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# The Grand Ethiopian Renaissance Dam: A Large Scale Energy Project in Violation of International Law?

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*Ricarda E. von Meding*[*]

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## ABSTRACT

The Grand Ethiopian Renaissance Dam ("GERD"), a $4.7 billion construction expected to produce 6,000 megawatts of power, will be the largest hydropower dam in Africa and the tenth largest in the world. The dam will feed electricity into the grids of Ethiopia and its neighboring countries, providing vast economic advantages for the region. At the same time, riparian states downstream from the Nile River, especially water-dependent Egypt, fear a threat to their freshwater resources and are heavily opposed to the building and future operation of the dam. As the legality of the project has been challenged by Egypt and others, the question arises whether the GERD violates international law. This question is answered by analyzing existing international agreements and customary international law. This Article concludes that the GERD is not in violation as long as negotiations between the parties at stake are maintained, and Ethiopia exercises due diligence in preventing the imposition of significant transboundary harm.

## I. INTRODUCTION

> *And the waters of the sea will be dried up, and the river will be dry and parched, and its canals will become foul, and the branches of Egypt's Nile will diminish and dry up, reeds and rushes will rot away. There will be bare places by the Nile, on the brink of the Nile, and all that is sown by the Nile will be parched, will be driven away, and will be no more. The fishermen will mourn and lament, all who cast a hook in the Nile; and they will languish who spread nets on the water.*[1]

Almost 3,000 years ago, a devastating prophecy was proclaimed revealing the future of the Nile River in Egypt. Considering the predicted consequences of the filling and operation of the Grand Ethiopian Renaissance Dam ("GERD") today, fear that this biblical prediction will soon come to fruition seems more realistic than ever. The GERD, which began construction in 2011[2] at a cost of $4.7 billion and is expected to produce 6,000 megawatts of power,[3] will be the largest hydropower dam in all of Africa and the tenth largest in the world.[4] Additionally, it will provide electricity to Ethiopia and its neighboring countries, which is expected to result in vast economic advantages for the region.[5] The dam is

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1. *Isaiah* 19:5–8 (ESV) (emphasis added).

2. *Security Council Press Release SC/14232: Grand Ethiopian Renaissance Dam Agreement Within Reach, Under-Secretary-General Tells Security Council, as Trilateral Talks Proceed to Settle Remaining Differences*, UNITED NATIONS (June 29, 2020), https://www.un.org/press/en/2020/sc14232.doc.htm [https://perma.cc/2TFT-X5TR].

3. *Egyptian Warning over Ethiopia Nile Dam*, BBC (June 10, 2013), https://www.bbc.com/news/world-africa-22850124 [https://perma.cc/76AF-FB49].

4. Salman M. A. Salman, *The Grand Ethiopian Renaissance Dam: The Road to the Declaration of Principles and the Khartoum Document*, 41 WATER INT'L 512, 516 (2016).

5. *See* Mahemud Eshtu Tekuya, *Sink or Swim: Alternatives for Unlocking the Grand Ethiopian Renaissance Dam Dispute*, 59 COLUM. J. TRANSNAT'L L. 65, 68 (2020).

located on the Blue Nile River, a tributary stream of the Nile, and draws from the Nile River's basin area, which covers 11 African countries before entering the Mediterranean Sea in Egypt.[6] Egypt, the riparian[7] furthest downstream, is heavily dependent on the Blue Nile, with 85–90% of the nation's freshwater coming from the river.[8] The construction of the dam potentially threatens freshwater resources in Egypt—a danger with serious consequences.


*Figure 1: The Nile River Basin indicating the location of the GERD*[9]

6. The Nile-riparian states are Egypt, Sudan, South Sudan, Ethiopia, Eritrea, Uganda, Congo, Kenya, Tanzania, Rwanda, and Burundi.

7. A riparian state is "located on the bank of a natural watercourse (such as a river)." *Riparian*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/riparian [https://perma.cc/QTW8-QZK9] (last visited Oct. 18, 2021).

8. *Compare* Mahemud Eshtu Tekuya, *The Egyptian Hydro-Hegemony in the Nile Basin: The Quest for Changing the Status Quo*, 26 J. WATER L. 10, 10 n.2 (2020) ("Ethiopia contributes 86% of the water reaching Egypt . . . ."), *with* THE WATER RESOURCES OF THE NILE BASIN, THE STATE OF THE RIVER NILE BASIN 36 (2012) (mentioning 85–90% comes from the "Eastern Nile sub-system" which encompasses the Blue Nile).

9. *Nile*, WIKIPEDIA, https://en.wikipedia.org/wiki/Nile#/media/File:River_Nile_map.svg [https://perma.cc/8HRX-BLFD] (last visited Sept. 26, 2021) (Graph altered with a marker to depict the location of the GERD).

As a vital freshwater resource in a mostly arid region, disputes over the Nile River's water have long existed. Addressing Ethiopia's then-existing plan to build a dam, former Egyptian President Anwar Sadat stated in 1978 that "[w]e depend upon the Nile 100[%] in our life, so if anyone, at any moment, thinks to deprive us of our life we shall never hesitate to go to war because it is a matter of life or death,"[10] and in 1979 that "[t]he only matter that could take Egypt to war again is water."[11] In 2013, after Ethiopia began diverting water for the GERD's erection, then-President Mohammed Morsi threatened "if [the Nile River water] diminishes by one drop then our blood is the alternative."[12] After the Ethiopian cybersecurity agency reported that Egyptian individuals carried out cyberattacks on Ethiopian official websites in 2020 to impair the building of the GERD by weakening Ethiopia's infrastructure,[13] some authors argued that a war over the water had already begun.[14] With Ethiopia and Egypt insisting on their respective positions, the question arises as to whether the filling and operation of the GERD constitutes a violation of international law. This Article answers that question by evaluating specific international law governing the Nile River Basin and general international water law. The analysis begins with an evaluation of the applicable law, followed by an analysis of the procedural and substantive obligations under such applicable law, and then concludes with whether the GERD violates international law. This Article does not analyze whether the past erection of the GERD constituted a violation, as current disputes focus solely on the way forward—how and when the dam reservoir may be filled and operated.

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10. Christopher L. Kukk & David A. Deese, *At the Water's Edge--Regional Conflict and Cooperation over Fresh Water*, 1 UCLA J. INT'L L. & FOREIGN AFF. 21, 46 (1996).

11. Niveen Tadros, *Shrinking Water Resources: The National Security Issue of This Century*, 17 NW. J. INT'L L. & BUS. 1091, 1091 (1997).

12. *Egyptian Warning over Ethiopia Nile Dam*, *supra* note 3.

13. *See Information Network Security Agency*, FACEBOOK (June 22, 2020), https://www.facebook.com/INSA.ETHIOPIA/photos/a.406907239409122/2716831498416673/?type=3&theater [https://perma.cc/Q8YM-GLZJ].

14. *See* Ayenat Mersie, *The Ethiopian-Egyptian Water War Has Begun*, FOREIGN POL'Y (Sept. 22, 2020, 6:41 AM), https://foreignpolicy.com/2020/09/22/the-ethiopian-egyptian-water-war-has-begun/ [https://perma.cc/4E5N-CFZE]; *see also* Tekuya, *supra* note 5, at 65 (describing "a war of words and accusations").

## II. APPLICABLE LEGAL FRAMEWORKS

### *A. The Nile's Regulatory Framework*

With a length of 6,650 kilometers,[15] the Nile River is the world's longest river[16] and flows through a region that has seen significant political change throughout its past. Consequently, the river basin has been bound by various regional agreements. As it is disputed which of these agreements are currently binding upon the riparian states, an overview of the (potentially) applicable law is provided in the following sections.

#### *1. Colonial and Early Post-Colonial Agreements*

The first steps toward international regulation of the Nile's waters were taken in the late 19th century when a vast majority of the Nile Basin was still colonized.[17] Various agreements on the Nile River were finalized by the United Kingdom, the main local colonial power of today's sovereign African states. An early agreement between Great Britain and Ethiopia dating back to 1902 provided the British colonists great influence over the Nile's water.[18] This agreement barred Ethiopia from constructing any works across the Nile tributaries that "would arrest the flow of their waters except into the Nile in agreement with His Britannic Majesty's Government and the Government of the Soudan."[19]

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15. Tekuya, *supra* note 8, at 10 n.2.

16. *Id.* at 10.

17. Arthur Okoth-Owiro, *The Nile Treaty*: *State Succession and International Treaty Commitments: A Case Study of the Nile Water Treaties*, *in* 9 OCCASIONAL PAPERS EAST AFRICA 6–7 (Konrad Adenauer Foundation ed., 2004); Christina M. Carroll, *Past and Future Legal Framework of the Nile River Basin*, 12 GEO. INT'L ENVTL. L. REV. 269, 276–79 (1999). Ethiopia is the only country in the region that was never colonized; it was only occupied by Italy between 1936 and 1941. Aaron Tesfaye, *The Politics of the Imposed and Negotiation of the Emerging Nile Basin Regime*, 7 INT'L J. ETH. STUD. 57, 62 (2013).

18. *See* Treaties Relative to the Frontiers Between the Soudan, Ethiopia and Eritrea, Eth.-U.K., May 15, 1902, [1902] U.K.T.S. 16 [hereinafter 1902 Agreement]. All regional treaties can be viewed at *African River Basins*, INT'L WATER PROJECT, https://www.internationalwaterlaw.org/document[s/africa.html #Nile%20River%20Basin [https://perma.cc/2T37-WT68] (last visited Oct. 18, 2021).

19. 1902 Agreement, *supra* note 18, art. III; *see* Kristin Wiebe, *The Nile River: Potential for Conflict and Cooperation in the Face of Water Degradation*, 41 NAT. RES. J. 731, 746 (2001).

In 1929[20] and 1959,[21] two more regional agreements followed. The 1929 Agreement was negotiated between Egypt and the British colonists on behalf of Sudan, Uganda, Kenya, and Tanganyika (today: Tanzania).[22] In the 1929 Agreement, the river water was allocated based on Egypt and Sudan's respective needs,[23] further reaffirming that works on the river could not be constructed that 1) either reduce the quantities of water arriving in Egypt or modify the date of its arrival, or 2) lower its level.[24] The 1959 Agreement was entered into by Sudan and the United Arab Republic.[25] According to that Agreement, Egypt was allocated a guaranteed 55.5 billion cubic meters of water annually, whereas Sudan was promised a share of 18.5 billion cubic meters.[26]

Both Agreements disregarded the needs of the other riparian states, despite the majority of the Nile's water flowing from Ethiopia. From today's perspective, subjecting the erection of a river project to another state's consent is not a general principle of law or customary law,[27] as this would conflict with state sovereignty.

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20. Exchange of Notes Regarding the Use of the Waters of the Nile for Irrigation Purposes, Egypt-U.K., May 7, 1929, [1929] U.K.T.S. 17 [hereinafter 1929 Agreement]; *see also* Okoth-Owiro, *supra* note 17, at 7–8; Carroll, *supra* note 17, at 276–80.

21. Agreement for the Full Utilization of the Nile Waters, Egypt-Sudan, Nov. 8, 1959, 453 U.N.T.S. 51 [hereinafter 1959 Agreement]. One reason for the 1959 Agreement was the fact that Sudan, after becoming independent in 1956, did not consider itself bound to the 1929 Agreement. *See* Okoth-Owiro, *supra* note 17, at 13.

22. Okoth-Owiro, *supra* note 17, at 7.

23. Aaron T. Wolf, *Shared Waters: Conflict and Cooperation*, 32 ANN. REV. ENV'T. RES. 241, 249 (2007).

24. *See* 1929 Agreement, *supra* note 20; Ryan B. Stoa, *The United Nations Watercourses Convention on the Dawn of Entry into Force*, 47 VAND. J. TRANSNAT'L L. 1321, 1355 (2014).

25. *See* 1959 Agreement, *supra* note 21. At the time of the 1959 Agreement, Egypt was a part of the United Arab Republic.

26. *See id.*

27. *See* Lake Lanoux (Fr. v. Spain), 12 R.I.A.A. 281 (Arb. Trib. 1957), 24 I.L.R. 101, para 13 [hereinafter *Lake Lanoux* Arb.] ("[T]he rule that States may utilize the hydraulic power of international watercourses only on condition of a *prior* agreement between the interested States cannot be established as a custom, even less as a general principle of law . . . . Customary international law . . . does not . . . permit us to conclude that there exists a general principle of law or a custom to this effect.").

*2. The Agreement on the Nile River Basin Cooperative Framework and Its Legal Implications*

*a. Emergence of the Agreement on the Nile River Basin Cooperative Framework*

Several decades later, the Nile Basin countries convened to renegotiate the use and management of the Nile River. The negotiations resulted in the Agreement on the Nile River Basin Cooperative Framework ("CFA"), also referred to as the Entebbe Agreement, in May 2010.[28] As it currently stands, the CFA is signed by Ethiopia, Tanzania, Rwanda, Uganda, Kenya, and Burundi and ratified by Ethiopia, Tanzania, Uganda, and Rwanda.[29] In order for the CFA to have the effect of law, six ratifications or accessions are needed,[30] meaning the Agreement is currently two states short of the requisite amount.

Due to disputes over the precise wording of Article 14(b) of the CFA, which regulates water security, Egypt and Sudan refused to enter into the Agreement.[31] The two countries view that section as a threat to their previously agreed-upon shares of water and the need for Egypt's consent prior to constructions on the tributary streams as laid out in the Agreements of 1902, 1929, and 1959.

*b. Implications of Earlier Agreements*

If the earlier Agreements are binding upon the other riparian states, Egypt would have a right to the majority of Nile water and a veto power over projects such as the GERD.[32] To substantiate this view, Egypt relies on the fact that the old Agreements remain in place until they are replaced by a new agreement of all parties—a legal concept referred to as the

28. Agreement on the Nile River Basin Cooperative Framework, *opened for signature* May 14, 2010 [hereinafter CFA].

29. *See Cooperative Framework Agreement*, NILE BASIN INITIATIVE, https://nilebasin.org/index.php?option=com_content&view=article&id=73&Itemid=87&lang= [https://perma.cc/29DV-SBAP] (last visited Oct. 18, 2021).

30. CFA, *supra* note 28, art. 42.

31. The current version of Article 14(b) of the CFA provides that states are "not to significantly affect the water security of any other Nile Basin State." *Id.* annex, art. 14(b) (emphasis omitted). Egypt and Sudan disagreed with this, proposing instead that the wording should state "not to adversely affect the water security and current uses and rights of any other Nile Basin State." *See id.* (emphasis omitted).

32. Wolf, *supra* note 23, at 249.

"historical use doctrine."[33] Alternatively, the argument could be made in favor of Egypt that the 1929 Agreement is still in force because of its territorial implications which "necessitate its respect by successor states."[34] Underlying this is the idea that the scope of the old Agreements is regionally limited to the Nile territory, and that it should therefore be binding on whichever state's territory falls within this scope.[35]

To the contrary, all other riparian states rely on the "clean slate doctrine,"[36] also referred to as the "Nyerere Doctrine" in the local context of the Nile.[37] The doctrine provides that treaties entered into by the colonial powers are not binding on their successors regarding treaty obligations if the successor states decide not to accept such obligations.[38] However, this argument would not work in Ethiopia's favor in regard to the 1902 Agreement as Ethiopia was never colonized. An additional argument against the current applicability of colonial Agreements is that Great Britain concluded inheritance treaties with some of its former colonies, which is not the case with the Nile-riparian states that were formerly British colonies.[39] In the case of an inheritance treaty, the predecessor and successor states agree on future treaty rights and obligations of the successor state under colonial treaties.[40] Further, the 1978 Vienna Convention on Succession of States in Respect of Treaties,[41] to which Egypt and Ethiopia were parties, establishes that "[t]he obligations or rights of a predecessor State under treaties in force . . . do not become the obligations or rights of the successor State . . . ."[42]

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33. *See* Wiebe, *supra* note 19, at 747.

34. Okoth-Owiro, *supra* note 17, at 16.

35. *Id.*

36. Carroll, *supra* note 17, at 278.

37. Tesfaye, *supra* note 17, at 72; Goitom Gebreluel, *Ethiopia's Grand Renaissance Dam: Ending Africa's Oldest Geopolitical Rivalry?*, 37 WASH. Q. 25, 27 (2014); Mohamed S. Helal, *Inheriting International Rivers: State Succession to Territorial Obligations, South Sudan, and the 1959 Nile Waters Agreement*, 27 EMORY INT'L L. REV. 907, 941 (2013); Scott O. McKenzie, Note, *Egypt's Choice: From the Nile Basin Treaty to the Cooperative Framework Agreement, an International Legal Analysis*, 21 TRANSNAT'L L. & CONTEMP. PROBS. 571, 587 (2012); Carroll, *supra* note 17, at 279.

38. *See* Tesfaye, *supra* note 17, at 72–73; Gebreluel, *supra* note 37, at 27; Helal, *supra* note 37, at 941; McKenzie, *supra* note 37, at 587; Carroll, *supra* note 17, at 279.

39. *See, e.g.*, Okoth-Owiro, *supra* note 17, at 12.

40. *Id.*

41. Vienna Convention on Succession of States in Respect of Treaties, Aug. 23, 1978, 1946 U.N.T.S. 3, 17 I.L.M. 1488 [hereinafter VCSST].

42. *Id.* art. 8.

Although no other states are parties to the treaty (Congo and Sudan are mere signatories), the fact that Egypt signed and deposited the treaty indicates its general willingness to disregard obligations and rights under colonial treaties. Alternatively, the doctrine of *rebus sic stantibus* could be invoked to provide states the possibility of terminating agreements after far-reaching changes such as decolonization take effect.[43] The Nile-riparian states' public statements indicating they do not feel bound to any colonial Agreements could be regarded as such a termination.[44]

Overall, the majority of arguments oppose the binding effect of the colonial treaties, especially concerning the sovereignty of the other African states. The 1959 Agreement may be regarded as only binding upon Sudan and Egypt, and not on other riparian states which did not partake in the Agreement.[45] The rights that the British received under the 1902 Agreement vis-à-vis Ethiopia may be seen as non-transferable to Egypt as a new sovereign country, meaning Egypt cannot claim previously Ethiopian obligations thereunder.

Therefore, without six ratifications of the CFA and without colonial Agreements that bind all parties to the dispute, there is currently no comprehensive regulatory framework on the Nile River Basin which could be applied to evaluate the GERD's lawfulness. However, the CFA is expected to eventually enter into force, which would ultimately provide for a comprehensive framework.

### *3. The 2015 Declaration of Principles Between Egypt, Sudan, and Ethiopia*

#### *a. Emergence and Content of the Declaration*

Since the CFA's drafting, only one major agreement has come into existence that alleviates the conflict over the GERD in recent years: the 2015 Declaration of Principles ("DoPs").[46] The Declaration contains

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43. *See* Okoth-Owiro, *supra* note 17, at 19; Tekuya, *supra* note 8, at 12. The doctrine is an acknowledged concept of customary international law. *See* Vienna Convention on the Law of Treaties art. 62, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

44. Okoth-Owiro, *supra* note 17, at 19.

45. *See id.* at 21, 34; *see also* Wiebe, *supra* note 19, at 747 (calling the 1959 Agreement "virtually useless"); *cf.* Carroll, *supra* note 17, at 281 (referring to the legal status as "uncertain").

46. Agreement on Declaration of Principles between the Arab Republic of Egypt, the Federal Democratic Republic of Ethiopia, and the Republic of the

principles which are intended to govern the GERD's erection. It attempts to unite Ethiopia, Sudan, and Egypt's contrasting viewpoints on the lawfulness of the GERD. The DoPs concluded after lengthy tripartite meetings between the ministers of those nations.[47] The Declaration consists of ten main principles, many of which resemble international water law principles as reflected in the 1997 UN Convention on the Law of Non-Navigational Uses of International Waterways,[48] the major international convention on watercourses, and the CFA. The DoPs include, among others, the following principles: not to cause significant harm,[49] equitable and reasonable utilization,[50] cooperation on the first filling and operation of the dam,[51] and further principles targeting such filling and operation.[52] The DoPs explicitly recognize the notion of sovereignty and territorial integrity of the three states.[53] Taking into account past legal developments in the area, the DoPs can be regarded as a "landmark development"[54] as they provide the first agreement where Egypt expressly acknowledged the equality of the riparian states[55] and their respective rights to build and operate dams on the river without subjection to alleged historical obligations.

*b. Legal Status of the Declaration*

However, the DoPs' legal status is disputed, and its principles have not fully solved the conflict surrounding the GERD. The DoPs could be regarded as soft or hard law, or as consisting partly of commitments and partly of obligations.[56] Soft law is law that does not immediately create

Sudan on on the Grand Ethiopian Renaissance Dam Project, Mar. 23, 2015 [hereinafter DoPs].

47. See Salman, *supra* note 4, at 512–27, for an extensive overview of the negotiation process.

48. Convention on the Law of the Non-Navigational Uses of International Watercourses, May 21, 1997, 2999 U.N.T.S. 52106 [hereinafter UN Watercourses Convention].

49. DoPs, *supra* note 46, princ. III.

50. *Id.* princ. IV.

51. *Id.* princ. V.

52. *See id.* princ. II, VI–VIII.

53. *Id.* princ. IX.

54. Salman, *supra* note 4, at 522.

55. *See* DoPs, *supra* note 46, princ. IX.

56. *See* Tekuya, *supra* note 8, at 15–16; *see also* Tekuya, *supra* note 5, at 79–80.

obligations and rights for the parties and is therefore non-binding, whereas hard law is binding on the parties and legally enforceable.[57]

The fact that the three parties have subsequently signed an additional document on the DoPs' implementation which states the "sincere and full commitment of the three countries to adhere to the Agreement on the Declaration of Principles" speaks in favor of its bindingness.[58] Content-wise, the frequent usage of the word "shall" with regard to actions also supports the argument that the DoPs are binding.[59]

On the other hand, the name of the DoPs containing "Declarations" is more often, but not exclusively,[60] used for soft law.[61] Further, an argument against its bindingness could be made based on the fact that no formal ratification, deposition, or entry into force is provided for in the Agreement, as is generally the case with any binding agreement.[62] Nor are there any provisions regarding the possibility of reservations or means of enforcement. The binding sources of international law, listed in Article 38(1) of the Statute of the International Court of Justice ("ICJ Statute"),[63] merely refers to "international conventions, whether general or particular," with "conventions" meaning that the legal documents require some form of formal adoption in line with international law.[64] As this is not foreseen

57. *See Hard Law/Soft Law*, EUR. CTR. FOR CONST. & HUMAN RIGHTS, https://www.ecchr.eu/en/glossary/hard-law-soft-law/ [https://perma.cc/WCQ6-GF4G] (last visited Oct. 18, 2021).

58. 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), Dec. 27–28, 2015, https://www.internationalwaterlaw.org/documents/regionaldocs/Khartoum_Document_29_Dec_2015.pdf [https://perma.cc/9EJ7-86P8] [hereinafter 2015 Khartoum Document]; *see African River Basins*, INT'L WATER L. PROJECT, https://www.internationalwaterlaw.org/documents/africa.html#Nile%20River%20Basin [https://perma.cc/NW24-SBKU] (last visited Sept. 10, 2021); *see also* Tekuya, *supra* note 5, at 80–81.

59. *See* DoPs, *supra* note 46, princ. III–V, VII–IX; *see also id.* pmbl. (mentioning that the three states have committed themselves to the principles).

60. *See, e.g.*, Declaration of Panama, Oct. 4, 1995, [1995] PITSE 7.

61. *See* Tekuya, *supra* note 8, at 15–16; *see also* Tekuya, *supra* note 5, at 79–80.

62. Tekuya, *supra* note 5, at 79 (citing VCLT, *supra* note 43, art. 24(4)).

63. Statute of the International Court of Justice, art. 38(1) [hereinafter ICJ Statute].

64. *See id.* art. 38(1)(a). Article 38(1)(a) of the ICJ Statute states that the international conventions covered herein establish rules that are "*expressly* recognized by the contesting states." *Id.* (emphasis added).

in the DoPs, the argument can be made *ex negativo*[65] that the DoPs are overall not hard law but instead are merely soft law. This argument is also supported by the fact that Principle 5 foresees multiple future agreements,[66] which would qualify the DoPs as a more preliminary result of negotiations.

Moving forward, the question surrounding the binding effect of the DoPs does not need to be answered concerning accepted principles of customary international law found therein, such as the principles of "no significant harm" and of "equitable and reasonable utilization," as these *per se* constitute international law.[67]

On the other hand, the specific framework surrounding the GERD, such as the principles on the first filling and operating of the dam that deviate from customary international law or that go into more detail, could merely constitute soft law.[68] Procedural duties hereunder and potential breaches thereof are nevertheless examined in the Section on procedural duties, as there is no clear answer to whether the DoPs are legally binding.

### *B. International Water Law*

This Section provides a brief overview of the current "playing field" of international water law beyond the Nile River Basin. This Section also covers the formation of customary international law and major multilateral environmental agreements.

#### *1. The Formation of Customary International Water Law*

With 263 transboundary lake and river basins[69] on the one hand and growing populations, agriculture, and industrialization on the other hand,

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65. Angelika Nußberger, *Hard Law or Soft Law—Does it Matter?*, *in* THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND GENERAL INTERNATIONAL LAW 43 (Anne van Aaken & Iulia Motoc eds., 2018).

66. According to DoPs, *supra* note 46, princ. V ("The three countries . . . will utilize the final outcomes of the joint studies . . . to . . . [a]gree on guidelines and rules on the first filling of GERD which shall cover all different scenarios, in parallel with the construction of GERD. . . . [and] [a]gree on guidelines and rules for the annual operation of GERD . . . .").

67. *See* ICJ Statute, *supra* note 63, art. 38(1)(b) (stating the court shall apply "international custom"). See discussion *infra* Part II.B.1.b for a validation of the question whether these principles constitute customary international law.

68. *See* discussion *supra* Part II.A.3.b.

69. *International Decade for Action 'Water for Life' 2005-2015*, UNITED NATIONS DEP'T OF ECON. & SOC. AFFS., https://www.un.org/waterforlife

the demand for freshwater resources has naturally increased while the global supply has remained the same. Thus, disputes over water allocation continue to increase.

*a. Uniting Opposing Viewpoints of Upstream and Downstream States*

Naturally, upstream and downstream riparian states' interests are "fundamentally opposed."[70] This has subsequently led to different legal theories—that can and have been successfully invoked in the past—that will benefit either the upstream or downstream nation, resulting in a deadlock unless middle ground is established. Upstream states rely on "absolute territorial sovereignty," also referred to as the Harmon Doctrine,[71] which provides for an unlimited sovereign right to use all the resources within their territory. Downstream states, on the other hand, favor the "absolute integrity of the watercourse," where upstream states "can do nothing that affects the quantity or quality of water that flows down the watercourse."[72]

*b. Major Principles in Today's Customary International Law*

Over the years, a middle ground has evolved, granting every state the right to "equitable utilization" of the water without imposing "significant transboundary harm" upon any other riparian state.[73] The duty to avoid the imposition of significant transboundary harm is a major principle in international environmental law and is not limited to only water resources as established and reaffirmed in various decisions and sources, such as the

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decade/transboundary_waters.shtml [https://perma.cc/R9PA-XMAS] (last updated Oct. 23, 2014).

70. *See* Carel Dieperink, *Successful International Cooperation in the Rhine Catchment Area*, 25 WATER INT'L 347, 349 (2000); Attila M. Tanzi, *The Inter-Relationship Between No Harm, Equitable and Reasonable Utilisation and Cooperation Under International Water Law*, 20 INT'L ENV'T AGREEMENTS: POL., L. & ECON. 619 (2020).

71. Joseph W. Dellapenna, *The Berlin Rules on Water Resources: A New Paradigm for International Water Law*, IWRA WORLD WATER CONG. PROC. 1 (2008); Tuomas Kuokkanen, *Water Security and International Law*, 20 POTCHEFSTROOM ELEC. L.J. 6 (2017).

72. Dellapenna, *supra* note 71, at 2.

73. *Id.*; *see e.g.*, UN Watercourses Convention, *supra* note 48, arts. 5, 7; *Berlin Rules on Water Resources*, *infra* note 95, arts. 12, 16; CFA, *supra* note 28, art. 3(4), (5); *see also* DoPs, *supra* note 46, princ. 3–4.

*Trail Smelter* Case,[74] Principle 21 of the Stockholm Declaration,[75] the *Lake Lanoux* Case,[76] the *Gabčikovo-Nagymaros* Case,[77] the *Iron Rhine Railway* Case,[78] the *Pulp Mills on the River Uruguay* Case,[79] and the *Nicaragua v. Costa Rica* Case.[80]

Riparian states are currently regarded as forming a "community of interest"[81] that "becomes the basis of a common legal right, the essential features of which are the perfect equality of all riparian States in the user of the whole course of the river and the exclusion of any preferential privilege of any one riparian State in relation to the others."[82] Notably, today's international water law does not provide every riparian state an equal share of water but instead sets out factors—varying between different legal documents—which can be used to determine what constitutes an amount sufficient for "equitable utilization."

During the negotiations on the CFA between Nile-riparian countries, the principle of "water security" was developed to further clarify the respective rights of upstream and downstream countries and unite Egypt and Sudan's opposing viewpoints vis-à-vis the other riparian countries. Egypt and Sudan wanted the CFA to explicitly recognize their rights under "existing agreements" from colonial and early post-colonial times, a demand not met favorably by the other Nile-riparian states during

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74. Trail Smelter (U.S. v. Can.), 3 R.I.A.A. 1905 (1941).

75. U.N. Conference on the Human Environment, *Stockholm Declaration*, U.N. Doc. A/CONF.48/14/Rev.1. See Alexandre Kiss, *The International Protection of the Environment*, *in* THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW: ESSAYS IN LEGAL PHILOSOPHY, DOCTRINE, AND THEORY (Ronald St. J. MacDonald and Douglas M. Johnston eds., 1983), for a discussion of the principle.

76. *Lake Lanoux* Arb., *supra* note 27.

77. Gabčikovo-Nagymaros Project (Hung./Slovk.), Judgment, 1997 I.C.J. 7 (Sept. 25).

78. Iron Rhine ("Ijzeren Rijn") Railway (Belg. v. Neth.), 27 R.I.A.A. 35 (Perm. Ct. Arb. 2005).

79. Pulp Mills on the River Uruguay (Arg. v. Urug.), Judgment, 2010 I.C.J. Rep. 14, ¶ 101 (Apr. 20) [hereinafter *Pulp Mills* Case].

80. Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicar.) and Construction of a Road in Costa Rica Along the San Juan River (Nicar. v. Costa Rica), Judgment, 2015 I.C.J. 665 (Dec. 16) [hereinafter *Nicaragua v. Costa Rica* Case].

81. Case Relating to the Territorial Jurisdiction of the International Commission of the River Oder (U.K. v. Pol.), 1929 P.C.I.J. (ser. A) No. 23, at 27 (Sept. 10).

82. *Id.*

negotiations.[83] However, the concept of water security has not yet been expressly acknowledged as a principle of international customary law[84] and (given the fact that in the absence of water security there is an imminent threat of significant harm) is not essential to the discussion of water rights as it is already encompassed within the existing international legal framework.

*2. Relevant International Agreements*

In addition to customary international law (which evolves as a consequence of arbitration, court decisions, states' treaties, actual practice, and *opinio juris*),[85] a plethora of international agreements exist that could potentially be relevant in determining whether the GERD violates international law. The most important agreements and their implications are summarized in the following sections of this Article.

*a. United Nations Convention on the Law of Non-Navigational Uses of International Waterways of 1997*

At the international level, potentially the main applicable instrument is the 1997 UN Watercourses Convention,[86] a framework convention which, *inter alia*, sets out the two principles of "[e]quitable and reasonable utilization and participation" of waterways[87] and an "[o]bligation not to cause significant harm."[88] When these two principles conflict, the principle of equitable and reasonable utilization prevails.[89]

In order to immediately apply to the GERD, the Nile-riparian states need to be parties to the Convention, which is currently not the case. Most Nile-riparian countries initially abstained from voting or voted against the

83. *See* Mahemud Eshtu Tekuya, *Governing the Nile Under Climatic Uncertainty: The Need for a Climate-Proof Basin-Wide Treaty*, 59 NAT. RES. J. 321, 332 (2019).

84. Kuokkanen, *supra* note 71, at 16 (referring to water security's emergence as "a new notion" in international law that has always been present in international water law, but "not necessarily labelled as water security rules").

85. *Opinio juris et necessitatis* means a "sense of legal obligation" or a practice that is "accepted as law" by states. See IAN BROWNLIE, PRINCIPLES PUBLIC INTERNATIONAL LAW 8 (7th ed. 2008), referring, *inter alia*, to the wording of the ICJ Statute.

86. *See* UN Watercourses Convention, *supra* note 48.

87. *Id.* art. 5.

88. *Id.* art. 7.

89. *See id.*

UN's Convention.[90] However, as mentioned above, these principles are now considered to be customary international law and have expressly been acknowledged by the Nile-riparian states,[91] meaning they are nevertheless relevant in the regional context.

*b. United Nations Economic Commission for Europe Convention on the Protection and Use of Transboundary Watercourses and International Lakes of 1992*

Another potentially relevant Convention is the United Nations Economic Commission for Europe ("UNECE") Convention on the Protection and Use of Transboundary Watercourses and International Lakes ("UN Water Convention").[92] It mandates the parties to "take all appropriate measures . . . [t]o ensure that transboundary waters are used in a reasonable and equitable way, taking into particular account their transboundary character, in the case of activities which cause or are likely to cause transboundary impact."[93] Therefore, the UN Water Convention reiterates the principles already mentioned above but does not bind any of the Nile-riparian countries.

*c. Berlin Rules of 2004*

In addition to the UN, another relevant player in the development of international water law is the International Law Association ("ILA"). Following the ILA's 1966 Helsinki Rules on the Uses of International River Waters,[94] the Berlin Rules on Water Resources[95] were adopted in 2004 to supersede prior ILA rules and provide an overview of current customary international law applicable to a broader spectrum of covered

90. Only Kenya and Sudan voted in favor. *See* Gabriel Eckstein, *The Status of the UN Watercourses Convention: Does it Still Hold Water?*, 36 INT'L J. WATER RES. Dev. 429, 442–43 (2020).

91. *See, e.g.*, the DoPs and the letters of Egypt, Sudan and Ethiopia to the UN Security Council.

92. *See* U.N. Econ. Comm. Eur., Convention on the Protection and Use of Transboundary Watercourses and International Lakes, March 17, 1992, 1936 U.N.T.S. 269 [hereinafter UN Water Convention].

93. *Id.* art. 2(2).

94. Int. L. Assoc., Rep. of the Fifty-Second Conf., *The Helsinki Rules on the Uses of the Waters of International Rivers* (Rep. of the Conference in Helsinki, 1966).

95. Int. L. Assoc., Rep. of the Seventy-First Conf., *The Berlin Rules on Water Resources* (Rep. of the Conference in Berlin, 2004) [hereinafter *Berlin Rules on Water Resources*].

freshwater resources.[96] The Berlin Rules do not constitute binding international law but instead are a summary of applicable rules. The Berlin Rules mention the rules of cooperation,[97] equitable utilization,[98] and avoidance of transboundary harm.[99] The rules mandate a procedural obligation to assess environmental impacts of programs, projects, and activities[100] and lay out the duties of international cooperation and administration, including the duties of exchange of information, notification, and consultation.[101] While they are not inherently binding on states, they codify international arbitration law, court decisions, and other sources and therefore can be seen as an additional approval of the principles central in the GERD dispute.

*3. Procedural Obligations Under International Water Law*

In international water law, a distinction can be drawn between the procedural and the above-mentioned substantive obligations. This distinction is especially helpful when analyzing potential breaches regarding the GERD's filling and future operation. Procedural obligations arise from the states' entitlement to be protected against significant transboundary harm[102] and aim to ensure that there will not be a breach of substantive obligations.

*a. Duty to Assess, Notify, and Consult*

An analysis of treaties demonstrates that obligations to "*assess, notify, and consult*" are present in international law if there is a significant risk

96. *See generally* Dellapenna, *supra* note 71; Salman M. A. Salman, *The Helsinki Rules, the UN Watercourses Convention and the Berlin Rules: Perspectives on International Water Law*, 23 WATER RES. DEV. 625, 625–40 (2007).

97. *Berlin Rules on Water Resources*, *supra* note 95, art. 11.

98. *Id.* art. 12; *see also id.* art. 13 (providing a determination of equitable and reasonable use).

99. *Id.* art. 16.

100. *Id.* arts. 29–31.

101. *Id.* arts. 56–59.

102. *See* Günther Handl, *Transboundary Impacts*, *in* OXFORD HANDBOOK INTERNATIONAL ENVIRONMENTAL LAW 540–42 (Daniel Bodansky, Jutta Brunnée & Ellen Hey eds., 2007); Phoebe N. Okowa, *Procedural Obligations in International Environmental Law*, 67 BRIT. Y.B. INT'L L. 275 (1996); *Developments in the Law – International Environmental Law*, 104 HARV. L. REV. 1484, 1511–20 (1991).

that a proposed action may impose transboundary harm on another state.[103] For example, such obligations are located in Principles 17–19 of the 1992 Rio Declaration on Environment and Development. Although a non-binding legal document, the Rio Declaration is useful to examine.[104] Procedural duties are mentioned in Articles 7–9 of the ILC's draft Articles on Prevention of Transboundary Harm from Hazardous Activities,[105] Articles 11–19 of the UN Watercourses Convention, and Articles 4, 6–8 of the Aarhus Convention.[106]

Assessing potential harm to other states includes the undertaking of an environmental impact assessment where an evaluation is conducted on whether "there is a risk that the proposed . . . activity may have a significant adverse impact in a transboundary context, *in particular, on a shared resource*."[107] However, the exact content of such an environmental impact assessment can be determined by each state within its respective legislation as long as it acts with due diligence.[108] The duty to *notify* the (potentially) affected party will often be found in a more specific agreement[109] and is a necessary step to "*consult* in order to assess the risks of the plan and to negotiate possible changes which may eliminate those risks or minimize their effects."[110] *Consultation* is further recognized in various multilateral environmental agreements such as Articles 3(7) and 5 of the Espoo Convention, which underlines its importance in international law.[111] Egypt, Ethiopia, and Sudan are not parties to any of the binding Agreements mentioned above delineating such procedural duties. However, since the duties are extensively mentioned in multilateral environmental agreements, they can be regarded as part of customary

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103. *See* Okowa, *supra* note 102, at 277–78.

104. *See* Flores v. S. Peru Copper Corp., 343 F.3d 140, 169 (2d Cir. 2003) (explaining "neither of these declarations created enforceable legal obligations").

105. Int'l Law Comm'n, Rep. on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10, at 157–61 (2001).

106. U.N., Econ. & Soc. Council, Econ. Comm. Eur., Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, June 25, 1998, 2161 U.N.T.S. 447.

107. *Pulp Mills* Case, Judgment, 2010 I.C.J. Rep. 14, ¶ 204 (Apr. 20) (emphasis added).

108. *Id.* ¶ 205.

109. *See, e.g.*, *id.* ¶¶ 123–30 (discussing a 1975 agreement between Uruguay and Argentina).

110. *Id.* ¶ 115 (emphasis added).

111. *See, e.g.*, U.N., Econ. & Soc. Council, Econ. Comm. Eur., Convention on Environmental Impact Assessment, International Legal Materials, February 25, 1991, 1989 U.N.T.S. 309; *cf.* Okowa, *supra* note 102, at 277 n.5.

international law. As such, they also need to be complied with by countries that are not parties to the Conventions mentioned above.

*b. Duty to Negotiate in Good Faith*

Further, a duty to negotiate in good faith was established in multiple proceedings when a state acts in a way potentially affecting an international watercourse.[112] Good faith means a state's action "must not be mere formalities," but instead genuinely aims at reconciling interests potentially adversely affected.[113] In the *Lake Lanoux* case,[114] for example, the Spanish government feared that French works on the lake may adversely affect Spanish interests. Spain took the view that the May 26, 1866 Treaty of Bayonne between France and Spain obliged France to subject such works to a prior agreement with the Spanish government. While the necessity of such an agreement was denied, the International Court of Justice ("ICJ") held that the party carrying out the works must provide the other party with sufficient information necessary to decide whether the other state's interests will be affected and then negotiate in good faith.[115]

## III. POTENTIAL BREACHES OF PROCEDURAL AND SUBSTANTIVE OBLIGATIONS DUE TO THE ERECTION AND FUTURE OPERATION OF THE GERD

Having carved out the main procedural and substantive obligations under international water law, which are arguably applicable to the filling and operation of the GERD, Part III will analyze whether Ethiopia, by filling and planning to operate the GERD, has breached any such obligations.

### *A. Procedural Obligation Under the 1902 Colonial Treaty to Obtain Prior Agreement*

Although it remains undetermined whether the 1902 Treaty still imposes a duty on Ethiopia to obtain an agreement from Egypt and Sudan, the latter as the successor of the British, before undertaking actions

112. *See generally Pulp Mills* Case, 2010 I.C.J. Rep. 14; *see also Lake Lanoux* Arb., *supra* note 27.
113. *Lake Lanoux* Arb., *supra* note 27.
114. *Id.*
115. *Id.*

perceived to "arrest[] the Nile waters,"[116] that question is not relevant if either of the following are true: the GERD does not *de facto* "arrest the waters" or if Egypt and Sudan approved the GERD.

From the wording of the 1902 Treaty, the treaty is arguably only applicable in situations where the Nile water is fully "arrested," implying that Egypt and Sudan do not receive any share of the Nile waters. However, interpreting the treaty from its *telos*,[117] a reading of the ambiguous language is not convincing as it would be technically absurd to arrest all of the Nile waters or redirect the waters to areas outside of Sudan and Egypt. Instead, the 1902 Treaty can be read to apply to larger projects erected on the Nile or its tributaries, meaning the GERD would be subject to it.

However, the question becomes irrelevant if Egypt and Sudan gave their approval to the GERD. Such an approval can be implied by the 2015 DoPs, all of which presuppose that the GERD could be built and only details surrounding the filling and operation needed to be discussed. The DoPs expressly contain an agreement that Ethiopia may "arrest the waters" of the Blue Nile to advance the GERD, and thus Ethiopia should not be viewed as breaching any duties under the 1902 Treaty.

### *B. Procedural Obligations Under the 2015 Declaration of Principles and Customary International Law*

The above-mentioned obligations to assess, notify, and consult are mirrored in the DoPs, which is why it is first evaluated whether Ethiopia's conduct constitutes a breach of its obligations under the DoPs. According to Principle 5 of the 2015 DoPs, Ethiopia is obliged "[t]o implement the recommendations of the International Panel of Experts (IPoE), [and to] respect the final outcomes of the Technical National Committee (TNC) on the joint studies recommended in the IPOE Final Report throughout the different phases of the project."[118] Based on the "final outcomes of the joint studies," the three countries are expected to "[a]gree on guidelines and rules on the first filling of GERD"[119] and for its "annual operation . . . which the owner of the dam may adjust from time to time."[120] Further, the DoPs expect the providence of "data and information needed for the conduct of the TNC joint studies in good faith and in a timely manner."[121]

116. *See* discussion *supra* Part II.A.1.
117. Meaning from its purpose.
118. DoPs, *supra* note 46, princ. V.
119. *Id.* princ. V, para. 2(a).
120. *Id.* princ. V, para. 2(b).
121. *Id.* princ. VII.

These requirements mirror the *assessment* of potential impacts on downstream states, *notification* regarding such impacts, and subsequent *consultation* in the form of agreements.

Regarding the operation of the dam, the DoPs provide for "inform[ing] the downstream countries of any unforeseen or urgent circumstances requiring adjustments in the operation of GERD"[122] and for "sustain[ed] cooperation and coordination on the annual operation of GERD with downstream reservoirs . . . through the . . . ministries responsible for water."[123] An appropriate coordination mechanism is to be set up for this. Principle 5 provides for a timeframe of 15 months to conduct the processes mentioned.

### *1. Compliance with Procedural Obligations and the "Current Stand"*

It must be addressed whether Ethiopia has complied with the procedural duties imposed through Principles 5 and 7. The final report of the IPoE, published on May 31, 2013,[124] contains recommendations such as conducting joint studies of the three countries through the TNC. However, the studies were never initiated as the three countries disagreed on a baseline for modeling, which can be broken down to disagreements over the validity of rights under the colonial Agreements.[125] Negotiations over these studies and (by now) the filling and annual operation of the GERD have continued for years with input from various international actors such as the United States ("U.S."), the World Bank, and most recently the United Nations Security Council and the African Union ("AU").[126] As of July 2021, the three countries have resumed negotiations under the auspices of the AU with the idea of finding an "African solution . . . to African problems."[127] Meanwhile, the United Nations Security Council held a meeting on the dam requested by Sudan and Egypt because, in their opinion,

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122. *Id.* princ. V, para. 3(c).

123. *Id.* princ. V.

124. Int'l Panel of Experts [IPoE] on the Grand Ethiopian Renaissance Dam Project (GERDP), Final Report 18–19, 39–42 (2013) [hereinafter IPoE Report].

125. Tekuya, *supra* note 5, at 84–86.

126. For a detailed description of the different stages of negotiation and their legal relevance, see generally Tekuya, *supra* note 5, at 86–101.

127. Meetings Coverage, Security Council, Egypt, Ethiopia, Sudan Should Negotiate Mutually Beneficial Agreement over Management of Nile Waters, Top Official Tells Security Council, U.N. Meetings Coverage SC/14576, (July 8, 2021).

the filling of the dam poses a threat to international peace and security.[128] At the same time, the reservoir behind the dam has already been filled twice during past rainy seasons, with the "second filling" completed,[129] making the dam a *fait accompli* and close to being operational. If the procedural obligations imposed under the DoPs are regarded as absolute, Ethiopia could be in breach by not conducting joint studies with Egypt and Sudan and initiating the filling of the dam without a subsequent agreement.

*2. Performance of Procedural Duties in Good Faith*

However, under Article 26 of the VCLT and Principle 1 of the DoPs, states must only perform duties arising from treaties binding upon them "in good faith." This demonstrates that the procedural duties cannot be seen as absolute: determination of a breach must be considered in light of Ethiopia's due diligence and degree of fault. Thus, the question arises as to whether Ethiopia has breached its duty to act in good faith regarding the filling of the GERD despite not being able to garner the other countries' agreement on the precise manner in which the studies were to be conducted. Given the lengthy attempts to come to an agreement, with negotiations spanning nearly a decade, the establishment of the IPoE, and the general willingness of Ethiopia to exchange data and information with the downstream countries in the future, it could be argued that Ethiopia exercised good faith in attempting to fulfill its procedural obligations. The author Tekuya concludes that "requiring a preliminary agreement for filling and testing the GERD goes beyond the requirements of international law governing transboundary watercourses."[130] However, Ethiopia explicitly affirmed in Principle 5 of the DoPs that such an agreement should be reached. Therefore, the underlying question turns to whether reaching an agreement can actually constitute a breach of a procedural duty if performance of such a duty necessarily involves other actors. On the one hand, Ethiopia could be viewed as failing to exercise due diligence with its unsuccessful attempts at reaching agreements with Sudan and Egypt. After the U.S. Department of Treasury intervened, an agreement that Egypt and Sudan would have favored was drafted by the

128. *Id.*

129. *Ethiopia Says Second Filling of Renaissance Dam Complete*, AL JAZEERA (July 19, 2021), https://www.aljazeera.com/news/2021/7/19/ethiopia-says-second-filling-of-renaissance-dam-complete [https://perma.cc/MKT6-BCV7].

130. Tekuya, *supra* note 5, at 99–100.

Department and the World Bank.[131] Ethiopia refused to enter,[132] as the country did not view the proposal as suitable because the draft was not prepared by the three countries pursuant to the DoPs.[133] Notably, Ethiopia also opposed the suggested agreement because its sovereign rights would have been diminished; the GERD would have been disadvantaged as opposed to other dams on the Nile (such as the Aswan Dam), and the draft would have granted the other states a great deal of influence regarding its operation.[134] Given the significance of these concessions, the fact that Ethiopia refrained from entering into this agreement as a breach of its duties is not very convincing. Otherwise, the other states would have a veto power on whether Ethiopia is in breach (for instance, by never agreeing to anything proposed or dragging negotiations on indefinitely). Therefore, by keeping up negotiations in good faith on the filing and annual operation, Ethiopia fulfilled its duties under Principle 5 of the DoPs.

Although Ethiopia maintained good faith negotiations, an argument exists that the country should have refrained from filling the dam reservoir altogether. From their language, the DoPs do not impose such a duty explicitly. Thus, the duty can only be derived implicitly, which is not sufficient to constitute a breach of duties under the DoPs (especially, as in this case, where the other states would again have veto power to permanently keep Ethiopia from ever filling its dam, thereby violating Ethiopia's sovereign rights).[135] This does not mean Ethiopia may not be in substantial breach because of the filling and future operations, but regarding procedural duties, even if the DoPs are regarded as binding law, Ethiopia is not breaching them. The same can be said for the "underlying" procedural duties to assess, notify, and consult in international law, as Ethiopia conducted an environmental, social, and transboundary environmental impact assessment[136] and continuously communicated with the other two nations.

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131. *Statement by the Treasury on the Grand Ethiopian Renaissance Dam*, U.S. DEP'T OF THE TREASURY (Feb. 28, 2020), https://home.treasury.gov/news/secretary-statements-remarks/statement-by-the-secretary-of-the-treasury-on-the-grand-ethiopian-renaissance-dam [https://perma.cc/G53C-BMPS].

132. Press Release, Embassy of Eth., London, Statement of Ethiopia on the Negotiations on the Grand Ethiopian Renaissance Dam (Feb. 29, 2020).

133. *Id.*

134. *See* Tekuya, *supra* note 5, at 95–100.

135. See *Lake Lanoux* Arb., *supra* note 27, at 14, for the argument of an adverse veto power in a similar situation. *See also* Tekuya, *supra* note 5, at 96–97.

136. IPoE Report, *supra* note 124, at 18–19, 39–42; Tekuya, *supra* note 5, at 99.

### *C. Substantive Obligations*

Following the discussion of breaches of procedural duties, a discussion follows as to whether Ethiopia breached any substantive obligations under applicable laws. At the core of the substantive discussion is whether the filling and operation of the GERD may result in significant harm for the downstream countries, especially Egypt and Sudan, and whether Ethiopia's conduct is covered by the principle of reasonable and equitable utilization. The relevant documents[137] all set out rules on how the two major principles interrelate and also what constitutes reasonable and equitable utilization.

#### *1. Applicable Legal Standard*

Whether Ethiopia breached any substantive obligations must be considered against the background of a relevant legal standard in the present case. To determine this standard, the 2015 DoPs, the UN Watercourses Convention, the UN Water Convention, and the Berlin Rules on Water Resources seem applicable. These authorities are all framed similarly but vary in detail, especially regarding the factors for determining reasonable and equitable use. Using the 2015 DoPs would be advantageous as the document is specifically tailored to the Nile, whereas the UN Conventions and the Berlin Rules have a broader application. However, the UN Watercourses Convention codifies customary international law[138] and constitutes a binding legal instrument (although not directly binding to the Nile-riparian countries) that goes into more detail than the UN Water Convention. It might be more persuasive to a court or arbitral committee should this case ever be submitted for litigation or arbitration. Therefore, it is logical to primarily refer to the UN Watercourses Convention.

#### *2. Reasonable and Equitable Utilization vs. No Significant Harm*

The interrelationship between the two principles of reasonable and equitable utilization and no significant harm has been assessed differently

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137. Meaning the DoPs, the UN Watercourses Convention, the UN Water Convention, and the Berlin Rules on Water Resources.

138. Ariel Litke & Alistair Rieu-Clarke, *The UN Watercourses Convention: A Milestone in the History of International Water Law*, GLOB. WATER F. (Feb. 2, 2015), https://globalwaterforum.org/2015/02/02/the-un-watercourses-convention-a-milestone-in-the-history-of-international-water-law/ [https://perma.cc/3KP5-AMGF].

in legal practice and literature.[139] According to the language of Article 7(2) of the UN Watercourses Convention, the Convention does not prohibit the imposition of significant harm altogether; rather, a balance must be found between the upstream and downstream states' competing interests. If a use causes such harm, all the appropriate measures must be taken to eliminate or mitigate such harm,[140] which endorses the ultimate prevalence of the principle of equitable and reasonable utilization.[141] Thus, a breach occurs if a state "causes significant harm, without properly balancing all the equitable utilization factors."[142]

*3. Factors Laid Out in Article 6 of the UN Watercourses Convention*

Article 6 of the UN Watercourses Convention provides that equitable and reasonable utilization "requires taking into account all relevant factors and circumstances" and provides a non-exhaustive list of factors, which this subsection will now assess in the local context surrounding the GERD. First, various factors "of a natural character" are mentioned.[143] On one hand, with their dry climates and little access to freshwater, Egypt and Sudan's geographic circumstances[144] are favorable to their position. However, if one considers that Ethiopia provides the majority of the Nile's water, a hydrographic or hydrological argument in its favor could be made, and from an equity perspective, Ethiopia should benefit from the advantages such water resources pose.[145] Therefore, the above-mentioned factor "of a natural character" is rather favorable to Ethiopia's planned use of the river.

Next, the social and economic needs of the riparian states must be taken into account.[146] Historically, Ethiopia has been an extremely impoverished country. However, it has seen significant economic

139. *See* Eckstein, *supra* note 90, at 434–43; Tanzi, *supra* note 70; Stoa, *supra* note 24, at 1327–29.

140. *See* UN Watercourses Convention, *supra* note 48, art. 7(2).

141. Other authors argue that one principle is inherent in the other and neglect a "hierarchy." *See, e.g.*, Tanzi, *supra* note 70, at 622.

142. *Id.*

143. UN Watercourses Convention, *supra* note 48, art. 6(1)(a).

144. *See* Tekuya, *supra* note 83, at 334.

145. Explicitly including the contributing amount of water as one of the factors in Article 6 of the UN Watercourses Convention was suggested, but not implemented. Carroll, *supra* note 17, at 288.

146. *See* UN Watercourses Convention, *supra* note 48, art. 6(1)(b).

improvements in recent years, and its GDP has grown considerably,[147] although its GDP is still significantly lower than Egypt's.[148] Further, roughly 55% of Ethiopia's population still has no access to electricity,[149] a fact that could change significantly once the GERD is in place and grid systems transport the created energy. The social and economic needs of Ethiopians are favorable to Ethiopia's position. Moreover, the population dependent on the watercourse in each watercourse state must be considered.[150] While Ethiopia has vast water resources, Egypt's rising population, forecasted to reach 115 million by 2050 and located in an area 95% desert,[151] is heavily dependent on the Nile River. This factor is thus favorable to Egypt. Further, the effects of its use on other riparian states must be considered.[152] This is a heavily disputed issue, with Ethiopia arguing that the hydropower dam may actually improve water management on the river by preventing floods and improving forecasting options.[153] Egypt, on the other hand, warns about catastrophic consequences such as increased droughts, higher salinity of the lower Nile due to low water levels, and corresponding adverse effects on agriculture and general living conditions.[154] The effects also depend upon the manner in which the filling and operation is conducted and whether there will be adequate cooperation and communication tools to effectively manage the water with the downstream nations, especially Sudan. Therefore, this factor is not favorable for either country.

Furthermore, existing and potential uses need to be considered.[155] Egypt has heavily relied on past usage and agreements dating back to colonial and early post-colonial times, which are more in its favor.[156]

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147. The numbers of Ethiopia's GDP growth vary between 7% and 11%. S*ee* Gebreluel, *supra* note 37, at 29.

148. Carroll, *supra* note 17, at 292.

149. *See Ethiopia Energy Outlook: Analysis from Africa Energy Outlook 2019*, IEA (Nov. 8, 2019), https://www.iea.org/articles/ethiopia-energy-outlook [https://perma.cc/C4E7-JRWZ].

150. *See* UN Watercourses Convention, *supra* note 48, art. 6(1)(c).

151. *See* Tesfaye, *supra* note 17, at 68.

152. *See* UN Watercourses Convention, *supra* note 48, art. 6(1)(d).

153. John Mukum Mbaku, *The Controversy over the Grand Ethiopian Renaissance Dam*, BROOKINGS (Aug. 5, 2020), https://www.brookings.edu/blog/africa-in-focus/2020/08/05/the-controversy-over-the-grand-ethiopian-renaissance-dam/ [https://perma.cc/5FP6-EP6K].

154. *'Means Our Death': Egyptian Farmers Fear Effect of Ethiopia Dam*, AL JAZEERA (Aug. 20, 2020), https://www.aljazeera.com/news/2020/8/20/means-our-death-egyptian-farmers-fear-effect-of-ethiopia-dam.

155. UN Watercourses Convention, *supra* note 48, art. 6(1)(e).

156. Carroll, *supra* note 17, at 288.

While it is true that Egypt has had more uses in the past, the Convention's aim is not to provide for a rigid system that cements past power dynamics but rather to balance the already existing rights and usages against potential ones. With Ethiopia's rising economy and demands, along with the fact that it has benefited significantly less from the opportunities the Nile provides when compared to Egypt and the Aswan Dam, the notion that the law would prevent Ethiopia from taking advantage of the potential utility provided by the Nile, as it has currently done with the GERD, is not plausible. Hence, this factor can also be regarded as even between the two countries. Article 6(1)(f) of the UN Watercourses Convention demands for conservation, protection, development, and economy of use of the watercourse's water resources and the costs of measures taken to that effect to be factored. The GERD will forward the human-driven development of the Nile, but the project could also pose considerable risks regarding the conservation and protection of the river.[157] With decreases of water levels forecasted and increased risks of droughts as a consequence of climate change,[158] this factor is not favorable to Ethiopia, or it at least evens out the states' interests.

Lastly, the availability of alternatives with comparable value to the use must be considered according to Article 6(1)(g) UN Watercourses Convention. This aspect entered the Convention as a consequence of a similarly worded draft proposal by Egypt.[159] Comparatively valued alternatives for Ethiopia would attempt to find other clean energy sources to improve electricity access in their country, to build multiple smaller dams, or to import electricity from neighboring countries. However, from today's perspective, especially with the construction of the GERD nearly completed, these arguments do not seem convincing. This "availability of alternatives" factor is also not favorable for Ethiopia as long as the country cooperates with the downstream countries on the filling and operation of the hydropower dam. Therefore, the overall majority of arguments seem favorable for Ethiopia and for the lawfulness of the project.

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157. The IPoE Report, *supra* note 124, at 18–19, 39–42, found that more in-depth studies were needed to clearly assess potential environmental impacts on Ethiopia and the downstream countries.

158. *See* UNITED NATIONS ENV'T PROGRAMME, CLIMATE CHANGE ADAPTATION CAPACITIES IN THE NILE RIVER BASIN 13 (2015); *see also* UNESCO WORLD WATER ASSESSMENT PROGRAM, THE UNITED NATIONS WORLD WATER DEVELOPMENT REPORT 2020: WATER AND CLIMATE CHANGE 29 (2020) (citing Mohamed E. Elshamy, Mohamed A.-A. Sayed, Bakr Badawy, *Impacts of Climate Change on the Nile Flows at Dongola Using Statistical Downscaled GCM Scenarios*, 2 NILE BASIN WATER ENG'G SCI. MAG. 1 (2009)).

159. Carroll, *supra* note 17, at 288.

*4. Preventing Significant Harm Moving Forward*

This finding, however, does not mean that Ethiopia does not need to continue to cooperate with the other countries and exercise due diligence[160] in preventing transboundary harm moving forward. *De minimis* impacts on Egypt or other downstream countries will not suffice for such a finding;[161] rather, the impacts need to be "significant." Generally, a significant harm or threat has been denied by the International Panel of Experts with experts from Sudan, Egypt, and Ethiopia in its final report on the project.[162]

## IV. CONCLUSION

This Article provides a general overview of international law potentially applicable to the GERD dispute and analyzes the procedural and substantive implications arising therefrom. It has been established that currently, the lengthy ongoing negotiations regarding the filling and operation of the dam next to the continued filling of the dam are not in violation of international law, nor is the future operation of the dam, as long as Ethiopia continues negotiating with the other states and exercises due diligence in preventing significant transboundary harm. Hopefully, the dispute, which by now has lasted a decade, can eventually become a solution satisfying all parties. Moving forward and looking beyond the current dispute on the GERD, the CFA's ratification and the establishment of a regional instrument to govern future disputes around the Nile River can be viewed as essential in determining the future legality of projects on this vital resource.

160. For the standard of due diligence, see *Pulp Mills* Case, 2010 I.C.J. Rep. 14, ¶¶ 64–65; Günther Handl, *Trail Smelter in Contemporary International Law: Application to Nuclear Energy*, TRANSBOUNDARY HARM IN INTERNATIONAL LAW: LESSONS FROM THE TRAIL SMELTER ARBITRATION 132 (Rebecca M. Bratspies & Russell A. Miller eds., 2006).

161. *Nicaragua v. Costa Rica*, Judgment, 2015 I.C.J. 665, ¶ 192 (Dec. 16).

162. *See* Tekuya, *supra* note 5, at 83 n.97; *see also* Stoa, *supra* note 24, 1364–65 n.222. It should, however, be taken into account that the IPoE Report states in many places that its authors are lacking in-depth information and want further studies to be conducted. *See* IPoE Report, *supra* note 124.