

**A Study on the Concept of International
River in International Water Law
and
Its Applications in Nile Basin Agreements**

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Introduction:



The definition of International River went through several stages, and many terms were given. Each term had certain meanings that indicate a specific understanding of the International River whether from the functional or the hydrological or any other aspect. Such definitions were differentiated according to the need of the international community. Throughout nearly two hundred years, the international rivers were viewed from the navigational aspect. Such view was, sometimes, intermingled with the regional sovereignty standards, and with the standards for cross-border recruitment, other times. Such outlook out-balanced at the expense of the use of river water in non-navigational purposes, which was not as important as the navigational aspect, at the beginning. The definitions of International River were, naturally, limited to international navigation purposes. Then the attention of the international community turned towards the utilization of international rivers in non-navigational purposes coinciding with the growing uses of the river on this aspect. This was followed by an escalating attention to the equitable utilization of international river waters, besides the scarcity of fresh water resources, and the protection of international rivers against pollution, in addition to maintenance of its ecological systems. Actually, such issues and matters had a remarkable impact in highlighting new terms. Some of these terms were new in their formulation and had appropriate meanings that indicate their purposes; while others lacked novelty, and thus were reformulated to fit the new purposes for joint utilization of international river waters.

The Barcelona Convention and Statute on the Regime of Navigable Waterways of International Concern concluded on the 20th of April 1921 is considered, in general, to be the cornerstone of the agreements concerning International Rivers

since it founded a very important principle stating, in brief, that the International River is governed with international legal principles and thus cannot be dealt with in the framework of unilateral decisions taken by the riparian state through which the river passes. Although the international jurisprudence did not rely much on the treaty because actually it was only obligatory to about twenty countries that have ratified it, in addition to being theoretical rather than practical. From all the states that ratified the convention, only five have international rivers passing through their lands.

Coinciding with the European Renaissance, the importance of international river waters in non-navigational affairs increased. However, the navigational aspects were falling behind in terms of priority, and it seemed that the economic use is the title of the new phase to exploit the waters of international rivers, which Herbert Smith mentioned in his well-known book entitled *the Economic Uses of International Rivers*: "The river system constitutes, by nature, an indivisible physical unit, and its resources should be developed to maximize the benefit of human society regardless of political boundaries." We can say that the change in approach from the use of traditional terms to the use of other innovative ones to define the international rivers was subject to the transition from navigational purposes to

other non-navigational uses of the international river waters.

Among the numerous terms that entitled the new phase of the use of the waters of international rivers was the "International Drainage Basin". This was the most famous and the most accurate term that agreed with the scientific aspects. It was given by the International Law Association (ILA) in its 1966 well-known Helsinki Rules. This is in addition to the term "International Watercourses" given by the United Nations International Law Commission (UNILC) during its preparation for a framework agreement on the non-navigational uses of the international river. Many other terms varied between these two terms, all in the same context, trying to reach a satisfactorily resolution for both parties, namely: upstream and downstream states which were, always, in disagreement on many issues starting from those related with the terms and ending with the principles of the international water law .

**The concept of International River
in the Nile Basin agreements
First: The Concept in the Nile Basin
agreements**

By extrapolating the agreements concluded before the Nile Basin Initiative (NBI), we noticed that they could be divided into two periods: The period before 1966, the date of the ratification of the 1966 historic rules of Helsinki,

and the period that followed that date.

As for the first period, agreements rarely used the term "Basin", but just used the term "River", its "Branches" or "Effluents", and its "Tributaries". Also, they sometimes use the term "Waters" and at other times they just use the word "Nile" or the name of the river itself such as "Atbara", "Blue Nile", "Sobat", "Isango", etc. It is noteworthy that the term "Basin" was not used at this stage due to two reasons. First, the current use of the concept of International river in consistent with the purposes of navigational uses had come before the International Law Association set the 1966 Helsinki Rules. Thus, the International Water Law, at that time, was not as developed as in the later stage after the set of the 1966 Helsinki rules. Therefore, the definition of the International River was limited to the characteristic that it crosses the borders of two or more states. Second, most of the agreements of that stage were preventive, by their very nature. This means that they protect the rights and the current uses within the basin, and accordingly they did not make any changes in the natural flow of the Nile. Since the water works were related to the engineering works on the same water-course or its branches or tributaries, therefore there was no dire need to use the term "Basin".

In a word, the 1966 Helsinki Rules helped a lot in perceiving modern con-

cepts of the terms related to the common uses of waters of international rivers, and especially the term "Basin". The impact of such rules was sound clear on the agreements concluded later after 1966. For example, The 1991 Agreement between Egypt and Uganda on Owen reservoir used the term "Hydrological Regime". While the Declaration of Peace and Friendship between Ethiopia and Sudan on 23 December 1991 used the term "Basin" more than once. Also, it was mentioned within the commendable recommendations of the joint committee between Ethiopia and Sudan, which set the items of this Declaration related to the agreement of both parties on the fundamental need for natural resources including surface water and groundwater, as well as any coexisting living thing whether human or plant or animal, in addition to ecological aspects, and other things that depend on the natural resource. Similarly, the Articles of the 1993 Framework for General Cooperation between Egypt and Ethiopia used the term "Basin" along with the term "River Nile", although it came less than its counterpart of the Sudanese Ethiopian Declaration, in terms of understanding the nature of water relations within the Nile Basin. We can conclude that the institutional arrangements within the Nile Basin, regardless of the time period of their establishment, were based on the concept of the "Basin" such as the 1977

Convention on the Development of Kagera Basin, the 1994 Convention on the Fisheries of Lake Victoria, and the 1999 East African Community (EAC), and the 2003 East African Protocol by which Lake Victoria Basin Commission was founded.

Second: The concept in the Nile Basin Cooperative Framework Agreement CFA

The concept of the International River has a numerous significance concerning any international agreement on the use of common water resource among the riparian states. It determines the field and the scope of work of the Convention which includes the legal principles that govern it, and which expands and narrows according to the concept it contains. Within the framework of that concept, we can decide the extent of agreement between the Convention and the global developments concerning the sustainable development, environmental protection, and integrated management of International River. Also this concept has its impact on the rule of equity and its related factors. We can acknowledge the concept adopted by the Cooperative Framework Agreement, known as the Framework Convention in the provisions of Article 2, and adopting two concepts of the Nile River. The first is represented in the Nile River Basin, Which is defined in paragraph (a) of the draft as "the geographical area bounded by the borders of water-

shed of the Nile River network that uses that term when addressing aspects of environmental protection, maintenance, and development." The second concept was mentioned in paragraph (b), in which the term Nile River Network is defined as: "the Nile River, its surface and ground water, and this term shall be used in addressing the use of water."

It is noteworthy that these two paragraphs were subject to long discussions and reservations in respect to the Ethiopian and Egyptian delegations. The Egyptian delegation abided, completely, by the "Basin" concept mentioned in the 1966 rules of Helsinki. On the other side, the Ethiopian delegation abided by the "Waterway" concept just as mentioned in the 1997 UN Convention. As it is clear from the text of Article 2 that the "Basin" concept remained subject to the measures relating to the protection of the environment, the maintenance or river development, while the concept of the "Network" addresses the use of water. As aforementioned, the discussions witnessed great disagreements between the members of the International Law Commission to approve the term that would be adopted in the draft of the 1997 UN Convention. Such dispute ended for the benefit of the "International Watercourse" term, due to the fear of many riparian states over their sovereignty in case the term "Basin" is used, since its geographical

description includes the geographical area surrounding this watercourse, in addition to the waterway network. It seems that there were attempts to reach a compromise concerning such dispute since some countries wanted to use the term “Basin” on everything related to the pollution of the river and use the term “Watercourse” when it comes to the uses. However, this proposal was rejected by the members of the Committee.

It seems that this compromise has been reached when the Framework Convention has been drafted as previously mentioned. However, we believe that this solution has not been worked because of the fear of some Nile Basin states, particularly Ethiopia, from the interference in their regional sovereignty but because of their fear from something more important. The Nile Basin states limited the uses to the concept of the “Network” as mentioned in the Convention. This means that everything related to the use of the common waters of the river including water projects that affect the water quotas of the Nile Basin states, in addition to electric energy projects including the dams and reservoirs established whether for water storage or for power generation. Thus the term “Network” will be more suitable for this context.

Consequently, the uses of water will be limited, as aforementioned, to the waterway rather than the basin. This

means that the equitable cooperation will be achieved within the framework of the amount of water flowing in the river, which reaches 84 billion cubic meters of water at Aswan. In other words, the draft will not allow the Nile Basin states to claim its right in the equitable use of the water falling on the entire basin which is estimated by some water experts to be about 1660 billion cubic meters of water. Within the framework of this concept, the uses were limited to the environmental protection, maintenance and Nile River development. This matter is criticized for there is no comparison between the size of the benefit enjoyed by those states, and the size of the benefit enjoyed by Egypt under the concept of the “Network”.

According to the text of Article 2, the riparian states can claim a share of the water distributed among Egypt and Sudan under the 1959 Convention, although Egypt, actually, receives less than 5% of the volume of water falling on the entire basin. At the time such states request to share the Nile water quota of Egypt and Sudan, they use large amounts of the water falling on the basin which is known as the Virtual Water or the Green Water. For example, Ethiopia has a huge animal wealth that consumes large amounts of water from the basin, in addition to its share of the rain-dependent agriculture in this area. Furthermore, Lake States gain a huge amount of revenues from

the tropical safari tours conducted inside the tropical forests, such as the use of Lake Victoria as an important tourist resource for these countries, in addition to the water consumed by the plants and animals of this region known as Tropical Flora and Fauna.

Recommendations of the study:

Concerning the UN Convention on the Law of the Use of International Watercourses for Non-navigational Purposes, Egypt abstained from voting on the UN Convention. This came as an objection to the concept adopted by this Convention concerning the definition of the International River since it, definitely, harms the Egyptian water interests. However, it is more appropriate for Egypt to ratify this Convention in case it is amended to suit these interests.

Concerning the Cooperative Framework Agreement (CFA) of the Nile River Basin:

The representatives of Egypt made preservation on the concept of the “International River” adopted by the Framework Convention, which was signed by some of the Nile Basin countries in May 2010, whether in respect to the Nile basin, or to the Nile River network because both terms are used in an ambiguous and a vague way. The first does not agree with the 1966 historic Helsinki rules and the latter does not agree with the provisions of the 1997 UN Convention on the Law of the International Water-

courses. It may seem strange that Egypt announced its three preservations concerning the Framework Convention without relating these preservations to the concept of the “International River” mentioned in the Framework Convention. Therefore, we suggest the importance of reconsidering the fourth preservation and put it into consideration in any negotiations or attempts that may be made to remove the reasons of disagreement with the upstream states in this regard.

This study mainly addresses the concept of the “International River” in the International Water Law and its applications in Nile River Agreements and the Framework Convention concluded between some of the Nile Basin states without covering the other points of disagreement in this Agreement, and in particular the legal part. Thus, we recommend the Egyptian government to necessarily exert more efforts in activating the institutional frameworks within the basin which are based on the technical aspects only, and which are usually accompanied by simple agreements addressing institutional aspects of technical cooperation with the Nile Basin states. This is not an appropriate time to conclude any legal agreements under this state of mutual distrust in the relationship between Egypt and some upstream states. Hence, it is better, in the mean time, to stay away from discussing any legal aspects.