

**International Legal Perspectives on the  
Utilization of Trans-Boundary Rivers:  
The Case of the Ethiopian Renaissance  
(Nile) Dam**

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## Preface

The Renaissance Dam in Ethiopia is the second bitterest test to the political integrity of modern-day Egypt probably next to the birth and survival of the state of Israel since 1948 ( though I am not a fan of either side.) Egyptian nationalist leaders and the populace of the time could never swallow the truth of Israeli's coming into being at the edges of their noses as near as a kitchen for a household. Driven by its influence in the Arab world, Egypt spearheaded the grand project of militarily eliminating Israel in three major interstate wars—1956, 1967, and finally 1973. In all these wars, Egypt caused injuries at the battles on Israel but conclusively lost the war. Egyptian leaders had to put an official end to this embarrassment by accepting Israeli terms of peace, official recognition, and cooperation in exchange for \$2.3 billion United States' assistance annually to the uproar of the entire Arab world and nationalist Egyptians.

For many Egyptians, the ex-president Anwar Sadat put his signature at the Camp David Accord in 1979 in naked betrayal of Egypt and the Arab cause. As a pacifist expert in Political Science and International Relations, I realize how it was painful and challenging for Sadat to agree and approve this Accord. He did it boldly thanks to American influence and his authoritarian rule, partly. At the conclusion of the signature ceremony, Sadat tried to quell the Egyptian broken melancholy of the historical shame by promising that his country hereafter would fight only for water reasons. However, Sadat paid his life for this by a disgruntled soldier from within.

Now, Egyptians stand in face of the second historical challenge, the Renaissance Dam of Ethiopia, which has begun actually disturbing their political maturity, rationality, integrity, and wisdom. Open policy dilemma and inconsistency among government leaders and opinion intoxication and sensationalism among some leading elites out of government circles have surfaced themselves since the news of Ethiopia's diverting some meters of the Nile flow for only technical reasons. It is a blessing for Egyptians that they have some most knowledgeable and insightful elites like Elbaradi, who are demanding for civility, rationality, and sobriety to reign in the conservative minds of maddened elites and advisors.

So far, these elites had to swallow the first round of shame by their 'childlike conspiracy' against Ethiopia in both publicity and substance. The conspiracy sufficiently demonstrated that these Egyptian elites have no any clear understanding of their environment and world, politics and science, history and psychology. They have no an iota of knowledge about the logic and grammar of interstate war in the 21st century. However, the greatest Egyptian shame will happen if the government, as some advisors are saying, will officially ask Ethiopia to halt the construction of the dam. Logically speaking, this future question will breed the greatest shame simply because it has no any inherent mechanism to enforce the next measure when Ethiopia will definitely say 'No!!'.

The following research paper, which I presented at an international conference in South Africa in 2011, depicts the legal, moral, and political distances and contradictions between Ethiopia and Egyptian elites. The paper strongly advises by its implications that Egyptians will have to pay the smallest cost of the Camp David Accord by agreeing to come to dialogues on the Nile issue with Ethiopia. I appreciate that Egyptians ended the crisis with Israel through an informally negotiated 'face saving solution'; they should however replace this diplomatic tradition now with Ethiopia by adopting a principled win-win exchange of national advantages.

# **International Legal Perspectives on the Utilization of Trans-Boundary Rivers The Case of the Ethiopian Renaissance (Nile) Dam**

## **Abstract**

*Ethiopia's recent venture to construct the biggest dam in the country's history over the Nile River in Benshangul-Gumuz Region has precipitated a renewed international legal squabble among the major riparian states of the Nile Basin-Ethiopia and Egypt. The governments and professionals of the two states have repeatedly expressed their positions on rights and duties to International Law in the utilization of International Rivers for development goals. Egyptians strongly stick to the "International Duty" of Ethiopia as an upper riparian state to present prior notification documents about the technical details of the Dam. The purpose is to verify the technical soundness of the project against the international principles of "No-Diversion of International Rivers and "No Harm to a Lower Riparian State/s." Ethiopia, on its part, argues for having immunity from such sectional demands for obligations as per terms of the Nile Initiative Framework Agreement, 2010, signed among most upper riparian states. Ethiopians prefer and advance the international principles of "Collective State Interests, the Overriding Place of Interstate Treaties and State Responsibility" as the corner stone of their foreign policy over the use of Nile River as part of a broad international river system. The question is, however: where are the ultimate legal and technical places of these two strands of arguments in the international legal regime? Why have the two states strongly banked on differing policy orientations in the applications of International Law? What are the legal and historical roots of the major international legal perspectives explaining the divergent policy orientations of Ethiopia and Egypt? The purpose of this paper is to explain existing axioms of international law that address these questions of serious contemporary interest*

**Key Terms:** International Law, the Great Ethiopia's Renaissance Dam, International Conventions and Principles, Principles of no-diversion, no-harm, equitable utilization of international river...

## **1. Introduction**

The Renaissance Dam<sup>1</sup> is a new hydrological event in Africa in, general, and in Ethiopia, in particular. It is at present under construction at the very course of the Blue Nile that contributes about 86% of the total Nile waters. The specific site of the project is some 42 kilometers away from the eastern border of the Sudan. The Blue Nile Dam under construction is reportedly one of the largest Dams in Africa, two times larger than the inland Lake Tana in Northern Ethiopia. The Dam will estimably hold about 63 billion cubic liters of water at completion. The Ethiopian government designed to generate about 6000 megawatts of hydroelectric power. The hydropower planned to be generated from the dam is expected to raise the national power supply three times more than Ethiopia has now had so far. The project is estimated to cost about \$5 billion or about 80 billion Ethiopian birr up to its completion after five or less years.<sup>2</sup> A renewed academic discussion is currently high on the air in many places but more articulate and serious in Ethiopia and Egypt, to a lesser degree, in Sudan. This discourse is a significant point more for scholars of International Law for three main reasons. A. The construction of the Dam was made official

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<sup>1</sup> The Ethiopian Renaissance Dam' is the official name given to the new Blue Nile Dam by the 66 Regular Session of the Council of Ministers of the Federal Government in May 2/2011.

<sup>2</sup> Meles Zenawi, the Prime Minister of the Federal Government of Ethiopia informed the Ethiopian people in a televised speech detailing size and budget estimate of the Dam on April 4/2011 after he officially inaugurated the beginning of its construction.

by the government of Ethiopia on April 4/2011 while there were no any official agreements between Ethiopia versus Egypt and Sudan. B. It was also launched at the time when Egypt and Sudan officially expressed that they had not so far found any reasonable ground to revise the 1959 Bilateral Agreement;<sup>3</sup>; C. It is fairly, however, simple to assume that the huge size of the Blue Nile Dam in Ethiopia will have a remarkable effect on the established perceptions in Egypt of water use and distribution that, many advise, needs some kind of Interstate Agreement.

This paper is a systematic attempt at examining the backgrounds of interstate relations in light of Nile water utilization patterns up until the official commencements of the new Dam. It will also consider the backgrounds of the doctrines, principles, conventions and customary laws which Ethiopia and Egypt have long been advancing in their respective rights, adversely affecting venues toward making working bilateral water agreement and the spill-over effect of the Dam on the international body of laws and rules on trans-boundary rivers and their utilizations.

## 2. Background Views: Nile Water Utilization, Conflict, and Cooperation

The Ethiopian Dam is conceived and its official start has been announced amidst traditional interstate conflicts, first and foremost, between the major contributor of the Nile waters, Ethiopia, and Egypt, with latter being the major recipient country, followed by Sudan<sup>4</sup>. Before discussions on conflicting and cooperative relations among the three major Nile Basin states under view, it is therefore sound to disclose existing variations or patterns in the utilization of Nile Waters among the states.

### A. Nile Water Utilization

The Nile water in Egypt is widely used first for irrigated agriculture since from ancient times. With dramatic changes in global production structures from agriculture to manufacturing and industry especially since the turn of the 18th century in Europe and America. Egypt was able to become a major producer and supplier of cotton to American Markets.<sup>5</sup> Following British colonization of Egypt, the introduction of improved production technologies, more water from the Nile River began to be used. The growth and expansion of urbanization in recent Egypt has generally followed the map of Nile where more water became the basis of urban life. 2.4. billion Cubic liters of water are used for Municipal and Industrial services with a drainage outflow of about 17 .5 billion into Mediterranean Sea.<sup>6</sup> Nile River in Egypt also furnishes inland transport rout, fishing, tourism, sports and environment. Egypt completed the construction of Aswan Dam in 1902, enlarged it in 1912, and heightened in again 1934 to store 5.1 billion

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<sup>3</sup> Egypt and Sudan signed this agreement in 1959 in Cairo as major lower riparian states which provides for the Full Utilization of the Nile Waters with 55 and 18 billion cubic liters of water share between them respectively.

<sup>4</sup>Evans. E (1990), History of the Nile Flows, in P.P Howell and J. A. Allan (eds.) *The Nile: Resources Evaluation, Resource Management, Hydro-politics and Legal Issues*, prepared for Publication for a Conference held in London at the Royal Geographic Society and School of Oriental and African Studies, University of London.

<sup>5</sup> D. G. Knott and R.M. G. Hewett (1990) History of the Nile Flows, in P.P Howell and J. A. Allan (eds.) *The Nile: Resources Evaluation, Resource Management, Hydro-politics and Legal Issues*, prepared for Publication for a Conference held in London at the Royal Geographic Society and School of Oriental and African Studies, University of London.

<sup>6</sup> James McCann (1981)“Ethiopia, Britain and Negotiations for the Lake Tana Dam 1922–1935,” *International Journal of African Historical Studies*,: U.S Department of the Interior, *Land and Water Resources of the Blue Nile Basin: Ethiopia* 17 vols., (Washington D.C.: Government Printing Office, 1964).

liters of water. There were more than ten barrages extending from Aswan Dam making irrigated agriculture possible like Assuite, Zifta, Esana, Nag Hamuidi, Edifina.<sup>7</sup> The completion of High Aswan Dam, the Nasser Lake, in 1963 with a total storage capacity of about 162 billion cubic liters, and 107 billion cubic liters of actual storage, made a whole year agricultural production possible. In a nutshell, Egypt's share in the use of the Nile waters has remarkably progressed to surpass its 55 billion cubic liters legal quota anchored in the 1959 bilateral Agreement with Sudan. Sudan began utilizing Nile River for agricultural Irrigation purposes as early as 1910 while it was under British colonial rule. To date, Sudan has been producing a large amount of cotton and other cash crops<sup>8</sup>. Ethiopia's share until the Great Ethiopian Nile Dam was limited to only 0.6% of the total water. The Grand Abay Dam project of Ethiopia will be the second biggest utilization of Nile Waters next to Egypt and ahead of Sudan by catchments calculation. It is the first biggest hydro electric power project to operate at a single location with the largest power potential but while the statistics is more than 110 in Egypt and 18 million hectares in Sudan. 2 million tones silt from Ethiopia that sediment into the Nile water in Egypt causing a loss of about 2.9 billion cubic liters of water will be reduced substantially by some 90%.<sup>9</sup>

## A. Cooperative Relations

Paradoxically enough, the "Ethiopian Renaissance Dam" has been made official amidst cooperative relations among Ethiopia, Sudan and Egypt in other spheres of interstate relations.<sup>10</sup> Ethiopia and Egypt have signed and implemented a dozen of bilateral agreements over joint and individual investment ventures in such areas as agriculture, manufacturing, trade and industry amounting to about \$2.1 billion at the announcement of the construction of the Ethiopian Dam. One Egyptian mining company, for instance, congratulated the two governments that it has discovered a reliable store of gold just a few kilometers away from the very location of the Renaissance Dam just only after 5 days the Prime Minister of Ethiopia laid the Dam's cornerstones.<sup>11</sup>

There has been a steady growth in the overall Egyptian direct foreign investment flow into Ethiopia with successful establishments of such factories like pipelines, textile, shoe and leather, to mention but only a few. There has been a joint interstate cooperation commission regularly meeting at the level of ministers between the two states and signed a lot of agreements in such areas as sports, education, culture, history, transport, information, technology and science. In the sphere of international security and diplomacy, Egypt and Ethiopia have similar foreign policies. Egypt voted for the Head Quarters of the African Union 2004, at the Union's General Assembly Meeting in Tunis, to continue to be seated in Addis Ababa at the

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<sup>7</sup>See Zewude Abate(1990), History of the Nile Flows, in P.P Howell and J. A. Allan (eds.) *The Nile: Resources Evaluation, Resource Management, Hydro-politics and Legal Issues*, prepared for Publication for a Conference held in London at the Royal Geographic Society and School of Oriental and African Studies, University of London.

<sup>8</sup>See Terje Tvedt, (1992), the Management of Water and Irrigation: the Blue Nile, in M. Doornbos, et, al, (eds) *Beyond Conflict in the Horn of Africa*. James Curry Limited: London.

<sup>9</sup> See Kendie, Daniel. Egypt and the Hydro-Politics of the Blue Nile River *Northeast African Studies* , Volume 6, Number 1-2, 1999 (New Series), pp. 141-169 (Article) Published by Michigan State University Press.

<sup>10</sup> Prime Minister Meles Zenawi gave contradictory answers for Egyptian National Television on October 10, 2011 where he underpinned the existence of cordial relations with both states but accused Egypt for conspiring against Ethiopia's national interests in an interview on April 2, 2011 for domestic Television and Radio journalists while he consistently assured relations of friendship with Sudan. However, his official policy statements at a state visit on September 16,2011 in Cairo underscored general friendship and cooperation with either Egypt or Sudan.

<sup>11</sup> See Reporter Weekly, April 28, 2011, *Vol. 16, No, 227*.

time when Libya pressured African leaders to decide for their relocation in Tripoli.<sup>12</sup> Ethiopia and Sudan also have signed and implemented a series of interstate agreements on a wide range of issues like border security, control over terrorism, drug trafficking, etc. A number of Sudanese investors have established several manufacturing plants in many parts of Ethiopia like meat processing plants, mineral waters, textile, and others.<sup>13</sup> Sudanese investors and business people have been granted visa free entry rights into Ethiopia's territory whenever they need to do so. Ethiopia has been playing a role of a trusted referee, a mutually agreed Good Office. Sudan agreed for the deployment of entire military regiments from Ethiopia only, where Ethiopia contributed about five thousand strong to be deployed in Darfur but under United Nations' Command and another four thousand three hundred along the border between southern and northern Sudan.<sup>14</sup>

## **B. Conflicts and Divergent Perceptions**

There have been similar patterns of conflicting interests despite all these cordial relations among Egypt, Sudan and Ethiopia. Historically, it is recorded that Egypt under Ismail Khedive Pasha invaded northern Ethiopia and tried to control the Blue Nile from its source as a colonial territory in 1874 and 1876, at Gunda Gundi and Gurea receptively. These invasions resulted in total military reversals of Egyptian forces by Emperor Yohhanes IV of Ethiopia. Since then, there was no any move by Egyptians to directly attack and control Ethiopia militarily in any degree.<sup>15</sup> The major form and manifestation of conflict takes serious diplomatic and, at times, proxy interventions in the internal affairs of the other particularly between Ethiopia and Egypt. This conflict obviously emanates between them mostly as the result of their divergent hydro-topographic positions as suppliers and recipients respectively. At grassroots level, the relations particularly between the peoples of Egypt and Ethiopia have been grossly characterized by a shadow of mutual suspicions, hostile perceptions, conspiracy theories, and deeply entrenched emotions directly related to their positions to the Nile River.

At state level, Egyptian and Sudanese official foreign policy statements on Nile River are known more in practical manifestations than documented principles and strategies. Egypt particularly has long appeared to see the issue around Nile as something 'permanently sealed' by working international laws and conventions.<sup>16</sup> The Foreign Relations and National Security Policies and Strategies of the Ethiopian Government, however, explicitly underscore that Egypt has long been trying to weaken Ethiopia in order to insure that its monopoly control and use of the Nile Waters would continue unrivaled and un-competed.<sup>17</sup> Ethiopia complained over Egyptian 'interventionist behavior' of assisting the separatist war in Eritrea before 1991 and the bloody border war of 1998-2000 after the latter's independence.<sup>18</sup> The most visible manifestation of Egyptian suspicion of Ethiopia occurred following the event in Addis Ababa in may 1997 when a group of terrorists attempted to kill the former president of Egypt, Hossni Mubarak. The event provoked a heated diplomatic squabble among Ethiopia, Sudan and Egypt where, unexpectedly, the latter two shared the same position against Ethiopia. Ethiopia accused Sudan for sponsoring the terrorist attack and convinced the United Nations, which in 2000 voted for a two-year

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<sup>12</sup> Prime Minister Meles Zenawi accused of the former Libyan leader, Colonel Moammar Gaddafi in an interview he held on March 21, 2007 with domestic private and public journalists of conspiring to shift the African Union Headquarters from Addis Ababa to Tripoli.

<sup>13</sup> See Reporter Weekly, March 23, Vol. 16, No, 222

<sup>14</sup> The Ethiopian National Television transmitted the news on its May 8<sup>th</sup> Evening News Desk coating General Samora Yenus, the Commander-in-chief of the armed forces, as the official source.

<sup>15</sup> Neguse Ayele, (2005) Who was Civilized and who was savage? In Poulos Melikias and Getachew Metaferias, *the Battle of Adwa*: Algora Publishing: New York.

<sup>16</sup> Yakobe Arsano so remarked on Studio Forum called 'our affaires' held on May 24<sup>th</sup> by the Ethiopian National Television specially prepared on the issues Renaissance Dam

<sup>17</sup> See the Document, Pages from 126 to 129

<sup>18</sup> See Zewude Reta, 'the Eritrean Affair: from 1941 to 1962' Shamma Books Publishers: Addis Ababa (2000).

military sanction against the Khartoum Government, which, Egypt, however, was opposed to by voting against the proposal. All in all, despite recent cooperative trends, the entire relations among these countries have been dominated by a fluctuating rise and fall of conflicts specifically with matters related to the Nile River.

### **C. Egypt and Ethiopia behind the Renaissance Dam**

The Ethiopian Renaissance Dam was made official almost unexpectedly for all pertinent parties to result in producing far reaching consequences on the doctrines, principles and relevance of International Water Law as well as on the long-held policy traditions of the said states. One could study the dam's effect from various angles; however, it is enough here to identify the major background trends and events behind the dam with continued implications at present.

Firstly, Ethiopia has, apparently by deliberate design, unusually been engaged in spearheading the coming into existence of the Nile Basin Initiative 2007, which consists of the seven Upper riparian states in addition to Ethiopia; namely, Uganda, Kenya, Tanzania, Rwanda, Burundi and Democratic Congo. The Initiative is supposed to be the first legal framework. While Sudan refrains from joining the Agreement, Egypt's response to the demand for signature has been an automatic rejection by, of course, the ousted regime of the ex-Egyptian president, Hosni Mubarak. Egypt recognizes no other international set of international water laws or agreement except the Egyptian-Sudan 1959 Full Utilization of Nile Waters Treaty.<sup>19</sup> Egypt consistently declined offers for active participation arguing that these are adverse to its "unquestioned right" to its share of the Nile waters as per the Treaty mentioned above;

Secondly, Egyptian leaders adopt a different form of regional cooperation in which they are willing to support Egypt-sponsored and monitored utilization of Nile Water projects in lower riparian states. This Egyptian policy orientations have grown up from surviving spirit borne out of a series of colonial Treaties: the Anglo-Italian Protocol of 1891, for the continued flow of Tekeze Waters the British Colony of Egypt through Sudan, the 1906 Tripartite Agreement among France, Italy and Britain recognizing British political influence over the Ethiopian Territory of the Nile Basin, the 1929 Britain-Egypt Agreement recognizing Egypt's natural and historical rights over the Nile Waters, and many others.<sup>20</sup> Egyptians were able to convince Uganda and Sudan to accept these terms in the 1980s. As the result, Uganda agreed for canceling a construction of additional water reservoir facilities at the mouth of Lake Victoria in the 1990s;<sup>21</sup>

Thirdly, Ethiopian Government officials disclosed that they made the project official after they first exhausted all possible global sources of finance which were convinced by Egypt and Sudan not to assist the former. This led the Ethiopian people to embark on launching the project by insuring domestic sources of funding to wholly cover all costs. The apparent reason for Egyptian-Sudanese effective lobby was expressed to be the usual argument that any such project would harm their national interests. According to Egyptian sources, Egyptian authorities were not formally informed by the Ethiopian government about the dam. The Ethiopian government posed the argument that this would happen only through the Nile Initiative Framework.<sup>22</sup> Moreover, Ethiopia announced the new Nile Project after successfully completing other similar hydroelectric projects at other Nile Tributary Rivers like Tana Beles and Tekeze, which did not entail heated debates;

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<sup>19</sup> See Giorgio Guariso, et al "Implications of Ethiopian Water Development for Egypt and Sudan," *Water Resources Development*, 1987, 3.

<sup>20</sup> See Alexander Gibb and Partners, "Hunting Technical Services" *Blue Nile Waters Study. Volume 1. Main Report.*,1978.

<sup>21</sup> See The Editorial at Addis Zemen Daily, April 4,2011, *Vol. 64. No.*

<sup>22</sup> see Kinde Daneal, pp, 12

Fourthly, the Dam came into official announcement at the very time when Egypt was politically troubled by a revolutionary uprising. Sudan, too, was faced with rising instability engendered by the newly emerging Southern Sudan. Moreover, the Sudanese president was under persecution by the European Human Rights Court. Amidst all these, there came no new developments in the sphere of international water law that could affect the construction of the dam negatively or positively. Even so, the newly instated provisional government of Egypt first tended to insist on the traditional Egyptian Nile Policy that Ethiopia should discharge its duty of notifying Egypt of the project before launching construction. However, it remains questionable whether the readiness of Ethiopia to meet these preconditions would convince Egyptians to approach realistically the dispute. Egypt recently agreed only to name a Joint Technical Commission that would study the impacts of the project.<sup>23</sup>

These major backgrounds of the Dam have induced debates. Many scholars of international law tend to emphasize a shift in a political balance of power among the three states behind Ethiopia's move to launch the dam's construction.<sup>24</sup> Other scholars dismiss this argument advancing the idea that what Ethiopia took as an opportunity was rather the weaknesses of international water law.<sup>25</sup> What does this mean? Ensuing sections attempt to clarify this.

### **3. Doctrines, Principles and Practices of International Law**

From politico-legal points of views, while the three states easily come to mutual understandings over being subject to general international principles of civilized states, they soon inter into fierce politico-legal squabbles over internationally renowned Doctrines, Conventions and Rules governing interstate relations. Let see the matter orderly by starting discussion first on major doctrines developed to govern theories, principles, conventions and rules of utilizing trans-boundary rivers.

#### **A. Doctrines**

The first doctrine ever applied was "Absolute Territorial Sovereignty Theory"<sup>26</sup> which argues that a state has complete control over all waters lying within its territorial jurisdiction, and may utilize those waters without regard to its effect on other co-riparian states, especially downstream States. This theory does not sound consistent with the demands of states under present legal views and moral thoughts, which uphold 'mutual benefit' as a guiding principle. As such, both Ethiopia and Egypt have the least taste and inclination to this theory;

The second doctrine "Absolute Territorial Integrity" theory constitutes the opposite extreme of the Harmon Doctrine. According to scholarly arguments<sup>27</sup>, a state is entitled to expect that the same volume of water, uninterrupted in quantity and unimpaired in quality, flows into its territory. Therefore, it argues that no interruption, diminution or augmentation of the flow caused by the use of waters located in a riparian state is to be permitted. The upper-stream State under view has the right to exploit the waters of a river so long as such utilization does not affect the interests of the lower riparian. On the other hand, downstream states have the right to object any upstream water utilization that is likely to disrupt the natural flow or adversely affect the water position of the former. This again has the least policy taste particularly for Ethiopia as one and the major contributor of the Nile waters from among the upper

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<sup>23</sup> See Reporter Vol. 1254, No. 3.

<sup>24</sup> Yakob Arsano said it at the ETRE, Yegna Guday (Our affaire) weekly forum, May 29,2011

<sup>25</sup> Getachew Reda, a spokesperson for the foreign Ministry of the Ethiopian government said it the ETRE, Yegna Guday (Our affaire) weekly forum, May 29, 2011.

<sup>26</sup> See S. McCaffrey The Harmon Doctrine One Hundred Years Later: Buried, Not Praised. *Natural Resources Journal* 36,1996.

<sup>27</sup> See L. OPPENHEIM (1955), International Law. *Eighth Edition., Volume. One*, Edited by H. Lauterpacht.

riparian states. Egypt is also cold to the theory for largely pragmatic reasons that this would scarcely fit existing international realities.

The doctrine of ‘Community of Interest’<sup>28</sup> argues that a state’s sovereignty is limited by similar rights of other states sharing the same basin. This theory emphasizes the maximum utilization and optimum economic development of an entire river basin. It reinstates the community of interest approach and attributes a positive duty to render active cooperation in the rational development and utilization of the shared water resources. In other words, this theory considers the water of an international drainage basin to be managed as a unit without regard to national territorial boundaries. Therefore, the various co-riparian states should manage and develop the drainage basin jointly and share the benefits derived there from. This theory has stood as Ethiopia’s kernel of foreign policy over the utilization of Nile River in the previous 15 years.<sup>29</sup>

This theory, on the Egyptian side, has never been widely accepted and applied, especially with regard to the non-navigational uses of international watercourses for three major reasons of top national interest: one is that the theory does not consider the different degrees of dependence among states on international waters; two, it does not consider the existence of alternative sources of water for upper riparian states; three and last, it does not consider differing capacities among states in utilizing international rivers, the MoF notes.<sup>30</sup> This theory was, however, upheld by the Permanent Court of International Justice in the adjudication of several cases at different times. The theory attracts Ethiopia more than Egypt as a basis of general principle and policy toward the utilization of the waters of the Nile River.

Limited ‘Territorial Sovereignty and Integrity Theory’<sup>31</sup> is the fourth doctrine. This approach holds that states have a sovereign right to use a water resource in international watercourses lying within their own territory to the extent that such use does not cause any injury or harm to other states. Accordingly, if the use of water resources in international watercourses by a state affects the interest of the co-riparian state, then the sovereign right of the state to the use of water in the international watercourses is limited. This theory is the entire policy foundation of Egypt<sup>32</sup> for a long period of time with a set of other Conventions and state practices to satisfy its national interests. Despite this, some of the most important Egyptian international conventional and legal preferences are also shared partially by Ethiopia, as MoE notes. The two states diverge, however, on other key principles and details which make the difference far apart and visible. Now, let us see how these theoretical differences affect subsequent policy cleavages between Egypt and Ethiopia with elevated debates occurring due to the newly launched Nile Dam Project.

## **B. International Conventions, Principles and Rules**

The most frequently cited rules, conventions and principles include the 1966 Helsinki Rules of International Water Courses and the 1997 United Nations Convention on Non-navigational Uses of International Watercourses. Egypt banks on these international conventions for all its policy rationales toward Ethiopia’s involvement in the utilization of the Nile River.<sup>33</sup> It argues that states should and could not “divert” the natural directions and courses of river flows, which would have always negative consequences on lower riparian states. “No-diversion” argument is the traditional top policy priority of

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<sup>28</sup> The newly launched Nile Basin has made this doctrine the basis of its entire goals and policies on its Establishing Treaty signed in 2009.

<sup>29</sup> See Foreign Policy and National Security Policies’ Document page 14

<sup>30</sup> See Reporter for Interviews with Asfaw Dingamo, Minister of Water Development from 2007 to 2010.

<sup>31</sup> See D. CAPONERA (1992), *Principles of Water Law and Administration, National and International*. Queens Publications: London.

<sup>32</sup> See Anderzy Bartnisky and Yonan Mantel Neicheko (1981) Ethiopia’s History.

<sup>33</sup> See Mohamed S. Amr (2002), Diversion of International Watercourses Under International Law, in (eds) AFRICAN YEARBOOK OF INTERNATIONAL LAW (2002) *Volume 10*. Martinus Nijhoff. Publishers: Leiden / Boston.

Egypt. Egyptians broaden the scope of “diversion” to include many other development activities. The term “diversion” as defined may differ linguistically from other terms related to some acts which affect the flow of watercourses, such as extracting water and holding the flow of water. “Withdrawal” or “extracting” of water means that a State withdraws or extracts water from a watercourse flowing into another State, usually a neighboring country, and without the consent of the latter State.<sup>34</sup> The best example of such an act is Israel’s extraction of water from the Litani River in South Lebanon. The other term “holding or stopping the flow of water” means that any act taken by a riparian State in order to fill reservoirs behind dams. The best example for such an act is the Turkish act which stopped the flow of the Euphrates River to fill the reservoir behind the Ataturk Dam.<sup>35</sup>

For Egypt “diversion” over the River Nile or any of its tributaries is said to occur if the activities of the upper riparian states result in any one of the following changes on its water position: first, if it causes shortage of water supply as different from the amount previously used and held; second, if it causes damage to the environment; third, if it results in Reduction in the Level and Quality of the Groundwater; fourth, if it causes Shortage in Hydroelectric Power; and fifth, if it inflicts other impacts including like the interception of a large proportion of the sediment carried by that river and if the diversion might damage tourist sites of the lower riparian States.<sup>36</sup> There are usually four traditional ways of interstate relations to implement such principles of international law and let us see which one Egypt opts for:

A. states may sign a Treaty providing for a total prohibition of “diversion”;

B. states may sign for a Treaty allowing “diversion” under total freedom of action;

C. states may sign Treaties over “diversion” of specific rivers, volumes, time schedules, tolerable degree of damages, etc; and,

D. states may sign no Treaty at all leaving “diversion” decisions to be based on accepted “principles of international law.”<sup>37</sup> Scenario D is the established policy basis of Egyptian water utilization policy toward Ethiopia..

And last, that these rules have several confusing and vague Articles that, according to Egypt, put Ethiopia on a wavering legal position grappling with their “true meanings” which easily would shift the “burden of making prior cares” to Ethiopians.<sup>38</sup> However, these international rules never explicitly provide for non-use of upper riparian states to utilize international rivers for various purposes on their domestic territories except that they make it a duty for the state to assure that it does not negatively affect the lower riparian states. Let us see how the instruments of “Equitable Utilization Doctrine” of international law appear to be meshed up and confused with the principle of “no harm”.<sup>39</sup>

Paragraph 2 of Article 5 states: “Relevant factors which are to be considered, include, but are not limited to: (a) the geography of the basin, including in particular the extent of the drainage area in the territory of each basin State; (b) the hydrology of the basin, including in particular the contribution of water by each basin State; (c) the climate affecting the basin; (d) the past utilization of the water of the basin, including

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<sup>34</sup> See the 1966 Helsinki Rules of International Water Courses and the 1997 United Nations Convention on Non-navigational Uses of International Watercourses

<sup>35</sup> See F. BERBER, (1959), *Rivers in International Law*. London

<sup>36</sup> . See Yaa-kob Arsano (1990), Arab Alliance and Ethiopia’s Reaction to the Red Sea Question. Paper Presented at *Peace and Development in Ethiopia Symposium*, Organized by the main Department of the Higher Education of Ethiopia.

<sup>37</sup> See Yakob Arsoano (1999), Predicaments of Cooperation in the Nile Basin, in Katsuyoshi Fukui et al, (eds) (1997), *Ethiopia in Border Perspective*, the Proceedings of the 13<sup>th</sup> International Conference of the Ethiopian Studies, held in Kyoto, Japan.

<sup>38</sup> See Zewude Abate(1990), History of the Nile Flows, in P.P Howell and J. A. Allan (eds.) *The Nile: Resources Evaluation, Resource Management, Hydro-politics and Legal Issues*, prepared for Publication for a Conference held in London at the Royal Geographic Society and School of Oriental and African Studies, University of London.

<sup>39</sup> see Yakobe Arsano 1992

in particular existing utilization; (e) the economic and social needs for each State; (f) the population dependent on the waters of the basin in each basin State; (g) the comparable costs of alternative means of satisfying the economic and social need of each basin State; (h) the availability of other resources; (i) the avoidance of unnecessary waste in the utilization of the waters of the basin; (j) the practicability of compensation to one or more of the co-basin States as a means of adjusting conflicts among uses; and, (k) the degree to which the needs of a basin State may be satisfied, without causing substantial injury to a co-basin State.”

If these are the conditions of equitable utilization of international waters, what does “no harm” principle mean, therefore? Who, and how, can measure the incidence of “harm” on a riparian state by the actions of another upper riparian state, be it diversion or otherwise?

What if hundred or one thousand electric lumps lose their bright color powers across the streets of Cairo following the construction of the Grand Abay Dam by Ethiopia? Is it “harm” that could be cited as enough to justify Ethiopia’s refrain from constructing the dam? These questions have been common wrangling points among the diplomats of concerned states so far. According to Mohammed Amr, Ethiopia has supported the idea of qualifying the principle “no harm” to be more operational adding such qualifications like “no significant or appreciable harm”.<sup>40</sup> Egypt was opposed to the qualification proposal preferring the term to remain vague. However, Mohammed himself admits that the “no significant harm” principle is more acceptable than the “no harm” among many diplomats and legal scholars. Ethiopia, on its part, advances these international rules and conventions for specifically three major reasons: first, distinguishing technicality from fundamental international principles of cooperation is one of the most important challenges of Ethiopia to the Egyptian stance on ‘non-diversion’ principles.<sup>41</sup> According to Ethiopians, diversion may induce not only negative results but also positive improvements of the overall utilization of Nile river waters. Ethiopia argues that any water utilization on its territory could be mutually agreed through bilateral and multilateral cooperation and consultation over its technical effects among professionals in the field but what matters most is the political will.<sup>41</sup>

For Ethiopia, the principles of “no-diversion, equitable utilization of the Nile Waters and no-harm” arguments could be reconciled only through close interstate mutual understanding. Ethiopia capitalizes on the “equitable utilization” doctrine and prefers no-diversion and no-harm principles to being tabled to interstate technical verifications. In the absence of formal bilateral or multilateral treaties over the use of Nile River, the remaining legal option for Ethiopia appears to stick to Article 2 of the Helsinki Convention<sup>42</sup> on the Protection and Use of Trans boundary Watercourses and International Lakes 1992. It states that the State Parties to the Convention shall take all appropriate measures to ensure that the Trans boundary waters are used in a “reasonable and equitable” way. Moreover, this principle originated as a middle position of reasonableness between the two extreme principles: the absolute territorial sovereignty assertion of upstream States, and absolute territorial integrity claims of downstream States.<sup>43</sup> Many terms

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<sup>40</sup> . See Mohamed S. Amr (2002), *Diversion of International Watercourses Under International Law*, in (eds) AFRICAN YEARBOOK OF INTERNATIONAL LAW (2002) *Volume 10*. Martinus Nijhoff. Publishers: Leiden / Boston.

<sup>41</sup>See Morjouri M. Whiteman (1964), *Digest of International Law*. Department of State Publication: Washington D.C.

<sup>42</sup>See Yaekob Arsano (2003), *Trans Boundary Waters: Prospects for Peaceful Co-Existence in the Horn of Africa*, in Tafesse, Yakob, Oyvind’s (eds) *in Topics Contemporary Political Development in Ethiopia*. Proceedings of the Launching Workshop of the Department of Political Science and International Relations(DPSIR) and the Norwegian Institute for Human Rights(NIHR). Addis Ababa: Addis Ababa University.

<sup>43</sup> See A. UTTON (1996), *Which Rule Should Prevail in International Water Disputes: That of Reasonableness or that of No Harm?*, *Natural Resources Journal* 36.

have been used for this principle, such as “equitable apportionment” or “equitable participation” where most propositions have proved to be to the chagrin of Egypt;

That the rules advance more the principles of “equitable share and no harm” is a well-established principle of international law that each riparian State is entitled, within its territory, to an equitable share of the water from an international watercourse. The principle of equitability has been recognized by international doctrine and several bilateral and multilateral treaties, including the UN Convention 1997 after many efforts to make the term much clearer to enable interstate cooperation to come true. Ethiopia expresses strong commitments to the principle of “no-harm” by basing its arguments on three fundamental policy and technical justifications:<sup>44</sup>

Ethiopia does not need the Nile Water for agricultural purposes except a few amounts as little as 6 billion cubic liters which is extremely negligible for Egypt. Egypt wastes more than two times of this amount of water through apparently careless management of evaporation. The significant demand of Ethiopia for water is for the development of hydro-electric power. The used water will continue to flow to lower riparian states avoiding the confusion of diversion. Such experiences abound in many interstate conflicts over the use of international rivers for same goal.<sup>45</sup> Spain leveled a similar case in 1890 on France tabled for adjudication through an Arbitration Tribunal. It was, however, finally proven that the Hydro-electric Power Plant never diverted or reduced the amount of river waters, nor adversely affected the environment whatsoever;

Ethiopians argue that utilization of the Nile water for Hydro-Electric power through the Grand Abay Dam is much economical and effective, incurring no perceivable wastage through evaporation because of its high altitude. As compared to Egypt and Sudan, which waste as much water as 12 billion cubic liter through evaporation, and as high as 32 billion cubic liter in evapo-transpiration, Ethiopia’s loss is less than a few millions, which has no a perceivable consequence on the former. Egypt’s huge loss of considerable water through evaporation could only be remedied by such projects like the Renaissance Dam, which will substantially address the problem;<sup>46</sup>

Ethiopia also strongly believes that its development activities over the Nile River will have a positive effect on environment which ultimately will benefit Egypt and Sudan for three reasons: one, it helps to rehabilitate the largely deforested basin due to recurrent droughts in the three major states; two, it encourages watershed development in which the rehabilitated and cultivated portions around the Grand Abay Dam Project and as far as Sudan will store an unprecedented amount of ground water to support and sustain the overall Nile surface water and facilitate a healthy hydraulic process in the region; three, it significantly arrests erosion reducing the considerable silt, negatively affecting and wasting water in Egypt and Sudan. According to J.V. Sutcliffe and J.B.C. Lasenby the amount of loss in water and agricultural productivity in Egypt and Sudan only in 1986-88 due destruction caused by heavy flooding

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<sup>44</sup>See \_\_\_\_\_ (2002) Ministry of Information Foreign Affaires and National Security Policies and Strategies of the EFDR Government: Ministry of Information, Department of Press and Audiovisual: Addis Ababa.

<sup>45</sup> .See D. CAPONERA (1992), Principles of Water Law and Administration, National and International. Queens Publications: London.

<sup>46</sup> See Reporter (2011), Interviews with Afsaw Dingamo over Ethio-Egyptian Policy Cleavages over the Utilization of River Nile. *Volume 16, Number, 13.*

equals the total amount of the water wasted through evaporation in an average of five year period.<sup>47</sup> Zewude Abate notes that if Egypt and Sudan are committed to fully utilizing the Nile Waters for their development needs, wastages of water, destructions and harms both from droughts and floods, and seasonal fluctuations should be mitigated significantly and ultimately controlled.<sup>48</sup> The key instrument for this goal to achieve, however, is to be found in Ethiopia.

That these duties are simpler to meet makes them highly preferable by Ethiopia. For Ethiopia, there are several experiences where interstate treaties could prevent potential conflicts simply because they rule out detailed mechanisms of peaceful settlement of disputes in advance of their occurrence.<sup>49</sup>

## Conclusions

International Law, in general, exists and effectively contributes to positively settle a wide range of controversial issues. Despite that, it also equally has several more loopholes to strictly examine and mend particularly in major areas of International Water Law. Due to its inherent nature as a rule applying to the most complex interstate relations, international water law obviously could not be as much compressive, to the point and accurately instrumental as required and desired.

With particular reference to international rivers, international law undeniably is too general while international rivers are too particularistic. International law tends and seriously tries to be too objective regardless of the unavoidable particularity of each state in question, state interest in international rivers is too subjective. International law tends to be too vague, ambiguous and idealistic in its provisions and statements, while state use of international rivers demands an approach which is as clearer as possible, straightforward and realistic. The Ethiopian Renaissance Dam represents the fact that state practice in the specific area of international waters is still guided by state practice usually through unilateral actions. As such, international principles, in this case, follow far behind state practice, in the political sense of the term.

Ethiopians now stand as a legal challenger not only to the timely relevance of the traditional Egyptian policy that founded itself on the perceptions of Ethiopia's capacity limitations to make use of the Nile waters but also to the adequacy of international law to preempt interstate misunderstandings. Obviously, the Renaissance Dam has showed that Egyptians have created a formidable duty more on themselves than on Ethiopia by their insistence on pursuing 'No Negotiation' Nile Policy. At present, it means that Egyptians, in demonstrating their loyalty to their policy, have to wait patiently until practice proves whether the Dam would actually harm or does not harm their advantages. Legally speaking, Egypt finally finds itself prisoner of its own policy.

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<sup>47</sup> J.V. Sutcliffe and J.B.C. Lazenby (1990) History of the Nile Flows, in P.P Howell and J. A. Allan (eds.) The Nile: Resources Evaluation, Resource Management, Hydro-politics and Legal Issues, prepared for Publication for a Conference held in London at the Royal Geographic Society and School of Oriental and African Studies, University of London.

<sup>48</sup> See Zewude Abate

<sup>49</sup> R. HAYTON (1967), The Plata Basin, in A. GARRETSON et al. (eds.), *The Law of International Drainage Basins*.

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