, Tanzania made a declaration that:

The Government of Tanganyika, conscious of the vital importance of Lake Victoria and its catchment area to the future needs and interests of the people of Tanganyika as an independent sovereign state in relation to the provisions of the Nile Waters Agreement on the use of waters of the Nile entered into in 1929 by means of an Exchange of Notes between the Governments of Egypt and United Kingdom. As a result of such considerations the Government of Tanganyika has come to the conclusion that the provision of the 1929 Agreement purporting to bind the countries under British Administration are not binding on Tanganyika.

In a Note of 21st November 1963, Egypt replied that pending the conclusion of a new agreement regarding the Nile, the 1929 Agreement remained applicable. Copies were sent to all affected States (Sudan, Kenya, Uganda and Tanzania), and neither of them contested or even replied to the note. The silence of the affected States may be or may not be interpreted as embracing the 1929 Agreement. According to some authors, if interpreted as an acceptance, it is based on the doctrine of state succession but on an informal arrangement that the 1929 Agreement would continue to apply "pending further agreement". On their part, Kenya and Uganda took the same stance as that of Tanzania, which is now widely known as the Nyerere Doctrine of Succession of State with regards to the two year grace period. However, unlike Tanzania, they did not contest the devolution of the 1929 Agreement. It could therefore be argued that, with the lapse of the two year grace period, and due to the

98 Godana, supra note 14 at p. 145.
99 Garretson, supra note 15 at p. 287.
100 Tanzania was then known as Tanganyika before its unification with Zanzibar to become what is presently known as Republic of Tanzania.
102 Idem.
103 Idem.
104 Godana, supra note 14 at p. 149.
105 Degefu, supra note 3 at p.337.
106 The Late Nyerere is a former President of Tanzania. For the Discussion of the Nyerere Doctrine see, M. Yilma, 'State Succession in Africa', Recueil des Cours, Vol.200, 1986, p. 93-234.
possible territorial nature of the Agreement, it devolved on Kenya and Uganda pursuant to the doctrine of dispositive treaties, since it was neither renegotiated or amended and since they conceded the possibility of devolution of certain treaties by operation of customary international law.107

An analogous example of state succession with regards to international water law is that of the River Niger. It should be noted that the legal regime of the Niger River during the colonial era pertained to international navigation. The General Act of the Berlin Conference of 26th February 1885 had as its objective the creation of international regimes for the Congo and Niger Rivers for the benefit of all nations. Article I of the Act provides for the principle of complete freedom of trade in all the regions forming the basin of the Congo and its outlets. Article II expressed that all flags without distinction of nationality had free access to the whole of the coastline and particularly, the right to engage in coast trading, even though that right had been traditionally reserved to the riparian state. In general, the Act of Berlin of 1885 established freedom of navigation on Congo and Niger Rivers. The basis of this freedom was complete equality to naval and civilian vessels, in time of both peace and of war, and without any recognition of a right to any party in temporary control of the River to take action against an enemy state(s). The aspects of the Act expressed the principles applicable to rivers as construed by “public law of Europe”. Taken for granted, it may be coneluded that the territorial character of the Act suggest that the regime in question was dispositive in character. It is paramount to review the history of the two Rivers in order to determine whether state practice supports the view.

With regards to the Congo River, the regime established by the Act of 1855 was considered to be binding upon Belgium after she acquired the Basin territory from her King, who had all along been an original Party to the 1885 Act.108 After the First World War, some of the Parties adopted the Treaty of Saint-Germain-en-Laye109 which modified the regime established by the 1885 Act. The General Act of 1885

108 The territory of Congo which was the private possession of King Leopold of Belgium on 28th November 1907; see Hertslet, The Map of Africa by Treaty, 3rd ed., 1967, Vol.III, p.546.
was replaced by a preferential system of free-trade.\textsuperscript{110} This process became a bone of contention in the \textit{Oscar Chinn Case}.\textsuperscript{111} The Permanent Court of International Justice rejected the claim that Belgium was a successor to the obligations of her King as a result of state succession. The Court upheld the unilateral Belgian measures which violated the river regime for being discriminatory with regards to Belgian Nationals thus "overriding national interests". It implicitly overruled the idea of permanent continuation of the legal regime governing the River. In other words, the view that the legal regime was dispositive in nature was objected. Judge Van Eysing presented a dissenting judgment whereby he was of the opinion that the regime was dispositive in nature. In addition to the case, the practice of the Belgian Government, in her exercise of sovereignty over Congo indicates frequent infringement by States Parties to the 1885 Berlin Act.\textsuperscript{112} The above scenario negates the fact that the legal regime governing the River was territorial in character and thus devolved to successor states automatically. \textit{Prima-facie}, it would appear that the Berlin Act, as amended by the Convention of Saint-Germain-en-Laye, formed a dispositive treaty regime which would automatically devolve to successor state. However, this is not the case given the subsequent practice of the Basin States following their decolonisation.

The practice of the States in the region proves that the earlier legal regime did not devolve on successor states. In 1960, the Congo became independent. This raised the question of legal status of treaties entered into by Belgium which was the colonial power. The Prime Minister of Congo made a declaration that all treaties concluded by Belgium on behalf of the Congo would either be adopted or repudiated after prior consideration. These treaties were neither adopted nor renounced expressly. The Constitution of the Congo of 1967 stated in its Article 6: "Treaties or international agreements concluded before 30\textsuperscript{th} June 1960 (the date of independence) will remain valid only to the extent that they have not been modified by national legislation. Earlier, in 1966, Congo had adopted a Code of Navigation relating to the River. This may imply that the Act of 1885 was modified by the Code. However, it is generally accepted that domestic legal order cannot be used as a valid defence to waive international obligations established by international order. According to Godana, the

\begin{footnotesize}
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\item[110] Godana, \textit{supra} note 14 at p.158.
\item[111] Permanent Court of International Justice, Series A/B No. 63.
\item[112] Godana, \textit{supra} note 14 at p. 159
\end{itemize}
\end{footnotesize}
1885 Act is that it reflects the Congo practise on the rejection of the view that treaties on rivers are dispositive in character and devolved automatically on successor states.\textsuperscript{113}

With regards to the non-navigational aspects of the River Congo, the newly independent States of the basin departed from the customs duty schedules established by the Berlin Act and the Treaty of Saint-Germain-en-Laye. In 1962, the Central African Republic, Chad, Congo Brazzaville and Gabon founded a Customs Union. They put forward an argument in support of their common customs tariff that their accession to independence had in effect terminated the application of the Act of Berlin and the Treaty of Saint-Germain-en-Laye.\textsuperscript{114}

With regards to countries forming the Niger River Basin, the ensuing events were similar to those of the Congo River Basin. The new Niger Basin States objected to any obligation to be bound by the colonial agreements. The colonial legal regime was replaced with a new one, embodied in the 1963 Convention of Niamey. One of the debates in the course of the Conference was whether it was necessary for the independent States to terminate the colonial regime. In general, the attitude of the newly independent states was that they were not ready to accept the survival of agreements concluded by departing colonial powers which disregarded their interests.\textsuperscript{115} It is particularly important to note that the new independent Niger basin States, more specifically the delegates of the francophone States, took the opportunity during the Niamey Conference to make it clear that their accession to independence meant that they were relieved from engagements undertaken by colonial powers. This was an express rejection of the doctrine of territorial treaties that bind states perpetually. It should be noted that there was one Anglo-phone country (Nigeria), which undertook a devolution agreement to continue to apply the international obligations entered into by Great Britain.

Even though all states present were of the opinion that the colonial legal regime with regards to the River Niger had lapsed as a result of the riparian states accession to

\textsuperscript{113} Id., at p.160.
\textsuperscript{114} GATT Doc. L/2061 of 13\textsuperscript{th} September 1963.
independence, the basin states “for the avoidance of doubt” expressly included in the Treaty, a declaration of “their intention to be freed from any obligations that might still be brought to rest upon them”. Article 9 of the 1963 Convention adopted at the Niamey Conference stipulates:

Subject to the provisions of this Convention and of the Annexed Statute, the General Act of the Berlin of 26th February 1885, the General Act and Declaration of Brussels of 2nd July 1890 and the Convention of Saint – Germain – en- Laye of 10th September 1919 are considered as abrogated in so far as they could bind State parties to this Convention.

According to Godana, the European powers which were beneficiaries of the 1885 General Act of the Berlin Conference and the Convention of Saint-Germain-en-Laye did not protest against the collective action. This implied acceptance of the action of the Basin States by them (the colonial powers).

The above practice by African States is a clear manifestation that most of them did not recognise any treaty as devolving to them automatically, regardless of the status of the treaty. As we have seen above, the emergence of several new and sovereign African States on the international scene in the post Second World War era had a recognisable impact on international relations. Apart from the examples illustrated above, it is essential to study the attitudes and practices of the newly independent states, more specifically African States, with regards to treaties concluded by predecessor States. These States have enormously contributed to the development and codification of international law, for example the development and codification of the law of state succession. It is thus important to analyse and appraise the contributions of the newly independent African States with regards to phenomenon of State succession as a result of decolonization. The subsequent paragraphs will examine the legal problems which arose in the event of state succession of treaties as opposed to the specific field of international water agreements. It cannot be treated in isolation.

Most African States became independent in the early 1960s via the application of the doctrine of self-determination as well as the commonly known United Nations General Assembly Resolution 1514 (XV) of 14th December 1960 on the granting of

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117 Godana, supra note 14 at p. 162.
independence to colonial countries and peoples. It would not be wrong to assert that the process of decolonisation was to a large extent peaceful and "the transfer of power from the predecessor States to the successor States was carried out in a spirit of cooperation and accommodation".

Upon independence, the African States were caught in a dilemma of ensuring their complete freedom with regards to colonial commitments and at the same time ensuring stability in the future of international relations of the new independent States vis-à-vis the rest of the countries. Tanzania, an African State was no exception. To this effect, Nyerere proposed the formulation of a modern concept of the optional principle of the law of state succession which later came to be known as the "Nyerere Doctrine of State Succession". Nyerere, then the Prime Minister of Tanganyika, declared in the National Assembly:

The Government is naturally anxious that the emergence of Tanganyika as an independent State should in general cause as little disruption as possible to the relations which previously existed between foreign States and Tanganyika. At the same time, the Government must be vigilant to ensure that where international law does not require it, Tanganyika shall not in the future be bound by pre-independence commitments which are no longer compatible with their new status and interests.

Great Britain persistently tried to push Tanganyika in entering a devolution Agreement aimed at ensuring that its vested interests in the Successor State would be protected. However, Nyerere totally resisted the pressure from Britain since he did not see any benefits or legitimacy in such a devolution agreement. Tanganyika made a declaration:

A suggestion has been made by the United Kingdom Government for the conclusion of an inheritance agreement between Tanganyika and herself, similar to the ones previously concluded by the United Nations and other countries coming to independence. After examining the proposal in detail the Government has felt unable to accept it. We understand that the effect of such agreement might be to enable third States to call upon Tanganyika to perform certain treaty obligations from which Tanganyika would otherwise have been released by her emergence to independent statehood. Moreover, we were advised that an inheritance agreement would probably not be able by itself to enable us to insist that third States discharge towards us the obligations which they assumed under the original treaty. We have, therefore, decided to follow a different path.

The Nyerere Doctrine has its roots in another classical doctrine: the "clean slate" (Tabula rasa), which we analysed earlier. It assumed that all new states commence

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120 Yilma, supra note 106 at p.121.
121 Tanganyika, Assembly Debates (Hansard), Tanganyika National Assembly Official Reports, Thirty-sixth Session (Sixth Meeting), 30th November 1961, p.10.
122 Yilma, supra note 106 at p. 122.
123 Tanganyika, supra note 121 at p. 10.
without inheriting any of the obligations of the Predecessor State. The Nyerere Doctrine requires that all agreements entered into by the colonial power automatically lapsed as a result of state succession, due to the mere fact of “emergence into independent statehood”. However the Doctrine does consider the possibility of renewal of some obligations of the predecessor states or instruments of mutual interests. The renewal of any obligation or instrument is dependant on the free choice and express consent of the successor state. The Doctrine rejects the notion of perpetual continuation of any instrument entered into by the predecessor state.

The Doctrine further objects to any categorization of international obligations which a successor state might have to adopt automatically as a result of the nature or type of the obligation (i.e. dispositive, localized, and other obligations) but it does not disown customary international law. Unlike the concept of Tabula rasa, the doctrine manifests that matters which are required by customary international law to continue without interruption should not be affected by transfer of sovereignty.

The Nyerere Doctrine of State Succession is considered to be compatible with some fundamental principles of international law. It is imperative to mention some of the principles and their compatibility with the doctrine. The doctrine is considered to be compatible with the Principles of the Charter of the United Nations and the Charter of the Organization of the African Unity (now African Union). The most important principle is that of sovereign equality of States provided in Article 2(1) of the United Nations Charter as well as in various United Nations Resolutions. The Principle has also been reiterated in the United Nations Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States adopted by the General Assembly Resolution 2625(XXV) on 24th October 1970, at the Commemorative Session of the United Nations Twenty fifth Anniversary. The Principle of Sovereignty Equality is stated in the following words:

All States enjoy sovereign equality. They have equal rights and duties and are equal members of the international community, notwithstanding differences of an economic, social, or other nature. In particular, sovereign equality includes the following elements:

a. States are juridically equal;
b. Each state enjoys the rights inherent in full sovereignty;
c. Each State has the duty to respect the personality of other States;
d. The territorial integrity and political independence of the State are inviolable;

124 Idem.
e. Each State has the right to freely choose and develop its political, social and cultural systems;
f. Each State has the duty to comply fully and in good faith with its international obligations and to live in peace with other States. \[125\]

The newly independent states have a right either to retain or reject any of the obligations of the predecessor state in line with the principle of sovereignty (i.e. the right of option). \[126\] It is also considered that any attempt to enhance the predecessor States’ rights and obligations are transferred to the Successor State without their consent (successor state) would mean that the successor is in an inferior position and thus may endanger the principle of sovereign equality of states. \[127\]

The Nyerere doctrine is also compatible with and based on the “right of peoples and nations to permanent sovereignty over their natural wealth and resources”. This principle has been declared in various United Nations General Assembly Resolutions \[128\] and has been embodied in the International Covenant on Economic Social and Cultural Rights. \[129\] In paragraph 1 of the United Nations Resolution 1314 (XIII), the principle of the right of permanent sovereignty over natural wealth and resources is “a basic constituent of the right to self-determination”. The above instruments suggest that, in the event of state succession, the successor state automatically acquires the right of permanent sovereignty over the state’s natural wealth by virtue of transfer of sovereignty. \[130\] In other words the successor states have inherent sovereign right of revising or redirecting the policy of its national wealth and resources in line with the interests of national development and of the well being of the people of the state concerned. This right of a Successor State to determine its own fate with regards to the rights and obligations of the Predecessor State in the event of state succession as a result of decolonisation has been asserted by numerous African States.

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\[126\] Yilma, *Supra* note 106 at p. 125.

\[127\] Idem.


The Nyerere doctrine had enormous impact on numerous African States. The doctrine attracted heated debate at every legal conferences or seminars with regards to the problem of succession. Many newly independent states adopted the doctrine. Countries like Botswana in 1966, Lesotho in 1967, Nauru in 1968 and Swaziland in 1968 applied the “opting-in-formula” vis-à-vis the Nyerere formula. Other countries which subscribed to the doctrine are Guyana, Barbados, Mauritius and Tonga. The newly independent francophone African States which did not expressly make a declaration that they would apply the “clean-slate” doctrine in as far as state succession is concerned, for example Algeria, Upper Volta, Senegal and Guinea, reserved their right of option, while some States indicated specific treaties that they accepted. Both Congo Brazzaville and Malagasy made declarations which adhered to the Nyerere doctrine.

The Anglophone West African States such as Nigeria and Ghana were pressured to enter into devolution agreements signifying that they succeeded to all treaties concluded by the British Government. According to Judge T.O. Elias, the succession of State in Nigeria did not differ from the Nyerere doctrine, since she always reserved her right of option. He commented that:

At the time of granting of independence, the metropolitan countries had ensured by means of an exchange of letters that treaties and agreements should be kept alive. Unfortunately, most of the negotiators of the formerly dependent countries had been too eager for the attainment of independence to go into the details of such treaties, but as soon as the law officers of the newly independent country had time to examine them, they had realized what difficulties were likely to ensue.

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131 Yilma, supra, note 106 at p.139.
133 United Nations, Supplement to the ‘Materials on Succession of States’, id., at pp. 48-48 and 54-56.
Even though there were devolution agreements, only 7 out of the 334 treaties entered into by Britain on behalf of Nigeria continued being into force after close scrutiny of the contents and their importance.\textsuperscript{138}

Other countries which applied in practice the Nyerere doctrine of succession of states include, the former Portuguese territories of Angola, Mozambique, Guinea Bissau, Cape Verde and Zimbabwe even though they did not expressly make declarations to that effect.

The preceding paragraphs are evidence of the practice of African States in as far as State Succession is concerned. It goes without saying that most African States adhered to the “Nyerere Doctrine of State Succession”. According to the doctrine, in case the obligations and rights are customary in status, then they continue to apply. It is therefore important to show whether a norm is customary in nature and thus succeeded to by a newly independent State. In line with the above discussion, it is paramount to determine whether the Nile legal regime is customary in nature and thus devolved to Successor States.

The ILC conceded that in the stance of the 1929 Agreement, there is complication by virtue of it having been “concluded by an administering power, whose competence to bind a dependent territory in respect of territorial obligations is afterwards disputed on the territories becoming independent”\textsuperscript{139}. In the same vein, an agreement granting Syria water rights with regards to the River Jordan was obscured by analogous complications. Great Britain and France concluded a series of agreements including that of the Utilization of River Jordan.\textsuperscript{140} In debates which took place in the Security Council, Israel denied that it was a Successor State with regards to treaties concluded by the United Kingdom. These arguments manifest that the ILC was faced with a daunting task of declaring that all treaties concerning water rights were “territorial” in nature as rule a of customary international law.

\textsuperscript{138} Idem.
\textsuperscript{140} See, id at p.204; For the series of Agreements see, UN, Legislative Texts and Treaties, supra note 11 at pp. 287-288.
In the *Gabcikovo-Nagymaros* Case an important point of dispute was whether the Agreement to construct a series of Dams along the River Danube established a “territorial regime” thus subject to automatic succession. The International Court of Justice concluded that Article 12 of the 1978 Vienna Convention on Succession of States in Respect of Treaties was declaratory of customary international law and that the Agreement in question was indeed of territorial in character despite the fact that it had never been executed and had been substantially repudiated by both parties. It is crystal clear that this case involved assessing whether or not there was sufficient evidence to support the establishment of the principle of automatic succession as a norm of general international law. In making this point, the ICJ reiterated what had earlier been uttered by the ILC: that “treaties concerning water rights or navigation on rivers are commonly regarded as candidates for inclusion in the category of territorial treaties”.

However, the comment by the ILC that treaties with regards to water rights was that they are “candidates” and are not automatically territorial treaties. Different factors have to be taken into account in order to establish whether a given water agreement falls into the category of territorial regime within the meaning the abovementioned Article 12. A close scrutiny of the ICJ judgment in the *Gabcikovo* Case reveals that the Court heavily relied on the navigational rights which are universally accepted as norms of customary international law even in the absence of the Vienna Convention on Succession of State in Respect of Treaties to declare that the 1977 Danube Treaty was territorial. I am of the opinion that the notion of “territorial treaties” which are not affected by state succession forms part and parcel of the corpus of customary international norms. However, it is problematic simply to declare that all water rights agreements are automatically territorial treaties and that is why the ILC chose to term water rights treaties as “candidates” for inclusion in this category.

In case the issue of division of the Nile waters is ever submitted to any dispute settlement body, the question which would be at the core of examination would be the validity of the 1929 Agreement or any other relevant agreements and determine the

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141 *Gabcikovo-Nagymaros* Case, supra note 56.
142 *Id.*, para. 120-123.
143 *Id.*, Para. 123.
water rights accruing from those Agreements, unless of course the parties opt to request the dispute settling body to decide the case ex aequo et bono. It is submitted that, on the basis of the previously discussed precedents, the 1929 Agreement survived the decolonisation process for two reasons. First, all evidence shows that the Agreement is a “candidate” for inclusion in the category of territorial treaties, which brings it within the ambit of Article 12 of the Vienna Convention on Succession of States with Respect to Treaties (which has been accepted by the ICJ as a norm of customary international law as we have discussed above). Second, the practice of the states concerned evidenced that they had accepted the continuation in force of the rights and obligations envisioned by the 1929 Agreement, albeit pending the making of a novel comprehensive agreement to supersede it.

(3) Post Colonial Agreements

a. The 1959 Agreement for the Full Utilization of Nile Waters

This was the first Agreement to be concluded with regards to the Nile River after the colonial era. On Sudan’s attainment of independence, she officially repudiated the 1929 Exchange of Notes, on the grounds that “economic and technical development since 1929 had rendered these provisions obsolescent”.144 In 1959, Egypt and Sudan negotiated the Agreement on the Full Utilization of the Nile Waters.145 This Agreement embodies an accord by Egypt and Sudan “to the construction by the United Arab Republic of the Sudd el-Aali Reservoirs at Aswan as the first of a series of over one year storage schemes on the Nile”.146 The Agreement further stipulates that:

“In order to enable the Sudan to utilize its share of the water, the two Republics agree that the Republic of Sudan shall construct the Rosieres Dam on the Blue Nile and any other works which the Republic of Sudan considers essential for the utilization of its shares”. 147

144 Yimmer, supra note 47 at p. 187.
145 Agreement on the Full Utilization of the Nile Waters, November 8, 1959, Sudan-United Arab Republic 453 UNTS 51 (Hereinafter 1959 Agreement).
146 Id., at Art. II(1)
147 Id., at Art. II (2)
Article I spells out the specific terms of the Agreement and deals squarely with the concept of established rights which are entrenched in the 1929 Agreement. Article I of the 1959 Agreement entitled “The Present Acquired Rights”, stipulates:

1. That the amount of the Nile waters used by the United Arab Republic until this Agreement is signed shall be her acquired right before obtaining the benefits of the Nile control projects and the projects will increase its yield and which projects are referred to in this Agreement; the total of this acquired right is 48 Milliards cubic meters per year measured at Aswan;

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

The Agreement then focussed on the problem of the mathematical allocation of the net benefits yielded by the Sudd-el-Aali Reservoir among the Parties. It should be recollected that the waters already appropriated totalled up to 52 Milliards cubic meters: 48 milliards belonged to Egypt and 4 milliards to Sudan.\textsuperscript{148}10 milliards cubic meters of water were designated from the evaporation losses from the reservoir. Since the net benefits from the total capacity of the reservoir had been estimated at 84 milliards, this left 22 milliards. The Parties agreed to share the remaining amounts in the ratio of 14.5 for Sudan and 7.5 for Egypt. It was further agreed that the net benefit was prone to revision at reasonable intervals to be agreed upon by the Parties at the beginning of the operation of the Sudd-el-Aali Reservoir.\textsuperscript{149}It was further recognised that in case the estimated total net of 84 milliards cubic meters per year exceeds as a result of increases in the mean natural river, then the extra waters shall be equally distributed between the two countries.\textsuperscript{150}On the contrary, in case of a string of years of shortage of supply to the Sudd-el-Aali Reservoirs, the Technical Committee was entitled to establish necessary arrangements to be followed by both parties to face the limited supply in such low years in a fair manner.\textsuperscript{151}

Since the construction of Sudd-el-Aali Reservoir posed possible rise of flooding in the territory of Sudan, it was necessary to tackle the issue of relocation of the local population. According to Article II(6) of the 1959 Agreement, Egypt was obliged to pay 15 million Egyptians Pounds to the Republic of Sudan “as full compensation for damage resulting to the Sudanese existing properties as a result of storage in the Sudd-

\textsuperscript{148} 1929 Agreement, supra note 24.
\textsuperscript{149} Id., at Art.II(5)
\textsuperscript{150} Id., Art. II (4)
\textsuperscript{151} Id., Art. IV 1 (c).
el-Aali Reservoir". On its part, Sudan had a duty to effect before July 1963 “the final transfer of the population of Halfa and all other Sudanese inhabitants whose lands shall be submerged by the stored water” (Art. II (7)).

For the first time in the history of the legal regime of the Nile, provision was made for conservation measures in order to increase the natural supply believed to be vital for the future of the Parties agricultural developments. The Agreement stipulated in its Article III (1) that:

The Republic of the Sudan in agreement with the United Arab Republic shall construct projects for the increase of the River yield by preventing losses of waters of the Nile Basin in the Swamps of Bahr el Jebel, Bahr el Zeraf, Bahr el Ghazal and its tributaries, the Sobat River and its tributaries and the White Nile Basin.

It was agreed in the same provision that the net yield of such projects and the costs of their construction “shall be shared in the same ration of 50%”.

The final point to explore with regards to the 1959 Agreement concerns the issue of needs to utilize water of the other Basin States. This issue was considered to pose possible effects to the interests of Egypt and Sudan, should the needs necessitate negotiations with those other States. Article V (1) provides:

If it becomes necessary to hold any negotiations concerning the Nile Waters, with any riparian state, outside the boundary of the two Republics, the Governments of the Sudan Republic and the United Arab Republic shall agree on a unified view after the subject is studied by the said Technical Commission. The said unified view shall be the basis of any negotiations by the Commission with the said States.

It was further agreed in article V (2) that:

As the riparian States, other than the two Republics, claim a share in the Nile waters, the two republics have agreed that they shall jointly consider and reach on unified view regarding the said claims. And if the said considerations result in the acceptance of allotting an amount of the Nile waters to one or the other of the said states, the accepted amount shall be deducted from the shares of the two Republics in equal parts as calculated at Aswan.

b. 1977 Agreement for the Establishment of the Kagera Basin Authority and Management of the Kagera River Basin

This is an Agreement between the basin States of the Victoria Nile with regards to the harnessing of the drainage basin’s water resources. It was concluded in 1977 by three of the four basin States (Burundi, Rwanda and Tanzania) of the Kagera River. Uganda acceded to the Agreement later.

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152 The payment was effected in yearly instalments from 1960-63. Annex II (A) of the Agreement.
In the 1960s, there was concern among the Basin States of the Kagera River on the harnessing of the water and land resources of this river’s basin. The four Basin States engaged in successive consultative meetings. There was an apparent need for cooperation between them and for coordination of national planning for the optimal development of the basin. This culminated into the birth of a text of the Agreement for the Establishment of the Organisation for the Development and Management of the Kagera River Basin. The Agreement was subsequently ratified by Rwanda, Burundi and Tanzania on 24th August 1977 and it came into force on 5th February 1978. Article 19 empowered Uganda to accede to the Agreement. As a result, Uganda became a Party to the Agreement on 19th May 1981.

Critics of the Agreement suggest that it is deficient in legal substance as it is almost exclusively concerned with the establishment of an institutional framework for cooperation, with only two provisions which apparently deal with substantive law as distinguished from purely matters of organisation. The Preamble embraces the desire of the Basin States “to further develop and reinforce the existing cooperation between the four States” with the objective of developing the Basin’s potential, specifically as regards hydropower, fishing, agriculture, mining and tourism. The other provision which apparently relates to substantive law, but only partly, is Article 2 which enumerates the objectives of the Organisation.

The Article endows the Organisation with the power to deal with virtually all activities to be undertaken in the Kagera River Basin, which include: water and hydropower resources development; the furnishing of water and water-related services for mining and industrial activities; supply of drinking water; agriculture and livestock development, forestry and land reclamation; mineral exploration and exploitation; disease and pest control; transport and communications; trade, tourism, wildlife conservation, fisheries and aquatic development; industrial development; and the protection of the environment. Beyond this, however, virtually the entire Agreement is devoted to outlining a framework for the Organisation and adequate procedures for development and management of the basin.

154 Godana, supra note 14 at p.192.
c. 2003 Protocol for Sustainable Development of Lake Victoria

The Protocol was signed in Arusha, Tanzania on the 29th of November 2003, under the auspices of the East African Community. Its Parties are: Kenya, Uganda and Tanzania. The Protocol is an integral part of the Treaty Establishing the East African Community. The object of the Protocol is “investment in the field of energy, transport, communications, infrastructure, tourism, agriculture, fisheries, livestock, forestry, mining and other areas of social and economic endeavour to spur development and eradicate poverty in the Lake Victoria Basin”. Article 1 of the Protocol deals with the definition of major terms. Article 4 provides for “Principles” of the Protocol which incorporate contemporary legal principles of shared watercourses. Article 4(2) stipulates:

... the management of the resources of the Basin shall be guided by the following principles:
(a) the principle of equitable and reasonable utilization of water resources.
(b) The principle of sustainable development;
(c) The principle of prevention to cause harm...
(d) The principle of prior notification concerning planned measures...

Article 5 entitled “Reasonable and Equitable Utilisation of Water Resources” provides “The Partner States shall utilise the water resources of the basin, in their respective territories in an equitable and reasonable manner”. Article 5 includes an inexhaustible list of factors to be taken into account when determining what is equitable.

Articles 7 to 32 elaborate in detail how to use the water resources of the Lake Victoria Basin in a sustainable manner. Articles 33 to 45 provide for an institutional framework.

Article 48 of the Protocol provides: “The provisions of this Protocol shall take precedence over any other existing agreements relating to Lake Victoria and in case any other agreement is inconsistent with this Protocol, it shall be null and void to the

157 See Protocol, supra note 156 at Article 47. The Article states: “This Protocol shall upon entry into force be an integral part of the Treaty and in case of an inconsistency between this Protocol and the Treaty, the Treaty shall prevail”.
158 Id., at Preamble; see also, Article 3 of the Protocol.
159 For a discussion of the fundamental principles of international shared watercourses, see, infra, Chapter 3 of the present thesis.
extent of its inconsistency”. The application of this Protocol\textsuperscript{160} will cause controversies since it \textit{prima facie} contradicts the object and purpose of the 1929 Nile Agreement.\textsuperscript{161} The Protocol grants Parties the right to utilize waters resources respecting principles of international watercourses provided therein whereas, the 1929 Nile Agreement grants Egypt the “right to veto” projects in those States. It should be recalled that the Parties to the Protocol (viz. Kenya, Uganda and Tanzania) are also Parties to the 1929 Nile Agreement discussed above.

One may pose a question, which of the two (the 2003 Protocol or the 1929 Nile Agreement) takes precedence? The Protocol is \textit{lex posterior}. However, Egypt is not a Party to the Protocol. As we saw above, Article 48 grants the Protocol precedence over existing such as the 1929 Nile Agreement. The Vienna Convention on the Law of Treaties provides that states are not bound by treaties which they are not parties\textsuperscript{162} to unless the treaty is a codification of or has crystallized into customary norms. Therefore, on the basis of the customary international norm provided for in the Vienna Convention on the Law of Treaties, the Protocol which is \textit{lex posterior} does not \textit{per se} alter the relationship of the Parties to it and Egypt provided for under the 1929 Nile Agreement. However, as I noted above, the Protocol embodies contemporary fundamental principles of international watercourse law. The relationship of these fundamental principles and the 1929 Nile Agreement is extensively discussed in chapter three and four of the present thesis.

It should be noted that even though Article 48 of the Protocol provides for its precedence in case of any inconsistencies with existing agreements, the drafters provided a safety net in case of those inconsistencies. Article 48(2) states “where the exercise of the rights and obligations originating from an existing agreement relating to the Lake, is likely to cause serious damage or threat to the Lake Victoria and the people, the Partner States shall as soon as practicable enter into negotiations or take other measures to remedy the situation”. This safety net allows Parties to resolve any

\textsuperscript{160} The provisions of the Protocol have not yet been applied in terms of initiating projects. At the moment all major projects are discussed under the auspices of the Nile Basin Initiative discussed in the following section.

\textsuperscript{161} For a detailed discussion on the contradiction of the 1929 Nile Agreement and the principles of international shared watercourses such as those incorporated in the Protocol, see, \textit{infra}, chapter 3 of the present thesis.

\textsuperscript{162} Vienna Convention on the Law of Treaties, \textit{supra} at Art. 35.
conflicts which may result in its application *vis-à-vis* existing agreements. For example, if one of the Basin States wanted to initiate a project which is in line with the requirements of the Protocol, and Egypt used her “right of veto” granted by the 1929 Nile Agreement, the safety net allows the Party to “negotiate” or “take other measures to remedy the situation”. Those “other measures” are not elaborated by the Protocol. The “other measure” in case of the above scenario may be for the State to halt the project in order to respect her obligations under the 1929 Nile Agreement even though article 48(1) of the Protocol accords its precedence over existing agreements.

One other interesting provision of the Protocol is Article 5(7). It stipulates: “In the view of the relationship between the Lake Victoria Basin and the Nile River Basin, the Partner States shall cooperate with other interested Parties, regional or international bodies and programmes and in so doing, the Partner States shall negotiate as a bloc”.163 This stipulation resembles the one in the 1959 Agreement between Egypt and Sudan for the Full Utilization of the Nile, which obliges them to negotiate as a bloc on issues regarding the utilization of the Nile with other Basin States.164 The purpose of such provisions is to provide states with higher bargaining powers than they would possess when negotiating individually.

(4) Other Arrangements in the Nile Basin

This section illustrates various informal processes that have taken place in the Nile Basin. Endeavours such as the Framework for General Cooperation between Ethiopia and the Republic of Egypt, TECCONILE, the Nile 2000 Conferences, the Nile River Basin Action Plan, and the Nile Basin Initiative (NBI), appear to suggest cooperative frameworks which are part of what helps law emerge.

In 1967, Egypt, Kenya, Sudan, Tanzania, Uganda and the United Nations Development Programme (UNDP) concluded an Agreement for the Hydro-meteorological Survey of Lakes Victoria, Kyoga and Albert (hereinafter Hydromet

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163 See, also Preamble to the Protocol.
This Agreement established a hydrometeorological survey project whose objectives included the collection and analysis of hydrometeorological data of the catchments of Lakes Victoria, Kyoga and Albert as well as an extensive study of the water balance of the Nile.

The objective of the first phase of the hydrometeorological survey of the catchments of the Lakes was the collection of meteorological and hydrological data on the upper Basin (Kenya, Tanzania and Uganda) data, which were paramount to the study of water balance situated in the upper Basin. This phase commenced in 1967. Subsequently, there was a second phase whose objectives were to: formulate a mathematical framework representing the Upper Nile Basin, encompassing all rivers and lakes; develop diverse alternative models of regulations for the abovementioned Lakes, individually and as a system; continue to develop aspects pertaining to the evaporation determination, evaporation transpiration, index catchments, collection, publication and analysis of data; and, to educate the staff of the participating States in systems analysis, regulation and use of rivers and lakes. The five founder States of the Agreement have since been joined by the rest of the States constituting the Nile Basin.

In early 1980s, there was a series of overlapping initiatives. The more ambitious UNDUGU, meaning “brotherhood in Swahili” group was founded, bringing together all Nile Riparian States, except Ethiopia and Kenya. UNDUGU’s goal was to foster economic, social, cultural and technical ties among Nile States, with a view of establishing the foundation of a permanent sub-regional economic organization. It is argued that although UNDUGU’s achievements were few, it at least provided a forum for information sharing.

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166 Lake Albert was later changed to become Lake Mobutu Sese Seko.
167 See, UNDP (Special Fund), Plan of Operation for the Hydrometeorological Survey of the Catchments of Lakes Victoria, Kyoga and Albert, as cited in Godana, supra note 14 at p. 191.
168 Godana, supra note 14 at p. 191.
In 1992, an intergovernmental technical cooperation committee for the promotion of the Nile (TECCONILE) was established. Its main long-term objectives were: assisting participating states in the development, conservation, and use of the Nile waters resources in an integrated and sustainable manner, taking into consideration basin-wide cooperation, for the benefit of all as well as assisting the countries in the determination of equitable entitlement of each riparian country to the utilization of the Nile waters.

TECCONILE successive meetings culminated in the creation of a Nile River Basin Action. All Nile Basin States participated in the development of the plan, which was formally approved by the Council of Ministers of Water Affairs of Nile Basin States in February 1995. The five components of the Plan were: A. Integrated Water Resources Planning and Management; B. Capacity Building; C. Training; D. Regional Cooperation; and, E. Environmental Protection and Enhancement. As a result of limited implementation under the Action Plan as was originally conceived, it was subsequently revised into the Nile River Basin Strategic Action Program. The Nile Basin Initiative (NBI) was launched as well, to replace the TECCONILE in the same year.

The NBI was formed as a result of the “Nile Conferences” which aimed at promoting basin-wide cooperation on shared freshwater. The theme of the Conferences revolves around comprehensive cooperation with an aim of sharing information on challenges faced by each riparian State. All Basin States have participated in the Conferences, even though for sometime, Burundi, Eritrea, Ethiopia and Kenya insisted they were merely observers. However, at glance one cannot discern any

174 TECCONILE, supra note 172 at vi-viii.
176 The process had the backing of Canadian International Development Agency (CIDA), UNDP, and the World Meteorological Organization.
177 Shady, supra note 171 at p. 77.
difference between “member” and “observer” delegations since they sit together, present papers, enter into discussions, and participate in drafting of joint communiqués by the Nile Basin States. Even though the 2002 Nile Conference series was conceived as “technically oriented”, papers often examined the legal status of riparian relationships i.e., the continued vitality of the old regime, equitable use versus avoidance of harm, were publicly debated.

One of the most important breakthroughs was the creation of the NBI in February 1999 and the official launching of its Secretariat in Entebbe, Uganda, in September 1999. As we saw earlier, the NBI and its Nile River Basin Strategic Action Program have superseded TECCONILE and the Nile Basin Action Plan, respectively. The NBI has the objective of promoting “sustainable socio-economic development through the equitable utilization of, and benefit from, the common Nile Basin water resources”. The NBI is perceived as a “transitional mechanism” to facilitate basin-wide discourse until a “permanent cooperative framework” is concluded. Until the framework is concluded, sub-basin activities under the NBI are governed by “common understanding” of the basin states regarding several implementation guidelines.

A Panel of Experts was established to deal with the “highly sensitive” issues arising in the context of the framework. In August 2000, the Ministers in charge of Water Affairs from all ten Basin States, including Eritrea as an observer, met in Sudan, to review the Panel’s final report on the framework. At the conclusion of the meeting, it was reported that that there was “remarkable convergence toward future cooperation” and that the Panel had reached consensus on most of the framework’s parts. Consensus was not reached “mainly on the principle of prior notification of planned measures and the state of existing agreements under the new cooperative

179 Brunnee, Toope, supra note 169 at p. 136.
180 Idem.
182 This is the “shared vision” pursued by the NBI, see NBI, supra note 165.
183 Idem.
framework".\textsuperscript{186} With regards to the status of the existing agreements, some States were of the opinion that the cooperative framework should supersede all previous agreements between member States, while others preferred harmonisation of the existing agreements and the new framework.\textsuperscript{187} Nonetheless, progress has been achieved with regards to package cooperative projects in the Nile.

Another remarkable arrangement is the Framework for General Cooperation between Ethiopia and the Arab Republic of Egypt which was signed in Egypt on July 1\textsuperscript{st} 1993.\textsuperscript{188} The Cooperation Agreement focussed on the Nile Basin as a "centre of mutual interest".\textsuperscript{189} In its eight articles, the Agreement emphasises on principles of good neighbourliness, peaceful settlement of disputes, non-interference in internal affairs of States, commitment to consolidate mutual trust, importance of cooperation, importance of rules and principles of international law, no-harm concept, necessity of conservation and protection of the Nile waters, and, appropriate consultation.

These "other arrangements in the Nile Basin" have re-shaped the Basin States' identities by promoting enhanced legitimacy for emerging principles. The cooperative frameworks form part of what helps law emerge. Existing legal norms affect the interaction of states and state practice, which may lead to the birth of customary international norms. Such "arrangements" that we have discussed above may be categorised as simply illustrating the concept of cooperation which may underlie effective normative evolution. These arrangements at least manifest the element of good faith commitment, an expectation that if possible they will be adhered to, but most important a possibility of influencing state practice as well as evidence of \textit{opinio juris} which are vital elements of customary international law. Such arrangements are manifestations of general consent to certain basic principles acceptable and practicable for states involved. According to Brunnée and Toope, such arrangements in the Nile processes "have aspired to promote the kind of interaction, trust building, and mutual learning that are crucial to the emergence of shared understanding", which

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{186} Idem.
\item \textsuperscript{187} Idem.
\item \textsuperscript{188} Framework for the General Cooperation, July 1\textsuperscript{st} 1993, Egypt and Ethiopia, at http://www.fao.org/docrep/w74146/w74140p.htm
\item \textsuperscript{189} Id., Preamble.
\end{itemize}
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are paramount to the evolution of norms. Therefore, it is fair to argue that these “other arrangements” which have constantly recognised international customary law concerning water resources, such as equitable sharing, no-harm rule, the duty to cooperate, the duty to notify etc., might suggest that these principles help in the guiding of Basin States interaction by discarding competitive egocentric arguments and embracing cooperation. It will be discussed later whether the norms can be regarded as binding on the Nile Basin States by virtue of customary international law and thus rendering the old treaties desolate.

The Nile River Basin as we saw above is composed of an intricate legal regime contained in several legal instruments which were concluded during the colonial era and some of them devolved to the successor states as discussed above, as a result of succession of states. The 1929 Agreement is the first full-scale Treaty, in as far as the Nile legal regime is concerned, but it is by no means exhaustive. This Agreement is the centre of all controversies between the Nile riparian States. The 1959 Agreement between Egypt and Sudan unreasonably purports to divide the Nile between two basin States in total disregard of the eight other watercourse states.

One of the salient features of the present Nile regime is the model of bilateral treaty making. This pattern did not foster opportunities for basin-wide interaction and trust-building. Another feature is that the terms of the most of the Nile Agreements discussed above focussed on providing exclusive utility rights to Egypt and to a lesser extent Sudan. This gave rise to the distinct and egocentric identities by the Nile Basin States.

There is conspicuous lack of provisions in the various Nile agreements with regards to the adaptation to principles of international watercourse law. In the same vein, the legal positions of various Nile Basin States with regards to international watercourse law have been diverse. Apart from Egypt’s argument that the colonial agreements are legitimate, they have always based their argument upon reliance and historical usage. These arguments have been refuted by all other Nile Basin States, except Sudan,

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190 Brunnée and Toope, supra note 169 at p. 155.
191 For the role of emerging Customary norms, see, infra, Chapter 4.
192 Brunnée and Toope, supra note 169 at p. 147.
which is linked to Egypt by virtue of the 1959 Treaty. Ethiopia, for example, has always been in support of the pre-eminence of “the sovereign right... to optimal utilization” of water and its resources within the territorial jurisdiction of each state. Ethiopia has since refused to acknowledge any existing instrument or obligation deterring her from freely utilizing the Nile Waters on her territory. Kenya, Uganda and Tanzania, have all expressly or implicitly rejected the notion of perpetual obligation as a result of the 1929 Agreement, although they have accepted it as a temporary measure pending the long awaited conclusion of a comprehensive equitable Nile Agreement.

Given the notion of state succession as discussed in this chapter some of the Agreements devolved upon successor state by virtue of the law of state succession. The 1929 Agreement seems to have survived as a result of state succession. This suggests that upstream States in the Nile basin cannot in the present time repudiate the 1929 Agreement on the basis that they have not succeeded to it. In addition to the agreements which devolved to successor states, there are other agreements which were concluded by the independent states. In addition, there are “other arrangements” which, at least as we saw earlier, help in the evolution of law. All of these instruments make up the Nile legal regime.

CHAPTER 2. THE NATURE OF THE 1929 NILE AGREEMENT

In the present chapter, an attempt will be made to locate the 1929 Nile Agreement in the wider corpus of public international law. An in-depth dissection of the agreement will be undertaken with a particular interest to its relationship with international law norms.

Given the number of treaties that govern the Nile waters, it is necessary to justify why the author has specifically preferred the 1929 Exchange of Notes in Regard to the Use of Waters of the River Nile for Irrigation Purposes (hereinafter 1929 Nile Agreement)\(^1\), over the other agreements.

The 1929 Nile Water Agreement has consistently been a source of enormous controversies right from the time of independence of the states involved. No other treaty governing the Nile has been a subject of debate among riparian states. In fact, one may be justified to say that it is the centre of all controversies between Nile riparian states.

1. The 1929 Agreement as a Treaty

A question may be posed whether the 1929 Agreement is a treaty in the sense of international law. The answer to the question forms the very basic foundation of analysing the relationship of the Agreement to the wider context of international law. Before delving into the process of determining whether the 1929 Nile Agreement is a treaty under international law\(^2\), it is pertinent to briefly refresh ourselves on the contents of the 1929 Nile Agreement.

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1 Exchange of Notes of 26\(^{th}\) January 1925 contained in Appendix A to the 1929 Agreement (hereinafter 1929 Nile Water Agreement), 93 LNTS 44.

2 This study has deliberately avoided engaging in the futile debate as to whether international law is “law”. For some insights on this debate, see, Glanville L. W., “International Law and the Controversy Concerning the Word “Law”” 22 BYIL 1945, 146-163. Further, this study has avoided plunging in the debate of whether treaties are sources of law or merely sources of obligation. For some insights on this debate, see, Fitzmaurice G., “Some Problems Regarding the Formal Sources of International Law” in F.M. Van Asbeck et al. (eds.), Symbolae Verzijl (1958), 153-176: This document is partially reprinted in Harris D.J., Cases and Materials on International Law (2004, 6\(^{th}\) ed.), 42-43; See also, Maurice
As we earlier saw, the 1929 Nile Agreement was concluded between Egypt and Britain by Exchange of Notes. The 1925 Commission’s Report was annexed to the Exchange of Notes as an integral part thereof. In sum, the 1929 Nile Agreement is composed of both the Exchange of Notes and the Commission’s Report.

In order to determine whether the 1929 Nile Agreement is a treaty, it is important to first understand the concept of “treaty” in international law. The discovery of the meaning will serve as a guide to decide whether the 1929 Nile Agreement is a treaty.

According to the definition provided by the United Nations, “the term ‘treaty’ can be used as a common generic or as a particular term which indicates an instrument with certain characteristics”. When the term ‘treaty’ is used as a generic term, it encompasses all agreements binding at international law concluded by international entities, whatever their designation. Both the 1969 Vienna Convention and the 1986 Vienna Convention, succinctly corroborate the generic utility of the term ‘treaty’. Article 2 paragraph 1(a) of the 1969 Vienna Convention on the Law of Treaties, defines a ‘treaty as ‘an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation’. The 1986 Vienna Convention on the Law of treaties merely projected this definition to encompass international instruments involving international organizations as parties. Ex facie, there are several components which are essential to comprehend when discussing whether a given instrument is a treaty in accordance with the 1969 Vienna Convention on the Law of Treaties. They include: the designation; number of instruments; concluded between states; in written form; should be international agreement; and, should be governed by international law.

4 Idem.
8 1986 Vienna Convention on the law of Treaties, supra note 6 at Art. 4.
The designation given to a treaty is legally of no value according to Article 2 paragraph 1(a) of the 1969 Vienna Convention on the Law of Treaties. In the course of the development of international law, treaties have encountered “an extraordinary varied nomenclature”. The International Law Commission observed that “there is no exclusive or systematic use of nomenclature for particular types of transactions”. Throughout the history of international law, treaties have been designated various titles, such as, covenant, convention, charter, agreement, constitutive act, exchange of notes, etc. On this point, the Permanent Court of International Justice (PCIJ), in the Customs Regime Between Germany and Austria Advisory Opinion, held that “from the standpoint of the obligatory character of international engagements, it is well known that such engagements may be taken in the form of treaties, conventions, declarations, agreements, protocol, or exchange of notes”.

Consequently, the fact that the 1929 Nile Agreement is entitled, “exchange of notes”, does not by itself determine its binding nature. According to the UN Treaty Collection, “an ‘exchange of notes’ is a record of routine agreement, that has similarities with the private law contract”. This form of agreement consists of exchange of documents whereby each party possesses the document signed by

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10 Idem.
13 For example, 1945 Charter of the United Nations, 1 UNTS xvi; UKTS 67 1946, Cmd. 7015.
14 For example, 1994 Marrakesh Agreement Establishing the World Trade Organisation, WTO Legal Texts, 3.
15 For example, 2002 Constitutive Act of the African Union.
16 For example, The 1929 Exchange of Notes regarding the use of the Nile River for irrigation purposes, supra note 1.
17 For further insights in designation, see, generally, D. P. Myer, ‘The Names and Scopes of Treaties’, 51 AJIL (1957), 574-605; see also J. Klabbers, The Concept of Treaty in International Law, (1996), 42-44.
18 Customs Regime Between Germany and Austria (Protocol of March 19, 1931), PCIJ, Ser. A/B, No. 41 at 47 (1931).
19 UN, supra note 4.
representatives of the other.\textsuperscript{20} This technique is frequently resorted to, due to its speedy procedure or to avoid the lengthy procedure of legislative approval.\textsuperscript{21}

With regards to the number of instruments, Article 2(1)(a) of the 1969 Vienna Convention on the Law of Treaties, eloquently points out that the number of instruments making up an agreement is irrelevant to the binding nature of the agreement. The two Franco-German Treaties concluded on 17\textsuperscript{th} August 1927 and 20\textsuperscript{th} June 1928, consisted of 17 to 19 related communications respectively.\textsuperscript{22} In the Nicaragua Case, the ICJ stated that “…the declarations even though they are unilateral acts, establish a series of bilateral engagements…”\textsuperscript{23} This was with regards to the various unilateral declarations issued by States under Article 36 paragraph 2 of the ICJ Statute, accepting the Court’s compulsory jurisdiction. In effect, the Court implied that regardless of the number of declarations, they may all be construed as an agreement of the Court’s compulsory jurisdiction. Thus, the fact that the 1929 Nile Agreement is composed of numerous documents is immaterial to the issue of whether the Agreement is a treaty and thus binding.

The criteria that the agreement should be concluded between states, and that it should be written, will not be discussed in this thesis simply because the 1929 Nile Agreement was concluded between states and it is written. The criterion that an agreement should be governed by international law will be discussed in details in the course of this chapter.

Having discussed the criteria required by the Vienna Convention on the Law of Treaties for an instrument to be regarded as treaty in the sense of international law, it is worthwhile to make a few pertinent points about the requirements by the Convention. First, it should be noted that Article 2 is titled “use of terms”. Article 2 paragraph 1 commences with the wording ‘For the purposes of the present Convention’, which means that the definitions should not be perceived to be universal. In other words, the definitions were originally tailored for the 1969 Vienna

\textsuperscript{20} Idem. The signatories of the letters may be Government Ministers, diplomats or departmental heads.
\textsuperscript{21} Idem.
\textsuperscript{22} C. Chayet, ‘Les Accords en Forme Simplifiée’ 3 AFDI (1957), at p. 8.
\textsuperscript{23} Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States), (Jurisdiction of the Court and Admissibility of Application), ICJ Reps. (1983) p. 418, para. 59-60.
Convention on the Law of Treaties. However, it is also noteworthy that regardless of the number of parties to the 1969 Vienna Convention on the Law of Treaties, a vast majority of its provisions are deemed to have the status of customary norms.24

Apart from fulfilling the requirements outlined by Article 2(1) (a) on the definition of a treaty, it would be pertinent to explore whether the Parties to the 1929 Nile Agreement intended it to be a treaty. The intention of the parties is another customary law element which should be looked into when defining certain agreements as treaties. The reason for this inquiry is that as we earlier saw, the 1929 Nile Agreement is made up of exchange of notes, which poses the problem of whether the notes were intended either to be a binding treaty or merely non-binding instrument. Exchange of Notes (letters) may constitute either a treaty or non-binding instruments depending on the intention of the parties involved. For example, in the Qatar/Bahrain Case, both Parties agreed that “the exchange of letters of December 1987 constitute an international agreement with binding force in their mutual relations”.25 Thus, it is prerequisite to unveil the intention of parties to such exchange of notes.

Jan Klabbers contends, “the intention to be bound is an awkward notion”.26 The reasons for the “awkwardness” are, first, it is difficult to identify intent; second, there is a risk of imbuing parties to agreements with a “psychological state” that they may have never originally held.27 The definition of “treaty” embraced by the 1969 Vienna Convention on the Law of Treaties does not expressly provide for the element of intent. However, it may be noted that the Vienna Convention refers to agreements “governed by international law” in article 2(1)(a). Whether an agreement is governed by international law can only be determined by reference to the intent of the parties. Parties might intend a given agreement to be non-binding or governed by national law. To that extent it may be argued that intent is a necessary element albeit implicit of the definition of a treaty by the Vienna Convention.

25 Qatar v. Bahrain Case, supra note 27 at para. 22.
26 J. Klabbers, supra note 17 at p. 65.
27 Idem.
Despite its “awkwardness”, the element of intent can be vital in the determination of whether an instrument (i.e. exchange of notes) is to be reckoned as binding in the sense of international law.\footnote{Idem; see also, S. Rosenne, \textit{Developments in the Law of Treaties} 1945-1986, (1989), Chp. 2; H.H.M Sondaal, ‘Some Features of Dutch Treaty Practice’ 19 \textit{NYIL} (1988), 183; K.I. Ingweike, ‘The Definition and Scope of ‘Treaty’ Under International Law’ 28 \textit{IJIL} (1988), 249-263.} It is therefore pertinent to contrive means to unveil the intent of the parties to a given instrument. Without wishing to plunge into the discussion of the difficulties of ascertaining the intention of the parties to an agreement, it is imperative to indicate some of the clues which attest the intention of the Parties to the 1929 Nile Agreement (consisting of Exchange of Notes) to be bound by it.

Before determining whether the parties to the 1929 Agreement had the intention to be bound by the exchange of notes or not, it is paramount to understand what an exchange of notes is. According to the UN Treaty Collection Reference Guide,

An ‘exchange of notes’ is a record of a routine agreement, that has many similarities with the private law contract. The agreement consists of the exchange of two documents, each of the parties being in possession of the one signed by the representatives of the other. Under the usual procedure, the accepting State repeats the text of the offering State to record its assent. The signatories of the letters may be government Ministers, diplomats or departmental heads. The technique of exchange of notes is frequently resorted to, either because of its speedy procedure, or sometimes, to avoid the process of legislative approval.\footnote{UN, supra note 4.}

A cursory glance at the definition of exchange of notes by the UN reveals that it does not differentiate binding and non-binding exchange of notes. The definition merely outlines the procedure of creating exchange of notes. In fact, the 1929 Nile Agreement consisting of Exchange of Notes followed the same procedure. Since neither the definition of exchange of notes nor the 1969 Vienna Convention on Law of Treaties makes room for the element of “intention to be bound” expressly, it is pertinent to pursue other clues which are more often inherent in the wording of exchange of notes or the subsequent acts of the parties to the given exchange of notes.

The terms of the Exchange of Notes comprising the 1929 Nile Agreement evince the intent of the parties to be bound by them. In Mahmoud Pasha’s Note, it was lucidly provided, “The Egyptian Government therefore accept the findings of the 1925 Nile Commission, whose report is annexed hereto and is considered as an integral part of
the present Agreement". This means that the 1929 Agreement consists of both the Exchange of Notes between Egypt and Great Britain and the 1925 Nile Commission report which was an annex. *Ipso facto*, the Exchange of Notes was intended to be binding. Authors like Aust have, expressed that it is customary that if an exchange of notes expressly provides that ‘it shall constitute an agreement between our two governments’, then it is intended to be a treaty in the sense of international law. This serves to denote that the wording of an exchange of notes is very important when determining whether the parties intended it to be a binding treaty.

It can be posited that the international registration of an instrument is significant to the determination of the intent of the parties to be bound by it. The registration of the 1929 Nile Agreement took place on the 26th July 1929. The registration was undertaken in accordance with Article 18 of the Covenant of the League of Nations which read: ‘Every treaty or international engagement entered into hereafter by any Member of the League shall be forthwith registered with the Secretariat and shall as soon as possible be published by it. No such treaty or international obligation shall be binding until so registered.’ The League of Nations was later replaced by the United Nations. Article 102 of the UN Charter also provides for registration of treaties. It states

1. Every treaty or international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered and published by it
2. No Party to any such treaty or international agreement which has not been registered in accordance with the provision of this article may invoke the treaty or agreement before any organ of the United Nations.

It may be gleaned from the above stipulations that registration is not synonymous to the definition of a treaty in the sense that it is binding. In fact, the Secretariat provides in every volume of the United Nations Treaty Series: ‘If it is the understanding of the Secretariat that its action does not confer on the instrument the status of a treaty or an international agreement if it does not already have that status...’ In other words, the UN Secretariat has refrained from defining what constitutes an agreement for the

30 Mahmood Pasha Note, supra note 1.
31 Aust, supra note 29 at p. 21.
32 K. Widdows, ‘What is an Agreement in International Law’, 5 *BYIL* (1979), 117, at 143.
35 Check any UN Treaty Series.
purpose of registration. According to Hutchinson, the registration of agreements is merely a duty to the members of the United Nations.37

In the Qatar-Bahrain Case, the ICJ observed:

...an international agreement or treaty that has not been registered with the Secretariat of the United Nations, may not, according to the provisions of Article 102 of the Charter, be invoked by the Parties before any organ of the United Nations. Non-registration or late registration, on the other hand, does not have any consequences for the actual validity of the agreement, which remains no less binding upon the parties.38

This implies that, whether an international agreement is binding or not is not determined by its registration. It should be noted that the Secretariat normally review whether a document presented for registration fulfils the criteria required for treaties. Occasionally, it has refused to register some documents.39 It may be said that the registration of an agreement is not by itself conclusive of the binding nature of the Agreement. However, it is one of the clues among many others that aid in the unveiling of the willingness of the parties to be bound by a given agreement. Therefore, the fact that the Exchange on Notes between Egypt and Great Britain were registered as part of the 1929 Nile Agreement is a pathway to the determination of the intention of the parties to be bound by it.

Generally, we have tried to establish the problems faced in determining whether a given document is legally binding in the sense of international law. The 1969 Vienna Convention on the Law of Treaties does not provide an exhaustive answer as to what a treaty is. Rather, it provides elements to determine what constitutes a treaty. Some, if not all of the elements have crystallized into customary international law. However, whether the elements are customary or not, one thing is certain, the elements do not give a definitive answer of what a treaty is in the sense international law. That is why the thesis relied to another element, which is “intent to be bound”. It was revealed that the element of intent is “awkward” given the problems that can be encountered in identifying the intent. Despite the problems, the element of intent is important as an evidence of the parties’ intention to be bound by a given agreement.

37 D.N. Hutchson, ‘The Significance of the Registration or Non-registration of an International Agreement in Determining on Whether or not it is a Treaty’ 46 CLP (1993/II), at 259; see also, R. Valbuena, ‘What Constitutes a Treaty?-Acceptance of Terms of a Conciliation Commission’ 46 AJPIL (1994), 167-175.
39 For examples, see, the Repertory Practice of the United Nations, Vol. V.
From the above, it is appropriate to postulate that the 1929 Nile Agreement is a binding treaty in international law. The Agreement, as was revealed in the course of the present section, fulfils the elements required by the 1969 Vienna Convention on the Law of Treaties. Further, it is well beyond doubt that the Parties to the 1929 Nile Agreement had the intention to be bound by it. In fact, none of the Nile Basin States has ever contested that the Agreement is not a treaty. As was seen in the previous chapter, what is contested is whether the Agreement is applicable.

2. Is the 1929 Nile Agreement of the Nile a Self-Contained Treaty?

Before we attempt to answer the question whether the 1929 Nile Agreement is a “self-contained treaty”, we shall first review what is meant by the concept of “self-contained”. The concept first appeared in the Wimbledon Case.40 The Permanent Court of International Justice was of the view that the provisions relating to the Kiel Canal in the Treaty of Versailles were “self-contained” since they could not be modified by other provisions referring to the Inland Navigable Waterways of Germany. The Court pointed out:

The provisions relating to the Kiel Canal in the Treaty of Versailles are therefore self-contained; if they had to be supplemented and interpreted by the aid of those referring to the inland navigation waterways of Germany in previous sections of Part. XII, they would lose their “raison d'etre”.41

However, it should be noted that the Court singled out that the Treaty of Versailles was self-contained only in as far as provisions relating to the Kiel Canal were concerned. I am of the opinion that given the fact that the Court singled out provisions relating to the Kiel Canal as “self-contained”, it implied that the Treaty of Versailles was not entirely “self-contained”.

The ICJ also endorsed the concept of “self-contained regimes” in the Tehran Hostages Case.42 This case was instituted by the United States of America (USA)

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40 S.S. Wimbledon, PCIJ-Series A, No. 1, The contents of the judgment can also be found on the ICJ website: www.icj-cij.org last visited on 27/07/2005.
41 Id., at 23-24.
before the ICJ against the Islamic Republic of Iran in respect of seizure and holding as hostages members of the US diplomatic and consular staff and certain other US nationals. Taking into consideration the relevant provisions of the 1961 and 1963 Vienna Conventions\footnote{1961 Vienna Convention on Diplomatic Relations and Optional Protocols, Vienna, 500 UNTS 7310; 1963 Vienna Convention on Consular Relations, 596 UNTS 8638.}, on declaring a diplomat or consular official \textit{persona non grata}, and on severing of diplomatic relations and closure of an offending mission, the Court proceeded to proclaim that:

[T]he rules of diplomatic law, in short, constitutes a self- contained regime which, on the one hand, lays down the receiving State’s obligations regarding the facilities, privileges and immunities to be accorded to diplomatic missions and, on the other, foresees their possible abuse by members of the mission and specifies the means at the disposal of the receiving State to counter any such abuse. These means are, by their nature, entirely efficacious.\footnote{Tehran Hostages Case, supra note 3 at para. 86.}

The Court endorsed the concept of “self contained regime” in as far as the terms of state responsibility were concerned. The Court proclaimed that the diplomatic law embraced the concept of “self-contained regime” in relation to the fact that “diplomatic law itself provides the necessary means of defence against, and sanction for, illicit activities by members of diplomatic or consular missions”.\footnote{Id., at para. 83.} Hence, the ICJ findings do not seem to suggest that the law governing diplomatic relations is a “self-contained regime” in the sense that it was independent of other rules of international law. In other words, the rules according to the ICJ decision, were based on the particular circumstances surrounding the \textit{Tehran-Hostages Case} which necessitated that remedies provided for in the law of diplomatic relations should be resorted to in case of breach, and not any other remedies, such as the occupation of the embassy by Iraq and the taking of hostages of diplomatic and consular officials.

Even though the two decisions by the PCIJ and the ICJ, discussed in the preceding paragraphs, applied the concept of “self-contained regime”, they did not clearly illustrate what is meant by the concept. It may be that both Courts found the concept to be clear and thus needed no further elaboration. It is important to clear any obscurity created by the so called concept of “self-contained regimes”. The Special Rapporteur of the ILC, Willem Riphagen\footnote{Willem Riphagen was a special rapporteur of the ILC from 1980 to 1986 on the Topic of State Responsibility.}, extensively referred to the concept of
“self-contained regimes”\textsuperscript{47}. He was of the opinion that states could conclude treaties and decide a special regime of responsibility for the breach of obligations.\textsuperscript{48} Though he called it “subsystems”, it is synonymous to the concept of “self-contained regimes”.

Therefore, the failure of a State to perform obligations of a self-contained regime would preclude the other State (viz. Victim State) from applying remedies contained in international law system: instead she is required to settle the dispute in accordance with the procedures inherent in the given regime. In order to comprehend this concept fully, it is pertinent at this juncture to briefly review the World Trade Organisation (WTO) regime which is sometimes wrongly considered as a typical example of a self-contained regime.

The Dispute Settlement System of the WTO excludes general international rules on state responsibility.\textsuperscript{49} So in a case where there is a trade dispute between State A and B (both contracting parties of the GATT (General Agreement on Trade and Tariffs), applying the Dispute Settlement System of the GATT), the States are required to settle the dispute within the ambit of the GATT system, and cannot for example use countermeasures applicable as a remedy in the law of state responsibility, since they contradict the GATT Dispute Settlement System.

The International Law Commission made reference to the concept of “self-contained regimes” in the Commentary to the 2001 ILC Articles on Responsibility of States for International Wrongful Acts. Article 55 of the ILC draft entitled \textit{Lex-Specialis} provided: “These articles do not apply where and to the extent that the conditions for the existence of an international wrongful act or the content or implementation of international responsibility of a State are governed by special rules of international law”.\textsuperscript{50} In the Commentary to this Article, the ILC made direct reference to the notion of “self-contained regime”. The ILC pointed out that:


\textsuperscript{48} Idem.

\textsuperscript{49} The WTO dispute settlement system is self-contained.

Article 55 is designed to cover both "strong" forms of *lex specialis*, including what are often referred to as self-contained regimes, as well as "weaker" forms such as specific treaty provisions on a single point, for example, a specific provision excluding restitution.\(^51\)

The ILC noted that there are "strong" forms of *lex-specialis* "often referred to as self-contained regimes". By this, the ILC was illustrating that there are some legal regimes such as the WTO law which are *lex specialis* as opposed to general international law (*lex- generalis*) in certain aspects (for example, the WTO Dispute Settlement System *vis-à-vis* certain general norms on state responsibility). However, this does not mean that such "strong" forms of *lex-specialis* often referred to as "self-contained regimes" are *lex-specialis* *vis-à-vis* the entire international law system.

A lot of ink has been spilt writing on the so-called concept of "self-contained regime".\(^52\) However, all literature about this concept revolves around certain legal regimes (more especially, diplomatic immunities, WTO Dispute Settlement System, European Community, and human rights treaties), that in terms of their compliance mechanisms or secondary rules, may be "self-contained" without any or limited application of general international law.\(^53\) No writing has demonstrated self-contained regimes which are entirely isolated from all norms of international law (including law of treaties, law of state succession, judicial proceedings, and matters such as the use of force and human rights) not to speak of treaties concluded outside the realm of international law system.\(^54\) Even the highly developed system of European Community at times refers to general international law.\(^55\) From the above discussion, it is truism to say that states can contract out of one, or several rules of international law (except those of *Jus cogens*)\(^56\), but they cannot contract out of the entire system of international law. The fact that treaties are inevitably part of the international family

\(^{51}\) Id., at p. 358.


\(^{54}\) Idem.


\(^{56}\) 1969 Vienna Convention on Law of Treaties, supra note 6 at Art.53 and 64.
does not prevent states when concluding treaties, from providing for certain parts of the treaty to prevail over other norms of international law.

Some precedents show that treaties must also be applied and interpreted taking into consideration the general background of norms of international law. Both the Permanent Court of International Justice and the International Court of Justice supported this position. In the *Chorzow Factory Case*, the PCIJ was of the view that: “it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation.” Hence, “Reparation is the indispensable complement of a failure to apply a convention, and there is no necessity for this to be stated in the convention itself”. Having made this observation, the Court pointed out that, since the obligation to make reparations was a principle of international law, the only task facing the court was to “...ascertain whether a breach of an international engagement has in fact taken place...”

In the *South West Africa Advisory Opinion on the Legal Consequences of the Continued Presence of South Africa notwithstanding the Security Council Resolution 276 (1970) (1970-1971)*, the ICJ confirmed the right of termination of a treaty for breach and concluded that, for the abovementioned right not to be applicable to the mandate:

...it would be necessary to show that the mandates system, as established under the league, excluded the application of the general principle of law that a right of termination on account of breach must be presumed to exist in respect of all treaties, except as regards provisions relating to the protection of human person contained in treaties of a humanitarian character (as indicated in Art.60 para. 5, of the Vienna Convention). The silence of a treaty as to the existence of such a right cannot be interpreted as implying the exclusion of a right which has its source outside of the treaty, in general international law, and is dependent on the occurrence of circumstances which are not normally envisaged when a treaty is concluded.

In the *ELSI Case*, the ICJ rejected the objection of the United States to the application of the rule of exhaustion of local remedies to a case brought under Art. XXVI of the

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57 E. Lauterpacht, 'Restrictive Interpretation and the Principle of Effectiveness in Interpretation of Treaties', *BYIL* 48 (1949), 76; A.D. Mc Nair, *The Law of Treaties* 466 (1961); Georges Pinson (Fr.) v. *United Mexican States*, 5 *R.I.A.A* 327 (1929), 422, (Permanent Court of Arbitration); see also Vienna Convention, *id.*, at Art. 31 (3) (c).
58 *Chorzow Factory Case*, (Germany v. Poland), Merits, 1928, *PCIJ* (Ser. A) No. 17, at 29.
59 *Idem*.
1948 Treaty of Friendship, Commerce and Navigation between Italy and the United States (hereinafter “FCN Treaty”). The Court pronounced that there is “no doubt that the parties to a treaty can therein either agree that the local remedies rule shall not apply to claims based on alleged breaches of that treaty”.

However, the Court found that it was “unable to accept that an important principle of customary international law should be held to have been tacitly dispensed with, in the absence of any words making clear an intention to do so.” It was therefore pertinent that the Parties to the FCN Treaty indicate in the Treaty that they were, or had an intention to “contract-out” of the important norm of international law of exhaustion of local remedies. This is evidence that it is possible for states to “contract-out” of some norms of international law but not the entire system of international law. This approach was also confirmed in the Iran-US Claims Tribunal.

In the Kasikili/Sedudu Island Case, the ICJ noted that in the terms of Article I of the Special Agreement signed by both the Republic of Botswana and the Republic of Namibia, “it was asked to determine the boundary between Namibia and Botswana around Kasikili/Sedudu Island and the legal status of the Island ‘on the basis of the Anglo-German Treaty of 1st July 1890’ and the rules and principles of international law”. The Court correctly stated that: “Even if there had been no reference to the ‘rules and principles of international law’, the Court would in any event have been entitled to apply the general rules of international treaty interpretation for the purpose of interpreting the 1890 Treaty”.

From the above sources, it is noteworthy that even though all treaties are inevitably part of the corpus of international law, states are not prevented from agreeing that a specific regime, provision or even treaty prevails over another (except jus cogens norms). Therefore the answer to the question as to whether the entire 1929 Nile Waters Agreement is a self-contained regime is no, because the Agreement is part of

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62 Idem.
63 Idem.
65 Case Concerning Kasikili/Sedudu Island (Botswana v. Namibia), ICJ Reports, No. 98, 12 December 1999 at para. 93.
66 Idem.
the corpus of international law. The Agreement may have contracted-out of certain principles of international law but not the entire system of international law. What postulates inquiry is, to what extent has the 1929 Nile Agreement contracted out of international system? In other words, what is the relevance of international law to the Nile legal regime?

The extent to which a treaty contracts out of the general norms of international law depends solely on the interpretation of the treaty. Article 31(3) of the Vienna Convention on the Law of Treaties entitled, “general rule of interpretation”, provides that when interpreting a treaty:

There shall be taken into account, together with the context:

a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
c) any relevant rules of international law applicable in the relations between the parties.

The WTO Panel in the Korea-Government Procurement Case pointed out that “…international law applies to the extent that the WTO Treaty Agreement did not ‘contract out’ from it. To put it in another way, to the extent there is no conflict or inconsistency, or an expression in a covered WTO Agreement that implies differently …”.67 Applying this line of reasoning, the Panel stated:

Thus, on the basis of the ample evidence provided by both parties to the dispute, we will review the claim of nullification or impairment raised by the United States within the framework of principles of international law which are generally applicable not only to performance of treatise but also to treaty negotiation. To do otherwise potentially would leave a gap in the applicability of the law generally to WTO disputes and we see no evidence in the language of the WTO Agreements that such a gap was intended. If the non-violation remedy were deemed not to provide a relief for such problems as have arisen in the present case regarding good faith and error in the negotiation of GPA commitments (and one might add, in tariff and services commitments under other WTO Agreements), then nothing could be done about them within the framework of the WTO dispute settlement mechanism if general rules of customary international law on good faith and error in treaty negotiations were ruled not to be applicable. As was argued above, that would not be in conformity with the normal relationship between international law and treaty law or with WTO Agreements.68

The Panel specifically applied Article 48 of the Vienna Convention on Law of Treaties, which regards error in respect to a treaty.69

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68 Id., at para. 112.
69 Id., at paras. 7.123-7.126.
In the Gabcikovo-Nagymaros Case, the ICJ was reluctant to interpret the 1977 Treaty Concerning the Construction and Operation of the Gabcikovo-Nagymaros System of Locks (hereinafter the 1977 Treaty) as a “self-contained” regime. It interpreted the Treaty in the light of established general law; in as far as the treaty was silent.\(^70\) The Court held that “…newly developed norms of environmental law are relevant for the implementation of the treaty…”\(^71\) It further stressed that “…the Treaty is not static, and is open to adapt to emerging principles of international law”.\(^72\)

The discussion in this section serves to enlighten us that the Nile legal regime may exclude some norms of general international law. However, this does not in any way suggest that the entire bulk of general international law is not applicable to the 1929 Nile Agreement. The Agreement contracts out of some general norms of international law, more especially, the norm of reasonable and “equitable utilization” of resources in a state’s territory.\(^73\) The general customary international law permits states to utilise resources in a “reasonable and equitable manner”. The 1929 Nile Agreement on its part contracts out of the general law. Egypt is endowed by the Agreement with the power to veto any projects which can interfere with the quantity of water arriving in her territory.\(^74\) The fact that the 1929 Nile Agreement contracts out of the general law does not mean that it contracts out of the larger system of international law.

In the light of the above, it is plausible to assert that the corpus of international law relevant to the Nile legal regime was not exhausted by the 1929 Nile Agreement. The legal existence of the Agreement is not in a vacuum, and it must be applied together with applicable general international law. It is very possible that other ‘sub-systems’ of international law, such as international environmental law or human rights law, can influence the 1929 Nile Agreement. This further explains the point that the 1929 Nile Agreement should not only be considered in the light of the system of international law but also in the light of other “subsystems” which are capable of modifying it.


\(^{71}\) Id., at para. 112.

\(^{72}\) Idem.

\(^{73}\) The subsequent chapters will discuss in depth the concept of ‘equitable utilization’, how the 1929 Nile Agreement contracts out of the well established norm, and its role in the modification of the Agreement.

\(^{74}\) For the discussion of the 1929 Nile Agreement, see, supra Chapter 1.
Therefore, it may be concluded that the 1929 Nile Agreement is not a wholly “closed” or “self-contained” regime; it was created in the wider context of international law. If only the 1929 Nile Agreement is applied in solving conflicts pertaining to the allocation of waters, then the unity of international law is endangered. Further, the lacuna left by the 1929 Nile Agreement would never be resolved if recourse to other norms of international law is barred. The argument that the Agreement is ‘self-sufficient’ and completely de-linked from international law system would provide a safe haven for states and in particular Egypt, to escape from other obligations entered in international relations. In the light of the above conclusion, the Nile Agreement is part of the wider corpus of norms of international law, taking into account, together with its context: subsequent agreements by parties regarding its application; subsequent practices with regards to the application of the Agreement; and, relevant rules of international law applicable between the parties to the Agreement.75

3. Is the 1929 Nile Agreement a Multilateral or a Bilateral Treaty?

As we saw in section I of this chapter, the 1929 Nile Agreement is a treaty in the sense that it is binding on its parties. It should be recalled that the 1929 Nile Agreement initially had two parties: Egypt and the Great Britain on behalf of Sudan and other countries under her administration (then, Kenya, Tanganyika and Uganda).76 After independence, as we earlier saw, all States which were formerly under the British Administration became individually bound by the 1929 Nile Agreement as a result of state succession.77 A cursory glance at the Agreement would suggest that, before independence of the above mentioned States, it was a bilateral treaty between Egypt on one hand, and, Britain on behalf of the countries she administered on the other hand. Does the subsequent independence of States previously colonised by Britain suggest that the 1929 Nile Agreement is now a multilateral agreement, since the States formerly under the British rule were each independent Parties to the Treaty?

75 1969 Vienna Convention on the Law of Treaties, supra note 6 at Article 31(3)
76 Mahmoud Pasha’s Note and especially, para. 4 (b).
77 For the discussion of state succession in relation to the Nile legal regime see supra at chapter 1.
If we are to go by numbers, it would appear that the 1929 Nile Agreement is a multilateral treaty, since it has more than two parties as opposed to when it was signed between Egypt and Great Britain. The question one may pose is, is it possible for a number of States (more than two) to enter into an agreement in which the obligations created are bilateral in nature? The answer to this question is in the affirmative. Switzerland and the European Union entered into a series of bilateral treaties as a result of the rejection of the European Economic Area Agreement by Switzerland. Each of those bilateral treaties had seventeen parties. It should be noted that the seventeen parties were divided into two, Switzerland on the one hand, and the European Union and its members on the other. This meant that the treaties established rights and obligations between Switzerland and the European Union as well as its members. The treaties did not establish rights and obligations amongst the members of the European Union.

With regards to the 1929 Nile Agreement, the scenario is tricky. Before the independence of the States Parties to the 1929 Nile Agreement, there were only two parties (Viz. Egypt and the Great Britain), just like the scenario of Swiss and the European Union. After independence, there were more than two parties to the Agreement since the independent States were no longer under a single umbrella of the British Administration. In the same vein, it is worth contemplating the status of the bilateral treaties between Swiss and the European Union in case of the hypothesis that the European Union was to disintegrate, and the members were to succeed individually the treaties. Would the treaties still be considered as bilateral treaties? Again if we go by numbers, the treaties would appear to be multilateral since the parties to them are more than two. A further question would be, is it possible for a multilateral treaty to contain obligations which are bilateral (synallagmatic or reciprocal) or unilateral in nature? The answer to this question highly depends on the stipulations of a given treaty. In other words, it depends on the nature of the obligations stipulated in a treaty.

From the above, one may assert that the 1929 Agreement is presently a multilateral agreement. It has more than two parties. But what is the nature of the 1929 Nile Agreement?

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Agreement obligations? Are they of the bilateral (synallagmatic or reciprocal) nature, in that the 1929 Nile Agreement obligations may be classified as a compilation of bilateral treaty relations, each of them unattached to the other? Are they multilateral (erga omnes partes or integral) in nature, in that their binding character is collective and thus cannot be parted into bilateral relations? Or, are they unilateral concessions?

The classification of the 1929 Nile Agreement obligations in either of the abovementioned compartments has major legal ramifications. The classification will aid in determining how the 1929 Nile Agreement can be modified, which is the subject matter of chapters 4 and 5. Do the obligations in the 1929 Agreement permit inter se modification, among a limited number of parties to the Agreement? In principle, inter se modification is permissible when such modification relates to the reciprocal obligations or unilateral concession. Article 41 of the 1969 Vienna Convention on the Law of Treaties stipulates:

Two or more of the Parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:

...b. the modification in question is not prohibited by the treaty and:
   (i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;
   (ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.

Article 41 simply illustrates how reciprocal or even unilateral concessions can be modified inter se, in a multilateral treaty.79

The determination of the nature of obligations encompassed in the 1929 Nile Agreement will also have a great influence on the rules of standing to bring litigation before international courts or tribunals. It is a well known principle that the legal standing to launch a complaint on the responsibility of a state is limited only to injured states. This is reflected in the Article 42 of the International Law Commission Articles on State Responsibility. Article 42 (a) provides that the invocation of state responsibility is an entitlement endowed to injured states. In the South West Africa Case, the claims of Liberia and Ethiopia were inadmissible on the basis that they did not have a legal right in the South Africa’s compliance to the obligations owing to the

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79 It should be noted that Article 58 of the Vienna Convention on the Law of Treaties provides for the same rules with regards to inter se suspension of reservations.
inhabitants of the territory.\textsuperscript{80} It may be that Liberia and Ethiopia had a “legal interest” in the sense that they wanted to ensure that the League of Nation Convention was abided by, but as Pauwelyn contends, “normally more than a ‘legal interest’ is needed for a state to have standing, namely one must prove the existence of a ‘legal right’”.\textsuperscript{81} Any breach of international obligations could affect the legal interests of states who want the rule of law to prevail.\textsuperscript{82}

However, such legal interest is not enough for a state to invoke responsibility in case of breach. In the \textit{Diplomatic and Consular Staff Case}, after referring to the “fundamentally unlawful character” of Iran’s detention of the diplomatic and consular personnel, the ICJ pointed out,

[T]he attention of the entire international community, of which Iran itself has been a member since time immemorial, to the irreparable harm that may be caused by events of the kind now before the court. Such events cannot fail to undermine the edifice of law carefully constructed by mankind over a period of centuries, the maintenance of which is vital for the security and well-being of the complex of international community of the present day, to which it is more essential than ever that the rules developed to ensure the ordered progress of relations between its members should be constantly and scrupulously respected.\textsuperscript{83}

The Case illustrated that the international community had a legal interest in seeing international law abided by. But this did not mean that all states’ rights were injured. It could have not been possible for any state to launch a claim apart from the United State which was the injured state. In the same vein, Crawford noted in his third report that: “outside the field of ‘integral’ obligations, or obligations \textit{erga omnes partes}, ...it is doubtful that states have a right or even a legally protected interest, for the purpose of state responsibility, in the legal relations of third states \textit{inter se}”.\textsuperscript{84}

In general, if the 1929 Nile Agreement obligations are multilateral or \textit{erga omnes partes}, then \textit{inter se} modifications of the Agreement as well as suspension of the obligations would not be permissible. Further, the standing to launch a claim would in principle be granted to all Parties to the 1929 Nile Agreement. On the other hand, if the obligations in the 1929 are bilateral or unilateral commitments, then \textit{inter se} modification and suspension as a result of breach would be permissible in theory.

\textsuperscript{81} J. Pauwelyn, \textit{Conflict of Norms in International Law}, 2003, p. 81.
\textsuperscript{83} \textit{United States Diplomatic and Consular Staff in Tehran, ICJ Reps.} 1980, p. 3, at p. 43, para. 92.
\textsuperscript{84} Crawford, \textit{Third Report}, para. 104
With regards to standing, it would normally be permissible to the party which is injured as a result of the alleged breach.

The standard example of a multilateral treaty containing bilateral obligations is the 1961 Vienna Convention on Diplomatic Relations. In the Diplomatic and Consular Staff Case, it is difficult, if not impossible to envisage a scenario whereby another state apart from the United States of America, would launch a claim before the International Court of Justice. The prototype of a treaty embracing multilateral obligations is the 1948 Genocide Convention. In the Advisory Opinion on the Reservation to the Genocide Convention, the International Court of Justice held:

[In such a Convention [as the Genocide Convention], the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the raison d'etre of the Convention. Consequently, in a Convention of this type one cannot speak of individual advantages to States, or of the maintenance of a perfect contractual balance between rights and duties. The high ideals which inspired the Convention provided, by virtue of the common will of the Parties, the foundation and measure of all.]

This Case illustrated that the Genocide Convention embraced obligations which were multilateral in character. It is noteworthy that such agreements (i.e. The Genocide Convention) may only in principle be modified by an agreement of all contracting parties.

It is paramount to stress that it is not always easy to draw a separate line between bilateral and multilateral obligations. Oscar Schachter rightly points out: "[T]he distinction is, of course, a familiar one although the line between the two categories is sometimes blurred". In most cases, it is vital to review every provision and every obligation individually, since it is difficult to define most of the treaties in their entirety as encompassing bilateral or multilateral obligations or even unilateral commitments.

From the above discussion of compartmentalization of obligations, it is now possible to classify the obligations entailed in the 1929 Nile Agreement. Initially, the 1929 Nile Agreement was a bilateral treaty, since it was negotiated by two parties (Egypt

86 Reservation to the Genocide Convention, ICJ Reps. 1951, 23; see also, dissenting opinion of Judge Van Eysinga in Oscar Chinn Case, PCIJ, Series A/B, No. 63, 132-34 (1934).
and Great Britain) on behalf of Sudan and other countries she administered. The obligations in the Agreement were by nature unilateral commitments by Great Britain to respect the “natural and historic rights” of Egypt in the Nile waters. Great Britain made a commitment that it would not undertake projects on the Nile River, which would hamper the flow of the waters unless permitted by Egypt. With the advent of independence of states which were formerly under the British administration, and subsequent succession to the 1929 Nile Agreement, it became a multilateral agreement by virtue of it having more than two parties. Even though the Agreement transformed into a multilateral treaty, its obligations remained unilateral commitments by all States which succeeded to the Agreement.

It should be recalled that the 1929 Nile Agreement was largely created in order to settle the issue of the Nile water utilisation between Egypt and Sudan. The formula for the amounts of waters to be used by both States forms the bulk of the 1925 Nile Commission Report annexed to the Exchange of Notes. In the Note of Pasha to Lord Lloyd, a provision was drafted which stipulated that no project could be undertaken on the Nile River and its tributaries, by Sudan or Countries under the British Administration unless consented to by Egypt. In other words, Egypt had a right of veto to projects in the upstream countries. This is contrary to the findings by the Tribunal in the *Lac Lanoux Case*, whereby it was concluded that no state has a right to veto projects of another state in case of a shared watercourse.88

After independence and as a consequence of state succession, each individual State under the British administration had the obligation to respect the provisions of the 1929 Nile Agreement. This meant that each individual State had commitments between herself and Egypt, to refrain from undertaking projects which would, “entail, any prejudice to the interests of Egypt”, either by reducing “the quantity of water arriving in Egypt” or modifying “the date of its arrival, or lower its level” unless there is a “previous agreement of the Egyptian Government”.89

89 Note to Pasha in *supra* note 1at para 4(b).
The fact that the 1929 Nile Agreement is a series of unilateral commitments by the Parties to it, vis-à-vis Egypt, has legal ramifications. First, a breach of the obligations in the Agreement does not affect the rights of all States’ party to it. In case the Agreement is breached, it is only the rights of Egypt which are affected. This is so because it is the rights of Egypt which are jealously guarded by the Agreement. It is true that a lower watercourse states like Sudan may consider that its rights are affected, in case the level of the Nile waters is reduced as a result of projects in the upper basin States. However, only their interests in the waters of the Nile are affected and not their rights under the 1929 Nile Agreement. In theory, no other party to the Agreement can claim that her rights are affected in case of breach of its obligations, except Egypt. In practice, a lower basin state (i.e. Sudan) can launch claims otherwise by resorting to relevant customary international law with regards to international watercourse law.

Another issue entwined with “affected rights” is that of standing. From the discussions that we earlier had with relation to standing, it would be fair to conclude that the 1929 Nile Agreement only gives the right to launch a claim before international courts to Egypt. It would seem that the other Parties to the Agreement are excluded from that right. The Agreement suggests that, in case of breach of its obligations by any of the Parties to it, then only Egypt’s rights are affected. Consequently, it is only Egypt which has the right of standing before international courts or tribunals. Even though other States may have an interest to seeing that the provisions of the Agreement are observed, as we earlier observed require the existence of a “legal right”.

In as far as the consequences of the breach are concerned, only States whose rights are affected can resort to countermeasures or suspension of obligations, as we earlier saw. Further, as was discussed elsewhere, obligations which are integral in nature cannot be suspended, since suspending such obligations would affect rights of other states party to the treaty. In the case of the 1929 Nile Agreement, such remedies as countermeasures and suspension of the obligations can be resorted to since its obligations are not integral in nature. The remedies of countermeasure and suspension

90 The customary international law with regards to shared watercourses is discussed in infra Chapter 3 of the present thesis.
of the obligations are only permissible for the “specially affected” State. Under the stipulations of the 1929 Nile Agreement, only Egypt’s right can be “specially affected”. Thus, in theory, only Egypt can utilise the remedies of countermeasures and suspension. In practice, it would be difficult to envisage a scenario where Egypt would resort to suspending the obligations of the Agreement, since she has no obligations to suspend. In other words, it is only the other Nile Basin States which have obligations vis-à-vis Egypt. However, those other States are not entitled to the remedies of suspension or even countermeasures, since the breach of the obligations by one party does not affect the “legal rights” of all other parties under the Agreement.

The 1929 Nile Agreement does not provide for the possibility of modification, neither does it prohibit it. Therefore, since modification of the Agreement is not prohibited or permitted, it can nevertheless be undertaken by other means. The main question is, how can the 1929 Nile Agreement be modified without affecting “…the enjoyment by the other parties of the rights under the treaty or the performance of their obligations” and without derogating from “the object and purpose of the treaty as a whole” which is incompatible with its “effective execution”?91 The 1929 Nile Agreement clearly has as its “object and purpose” the protection of Egypt’s interests in the Nile waters. Moreover, in case of modification, it is only the rights of Egypt which can be affected. Thus, modification can be done either by a mutual agreement of Parties to the 1929 Nile Agreement, or, an agreement between Egypt and any other Party to the Agreement. In any instance of modification of the Agreement, Egypt has to be involved. Again, the reason why Egypt has to be involved is that any modification to the Agreement would specifically affect her rights derived from it. In 1959, Egypt and Sudan modified the 1929 Nile Agreement as between themselves.92 To some extent, the 1929 Nile Agreement may be modified by Egypt unilaterally. A unilateral modification of the Agreement allowing a riparian state to use the waters of the Nile without the need to seek permission from Egypt would be permissible. On the other hand, a unilateral modification of the Agreement by Egypt prohibiting Sudan to use

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92 Agreement on the Full Utilization of the Nile Waters, November 8, 1959, Sudan-United Arab Republic 453 UNTS 51 (Hereinafter 1959 Agreement), discussed in Chapter 2.
the shares of the Nile appropriated to her by the 1929 Nile Agreement would not be permissible.

Conclusively, the fact that the 1929 Nile Agreement is a multilateral agreement whose obligations are not integral in nature, has major ramifications to the scope of study of the present thesis. Given the contractual nature of the Agreement, it can be deviated from *inter se*, in principle, provided Egypt is among the parties deviating from the Agreement. The subsequent chapters shall examine how the 1929 Nile Agreement can be modified. In case the 1929 Nile Agreement obligations were integral, no *inter se* modification could be permitted. The subsequent section discusses whether the 1929 Nile Agreement is perpetual.

4. Is the Nile Agreement a Perpetual Treaty?

A cursory glance at the 1929 Nile Agreement would lead one to the illusion that the Agreement was intended to be binding, in its entirety, in perpetuity. From this perspective, it may be contended that the Agreement can never be modified. According to Egypt, she possesses “natural and historic rights” on the waters of the Nile, which are customary in nature. Therefore, “a treaty expressly recognising these rights would be intended by both parties to be binding forever”.93 Further, in the Note of Lord Lloyd (on behalf of United Kingdom) to Mahamed Mahmoud Pasha (on behalf of Egypt), he assured Egypt that the United Kingdom “acknowledged the natural and historic rights of Egypt in the waters of the Nile”, and that it was a “fundamental principle of British policy” that the principle of Egypt’s natural and historic rights in the Nile waters “…will be observed at all times and under any conditions that may arise”.94 From the Note, it would seem that the obligations included in the 1929 Nile Agreement were intended to be perpetual, regardless of “any conditions that may arise”.

Before we discuss whether the obligations in the 1929 Nile Agreement are perpetual, it is paramount to review whether there is any such thing as “perpetuity” of

94 Note of Lord Lloyd to Mahmoud Pasha of 7th May 1979, para. 4.
obligations in international law. As we saw in the previous sections, international law is always evolving. Thus, treaties such as the 1929 Nile Agreement which are part of international law cannot purport to be static by claiming that they are binding in perpetuity while international law is evolving. As was discussed elsewhere, the 1929 Nile Agreement is not a separate or self-contained regime. It must be applied in accordance with rules of international law. This emphasises the point that the 1929 Nile Agreement is a treaty which functions within the precincts of a larger legal system. The *Gabcikovo/ Nagymaros project* Case is a classic demonstration that treaties function in the wider corpus of international law.95 Apart from the possibility of international law norms modifying a treaty, subsequent practice in the application of an agreement by one party or several parties, may have the effect of modifying it.

Another point which supports the contention that there is nothing like treaties which bind in “perpetuity” is the notion of the hierarchy of norms. In the instance a norm derived from any source contradicts the norm of *jus cogens*, then the norm is void. The 1969 Vienna Convention on the Law of Treaties defines a norm of *jus cogens* as a “…norm accepted and recognised by international community of States as a whole as a norm from which no derogation is permitted and can be modified only by a subsequent norm of general international law having the same character”.96 Therefore, in case a treaty such as the 1929 Nile Agreement has articles which contradict norms of *jus cogens*, then, undoubtedly, it will be modified. Thus its “perpetuity” is questionable if it can be modified by another norm (*jus cogens* norms). In general, no treaty in international law can claim the possibility of entirely applying in “perpetuity” even if the parties to it intended it to be so.

Moreover, a close scrutiny of the 1929 Nile Agreement reveals that it is doubtful that the parties indeed intended the Agreement to bind them in perpetuity. The 1925 Nile Commission Report which was annexed to the 1929 Nile Agreement stipulated that this was a “…practical working arrangement which would respect the needs of established irrigation… without compromising in any way the needs of the more

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distant future". Further, as was discussed in the previous chapter, the subsequent practice of Parties to the 1929 Nile Agreement suggests that they did not consider it as a perpetual treaty. After independence, the Nile Basin States contested the applicability of the 1929 Nile Agreement, and Egypt replied to the contestations that pending the conclusion of a new agreement, the 1929 Nile Agreement remained applicable. Therefore, the subsequent practice by all Parties to the Agreement is evidence that they did not and presently do not regard it as a perpetual Agreement.

Given the above discussion, it is plausible to conclude that no treaty can purport to contain perpetual obligations, even if the parties intended so. This is so because international law evolves, and all treaties in the sense of international law are part of the larger legal system. It is impossible for a system to evolve and its part to be static. Thus, if the system can evolve, then, surely the parts also inevitably follow suit. Further, the 1929 Nile Agreement does not clearly show the intention of the Parties to be bound by it in “perpetuity”. The subsequent practice of the Parties to the 1929 Nile Agreement is far from suggesting that they regarded the Agreement as applicable in “perpetuity”. Hence, the 1929 Nile Agreement is prone to modification as will be reviewed in depth in the chapter 4. The following section discusses whether the 1929 Nile Agreement can be considered as custom.

5. Is the 1929 Nile Agreement Customary International Law?

It is debatable whether the 1929 Nile Agreement was a codification of the existing customary international law then. Is the 1929 Nile Agreement a reflection of international customary law at the time? Or, was it a progressive codification which would be useful for development of customary international law? This section will consider these pertinent issues as well as discuss the legal implications of those issues.

In the Exchange of Notes forming the 1929 Nile Agreement, the expression “natural and historic rights” of Egypt appears frequently. In the Note of Lord Allenby to Pasha, the British High Commissioner expressed that “...for the purpose of examining and proposing the basis on which irrigation can be carried out..., full consideration of

interests of Egypt” should be taken into account with the purpose of avoiding “…detriment to her (Egypt) natural and historic right”.98 Further, in the Note of Lord Lloyd to Pasha, “the natural and historic rights of Egypt in the Waters of the Nile” were recognised by the United Kingdom.99 This leads one to contemplate whether “the natural and historic rights” expressed in each and every Exchange of Notes making the 1929 Nile Agreement was a codification of the existing customary international law.

It is common for treaties to codify existing customary international law. As such, a treaty can be evidence of customary international law. In theory, the two remain independent of each other. In the Nicaragua Case, the International Court of Justice succinctly pointed out that custom and treaty are both sources of international law which exist independent of each other.100 In other words, the fact that a customary international law norm has been codified in a treaty does not negate the customary status of the norm. The termination of a treaty codifying a custom is not synonymous to the automatic termination of the custom. In case the 1929 Nile Agreement was a codification of the existing custom, it would mean that, if the treaty ceased to apply, the parties would still be bound by custom, not unless the custom also changes. Further, if any party was to successfully withdraw from the Agreement, then, the party would still be bound by the custom.

The determination of whether a treaty is a codification of existing custom is not an easy task and can at best be accomplished by resorting to the psychological or subjective elements for custom to exist, namely opinio juris and the existence of “general practice” accepted by parties as law. In the North Sea Continental Shelf Case, the International Court of Justice emphatically confirmed that a treaty could be evidence of customary international law if there was proof of state practice and opinio juris.101 In this particular case, the result was not regarded as having attained the status of customary international law.102 In the Libya/Malta Continental Shelf Case, the Court stated, “it is of course axiomatic that the material of customary international

98 Lord Allenby Note to Pasha, in LNTS, supra note 1 at p. 93.
99 Lord Lloyd Note to Pasha in id., at p. 116.
100 Case Concerning Military and Paramilitary Activities In and Against Nicaragua, ICJ Reports (1985), para. 27.
101 North Sea Continental Shelf Cases,ICJ Rep. 3 (1969) para. 27.
102 Idem.
law is to be looked at primarily in the actual practice and opinio juris of States”, regardless of whether the “…conventions may have an important role play in recording and defining rules deriving from custom…”103 In the Military and Paramilitary Activities Case, the Court pointed out the importance of the two components of customary international law (Viz. opinio juris and state practice). The Court said:

Bound as it is by Article 38 of its statute to apply, inter alia, international custom “as evidence of a general practice accepted as law”, the Court may not disregard the essential role played by general practice. Where two States agree to incorporate a particular rule in a treaty, their agreement suffices to make that rule a legal one, binding upon them; but in the field of customary international law, the shared view of the Parties as to the content of what they regard as the rule is not enough. The Court must satisfy itself that the existence of the rule in the opinio juris of States is confirmed by practice104

From the above discussion, it is clear that for customary international law norm to develop, the two psychological elements, viz. opinio juris and state practice have to be present.

Various writers have tried to explain the formation of customary international law albeit differently. According to Kirgis, the two elements of customary international law may outweigh each other depending on circumstances surrounding particular cases. He suggests that “the more destabilising or morally distasteful the activity for example the offensive use of force or deprivation of fundamental human rights- the more readily international decision makers will substitute one element for the other provided that the asserted restrictive rule seems reasonable”.105 D’Amato points out that “although the acts of states on real-world stage often clash, the resultant accommodations have an enduring and authoritative quality because they manifest the latent stability of the system”.106 He further suggests that “the role of opinio juris in this process is simply to identify which acts out of the many have legal consequences”.107 On his part, Mendelson is of the view that an in-depth examination of state practice is a futile task, if there is ample evidence that states have consented to a customary norm.108

103 Case Concerning the Continental Shelf (Libyan Arab Jamahiriya/Malta), ICJ Reports (1985), para. 27.
104 Case Concerning Military and Paramilitary Activity in and Against Nicaragua, supra note 23 at para. 184.
105 F.L. Kirgis, ‘Custom on a Sliding Scale’, 81 AJIL 1987, p. 149.
107 Idem.

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All the above literature seems to suggest that there are two elements which are essential components of customary international law (viz. *opinio juris* and state practice), albeit different authors giving more weight to one of the two components. Even though authors discussed above differ on the importance of the individual components of customary international law, they do seem to concur that it is prerequisite for the elements of customary international law to be present in order for its formation. For them, it is the components which matter regardless of whether the custom is written or unwritten.

From the above discussion, one may confidently assert that international law requires that both components of customary law be present for a particular norm to be customary albeit in different proportions, given the case at hand. Further, a treaty may codify existing customs. It is not a strange phenomenon for a document to codify existing customary norms. In fact, the International Law Commission’s work on the codification of customary international law is widely regarded as ample evidence of existing customary law. Most of its codifications have been relied on by international courts, international organizations, and governments as evidence of authoritative statements of law. For example, in the *Gabcikovo-Nagymaros* Case, the Court relied heavily on the International Law Commission’s works on treaties, international watercourses, state succession, and state responsibility even though some of the works had not come into force.\footnote{See Generally, *Gabcikovo-Nagymaros Case*, ICJ Report, supra note 74.} The work of the International Law Commission is, among other things, codification of existing rules.\footnote{Statute of the ILC, Article 1.} In its work of codification, the International Law Commission takes into account the components of *opinio juris* and state practice. This is evidenced by the detailed commentaries to specific provisions on diverse subjects, which the Commission believe to be norms of customary international law. At times, the Commission indicate the provisions which have attained the status of customary international law. This justifies the fact that it is possible for treaties to codify a customary law norm provided the norm contains the two components of customary international law.

In the light of the above, it is pertinent to discuss whether the 1929 Nile Agreement was a codification of the then existing customs. As was discussed elsewhere, the 1929
Nile Agreement purports to codify the then existing customs. It acknowledges that Egypt had “natural and historic rights” in the waters of the Nile. In other words, the Agreement recognises the pre-existing custom.

In order to determine whether the 1929 Nile Agreement codified the existing custom, it is pertinent to undertake an in-depth examination of the then “state practice” and “opinio juris”. A close examination of the work of the Nile Commission of 1925 in the light of its terms of reference reveals that the Commission was not “analogous to a tribunal adjudicating impartially as if between two states” on the basis of existing customary norms.111 The Commission in fact described its task as being “to propose a basis for irrigation in which full consideration should be given to the rights and interests of Egypt”.112 Thus, its task was to examine the extent to which Sudan could use the waters of the Nile, without prejudice, not only to Egyptian rights, but more important to the interests of Egypt, both present and future. It is with no surprise then that the Commission observed that the “precedent in this matter of water allocation are rare and practice varied; and the Commission is aware of no generally adopted code or standard practice upon which the settlement of a question of inter-communal water allocation may be based”.113 The Commission further noted that “moreover, there are in the present case special factors, historical, political, and technical, which might render inappropriate too strict an application of principles adopted elsewhere”.114 The Commission also asserted that it:

...decided to approach its task with the object of devising a practical working arrangement which would respect the needs of established irrigation, while permitting such programme of extension as might be feasible under present conditions and those of the near future, without at the same time compromising in any way the possibilities of the more distant future.115

The above discussion suggests that the expression “natural and historic rights” was not intended to mean that the said right was customary in nature. However, it is still unclear what the parties had in mind when they agreed that the British Government had “… no intention of trespassing upon the natural and historic rights which they

113 Id., at para. 21.
114 Idem.
115 Id., at para. 22.
recognise to-day no less than in the past”.

According to Egyptian authors the Agreement “merely recorded Egypt’s established rights over the Nile since antiquity”. Authors such as Pompe concluded that the reference to “natural and historic rights” in the 1929 Nile Agreement did not encompass the already appropriated waters, but also “natural and historic rights” of the waters of the Nile as a whole. However, authors such as Batstone, are of the view that, “whatever validity historic or established rights based on long usage have in law, such validity cannot extend beyond the limits of actual usage”. On his part, Cory contends that the doctrine of prior appropriation “recognises vested rights, but limits these vested rights, and does not give a ‘first appropriator’ a right of pre-emption upon the ‘unappropriated’ water supply”. Thus, it cannot be taken for granted that it was the established opinio juris of the Parties that Egypt had “natural and historic rights” over the entire waters of the Nile.

With regards to the practice of the States involved, the fact that the States in the Nile Basin did not use the waters from “antiquity” is not analogous to acquiescing in Egypt’s “natural and historic rights” in the use of the Nile. As Godana rightly points out, prior to the 1929 Nile Agreement, the upstream States did not “have at the time any tangible interest in arresting the flow of the waters”. As a result, in cases where the upstream State has little or no interest in the utilisation of the water, there is no reason why it should interrupt the natural flow of the waters. Thus, the upstream States, having little interest over the Nile waters at the time, as a result of circumstances then, “they had no reason to withhold it from friendly, lower riparians”. Further, as Berber observed, the Agreement was a treaty in which Great Britain “was so much the more ready to sacrifice the interests of Sudan, as its first concern was not to represent and defend the interests of Sudan”. He also noted that the British Government’s interest was to obtain “a friendly Egyptian Government, that is, an Egyptian Government which would be ready to give way on such matters as the

116 Idem.
117 M.Khadduri, (ed.), Major Middle Eastern Problems in International Law, 1972, p. 112.
119 Batstone, supra note 115 at p. 529.
121 Godana, supra note 97 at p. 176.
122 Idem.
123 F.I. Berber, Rivers in International Law, 1959, p. 76.
Suez Canal and the military occupation”. 124 He concludes that such a treaty “was a political matter and that it cannot be used as a precedent in international law”. 125 For these reasons, the 1929 Nile Agreement cannot be considered as having codified the then existing customary international law.

Now we turn to the issue of whether the provision of the 1929 Nile Agreement of “natural and historic” rights progressively became customary international law. It is now widely recognised that treaties wield immense influence in the development of customary international law. Judge Sorensen was of the opinion that treaties, “may serve as an authoritative guide for the practice of states faced with the relevant new legal problems, and its provisions thus become the nucleus around which new set of generally recognized rules may crystallize”. 126 This implies that in the presence of general and uniform state practice supporting the rules stipulated by a treaty together with relevant opinio juris, the rules evolve into binding customary norms. This suggests that minus the treaty, the states are still bound by customary international law, unless of course they change the custom. In the North Sea Continental Shelf Cases, the Court confirmed that a treaty norm can become customary international norm. The Court contended that “there is no doubt that this process is a perfectly possible one and does from time to time occur: it constitutes indeed one of the recognised methods by which customary international law may be formed”. 127 Indeed, the 1969 Vienna Convention on the Law of Treaties provides that a treaty norm may bind “third states as customary international law, recognised as such”. 128 This implies that treaty norms have a potential of progressively becoming customary international law provided the components of customary international law are conspicuous.

As a consequence of lack of clarity on what was meant by Egypt’s “natural and historic” rights in the Nile waters coupled with lack of uniform state practice, the expression in the 1929 Nile Agreement is not a customary international norm. The expression was neither a codification of the then existing custom nor has it developed into customary international law. If the Agreement was to be terminated, the States

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124 Idem.
125 Idem.
126 Fisheries Case, ICJ Reports, 1966, 244.
127 Id., at 41.
128 1969 Vienna Convention on the Law of Treaties, Article 38; see also Fisheries Case, Id., at 39.
would therefore not continue to be bound by customary international law since there is none. The expression should be considered as a mere provision of the Agreement. Rights and obligations arising from the provision are still applicable pending the conclusion of a new and comprehensive treaty.
CHAPTER 3. THE 1929 NILE AGREEMENT AND PRINCIPLES OF INTERNATIONAL WATERCOURSE LAW

One of the most difficult aspects of international law is to understand how different norms or bodies of law interact. In the previous chapter, it was shown beyond doubt that the 1929 Nile Waters Agreement is part of the wider corpus of international law. The present chapter explores the relationship between the 1929 Nile Agreement and the principles of international law relating to shared watercourses.

In discussing the principles of international watercourse law, emphasis will be laid on the 1997 UN Watercourse Convention as well as customary norms of shared watercourses. This chapter considers whether the 1929 Nile Agreement interacts harmoniously with the principles of international watercourse law. The outcome of this investigation will determine whether the 1929 Nile Agreement can be interpreted in the light of those principles, or whether it has been revised or terminated by the principles.1

1. Treaties as Sources of Principles of International Watercourse Law

(1) The 1997 Watercourse Convention

The Convention on the Law of Non-navigational Uses of International Watercourse was adopted by the United Nations General Assembly2 following some twenty years of preparatory works by the International Law Commission.3 The Convention is in the form of a Framework Agreement and contains thirty seven articles divided into seven parts. Part I contains the Introduction; Part II, entitled General Principles outlines some of the most important procedural and substantive provisions; Part III is entitled

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1 The interpretation, revision or termination of the 1929 Nile Agreement in the light of the principles of international shared watercourses is discussed in chapter 4 of the present thesis.


Planned Measures; and, Part IV, is Protection, Preservation and Management. The Convention further contains: Part V, Harmful Conditions and Emergency Situations; Part VI, Miscellaneous Provisions; and finally, Part VII, Final Clauses. The Convention also contains an Appendix which outlines the procedure for arbitration. In the following overview of the Convention, the author will pay particular attention to the articles he thinks may be of special significance to the evolution of principles of international watercourse law as they affect the legal regime of the River Nile.

The Watercourse Convention applies to non-navigational uses of international watercourses, as indicated by the phrase in Article 1(1) of the Convention that it is "for purposes other than navigation". The phrase "international watercourse" is often thought to be synonymous with "international rivers", but as indicated by the Convention, it is much broader. Article 2(b) defines "international watercourse" as "a watercourse, parts of which are situated in different states". Article 2(a) defines "watercourse" as "a system of surface waters and ground waters constituting by virtue of their physical relationship a unitary whole and normally flowing into a common terminus". Even though there is a widespread support for the concept of drainage basin in contemporary treaty practice and works of international codification bodies, "the evidence of disagreement in the ILC suggests that it is premature to attribute customary status to this concept as a definition of the geographical scope of international water resources law".4 The definition includes ground water and not only the "common terminus" which is the river. The inclusion of ground water in the definition of watercourse led to the abstention of two states from the vote on the Convention.5 The inclusion of ground water in the definition of what constitutes a watercourse would prove to be controversial in case the Nile Basin States decide to negotiate a treaty. There are already signs of lack of agreement on whether ground water should be included in the definition of watercourses. Rwanda, a Nile Basin State abstained as a result of this. On its part, Egypt has argued that in the utilization of a watercourse the availability of other water resources in a given state should be

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5 Verbatim Record, 99th Plenary Meeting, UNGA, 21st May 1997, UN Doc. A/51/PV.99, at 5(Pakistan) and 12 (Rwanda).
taken into consideration.\textsuperscript{6} This suggests that Egypt would support any far reaching definition of “watercourse” such as the inclusion of tributaries and watersheds mainly because she relies exclusively on the Nile waters for freshwater. Whether for example Egypt would claim that rainwater which is captured by upstream riparian states and which would have ended in the Nile should be included in the definition of watercourses is interesting. From the above definition in the Watercourse Convention, it does not appear that rainwater is part of the definition of watercourses. The definition goes as far as defining international watercourses to include “groundwater”. It is predictable that most of the upstream states such as Rwanda which are bequeathed with ground waters would prefer a more restrictive definition of “watercourses” such as the exclusion of ground waters, tributaries and watersheds in the definition. In the end, the definition of the term “watercourse” would depend largely on negotiations by riparian states.

Articles 3 and 4 of the Convention provide for the relationship of the Convention to agreements relating to specific watercourses. In general terms, Article 3 calls upon states sharing a watercourse to conclude agreements and “apply” and “adjust” the provisions of the Convention to the peculiar characteristics of a given watercourse. This provision of the Convention clearly manifests that it is a framework convention in the sense that it outlines general principles and rules which may be tailored to suit specific conditions of a watercourse and needs of watercourse states. However, unlike other framework agreements such as the Ozone Layer Convention\textsuperscript{7} and the Climate Change Convention\textsuperscript{8}, the Watercourse Convention does not envisage implementation through subsequently negotiated protocols.\textsuperscript{9} The most striking feature of Article 3 is the stipulation in its paragraph 1 that “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”. This article was a major blow to some participants in the UN General Assembly Conference with regards to this Convention,

\textsuperscript{6} Egypt (verbatim) in UN Doc. A/C.6/51/NUW/WG/CRP.53.
\textsuperscript{7} Vienna Convention for the Protection of the Ozone Layer, 26 ILM 1529 (1987).
\textsuperscript{8} UN Framework Convention on Climate Change, 31 ILM 849 (1992).
\textsuperscript{9} In the ‘Statement of Understanding’ with regards to Article 3, the Chairman of the Working Group of the Whole noted: “(a) The present Convention will serve as a guideline for future watercourse Convention…”. Report of the Sixth Committee convening as the working Group of the Whole, 11\textsuperscript{th} April 1997, UN Doc. A/51/869, p. 5.
notably Portugal and Ethiopia which were of the view that harmonization of the older treaties with the Convention should have been made obligatory.\textsuperscript{10} This was a victory for States who wished to maintain the status quo with regards to existing watercourse agreements. As a consolation to those who advocated for compulsory harmonization, Article 3 (2), adds, “[n]otwithstanding the provisions of paragraph 1 (existing agreements) may, where necessary, consider harmonizing such agreements with the basic principles of the present Convention”. According to Caflisch, this provision is “virtually without substance”.\textsuperscript{11} The language in the provision clearly manifests that harmonization can only take place in case there is consent of all states parties to a given older treaty. This is in conformity with the customary rules on amendment of treaties as well as the opening of the first paragraph of the Article that “in the absence of an agreement to the contrary...”. Article 3(2) simply states the obvious, that existing agreements can only be amended with the consent of all the states parties to them. With regards to future agreements, Article 3(3) of the Convention virtually retained the International Law Commission’s Draft Article 3(1) which provided that in future watercourse states may conclude new agreements “which apply and adjust the provisions of the present Convention to the characteristics and uses” of a given Convention. Even though the Convention has not entered into force, it has led to some states “applying” the general principles in the Convention in “adjusting” existing watercourse agreements. The 1995 Southern African Development Community Watercourse Agreement amendment by the Revised Protocol on Shared Watercourses was inspired by the Watercourse Convention.\textsuperscript{12} Article 3 was put to vote within the Working Group. Surprisingly, Egypt and France, both strong proponents of the survival of existing watercourse agreements, opted to vote against the article which ensured their view.

\textsuperscript{10} See for example, Statement of Ethiopia in explaining its vote on the Convention, verbatim record, \textit{id.}, at 9-10.


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On its part, Article 4 of the Convention deals with the rights of riparian states to participate in specific agreements applicable to the entirety of an international watercourse (paragraph 1) as well as those that partially apply to the “watercourse, or to a particular project, program or use” (paragraph 2). Article 4(1) provides that all riparian states are entitled to participate in the negotiation of an agreement and become party to it. As for Article 4(2), watercourse states which are potentially affected by the implementation of an agreement to which they are not party may participate in consultations with regards to the agreement “and, where appropriate, in negotiation thereof in good faith with a view to becoming party thereto, to the extent that its use is thereby affected”. This paragraph would mean that in case a number of Nile Basin States want to enter into an agreement with regards to the use of the Nile, they have to consult with other States that would potentially be affected by the agreement and the negotiations would preferably lead the third state to become a party to it. This is controversial because states negotiating an agreement may prefer not to include other states sharing the watercourse in the negotiations, or may desire that those other states not become parties to the agreement. However, this provision is very important because it would deter states from making agreements which do not take into consideration interests of other affected states. It emphasises the importance of cooperation and community of interests among riparian states. In order to achieve goals laid down in Article 5 which provides for equitable and reasonable utilization since a regime of equitable utilization of a watercourse cannot be achieved solely through agreements which isolate other riparian states; cooperation of all basin states is prerequisite.

Part II which is entitled “General Principles” is undoubtedly the backbone of the Convention. The first article in this part is Article 5 entitled “Equitable and Reasonable Utilisation and Participation”. This article outlines the cornerstone of shared watercourses- the principle which requires states to utilize an international watercourse in a manner that is equitable and reasonable vis-à-vis other states sharing the watercourse. Indeed, the importance of Article 5 was such that in the Gabcikovo-Nagymaros Project Case, the ICJ cited it in emphasizing that the project involved in

13 This was the concern of some states in the UN deliberations. See. S. McCaffrey, The Law of International Watercourses: Non-Navigational uses, 2001, p. 304.
the case should be operated “in an equitable and reasonable manner”. Article 6 of the Convention outlines a non-exhaustive list of factors to be taken into account in making the determination of what is “equitable and reasonable utilization”. It is notable that the listing of factors in Article 6 is silent on the priority or weight attached to each one, or the means of reconciling conflicts. According to the International Law Commission’s Commentary on Article 6(3), “…the weight to be accorded to individual factors as well as their relevance will vary with the circumstances”.15

Article 7 of the Convention provides for the obligation not to cause significant harm. There is a temptation of engaging in a sterile debate on the contradiction between Article 5 providing for “equitable and reasonable utilization” on the one hand, and Article 7 which provides for the obligation of “no harm”. In fact the debate goes as far as mooting on which of the two principles has primacy. Authors such as Bourne point out that “the relationship between the principle of equitable utilization on the one hand and that of no harm or no significant harm on the other hand, has been, and continues to be, a subject of controversy.”16 In fact he goes ahead and declares the supremacy of the principle of equitable utilization in the UN Watercourse Convention.17 Wouters highlights the conflict between the principles viz. “equitable

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14 Case Concerning Gabčíkovo-Nagymaros Project, (Hungary v. Slovakia), 1997 ICJ Reports, para. 147. According to Feldman, “…the Truman Proclamation’s Criterion of equitable principles was adopted by the ICJ in the North Sea Cases, and the Court of Arbitration in the Anglo-French Continental Shelf Case”. See, North Sea Continental Shelf Cases (German v. Denmark; German v. Netherlands), ICJ Reps. 1969, para. 47, 86 and 101(c). See also Case Concerning the Delimitation of the Continental Shelf between the United Kingdom and France, UNRlAA, Vol. XVIII (Sales No. E/F80.v.7), 1979, at 57 and 92-3. In the Fisheries Case, the ICJ required states to apply equitable principles in reaching an equitable solution. See Fisheries Case (Merit), ICJ Reps. 1974, at para. 69. In the Tunisia/Libya Continental Shelf Case, the ICJ was of the view that “the delimitation is to be effected in accordance with equitable principles, and taking into account all relevant circumstances”. See Continental Shelf Case (Tunisia v. Libyan Arab Jamahiriya), ICJ Reps, 1982, para 133 A(1). In the Gulf of Maine Case, the ICJ proclaimed that “the fundamental rule of general international law governing maritime delimitation... requires that the delimitation line be established while applying equitable criteria to that operation with a view of reaching equitable result. See Delimitation of Maritime Boundary in the Gulf of Maine Area (Canada v. United States), ICJ Reps. 1984, para. 230; see generally, Case Concerning Land and Maritime Boundary between Cameroon and Nigeria, ICJ Reps., 2002.

15 1997 UN Watercourse Convention, supra note 1 at Article 6(3); Reports of the International Law Commission (1994), 235; see also International Law Association, 1966 Helsinki Rules, Commentary, 489.


17 See generally idem.
and reasonable utilization” and “no significant harm”. Birnie and Boyle rightly point out that “the apparent conflict between these principles is unreal and often based on a misunderstanding of the obligation to prevent harm in international law”. International law does not require an absolute prohibition of all harm. What is required is that states act diligently to control and regulate activities in their territory, which may cause transboundary harm. In other words, the obligation is that of “due-diligence”, or best efforts under given circumstances. This analysis seems to be correct since it enjoys overwhelming support of treaties and work of the International Law Commission.

From this analysis, it is plausible to conclude that there is no contradiction of the provisions of “equitable and reasonable utilization” and “obligation not to cause harm”, and thus no need to determine which takes “precedence”. A watercourse state cannot justify its actions by arguing that it is acting equitably or reasonably in disregard of its obligation to apply best effort at its disposal to minimize harm. In the same token, the duty of a riparian state to undertake best efforts to minimize harm to other riparian states is not synonymous with impeding the “reasonable and equitable development of a watercourse or the use of its waters in whatever way a state chooses”. It is possible that certain activities may be “equitable and reasonable” but still entail significant harm to another watercourse state. In such circumstances, the state which claims her activities to be “equitable and reasonable” has to show that she respected the obligation of due-diligence. If the obligation of “due-diligence” is observed by that state and still significant harm is unavoidable, then the state can proceed with the activity in an equitable manner.

20Birnie & Boyle, id., at p. 308; see also II Yearbook of International Law Commission, (1994), pt 2 at 103 and 124.
21Idem.
22Birnie & Boyle, Id., at p. 308
Other articles included in Part II are: Article 8 “General Obligation to Cooperate”; Article 9 “Regular Exchange of Data and Information”; and, Article 10 “Relationship between Different Kinds of Uses”. The first paragraph of Article 8 provides for cooperation in good faith.\textsuperscript{23} The second paragraph notes the importance of joint mechanisms, or commissions, aimed at the effective and harmonious management of international watercourses. The importance of such joint ventures is manifested in agreements\textsuperscript{24} and judicial decisions\textsuperscript{25} with regards to watercourses. Article 9 provides for regular exchange of data and information. This exchange of data and information is a backbone of cooperation to ensure equitable and reasonable utilization of an international watercourse. It is difficult for states to justify and satisfy that its utilization of a watercourse is equitable and reasonable vis-à-vis other riparian states unless they give and receive data and information on a regular basis with regards to the condition of the watercourse and their uses. This regular exchange forms an important recipe for the processes of consultation and negotiation which are required by customary international law in case of a project which can have adverse impact on other riparian states.\textsuperscript{26}

Article 10 stipulates:

1. In the absence of agreement or custom to the contrary, no use of an international watercourse enjoys inherent priority over other uses;
2. In the event of a conflict between uses of an international watercourse, it shall be resolved with reference to articles 5 to 7, with special regards being given to the requirements of vital human needs.

\textsuperscript{23} For a detailed discussion on the duty to Cooperate, see, infra, the section entitled The Duty to Cooperate, in the present chapter.
\textsuperscript{25} In the Gabickovo- Nagymaros Case, the ICJ was of the view that the re-establishment of a joint management regime by the parties to the dispute would accord with the concept of common utilization of shared resources, see Gabickovo-Nagymaros Project Case, supra note 14 at para. 147; see also Pulp Mills Case, ICJ Rep. 2006, at para. 82.
\textsuperscript{26} For discussion of the customary norms of consultation and negotiation in good faith see, infra, the section entitled The Duty to Cooperate, in the present chapter.
Apparently, there is a contradiction between provisions of Article 10(1) and Article 6 on the one hand and Article 10(2) on the other. Article 6 does not give priority to any of the uses of resources of an international watercourse. Similarly, Article 10(1) expressly provides that “there is no inherent priority” of uses of resources of an international watercourse. In contrast, Article 10(2) provides for “special regard” to be given “to the requirements of vital human needs” in case of conflict between different uses of an international watercourse. However, given the language of Article 10(2) and the ILC Commentary to the provision, the conflict is unreal. “Special regard” is synonymous to “special attention” and not “priority”. In the Commentary to this provision, the ILC observed “since paragraph 2 includes reference to Article 6, the later factor is, in any event, one of those to be taken into account by watercourse states concerned in arriving at a resolution of a conflict between uses”. Also important to note is that a “statement of understanding” accompanying the text of the Convention indicated that: “in determining ‘vital human needs’ special attention is to be paid to providing water to sustain human life, including both drinking water and water required for production of food in order to prevent starvation”. 27 The purpose of the statement would have probably been to clarify what “vital human needs” entail, in order to avoid scenarios of states using the provision as a loophole to argue that their use have preference on this basis when indeed the uses are far from being “vital human needs”.28 The notion of ‘vital human needs’ is closely related to the concept of “human right to water” which is discussed in the present chapter.29

Part III, entitled “Planned Measures”, deals with the procedural matters for the implementation of the fundamental principles of the Convention in the specific context of planned measures. The set of articles in this part establish the procedures to be followed in case a given state wants to initiate a project that may cause a significant adverse effect on other states sharing a watercourse. According to McCaffrey, Part III “provides further evidence that the international community as a whole emphatically rejected the notion that a state has unfettered discretion to do as it

27 See United Nations, Report of the Sixth Committee convening as the Working Group of the Whole, 11th April 1997, UN Doc. a/51/869, p. 5.
28 McCaffrey, supra note 13 at p. 311.
29 See, infra, section entitled A Human Right to Water: Is there a human right to water, in the present chapter of this thesis.
alone wishes with the portion of international watercourse within its territory, regardless of the effects on other states".30 The fundamental obligation to provide prior notification of "planned measures" with a view to consult and negotiate was accepted by most delegations. Two of the States which did not vote for Part III are Turkey and Ethiopia.31 Turkey explained her negative vote on the Convention by stating that Part III introduced a veto. However, as we shall see in the course of the present chapter, the obligation of notification of planned measures with a view of consulting and negotiation in Part III and as a norm of customary international law does not provide for the right to veto to any state.32

The question as to how the Watercourse Convention is applicable to the legal regime of the Nile River can be answered based on two scenarios. The first is that no country in the Nile Basin is a Party to the Convention. In this case, the Convention per se is not in any way applicable to the Nile River legal regime on the basis of the principle that treaties do not ipso facto bind third parties.33 The second scenario is where all the Nile Basin Countries become parties to the Watercourse Convention, how is it going to be applicable to the Nile River legal regime? The answer to the question is found in the subsequent subsection.

(2) Applicability of the 1997 UN Watercourse Convention to the Nile Legal Regime.

First we shall discuss how the Convention is applicable to the existing Nile Water Agreement. The fate of existing international watercourse agreements was a major question to be settled by the working Group. Caflisch points out that the reason why the issue had not been covered at all by the Draft Articles was presumably because the International Law Commission had assumed that it was obvious that existing agreements would continue to apply unless the parties decided to abrogate or amend

30 McCaffrey supra note 13 at p. 312.
31 Verbatim record, 99th Plenary meeting, UN Doc. A/51/PV.99, p. 4 (Turkey) and 9 (Ethiopia), (1997).
32 For a detailed discussion of the obligation of notification, see, infra, the section entitled The Duty to Cooperate, in the present chapter. In both the Lac Lanoux Arbitration and the Pulp Mills Case, which are discussed in this section, the relevant Tribunals refuted the fact that there was a 'right to veto' in international law, and strengthened the fact that what was required in international law was the obligation to consult and negotiate (which are components of duty to cooperate.) in good faith. These two cases are discussed in the present chapter.
33 1969 Convention on Law of Treaties (Vienna), 1155 UNTS 331, at Art. 34.
them in line with the new Watercourse Convention.\textsuperscript{34} Some participants, notably, Portugal and Ethiopia were of the view that at least some provisions of the Watercourse Convention should be regarded not only as codification of customary rules, but as norms of \textit{jus cogens}.\textsuperscript{35} In case this position was adopted, it would have meant that in accordance with Article 64 of the Vienna Convention on the Law of Treaties, all the existing watercourse treaties contradicting the rules of \textit{jus cogens} would be considered null. On the other hand, some participants such as Egypt, France and Switzerland were of the view that existing watercourse agreements should in no way be affected by the new Convention. It should be noted that both opposing sides included upper as well as lower watercourse states. This is a manifestation of the fact that the issue at hand was not conditioned by geographical factors, but rather by the question of who was well placed to benefit from the various existing watercourse agreements.\textsuperscript{36}

As a result of compromise, Article 3 of the Watercourse Convention was drafted. Article 3(1) stipulates: “[n]othing in the present convention shall affect the rights and 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”. This means that States wishing to maintain the \textit{status quo} with regards to existing watercourse agreements were favoured by this provision. As a concession to those who were of the view that existing watercourse agreements should be eliminated, Article 3(2) went on to stipulate: “[n]otwithstanding the provisions of paragraph 1, Parties to [existing] agreements... may, where necessary, consider harmonizing such agreements with the basic principles of the present Convention”. In other words Article 3(2) does not go beyond stating what is obvious. Therefore, in order to harmonize the existing Nile legal regime with principles of the Watercourse Convention in accordance with this Article is fully dependent on the consent of all parties is required.

\textsuperscript{34} Caflisch, \textit{supra} note 11 at p.9.
\textsuperscript{35} See. For example, the statement of Ethiopia in explaining its vote on the Convention, Verbatim record, 99\textsuperscript{th} Plenary Meeting, UN Doc. A/51/PV.99, p. 9 (1997).
\textsuperscript{36} Caflisch, \textit{supra} note 11 at p. 10.
It should be noted that the most fundamental principles contained in the Convention do indeed reflect customary norms with regards to international shared watercourses. In the Gabcikovo-Nagymaros Project Case, the ICJ asserted that the adoption of the Convention concretized ‘the principle of community of interests’ in an international shared watercourse.\(^{37}\) It is true that the ILC in drafting the International Watercourse Convention did not expressly manifest a view on whether a particular article or paragraph is a codification of customary international law or an effort to progressively develop the law.\(^{38}\) However, as we shall see in the next section, the convention did indeed codify some legal principles of shared watercourses which existed as customary norms.

The most notable provisions contained in the Convention which correspond to customary international norms are the obligation: to utilize an international watercourse in an equitable and reasonable manner; not to cause significant harm; and, to notify potentially affected basin states of planned measures on an international watercourse. Other provisions which reflect customary international law are those with regards to the protection of environment. It should be noted that the principles with regards to the protection of environment are closely intertwined to, or flow from the fundamental obligations discussed.

Clearly, a global multilateral instrument, such as the 1997 International Watercourse Convention, has great potential for influencing the interpretation of the 1929 Nile Agreement. More so because as we saw in the previous paragraphs it codified existing customary international law. The Convention was negotiated in the Sixth (Legal) Committee of the General Assembly, on the foundation established by the Draft Articles adopted by the International Law Commission.\(^{39}\) As of October 2007, 16

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\(^{37}\) *Gabcikovo-Nagymaros Case*, supra note 14 at para.87.

\(^{38}\) This is the common trend for the ILC. It does not draw a clear distinction between codification and progressive development of law. See, A. Boyle and C. Chinkin, *The making of International Law*, 2007, Chapter 4.

States have signed the Convention.\textsuperscript{40} This may lead to the questioning of the significance of the Convention to the Nile Basin States none of which is a party. The significance of the Convention to the Nile basin states lies in the fact that they all participated in the discussion of the ILC Draft Articles on Watercourses which culminated in the Watercourse Convention.

The next section will discuss customary international norms governing shared watercourses.

2. Customary International Principles Governing International Watercourse Law

As was pointed out in the previous section, there are certain fundamental principles which govern international shared watercourses. These principles are of customary status. The present section will discuss those principles.

(1) Equitable Utilization

a. Evidence of the customary status of the principle of equitable utilization

A review of the existing water law agreements reveal a widespread acceptance by basin states of the principle of equitable sharing in the utilization of international watercourses.\textsuperscript{41} The doctrine of equitable utilization has been recognized either explicitly or implicitly in a plethora of international treaties concerning international watercourses concluded by States in all parts of the world.\textsuperscript{42} It is noteworthy that the language and the approaches of these treaties vary considerably. However, “their
unifying theme is the recognition of the equal and correlative rights of the parties to the use and benefits of the international watercourse or watercourses in question.43

The comparative study undertaken by Olmstead with regards to the 1959 Nile Waters Agreement44, the Indus Waters Treaty45 and the 1961 Treaty between Canada and the United States of America relating to co-operative development of the water resources of the Columbia River Basin46, led him to conclude: "...the common theme running through these three recent treaties is that the great benefits derived from co-operative development of the river basin are to be shared..."47

Similarly, Lipper observed:
...treaties must be evaluated with caution; their significance rests not in the specific provisions of a particular treaty, but in underlying factors found in common among such treaties. It is of great importance that all of the numerous treaties dealing with successive rivers have one common element—the recognition of the shared rights of the signatory States to utilize the waters of an international river. Nor are these treaties limited to any area of the world, for the Americas, Europe, Asia and Africa are represented.48

The 1997 Watercourse Convention stipulates in Art 5:
Article 5: Equitable and Reasonable Utilization and Participation:
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 into account the interests of the watercourse States concerned, consistent 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 thereof, as provided in the present Convention.

The ILC in its Commentary to the International Watercourse Convention noted: "Article 5 sets out fundamental rights and duties of States with regard to the utilization of international watercourses for purposes other than navigation. One of the most basic of these is the well-established rule of equitable utilization..."49

43 Id., at para. 42.
47 Garretson et al., supra note 4 at p. 3.
48 J. Lipper, 'Equitable Utilization', in id. at p. 33.
49 ILC, Commentary on ILC Articles on International Watercourse Convention, YbILC (1994) at p. 25.
Recent treaties and protocols are mostly founded on the principle of equitable utilization. Some of the treaties and more especially those concerning African shared rivers have made a huge stride in the direction of achieving equitable utilization by installing organizations competent to undertake the task of managing the entire international watercourse.50 One of the most exemplary and recent development with regards to equitable sharing of an international watercourse is that of Southern Africa Development Community (SADC). The 1995 SADC Protocol adopts and recognizes general principles, including respect for the principle of equitable utilization which it explicitly recognizes as customary international law.51 The 2000 SADC Protocol which revises the 1995 Protocol also categorically provides for the equitable utilization of watercourses open to each member state.52 The Niger-Nigeria Common Water Resources Agreement provides for water management with a view to “...equitable development...and use of the water resources in the river basins...”53 The Interim Agreement on the Incomati and Maputo Watercourse likewise recognizes the applicability of the principle of “equitable and reasonable utilization”.54

Recent treaties from other regions of the world also vehemently support the principle of equitable utilization. The Helsinki Convention requires Parties to “take all appropriate measures to ensure that transboundary waters are used in a reasonable and

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52 A Revised Protocol Agreed in 2000, 40 ILM (2001), Article 2(2).
equitable way..."55 The Danube River Convention calls upon parties to embark on the "rational use of surface water and the ground water in the catchment area" with a goal of equitable management of the water resources.56 The Mekong Agreement stipulates the "parties agree to utilize the waters of Mekong river system in a reasonable and equitable manner..."57 Finally, the Sava Framework Convention provides that States are entitled to "...a reasonable and equitable share of the beneficial uses of the Sava River..."58

Apart from the treaties mentioned above, numerous intergovernmental and nongovernmental bodies have adopted declarations, statements of principle, and recommendations which render support to the principle of equitability in the non-navigational uses of international watercourses. A few examples will be referred to in the present thesis.59 One of the earliest examples is the Declaration of Montevideo Concerning the Industrial and Agricultural Use of International Rivers, adopted by the Seventh International Conference of American States at its fifth plenary session on 24th December 1933.60 In its Article 2, the Declaration provides that "states have the exclusive right to exploit... waters of international rivers" without prejudice to the "...equal right due to the neighbouring State..."

In 1977, the United Nations held a water conference and adopted the Mar del Plata Action Plan.61 Recommendation 7 requires States to make legislations "...to promote...equitable use...of water". Recommendations 90 and 91 call upon states to cooperate in the case of shared water resources in order to safeguard the principle of

60 The International Conferences of American States, First Supplement 1933-1940, 1940, p.88; see also texts reproduced in Yb/LC, 1974, vol.II, at annex I.A.
equitability in the utilization of the resources. In 1971, the Committee on Natural Resources of the Economic and Social Council presented a report to the Secretary General which recognized the optimum beneficial utilization of international shared waters “where all parties can benefit in a tangible and visible way through cooperative action”.62 A sub-committee created by the Asian-African Legal Consultative Committee in 1972 recommended that all riparian States had a right of “equitable share in the beneficial uses of the waters of an international drainage basin”.63 In 1993, a statement was made on Water and Sustainable Development in Dublin.64 Principle 4 of the Statement recognizes the importance of considering water as an “economic good” for the purpose of “achieving efficient and equitable use... of water resources”.

The most relevant inter-governmental organisation to the Nile riparian States supporting the principle of equitability is the Nile Basin Initiative.65 As we saw elsewhere in this thesis all the Nile States are members of the Nile Basin Initiative apart from Eritrea which has the status of an observer State. The main goal of the Initiative is “to achieve sustainable socioeconomic development through the equitable utilization of, and benefit from the common Nile Basin water resources”.66 This is a clear manifestation that the Nile States support the principle of equitable sharing per se. What they differ on up to date is what constitutes the equitable sharing. The issue of what is equitable is discussed in the following subsection.

International non-governmental organizations also support the view that the principle of equitability is the guiding principle with regards to international watercourse law. In 1961, the Institute of International Law adopted a resolution regarding the non-navigational uses of international watercourses.67 This resolution affords watercourse states the right to utilize the waters on the basis of equity. The International Law Association (ILA) has also been involved in the preparation of several documents

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62 ‘Report to the Committee on Natural Resources of the Economic and Social Council’, 1971, E/C.72/Add.6, para.1.
concerning utilization of international watercourses. The most remarkable draft is the “Helsinki Rules on the Uses of the Waters of International Rivers”.\(^{68}\) Chapter 2 of the Helsinki Rules provides for “Equitable utilization of the waters of an international basin”. The ILA also recently completed a revision of the Helsinki and other International Law Association Rules on International Water Resources.\(^ {69} \) Article 12 of the Berlin Rules provides for equitable utilization.

Decisions of international courts and tribunals are supportive of the principle of equitability. In the Case concerning River Oder, the PCII, applied the principles “governing international fluvial law in general”.\(^ {70} \) The Court was of the opinion that the “right of passage” was governed by “the community of interest of Riparian States”.\(^ {71} \) The Court further asserted:

This community of interest in a navigable river becomes the basis of a common legal right, the essential features of which are the perfect equality of all riparian States in the use of the whole course of the river and the exclusion of any preferential privilege of any one riparian State in relation to the others.\(^ {72} \)

Even though the case concerned issues of navigation, the pronouncement of the court is also applicable to non-navigational uses.\(^ {73} \) In fact, in the most recent case in the sphere of shared resources, for the first time the Court extended to non-navigational uses of a watercourse the principle of “community interest” originally enunciated in the River Oder case.\(^ {74} \)

In the Diversion of Water from the Meuse Case\(^ {75} \), the PCII pointed out that “the points at issue must all be determined solely by the interpretation and application of [the 1863] Treaty” even though the parties had reference in their written and oral pleadings to “the application of the general rules of international law as regards

\(^{71}\) Id., at pp. 26-27.
\(^{72}\) Idem.
\(^{73}\) Lipper, in supra note 4 at p. 29.; Lammers, supra note 70 at p. 507.
\(^{74}\) Gabčíkovo-Nagymaros Project Case, supra note 14 at para. 85.
\(^{75}\) The Diversion of Water from the Meuse Case, Judgment of 28th June 1937, PCII, Series A/B, No. 70, p. 4.
rivers”.\textsuperscript{76} Authors such as Lester are of the opinion that the Case did not bear anything tangible with regards to international law, except that there was “potentiality of judicial process” in the field of shared resources.\textsuperscript{77} The most important point with regards to the notion of equitability in this case is to be found in the concurring opinion of Judge Hudson. According to him, the Court derived “equitable powers” from “general principles of law recognized by civilized nations”.\textsuperscript{78}

In the \textit{Gabcikovo-Nagymaros} Case, the judgment contains a wealth of material with regards to the international law of watercourses and international environmental obligations. The Court reinforced the status of the principle of “equitable utilization”, with much emphasis on a state’s “basic right” to an equitable and reasonable share of international water resources.\textsuperscript{79} Probably the resources anticipated in the judgment would include the water itself, such benefits as electric power, fisheries, recreation, irrigation etc. While it is not entirely clear as to the precise implications of describing this right as a “basic” one, it is reasonable to consider that a state will not be regarded as having forfeited or waived the right even though the deprivation of the state’s equitable share can be proven by the state’s earlier undertakings and conduct.\textsuperscript{80}

In the \textit{Lake Lanoux} Arbitration, the Tribunal was of the opinion that “there is a rule prohibiting the upper riparian State from altering the waters of a river in circumstances calculated to do serious harm to the lower riparian State”.\textsuperscript{81} This clearly indicates that upper riparian States have an obligation to respect the equitable right of lower riparian States when undertaking projects which may entail altering the waters of a river.

From the above, it is evinced that the guiding principle as far as the use of international watercourses is concerned is “equitableness”. The next obvious question is what is equitable? The answer to this question arouses more curiosity as to whether

\textsuperscript{76} Id., at p. 6.
\textsuperscript{77} A.P. Lester, ‘Pollution’ in Garretson \textit{et al.}, \textit{supra} note 4 at p. 100; see also, Lammers, \textit{supra} note 70 at p. 504.
\textsuperscript{78} \textit{Meuse} Case, \textit{supra} note 75 at p. 76.
\textsuperscript{79} \textit{Gabcikovo-Nagymaros} Case, \textit{supra} note 14 at para. 78.
\textsuperscript{80} See, McCaffrey, \textit{supra} note 13 at p. 192.
\textsuperscript{81} \textit{The Lac Lanoux Arbitration}, UNRIAA, vol. XII (Sales No. 63, v.3), pp. 281 \textit{et seq.} at para 22(3).
the 1929 Nile Agreement is equitable. The next subsections attempt to answer both questions.

b. The meaning of “equitability” in the context of international watercourse

From the previous subsection, it goes without question that watercourse States are entitled to equitably utilize waters of an international watercourse traversing their territories. The fundamental principle of “equitable and reasonable utilization” does not mean that watercourse states are entitled to an equal share of the uses and benefits of the watercourse or division of the water into identical and equal portions.82 The main task is defining “reasonable and equitable utilization” in precise terms. Suffice it to say that so far, there has not been discovered any way of defining the above stipulation precisely. According to Birnie and Boyle, “as in other contexts,... the issue turns on a balancing of relevant factors and must be responsive to the circumstances of individual cases.”83

Article 6 of the 1997 Watercourse Convention exposits a non-exhaustive list of factors to be taken into consideration in determining what is “reasonable and equitable” utilization. They include:

(a) Geographical, hydrographic, hydrological, climatic, ecological, and other factors of a natural character;
(b) The social and economic needs of the watercourse states concerned;
(c) The population dependent on the watercourse in each state;
(d) The effects of the use or uses of the watercourse in one watercourse state on other watercourse states;
(e) Existing and potential uses of the international watercourse;
(f) Conservation, protection, development, and economy of use of the water resources of the watercourse and the costs of measures taken to that effect;
(g) The availability of alternatives, of corresponding value, to a particular planned or existing use.

82 ILC Draft Articles, supra note 3 at Commentary 8, p. 29; see also, Lipper, in supra note 4 at p. 44ff; Jiménez de Aréchaga, 'International Law in the Past Third of a Century', 159 Recueil des Cours (1978); S. McCAffrey, The Law of International Watercourses, II YbILC(1986) pt. 1, 114.
83 Birnie and Boyle, supra note 4 at p. 303; equitable principles have also been applied in the context of delimitation of continental shelves and allocation of shared fishing stocks as evidenced in: North Sea Continental Shelf Case, supra note 14 at para. 93; Tunisia-Libya Continental Shelf Case, supra note 14 at 18; Malta-Libya Continental Shelf Case, supra note 14 at 13; Gulf of Maine Case, supra note 11 at 246; Icelandic Fisheries Case, supra note 14 at 3; and, 1982 United Nations Convention on the Law of the Sea, Official Records of the Third United Nations Conference on the Law of the Sea, Vol. XVII, Sales No. E 84. V.3, Doc. A/CONF. 62/122 at Articles 69, 70, 87.
According to the 1966 Helsinki Rules\textsuperscript{84}, Article V (2), the factors in determining what is “reasonable and equitable” include:

(a) The geography of the basin, including in particular the extent of the drainage area in the territory of each state;
(b) The hydrology of the basin, including in particular the contribution of water by each basin state;
(c) The climate affecting the basin;
(d) The past utilization of the waters of the basin, including in particular existing utilization;
(e) The economic and social needs of each basin State;
(f) The population dependant on the waters of the basin in each basin State;
(g) The comparative costs of alternative means of satisfying the economic and social needs of each basin state;
(h) The availability of other resources;
(i) The avoidance of unnecessary wastes in the utilization of waters of the basin;
(j) The practicability of compensation to one or more of the co-basin States as a means of adjusting conflicts among uses;
(k) The degree to which the needs of a basin State may be satisfied, without causing substantial injuries to a co-basin State.

The most recent work with regards to the factors determining what is “reasonable and equitable” is that of the International Law Association (ILA). In its Final Draft Report in 2004\textsuperscript{85}, the ILA replicated the factors in the 1997 UN Watercourse Convention with minimal modifications. The factors are enlisted in Article 13. The modifications include the addition of the term “hydrogeographical” to the list provided in Article 6(1)(a) of the UN Watercourse Convention. The rationale behind the inclusion of the term is “to reflect the greater attention in these rules to ground water” which is not provided for in the UN Watercourse Convention.\textsuperscript{86} The other modification which was included in the ILA Berlin Rules is the addition of two more factors to those provided for in the UN Watercourse Convention. The factors include:

(h) the sustainability of the proposed or existing uses; and,
(i) the minimization of environmental harm.\textsuperscript{87}

The wisdom behind the inclusion of the above two factors is to emphasise the importance of sustainability and minimization of environmental harm which can be caused by uses. It may be argued that those elements were initially implicit in the

\textsuperscript{86} Id., at commentary to Article 13.
\textsuperscript{87} The factors of sustainability of the project and the minimization of environmental harm were at the core of the Pulp Mills Case. See generally, Pulp Mills Case, supra note 25.
factors enlisted by both the 1966 Helsinki Rules and the 1997 UN Watercourse Convention.

c. Application of the Principle of “Equitability”

Having looked at factors which may be considered in determining what reasonable and equitable use is, another question may be, how does a watercourse State know whether its use is equitable and reasonable vis-à-vis other States? The answer would be to weigh if the proposed use falls under the factors of determining what equitable and reasonable utilisation is. But who is to determine whether a given use is more equitable and reasonable than other uses of other watercourse states? There is no simplistic answer to this question.

Egypt has always claimed her priority of existing uses in the waters of the Nile. Egypt successfully defended her priority of existing uses in the negotiation of the 1959 Agreement for the full utilization of the Nile Waters which were provided for in the 1929 Nile Agreement. Article 1 of the 1959 Agreement states:

(1) The quantities of water actually used by the United Arab Republic until the date of signing this Agreement constitutes their established right prior to the benefits accruing to them through the implementation of the control works referred to in this Agreement. ....
(2) The quantities of water used at present by the Republic of the Sudan constitute their established right prior to the accruing to them through the implementation of the aforementioned control works.

The other Nile Basin States would argue that priority of uses is not a customary principle. In response to the conclusion of the 1959 Nile Agreement, Ethiopia in an aide memoir addressed to the diplomatic mission in Cairo, declared: “Ethiopia has the right and obligation to exploit its water resources, for the benefit of present and future generations of its citizens [and] must, therefore, reassert and reserve now and for future, the right take all such measures in respect of its water resources”.88 It is debatable why Ethiopia protested against the 1959 Nile Agreement. Under the Vienna Convention on the Law of Treaties third parties are not bound by Treaties.89 It appears that Ethiopia’s aim was to protest against any possibility that Sudan and Egypt were

89 VCLT, supra note 33 at Article 34.
creating customary international law- in this case priority of existing uses. In the absence of a treaty, a state does not owe any obligation to another state to respect existing uses of a watercourse. Existing uses as provided for in the Helsinki Rules and the 1997 UN Watercourse Convention is one of the factors to be taken into consideration when determining what is equitable.

Neither the 1966 Helsinki Rules nor the 1997 UN Watercourse Convention provides any hierarchy or priority to the factors determining reasonable and equitable uses of a watercourse. Moreover, the list does not provide how competing conflict of uses can be reconciled. Article VI of the Helsinki Rules clearly provides that “a use or category of uses is not entitled to any inherent preference over other use or category of uses”. Article 6(3) of the UN Watercourse Convention provides:

3. The weight to be given to each factor is to be determined by its importance in comparison with that of other relevant factors. In determining what is a reasonable and equitable use, all relevant factors are to be considered together and a conclusion reached on the basis of the whole.

From the above, it may be deduced that individual cases would be judged taking into consideration different factors. This would create room for uncertainty in the application of the principle of reasonable and equitable sharing. As a result of the rare application of third-party dispute settlement in issues involving river disputes there is lack of comparable judicial elaboration.90

Recently, the tendency has been to give priority to domestic uses when determining an “equitable and reasonable” use. Article 10 of the 1997 UN Watercourse Convention provides “In the absence of an agreement or custom to the contrary, no use of an international watercourse enjoys inherent priority over other uses”. It further accords “special regard” in any equitable balance to “vital human needs”. This provision demonstrates at least an inchoate priority, even though it does not specify whether the “vital needs” are limited to drinking water and sanitation, or include activities based on economic and agricultural needs. The ILC commentary refers to “sufficient water to sustain human life, including both drinking water and water

90 Birnie and Boyle, supra note 4 at p. 304. In the Gabcikovo-Nagymaros Case and the Pulp-Mills Case the issue of balance of different factors in the application of the principle reasonable and equitable utilization was discussed. Compare this to the amount of cases involving the delimitation of continental shelves cited in supra note 11.
required for the production of food in order to prevent starvation”.91 Article 10(1) of the 2004 ILA Berlin Rules provides: “in determining an equitable and reasonable use, States shall first allocate waters to satisfy vital human needs”.

The preference in the ILA Rules is more concrete than in the UN Watercourse Convention. The 2001 Bonn Declaration provides in its Recommendation 4(1): “water should be equitably and sustainably allocated, first to human needs and then to the functioning of ecosystems and different economic uses including food security…”92 Article 2(20) of the Berlin Rules clearly defines “vital human needs” as “waters used for immediate human survival, including drinking, cooking, and sanitary needs, as well as water needed for the immediate sustenance of a household”. Even though the definition of what constitutes vital needs is much more clarified in the Berlin Rules as compared to the UN Watercourse Convention, what entails “water needed for the immediate sustenance of a household” is not very clear. Would the sustenance of a house include irrigation for subsistence food? Or cash crops in order to sustain a family financially? The answers to these questions cannot be easily retrieved from the above definition of “vital human needs”. The concept of “vital human needs” is closely linked with another concept of human right to water which will be discussed elsewhere in the present chapter.93

An insightful study of the factors of “equitable utilization” reveals that they are evolutionary in nature. For example, a population thirty years ago which depended on a watercourse would be higher today. The climate of a given basin might significantly change with years which in turn may affect the quantity of waters in a given watercourse. This complicates the already complex issue of determining what “equitable utilization” is. Who is to determine whether a given set of factors which led to an agreement have changed? When should the factors be considered as having changed? What would happen in case a State(s) which is enjoying more benefits in a given Agreement is reluctant in accepting its amendment in order to fit the circumstances at hand? Such questions indicate how complex the notion of “equitable

93 See, infra, section entitled A Human Right to Water: Is there a human right to water, in the present chapter of this thesis.
utilization” is. So far the best solution to the complex situation of balancing the factors and the likelihood that the needs of given States may transmute, is probably moving more to cooperation. Cooperation may be achieved by formation of a common management regime tailored to achieve equitable and optimum utilization of the resources of the watercourse. The duty to cooperate will be discussed elsewhere in this chapter.

The preceding subsection shows that the principle of equitability is a customary international norm. As for the present subsection, it endeavours to shade light on what equitable principle is. Basing on the outcome of the two sections, the following subsection will discuss whether the 1929 Nile Agreement is equitable.

d. Is the 1929 Nile Agreement Equitable?

As we earlier saw, the 1929 Nile Agreement provides that in order for Parties to undertake projects on the Nile River which would, “in such a manner as to entail any prejudice to the interests of Egypt, either reduce the quantity of water arriving in Egypt, or modify the date of its arrival, or lower its level”, there has to be a “previous agreement of the Egyptian Government”. Such a provision would lead one to question whether the Agreement is equitable in line with the previous subsections which discussed the principle of equitable utilization.

In the previous subsections, the main theme was that each and every watercourse state in a shared watercourse enjoys the inherent right of “equitable utilization” of the resources of the watercourse. This would suggest that all Nile riparian States enjoy the right to equitable utilization. In this line, it was indeed right for Egypt to assert that she had “natural and historic” rights, if what was meant was a right to “equitable utilization”. However, as we saw in the previous chapter, what was meant by “natural and historic rights” is not clear. The main questions would be, was the Nile Agreement equitable in 1929? And if it was, is it equitable today?

94 Schwebel, II YbILC, 1982, pt.1, 76, para. 70; McCaffrey, supra note 82 at para. 177.
95 Mahmoud Pasha’s Note to Lord Lloyd in Exchange of Notes between His Majesty’s Government in the United Kingdom and the Egyptian Government in Regard to the Use of Waters of the River Nile for Irrigation Purposes, 93 LNTS 44, para 4(b).
The discussion in the previous subsection highlighted that what is equitable is what is agreed upon by the States involved taking into consideration the factors discussed therein. A close scrutiny of the 1929 Nile Agreement reveals that the sole purpose of the Agreement was to protect Egypt’s irrigation interests. It would be plausible to say that the driving force behind the negotiation of the Agreement was to enhance Egypt’s economic and social needs and to consider the then existing uses of the Nile which are examples of factors to take into consideration when deciding what is equitable. As was discussed elsewhere, States are free to agree which of the factors should take priority. In this line of argument, it would be credible to assert that the Parties to the Nile Agreement deemed it “equitable” then to allow Egypt’s interests in the waters of the Nile to take precedence. The Agreement was made out of free will between Egypt and the United Kingdom on behalf of the Countries it administered. Thus, the Agreement was equitable.

A contrary argument would be that the Agreement was equitable when it was concluded but is no longer so because circumstances have significantly changed. An example of what has significantly changed was the transfer of power. It might have been that what the United Kingdom construed as “equitable” when she was concluding the Agreement was in fact not in the interests of the countries she administered. The independence of the States concerned led to a different understanding from those States on what is “equitable” in their best interests. This might have been the reason why most of those Countries contested the “legality” of the Agreement. In other words, all parties to the 1929 Nile Agreement with the exception of Egypt considered that their independence was a fundamental change of circumstances which would render the Agreement terminated. A similar argument was rejected by the ICJ in the Gabcikovo-Nagymaros Project Case.

The ICJ was of the view that “the prevailing political situation was certainly relevant for the conclusion of the 1977 Treaty”, however, “the prevalent political conditions were thus not closely linked to the object and purpose of the Treaty that they constituted an essential basis of the consent of the parties and, in changing, radically

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96 On the discussion of whether the 1929 Nile Agreement devolved to the newly independent State, see chapter 2 of the present thesis.
altered the extent of the obligations still to be performed". In order for the 1929 Nile Agreement to be considered as having encountered a fundamental change of circumstances as a result of the independence of the Nile Basin States, such independence must be closely related to the object and purpose of the Agreement in such a manner that it formed part and parcel of the essential basis of the consent of the parties involved. According to one commentator, the 1929 Nile Agreement was a fundamental representation of political concessions by the British Government in order to attain an Egyptian Government to deal with.

However, given the fact that it is extremely difficult to resort to the principle of fundamental changes of circumstances to terminate a treaty since there is no precedent of states successfully terminating a treaty as a result of fundamental changes of circumstances, and the state practice of the Nile riparian States, it would be difficult to conclude that the 1929 Nile Agreement can be terminated as a result of fundamental change of circumstances viz. the independence of the Nile States. As was discussed in the previous chapter, the 1929 Agreement devolved to the newly independent states of the Nile Basin. Indeed, as we saw in the previous chapter, the Parties to the Agreement have agreed to retain it albeit temporarily until a new arrangement is reached. What is contestable is whether the Agreement was any longer "equitable" given the independence of States.

Another argument in favour of the assertion that the Agreement is no longer equitable is that other circumstances such as the climate, rainfall patterns, population dependent on the waters of the Nile have adversely changed and thus rendering the Agreement no longer equitable. Given that the Agreement is at present over seventy years old, the said circumstances have changed. It would have been that, at the time of the conclusion of the Agreement, the population dependant on the Nile waters from the other riparian States except Egypt and to some extent Sudan was minimal or non-existing. This might have led the United Kingdom on behalf of the Countries it administered to consider negotiating such an agreement which gave Egypt the right to

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97 Gabcikovo-Nagymaros Project Case, supra note 14 at para. 104.
99 Gabcikovo-Nagymaros Case, supra note 14 at para. 104; Fisheries Jurisdiction Case, supra note 14 at para. 43.
100 For the discussion on the succession of the 1929 Nile Agreement, see supra, Chapter 1 of the present thesis.
veto any projects in those countries. The rainfall pattern has changed in the Nile Basin in that most of the farmers in the upstream riparian states now require waters of the Nile to irrigate their land as opposed to over seventy years ago when the Agreement was concluded. Hence, it is plausible to conclude that even though the 1929 Nile Agreement might have been “equitable” at the time of its conclusion, it is no longer so as a result of changes in circumstances surrounding the Nile Basin.

In the Gabcikovo-Nagymaros Project Case, the ICJ rejected the argument by Hungary that “the project diminishing economic viability” constituted a fundamental change of circumstances which “radically altered the extent of the obligations still to be performed” for the same reasons that it rejected that the change in prevailing political situation necessary meant fundamental change of circumstances. The “diminishing economic viability” should closely be “linked to the object and purpose of the Treaty that they constituted an essential basis of the consent of the parties” if it was to be considered as a fundamental change of circumstances.

It is pertinent to review whether the changed circumstances which render the 1929 Nile Agreement not equitable today were closely linked to the “object and purpose” of the Agreement. As has been noted previously in the present thesis, the object and purpose of the 1929 Nile Agreement was to give Egypt the right to veto projects if she considered them to reduce the quantity and quality of the waters arriving in her territory. Even though it was argued above that the Agreement might have been equitable at the time but not today (due to the change of circumstances), it does not appear that the “object and purpose” of the Agreement was for it to be equitable. This is supported by the fact that the equitable principle with regards to shared watercourses is a new norm in comparison to the 1929 Nile Agreement, thus it may not have been the “object and purpose” of the Agreement. Further, even though the circumstances then might have rendered the Agreement equitable then as was pointed out above, and even though it might have been the case that the circumstances then were relevant for the conclusion of the Agreement, they were not closely linked to the “object and purpose” of the Agreement which was to grant Egypt the right to veto

101 Gabcikovo-Nagymaros Case, supra note 14 at para. 104.
102 Idem.
103 For the discussion of which is Lex-posterior, viz. the equitable principle or the 1929 Nile Agreement, see Infra, chapter 4 of the present thesis.
projects of other basin states. Thus, it is futile to discuss whether the obligations to be performed under the Agreement have radically been altered as a result of it not being "equitable" today, since as was established above, the "object and purpose" of the Agreement was not for it to be so. A striking point was made by the ICJ in the Gabcikovo-Nagymaros Case: "Besides, even though the estimated profitability of the project might have appeared less in 1992 than in 1997, it does not appear from the record before the Court that it was bound to diminish to such an extent that the treaty obligations of the parties would have been radically transformed as a result".\(^{104}\) It is not clear whether from this pronouncement the Court meant that, if the "estimated profitability" would have diminished to the extent, the parties ability to undertake the treaty obligations "would have been radically transformed as a result" then a fundamental change of circumstances would have taken place regardless of whether the profitability was linked to the "object and purpose" of the Treaty. If this is correct, it would mean that even though the equitable principle was not closely linked to the "object and purpose" of the 1929 Nile Agreement, it would nonetheless lead to a situation of fundamental change of circumstances if it can be proved that the diminishing of the principle has led to the radical transformation of the parties' treaty obligations.

This is, however, a flawed way of looking at the pronouncement by the Court. It would appear that what the Court meant was that even if there was any chance of linking the "estimated profitability" to the "object and purpose" of the Treaty, the circumstances at the time of the Case with regards to the profitability did not dictate that its diminishing was of such an extent that the parties' treaty obligations had been transformed radically to warrant the application of the principle of fundamental change of circumstances.

From the above discussion, it is plausible to conclude that, for the principle of fundamental change of circumstances to apply for the purposes of terminating a treaty such as the 1929 Nile Agreement, such changes should: first, "constitute an essential basis of the parties to be bound by the treaty"; second, "radically transform the extent

\(^{104}\) Gabcikovo-Nagymaros Project case, supra note 14 at para. 104.
of obligations still to be performed under the treaty”.\footnote{Article 62 of the Vienna Convention on the Law of Treaties, \textit{supra} note 33. As will be discussed in the next chapter, Article 62 of the Vienna Convention on the Law of Treaties regarding fundamental changes of circumstances is a norm of customary international law.} Thus, even though the Agreement might have been equitable and it is not at the moment due to changes viz., independence of Nile Basin States and other changes such as more need for water, such changes do not fulfil the requirements of the principle of fundamental change of circumstances. The subsequent paragraph discusses whether the state practice of the Nile Basin States supports my earlier assertion that the 1929 Nile Agreement might have been equitable at the time of its conclusion but due to the changed circumstances, it is no longer so.

In 1959, Egypt and Sudan concluded another Agreement for the full utilization of the Nile waters.\footnote{Agreement on the Full Utilization of the Nile Waters, \textit{supra} note 44.} This Agreement was seen as a modification of the 1929 Nile Agreement which Sudan had considered repudiated. One may argue that this Agreement was concluded in order to satisfy the need of Sudan to enjoy her right to “equitable utilization” since circumstances had changed rendering the 1929 Nile Agreement “inequitable”. In fact the reason that Sudan provided for considering the Agreement repudiated was that “economic and technical development since 1929 had rendered these provisions obsolescent”. This is what led authors like Hosni to see this move by Egypt and Sudan as drifting more to the notion of “equitable utilization”.\footnote{S. Hosni, ‘The Nile Regime’, \textit{Revue Egyptienne de Droit International} (Cairo), vol. 17 (1961), p. 67.} Another significant practice is the establishment of the Nile Basin Initiative with the objective of enhancing equitable sharing of the resources of the Nile. This suggests that former initiatives including the conclusion of the 1929 Nile Agreement were no longer “equitable” and thus the need to search for a more equitable way of utilizing the resources of the Nile by establishing the Nile Basin Initiative. The following chapter will engage in an in-depth review of the practice of the Nile riparian States with regards to equitable sharing in line with how the 1929 Nile Agreement can accommodate evolving legal principles such as equitable utilization. Suffice it to note that the 1929 Nile Agreement might have been equitable at the time of its conclusion but given the changing in circumstances surrounding the Nile Basin it is no longer so. However, the argument that the Agreement is no longer “equitable” is not analogous to it no longer being binding. The following chapter will discuss whether the 1929
Nile Agreement which is no longer “equitable” can be interpreted in the light of the “equitable principle” or whether the advent of such a principle has modified the Agreement.

(2) Avoidance of Transboundary Harm

States have an obligation under customary international law to avoid and prevent significant harm to other States as a result of their activities. This principle is an application of the Latin maxim sic utere tuo ut alienum non laedas. There is a widespread support for the obligation not to cause harm in international instruments. A close scrutiny of most of these instruments reveal that what is required is the exercise of “due diligence” when utilizing an international watercourse in such a way as “not to cause significant harm”. The due diligence test or best efforts under the circumstances clarify beyond doubt that the “no-harm” principle is not an “absolute obligation”. Indeed, as pointed out in the Corfu-Channel Case:

…it cannot be concluded from the mere fact of control exercised by a State over its territory and waters that that State necessarily knew, or ought to have known, of any unlawful act perpetrated therein, nor yet that it necessarily knew, or should have known the authors. This fact, by itself and apart from other circumstances, neither involves prima facie responsibility nor shifts the burden of proof.

As was discussed earlier, much debate has been generated over the extent to which the obligation of “no-harm” contradicts that of “equitable and reasonable” utilization and which of the two should take precedence in case of contradiction. However, contrary to the debate, a state which is in default of doing its best to control avoidable transboundary harm to other states cannot easily justify that it is acting equitably or reasonably, whichever principle prevails. In the same vein, an obligation for a State to do its best to minimize unnecessary or avoidable harm to other states does not impede the reasonable and equitable development of a watercourse by the given state. This discussion supports the conclusion that, far from contradiction, the principles of

108 For the Sources, see, Berlin Rules Sources, at supra note 85 at p. 51-54.
110 For the debates on this issue, see, ILC debates as discussed in S. McCaffrey, The Law of International Watercourse: Some Recent Developments and Unanswered Questions’, 17 Denver Journal of International Law and Policy (1989), at pp. 508-510; Handl, supra note 19 at pp. 128-133; see also Final ILC Commentary, supra note 3 at pt 2, pp. 96-105; see also, Birnie and Boyle, supra note 4 at p. 308.
111 Birnie and Boyle, Idem.
“equitable and reasonable utilization” and “no-harm” are in fact intimately related. The two principles are also closely related to other principles, viz., sustainability and minimization of environmental harm. As we saw with regards to equitable utilization, such concepts as “appropriate measures” and “significant harm” which form part and parcel of the principle of “no harm” can lead to different interpretations from different states depending on which state is interpreting them. An upstream state might argue that her activities do not cause significant harm to a downstream state. While the downstream state may consider activities of an upstream state to cause significant harm to her. Such complex questions as we earlier saw with regards to equitable utilization can best be resolved by cooperation between given basin states.

The 1929 Nile Agreement jealously protects the no harm principle vis-à-vis Egypt and to some extent Sudan. As we have encountered in different parts of this thesis, the Agreement was about the protection of the interests of Egypt and to some extent Sudan. No projects can be undertaken by other Nile riparian States unless with the prior agreement of Egypt. Thus, it is up to Egypt to determine what is harmful in case the parties to the Agreement wish to undertake a project which would reduce the waters of the Nile or affect the time the waters arrive in Egypt. Given that the principle of “no-harm” allows states to use watercourses in their territories without significantly harming the interests of the other watercourse states, would it be proper under the principle for Egypt as a lower watercourse state to determine which projects fulfil the requirements of the principle? Under this principle, it is clear that no riparian state has an inherent right to determine which uses fulfil its requirements. However, the 1929 Nile Agreement grants such right to Egypt. Prima facie, the Agreement and the principle are incompatible. The next chapter will discuss whether the Nile Agreement and the principle can be harmonised by interpreting the Agreement in the light of the principle, or whether the principle has modified the Agreement.

(3) The Duty to Cooperate

The main question to ponder is whether the duty to cooperate is a customary international law norm. Smith was of the opinion that given the nature of water as a

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112 See, Lac-Lanoux Case, supra note 81 at para. 1065. The Tribunal held that there is no state which has a right to veto projects of another state in case of a shared watercourse.
natural resource,

a

duty to cooperate stems from the fact that it underlies all other

rights and obligations relating to international watercourse law. He concluded:

The first

principle is that
so developed

river system is naturally an indivisible physical unit, and that as such it
render the greatest service to the whole human community which it
serves, whether or not that community is divided into two or more political jurisdictions. It is the
positive duty of every government concerned to the extent of its power in promoting this development.
should be

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that the "governments concerned"

can

achieve the above goal of

rendering "the greatest service to the whole communities" which they
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shared watercourse is

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by cooperation. In the absence of the duty to cooperate, such

principles of equitable utilization and no-harm cannot be achievable. In

words, there has to be

some

form of cooperation in order to effectively manage

given watercourse for the benefit of all states involved.

question whether the duty to cooperate is
endeavour to

answer

another

a customary

Before

international

we answer
norm, we

the

shall

equally difficult question of what the duty to cooperate

is.

There is

no

cooperation

monitoring

precise definition of what entails the duty to cooperate. Forms of
may

or

include friendly relationships, exchange of information, joint

research to duties such

as

exchange of particular information,

notification, early warning, and entry into consultations, conclusion of agreements or
establishment of
of

common

management bodies for the purpose of peaceful settlement

disputes.

There is

overwhelming support of the duty to cooperate in international law. The

starting point is the UN Charter. Chapter I entitled "purposes and principles" contains
two

articles

(1 and 2) which clearly stipulate that cooperation of states is

prerequisite for the fulfilment of
With

purposes

and principles of the United

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Nations.114

regards to shared watercourses, the 1997 Watercourse Convention provides for

cooperation. The preamble of the Convention strongly affirms the importance of
international

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cooperation. Article 8 highlights the general obligation to cooperate

as

Also see, Declaration on Principles of International Law Concerning Friendly Relations and Co¬

operation Among States in Accordance with the Charter of the United Nations,, UN General Assembly
Resolution 2625 (XXV), 1970,
- on
which see The United Nations and the Principles of

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well as the establishment of joint mechanisms or commissions to enhance cooperation. Also intertwined with the obligation to cooperate is the duty to exchange data and information provided for in Article 9 of the Watercourse Convention. The exchange of information is in relation to planned measures in Articles 11-19 of the Convention which provide for consultation. The duty to cooperate is inscribed in numerous other Article of the Watercourse Convention. 115

Other international law instruments which provide for the duty to cooperate include: the Stockholm Declaration 116; World Charter for Nature 117; United Nation Convention on the Law of the Sea (UNCLOS) 118; ASEAN Agreement on the Conservation of Nature 119; Rio Declaration 120; Biological Diversity Convention 121; Convention to Combat Desertification 122; Bonn Declaration 123; Johannesburg Declaration on Sustainable Development 124; African Convention on the Conservation of Nature and natural Resources 125; and, the Carpathians Convention 126. There are other numerous international and regional instruments which agitate for the duty to cooperate. 127 In relation to the UNCLOS the ITLOS has twice held that “the duty to cooperate is a

115 For the discussion of the 1997 Watercourse Convention, see Section 1 of the present chapter. Article 2(6) provides for cooperation in preventing, controlling and reducing transboundary harm. Article 3 provides for parties to cooperate in case they want to harmonise other agreements with the Watercourse Convention. Article 5 provides that riparian States have the duty to cooperate in the protection and development of the watercourse. Article 6 requires States to enter into consultations in a spirit of cooperation. Article 25 on the regulation of an international watercourse and Article 28 which provides for emergency situations enhance prompt notification of other potentially affected states.


123 2001 Bonn Declaration, summary of principles

124 2002 Johannesburg Declaration on Sustainable Development, World Summit Plan Annex, UN Department of Economic and Social Development, Para. 29.


126 2003 Carpathian Convention, Article 2(2)(d).

127 For a detailed discussion of the instruments, see, 1994 ILC Watercourse Convention, supra note 36 at commentary to Article 8.
fundamental principle in the prevention of pollution of the marine environment under Part XII of the Convention and general international law...”128

From the above, it is evident that the cooperation is required. In the Lac Lanoux Arbitration, the duty of prior notification, negotiation and consultation were deemed to constitute requirements of customary international law.129 According to Bourne, even though the decision of the Arbitration was based on the terms of a treaty, it does manifest the general principle of customary international law obliging states to take into consideration interests of other watercourse states and thus as a matter of fact lead to the obligation to give notice, to consult and to negotiate.130 Kirgis is of the view that the Case supports a customary obligation to engage in “meaningful preliminary negotiations”.131 In the Lac Lanoux Arbitration, the Tribunal held that: “The conflicting interests aroused by the industrial use of international rivers must be reconciled by mutual concessions embodied in comprehensive agreements”.132 Thus the duty to consult and negotiate in good faith is required. In the Nuclear Test Cases, the principle of good faith was considered to be paramount “more especially in an age when this cooperation is becoming increasingly essential.133 From the above discussion, it would be plausible to assert that the obligation on states to cooperate is an obligation to consult and negotiate in good faith.

As Birnie and Boyle rightly contend, consultation and negotiation in good faith are not only required “as a mere formality, but as a genuine attempt to conclude an agreement”.134 In the Lac Lanoux Arbitration, the Tribunal asserted “… it must be stressed how closely linked together are the obligation to take into consideration, in the course of negotiations, adverse interests and the obligation to give a reasonable place to these interests in the solution finally adopted”.135 In the Icelandic Fisheries Case, the Court held, “negotiations in good faith,… involve in the circumstances of

128 Mox Plant case (Provisional Measures) (n 1) para. 82; Land Reclamation (Provisional Measures) (n 1) para. 92.
129 Lac Lanoux Arbitration, supra note 81 at 129 ff.
132 Lac Lanoux Arbitration, supra note 81 no. 204 at 119.
133 Nuclear Test Cases, ICJ Reports (1974) at para. 49.
134 Birnie and Boyle, supra note 4 at p. 321.
135 Lac Lanoux Arbitration, supra note 81 at 141; see also 199, 128.
the case an obligation upon Parties to pay reasonable regard to each other’s rights and to conservation requirements pending the conclusion of the negotiations.\textsuperscript{136} In the \textit{North Sea Continental Shelf} Case, Parties were required to enter into negotiations with a view to arriving at an agreement.\textsuperscript{137} The above position was reiterated in the \textit{Gabcikovo-Nagymaros} Case.\textsuperscript{138}

The 1929 Nile Agreement provides for cooperation in a way that is quite different from that which is required by international law. As has been consistently discussed, the Nile Agreement provides that in the absence of a prior agreement with Egypt, no projects which would prejudice the quantity or quality of water arriving in Egypt can be undertaken. This means that all parties to the 1929 Nile Agreement have to consult Egypt before embarking on projects. Not only do they have to consult Egypt, they have to attain her permission.

In the \textit{Pulp Mills} Case, there was a question of “right to veto” projects by any of the parties to the 1975 Statute of the River Uruguay.\textsuperscript{139} Argentina argued that Article 9 of the 1975 Statute “established a ‘no construction’ obligation...” in case both parties fail to agree, or in the absence of such an agreement, “construction” only takes place after a ruling by the Court.\textsuperscript{140} Uruguay contended that the 1975 Statute and in particular Articles 7 et seq. did not grant either party a “right to veto” industrial development projects of the other.\textsuperscript{141} It should be noted that this case was on a proper interpretation of a statute.

This Case poses a different scenario from that surrounding the 1929 Nile Agreement. The 1929 Nile Agreement is crystal clear that Egypt has the “right to veto” projects of upstream parties to the Agreement. Parties to the 1929 Nile Agreement have never questioned the interpretation of its stipulations regarding Egypt’s “right to veto”. Indeed, that is why they advocate for a new “equitable” agreement. What is relevant in the \textit{Pulp Mills Case} is the following pronouncement by the Court:

\begin{footnotesize}
\begin{enumerate}
\item \textit{Icelandic Fisheries} Case, \textit{supra} note 14 at para. 70.
\item \textit{North Sea Continental Shelf} Case, \textit{supra} note 14 at paras. 85 \& 87.
\item \textit{Gabcikovo-Nagymaros} Case, \textit{supra} note 14 at para. 141.
\item \textit{Pulp Mills} Case, \textit{supra} note 25.
\item \textit{Id.}, at para. 34.
\item \textit{Id.}, at para. 43.
\end{enumerate}
\end{footnotesize}
Whereas, notwithstanding the fact that the Court has not been able to accede to the request by Argentina for the indication of provisional measures ordering the suspension of construction of the mills, the Parties are required to fulfil their obligations under international law;... the Court wishes to stress the necessity for Argentina and Uruguay to implement in good faith the consultation and cooperation procedures provided for by the 1975 Statute, with CARU constituting the envisaged forum in this regard..."\(^{142}\)

The Court simply pointed out that under international law there is a duty to cooperate and more especially the duty to consult in good faith. By not granting the provisional measures requested by Argentina on the ground that she had a "right to veto" the project, and only stressing the duty to consult and cooperate in good faith as required by international obligations, the Court implied that the "right to veto" is not a norm of general international law, although as a matter of interpretation of the 1975 Treaty it has reserved the matter for decision on the merits.

Thus, what is required in international law is negotiation, consultation and attaining a mutual agreement in good faith among riparian states. On the face of it, there is a possible conflict between the principle of duty to cooperate and the "right of veto" provided for in the 1929 Nile Agreement. The subsequent chapter will review whether the Agreement can be harmonised with the principle through interpreting it in the light of the principle, or whether the principle has modified the Agreement.

3. Other International Law Concepts

(1) A Human Right to Water. Is there a human right to water?

"Human rights are protected by internationally guaranteed standards that ensure the fundamental freedoms and dignity of individuals and communities".\(^{143}\) There has been a significant progressive development of the concept of human rights since World War II. Of importance was the development of the 1948 Universal Declaration of Human Rights (UDHR).\(^{144}\) The UDHR provides for various rights and freedoms. Even though the UDHR is not a treaty *per se*, its provisions have overtime crystallized into customary international law. Moreover, the UDHR inspired the development of the

\(^{142}\) Id., at para. 82.

\(^{143}\) World Health Organisation [hereinafter WHO], *Right to Water*, 2003 at p. 7 [2003].

\(^{144}\) *Universal Declaration of Human Rights*, adopted and proclaimed by UNGA Resolution 217 A(III), 10th December 1948, UN Doc. A/810 (III).
International Covenant on Civil and Political Rights (ICCPR)\textsuperscript{145}, and the International Covenant on Economic, Social and Cultural Rights (ICESCR)\textsuperscript{146}. It is not the purpose of this section to discuss the reasons for the separation of human rights into two treaties.\textsuperscript{147}

Given this brief description of human rights, it is pertinent to answer the question whether there is a human right to water.\textsuperscript{148} There are very limited global human rights instruments which explicitly provide for a human right to water. The Geneva Conventions and their additional protocols which relate to armed conflicts explicitly recognize a right to water.\textsuperscript{149} The provisions in these instruments only relate to times of war and with regards to drinking water. The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) obliges Parties to purge discrimination against women by ensuring that women and more especially those who live in rural areas "enjoy adequate living conditions, particularly in relation to... sanitation, electricity and water supply..."\textsuperscript{150} This Convention is restricted to women and more especially those who live in rural areas. The Convention on Rights of Children recognizes children's right to enjoy the highest attainable standard of health "... through the provision of adequate nutritious foods and clean drinking water..."\textsuperscript{151} This Convention is focussed more on the issue of health and hence water quality is at the helm of the issues emphasised. The right to water is also expressly recognised in certain non-legally binding resolutions and declarations. The Mar del Plata Action Plan recognized water as a right, resolving that all people have a right to drinking water, both in quantities and qualities equal to their basic needs.\textsuperscript{152} The

\textsuperscript{146} International Covenant on Economic, Social and Cultural Rights, adopted by UNGA Resolution, in 993 UNTS 3 and 6 ILM (1967), 360.
\textsuperscript{147} In general, the separation of the human rights into two treaties was a reflection of the division in the cold war period between "West" and "East". See generally, H.J. Steiner, P. Alston, \textit{International Human Rights In Context}, 2000, (2nd edn.)
Dublin Conference on Water and Sustainable Development expressly provides in Principle 4 of the Dublin Statement “... it is vital to recognize first the basic right of all human beings to have access to clean water and sanitation at an affordable price”.\textsuperscript{153} Chapter 18 of the Agenda 21 on freshwater highlights that a right to water entails three elements viz. access, quality and quantity, by making certain “...that adequate supplies of water of good quality are maintained for the entire population of this planet”\textsuperscript{154} and also that “all peoples, whatever their stage of development and their social and economic conditions, have the right to have access to drinking water in quantities and of a quality equal to their basic human needs.”\textsuperscript{155}

In addition to international instruments, there are some regional arrangements which expressly provide for the human right to water. The European Council of Environmental Law (ECEL) Resolution on the right to water “considers that the right to water cannot be dissociated from the right to food and the right to housing which are recognized as human rights and that the right to water is also closely linked to the right to health”.\textsuperscript{156} The European Commission of the United Nations for Europe (ECE) Protocol on Water and Health to the 1992 Convention on the Use of the Transboundary Watercourses and International Lakes provides “[P]arties shall, in particular, take all appropriate measures for the purpose of ensuring: (a) adequate supplies of wholesome drinking water...”.\textsuperscript{157} Access to water is further reinforced in Article 5(1) and Article 6(1) of the Protocol which provide for equitability with regards to water and access to drinking water respectively. The African Charter on the Rights and Welfare of Children provides that State Parties are required to take measures “to ensure the provision of adequate nutrition and safe drinking water...”\textsuperscript{158}

Aside from the instruments which expressly provide for the right to water, there is an argument that water rights may be extrapolated from existing human rights. Indeed there is an argument that certain well established rights implicitly provide for the right

\textsuperscript{153} Dublin Statement, supra note 64 at Principle 4.
\textsuperscript{154} Agenda 21, para. 18.47
\textsuperscript{155} Id., at para. 18.18.
to water. The following section will modestly and in a straight forward manner review whether water rights can be extrapolated from existing human rights.

(2) Extrapolation of Human Right to Water from Existing Human rights

Extrapolation of human rights (such as the right to water, the right to environment) from well established rights (such as the right to life, health, etc.) is an emerging tendency. The point of departure in the discussion of whether other rights can be extrapolated from existing human rights is that a failure to protect such rights may interfere with existing individual rights. In a Separate Opinion, Judge Weeramantry, pointed out:

"the protection of the environment is likewise a vital part of contemporary human rights doctrine, for it is a sine qua non for numerous human rights such as the right to health and the right to life itself. It is scarcely necessary to elaborate on this, as damage to the environment can impair and undermine the human rights spoken of in the Universal Declaration and other human rights instruments."

Even though the Judge was commenting on extrapolation of environmental rights from existing established rights, the same would apply for any other "human right" which is "sine qua non" to established rights, in this case "the human right to water". In the Ogoniland Case, it was argued that the rights violated (viz. Article 16(1) which stipulates that "Every individual shall have the right to enjoy the best attainable state of physical and mental health" and Article 24 which stipulates that "All peoples shall have the right to a general satisfactory environment favourable to their development") "were closely linked to economic and social rights in so far as the environment affects the quality of life and safety of the individual". In other words, if the environment is degraded by the pollution such as the case in the Ogoniland, and it affects the quality of life and safety of individual protected by such rights as the right to life, the right to health, the right to satisfactory living conditions, then the rights themselves are breached. Thus, the right to a clean and safe environment can be extrapolated from such existing rights. The same would be said of water, if the quality and quantity of water affects the “the quality of life and safety of an individual” then it is potentially a violation of existing rights protecting such conditions.

159 CaseGabcikovo-Nagymaros Project Case, supra note 14 at Separate Opinion of Judge Weeramantry.
The following subsections will discuss the extrapolation of right to water from established rights.

a. The Right to Life

The right to life is jealously guarded in major human rights instruments.\(^{161}\) Article 6 of the ICCPR stipulates that every human being has the inherent right to life. Moreover, Article 4 of the Covenant provides that the right to life cannot be derogated under whatsoever circumstances, even in times of public emergency. In a comment pertaining to “inherent right to life”, the Human Rights Committee was of the opinion that “[T]he expression ‘inherent right to life’ cannot properly be understood in a restrictive manner, and the protection of this right requires that states adopt positive measures”.\(^{162}\) Positive measures which states should take in line with the right to life include reduction of mortality rate and rising of life expectancy. In practice, with regards to the reporting process, the Committee has in a constituent manner required that states provide information on public health and environmental fields, including registration of the transportation and dumping of nuclear waste.\(^{163}\) The Inter-American Commission seems to have adopted the positive approach of the Human Rights Committee with regards to the right to life.\(^{164}\)

So far very limited cases are known to have been instigated under the complaints machinery of treaties regarding the extrapolation of other rights from the right to life. In the Port Hope Case, the Canadian citizens alleged that the stocking of nuclear wastes near their homes was a threat to the lives of the concerned citizens and future generations in Port Hope.\(^{165}\) Even though the UN Human Rights Committee deemed

\(^{161}\) ICCPR, supra note 145 at Art. 6; UDHR, supra note 144 at Art. 3; 1950 European Convention for the Protection of Human Rights and Freedoms (Rome), 213 UNTS 71 (1953) at Art. 2; 1969 American Convention on Human Rights, OAS Treaty Series No. 36, 1144 UNTS 123 (1978) at Art. 4; African Charter, Art. 4.

\(^{162}\) Human Rights Committee, General Comment No. 6 on Article 6 of the ICCPR, adopted on the 16th Session, 1982.


the complaint inadmissible for non-exhaustion of local remedies, it acknowledged that the case raised "serious issues under Art. 6(1)... with regard to the obligation of States parties to protect human life". In the Case of W. v. United Kingdom, the European Commission reviewed the claim that nuclear tests and dumping of radioactive wastes in the sea contravened the right to life stipulated in Article 2 of the European Convention on Human Rights. The American Commission in its Report on the Human Rights Situation in Ecuador was of the opinion that the citizens were exposed to toxic secondary products of oil exploitation in their drinking and bathing water which endangered their lives. The Commission pointed out that "where environmental contamination and degradation pose a persistent threat to human life, the foregoing rights viz. right to life are implicated".

At the national level, the Indian jurisprudence has been at the forefront in extrapolating the right to water from the right to life. In the Attakoya v. Union of India, the court discussed the legality of extracting water to expand the supply of water in the Lakshwadeep Islands. It stated, "administrative agency cannot be permitted to function in such a manner as to make inroads into the fundamental right under Art. 21(of the Constitution)... the right to sweet water... attributes of the right to life, for these are the basic elements which sustain life itself".

From the above, it may be plausibly concluded that there is a possibility of extrapolating a human right to water from human right to life. Prima facie, this would mean that since the right to life is non-derogable, then the right to water would also be less non-derogable if it is attached to the right to life. The Inter-American system of protection of human rights laid great emphasis on the non-derogability of the right to judicial guarantees and the principle of due process enshrined in Article 8 of the American Charter of Human Rights (ACHR) in case it is attached to non-derogable rights provided for in Article 27(2) of the Convention. The American Court of Human Rights

166 Idem.
169 Attakoya Thangal v. Union of India 1990 (1) KLT 580. It should be noted that Article 21 of the Indian Constitution guarantees the right to life.
170 See Article 4(2) of the ICCPR which provides for non-derogable rights, one of which is the right to life provided for in Article 6; Also see, Article 27 (2) of ACHR
Rights in its Advisory Opinion No. 9 and 10 held that judicial remedies viz. *habeas corpus* and judicial guarantees were so essential for the protection of non-derogable rights provided in Article 27(2) of the Convention that they could not be suspended even under states of emergency.\(^{171}\) From this perspective, the rights of judicial guarantees become non-derogable in so far that the guarantees are linked to non-derogable rights such as the right to life. If this is the case, it could have a significant impact on the Nile legal regime. As we earlier noted, the 1929 Nile Agreement grants Egypt the right to veto any project which may affect the quality or quantity of the Nile water regardless of the nature of the project. In other words, even if the project targets to provide drinking water for citizens in other Nile Riparian States by utilising the Nile waters, Egypt has the right under the Agreement to veto the project. However, if the thesis that the right to water can be extrapolated from the right to life is correct, then the Riparian states can justify projects designed to enhance the right to water.

The case law with regards to environmental cases shows that one of the most fundamental issues to the courts is the balancing of interests. Courts dealing with environmental issues have employed much effort to answer the questions of “balance, necessity and the degree of interference”\(^ {172}\). The case law manifests that few rights if any are absolute. In the *Pulp Mills Case*, the Court pointed out the need to balance competing interests.\(^{173}\) The Court was of the opinion that:

> Whereas the present case highlights the importance of the need to ensure environmental protection of shared natural resources while allowing for sustainable economic development; whereas it is particular necessary to bear in mind the reliance of the Parties on the quality of the water of the River Uruguay for their livelihood and economic development; whereas from this point of view account must be taken of the need to safeguard the continued conservation of the river environment and the rights of economic development of the riparian States...

In the *Gabcikovo- Nagymaros Project Case*, the Court held that there was need to reconcile economic development with other interests such as the protection of the environment.\(^{175}\)

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\(^{173}\) *Pulp Mills Case*, *supra* note 25.

\(^{174}\) *Id.*, at para. 80

\(^{175}\) *Gabcikovo-Nagymaros Case*, *supra* 14 note at para. 140.
This approach of balancing economic development and the general interests of the community against other interests such as the protection of individual rights has been taken by the Inter American Commission of Human Rights\textsuperscript{176}, the UN Human Rights Committee\textsuperscript{177} and the European Court of Human Rights\textsuperscript{178} and the African Commission on Human Rights\textsuperscript{179}. The above case law illustrates that other rights extrapolated from existing rights (for example the right to water extrapolated from the right to life) have to be “sufficiently balanced against economic benefits for the community as a whole”.\textsuperscript{180} This is relevant to the extrapolation of “the right to water” from existing rights such as “the right to life”. Invariably, if the right to life is hampered by the quantity and quality of water, then the degree of balancing will inevitably be very minimal. However, in cases where the quantity and quality of water is not substantially affected, and can be mitigated by either purifying the water or by shifting the affected population to other areas where there is suitable water, then a fair balance between the economic benefit of the community as a whole and the rights of individuals has to be taken. The most probable fair balance in this scenario would be in favour of the community since the effects to individuals can be mitigated.\textsuperscript{181} This approach has major ramifications with regards to the 1929 Nile Agreement. A cursory glance at the Agreement would suggest that there is potential conflict of its stipulation of Egypt’s “right to veto” projects of upstream riparian states regardless of their purpose and the “right to water” of individuals in those States which can be extrapolated from the “right to life”. The next chapter will discuss whether the Agreement can be interpreted in the light of the right to water extrapolated from the right to life or if this is not possible, whether the Agreement has been modified by the right.


\textsuperscript{177} Ilmari Lamsman v. Finland (1996), ICCPR Communication No. 511/ 1992, para. 9.4; for the discussion of this case see, Boyle, Idem.


\textsuperscript{179} Ogoniland Case, supra note 160 at paras. 52-53.

\textsuperscript{180} Boyle, supra note 172 at p. 19.

It should be noted that all the Nile Basin States are parties to either all or some of the human rights treaties which provide for the right to life which can potentially be extended to the right to water as we discussed in the preceding sections. Thus, since the 1929 Nile Agreement is older than most of the human rights treaties, it can per se be modified by them.\(^{182}\) This should be done cautiously because there is a lack of substantial state practice and judicial decisions indicating that a right to water can be extrapolated from a right to life.

b. The right to health

Article 12 of the ICESCR provides that everyone has a right to the enjoyment of the highest attainable standard of physical and mental health. The Convention on the Rights of the Child makes explicit connection between health and accessibility to water. Article 24 of this Convention provides that a child has the right to the enjoyment of the highest attainable standard of health and that States should take among other measures in order to implement this right to “combat disease and malnutrition...through inter alia...the provision... of clean drinking-water”. Article 16 of the African Charter reiterates what is provided for in Article 12 of the ICESCR. According to the Committee on Economic, Social and Cultural Rights in its General Comment 15 on the right to water, the right is inextricably related to the highest attainable standard of health provided for in Article 12(1) of the ICESCR.\(^{183}\) Toebes is of the view that the right to accessibility of clean drinking water is a precondition for health and thus an element which can be considered to fall under the ambit of the right to health.\(^{184}\) In other words, absence of accessibility to drinking water directly blights the prospects of the right to health.

In a claim brought before the African Commission against the then Zaire (now Democratic Republic of Congo), the Commission was of the view that “the failure of the Government to provide basic services such as safe drinking water and electricity... as alleged in communication 100/93 constitutes a violation of Art. 16” of

\(^{182}\) The modification of the 1929 Nile Agreement is discussed in the following Chapter.


\(^{184}\) B.C.A. Toebes., The right to Health as a Human Right in International Law, 1999, p. 255 & 270.
the African charter which provides that every individual has the right to enjoy the best attainable state of physical and mental health, and that States Parties should take necessary measures to protect the health of their people.185 This is the only instance where an international body translated the right to health to include accessibility to safe drinking water. This is evidence of insufficient jurisprudence as well as state practice to suggest that water rights cannot be automatically extrapolated from the right to health.

Therefore, as we saw with regards to the right to life, it would be treading on thin ice to firmly conclude that the right to health is synonymous to the right to water. However, as we saw with the extrapolation of the right to water from the right to life, the issue of balancing competing interests comes into play. A failure to provide clean drinking water that result in harm to health is likely to be a violation of the right to health. As we saw with the right to life, if the argument that the right to health is comprised of access to water, then it has an impact on the 1929 Nile Agreement in the same manner as was discussed in the previous subsection. The next chapter will discuss the impact.

c. The right to an adequate standard of living

The right to an adequate standard of living is articulated in Article 25 of the UDHR and Article 11 of the ICESCR. The adequate standard of living provided by the two documents cannot be achieved without some form of accessibility to water. Moreover, as provided for in Article 11 of the ICESCR, the right to adequate standard of living includes accessibility to adequate food. According to the Committee of ECSR, “the right to water clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental conditions for survival”.186 Some authors have argued that “food” in the present case implies *inter alia* water. Pearsall is of the view that the general definition of food is “any nutritious substance that people or animals eat or drink or that plant

186 CESCR, *supra* note 183 at para. 3.
absorb in order to maintain life and growth”. On his part, McCaffrey argues that “the right to food should be interpreted as the right to receive life-sustaining nourishment, or sustenance, so that it would include the right to potable drinking water sufficient to sustain life”.

The right to an adequate standard of living is also provided for in the UN Charter. In its preamble, the UN Charter articulates the determination to promote “economic and social advancement of all people”. This is cemented in Article 55 of the Charter. In case the right to an adequate standard of living provided for in the Charter can be interpreted to include accessibility to water, then it has an impact on such treaties as the 1929 Nile Agreement, since any agreement which is in conflict with the UN Charter is void. The reason being that the 1929 Nile Agreement gives Egypt the right to veto any projects by other parties to it, regardless of their nature, viz., even if the project is aimed at providing drinking water in line with the amelioration of the living standards of their citizens as stipulated in the UN Charter.

It should be noted that it is a difficult task to extrapolate the right to water from other established rights. It is even more difficult to relate the right to water to international shared watercourses as will be discussed in the following section.

d. The Problem of Linking Water, Human Rights and Shared Watercourses

As was discussed in the above subsections, there is a high possibility that a human right to water exists. However, this right has not been explicitly recognised by international law as a fundamental human right. There is also a possibility of interpreting existing fundamental human rights to incorporate a right to water. This right is also expressly articulated in non-binding instruments.

Despite the possibility of the existence of a right to water, there are inherent problems with regards to the practical application and definition of such a right. Existence of a right to water would require that states take positive measures to ensure accessibility

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of water to its citizens. The problem lies in determining who should supervise whether states are fulfilling their obligation as well as the standards that should be used to supervise. Further, such a right poses definitional problems. What constitutes a right to water is bound to experience uncertainty and ambiguity. Is water for subsistence farming included in this right? Or is water for commercial irrigation included? These are issues which have not been determined by international law.

The already complex issue of determining what a right to water is would even be more complicated in case such a right were linked to shared watercourses such as the Nile. Can the upstream watercourse states utilise waters of a watercourse to the detriment of downstream states in the name of enhancing its citizen’s right to water? This is a recipe of more harm than good because not only does it threaten the equivalent right of water of citizens of lower watercourse states but also international peace and the right to equitable sharing of states.

Therefore, what entails a “human right to water” is, in the end, a theme for each society to determine in line with its own values and choices and within the limits of internationally agreed principles. The panacea to the problem of accessibility of water cannot be found in expansive claims for human rights. The remedy to the problem lies in cooperation of states to come up with an equitable agreement to the utilization of a watercourse. To argue, as I have done, that international law does not require a human right to water in as far as shared watercourses are concerned, does not mean that the same is necessarily true of highlighting and giving priority to vital human needs in determining what is equitable. This point need not be developed here; the purpose of the fifth chapter is to determine how the Nile riparian States can cooperate to come up with an equitable agreement giving priority to vital human needs.

(2) Right to Sustainable Development

Sustainable development is viewed as a process which integrates developmental objectives and environmental protection, and which takes into account the future as well as present needs. Principle 3 of the Rio Declaration fully endorsed the concept

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189 Birnie and Boyle, supra note 4 at p. 316.
of a “right to development” as an element of sustainable development. Principle 3 further introduces the important limitation that the right to development must be expressed “equitably” in order to meet both developmental and environmental needs of present and future generations. Critics, such as the USA, have asserted that this right to development is not a right in any way but only a “goal”. The implications of sustainable development is primarily procedural rather than substantive standard applicable for judicial review and determination and its main objective is to guide national and international policies or decisions on resource use. The notion of sustainable development has wide support from international instruments, policies and numerous government decisions both at national and regional level, law and policy by international organizations, and jurisprudence.

Article 24 of the UN Watercourses Convention recognises that participating watercourse states will be entitled to consider a management process which affords a proper place to sustainable development. This is also one of the implicit lessons of Gabcikovo-Nagymaros Case. Since the introduction of sustainable development, it has become a remarkable feature of watercourse treaties.
The question arises as to how the older watercourse treaties such as the 1929 Nile Water Agreement may be affected by this notion of sustainable development. It should be recalled that the Nile Agreement, clearly gives Egypt the power to veto any project obstructing the flow of the Nile. This differs from the notion of sustainable development which allows countries the right to develop as long as other components of sustainable development such as integration of environmental protection and economic development, sustainable utilization and conservation of natural resources, intergenerational equity and intra-generation equity as well as procedural elements such as environmental impact assess, access to information, public participation in decision making are taken into consideration.  

As we earlier saw, the 1997 Watercourse Convention does not alter existing treaties, however, the Gabcikovo-Nagymaros Case pointed out that older watercourse treaties may be affected by the objective of sustainable development and the need to integrate environmental and economic considerations taking into account intergeneration perspectives. The ICJ was of the view that the 1977 Bilateral Treaty continued to govern the parties but not in a static isolation but in a dynamic manner in conjunction with the evolution of rules and norms relating to international watercourses, sustainable development, and environmental protection. This illustrates the Court’s interpretation of the 1977 Treaty by reference to the evolving norms. The court held that the 1977 Treaty’s silence on the subject of monitoring of environmental effects is a continuing obligation for the parties under general international law. This suggests that watercourse agreements are not self contained regimes and that they do not stop the application of international law at the date of conclusion of relevant treaty.

With these remarks, it is plausible to conclude that the approach used in interpreting the 1977 Treaty by the ICJ may have similar implications for the Nile Agreement in as far as the Agreement is silent. For example, in case Egypt uses its right and grants a State Party to the Agreement permission to undertake a project, since the Agreement does not provide for environmental impact assessment or monitoring (which are

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198 It should be noted that sustainable development contains both substantive and procedural elements. Substantive elements are mainly set out in Principles 3-8 and 16 of the Rio Declaration. The Principal procedural elements are found in Principles 10 and 17 dealing with public participation in decision making and environmental impact assessment.

199 Gabcikovo-Nagymaros Case, supra note 14 at paras. 112 and 140.

200 Birnie and Boyle, supra note 4 at p. 317.
elements of sustainable development) of future project undertaken on the Nile waters, there is no evident reason as to why the general law on EIA and monitoring will not apply, since the it does not expressly or impliedly exclude them.

One of the most significant elements of sustainable development is “sustainable utilization”. According to Birnie and Boyle, “there is enough evidence to show that sustainable utilization is at least an evolving element of international watercourse law, and probably an essential element if the objectives of sustainable development are to be fully realized”.201 According to Article 5 of the 1997 UN Watercourse Convention, States shall utilize international watercourses “with a view to attain optimal and sustainable utilization thereof and benefits therefrom…”202 It is striking that the notion of “sustainable utilization” was included in the Article entitled “Equitable and Reasonable Utilization and Participation”. The expression “with a view to” suggests that the objective of states in utilizing international shared watercourses is to achieve both “optimal and sustainable utilization” of the watercourse.203 I am of the view that Article 5(1) as a whole suggests that in order for a given utilization to be equitable it has to be sustainable. The first sentence of Article 5(1) expresses the basic rule of equitable utilization. The second sentence of the Article which provides for “sustainable utilization” elaborates upon the concept of “equitable utilization”. A given utilization of a watercourse cannot be equitable if it is not sustainable. In other words, sustainable utilization is a part of the principle of equitable utilization. This view is strengthened by the stipulation in Article 6 of the Watercourse Convention entitled “Factors Relevant to Equitable and Reasonable Utilization”. One of the factors to be taken into consideration for a use to be equitable and reasonable is “conservation, protection, development and economy of use of the water resources of the watercourse…”204 The stipulation implies sustainable utilization. In order for a utilization to be sustainable, it has to take into consideration the “conservation and protection” of the resource in this case shared watercourses. If the thesis that “sustainable utilization” is a facet of the principle of equitable and reasonable utilization which is a principle of customary international law is true, then it

201 Id., at p. 318.
202 1997 UN Watercourse, supra note 2 at Article 5(1)
203 Commentaries to Draft Articles on the Law of Non-Navigational Uses Of International Watercourses, supra note 3 at p. 97.
204 1997 UN Watercourse Convention, supra note 2 at Art. 6(1)(f).
(sustainable utilization) is a norm of international law in its own right in as far as international shared watercourses are concerned. This view has major ramifications to the 1929 Nile Agreement.

The “right to veto” accorded to Egypt by the 1929 Nile Agreement implies that what constitutes “sustainable utilization” is determined by her. However, this is not what is required by the principle of sustainable utilization. Even though it is not easy to clearly see what the principle of sustainable utilization means when applied to international shared watercourses, the “right to veto” is not part of the requirement of the principle. It is possible that Egypt may grant permission to projects of upstream States which are “sustainable” or deny those which fulfil the principle of sustainable use. The next chapter will discuss whether the principle and the Agreement can be harmonized either through interpreting the Agreement in the light of the principle. The chapter will also review whether the Agreement has been modified by the principle in case it cannot be interpreted in the light of the principle.

Common Article 1 of the ICCPR and ICESCR sparks an interesting debate with regards to sustainable development. Common Article 1(2) stipulates

All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.”

The Article talks of use of “natural wealth and resources”. Indisputably, international shared watercourses fall under this category of resources. Thus, “peoples” may use watercourses which straddle in their territories. The term “peoples” signifies that the right to utilization of resources such as watercourses is a collective or solidarity right.

However, this utilization is not absolute or unqualified. It should be “without prejudice to any obligations arising out of international economic cooperation, based on the principle of mutual benefit and international law”. In other words, the use should be equitable if it is to be based on the principle of “mutual benefit”. As we pointed out above, for utilization of watercourses to be equitable, it has to be sustainable. Further, the Article suggests that the utilization of resources should be based on international law. If, at present, international law principles suggest that the

\[205\] See, ICCPR, supra note 145; ICESCR, supra note 146.
use of watercourses should be equitable and sustainable, then the right to dispose such resources should respect those principles. Finally, the Article unequivocally provides that "in no case may a people be deprived of its own means of subsistence". The expression "in no case" can be interpreted to mean "in no circumstances whatsoever". In other words, the peoples' right to "own its means of subsistence" cannot be derogated. This would imply that not even a treaty such as the 1929 Nile Agreement can deprive the right. The stipulation would also be construed to mean that the use of waters in one state in disregard of peoples of other states "own means of subsistence" would be a violation of the Common Article 1(2). In the Ogoniland Case, the exploitation of the oil reserves in the ogoniland by Oil Consortiums under the blessing of the Nigeria Government in disregard of the interests of the Ogoni Communities was considered by the African Commission on Human and Peoples' Rights as a violation of Article 21(1) of the ACHPR which stipulates that "All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it."206 This provision is similar to the Common Article 1 discussed above.

To sum up the discussion on the Common Article 1, utilization of watercourses is a right but it comes with the duty to respect principles of international watercourses law such as equitable and reasonable utilization, no-harm principle as well as the principle of sustainable utilization. Further, no "peoples" should be denied of this basic right when it is attached to their "means of subsistence". This analysis of the Common Article 1 has major consequences on the 1929 Nile Agreement. The "right to veto" projects granted to Egypt by the Agreement could be translated to mean that Egypt can veto projects of upstream States irregardless of whether they fall under the ambit of the requirements of Common Article 1(2). For instance, Egypt has the right to veto projects on the River Nile which deprive "peoples" of other states their "own means of subsistence". Egypt can also veto projects which respect international principles of equitable and sustainable utilization. There is, prima-facie, a conflict between the Agreement and requirement of the Common Article 1. It should be noted that all Nile Basin States are Parties to the two Covenants discussed above. The next chapter will discuss whether the 1929 Nile Agreement can be harmonized with the requirements of

206 Ogoniland Case, supra note 160 at para.69.
the Articles which are customary in nature, either by interpretation in the light of the principles or by modification.

In the present chapter, it was demonstrated that there are international principles which govern the use shared watercourses. Some of the principles such as the right to equitable sharing, the duty not to cause transboundary harm, and the duty to cooperate are customary international norm in status. There are other concepts such as the right to water and the right to a sustainable development which have not crystallised into customary international norms.

The customary principles are contained in major watercourse treaties such as the 1997 international watercourse convention which is not yet in force and thus not binding to the Nile Basin States. However, such principles bind the parties to the Nile Agreement since they are customary. It should be noted that all these principles and concepts with regards to shared watercourses grant all basin states the right to utilize water in accordance with their requirements. On the other hand, the 1929 Nile Agreement grants Egypt the right to veto uses of other basin states. Can the principles and concepts be harmonized with the Agreement? If not, can the principles modify the Agreement? The answers to these questions will be found in the next chapter, which reviews whether such principles and concepts can be accommodated by the 1929 Nile Agreement through the processes of interpretation, revision or termination.
CHAPTER 4. THE INTERPRETATION, REVISION OR TERMINATION OF THE 1929 NILE AGREEMENT IN THE LIGHT OF PRINCIPLES OF INTERNATIONAL WATERCOURSE LAW.

As was discussed in the foregoing chapter, the principles of international shared watercourses include: equitable utilization, avoidance of transboundary harm and a duty to cooperate which involves the negotiation, consultation and attaining mutual agreement in good faith among riparian states. There are also some concepts such as the right to water and sustainable development which has inherent factors such as sustainable use of water which is a customary international norm. It should be noted that all these principles and concepts have one common thing. They grant all watercourse states the right to utilize the waters in their territories in accordance with their requirements. The principles do not grant any state the right to veto projects of other watercourse states as we saw in the preceding chapter. On the other hand, the 1929 Nile Agreement grants Egypt the right to veto projects of other basin states. In the present chapter, a discussion will ensue on how the 1929 Nile Agreement can be interpreted, revised or terminated in the light of those principles and concepts of international law.

It is not the purpose of the present thesis to discuss the issue of termination or revision as a result of conclusion of a new treaty since none has been concluded to that effect. In the former chapter we discussed the 1997 UN Convention on the Law of the Non-navigational Uses of Watercourses and how it codifies international law principles with regards to shared watercourses. Thus, the Convention has an impact on the 1929 Nile Agreement.

The subsequent section will discuss the interpretation of the 1929 Nile Agreement in the light of the principles of international watercourse law. Then a review will be made of whether the Nile Agreement has been terminated or revised by those principles.

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1 As was discussed in the preceding chapter, the UN Convention by itself cannot bind any of the Nile Riparian States since they are not Parties to it. However, the Convention has a potential of binding the Nile States as a result of its codification of norms of international shared watercourses; See, supra at Chapter 3 of this thesis.
1. Interpreting the 1929 Nile Agreement in the Light of Principles of international Watercourse Law

One of the ways that an agreement can accommodate evolving legal regimes is by interpreting it in the light of those regimes. It is widely accepted that treaties wield immense capacity of a dynamic interpretation in the process of evolutionary change in international law. The rationale of interpreting treaties in the light of other norms of international law is: to prevent conflicts between applicable norms; to avoid a scenario of “premature obsolence” of negotiated treaties; and, to avoid constant amendments.²

The rules of interpretation are provided for in Articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties. The Articles provide:

Article 31:
General rule of interpretation:
1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise in addition to the text, including its preamble and annexes:
   (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
   (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
   (a) any subsequent agreement between the parties regarding the interpretation of the treaty or application of its provisions;
   (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
   (c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

Article 32:
Supplementary means of interpretation:
Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31, or determine the meaning when the interpretation according to Article 31:
(a) leaves the meaning ambiguous or obscure; or,
(b) leads to a result which is manifestly absurd or unreasonable.

It is convenient at this juncture to make certain more general observations with regards to the provisions on interpretation of treaties in Articles 31 and 32 of the 1969 Vienna Convention. Article 4 of the Convention generally provides for non-retroactivity of the Convention, “without prejudice to the application of any rules set forth in the present Convention to which treaties would be subject under international law independently of the convention”. However, it is widely accepted that the Convention is a reflection of customary international law as it stands now. Particularly, it is well established that Articles 31 and 32 of the 1969 Vienna Convention reflect pre-existing customary international law, and thus are applicable to treaties concluded before the entry into force of the Convention, unless there are *lex specialis* rules in a given treaty indicating the contrary.\(^3\) The ICJ has consistently applied customary international norms of interpretation inherent in the above Articles to treaties older than the Convention and even to non-parties.\(^4\)

In the *Arbitration Regarding the Iron Rhine Railway*, the Arbitral Tribunal noted that, “although the clauses contained within Article 31 are not hierarchical, there is no doubt that the starting point for interpretation is the ordinary meaning to be given to the terms, taking them in context, and having regard also to the object and purpose of the treaty”.\(^5\) The point made by the Tribunal was that, even though there is no hierarchical order of interpretation clauses contained in Article 31, in interpreting one should look at the ordinary meaning of the words in the first instance. However, the review of the ordinary meaning of the words should extend further and look at the context of the case. For example, has the meaning of the words evolved and thus can the words be interpreted in the light of the evolution? Finally, this interpretation of the words should not lose track of the object and purpose of the treaty which signifies the will of the states parties to it. This method of interpretation gives room to “evolutionary interpretation”.

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\(^3\) *The Arbitration Regarding the Iron Rhine (“Ijeren RIJN) Railway (Belgium v. Netherlands)*, Award of Arbitral Tribunal, 2005., at para. 45.


\(^5\) *The Iron Rhine Case*, supra note 3 at para. 47.
Article 31(3)(C) of the Vienna Convention on the Law of Treaties expressly provides that in the event of interpretation of a treaty, account shall be taken together with the context “any relevant rules of international law applicable in the relations between the parties”. This process of accommodative interpretation was acknowledged by the ICJ. In the Namibia Advisory Opinion, the ICJ nodded to the fact that treaties should be “interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation”. Further, the ICJ acknowledged “the primary importance of interpreting an instrument in accordance with the intentions of the parties at the time of conclusion”. This approach by the ICJ of combining both the elements of intertemporal and evolutionary interpretation is reflected in the International Law Commission commentary to what is presently Article 31(1)(c).

The World Trade Organisation Appellate Body has utilised the concept of accommodative/evolutionary interpretation to certain concepts in the 1947 General Agreement on Tariffs and Trade (GATT). In the US-Shrimp Turtle Decision, the Appellate Body interpreted the GATT term “exhaustible natural resources” provided for in GATT Article xx (g) with reference to inter alia, the 1982 United Nations Convention on the Law of the Sea (UNCLOS), the 1979 Convention on Migratory Species, the 1973 Convention on International Trade in Endangered Species (CITES), and, the 1992 Convention on Biological Diversity.

The evolutionary interpretation technique applied in the cases discussed above is about giving meaning to the terms of a given treaty. This technique cannot be extended for the purpose of creating new norms. As manifested in the above cases, the interpretation was concerned with specific provisions or phrases such as “exhaustible natural resources” in the light of contemporary general international law. In other words, such interpretation should be intra legem. In the Libyan Arab

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7 Idem. See also Aegian Sea Continental Shelf Case (Greece v. Turkey), ICI Reports 3, at 32-33; Oil Platforms Case (Iran v. United States of America), ICI Reports at paras 40-1; Bankovic v. Belgium (2002), 41 International Legal Materials 517, at paras. 55-66; Al-Adansi v. United Kingdom (2001), 123 International Law Reports 24; Forgarty v. United Kingdom (2001) 123 International Law Reports 54; McElhinney v. Ireland, 12 International Law Report 73.


Jamahiriya/Chad Case, the ICJ was of the opinion: “A treaty must be interpreted in
good faith, in accordance with the ordinary meaning to be given to its terms in their
class and in the light of its object and purposes”.10 In the Kasikili/Sedudu Case, the
ICJ categorically stated “In order to illuminate the meaning of words agreed upon in
1890...there is nothing that prevents the Court from taking into account the present-
day state of scientific knowledge.”11

In the European Communities-Measures Affecting the Approval and Marketing of
Biotech Products12 the application of Article 31(3)(c) was at the core of the Case. The
European Communities argued that “the panel is required to interpret the relevant
rules of WTO law consistently with other rules of international law that may be
relevant to the proceedings”.13 According to the Communities, the Panel did not have
a choice but to apply rules of international law that are pertinent to the Case. This is
evidenced by the expression “the panel is required”. The European Communities were
of the view that any rule of international law which may be relevant to a case at issue
should be applied by the Panel in interpreting a disputed agreement. This is in
disregard of whether the relevant rule is binding to the parties in a dispute.14 In
concretizing her argument, the European Communities cited the Shrimp-Turtle Case
discussed above.15

On her part, the United States argued that “the only way other sources of international
law could be pertinent to this dispute is if,... those other sources of law would assist
the Panel in clarifying the existing provisions of the [covered] agreements in
accordance with the customary rules of interpretation of public international law”.16 In
other words, the assertion by the United States meant that if international law is to be
resorted to in interpreting stipulations of an agreement [WTO Agreement in this

10 Territorial Dispute (Libyan Arab Jamahiriya/Chad), supra note 4 at pp. 21-22, para 41.
11 Case Concerning Kasikili/Sedudu Island, supra note 4 para 20.; Compare with Controversia Sobre el
Recorrido de la traza deel limite entre Hito 62 y el Monte Fitz Roy (Argentina/Chile) [Dispute
Concerning the Course of the Frontier between B.P. 62 and Mount Fitz Roy (Argentina/Chile) also
known as Laguna del Desierto Case, Arbitral Award of 21st October 1994, international Law Report,
157.
12 WTO, European Communities-Measures Affecting the Approval and Marketing of Biotech Products,
13 Id., at para. 7.52.
14 Id., at para. 7.52 and 7.71
15 Id., at para. 7.52
16 Id., at para. 7.57.
case], then it is only pertinent in as far as it assists the Panel in the interpretation of the particular disputed stipulations of the agreement at issue. Further, the United States, Canada and Argentina fronted the argument that the relevant applicable rules should be applicable in relations between the parties in a dispute.\textsuperscript{17} This argument was in line with the provision of Article 31(3)(c) of the Vienna Convention that the “relevant rule(s) of international law” should be “applicable in the relations between the parties”.

The Panel held that, in accordance with Article 31(3)(c) of the Vienna Convention, a rule of international law is not applicable in interpretation of a disputed stipulation of an agreement if at least one of the parties to a dispute is not a party to the rule.\textsuperscript{18} With regards to rules of international law not applicable to the parties in a dispute, the Panel pointed out that “it is not apparent why a sovereign State would agree to a mandatory rule of treaty interpretation which could have as a consequence that the interpretation of a treaty to which that State is a party is affected by other rules of international law which that State has decided not to accept”.\textsuperscript{19} The Panel further held that, such rules, in addition to dictionaries, “may in some cases aid a treaty interpreter in establishing or confirming, the ordinary meaning of treaty terms in the specific context in which they are used”.\textsuperscript{20} The Panel also rightly pointed out that “such rules would not be considered because they are legal rules, but rather because they may provide evidence of the ordinary meaning of terms in the same way that dictionaries do” and “they would be considered for their informative character”, since “it follows that when a treaty interpreter does not consider another rule of international law to be informative, he or she need not rely on it”.\textsuperscript{21}

This technique of interpretation should be undertaken in the strict sense of the word and should not be used as a means of modification of treaties. This task should be done in the light of the object and purpose of the treaty.\textsuperscript{22} Sight must not be lost of the

\textsuperscript{17} For United States Argument, see, \textit{Id.}, at para. 7.58.; For Canada’s Argument, see, \textit{id.}, at para. 7.60; for Argentina’s argument, see, \textit{id.}, at para. 7.63
\textsuperscript{18} \textit{Id.}, at para. 7.71.
\textsuperscript{19} \textit{Idem.}
\textsuperscript{20} \textit{Id.}, at para. 7.92.
\textsuperscript{21} \textit{Idem.}
\textsuperscript{22} 1969 Vienna Convention on the Law of Treaties, 1969, 1155 \textit{UNTS} 331, at Article 31(1).; See also, \textit{Dispute Concerning Access to Information Under Article 9 of the OSPAR Convention, (Ireland v.}
fact that interpretation seeks to provide flesh to the intention of the parties. The interpretation should not be in abstracto, by a mechanistic appreciation of indicia. Rather, “the task is to decide what general idea the Parties had in mind, and then make reality of the general idea through the contemporary knowledge”. Judge Bedjaoui held a similar view in the Gabčíkovo-Nagymaros case. He expressed:

Une interpellation d’un traité qui viendrait à substituer un tout autre droit à celui qui le régissait au moment de sa conclusion constituerait une revision détournée. ‘interprétation’ n’est pas ‘substitution’ à un texte négocié, ni convenu. Sans qu’il faille renoncer à même nécessaire dans hypotheses très limitées, il convient de dire qu’elle ne peut pas être appliquée automatiquement à n’importe quelle affaire.

However, the rulings of the Iron Rhine Case seem particularly stunning in as far as the interpretation of treaties in the light of new legal developments is concerned. The Arbitral Tribunal interpreted Article XII of the 1893 Iron Rhine Treaty in an evolutive manner by applying new technical developments. Netherlands argued that she was “under an obligation to bring the Iron Rhine railway back to the levels maintained during the regular [albeit light] use of the line prior to discontinuation of such use in 1991”. On her part, Belgium argued that due to the development in technology, Article XII of the Treaty should be interpreted to apply both to adaptation and modernisation of railway. The Tribunal pointed out that “the question of significant adaptation and modernisation is a more complex, and as yet unchartered problem. The application of international law may assist in its resolution.” The Tribunal rightly expressed that Article 31(3)(c) of the Vienna Convention required that in interpretation, account should be taken of “any relevant rules of international law applicable in the relations between the parties”. The Tribunal held:

In the present case it is not a conceptual or generic term that is in issue, but rather new technical developments relating to the operation and capacity of the railway. But here too, it seems that an evolutive interpretation, which would ensure an application of the treaty that would be in terms of its object and purpose, will be preferred to a strict application of intertemporal rule.

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23 Declaration of Judge Higgins to the Kasikili/Sedudu Case, in supra note 4 at para. 4.
25 Iron Rhine Case, supra note 3.
26 Id., at para. 80
27 Id., at para. 76.
28 Id., at para. 26, final submissions of Belgium.
29 Id., at para. 77.
30 Id., at para. 79
31 Id., at para. 80.
On this basis, the Tribunal decided:

The object and purpose of the 1893 Treaty of Separation was to resolve the many difficult problems complicating a stable separation of Belgium and the Netherlands: that of Article XII was to provide for transport links from Belgium to Germany, across a route designated by the 1842 Boundary Treaty. This object was not for a fixed duration and its purpose was “commercial communication”. It necessarily flows, even in the absence of specific wording, that such works, going beyond restoration to previous functionality, as might from time to time be necessary or desirable for contemporary commerciality, would remain a concomitant of the right of the right of transit that Belgium would be able to request. That being so, the entirety of Article XII, with its careful balance of the rights and obligations of the parties, remains in principle applicable to the adaptation and modernisation requested by Belgium.\(^\text{32}\)

This decision by the Tribunal raises some major questions with regards to interpretation. First, the Tribunal held that evolutive interpretation in line with Article 31(3)(c) would also be applicable in cases of new technological developments. This is a wrong interpretation of what the Article requires. The Article clearly expresses that in the interpretation of an agreement “any relevant rules of international law” which are binding on the parties may be applied. To suggest as the Tribunal does that the Article gives room to new technological developments is wrong. It is difficult to explain on what basis the Tribunal decided that new technological developments can be resorted to in evolutive interpretation.

In supporting its position, the Tribunal wrongly cites the Gabcikovo-Nagymaros Case view that “the Treaty is not static, and is open to adapt to emerging norms of international law”.\(^\text{33}\) What the Tribunal fails to note is that the ICJ was referring to international norms, in line with Article 31(3)(c) of the Vienna Convention and not any new developments such as technological developments. The Tribunal also failed to notice that in the same paragraph that it cited in the Gabcikovo-Nagymaros Case, the ICJ pointed out that the responsibility to adapt those new norms to the Treaty in question was the responsibility of the parties and not the Court. In contrast, in the Iron Rhine Case, the Tribunal purports to adapt new technological developments to the existing treaty, and gives no room for the parties to discuss in good faith the implementation of these developments. In this case, the Tribunal was not interpreting “a conceptual or generic term” in the light of “relevant rules applicable in the relation between the parties” as required by international law and supported by case law discussed above. Indeed, the Tribunal was trying to interpret terms of the Treaty in the light of technological developments which is unprecedented in international law.

\(^{32}\) Id., at para. 83.
\(^{33}\) Id., at para. 80. For the view of the ICJ, see, Gabcikovo-Nagymaros Case, supra note 24 at para. 112.
At best this can be considered as a radical evolutive interpretation, at worst it can be considered to be a re-writing of the Treaty by the Tribunal which is not permissible under international law. I am of the view that the right approach to follow in interpreting generic concepts or terms of a treaty in an evolutive manner is that of European Communities-Measures Affecting the Approval and Marketing of Biotech Products Case which is in line with norms of international law provided for in Article 31(3)(c) of the Vienna Convention and supported by the case-law discussed in the present section.

Armed with the above review of the debate on how agreements can accommodate evolving legal regimes, it is now convenient to determine whether the 1929 Nile Agreement can be interpreted in such a manner as to harmonize it with contemporary international principles of shared watercourses. In other words, is the Agreement inherently evolutionary and thus prone to evolutionary interpretation? In order to answer this question, a review of the intention of the parties to the Agreement is pertinent.

In the report of the Nile Commission, which is an integral part of the 1929 Nile Agreement, it was expressed that the Commission was “aware that doubtful points may arise” in the interpretation of the Agreement. However, the Commission was quick to point out that “it does not feel called upon to make proposals with regard to special arrangements for dealing with such doubts and differences, which seem to be outside the sphere of a technical commission”. In the Note of Pasha to Lord Lloyd, it was expressed: “It is recognised that in the course of the operations here, contemplated uncertainty may arise from time to time either as to the correct interpretation of a question of principle or as to technical or administrative details. Every question of this kind should be approached in a spirit of mutual good faith”. Further, “in case of any difference of opinion arising as to the interpretation... which the two governments find themselves unable to settle, the matter shall be referred to an independent body with a view of arbitration”.

34 The Report of the Nile Commission is annexed to the Note from Mohamed Mahmoud Pasha to Lord Lloyd, 7th May 1929, 93 LNTS 44, excerpts reprinted in Legislative Texts, Treaty no. 7, p. 88, para. 91.
35 Idem.
36 Note of Pasha to Lord Lloyd, in LNTS, id., 15 at para. 4 (f).
37 Id., para 4(7).
From the above, it is discernable that the provisions on interpretation in the 1929 Nile Agreement are not meticulously tailored. They only elaborate the procedural matters of interpretation and not the substantive matters of interpretation. It is therefore up to the independent arbitration body provided for in the Agreement to interpret it in the light of rules of interpretation of international law since the Agreement does not “contract out” of them. Hence, the possibility of the arbitration body using the technique of evolutionary interpretation which enjoys substantial support in international law as we saw earlier cannot be ruled out.

However, the evolutionary interpretation of the 1929 Nile Agreement has to be undertaken with some caution. The case law manifests that excessively ambitious technique of re-interpretation or “cross-fertilization” of treaties by reference to later norms of international law “are likely to have only limited success”. 38 It is therefore pertinent to review whether the limits of evolutionary interpretation recognised by international tribunals are applicable to the 1929 Nile Agreement. In order to undertake the task, it is important to review whether the stipulations in the 1929 Nile Agreement were intended to be evolutionary.

The most controversial provisions as we saw elsewhere, include, first, the stipulation that:

Save with the previous agreement of the Egyptian Government, no irrigation or power works or measures are to be constructed or taken on the River Nile and its branches, or on the lakes from which it flows, so far as all these are in the Sudan or in countries under British administration, which would, in such a manner as to entail any prejudice to the interests of Egypt, either reduce the quantity of water arriving in Egypt, or modify the date of its arrival, or lower its level. 39

The second stipulation is that of Egypt’s “natural and historical rights in the waters of the Nile” which is ubiquitous in the Agreement. As was discussed in the previous chapter, what constitutes “natural and historic rights” is ambiguous and thus prone to interpretation. The question is: can such stipulations be interpreted in the light of contemporary international legal principles of shared watercourses?

38 Boyle, supra note 2 at p. 569. See also Ireland’s attempt to rewrite the 1982 United Nations Convention on the Law of the Sea, in the Mox Plant Arbitration (PCA, 2003); for a contrary view, see, Sands in Boyle and Freestone, supra note 24 at p. 39.
39 See Note of Pasha to Lord Lloyd, in LNTS, supra note 34 at para 4 (b).
With regards to the first stipulation mentioned above, it should be recalled that Egypt possesses the right to veto projects of upstream States under the 1929 Nile Agreement. This right to veto by a downstream state to projects of upstream states is not one of the requirements of principles of international watercourse law.\(^{40}\) In the *Lac Lanoux* Arbitration, Spain contented that “the execution of the French project required the agreement of the two Governments, and that in the absence of such agreement the country which proposed the project could not have freedom of action to undertake the works”. Spain based its contention on the Bilateral Treaty and Additional Act between herself and France as well as on generally accepted rules of international law.

The Tribunal was of the view that:

To admit that in a given matter competence may no longer be exercised except on the condition of or by means of an agreement between two states is to place an essential restriction on the sovereignty of a State, and it may be allowed only if there is conclusive proof. Undoubtedly international practice discloses some specific cases in which this assumption is proved... But these cases are exceptional and international case law does not readily recognize their existence, especially when they infringe upon the territorial sovereignty of a State which would be true in the present case.

In fact, to evaluate in its essence the need for a preliminary agreement, it is necessary to adopt the hypothesis that the States concerned cannot arrive at an agreement. In that case, it would have to be admitted that a State which ordinarily is competent has lost the right to act alone as a consequence of the unconditional and discretionary opposition of another State. This is to admit “a right of consent”, “a right of veto”, which at the discretion of one State paralyses another State’s exercise of its territorial competence.

For this reason, international practice prefers to resort to less extreme solutions, limiting itself to requiring States to seek the terms of an agreement by preliminary negotiations without making the exercise of their competence conditional on the conclusion of this agreement.\(^{41}\)

In the light of the above, the Tribunal concluded that, given international practice, “the rule that States may use the hydraulic power of international waterways only if preliminary agreement between the states concerned has been concluded cannot be established as a customary rule or, still less, as a general principle of law”.\(^{42}\) In reaching this conclusion, the Tribunal noted that “…there is a rule prohibiting upper riparian State from altering the waters of a river in circumstances calculated to do serious injury to the lower riparian State...”\(^{43}\) It should be noted that the dispute involved the utilization of water for the generation of the Hydraulic power. However, the international norms applied in deciding the Award are applicable to any dispute involving any kind of utilization of water. Of importance to note is that the Tribunal

\(^{40}\) For factors of equitable and reasonable utilization, see, *supra*, Chapter 3 of this thesis.


\(^{42}\) *Idem.*

\(^{43}\) *Idem.*
reached the decision that there was no right of veto of projects by one party in “customary international law or general international law”. The Tribunal propounded that in accordance with “the trends apparent in current international practice...” states are obliged “…to take into consideration, adverse interests in the course of negotiations...” and “…give a reasonable place to these interests in the adopted solution...”\(^{44}\)

Since there is no international obligation to prior consent of states in the utilization of a watercourse by other states, it can only result from a treaty such as the 1929 Nile Agreement. Given that the Agreement gives Egypt a right to veto which contradicts the international norm of “taking into consideration all adverse interests” and adopting a solution, it may be plausible to assert that the two viz. 1929 Nile Agreement and international obligations with regards to the utilization and sharing of watercourses (discussed in the previous chapter) are irreconcilable. Given the fact that interpretation of terms of a treaty in the light of principles of international law is permissible under international law unless it is proven this would be contrary to the parties’ “intentions and expectations expressed during the negotiations preceding the conclusion of the treaty”, the 1929 Nile Agreement cannot be interpreted in the light of the requirements of the norms of international watercourse law since this would be contrary to the spirit and the intention of the parties of the Agreement which was to grant Egypt a “right to veto” projects of upstream states. As we discussed in the previous chapter, the principles of international watercourse law such as equitable utilization, no-harm, sustainable use as well as international law concepts such as the right to water grant all the riparian states the right to utilization of water in a cooperative manner. Thus, these principles cannot be harmonised with the requirements of the 1929 Nile Agreement since it grants Egypt the right to veto projects at her own whims and caprices without taking into consideration the principles. Therefore, the only alternative to reconcile the two viz. the Agreement and the principle, is by modifying or terminating the Agreement in the light of the principles as will be discussed in the subsequent parts of the present chapter.

\[^{44}\text{Id.}, \text{para. 1068.}\]
Now we turn to the second controversial part of the Agreement, that of Egypt’s “natural and historical rights in the waters of the Nile”. As was discussed in the previous chapter, it might have been that “natural and historical rights” did in fact mean Egypt’s rights to utilize the waters of the Nile. However, considering the context of the Agreement which gave Egypt the “right to veto” then, what was considered as “natural and historical rights” of Egypt cannot be understood to be rights granted by norms of shared watercourses since what the norms provide is that all riparian states should have the right to utilize the resources of the water in a cooperative manner. Even if there was a possibility of interpreting Egypt’s “natural and historical rights” as her right to utilize the Nile waters as provided by international watercourse law, it would have little significance since it would be countered by the provision of the 1929 Nile Agreement that grants her the “right to veto” projects of upstream states which is against the spirit of the principles of international watercourse law.

From the above discussion it may be discerned that the 1929 Nile Agreement cannot be interpreted in the light of principles of international watercourse law since they are different in their terms. Therefore, the only way to reconcile the 1929 Nile Agreement and the principles is by changing the Agreement in the light of the principles of international watercourse law. The following section will examine whether and how the Nile Agreement can be revised or terminated in the light of principles of international watercourse law.

2. The Relationship of Customary Law of Shared Watercourses and the 1929 Nile Agreement

It is generally accepted that there is no inherent hierarchy of the traditional sources of international law enumerated in paragraphs 1 (a) to (c) of article 38 of the ICJ Statute viz. treaties, customary international law and general principles of law.45 In other

45 Some authors consider that the order in which sources of international law appear in Art. 38 of the ICJ reflects a hierarchy of sources of international law with regards to “an authoritative initial basis for the application of international law”; see Lauterpacht, H., International Law: Collected Papers (ed. E. Lauterpacht, (i), 1970, 86-88; Parry C., The Sources and Evidences of International Law, 1965, 33-34.
words, none of the traditional sources has a higher normative value or *lex superior*. Accordingly, a conflict of principles of customary international law such as those of shared watercourses and a treaty such as the 1929 Nile Agreement cannot be solved by reference to the respective sources from which norms originate. This view suggests the possible conflict of norms originating from treaties and those originating from customs. Customary international law may proceed to evolve outside the scope of a given treaty leading to the establishment of new rules conflicting with that treaty. A vivid example is the evolution of customary principles of international watercourse law which conflict the 1929 Nile Agreement as was discussed elsewhere.

Given the fact that there is absence of inherent *lex superior* in sources of international law—since the sources are all forms of expression of state will—other criteria can be resorted to in solving conflict of this nature (viz. the 1929 Nile Agreement and recent customary principles of international watercourse law). These criteria are: the chronological order of the conflicting norms (*lex posterior*); or the relative degree of generality (*lex specialis*). If the conflicting rules are all expressions of equal authority, then the rule which is more recent (*lex posterior*), or more specific (*lex specialis*) will prevail. Despite these criteria, there is still controversy as to whether treaties can be revised or terminated in the light of novel customary international law. The subsequent subsection will discuss revision or termination of the 1929 Nile Agreement in the light of the customary principles of international watercourse law by application of the criteria discussed herein.

3. Revision or Termination of the 1929 Nile Agreement as a Result of Emergence of a New Custom

As we saw in the above subsection, a number of authors agree that a treaty can be revised or terminated by a new customary norm due to the fact that custom and treaties are sources of international law of the same value status. The development of customary international law and treaty replicate different ways a state can express

consent to be legally bound. In other words, one way of expressing consent may be substituted for another, depending on whether the will of states has changed accordingly.

If it is accepted that treaties and customs have the same hierarchical value, then treaty termination or revision is regarded as taking place automatically on account of new customary law that binds all the parties to the treaty.\(^{(48)}\) This would mean that, if it is determined that the customary international principles of international shared watercourses are *lex posterior* in relation to the 1929 Nile Agreement, then it would automatically revise or even terminate it depending on their reconcilability. Before we pursue this discussion, it is paramount to determine which of the two viz. customary international legal principles of shared watercourses and the 1929 Nile Agreement is *lex posterior*.

(1) *The 1929 Nile Agreement and the International Legal Principles of International Watercourses: which is Lex Posterior?*

According to different authors, States have since time immemorial taken various positions with regards to the utilization of shared watercourses.\(^{(49)}\) These positions of States have been arranged in four theoretical bases by publicists. They are: the absolute territorial sovereignty; the absolute territorial integrity; limited territorial sovereignty; and, community of interests.\(^{(50)}\) However, none of the four bases formed customary international law principles with regards to international watercourses, more especially in as far as the non-navigable uses of the watercourses were concerned. The four bases appeared in different treaties regarding non-navigable uses of watercourses. It is not the intention of the present thesis to explain in detail what entails the different bases and which treaties incorporated them.


\(^{(50)}\) For a detailed discussion of these bases, see generally, Huber, M., ‘Ein Beitrag zur Lehre von der Gebietshoheit an Grenzflüssen’ *Zeitschrift Für Völkerrecht Und Bundesstaatsrecht*, 1907, pp. 29 et seq., 159 et seq.; McCaffrey, *idem*, Godana, *idem*. 168
However, of interest to the present work is the fourth base which is “community of interest”. Community of interest is synonymous to equitable utilization, since what is required under this base is that waters of a shared watercourse should be shared by basin states.\textsuperscript{51} This principle also embraces other principles such as the no-harm, the right to water and the sustainable use of watercourses since all of these factors have to be taken into consideration if the interests of the riparian states as a whole are to be realised. The principle of community of interest was a well established customary international norm with regards to navigational uses of watercourses. This was manifested by the Permanent Court of International Justice (PCIJ) in its 1929 decision in the case concerning the \textit{Territorial Jurisdiction of the International Commission of the River Oder}.\textsuperscript{52} However, with regards to non-navigational uses, it was not clear whether the principle was applicable as a norm of customary international law then.

As recently as 1985, authors such as Godana did not recognize the principle of the community of interest as a norm of customary international law. He noted that the notion of community of interests is an idea “well known in municipal water systems and is the legal principle most appropriate for a fully developed legal community” but “the idea has yet to develop into a principle of international law governing international water relations in the absence of treaties”.\textsuperscript{53} McCaffrey is of the view that the principle of “community of interests” as a customary international norm with regards to non-navigational uses of a shared watercourse is recent. Commenting on Godana’s view, he noted that the reason that Godana did not consider the principle of “community of interest” as a customary international law was that “he wrote well before the International Court of Justice passed the Judgment in the \textit{Gabcikovo-Nagymaros Case}”.\textsuperscript{54}

Indeed, the ICJ in this case asserted that “Modern development of international law has strengthened [the community of interest] principle for non-navigational uses of international watercourses as well”.\textsuperscript{55} The judgment of the ICJ recognised the customary principle of “community of interest” as “modern”. The ILC, in drafting the

\begin{footnotes}
\item[51] McCaffrey, \textit{id.}, at p. 150.
\item[52] \textit{Territorial Jurisdiction of the International Commission of the River Oder}, Judgment no. 16, 10 September 1929 PCIJ Series A no. 23, at p. 27-8.
\item[53] Godana, \textit{supra} note 49 at p. 49.
\item[54] McCaffrey, \textit{supra} note 49 at p. 163.
\item[55] \textit{Gabcikovo-Nagymaros Project Case}, \textit{supra} note 24 at para. 85.
\end{footnotes}
Articles of the Convention of the Non-navigable Uses of Watercourses, had to undertake a survey "of all available evidence of the general practice of States, accepted as law, in respect of non-navigational uses of water..." in the eighties whose conclusion was that certain principles of international watercourses such as equitable utilization and no harm had attained the status of customary international law as a result of state practice.56

Further evidence that the customary international principles of international watercourse law are *lex posterior* in relation to the 1929 Nile Agreement is to be found in the stipulations of the Agreement. In the report of the Commission which is an integral part of the Agreement, it was stipulated: "Precedents in this matter of water allocation are rare and practice varied; and the Commission is aware of no generally adopted code or standard practice upon which the settlement of inter-communal water allocation might be based."57 This is clear evidence that at the time of the inception of the 1929 Nile Agreement, there was no customary international norm known by the parties to it. Therefore, the advent of principles of international watercourse law is *lex posterior* compared to the Agreement.

All the above evidences show that the customary international norms of shared watercourses are later than the 1929 Nile Agreement. Going by the argument so far, it would be deemed that the 1929 Nile Agreement, which is not in conformity with the principles of international watercourse law as they are today, is automatically revised or terminated by the principles, since they are *lex posterior*. However, this position is a recipe for further problems with respect to the relationship between *lex posterior* and *lex specialis* as will be discussed in the subsequent subsection.

(2) *Lex Posterior* v. *Lex Specialis*

It is evident from the above discussion that the customary principles of international watercourse law are *lex posterior* compared to the 1929 Nile Agreement. However,

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the issue of which of the two is lex specialis is debatable. Further, in case it is proven that the Agreement is the lex specialis, does it suprervene the customary international law of shared watercourses which is lex posterior? According to Kontou, it is likely that a prior treaty may apply more specifically to the issue at hand than a new customary international norm due to the fact that it either binds a limited number of states (lex specialis ratine personae) or, it provides a more detailed regulation of the particular issue at hand (lex specialis ratione materiae). In line with this view, it may be asserted that the 1929 Nile Agreement is lex specialis because it binds a few States and it is specific to the Nile River, as opposed to the customary international norm of equitable utilization which is binding erga omnes. Further, the view that the Agreement is lex specialis is also evident in its stipulations which suggest the intention of the Parties.

While the Report of the Nile Commission noted that there was absence of established practice with regards to water allocation of an international watercourse, it also pointed out to the fact that there were “special factors, historical, political and technical, which might render inappropriate too strict an application of principles adopted elsewhere”. This may be read as a suggestion that the Agreement was specific to the circumstances surrounding the Nile Agreement. However, it remains unclear whether the Commission would have taken a different approach had there been established customs with regards to allocation of waters such as those of equitable utilization and no harm.

The debate still lingers: which of the two, lex specialis or lex posterior would take precedence? This debate has encountered division in the views of publicists. According to some authors, the lex posterior always terminates or revises the lex prior, even in cases where the prior rule is lex specialis. On the contrary, some authors are of the view that a later law, general in character, does not repeal an earlier

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58 Kontou, supra note 47 at p. 24.
60 Monaco, R., 'Cours Général de Droit International Public' 125 Recueil des Cours (1968-III), at p. 214; Castberg, F., 'La Méthodologie du Droit International Public', 43 Recueil des Cours (1933-1), at 338.
law that is special in nature (lex posterior generalis non derogate legi prior specialis).61

The practice of international tribunals has been to apply treaties that conflicted with more recent customary international norms without justifying whether the decisions are based on the concepts of lex specialis or lex posterior. Tribunals have been reluctant to accept the view that new customary law such as those of international watercourse law can automatically revise or terminate a treaty such as the 1929 Nile Agreement unless this is what the parties intended.62 In the United Kingdom v. France Continental Shelf Arbitration, the Tribunal acknowledged that “only the most conclusive indications of the intention of the parties to the 1958 Convention to regard it as terminated” in the light of evolution of the law of the sea would justify the Convention obsolete or inapplicable.63 According to some authors, the proclivity of tribunals to apply treaties in the first instance in cases where there is a new custom is basically for practical considerations.64 Moreover, the task of determining which of the two viz. treaty or custom is lex specialis is daunting. Further, Tribunals might have been motivated by the importance attached to the principle of pacta sunt servanda and the importance of ensuring treaty stability.65

In the view of the author, in case there is a contradiction between a treaty and a new custom, then it is incumbent on the will of the States to determine which prevails over the other. It is injudicious to apply either the rule of lex posterior or lex specialis in solving such conflicts in neglect of the intentions of the parties. In case the parties in their practice decide to apply a supervening custom, then the prior treaty is considered terminated or revised as a result of another concept of desuetude as will be discussed shortly. Therefore, the mere fact that the customary principles of international watercourse law are lex posterior is not enough to suggest that they automatically

65 Schwanenberger, id., at p. 56.
revised or even to the extreme terminated the 1929 Nile Agreement. Conversely, the sheer fact that the Agreement is *lex specialis* is not analogous to the fact that it automatically prevails over the supervening custom of equitable sharing. The most important factor to consider in determining which of the two viz. the Agreement or the custom takes precedence is to review the intentions of the parties to the Agreement. The ensuing discussion will elaborate how a treaty can be terminated or revised in the light of a supervening custom through a process known as *desuetude* and whether the 1929 Nile Agreement has been terminated or revised as a result of the process.

(3) Termination by *desuetude*: Has the 1929 Nile Agreement been a victim of *desuetude*?

A treaty can be terminated when it falls into *desuetude* as a result of its non-application by its parties over a period of time. This establishes their consent to let it lapse. However, mere lapse of time even if long is not sufficient for a treaty to fall into *desuetude*. The disuse can be evinced when states party to a treaty fail to invoke it in situations where they were expected to do so, or if they have acquiesced in conduct constituting the violation of the relevant treaty. In the *Yuille, Shortridge and Co. Arbitration* between the Great Britain and Portugal, the Tribunal accorded to the fact that there is a possibility of treaties being terminated by *desuetude*. It stated: "il est certain qu'il appartient aux gouvernements d'abroger expressément un traité ou d'en suspendre l'usage, ce qui devra être regardé par leurs sujets comme une desuetude dérogeant au traité".

Some authors describe *desuetude* as treaty termination based on the "implied consent" of the parties involved. The ILC was of the same view. It stated:

...the Commission considered whether "obsolescence" or "desuetude" should be recognised as a distinct ground of termination of treaties. But it concluded that, while "obsolescence" or "desuetude" may be a factual cause of the termination of a treaty, the legal basis of such termination, when it

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66 *Id.*, at p. 535.
occurs, is the consent of parties to abandon the treaty which is to be implied from their conduct in relation to the treaty. In the Commission’s view, therefore, cases of “obsolescence” or “desuetude” may be considered as covered by [Article 51, paragraph b.] under which a treaty may be terminated “at any time by consent of all parties.”

On the contrary, authors such as Capotorti are of the view that desuetude has its basis in customary international law. He stated: “... la doctrine dominante contemporaine reconnait à la coutume une pleine autonomie de caractères par rapport à l’ accord., et la réalité des relations juridique internationals assigne à la pratique des Etats un role qui dépasse largement ce schema de l’accord tacite”.

This view of Capotorti is, however, contradicted by opinions of prominent judges in international tribunals which have constantly applied the term desuetude with regards to termination by the implied consent of parties involved. In the Nuclear Test Case, Judges Onyeama, Dillard, Jiménez and Sir Humphrey Waldock, in their dissenting opinion were of the view that it was impossible “to conclude from the conduct of the parties in relation to the 1928 Act, and more especially from that of France prior to the filling of the application in this case, their consent to abandon the Act”. In order to prove implied abrogation, it was paramount “to produce proof of the facta conclusional which would have to be relied on to demonstrate the contrarius consensus of the parties”.

In the Aegean Sea Continental Shelf Case, Judge de Castro and Judge ad hoc Stsinopoulos, in their dissenting opinions, were of the view that the General Act of 1928 was still in force because parties to it “had not evinced the will to cease to be parties to it”. It should be noted that from the above cases, the decisions of the ICJ were reluctant to discuss the issue of desuetude. The issue was discussed in passim in the dissenting opinions.

According to McNair, desuetude is reasonably well accepted in case of failure of parties to invoke a treaty, or acquiescence by them through acts or conduct which prima facie constitutes violations of the given treaty:

Provided that the said failure or acquiescence:
   1. had been frequently repeated;

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71 Capotorti, supra note 48 at p. 519.
72 Nuclear Test Case, ICJ Reports (1973), 99.
73 Id., at p. 338; see also dissenting opinion of Judge Barwick, at 405, 406.
74 Id., at p. 381.
75 Aegean Sea Continental Shelf Cases, supra note 7 at 62, 72.
2. could be imputed to a government and not merely to individuals;
3. was incapable of reasonable explanation;
4. had not been negativated by protests reserving the rights of the party affected; and it is probable that in time even a protest which was not accompanied or followed by some other action would not suffice to keep the treaty alive.\textsuperscript{76}

The author is in accord with McNair's criteria for determining whether a given treaty has become desuetude. In line with the criteria, one may question whether supervening customs of international watercourse law are a basis for desuetude of a treaty such as the 1929 Nile Agreement. In case parties fail to invoke a treaty in favour of a supervening customary law, in accordance with the above criteria, then the treaty or specific treaty provisions fall into desuetude. On the contrary, in case the parties continually apply a treaty in negation of a given supervening custom, then the treaty prevails, partly because it is the will of the states to be bound by the treaty; also this may be considered as a protest to the custom; finally, it may be that the custom was in turn immediately terminated by the treaty. The most complex problem is when a state party to a treaty protests against a supervening custom which potentially affects its rights under a given treaty, and other parties embrace the custom as having led the treaty to desuetude. In our view, which is supported by case law, legal writings, and state practice, what is required for a treaty as whole or specific provisions to be desuetude as a result of supervening custom is the subsequent practice of all parties with regards to the custom. If one party protests, then the treaty continues to apply unless the custom is a \textit{jus cogens} norm.

Closely related to the notion of desuetude is the concept of modification of treaties by subsequent practice. There is no clear difference between the two concepts. One minor difference is that desuetude extinguishes a treaty by its non-application whereas modification of treaty by subsequent practice involves both the desuetude of a treaty rule and its substitution by a new rule.\textsuperscript{77} It is common for authors to apply the term desuetude in a broad manner to incorporate both situations.\textsuperscript{78} According to me, both desuetude and modification of treaties by subsequent practice happen as a result of implied consent. Therefore, the practice for both is implied consent to terminate a treaty. In this light, when reference is made to treaty termination by subsequent

\textsuperscript{76} McNair, \textit{supra} note 67 at p. 518.
\textsuperscript{77} Kontou, \textit{supra} note 47 at p. 28.
\textsuperscript{78} Idem; see also Karl, \textit{Vertrag}, 1983, p. 257.
practice, it will be understood as applying *mutatis mutandis* to desuetude and vice-versa.

In the *United States v. France Air Transport Services Agreement Arbitration*, the Tribunal was of the view that there was need for “careful consideration” with regards “to the attitude adopted by each of the parties [US & France], in particular from the time when the first differences of opinion as to principle arose regarding the application of the Agreement”.\(^79\) The Tribunal in illustrating the impact of subsequent practice on treaties, stated that such conduct was “… a possible source of a subsequent modification, arising out of certain actions or certain attitudes, having a bearing on the juridical situation of the parties and on the rights that each of them could claim.”\(^80\) In the *Temple of Préah* Case, the ICJ considered the conduct of parties as a possible source of modification of an agreement.\(^81\) The Court stated: “Both Parties by their conduct, recognized the line and thereby in effect agreed to regard it as being the frontier line”.\(^82\)

The ILC, in the earlier stages of drafting the Law of Treaties, provided that a treaty may be terminated or revised by subsequent practice of the parties, depending on how they apply the treaty, thus, establishing their agreement to that effect.\(^83\) It should be noted that this provision was not included in the final Vienna Convention on the Law of Treaties. It is our view that even though the Vienna Convention on the Law of Treaties does not provided for treaty amendment or termination by subsequent practice of the parties, it is generally considered as a norm of customary international law.\(^84\) As provided in the Commentary to Article 38 of the ILC Draft of the Law of Treaties, two criteria have to be fulfilled in order for subsequent practice to terminate or revise a treaty: first, the practice to modify a treaty “must be such as to establish the agreement of the parties as a whole to the modification in question”; and second, a

\(^79\) *Air Transport Services Application*, 38 *ILR* (1969), 182, at 248-9
\(^80\) Id., at 249.
\(^81\) *Case Concerning Temple of Préah Vihéar (Cambodia v. Thailand)*, ICJ Reports (1962), p. 6; see also *ILR*, 53, at p. 71.
\(^82\) Idem.
\(^83\) Article 68 of the Draft Articles of the Vienna Convention on the Law of Treaties, in *YblILC* (1964-II), at 198; see also ILC Commentary on Article 38 of the Draft, in *YblILC* (1966-II), at 236.
\(^84\) Kontou, *supra* note 47 at p. 27; Karl, *supra* note 78 at p. 128; see also, *Fisheries Jurisdiction Case*, ICJ Reports (1973), at 18, Namibia Advisory Opinion, *supra* note 6 at 47; *Jurisdiction of ICAO Council*, ICJ Reports (1972), at 67; *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, *supra* note 24 at 46.
consistent practice establishing the common consent of the parties “to the application of the treaty in a manner different from that laid down in certain provisions, may have the effect of modifying the treaty”.\textsuperscript{85} It should be noted that in the Draft, the Commission considered the notion of termination or revision of a treaty by subsequent practice as a norm of general international law.\textsuperscript{86} We agree with this assertion of the ILC. It is from this backdrop that we examine whether there is subsequent practice suggesting that the 1929 Nile Agreement was modified in favour of the customary international norms of shared watercourses.

It is plausible to note that it is not automatic that a supervening custom terminates or revises a treaty. In as far as parties to a treaty have not terminated or revised either explicitly or implicitly a prior treaty in favour of a supervening custom, the treaty remains in force. With regards to implied consent to terminate or revise a treaty in line with a subsequent custom, the intent of the parties to terminate or modify it must be proven on a case-to-case basis taking into consideration the subsequent practice of the parties, and implied consent cannot be inferred from the fact that parties are automatically bound by a new custom which is contrastive to the treaty provisions.

Given the above discussion, the provisions of the 1929 Nile Agreement cannot be considered as having been automatically terminated or revised as a result of the advent of new customary norms of international watercourse law. In order to determine whether a treaty such as the 1929 Nile Agreement has been revised or terminated in the light of supervening customary norms, one has to review the subsequent practice of parties in relation to those customs. The following discussion will discuss whether the subsequent practice of the parties to the 1929 Nile Agreement suggest that they revised or terminated it in the light of the new customs of international watercourse law.

(4) Subsequent Practice of the Parties to the 1929 Nile Agreement with regards to the Customary Principles of International Watercourse Law

a. Has the 1929 Nile Agreement been Terminated or Revised as a Result of the Emergence of Customary Principles of International Watercourse Law?


\textsuperscript{86} Idem.
A review of the state practice of the Parties to the Nile Agreement is paramount in order to determine whether the Nile Agreement has been revised or terminated in the light of the supervening norm of customary international law. Egypt has consistently asserted that the 1929 Nile Agreement was applicable and binding on the Parties to it. However, it should be noted that she entered into an Agreement with Sudan (a party to the 1929 Nile Agreement), in 1959 which recognised the notion of equitable sharing as was discussed in the previous chapter. As was discussed in Chapter 3, the Nile Agreement is a series of bilateral treaty between Egypt and the rest of the Parties. Therefore, according to international law, Egypt has the right to modify or even terminate the treaty as between herself and any of the Parties, which she did with regards to Sudan. The mere fact that Egypt entered into an Agreement with Sudan which is equitable cannot be considered as Egypt’s subsequent practice to revise or terminate the Nile Agreement in the light of the customary norms of international watercourse law in as far as the rest of the Parties to the Agreement are concerned.

Moreover, Egypt has used all the available opportunity to ascertain the legality of the Agreement. Indeed, when one Party to the Agreement (Tanzania), protested the legality of the Agreement upon her independence, Egypt replied that pending the conclusion of a new arrangement, it remained valid and applicable. The most recent practice of Egypt is with regards to the threats of the other Parties to the Agreement to use the waters of the Nile without the consent of Egypt as provided for in the Agreement. Egypt reiterated that the use of the Nile waters in contravention of the Nile Agreement was not permissible under international law.

Another important indicator of the practice of Egypt with regards to the principle of equitable utilization is her participation in the Nile Basin Initiative. As was discussed elsewhere, the main goal of the Initiative is the promotion of equitable and sustainable utilization of the waters of the Nile. The mere participation of Egypt in such an organisation which fronts the principle of equitable utilization of the Nile waters does

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89 See supra Chapter 3.
not mean that she has consented to the revision or termination of the Agreement in the light of the new customary norm of equitable utilization. The practice must be consistent. And this is not the case with regards to Egypt.

One may question whether the fact that Egypt has not issued or denied consent to projects in the Nile since independence of the Nile Basin States is tantamount to obsolescence of the 1929 Nile Agreement which provides her the right to do so, giving way to the customary norm of equitable utilization. This way of reasoning is faulty because the other Basin States have not sought the consent since they have questioned the legality of the Agreement which gives such a right to Egypt. Further, those States have not shown a practice of defying the provision by undertaking projects with disregard to Egypt's consent. All they have done is to issue threats of undertaking such projects which have always encountered counter threats of Egypt.

As far as the other Parties are concerned, the practice is diverse and inconsistent. Sudan questioned the legality of the 1929 Nile Agreement upon her independence but later accepted its legality in the subsequent Agreement of 1959, as was discussed earlier.90 The other countries (Kenya, Uganda and Tanzania), questioned the legality of the Agreement, but later implicitly accepted its legality “pending conclusion of a new arrangement”.91 Indeed, most recently, there has been talk of negotiations by Parties to Agreement with an aim of reviewing it.92 The Ministers of Water from Tanzania, Uganda, Kenya, Sudan and Egypt had four meetings in 2006 to discuss the issue of reviewing the Agreement.93 This is an indication that the practice of the States concerned is that the 1929 Nile Agreement is still applicable pending the conclusion of a novel equitable arrangement. There is no suggestion that the Parties by their subsequent practice have rendered the Agreement obsolete in favour of the supervening custom of equitable utilization. The next section discusses whether the customary principle of fundamental change to circumstances is applicable in case a new custom emerges.

90 See, supra Chapter 1.
91 Idem
92 East African Countries to Benefit as the Nile Treaty is Reviewed', Daily Nation, 21st May 2006.
93 Idem.
(5) Fundamental change of Circumstances

There is also an argument that in some circumstances, treaty termination by a new customary law may apply as a result of the principle of *conventio omnis intelligitur rebus sic stantibus*. According to Article 62 of the Vienna Convention, a treaty can be terminated as a result of *rebus sic stantibus*. Article 62 states:

1. A fundamental change of circumstances which has occurred with regards 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:
   (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.

According to the *Fisheries Jurisdiction Case*, the ICJ states: “Article 62 of the Vienna Convention on the Law of Treaties, ... may in many respects be considered as a codification of existing customary law on the subject of the termination of a treaty relationship on the account of changes of circumstances”. Given the above conditions for fundamental change of circumstances to occur, one may question whether an emergence of a customary norm such as those of international shared watercourses can be considered as a change in circumstances so fundamental that it may terminate a treaty such as the 1929 Nile Agreement.

In the *Fisheries Jurisdiction Case*, the ICJ was of the view that: “changes in the law may under certain circumstances constitute valid grounds for invoking a change of circumstances affecting the duration of the treaty”. The ICJ further held that, in order for *rebus sic stantibus* to apply, the circumstances which have changed should have increased “the burden of the obligations to be executed to the extent of rendering the performance something essentially different from that originally undertaken”. This reasoning is based on the view that the circumstances which have changed formed the

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94 *Fisheries Jurisdiction Case*, supra note 84 at p. 19, para. 36; see also, Gabcikovo-Nagymaros Case, supra note 24 at para 104.
95 *Fisheries Jurisdiction Case*, id., at 18, para. 32.
96 *Fisheries Jurisdiction Case*, id., at p. 21.
essential basis of the consent of the parties as the circumstances of law. In this case, it was held that the evolution of the law of the sea had not affected the balance of rights and obligations.

The ILC, in the commentary to the Draft Articles of the Vienna Convention on the Law of Treaties, was faced with a question of whether general changes of circumstances outside the scope of a treaty might not at times require the application of the principle of fundamental change of circumstances. The Commission was of the view that “such general changes could properly be invoked as a ground for terminating or withdrawing from a treaty only if their effect was to alter a circumstance constituting an essential basis of the consent of the parties to the treaty”.

In the Gabcikovo-Nagymaros Project Case, the ICJ pointed out that “a fundamental change of circumstances must have been unforeseen; the existence of the circumstances must have constituted an essential basis of consent of the parties to be bound by the Treaty”. Emergence of a new customary norm such as that of equitable sharing may be one of the “general changes” referred to in the ILC Commentary.

However, with regards to fundamental changes of circumstances, certain States were concerned with the dangers which this principle posed for the security of treaties. It would seem that the States were more concerned with the security of treaties and feared possible abuse of the clause of fundamental change of circumstances. The Commission reiterated by asserting that the way the Article was drafted, was sufficient enough to safeguard it from being abused. Indeed, in the Gabcikovo-Nagymaros Project Case, the ICJ noted that “the negative and conditional of Article 62 of the Vienna Convention on the Law of Treaties…” indicated that “the stability of

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97 Jiménez d’Aréchaga, E., ‘General Course in Public International Law’ RCISO (1978-I)
98 Fisheries Jurisdiction Case, supra note 84 at para. 43, p. 21.
99 ILC Commentary to Article 62 (then 59) in Yb/LC (1966 Vol.II) at p. 250, para. 10.
100 Idem.
101 Gabcikovo-Nagymaros Case, supra note 24 at para. 104.
102 Id., at p. 260, para. 13.
103 Idem.
treaty relations requires that the plea of fundamental change of circumstances be applied only in exceptional cases.".104

From the above, it is clearly manifested that it is extremely difficult for cases involving conflict of an emerging custom and a prior treaty to meet the conditions required for altering the contractual balance of rights and obligations. The application of the principle of rebus sic stantibus arises in respect to cases where the change of customary international law affects implementation of a treaty.105 The question whether the advent of the principles of international watercourse law is a fundamental change of circumstances which is a ground for termination of the 1929 Nile Agreement merits discussion. It should be noted that the Parties to the Agreement have never challenged it on this basis. In fact, the only time that the issue of fundamental changes of circumstances arose was when it was argued that the independence of Nile Basin States was a change of circumstances so fundamental that it warranted the termination of the Agreement.106

(6) Supervening Custom as a Reason to Demand for Revision of the Treaty

Given the discussion in this chapter, when a treaty becomes incompatible with the supervening principle such as that of equitable sharing, the practice is that a party to such a treaty has the opportunity to call for the revision or termination of the said treaty on the ground of development of a new custom. State practice manifests numerous examples where one or several parties demanded for treaty revision on account of its incompatibility with supervening custom. Some of the treaties were expressly abrogated, revised, or substituted by a new treaty. Some examples where treaties were expressly abrogated, revised or substituted by new treaties as result of emerging customs include the abolition of capitulation107, and fisheries in the North

104 Id., at para. 104.
105 Kontou, supra note 47 at p. 34.
106 Godana, supra note 49 at p. 142; see also discussion in chapter 3 of this thesis.
107 See, 1830 Treaty of Commerce and Navigation with the USA, in Hurowitz, J.C., Diplomacy in the Near and Middle East (i), (1956), at 102; for Britain’s Capitulatory Rights, see, id., at 25; Other Capitulatory Powers wer, Austria, Hungary, Belgium, Brazil, Denmark, Germany, Greece, Italy, the Netherlands, Norway, Portugal, Russia, Spain and Sweden; For further discussion of The Abolition of the Capitulations, see, Kontou, supra note 47 at p. 78-85.
Atlantic. In both cases, the view that treaties could be automatically revised or terminated in the view of supervening developments in principles of law was vehemently opposed. The supervening customs led to negotiation of new treaties which took them into consideration.

There is also state practice which reveals that a treaty was terminated or revised following subsequent practice of parties. In the extradition regime in the East Indies, the 1815 Convention was considered to have lost its raison d’être which meant it was modified as a result of implied consent of the Parties. In the present scenario, the Parties did not expressly terminate or revise the Convention, but they just let it lapse by derogating from its provisions in practice in favour of the legal developments in the law of extradition.

In other cases, the process of a treaty adapting to supervening principles was longer and at times controversial. An example is the Treaty on the Panama Canal signed in 1903. Article III of the Treaty granted the USA, the perpetual “use, occupation and control of a zone of land and land under water for the construction, maintenance, operation, sanitation and protection” of the Canal. On its part, Article IV provided that the US would possess and exercise “all the rights, power and authority... to the entire exclusion of the exercise by the Republic of Panama of such rights, power and authority”. Article X in turn obliged Panama to refrain from imposing taxes on equipment or employees in the service of the Canal Company.

After a long dispute between Panama and the USA on the on the legal status of the Canal, based on Panama’s discontent of the provisions 1903 Treaty, and the circumstances surrounding its conclusion, they mutually consented to revise

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109 Convention of 7th March 1815 in De Clerq, Recueil des Traités de la France, ii, at 452.
111 Id., at 465.
113 On the history of negotiations which led to the conclusion of the 1903 Treaty, see generally, R.A. Baxter, R.D. Carroll, The Panama Canal (1965); N.J. Padelford, The Panama Canal in Peace and War, (1942).
it.\textsuperscript{114} Despite the two amendments of the Treaty, Panama still challenged the legal regime applicable to the Canal. Panama's challenge was based on two arguments: first, that the Treaty was imposed on her against her interests\textsuperscript{115} and, second, it was incompatible with new principles of international law.\textsuperscript{116} Panama presented her case before the Security Council in 1973\textsuperscript{117}, and a series of meetings were held to discuss the case at hand. Panama argued that the Treaty was incompatible with principles of international law\textsuperscript{118}, and general international law.\textsuperscript{119}

In the course of the UN meetings, there was an almost consensus that the revision of the 1903 Treaty was paramount. El-Salvador was of the view that such a revision would "write off and cancel one of those historical mortgages and to do so by bringing to bear the entire body of ideas, principles and norms that he international community has evolved over the last decades".\textsuperscript{120} The Secretary General of the UN, Cuba, Colombia, Peru, Canada, the United Kingdom and Australia were of the view that provisions of the 1903 Treaty were incompatible with norms of international law and needed to be updated with contemporary realities and international concepts.\textsuperscript{121} Most of the States were of the view that the replacement of the 1903 Treaty by a new Agreement was a matter to be resolved by negotiations between the Parties viz. Panama and the USA.\textsuperscript{122} The USA also recognized that "the relationship originally defined in the 1903 Convention needs to be brought into line with the

\textsuperscript{114} The treaty was first revised in 1936, see, General Treaty of Friendship and Cooperation of 2\textsuperscript{nd} March 1936, 53 Stat 1807 (1939), UKTS No. 945; The Treaty was further revised in 1955, see, Treaty of Mutual Understanding and Cooperation of 25\textsuperscript{th} January 1955, 243 UNTS 211.

\textsuperscript{115} Security Council Official Records (1964), 1086\textsuperscript{th} Meeting, at 7.

\textsuperscript{116} 3 Whiteman's Digest of International Law, at 1152.

\textsuperscript{117} 28 Security Council Records (1973), 1684\textsuperscript{th} Meeting, at 4.

\textsuperscript{118} See Id., 1704\textsuperscript{th} Meeting, at 6-7; see also, 1702\textsuperscript{nd} Meeting at 5. The principles included "international concerning friendly relations and co-operation among states and particularly those pertaining to respect for the territorial integrity and political independence of states, non-intervention, equality of rights and self determination of peoples, the sovereign equality of states, the elimination of all forms of foreign domination, the right to peoples and nations to permanent sovereignty over their natural resources and international cooperation in the economic and social development of all nations, See Articles, 1-2, 55-56 of the UN Charter.

\textsuperscript{119} C.F. Tunkin, Theory of International Law, (1974), 175-6; See also Case Concerning Military Activities in and Against Nicaragua, Merits, ICJ Reports (1986), at 99, 101-107; see also, The Declaration on Friendly Cooperation Among States, Res. 2625 (XXV) of 24\textsuperscript{th} October 1970, 25 GAOR, Supp. No. 28.

\textsuperscript{120} El-Salvador, 1697th Meeting, at 6.

\textsuperscript{121} Secretary General of the UN, 1701\textsuperscript{st} Meeting, at 2; Cuba, 1696\textsuperscript{th} Meeting, at 21; Colombia, 1696\textsuperscript{th} Meeting, at 15; Peru 1701\textsuperscript{st} Meeting, at 5; Canada, 1700\textsuperscript{th} Meeting, at 18; United kingdom, 1701\textsuperscript{st} Meeting at 13; Australia, 1699\textsuperscript{th} Meeting, at 14.

\textsuperscript{122} See for example: Indonesia, 1699\textsuperscript{th} Meeting, at 9; Peru, 1701\textsuperscript{st} Meeting, at 5; Canada, 1700\textsuperscript{th} Meeting, at 13.
realities of the world"123 by replacing "the 1903 Convention by a totally new instrument reflecting a new spirit"124. As a result, two new treaties were negotiated to replace the 1903 Treaty.125

With regards to the Nile waters question, as we saw earlier, the 1929 Nile Agreement was revised in 1959 in order to take into account the interests of Sudan in the management and utilization of the Nile waters.126 Countries such as the United States and United Kingdom pressed for Nile Basin States to cooperate in order to ensure the best and most equitable use of the Nile waters.127 On their part, Nile States as we saw earlier are in favour of equitable use of the Nile waters. What they do not agree on is what entails equitable use.

From the above discussion, it can be discerned that an emergence of new norms can be used as a ground for demanding termination or revision of a treaty. Several judgments suggest that new norms may be a ground for termination of a prior treaty, since a party is conferred the right to request for negotiations with an aim of abrogating provisions of a treaty in line with the new norms. In the Fisheries Jurisdiction Case, the ICJ held that 'changes in law may under certain conditions constitute valid grounds for invoking a change of circumstances affecting the duration of a treaty'.128 In other words, the Court was of the view that a change in norms may be a fundamental change of circumstances envisaged in Article 62 of the Vienna Convention on the Law of Treaties. In the Fisheries Jurisdiction Case (Merits), the ICJ pointed out that both Iceland and the UK were obliged to negotiate an equitable solution in the light of the evolution of norms.129

123 USA, 1701st Meeting, at 16.
124 USA, 1704th Meeting, at 8.
125 1977 Panama Canal Treaty, 16 ILM (1977), at 1022; and, 1977 Treaty Concerning the Permanent Neutrality and Operation of the Panama Canal, id., at 1040.
128 Fisheries Jurisdiction Case, supra note 84 at 18, para. 32.
129 Fisheries Case (Merits), at para. 68, et seq.
The decisions in the above cases are a clear manifestation that tribunals are not eager to bear the view that supervening customary norms can automatically terminate or revise incompatible treaties, unless it is the intention of parties to such a treaty or the norm is *jus cogens*. In the *Sedco Award*, the Tribunal regarded Article IV of the Treaty of Amity, Economic Relations and Consular Rights between the US and Iran as suggesting that the Parties intended to incorporate custom as it may emerge in different times.\(^\text{130}\) In the *United Kingdom-France Continental Arbitration*, the Tribunal pointed out that “only the most conclusive indications of the intention of the parties to regard it as terminated” would warrant treating it as so.\(^\text{131}\)

In order for a supervening norm to be invoked as a basis for revising or terminating a prior treaty, the following criteria must be fulfilled: 1. the new customary norm must be incompatible with the treaty provisions; 2. it must be distinct from the customary law in force at the time of the conclusion of the treaty; 3. it must be binding upon all parties to the treaty; and, 4. the parties must not have intended that the treaty should continue to apply as special law.\(^\text{132}\) It is in the light of the above criteria that we are going to examine whether the emergence of new customary norms of international watercourse law can be invoked as a ground for terminating or revising the 1929 Nile Agreement.

The first criterion is that the new custom must be incompatible with the treaty provisions. The 1929 Nile Agreement is incompatible with the norms of international watercourse law in the sense that they cannot be applicable simultaneously. As we noted elsewhere, the 1929 Nile Agreement provides Egypt with a veto over projects in upstream States which may lead in the reduction of the quality of water. This is incompatible with the principles of international watercourse law which provide states a right to utilization of waters of a watercourse in their territory in respect of the requirements of the principles.\(^\text{133}\) It should also be noted that the assumption on the basis of which the Agreement was drafted does not signify any practice with regards to shared watercourses. The Commission which drafted the Nile Report regarded as

\(^{130}\) *Sedco Inc. v. NIOC and Iran*, *supra* note 62 at 132.

\(^{131}\) *The UK-France-France Continental Shelf Arbitration*, *supra* note 63 at 44.

\(^{132}\) *Kontou*, *supra* note 47 at p. 146.

\(^{133}\) For discussion of principles of international shared watercourses, see *supra* chapter 3 of the present thesis.
an integral part of the Agreement was of the assumption that precedents in the matter of water allocation were rare and practice varied and that the commission was not aware of any generally “adopted code or standard practice upon which the settlement of a question of inter-communal water allocation might be based”. The Commission’s assumption was right.

The second criterion is that the customary law at the moment the treaty was concluded must have subsequently changed. At the time of the conclusion of the 1929 Nile Agreement, there was no known custom with regards to shared watercourse law. This is manifested in the previous paragraph where the Commission was ignorant of any principle governing watercourses. In other words, the Nile Agreement did not derogate from any existing customary norm. Therefore, what changed was the advent of new customary norms of international watercourse law which subsequently followed the conclusion of the Nile Agreement. It should be made clear that the change in norms does not have to be “fundamental”. Thus, the advent of new norms of international law and their capacity to revise or terminate treaties is distinct from abrogation or termination as a result of a fundamental change of circumstances even though as we saw in the previous discussion, the emergence of a new norm can at times be considered as a fundamental change of circumstances. In other words, not all emergence of new norm is a fundament change of circumstances and the emergence of norms should not be “fundamental” in order to consider the norm as a ground for revision or termination of a treaty.

The third criterion is that the new norm must be binding on all parties. In case a party(ies) persistently objects the emerging norm of international law, all its treaty relations are unaltered by that norm. As was discussed elsewhere, no Nile Basin State has persistently objected to the principles of international watercourse law. Indeed, the most recent state practice manifested by the parties is that the way forward in the utilization of the Nile waters is to take into consideration principles of international watercourse law. This is clearly evinced by the participation of all the Nile Basin States in the Nile Basin Initiative whose main objective is “to achieve sustainable

135 Idem.
136 See, supra Chapter 3 of the present thesis.
socio-economic development through the equitable utilization of, and benefit from, the common Nile Basin resources”.\footnote{137}

A state is not entitled to demand for the revision or termination of a treaty as a result of a supervening custom, if the treaty provisions exclude the possibility. A treaty which excludes the possibility of revision or termination may be construed to mean that it was the intention of the parties to consider the treaty or some of its provisions as \textit{lex specialis} in their \textit{inter se} relations, even if contrary customary norms subsequently emerge. A cursory glance at the 1929 Nile Agreement would suggest that the Agreement was intended to be binding in perpetuity, thus could not be revised or terminated by supervening customary norms.\footnote{138} However, an in-depth review of the Agreement and subsequent practice of the parties to it reveals that it was not intended to exclude the possibility of revision or termination by supervening customary norms.\footnote{139} Thus, the question as to whether the Nile Agreement can be revised or terminated in the light of supervening norms is one to be solved by international law.

As we earlier saw, the position which is overwhelmingly supported by state practice and judicial decisions is that a supervening customary norm can be used as a ground for demanding negotiations with a view of adjusting a prior incompatible treaty to it. In other words, supervening customary norms such as “equitable utilization” do not automatically repudiate or revise prior incompatible treaties such as the 1929 Nile Agreement. The incompatibility does not allow any party to unilaterally effect the change. In the case that a new norm such as “equitable utilization” emerges, parties to a prior treaty have two options: first, parties can decide that the treaty should continue to apply in their \textit{inter se} relationships (if the new norm is not \textit{jus cogens}); second, a party can initiate claims that the treaty is incompatible with supervening customary norms in the view of negotiating a new treaty or submit the dispute to a third party for settlement if necessary.\footnote{140} It appears that state practice is against unilateral action as a means to adapt a prior treaty such as the Nile Agreement to new customary norms of international watercourse law.

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\begin{itemize}
\item \footnote{137}{See, webpage of the Nile Basin Initiative at www.nilebasin.org}
\item \footnote{138}{\textit{Supra}, Chapter 2 of the present thesis.}
\item \footnote{139}{\textit{Idem}.}
\item \footnote{140}{Kontou, \textit{supra} note 30 at p. 151.}
\end{itemize}

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In case a supervening customary norm viz. equitable utilization emerges, all parties to a prior treaty may agree that it is incompatible with the new custom and that the treaty requires subsequent modification or termination. A second scenario would be that some parties may raise the issue of revision or termination in the light of new norms and some may be against it. With regards to the Nile legal regime, all parties recognize the principles of international watercourse law. This is manifested in the fact that the States have established the Nile Basin Initiative and one of its objectives is the drafting of a new agreement which will take into consideration the principles.

However, despite the institution of the Initiative, tensions have been simmering among the Nile Basin States. On the 16th February 2004, Tanzania launched a project to construct a pipeline that would distribute water from Lake Victoria to 420,000 residents of two major towns.\textsuperscript{141} Egypt declared that under the 1929 Nile Agreement, she had rights to veto projects which would threaten her vital interests in guaranteeing the amount of water arriving on her territory.\textsuperscript{142} Kenya on her part stated through her assistant Minister of Foreign Affairs that “Kenya will not accept any restrictions on the use of Lake Victoria and River Nile”.\textsuperscript{143} The above differing points of view are clear indications of a looming conflict over the Nile legal regime. At times, the process of overhauling the 1929 Nile Agreement has seemed to be in vicinity, but as evinced by the above recent conflicts, it can be said that the procedure of negotiating a new treaty is blurred with uncertainties.

A perfunctory glimpse at the workings of the Nile Basin Initiative shows that it is far from negotiating a new treaty replacing the 1929 Nile Agreement. In fact, the idea behind the Initiative seems to be that the Agreement should not be the departing point for regional dialogue and cooperation.\textsuperscript{144} Apparently, there is a conflict with regards to the adaptation of the Nile Agreement to the principles of international watercourse law. One may question what would happen in case the conflicts and confusions persist.

\textsuperscript{141} ‘Tanzania Says it is not Bound by Nile Water Treaty’, The mail and Guardian online, (2004), accessed at www.mg.co.za last visited on 25th March 2006.

\textsuperscript{142} Nimrod, R., ‘Rising Tension Over the Nile River Basin’, Middle East Media Research Institute, 2004.


with regards to the negotiation of a new treaty. Just like any other international dispute, parties to the Agreement are obliged by international law to settle the conflict through peaceful means such as negotiations. If negotiations fail, then the parties will be required to resort to third party settlement such as mediation, conciliation, arbitration, judicial settlement or resort to UN or regional agencies such as the African Union (AU).

In negotiating a new treaty, the process should be guided by the principle of good faith. Good faith negotiations means that parties should “seek by preliminary negotiations, terms for an agreement” in a manner that involves accepting “in good faith all communications and contracts which could, by broad comparison of interests and by reciprocal good will, provide states with the best conditions for concluding agreements”. States are also required to “conduct themselves so that the negotiations are meaningful”, and, they must undertake the obligation “with a genuine intention to achieve a positive result”. In this vein, the Nile Basin States, as a result of a supervening customary norm of equitable utilization, should negotiate with a goal of adjusting the Nile Agreement to the new realities, or negotiate a new treaty altogether. It is paramount to note at this juncture that the obligation to negotiate is not synonymous to an obligation to reach an agreement. In other words, what is required under international law is the obligation to negotiate in good faith. The breach of the principle of good faith has ramifications under international law. First, tribunals may require parties to re-conduct negotiations, if it is relevant, given the circumstances of the case. Second, sanctions may be resorted to “in case of violation of the rules of good faith”. The ILC in its Draft Articles on the Law of

145 Lac Lanoux Arbitration, supra note 41 at 128, 129-30.
146 North Sea Continental Shelf Cases, ICJ Rep. (1969), 4, at 47; see also, Fisheries Jurisdiction Case, supra note 84 at 31-3.
148 See North Sea Continental Shelf Cases, supra note 146 at 47, 53, where the ICJ was of the view that the parties had the obligation to negotiate a delimitation agreement on the basis of equitable principle.
149 See Lac Lanoux, supra note 41 at 130; see also, Railway Traffic between Lithuania and Poland, PCIJ, Ser. A/B, No. 42 (1931), at 116; Advisory Opinion on the Status of South West Africa, ICJ Reps. (1950), at 128, 139; For a detailed discussion see, E. Zoller, La Bonne Foi en Droit International Public, (1977), at 59.
150 North sea Continental Shelf Cases, supra note 146 at 148; Fisheries Jurisdiction Case, supra note 84 at 33.
151 Lac Lanoux, supra note 41 at 128.
State Responsibility provide that States may seek reparation for the breach of the customary norm of good faith.\textsuperscript{152}

From the above discussion, it may plausibly be said that new customary principles such as those of international watercourse law would not automatically modify a prior treaty such as the 1929 Nile Agreement. The advent of the principles avail parties to the Agreement the possibility of initiating a process of reviewing the Agreement in the light of the principles. It would appear that the state practice of the Parties to the 1929 Nile Agreement consider it as a temporary arrangement pending the conclusion of a new treaty which will take into consideration principles of international watercourse law. However, they differ on the applicability of the principles. It is therefore up to the Nile Basin States to negotiate in good faith a new comprehensive treaty enhancing the principles of international watercourse law. The following chapter shall discuss the need for cooperation and factors that should be taken into consideration in the conclusion of a new treaty which will abrogate the 1929 Nile Agreement.

CHAPTER 5. THE FUTURE OF THE NILE LEGAL REGIME

The present chapter primarily seeks to flesh out a framework for understanding the important legal issues linked with the development of a legal regime for transboundary cooperation in the Nile region. In understanding the development of a legal regime in any shared watercourse, it is paramount to consider international relations. Consequently, a brief study will be undertaken of international relations theory with a view of providing a framework for an in-depth consideration of the development of a legal regime. In order to fully understand the theory of legal regime development a case study will be undertaken of the Southern African Development Community (SADC) watercourse issues and compare them with the Nile watercourse issues. The main reasons for choosing the SADC watercourse legal regime over other watercourse legal regimes are: first, the SADC region resembles the Nile region in terms of disparity of the economic set up of countries involved, climate, water distribution in the watercourse states, the uses and needs for water, the population distribution and growth in the region etc, as shall be manifested in the course of the present chapter; second, the SADC watercourse legal regime is a representation of a contemporary legal regime which incorporates general principles of international watercourse law to suit the particular circumstances of the SADC region, which as we have just noted resembles to a large extent, those of the Nile region. The first section will discuss regime theory. The second section will make a comparison between the circumstances of the SADC region and the Nile region. The third section incorporates a discussion of the SADC watercourse legal regime. Finally, the fourth section will explore how the SADC watercourse legal regime incorporated international legal principles of shared watercourses and whether it is plausible for Nile Basin States to emulate the process in developing a comprehensive Nile legal regime.
1. Regime Theory and International Law

In the last three decades, international relations literature has been filled with studies concerning regimes. The growing interest within the political science realm was how regime theory could be applied to explain international cooperative behaviour. With the mushrooming international organizations in the post war United Nations era, political scientists sought to understand how these organizations were created, operated and responded to evolving conditions. They turned to regime theory to explain and gain greater insight to such developments. The international regime theory also enhanced a better understanding of new initiatives for cooperation among states. Indeed, regime theory became a major area of study in the scope of international relations theory.

This differs from the study of international lawyers who have given little attention to the theory of international regimes. However, despite the disparities in approaches, there has been of recent been an increased intermingling of international relations theory and international law. Indeed as one author puts it, “many international lawyers have concluded that regime theory can contribute to international law as well as international relations”. Regime theory is indeed of significant importance international law and more so to the building of a legal regime in the Nile region. In order to understand the dynamics of regime theory, it is first paramount to consider several theoretical issues, viz. the definition of a regime, factors prerequisite for

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1 F. Kratochwil and J.G. Ruggie, 'International Organization: A State of the Art on an Art of the State' (1986), 40 Journal of International Organizations 753, at 759-63; A detailed example of literature is also to be found in S.D. Krasner (ed.), International Regimes, (1983); For an international perspective on developments in international law perspective on the developments in international relations theory, see K.W. Abbott, 'Modern International Relations Theory: A Prospectus for International Lawyers' (1989), 14 Yale Journal of International Law 335-411.


regime formation, the impact of the formative process on a regime structure, effectiveness of a regime, and response of regimes to change. After a study of these issues it will then be possible to gain understanding why regime theory is important in legal regime building and sustenance in the Nile Region.

(1) What is a Regime?

In the 1970’s, there was bone of contention on what constituted a regime. Ruggie was of the view that a regime was “a set of mutual expectations, rules and regulations, plans and organizational energies and financial commitments, which have been accepted by a group of states”. Haas on his part described regimes as “collective arrangements among nations designed to create or more effectively use scientific or technological capabilities”. Haas’ original description of a regime has over the time evolved. Young defines regimes as “social institutions governing the actions of those interested in specifiable activities. As such, they are recognized patterns of practice around which expectations converge”. Of all authors who have attempted to define what a regime is, Krasner’s definition has widely received greater acknowledgement by legal theorists. Krasner defines regimes in the following manner:

Regimes can be defined as sets of implicit or explicit principles, norms, rules and decision-making procedures around which actors’ expectations converge in a given area of international relations. Principles are beliefs of fact, causation and rectitude. Norms are standards of behaviour defined in terms of rights and obligations. Rules are specific prescriptions or proscriptions for action. Decision-making procedures are prevailing practices for making and implementing collective choice.

Keohane is of the view that Krasner definition is very useful as a starting point but he also noted that it leaves certain ambiguities which he further expanded.

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7 Ruggie, supra note 3 at 570.
8 Haas, supra note 3 at p. 147
upon. Keohane views norms as standards of behaviour without taking into consideration whether they are created for self-interest or otherwise. Keohane definition of the concept of a regime underlines the necessity for some procedures of enforcement in the form of “injunctions”. Keohane deems injunctions as politically consequential albeit very specific to allow identification of violation and are thus essential for international regimes.

Despite not having a standard definition amongst various authors on regime definition, some common features are outstanding. The major foundation for regime is principles and norms which are recognized by states as international actors. Regimes create international institutions which may either be formal or informal with a goal of dealing with identifiable issue areas. These common features of regimes are contained in the classic definition of Krasner which as we earlier noted has received greater acknowledgement by regime theorists. In a nutshell, international regimes are principles, norms, rules, and procedures of decision making around which actors converge their expectations in a given issue-area.

(2) Regime Creation

All regime theorists contend that for a regime to be created there has to be an “issue area” which states and/or other international actors converge. One may pose the following questions with regards to issue areas: how are they identifiable? And, how far should they have developed in order for states to converge to form a regime? Legal theorists have endeavoured to answer these two questions. According to Haas, the creation of an issue area is closely interlinked to the concept of interdependence. He is of the view that when states start to query the terms of their interdependence, an issue area develops. Therefore, once states and other organisations have reason to

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13 Keohane, supra note 5 at p. 57.
14 Idem.
15 Id. At p. 59
16 Idem.
17 Krasner, Supra note 12 at p. 1. Even though major actors in international law are states, other entities such as international organizations and NGOs can be considered as international actors.
19 Idem.
believe that they have mutual interest in an issue area, they converge and create a regime. However, an issue area will fully be developed once stronger nations are part and parcel of it. According to Keohane regimes are created to find solutions to problems which states deem to be so closely intertwined.

According to both Haas and Ruggie, for an issue area to reach the stage where states are attracted to converge upon it, two processes must have bee fulfilled viz., knowledge and politicisation. First, knowledge has to be collated with regards to an issue area, and then politicisation takes place. Therefore, a regime is created when an issue area exists. However for an issue area to develop certain steps of knowledge and politicisation have to take place in order to make it possible for states to converge and develop a regime in their mutual interest.

After an issue area has been identified and believed by the actors to incorporate their mutual and common interest, it is then enhanced in some form of agreement or understanding. Thus prerequisite conditions for formation of a regime can be said to have been fulfilled. According to Haas, the formation of a regime involves a complex process which includes many variables. Legal theorists such as Feld, Jordan and Hurwitz have categorized regime formation into three methods. The first method is the “contractarian track” whereby the actors converge with an aim of negotiating a contract that outlines the framework for the regime to operate. An example of such a framework is the negotiation of the 1997 Convention on the Non-Navigational Uses of International Watercourses. The second method is the “evolutionary approach” whereby regimes evolve over a period of time. In this instance, rules evolve from being mere rules to norms of customary international law or they can also evolve through unilateral action resulting in de facto or de jure regime recognition. An example would be the 1945 Truman Declaration which eventually led to the development of the Convention on Continental Shelf. The third method is the
"piecemeal process" which results from actors arriving at an agreement on certain points in a given issue area but cannot reach a comprehensive consensus. In this scenario, the actors hope that the ultimate consensus may be reached at in future by either expanding the issue area or the policy scope contracting. An example of this form of regime formation is the debate over the breadth of the territorial sea. This matter was unresolved in the 1958 Convention on the Territorial Sea and Contiguous Zone as well as at the second UN Convention on the Law of the Sea in 1960. The issue was finally settled in the 1982 UN Convention on the Law of the Sea (UNCLOS) in Article 3 which provided for a twelve mile breadth of the territorial sea. Apart from the three methods of regime formation discussed above, regime theorists also believe that for a regime to form there has to be a hegemonic power.

(3) Effectiveness of a Regime

What are the conditions for a regime to be effective? This is one of the questions regime theorists tend to turn to after a regime has formed. A prerequisite for regime effectiveness is the aptitude of the regime to enforce decision upon the actors and at the same time obtaining to some extent acceptance from those who are not part of the regime. If the objectives of implementation and acceptance are achieved, then the regime is largely considered to be effective; if they cannot be achieved, then the regime either changes or disintegrates. According to Haas, the actor(s) which were dominant in the regime formation can have a great influence on the effectiveness of the regime.

The effectiveness of a regime depends largely on its dynamics. Incentives which accrue from a regime contribute to a high degree to the effectiveness of a regime more especially at the initial stages. Some states may not enjoy benefits from the strong

28 Idem.
29 Idem.
30 See Keohane, supra note 5 at p. 72; see also, Oran R. Young, 'The Politics of International Regime Formation: Managing Natural Resources and the Environment' (1989), 43 International Organization, at p. 366-74.
32 Haas, supra note 9 at p. 193.
33 Haas, supra note 18 at p. 396.
issue areas but may have benefits which result from other areas of their interdependence. Regime effectiveness can to some extent result from a simple desire by actors to enter into and comply with arrangements made by like-minded actors. This is evidenced by multilateral regimes, which can reduce “transaction costs” and be the “least expensive route to a high degree of cost certainty”. Multilateral regimes attract many actors because of the importance or nature of the issue area and the advantages in such regimes and thus enhancing greater adherence to the norms of the regime.

(4) Change of Regime

Once a legal regime has been formed and is effective, it may face a test of change as a result of pressure which may be external or internal. Regime change may be as a result of pressures surrounding the issue area which were not foreseen at the time of the formation of a regime, or which were ignored because they proved to be too difficult to resolve. A regime may be forced to change as a result of new developments in technological, economical, societal and political aspects. Regime change can be in form of an amendment, modification, replacement or even disintegration. According to regime theorists, all regimes ultimately face the test of change as a result of pressures but how they react to the pressures will determine their disintegration or adaptation to change.

It is a complex task to ascertain a list of common factors which can lead to a change in regime. Regimes may change as a result of a change in a fundamental principle of a regime. Young gives an example of the pressures on the principle of unrestricted common property for marine fisheries caused by depletion of the resource. Regimes may also change as a result of external factors such as the change in technology.

37 Rothwell, supra note 35 at p. 18.
Young refers to the growth in technology with regards to fishing techniques which undermined the common-property high-sea fishing regimes. Regime change may also result from changes in related regimes or changes of interests of a hegemon.

(5) The Importance of Studying Regimes.

Since political developments shape the legal regimes that are formed in international law, it is worthwhile to consider why actors seek to cooperate and the impact of the cooperation on the development and prospects of a regime. As we saw in the course of the above discussion, the study of international regimes offers an insight of how norms develop around certain issue areas, and why certain legal regimes prosper and others fail and what should be taken into consideration when there is a necessity to change a legal regime. According to Haggard and Simmons, the study of regimes is important because it brings one into direct contact with regime dynamics which offer a greater incentive for states to cooperate with less cost than other forms of international cooperation. Keohane sums it up in a very convincing manner in his argument that regimes have a capacity:

Permit governments to attain objectives that would otherwise be unattainable. They do so in part by facilitating intergovernmental agreements. Regimes facilitate agreements by raising the anticipated costs of violating others' property rights, by altering transaction costs through the clustering of issues, and by providing reliable information to members. Regimes are relatively efficient institutions, compared with the alternatives of having myriad of unrelated agreements, since their principles, rules and institutions create linkages among issues that give actors incentives to reach mutually beneficial agreements.

In general, Regime theory provides tools for international lawyers to understand the dynamics relating to international cooperation. The study of regimes offers greater insight of how international norms are created and how they evolve in a lifetime of a regime. The study of regime dynamics and the behaviour of actors involved offer a greater opportunity to broadly understand international law than would otherwise be afforded by the strict analysis of law. Further, the study of regimes helps us understand why international law in a given domain forms and why it changes as it does due to either internal or external pressure. Since the Nile legal regime is an

41 Id.p. 99.
42 Haggards and Simmons, supra note 38 at p. 513.
43 Keohane, supra note 5 at p. 97.
44 Rothwell, supra note 35 at p. 408.
example of a regime in which international law plays an important part, regime theory offers the opportunity to study how that law has evolved, its function and how it may be impacted upon in future. However in order to understand dynamics of a regime in a more practical manner, it is important to study another regime, that of SADC which is well established and endeavour to relate it to the formation and sustenance of a Nile legal regime.

2. Comparison between the SADC Region and the Nile Basin

As we saw in chapter one of the present thesis, the Nile Basin region is composed of the Nile River which is divided into the White and the Blue Nile. The utilization of the River is a whole has caused controversies. On the other hand, the SADC Region is endowed with numerous shared rivers with each country sharing at least one river basin with another country. In this respect, the hydrology of the Nile region and that of SADC region is different. In the Nile region, it is ten countries, one basin viz. the Nile, whereas in the SADC region, it is fourteen countries, eleven basins.

As we earlier saw, the Nile region is characterised by climatic zones that range from tropics in the Democratic Republic of Congo to the arid regions of Sudan and Egypt. On its part, the SADC region is comprised of countries below the latitude of five degree south. Similar to the Nile Region, the climatic zones range from the tropics of the Democratic Republic of Congo to the arid regions of the Kalahari Desert in Botswana and Namib Desert, which cover the Southern Angola and the Coastal part of Namibia as well as the Northern Coastal areas of South Africa.

Similar to the Nile region, the countries comprising the SADC region are marked by distinct variations in size, population, economic standards as well as water availability and utilization. The enormous countries of Democratic Republic of Congo, Angola,
and South Africa are distinct from the tiny Island States of Mauritius and Seychelles as well as the small landlocked countries of Lesotho and Swaziland. The SADC region just like the Nile region is comprised of the poorest countries in the world, such as DRC, Malawi, Angola, Mozambique, and Tanzania whose per capita GNP varies from $ 190 to $ 240. On the other hand, the region is also composed of States that are relatively rich such as Seychelles, Mauritius, and South Africa whose per capita GNP are $ 6,420, $ 3,370 and $ 3,160, respectively.51

Water availability in the SADC region sharply varies in a similar manner to the Nile region52 as a result of climatic conditions which influence rainfall patterns. In Angola, DRC and Namibia, the availability of freshwater ranges from 15,000 to 27,000 cubic meters per capita.53 On the other hand, countries such as South Africa, Zimbabwe, and Malawi, the availability of freshwater per capita range from 1000-2000 cubic meters. Just like the Nile Region, the SADC region experiences spells of droughts resulting from lack of rainfall or floods as a result of extreme rainfalls.

Similar to the Nile Region, the SADC region is deemed to experience steady increase in population. It is projected that the population of the SADC region which was less than 200 million in 1999 will exceed 350 million in 2025.54 Approximately, 90 % of the water in the region is used for irrigation.55 Only 20% of the arable land is irrigated, and 70% of the regions population depends on agriculture for food and employment.56

From the above comparison, it is clear that both the Nile Region and the SADC region share a lot of similarities in terms of characteristics. It is for this reason as earlier touched on that the SADC watercourse legal regime may be a suitable role model for developing a comprehensive legal regime for the Nile Basin. The subsequent section discusses the SADC watercourse legal regime.

52 Idem.
56 Idem.
3. The Overview of the SADC Watercourse Legal Regime

Before we embark on any meaningful discussion of the SADC watercourse legal regime, it is paramount to arm ourselves with a brief background of SADC.

(1) SADC in a nutshell

The Southern African Development Community (SADC) is composed of fourteen countries. In the late seventies, Countries of Southern African Region projected their concerted efforts towards economic cooperation. In an unprecedented manner in this direction, nine Countries met to discuss means of achieving such cooperation. In the following year, on April 1 1980, a declaration was passed entitled Lusaka Declaration, Southern Africa: Towards Economic Liberation. The Declaration established the Southern African Development Coordination Conference (SADCC).

The SADCC main objectives were to facilitate economic development and integration as well as minimize their dependence on South Africa which at the time was under the white minority rule. The SADCC continued to exist albeit without a formal legal status befitting an international organization until August 17, 1992, when the Member States concluded a Treaty of Southern African Development Community (SADC). The Treaty established SADC as an international organization with legal status. In subsequent years, other countries joined the SADC. A cursory glance at the SADC Treaty reveals that it is concerned with a spectrum of issues which include economic, political, and legal issues. The preamble refers to the importance of mobilizing resources with the aim of promoting policies, programs, and projects.

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57 The members of SADC include: Angola, Botswana, Democratic Republic of Congo, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe. See www.Sadc.int.

58 The countries that met in Gabrone Botswana in May 1979 were: Angola, Botswana, Lesotho, Malawi, Mozambique, Swaziland, Tanzania, Zambia and Malawi, see idem.

59 See, idem.

60 See, supra note 48 at p. 986.

61 See, 1980 Treaty of the Southern African Development Community, Apr. 1, 1980, 32 ILM 120 (1993); see also the SADC website at supra note 1; For the history of SADC, see Rosalind H. Thomas, Introductory Note, 32 ILM 116 (1993).

62 For example, Namibia attained independence in the 1990, and became a Member State as the 10th Member. South Africa joined the SADC in 1994 after the collapse of the Apartheid regime; other countries to join were the Democratic Republic of Congo, Mauritius, and Seychelles, see supra note 1.
“within the framework for economic integration”. Article 3 of the Treaty provides that the “SADC shall be an international organization, and shall have legal personality with capacity and power to enter into contract, acquire, own or dispose of movable and immovable property and to sue and be sued”. Article 4 denotes the fundamental principles which include: sovereign equality of all members; solidarity, peace and security; human rights, democracy and rule of law; equity; balance and mutual benefit; and peaceful settlement of disputes. Article 5 lays down the objectives of the SADC which comprise achieving development and economic growth, alleviating poverty, enhancing the standard and quality of life of the peoples of Southern Africa, achieving “sustainable utilization of natural resources and effective protection of the environment” as well as the promotion and maximization of productive employment and utilization of resources of the region. Article 6 requires SADC states to espouse adequate measures aimed at achieving the objectives of the Treaty. In addition, the Article obliges Parties to the Treaty to abstain from any measures which would imperil the sustenance of its fundamental principles, the fulfilment of its objectives, and putting into practical effect the provisions of the Treaty. Article 21 provides that the SADC states shall cooperate with a view of fostering regional development and integration taking into consideration the principles of balance, equity, and mutual benefit. The Article further enlists the important areas of cooperation which include food security, land and agriculture, natural resources and environment, politics, diplomacy as well as international relations, peace and security.

Given that water touches all spheres of life, from food security to agriculture, from economic and commercial uses to domestic and social uses, which forms the corpus of SADC existence, it was necessary for the Members to negotiate a legal regime aimed at the utility and management of the shared water resources. With the support of the already established organizational structure, the Member States of SADC managed to conclude two protocols on Shared Watercourse Systems, which will be discussed in the subsequent subsection. The organizational structure of SADC includes the Headquarters which are located in Gabrone, the Capital of Botswana. The

institution of SADC as enumerated in Chapter 5 of the Treaty consists of: the Summit of Heads of States or Governments; the Council of Ministers; Commissions; the Standing Committee of Officials; the Secretariat; and, the Tribunal. It is not the aim of the author to delve into the responsibilities of each and every individual institution. However, suffice it to say that the organizational structure ensured that the SADC Member States smoothly negotiated Protocols enhancing the use and management of the watercourses in the region. The following subsection examines the legal regime of the watercourses in the SADC region.

(2) The SADC Watercourse Legal Regime

One of the main characteristics of the SADC region is the presence of a large number of transboundary watercourses. Each State in the SADC region shares at least one river basin with another State (with the exception of the Island States of Mauritius). Due to water stress in the region and the number of shared river basins, it was pertinent that after the conclusion of the 1992 SADC Treaty, the Member States immediately focussed on the issue of regulation of the utilization and management of the shared watercourses. This cooperation in the issues of shared watercourses culminated in the conclusion of the Protocol on Shared Watercourses Systems in 1995.

The 1995 Protocol was signed in Johannesburg, South Africa on August, 23, 1995. It entered into force three years later in September 29, 1998. The Preamble of the Protocol recognizes the Helsinki Rules and the work of the International Law Commission on the Non-Navigational Uses of International Watercourses. It also acknowledges pertinent provisions of the Agenda 21 of the UNCED, the concept of environmentally sound management, sustainable development, and equitable utilization of shared watercourses. Article 1 of the Protocol generally defines Drainage Basin on the basis of how it was defined by the International Law

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64 SADC Treaty, supra note 61 at Art. 9.
Association in the Helsinki Rules.66 The Article also defines the term “watercourse system” in a manner largely based on the early works of the ILC on the Draft of the UN Convention on the Law of Non-Navigational Uses of International Watercourses.67 Article 2 enumerates some of the fundamental principles such as those of equality of rights in the use of the shared watercourse systems, community of interest in the equitable utilization of shared watercourses, and the need to enhance proper balance between resource development and environment conservation. Article 2 also notes factors to take into consideration in determining what “equitable and reasonable utilization” is.68

These factors are to a large extent a replication of the 1966 Helsinki Rules with one exception of “guidelines and agreed standards to be adopted”.69 It should be noted that the Protocol does not precisely elaborate what those “guidelines and standards” are or the authority entitled to set them.70 The rest of the Protocol is fashioned on the thrust of procedural matters71 and the establishment and operation of numerous institutions.72 Article 5 provides for the objectives of the river basin institutions. The Article also articulates the functions of the river basin management institutions in as far as national water resources policies and legislation, research and data handling, water control and utilization, environmental protection, and hydro meteorological monitoring are concerned.

66 Article II of the Helsinki Rules defines the term “international drainage basin” as “a geographical area extending over two or more States determined by the watershed limits of a system of waters, including surface and underground waters, flowing into a common terminus”, see, ILA, Report of the Fifty-Second Conference held at Helsinki 486 (1967).
68 1995 Protocol, supra note 63 at Art. 2(7).
69 Id., at Art. 2(7)(e). Compare the factors to be taken into consideration when determining “equitable and reasonable utilization” under the 1995 Protocol with those provided in the 1966 Helsinki Rules, supra note 61 at Art. V(2) (a-k).
70 Salmaan, supra note 48 at p. 1000.
71 For example, Article 2(8) obliges Member States to require any person intending to use the waters of a shared watercourse for purposes other than domestic use or intending to discharge waste in such waters to obtain a permit. Such a permit should be issued after it is determined that the discharge would not have a detrimental effect on the regime of watercourse system (Art. 2 (10)). For other procedural matters, see, Art. 2 (9) (4) (11) (12).
72 See Art 3(2)(a) which provides that the 1995 Protocol recommends the establishment of such institutions as monitoring units to be based at the SADC Environment and Land Management Sector; Art 3(2)(c) provides for the establishment of river basin commissions between Basin States for each transboundary basin, and river authorities or boards for each transboundary basin.
After the adoption of the 1997 UN Convention on Watercourses, the SADC Members became more enlightened on the principles of international shared watercourses. They decided to revise the 1995 protocol with a view of taking into consideration the developments in international water law brought about by the advent of the UN Convention, as well as to fill the lacunae of the Protocol. The Protocol was revised in 2000 into what is known as the Revised Protocol on Shared Watercourses in the SADC. The Preamble of the Revised Protocol recognizes developments in the field of international law. Indeed, it is the first agreement to apply the provisions of the 1997 UN Convention. One of the most striking stipulations in the Revised Protocol is Article 3. Article 3 embraces numerous general principles such as the recognition of the unity and coherence of each shared watercourse and the call for harmonization of water uses in the shared watercourses; principles which were earlier laid down in the 1995 Protocol; equality of rights of the riparian states; and the significance of striking a balance between resource development and the needs of the environment with a goal of promoting sustainable development. The Article further emphasises the need for cooperation and exchange of information.

The above discussion of the SADC watercourse legal regime illustrates that states can use the already existing principles of international shared watercourses to develop a suitable legal regime. The following section will discuss whether the Nile States should emulate the SADC region in search of an appropriate legal regime.

4. Emulating the SADC Region Collective Action in Search for the Nile Legal Regime

As we saw in chapter 1 of the present thesis, the empirical puzzle is that of ten independent States in the Nile Basin that share the waters of the Nile but have not adopted any comprehensive legal regime that regulates the sharing. As manifested throughout the thesis, the status quo is that Egypt has exclusive use of the Nile waters and Sudan has substantial share of the waters. Egypt purports the right to veto projects in upstream states. The SADC region on its part is endowed with numerous shared

watercourses and has developed comprehensive set of rules and understandings that
regulate the sharing. In order for the SADC countries to develop a comprehensive
legal regime, the countries involved had to demonstrate a very high degree of
cooperation. The bone of contention is, is it possible for the Nile Riparians to exhibit
a similar degree of cooperation in order to develop a legal regime? In other words, can
the countries in the Nile Basin region emulate the progress of the SADC region
countries in the search for greater cooperation, and ultimately develop a legal regime?

It should be noted that the SADC region actors had divergent interests but opted to
coordinate their actions to achieve common purposes where their interests converged.
It should also be noted that this coordination was inspired and is sustained voluntarily.
One may question how the SADC States voluntarily developed rules jointly aimed at
managing and exploiting watercourses in the region. According to Lichbach, the
explanation of collective action can be classified into four “explanatory frameworks”:74
The first framework is that of community whereby the culture of a
given group exerts pressure on individuals in the group to “voluntarily” contribute to
public good; second, market framework, “whereby the rational and uncoordinated
actions of individuals contribute to the provision of public good”; third, contract
framework, whereby parties concerned negotiate an agreement that enhances
individual interests for all parties to the contract; fourth, is hierarchy, whereby
collective action problems are solved through imposition and enforcement by
dominant powers who consider the benefits of collective action to exceed the costs.75

Communities may be centred on such issues as religion, blood, patriotism, language,
culture, etc. As a result such communities tend to act collectively since individual
members may endure the wrath of other group members if they shirk their duties, and
gain respect if they execute their duties diligently.76 Other communities are formed
contractually. In such communities, individual members are part and parcel of the
fixed goals of the community.

75 Idem.
76 Idem.
A cursory glance at the development of SADC watercourses agreements reveals that there was a community well before the agreements were negotiated. There was a well functioning institution in the name of SADC which provided a framework for relatively voluntary solutions to collective action problems which had been sustained for a while. The formation of SADC was motivated by the fact that countries involved shared “positive experiences gained in working together in the group of frontline states, to advance the political struggle” which resulted “into broader co-operation in pursuit of economic and social development” as well as a desire for economic prosperity.77 Such a community which shared common values facilitated the development of a watercourse legal regime through a hegemony that compelled institutional solutions. With regards to the Nile Basin, there is lack of a community of countries involved.78 There are no shared values in the sense of SADC that could compel riparians into safeguarding collective action with regards to sharing of the waters of the Nile. The transboundary market or economic mechanisms are almost absent (albeit all of the Nile countries loosely connected in the Common Market for Eastern and Southern Africa [COMESA]).79

Indeed, the Nile Basin States have moved towards the formation of a community in a very intriguing manner. In the course of the years, the Nile states endeavoured to undertake initiatives which always ended in shambles. Examples of such initiatives include: the Hydromet Project based on a 1967 agreement among Egypt, Sudan, Kenya, Tanzania, and Uganda with the support of the United Nations Development Program (UNDP) and the World Meteorological Organization80; the UNDUGU (meaning “brotherhood” in Swahili) which was founded in 1983 and brought together all the Nile Basin States, except Kenya and Ethiopia and had a goal of fostering economic, social, cultural, and technical ties among them.81 The reason for the failure

77 See, SADC, ‘History, Evolution and Current Status”, at www.sadc.int
78 Waterbury, supra note 74 at p. 167.
79 The motivation behind the establishment of COMESA was the setting up of a common market as opposed to SADC which was established for every sphere of development in the Southern African Region and was motivated by their common struggle against colonialism and later apartheid in South Africa.
of such initiatives lay in the fact that the States did not embrace any common values in the sense of the SADC as was discussed in the previous paragraphs.

In the 1990s there was a move to cooperation in the form of an intergovernmental technical cooperation committee for the promotion of development and environmental protection on the Nile (TECCONILE). The TECCONILE meetings resulted in the development of a Nile River Basin Action Plan. TECCONILE highlighted twenty-two projects categorised in five components. Component D entitled “Regional Cooperation” was aimed at “the establishment of a basin-wide, multidisciplinary framework for legal and institutional arrangements.”

However, due to the absence of community values in the sense of the SADC, resource constraints and the continual competitive behaviour among the Riparian States, very minimal implementation occurred under the Action Plan as originally envisaged. As a result, in 1999, the programme was replaced by the Nile River Basin Strategic Action Program (NBSAP) and TECCONILE was replaced by the Nile Basin Initiative (NBI). Prior to this landmark transformation, there were a series of conferences popularly known as the “Nile 2002 Conferences” which were designated for the promotion of basin-wide cooperation. These Conferences “when linked to an evolving normative framework” they have “played an important role in changing the political climate along the Nile.” Even though the “Nile 2002 Conferences” were conceived to be “technical” in the sense that they brought together technical delegates in the issues of water from the Nile Basin States, their discussions highly influenced the evolution towards the formation of NBSAP and the NBI. The NBI is expected to be

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84 Id., at vi-vii. The five components were: A. Integrated Water Resources Planning and Management B. Capacity Building C. Training D. Regional Cooperation, and E. Environmental Protection and Enhancement.

85 Id., at vii.

86 Brunnee & Toope, supra note 81 at p. 135.


88 Brunnee & Toope, supra note 81 at p. 135.
involved with both the technical and political process, and linking them together. As seen elsewhere, the NBI “Shared Vision” is to promote “sustainable socio-economic development through the equitable utilization of, and benefit from the common Nile Basin water resources”. The NBI is considered as a “transitional mechanism” with a view of facilitating basin-wide cooperation pending a “permanent cooperative framework to be established”. This is a manifestation that a “community” is being formed regardless of the Nile Basin States not sharing any common values in the sense of SADC Countries. It is questionable how a “community” can be formed inspite of lack of common values among the countries sharing the Nile waters.

According to Brunnee and Toope, “various explanations can be offered, not singular answers, but rather a constellation of influences promoting changing patterns of behaviour”. The creation of the 1997 UN Watercourse Convention is one of the major factors behind the emergence of a nascent “community” in the Nile region. Prior to the UN Watercourse Convention, there was a constant debate among Nile Riparian States on the relationship between two fundamental principles of international watercourse law, viz. “equitable utilization” and “no significant harm”. The Nile Basin States have held diametrically opposing positions on which of the two principles takes precedence. The upper stream States embraced the principle of “equitable utilization” as the overriding norm. On the other hand, Egypt as a downstream state has passionately argued that the principle of “no significance harm” takes precedence.

89 NBI, supra note 87.
90 Idem.
92 Brunnee and Toope, supra note 81 at p. 140.
93 See for example, UN. GAOR, 6th Comm., 51st Sess., 16th Meeting, in 37 UN DOC. A/C.6/51/SR.16 (1996); Ethiopia abstained from voting on the resolution to adopt the Draft Convention claiming that it was not suited for “achieving the required balance” which is paramount to “safeguarding the interests of upper riparian States; Rwanda on her part considered that the Draft Convention accorded primacy to the principle of no harm citing that she disapproved the provisions on the relationship with the equitable utilization norm; see, UN GAOR, 6th Comm. 51st Session, 62nd Meeting in 28 UN DOC. A/C.6/51/SR.13 (1996). Tanzania also abstained for a similar reason; see, UN GAOR, 6th Comm. 51st Sess., 62nd Meeting in 40 UN Doc. A/C.6/51/SR.62/Add. 1 (1997).
94 Egypt on her part abstained from voting on the resolution to adopt the Draft Convention stating among other reasons, the need to give primacy to no-harm rule; see UN GAOR, 6th Comm. 51st Sess. 62nd Meeting, in 10 UN DOC. A/C.6/SR. 62/Add.1 (1997).
Given the voting pattern in the UN General Assembly where a majority of the Nile riparian States abstained from voting or voted against the UN Watercourse Convention\textsuperscript{95}, it may be plausible to construct a proposition that the Convention “deprives each side of convincing legal arguments for the priority of their claims”.\textsuperscript{96} Indeed, it may be validly asserted that the “Convention may have actually succeeded in cancelling out-or balancing-the competing legal arguments”.\textsuperscript{97} Therefore, the Convention goaded the Nile States to review their competitive positions and to cooperate amongst themselves with a view of creating equitable solutions to their disagreements. Consequently, the NBI was formed, and it seems to reflect the UN Watercourse convention in terms of harmonizing the equitable utilization principle and that of no-harm.\textsuperscript{98} Further, any subsidiary action programs are supposed to “build on principles of equitable utilization, no significant harm and cooperation”.\textsuperscript{99}

Other factors which have led to a nascent “community” in the Nile Basin region include: the realization that the status quo on the utilization of the Nile’s waters is unsustainable, largely as a result of population growth and advancement in irrigation\textsuperscript{100}; most Nile Basin States recognise the importance of a comprehensive legal regime regulating the Nile given as one of the experts on the Nile states that “more people will die very soon if (the basin states) don’t start to cooperate” since “the water those states receive is less than they need to live on, and this pattern has been so since the 1950s\textsuperscript{101}; it is now common knowledge that not each and every action on the Nile necessarily pits winners and losers, and cooperation on utilization and management of the Nile waters in such domains as protection of water quality, pollution control, hydroelectric development, and managing adversities of evaporation, could be of immense benefit to all Nile Basin States; Finally, the active

\textsuperscript{95} See UN GAOR, 51\textsuperscript{st} Sess., 99\textsuperscript{th} Plenary Meeting at 7-8, \textit{UN DOC. A/51/PV. 99} (1997); in favour: Kenya and Sudan; Against: Burundi; Abstentions: Egypt, Rwanda and Tanzania.

\textsuperscript{96} Brunnee & Toope, \textit{supra} note 81 at p. 152.

\textsuperscript{97} Idem.

\textsuperscript{98} See NBI “Shared Vision”, NBI Overview, \textit{supra} note 87.

\textsuperscript{99} Idem.


involvement of multilateral and bilateral donor agencies such as World Bank and UNDP have acted as catalysts towards the cooperation of Nile Basin States.\textsuperscript{102}

Conclusively, any Nile Basin Cooperation will be based on a contractual foundation based on international principles of water law. It is incumbent upon the Nile Basin States to imbue the general principles of international watercourse law inscribed in the UN Watercourse Convention, to enhance adherence to the cooperative principles of water law.\textsuperscript{103} The formation of the contractual understandings should be encouraged and brokered by third party donor agencies such as the World Bank. The World Bank, in one of its memorandums, required the Bank’s management to take steps to investigate or to process a project only after there has been an approval of a procedure for dealing with the international aspects of the project including the duty to cooperate.\textsuperscript{104} In the practice of the Bank, it refused to finance projects in cases of disputed international watercourses and insisted upon agreement between watercourse states.\textsuperscript{105}

The nascent of NBI, forms the foundation of which encourages “discourse, learning, and identity change that promises to weave these cooperative principles into the fabric of social interaction of the Nile”.\textsuperscript{106} Despite the difference between SADC region and the Nile region with regards to the presence of a community which shares the same values, a lot can be learnt from the process of developing a legal regime in the SADC region, which can be applied in the Nile region. The following section discusses how


\textsuperscript{103} For a detailed discussion of the duty to cooperate, see, Chapter 1 of the present thesis.


\textsuperscript{105} Some of the projects not financed as a result of a dispute include: Projects on the Indus proposed by India (Bhakra/Nagar, 1949) and Pakistan (Lower Sind Barrage Project, 1950); In the case of the Nile (Egypt: High Dam Project); (Sudan Roseries Dam Project, 1957 and Managil Extension Irrigation Project, 1957); on the Euphrates (Syria: Youssef Pasha Multipurpose Dam, 1953), see, Raj Krishna, ‘The Evolution and Context of the Bank Policy for Projects on International Waterways’ in Salman M. A. Salman & Laurence Boisson de Chazournes (ed.), \textit{International Watercourses}, World Bank Technical Paper No. 414, 1998, at p. 31.

\textsuperscript{106} Brunnee & Toope, supra note 81 at p. 153.
SADC utilise the principles of international law in developing the Watercourse Protocols and whether it is the plausible way forward for the Nile Basin States.

5. The Incorporation of the Principles of International Watercourse Law in the SADC Region: Is it the Way Forward for the Nile Region?

The present section will discuss how the SADC incorporated norms of international law into its watercourse legal regime. Then a discussion will ensue on whether this is the plausible way forward for the Nile States.


As was discussed elsewhere in the present thesis, the 1997 UN Convention on Watercourses has endeavoured to establish a lowest common denominator by inscribing well-accepted principles of shared watercourses.\(^{107}\) Indeed, the deliberations of the ILC have helped in structuring a framework for watercourse regimes. A treaty such as the 1997 UN Watercourse Convention provides conceptual material as guidance for negotiation amongst riparian states. Avoiding such a convention which “embodies centuries of experience and the lessons of trial and error and of costly, destructive conflicts” when negotiating an agreement would amount to treading on thin ice.\(^{108}\) Waterbury contends that “contemporary actors, groping towards mutual understandings, would be foolish to forego these distilled lessons”.\(^{109}\) It is from this backdrop that SADC applied the 1997 Watercourse Convention to develop the watercourse legal regime.

At first sight, one notices that the SADC has had to grapple with adopting principles of international law embodied in the 1997 Watercourse Convention to its legal regime. In its preamble, the Revised Protocol succinctly refers to “the progress with

\(^{107}\) For a detailed discussion of the 1997 International Watercourse Convention, see, *supra*, chapter 3 of the present Thesis.

\(^{108}\) Waterbury, *supra* note 74 at p. 28.

\(^{109}\) *Idem.*
the development and codification of international water law initiated by the Helsinki Rules and that of the United Nations Convention on the Law of Non-navigational Uses of International Watercourses". It is evident from the discussion in the subsequent paragraphs that the Revised Protocol embraced most of the international watercourse concepts embodied in the 1997 UN Watercourse Convention.

One of the most striking features of the Revised Protocol is the use of the term "watercourse" in line with Article 2(a) of the UN Watercourse Convention.\(^{110}\) The UN Watercourse Convention defines the term "watercourse" as "a system of surface waters and groundwater constituting by virtue of their physical relationship a unitary whole and normally flowing into a common terminus". The revised Protocol moves a step further than the UN Watercourse Convention and defines the term "common terminus" to include: "sea, lake, or aquifer".\(^{111}\)

With regards to the principle of "equitable and reasonable utilisation", the Revised Protocol reiterates what the UN Convention stipulates. Article 3(8)(a) of the Revised Protocol outlines factors akin to those enumerated in Article 6(1) of the UN Convention used as a benchmark to determine what is "equitable and reasonable utilisation".\(^{112}\) Further, Article 3(8)(b) of the Revised Protocol regarding the weight attached to each factor is similar to Article 6(3) of the UN Convention.\(^{113}\) On the concept of "obligation not to cause significant harm", the stipulations of Article 3(10) of the Revised Protocol are adopted from Article 7 of the UN Watercourse Convention, albeit a conspicuous difference. The difference is with regards to what a riparian state should give "due regard to" in case a "significant harm" occurs as a result of utilisation of a shared watercourse. Article 7 of the UN Watercourse Convention entails that "due regard" is given to the provisions of Article 5 and 6 providing for "equitable and reasonable utilization". On the other hand, the Revised

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\(^{111}\) The elongation of Art. 1 of the Revised Protocol to include the phrase "such as sea, lake or aquifer" was coined in order to create room for the view expressed by Mozambique opposing the phrase "water flowing into a common terminus". See, Chenje M., ed., State of the Environment-Zambezi Basin 2000, at 274.

\(^{112}\) For the discussion of Article 6(1) of the UN Watercourse Convention, see supra, Chapter 3 of the present Thesis.

\(^{113}\) See idem for the discussion of Article 6(3) of the UN Watercourse Convention.
Protocol stipulates that “due regard” should be given to the obligation to take all appropriate measures to prevent significant harm.114

According to Salman, the reason for the difference in the stipulations of the UN Convention and the Revised Protocol with regards to what entails the obligation not to cause harm can be traced from the reluctance of SADC Members “to subordinate the obligation not to cause significant harm to the principle of equitable and reasonable utilization”.115 He further contends that “it may also be an attempt to give equal weight to two principles and to satisfy proponents of both.”116 He also notes that the ambiguity in the Revised Protocol is a recipe for “controversy as to which of the two principles dominate” (that of equitable and reasonable utilisation or that of obligation not to cause significant harm).117

I disagree with Salman’s view, because as I argued elsewhere, the opinion that there is a conflict between the principle of equitable and reasonable utilization and that of obligation not to cause significant harm is unfounded.118 Indeed, what is of concern is that the Revised Protocol failed to illustrate that the two principles are inextricably intertwined. Failure to link the two principles in the Revised Protocol has led to the perpetuation of the rhetoric that they (the principles) are conflicting in nature and that one of them should take precedence.

Article 4(1) of the Revised Protocol on Planned measures is a reflection of Part III of the UN Watercourse Convention entitled “Planned Measures”, which is composed of Articles 11 to 19. In general, the provisions of the Revised Protocol, just like those of the UN Watercourse Convention deal with the issue of notification to other riparian States about planned measures which are prone to cause significant adverse effect upon them, the period of reply119, obligation of notifying state during the period of

114 See Revised Protocol, supra note 63 at Article 3(10).
115 Salman, supra note 48 at 1008.
116 Id., at 1009.
117 Idem.
118 See, argument in supra of Chapter 3 of the present Thesis for the discussion on the relationship between the principle of equitable and reasonable utilization and the obligation not to cause harm.
119 It should be noted that both instruments, viz: the Revised Protocol and the 1997 UN Watercourse Convention provide a period of six months to study and evaluate the possible effects of the planned measures and to communicate their findings. Further, both instruments allow an extension of six
reply, reply to notification, or absence of a reply. Other procedural matters dealt with by both instruments in a similar manner are issues of consultation and negotiations with regards to urgent implementation of planned measures. It should be noted that the 1995 Protocol only addressed the issue of utmost urgent planned measures without providing detailed procedures and most notably, those of notification. It was pertinent to reiterate the UN Watercourse Convention, which is fairly detailed, in developing the Revised Protocol.

Article 4(2), (3), of the Revised Protocol deals with the issue of environmental protection and preservation in the same manner as Chapter IV of the UN Watercourse Convention entitled “Protection, Preservation and Management” consisting of Article 20-26. Article 4(2)&(3) in a similar manner as Chapter IV of the UN Watercourse Convention deal mainly with the protection and preservation of ecosystems as well as the prevention, reduction and control of pollution. The Revised Protocol reiterates recommendations provided by the UN Convention with regards to matters of Environmental Protection and Preservation. The recommendations include: setting joint water quality objectives and criteria; establishing techniques and practices to address pollution from point and non-point sources; and establishment of a list of substances which would negatively affect the quality of the waters of shared watercourses and thus should be prohibited, limited, investigated or monitored. In general, the SADC Countries are obliged under the Revised Protocol to take all available measures for the protection and preservation of the aquatic environment of shared watercourses. It is clear that the Revised Protocol in a similar manner to the UN Watercourse Convention provides a detailed elaboration with regards to the treatment of environment as opposed to the 1995 Protocol.

Article 4(3) of the Revised Protocol also addresses other spheres of management, regulation and installations as dealt with under Articles 24, 25, 26 and 29 of the UN Watercourse Convention. Both documents require consultation with regards to

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120 1995 Protocol, supra note 63 at Articles 4 and 5.
121 Revised Protocol, supra note 63 at article 4(2)&(3), compare with the 1997 UN Watercourse Convention, annexed to the UNGA Res. 51/229 at Articles 20-26.
122 Note that in Art. 28 of the UN Watercourse Convention in id., the term “marine environment” in used instead of “aquatic environment”.

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management of shared watercourses including establishment of a joint mechanism. Parties to both Documents are further required to apply their best efforts to maintain and protect installations, facilities and other works related to shared watercourses. The 1995 Protocol did not deal with those issues. Thus, the Revised Protocol did in fact mirror the UN Convention on how to deal with those issues.

It is conspicuous that the 1995 Protocol did not provide for its relationship with existing and future watercourse agreements. The Revised Protocol on its part reflected Article 3 of the UN Watercourse Convention with a single modification. In a similar manner, both the Revised Protocol and the UN Watercourse Convention provide for the rights and obligations of riparians arising from agreements not affected by them. Both instruments further provide that such watercourse States parties to existing agreements may consider harmonizing them with the respective Documents, viz. UN Watercourse Convention and the Revised Protocol.

However, the two instruments differ with regards to future agreements. The UN Watercourse Convention provides that the watercourse states can enter into agreements that “apply and adjust” the provisions of the Convention. The Revised Protocol on the other hand does not give room for future agreements to adjust its provisions. Future Agreements can only “apply” the provisions of the Revised Protocol. Salman rightly points out that the UN Convention is a universal Framework Document which was negotiated by states with varying degrees of interests, thus it is supposed to cater for specific features of different international watercourses, hence allowing “adjustment” to its provisions by subsequent agreements. With regards to the Revised Protocol, it is “a regional instrument whose application is limited to certain defined countries and watercourses”, and thus has to provide both stability and predictability. Both documents further provide that future

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123 See UN Watercourse Convention, id., at Art. 3; see also, Revised Protocol, supra note 63 at Art. 6(2).
124 Article 3(3) of the UN Watercourse Convention provides: “Watercourse States may enter into one or more agreements referred to as ‘watercourse agreement’ which ‘apply and adjust’ the provisions of the present Convention to the characteristics and uses of a particular international watercourse or part thereof”. On the other hand, Article 6(3) of the Revised Protocol provides that: “watercourse States may enter into agreements which ‘apply’ the provisions of this protocol to the characteristics and uses of a particular shared watercourse or part thereof”.
125 Salman, supra note 48 at 1014.
126 Id., at pp. 1014-15.
agreements can deal with all or part of a shared watercourse or a specific project or program.\textsuperscript{127}

It should be noted that, even though the Revised Protocol mirrored the UN Watercourse Convention in many aspects, it also addressed a number of issues in a distinct manner from the Convention. These issues include: navigational uses of shared watercourses, institutional framework; and settlement of disputes.

Article 1(1) of the UN Watercourse Convention points out that the navigational uses of international watercourses are not within the purview of the Convention, with an exception of non-navigational uses which affect navigation or those uses are affected by navigation.\textsuperscript{128} Both the 1995 Protocol and the Revised Protocol project to navigation amongst other uses.\textsuperscript{129} It was important for the SADC States to include navigational uses in their watercourse legal regime since the region is composed of six landlocked states whose gateway to the sea may involve use of shared rivers.

With regards to institutional framework, Article 5 of the Revised Protocol provides for the framework aimed at implementing the Protocol. The institutional framework is in form of committees which include: the Committee for Ministers in charge of Water, the Committee of Water Senior Officials, the Water Sector Coordinating Unit, and the Water Resources Technical Committee and Sub-Committees.

The Committee of Ministers in charge of Water, which is at the helm of the institutional framework, is responsible for overseeing and monitoring implementation of the protocol as well as assisting in the resolution of potential conflicts with regards to shared watercourses.\textsuperscript{130} The Committee of Water Senior Officials responsibilities include examination of all reports and documents placed at their disposal by the Water Resources Technical Committee and the Water Sector Coordinating Unit.\textsuperscript{131} The Coordinating Unit is responsible for organizing and managing all technical and policy meetings as well as mobilizing financial and technical resources necessary to

\textsuperscript{127} See UN Watercourse Convention, \textit{supra} note 121 at Art. 3(4); see also Revised Protocol, \textit{supra} note 63 at Art. 6(4).
\textsuperscript{128} UN watercourse Convention, \textit{id.}, at art. 1.
\textsuperscript{129} 1995 Protocol, \textit{supra} note 63 at Art. 2(1); see also Revised Protocol, \textit{supra} note 63 at Art. 3(2).
\textsuperscript{130} Revised Protocol, \textit{id.}, at Art. 5(2)(a).
\textsuperscript{131} \textit{Id.}, Art. 5(2)(b).
implement the Revised Protocol. The Technical Committee is in charge of supplying technical support and advice to the Committee of Water Senior Officials and discussing issues submitted for consideration by the Water Sector Coordinating Unit.132

Further, the Revised Protocol obliges the Riparian States to establish apposite national institutions such as watercourse commissions, water authorities, or water boards aimed at enhancing the implementation of the Protocol.133 The UN Watercourse Convention does not establish such a complex institutional framework in charge of overseeing its implementation since it is a prototype of a framework convention.134

In as far as dispute settlement is concerned; the UN Watercourse Convention provides ornate procedures and mechanisms aimed at settlement of disputes.135 It also consists of an annex composed of fourteen articles on arbitration. The most probable reason for the detailed means of settlement of disputes by the UN Watercourse Convention is that as a framework convention, it had to offer a wide range of available means of dispute settlement in order to provide a wider scope of choice for possible means of settling disputes to its parties to select the most suitable means to individual circumstances. The Revised Protocol on its part established a simplified procedure and mechanism for settlement of disputes. Article 7(1) of the Revised Protocol provides that “State Parties shall strive to resolve all disputes regarding the implementation, interpretation and application of the provisions of this Protocol amicably in accordance with the principles enshrined in Article 4 of the Treaty”.136 Similar to the 1995 Protocol, the Revised Protocol further provides that disputes between States not settled amicably shall be referred to the Tribunal.137 In case of disputes between the SADC and a state party, it shall be referred to the

132 Id., Art. 5(2)(c).
133 Id., Art. 5(3).
134 UN Watercourse Convention, supra note 121, Preamble; The UN Watercourse Convention differs from conventions such as the UNCLOS, whose nature obligates an institutional arrangement for its implementation.
135 See generally, UN Watercourse Convention, id. at Art. 33. Art. 33(2) states: “if the Parties concerned cannot reach agreement by negotiations... they may jointly seek the good offices of, or request mediation or conciliation, by a third party, or make use, as appropriate, of any joint watercourse institutions that may have been established by them, or agree to submit the dispute to arbitration or the International Court of Justice.
136 The Treaty referred to is the SADC Treaty, supra note 61.
137 Revised Protocol, supra note 63 at Art. 7(2).
Tribunal for an advisory opinion in accordance with Article 16(4) of the SADC Treaty.\footnote{Id., Art. 7(3); For SADC Treaty see, supra note 61.} It should be noted that decisions of the Tribunal are “final and binding”.\footnote{SADC Treaty, id., Art. 16(5).}

As Birnie and Boyle rightly point out, the value of a framework convention such as the UN Watercourse Convention is that it establishes basic principles which form the common denominator for parties regardless of their subsequent adoption of agreements covering individual watercourses.\footnote{Birnie and Boyle, supra note 73 at p. 239.} Further, such a framework convention provides “a flexible basis for the development of institutions and the harmonization of law and policy for each regional watercourse”.\footnote{Idem.} This was the scenario in the developing of the Revised Protocol of SADC watercourses which applied the provisions of UN Watercourse Convention. Part of the Revised Protocol as we saw in the course of the discussion in the present section exactly resembles the UN Watercourse Convention. This suggests that the Revised Protocol may partly be viewed as a “regional framework” which may be used as guideline for SADC Members in their further negotiations aimed at specific shared watercourses in the region.\footnote{As we earlier saw, the SADC Region is composed of eleven distinct shared watercourses.} In other stipulations, more especially with regards to the institutional arrangements, the Revised Protocol appears to stipulate provisions which are “final” in the sense that they do not appear to be guidelines. Those stipulations appear to enshrine how matters should be handled without room for adjustments by other agreements to specific watercourses in the region. From the above discussion, one is tempted to question whether the road map applied by the SADC Region of incorporating international watercourse principles in developing a legal regime is the way forward for the Nile States.

(2) SADC Incorporation of International Watercourse Law Principles: Is It the Way Forward for the Development of the Nile Legal Regime?

As we have encountered in the course of the present thesis, the problem with regards to the Nile Basin cooperation is the “equitable and reasonable utilization” of the Nile waters. The SADC member States as we saw earlier, resolved the problem by
applying guidelines presented in the UN Watercourse Convention in developing a legal regime. In the light of the SADC achievements, one may pose the question whether this is the plausible way forward for the development of the Nile legal regime.

According to Sherk et al., the UN Watercourse Convention “may not be perfect” but it goes a long way to codify customary norms relating to international shared watercourses which have formed the corpus of “rules of the game” in determining “who gets what”. Indeed, Brunnee and Toope assert that an improvement in the scope of international watercourse law is “one of the reasons for a new, more cooperative spirit in Nile Basin relationships”.

It is for this reason that I am of the opinion that the way forward for the development of a comprehensive Nile legal regime should be modelled to the SADC watercourse legal regime which incorporated principles of shared watercourses as provided by the UN Watercourse Convention. This, as we earlier saw would involve a general and common understanding among the Nile riparian States of the principles of international shared watercourses. Therefore, similar to the SADC, the Nile States should embrace the principles in the UN Watercourse Convention which include: the equitable utilization principle; the no-harm norm; sustainable development; and intergenerational equity. Indeed, such provisions of the Watercourse Convention which are technical and procedural could play a major role of being textual blueprints for similar provisions in the prospective Nile Agreement, as was the case with the SADC development of the 2000 Watercourse Protocol. As one author optimistically states, “the NBI will most likely adopt the general principles of the existing watercourse legal instruments”.

However, as manifested in the SADC 2000 Watercourse Protocol, the UN Watercourse Convention does not plunge deeply into promoting the cooperation

144 Brunnee & Toope, supra note 81 at p. 131, 151.
145 See, supra, previous section.
principles. Hence, there is need for Nile Riparian States to go further than the Convention in developing those cooperative principles. The issues which should be dealt with in depth in a similar manner to the SADC 2000 Protocol on Watercourses include: navigational uses of water (even though not very important because the larger part of the Nile is not navigable); institutional framework which should include institutions both at the basin level and at national level of each individual riparian States; and, finally, an appropriate system of settlement of disputes.

However, the entrenchment of the principles of water law into a comprehensive Nile Agreement can only be achieved if there is a consensus that the status quo is neither desirable nor viable. As discussed elsewhere, Egypt would prefer the status quo. Egypt has persistently declared that she would reject any basin-wide agreement which would deny her of the “acquired rights” in the former legal regimes. Other countries have advanced the idea that “acquired rights” is one of the factors of equitable sharing, but not higher in hierarchy compared to other factors. Indeed, the principles of international water law are not yet fully entrenched in the practice of the Nile. Collins points out that, “in a new century of self-determination and democracy, even those who are most dependent on the Nile recognize the need for equitable use by all those who drink its water”, but “to define and agree on what constitutes equitable utilization, however will be a perilous passage down a long river...” It is a general knowledge that most often than not, it takes a long time to negotiate and conclude treaties with regard to international shared watercourses.

However, I am of the opinion that the creation of a common understanding of principles of shared watercourses in form of an agreement in the Nile Basin need not take a very long period of time. Indeed, as El-Khodari opines, the lack of such an agreement is the “thorniest issue that would cause the NBI to break apart”. The

147 Waterbury, supra note 74 at p. 169.
148 For the factors of equitable utilization, see UN Watercourse Convention, supra note 121 at Art. 6.
149 Brunnee & Tootpe, supra note 81 at p. 153.
common understanding would be in a model of the SADC 2000 Protocol on Watercourses\textsuperscript{153} which allows for the creation of other agreements on individual shared watercourses in the Southern African region. In other words, the prospective comprehensive basin-wide cooperative agreement should not delve into details of the distribution of waters, the protection of environment etc. It should reinstate the common understanding of the principles underlying equitable utilization of international watercourses.

The reason why I propose a fairly general basin-wide agreement is because different sub-basins in the Nile region have differing priorities. A vivid glimpse of the needs of different sub-basins of the Nile which is not conclusive goes to prove that a comprehensive basin-wide agreement would not be able to cater for all sub-basin needs, since they are different depending on the individual sub-basin. Waterbury points out to six sub-basins.\textsuperscript{154}

1. The Lake Victoria: the States in this sub-basin (Kenya, Uganda, Tanzania), are faced with the problem of water hyacinth and the reduction of pollution of the Lake. This could form one sub-basin with a view of controlling the above for the benefits of those countries. It would involve environmentally oriented abstraction of, or runoff, into the lake, lake navigation, hydropower sharing, weed-control, disease control, etc.

2. The Kagera: The Kagera sub-basin has been present on paper, in the form of Kagera Basin Organization.\textsuperscript{155} It is composed of Tanzania, Rwanda, Burundi and Uganda. The sub-basin’s major priority is not irrigation since it enjoys relatively high and even rainfall. Hydropower generation is the priority.

3. Uganda-Sudan would form another sub-basin which would manage issues of Albert Nile and Bahr al-Jebel. The issues would probably include irrigation and power generation.

4. Uganda-Congo-Sudan-Egypt would form another sub-basin which would be involved in managing the entire White Nile with a view of storing water to be released during the dry season.

\textsuperscript{153} See, \textit{supra} of the present chapter.

\textsuperscript{154} Waterbury, \textit{supra} note 74 at p. 174.

\textsuperscript{155} Agreement for the Establishment of the Organization for the Management and Development of the Kagera River Basin, Concluded at Rusumo, Rwanda, 24\textsuperscript{th} August 1977, Came into force 5\textsuperscript{th} February 1978, 1089 \textit{UNTS} 165.
5. Sudan and Egypt would be involved with water storage, power generation and irrigation schemes on the Blue Nile.

6. Finally, Eritrea-Sudan would manage the Gash and Baraka rivers.

Indeed, according to Waterbury, “sub-basin accords could one day ‘federate’ into a basin wide state”.\(^{156}\) Dagne et al. has proposed a sub-basin wide cooperation which would in future give birth to basin-wide cooperation.\(^{157}\) However, inspired by the model of the SADC 2000 Protocol Watercourses, I am of the opposing view. I believe that a firm foundation would be borne out of basin-wide cooperation which would lead to the birth of a comprehensive agreement. This agreement would encompass a general understanding of principles of shared watercourses which would in turn provide an appropriate and effective space for the creation of agreements which are specific to individual sub-basins.

This approach was used in the Europe region under the auspices of the United Nations Economic Commission for Europe. The Convention on the Protection and Use of Transboundary Watercourses and International Lakes was signed in Helsinki in 1992 (hereinafter 1992 UNECE Helsinki Convention).\(^{158}\) Issues for cooperation in the region included: rationale use of water; pollution prevention from industry; prevention of accidental water pollution; groundwater protection; good practice of transboundary water management.\(^{159}\) The Convention plays an important role in the development of transboundary watercourse cooperation in the region of ECE. Its provisions are general in nature and they include: Bilateral and Multilateral Cooperation (Article 9); Consultations (Article 10); Joint Monitoring and Assessment (Article 11); Common Research and Development (Article 12); Exchange of Information between Riparian States (Article 13); Waning and Alarm Systems (Article 14); Mutual Assistance (Article 15); and, Public Information (Article 16). Article 9 of the 1992 UNECE

\(^{156}\) Waterbury, supra note 74 at p. 174.


\(^{158}\) 1992 Convention on the Protection and Use of Transboundary Watercourses and Lakes (Helsinki), at www.unece.org/env/water

Helsinki Convention which is under part II entitled provisions relating to riparian parties obliges member states to:

“... to enter into bilateral or multilateral agreement or other arrangements, where these do not yet exist or adopt the existing ones, where necessary, to eliminate the contradictions with the basic principles of this Convention, in order to define their mutual relations and conduct regarding the prevention, control and reduction of transboundary impact...”

As a matter of fact, there are approximately 160 agreements with regards to transboundary water cooperation in the ECE Region. The 1992 UNECE Helsinki Convention is a Framework Convention for the member states to develop sub-regional watercourses meticulously tailored for individual circumstances. Indeed, this approach seems to be the one which is embraced by the Nile Basin States in the NBI since they aim at establishing sub-basin arrangements within the purview of a basin wide framework as manifested by the subsidiary action programmes of the NBI. The short term goal for the Nile Basin States in the NBI is to achieve a regional framework “acceptable to all basin states” and long term goal is to “pave the way for milestones which would determine net equitable entitlements for each riparian country for the use of the Nile waters”.

6. Final Remarks

It should be noted that the Nile Basin States were on the verge of concluding negotiations on the Nile River Basin Cooperative Framework Agreement on June 2007 in Entebbe, Uganda. According to the NBI, “the Cooperative Framework calls for the establishment of a permanent Nile River Basin Commission through which the countries will act together to manage and develop the resources of the Nile”. According to some sources, there was disagreement on the priority of current

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160 Some agreements were developed prior to the Convention, for example, 1858 Agreement between Austria and Bavaria Regulating River Inn, 1863 Agreement between Belgium and the Netherlands on the Water Supply of the River Meuse; other agreements were developed after the Convention was adopted, for example, the 1999 Rhine Convention, see idem.
161 See Brunnee & Toope, supra note 81 at p. 136; see also NBI, Policy Guidelines for the Nile River Basin Strategic Action Programme, in Council of Ministers of Water Affairs of the Nile Basin States (Item 5, Shared Vision Program).
163 See NBI, Idem. The author does not possess the Agreement because it is not in public domain.
164 Idem.
uses and rights Nile Basin States.\textsuperscript{165} Egypt and Sudan supported protection of current uses whereas the rest of the Nile Riparian States opposed such protection. This led to "unfinished business".\textsuperscript{166}

Let us suppose that the parties to the 1929 Nile Agreement have observed the procedural requirements of the duty to cooperate with a view to arriving at an equitable agreement but there are still no tangible results. This may be because the Parties refuse to relinquish their initial positions, or cannot come up with a compromise agreement which may lead to a diplomatic stalemate. The question to be asked is what then?

For states to reach a point of diplomatic stalemate, most likely they would have engaged in "moves and countermoves, decisions and sub-decisions, that have been made from those [choices] potentially available".\textsuperscript{167} The overall move of reaching a diplomatic stalemate is divided into subsets of interdependent moves which may be distinguished from one another. A vivid example of moves and countermoves which may ultimately lead to a diplomatic stalemate would be:

An initial \textit{fait accompli}; a claimant state's demand to enter into an negotiation on the central claim to termination; an objecting side's total or partial rejection of proposals to enter into direct talks; varying degrees of warning and commitments to threats and promises, which are tied to the central claim, related issues, or to the demand to negotiate; the gradual fulfilment of threats; reprisals to treaty violations; retaliations or reprisals and so on.\textsuperscript{168}

The above scenario is familiar to the discussion of the Nile legal regime as we saw in the course of the thesis. The Parties to the 1929 Nile Agreement have issued both formal and informal protests targeting it. Indeed, Parties resolved to retain the Agreement temporarily pending the conclusion of a new agreement replacing it. Egypt had always tried to avoid active bargaining aimed at the conclusion of a new agreement as she could. In the initial stages, it is logical and understandable that Egypt expected at best that the 1929 Nile Agreement would remain in force. There is no reason why she should have desired to negotiate the matter at all because the Agreement provided her with enormous advantages.


\textsuperscript{166} \textit{Idem}.


\textsuperscript{168} \textit{Idem}.
The other Parties to the 1929 Nile Agreement did not control all the variables that would have led to their preferred outcome (that of concluding a new agreement to replace it). They were (and still are) less powerful than Egypt economically and militarily. However, with the passing of time, Egypt was pressurized by both internal and external factors to negotiate with other riparian states. The internal pressure resulted from the change of circumstances in the Nile region such as the population growth, industrial growth and change of rainfall patterns. These changes led the Nile riparian states to step up the pressure for the negotiation of a new equitable treaty. Indeed, in 1959, Egypt yielded to the pressure and concluded a more equitable Agreement with Sudan which modified the 1929 Nile Agreement. From the 1980s to present, the internal pressure led Egypt to change her stance and engage with other states in different initiatives.

The external pressure included the emergence of customary norms of international shared watercourses and the pivotal role of the World Bank. The 1929 Nile Agreement was formed at a period when there were no customary norms governing shared watercourses. As was shown in chapter 4, the norms conflict with the spirit of the Agreement. As a result, Egypt was under immense pressure to negotiate with other States with a view of concluding a new agreement which is in line with the contemporary norms. The World Bank has also played an instrumental role in bringing the Nile States to the negotiating table in the Nile Basin Initiative with the goal of achieving an equitable agreement on the utilization of the Nile resources.

For some time, the Nile riparian States have failed to come up with such an agreement. In order to solve this stalemate, states may resort to other solutions. Either the Parties will resort to an institutionalized form of third party settlement, or they will turn to a more strategic and meaningful bargaining which would lead to an agreed solution. In the extreme, the dispute could lead to a war.

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169 For a discussion of the 1959 Nile Agreement, see, supra chapter 1 of the present thesis.
170 For a discussion of the Initiatives, see, id.
171 For a discussion of the Customary Norms, see, supra chapter 3 of the present thesis.
172 The role of the World Bank is discussed in the present chapter.
173 Egyptian Minister of Water described Kenya’s intention to withdraw from the Agreement as “an act of war”. Boutros Ghali, the former UN Secretary General and Foreign Affairs Minister of Egypt.
Our primary concern here is the outcome where Parties will resort to the institutionalized third party such as an international tribunal for the settlement of the dispute. A Nile riparian state might, for example, undertake a project that reduces the waters of the Nile and which Egypt has vetoed. The writing is on the wall that the Nile States are willing to undertake such projects. For example, Tanzania has launched a mega project to draw water from the Lake Victoria to supply her population with water whether Egypt consents or not.174 Most recently, some of the Parties to the 1929 Nile Agreement concluded another Agreement which allows its Parties to undertake such projects in disregard of Egypt’s right to veto granted by the former Agreement.175

Egypt may claim that such a project breaches the 1929 Nile Agreement and the international principle of *pacta sunt servanda*. In the *Gabcikovo-Nagymaros Project Case*, the ICJ held that both Parties to the dispute had breached their international obligations. Hungary had stopped the work on the project citing environmental concerns whereas Slovakia as a successor to Czechoslovakia had breached her obligations by putting into operation Variant C.176 The outcome of the Court was that the Parties should renegotiate the Treaty concerned. The Court stated: “It is not for the Court to determine what shall be the final result of these negotiations to be conducted by the Parties”.177 The re-negotiation was to take into consideration “… the norms of international environment and the law of international watercourses”.178 It should be noted that it is the breaching that led to the situation of the Parties being asked by the Court to renegotiate. The Court did not order the Parties to obey the terms of the 1977 Treaty on the Danube River. However, the problem with the Nile scenario would be that it is a party which is accused of breaching an agreement unilaterally whereas in the *Gabcikovo-Nagymaros* Case, both Parties to the dispute had breached their

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175 2003 Protocol for Sustainable Development of Lake Victoria Basin, discussed in chapter 1 of the present thesis.
176 *Case Concerning Gabcikovo-Nagymaros Project* (Hungary v. Slovakia), 1997 *ICJ Reports*, paras. 54, 57, 78, 85 and 86.
177 Id., at para. 140.
178 Idem.
obligations. Therefore, it is not clear whether the institutionalized third party would order the Parties to re-negotiate, or would order the state which has breached her obligations to respect them.

On the other hand, the other States may argue that the 1929 Nile Agreement should be interpreted by the tribunal in the light of principles such as the right to water, right to freely dispose of one's own natural wealth and resources without prejudice to any obligations arising from principles of international law, the right to sustainable development and the geographical location. The principles allow riparian states to undertake projects without prejudice to the principles of international law such as those of international shared watercourses. As was discussed in chapter 4 of the present thesis, there is no obligation in general international law of prior consent in the utilization of watercourses. However, the 1929 Nile Agreement grants such a right of veto to Egypt. It may be argued that the right to veto may be narrowly interpreted in such a manner that it incorporates the principles discussed above. This would mean that, for example, any project which would be aimed at providing a State's population with water in order to enhance its right to water could not be vetoed by Egypt. Another example would be that given the geographical situation of a state (upstream in this case), Egypt's veto would be interpreted in such a manner that a project undertaken to enhance the right to freely dispose of natural wealth and resources of a state which respects obligations of international law such as those of international shared watercourse law cannot be vetoed. In other words, the veto can only be used for projects which do not fall under uses to enhance the right to water, the right to freely dispose natural resources and wealth and the right to sustainable development. However, as we concluded in chapter 4 of the present thesis, the right to veto cannot be interpreted in the light of the above principles which allow all riparian states to utilize water. Any attempt to apply an excessively ambitious technique of re-interpretation or "cross-fertilization" by reference to other norms of international law would amount to re-writing of the 1929 Nile Agreement and is "likely to have only limited success".

179 See discussion of these principles in supra, Chapter 4.
As was noted above, one of the outcomes of a third-party dispute settlement such as an international tribunal would be that the parties negotiate in “good faith” as was the case in the Gabcikovo-Nagymaros Project Case. A question would be, what would happen if the Parties to the Nile Agreement totally fail to reach an agreement even after the submission of the dispute to a third party?

International law does not answer this question. Sir Humphrey Waldock in the commentary to draft Article 65 of the Vienna Convention on the Law of Treaties explained that:

The Commission did not find it possible to carry the procedural provisions beyond this point without becoming involved in some measure and in one form or another in compulsory solution to the question at issue between the Parties. If after recourse to the means indicated in Article 33 (of the UN Charter) the parties should reach a deadlock, it would be for each Government to appreciate the situation and to act as good faith demands.”

It is difficult to imagine the outcome of such appreciation. The most probable outcome would be to go back to the negotiating table with more willingness on the Parties to compromise their earlier positions. Another outcome would be that the Nile riparian would terminate the Agreement in favour of the principles of international shared watercourse law. Or the status quo would remain.

In the instance where one or more of the Parties to the 1929 Nile Agreement unilaterally terminates the Agreement in favour of the principles of international shared watercourse law, she/they may argue that Egypt has shown unwillingness to cooperate in concluding a new treaty replacing the 1929 Nile Agreement. It should be recalled that all the Parties to the Agreement agreed that it would continue applying pending the conclusion of a new treaty. The State would show that Egypt has persistently frustrated the efforts to conclude a new treaty, preferring the status quo. The State may point to the fact that by frustrating efforts to conclude as was agreed by all Parties to the 1929 Nile Agreement, Egypt has breached the principle of negotiating in good faith. Thus, the State would argue that failure to agree on a new treaty justifies her action to terminate the treaty. It would be easy for a state to justify


182 See, Idem; see also chapter 2 of the present thesis.
the termination of the Agreement because she is terminating it in the favour of another existing legal regime (customary principles of international watercourse law). It would be much more difficult for a state to ponder termination if there is no safety cushion for her. The customary principles of international watercourse law act as the cushion for a state wishing to terminate the 1929 Nile Agreement as a result of failure to reach an agreement.

I am of the view that proper realization of cooperation amongst Nile Riparian States will be achieved when they agree on a basin-wide agreement which will take into consideration principles and emerging principles of international shared watercourses discussed in the course of this thesis. I agree that the agreement by itself will not solve all the problems in the utilization of the Nile, but it is also true that there can be no serious resolution of disputes of water utilization without it. Such a treaty would be a paramount means of translating the cooperative political will into applicable and enforceable action.

There is an indispensable need for the Nile Basin States to come up with an equitable, inclusive and effective agreement concerning the Nile instead of relying on an archaic legal regime that poses more harm than good. Each riparian State depends on the others to use the waters equitably and responsibly. As has been seen in the course of the paper, the Nile legal regime is not only archaic but it does not also fulfil the fundamental norms governing the utilization of international watercourses. It is also notable that equitable and reasonable utilization of the Nile as well as other shared water resources is a process. It is a dynamic process, which relies heavily upon active cooperation between riparian states.

Achieving equity for Nile Basin Countries is not an abstract question since an equitable regime is a fundamental requirement of international law. This equitable regime should always aim at securing an equitable apportionment without quibbling over formulas.
CONCLUSION

This thesis seems to be compendious in terms of the range of international law issues it summoned up. The most notable of those issues are: international watercourse law, state succession, human rights law and the law of treaties. Water is the most essential and fought over resource in the World. Struggles over the allocation of water are framed by legal regimes that encompass the body of established rules. But as values change, novel norms and court rulings can affect already established legal regimes. The history of the Nile River, a shared freshwater resource provides an ideal case study to explore the struggle for control over water and how changes in legal regimes affect water allocation. The Nile River has been a source of life and conflict between the riparian countries in the Nile Basin for centuries.

This study has sought to explore the Nile legal regime and its relationship to the principles of international law. In the first chapter, we reviewed and analyzed all treaties with regards to the Nile River. Despite the fact that the River is shared by 10 States, the treaties constituting the Nile legal regime are bilateral in nature with an exception of the 1977 Kagera River Treaty. The treaties have dealt with a wide range of watercourse issues such as irrigation, hydropower production or storage for flood control. Most of those treaties were concluded by the major European Powers in the first quarter of the century. Of all the treaties constituting the Nile legal regime, the most controversial one is the 1929 Nile Agreement. The Agreement provides Egypt with the right to veto projects of upstream riparian states.

With the independence of the Nile Riparian States, arguments and counter-arguments, and theses and anti-theses regarding the application of the 1929 Nile Agreement ensued. This work concludes in the first chapter that given the international principle of state succession the Agreement devolved to the newly independent states. However, the state practice of the parties to the Agreement suggests that the Agreement is applicable pending the conclusion of a new comprehensive Agreement.
As we see in chapter two, the 1929 Nile Agreement is not a separate or self-contained legal regime. The work thus ponder the question: how does the Agreement relate to the wider corpus of international law? The answer to this question is that the Agreement must be interpreted and applied in line with the rules of treaty law, including those which allow other agreements and rules of international law to be taken into account. This re-emphasises that the Agreement is a treaty which functions in the larger international law legal system. Therefore, it is important that the starting point when reviewing the relationship between the Agreement and the larger system of international law should be integration within that system rather than fragmentation from it.

This thesis explores how far the 1929 Nile Agreement can be interpreted in an evolutionary manner. If it cannot be interpreted in an evolutionary manner, can the international principles of shared watercourses be integrated in the Agreement by modifying it, or do the principles terminate it? The outcome of the discussion depends to a large extent on the assumption we make about the Agreement, its purposes and objects, and the practice of the parties.

Chapter four explores the question of whether the 1929 Nile Agreement can be interpreted in an evolutionary manner to integrate the new principles of international shared watercourse which include the principle of equitable and reasonable utilization and the no-harm rule. Also discussed is whether such emerging principles as the right to water and sustainable use can play a role in the evolutionary interpretation of the Agreement. These principles and emerging principles have been extensively discussed in chapter 3 of the present thesis. All the principles and emerging principles with regards to international shared watercourses appear to have one thing in common. That is, they all allow riparian states the right to utilize watercourses in respect of requirements they outline. On the other hand, the 1929 Nile Agreement grants Egypt the right to veto projects of upstream riparian states. The object and purpose of the Agreement was to protect Egypt’s rights vis-à-vis other parties to the Agreement. The conclusion is that given the object and purposes of the Agreement and the requirements of the principles and emerging principles, the 1929 Nile Agreement cannot integrate the principles through its evolutive interpretation. Any attempt to
integrate the principles would be re-drafting the Agreement in disregard of the will of the parties, which is not acceptable under international law.

Therefore, if the 1929 Nile Agreement cannot integrate principles of international watercourse through its evolutive interpretation, the only other way is for the principles to modify or terminate the Agreement. In this work, we concluded that the 1929 Nile Agreement was incompatible with the supervening customary principles with regard to international shared watercourses. We examined a number of incidents where a treaty became incompatible with supervening customary law. We came up with the conclusion one party or more has/have the right to call for the revision or termination of a treaty on account of the emergence of a new custom. The new custom does not automatically revise or terminate an existing treaty such as the 1929 Nile Agreement. One has to review the intention of the parties. Do the parties intend to retain the existing treaty or do they intend to embrace the supervening custom? In the case of the parties to the 1929 Nile Agreement, it was revealed that their practice suggests that the Agreement will continue to apply pending the conclusion of a new comprehensive treaty.

Finally, the thesis discusses future prospects with regards to the Nile legal regime. The Nile Basin States have manifested willingness to act in managing their problems, preferring cooperative approaches in tackling such problems and conflict. The birth of the Nile Basin Initiative is a clear indication that the spirit of cooperation could prevail even though the states involved have diverse riparian interests. The Nile Basin States do recognize the need to initiate the process of problem solving, means of cooperation, and development of projects on the Nile aimed at addressing their particular needs to safeguard their interests of what they regard as equitable and reasonable utilization. However, the states have up to now not agreed on what constitutes equitable and reasonable utilization. The differing interests have led the Nile Riparian States to define what is equitable by considering their individual national interests and sentiments which conflict. The intervention of third parties in the complex negotiations with the Nile Basin Initiative has been very useful. The most notable third party is the World Bank. The Bank has played a meaningful role in the negotiations in the Nile Basin Initiative due to its financial power. It is reckoned that the Nile Basin States cannot in their individual capacities undertake projects on the
Nile due to the high costs of such projects. As we saw in chapter five of the present thesis, it is the custom of World Bank to fund projects which riparian states have in a manner of cooperation reached an agreement. Therefore, the Nile States have no other choice but to cooperate in order for their projects to be funded.
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