T.C.
ANKARA YILDIRIM BEYAZIT UNIVERSITY
GRADUATE SCHOOL OF SOCIAL SCIENCE

THE TRANSBOUNDARY WATERCOURSE MANAGEMENT UNDER INTERNATIONAL LAW: THE COMPARATIVE CASES OF TIGRIS-EUPHRATES AND NILE RIVER BASIN

MASTER OF LAW DISSERTATION

Yusuf Ali MOHAMMED

PUBLIC LAW

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Supervisor

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APPROVAL PAGE

The dissertation, titled as "The Transboundary Watercourse Management under International Law: The Comparative Cases of Tigris-Euphrates and Nile River Basin," and prepared by Yusuf Ali MOHAMMED, was accepted by the following committee members unanimously/ by majority as a dissertation for the degree of Master of Law in Ankara Yıldırım Beyazıt University, Graduate School of Social Science, Department of Public Law.

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DECLARATION

I, Yusuf Ali MOHAMMED, hereby declare that this dissertation is my own work, and all information in this document has been obtained and presented in accordance with academic rules and ethical conduct. I do not have any unethical behaviour that violates patents or copyrights at all stages from the planning to writing of the thesis. I also declare that, as required by these rules and conduct, I have fully cited and referenced all material and results that are not original to this work. (16/08/2021)

Signature:
Yusuf Ali MOHAMMED

DEDICATION

I dedicate this thesis to my mother, Hawa Abdi UMER

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ÖZET

Uluslararası Hukuk Kapsamında Sınıraşan Sular Yönetimi: Dicle-Fırat Havzası Örneği ve Nil Nehri Havzasına Yansımaları

Dünyamızın yaklaşık üçte ikisi suyla kaplı olmasına rağmen, su, hala en önemli tartışmalı kaynak alanlarından biridir. Özellikle paylaşılan kaynaklar üzerinde bulunan sınıraşan suları, Devletlerin çıkarlarının çatışması sebebi ile son derece kritik dikkat gerektirir. Bu çatışan çıkarlar nedeniyle sorunsuz uygulamalar bulunmazken, uygulamalar zaman zaman ve havza havza farklılıklar gösterir. Bu sebeple farklı bölgesel havza devletleri farklı sınıraşan suları yönetim yaklaşımını izler. Bu bağlamda, çalışma sınıraşan suları yönetimini – genel olarak uluslararası hukuk perspektifinden ve – özel olaraksa Dicle-Fırat ve Nil Nehri Havzası vakaları üzerinden açıklamaya çalışacaktır.

Uluslararası Hukuk kapsamındaki sınıraşan suları yönetimini Dicle-Fırat ve Nil Nehri Havzalarının uygulamalarıyla karşılaştırmalı bir şekilde ilişkilendirmek amacıyla, çalışma, nehir havzalarının yönetiminde yol gösterici yasal rejimlerin olup olmadığını ele almaktadır. Eğer öyleyse, uluslararası hukuk ışığında yukarıda belirtilen havza yönetiminde uygulamanın niteliği, yasallığı ve uygulama kapsamı nelerdir? Ayrıca çalışma Dicle-Fırat ve Nil Nehri Havzası yönetimi için ortak kurumsal düzenleme olup olmadığında da bahsetmektedir. Eğer öyleyse, mevcut havza yönetiminde ortak kurumsal düzenlemenin türü, niteliği ve kapsamı nelerdir? Çalışma, son olarak, Dicle-Fırat Nehir Havzasının sınıraşan suları yönetiminin, Nil Nehri Havzasının yönetiminde gözlemlenen olası boşlukları çözmede örnek bir deneyim olarak kabul edilip edilemeyeceğine veya bunun tersinin mümkün olup olmadığına değinmektedir.

Yukarıda belirtilen konuları ele alan çalışma, bu maddelerle birlikte ortaya çıkmayı hedeflemiştir: – 1) uluslararası hukuk perspektifinden, Dicle-Fırat ve Nil Nehri Havzaları yönetiminin yol gösterici yasal rejimleri, – 2) idari kurumsal perspektiften, Dicle-Fırat ve Nil Nehri Havzalarında mevcut havza çapında organizasyonel yapıları, – 3) karşılaştırmalı bakış açısı ile, Dicle-Fırat ve Nil Nehri Havzaları yönetiminin benzerlikleri ve farklılıkları, olası boşlukları ve birbirlerinden öğrenilecek dersler şeklinde olan daha iyi deneyimler ile birleştirilmiştir.

Anahtar Kelimeler: Havza Kurumsal Düzenleme, Uluslararası Suları Hukuku, Nil Nehri Havzası, Dicle-Fırat Nehri Havzası, Sınıraşan Suları Yönetimi

ABSTRACT

The Transboundary Watercourse Management under International Law: The Comparative Cases of Tigris-Euphrates and Nile River Basin

Though about two-thirds of our world is covered with water, it is still one of the major disputed resource areas. Especially, the transboundary watercourses need utmost critical attention as it involves different conflicting States interests over the shared resources. Due to these conflicting interests, there are no smooth practices and the practices differ from time to time and basin to basin. For these reasons, different regional basin states follow different transboundary watercourses management approaches. In this aspect, the study tries to articulate transboundary watercourses management – from international law perspective in general and – from Tigris-Euphrates and Nile River Bain cases in particular.

In an attempt to correlate the transboundary watercourse management under International Law with the practices of Tigris-Euphrates and Nile River Basins in a comparative manner, the study address whether there are guiding legal regimes in the latter river basins management or not? If so, what are the nature, legality and scope of application in the aforesaid basins' management in light of international law? The study also addresses whether there are joint institutional arrangements in place for Tigris-Euphrates and Nile River Basin management or not? If so, what are the type, nature and scope of the joint institutional arrangement in the foregoing basins' management? The study finally addresses whether the Tigris-Euphrates River Basin watercourse management can be considered as an exemplary experience in solving the possible gaps observed in the Nile River Basin States' management, or vice versa or not?

In addressing the aforementioned issues, the study aims to come up with – 1) from international law perspectives, the guiding legal regimes of Tigris-Euphrates and Nile River Basins management, – 2) from administrative institutional perspective, the existing basin-wide organizational set up in Tigris-Euphrates and Nile River Basins, – 3) from comparative perspective, the similarities and differences of Tigris-Euphrates and Nile River Basins management coupled with their respective possible gaps and better experiences in lesson-to-be learned way from each other.

Keywords: Basin Institutional Arrangement, International Watercourse Law, Nile River Basin, Tigris-Euphrates River Basin, Transboundary Watercourses Management

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LIST OF ABBREVIATIONS

AU:	African Union
BCM:	Billion Cubic Meters
CFA:	Cooperative Framework Agreements
CIDA:	Canadian International Development Agency
D.C:	District of Columbia
DoP:	Declaration of Principles
DRC:	Democratic Republic of Congo
EN-SAP:	Eastern Nile Region-Subsidiary Action programs
GAP:	Güneydoğu Anadolu Projesi (Southeastern Anatolia Project)
GERD:	Grand Ethiopian Renaissance Dam
HydroMet**:**	Hydrological-Meteorological survey of Lakes Victoria, Kiyoga and Albert
ICJ:	International Court of Justice
IGP:	International Hydrological Programme
ILA:	International Law Association
ILC:	International Law Commission
IMF:	International Monetary Fund
IPoE:	International Panel of Expert
IWRM:	Integrated Water Resource Management
JTC:	Joint Technical Committee
KM2:	Kilometer Squared (Square Kilometer)
MCM:	Million Cubic Meters
MoU:	Memorandum of Understandings
MW:	Mega Watt

M^3/sec:	Cubic Meter per Second
NBC:	Nile Basin Commission
NBI:	Nile Basin Initiatives
NEL-SAP:	Nile Equatorial Lakes Region-Subsidiary Action programs
Nile-COM:	Council of Ministers of Water Affairs of the Nile Basin
Nile-SEC:	Secretariat of the Nile Basin Initiative
Nile-TAC:	Technical Advisory Committee of the Nile Basin
NISRG:	National Independent Scientific Research Group
PCIJ:	Permanent Court of International Justice
SAPs:	Subsidiary Action programs
SVPs:	Shared Vision Programs
T.C.:	Türkiye Cumhuriyeti (Republic of Turkey)
TECCONILE:	Technical Cooperation Committee for the Promotion of Development And Environmental Protection of the Nile Basin
TNC:	Technical National Committee
TVA:	Tennessee' Valley Authority
UK:	United Kingdom
UKTS:	United Kingdom Treaty Series
UN:	United Nations
UNDP:	United Nations Development Program
UNECE:	United Nations Economic Commission for Europe
UNESCO:	United Nations Educational, Scientific and Cultural Organization
UNTS:	United Nation Treaty Series
USA:	United State of America
USAID:	United States Agency for International Development

VCLT:	Vienna Convention on the Law of Treaties
WB:	World Bank
WMO:	World Meteorological Organization
WWI:	World War I
WWII:	World War II
YÖK:	Yükseköğretim Kurulu (Commission for Higher Education)

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INTRODUCTION

A world is endowed with so many resources both under and outer surfaces of the earth. Let alone a complicated and sophisticated matter of under surfaced natural resources, the now alarming which need utmost critical attention is the outer surface natural resource in general and cross-boundary watercourse resources in particular. These transboundary watercourse resources are – "the aquifers and lake and river basin shared by two or more countries"[1] – which "...cover 45.3 % of the earth's land surface, affect about 40% of the world's population, and account for approximately 80% of global river flows."[2]

When we see the practices of States in using these transboundary watercourses, there are no smooth precedents as it differs from – time to time and River basin to River basin. But, how these river basins are being managed in their respective scarce water resources areas needs a critical attention & assessment from the international water law perspective. Especially, scrutinizing different river basins cases in a comparative lesson-to-be-learned manner so as to adopt its best experience is a welcome strategy under international comparative law, as such studies have not only academic relevance but also have practical significance in solving the respective basin-wide disputed issues at hand. Accordingly, this thesis considers the two most disputed Transboundary watercourses management in the Middle East, i.e., Tigris-Euphrates and Nile River Basins.

In the above vein, the study is conducted with the key objective of internalizing normative framework and institutional arrangements exhibited in Tigris-Euphrates river basin in a way that could be helpful to solve the existing Nile River Basin disputes. Therefore, taking this general introduction section as a backdrop, the study is organised into five major Chapters. The first Chapter gives a short reflection about the study, while the following Chapter analyses 'international transboundary watercourses management' from the guiding legal regime of international watercourse and institutional arrangement perspectives. Chapter three examines the transboundary watercourse management in the Tigris-Euphrates River Basin, while Chapter four evaluates the transboundary watercourse

[1] **United Nation Waters**. Transboundary Waters. Available at <https://www.unwater.org/water-facts/transboundary-waters/> I.a.d. 21/07/2021.

[2] **Food and Agricultural Organization of the United Nations**. Transboundary Waters. Available at <http://www.fao.org/land-water/water/water-management/transboundary-water-management/en/> I.a.d. 21/07/2021.

management in the Nile River Basin. The fifth Chapter critically scrutinizes the transboundary watercourse management exhibited in Tigris-Euphrates River Basins from Nile River Basin perspective in comparative and lesson to be learned approaches. Lastly, the study is finalised by providing a conclusion.

CHAPTER ONE

ABOUT THE STUDY

1.1. Nature, Content and Limits of Problem

It is quite obvious that lots of independent studies have been done for each – Tigris-Euphrates and Nile River Basins. Some studies include the Tigris-Euphrates and Nile River Basins cases in their respective studies but it is only used as a descriptive method together with other River basin case scenarios. Though there are few particular 'unpublished studies'[3], yet its respective scope was only limited to the comparative study of their respective riparians states diplomatic, political *et al* relationship and cooperation of intra and/or inter Tigris-Euphrates and Nile River Basins. Moreover, these already conducted studies gave mere and incidental consideration when it comes to – international watercourse law in general and – normative and institutional arrangements in particular.

To the best knowledge of the Author, comparative critical assessments in the area of 'transboundary watercourse management in the Tigris-Euphrates and Nile River Basin cases from the international watercourse law perspective' have not been conducted in a comprehensive manner at all.

Therefore, this study addresses the comparative analysis of the transboundary watercourse management of the Tigris-Euphrates and Nile River Basins cases from an International law perspective for the first time in a sufficient and satisfactory discourse. Moreover, the scope of the study is limited to the examination of normative and institutional aspects of the latter two basins' management practices.

[3] **Seulaiman Aragaw Hussen**. (2014). Comparative Study of the Role of Transboundary Rivers in Relations of Countries: the case of Nile and Euphrates. (Master Thesis). Hacettepe University. Graduate School of Social Sciences. Department of International Relations. Ankara. Available at <https://tez.yok.gov.tr/UlusalTezMerkezi/giris.jsp> (with record number - 365016) I.a.d. 21/07/2021; **Tariku Raga Lencho**. (2014). Challenges of Cooperation in the Nile and Euphrates-Tigris Basins: a Comparative Analysis. (Master Dissertation). Addis Ababa University. School of Graduate Studies. Department of Political Science and International Relations. Available at <http://etd.aau.edu.et/bitstream/handle/123456789/4696/Tariku%20Raga.pdf?sequence=1&isAllowed=y> I.a.d. 21/07/2021.

1.2. Research Questions

The study tries to address a number of issues, of which the principal one is 'whether the comparative correlation of Transboundary watercourse management in Tigris-Euphrates and Nile River Basin enable the respective basin States to solve their outstanding critical issues at hand or not?' Under these vain, the study addresses the following particular issues, notably:

1) whether there are guiding legal regimes in Tigris-Euphrates and Nile River Basin management or not? If so, what is the nature, legality and scope of application in the aforesaid basins' management in light of international law?

2) whether there are joint institutional arrangements in place for Tigris-Euphrates and Nile River Basin management or not? If so, what is the type, nature and scope of the joint institutional arrangement in the foregoing basins' management?

3) whether the Tigris-Euphrates River Basin's transboundary watercourse management could be considered as an exemplary experience in solving the possible gaps and issues observed in the Nile River Basin States' management or vice versa or not?

1.3. Aims and Expected Benefits of Research

The principal aim of the study is to examine 'the transboundary watercourse management under International law in light of the practices of Tigris-Euphrates and Nile River Basin in a comparative way', so as to indicate how the vice versa management experience could be entertained to solve their respective basin-wide contentious issues. Under this umbrella, the study also aims to address the following purposes:

1) examine the guiding legal regimes of Tigris-Euphrates and Nile River Basin management in light of international law alongside its nature, legality and scope of application.

2) analyse the type, nature and scope of the joint institutional arrangement in place in Tigris-Euphrates Basin in relation to the Nile River Basin in managing their

respective Transboundary watercourse.

3) ascertain the better experiences of transboundary watercourse management in the Tigris-Euphrates River Basin in solving the possible gaps and issues observed in the Nile River Basin management and/or vice versa.

As the study to be conducted strives to attain the above objectives from a new different perspective, it significantly contributes to the existing gaps academically. On the one hand, it will be a great input for students, researchers and policy makers who are interested and concerned in the 'the international comparative study of the transboundary watercourse management under International law with respect to the Tigris-Euphrates and Nile River Basins particular case'. On other hand, it will lay down a motivational ground for other fellow researchers in conducting further studies deep into the area.

1.4. The Method of Research

The study is conducted basically on the qualitative research methodology. Accordingly, the study is based on analysing the normative and institutional aspect of the existing Tigris-Euphrates and Nile River basins Treaties from the international law perspective. Moreover, the study employs various literature reviews of numerous books, journals and articles as a source.

CHAPTER TWO

INTERNATIONAL WATERCOURSE MANAGEMENT: THE GUIDING LEGAL REGIME AND ITS INSTITUTIONAL ARRANGEMENT

2.1. Introduction

As this chapter is a crucial take-off for the following chapters, theoretical analysis has been made on international transboundary watercourse management in general, and the guiding legal regime of international watercourse and institutional arrangement.

In the above vein, the chapter is divided in six sections and eight sub-sections. The first section gives a short overview Introduction of the chapter. While the second section coupled with its three sub-section deals about the major three theoretical standing of transboundary watercourse, the third section alongside its three subsections gives not only a clear view of the two Customary International Law of Transboundary watercourse, but also expose the most controversial issues of the latter. The fourth section coupled with its two subsections discusses the UN Transboundary watercourse Conventions in general, and the latter's adopted Principles and contentious issues in particular. The fifth section gives a short brief of Institutional arrangement for transboundary watercourse, followed by the last concluding section of the chapter.

2.2. Major Theoretical Doctrines of Transboundary Watercourse

Though the nature and scope differs, the evolution of international transboundary watercourse is at the center of human evolution as water is one among the very basic human needs that is crucial for survival. Moreover, the creation of States increases the utmost importance of water for various domestic usages. On the one hand, the increasing demand of water due to the widening demographic nature, agricultural development, industrial revolution, energy production, and on the other hand, the deterioration of quality and quantity of transboundary water resource, created a conflicting interest among basin States, as States follow different approaches to retain & attain their respective vital

resource interests. These complications lead to the emergence of various theoretical doctrines of transboundary watercourses.

Accordingly, three major theoretical doctrinal principles have developed so far. And these theories are 'absolute territorial sovereignty', 'absolute territorial integrity', and 'limited territorial sovereignty'. Though two additional legal doctrines, i.e., 'prior appropriation' and the 'community interest', would alternatively be considered, however, for the purpose of this study, the former three major legal theories are to be discussed in detail in the following sections.

2.2.1. Absolute territorial sovereignty

The 'absolute territorial sovereignty' theory is one of the extreme picks of transboundary watercourse, which mainly gives an exclusive right for a particular upstream basin State. In this theory, a particular "co-basin state may freely utilize waters within its territory without having any regard to the rights of downstream or contiguous states… [in a sense that] a state may extract or alter the quality of these waters to an unlimited extent but has no right to demand continued flow from an upper co-basin state or to assert its rights against a contiguous state."[4] This theoretical thought is also known as 'Harmon Doctrine' as the theory emanates from the then US Attorney General, named 'Harmon', for the first time in 1895 in which the latter argued for absolute right of USA over Rio Grande irrigation usage by stating that:

> *"The fact that the Rio Grande lacks sufficient water to permit its use by the inhabitants of both countries does not entitle Mexico to impose restrictions on the United States which would hamper the development of the latter's territory or deprive its inhabitants of an advantage with which nature had endowed it and which is situated entirely within its territory. To admit such a principle would be completely contrary to the principle that the United States exercises full sovereignty over its natural territory*."[5]

He also continued arguing:

[4] **Owen McIntyre**. (2010). International Water Law: Concepts, Evolution and Development. In Anton Earle, Anders Jägerskog and Joakim Öjendal (eds). Transboundary Water Management Principles and Practice. 1st Edition. London. New York. Earthscan. p-61.
[5] Excerpted from **ibid**.

"To admit such a principle would be completely contrary to the principle that [the] USA exercises full sovereignty over its national territory."[6]

However, though the 'Harmon doctrine' contribution is undeniable, this theory doesn't last long. The United State itself doesn't show its conformity toward the former. This was clearly reflected in the 1906 US-Mexico Rio Grande river treaty and 1909 US-Canada boundary water treaty. The very reason for this fact is that, having this doctrine at hand, though the US might have won the 'Rio Grande river' case as the basin's upper riparian States, but the US might lose the boundary waters case against Canada as the latter is geographically located on the lower riparian State.

The effort of other states to adopt this theory fell shortly as the theory didn't go along with their respective practical basin scenarios. This can be inferred from the case of the Indus River as India claimed for 'full freedom' over the resource but later on accepted the right of Pakistan. Similar cases have been observed in the 'Mauri River' 'Lauca River' as well.

One thing interesting is "…those authors who might be argued to have endorsed the principle mostly voiced their respective positions before non-navigational uses of international watercourses had taken on much significance, which 'may have led them not to appreciate fully the serious ecological, economic and other harm … that could result from large-scale diversions or pollution'."[7] What makes it more interesting is again, "… [almost] all the commentators referred to came from only four countries, Austria, Germany, Canada and the United States, each of which are upstream states, at least in relation to some of their watercourses."[8] Despite these facts, however, "…it is possible to conclude that no recent authoritative work supports this approach while very many, including even relatively early ones, completely eschew it."[9]

Therefore, scholars concluded the Attorney Generals driven Harmon doctrinal thought as an, *inter alia*, "unfortunate anomaly, intolerable, radically unsound."[10] As a

[6] Excerpted from **ibid**.
[7] **Ibid**, p.62.
[8] **Ibid**.
[9] **Ibid**.
[10] **Ibid**, p.61-62.

result, "[I]t is at best an anachronism that has no place in today's interdependent, water-scarce world."[11]

2.2.2. Absolute territorial integrity

The other theory that is characterized as the other pick is 'absolute territorial integrity', which predominantly favours the respective downstream basin States. This theory "confers a right on a lower co-basin state to demand the continuation of the full flow of waters of natural quality from an upper co-basin state but confers no right to restrict or impair the natural flow of waters from its territory into that of a still lower co-basin state."[12] Moreover, it "would effectively grant a right of veto upon a downstream or contiguous state, as its prior consent would be required for any change in the regime of the international watercourse."[13]

Though some downstream States like "Argentina, Spain, Bangladesh, and a number of Arab States have invoked the principle of absolute territorial integrity"[14], "its [practical] application was unequivocally rejected in the 1957 case of *Lac Lanoux* (*Spain v. France*)."[15] Moreover, scholars like McCaffrey argue that "reliance on these contrasting extreme positions demonstrates above all else that they were invoked as 'tools of advocacy' rather than as legal principles."[16]

It is also clearly perceived that, like absolute territorial sovereignty, "most of the authors cited in support of absolute territorial integrity wrote before non-navigational uses had assumed much significance and thus before state practice concerning non-navigational uses had substantially developed,"[17] so that has got little support in the contemporary world.

[11] **Stephen McCaffrey**. (2001). The Law of International Watercourses – Non-Navigational Uses. Oxford University Press. Oxford, p.114.
[12] **McIntyre**, (2010), p.62.
[13] **Ibid**, p.63.
[14] **Ibid**.
[15] **Ibid**.
[16] **Ibid**; see also **McCaffrey**. (2001), p.129-130.
[17] **Ibid**, p.62.

Therefore, now a day, most scholars "has so far rejected [this Absolute Territorial Integrity theory]"[18] and "like the Harmon doctrine, it has limited support in state practice, jurisprudence or the writings of commentators."[19]

2.2.3. Limited Territorial Sovereignty

The 'limited territorial sovereignty' is a middle striking theory that lies in the mid-way of 'absolute territorial sovereignty' and 'absolute territorial integrity' with its compromising approach by entitling "each co-basin state to an equitable and reasonable use of waters flowing through its territory."[20] This theory is alternatively named as 'equitable apportionment theory'[21] and/or 'sovereign equality and territorial integrity.'[22]

The guiding principle of this theory is "on the notion that international watercourses are shared resources in which there exists a community of interest among all co-basin states [in a sense that]… a community of interest requires a 'reasonable and equitable' balancing of state interests which accommodates the needs and uses of each state."[23] Moreover the theory "has its doctrinal origins in the sovereign equality of states, whereby all states sharing an international watercourse have equivalent rights to the use of its waters."[24]

From its application point of view, this theory "appears to have its origins in widespread state practice, [bilateral and multilateral] treaty law, in judicial decisions"[25] and major international scholars commentators.

In relation to States practice, though the theory considered to have "received some limited support among the state practice of the several Middle Eastern States,"[26] the vast majority of states' practices seem to be in line with this theory. To mention some prominent cases, *inter alia*, the 1856 agreement between Dutch-Belgian over River Meuse

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[18] **P. K. Parhi**/ **R. N. Sankhua**. (2014). Beyond the Transboundary River: Issues of Riparian Responsibilities. J. Inst. Eng. India Ser. A. Vol. 94. No. 4, p-258.
[19] **M.M. Rahaman**. (2009). Principles of international water law: creating effective transboundary water resources management. Int. J. Sustainable Society. Vol. 1. No. 3, p.210.
[20] **McIntyre**, (2010), p.64.
[21] **Parhi/Sankhua**. (2014), p.258.
[22] **Rahaman**. (2009), p.201.
[23] **McIntyre**, (2010), p.64.
[24] **Ibid**.
[25] **Ibid**, p.65.
[26] **Ibid**; see also **McCaffrey**. (2001), p.142.

in which "both parties are entitled to make the natural use of the stream;"[27] the 1971 Act of Asunción between Argentina and Brazil over Paraná River in which "each state may use the waters in accordance with its needs provided;"[28] the 1909 Boundary Water treaty between US-Canada in which "[E]ach country would be entitled to an 'equitable' share of water for irrigation,"[29] and in the US-Mexico case over the Rio Grande river as well, the US admitted "[R]iparians are entitled to share in the use and benefits of a system of international waters on a just and reasonable basis."[30]

Unlike those previous theories, this Limited Territorial Sovereignty theory "has received consistent support in the case law of international tribunals, with…'no known international decision supports a contrary rule."[31] For instances, the '*Lac Lanoux* Arbitration'[32] and '*Gabcíkovo-Nagymaros*'[33] case clearly shows the "support particular formulations or interpretations of the doctrine of limited territorial sovereignty"[34] and "left little doubt that equitable utilization comprises the governing principle in the field of international watercourses."[35]

This theory is considered a guiding principle for a number of international legislation like, *inter alia*, "Institute of International Law's 1961 Salzburg Resolution; the International Law Association's (ILA) 1966 Helsinki Rules on the Uses of Waters of International Rivers; the United Nations Environment Programme's 1978 Principles on Shared Natural Resources; and [the 1997 UN] Law of Non-Navigational Uses of International Watercourses Convention adopted by the International Law Commission; [the ILA] 2004 Berlin Rules on Water Resources Law."[36]

For the above very reason, "the doctrine of limited territorial sovereignty is today supported by the overwhelming majority of commentators [and]… widely regarded… as

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[27] **Ibid**; see also **Ibid**, p.139.
[28] Declaration of Asunción on the Use of International Rivers (Argentina and Brazil) (Signed in June 1971), Paragraph 2. see **Ibid**.
[29] **McCaffrey**. (2001), p.144.
[30] **Ibid**, p.143.
[31] **McIntyre**, (2010), p.65; see also **Ibid**, p.145.
[32] Lake Lanoux Arbitration (France v. Spain). Arbitral Tribunal. Reference No. R.I.A.A. 281. November 16, 1957. Available at <http://www.cawater-info.net/bk/water_law/pdf/france_v_spain.pdf> I.a.d. 14/07/2021.
[33] Gabcikovo-Nagymaros Project (Hungary v. Slovakia). International Court of Justice (ICJ). Case ICJ GL No 92. 25 September 1997. Available at <https://www.icj-cij.org/public/files/case-related/92/092-19970925-JUD-01-00-EN.pdf> I.a.d. 14/07/2021.
[34] **McIntyre**, (2010), p.65.
[35] **Ibid**, p.66.
[36] **Ibid**, p.65.

the primary rule of 'customary international law'[37] governing the use and allocation of the waters of international watercourses."[38]

2.3. Customary International Law of Transboundary Watercourse

A quick skim of international law development basically related with States conformity through its domestic law assimilation and international relation, in a sense of abiding by a particular way of order. Such an attitude creates a strong foundation between/among States to be guided by a particular Principle, up on reciprocal practice.

The degree of acceptability depends on how many States, and sometimes which potential States, adhere to that particular Principles and/or vice versa. As more States act in accordance with a provided Principle with the intention of abiding by it, *opinio juris*, its acceptability and application under international law gets higher and wider under lots of circumstances. In such a way, as more international and non-international actors, like States, international courts, international organization, authoritative scholars *et al*, adhere to a particular Principle, the latter be lifted up to 'Customary International Law'. Once a particular Principle has got a status of Customary International Law, all States, except persistent objector/s, have to be abided by it. Accepting such customary international law in general, States or international organizations entered into bilateral or multilateral treaties to formalize, detail, and/or fill its possible lacunas.

Coming to International transboundary watercourse, the 'limited territorial sovereignty' theory gave birth to two basic principles that have got status of Customary International Law, i.e. 'Equitable & Reasonable Utilization' and 'No-Harm rule' Principle.

2.3.1. Equitable and Reasonable Utilization Principle

It is clear that the 'equitable and reasonable utilization' principle is a very crucial principle originating from 'limited territorial sovereignty' legal theory, which empowers

[37] Customary international law is a primary source of international law and consists of rules of law derived from the widespread and consistent practice of states acting out of the belief that the law required them to act in that manner. Such rules are binding upon all states which have not actively rejected such obligations and apply in the absence of applicable conventional rules. See in general **İbrahim Kaya**. (2005). The Question of Sources of Law Concerning International Watercourses. Dokuz Eylül Üniversitesi Hukuk Fakültesi Dergisi. Vol. 7. No. 1, p.69-71.

[38] **P. W. Birnie/ A. E. Boyle, C. Redgwell**. (2009). International Law and the Environment. 3rd edition. Oxford. Clarendon Press, p.202.

both upstream and downstream basin States to utilize their shared transboundary water resources in an equitable and reasonable manner within their respective sovereign territory.

This principle follows a very standardized tolerable approach - by not only "entail[ing] a balance of interests that accommodates the needs and uses of each riparian state"[39] Moreover, it "rests on a foundation of shared sovereignty, equality of rights,"[40] but not equate with equal shares, as the respective basin States water share be determined by taking lots of relevant factors like, *inter alia*, "the geography of the basin, hydrology of the basin, population dependent on the waters, economic and social needs, existing utilisation of waters, potential needs in future, climatic and ecological factors to a natural character and availability of other resources should be taken into account."[41]

The 'equitable and reasonable utilization' principle "has substantial support in state practice, judicial decisions and international codifications."[42] Among the international court's decision which have endorsed 'equitable & reasonable use' principle, the case of 'River Oder'[43] and *'Gabcikovo- Nagymaros*'[44] are the most common ones. The PCIJ decided the 'River Oder' case by stating:

> *"an important basis of the entitlement to an equitable share is the notion of equality of right."*

The ICJ also firmly confirmed this fact in the *'Gabcikovo- Nagymaros*' case by indicating in its decision as:

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[39] **Rahaman**. (2009), p.2010.

[40] **Ibid**.

[41] **Ibid**, p.2011; *see also* Helsinki Rules on the Uses of Waters of International Rivers (adopted by International Law Association (ILA) in August 1966), Article V. Available at <https://www.internationalwaterlaw.org/documents/intldocs/ILA/ILA-HelsinkiRules1966-as_amended.pdf> I.a.d. 15/07/2021**;** Convention on the Law of the Non-navigational Uses of International Watercourses (Adopted on 21 May 1997 by the UN General Assembly Resolution 51/229, entered into force on 17 August 2014), Article 6. Available at <https://legal.un.org/ilc/texts/instruments/english/conventions/8_3_1997.pdf> I.a.d. 15/07/2021; Berlin Rules on Water resources (Adopted by International Law Association in August 2004), Article 13. Available at <http://www.cawater-info.net/library/eng/l/berlin_rules.pdf> I.a.d. 14/07/2021.

[42] **Ibid**.

[43] Territorial Jurisdiction of the International Commission of the River Oder Case. (United Kingdom, Czechoslovakia, Denmark, France, Germany, Sweden V. Poland). Permanent Court of International Justice (PCIJ). Case PCIJ Series A no 23. 20 August 1929. Available at <http://www.worldcourts.com/pcij/eng/decisions/1929.09.10_river_oder.htm> I.a.d. 15/07/2021.

[44] **Gabcikovo-Nagymaros Case**. (1997).

"*International Rivers are shared resources and all riparian states have equal rights to enjoy both the commodity and non-commodity ecological benefits of the river."*[45]

Most bilateral and multilateral watercourse treaties and conventions incorporate the 'equitable and reasonable utilization' principle as a base scenario for their respective water share. Let alone regional basin watercourse treaties, all of those UN, ILA and ILC lead legal regimes dealing with international transboundary watercourses have included this principle in the first row. This can be clearly inferred from '1966 Helsinki Rules'[46] '1997 UN Watercourses Convention,'[47] '2004 Berlin Rules'[48] *et al*. On the base of these facts, the ILC commentary indicates "a survey of all available evidence of the general practice of States, accepted as law … reveals that there is overwhelming support for the doctrine of equitable utilization as a general rule of law for the determination of the rights and obligations of states in this field."[49] Similarly, the ILA commentary on the 2004 Berlin Rule states "[t]oday the principle of equitable utilization is universally accepted as basic to the management of the waters of an international drainage basin."[50] *Moreover, scholars like* Joseph W. Dellapenna dare to state "[e]xperts on international water law have been nearly unanimous on the primacy of equitable utilization rule in international water."[51]

Having the above concrete facts and basing on the broad acceptance, therefore, the 'equitable and reasonable utilization' Principle is considered "as the primary rule of customary international law governing the use and allocation of the waters of international watercourses."[52]

2.3.2. Principle of No-Harm rule

Like the 'equitable and reasonable utilization' principle, the 'no-harm rule' principle also originates in the parcel of 'limited territorial sovereignty', by "stipulat[ing]

[45] **Ibid**.
[46] **Helsinki Rules.** (1996)**,** Articles IV, V, VII, X, XXIX [4].
[47] **UN Watercourses Convention.** (1997), Articles 5, 6, 7, 15, 16, 17, 19.
[48] **Berlin Rules. (2004)**, Articles 10.1, 12, 13, 14, 16.
[49] **Elias N. Stebek**. (2007). Eastern Nile at Crossroads: Preservation and Utilization Concerns in Focus. Mizan Law Review, Vol. 1. No. 1, p.49.
[50] **McIntyre**, (2010), p.66; see also for detail **ILA**. (2004). Commentary on Berlin Rules. Article 12 - Equitable Utilization, p.20. Available at <https://www.internationalwaterlaw.org/documents/intldocs/ILA/ILA_Berlin_Rules-2004.pdf> I.a.d. 15/07/2021.
[51] **Joseph W. Dellapenna**. (2001). The customary international law of transboundary fresh waters, International Journal of Global Environmental law. Vol. 1. No. ¾, p.279.
[52] **McIntyre**, (2010), p.66.

that all watercourse States have an equal right to the utilisation of a shared watercourse and but they must also respect the sovereignty of other States to equal rights of use."[53]

The 'no-harm rule' principle dictates "no state in an international drainage basin are allowed to use the watercourses in their territory in a way that would cause significant harm to other basin states or to their environment, including harm to human health or safety, to the use of the waters for beneficial purposes or to the living organisms of the watercourse systems."[54] Hence, this principle "is widely recognised and incorporated not only in modern transboundary water agreements, but also into international environmental law more generally."[55]

Though this principle is mistakenly often associated with downstream States' right for obvious facts, upstream States could possibly be benefited from the principle against downstream States harmful handling of their shared river resource, so that both upper–lower and lower-upper riparian discourses can be entertained.

Under the 'no-harm rule' principle, "the language used to refer to the obligation and to the concept of harm varies from one freshwater instrument to another."[56] While 'significant harm'[57] terminology is predominantly used in the 1997 UN Watercourse Convention, the 1992 UNECE Water Convention uses 'transboundary impact'[58] and the "World Bank [WB] Policy for Projects on International Waterways makes reference to 'appreciable harm'."[59]

For this study, the 1997 UN Watercourse Convention 'significant harm' terminology is considered. Accordingly, under the 'no significant harm rule,' States are obliged to take all necessary risk minimizing measures not to cause significant harm to a down neighbouring basin States. A very crucial parameter in this case is 'significant' harm,

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[53] UN Watercourses Convention. User's Guide Fact Sheet Series, Number 5. No Significant Harm Rule, p.1. Available at <https://www.unwatercoursesconvention.org/documents/UNWC-Fact-Sheet-5-No-Significant-Harm-Rule.pdf> I.a.d. 15/07/2021.

[54] **Rahaman**. (2009), p.211.

[55] **User's Guide Fact Sheet Series**. (Number 5), p.1.

[56] **M. Tignino/ C. Bréthaut**. (2020). The role of international case law in implementing the obligation not to cause significant harm. Int Environ Agreements, Vol. 20, p.632.

[57] **UN Watercourses Convention**. (1997), Article 7. The obligation not to cause significant harm implicitly appears through the duty to prevent pollution and the mechanism of notification and consultation.

[58] UN Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Adopted on 17 March 1992 and entered into force on 6 October 1996), Article 1(2), 2, 3, 5, 9, 11, 14, 16. The convention uses this terminology to evaluate transboundary watercourses vis-a-vis environmental harms. Available at <https://treaties.un.org/doc/Treaties/1992/03/19920317%2005-46%20AM/Ch_XXVII_05p.pdf> I.a.d. 15/07/2021.

[59] **Tignino/Bréthaut**. (2020), p.632.

which is "defined as the real impairment of a use, established by objective evidence, [and in this parameter] …[f]or harm to be qualified as significant it must not be trivial in nature but it need not rise to the level of being substantial [which ultimately] …be determined on a case by case basis."[60] The 'significant' threshold excludes mere inconveniences or minor disturbances that States are expected to tolerate, in conformity with the legal rule of 'good neighbourliness'.[61] Hence, 'significant harm' doesn't mean an absolute prohibition of harms as appreciable harm is tolerable under a scheme of 'equitable and reasonable utilization'.

A number of International Tribunals and ICJ endorsed the Principle of No-Significant-Harm rule, namely the '*Trail Smelter case', 'Lake Lanoux case' et al.*

In the '*Trail Smelter case'* of, the "tribunal concluded:

> *under the principles of international law, as well as of the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence."*[62]

Moreover, in the famous *'Lake Lanoux case'*, "the 'no-harm' rule was only affirmed by the tribunal by way of *obiter dicta* stating that:

> *'There is a rule prohibiting the upper riparian State from altering the waters of a river in circumstances to do serious injury to the lower riparian State.'"*[63]

The 'no-harm rule' is widely incorporated in the number of bilateral and multilateral treaties. Letting alone bilateral and regional treaties, the latter principle is dictated in 1966 Helsinki Rules,[64] 1997 UN Watercourses Convention,[65] 2004 Berlin Rules[66] and 1992 UNECE Water Convention.[67] Moreover, the Principle is also incorporated in a number of international environmental conventions and declarations like,

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[60] **User's Guide Fact Sheet Series**. (Number 5), p.1.
[61] **Ibid**.
[62] Excerpted from **Tignino/ Bréthaut**. (2020), p.635.
[63] Excerpted from **Ibid**, p.637.
[64] **Helsinki Rules**. (1966), Articles V, X, XI, XXIX [2].
[65] **UN Watercourses Convention**. (1997)**,** Articles 7, 10, 12, 15, 16, 17, 19, 20, 21.2, 22, 26.2, 27, 28.1, 28.3.
[66] **Berlin Rules**. (2004)**,** Articles 8, 10.2, 16.
[67] **UNECE Water Convention**. (1992), Articles 2.1, 2.3, 2.4, 3.

inter alia, the 1972 Stockholm Declaration,[68] the 1992 Rio Declaration[69] and the 1992 Biological Diversity.[70]

Taking into account the above concrete facts, the 'no-harm rule' principle "is now considered as part of the customary international law."[71]

2.3.3. Equitable & Reasonable Utilization Principle vis-à-vis Principle of No-Harm rule

As a clear set up, it has to be vivid that the 'no-harm rule' has economic as well as environmental aspects. It is also quite understandable the strong alliance of the principle with environmental protection. Though "most scholars unconditionally support the 'no-harm' rule from the environmental perspective as fully valid, however, underlines the precaution that is needed in the interpretation of the rule with regard to the economic aspect, i.e. utilization of watercourses."[72]

The 'Equitable & Reasonable Utilization' and 'No-Harm rule' are the two guiding principles of transboundary watercourses. While the 'equitable and reasonable utilization' principle gives a right for basin states to use their shared water resources in their respective sovereign land, on the other hand, the 'no-harm rule' principle burdens the basin States with a responsibility to use their shared water resource in a manner that shall not cause harm to a neighboring basin States.

However, as there is no way of upholding absolute prohibition of harms, the extent tolerable harm is usually at dispute. In the vein of this disputed issue, the much higher contesting issue is 'whether Equitable & Reasonable Utilization or No-Harm rule shall take priority'. Even during the 1997 UN Watercourse convention development, long debate &

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[68] Declaration of the United Nation Conference on the Human Environment (Adopted on 16 June 1972 by UN General Assembly Resolution No. 2994 (XXVII)), Principles 21, 22. Available at <http://docenti.unimc.it/elisa.scotti/teaching/2016/16155/files/file.2017-03-11.7227158899> I.a.d. 15/07/2021.

[69] The 1992 United Nation Rio Declaration on Environment and Development (Adopted on 12 August 1992 by UN General), Principles 2, 4, 13, 24. Available at <https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_CONF.151_26_Vol.I_Declaration.pdf> I.a.d. 15/07/2021.

[70] The 1992 United Nation Convention on Biological Diversity (Adopted on 5 June 1992 by UN General Assembly and entered into force on 29 December 1993**)**, Article 3. Available at <https://www.cbd.int/doc/legal/cbd-en.pdf> I.a.d. 15/07/2021.

[71] **Rahaman**. (2009), p.211.

[72] **Yusuf Ali Mohammed**. (2014). The 'Water Security' Principle Under Nile Basin Cooperative Framework Agreement vis- à-vis International Water Law. (LL.B Dissertation). Dire Dawa University. School of Law, p-34; see also **Stebek**. (2007), p.49.

discussion was made on this particular issue. While "upstream States generally did not support the prioritisation of no significant harm rule, because they feared it might potentially lead to a curtailment of future upstream developments, [on the other hand] most downstream States did not favour the primacy of the principle of equitable and reasonable utilisation due to a perception that it allowed scope for harm to occur from such developments with impacts downstream." [73] Despite such unsettled contentious issues, "the revised set of Articles 5 to 7 was adopted by 38 votes in favour, 4 (China, France, Tanzania and Turkey) against and 22 abstaining."[74]

Even "though the text that was eventually agreed upon by States [claimed] to strike a balance between these two principles,"[75] arguably, the Convention still seems to be prioritising 'Equitable and Reasonable Utilization' principle, as a governing principle of transboundary watercourses. The phrasing of Article 7 (2) – "where significant harm nevertheless is caused to another watercourse State ...due regard for the [equitable & reasonable utilization] provisions of articles 5 and 6", and Article 10 (2) – "in the event of a conflict between uses of an international watercourse, it shall be resolved with reference to [the equitable & reasonable utilization provision of] articles 5 to 7" exemplify this fact, as the harm is to be evaluated within the scope of 'Equitable & Reasonable Utilization' principle. Moreover, a convincing logic stretched from this fact is "a State must always give 'due regard' to the principle of 'equitable and reasonable utilisation' whenever significant harm occurs, however, there is no reciprocal obligation of 'due regard' to the principle of 'no significant harm' when States are determining if a use or uses are equitable and reasonable; and it is this crucial distinction [which] led many legal scholars to conclude that the duty not to cause significant harm is thus a secondary obligation to the primary principle of equitable and reasonable utilisation."[76]

McCaffrey, one of the prominent scholar in the field, described the above scenario as:

> "*If equitable utilization is the controlling legal principle, upstream State A may develop its water resources in an equitable and reasonable manner vis-à-vis*

[73] **User's Guide Fact Sheet Series**. (Number 5), p.1.
[74] **Alistair Rieu-Clarke/ Flavia Rocha Loures**. (2009). Still not in force: Should States support the 1997 UN Watercourses Convention? Review of European Community & International Environmental Law. Vol. 18. No.2, p-14.
[75] **User's Guide Fact Sheet Series**. (Number 5), p.1.
[76] **Ibid**, p.2.

downstream States B and C, even though that development would cause significant harm to their established uses. If, on the other hand, the obligation not to cause significant harm is dominant, State A could engage in no development, no matter how equitable and reasonable, that could cause States B and C significant harm."[77]

This same scholar also indicates the non-absoluteness of the 'no-harm rule' arguing "it is mitigated by several factors, all of which depend upon the circumstances of the particular case; the harm must be 'significant'; the obligation is one of due diligence; and the harm must be unreasonable."[78] It is not only believed such a method would balance with least harm among basin States, but also creates a mechanism of compensation for greater materialized damage. In order to determine the extent of damage, while differentiating '*factual harm*' and '*legal injury',* it has to be born in mind "it is only injury to '*a legally protected interest*' that is prohibited."[79]

Caflisch, another prominent scholar, "argue that the no harm rule is, at present, of little use in the allocation of the utilizations of transboundary watercourses since most international waterways are fully exploited or even over-used at the moment, [therefore], the issue is no longer one of not causing harm but one of apportioning resources among competing uses and users so that the negative no-harm rule had to be superseded by a positive rule which would make it possible to effect such an apportionment."[80]

2.4. UN Transboundary Watercourse Convention

With the aim of developing a codified International Non-navigational Transboundary watercourses legal regime, a number of studies and codification attempts have been made by Prof. H. A. Smith of London[81] as well as ILA[82] and ILC[83] since the

[77] Excerpted from **Stebek**. (2007), p.49-50.

[78] **Ibid**; see also **McCaffrey**. (2001), p.380.

[79] **Ibid**, p.53; see also **Ibid**, p.329.

[80] Excerpted from **Ibid**, p.49.

[81] Prof. H. A. Smith of London, was the first scholar who carried out an important study on the legal aspects of using the waters of the transboundary rivers. His book on The Economic Use of International Rivers was published in 1931. He reviewed more than 100 treaties and studied several conflicts on the use of transboundary rivers. He emphasized the doctrine of riparian rights, which entitled the lower riparian states to a share of the natural flow of a river. He also noted that some of the treaties considered the concept of equitable utilization. See **Asit K. Biswas**. (2008). Management of Transboundary Waters: An Overview. In Olli Varis, Cecilia Tortajada, Asit K. Biswas (eds). Management of Transboundary Rivers and Lakes. Berlin. Heidelberg. Springer, p.13.

[82] The International Law Association [ILA] was founded in Brussels in 1873. Its objectives, under its Constitution, are "the study, clarification and development of international law, both public and private, and

1900's. The prominent revolutionary codification was the work of ILA and ILC, in which the former developed a draft on Dubrovnik Rules, Helsinki Rules and Berlin Rules, while the latter is responsible for a draft of the famous 1997 UN Watercourse Convention *et al*.

Though ILA introduced the 1966 Helsinki Rules, the updated version of Dubrovnik Rules, for transboundary watercourses, through Finland's proposed resolution, in the UN General Assembly in 1970, however, member states reserved to endorse these rules on three grounds, claiming "the Rules were formulated by a professional organization, which did not represent nation states; since nation states had not participated in the formulation of the Helsinki Rules, their adoption as a model could preclude new considerations on this complex issue; the Rules were based on a drainage basin approach, which could be a potential problem in terms of national sovereignty considerations."[84]

The ILA continued updating the Helsinki Rules, and as a result, came up with the 2004 Berlin Rules. Even though, all three of the ILA works "show the progressive evolution of the legal regime for managing transboundary waters over nearly half a century, [however] since these rules have been formulated by a non-governmental organization, and not approved by the nation-states, they can probably be best regarded as guidelines for a legal regime for managing transboundary waters."[85]

Up on the failure of Helsinki Rules, the UN passed a major shifting resolution 2669 (XXV) in December 1970 and recommended the ILC to "take up the study of the law of the non-navigable uses of international watercourses with a view to progressive development and codification."[86] After two decades of study, the Commission came up with a draft in early 1990's and conducted a number of discussion platforms with stakeholders. Despite a major difference among basin States, the UN General Assembly approved with more than 100 States vote in favour of the ILC's Draft on 'Convention on the Law of the Non-Navigational Uses of the International Watercourses' in July 1997.

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the furtherance of international understanding and respect for international law." The ILA has consultative status, as an international non-governmental organization, with a number of the United Nations specialized agencies. See **ILA**. (1873). Available at <https://www.ila-hq.org/index.php/about-us/aboutus2> I.a.d. 15/07/2021.

[83] The International Law Commission [ILC] was established by the General Assembly, in 1947, to undertake the mandate of the Assembly, under article 13 (1) (*a*) of the Charter of the United Nations to "initiate studies and make recommendations for the purpose of ... encouraging the progressive development of international law and its codification". See **ILC**. (1947). Available at <https://legal.un.org/ilc/> I.a.d. 15/07/2021.

[84] **Biswas**. (2008), p.13.

[85] **Ibid**, p.17.

[86] **Ibid**, p.14.

The Convention entered into force on August 17, 2014, in accordance with Article 36 (1) of the latter Convention.

2.4.1. The Principles adopted in 1997 UN Watercourse Convention

The 1997 UN Watercourse Convention has incorporated a number of major principles for transboundary waters. Letting alone the two major principles, named 'equitable and reasonable utilisation' Principle and 'No-Significant-harm rule' Principle, which have been dealt with under the previous section, in this section it is worth noting those left over principles of the Convention.

Among those Principles that deserve to be discussed here are: Principles Cooperation, Regular exchange of Data and Information, Notification of Planned Measure and Peaceful Settlement of Dispute.

With respect to a shared transboundary watercourse, the very baseline of riparian States is that water shall not be a source of Conflict, but Cooperation. With this understanding, the 'Principle of Cooperation' dictates "States shall cooperate on the basis of sovereign equality, territorial integrity, mutual benefit and good faith in order to attain optimal utilization and adequate protection of an international watercourse."[87] The Convention also provides "watercourse States may consider the establishment of joint mechanisms or commissions as deemed necessary by them, to facilitate cooperation on relevant measures and procedures."[88]

Through the cooperation mechanism, the 'Regular exchange of Data and Information' Principle states riparian States "shall on a regular basis exchange readily available data and information on the condition of the watercourse, in particular that of a hydrological, meteorological, hydrogeological and ecological nature [*et al*]."[89]

Within the scope of 'Regular exchange of Data and Information', riparian States shall timely notify each other of their respective planned measures and if such planned measures have "significant adverse effect upon other watercourse States... [s]uch notification shall be accompanied by available technical data and information, including

[87] **UN Watercourses Convention. (1997)**, Article 8 (1).
[88] **Ibid**, Article 8 (2).
[89] **Ibid**, Article 9 (1).

the results of any environmental impact assessment, in order to enable the notified States to evaluate the possible effects of the planned measures."[90]

Despite the above scenarios, the Convention incorporates the 'Peaceful Settlement of Dispute' principle in which riparian States "shall, in the absence of an applicable agreement between them, seek a settlement of the dispute by peaceful means."[91]

2.4.2. Contentious issues of the 1997 UN Watercourse Convention

It is not only the draft development and consultation of the 1997 UN Watercourse Convention which takes a very long time, so does the phase of entering the latter into force through States ratification. This was due to the contentious issues revolving around the Convention and States hesitation to endorse this controversial Convention, as it was adopted without narrowing their differences. Let alone the very contentious issues of 'Equitable and Reasonable Utilization' vs. 'No-Harm Rule' for obvious reasons, the other two major contentious issues, namely the 'Existing and Future Agreement' and 'Compulsory Dispute Settlement', are worthy to be discussed under this section.

Starting with the 'Existing and Future Agreement' issue, the two diverse for-against views rotate around Article 3 of the Convention. The latter dictates, "in the absence of an agreement to the contrary, nothing in the present Convention shall affect the rights or obligations of a watercourse State arising from agreements in force for it on the date on which it became a party to the present Convention [however riparian States may]... consider harmonizing such agreements with the basic principles of the present Convention."[92] The very purpose of these provision is "[not only] to capture the framework nature of the UN Watercourses Convention, by providing sufficient flexibility to accommodate specific circumstances at the regional and basin levels, [but also] to address the concerns of those States that felt that a mandatory review of the 3,600 or so existing watercourse agreements, upon entry into force of the Convention, would be unduly burdensome."[93] However, there were states who rejected this approach and argued for "a clear obligation to harmonise existing agreements with the Convention."[94] With these

[90] **Ibid**, Article 12.
[91] **Ibid**, Article 33 (1).
[92] **Ibid**, Article 3 (1& 3).
[93] **Rieu-Clarke/Loures**. (2009), p.13.
[94] **Ibid**, p.14.

heated diverse opinions, "35 countries voted in favour of the text, while 3 countries voted against (Ethiopia, France and Turkey), and 22 abstained."[95]

Coming to the 'Compulsory Dispute Settlement' issue, Article 33 of the Convention, though provides for amicable or mutual adjudication dispute settlement mechanism, however, provides if no agreement is reached within six months, with the fear of turning a dispute in to a real conflict, the convention follows a compulsory approach and dictates that "the dispute shall be submitted [even unilaterally], at the request of any of the parties to the dispute, to impartial fact-finding [Commission]."[96] Such approach of period fixation and Compulsory fact-finding Commission arrangement, with unilateral initiation, was a source of contentious issues. Accordingly, the provision of "Article 33 was adopted by 33 votes to 5 (China, Colombia, France, India and Turkey), with 25 abstentions."[97]

2.5. Institutional Arrangement of Transboundary Watercourse

One among a very crucial step for the basin-wide watercourse cooperation is the establishment of Institutional Arrangement. Because, "Institutions in transboundary water cooperation have generally shown a remarkable vitality, and it has been observed that 'once international institutions are in place, they are tremendously resilient over time, even between otherwise hostile riparian nations, and even when conflict is waged over other issues'."[98]

The significance of such Institutional arrangement is underlined in most of the major legal regime of international watercourses like, *inter alia*, the 1997 UN Watercourse Convention,[99] and the 2004 Berlin Rules.[100]

Basin States follow different approaches of institutional set-up, which can be categorised into three basic groups: a River Basin Commission, a River Basin Authority, and a River Basin Coordinating Committee or Council.

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[95] **Ibid**, p.14.

[96] **UN Watercourses Convention. (1997)**, Article 33 (3).

[97] **Biswas**. (2008), p.15.

[98] **R. Vollmer/ R. Ardakanian/ M. Hare/ J. Leentvaar/ C. Van der Schaaf/ L. Wirkus**. (2009). Institutional Capacity Development in Transboundary Water Management. United Nations World Water Assessment Programme Insights. Paris: UNESCO, p.11. Available at <https://www.ais.unwater.org/ais/pluginfile.php/90/course/section/126/181792e.pdf> I.a.d. 15/07/2021.

[99] **UN Watercourses Conventio. (1997)**, Article 33 (2).

[100] **Berlin Rules. (2004)**, Article 31 (e), 34 (f), 35 (d).

A River Basin Commission arrangement is a much formal set-up and considered "When significant development options are still to be considered in the river basin; Where conflicting uses are significant; Where information and policies still need further development to ensure equitable sharing of resources and to limit the harmful impacts of resource use; When water resource planning and management practices are not well detailed – either to facilitate further development or to limit development to restore desired environmental values in the basin, and; Where simulation models, systems and the underlying data and information are not readily available, or need further development."[101] The possible structure of a particular basin Commission are "'Ministerial Council' – that presides over the commission to provide ultimate authority, 'Board of management or group of commissioners' – who set objectives, goals, policy and strategic direction, and 'technical officers and experts' — [that give technical supports]."[102] Though "the commission usually would not interfere in general water management functions, [h]owever, the commission would set the bulk water shares that each state/province is entitled to divert and would monitor water use at the higher state/provincial level."[103] Moreover, "one of the commission's duties is to arbitrate trans-jurisdictional or transboundary disputes [and to ensure] equal partnership among all stakeholders, good knowledge of the basin's resources, and involvement of the basin community as and when relevant in planning and decision making."[104]

A River Basin Authority is the other category of institutional arrangement for transboundary watercourses. As this model "usually takes one of two forms, [on the one hand] it may be a large, multi-disciplinary organization with specific development tasks to undertake, such as hydropower development or navigation, [or on the other hand] the authority may [alternatively] be an organization that absorbs virtually all the water resources functions of other agencies in the basin, rendering it very large and powerful."[105] Though "the authorities resembled large private companies"[106] and "some countries

[101] **Peter Millington/ Douglas Olson/ Shelley McMillan**. (2006). An introduction to integrated river basin management, from Concepts to Good Practice. Briefing note no. 1 – An Introduction to Integrated River Basin Management. Washington, D.C. World Bank Group, p-8. Available at <https://documents1.worldbank.org/curated/en/965371468340137430/pdf/411500Intro0to1mgmt0NOTE1101PUBLIC1.pdf> I.a.d. 20/05/2021.

[102] **Millington** et al. (2006), p.8.

[103] **Ibid**.

[104] **Ibid**, p.9.

[105] **Ibid**.

[106] **Ibid**.

authorities are being transformed into 'commissions'[107] or 'coordinating committees/councils',[108] [however] this model is adequate, for example, in some African basins because of their relatively low degree of water resources development, such as the Niger."[109] Despite the latter facts, the model "however, is not suitable for 'historically, geographically, and politically very complex' basins such as the Nile."[110]

A River Basin Coordinating Committee or Council model, which is formed up on the assumption of "the existing agencies within the river basin are operating effectively; [m]ost of the important data networks are in place and good quality data and information is being generated; most of the high priority water projects have been constructed; competition for resource use between the states or provinces in the basin and the major uses within each of these has been resolved."[111] Though such Committee or Council "would comprise ministers or senior representatives [of basin States, however,] the committee has no real [executive] power to direct the activities and actions of members, [and] its strength (and weakness) lies in its reliance on the full and fair cooperation and participation of its members, as well as the strength and ability of the chairperson to manage the affairs and to achieve the trust and confidence of all members."[112] This institutional set-up "can be used as the first stage in the development of an ongoing form of basin coordination, [and later on] the coordination committee would cease to function when the new organization comes into being."[113]

In order to establish such Joint Institutional set-up of transboundary watercourses, basin States need to agree in a form of bilateral or multilateral treaties to do so. In this vein, watercourse States need to not only determine the appropriate type of Institutional model, but also set measurable clear tasks and responsibilities. Moreover, "The [institutional mandate] does not only have to be clear-cut and coherent, [but] also need to be

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[107] 'Tennessee' Valley Authority (TVA), – of *U.S. government agency established in 1933 to control floods, improve navigation, improve the living standards of farmers, and produce electrical power along the Tennessee River and its tributaries*, and 'Mahaweli' (River Basin) Authority, – of *Sri Lanka based Authority which decides on water allocation among sectors, regions and users at weekly to seasonal timescales and on policy at the longer term*, have both transitioned toward the basin commission model. See **Ibid**.

[108] The Snowy Mountains Authority, – *a hydroelectricity and irrigation complex in south-east Australia* has been disbanded and replaced by a coordinating committee/council. See **Ibid**.

[109] **Vollmer** et al. (2009), p.9.

[110] **Ibid**.

[111] **Millington** et al. (2006), p.6.

[112] **Ibid**, p.7.

[113] **Ibid**.

enforceable."[114] For the effective realization of the latter, it is crucial to align basin States national legislation in general and the legal provisions dealing with River Basin Organization in particular.

2.6. Concluding Remarks

The evolution of international transboundary watercourse is at the center of human evolution as water is one among the very basic human needs that is crucial for survival. Throughout this revolution, among the three major theoretical doctrinal principles, the two opposing extreme theories, i.e., *'absolute territorial sovereignty'*, *'absolute territorial integrity'*, "are, in essence, factually myopic and legally 'anarchic': [as] they ignore other states' need for and reliance on the waters of an international watercourse, and they deny that sovereignty entails duties as well as rights."[115] These lead to the emergency of a middle ground, which is more universal and tolerable theoretical thought, called *'limited territorial sovereignty'*. The overwhelming support of different international legal instruments, authoritative scholars, judiciaries lifts the latter doctrine up to the Customary International Law. The aforementioned facts gave birth to a very crucial Principles of Customary International Law, i.e., *'Equitable & Reasonable Utilization'* and *'No-Harm rule'* Principle. Arguably, not only the latter is a primary governing principle of transboundary watercourse, but the latter is also qualified within a scope of the former.

Since 1900's a number of studies and codification attempts have been made by Prof. H. A. Smith of London, ILA and ILC. In this vein, a number of international transboundary watercourse legal instruments have developed, *inter alia*, Dubrovnik Rules, Helsinki Rules, Berlin Rules, and 1997 UN Watercourses Convention. Though States opposing diverse standing was yet to be compromised, the UN adopted it on 17 August 2014 and it is now the only Universal legal instrument. On the one hand the Convention incorporates six major principles, namely *'Equitable and Reasonable utilisation'*, *'No-Significant-harm rule'*, *'Principles Cooperation'*, *'Regular exchange of Data and Information'*, *'Notification of Planned Measure'* and *'Peaceful Settlement of Dispute'*, on the other hand, the Convention contain contentious issues like *'Equitable and Reasonable Utilization' vs. 'No-Harm Rule'*, *'Existing vs. Future Agreement'*, and *'Compulsory Dispute Settlement'*.

[114] **Vollmer** et al. (2009), p.12.
[115] **McCaffrey**. (2001), p.135.

Bearing in mind the very significance of Institutional arrangement of International Transboundary watercourse through bilateral or multilateral treaties, there are three joint structural set-ups known as *'River Basin Commission'*, *'River Basin Authority'*, and *'River Basin Coordinating Committee or Council'*. Though these joint institutional arrangement applications vary depending on the nature of watercourse basins, the most common one is *'River Basin Commission'*. To manage transboundary watercourses through such Joint Institutional arrangement mechanisms, basin States have to, *inter alia*, – agree on a basin wide 'Legal Framework', determine appropriate 'Institutional model', set its clear tasks and responsibilities, align it with its domestic legislation, and take necessary steps to enforce it.

CHAPTER THREE

THE TRANSBOUNDARY WATERCOURSE MANAGEMENT IN THE TIGRIS-EUPHRATES RIVER BASIN

3.1. Introduction

The Tigris-Euphrates Rivers "are well known through history …due to the fact that the water of these rivers had witnessed the dawn of civilization in Mesopotamia …[and] was reflected in their historic achievements."[116] The two rivers "originate in [the high mountains] of southeast Turkey,"[117] and "flow down …into the Gulf …through Turkey, Syria, [Iran] and Iraq."[118] Though Tigris-Euphrates River rises from the same geographical location, however, basin-wide geographical set up of the two rivers differs.

Taking a look at Euphrates River, On the one hand, its "…length is about 1178 km in Turkey then it enters Syria and runs about 604 km to reach the Iraqi border where it runs 1160 km toward the south, [and on the other hand, its] catchment area in Turkey is about 125,000 km2 (28.2%), …7600 km2 (17.1%) in Syria, and the remainder 177,000 km2 (39.9%) is in Iraq."[119]

Aside from the above, "The Tigris River is 1718 km long and its drainage area is 235,000 km2 distributed between 4 countries as follows: Turkey (17%), Syria (2%), Iran (29%) and Iraq (52%)."[120] The River "…runs toward the Turkish–Syrian border and forms the border between these countries for about 45 km, then it enters Iraq 4 km north Fiesh Khabour near Zakha city."[121]

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[116] **Nadhir Al-Ansari/ Nasrat Adamo/ Varoujan K. Sissakian/ Sven Knutsson/ Jan Laue**. (2018). Water Resources of the Tigris River Catchment. Journal of Earth Sciences and Geotechnical Engineering. vol. 8. No. 3, p.23.

[117] **Nadhir Al-Ansari**. (2019). Hydro Geopolitics of the Tigris and Euphrates. In Y. Mustafa/ S. Sadkhan/ S. Zebari/ K. Jacksi (eds). Recent Researches in Earth and Environmental Sciences. Book Series. Berlin. Springer, p.36.

[118] **T.C. Ministry of Foreign Affairs**. (2015). Water: A source of conflict of coopeariton in the Middle East? p.2. Available at <https://www.mfa.gov.tr/data/DISPOLITIKA/WaterASourceofConflictofCoopintheMiddleEast.pdf> I.a.d. 15/07/2021.

[119] Part of the catchment of the river lies in Saudi Arabia (66,000 km2), but it does not supply any water to the river except when precipitation takes place in that area which is very rare. See **Al-Ansari**. (2019), p.36.

[120] **Ibid**, p.37.

[121] **Ibid**.

Finally, "The confluence of the Tigris and Euphrates Rivers at Qurna city forms Shat Al-Arab River, [in which] the catchment of [the latter] river [is] shared between Iraq and Iran."[122]

Table 3.1: Tigris-Euphrates Basin States, annual flow and contribution[123]

No.	Basin Facts	Tigris River	Euphrates River
1.	Riparian Countries	Turkey, Syria, Iraq & Iran	Turkey, Syria & Iraq
2.	Mean Annual Flow Volume	20 BCM	26.6 BCM
3.	Riparian Contribution to Annual Discharge	Turkey – 40-65% Iraq – 10-40% Iran – 5-25% Syria – 0%	Turkey – 89% Syria – 11% Iraq – 0%

Though the basin involves four countries – Turkey and Iran from upstream countries and Syria and Iraq (theoretically Saudi Arabia as well) from downstream countries, the key players are three basin States – Turkey, Syria and Iraq. For these reasons, lots of researchers consider the latter three basin countries in their studies and a similar approach has been adopted in this study, with, however, some consideration of Iran issues to some extent.

With the above general geographical understandings, this chapter gives due consideration to the management of the Tigris-Euphrates River from international watercourse law in general and from its normative and institutional aspect in particular.

3.2. Legal Regime of Tigris-Euphrates River Basin

3.2.1. Multilateral Conventions

In order to manage transboundary watercourses properly, there need to be basin-wide consented multilateral or bilateral legal regimes in place.

[122] **Ibid**, p.38.

[123] Excerpted from **Anna Bachmann/ Virginia Tice/ Laith Ali Al-Obeidi/ Dicle Tuba Kılıç**. (2019). Tigris-Euphrates River Ecosystem: A Status Report. Mesopotamia Water Forum. Available at <https://www.savethetigris.org/wp-content/uploads/2019/03/Paper-Challenge-C-Ecosystem-FINAL-to-be-published.pdf> I.a.d. 21/07/2021.

As provided in the previous chapter, there is a single international legal instrument named as the '1997 UN Convention on the Law of the Non-Navigational Uses of International Watercourses' with its universal applicability. However, "three countries …Turkey, China and Burundi …voted against this [Convention]."[124] Taking a look at from other Tigris-Euphrates river basin States perspective, Syria – ratified it; though "Iraq did not participate in the voting"[125] – it acceded and vowed to be abided by it; and Iran – voted in favor but didn't take any step for ratification.[126]

Assuming its most upstream riparian strategic player in the Tigris-Euphrates River basin, it is significant to discuss why Turkey rejected the 1997 UN Watercourse Convention as it encompasses multifaceted implications. It is vivid "during the negotiation process for the UN Watercourses Convention, Turkey played a leading role among the nations opposing the draft articles."[127]

From general context, Turkey strongly rejected the convention by arguing as "the Convention goes beyond the scope of a framework… and claimed that the draft convention was broader than had been intended in the General Assembly resolution 51/206; it should have merely established general principles, the application of which would be determined by means of specific agreements taking account of the particular characteristics of each watercourse; however, contrary to what should be the case with a framework convention, the draft convention established a mechanism for prior notification on planned measures which had no basis in general and customary international law, and which created an obvious imbalance among states by setting up an obligation to obtain prior approval on planned measures from other riparians."[128]

Particularly, following are the major reservations of Turkey. Its first reservation was with respect to 'equitable and reasonable use' of Article 5 of the convention, arguing

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[124] **Al-Ansari**. (2019), p.51.

[125] **Osman Devrim Elvan**. (2012). Integrated Water Resources Management work in the Euphrates and Tigris River-Basin, Scientific Research and Essays Vol. 7. No. 49, p.4165. Available at <https://academicjournals.org/journal/SRE/article-full-text-pdf/8A0CE8935730> I.a.d. 15/07/2021.

[126] **Alistair Rieu-Clarke/ Ruby Moynihan/ Bjørn-Oliver Magsig**. (2012). UN Watercourses Convention, User's Guide. 1st edition. IHP-HELP Centre for Water Law, Policy and Science. UNESCO. United Kingdom, p.37. Available at <https://www.iucn.org/sites/dev/files/un_watercourses_convention_-_users_guide.pdf> I.a.d. 15/07/2021; see also UN General Assembly Vote and Status of UN Convention on the Law of Non Navigational Used of International Watercourses. (2002). Available at <https://bit.ly/2QLsxNO> I.a.d. 15/07/2021.

[127] **Annika Kramer/ Aysegul Kibaroglu**. (2011). Turkey's Position towards International Water Law. In Aysegul Kibaroglu, Annika Kramer, Waltina Scheumann (eds). Turkey's Water Policy, National Frameworks and International Cooperation. Springer Heidelberg Dordrecht. London - New York, p.218.

[128] **Kramer/ Kibaroglu.** (2011), p.218-219.

that the latter principle "should [not only] be understood in light of the fundamental principle of the sovereign rights of states over their territory, [but also] should also be applied by taking fully into account all the particularities of the watercourses, including the distinction of whether they are transboundary by nature or international (forming a boundary) between states; Turkish officials suggested that the principle of 'optimal utilisation' should aim at both protecting the watercourse and at optimising the interests of riparian states in a way that avoids water waste."[129]

In connection with the above argument, "Turkey also asserted that the obligation not to cause significant harm should be subsidiary to the principle of equitable and reasonable utilisation. In other words, if a state made use of a watercourse in conformity with the principle of equitable and reasonable utilization, the exercise of that right should not be limited by a second criterion."[130]

By standing on the very cored principle of International Customary law of 'equitable and reasonable (and optimum) utilization' of transboundary watercourse, Turkey object those Principles adopted under Part III and IV of the Convention, which deals about 'Planned Measures' and 'Protection, Preservation and Management' respectively. Though it is so clear of "the main purpose of the Convention should be to achieve an equitable and reasonable arrangement regulating water utilisation among the watercourse states: 'any other approach turns the Convention into a document which unilaterally restricts, in terms of both quantity and quality the utilisation rights of states in which watercourses originate; due attention should also be paid to establishing an equitable balance of rights and obligations among all watercourse states.'"[131] However, "according to the Turkish Government, while these requirements were taken into account to a certain extent in the general principles set forth in Part II of the Convention, the same cannot be said of Part III and Part IV of the"[132] Convention. Especially, "Turkish authorities delivered severe criticism mainly on the point that Part III comprises detailed procedural arrangements such as determining the period for reply to notification, ignoring the basic fact that each international watercourse possesses different and specific characteristics."[133]

[129] **Kramer/ Kibaroglu.** (2011), p.219.
[130] **Ibid**.
[131] **Ibid**.
[132] **Ibid**.
[133] **Ibid**.

Turkey also criticised Dispute Settlement mechanisms provided under Article 33 and it's Annex by arguing its non-appropriateness of "setting out obligatory dispute settlement rules, [and claim] the latter should be left to the discretion of the States concerned."[134]

In relation to existing and future agreements over transboundary watercourses, Turkey argued "Parties to existing agreements should be free to choose whether or not to accept the principles set forth in the draft articles, [and so does] for future agreements."[135]

All in a glance, "Turkey's cautious attitude towards the ILC 1994 Draft and its refusal to endorse the 1997 UN Watercourses Convention originates from the deep concern about the fact that certain articles of the Convention might restrain its official stance in future negotiations for the allocation and management of the Euphrates-Tigris rivers system."[136]

Taking into account the above facts, conclusion can be made as to the non-applicability of the 1997 UN Watercourse Convention on the Tigris-Euphrates basin case, and regrettably no Multilateral Watercourse Convention applicable on the latter basin.

3.2.2. Tigris-Euphrates River Basin Basin-wide Treaties

As provided in the aforementioned section, there is no Multilateral Watercourse Convention potentially applicable to a particular Tigris-Euphrates River Basin case, which leads to an exploration for basin-wide treaties. Speaking of basin-wide treaties, following sections are devoted to discuss the existing Tigris-Euphrates river basin agreements.

3.2.2.1. Tigris-Euphrates River Basin-wide Treaties – Pre WWII

It is quite interesting that "prior to the twentieth century the whole of the Tigris-Euphrates basin was under the control of a unified, although sometimes weak, government, [and] this situation lasted through World War I with the collapse of the Ottoman Empire." [137] After "the fall of the Ottoman Empire …the present political boundaries …with a new

[134] **Ibid**.
[135] **Ibid**, p.220.
[136] **Ibid**.
[137] **Peter Beaumo**. (2001). Restructuring of Water Usage in the Tigris-Euphrates Basin: The Impact of Modern Water Management Policies. Middle East Natural Environment. Yale F & ES Bulletin, p.171.

transboundary river basin …were established …[and] a number of agreements have been reached between [and/or among] involved parties since …early 1920s."[138]

Thinking of Tigris-Euphrates basin-wide Treaties before World War II (WW II), the followings are the major agreements that pop-up in the latter transboundary watercourse basin.

An agreement assumed to be "the first treaty… which is known as the Constantinople accord concerning borders delineation between the two countries… was… signed… in 1913 between Britain, Russia, Iran and Turkey for the regulation of Shat Al-Arab River."[139] After getting its dependence from Great Britain in 1932, "Iraq and Iran placed [their second] agreement in 1937… with support from the League of Nations… for demarcating their border and regulating navigation in Shat Al-Arab River… [in which] according to these agreements, Iraq has the full sovereignty over the two banks of Shat Al-Arab River, although Iran kept claiming half of the river to its sovereignty."[140] The two countries signed another agreement in Algeria in 1975, which will be discussed in the coming next section of post WWII Tigris-Euphrates Basin-wide agreements.

In 1920, the Paris Treaty was signed, between France (representing Syria) and Britain (representing Iraq), in which the two States agreed under Article 3 "for setting up a joint committee to make a provisional study for any project to be carried out by the French mandatory government in relation to the waters of the Euphrates and Tigris as to affect the waters of the two rivers at the point of their entry into the region subject to the British mandate,"[141] "whereby [in short] Syria undertook to do nothing that might substantially alter the flow of the Euphrates."[142]

The other Tigris-Euphrates bilateral treaty was made between Turkey and France (representing Syria) in 1921, in which it's "'Article 12'[143] of the Treaty Speaks about water

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Available at <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.539.3915&rep=rep1&type=pdf> I.a.d. 16/07/2021.

[138] **Dogan Altinbilek**. (2004). Development and Management of the Euphrates–Tigris Basin. Water Resources Development. Vol. 20. No. 1, p.15.

[139] **Al-Ansari**. (2019), p.56.

[140] **Ibid**.

[141] **İlhan Sağsenç**. (2006). The Issue of Management of The Waters of The Euphrates and Tigris Basin In International Context. (Master Thesis). Middle East Technical University. Graduate School of Social Science, p.33.

[142] **İbrahim Mazlum**. (1996). Water in the Middle East: The Scarce Resource of the Region. (Master Thesis). Marmara University. Graduate Institution of Social Science, p.39.

[143] Article 12 States as *"The Kuveik water is to be distributed between the city of Aleppo and the region under Turkish control in such a way as to give equitable satisfaction to the two parties. The city of Aleppo to*

apportionments and water supply for the city of Aleppo, without going into detail."[144] With the aim of affirming the latter Treaty, the same aforementioned parties (Turkey-France) signed "the [1926] Convention of Friendship and Good Neighborliness with protocol and notes, [in which] its Article 13 of the Convention relates to water supply again for Aleppo and for irrigation."[145]

The last treaty signed during the pre WWII period is the 1923 Lausanne Peace Treaty, "signed between [Turkey] and the 'Victorious States'[146] of World War I, [in which] 'Article 109'[147] is related to the Euphrates and Tigris."[148] The latter provision "confirms that issues related to transboundary water should be dealt with separately and with mutual respect."[149] Moreover, "Turkey must consult Iraq before undertaking any hydraulic works."[150]

3.2.2.2 Tigris-Euphrates River Basin-wide Treaties – Post WWII

The New era of Tigris-Euphrates River Basin engagement started after WWII, which resulted in the conclusion of a number of treaties among the riparian States.

It is quite perceivable that "there are no direct agreements between Iraq and Turkey on the utility of transboundary waters, [but] the only [first] arrangement between the two countries is dated back to [the] 1946"[151] 'Treaty of Friendship and Neighbourly Relations

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meet its water requirements will be able to take water from the Euphrates the costs are paid". Excerpted from **Sağsenç**. (2006), p.33-34.

[144] **Mazlum**. (1996), p.36.

[145] **Ibid**, p.37.

[146] The British Empire, France, Italy, Japan, Greece, Roumania and Yugoslavia (the Serb-Croat-Slovene State). See for detail 'Treaty of Peace with Turkey' (Signed on 24 July 1923 at Lausanne). Available at <https://wwi.lib.byu.edu/index.php/Treaty_of_Lausanne> I.a.d. 16/07/2021.

[147] Article 109 state as "*In default of any provisions to the contrary, when as the result of the fixing of a new frontier the hydraulic system (canalisation, inundation irrigation, drainage or similar matters) in a state, or when use is made on the territory at a state, in virtue of pre-war usage, of water or hydraulic power the source of which is on the territory of another state, an agreement shall be made between the state concerned to safeguard the interests and rights acquired by each of them. Failing an agreement, the matter shall be regulated by arbitration."* Excerpted from **Sağsenç**. (2006), p.34.

[148] **Ibid**.

[149] **United Nations Economic and Social Commission for Western Asia**. (2013). Inventory of Shared Water Resources in Western Asia, CHAPTER 3 - TIGRIS RIVER BASIN. Beirut, p.120. Available at <https://waterinventory.org/sites/waterinventory.org/files/chapters/Chapter-03-Tigris_River-Basin-web_0.pdf> I.a.d. 16/07/2021.

[150] **United Nations Economic and Social Commission for Western Asia**. (2013), p.120; **Al-Ansari**. (2019), p.53.

[151] **Seyfi Kılıç**. (2018). Iran-Iraq Transboundary Water Relations and Turkey, Centre for Middle Easter Studies. Policy Brief, No: 79, p.4. Available at <https://orsam.org.tr/d_hbanaliz/iran-iraq-transboundary-water-relations-and-turkey2.pdf> I.a.d. 16/07/2021.

between [the two latter countries]' signed in Ankara. In this treaty alongside its Protocols on 'Flow Regulation of the Tigris and Euphrates Rivers and of Their Tributaries', though the parties agreed to "deal with their respective interests in the Euphrates-Tigris river basin and tributaries, [however, the preamble[152], Article 1[153], Article 2[154], Article 3[155], Article 4[156], Article 5[157] *et al* of] the protocol emphasized mainly [on] the urgency of building up flood control works on the Euphrates and Tigris river basin and underlined the positive impact of storage facilities to be sited in the Turkish territory."[158]

Though there were disagreement between Syria and Iraq in1962 through 1966 in which the latter "reiterated its claim to acquired rights in a fixed share of the Euphrates discharge …[while the former] has argued that potential needs must be weighed against acquired rights, [however], in 1967, Syria accepted that Iraq was entitled to 59% of the flow of the river at the Syrian-Iraqi border, which, in normal years, would be about equivalent to the absolute quantity that Iraq claimed its share."[159] Moreover, during the filling period of 'Keban' and 'Taqba' Dam, "in 1974, Syria agreed to release in the month of June a minimum of 90 cum/sec, 110 cum/sec in the first ten days, and the entire flow of the river net of agricultural needs in Syria thereafter."[160] After a while in 1990, though Syria and Iraq "entered into a bilateral agreement according to which the two countries share the waters received from Turkey on a 58% (Iraq) and 42% (Syria) basis, [however,]

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[152] The preamble provides as "*In order to ensure the maintenance of regular water supply, to regulate the water flow and to avoid the danger of floods during the annual periods of high water, it had been found necessary to construct dams and permanent observation stations in Turkish territory.*" Excerpted from **Sağsenç**. (2006), p.35.

[153] Article 1 states as "*Authorisation to undertake studies with a view to controlling the river: Iraq may send to Turkey groups of technical experts to make investigations and surveys, collect hydraulic and geological information needed for the selection sites for the construction of dams and observation stations to be constructed on the Tigris, Euphrates and their tributaries*". Excerpted from **Ibid**.

[154] Article 2 states as "*Collaboration in carrying out the projected studies (right of access). Provision of facilities: The technical experts from Iraq shall collaborate with Turkish technical experts; Turkey shall authorise them to proceed to the places to be visited and shall provide them with the information, assistance and facilities necessary for the accomplishment of their task.*" Excerpted from **Ibid**.

[155] Article 3 states as "*Turkey shall install and operate permanent flow measurement facilities, and transmit periodically the readings and the recorded data to Iraq.*" Excerpted from **Ibid**, p.36.

[156] Article 4 states as "*Turkey in principle accepts to construct flow regulation works needed in the interest of Iraq in Turkish territory.*" Excerpted from **Ibid**.

[157] Article 5 states as "*Turkey shall inform Iraq of projects for waterworks on any of the Protocol watercourses, and shall consult with Iraq with a view to accommodating the interests of both countries.*" Excerpted from **Ibid**.

[158] **Ibid**, p.35.

[159] **Mazlum**. (1996), p.39-40.

[160] **Ibid**, p.40.

…those who closely follow the politics of cooperation in the basin are skeptical as to whether these occasional agreements have been honored by the countries over time."[161]

During the 'Keban Dam' reservoir project, "USAID was the acting donor for the [latter] project, while World Bank was the leading agency financing the Karakaya Dam further downstream …[and up on insistency] of the [down] riparian [States], particularly Iraq, …both [financial] agencies [were] insist[ing and pressuring] that guaranteed flows be released by Turkey to downstream riparians during the impounding and operation of the reservoirs, …[consequently, an agreement [was] signed in Ankara in 1966 with USAID, [in which] Turkey guaranteed to undertake all necessary measures to maintain a discharge of 350 m3/sec immediately downstream from the dam, provided that the natural flow of the river was adequate to supply the above discharge."[162]

As pointed out in the previous Pre WWII Tigris-Euphrates Basin-wide treaty section, after so much political tension, Iran and Iraq signed an agreement in Algeria in 1975, in which "Iraq to concede its right in half the Shatt Al-Arab and the Kurdish rebellion was ended."[163] Though "Iraq felt …humiliated …[and consequently] kept the strong position that [it] would never reinstate the 1975 agreement …[however, after] the relationship between the two countries [got improved, and after discussing] the Shatt Al-Arab issue in 2014, both parties agreed to move forward and work on the marking of land borders and to implement agreements in accordance with the borders' treaty, protocols and agreements that were signed between the two countries in 1975."[164]

The '1987 Economic Protocol' is a 'provisional agreement' signed between Turkey and Syria, in which under its 'Article 6'[165] Turkey agreed to undertake "the quantity of waters flowing to the Turkish-Syrian borders during the filling of Atatürk Dam in Turkey

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[161] **Christina Leb**. (_____). The Tigris-Euphrates Joint Technical Committee – deadlocked. IUCN Water Programme, p.2. Available at <https://www.iucn.org/sites/dev/files/import/downloads/tigris_euphrates.pdf> I.a.d. 16/07/2021.

[162] **Aysegul Kibaroglu/ Olcay Ünver**. (2000). An Institutional Framework for Facilitating Cooperation in the Euphrates-Tigris River Basin. International Negotiation: A Journal of Theory and Practice. Vol. 5. No. 2, p.4.

[163] **Al-Ansari**. (2019), p.56.

[164] **Ibid**.

[165] Article 6 of the Protocol states as "*During the filling up period of the Ataturk Dam reservoir and until the final allocation of the waters of the Euphrates among the three riparian countries, the Turkish Side undertakes to release a yearly average of more than 500 m³/sec. At the Turkish-Syrian border and in cases where the monthly flow falls below the level of 500 m³/sec., the Turkish Side agrees to make up the difference during the following month*". Excerpted from **Sağsenç**. (2006), p.36.

[would] not be less than 500 [m³]/sec."[166] During that time, "Iraq had objected to this agreement [claiming that] it did not meet the minimum limit of his legitimate rights to the waters of the Euphrates."[167]

After a number of serious discussions at political and technical level under JTC, Turkey-Syria and Turkey-Iraq have signed a bunch of Memorandum of Understandings.

In October 2009, Turkey and Iraq signed "forty eight Memorandum of Understandings, [among which] one was on water"[168], which can be considered the 2nd one after the 1946 treaty. According to this late particular water protocol, "the two sides [not only] agreed to exchange hydrological and meteorological information as well as exchanging expertise in these fields, [but also agreed to] emphasized the utilization and management of regional water resources in an efficient manner."[169]

On the other hand, Turkey and Syria "signed fifty MoUs at the first meeting of the High-Level Strategic Cooperation Council in Damascus including four MoUs related to regional waters."[170] These are:

i) *The MoU Between the Government of the Republic of Turkey and the Government of the Syrian Arab Republic for the Construction of a Joint Dam on the Orontes River Under the Name "Friendship Dam." According to this, both countries will share costs of the dam, which will be built at the border. It will produce energy for both sides and irrigate 20,000 hectares of agricultural area in Turkey and 10,000 hectares in Syria. Although the details of the dam will be ironed out in the feasibility study, it is expected to be approximately 15m high and have a capacity of 110 MCM of water storage. Of that total, 40 MCM will be used to prevent flooding and the rest for energy production and irrigation. The foundation of the dam is expected to be laid out in 2010.*[171]
ii) *The MoU Between the Government of the Republic of Turkey and the Government of the Syrian Arab Republic on Establishment of a Pumping Station in the*

[166] **Ibid**.
[167] **Ibid**.
[168] **Aysegul Kibaroglu/ Waltina Scheumann**. (2011). Euphrates-Tigris Rivers System: Political Rapprochement and Transboundary Water Cooperation. In Aysegul Kibaroglu, Annika Kramer, Waltina Scheumann (eds). Turkey's Water Policy. National Frameworks and International Cooperation. London - New York. Springer Heidelberg Dordrecht, p.293.
[169] **Ibid**.
[170] **Ibid**.
[171] Excerpted from **Ibid**.

Territories of Syrian Arab Republic for Water Withdrawal From the Tigris River. With this protocol, the quantity of water drawn annually from the Tigris River by Syria, when the flow of water is within the average, will be 1.25 BCM. The water withdrawals are arranged according to monthly flows, and it is indicated that pumping will be done when time and place allows.[172]

iii) *The MoU between the Government of the Republic of Turkey and the Government of the Syrian Arab Republic in the Field of Efficient Utilization of Water Resources and Combating of Drought.*[173]

iv) *The MoU between the Government of the Republic of Turkey and the Government of the Syrian Arab Republic in the Field of Remediation of Water Quality.*[174]

3.3. Administrative Institutional Arrangement of Tigris-Euphrates River Basin

Though Tigris-Euphrates basin States are four – Turkey, Syria, Iraq and Iran, the latter state "has not engaged in the water quantity discussions between the other three co-riparian countries."[175] As a result, the engagement of Iran with Turkey and Syria through institutional arrangement mechanisms is not available. Despite the aforementioned facts, "Little is known about cooperation between Iran and Iraq on the issue of shared water, [as] both countries met regularly [for some-time] to discuss pressing water issues of mutual concern."[176] With this glance, "following Iran's exploitation and diversion of shared rivers without prior notification (e.g. on the Karkheh River), the two states decided to form a joint technical committee in order to address issues of mutual concern. Iraq's Ministry of Water Resources reports that this committee holds regular meetings and organizes technical exchange visits."[177]

For the above reason, the following sections focus on the institutional arrangement mechanism of Turkey-Syrian-Iraq.

[172] Excerpted from **Ibid**, p.293-294.
[173] Excerpted from **Ibid**, p.294.
[174] Excerpted from **Ibid**.
[175] **Leb**. (_____), p.5.
[176] **United Nations Economic and Social Commission for Western Asia**. (2013), p.121.
[177] **Ibid**.

3.3.1. First JTC Formation – *Ad-hoc* One

Although the legislative history of the basin has a 65 year history, the rise of the water dispute in the Euphrates-Tigris river basin goes back only about 30 years.[178] Dispute alongside "the water question emerged on the regional agenda when the 'three riparians'[179] initiated major development projects."[180] Such "uncoordinated nature of these supply-led developments as well as inefficient and ineffective demand management practices within the framework of national water policy and management of the co-riparians continue to be the principal causes of water imbalance in the Euphrates-Tigris river basin."[181]

Especially, due to downstream riparian States, particularly Iraq's, high concern over "Turkey's decision to construct the Keban Dam on the Euphrates, [during their bilateral meeting in 1964,] Turkey proposed the establishment of a Joint Technical Committee (JTC)."[182]

Under the umbrella of JTC, the committee "would inspect each river to determine its average yearly discharge …[and] would determine the irrigation needs of the three countries through joint field studies and would be authorised - by calculating the needs of the riparians for present and future projects - to prepare a statement of the main principles and procedures in order to facilitate an agreement on water rights."[183]

After holding the "first technical meeting between Turkey and Iraq, a few more ad hoc meetings were held, [among which] the most notable one [was] – the first tripartite negotiation – [which] was held in Baghdad in 1965 where the three delegations exchanged technical data on the Haditha (Iraq), Tabqa (Syria) and Keban (Turkey) dams."[184] During the negotiation "Syria suggested, in line with a Turkish proposal, that it would be beneficial to commission a JTC study of the water requirements of the irrigable lands, and subsequently to examine the possibility of covering possible shortages of water supplied by the Euphrates by diverting a part of the Tigris River's water to the Euphrates, [which, however,] Iraq strongly opposed to, and insisted on negotiating only on the waters of the

[178] **Kibaroglu/ Ünver**. (2000), p.3.
[179] It is only since the 1960s that, on the one hand, Turkey and Syria have put forward ambitious plans to develop the waters of the Euphrates-Tigris river system for energy and irrigation purposes, while at the same time, Iraq also announced new schemes for an extension of its irrigated area. **See Ibid**.
[180] **Ibid**.
[181] **Ibid**.
[182] **Kibaroglu/ Scheumann**. (2011), p.283.
[183] **Ibid**.
[184] **Ibid**.

Euphrates."[185] Though, "during the 1970s, delegations from the three countries gathered on several occasions to exchange information about technical issues relating to the reservoirs, [however,] no agreement was reached, and [as a result] Turkey and Syria unilaterally determined the impounding programmes for their reservoirs."[186]

3.3.2. Second JTC Formation – Permanent One

The Turkish development plan over Tigris-Euphrates in general and, the 'Southeastern Anatolia Project'[187] (GAP) through the construction commencement of 'Atatürk Dam'[188], 'Şanlıurfa Tunnels'[189] *et al* in particular "created a new demand for cooperation; [consequently,] Iraq proposed the formation of a permanent JTC"[190]. After "the end of the first meeting of the Joint Economic Commission between Turkey and Iraq in 1980, a [permanent] JTC was established, which Syria joined in 1983."[191]

The JTC "was set up as a purely technical committee of experts with the mandate" [192] "to decide the methods and procedures which would lead to a definition of the reasonable and appropriate amount of water that each country would need from both rivers."[193] Moreover, the prior "agenda of the JTC were the exchange of hydrological and meteorological data and information on the Euphrates-Tigris Basin, the sharing of information on progress achieved in the construction of dams and irrigation schemes in three riparian countries, and the discussion of initial plans for filling the Karakaya and Atatürk Reservoirs."[194]

In the above vein, throughout their sixteen joint meetings, "…however, the JTC could not fulfill its objectives and [at last in 1992] the talks became deadlocked, and failed

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[185] **Ibid**.

[186] **Ibid**, p.284.

[187] The Southeastern Anatolia Project (GAP) is considered to be one of the most ambitious regional development projects in Turkey by encompassing not only hydropower and irrigation infrastructure development as originally planned, but also related sectors including industry, transportation, rural and urban infrastructure, environmental protection and social sector in the region. For detail see **Murat Kankal**/ **Sinan Nacar**/ **Ergun Uzlu**. (2016). Status of hydropower and water resources in the Southeastern Anatolia Project (GAP) of Turkey. Energy Report. Vol. 2, p.123-128.

[188] 'Atatürk Dam' has been the centrepiece of the GAP.

[189] 'Sanlıurfa Tunnels' are the major units of GAP consisting of two giant irrigation tunnels which will discharge water from the Atatürk Dam reservoir.

[190] **Kibaroglu/ Scheumann**. (2011), p.284.

[191] **Ibid**.

[192] Leb. (_____), p.2.

[193] **Kibaroglu/ Ünver**. (2000), p.8.

[194] **Ibid**, p.9.

to produce even outlines of its meetings."[195] In order to grasp-out the very essence resulting such a deadlock, it is very crucial to see the three basin countries' uncompromising arguments from their respective perspective.

3.2.2.1. Iraq's Perspective

The very standing of Iraq started with its argument in claiming of 'historical right' or "Acquired Rights relating to its 'ancestral irrigation' from the Euphrates and Tigris rivers"[196], and " …suggests that international law required that this right, which originated in ancient times, should be respected"[197]. This 'historical right' or 'Acquired Right' claim is stemmed from two dimensions; on the one hand, it stem from Iraq narration on "the fact that for thousands of years these rivers have given life to the inhabitants of Mesopotamia and thus constitute an acquired right for this people, [so that] no upstream riparian country is entitled to take away the rights of these inhabitants; [on the other hand, it] stems from the existing irrigation and water installations [in Iraq, in which the latter consider] 1.9 million hectares of agricultural land in the Euphrates basin, including the ancestral irrigation systems left from Sumerian times."[198] Moreover, as a lower riparian basin States, "Iraq [is] supporters of the theory of absolute territorial integrity [and continue pressuring] …Turkey not …to change the natural flow of the waters in a manner that adversely affects water usage within the lower riparian countries."[199]

Standing on the above 'Acquired Right' and 'absolute territorial integrity' theory grounds, Iraq accused "Turkey [of] caus[ing] damage to the downstream riparian states, by building new dams and irrigation systems"[200] under 'GAP' project in general and 'Atatürk Dam' in particular. Iraq continued also accusing Turkey of "violating international law by not informing Baghdad in a timely manner and by reducing the amount of flow below the agreed level, during the initial impounding of the Atatürk Dam."[201]

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[195] **Ibid**.
[196] **T.C. Ministry of Foreign Affairs**. (1996). Water Issues between Turkey, Syria and Iraq. Department of Regional and Transboundary Waters, page – 8. Available at <https://dergipark.org.tr/tr/download/article-file/817266> I.a.d. 16/07/2021.
[197] **Elvan**. (2012), p.4164
[198] **Ministry of Foreign Affairs**. (1996), p.8.
[199] **Elvan**. (2012), p.4164
[200] **Ministry of Foreign Affairs**. (1996), p.9.
[201] **Ibid**.

Within the scope of "the definition of the Euphrates and Tigris rivers, …[Iraq constitutes the two rivers as] international waters [not as transboundary watercourse] …which need to be shared among all riparian countries."[202] Moreover, Iraq also considers "that the hydraulic systems of these two rivers should be considered separate, because the two rivers irrigate different basins, [consequently] Iraq …intends to keep the 'common irrigation policy'[203] off the negotiation table."[204]

In relation to quantification of Tigris-Euphrates River in 'equitable and reasonable' manner, "Iraqi officials have also declared that [the latter water resources] must be shared among the riparians through a 'mathematical formula'[205]",[206] and accordingly, "each riparian should declare its claims for the realised projects, for those under construction and, finally, for any that are planned, [so that] each country's water quota would be defined subsequently, i.e. first for the projects in operation, then for those under construction, etc., with the realised projects having priority over planned projects."[207]

Aside from the above, "Iraqi authorities argue that the 1987 Protocol has lost its validity due to the fact that the impounding of the Atatürk Dam has been completed, therefore, the final allocation must be made and, [accordingly,] from the 1000 m3/s annual average flow of Euphrates, one-third amount, [which is] not less than 700 m3/s …should now be released to the downstream countries."[208]

3.2.2.2. Syria's Perspective

Like Iraq, Syria not only claimed for the "[possession of 'historical right' or] 'acquired rights', dating from antique periods, over the rivers that pass through Syrian territory,"[209] but also stand in line with 'theory of absolute territorial integrity.'"[210]

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[202] **Elvan**. (2012), p.4162.

[203] A proposed common irrigation policy would involve connecting the confluence of the two rivers by canals and waterways, thereby forming a single basin. See **Ibid**, p.4163.

[204] **Ibid**.

[205] Iraqi's mathematical formula, follows accordingly: 1) each of the riparian states will notify the others of its water demand for each of its completed projects as well as for the projects under construction or planned; 2) hydrologic data will be exchanged on the Euphrates and Tigris waters; 3) after gathering all relevant data, the JTC will, first, calculate the demand for water of the projects in operation, then for the projects under construction and, last, for the planned projects. The determination of needs for these projects will be made separately. See **Ministry of Foreign Affairs**. (1996), p.9.

[206] **Ibid**.

[207] **Kibaroglu/ Scheumann**. (2011), p.285.

[208] **Ministry of Foreign Affairs**. (1996), p.9.

[209] **Ibid**.

[210] **Elvan**. (2012), p.4164.

Moreover, "Syria further claims that, during the initial impounding of the Atatürk Dam, Turkey acted against the spirit of good neighbourliness and caused significant damage to Syrian agriculture, as well as hydroelectric generation and water supply facilities."[211]

Unlike Iraq, Syria claim "claims that the Euphrates and Tigris rivers are 'international
watercourses' which can be classified as 'shared resources'."[212] Within this spirit, Syria argued that Tigris-Euphrates water resource "must be shared among the riparian states according to …a simple 'mathematical formula',[213]"[214] and "proposed that the co-riparians should declare their demands for each river separately, i.e. the Tigris and the Euphrates rivers [independently, and after that] if the claims exceed a river's discharge, the deficit will be proportionally deduced from each share."[215] For the realization of the latter, "Syria demands that international observers be present at negotiations between the basin states and, in accordance with the opinions of those observers, the UN should enforce mandatory sanctions on those countries which hinder sharing procedures established at these negotiations."[216]

Aside from the above, "Syria requests that the ILC's studies be finalised and that rules and regulations be established as soon as possible, [so that] inter-state disputes about sharing the water of this international watercourse [including Tigris-Euphrates River basin] dispute should be resolved in international bodies, such as International Court of Justice, and within an institutional framework of dialogue or arbitration."[217]

3.2.2.3. Turkey's Perspective

In relation to those claims asserted by Syria and Iraq were being made against the most upstream riparian Turkey with the very objective of "mak[ing] Turkey [to] release a

[211] **Ministry of Foreign Affairs**. (1996), p.9-10.
[212] **Ibid**, p.9.
[213] Syria's simple mathematical formula follows accordingly: 1) each riparian State shall declare its demands on each river separately 2) the capacities of both rivers (in each riparian state) shall be calculated 3) if the total demand does not exceed the total supply, the water shall be shared according to the stated figures 4) if the total demand for water declared by the three riparians exceeds the water potential of a given river, the exceeding amount should be deducted proportionally from the demand of each riparian state. See **Ibid**.
[214] **Ibid**.
[215] **Kibaroglu/ Scheumann**. (2011), p.285.
[216] **Ministry of Foreign Affairs**. (1996), p.10.
[217] **Ibid**.

greater amount of water"[218] under the auspices of] 'Acquired Rights', Turkey dismisses the concept based on Stephen C. McCaffrey reflection. According to the latter Professor:

> *"A downstream State that was first to develop its water resources could not foreclose later development by an upstream State by demonstrating that the later development would cause it harm; under the doctrine of equitable utilisation, the fact that a downstream State was 'first to develop' (and thus had made prior uses that would be adversely affected by new upstream uses) would be merely one of a number of factors to be taken into consideration in arriving at an equitable allocation of the uses and benefits of the watercourse."*[219]

With regard to the very core definition of the river basin, Turkey argued that "one that has its opposing banks under the sovereignty of different countries renders both rivers transboundary rather than international"[220]. Since no common definitions could be agreed upon during these meetings, it has been impossible to proceed with the principles of use.[221]

In relation to a mono-dual basin issues, Turkey consider the Tigris-Euphrates as one river basin and argued as "the basin is a whole in terms of their upper water collection and lower distribution basins, [and the two river] confluence of the natural courses of two rivers in Shatt-al –Arab and the presence of Thartar Canal (both in Iraq)."[222]

With respect to transboundary watercourse theory, though "many international studies have concluded that Turkey's approach is based on defending the Harmon doctrine, [however,] …Turkey's published national policy expresses its right to use the waters, but also emphasizes the necessity to ensure that this use must be equitable and reasonable and must also comply with the principles of international law, therefore, it acts under the theory of 'limited territorial sovereignty' rather than supporting one of 'absolute territorial sovereignty'."[223]

Basin on the aforementioned Turkish theory and policy, Turkey claim for the utilization of Tigris-Euphrates water depending on "the right of [limited] sovereignty [with] …internationally accepted principles such as 'righteous and reasonable use and

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[218] **Ibid**.
[219] **Stephen McCaffrey**. (1991). The Law of International Watercourses: Some Recent Developments and Unanswered Questions. Denver Journal of International Law and Policy. Vol. 17. No. 3, p.509; see also **Ibid**.
[220] **Elvan**. (2012), p.4163.
[221] **Ibid**, p.4162.
[222] **Ibid**, p.4163.
[223] **Ibid**, p.4164.

‘causing no harm’ [by clarifying] …that the principle of "causing no harm" will not imply a waiver of self-rights in order to ensure that the needs of the neighbors are fulfilled.”[224]

In relation to ‘GAP’ project in general and ‘Atatürk Dam’, “Turkey [firmly argued that] as the headwater riparian, [it] provided complete information including the rules of operation of the reservoirs in its territory in order to ensure better water management in the Euphrates-Tigris Basin.”[225]

Coming to quantification of transboundary water resources, “Turkey proposed the *‘Three Stage’*[226] Plan for Optimum, Equitable and Reasonable Utilization of the Transboundary watercourses of the Tigris-Euphrates Basin, [by] encompass[ing] joint inventory studies of land and water resources of the region and the estimation of water needs for the competing sectors, agriculture in particular.”[227] Moreover, though “along with reaching a set of agreed upon criteria in data-sharing, it was hoped that [the Turkish Three Stage Plan] could [not only pave a way for] coordinating development projects [but also] create joint projects, however, the …Plan was coolly received by Iraq and Syria, and they continued to demand fixed water quotas.”[228]

With regard to dispute resolution mechanism before international bodies, “the Turkish diplomacy underlines the importance of settling disputes over transboundary waters in a peaceful manner, [by] emphasiz[ing] that transboundary water issues should be negotiated between the riparian states only; [and for these reasons, Turkey is not accepting] the third party[’s] intervention [in the form of] …mediation [or even arbitration] attempts.”[229]

3.3.3. JTC Revitalization

After encountering deadlocks as stated in the aforementioned sections, in “March 2007 …the Turkish Energy and Natural Resources Minister invited the Syrian Minister of Irrigation and Iraqi’s Water Resources Minister to discuss how to set up a cooperative

[224] **Ibid**, p.4165.
[225] **Kibaroglu/ Ünver**. (2000), p.9.
[226] The Three-Stages Plans are 1) the Inventory Studies of Water Resources, 2) Inventory studies of land resources, and 3) Evaluation of Water and Land Resources. See for detail **Vakur Sümer**. (2015). Three Decades after Three-Stage Plan: Time for a Reappraisal. Centre For Middle Eastern Studies. Available at <https://www.orsam.org.tr/en/three-decades-after-three-stage-plan-time-for-a-reappraisal/> I.a.d. 21/07/2021.
[227] **Kibaroglu/ Scheumann**. (2011), p.284-285
[228] **Ibid**, p.285.
[229] **Ibid**, p.227.

framework to deal with regional water issues; [accordingly,] the Ministers decided that [the frozen] periodic meetings of the JTC would be reconvened."[230] After "the first one being convened in Syria [i]n May 2007, …a series of JTC meetings were conducted …in Istanbul [and] …in Syria …in 2009."[231]

During the negotiation, the parties have agreed to "share data (current and historical) regarding meteorological patterns and water quality in the Tigris and Euphrates rivers."[232] Most importantly the basin countries agreed "…to establish a 'Water Institute'[233] in Turkey, [and to] …appoint fifteen water engineers with an aim to conduct studies on water use efficiency and better water management in the region."[234] Accordingly, "the engineers have been meeting to exchange information and know-how."[235] Moreover, a number of training used to be given on a number of sectors, most notably: "…on modern irrigation practices in the region, [and on] …construction and safety of the dams."[236]

3.3.4. Failure and Success of the JTC

Through ups and downs of negotiation under the JTC institutional framework, various scholars attribute diverse views on the successes and failures of the latter institution. Some consider trilateral cooperation under this [institution] as a failure, while others attribute moderate success to this body.[237]

Taking a look at "those who criticize the work of the [JTC], blame the failure of this forum on the countries' differing views on the purpose of the Committee, which hampered the work of the [institution] from the outset."[238] In particular, "while Turkey considered it as a merely consultative body, Syria and Iraq would have liked to see the work of the Commission focus on the development of a water sharing agreement."[239] Moreover, "they further point to deficiencies of effectiveness that are on the one hand due

[230] **Ibid**, p.294.
[231] **Ibid**.
[232] **Ibid**.
[233] The 'Water Institute' would map water resources in the region and draw a report on measures that the respective countries must take for effective management of these resources. See **Ibid**.
[234] **Ibid**.
[235] **Ibid**.
[236] **Ibid**.
[237] **Leb**. (_____), p.3.
[238] **Ibid**.
[239] **Ibid**.

to the fact that on occasional basis the Committee met as mere bilateral body, because depending on the issues on the agenda and/or the prevailing political situation of the time, one or the other party refused to attend; and on the other hand they claim that the absence of Iran, which as an important contributor to the Euphrates-Tigris water system would add another 30-35 km3 to any allocation equation discussed in this forum, undermined the effectiveness of allocation negotiations."[240]

Aside from the above, "those who have a more positive outlook on the work of the Joint Technical Committee see it as a forum, which despite its irregular meetings provided at least for some level of consultation and cooperation among the riparian countries."[241] The cooperation had even started bearing fruit with the MoU signing in 2009. The signing of latter MoU "marked a major change [as] on 6th February 2011, the Prime Ministers of [Syria and Turkey] celebrated the laying of the foundation stone of the Friendship Dam, [though the] construction came to a halt with the Syrian crises, which [supposed to be] started in March of the same year."[242]

3.4. Concluding Remarks

Historically, Tigris-Euphrates Rivers is a well-known river, which is, though composed of four basin States, i.e., Turkey and Iran from upstream countries, and Syria and Iraq from downstream countries, however, only three countries (Turkey, Syria and Iraq) are the major key players in the former basin.

A critical normative examination of Tigris-Euphrates Rivers Basin showed the non-existence of enforceable multilateral legal regime in general and the non-applicability of the 1997 UN Watercourse Convention in particular. Despite the aforementioned facts, however, a number of Bilateral and/or Trilateral basin-wide Treaties were negotiated over Tigris-Euphrates Rivers, which can systematically be categorized under Pre and Post World War II.

The 1913 Constantinople accord of Britain, Russia, Iran and Turkey, the 1920 Paris Treaty of France (Syria) and Britain (Iraq), the 1921 Turkey and France (Syria), the 1926 Convention of Friendship and Good Neighbourliness with protocol and notes of Turkey

[240] **Ibid**.
[241] **Ibid**.
[242] **Ayşegül Kibaroglu**. (2017). Euphrates-Tigris River Basin Water Management as Conflict Prevention, Orient. Vol. 58. No. 1, p.23.

and France (Syria), the 1923 Lausanne Peace Treaty of Turkey and the 'Victorious States', and the 1937 Iraq and Iran Agreement are pre WWII Tigris-Euphrates Rivers Basin Treaties; while the post WWII agreements are: the 1946 'Treaty of Friendship and Neighbourly Relations between Turkey and Iraq', the 1967 1974 and 1990 Syria and Iraq Agreement, the 1966 Turkey and USAID Agreement, the 1975 Iran and Iraq Agreement, the '1987 Economic Protocol' of Turkey and Syria, the 2009 MoUs between Turkey and Iraq, the 2009 MoUs between Turkey and Syria.

It is clear from a quick analysis of the above Pre-Post WWII Agreements that these Treaties are either related to issues of minimum water discharge, flood regulation or general commitment over Tigris-Euphrates River, which, however, do not deal with a basin-wide river management in general, and quantity apportionment and/or quality regulation in particular. Moreover, it is also regrettable to add the non-existence of basin-wide multilateral treaties among not only the four riparian basin countries, but also among the three key major players of the latter basin countries.

Due to uncoordinated developmental pushing factors after WWII, the three key major players of Tigris-Euphrates basin countries engage in a serious discussion over the latter water resource. Affirming Turkey's proposal, negotiation started to take place in 1964 under a kind of *ad-hoc* JTC, but failed to progress in1970s. With a much pressing GAP agendas, though a trilateral permanent JTC was initiated up on the proposal of Iraq in the 1980s, however, after sixteen meetings their talk reached a deadlock. The main reasons leading for the latter deadlock is the uncompromising stand of riparians toward: 'Acquired/Historical Rights' terminology, definition of the river basin, mono/dual basin approach, transboundary watercourse theory, priority of 'equitable & reasonable' use vis-à-vis 'no-harm' rule, mistrust over GAP projects, water quantification formula, dispute settlement mechanism *et al*.

Though a number of criticisms are attributed to the failure of JTC, however, with all its shortcomings, it is indisputable in providing an institutional platform where riparians come together to cooperate, consult and negotiate. And it is with the spirit of the latter that an attempt to revitalize the JTC was in place, though, "it was abruptly halted in 2011 as [not only] overarching bilateral political relations worsened," [243] but also Iraq's and Syria's internal political turmoil coupled with its geopolitics worsened. However, "when it has a

[243] **Ibid**, p 24.

chance to resume, transboundary water cooperation should start from a variety of perspectives and issues, which may again provide opportunities for regional cooperation."[244]

[244] **Ibid**.

CHAPTER FOUR

THE TRANSBOUNDARY WATERCOURSE MANAGEMENT IN THE NILE RIVER BASIN

4.1 Introduction

The Nile basin is one of the few regions of the earth in which extensive archaeological remains of ancient civilisations, renowned polities, kingdoms and empires can still be found.[245] Bearing in mind the latter embodiment of the Nile River valley, it is quite important to look into its origin, geographical nature and related points of the latter river.

The Nile River "is a giant in terms of length, and a dwarf in terms of the volume it carries,"[246] as it is considered "…the longest river in the world that stretches 6,825 km, and 4rth largest river on earth with its catchment area of 3.[3] million [km2],"[247] which "…covers roughly 10% of the African continent."[248]

As the Nile River is made up of two main sources, the White Nile and Blue Nile alongside Atbara, its "…river system originates from two distinct geographical zones, [notably] …East and Central Africa."[249] The White Nile "has its headwater in Lake Victoria in Jinja, Uganda, and has its catchment area in the wider Equatorial Lake Plateau, shared by Burundi, DRC, Kenya, Rwanda, Tanzania and Uganda, [while] The Blue Nile gets birth in Ethiopia and dispatches from Lake Tana."[250] Finally, "The White and the Blue

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[245] **Yacob Arsano**. (2011). Negotiations for a Nile-Cooperative Framework Agreement. Institute for Security Studies. Paper 222, p.1. Available at <https://www.files.ethz.ch/isn/136717/PAPER222.pdf> I.a.d 20/06/2021.

[246] **Jon Harald Sande Lie**. (2010). Supporting the Nile Basin Initiative: A Political Analysis 'beyond the River'. Norwegian Institute of International Affairs, p.3. Available at <https://www.academia.edu/2243972/Supporting_the_Nile_Basin_Initiative_A_Political_Analysis_Beyond_the_River> I.a.d 20/06/2021.

[247] **Mohammed**. (2014), p.9; see also **Arsano**. (2011), p.1.

[248] **Samuel Luzi**. (2008). Double-edged Hydropolitics on the Nile: Linkages Between Domestic Water Policy Making and Transboundary Conflict and Cooperation. (Ph.D Dissertation). Swiss Federal Institute of Technology Zurich. Center for Security Studies, p.61.

[249] **Arthur Okoth-Owiro**. (2004). The Nile Treaty: State Succession and International Treaty Commitments: A Case Study of the Nile Water Treaties. Nairobi. Konrad Adenauer Stiftung and Law and Policy Research Foundation, p.2. Available at <https://www.kas.de/c/document_library/get_file?uuid=03f3b3a7-47bc-a01d-0e28-300afddd3939&groupId=252038> I.a.d 20/06/2021.

[250] **Mohammed**. (2014), p.9.

Nile merge in Khartoum, Sudan and further downstream at Atbara [coming from Ethio-Eritrea border] and joined by the Tekeze River"[251], accordingly flow toward Egypt and "empties into [the] Mediterranean Sea."[252]

With regard to their contribution for the total water flow, "The Blue Nile is the major, and highly variable (75 – 90 [%]), source for the flow of the Nile …[while] the remainder derives from the White Nile."[253]

Table 4.1: Nile River Basin States, annual flow and contribution[254]

No.	Basin Facts	Blue Nile River	Atbara River	White Nile River
4.	Riparian Countries	Ethiopia, Sudan & Egypt	Ethiopia, Eritrea, Sudan & Egypt ☞ (somehow bordered with Eritrea)	Burundi, DRC, Kenya, Rwanda, Tanzania and Uganda, Sudan & Egypt
5.	Mean Annual Flow Volume (86.5 BCM)	47.6 BCM	11.2 BCM	27.7 BCM
		58.8 BCM		
6.	Riparian Contribution to Annual Discharge	☞ Ethiopia- 55% ☞ Sudan – 0% ☞ South Sudan – 0% ☞ Egypt – 0%	☞ Ethiopia-13% ☞ Eritrea (not certain) ☞ Sudan – 0% ☞ South Sudan – 0% ☞ Egypt – 0%	Burundi DRC Kenya Rwanda Tanzania Uganda — 32% ☞ Sudan – 0% ☞ South Sudan – 0% ☞ Egypt – 0%

Taking into account the above stated facts, all of the Nile River systems stem from upstream states of Burundi, DRC, Eretria, Ethiopia, Kenya, Rwanda, Tanzania and Uganda, and flow toward the downstream states of Sudan (and South Sudan) and Egypt.

[251] **Ibid**.

[252] **National Geography**. Nile River. Available at <https://www.nationalgeographic.org/encyclopedia/nile-river/> I.a.d 20/06/2021.

[253] **Joseph W. Dellapenna**. (1997). The Nile as a Legal and Political Structure. In Edward H. P. Brans/ Esther J. de Haan/ André Nollkaemper/ Jan Rinzema (eds). The Scarcity of Water: Emerging Legal and Policy Responses. London. Kluwer Law International, p.4.

[254] Extracted from – the above aforementioned analysis facts and – **Kevin G. Wheeler/ Marc Jeuland/ Jim W. Hall/ Edith Zagona/ Dale Whittington**. (2020) Understanding and managing new risks on the Nile with the Grand Ethiopian Renaissance Dam. Nature Communication. Vol. 11. No. 1, p.2.

Even though there are a number of attempts to involve all of these Nile basin countries, the major players are three basin states – Ethiopia, Egypt and Sudan, for obvious reasons. Consequently, researchers usually strive to consider the latter three basin countries in their respective studies. Though this study follows a similar approach, significant consideration has also been given to the other Nile basin states in a deserving level.

Within the above scope of understanding, this chapter scrutinizes the management of the Nile River Basin from international watercourse law in general and from its normative and institutional aspect in particular.

4.2. Legal Regime of Nile River Basin

4.2.1. Multilateral Conventions

Taking into account the nature of the Nile River Basin, it's crucial to first see the applicability of the UN Watercourse Convention. Though the adoption of the latter convention was assumed to bring lots of hope in creating a conducive environment in managing the transboundary watercourses, however, it "has seen an expressed suspicion, and even rejection, from the Nile riparian [countries]."[255]

Among the upstream countries, Ethiopia was discomfortable with some of its adopted principles, *inter alia* "obligations for the notification of other riparian of planned measures and projects in their territories,"[256] believing it would compromise its interest in utilizing the Nile water resource. Ethiopia complained of the lack of balance between the rights of downstream states and those of upstream states, and retorted that the Working Group that drafted the Watercourse Convention had made 'no serious desire to accommodate' the interests of the upstream states, 'particularly [those of] …a developing country such as Ethiopia.'"[257] Moreover, the other upstream country, "Rwanda pointed out

[255] **Takele Soboka Bulto**. (2008). Between ambivalence and necessity in the Nile Basin: occlusions on the path towards a basin-wide treaty. Mizan Law Review. Vol. 2. No. 2, p.224.

[256] **Salman M.A. Salman**. (2014). Entry into Force of the UN Watercourses Convention – Where are the Nile Basin Countries? International Water Law Blog Project. Available at <https://www.internationalwaterlaw.org/blog/2014/06/02/dr-salman-m-a-salman-entry-into-force-of-the-un-watercourses-convention-where-are-the-nile-basin-countries/> I.a.d 06/11/2021.

[257] **Bulto**. (2008), p.224; see also **Aaron Schwabach**. (1998). The United Nations Convention on the Law of Nonnavigational Uses of International Watercourses, Customary International Law, and the Interests of Developing Upper Riparians. Texas International Law Journal. Vol. 33. No. 2, p.275-276.

that the Watercourse Convention lacked regard for sovereignty which it considered a 'sacrosanct principle' in treaty making processes."[258]

Aside from the above, the only particular country that clearly voiced up against the Convention was Egypt (and Sudan in a lesser extent as well), - by "cling strongly to their historical rights and uses [and with their] believe that the …Convention tilts towards equitable and reasonable utilization at the expense of the obligation not to cause significant harm."[259]

At the voting in the General Assembly to approve the UN Convention, of the Nile Basin
states only 'Kenya and Sudan'[260] voted for it, while only Burundi [alongside Turkey and China] voted against it.[261] Egypt, Ethiopia, Rwanda and Tanzania have abstained in the voting process and have not signed it to date.[262] The [DRC], Eritrea, and Uganda were absent and did not vote, and have not acceded to the Watercourse Convention subsequently.[263]

It is quite obvious from the above analysis that the UN Watercourse Convention is in no position to regulate and guide the Nile River Basin, therefore, significant to explore as to the existence, applicability, extent of application *et al* of basin-wide treaties.

4.2.2. Nile River Basin-wide Treaties

The geopolitics of Africa is so complicated and implicated with the influence of colonial powers during the colonial period, in which the Nile issue is no different. Among the then colonial powers, the impact of the British on the Nile River Basin is undeniable.

The British, after gaining effective control of Egypt in 1882, struggled for a little over two decades to subdue the sparsely peopled Sudan and to race other colonial powers to find and secure control of the headwaters of the Nile.[264] With the very aim of controlling the Nile River from head to toe, the British had entered into some contractual agreement

[258] **Ibid**; see also **Ibid**, p.276-277.
[259] **Salman**. (2014).
[260] Though Kenya and Sudan voted in favour of the Convention, they haven't ratified it yet.
[261] **Dellapenna**. (1997), p.13.
[262] **Bulto**. (2008), p. 224.
[263] **Ibid**.
[264] **Dellapenna**. (1997), p.5.

with other colonial powers and riparian countries. Following their independence, a number of treaties have also been negotiated between and/or among Nile riparians.

In the following section, a focus has been given for these both colonial treaties and post-colonial treaties.

4.2.2.1. Nile River Basin-Wide Treaties – During Colonization

During the colonial period, the British's first move was to secure its Nile interest against its colonial counterparts through the following six agreements, i.e., the 1891, 1901, 1906 (x2), 1919 and 1925 treaties. Before embarking to discuss on these colonial treaties, it has to born in mind of the fact that "Ethiopia is/was the only independent country [alongside Liberia] that was never colonized"[265], therefore, was at liberty to object to every colonial Nile treaty believed to be unjust, unfair, and undermine its right over the Nile River.

The 1891 "protocol for the demarcation of their respective spheres of influence in Eastern Africa"[266] was signed between Britain (on behalf of Egypt and Sudan) and Italy (on behalf of Eretria). Though "the Protocol was not on the water of the Nile per se,"[267] incidentally it incorporated Article III, which read as:

> *"The Government of Italy undertakes not to construct on the Atbara any irrigation or other works which might sensibly modify its flow into the Nile."*[268]

This treaty is "senseless and irrelevant [for] the fact that [not only] the Nile River did not flow in the territory colonized by Italy, which was the basis for its claim to its water [but also] [a]t the time of the treaty conclusion, Italy had not established itself in Ethiopia, [therefore], …did not have the right to engage in negotiation over the headwater found in the upper riparian area, in particular Ethiopia."[269]

In a similar approach, the above same countries (Anglo-Italy) entered into another agreement again in 1901, and agreed:

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[265] See in general **K. V**. **RAM** (1997). The Survival of Ethiopian Independence. Journal of the Historical Society of Nigeria. Vol. 8. No. 4, page 131–141.
[266] **Okoth-Owiro**. (2004), p.6.
[267] **Geoffrey Michael Mtua**. (2017). Bilateral Treaties on the Nile River and their Impacts on International Relations. (Master Dissertation). Tumaini University Makumira. Faculty of Law, p.31.
[268] Excepted from **Okoth-Owiro**. (2004), p.2.
[269] **Mtua**. (2017), p.31.

> *"The Government of [Eritrea], while recognizing all its rights on the waters of the Gash and having regard to the requirements of the Colony, sees no difficulty in declaring that, in so far as the regime of the waters of that river are concerned, it will regulate its conduct in accordance with the principles of good neighbourship."*[270]

Evidence is scarce, however, on whether or not the parties to the agreement were bound by this treaty.[271]

Again, the above same counties (Anglo-Italy) "had signed an agreement in 1919 over Lake Tana, of Ethiopia, which read in part as follows:

> *'In view of the predominating interests of Great Britain in respect of the control of the waters of Lake Tana, Italy offers Great Britain her support, in order that she may obtain from Ethiopia the concession to carry out works of barrage in the lake itself.'"*[272]

According to the 1925 'exchange of Notes' between Britain and Italy, the two countries have agreed to modify the aforementioned 1919 agreement in accordance with the following essence:

> *"...Italy recognizes the prior hydraulic rights of Egypt and the Sudan ...not to construct on the head waters of the Blue Nile and the White Nile ...and their tributaries and affluent's any work which might sensibly modify their flow into the main river."*[273]

It is important to bear in mind that, "[l]ike the previous treaty Ethiopia voiced its objection against this treat[ies]."[274]

Britain and Belgium (representing Congo) signed an agreement in May 1906 "with an aim of re-defining their respective spheres of influence Great Britain in Eastern and Central Africa,"[275] and Article III of their treaty in particular states:

> *"The Government of the independent state of the Congo undertakes not to construct, or allow to be constructed, any work over or near the Semliki or Isango*

[270] Excerpted from **Ibid**, p.32.
[271] **Ibid**.
[272] Excerpted from **Ibid**, p.36.
[273] Excerpted from **Ibid**.
[274] **Ibid**.
[275] **Ibid**, p.35.

> *[R]iver which would diminish the volume of water entering Lake Albert except in agreement with the Sudanese Government."*[276]

The treaty considered to be the last one made among the colonial powers is the '1906 Tripartite Treaty' signed (in December) among Britain, France and Italy. The latter treaty under its Article IV (a) states:

> *"In order to preserve the integrity of Ethiopia and provide further that the parties would safeguard the interests of the United Kingdom and Egypt in the Nile basin, especially as regards the regulation of the water of that river and its tributaries without prejudice to Italian interests."*[277]

It is difficult to imagine how they could claim to protect Ethiopia's interest, without inviting Ethiopia to take part in the agreement process, or without consulting Ethiopia.[278] Consequently, the Ethiopian government immediately voiced its vehement rejection of the agreement and indicated that no country had the right to stop it using its water.[279]

Aside from the above, Britain (representing Sudan) entered into an agreement in a similar approach and skewed intention with Ethiopia in 1902 and later on with Egypt, up getting its independence, in 1929 and 1952.

Though the ultimate objective of the '1902 Anglo-Ethiopia agreement'[280] was to demarcate its 1600 km long border between Sudan and Ethiopia,[281] it incidentally incorporates a particular provision related to the Nile River, i.e., Article III.

There was a disagreement on the meaning of the word "arrest" in the Amharic (Ethiopian Language) and the English versions.[282] The Article III of the English version states:

> *"His Majesty the Emperor Menelik II, King of Kings of Ethiopia, engages himself towards the Government of His Britannic Majesty not to construct, or allow to be constructed, any work across the Blue Nile, Lake Tsana, or the Sobat which would*

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[276] Excerpted from **Ibid**.

[277] Excerpted from **Ibid**, p.35-36; see also **Okoth-Owiro**. (2004), p.7.

[278] **Ibid**, p.36; see also **Lencho**. (2014), p.30.

[279] **Ibid**.

[280] The Frontiers between the Soudan, Ethiopia, and Eritrea (Eth.-U.K.). (May 15, 1902). U.K.T.S. 16 (1902). From now on the 'Anglo-Ethiopia agreement (1902)'. Available at <https://www.marefa.org/images/b/bd/Treaty_of_Addis_Ababa_1902.pdf> I.a.d 22/07/2021.

[281] See in general **Edward Ullendorff**. (1967). The Anglo-Ethiopian Treaty of 1902. Bulletin of the School of Oriental and African Studies. University of London. Vol. 30. No. 3, p.641-654; see also **Wondwosen Teshome**. (2009). Colonial Boundaries of Africa: the Case of Ethiopia's Boundary with Sudan. Ege Academic Review. Vol. 9. No. 1, p.337-367.

[282] **Mtua**. (2017), p.34.

> ***arrest*** *the flow of their waters into the Nile except in agreement with His Britannic Majesty's Government and the Government of the Soudan."*[283]

The Article III of the Amharic version (as translated into English by distinguished expert in the field) read as:

> "*His Majesty Menelik II, King of Kings, Ethiopia, has agreed into this treaty not to construct, nor authorize anyone to construct a work that blocks up/stops up from river bank to river bank the water descending from the Black Abbay, from the Tana Sea, and from the Sobat River towards the White Abbay without previously agreeing with the English Government."*[284]

Great Britain assumed that with the exception of domestic uses and local irrigational rights, the agreement had definitively deprived Ethiopia of the right to use the resource in any way whatsoever, while Ethiopia's reading submitted that only complete arrest of the flows of the river had been prohibited under the treaty arrangement.[285] Due to this reason, Ethiopia back[ed] down from ratifying the agreement, consequently repudiated it.[286]

The other colonial agreement is the 1929 one concluded through "[t]he Exchange of Notes between Great Britain (acting for Sudan and her East African dependencies) and Egypt."[287] This agreement is considered a classic case of establishing or historic rights [and] …was designed to recognize Egypt's acquired rights over the Nile and to avoid appreciable harm to Egypt's agricultural sector.[288]

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[283] **Anglo-Ethiopia agreement**. (1902), Article III.

[284] Excerpted from **Tadesse Kassa Woldetsadik**. (2013). International Watercourses Law in the Nile River Basin: Three States at a Crossroads. London. Routledge, p.57.

[285] **Tadesse Kassa Woldetsadik**. (2015). Anglo-Ethiopian Treaty on the Nile and the Tana Dam Concessions: A Script in Legal History of Ethiopia's Diplomatic Confront (1900-1956). Mizan Law Review. Vol 8. No.2, p.278.

[286] **Ibid**; see also **Mtua**. (2017), p.34; see also **Richard K. Paisley/ Taylor W. Henshaw**. (2013). Transboundary governance of the Nile River Basin: Past, present and future. Environmental Development. Volume 7, p.63.

[287] Exchange of Notes in regard to the use of the waters of the River Nile for irrigation purposes (Her Majesty's Government in the United Kingdom and the Egyptian Government) (exchanged on 7 May 1929). From now on 'Anglo-Egypt Agreement (1929)'. Available at <http://gis.nacse.org/tfdd/tfdddocs/92ENG.pdf> I.a.d. 27/07/2021; see also **Okoth-Owiro**. (2004), p.7.

[288] **Erin Johnston**. (2009). Factors Influencing a Basin-Wide Agreement Governing the Nile River. (Master Dissertation). Simon Fraser University. School for International Studies, p.34.

The purpose of the 1929 Nile Waters agreement was to guarantee and facilitate an increase in the volume of water reaching Egypt[289], and thus, the two countries had agreed:

> *"…no irrigation or power works, or measures are to be constructed or taken on the River Nile or its branches, or on the lakes from which it flows in the Sudan or in countries under British administration, which would, in such a manner as to entail prejudice to the interests of Egypt, either reduce the quantity of water arriving in Egypt or modify the date of its arrival, or lower its level."*[290]

Accordingly, "Egypt [not only] kept the right to monitor the Nile flow in the upstream countries, [but also] …assumed – the right to undertake Nile river related projects without the consent of upper riparian states, and – …the right to veto any construction projects"[291] taking place in the upper riparian basin. Moreover, while "…Egypt obtained 92.3% of the utilizable flow of the Nile (48 of 52 BCM) and the Sudan 7.7%,"[292] however, those upstream countries right over their shared Nile water resource were disregarded. For the very latter reason, "East African states in general and Ethiopia in particular did not recognize the validity of the agreement, nor did they ever accept Egypt's claim to acquired or historic rights."[293]

The last colonial-era treaty regulation of the Nile River System was the 1952 Agreement concluded by Exchange of Notes between Egypt and the United Kingdom (acting for Uganda) concerning the construction of the Owen Falls Dam in Uganda, then under British colonial administration.[294] This agreement was meant for the "regulation [and control] of the Nile River flow, and the production of hydroelectric power for Uganda."[295] Accordingly, the two countries have agreed that:

> *"— this [dam] action does not entail any prejudice to the interests of Egypt in accordance with the Nile Waters Agreement of 1929 and does not adversely affect*

[289] **Okoth-Owiro**. (2004), p.8.
[290] Excerpted from **Ibid**.
[291] **Mtua**. (2017), p.38.
[292] **John Waterbury**. (1997). Between Unilateralism and Comprehensive Accords: Modest Steps toward Cooperation in International River Basins. International Journal of Water Resources Development. Vol. 13. No. 3, p.284.
[293] **Mtua**. (2017), p.38.
[294] **Okoth-Owiro**. (2004), p.9.
[295] **Ibid**.

the discharge of water to be passed through the dam in accordance with the arrangements to be agreed between the two Governments —. "[296]

The legality and viability of the colonial legal regime in general and the 1929 Anglo-Egyptian Agreement in particular, coupled with its fate after the end of colonial period, is so controversial.

While "Egypt insists and continues claiming the binding effect of the 1929 agreement on Kenya, Tanzania, Sudan and Uganda having the theory of 'Universal State Succession'[297], [h]owever, the [upstream] States invoke the 'clean state'[298] principle under the 'VCLT of 1969'[299] and the 'Nyerere Doctrine' of State Succession'[300], and they decisively rejected all Nile water agreements to which they had not been party and any other agreements or understandings that were prejudicial to their sovereign rights and national interests."[301] The upper riparians also vividly "declared that they would not sanction any Nile waters agreements that Britain had concluded when their countries were under colonial rule."[302]

Even Sudan did not hesitate to challenge the lopsided 22:1 allocation ratio that the 1929 agreement ordained and rejected it in 1958, only two years after independence, by claiming for a revision.[303]

Surprisingly, up on the end of colonial period, "Great Britain had adopted the attitude that these treaties should be renegotiated,"[304] and stated the following:

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[296] Excerpted from **Ibid**.

[297] 'Universal State Succession' was inspired by the Roman law conception of succession to the property of a deceased person – regards the sovereign personality of the state as 'permanent and immortal and thus transmissible to the successor', and state territory as property sanctioning, thus, the compulsory transmission of all the rights and obligations of the predecessor state to the successor. See **Mohammed**. (2014), p.19.

[298] 'clean state' principle is perceived from the 1969 Vienna Convention on the Law of Treaties (VCLT) under its Article 16 which stipulate that a state 'is not bound to maintain in force, or to become a party to, any treaty by reason only of the fact that at the date of the succession of states the Treaty was in force in respect of the territory to which the succession of state relates'. See **Ibid**.

[299] Vienna Convention on the Law of Treaties (adopted at Vienna on 23 May 1969 and entered into force on 27 Jan. 1980). 1155 UNTS 331. From now on VCLT (1969). Available at <https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf> I.a.d 22/07/2021.

[300] The 'doctrine of Nyerere' essentially endorsed the classical clean slate (tabula rasa) theory and rejects 'any categorization of international obligations which a successor state might have to accept or reject only because of the nature or type of the obligation', without, however, disregarding customary international law. See **Mohammed**. (2014), p.19.

[301] See **Ibid**; see also **Arsano**. (2011), p.4.

[302] See **Ibid**.

[303] See **Ibid**; see also **Dereje Zeleke Mekonnen**. (2010). The Nile Basin Cooperative Framework Agreement Negotiations and the Adoption of a 'Water Security' Paradigm: Flight into Obscurity or a Logical Cul-de-sac? The European Journal of International Law. Vol. 21. No. 2, p.434.

"The territories of British East Africa will need for their development more water than they at present use and will wish their claims for more water to be recognized by other states concerned. Moreover, they will find it difficult to press ahead with their own development until they know what new works downstream states will require on the headwaters within British East African Territory. For this reason the United Kingdom Government would welcome an early settlement of the whole Nile waters question."[305]

4.2.2.2. Nile River Basin-wide Treaties – Post Colonization

Coming to the post-colonial period, there are five (5) basin-wide Nile treaties, notably the 1959, 1991, 1993, 2010 and 2015. It is very crucial to bear in mind that these treaties were so influenced by "the colonial era mentality [which] is still refusing to give way to the post-independence situations."[306]

The first immediate post-colonial treaty was the 1959 treaty signed between Egypt and Sudan for the 'Full Utilization of Nile waters'[307]. As Sudan got its independence in 1956, the latter "was in a more favourable bargaining position during negotiation of the 1959 Agreement, and [consequently] demanded the allocation be re-adjusted."[308] After "[t]he controversy on the quantity of average annual Nile flow was settled and agreed to be about 84 billion cubic meters measured at Aswan High Dam, in Egypt,"[309] the two countries had agreed on the following main points:

"a) The agreement allowed the entire average annual flow of the Nile to be shared among the Sudan and Egypt at 18.5 and 55.5 billion cubic meters, respectively.

b) Annual water loss due to evaporation and other factors were agreed to be about 10 billion cubic meters. This quantity would be deducted from the Nile yield before share was assigned to Egypt and Sudan.

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[304] **Okoth-Owiro**. (2004), p.19.

[305] Excerpted from **Ibid**, p.13.

[306] **Bulto**. (2008), p.208.

[307] Agreement for the Full Utilization of the Nile Waters. (Egypt-Sudan) (Signed at Cairo on Nov. 8 1959). And Protocol Concerning the Establishment of Permanent Joint Technical Committee. (Egypt-Sudan) (Signed at Cairo on Jan. 17 1960). From now on 'Egypt-Sudan Agreement (1959)'. Available on 'International Water Law Blog' at <https://www.internationalwaterlaw.org/documents/regionaldocs/UAR_Sudan1959_and_Protocol1960.pdf> I.a.d 22/07/2021.

[308] **Johnston**. (2009), p.35.

[309] **Mtua**. (2017), p.41.

c) …If claim would come from the remaining riparian countries over the Nile water resource, both the Sudan and Egypt shall, together, handle the claims.

d) If the claim prevails and the Nile water has to be shared with …[upper] riparian state, that allocated amount would be deducted from the Sudan's and Egypt's and allocations/shares in equal parts of Nile volume measured at Aswan."[310]

This 1959 treaty has proved, like its colonial era predecessors, to be nothing more than a continuation of the colonial policies.[311] Because, the treaty is "only anomalous for two downstream states [due to the fact that] ...[l]ike its colonial predecessors, it was aimed to protect the [the latter] interests, [and] …[l]ike the colonial era treaties, it did not give any consideration to the interests of the [upper] riparians that are equally entitled to the utilisation of the waters of the Nile."[312]

The upper riparian states have rejected the legal foundation of the agreement and its binding force under the auspices of the principle that a treaty binds the parties and only the parties for the very fact that bilateral treaties, which is subject to the *pacta tertiis nec nocent nec prosunt* rule of treaty law, neither impose any obligations nor confer any rights on third states.[313]

According to the foregoing 1959 Agreement "[r]ather than presenting a united front to Ethiopia [and other upper riparians] as required by article 5, …Egypt and Sudan have undertook separate negotiations with Ethiopia, [accordingly, a] new treaty regime for the Nile River has begun to emerge out of these negotiations, although its final contours remain unclear at this time."[314] These treaty regimes are the 1991 Ethio-Sudan Agreement and the 1993 Ethio-Egypt Agreement.

The 1991 Ethio-Sudan 'Accord on Peace and Friendship' was signed "[f]ollowing the change of government in Ethiopia in 1991, the two countries agreed to explore cooperation over the Blue Nile and Atbara River, [and] …declared their belief in the principle of 'equitable entitlements to the use of the Nile waters without causing appreciable harm to one another'."[315]

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[310] Excerpted from **Ibid**.
[311] **Bulto**. (2008), p.209.
[312] **Ibid**.
[313] **Mohammed**. (2014), p.19-20; see also **VCLT (1969)**, Article 34 and 35.
[314] **Dellapenna**. (1997), p.11.
[315] **Mtua**. (2017), p.79; see also **Lencho**. (2014), p.53.

It's been voiced "Ethio-Sudanese cooperation in the management of their shared basins is compelling," and "rather than reaching an agreement with Egypt in 1959, 'Sudan's interests would have probably been served by helping itself to the water or reaching some accommodation with Ethiopia'."[316]

After a while Ethiopia and Egypt had also signed 'Framework for general Cooperation' in July 1993. This treaty, "covering a wide range of issues of mutual cooperation, included a clause by which each nation agreed not to undertake any activity relating to the Nile that would harm the other, and to consult and cooperate on mutually beneficial projects on the basis of the principles of international law."[317] The Framework was only indicative of the base of future negotiations and failed to provide detailed rules.[318]

Aside from the above, the Nile riparians had made a revolutionary attempt in crafting 'the Nile Basin Cooperative Framework Agreement (CFA)'. The latter effort was applauded by most not only of its inclusiveness and water allocation strategy, but also of its compatibility with the 1997 UN Watercourse Convention, and aim of establishing basin-wide 'Nile Basin Commission'[319] in order to actualize the former.

However, "[d]uring the decade long negotiations, "the fate of the [colonial treaties and related ones, notably the] 1902, 1929, and 1959 Agreements was the 'subject of controversy'[320]."[321] The controversy was so intensified when the non-legal, but politically motivated, 'water security' principle was introduced and framed under Article 3 (15) in general and] Article 14 in particular. Let alone "the legality in-question of the 'water security' principle"[322] per se, the down riparians request for reservation, "by calling for the replacement of sub-article (b) of Article 14 that is stated in the draft as *'not to significantly*

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[316] **Ibid**, p.80; see also **Elliott School of International Affairs**. (2013). Nile Basin Relations: Egypt, Sudan and Ethiopia. Available at <http://www.waterpolitics.com/2013/03/03/nile-basin-relations-egypt-sudan-and-ethiopia/> I.a.d 23/07/2021.

[317] **Dellapenna**. (1997), p.19-20.

[318] **Mtua**. (2017), p.42.

[319] Agreement on the Nile River Basin Cooperative Framework. (NBI member states). (opened for signature May 2010). From now on 'CFA (2010)'. Available at <https://nilebasin.org/images/docs/CFA%20-%20English%20%20FrenchVersion.pdf> I.a.d 22/07/2021.

[320] The controversy was, while *"the upstream States believed that the purpose of the Cooperative Framework project was to produce an inclusive agreement that would replace and supersede the previous agreements,* [however], *the lower riparian States – Egypt and Sudan – insisted that the new agreement must explicitly recognize the earlier treaties, referred to as 'existing agreements,' and would continue to be binding against all riparian States.*" See **Mahemud Eshtu Tekuya**. (2019). Governing the Nile Under Climatic Uncertainty: The Need for a Climate-Proof Basin- Wide Treaty. Natural Resources Journal. Vol. 59. No. 2, p.332.

[321] **Ibid**.

[322] See for detail **Mohammed**. (2014), p.37-46.

affect the water security of any other Nile Basin State' thereof by a new sub-article (b) which read as *'not to adversely affect the water security and current uses and rights of any other Nile Basin State,'"*[323] which was totally unacceptable by upper riparians, creating a decade-long negotiation back to square one.

Despite the aforementioned issues, the CFA were opened "for signature on May 14, 2010, [while attaching] …the unresolved Article 14(b) …to th[e] agreement and [providing] it will be resolved by the Nile River Basin Commission within six months of its establishment."[324] By its terms, the CFA requires six ratifications to enter into force.[325] Even though 6 countries – *Ethiopia, Rwanda, Tanzania and Uganda, Kenya and Burundi* – signed the Agreement, but until today only – four countries[326] – have ratified it.

Therefore, though the CFA neither binds the lower riparian States nor reallocates the shared-waters of the Nile, it had led a strong foundation in changing a decade long narration over Nile River and boosts the action of counter Hydro-hegemonic strategy of the upper riparian states.[327]

Up on the deadlock over the CFA, "[a] major shifting strategy, which has shaken Egypt's hydro-hegemony, has been undertaken by Ethiopia in starting construction of 'Grand Ethiopian Renaissance Dam (GERD)'[328] on the Blue Nile near [the] Ethio-Sudan border in April 2011."[329] This is due to among "25 dams and major water control infrastructures on the Nile River, GERD is the first major dam to be built on the main Blue Nile River of Ethiopia."[330] Accordingly, "[t]he GERD is portrayed by Egypt as threat for water security, while Sudan appears comfortable with immediate access to both water and power, [and] …tacitly approved Ethiopia's desire to build the dam anticipating benefits from a dam close to its border that could settle out sediment and control flooding."[331] To

[323] **Ibid**, p.11; see also **Lie**. (2010), p.12.
[324] **CFA. (2010)**.
[325] **Ibid**.
[326] Ethiopia, Tanzania, Rwanda & Uganda have ratified the CFA.
[327] **Yusuf Ali Mohammed**. (2020). The Counter Hydro-Hegemonic Strategy and GERD – Under Threat, Addis Insight. Available at <https://www.addisinsight.net/the-counter-hydro-hegemonic-strategy-and-gerd-under-threat/> I.a.d 23/07/2021.
[328] GERD Africa's largest Electric power hub on one of the Nile River's main tributaries – the Blue Nile in Ethiopia – designed to generate (about 6000 MW at early stage, but later on downgraded to) 5,150 MW of electricity from thirteen turbines.
[329] **Mohammed**. (2020).
[330] **Wossenu Abtew/ Shimelis Behailu Dessu. (2019).** The Grand Ethiopian Renaissance Dam on the Blue Nile**.** Switzerland. Springer International Publishing AG (part of Springer Nature)**, p.64.**
[331] **Abtew/Dessu. (2019), p.131.**

tackle the aforementioned issues and "[o]ther concerns include rate of initial dam filling, dam operations, and potential dam failure, [the three countries – Ethiopia, Sudan and Egypt – came up with] …'four major agreements'[332] to address these concerns."[333].

For the purpose of this study, focus has been given to the major one of 2015 Tripartite 'Declaration of Principles'[334] (DoP) on GERD. The latter declaration "codifies some fundamental principles of international water law – including the principle of equitable and reasonable utilization, and the "no significant harm" rule – as the governing rubric of the Blue Nile."[335] Accordingly, it is assumed to have "expressly considers Ethiopia's interests and recognizes the significance of the Nile River for the sustainable development of its people."[336]

However, the declaration is not as inclusive as the CFA; neither established institutional arrangement "nor does it provide any guidance for the equitable allocation of 'the shared water' during the filling and operation of the GERD"[337]. Instead, the DoPs merely recommends that the three States – Ethiopia, Egypt and Sudan – agree on rules concerning the first filling and operation of the GERD based on the recommendation of an [IPoE].[338]

With the aim of conducting thorough studies on GERD's first filling and operation, the three countries had attempted to establish not only IPoE, but also some other technical experts, *inter alia*, "'BRLi Group' and 'Artelia' firms through 'Technical National Committee' (TNC), and 'National Independent Scientific Research Group' (NISRG),"[339] and conducted a bunch of meetings on various levels. However, the three countries were

[332] These four agreements are: formation of International Panel of Experts, signing of Declaration of Principles by heads of states, meeting of foreign and irrigation and water ministers on implementation of IPoE [The International Panel of Experts] recommendations, approval of water resource and hydropower simulation study by international consultants. See **Ibid.**

[333] See for detail **Ibid**, p.134-141.

[334] Agreement on Declaration of Principles on the Grand Ethiopian Renaissance Dam Project (Egypt, Ethiopia and Sudan) (Signed at Cairo on 23 Mar. 2015). From now on 'DoP (2015)'. Available on 'International water law project blog' at <https://www.internationalwaterlaw.org/documents/regionaldocs/Final_Nile_Agreement_23_March_2015.pdf> I.a.d 23/07/2021.

[335] **Mahemud Eshtu Tekuya**. (2020). Sink or Swim: Alternatives for Unlocking the Grand Ethiopian Renaissance Dam Dispute. Columbia Journal of Transnational Law. Vol. 59. No. 1, p.79.

[336] **Ibid**.

[337] **Tekuya**. (2019), p.342.

[338] **Ibid**.

[339] See for detail **Tekuya**. (2020), p.83-86.

unable to settle their differences, mainly on 'Drought Mitigation Strategy'[340], and 'Dispute Resolution Mechanism',[341] thus, reached a deadlock.

Having the above as an opportunity and with the aim of internationalizing the GERD issue at the same time, "Egypt made a number of efforts in pushing the international communities"[342] like the Arab League, the USA, the UN Security Council *et al*, and international financial institution like World Bank *et al*, to engage in the GERD matter, despite Persistent objection of Ethiopia on all those cases, "with the exception of late US intervention" [343] under 'Donald Trump'[344] administration, which ended up nothing but a failed one.

Now "the AU [African Union] is seized of [the GERD] matter,"[345] and the latter is trying to settle the three countries' differences through roundtable dialogue, but with no success so far.

4.3. Administrative Institutional Arrangement of the Nile River Basin

Though Nile legal regimes had come into picture during the colonial era of the early 20th century, the basin institutional arrangement started in the mid-20th century. These institutions are: Permanent Joint Technical Committee (JTC), 'HydroMet', 'Undugu', and 'TECCONILE' coupled with the late 'Nile Basin Initiative'. The following section, accordingly, devotes itself to discuss the aforementioned Nile River Basin institutions.

4.3.1. Egypt-Sudan Permanent Joint Technical Committee on the Nile

During the 1959 Egypt-Sudan agreement, with the aim of "insur[ing] technical co-operation between the two Republics …the [latter] agree[d] to constitute a Permanent Joint

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340 See for detail **Ibid**, p.89-93.

341 See for detail **Ibid**, p.93-95.

342 See for detail **Ibid**, p.88-89.

343 See in general **Ibid**, p.89.

344 **Addis Getachew/ Felix Tih**. (2021). Ethiopia reacts to Trump's 'reckless' Nile Dam remarks. Anadolu Agency. Available at <https://www.aa.com.tr/en/africa/ethiopia-reacts-to-trumps-reckless-nile-dam-remarks/2018086> I.a.d 23/07/2021.

345 **African Union**. (2021). Communiqué of the Extraordinary African Union (AU) Bureau of the Assembly of Heads of State and Government video-teleconference Meeting on the GERD. Available at <https://au.int/en/pressreleases/20200626/hosg-communique-meetinng-grand-ethiopian-renaissance-dam-gerd> I.a.d 23/07/2021.

Technical Committee composed of an equal number of members from both Republics."[346] According to Article V (1), this technical committee was responsible, *inter alia*:

> *(a) To draw the main lines of schemes aiming at the increase of the River supply and to supervise and direct the research work and investigations and collection of data necessary for the preparation of projects … .*
>
> *(b) To supervise the execution of the approved projects.*
>
> *(e) In view of the possibility of the occurrence of a series of years of low river supply …that will not enable both Republics to draw their normal quota in any year, the Committee shall put up the necessary arrangements …in a manner that will not cause any damage to either party…*

For "any question connected with Nile water needs negotiations with the governments of any [upper] riparian territories outside [the two country, the committee is entrusted with not only to] assume the responsibility to contact the concerned authorities in those territories, in order to lay down all the technical details in connection with the execution as well as the Working Arrangements and maintenance of the works in question, [but also empowered to] …supervise the execution of the technical provisions of such agreements …"[347]

This cooperative scheme has been, and is, effective only between the two countries, [so that] does not symbolise an all-inclusive scheme embracing all riparian states.[348] Moreover, as discussed in the previous sections, its viability and effectiveness is being questioned as the two countries didn't stick with this arrangement and moved on separate ways to settle their respective differences with Ethiopia.

4.3.2. HydroMet

Following a dramatic rise in Lake Victoria in the early 1960s that led to severe flooding and damage along the shores of Lake Victoria, the World Meteorological Organization (WMO), in collaboration with the United Nations Development Program

[346] **Egypt-Sudan Agreement (1959)**, Article IV (1).
[347] **Ibid**, Article V (1).
[348] **Mohammed Abdo**. (2004). The Nile Question: The Accords on the Water of the Nile and Their Implications On. Perceptions-Journal of International Affairs. Vol. IX. No. 2, p.51.

(UNDP) and …Egypt, established …'HydroMet' (Hydrological Metrology) [in 1967] …[which was]the first collaborative effort between [most] of the riparians.[349]

Active member states of this initiative were "all of the riparians except Ethiopia and DRC (Zaire at the time)"[350] were only participating as observers.

The very objectives of HydroMet were "to collect and analyze hydrological and meteorological data in the great lake catchments area, with a specific purpose of regulating the water level of Lake Victoria as well as the water flow of the Nile."[351]

Though the initiative is appreciated for "collect[ing] hydro-meteorological data[s] over a 25-year period, …[conducting various train[ing] [programs, and] …allow[ing] member countries to discuss various technical issues related to the development of the Nile"[352], however, "it is criticized for not bringing about any substantive impact on harmonizing the upstream-downstream polarization of interests,"[353] and for not translating "its projects… into operation."[354]

4.3.2. Undugu

With the purpose of run[ing] in parallel with HydroMet, the so called "'UNDUGO'[355] was formed at Egypt's behest**."**[356] This institution "included all Nile riparians except Kenya and Ethiopia, which participated as observers."[357]

Undugu was established "…to provide a forum for information [and] …expertise sharing …to foster economic, social, cultural, and technical ties."[358] Moreover, the initiative was "established ...with the intent of taking the focus away from purely water-

[349] **Johnston**. (2009), p.38.
[350] **Ibid**.
[351] **Mtua**. (2017), p.66; see also **Kibrome Mekonnen**. (2011). Water use and the quest for sustainable development of the Eastern Nile Basin: An International law analysis. (Master dissertation). Addis Ababa University. Faculty of Law, p.45.
[352] **Johnston**. (2009), p.37-38.
[353] **Mtua**. (2017), p.66.
[354] **Yacob Arsano**. (2007). Ethiopia and the Nile: Dilemmas of National and Regional Hydro politics. (PhD Dissertation). Swiss Federal Institute of Technology. Center for Security Studies, p.214.
[355] 'UNDUGO' means 'brotherhood' in Swahili. See **Paisley**/**Henshaw**. (2013), p.64.
[356] **Ibid**.
[357] **Ibid**.
[358] **Ibid**.

related issues and instead emphasizing potential collaborative initiatives in transportation, tourism, public health, inter riparian investment and regional security."[359]

Despite the above fact, however, "Undugu was deemed a failure due to Ethiopia's reluctance to participant, based upon a mistrust of Egypt,"[360] due to "an exercise in hegemonic influence."[361]

4.3.3. TECCONILE

Up on the completion of HydroMet, "…'Egypt, the Sudan, Rwanda, Tanzania, Uganda and Democratic Republic of Congo'[362] created a new organization called Technical Cooperation Committee for the Promotion of Development and Environmental Protection of the Nile Basin (TECCONILE) with [the] signing of an agreement at Kampala, Uganda in 1992, with funding support from the Canadian International Development Agency (CIDA)."[363]

The TECCONILE initiative aimed to reach a comprehensive legal and institutional framework consisting of the short and long term goals.[364] In the short term, it was aimed at achieving development of infrastructure, capacity building and techniques for management of water resources and formulation of national master plans and their integration into a Nile Basin Action Plan.[365] The long-term objectives aimed at the development of the Nile Basin in an integrated and sustainable manner through basin-wide cooperation and the determination of equitable sharing of its waters.[366]

Despite the commitments made, not all the planned projects were implemented due to lack of funding, delayed funding or insufficient funding from what was promised by the donors, [with the exception of] …its modest contribution towards the Nile Basin Action Plan activities.[367]

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[359] **Johnston**. (2009), p.38.
[360] **Ibid**, p.39.
[361] **Paisley**/**Henshaw**. (2013), p.64; see also **Jutta Brunnée/ Stephen J. Toope**. (2002) The Changing Nile Basin Regime: Does Law Matter? Harvard International Law Journal. Vol. 43. No. 1, p.133.
[362] The remaining four riparian states of Burundi, Eritrea, Ethiopia and Kenya participated as observers.
[363] **Mtua**. (2017), p.67.
[364] **Ibid**.
[365] **Ibid**.
[366] **Ibid**.
[367] **Ibid**, p.68.

Apart from the above, the initiatives had been widely criticised "…because its framework did not address the fundamental issue of equitable water apportionment, [and] Egypt was again – perceived to dominate"[368] and – "characterized [of] maintain[ing] the 1959 allocation rights."[369] For this reason, TECCONILE was replaced by [the] Nile Basin Initiative in 1999 and since then multilateral cooperation has changed dramatically.[370]

4.3.4. Nile Basin Initiative

In 1999 Nile Basin riparians established, comparatively, the first ever inclusive basin-wide organ named 'Nile Basin Initiative' (NBI), with the support of "the World Bank, the CIDA and the UNDP."[371] The NBI is the first real basin-wide cooperative effort within the Nile Basin, [comprising] [a]ll of the riparians are members, with the exception of Eritrea which has observer status.[372]

The NBI also has two tracks: The technical tracks and the legal tracks.[373] The technical aspect of the NBI deals with environmental, irrigation, watershed, flooding and hydropower projects under the 'Shared Vision Programs' (SVPs) and 'Subsidiary Action programs' (SAPs). These "Strategic Action Projects are divided into two core programs: the Nile Equatorial Lakes Region (NEL-SAP), comprised of the six Equatorial Lakes countries plus Egypt and Sudan; and the Eastern Nile [Region] (EN-SAP), consisting of Egypt, Ethiopia and Sudan"[374] Though this approach is considered of "promoting sub-regional projects …to reduce the transaction costs and …the complexity of negotiations between [eleven] separate riparian states, [however, it] …goes against the approach of viewing the entire basin as a single unit, as is proposed within the Integrated Water Resource Management (IWRM)."[375]

The legal track deals with the legal and institutional aspects of the NBI.[376] Obviously the NBI was established as "transitional arrangement until a permanent legal

[368] **Paisley/Henshaw**. (2013), p.65.
[369] **Johnston**. (2009), p.39.
[370] **Mtua**. (2017), p.68.
[371] **Johnston**. (2009), p.40.
[372] **Ibid**.
[373] **Mtua**. (2017), p.69.
[374] **Johnston**. (2009), p.41-42; see also **Nile Basin Initiative**. (1999). Available at <https://nilebasin.org/index.php/media-center/maps/66-major-subbasins> I.a.d 23/07/2021.
[375] **Ibid**, p.42.
[376] **Mtua**. (2017), p.69.

and institutional framework is in place,"[377] CFA was designed for "the formation of [the] permanent Nile Basin Commission (NBC) when the existing NBI lifetime ends. …within three years' time, [h]owever, …[members] of the NBI have failed to agree on a formalized legal agreement to form such a body,"[378] and, accordingly, left off with no breakthrough of not actualizing it, up until this study is conducted.

The NBI "comprises a Council of Ministers of Water Affairs of the Nile Basin (Nile-COM), a Technical Advisory Committee (Nile-TAC) and a Secretariat (Nile-SEC)."[379] Nile-COM is the "highest decision-making organ [which is] …made up of water affairs ministers of the Nile basin states."[380] Chairmanship of the Council is rotated annually.[381] The Nile-TAC, "consists of one member from each country and an alternate,"[382] was established with the very aim of providing technical support for Nile-COM.

The Nile-SEC, which is "located in Entebbe, Uganda, [is not only responsible of] providing administrative, financial and logistical support and services to Nile-TAC and the Nile-COM, [but also] …responsible for the coordination and monitoring of the Shared Vision Program working groups and Subsidiary Action Programs where appropriate, and for providing logistic support to these activities."[383]

Bearing in mind its transitional body, though not supposed to last this long for the obvious aforementioned reasons, the NBI believed to have been "help[ing] to relieve the tension within the basin, [in spite of] key issues that are yet to be addressed."[384]

Despite all of the above facts, it is crucial to extract out the very standing of upper and lower riparian states, with a particular focus on Egypt and Ethiopia, which leads them to such an ultimate stiff dispute over their shared Nile water resource.

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[377] **Abdalla KM**. (2008). Institutional and legal arrangements in the Nile river basin: suggestions to improve the current situation toward adaptive integrated water resources management. Water Science Technology. Vol. 58. Issue No. 10, p.9.
[378] **Mtua**. (2017), p.70.
[379] **Ibid**, p.69.
[380] **Ibid**.
[381] **Ibid**, p.69-70.
[382] **Ibid**, p.70.
[383] **Ibid**; see also **Lencho**. (2014), p.36.
[384] **Ibid**.

4.3.5. Egypt (and Sudan to a lesser extent) Perspectives

The very argument of Egypt starts with "the fact that Egypt has used the waters of the Nile River for millennia without any credible challenge from any of the upstream states."[385] Thus, "Egypt and Sudan are claiming a right to the absolute integrity of the river based on their prior use and the asserted duty of upper basin states to avoid causing significant harm to existing uses."[386] In connection with these, "[t]he Egyptians, and to a lesser extent the Sudanese, favour the *prior use doctrine*, also known as *prior appropriation doctrine* which provides that 'the first user of the water acquires a definitive right to it, first in time, first in right …[so] that the [Nile] upstream states remain prevented from using the waters.'" [387] Unsurprisingly, "[a]s Egypt has always been sensitive to the possibilities of development of the Nile by upstream states, its adherence to the doctrine of absolute territorial integrity had remained unchanged" up until today. [388] Moreover, "[a]s part of its diplomatic program opposing international assistance to [upper riparians, in particular to] Ethiopia for the construction of dams on the Blue Nile and the Atbara, Egypt [and Sudan] deployed legal arguments, [by] …invoke[ing] a strong version of the 'no harm' rule."[389]

Spring boarding from the above claim coupled with asserted narration of Egypt's "total dependen[ce] on the waters of the Nile for millennia, prompted Egypt to claim that it has 'historical', 'natural' or 'acquired' rights.**"**[390] For obvious aforementioned reasons "Egypt also holds the view that she has 'natural and historic" rights over Nile waters acquired by long usage and recognised by other states like Great Britain and Sudan, and that the Nile Water treaties have been declaratory of international customary law relating to fluvial law."[391]

Having the above narration on the one hand, "Egypt and Sudan still cling to the conviction that their national security depends on guaranteeing current flow levels, and

[385] **Mwangi S. Kimenyi/John Mukum Mbaku**. (2015). International Water Law and the Nile River Basin. In Governing the Nile River Basin: The Search for a New Legal Regime. Washington, D.C. Brookings Institution Press, p.64.
[386] **Dellapenna**. (1997), p.17.
[387] **Bulto**. (2008), p.213.
[388] **Ibid**, p.214.
[389] **Dellapenna**. (1997), p.17.
[390] **Bulto**. (2008), p.213.
[391] **Okoth-Owiro**. (2004), p.16.

insist on maintaining their purported rights pursuant"[392] to the 1902, 1929 & 1959 Agreements. Egypt holds the view that all the Nile River agreements are by their nature perpetually binding on successor states.[393] Egypt further asserts that treaties concluded by European powers acting on behalf of colonised African states continue to be in force by virtue of the law of state succession and because of the territorial nature of the obligations resulting from these treaties.[394] Not only under those failed 'HydroMet', 'Undugu', and 'TECCONILE' platform, but also "[s]ince the Nile Basin Initiative went into force, Egyptian authorities have made relatively aggressive efforts to prevent the development and adoption of any legal framework that, in their opinion, would threaten the rights granted them by the [aforementioned] Nile Waters agreements.[395]

Moreover, the non-ending negotiation over the GERD, which is still going on with repetitive déja vu, is also embodied in the above claims, thus, "[t]he colonial Nile Waters Treaties [coupled with the 1959 Agreement] comprise[s] the principal obstacle to the GERD negotiations."[396]

4.3.6. Ethiopia (and other upper riparians to a lesser extent) Perspectives

From the very beginning "…adherence to the theory by downstream states of the Nile Basin has provoked the upper riparians to hold to a counter stance, wherein they hold to the principle of absolute territorial sovereignty over the waters flowing in their territories.[397] Particularly, "Ethiopia's '*aide-memoire'*[398] of 23 September 1957, [which] addressed to diplomatic missions in Cairo, [and its 'pronouncement'[399] on the 1977] UN

[392] **Paisley/Henshaw**. (2013), p.67.
[393] **Okoth-Owiro**. (2004), p.16.
[394] **Ibid**.
[395] **Kimenyi/Mbaku**. (2015), p.65.
[396] **Tekuya**. (2020), p.101.
[397] **Bulto**. (2008), p.215; see also **Arsano**. (2007), p.90.
[398] The '*aide-memoire'* stated "Ethiopia has the right and the obligation to exploit the water resources of the Empire…for the benefit of present and future generation of its citizens…[and]…must, therefore, reassert and reserve now and for the future, the right to take all such measures in respect of its water resources and, in particular, as regards that portion of the same which is of the greatest importance to its welfare, namely, those waters providing so nearly the entirety of the volume of the Nile, whatever may be the measure of utilization of such waters sought by recipient states situated along the course of that river." See **Ibid**, p.212.
[399] Ethiopia pronounced that it is "…the sovereign right of any riparian state, in the absence of an international agreement, to proceed unilaterally with the development of water resources within its territory." See **Ibid**.

Water Conference held in Argentina …seems to incline towards this theory, although it did not categorically adhere to it."[400]

However, the aforementioned '*aide-memoire*' and 'pronouncement' is considered "as a declaration which amplifies an aspect of the theory of equitable utilization because it has the basic theme of claiming equitable share."[401] Accordingly, as the theory is "almost unanimously abandoned today" for those obvious reasons discussed in Chapter two of this paper, so does the Nile upper riparians (including Ethiopia) "unanimous[ly] declar[e] that they seek 'to achieve sustainable socioeconomic development through *equitable utilization* of, and benefit from, the common Nile Basin water resources'."[402]

Coming to the 'Natural' and 'Historical' Rights claim over the total Nile water, other riparians (mainly Ethiopia) "ha[ve] challenged and raised objections to Egyptian interference in its use of the Blue Nile."[403] Moreover, riparians continue arguing "closer reference to various ICJ [like *inter alia* 'Nigeria-Cameroon' case[404], 'Libya-Chad' case[405], 'Lake Lanoux' Arbitration[406]] decisions clearly indicate that claims of priority rights and historical consolidation cannot, on their own, be viable grounds for claiming rights under international law."[407] It is "merely a factors that can be taken into account to substantiate claims supported by treaties, customary international law or general principles recognized in the major legal systems,"[408] which is, however, absent in the Nile case.

Aside from the above, in relation to the downstream states claim of established right and guaranteed total flow of the Nile water as per the 1902 and 1929 colonial agreements and the 1959 Nile treaty, as briefly explained in the previous Treaty section, upstream countries vividly react against the latter agreements. Accordingly, it is needless to detail: Ethiopia's explicit objection against and refrainment from ratification of the 1902 agreement, other upper riparian state's disobedience against the 1929 colonial treaty citing

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[400] **Ibid**.
[401] **Ibid**, p.215.
[402] **Ibid** p.213.
[403] **Kimenyi/Mbaku**. (2015), p.64-65.
[404] Land and Maritime Boundary case (Cameroon and Nigeria). International Court of Justice. Case ICJ GL No. 194. 10 October 2002.
[405] Territorial Dispute (Libya Arab Jamahiriya v. Chad). International Court of Justice. Case ICJ GL No. 83. 3 February 1994. Available at <https://www.icj-cij.org/public/files/case-related/83/083-19940203-JUD-01-00-EN.pdf> I.a.d 26/07/2021.
[406] **Lake Lanoux Arbitration**. (1957), p.23-24.
[407] **Mohammed**. (2014), p.35; see also **Stebek**. (2007), p.47.
[408] **Ibid**.

'clean state' principle and 'Nyerere Doctrine' of State Succession, and the non-application of the 1959 Egypt-Sudan agreement on third party, which was not part and parcel of the negotiation as per the VCLT of 1969.

4.3.7. Failure and Success of Nile Institutions

Those Nile Basin institutional arrangements discussed in the above sections are exposed to not only negative criticism, but also appreciated with affirmative critique.

The multilateral cooperation, which was initiated under a number of institutional arrangements, "…has been driven by the agenda of Egypt [and Sudan to a lesser extent]."[409] Accordingly, "Egypt has initiated a number of inconclusive initiatives like HYDROMET, UNDUNGU and TECCONILE but without success."[410] These latter platforms assumed to have failed **"**for the very fact of the observer status of Ethiopia and Kenya, and the domination by hydro-hegemony of Egypt as a delaying mechanism to prolong the life span of the *status quo*."[411] Not only the aforementioned platform ones, even the more inclusive NBI platform also "…been criticised for lack of results and the donor community has grown impatient with the slow release of funds**.**"[412]

Despite the above facts, however, these initiatives have been thanked for "[t]he technical studies, information and data gathering, training and capacity building activities, public engagement activities, and exchanges of technical experts are all small steps toward building trust amongst the Nile riparian countries."[413] In particular to NBI, "the organization has made substantial steps [and] …effort to create a knowledge base …progress toward …common understanding [and] …potential cooperation."[414] Moreover, "the time and resources invested by member countries in the negotiation process has created basin-wide groups of experts who have a common understanding of the issues and have even developed personal relationships, which can help support cooperation."[415]Aside from these, however, "…there is still a long way to go towards formal cooperation that

[409] **Johnston**. (2009), p.42.
[410] **Mohammed**. (2014), p.11.
[411] **Ibid**, p.21.
[412] **Johnston**. (2009), p.42.
[413] **Ibid**.
[414] **Ibid**.
[415] **Ibid**, p.43.

could lead to [all inclusive] Nile Agreement,"[416] in, of course, establishing permanent NBC.

4.4. Concluding Remarks

Nile River Basin is a basin with not only historically rich, but also with a giant and dwarf Nile River, all originating from the upper riparians, mainly of the White Nile, Blue Nile and Atbara river. Though the basin is composed of eight upstream riparians and two downstream riparians, the key players are Egypt, Ethiopia and Sudan.

A close examination as to the guiding legal regime of Nile River Basin amplifies the non-applicability of the 1997 UN Watercourse Convention, though some riparians voted in favour but not ratified yet, while some others abstained and voted against the convention. However, there are basin colonial and post-colonial treaties, in which the former guiding narration had tremendous impact on the latter ones. The formal Nile treaties started to be in place during the colonial era, with the British's plan of securing the Nile water resource for its own Economic and political interest. Accordingly, the British, on the one hand, negotiated the 1981, 1901, 1906 (x2), 1919 and 1925 with its counter colonial power of Italy, Belgium and France, and on the other hand, negotiated the 1902, 1929 and 1952 with Ethiopia and Egypt.

Though Ethiopia, the then only Independent country, rejected all of those colonial and related Nile treaties which considered to be not only unfair, but also jeopardize its right over Nile River, however, the legacy of these colonial treaties alongside its narration has continued spilling tremendous impact on basin-wide legal regime and administrative institutional arrangement. In this regard, the 1959 Egypt-Sudan agreement, together with the 1991, 1993, 2010 and 2015, is evident of the case. Though the 1959 agreement is lauded as the only post-colonial treaty that quantify the whole Nile water flow among the two extreme down riparians of Egypt and Sudan, however, the upper riparians voiced up their objection, firmly expressed not to be abide by, and vowed to use the river equitably. The rest post-colonial treaties are mere cooperative ones, which are not capable enough in settling down riparians major issues and never ending controversy over the Nile River.

The Nile River Basin's major controversial issues were related with – the downstream riparian's uncompromising claim of 'absolute integrity of the river based on

[416] **Ibid**.

prior use', 'historical', 'natural' or 'acquired' rights over the whole bulk of Nile water, and 'colonial and post-immediate-colonial' treaties as established right, and – on the other hand, the upper riparians claim of - 'equitable' utilization of Nile river, the non-acceptability of 'historical', 'natural' or 'acquired' rights citing their respective persistence objection, and the non-applicability of 'colonial and post-immediate-colonial' treaties citing 'clean state' principle, 'Nyerere Doctrine' of State Succession, and '*pacta tertiis nec nocent nec prosunt'* rule.

In order to solve their differences, Nile Basin countries had engaged in a number of institutional initiates, notably, Permanent Joint Technical Committee, 'HydroMet', 'Undugu', 'TECCONILE' and 'NBI'. All of these initiatives were 'ad-hoc' by its nature, while the last one, i.e., NBI, was envisioned to be a transitional body toward a permanent institution, mainly of the Nile Basin Commission, which is fated as unfortunate at the moment.

Aside from the above fact, though these Nile initiatives are criticized for the very fact of Egypt's initiation in initiating most of Nile Basin initiatives (with hydro-hegemonic domination and delaying mechanism to prolong the lifespan of the *status quo*), observer status of crucial riparians like Ethiopia and Kenya coupled with its lack of results, however, it has been appreciated for its extensive knowledge based technical engagements and a number of other activities which could laid foundation for cooperation. Despite these facts, however, much has to be done with the very aim of creating a basin-wide all inclusive legal regime – CFA and permanent Nile River Basin institution – NBC.

CHAPTER FIVE

THE COMPARATIVE ANALYSIS OF THE TRANSBOUNDARY WATERCOURSE MANAGEMENT IN THE TIGRIS-EUPHRATES AND NILE RIVER BASINS

5.1. Introduction

This chapter is a very crucial one as the aforementioned chapters' discussions finally strive to bear fruit in the following sections. Though it is easily aware-able of the fact that – 1) the number of riparians in Tigris-Euphrates and Nile River basins exhibits considerable variation and – 2) compared to Tigris-Euphrates River basin, there are other regional river basins with more riparian member states, however, for the very reasons stated in Chapter one and in the following sections, it is very significant to compare and scrutinize the transboundary watercourse management of the two basins from international watercourse law.

Therefore, it is quite important to start with the very basic nature of transboundary watercourses in uncovering its fortune of sharing lots of common features, which the Nile and Tigris-Euphrates River Basin are non-different in these regards. Thus, the immediate next section devotes to analyze the similar features of the latter two River Basins. The third section embarks on scrutinizing different distinctive features of Nile and Tigris-Euphrates River Basin first and followed by tracking lessons to be drawn from each respective Basin watercourse management. The fourth section gives due consideration in exploring the 'equitable and reasonable' use vis-à-vis the watercourse management of Tigris-Euphrates and Nile River basin. The last section of this chapter gives a usual concluding remark.

5.2. Similar Features of the Tigris-Euphrates and Nile River Basin

5.2.1. General Perspective

The Nile and Tigris-Euphrates River Basins are basins with tremendously imprinted civilization across their respective basins. Though the geographical location where both Nile and Tigris-Euphrates River tributaries originate differ as the latter ones are

typically originating from Asia while the former one is sourcing from East and Central Africa, surprisingly, both Rivers are destined to flow toward the Middle East.

In the Tigris-Euphrates River basin that flows toward the two downstream of Syria and Iraq, Turkey is the preponderance contributor to the whole bulk of water. While in the Nile River Basin that flows toward the two downstream of Sudan and Egypt, Ethiopia is the lion share contributor for the total flow water resource. Due to these reasons, surprisingly, the key players in both River basins are three riparians in number, notably – Turkey, Syria and Iraq in Tigris-Euphrates River basin, while – Ethiopia, Egypt and Sudan in Nile River Basin.

Due to the above facts, it is quite important to bear in mind the complexity arising from both basins' are directly or indirectly linked. In order to grasp-out such similar features, the following sections are devoted to scrutinizing the normative and institutional resemblance of Nile and Tigris-Euphrates River basins.

5.2.2. Normative Perspective

The very essence of considering Tigris-Euphrates River as two different river systems is vividly observed. Similarly, the Nile River is also somehow exposed to such similar scenarios. Unsurprisingly, in both basins, the claims of dividing the bulk River in two river systems come from downstream riparians states. In Tigris-Euphrates basin, though Turkey persistently followed a unified approach of considering Tigris-Euphrates River as a single river system, however, Syria and Iraq desire to follow a different approach of considering the latter River as two independent river systems, i.e., Tigris River system and Euphrates River system. The same goes to Nile River Basin, in which Upper riparians, notably Ethiopia, follow a track of Turkey in considering Nile River as a single unit, while, Egypt, and Sudan to a lesser, seems to be claiming in line with Syria and Iraq in following a similar approach of considering Nile as two independent river system, notably Blue Nile River system and White Nile River system.

One can observe other crucial similarities in relation to the single available guiding legal regime of the 1997 UN Watercourse Contention. The latter legal regime in no way be applicable in managing both Nile and Tigris-Euphrates River basin, for the very reason of not only diverse and conflicting stance of riparian states over it, but also for not ratifying and/or accessioning to by majority riparians.

Upon the non-applicability of the 1997 Multilateral Convection, it is quite logical to look into the two basins feature from Customary International Law perspective. One can infer from previous discussion in both chapter three and four that there are conflicting stance over the two major customary international watercourse laws, especially in relation to the priority of 'equitable and reasonable' utilization vis-à-vis 'no-harm' rule, which, of course, was one among the major issues led most riparians to back down from ratifying and/or accessioning the aforementioned Watercourse Convention.

In both Nile and Tigris-Euphrates River basin, there are no consistent practices as to the uniform application of aforesaid Customary International Laws. Both basin's downstream riparian states stick with the 'no-harm' rule with the intention of keeping the water flow without its respective quantify and/or quality reduction, while upper riparians claim for 'equitable and reasonable' use with the aim of using their respective shared water resource in equitable manner without, of course, creating significant harm toward downstream states. Unfortunately, as there is no consensus over the very base and priority of 'equitable and reasonable' utilization and 'no-harm' rule, there is no way of assuming the latter to be the guiding principle in managing both Nile and Tigris-Euphrates River basin.

Taking into account a flowing nature of River from upstream to downstream for a long period of time and with sole aim of keeping a non-interrupted flow, both down riparian States of Nile and Tigris-Euphrates River Basin argue along a 'Historical,' 'Natural' or 'Acquired' right claim over their respective water resource. In a way of not creating an established customary right, upper riparian States of both Nile and Tigris-Euphrates River Basin persistently objecting the aforesaid claim, for the very obvious purpose of not forfeiting their respective equitable utilization, and argue in a similar pattern that the provided claim is only a single criteria of consideration to determine the equitable quantification of their respective water resource among basin States.

Another significant point which needs to be addressed is the impact of foreign elements in both the Nile and Tigris-Euphrates River Basin. During pre WWII, the active involvement of foreign state in Tigris-Euphrates River Basin is quite perceivable from the '1913 Constantinople accord' of Britain and Russia, the '1920 Paris Treaty' of France (on behalf of Syria) and Britain (on behalf of Iraq), the 1921 & 1926 agreements of Turkey and France (on behalf of Syria), and the Lausanne Peace Treaty of Turkey and Victorious States. At the same time, during the colonization period, the direct foreign countries

intervention can be drawn from the 1891, 1901, 1919 and 1925 agreements of Britain (representing Egypt and Sudan] and Italy (representing Eretria), the 1906 treaty made between British and Belgium (representing Congo), the 1906 Tripartite Treaty signed among Britain, France and Italy, and most importantly the '1902 Anglo-Ethiopia agreement' and the '1929 Great Britain (acting on behalf of Sudan and her East African dependencies) and Egypt. In both basins, the direct and indirect involvement of European countries had implicated and complicated the respective basins watercourse managements. Especially, the impacts of British and French in the Tigris-Euphrates River Basin, to a lower extent, and in the Nile River Basin, to a greater extent, must be noted. Let alone other agreements, the Lausanne Peace Treaty which makes Turkey to make concessions against its right in abiding by the latter on a condition of first consulting with Iraq before taking place any water related projects over Tigris-Euphrates River is evident in this regard.

Similarly, let alone other treaties, the 1929 Anglo-Egypt treaty and the 1902 Anglo-Ethiopia agreement, on the one hand, created a narration of so called 'acquired rights' over the Nile and consider the bulk of Nile water as a sole property of Egypt, and Sudan, to a lesser extent, and on the other hand, strived to put restriction on Ethiopia, for the obvious reason and, of course, on the other upper riparians as well, not to decrease the total flow of the Nile river and not to undertake any kind of hydraulic projects, without downstream states express consent and agreement.

5.2.3. Institutional Perspective

Coming to institutional arrangement, a number of similarities between Nile and Tigris-Euphrates River Basin can be extracted, notably the *ad-hoc* nature, bestowed responsibilities, *et al*.

In the Tigris-Euphrates River basin, it is obvious of the *ad-hoc* nature of the first established JTC. Similarly, it is needless to mention the *ad-hoc* nature of all of the Nile River Basin institutions.

Let alone the failed *ad-hoc* JTC of Tigris-Euphrates River basin and four failed *ad-hoc* Nile River Basin institutions, one can see the technical expertise responsibilities of the late permanent JTC of the former and the *ad-hoc* NBI one of the latter. To be precise, the former JTC was purely bestowed with a pure technical responsibility of, *inter alia*,

exchanging of ‘hydrological and meteorological data’ and ‘the progress achieved in the construction of dams and irrigation schemes’ in Euphrates-Tigris River Basin. In a similar vein, NBI is also empowered with the expertise responsibility of dealing with ‘environmental, irrigation, watershed, flooding and hydropower projects’.

The other likeness of the Nile and Tigris-Euphrates River Basin is its respective institutions' lack of producing positive results, which, of course, leads the JTC and Nile initiatives not to be able to achieve its respective ultimate goal.

5.3. The Tigris-Euphrates and Nile River Basin: Where the Difference Lies

5.3.1. General Perspective

Though Tigris-Euphrates River is considered the longest one in South-west Asia with its 4,700 km long flow, however, the Nile River with its 6,825 km long is not only by far longer and wider occupant than the former river, but also considered the longest one on the entire earth.

Historically, the overall administration of the Nile and Tigris-Euphrates River Basin are featured with a different scenario. It is quite clear of the latter in which the whole basin was under a unified Ottoman Empire administration as all of the now basin States were under the latter. After the fall of the Ottoman Empire, however, the basin was practically divided among the now existing sovereign basin states. Taking a look at the case of the Nile River Basin, one can observe different experiences in this regard. During the colonization period, though most upstream riparians were under colony of British and Italian power, however, Ethiopia, the lion share contributor to the whole bulk of the Nile River, was not. In the post-colonization period, for obvious reasons, the basin was divided among the now existing independent riparian states. As a result, unlike Tigris-Euphrates River Basin, conclusions can be drawn as to the non-existence of traces in which the Nile River Basin was under single/unified administration.

When one takes a look at the general respective basin riparians compositions, a tremendous variation can clearly be observed, though, of course, both basins’ key players are only limited to three riparians countries, as explained in the previous section. In the Tigris-Euphrates River basin, the riparian states are composed of two upstreams – Turkey and Iran, and two downstreams Syria and Iraq (and Saudi Arabia). Whereas in the Nile

River basin, the riparian states are made up of eight upper riparians – Burundi, DRC, Eretria, Ethiopia, Kenya, Rwanda, Tanzania and Uganda, and two down riparians states – Egypt and Sudan (and South Sudan).

With the very intention of extracting further dissimilarities, the following section is dedicated to scrutinize the normative and institutional divergence of Nile and Tigris-Euphrates River basins.

5.3.2. Normative Perspective

A close reading of the Nile and Tigris-Euphrates River Basin shows a major disparity when it comes to the legal doctrine of transboundary watercourses. The practices of Tigris-Euphrates River Basin, as can clearly be grasped from the previous chapter three, shows the attachment of both upper and lower riparians toward 'limited territorial sovereignty' approach, which entitled them the right to use their shared resources in an equitable and reasonable manner. However, when it comes to the Nile River basin, this is not the case, as upstream and downstreams countries follow conflicting theoretical approaches. With the intention of using the entire Nile flow, the latter adhere to 'absolute territorial integrity' and 'prior appropriation' perspective; while the former cling to 'limited territorial sovereignty' and claim for an equitable utilization of their shared water resource.

The other crucial point is the maturity level of negotiation over water quantification among upper and down riparian states. In the Tigris-Euphrates River Basin, among the basin key players Turkey and Syria came up with a 'provisional agreement' in 1987 during 'Atatürk' Dam in which Turkey was bound to release not less than 500 m^3/sec of water toward Syria.[417] From these 500 m^3/sec flows, the latter brokered with Iraq in 1990 to share 42% and 58% respectively.[418] For the lasting ones, though not settled yet, different formulas of water quantification were introduced by respective basin states. Having this Tigris-Euphrates River Basin case on one hand, one can observe a totally different story when it comes to the Nile River Basin. The strangeness of the latter can be drawn from the 1929 Anglo-Egypt agreement and the 1959 Egypt-Sudan agreement, were – the whole bulk of Nile water resource considered as the sole property of the two down extreme riparians,

[417] **Sağsenç**. (2006), p.36.
[418] **Leb**. (_____), p.2.

Egypt and Sudan, and – the total flow of Nile River divided between the two latter two down riparian states.[419] In order to change these hydro-hegemonic practices, though upstream riparians are pushing for their respective equitable share, the down riparians were/are not ready to negotiate on the Nile water quantification, let alone of discussing methods of how to quantify the latter. Hence, unlike Tigris-Euphrates River Basin case, the upper and down Nile River basin riparians negotiation over the quantification of their shared water resource is off the table and so far immature.

5.3.3. Institutional Perspective

It is quite understandable from the previous chapter two of the three categories of institutional setup, notably 'River Basin Commission', 'River Basin Authority' and 'River Basin Coordinating Committee or Council'. A close analysis of the late institutional setup in – Tigris-Euphrates River Basin's JTC seems to be structured in line with the latter instructional arrangement. Whereas – Nile River Basin's NBI seems to be designed in accordance with 'River Basin Authority', with the obvious intention of transforming into NBC, which will possibly be in line with 'River Basin Commission'.

From the durational perspective, the institutional arrangement mechanism of the Nile and Tigris-Euphrates River basin can be analysed from its *ad-hoc* and/or permanent nature of the latters. Though the first JTC structure of Tigris-Euphrates River basin was an *ad-hoc* one, the second JTC, which is a far better significant one, is featured as a permanent basin institution. Whereas when it comes to Nile River Basin, though the Basin is destined in establishing more administrative institutions like 'HydroMet', 'Undugu', and 'TECCONILE', and 'Nile Basin Initiative', with the exception of, of course, a failed Permanent JTC of Egypt & Sudan one, all are *ad-hoc* by its nature and were, unfortunately, unlucky to establish NBC for the obvious reason of not entering the CFA into force.

In relation to empowerment of the two basins' institutions, the Tigris-Euphrates River basin's JTC seems to be a typical committee arrangement with simple administrative structures. Whereas, from the Nile-COM, Nile-TAC and Nile-SEC administrative arrangements, the Nile River Basin's NBI appears to be somehow well structured and empowered.

[419] See in general **Anglo-Egypt Agreement (1929)**; see also in general **Egypt-Sudan Agreement (1959)**.

Taking a look at the respective basins activeness, regrettably, the JTC of Tigris-Euphrates River basin was halted in 2011 as negotiators reached a gridlock coupled with Iraq's and Syria's internal political turmoil. However, the NBI, though considered weak, seems to be an active institution of the Nile River Basin.

5.3.4. Lesson to be drawn from Tigris-Euphrates River Basin Watercourse Management

In transboundary watercourses, the significance of building trust among upper and down riparian basin states is beyond imagination, as it has practical weight in bringing the latter more closer in the spirit of cooperation. In this regard, the experience of the Tigris-Euphrates River basin in laying a foundation stone to build 'Friendship dam' along Turkey and Syria border in February 2011 shall be considered a great step in building trust among riparian states. Such kind of momentum action must be taken as the best experience and shall be adopted in the Nile River basin, where trust is desperately needed as cooperation among upper and down riparian states is almost nil.

Transboundary watercourse by its nature crosses a particular sovereign country's boundary and flows from one basin state toward another. Though this river is somehow related in one way or another with boundary issues, it is always important to dissociate and entertain the river agendas distinctly, as the latter can potentially exacerbate the complexity and mismanagement of the former case. In this regard, the Tigris-Euphrates River basin case is very crucial and shall be taken as the best experience, as the 1923 Lausanne Peace Treaty has a clear provision stating 'transboundary water should be dealt with separately'. The aforementioned experience shall be considered as an antidote for the Nile River basin case. From the very start, it is quite obvious that the Nile River basin dispute is implicated and complicated with the overall colonial powers political and economic interest. In this respect, the impact of the British Empire was so enormous, especially in correlating and complicating the Nile River issues with boundary agreements. The 1902 Anglo-Ethiopia agreement and its contentious issues revolving around Article III are evident in the aforementioned cases. Like the Lausanne Peace Treaty, the Nile River basin riparians shall better follow the latter suit and expressly detach the boundary issues with that of River and separately deal with the latter with the spirit of good-neighbourhood and win-win manner.

Aside from the above, the now disputed issues arising from the first filling and operation of 'GERD', though complex due its geopolitical influence, can somehow be assumed similar with the disputed issues experienced during the first filling and operation of the 'Atatürk' Dam reservoir. With thorough scrutiny of the latter experience, preferably in a comparative manner with that of 'GERD', it can be set as a good model of helping to resolve the current 'GERD' related critical crises.

5.3.5. Lesson to be drawn from Nile River Basin Watercourse Management

The significance of all inclusive guiding legal regimes in transboundary watercourse is very requisite, as the more inclusive the legal regime is, the less dispute in the basin. In this stance, the Nile Basin CFA, though not entered in to force yet, is not only – an all-inclusive single legal regime set to govern the Nile River Basin with the intention of replacing colonial and immediate post-colonial treaties, but also – considered a visionary legal instrument with the potential of taking the Nile Basin cooperation to the next level. These all-inclusiveness approaches coupled with its CFA can be set as a positive experience and copybook respectively for the Tigris-Euphrates Basin case.

As transboundary watercourse negotiation is full of ups and downs, continuous cooperation, negotiation *et al* through some kind of institutional platform is so vital. Even during deadlocks, the only way-out is to keep talking-the-talk. In this regard, the NBI, though not successful and blamed of no bearing result, can be set as a positive experience. This is mainly of not halting itself, and continues, – at least, existing as an institutional platform and, – somehow, exercising its responsibility. The JTC shall follow the NBI approach and activate itself so as to play its productive role in the Tigris-Euphrates River basin.

5.4. The 'Equitable and Reasonable' Use Application in Tigris-Euphrates and Nile River Basin Management

In the transboundary watercourse management, the primacy of 'equitable and reasonable' utilization principle is, arguably, quite vivid. Within the scope of the latter principle, scrutinizing the watercourse management of Tigris-Euphrates and Nile River basin, so as to clearly determine which basin better cling with that particular principle, is very crucial.

To start with Tigris-Euphrates basin, despite unsettled issues of water sharing modalities, practically speaking, there is an already being used amount of water on all sides of the latter basin's riparian states. These fact can be clearly inferred from the 1987 Turkey-Syrian 'provisional agreement' which guaranteed the discharge of 'not less than 500 m^3/sec of water toward Syria'[420] on the one hand, and the 1990 Syria-Iraq agreement to partition the latter 500 m^3/sec flow of water in '42% and 58% respectively'.[421]

The efforts of first JTC in determining and regulating yearly discharge of Tigris-Euphrates water alongside its irrigation need and strategy as well as its discussion in creating conducive environment for all independent and joint projects on the basin, clearly shows the commitment of the institution toward establishing the 'equitable and reasonable' usage of the river. The exhaustive work of the second JTC in order to come up with a detailed master plan which could possibly achieve the very ultimate goal of 'equitable and reasonable' share of Tigris-Euphrates water resources among all riparian states, is also evident of the former institution's very objectives in adhering toward 'equitable and reasonable' principle.

Coming to the Nile River basin, the total flow of the water is used only by the two down riparian states and the upper riparians, though origin for the whole bulk of the River, are never allowed to use it for whatever reasons like, inter alia, irrigation, sanitation, electric production without the former consent. These can be clearly perceived from the 1902 Anglo-Ethiopia Agreement which created a complexity in creating an obstacle for Ethiopia not to implement any kind of projects which could possibly arrests the total flow of the river, Moreover, the same fact can be extracted from 1929 Anglo-Egypt Agreement and the 1959 Egypt-Sudan Agreement which created a narration of historical and natural right alongside with the provision of exclusive ownership of the Nile River to the two down riparians States.

Though all these aforementioned agreements were in place with the sole justification of the latter of not having other water alternatives, the need of upper riparian and other alternate water potential of down riparians states were not properly taken into consideration. Let alone other upper riparians, taking a closer look at the case of Ethiopia, the lion share contributor to the Nile, one can see, with a naturally gifted frequent rainy season, 'Of Ethiopia's annually available 123 bcm surface water, a mere three per cent

[420] **Sağsenç**. (2006), p.36.
[421] **Leb**. (_____), p.2.

[3%] remains in the country, while the remaining bulk [of] …70 [%] are found within the Ethiopian [blue] Nile basin'[422] and the rest flows away toward other frontier. In this regard, the extreme need of more water by Ethiopia and other upstream riparian states is clearly undeniable. On the other hand, let alone Sudan, Egypt, a much more dependent on the Nile water, has other water alternative potential, namely of 'Seawater desalination and groundwater extraction,'[423] which can be useful for lots of domestic consumption. Though the aforementioned facts are so vivid, the will of – considering the need of upper riparians and – compromising water share to other riparians in 'equitable and reasonable' manner are absent in the Nile River Basin.

Despite a mere attempt, the efforts put in place through a number of institutional arrangements like HydroMet', 'Undugu', 'TECCONILE', and 'NBI' of settling the above issues were/are weak. This is due to the fact that these aforementioned institutions were designed not to entertain cases relating to 'equitable and reasonable' sharing requests by upper riparians, as such kinds of water share requests are considered as a 'red line' by down riparians. Even the very attempt of transforming NBI into NBC, through the coming into force of CFA, which would ultimately deal with equitable and reasonable water apportionment, was undermined by the walk-away of Egypt and Sudan from the CFA deal. Moreover, the now vacuously circling GERD related disputed issues are also intertwined with the maintenance of its *status quo* relating to the total water flow toward downstream riparians without any interruption, which exemplifies the rigid stance of the latter of no intention in sharing the Nile water resource in equitable and reasonable manner with the rest of upper riparian states.

On the backdrop of the afore-stated facts and grounds, compared to the Nile River Basin, the Tigris-Euphrates River basin management is in fact in a far better position of – not only clinging onto, – but also of, somehow, putting into practicing the 'equitable and reasonable' use principle through its legal regime and institutional efforts.

[422] **Arsano**. (2007), p.102, 145,170.

[423] **Amir Nashed/ Alistair Sproul/ Greg Leslie**. (2014). Water resources and the potential of brackish groundwater extraction in Egypt: A review. Journal of Water Supply: Research and Technology—AQUA. Vol. 63. No.6, p.399–428.

5.5. Concluding Remark

As transboundary watercourse by its nature share lots of common features, the Nile and Tigris-Euphrates River Basin are non-different in these regards. Both basins are not only embodied with rich history, but their respective rivers are also destined to flow toward the Middle East. Surprisingly, both basins' key players are three riparian states, – Turkey, Syria and Iraq from Tigris-Euphrates River basin, and – Ethiopia, Egypt and Sudan from Nile River Basin.

In both basins, their respective downstream states tend to divide their respective river in two river systems, while the upper riparians consider their respective river as a single unified river system. Due to non-ratification and absence of consistent practices, neither the 1997 UN Watercourse Contention, nor customary international watercourse laws is applicable on both river basins. In both basins, down riparians claim for 'Historical,' 'Natural' or 'Acquired' right over their respective water resource, while upper riparians continuously object to these claims. The foreign countries intervention, especially that of France and British, have been recorded with their respective imprinted negative impact on both basins.

In both basins, the *ad-hoc* nature of first JTC and all Nile intuitional arrangements, its bestowed respective responsibilities, and lack of result, despite their effort, are its instructional wise resemblance.

Of course as both Nile and Tigris-Euphrates River Basin have so much in common, the two basins are also featured with divergent attributes. In relation to its length, the Nile River is considered by far the longest river on earth. Unlike the Nile River basin, Tigris-Euphrates River basin was under a unified Ottoman Empire administration before getting divided among the now existing basin riparians up on the fall of the latter. Composition wise, the Tigris-Euphrates River basin has four riparians, while the Nile River basin has eleven riparians.

All upper and lower riparians states of Tigris-Euphrates River basin are assumed to adhere to 'limited territorial sovereignty' approach, while upper and lower riparian states of Nile River Basin follow conflicting doctrinal approach, as they cling to 'absolute territorial integrity' and 'prior appropriation', and 'limited territorial sovereignty' respectively. Unlike Nile River basin riparians where negotiation over the quantification of their shared water resource is off the table, the 1987 Turkey-Syria agreement and the 1990

Syria-Iraq agreement coupled with different formulas of water quantification presented by the respective riparian basin states exposes the progressive maturity level water quantification in the Tigris-Euphrates River basin.

The JTC institutional arrangement of Tigris-Euphrates River basin is structured in line with 'River Basin Coordinating Committee or Council', whiles the NBI is designed in light of 'River Basin Authority', with the aim of transforming into NBC which is in parallel with 'River Basin Commission'. The second JTC of Tigris-Euphrates River basin is a permanent one, whereas all of the Nile River basin administrative institutions are *ad-hoc* by their nature. From its structural set up, unlike Tigris-Euphrates River basin's JTC, the Nile River Basin's NBI is well structured with its Nile-COM, Nile-TAC and Nile-SEC administrative arrangements. For obvious deadlock and political reasons, the second JTC of Tigris-Euphrates River basin is no longer operational, while the Nile River Basin's NBI, though weak, is still active one.

In the Tigris-Euphrates River basin, the effort of building trust through 'Friendship dam' along Turkey and Syria border, dissociating border issues with transboundary water in Lausanne Peace Treaty, the experience of first filling and operation of 'Atatürk' dam *et al* can be taken as the best experience to be adopted in the Nile River basin.

In the Nile River basin, the all riparian inclusive nature in producing CFA, the active engagement of NBI without being halted can be set as a good example which can be adopted in the Tigris-Euphrates River basin.

Last, but not least, though not agreed on issues of water sharing modalities for sustainable water usage, the practical use of Tigris-Euphrates water resource by all riparians conjoined with the legal regime and institutional efforts in line with the latter fact on the one hand, and the uncompromising way of using the whole bulk of Nile water resource by down riparians states coupled with the basin exclusive legal regime and weakened institutional arrangement with the aim of prolonging the latter *status quo* on the other hand, clearly shows the Tigris-Euphrates River basin management are in far better position of – not only clinging onto, – but also of, somehow, putting into practicing the 'equitable and reasonable' use principle.

CONCLUSION

At the center of human evolution, the international transboundary watercourse pass through a number of theoretical doctrine in which the two obsolete opposing extreme theories, i.e., *'absolute territorial sovereignty'* and *'absolute territorial integrity'*, lead to the emergency of a middle ground theoretical thought known as *'limited territorial sovereignty'*. The overwhelming support to the latter theory by different international legal instruments, authoritative scholars, judicial decision *et al* not only level up this particular doctrine to the Customary International Law, but also played a vital role in giving birth to *'Equitable & Reasonable Utilization'* and *'No-Harm rule'* Principle, in which the former principle is, arguably, considered the primary governing principle of transboundary watercourse as the latter one is qualified within a scope of the former.

Upon a number of studies and codification attempts made by Prof. H. A. Smith of London, ILA and ILC, international transboundary watercourse legal instruments like Dubrovnik Rules, Helsinki Rules, Berlin Rules, and the 1997 UN Watercourses Convention have developed. As a single universal legal regime, though the latter convention was adopted by the UN on 17 August 2014, it was endorsed without settling states opposing diverse standing on contentious issues like *'Equitable and Reasonable Utilization' vs. 'No-Harm Rule'*, *'Existing vs. Future Agreement'*, and *'Compulsory Dispute Settlement'*.

Beside normative legal regime, the significance of institutional arrangement in transboundary watercourse leads to the emergence of three prominent types of joint structural set-ups called *'River Basin Commission'*, *'River Basin Authority'* and *'River Basin Coordinating Committee or Council'*. Though the former 'commission' structural set up is the common one, all three structural set up need – choosing appropriate 'institutional model', enabling 'Legal Regime', setting its clear tasks and responsibilities, aligning it with its respective domestic legislation, and taking necessary steps to enforce it.

Having the forgoing facts as a springboard, the cases of Tigris-Euphrates and Nile Rivers Basin have been thoroughly scrutinized.

Starting with the Tigris-Euphrates River Basin, a critical normative examination of the latter basin shows, though the 1997 UN Watercourse Convention is not a guiding legal regime, a number of Pre and Post WWII basin-wide bilateral and/or multilateral treaties

were in place. Though these agreements either related to issues of minimum water discharge, flood regulation or general commitment over Tigris-Euphrates River, however, its thorough analysis exposes the non-existence of basin-wide multilateral treaties dealing with a basin-wide river management in general, and clear quantitative water apportionment and/or qualitative river regulation in particular.

Up on a number of pressing agendas, the three key major players of Tigris-Euphrates River Basin riparians started negotiating – first under ad-hoc JTC up on Turkey's initiation in 1964, which failed to progress in 1970, and – later on under permanent JTC up on the proposal of Iraq in 1980s, which again end up with a deadlock. These negotiations had failed due to the riparians inability to reach an agreement on the issues of, *inter alia*, 'Acquired/Historical Rights', definition of the river basin, mono/dual basin approach, transboundary watercourse theory, priority over 'equitable & reasonable' use vis-à-vis 'no-harm' rule, mistrust over GAP projects, water quantification formula, dispute settlement mechanism. Despite the aforementioned facts, later on, there was an attempt to revitalize the JTC, though, again abruptly halted in 2011 mainly of 'overarching bilateral political relations worsening' and internal political turmoil, however, optimistically, with the chance of resuming negotiation under the JTC, once the riparians political stability are in place.

Coming to the Nile River Basin, a close normative scrutinization uncovers the non-application of 1997 UN Watercourse Convention in the latter basin. Despite the foregoing fact, there are basin-wide colonial and post-colonial treaties, in which the former have significant impact on the latter ones, in shaping its present narration. These former colonial treaties coupled with immediate post-colonial treaty divide the whole bulk of Nile water flow to the two extreme down riparians which the nine upstream countries find it extremely unfair and voiced up their objection against such claim based on the principles of VCLT in general and clean state' principle, 'Nyerere Doctrine' of State Succession, and '*pacta tertiis nec nocent nec prosunt'* rule in particular, while the rest post-colonial treaties are mere general cooperation ones which are not capable enough in settling down riparians major issues and never ending controversy over the Nile River.

With the aim of settling their difference, Nile riparian countries engaged in dialogues under a number of *ad-hoc* institutional initiatives like 'HydroMet', 'Undugu', 'TECCONILE' and 'NBI', but ended up without fortunate success. The disputes resulting for the failure were the uncompromising issues relating to 'doctrinal standing point',

'historical/natural' right, colonial/post- immediate-colonial treaties, equitable & reasonable' use vis-à-vis 'no-harm' rule, fist filling and operation of GERD *et al*. Moreover, though these initiatives were criticized due to Egypt's hydro-hegemonic role, observer status of crucial riparians like Ethiopia and Kenya, lack of bearing fruit, it has been applauded for its extensive knowledge based technical engagements and for being cooperation-al platform for a yet to be achieved basin-wide all inclusive legal regime – CFA and permanent Nile River Basin institution – NBC.

At the backdrop of the above Tigris-Euphrates and Nile River Basin analysis, a critical comparative scrutinization of the latter two basins uncovers lots of important themes.

To start with its common features, both Tigris-Euphrates and Nile River basins are: embodied with rich history, geographically flow toward the Middle East, key players are three riparian states (one upper riparian vs. two down riparians) *et al*. Normatively, in both basins, the non-application of the 1997 UN Watercourse Convention, the trend of dividing the river system into two, the claim of 'Historical/Natural' rights, and the influence and intervention of foreign countries *et al* can be clearly perceived. Institutionally, in both basins, the ad-hoc nature of the first JTC and all of the Nile intuitional initiatives, their bestowed respective responsibilities, and lack of bearing result can vividly be *discerned.*

Aside from the above, the very divergent of features of Tigris-Euphrates and Nile River basins can be observed from – the length as the latter one is so far considered the longest of all rivers, – unlike Nile River Basin, the administration of Tigris-Euphrates River Basin which was under a unified Ottoman Empire administration before getting divided among the now existing basin riparians, – riparians compositions as the Tigris-Euphrates River basin has four riparians, while the Nile River basin have eleven riparians.

In addition, other dissimilar features can be distinguished from – doctrinal perspective as, unlike Tigris-Euphrates River basin riparians which cling to 'limited territorial sovereignty', the upper and lower Nile River basin adhere to diverse conflicting doctrinal approach, – quantificational perspective as, unlike the latter basin where re-quantification agenda is off the table, the experiences of the former basin reveal a relative progressive maturity. Institutional wise, additional distinction can be detected from – the late institutional arrangement model as the JTC is in row with 'River Basin Coordinating Committee or Council', whereas the NBI is in line with 'River Basin Authority', – the

duration of its establishment as the late JTC is a permanent one, while all the Nile River basin institutional initiatives are ad-hoc ones, – the structural setups as, unlike the JTC, the NBI is well structured with its Nile-COM, Nile-TAC and Nile-SEC arrangements, – operational wise as, unlike the JTC, the NBI, though weak, still active and operational.

Having the above comparatively stated facts on the one hand, one can crack down the better experiences of Tigris-Euphrates and Nile River Basin which can and shall be adopted in the aforesaid respective basins scenarios.

The Tigris-Euphrates River Basin has better experience in terms of – building trust among riparian states, – the dissociation of border issues with transboundary water, – adhering and applying 'equitable and reasonable' use principle, and – first filling and operation of dams.

The better experience of Tigris-Euphrates River Basin in building trust among riparian states can be grasped from the level of latter basin efforts in building 'Friendship dam' along Turkey and Syria border'. The Nile River Basin desperately needs such a trust building strategy, so that shall follow and adopt the Tigris-Euphrates River Basin's foregoing experience in order to be able to transform basin-wide cooperation to the next level.

When it comes to dissociation of transboundary water issues with border issues, Tigris-Euphrates River Basin has a better experience through its 1923 Lausanne Peace Treaty. In this regard, the Nile River Basin is in lots of trouble as most of its colonial treaties in general and the 1902 Anglo-Ethiopia agreement in particular deal with border and river in kind of inseparable way with the potential of exacerbating and complicating the Nile cooperation and negotiation. Hence, the aforementioned Tigris-Euphrates River Basin's experience of dealing transboundary watercourse separately can and shall be adopted in the Nile River Basin so as to bring the Nile cooperation on the right track.

Tigris-Euphrates River Basin has better experience in adhering and applying 'equitable and reasonable' use principle. Though there are unsettled issues related to water quantification formula, the existence of understanding coupled with the commitments of the latter basin riparians in utilizing the water resource in 'equitable and reasonable' manner can be extracted from 1987 Turkey-Syrian treaty and 1990 Syria-Iraq treaty alongside the institutional effort of JTC in realizing the preceding principle application. Coming to the Nile River Basin, there is 'all water is mine' mentality coupled with a

practical utilization of the whole bulk of Nile water only by the two down riparians without due consideration of all upper riparians interests. In these vain, almost all of its major legal regime and institutional arrangements are designed alongside the latter narration so as not to entertain cases relating to 'equitable water apportionment' requests as the aforenamed claim is considered a 'red line' by down riparians, which is a huge obstacle to pursue the Nile negotiation in good-faith. In this regard, the experience of Tigris-Euphrates River Basin can play a great role in messaging 'better to share than to ignore' to the Nile River Basin – as, in the latter basin, there are pushing and pulling factors coupled with facts on the ground and – as, no matter when, where and/or what, the equitable water share is an inevitable one which needs to be entertained sooner than later. Thus, the Nile River Basin can and shall adopt the experience of the aforesaid Tigris-Euphrates River Basin in accordance with its basin scenario, at least as a take-off, in sharing its water resources in 'equitable and reasonable' manner.

The other Tigris-Euphrates River Basin's better experience is with regard to the first filling and operation of huge dams constructed alongside the transboundary watercourse via its GAP. Especially, Turkey's 'Atatürk' dam resembles the massive GERD in which the latter is full of disputed issues and deadlocks as parties couldn't agree on the terms of its first filling and operation. In this regard, with thorough comparative studies, the experience of 'Atatürk' dam's first filling and operation can have a potential of helping to settle disputed issues of the first filling and operation of the GERD.

Aside from the Tigris-Euphrates River Basin experience, the Nile River basin has better experience in terms of – the all-inclusive nature of CFA, and – the non-stop active engagement of the NBI.

In the post-colonial period, the Nile River Basin has better experience in striving to produce the CFA, which, though not enforced yet, but, has been applauded for its all-inclusiveness. However, in the Tigris-Euphrates River Basin, despite bilateral treaties and MoUs, there is no legal regime where all riparian have engaged in. Hence, taking into account the very significance of having basin-wide all inclusive legal regime, the aforesaid Nile River Basin experience can be taken as a good approach and its legal regime named CFA can be taken as a copy-book and shall be adopted in accordance with the Tigris-Euphrates River Basin scenario.

When it comes to a non-stop operation of institutional engagement in the basin-wide matter, the Nile River Basin has better experience via its NBI, which is still operating, despite its shortcomings, without being halted. In the case of Tigris-Euphrates River Basin, the JTC is not operating for about a decade now due to the obvious geopolitical instabilities. Though the incidents that ultimately lead the JTC to a halt are understandable, however, the continuous negotiation and talk over transboundary watercourse management through its basin-wide institutional structure even under difficult circumstances is very crucial. In this regard, the foregoing Nile River Basin experience can and shall be taken accordingly and, like the NBI, letting the JTC – be operational and – to engage in whatever capacity it allows in the Tigris-Euphrates River Basin management is very pivotal.

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APPENDIX 1 – CURRICULUM VITAE

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GENDER
- ☞ M (Male)

BIRTH DATE
- ☞ 23/05/1990

BIRTH PLACE & NATIONALITY
- ☞ Harar, Ethiopian

INTERNATIONAL LANGUAGES
- ☞ English & Turkish

SKILLS
- ☞ Critical, strategic thinking, intellectual, and analytical skills
- ☞ Research & Writing Skills
- ☞ Creative Problem Solving
- ☞ Communication Skill
- ☞ Basic ICT, Computer and Technology related Skils

EXPERIENCE	
• Dec. 10/2014 – Sep. 25/2018 • July 29 – Dec. 10/2014 • March 25 – 27/2014 • April 7 - July 28/2014	☞ Legal advisor to the President, Harar, Ethiopia ☞ Legal expert, Office of the President, Harar, Ethiopia ☞ Participated in a National Moot Court Competition & won a runner up Cup, Addis Ababa University, Ethiopia ☞ Externship program (as assistance Judge) at High Court, Harar, Ethiopia

ACADEMIC FORMATION 1	
UNDER GRADUATE PROGRAM	**Dire Dawa University**/Bachelor of Law (LL.B) Graduate September 2010 – July 2014 Dire Dawa, Ethiopia
THESIS TOPIC	The 'Water Security' Principle Under Nile Basin Cooperative Framework Agreement vis-à-vis International Water Law

ACADEMIC FORMATION 2	
GRADUATE PROGRAM	Ankara Yıldirim Beyazit University/Master of Law (LL.M) Candidate September 2019 – August 2021 Ankara, Turkey
THESIS TOPIC	The Transboundary Watercourse Management Under International Law: The Comparative Cases of Tigris-Euphrates and Nile River Basin

PUBLISHED BOOK & RELEASED ARTICLE	
PUBLISHED BOOK	The 'Water Security' Principle Under Nile Basin CFA and Its Ramification Published on August 25, 2017 Available on Amazon Link: https://amzn.to/3qHECk4
RELEASED ARTICLE	The Counter Hydro-Hegemonic Strategy and GERD – Under Threat Published on June 7, 2020 Available on Addis-Insight Digital News Outlet Link: https://bit.ly/3u5Ik9n
RELEASED ARTICLE	Harari People, Self-Administration and Electoral System: Clearing Wrong Perceptions Published on June 3, 2021 Available on Addis Standard Digital News Outlet Link: https://bit.ly/2VhtO21

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DECLARATION:

I, Yusuf Ali MOHAMMED, hereby declared that the above particular information and stated facts are true, correct and complete to the best of my knowledge and belief.

Ankara, Turkey

August, 2021