The Duty to Notify Planned Measures under International Watercourse Law and the Nile Basin Cooperative Framework Agreement

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Abstract

The duty to notify planned measures is one of the obligations imposed upon riparian states planning to perform activities that may have a significant adverse effect upon other watercourse states. Although the duty is found in the UN Watercourse Convention and other watercourse agreements, there is no consensus as to the details of this rule and its status under international watercourse law. Among the main points of contention are whether this obligation is a customary international law obligation and whether its non-observance would lead to the strict liability of the state concerned. Taking into account the divergent approaches of articulation of this duty under the UN Watercourse Convention and the Cooperative Framework Agreement over the Nile, there exist disagreements as to the contents of this duty. This has its own impact on the proper implementation of this duty by watercourse states. In this article the writer will mainly investigate the essence and normative basis of the duty to inform planned measures as enshrined under these instruments. The writer will mainly employ a doctrinal analysis in addressing the abovementioned issues and bases the scrutiny on the relevant sources of international law.

Keywords: Nile River Basin, UN Watercourse Convention, the duty to notify planned measures, Cooperative Framework Agreement (CFA)

Introduction

The uses of international watercourses are mainly classified into navigational and non-navigational uses. The navigational uses of international watercourses are very common in the periods where international watercourses are the major ways of transportation. Since the time when

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humankind massively used the international watercourse for systematic large scale irrigation and hydroelectric generation, the non-navigational purpose of these international watercourses become an issue that needs the states' regulation.[1] Though there are different efforts to codify a law concerning the non-navigational uses of international watercourses, the most successful one is the attempt made by the International Law Commission (ILC). The ILC work was adopted by the United Nations General Assembly in 1997. This draft convention on the non-navigational uses of international watercourses came into force on 17 August, 2014 in accordance with Article 36(1) of the same.[2]

According to the 1997 UN Watercourse Convention, each riparian state of an international watercourse has the responsibility of exchanging on a regular basis readily available data and information on the condition of the watercourse.[3] The exchange of data and information regarding the state of the watercourse includes both current and future planned uses along the international watercourse.[4] This duty of states to notify planned measures is one of the procedural obligations[5]of the riparian states provided under the 1997 UN Watercourses Convention. The inclusion of the obligation to provide prior notification of planned measures under the UN Watercourse Convention indicates that the international community rejects a state's unfettered discretion to do as it alone wishes with the portion of an international watercourse within its territory.[6] According to the UN

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[1] Ibrahim Kaya, Equitable Utilization: The Law of Non-navigational Uses of International Watercourses, Ashagate Publishing limited, 2003, pp, 1-2

[2] https://treaties.un.org/pages/viewdetails.aspx?src=ind&mtdsg_no=xxvii-12&chapter=27&lang=en last visited 4/4/2019. As of April 2019, the convention has been ratified by 36 states. It is important to note that there is no any state from the Nile basin countries which neither ratified nor signed this convention.

[3] The UN Convention on the Law of the Non-navigational Uses of International Watercourses, adopted by the
General Assembly of the United Nations by resolution 51/229, in its Fifty-first Session, on 21 May 1997, come in
to force, August 2014, Look Article 9(1).

[4] Muhammad Mizanur Rahaman, Principles of Transboundary Water Resources Management and Ganges Treaties: An Analysis, *Water Resources Development*, Vol. 25, No. 1, 159–173, March 2009, p.162

[5] There is a classification of obligation on watercourse states in to substantive obligation and procedural obligation. This can be inferred from the classification made by Stephen C. McCaffrey, in his book entitled "The law of international watercourses", 2nd ed, Oxford University press, 2007.

[6] Stephen McCaffrey , The UN Convention on the Law of the Non-Navigational Uses of International Watercourses: Prospects and Pitfalls, in *Salman M.A.Salman and Laurence Boisson de Chazourn* (editors) International Watercourses *Enhancing cooperation and Managing Conflicts, Proceeding of*

Watercourse Convention, the notification shall be accompanied by available technical data and information, including the results of any environmental impact assessment.[7]

Some authors note that the duty to notify planned measures is a generally accepted practice. According to this practice a watercourse state potentially affected by planned activities of a co-riparian has the right to be promptly notified of such activities before it is implemented.[8] Nevertheless, there is no consensus and clarity to what extent the duty is considered as a generally accepted practice that is binding on riparian states under international watercourses law. Especially in the absence of an inclusive legal framework governing the utilization, management, and conservation of transboundary watercourses, tension and confrontation between riparian states over the normative content of the duty to notify planned measures are likely to occur.[9]

Because of this fact it is possible to look at the diverse construction of this duty in different international watercourse agreements. Moreover, it is also worth looking at the divergent views of authors regarding its status under international watercourse law. While some authors argue that the duty to notify planned measures is a binding customary obligation for the riparian state,[10] others contend that it is not a strict substantive legal obligation.[11]

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the world bank seminar, World Bank Technical Paper No. 414 , *The World Bank Washington, first published in 1998 D.C.* P.23.

[7] Supra note 3, UN watercourse convention, Article 9(1) second paragraph.

[8] Dr Attila Tanzi, Chairman, Legal Board, UNECE Water Convention, commentary on"Planned Measures" Under International Water Law, available at; <https://www.unece.org/.../**water**/.../Tanzi_**planned_measures**_Eng.pdf> last visited July 5, 2017.p.10 Szekely, Alberto, "General Principles" and "Planned Measures" Provisions in the International Law Commission Draft Articles on the Non-Navigational Uses of International Watercourses: A Mexican Point of View" (1991). The Law of International Watercourses: The United Nations International Law Commission's Draft Rules on the Non-Navigational Uses of International Watercourses (October 18). P.17 it can be reached at: http://scholar.law.colorado.edu/law-of-international-watercourses-united-nations-international-law-commission/6

[9] Abiy Chelkeba, Notification and Consultation of Projects in Transboundary Water Resources: Confidence Building rather than Legal Obligation in the Context of GERD, *Mizan Law Review*, Vol. 11, No.1, September 2017, p. 125.

[10] The following statements are quoted from different sources to support this position. The duty to cooperate and notify other riparian states about planned measures for shared watercourses and… were among the cornerstone articles of customary law. See Reaz Rahman, 'The law of the non-navigational

According to the latter, the duty to notify is rather a procedural requirement that forms an integrated part of the due diligence obligation imposed upon states performing developmental activities in their domestic undertakings over an international watercourse. Such disputed issues as the specific content and scope of the duty to notify planned measures as well as its normative content under the UN Watercourse Convention and the agreements within the Nile basin[12] will be the focus of this article.

Following this introduction, the first section of this article will talk about general remarks on the development of international watercourse law and the basic principles. The second section discusses the development of the duty to notify planned measures under international law. While the third section discusses the content, scope and essence of the duty to notify planned measures under the 1997 UN Watercourse Convention, the forth section will assess the duty to notify planned measures under the agreement over the Nile, especially on the Cooperative Framework Agreement over the Nile (CFA). The last two sections discuss the status of the duty to notify planned measures under international law and concluding remarks respectively.

1. International Watercourse Law and the Basic Principles

The development of international water law is inseparable from the development of international law in general. Such fundamental principles and basic concepts like the sovereign equality of states, non-interference in matters of exclusive national jurisdiction, responsibility for the breach of

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uses of international watercourses: dilemma for lower riparian, 1995-1996, Vol. 19, Fordham International Law Journal, PP.9-10. The obligation of the co-riparian states to inform and notify each other prior to implementing or taking any action has become a recognized rule of customary international law. See ibid Abiy Chelkeba, p.128. During the negotiation of the UN watercourse convention the prior notification was not controversial, the general acceptance of the preposition that states have a duty to provide prior notification of planned projects that may adverse impact on co-riparian….required by customary international law. Stephen McCaffrey, *The Law of International Watercourses*,2nd edition, Oxford University Press, first published in 2007, P. 473.

[11] Jutta Brunnée, ESIL Reflection: Procedure and Substance in International Environmental Law: Confused at a Higher Level? Vol 5, Issue 6 available at at:-http://esil-sedi.eu/?p=1344 last visited 23/11/2018.

[12] The total area of the Nile basin represents 10.3% of the area of the African continent and spreads over eleven countries. Nile River, with an estimated length of over 6800 km, is the longest river flowing from south to north over. It is fed by two main river systems: the White Nile, with its sources on the Equatorial Lake Plateau (Burundi, Rwanda, Tanzania, Kenya, Zaire and Uganda), and the Blue Nile, with its sources in the Ethiopian highlands. It can be reached at: http://www.fao.org/3/W4347E/w4347e0k.htm last visited 5/04/2019

state's international obligations, and peaceful settlement of international disputes equally apply to international watercourse law.[13] At the same time, this independent branch of international law has developed its own principles and norms specifically tailored to regulate states' conduct in a rather distinct field, i.e. in the utilization of transboundary water resources.

International Watercourse Law has developed as part of the evolution of human social organization and the intensification of use by human society of fresh water.[14] The importance of water in international relations and the need for cooperation in developing as well as protecting international rivers has resulted in the development of a treaty regime regulating the non-navigational uses of international watercourses.[15]

Despite the attempt by the international community to agree on a comprehensive convention to manage transboundary water resources, there are still some basic rules and principles that are commonly cited to regulate the non-navigational uses of international watercourses. Among these basic rules the equitable utilization principle and the obligation not to cause significant harm can be mentioned.[16] While the principle of equitable utilization evolved from early inter-state practice involving watercourses, the duty not to cause significant harm rule originated as a general principle of law in inter-state relation.[17] Taking into consideration the due diligence nature of the obligation one may say that the duty to inform planned measures is an additional extension of the duty not to cause significant harm rule.

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[13] Sergei Vinogradov, and et al., Transforming Potential Conflict into Cooperation Potential: The Role of International Water Law, (2003) University of Dundee, UK, UNESCO, working paper <http://unesdoc.unesco.org/images/0013/001332/133258e.pdf >, p 12. Last visited 14/09/2018

[14] Supra note 10, Stephen McCaffrey, p. 58.

[15] David J. Lazerwitz, The Flow of International Water Law: The International Law Commission's Law of the Non-Navigational Uses of International Watercourses, *Indiana Journal of Global Legal Studies*: Vol. 1: Iss.1, 1993, P.248

[16] Kai Wegerich & Oliver Olsson (2010) Late developers and the inequity of "equitable utilization" and the harm of "do no harm", Water International, Vol 35, No.6, 707-717, available at at https://www.tandfonline.com/doi/full/10.1080/02508060.2010.533345?scroll=top&needAccess=true

[17] Patricia K. Wouters, An Assessment of Recent Developments in International Watercourse Law through the Prism of the Substantive Rules Governing Use Allocation, Natural Resources Journal, Vol. 36, No. 2, River Basins (Spring 1996), P.419

The basic rule of equitable and reasonable utilization entitles watercourse states the right to use waters of the transboundary watercourse located in the territory of the state with a correlative duty to ensure comparable rights enjoyed by all basin states.[18] However, the obligation not to cause significant harm calls for watercourse states to take all appropriate measures to prevent causing significant harm to other watercourse states. The obligation "not to cause significant harm" is basically linked to concerns about trans-boundary pollution affecting water quality.[19] Like that of the rule of equitable and reasonable utilization, there is a general agreement that the principle of the duty not to cause significant harm has already achieved the status of customary international law.[20] These rules are widely accepted as the basic principles that serve as the foundations of the law of international watercourses and the UN Watercourse Convention.[21]

Agreement, on which of the two rules (equitable and reasonable utilization or the obligation not to cause harm) takes priority over the other, has proved quite difficult to attain and the issue has preoccupied the work of ILC throughout its 23 years of work on the convention. Each rapporteur dealt with the issue in a different way, with some equating the two principles and others subordinating one principle to the other.[22] Taking into account the

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[18] Supra note 13, Sergei Vinogradov, p.12 equitable and reasonable utilization principle is one of the basic international Customary laws international watercourse law.

[19] Albert E. Utton, Which Rule should prevail in international dispute: That of reasonableness or that of No harm? Natural resource Journal, Vol 36, 1996, P.639

[20] Scholars like McCaffrey and Caflisch have concurred that this principle is firmly grounded in customary international law and is a general principle of international law. See generally Mohammed S. Helal, Sharing Blue Gold: The 1997 UN Convention on the Law of the Non-Navigational Uses of International Watercourses Ten Years On, *Colo. J. Int'l Environmental. Law.& Pol'y*, Vol. 18:2, 2007, p.356.

[21] User's Guide Fact Sheet Series: Number 5, No Significant Harm Rule, available at; http://www.unwatercoursesconvention.org/documents/UNWC-Fact-Sheet-5-No-Significant-Harm-Rule, last visited 13/12/2018.

[22] For example, Special Rapporteur Rosenstock, in his first report in 1993, reversed precedent in favor of the principle of equitable utilization. However, in the 1988 40th session it is stated that "[a] watercourse State's right to utilize an international watercourse [system] in an equitable and reasonable manner has its limit in the duty of that State not to cause appreciable harm to other watercourse States. In other words—prima facie, at least—utilization of an international watercourse [system] is not equitable if it causes other watercourse States appreciable harm. Thus a watercourse State may not justify a use that causes appreciable harm to another watercourse State on the ground that the use is 'equitable', in the absence of agreement between the watercourse States concerned. See Report of the International Law Commission on the work of its fortieth session, 9 May-29 July 1988, Official Records of the General Assembly, Forty-third session, Supplement No.10,p.36.This clearly shows that there seems to have been some sort of priority given to the duty to cause appreciable harm to other watercourse States.

respective advantages riparian states derived from these principles, they differ in terms of their preference for these core principles. Ethiopia, for example, believes that a Nile agreement should be based on the principle of equitable utilization and that the "no significant harm" principle should only operate when a state has exceeded its equitable or reasonable use.[23] Believing that this principle gives better right, most of the time lower riparian states prefer the no significant harm rule over that of the principle of equitable utilization.[24] On the other hand, upper riparians favor the equitable utilization principle because it provides more scope for states to utilize their share of the watercourse.[25]

Like the two core principles of international watercourse law, there are also other rules that developed in recent decades to regulate the conduct of watercourse states. Among these rules the duty to notify planned measures may be mentioned.

2. The Duty to Notify Planned Measures under International Watercourse Law

The very aim of the duty to notify planned measures is to provide early warning of potentially adverse changes in shared international watercourses. This will allow the states concerned the opportunity to make the necessary adjustments.[26] From the outset, the duty seems to contradict with the old and well-developed international law principle called state sovereignty, which entitles states to conduct their domestic affairs without interference by other states or external actors. However, the sovereignty of states is not absolute and is increasingly subject to limitations based on certain fundamental concerns and principles. This includes human rights protection,

[23] Country paper, Ethiopia, Water Resources Management of the Nile Basin: Basis for Cooperation 9-10(Feb.24-27, 1997) (unpublished paper prepared for the Fifth Nile 2002 Conference, on file with Geo, International Environmental Law Rev.).

[24] Salman M.A. Salman (2013) The Nile Basin Cooperative Framework Agreement: a peacefully unfolding African spring?, Water International, Vol 38: no 1, 17-29, P. 22.

[25] *Ibid.*

[26] Stephen C. McCaffrey, The Law of International Watercourses: Some Recent Developments and Unanswered Questions, Denver Journal of International law and policy Vol,17 No. 3, 1989, P.511 The core of this procedural underpinnings is to encourage the transparency of a proposed project and to ensure that it is for maximizing the benefits with no significant adverse effects to the other watercourse states. Look Trilochan Upreti, International Watercourses Law and Its Application in South Asia, Pairavi Prakashan,2006 Pp.121-122.

environmental considerations, and the need to peaceful coexistence between states.[27] There are instances in which state sovereignty may not be claimed by the harming state where the activities over shared resources do have transboundary effect on other states.[28] Imposing a duty on states to notify planned measures in cases, where a planned activity has significant adverse effects upon other watercourse states, can also be cited as one development of limitation on state sovereignty. Therefore, it can be said that the state concerned needs to observe this obligation in its relation with other watercourse states.

There are authors who note that the development of the duty to notify planned measures is traced back mainly to international environmental cases.[29] In fact, it is possible to examine what some old watercourse utilization treaties include in this duty.[30] The roots of this procedural duty of the state can even be traced back to international case laws.[31]

Taking into account the very nature of the general rules of cooperation,[32] there are views that state the duty to notify planned measures is understood as a specific application of the general principle of cooperation between states.[33] This principle, which declares that states have an obligation to

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[27] For example issues related to human rights and racial oppression do not now fall within the closed category of domestic jurisdiction. It was stated on behalf of the European Community, for example, that the 'protection of human rights and fundamental freedoms can in no way be considered an interference in a state's internal affairs'. Reference was also made to 'the moral right to intervene whenever human rights are violated'. See Show, Malcolm N., *International Law*, 6th edition, Cambridge University Press, Cambridge, 2008, p.213. See also M. Reisman, 'Sovereignty and Human Rights in Contemporary International Law', 84 AJIL, 1990, p. 866.

[28] The sovereignty of the contracting States over the waters of successive rivers which flow on their territories is not absolute, but is made subject to modifications arrived at between the two parties. Look Lake Lanoux Arbitration (France V. Spain) (1957) *Arbitral Tribunal. November 1*6, 1957, P.12, available at at http://www2.ecolex.org/server2.php/libcat/docs/.../Full/En/COU-143747E.pd... last visited 06/07/2017.

[29] Elli Louka, International Environmental Law Fairness, Effectiveness, and World Order, Cambridge University Press, First published in 2006, P.123

[30] The multilateral convention relating to the development of hydraulic power affecting more than one state, which was signed at Geneva, 9 December 1923, and Art 7, Paragraph 2 of the Indus Water Treaty of 1960. Look Dante A. Caponera, National and International Water Law and Administration selected writings, International and National water law and policy series, Kluwer law international, 2003, p.212.

[31] Supra note 15, David J. Lazerwitz, Pp. 263-264

[32] Yearbook of the International Law Commission 1987 *Summary records of the meetings of the thirty-ninth session 4 May-17 July 1987, Vol. 1,* P.71, Para.13.

[33] Supra note 10, Stephen McCaffrey, P. 472.

cooperate in the interests of avoiding harm to another state, was clearly articulated in the Lake Lanoux Arbitration.[34]One may say among the different means of avoiding harm to other states of international watercourses, notifying new planned activities within the shared watercourse can be mentioned.

The Arbitral Tribunal, in its decision of November 16/1957, stated that:

> "[S]tates are today perfectly conscious of the importance of the conflicting interests brought into play by the industrial use of international rivers, and of the necessity to reconcile them by mutual concessions. The only way to arrive at such compromises of interests is to conclude agreements on an increasingly comprehensive basis … There would thus appear to be an *obligation to accept in good faith all communications* and contracts which could, by a broad comparison of interests and by *reciprocal good will*, provide States with the best conditions for concluding agreements...."[35]

From this case, one can understand that the broad statement of agreement on an increasing comprehensive basis with reciprocal good will possibly incorporates the obligation to cooperate. One way of enforcing this general obligation as stated above may be to include the exchange of information and consultation among riparian states on the possible effects of planned measures. Elli Louka noted that the tribunal in this case concluded that France had the duty to notify and consult with Spain with regard to work planned on Lake Lanoux.[36] It is also stated in the findings of the Tribunal that the conflicting interests that arose due to the industrial use of international rivers must be reconciled by mutual concessions embodied in comprehensive agreements.[37] This means states have a duty to make arrangements and modalities that possibly avoid confrontation.

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[34] The Lake Lanoux dispute arose from the French Government's decision to permit Électricité de France to develop a hydroelectric project that diverted water from Lake Lanoux into the Ariège River. Spain opposed the French project, which initially provided for no return of water to the Carol River and offered only monetary compensation by France. The French offer to modify the project by returning to the Carol the same amount of water that it extracted for the reservoir, was also rejected by Spain. It can be reached at: https://www.internationalwaterlaw.org/cases/othertribunals.html Last visited 05/04/2019

[35] Supra note 15, David J. Lazerwitz, p. 264.

[36] The *Lake Lanoux* case has been heralded as establishing the principle of prior consultation with another state before undertaking a project that has transboundary effects. See Supra note 29, Elli Louka, P.123, PP,41-42

[37] Supra note 28, Lake Lanoux Arbitration , P. 15.

A state wishing to undertake a project that will possibly affect an international watercourse cannot decide whether another state's interests will be affected; the other state is the sole judge of that and has the right to get information on the proposals. In order to enable the state to come up with a conscious decision, consultations and negotiations between the two states must be genuine, must comply with the rules of good faith, and must not be mere formalities.[38] However, this does not mean the state that is notified of its planned measures cannot advance its project until it gets the consent of the other watercourse states. Subjecting a state's right to use its watercourses to the completion of a prior agreement with another state would give the other state essentially "*a right to veto*". This will paralyze the exercise of territorial competence of one state at the discretion of another state.[39]

Under the International Law Association Helsinki Rules on the uses of the waters of international rivers, we may find a provision relevant to the duty of the state to notify planned measures. It is provided under Article XXIX (2) of the Helsinki Rules which states, "A State, regardless of its location in a drainage basin, should in particular furnish to any other basin State, the interests of which may be substantially affected, notice of any proposed construction or installation which would alter the regime of the basin in a way which might give rise to a dispute…and the notice should include such essential facts as will permit the recipient to make an assessment of the probable effect of the proposed alteration." [40] From the provisions of Helsinki rules, it is possible to look at the inclusion of the obligation to notify planned activities by riparian states to other riparian states. What is interesting in this provision is the duty is imposed upon the watercourse states irrespective of the location of the state as upper or lower riparian. However, mostly the lower riparian states note that because of their location in the basin, they believed that this obligation is primarily imposed only on

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[38] *Ibid*., pp 15-16.

[39] Lake Lanoux Arbitration, (France v. Spain), Nov. 16. 1957, 12 UN Reports of International Arbitral Awards 281 (1957). Para. 11, as noted by supra note 29 Elli Louka, p. 42.

[40] The Helsinki Rules on the Uses of the Waters of International Rivers, Adopted by the International Law Association, held at Helsinki in August 1966, Article XXIX.

the upper riparian states of the water basin, noting that harm is traveling to the downstream of the watercourse.[41]

The other international instrument is the 1992 Rio Declaration on Environment and Development.[42] Though this declaration is not specifically concerned about watercourse utilization, as the declaration contains statements on the notification of transboundary environmental impacts of the states' conduct, it has some implications and relevance to the utilization of watercourses. The declaration frames the principle in the following terms: "States shall provide prior and timely notification and relevant information to potentially affected states on activities that may have a significant adverse transboundary environmental effect and shall consult with those states at an early stage and in good faith".[43] Though the document deals with general environmental law matters, this provision is particularly significant because it had proved impossible to include a similar principle in the Stockholm Declaration on the Human Environment twenty years before the Rio Declaration, owing chiefly to the objections of Brazil,[44] which was embroiled in a dispute about prior notification with Argentina concerning the *Itapúa* dam project on the *Paraná* River.[45] The reason why Brazil objects to

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[41] In this regard it is stated that '… downstream riparians require that they be notified of any activity upstream to ensure that such activity would not harm their interests. Most downstream riparians believe that this is a unilateral requirement and does not apply to upstream riparians. Look Salman M.A. Salman, 'Downstream riparians can also harm upstream riparians: the concept of foreclosure of future uses', July 2010, Vol. 35, No. 4, *Water International,* p. 351.

[42] Rio Declaration on Environment and Development, Rio de Janeiro, Brazil, 14 June 1992.

[43] *Ibid*, Principle19.

[44] The draft Stockholm declaration on the Human Environment incorporate a principle which states that:- "the right and duty to consult each other if there are reason to believe that any planned activity may cause serious harm to the Environment in general or infringe up on the Environmental right of other states." Some states like the US and Canada come up with detailed issues that should be undertaken by this principle. Some other states notes that this already stated under the UN Charter therefore there is no need to incorporate with this declaration as it is redundant. A group of African states requested for making a bit strong obligation on state parties. Some other states note that the declaration is somewhat inspirational document therefore we should not incorporate such obligation in this document. Latter Brazil come to exist as the main opponent of this principle within the Stockholm Declaration and notes that the adoption of this principle might be used as obstacle in the path of development. This is accepted by the general assembly drafted as what is presently existed in Art 21 and 22 of the Declaration.

[45] Supra note 5, Stephen C. McCaffrey, p. 472. The dispute arose in the early 1970s between Brazil and Argentina over plans by Brazil and Paraguay to construct one of the world's largest dams across the Parana River at *Itapúa*. Argentina was concerned that this project will have adverse impact on a dam it planned to construct. Argentina also maintained that Brazil had an obligation under international law to inform it of the technical details of the *Itapúa* project and to consult with it so that Brazil might take Argentina's concerns into account. First Brazil vigorously denied the existence of such obligation of

this principle is because of her fear that the principle might be used as obstacle in the path of development of the state. This general rule of international environmental law has its own importance for the specific regime of international watercourse law.

There are also bilateral as well as multilateral international watercourse treaties that incorporate the duty to inform planned measures.[46] The following treaties such as the Ganges River basin, i.e. the 1996 Mahakali Treaty between Nepal and India and the 1996 Ganges Treaty between India and Bangladesh[47]; the 1995 SADC Protocol on Shared Watercourse Systems (Articles 2[9], 2[10]); Article 22 of the 2002 Sava River Basin Agreement; the 1995 Mekong Agreement (Articles 5, 10, 11, 24), are bilateral treaties, just to mention a few.[48] The Mekong River Commission, Preliminary Procedures for Notification, Prior Consultation and Agreement, 12 November 2002, which state how to receive prior notice of proposed projects and measures likely to have a significant cross-border impact can also be mentioned. The Senegal River Water Charter was concluded by Mali, Mauritania and Senegal in May 2002 and later on Guinea became a party in 2006. Article 4 of the Charter enumerates a number of principles for the proper allocation of the water resources of the Senegal River. Among these principles is "the obligation of each riparian state to inform other riparian states before engaging in any activity or project likely to have an impact on water availability, and/or the possibility to implement future projects" may be mentioned.[49]

However, there are also instances where riparian states objected to the rule of prior notification of planned measures. For example, the existence of such a duty was disputed in 1979 when an agreement concluded by Argentina, Brazil, and Paraguay on the coordination of separate water development

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prior notification and consultation; however in 29 September 1972 they come in to agreement and able to resolve this dispute in an amicable fashion by incorporating provision that deal with exchange of hydrological information.

[46] Salman M. A. Salman, The World Bank Policy for Projects on International Waterways An Historical and Legal Analysis, the World Bank Washington DC, Law, Justice and development series, Martinus Nijhoff Publishers, 2009, P. 105.

[47] Article IV-VII of the Ganges Treaty (1996), Articles 6, 9 of Mahakali Treaty (1996) includes provision regarding Notification, consultation and negotiation. See supra note 5, p.170.

[48] *Ibid.,* p. 61.

[49] Supra note 41, Salman M.A. Salman, P. 353.

projects planned on bi-lateral bases by these three states on the Paraná River, which ended a bitter dispute between Argentina and Brazil over prior notification. Argentina was of the opinion that Brazil had an obligation to provide prior notification and technical details regarding the bi-lateral Brazilian/Paraguayan *Itaipú* project and to consult with Argentina because of concerns the project would adversely affect a dam it planned to construct with Paraguay further downstream on the Paraná. In the end, these states came to agreement in 1979, which included these two obligations.[50]

Part three of the 1997 UN Watercourse Convention, which came into force in August 2014 after the 35th state[51] ratified the document, is centered on the obligation set out in Part III of the convention (Articles 11-19) for watercourse states to exchange information and consult with each other on the possible effects of planned measures on the condition of an international watercourse. The inclusion of provisions on information concerning planned measures is contained in some bilateral[52] and multilateral agreements[53] on international watercourses and is also addressed in decisions of the ICJ[54] as well as different arbitral court decisions.[55] However, it is important to state that the details of this obligation differ from one treaty to the other.

[50] Kerstin Mechlem, water as a vehicle for inter-state cooperation: a legal perspective, *FAO Development Law Service,* August 2003, P 17. http://www.fao.org/Legal/pub-e.htm, last visited 18 September 2016.

[51] The 35th state to accede the convention is Vietnam. The state accedes to the convention in 19 May, 2014 and the Convention entered into force on 17 August 2014, 90 days after that 35th ratification was deposited.

[52] The bilateral treaties of the Ganges River basin i.e. the 1996 Mahakali Treaty between Nepal and India.

[53] For Zambezi Watercourse states the ‘duty to notify’ is a legally binding international treaty obligation set out in Art.16 of the Agreement establishing the Zambezi Watercourse Commission (ZAMCOM Agreement) as well as Art.4 of the Revised SADC Protocol on Shared Watercourses. Look Zambezi Watercourse Commission, ZAMCOM Procedures for Notification of Planned Measures, p.5, available at at http://www.zambezicommission.org/sites/default/files/clusters_pdfs/ZAMCOM-Procedures-for-Notification-of-Planned-Measures.pdf last visited 06/12/2018

[54] In the *Pulp Mills (Argentina v.Uruguay) 2010* case, ICJ recognized the existence of a stand-alone obligation in international law for States planning measures or projects with the potential to significantly impact upon a shared watercourse or other watercourse States to provide meaningful notification. Look ibid, P.6

[55] Lake Lanoux Arbitration, (France v. Spain)

3. Essence of the Duty to Notify Planned Measures under the 1997 UN Watercourse Convention

The existence and, to a lesser degree, the normative status of general environmental rules have largely been defined by the "progressive gathering of recurrent treaty provisions, recommendations made by international organizations, resolutions adopted at the end of international conferences, and other texts that can be said to have influenced state practice."[56] The application of the duty to notify planned measures is amply supported by UNGA Resolution 2995(1972), by the 1997 UN watercourse convention, and by other international codifications, declarations, case laws, and commentators.[57]

The UNGA Resolution of 2995(1972) states that in exercising their sovereignty over their natural resources, states must seek, through effective bilateral and multilateral co-operation or through regional machinery, to preserve and improve the environment; in addition, it emphasizes that, in the exploration, exploitation and development of their natural resources, states must not produce significant harmful effects in zones situated outside their national jurisdiction.[58] It also notes that co-operation between states in the field of the environment will be effectively achieved if the technical data relating to the work to be carried out by states within their national jurisdiction is properly communicated with a view to avoiding significant harm that may occur in the environment of the other state.[59]The resolution also recognized the importance of the exchange of technical data with respect to proposed activities in preventing transboundary harm.[60] From this resolution one can infer that the prohibition of producing significant harmful

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[56] Owen McIntyre The Role of Customary Rules and Principles in the Environmental Protection of Shared International Freshwater Resources, Faculty of Law, University College Cork, National University of Ireland. at <www.esil-sedi.eu/sites/default/files/**McIntyre**.PDF> Pp.2-3 last accessed on 02/12/2018.

[57] Patricia Birnie and Etal, international law and the Environment, Oxford ; New York : Oxford University Press, 3rd ed. 2009, p. 565.

[58] UN general Assembly resolution 2995 (1972), *2112th plenary meeting, 15 December 1972,* Co-operation between States in the field of the environment, <http://www.un.org/ga/ RESOLUTION>. last visited 5/04/2019.

[59] *Ibid*.

[60] Neil Craik, The International Law of Environmental Impact Assessment: Process, Substance and Integration, Cambridge University Press, first published in 2008, P. 91.

effects on the environments of other states might include a duty on the part of the state to notify its planned measures that possibly have significant impact upon the environment of the other neighboring states, including neighboring states within the shared international watercourses. This can be supported by the very nature of the requirement of due diligence on the part of the planning state not to produce significant harm to the other watercourse states.

The 1997 UN watercourse convention incorporates provisions that deal with the rules of planned measures. The inclusion of the articles on transboundary notification and consultation in the 1997 UN watercourses convention was opposed by only three states, all upstream: Ethiopia, Rwanda, and Turkey.[61] Some note that acceptance by most delegations of the basic obligation to provide prior notification is itself important: "It provides further evidence that the international community as a whole emphatically rejects the notion that a state has unfettered discretion to do as it wishes with the portion of an international watercourse within its territory."[62] Despite the fact that the watercourse convention is a 'framework convention' that was assumed to provide general guidelines, it came up with detailed rules of the duty to notify planned measures under Art 12-19 of the convention.[63] This does have its own impact on the position of these upper riparian states and even for late ratification of the convention. In this regard, it might be important to look at the position of the states in the adoption of the convention. Even the states that support the convention for its adoption failed to ratify and took 17 years for the document to be enforced among member states. We may say that the voting pattern of the watercourse convention reveals that the document was supported mainly by downstream and midstream states while many upstream states either voted against or abstained.[64] For instance, all of the three states that voted against the convention are upper riparian states.[65] Among other things, one may say that the way the provisions on planned measures drafted

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[61] Muhammad Mizanur Rahaman, Principles of international water law: creating effective transboundary water resources management, *2009 Vol. 1, No. 3, Int. J. Sustainable Society,* P. 212.

[62] Supra note 57, Patricia Birnie and Etal, p. 566.

[63] Supra note 46, Salman M. A. Salman, P. 108.

[64] Andualem Eshetu Lema, The United Nations Watercourses Convention from the Ethiopian Context: Better to Join or stay out?, Haramaya Law Review, 2015, Vol 4. No1, P. 6.

[65] (Burundi, Turkey and China) are upper riparian states for the Nile, Tigris-Euphrates, and Mekong Rivers respectively.

in the convention may contribute to the late ratification of the documents by the upper riparian states and these states might look at the provisions on planned measures as an additional extension of the duty not to cause significant harm rules.

In fact, it is not feasible to achieve equitable and optimal utilization of a transboundary watercourse without information and data exchange and consultations between the states sharing it. Therefore, prior notification with respect to planned activities that may significantly affect other co-riparians is a crucial obligation. It plays an important role in preventing international disputes.[66] However, the issue of when notification and consultation of planned measures will be triggered is an important point that needs analysis.

In order to properly realize the rule of equitable and reasonable utilization, certain mechanisms of cooperation are necessary, including the prior notification of planned measures, the exchange of information, consultations, and in certain instances negotiations.[67] The convention sets forth a number of procedural rules to be followed by states when they seek to undertake works on an international watercourse. In the first instance, "states must 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 and related to the water quality, as well as related forecasts."[68] In the event of a planned measure, states are required to "exchange information and consult each other and, if necessary, negotiate on the possible effects of planned measures on the condition of an international watercourse".[69] This article lays down a general obligation on the states to consult each other on the possible effects of these measures. The exchange of information is important in addressing problems that may possibly come out of the one-sided assessments of the state planning the project on the actual nature of the planned activities. As stated in the Yearbook of the International Law Commission, riparian states

[66] Supra note 13, Sergei Vinogradov, p. 57.

[67] *Ibid.,* p. 19.

[68] Supra note 3, The UN Watercourse Convention, Look Article 9(1).

[69] Supra note 13, Sergei Vinogradov, p.19 and Article 11of the UNWCC.

have an interest in being informed of possible effects of planned measures.[70] This will have the effect of avoiding problems that are inherent in unilateral assessments of the actual nature of such effects.[71]

In cases where planned measures could have possible adverse effects on the riparian states, there are a more stringent procedural requirements expected from the state planning such activities.[72] Article 12 of the UN Watercourse Convention states that, "Before a watercourse state implements or permits the implementation of planned measures, which may have a significant adverse effect upon other watercourse states, it shall provide those states with timely notification thereof." This article stipulates obligations regarding planned measures that may have a significant adverse effect upon other watercourse states.[73] The articles under part three establish a procedural framework designed to assist watercourse states in maintaining an equitable balance between their respective uses of an international watercourse.[74] It is believed that this set of procedures under these articles will help watercourse states to avoid disputes relating to new uses of watercourses.[75] However, there is a fear on the part of the planning state that the duty may be construed as a limitation on developing a new water use over the shared international watercourse.

[70] Yearbook of the International Law Commission (1994), Summary records of the meetings of the forty sixth session, 2 May -22 July 1994, Extract from the Yearbook of the International Law Commission: Document A/49/10, Volume II, United Nations, New York, P.111.

[71] *Ibid.*, P. 111.

[72] *Id.*, p.111.The international law Association Helsinki rules also requested [a] State, regardless of its location in a drainage basin, should in particular furnish to any other basin State, the interests of which may be substantially affected, notice of any proposed construction or installation which would alter the regime of the basin... and the notice should include such essential facts as will permit the recipient to make an assessment of the probable effect of the proposed alteration. Look Helsinki rules Art XXIX(2). Here it is important to note that although the Helsinki Rules do not reach the status of an international treaty, the Rules may be characterized as teachings of publicists, because the International Law Association is a body of experts in the field of international law. As teachings of publicists, the Helsinki Rules are a source of international law for international watercourse law. Look Sharing the Gifts of the Nile: Establishment of a Legal Regime for Nile Waters Management, Temp. Int'l & Comp. L.J., vol 7, 1993, Pp. 101-102.

[73] Supra note 3, the UN Watercourse Convention, Article 12.

[74] Supra note 70, Yearbook of the International Law Commission (1994), P. 111.

[75] *Ibid.*, P. 111.

According to the ILC document, a "significant adverse effect" may not rise to the level of "significant harm" within the meaning of article 7.[76] "Significant harm" is not an appropriate standard for the setting in motion of the procedures under part three of the convention, since the use of this standard would mean that the procedures under articles 12-19 would be engaged only where implementation of the new measures might result in a conduct covered by article 7.[77]

It is important to note that the duty to provide notification under the convention arises not when the state planning measures or asked to issue a permit for planned measures believes those measures may result in significant harm to other riparian states. Rather, the threshold is lower when the planning state has a reason to believe that the measures in question may have a "significant adverse effect" upon other states that the obligation is triggered. This threshold is chosen deliberately by the ILC.[78] It advances the goal of prevention of harm.[79] However, as the duty to inform measures mainly aims at preventing harm to the watercourse states, it seems this duty may possibly endanger the equitable and reasonable utilization rights of the planning states. Beyond the new states to utilize the watercourse, extra duty is imposed by this provision in addition to what is clearly stated under Article 7 of the convention. On the other hand, one may say that this duty is a means of safeguarding the notified state from the possible significant harm by the planning state.

After reading Article 12 of the convention, one may say that unless the state planning the measures notifies the other concerned watercourse states, this

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[76] *Ibid.,* p. 111 under Article 7 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. Though it is not easy to show this threshold clearly, it is indicated that causing harm to another state by utilizing the shared river resource has to have a '*significant*' impact on other watercourse states. This threshold implies that the state actor must be in a position to cause the other riparian states to suffer some degree of harm, and that harm; is not a simple harm on that states rather it linked with some degree of harm that do have an effect on the utilization of that shared resources. Scholars who study international water law stipulate that in order to qualify as ―significant‖ the level of harm has to be higher than merely perceptible or trivial (which would be considered insignificant), but it could be less than severe or substantial.

[77] *Id.*, p. 111.

[78] Para.2 of the commentary to art .11, ILC 1994 Report, R.111: "the threshold established by the standard [of 'significant adverse effect'] is intended to be lower than that of 'significant harm' under article 7." As noted by Supra note 5, Stephen C. McCaffrey, 2007, p 472

[79] *Id*, p. 472.

article will not allow a watercourse state to advance its planned project that possibly has a significant adverse impact on other watercourse states. This means that so long as every new use of the watercourse has a significant adverse impact on other watercourse states, it has to be notified to other watercourse states even if the new use of the watercourse resource is under the equitable use right of the state planning the project. According to the first statement of Article 12, the one who will assess the threshold of the harm of the planned activity on the other watercourse states is the state that planned the project. This entails the state planning to undertake its own assessment of the impact of the project upon other watercourse states.[80] This again denotes that notification to the other watercourse states depends upon whether the planning state properly investigates its environmental impact assessment of the project upon other states and the proper investigation of facts on the ground.

The convention under Article 13 provides that, unless an agreement is made by the basin states, the notifying state shall allow notified states a period of six months within which to study and evaluate the measures and to communicate their findings. However, this period can be extended for a further six months at the request of a notified state 'for which the evaluation of the planned measures poses special difficulty'.[81] The rules of the International Law Association Helsinki, on the other hand, request a state providing the notice to afford the recipient a *reasonable period of time* to make an assessment of the possible effect of the proposed project and to submit its views thereon to the state furnishing the notice.[82] Unlike the UN Watercourse Convention, which is limited to a period of six months within which the notified state should reply to the notifying state, the Helsinki rules use a general standard.

When it is said that the state is under a duty to notify planned measures, it is not saying that a state carrying out planned measures is required to gain the

[80] Stephen McCaffrey, The Law of International Watercourses: Some resent development and unanswered questions, Denver Journal of International Law and Policy, 1989, Vol. 17, no 3, P. 512.

[81] Supra note 3, The 1997 UN Watercourse Convention, Art 13.

[82] The Helsinki Rules on the Uses of the Waters of International Rivers, Adopted by the International Law Association at the fifty-second conference, held at Helsinki in August 1966. Report of the Committee on the Uses of the Waters of International Rivers (London, International Law Association, 1967), Art XXIX(3)

consent of co-riparian states before it begins its planned project. The need to have a prior consent of the state concerned is not required.[83] This signifies that the notifying state may proceed with its planned project and there is no duty on the part of the notifying state to get the consent of the notified state to proceed with its planned measures. During the utilization of international watercourse resources, there is no necessity to have the consent of the other riparian states. However, there is an obligation on the planning state to engage in timely notification, technical consultations, and cooperation and exchange of available technical data and information to the other riparian states.[84] I think the very importance of the general rule of prior notice is and should solely be for technical purposes and is not a matter of gaining the consent of the other riparian states. Nowhere in the text of the convention is it stipulated that notifying and notified states have to agree on a planned measure. Rather, it simply obliges them to consult.[85] Therefore, its main purposes include giving the other watercourse states the opportunity to assess the impact of the planned measures on its own and taking the necessary technical measures and consultation with the planning states.

Despite the general rule, as stated under Article 14(b) of the convention, the notifying state shall not implement the planned measures without the consent of the notified states. This means the state which notifies its planned measure with a possible significant adverse effect upon the other watercourse states is not allowed to carry on its planned project during the periods in which the notified states are allowed to evaluate the possible effects of the planned measures under Article 13 of the convention. According to an ILC commentary, the very aim of the duty not to proceed with implementation is intended to assist watercourse states in ensuring that any measures they plan will not be inconsistent with their obligations under Articles 5 and 7.

[83] Dr Patricia K. Wouters & etal, Sharing Transboundary Waters An Integrated Assessment of Equitable Entitlement: The Legal Assessment Model, UNESCO, Paris, 2005, p. 24 available at http://www.cawater-info.net/bk/water_law/pdf/legal_model_doc.pdf Last accessed 18/11/2018

[84] Supra note 3, the UN Watercourse Convention, Art 12.

[85] Alistair Rieu-Clarke, Notification and Consultation on Planned Measures Concerning International Watercourses: Learning Lessons from the Pulp Mills and Kishenganga Cases, Yearbook of international Environmental Law, Vol. 24, No. 1 (2014), P. 108.

Moreover, it will help the notifying state to obtain all the information it would need to be in a position to comply with Articles 5 to 7.[86]

There are also detailed procedures aimed at assisting the state planning a project, and the other watercourse states within the basin may exchange information about the planned measures.[87] The notified watercourse state has a fixed period within which to reply, informing of its opinion with respect to the proposed measure. Where no response is received, and the notifying state is confident that its planned measure complies with the other obligations enshrined under the UN Watercourse Conventions, it can proceed as planned. Whereas if the notified state objects to the planned measure, consultations are required; this is aimed at seeking a solution that will equitably and reasonably serve the watercourse states.[88]

There may be instances where a state may believe that its planned activity has no a significant adverse effect upon other watercourse states and proceed with its projects. In this case, if the other watercourse states think the planned measures have significant adverse effects upon them, the states may request the planning state to observe the obligation imposed on it under Article 12 of the Convention.[89] In this case, the planning state must be willing either to proceed based on the request of the other states or to insist on its position. If the planning state still maintains that its planned project has no a significant adverse effect, it has a duty to provide the other states a documented explanation to this effect.[90]

If riparian states object to the planned use, they are required to enter into discussions with the notifying state "with a view to arriving at an equitable resolution of the situation".[91] If the state objects to the planned measures, the entire process might take twelve months or longer. If the matter is not resolved to the satisfaction of one or more of the states concerned, the

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[86] Report of the International Law Commission on the work of its forty-sixth session, 2 May -22 July 1994, Official Records of the General Assembly, Forty-ninth session, Supplement Extract from the Yearbook of the International Law Commission:- 1994 Document:-, vol. II(2), P.114.

[87] Supra note 3, the UN Watercourse Convention, Look Art 12,13,14,15,16,17,18 and 19.

[88] Supra note 13, Sergei Vinogradov, p. 19.

[89] Supra note 3, the UN Watercourse Convention, Art 18(1).

[90] *Ibid*, Art 18(2).

[91] *Ibid*, Art 17(1).

dispute settlement procedures of Article 33 would be applicable.[92]

These articles represent the acceptance by the international law commission of the principles of prior notification, consultation and negotiation in relation to new watercourse uses or modifications of existing ones.[93] While the procedures they establish are quite general, they provide a framework within that states sharing international watercourses can develop specific regimes tailored to their particular needs and to the characteristics of the watercourse and uses being made of it. The articles cover all potentially adverse effects of planned measures, including environmental impacts.[94]

4. Exceptions to the Duty to Notify Planned Measures under the UN Watercourse Convention

There are exceptional circumstances that are stated under the UN Watercourse Convention in which the riparian states may not be required to give notice of their planned measures to the other riparian states. There are three instances in this regard. The first exception is found in Article 19, which states that a watercourse state may immediately proceed with measures that are "of the utmost urgency in order to protect public health, public safety or other equally important interests." Article 19 mainly requires that planned measures be implemented immediately, without awaiting the expiry of the periods allowed for reply to notification and for consultations and negotiations.[95] In this case, the implementing state must transmit to the other watercourse states a formal declaration of the urgency of the measures together with relevant data and information, then after the normal requirements of consultation, negotiation will proceed.[96]

The second exception is found under Article 28 of the UN Watercourse Convention, which allows states latitude in procedural compliance in the case of actual emergency situations that are related to international watercourses. An emergency is defined here as "a situation that causes, or

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[92] Stephen McCaffrey, The contribution of the UN Convention on the law of the non-navigational uses of international watercourses, Int. J. Global Environmental Issues, Vol. 1, Nos. 3/4, 2001 p. 256.

[93] Supra note 80, Stephen McCaffrey, p. 512.

[94] *Ibid*, pp. 512-513.

[95] Supra note 70, Yearbook of the International Law Commission (1994), p.118.

[96] Supra note 15, David J. Lazerwitz, p. 265.

poses an imminent threat of causing, serious harm to ... other States and that results suddenly from natural causes. .. Or from human conduct..."[97] This article provides that a state in whose territory an emergency occurs needs only to notify the other watercourse states and relevant international organizations.[98] However, there is no clear obligation imposed upon other states to come to the assistance of the victim state. The obligation only comes into effect when the necessary contingency plans have been agreed to in advance.[99]

The third exception is what is stated under Article 31; the article reads: "Nothing in the present Convention obliges a watercourse State to provide data or information vital to its national defense or security". On the other hand, states shall cooperate in good faith with the other watercourse states with a view to providing as much information as possible under the circumstances.[100] This article allows states to withhold information that is vital to their national defense or security, thereby protecting this most important sovereign interest from disclosure. It should be noted, however, that the national defense and security criteria have no specific definitions in the convention and could potentially become an avenue of retreat for signatory states to avoid compliance with the articles. Article 31 attempts to narrow this exception by requiring that states "shall cooperate in good faith with other watercourse States with a view to providing as much information as possible under the circumstances."[101] In such like instances, the state that

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[97] Art 28(1) of the UN watercourse convention states that:- For the purposes of this article, "emergency" means a situation that causes, or poses an imminent threat of causing, serious harm to watercourse States or other States and that results suddenly from natural causes, such as floods, the breaking up of ice, landslides or earthquakes, or from human conduct, such as industrial accidents.

[98] The most effective action to counteract most emergencies resulting from human conduct is that taken where the industrial accident, vessel grounding or other incident occurs. But the paragraph requires only that all "practicable" measures be taken, meaning those that are feasible, workable and reasonable. Further, only such measures as are "necessitated by the circumstances" need be taken, meaning those that are warranted by the factual situation of the emergency and its possible effect upon other States. Supra note 68, The Yearbook of the International Law Commission (1994), P. 130.

[99] At this moment it is important to note the difference between the two exceptions. Article 19 deals with planned measures whose implementation is of the utmost urgency "in order to protect public health, public safety or other equally important interests". It does not deal with emergency situations, which will be addressed in article 28. Article 19 concerns highly exceptional cases in which interests of overriding importance require that planned measures be implemented immediately, without awaiting the expiry of the periods allowed for reply to notification and for consultations and negotiations. Art 28 deals with issues that deals with the already existence of emergencies in the watercourse state.

[100] Supra note 3, The UN watercourse convention, Art 31.

[101] Supra note 15, David J. Lazerwitz, p. 265.

planned the project in the international watercourse may not be required to give such notification to other riparian states of that specific international watercourse. However, the states doing this have to perform in good faith and consider what is stated in the above articles of the international watercourse convention.

5. The Duty to Notify Planned Measures in the Bilateral and Multilateral Agreements of the Nile Basin

The Nile River Basin does not yet have a comprehensive treaty framework that could be applied to all the riparian states. What is more, the absence of a unified legal regime and the unique geopolitical setting of the region have so far limited possibilities of integrated river basin planning and utilization.[102] Except for the Constitutive Act of the Nile Basin Initiative, which clearly highlighted the Nile as a shared resource of all the riparian states and recognizes the equitable utilization of the resource across the basin region,[103] one would note that throughout its long history, not a single legal arrangement has been made about the use of the Nile.[104] However, there are a number of bilateral and multilateral treaties signed since the period of colonization. In the following subsections, an attempt will be made to appraise the duty to notify planned measures or a related principle that imposes a comparable sense of duty under bilateral and multilateral agreements within the basin; and to evaluate how far this duty is incorporated under the Cooperative Framework Agreement over the Nile.

In recent diplomatic negotiations of the Eastern Nile states, it is observed that Ethiopia let the downstream states work with the state to assess the effect of the Great Ethiopian Renaissance Dam (GERD) on the downstream states. The Ethiopian government provided the necessary GERD Project in hard and soft copies for review to an international panel of experts to which the representatives of the downstream states are a party.[105] As it has been

[102] Zewdu Mengesha, Application of the Duty not to Cause Significant Harm in the Context of the Nile River Basin, *Bahir Dar University Journal of Law, 2014, Vol.4, No.2,* p. 287.

[103] Please see the objectives of Nile basin imitative, available at http://www.nilebasin.org/index.php/nbi/who-we-are last visited 10/12/2018

[104] Christina M. Carroll, Past and Future Legal Framework of the Nile River Basin, 1999, Vol.12, The Georgetown International Environmental law Review, P.282

[105] International Panel of experts (IPoE) on Grand Ethiopian Renaissance project Dam Project (GERDP), Final Report Addis Ababa Ethiopia, may 31st 2013 p.4 available at :

repeatedly stated by different higher officials of the government of Ethiopia, Ethiopia did this not from the sense of legal obligation, rather in good faith for having a good relation with these basin states and to maintain a good neighborhood with them. In fact, the motive of Ethiopia was appreciated by the international panel of experts. The panel clearly stated that it appreciated the initiative taken by Ethiopia to invite the two downstream riparian countries, Egypt and Sudan, to undertake joint consultation on the project.[106] This clearly shows that Ethiopia undertook this action not out of a legal duty imposed upon the state rather from the sense of good neighborhood and good faith.

5.1 The Duty to Notify Planned Measures under the Colonial Agreements[107] of the Nile

The past legal agreements for Nile water allocation were subject to Egyptian hegemony and there is no single legal statement or agreement that acknowledges that all the riparians of the Nile have rights to its water resources.[108] The existing legal framework of the Nile does not reflect the needs and interests of all Nile riparian states.[109] Most of the Nile agreements are also bilateral, and all have questionable effects today because they were adopted in the colonial period.[110] Moreover, there is no post-colonial agreement reflecting the interests of all riparian states of the Nile.[111] Despite this fact, according to authors who studied the laws that govern the water resources utilization of the Nile River, the treaties and legal instruments regulating the use of Nile waters may be divided into four categories.[112]

http://www.scidev.net/filemanager/root/site_assets/docs/international_panel_of_experts_for_ethiopian_renaissance_dam-_final_report.pdf

106 *Ibid*, p.1.

107 It is important to tell the reader that the discussion under this subsection is mainly for the sake of assessing the development of the duty to notify planned measures under the Nile water use agreements and this should not be taken to mean that these different colonial agreements have a binding effect upon watercourse states of the Nile in the present days. Beyond the nature of the duty imposed by these old agreements may not exactly reflect the current form of the duty to notify planned measures.

108 Nurit Kliot (1994), Water Resources and Conflict in the Middle East, Rutledge, London and New York, P.75.

109 Supra note 104, Christina M. Carroll, P. 270.

110 *Ibid*, P. 270.

111 *Ibid*, P. 270.

112 The purpose of taking this classification is for the sake of simplicity to make my investigation about the duty under different periods of the agreements on the Nile water.

These are treaties between the United Kingdom and countries under the control of the upper riparians of the Nile basin around the beginning of the 20th century. The second one is the 1929 Nile Waters Agreement; the third is a set of agreements and measures complementing and consolidating the 1929 agreement; and finally there exist post-colonial treaties and other legal instruments.[113] The CFA can be categorized under the last category of the treaties.

The most important treaties within the first categories of instruments include the 1891 Protocol between the United Kingdom and Italy for the demarcation of their respective spheres of influence in Eastern Africa, the 1902 agreement between United Kingdom and His Majesty Emperor Menelik II of Ethiopia, which mainly aimed to set boundaries between Anglo-Egyptian Sudan and Ethiopia. The other treaties within this first category also include the 1906 United Kingdom and the Independent State of the Congo Treaty to Re-define their Respective Spheres of Influence in Eastern and Central Africa. In addition to this, in 1925, there was an exchange of notes between Italy and the United Kingdom by which Italy recognized the prior hydraulic rights of Egypt and the Sudan. In this agreement, the upper riparian states, which were under the colony of these countries, agreed not to construct in the headwaters of the Blue Nile and White Nile rivers and their tributaries any work that might sensibly modify their flow into the main river.[114] All the first categories of treaties one way or another incorporate a provision that prohibits the construction of water works in the upper basins of the Nile. For example, the 1902 treaty provides 'restriction on construction of dams across the Blue Nile, Lake Tana or Sobat without the prior consent of the British Government of Sudan.[115] This treaty shows that the upper riparian state, Ethiopia, has the duty to notify planned activity to the British Government of Sudan and get the approval of

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[113] Arthur Okoth-Owiro, The Nile Treaty State Succession and International Treaty Commitments: A Case Study of the Nile Water Treaties, *Law and Policy Research Foundation,* Nairobi 2004, p. 6.

[114] Exchange of notes between the United Kingdom and Italy respecting concessions for a barrage at Lake Tsana and a railway across Abyssinia from Eritrea to Italian Somaliland. Rome, 14 and 20 December 1925, British and Foreign State Papers, vol. 121. p. 805. Available at:- http://www.fao.org/docrep/W7414B/w7414b0u.htm

[115] Tadesse kassa, The 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.2,2014, p. 278.

the British government before undertaking such projects. This means the upper riparian state, Ethiopia, must pledge not to construct dams or other structures within the watercourse and if the state wishes, it has to communicate its planned projects and get the consent of the British Government of Sudan. This agreement gives a veto right to the British Government of Sudan.

The 1929 Exchange of Notes between Great Britain (acting for and on the behalf of Sudan and her East African colonies) stated under Art 4(II) that "except with the prior consent of the Egyptian Government, no irrigation works shall be undertaken nor electric generators installed along the Nile and its branches nor on the lakes from which they flow if these lakes are situated in Sudan or in countries under British administration which could jeopardize the interests of Egypt either by reducing the quantity of water flowing into Egypt…"[116] The effect of this treaty is that all the riparian countries under British administration had to seek the consent of the Egyptian Government if they wanted to carry out irrigation, power works or construction of any other measures on the River Nile or its branches or on the lakes in those territories. It is possible to say that this colonial treaty imposes an obligation on riparian states to inform Egypt and get her blessing before undertaking the planned activity. This mean that the upper riparian states of the Nile basin that were under British colony needed the consent of Egypt to carry on with any planned activities using the water resource of the river.

The Supplementary Agreement of 1932 (the Aswan Dam Project) and the 1949 Owen Falls Agreement were made with the view to constructing the Owen Falls Dam in Uganda; the agreement was made between Great Britain as administrator of Uganda and Egypt to protect her interest recognized by the 1929 agreement. This treaty as a project-based arrangement concerning only the Owen falls dam; however, it is important to note that following this agreement even after the independence of Uganda, the state was requesting the blessing of Egypt for the projects that Uganda wants to perform in the Nile Basin water resources.[117] This means in order to undertake projects in

[116] Exchange of Notes Regarding the Use of the Waters of the Nile for Irrigation, May 7 , 1929, Egypt-U.K, Art 4(II) .

[117] Appendix B.1, History of Riparian Agreements Respecting the River Nile, *Bujagali Project Hydropower Facility EIA,* March 2001, P.5

the Nile basin, the Egyptian officials should give consent to the planned projects of Uganda. This can be substantiated from the different diplomatic letters that were sent by Uganda to Egypt while the state was a British Colony.[118]According to this agreement, the interests of Egypt will, during the period of construction represented at the site by an Egyptian resident engineer; the engineer will make sure the activity is undertaken in a way that protects the interest of Egypt.[119] This shows that beyond imposing a duty to notify on the part of Uganda its planned measures, this agreement entitles Egypt to follow up the project so as to protect her interests.

In post colonial era, there have been a number of technical cooperation agreements. The most important of all these agreements is the 1959 agreement between Egypt and Sudan on the Full Utilization of the Nile waters.[120] This agreement did not come up with a clear provision with regard to the duty to notify planned measures by the state planning to enhance the utilization of the water resource of the Nile in its territory. However, it is stated under Art 3 [121] that if Egypt, on account of the progress in its planned agricultural expansion, finds it necessary to start any of the increase of the Nile yield project after its approval by the two governments and at a time

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<http://documents.worldbank.org/curated/en/835071468111856514/pdf/multi0page.pdf> last visited 10/04/2019

[118] *Ibid.* It can be noted from history that Uganda was sending diplomatic letters to Egypt for the purpose of requesting the latter state to allow the former state to perform activities on the Nile Basin located in her territory. Such letters was sent by Uganda may be interpreted in recognizing the prior right of Egypt on the water resources of the Nile. From the different letters it is possible to look the attempt made by Uganda to show that the activities undertaken by the state will not have impact on Egypt right over the water resource. A case in point is the Owen Falls Dam Extension Project where Egypt was consulted before the project could take off. It was only after extensive consultations with the other riparian states, especially the downstream ones that the project finally started. For example in 16/05/2006 the Egyptian foreign affair ministry respond for the letter of Uganda dated in 3rd may 2006. The Egyptian government responds to the government of Uganda, upon Uganda request for the renewal of Egypt's no objection to the development of *Bujagali* hydro electric project and *Karuma* project. The Egyptian foreign affair ministry clearly notes that taking into account the projects do not affects Egypt's water share from the river Nile in accordance with the relevant existing agreements in this regards…therefore the relevant Egyptian governmental authorities do not object the project of Uganda.

[119] Exchange of Notes Constituting an Agreement Regarding the Construction of the Owen Falls Dam, Uganda, May 30-31, 1949, Egypt-U.K, no. 4.

[120] United Arab Republic and Sudan Agreement for the Full Utilization of the Nile Waters Signed at Cairo, on 8 November 1959; come in to force 12 December 1959.

[121] *Ibid*, this article deals with projects for the utilization of lost waters in the Nile Basin. It is known that considerable volumes of the Nile Basin Waters are lost in the swamps of Bahr El Jebel, Bahr El Zeraf, Balir el Ghazal and the Sobat River, the two Republics agree in order to prevent these losses and to increase the yield of the River for use in agricultural expansion in the two Republics.

when the Sudan Republic does not need such a project, the United Arab Republic *shall notify* the Sudan Republic of the time convenient for the former to start the effecting of the planned project. This can be considered one instance that deals with the notification of planned measures with regard to activities within the basin water resources.

5.2 The Duty to Inform Planned Measures under the Cooperative Framework Agreement over the Nile (CFA)

The Nile River Basin Cooperative Framework Agreement is an agreement for the regulation of "the use, development, protection, conservation and management of the Nile River Basin and its resources and establishes an institutional mechanism for cooperation among the Nile Basin States."[122] Despite this huge ambition, this agreement is not yet entered into force failing to fulfill the minimum number of ratification as required by the agreement for its entry into force.[123] Part I, Article 3(8) of the Agreement deals with information concerning planned measures, and reads: "The principle that the Nile Basin States exchange information on planned measures through the Nile River Basin Commission." The Commission "which is planned to establish by Part III of the Framework Agreement, will serve as a means to exchange such information among the Nile River Basin states".[124] It is also stated that Nile Basin States shall observe the rules and procedures established by the Nile River Basin Commission for exchanging information concerning planned measures.[125] This means the detailed rules with regard to the rules of procedure governing exchange of information for planned activities will be issued by the Nile Basin Commission after its establishment.

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[122] Agreement on the Nile River Basin Cooperative Framework, May 2009, Entebbe, Uganda, Art.1 It has not yet entered into force.

[123] According to Article 43 of the framework agreement shall enter into force on the sixtieth day following the date of the deposit of the sixth instrument of ratification or accession with the African Union. Presently 6 states (Ethiopia Ruanda, Kenya, Tanzania, Uganda and Burundi) signed and three states Ethiopia, Ruanda and Tanzania Ratified with the respective legislative organs of the states. See ≤http://www.nilebasin.org/index.php/nbi/cooperative-framework-agreement> last visited at 20

[124] Supra note 122, Agreement on the Nile River Basin Cooperative Framework, Art 3(8) and 2(e).

[125] *Ibid*, Article 8(2).

Taking into account the general framing of the exchange of information concerning planned measures under Article 8 of the CFA[126], it may be possible to argue that the duty to inform planned measures is drafted in a way that might not impose stringent duty upon a state planning to perform a different activity over the water resources of the Nile. If we are able to contrast the drafting of this principle under CFA with that of the UN watercourse convention, this stand may be acceptable. In fact, the drafting process of the principle of planned measures under the CFA has been one of the most difficult issues throughout the CFA negotiations.[127]

As stated in the above discussion, the Articles from 12 to 19 of the UN Watercourse Convention provide a detailed rule on the exchange of information concerning a planned measure. The duty imposed by the CFA on the state planning the activity is to give information about the planned activity to the Nile Basin Commission, not to the potentially affected watercourse states.[128] This has its own impact on how the planned measure is communicated to the concerned states, at least in terms of communicating the planned activities to the concerned state at the earliest possible time. The states only get the information on the planned measures from the commission after this organ is notified by the state planning the activity. During the negotiation process on the Cooperative Framework Agreement, Ethiopia, for example opposed notification of other riparians because of its concerns that such notification may be construed as recognition of the 1902 treaty,[129] which the lower riparian states of the Nile, especially Egypt, claim that the agreement gives the state a historical rights over the watercourse resources. By comparing with the UN watercourse convention and taking into account the drafting history of the CFA, the position taken by CFA may be construed as if the watercourse states of the Nile are not willing to abide by a detailed duty of due diligence. The preference by the states of the Nile

[126] *Ibid*, Art 8(1) it is stated that "Nile Basin States agree to exchange information through the Nile River Basin Commission.

[127] Musa Mohammed Abseno (2013) Role and relevance of the 1997 UN Watercourses Convention in resolving transboundary water disputes in the Nile, International Journal of River Basin Management, Vol 11: no2, 193-203, P. 199.

[128] Supra note 122, Agreement on the Nile River Basin Cooperative Framework, as the agreement notes that the exchange of the information is made through Nile River basin commission. look Art 8(1) of the CFA.

[129] Supra note 24, Salman M.A. Salman, P. 22.

in the CFA to exchange information through the Nile basin Commission may have its own impact upon the potential affected states. So long as the states are not directly notified by the state planning the project, one may say that the institutional capacity and the neutrality of the commission will possibly have an impact on the proper notification of information received from the planning state to the other watercourse states of the Nile.

However, as the details of the procedural rules have not yet come into existence, it might be a bit difficult to take position that this duty is formulated loosely. However, it can be again argued that despite the efforts of lower riparian states for the inclusion of similar articulation of the duty to notify planned measures under the UN watercourse Convention,[130] they failed to convince the position taken by upper riparian states. The failure to take due consideration by Nile basin states in drafting this duty in the main part of the framework agreement might suggest that the upper riparian states of the Nile were not happy with the very essence of the duty as enshrined in the UN watercourse convention. The CFA is mainly signed and ratified by the upper basin sates of the Nile.[131] What was happening at the very voting process for this article of the UN watercourse convention might slightly support this argument.[132] This idea was even supported by the Nile watercourse states at the drafting stages of the CFA. Earlier at the drafting stage of the CFA, there was an attempt to adopt the provisions on planned measures from the draft UN Watercourse Convention. However, the lack of agreement in adopting procedural rules on planned measures had led to the removal from the earlier CFA of provisions on planned measures, which had been adopted from the UNWC.[133]

Egypt and Sudan insist that provisions on notification of other riparians about planned measures is in line with those included in the World Bank

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[130] *Ibid*, P. 22.

[131] Up to 20/09/2018 6 states sign and 3 states ratified with their domestic legislative authorities. These states which sign and ratified the CFA are the upper riparian states of the Nile. http://www.nilebasin.org/index.php/nbi/cooperative-framework-agreement last visited 20/09/2017.

[132] The basic obligation to provide prior notification about planned activity was accepted as a part of the Convention by most delegation; however three states did not support this article. The states were Ethiopia, Rwanda and Turkey. Supra note 5, Stephen C. McCaffrey, p.473, look also Supra note 6, Stephen McCaffrey, p. 23.

[133] Musa M. Abseno (2013) The influence of the UN Watercourses Convention on the development of a treaty regime in the Nile River basin, Water International, Vol 38: no 2, 192-203, P. 200.

Policy for Projects on International Waterways and that of the watercourses convention and argued that therefore it should be included in the CFA.[134] Ethiopia, for example, rejected the former draft rules on planned measures, stating that the issue of planned measures becomes relevant if and only if a water sharing arrangement is set and gets acceptance from the basin states. In the absence of Water sharing arrangement, Ethiopia notes that we need only general rules; therefore, the rules governing the regular exchange of data and information are sufficient.[135] Furthermore, Ethiopia's position on the UN Watercourse Convention was clear. The state noted that Part III of the convention imposed an onerous burden upon riparian states.[136]

These all can show that the position of Nile basin states on the content of the rule of planned measures were varied at the negotiation of the CFA and this leads to the drafting of the rule in its current form. One may note that the current form of the duty to notify planned measures under the CFA is intentional articulation by the watercourse states of the Nile. Though the detailed rules are expected to be issued by the Nile River Commission on which the Conference of Heads of State and Government is the supreme policy-making organ, it might be unwise to expect that a similar form of the rules with the UN Watercourse Convention will be articulated by this organ. The fear with which Nile basin states consider this rule as imposing limitation on the latecomer states' equitable uses right of the watercourse resources of the Nile might force the Conference of Heads of State and Government to maintain this position. Taking into account the history of the Nile watercourse states, there is a fear on the part of the upper riparian states of the Nile that the duty to notify planned measures may be construed mainly as a means of maintaining the interests of Lower Riparian states of the Nile, which the old colonial agreements mainly favor. Like the state of Ethiopia, the other upper riparian states took a similar position by saying that without having a proper water allocation agreement of the river, abiding themselves by a similar detailed rule of the duty to notify planned measures as enshrined

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[134] Supra note 24,Salman M.A. Salman, P. 22.

[135] PoE Final Report, 2000, p. 17 as noted by Supra note 133, Musa M. Abseno (2013), P. 200.

[136] Official Records of the 99th Plenary Meeting of the 51st Session, UN Doc A/51/PV.99 (1997) p. 9 as noted by supra note 85, Alistair Rieu-Clarke, p. 108.

under the UNWC may not be wise to protect their respective equitable and reasonably utilization rights of these states.

6. The International Customary Law status of the Duty to Notify Planned Measure

There is disagreement whether riparian's duty to inform about planned measures has the status of international customary law under the present international watercourse laws. In fact, there are diverse views as to what status this duty has under international watercourse law. Some authors in the field of international watercourse law argued that riparian's duty to notify planned measures is accepted as a general practice by watercourse states and even has the status of customary international law.[137] There are also views that support this stand.[138] This means that the duty will bind every riparian state irrespective of the fact that they are a member of a treaty to that effect or not.[139] The provision of the UN Watercourse Convention on prior notification was not controversial during the negotiation of the convention;

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[137] Supra note 8, Attila Tanzi (Ph.D.), P. 10. At least as regards the duty to provide neighboring States with prior notice of plans to exploit a shared natural resource, commentators agree that it is an obligatory requirement under customary international law or 'as a principle generally recognized in international environmental law'. Several States have sought to rely on the duty to provide prior notification in the course of international disputes. The obligation certainly receives broad support in important recent conventional and declaratory instruments. There are individuals who argue that the customary law status of this obligation would also be supported by the general duty to cooperate. The *Pulp Mills* case is often cited to support this argument because the International Court of Justice found that Uruguay breached its procedural obligation under the 1975 Statute to inform, notify and negotiate with Argentina regarding the authorization and construction of the pulp mills. However, it is important to note that the Court's decision refers only to the obligation to 'inform, notify, and negotiate' under the 1975 Statute specifically, and not under general international law. See also Nadia Sanchez and et al, Recent Changes in the Nile Region May Create an Opportunity for a More Equitable Sharing of the Nile River Waters, *Netherlands International Law Review*, 2011, p. 376.

[138] Dante noted that the duty of basin state initiating a project which may adversely affect the right and interests of co-basin states to bring the issue to the knowledge of these states are…increasingly regarded as a rule of international customary law. look supra note 30, Dante A. Caponera, National and International Water Law and Administration selected writings, International and National water law and policy series, Kluwer law international, 2003, p. 212.

[139] Here it should also be mentioned that proving the existence of international customary laws is also a difficult task that need to look different things like looking the existence of state practice and *opinio juris* as per Article 38(1) of the ICJ Statute. Customary international law is more complex and uncertain than formal agreements such as treaties or conventions. Customary international law consists of the practices of states undertaken out of a sense of legal obligation that is out of a sense that the practice is required by law. In determining what customary international law actually is, diplomats, international tribunals, lawyers, and scholars must examine a wide variety of sources of state practice. Look Joseph W. Dellapenna, The customary international law of transboundary fresh waters, *Int. J. Global Environmental Issues, Vol. 1, Nos. 3/4,* 2001 pp. 266-267

this indicates states generally accept that they have a duty to provide prior notification of planned projects that may adversely impact co-riparians.[140] It may be concluded from the available evidence, the manner in which disputes between states have been resolved, state treaty practice, instruments adopted like the Rio Declaration and General Assembly Resolution 2995, the work of expert bodies, and the writings of commentators shows that prior notification is required by customary international law.[141] This idea is also supported by authors like Charles .B. Bourne. He noted that for the most part, the basic requirements of the exchange of information, notices, consultations, and negotiation now form part of customary international law.[142]

However, in order to say that a riparian's duty to notify planned measures has achieved the status of international customary law; we need to be certain as to the existence of the general state practice as well as the existence *opinio juris*. This means that states are practicing such an act because of their beliefs that such an activity is a legal obligation imposed upon them. Unless we do have such evidence as to this conviction, it becomes difficult to conclude that the practice has the status of international customary law. When we assess the existence of the general practice of the duty to notify planned measures, it seems that the practice is mainly supported by agreements that emanate either from bilateral or multilateral watercourse agreements.[143] Some states even feel that too detailed rules of the duty to notify planned measures has no basis in general and customary international law.[144]

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[140] Supra note 5, Stephen C. McCaffrey, p. 473.

[141] *Id*, p. 473

[142] Charles .B. Bourne, The International Law Commission's Draft Articles on the Law of International Watercourses: Principles and Planned Measures, (1991) University of Colorado Law School Colorado Law Scholarly Commons, p.11 http://scholar.law.colorado.edu/law-of-international-watercourses-united-nations-international-law-commission/4 Last visited 20/09/2018. Bourne also notes that there is now considerable authority for this proposition. In the Helsinki Rules, the ILA treated these procedural rules only as recommendations: see Helsinki Rules, and as recently as the Stockholm Conference on the Environment in 1972, there was no agreement that the rules were obligatory. But the Lake Lanoux arbitration had treated them as part of international law.

[143] It is important to mention that in both the Pulp Mills *case and* Indus Waters Kishenganga Arbitration (Pakistan v India) though the ICJ entertained the issue with regard to the duty to notify planned measures, in both cases the court mainly based its assessment in terms of the agreement made by the watercourse states. Supra note 85, Alistair Rieu-Clarke, Pp.113-116

[144] *Ibid*, P.107 it is important what Ethiopia and Turkey raised as opposition to the text presented by the ILC regarding the way how this duty is constituted in the UN framework convention.

There are also other authors who argue that this riparian duty to cooperate and to notify planned measures is not a strict legal obligation.[145] Most of the time it is possible to examine how the detailed rules of the duty to notify planned measures differ from one agreement to the other. This might tell us that there is no consensus on what exactly this duty imposes upon watercourse states. Therefore, unless the riparian state is a member to a treaty that stipulates the riparian's duty to notify planned measures, it will not be bound by such obligations.

Though a number of watercourse agreements incorporate this duty, the existence of this duty should not imply the corresponding powers of veto. The very existence of this obligation does not mean that one state is obliged to obtain the consent of all interested states and by that token to conclude an agreement with them before it may proceed with its project.[146] ICJ's formulation in *Costa Rica v. Nicaragua* could suggest that only when an environmental impact assessment by the planning state confirms that there is a risk of significant trans-boundary harm, the state causing the risk must notify potentially affected states.[147] This could give wider discretion to the planning states. Watercourse states may even fear that the existence of this duty may be taken as if it may impose more duty on the new riparian states that plan to utilize the watercourse resources. This, in fact, relates with what the upper riparian states of the Nile understood or decided while they were in the negotiation of the CFA. Therefore, taking into consideration the above discussion on the subject matter it is possible to say that though the general rule of the duty to notify planned measures is in the process of forming customary international law and the details of the rule is still disputed.

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[145] Calero Rodriguez argued that 'cooperation was a goal, a guideline for conduct, but not a strict legal obligation which, if violated, would entail international responsibility' See [1987] *Yearbook of the International Law Commission*, vol. 1, at 71.

[146] Dante A Caponera (1921–2003), Principles of Water Law and Administration National and International (2nd Edition, Taylor & Francis Group, London, UK 2007) PP. 220-221

[147] Yoshifumi Tanaka , Case Note on the cases concerning Certain Activities carried out by Nicaraguain the Border Area (Costa Rica v. Nicaragua), Some Reflections on the Obligation to Conduct an Environmental Impact Assessment, Review of European community and International Environmental law (RECIEL) 26 (1) 2017 P. 95.

Concluding Remarks

Riparian's duty to notify planned measures is one of the principles that govern the international watercourse regime. It constitutes recognition that activities performed in one of the riparian states will have some sort of positive and/or negative effect on the other members of the international watercourse states; this principle is developed. In order to minimize the adverse negative effect of the project performed by one member of the riparian states to the other states, international watercourse law has come up with such prior notification of the planned measures to the other states in the watercourses. However, what status this principle has under international watercourse laws and especially whether it gets the status of international customary law is contested. In fact, it is observed that while watercourse states incorporate this duty in their agreement, and international tribunals also use this duty to settle disputes mainly if it emanates from the agreements of the concerned state. Nevertheless, it should also be emphasized that there is significant diversity in how the principle is drafted in different international watercourse treaties. While some of the international treaties came up with detailed rules of the duty, others prefer to state in a general way. The 1997 UN Watercourse Convention and the Cooperative Framework Agreement over the Nile show this nature respectively. Such diverse articulations have an impact on the proper development of the principle under the international watercourse law regime. It can be concluded that the principle is not yet fully grown in its development. Again there is fear among the upper riparian states of the Nile that the existence of this duty may be taken as if it may impose more duty on the new riparian states that plan to utilize the watercourse resources.

In view of the above, it is difficult to conclude that this principle has attained a customary international law status at present. Considering the widespread inclusion of the duty in different watercourse treaties over many decades, it may be argued that it is in the process of forming international customary law. Emerging practice among riparian states indicates that states make requests for information on planned measures, cooperate and share relevant information. However, taking into consideration the divergent articulation in different watercourse agreements and the due diligence nature of the duty, new states that plan to utilize the watercourse resources may not look at the duty as a strict duty with which they will comply in case they face vital interests.