

TOWARDS A PEACEFUL SETTLEMENT OF THE DISPUTE OVER THE GRAND ETHIOPIAN RENAISSANCE DAM ON THE BASIS OF THE PRINCIPLES OF THE LAW OF INTERNATIONAL WATERCOURSES

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Abstract: *This paper deals with the dispute between Egypt and Ethiopia over the legality of the construction of the Grand Ethiopian Renaissance Dam on the Blue Nile river and the legal principles of international law of watercourses as applicable to the dam which may be applied to resolve the dispute peacefully.*

Keywords: *Nile Basin, Grand Ethiopian Renaissance Dam, International Dispute, the law of international watercourses*

INTRODUCTION

Transboundary watercourses (internationally shared rivers) contribute to the economic, social and environmental well-being of most of the world's population and natural systems. They link populations both within and between countries and create hydrological and economic interdependencies.¹ The world's 263 international river basins account for nearly 50% of the Earth's surface and generate roughly 60% of global freshwater flow.² About 40% of the world's population lives in transboundary river basins, and more than 90% live in countries with basins that cross international borders.³ Without cooperation between the riparian states of transboundary watercourses and the creation of a legal regime to govern this cooperation, competition for water could ultimately lead to serious conflict.⁴

In this regard, the Nile river creates opportunities for serious conflict over the division of its water resources.⁵ Considering the high population growth, poverty, food insecurity,

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¹ UNITED NATIONS. Transboundary waters. Sharing benefits, sharing responsibilities. In: *UN Thematic Paper 1* [online]. 2008 [2020-04-08]. Available at: <<https://www.unwater.org/publications/transboundary-waters-sharing-benefits-sharing-responsibilities/>>

² See e.g. GIORDANO, M. A., WOLF, A. T. The world's international freshwater agreements. In: *Atlas of International Freshwater Agreements* [online]. 2002 [2021-11-20]. Available at: <<https://transboundarywaters.science.oregonstate.edu/sites/transboundarywaters.science.oregonstate.edu/files/Database/ResearchProjects/AtlasFreshwaterAgreements.pdf>>.

³ See e.g. SADOFF, C., GREY, D. Cooperation on international rivers: A continuum for securing and sharing benefits. *Water International*. 2005, Vol. 30, No. 4, p. 420.

⁴ As the former Secretary-General of the United Nations Kofi Annan stated in February 2002 "Fierce national competition over water resources has prompted fears that water issues contain the seeds of violent conflict. If all the world's peoples work together, a secure and sustainable water future can be ours." WOUTERS, P. International law-facilitating transboundary water cooperation. In: *Global water partnership technical committee (tec) tec background papers 17* [online]. 2013 [2020-08-21]. Available at: <https://www.un.org/waterforlifedecade/transboundary_waters.shtml>.

⁵ ABEBE, D. Egypt, Ethiopia, and the Nile: The economics of international water law. *Chicago Journal of International Law*. 2014, Vol. 15, No. 1, p. 27.

environmental degradation, and water scarcity, the demand for fresh water in Nile Basin riparian states is likely to rise concomitant with a decrease in the future supply.⁶ About three hundred million people live in the Nile Basin, and the population is increasing by a rate of 3% annually; it is projected to reach four hundred million by 2025 and one billion by 2050. In addition to population pressure, some scientists believe that climate change is reducing the amount of water in the Nile Basin,⁷ and these factors are driving the riparian states of the Nile basin to engage in unilateral development projects rather than follow shared water principles, particularly when no prior agreements exist.⁸ Although conflict over the allocation of the waters of the Nile River has existed for many years, disputes, especially between Egypt and Ethiopia, significantly escalated when the latter commenced construction of the Grand Ethiopian Renaissance Dam (GERD) on the Blue Nile in 2011.⁹ This \$4.2 billion project located just upstream of the Ethiopian-Sudan border is aimed at creating one of the world's largest hydroelectric power plants.¹⁰ So far, the project has generated the most intractable challenge yet between the two states.¹¹

This study tackles the development of the dispute over the construction and in-fill of the GERD reservoir, and sheds light on the legal argument between Egypt and Ethiopia over the dam. It also examines the principles of international watercourse law as applicable to settling the dispute. For this purpose, the study is divided into four sections: 1) The development of the dispute between Egypt and Ethiopia over the GERD; 2) water Resources in Egypt and Ethiopia; 3) the legal arguments between Egypt and Ethiopia over the Legality of the GERD; and, 4) principles of the Law on International Watercourses and the Dispute over GERD. The importance of the study lies in the seriousness of the Egyptian-Ethiopian dispute over the GERD and the potential for a regional water war, as many officials and scholars have warned. Such a war could threaten international peace and security not only in the Middle East but also worldwide, notwithstanding the dangerous and unexpected effects that the dam could have on the economic, social and water security of Egypt.

⁶ IBRAHIM, M. A. The Nile Basin Cooperative Framework Agreement: The beginning of the end of Egyptian hydro-political hegemony. *Missouri Environmental Law and Policy Review*. 2011, Vol. 18, No. 2, p. 286.

⁷ HELAL, M. S. Inheriting international rivers: State succession to territorial obligations, South Sudan, and the 1959 Nile Waters Agreement. *Emory International Law Review*. 2013, Vol. 27, No. 2, p. 907.

⁸ GARI, Y., BLOCK, P., ASSEFA, G. MEKONNEN, M., TILAHUN, S. A. Quantifying the United Nations' watercourse convention indicators to inform equitable transboundary river sharing: application to the Nile River Basin. *Water*. 2020, Vol. 12, [2020-04-02]. Available at: <<https://www.mdpi.com/2073-4441/12/9/2499>>.

⁹ MBAKU, J. M. The controversy over the Grand Ethiopian Renaissance Dam. In: *The Brookings Institution, Washington, DC* [online]. 2020 [2020-06-29]. Available at: <<https://www.brookings.edu/blog/africa-in-focus/2020/08/05/the-controversy-over-the-grand-ethiopian-renaissance-dam/>>.

¹⁰ ABEBE, D. Egypt, Ethiopia, and the Nile: The economics of international water law. *Chicago Journal of International Law*. 2014, Vol. 15, No. 1, p. 32.

¹¹ KANDEEL, A. Nile Basin's GERD dispute creates risks for Egypt, Sudan, and beyond. In: *Atlantic Council* [online]. 10. 7. 2020 [2020-03-02]. Available at: <<https://www.atlanticcouncil.org/blogs/menasource/nile-basins-gerd-dispute-creates-risks-for-egypt-sudan-and-beyond/>>.

1. THE DEVELOPMENTS OF THE DISPUTE¹² BETWEEN EGYPT AND ETHIOPIA OVER GERD

Although Ethiopia and Egypt do not share a border, the ecological relation created by the Nile intricately ties the two countries. This relationship has throughout history been characterized by deep distrust, suspicion, misunderstanding and even political and military confrontation.¹³ Aside from its developmental importance to Ethiopia, the GERD has been accorded a highly symbolic meaning by the Ethiopian ruling elite, embodying the reawakening of the Ethiopian nation and representing an essential element in the process of reinventing and redefining Ethiopia's identity. Government officials in Ethiopia have therefore framed the GERD as a symbol of national self-determination.¹⁴ Likewise, the Egyptian government has adopted a similarly nationalist orientation toward the Nile, clinging to historic agreements on Nile waters, including its "historic water rights" as laid out in Article 44 of the Egyptian Constitution adopted in 2014 (as amended).¹⁵ The dispute over GERD escalated between Egypt and Ethiopia when the latter announced that the reservoir would begin to be filled in July, 2020,¹⁶ even without an agreement with downstream countries. This action is contrary to Egypt's mandate that the dam should not be filled without an Environmental and Social Impact Assessment (ESIA), and led Egypt to make a formal complaint to the UN Security Council.¹⁷

In a letter addressed to the President of the UN Security Council dated June 19, 2020, the Permanent Representative of Egypt to the UN cited Article 35 of the UN Charter pertaining to threats to international peace and security.¹⁸ Egypt called on the council to adopt a resolution obliging Ethiopia not to fill the dam until the end of the ongoing negotiations under the auspices of the African Union, obligating the concerned parties to reach a legal agreement over all the disputing matters.¹⁹ The letter outlined how filling the GERD reservoir "would constitute a material breach of the 2015 Agreement on the Declaration of Principles concluded between the three riparian countries of Egypt, Sudan and

¹² About the concept of 'dispute' in international law, ODUNTAN, G. *International law and boundary disputes in Africa*. London: Routledge, 2015, p. 60.

¹³ KINFE, A. *Nile dilemmas: hydro politics and potential conflict flashpoints*. Eiipt Hadad, 2004, p. 69.

¹⁴ MESHEL, T. Swimming against the current: revisiting the principles of international water law in the resolution of fresh water disputes. *Harvard International Law Journal*. 2020, Vol. 61, No. 1, p. 135.

¹⁵ The Article states that "The State commits to protecting the Nile River, maintaining Egypt's historic rights thereto...". HEFNY, M., EL-DIN AMER, S. Egypt and the Nile Basin. *Aquatic Sciences*. 2005, Vol. 67, p. 42.

¹⁶ KANDEEL, A. Nile Basin's GERD dispute creates risks for Egypt, Sudan, and beyond. The GERD reservoir will cover an area of 1,874 km² at the full supply level of 640 m above mean sea level, with total and active storage volumes of 74 and 60 BCM, respectively. The GERD's reservoir can hold 88% of the mean annual flow of the Nile, measured at Egypt's southern border city, Aswan. MBAKU, J. M. The controversy over the Grand Ethiopian Renaissance Dam.

¹⁷ MBAKU, J. M. The controversy over the Grand Ethiopian Renaissance Dam. In: *The Brookings Institution, Washington, DC* [online]. 2020 [2020-06-29]. Available at: <<https://www.brookings.edu/blog/africa-in-focus/2020/08/05/the-controversy-over-the-grand-ethiopian-renaissance-dam/>>.

¹⁸ A letter from Egypt addressed to the President of the UN Security Council on the Grand Ethiopian Renaissance Dam project. UNSC Doc. S/2020/566. In: *United Nations Security Council* [online]. 2. 7. 2020 [2022-01-03]. Available at: <https://www.securitycouncilreport.org/atf/cf/%7B65BF9B9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/S_2020_636.pdf>.

¹⁹ *Ibid.*

Ethiopia.”²⁰ In response, the Permanent Representative of Ethiopia addressed a letter to the Presidency of the UN Security Council on June 22, 2020, stating that “Ethiopia has made it clear from the very beginning that construction of the Grand Ethiopian Renaissance Dam is based on its sovereign and legitimate rights to use the Nile waters and it not causing significant harm to downstream countries.”²¹ However, the UN Security Council refused to become involved and called upon disputing parties to resolve their dispute under the African Union-led process.²²

In July 2020, Ethiopia completed the first phase of filling up the reservoir of the GERD with 4.9 billion cubic meters of water. Another 18.4 billion cubic meters of water were pumped during the second phase last July.²³ Ethiopia says it will take between five to seven years to fill up the dam to its maximum flood season capacity of 74 billion cubic meters.²⁴ This prospect worries downstream countries Egypt and Sudan due to its potential socio-economic and environmental damages.²⁵ According to Egypt, the dam will severely reduce the country’s share of the Nile water, which is almost entirely dependent on it. Sudan has also expressed concerns about the safety of the dam and its impact on water stations and dams. In a statement issued on July 6, 2021, Egypt’s irrigation ministry condemned the move as “a violation of international laws and norms that regulate projects built on the shared basins of international rivers,” and had expressed his government’s “firm rejection of this unilateral measure.”²⁶

2. WATER RESOURCES IN EGYPT AND ETHIOPIA

The Nile Basin has two major tributaries, the Blue and White Niles.²⁷ Ethiopia contributes about 86% of the Nile’s water from the Blue Nile, on which the GERD has been constructed.²⁸ Egypt has always depended on the waters of the Nile, which provides 96%

²⁰ Ibid.

²¹ Letter from the permanent representative of Ethiopia addressed to the President of the UN Security Council. Doc. S/2020/567. In: *United Nations Security Council* [online]. 30. 6. 2020 [2022-02-01]. Available at: <https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/S_2020_567Ethiopia%20letter%20of%2022%20June.pdf>.

²² United Nations Security Council, Grand Ethiopian Renaissance Dam agreement within reach, Under-Secretary-General tells Security Council, as trilateral talks proceed to settle remaining differences. In: *UNSC Press Release* [online]. 2020 [2020-04-16] Available at: <<https://www.un.org/press/en/2020/sc14232.doc.htm>>.

²³ The Ethiopian Irrigation Minister Seleshi Bekele announced on July 19, 2021 that “The second filling of our flagship project, the GERD, has been completed,” he added that “The dam’s two turbines will soon generate electric power” In: *Africa News* [online]. [2021-11-20]. Available at: <<https://www.africanews.com/2021/07/19/ethiopia-completes-second-phase-of-refill-on-controversial-mega-dam-on-the-nile/>>.

²⁴ BBC News: River Nile dam: Reservoir filling up, Ethiopia confirms. In: *BBC News* [online]. 15. 7. 2021 [2021-11-21]. Available at: <<https://www.bbc.com/news/world-africa-53416277>>.

²⁵ SALAM, K. The Blue Nile is dammed. In: *Foreign Policy* [online]. 24. 7. 2020 [2020-02-27]. Available at: <<https://foreignpolicy.com/2020/07/24/the-blue-nile-is-dammed/>>.

²⁶ Ethiopia begins second stage of filling mega-dam, angering Egypt. In: *France 24* [online]. 6. 7. 2021 [2021-11-21]. Available at: <<https://www.france24.com/en/live-news/20210706-ethiopia-begins-second-stage-of-filling-mega-dam-angering-egypt>>.

²⁷ See e.g. CHELKEBA, A. The influence of the UN Watercourses Convention on the development of the Nile River Basin Cooperative Framework Agreement. *Mizan Law Review*. 2018, Vol. 12, No. 1, p. 165, [2020-04-13]. Available at: <<https://www.ajol.info/index.php/mlr/article/view/181175>>.

²⁸ ECKSTEIN, G. Water scarcity, conflict and security in a climate change world: challenges and opportunities for international law and policy. *Wis. Int. L. J.* 2009, Vol. 27, No. 3, p. 409.

of its renewable freshwater; the Nile Valley also hosts 98% of Egypt's population.²⁹ Providing nearly 86% of Egypt's freshwater, the Nile is the major component of the Egyptian agro-economy and is also required for industrial production and sewage treatment.³⁰ Unlike Egypt, Ethiopia is not freshwater poor. River basins extend across 94% of its territory, and internal river systems cover 28% of the country; in contrast, more than 96% of Egypt's territory is desert.³¹ Furthermore, Ethiopia enjoys abundant rainfall averaging about 848 mm/year, but Egypt is widely considered to have the lowest global rainfall at about 18.1 mm/year. Ethiopia depends mainly on direct rainfall and its network of twenty lakes for its rain-fed agriculture, while Egypt mainly depends on irrigated agriculture. This is also reflected in the fact that Ethiopia has the largest livestock population in Africa with over 106 million animals benefiting from grazing land watered by rainfall, compared to Egypt's 19 million livestock.³²

Since the GERD will change the flow pattern of the Blue Nile,³³ Ethiopia will be able to control most of the Nile River freshwater flowing into Egypt and Sudan.³⁴ Filling the GERD reservoir over six years will inevitably decrease the annual Nile flow to Lake Nasser by about 12 billion cubic meters, representing approximately 23% of Egypt's annual share of Nile water. It will also lower the amount of electricity generated from the Aswan High Dam and Aswan Reservoir. Although Egypt is currently suffering shortages of water and electricity, these shortages will increase during and after the filling of the GERD reservoir and consequently worsen the adverse impacts on Egypt, especially during periods of low flood.³⁵

3. THE LEGAL ARGUMENT BETWEEN EGYPT AND ETHIOPIA OVER THE LEGALITY OF THE GERD

Several historical bilateral and trilateral treaties dating from the colonial era address water allocation in the Nile River, and these remain politically relevant to contemporary negotiations between Egypt and Ethiopia over GERD. One of the earliest agreements regarding the Blue Nile is a treaty concluded in 1902 in Addis Ababa between Great Britain and Emperor Menelik of the independent Kingdom of Ethiopia, relative to the frontiers between the then Anglo-Egyptian Sudan, the Kingdom of Ethiopia, and Er-

²⁹ ABEBE, D. *Egypt, Ethiopia, and the Nile: The economics of international water law*. p. 31.

³⁰ *Ibid.*, p. 31.

³¹ KANDEEL, A. *Nile Basin's GERD dispute creates risks for Egypt, Sudan, and beyond*.

³² FARHAT, F. Is Ethiopia's GERD in breach of international law? In: *Al-Arab Weekly* [online]. 10. 7. 2020 [2020-06-22]. Available at: <<https://thearabweekly.com/ethiopias-gerd-breach-international-law>>.

³³ SATTI, S., ZAITCHIK, B., SIDDIQUI, S. The question of Sudan: a hydro-economic optimization model for the Sudanese Blue Nile. *Hydrology and Earth System Sciences*. 2015, Vol. 19, No. 5, pp. 2, 275.

³⁴ KANDEEL, A. *Nile Basin's GERD dispute creates risks for Egypt, Sudan, and beyond*.

³⁵ RAMADAN, S. M., NEGM, A. M., SMANNY, M., HELMY, A. Environmental impacts of the Great Ethiopian Renaissance Dam on Egyptian water resources management and security. In: *Researchgate* [online]. 2013 [2021-11-20]. Available at:

<https://www.researchgate.net/publication/262674871_Environmental_Impacts_Of_Great_Ethiopian_Renaissance_Dam_On_The_Egyptian_Water_Resources_Management_And_Security>.

itrea.³⁶ Article 3 of the agreement stipulates that the Ethiopian King will not “construct, or allow to be constructed, any work across the Blue Nile, Lake Tsana or the Sobat, which would arrest the flow of their waters into the Nile except in agreement with His Britannic Majesty’s Government and the Government of Sudan.” In exchange, Ethiopia received British recognition of Ethiopian independence.³⁷ This agreement is now used by Egypt to urge Ethiopia not to undertake any measures that would reduce the availability of the Nile’s water resources to Egypt, including the GERD.³⁸ In response, Ethiopia has pointed to inconsistencies in the text of the 1902 Treaty, arguing that the Amharic text (if not the English text) does not relinquish the rights to the Nile so explicitly.³⁹ According to the Amharic version, ‘arrest’ has been translated as ‘stop’.⁴⁰ Ethiopia also does not consider itself to be bound by the treaty since it never came into force because Britain did not ratify it, and the Ethiopian government rejected the agreement in the 1950s.⁴¹ Ethiopia additionally claims the right to relieve itself of the duties imposed in the treaty since Britain violated its terms by recognizing the Italian invasion of Ethiopia in 1935.⁴²

Other agreements that Egypt depends on to defend its historical and inherent rights over the Nile river water allocation are the 1929 and 1959 Nile Water Agreements between Egypt and Sudan. The 1929 Nile Waters Agreement was concluded in an exchange of notes between the British High Commission in Cairo and the Egyptian government, on behalf of its colonies in Sudan, Kenya, Uganda and Tanganyika (present-day Tanzania).⁴³ Article 4(ii) states that,

Except with the prior consent of the Egyptian Government, no irrigation works shall be undertaken nor electric generators installed along the Nile and its branches nor on the lakes from which they flow if these lakes are situated in Sudan or in countries under British administration which could jeopardize the interests of Egypt either by reducing

³⁶ The Nile Treaty, 1902. *Treaty between Ethiopia and the United Kingdom, relative to the frontiers between the Anglo-Egyptian Sudan, Ethiopia, and Eritrea*. In: *United Nations Office of Legal Affairs* [online]. [2020-08-22]. Available at: <http://untreaty.un.org/ilc/documentation/english/a_5409.pdf>. See e.g. WOLDETSADIK, T. K. Anglo-Ethiopian Treaty on the Nile and the Tana Dam Concessions: A script in legal history of Ethiopia’s diplomatic confront (1900–1956). *Mizan Law Review*. 2014, Vol. 8, No. 2, p. 271.

³⁷ See e.g. SWAIN, A. Ethiopia, the Sudan and Egypt: The Nile River dispute. *Journal of African Studies*. 1997, Vol. 35, No. 4, p. 675.

³⁸ FARHAT, F. *Is Ethiopia’s GERD in breach of international law?*

³⁹ *Ibid.*

⁴⁰ YIHDEGO, Z. The Blue Nile Dam controversy in the eyes of international law: Part 1, energy transboundary. In: *Global Water Forum* [online]. 18. 6. 2013 [2020-08-22]. Available at: <<https://globalwaterforum.org/2013/06/18/the-blue-nile-dam-controversy-in-the-eyes-of-international-law/>>.

⁴¹ IBRAHIM, M. A. The Nile Basin Cooperative Framework Agreement: The beginning of the end of Egyptian hydro-political hegemony. *Missouri Environmental Law and Policy Review*. 2011, Vol. 18, No. 2, p. 299.

⁴² See e.g. DELLAPENNA, J. W. Treaties as instruments for managing internationally-shared water resources: restricted sovereignty vs. community of property. *Case Western Reserve Journal of International Law*. 1994, Vol. 26, No. 27, p. 27.

⁴³ Exchange of notes between His Majesty’s Government in the United Kingdom and the Egyptian Government in regard to the use of waters of the River Nile for irrigation purposes. In: *International Water Law* [online]. 7. 5. 1929 [2020-08-03]. Available at: <https://www.internationalwaterlaw.org/documents/regionaldocs/Egypt_UK_Nile_Agreement-1929.html>.

the quantity of water flowing into Egypt or appreciably changing the date of its flow or causing its level to drop.

This Agreement allocated much of the bulk of the annual flow of the Nile River (48 billion cubic meters of water) to Egypt and four billion to Sudan, which was largely in favor of Egypt and, to a limited extent, Sudan;⁴⁴ it thus heavily favored the historic rights of Egypt in the waters of the Nile.⁴⁵

After World War II, the control of Nile waters once again became a central issue in regional politics as self-determination and national liberation movements strengthened. The Sudanese government began preparing the case for an increase in its share of Nile waters following the Egyptian revolution in 1952, and revived its plans to build the Jonglei Canal through the swamps dam. This required an increase in allocated use of Nile waters above the amount stipulated in the 1929 agreement.⁴⁶ At the same time, Egypt was planning to build the Aswan High Dam to create a reservoir extending 150km into the Sudan, submerging the old town of Halfa and displacing fifty thousand people.⁴⁷

These factors, *inter alia*, led Egypt and the Sudan to renegotiate the 1929 Agreement by concluding the 1959 Nile Agreement,⁴⁸ which continues to govern water allocation of the Nile river between the two states.⁴⁹ The new agreement incorporated the main provisions of the 1929 Nile Agreement, and the opening paragraphs of its preamble confirm that the new agreement is predicated on the 1929 Nile Waters Agreement. It states that “While the 1959 Agreement effectively replaced allocations set forth in the 1929 Agreement, the agreements together create a comprehensive regime.”⁵⁰ The agreement bestows almost exclusive rights to Egypt and Sudan to exploit the Nile waters, while barring other riparian states from using the Nile waters. According to the agreement, Egypt and Sudan received 55.5 and 18.5 billion cubic meters, respectively, out of the river’s average annual flow of 84 billion cubic meters. During the last six decades, both countries have considered their share of 1959 Nile water agreement as their “non-negotiable entitlement to the Nile waters,” because they depend on its provision to support the inherent historical right to the Nile river.⁵¹

⁴⁴ CHELKEBA, A. The influence of the UN Watercourses Convention on the development of the Nile River Basin Cooperative Framework Agreement. *Mizan Law Review*. 2018, Vol. 12, No. 1, pp. 169–170.

⁴⁵ OKOTH, P. The Nile River question and the riparian states: contextualizing Uganda’s foreign policy interests. *African Sociological Review*. 2007, Vol. 11, No. 1, p. 81.

⁴⁶ *Ibid.*

⁴⁷ The period 1954–1958 was characterized by political conflicts between Egypt and the Sudan over sharing the Nile waters. Sudan achieved independence in 1956 and its first Prime Minister immediately reiterated that the 1929 agreement had to be revised, just when Gamal Abdel Nasser of Egypt was contemplating the creation of a massive new dam at Aswan. *Ibid.* p. 86.

⁴⁸ Agreement between the Republic of the Sudan and the United Arab Republic for the Full Utilization of the Nile Waters, Sudan-United Arab Republic (Nov. 8, 1959). In: *treaties.un.org* [online]. [2020-07-03]. Available at: <<https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280132f7f>>.

⁴⁹ ABEBE, D. Egypt, Ethiopia, and the Nile: The economics of international water law. *Chicago Journal of International Law*. 2014, Vol. 15, No. 1, p. 32.

⁵⁰ HELAL, M. S. Inheriting international rivers: State succession to territorial obligations, South Sudan, and the 1959 Nile Waters Agreement. *Emory International Law Review*. 2013, Vol. 27, No. 2, p. 927.

⁵¹ CHELKEBA, A. The influence of the UN Watercourses Convention on the development of the Nile River Basin Cooperative Framework Agreement. *Mizan Law Review*. 2018, Vol. 12, No. 1, p. 170.

Responding to these actions, Ethiopia and other Nile upper riparian states hold the firm position that the 1959 agreement is ‘unfair’ and invalid,⁵² stressing that the existing legal regime reflects the power politics of colonial rather than modern times.⁵³ They assert that, although the 1959 Agreement claims to be a transaction on the ‘full utilization’ of the Nile, it apportions the whole of the Nile between Egypt and Sudan. Further, as a bilateral treaty concluded between the two lower-most riparian states, it only obligates these two states and cannot bind others.⁵⁴ Upon independence, several East African states consistently refused to be bound by treaties to which they are not party, including the 1959 Nile Agreement.⁵⁵ However, one commentator urged that this agreement granted Egypt the power of veto over future Nile River projects.⁵⁶

Regarding the validity of the early colonial treaties related to the water allocation and utilization of the Nile river, Ethiopia and other upper riparian states have argued that these treaties violate one of the most important peremptory rules of international law,⁵⁷ namely, the rights to self-determination and permanent sovereignty over natural resources.⁵⁸ They also effectively reject these colonial agreements on the basis of the Nyerere Doctrine of Treaty Succession,⁵⁹ which states that “Former colonial countries had no role in the formulation and conclusion of treaties done in the colonial era, and therefore they must not be assumed to automatically succeed to those treaties.”⁶⁰ They also defend the principle of the *tabula rasa* stipulated in Article 16 of the 1978 Vienna Convention on Succession of States in Respect of Treaties, related to states newly independent from colonialism.⁶¹ The ‘clean slate’ principle means that such states should not be bound by treaties from their colonial era, except for treaties that determine borders, to prevent future disputes with neighboring countries.⁶²

⁵² Ibid.

⁵³ IBRAHIM, M. A. The Nile Basin Cooperative Framework Agreement: The beginning of the end of Egyptian hydro-political hegemony. *Missouri Environmental Law and Policy Review*. 2011, Vol. 18, No. 2, p. 296.

⁵⁴ Ibid., p. 296–297.

⁵⁵ WENDL, A. K. International water rights on the White Nile of the New State of South Sudan. *Boston College International & Comparative Law Review*. 2016, Vol. 39, No. 1, p. 1.

⁵⁶ MBAKU, J. M. *The controversy over the Grand Ethiopian Renaissance Dam*.

⁵⁷ Article 53 of the Vienna Convention on the Law of Treaties stipulates that “[a] treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law.” Similarly, Article 64 provides that “[i]f a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.”

⁵⁸ IBRAHIM, M. A. *The Nile Basin Cooperative Framework Agreement: The beginning of the end of Egyptian hydro-political hegemony*. p. 298–299. See generally CASSESE, A. *Self-determination of peoples: a legal reappraisal*. Cambridge: Cambridge University Press, 1995, pp. 133–40.

⁵⁹ The “Nyerere Doctrine of Treaty Succession” was originally asserted by the first President of Tanganyika (Tanzania), Julius Nyerere, in 1961. According to this approach, Tanzania refused to be bound by colonial-era agreements “unless required by international law.” The justification for this approach was that the Agreements could not bind an independent state because “the new states never took part in the negotiations creating the obligations under the treaties.” See KNOBELSDORF, V. The Nile Waters Agreements: imposition and impacts of a transboundary legal system. *Columbia Journal of Transnational Law*. 2006, Vol. 44, No. 2, p. 622.

⁶⁰ IBRAHIM, M. A. *The Nile Basin Cooperative Framework Agreement: The beginning of the end of Egyptian hydro-political hegemony*. p. 298.

⁶¹ WENDL, A. K. *International water rights on the White Nile of the New State of South Sudan*. p. 16.

⁶² The principle was adopted based on the recent experiences of decolonization, mainly in Africa and South America. WENDL, A. K. *International water rights on the White Nile of the New State of South Sudan*. p. 12.

However, Egypt seems to be unreceptive to any of these arguments on the invalidity of colonial treaties.⁶³ It refers to the international law principle of state succession to argue that this treaty is still valid, since the agreements are ‘real’ or ‘territorial’ treaties and may not be rejected by the riparian states, even though it was their colonial masters who signed and benefited from them.⁶⁴ Egypt also considers that the colonial treaties governing the water allocation of the Nile river between the riparian countries of the Nile basin are very similar to the regional treaties related to the demarcation of borders. Indeed, the International Court of Justice ruled in the *Gabčíkovo-Nagymaros Project Case 1997* that water agreements, like border agreements, cannot be amended.⁶⁵

Despite these disputed issues, Egypt, Ethiopia and Sudan signed the Declaration of Principles (DoPs) on the GERD on March 23, 2015, in Khartoum. The ten principles can be grouped into three key areas: substantive, procedural, and technical.⁶⁶ The substantive commitments expressly refer to: the recognition of the GERD as a hydropower project necessary for development, and regional integration and cooperation (Article 2); the duty to prevent significant harm (Article 3); and, the principle of equitable utilization (Article 4). The technical commitments require the parties to cooperate in the filling and operation of the dam (Article 5). This Article is the core provision of the DoPs, and the three countries must “implement the recommendations of the International Panel of Experts (IPE) [and] respect the final outcomes of the 2014 Tripartite National Committee (TNC) Final Report on the joint studies recommended by the IPE Final Report throughout the different stages of the project.” It also stipulates that,

the three countries, in the spirit of cooperation, will utilize the final outcomes of the joint studies, to be conducted as per the recommendations of the IPE Report and agreed upon by the TNC, to:⁶⁷

⁶³ WENDL, A. K. *International water rights on the White Nile of the New State of South Sudan*. p. 3.

⁶⁴ See OKIDI, C. O. Review of treaties on consumptive utilization of waters of Lake Victoria and Nile drainage system. *Natural Resources Journal*. 1982, Vol. 22, No. 1, p. 161. The rejection of real or regional treaties is the most important thing that distinguishes the Nyerere Doctrine from the principle of the ‘clean slate’ or *tabula rasa*, so Tanzania gave all treaties on its territory concluded by the United Kingdom a grace period of two years, during which these would be renegotiated and end what contradicts international law. Egypt believed that this would maintain the Nile Water Agreement of 1929, as it is a specific treaty binding on Tanzania by rule of law. See e.g. SEATON, E., MALITAT, S. *Tanzania treaty practice*. Oxford: Oxford University Press, 1973, p. 90.

⁶⁵ See DÓCZI, Z. Case note: *Gabčíkovo-Nagymaros project case 1997 (ICJ)*. *Legal Studies*. 2014, Vol. 3, No. 1, p. 17 and International Court of Justice: reports of judgements, advisory opinions and orders. Case concerning the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*. Judgement of 25 September, 1997. In: International Court of Justice [online]. 25. 9. 1997 [2021-11-20]. Available at: <<https://www.icj-cij.org/public/files/case-related/92/7375.pdf>>.

⁶⁶ YIHDEGO, Z. International law connotations of US-‘mediated’ Blue Nile dam negotiations and outcomes: background. In: *Global Water Forum* [online]. 16. 4. 2020 [2020-09-22]. Available at: <<https://globalwaterforum.org/2020/04/16/international-law-connotations-of-us-mediated-blue-nile-dam-negotiations-and-outcomes-background/>>.

⁶⁷ HELAL, M. So close, yet so far: an account of the negotiations on the Grand Ethiopian Renaissance Dam (part III). In: *OpinioJuris* [online]. 4. 5. 2020 [2020-06-22]. Available at: <<http://opiniojuris.org/2020/05/04/so-close-yet-so-far-an-account-of-the-negotiations-on-the-grand-ethiopian-renaissance-dam-part-iii/>>. See also KANDEEL, A. Egypt’s sustainable development threatened by Ethiopian dam. In: *Middle East Institute* [online]. 23. 5. 2018 [2020-06-22]. Available at: <<https://www.mei.edu/publications/egypts-sustainable-development-threatened-ethiopian-dam>>.

- a. Agree on guidelines and rules on the first filling of GERD which shall cover all different scenarios, in parallel with the construction of GERD.
- b. Agree on guidelines and rules for the annual operation of GERD, which the owner of the dam may adjust from time to time.
- c. Inform the downstream countries of any unforeseen or urgent circumstances requiring adjustments in the operation of GERD.

The procedural commitments include: principles of cooperation based on international law, good faith, sovereign equality, territorial integrity and mutual benefit (Articles 1 and 9); priority for Egypt and Sudan in the purchase of electricity as a confidence building measure (Article 6); guaranteed information and data exchange between members of the Tripartite National Committee (TNC) (Article 7); and, provisions on dispute settlement (Article 10). The DoPs can be said to be the first of its kind in demonstrating consensus on contemporary principles of international water law among eastern Nile countries.⁶⁸ However, Ethiopia has reneged on the 2015 Declaration of Principles (DoP) and continued to rapidly build and fill the GERD without a required, orderly multilateral legal process.⁶⁹

4. PRINCIPLES OF THE LAW ON INTERNATIONAL WATERCOURSES AND THE DISPUTE OVER GERD

On 21 May, 1997, the General Assembly of the UN adopted the Convention on the Law of the Non-Navigational Uses of International Watercourses (hereinafter 1997 Watercourses Convention), which entered into force on 17 August, 2014.⁷⁰ In its Draft Article, the International Law Commission (ILC) considered an international watercourse as a “shared natural resource.”⁷¹ This convention is the first global water law,⁷² and provides a legal framework for inter-State cooperation on international watercourses.⁷³ It aims to regulate different aspects of water use and management, protect and conserve transboundary watercourses, and “pro-

⁶⁸ YIHDEGO, Z. *International law connotations of US-‘mediated’ Blue Nile dam negotiations and outcomes: background*.

⁶⁹ KANDEEL, A. *Nile Basin’s GERD dispute creates risks for Egypt, Sudan, and beyond*.

⁷⁰ Convention on the Law of the Non-Navigational Uses of International Watercourses. In: *legal.un.org* [online]. 1997. [2020-09-22] Available at: <https://legal.un.org/ilc/texts/instruments/english/conventions/8_3_1997.pdf>.

⁷¹ In a report from the International Law Commission (Thirty-Second Session, UN Doc. A/35/10, 1980, p. 132.), para. 58 states that “In fact, there is substantial direct precedent in treaty law and international practice for treating the waters of international watercourses as a shared natural resource [...] it is an implemented assumption of States that the waters of an international watercourse constitute a shared natural resource.”

⁷² United Nations. *Transboundary water cooperation reader UN water decade programme on advocacy and communication (UNW-DPAC)*. United Nations Office to Support the International Decade for Action ‘Water for Life’. 2005–2015. In: *un.org* [online]. [2021-11-20] Available at: <https://www.un.org/waterforlifedecade/pdf/05_2010_reader_transboundary_waters_eng.pdf>.

⁷³ The convention defines international watercourse in Article 1 as, “a watercourse, parts of which are situated in different states”, including both “surface water and ground waters constituting by virtue of their physical relationship a unitary whole and normally flowing into a common terminus.” In other words, the international watercourses are these surface waters that cross-national boundaries. See the Report of the International Law Commission, (Forty-Ninth Session, UN GAOR, Supp. No. 10, at 199, at Art. 2, UN Doc. A/49/10, 1994).

mote optimal and sustainable utilization thereof for present and future generations.”⁷⁴ As a framework convention, it leaves the details for the riparian states so that they can draw their water agreements in the context of the respective river basins in question and, if possible, harmonize them with the Watercourses Convention.⁷⁵ Although the Nile riparian states participated in the preparation of the convention, they are yet to ratify it.⁷⁶ Despite this, the convention may be considered an instrument that reflects a general consensus as to the principles that are universally applicable in the field, irrespective of the ratification failure.⁷⁷ Even for Egypt and Ethiopia, the convention’s principles are now widely considered an accurate representation of binding customary international law.⁷⁸ The convention enshrines the main principles of customary international law developed through a sequence of claims and counterclaims between two states or a group of states until an agreement is reached.⁷⁹

As such, the use of an international watercourse is a declaration of State sovereignty under customary international law.⁸⁰ However, international watercourses law and international water law limit this sovereignty. The 1997 Watercourses Convention rests on the core principles of “equitable and reasonable” (Article 5) utilization and participation by the riparian states exploiting a watercourse, an obligation not to cause “significant harm” (Article 7) to other states sharing the watercourse, and a general obligation to cooperate (Articles 8–11).⁸¹

Regarding the dispute over GERD, Ethiopia relies upon its sovereign right to utilize the Nile in an “equitable and reasonable” manner, while Egypt affirms its historical and natural rights over the river regarding not causing harm due to the construction of the dam and necessity to respect the principle of the general obligation to cooperate. This includes other sub-principles, the most important of which is “prior notification.”

4.1 The Principle of Equitable and Reasonable Utilization

The principle of equitable and reasonable use as stipulated in Article 5 of the Watercourses Convention is a fundamental principle of contemporary international water law

⁷⁴ See the preamble of the Watercourse Convention, para 4, and United Nations, Transboundary waters. Sharing benefits, sharing responsibilities, p. 5.

⁷⁵ See SALMAN, M. A. Entry into force of the UN Watercourses Convention: Why should it matter? *International Journal of Water Resources Development*. 2015, Vol. 31, No. 1, p. 4.

⁷⁶ *Ibid.*

⁷⁷ MCCAFFREY, S. C. The contribution of the UN Convention on the Law of the Non-Navigational Uses of International Watercourses. *International Journal of Global Environmental Issues*. 2001, Vol. 1, No. 3/4, p. 250.

⁷⁸ FARHAT, F. *Is Ethiopia’s GERD in breach of international law?*

⁷⁹ The 1997 Watercourses Convention incorporated the Helsinki Rules on the Uses of the Waters of International Rivers of 1966. However, these rules lack enforcement power because the ILC is a non-governmental agency. See SERGENT, M. R. Comparison of the Helsinki Rules to the 1994 U.N. Draft Articles: Will the progression of International Watercourse Law be dammed? *Villanova Environmental Law Journal*. 1997, Vol. 8, No. 2, p. 435; and BHATTI, M. N., FAROOQ, M. Development and codification of International Law on Non-Navigational Uses of International Watercourses. *Pakistan Journal of Social Sciences*. 2019, Vol. 39, No. 4, p. 1307.

⁸⁰ SERGENT, M. R. Comparison of the Helsinki Rules to the 1994 U.N. Draft Articles: Will the progression of International Watercourse Law be dammed? p. 438. In: *digitalcommons.law.villanova.edu* [online]. 1997 [2022-01-05]. Available at: <<https://digitalcommons.law.villanova.edu/cgi/viewcontent.cgi?article=1208&context=elj>>.

⁸¹ BHATTI, M. N., FAROOQ, M. *Development and codification of International Law on Non-Navigational Uses of International Watercourses*. p. 1309.

for transboundary water resources, and forms the conceptual backbone of international water law.⁸² This use-oriented principle is a sub-set of the theory of limited territorial sovereignty.⁸³ It requires that a state sharing an international watercourse with other States utilize the watercourse in its territory in a manner that is equitable and reasonable vis-à-vis the other states sharing it.⁸⁴ The phrase “optimal utilization,” contained in the first paragraph of this article, implies that riparian states must work together to achieve the optimal use of the watercourse as if no state boundaries existed.⁸⁵ The principle arose out of the dialectical process of states claiming absolute control over national waters (absolute territorial sovereignty)⁸⁶ and the counter-claim requiring that waters flowing across borders not be altered in terms of quantity or quality, other than what would happen naturally (absolute territorial integrity).^{87, 88} Significantly, it is an amalgamation of the principles of absolute territorial sovereignty and territorial integrity in that it recognizes and evaluates the shared and competing interests of all states embracing the watercourse.⁸⁹ It refers to the principle of limited territorial sovereignty over national waters which limits the rights of the riparian states and obliges them to consider the needs of their neighbors.⁹⁰ Article 6 of the Watercourses Convention on equitable and reasonable use of an international watercourse requires states to consider the following relevant factors and circumstances:

⁸² VICK, M. J. The Law of International Waters: reasonable utilization. *Chicago-Kent Journal of International and Comparative Law*. 2012, Vol. 12, No. 1, p. 141; see also DELLAPENNA, J. W. The customary international law of transboundary fresh waters. *International Journal of Global Environmental*. 2001, Vol. 1, No. 3–4, p. 264.

⁸³ RAHAMAN, M. M. Principles of International Water Law: creating effective transboundary water resources management. *International Journal of Sustainable Society*. 2009, Vol. 1, No. 3, p. 207, and CHIUSLI, L. United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses. In: M. Fitzmaurice – A. Tanzi – A. Papantoniou (eds.). *Multilateral environmental treaties*. Cheltenham: Edward Elgar Publishing, 2017, p. 210.

⁸⁴ ‘Equitable utilization’ has been linked to benefit sharing, while ‘reasonable utilization’ has been interpreted as “indicating a suitable and beneficial use ... applicable to the optimal and the sustainable elements of water utilization.” ‘Equity’ is a body of principles constituting what is fair and right, such principles being “constitutive rules of distribution deduced from the principle of equity granting lawfulness to the exercise of a right.” See DEL CASTILLO-LABORDE, L. Equitable utilization of shared resources. *Max Planck Encyclopedia of Pub. Int’l L*. 2010, Vol. 74 and MCCAFFREY, S. C. Convention on the Law of the Non-Navigational Uses of International Watercourses. In: *United Nations Audiovisual Library of International Law* [online]. 2008 [2021-11-20]. Available at: <<https://legal.un.org/avl/ha/clnuiw/clnuiw.html>>.

⁸⁵ SERGENT, M. R. *Comparison of the Helsinki Rules to the 1994 U.N. Draft Articles: Will the progression of International Watercourse Law be dammed?* p. 457–458.

⁸⁶ The substance of the principle of ‘absolute territorial sovereignty’ is that a State is fully free to use the waters flowing through its territory as it pleases and it need not pay heed to any restriction or prohibition on such use. See UPRETI, T. International Watercourses Law and its application in South Asia. *Pairavi Prakashan*. 2006, p. 103, [2020-04-05]. Available at: <<https://www.internationalwaterlaw.org/bibliography/articles/general/upreti/upreti-inner+content.pdf>>.

⁸⁷ Despite the semantic similarities with the title of the first principle, this is just the opposite of the earlier rule. It pledges the right of a downstream State on the grounds that upstream States cannot diminish, or change the flow of, international watercourses. See UPRETI, T. *International Watercourses Law and its application in South Asia*. Kathmandu: Pairavi Prakashan, 2006, pp. 104–105.

⁸⁸ WENDL, A. K. *International water rights on the White Nile of the New State of South Sudan*. p. 33.

⁸⁹ ECKSTEIN, G. Application of International Water Law to transboundary groundwater resources and the Slovak-Hungarian dispute over Gabčíkovo Nagymaros. *Suffolk Transnational Law Review*. 1995, Vol. 19, p. 67.

⁹⁰ WENDL, A. K. *International water rights on the White Nile of the New State of South Sudan*. p. 33.

- (a) Geographic, hydrographic, hydrological, climatic, ecological and other factors of a natural character;
- (b) The social and economic needs of the watercourse states concerned;
- (c) The population dependent on the watercourse in each watercourse state;
- (d) The effects of the use or uses of the watercourses in one watercourse state on other watercourse states;
- (e) Existing and potential uses of the watercourse;
- (f) Conservation, protection, development and economy of use of the water resources of the watercourse and the costs of measures taken to that effect; and,
- (g) The availability of alternatives, of comparable value, to a particular planned or existing use.

The list is non-exhaustive⁹¹ and it leaves the weighting of these criteria to be decided case-by-case, since it is unclear which criteria are applied for water allocation purposes.⁹² Indeed, it leaves unresolved the level of detail and other mechanisms required to take water allocation to a satisfying or unambiguous conclusion.⁹³ The difficulty of measuring these broad factors in terms of quantity or specific units casts doubts on its applicability and interpretation.⁹⁴

Regarding the GERD dispute, when speaking of the equitable and reasonable use of waters in a watercourse in Article 5, Egypt has a compelling argument that the *status quo* of the Nile river's water allocation (without the GERD) is equitable and reasonable.⁹⁵ Ethiopia, however, argues that it has a sovereign right to exploit its water resources, and claims that building the GERD is equitable and reasonable. In terms of whether the *status quo* is just and acceptable according to international watercourses law, contemporary international law strongly appears to favor the principle of equitable and reasonable use of international rivers, even without a treaty governing the use and utilization of a river.⁹⁶ Indeed, claims of inherent and existing use as a bar to equitable and reasonable use are expressly rejected in the 1997 UN Convention.⁹⁷

⁹¹ MESHEL, T. *Swimming against the current: revisiting the principles of international water law in the resolution of fresh water disputes*. p. 160.

⁹² CHELKEBA, A. *The influence of the UN Watercourses Convention on the development of the Nile River Basin Co-operative Framework Agreement*. p. 179. This approach follows the 1966 ILA Helsinki Rules, which introduced the notion of equitable and reasonable use and a methodology for implementing this rule. ILA Helsinki Rules. In: *internationalwaterlaw.org* [online]. 1966 [2020-04-10]. Available at: <https://www.internationalwaterlaw.org/documents/intldocs/ILA/Helsinki_Rules-original_with_comments.pdf>.

⁹³ CHELKEBA, A. *The influence of the UN Watercourses Convention on the development of the Nile River Basin Co-operative Framework Agreement*. p. 180.

⁹⁴ GARI, Y., BLOCK, P., ASSEFA, G., MEKONNEN, M., TILAHUN, S. A. Quantifying the United Nations' watercourse convention indicators to inform equitable transboundary river sharing: application to the Nile River Basin. *Water MDPI Journal*. 2020, [2022-01-05]. Available at: <<https://www.mdpi.com/2073-4441/12/9/2499>>.

⁹⁵ FARHAT, F. *Is Ethiopia's GERD in breach of international law?*

⁹⁶ YIHDEGO, Z. *The Blue Nile Dam controversy in the eyes of international law: Part 1, energy transboundary*.

⁹⁷ *Ibid.*

Stability, however, is an essential pillar of the peaceful coexistence of all states, and is especially important in those territorial matters which are often at the heart of states' concerns. The 1982 United Convention of the Law of the Sea permits the preservation of the territorial *status quo* and avoids a constant reshaping of boundaries that would likely fuel international conflicts.⁹⁸

In my view, as a presumed principle for the maintenance of the stability and security of international relations, in the case of territorial borders disputes between countries, the *status quo* seems very appropriate to resolving the dispute over the allocation of the Nile waters. International case law and scholars of international law both agree that international disputes over territorial boundaries, and the determination of the water quotas of international rivers between states, are very similar. Thus, any agreement reached between the riparian states of the Nile Basin regarding the allocation of the river's water must take into consideration the preservation of Egypt's historical rights.

4.2 The Obligation Not to Cause Significant Harm

Under the principles of international law, no state has the right to use or permit the use of its territory so as to cause injury in, or onto, 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.⁹⁹ In the Corfu Channel Case, the ICJ stated that as a principle of customary international law that it is “every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.”¹⁰⁰ This principle is also a part of the theory of limited territorial sovereignty.¹⁰¹ Although states have a sovereign right to exploit their water resources, they also have a responsibility to ensure that actions taken within their national boundaries do not cause harm to other states. Because the use of international waters in one state affects the quality and quantity of water in another, the regulation of the use of water is essential to minimize injury to all states sharing a water supply.¹⁰²

In this regard, Article 7 of the 1997 Watercourses Convention imposes an obligation on states to “take all appropriate measures to prevent the causing of significant harm” to the

⁹⁸ BLANCHETTE-SEGUIN, V. Preserving territorial status quo: Grotian Law of Nature, baselines and rising sea level. *New York University Journal of International Law and Politics*. 2017, Vol. 50, p. 227.

⁹⁹ This is reproduced in the context of the Nile Basin in Article 5 of the CFA, which reads: “Nile Basin States shall, in utilizing Nile River System water resources in their territories, take all appropriate measures to prevent the causing of significant harm to other Basin States.” See CHELKEBA, A. *The influence of the UN Watercourses Convention on the development of the Nile River Basin Cooperative Framework Agreement*. pp. 181–182.

¹⁰⁰ Corfu Channel Case (U.K. v. Albania), Judgment, 1949 I.C.J. Rep. 4, 22 (Apr. 9). This principle, as an inherent part of international environmental law, derives from a Roman law principle prohibiting the use of property in a manner that injures someone else's property, called *sic utere tuo ut alienum non laeda*. This principle prohibits States from using their territory to cause harm to another State. See ISLAM, N. *The Law of Non-Navigational Uses of International Watercourses: options for regional regime-building in Asia*. Alphen aan den Rijn: Kluwer Law International, 2010, p. 106.

¹⁰¹ ECKSTEIN, G. Development of international water law and the UN Watercourse Convention. In: A. Turton – R. Henwood (eds.). *Hydro-politics in the developing world: A Southern African perspective*. South Africa, African Water Issues Research Unit, 2002, pp. 81–96.

¹⁰² SERGENT, M. R. *Comparison of the Helsinki Rules to the 1994 U.N. Draft Articles: Will the progression of International Watercourse Law be dammed?* p. 438.

other states sharing an international watercourse.¹⁰³ This principle suggests that upstream riparian states have a sovereign right to develop their water resources, as long as such development does not “significantly harm” downstream riparian states. Articles 5 and 7 of the Convention, read together, appear to encourage states to minimize significant harm from their use of the international watercourse, and to reach equitable and reasonable solutions to watercourse conflicts.¹⁰⁴

In defining what constitutes significant harm, it should be noted that it is not limited to harm directly related to the flow of water or the use of the watercourse. Rather, it includes “harm resulting from activities indirectly affecting a watercourse, and harm that is itself not necessarily connected with the use of the watercourse,” such as deforestation in one country that causes flooding in another, or air pollution in one country that results in the pollution of a river or lake in another.¹⁰⁵ Such “significant harm” may also include harm to “human health or safety, to the use of the waters for beneficial purposes, or to the living organisms of the watercourse systems.”¹⁰⁶ Indeed, harm that is “significant” may have a detrimental impact on human health, industry, property, the environment or agriculture, among others, so long as such effects can be measured factually and objectively.¹⁰⁷ Here, the no significant harm principle is one of due diligence of conduct rather than result. It is an obligation of conduct not result if a state fails to take “all reasonable or necessary measures to prevent” harm; states are thus liable for their conduct, not the result of harm.¹⁰⁸

The International Law Commission’s only attempt to define the obligation of due diligence is to indicate (only in the commentary) that a state violates its obligation of due diligence only if it knew or ought to have known that the particular use of an international watercourse would cause significant harm to other watercourse states.¹⁰⁹ The due diligence standard can thus facilitate the resolution of fresh water disputes since it does not simply impose an “negative duty” to avoid harm, but rather a “positive duty to take concrete steps” to prevent harm, making such harm not only more easily attributable to a par-

¹⁰³ The 1991 UN Draft Articles use the term ‘appreciable harm’ not ‘significant harm.’ The quantitative term ‘appreciable’ “has been deliberately chosen as being less than ‘substantial’ (as in the ILA rules) and more than ‘perceptible.’” The 1994 UN Draft Articles changed the threshold of ‘appreciable harm’ to that of ‘significant harm.’ The significance of this change in phraseology is debated in the scholarly community, and its main focus is the relationship between Articles 5 and 7. See SERGENT, M. R. *Comparison of the Helsinki Rules to the 1994 U.N. Draft Articles: Will the progression of International Watercourse Law be dammed?* pp. 457–458.

¹⁰⁴ CHELKEBA, A. *The influence of the UN Watercourses Convention on the development of the Nile River Basin Cooperative Framework Agreement.* p. 182.

¹⁰⁵ MCCAFFREY, S. C. *The Law of International Watercourses.* Oxford: Oxford International Law Library, 2019, pp. 470–71.

¹⁰⁶ MESHTEL, T. *Swimming against the current: revisiting the principles of international water law in the resolution of fresh water disputes.* p. 164.

¹⁰⁷ *Ibid.*

¹⁰⁸ TANAKA, A. Due diligence obligations and transboundary environmental harm: cybersecurity applications. *Laws (MDIP)*. 2018, Vol. 7, No. 4, p. 1. [2020-08-18]. Available at: <<https://ideas.repec.org/a/gam/jlawss/v7y2018i4p36-d179392.html>>.

¹⁰⁹ International Law Commission. Draft articles on the Law of Non-Navigational Uses of International Watercourses (Draft Articles II). Art. 4, Report of the 46th Meeting of the International Law Commission. 1994. A/49/10 (ILC Report), p. 237.

ticular state but also less likely to occur if diligence is exercised.¹¹⁰ Therefore, states are obligated to act diligently both where there is evidence of actual significant harm, and where there is a risk of such harm; as such, they are required to continuously monitor a project's potentially harmful effects.¹¹¹ Notwithstanding this, most jurists assert that the principle of no significant harm is much more relevant to issues of water quality, such as pollution, rather than those of water quantity, such as allocation and use.¹¹²

At issue, then, is which concept – no significant harm or equitable utilization – should prevail when the two principles come into conflict. If the former prevails, a state could not engage in an activity that significantly harms another state; if the latter, the harm would be just one factor weighed against others in Article 6.¹¹³ In the early days of international water law no significant harm was considered the leading principle, but experts on international water law are almost unanimous on the primacy of the equitable utilization rule in international water law.¹¹⁴ This includes the Special Rapporteur for the International Law Commission, who collectively drafted Articles 5 and 7 of the 1997 Watercourses convention.¹¹⁵ One international law expert examined the outcome of six such disputes¹¹⁶ submitted to arbitration and judicial settlement between 1920–2018.¹¹⁷ He

¹¹⁰ MESHEL, T. *Swimming against the current: revisiting the principles of international water law in the resolution of fresh water disputes*. pp. 164–165. Guidance on the due diligence standard of the no significant harm principle can be found, for instance, in the advisory opinion of the International Tribunal for the Law of the Sea (ITLOS) Seabed Chamber in *Activities in the Area*, in which the Tribunal noted that such standard “may change over time as measures considered sufficiently diligent at a certain moment may become not diligent enough in light, for instance, of new scientific or technological knowledge. It may also change in relation to the risks involved in the activity and be more severe for the riskier activities.” See MESHEL, T. *Swimming against the current: revisiting the principles of international water law in the resolution of fresh water disputes*.

¹¹¹ MESHEL, T. *Swimming against the current: revisiting the principles of international water law in the resolution of fresh water disputes*. See e.g. *Pulp Mills on River Uruguay* (Arg. v. Uru.), Judgment I.C.J. 14 (2010): 205 (Apr. 20).

¹¹² See e.g. *Gabcikovo-Nagymaros Project* (Hungary vs. Slovakia), Judgment, 1997 I.C.J. 7 (Sept. 25). Some commentators consider these two principles as complementary, arguing that significant harm appears as one factor in the determination of the equitable nature of a use. The 1997 Watercourses Convention was not intended to render the no harm rule subservient to the equitable utilization principle, but rather merely stresses that the latter is inherent in the former and vice versa. See e.g. TANZI, A., OKOWA, P. N. review of ARCARI, M. *The United Nations Convention on the Law of International Watercourses. Yearbook of International Environmental Law*. 2001, Vol. 12, No. 1, p. 826.

¹¹³ SERGENT, M. R. *Comparison of the Helsinki Rules to the 1994 U.N. Draft Articles: Will the progression of International Watercourse Law be dammed?* pp. 457–458.

¹¹⁴ Although McCaffrey states that the Fourth Special Rapporteur for International Law Commission intended the ‘no harm’ rule to be primary, with the rule of equitable utilization to be subordinate to the ‘no harm’ rule, he does not seem entirely convinced. He has publicly stated that the ‘no harm’ rule does not comport with State practice and he has argued that there is a “human right to water”, a right that can hardly exist if the over-riding obligation of communities is to defer to pre-existing or downstream uses under the ‘no harm’ rule. See DELLAPENNA, J. W. *The customary international law of transboundary fresh waters*. p. 279.

¹¹⁵ DELLAPENNA, J. W. *The customary international law of transboundary fresh waters*.

¹¹⁶ These disputes are: 1) *Diversion of Water from Meuse* (Netherlands vs. Belgium), Judgment, 1937 P.C.I.J. (ser. A/B) No. 70 (June 28); 2) *Lake Lanoux Arbitration* (France vs. Spain), Tribunal Arbitral, 12 R.I.A.A. 281 (Nov. 16, 1957); 3) *Gabcikovo-Nagymaros Project* (Hungary vs. Slovakia), Judgment, 1997 I.C.J. 7 (Sept. 25); 4) *Pulp Mills on River Uruguay* (Argentina vs. Uruguay), Judgment, 2010 I.C.J. 14 (Apr. 20); 5) *Indus Waters Kishenganga Arbitration* (Pakistan v. India), Final Award and Partial Award, 31 R.I.A.A. 1 (Perm. Ct. Arb. 2013); 6) *Certain Activities Carried out by Nicaragua in Border Area* (Costa Rica vs. Nicaragua) joined with *Construction of Road in Costa Rica Along San Juan River* (Nicaragua vs. Costa Rica), Judgment, 2015 I.C.J. 665 (Dec. 16). See MESHEL, T. *Swimming against the current: revisiting the principles of international water law in the resolution of fresh water disputes*. p. 171.

finds that the disputes in which the no significant harm principle was used were successfully resolved, unlike the disputes using the equitable and reasonable utilization principle. The analysis revealed that where the latter principle was used without the former, namely in the *Danube River* case, the dispute was unsuccessfully resolved. The absence of both principles in the *Meuse River* case also did not lead to a successful resolution. In contrast, in the four disputes with successful resolutions – *Lake Lanoux*, *Indus River*, *San Juan River* and *Uruguay River* – the no significant harm principle was used, either alone (in the first three) or with the equitable and reasonable utilization principle (in the latter).¹¹⁸

With GERD, as so often in disputes between up- and downstream states, it is evident that Ethiopia claims an equitable and reasonable right to build the dam, and that the no harm principle should only operate when a state has exceeded its equitable or reasonable use.¹¹⁹ Egypt, however, maintains the right to be free of the significant harm that would be caused to it by filling the dam,¹²⁰ and believes that no country has the right to interrupt the flow of the Nile through its territory, as any measure that changes the flow's *status quo* is likely to cause significant harm.¹²¹

Alongside the two principles discussed here, it is possible to say that Ethiopia has an obligation, as a riparian state of an international watercourse, to cooperate and exchange data and information regarding the condition of the watercourse, as well as present and future planned uses along the watercourse, as stated in Articles 8–9 of the Watercourses Convention.¹²² “Prior notice” must also be given by a riparian if its proposed use of a shared watercourse may cause serious harm to the rights or interests of another riparian sharing the same watercourse, as stated in Articles 11–18 of the convention. Indeed, the planning state is required to give notice if the planned measures are predicted to have a “significant adverse effect” upon the other watercourse states concerned.¹²³ The obligation to provide prior notification is an autonomous requirement of customary and conventional international law and is equally central to the effective implementation of both the principle of equitable and reasonable utilization and the duty to prevent significant transboundary harm.¹²⁴

¹¹⁷ MESHEL, T. *Swimming against the current: revisiting the principles of international water law in the resolution of fresh water disputes*. p. 172.

¹¹⁸ *Ibid.*

¹¹⁹ CARROLL, C. M. Past and future legal framework of the Nile River Basin. *Georgetown International Environmental Law Review*. 1999, Vol. 12, No. 269, p. 284.

¹²⁰ MESHEL, T. *Swimming against the current: revisiting the principles of international water law in the resolution of fresh water disputes*. p. 141.

¹²¹ *Ibid.*

¹²² RAHAMAN, M. M. *Principles of International Water Law: creating effective transboundary water resources management*. p. 212. See also CHIUSI, L. *United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses*. p. 253.

¹²³ See LEMA, A. E. The United Nations Watercourses Convention from the Ethiopian context: Better to join or stay out? *Haramaya Law Review*. 2015, Vol. 4, No. 1, p. 1.

¹²⁴ RAHAMAN, M. M. *Principles of International Water Law: creating effective transboundary water resources management*. In this regard it is interesting to note that the obligation to provide prior notification of such changes was accepted as a part of the Convention by most delegations. However, the principle was opposed by only three upstream riparian countries: Ethiopia (Nile Basin), Rwanda (Nile Basin) and Turkey (Tigris–Euphrates Basin).

Article 3 of the International Law Association's Complementary Rules as applicable to international resources (adopted at the 62nd conference in Seoul, 1986) states that, "when a basin State proposes to undertake, or to permit the undertaking of, a project that may substantially affect the interests of any co-basin State, it shall give such State or States notice of the project. The notice shall include information, data and specifications adequate for assessment of the effects of the project."¹²⁵ Accordingly, Ethiopia has been developing the GERD without engaging downstream countries in material issues that affect them or allowing them a full and independent evaluation of the GERD through Environmental and Social Impact Assessments (ESIAs). Required by law, ESIA's apply international environmental law and customary development law, and are most useful before a country develops any project that necessitates an ESIA.¹²⁶ Indeed, they are critical to the avoidance or mitigation of any significant foreseen harm and without them harm cannot be fully understood, prepared for, or mitigated.¹²⁷

The primacy of the no-harm principle can be relied upon by Egypt in order to oblige Ethiopia to reach an agreement relating to economic, social and environmental harm, if it is conclusively proven by ESIA's that the significant harm to which Egypt could be exposed is the result of the GERD. Generally, states have a duty to cooperate over the utilization and management of shared watercourses, but the legal implications of this duty remain somewhat ambiguous and it is an abstract rule which should be made clearer.¹²⁸

CONCLUSION

This paper focused on the dispute between Egypt and Ethiopia over the legality of the construction of the Grand Ethiopian Renaissance Dam on the Blue Nile river and the legal principles of international law as applicable to the dam that could contribute to resolving the dispute peacefully.

Ethiopia and downstream nations Egypt and Sudan have been embroiled in a long-running diplomatic standoff over GERD. The conflict accelerated after Ethiopia began construction on the Blue Nile Renaissance Dam in 2011. Located just upstream of Ethiopia's border with Sudan, the project will be one of the world's biggest hydroelectric power plants. Ethiopia began filling the dam's reservoir in July 2020 and completed the second Phase in July 2021, despite the absence of a formal agreement with Egypt and Sudan. Ethiopia plans to finish filling the GERD reservoir in the next four years.

Historic trilateral and bilateral treaties concerning the Nile date from the colonial era and are still relevant to current GERD negotiations between Egypt and Ethiopia. Ethiopia on the other hand does not consider itself bound by these treaties and claims to be free from the obligations they impose, considering them 'invalid' and 'unfair' since they represent the

¹²⁵ RAHAMAN, M. M. *Principles of International Water Law: creating effective transboundary water resources management*; see also CHIUSI, L. *United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses*. p. 212.

¹²⁶ KANDEEL, A. *Nile Basin's GERD dispute creates risks for Egypt, Sudan, and beyond*.

¹²⁷ *Ibid.*

¹²⁸ MCCAFFREY, S. C. *The Law of International Watercourses*. p. 470.

power politics of colonial times rather than of today. Also, it advocates a “clean slate” principle in the sense that states should not be bound by treaties from their colonial era.

Egypt appears unreceptive to these arguments regarding the validity of colonial treaties. It believes that the colonial treaties governing the water allocation of the Nile river among riparian countries in the Nile basin are very similar to the regional agreements related to the demarcation of borders. Accordingly, the International Court of Justice ruled in the *Gabčikovo-Nagymaros Project Case 1997* that water agreements, like border agreements, cannot be amended.

Additionally, Egypt, Ethiopia, and Sudan signed the Declaration of Principles (DoPs) on the GERD on March 23, 2015, in Khartoum. As the first of its kind, the DoPs demonstrate consensus among eastern Nile countries on contemporary principles of the law of international watercourses. Even so, Ethiopia has continued to rapidly expand and fill the GERD without committing to DoPs.

As the first global water law, the 1997 Convention on the Law of the Non-Navigational Uses of International Watercourses provides a legal framework for interstate cooperation regarding international watercourses. Its objectives include regulating water use and management, protecting transboundary watercourses, and promoting their optimal and sustainable use. The disputed states are not parties to the convention, but its principles are now widely regarded as binding customary international law. The core principles of the convention include equitable use, avoidance of significant harm to riparian states, information exchange, prior notification, and peaceful settlement of disputes.

Continuing to fill the dam’s reservoir would cause significant damage to Egypt and Sudan. To prevent such damage, the two countries have urged Ethiopia to sign an international agreement based on international watercourses law, but no agreement has yet been reached after many years of negotiations.

Ethiopia and other upper riparian Nile Basin states should consider Egypt’s total dependence on the waters of the Nile and its importance to the latter’s national security. Egypt does not deny the importance of the GERD for the development of Ethiopia and does not totally oppose its construction, but its great concern is the social, economic, environmental and security impacts of filling the dam’s reservoir and the damage that could result thereupon. A mutual understanding would help the riparian states of the Nile to develop a water management system that can significantly enhance equitable and reasonable use while minimizing significant harm, recognizing the Nile as a “shared natural resource” and seeking to ensure beneficial rights for all riparian states as a shared community. The principles of the law of international watercourses provide a good path for the states in dispute over the GERD to establish a framework of cooperation to settle the dispute and promote sustainable development, away from endless legal argument over its applicability and enforceability. Egypt and Sudan, as well as Ethiopia, have no choice but to agree how and when the dam’s reservoir is filled, and to assess the harm that could arise. A peaceful settlement to the dispute must always be the preferred option.