

A Model for African Shared Water Resources: The Senegal River Legal System

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Twenty-five years ago, the late B.A. Godana stressed that despite the gap between, on the one hand, the vast number of African international drainage basins and their potential for socio-economic development of the States and, on the other hand, the dearth of international regulations governing water resources, it was noteworthy that the achievements in terms of cooperation were impressive. More than any other African river, the Senegal has been characterized and governed by the most progressive and articulated legal regime. The leitmotif since the inception of this legal regime has been to engage in an experiment that not only follows the most advanced concepts of integrated water resources management, but may also offer lessons in cooperation at the global level. Therefore, the legal architecture to foster cooperation over the management of the Senegal has influenced the development of the law of international watercourses in Africa.

INTRODUCTION

Among African rivers, the Senegal has been characterized and governed by the most pioneering, progressive and articulated legal regime. Since the inception of this legal regime, its *leitmotif* has been to 'engage in an experiment in international organization that is not only following the most advanced concepts of integrated river basin development, but which may also afford a lesson in cooperation on a broad scale'.¹ It is because of this nature that the legal architecture designed to foster cooperation over the management of the Senegal has influenced the development of the law of international watercourses in Africa.

This article will show that the development of the legal regime of the Senegal River has been a success story in Africa. That success story is mainly due to its pioneer-

ing and progressive character. Several new legal experiences in the field of water resources management in Africa took place first in the context of the Senegal River basin. For instance, the Senegal was the first African river for which a treaty governing common works (e.g., dams) was elaborated. In the same vein, the very first Water Charter in Africa was signed in the context of the Senegal River basin. Despite the need for improving sustainable development in the Senegal River basin, it is undeniable that in the specific context of African watercourses, the legal regime of the river has ensured effective and efficient cooperation among the riparian States, even in times of conflict between some of them.² The omnipresence of water diplomacy is by itself evidence of success. The literature has quite often focused on economic or purely environmental indicators to determine whether African river basin organizations have achieved effective management of water resources.³ This article argues instead that the degree of water diplomacy should be the main indicator in determining whether a legal regime has succeeded in governing the management and use of water resources.

The Senegal River⁴ is the second most important river in West Africa after the Niger. It measures 1,800 km,⁵ has a surface area of about 300,000 km²,⁶ and spreads over four countries: Guinea, Mali, Mauritania and Senegal. Prior to their independence, Mauritania and Senegal were cradled into the waters of cooperation through bodies such as the *Organisation Autonome de la Vallée* (OAV) and the *Mission d'Aménagement du*

¹ T. Parnall and A.E. Utton, 'The Senegal Valley Authority: A Unique Experiment in International River Basin Planning', 51:2 *Indiana Law Journal* (1976), 237. See also M.J. Vick, 'The Senegal River Basin: A Retrospective and Prospective Look at the Legal Regime', 46:1 *Natural Resources Journal* (2006), 211, at 211: 'In 1972, the states of Mali, Mauritania and Senegal formed the Organization for the Development of the River Senegal, which has been lauded as the most progressive of river institutions.'

² M. Kipping, 'Water Security in the Senegal River Basin: Water Cooperation and Water Conflicts', in: H.G. Brauch *et al.* (eds.), *Facing Global Environmental Change: Environmental, Human, Energy, Food, Health and Water Security Concepts* (Springer, 2009), 675.

³ F.J.G. Padt and J.C. Sanches, 'Creating New Spaces for Sustainable Water Management in the Senegal River Basin', 53:2 *Natural Resources Journal* (2013), 265.

⁴ Some authors consider that it would be more appropriate to speak about the 'Senegal Rivers' since the Senegal is the result of the meeting of two separate rivers, the Bafing and the Bakoye. See, e.g., B.A. Godana, *Africa's Shared Water Resources: Legal and Institutional Aspects of the Nile, Niger and Senegal River Systems* (Frances Pinter/Lynne Rienner, 1985), at 91. See also M.J. Vick, n. 1 above, at 211 and 216–219.

⁵ The three longest rivers in Africa are the Nile (5,611 km), the Congo (4,650 km) and the Niger (4,200 km). See B.A. Godana, n. 4 above.

⁶ See <<http://www.omvs.org/fr/fleuve/physique.php>>.

Bassin du Fleuve Sénégal (MAS).⁷ However, the ‘community of interest’⁸ to cooperate fully in the management of the Senegal River basin crystallized among the four riparian States in 1963 with the conclusion of the Bamako Convention for the Development of the Senegal River.⁹

THE CRYSTALLIZATION OF THE COMMUNITY OF INTERESTS OVER THE SENEGAL RIVER

The Bamako Convention established an organization grouping the four riparian States, named the ‘Inter-State Committee’ (in French: *Comité inter-Etats pour l’Aménagement du fleuve Sénégal*). The mandate of the Committee was to promote and coordinate studies and activities for the harnessing of the Senegal River basin. Most importantly, the Bamako Convention internationalized the river, including its tributaries and sub-tributaries. Such a step was of the utmost importance at the time,¹⁰ and demonstrated a pioneering approach to

transboundary water cooperation in Africa. Even the Act regarding navigation and economic cooperation between the States of the Niger basin, which was concluded in the same year, opted for fuzziest language – not stating clearly that the Niger was ‘internationalized’ and providing only that ‘the utilisation of the River Niger, its tributaries and sub-tributaries, is open to each riparian State in respect of the portion of the River Niger basin lying in its territory and without prejudice to its sovereign rights’.¹¹

Not only was the Bamako Convention the first postcolonial West African treaty concluded in relation to water resources management, but the institutional machinery upon which it rested was progressive and the powers entrusted to the Inter-State Committee departed from general international law as well as international practice.¹² Every project on the Senegal River (both national and common projects), its tributaries and sub-tributaries was made dependent on the unanimous approval of the Committee. In other words, each member State had some kind of right of veto on any project of another member State.¹³ General international law still does not point in such a direction, as reflected in the 1997 United Nations Convention on the Law of the Non-navigational Uses of International Watercourses,¹⁴ or as underlined by the arbitral tribu-

⁷ See A. Fall and A. Cassar, ‘Improving Governance and Public Participation in International Watercourse Management: Experience of the African Development Bank in the Senegal River Basin’, in: C. Bruch, M. Nakayama and K.A. Salewicz (eds.), *Public Participation in the Governance of International Freshwater Resources* (United Nations University Press, 2005), 216, at 223: ‘[T]hese organizations are of interest historically for the economic and technical data they provided; however, in legal and institutional terms, these arrangements have contributed little.’ See also B.A. Godana, n. 4 above, at 127, who mentions another body that was created in December 1949: *Commission consultative des études pour l’aménagement du fleuve Sénégal*. According to Godana, ‘this body was composed of the Secretary-General of the General Government of French West Africa, the Governors of Senegal, Mauritania and Sudan (Mali), four parliamentarians of each State and the chiefs of public works of these countries. It was to examine the projects of harnessing the river for purposes of navigation, hydro-electric power production, irrigation and agricultural production, as well as pastoralism. Surprisingly, Guinea was not represented. However, the regime of the Senegal River made no contributions to the development of international water law.’ Ibid.

⁸ See the famous dictum of the Permanent Court of International Justice (PCIJ) in the *Oder* case: ‘[The] community of interest 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 user of the whole course of the river and the exclusion of any preferential privilege of any one riparian State in relation to the others.’ PCIJ 10 September 1929, *Territorial Jurisdiction of the International Commission of the River Oder*, Judgment No. 16 (Ser. A, No. 23), at 27. See also, ICJ 25 September 1997, *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, [1997] ICJ Rep 7 (*Gabčíkovo-Nagymaros*), at paragraph 85.

⁹ Convention for the Development of the Senegal River (Bamako, 26 July 1963).

¹⁰ As explained by B.A. Godana, n. 4 above, at 127 (emphasis added): ‘Prior to the advent of independence for the basin States, this river, unlike the Niger, the Nile and the Congo, had not formed the object of an international convention, for the entire drainage basin was then under French colonial rule, today’s four basin States then constituting parts of French West Africa. *The river was inter-territorial but not international.*’

¹¹ Act Regarding Navigation and Economic Co-operation between the States of the Niger Basin (Niamey, 26 October 1963; in force 1 February 1966), Article 2. See also, the Convention Relating to the Status of the River Gambia (Kaolack, 30 June 1978), which is usually considered as a duplicate of the legal instruments governing the Senegal River: ‘Within the framework of the provisions of the present agreement the Gambia River and its tributaries is declared a *river of regional interest* within the national territories of the riparian States.’ Ibid., Article 1 (emphasis added).

¹² See L. Teclaff, ‘The Influence of Recent Trends in Water Legislation on the Structure and Functions of Water Administration’, 9:1 *Land and Water Law Review* (1974), 1, at 3–4: ‘The emergence of the river basin as the physical framework of international cooperation in utilizing transboundary waters extended the operative area of international water administration without, however, changing its function. Thus, the jurisdiction of the Nile, Indus, and La Plata commissions . . . embraces an entire basin or the major part of one but . . . they have authority only to advise and supervise the execution of waterworks already approved . . . it is still utopian to expect the emergence of supra-national drainage basin authorities.’ See also T. Parnall and A.E. Utton, n. 1 above, at 236, explaining that ‘an overdeveloped sense of national sovereignty seemed to prevent the establishment of effective international river basin organizations. Indeed, the inability of river basin organizations to make decisions and to draw up resource management plans that have at least some binding effect on the member basin states is probably the single most important weakness of the majority of international river organizations. . . . The OMVS is a unique exception to this assessment.’

¹³ See B.A. Godana, n. 4 above, at 219.

¹⁴ See, e.g., Article 11 of the Convention on the Law of the Non-navigational Uses of International Watercourses (New York, 21 May 1997; not yet in force): ‘Watercourse States shall exchange information and consult each other and, if necessary, negotiate on the possible effects of planned measures on the condition of an international watercourse.’ See also *ibid.*, Article 17.

nal in the *Lake Lanoux* case.¹⁵ At the level of African river basin commissions, the established practice is generally to formulate an obligation or duty to *consult* the competent commission or organization.¹⁶ The Bamako Convention paved the way for a joint management system of the Senegal River and left almost no room for unilateral action by the riparian States in the exploitation of the resources of the Senegal. Unlike many other international rivers, the strong adherence to a cooperative spirit in terms of water resources management did not grow out of a conflict over the use of the Senegal River resources. Instead, 'the catalyst for cooperation was the vulnerability of the populations of the basin states. These four countries believe that collaboration on the development of this resource would improve the standard of living of all involved.'¹⁷

It is the very same cooperative spirit that led the four riparian States in 1968 to embark upon a new kind of experiment: establishing a new river organization (in French: *Organisation des Etats Riverains du Sénégal*

(OERS); in English: Organization of Boundary States of the Senegal River), which would serve as a forum of cooperation not only for water resources management but also for cooperation with respect to cultural, economic, social and military issues.¹⁸ In other words, water resources management was seen as the epicenter for the development of axes of cooperation in other important fields for the economic, cultural and social development of Guinea, Mali, Mauritania and Senegal. This was not so common in Africa. For decades, river basin organizations in Africa were perceived as self-contained institutions operating strictly in relation to water resources management and cooperation over water resources was often carried out in clinical isolation from other issues. It can thus be sustained that the holistic model set forth through the institution of the OERS was a first attempt to develop what is nowadays known as 'integrated water resources management' (IWRM).¹⁹ Despite the limits and weaknesses of the OERS²⁰ (not to mention its ambitious purposes), at the dawn of the 1970s the experience of the OERS and the results achieved by the Inter-State Committee were sufficient to provide firm grounding to the assumption that only a new, strong and predictable joint legal regime would foster the development of the Senegal River and strengthen the 'community of interests' between the four riparian States. However, the vicissitudes of international relations prevented Guinea from taking part in what was going to be the second generation of legal instruments governing cooperation within the Senegal River basin.²¹

¹⁵ *Lake Lanoux Arbitration (France v. Spain)*, [1957] 12 RIAA 281, at paragraphs 11–13 (emphasis added): 'To admit that jurisdiction in a certain field can no longer be exercised except the condition of, or by way of, an agreement between two States is to place an essential restriction on the sovereignty of a State, and such restriction could only be admitted if there were clear and convincing evidence. . . . But international practice does not so far permit more than the following conclusion: the rule that States may utilize the hydraulic power of international watercourses only on condition of a prior agreement between the interested States cannot be established as a custom, even less as a general principle of law.'

¹⁶ See, e.g., Agreement Concerning the River Niger Commission and the Navigation and Transport on the River Niger (Niamey, 25 November 1964; in force 12 April 1966) ('Niger River Agreement'), Article 12 (emphasis added): 'In order to achieve maximum co-operation . . . , the riparian States undertake to inform the Commission as provided for in Chapter I of the present Agreement, at the earliest stage, of all studies and works upon which they propose to embark. They undertake further to abstain from carrying out on the portion of the River, its tributaries and sub-tributaries subject to their jurisdiction any works likely to pollute the waters, or any modification likely to affect biological characteristics of its fauna and flora, without adequate notice to, and prior consultation with, the Commission.' See also Convention and Statutes Relating to the Development of the Chad Basin (Fort Lamy, 22 May 1964; in force 15 September 1964), Article 5 (emphasis added): 'The Member States undertake to refrain from adopting, without referring to the Commission beforehand, any measures likely to exert a marked influence either upon the extent of water losses, or upon the form of the annual hydrograph and limnograph and certain other characteristics of the Lake, upon the conditions of their exploitation by other bordering States, upon the sanitary condition of the water resources or upon the biological characteristics of the fauna and the flora of the Basin. In particular, the Member States agree not to undertake in that part of the Basin falling within their jurisdiction any work in connection with the development of water resources or the soil likely to have a marked influence upon the system of the water courses and levels of the Basin without adequate notice and prior consultations with the Commission.'

¹⁷ J.T. Newton, 'Case Study of Transboundary Dispute Resolution: Organization for the Development of the Senegal River (OMVS)', Transboundary Freshwater Dispute Database, Oregon State University, (2007), found at: <http://www.transboundarywaters.orst.edu/research/case_studies/OMVS_New.htm>.

¹⁸ Labé Convention establishing the Organization of Boundary States of the Senegal River (Labé, 24 March 1968). According to J.T. Newton, n. 17 above, '[t]he goals of OERS were more comprehensive than those of the Comité inter-Etats. Because its objectives were not limited to the valorization of the basin, the member states attempted to politically and economically integrate the basin through the standardization of legislation, the improvement of education and the further breaking down of borders to allow increased trade and labor movement. This initiative demonstrated the interest these four countries had in treating the river basin as an international resource.'

¹⁹ IWRM is 'a process which promotes the coordinated development and management of water, land and related resources in order to maximise economic and social welfare in an equitable manner without compromising the sustainability of vital ecosystems and the environment'. See Global Water Partnership, 'What is IWRM?', found at: <<http://www.gwp.org/en/The-Challenge/What-is-IWRM/>>.

²⁰ For a thorough analysis of the political context (in particular, disagreements and mistrust between Senegal, Guinea and Mauritania) that led to the paralysis of the OERS, see B.A. Godana, n. 4 above, at 220. J.T. Newton, n. 17 above, explains that: 'The economic cooperation of the member states of OERS advanced with various ministerial-level meetings in the transportation and economic sectors, but when political instability of the basin occurred in 1970, difficulties arose within the organization. The nature of OERS was such that decisions were made unanimously, and when Guinea was absent for two meetings in 1971 (due to regional political instability), negotiations came to a halt. Consequently, Guinea withdrew from OERS in 1972 and the organization became defunct.'

²¹ Mali, Mauritania and Senegal denounced the 1968 Labé Convention in 1972.

THE BIRTH OF THE SENEGAL RIVER LEGAL SYSTEM

As stressed by an arbitral tribunal: ‘When the States bordering an international waterway decide to create a joint regime for the use of its waters, they are acknowledging a “community of interests” which leads to a “community of law”.’²² In the context of the Senegal River, the idea of a ‘community of law’ was from the very beginning inseparable from the need to establish a ‘community of management’ for the River’s resources. The only legal safeguard that was foreseen by the riparian States to ensure the effectiveness and the predictability of a community of management was to subject the implementation of measures or activities within the Senegal River basin to the unanimity rule or a prior agreement rule. Not surprisingly, when three of the riparian States of the Senegal (Mali, Mauritania and Senegal) concluded the 1972 Convention on the Status of the Senegal River,²³ the prior agreement rule was strengthened. Article 4 of this Convention states clearly:

No project which is likely to bring about serious modifications on the characteristics of the river’s regime, on its navigation conditions, the agricultural and industrial exploitation of the river, the sanitary state of the waters, the biological characteristics of its fauna and its flora, as well as its water level, *will be implemented without the prior approval of the contracting States.*²⁴

Without this explicit wording, there would be no predictability as to whether activities and measures on the Senegal River are subject to the prior agreement rule, and it would have been impossible to interpret the 1972 Convention as embodying such a rule.²⁵

²² Permanent Court of Arbitration, *Case Concerning the Auditing of Accounts between the Kingdom of the Netherlands and the French Republic pursuant to the Additional Protocol of 25 September 1991 to the Convention on the Protection of the Rhine against Pollution by Chlorides of 3 December 1976*, Arbitral Award, 12 March 2004 (*‘Rhine Chlorides Arbitration’*), found at: <http://www.pca-cpa.org/upload/files/Neth_Fr_award_English.pdf>, at paragraph 97.

²³ Convention on the Status of the Senegal River (Nouakchott, 11 March 1972; in force 1974).

²⁴ *Ibid.*, Article 4 (emphasis added).

²⁵ See, e.g., how the International Court of Justice (ICJ) interpreted the 1975 Statute of the River Uruguay (Salto, 26 February 1975; in force 18 September 1976) as neither setting out a prior agreement rule nor a power for the ICJ to decide whether or not to authorize an activity, even if the Court is at the centre of the machinery of cooperation laid down by the 1975 Statute. This is in contrast to the 1972 Convention on the Status of the Senegal River, n. 23 above, which confers to the river organization the final say with respect to activities carried out within the Senegal River basin. As the Court observes: ‘[N]o construction obligation’, said to be borne by Uruguay between the end of the negotiation period and the decision of the Court, *is not expressly laid down by the 1975 Statute and does not follow from its provisions. . . . Consequently, the State initiating the plan may, at the end of the negotiation period, proceed with construction at its own risk.* ICJ 20 April 2010, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, [2010] ICJ Rep. 14 (*‘Pulp Mills’*), at paragraph 154 (emphasis added).

Besides the community of management that it consolidated, the ‘community of law’ that was being built in 1972 adhered to a new legal architecture. While the 1963 Bamako Convention and the 1968 Labé Convention encompassed both procedural and substantive rights and obligations with respect to the management of the resources of the Senegal River, in 1972 Mali, Mauritania and Senegal opted for a different approach that consisted of separating to a certain extent the joint *substantive* legal regime from the joint *procedural* legal regime appertaining to cooperation within the Senegal River basin. Hence, they concluded one agreement (the 1972 Convention on the Status of the Senegal River) dealing with the substantive rights and obligations of the riparian States (in particular those related to agricultural and industrial uses and navigation and transport purposes) and another *institutional* agreement establishing the *Organisation pour la Mise en Valeur du fleuve Sénégal* (OMVS) (in English: the Senegal River Development Organization) through the 1972 OMVS Convention.²⁶

This was a first in the design of legal frameworks relating to water resources management in Africa. For instance, both the riparian States of the Niger River²⁷ and of the Chad River basin²⁸ mixed substantive and procedural rights and obligations in their constitutive legal instruments. If such a mixture might be perceived as a willingness to elaborate a ‘comprehensive regime’,²⁹ practice has shown that this kind of approach might lead to diverging and unpredictable legal interpretations.³⁰ Concerning the ‘community of law’ estab-

²⁶ Convention Establishing the Senegal River Development Organization (Nouakchott, 11 March 1972; in force 1974) (*‘OMVS Convention’*).

²⁷ The 1964 Niger River Agreement, n. 16 above, is an agreement establishing the River Niger commission and governing navigation and transport on the River Niger as well as embodying provisions relating to agricultural and industrial utilization and development.

²⁸ The Convention and Statutes Relating to the Development of the Chad Basin, n. 16 above, are rather confusing with respect to their object and purpose. The Convention establishes the Chad Basin Commission without specifying its powers and the applicable procedures, while the Statutes contain provisions regarding substantive rights and obligations (e.g., domestic, agricultural and industrial utilization of water resources) as well as specific provisions concerning the powers of the Chad Basin Commission.

²⁹ Compare to what the ICJ said about the 1975 Statute on the River Uruguay, in *Pulp Mills*, n. 25 above, Provisional Measures, Order of 13 July 2006, [2006] ICJ Rep. 133, at paragraph 81.

³⁰ See, e.g., the *Pulp Mills* case, in which the ICJ interpreted the 1975 Statute on the River Uruguay as being based on a nexus of separate substantive obligations and procedural obligations: ‘The Court notes that the 1975 Statute created CARU and established procedures in connection with that institution, so as to enable the parties to fulfil their substantive obligations. *However, nowhere does the 1975 Statute indicate that a party may fulfil its substantive obligations by complying solely with its procedural obligations, nor that a breach of procedural obligations automatically entails the breach of substantive ones. Likewise, the fact that the parties have complied with their substantive obligations does not mean that they are deemed to have complied ipso facto with their procedural obligations, or are excused from doing so.* Moreover, the link between these two categories of obligations

lished through the 1972 Conventions on the Status of the Senegal River and the OMVS, it is quite impossible to consider that an OMVS member State could comply with its substantive obligations without first complying with its procedural obligations under the 1972 OMVS Convention. Conversely, compliance by an OMVS member State with its substantive obligations can be deduced *ipso facto* when it has acted in accordance with the procedural obligations enshrined in the 1972 OMVS Convention.

By fragmenting the substantive and procedural joint legal regimes applicable to the Senegal River basin, the intention of the drafters of the two 1972 treaties was to make sure that compliance with substantive obligations would be constantly supervised and scrutinized by the joint machinery of the OMVS. Only the OMVS – through its Permanent Water Committee (in French: *Comité permanent des eaux*) – can decide, for instance, that a planned measure would not affect the quality of the waters. Moreover, only the OMVS, through the unanimous decision of its members, can approve a planned measure on the Senegal River. No unilateral determination by the concerned member State is allowed. Thus, there is no recognition of the ‘proceed at own risk’ principle, formulated by the International Court of Justice (ICJ) in the *Passage Through the Great Belt* provisional measures order³¹ and recently accepted as a ‘principle of international law’ by an arbitral tribunal in a dispute between Pakistan and India over the construction of a dam on the Indus.³²

The sustainability of the ‘community of law’ is inextricably linked to the functioning of the OMVS and to its system of prior approval of planned activities on the Senegal River. The aforementioned interpretation is confirmed by the ordinary meaning of the terms of the 1972 OMVS Convention, which makes the implementation of the Convention the primary purpose of the OMVS.³³ It is also confirmed by the subsequent practice³⁴ of the OMVS, which over the years has become the

can also be broken, in fact, when a party which has not complied with its procedural obligations subsequently abandons the implementation of its planned activity.’ *Pulp Mills*, n. 25 above, at paragraph 78 (emphasis added).

³¹ ICJ 29 July 1991, *Passage through the Great Belt (Finland v. Denmark)*, Provisional Measures, [1991] ICJ Rep. 12, at paragraph 33: ‘A State engaged in works that may violate the rights of another State can proceed only at its own risk.’

³² Permanent Court of Arbitration, *Indus Waters Kishenganga Arbitration (Pakistan v. India)*, Order on the Interim Measures Application of Pakistan dated June 6, 2011, 23 September 2011, found at: <<http://www.pca-cpa.org/upload/files/16.%20Order%20on%20Interim%20Measures%20dated%2023%20September%202011.pdf>>, at paragraph 143. See also paragraph 122.

³³ OMVS Convention, n. 26 above, Article 1.1.

³⁴ As emphasized by the ICJ: ‘[T]he constituent instruments of international organizations are also treaties of a particular type; their object is to create new subjects of law endowed with a certain autonomy, to which the parties entrust the task of realizing common goals. Such treaties can raise specific problems of interpretation

alpha and omega of cooperation within the Senegal River basin, and the benchmark for most African river basin organizations, if not for all of those in West Africa. As an illustration, when in the early 1990s Senegal drew up ‘The Master Plan for the Integrated Development of the Left Bank’ (in French: *Programme de développement de la rive gauche du fleuve Sénégal*), the OMVS ‘felt that this plan was an affront to the authority of the OMVS, and did not allow its implementation’.³⁵ Yet, Senegal felt that the plan would ensure a more integrated form of development than that purely focusing on irrigated agriculture and that it ‘would continue to promote irrigated agriculture without jeopardizing other uses of the water such as flood-recessional farming while at the same time promoting an artificial yearly flood’.³⁶ After 40 years, it appears that whenever an OMVS member State attempts to act outside of the ‘community of law’, situations of civil turmoil³⁷ or inter-State tensions arose within the Senegal River basin, particularly between Senegal and Mauritania with respect to the Fossil Valley’s Regeneration Programme.³⁸ This is because unilateral actions in breach of the ‘community of law’ are perceived on the part of OMVS member States to be distorting the very objective of *solidarity* that remains the ultimate end justifying full adherence³⁹ to the legal regime governing the Senegal River basin.⁴⁰

As pointed out by the arbitral tribunal in the *Rhine Chlorides Arbitration*: ‘Solidarity between the border-

owing, *inter alia*, to their character which is conventional and at the same time institutional; the very nature of the organization created, the objectives which have been assigned to it by its founders, the imperatives associated with the effective performance of its functions, *as well as its own practice*, are all elements which may deserve special attention when the time comes to interpret these constituent treaties.’ ICJ 8 July 1996, *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, [1996] ICJ Rep. 226, at paragraph 19 (emphasis in original). See also ICJ 11 June 1998, *Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections*, Judgment, [1998] ICJ Rep. 275, at paragraph 66, where the ICJ refers to the ‘practice’ and the ‘treaty texts’ to interpret the powers of the Lake Chad Basin Commission.

³⁵ See J.T. Newton, n. 17 above.

³⁶ *Ibid.*

³⁷ See <<http://www.senegalaisement.com/senegal/geographie.html>>.

³⁸ The ‘*Vallées fossiles*’ refer to an area of river beds in Senegal that have dried out because of adverse climatic conditions. See the information available on the website of the Israeli Ministry of Foreign Affairs, found at: <<http://www.mfa.gov.il/MFA/Mashav+-+International+Development/Activities/Vallees+Fossiles+-+The+Bas+Ferlo+Valley+Pilot+Irrig.htm>>.

³⁹ Convention on the Status of the Senegal River, 23 above, preamble (emphasis added): ‘Considérant l’accord sans réserve des Etats sur les modalités d’aménagement général du fleuve Sénégal et sur les étapes de régularisation et d’utilisation de ses eaux dans le triple but notamment de développer la production d’énergie, l’irrigation et la navigation.’

⁴⁰ OMVS Convention, n. 26 above, preamble (emphasis added): ‘Décidés à promouvoir et à intensifier la coopération et les échanges économiques et à poursuivre en commun leurs efforts de développement économique par la mise en valeur des ressources du fleuve Sénégal.’

ing States is undoubtedly a factor in their community of interests.⁴¹ In the context of the Senegal River basin, solidarity manifested itself in a unique legal fashion through the conclusion of the 1978 Convention on Common Works.⁴² Never before had riparian States of an African international watercourse agreed through a conventional instrument to subject works on a shared watercourse to a regime of common and indivisible ownership (in French: *propriété commune et indivisible*) – all in the name of solidarity.⁴³ Vick underscores the fact that the 1978 Common Works Convention, because of its reference to ‘equity and equality’,⁴⁴ establishes a ‘legal régime [which] is different from any of the four major theories of watercourse law that are based on state sovereignty, absolute territorial sovereignty (the Harmon Doctrine), absolute territorial integrity, or limited territorial sovereignty or community of interests’.⁴⁵ She even suggests that acceptance by OMVS member States of the need to relinquish their sovereign control and ownership of land, as well as of the river works, to the OMVS ‘is far more than would be expected under the most cooperative theories of basin management or good neighborliness’.⁴⁶ It is worth reiterating that water resources management has been a driving factor for sub-regional integration in that part of West Africa long before monetary and other economic issues.⁴⁷

By the end of the 1970s, a joint legal regime based on a ‘community of law’ and ‘solidarity’ was perfected within the Senegal River basin. All the legal ingredients for sustainable cooperation over water resources management and for the development of the law of watercourses in Africa were ultimately used by Mali, Mauritania and Senegal. The sophisticated character of the legal regime allowed the development and autonomization of a genuine ‘water diplomacy’. As an illustration, when at the beginning of the 1990s Mauritania and Senegal ceased all diplomatic relations because of a conflict over the frontier between the two countries on the Senegal River⁴⁸ and over grazing

rights, the only forum within which the two States were still cooperating was the OMVS. Nevertheless, in light of the ever-changing international context, the ‘essential mutuality of the interests’⁴⁹ of the Senegal River’s riparian States required the adoption of a third generation of legal instruments and policies in order to better accommodate these mutual interests. This became the era of the ‘Water Charter’ (in French: *Charte des Eaux du fleuve Sénégal*).⁵⁰

A NEW PARADIGM FOR THE MANAGEMENT AND REGULATION OF AFRICAN SHARED WATER RESOURCES: FROM THE RIVER TO THE WATER

Treaties are ‘not static and are open to adapt to emerging norms of international law’.⁵¹ Albeit being progressive and pioneering to a certain extent, the 1972 Conventions on the Status of the Senegal River and the OMVS did not include elaborate provisions on the protection of the environment. Furthermore, the codification and development of the international law of watercourses as reflected in the 1997 United Nations Convention on the Law of the Non-navigational Uses of International Watercourses have emphasized the importance of fundamental principles such as equitable and reasonable utilization and participation and the obligation not to cause significant harm. If these fundamental principles were somewhat indirectly referenced in the corpus of rules governing the management of the Senegal River basin,⁵² they did not benefit *mutatis mutandis* from the same legal content as under general international law.⁵³ To remedy this situation, the OMVS

the dispute over the frontier on the Senegal River, see M.M. Mbengue, ‘Le Statut du Fleuve Sénégal: Visages Actuels’, in: L. Boisson de Chazournes and S.M.A. Salman (eds.), *Water Resources and International Law* (Nijhoff, 2005), 473, at 507–508. See also, R. Parker, ‘The Senegal-Mauritania Conflict of 1989: A Fragile Equilibrium’, 29:1 *Journal of Modern African Studies* (1991), 155.

⁴⁹ See *Indus Waters Kishenganga Arbitration*, n. 32 above, at paragraph 121.

⁵⁰ Charter of Water of the Senegal River (28 May 2002) (‘Senegal Water Charter’), found at: <http://iea.uoregon.edu/pages/view_treaty.php?t=2002-SenegalRiverWaterCharter.EN.txt&par=view_treaty_html>.

⁵¹ See *Gabcikovo-Nagymaros*, n. 8 above, at paragraph 112.

⁵² For instance, the obligation not to cause harm is indirectly reflected in Article 4 of the 1972 Convention on the Status of the Senegal River, 23 above. The principle of equitable and reasonable utilization and participation can be considered to be indirectly referenced in its preamble (‘Considering that the joint exploitation of the river implies freedom of navigation and equal treatment for all contracting States in conformity with the provisions of this present convention’) and its Article 2 (‘The contracting States solemnly express their determination to set up a close cooperation which will facilitate the rational exploitation of the resources of the Senegal River’).

⁵³ For instance, albeit the 1972 Convention on the Status of the Senegal River, *ibid.*, refers to ‘equality’ in the use of the Senegal, it

⁴¹ *Rhine Chlorides Arbitration*, n. 22 above, at paragraph 97.

⁴² Convention on the Legal Status of Common Works (Bamako, 21 December 1978) (‘Common Works Convention’).

⁴³ See *ibid.*, preamble (emphasis added): ‘Désireux de renforcer toujours davantage les liens d’amitié, de fraternité et de solidarité qui unissent leurs peuples respectifs par une mise en valeur rationnelle du bassin du fleuve Sénégal.’

⁴⁴ Common Works Convention, n. 42 above, Article 1.

⁴⁵ See M.J. Vick, n. 1 above, at 215.

⁴⁶ *Ibid.*, at 216.

⁴⁷ Common Works Convention, n. 42 above, preamble (emphasis added): ‘Déterminés à poursuivre leur coopération technique et économique au sein de l’Organisation pour la mise en valeur du fleuve Sénégal (OMVS), gage certain de leur commune volonté politique d’intégration sous-régionale.’

⁴⁸ Senegal claims that the border between the two countries is on the right bank of the Senegal River (i.e., on the Mauritanian side of the river), which would imply that Senegal has sovereignty over the entire river. Mauritania, however, claims that the frontier on the Senegal River should be demarcated according to a median line. On

member States, assisted by the World Bank, introduced a new approach – the elaboration of a ‘Water Charter’ – rather than amending the 1972 legal instruments. The 2002 Water Charter of the Senegal River is the first instrument of that type adopted in Africa. It is a treaty under the general law of treaties,⁵⁴ but from the point of view of the ‘community of law’ it rather acts as a kind of ‘constitution’ in the pyramid of legal instruments governing cooperation in the Senegal River basin. Indeed, all the previous instruments (in particular, the 1972 Conventions) have to be implemented and interpreted in accordance with the Water Charter. Its constitutional function further derives from the fact that it enunciates the new spirit in which the management of the resources of the Senegal River must be conducted.⁵⁵

One of the main aspects of the changing dynamics was to ensure that cooperation over the Senegal River would be based on an ‘inclusive framework’ – that is, *all* riparian States must be involved in the development of the river. For that purpose, it was essential that Guinea – as the upstream State – would become an OMVS member State after 30 years of absence. The Water Charter insists on the necessity to consolidate the relations of good neighbourliness between the ‘riparian States’ of the Senegal River and on the need to take into account the interests of the Guinean part of the basin in the elaboration of development policies and programmes within the basin.⁵⁶ For the first time since 1972, the ‘contracting State-based approach’⁵⁷ was thus abandoned in favour of a ‘riparian State-based perspective’.

does not explicitly mention the ‘principle of equitable and reasonable utilization’ and is not that elaborated in relation to the legal criteria that have to be taken into account in order to determine whether the Senegal River is used in an equitable and reasonable manner.

⁵⁴ See Vienna Convention on the Law of Treaties (Vienna, 23 May 1969; in force 27 January 1980), Article 2.

⁵⁵ See M.J. Vick, n. 1 above, at 233–234, who explains: ‘With the assistance of the World Bank, non-governmental organizations, and other financial institutions, the OMVS revised its purpose and objectives under a new Water Charter in 2002. . . . The 2002 Water Charter may be viewed as the modern version of what was in 1976 the most advanced concepts of integrated river basin development . . . it is a modernization of the management principles established in 1963 undertaken in light of the very serious problems experienced in the basin.’

⁵⁶ Senegal Water Charter, n. 50 above, preamble. Guinea became a member of the OMVS in 2006 without becoming a party to the 1972 Convention on the Status of the Senegal River. See World Bank, ‘Guinea’s Membership in the Senegal River Basin Organization Promises More Development and Growth in the Region’, Press Release (May 2006), found at: <http://www4.worldbank.org/afri/results_survey/dsp_success_tabs.cfm?pid=P093826>.

⁵⁷ The 1972 Conventions on the Status of the Senegal River and the OMVS limited themselves to addressing the contracting States to the 1972 Convention on the Status of the Senegal River and not the riparian States of the river. Thus, Guinea was *de facto* excluded from the legal regime and no provision really left a door open for Guinea to subsequently become a party to the 1972 instruments.

The Water Charter truly reflects the values that must guide postmodern water resources management in Africa. It is therefore not surprising that other African river basin organizations have followed in the steps of the OMVS by adopting their own water charters. This is the case for the Niger Basin Authority, which adopted the Niger Basin Water Charter in 2008 (in French: *Charte de l’eau du Bassin du Niger*).⁵⁸ It is also the case for the Lake Chad Basin Commission, which adopted a water charter in 2012.

The Senegal Water Charter is governed by three main themes, related to sustainable development, public participation and universalism. While the first two themes will not be dealt with in the present contribution,⁵⁹ it is important to recall that by including general and specific provisions on environmental protection and the right of users and different stakeholders to participate in the decision-making process relating to the management of the Senegal River,⁶⁰ the Water Charter has thoroughly reflected the ‘contemporary concerns of the community of nations’⁶¹ as expressed since the 1992 United Nations Conference on Environment and Development.⁶²

The theme of universalism is identifiable throughout the Water Charter. Whereas the 1972 legal instruments pertaining to the Senegal River did not make an explicit mention of so-called ‘universal’ or ‘customary’ principles of the international law of watercourses, the Water Charter of the Senegal River makes a clear *renvoi* to those principles and acknowledges the applicability

⁵⁸ Niger Basin Water Charter (Niamey, 30 April 2008), found at: <http://iea.uoregon.edu/pages/view_treaty.php?t=2008-NigerBasinWaterCharter.FR.txt&par=view_treaty_html>.

⁵⁹ For developments on those two themes, see M.J. Vick, n. 1 above, at 234–237.

⁶⁰ See in particular the sustainable development and public participation objectives in the preamble of the Senegal Water Charter, n. 51 above: ‘[T]o provide both a *sustainable* and evolutionary framework to common interests between the riparian States of the Senegal River. . . . Convinced that the Senegal River, an ecosystem essential to the *sustainable development* of the riparian countries, is to be managed by taking into consideration the water cycle as a whole, as well as the sectorial and intersectorial needs. . . . Considering that water resource distribution between uses, its management and its development will have to take into account the objective of *sustainable development* by associating various actors: users, managers, decision-makers, developers and experts concerned, in a global and integrated approach . . . and to promote an optimal and *sustainable use* of the resource, which implies users’ accountability and an affirmed policy on water economy through an integrated and equitable management, for the benefit of present and future generations.. Translation found in: M.J. Vick, n. 1 above, at 226. Another unofficial translation of the Senegal Water Charter can be found at: <<http://www.tematea.org/?q=node/6580>>.

⁶¹ WTO AB 12 October 1998, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, at paragraph 129.

⁶² The Senegal Water Charter, in contrast with the Niger Basin Water Charter, does not explicitly address another ‘contemporary concern of the community of nations’ – that is, the right to water.

within the Senegal River basin of the general principles and customary principles of international water law as codified in the 1997 UN Convention on the Law of the Non-navigational Uses of International Watercourses.⁶³

Such unequivocal language is unique in comparison to other water charters. The Niger Basin Water Charter did not go as far as stating the strict applicability of the customary principles to the relations between Niger Basin Authority member States, and did not even explicitly recognize the codification character of the 1997 Watercourses.⁶⁴ The draft Water Charter for the Lake Chad Basin opts for an intermediary approach that neither goes as far as stressing the applicability of the customary principles of the law of international watercourse nor limits itself to simply 'referring' (in French: '*se référant*') to the 1997 Watercourses Convention. It merely 'notes' the decisive contribution of treaty instruments (among which the 1997 Watercourses Convention) to the codification and progressive development of the law of international watercourses and lakes.⁶⁵

By incorporating universal principles, the Water Charter of the Senegal River confirms the intrinsic and extrinsic interplay that characterizes universal and basin perspectives as well as universal and basin 'codification endeavours'.⁶⁶ Most importantly, it reveals that 'norms established at the universal, regional and basin levels [can] be read together, and a systemic interpretation of international law [can] be promoted'.⁶⁷ That being said, the pattern of universalism that is instilled in the Water Charter of the Senegal River is not only of a normative nature. The OMVS has recently been involved in a series of pragmatic actions that would consolidate the importance of universalist principles in the law of international watercourses. One of those actions has been to launch a process at the level of the four riparian States in order to proceed to a 'basin-wide ratification' of the 1997 Watercourses Convention. That would constitute a unique development in the history of African river basin organizations, and would help facilitate the entry into force of the 1997 UN Convention. Other actions that tend to be more informal in nature but still universalist in their purpose include the participation of the OMVS in universal networks such as the International Network of Basin Organizations (INBO). The INBO is composed, *inter alia*, of river basin organizations and regional networks in Africa,

Latin America, North America, Europe, Asia and Brazil, and is currently led by the High Commissioner of the OMVS. The OMVS is one of the strong supporters of the 'World Pact for Better Basin Management', which through the principles and objectives it embodies reveals the emergence of common principles with respect to the management of transboundary rivers and the administration of river basin organizations.⁶⁸

CONCLUSION

The OMVS, thanks also to the support of 'global forces'⁶⁹ such as international financial institutions and foreign donors, has grown to become an important actor in the governance of international watercourses, not only in Africa but also at the global level.⁷⁰ Such a development and evolution was not necessarily foreseeable. A bit less than 30 years ago, two experienced observers of the OMVS were wondering whether the organization, despite its early achievements, would 'really work',⁷¹ stressing the fact that Mali, Mauritania and Senegal 'will have to do what no other group of states has yet managed to do, and [that] it remains to be seen whether any truly effective international river authority can survive the political, economic and social pressures inherent in river regulation'.⁷² The success story of the OMVS should speak for itself.

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⁶³ Senegal Water Charter, n. 50 above, preamble.

⁶⁴ See Niger Basin Water Charter, n. 58 above, preamble, which merely 'refers' ('*se référant*') to the 1997 Watercourses Convention.

⁶⁵ Water Charter for the Lake Chad Basin, preamble (on file with the author).

⁶⁶ L. Boisson de Chazournes, *Freshwater and International Law: The Interplay between Universal, Regional and Basin Perspectives* (UNESCO, 2009), at 6.

⁶⁷ *Ibid.*, at 9.

⁶⁸ International River Basin Organizations, 'World Pact for Better Basin Management' (2012), found at: <http://www.riob.org/IMG/pdf/World_Pact_better_Basin_managt_Eng_-06_2012.pdf>.

⁶⁹ See, A. Guest, 'Security in the Senegal River Basin', in: C. Thomas and P. Wilkin (eds.), *Globalization, Human Security and the African Experience* (Lynne Rienner, 1999), 101, at 112–113.

⁷⁰ On the importance of regional water governance for the development of international water law, see also R. Moynihan and B.-O. Magsig, 'The Rising Role of Regional Approaches in International Water Law: Lessons from the UNECE Water Regime and Himalayan Asia for Strengthening Transboundary Water Cooperation', 23:1 *Review of European, Comparative and International Environmental Law* (2014).

⁷¹ See T. Parnall and A.E. Utton, n. 1 above, at 251.

⁷² *Ibid.*