

Application of the Duty not to Cause Significant Harm in the context of the Nile River Basin

Zewdu Mengesha*

Abstract

The duty not to cause significant harm is an obligation of customary international law relating to utilization of international watercourses. This duty requires a state sharing freshwater resources to refrain from causing significant harm to other states through its use of a shared international watercourse. It also requires consideration of all relevant factors that are essential for its effective implementation in any given international watercourse. In relation to this duty, the Nile Basin States adopted the Nile Basin Cooperative Framework Agreement to regulate the use, development, protection, conservation and management of the Nile River Basin and its resources. However, the Nile River Basin Cooperative Framework Agreement did not set out detailed guidelines on how the Nile River Basin Commission should promote and facilitate the implementation of the principles enshrined under this Framework convention, which includes the duty not to cause significant harm. This entails drawbacks for the application of the principle in the Nile Basin. Thus, this Article examines how the duty not to cause significant harm should be applied in the Nile Basin.

Key Terms: the duty not to cause significant harm, equitable and reasonable utilization, the Nile basin

* LLB (Bahir Dar University), LLM (Addis Ababa University), Lecturer in Law at Bahir Dar University School of law. The author is very grateful to Mr. Fasil Amedetsion, Dr. Tadesse Kassa, the editor-in-chief and the anonymous reviewers for valuable comments on earlier drafts of this article. All errors remain mine. The writer can be reached at: zewdu_mengesha@yahoo.com

Introduction

The duty not to cause significant harm is among a few principles that govern the issue of international watercourses. The 1997 UN Convention on the Law of the Non-Navigational Uses of International Watercourses (UN Watercourse Convention) is one of the most recent and comprehensive international watercourse agreements with regard to Non-navigational uses of International Watercourses. The convention incorporates this principle under the second part, entitled ‘general principles.’ This implies that the duty not to cause significant harm is among the most important principles regulating issues regarding non-navigational uses of international watercourses.

Another most cardinal principle of international watercourses law incorporated under the UN Watercourse Convention (1997) is the principle of equitable and reasonable utilization and participation. Article 5 of this convention states that watercourse states shall, in their respective territories, utilize an international watercourse in an equitable and reasonable manner. It further stipulates that an international watercourse shall be used and developed by watercourse states with a view to attaining optimal and sustainable utilization thereof and benefits therefrom, taking into account the interests of the watercourse states concerned, and consistent with adequate protection of the watercourse.

It is commonly believed that it is only upstream riparian states that can harm downstream states by affecting the quantity or quality of water flowing to them. It is not generally realized that downstream riparian can also harm upstream riparian by foreclosing their future uses of water through the prior use of, and the claiming of rights to such water.¹ For this reason, downstream riparian states require that they be notified of any activity upstream to ensure that such activity will not harm their interests. Many believe that this is a unilateral requirement imposed upon the upper riparian countries and does not apply to downstream states. Along these lines of thinking, it is also widely believed that only upstream riparian's can harm downstream riparian's, and not the other way around.² But it is also important to note that, contrary to popular belief, in some cases "harm" can be caused by a downstream state to its upstream riparian neighbors. For example, by foreclosing the upstream state's future water uses through the prior utilization of such water.³

The application of the duty not to cause significant harm under international watercourses law has always been controversial. In the absence of a detailed

¹ Salman M.A. Salman (2010), Downstream riparians can also harm upstream riparians: the concept of foreclosure of future uses, *Water International* Vol. 35, No. 4, Rutledge Taylor & Francis Group, P.350.

² Ibid, P.351

³ Wouters, Vinogradov, Allan, Jones & R. Clark (2005), *Sharing Transboundary Waters: An Integrated Assessment of Equitable Entitlement: The Legal Assessment Model*, Technical Documents in Hydrology, No. 74, UNESCO, Paris, p. 54 [hereinafter Wouters et al, *Sharing Transboundary Waters: An Integrated Assessment of Equitable Entitlement: The Legal Assessment Model*].

and universally accepted set of rules, the actual implementation of the principle is bound to be problematic. No comprehensive international treaty framework exists that could be enforced against all the riparian states in the Nile River Basin. What is more, the absence of a unified legal regime and the unique geopolitical setting of the region may have a negative effect on the possibilities of integrated river basin planning and utilization.

Except for the Constitutive Act of the Nile Basin Initiative, which describes the Nile as a shared resource of all the riparian communities and recognizes a common commitment to its equitable utilization across the basin region, one would note, perhaps with a degree of dismay, that throughout its long history, the Nile had never been subjected to a single legal arrangement. Such an agreement would no doubt acknowledge that all the co-riparian states of the Nile have the right to the water resources, but that such rights are limited by the principle of just and equitable water sharing.⁴ In the absence of an inclusive treaty framework, disputants must resort to customary international law and general principles of law to fill the legal gaps left unaddressed by formal agreements.

The Nile River Basin Cooperative Framework Agreement (CFA) provides that when utilizing the Nile River System's water resources in their territories,

⁴ Nurit Kliot, *Water Resources and Conflict in the Middle East*, Rutledge, London and New York, 1994, p.91 [herein after Kliot, *Water Resources and Conflict in the Middle East*].

the basin states shall take all appropriate measures to prevent causing significant harm to other states. The stipulation does not, however, set out clear guidelines which direct the effective application of the principle in the specific context of the basin.⁵ Similarly other regional watercourse agreements fail to clearly stipulate guidelines to be considered for the effective application of this principle. In this context, the 1995 Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin may be mentioned.

This highlights the need to scrutinize such specifics as the relationship of the rule with other principles of international watercourses law, to identify which scales of utilization or what patterns of use are subjected to the protected regime of the no significant harm rule, and to analyze how the contemporary

⁵ Article 16(a) of the Nile River Basin Cooperative Framework Agreement states that “[t]he Nile River Basin Commission is mandated with the promotion and facilitation of the implementation of the principles that are enshrined in the Cooperative Framework Agreement of the Nile. CFA is a regional watercourse agreement deals about the use, development, protection, conservation and management of the Nile River Basin and its resources and establishes an institutional mechanism for cooperation among the Nile Basin States. The convention is not yet into force. In April 2010, seven of the Nile Basin states agreed to open the CFA for signature. Egypt and Sudan rejected this proposition, despite these disagreements; the Agreement on the Nile River Basin Cooperative Framework was officially opened for signature on 14 May 2010. Ethiopia, Rwanda, Tanzania, Uganda, Kenya and Burundi signed the CFA. Ethiopia, Rwanda and Tanzania ratifies CFA in June 13, 2013, August 28, 2013 and March 26 2015 respectively. <http://www.nilebasin.org/index.php/spotlight/99-cfa-overview> last visited 19/05/2015.

setting of international law as well as its evolution addresses the application of the no significant harm rule in the general context of river basins.

1. The Patterns of Utilization in the Nile River Basin

The Nile River is the principal artery of life in Egypt. However, this basic fact does not apply in the same way to the other riparian states. Indeed, the Nile River has shaped the life, habits and culture of Egyptian people over centuries, and its periodic flooding has constantly renewed the life cycle.⁶ The river has brought life-giving waters through the heart of the North African desert for millennia, and has been relied on by farmers, and others in Egypt, for a long period of time.⁷

In the modern era, water utilization in modern times began in 1834, when Mohammed Ali Pasha attempted to expand the area utilized for summer crops by creating a system of canals in the delta; that year Mohammed Ali tried to regulate the river by constructing a barrage across the Nile on its bifurcation at the head of the delta.⁸ The barrage was intended to raise the level of water, but it was not until 1861 when British engineers completed the construction

⁶Ancient Egyptian history indicates that the people became used measuring the level of the river and considered this measurement an indication of the economic and civilized conditions of the country. Hamdy A. Hassan and Ahmad Al Rasheedy, 'The Nile River and Egyptian Foreign Policy Interests', *African Sociological Review* 11(1) 2007, p.26.

⁷ Joseph W. Dellapenna., Treaties as Instruments for Managing Internationally-Shared Water Resources: Restricted Sovereignty vs. Community of Property, *Case W. Res. J. Int'l L.*, vol. 26:027, 1994, p.47.

⁸ Kliot, supra note 4, Water Resources and Conflict in the Middle East, p.32.

that the Delta Barrage functioned properly.⁹ In fact, a number of factors have contributed to the history of water utilization, management, and development in the Nile Basin in the past century. Among the notable factors, the presences of British interests in the basin during the colonial era and a policy of water security pursued by Egypt in the subsequent decades may be mentioned.¹⁰

The impending struggles over the waters of the Nile follow the patterns that have been found in river basins worldwide.¹¹ As is generally the case, development in the Nile Basin occurred earlier and faster in the lower basin than in the upper basin. This creates a set of existing users who demand protection for their "prior rights" and a class of disadvantaged potential users upstream who demand developmental equity.¹² In the past, Egypt and Sudan ignored the interests of the upper riparian states and failed to invite them to take part in the planning or construction of major water projects, including the Aswan Dam.¹³

⁹ Ibid, p.32.

¹⁰ Mohammed Abdo , *The Nile Question: The Accords on the Water of the Nile and Their Implications on Cooperative Schemes in the Basin*, 2004 p.46, available at:<http://sam.gov.tr/wp-content/uploads/2012/01/4.-Mohammed-Abdo.pdf>.

¹¹ Dellapenna, supra note 7, p.51.

¹² Ibid. p.51.

¹³ Kliot, supra note 4, *Water Resources and Conflict in the Middle East*, p.90.

Following the Egyptian failure to implement the Century Storage Project which evolved from several sources,¹⁴ all the riparian states, but especially Egypt, gradually developed their own separate water projects.¹⁵ Egypt has utilized the Nile for irrigation for centuries. Agriculture in Egypt is almost entirely dependent on irrigation from the Nile since there is no significant rainfall except in a narrow strip along the Mediterranean coast. The total irrigation area in 1997 was about 8 million *feddan*,¹⁶ which equates to approximately 3.36 million hectares (ha).¹⁷

The major controlling structures on the Nile in Egypt include the High and Old Aswan Dams and a number of downstream barrages. The Old Aswan Dam was completed in 1902 with a storage volume of about 1 BCM.¹⁸ By increasing the height of the dam, the storage capacity was increased to 5 BCM in 1934. The High Aswan Dam (HAD), upstream of the (Old) Aswan Dam, was completed in 1964, and the Lake Nasser reservoir created by the dam drastically improved the regulation of the Nile water.¹⁹ According to a study conducted by the Food and Agriculture Organization (FAO) on

¹⁴ Basically, the plan envisaged storage of water on the Blue and White Nile from affluent years for use during periods of drought. Although the plan calls for dams to be built in several basin states, its primary aim is to maintain the interests of Egypt.

¹⁵ Kliot, supra note 4, *Water Resources and Conflict in the Middle East*, p.37.

¹⁶ Arab Republic of Egypt, Ministry of Water Resources and Irrigation (2005) 'National Water Resource Plan for Egypt – 2017', Cairo, pp. 2-31.

¹⁷ NB: 1 *feddan* = 4 200 m² = 0.42 ha = 4.2 x 10⁻⁴ x 1 000 ha

¹⁸ Arab Republic of Egypt, Ministry of Water Resources and Irrigation, supra note 16, pp.2-4

¹⁹ Ibid, pp.2-4.

“irrigation potential” and actual irrigation by country and river basin, Egypt has irrigation potential of 4,420,000 ha of land within the basin, of which 3,078,000 ha are already in use.²⁰ The Republic of Sudan, both prior to and after the secession of south Sudan, has made only moderate use of the resource so far, but has been embarking on a program of agricultural expansion. The FAO study indicated that the irrigation potential of Sudan within the basin was an estimated 2,750,000 ha, of which 1,935,200 ha are in use.²¹ According to the document issued by FAO In 1997, the gross irrigational water requirements in the Nile Basin were estimated as standing at 124 BCM per year, of which 19.98 was in Ethiopia, 38.5 in Sudan and 57.46 in Egypt.²²

The states further upstream, including Ethiopia, Tanzania and Uganda which supply the waters of the river, have only begun to make use of the water very recently. At the close of the last millennium, Ethiopia was irrigating fewer than 200,000 ha of farmland, although a total of 3.7 million ha had been classified as potentially irrigable.²³ This gross underdevelopment of this capacity to grow food and industrial crops spurred the Irrigation Development

²⁰www.fao.org/docrep/w4347e/w4347e0k.htm#thenilebasin, last visited 15/03/2014.

²¹www.fao.org/docrep/w4347e/w4347e0k.htm#thenilebasin, last visited 15/03/2014 The study is made before south Sudan succeeds from former republic of Sudan.

²² FAO irrigation potential in Africa, available at: <http://www.fao.org/docrep/w4347e/w4347e00.htm>, last visited 3/19/2014.

²³ Federal Democratic Republic of Ethiopia, Ministry of Water Resources (2002) ‘Water Sector Development Program Main Report’, Addis Ababa, vol. II,p.46.

Program (IDP) to generate a plan to increase irrigation substantially within 15 years (2002–2016).²⁴ In this regard the irrigation potential of the Nile Basin in Ethiopia has been estimated at more than 2.2 million hectares.²⁵ The irrigated area was about 23,000 hectares in 1989. In the same manner, Uganda is in much the same position as other upper riparian states of the Nile. The irrigation potential of Uganda is estimated 202,000 ha of which only 5,550 ha are irrigated.²⁶ This unequal development of a river can cause great political, economic and legal difficulties in the proper application of the duty not to cause significant harm.²⁷

The difference in the pattern of utilization between the upper and lower riparian states has its own effect in the appropriate application of the principle. Sooner or later, the state which has been slow to develop the portion of the river in its territory will need more and more water for domestic and sanitary purposes, for agriculture, for hydro-electric power, for industry and so forth.²⁸ Considering that Egypt's water resources mainly originate beyond its borders, Egypt will campaign to maintain her water security in the Nile River. Despite the fact that the Blue Nile comes from the Ethiopian Highlands, which provides almost 85 percent of the Nile's water share;

²⁴ *Ibid.* p.46.

²⁵ www.fao.org/docrep/w4347e/w4347e0k.htm#thenilebasin, last visited 15/03/2014.

²⁶ *Ibid.*

²⁷ C. B. Bourne, 'The Right to Utilize the Waters of International Rivers', University of British Columbia, *The Canadian Yearbook of International Law*, 1965, p.187.

²⁸ *Ibid.* p.187.

Ethiopia has been largely neglected in all Nile water agreements, which date from the twentieth century. Ethiopia, the uppermost riparian state of the Blue Nile basin, protested to Egypt and Sudan when the two countries concluded the 1959 Nile Agreement that divided the Nile waters exclusively between them. Ethiopia has since been objecting to most of the projects undertaken by Egypt and Sudan on the Nile because Ethiopia has realized that those projects could have a negative effect on its future use of the Nile waters, and its equitable and reasonable share of the resource.²⁹ However no measures of integrated planning have been applied in the Nile Basin. Moreover, since the only multipurpose (and highly consumptive) project, the Aswan High Dam, is located in Egypt (for the sole benefit of Egypt and Sudan), any plan for future utilization of the upper Nile waters, whether in Ethiopia or other upstream states, is interpreted in Egypt as a threat to its very existence.³⁰

Economic development is often accompanied by greater diplomatic heft. Egypt can exert its influence on international organizations to block international financing of Nile projects. For instance, Egypt has blocked Asian Development Bank (ADB) funds meant to aid Nile riparian states in their exploitation of the Nile. It has also contributed towards the establishment of the World Bank's Operating Directive 6.50, which

²⁹ Salman M.A. Salman , *The United Nations Watercourses Convention Ten Years Later: Why Has its Entry into Force Proven Difficult?*, *International Water Resources Association Water International*, vol. 32, no. 1, 2007, p.9.

³⁰ Kliot, *supra* note 1, *Water Resources and Conflict in the Middle East*, p.266.

conditions disbursement of World Bank funds for the development of projects along internationally shared rivers upon agreement by all riparian states.³¹ Thus, the inability of upper riparian states to raise the massive amounts required for Nile projects has precluded them from building dams along the river for hydroelectric purposes and irrigation schemes.³²

For decades, the political turmoil in Ethiopia prevented the country from developing the Nile's waters. If, however, Ethiopia succeeds in remaining stable and undertakes major development projects, this picture will change.³³ In fact, Ethiopia's relative political stability and economic strength have led to a realization that more substantial water use is inevitable, because economic growth is more likely and effective planning could be undertaken. The last few years witnessed the Ethiopian economy continuously improving which, in turn, has led to the implementation of various projects on the Nile River. For instance, Ethiopia announced the commencement of construction of its Grand Renaissance Dam, which will generate 6000 MW of hydro-power, making it Africa's largest hydroelectric plant. This has caused tense diplomatic confrontations between Egypt, Ethiopia and, to a certain degree, Sudan.

³¹ Fasil Amdetsion, *Where Water is Worth More than Gold: Addressing Water Shortages in the Middle East and Africa by Overcoming the Impediments to Basin-Wide Agreements*, *SAIS Review*, vol. 32, no. 1, Winter-Spring 2012, pp. 169-183, Johns Hopkins University Press, p.174.

³² *Ibid.* p.174.

³³ Dellapenna, *supra* note 7, p.50.

Developmental disparities frequently establish a pattern whereby lower-basin water users have military power to enforce their will, while upper-basin users have the water and the ability to cut it off or contaminate it. The resulting tension can be managed only if the water is controlled in such a way as to assure the equitable participation of all states sharing the basin for their economic developmental activities.³⁴

2. Application of the No Significant Harm Principle in the Nile River Basin

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

This duty requires that states exercise due diligence to utilize a watercourse in such a way as not to cause significant harm. However, the fact that an activity causes significant harm does not by itself necessarily constitute a basis for barring it. A watercourse state can be deemed to have violated its due diligence obligation only if it knew or ought to have known that the particular use of an international watercourse would cause significant harm to other

³⁴ Ibid.p.51.

watercourse states.³⁵ Sometimes, even an equitable allocation of the uses and benefits of the waters of an international watercourse might entail some factual "harm", because an international watercourse might not always be capable of fully satisfying the competing claims of all the states concerned. For example, where there is insufficient water in a watercourse to satisfy the expressed needs or claims of the states concerned, an equitable allocation would inevitably result in their needs or claims not being fully satisfied. In that sense they could be said to be "harmed" by an allocation of the uses and benefits of the watercourse, even if that allocation was, in fact, equitable.³⁶ However, such harms to a watercourse state cannot entail a legal "injury" or be otherwise considered a wrongful act by the other riparian states.

Here it is important to consider how far a watercourse state's existing utilization of the Nile is protected. As stated in Article VIII of the Helsinki Rules on the Uses of the Waters of International Rivers, an existing reasonable use may continue in operation unless the factors justifying its continuance are outweighed by other factors leading to the conclusion that it be modified or terminated so as to accommodate a competing incompatible

³⁵ ILC (1994), *Report of the International Law Commission on the work of its forty-sixth session*, U.N. Doc. A/49/10, p.104.

³⁶ Report of the International Law Commission on the work of its thirty-eighth session (5 May- 11 July 1986), Document A/41/10, Official Records of the General Assembly, Forty-first session, Supplement No.10,Par.41.

use.³⁷ As stated in the commentary of the Berlin rules, a Basin State cannot preclude present uses by another basin state by a claim that the objecting states will need the water at some time in the future. On the other hand, such existing uses of water allocated to another state do not become a vested right relative to later beginning uses in the state to which the water is allocated.³⁸ However no corresponding provision was incorporated into the UN Watercourse Convention or the agreement on the Nile River Basin Cooperative Framework, nor would such an insertion be indispensable in any event. Both instruments prescribed that in deciding the equitability of utilization, an existing use of any basin state, however vital, would not necessarily receive complete protection. In fact, an existing use constitutes only one of the numerous factors considered cumulatively, and as such, it

³⁷ The Helsinki Rules on the Uses of the Waters of International Rivers which was adopted by the International Law Association at the fifty-second conference, held at Helsinki in August 1966 under Article VIII states that:-

1. An existing reasonable use may continue in operation unless the factors justifying its continuance are outweighed by other factors leading to the conclusion that it be modified or terminated so as to accommodate a competing incompatible use.
2. (a) A use that is in fact operational is deemed to have been an existing use from the time of the initiation of construction directly related to the use or, where such construction is not required, the undertaking of comparable acts of actual implementation.
(b) Such a use continues to be an existing use until such time as it is discontinued with the intention that it be abandoned.
3. A use will not be deemed an existing use if at the time of becoming operational it is incompatible with an already existing reasonable use.

³⁸ International Law Association Berlin Conference (2004) Water Resources Law, P.22

occupies no particular position of pre-eminence.³⁹ For example, Article 6(1)(e) of the UN Watercourse Convention refers to both existing and potential uses of the international watercourse in order to emphasize that neither is given priority, while recognizing that one or both factors may be relevant in a given case.⁴⁰

Hence first appropriators cannot legally presume that entrenched uses in shared river courses will be accorded secure protection in perpetuity. When new users of a resource become “ready to use the waters or to increase an existing use, in this case the entire question of equitable utilization of the waters is opened up for review... and the rights and needs of the various states would be considered”.⁴¹ This means that the existing use of a state will be maintained if this utilization is in line with the principle of equitable and reasonable utilization with respect to that common international watercourse. This implies that in the long term, were the rule of equitable utilization

³⁹ Tadesse Kassa Woldetsadik (2013), *International watercourses law in the Nile River Basin: Three States at a Crossroads*, (Routledge Taylor and Francis Group, London/New York), p.254. [Herein after Tadesse, *International watercourses law in the Nile River Basin: Three states at a crossroads*].

⁴⁰ International Law Commission (1994), *Report of the Commission to the General Assembly on the work of its forty-sixth session*, vol. II, Part II, United Nations, New York and Geneva, p.101.

⁴¹ Tadesse K. Woldetsadik, *supra* note 39, p.254

enforced, Egypt and Sudan could be confronted with the risk of losing a great deal of the benefits they now enjoy through prior appropriation.⁴²

Moreover, it is true that the material application of the duty not to cause significant harm raises a number of other difficult questions. For example, it will be problematic to determine what action would be adequate to satisfy the duty of “all appropriate measures” under Article 7(1) of the UN watercourse convention. In addition, it is stated that a watercourse state could be required to pay compensation “where appropriate” if it has caused significant harm to another watercourse state. But again, there could be disagreement about when compensation is “appropriate.”⁴³ Beyond this, the term “harm” is not defined. Does the use of more water by Ethiopia constitute harm to Egypt, for example? Or does “harm” only refer to serious pollution of the waters that would in turn affect a downstream state? There is no adequate guidance about this.⁴⁴ Thus the ambiguity makes the application of the duty not to cause significant harm will pit upstream and downstream states against each other.

2.1 Positions Advocated by Upper and Lower Riparian States

The structure of the legal argument related to the specific framework is categorized by opposing claims. Every state bases its rights on the refutation

⁴² Ibid.p.254.

⁴³ Christina M.Carroll, ‘Past and Future Legal Framework of the Nile River Basin’, *The Georgetown International Environmental Law Review*, vol.12, (1999-2000), p.289.

⁴⁴ Ibid. p.290.

of the rights of others. When we come up to the position of the lower riparian states, for example, Egypt holds the view that she has “natural and historic” rights over Nile waters acquired by long usage and recognized by other states such as Great Britain and Sudan, and that the 1929 and 1959 Nile water treaties have been declaratory of international customary law relating to fluvial law.⁴⁵ The 1929 Agreement was an ‘Exchange of Notes’ between Egypt and Britain. This treaty did not only bind Sudan to Egypt’s approval before undertaking any irrigation project, but also gave Egypt rights over the use of Lake Victoria and other water bodies around the River Nile. Egypt, as the downstream state, had its interests guaranteed in three-fold ways, these include: - Having a claim to the entire timely flow at a total amount of 48 BCM/year, having rights to on-site inspectors at the *Sennar* dam, which is outside of Egyptian territory, Being guaranteed that no works would be developed along the river or on any part of its territory, which would threaten Egyptian interests.⁴⁶ The 1929 Egyptian-British treaty was last revised in 1959.

⁴⁵ Arthur Okoth-Owiro, *The Nile Treaty State Succession and International Treaty Commitments: A Case Study of The Nile Water Treaties*, Konrad Adenauer Stiftung and Law and Policy Research Foundation, Nairobi 2004 ,p.16.

⁴⁶ Patrick L. Otieno Lumumba, The Interpretation of the 1929 Treaty and its Legal Relevance and Implications for the Stability of the Region, *African Sociological Review* 11, 1, 2007,P.13

The 1959 agreement was a treaty between United Arab Republic and Sudan for the Full Utilization of the Nile Waters Signed at Cairo, on 8 November 1959; in force 12 December 1959. This agreement is concluded without involving other watercourse states of the basin. According to Article 2(4) of this treaty Egypt is allowed to take the lion's share which is 55½ Billiards and 18½ Billiards for the Republic of the Sudan.

The lower riparian states have submitted that their water rights cannot be affected by any upstream diminution of the flow of the water based on factual and legal bases. Egyptian scholars have argued that according to the 1959 agreement, Egypt has been allowed to utilize 55.5 BCM of water.⁴⁷ Egypt argues that this constitutes only "55.5 BCM out of total 200 BCM of water resources in the Nile basin," i.e., about 4 percent of the total precipitation falling over the Nile basin which is estimated at around 1,600 BCM of water."⁴⁸

The average annual rainfall in the upper part of the basin is much higher than the rainfall in the lower basin. For example, in Ethiopia the average annual

⁴⁷ The 1959 Agreement for the Full Utilization of Nile Waters guaranteed that 55.5 BCM per year would flow into Egypt without any hindrance from Sudan. The agreement also allowed Egypt to construct the Aswan Dam for "long term" water needs.

⁴⁸ Marawan Badr, Egyptian Ambassador to Ethiopia, an interview with journalists from the Ethiopian Press Agency focused on issues related to the Ethio-Eritrean border dispute, the Nile waters and peace efforts in Somalia. 23 July 1998, available at: http://www.geocities.com/~dagmawi/News_July23_Egypt.html.

rainfall is 1125 mm, whereas in Egypt it is 15 mm.⁴⁹ Therefore on different occasions Egypt has argued that, as a nation of limited endowments, it “relies totally on the waters of the Nile for its survival, because it is an arid desert land.”⁵⁰ Egypt has sought to highlight this dearth of precipitation in defending its utilization of the Nile. It has attempted to differentiating between the Nile River and the Nile Basin. While the former carries between 90-100 billion cubic meters of water down the watercourse, the latter actually receives some 1,660 billion cubic meters of rainfall, 85 percent of which falls on the Ethiopian high plateau and the rest over the other upstream nations.⁵¹ Rather than fixate on its water quota, Egypt contends that upstream countries would be better off focusing their own energies on exploitation of this untapped water supply, much of which is currently lost to seepage and evaporation.⁵² Beyond it is also observed while the Lower riparian states maintained that upper riparian states do have other available water resources outside the Nile Basin area.

In defense of its existing uses and rights which cannot be subjected to upstream harm, Egypt builds its legal argument on the basis of successive

⁴⁹www.fao.org/docrep/w4347e/w4347e0k.htm#thenilebasin, last visited 15/03/2014.

⁵⁰ Shams Al Din Al Hajjaji , ‘The long empty canyon: A study of the old/new legal problems of the Nile basin’, *Journal of Water Resources and Ocean Science*, vol. 2, no.5, 2013, p.146, available at; <http://www.sciencepublishinggroup.com/j/wros>.

⁵¹ Accord or Discord on the Nile? - Part I, Int'l Water Law Project Blog, <http://www.internationalwaterlaw.org/blog/2010/07/26/accord-or-discord-on-the-nile-%E2%80%93-part-i/>, last visited 17/03/2014.

⁵² Ibid

legal notes and agreements. The crux of the argument submits that the Nile waters should flow to the lower riparian states of the Nile (Egypt and Sudan) without any impediment or diminution. Egypt considers any changing to the present status quo of utilization would violate the duty not to cause significant harm imposed on the Nile Basin countries by virtue of the stipulations of international law. Hence, the duty not to cause significant harm rule has been proposed and construed as a means for maintaining existing patterns of utilization irrespective of the fact that there is no all inclusive agreement among all of the Nile Basin states.⁵³

From the forgoing, it is plain that downstream countries of the Nile perceive the duty not to cause significant harm rule as a basic guarantee for the historical and acquired rights which they believe have been established through continuous utilization of the resource prior to the upstream counterparts and as acquired rights obtained from successive notes and conventions, though it is unfortunately refuted by upper riparian countries especially Ethiopia.

On the other hand, the view of the upper riparian states appears to be different. Ethiopia does not acknowledge any existing treaty or other obligations preventing it from freely disposing of the Nile waters in its

⁵³ Interview with His Excellency Ambassador FissehaYeimer, Special Legal Advisor for the Minster of Foreign Affairs and former Director General for the international law directorate. December 2013.

territory. For their part, the upper riparian states on whose behalf Great Britain and other colonial powers had signed noninterference treaty obligations do not share the view of the lower riparian states on the perpetual nature of the present regime.⁵⁴ Upper riparian states consider the Egyptian defense based on historical rights an excuse to get the lion's share of the Nile water. This argument is considered to be prejudicing their water rights.⁵⁵ For example, the Agreement for the Full Utilization of the Nile between Egypt and Sudan aimed at full utilization of the Nile River only between those two nations. Ethiopia and the East African states were not invited to be part of the 1959 agreement.⁵⁶ According to Article 34 of the Vienna Convention on the Law of Treaties, a treaty does not create either obligations or rights for a third state without its consent".⁵⁷

Therefore, Ethiopia is not bound by this agreement as she is not a party and also objected to this agreement during its negotiation stage in the 1950s. The east African nations have objected to the agreements on a number of

⁵⁴ B.A.Godana, *African shared water resources, legal and institutional aspects of the Nile, Niger and Senegal River systems*, Graduate Institute of International Studies, Geneva, 1985, p.197

⁵⁵ British Yearbook of International Law, 1930, pp. 195-196, as cited by Mohammad Tufail Jawed, Rights of the Riparian, *Pakistan Horizon*, vol. 17, no. 2 (Second Quarter, 1964), p.147

⁵⁶ However it is possible to come in to the conclusion that the 1959 agreement incorporates possible future claims by other countries of the Nile as this is tacitly acknowledge within the new agreement of the two states.

⁵⁷ Vienna Convention on the Law of Treaties, adopted on May 22, 1969, entered into force on Jan. 27, 1980

occasions; for example, speaking to journalists on February 12, 2002, Energy Minister of Kenya Raila Odinga said that the 1929 Agreement should be renegotiated; “the three countries (Kenya, Uganda and Tanzania) were not independent and were under colonial rule. That is what makes the treaty unfair. Why should we be denied the use of our water in the name of conserving it for others downstream?”⁵⁸ Similarly much earlier in 1962, the Government of Tanganyika outlined its policy on the use of the waters of the Nile. The note reads that the provisions of the 1929 Agreement purporting to apply to the countries under British Administration are not binding on Tanganyika. At the same time, however, and recognizing the importance of the waters of the Nile that have their source in Lake Victoria to the governments and people of all riparian states, the Government of Tanganyika stated it is willing to enter into discussions with other interested governments at the appropriate time, with a view to formulating and agreeing on measures for the regulation and division of the waters in a manner that is just and equitable to all riparian states and the greatest benefit to all their peoples.”⁵⁹

These riparian states adopted the *Nyerere* doctrine ("clean slate" principle) and declared their intention not to be bound by these agreements.⁶⁰ The 1978

⁵⁸ Arthur Okoth-Owiro, *supra* note 45, p.15.

⁵⁹ *Ibid.* pp.14-15.

⁶⁰ In this regard, by a communication to the Secretary-General of the United Nations dated March 25, 1964, the Prime Minister of Kenya adopted the *Nyerere* doctrine and declared her intention not to be bound by that treaty. Look, *Ibid*

Vienna Convention on Succession of States in Respect of Treaties, which applies to normal cases of state succession, incorporates the "clean slate" principle into its provisions. Specifically, Article 16 of the convention stipulates: "[A] newly independent State is not bound to maintain in force or to become a party to, any treaty by reason only of the fact that at the date of the succession of states the treaty was in force in respect of the territory to which the succession of states relates."⁶¹ In fact, Article 11 provides that state succession does not affect "a boundary established by a treaty" or the "obligations and rights established by a treaty and relating to the regime of a boundary."⁶² The question of whether the 1929 Nile Waters Agreement falls within the ambit of Article 12, an exception to the "clean slate" doctrine, would seem to provide more fertile ground for disagreement.⁶³ However, the point remained that the upper riparian states of the Nile strongly maintained that Egypt and Sudan did not have the right to distribute the Nile water share without referring to other riparian states of the Nile Basin.

Although specific geographical, political, and economic contexts shape the legal discourse, the equitable utilization principle is typically advanced by

⁶¹ Vienna Convention on Succession of States in Respect of Treaties, Aug. 23, 1978, Article 16.

⁶² Ibid. Art.11.

⁶³ Jeffrey D. Azarva, 'Conflict on the Nile: International Watercourse Law and the Elusive Effort to Create A Transboundary Water Regime In The Nile Basin', *Temple International & Comparative Law Journal*, vol.25, 2011 p.473.

upper riparians, such as Ethiopia, looking to alter or increase the uses of an international watercourse in their respective jurisdictions.

Though Egypt has at different times clearly expressed that every country of the basin has an equitable right to the utilization of the resource of the Nile, she has also taken the position that existing utilization of the riparian states must not be compromised by future utilization of the basin states.⁶⁴ Egypt has tended to argue that the right to equitable utilization finds its limitation in the duty not to cause significant transboundary harm.⁶⁵ This position aims to protect Egypt's existing utilization of the resource of the Nile.

Upper riparians, in turn, have countered that this argument would amount to a system of prior appropriation and effectively preclude their own development. Therefore, the argument goes, it is the principle of equitable utilization that ultimately takes priority, with downstream harm being merely one factor to be considered in the determination of what is equitable and reasonable.⁶⁶ Ethiopia, for example, believes that a Nile agreement should be based on the principle of equitable utilization, and that the "no significant harm" principle

⁶⁴ Jutta Brunnee and Stephen J. Toope, *The Changing Nile Basin Regime: Does Law Matter?*, Vol. 43, no. 1, Winter 2002, pp.149-150.

⁶⁵ Egypt expressed reservations about "making the two principles equivalent" and noted that the "no harm rule" was "the cornerstone of any legal regime on international watercourses". Look Ibid, pp.149-150.

⁶⁶ Ibid. pp.149-150.

In this regard Ethiopia insisted that according primacy to the no harm rule would render meaningless the right to equitable and reasonable utilization and would disrupt the balance of the regime.

should only operate when a state has exceeded its equitable or reasonable use.⁶⁷ Egypt, on the other hand, believes that it has the right to the uninterrupted flow of the river through its territory; any measure that changes the status quo causes significant harm.⁶⁸

And finally, although the Nile Basin Cooperative Framework Agreement includes a provision on the principle of the duty not to cause significant harm, it is noted that there has been disagreement among the riparian states as to the importance of including this rule under this framework convention. Ethiopia, in particular, has constantly argued against inclusion of the principle, understanding that it may jeopardize the interests of upper riparian states that do not utilize the Nile water resources on a par with the downstream countries.⁶⁹

However, the Nile riparian states included the principle of the duty not to cause significant harm under the cooperative framework agreement in much the same way as the UN Watercourse Convention. The reason for the incorporation of this principle has mainly been related to the influence exerted by downstream countries and the willingness of the upper riparian states to

⁶⁷ Country paper, Ethiopia, Water Resources Management of the Nile Basin: Basis for Cooperation 9-10 (Feb.24-27, 1997) (unpublished paper prepared for the Fifth Nile Conference, on file with Geo, International Environmental Law Rev.).

⁶⁸ Carroll, *supra* note 43, p.290.

⁶⁹ An interview conducted with Ato Fekahmed Negash, the Directorate Director for Boundary and Transboundary River at the FDRE ministry of Water, Irrigation and Energy. October 2013.

acquiesce to such measure as a gesture of developing partnership and trust, but most importantly, there was also a wider perception among all participating states that the principle constitutes a rule of customary international law.⁷⁰ But it is interesting to note that though the principle was included, the lower riparian states ultimately decided not to sign the CFA.

A further inclusion of the concept of water security under the CFA could as well be cited as a compromise, although, in the end, its exact essence and scope was subjected to different interpretations and hence engendered conflict about proper application of the concept in the basin.⁷¹ Though Nile Basin states recognize the vital importance of water security to each of them, no consensus was reached on Article 14(b), which reads as follows: “not to significantly affect the water security of any other Nile Basin State, all countries agreed to this proposal except Egypt and Sudan”. Egypt proposed that Article 14(b) should be replaced by the following wording: “(b) not to adversely affect the water security and current uses and rights of any other Nile Basin State”.⁷² The lower riparian states of the Nile sought to maintain their existing uses through this theory, whereas the upper riparian states insisted that there should not be any privileged protection provided for existing uses but rather that protection should be equally provided for existing and potential uses.

⁷⁰ Ibid.

⁷¹ Ibid.

⁷² Agreement on the Nile River Basin Cooperative Framework, *supra* note 5, Art.14(b).

The question here is how the parties can possibly apply the duty not to cause significant harm, while they hold such different positions and attitudes with regard to the definition of the duty. Evidently, when the application of the duty not to cause significant harm is considered in the specific context of the legal and developmental reality in the Nile Basin, one must see and give due consideration to all of the contesting positions taken by the riparian states and evaluate the same in light of the dictates of international watercourses law.

2.2 Examination of the Positions under International Water Law

The framework of international water law has reinforced separate and competitive identities among Nile Basin states. It has also served to reinforce self-interested and ultimately unconvincing, legal arguments.⁷³

It is not uncommon for states taking different stands on different occasions in relation to the theories and principles of state sovereignty and international watercourses law. States fundamentally strive to protect their interest in utilizing their share in transboundary water resources. In this regard, the disputes that the United States of America with Mexico and Canada are illustrative. The US Department of State defended its rights on the basis of the theory of absolute territorial sovereignty (i.e., the equivalent of the Harmon Doctrine) in its disputes with Mexico regarding the waters of the Rio Grande.

⁷³Jutta Brunnee and Stephen J. Toope, 'The Changing Nile Basin Regime: Does Law Matter?' *Harvard International Law Journal*, vol. 43, no. 1, 2002, p.148.

The US submitted that there was no international law which imposed a limitation on riparian states and which dictated how the states should utilize the water resource.⁷⁴ In this case the USA is an upper riparian state, as the Rio Grande River flows from southwestern Colorado in the United States to the Gulf of Mexico. Having thus set out its legal position, as viewed by the United States, the declaration concluded that the US was ready to act “in accordance with high principles of equity and with friendly sentiments which should exist between two neighbors”.⁷⁵ But, in another case, the US took a position which contradicted its legal position regarding the waters of the Rio Grande. In a dispute with Canada, the US embraced a form of the limited territorial sovereignty or integrity principle.

The unresolved relationship between two core principles of international water law, "equitable utilization" and "no significant harm," has allowed watercourse states to maintain irreconcilable positions.⁷⁶ As stated earlier, the same is true for the Nile Basin countries. While the upper Nile states have conventionally based their claims on the principle of equitable and reasonable utilization, the lower riparian states have always tried to base their arguments on the duty not to cause harm rule, believing that this principle will preserve pre-existing patterns of utilization of the resources of the Nile River.

⁷⁴ Godana, *supra* note 54, p.33.

⁷⁵ *Ibid.* p.33.

⁷⁶ Brunee et al, *supra* note 64, p.148.

While it is not readily apparent from a simple reading of the relevant provisions of the UN Watercourse Convention, it has been widely accepted that the convention has to some degree subordinated the duty not to cause significant harm to the principle of equitable and reasonable utilization.⁷⁷ In fact careful reading of Article 5, 6 and 7 of the convention should lead to the conclusion that the obligation not to cause significant harm has indeed been subordinated to the principle of equitable and reasonable utilization. Yet this should in no way be viewed as favoring upstream riparians in all circumstances. But what can be agreed is that the principle of equitable and reasonable utilization is the guiding principle of international law since the Helsinki Rules were issued in 1966, duly recognizes, and is based on, the equality of all the riparians in the use of the shared watercourse.⁷⁸

It is evident that the downstream riparians could be harmed by changes in water quality and quantity caused by uses in upstream locations. However it is much less obvious, and generally not recognized, that the upstream riparians can be harmed by the potential foreclosure of their future use of water caused by the prior use and the claiming of rights by downstream riparians.⁷⁹

⁷⁷ Bourne 1997, Caflisch 1998, Paisley 2002, McCaffrey 2007, Salman 2007—all as cited by Salman M.A. Salman, Downstream riparians can also harm upstream riparians: The concept of foreclosure of future uses, *Water International*, vol. 35, no. 4, July 2010, Rutledge Taylor & Francis Group. p. 355.

⁷⁸ Salman, supra note 29, p.9.

⁷⁹ Ibid.p.9.

All of the agreements made in regard to the water of the Nile are of limited scope in their application. None of them managed to involve all the basin states, and all were concluded mainly to secure and safeguard the interests of the two lower riparian states, particularly Egypt. While Egypt and Sudan continue to rely on the 1929 and 1959 agreements by adamantly maintaining that the treaties' provisions remain binding, the upper riparian states have made their own position clear. They will not be bound by such treaties.⁸⁰ Here we have to note that these treaties are bilateral, which means that they cannot legitimately be perceived to regulate all of the Nile waters and all of the basin states. These instruments approach the problems in the basin in a splintered manner.⁸¹

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

If one follows the argument put forward by Egypt, it is possible to reach the conclusion that upstream countries in the Nile Basin may be precluded from developing the water resources of the Nile forever. However in recent periods especially after the coming in to power of Mr. Abdul Fattah al-Sisi the position taken by Egypt seems changing and the three states able to sign a

⁸⁰ Azarva, *supra* note 63, p.470.

⁸¹ Mohammed Abdo, *supra* note 10 , p.51.

preliminary deal on sharing water from the Nile River in the capital city of Sudan.⁸² A rational approach would have to be devised to understand how the two apparently conflicting principles operate in real settings, and to identify what scales of existing utilization would be protected, if any, and under what circumstances.

2.3 Factors Considered in the Application of the Duty not to Cause Significant Harm

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

Obviously, the scope of a state's right to equitable use depends upon the facts and circumstances of each individual case, and specifically upon weighing of several relevant factors. Article 6 of the UN Watercourse Convention specifically provides a non-exhaustive list of factors and circumstances that includes geographic and hydrologic factors, social and economic needs, effects of the use of the watercourse on another state, existing and potential

⁸² <http://www.bbc.com/news/world-africa-32016763> BBC news titled with “Egypt, Ethiopia and Sudan sign deal to end Nile dispute” last visited 25/03/2015

uses, conservation and economic factors, and availability of alternatives.⁸³ Therefore, the principle of equitable utilization does not provide carte blanche authorization to states to utilize the resource as they deem fit; instead, the objective of the principle is to attain optimal and sustainable utilization thereof by considering all of the factors that are essential to apply the principle.⁸⁴

In the same way, the application of the duty not to cause significant harm requires a careful construction of conceptual interpretation that facilitates its effective application. This is particularly important given that no clear guidance has been stipulated under the UN Watercourse Convention or the Nile River Basin Cooperative Framework Agreement (CFA), except that which flows from the combined reading of Article 5 and 7 of the convention. In the following parts, an attempt will be made to discuss a few of the factors that may have to be considered in the application of the rule in the Nile River Basin- without in any way denying the problematic nature and status of its relationship with the equitable and reasonable use doctrine - now settled in leading literatures on international watercourses law.

⁸³ David J. Lazerwitz, *The Flow of International Water Law: The International Law Commission's Law of the Non-Navigational Uses of International Watercourses*, *Global Legal Studies Journal*, Vol. 1:, 1993, p.259.

⁸⁴ Mohammed S. Helal, *Sharing Blue Gold: The 1997 UN Convention on the Law of the Non-Navigational Uses of International Watercourses Ten Years On*, *Colombia journal of international Environmental Law and Policy*, vol. 18, no.2, 2007, p.344.

2.3.1 Efforts of the Basin States to avoid, minimize and mitigate Harm

The duty not to cause significant harm rule sets limitations on the sovereign freedom of states to exploit their water resources. A state may be held responsible under international law for acts that breach international obligations concerning the use of shared water resources. As the duty ‘not to cause significant harm’ is a due diligence obligation of prevention, rather than an absolute prohibition on transboundary harm, what states are required to do is to take due care to avoid, minimize and mitigate harm. A state’s compliance with this obligation is not dependent solely on harm not being caused, but rather determined by a country’s reasonable conduct in terms of preventative behavior to avoid the harm in question.⁸⁵

Here, what a watercourse state is required to do is to take only those measures of prevention that are deemed appropriate according, for example, to a state’s capabilities. The obligation of due diligence contained in Article 7 of the UN watercourse convention sets the threshold for lawful state activity. It is not intended to guarantee that in utilizing an international watercourse, significant harm will not occur. It is an obligation of conduct, not an obligation of result. What the obligation entails is that a watercourse state whose use causes significant harm can be deemed to have breached its obligation to exercise

⁸⁵ This was confirmed by the International Court of Justice decision in the Pulp Mills on the River Uruguay case. See also User’s Guide Fact Sheet Series: Number 5, No Significant Harm Rule, available at; <http://www.unwatercoursesconvention.org/documents/UNWC-Fact-Sheet-5-No-Significant-Harm-Rule>, visited 13/12/2013.

due diligence so as not to cause significant harm only when it has intentionally or negligently caused the event which had to be prevented or has intentionally or negligently not prevented others in its territory from causing that event or has abstained from abating it. Therefore, "[t]he State may be responsible . . . for not enacting necessary legislation, for not enforcing its laws . . . or for not preventing or terminating an illegal activity, or for not punishing the person responsible for it".⁸⁶

The type of harm that needs to be avoided is qualified by the term 'significant'- defined as a real impairment of a use, established by objective evidence. For harm to qualify as 'significant' it must not be trivial in nature but it need not rise to the level of being substantial; this is determined on a case-by-case basis. The 'significant' threshold excludes mere inconveniences or minor disturbances that states are expected to tolerate in conformity with the legal rule of 'good neighborliness'.⁸⁷

The issue at stake is whether a state may avoid responsibility for causing harm to another riparian state by adopting conduct that could reasonably be expected or required in order to prevent the harm, or whether the

⁸⁶ International Law Commission (1994), *Report of the Commission to the General Assembly on the work of its forty-sixth session*, vol. II, Part II, United Nations, New York and Geneva, pp.101-103.

⁸⁷ User's Guide Fact Sheet Series: Number 5, No Significant Harm Rule, available at: <http://www.unwatercoursesconvention.org/documents/UNWC-Fact-Sheet-5-No-Significant-Harm-Rule>, visited 13/12/2013.

responsibility of the state is involved, regardless of its conduct, in any case in which the prohibited harm has taken place.⁸⁸

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

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

⁸⁸ Maurizio Arcari, 'The Codification of The Law of International Watercourses: The Draft Articles Adopted by the International Law Commission', pp.17-18, available at: http://dspace.unav.es/dspace/bitstream/10171/21504/1/ADI_XIII_1997.

will be imposed upon the watercourse state will be different than it would be if the state had not exerted such effort. This derives from the due diligence nature of the obligation not to cause significant harm.⁸⁹

2.3.2 Existing Utilization: Falling within the Margin of Equitable Utilization?

As touched upon in the preceding paragraph, this can be taken as an important factor requiring serious consideration while applying the duty not to cause significant harm in the Nile Basin. Obviously, trans-boundary water resources are the shared amenities of all countries in the basin. No nation will have a monopoly over such waters.

In the case concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay), the Court notes utilization of a river could not be considered to be equitable and reasonable if the interests of the other riparian State in the

⁸⁹The duty not to cause significant harm is considered to be a due diligence obligation of watercourse states. The obligation of due diligence contained in article 7 sets the threshold for lawful state activity. It is not intended to guarantee that in utilizing an international watercourse significant harm will not occur. It is an obligation of conduct, not an obligation of result. The obligation entails that a watercourse state whose use causes significant harm can be deemed to have breached its obligation to exercise due diligence so as not to cause significant harm only when it has intentionally or negligently caused the event which had to be prevented or has intentionally or negligently not prevented others in its territory from causing that event or has abstained from mitigating it.

shared resource...were not taken into account.⁹⁰ Therefore, basin countries shall only use water in an equitable and reasonable manner without affecting the equally equitable rights of other countries. This could be easily undertaken when basin states agree to manage and utilize the water resource among them. However, water allocation agreements are not easy to achieve.

The Nile Basin states may have different views about what constitutes utilization in an equitable and reasonable manner. For example, Egypt in the present days uses the greatest share of the Nile's water and may consider its utilization equitable because it has no other source of water that can be substituted for the Nile. Ethiopia, on the other hand, may have a different view of what constitutes equitable use. Ethiopia may believe that it is entitled to a greater share of Nile water as the country contributes the lion's share of the Nile waters.⁹¹

Though contribution of water from each watercourse state is not clearly stipulated as a relevant factor for determining equitable utilization under Article 6 of the UN Watercourse Convention, the Nile River Basin Cooperative Framework Agreement's Article 4(2) (h) explicitly states that the contribution of each basin state to the waters of the Nile River system will be

⁹⁰ International Court of Justice, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment of 20 April 2010, Par, 177, it can be reached at <http://www.icj-cij.org/docket/files/135/15877.pdf> last consulted 27/02/2015.

⁹¹ Carroll, *supra* note 43, p.288.

one among other factor in determining equitable utilization among the basin states of the Nile.

As discussed earlier, the application of equitable and reasonable utilization in a particular watercourse does not necessarily prohibit utilization that causes harm unless it exceeds the limits of the using state's equitable share. While the Drafting Committee of the UN Watercourse Convention had finally agreed on a text for Article 7, it was generally agreed that, in certain circumstances, 'equitable and reasonable utilization' of an international watercourse might still involve some significant harm to another watercourse state, so long as the activity is within the parameters permitted by Article 5 on reasonable and equitable utilization. It was equally true that the state should not be relieved from the obligation to consider the interests of the other riparian states. That obligation is the exercise of due diligence in the utilization of the watercourse in such a way as not to cause significant harm to other watercourse states.⁹² If, despite the equitable and reasonable utilization of the water resource and the exercise of due diligence, significant harm was caused to another watercourse state, the parties should consult, first, to verify that the use of the watercourse was reasonable and equitable; secondly, to check whether some ad hoc adjustments to the utilization could eliminate or

⁹² International Law Commission (1994), *Summary records of the meetings of the forty-sixth session*
2 May-22 July, vol. 1, pp.167-168.

minimize the harm; and, finally, in case harm has occurred, to decide whether compensation would be possible for the victim watercourse state.⁹³

Thus, even if a state's utilization of the Nile causes significant harm to another watercourse state, if such utilization falls within the margin of equitable and reasonable utilization as permitted under international law, the injuring state will not be required to stop its utilization of the resource. However, an important limitation could perhaps be that in cases where a use entails significant harm to human health and safety, this may be understood to be inherently inequitable and unreasonable.⁹⁴ The state where the harm originates may be required to negotiate with the state where the harm is experienced in order to provide the injured state adequate compensation or other relief (for example, a modification in the operation of the activity so as to avoid or minimize future damages).⁹⁵

However the application of this factor remains in question as there are no rules or guidelines that clearly state the water shares of the Nile Basin states. In fact this is also a common problem for other watercourses. As there is no comprehensive water allocation agreement exists among the riparian states; it

⁹³ Ibid.p.168.

⁹⁴ Arcari, *supra* note 88, p.23.

⁹⁵For these conclusions, see the report of the Working Group on International Liability established by the ILC at its 1996 session, in Report of the International Law Commission on the Work of its Forty-Eight Session, General Assembly Official Records, 51st Session, Supplement. no.10, UN Doc.A/51/10, p.235- 327 (in particular pp. 235-236 and 270-272). As noted by Ibid. pp.24-25.

is not easy to apply this factor effectively. Despite the existence of such water allocation agreements, if the riparian states were able to negotiate with the view of expanding their utilization, the Nile Basin states might be able to use the resources fairly. It might be possible to assess the actions of the watercourse states and their utilization of the water, if the basin states were able to come together to negotiate.

2.3.3 The Type and Extent of Harm Suffered

In the application of the duty not to cause significant harm, there is a need to assess the extent of damage (harm) suffered by watercourse states through the acts of other watercourse states. One has to define clearly the extent and type of damage forbidden by the duty not to cause significant harm. It is important to ascertain the threshold at which the harmful consequences of the use of an international watercourse become legally relevant to the application of the rule, and is therefore prohibited.⁹⁶

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

⁹⁶ Ibid.p.17.

and formulate the corresponding degree of harm by providing evaluative parameters.

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

But the issue at the heart of international water quantity disputes is the fact that there are no comprehensive rules that are internationally accepted for allocating shared water resources or their benefits. This makes it difficult to come up with guidelines. Beyond the problem is compounded by the fact that water is a vital resource that is mobile and fluctuates in time and in space, ignoring political boundaries.⁹⁷ Despite the challenges, it is essential to come up with an allocations agreement or a similar arrangement which indicates in some form the equitable entitlement of each state to the waters or beneficial uses of the shared resource. This would serve to determine how much harm

⁹⁷ Aaron T. Wolf, Criteria for equitable allocations: The heart of international water conflict, *Natural Resources Forum*, vol. 23(1), 1999, pp. 3-30.

may have been suffered by a watercourse state of the Nile Basin through the utilization of the harming state beyond the allocated share or its recognized equitable entitlement.

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

2.3.4 Other Relevant Factors

In addition, there may be other relevant issues in the application of the duty not to cause significant harm in the Nile Basin. The watercourses states are expected to clearly state how far the factors in question affect the harming state and have influenced it to not comply with its duty not to cause significant harm. Here again, due diligence is required. For example various circumstances may force a state to utilize the watercourse beyond its presumed entitlement or allocated share of the resources of the Nile.

As the nature of the duty not to cause significant harm is a due diligence obligation, it is very important to consider whether the state in question is performing this obligation with due care. Evidently, even when a state performs its activities with due diligence, there may be circumstances that

force it to utilize the shared water resource beyond its presumed rights or allocated shares. In such cases, it is important to examine how far the state concerned has exerted efforts to tackle and possibly avoid over-utilization of the resource. For example let assume that one riparian state A of the Nile utilize the water resource of the Nile beyond its allocated share and due to this one among other riparian state B of the Nile suffers harm which amount to “significant”. In this case the harming state A, may stipulate that it is due to a difficult circumstance that force the state concerned to utilize exceeding the allocated share. In such like cases the watercourse states of the Nile have to assess whether such like situation will force a state A to utilize the shared resource beyond what is allocated to it? This may be measured taking in to account objective standards set forth by the watercourse states. If it is finally found that the harming state in normal course of things does have the option to resort to other mechanism and able to culminate the significant harm happened to the other riparian state B of the Nile; in such cases state A may not avail itself as a means to minimize the obligation incurred because of its over utilization of the shared watercourse resources which causes “significant harm”. However I argue that if it is proved through objective standards set forth by the watercourse states that the harming state A has not any other option than doing such like harm to the state B, the liability imposed upon state A due to noncompliance of the duty not to cause significant harm have to be minimized or its obligation to pay compensation through subsequent

negotiation of these watercourse states have to take in to consider the attentiveness of the state A.

Therefore, if the state concerned is able to prove that there are factors that prevent it from performing its duty to the other watercourse states, despite fulfillment of the due diligence obligation, these factors may be taken into account. However, this could only happen in cases where the watercourse states or any other organ established for settling such issues - including the Nile River Basin Commission which will be established to handle such issues - finds that this is a valid and justified act, such that the state in question was forced by that factor not to perform its obligations emanating from this principle. Therefore, the duty imposed upon the harming state may be reduced and, if there are damages assessed, the assessed compensation payment may be reduced.

3. Possible Problems in the Application of the Duty not to Cause Significant Harm in the Basin

3.1 Disagreement in the Allocation of the Shared Water

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

The upper riparian states of the Nile Basin argue that the ‘no significant harm’ principle must be applied from the perspective that there is no prior right that should be maintained automatically. In operational fact, and on the basis of a correct reading of the pertinent provisions of the UN Watercourse Convention and the CFA, the principle is implemented as if there are no established rights. Even where a pattern of previous utilization exists, this must simply be seen as one factor among many in the allocation of a shared resource among the Nile Basin states. Therefore the application of the principle may also be affected by the diverse interest of the Upper and lower of the riparian states of the Nile with regard to the allocation of the shared water.

3.2 Divergence in Defining Terms

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

between the upper and lower riparian states' viewpoints were also enshrined when these states drafted the Cooperative Framework Agreement.⁹⁸ Thus, downstream countries campaigned to maintain their existing utilization through the concept of water security.

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

3.3 Weight Accorded for Each of the Factors

Unless there is agreement among the riparian states of the Nile about how much weight to accord to each factor, it will be difficult for them to implement the principle effectively in the basin. Here, the analysis should not be limited to the factors that apply to the duty not to cause significant harm, but rather expanded to look at the factors enshrined in the equitable and reasonable utilization principle. For example one of the purposes and objectives of the Nile Basin Commission is "to promote and facilitate the implementation of the principles, rights and obligations provided for in the

⁹⁸At the end of the negotiations, no consensus was reached on article 14(b), which reads as follows: "not to significantly affect the water security of any other Nile Basin State, all countries agreed to this proposal except Egypt and Sudan. Egypt proposed that Article 14(b) should be replaced by the following wording: (b) not to adversely affect the water security and current uses and rights of any other Nile Basin State."

Framework”⁹⁹. Therefore, the Commission is expected to promote and facilitate a mechanism that will help it to perform this mandate.

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

Conclusion

The application of the principle of the duty not to cause significant harm under international watercourse law remains controversial. Especially, in the absence of detailed, legally-binding rules developed with a view to applying the principle in a basin, implementation will be problematic. This is true for the Nile River Basin as well. Though Article 7 of the UN Watercourse Convention provides that states have to ‘take all appropriate measures to prevent the causing of significant harm’, this has been difficult to apply in practice. If ‘harm’ is caused, Article 7(2) also provides that a watercourse state ‘take all appropriate measures’ to eliminate or mitigate the harm. But it will be difficult to determine what action is adequate to satisfy the duty to

⁹⁹ *Supra* note 72, Art.16(a).

take ‘all appropriate measures.’ Beyond this, the term ‘harm’ has not been defined. Does the use of more water by Ethiopia constitute harm to Egypt, for example? Or does “harm” only refer to serious pollution of the waters that would in turn affect a downstream state? There is no adequate guidance here. Thus, the application of the duty not to cause significant harm will pit upstream and downstream states against each other.

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

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

that particular watercourse. These factors might include a basin state's efforts to avoid, minimize and mitigate harm caused by existing utilization; whether current utilization is falling within the margin of equitable utilization and the type and extent of damage sustained.

It is recommended that the Nile Basin states should agree to set aside their differences and work together for their common good. The Nile Basin states need to agree on how to define the duty not to cause significant harm with regard to the threshold of prohibited harm. Beyond the basin states are advised to agree on the rules and procedures for the effective implementation of the duty not to cause significant harm in the Nile Basin. In cases where the reasonable and beneficial uses of all watercourse states cannot be fully realized, "conflict of uses" results. In such a case, international practice recognizes that some adjustments or accommodations are required in order to preserve each watercourse state's equality of rights. These adjustments or accommodations should be based on equity, and can best be achieved on the basis of specific watercourse agreements. Therefore Nile Basin states should negotiate. This will enable them to effectively implement basic principles, including the duty not to cause significant harm.

For effective application of the duty not to cause significant harm in the Nile Basin it is advisable to have a water allocation agreement among the riparian states. However, it has not proved easy for the states to come to such an

agreement. The upper riparian states believe that the principle must be applied based on the perspective that there were no prior utilization to be maintained; accordingly the principle should be implemented as if there were no established usage and associated rights. Even where previous utilization exists, it must be seen as only one factor among many in the allocation of the shared watercourse resource among the Nile Basin states. In contrast, lower riparian states, and Egypt in particular, seek to maintain their right to existing utilizations based on agreements such as the 1929 and 1959 treaties. Thus, the application of the principle is affected by the diverse interest and position of the upper and lower riparian states of the Nile.