The Relevance and Contribution of the UN Watercourses Convention toward Resolving the Problems in the Nile Basin

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Abstract

One of the major problems in the Nile basin with respect to the utilization and management of the water is to strike a balance between patting the water in a reasonable manner and causing no significant harm to the existing uses. To date, the Nile basin states could not, however, forge a comprehensive legal framework to resolve the problem. Since there are no sound rules and principles, which govern water allocation and management, acceptable to all the riparian states at present, one may resort to the UN Watercourses Convention- the only global Convention in place that governs the utilization, management, and development of shared water resources for non-navigational purposes. The article aims at probing the relevance and contribution of the Convention toward crafting cooperative arrangement and thereby reversing the current patterns of the utilization and management of the waters of the Nile, which is iniquitous. In spite of the fact that most of the Nile basin states present during the session of the General Assembly for the adoption of the Convention abstained from voting in favor of it, it is concluded that the Convention is relevant to the Nile basin and incorporates important principles and rules that could help address the problems in the basin. It is also held that it provides the Nile basin states with appropriate legal framework that could be used as the basis for negotiation as to how to use, manage, and develop the resources of the basin to the benefit of all riparian states.

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Introduction

The Convention came into being as the result of the codification efforts undertaken by the ILC (the International Law Commission) for close to 25 years. The UN instructed the ILC to launch a treatise study on international watercourses with a view to its progressive development and codification in 1970. Following a series of works, the UN General Assembly adopted the final text of the Convention in 1997. The Convention deals mainly with the non-navigational uses of international watercourses. The goals of the Convention, espoused under its preamble, are to ensure the utilization, development, conservation, management, and protection of international watercourses, and the promotion of their optional and sustainable utilization for the present and future generations.

The Convention on the Law of the Non-Navigational Uses of International Watercourses (hereinafter referred to as the UN Watercourses Convention) is the only Convention adopted at international scene to govern the uses of international watercourses for the purposes other than navigation. Prior to it, the international community did not have a set of rules codified at inter state level.

There were seven Nile basin states that took part in the session held for the adoption of the Convention by the UN General Assembly. Four of them abstained- Ethiopia, Egypt, Rwanda, and Tanzania. Two of them, Kenya and Sudan, voted in favor. Burundi opposed it. Uganda, DRC and Eritrea were absent. Given this voting of the Nile Basin states, one wonders whether the Convention is of relevance to the Nile Basin and contributes toward resolving the predicament in the basin. The article begins with the reaction of the Nile basin states to the Convention before and at the time it was adopted and the reasons for such reply. It identifies some factors showing the relevance and contribution of the Convention toward attempts at cooperative scheme in the Nile basin. It finally considers the impact of the terms of the Convention on the Nile Basin Initiative.
1. Reaction of the Nile Basin States to the Convention

The International Law Commission adopted, in 1994, on second reading, the draft of the Convention on the Law of the Non-Navigational Uses of International Watercourses and recommended the elaboration of the draft convention by the General Assembly or an international conference. According to the recommendation of the ILC, the General Assembly invited states to submit written comments and observations on the draft articles of the convention. It also designated the Sixth Committee to convene as a Working Group of the Whole to elaborate the draft convention in light of the written comments and observations of states and views expressed in the debate of the Forty Ninth Session of the Assembly.

The reaction of the Nile basin states to the Convention can be gathered from the comments and observations they submitted to the General Assembly before the Working Group convened to elaborate the Convention, the proposals they submitted to the Working Group and voting they cast at the end of the Second Session of the Working Group, and the statements they made at the voting for the adoption of the final text of the Convention at the General Assembly.

Ethiopia and the Sudan were among the Nile basin states that submitted written comments and observations on the draft convention adopted by the ILC on second reading. The comments of Ethiopia and Sudan focused mainly on Articles 3, 5, 6, and 7 of the draft convention.

Ethiopia, Egypt and the Sudan were among the Nile basin states that submitted proposals to the Working Group in relation to different articles of the draft convention. The proposals of Ethiopia, Egypt and the Sudan were especially in relation to Articles 3, 5, 6, and 7 of the draft convention.

The Working Group held two separate sessions. The first one was from 7-25 October 1996 and the second was from 24 March-4 April 1997.

At the first session of the Working Group, many contentious issues were raised by states. At the heart of the deliberations were issues relating to the identification of the substantive rules that should determine the rights and duties watercourse states, factors to be considered in the determination of reasonable and equitable utilization, relationships between reasonable and equitable utilization and no harm, rules in the event of conflicts of uses, and the fate of existing watercourse agreements.

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2. General Assembly Resolution 49/52 paragraphs 2 and 3.
3. UN Doc. A/51/275, 1996; and UN Doc. A/51/275/Add.3
4. UN Doc. A/51/869, 1997
When one looks at the both the written comments and observations and proposals of the Nile Basin states (Ethiopia, Egypt, and Sudan), one can see that the core controversial issues at the first session of the Working Group hold true also for the Nile Basin states as their main concerns were with respect to Articles 3, 5, 6, and 7 of the draft convention, which deal with the existing watercourse agreements, reasonable and equitable utilization, factors that determine reasonable and equitable utilization, and no harm respectively.

The First Meeting of the Working Group failed to produce agreement on core issues. Hence, the Second Meeting was found to be of necessity. Thus, the Second Meeting was held from 24 March-4 April 1997. At the second meeting three central issues emerged as the focal points of disagreement among states, which include the status of existing watercourse agreement under the Convention and the effect of the Convention on future watercourse agreement, the substantive rules provided by Articles 5, 6, and 7 of the 1994 draft convention adopted by the ILC on second reading and the relationship between them and the rules that govern dispute settlement.

The states that showed discrepancy on the fate of the existing watercourse agreement included both the upper riparian states and lower riparian states and such disparity was not conditioned by geographical contemplation but rather by the question of who was well-served by the existing agreement. The controversy on the relationship between the substantive rules of articles 5, 6 and 7 was based on the doctrines adopted by states concerning the utilization of shared water, which are the doctrine of absolute territorial sovereignty and the doctrine of absolute territorial integrity (prior appropriation).

Since the positions of states concerning the aforementioned core issues were found to be irreconcilable, the Working Group introduced modification to articles 3, 6, 7, 10, etc of the draft convention adopted by the ILC in 1994. After the modification, three voting were made on Articles 3, 5, 6, 7, and 33 and finally the whole text of the convention was presented for voting.

36 states (including the Sudan and Egypt) voted in favor of the modified version of Article 3, 3 states (including Ethiopia) voted against it, and 21 states (including Rwanda and Tanzania) abstained. It was in order to bring together the incongruent views of states toward the fate of the existing watercourse agreement that Article 3(1), as modified by the Working Group, maintained the position of those states that want to see such

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6. Bourne, supra note no. 5, pp. 10-11
7. Caflish, supra note 5, p. 10
8. Bourne, supra note no. 5, p.11
9. Caflish supra note no. 5, p. 10
10. UN Doc. A/51/869, 1997
agreements unaffected and that Article 3(2) was inserted as a concession to those that want to get them replaced by the Convention.\textsuperscript{12} Thus, the spirit of the Convention is against the argument offered by Ethiopia that the Convention should replace existing watercourse agreements.\textsuperscript{13}

Another core issue set aside for voting, on package basis, at the end of the Second Session of the Working Group was the substantive rules under Articles 5, 6, and 7 of the draft convention and the relationships between them. 38 states (none of the Nile Basin states) voted in favor; 4 states (including Tanzania) opposed; and 22 states (including Ethiopia, Rwanda, and Sudan) abstained.\textsuperscript{14}

The alteration introduced to Articles 5 and 7 of the original draft submitted by the ILC put in place compromising formula and contain something for everyone.\textsuperscript{15} Regardless of whether one is from the equitable utilization or no harm school, one can claim partial victory.\textsuperscript{16} The modified version of Articles 5 and 7 put both the reasonable and equitable use on par with no harm and no priority is set between them in event of conflicts of uses of shared water resources. Thus, the rules favored neither upper nor lower riparian states.\textsuperscript{17} This is against the position of some Nile riparian states, for instance, Ethiopia, which held that basic consideration should be given to the reasonable and equitable utilization in relation to harm and that significant harm should be subordinated to it.\textsuperscript{18} Egypt held, contrary to Ethiopia’s position, that the governing rule concerning utilization of shared water resources is the rule of no harm.\textsuperscript{19}

When the whole text of the Convention was put for voting at the end of the Second Session of the Working Group, 42 states (including Ethiopia and Sudan) voted in favor; 3 states (none of the Nile basin states present) opposed its adoption; and 18 states (including Egypt, Rwanda and Tanzania) abstained.\textsuperscript{20} It seems a paradox that Ethiopia that abstained during the voting on Articles 5, 6, and 7; that voted against Article 3 and that abstained during the voting on Article 33 finally voted in favor of the entire text of the convention.\textsuperscript{21}

One can also see the reaction of the Nile basin states during the voting made at the meeting of the General Assembly for the adoption of the final text of the Convention submitted to the Assembly by the Working Group. Ethiopia, Egypt and Rwanda were

\textsuperscript{13} Caflish, supra note no. 1, pp. 10-11; McCaffrey, supra note no. 12, p. 252
\textsuperscript{14} UN Doc. A/C.6/51/NUW/CRP. 94, 1997
\textsuperscript{15} McCaffrey, supra note no. 12, p. 255
\textsuperscript{16} Ibid
\textsuperscript{18} Report of the Secretary General, UN Doc. A/51/275, 6 August 1996, pp. 33-34 1996
\textsuperscript{19} UN Doc. A/C.6/51/RS.62/add. 1, 1997
\textsuperscript{20} UN Doc. L.3/L.3 ADD.1/CRP.94, 1997
\textsuperscript{21} UN Doc. L.3/L.3 ADD.1/CRP.94, 1997
among the Nile basis states that made their reflections toward the Convention. The statements made by them revolved mainly around Articles 3, 5, 6, and 7 of the Convention adopted by the Working Group.\textsuperscript{22}

The final version of the Convention was adopted by the General Assembly by 103 votes in favor (including Sudan and Kenya); 27 states (including Ethiopia, Egypt, Rwanda and Tanzania); and 3 states (including Burundi) opposed it.

In a nutshell, at the heart of reaction of the Nile basin states to the Convention one finds important considerations such as the fate of existing agreement with respect to the water of the Nile and the substantive rules of reasonable and equitable use on the one hand and the no harm rule on the other and the relationships between them. It is the status quo put in place by the regimes on the Nile, concluded at both the colonial and postcolonial periods, which determined the reaction of the Nile basin states toward the Convention. For instance, the 1959 Agreement concluded between Egypt and Sudan divided the entire water of the Nile to the two states only. Ethiopia and other upper riparian states are of the opinion that such agreement is unfair, that it is valid between the two countries only, and that they need to harness the water in a fair and rational manner. On the other side, Egypt wants to maintain control over the water of the Nile and alleges that the Agreement binds other riparian states as well. Hence, the issues of fair allocation of water and of the existing agreement disclose the Nile basin states response to the Convention. It suffices to look at the statements made by Ethiopia and Egypt at the time of adoption of the final text of the Convention by the General Assembly. Ethiopia abstained from voting by alleging that the Convention was not balanced since Article 7 and Part III of the Convention put an onerous burden on upper riparian states and this makes the Convention to tilt toward the lower riparian states.\textsuperscript{23} Ethiopia also held that it is specific watercourse agreements that should be adjusted to the Convention and not the vice versa.\textsuperscript{24} Egypt’s Representative at the time of the adoption of the Convention, Lamia A. Mekhemar, said that the Convention should not affect bilateral or regional agreements and that the application of the terms of the Convention should take into account existing agreements and customary uses.\textsuperscript{25} Thus, the status quo in the Nile basin as maintained by the 1959 Agreement shows the fundamental consideration behind, for instance, Ethiopia’s and Egypt’s reply to the Convention, as evident in the statements made by the representatives of the two countries at the adoption of the Convention.

\section*{2. The Relevance and Contribution of the Convention toward Resolving the Problems in the Nile basin}

One wonders whether the Convention is relevant to settle issues related to the Nile basin, given the fact that most of its riparian states present at the adoption of the Convention at the General Assembly session abstained during the voting process for the adoption of the Convention. Four Nile basin states- Ethiopia, Rwanda, Tanzania and Egypt- desisted

\textsuperscript{22}. General Assembly Press Release GA/9248, 21 May 1997
\textsuperscript{23}. Ibid
\textsuperscript{24}. Ibid
\textsuperscript{25}. Ibid
from voting in favor of the Convention. Burundi voted against it. Kenya and Sudan voted in favor of it. In fact, this is not only true for the Nile basin states but also true for the other shared water resources. Watercourse states of the world’s major international watercourses that are particularly subject to disputes did not favor the Convention.  

What immediately conjures up in one’s mind by examining this voting pattern is whether or not the Convention is relevant for and applies to the Nile basin at all and contributes toward resolving problems prevalent in the Nile basin.

The overall voting result, the influence of its draft and the adopted text, reference made to it by the International Court of Justice, absence of framework agreement incorporating all Nile basin states, provision of rules and principles that serves as the plinth of negotiation in the Nile Basin, and nature of the Convention, and application of some of the provisions of the Convention to the Nile basin are among main factors that one needs to consider in order to determine the relevance of the Convention and its contribution toward resolving the problems in the Nile basin.

**Voting Results in the Adoption of the Convention**

Prior to 1997 the international community did not have a set of rules and principles, which are adopted at inter state level, governing issues and problems arising from international waters. Considering the roles played by international waters in international relations, given the fact that 40 % of the world population relies on shared waters, the international community commissioned a codification of rules in this respect under the aegis of the UN and the efforts culminated in the adoption of the Convention.  

The Convention was adopted by 103 states, out of 135 states that were present during its adoption, 27 states refrained from voting and three states opposed it. It was adopted, hence, by a wide margin and this manifests that it could serve as a standard for state practice relating to shared water resources. Irrespective of the politics and national interests involved in the voting process, the passage of the Convention by such vote indicates that there is a broad agreement in the international community on at least the basic principles that are incorporated in it and that govern international watercourses.

The manner in which it was adopted itself marks a success story, for it achieved universality. It attracted the support of the majority states despite controversies over some key issues and this manifests the will of the international community to be governed by the rules and principles of the Convention. The weight of the growing consensus of the international community, which was manifested in how it was adopted, carries persuasive


\[28\] Eckstein, supra note no. 26, p. 88; see also McCaffrey, supra note no. 12, p. 261
force in its application for states that voted against it or who abstained. It contains something everyone could live with, as held by Stephen McCaffrey. It provides rules and principles, of international water resources, that could settle the problems of all the riparian states in a particular basin, regardless of their geographical location. It, thus, plays an important role in the management of international waters by serving as an authoritative statement of relevant international law. This is because it is an instrument whose primary purpose is to facilitate basin-wide cooperation and prevents conflicts. It could, therefore, encourage watercourse states at loggerheads on shared water resources to have recourse to it.

For the Nile basin this could be a sort of warning in the sense that the business can no longer be done as usual and that they take need to take into account the Convention of the international community, if they cannot work out and come up with their own agreement. Sticking to historic and acquired right to claim the water of basin does not have any place in the face of the Convention. This is because the Convention helped in clarifying and codifying the rules and principles of the regime applicable to international watercourses, which are in tandem with the existing practices of states. These are the rules and principles, substantive and procedural in nature, that could apply to any international watercourse and that the Nile basin is not an exception to them. The weight of the consensus with which the Convention was adopted will carry persuasive force and in this respect it, could encourage the Nile basin states to refer to it. The reason why Ethiopia abstained, during the voting process for the adoption of the Convention, was that it hoped that it might encourage negotiations to ensure reasonable utilization and promote cooperation. Egypt also held that the Convention provides a set of principles and articles on the use of waters and also that it provides a basis for improved cooperation, in the spirit of full and mutual respect. As admitted by both Ethiopia and Egypt, the adoption of the Convention has persuasive force in reconsidering the status quo in the basin.

### Influence of the Draft and Final Texts of the Convention

Before it was taken up, the draft convention had exerted its influence significantly on other international agreements over international waters, which include, among others, the Convention on the Protection and Use of Tran boundary Watercourses and International Lakes of 1992, the SADC Protocol on Shared Watercourses Systems in SADC countries of 1995, the Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin of 1995, and the Protocol on Common Water Resources, concluded by Argentina and Chile, of 1997. Its influence is also evident after it was adopted as discerned from the 1999 Draft Protocol to the 1992 Convention on

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29. Wouters, et al., supra note no. 17
31. Press Release, supra note no. 22
32. Press Release, supra note no. 22
33. Eckstein, supra note no. 26, p. 89
the Protection and Use of the Transboundary Watercourses and International Lakes.\textsuperscript{34} Furthermore, its weight can be gathered from an attempt made by the Nile Basin states to employ it, after it was adopted, as a guideline for the making of rules regulating the water of the Nile in the Nile Basin Initiative framework.\textsuperscript{35} The influence of the Convention on the cooperative schemes in the Nile basin is discussed in the last section of this article.

\textbf{Decision of the ICJ}

The International Court of Justice made reference to it in rendering decision over the Gabcikovo-Nagymaros Case, in which it affirmed that the principle of equitable use of water is a cardinal principle.\textsuperscript{36} The Court has attached importance to the principle of reasonable and equitable utilization and its decision is important in many respects in the filed of international watercourses. It explicitly referred to the Convention as an authoritative statement of the law of international watercourses and this is particularly remarkable, given the fact that the Convention was not ratified by a single state at the time the decision was rendered.\textsuperscript{37} The decision is also a landmark in the sense that it could influence the thinking of many disputants over international watercourses when they consider means for dispute settlement.\textsuperscript{38} This is in the sense that it influences disputing states to admit that the principle of reasonable and equitable utilization is the governing rule for the settlement of their disputes relating to shared water resources. In addition, a number of states recognized it as an authoritative statement of the fundamental principles of international water law.\textsuperscript{39} Regardless of when and whether it comes in force, it will continue to play an important role in the management of international watercourses.\textsuperscript{40} Thus, in case the Nile basin states refer their dispute on the uses of the water of the Nile to international tribunals, for instance the ICJ, the decision of the ICJ over the Gabcikovo-Nagymaros Case has an important implication in hearing the disputes and rendering final decision. The decision has also repercussion in looking for lasting solutions through negotiations among the Nile basin states themselves since the interpretation of the principle of reasonable and equitable utilization by the Court can give guidance to the states searching for solutions.

\textbf{Absence of Comprehensive Legal Framework on the Utilization and Management of the Nile Water}

\begin{itemize}
  \item\textsuperscript{34} Ibid
  \item\textsuperscript{37} Wouters, supra note no. 30, p. 327
  \item\textsuperscript{40} Ibid
\end{itemize}
In the absence of a legal framework, one cannot envisage the settlement of differences among the riparian states that are related to the use of shared water resources. The presence of a legal framework is an earmark and constitutes an important component of cooperation and contributes to the means of finding and reaching solutions to international watercourse problems and avoids potential conflicts on them.

The Convention provides a starting point for the negotiation of agreements relating to specific watercourse, and in the absence of any applicable agreement, sets basic parameters governing the conduct of riparian states to the watercourse.41

Today, there is no sound legal framework acceptable to all Nile basin states. This is one of the unique traits of the basin. The absence of such agreement has become a panacea for ways that lead to cooperation. The valid agreements in place in the Nile basin such as the 1959 Agreement (between Egypt and Sudan) and the 1929 Agreement (between Egypt and Uganda) are bilateral ones, which approached the water utilization and management in a splintered manner. The agreements do not represent a practice to be adopted by states sharing water resources. The two lower riparian states are not even, at present, willing to get these agreements scratched. This may even undermine the efforts of the recently launched Nile Basin Initiative, which has been perceived by many as a promising start.

It is the lack of a basin-wide agreement and the current situation in the basin that urges one to look for a legal springboard that could address the problems in the basin. The UN Watercourse Convention could be a good base and provides the basin states with a foundation in terms of searching for a legal framework capable of resolving the problems. The Convention could be referred and applied to the Nile basin in order to look for a means to resolve the existing problems since the basin states are not in a position to forge an agreement binding them and set up cooperative scheme. In the absence of a comprehensive agreement, it is the principles of reasonable use, no harm rule and the duty to cooperate, which are enshrined in the Convention, that determine the limit to sovereignty, confers rights up on and imposes obligations on the Nile riparian states that are exhibiting conflicting interests. Hence, the Convention provides them with appropriate framework based on which they could negotiate and reach an agreement.

**Provision of Rules and Principles**

The Convention contains some important substantive and procedural rules and principles on how to use and manage international watercourses. It incorporates, among other things, such principles and rules as reasonable and equitable use, no significant harm, duty to cooperate, etc. The importance of the Convention, in general and the principle of reasonable use and duty to cooperate, in particular, are underscored by the ICJ in its decision on the Danube Case, since the Court specifically made reference to Article 5 of the Convention in delivering its decision.

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41 McCaffrey, Supra note no. 12, p. 261
Where the substantive and procedural rules, which serve to level the playing, such as equitable use, prior notification of planned measures, exchange of information are missing, the opportunity for unilateral development and power politics is always present. The absence of a legal framework for the management of international water resources increases the likelihood of inequalities and adverse consequences leading, in the worst-case scenario, to serious international conflicts over water.

On substantive side, the Convention puts all the basin states on a level playing field. This permits each state to put forth its case based on all factors relevant to its particular needs. The procedural mechanisms provided by it are important, particularly, for states that share an international watercourse for which no agreement exists. When there is conflict of uses, the Convention provides rules, for instance Article 10, as to the relationships among different types of uses that give rise to such conflict.

One of the unique features of the Nile basin is the absence of sound rules and principles on the uses, management and development of its resources. The basin is also characterized by the presence of a zero-sum game, which results in distrust, suspicion, and tension among the states sharing it. The use of the water by one riparian state, especially by the upper riparian state, is perceived by another, particularly the lower riparian states, as detrimental to their interest and the latter will lose out. Similarly, the insistence on the status quo, by the lower riparian states, deprives the upper riparian states of their right to use the water. Hence, the utilization, management, and development of the resources of the Nile basin are characterized by an uncoordinated approach.

The Convention furnishes the basin states with the rules and principles of the game, which is a win-win one, for the reason that it gives due regard to the interest of all the riparian states and there is no state that will lose out by its application. It provides them with the basic rules and general architecture for using and managing the water. It also calls for an integrated management of international watercourses and this is against the unilateral uses and management that has been the trend so far. Thus, if the basin states embark on negotiations on the basis of the rules and principles of it, they will be in a better position to reverse the status quo and avert the potential extreme type of conflict, which might arise, as predicted by some authorities, in the basin in the absence of certain rules and principles governing the disputes. This is because the Convention is, in the words of McCaffrey, a bit like a buffet, i.e. there is something in it for everyone, which means that no matter whether one adheres to the principle of equitable use or the no harm rule, one can claim a victory. Thus, the rules incorporated in the Convention could

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42. Wouters, supra note no. 39, p. 503
43. Ibid
45. Ibid
46. Ibid
replace divergent approaches representing conflicting interests of upstream and downstream states by an approach that emphasizes fair allocation of waters and cooperative and comprehensive management that benefits all riparian states and this will ensure the efficient and sustainable use of the resource.

**It Serves a Framework for Future Agreement**

The Convention is put as a broad and framework agreement. Although general, it is useful in providing the constitutive foundation for a legal regime that could be used as a preliminary model for regional agreements. It is important and has an additional benefit of providing greater stability and predictability. The framework nature aims at laying down the constitutive foundations for a legal regime and is then elaborated through additional treaty. As a framework agreement, it, therefore, provides basic principles and rules and procedures in the absence of watercourse agreement and the watercourse states can apply and adjust it through specific watercourse agreements to suit the conditions of individual watercourse and needs of the shared water concerned.

It is the diversity characterizing individual watercourses and the subsequent difficulty in drafting general principles that will apply universally to all watercourses that urged the ILC to come up with a framework convention. This approach provides watercourse states with general principles and rules applicable to non-navigational uses of international waters and also provides guidelines for the negotiation of future agreements.

The Nile basin does not have a legal foundation on how to use the resources and deal with the problems among the riparian states. In the absence of such legal foundation, one could make recourse to the Convention, as a base for negotiation on how to address the problems in the basin. It is hoped, by the ILC, that the framework agreement will provide watercourse states with a firm common ground, as a base for future negotiations. The same could be said of the Nile basin and that it provides the riparian states with a good start for future negotiation. It can, therefore, serve, for instance, as a sufficient framework for present negotiations under the tutelage of the Nile Basin Initiative as well as for future negotiations.

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50. Ibid
53. Ibid
54. Ibid, p. 210
It Serves as a Guideline

The Convention is a framework agreement and as such it provides general principles and rules that watercourse states could apply and adjust through specific water agreement. This arrangement enables it to play a role in setting forth guidelines for future negotiations. The Statements of Understanding on Article 3 of the Convention states that it serves as a guideline for future watercourse agreements. The watercourse states are, therefore, encouraged to consider its principles and rules while conducting negotiations for agreement on international watercourses. The Statement of Understanding was entirely based on the commentary of the Convention and is of equal importance as the commentary itself, because the Working Group’s aim was to elaborate it based on the commentary prepared by the ILC. The Convention is a gesture of goodwill and indicates a high level of dedication to resolving the question of international watercourses. It will help remove the misplaced suspicion of many states by providing a stable guideline and framework within which each basin could operate.

For the Nile basin that is known for the absence of rational and sound rules on how to use and manage its resources, the Convention could serve as a guideline for the future negotiations that could be made by them. The substantive and procedural principles that could guide them are incorporated in the Convention. The importance of the Convention being in Framework was underscored by, for instance, Egypt and Ethiopia. The statement made by the Egypt’s representative at the adoption of the Convention at the General Assembly and the comment and observation of Ethiopia submitted to the General Assembly before the Working Group assumed its task indicate that they endorsed this nature of the Convention and that this is important for the utilization and management of shared water resources.

Its Flexibility

The Convention determines the legal entitlement to use the waters of international watercourses through its principle of reasonable use. The mechanisms for determining legal entitlements are set forth in it, primarily, through its procedural rules of Article 8, 9, 11-19, and 33. The process is supported by the provision requiring consultation and joint management. Where the issues of legal entitlement to water arise, the determination of what is reasonable and equitable is facilitated by the Convention, since it provides a broad, but non-exhaustive, factors to be considered to that effect under Article 6. Its procedural rules establish a framework within which states can operate, exchange information, provide prior notification of planned measures, establish joint management mechanism and this represents its strength. This makes it a flexible

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56. Green Cross International, supra note no. 49, p. 60
57. Ibid
58. Press Release, supra note no. 22; see also UN Doc. A/51/271, 1996
59. Wouters, supra note no. 30, p. 320
60. Ibid
61. Ibid
instrument to govern legal entitlement, when supplemented by a comprehensive set of
detailed procedural rules.62 Another provision that accords a flexible nature to it is
Article 10, which provides that a use of water is not entitled to have preference over any
other kind of use. All types of uses have equal weight when determining what a
reasonable and equitable use is. All of them are considered on equal footing in arriving at
reasonable use. The watercourse states could take into account any of the various factors,
listed under Article 6, and achieve the principle. This encourages the watercourse states
to apply the article in a flexible manner by avoiding the fact that there exists a pecking
order in the types of the uses of water, with one having priority over another and also
enables them to take into account conditions in their basin.

Still another rule that makes the Convention flexible is found under its Article 3. States
are free to “adjust the provisions” of the Convention to the particular characteristics of
the watercourse concerned so long as the rights of other watercourse states are not
affected by the Convention.63

In the Nile basin the allocation of water has so far been determined by historic and
acquired rights, which does not accommodate the interest of all the riparian states. The
legal entitlement to the water that is based on this right maintains the status quo and
precludes the other states from having a share from the water. The negotiations for the
allocation or reallocation of the waters of the basin, for the purpose of achieving fairness,
should be based on the consideration of all the relevant factors, such as the ones listed
under Article 6 of the Convention and others are deemed relevant by the Nile basin states.
The historic or existing use is merely one of the factors to be given credit and should not
be a dominant one, for the Convention is, under Article 10, against the fact that historic
use has inherent priority over the remaining uses and the same applies to the causing of
harm to the existing use. Potential use by the upper riparian state is as important and of
equal weight as the existing use. The claim of the upper riparian states for the reallocation
of the water is addressed if negotiations are based on the principle of reasonable and
equitable use for the reason that it is flexible and takes in to account a number of factors,
which are not exhaustive, to that effect. When accompanied by the procedural rules of the
Convention, a settled agreement is likely.

Its Application on the Nile

Treaties and customary international law are important sources of international law
under Article 38 of the Statute of the ICJ. One needs to determine the relationship
between them in instances whereby both at a time cover a certain rule. The codification
and incorporation of customary rule of international law in treaty does not serve as a bar
to the application and operation of the customary rule. There is a possibility that they may
function side by side, even if a treaty covers a rule provided by customary law. This is
affirmed by the ICJ decision on the Nicaragua Case. In this Case the jurisdiction of the
Court was excluded by treaty but it made the decision based on the customary rule of
international law, the content of which was considered to be the same as that laid down in

62 Ibid
63 Wouters, supra note no. 17
As to how a customary rule applies, despite the fact that is incorporated in the treaty, the Court found out that principles such as those of the non use of force, non intervention, respect for the independence and territorial integrity of states and the freedom of navigation continue to be binding as part of customary international law, even if there are provisions of conventional law in which they are incorporated. Likewise, in the North Sea Continental Shelf Cases, Denmark and the Netherlands claimed that Article 6 of the Continental Shelf Convention was binding Germany, a non-party to it, as a matter of customary international law. The ICJ reached the conclusion that Article 6 of the Convention did not embody or crystallize the existing or emerging rule, but after the Convention came into force, the rule of Article 6 becomes a rule of customary international law and is binding on all states, owing partly because of its impact and partly on the basis of subsequent state practice. The decision affirms the fact that customary rule could apply and bind a state even if there is a treaty and a state may not be a party to it. The state is bound not by the treaty but by the operation of the rule of customary international law. Thus, from this decision, it means that a treaty does not deprive a customary rule of its existence and application, so long as the matter covered by both are identical. The incorporation of a customary rule in treaty serves, in such circumstances, as evidence of the existence of the customary rule.

The principle of reasonable and equitable utilization has attained the status of customary rule of international law. This assertion could be backed by the practices of states, which are found, mainly, in the treaties concluded by them and resolution of conflicts on the uses of water of international watercourses, the decisions of international and national tribunals over conflicts on uses of shared waters, and the writings of lawyers in this field. The Convention provides for the principle of reasonable use and what it tried in this respect was to codify a norm that has already attained the status of rule of customary international law. Hence, the Nile basin states are bound, in as far as this rule is concerned, as it amounts to a norm of international law in the field of shared water resources. The abstention of Ethiopia and Egypt during the voting for the adoption of the Convention does not mean that it does not govern the issues of water allocation, of the Nile, on the basis of the principle of reasonable and equitable utilization. This is because the acceptance of the principle as custom manifests the will of the international community at large and corresponds with the practices of states sharing water resources. It is these will that makes the established rules of customary international law binding on a new or existing states. Therefore, even if Ethiopia and Egypt are among the states that abstained during the voting process for the adoption of the Convention, they are bound by

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64. Peter Malanczuk, *Akehurst’s Modern Introduction to International Law*, Peter Malanczuk eds. 7th eds., Rout Ledge New york, 1997, P. 40
67. Ibid
68. Malanczuk, supra note no. 64, p. 37
69. McCaffrey, supra note no. 12, p. 260
70. Commentary, supra note no. 52, pp. 222-231
the principle of reasonable and equitable use in sharing the waters of the Nile, not because they are party to the Convention, but because of customary rule.

The codification of existing customary rule makes it a relevant instrument for the Nile basin, which is featured by the absence of a comprehensive set of rules and principles with respect to how to use, manage, and develop its resources. In the absence of such rules and principles, one could apply and make use of the rules and principles enshrined in the Convention. This is because its value-added rests mainly on its codification of customary international law rules of core interest to different group of states. So, the claims based on absolute territorial sovereignty and integrity and acquired and historic rights do not have a legal pedigree in the light of the principle of reasonable and equitable utilization, in particular, and the Convention, in general. The claims based on these theories should give way to the principle of reasonable and equitable use, which is customary rule and binds all states, since sticking to acquired and historical rights in order to claim entitlement to the waters of the Nile is in defiance to the spirit of the Convention, in general, and to the principle of reasonable and equitable use, in particular.

When applied to the Nile basin states, the Convention’s terms effectively neutralize the previously competing rules as provided under Articles 5 and 7 since it places the two rules on equal footing. Hence, it divests each side, upper and lower riparian states, of persuasive legal arguments for the precedence of their claims. This urges both the upper and lower riparian states to reexamine their ingrained positions and engage with one another to find fair solutions to their controversies. The support for such contention can be found in the voting at the General Assembly for the adoption of the Convention. The majority of the Nile basin states present during the adoption of the Convention abstained from voting for the Convention (Ethiopia, Egypt, Rwanda Tanzania); Burundi voted against it; Kenya and Sudan voted in favor of it; and Eritrea, Uganda and Democratic Republic of Congo were absent. The explanation for such voting is found, in part, in Articles 5 and 7 of the Convention that failed to maintain equilibrium properly between the two rules. If neither lower riparian states nor upper riparian states believed that the Convention adequately protected their apparently divergent claims, the Convention may have actually succeeded in negating the contending legal arguments. Thus, owing to the rules incorporated under Articles 5 and 7, neither side was left with any convincing way to uphold the legal priority of their positions. The factors to be taken into account in arriving at a reasonable and equitable utilization are provided under Article 6. Article 10 provides that no priority is accorded to any use of water over the other. As a result, sticking to historic uses and no harm on the one hand and absolute territorial sovereignty

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72. Salman, supra note no. 38, p. 168
74. Ibid
75. Ibid
76. Ibid, p. 152
77. Eckstein, supra note no. 26, pp. 91-95
78. Brunnee and Toope, supra note no. 73, p. 152
79. Ibid
80. Ibid
on the other do not resolve problems hovering around the Nile basin. It is the taking in to account of different factors that could address the demands for fair partition of the water to the benefit of all riparian states and settle the problems. This demands cooperation, as provided under Article 9 of the Convention.

Generally, the application of the rules of the Convention could contribute towards settling the quagmire in the Nile basin. This is because the rules embodied under Articles 5, 6, 7, and 10 of the Convention are useful in dissuading antagonistic claims and counter-claims and in encouraging accommodation of the interests of all riparian states in their bid to attain agreement.


The UN Watercourses Convention constitutes a milestone in the development of the law governing internationally shared water resources and that it will have significant bearing on states even if it does not enter into force.\(^{81}\) The success of the UN Watercourses Convention does not seem to depend on the ratification of it by the required number of states.\(^ {82}\) Whether or not it enters into force, its influence is more likely to draw from its status as the most authoritative statement of general principles and rules governing the non-navigational uses of international watercourses.\(^ {83}\) Even if it never enters into force, it already has generated considerable influence on states, which is apparent in the drafting of new agreements or the diplomatic negotiations between states regarding their shared watercourses.\(^ {84}\) For instance, the drafters of the Southern African Development Community Protocol on Shared Watercourses have rewritten the Protocol to include the main provisions of the Convention.\(^ {85}\) The influence of the Convention is evident in the 1997 Draft Protocol to the 1992 UN/ECE Convention on the Protection and Use of Tranboundary Watercourses and International Lakes.\(^ {86}\) One can also see the influence of the draft convention in the decision of the International Court of Justice over the Gabčikovo-Nagymaros Case involving Hungary and Slovakia over the Danube. In the Gabčikovo-Nagymaros case, the Court expressly referred to Article 5 of the Convention and held that the modern development of international law strengthened the principle for the non-navigational uses of international watercourses as evidenced by the adoption of the UN Watercourses Convention.\(^ {87}\).

The influence of the Convention is also visible in the Nile basin. The language of the Nile Basin Initiative appears to go after the lead of the UN Watercourses Convention in

\(^{82}\) Wouters, Salman, and Jones, supra note no. 44, p. 7
\(^{83}\) McCaffrey, supra note no. 12, p. 261
\(^{84}\) Wouters, Salman, and Jones, supra note no. 44 , p. 7
\(^{85}\) Ibid
\(^{86}\) Eckstein, supra note no. 26, p. 89
drawing together the equitable utilization and no harm principles. The foundations of the Shared Vision and the Subsidiary Action Programs of the Nile Basin Initiative are the principles of equitable and reasonable utilization, no significant harm, cooperation in the management and development of the water of the Nile and its sustainable utilization. A concrete evidence of the influence on the Nile basin is to be found in the works being undertaken in the Cooperative Framework (Project D3) of the Nile Basin Initiative. This project comprises of three experts from riparian states and aims at providing support to the Nile basin states in defining an adequate and acceptable framework for cooperation that may pave the way for the equitable and legitimate uses of the Nile water. The experts made series of discussions on for the Framework Agreement on the basis of the principles of the UN Watercourses Convention. So far, no agreement has been reached. Making discussion for the Framework Agreement of Project D3 of the Nile Basin Initiative on the basis of the Convention indicates the extent of the pressure of the Convention on the Nile basin states. It is owing to this influence that Wiebe made prediction that the Nile Basin Initiative would most likely embrace the general principles of the existing Watercourses Convention. Her prediction was based on the fact that the Nile Basin Initiative launched Project D3, which is vested with the task of coming up with the legal framework regulating the utilization and management of the Nile water.

The influence of the Convention on the Nile basin states came as a result of coincidence between the vote on the Convention in 1997 and the growing momentum in the work on the Nile Basin Initiative. It is the changes and improvements in the legal principles of entitlement to water, as embodied in the UN Watercourses Convention, that serves as one of the reasons for a new and more cooperative spirit in the Nile basin relationships, which culminated in the Nile Basin Initiative. Thus, the evolving normative framework for shared freshwater resources has helped to redefine both the identities and interests of key state actors in the Nile basin, moving them toward more cooperative conducts. It is, therefore, likely that the rules and principles, both substantive and procedural, of the UN Watercourses Convention affect, in one way or another, the attempts toward putting in place cooperative arrangements for the sharing and management of the water of the Nile. It is to be admitted, however, that the real effect of the terms of the Convention on such schemes will be elicited from the ultimate results of the ongoing discussions within the umbrella of the Nile Basin Initiative.

**Concluding Remark**

It is true actually that the principles and rules incorporated in the UN Watercourses Convention cannot, as they stand, conclusively resolve the problems enveloping the Nile
basin. They are rather subject to the degree to which the Nile basin states embrace the principles contained in the Convention. Thus, the Convention’s impact and effectiveness do not necessarily hinge on its ratification by the Nile basin states. If the Nile basin states show readiness and genuinely make use of it as foundation and guideline for their negotiations, it could contribute toward forging cooperative spirit in the Nile basin and thereby resolve the conflicts over the uses and management of the water of the Nile. This is made possible if they could arrive at a compromise on national interests and security concerns, de-politicize the issues of the Nile, and engage in dialogue in good faith with a view to addressing the water demands to the benefit of all the riparian states.