INTERNATIONAL WATER LAW & ALLOCATION IN THE NILE BASIN: A COHERENT SYSTEM OF LAW OR EMPTY RHETORIC?
OUTLINE

1. Background to the Nile dispute
2. International Water Law
   - Equitable and reasonable use
   - No-harm
3. Critique of IWL
4. What role for IWL in the Nile basin dispute?
5. Main controversy: Article 14 (b) of the draft CFA
THE RIVER NILE RUNS THROUGH ELEVEN STATES

Colonies, Protectorates, Mandates, Trust Territories

Sudan, Tanzania, Kenya, Uganda, DRC, Rwanda, Burundi

Secession

Eritrea, South Sudan

Belligerent occupation

Ethiopia
THE NILE TREATIES

• Treaties governing use of the Nile were concluded during the colonial era

• Two examples:
  • 1902 Anglo-Ethiopian Treaty
  • 1929 Anglo-Egyptian Treaty
1902 ANGLO-ETHIOPIAN TREATY

- Preamble: “HM King of the UK and HM Menelek II, King of Kings of Ethiopia... have agreed upon and do conclude the following Articles, which shall be binding on themselves, their heirs and successors:”

- Art. III: Ethiopian Emperor agrees “not to construct or allow to be constructed any work along the Blue Nile, Lake Tsana, or the Sobat, which would arrest the flow of their waters into the Nile, except in agreement with His Britannic Majesty’s Government and the Government of the Sudan.”
WHAT IS INTERNATIONAL LAW AND WHY IS IT IMPORTANT?
WHAT IS THE LAW OF NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES

1997 UN Convention

Equitable and reasonable use

No-harm
EQUITABLE AND REASONABLE USE

• What does it mean?
  • Sovereignty
  • Equality of right
  • Does it mean equal volumes of water?
  • The development of the principle
NO-HARM

• Origins of the principle

• Significant or appreciable harm?
DETERMINING EQUITABLE AND REASONABLE USE

1966 Helsinki Rules, Article V (not in any order of priority)

(a) The geography of the basin, including in particular the extent of the drainage area in the territory of each basin State;

(b) The hydrology of the basin, including in particular the contribution of water by each basin State;

(c) The climate affecting the basin;

(d) The past utilization of the waters of the basin, including in particular existing utilization;

(e) The economic and social needs of each basin State;

(f) The population dependent on the waters of the basin in each basin State;

(g) The comparative costs of alternative means of satisfying the economic and social needs of each basin State;

(h) The availability of other resources;

(i) The avoidance of unnecessary waste in the utilization of waters of the basin;

(j) The practicability of compensation to one or more of the co-basin States as a means of adjusting conflicts among uses; and

(k) The degree to which the needs of a basin State may be satisfied, without causing substantial injury to a co-basin State.
COMPARING THE 1997 UN CONVENTION AND THE HELSINKI RULES

• Equitable and reasonable use/share

• No-harm

• Determining equitable and reasonable use
How do we deal with future uses that conflict with existing uses? (Article 17 1997 UN Convention)

1. If a communication is made under article 15 that implementation of the planned measures would be inconsistent with the provisions of article 5 or 7, the notifying State and the State making the communication shall enter into consultations and, if necessary, negotiations with a view to arriving at an equitable resolution of the situation.

2. The consultations and negotiations shall be conducted on the basis that each State must in good faith pay reasonable regard to the rights and legitimate interests of the other State.

3. During the course of the consultations and negotiations, the notifying State shall, if so requested by the notified State at the time it makes the communication, refrain from implementing or permitting the implementation of the planned measures for a period of six months unless otherwise agreed.
CRITIQUE

• IWL in general:
  • Legitimacy (how law is made – process)

• 1997 UN Watercourses Convention
  • General and open-ended (subjective and self-serving)
  • Institutionalizes the conflict between upstream and downstream states
  • Indeterminacy makes it easier to justify non-compliance
RECENT DEVELOPMENTS IN THE NILE BASIN: WHAT ROLE FOR IWL?

Basin Level

- Nile Basin Initiative

- 2010 Nile Comprehensive Framework Agreement (not yet in force)
### EQUITABLE AND REASONABLE USE

<table>
<thead>
<tr>
<th>1997 UN Convention</th>
<th>Draft CFA (article 4(1))</th>
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<tbody>
<tr>
<td>1. Watercourse States shall in their respective territories <em>utilize</em> an international watercourse in an equitable and reasonable manner. In particular, an international watercourse shall be used and developed by watercourse States with a view to attaining optimal and sustainable utilization thereof and benefits therefrom, taking into account the interests of the watercourse States concerned, consistent with adequate protection of the watercourse.</td>
<td>Nile basin states shall in their respective territories utilize the water resources of the Nile River basin in an equitable and reasonable manner. In particular, those water resources shall be used and developed by Nile Basin States with a view to attaining optimal and sustainable utilization thereof and benefits therefrom, taking into account the interests of the Basin States concerned, consistent with adequate protection of those water resources. <em>Each basin state is entitled to an equitable and reasonable share in the beneficial uses of the water resources of the Nile river basin.</em></td>
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[Borrowed from the Helsinki Rules]
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<thead>
<tr>
<th><strong>1997 UN Convention (article 6)</strong></th>
<th><strong>Draft CFA (article 4(2))</strong></th>
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<tr>
<td>(a) Geographic, hydrographic, hydrological, climatic, ecological and other factors of a natural character;</td>
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<td>(b) The social and economic needs of the watercourse States concerned;</td>
<td>(b) The social and economic needs of the basin states concerned;</td>
</tr>
<tr>
<td>(c) The population dependent on the watercourse in each watercourse State;</td>
<td>(c) The population dependent on the water resources in each basin state;</td>
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<tr>
<td>(d) The effects of the use or uses of the water resources in one watercourse State on other watercourse States;</td>
<td>(d) The effects of the use or uses of the water resources in one basin state on other basin states;</td>
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<tr>
<td>(e) Existing and potential uses of the watercourse;</td>
<td>(e) Existing and potential uses of the water resources;</td>
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<td>(f) Conservation, protection, development and economy of use of the water resources of the watercourse and the costs of measures taken to that effect;</td>
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<td>(g) The availability of alternatives, of comparable value, to a particular planned or existing use.</td>
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<td>(h) The contribution of each basin state to the waters of the Nile River basin [Ethiopia];</td>
<td></td>
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<tr>
<td>(i) The extent of the drainage area in the territory of each basin state [Sudan]</td>
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## NO-HARM

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<th>1997 UN Convention (article 6)</th>
<th>Draft CFA (article 5)</th>
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<tbody>
<tr>
<td>1. Watercourse States shall, in utilizing an international watercourse in their territories, take all appropriate measures to prevent the causing of significant harm to other watercourse States.</td>
<td>1. Nile basin states shall, in utilizing Nile River basin water resources in their territories, <strong>take all appropriate measures to</strong> prevent the causing of significant harm to other basin states.</td>
</tr>
<tr>
<td>2. Where significant harm nevertheless is caused to another watercourse State, the States whose use causes such harm shall, in the absence of agreement to such use, take all appropriate measures, having due regard for the provisions of articles 5 and 6, in consultation with the affected State, to eliminate or mitigate such harm and, where appropriate, to discuss the question of compensation.</td>
<td>2. Where significant harm nevertheless is caused to another Nile basin state, the States whose use causes such harm shall in the absence of agreement to such use, take all appropriate measures, having due regard to the provisions of article 4 above, in consultation with the affected state, to eliminate or mitigate such harm and, where appropriate, to discuss the question of compensation.</td>
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* Refrain from and prevent (Egypt)
## NOTIFICATION OF PLANNED MEASURES

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<th>1997 UN Convention (articles 12)</th>
<th>Draft CFA (article 8)</th>
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<td>Before a watercourse State implements or permits the implementation of planned measures which</td>
<td>1. Nile Basin States agree to exchange information through the Nile River Basin</td>
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<td>may have a significant adverse effect upon other watercourse States, it shall provide those</td>
<td>Commission.</td>
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<td>States with timely notification thereof. Such notification shall be accompanied by available</td>
<td>2. Nile Basin States shall observe the rules and procedures established by the Nile</td>
</tr>
<tr>
<td>technical data and information, including the results of any environmental impact assessment,</td>
<td>River Basin Commission for exchanging information concerning planned measures.</td>
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<td>in order to enable the notified States to evaluate the possible effects of the planned measures.</td>
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MAIN CONTROVERSY:
ARTICLE 14 (WATER SECURITY)

Having due regard to the provisions of Articles 4 and 5, Nile Basin States recognize the vital importance of water security to each of them. The States also recognize that the cooperation management and development of waters of the Nile River System will facilitate achievement of water security and other benefits. Nile Basin States therefore agree, in a spirit of cooperation:

(a) to work together to ensure that all states achieve and sustain water security;

(b) ... [the unresolved Article 14(b) is annexed to be resolved by the Nile River Basin Commission within six months of its establishment].*

*Not to adversely affect the water security or the present and future uses or rights of any other Nile Basin State (Technical Committee)

* Not to adversely affect the water security and current uses and rights of any other Nile Basin States (Egypt and Sudan)
CONCLUSIONS

1. The 1997 UN Convention does not adequately reflect the status of IWL (arbitrary drafting process) and therefore offers very limited guidance to Nile basin states on how to proceed about allocating the beneficial uses of the Nile waters.

2. The 10-year drafting process of the CFA produced a text that largely reflected the 1997 UN Convention, while eliminating the few safeguards against harm.

3. Possible solutions?
   • A revision of the provisions of the 1997 UN Convention & CFA
   • Disregard principle
   • Mutual Gains Approach (McCaffrey, Grzybowski and Paisley)
   • “Corrective equity” or rule-based equity rather than broad-based equity (Franck)
THANK YOU

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