



Seek Wisdom, Elevate your Intellect and Serve Humanity



ADDIS ABABA UNIVERSITY
COLLEGE OF LAW AND GOVERNANCE STUDIES
SCHOOL OF LAW GRADUATE PROGRAM

Masters of Laws (LL, M) in Public International Law

**NEGOTIATIONS ON THE GERD: EXAMINATION OF THE 2015 AGREEMENT ON
THE DECLARATION OF PRINCIPLES AND BEYOND**

*A thesis submitted in partial fulfillment of the requirements for the Award of Master of Laws
(LL, M) in Public International Law at School of Law, College of Law and Governance Studies,
Addis Ababa University*

By

Jana Ayana

**Supervisor: Dr. Wondemagegn T. Goshu (Dr.Jur), (Assistant Professor, AAU School of law
and Governance Studies), (Head, Center for Human Rights, AAU)**

June, 2021

Addis Ababa, Ethiopia

Negotiation on the GERD: Examination of the 2015 Agreement on the Declaration of Principles and Beyond

A thesis submitted in partial fulfillment of the requirements for the Award of Master of Laws (LL, M) in Public International Law at School of Law, College of Law and Governance Studies, Addis Ababa University

By:

Jana Ayana

Supervisor: Dr. Wondemagegn Tadesse (PhD, Assistant Professors)

June,2021

DECLARATION

I, JANA AYANA Hereby declare that the thesis entitles as; ‘Negotiation on the GERD: Examination of the 2015 Agreement on Declaration of Principles and beyond’ is my original work and that it has not been submitted to any degree or examination in any other university. Whenever other sources are used or quoted, they have been duly acknowledged.

Jana Ayana

Signature.....

Date.....

Supervisor: Dr. Wondemagegn Tadesse (PhD, Assistant Professor)

Signature.....

Date.....

DEDICATED TO:

1. Hebron Jana, my lovely daughter.
2. Poor Ethiopians, who are in need of eradication of a poverty they are in.
3. Innocent Ethiopian Mothers and Children, who are inhumanely killed here and there by cruel criminal bands!

AKNOWLEDGMENT

Above all, let my gratefulness goes to the Omnipotent GOD, who helped me finalize this thesis. With GOD, I managed to finalize this work in a situation of careful covid time and non-conducive environment.

Then, my courteous gratitude extends to my Supervisor, Dr. Wondemagegn Tadesse, for his genuine, responsible and careful supervision. Without his insight, courage and steadfast follow-ups, my thesis would have not been shaped and completed. Dr., having you as a Supervisor is just more than a privilege and is a miracle. Again, I am very thankful of Dejene Yemane (Doctorial student of public international law) at Addis Ababa University, who enormously and wisely devoted his precious time to shape the title of my study.

More so, my deepest gratitude goes to my family and close friends who have contributed relentless efforts (both moral and material) for the accomplishment of my thesis. Buze (my life and lovely wife), Sintayehu Kebede (my close friend, wise and concerned man), Abebe Zeleke (my humble friend and lecturer) and Asrat Bayabel (best friend of my life and great lawyer), I owe you all.

Lastly, I extend my recognition to Assosa University for sponsoring my study.

ACRONYMS

AU	African Union
BCM	Billon Cubic Meters
CFA	Cooperative Framework Agreement
DoPs	Declaration of Principles
EIA	Environmental Impact Assessment
EU	European Union
GERD	Grand Ethiopian Renaissance Dam
GERDP	Grand Ethiopian Renaissance Dam Project
ICJ	International Court of Justice
ILA	International law Associations
ILC	International law Commission
IIL	Institute of International law
IPOE	International Panel of Experts
NBI	Nile Basin Initiatives
NISRG	National Independent Scientific Research Groups
PCIJ	Permanent Court of International Justice
TNC	Technical National Committee
UN	United Nations
UNECE	United Nations Economic Commission for Europe
UNFC	United Nations Framework Convention
UN ILC	United Nations international law commission
UNWC	United Nations Watercourses Convention
USA	United States of America
WB	World Bank

TABLE OF CONTENTS

DECLARATION.....	II
AKNOWLEDGMENT.....	IV
ACRONYM.....	V
TABLE OF CONTENTS.....	VI
Abstract.....	1
CHAPTER ONE.....	2
1. Introduction.....	2
1.1. Background.....	2
1.2. Statement of the Problem.....	3
1.3. Research Questions.....	5
1.4. Methodology.....	5
1.5. Design and Out line.....	8
1.6. Research Objectives.....	9
1.7. Scope of the Study.....	9
1.8. Significance of the Study.....	10
1.9. Limitations of the Study.....	10
CHAPTER TWO.....	10
2. THEORETICAL AND LEGAL FRAMEWORKS OF INTERNATIONAL WATER LAW.....	10
2.1. Theories and Doctrines of International Water Laws.....	10
2.1.1. The Harmon Doctrine.....	11
2.1.2. The Theory of Absolute Territorial Integrity.....	11
2.1.3. The Theory of Limited territorial sovereignty.....	12
2.1.4. The Theory of common Management.....	13
2.2. Sources of International Water Law.....	13
2.2.1. Customary International Water Law.....	13
2.2.2. The UN Framework Convention.....	14
2.2.3. The Helsinki Rules.....	15
2.2.4. The Berlin Rules.....	16
2.3. The Nile Basin Agreements.....	17
2.3.1. The Anglo-Egyptian Nile Water Agreement (1929).....	17
2.3.2. The Bilateral Treaty among Egypt and Sudan (1959).....	18

2.3.3.	The Cooperative Framework Agreement (CFA)	18
2.3.4.	The Declaration of Principles on the GERD.....	19
CHAPTER THREE	20
3.	FUNDAMENTAL PRINCIPLES AND OBLIGATIONS	20
3.1.	The Principle of Equitable and Reasonable Utilization.....	21
3.1.1.	The Conceptual Background.....	22
3.1.2.	The Normative Content.....	22
3.1.3.	Factors Relevant to Determine the Principle	23
3.1.4.	Application of the Principle	24
3.2.	The Principle of Prevention of Significant Transboundary Harm	25
3.2.1.	The Meaning of Significant Harm	25
3.2.2.	The Guiding Principle.....	26
3.2.3.	All appropriate Measures	26
3.2.4.	Application of the Principle	27
3.3.	The General Duty of Cooperation.....	28
3.3.1.	Cooperation based on sovereign equality and territorial integrity.....	29
3.3.2.	Cooperation based on Mutual benefit and Good faith.....	30
3.4.	The principle of peaceful settlement of International water dispute.....	30
3.4.1.	Optional Mechanisms of Dispute Settlement	31
3.4.2.	Compulsory Mechanism of Dispute Settlement	31
CHAPTER FOUR	32
4.	EXAMINATION OF THE DECLARATION OF PRINCIPLES ON THE GERD UNDER INTERNATIONAL WATER LAWS.....	32
4.1.	Gaps in International water law as to Interpretation and application: Overview	34
4.1.1.	The gaps under International water law	34
4.1.2.	The Interpretation and Application of the Principles.....	35
4.2.	Examination of Equitable and Reasonable Utilization Principle on the GERD	36
4.2.1.	Analysis of Factors Relevant to Determine the Principle	38
4.2.2.	A look at the factors in the Declaration of principles on the GERD	40
4.3.	Scrutiny of the Principle of Not causing Significant Harm on the GERD	41
4.3.1.	The Report of International Panel of Experts on the GERD	43
4.3.2.	The Threshold of Contested Harm on the GERD.....	44
4.3.3.	The Interpretation and Application of the Principle on the GERD	45

4.4.	Cooperation under the Declaration of Principles.....	46
4.4.1.	Formation of the IPOE and Joint Commission.....	46
4.4.2.	Tripartite National Committees	47
4.4.3.	Agreement to form Joint Research Group	48
4.5.	Assessment of GERD negotiation	48
4.5.1.	The Principle of Schedule of Filling and Annual operation of the Dam	49
4.5.2.	The Normative status of the Declaration of Principles on the GERD	50
4.6.	Dispute Settlement Efforts under the GERD.....	51
4.6.1.	The Mediation efforts on the GERD.....	51
4.6.2.	The mediation role by the AU and the Effects	53
CHAPTER FIVE		54
5.	CONCLUSIONS AND RECOMMENDATIONS	54
5.1.	Conclusion	54
5.2.	Recommendation	58
BIBILOGRAPGY.....		58

Abstract

International water law governing international watercourses evolved from various theoretical foundations and doctrines. These doctrines cemented the codifications of the fundamental principles of international water treaties, rules and customary international water law. Accordingly, the principle of “equitable and reasonable utilization”, the principle of “not causing significant harm” and the duty of cooperation becomes the core substantive principles governing the right and obligation of states sharing international watercourses. This research is devoted in the examination of the declaration of principles on the GERD in the law of international watercourses. The work makes assessments of the declaration of principles on the GERD agreed among Egypt, Ethiopia and Sudan in 2015 under the UN watercourses convention, the Helsinki Rules on international watercourses and Berlin Rules on water resources. Along this, since the Nile water agreements are the common legal contestations among the upper and lower basin states, this work looked in to it. Moreover, because the principle of “equitable and reasonable utilization”, the principle of “not causing significant harm”, the principle of cooperation and principle of settlement of international water dispute are the pillars of international water rules, this work tried to clarify their conceptual frameworks, interpretive approaches and practical applications. Then, examination of the declaration of principles in the substantive principles of international water law is very crucial to dictate the right and obligation of Egypt, Ethiopia and the Sudan. To this end, this work torches some light on the interpretive approaches implied in international water laws to the declaration of principles on the GERD. On top of this, the research examines the threshold of the harm inflicted by GERD which is contented by Egypt and the Sudan based on the report of the International Panel of Experts. Accordingly, this research confirmed that Ethiopian cooperative efforts in initiating and forming “harm assessing bodies” such as international panel of experts, tripartite national committees and National Independent Scientific Research Groups clearly implies the fact that Ethiopia achieved its due diligence obligation imposed on it under the principle of preventing transboundary significant harm. The cooperation also shows Ethiopian adherence to use waters of the Blue Nile, including construction of the GERD, in accordance with the principle of equitable and reasonable utilization.

CHAPTER ONE

1. Introduction

1.1. Background

There are two major categories of disputes on the Nile River. The first relates to the Cooperative Framework Agreement (CFA) and its provision dealing with water apportionment. The second is about the GERD and its impact on water volume, water quality and dam safety.¹ The Grand Ethiopian Renaissance Dam (GERD) is a giant Ethiopian national project² and is under construction in Benshangul-Gumuz for the purpose of power generation,³ to contribute to economic development, promotion of transboundary cooperation and regional integration through generation of sustainable and reliable clean energy supply.⁴ However, Egypt immediately opposed the construction of the GERD⁵ and this opposition emanated from the claim based on the principle of acquired right doctrine and contention of transboundary significant harm. Related to this, Egypt contested that GERD decreases water flow to her irrigated area and as a result a decrease in electricity at High Aswan Dam.

Sudan initially stood between support and opposition up on the GERD throughout the Negotiations.⁶ Beyond all these; the dispute over the GERD is pinned to the stand of Egypt pertaining to previous Nile treaties which empowered Egypt over the Nile water usage. The main bone of contention on the CFA and GERD negotiations is that Egypt wants to bind the upstream riparian states to agreements that were concluded without their full and effective participation and which did not take the interests of upstream riparian states into account.⁷ Besides, Ethiopia insisted and called for an equitable and cooperative allocation of the Nile water usage based on a basin-wide treaty in accordance with the Cooperative Frame work Agreement. However, Egypt

¹ Mehari Taddele Maru, the Nile Rivalry and Its Peace and Security Implications: What Can the African Union Do? (Vol. 1 : Issue 1, institute for peace and security studies, June 2020)p-4

² Rawia Tawfik, Revisiting hydro-hegemony from a benefits haring perspective: the case of the Grand Ethiopian Renaissance Dam(2015)p-21

³ Ethiopian Economic Association Report (2007/2008), Paragraph-222

⁴ The Declaration of Principles(2015), Article II

⁵ Ejigu, Natan Aslake, Construction of Grand Ethiopian Renaissance Dam on the Nile: Cause for Cooperation or Conflict among Egypt, Ethiopia and Sudan(2016)p-53

⁶ Goitom Gebreluel, "Ethiopia's Grand Renaissance Dam: Ending Africa's Oldest Geopolitical Rivalry?" *The Washington Quarterly*, no 2 (2014), p-25

⁷ Mwangi S. Kimenyi, Turbulence in the Nile: Toward a Consensual and Sustainable Allocation of the Nile River Waters(2010)p-2

and Sudan rejected⁸ the deal under the Cooperative Framework Agreement (CFA) for it did not recognize their “historic rights” which is against upstream projects including the GERD. Again, the Declaration of Principles (DoPs)⁹ which enumerated the principle of equitable allocation, reasonable utilization and cooperative usage¹⁰ of the Nile water is negotiated with the basin states but brought no stable solutions. Hence, though under negotiation, the GERD constitutes a significant historical, hegemonial and legal controversies and unsettled legal claims among Egypt, Ethiopia and Sudan.¹¹ Though potential agreement reached on the declaration's principles under the auspices of international water law, lack of a wider and universally negotiated binding legal Agreement among the Nile basin states caused the negotiation stalemates.¹²

1.2. Statement of the Problem

The controversial legal dispute among Egypt, Ethiopia and Sudan on the Nile water use and share accounts a long time and emanates from the fractured Nile river legal regimes. The CFA and the GERD legal problems and issues contested therein also emanate from the Nile basin agreements and elusive legal frameworks of the basin. The lower Nile basin states (Egypt and Sudan) did not want to relinquish an established status of their hydro-hegemony, and Ethiopia persisted to oppose alleging its sovereign right to exploit natural resources of the Nile water including construction of the GERD. Egypt claims “historic rights” and water security basing its argument on colonial Agreements. But Ethiopia, which does not consider itself bound by these instruments, claims its sovereign right to exploit natural resources of the Blue Nile for the benefit of its socio-economic development. The distribution of the Nile waters has, for a long time, been governed by ancient agreements involved only Egypt and Sudan, to the exclusion of Ethiopia and other riparian countries. To make things worse, the declaration of principles agreed among Egypt, Ethiopia and Sudan also signed without clarification of the provisions dealing with the relationship among the principle of “equitable and reasonable utilization” and the principle of

⁸ Hanne Knaepen and Bruce Byiers, Understanding the Nile Basin Initiative, Balancing historical rights, national needs and regional interests (March 2017) see <http://www.sudantribune.com/spip.php?article54073>; <http://news.bbc.co.uk/2/hi/africa/8682387.stm>. accessed on October 11 2020, at 10:30

⁹ Agreement on Declaration of Principles between The Arab Republic of Egypt, The Federal Democratic Republic of Ethiopia And The Republic of the Sudan On The Grand Ethiopian Renaissance Dam Project (GERD)(23rd March 2015,Khartoum, Sudan), Principle- IV

¹⁰ Convention on the Law of the Non-navigational Uses of International Watercourses(1997), Adopted by the General Assembly of the United Nations on 21 May 1997), Article 6(3)

¹¹ Dereje Zeleke Mekonnen, Declaration of Principles on the Grand Ethiopian Renaissance Dam: Some Issues of Concern (Mizan law review, Vol. 11, No.2 December 2017)p-258

¹² Agreement on the Nile River Basin Cooperative Framework(2010),Article 41 needs ratification or accession of all the Nile Basin Co-riparians, but Egypt and Sudan failed to ratify this agreement and it could not come in to effect

preventing “significant transboundary harm” on which the parties bases their claims. These paradoxical dynamics creates legal controversy which seeks interpretation and application of those aforementioned principles pursuant to international watercourses treaties and customary international water laws. Verifying legally imposed right and obligation of the parties to the declaration of principles seeks seeing at the normative legal frameworks and examination of the Agreement on the Declaration of Principles on the GERD in accordance with the approaches, interpretation and application of international water laws pertinent to the principle of equitable and reasonable utilization and the principle of preventing significant harm.

Since the start of the GERD construction, direct talks have been held between Egypt, Sudan and Ethiopia and mediation efforts have been sought from various institutions and countries to defuse the tension created by GERD. Here, concerning rules on the First Filling and annual operation of the GERD, parties did not arrived at conclusive agreement and Ethiopia denounce, as the owner of the GERD, it will commence first filling of the GERD in parallel with the construction of the Dam in accordance with the principles of equitable and reasonable utilization without causing significant harm to Egypt and Sudan, as provided for under the Agreement on the Declaration of Principles¹³ and principles of international water law. Although the three countries have embarked on a negotiation process in order to avoid an escalation that could lead to further co-riparian’s crisis, they could not still reach at normatively conclusive solutions.¹⁴ On the point of dispute settlement, Ethiopia refuses to tie its hands through a pre-established mechanism and prefers an ad hoc mechanism negotiated on a case-by-case basis favoring regional mediation organs (the AU). Therefore, this research seeks to resolve the controversy in the negotiation of the GERD pertaining to the interpretation and application of the principle of equitable and reasonable utilization adhered to by Ethiopia without causing significant harm to Egypt and Sudan. Therefore, in order to address the problem, examination of the Declaration of Principles on the GERD under international water laws is very crucial.

¹³ Griff Witte, “Egypt Sees Ethiopian Dam as Risk to Water Supply,” *Washington Post*, June 18, 2013, <http://www.theguardian.com/world/2013/jun/18/egypt-ethiopia-dam-blue-nile>

¹⁴ Egypt, Ethiopia and Talk on Filling, GERD Reservoir with Water,” ECADF Ethiopian News (blog), August 3, 2019, <https://ecadforum.com/2019/08/03/egypt-ethiopia-talk-on-filling-gerd-reservoir-with-water>

1.3. Research Questions

The core question pertaining to this thesis is the inquiry that seeks examination of the 2015 Agreement on the Declaration of Principles on the GERD under international water laws and practices. How the Nile waters agreements and the Declaration of Principles on the GERD should be scrutinized under international water laws? So, the thesis will answer the following questions.

1. What are the legal claims by Egypt and Sudan on the GERD? And how can the legal claims be interpreted and applied under international water laws?
2. How could the principles of “equitable and reasonable utilization” be interpreted and reconciled with the principle of “not causing significant harm” under international water laws and practice?
3. How could the principle of ‘not causing significant harm’ and ‘reasonable and equitable utilization’ be interpreted and applied under the Declaration of Principles on the GERD in accordance with international transboundary water legal principles?
4. What are relevant factors that help to determine the principle of reasonable and equitable use?
5. What efforts are made by Ethiopia in order to prevent harm to Egypt and Sudan?
6. How can the dispute settlements and mediation efforts made under the GERD be assessed under the DoPs and international water laws?

1.4. Methodology

Researching international law is not an easy task particularly when the area of application and legal issues contested are interwoven to socio-economic and political interests of the disputant states. There is no generally accepted definition of the methodology of international law.¹⁵ A huge scholarly debate did not rest on a particular methodology and technique to be employed on a particular international issue.¹⁶ Besides, the application and interpretations of the principles provided under the DoPs require searching primary and secondary international water law sources to address issues in the GERD dispute. This is because methodology within the context

¹⁵ Christian Dominice, Methodology of international law (1997), <http://graduate.institute-publications.html>, accessed on Sunday, January 10, 2021, 4:15:17 PM

¹⁶ Kelly Vinopal, Researching Public International Law (American societies of international law, (2013) p-5

of international water law is defined as being representative of the application of a conceptual apparatus or frameworks that could be applied to the problems faced in an international arena.¹⁷

On the other hand, doctrinal legal research describes detailed and highly technical commentary upon, and systematic exposition of the context of legal doctrine.¹⁸ Doctrinal research is therefore concerned with the discovery and development of legal doctrines for publication in textbooks or journal articles and its research questions. Accordingly, in the next body of this Research, it is sound to make technical analysis of the legal doctrine and how it has been developed and applied. The stability and certainty of established Nile agreements and the Declaration of Principles on the GERD need evaluation of stated principles inserted therein. Moreover, analysis of international water law ‘legal principles’ and case law to apply to the GERD dispute is crucial. So, arranging, ordering and systematizing legal propositions and study of legal institution through legal reasoning or rational deduction must involve doctrinal analysis since it provides the systematic exposition of the rules.¹⁹ Therefore, it is logical to rely on to evaluate the Nile legal issues related to the GERD and the DoPs.

As far as the approach and design of this research methodology is concerned, firstly, it is devoted to researching the primary and secondary sources of international water laws and international practices to make examination of the Eastern Nile basin agreements, the Declaration of Principles on the GERD and legally driven facts and legal issues contested on the GERD dispute. International water law sources calls to finding the logical connotation and application of international water treaties, international customary law and general principles of international water laws. Identifying and analyzing relevant provision of the DoPs and evaluating them within international water law principles is very important tool to show some pillars on how to resolve the dispute for the current legal controversy among Egypt, Ethiopia and the Sudan. Therefore, I employed international law methodology in a way of searching international principles and customary practices to be applied to GERD dispute and in order to make legal analysis of the Declarations of Principle (DoPs).

Secondly, it is important to note that my method not only stick itself to the international approach of searching primary and secondary sources in international law applicable but heavily

¹⁷ S. Ratner and A. Slaughter, “Appraising the Methods of International Law: A Prospectus for Readers” *American Journal of International law* (1999) pp 291-292

¹⁸ Michael Salter and Julie Mason, *Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research* (Pearson 2007),p-49

¹⁹ Vijay M Gawas, Doctrinal legal research method a guiding principle in reforming the law and legal system towards the research development , *International Journal of Law*, (Volume 3; Issue 5; September 2017)pp- 128-130

relies on doctrinal analysis of the developments of legal concepts in the Eastern Nile basin agreements including, *inter alia* by finding the relevant legal principles in the DoPs to analyze if they are coherent and rational in accordance with principles stated under international water laws. The approach would carefully interpret the relevant legal documents to properly construe the meaning of terms like “equitable and reasonable utilization” and relevant factors that can help to determine it and the term “significant harm” provided in the UN watercourses Convention, the Helsinki Rules on international watercourses and the Berlin Rules on water recourses. It would also look in to the litigation surrounding the Gabcikovo-Nagymaros Project on the Danube River at the International Court of Justice.

Finally, after weighing all of these legal materials, the doctrinal analysis would presumably produce some legal conclusion: perhaps Egypt has the better legal argument and should be permitted to limit the utilization of the Nile by upstream riparian states like Ethiopia, or perhaps Ethiopia can exploit its water resources to the extent that it does not cause significant harm to downstream states (Egypt and Sudan). Of course, it could be argued that the doctrinal analysis would be simplified if the focus were on only one document, like the Convention. This can be done by using doctrinal analysis of the statutory materials, Reports of Committees, Case Reports and scholarly digests within the GERD contested legal issues, the Nile agreements and the DoPs. This approach is suitable to examine the controversies of the legal issues claimed under the Nile basin Agreements and Declaration of principles on the GERD.

Scholarly commentaries on practical application to the Nile water use and share problem and contested legal principles and rules under the DoPs like “non-harm principle”, “reasonable and equitable utilization” and issues of filling of the dam and dispute settlement among Egypt, Ethiopia and the Sudan also lays some paramount foundation to relay on. Besides, this form of scholarship has always been the dominant form of academic legal research and has an important role to play in the development of legal doctrines through the publication of conventional legal treatises, articles and textbooks.²⁰

However, though doctrinal analysis is important to employ to academic legal study of most legal rules and principles of international water laws, the sole legal examination of the DoPs in relation to negotiations on the GERD is difficult to arrive at a purely normative conclusions since these conclusions are not an exact science. Instead, a purely normative conclusion are formed of scholarly legal reasoning and logical discourses, which can be influenced by other factors, such

²⁰ Card, The legal scholar, The Reporter: Newsletter of the Society of Legal Scholars, (2002), pp, 5–12

as historical, socio-economic and political analysis of the Eastern Nile basin legal contestations. Some scholars describes these overlapping factors as ‘interdisciplinary’, a convergence of different academic areas of study.²¹ That is to say an examination of international water legal doctrines regarding the Nile agreements, which is ratified and adopted by different member states, each with its own legal traditions, policies and political interests, will inevitably lead the researcher to look beyond the black letter law.²² However, this is not to say the research employed the technique of a multidisciplinary co-research (socio-legal research) in its absolute sense. Rather, this is an approach to take analysis of existing scholarly approaches to the historical, diplomatic, socio-economic and political data in the legal contexts of Agreements on declaration of Principles on the GERD. In order to identify diversified problematic issues and legal claims in conjunction with socio-economic and political manifestations of the negotiating Eastern Nile basin states, some data out of pure legal principles are helpful to shade some pillars on how to solve the Nile water dispute and the GERD controversies.

1.5. Design and Out line

Chapter two of this thesis composes the theoretical and normative legal frameworks of international water laws concerned with the doctrines of equitable and reasonable utilization of international watercourses in relation to the doctrine of non-harm rule. Here, the Harmon doctrine, the theory of absolute territorial integrity, the theory of limited territorial sovereignty and the theory of common management are discussed. Again, this chapter is devoted on identifying the fundamental sources of international water laws. Accordingly, international customary water laws, international framework conventions and Rules governing international watercourses, the Nile basin Agreements and the Cooperative Framework Agreement and Agreements of the Declaration of Principles on the GERD are selected and overlooked.

Chapter three conveys the fundamental substantive principles of international water laws pertinent to the obligation of sates utilizing international watercourse. The principle of equitable and reasonable utilization, the principle of not causing significant harm, the duty of cooperation and the principle of peaceful settlement of international dispute are among the targeted selections for discussions. Accordingly, the conceptual connotations and approaches, interpretations and

²¹ Becher, Towards a definition of disciplinary cultures, *Studies in Higher Education* (1981) pp-109–122

²² Dave Owen and Caroline Noblet, interdisciplinary research and environmental law *Forthcoming, Ecology Law Quarterly*(June 25, 201)p-6,

applications of these fundamental and principal rules of international watercourses laws are closely looked.

Moreover, chapter four of this thesis covers examination of the Agreement on the Declaration of Principles on the GERD in the laws of international watercourses conventions and Rules. Here, closer scrutiny of the provision stated within the DoPs in relation to international conventions and rules is made. More so, an attempt to reconcile the legal contestations by Egypt and Sudan based on the claims of harm by the GERD and argument based on equitable and reasonable utilization forwarded by Ethiopia's side is assessed. The last chapter conveys conclusions and recommendations of the examination of the 2015 Agreement on the Declaration of Principles on the GERD.

1.6. Research Objectives

The overall objective of this thesis is to examine the Declaration of Principles (DoPs) on the GERD against the principles of International Watercourses laws and practices. The objective, *inter alia*, seeks:

1. To explore relevant principles and doctrines of international water laws pertaining to the rights and obligations of states utilizing international watercourses in relation to the agreement under the Declaration of Principles on the GERD.
2. To examine the DoPs and problems of current negotiations under international water laws and to explore the legal claims on the GERD.
3. To examine the principle of "equitable and reasonable utilization", the principle of "not causing significant harm", the duty of cooperation and peaceful settlement of international water dispute under international watercourses laws within the dictation of the Agreement on the Declaration of Principles on the GERD.

1.7. Scope of the Study

This work covers examination of the Declaration of Principles on the GERD under international water laws which pertain to issues under negotiations on the GERD including the examination of the 2015 Agreement on Declaration of Principles (DoPs) signed between Ethiopia, Egypt and Sudan.

1.8. Significance of the Study

This study is crucial to examine the DoPs under the auspices of pertinent international water laws. It torches some pillars on the GERD negotiating partners to frame stable legal regime in the basin in accordance with cooperative and “reasonable and equitable principles” without “causing significant harm” among co-riparians. By identifying ways as to the interpretation and application of the principles dictated under the DoPs in the domain of international water laws, it hopefully points some directions about “reasonable, cooperative use and share of the Nile water”. This study may also motivate disputing co-riparians avoid apparent tensions and ease threat to use force by looking in to “legally framed solutions”.

1.9. Limitations of the Study

It is difficult to examine and frame some hypothesis on the current talks among the GERD negotiating partners due to some unfounded political intentions and motives of the parties. Additionally, costs, conditions, issues of national security and political interest of the negotiating states may challenge to get sources.

CHAPTER TWO

2. THEORETICAL AND LEGAL FRAMEWORKS OF INTERNATIONAL WATER LAW

2.1. Theories and Doctrines of International Water Laws

The theoretical foundation of the principles of international water law related to transboundary water resources management evolved from different theories and doctrines.²³ The utility in international water law theories and doctrines is to fill the legal gaps in the absence of treaties, customs and regional agreements.

²³ Rahaman, M.M. (2009) ‘Principles of international water law: creating effective transboundary water resources management’, *Int. J. Sustainable Society*, Vol. 1, No. 3, pp.207–223)p209

2.1.1. *The Harmon Doctrine*

This doctrine²⁴ is an expression of the principle of full sovereignty of states over their national territories and clearly favors upstream states to the detriment of downstream states' interests.²⁵ According to this theory (absolute territorial sovereignty), every nation can utilize the waters of an international river flowing on its territory regardless of the consequences in other countries and without the duty to consultation.²⁶ This doctrine argues²⁷ that states may freely use the water within their own territory,²⁸ though such uses may inflict harm on the neighboring co-riparians. Historically, this principle has been favored by upstream states.²⁹ Although asserted by some states on a few occasions, in most cases, this theory has never been followed. The writings of publicists over time also reflect a decline in its support. Currently, there are no advocates of this theory.³⁰

2.1.2. *The Theory of Absolute Territorial Integrity*

This doctrine has been advocated by downstream riparian states³¹ to demand continuation of the natural flow of an international river into its territory from the upper riparians. It imposes a duty on upper riparian states not to restrict the natural flow of waters to other lower riparians.³² In essence, this doctrine is the exact opposite of the principle of absolute territorial sovereignty as it is intended to favour downstream riparians, by protecting existing uses or prior appropriation.³³ This opposition is due to the fact that the theory of absolute territorial sovereignty entitles states' use an international river in their territory without giving regard to other state's existing uses or prior appropriation rights. This principle has also been criticized and, like the Harmon Doctrine, is not recognized as a part of contemporary international water law. The principle of absolute territorial integrity has been advocated by downstream states because it advances the idea that every state is entitled to the natural flow of a river systems crossing its border.³⁴ This converse

²⁴ The Doctrine is named by Harmon on US Opinions of Attorney-General, 21 (1893-97) 274.

²⁵ Ibid Maria at p81

²⁶ Ibid (Rahaman)p209

²⁷ McCaffrey, 'The harmon doctrine one hundred years later: buried, not praised' (1996) Natural Resources Journal (1965) p 551

²⁸ Id at p-10

²⁹ Francisco Nunes Correia et, al. International framework for the management of transboundary water resources' Water International 24/86(1999)p 89

³⁰ Maria Manuela de Franqa Doria, the principle of cooperation in the law of international Watercourses(2008)p85

³¹ Anne Funnemark, water recourses and inter-state conflict: legal principles and the Grand Ethiopian Renaissance Dam(2020)p.9

³² M.A Salman, The Helsinki Rules, the UN Watercourses Convention and the Berlin Rules: Perspectives on International Water Law(Water Resources Development, Vol. 23, No. 4, 625-640(2007)p-628

³³ Ibid

³⁴ Ibid

principle limits upstream riparian states' use of transboundary watercourses, and effectively gives lower-riparian states veto over upper riparian states' use.³⁵ In cases where downstream riparians have historically taken more advantage of their water resources, as is the case in the Ethiopia-Egypt GERD dispute where treaties exist, the principle of absolute territorial integrity supports Egypt's argument of a right to preserve pre-existing uses of transboundary watercourses.³⁶ Both the principles of absolute territorial sovereignty and absolute territorial integrity take extreme stances in relation to the allocation and use of transboundary watercourses.³⁷

2.1.3. *The Theory of Limited territorial sovereignty*

This theory also called the theory of equitable and reasonable utilisation. It asserts³⁸ that each riparian state is entitled to a reasonable and equitable share³⁹ in the beneficial utilisation of the watercourses, the right of which is to be determined on a case-by-case basis in accordance with relevant factors to be taken into account.⁴⁰ This theory considers international watercourses as shared resources and requires the states to take into account the interests of the neighboring riparian states, requiring some compromise of interest by all.⁴¹ This doctrine favors states to develop the river basin in their territory independently and without the need of consent of co-riparian states to plan and build water works on their territory as long as these do not interfere with the co-basin states' rights to an equitable and reasonable share of the beneficial uses of the watercourse. This asserts that every riparian state has a right to use the waters of the international river, but is under a corresponding duty to ensure that such use does not harm other riparians.⁴² The advantage⁴³ of this theory is that it simultaneously recognizes the rights of both upstream and downstream countries as it guarantees the right of reasonable use by the upstream country in the framework of equitable use by all interested parties. Principles of equitable and reasonable

³⁵ Ibid

³⁶ Ibid (n82)p627

³⁷ Charter of the United Nations (1945), Article 2(1)

³⁸ Birnie P, Boyle A. & Redgwell C, "*International law & the environment*", Oxford, Oxford University Press, 2009 (Third Edition) p540

³⁹ The UN convention on international Watercourse(1997)Article 7

⁴⁰ Fisher Douglas, "*Law and governance of water resources: The challenge of sustainability*", Cheltenham: Edward Elgar Publishing(2009)p119

⁴¹ Hunter D, Salzman J & Zaelke D, "*International environmental law and policy*", New York: Foundation Press, (Third edition, 2007) p875

⁴² Ibid Rahaman

⁴³ M.A Salman, The Helsinki Rules, the UN Watercourses Convention and the Berlin Rules: Perspectives on International Water Law(Water Resources Development, Vol. 23, No. 4, 625–640(2007)p628

utilisation and obligation not to cause significant harm⁴⁴ are the part of the theory of limited territorial sovereignty. Hence, only the theory of limited territorial sovereignty survived and formed the basis of modern international water law.⁴⁵

2.1.4. *The Theory of common Management*

This doctrine advocates management as to the use and share of an international river conjointly. The basis of this theory is that the entire river basin is an economic unit, and the rights over the waters of the entire river are vested in the collective body of the riparian states, or divided among them either by agreement or on the basis of proportionality.⁴⁶ This principle is an extension of the theory of limited territorial integrity but goes beyond the third principle by vesting the rights over the river in a collective body. This principle did not gain wide acceptance because riparian states believe that it forces them into reaching further agreements.⁴⁷ It is an ideal principle that overlooks sovereignty and the competing demands of the different riparians. Hence, the theory of limited territorial sovereignty survived and formed the basis of modern international water law.⁴⁸

2.2. Sources of International Water Law

Sources international water law comprises customary law, framework treaties with a universal scope of application, regional water use agreements for specific water resources.⁴⁹ The general principles of international water law have emerged from customary international law and water use and share agreements.⁵⁰ While international water law serves as a guideline for water negotiations, enforcement and implementation of international treaties, the commitment of the signatories to such agreements is required as no international enforcement body exists.⁵¹

2.2.1. *Customary International Water Law*

⁴⁴ Ibid

⁴⁵ Ibid

⁴⁶ McCaffrey, Stephen C. *The law of international watercourses*, (oxford University Press(2007) p389

⁴⁷ Stephen C. McCaffrey, *The Harmon Doctrine One Hundred Years Later: Buried, Not Praised, the Natural Recourse Journal*, Volume 36Issue 4(1996)p968

⁴⁸ Kuokkanen, Tuomas. *International Law and the Environment Variations on a Theme*,(The Hague / London / New York; Kluwer Law International, (2002)p 322

⁴⁹ Ute Mager, international water law, Global developments and Regional examples(2015)p.11

⁵⁰ Report, Adapted from United Nations Economic and Social Commission for Western Asia (ESCWA), BGR and GTZ, enhancing Negotiation Skills on International Water Issues in the ESCWA Region. Beirut: ESCWA(2004)

⁵¹ < <http://www.escwa.un.org/about/gov/resolutions.asp>>accessed on Thursday, March 18, 2021, 10:27:54 AM

Many rules of customary water laws regarding internationally shared fresh water has emerged in the last century.⁵² There are only three undisputed rules of customary international water law concerning non-navigational uses of international water resources.⁵³ These are the rules of equitable and reasonable utilization, the no-harm rule and the duty of cooperation.⁵⁴ The concept of territorial sovereignty and territorial integrity are still used as arguments in water diplomacy, but are not approved as legally binding rules because the idea that a riparian can proceed at will with his part of an international river ignores the fundamental character of a shared resource.⁵⁵ However, the content and scope of the principles codified as customary rules are subject to controversial interpretation and are full of gaps.⁵⁶ The relationship between the principle of equitable and reasonable utilization and the principle of not causing significant harm is subject to contradictions.⁵⁷ The principle of equitable and reasonable utilization and the principle of not causing significant harm are also incorporated in the Declaration of Principles up on the GERD agreed among Egypt, Ethiopia and Sudan in 2015. Therefore, one can argue that these principles are binding on the parties since they get the status of customary international water law.

2.2.2. The UN Framework Convention

The General Assembly of the United Nations adopted the UN convention on non navigable uses of international water courses in 1997.⁵⁸ The convention was developed with an objective to prevent and resolve conflicts of transboundary water resources and to promote sustainable development.⁵⁹ The Convention is a framework convention that aims at ensuring the utilization, development, conservation, management and protection of international watercourses, and promoting optimal and sustainable utilization thereof for present and future generations.⁶⁰ The convention offers principles to which states are required of their conduct in order to reflect

⁵² Joseph W. Dellapenna, The customary international law of transboundary fresh waters, *Int. J. Global Environmental Issues*, Vol. 1, Nos. 3/4, (2001)p270

⁵³ Ute Mager, *International Water Law, Global Developments and Regional Examples*(2015)p12

⁵⁴ Caponera, Dante A., *Principles of Water Law and Administration. National and International*, 2nd edition, revised and updated by Marcella Nanni,(2007)p216

⁵⁵ Brown Weiss, *The Evolution of International Water Law*, in: *Recueil des Course* (2007)p 163

⁵⁶ Helal, Mohammed S., *Sharing Blue Gold: UN Convention on the Law of the Non-Navigational Uses of International Watercourses Ten Years On*, *Colorado Journal of International Environmental Law and Policy* (2007)p337

⁵⁷ *Ibid*

⁵⁸ Ute Mager (note 89)p15

⁵⁹ The UN report, *Shared Waters –Shared Opportunities World Water Day March 22 Transboundary Waters in the ESCWA Region*(2009)para3

⁶⁰ M.A Salman, The Helsinki Rules, the UN Watercourses Convention and the Berlin Rules: Perspectives on International Water Law(*Water Resources Development*, Vol. 23, No. 4, 625–640(2007)p633

customary international law.⁶¹ The convention does not follow the river basin approach but puts the term “international water course” in the center of its regulations.⁶² The convention provided the two substantive rules of customary international water law in its article 5, 6 and article 7. As stated in article 5, the equitable and reasonable utilization rule is supplemented by equitable and reasonable participation in use, development and protection referring to the objective of sustainability. Whereas, article 6 deals with a non-exhaustive list of relevant factors for the determination of equitable and reasonable utilization without stating any priority.⁶³ This is also evident in the provisions⁶⁴ of the agreement on Declaration Principles signed among Egypt, Sudan and Ethiopia. The convention provides that in the absence of agreement or custom to the contrary, no use of an international watercourse enjoys inherent priority over the other uses.⁶⁵ But in this case the ILC went further and added in paragraph 2 that in the event of a conflict between the uses, this should be resolved according to the principle of equitable and reasonable utilisation and the obligation not to cause significant harm, and that vital human needs should never be compromised.⁶⁶ The vital human needs are those water uses that cannot prevent sustainment of human life, such as drinking and sanitations. Therefore, states’ use of international watercourse can be equitable and reasonable so long as such use does not impair vital needs of human life of the state claiming the harm.

2.2.3. The Helsinki Rules

The Helsinki Rules on the use of the water of international rivers (1966) adopted⁶⁷ the drainage basin approach and are applicable to the entire watershed limit of an international river, including surface and underground water flowing thereto.⁶⁸ Rules⁶⁹ are applicable to the use of waters of an international drainage basin. Such a drainage basin is defined as “a geographical area extending over two or more states determined by the watershed limits of the system of

⁶¹ Ibid

⁶² The UN convention on international watercourses (1997) article 2(a) defines “Watercourse” as a system of surface waters and groundwaters constituting by virtue of their physical relationship a unitary whole and normally flowing into a common terminus.

⁶³ Ibid Ute Mager at p16

⁶⁴ Agreement on the Declaration of Principles on the Grand Ethiopian Renaissance Dam(2015), Article III and IV the UN Watercourses Convention(1997)Article 10(1)

⁶⁵ Francisco Nunes Correia and Joaquim Evaristo da Silva, ‘International framework for the management of transboundary water resources’ Water International 24/86(1999) p50

⁶⁷ The statements and resolutions adopted by the ILA in Dubrovnik and New York and the discussion in Tokyo in the first 10 years since it started working on international rivers paved the road for the comprehensive rules issued by the ILA in its meeting in Helsinki in 1966, ILA (International Law Association) (1966)

⁶⁸ Wambua Kitukul, The Doctrine of Equitable and Reasonable Utilization of International Water and Its Application under International Watercourses Law(2014)p7

⁶⁹ The Helsinki Rules(1966)Article I

waters.⁷⁰ The Rules were the first to comprehensively expound on the doctrine of equitable and reasonable use, and uphold the right of riparian states to reasonable and equitable share in beneficial uses of a basin.⁷¹ The Rules call for a holistic approach to weighting of factors and do not accord any factor priority over the others. It⁷² gives basis for recognition and termination of uses, based on abandonment or incompatibility with prior uses. The Rules created a basis of the significant harm principle, by calling for prevention of pollution to the water basin and compensation for the same.⁷³

2.2.4. The Berlin Rules

The Berlin Rules on water recourses (2004)⁷⁴ are quite comprehensive and detailed.⁷⁵ The Rules' provisions cover various issues on water resources go beyond the Helsinki Rules and the UN watercourses convention. The Report of the water resources committee stated that the Rules incorporate the experience of the nearly four decades since the Helsinki Rules were adopted: taking into account the development of important bodies of international environmental law.⁷⁶ The emphasis by the committee of the developments in international environmental law is worth noting, given the manner in which the Berlin Rules dealt with the relationship between the principle of equitable and reasonable utilization and the obligation not to cause harm. It is also worth noting that a number of the Berlin Rules are applicable to the management of all waters, both national and international. The Berlin Rules also stand in sharp contrast to the work of the IIL and ILC in this field. The Berlin Rules⁷⁷ addresses various issues related to all waters, ranging from participation of persons likely to be affected by decisions concerning the management of waters. It applies⁷⁸ to internationally shared waters. The Rules⁷⁹ states that Basin states shall in their respective territories manage the waters of an international drainage basin in

⁷⁰ M.A. Salman, The Helsinki Rules, the UN Watercourses Convention and the Berlin Rules: Perspectives on International Water Law, Water Resources Development, Vol. 23, No. 4, 625–640, (December 2007)p629

⁷¹ Article IV of the Helsinki Rules (1966)

⁷² The Helsinki Rules(1966)Article VIII

⁷³ Ibid

⁷⁴ The rules were discussed and approved during the ILA Seventy-first Conference held in Berlin in August 2004

⁷⁵ Salman, S. (2006) International water disputes—a new breed of claims, claimants and settlement institutions, *Water International*, 31, pp. 2–11.

⁷⁶ ILA Report of the Seventy-First Conference, Berlin, (London: International Law Association) (2004) pp 334-421

⁷⁷ The Berlin Rules(2004)Chapter II

⁷⁸ The Berlin Rules(2004)Chapter III

⁷⁹ The Berlin Rules(2004)Article 12

an equitable and reasonable manner having due regard for the obligation not to cause significant harm to other basin States.⁸⁰

2.3. The Nile Basin Agreements

The legal regime governing the Nile Basin is contentious and fragmented.⁸¹ The Basin does not have a mutually acceptable legal framework applicable to all riparian states. Currently, three types of legal instruments apply: bilateral treaties, a multilateral agreement establishing a framework for cooperation, and the DoPs are relevant to the use and allocation of Nile waters.⁸² Several bilateral treaties exist between riparian states and their former colonial powers concerning the flow of the Nile water. However, the 1929 Nile water agreement and the 1959 Nile Treaty between Sudan and Egypt are the most widely disputed among the lower and upper basins states.⁸³

2.3.1. *The Anglo-Egyptian Nile Water Agreement (1929)*

This Nile water agreement took place between Egypt and Britain on behalf of Sudan on 7 May 1929.⁸⁴ The agreement stipulated that no irrigation or power works are to be constructed or taken on the Nile or its tributaries, or on the lakes from which it flows in so far as all these are in Sudan or in countries under British administration.⁸⁵ By virtue of this agreement, Egypt recognized Sudan's right to water in amounts adequate enough for its own development, as long as Egypt's "natural and historic rights" were respected.⁸⁶ According to this agreement, Egypt's share was set at 48 BCM, in contrast to just 4 BCM for Sudan, and Egypt reserved the right to inspect and veto upstream water projects that would affect the volume and perennial flow of the river.⁸⁷ However, it seems that, fearing organized counter-claims, 32 BCM went unallotted because the treaty was reached without the participation of the remaining riparian states.⁸⁸ The agreement all

⁸⁰ Ibid

⁸¹ Mahemud Eshtu Tekuya, Sink or Swim: Alternatives for Unlocking the Grand Ethiopian Renaissance Dam Dispute, *Columbia Journal of Transnational Law*(591) (2020)p-76

⁸² Valerie Knobelsdorf, The Nile Waters Agreements: Imposition and Impacts of a Transboundary Legal System(2003)p-9

⁸³ Ibid (n82)p-77

⁸⁴ Wuhibegezer Ferede, et, al., The Efficacy of Water Treaties in the Eastern Nile Basin,(the African spectrum 49:1(2014)p62

⁸⁵ Elias Ashebir, the politics of the Nile Basin (2009)p78

⁸⁶ O' Cannel, D.P.: State Successions in Municipal Law & International Law ,Cambridge University Press, Cambridge, Vol. II, (1967) p247

⁸⁷ Ibid(167)p79

⁸⁸ Swain Ashok, Ethiopia, the Sudan, and Egypt: The Nile River Dispute, in: The Journal of Modern African Studies, (1997) p.677

but ignored the rights of the other upper riparian states, and its inappropriateness is evident as it favors Egypt over the remaining riparian states.⁸⁹ Moreover, since the treaty would have given veto power to Egypt over the shared natural resources of the Nile River while excluding the remaining riparian countries, it would be absurd for those excluded countries to have been bound by it.⁹⁰

2.3.2. *The Bilateral Treaty among Egypt and Sudan (1959)*

The Nile waters agreement of 1959 is the first agreement between independent African states regarding international water share.⁹¹ This agreement was initially centered on the construction of the huge reservoir for the Aswan High Dam, with a storage capacity of 156 BCM per year.⁹² This agreement settled the controversy over the quantity of the average annual Nile flow, which was agreed to be approximately 84 BCM, measured at the Aswan High Dam.⁹³ The agreement allowed the entire average annual flow of the Nile to be shared between Sudan and Egypt, respectively taking in 18.5 and 55.5 BCM. Annual water loss due to evaporation and other factors was agreed to be about 10 BCM.⁹⁴ According to this agreement, if any complaints come from the remaining riparian countries over the Nile water resources, Sudan and Egypt shall handle it together.⁹⁵ It approved Sudan's plan to construct the Roseires Dam on the Blue Nile and to develop additional irrigation and hydroelectric power generation sources.⁹⁶ Thus, the agreement, despite its exclusivity, pioneered the concept of the institutionalization of water-sharing in the Nile Basin. The agreement also endorsed its precursor and completely ignored the rights of the remaining countries in the basin.⁹⁷ Hence, the two Nile water agreements (the 1929 and the 1959) did not totally consider the right of upper riparian states in the apportionment of the waters of the Nile. Another evil of these Nile water agreements is the reliance of Egypt and Sudan basing their claims on their agreements.

2.3.3. *The Cooperative Framework Agreement (CFA)*

⁸⁹ Collins Robert, *The Waters of The Nile: Hydro politics and the Jonglei Canal*, Oxford: Oxford University Press, (1990)p157

⁹⁰ Ibid

⁹¹ Ibid (n86)

⁹² The initial objective of the agreement among Egypt and Sudan (1959) was for the construction of the huge reservoir for the Aswan High Dam

⁹³ Elias Ashebir, *the politics of the Nile basin*(2009)p.81

⁹⁴ Ibid

⁹⁵ Waterbury, J.: *Hydro politics of the Nile Valley*, Syracuse University Press, New York, (1979) p.102

⁹⁶ Ibid

⁹⁷ See Supra note 89

The riparian countries of the Nile have been engaged in serious negotiations for a Cooperative Framework Agreement under the auspices of the Nile Basin Initiative.⁹⁸ But Egypt and Sudan have refused to sign the Cooperative Framework agreement, suggesting that the wording of Article 14 (b), on water security for other Nile nations, interrupts with the pre-existing water rights and usage allocations.⁹⁹ Their disagreement concerns whether the new treaty would nullify the colonial agreements possibly resulting in the reallocation the claimed shares of Egypt and Sudan.¹⁰⁰ The upper riparian states want the new agreement to supersede any previous agreements, while lower riparian states want it to explicitly recognize all previous agreements.¹⁰¹ Egypt and Sudan maintain that instead of such immediate changes, the focus should be on refining the NBI.¹⁰² There had been a promising move towards basin-wide co-operation, particularly with the launch of the Nile Basin Initiative in February 1999. Its vision was to “achieve sustainable socio-economic development through the equitable utilization of, and benefit from, the common Nile basin water resources.”¹⁰³ Although not all of the riparian states have signed on as yet, the progress of change is already evident.¹⁰⁴

2.3.4. *The Declaration of Principles on the GERD*

Because GERD project sparked disagreement on Nile water use and share among Egypt, Sudan and Ethiopia, negotiations on this issue resulted in an Agreement on Declaration of Principle on the GERD in March 2015.¹⁰⁵ The Declaration of Principle not only recognizes the increasing water needs of the parties, but also reaffirms the principles of “no significant harm” and “equitable and reasonable utilization”.¹⁰⁶ The ultimate underlying objective of the DoPs is deemed to ensuring equitable and reasonable utilization of the Nile waters by the parties and to ensure¹⁰⁷ that the GERD contributes not only to the provision of energy, but also to economic

⁹⁸ Yacob Arsano, Negotiations for a Nile-Cooperative Framework Agreement ISS Paper 222)(January 2011)p4

⁹⁹ Article 14(b) of the Cooperative Framework Agreement(2010)

¹⁰⁰ Abadir M. Ibrahim, the Nile Basin Cooperative Framework Agreement: The Beginning of the End of Egyptian Hydro-Political Hegemony, 18 Mo. Envtl. L. & Pol'y Rev. 282 (2011) p.302

¹⁰¹ Ahmed El Mufti, *The Success of the Impossible Negotiations About the Waters of the Nile: 1891-2007*, Consultation Document, March-April 2007, http://www.moj.gov.sd/images/magazine_2007.pdf.

¹⁰² NBI was conceived as a transitional institution until the CFA negotiations were finalized and a permanent institution was created (NBI, 1999).

¹⁰³ Elsa Sordedra, *the Nile Basin Initiatives*(2014)p7

¹⁰⁴ Jack Di Nunzio, Conflict on the Nile: The future of transboundary water disputes over the world's longest river (25 November 2013)p-10

¹⁰⁵ Agreement on Declaration of Principles between The Arab Republic of Egypt, The Federal Democratic Republic of Ethiopia And The Republic of the Sudan On The Grand Ethiopian Renaissance Dam Project (23rdMarch 2015)

¹⁰⁶ Ernest Cece Peguita, The Nile Water Dispute – International Legal Aspects, *Advances in Social Science, Education and Humanities Research, volume 498(2020)p295*

¹⁰⁷ The Declaration of Principles(2015) (Art 3 cum Art 4)

growth, regional cooperation and integration.¹⁰⁸ However, the “No harm” principle and “Equitable and Reasonable Utilization” is provisionally ordered in direct contrast with the UN Watercourses Convention and seems the unilateral and unconditional protection given to prior uses of waters resources among riparian states.¹⁰⁹ This is because the UN watercourses convention seems to prioritize the principle of equitable and reasonable utilization and provided the non-harm rule in its subsequent provision. But, the DoPs provisionally prioritizes the non harm principle. Besides, the DoPs contains procedural standards such as the development of rules and guidelines for the operation of the GERD, informing downstream states of unforeseen or urgent circumstances, the establishment of an 'appropriate coordination mechanism, the exchange of data and information, and a dispute resolution mechanism.¹¹⁰ Moreover, after conclusion of the DoPs negotiations continued and the ministers of water resources and the ministers of foreign affairs of the three countries signed the Khartoum agreement, originally titled “summary and the outcomes of the meeting”¹¹¹ as a reaffirmation of their full commitment to the DoPs. The final document records the endorsement of the ministers of the modalities for two studies on the “water resources/hydropower system simulation model” and “transboundary environmental and socio-economic impact assessment” of the GERD.¹¹² However, disagreement on the baseline data to use in the two studies led to a stalemate in the negotiations and fractured Egyptian and Sudanese alliance.¹¹³

CHAPTER THREE

3. FUNDAMENTAL PRINCIPLES AND OBLIGATIONS

The undisputed rules of customary international water law governing non-navigational uses of international water resources comprise rules of equitable and reasonable utilization, the no-harm rule and the duty to cooperate.¹¹⁴ Equitable utilization is the division of the waters of an international river among the co-riparian states in accordance with the legitimate economic and

¹⁰⁸ Z. Yihdego, A. Rieu-Clarke, An exploration of fairness in international law through the Blue Nile and GERD, *Water International* 41(4) (2016)p544

¹⁰⁹ T. Meshel, Swimming Against the Current: Revisiting the Principles of International Water Law in the Resolution of Fresh Water Disputes, *Harvard International Law Journal* 61(1) (2020)p140

¹¹⁰ Ibid

¹¹¹ The 4th tripartite meeting of the ministers of foreign and water affairs of Egypt, Ethiopia, and Sudan on the Grand Ethiopian Renaissance Dam Project (GERDP), Khartoum – Sudan, 27–28 December 2015.

¹¹² Ibid(n110)p295

¹¹³ Id

¹¹⁴ Dellapenna, Joseph W./Gupta, Joyeeta, The Evolution of Global Water Law, in: Dellapenna, Joseph W./Gupta Joyeeta (ed.), *The Evolution of the Law and Politics of Water*, 2009, p. 3

social needs of each state in such a manner as to achieve the maximum benefit for all with a minimum of detriment to each riparians.¹¹⁵ As is frequently the case in disputes between upstream and downstream states, Ethiopia adopted an equitable and reasonable right to build the GERD, while Egypt and Sudan maintains their right to be free from significant harm that would be caused by the dam.¹¹⁶ Egypt contested that GERD project would cause harm to its water security. But Ethiopia has been justifying the construction of the GERD based on the principle of reasonable and equitable utilization of the Nile water. Hence these claims need closer overview on principles provided under the UN convention on non-navigational watercourses, the Berlin Rules (2004) and the Helsinki Rules (1966). Essentially, the equitable and reasonable utilization principle entitles each basin state to a reasonable and equitable share of an international watercourse and obligates it to use the watercourse in a manner that is equitable and reasonable manner. The no significant harm principle prohibits states from using their territory in such a way as to cause significant harm to another state.¹¹⁷

3.1. The Principle of Equitable and Reasonable Utilization

The principle of equitable and reasonable utilization recognizes as a border line under which the concept of “reasonableness” become relative. The most fundamental rule of the law of non navigational use of international watercourses is that of equitable and reasonable utilization of shared freshwater resources.¹¹⁸ This rule requires that states use and protect international freshwater in a manner that is equitable and reasonable with regard to other states.¹¹⁹ Equitable and reasonable utilization requires that each riparian state shall take into account all relevant factors consisting socio-economic and physical arrangements of the basin and other states’ dependence upon it. The object of this rule is to achieve a fair balance among the uses of an international watercourse by the states sharing it.¹²⁰ The principle of equitable and reasonable use enshrines both upstream and downstream countries of an international river to a “fair play”, as

¹¹⁵ Sharif S. Elmusa, *Equitable Utilization and Significant Harm: Focusing International Water Law on Development*(*the Arab World Geographer/Le Géographe du monde arabe* 7, no 4 (2004))p-229

¹¹⁶ Tamar Meshel, *swimming Against the Current: Revisiting the Principles of International Water Law in the Resolution of Fresh Water Disputes*,(*Harvard International Law Journal*, Volume 61, Number 1, Winter 2020)p-140

¹¹⁷ *Ibid* Tamar

¹¹⁸ The UN watercourses convention, article 5 cum article 6

¹¹⁹ Dinar, *the development and application of international water law*(2007)p65

¹²⁰ *Ibid*

enshrined in the UN Convention¹²¹ and the Berlin Rules.¹²² The principle manifested as the codifications of customary international water law.¹²³

3.1.1. *The Conceptual Background*

The principle dictates the need to balance socio-economic and environmental values in the use of natural resources and to take in to account the carrying capacity of international watercourses.¹²⁴ Understanding of the doctrine of equitable and reasonable utilization requires interrogation of two related doctrines; territorial sovereignty and territorial integrity.¹²⁵ Territorial sovereignty holds that states have absolute sovereignty over waters within their territory.¹²⁶ It can be seen as an extension of a state's political sovereignty over its territory. It is also seen to favour the upstream states and is therefore resisted by downstream states.¹²⁷ This is because the principle of equitable and reasonable utilization gives geographically up stream states a right to use the water of international river flowing in their territory though such use may inflict non significant harm to geographically downstream states. However, the Declaration of principles on the GERD does not provided a clue as to the concept of the principle but it simply stated as “the countries shall utilize their shared water resources in their respective territories in an equitable and reasonable manner”.

3.1.2. *The Normative Content*

The equitable and reasonable use doctrine is provided under UN convention on international watercourses,¹²⁸ the Helsinki Rules on international watercourses and the Berlin Rules. The objective of incorporating this principle in the aforementioned Rules is to reconcile conflicting interests across international borders so as to provide the maximum benefit to each state from the uses of the waters with the minimum detriment to each. The UN watercourses convention¹²⁹ establishes the doctrine as both substantive and procedural norm. All the same, the Declaration

¹²¹ The UN convention on international watercourse(1997) Article 5 (1)

¹²² The Berlin Rules on Water Resources(2004) Article 12

¹²³ Zeray Yihdego, The Blue Nile dam controversy in the eyes of international law,(2013) p-2, Global Water Forum www.globalwaterforum.org/2

¹²⁴ The UN watercourses convention users' guide fact sheet series No 4, p.1

¹²⁵ Wambua Kitukul, The Doctrine of Equitable and Reasonable Utilization of International Water and Its Application under International Watercourses Law(2014)p-2

¹²⁶ Hunter D, Salzman J & Zaelke D, “International environmental law and policy”, New York: Foundation Press, 2002 (Third edition, 2007) p-875

¹²⁷ Birnie P, Boule A. & Redgwell C, “International law & the environment”, Oxford, Oxford University Press, 2009 (Third Edition) p-540

¹²⁸ The UN Convention on Use of International Watercourses (1997) Article 5 cum 6

¹²⁹ Ibid article 5

of principles on the GERD¹³⁰ provided that the parties shall utilize their shared water resources in their respective territories in an equitable and reasonable manner.

As a substantive norm, the doctrine creates a substantive right to equitable and reasonable use of international waters, as affirmed in the *Gabcikovo Nagymaros case*.¹³¹ Riparian states are therefore mandated to use shared watercourses in an equitable and reasonable manner with a view of obtaining optimal and sustainable utilization thereof consistent with protection of the said watercourse.¹³² It should be noted however that a riparian state's equitable share is rather a right to the beneficial uses of a shared watercourse and not an equal share, which is determined by balancing of various factors.¹³³ As a procedural norm, the treaty establishes the procedural right of riparian states to participate in the use and management of shared watercourses in an equitable and reasonable manner, with a duty to cooperate on the same.¹³⁴ Riparian states cannot therefore exclude the participation of a fellow riparian state in the management of a shared watercourse.¹³⁵

3.1.3. Factors Relevant to Determine the Principle

Due to the fact that the principle of equitable and reasonable utilization is too general, the concept demands weighing relevant factors and circumstances to determine the principle. The list of factors and circumstances to be taken into account when determining equitable and reasonable use can be divided into three broad categories: these are factors of a natural character (hydrographic, hydrological, climatic and ecological factors); factors of economic and social ones (economic needs, population dependent on watercourse, effects of use on coriparians, existing and potential uses, conservation measures, and availability of alternatives); and the environmental factors.¹³⁶ The UN watercourses Convention¹³⁷ and the Helsinki rules¹³⁸ on the uses of waters of international rivers do not include an indicative list on list of factors relevant

¹³⁰ The Declaration of principles signed among Egypt, Ethiopia and the Sudan (2015), Article IV 1st paragraph

¹³¹ *Gabcikovo-Nagymaros Project* (I.C.J. Sept. 25, 1997)

¹³² Wambua Kitukul, *The Doctrine of Equitable and Reasonable Utilization of International Water and Its Application under International Watercourses Law*(2014)p5

¹³³ Fisher Douglas, "*Law and governance of water resources: The challenge of sustainability*", Cheltenham: Edward Elgar Publishing(2009) p-119

¹³⁴ The UN Convention on Use of International Watercourses (1997) article 5(1)

¹³⁵ *Ibid*

¹³⁶ Aaron T. Wolf, *Criteria for equitable allocation, the heart of international water conflict*, *Natural Resource Forum*23(1999) 3-30

¹³⁷ The UN watercourses convention(1997), article 6(1)

¹³⁸ Article V(2), Adopted by the international law Associations at the 52nd conference, held at the Helsinki in August 1966, Report of the Committee on the use of the water of international Rivers(London, International law Asociassions,1967)

to determine the principle. Besides, the Declaration of principles on the GERD¹³⁹ provided non-exhaustive lists of factors that help to determine the principle of equitable and reasonable utilization; but the parties left without further agreement on each element of the factors. On the other hand, the framework convention seems to ease the difficulty by advising parties to make agreements on each factor clearly.¹⁴⁰ Hence, parties are recommended to enter in to bilateral or multilateral agreements or other arrangements to define their mutual relations or conducts regarding the prevention, control and reduction of transboundary impact with all inclusive issues under the convention and other issues the riparian parties might deem it necessary to cooperate.¹⁴¹

3.1.4. Application of the Principle

This is founded by the Permanent Court of Justice¹⁴² on the community of interest of riparian states which forms the basis of a common legal right of all riparian States in the use of the whole course of the river and the exclusion of any preferential privilege of any one riparian state in relation to the others.¹⁴³ On the basis of state practice, the principle of equitable and reasonable utilisation, the key principle of international law laid down initially in the 1966 ILA Helsinki Rules. In addition to this, the ICJ in Gabcikovo-Nagymaros case confirmed a watercourses states' basic right to an equitable and reasonable sharing of the resources of an international river.¹⁴⁴ Equitable and reasonable utilisation consists of the right of the riparian state to use the waters of the watercourse to the same degree as the other riparian states. This right is based on the theory of the sovereign equality of states.¹⁴⁵ The UN Watercourses convention attempts to facilitate the application of the equitable and reasonable utilization principle by providing¹⁴⁶ a non-exhaustive list of factors to be considered in determining whether a particular use of a shared fresh water resource is equitable and reasonable.¹⁴⁷ However, the lists of factors which help to determine the principle of equitable and reasonable utilization does not provide a method

¹³⁹ The declaration of principles(2015), Article IV, paragraph(a-i)

¹⁴⁰ Owen McIntyre, the principle of equitable and reasonable utilization on 16 November 2016,p.150

¹⁴¹ Supra note 140, atp.151

¹⁴² PCIJ reports on a case concerning the continental shelf(Libya Arab Jamahiriya vs. Malta)3 June, 1985

¹⁴³ The UN Convention on the Law of Non-Navigational Uses of International Watercourses (1997) Article 5(1) cum Article (IV) and (V), Helsinki Rules(1966) and Article 12 of the Berlin Rules (2004) become binding rules of customary international law

¹⁴⁴ ICJ reports on the case concerning the Gabcikovo-Nagymaros (Hungary vs. Slovenia),1997, Para.158

¹⁴⁵ Maria Manuela de Franca Doria, the principle of cooperation in the law of international watercourses(2008)p-95

¹⁴⁶ The UN Convention on Use of International Watercourses (1997) article 6

¹⁴⁷ T. Meshel, Swimming Against the Current: Revisiting the Principles of International Water Law in the Resolution of Fresh Water Disputes, Harvard International Law Journal 61(1) (2020)p160

or process for applying the factors to a given dispute, and runs the risk of steering states towards equalization rather than equitable water allocation.¹⁴⁸ Applying the principle of equitable and reasonable utilisation requires a complex determination.¹⁴⁹ In order to apply the principle of equitable utilisation, it seems clear that the natural characteristics of the flow should constitute the basis for the sharing of the water volume and for this purpose the collection and exchange of information on the watercourse is essential. The UN Watercourses Convention¹⁵⁰ attempts to answer this question by suggesting the entry into consultations between watercourse states when the need arises.¹⁵¹

3.2. The Principle of Prevention of Significant Transboundary Harm

The obligation of no significant harm derives from the theory of limited territorial sovereignty.¹⁵² This theory stipulates that all watercourse states have the right to utilize a shared watercourse but they should respect the sovereignty of other states to equal right to use. This principle is accepted as one of the foundation of the law of international watercourses and the UN watercourses convention.¹⁵³

3.2.1. The Meaning of Significant Harm

The duty of “not causing significant harm” is a due diligence obligation of prevention rather than an absolute prevention of significant transboundary harm. The level of harm in order to qualify as ‘significant’ has to be higher than merely perceptible or trivial; but could be less than severe or substantial.²²³ What constitutes “harm” has to be more than just an “adverse effect” which must be a real impairment of a use, with a detrimental impact of some consequence upon the environment or the socio-economic development of the harmed state.¹⁵⁴ Significant harm, then, has to be established by objective evidence and should be determined on a case by case basis. Hence, state’s compliance with article 7 of the UN watercourses convention is not dependant solely on harm being caused, rather determined by the state’s reasonable conduct in terms of preventive behavior to avoid the harm in question.¹⁵⁵ The UN Convention tries to avoid the

¹⁴⁸ Frederick W. Frey, *The Political Context of Conflict and Cooperation Over International River Basins*, 18 *Water Int'l* 54, 58 (1993)p131

¹⁴⁹ Ibid

¹⁵⁰ Alistair Rieu-Clarke, et.al, UN watercourse convention users’ Guide(2012)p117

¹⁵¹ Supra note 141,p.152

¹⁵² UN watercourses Convention Users’ Guide Fact Sheet Series Number 5, Para.2

¹⁵³ The UN watercourses convention(1997), Article 7(1) cum Article 7(2)

¹⁵⁴ Supra note 150

¹⁵⁵ The UN watercourses convention user’s guide fact sheet series No 5, Para.4

potential difficulties between those two rules by affording the principle of equitable and reasonable utilisation priority (article 5) while giving the no significant harm rule special status (Article 7 (1). Pursuant to the Convention, and only in certain limited circumstances, taking measures to prevent significant harm may be inappropriate, or lead to an inequitable result, and some level of harm may therefore be tolerated (article 7 (2)).¹⁵⁶ The reference to Articles 5 and 6 supports the UN Convention and states are therefore not legally responsible for causing significant harm if they can show that they have taken all appropriate measures to prevent such harm, and their use of an international watercourse is equitable and reasonable. Thus, the scope for a state to cause significant harm becomes limited.

3.2.2. *The Guiding Principle*

The principle of “not causing significant harm” derives its normative foundation from *sic utere tuo ut alienum non laedas*, (so use your own as not to harm that of another),¹⁵⁷ or the good neighborliness principle. Accordingly, no states in an international watercourse are allowed to use the watercourses in their territory in such a way as to cause significant harm to other watercourse states or to their environment, including harm to human health or safety, to the use of the waters for beneficial purposes, or to the living organisms of the watercourse systems.¹⁵⁸ This principle is widely incorporated in modern transboundary water agreements and gets the status of customary international environmental law.¹⁵⁹ However, the question remains about the definition or extent of the word ‘significant’ and how to define “harm” as a “significant harm”.¹⁶⁰ It is also important to note that, contrary to popular belief, in some cases ‘harm’ can be caused by a downstream state to its upstream riparian by foreclosing the upstream state’s future water uses through the prior utilisation of such water.¹⁶¹

3.2.3. *All appropriate Measures*

States are required to take only those measures of prevention deemed appropriate pursuant to states’ resource capabilities.¹⁶² Accordingly, co-riparian states are under the obligation to take

¹⁵⁶ According to Alistair Rieu-Clarke, et.al, the cumulative reading of Article 5,7(1)(2) will be that a state may not claim legal injury provided that the alleged harm is not significant, by taking in to account Article 10 of UNWC (the vital human needs line)

¹⁵⁷ Waseem A. Qureshi, *The IWT and the UNWC: Commonalities and Differences*, 23 Ocean & Coastal L.J. 87 Available at: [https://digitalcommons.maine.gov/oclj/vol23/iss1/4\(2018\)p118](https://digitalcommons.maine.gov/oclj/vol23/iss1/4(2018)p118)

¹⁵⁸ UN Watercourse convention User’s Guide, (2004)p.217

¹⁵⁹ Ibid

¹⁶⁰ Article 7(1) of the UN convention on watercourse(1997)

¹⁶¹ See Supra note 159

¹⁶² The UN watercourses convention user’s guide fact sheet series No.5

“all appropriate measures” to ensure that activities conducted under their territorial jurisdiction do not cause significant harm to the territory of other riparians.¹⁶³ Therefore, states must provide prior notification and exchange information with regard to any planned measure that might “significantly harm” other transboundary watercourse states. Taking all appropriate measures, then, is an obligation of due diligence in utilisation: a diligence proportioned to the magnitude of the subject and to the dignity and strength of the power which is exercising it and such care as governments ordinarily employ in their domestic concerns.¹⁶⁴ The question which has to be answered here is one of duty of care: what would be expected of a reasonable government in similar circumstances. Hence, a state can be deemed to have breached the obligation not to cause significant harm not only when it has intentionally or negligently caused the event itself, but also in case the state did not prevent others in its territory from causing it.¹⁶⁵

3.2.4. Application of the Principle

There is a huge scholarly debate as to prioritization and application of the principle of “equitable and reasonable utilization” and that of “not causing significant harm”. The debate however rests on the conclusion that the principle of “not causing significant harm” as a secondary obligation to the primacy of the rule of “equitable and reasonable utilization”. Hence, a state’s compliance with the principle is not dependent solely on harm being caused, rather determined by a country’s reasonable conduct in terms of preventative behavior to avoid the harm in question.¹⁶⁶ This was confirmed by the International Court of Justice decision in the Pulp Mills on the River Uruguay case, which included the need to conduct an EIA as part of this duty.¹⁶⁷ Furthermore, countries are required to take only those measures of prevention deemed appropriate according to a state’s resource capabilities. The type of harm countries must avoid causing is qualified by the term “significant” which is defined as the real impairment of a use, established by objective evidence.¹⁶⁸ For harm to be qualified as “significant” it must not be trivial in nature but it need not rise to the level of being substantial; this is to be determined on a case by case basis. The “significant” threshold excludes mere inconveniences or minor disturbances that States are expected to tolerate, in conformity with the legal rule of “good neighborliness”.

¹⁶³ Ibid (n231)at p218

¹⁶⁴ The ILC Draft Articles 1994, Art 7 at 103, Para 4; referring to the Geneva Arbitration (The Alabama Case) reported in Moore JB, History and Digest of the International, Vol I (1898)p573

¹⁶⁵ Ibid

¹⁶⁶ The UN watercourse convention Users’ Guide Fact sheet series,5, Para.3

¹⁶⁷ A case concerning Pulp Mills on the River Uruguay (Argentina vs. Uruguay) ,13 July 2006

¹⁶⁸ Ibid

3.3. The General Duty of Cooperation

The purpose of the duty to cooperate, the third core principle of international water law, has traditionally been to regulate states' interactions in the ongoing management of shared fresh water resources in order to prevent transboundary fresh water disputes.¹⁶⁹ The meaning of this principle and its implementation at the international sphere is open to controversy.¹⁷⁰ The general obligation to co-operate presupposes the doctrines of sovereign equality, territorial integrity, mutual benefit and good faith.¹⁷¹ This general diction of the principle is intended to enhance the normative force of other provisions of the convention on specific aspects of cooperation.¹⁷² Thus at the core of cooperation is establishing a clear link between the rules on the use and the rules on the protection, preservation and management of international watercourses.¹⁷³ The obligation of states to co-operate is, in the view of the ILC, one of the component parts of the obligation of participation. The form of co-operation suggested¹⁷⁴ is the establishment of joint mechanisms or commissions to facilitate co-operation on relevant measures and procedures.¹⁷⁵ International legal scholars have been at odds over the issue of whether cooperation is a substantive and binding legal obligation or a mere guideline for achieving other rules pertaining to state's conduct.¹⁷⁶ However, the principle is a logical extension of the principle of equitable and reasonable utilisation; and most states have concluded that cooperating with their co-riparians is ultimately more in their self-interest than proceeding unilaterally. However, the UN convention¹⁷⁷ on international watercourse presents cooperation as a legal obligation. Be that as it may, parties to the Declaration of principles on the GERD give substantial place to the duty of cooperation and incorporated in its very first provision and agreed in understanding of upstream and downstream water needs in its various aspects.¹⁷⁸

¹⁶⁹ Tamar Meshel, *International Law and Transboundary Fresh Water Resources: A Dispute Resolution Perspective*(2018)p71

¹⁷⁰ Ejigu, Natan Aslake, *Construction of Grand Ethiopian Renaissance Dam on the Nile: Cause for Cooperation or Conflict among Egypt, Ethiopia and Sudan*(2016)p31

¹⁷¹ The UN Convention on international watercourses(1997) Article 8(1)

¹⁷² Maria Manuela De Franqa Doria and Farrajota Luciano Koberwein, *the principle of cooperation in the law of international Watercourses* (2008)p-137

¹⁷³ Stefen McCaffery, *the law of international watercourses*(2001)p46

¹⁷⁴ The UN watercourse convention (1997), Article 8(2)

¹⁷⁵ *ibid*

¹⁷⁶ Wouters and others, *Sharing Transboundary Waters: An Integrated Assessment of Equitable Entitlement: The Legal Assessment Model* at p23

¹⁷⁷ The UN Convention on international watercourses(1997)article 8

¹⁷⁸ The Declaration of principles(2015), Article I, para 1

3.3.1. *Cooperation based on sovereign equality and territorial integrity*

The principle of the sovereign equality of states is one of the foundations of international water law.¹⁷⁹ The principle of sovereign equality of states is also interconnected with almost all principles including that of cooperation.¹⁸⁰ The growing idea of co-operation and interdependence between states necessitates the existence of an international community of states.¹⁸¹ Pursuant to international law, all states enjoy sovereign equality, notwithstanding the differences in socio-economic and political bargains.¹⁸² Hence, sovereign equality is one of the tenets of the international legal order. The principle of sovereign equality of states forms the cornerstone of the rights and duties of states. These principles dictates premises of jurisdiction over a territory and a permanent population living there; and non-intervention in the area of exclusive jurisdiction of another state.¹⁸³ The concept of sovereign equality implies several other important principles such as the right to independence and the ban on the use of force.¹⁸⁴ Again, the principle of territorial integrity protects the sovereign states against violations of its territory.¹⁸⁵ It renders illegal acts of direct physical effect in the territory of another state as well as sovereign acts that one state carries out on the territory of another state. The states' territorial sovereignty is protected against forceful as well as non-forceful interventions.¹⁸⁶ The UN charter¹⁸⁷ does not define what actually means by 'territorial integrity', but it is now well recognized and reflects the fundamental international objective in the stability of boundaries. Besides, the UN Watercourses Convention¹⁸⁸ provided the duty to cooperate comprising the procedural duties of prior information and of prior consultation. It could be said that these procedural duties of cooperation seek to operationalise the fundamental principles of equitable and reasonable utilisation and no significant harm.¹⁸⁹ Therefore, cooperation provides the basis for many of the procedural rights and obligations contained primarily in the UN Watercourse

¹⁷⁹ Maria Manuela de Franca Doria, the principle of cooperation in the law of international watercourses(2008)p-89

¹⁸⁰ Perrez, Cooperative Sovereignty from Independence to Interdependence in the Structure of International Environmental Law (2000) p.13

¹⁸¹ MP Ferreira-Snyman, the evolution of state sovereignty: Historical overview(

¹⁸² Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations (GA Res 2625 (XXV) (1970)

¹⁸³ UN Watercourses Convention User's Guide(2012)p124

¹⁸⁴ J Kokott, 'States, Sovereign Equality' in Max Planck Encyclopedia of Public International Law

¹⁸⁵ Christian Marxden, Territorial Integrity in International Law and Its Concept and Implications for Crimea (2015)p15

¹⁸⁶ L. Oppenheim, International Law, in: H. Lauter pacht Disputes, War and Neutrality,(7th ed. 1952)p.154

¹⁸⁷ The Charter of the United Nations,article2(4)

¹⁸⁸ The UN Watercourses Convention(1997)article 8

¹⁸⁹ Ibid, article (5-7)

Convention.¹⁹⁰ All the same, the Declaration of principles on the GERD gives a great emphasis to the principles and provided that the parties shall cooperate on the basis of sovereign equality, territorial integrity, mutual benefit and good faith in order to attain optimal utilization and adequate protection of the Blue Nile river.¹⁹¹

3.3.2. Cooperation based on Mutual benefit and Good faith

The principle of mutual benefit implies that cooperation should lead to ‘win-win’ destinations whereby all states involved in cooperative activities gain from the interaction.¹⁹² In most cases, the concrete obligation to co-operate lies on procedural rules. These procedural rules are *inter alia*, the obligation to exchange data and information, the obligation to notify planned measure and environmental impact assessments the obligation to enter in to consultation¹⁹³ and the obligation to negotiate in good faith. The purpose of good faith negotiation is mutual benefit and to attain optimal utilization and adequate protection of an international watercourse.¹⁹⁴ These procedures have evolved towards more intensive degrees of co-operation through the adoption of an integrated management approach and the establishment of joint institutional mechanisms or commissions.¹⁹⁵ As cooperation in the Declaration of Principles on the GERD implies, Egypt, Ethiopia, and Sudan agreed to provide data and information needed for the conduct of the Tripartite National Committee joint studies in good faith and in a timely manner.¹⁹⁶

3.4. The principle of peaceful settlement of International water dispute

Negotiation between the parties is the first stage of settling international water dispute as set out in the UN Convention.¹⁹⁷ Pacific settlement of international water dispute can take different forms, including bilateral talks and diplomatic correspondence.¹⁹⁸ In international dispute settlement mechanisms, two mechanisms are compulsory: these are binding arbitration and

¹⁹⁰ The UN watercourses convention article 8(1)

¹⁹¹ Agreement on Declaration of Principles signed among Egypt, Ethiopia and the Sudan(2015),Article IX

¹⁹² Ibid

¹⁹³ Attila M. Tanzi, The inter-relationship between no harm, equitable and reasonable utilisation and cooperation under international water law, *Int Environ Agreements* (2020) 20:619–629)p626

¹⁹⁴ The UN Watercourses Convention (1997)article 8(1)

¹⁹⁵ See Id at article 8(2)

¹⁹⁶ Agreement on the Declaration of principles(2015), Article VII

¹⁹⁷ The UN Watercourses Convention (1997)Article 33 (2)

¹⁹⁸ Ibid

adjudication.¹⁹⁹ All other methods are optional. In any case, however, parties are under the obligation to conduct negotiations in good faith and in a manner that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating modification of it, as stipulated by the ICJ in Gabcikovo-Nagymaros case.²⁰⁰

3.4.1. Optional Mechanisms of Dispute Settlement

Negotiation²⁰¹ is the fundamental tenet in resolving any international dispute and parties should set the terms of their settlement in that domain.²⁰² Related to this, consultation forms a non-legally binding memorandum of understanding of the parties. Formal negotiations are often preceded by consultations, which usually involve the exchange of views and information.²⁰³ Consultation is normally an ad hoc procedure, but it can also be provided for in any watercourse agreement either within an institutional mechanism or a convention to which the disputants are parties to it. The UN watercourses convention specifies that parties should make use of any existing joint institutions. The list of optional procedures²⁰⁴ is quite impressive and includes good offices, mediation, and conciliation, use of any joint watercourse institution, arbitration, and submission to the International Court of Justice.²⁰⁵ This list does not include one of the mechanisms mentioned in Article 33 of the UN Charter. The UN Watercourses convention does include good offices, a procedure absent from the UN charters' text.²⁰⁶ Instead of resort to regional agencies or arrangements mentioned in the charter, the convention refers to the use of any joint watercourse institution.²⁰⁷

3.4.2. Compulsory Mechanism of Dispute Settlement

If the parties cannot solve their dispute by a means of their choice or by negotiations, it shall be submitted, at the request of any of the parties to the dispute, to impartial fact-finding.²⁰⁸

¹⁹⁹ Ruth Lapidot, *Dispute Settlements under the 1997 convention on law of international watercourses*, international water studies Volume 75(1998)p234

²⁰⁰ The Gabcikovo-Nagymaros Case (Hungary vs. Slovakia), 1997 ICJ No. 92, 78, 85, 141, reprinted in 37 INT'L LEGAL MAT'LS 162 (1998)

²⁰¹ The UN Watercourses Convention (1997)article 33(2)

²⁰² Alistair Rieu-Clarke, Ruby Moynihan and Bjørn-Oliver Magsig, *UN Watercourses Convention User's Guide*(2012)p237

²⁰³ Ibid

²⁰⁴ Ruth Lapidot, *Dispute Settlements under the 1997 Convention on the law of the non-navigational use of international waters*(1998)p236

²⁰⁵ Bourne, *Mediation, Conciliation and Adjudication in the Settlement of International Drainage Disputes*, Canadian Yearbook of International law (1971) p114

²⁰⁶ J.G. Merrills, *International Dispute Settlement*, third edition, Cambridge University Press (1998) p3

²⁰⁷ See Article 33 of the UN watercourses Convention and the UN Charter of the same article

²⁰⁸ Ibid (n206)at p237

According to the UN Watercourses Convention,²⁰⁹ if the parties concerned have not been able to settle their dispute through negotiations or any other means (six months from the time of the request for negotiations), the dispute shall be submitted, at the request of any of the parties to the dispute, to impartial fact-finding.²¹⁰ The UN watercourses convention has also adopted the “opt-in” procedure. Accordingly, when becoming a party to the convention or thereafter, a state may declare that in respect of any dispute not resolved by the optional mechanisms, it accepts the compulsory jurisdiction of the International Court of Justice or of an arbitration panel.²¹¹ States can opt for a binding method of dispute settlement by agreeing to submit the dispute to the binding arbitration or to the International Court of Justice. However, if parties choose to use either of the two legally binding dispute resolution methods (Arbitration or Adjudication)²¹² then the decision in both these methods is binding and not appealable.

Coming to the Declaration of principles’ dispute settlement provisions, the DoPs stated that the parties “will settle disputes, arising out of the interpretation or implementation of this agreement, amicably through consultation or negotiation in accordance with the principle of good faith. If the parties are unable to resolve the dispute through consultation or negotiation, they may jointly request for conciliation, mediation or refer the matter for the consideration of the heads of their concerned governments.”²¹³ Therefore, the DoPs recognized consultations, negotiations and mediations in good faith to resolve the dispute on the interpretation and application of the DoPs and refers to their government’s authority to determine if the solution needs compulsory arbitration or adjudication.

CHAPTER FOUR

4. EXAMINATION OF THE DECLARATION OF PRINCIPLES ON THE GERD UNDER INTERNATIONAL WATER LAWS

As a foundational principle of international watercourse law, negotiations and any possible agreement between the countries should be guided by the principle of equitable and reasonable use of transboundary watercourses without causing significant harm.²¹⁴ As a matter of customary

²⁰⁹ The UN Watercourses Convention (1997) art 33(3)

²¹⁰ Ibid

²¹¹ The UN Watercourses Convention (1997) art 33(10)

²¹² The UN Watercourses Convention (1997) Article 33 (3) and 33(10)

²¹³ Agreement on the Declaration of Principles(2015), Article X

²¹⁴ The UNWC, Article 5(1)

law, the principle of equitable and reasonable utilisation is binding on the states.²¹⁵ However, framework of international water law has reinforced separate and competitive identities among Nile basin states.²¹⁶ At the basin, the law of international watercourses served to reinforce self-interests and unconvincing legal arguments.²¹⁷ Hence, by drawing some key principles of international water laws applicable to transboundary watercourse disputes, this part of my work dives in to an examination of Agreement on Declaration of Principles on the GERD under international watercourses laws. Scrutiny of the approaches, interpretation and application of the principles of equitable and reasonable utilization in relation with ‘not causing significant harm’ and other related matters that underpin the negotiations between Egypt, Ethiopia and Sudan is the focal point of the examination.

Throughout the negotiations on the Nile water agreements and the GERD dispute, parties to the DoPs have argued to have international law on their side,²¹⁸ displaying their eagerness to demonstrate adherence to principles of international water law. Accordingly, while Ethiopia adhered and adopted the principle of equitable and reasonable utilization of the Nile water in justifying the GERD, Egypt and the Sudan want to avert transboundary significant harm that might be caused by the GERD. The agreement of Declaration of Principles on the GERD established the principle of equitable and reasonable utilization²¹⁹ in combination with the no significant harm.²²⁰ This shows the states’ familiarity with the principles and suggests an initial willingness to adhere to the principles to use the waters of the Nile River. This is a fundamental perception of the parties for successful negotiations. In particular, inclusion in the DoPs of the principle of equitable and reasonable utilization and prevention of significant harm would entail a consideration from Egypt’s side of Ethiopia’s right to use the natural resources of the Blue Nile waters including construction of the GERD.²²¹ Moreover, willingness from Ethiopia to commit itself to an agreement on the running of the GERD is a key step in showing that the building of

²¹⁵ Anne Funnemark, water resources and Inter-state Conflict: Legal Principles and the Grand Ethiopian Renaissance Dam (GERD)(2020)p34

²¹⁶ Jutta Brunnee et.al, ‘the Changing Nile Basin Regime: Does Law Matter?’ *Harvard International Law Journal*, vol. 43, no. 1, 2002, p.148.

²¹⁷ Zewdu Mengesha, Application of the Duty not to Cause Significant Harm in the context of the Nile River Basin, *Bahir Dar University Journal of Law Vol.4, No.2 (2014)p312*

²¹⁸ International Crisis Group, ‘The Nil Dam: A Short Window to Embrace Compromise’ (17th of June 2020), Available at: <https://www.crisisgroup.org/africa/horn-africa/ethiopia/nile-dam-talks-short-window-embrace-compromise>

²¹⁹ Agreement on Declaration of Principles(2015) article IV

²²⁰ Supra note 220, article III

²²¹ See supra note 217, p.150

the dam could rather benefit the region as a whole because it would make evident the country's commitment to cooperation.²²²

4.1. Gaps in International water law as to Interpretation and application: Overview

4.1.1. The gaps under International water law

Despite the fact that the ILA has made relentless efforts to clarify the relationship between equitable and reasonable utilization and no significant harm, the two principles continue to be susceptible to contradictory interpretations.²²³ As a result, their practical application in the resolution of interstate fresh water disputes remains uncertain and confused.²²⁴ Indeed, states sharing fresh water resources frequently exhibit a weak understanding of these principles, leading to difficulties in executing them. This is evident, for instance, in the GERD dispute among Egypt, Sudan and Ethiopia.

As is frequently the case in disputes between upstream and downstream states, Ethiopia claims an equitable and reasonable right to build the GERD, while Egypt and the Sudan contested the right to be free from significant harm that would be caused by the dam.²²⁵ Therefore, the potential for the “no significant harm” and “equitable and reasonable utilization” principles in their current formulation to effectively guide the resolution of this, and other, interstate fresh water disputes is therefore questionable.²²⁶ However, their relationship remains inconsistent and controversial hindering the use of these principles in the resolution of interstate fresh water disputes. Indeed, some of international water disputes, such as the GERD dispute, invoke conflicting claims of “historic uses” under the no significant harm principle and “equitable” uses under the equitable and reasonable utilization principle.²²⁷ That means Egypt and Sudan not only claims harm which might be caused by the GERD but also contested their acquired rights adjusted by previous Nile water agreements on the GERD negotiations. In these situations, the unclear relationship between the two principles enables states to stick to contradictory interpretations that suit their unilateral interests, thereby aggravating the dispute rather than resolving it. Such conflicting interpretations evidence the difficulty in providing general legal

²²² See Supra note 217, p.149

²²³ Tamar Meshel, *International Law and Transboundary Fresh Water Resources: A Dispute Resolution Perspective* (2018)p.160

²²⁴ Ibid at p.160

²²⁵ Stephen C. McCaffrey, *Second Rep. on the Law of the Non-Navigational Uses of International Watercourses*, 1986 Year Book of Int'l L. Comm'n, A/CN.4/399 and Add. 1 and 2 (1986)

²²⁶ Tamar Meshel, in reviewing, *Swimming Against the Current: Revisiting the Principles of International Water Law in the Resolution of Fresh Water Disputes*, 2020 / *Swimming Against the Current*, p. 151

²²⁷ Tamar Meshel, Supra note 223,at p.159

principles that would be applicable to all international fresh water resources and disputes. Importantly, however, determination of what is *equitable* and *reasonable* in a given case is a responsibility of basin states which they should carry out through negotiation of specific watercourse agreements.²²⁸ Once the specific rights of riparian states are determined in an inclusive agreement, the obligation not to cause significant harm circumscribes the right by obliging riparian states to take all appropriate measures to prevent the causing of significant harm constituting a legal injury to other riparian states.²²⁹ As the examination of the equitable and reasonable utilization and no significant harm principles, there is thus a need to revisit these principles.

4.1.2. The Interpretation and Application of the Principles

The first approach to reconcile the problem of contradiction in the principle of “equitable and reasonable utilization” and the principle of “not causing significant harm” is treating the two principles as complementary.²³⁰ This can be attained by defining the “no significant harm” principle as prohibiting only the causation of legal injury, i.e. an injury to a state’s legally protected right to an equitable share of the uses of an international fresh water resource, rather than as prohibiting factual harm.²³¹ Seeing the two principles by this lens, the principles would be compatible since a state may not invoke the “no significant harm principle” without showing that its equitable interest in the shared resource has been implicated.²³² However, since this requires that the initiating states use or other conduct resulting in harm is “unreasonable” (inequitable) in respect of the affected state based on determination of the relevant factors provided, it may result in violation of the no significant harm principle.²³³ The second way that has been suggested for applying the principle of “equitable and reasonable utilization” and “no significant harm” is to require a state that has caused significant harm in overall assessments of the relevant factors which are listed to determine the principle of equitable and reasonable utilization.²³⁴ This approach recognizes the importance of the “no significant harm principles” as a due diligence obligations, but yet remains guided by equitable and reasonable utilization since; ultimately, a “use” can cause significant harm and still be equitable and reasonable, and thus

²²⁸ Dereje Zeleke Mekonnen, Declaration of Principles on the Grand Ethiopian Renaissance Dam: Some Issues of Concern, MIZAN LAW REVIEW, Vol. 11, No.2 December 2017, p.274

²²⁹ See Dereje Zeleke citing The UN watercourses Convention 1997, article 3, Para3

²³⁰ Jens Evensen, the law of Non navigational use of international watercourse, UN Doc A/CN 4/367/, April 19,1983

²³¹ McCaffrey, the law of international watercourses(2001)p.154

²³² Ibid

²³³ Supra note 378,p159

²³⁴ Id at p.160

permissible.²³⁵ It is necessary that the principle of equitable utilization and the duty not to cause significant harm each require exactness in their application.²³⁶ Therefore the issues must be examined on a case by case basis.²³⁷ The international practice relies on the principle of equitable and reasonable utilization to determine whether an activity or use that causes significant harm should be permitted. It's therefore tantamount to treating equitable and reasonable utilization as the governing principle and no significant harm as subsidiary to it.²³⁸ Some scholars favor such a prioritization and consider the equitable and reasonable utilization principle as the “governing” or “preeminent” principle of international water law.²³⁹

4.2. Examination of Equitable and Reasonable Utilization Principle on the GERD

The principle of “equitable and reasonable use” of an international²⁴⁰ river is enshrined in the UN watercourses convention²⁴¹ and the Berlin Rules,²⁴² which are deemed as codifications of most relevant customary principles.²⁴³ Besides, recognized as the controlling principle of international watercourse law by the Helsinki Rules,²⁴⁴ the principle of equitable and reasonable utilization enjoys considerable support by international community and environmental law experts. The principle is believed to ensure the optimal utilization, development, conservation, management, and protection of international watercourses for both present and future generations.²⁴⁵ Upstream riparians have traditionally championed this principle since it provides for greater use of a watercourse despite a resultant impact on downstream parties.²⁴⁶ As provided under the UN watercourses convention, watercourse states shall in their respective territories

²³⁵ Stephen C. McCaffrey, *Intertwined General Principles*, in Research Handbook on International Water Law 91 (Stephen McCaffrey et al. eds., 2019)

²³⁶ Patricia K. Wouters, an Assessment of Recent Developments in International Watercourse Law through the Prism of the Substantive Rules Governing Use Allocation, *International Watercourse Law*, vol. 36, Spring, (1996), p. 420.

²³⁷ Zewdu Mengesha, The duty not to cause significant harm under international water law: Its application in the Nile basin, 2014, p, 37

²³⁸ Supra note 391 at p 421

²³⁹ Ibid

²⁴⁰ Zeray Yihdego, the blue Nile Dam controversy in the eyes of international law: part 2 (2013) Global Water Forum www.globalwaterforum.org | 1

²⁴¹ The 1997 Convention on the Law of Non-Navigational Uses of International Watercourses (1997) Article 5 (1)

²⁴² The *Berlin Rules on Water Resources* (2004) Article 12

²⁴³ Margaret J. Vick, ‘The Law of International Waters: Reasonable Utilization’, 12 *Chicago-Kent Journal of International and Comparative Law*, (Spring 2012) p 121

²⁴⁴ Supra note 302 at p.632

²⁴⁵ Lilian Del Castillo-Laborde, *Equitable Utilization of Shared Resources*, in Max Planck Encyclopedia of Pub. Int'l L. (2010)p.40

²⁴⁶ Id at p.633

utilize an international watercourse in an equitable and reasonable manner.²⁴⁷ In particular, an international watercourse shall be used and developed by watercourse states with a view to attaining optimal and sustainable utilization thereof and benefits therefrom, taking into account the interests of the watercourse states concerned, and consistent with adequate protection of the watercourse.²⁴⁸ Again, it provided that watercourse states shall participate in the use, development and protection of an international watercourse in an equitable and reasonable manner.²⁴⁹ Such participation includes both the right to utilize the watercourse and the duty to cooperate in the protection and development thereof, as provided in the present Convention.²⁵⁰ However, neither Egypt nor Ethiopia is a signatory to the UN watercourses convention, the Helsinki Rules and the Berlin Rules.²⁵¹ None of the parties to the agreement of the Declaration of Principle on the GERD are a party to the fundamental international water law conventions and rules. Egypt is also not a party to the Cooperative Framework Agreement negotiated by the 11 riparian states sharing the River.²⁵² This is due to Egypt's intent to secure the hegemony over the Nile waters. Egypt also outlined the objective of DoPs on the GERD to be limited solely for the purpose of Electric power generation.²⁵³ Indeed, parties to the DoPs cannot resist being not a party to international convention and rules with regard to those fundamental principles since the principles are binding on them as customary international law. In fact, the exclusive consumptive utilization of the Nile waters by Egypt and Sudan²⁵⁴ has been transformed from being a challenged fact on the ground into a legal reality which Ethiopia is bound to honor and respect. However, Egypt has concluded several agreements with Ethiopia that relate to the Nile, including the General Framework Agreement and the Declaration of Principles.²⁵⁵ The General Framework Agreement provides that "the issue of the use of the Nile waters shall be worked out on the basis of the rules and principles of international law."²⁵⁶ However, it only specifically

²⁴⁷ The UN watercourses Convention(1997) (art 5 cum art 6)

²⁴⁸ Id at article 5(1)

²⁴⁹ Id

²⁵⁰ Id at art5(2)

²⁵¹ See Tamar Meshel at p180

²⁵² Agreement on the Nile River Basin Cooperative Framework, May 14, 2010 (not in force), <https://perma.cc/XJ65-G9UN>, and six riparian states have so far signed the agreement, and Ethiopia, Rwanda, and Tanzania have ratified it. Three more countries need to ratify it to make it enforceable. DRC, Egypt, and Sudan has yet to sign it.

²⁵³ Dereje Zeleke Mekonnen, Declaration of Principles on the Grand Ethiopian Renaissance Dam: Some Issues of Concern, MIZAN LAW REVIEW, Vol. 11, No.2 December (2017)p268: DOI <http://dx.doi.org/10.4314/mlr.v11i2.1>

²⁵⁴ See the exclusive water apportionment treaties of 1929 and 1959 among Egypt and Sudan

²⁵⁵ Framework for General Cooperation, Egypt-Eth., Jul. 1, 1993, 2693 U.N.T.S. 71

²⁵⁶ Framework for General Cooperation, article 4

refers to the no significant harm principle and does not mention the equitable and reasonable utilization principle.²⁵⁷

Throughout the negotiations, Egypt's main argument is based on the 'principle' of historic or inherent right to use the Nile.²⁵⁸ Egypt in particular argues that as a desert nation it has no other option for survival but to depend on the River, while Ethiopia and others have other options including heavy rain to satisfy their water and agricultural needs. In sharp contrast, Ethiopia and other riparian countries base their argument on the equitable use and utilisation principle, which is regarded by many as part of customary international water law.²⁵⁹ Seeing at the agreement on the Declaration of principles on the GERD also shows that the DoPs established the principle of equitable and reasonable utilization in combination with the no significant harm principle. It provided that the parties shall utilize their shared water resources in their respective territories in an equitable and reasonable manner.²⁶⁰ The Declaration of Principles provides a principle of "equitable and reasonable utilization" and the principle of "not causing significant harm" which resembles Articles 5 and 6 of the UN watercourses convention but the parties to the declaration omits any explicit reference to what to mean by "equitable" or "reasonable" use.²⁶¹

4.2.1. *Analysis of Factors Relevant to Determine the Principle*

After the prolonged and sustained effort of the ILA in its Helsinki Resolution on 1966,²⁶² the rules of equitable utilisation as determinants of the allocation and sharing of water resources among the riparian countries were adopted, which has become the substantive law ever since.²⁶³ The UN watercourses convention²⁶⁴ attempts to facilitate the application of the equitable and reasonable utilization principle by providing a non-exhaustive list of factors.²⁶⁵ The provisions²⁶⁶

²⁵⁷ Supra note 252, at article 5

²⁵⁸ Joseph W. Dellapenna, 'The customary international law of transboundary fresh waters' *Int. J. Global Environmental Issues*, Vol 1, No 3/4, (2001), pp264-305

²⁵⁹ Ibid

²⁶⁰ Agreement on Declaration of Principles between The Arab Republic of Egypt, The Federal Democratic Republic of Ethiopia And The Republic of the Sudan On The Grand Ethiopian Renaissance Dam Project (GERD) 23rd March (2015) article (IV) Para 1

²⁶¹ UNWC Article 5 cum Article 6

²⁶² ILA report of the fifty second conference, Helsinki (1966)p 486

²⁶³ B. R. Chauhan, *Settlement of International and Inter-State Water Disputes in India*, Bombay: Indian Law Institute, (1992) pp. 21-40. There are some scholars who hold a different view on whether there are only four rules on the subject. Chauhan has argued that there are seven prevailing rules, including the doctrine of riparian rights, prior appropriation, territorial sovereignty, natural flow, equitable apportionment, community of interest, and the equitable utilisation theory.

²⁶⁴ Id at article 6

²⁶⁵ Tamar Meshel, Swimming Against the Current: *Revisiting the Principles of International Water Law in the Resolution of Fresh Water Disputes*, *Harvard International Law Journal / Vol. 61, No 1, Winter (2020)*p160

²⁶⁶ UN watercourses convention, Article 6(3)

merely suggest that the weight to be given to each factor is to be determined by its importance and that all relevant factors are to be considered together.²⁶⁷ For instance, the first factor which deals about the geographic, hydrographic, hydrological, climatic, ecological and other factors of a natural character includes virtually every physical feature that has some relationship to fresh water.²⁶⁸ However, the convention gives special regard to “vital human needs” in resolving conflicts between different uses of an international watercourse.²⁶⁹ Again, in determining the “vital human needs”, the UNECE guide stated that special attention must be paid to providing sufficient water to sustain human life including both drinking water and water required for provision of food, in order to prevent starvation.²⁷⁰ On this basis, the guide concludes that “in weighing up all the relevant factors, every effort should be made to maximize the resultant benefits to the watercourse states equitably, whilst at the same time protecting the long term sustainability of the resource.”²⁷¹ Moreover, it is important to define the relevant factors to be considered that will significantly help resolve the dispute during negotiations and other diplomatic efforts to avert and mitigate future conflicts.²⁷² The socio-economic and demographic aspects of the populations and the existing and potential uses are given equal weight in order to determine whether or not a particular use is equitable. It is useful to mention here that in the context of rejection of the population factor (huge population was a reason to demand priority) in determining equitable utilisation by the ICJ in its decision of the delimitation of a continental shelf, it was thought essential to define those elements.²⁷³ In order to give emphasis to the population factor it was essential to put it expressly to avoid any confusion created by the above judgment. In the case of the allocation of resources between two developing countries, the less developed country, for example as between India and Nepal, Nepal, should get priority according to the rule of equity.²⁷⁴ This is by analogy with the tradition of developed countries providing finance to the development effort of developing countries, to less developed countries at different

²⁶⁷ Tamar Meshel, supra note 332 at p.161

²⁶⁸ Stephen M. Schwebel, First Rep. on the Law of the Non-Navigational Uses of International Watercourse, U.N. Doc. A/CN.4/320, (May 21, 1979)p 162

²⁶⁹ UNWC, supra note 321, article 10(2)

²⁷⁰ Report of the six committee convening as the working group of the whole, UN Doc A/51/869, 11 April 1997

²⁷¹ UNECE, Guide to implementing the water convention (New York and Geneva, 2013). The Guide suggests its official status and interpretive value by explaining at Para V that it was adopted by the fifth session of the Meeting of the parties to the water convention in 2010 which relevant updates introduced under the guidance of the convention’s Bureau in accordance with the mandate given by the sixth session of the Meetings of the parties in 2012.

²⁷² Ibid

²⁷³ Judge Weeramantry’s opinion in the Maritime Delimitation in the Area between Greenland and *Jan Mayen* case (Denmark vs. Norway) ICJ Reports (1993) p.268

²⁷⁴ Report on the sixth committee conveying as the working group of the whole, UN a/51/859, 11 April, 1997

stages of development.²⁷⁵ It can be argued that developing and vulnerable nations could benefit from socio-economic, and population factors stipulated in Article 6 of the UN watercourses convention, whilst sharing and allocating the benefits from common water resources.²⁷⁶ The next significant development is the interpretation of equitable utilisation in the context of the Gabcikovo-Nagymaros case²⁷⁷ by the ICJ which recognized equitable utilisation as a basic rule in articles 5 and 6 of the UN watercourses convention.²⁷⁸ In this case, the court held the view that according to the treaty of 1977, Hungary had agreed to share the benefits from the Danube River. Non-implementation of the treaty, however, did not mean that it had forfeited its right over the reasonable and equitable sharing of the benefits there on.²⁷⁹

4.2.2. A look at the factors in the Declaration of principles on the GERD

Seeing at some relevant factors provided under agreement on Declaration of Principles on the GERD,²⁸⁰ to determine whether the utilization and use of the Nile water accords with the principle of equitable and reasonable utilization, it needs logical reasoning and good faith negotiations on each relevant factor among co-riparians. For example, when one looks into the geographic condition of Egypt, it forms part of the Saharan desert. It is characterized by the climatic conditions of hot dry summers and mild winters and it received very low, irregular and unpredictable rainfall.²⁸¹ Egyptians are 97 percent dependent on the Nile waters with no viable alternative water resources. Therefore, in view of these factors, the treaty seems an instrument of securing and maintaining the water need of Egypt.²⁸² All the forgoing elements of the principle affirmatively work for Egypt. This, in turn, keeps Ethiopia loyal to the water interest of Egypt thereby compromising its domestic interests.²⁸³ That means most of the lists of factors provided under the DoPs (article IV (a-i)) such as the natural and the socio-economic factors which are deemed to determine the principle of equitable and reasonable utilization favors the downstream

²⁷⁵ X. Fuentes, “Sustainable and Equitable Utilisation of International Watercourses” (1998) p.119; also see principle 6 of the Rio Declaration proclaiming that the special situation and needs of developing and those most environmental vulnerable, shall be given special priority.

²⁷⁶ Ibid

²⁷⁷ In the *Gabcikovo-Nagymaros* case interpretation of equitable utilisation has been construed as a skeleton rule of shared natural resources between the states, in 37 ILM (1998), Para. 85, p. 191.

²⁷⁸ See ICJ’s decision in the case of the *Gabcikovo-Nagymaros* in relation to Article 5 and 6 of the UN watercourses convention

²⁷⁹ Ibid at p190

²⁸⁰ Bayeh E (2016) Agreement on Declaration of Principles on the Grand Ethiopian Renaissance Dam Project: A Reaffirmation of the 1929 and 1959 Agreements? *Arts Social Sci J* 7: 170. doi:10.4172/2151-6200.1000170

²⁸¹ Ibid

²⁸² Fouad K, Samiha O, Nemat Allah O, Abed El-Hady G (2011) Determination Of agro-climatic zones in Egypt using a robust statistical procedure. Fifteenth International Water Technology Conference, Alexandria, Egypt

²⁸³ Supra note 282 at p.2

states. However, it can be argued based on international practice that the number of populations and the level of development of Ethiopia may be a positive input for the justification of adopting the principle. Off all, Ethiopia contributed an amount of more than 86% to the Nile waters conforms to article IV (h) of the DoPs. That means the contribution of each basin state to the waters of the Nile River system is provided as a relevant factor which help to determine the principle of equitable and reasonable utilization. To sum up, the Declaration of Principle²⁸⁴ recognizes the increasing water needs of each party and reaffirms the principles of “no harm”²⁸⁵ and “equitable and reasonable utilization”.²⁸⁶ Moreover, the DoPs contains procedural standards such as the development of rules and guidelines for the operation of the GERD, informing downstream states of unforeseen or urgent circumstances, the establishment of an appropriate coordination mechanism, the exchange of data and information, and a dispute resolution mechanism. The ultimate underlying objective of the DoPs, in addition to ensuring equitable and reasonable utilization of the Nile waters by the parties is to ensure²⁸⁷ that the GERD contributes not only to the provision of energy, but also to economic growth, regional cooperation and integration.²⁸⁸

4.3. Scrutiny of the Principle of Not causing Significant Harm on the GERD

As provided under the Declaration of Principles on the GERD,²⁸⁹ parties shall take all appropriate measures to prevent the causing of significant harm in utilizing the Blue/Main Nile.²⁹⁰ However, where significant harm nevertheless is caused to one of the countries, the state whose use causes such harm shall, in the absence of agreement to such use, take all appropriate measures in consultations with the affected state to eliminate or mitigate such harm and, where appropriate, to discuss the question of compensation.²⁹¹ The DoPs in its article III, first paragraph stated that the three countries shall take “all appropriate measures” to prevent the

²⁸⁴ Agreement on Declaration of Principles between The Arab Republic of Egypt, The Federal Democratic Republic of Ethiopia And The Republic of the Sudan On The Grand Ethiopian Renaissance Dam Project (GERD) 23rd March 2015

²⁸⁵ Article III of the Declaration of Principles (DoPs)

²⁸⁶ Article IV of the Declaration of Principles(DoPs)

²⁸⁷ The Declaration of Principles (2015)Art 3 cum 4

²⁸⁸ Tamar Meshel, swimming Against the Current: Revisiting the Principles of International Water Law in the Resolution of Fresh Water Disputes, (Harvard International Law Journal, Volume 61, Number 1, Winter 2020)p-138

²⁸⁹ The Declaration of principles(2015)article III

²⁹⁰ Id paragraph 1

²⁹¹ See supra note 291, Para.2

causing of significant harm in utilizing the Nile waters.²⁹² Again, the second paragraph of the same provision involves a significant omission with serious normative consequence, which reads: “where significant harm nevertheless is caused to one of the countries, the state whose use causes such harm shall, in the absence of agreement to such use, take all appropriate measures in consultations with the affected state to eliminate or mitigate such harm and, where appropriate, to discuss the question of compensation. This reformulation involves a significant omission of the phrase “having due regard” for the provisions of UN watercourses convention.²⁹³ However, those riparian states those who act to assert their legal entitlement²⁹⁴ and get a reasonable share must not inflict a significant harm upon riparian states, as stated in the UN watercourses convention²⁹⁵ and restated in the Berlin Rules.²⁹⁶ This means that watercourse states ought to “take all appropriate measures”, in consultation with concerned parties, to prevent such significant harm. For example, denying water necessary for human survival, by an upstream county, may well amount to causing a significant harm.²⁹⁷ On the other hand, the duty to prevent and avoid a significant harm presupposes the use and utilisation of a river in an equitable and a reasonable manner.²⁹⁸ Some impact may thus be felt in downstream countries while a country exercises its legal entitlement over an international river.²⁹⁹ The principle of preventing a significant harm is only meant to ensure, for example, that ‘minimum individual water requirements’ of human beings, in downstream countries, is not significantly affected.³⁰⁰ In light of this principle Egypt’s objection on the basis of its future expansion of dams and hydro-electric power stations will most likely not be accommodated by Ethiopia in accordance with the declaration and the UN watercourses convention.³⁰¹ The development needs of upstream countries including Ethiopia should be fully recognized by Egypt (similar to Sudan) as part of

²⁹² Dereje Zeleke Mekonnen, Declaration of Principles on the Grand Ethiopian Renaissance Dam: Some Issues of Concern, *MIZAN LAW REVIEW*, Vol. 11, No.2 December (2017)p271

²⁹³ The cumulative reading of the UNWC Articles 5 and 6” found in Article 7(2)

²⁹⁴ See supra note 302 at p.2

²⁹⁵ The UN watercourses Convention (1997) Art 7(2)

²⁹⁶ The *Berlin Rules on Water Resources* (2004) Article 12

²⁹⁷ Alistair Rieu-Clarke, *International Law and Sustainable Development: from the law of international watercourses* (IWA Publishing, London, 2005) pp101-120

²⁹⁸ Zeray Yihdego, the Blue Nile Dam controversy in the eyes of international law, *Global Water Forum* www.globalwaterforum.org | 1, 2013, part 2

²⁹⁹ The Berlin Rules on international watercourses(2004),Article 16

³⁰⁰ Supra note 371 at p.3

³⁰¹ Id

the global action to eradicate poverty. The riparian countries cannot, however, achieve this without creating an environment of mutual trust among them all.³⁰²

4.3.1. *The Report of International Panel of Experts on the GERD*

Egypt, Ethiopia and Sudan appointed the IPOE to review the various impacts of the dam on the Nile River and its basin in 2013.³⁰³ The IPOE evaluated the dam and its socio-economic, hydrological and environmental impacts on Egypt, Sudan and Ethiopia.³⁰⁴ Egypt disagrees over the implementation of some of the recommendations of the IPOE.³⁰⁵ These recommendations were transboundary impact assessments, hydrological and socio-environmental impacts of the GERD on Egypt and Sudan. Up until 2015, Ethiopia, Egypt and Sudan still agreed on the technicalities of the GERD. Hence, whether the GERD will inflict a significant harm on Egypt and Sudan is a technical matter which requires scientific expertise. To this end, Ethiopia cooperatively initiated for the formation of tripartite Technical Commission, mandated to examine the potential impacts of the construction GERD on Egypt and Sudan, and submitted its report to all concerned co-riparians.³⁰⁶ Accordingly, Ethiopian Water and Energy Ministry welcomed the Report by IPOE as it confirms that the dam will not have a significant negative impact on either Egypt or Sudan and meets international standards.³⁰⁷

Hence, the Agreement of the Declaration of Principle on the GERD has been an instrument for the three countries to cooperate and work together during and after the construction of the GERD.³⁰⁸ This cooperation includes the participation of an International Panel of Experts that will research better ways to manage and operate the dam. Here, one of the major achievements has been the commitment from Ethiopia to avoid causing significant harm to Egypt and Sudan, which are very reliant on the Nile waters.³⁰⁹ Also, in case any harm is done, Ethiopia will take the necessary actions to mitigate and discuss compensation ‘whenever convenient’. In this regard, the agreement has been an instrument to avoid escalating conflicts between the three

³⁰² Id

³⁰³ Mehari Tadele Maru, *The Nile Rivalry and Its Peace and Security Implications: What Can the African Union Do?* Institute for peace and security studies, Vol. 1 | Issue 1 | June 2020, p.6

³⁰⁴ Supra note 305, Sudan and Egypt Agree to establish a Tripartite Committee to assess the impacts of the Ethiopian Renaissance Dam, Sudan -agrees-to-tripartite-committee-over-Ethiopian Nile-dam

³⁰⁵ Supra note 376 and Abiy Hailu, 2014, tripartite discussion terminated owing to Egyptian proposal against Ethiopia’s Interest. Addis Ababa: The Ethiopian Herald, 17 January, P.1

³⁰⁶ The final Report on International Panel of Experts (IPOE) (May 21st 2013)pp14-18

³⁰⁷ Supra note 302 at p.3

³⁰⁸ A report document by the Organization for World Peace Analysis of the Nile Water Crisis,(World Peace IS Possible), produced by the OWP’s Policy Analysis Team: Arthur Jamo, Ingrid Valladares, Jared Hatten and Olayiwola Ademola(2018)p-24

³⁰⁹ Ibid

countries, and to reassure that any harm will be Ethiopia's responsibility. However, this is deemed as an achievement it has also been a failure for some, especially on Ethiopia's side in recurring its sovereignty for further development of the Nile waters.³¹⁰ That is to say, according to some scholars comment, limitation of the dam's purpose for power generation may hinder Ethiopia's future whim to develop the reservoir for irrigation purposes.

4.3.2. *The Threshold of Contested Harm on the GERD*

The duty of "not to cause significant harm" is a due diligence obligation of prevention, rather than an absolute prohibition on transboundary harm.³¹¹ Hence, a state's compliance with the principle is not dependent solely on harm being caused, but rather determined by a country's reasonable conduct in terms of preventative behavior to avoid the harm in question.³¹² Furthermore, countries are required to take only those measures of prevention deemed appropriate pursuant to a state's resource capabilities.³¹³ The type of harm countries must avoid causing is qualified by the term significant which can be defined as the real impairment of a use, established by objective evidence.³¹⁴ Due diligence has been defined to mean a diligence proportioned to the magnitude of the subject and to the dignity and strength of the power which is to exercise it; and such care as governments ordinarily employ in their domestic concerns.³¹⁵ The obligation of due diligence contained in article 7 sets the threshold for lawful state activity. It is not intended to guarantee that in utilizing an international watercourse significant harm would not occur.³¹⁶ It is an obligation of conduct, not an obligation of result. What the obligation entails is that a watercourse state whose use causes significant harm can be deemed to have breached its obligation to exercise due diligence so as not to cause significant harm only when it has intentionally or negligently caused the event which had to be prevented or has intentionally or negligently not prevented others in its territory from causing that event or has abstained from

³¹⁰ Supra note 373 at p. 25

³¹¹ The UN watercourse Convention User's Guide, Fact-sheet serious No. 5, Electronic version available on-line at: www.dundee.ac.uk/water

³¹² Wegerich, K., et.al, Developers and the Inequity of 'Equitable Utilisation' and the Harm of "Do No Harm" (2010) 35 Water International 707

³¹³ McIntyre, O. Environmental Protection of International Watercourses under International Law (Ashgate 2007) pp 87- 112

³¹⁴ Rieu-Clarke, A., Moynihan, R. and Magsig, B., UN Watercourses Convention – User's Guide (CWLPS 2012)pp117-122

³¹⁵ Commentary, on the law of non navigational use of international watercourses(1994)p103

³¹⁶ The International Law Commission's draft articles on the law of international watercourses: Principles and planned measures", *Colorado Journal of International environmental Law and Policy* (Boulder), vol. 3, No. 1 (Winter 1992), pp. 65-92;

abating it.³¹⁷ Therefore, a state may be responsible for not enacting necessary legislation, for not enforcing its laws or for not preventing or terminating an illegal activity, or for not punishing the person responsible for it.³¹⁸

Coming to the DoPs, the thresholds in the Declaration of Principles triggers dam operation during special conditions.³¹⁹ These quantified obligations in the GERD guidelines and rules reflect the extent of existing water use in Ethiopia. These thresholds are not permanent agreements on the definition of significant harm signifying a perpetual undertaking obliging Ethiopia to release the same volume of water.³²⁰ Considering Ethiopia's right for future development over the Nile, the thresholds on the GERD guidelines and rules must be considered temporary committal of the waters of the Blue Nile. If Egypt seeks to establish a permanent water share allocation, it shall be willing to enter into a water allocation agreement. Ethiopia is ready to start the talks on this topic involving all the riparian countries of the Nile.³²¹

4.3.3. *The Interpretation and Application of the Principle on the GERD*

The GERD dispute invokes conflicting claims of “historic uses” under the no significant harm principle by Egypt and the Sudan and “equitable uses” under the equitable and reasonable utilization principle by Ethiopia.³²² In these situations, the unclear relationship between the two principles enables states to adhere to contradictory interpretations that suit their unilateral interests, thereby aggravating the dispute rather than resolving it.³²³ Hence, the ambiguity surrounding their relationship and application hinder their use in the resolution of the GERD dispute.³²⁴ Indeed, the controversial relationship between these two principles has resulted in

³¹⁷Text adopted by the International Law Commission at its forty-sixth session, in 1994, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (at para. 222). The report, which also contains commentaries on the draft articles, appears in *Yearbook of the International Law Commission, 1994*, vol. II, Part Two

³¹⁸ P. K. Wouters, allocation of the non-navigational uses of international watercourses: Efforts at codification and the experience of Canada and the United States", *The Canadian Yearbook of International Law (Vancouver)*, vol. XXX (1992), pp. 43

³¹⁹ A response letter submitted by Ethiopia to the UNSC, to Egypt's allegation on GERD operation and schedule of filling the dam, dated (22 June 2020) Para. 8

³²⁰ Ibid

³²¹ Supra note 321, Para .9

³²² Tamar Meshel, Swimming Against the Current: Revisiting the Principles of International Water Law in the Resolution of Fresh Water Disputes, *Harvard International Law Journal / Vol. 61, No 1, Winter (2020)*p182

³²³ Stephen C. McCaffrey, *Second Rep. on the Law of the Non-Navigational Uses of International Watercourses*, 1986 Y.B. Int'l L. Comm'n, A/CN.4/399 and Add 1 and 2 (1986)

³²⁴ Ibid

contradictory interpretations adopted by Egypt and Ethiopia, preventing any effective balancing of their competing interests in the Nile River.³²⁵

As far as the Declaration of Principles dealing with the principle of equitable and reasonable utilization without causing significant harm is concerned, the DoPs states that the three Countries shall take all appropriate measures to prevent the causing of significant harm in utilizing the Blue Nile.³²⁶ Since the interpretation and application of the provisions dealing with prevention of significant harm is not defined and verified, parties to the DoPs needs to further agree on each elements to enhance full understandings. Again, the DoPs reinstates that where significant harm nevertheless is caused to one of the countries, the state whose use causes such harm shall, in the absence of agreement to such use, take all appropriate measures in consultations with the affected state to eliminate or mitigate such harm and, where appropriate, to discuss the question of compensation.³²⁷

4.4. Cooperation under the Declaration of Principles

The UN watercourses convention obliges³²⁸ watercourse states to cooperate in using and utilizing an international river, through information sharing, notification of projects and establishing joint commissions.³²⁹ Concluding an international agreement to mitigate and manage disputes is also an important component of the duty to cooperate.³³⁰ The next section of this work assesses the cooperative efforts in the negotiations over the GERD dispute under auspices of the declaration of principles and principles of international law.³³¹

4.4.1. Formation of the IPOE and Joint Commission

Parties to the Declaration of Principles on the GERD succeeded in establishing the technical commission and international panel of experts to study the impact of the GERD, which is a positive move towards cooperation but expectedly led to divergent weighing of its recent

³²⁵ Habatamu Alebachew, *International Legal Perspectives on the Utilization of Trans-Boundary Rivers: The Case of the Ethiopian Renaissance (Nile) Dam, in Water and the Law: Towards Sustainability* 66, 73–74, 80–81 (Michael Kidd et al. eds., 2014).

³²⁶ Agreement on the Declaration of Principles on the GERD (2015) Article III

³²⁷ See supra note 328, Article III, Para 2

³²⁸ The UN watercourses convention, 1997, Article 5 (2)

³²⁹ Zeray Yihdego, *The Blue Nile dam controversy in the eyes of international law*, 2013, part 2 p.4

³³⁰ The Berlin Rules on international watercourses(2004), Article 11

³³¹ Agreement on the Declaration of Principles(2015), Article I, Para.1

report.³³² However, a pretty good cooperation among the parties is very crucial. The IPoE was formed to review the design and study documents of the GERD; to provide transparent information sharing; and to seek understanding on the benefits and costs accrued to the three countries and impacts, if any, of the GERD on Egypt and the Sudan.³³³ The Panel was composed of two experts from each of the three countries and four international experts from Germany, South Africa, France and Britain. The main objective of the formation of the IPoE is to ensure assessment of the harm that might be caused by the GERD; in accordance with cooperation in good faith and to perform obligation of taking appropriate measures.³³⁴ The Panel examined more than 150 design and study documents on the GERD provided by Ethiopia and submitted its final report on 31 May, 2013 to the water affairs ministers.³³⁵

In its final report adopted by consensus, the IPoE has concluded that the design and construction of the GERD is up to international standards.³³⁶ The Panel also recommended that Ethiopia, Egypt and the Sudan conduct two additional studies namely hydropower/water resources simulation modeling at the Eastern Nile level, and trans-boundary socio-economic and environmental impact assessment.³³⁷ As article VIII of the DoPs stated, Egypt and the Sudan expressed their appreciation of Ethiopia for implementing the recommendations in good faith.³³⁸

4.4.2. *Tripartite National Committees*

Despite negotiation stalemates, Ethiopia continued its determination to cooperate based on common understanding, mutual benefit, good faith, win-win, and principles of international law; as provided under the Declaration of principles.³³⁹ To this end, Ethiopia positively initiated the formation of the Tripartite National Committee (TNC) in August 2014.³⁴⁰ The committee composed of 12 experts, four from each of the three countries. The committee was tasked to guide and follow up on the conduct of the two IPoE recommended studies.³⁴¹ Accordingly, 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 IPoE report. According to the declaration of

³³² Letter dated 14 May 2020 from the Permanent Representative of Ethiopia to the United Nations addressed to the President of the United Nations Security Council(15 May,2020),Para.16

³³³ Supra note 334, Para.17

³³⁴ Agreement on the Declaration of Principles(2015), Article V

³³⁵ Final Report, International Panel of Experts on the Grand Ethiopian Renaissance Dam Project (May 31st 2013)

³³⁶ See Supra Note 337, at pp.21-32

³³⁷ Supra Note 439, Para.27

³³⁸ Ibid

³³⁹ The Declaration of principles on GERD (2015), Article I, Para 1

³⁴⁰ The ministerial meetings formed the TNC on August 2014

³⁴¹ This effort cooperative efforts was done in accordance with the DoPs (2015),Article V Para.3

principles, parties agreed to implement the recommendations of the International Panel of Experts, respect the final outcomes of the Technical National Committee, the final report on the joint studies recommended in the IPOE and the final report throughout the different phases of the project.³⁴² However, due to the mistrust by the downstream states on the reports of the IPOE, the ministerial meetings on which the works of the TNC did not go further.

4.4.3. Agreement to form Joint Research Group

Due to negotiation stalemates on the IPOE recommended studies, Ethiopia proposed for the establishment of the National Independent Scientific Research Groups (NISRG) composed of five scientists from Egypt, Ethiopia and the Sudan in February 2018.³⁴³ The Group was tasked to conduct and submit scientific studies to water affairs of the three states' ministers in order to inform the first filling and annual operation of the GERD in line with the Declaration of Principles.³⁴⁴ After conducting four meetings and carrying out modeling and scenario-based analysis, the NISRG submitted its report to the Ministers of Water Affairs of the three countries.³⁴⁵ Ministers reviewed the report and resolved outstanding issues from the deliberations by technical experts of the three countries. An agreed minute of the meeting indicating the consensus of the Ministers on the first filling and annual operation of the GERD was jointly prepared. While Ethiopia and the Sudan were ready to sign, Egypt declined at the last minute citing the need to consult with the higher authorities in Cairo.³⁴⁶ Encouraged by the outcomes produced by the NISRG, though Ethiopia and the Sudan made repeated efforts³⁴⁷ to move the process forward and to make the scientific group to continue its work based on previously agreed points of discussion, Egypt's inflexible approach prevented the NISRG from analyzing issues.

4.5. Assessment of GERD negotiation

In the GERD negotiations, Egypt and Sudan want to be secured from any harm by GERD; and Ethiopia has justified the utilization of the Nile waters including GERD project under principle

³⁴² See supra note 341, Article V, Para 1 and 2

³⁴³ The National Independent Scientific Research Groups (NISRG) was established effective 15 May 2018 by the decision of the Nine Party meeting in Addis Ababa.

³⁴⁴ Under the Declaration of Principles 2015, Article V(a) the three states agree on guidelines and rules on the first filling of GERD which shall cover all different scenarios, in parallel with the construction of GERD.

³⁴⁵ Report by NISRG in a meeting held on 25 September 2018 in Addis Ababa.

³⁴⁶ Letter dated 14 May 2020 from the Permanent Representative of Ethiopia to the United Nations addressed to the President of the United Nations Security Council (15 May, 2020), Para. 36

³⁴⁷ Ibid

of sovereign right in the auspices of equitable and reasonable principle.³⁴⁸ After the conclusion of the DoPs, the three countries continued negotiations and the ministers of water resources and the ministers of foreign affairs of the three countries signed the Khartoum Agreement, originally titled “summary and the outcomes of the Meeting as a reaffirmation of their full commitment to the DoPs.”³⁴⁹ Currently, the main concern of negotiation on the GERD has become the schedule of filling the dam owing the reason of drought and water quantity. However, the principles of the schedule of filling and the annual operation of the dam are provided under the declaration of Principles.³⁵⁰

4.5.1. The Principle of Schedule of Filling and Annual operation of the Dam

The parties agreed the first filling of the GERD reservoir and annual operation of the dam without causing significant harm to the downstream states.³⁵¹ The three states must consider the factors provided in Article IV of the DoPs, including climatic and hydrological conditions of the river, the effect of the GERD’s use on other riparian states, population, existing and potential water uses, efficient utilization of water resources, and the water contribution of each state for ensuring equitable filling of the GERD.³⁵² Concerning the filling of the GERD reservoir and annual operation of the dam to downstream reservoirs, there is a need for reconsideration of the approach of “the Joint statement release on Jan. 2020”³⁵³

The statement disregards equitable and reasonable utilization and focuses only on potential impact, which is inappropriate and contrary to the cardinal principles of international watercourse law.³⁵⁴ Under the statement’s proposed framework, Ethiopia would further need to fill the dam during the wet season, generally from July to August, while taking appropriate mitigation measures for Egypt and Sudan during drought, prolonged drought period and

³⁴⁸ Though subsequent meetings in Cairo (15–16 September 2019) and Khartoum (30 September to 03 October 2019), the meetings bears no substantial fruits

³⁴⁹ The 4th tripartite meeting of the ministers of foreign and water affairs of Egypt, Ethiopia, and Sudan on the Grand Ethiopian Renaissance Dam Project (GERD), Khartoum – Sudan, (27–28 December 2015) Article (3 – 4)

³⁵⁰ The declaration of Principles on the GERD(2015), Article V, Para(a)cum(b)

³⁵¹ DoPs, *supra* note 430, Article V

³⁵² Mahemud Eshtu Tekuya, Sink or Swim: Alternatives for Unlocking the Grand Ethiopian Renaissance Dam Dispute, 90 *COLUMBIA JOURNAL OF TRANSNATIONAL LAW* [59:1], 2020

³⁵³ Press Release, U.S. Dep’t of the Treasury, Joint Statement of Egypt, Ethiopia, Sudan, the United States and the World Bank, (Jan. 15, 2020), <https://home.treasury.gov/news/pressreleases/sm875> [https://perma.cc/SJ3L-C98E]

³⁵⁴ See *supra* note 434, et.al, the statement imposes much of the drought mitigation burden on Ethiopia and does not adequately address significant principles such as “equitable utilization” or “significant harm.” Yihdego, *supra* note 8, at 4. It instead makes reference to the “potential impact” of a project and therefore—relative to a duty to prevent significant harm—raises the threshold for, and increases the scope of, the harms that must be prevented during filling.

prolonged dry years.³⁵⁵ Based on this principle, the U.S. proposal agreement included the three aforementioned drought-mitigation mechanisms. As noted, the mechanisms would compel Ethiopia to release the “flow” of the Blue Nile and more water from the GERD reservoir without any *quid pro quo*.³⁵⁶ Therefore, as for the filling period of the GERD³⁵⁷ too short timeframe may affect the interests of Sudan and Egypt due to the decrease in water quantity they are alleging on one hand and protracted more years may significantly impact Ethiopian interests on the other hand, to finish the GERD project. Hence parties should negotiate to balance issues pertaining to the filling and annual operation of the dam in good faith.³⁵⁸ The parties to the DoPs guide lines³⁵⁹ should annually notify the other parties of its operation plan, and how they are using the Nile waters and how much water is stored in their respective reservoirs on an annual basis. This trend is flexible and adaptive to address the uncertainty associated with climate change and population growth in the Nile Basin.³⁶⁰

4.5.2. *The Normative status of the Declaration of Principles on the GERD*

The DoPs cannot qualify the status of a treaty since it does not deal the rights and obligation of the parties.³⁶¹ In addition to this, the instrument is neither ratified by Ethiopian parliament nor is deposited in the UN secretariat.³⁶² Besides, the international agreements making and ratification procedure proclamation No.1024/ 2017 states that Ethiopian parliament shall ratify such international agreements for the instrument to have a binding force up on Ethiopia.³⁶³ Moreover, as stated above, Ethiopian House of People’s Representative has not ratified the DoPs yet. Looking the DoPs in those perspectives, one can argue that it will has no binding force on Ethiopia, and Ethiopia has no obligation to conform its conduct to the DoPs since it lacks the requirements of the legislative procedure or ratification process by Ethiopian parliament. However, the binding nature or the normative status of an international agreement is not solely depends on the ratification procedure. Rather it needs a closer looks on the status of the rules

³⁵⁵ *Id*

³⁵⁶ *Id*

³⁵⁷ MAHEMUD ESHTU TEKUYA citing Zeray Yihdego et.al, International Law developments on the Sharing of Blue Nile Waters: a fairness perspective(2012)p.5

³⁵⁸ *Id*

³⁵⁹ The Declaration of Principles on the GERD, Article VII, accordingly, Egypt, Ethiopia, and Sudan shall provide data and information needed for the conduct of the TNC joint studies in good faith and in a timely manner.

³⁶⁰ Stephen C. McCaffrey, *The Need for Flexibility in Freshwater Treaty Regimes*, 27 NAT. RES. F. 156, 160 (2003)

³⁶¹ Addis standard, commentary, the 2015 agreement on the declaration of principles is not a treaty and Ethiopia does not have obligation therefrom(May 21,2020)

³⁶² *Ibid*

³⁶³ International agreements making and ratification procedure proclamation (No.1024/ 2017), article 11

stated in the agreement in question. That is to say, most of the principles provided in the DoPs such as the principle of equitable and reasonable utilization, the principle of not causing significant harm, the principle of dispute settlements, the principle of sovereign equality and territorial integrity and the principle of cooperation become rules of customary international water laws governing international watercourses. However, the principle of the DoPs which deals about the filling and annual operation of the GERD is not rule of customary international law, and, hence it has no binding force on Ethiopia.

4.6. Dispute Settlement Efforts under the GERD

4.6.1. *The Mediation efforts on the GERD*

Diplomatic avenues such as consultation, mediation, and conciliation are recognized peaceful dispute settlement mechanisms under international law.³⁶⁴ In accordance with state sovereignty, these mechanisms afford disputing states the opportunity to control the process.³⁶⁵ The DoPs recognizes these mechanisms in Article X, and urges the parties to resolve disputes through consultation, negotiation, and only as a last resort to “jointly request for conciliation or mediation.”³⁶⁶ Consequently, in order for the United States’ participation in the GERD talks to be legitimate, the three states must have jointly requested its active engagement and consented to its proposed solutions.³⁶⁷ There is, however, no available evidence supporting an assertion that either Ethiopia or Sudan consented to the United States’ or World Bank’s mediation.³⁶⁸ There are only statements by Ethiopia accepting the United States and the World Bank as observers to the negotiations, not mediators.³⁶⁹ Therefore, it can be argued that the United States and the World Bank acted contrary to Article X of the DoPs by actively participating in the GERD negotiations as a mediator without obtaining Ethiopia’s and Sudan’s consent.³⁷⁰ Therefore, seeing the act of the US Treasury on the GERD dispute settlement under international law and the DoPs, the

³⁶⁴ The Charter of the United Nations(UNC), Article 33(1)

³⁶⁵ Supra note 334, at p.100

³⁶⁶ The DoPs, article X

³⁶⁷ Id

³⁶⁸ Id

³⁶⁹ Press Release, Joint Statement, U.S. Dep’t of the Treasury, Joint Statement of Egypt, Ethiopia, Sudan, the United States, and the World Bank, (Feb. 13, 2020), <https://home.treasury.gov/news/pressreleases/sm907> [<https://perma.cc/VH6H-VYGA>]

³⁷⁰ Elias Meseret, *Ethiopia Won’t Be Forced by the US on Dam, Foreign Minister Says*, ASSOCIATED PRESS (Mar. 13, 2020), <https://apnews.com/39183ccfeed1c0796ad38796d459ff3b> [<https://perma.cc/V4KX-75EX>] (interviewing the Foreign Minister of Ethiopia).

Treasury, in the name of technical support from the World Bank, drafted an agreement open for signature by the parties.³⁷¹

Egypt endorsed the agreement, while Ethiopia requested more time for national consultation.³⁷² Ethiopia duly notified all parties of this request, reminded the U.S. Treasury of its observer status. The U.S. Treasury disregarded Ethiopia's request by undertaking separate bilateral meetings with Egypt and Sudan and issued a surprising statement requesting Ethiopia sign the agreement, and warned Ethiopia to refrain from filling and testing the GERD without an agreement with Egypt and Sudan.³⁷³ The dispute settlement, as provided under the interpretative guideline of the UN watercourses convention provisions,³⁷⁴ mediation involves more active third party participation in the negotiations. The mediator conducts the negotiations between contending parties on the basis of proposals made by the mediator aimed at a mutually acceptable compromise.³⁷⁵ The mediator's role can involve communication, clarification of issues, drafting of proposals, identifying areas of agreement between parties, and elaboration of provisional arrangements to minimize contentious and propose alternate solutions.³⁷⁶ Hence, the convention puts some pillars on the role of the mediators but did not imply a forceful (both material and moral) on negotiating states to sign draft agreements without their states' consent. Consent is a fundamentally required element for valid treaty making process.³⁷⁷ Moreover, the DoPs states that: "the three countries will settle disputes, arising out of the interpretation or implementation of this agreement, amicably through consultation or negotiation in accordance with the principle of good faith. If the Parties are unable to resolve the dispute through consultation or negotiation, they may jointly request for conciliation, mediation or refer the matter for the consideration of the Heads of State/Head of Government."³⁷⁸ Here too, there is no indication of the role of the mediator as the US Treasury did so. Hence, the acts and efforts of US Treasury is contrary to the dispute settlement mechanisms provided under the UN watercourses convention and the Declaration of Principles.³⁷⁹

³⁷¹ See Supra note 448

³⁷² See Supra note 449

³⁷³ *Id*

³⁷⁴ The UN Convention on International watercourse 1997, Article 33

³⁷⁵ *Id*

³⁷⁶ Alistair Rieu-Clarke et.al, UN watercourses Convention User's Guide(2012)p.241

³⁷⁷ Vienna Convention on law of Treaties(1969), Article 11

³⁷⁸ The DoPs, article X

³⁷⁹ See the cumulative readings of Article 33 of the UNWC and Article X of the DoPs.

4.6.2. *The AU's Role of mediation and the Effects*

After the US administration and the World Bank have failed to get Ethiopia to sign an agreement they prepared, the AU involved to settling the GERD dispute through its Bureau of Assembly of heads of state and government. The AU reinforces the principle of “African solutions to African problems”.³⁸⁰ On June 27, 2020, the AU issued a communiqué setting out the decisions of the meeting, chaired by the AU chairperson, President Ramaphosa of South Africa, and by the Bureau.³⁸¹ The Bureau made significant decisions. Accordingly, the three parties should refrain from making any statements or taking any actions that may jeopardize or complicate the AU-led process. Again, the Bureau requested the UN Security Council to take note of the fact that the AU is held of the matter.³⁸² The US and EU were invited as observers in the negotiations.

Hence, the current AU-led negotiations on the GERD have seen to achieve important results towards making parties agreements on the filling and annual operation of the dam.³⁸³ The AU's engagement at the Bureau-level is a break with its tradition of trying to resolve the issue through behind- the-scene quite diplomacy.³⁸⁴ The AU's involvement has also helped to de-escalate the tensions that have reached an all-time high when the GERD highly politicized following the fallout from the US-brokered negotiation.³⁸⁵ The AU's involvement also has halted a regional axis formation and eased pressures on the regional states to choose sides. Its engagement likewise helped to steam great power politics such as the US.

However, the AU-led process has some challenges facing the organization. Firstly, it lacks legal frameworks on the management and use of transboundary watercourses. With lack of legal frameworks to guide the mediation process, the current negotiations are based on the positions of each party's arguments. Moreover, the AU lacks institutional capacity to resolve disputes of international watercourses.³⁸⁶ It had to establish an ad-hoc committee of external experts for the current negotiation on the GERD. Sources close to negotiations indicated that finding African experts has been challenging, as there are not hydrologists and international water law experts.³⁸⁷

³⁸⁰ Mehari Tadele Maru, *The Nile Rivalry and Its Peace and Security Implications: What Can the African Union Do?*, Policy brief, institute of peace and security studies, AAU, (Vol. 1 | Issue 1 | June 2020) p.2

³⁸¹ Ibid

³⁸² Ibid

³⁸³ *The African Peace and Security Reports and PSC insights, the AU's role beyond the GERD negotiations*, 04 Sep 2020

³⁸⁴ Ibid

³⁸⁵ Ibid

³⁸⁶ Ibid

³⁸⁷ Ibid

CHAPTER FIVE

5. CONCLUSIONS AND RECOMMENDATIONS

5.1. Conclusion

Despite relentless efforts made by legal scholars to clarify the relationship between equitable and reasonable utilization and no significant harm, the two principles are susceptible to substantial contradictions. As a result, the application of these principles on international water dispute remains confused. This confusion is apparent in the GERD case because Ethiopia adopted equitable and reasonable right to build the GERD and Egypt and Sudan need to maintain their right to be free from significant harm that would be caused by the dam.³⁸⁸

However, to have the two substantive principles reconciled, the first interpretive approach forwarded by scholarly comment is treating them as complementary. This could be achieved by defining the principle of “no significant harm” as prohibiting only of the causation of the legal injury, which is states’ legally protected right to an equitable share of the uses of an international water, rather than prohibiting a factual harm.³⁸⁹ This interpretive approach seems compatible since states’ cannot bring into play the “no significant harm” principle without showing its equitable interest on the ground. That means, if the harm claiming state’s share of the water is inequitable at the beginning, such state cannot claim significant harm at least as a reply to the principle of equitable and reasonable utilization of the water. But this approach further requires an assessment whether the use and utilization of the resource is “reasonable” and “equitable” pursuant to relevant factors provided under international water laws. Therefore, an alternative approach to find the reconciliation of the two principles is to require a state to do its best in mitigation of the harm within the context of consultation to find mutually acceptable solutions guided under the principle of equitable and reasonable utilization. This way recognizes the due diligence obligation since a use of international river can still cause harm but still be equitable and reasonable, and then permissible.³⁹⁰

In most international cases, the practice of applying the contradictory principles continues to rely on prioritization of the principle of equitable and reasonable utilization. This is so to determine if

³⁸⁸ Tamar Meshel, *Swimming against the Current: Revisiting the principles of international water law in the resolution of fresh water dispute* 142 *Harvard International Law Journal / Vol. 61* (2020)

³⁸⁹ Stephen C. McCaffrey, *The Law of International Watercourses* 29 (3d ed. 2019) p.469

³⁹⁰ Stephen C. McCaffrey, *Intertwined General Principles*, in *Research Handbook on International Water Law* 91 (Stephen C. McCaffrey et al. eds., 2019)

an activity or use that causes significant harm should be permitted. They are therefore tantamount to treating equitable and reasonable utilization as the governing principle and no significant harm as subsidiary to it.³⁹¹ In this regard, the most prominent legal scholars such as McCaffrey, who assessed these substantive principles of international water law and who even participated in the travaux préparatoires of the law governing non navigational international water legal frameworks concluded the fact that the interpretation and application of the two principles favors prioritization of the principle of equitable and reasonable utilization and consider it as the governing or preeminent principle of customary international water law.³⁹²

Coming to the case at hand, the legal regime governing the Nile Basin is contentious and fragmented among the upper and lower riparian states. The basin does not have a mutually negotiated and acceptable legal framework applicable to all riparian states. Related to this, though riparian states underwent serious consecutive negotiations towards having a legally binding and institutionally strong legal frameworks that may enhance equitable and reasonable utilization and allocations of the Blue Nile waters under the Cooperative Framework Agreement, Egypt and Sudan refused to sign the deal claiming the inclusion of their acquired right in to the provision of the framework.³⁹³ Most disagreements and negotiation stalemates are the results of previous Nile agreements; dealt only among Egypt and Sudan which they want to bind up on the upper riparians.

To that end, the GERD project became a firm concern of Egypt and Sudan since its construction in 2011. Accordingly, the claim on the GERD pertains to the fact that it may cause harm to lower riparians irrigation area by decreasing the amount of water flow. But Ethiopia has been justifying the GERD project based on adherence to the principle of equitable and reasonable utilization of the Blue Nile water. Hence, the GERD dispute entails limited ability of both international water laws and the Declaration of Principles. Of all, the principles of preventing transboundary significant harm on which the lower riparians rely on and the principle of equitable and reasonable utilization on which Ethiopia adopted to use the Nile water are subject to controversial interpretation under international water laws and the DoPs.

On the other hand, a closer examination of the DoPs reveals the fact that the principles inserted therein covers dubious provisions left by the parties without putting a clear guidelines of interpretation and application to the effect. The controversy starts from the objectives of the

³⁹¹ Richard Paisley, *Adversaries into Partners: International Water Law and the Equitable Sharing of Downstream Benefits*, 3 *Melb. J.Int'l L.* 280, 283 (2002)

³⁹² *Supra* note 381, at p.506

³⁹³ The Cooperative Framework Agreement(2010), Article 14(b)

declaration which raised scholarly questions; that whether article II of the DoPs limits the purpose of the GERD solely to a “power generation”. Whereas, other legal scholars looked the provision that adds the phrase “economic development” and suggested that the purpose of the GERD is not limited to power generation but also extends to the “over-all” economic development of Ethiopia and to the whole region’s integrative economic development.

All the same, the nature of provisions stated in the DoPs seems a simple political statement and lacks technical details on legal issues and is silent on critical matters. Parties to the DoPs left to deal on the details of the rights and obligations of the parties. So, it opens doors for diversified understandings, interpretation and expectations. The DoPs does not clarify the rights and obligations of the parties, which in turn resulted in frequent negotiation stalemates on the GERD dispute. Here, it is important to conclude that Ethiopian parliament has not ratified the DoPs and hence the DoPs did not pass the ratification procedure required of international agreements to have a binding force on Ethiopia. This requirement is provided under article 11 of the international agreements making and ratification procedure proclamation No.1024/ 2017. According to the proclamation’s requirement, the DoPs is simply a soft and non-binding declaration which Ethiopia might not obliged to respect. However, most of the provisions inserted in the DoPs such as the principle of equitable and reasonable utilization, the principle of not causing significant harm, the principle of dispute settlements, the principle of sovereign equality and territorial integrity and the principle of cooperation become rules of customary international water laws, and hence binding on parties to the DoPs. But, concerning the filling and annual operation of the dam which Egypt and Sudan alleges to bind on Ethiopia is not customary rule. Hence, Ethiopia has no obligation to be abided to that principle except agreement.

The issue pertaining to the GERD and as to “what conduct by the sides of Ethiopia” would inflict “significant harm” is difficult to determine. On top of this, elements provided under the DoPs dealing with relevant factors which might help to determine whether the use of the Nile waters is “equitable and reasonable” are left without agreement by the parties. Besides, the Declaration of Principles on the GERD simply highlights the principle of equitable and reasonable utilization, which Ethiopia adopted.³⁹⁴ More so, the DoPs adopted relevant factors that help to determine the principle of equitable and reasonable utilization. The socio-economic

³⁹⁴ Rawia Tawfik, Revisiting hydro-hegemony from benefit sharing perspectives: the case of Grand Ethiopian Renaissance Dam(2015)p.36

needs, the size of dependent population and availability of other alternative water recourses may justify Egypt's allegations. All the same, the extent and proportion of the drainage area in state's territory is the other factor that may favors Ethiopian justification since Ethiopia contributes about 86% of the water. However, the UN watercourse convention states that the relevant factors shall be defined all together.

However, to avoid contested significant harm up on the GERD, Ethiopia initiated the formation of International Panel of Experts, Tripartite National Committee and National Independent Scientific Research Groups to enhancing study up on the contested harm that might be caused by the GERD. Accordingly, the IPOE finalized its report and presented it in 2013 with a conclusion of the fact that the GERD has no significant impact on the downstream states (Egypt and Sudan). This cooperative efforts by the side of Ethiopia shows the performance of its due diligence obligation of preventing transboundary significance harm to its fellow downstream co-riparians by taking all appropriate measures pursuant to the provision under the Declaration of Principles,³⁹⁵ and in accordance with the UN watercourses Convention,³⁹⁶ the Helsinki Rules on international watercourses,³⁹⁷ and the Berlin Rules.³⁹⁸

As far as the dispute settlement of the GERD is concerned, the US treasury and the WB tried to set a draft agreement on the filling and annual operation of the GERD. This was done only by Egypt's diplomacy because there is no available evidence which shows the consent of Ethiopia and Sudan for the US mediation role to draft that agreement. However, after the US efforts fallout and whilst the UN Security Council returns back the GERD case to the AU, this organ is paying relentless efforts to settle the dispute through negotiations. Hence, the current AU-led negotiations on the GERD have seen to achieve important results towards making parties agreements on the filling and annual operation of the dam. The AU's engagement at the Bureau-level is a break with its tradition of trying to resolve the issue through behind- the-scene quite diplomacy. The AU's involvement has also helped to de-escalate the tensions by disregarding the US and the WB indirect political interests on the case. The AU's engagement likewise helped to steam great power politics such as the US. The AU's involvement also has halted a regional axis formation and eased pressures on the regional states to choose sides.

³⁹⁵ In accordance with cooperation in good faith and mutual benefit (Article I of the DoPs) and Article III of the same, Ethiopia initiated the formation of IPOE, TNC and NISRG which shows the performance of due diligence obligation to avert or mitigate significant transboundary harm to its fellow co-riparians.

³⁹⁶ The UN watercourses Convention (1997),Article 7(1)

³⁹⁷ The Helsinki Rules(1966), Article V

³⁹⁸ The Berlin Rules on international watercourses(2004), Article12

However, the AU-led process has some challenges facing the organization. Firstly, it lacks legal frameworks on the management and use of transboundary watercourses. With lack of legal frameworks to guide the mediation process, the current negotiations are based on the positions of each party's arguments. Moreover, the AU also lacks qualified institutional and expertise capacity to resolve disputes of international watercourses.

5.2. Recommendation

The UN International Law Commission should reformulate and shape the confusions on the interpretations and application of the principles of “equitable and reasonable utilizations” and “no significant harm” in a coherently clear manner.

Again, parties to the Declaration of Principles on the GERD must frame the principles therein with full assertions that dictate the right and obligation of each party. More so, the Nile basin needs basin-wide treaty with legally binding and firmly institutionalized legal frameworks. Moreover, Egypt, Ethiopia and Sudan shall cooperatively implement the principle of “equitable and reasonable utilization” without causing harm to each other or by mitigating the harm, if any, and must avoid a threat to use force that may result in regional insecurity. Parties shall continue the GERD negotiations in good faith by respecting the principle of good neighborliness and must move towards win-win solutions. Parties should also move further to enhance regional socio-economic integration and development. Concerning GERD dispute and schedule of filling and annual operation of the GERD, the Mediators such as the US, EU and WB, shall respect the principles of pacific settlement of international water dispute and the declaration of principles on the GERD, and the organs should have hands off and avoid their indirect political and material pressures up on Ethiopia along with all the issues of the GERD. They should leave the matter to the regional process i.e. the African Union.

The AU should continue with the negotiation of the parties concerning the filling and annual operation of the dam and should bring more results towards achieving a solid solution on the GERD dispute and the basin-wide Nile issues as well.

BIBILOGRAPGY

I. Treaties

Negotiations on the GERD: Examination of the 2015 Agreement on the DoPs and Beyond

1. The UN Convention on the Law of the Non-navigational Uses of International Watercourses, Adopted by the General Assembly of the United Nations on 21 May 1997, Entered into force on 17 August 2014. See General Assembly resolution 51/229, annex, Official Records of the General Assembly, Fifty-first Session, Supplement No. 49(A/51/49).
2. The Helsinki Rules on the uses of the waters of international Rivers, adopted in August 1966, by the conference held in Helsinki and Resolutions of 52nd conference on international law
3. The Berlin Rules on water Resources, Adopted, 21 August 2004 by ILA
4. Agreement on Declaration of Principles between The Arab Republic of Egypt, The Federal Democratic Republic of Ethiopia And The Republic of the Sudan On The Grand Ethiopian Renaissance Dam Project, adopted 23rd March 2015 Khartoum, Sudan.
5. The Cooperative Framework Agreement(CFA), adopted by the extra-ordinary Meeting of NILE-COM at Sharm El Sheikh on 13 April 2010, and opened for signature in Entebbe, Uganda, on 14 May 2010

II. Books

1. Stefan J McCaffery the law of international watercourses, non navigational use 29 (3rd ed, 2019)
2. Salman M.A. Salman & Kishor Uprety Shared Watercourses and Water Security in South Asia: Challenges of Negotiating and Enforcing Treaties, International Water Law (2018).
3. Owen McIntyre, the UNECE convention on the protection and use of transboundary watercourses and international lakes, edited by Attala Tanzi, et al, (BRILL) on 16 November 2016.
4. Salman M.A. Salman, The Helsinki Rules, the UN Watercourses Convention and the Berlin Rules: Perspectives on International Water Law, WATER RESOURCES DEV,(2007)
5. Tamar Meshel ,International Law and Transboundary Fresh Water Resources: A Dispute Resolution Perspective(Toronto university)(2018)

III. Articles

1. M.A Salman, The Helsinki Rules, the UN Watercourses Convention and the Berlin Rules: Perspectives on International Water Law(Water Resources Development, Vol. 23, No. 4, 625–640(2007))
-

2. Tamar Meshel, Swimming against the Current: Revisiting the principles of international water law in the resolution of fresh water dispute 142 Harvard International Law Journal / Vol. 61 (2020)
3. Mehari Taddele Maru, the Nile Rivalry and Its Peace and Security Implications: What Can the African Union Do? (Vol. 1 : Issue 1, institute for peace and security studies, June 2020)
4. Francisco Nunes Correia and Joaquim Evaristo da Silva, ‘International framework for the management of transboundary water resources’ Water International 24/86(1999)
5. Rahaman, M.M, ‘Principles of international water law: creating effective transboundary water resources management’, Int. J. Sustainable Society, Vol. 1, No. 3, (2009)
6. Dereje Zeleke Mekonnen, Declaration of Principles on the Grand Ethiopian Renaissance Dam: Some Issues of Concern, MIZAN LAW REVIEW, Vol. 11, No.2 December (2017)
7. Ernest Cece Peguita, The Nile Water Dispute : International Legal Aspects, Advances in Social Science, Education and Humanities Research, volume 498 Proceedings of the XIV European-Asian "The value of law" Atlantis press (2020)
8. Stephen C. McCaffrey, Second Rep. on the Law of the Non-Navigational Uses of International Watercourses, 1986 Y.B. Int'l L. Comm'n, A/CN.4/399 and Add 1 and 2 (1986)
9. Mahemud Eshetu Tekuya, Sink or Swim: Alternatives for Unlocking the Grand Ethiopian Renaissance Dam Dispute, Colombian Journal of International law,59:1(2020)
10. Rahaman, M.M. (2009) ‘Principles of international water law: creating effective transboundary water resources management’, Int. J. Sustainable Society, Vol. 1, No. 3,

IV. Cases

1. A Case Concerning the Gabcikovo-Nagymaros Project (HUNGARY/SLOVAKIA) 25 September 1997
2. A case concerning the continental shelf(Libya Arab Jamahiriya vs. Malta)3 June, 1985
3. A case concerning Pulp Mills on the River Uruguay (Argentina vs. Uruguay) ,13 July 2006

V. Internet Source

1. <https://www.crisisgroup.org/africa/horn-africa/ethiopia/nile-dam-talks-short-window-embrace-compromise> accessed on Wednesday, September 23, 2020, 12:22:30 PM

Negotiations on the GERD: Examination of the 2015 Agreement on the DoPs and Beyond

2. <https://home.treasury.gov/news/pressreleases> accessed on Monday, May 10, 2021, 8:37:13 AM
3. <http://www.sudantribune.com/spip.php?article54073>; accessed on Tuesday, January 26, 2021, 1:26:15 PM
4. <http://www.scholarship.law.missouri.edu/jesl/vol18/iss2/4> accessed on Thursday, April 01, 2021, 11:50:41 AM