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# International human right to water and environmental protection concerning the Senegal River

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# Summary

The environmental regulation of the Senegal River is more progressed than the international law stipulates. With progressed regulation in this thesis means how the situation and circumstances are for the citizens of the current riparian states.

The protection of environment and the human rights are on the point of converging and hypothetic the international environmental rules to prevent pollution of freshwater resources could reinforce a human right to water. It could even be the contraire that a human right to water is a reason that a State has to adopt a regulation to protect the environment linked to a resource of freshwater.

It seems obvious that 2002 Water Charter theoretically considering the human right to water as the overall purpose for the water resource in the Senegal River. Concerning public participation there is a lack of participation of local people in water management in the river mainly due to the model set up by the OMVS. The model exclude or tackle in a very light way the issue of public participation in decision-making throughout its juridical instruments.

# Sammanfattning

Den miljörättsliga regleringen av Senegal floden är mer fortskridande än internationell rätt. Med fortskridande menas i denna uppsats hur situationen är för medborgarna i aktuella vattendragsstater.

Miljöskydd och den mänskliga rättigheten till vatten sammanstrålar på vissa punkter och hypotetiskt så kan de internationella miljörättsliga reglerna om förebyggande av förorening av sötvatten stärka den mänskliga rättigheten till vatten. Situationen kan likväl vara den motsatta att den mänskliga rättigheten till vatten är anledning till att en stat inför miljörättsliga regler avseende en sötvattenresurs.

Det verkar uppenbart att vatten charter från 2002 (2002 Water Charter) teoretiskt tar hänsyn till den mänskliga rättigheten till vatten som ett generellt syfte för vattenresursen i Senegal floden. Avseende offentligt deltagande föreligger en brist av deltagande av lokala befolkningen i vatten direktionen. Bristen på deltagandet är till stor del på grund av hur OMVS's utformning av vatten styrningen. Det är en modell som väldigt lite tar hänsyn till påverkan genom offentligt deltagande i de juridiska instrumenten.

# Preface

It has been some years since started this thesis and because of many different circumstances it has taken long time.

The topic of the thesis is very stimulating and basic the human being cannot live without water. The protection of the environment, the nature and animals is a announcement I like to highlight. I believe that the world could be better if every child would be given the possibility to respect those three spheres from childhood.

Thanks to my little daughter that has been sleeping well and letting me fulfilled this thesis during the time she was only two until six months old.

Even thanks to Ulf Linderfalk that let me finish this thesis when I asked for.

# Abbreviations

1972 Status Convention	Convention on the Status of the Senegal River, March 11, 1972
1972 OMVS Convention	Convention creating Organization for the Development of the Senegal River, March 11, 1972
1977 Treaty	Treaty on the Construction and Operation of the Gabtikovo-Nagymaros Barrage System of 16 September 1977
1978 Infrastructure Convention	Convention on legal status of the jointly-owed infrastructures
1997 Watercourse Convention	Convention on the Law of the Non-navigational Uses of International Watercourses, May 21, 1997
2002 Water Charter	Charter of Water of the Senegal River, May 21, 2002
2003 Strategic Declaration	The Declaration of Nouakchott Relative to Strategic Orientation Framework for the OMVS, May 21, 2003
ACHPR	African Charter on Human and Peoples' Rights
CESCR	United Nations Committee on Economic, Social and Cultural Rights
CIEA	Convention on Environmental Impact Assessment in Transboundary Context
Covenant on ESCR	United Nations Covenant on Economic, Social and Cultural Rights
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women

CRC	Convention of the Rights of the Child
EIA	environmental impact assessment
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICCPR	International Covenant on Civil and Political Rights
ILA	International Law Association
ILC	International Law Commission
ITLOS	International Tribunal for the Law of the Sea
Law of Treaties	Vienna Convention on the law of treaties, 1969
OMVS	Organization for the Development of the Senegal River (L'Organisation pour la Mise en Valeur du Fleuve Sénégal).
CPE	Standing committee of water (Commission permanente des eaux)
SOGED	Convention creating Agency of Management and Exploitation of Diama, signed January 7, 1997.
SOGEM	Convention creating Agency of Energy Management of Manantali, signed January 7, 1997
Stockholm Declaration	Declaration of the United Nations Conference on the Human Environment, June 1972
Treaty of Versailles	Treaty of Versailles 1919
Rio Declaration	Rio Declaration on Environment and Development, June 1992



UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCED	United Nations Conference on Environment and Development
UNCLOS	United Nations Convention on Law of the Sea, Montego Bay 1982, signed in 1982 and in force since 1994
WB	World Bank
WSSD	World Summit on Sustainable Development, 2002

# 1 Introduction

The regulation of shared water resources is developing more and more in order to ensure international stability. “Freshwater availability and use, as well as the conservation of aquatic resources, are a key to human well-being”<sup>1</sup> and if the contemporary movements of impacts of population increase, rural to urban migration, and rising wealth and resource consumption and climate changes remain, 1.8 billion people will live in nations or zones with absolute water scarcity and two-thirds of the humanity could be subject to water stress by 2025.<sup>2</sup>

One-half of the world’s river basins, that is more than three hundred rivers<sup>3</sup>, are shared by two or more nations, despite they include simply 3 per cent of the volume of water on earth, they present the great majority of the source used in human activity. The principal supply of the earthly freshwater is in rivers, lakes and reservoirs for the reason that almost 90 per cent of the total is locked into ice caps or glaciers, in the atmosphere or soil, or is deep underground.<sup>4</sup>

This thesis concerns an international river called Senegal River and compares the environmental regulation as well as the human right to water related to the Senegal River with those existing in the international and customary law. The human right to water is close connected to environmental law and one required method to ensure that actors other than the government will be allowed and supported to engage themselves in water management, is the **right to participate** in the management of water resources.<sup>5</sup>

## 1.1 Background

This thesis is all about the international and regional environmental regulation of the Senegal River linked to the human right to water. This river is one of the most important rivers in West Africa. Its basin covers around 300 000 square kilometres<sup>6</sup>, and it is shared by Guinea (11 %), Mali (53%), Mauritania (26%) and Senegal (10%). The four riparian countries, with their total cumulative population of 35 million, are ranked among the 25 poorest in the world. The basin of twelve million inhabitants has an annual population growth rate estimated to 2,7 percent, it has a limited

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<sup>1</sup> Global Environmental Outlook, GEO-4, Section B: State-and-trends of the Environment: 1987-2007, Ch 4, Water, 116.

<sup>2</sup> See id., 116.

<sup>3</sup> L. Boisson de Chazournes, S.M.A. Salman, Foreword, XXXIV.

<sup>4</sup> Sands P. and Peel J., with Fabra A. and MacKenzie R., 304.

<sup>5</sup> L. Boisson de Chazournes, S.M.A. Salman, Introduction, 79.

<sup>6</sup> This can be compared with the 225 000 square km covers by the River Rhine, Sands P. and Peel J., with Fabra A. and MacKenzie R., 320.

sustainable growth and the welfare hence the basin hydropower potential and irrigable lands are under-developed.<sup>7</sup>

The Senegal River is interesting in many ways for the international environmental law and the human right to water. The Senegal River was in 1972 declared an international river by three (out of totally four) riparian states, viz the Republic of Senegal (Senegal), the Republic of Mali (Mali) and the Islamic Republic of Mauritania (Mauritania) by the Convention on the Statute of the Senegal River<sup>8</sup> (1972 Statute Convention, attached supplement A). The three countries created at the same time the OMVS<sup>9</sup> by the Convention creating Organization for the Development of the Senegal River (1972 OMVS Convention). These two conventions were some of the first agreements concerning complete river management including non-navigational and navigational uses. They served as sources of basin cooperation for the International Law Commission (ILC) for the drafting of the United Nations 1997 Convention on the Law of the Non-navigational Uses of International Watercourses (1997 Watercourses Convention).<sup>10</sup> Additionally the framework, which was created by those two conventions, has been described “advanced, highly developed planning approach to the management of international water resources” by Stephen McCaffrey, the Special Reporter to the ILC<sup>11</sup> as well as by the author of the volume “The Law of International Watercourses”<sup>12</sup>.

The cooperation through the OMVS besides other achievements has resulted in the creation of two dams, i.e. Diama Dam in operation since 1986 and the Manantali Dam since 1988. Although it should not be forgotten, that as recently as August 2000 Senegal called on all its citizens to leave Mauritania because of a water dispute between the two countries and in 1989 a bloodbath in which hundreds of Mauritians and Senegalese were killed when the two governments disagreed over rights along the river.<sup>13</sup>

In May 2002 the three contracting states<sup>14</sup> signed the Charter of Water of the Senegal River (2002 Water Charter, attached: Supplement B), which has been formed progressively by thirteen successive versions. The concerned states as well as the representatives of the users of the water participated in the process<sup>15</sup>. The charter emerged from the codification of the principles and rules contained in the 1997 Watercourses Convention and contributed to

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<sup>7</sup> The World Bank, Report No: 34945-AFR, May 10, 2006, p. 33.

<sup>8</sup> Article 1 of 1972 Statute Convention.

<sup>9</sup> Original name of the organization: l’Organisation pour la Mise en Valeur du Fleuve Sénégal (OMVS).

<sup>10</sup> Vick, 124.

<sup>11</sup> ILC (1987), §28.

<sup>12</sup> See McCaffrey Stephen, *The Law of International Watercourses*, Oxford University Press Inc., New York, 2<sup>nd</sup> ed., 2007.

<sup>13</sup> Global Security org., June 2000, Military News, Senegal/ Mauritania, Voice of America 08 June 2000.

<sup>14</sup> In March 2006 even the riparian State Guinea (re-)entered to the framework of conventions, see: <http://www.portail-omvs.org/presentation/historique/historique>, last visited 08/01/2015.

<sup>15</sup> Merzoug, M.S.O, Reig, L., 14(18).

a progressive development of international law supporting some principles and standards in the recent international environmental law.<sup>16</sup> The central objectives of the Charter are to define the principles and the system for the distribution of the water of the river among the various sectors of use; to determine rules related to the safeguarding and to the protection of environment, essentially as regards to fauna, flora, and ecosystems; and lastly to set the framework and a system of participation of the users of the water in decision of resources management of the river.<sup>17</sup> The 2002 Water Charter contains furthermore an exceptional, especially at that time, stipulation about human right to water<sup>18</sup> intended to guarantee inhabitants' needs against other utilization of the water.<sup>19</sup>

## 1.2 Purpose

The purpose is to determine whether the regulation of the Senegal River is more progressed than the regulation in international law. The two legal areas that are in focus are environmental law and human right to water. The environmental customary law and the international human right to water compared with current stipulations in two conventions and one charter of the Senegal River. The aimed environmental regulations are rules that protect and preserve the environment besides prevent, reduce and control the pollution of freshwater as well as rules linked to the human right to water.

Thus, the objective is in particular to investigate and compare the rules related to those two fields of international law in three different agreements of the Senegal River. Those three agreements are namely the 1972 statute Convention, the 1972 OMVS Convention and the 2002 Water Charter respectively. The charter contains a modern system for structured equal cooperation between the states<sup>20</sup>, is much younger than the conventions and will have a vaster decisive significant for the conclusion of the thesis. In the 2002 Water Charter the focus will be on the contain 4. "Protection and safeguarding of the environment" and the human right to water in the light of the aim of the charter which is mainly stippled in the article 2. The Senegal River has been a precursor for the management of international water resources<sup>21</sup> and the conclusion will partially depend on if the river still merits that denomination.

Therefore, the purpose is to determine if the Senegal River has a more extended environmental protection and in what manner the human right to

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<sup>16</sup> L. Boisson de Chazournes, S.M.A. Salman, 525.

<sup>17</sup> 2002 Water Charter, article 2; A.M. Sène, S. Bonin, O. Soubeyran, 1928; L. Boisson de Chazournes, S.M.A. Salman, 526.

<sup>18</sup> 2002 Water Charter, art. 4 in fine.

<sup>19</sup> Dr. Frans J.G. Padt, Juan Carlos Sanchez, 277.

<sup>20</sup> Vick, 233-235.

<sup>21</sup> See i.d.

water exists. To determine what an extended regulation is I will have the conclusion of Sands and Peel J., with Fabra A. and MacKenzie R as a role model that also is an excellent starting-point for the readers. They mean that there are three required areas still to complete if international law is to resist to halting overuse of freshwater and its pollution:

1. requirement of progress special international water quality standards, global and regional, probably with general application and which could take account of regional and local circumstances,
2. request for effective environmental assessments on the root causes of the problems, i.e. agricultural practices and industrial activities, and
3. effective enforcement mechanisms available to public and private entities with a right of appeal along with valuable principles on access to information and IEA procedures.<sup>22</sup>

## 1.3 Method and material

As the topic of this thesis relate to two restricted and diminutive fields of international law, I have chosen to first analyse the international law in general connected to those two areas of law. The introductory part contains a general review of international water law and international environmental law for protection of freshwater and the human right to water in international law. The premises of those two chapter will be compared with the regulation of the Senegal River, are to be read for better understand the remaining chapters which are the central components of this thesis together with the conclusion of the thesis.

This thesis is based on information mainly obtained in three countries, at the library at the Law Faculty of “Université de Nice – Sophia Antipolis” in Nice in France, at the library at the Law Faculty in Lund and thirdly thus in Senegal during the field study. I have as well collected data relevant from different databases. I acquired the scholarship “Minor Field Study” by SIDA from Raoul Wallenberg Institute via Swedish International Development Cooperation Agency (SIDA), which gave me the possibility to undertake a “Minor Field Study” in Dakar, Senegal during two months. I visited the head office of OMVS, and had the privilege to carry out interviews and consulting the conventions and charter of the river with persons who work daily with them. I obtained judicial documents containing precisions of the provisions in the three conventions I focus on in this thesis. Regularly those were documents I had not found or did not have any awareness of during my research before leaving to Senegal. The reception at OMVS was very agreeable and friendly collaborative and I would like to thank them genuinely.

In order to investigate and analyze the environmental protection of the Senegal River, I intend to depart from the 1972 Statute Convention, the

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<sup>22</sup>Sands P. and Peel J., with Fabra A. and MacKenzie R., 340-341.

1972 OMVS Convention and the 2002 Charter of Water. Further on I aim to consider pertinent provisions in the four other conventions<sup>23</sup> that were signed in the context of OMVS during those thirty years. This thesis highlights the environmental impacts of agricultural practices and the industrial activities on the Senegal River, as well as the available mechanisms for effective enforcement of the public and private entities.

I do not give a deep view of the system of government of the OMVS but to focus on the SCW. The SCW is a fundamental organ of OMVS in the performing of the equitable and reasonable management politic of the water resources of the Senegal River.<sup>24</sup>

I have chosen to give a brief review of international water law and international environmental law for protection of the freshwaters instead of investigating precise elements in those domains. I have used several volumes, articles, international documents, international cases etc in order to make this thesis well founded and reasonable. Many bibliographies are in French and I have translated most of the parts to English but in some cases, I found it better to cite the source. The most important two conventions and the charter exist in English but they are unofficial and thus I have attached the official text in French.

I have found it very informative to use texts in both English and French for better understanding of the specific sense of the expressions. I have discovered numerous texts less well translated into English and by comparing those to French texts, the significations were often clearer. I have chosen to style the names of OMVS's organs in English and not with their original French term, on the other hand in any case I used an abbreviation I decided to use the French one. This done in order to obtain a better flow of the reading and at the same time facilitate those who want to know more about the framework near OMVS as the original documents are in French. The juridical documents of OMVS that I found in English I have choose to use abbreviation in English but when no official translated text were found in English I have choose to have the reference in the original language which is French.

## **1.4 Delimitations and disposition**

As I already mentioned, this thesis will consist of two parts, the first part is a general part of international water law together with international environmental law followed by a chapter concerning human right to water.

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<sup>23</sup> The Convention of December 1978 on the legal status of the jointly-owned infrastructure, the Convention of May 1982 on the financing modalities of the jointly-owned infrastructure, the Convention of 7 January 1997 concerning the creation of the Agency for the Management and Exploitation of the Diama, and the Convention of 7 January 1997 concerning the creation of the Agency for the Management of Power of the Manantali.

<sup>24</sup> 2002 Water Charter, art. 19-20, 22 and Merzoug, M.S, 2005, 150.

There after appears the central and more extensive part containing an analysis of the environmental regulations and the human right to water concerning the Senegal River. The conclusion of the thesis depends on the extent of the protection of shared water resources in the Senegal River.

For the conclusion of the thesis, it is necessary to determine the grade of progress for the regulation of the Senegal River. Obviously, the question of what progressed regulation means is vital and the thesis' centre of attention is the circumstances for the citizens of the riparian states. Regulations that benefit the shareholders, companies and others organism are not in focus and the conclusion is not depending on their situation concerning the human right to water and the environmental protection.

This thesis explores environmental rules concerning freshwater in international and regional law. The national legislations of the riparian countries to the Senegal River are not investigated and no deep focus is given to the specific conventions for the two dams that been constructed in the name of OMVS. Neither any national document related to a member state and to the work of OMVS analysed, thus this thesis are in the context of international law. This may have some negative effect of the conclusion of this thesis because there could be a better protection of the environment and the human right to water around the Senegal River on national level.

## 2 International Environmental Law of Freshwater

This chapter introduces the international customary law concerning the protection of freshwater. The intention is not to investigate this field of law but rather to present a common opinion and conclusion from current doctrine, cases and conventions. This to aim the purpose of thesis which is to compare this field of the international law with the current regulation of the Senegal River.

As claimed in the prime introduction of this thesis, more than three hundred rivers or one-half of the world's river basins are shared by two or more nations and include almost one third of the available freshwater on earth. A river shared by two or more States designates by the term international watercourse. Until recently states practice relating to international watercourses concerned approximately solely the surface water of international rivers and lakes shared by at least two states. The reason for that appreciation was that the principal function was the navigation thus almost all other uses of the water had no value. Due to development and acknowledge of increasing need of protection of the environment and freshwater resources, the notion of international watercourse includes nowadays other components of the watercourse system as tributaries and groundwater.<sup>25</sup> This is in argument with what we notice about the definition in the 1997 Watercourse convention. For purpose of that Convention, the use of term "watercourse" means "*a system of surface waters and groundwaters constituting by virtue of their physical relationship a unitary whole and normally flowing into a common terminus;*"... . To complete that definition there is also the expression "international watercourse" which signifies "... *a watercourse, parts of which are situated in different States; ...*".<sup>26</sup> Making it unproblematic thus by referring to the 1997 Watercourse convention since the definition of international watercourse could be more complicated<sup>27</sup> but it is not in the purpose of this thesis to investigate the definition of an international watercourse. The grounding to this thesis is to be aware of that there are certain rivers in the world that are declared to be international watercourses and that they are objects for a specific extensive international regulation. A traditional issue related to an international watercourse concerns the classic concept of upstream and downstream States. An upstream State may use more water and the remaining water resource is not sufficient for the downstream State to the same watercourse. Further on the discharges from an upper riparian may cause problem for the fishing industry or the agriculture in the lower riparian. More over the upper State in general claims for the principle of equitable and reasonable

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<sup>25</sup> McCaffrey, 34.

<sup>26</sup> 1997 Watercourse Convention, art.2(a) and (b).

<sup>27</sup> McCaffrey, p 34-47.



utilization but the downstream State invokes the no-harm principle.<sup>28</sup> These principles will be analysed later on. It is not always the case because the river could be boundary between two contiguous states and the upstream and downstream interests are not essential. Each watercourse and each boundary is unique and there are also several ways of establish the boundary, for example the median line if the watercourse is not navigable and maybe boundary by the thalweg if it is open for navigation.<sup>29</sup> In addition in the centre of a regulation of an international watercourse is always the sovereignty of the States. A State is sovereign in its territory but the sovereignty is no longer absolute as it may have been. It is still fundamental in the international law that a State has territorial sovereignty but the sovereignty is limited by cases and by several principles and rules as described below.

## 2.1 Introduction to customary law to protect freshwater

Before looking at cases which more specific concern international watercourses, two cases will be briefly comment that are well-known in the customary international law. The cases are Corfu Channel Case and Trail Smelter arbitration and compose start points for limiting the sovereignty territorial and at some way even the international environmental law. The first case was even the first case before ICJ since it changed statute and name from PICJ. This case is from 1949 and between Albania and the United Kingdom concerning mines in the Corfu Channel, a channel between Albanian and the Island Corfu in the south of Adriatic Sea in the Mediterranean Sea. Those mines had on October 1946 caused damage and death on the British ships striking in the Albanian territorial water. Albania knew about the mines and did not warn the British ship. In brief the ICJ declared that a State is obligated to control its territory so it is not used in a way that violates the rights of other States. The Court described the obligation as based on “*general and well-recognised principle*” and did not limit the statement to the situation in the case, hence it seems that ICJ declared that a violation of international law is occurred if a State permits the use of its territory in a manner that injures other States’ rights.<sup>30</sup> This decision of ICJ limits the sovereignty territorial, on the contrary it does not concern an international watercourse or damage of the ecology. Anyway the obligation may be brought to force with an international watercourse if a State use their water in the manner that cause damage to another riparian State. The next case to underline is the Trail Smelter arbitration where observing another restriction of the territorial sovereignty. This case concerns a Canadian company which by toxic fume caused harm into the territory of the USA several miles away. The arbitration stated under

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<sup>28</sup> McCaffrey, 36-37, 67-68.

<sup>29</sup> McCaffrey, 70-72.

<sup>30</sup> Corfu Channel Case (merits), 1949, ICJ, 10, 22.

international law as well as under the law of United States that “*no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence*”.<sup>31</sup> The obligation held of the Arbitration Court protects the properties and persons in another States territory and not as in Corfu Channel case the rights of another State. The Trail Smelter Case concerns fume carried by wind between two countries and it is discussed to be analogous applied in similar situations for instance pollution transported by water in an international watercourse.<sup>32</sup> It is evident that in the end of the 30<sup>th</sup> the world in general did not appreciate about the environment as we do today. Both those two cases are forerunners to principles 21<sup>33</sup> of the Stockholm declaration and principle 2<sup>34</sup> of the Rio Declaration. These principles, which are general principles<sup>35</sup>, provide the obligation that states have sovereignty over their natural resources and the responsibility not to cause transboundary environmental damage. This obligation reflects an international customary legal obligation.<sup>36</sup> Additionally there are several other general principles in international law that apply on fresh water and that will have importance in this thesis. These are the principle of preventive action, the principle of co-operation, the principle (or concept) of sustainable development, the precautionary principle, the polluter-pays principle, and the principle of common but differentiated responsibility<sup>37</sup>. Each one of these has its own role and is important. It is the obligation reflected in the principle 21 and principle 2 above and the principle of co-operation that reflect an international customary legal obligation. With that means that a violation of one of these two obligations could due a free-standing legal remedy.<sup>38</sup>

This principle of co-operation is for example found in Principle 24 of the Stockholm Declaration, which reflects a general political commitment to international cooperation in matters concerning the protection of the environment, and in Principle 27 of the Rio Declaration, which provides “States and people shall cooperate in good faith and in a spirit of partnership in the fulfilment of the principles embodied in this declaration and in the further development of international law in the field of sustainable

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<sup>31</sup> Trail Smelter Arbitration, 1939/41, UNRIAA III, 1965.

<sup>32</sup> McCaffrey, 229.

<sup>33</sup> “States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.”

<sup>34</sup> “States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.”

<sup>35</sup> Sands P. and Peel J., with Fabra A. and MacKenzie R., 187.

<sup>36</sup> Sands P. and Peel J., with Fabra A. and MacKenzie R., 188.

<sup>37</sup> Sands P. and Peel J., with Fabra A. and MacKenzie R., 188.

<sup>38</sup> Sands P. and Peel J., with Fabra A. and MacKenzie R., 188.

development.” A specific application of the principle of co-operation, is the principle of prior notification concerning new uses of for example a river that may affect co-riparians and it appears now to be part of customary international law.<sup>39</sup>

Most important and expected to have much significance in decisions if international environmental obligations will acquire a vital position in global relationships are two principles, i.e. the principle of sustainable development and the precautionary principle.<sup>40</sup>

A special kind of manner that an obligation could be fulfilled is an obligation of due diligence and it will frequently be mentioned in this thesis. Due diligence is a way of fulfilling an obligation and almost all conceivable obligation can consist of the obligation of due diligence. This manner of an obligation may appear in several terms as “*all appropriate measures*”, “*best practicable means at their disposal*” or “*all practical steps*”.<sup>41</sup> This concept of due diligence is regularly used and strongly related to the context of the *sic utere tue*, i.e. the no-harm principle. In this thesis due diligence is relevant because of the specific application of the doctrine in that context to the issues related to pollution and environmental harm. This is a way of obtaining a justification if for example pollution is caused and thus the obligation is normally more flexible than the strict no-harm obligation.<sup>42</sup> This sort of obligation means that a State, or other juridical or even natural person, has to act in its best way according to its capability. Thus for example if a State, which is obligated to take all measures necessary to not pollute an international watercourse, has done all that can reasonably be expected to avert the pollution, it has fulfilled its obligation to not pollute an international watercourse. This is the case even if the actual international watercourse is polluted and harm is caused to other riparian States. Nonetheless we will see that this imagined obligation to not pollute an international watercourse does not exist in international environmental law and we shall be satisfied with the obligation to prevent, reduce and control the pollution of the water that may cause significant harm. In fact even the expression “may cause” signifies the obligation of due diligence to prevent the treat of significant harm which make the obligation even less absolute.<sup>43</sup>

## **2.1.1 Two historical important cases for environmental protection**

### **The River Oder Case**

Already in 1929 PCIJ held that the utilisation of international rivers (including their flow) was subject to international law. The principal question for the court in the River Oder Case was to determine the extension

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<sup>39</sup> McCaffrey, 472-476.

<sup>40</sup> Sands P. and Peel J., with Fabra A. and MacKenzie R., 237.

<sup>41</sup> McCaffrey, 437.

<sup>42</sup> McCaffrey, 437.

<sup>43</sup> ILC, 122.

of jurisdiction for an International Commission<sup>44</sup>, accordingly part XII concerning Ports, Waterways and Railways in the particular treaty called the Treaty of Versailles of 1919. The Commission was charged to inter alia “define the sections of the river or its tributaries to which the international regime shall be applied”. In section II regarding Navigation Article 331 declares several rivers, including the Oder river, as international rivers “and all navigable parts of the rivers systems which naturally provide more than one State with access to the sea... ..together with lateral canals and channels constructed either to duplicate or to improve naturally navigable sections of the specified river systems or to connect two naturally navigable sections of the same river.” PCIJ observed that it had to remedy international fluvial law and stated that the principle of freedom of navigation extends by a “community of interests in a navigable river becomes the basis of a common legal right, the essential features of which are the perfect equality of all riparian states in the use of the whole course of the river and the exclusion of any preferential privilege of any one riparian in relation to others”.<sup>45</sup> With “common legal right” must not mean similar rights for every state and nowadays this expression is almost certainly replaced by “equitable utilisation”. The conclusion of the court of a common legal right for riparian states to an international watercourse relates to navigation as well as the characteristics of a river tend the right to relate to non-navigational uses.<sup>46</sup> More recent in 1998 by Gabón-Nagymaros Project Case<sup>47</sup> the ICJ extended the application of the principle of non-navigational uses of an international watercourse and indicated that shared natural resources of a river which are subjected to *common legal right* may not be used by one riparian state in a way that it prevents or restricts the other riparian states from their equitable and reasonable uses.<sup>48</sup> The expression “community of interests” used by the PCIJ in 1929 heralds the second here highlighted case concerning environmental protection, the arbitral award in the Lake Lanoux case<sup>49</sup> between France and Spain from 1957. Briefly the fact was that France benefited hydro-electric power by using 25 per cent of the flow to in Carol River which flows from France to Spain and is an international watercourse. The Arbitration stated that France was not held guilty for an infringement of Spain’s rights but proposed that it could have been the case if Spain had shown that the topical works would pollute the waters or change the chemical composition, temperature or other characteristics of the water and simultaneously by consequence injure the interests of Spain. At this time a specific application of the principle to cooperate i.e. the obligation to prior notification concerning new uses that may affect co-riparians was denied by the court, who as an alternative stated that France was entitled to exercise her rights but that she could not ignore the

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<sup>44</sup> River Oder Case, 1929, PCIJ, Series A23, 13. Article 341 (19) in the Treaty of Versailles placed the Oder river under the administration of an this Commission comprising Poland, Prussia, Czecho-Slovak State, Great Britain, France, Denmark and Sweden.

<sup>45</sup> River Oder Case, 1929, PCIJ, Series A23, 27.

<sup>46</sup> McCaffrey, 205.

<sup>47</sup> Case Concerning the Gabón-Nagymaros Project, (Hungary v. Slovakia), 1997, <http://www.icj-cij.org/docket/files/92/7375.pdf>, last visited 24/02/2015.

<sup>48</sup> McCaffrey, 206.

<sup>49</sup> Lake Lanoux arbitration (France v. Spain), 1957, 24 ILR 101.

Spanish interests. Spain was entitled to claim that her rights should be respected and that her interests would be taken into consideration. Thus it could not be established as a custom or as a general principle of law in 1957 that a state solitary due to a previous agreement is allowed to utilise the hydraulic power of international watercourses.<sup>50</sup> The award of Lac Lanoux Arbitral extends the rule regard equal riparian rights to international rivers from the River Oder case and heralds the provisions now set forth in the 1997 Watercourses Convention as well as non-binding rules.<sup>51</sup>

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<sup>50</sup> Sands P. and Peel J., with Fabra A. and MacKenzie R., 307-308 and Shaw, 641 note 220.

<sup>51</sup> Sands P. and Peel J., with Fabra A. and MacKenzie R., 308.

## 2.1.2 Conventional consecration

In 1966 a convention called the Helsinki rules on the Uses of the Waters Internationals Rivers, took form. This is the convention by International Law Association<sup>52</sup> (ILA) which is the most noted resultants since ILA's foundation in 1873. This convention was one attempt by international lawyers to consider the protection of freshwater by classifying obligations and rights of states.<sup>53</sup> Those rules of Helsinki were pioneers of codification of the law of international watercourses<sup>54</sup> and marked at their adoption in 1966 a vital phase in international attempts to administer and protect freshwaters.<sup>55</sup> An obligation of Helsinki rules was that all states should prevent new forms of water pollution which cause substantial injury to the territory of other basin states. On the other hand those rules permitted each river state to a reasonable and equitable share in the beneficial use of the waters. ILA has after Helsinki rules adopted two other non-binding regulations concerning freshwater besides other non-governmental efforts following by non-binding instruments, conventions, recommendations and guidelines developed by different international and regional institutions and organisations in order resorting a well-founded method.<sup>56</sup>

### 1997 Watercourse Convention

The 1997 Watercourse convention is based on the codification efforts of the ILC as reflected in the drafts Articles on the Law of Non-Navigational Uses of International Watercourses. The Convention was prepared by ILC which is in the framework of United Nation responsible for the development of international law and its codification. "The Working Group of the Whole" held sessions in October 1996 and April 1997 to complete the drafts articles adopted by the ILC. This convention was adopted by the United Nations General Assembly on May 21st, 1997, entered into force in August 2014<sup>57</sup> and there are several reasons that it is of significant value. The forum in which it was negotiated was open for all interested states. The fact that the Convention was adopted by a great majority and only three countries voted negative prove that it is in general accepted in the international community and it will probably have an eminent impact on issues between riparians. This could be the reality even if not both states are parties to the Convention and additionally it may be an instrument to interpret other general, specific or regional agreements which concerned states have concluded. The 1997 Watercourse Convention will be, as the ILC's draft articles has been, a model for specific or regional agreements in the current field of international law. Later on, in the case concerning Gabón-Nagymaros Project, the ICJ had confirmed a strong valour to the Convention as a

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<sup>52</sup> ILA is association with the objectives to study, clarify and develop international law. See: <http://www.ila-hq.org/index.cfm>, last seen 25/02/15

<sup>53</sup> Sands P. and Peel J., with Fabra A. and MacKenzie R., 308.

<sup>54</sup> McCaffrey, 380.

<sup>55</sup> Sands P. and Peel J., with Fabra A. and MacKenzie R., 308.

<sup>56</sup> Sands P. and Peel J., with Fabra A. and MacKenzie R., 308-310.

<sup>57</sup> [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XXVII-12&chapter=27&lang=en#1](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-12&chapter=27&lang=en#1), last visited 11/02/2015

reliable instrument even long time before it entered into force. The Conventions had been concluded four months before ICJ rendered the judgement of Gabón-Nagymaros Project and only three states had signed the convention.<sup>58</sup> As the name of the convention indicates this treaty relates to uses of international watercourses and their water for purpose other than navigation<sup>59</sup> and it establishes a framework of general principles to guide the behaviour of states. The preamble of the convention aims directly to protect environment and indirectly the human right to water. It affirms different problems connected to international watercourses, for example escalating requests and pollution. It ensures promotion of the optimal and sustainable utilization of international watercourses for present and future generation. This means that the human right to water is at least indirectly represents in the term generation. The preamble even recalls the principles and recommendations in the Rio Declaration and Agenda 21 adopted by UNCED in 1992.

There are four definitions in Article 2 and the definition of “watercourse” seems to be the most important because its width, i.e. “system of surface waters and groundwater constituting by virtue of their physical relationship a unitary whole and normally flowing into a common terminus;”. This calls to the attention to the interrelationship between all parts of the hydrological system and it should thus be immediately clear that an effect on one part of the system could, depending upon the circumstances, be transmitted to others parts.<sup>60</sup>

Before taking a deeper look at the convention, Articles 3-4 deserve to be highlighted. They concern other watercourse agreements that may be in force for a State becoming member of the 1997 Watercourse Convention. This is interesting for the contractual part but as none of the OMVS member states have signed or ratified this convention<sup>61</sup>, it is not in the purpose of this thesis to analyse those articles. Although Guinea became member as recently as March 2006<sup>62</sup> and before that an interpretation of the 1997 Watercourse Convention, could have lead the OMVS States to become aware of legally solution of disputes with Guinea.

Part II, Article 5-10, of the 1997 Watercourse Convention provides the general principles. Article 5 stipulates the principle of equitable and reasonable utilization and participation, which is a common cornerstone of the international water law.<sup>63</sup> This principle is a general obligation and in Part IV of the convention there are several specific applications of it which will be discussed. Similarly, Article 7, the obligation not to cause significant

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<sup>58</sup> McCaffrey, 217, 375-377.

<sup>59</sup> 1997 Watercourse Convention, art.1(1) and art 3.

<sup>60</sup> McCaffrey, 360.

<sup>61</sup> [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XXVII-12&chapter=27&lang=en#1](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-12&chapter=27&lang=en#1), last visited 11/02/2015.

<sup>62</sup> <http://www.portail-omvs.org/presentation/historique/historique>, last visited 08/01/2015.

<sup>63</sup> ILC 96-97, McCaffrey, 363.

harm, has specific application in Article 21§1-2<sup>64</sup>, Article 22<sup>65</sup> and 24§2<sup>66</sup> as well as Article 8, a general obligation to cooperate, has specific application in Article 21§2<sup>67</sup> and 25§1<sup>68</sup>. The obligation in Article 20 and Article 23 are of importance and are analysed below.

Article 5 paragraph one states that watercourse states shall in their respective territories utilise an international watercourse in an equitable and reasonable manner and shall in particular the international watercourse be used and developed with a goal to achieve optimal and sustainable utilisation thereof and benefits therefrom. Interests of concerned riparian states, consistent with adequate protection of the watercourse, shall be taken into account. The 1<sup>st</sup> Paragraph 1 stipulates the rule of equitable utilisation is well-established and is a complement to the principle of equitable participation in paragraph 2.<sup>69</sup> The ICJ referred to this Article in Gabčíkovo-Nagymaros Project case, ICJ Reports 1997 which are analysed below.

During the sessions of the Working Group of the Whole several delegates requested for an update of the ILC's draft to correspond the development in international environmental law. Regarding to Article 5 the only change is the addition of the words "and sustainable" after "optimal" in Article 5 § 1. This update seems to be superfluous because "adequate protection" that the article provides is now implied in the notion of "sustainability".<sup>70</sup>

There is an acceptance of a requiring a new concept of equitable participation provided in Article 5 paragraph two, because it expresses by indirect means that management of equitable utilization of an international river as well as the protection and preservation of its ecosystem cannot be achieved deprived of cooperation.<sup>71</sup>

Article 6 expresses a non-exhaustive list of factors and circumstances that are to be considered to fulfil the obligation in Article 5, i.e. assuring an equitable and reasonable utilisation of the international watercourse.<sup>72</sup> Article 7 provides that watercourse states shall take all appropriate measures to prevent causing significant harm to other watercourse states. Earlier the phrase contained "exercise due diligence" but the signification does not seem to have changed. Where such harm is caused, consultations are to take place in order to eliminate or mitigate such harm and consider to compensation where appropriate.<sup>73</sup> Even Article 8 is interesting concerning this which emphasises that watercourse states shall co-operate in order to

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<sup>64</sup> ILC, 121-122,

<sup>65</sup> ILC, 124.

<sup>66</sup> ILC, 125.

<sup>67</sup> ILC, 122-123.

<sup>68</sup> ILC, 126.

<sup>69</sup> ILC, 97.

<sup>70</sup> McCaffrey, 363.

<sup>71</sup> McCaffrey, 363.

<sup>72</sup> Sands P. and Peel J., with Fabra A. and MacKenzie R., 310.

<sup>73</sup> Sands P. and Peel J., with Fabra A. and MacKenzie R., 310-311.



attain optimal utilisation and adequate protection of an international watercourse.

Article 10 in the 1997 Watercourse Convention states the common principle that no use is in priority over another use and that in the case of conflict between uses it shall be worked out with reference to Article 5 to 7 and with special regards to “*vital human needs*”. Since this requirement is related to the human right to water it is introduced further in chapter 3, i.e. Insight of the Human Right to Water.

Part III of the 1997 Watercourse Convention establishes a procedure of four stages consisting of information exchange, notification, consultation and negotiation and urgent implementation of planned measures.<sup>74</sup> Thereby Article 12 provides the principle of prior notification concerning implements of planned measures “which may have a significant adverse effect”<sup>75</sup> upon co-riparians and the Working Group of the Whole included “the results of any environmental impact assessment”<sup>76</sup> to the article in order to highlight its importance.<sup>77</sup> This concept of environmental impact assessment which became known after the 1972 Stockholm Conference is today more generally accepted in national as well as in international law as an integration of environmental consideration into socio-economic development and decision-making processes. An environmental impact assessment is a method which may be divided into three phases and purposes. Initially information of environmental consequences of actual measures shall be available for decision-makers. Secondly the information shall have an effect on the decisions about those measures and finally concerned individuals shall be assured participation in the decision-making process.<sup>78</sup> Today several domestic and international instruments that have adopted this concept of environmental impact assessment. One of the most important for proving it is requirement in general international law could be the Principle 17 in Rio Declaration which states: “*Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority.*”<sup>79</sup> The principle is relevant for the Gabčíkovo-Nagymaros project case that is analysed after section on 1997 Watercourse Convention.

The next section of the convention, consisting of Articles 20 to 25, is the most interesting part for this thesis. Even the Working Group of the Whole attached a great importance to this part IV, given the name “Protection, preservation and management”, but finally only some smaller changes were made to the ILC’s draft in the view to support these environmental

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<sup>74</sup> Article 11-19, 1997 Watercourse Convention.

<sup>75</sup> 1997 Watercourse Convention, article 12.

<sup>76</sup> 1997 Watercourse Convention, article 12.

<sup>77</sup> McCaffrey, 372.

<sup>78</sup> Sands P. and Peel J., with Fabra A. and MacKenzie R., 601.

<sup>79</sup> I.e. 1991 Espo Convention, 1992 Biodiversity Convention, 1982 UNCLOS etc.

provisions.<sup>80</sup> Article 20 is the opening article of Part IV. It is general which was the intent of Commission of ILC; it should be the predecessor of the other articles. The obligation in Article 20 to “protect and preserve the ecosystem of international watercourses” is nevertheless two specific applications of the requirement contained in Article 5. It obligates the watercourse States to use and develop an international watercourse in a manner that is consistent with adequate protection thereof. Article 20 provides obligations of protection and preservation as Article 192 of the UNCLOS. The Commission of ILC has chosen to connect the obligation to “ecosystem of international watercourses” instead of the notion of the “environment” of a watercourse, since the first expression is more exact. The term “environment” could get a too extensive interpretation and be relevant, maybe even solely, for areas contiguous to the watercourse. The term “ecosystem” seems to be more sharply defined scientifically and legally. Article 20 even states that watercourse States shall operate individually or jointly and that indicates that there are situations when watercourse States have to cooperate on an equitable basis to care for and conserve the actual ecosystem.<sup>81</sup>

Article 21 paragraph 1 continuing is a definition of “pollution of an international watercourse” which only applies to the purpose of that article.<sup>82</sup> This definition is in several aspects more general in comparison to other definitions of the term “*pollution*”; e.g. because it mentions no type of pollution, it has no threshold at which the pollution prejudices not allowed, it refers not to any particular harmful effects and it simply requires that pollution is caused by acts or omissions from human conduct. The definition does not refer to biological alterations because that term is not *per se* considered as pollution and the Commission of ILC has chosen to stipulate about this in a separate article, in Article 22.<sup>83</sup>

The general obligation in Article 21 §2 that a watercourse States shall “...*prevent, reduce and control pollution of an international watercourse that may cause significant harm to other watercourse States or to their environment...*” is a specific application of the general principles contained in Articles 5 and 7. With the knowledge that international watercourses that are already polluted exist the Commission used the terms reduce and control. Additionally for international watercourse which are not polluted it employed the term prevent. This prescription to prevent, reduce and control pollution is even used in Article 194 UNCLOS when facing the same situation in case of marine pollution.<sup>84</sup>

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<sup>80</sup> McCaffrey, 372.

<sup>81</sup> ILC, 118-119.

<sup>82</sup> ILC, 121, the definition indicates: “means any detrimental alteration in the composition or quality of the waters of an international watercourse which results directly or indirectly from human conduct.”.

<sup>83</sup> ILC, 121-122.

<sup>84</sup> ILC, 122.

The first sentence in Article 21 § 2 stipulates that the States must, when pertinent, jointly act against a pollution of an international watercourse. In fine Article 21 § 2 stipulates the duty to harmonize strategies and is a specific application of certain of the general obligations contained in Article 5 § 2 that the “...States shall participate... ...in an equitable and reasonable manner” and in Article 8 § 1 the “...States shall cooperate...” for the purpose of generating “optimal utilization and adequate protection” of the international watercourse. Article 8 § 2 insists on mechanisms and commissions which the States jointly may consider to establish. With the requirement in Article 21 § 2 in fine that watercourse States shall “take steps to harmonize their policies” regarding the prevention, reduction and control of pollution of an international watercourse. This means that watercourse States should cooperate in good faith with the purpose to permanently harmonize their strategies. Primarily the States have to obtain harmonisation of policies and when the policies are lucratively corresponding, regularly jointly make efforts to maintain the coordination as circumstances change.<sup>85</sup>

The obligation to reduce and control pollution is state practise in this field of law. The obligation seems to be of due diligence because the state practise tends to tolerate a greater degree of pollution destruction if the State of origin makes its best efforts to diminish the pollution to a common supportable degree. On the other hand if a State of origin does not, the affected State obtains the right to claim that the former State has failed to fulfil the present obligation of due diligence.<sup>86</sup>

Article 21 § 3 stipulates that States shall consult in purpose to achieve agreements concerning measures and methods to prevent, reduce and control pollution of an international watercourse. Among others a list of prohibited, limited, investigated and monitored substances is proposed. This is a practise that several international agreements have copied.<sup>87</sup>

Article 22 stipulates that watercourse States should take all necessary measures to prevent the introduction of species, alien or new, into the international watercourse which may have harmful effects to the ecosystem of the watercourse which cause significant harm to other riparians. This separate obligation to prevent introduction of species is necessary because the definition of pollution in Article 21 § 1 does not cover biological alterations. With “species” means flora and fauna, in other words vegetation, animals and additional living organisms. Alien species are those who are not naturally inhabitant and new species are those who have been genetically created by biological engineering. A limit of the obligation is that it does not concern activities outside the watercourse, e.g. fish farming. The expression “take all measures necessary” to prevent the introduction of alien or new species, indicates that the obligation is one of due diligence. If a State does everything it can be expected to do to prevent the current

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<sup>85</sup> ILC, 123.

<sup>86</sup> ILC, 122.

<sup>87</sup> ILC, 123.

introduction, it will not entitle a State affected by the introduction to claim that the obligation has been breached.<sup>88</sup>

Article 23 concerns protection and preservation of the marine environment from pollution of international watercourses and is also the core of this thesis. This article does not stipulate an obligation to protect the marine environment<sup>89</sup> although it forces the States to take all necessary measures with regards to an international watercourse to shelter and preserve the marine environment which includes even estuaries. Thus, Article 23 has in view to protect and preserve the marine environment from land-based sources and other pollution transported by an international watercourse. This obligation is separate from and additional to, the ones in Article 20 to 22. Thus, if a State harms an estuary due to polluting of an international watercourse without violate its obligation to not cause significant harm to other watercourse States, Article 23 requires the injury causing State to take all measures necessary to protect and preserve the estuary. This is consequently one of the due diligence responsibility which means that a State has to take all necessary measures of which it is capable, financially and technologically.<sup>90</sup>

Article 24 has the purpose to simplify and on force discussions between watercourse States when one riparian State makes a request for this. There is no obligation of a result but the negotiation may end up in an establishment of a management which means in particular sustainable development, providing for implementation of plans adopted, promotion rational and optimal utilization as well as protection and control of the watercourse. The expression of “sustainable development” and “rational and optimal utilization” does not affect the application of Article 5 and 7 which are the primary foundation of the convention as a whole. With “sustainable development” means that it shall be a perdurable advancement for present and future generations. The term “rational” is to be interpreted as the “utilization, protection and control” shall be planned of the watercourse States concerned and not on improvised or unsystematic basis.<sup>91</sup> The Article 24 is meant to be broadly adequate for a general agreement and indicates guidelines to watercourse states concerning competences and roles of prospective mechanisms or institutions.

As noted before Article 25 is a specific application initially of Article 8 and secondly Article 5 initially. It stipulates thus both in one part the general obligation to cooperate and thereafter in paragraph 2 the obligation of equitable participation, in other words to reach a regulation of an international watercourse the riparian shall collaborate when appropriate and fairly participate in the work and expenses of the regulation they may

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<sup>88</sup> ILC, 124.

<sup>89</sup> The term “marine environment” signifies, inter alia, the water, flora and fauna of the sea, the seabed and - floor. ILC, 125.

<sup>90</sup> ILC, 124-125.

<sup>91</sup> ILC, 125.

enterprise. A regulation is often needed to control damage of the stream and to take full advantage of positive effects of the watercourse.<sup>92</sup> Paragraph 3 in Article 25 indicates a definition of “*regulation*” which here means “*hydraulic works or any other continuing measure*” which “*alter, vary or otherwise control the flow of the waters*”. Article 26 concerns the safety for all type of works related to an international watercourse. A State is in their territory obligated to look after and preserve installations and equivalent to their “best efforts”. The expression “best efforts” to maintain and protect installations in Article 26 makes it an obligation of due diligence. A State may harm an installation but if it has done what is within its individual capability, the State consequently has fulfilled its obligation according to Article 26. Paragraph 2 of Article 26 has a preventive intention and stipulates an obligation to enter into consultation if a watercourse State requests for it with rational motive to endure significant adverse effect. This obligation to consult other watercourse States once requested could arise from two different situations. The first with regard to safety operation and maintenance of works and secondly the protection from voluntary or delinquent acts as well as natural catastrophes. The articles focus on the works in a State’s own territory, nevertheless it could for a watercourse state be appropriate to protect and maintain joint installations in another State.<sup>93</sup>

The next part of the convention is named “Harmful conditions and emergency situations” and Article 27 therein deserves to be mentioned in this thesis. It concerns prevention and mitigation of harmful conditions of which watercourse States shall take all appropriate measures if they may be harmful to other watercourse states. Those conditions could result from natural causes or human conduct and also includes the combination of them. Occurrence from completely natural causes is out of the control of the human being but our acts influence the nature and states shall thus “take all appropriate measures” to diminish and avert harmful conditions that are the cause to those occurrences.<sup>94</sup> This article seems to have importance for the environment and the human right to water because of the influence of the human acting on natural catastrophes is said to be a cause of the pollution and a threat to the drinking water. This is an obligation of due diligence and the State is obligated to act until the point it is reasonably be expected considering its capability. Article 27 is an application of the general obligation of equitable participation stipulated in Article 5 and thus the state shall act mutually where appropriate.<sup>95</sup>

The last two parts of the 1997 Watercourse conventions is called “*Miscellaneous provisions*” and finally Part VII “*Final clauses*” and are not of special interesting for this thesis.

It is thus clear that the international community is coming to terms with the need to protect the environmental of international watercourses. Note that a

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<sup>92</sup> ILC, 126.

<sup>93</sup> ILC, 127.

<sup>94</sup> ILC, 128-129.

<sup>95</sup> ILC, 129.

variety of regional and bilateral agreements and arrangements exist with regard to international watercourses: International Commission of the Rhine, the US-Canadian International Joint Commission and provisions concerning the Zambezi River System and the Niger Basin.<sup>96</sup>

### **2.1.3 Case concerning Gab íkovo – Nagymaros Project**

The Case concerning Gab íkovo-Nagymaros Project is the first case concerning water resources since Lake Lanoux arbitration<sup>97</sup> in 1957, and even the primary case after the adoption of 1997 Watercourse Convention. Furthermore in this case it is the first time a state appeal the ICJ “ecological necessity” in the objective to deviate from its obligations in force of a treaty.<sup>98</sup> Briefly the facts were that Hungary and Czechoslovakia<sup>99</sup> had in 1977 signed a treaty<sup>100</sup> regarding construction and operation of a barrage system in the Danube River. The barrage system was planned to manage the general exploitation of the natural resources for the development of water resources, energy, transport, agriculture and other sectors of the national economy of the two countries. Danube River is after Volga the longest river in Europe and at one part it constitutes the boundary between Hungary and Slovakia. This case concerns the part from Bratislava in Slovakia to Budapest in Hungary. The river is very important for the development in the region and international co-operation has been necessary to simplify for agriculture, forestry as well as for the industry but the consequences for the environment have been critical, especially for the resource of freshwater. The signature of the treaty in 1977 aimed at these problems and the operations should serve as power generations from 1986 until 1990. The project started in 1978 but some ten years later as consequence of national public critique, Hungary suspended the work in 1989. Negotiations were held between the two countries and Slovakia investigated new alternative solutions; one of them the “Variant C” which proposed a diversion of the water by Slovakia on its territory. It remained to find a solution for Hungary as well as deepening of the Danube River to enable the navigation. Slovakia anyhow undertook the Variant C in November 1991. The negotiations continued without a united solution, Hungary terminated in May 1992 the 1977 Treaty and the same year Hungary seized the ICJ with knowledge that the court had no jurisdiction. Mediation held by the Commission of European Communities lead to an agreement to submit the dispute to ICJ and thus in April 1993 a special agreement for submission to the ICJ the difference concerning the Gab íkovo-Nagymaros Project was signed in Brussels. The court had three questions to answer on the basis of the 1977 Treaty, international rules and principles as well as other treaties that might

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<sup>96</sup> Sands P. and Peel J., with Fabra A. and MacKenzie R., 319-339.

<sup>97</sup> Lake Lanoux arbitration (France v. Spain), 1957, 24 ILR 101.

<sup>98</sup> Paquerot, 80.

<sup>99</sup> The current part of Czechoslovakia became independent as Slovakia on 1 January 1993.

<sup>100</sup> Treaty on the Construction and Operation of the Gabtikovo-Nagymaros Barrage System of 16 September 1977.

be applicable. The first question was if Hungary was entitled to suspend the works in 1989, the second was if Slovakia was entitled to undertake the Variant C in 1991, and the third was what were the legal effects of the Hungarian notification in 1992 of termination of the 1977 Treaty?<sup>101</sup> Those questions are interesting for this thesis.

By referring to the rules of the effects of suspension and denunciation in Article 60 to 62<sup>102</sup> in the Law of Treaties the ICJ did not accept the arguments invoked by Hungary for suspending the works. It had not at that time suspended the application of the 1977 Treaty or rejected the Treaty. Hence Hungary had violated one of its international obligations and involved the responsibility of the current State under the law of state responsibility. Further on Hungary also invoked "state of necessity", hence it tried to justify its conduct even if it has been illegal. Nevertheless the duty to compensate its partner, Slovakia, would although remain. The parties had agreed to solve this question in the light of Article 33<sup>103</sup> of ILC Draft Articles on the International Responsibility of States. The ICJ referred to the commentary of the draft which invoke that the situation of state of necessity has to concern protection of essential interest which is threatened by serious and approaching risk. Hungary had argued that the various installations in the system of Danube would have brought about several ecological problems for example that the groundwater would in the long term be gravely damaged, impairing the water quality, diminished water supply of the city of Budapest, risks of eutrophication, harm on the fluvial fauna and flora etc. Hungary defended thus its behaviour by relying on the state of ecological necessity. The Court stated that the situation of state of necessity had to be topical during the time when Hungary suspended the works, thus in 1989. The ecological problems that Hungary had invoked were hypothetical and modification of the environment that would occur on long

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<sup>101</sup> Case concerning Gabčíkovo-Nagymaros project, 8-9, 14-15, 22, 24, 27.

<sup>102</sup> Article 60 concerns termination or suspension of the operation of a treaty as a consequence of its breach, article 61 concerns supervening impossibility of performance and article 62 concerns fundamental change of circumstances. See <https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf>, last visited 2015-01-13.

<sup>103</sup> The ICJ cited the article 33 in Case concerning Gabčíkovo-Nagymaros project, 39-40; "Article 33. State of Necessity

1. A state of necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act of that State not in conformity with an international obligation of the State unless:

- (a) the act was the only means of safeguarding an essential interest of the State against a grave and imminent peril; and
- (b) the act did not seriously impair an essential interest of the State towards which the obligation existed.

2. In any case, a state of necessity may not be invoked by a State as a ground for precluding wrongfulness:

- (a) if the international obligation with which the act of the State is not in conformity arises out of a peremptory norm of general international law; or
- (b) if the international obligation with which the act of the State is not in conformity is laid down by a treaty which, explicitly or implicitly, excludes the possibility of invoking the state of necessity with respect to that obligation; or
- (c) if the State in question has contributed to the occurrence of the state of necessity."

term. The ICJ stated that it was not established in 1989 that there was a state of necessity.<sup>104</sup> We shall remember that ICJ decided in line with prescribed law in 1989.

The ICJ then turned to the second question concerning whether Slovakia was entitled to undertake the Variant C in 1991. Slovakia proposed the unilateral operation called Variant C immediately after the Hungarian suspension of works in 1989 and even expressed in a Note Verbal of 30 October 1989 that it would force to start a provisional project if Hungary continues to breach the Treaty. Pursuant Slovakia the operation of Variant C carried out only what Hungary had agreed to including some necessary adjustment due to the Hungarian failure to fulfil its obligations. Hungary contended that Slovakia had violated the 1977 Treaty, several other treaties and its obligations under general international law by undertake Variant C. The ICJ stated that even if Hungary had violated its obligations under the 1977 Treaty, they had not lost its right to an equitable and reasonable dividing of the resources in the Danube River. Slovakia was judged having committed an internationally wrongful act. Further on the ICJ thereafter had to investigate if this act could be legal as a countermeasure to Hungary's former unlawful acts. Thus the operation of Variant C could be lawful if it could be seen as an answer to the international wrongful act of Hungary. This criterion and as well as the second criterion was fulfilled, i.e. that the Slovakia have had to request Hungary to take up the obligations in the 1977 Treaty which it thus had done. Thirdly there is a criterion of effects, the effects of countermeasures have to be proportional to the damage caused in the light of the current rights. The ICJ referred to River Oder Case and the sentence earlier quoted discussing that case<sup>105</sup>. Thus it is here ICJ extends the application of the principle of non-navigational uses of an international watercourse by referring to the modern development of the international law which is demonstrated in the 1997 Watercourse Convention. ICJ indicated that shared natural resources of a river which are subjected to "*common legal right*" may not be used by one riparian state in a way that it prevents or restricts the other riparian states from their equitable and reasonable uses. After that the ICJ stated that Slovakia had not fulfilled the criterion of proportionality due to the unilateral control of shared resources when it had divested Hungary of its right to an equitable and reasonable share of the resources in Danube River. It was thus not legal countermeasures undertaken by Slovakia. As the Court had already found one criterion that Slovakia did not fulfil and it did not have to investigate the forth criterion of purpose, i.e. that the countermeasure must be meant to make the failing State conform its act and it must be reversible.<sup>106</sup>

Thirdly the ICJ had to determine the legal effects of the Hungarian notification in May 1992 of termination of the 1977 Treaty. For demonstrate the effectiveness of the termination Hungary invoked five different arguments, i.e. the existence of a state of necessity, the impossibility of

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<sup>104</sup> Case concerning Gabčíkovo-Nagymaros project, 32-33, 35-36, 41-43.

<sup>105</sup> See chapter 2.1.1.

<sup>106</sup> Case concerning Gabčíkovo-Nagymaros project, 44, 49, 51-54.



performance of the Treaty, fundamental change of circumstances, the material breach of the 1977 Treaty by Slovakia and fifth the development of new norms of international environmental law. Slovakia contested all five arguments and the ICJ dismissed them as well. Hence the ICJ did not find the notification of Hungary in 1992 having legal effect to terminate the 1977 Treaty. The ICJ pointed out that the new norms of the international environmental law are of interest to implement the 1977 Treaty and that the treaty contains obligations of purpose to protect the quality of water and nature by considering new environmental norms when agreeing measures to fixed in the common strategy. Hence the Treaty was not constant but responsive to conform to emerging international law for which the parties has a jointly responsibility. The Court affirmed that "*the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn*". ICJ continued by pointing out that the "*awareness of the vulnerability of the environment and the recognition that environmental risks have to be assessed on a continuous basis, have become much stronger in the years since the Treaty's conclusion*". The Treaty emphasis these new matters and the Parties had agreed to perform requirements conforming environmental development as well as vital precautionary measures. On the other side the Parties had in no sense reached an agreement concerning the consequences for the projects. It seems that the ICJ found it sad that no parties had contended that a new jus cogens had occurred since the conclusion of the 1977 Treaty. The Court stated that it not had to examine the application area of Article 64 in the Law of the Treaties which states about jus cogens because the parties had ratified that Convention after the conclusion of the Treats to which thus merely customary international law are applicable.<sup>107</sup>

At last the ICJ had to decide the legal effects of its judgement and here the Court dealt with the previous comportment of the Parties and determines the legality of that comportment between 1989 and 1992 as well as its effects on the existence of the 1977 Treaty. The ICJ should decide the prospective comportment of Parties and this part of the Judgment would be normative due to the obligations and rights it would assigned the Parties. The Court stated that the two Parties had to agree regarding measures of execution of the Judgment and as the 1977 Treaty still is in force it governs the state of affairs as *lex specialis*, together with other relevant conventions and rules of general international law, especially rules of State responsibility. Both Parties had failed to implement the 1977 Treaty but what is important is that factual situation as it had developed since 1989 shall be placed within the context of the preserved and developing treaty relationship, in order to achieve its object and purpose in so far it is possible. The 1977 Treaty was signed to achieve production of energy but was even serving other purposes as improving the navigability of the Danube and the safeguard of the ecology. No target shall have priority over another and the ICJ stated that none of them had lost its importance. The Parties have to accept three

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<sup>107</sup> Case concerning Gab fıkovo-Nagymaros project, 55, 64-66.

categories of requirements to reach these objectives, i.e. requirements of comportment, performance and effect.<sup>108</sup>

The Court stated that a main problem is the impact on the environment and it must be evaluated by taking nowadays standards into considerations. Further on the ICJ pointed out that in the past the mankind used to give priority to economic development without taking the effects on the environment into consideration. During the last two decades several instruments with new standards and norms have been developed which Hungary and Slovakia will have to conform to. The ICJ indicated that the concept of sustainable development is interesting for the application of the 1977 Treaty and the Parties have to update the treaty in this sense. It is not for the Court to decide the final outcome of their consultations but the solution has to respect both the purpose of the 1977 Treaty and the requirements of international environmental law as well as principles of the law of international watercourses. The ICJ stated that the restoration of the joint regime should confirm the concept of common utilisation of shared water resources due to several purposes of the treaty as well as the Article 5 of the 1997 Watercourse convention.<sup>109</sup> The ICJ seems also to have estimated that the obligation of environmental impact assessment is a rule that exists and it is one of the new environmental rules recently appeared which were pertinent for the future execution of the 1977 Treaty between Hungary and Slovakia.<sup>110</sup>

This case is an excellent example of exercise equilibrium through application of the principle of equitable and reasonable sharing of resources between the need of hydro electrical energy of Slovakia, and harmful environmental consequences on the territory of Hungary. Thus this is the classic issue between an upper riparian, Slovakia and a downstream State, Hungary. The upper state points out the principles of equitable and reasonable utilization and the downstream State invoke the no-harm principle. ICJ confirmed by this judgement that 1997 Watercourse Convention is a veritable instrument of codification which transforms the existing customary law into a treaty. The controversy between the two principles; equitable and reasonable utilisation (art. 5, 1997 Watercourse C) and obligation not cause significant harm (art. 7, 1997 Watercourse C). ICJ seems to give priority to the first one because Slovakia was held guilty for having violated the principle of equitable utilisation and not on an establishment of harm. Anyway the judgement seems to illustrate that there is no contradiction between the two principles but in this case an opposition of the uses of the water resources undertaken by the riparian States.<sup>111</sup> It shall not be forgotten that the ICJ was principally constrained to the application of the law as it was between 1989 and in 1992, when the issues between Hungary and Slovakia occurred. We could imagine that ICJ could have been obedient to take further steps to recognise the development of the

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<sup>108</sup> Case concerning Gabčíkovo-Nagymaros project, 73-74.

<sup>109</sup> Case concerning Gabčíkovo-Nagymaros project, 66, 72-75, 77.

<sup>110</sup> Paquerot, 84.

<sup>111</sup> Paquerot, 81-82.

international environmental law if it had not been restraint to the time when the dispute had occurred. Nevertheless the Court contributed to the development of that field of law, accepted the notion of “ecological necessity” and required of frequent environmental impact assessment.<sup>112</sup> There are critiques against this judgement of ICJ relating to insufficient knowledge of technical and environmental issues and hence secondary failure the convenience of ICJ to decide in cases concerning the environment and the watercourses. Because of this a demand for an international environmental Court exists, comparable with ITLOS, but there is no implementation on the top.<sup>113</sup>

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<sup>112</sup> Sands P. and Peel J., with Fabra A. and MacKenzie R., 318-319.

<sup>113</sup> L. Boisson de Chazournes, S.M.A. Salman, Ochoa-Ruiz, 383.

# 3 Insight of the Human Right to Water

In general, it is considered that the regulation of fresh water is an environmental problem due to for example the contribution of dangerous physical condition by pollution and overuse. It is on the other hand obviously that it even is a human rights issue.<sup>114</sup> As I pointed out in beginning of the introduction to this thesis, two-thirds of the humanity could be subject to water stress by 2025 and the call for human rights benefits as wide acceptance in the global construction other than the different value and respect of the rights marks a disagreement.<sup>115</sup> In customary international law there are several human rights due to the state practise, i.e. prohibition of torture, genocide and slavery and the principle of non-discrimination.<sup>116</sup>

## 3.1 International conventions and covenants related to the human right to water

Hypothetically a human right to sufficient quantity of healthy fresh water could be an independent human right but even a right that is included in other human rights. It may be a component for example in the human right to adequate standard of living which comprises the right to adequate food as well as the right to enjoyment of the highest attainable standard of physical and mental health. In fact none of these human rights could be satisfied without access to drinking water and sanitation.<sup>117</sup> This chapter involves the human rights related to freshwater resources of international watercourses. I emphasize certain human rights that depend on freshwater, those are the human right to life, human right to enjoyment of the highest attainable standard of physical and mental health, human right to adequate standard of living, human right to water as well as the human right to a clean environment.

The UDHR states guidelines and the inherent human rights are not compulsory obligations in force of that legal instrument.<sup>118</sup> The UDHR stipulates in Article 25 about the human “*right to a standard of adequate for health and well-being*” which today is contended to include even the human right to water. Further on the two other well-known and international

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<sup>114</sup> Sands P. and Peel J., with Fabra A. and MacKenzie R., 340.

<sup>115</sup> Global Environmental Outlook, GEO-4, Section B: State-and-trends of the Environment: 1987-2007, Ch 4, Water, 117.

<sup>116</sup> Shaw, 201.

<sup>117</sup> Paquerot, 130.

<sup>118</sup> Shaw, 33.

instruments concerning human rights are the ICESCR<sup>119</sup> and the ICCPR<sup>120</sup>. The human rights in ICCPR have the intention to be compulsory obligations<sup>121</sup> and its Article 2 states that member States shall “*respect*” and “*ensure*” the rights in the Covenant. As concerns the human rights in ICESCR the member States shall take the steps “*to the maximum of its available resources*” to give effect to the rights incorporated in the Covenant.<sup>122</sup> With this mean that the states do not have an obligation of result but an obligation upon using their best means and resources for fulfilling ensuring the rights for their citizens.<sup>123</sup> This is an obligation of sort due diligence and that kind of obligation I will present in chapter 2. Neither ICCPR nor ICESCR stipulates directly about the human right to water but the both covenants imply in their texts pertinent human rights. Article 6 of ICCPR states the right to life and is a human right which indirectly states the right to water.<sup>124</sup> The Article 11 of ICESCR states the right to adequate standard of living, and Article 12 states the right to enjoyment of the highest attainable standard of physical and mental health.

In 2002 the UN Committee on Economic Social and Cultural Rights declared in General Comment 15<sup>125</sup> that the human right to water is independent and includes in the Article 11 of ICESCR, viz. the right to adequate standard of living, as well as Article 12 of ICESCR, viz. the right to enjoyment of the highest attainable standard of physical and mental health.<sup>126</sup> A General Comment is a guiding instrument and compulsory.<sup>127</sup>

Besides Article 24§2 (c) of CRC mentions expressly the human right to drinking water. This convention was adopted in 1989 and that fairly recent year could be the reason why it stipulates this human right. The CRC is a legally binding convention<sup>128</sup> and all the worlds’ countries have signed and ratified it except from Somalia and the United States.<sup>129</sup> Even the CEDAW from 1979 stipulates expressly in its Article 14(2) h that States Parties shall guarantee women in rural areas the right to benefit adequate living conditions, especially inter alia regarding water supply.<sup>130</sup> Thus intending two particularly vulnerable groups could state that there is another reason why those two conventions expressly declaring the right to water.<sup>131</sup>

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<sup>119</sup> <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>, last visited 15/01/2015.

<sup>120</sup> <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>, last visited 15/01/2015.

<sup>121</sup> Shaw, 227.

<sup>122</sup> ICESCR, Article 2.

<sup>123</sup> Shaw, 222.

<sup>124</sup> L. Boisson de Chazournes, S.M.A. Salman, 78.

<sup>125</sup> The General Comment 15 states that the “human right entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses” as the content of the human right to water.

<sup>126</sup> McCaffrey, 369-371, Paquerot, 122.

<sup>127</sup> McCaffrey, 370.

<sup>128</sup> Nowak, 92.

<sup>129</sup> [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-11&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en)

<sup>130</sup> CEDAW, Article 14(2) h).

<sup>131</sup> Paquerot, 139.

The four riparian states of the Senegal River have all ratified the ICESCR, the ICCPR, the CRC and the CEDAW.<sup>132</sup>

It exists a debate concerning an international human right to a clean environment and there are several human rights which have relevance for the environment.<sup>133</sup> Already in the end of the 60<sup>th</sup> occurred the first acceptance of the link between the quality of the environment and the benefit of fundamental human rights.<sup>134</sup> Later on the Stockholm Declaration noted in its preamble that the environment is vital for the satisfaction of the fundamental human rights and its principle 1 denounces that human being *“has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being”, and he bears a solemn responsibility to protect and improve the environment for present and future generations.*” Even principle 1 of Rio Declaration states that *“[h]uman beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature”*. But the main focus of the UN conference in Rio where upon states and their sovereignty rather than upon individuals and their rights.<sup>135</sup> As mentioned in the main introduction the centre of attention of this thesis is the circumstances for the citizens of the riparian states and not the situation for shareholders, companies and others organism.

For the conclusion of the thesis, it is necessary to determine the grade of progress for the regulation of the Senegal River. Obviously, the question of what progressed regulation means is vital and the thesis’ centre of attention is the circumstances for the citizens of the riparian states. Regulations that benefits the shareholders, companies and others organism are not in focus and the conclusion is not depending on their situation concerning the human right to water and the environmental protection.

There are not yet binding instruments or state practise supporting the human right to a clean environment. One of the first legal documents which founded the right to public participation and indemnity when suffering environmental damage or degradation is the 1982 World Charter for Nature.<sup>136</sup> United Nations General Assembly recognised in a resolution in December 1990 *“that all individuals are entitled to live in an environment adequate for their health and well-being”* and requested for attempt guarantee for a more salubrious environment.<sup>137</sup>

The protection of environment and the human rights are on the point of converging.<sup>138</sup> Hypothetic the international environmental rules to prevent

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<sup>132</sup> <http://indicators.ohchr.org/>, last visited 13/01/2015.

<sup>133</sup> Sands P. and Peel J., with Fabra A. and MacKenzie R., 777-780, Shaw, 615-617.

<sup>134</sup> Sands P. and Peel J., with Fabra A. and MacKenzie R., 777.

<sup>135</sup> Shaw, 615-616.

<sup>136</sup> Sands P. and Peel J., with Fabra A. and MacKenzie R., 777-780.

<sup>137</sup> UNGA, A/RES/45/94, paragraph 1-2.

<sup>138</sup> See Shaw, 616.

pollution of freshwater resources could reinforce a human right to water. On the other side it could even be the contraire that a human right to water is a reason that a State has to adopt a regulation to protect the environment linked to a resource of freshwater. The human right to water may even be a part of the right for population to freely dispose of their natural wealth and resources, the right to life, the right to enjoyment of the highest attainable standard of physical and mental health and the right to benefit adequate living conditions.<sup>139</sup>

As this thesis analyses the regulation of the Senegal River in West-Africa some articles are to be remarked in the regional instrument the ACHPR adopted in 1981. All four riparian countries of the Senegal River have ratified this charter.<sup>140</sup> The ACHPR has at least four articles that are interesting and which could be a part of the human right to water. The Article 16 (1) states that States members “*shall take the necessary measures to protect the health of their people*”, the Article 20 (1) states “*the right to self-determination*”, Article 21 dispose that “*peoples shall have the right to freely dispose of their wealth and natural resources*” and this “*right shall be exercised in the exclusive interest of the people*” and finally Article 24 which stipulates that “*all peoples shall have the right to a general satisfactory environment favourable to their development*”. When reading this you should reflect on the implication of that the system of supervise for the human rights in the African Charter are not that ground-breaking as the containment of the articles. In general the politicians in Africa fear that the system of human rights may interferes extremely on their sovereignty.<sup>141</sup>

Recently the United Nations General Assembly Resolution 10967<sup>142</sup> from July 2010 was making access to clean and safe water a human right. Senegal and Mali were voted in favour for the resolution and Guinea and Mauritania were absent. Two of the OMVS’ countries thus have an obligation to assure their citizens have access to water pursuant the human right to water. This voting in favour creates a dare and openings for Senegal and Mali, the obligation authorises stakeholders and reinforce political structures.<sup>143</sup>

## **3.2 Human right to water as regarding the regulation of the international watercourses**

In the 1997 Watercourse Convention we observe that Article 10 states:

***“Relationship between different kinds of uses***

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<sup>139</sup> Paquerot, 130-132.

<sup>140</sup> [http://www.achpr.org/english/ratifications/ratification\\_african%20charter.pdf](http://www.achpr.org/english/ratifications/ratification_african%20charter.pdf)

<sup>141</sup> Nowak, 206.

<sup>142</sup> [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/64/PV.108](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/64/PV.108) (last visited 01/03/2015)

<sup>143</sup> Dr. Frans J.G. Padt, Juan Carlos Sanchez, 284.

1. *In the absence of agreement or custom to the contrary, no use of an international watercourse enjoys inherent priority over other uses.*
2. *In the event of a conflict between uses of an international watercourse, it shall be resolved with reference to articles 5 to 7, with special regard being given to the requirements of vital human needs.”*

Thus a disagreement between uses of an international watercourse shall be resolved with reference to articles 5 to 7 “*with special regard being given to the requirements of vital human needs*”. Article 10 concerns the proportion between the different kinds of uses of an international watercourse and in the beginning it stipulates that no use shall have precedence for an alternative use. Accordingly Article 1 § 2 in fine, this order to equality of use applies even to navigation which is in the application area of the convention “*insofar as other uses affect navigation or are affected by navigation*”.

Ergo Article 10 of 1997 Watercourse Convention states that a conflict between uses of an international watercourse shall be resolved with reference to article 5 to 7 in the same convention. These articles have been introduced in the chapter 2.1.2 and provides about principles of equitable and reasonable utilization and participation<sup>144</sup>, that watercourse states shall take all appropriate measures to prevent the causing of significant harm to other watercourse states<sup>145</sup> in addition a non-exhaustive list of factors<sup>146</sup> and circumstances that are to be considered<sup>147</sup>.

The aspects noted in Article 6 are significant if they are relevant for the current international watercourse.<sup>148</sup> The criterion of priority for essential human requests is an emphasis of Article 6 (b), i.e. social and economic needs. The preference for “*vital human needs*” seems to signal the human right to water and accordingly the ILC Comments signifies that enough water to assist human life viz. water for drinking and nutrition aim to prevent starvation, could benefit an exceptional consideration<sup>149</sup>. This is correct and in accordance with the human right to water as the UN Committee on Economic Social and Cultural Rights 2002 declared in General Comment 15.<sup>150</sup>

The commentary of ILC is in line with the development of the international law for international watercourse.<sup>151</sup> Several documents concluded that water experts point out that complex proceed to preserve and safeguard the environmental resources must be utilized. Those proceeds would not be operated if there is a priority of use of an international watercourse. In fact

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<sup>144</sup> 1997 Watercourse Convention, Article 5.

<sup>145</sup> 1997 Watercourse Convention, Article 7.

<sup>146</sup> Sands P. and Peel J., with Fabra A. and MacKenzie R., 467.

<sup>147</sup> 1997 Watercourse Convention, Article 6.

<sup>148</sup> ILC Comments, 110 § 3.

<sup>149</sup> ILC Comments, 110 §4.

<sup>150</sup> McCaffrey, 369.

<sup>151</sup> McCaffrey, 369.



the absence of priority of use will make possible to guarantee that vital human needs are contented.<sup>152</sup>

The interpretation by several authors regarding the requirement of vital human rights in Article 10 § 2 1997 Watercourse Convention, seems to value the demand as a real priority but in the same way the paragraph stipulates that no use of the water shall be given priority before another. Thus the necessity of fundamental human rights benefits simply a specific consideration. The common conclusion seems to hesitate to believe that it is a compulsory obligation to give priority to the vital human right.<sup>153</sup>

The negotiations of the current article implicated disagreement between a number of States that demand for essential human rights could become a vagueness that makes it possible to escape the requirement. One reason for this doubt is that the significance of “*vital human needs*” is imprecise which may result in a State gives prevail to its use instead of the genuine human needs. Another reason is the contingency for situation with several riparian States for example one State which produces food to another whose population is starving but the third State wants priority for its use.<sup>154</sup> During the elaborations of the 1997 Watercourse Convention the statements of understanding were noted pertaining to the text and concerning Article 10 it stated “*In determining "vital human needs", special attention is to be paid to providing sufficient water to sustain human life, including both drinking water and water required for production of food in order to prevent starvation.*”<sup>155</sup> As this statement is in line with the ILC Commentary it seems not add any new problems.<sup>156</sup>

The part V of the convention is named “*Harmful conditions and emergency situations*” and Article 27 concerns prevention and mitigation of harmful conditions of which watercourse States shall take all appropriate measures if they may be harmful to other watercourse states. Those conditions could result from natural causes or human conduct and includes even the combination of them. Occurrence from completely natural causes is out of the control of the human being but our acts influence the nature and States shall thus “*take all appropriate measures*” to diminish and avert harmful conditions that are the cause to those occurrences.<sup>157</sup> This article seems to having importance for the human right to water because of the influence of the human acting on natural catastrophes is said to be a cause of the pollution and a treat to the drinking water. This is an obligation of due diligence and the State is obligate to act to the point it is reasonably be expected considering their capability. Article 27 is an application of the

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<sup>152</sup> ILC Comments, 110 § 4-5.

<sup>153</sup> Paquerot, 143.

<sup>154</sup> McCaffrey, 369.

<sup>155</sup> Report of the Sixth Committee convening as the Working Group of the Whole, 1997, 5.

<sup>156</sup> McCaffrey, 369.

<sup>157</sup> ILC, 128-129.

general obligation of equitable participation stipulated in Article 5 and thus the State shall act mutually where appropriate.<sup>158</sup>

None of the four riparian states of the Senegal River have signed nor ratified the 1997 Watercourse Convention.

The problematic with an international river in a region where there is a lack of drinking water is that the water shall satisfy the population in more than one country. The countries concerned may have to co-operate in intention to obtain a solution that gives enough water to the population in the both countries. With “*sufficient*” water daily for one person is calculated by World Health Organisation among others to between 20 and 40 litres including drinking, cooking and sanitation.<sup>159</sup> For example an upper riparian could utilize more water than remaining water is sufficient for the downstream State and before the above cited United Nations General Assembly Resolution 10967 from July 2010, the international human rights law could not held the current upper State guilty of violating a human right of the population in the downstream State. At least since 2010 two member states of OMVS, i.e. Senegal and Mali, may be hold quality of breaking a human rights law concerning this matter.

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<sup>158</sup> ILC, 129.

<sup>159</sup> McCaffrey, 371.

## 4 The regulation of the Senegal River

The Senegal River is one of the most important rivers in West Africa and is situated between the latitude north  $10^{\circ} 30'$  and  $17^{\circ} 30'$  and the longitude west  $7^{\circ} 30'$  and  $16^{\circ} 30'$ .<sup>160</sup> It is with its length of 1.800 km, the second longest river in Africa after river Niger<sup>161</sup>. Its basin, that covers around 300 000 square kilometres<sup>162</sup>, are shared by Guinea (11 %), Mali (53%), Mauritania (26%) and Senegal (10%).<sup>163</sup>

Consistently the basin of the river is divide into three zones; the high basin, the medium and the low valley and the delta following the different conditions of topography, hydrographical and climatologic.<sup>164</sup> Crossroads of several rivers form the Senegal River<sup>165</sup>, it takes that name first after the junction of Bafing River and Bakoye River in Bafoulabe in Mali. The Bafing River founds in the Fouta Djallon Mountains in Guinea and has an important flow, 430 cubic meters, which is more than 50 percent of the average flow rate to the Senegal River. The Bakoye River which has its sources in many small dikes, has about 170 cubic meters (5 billion cubic meters a year). After Bafoulabe there are four major watercourses along the Senegal River, i.e. the Kolimbine and the Karakoro in Mali and Gorgol in Senegal. The fourth, the Faleme, is the most important and it founds as Bafing River in Fouta Djallon Mountains and has an average flow rate of 6 billion cubic meters a year.<sup>166</sup> The annual flow of the Senegal River is vastly irregular although the total annual discharge is approximate 24 billion m<sup>3</sup> per year.<sup>167</sup>

The four riparian countries of the Senegal River, with their total cumulative population of 35 million, are ranked among the 32 poorest in the world. 12 million inhabitants live in the basin with an annual population growth rate estimated to 2,7 percent.<sup>168</sup> They have a limited sustainable growth and welfare hence the basin hydropower potential and irrigable lands are underdeveloped. The Diama dam in the Senegal River, built from the mouth to the Atlantic, has been in operation since 1986. It stops the seawater intrusion during the dry-season. This dam additionally increases the quantity

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<sup>160</sup> OMVS : Un Exemple Reussi de Gestion d'un Grand Bassin Transfrontalier en Afrique de l'Ouest", 4.

<sup>161</sup> L. Boisson de Chazournes, S.M.A. Salman, 475.

<sup>162</sup> This could be compared with the 225 000 square km covers by the River Rhine in Europe, Sands, 478.

<sup>163</sup> The United Nations World Water Development Report, 450.

<sup>164</sup> OMVS : Un Exemple Reussi de Gestion d'un Grand Bassin Transfrontalier en Afrique de l'Ouest, 3.

<sup>165</sup> A.M. Sène, S. Bonin, O. Soubeyran, 1918-1919.

<sup>166</sup> WB 2006, 32.

<sup>167</sup> WB 2013, 12.

<sup>168</sup> WB 2013, 12.

of the reservoir, permitting irrigation and filling of lakes and even enabling to furnish Dakar's, the capital of Senegal, 2.5 million people with water. In south-west Mali, 1,200 km from the mouth of Senegal River, the Manantali dam is in operation since 1988 where it regulate the flow of Bafing River. It generates 200 MW of electric power per year and stock up water to make possible irrigation and navigation during the dry season.<sup>169</sup>

The OMVS is a result following of the long tentative process of rational control and exploitation of the resources of the Senegal River. Between the publication of "A plan for agriculture colonisation in Senegal" in 1802 by the colonial authority and the creation of OMVS in 1972, there are great endeavours trying to regulate the resources of the Senegal River.<sup>170</sup> The attempts augment after the independence of the four riparian countries<sup>171</sup> with the creation of Inter-States Committee in 1960. That committee was substituted by 1970 Org which subsequent to the withdrawal of Guinea was replaced by the OMVS. Subsequent upon the substitution of that committee for the Organization of the Riverside States of Senegal River in 1970, Guinea is withdrawn and replaced by the OMVS. At this time, the countries had found it engaging to implement mechanisms of the river in objective to avoid the negative consequences of climate vagaries.<sup>172</sup>

## 4.1 The Convention on the Status of the Senegal River

The purposes of the 1972 Status Convention are stipulated in the preamble and in articles 1-3, i.e. to declare the Senegal River as an international river<sup>173</sup>. They are to affirm the Member states to develop a dense cooperation to permit rational exploitation of the natural resources and to assure the liberty of navigation as well as the equal treatment of the users and to define methods of exploitation. At this time, in 1972, there were according to the preamble of the convention three particular uses of the water which were energy production, the irrigation and navigation. Thus did the question of environmental protection and human right to water not have a primary precedence.

In the Preamble this convention also considers the Charter of the United Nations, the Charter of the Organisation of African Unity of May 25, 1963 and that the coordinated installations of the Senegal River for the rational exploitation of its natural resources offers prospects for fertile economic co-

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<sup>169</sup> WB 2006, 33.

<sup>170</sup> A.M. Sène, S. Bonin, O. Soubeyran, 2.

<sup>171</sup> Independence Day: Senegal, 4 April 1960 (from France), note - complete independence achieved upon dissolution of federation with Mali on 20 August 1960, Mali, 22 September 1960 (from France), Mauritania, 28 November 1960 (from France), Guinea, 2 October 1958 (from France). See The World Factbook, Central Intelligence Agency, [www.cia.gov](http://www.cia.gov).

<sup>172</sup> A.M. Sène, S. Bonin, O. Soubeyran, 1919.

<sup>173</sup> See definition of international watercourse in the beginning of chapter 2.

operation. In addition it considers an unconditional accord of the member states on the methods for general installation of the river and the phase of regulation as well as its triple purpose of use of the water. Lastly it also considers the principle of freedom of navigation and equal treatment of the users.

In article 1 the member states declare that the Senegal River and its tributaries as an international river on their territory. Article 2 confirms that their solemn willingness to develop a solid co-operation with the object to assume the rational exploration of the river's resources and grant the freedom of navigation and equal treatment of all use sectors.

The preamble mentions "natural resources", article 2 "resources of the Senegal River" and article 4 "the biological characteristics of its fauna and flora" and those three sentences are where we find references to preoccupation of the environment protection in the convention. There is no indication of the human right to water in the 1972 Status Convention. Thus OMVS' objective from the beginning regarding environment protection could (today) be seen as restrictive since the convention neither explicit indicate the preoccupation of the environment nor precise any details.<sup>174</sup> There is consequently no requirement of EIAs or impact assessment in 1972 Conventions during the High Commission analyses development projects and not when the commission propose recommendations to the Council of Ministers. Conversely the EIAs were not a common practice in 1972 but the omission of this requirement does not relieve OMVS of a general obligation to comply with emerging standards of international law and evaluate the environmental consequences at each successive decision point in the development process.<sup>175</sup> Regarding the human right to water neither pointing finger at OMVS meanwhile the right is considered in international law only since 2002.<sup>176</sup>

Pursuant to the organisation itself, OMVS, the innovation with the convention was to be found under the section II, "*Exploitation agricultural and industrial*", Article 4.<sup>177</sup> Thus this article stipulates an indication of the principle of consent previously execution<sup>178</sup> and specifies an obligation for the states that all shall authorise before the realisation of a project likely to modify in a substantial way the characteristics of the river regime, its conditions of navigability, agriculture and industrial exploitation, sanitary state of water, the biologically characteristics of its fauna and flora and its water level. This obligation is in focus in this thesis. As we will see later the obligation has developed in to the relatively recently adopted 2002 Water Charter which recalls and reinforces this duty of prior approval.<sup>179</sup>

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<sup>174</sup> Merzoug, 14 (18).

<sup>175</sup> Vick, 222-223.

<sup>176</sup> See Chapter 3.1-2.

<sup>177</sup> OMVS, "Un Exemple Reussi de Gestion d'un Grand Bassin Transfrontalier en Afrique de l'Ouest" 4(14).

<sup>178</sup> McCaffrey, 273 ; OMVS, Historique, 2(3).

<sup>179</sup> 2002 Water Charter, art. 4, 10 and 24.

Articles 6-9 concern navigation and transport which were the main interests for OMVS in the beginning. The main interests will change further on with the principles of equity and cooperation will be more essential even though the general principles of prior notification remains and has been reinforced.<sup>180</sup> Earlier a common organization of cooperation was to be created by the member states to assure the application of the present convention and to promote and coordinate the studies and works for the development of the Senegal River.<sup>181</sup> Consequently the OMVS was created the same day by the same actors<sup>182</sup>, see next section.

## **4.2 The Convention creating organization for the development of the Senegal River**

In charge to apply the 1972 Status Convention, the 1972 OMVS Convention was signed the same day, March 11, 1972. Its vision is also to promote and coordinate the studies and work of development of the basin of the river as well as all requested technical and economical operations mandated from the Member states. The OMVS is the legal personality and has the capacity to contract, be part of legal proceedings and so forth<sup>183</sup>. The two conventions of 1972 were globally some of the first accords for complete management including non-navigational and navigational uses of a river. Already more than forty years ago those conventions dealt with major legal principles for non-navigational uses of an international river and assist as examples of basin cooperation when ILC drafted the 1997 Watercourse Convention.<sup>184</sup>

The 1972 OMVS Convention establishes several organs of OMVS and sets up their vocation. There has been modifications since 1972 OMVS Convention and here I simply mention the most important organs created by that convention; the Conference of the Heads of States and government (which was and still is the supreme organ and it has a President<sup>185</sup>), the Council of Ministers<sup>186</sup>, the Office of the High Commission<sup>187</sup> and the Standing Committee of Water<sup>188</sup>. Vital for this thesis is the main function of the Standing Committee of Water which is to fix the principles and system

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<sup>180</sup> 2002 Water Charter, art. 4 and 10.

<sup>181</sup> 1972 Status Convention, art. 11.

<sup>182</sup> OMVS, Plan, 2(7).

<sup>183</sup> See article 1 §3 al 2 a-f, 1972 OMVS Convention.

<sup>184</sup> Vick, 214.

<sup>185</sup> 1972 OMVS Convention, art.3-6.

<sup>186</sup> 1972 OMVS Convention, art.8-10.

<sup>187</sup> 1972 OMVS Convention, art.11-19.

<sup>188</sup> 1972 OMVS Convention, art.20.

of the allocation of water. Further on in Chapter 4.7 I will analyse both this Committee which original functions remain but has been developed and expanded as well as the operating rang of the organs.

### 4.3 Conventions concerning common works

For the rivers in Africa it is rare to have a specific convention covering common works.<sup>189</sup> The regulation in the 1978 Works Convention gives each member state equal right to all works<sup>190</sup> and declared the dams, ports, harbours and the navigable channel of the Senegal River joint and inseparable property. Those works are among others the Manantali Dam in Mali, the Diama Dam in Senegal, the fluvial-maritime port of Saint-Louis (in Senegal), the river port of Kayes (in Mali) in addition to ports of call, works installations for navigational fairway as well as attached and annexed works.<sup>191</sup> There are rules for executing those shared works<sup>192</sup>, for rights and obligations (grounded on equality and equity)<sup>193</sup>, concerning exploitation and management of the jointly-owned works<sup>194</sup>, regarding privileges and immunity agreed with management agencies<sup>195</sup> and ruling relating to formalities of the convention as modification and interpretation etc<sup>196</sup>.

The management of the common works acquired to OMVS and the member states promise to take legislative, legal and administrative action as necessary to provide the lands needed for construction of the shared works. The 1978 Works Convention contributes a legal regime based on principles of equality and equity.

The Convention of May 1982 on the financing modalities of the common work was signed in the capital of Mali, Bamako. It provides financial support of OMVS' programs i.e. donations, loans and subventions, as well as the instruments of guaranties for lenders and a key imputation of costs and expenses that can be modified every time necessary. This field of common works is not frequency existing but probably efficient and for those reason interesting. It could be motivating to analyse the value of this convention deeper but in lack of time I have chosen to focus on the 2002 Water Charter.<sup>197</sup>

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<sup>189</sup> L. Boisson de Chazournes, S.M.A. Salman, 517.

<sup>190</sup> 1978 Works Convention, art. 2.

<sup>191</sup> 1978 Works Convention, art. 3.

<sup>192</sup> 1978 Works Convention, art. 7-10.

<sup>193</sup> 1978 Works Convention, art. 11-14.

<sup>194</sup> 1978 Works Convention, art. 15-20.

<sup>195</sup> 1978 Works Convention, art. 21-29

<sup>196</sup> 1978 Works Convention, art. 30-34.

<sup>197</sup> See Merzoug, 109-110 and L. Boisson de Chazournes, S.M.A. Salman, 517-523 for more details about the convention.

Subsequent to the implementations of the dams i.e. the Diama Dam and the Manantali Dam, in operation since 1986 and 1988, the Convention creating Agency of Management and Exploitation of Diama and the Convention creating Agency of Energy Management of Manantali were signed<sup>198</sup>. The objective for both dams are to retain minimum water level in the river for year-round irrigation in the valley and in the lower reaches on reclaimed delta lands.<sup>199</sup> Both those conventions stipulate in their respective article 11 that the management of the dams should be done with respect to a future Water Charter for utilization of water resources in the Senegal River, in which principles and methods of the allocation of water between different usages would be defined.<sup>200</sup> That Water Charter was signed in May 2002 and I will analyse it in the next chapter.

## 4.4 The Water Charter of the Senegal River

The 2002 Water Charter of the Senegal River was progressively formed by subsequent cooperation between the concerned States and with the support from the group of the World Bank, representations of users, non-governmental organizations and other financial institutions. The Conference of Heads of State adopted the charter under authority in the 1972 OMVS Convention.<sup>201</sup> The 2002 Water Charter is enclosed at the end of this thesis.

### 2.5.1 The objectives and purpose

The objectives of the 2002 Water Charter are stipulated in Article 2, i.e. to establish principles and modalities for the allocation of the waters of the Senegal River among the different areas of use; to specify the methods of reviewing of new users projects or projects which affect the quality of the water; to establish rules related to the preservation and protection of the environment, particularly regarding wildlife, flora, and ecosystems; and finally to define the framework and the modalities of participation of the consumer of water in decision-making as far as water resources management of the river is concerned.<sup>202</sup> This approximate a river management influenced by the 1997 Watercourse Convention and that the OMVS challenges to overcome the harmful consequences of dam constructions.<sup>203</sup> In comparison to previous conventions related to the Senegal River, the 2002 Water Charter restore the objective of a specified quantity of electricity production and irrigation by the principles of equity and cooperation.<sup>204</sup> The following analysis will confirm that the regulation takes both an environmental approach, and recognises the human right to water. The former charter did not.

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<sup>198</sup> Both conventions signed January 7, 1997.

<sup>199</sup> Vick, 216.

<sup>200</sup> L. Boisson de Chazournes, S.M.A. Salman, 524.

<sup>201</sup> Merzoug, M.S.O, Reig, L., Vacca, G., 14(18), Vick, 233.

<sup>202</sup> See also A.M. Sène, S. Bonin, O. Soubeyran, 1928; L. Boisson de Chazournes, S.M.A. Salman, 526; Vick, 234.

<sup>203</sup> Vick, 235; *see also* 216-219 regarding negative consequences of the dams.

<sup>204</sup> Vick, 235.



Article 2 of the 2002 Water Charter writes that the repartition of resources shall be made considering the different areas of use and not considering the States. This demonstrate an established and maintained initial principle of the Senegal River. This principle is declared in Article 3 and thus the field of application of the hydrographical basin should be seen as one entity, physically, economically, socially and environmentally beyond the politics of each member state.<sup>205</sup>

*There are at least three appendices* referred to in the Charter, when visiting the OMVS office in Dakar, the staff claimed they do not yet exist.<sup>206</sup> It seems that the principles of the distribution of water should be defined in the appendices<sup>207</sup> as well as the scenarios of management of the Dams Manantali and Diama<sup>208</sup>.

### The Preamble

The Preamble of the Charter show awareness to the necessity of respecting to the general principles of law for fresh water considering international law and customary law<sup>209</sup> which has inspired the regime of international watercourses and in particular the 1997 Watercourse Convention<sup>210</sup>.<sup>211</sup> The preamble also writes that conscious shall be given to the vulnerability and the rarity of freshwater resources as well the importance of functions which they respond at the economic, social and environmental plan.<sup>212</sup> Moreover the preamble convinces that the Senegal River is an essential ecosystem for the maintaining of the sustainable development in the riparian states which is taken into account by showing awareness of the cycle of water as a whole, as well as the sectorial and cross industry needs.<sup>213</sup> Even concerning the distribution of the water resource over the different uses, their management and their development, the objective of development durable<sup>214</sup> is to be taking into account.<sup>215</sup> Additionally the preamble is anxious to endorse a policy of optimal and durable utilization of the resource, implying responsibility is given to the users and a policy of preservation of the water through an integrated supervision and equitable for the privilege for the present and future generations.<sup>216</sup> The Preamble of the Charter in fine refers to the principles and recommendations relative to the environment adopted notably by the UNCED in Rio Declaration from 1992<sup>217</sup>.

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<sup>205</sup> Merzoug, M.S.O, Reig, L., Vacca, G, 14 (18).

<sup>206</sup> M BA, August, 2008.

<sup>207</sup> 2002 Water Charter, Art. 7, probable Appendices 1, *see also* Art. 19

<sup>208</sup> 2002 Water Charter, Art. 14, appendices 2 and 3 are “Handbooks of Management” of the dams. *See also* Art. 15.

<sup>209</sup> *See* chapter 2.

<sup>210</sup> *See* chapter 2.1.3.

<sup>211</sup> 2002 Water Charter, Preamble, *line* 16.

<sup>212</sup> 2002 Water Charter, Preamble, *line* 21.

<sup>213</sup> 2002 Water Charter, Preamble, *line* 22.

<sup>214</sup> *See* chapter 2.

<sup>215</sup> 2002 Water Charter, Preamble, *line* 23.

<sup>216</sup> 2002 Water Charter, Preamble, *line* 25.

<sup>217</sup> *See* chapter 2.

This is a preamble that takes into account the essential of the international environmental law and the concept of the recent development of adjacent areas. For example, we can see it also emphasizes the 1997 Watercourse Convention, the concept of durable development, the principles and recommendations adopted in Rio Declaration 1992, which together provide an importance to the delicacy and scarcity of drinking water. Although the Preamble not explicitly considers directly international human right law, it may be read between the lines and further on in the charter, there are articles regarding for this matter. The continuous analyse of the 2002 Water Charter will in one way indicate more rigorous regulation of the Senegal River than the imperative international law provides in the field of environmental protection and in certain sense even concerning the human right to water. The comparison as a whole is to be found in the conclusion.

### Definitions

The first part of the 2002 Water Charter consists of Article 1 where the definitions are enumerated. For this thesis three terms are pointed out. First “pollution” in 15° which in the Charter signifies: *“the direct or indirect introduction by the man of substances or energy into the River, when it has or can have harmful effects, such as damage to the living resources, with river fauna and flora, human health risks, of the obstacles to the activities in the River, and of deteriorations of the quality of the water from the point of view of its use”*<sup>218</sup>. This is practically the definition used in UNCLOS.<sup>219</sup> According to 1997 Watercourse Convention, Article 21 §1 stipulates that *“pollution of an international watercourse”* for the purpose of that article<sup>220</sup> *“means any detrimental alteration in the composition or quality of the waters of an international watercourse which results directly or indirectly from human conduct”*. This could mean that the definition in the 2002 Water Charter are older than the one in the 1997 Watercourse Convention. On the other hand it should be considered if not the UNCLOS in general gives a more extensive and detailed protection and preservation of the marine environment<sup>221</sup> than 1997 Watercourse Convention protects and preserves the ecosystem of international rivers<sup>222</sup>. Further on the definition in the 1997 Watercourse Convention is limited to that relevant article and even that could illustrate that regulation of pollution is not in the main objective of the convention despite the fact that it recalls the Rio Declaration and Agenda 21<sup>223</sup>.<sup>224</sup> It is unambiguous that UNCLOS not applies to the international rivers and consequently the Senegal River. The Article 9 in

<sup>218</sup> 2002 Water Charter, Art. 1, 15°.

<sup>219</sup> Art. 1 § 4; *“For the purpose of this convention”*... .. *“pollution of the marine environment” means the introduction by man, directly or indirectly, of substances or energy into the marine environment, including estuaries, which results or is likely to result in such deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities;”*...

<sup>220</sup> “pollution” is only otherwise mentioned in the Preamble, line 5.

<sup>221</sup> See UNCLOS, Part XII, Art. 192-237.

<sup>222</sup> See 1997 Watercourse Convention, Art. 5-6 and Part IV, Art. 20-26.

<sup>223</sup> See Chapter 2.

<sup>224</sup> UN 1997 Convention, Preamble line 8.

UNCLOS concerns mouths of rivers and stipulates that “*If a river flows directly into the sea, the baseline*” for limiting the territorial sea and contiguous zone “...*shall be a straight line across the mouth of the river...*”. The side facing the ocean is territorial sea (or contiguous zone) to which the UNCLOS applies and the other side adjacent to the landside is the end of the river hence this convention does not apply.

The Senegal River has its mouth between Mauritania and Senegal therefore it becomes territorial sea for them both but in this thesis’ focus lies on the water inside; thus where the UNCLOS does not applies. However that convention could be interesting to study for the comprehension of regulation, environmental protection of water and may in some sense serve as a role model for advancement of regulation of freshwater even though the distinction with salt water is vital. The regulation of freshwater is newer and its shortage as a resource has recently appeared.

Concerning the main purpose of this thesis, analysis of the environmental protection of freshwater and to the human right to drinking water, questions related to the first field of law seem to be more associated and face more similar dilemmas within the two forms of water. Regarding issues of the human right to water the salt water is not of major use for agriculture, cooking, drinking or other uses related to the right to adequate home etc. which is the fundamental use of freshwater.

Returning to the definition of pollution in 2002 Water Charter it is not explicitly stipulated that pollution is prohibited, although related to an interdiction of pollution is the concept environmental protection which is regulated consistently in the text. The term pollution is simply used four times<sup>225</sup> in the Charter. In Article 16 it is even recommended for the member states to act in concert to prevent introduction of substances that may have detrimental effects to the ecosystem.<sup>226</sup> The 2002 Water Charter refers to responsibility regarding pollution according international law<sup>227</sup> and the absence of expressly outlawing pollution is consequently not vital.

The second definition to remark is “*requirement out of water*” in 16° which indicates: “*quantities of the resource of which must lay on the users, for human satisfaction and which allow a durable development their living conditions, in the respect of the environment and the texts of the Organization* . Concerning this definition the preamble considers the intensifying of requirement out of water.<sup>228</sup> Article 8 stipulates that the use of the water intends to assure four separate requirements of water. Initially the requirements out of drinking water for the populations is specified as the “in particular most vulnerable”, there after requirements out of water for the

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<sup>225</sup> The 2002 Water Charter, Art. 7 and Art. 16-18.

<sup>226</sup> Art. 16 §3, further analysed below, and see discussion; L. Boisson de Chazournes, S.M.A. Salman, 529-530.

<sup>227</sup> The 2002 Water Charter, Art. 18 in fine, where the term pollution is mentioned, which even stipulates the application of the polluter-pays principle. *See* also chapter 2 concerning international law and here below concerning Art. 18.

<sup>228</sup> The 2002 Water Charter, Preamble, line 24.

energy production, for industry and for navigation. In between it stipulates the guarantee of the “*needs for*” cultivation, the reproduction, silviculture, pisciculture, fishing, fauna, the flora and the milieu which thus not is linked to the expression “*requirement out of water*” and thus get a lower antecedence. The requirement out of water seems to be defined in a way of satisfying the human needs and hence to permit a sustainable development of living conditions. This is interesting and important for the human right to water which in this article have consistently priority before the other use of the water.<sup>229</sup>

The third definition “*domestic uses*” to spot is indicated in 18°: “*taking away or rejections having for object the need satisfaction of the people physical, and limited to the quantities necessary to the food, hygiene and the livestock or vegetable productions intended for the family use*”. In the 2002 Water Charter this expression is found in three different articles. First it is mention in the essential opening article 2 where the purpose and scope of the charter are settled to establish the principles and methods of distribution of the water of several areas of use by considering the domestic usage. This is favourable for the human right to water due to the link to an adequate standard of living<sup>230</sup> in which the residence water is fundamental.<sup>231</sup> Thereafter in Article 9 this term is re-visited as the charter insists on not prioritising between the uses of water except corresponding to principles of international law. Although in case of scarcity of water particular consideration shall benefit to the storage of drinking water and the domestic uses of water.<sup>232</sup> This is also a strengthening of the human right to water. Additionally, in Article 10 it is stipulated that collecting of water is controlled<sup>233</sup> except for domestic use and this is also in favour of the same human right.

### Principles and approach systems of allocating the water to the different uses

The general principles for the allocation of water to the usages are set in Article 4 as four obligations: to guarantee the balanced management of the water resource; to preserve the environment; to negotiate in the event of conflict; for each Coastal state to inform the other Coastal states before undertaking any action or any project which could have an impact on the availability of water and/or the possibility of implementing future projects. Furthermore there is a fifth general principle in Article 4, i.e. equitable and reasonable utilization although it seems to be merely a recommendation. The four obligations plus the recommendation are logically detailed further on in the Charter, which is analysed deeper later on while here only simply remarks are made. The first obligation, to guarantee the balanced

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<sup>229</sup> See chapter 3.

<sup>230</sup> For example ICESCR, Art. 11.

<sup>231</sup> See chapter 3.

<sup>232</sup> 2002 Water Charter Art. 4.

<sup>233</sup> The 2002 Water Charter, Art. 10: “...subjected to a preliminary declaration or authorization arrangement.”

management of the water resource, has an environmental approach. The word “balanced” in the light of the purpose of the convention must be ecological equality. E.g. the preamble requires management in respect of durable development and in favour of the present generations and future<sup>234</sup>, as well as in Article 16 about “natural balances” for the management of resources. It creates a rigid connection to the second obligation to preserve the environment which leads directly to a specific part in the convention, i.e. Part 4; “Protection and Safeguarding of the Environment”. Those first two obligations are direct useful for the environmental protection of the Senegal River and in focus of this thesis as follow later. Even the third requirement “to negotiate in the event of conflict” is beneficial for the same purpose. The 2002 Water Charter stipulates in Article 30 that any dispute regarding interpretation or appliance is solve preliminarily by conciliation or mediation, secondarily by seizing the Commission of Conciliation and Arbitration of the African Union and thirdly, and as last remedy by seizing the International Court of Justice. The same article stipulate that the Council of Ministers of OMVS decides for provisional measures<sup>235</sup> on proposal from the High-Commissioner.

**The fourth duty** for each riparian state is to inform the other riparian states prior carrying out any action or project which may have an effect on the accessibility of water or the opportunity to realize future projects. This is a repetition and the set off to a reinforcement of Article 4 of the 1972 Status Convention which stipulates the principle of previous consent.<sup>236</sup> The article stipules an obligation for the states to reach a consensus prior realisation of a project that is susceptible to in a sensitive way modify the characteristics of the river regime, its conditions of navigability, of agricultural and industrial exploitation, sanitary state of water, the biological characteristics of its fauna and flora or its water level. Below Article 10 in the 2002 Water Charter will show that the collecting of water, except domestic use, are subjected to a previous announcement or approval and that is one strengthening of this established obligation in the framework of the OMVS.

The obligation of notification directs as well to Part 6 of the 2002 Water Charter, “Methods of examination and approval of the new projects”<sup>237</sup>, where Article 24 divides new projects into three different categories. There are projects which not have significant effect, those which have an expected significant effect and thirdly derogatory projects in case of urgency. The first category seemingly not controlled. The second category of projects must be notified before their execution via the High Commissionership to

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<sup>234</sup> The 2002 Water Charter, Preamble, line 23 and 25.

<sup>235</sup> Those are in general internationally taken by decision with intention to preservative or preventive measures in anticipation of a final judgement, *see* Art. 290, UNCLOS, Art. 25 Statute of the International Tribunal for the Law of the Sea which has a exceptional competence in the field of international water law concerning provisional measurers while parties do not agree to jurisdiction, *see* for example that cases of that tribunal; Southern Bluetin Tuna Cases (New Zealand v. Japan) Cases Nos 3 and 4, and The MOX Plant Case (Ireland v. United Kingdon) Case No 10.

<sup>236</sup> McCaffrey, 273 ; OMVS, Historique, 2(3), *see also* Chapter 2.

<sup>237</sup> 2002 Water Charter, Art. 24-26.

the states members which has a time limit of three months to respond to the notification. The notification shall be made in the early hours, in conjunction with all technical data necessary to its evaluation, specially the impact studies. Consistently there must be a former consent of the member states, for projects that are likely to in a significant way affect the characteristics of the state of the river, the conditions of navigability, the industrial exploitation, the medical state of water or the biological characteristics of its wildlife and flora or the water level. The third category comprises derogatory projects, moved by the urgency and the required state has to make a formal declaration to the High Commissionership who is obliged to transmit it to the President of Council of Ministers and to the other member states. The formal declaration then leads to negotiations on the level of the Council of Ministers on the basis of a dossier instructed by the High Commissionership.<sup>238</sup>

Article 4 of the 2002 Water Charter in fine states that the principles aim to assure the complete enjoyment of the resource to the population of the riparian states, regarding the security of the inhabitants and of the works and basic human rights to healthy water considering sustainable development. This invocation of the human right to water is the first of its kind in a convention concerning freshwater<sup>239</sup> and as this thesis demonstrates that there are several references; direct<sup>240</sup>, and indirect<sup>241</sup>, to the human right of water in the framework of regulation regarding the Senegal River.

Article 5 of the 2002 Water Charter adopts two fields for the allocation of water; sub-regional cooperation and integrated management of the resources. It stipulates also elements to consider for that matter simultaneous as respecting the accessibility of water. Article 5 specifies the aspects for the allocation of the water between the uses and together with the general principles in Article 4.

Article 6 of the 2002 Water Charter provides the principles of non-discrimination, the obligation of the vital needs and safety for people are primary to the technical principles enumerated in Article 7. Article 7 refers to fixed principles in the appendices (which not been acquired) and enumerates essential elements to consider, i.e. the three ancient ambition for OMVS<sup>242</sup> in addition to cargo space, information on the flow, safety of works, water quantity and environmental protection and preservation. In fine the same Article enumerates two essentials elements concerning the economic principles that are relocation to finance the ecological management of the income of tax on the liable and the financial donation of every use to the investment, the frequent charge and reimburse of agreed dues. Those two elements concern Article 18 which is analysed below and where is observed for example the polluter-pays principle.

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<sup>238</sup> 2002 Water Charter, Art. 24.

<sup>239</sup> McCaffrey, 275.

<sup>240</sup> 2002 Water Charter, Preamble line 16, Articles 2, 4, 6 and 8-10.

<sup>241</sup> 2002 Water Charter, Articles 7 and 11.

<sup>242</sup> I.e. energy production, the irrigation and navigation, *see* Chapter 4.1.

Article 8 provides that the resource of water serves to in a right satisfy five different domains of function<sup>243</sup> and the requirements of drinking water to the inhabitants are the most vulnerable prerequisite. This illustrate thus that the population's needs of water is considered in a weak position and consequently, even with Article 4 in fine in mind, should be ensured. This marks as well a privilege for the human right to water comes before the four other domains of use, the environment included.

The support of the human right to water continues in Article 9 according to which the OMVS is charged to fix the priorities between the needs and the necessary water consumption. This article even stipulates that no use profits from a priority higher than any another according to the principles of international law<sup>244</sup>. In fine, this article fortifies the human right to water by confirming that in event of shortage the attention shall be given to the supply of drinking water and the domestic uses of water. Further on and additionally it is sole the domestic uses that are free, the enumerated operations in Article 10; constructions or operations of the installations or works and attainment that could jeopardize the health or public safety, impair the water run-off, reduce the water resource, affect the bed of the River or attack the quality or the biodiversity of the aquatic environment, are subjected to authorization agreement.

Remaining uses, except above mentioned, are basically subject to simple preliminary declaration. A classification of the thresholds for the authorization agreement and the preliminary declaration should be drawn up and implemented in conformity with the charter.<sup>245</sup> The request for authorisation is transmitted to the High commissionership and the Standing Committee of Water intervenes by means of its opinion<sup>246</sup> into the procedure of authorization and it is the Council of Ministers who may grant the authorisation. The authorization may be withdrawn on the grounds of public interest or in case of non-execution or non-performance and also approved subjected to the rights of the third party.<sup>247</sup> In Articles 8-10 is distinguished an element which direct or indirect protect the human right to water which is an innovative with the 2002 Water Charter to the regulation of the Senegal River. Important aspects for the environmental protection are the fact that grounds of public interest are reasons for withdrawn of the authorization and that realizations of works likely to attack the quality or the biodiversity of the aquatic environment are subjected to the authorization.<sup>248</sup> For more details on the formalities of the authorisation and the preliminary declaration and the vocation of the Standing Committee of Water, which is vital for this thesis, see chapter 4.7.

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<sup>243</sup> I.e. requirement out of drinking water for the population, needs for agriculture, the breeding, sylviculture, pisciculture, fishing, fauna, the flora and the environment; requirements out of water for the energy production; requirements out of water for industry; requirements out of water for navigation.

<sup>244</sup> See examples in Chapter 2.

<sup>245</sup> Ask for those documents but have not received them.

<sup>246</sup> For details of the work of the Standing Committee of Water, see Chapter 4.7.

<sup>247</sup> 2002 Water Charter, Art. 11.

<sup>248</sup> 2002 Water Charter, art 10-11.

As mentioned in connection with the general principles in Article 4, there is a duty for each riparian state to inform the other riparian states concerning certain projects and actions. Additionally there is a condition of transparency in Article 13 which writes that the states should ensure the public availability of information concerning the status and the quality of the water, the measures predicted or taken to guarantee the constancy of the flow of the River. Furthermore the states are jointly with the High commissionership required to make sure that the boarding populations receive education by promoting programmes for awareness of ecologically reasonable use of the water. Those two requirements are important for the environmental protection of the river but there are a lack of sufficient education concerning the population.<sup>249</sup>

Further on Part 3, Article 4-15 regarding the principles and modalities of water apportion between all use sectors, another important dimension for the objective of this thesis is Part 4, Articles 16-18, concerning the protection and preservation of the environment. This section is another specification of the general principles in Article 4, i.e. especially the obligation to preserve the environment when allocating water between the usages.

#### Protection and preservation of the environment

The Article 16 stipulates that both national and common agreements of the contracting States shall protect and preserve the ecosystem of the river, especially the ecology, the fragile zones and the marine milieu. The member states are engaged to control all actions of a nature that may in a susceptible way modify the features of the river, its sanitary shape, its biological quality of fauna and flora, its water course or in general its environment. In addition they shall stipulate to prevent, reduce and control consequences of natural origin or human conducts that may cause harm to other states, to the environment, to human health or safety.<sup>250</sup>

To complement the general rules in Article 16 of the 2002 Water Charter the member states shall according to Article 17 jointly adopt an environmental plan of action which determine in particular three conditions. Initially take limiting measures or provisory suspend certain utilizing of the water to confront a situation of deficit, to a threat or to consequences of nature catastrophe. Secondly with respect to general of rights and obligations pursuant the charter and the different accorded authorisations set the distinctive prescriptions. They shall apply to installations, conducts and practise of the usages as well as the conditions which allow outlawing, restricting, investigating or monitoring the exercise manner of different utilizing of the water. Thirdly to introduce necessary procedures to locate and to quantify the pollutions' sources and to surveil the emanation. Anyhow during the study in field I asked about the environmental plan of action on the contrary the answer where that it does not yet exist. In

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<sup>249</sup> Dr. Frans J.G. Padt, Juan Carlos Sanchez, 278.

<sup>250</sup> 2002 Water Charter, Art. 16 § 2.



February 2015 the same question was posed via email to OMVS but no answer has been received.<sup>251</sup>

A yearly evolution of the prospective quantity and quality of the water in the basin of Senegal River shall be accomplished. To complement the general rules in Article 16, the member states could jointly adopt other provisions to establish special conditions for when the regulations of the water police are pertinent “to divided water”<sup>252, 253</sup> Article 17 in fine stipulates that the coherence between surface water and the groundwater<sup>254</sup> shall be analysed by carrying out cartographic population count of the water-bearing restocks which shall be inventoried to define the zones of supplies and collecting. As concerning groundwater there is no clear definition of that discipline in the convention. The research of the relation between the river and the groundwater is weak, hence the general disposition of the charter applies to the river, its tribunes and the dikes and prescribe the necessity of investigating the groundwater.<sup>255</sup>

The last article, in the part relating to environmental protection, stipulates about financial support against pollution. The taxes ordained against environmental polluters are allocated to supply the environmental administration and tax shelter is initiated destined to assist economic effecters who practise the usage modalities in respect of the ecological resources. Moreover, the article stipulates a general principle of international environmental law, the polluter-pays principle which the member states of OMVS shall ensure affect to persons, natural and juridical. Even though this principle applies directly by this convention, Article 18 in fine also states that a violation by a state of its international obligations in the field of pollution engages its responsibility regarding rules of international law.

The remaining three parts of the 2002 Water Charter are analysed in the next chapter with focus on the regulation of the Standing Committee of Water, and covering the remaining substance of the charter vital for this thesis.

In the last contain number 7 about “Final Provisions” is stipulated a three years initial period as a probationary period.<sup>256</sup> This date passed already in May 2005 but the 2002 Water Charter it seaming that the Charter remains the same.<sup>257</sup>

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<sup>251</sup> Interview of M. BA in August, 2008.

<sup>252</sup> 2002 Water Charter, Art. 1, 13° withholds a definition of “divided water” i.e.: “water of the River”.

<sup>253</sup> 2002 Water Charter, Art.17, line 2 and 3.

<sup>254</sup> 2002 Water Charter, Art. 1, 20° stipulates a definition of subsoil water: “*the water contained in the porous, permeable and/or fissured geological formations whose total and/or partial renewal is associated the hydrological mode of the River*”.

<sup>255</sup> Merzoug, M.S.O, Reig, L., Vacca, G, 15(18).

<sup>256</sup> 2002 Water Charter, art. 28.

<sup>257</sup> OMVS homepage : [www.portail-omvs.org/presentation/cadre-juridique/charte-des-eaux](http://www.portail-omvs.org/presentation/cadre-juridique/charte-des-eaux)

## **4.5 Institutions in charge of the management of the Senegal River**

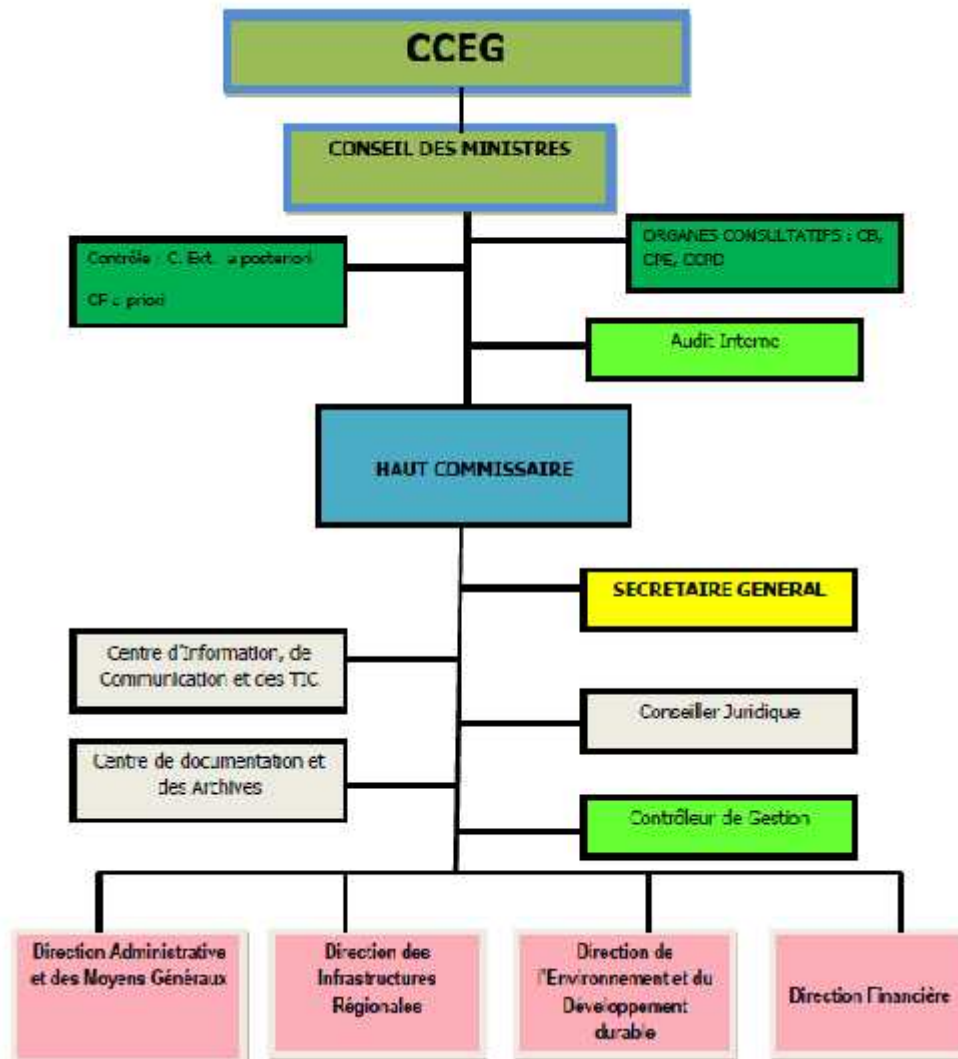
This is not a deep view of the system of government of the OMVS, but instead focus given to the CPE which is more important for the purpose of this thesis. The CPE is a fundamental organ in performing equitable and reasonable management politics of the water resources of the Senegal River. The central undertaking of the CPE is to fix the principles and the methods of the distribution of the water. The committee is composed of three experts from each member state and it meets on convocation of the High Commissionership or at request of a member state.<sup>258</sup>

The remaining organisation of OMVS is also important for performing environmental protection and the human right to water. Although CPE is the central organ for those two fields of law its work is dependent on the function of the other organs. The organization chart of OMVS is designed as follow:

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<sup>258</sup> 2002 Water Charter, art. 19-20, 22 and Merzoug, M.S, 2005, 150.

Organigramme du Haut Commissariat de l'OMVS



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The Conference of the Head of State and government is the supreme authority of the OMVS and it lays down the policy of co-operation and development of the organisation. It assembles in ordinary session the Head of States of the four member states once a year, makes the decisions concerning the general economic policy of the OMVS and any decision on the level of its spring.<sup>260</sup>

The Council of Ministers is the body of strategy and control of OMVS which complies the general policy of installation of the Senegal River, the development of its resources and co-operation between the States around the Senegal River. The Council of Ministers establishes the priority operations of installation of the river and development of its resources. It is composed of one minister per Member State which may be accompanied by their

<sup>259</sup> <http://www.portail-omvs.org/presentation/cadre-institutionnel/organigramme-lomvs>, last visited 10/05/2015. CCEG= la Conférence des Chefs d'État et de Gouvernement i.e. Conference of the Heads of State and government.

<sup>260</sup> 1972 OMVS Convention, art. 3-4 and Merzoug, M.S, 2005, 150-151.

government. The decisions of the Council of Ministers have force obligatory for the Member States.<sup>261</sup>

The High Commissionership is the executive organ of the OMVS, it applies the decisions of the Council of Ministers and regularly submits reports on the execution of these decisions. Moreover the High Commissionership justifies any initiative which it has to make within the framework of the directives given by the Council of Ministers. The High Commissionership is managed by a High Commissioner chosen by the Conference of the Head of State and government.<sup>262</sup>

Already at the 1972 OMVS Convention the CPE was created. Although its functions have changed and developed significantly with time the original purpose of the function remain. The central undertaking of the CPE is to establish the principles and the methods of the distribution of the water.<sup>263</sup> Once more it demonstrates the important change of the intention that the Water Charter implicate, i.e. from distribution of the water “*between the States and the sectors of use of water; industry, agriculture, transport*”<sup>264</sup> to simply “*between the various sectors of use*”<sup>265</sup>. It is no longer a distribution between states and the distribution is no longer limited to the former triple occupation of OMVS. The innovative opens for other sectors of use and make the environmental protection and the human right to water more important.

After the 1972 OMVS Convention the next central legal document about the SWC is the 2002 Water Charter. The charter dedicates Part 5<sup>266</sup> to “Institutions in Charge of the Management of Water and the Environment” and that is in fact only the CPE. There is (since at least 1978<sup>267</sup>) rules of procedure of the Committee, “*Règlement Intérieur de la Commission Permanente des Eaux*”, which describes its work. This thesis does not investigate the former procedure rules on the contrary the thesis aims to analyze simply the current one<sup>268</sup> mutually with and Part 5 and a few other articles concerning the CPE in the 2002 Water Charter.

Pursuant Article 6 of the 2002 Water Charter the CPE should be seized in two cases, when the situation corresponding to the floods or natural disasters. The second case is when the situation of shortage corresponding to one period of general or partial insufficiency, or to case of absolute necessity.

As mentioned in the chapter of 2002 Water Charter, the Article 10 of that charter stipulates a preliminary declaration or authorization for collecting

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<sup>261</sup> 1972 OMVS Convention, art. 8 and Merzoug, M.S, 2005, 150-151

<sup>262</sup> 1972 OMVS Convention, art. 11.

<sup>263</sup> 1972 OMVS Convention, art. 20 and 2002 Water Charter, art. 19.

<sup>264</sup> 1972 OMVS Convention, art.20.

<sup>265</sup> 2002 Water Charter, art. 2, xxx.

<sup>266</sup> 2002 Water Charter, art. 19-23.

<sup>267</sup> *Règlement Intérieur de la CPE*, 1978.

<sup>268</sup> *Règlement Intérieur de la CPE*, 2004

water from the river, except for domestic uses. Article 11 specifies that the request for authorisation is transmitted to the High commissionership and the Standing Committee of Water intervenes by means of its opinion into the procedure of authorization. It is the Council of Ministers who may grant the authorisation. There is a possibility to recourse near the Council of Ministers on seizure of the High commissionership, once again after the opinion of the CPE. This is the case if the event of dissension between the applicant and the controlling authority, i.e. the Council of Ministers.<sup>269</sup> Articles 10 to 12 are furthermore to be read in context of Article 24 which is analyzed in the section concerning the 2002 Water Charter.

Section 5, Articles 19-23 of the 2002 Water Charter are dedicated to the CPE, Article 21 stipulates that the CPE gives a consultative opinion on all projects and programs in connection with the stock management. In that context the SWC propose once a year at the Council of Ministers the control program of the works. The CPE gives its advisory opinion addressed to Council of Ministers on any project or program in connection with stock management.<sup>270</sup> The advisory opinion consists in recommendations which concern mainly four different areas i.e. firstly the principles and the methods of the equal distribution of the water between the different sector of use, secondly the instruction of all project of use of the water or work likely to affect in a significant way the characteristics of the state of the river, the conditions of navigability, the industrial or agricultural exploitation, the medical state of water, the biological characteristic of its wildlife and flora or the water level, thirdly the regulation of equitable use of the water and fourthly the regulation of the quantitative and qualitative conservation of the water.<sup>271</sup>

The second category of projects, which are likely to significantly affect on the river as described above, and the projects which are regulated particularly in Article 24 of the 2002 Water Charter. Anyway in the rules of procedure of the CPE there are more details about the formalities, the dossier from the Member state that will perform this type of project, shall contain the description of the project (localisation, physical, technical and economical characteristics, social consequences, rates of flow, periods of deduction) as well as the impact of the project in terms of the stress and effect on the river's regime, the quality of the water, the navigability and on the environment. The dossier is submitted by the member state to the High Commissionership which informs the other states and after investigation and hearing, submits the dossier within the time limit of 45 days under consideration, for an opinion of the CPE. In case of amendment of the initial project the demanding state shall supply a dossier containing exclusively the modifications envisaged.<sup>272</sup>

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<sup>269</sup> 2002 Water Charter, art. 12.

<sup>270</sup> 2002 Water Charter, art. 21.

<sup>271</sup> OMVS, Règlement Intérieur de la CPE, 2004, art. 1, a-d.

<sup>272</sup> OMVS, Règlement Intérieur de la CPE, 2004, art. 13.

The CPE shall take into account the provisions of the appendices<sup>273</sup> of the 2002 Water Charter, as mentioned before those appendices do not exist or it has not been possible to achieve when visiting the OMVS or by requesting them via e-mail. The CPE has an extensive competence, i.e. the organ shall take all disposal necessary to assure the control of the quality and quantity use of the water.<sup>274</sup> In addition every Member state has the possibility to solicit for the control of SWC stipulated in article 15 by sending a request including motives to the High Commissioner.<sup>275</sup> Further on in the rules of procedure it is established that the opinions and recommendations of CPE shall to be expressed in unanimously of the member states. In case of disagreement the high commissioner seize the President of the Council of Ministers.<sup>276</sup>

Until the 2002 Water Charter the OMVS did not permit public participation. Stated in Article 23 of that Charter the statue of observer may be contracted to four different groups, to be exact representatives of the users, local authorities, nongovernmental organizations, and decentralised management committees. By subjoined this important element the OMVS begins the process for citizen participation and for transparency in decision making.<sup>277</sup> This is equally prescribed in the internal regulation of the CPE, pursuant Article 7 that is a duplicate of article 23 in 2002 Water Charter. Pursuant those articles the right to petition to become observers near the CPE may barely be granted by the Council of Ministers on a proposal from the High-Commissioner. Thus, this is not a right that the potential observers may claim, it is more an enquiry they are able to attempt. If the Council of Ministers permit an observer, it will take part in an effective way in the work of the CPE.<sup>278</sup>

Senegales Suger Company is assigned as an observant within the CPE. OMVS has even grant this private company power to regulate a bridge-dam located in Richard Toll according to its needs in water.<sup>279</sup>

The analysis of “the Senegal River watershed management by regional organisation and public participation”<sup>280</sup> point out

- the lack of participation of local people in water management of the river,
- the reasons for the lack of participation approach are mainly due to the model set up by the OMVS in terms of water management in the river, a model that has excluded or tackled in a very light way the

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<sup>273</sup> 2002 Water Charter, art. 19.

<sup>274</sup> OMVS, Règlement Intérieur de la CPE, 2004, art. 15.

<sup>275</sup> OMVS, Règlement Intérieur de la CPE, 2004, art. 16.

<sup>276</sup> OMVS, Règlement Intérieur de la CPE, 2004, art. 12.

<sup>277</sup> Vick, 235.

<sup>278</sup> 2002 Water Charter, art. 23.

<sup>279</sup> A.M. Sène, S. Bonin, O. Soubeyran, p 6.

<sup>280</sup> A.M. Sène, S. Bonin, O. Soubeyran, p. xxx.

issue of public participation in decision-making through out its juridical and regulation instruments and

- elements of consideration on some measures, which could possibly improve the level of participation of local people in the river water management.

## 5 Conclusion

The environmental regulation of the Senegal River is more progressed than the international law stipulates. With progressed regulation in this thesis means how the situation and circumstances are for the citizens of the riparian states. Regulations that benefits the shareholders, companies and others organism are not in focus and this conclusion is not depending on their situation concerning the human right to water and the environmental protection.

Concerning the Senegal River the 2002 Water Charter is *lex specialis* and the 1997 Watercourse Convention may be seen as the *lex generalis*. Even other conventions signed by OMVS are part of *lex specialis*, and precede the 1997 Watercourse Convention. The *lex specialis* do not conquer the customary international law and as the 1997 Watercourse Convention in some part compose such rules, those shall not be omitted by the *lex specialis*. This is correct even though none of the member states of OMVS have signed the 1997 Watercourse Convention.

Essential for this conclusion is several specific terms and “*pollution*” is one of them. There are definitions in both the 2002 Water Charter and in 1997 Watercourse Convention, as follows;

*“the direct or indirect introduction by the man of substances or energy into the River, when it has or can have harmful effects, such as damage to the living resources, with river fauna and flora, human health risks, of the obstacles to the activities in the River, and of deteriorations of the quality of the water from the point of view of its use”*<sup>281</sup>

and in Article 21 §1 in 1997 Watercourse Convention:

*“pollution of an international watercourse”* for the purpose of that article<sup>282</sup>  
*“means any detrimental alteration in the composition or quality of the waters of an international watercourse which results directly or indirectly from human conduct”*.

To start with there is different definition because the Charter has a definition of “*pollution*” and the Convention of “*pollution of an international watercourse*”. Anyway it do not affect much, more than it is interesting to what the notion “*international watercourse*” refer to in Convention and how the regulation of the Senegal River defining the water of the river. This is linked to the review of the definition of the notion “*international watercourse*” in the beginning of chapter 2. Due to development and acknowledge of increasing need of protection of the environment and

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<sup>281</sup> 2002 Water Charter, Art. 1, 15°.

<sup>282</sup> “pollution” is only otherwise mentioned in the Preamble, line 5.



freshwater resources, the notion of international watercourse includes nowadays other components of the watercourse system as tributaries and groundwater.<sup>283</sup> In the 1997 Watercourse convention the use of term “watercourse” means “*a system of surface waters and groundwaters constituting by virtue of their physical relationship a unitary whole and normally flowing into a common terminus;*”... . Concerning the Senegal River Article 17 of the 2002 Water Charter stipulates that the coherence between surface water and the groundwater<sup>284</sup> shall be analysed by carrying out cartographic population count of the water-bearing restocks which shall be inventoried to define the zones of supplies and collecting. The definition of the groundwater is not clear in the Charter, the research of the relation between the river and the groundwater is weak. The disposition of the charter applies to the river, its tribunes and the dikes and prescribe the necessity of investigating the groundwater.<sup>285</sup> At this point the 2002 Water Charter seems weaker in protecting the whole unity of water to the Senegal River than the 1997 Watercourse Convention protects the water of an international watercourse. The Convention explicitly stipulates about a system of waters that is referred to by the notion “*watercourse*”.

As indicated before the definition in Article 21 § 1 of 1997 Watercourse convention of the “*pollution of an international watercourse*” is in several aspects more general in comparison with other definitions of the term “*pollution*”. This is for example because it mentions no type of pollution, it has no threshold at which the pollution prejudices not allowed, it refers not to any particular harmful effects and it simply requires that pollution is caused by acts or omissions from human conduct.<sup>286</sup>

The definition of “*pollution*” in Article 1, 15° 2002 Water Charter explicitly stipulates that it concerns direct and indirect introduction into the water, that pollution is not only when it has harmful effect but for when it “*can have*” such effects. The definition also enumerates different damages and points out that quality of water shall remain for the various uses of the water. Thus in comparing with the definition in 1997 Watercourse Convention the definition in 2002 Water Charter is more detailed and listing several harms. The regulation concerning the Senegal River seems at this point to be more progressed.

After knowing what the treaties mean with the notion “*pollution*” it is interesting to analyse what the regulations states about it. The 2002 Water Charter does not explicitly stipulated that pollution is prohibited, although the concept environmental protection is regulated consistently in the text. Pursuant Article 16 it is recommended for the member states to act in

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<sup>283</sup> McCaffrey, 34.

<sup>284</sup> 2002 Water Charter, Art. 1, 20° stipulates a definition of subsoil water: “*the water contained in the porous, permeable and/or fissured geological formations whose total and/or partial renewal is associated the hydrological mode of the River*”.

<sup>285</sup> Merzoug, M.S.O, Reig, L., Vacca, G, 15(18).

<sup>286</sup> ILC, 121-122.

concert to prevent introduction of substances which may have detrimental effects to the ecosystem.<sup>287</sup> The 2002 Water Charter refers to responsibility regarding pollution according international law<sup>288</sup> and the absence of expressly outlawing pollution is consequently not very vital. Thus concluding that either the 2002 Water Charter is less or more progressive concerning the definition of the notion “*pollution*” than international law. In both cases international law enter as it concerns responsibility of pollution.

Article 21 § 2 of the 1997 Watercourse Convention stipulates that a state shall “...*prevent, reduce and control pollution of an international watercourse that may cause significant harm to other watercourse States or to their environment...*”. The same Article stipulates that the states must, when pertinent, jointly act against a pollution of an international watercourse. In fine Article 21 § 2 stipulates the duty to harmonize strategies and that a state shall “*take steps to harmonize their policies*” regarding the prevention, reduction and control of pollution of an international watercourse. This means that watercourse States should cooperate in good faith with the purpose to permanently harmonize their strategies. Primarily the states have to obtain harmonisation of policies and when the policies are lucratively corresponding, regularly jointly make efforts to maintain the coordination as circumstances change.<sup>289</sup> The obligation to reduce and control pollution is state practise in this field of law. The obligation seems to be of due diligence because the state practise tends to tolerate a greater degree of pollution destruction if the state of origin makes its best efforts to diminish the pollution to a common supportable degree.<sup>290</sup>

In the 2002 Water Charter the term pollution is simply used four times.<sup>291</sup> In Article 16 it is even recommended for the member states to act in concert to prevent introduction of substances that may have detrimental effects to the ecosystem.<sup>292</sup> The Article 16 stipulates that both national and common agreements of the contracting states shall protect and preserve the ecosystem of the river, especially the ecology, the fragile zones and the marine milieu. The member states are engaged to control all actions of nature that may in a susceptible way modify the features of the river, its sanitary shape, its biological quality of fauna and flora, its watercourse or in general its environment. In addition they shall stipulate to prevent, reduce and control consequences of natural origin or human conducts that are likely cause harm to other states, to the environment, to human health or safety.<sup>293</sup> The article 16 has several resemblances with article 21 § 2, § 3 a-c and

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<sup>287</sup> Art. 16 §3, further analysed below and discussion L. Boisson de Chazournes, S.M.A. Salman, 529-530.

<sup>288</sup> The 2002 Water Charter, Art. 18 in fine, where the term pollution is mentioned, which even stipulates the application of the polluter-pays principle. *See* also chapter 2 concerning international law and here below concerning Art. 18.

<sup>289</sup> ILC, 123.

<sup>290</sup> ILC, 122.

<sup>291</sup> 2002 Water Charter, Art. 7 and Art. 16-18.

<sup>292</sup> 2002 Water Charter, Art. 16 § 3.

<sup>293</sup> 2002 Water Charter, Art. 16 § 3.

article 22 in the 1997 Watercourse Convention<sup>294</sup> notwithstanding it is stricter. It is a more rigid precept in 2002 Water Charter than the 1997 Watercourse convention prescribes, which requires prevention, reduction and control of pollution that may cause “*significant*” harm.<sup>295</sup>

Article 21 § 3 of the 1997 Watercourse Convention stipulates that states shall consult in purpose to achieve agreements concerning measures and methods to prevent, reduce and control pollution of an international watercourse. Concerning the Senegal River there is since at least 1972 a well-founded regulation of the water resources. The 1978 Convention of common works is exceptional and unique in its character and OMVS has by 2002 Water Charter adopted new general environmental principles. Article 4 of the Charter stipulates the general principles for the allocation of water between the usages, which are set of four obligations; to guarantee the balanced management of the water resource; to preserve the environment; to negotiate in the event of conflict; for each Coastal state to inform the other Coastal states before undertaking any action or any project which could have an impact on the availability of water and/or the possibility of implementing future projects.

The first obligation of Article 4 of the 2002 Water Charter to guarantee the balanced management of the water resource may be compared with Article 24 of the 1997 Watercourse Convention concerning management. Article 24 stipulates that “[w]atercourse States shall, at the request of any of them, enter into consultations concerning the management of an international watercourse, which may include the establishment of a joint management mechanism.”. Further on in paragraph 2 there is a definition of “management”, i.e “[p]lanning the sustainable development of an international watercourse and providing for the implementation of any plans adopted; and... ..[o]therwise promoting the rational and optimal utilization, protection and control of the watercourse.” Article 24 is meant to be broadly adequate for a general agreement and indicates guidelines to watercourse states concerning competences and roles of prospective mechanisms or institutions. The regulation concerning the Senegal River is more developed theoretical than the international law and the OMVS has a well-founded establishment.

The third obligation, to negotiate in the event of conflict, is similar to Article 8<sup>296</sup> in the 1997 Watercourse convention which stipulates an

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<sup>294</sup> See Chapter 2.1.4.

<sup>295</sup> 1997 Watercourse Convention, Art. 21 section 2.

<sup>296</sup> Article 8: « *General obligation to cooperate*

1. *Watercourse States shall cooperate on the basis of sovereign equality, territorial integrity, mutual benefit and good faith in order to attain optimal utilization and adequate protection of an international watercourse.*

2. *In determining the manner of such cooperation, watercourse States may consider the establishment of joint mechanisms or commissions, as deemed necessary by them, to facilitate*

obligation to cooperate in general, even if there is no dispute. Besides, this is not same as the regulation of the Senegal River because of the complexity of common conventions between the OMVS member states including for example mutually and inseparable assets<sup>297</sup>. The common works of OMVS should give the member states an incitement to cooperate and as a last resort negotiate. This should be seen as a more progressed regulation of the Senegal River in comparing with the international law.

The fourth duty for each riparian state is to inform the other riparian states prior carrying out any action or project which may have an affect on the accessibility of water or affect the opportunity to realize future projects. This is a repetition and the set off to a reinforcement of Article 4 of the 1972 Status Convention which stipulates the principle of previous consent.<sup>298</sup> Thus already in the beginning of the seventies the 1972 Status Convention stipulate that there must be an approval from the OMVS prior execution of a development program.<sup>299</sup>

For the obligation of notification Article 24 is important which stipulates about three different categories of new projects. Interesting are two categories, those which have an expected significant effect and derogatory projects in case of urgency. The first one must be notified before their execution via the High Commissionership to the states members which has a time limit of three months to respond the notification. The notification shall be made in the early hours, in conjunction with all technical data necessary to its evaluation, specially the impact studies. Consistently there must be a former consent of the member states, for projects that are likely to in a significant way affect the characteristics of the state of the river, the conditions of navigability, the industrial exploitation, the medical state of water or the biological characteristics of its wildlife and flora or the water level. The second one comprises derogatory projects, moved by the urgency and the required state has to make a formal declaration to the High Commissionership who is obliged to transmit it to the President of Council of Ministers and to the other member states.<sup>300</sup>

Article 24 of the 2002 Water Charter stipulates and clarifying the comportment for the states of OMVS in specially two different situations. It covers several different projects and give authority to organs in common of the states which shall execute current projects. There is a time schedule for the notification and the former consent of the member states is well undertaken. This regulation about previous announcement, dividing of projects into specially two categories, are precisions of the river management.

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*cooperation on relevant measures and procedures in the light of experience gained through cooperation in existing joint mechanisms and commissions in various regions. »*

<sup>297</sup> See Chapter 3.4 concerning the conventions on jointly-owned infrastructure.

<sup>298</sup> McCaffrey, 273 ; OMVS, Historique, 2(3), see also Chapter 2.

<sup>299</sup> McCaffrey, 273.

<sup>300</sup> 2002 Water Charter, Art. 24.

Article 12 of 1997 Watercourse Convention stipulates about notification concerning planned measures with possible adverse effects and the following articles give more details. This is a respectable way of informing other watercourse states concerning such a measure and a period of six months are given to attain studies which may be extended another period of six months. When comparing this notification with the relevant regulation of the Senegal River, there is a vast different. All projects expected significant effect concerning the Senegal River shall have an approval from the OMVS.

Concerning the international law the Article 11 of the 1997 Watercourse Convention stipulates that states shall inform and consult each other and negotiate. Article 12 stipulates that a watercourse state shall before implementation or permitting the implementation of planned actions which “*may have a significant adverse effect upon other watercourse states*”, provide states with timely notification thereof. Further on Article 13 stipulates that the notified state has six months to answer, the period could be extended another six months. If the notified state finds that implementation of the planned measures could be inconsistent, it shall attach to its finding a documented explanation setting forth the reasons for the finding.

By Article 12 of the 1997 Watercourse Convention the Working Group of the Whole included “*the results of any environmental impact assessment*”<sup>301</sup> to the article in order to highlight its importance. EIA is a requirement in general international law and for example the Principle 17 in Rio Declaration states about EIA. Conversely concerning the Senegal River, the EIAs were not a common practice in 1972 when OMVS were created. Anyway the omission of this requirement does not relieve OMVS of a general obligation to comply with emerging standards of international law and evaluate the environmental consequences at each successive decision point in the development process.<sup>302</sup> The article 24 paragraph 3 of the 2002 Water Charter stipulates about “*impact studies*” which may be another word for EIA. A notification of a project that may have significant effects shall contain the impact studies together with all necessary technical data.

In the Case concerning Gabón-Nagymaros Project from 1997 the ICJ also seems to have estimated that the obligation of environmental impact assessment is a rule that exists and it is one of the new environmental rules recently appeared.<sup>303</sup> Sands and Peel J., with Fabra A. and MacKenzie R pointed out effective environmental assessments as one of the three areas which are required to complete to resist the overuse of freshwater and its pollution.<sup>304</sup> The assessment should be on the root causes of the problems, i.e. agricultural practices and industrial activities and pursuant the 2002 Water Charter the impact studies cover all projects that may have significant

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<sup>301</sup> 1997 Watercourse Convention, article 12.

<sup>302</sup> Vick, 222-223.

<sup>303</sup> Paquerot, 84.

<sup>304</sup> Sands P. and Peel J., with Fabra A. and MacKenzie R., 340-341.

effects on the water.<sup>305</sup> This seems to be in accordance with the requirement and the regulation of the Senegal River may be enough developed but this thesis is lacking more information about the impact studies. It could be interesting to take a deeper look at those studies but there has not been sufficient time for that undertaking.

As this thesis compares the environmental regulation as well as the human right to water related to the Senegal River with those existing in the international and customary law, the following part of the conclusion is relating to the human right to water. As mentioned in the part “*Delimitations and disposition*” in the introduction, progressed regulation is in this thesis how the situation and circumstances are for the citizens of the riparian states. Regulations that benefit the shareholders, companies and others organism are not in focus and this conclusion is not depending on their situation.

The protection of environment and the human rights are on the point of converging<sup>306</sup> and hypothetic the international environmental rules to prevent pollution of freshwater resources could reinforce a human right to water. It could even be the contraire that the human right to water is a reason that a State has to adopt a regulation to protect the environment linked to a resource of freshwater. The human right to water may also be a part of the right for population to freely dispose of their natural wealth and resources, the right to life, the right to enjoyment of the highest attainable standard of physical and mental health and the right to benefit adequate living conditions.<sup>307</sup> For an effective human right to water concerning water management, to ensure that actors other than the government will be allowed and supported to engage themselves in water management, a method in focus is the right to participate in the management of water resources.<sup>308</sup> This is also one of the three areas that Sands and Peel J., with Fabra A. and MacKenzie R. pointed out to complete to resist the overuse of freshwater and its pollution.<sup>309</sup>

In the international law there is since July 2010 a distinct statement concerning the human right to water, in the United Nations General Assembly Resolution 10967<sup>310</sup>. This resolution makes access to clean and safe water a human right. Senegal and Mali voted in favour for the resolution and thus have an obligation under international law to assure their citizens have access to water pursuant the human right to water.<sup>311</sup> Guinea and Mauritania were absent and have probably not the same obligation. The obligation authorises stakeholders and reinforce political structures and perhaps the citizens will take benefit of this.

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<sup>305</sup> 2002 Water Charter, Article 24 § 3.

<sup>306</sup> See Shaw, 616.

<sup>307</sup> Paquerot, 130-132.

<sup>308</sup> L. Boisson de Chazournes, S.M.A. Salman, Introduction, 79.

<sup>309</sup> Sands P. and Peel J., with Fabra A. and MacKenzie R., 340-341.

<sup>310</sup> [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/64/PV.108](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/64/PV.108) (last visited 01/03/2015)

<sup>311</sup> Dr. Frans J.G. Padt, Juan Carlos Sanchez, 284.

Both the international law and the regulation of the Senegal River had earlier focus on the navigation in the current watercourse. By the years this has changed to nowadays considering the human right to water previous other use of the water. Article 10 in the 1997 Watercourse Convention states the common principle that no use is in priority over another use and that in the case of conflict between uses it shall be worked out with reference to Article 5 to 7 and with special regards to “*vital human needs*”. The statement to determine the notion “*vital human needs*” during the elaboration of the Convention wrote “*special attention is to be paid to providing sufficient water to sustain human life, including both drinking water and water required for production of food in order to prevent starvation*”<sup>312</sup> and obviously the human right to water is strengthened.

Concerning the Senegal River, the *lex specialis*, the Article 4 of the 2002 Water Charter in fine states that the principles aim to assure the complete enjoyment of the resource to the population of the riparian states, regarding the security of the inhabitants and of the works and basic human rights to healthy water considering sustainable development. This invocation of the human right to water is the first of its kind in a convention concerning freshwater<sup>313</sup> and as this thesis demonstrates that there are several references; direct<sup>314</sup>, and indirect<sup>315</sup>, to the human right of water in the framework of regulation regarding the Senegal River. Further on the Article 8 of the Charter provides that the resource of water serves to satisfy in a right way five different domains of function<sup>316</sup> and the requirements of drinking waters to the inhabitants are the most vulnerable prerequisite. This illustrate thus that the population’s needs of water is considered to be in a weak position and consequently, with even article 4 in fine in mind, should be ensured. This marks as well a privilege for the human right to water before the four other domains of use, inclusive the protection of environment. It is not the purpose of this thesis to compare the protection of the environment with the regulation of human right to water concerning the Senegal River. Although it seems that the human right to water has a higher position than the protection of the environment, even though the regulation concerning the environment is dedicated a whole chapter in the 2002 Water Charter. The protection of the environment is more complex and technique than the human right to water and that may be a reason for that dedicating a chapter.

Thereafter the Article 9 of 2002 Water Charter stipulates that “*[h]owever, in the event of shortage of the resource, a detailed attention will be given to the supply drinking water and the domestic uses of water*” and the Article

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<sup>312</sup> Report of the Sixth Committee convening as the Working Group of the Whole, 1997, 5.

<sup>313</sup> McCaffrey, 275.

<sup>314</sup> 2002 Water Charter, Preamble line 16, Articles 2, 4, 6 and 8-10.

<sup>315</sup> 2002 Water Charter, Articles 7 and 11.

<sup>316</sup> i.e. requirement out of drinking water for the population, needs for agriculture, the breeding, sylviculture, pisciculture, fishing, fauna, the flora and the environment; requirements out of water for the energy production; requirements out of water for industry; requirements out of water for navigation.

10 in the 2002 Water Charter stipulates that all collecting of water, except domestic use, are subjected to a previous announcement or approval and both those articles strengthen the human right to water. It seems obvious that 2002 Water Charter theoretically considering the human right to water as the overall purpose for the water resource in the Senegal River.

Besides more direct regulation of the human right to water, the 2002 Water Charter stipulates concerning observer in article 23. The position of observer may be contracted to four different groups and the OMVS begins with this important element the process for citizen participation and for transparency in decision making.<sup>317</sup> Until the 2002 Water Charter the OMVS did not permit public participation in their water management. On the other side this is not a right to claim, it is a potential possibility that the different groups may request. If the Council of Ministers permit an observer, it will take part in an effective way in the work of the CPE.<sup>318</sup> Senegales Suger Company is assigned as an observant within the CPE. OMVS has even grant this private company power to regulate a bridge-dam located in Richard Toll according to its needs in water.<sup>319</sup> Otherwise no observer have been accorded pursuant the bibliographies of this thesis.

Concerning public participation there is a lack of participation of local people in water management in the river mainly due to the model set up by the OMVS. The model exclude or tackle in a very light way the issue of public participation in decision-making throughout its juridical instruments.<sup>320</sup>

Furthermore the lack of education and information are obstacles to the participation of the citizens<sup>321</sup> even though the High commissionership is required to make sure that the boarding populations receive education by promoting programmes for awareness of ecologically reasonable use of the water.<sup>322</sup>

The 2002 Water Charter was formed by cooperation between representations of users, non-governmental organizations among others. This may demonstrate the public principal is used and interests of more private matter have been taken into account. Even the fact that other financial institutions than the World Bank has participated in the formation of the charter reveal that corruption could be more prevented. Hence it shall not be denied that the possibility of support, don, loan from diverse organisations, international institute could be a reason and an encouragement for the member states to develop its co-operation. This is anyhow conventional and an objective of the financial bodies, which require that the recipient accept more or less specified conditions. The World Bank

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<sup>317</sup> Vick, 235.

<sup>318</sup> 2002 Water Charter, art. 23.

<sup>319</sup> A.M. Sène, S. Bonin, O. Soubeyran, p 6.

<sup>320</sup> A.M. Sène, S. Bonin, O. Soubeyran, p. 1938.

<sup>321</sup> Dr. Frans J.G. Padt, Juan Carlos Sanchez, 278.

<sup>322</sup> 2002 Water Charter, art. 13.



for example has different criteria in which way the sum could be used including criteria of environmental standards.

Each state has different ambition for the use of the water resource in the Senegal River although no state may reach their target if it do not cooperate with the other riparian states and every state are in need of cooperation. The states have been in this situation since their independence.<sup>323</sup> If each state put enough attention to their people's need of fresh water and in the same time act according to their juridical obligations through OMVS, the Senegal River acquire an important protection. In addition there is a treat of corruption against the protection of the environment and an effective human right to water. The corruption is frequent in those countries, and it may be a bigger challenge to make sure that the regulation is effectively carried out.

The third area to complete if international law is to resist to halting overuse of freshwater and its pollution pursuant Sands and Peel J., with Fabra A. and MacKenzie R, is requirement of progress special international water quality standards, global and regional, probably with general application and which could take account of regional and local circumstances.<sup>324</sup> Concerning the Senegal River is regulated by some developed regional quality standards which take regional and local circumstances into account. The SCW is in charge to define principles and methods of the distribution of water and he states of OMVS shall on common form lists of substances that must be prohibited, limited, be studied or controlled.<sup>325</sup> For example Article 21 of the 1997 Watercourse Convention stipulates that watercourse states shall, at the request of another riparian state, consult with a view to arriving at mutually agreeable measures for example establishing lists of substances the introduction of which into the waters of an international. The regulation of the Senegal River is even at this point more well-established.

To sum up the regulation concerning the Senegal River is comprehensive with detailed conventions and several organs controlling the water management. The OMVS seems ambitious, high developed and well-established. On the contrary there are several controlling mechanism which are regulated in theory in the conventions but are not yet in effect. Between the four countries there is an expressly goodwill of finding compatible solutions for the entire basin, that is the regulation of OMVS a proof for.

There could though be a problem if the four states of OMVS agree to use the Senegal River in a way that harm the water resource. The countries could make an accord, consciously or unconsciously, for a work that destroy the water with the consequence a lack of drinking water for the citizen. At this time the regulation of the Senegal River does not give a better effective protection of the waters and other states would be able to claim the international law to protect the water. None of the member states of OMVS have signed the 1997 Watercourse Convention but it may anyway be seen as

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<sup>323</sup> Vick, 238.

<sup>324</sup>Sands P. and Peel J., with Fabra A. and MacKenzie R., 340-341.

<sup>325</sup>2002 Water Charter, art. 16.

*lex generalis* concerning the regulation of the water. Previously the 1997 Watercourse Convention there is the customary international that conquer both the framework of OMVS. In some part the 1997 Watercourse Convention compose customary international law.

Concerning the responsibility for the protection of the environment and the human right to water there are a compromise of two potential solutions. OMVS are responsible to guarantee harmonising of the politic. OMVS have a decision-making competence and a supra-national position. At the same time the four member states are each one responsible to guarantee the integrity of the national influence and have a prerogative to determine their politic concerning protection of the environment with the intention to synchronise their politic.<sup>326</sup>

This conclusion could be more well founded if the appendices to the 2002 Water Charter where included in the bibliography. The appendices shall define the principles of allocation of water and those principles.

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s<sup>326</sup> Merzoug, M.S.O, Reig, L., Vacca, G, 16-17(18).

# Supplement A: Convention on the status of the Senegal River

Convention on the statute of the Senegal River

Signed at Nouakchott, March 11, 1972

Heads of State and Government of

The Republic of Mali,

The Islamic Republic of Mauritania,

The Republic of Senegal,

*Considering* the Charter of the United Nations of June 26, 1945.

*Considering* the Charter of the Organization of African Unity of May 25, 1963.

*Considering* that the coordinated installation of the Senegal river for the rational exploitation of its natural resources offers prospects for fertile economic co-operation.

*Considering* the agreement without reserve of the States on the methods of installation general of the Senegal river and on the stages of regularization and use of its water in triple in particular drank to develop the energy production, the irrigation and navigation.

*'Considering* that the joint exploitation of the river implies the principle of the freedom of navigation and the equal treatment of the users.

ARE AGREED OF WHAT FOLLOWS:

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Contain I:  
Principles And Definitions  
Article 1

On the own territories of the Republic of Mali, Islamic Republic of Mauritania and Republic of Senegal, the Senegal river is declared river international including its affluents within the framework of the provisions of this Convention.

Article 2

The States of Mali, Mauritania and Senegal indicated hereafter “States contracting” solemnly affirm their will to develop a close cooperation to allow the rational exploitation of the resources of the Senegal river and to guarantee the freedom of navigation and the equal treatment of the users.

#### Article 3

The exploitation of the Senegal river is opened in each State contracting according to the methods defined by present Convention.

#### Contain II:

##### Farm And Industrial

#### Article 4

No project likely to modify in a significant way the characteristics of the mode of the river, its conditions of navigability, of farm or industrial, the medical state of water, the biological characteristics of its fauna or its flora, its water level, can be carried out without to be approved as a preliminary by the contracting States after discussions, and justifications of the possible oppositions.

The projects will have to reveal their incidences on the mode of the river, its conditions of navigability, of farm or industrial, the medical state of water, the biological characteristics of its fauna and its flora, as well as the requirements out of water called and the water level.

The contracting States must be in good time informed of any project interesting the exploitation of the river.

#### Article 5

A special convention between the contracting States will have to define with precision the conditions for implementation and operating of any work of common interest as well as the reciprocal obligations of the States.

Copy such conventions will be lodged with the Secretariat general of the United Nations, of the Organization of African Unity after ratification by the governments of the contracting States.

#### Contain III:

##### Navigation And Transport

#### Article 6

On the own territories of the contracting States, navigation on the Senegal river and its affluents, which will be indicated later on, entirely free and is opened to the nationals, with the commercial boats and goods of the contracting States, with the boats chartered by one or more contracting States, on an equal footing with regard to the harbour dues and the taxation of commercial navigation.

The commercial boats and foreign ships, of any origine, will be subjected to a common regulation which will be later on elaborate.

#### Article 7

The contracting States begin to maintain their sectors of the river in a state of navigability, within the framework of a payment of exploitation which elaborate joint and will be approved by the contracting States.

The mode of financing of work or works of establishment or improvement of the navigability of the Senegal river, as well as the methods of maintenance, exploitation of the navigability and depreciation of the works will be specified either by special conventions, or by the payment of exploitation referred to above.

#### Article 8

The taxes and royalties to which the buildings or the goods will be fixed using the river or its installations, including the maritime mouth and the affluents, will be representative of the services rendered to navigation and will not be any discriminatory.

The coastal traffic along the river will be the subject of a common regulation approved by the contracting States.

#### Article 9

The roads, the railroads or channels side which could be established with a special aim to compensate for the unnavigability or the imperfections of the waterway on certain sections of the river, of its affluents, junctions and exits, could be considered, within the framework of special reglementations adopted by the contracting States, like dependences of the river navigation and of this fact will be opened with the international traffic.

The lakes will be able, under the same conditions, being open to the international traffic.

It could not be perceived on these roads, railroads and channels that the tolls calculated on the administration and maintenance, construction costs and benefit which had to the contractors.

As for the rates of these tolls, the nationals of the contracting States will be treated on a foot of perfect equality.

#### Article 10

A common mode will be established by the contracting States with an aim of ensuring the safety and the control of navigation, given that that this mode will have to facilitate as much as possible the circulation of the ships and boats.

Contain IV:

Application

Article 11

The contracting States agree that they will create a common organization of co-operation which will be charged to take care of the application of this Convention, to promote and coordinate the studies and work of development of the Senegal river.

#### Article 12

The statute of this organization, its structure, its operating conditions, as well as the capacities which the contracting States will delegate to the person in charge for this organization within the framework of installation general of the Senegal river, will be the subject of a particular convention.

Contain V:

Others Provisions

#### Article 13

Present Convention will be subjected to the ratification of each State contracting in accordance with its own constitutional forms, the instruments of ratification will be lodged with the Government of the Islamic Republic of Mauritania which will notify some in each contracting State.

#### Article 14

Present Convention will come into effect, after ratification by all the contracting States, immediately after the deposit of the last instrument of ratification.

#### Article 15

Any Coastal state of the Senegal river can adhere to the present Convention. For this purpose, it will have to address a request written to the State agent of the instruments of ratification, which will seize the other Member States of them.

#### Article 16

The revision of this Convention can be requested from any time by one of the contracting States. The request for revision will have to be addressed in writing to the Government of the Islamic Republic of Mauritania, which will seize the Member States of them.

#### Article 17

(23Tel that modified by the 6/75/C.C.E.G/MN.N resolution of the Conference of the Heads of State and government of the Organization for the development of the Senegal river, dated December 16, 1975.)

Present Convention can be denounced by one of the contracting States after the expiry of a 99 years deadline as from its entry into force. The denunciation will be made in the form of written notification addressed to the Government of the Islamic Republic of Mauritania which will inform the other contracting States of them. It will take effect after deadline a six months.

It will not carry not reached, with less of contrary agreement, engagements former to the notification.

#### Article 18

In the absence of agreement between the States, any disagreement which would emerge between them, as for the interpretation or with the application of this convention, will be solved by the conciliation or the mediation. In the absence of agreement, the contracting States will have to approach the Commission of conciliation and arbitration of the Organization of African Unity. As a last resort, they will seize the International Court of Justice of The Hague.

In the event of urgency, the organization aimed to article 11 to take the academies required measures in particular intended to safeguard the principles adopted in Convention, while waiting for the solution of the disagreement.

# Supplement B: Charter of Water of the Senegal River

## Charter of Water of the Senegal River

**May 2002**

Heads of State of:

- the Republic of Mali
- the Islamic Republic of Mauritania
- the Republic of Senegal

*Considering* the Charter of the United Nations of June 26, 1945;

*Considering* the Treaty instituting the African Union of July 11, 2000;

*Considering* the Convention on the Statute of the Senegal River of March 11, 1972;

*Considering* Convention creating Organization for the Development of the Senegal river of March 11, 1972;

*Considering* the Convention on the legal statute of the common works of December 21, 1978;

*Considering* the Convention on the methods of financing of the common works of May 12, 1982;

*Considering* Convention creating Agency of Management and Exploitation of Diama of January 7, 1997;

*Considering* Convention creating the Agency of Energy management of Manantali of January 7, 1997;

*Considering* the n°7/CCEG/M.B Resolution bearing adoption of the legal instrument relating to the conditions for implementation of the work common called Dam Diama of December 11, 1979;

*Considering* the n°9/CCEG/M.B Resolution bearing adoption of the legal instrument relating to the conditions for implementation of the work common called Dam Manantali adopted on May 12, 1982:

*Considering* the Resolution n°89/CM/du bearing January 5, 1978 rules of procedure of the Standing committee of Water;



*Anxious* to strengthen the co-operation between the States and the people of the under-area and attaches to basic Conventions of the Organization;

*Affirming* the need for consolidating the bonds of good vicinity between the Coastal states of the Senegal River;

*Convinced* of the interest to take into account the Guinean part of the basin in the development of the policies and the programs of development of the basin of the Senegal River;

*Conscious* of the need of the respect of the general principles of the right of water resulting from the international law and the international common law which inspired the mode of the international rivers, and in particular the Convention of the United Nations on the right relating to the uses of the international rivers to ends other than the navigation of May 21, 1997;

Satisfied of institutional work and policy achieved to date within the framework of the Organization for the Development of the Senegal River;

*Eager* to give an at the same time durable and evolutionary framework to the community of the interests between the Coastal states of the Senegal River and to guarantee in each State and each user of the river a reasonable and equitable advantage of the use of water in accordance with the principles governing the right of divided water;

*Anxious* to cooperate in the good faith, the reciprocal consultation and in the spirit of good vicinity governing their relations;

*Determined* to jointly fight the practices of management of water likely to cause an injury in the States;

*Conscious* of the vulnerability and the scarcity of the fresh water resources, as of the importance of the functions which they fill in the plans economic, social and environmental;

*Convinced* that the River Senegal, ecosystem essential with the continuation of a durable development in the bordering countries, is to be considered by appreciating the cycle of water as a whole as well as the sectoral and intersector needs;

*Considering* that the resource sharing out of water between the uses, their management and their development will have to be carried out by taking account of the durable objective of development, by associating the various actors it: users, managers, decision makers, developers and experts concerned, in a global and integrated solution;

*Considering* the increase in the requirements out of water, the multiplicity and the diversification of the uses;

*Eager* to promote a policy of optimal and durable use of the resource implying the responsibility for the users and a policy affirmed in the field of the savings in water, by a management integrated and equitable for the benefit of the present generations and future;

*Recalling* the principles and recommendations relating to the environment adopted in particular by the Conference of the United Nations for the Environment and Development (CNUED) behaviour in Rio de Janeiro in 1992;

ARE AGREED OF WHAT FOLLOWS:

**Contain 1:  
Definitions  
Article 1st**

For purposes of this Charter, the following expressions and terms indicate:

- 1° “Coastal states”: coastal states of the Senegal River to knowing Guinea, Mali, Mauritania and Senegal;
- 2° “contracting States”: states left with the present Charter;
- 3° “Organization”: the Organization for the Development of the Senegal River;
- 4° “Conference of the Heads of States and Government”: the Conference of the Heads of State and Government of the Member States of the Organization for the Development of the Senegal River;
- 5° “the Council of Ministers”: the Council of Ministers of the Organization for the Development of the Senegal River;
- 6° “High commissionership”: the High commissionership of the Organization for the Development of the Senegal River;
- 7° “Standing committee of Water”: Standing committee of Water of the Organization for the Development of the Senegal River;
- 8° “River”: the Senegal River;
- 9° “Senegal River”: International river divided by the Coastal states;
- 10° “Charter”: this document, like its appendices;
- 11° “Resource”: the totality of the water resource available in the catchment area;

12° “Users”: persons or entities, current or future users of the resource;

13° “divided Water”: water of the River;

14° “Use”: the use of the resource for a given sector;

15° “Pollution”: the direct or indirect introduction by the man of substances or energy into the River, when it has or can have harmful effects, such as damage to the living resources, with river fauna and the flora, health risks human, of the obstacles to the activities in the River, and of deteriorations of the quality of the water from the point of view of its use;

16° “Requirements out of water”: quantities of the resource of which must lay out the users, for human satisfaction and who allow a durable development their living conditions, in the respect of the environment and the texts of the Organization;

17° “catchment Area of the River”: the Senegal River, its affluents, its distributaries and associated depressions;

18° “domestic Uses”: taking away or rejections having for object the need satisfaction of the people physical, and limited to the quantities necessary to the food, hygiene and the livestock or vegetable productions intended for the family use;

19° “Navigability”: optimal hydrological conditions allowing navigation; in particular guarantee with a draught sufficient for Navigation;

20° “Subsoil waters”: the water Contained in the porous, permeable and/or fissured geological formations whose total and/or partial renewal is associated the hydrological mode of the River.

Contain 2:

Object And Field Of Application

### **Article 2**

The Charter of Water has as an aim of:

- to fix the principles and the methods of the distribution of water of the Senegal River enters the various sectors of use. The various uses of water of the River can relate to agriculture, the breeding, continental fishing, pisciculture, sylviculture, fauna and the flora, hydroelectric energy, the water supply of the urban and rural populations, health, industry, navigation and the environment, by taking account of the domestic uses;

- to define the methods of examination and approval of the new users projects of water or affecting the quality of water;

- to determine the rules relating to the safeguarding and the environmental protection, particularly with regard to fauna, the flora, the ecosystems of the easily flooded plains and the wetlands;

- to define the framework and the methods of participation of the users of water in the catch of the decisions of stock management out of water of the Senegal River.

### **Article 3**

The present Charter applies to the whole of the catchment area of the Senegal River including the affluents, the distributaries and the associated depressions.

Contain 3:

Principles And Methods Of The Distribution Of Water Between The Uses

### **Article 4**

The use of water of the River is opened in each Coastal state, like with the people being on her territory in accordance with the principles and methods defined by the present Charter.

‘The distribution of water between the uses is in particular founded on the following general principles:

- obligation to guarantee the balanced management of the water resource;
- the equitable and reasonable use of water of the River;
- obligation to preserve the environment;
- obligation to negotiate in the event of conflict;
- obligation for each Coastal state to inform the other Coastal states before undertaking any action or any project which could have an impact on the availability of water and/or the possibility of implementing future projects.

The guiding principles of any distribution of water of the River aim at ensuring the populations of the Coastal states, the full pleasure of the resource, in the respect of the safety of the people and the works, as well as basic human rights to a salubrious water, from the point of view of a durable development.

### **Article 5**

Any distribution of water between the uses is fixed by taking in consideration the availability of the resource and integrating the following elements:

1) the sous-régionale co-operation, which takes into account:

- the safety and improvement of the incomes of the populations of the basin of the Senegal River;
- the fight counters the rural migration;
- food safety and the fight for the reduction of poverty;

- reinforcement of the economies of the Coastal states compared to the climatic changes;
- the quantitative and qualitative development of the production agricultural, energy, mining and industrial;
- the development integrated thanks to the infrastructures carried out.

2) the integrated management of the resource, which takes into account:

- the availability and the continuity of the resource;
- the integration of the dimension of the environment in the management of water and the durable maintenance of the favorable ecological conditions in the basin of the River;
- the irrigation of a maximum quantity of surfaces according to the availability of the resource;
- permanent navigability of the river;
- optimal exploitation of the hydroelectric potential energy available;
- the creation of the hydraulic conditions necessary to the flood of the Valley and the traditional cultures of fall;
- the rolling of the exceptional natural risings with Manantali, and the reduction of the risks of flood;
- improvement of the filling of the Lakes Guiers and the R' Kiz, as well as natural depressions;
- reasonable character of the requests by economic sector and their implications.

#### **Article 6**

The technical principles aimed to Article 7 are secondary compared to the principle of nondiscrimination, the obligation to satisfy the vital needs and with safety for the people.

They are appreciated according to three different contexts:

- the normal situation corresponding to the situation where the reasonable satisfaction of all the needs is possible;
- the situation corresponding to the floods or natural disasters;
- the situation of shortage corresponding to one period of general or partial insufficiency, or to a case of absolute necessity.

In these the last two cases, the Standing committee of Water is seized. However, if a State is brought to take emergency measures in a unilateral way, it will hold immediately informed the other States of them.

#### **Article 7**

The principles used in the distribution of water, such as defined in the appendices, take account of the following essential elements:

- storage capacity;
- the division of information on water flows of the River for the taking into account of the constraints of use;
- the safety of the works;
- water supply (urban, and rural);
- the safeguarding and environmental protection;

- the support for agriculture (of fall, irrigated), for the livestock and continental fishing;
- hydroelectric production;
- the freedom of navigation.

The economic principles used in the distribution of water, take account of the following essential aspects:

- reassignment of the revenues from taxes resulting from the tax on the users responsible for pollution to the financing for ecological management for the resource;
- the taking into account of the financial contribution of each use to the financing of the investments, the recurring loads and to the refunding of the contracted debts.

**Article 8**

The use of the water resource aims at satisfying in a way right:

- requirements out of drinking water for the populations, in particular most vulnerable;
- needs for agriculture, the breeding, silviculture, pisciculture, fishing, fauna, the flora and the environment;
- requirements out of water for the energy production;
- requirements out of water for industry;
- requirements out of water for navigation.

**Article 9**

The Organization, according to the requests of the users, fixes the priorities between the needs, as well as the water consumption necessary. No use profits from a priority compared to the others in accordance with the principles of the international law.

However, in the event of shortage of the resource, a detailed attention will be given to the supply drinking water and the domestic uses of water.

**Article 10**

Except the domestic uses which are free, the collecting of water of the river is subjected to a preliminary declaration or authorization arrangement.

The operations subjected to the authorization arrangement are:

- the construction or the operation of the installations or the works;
- the realization of work or various activities (taking away, discharges or rejections), likely to present dangers to health or public safety, to harm the free water run-off, to reduce the water resource, to affect the bed of the River, or to attack the quality or to the biodiversity of the aquatic environment.

The other operations are subjected to simple declaration. The authorities exerting the powers of police force and administration of water within each State have the obligation to transmit the declarations to the High commissionership.

A nomenclature of the thresholds of authorization and declaration will be worked out and implemented in accordance with the provisions of this

Charter. On the quantitative level, the thresholds of authorization or declaration of the operations are a function of the flow taken compared to the minimum flow.

On the qualitative level, they take account of the brittleness of the zones of taking away or rejection.

This nomenclature is elaborate by taking account of the scenarios of management.

#### **Article 11**

The request for authorization is transmitted to the High commissionership which informs it and subjects it within 45 day to the opinion of the Standing committee of Water. The authorization is granted by the Council of Ministers, after opinion of the Standing committee of Water.

This authorization is granted subject to the rights of the thirds and the rights exerted before. It can be withdrawn in the same forms for the reasons of public interest or in the event of nonexecution.

#### **Article 12**

The provisions of the Charter apply to title back-up troop with all that do not provide the national legislations. They are the national authorities of control and police force of water which will be charged to the first chief to apply them.

In the event of dissension between the applicant and the controlling authority, a recourse will be possible near the Council of Ministers on sasine of the High commissionership, after opinion of the Standing committee of Water.

#### **Article 13**

The Coastal states take care that information relating to the state of water of the River, with measurements envisaged or catches to ensure the regularity of the flow of the River, as with the quality of water are accessible to the public. The States and the High commissionership must parallel to take care the education of the bordering populations by encouraging programmes of sensitizing for an ecologically rational use of water of the River.

#### **Article 14**

The scenarios of management envisaged within the framework of the Handbooks of Management of the Dams Manantali and Diama (Appendices 2 and 3 of the Charter) set the standards to be respected for each use and the possible order of certain technical priorities. The cumulative criteria of management and the parameters which they imply are developed in the appendices. They will have to be constantly in conformity with the standards in force.

Except in the event of extraordinary circumstances, as mentioned in Article 6, the artificial rising will be guaranteed annually.

#### **Article 15**

The annual management of the reserves of the stoppings built on the Senegal River and its affluents and distributaries is carried out according to

principles' stated in the Handbooks of Management annexed to the Charter (Appendices 2 and 3 of the Charter).

Contain 4:

Protection And Safeguarding Of The Environment

**Article 16**

The contracting States protect and preserve the ecosystem of the River, and manage the resource in the respect of natural balances, in particular of the wet fragile zones and the marine environment, separately through their national legislations, and jointly by the legal instruments of the Organization for the Development of the Senegal River.

The contracting States begin to control any action likely to modify in a significant way the characteristics of the mode of the River, the medical state of water, the biological characteristics of its fauna and its flora, its water level and a general way its environment.

They make the provisions likely to prevent, reduce or control the events or conditions resulting from natural causes or human activities which are likely to cause a damage in the other States, with the environment of the River, the health or the safety of the Man.

For this reason, the contracting States act in concert in order to prevent the introduction of species foreign or new, plants or animals, likely to deteriorate the ecosystem. For this purpose, they:

- jointly draw up the list of the substances whose presence in water of the River must be prohibited, limited, be studied or controlled;

- objectives and common criteria concerning the quality of water according to the uses define jointly;

- work in concert in order to develop techniques and to found effective practices of saving of water and control of pollution specific or diffuse;

- work with the harmonization of the national legislations relating to the environmental questions concerning the catchment area.

**Article 17**

In complement of the general rules enacted above, the contracting States will jointly adopt a general plan of environmental action determining in particular the conditions in which the Organization:

- takes or provisional suspension restraint measures of certain uses of water, to face a situation of deficit, with a threat or the consequences of a natural disaster;

- enacts, in the respect of balance general of the rights and obligations resulting from this Charter and the various granted authorizations, of the special regulations applicable to the installations, activities and practical of



the users, as well as the conditions in whom can be controlled, suspended, be limited or prohibited the methods of exercise of the various uses of water.

- sets up, the procedures necessary to the location and the quantification of the sources of pollution, and for the monitoring of the effluents.

Within this framework, is carried out each year to the prospective evaluation of the quantity of water and the quality of the water of the catchment area of the River.

In complement with the general rules enacted above, the contracting States will be able to adopt other provisions together determining in particular the conditions under which the rules of police force of water are applicable to divided water.

With regard to subsoil waters, it is carried out a cartographic census of the aquiferous zones of refill, in order to inventory them, to delimit the zones of food and collecting, and to know the interactions between surface water and subsoil waters.

#### **Article 18**

The taxes instituted by the States against the users pollutants of the environment are assigned to the financing of the ecologically rational management of the resource.

The States begin to set up tax incentives intended to help the economic operators who practise respectful methods of use of the resource of the environment.

The States will take care that the principle pollutant-payer is applied to the people morals and physics.

Notwithstanding the application of the principle pollutant payer, the violation by a State of its international obligations as regards pollution engages its responsibility in accordance with the rules for the international law.

Contain 5:

Institutions In Charge Of The Management Of Water And The Environment

#### **Article 19**

The Standing committee of Water is charged to define, in accordance with the provisions of this Charter and of its appendices, the principles and the methods of the distribution of water between the various sectors of use.

#### **Article 20**

The Standing committee of Water is made up representatives of the Member States of the Organization.

#### **Article 21**

The Standing committee of Water gives an advisory opinion with the address of the Council of Ministers on any project or programs in connection with the stock management. Within this framework, it annually proposes at the Council of Ministers the control program of the works.

**Article 22**

The Standing committee of Water meets on convocation of the High-Commissioner of the Organization for the Development of the Senegal River or at the request of a Member State.

**Article 23**

The statute of observer near the Standing committee of Water could be granted by the Council of Ministers on a proposal from the High-Commissioner to certain entities of the Member States. They will take part in an effective way in work of the Standing committee of Water.

The statute of observer can be granted to:

- Representatives of the users;
- Representatives of the local authorities;
- Representatives of the NonGovernmental Organizations;
- Representatives of the Boards of decentralized management.

Contain 6:

**Methods Of Examination And Approval Of The New Projects**

**Article 24**

In accordance with the provisions of Article 4 of the Convention of March 11, 1972 relating to the Statute of the Senegal River and Article 10 of this Charter, any project of a certain width can be carried out only after prior approval of the contracting States. Moreover, an obligation of information and reciprocal consultation binds the parts, concerning the possible effects of the new projects.

There are three types of new projects:

- projects likely to have significant effects;
- projects not having significant effects;
- derogatory projects, moved by the urgency.

For the projects likely to have significant effects, it is made obligation, before their execution, to notify them in the States left, via the High commissionership. The notification must be done in good time and be accompanied by all the technical data necessary to its evaluation, in particular the impact studies. A three months deadline is granted to the States to answer the notification, the absence of answer being worth approval.

In any event, no project likely to modify in a significant way the characteristics of the mode of the River, its conditions of navigability, of industrial exploitation, the medical state of water, the biological

characteristics of its fauna or its flora, its water level, can be carried out without to be approved as a preliminary by the contracting States.

If the project is derogatory, the Applicant state makes a formal statement, near the High commissionership to which is made the obligation to transmit it to the President the Council of Ministers and to the Member States of the Organization. Negotiations are then started on the level of the Council of Ministers on the basis of file educated by the High commissionership.

**Article 25**

Are transmitted to the States for examination, only the projects subjected to the authorization arrangement.

**Article 26**

The approval aimed to Article 24 fact the object of a request addressed to the Council of Ministers and lodged with the High commissionership.

After instruction, the High-Commissioner seizes of it the Standing committee of Water which gives an opinion for the Council of Ministers.

The approval of a new project is exclusive spring of the Council of Ministers.

Contain 7:

Final Provisions

**Article 27**

The present Charter will come into effect after the deposit of the instruments of ratification by all the contracting States. It will be opened with adhesion the shortly after its entry into force for any other Coastal state of the River.

The instruments of ratification will be lodged with the government of the Islamic Republic of Mauritania which will inform of it the other contracting States and the High commissionership.

The present Charter will be addressed for recording with the Secretariat General of the United Nations at the time of her entry into force, in accordance with Article 102 of the Charter of the United Nations. It will be also addressed for recording to the Secretariat General of the African Union.

**Article 28**

The Charter will remain in force for all the lifespan of Convention carrying Statut of the Senegal River.

After this period, any State contracting can withdraw present Charter. The withdrawal will take place in the form of written notification addressed to the Government of the Islamic Republic of Mauritania which will inform the other contracting States of them. It will take effect after deadline a one year from the date on which the agent will have received notification from it.

It will not carry not reached, with less of contrary agreement, former engagements, this notification.

The provisions of the Charter will remain unchanged for one three years initial period known as probationary period.

After this period, a broad consultation will be held by the High commissionership, in order to evaluate the evolution of the stakes and the problems involved in the implementation of the Charter. Proposals for an amendment will be formulated if necessary, and will be submitted to the Council of Ministers.

With the exit of the probationary period, the provisions of the Charter will apply in a continuous way. Only the contracting States and the High commissionership will have the initiative to request his amendment.

The Conference of the Heads of States and Government is only qualified to rule on the modification of the Charter, on a proposal from the Council of Ministers.

#### **Article 29**

The appendices relating to the management of the works could be revised within shorter times so that the technical methods of application of the Charter remain in conformity in the duration with the rules in force and to take account of the evolutions related to the context of the catchment area.

The appendices with the Charter will be revised on justified request for a State or justified initiative of the High commissionership of the Organization for the Development of the Senegal River in dialogue with the actors concerned. The Council of Ministers proposes, on the basis of evaluation, measurements appropriate for adoption to the Heads of State and Government. The adopted measures become executory.

#### **Article 30**

Any disagreement which could emerge between the signatories parts, relative with the interpretation or the application of this Charter, its endorsements, or appendices, will be solved by the conciliation and the mediation. In the absence of agreement, the contracting States will have to seize the Commission of Conciliation and Arbitration of the African Union. As a last resort the International Court of Justice is seized.

During all the time that the settlement of the dispute lasts, and until its resolution, the Charter continues to apply in all its not disputed provisions. Moreover, the Council of Ministers of the Organization for the Development of the Senegal River will decide possible academies measurements on a proposal from the High-Commissioner.

In witness whereof, signed the present Charter,

**For the Republic of Mali**

**For the Islamic Republic of Mauritania**

**For the Republic of Senegal**

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