THE UNITED NATIONS WATERCOURSES CONVENTION FROM THE ETHIOPIAN CONTEXT: BETTER TO JOIN OR STAY OUT?

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Abstract

The 1997 Watercourses Convention is the first and the only worldwide instrument enacted under the auspice of the United Nations as far as the non-navigational uses of international watercourses is concerned. Although the Convention has entered in to force in 2014 after seventeen years of its adoption, many watercourse states are still hesitant to join the Convention. Given the divergent views of the respective countries towards the provisions of the Convention coupled with the existing tension and lack of genuine trust among downstream vis-à-vis upstream blocks, none of the Nile riparian states are currently parties to the Convention. The article is thus aimed to examine whether joining to or staying out from the Convention provides a better-off position for Ethiopia particularly in its relation with the two downstream Countries-Egypt and Sudan. Owing to the confusing and downstream favored provisions of the Convention coupled with the Egyptians' long lasting adherence to historic right based argument, the article asserted that the move to join the Convention might be expensive for Ethiopia which may force it to pay unnecessary bills for the advantages of the two downstream countries. Therefore, I argue that it is better for Ethiopia to stay out from the Convention and the complexities thereto while expecting at least 'a half and a loaf' from the application of the customary international water law regime, if there is any.

Keywords: equitable use, framework convention, Nile basin, riparian, significant harm, watercourses

I. INTRODUCTION

The United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses [hereinafter the UN Watercourses Convention (UNWCC) or the Convention] entered into force on 17 August 2014, following a long and complex journey.[1] The delay of the Convention's entry in to force and the reluctance of many countries to join it indicate the existence of divergent views among riparian countries towards the benefits they can derive out of it.[2] As a result, countries decided their better-off position by calculating cost-benefits of being party to the Convention or staying out of it. In this regard, the Nile riparian states including Ethiopia, Egypt and Sudan are not parties to the Convention.[3]

This article examines whether joining to or staying out from the UN Watercourses Convention is a better off position for Ethiopia in the context of Nile. To this effect, the article

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[1] Salman M.A. Salman, *Entry in to Force of the UN Watercourses Convention: Why should it Matter?* 31:1 INTERNATIONAL JOURNAL OF WATER RESOURCES DEVELOPMENT 4, 4 (2015).

[2] *Id*. at 5.

[3] *Id*. at 11.

examines the pros and cons of applying the Convention in the Nile River basin and its possible impacts on Ethiopia's interest. Whether the Convention favors the upstream Ethiopia or the downstream- Egypt and Sudan would be assessed depending up on the content and limitations of the Convention coupled with the legal framework of the Nile, the positions of riparian states, and the level of cooperation among Nile riparians.

The first section describes the lengthy and turbulent road to the UN Watercourses Convention. It particularly, presents the voting patterns made for the adoption of the Convention by the Working Group (commonly referred the UNGA's Sixth or Legal Committee) and then by the General Assembly with a view to examine how far the positions of riparian states were shaped by their geographical stand in the respective river basins as upstream, downstream or midstream states. It also briefly examines whether the Convention indeed entered into force under the acceptance of "watercourses states" for real by taking into consideration the existence of states that have ratified the Convention while having no apparent interest in the utilization of the "international watercourses" as covered in the meaning of the Convention. Section two presents the nature and scope of the Convention and the implication thereof with respect to its enforcement and acceptability. Section three presents the main controversial provisions of the Convention and the views of upstream and downstream riparian thereto as a background for the subsequent discussions. Section four examines whether the Convention really matters in the Nile River basin in general considering the divergent views of the riparian states towards the utilization of the Nile water. Section five analyzes the Convention's provisions in the Ethiopian context and answers the question 'whether we are better off as a non- party state or not'. Section six briefly presents the advantages and beneficial application of the Convention. Finally, the paper offers a concluding remark.

II. THE TURBULENT ROAD TOWARDS UNWCC AND BEYOND: ISSUES TO BE RAISED

The problems of the sharing, management and protection of international rivers did not bear the attention of the international community before the late 1950s mainly due to the fact that disputes over shared resources were rare.[4] It had also been asserted that there were no international customary rules that could be perceived in this area of law.[5] However, with the emergence of "new disputes in certain basins"[6], the issue of examining the question of the non-navigational uses of international watercourses became the exclusive realm of non-governmental efforts or States until late 1950's when the United Nations decided to examine the issue and referred the matter to the International Law Commission (ILC) in 1970 with the task of studying the law on the subject for codification and progressive development.[7]

Earlier than ILC, with a view to find acceptable rules of international law and solve the divergent views held by the upper and downstream states thereto, the two scholarly Non-Governmental Organizations namely the Institute of International Law (IIL) and the

[4] *Id*. at 5

[5] Mohammed S. Helal, *Sharing Blue Gold: The 1997 UN Convention on the Law of non –navigational Uses of International Watercourses Ten years on*, 18 COLO. J. INT'L ENVTL. L. & POL'Y, 337, 340 (2007).

[6] Charles B. Bourne, *The International Law Association's Contribution to The International Water Resource Law*, 36 NATURAL RESOURCES JOURNAL 155, 156 (1996). In this regard, for instance one can notice the international river disputes that have arisen after 1945 over Indus, Nile, Jordan and Columbia among the concerned riparian states.

[7] UNGA Resolution 2669 (XXV) of 8 December 1970. See also Helal, *supra* note 5, at 340.

International Law Association (ILA) had begun working on the law governing the utilization of international freshwater resource and adopted different resolutions and declarations.[8] However, the declarations and rules adopted by the two institutions are not all the same especially as to core principles to be used in determining the utilization of watercourses. As revealed in Madrid Declaration (1911) and Salzburg Resolution (1961), the works of the IIL emphasized on the obligation not to cause significant harm to other riparians even if the absolute prohibition of harm in the former declaration has been relaxed to some extent in the later resolution.[9] On the other hand, unlike the IIL resolutions, the ILA rules emphasized on the principle of equitable and reasonable utilization of shared watercourses as revealed in Dubrovnik statement (1956), the New York Resolution (1958) and largely in Helsinki Rules (1966).[10] Compared with others, the Helsinki rules were said to be the most comprehensive and widely referred rules until the adoption of the UN Watercourses Convention.[11]

Although such rules and resolutions were not binding per se, they generally influenced the ILC where it started its work in 1971. As the 1997 UN Watercourse Convention reflected the most important customary norms, it based largely on the ILA's work, particularly the Helsinki Rules, and to some extent on the work of the IIL.[12] In this regard, the Convention itself recognizes "the valuable contribution of international organizations, both governmental and non-governmental, to the codification and progressive development of international law in this field".[13]

However, it is important to note that the preparatory work of the UN Watercourses Convention by the ILC took more than two decades. The ILC adopted the final draft articles in 1994.[14] The draft articles were then considered by the UNGA's Sixth (Legal) Committee in 1996 and 1997, and finally adopted by the Assembly on May 21, 1997 by a vote of 103-3-27 (103 in favor, 3 against and 27 abstentions) with 33 States being absent.[15] Despite the fact that more than 100 states voted for the Convention in 1997, it entered into force after 17 years of its adoption on 17 August 2014, 90 days after the deposit of the 35th instrument of ratification by Vietnam.[16] This lengthy road to the Convention and its delay to enter in to force reveals the complexity of issues and the divergent views of riparian states towards its main provisions.

At this juncture it is important to observe the voting patterns made at the adoption of the final draft of the Convention in the Working Group and the adoption of the same by the General assembly in 1997. Although the Convention has been adopted by an overwhelming

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[8] Bourne, *supra* note 6, at 155-156.

[9] Salman, *supra* note 1, at 6.

[10] *Id.*

[11] Bourne, *supra* note 6, at 215-216. However, given the absence of a clear stance even as to the customary international law status of the subsequent UN Watercourses Convention, which largely inherits the Helsinki Rules with some modifications and additions of compromised languages, I believed that it is really difficult to confidently argue that the former Helsinki Rules has already achieved the status of customary international law.

[12] Salman, *supra* note 1, at 7.

[13] The United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses, May 21, 1997, UNGA Resolution A/RES/51/229, 36 ILM 700 (here after the UN Watercourses Convention), Paragraph ten of the preamble.

[14] Patricia Wouters, *An assessment of Recent Developments in International Watercourse Law through the Prism of the Substantive rules Governing use Allocation*, 36 NATURAL RESOURCES JOURNAL 417, 421(1996).

[15] UNGA Resolution A/RES/51/229 of 21 May 1997. See also Helal, *supra* note 5, at 341.

[16] Salman, *supra* note 1, at 10. The entry into force of the Convention required the ratification, acceptance, approval or accession by 35 states (See the UN Watercourses Convection, *supra* note13, Art. 36).

majority of states due to the concessionary or compromising languages of its provisions, the negotiation process was largely turbulent and full of contentions. For example, the meaning and the relations between the equitable and reasonable utilization principle and the no harm rule, the status of existing agreements, the dispute settlement and notification provisions were among the most contentious provisions of the Convention throughout the negotiation process where a range of alternatives were proposed by different states.[17] However, during negotiations the positions of the national delegations were largely shaped by their perceptions of their country's geographic circumstances as upstream, downstream or 'midstream' (upstream and downstream with respect to different watercourses) states.[18]

According to the Working Group's rules of procedures, the Group first had to adopt the draft articles on an article-by-article basis. While doing this, most of the articles were adopted with little discussions and without a vote. However, a recorded vote was requested regarding the articles 3, 5-7, and 33 plus annex.[19] For the purpose of this article let us see only the voting patterns made with respect to Art 3, and Art 5-7.

Art 3 (Watercourses Agreements) was adopted by 36 states for, 3 against (Egypt, France and Turkey) and 21 abstaining. Here surprisingly Egypt, the strong advocate of the survival of existing watercourse agreements, voted against Art 3 while Ethiopia has abstained.[20] With respect to the package on Art 5 to 7, it was adopted by 38 states in favor, 4 against (China, France, Tanzania and Turkey), and 22 abstaining. Ethiopia and Egypt were among those countries that were abstained.[21] But amongst the states that voted in favor of the adoption of the package, the majority of them were downstream and midstream states showing that the instant provisions are either in favor of them or confusing in the manner that supports their position.[22] Moreover, given the significant numbers of abstentions coupled with the votes against, the votes made in favor for the adoption of the above two items of provisions was a modest score; which in turn shows the extents of the discard among states on these delicate issues.

Eventually, the final text of the Convention was adopted by the Working Group of the whole by a vote of 42 states for, 3 against and 18 abstentions while 130 states were absent. Amongst the Nile riparian States who participated in the voting, Ethiopia and Sudan voted in favor, while Egypt, Rwanda and Tanzania abstained.[23] From the above voting pattern one can

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[17] See generally, LUCIUS CAFLISH, *Regulation of the uses of International Watercourses*, in INTERNATIONAL WATERCOURSES: ENHANCING COOPERATION AND MANAGING conflicts 3, 9-16; SALMAN M.A SALMAN (ed.), PROCEEDINGS OF A WORLD BANK SEMINAR, World Bank Technical Paper, 0253-7494; No. 414, 1998.

[18] John Crook & Stephen C. McCaffrey, *The United Nations starts Work on a Watercourse Convention*, 91 THE AMERICAN JOURNAL OF INTERNATIONAL LAW 371, 375, 1997. At this juncture, countries like Turkey, Ethiopia, India, China, France, Switzerland, Slovakia, Czech Republic and Spain were in upstream group; Netherlands, Portugal, Hungary, Egypt, Syria, Iraq, Bangladesh, Mexico and Greece were in downstream group; and Finland, Canada, USA, Germany, South Africa, Brazil and Israel were in midstream group. As a group of Countries with mixed-motive, the midstream group was the least uniform group (See Schroeder, *infra* note 19, at 29-30).

[19] Esther Schroeder, *The 1997 International Watercourses Convention-Background and Negotiation*, Working Paper on Management in Environmental planning (04/2002) ,at 32.

[20] CAFLISH, *supra* note 17, at 10-11. Here it is important to note that 103 states were absent during the adoption of the final draft of the Convention in the Working Group.

[21] Schroeder, *supra* note 19, at 33.

[22] *Id*, at 34.

[23] UN Doc. A/C.6/51/NUW /L.3Add.l/CRP.94; Sixth Committee Meeting No. 62, 4 April1997. See also PATRICIA WOUTERS, *The Legal Response to International Water Conflicts: The UN Watercourses Convention*

understand that Egypt had insisted in its position where it either voted against or abstained, while Ethiopia had voted in favor to the final draft of the Convention in the Working Group. Finally, after two decades of turbulent journey, the UN Watercourses Convention was adopted by the General Assembly on May 21, 1997 under the overwhelming majority of states. And, as mentioned above, the vote was 103 in favor, 3 against (Burundi[24], China and Turkey), 27 abstained[25] while 33 were absent.[26] Given the difficult, protracted and controversial history of its drafting, securing the support of such a solid majority of the UN Members, including a significant number of States sharing important international watercourses, was surprising.[27]

Nevertheless, it is important to examine the voting patterns with respect to upstream states vis-à-vis downstream or midstream states to understand which block voted largely in favor or against the adoption of the Convention, or abstained. Because this, to some extent, implies to whom the Convention favors at least in the perceptions of the then countries' representatives. Although the fact of securing large support from the side of the majority of downstream countries does not necessarily mean that the Convention is downstream favored, such fact would still have significance in determining whether the Convention is the one that ought to be ratified by upstream countries like Ethiopia particularly if the voting patterns made during the adoption of the Convention in 1997 and the subsequent ratifications for the entry into force of the same in 2014 coincided. Because this at least shows the 'comfort zone' nature of the Convention for the downstream and midstream states compared to the upstream once as revealed by their relative voting positions and the move to ratify the Convention then after. In addition, based on the circumstances of the case, other factors like the power balance, the level of trust and brotherhood among upstream and downstream states, the water abundance or scarcity in the basin as well as which block has already developed infrastructures on the water in question (the issue of existing uses) may influence the position that a given riparian state may take towards the Convention.

For example, upstream state having a hegemonic status and significant existing uses in the basin may opt to join the Convention even if in the normal course of things, the provisions of the Convention are said to be downstream favored. Similarly, if staying out would bring no change in the status quo, the weak upstream state with no substantial existing uses may still

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and Beyond, in INTERNATIONAL WATERCOURSES: ENHANCING COOPERATION AND MANAGING CONFLICTS, 291, 314 (Salman & Boissonde Chaournes eds., 1999).

[24] The vote of Burundi was something of a surprise. This was because; first it did not participate in the negotiations. Second, the state's hydro-geography in the upper Nile basin will prevent their activities from affecting Egypt or Sudan. Accordingly, some asserted that "Burundi's position may owe more to political considerations than to hydro-geographic reality". See Stephen McCaffrey & Mpazi Sinjela, *The 1997 United Nations Convention on International Watercourses*, 92(1) THE AMERICAN JOURNAL OF INTERNATIONAL LAW 94, 105 (1998).

[25] The abstained states: Andorra, Argentina, Azerbaijan, Bolivia, Bulgaria, Colombia, Cuba, Equator, Egypt, Ethiopia, France, Ghana, Guatemala, India, Israel, Mali, Mongolia, Pakistan, Panama, Paraguay, Peru, Rwanda, Spain, Tanzania, Uzbekistan.

[26] UNGA Resolution A/RES/51/229, *supra* note 15. See also Helal, *supra* note 5, at 341; and Schroeder, *supra note* 19, at 33. In this regard, the absent States were Afghanistan, Bahamas, Barbados, Belize, Benin, Bhutan, Cape Verde, Comoros, Democratic People's Republic of Korea, Dominican Republic, El Salvador, Eritrea, Fiji, Guinea, Lebanon, Mauritania, Myanmar, Niger, Nigeria, Palau, Saint Kitts &Nevis, Saint Lucia, Saint Vincent and the Grenadines, Senegal, Solomon Islands, Sri Lanka, Swaziland, Tajikistan, The former Yugoslav Republic of Macedonia, Turkmenistan, Uganda, Zaire, Zimbabwe.

[27] WOUTERS, *supra* note 23.

opt to vote in favor of the Convention just with a view to benefit from the little chance that the Convention accords to it, to use the same as a 'diplomatic instrument' of getting the heart of and financial support from the outside world, and thereby indirectly make the long-lasting prohibitive acts of the downstream hegemony to be condemned by the international community.

On the other hand, a downstream state having substantial existing uses with a hegemonic status in the basin may still opt not to join the Convention with a view to make the 'status quo' unaltered even in a slight degree although the Convention is still said to be downstream favored. In this regard, we can take for example the vote made against Art 3 (existing agreements) of the Convention by Egypt despite the fact that the provision is really in its favor; since it does not abolish the validity of 'existing agreements' where Egypt can benefit out of them. As will be discussed latter, Egypt's vote against Art 3 in particular and its abstention to the Convention and the subsequent hesitation to ratify the same in general does not mean that the Convention is not downstream favored. Rather, the positions of some downstream countries like Egypt is emanated from the overwhelming desire to have more and to make the status quo untouched. The saying of Gandhi can better express such kind of positions- "[T]here is enough for everyone's need. There is never enough for everyone's greed".[28]

Therefore, as one can understand from the aforementioned discussions the riparian states' placement in the basin may not be a sole determinant factor to hold the position for or against the Convention. Even there may be a situation where a country's position may owe more to political consideration than hydro-geographic reality. However, such instances are exceptional cases which may not undermine the value of using the strong nexus between the geographical position of states and their respective voting positions as a basis to determine or at least predict to which block the Convention seems favored.

In this regard, the overall observation of the voting pattern reveals that the Convention was supported mainly by downstream and midstream states while many upstream states were either voted against or abstained. For instance, all of the three States (Burundi, Turkey and China) that voted against the Convention are upper riparian for the Nile, Tigris-Euphrates, and Mekong Rivers respectively. Moreover, amongst the 27 states that abstained during the adoption of the Convention, a significant numbers of countries were upper riparian.[29] On the other hand, many of the major states which were the core of the downstream and midstream blocks voted in favor of the Convention.[30] These all shows how the downstream and midstream states had largely perceived that the Convention is in favor of them which seem right as the subsequent discussions reveals.

When coming to the Nile Basin, the above geographical position-based argument seems weak. Amongst the Nile riparian states, Ethiopia, Egypt, Tanzania and Rwanda abstained; Eritrea, Uganda, Zaire (DRC) were absent; Sudan and Kenya voted in favor while Burundi

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[28] As quoted in H.I.F. SAEIJI & M.J. VAN BERKEL, *The Global Water Crisis: The Major Issue of the Twenty first Century, a Growing and Explosive Problem*, in THE SCARCITY OF WATER, EMERGING LEGAL AND POLICY RESPONSES 121, 122 (Edward H.P. Brans et al, Eds., 1997).

[29] For example, Ethiopia, France, India, Spain, Rwanda and Tanzania.

[30] For example, Netherland, Portugal, Hungary, Syria, Bangladesh, Mexico and Greece from downstream block; and Finland, Canada, USA, Germany, South Africa, and Brazil from midstream block.

voted against.[31] Here the vote by Kenya in favor of the Convention as an upstream state and the abstention by Egypt as a downstream state during the adoption of the Convention may cast doubt on the above assertion that the main provisions are downstream favored. However, as argued above, the abstention of Egypt for example seems largely emanated from its strong desire to make the status quo untouched based on the long lasting "the drop of water argument", rather than not believing in the fact that the main provisions of the Convention are at least on average downstream favored. In this regard, the consistent vote in favor of the adoption of the Convention by Sudan during the Working Group as well as during the final adoption by the General Assembly in 1997 partly shows that the Sudanese initially perceived the Convention as favoring downstream. Particularly, as a midstream country, the then Sudan's position seems to take advantages of its position both as upstream state for Egypt and downstream state for others and thereby secure advantages of both sides that the Convention may confer while taking in mind its dominant water utilization in the basin at a distant second in one hand and the hegemonic status of the most downstream State-Egypt in the other hand.

Regarding the then position of Kenya, it may be derived by its relative position as downstream state for the upper White Nile basin. Or the state's hydro-geography in the upper Nile basin will prevent their activities from affecting Egypt or Sudan since it is the Blue Nile that contributes much for the Nile water to which Kenya has no concern. Despite its support in 1997, however, Kenya has reserved from ratifying the Convention and currently none of the Nile riparian states are parties to the Convention.

Nevertheless, the non-party status of the Nile riparian states to the Convention still shows the little acceptance of the Convention in the eyes of the Nile basin. Moreover, one can point out that in all major basins with conflicts, where such a Convention is expected to be applied on, at least one country voted against the Convention, abstained or were absent.[32] This shows how the major watercourses sates were in ambivalence particularly as to the contribution of the Convention to the resolution of disputes over the use of such international rivers like the Danube, Ganges, Jordan, Nile, Mekong or the Euphrates.[33]

Having said these on the adoption of the Convention and the voting patterns thereof, a question may arise on the issue of its ratification. As mentioned earlier, despite the adoption of the Convention by a solid majority numbers of states in 1997, it took seventeen years to enter into force showing that those who voted for its adoption did not show the same interest for its entry into force.[34] However, as we can understand from the lists of the countries that have ratified the Convention vis-à-vis their position in 1997;[35] the majority of them are still

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[31] Aaron T. Wolf, *Criteria for equitable allocations: the heart of international water conflict*, 23 NATURAL RESOURCE FORUM 3, 5 (1999). Here it should be noted that even if Sudan and Kenya voted in favor of the Convention in 1997, they have not yet joined the Convention. And currently no Nile riparian state is party to the Convention.

[32] Schroeder, *supra* note 19, at 22

[33] Aaron.T. Wolf, *Conflict and cooperation along international waterways*, 1 WATER POLICY 249, 252 (1998); Ellen Hey, The *Watercourses Convention: To what extent does it provide a basis for regulating uses of international watercourses?* 7(3) REVIEWS OF EUROPEAN COMMUNITY AND INTERNATIONAL ENVIRONMENTAL LAW 290, 297-300 (1998).

[34] Amongst more than 100 states that had voted in favor of the Convention, only about 25 states ratified the Convention, and almost all of them are downstream or midstream countries.

[35] Parties to the Convention includes Finland, Norway, Hungary, Sweden, the Netherlands, Portugal, Germany, Spain, Greece, France, Denmark, Luxemburg, Italy, Monte Negro, the UK, Ireland , South Africa,

remaining consistent with their previous position which is particularly true for downstream and midstream states. Thus, from the distribution of states that have ratified the Convention, one can point out that the majority of them are either downstream or midstream states showing again the Convention's provisions are comfortable with them compared to the upstream states.

However, it should be noted that all of the current parties to the Convention are not those who had given their support to its adoption in 1997. Certain countries that were absent or abstained in 1997 have also ratified the Convention.[36] This is may be either due to the change in their previous stand and understandings towards the provisions of the Convention or the change in their knowledge as to the nature of the 'watercourses' they shared with other countries or on some other motive.[37]

Similarly, the same reason of changes in countries' perceptions after 1997 justifies for the countries' failure, who had previously supported for its adoption, to go for ratification. For instance, in the Working Group both upstream and downstream states had voted for the compromising language of Art 7 of the Convention, because both camps had developed their own but different versions of understanding. At this juncture, Lucius Caflish for example noted:

> *The new formula [regarding the relationships of the two principles as reflected by the language of Art 7(2)] was considered by a number of lower riparians to be sufficiently neutral not to suggest a subordination of the no-harm rule to the principle of equitable and reasonable utilization. A number of upper riparians thought just the contrary, namely that, that formula was strong enough to support the idea of such subordination.*[38]

However, these positive but different perceptions that had been developed by the two blocks during the adoption of the Convention in 1997 did not continue then after. Instead, second thoughts about the relationship between the two principles started surfacing in the minds of many states which latter contributed for the delays of the entry into force of the Convention.[39] This shows how the compromising languages of the Convention (as the case for the relationships between the two principles) has paved the way for divergent lines of arguments where only the powerful would often benefit out of this uncertainty. Such kind of uncertainty and absence of clarity on the main principles of the Convention would erode the confidence of weak riparian states (particularly those found in basins characterized by asymmetric power relation and water utilization patterns like Nile) to equally compete and enforce their interests compared to the basin's hegemony acting with its full material, ideational and bargaining powers. As will be discussed later, the large opportunity of the hegemonies (Egypt and Sudan

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Namibia, Guinea Bissau, Burkina Faso, Nigeria, Niger, Benin, Chad, Cote d'Ivoire, Libya, Tunisia, Morocco, Syria, Lebanon, Palestine, Jordan, Iraq , Qatar, Uzbekistan and Vietnam.

[36] For example, Spain, France, Uzbekistan, Lebanon, Nigeria, Niger, Libya and Benin.

[37] For example, Libya was among the countries that had abstained in 1997 on the issue of groundwater; objecting the exclusionary rule of the Convention with respect to the 'confined groundwater or aquifer'. However, it joined the Convention latter. While explaining its reason for joining the Convention, Salman stated the changing of its perception regarding the nature of the ground water (i.e. the Nubian aquifer) it shared with other countries (e.g. Egypt) as a reason for its latter ratification. He further explained: "…Libya perceived the Nubian aquifer as a connected groundwater and joined the Convention, because she wants to be part of the Nile…' See Salman M.A. Salman (2015): Lecture given at University of Strathclyde, Glasgow, 22 May 2015, on the title '*Entry into force of the UN Watercourses Convention: Why should it matters?*" Available at Online Seminar www.ooskanews.com.

[38] CAFLISH, *supra* note 17, at 15.

[39] Salman, *supra* note 1, at 9.

in the Nile case) to benefit more from the compromising languages of the Convention coupled with many other downstream favored provisions of the same would make the move to join the Convention by countries like Ethiopia costly.

Coming back to the issue of ratification, it is important to address a question as to whether the entry in to force of the Convention has been succeeded under the ratification acts of 'interested' parties who are 'watercourse states' for real. It should be noted that some of the current parties to the Convention have neither trans-boundary surface water nor non-confined groundwater that shared with other countries. In other words, they have no apparent interest in the allocation and utilization of trans-boundary water resources putting the validity and entry into force of the Convention under a question mark. We can take for instance, Great Britain, Libya, Tunisia, Morocco and Qatar. Interestingly, Qatar and Libya have no surface water they share with other countries, and the ground water they share with other countries may not even be covered by the Convention since they are not connected with surface water.[40]

So the reason why parties who are nothing to do with trans-boundary watercourses joined the Convention may be either with another intention other than sharing of waters or to show simply their support to the idea and thereby contribute for the Convention's entry in to force. Owing to this fact, the writer believes that had it not been ratified by such parties who are nothing to do with international watercourses, the Convention would have not entered in to force or at least took more years.

Thus, the coming in to force of the Convention per se may not necessarily be considered as the reflections of watercourse states for real. The reluctant position of riparian states to sign and ratify or accede to the Convention reveals the riparian states' divergent view to its provisions and the interpretation thereto.[41] For instance, as mentioned above none of the Nile basin countries (of both upper riparian and lower riparian) are parties to the Convention with having different perceptions. Although some argued that such perceptions are inaccurate[42], the compromising languages of the Convention which are deliberately made with intent to facilitate its adoption have contributed for the existing areas of contentions. Some of the contentious provisions of the Convention are discussed latter.

III. SCOPE OF THE UNWCC: DO THEY HAVE ANY IMPLICATION ON THE ACCEPTABILITY OF THE CONVENTION?

UNWCC is "a framework instrument which sets forth general substantive and procedural provisions to be applied by all Parties irrespective of their specific geographical location, or position vis-à-vis other watercourse States, or level of development."[43] Therefore, as a framework Convention it does not address the peculiar feature of every trans-boundary watercourses.[44] Given the diverse characteristics of international watercourses and the interests thereto, the Convention only contains certain general rules that could serve as a basis

[40] Salman M.A. Salman, *The United Nations Watercourses Convention Ten Years Latter: Why Has its Entry in to Force Proven Difficult?* 32:1 INTERNATIONAL WATER RESOURCES ASSOCIATION, WATER INTERNATIONAL 1, 8 (2007).

[41] Salman, *supra* note 1, at 11.

[42] *Id.*

[43] WOUTERS, *supra* note 23, at 316.

[44] The framework nature of the Convention can be deduced from the provisions of the Convention itself. See The UN Watercourses Convention, supra note 13, Paragraph 5 of the Preamble and Art 3(3).

for negotiation, and leaves the details for the riparian states to complement in agreements by taking in to account the specific characteristics of the watercourse in question.[45] By doing so the Convention encourages parties to follow the general principles of the Convention in their specific agreements while still allowing the departure.[46]

Even if taking the 'framework approach' is widely described as a necessity for the watercourse Convention to reach in to consensus; it has also been criticized by many alleging that it provides little or no solution for basins with conflicts. Instead, it allows respective riparian states to engage in almost endless discussions over all the factors which might be considered.[47] This is especially true in a basin lacking genuine cooperative framework like Nile.[48] The Convention is adopted with the goal of ensuring the utilization, development, conservation, management and protection of international watercourses, and the promotion of their optimal and sustainable utilization for present and future generation.[49] To this effect, it incorporates different principles, but whose implementation primarily requires cooperation among riparian countries. That is why the Convention emphasized on the concept of cooperation; where it includes 15 references to the word and its derivatives.[50]

However, as mentioned above, a question may arise as to how such a 'framework Convention'; that only provides 'general guidelines' and whose implementation is heavily relied on the good will, cooperation and agreement of watercourse states; can indeed able to achieve its objectives. Accordingly, some scholars questioned the effect of the Watercourses Convention and its application to the resolution of disputes over the use of water in the river basins with conflict or susceptible to conflict where the relation among respective riparian states has been largely characterized by tension, lack of trust or genuine cooperation.[51]

Based on the framework and non-obligatory natures of the Convention's provisions, Hey for instance asserted that the Convention is designed in the manner that it neither furthers sustainable water use nor regulates the discretionary powers of watercourse states.[52] She argued that although the furtherance of cooperation and the attainment of sustainable water use thereto are acknowledged as the main goals that should be pursued by watercourse states, the Convention does not impose the concomitant legally binding obligations on its Parties.[53]

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[45] Salman, *supra* note 1, at 8.

[46] Takele Soboka, *Between Ambivalence and Necessity: Occlusions on the Path towards A Basin –Wide Treaty in the Nile Basin*, 20(3) COLO. J. INT'L ENVTL. L & POL'Y 291, 293(2008-2009).

[47] Peter Beaumont, *The 1997 UN Convention on the Law of Non-navigational uses of International Watercourses: Its Strengths and the Need for New Workable Guidelines*, 16(4) WATER RESOURCES DEVELOPMENT 475, 487(2000).

[48] As revealed in the past platform of negotiations in the Nile basin viz. Hydromet (1967), Udungu (1983) and Tecco Nile (1992), the negotiations were focused on technical matters which intentionally excludes the main issue of water allocation except the negotiations made for the Cooperative Framework Agreement (CFA) under the auspice of the Nile Basin Initiative (NBI). However, even the negotiations for the CFA failed to close the chapter of the colonial legacy and the downstream hegemony in the Nile basin due to the introduction of the non-legal concept- 'water security'- under Art 14 of the CFA by which the two downstream countries are aimed to protect their current uses and rights. See Agreement on the Nile River Basin Cooperative Framework, open for signature as of May 2010 (not yet entry into force), annex on Art 14(b) where Egypt and Sudan proposed a provision stipulating "not to adversely affect the water security and *current uses and rights* of any Nile basin state" (herein after CFA, 2010).

[49] The UN Watercourses Convention, *supra* note 13, paragraph 5 of the preamble.

[50] Salman, *supra* note 1, at .8

[51] Schroeder, *supra* note 19, at 21.

[52] Hey, *supra* note 33, at 297-299.

[53] *Id.* at 291-293.

She further asserted that it does not require states to protect basic human needs, nor that they develop integrated water policies or "provide minimum standards that watercourse states are to further develop through cooperation among themselves".[54] Similarly, Wolf supported this view by stating that "it [the Convention] provides few practical guidelines for allocations, the heart of most water conflicts".[55] Therefore, according to Hey and Wolf, the Convention is simply the collection of customary international law where it only specifies the fact that a number of general environmental law obligations apply to international watercourses; without imposing new obligations other than those which are already binding upon watercourse states by virtue of customary international law.[56]

However in the contrary, scholars like McCafrey and Tanzi supported the framework nature of the Convention and have the expectation that watercourse problems can be tackled in an integrated and coordinated manner through consultation and negotiation.[57] Although the writer of this article believe on negotiation, leaving everything to be determined by negotiations of parties would lead to infinite dialogue particularly given the scarcity of fresh water resources in many basins coupled with the Convention's wide room for parties' departure and absence of clear guidelines for negotiation.

Having said these with respect to the framework nature of the Convention, let us see the scope of the Convention. The scope of the Convention has been limited based on the types of uses of international watercourses (i.e. navigational and non-navigational uses) and the mode of their existence (i.e. surface water and ground water). Accordingly, the Convention's application is limited to "the uses of international watercourses and of their waters for purposes other than navigation and to measures of protection, preservation and management related to the uses of those watercourses and their waters".[58] However, the exclusion of the navigational uses of international watercourses is not absolute[59] as the Convention applies to navigation in so far as other uses affect or is affected by navigation.[60]

Moreover, 'confined ground water'- a ground water which is not connected with surface water flowing to a common terminus- are excluded from the ambit of the Convention as revealed in the definition of 'watercourse'. The Convention defines the term 'watercourse' to include both 'surface waters and ground waters constituting by virtue of their physical relationship a unitary whole and normally flowing into a common terminus'.[61] And it is international if parts of the watercourses are situated in different States.[62] It is clear from these definitions that certain, but not all ground waters fall within the scope of the Convention. The definition includes only groundwater which is hydrologically related to surface water. It does

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[54] *Id.* at 291.

[55] Wolf, *supra* note 33.

[56] Hey, *supra* note 33, at 292.

[57] STEPHAN C. MCCAFFREY, *Water scarcity: Institutional and legal responses*, in THE SCARCITY OF WATER: EMERGING LEGAL AND POLICY RESPONSES 52, 56 (Brans, Edward H.P. et al. eds, 1997), London, The Hague, Boston; and Attila Tanzi, *Codifying the minimum standards of the law of international watercourses: remarks on part one and a half*, 21(2) NATURAL RESOURCES FORUM 99, 116 (1997).

[58] The UN Watercourses Convention, *supra* note 13, Art. 1(1).

[59] Attila Tanzi, *The U.N. Convention on International Watercourses as a Framework for the avoidance and Settlement of Water law Dispute*, 11 LJIL 441, 446 (1998).

[60] *Id*. See also the UN Watercourses Convention; *supra* note 13, Art. 1 (2).

[61] *Id*. UN Watercourses Convention cited above, Art. 2(a).

[62] *Id*. Art. 2(b). Here it is important to note that the convention used the term 'international watercourses' than 'international rivers' where the former as the former includes lakes and groundwater, in addition to rivers.

not include trans-boundary aquifers (confined groundwater) that do not contribute water to, or receive water from, surface waters.[63] But, some argued that it is not entirely clear where exactly to draw the line between confined and non-confined ground waters and thereby identify those within the scope of the Convention from the uncovered once.[64] This may be due to the "scientific uncertainty" on the issue.

The exclusion of confined trans-boundary ground water, however, is pointed out as one of the most serious failings of the Convention[65] even if states are expected to be guided by the principles of the Convention as revealed in the ILC's recommendation and the draft article on trans-boundary Aquifers.[66] There were also states which failed to sign the Convention due to this fact. On the other hand, the inclusion of non-confined groundwater in the Convention was also cited as a reason for the abstentions of certain states to vote in favor of the Convention.[67] Therefore, one can observe limitations with respect to the nature and scope of the Convention.

IV. THE CONTROVERSIAL PROVISIONS OF THE CONVENTION

The UN Watercourses Convention is a general framework agreement that contains thirty-seven articles,[68] which are divided into seven parts. In addition to those introductory provisions dealing about the scope of its application, the main areas that the Convention addresses include watercourses agreements;[69] general principles like equitable and reasonable utilization[70] and the obligation not to cause harm; [71] notification for planned measures;[72] protection, preservation and management;[73] and dispute settlement.[74] With a view to provide a background for subsequent discussions, this section focused on those controversial articles dealing with the relationships of the Convention to existing agreements, the principle of equitable and reasonable utilization and no significant harm rule and the relation thereof, and finally the notification procedures.

A) The Status of Existing Agreements

The relationship of the Convention to agreements concerning specific watercourses is dealt with in Articles 3 and 4 of the Convention with respect to existing agreements, future agreements relating to the entire watercourse and partial water agreements.[75] The Convention generally encourages states sharing watercourses to enter into agreements that apply and adjust the provisions of the Convention to the particular characteristics of the watercourse

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[63] Stephan C. McCaffrey, *The International Law Commission adopts draft Article on Trans-boundary Aquifers*, 103 AMER. J. INT'L L. 272, 283-284 (2009). See also Salman, *supra* note 1, at 8.

[64] Christian Bahrman and Raya M. Stephan, *The UN Watercourses Convention and the Draft Article on Trans-boundary Aquifers: the way a head*, UNESCO-UNEP Conference, Paris, 6-8 December 2010, International Conference 'Trans-boundary Aquifers: Challenges and New Direction' (ISARM, 2010) at 4.

[65] Tanzi, *supra* note 59, at 451.

[66] McCaffrey S., *supra* note 63, at 281-282.

[67] STEPHAN C. MCCAFFREY, *The UN Convention on the Law of the Non-Navigational Uses of International Watercourses: Prospects and Pitfalls*, in INTERNATIONAL WATERCOURSES: ENHANCING COOPERATION AND MANAGING CONFLICTS 17, 18 (1997)

[68] In addition to the main 37 articles, the Convention annexed fourteen articles on Arbitration.

[69] The UN Watercourses Convention, *supra* note 13, Art 3 & 4.

[70] *Id.* Art. 5 & 6.

[71] *Id.* Art. 7

[72] *Id.* Art. 11-19.

[73] *Id*. Art. 20-26.

[74] *Id*. Art. 33.

[75] *Id.* see generally Art 3 & 4.

concerned.[76] Given the framework nature of the Convention, encouraging parties to enter in to specific watercourse agreements seems logical and expected. But the way that Art 3 of the Convention dealt with the status of existing agreements is particularly controversial.

Unlike other provisions of the Convention, the debate and the positions of states on the validity or otherwise of existing agreements was not conditioned by the geographical considerations (upper riparian vis-à-vis lower riparian) but, rather by the question of who was well served by the existing agreements.[77]Some participants in the Working Group (notably Portugal and Ethiopia)argued that at least some provisions of the new Convention should be regarded as rules of '*jus cogens*',[78] and thus pleaded for the lapse of all existing watercourse agreements that contradicts with such rules.[79] Particularly, Ethiopia wanted Article 3 to require existing watercourse agreements be harmonized with the Convention.[80] In contrast, other states (Egypt, France and Switzerland) insisted that existing watercourse agreements should be left unaffected by the new Convention.[81] Eventually, the text of Article 3 was revised by the Working Group and put to a vote before being adopted by 36 votes for, with 3 against (Egypt, France, and Turkey) and 21 abstentions.[82]

The provision preserves the validity of existing watercourse agreements, but adds that Parties "may, where necessary, consider harmonizing such agreements with the basic principles of the Convention."[83] From this provision one can understand that the Convention neither invalidated the existing agreements nor mandatorily required parties to harmonize it with the basic principles of the Convention. Moreover, the above compromise is virtually without substance because firstly, from the language used in Article 3(2), it is clear that there will be no "harmonization", or amendment of existing agreements without the consent of all States Parties to them. Secondly, the 'basic principles' with which such agreements may be harmonized are not defined under the Convention. Therefore, the issue of harmonization as well as determining how and with which principles the existing agreements shall be harmonized is totally left to the states concerned, and can only be accomplished by agreement. That is why Caflish noted that "Article 3(2) does not go beyond stating the obvious, namely, that existing agreements may be amended with the consent of all the States Parties to them."[84]

As a result, riparian states that already have agreements in place like Egypt and Sudan, believe that the Convention has not fully recognized those agreements because it suggests that the parties may consider harmonizing such agreements with the principles of the Convention. On the other hand, riparian states that have been left out of existing agreements like Ethiopia believe that the Convention should have subjected those agreements to the provisions of the Convention, and should have required inclusion of all riparians in the said agreement.[85]

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[76] *Id.* Art. 3 (3).

[77] CAFLISH, *supra* note 17, at 10.

[78] See VIENNA CONVENTION ON THE LAW OF TREATIES (1969), Art. 64.

[79] CAFLISH, *supra* note 17, at 10.

[80] Verbatim record, 99th plenary meeting, UN GA, 21 May 1997, UN Doc. A/51/PV.99, 9-10, cited in: *MCCAFFREY, Supra* note *67, at* 18.

[81] CAFLISH, *supra* note 17, at 10.

[82] *Id.*

[83] The UN Watercourses Convention, *supra* note 13, Art. 3(1) & (2).

[84] CAFLISH, *supra* note 17, at 10.

[85] Salman, *supra* note 1, at 12.

Regarding the reason why the Convention opt not to require mandatory harmonization, McCaffrey raised the issue of its impracticability stating that "given the vast number and variety of existing agreements, such a requirement would have been impractical."[86] But, he further states that the absence of such requirements in the Convention does not mean that the principles reflected in the Convention will be without significance in the 'interpretation' of existing agreements.[87] However, the writer of this article believes that even if the requirement of such harmonization would be difficult in practice and in return reduce its acceptance, it is not impossible. Rather it is a must as far as uniform and rule-based international regime is required to be established for the fair use and administration of trans-boundary water resources. Otherwise a party having a hegemonic status in the basin with respect to the 'material power', 'bargaining power' and 'ideational power' will always be the winner by using the same as an instrument to influence and prevent weaker co-riparian from developing hydraulic works in their own territory; which is not fair.

B) The Principle of Equitable and Reasonable Utilization and the "No Significant harm" Rule

The second and the most controversial provisions of the Convention are Articles 5 and 7, dealing respectively with the principle of equitable utilization and the obligation not to cause significant harm.[88] Art 5 sets out the fundamental rights and duties of states concerning the utilization of international watercourses by providing for the equitable and reasonable utilization of the watercourse by riparian states. This obligation is to be pursued with a view to attaining optimal and sustainable utilization 'consistent with adequate protection of the watercourse'.[89]

According to this principle, a state must use an international watercourse in a manner that is equitable and reasonable vis-à-vis other states sharing the watercourse. But this balance of equitability can be achieved through cooperation and information sharing among riparian states.[90] To this effect, the Convention provides the general obligation to cooperate[91] and required riparian states to exchange data and information concerning the condition of the watercourse on a regular basis.[92] That is why paragraph two of article 5 clearly provides a duty for participation between riparian states when using an international river. Therefore, the article includes both the right to utilize and the duty to cooperate.

The Convention also provides non-exhaustive lists of factors that should be taken in to consideration in determining the equitability and reasonableness of water utilization among riparian states.[93] Although, as will be discussed latter, the practical applications of the factors under Art 6 and attaching weight thereto are often difficult, those factors are needed to be

[86] MCCAFFREY, *supra* note 67, at 18
[87] *Id*.
[88] Tanzi, *supra* note 59, at 453-454.
[89] UN Watercourses Convention, *supra* note 13, Art 5(1).
[90] MCCAFFREY, *supra* note 67, at 19.
[91] UN Watercourses Convention, *supra* note 13, Art 8.
[92] *Id*. Ar.t 9.
[93] *Id*. Art. 6(1).

weighed and balanced in every concrete situation without giving priority to any such factors over the others.[94]

On the other hand, Art 7 provides the obligation of riparian states not to cause significant harm under two paragraphs. While the first paragraph incorporates the 'no-harm rule'[95], the second paragraph implies that a reasonable use may still cause significant harm to another watercourse state although all appropriate measures had been taken.[96] The provision on the no harm rule was actually the most controversial one from the very first (1991) ILC draft version of the article;[97] to the 1994 version[98], and which still continued in the final version of the Convention. It was discussed very controversially in the Working Group seeking the amendment of the draft article.[99] In this regard, the question whether the adjective 'significant' and the obligation of due diligence in the first paragraph (of the 1994 draft article) should be deleted; the issue of the introduction of another obligation of 'all appropriate measures' in the article's second paragraph; and the question as to which of the two articles 5 and 7 should be superior if they come into conflict were among the most contentious points during the negotiations which in deed entails modifications. In contrast, the issue of compensation was hardly discussed and not changed by the Working Group.[100]

Above all, the issue whether equitable utilization should prevail over the 'no-harm' obligation or vice-versa was the most controversial and hotly debated one.[101] In this regard, upstream riparian states favor the equitable utilization principle because it gives them greater flexibility in developing new upstream uses, particularly where the watercourses are being used intensely in downstream states. Downstream states, on the other hand, preferred the no harm rule of Art 7 because it affords greater protection to their established uses.[102] For example, with respect to the 1994 ILC's draft version of Article 7, the downstream countries as well as many 'intermediary' States supported, while the upstream countries including Ethiopia opposed it.[103]

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[94] Arcari, Maurizio, *The draft articles on the law of international watercourses adopted by the International Law Commission: an overview and some remarks on selected issues*, 21(3) NATURAL RESOURCES FORUM 170, 172-175(1997).

[95] The UN Watercourse Convention, *supra* note 13, Art 7(1).

[96] *Id.* Art 7(2).

[97] Article 7 in the ILC 1991 Draft Articles provided: 'Watercourse States shall utilize an international watercourse in such a way as not to cause appreciable harm to other watercourse States.' And many argued that in the 1991, the 'no appreciable harm' (Article 7) had been presented as the cornerstone provision of the entire document. See WOUTERS, *supra* note 23, at 307.

[98] Article 7 of the 1994 ILC Draft Articles read: "1. Watercourse States shall exercise due diligence to utilize an international watercourse in such a way as not to cause significant harm to other watercourse States. 2. Where, despite the exercise of due diligence, significant harm is caused to another watercourse State, the State whose use causes the harm shall, in the absence of agreement to such use, consult with the State suffering harm over: (a) the extent to which such use is equitable and reasonable taking into account the factors listed in article 6; (b) the question of ad hoc adjustments to *its* utilization, designed to eliminate or mitigate any such harm caused, and, where appropriate, the question of compensation." Despite the changes made in 1994 version, however, the provision could still be interpreted as endorsing the 'no-significant harm' rule as the primary obligation. See Wouter, supra note 14, 417.

[99] Tanzi, *supra* note 57, at114.

[100] Schroeder, *supra* note 19, at 43.

[101] MCCAFFREY, *supra* note 67, at 21-22.

[102] Christina M. Carroll, *Past and Future Legal Framework of the Nile River Basin*, 12 GEO. INT'L ENVT. REV. 269, 284. See also STEPHEN C. MCCAFFREY, THE LAW OF INTERNATIONAL WATERCOURSES, at 307 (Oxford University Press) (2007).

[103] CAFLISH, s*upra* note 17, at 14.

However, after a lengthy debate by the Working Group, a compromise regarding the relationship between the two principles was reached where the new language of Article 7 requires the state that causes significant harm to take measures to eliminate or mitigate such harm, and where appropriate, to discuss the question of compensation, "having due regard to articles 5 and 6."[104] Regarding the voting pattern in the working group, the 'package deal' (represented by Articles 5 to 7) was accepted by 38 votes to 4 (China, France, Tanzania, Turkey), with 22 abstentions.[105] Even if the compromise language facilitated approval of the Convention, some upper riparians still consider the Convention as biased in favor of lower riparians because of its specific and separate mention of the obligation not to cause harm. On the other hand, a number of downstream states such as Egypt concerned that the Convention favors upstream riparians because it subordinates the no harm rule to the principle of equitable and reasonable utilization[106].Although some argue that such controversies are the results of misconception[107], the relationships between the two principles are said to be unclear under the Convention making the inherent tension to continue among the upstream and downstream riparians.[108]

Therefore, the writer believe that it is better either to adopt the equitable and reasonable utilization principle alone or limiting the application of the no harm principle to environmental damaging activities rather than water allocation issues while providing effective compliance mechanisms, financial or otherwise, that could deter parties as well as non-parties to refrain from non-compliance activities. In this regard, it is possible to take lessons from different Multilateral Environmental Agreements (MEAs) that restrict or ban trade with non-parties unless upon their *de facto* compliance with the requirements of the agreements.[109] To this effect, for example the Watercourses Convection may use trade restrictive measures on products or services (e.g. agricultural products or hydroelectric power) produced using the watercourses in question for irrigation or hydroelectric generation although this proposal may face challenges from the GATT/WTO system that advocates free trade. Moreover, the proposal would be ineffective if the riparian state in question is determined to use the water resource only for domestic purposes.

C) The Notification Procedures of the Convention

The third controversial point is the notification process designed for planned measures under Part III of the Convention.[110]Under nine articles, the Convention provides a set of procedures to be followed in relation to new activity in one state that may have a significant adverse effect on other states sharing an international watercourse. This 'obligation to provide prior

[104] Salman, *supra* note 1, at 9.

[105] For more regarding the negotiations on Art 5&7, See generally Schroeder, *supra* note 19, at 39-47.

[106] Salman, *supra* note 1, at 11.

[107] *Id.*

[108] Ryan Stoa, *The United Nations Watercourses Convention on the Dawn of Entry In to Force*, 47 VAND. J.TRANSNAT'L L 1321, 1324-1325 (2014).

[109] Regarding the MEAs allowing trade with non- parties as an exception and up on their *de fact* compliance, see 1973 CITES Convention, Article X ("Where export or re-export is to, or import is from, a State not a Party to the present Convention, comparable documentation issued by the competent authorities in that State which substantially conforms with the requirements of the present Convention for permits and certificates may be accepted in lieu thereof by any Party."); 1987 Montreal Protocol, Article 4. See, e.g. Paragraph 1 ("Within one year of the entry into force of this Protocol, each Party shall ban the import of controlled substances from any State not party to this Protocol"); 1989 Basel Convention, Article 4(5) and 11.

[110] The UN Watercourses Convention, *supra* note 13, Art. 11-19.

notification of such changes was accepted as a part of the Convention by most delegations.'[111]However, it is important to note that Ethiopia, Rwanda and Turkey voted against Part III of the Convention believing that the provisions gave veto power to downstream riparians.[112]

Under the Convention, the planning state is required to give notice if the planned measures are predicted to have "significant adverse effect" up on the other watercourse states concerned. In other words, if the planned project is less likely to have a significant adverse effect on the other watercourse state, the planning state is not bound to give notice although there is still a room where the former state may request the latter to apply the normal notification procedures[113].But it should be noted that determining whether the planning state has a duty to give notice or not may be debatable, because it depends on the question whether the planned activity has a significant adverse effect or not which is often subjective and depends on the manner that the Environmental Impact Assessment (EIA) study has been conducted by the planning state.

Unlike many 'Multilateral Environmental Agreements',[114] the UN Watercourses Convention does not expressly require the planning state to conduct EIA, albeit the issue is impliedly referred under Art 12. Moreover, the Convention neither provides the criteria and procedures for determining whether an activity is likely to have significant adverse environmental impacts nor leave the issue to be set by "joint commissions" where the contested states are guided up on.[115]Rather, the Convention left the issue totally to the concerned watercourse states where they may negotiate on the possible effects of planned measures on the conditions of an international watercourse[116]which ultimately required parties to determine whether the planned measures are consistent with the provision of Art 5 or/and 7, which is difficult to be agreed up on as will be discussed latter.[117]

But in the situation where the planned measures may have adverse effect on the other watercourse state, the planning state shall give notice. In doing so, the notifying state is required to deliver the necessary data and information including the results of environmental impact assessment to the notified states[118]. Those states are then given six months to respond. But the six-month period put in place to reply for notifications may also be extended to another six months if the notified state faced 'special difficulty' in evaluating the planned measures. But during such period for reply, the notifying state shall not implement or permit the implementation of the planned measures without the consent of the notified States.[119]If the

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[111] MCCAFFREY, *supra* note 67, at 23.

[112] *Id.*

[113] The UN Watercourses Convention, *supra* note 13, Art. 12 Cum. Art. 18(2).

[114] For example, see the Rio Declaration(1992), Principle 17; the United Nations Framework Convention on Climate Change (UNFCCC)(1992), Art 4(1)(f); and the Convention on Biological Diversity (CBD), Art 14. Moreover, there is also EIA specific International Agreement viz. the 'Convention on EIA in Trans-boundary Context' (Espoo Convention, 1991).

[115] At this juncture it is important to note that, the CFA provides an explicit and separate provision for "Environmental impact assessment and audits". See CFA; *supra* note 48, Art. 9.

[116] The UN Watercourses Convention, *supra* note 13, Art 11

[117] Here, the majority of the provisions dealing about planned measures (Part III) referred to Art 5 and 7(i.e. the equitable and reasonable principle and the no harm rule) and required watercourse states to enter in to consultation and negotiation up on the issue.

[118] The UN Watercourses Convention, *supra* note 13, Art 12.

[119] *Id.* Art. 13 Cum Art 14(b).

notified states still object to the planned use, the concerned states shall enter into consultation 'with a view to arriving at an equitable resolution of the situation.'[120]Here again, the notifying State shall refrain from implementing or permitting the implementation of the planned measures during the course of the consultations and negotiations, for a period of six months unless otherwise agreed[121]. Therefore, this entire process could take twelve months or longer.

Due to such lengthy procedures, upper riparian states perceived that the notification process under the Convention favors downstream riparian and provides them with 'a veto power' over projects and programs of upstream riparian.[122]But many argued that the perception of upstream countries in this regard is inaccurate which is based on a false notion that "only upstream riparian can cause harm to downstream riparian".[123]Actually, no veto power is provided for in Part III of the Convention. However, it should be noted that the said provisions have at least a temporary suspensive effect upon the implementation of measures by the planning state.[124]

With respect to the above assertion, the writer of this article also believe that the Convention does not explicitly limit notification to downstream riparians or grant any state a veto power over the projects and programmes of other riparian states. Rather it requires notification of all riparians, both downstream as well as upstream.[125] This means in the eyes of the Convention upstream states can also be 'harmed' by activities of downstream states. However, I believe that the kind of harm that could be caused by the activities of downstream riparians for which they are required to notify upstream riparians is largely limited to those impacts relating to 'water quality changes' (for example, those activities introducing evasive/alien species to the watercourses, be it plant or fish varieties, whose environmental impacts can spread even upward towards the jurisdiction of upstream riparians); rather than 'water quantity changes'. This is actually true in most basins where water infrastructures have already been developed by downstream riparians without giving any notification to upstream riparians like what happened in the Nile basin. On the other hand, it is obvious that the downstream riparians can be harmed by the physical impacts of both the water quality and quantity changes caused by upstream uses since the water is flowing down. Thus, from this perspective the notification provisions of the Convention are more disadvantageous for upstream riparians and their impacts may go beyond delaying upstream projects although they do not go to the extent of giving a 'veto power' to downstream riparians.

Nevertheless, some argued 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, so that the formers can also benefit out of the notification procedures.[126]However, this seems an abstract notion since the upstream riparians, in the

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[120] *Id* Art. 15 Cum 17(1).

[121] *Id* Art. 17(3).

[122] Salman, *supra* note 1, at 11.

[123] *Id.*

[124] The UN Watercourses Convention, *supra* note 13, Arts. 13, 17 & 18.

[125] In this regard it is important to note that the World Bank Policy for Projects on International Waterways requires notification of all riparians, both downstream as well as upstream, underscoring the fact that harm is actually a two-way matter. See Salman M.A. Salman, *The World Bank Policy for Projects on International Waterways-an Historical and Legal analysis* (2009), as cited in Salman, *supra* note 1.

[126] See generally Salman M.A. Salman, D*ownstream riparians can also harm upstream riparians: The Concept of foreclosure of future uses*, 35(4) WATER INTERNATIONAL 350, 350-364 (2010).

majority of instances, are already harmed by the existing water constructions and prior uses of downstream riparians, which cannot be rectified by the notification procedures of the Convention, unless such downstream uses are forced to be reduced proportionally. But the option of reducing downstream existing uses for the equitable utilization of the water by upstream riparians seems unlikely to occur in practice. Therefore, I believe that except the environmental or water quality change related harms, the above instances of harm caused by downstream states under 'the concept of foreclosure of future uses' seems uncovered under the notification procedures of the Convention. Because the Convention requires notification in case a 'project may have significant adverse effect upon other watercourse States'. This means, the notification procedures of the Convention can apply either by downstream or upstream states when there are new project developments. Thus, except the case of new project development downstream, the notification provisions of the Convention are less likely to be invoked against downstream states that often tried to retrieve the status quo- their existing uses- rather than developing new projects.

V. THE UNWCC IN THE CONTEXT OF THE NILE BASIN: DOES IT REALLY MATTERS?

It is important to note that the main principles laid down in the Convention, especially those concerning equitable utilization, prevention of significant harm and prior notification of planned measures are basically codification of customary international law.[127] Moreover, the Convention has had a remarkable record of influence since its conclusion in 1997 as reflected in different judicial decisions and treaty negotiations.[128]Therefore, given its sphere of influence and customary international law status, the main principles of the Convention may be regarded as binding on all states whether they are parties or not.[129]In this regard, since the Nile basin countries including Ethiopia cannot escape from the application of the Convention's principles by being out of it, one may argue that it would be better to join the Convention which has been endorsed by a number of international entities and financial institutions like the World Bank.[130]

However, the fact that certain principles of the Convention are the codification versions of customary international water law does not necessarily mean that staying out from the Convention makes no difference. In other words, the effects of being party to the Convention for a given state may not be similar with the effects of the applications of the Convention in the name of customary international water law. This is because first, the problem is not mainly about the acceptability or otherwise of the Convention's Principles, but the problem is the way those Principles are interpreted and applied on the ground by riparian states. The principle of equitable and reasonable utilization for instance may have different meanings for Ethiopia and Egypt even if both agreed on the equitable utilization of the Nile water as a principle which in turn makes its practical application difficult.[131]

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[127] Stephen McCaffrey, *The U.N. Watercourses Convention: Retrospect and Prospect*, 21 PAC. MC GEORGE GLOBAL BUS. & DEV. L.J. 165, 167 (2008).

[128] Tanzi, *supra* note 59, at 443-444. See also *id*, at 170-171. For instance, the ICJ endorsed the Convention in September 1997, in the Gabcikovo-Nagymaros case, only four months after it was adopted by the UNGA. Moreover, as to negotiations, the Convention has played a role in the negotiation of treaties such as the 2000 SADC (Southern African Development Community) Revised Protocol.

[129] Salman, *supra* note 1, at 14.

[130] *Id.* at 13-14 (for more information about the impact and relevance of the Convention).

[131] Carroll, *supra* note 102, at 288.

As will be discussed later, the problematic application of the Convention's Principles mainly emanates from its compromising texts which paved the way for the existence of different types of interpretations by downstream and upstream countries. Second, the writer believes that all of the provisions of the Convention are not also the reflection of customary international water law. Even if the ILC mainly drafted the Convention based on the collections of customary international law, the ILC's work was not linear where different approaches were tested and some were rejected with a view to compromise different interests.[132]

Moreover, to determine whether the Convention really matters in Nile basin, it is important to examine its role in enhancing future cooperation in the region. Actually, the Nile states could theoretically consider negotiating a regional agreement under the auspices of the Convention since the Convention provides for the negotiation and adoption of regional watercourse agreements[133] and establishes a general obligation to "cooperate on the basis of sovereign equality, territorial integrity, mutual benefit and good faith in order to attain optimal utilization and adequate protection of international watercourses."[134] However, there are several barriers to using the Convention as a basis for a Nile agreement.[135]As mentioned earlier, most significantly, not all Nile states have supported the Convention during its adoption. Only Kenya and Sudan voted to adopt the Convention in the U.N. General Assembly. And more importantly none of the Nile riparian countries currently signed or ratified the Convention since its adoption.[136]

Thus, given the non-party status of the Nile states and their divergent views with respect to the fundamental provisions of the Convention; particularly regarding the status of existing agreements and the relationships between the two principles (i.e. equitable and reasonable principle, and no significant harm principle) coupled with the Convention's compromising and confusing languages thereto, it seems less likely for Nile river basin states to reach into consensus and come up with all-inclusive regional agreement under the framework of the Convention.[137] Even, if they stand to use the Convention as the basis for their agreement, under the current conditions they either failed to reach into agreement or as mentioned earlier, the hegemonies-Egypt and Sudan- would take the advantages of the uncertainty that often emanates from the compromised languages of the Convention since the other weak co-riparian cannot fairly compete and able to enforce their line of argument on equal footing.

Prior to the negotiation of a Nile agreement under the auspices of the Convention, the writer therefore believes that the Nile states first must come to a common understanding of the hydro- geography of the Nile and develop comparable institutional and legal frameworks for handling water resource matters on equal footing. Unless Nile states lay this foundation, a new Nile agreement will fail because of genuine and perceived inequities among riparian states and lack of capability to enforce the agreement. If countries do not have a shared view of the problems afflicting the Nile or the capability to implement management measures, they will

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[132] McCaffrey, *supra* note 126, at 166.

[133] The UN Watercourses Convention, *supra* note 13, Art. 3 & 4.

[134] *Id.* Art. 8.

[135] Carroll, *supra* note 102, at 283.

[136] Takele Seboka, *Between Ambivalence and Necessity in the Nile Basin: Occlusions on the Path towards a Nile Basin Treaty*, 2(2) MIZAN LAW REV. 201, 224-225 (2008).

[137] Carrol, *supra* note 102, at 287.

not be able to reach agreement or comply with the agreement that they create.[138]Hence the time for laying such foundations for genuine cooperation seems a long time dream in the Nile basin.

This has been tested in practice during the negotiation process on the Nile River Basin Cooperative Framework Agreement (CFA) which incorporates the provisions of the Convention on equitable and reasonable utilization,[139] the obligation not to cause significant harm,[140] as well as on cooperation[141] and exchange of data and information,[142]but rejected by the two downstream countries- Egypt and Sudan - claiming the protection for current uses and rights[143] in the name of "water security".[144]Here it is important to note that, had they accept the equitable and reasonable utilization principle as stipulated in the CFA, they would not come up with the concept of 'water security' to ruin the applicability of the principle, which still benefit them more.

However, as mentioned earlier the negative positions of the two downstream states do not often emanate from the fact that the provisions of the Convention are not, at least on average, downstream favored in the context of Nile. Rather their position is largely stemmed from the strong desire to make the status quo untouched. Therefore, in the situation where the two downstream countries, Egypt and Sudan, still hangs on "historic rights" coupled with the problematic practical application of the Convention's principles, it is difficult to argue that the existing Watercourses Convention would in fact matters in bringing the Nile basin countries in to genuine cooperative framework and thereby play a major part in the resolution of water allocation in the basin.[145]

Although the question 'so what should be done to envisage a new legal framework and governance scheme for the Nile' is beyond the scope of this article, the writer believes that for effective future negotiations what matter is whether all relevant stakeholders are provided with the facilities to participate fully and effectively in the compacting of a new governance scheme for the Nile. In the first place the colonially-imposed Nile River Agreements must be set aside since they did not take into consideration the interests of most of the upper riparian states. However, while rejecting the colonially-imposed Nile River Agreements, it is equally important to note that any attempts to negotiate an agreement without the participation of Egypt will be ineffective, leading only to increased conflict. In this regard, it is important to note that had the CFA entered in to force with the only ratifications of the upper riparian states while excluding Egypt and Sudan, it could not bring sustainable solution.

Therefore, trying to resolve the problem under a coordinated and all-inclusive multilateral approach shall always be considered as the first and the only option. However, it is important to change the negotiation fora with respect to the stakeholders to be participated in any future negotiations. Accordingly, I urge any Nile negotiation, whether it takes the UNWCC as the

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[138] *Id.* at 271.

[139] See CFA, *supra* note 48, Art. 3(4) & Art. 4; Cum. the UN Watercourses Convention, *supra* note 13, Art. 5 & 6.

[140] See Art. 3(5) & Art 5 of CFA Cum. Art 7 of the Convention.

[141] See Art. 3(1) of CFA Cum. Art 8 of the Convention.

[142] See Art. 3(8)(10), Art. 7 and Art 8 of CFA Cum. Art. 9 of Convention.

[143] Stoa, *supra* note 108, at 1325.

[144] See CFA, *supra* note 48, annex on Art 14(b).

[145] Takele, *supra* note 136, at 224.

basis or not, must include all the Nile River Basin riparian states where the national representations include not just each country's elites (i.e., political and economic leaders) but also the local communities whose livelihoods are dependent on and intertwined with the Nile. Moreover, it should include the developed industrial countries (which have a substantial economic presence in the Basin) as well as the multilateral organizations that support development efforts in this region. In doing so a sustainable governance scheme for the Nile must fully and effectively define the rights and obligations of the various stakeholders, making certain that those who partake in and benefit from the exploitation of the river's varied forms of wealth also contribute fully to its upkeep.[146]

VI. IS JOINING TO OR STAYING OUT FROM THE UNWCC WOULD BE A BETTER POLICY ADVICE IN THE ETHIOPIAN CONTEXT?

Given the divergent views and interpretations of the Convention's provisions, the position of riparian states to join it or not would ultimately depends upon the lens they used to observe the provisions of the Convention vis-à-vis the positions of other competing riparian states. As mentioned earlier, the geographical position where along a watershed a riparian state is situated (i.e. as upstream or downstream riparian), the existence or otherwise of genuine cooperative framework, the amount of trust and confidence among riparian, and the overall characteristics of the basin may determine the position of a given riparian state "to join to or abstain from" the UN Watercourses Convention.

Therefore, the question whether we are better off as non-party to the Convention or not should be examined based on the impacts that the Convention may impose on the interest of Ethiopia in the context of the Blue Nile in particular and the problems of the application of the Convention to the existing legal framework of the Nile basin in general. However, this does not mean that the issue shall be examined only in the context of the Blue Nile (Abbay) since most of the other major river basins of Ethiopia are also trans-boundary in nature.[147]However, among the trans-boundary rivers Ethiopia shares with other riparian states, the Blue Nile is the most important and poses many allocation challenges[148]at least due to two reasons; 1) it generates the lion share of the trans-boundary run-off from Ethiopia contributing 86% the Nile flow; and 2) it has been the long-lasting source of tension particularly with the two downstream states-Egypt and Sudan. For this reason, the article preferred to examine the issue largely from the context of Blue Nile and the two downstream riparian states since the other

[146] For a comprehensive discussion on proposals for a new framework, see Mwangi S. Kimenyi and John Mukum Mbaku, *Toward a Consensual and Sustainable Allocation of the Nile River Waters*, Draft Working Paper, August 2010.

[147] In this regard it is important to note that Ethiopia is upstream of all its trans-boundary rivers with more than 75% of the water resources flowing into neighboring countries. And no rivers flow into Ethiopia from neighboring countries. The Baro-Akobo, Abbay, Mereb and Tekezze drain into the Nile system; Wabi-Shebelle and Genale-Dawa discharge into the Indian Ocean after cutting through Somalia; part of the Dawa river forms a border with Kenya;. The Omo-Ghibe flows into Lake Rudolf or Turkana. Accordingly, some argue that this in itself is a major constraint on water resources development of the country since it requires negotiations with those countries sharing the water resources regarding water allocation and management of such trans-boundary rivers. See Imeru Tamrat, *Policy and Legal Framework for Water Resources Management in Ethiopia*, a paper presented at International Conference on Water Management in Federal and Federal Type Countries, at 4. See also generally FEKAHMED NEGASH, NATURE AND FEATURE OF ETHIOPIAN BASINS, Proceedings of National Water Forum, Addis Ababa (2004).

[148] Fekahmed Negash, *Managing Water for Inclusive and Sustainable Growth in Ethiopia: Key Challenges and Priorities*, European Report on Development; Confronting Scarcity: Managing Water, energy and land for inclusive and sustainable growth, at 25 (2012).

river basins do not generate significant trans-boundary run-off and are not yet the sources of controversy.

The status of existing agreements, the relationship between the principle of equitable and reasonable utilization, and no significant harm, and the notification of planned measures are among the main issues of controversies and the unfinished business in the Nile basin.[149] Accordingly, pros and cons of joining the watercourses Convention in the context of Ethiopia would be assessed under different scenarios by taking in to consider the gaps of the Convention and the practical problems of applying the Convention's principles.

A. Failure to Demand the Establishment of Joint Commission to Enforce the Principle of Equitable and Reasonable Utilization

Although the Convention obligates parties to cooperate for various purposes,[150]it does not provide any guidance on how countries should do so[151] and the enforcement mechanisms thereof. Particularly, it does not require the establishment of joint watercourse institution for the purpose of performing various functions, including: determining equitable allocations; managing international watercourses; settling disputes.[152] Rather it simply provides that parties 'may' use joint mechanisms or commissions for the purpose of facilitating cooperation, managing the shared resource and settling disputes[153] without requiring their establishment. From this we can understand that the Convention is weak in demanding collective actions.

Especially, the establishment of joint Commissions would have a great role to effectively implement the cornerstone principle of the Convention and thereby adaptively manage an international watercourse with changing conditions.[154] In the absence of genuine cooperative framework, quantitative water allocations and flexible treaty regime, the principle of equitable and reasonable utilization would be an abstract notion with no or little implementation.[155] To provide such imperatives for the effective implementation of the principle, joint institutions should be established with the authority to respond to changing conditions.[156]Although, the Convention provides obligations of regular exchange of date and information[157] and prior notification of planned measures[158] as a mechanism to keep the equitability balance in the uses of the water by one riparian state vis-à-vis the other riparian states, this system does not necessarily work well without a joint mechanism.[159]

The Convention provides non-exhaustive lists of factors that should be taken in to consideration in ensuring the equitable utilization of the international watercourse.[160]As it will

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[149] Magdy Hefny and Salah El-Din Amer, *Egypt and the Nile Basin*, 67 Special Feature Article, AQUAT. SCI. 42, 45 (2005).

[150] Here it is important to note that, the UN Watercourses Convention underscores the concept of cooperation, and includes 15 references to the word and its derivatives. See Salman, *supra* note 1, at 8.

[151] Carroll, *supra* note 102, at 291.

[152] McCaffrey, *supra* note 127, at 166.

[153] The UN Watercourse Convention, *supra* note 13, Art. 8(2), Art. 24 & Art. 32(2).

[154] McCaffrey, *supra* note 127, at 168.

[155] Helal, *supra* note 5, at 345. See also generally Wolf; *supra* note 31, at 3-30.

[156] Stephan McCaffrey, *The need for flexibility in fresh Water treaty Regimes*, 27 NATURAL RESOURCE FORUM 156, 160 (2003).

[157] The UN Watercourses Convention, *supra* note 13, Art. 9.

[158] *Id*. Art. 11-19.

[159] McCaffrey, *supra* note 127, at 168.

[160] The UN Watercourses Convention, *supra* note 13, Art. 6(1).

be discussed later, however, it may be difficult for riparian states to reach agreement on what combination of factors constitutes equitable utilization, which are often subject to different interpretations. In order to settle such potential disputes, requiring the establishment of joint Commission mandated to provide guiding rules and procedures on which riparian states are bound to observe is necessary for the effective implementation of the equitable and reasonable utilization principle. Despite this need, however the Convention simply required watercourse states to 'enter into consultations in a spirit of cooperation' in applying Art 5 and 6, when the need arise.[161]

In this regard, the CFA for example required Nile Basin States to 'observe the rules and procedures established by the Nile River Basin Commission for the effective implementation of equitable and reasonable utilization'[162], even if the Commission is not yet established due to the failure of the agreement to enter into force. The writer believes that the two downstream Countries-Egypt and Sudan- already known that, even before the commencement of the negotiations, they will not compromise on the so called 'current uses and rights' argument. They pretend as if they accepted the equitable and reasonable principle and make the negotiations to continue just to buy time as part of the "discursive hegemony" and "stalling tactics".[163]That is why they intentionally postponed the establishment of the Nile River Basin Commission and made the same conditional up on the adoption of the CFA; because they know that they will never be party to the Agreement.

Therefore, in the situation where the Watercourses Convention do not require the establishment of joint commission to facilitate cooperation and laying a foundation for the effective implementation of the cardinal principle of the Convention, the negotiations among riparian states would ultimately be a zero sum game where only the powerful is determined to win. Moreover, given the non-mandatory natures of the dispute settlement methods, except the "fact finding Commission", the riparian states' attempt to settle the issue of "equitable utilization" via the dispute settlement procedures of the Convention[164] will be cumbersome. This is especially true in the Nile basin where there have been "much more discordance, unilateralism, mutual insecurity and suspicion rather than trust and cooperation."[165]Although the problem of having an effective dispute settlement mechanism is common to all MEAs, it is better to take lesson from the WTO Dispute Settlement System (DSS) where the decisions of the panel and the appellate body are binding with mandatory and exclusive jurisdiction.[166]

So given the fact that the application of the principle of equitable utilization is heavily reposes on the amount of confidence among riparians,[167] the Ethiopia's move to join the Convention will not add anything in the status quo and able to change the long lasting positions of Egypt and Sudan on the Nile River as revealed in the CFA negotiations.

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[161] *Id.* Art. 6(2).

[162] CFA, *supra* note 48, Art. 4(6).

[163] For more information on hydro hegemony's tactics and strategies see generally Zeitoun M. and Warner J. (2006), *Hydro-hegemony framework for analysis of trans-boundary water conflicts*, 8 WATER POLICY 435, (2006).

[164] The UN Watercourses Convention, *supra* note 13, Art. 33.

[165] Takele, *supra* note 136, at 203.

[166] For a detailed discussion of the WTO DSS, See Chapter 3, WTO Dispute Settlement P. VAN DEN BOSSCHE & ZDOUC, THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION, 3rd ed. (CAMBRIDGE UNIVERSITY PRESS, 2013). See also Bossche and Gahti (2013), Use of the WTO Dispute Settlement System by LDCs and LICs, TRAPCA, at 9-11, 20.

[167] Takele, supra note 136, at 217.

B. The Paradox Between the Two Basic Principles of the Convention

The interplay between the two principles-the equitable and reasonable principle and the no harm rule- and their application in disputes between the conflicting uses of riparian States is the central tenet of the law of the non-navigational uses of international watercourses. It is, therefore, inevitable that these two principles and their scope and content have been, and remain, the subject of impassioned debate between riparian states as they attempt to apportion the waters of international watercourses.[168] In the following sub sections, the limitations of the Convention in relation with the two principles and the difficulty to implement them will be discussed in the context of Nile River while determining whether joining or staying out is a better position for Ethiopia.

1. The lack of clarity as to the relationships between the principle of equitable and reasonable utilization and the rule of "no significant harm"

Before discussing the two cardinal principles of the UN Watercourses, it is important to highlight the two extreme doctrines – the "doctrine of absolute sovereignty" and the "doctrine of territorial integrity"- which have been claimed regularly by riparians in negotiations often depending on where along a watershed they are situated.[169]The doctrine of absolute sovereignty is often claimed by an upstream riparian arguing that a State has absolute rights to water flowing through its territory. This doctrine allows upstream states a complete freedom of action with regard to that segment of international watercourses irrespective of any prejudice it might entail in other downstream countries. Conversely, the doctrine of absolute integrity maintains that the upstream state may not do anything that might affect the natural flow of the water in to downstream state.[170] Up on this doctrine, the lower riparian states have been attempted to secure their "historic rights" as acquired through seniority of use.[171]As Takele noted '[t]he positions of Nile riparian have also been, at least in theory, locked in these irreconcilable doctrines'[172]

But since such doctrines are not acceptable in the contemporary international water law and leaves very little room for negotiations, the doctrine of equitable utilization has "originated as a middle position of reasonableness between the two extremes of the absolute territorial sovereignty assertions of upstream states and absolute territorial integrity claims of downstream states."[173]With a view to reconcile the two extreme doctrines, the principle of equitable and reasonable utilization has been incorporated as a cardinal principle in the UN Watercourses Convention, but not alone.[174] Rather, it has been incorporated along with another concept- "the obligation not to cause significant harm"[175], while without setting a clear priority between the two.[176] This combination of Principles without a clear line of demarcation makes the implementation of the two Principles to be inherently in tension and

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[168] Helal, *supra* note 5, at 339.
[169] Wolf, *supra* note 31, at 5.
[170] Takele, *supra* note 136, at 212-213.
[171] Wolf, *supra* note 31, at 6.
[172] Takele, *supra* note 136, at 214.
[173] Albert E. Utton, *Which rule should prevail in International Waters: That of Reasonableness or that of No Harm?* 36 NATURAL RESOURCES JOURNAL 665, 638 (1996).
[174] The UN Watercourses Convention, *supra* note 13, Art 5 and 6.
[175] *Id*. Art. 7.
[176] Wolf, *supra* note 31, at 6-7.

thereby allow the inherent doctrinal conflicts between upstream and downstream riparian to continue. As a result, the Convention failed to establish meaningful rules for states in conflict over water resources.[177]To this connection, Wolf noted that,

> *Although the UN Convention has important components towards fostering peaceful relations, it is somewhat vague and even contradictory in its guidelines for the process of allocating international water resources. The document advises 'reasonable and equitable' use, and offers a series of considerations, which ought to be taken into account. But it also institutionalizes an inherent conflict between the 'rights based' positions of the upstream riparian-the principle of equitable use, sometimes argued in lieu of absolute sovereignty - and the downstream riparian - the obligation not to cause significant harm, a refined protection of historic rights.*[178]

Similarly, Utton while commenting the compromising languages of the draft article of Art 5 and 7, observed a direct clash between the established doctrine of equitable utilization and the rule of no significant harm.[179]The attempt to accommodate the two doctrines having different origins (as the doctrine of equitable utilization is for allocation of water quantity whereas the no significant harm is for the protection of water quality) would make the concept of reasonableness and the equitable consideration of all factors to be lost.[180] That is why it has been argued that the Convention created the collusion between the rules of water quantity and water quality. With a view to reconcile the two principles and thereby demarcate their areas of application, Utton proposed the rearrangement of the 'no harm' rule provision in the way to be applied in relation to water quality rather than quantity issue. Thus, the equitable and reasonable principle would clearly apply in water allocation disputes[181] unless the equitable utilization created water quality problem in which case the use that cause significant pollution/harm shall be deemed unreasonable.[182]

When we put the trigger in to the Nile basin, there is nowhere that the Watercourses Convention's "limitations are more apparent than in the geopolitical asperity of the Nile River Basin".[183] As one of the Convention's limitation, the lack of clarity as to the relationship between the principles of equitable and reasonable utilization and no significant harm hindered the Nile basin countries to reach in to agreement. And it was one of the major issues that proved highly contentious during the whole process of CFA negotiations.

This is because, Egypt and Sudan do not merely assert their rights under the colonial and post-colonial treaties (the 1929 and 1959 agreements); they reinforce those rights by invoking the principle of no significant harm's prohibition on adverse impacts to their allocations. On the other hand, upstream states including Ethiopia are increasingly assertive of their rights to an equitable and reasonable utilization of the Nile River's water resources. Unable to resolve the inherent tensions between the two principles, the states have resorted to creating an

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[177] Stoa, *supra* note 108, at 1324.
[178] Wolf, *supra* note 31, at 14-15.
[179] Utton, *supra* note 173, at 636.
[180] *Id*. at 635.
[181] *Id*. at 639-640.
[182] Bourne, *The Primacy of the Principle of Equitable Utilization in the 1997 Watercourses Convention*, 35 CAN. Y.B. INT'L L. 214, 215-216 (1997).
[183] Stoa, *supra* note 108, at 1324.

entirely new legal principle-water security.[184] But the definition of water security is disputed and leaves the Nile River Basin without a cooperative management agreement.[185]

Therefore, given the competition between the two cardinal principles and the absence of clear supremacy of the equitable and reasonable principle in the Convention, the move to join the Convention would be more disadvantageous for Ethiopia than the two downstream states-Egypt and Sudan. This is because in the context of the Nile basin, where the water is already fully used by Egypt and Sudan, Ethiopia's new use would almost inevitably result in the reduction of the quantity of the water that flows downstream and thereby bring 'significant harm' on downstream states even if its use is 'reasonable' and 'equitable'.[186]

In summary, due to the Convention's limitation, the riparian states do not agree as to the instances where the no harm rule could apply with respect to the principle of equitable utilization. Ethiopia believes that a Nile water allocation should be based on the principle of equitable utilization, and that the no harm principle should only operate when a state has exceeded its equitable or reasonable use. Egypt, on the other hand, believes that each country has the right to the uninterrupted flow of the river through its territory; any measure that changes the status quo flow is causing significant harm.[187]Thus, as mentioned earlier the application of the equitable utilization and no harm principles will pit upstream and downstream states against each other. And this would be advantageous for the most downstream country Egypt where it can use its ideational and bargaining power to influence the process of negotiations.

2. The Principle of Equitable and Reasonable Utilization: the difficulty to determine "equitable utilization"

In addition to the lack of clarity as to the interplay between the two cardinal Principles, the equitable and reasonable utilization principle by itself is a vague one with many possible interpretations. Vague and relative terms of the Convention like 'equitable', 'reasonable', 'optimal', and 'sustainable' are difficult to determine. Defining such concepts are intentionally vague both for reasons of legal interpretation and for political expediency which are creating ambiguity in the application of the principle.[188]

It is agreed that the practical application of an equitable and reasonable apportionment of an international watercourse requires the examination of all the relevant conditions of the watercourse and its riparian States.[189]To this effect, Art 6 of the Convention lays out a non-exhaustive list of factors that are relevant to determine what is equitable and reasonable in the course of utilizing an international watercourse or when negotiating or entering in to an agreement on an international watercourse.[190] However, there is no hierarchy among these

[184] CFA, *supra* note 48, Art. 14.
[185] Stoa, *supra* note 108, at 1325.
[186] Takele, *supra* note 136, at 222.
[187] Carroll, *supra* note 102, at 290.
[188] Wolf, *supra* note 31, at 7.
[189] Helal, *supra* note 5, at 347.
[190] UN Watercourses Convention, *supra* note 13, Art. 6 (1). Although the factors are non- exhaustive, the said sub-article of the Convention listed out seven factors : (a) geographic, hydrographic, hydrological, climatic, ecological and other factors of a natural character; (b) the social and economic needs of the watercourse states concerned; (c) the population dependent on the watercourse in the watercourse 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

components of 'reasonable use'. The applicable factors, which include the existing and potential uses of the watercourse, have no inherent weight. They are to be balanced according to their relative importance in a given situation where "all relevant factors are to be considered together and a conclusion reached on the basis of the whole".[191] In addition to the aforementioned article, Art 10 of the Convention says that, "in the absence of agreement or custom to the contrary, no use enjoys inherent priority over other uses", and that "in the event of a conflict between uses, (it shall be resolved) with special regard being given to the requirements of vital human needs".[192] Thus, except 'vital human needs', no use (hydroelectric power, irrigation, navigation etc) enjoys priority over the other use.

However, the application of those factors in determining the equitability or otherwise of the water use is difficult for different reasons. First, the Convention neither gave priority for certain factors nor attaches any weight to those factors. Thus, even if states may consider many factors under Art 6, it may be difficult to reach agreement on what combination of factors constitutes equal utilization. Second, Article 6 does not indicate whether states should consider the number of factors or the strength of the factors implicated.[193]

Moreover, the scopes of certain factors are not clear and so that they are open to different interpretations.[194] For example, the "social and economic needs of the Watercourse States", as one relevant factor is not clear as to whether it connotes the degree of the economic dependence on the watercourse or the relative economic development of the watercourse state. However, many scholars argued that the factor should not be construed to imply the stage of economic development which can further be collaborated by the fact that a criteria referring to the stage of economic development of watercourse States in one of the reports was deleted in the final version of the Convention.[195] Similarly in the "population dependent factor"[196], whether the degree of dependence of the population or the size of the population or both should be the relevant factor in equitable and reasonable apportionment is not clear.[197] Moreover, regarding "availability of alternatives, of comparable value" factor, the text is not clear whether such alternatives should be water-based or not. However, the ILC noted that such alternatives need not be water-based. But the substitute options should be of generally comparable feasibility, practicability and cost-effectiveness.[198]But the term "Comparable value" is still ambiguous. The Convention does not specify how this term should be used.[199]So in the situation where clear definitions and scopes of the relevant factors have not been clearly stipulated in the Convention, the same factor can easily be formulated to support either side in the same debate.

Therefore, it would be difficult for Nile riparian states to reach in to agreement as to what combination of factors constitutes equal utilization. Although disputes over the application of

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watercourse; (f) conservation, protection, development and economy of the water resources of the watercourse and the cost of measures taken to that effect; and (g) the availability of alternatives, of comparable value, to a particular planned or existing use.

[191] *Id*. Art. 6(3).

[192] *Id*. Art 10.

[193] Caroll, *supra* note 102, at 288.

[194] Helal, *supra* note 5, at 349.

[195] *Id*. at 350.

[196] The UN Watercourses Convention, *supra* note 13, Art. 6(1)(c)

[197] Helal, *supra* note 5, at 351.

[198] *Id.* at 352.

[199] Carroll, *supra* note 102, at 289.

Articles 5 and 6 are supposed to be answered under the Convention's dispute settlement provisions, such a process could be cumbersome.[200] Thus, given the ideational and bargaining power of Egypt, it is doubtful that Ethiopia will benefit from the equitable and reasonable utilization principle whose application is often vague and subject to different interpretations.

3. The relevant factors to determine equitable utilization: To whom they favored in the context of Nile?

As mentioned earlier, under the Convention's calculation of equitable utilization, it is complex to measure and quantify the weight that should be attached to a given individual factor and thereby reach in to genuine conclusions on the basis of the whole. Accordingly, Ethiopia and Egypt for example may have different views of what constitutes utilization in an "equitable and reasonable manner". And they may arrive in to different conclusions while using the same factors as bases of their calculation. For instance the fact that both existing and potential uses are incorporated as determining factors with no priority[201] allowed both Egypt and Ethiopia to make arguments in favor of them. However, as will be discussed, the totality of factors seems to give more protection to existing uses and thereby favored Egypt and Sudan than Ethiopia.

Egypt, which uses the greatest amount of Nile water, may consider its utilization equitable because it has no other source of water. In fact, Egypt argued during the Working Group negotiations that availability of other water sources should be a factor for determining equitable utilization under Article 6 although its proposal was not accepted.[202]However, still the factor, "the availability of alternatives, of comparable value, to a particular planned and existing use"[203]seems to favor Egypt. Since Egypt has no other source of water other than Nile, it can use this factor to consolidate the argument that it has no other projects available of 'comparable value' than Ethiopia. Egypt also might consider its use equitable because it was the first to make use of the Nile waters. It could use the "existing or potential use" factor[204] to support that argument. Here, even if Ethiopia can also use this factor on the basis of "potential use", the weight of this factor may be offset by Art 6(1) (d)'s factor which consider "the effects of the use or uses of the watercourses in one Watercourse State on other watercourse States". This is because Egypt and Sudan already have developments on Nile River so that any new developments by Ethiopia will affect their existing uses. And it is usually the upstream state that cause harm to the downstream although as some argued the downstream riparian can also cause harm to upstream by foreclosing the future uses of the upstream.[205]In this regard, Ethiopia could argue under Article 6(d) that 'the effects' of Egypt's 'use' on the amount of water that Ethiopia may use is inequitable. But compared to Egypt, Ethiopia's argument on this factor will not make a significant change on the total weight. In addition, Egypt might argue that "the population dependent on the watercourse" factor weighs in favor of protecting uses that its population has been dependent on over time.[206] Finally, it may argue

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[200] The UN Watercourses Convention, *supra* note 13, Art. 33.
[201] *Id*. See Art 6(1)(e)(f) Cum Art 6(3) and Art 10.
[202] MCCAFFREY, *supra* note 102, at 306.
[203] The UN Watercourses Convention, *supra* note 13, Art 6(1)(g).
[204] *Id*. Art. 6(1) (e).
[205] Salman, *supra* note 1, at 12.
[206] The UN Watercourses Convention, *supra* note 13, Art. 6(1) (c).

that it is using water equitably because it has advanced systems for "conservation" and "economy of use" given its technological advancement.[207]

The second Article 6 factor, "the social and economic needs of the watercourse states concerned," seems favorable to Ethiopia and other Nile states that have a lower per capita income than Egypt.[208]But as discussed above, many argued that this factor is dealing about the economic dependence on the watercourse rather than the stage of economic development of the watercourse state.[209] And this cast doubt as to whether the factor indeed favors Ethiopia. Above all, the Convention does not list out certain factors under Art 6 as relevant factors that could rather add value for Ethiopia. For instance, the contribution of water from each watercourse state, and the extent and proportion of the drainage area in the territory of each watercourse state are not listed as relevant factors for determining equitable utilization under Article 6 of the Convention. Had such factors been expressly listed in the Convention, they could be construed in favor of Ethiopia since it contributed 86% of the Nile water and has large basin area next to Sudan.

Actually, the lists of factors are illustrative so that riparian states may agree to add other relevant factor depending up on the unique features of the basin.[210] But, this does not mean that there is no difference between the listed and non-listed factors. Because, once the factor is listed, it would be relevant for determining equitable utilization unless it is totally irrelevant in the basin. In the contrary, however riparian states need to agree to add additional factors other than those listed under Art 6 of the Convention.

At the Working Group level, India sought to include "the contribution of water from each watercourse state" as a factor in the Convention, but the Working Group declined to include it.[211]Ethiopia, however, could argue that its significant contribution must be considered as a 'relevant' 'hydrographic' or 'hydrological' factor.[212] But, the exclusion of the aforementioned factor by the Working Group affects the weight it could rather have in determining equitable utilization. And obviously Egypt and Sudan may use the rejection of this factor by the Working Group to amplify the irrelevancy of the above factor in determining equitable utilization and thereby consolidate their argument while exploiting the benefits derived from other factors. Thus, the exclusion of such determinant factors puts Ethiopia in a disadvantageous position.

Nevertheless, one may argue that it is because of the inclusion of "hydrological factors" that the issue of "water contribution" was finally left out. However, the writer of this article disagrees with this assertion on the belief that "the water contribution" factor should be included as an independent factor given the large place it ought to have among other "hydrological factors". The Helsinki Rules, for instance, (which is said to be the basis of the Watercourses Convention) explicitly referred to the 'water contribution factor' by saying: "[T]he hydrology of the basin, including in *particular the contribution of water by each basin*

[207] *Id*. Art. 6(1) (f).
[208] *Id*. Art. 6(1)(b).
[209] Helal, *supra* note 5, at 350.
[210] For instance, the two factors have been added to CFA text. See CFA, *supra* note 48, Art 4(2)(h) and (i).
[211] Helal, *supra* note 5, at 349.
[212] The UN Watercourses Convention, *supra* note 13, Art 6(1)(a).

State;"[213] showing the large place the water contribution factor should have within the 'hydrological factors' category. Thus, the inclusion of the 'hydrological factor' cannot justify the failure to recognize the 'water contribution' factor as an independent factor unless the exclusion is aimed to get the voice of the downstream riparian states and leaving the issue a point of contention.

In summary beside the difficulty to apply the principle of equitable and reasonable utilization, the majority of the equitability determining factors seems inclined to favor Egypt and Sudan than Ethiopia.

4. The application of the 'No harm rule'

Besides the principle of equitable and reasonable utilization of international watercourses, the obligation not to cause significant harm to other watercourse States is the second fundamental pillar of the law of non-navigational uses of international watercourses. However, like that of equitable and reasonable principle, the no harm rule which provides that states 'take all appropriate measures to prevent the causing of significant harm'[214] is also difficult to apply.

First, the Convention defines neither the term 'harm' nor 'significant harm'. Second, if 'harm' is caused, Article 7(2) provides that a watercourse state 'take all appropriate measures' to eliminate or mitigate the harm. But, it will be hard to determine what action is adequate to satisfy the duty of 'all appropriate measures'. In addition, a watercourse state may pay compensation 'where appropriate' if it has caused significant harm to another watercourse state. Again, there will be disagreement about when compensation is 'appropriate'. That is why McCaffrey described the final result of negotiations of Art 7 as a "basket of Halloween candy: there is something in it for everyone. No matter whether you are from the equitable utilization or the no-harm school, you can claim at least partial victory."[215]

The Convention does not provide adequate guidance, for example as to whether the use of more water by Ethiopia constitutes harm to Egypt? Or does 'harm' only refer to serious pollution of the waters that would in turn affect a downstream state? Although the Convention does not absolutely prohibit causing significant harm,[216] the 'equitable and reasonable utilization' of the Nile water by Ethiopia still may cause significant harm to Egypt and Sudan. Thus, in the situation where harm is inevitable to downstream existing uses by new developments of Ethiopia, Egypt may demand compensation under Art 7(2) even if Ethiopia's utilization is equitable and reasonable. If this is so, it would be unfair for Ethiopia to join the Convention.

C. The Way the Convention Dealt with Existing Agreements

The existing Nile legal framework is uncertain for a number of reasons. Most importantly, the colonial and post-colonial era agreements are either invalid or their validity is in question. Egypt and Sudan insists on their validity, whereas other Nile states, following either the clean

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[213] *The Helsinki Rules on the Uses of the Waters of International Rivers* is adopted by the International Law Association at the 52nd conference, held at Helsinki in August 1966. Report of the Committee on the Uses of the Waters of International Rivers (London, International Law Association, 1967); Art V(II)(2).

[214] The UN Watercourses Convention, *supra* note 13, Art. 7(1).

[215] MCCAFFREY, *supra* note 67, at 22.

[216] *Id.*

state or Nyerere concepts of state succession, have denounced them.[217]Although some argued that colonial agreements as well as post-colonial bilateral agreements between Egypt and Sudan over the Nile have no legal effect whatsoever,[218] they continue to hinder fresh negotiations and agreements up on the equitable utilization of the Nile.[219]As observed during the negotiations on CFA, Egypt and Sudan maintain that the framework should include a clause that reads: "[n]ot adversely affect the water security of current uses and rights of any other Nile Basin states."[220] The water security of current uses and rights referred to here is the uses established under the 1929 and 1959 treaties between Egypt and Sudan.[221]

Nevertheless, as mentioned earlier the UNWCC neither invalidates the existing agreements nor required their harmonization with its basic principles. In other words, parties are simply encouraged, but not obligated, to harmonize existing agreements with the basic principles of the Convention.[222]And this may affect the interest of Ethiopia.

Since the two Nile agreements (i.e. the 1929 and 1959) are bilateral in their nature, Ethiopia may argue that they bind only the parties to them- Egypt and Sudan. Thus, if Ethiopia became party to the Convention (along with Egypt and Sudan), its rights under the Convention may not be affected in this regard, because Ethiopia was not party to such agreements.[223]Moreover, unlike the White Nile riparian countries, Ethiopia has never been under colonization except the temporary occupation by Italy. Thus, the argument of Egypt and Sudan regarding the validity of 1929 agreement on the basis of "state succession" would not work in the Ethiopian context.

However, it is important to examine whether Egypt and Sudan may take advantage over Ethiopia regarding the 1902 and 1993 agreements since Ethiopia signed those agreements as an independent sovereign state with colonial Britain and Egypt respectively. Actually, Ethiopia cannot raise 'the clean state' doctrine to renounce their validity. But particularly, with respect to the 1902 treaty, it seems that Ethiopia has a legitimate defense. Article III of the Treaty stipulated: "not to construct or allow to be constructed any work across the Blue Nile, Lake Tana, or the Sobat, which would arrest the flow of their waters except in agreement with His Britannic Majesty's Government and the Government of Sudan".[224]Based on this treaty, Sudan insists that Ethiopia may not begin Nile water projects without the consent of Britain and Sudan. Ethiopia, however renounced this agreement, inter alia invoking the Egyptian and Sudanese practice of denouncing unequal treaties signed by Britain on their behalf if they no longer reflect their development needs.[225]

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[217] Osott O. McKenzie, *Egypt's Choice: From the Nile Basin Treaty to the Cooperative Framework Agreement, an International Legal Analysis*, 21 TRANSNATIONAL LAW AND CONTEMPORARY PROBLEMS 571, 586-587(2012).

[218] See generally Girma Amare, *Nile Issue: The imperative Need for Negotiation on the Utilization of Nile Waters*, 2(6) EIIPD Occasional papers (1997).

[219] Takele, *supra* note 136, at 208.

[220] CFA, *supra* note 48, Annex on Art. 14(b).

[221] Takele, *supra* note 136, at 209.

[222] The UN Watercourses Convention, *supra* note 13, Art. 3(2).

[223] *Id.* Art. 3(6).

[224] Treaties between Great Britain and Ethiopia, and between Great Britain, Italy, and Ethiopia, relative to the Frontiers between the Anglo-Egyptian Soudan, Ethiopia, and Erythræa (railway to connect the Soudan with Uganda) Addis Ababa, May 15,1902, Art. III.

[225] Joseph W. Dellapena, *Rivers as Legal Structures: The Examples of the Jordan and the Nile*, 36 NATURAL RESOURCES JOURNAL 217, 243(1996). See also Caroll, *supra* note 102, at 279.

Moreover, Ethiopia has renounced this agreement on the view that the Emperor signed the Treaty as the result of a mistranslation between the English and the Amharic version of the Treaty which is considered as 'error of fact'.[226]According to the Amharic version, 'arrest' had been translated into 'stop', that is, as long as Menilk did not stop the waters, the agreement did not prevent him from utilizing and diverting Blue Nile water which seems playing with words.[227]And such error of "a fact or situation" may also render the Treaty void, as per Article 48 of the Vienna Convention on the Law of Treaties (1969) which mostly codified customary treaty rules.

However, whatever rebutting arguments may be, it seems that Egypt may take advantage of the 1993 Framework agreement for General Cooperation between Egypt and Ethiopia as far as the UNWCC does not affect existing agreements. Article 5 of the agreement states: "Each party shall refrain from engaging in any activity related to the Nile waters that may cause *appreciable harm* to the interests of the other party."[228] As we can understand from the provision, it incorporates only the 'no harm rule'. There is no mention of equitable and reasonable utilization. Therefore, in the situation where the relationships between the two principles are controversial under the Convention, Egypt may use the 1993 agreement to argue that Ethiopia has accepted the primacy of no harm rule over the equitable and reasonable utilization principle.

However, here the question may arise as to whether the 1993 framework agreement for general cooperation between Egypt and Ethiopia is a treaty with a binding effect or not. Of course, it is clear that as the status of the agreement differs, so does the influence and the effect it renders. The fundamental principle of treaty law is undoubtedly the proposition that treaties are binding upon the parties to them and must be performed in good faith (i.e. *pacta sunt servanda)* irrespective of whatever name the agreement is captioned. Otherwise, there is no reason for countries to enter into such obligations with each other.[229] As stipulated under Art 2 of the Vienna Convention on the Law of Treaties, a treaty is defined 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.' However, this does not mean that every agreement in written form is a treaty and binding on the parties thereto. It is essential that the parties intend to create legal relations as between themselves by means of their agreement. Thus, it is the 'intention not to create a binding arrangement' governed by international law which marks the difference between treaties and informal international instruments. In this regard, memoranda of understanding and exchange of notes for example are not as such legally binding.[230]

Here, it is important to note that the 1993 agreement is neither a memoranda of understanding nor exchange of note. Rather, it is the agreement entered between heads of state/government of the two countries having 'full powers' for the purpose of concluding the

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[226] Zeray Yihdego, *The Blue Nile dam Controversy in the eyes of International law*, GWF Discussion Paper 1325, University of Aberdeen, United Kingdom, Global Water Forum, Canberra, Australia (2013), available at: http://www.globalwaterforum.org/2013/06/18/the-blue-nile-dam-controversy-in-the-eyes-of-international-law/ (accessed on 23 December 2015).

[227] *Id.*

[228] Framework for General Cooperation between Arab Republic of Egypt and Ethiopia, July 1, 1993, Art. 5.

[229] MALCOM N. SHAW, INTERNATIONAL LAW, (6th ed., Cambridge University Press, 2008), at 903-4.

[230] *Id.* at 906.

treaty in accordance with Art 7 of the Vienna Convention. However, it may still raise a question as to whether it is just a declaration of intension or a binding treaty. At this juncture, while illustrating the need to make a difference between a treaty and other non-binding international agreements, the well-known international law scholar Malcom Shaw noted:

> *"…many agreements between states are merely statements of commonly held principles or objectives and are not intended to establish binding obligations. For instance, a declaration by a number of states in support of a particular political aim may in many cases be without legal (though not political) significance, as the states may regard it as a policy matter and not as setting up juridical relations between themselves. To see whether a particular agreement is intended to create legal relations, all the facts of the situation have to be examined carefully."*[231]

Given the framework nature of the 1993 agreement laying a background for future negotiations, one may argue that the agreement is too early to be called a treaty and result in a binding effect on parties. This, however, further requires the examination of the intent of the parties as seen in the language and context of the document concerned, the circumstances of its conclusion and the explanations given by the parties.[232] The texts of the agreement mainly focused on identifying the focus areas of cooperation for future negotiations which are actually broad in scope including other areas of cooperation in addition to the issue of Nile. However, the writer of this article believes that Art 5 of the agreement is the core and the most important provision of the agreement that reflects the intension of the parties to be bound by the wordings of the provision. The wording of the provision that clearly innumerate the commitment to which the parties are consented coupled with the focus of Art 6 on future consultation and cooperation of 'projects that would enhance the volume of flow and reduce the loss of Nile waters' shows how the agreement is concluded by Egypt only for the sake of Art 5 with a view to make it binding in future negotiations.

Thus, I believe that the 1993 agreement is a treaty but having a nature of framework agreement which calls for further negotiations and specific agreements on the use of the Nile waters. Nevertheless, future agreements could not be reached by the two states; they cannot deviate from the general objective of the Agreement and its provision of Art 5 that provides specific commitment particularly on Ethiopia. Moreover, even if the agreement was not ratified by Ethiopia, the act of signature of an international agreement, such as the 1993 agreement, by a member state creates an international obligation of good faith to refrain from acts designed to frustrate the objectives of the agreement.[233] Moreover, even if the 1993 Agreement may be regarded as a mere declaration of intention and thereby is not legally binding, it may have still a legal consequence as the circumstances of the case, for example as an aid to the interpretation of some other treaty - may be the UNWCC. As confirmed from other cases, there are even instances where the memorandum of understanding were not declared by tribunals as legally irrelevant (as the circumstances of the case) although they are not source of independent legal rights.[234]

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[231] *Id.* at 905.

[232] See Oscar Schachter, *The Twilight Existence of Nonbinding International Agreements*, 71 AJIL 290, 296 (1977).

[233] See the Vienna Convention on the Law of Treaties, *supra* note 78, Art. 18. See also Jan Klabbers, *How to Defeat a Treaty's Object and Purpose Pending Entry into Force: Towards Manifest Intent*, 34 VANDERBILT JOURNAL OF TRANSNATIONAL LAW, 283 (2001).

[234] SHAW, *supra* note 229, at 906.

D. The Notification Procedures of the Convention

The notification requirement of the Convention for planned measures actually applies for both upstream and downstream riparians. However, the detailed notification provisions of the Convention, as mentioned earlier, seem disadvantageous for upstream countries like Ethiopia. This is because in most river basins including Nile, major hydraulic works have already been developed unilaterally and without consultation by downstream riparian. And the attention of those riparians inevitably turned to protecting the flow of water on which these facilities depended.[235]Therefore, the detailed notification provisions of the Convention may at least delay the developmental activities of Ethiopia.

The issue was also a point of controversy during CFA negotiations where the two downstream countries – Egypt and Sudan-proposed detailed provisions in terms of exchange of information concerning planned measures similar to what was provided in the UN Watercourses Convention. But having such detailed procedures on notification procedures would have been tantamount to giving veto power to the downstream countries; the proposal was opposed by Ethiopia.[236] And finally parties agreed such information exchange and notification of measures to be made through the Nile basin Commission once it is established under the CFA.[237]

VII. ADVANTAGES AND BENEFICIAL APPLICATION OF THE CONVENTION

In contrast to the difficulties with the practical application of Articles 5, 6, and 7, and other related gaps of the Convention, the environmental management section of the Convention would be useful if it were applied to the Nile region. Part IV of the 1997 Convention is generally dedicated to "Protection, Preservation and Management" of international watercourses.[238]For example, Article 21, which obligates watercourse states to consult with each other for the prevention, reduction, and control of pollution, suggests that states set joint water quality objectives and criteria, devise techniques and practices to address pollution from point and non-point sources, and establish lists of substances that may not be added to the watercourse. Accordingly, Nile states could agree to utilize these factors in the development of a Nile water quality agreement.

Generally, the articles relating to the protection of the ecosystems of international watercourses provide "an important starting point, and reflect minimum international standards below which states may not fall, indicating the basis upon which states can further their efforts to achieve cooperative arrangements with their neighbors in the use of shared freshwater resources."[239]

In addition to the mutual benefits that could be derived from the green provisions of the Convention, being party to the Convention may increase the bargaining power of Ethiopia in the Nile basin. Since the Convention is endorsed and acknowledged by donor countries and

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[235] Delapena, *supra* note 225, at 239.

[236] Imeru Tamrat, *International Water law and its implications in the context of the Nile basin and the Ethiopian Renaissance Dam*, 10 WONBER, Alemayew Haile Memorial Foundation Bulletin 99, 116 (10th Half-Year) (2012).

[237] CFA, *supra* note 48, Art 8.

[238] The UN Watercourses Convention, *supra* note 13, Part IV, Art. 20-26.

[239] PHILIPPE SANDS, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW, (2nd ed. 2003), at 468.

financial institutions[240], joining the Convention may pave the way to get financial assistance or loan so that it can construct mega projects with in short period of time. This would be true however if the hydro hegemonies - Sudan and Egypt- remained as non-party states. But from the overall assessment, the disadvantages of joining the Convention overweight than its benefits in the context of Ethiopia.

VIII. CONCLUDING REMARKS

The article examines the provisions of the UN Watercourse Convention in the Ethiopian context and determines whether joining to or staying out is a better off advice. To this effect the provisions are analyzed by taking in to consider the existing legal frameworks and positions of the two downstream countries- Egypt and Sudan.

The article reveals the difficulty to apply the Convention's provisions and how they favored downstream countries- Egypt and Sudan. First, the relationship between the equitable and reasonable utilization principle and "no harm rule" is not clear. Moreover, the practical applications of the two principles are difficult and subject to different interpretations. Although the Convention listed out non-exhaustive factors to determine equitable utilization, the task of weighting those factors is difficult. Due to the lack of clarity of certain factors, the same factor can also be construed to support both sides in the same debate. Similarly, the practical applications of the no harm rule would be difficult. Terms like 'significant harm' and 'appropriate measures' are vague and open for interpretations. In such conditions, if Ethiopia joins the Convention, it would be at disadvantageous position where it may be forced to pay unnecessary bills for the advantages of the two downstream countries, Egypt and Sudan.

Despite the difficulty to apply the equitable and reasonable utilization principle, many of the individual factors used to determine equitability seems to favor Egypt. The detailed notification procedures and the way the Convention deal with the status of existing agreements cumulatively affect the interest of Ethiopia. Although Ethiopia and other Nile basin states would benefit from the environmental protection provisions of the Convention, the disadvantage of joining weighted in the context of Ethiopia. Thus, given the gaps of the Convention coupled with Egypt's adherence to historic right based argument, it is better for Ethiopia to stay out from the Convention and its complexities while expecting at least 'a half and a loaf' from the application of the customary international water law regime. But it should be noted that the application of customary international water law regime is not still free from controversies. Nevertheless, Ethiopia would definitely get a better half from the complexities of customary international law rather than the complexities of the Convention where parties are at least required in principle to adhere to the wordings and texts of the Convention; which often contains confusing and downstream favored provisions.

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[240] Salman, *supra* note 1, at 11-14.