

# THE GRAND ETHIOPIAN RENAISSANCE DAM — FILLING AND ANNUAL OPERATION: ISSUES OF LEGALITY AND EQUITABILITY

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## Abstract

*The Grand Ethiopian Renaissance Dam (GERD) first stage filling that retained 18.5 BCM of water of the Blue Nile River in two years filling plan of 2020 and 2021 has escalated disputes among riparians of Blue Nile sub-Basin, especially between Ethiopia and Egypt. The dispute attracted international attention owing to Egypt's hegemonic tactics in securitizing the issue by filing to the UN Security Council (UNSC). Egypt disparages the filling as 'unilateral' and detrimental to its survival; while Ethiopia firmly stands on realizing equitable and reasonable utilization of its chief river via the GERD filling. Therefore, the main objective of this article is to analyze the legality and equitability of the GERD filling and annual operation in milieu of the international water law regime as well as the Declaration of Principles on the GERD (DoP). It also interrogates validity of accusations and claims of downstream states in their submissions to the UNSC, especially Egypt's, against the filling from perspectives of the international water law regime. In doing so, the article argues that the GERD's filling and operation are clear reflections of Ethiopia's recognized and undeniable right to equitable and reasonable utilization in the Nile River Basin. In this regard, the article also argues that Egypt's past unilateral water developments that established its existing uses in the Nile and its current antagonistic position against the GERD at its filling and successive operational stages construed as acts causing significant harm on Ethiopia's right to equitably use the Nile. Further, as a concluding remark, the article forwards suggestions for policy makers and negotiators to consider in the way forward to galvanize Ethiopia's interest on the GERD and beyond in future GERD negotiations.*

**Keywords:** Blue Nile, GERD Filling, Equitable Utilization, No Significant Harm, UN Security Council

## INTRODUCTION

In the Nile River Basin, water developments by riparians have long been determined predominantly by their respective financial and technical capabilities which brought to the enduring disparity of existing uses among riparians.<sup>1</sup> Typically, Egypt and Sudan with no contribution dominated utilization of entire flow of the Nile; while Ethiopia has insignificant

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<sup>1</sup> See YACOB ARSANO, ETHIOPIA AND THE NILE: DILEMMAS OF NATIONAL AND REGIONAL HYDROPOLITICS 84-85 (PhD Thesis presented to the Faculty of Arts, the University of Zurich) (2007). See generally also Cascão, A.E. *Changing power relations in the Nile river basin: Unilateralism vs. cooperation?*, 2(2) WATER ALTERNATIVES 245 (2009). Mainly, Egypt's hydro-hegemonic influence on the Basin incapacitates attempted cooperative initiatives that aimed realizing equitable water sharing among riparians. In this regard, see generally Dereje Zeleke Mekonnen, *The Nile Basin Cooperative Framework Agreement Negotiations and the Adoption of a 'Water Security' Paradigm: Flight into Obscurity or a Logical Cul-de-sac?*, 21(2) EJIL 421 (2010).

recorded use despite supplying 86% to 95% of flow the Nile.<sup>2</sup> The Blue Nile River/Abbay alone contributes 49 billion cubic meters (BCM) or 59% of the average annual flow of the Nile.<sup>3</sup> Thus, due to the second to none contribution of the Blue Nile, dispute in the Nile is quintessential in the Blue Nile Sub-Basin (hereinafter, BNB).<sup>4</sup> Evidently, the construction of the GERD on the Blue Nile has been the source of disputes since its commencement among the three riparian countries particularly between Ethiopia and Egypt.

Egypt takes the GERD as a threat to its survival and ‘water security’;<sup>5</sup> while Ethiopia claims that the GERD is within its right to equitable utilization in BNB and that it is mutually beneficial to the downstream states in flood control and trading cheap electricity.<sup>6</sup> The dispute escalated vigorously since 2019 when first filling and annual operation of GERD was initiated including the first-stage-filling that aimed to retain 18.5 BCM of water in two phases/years.<sup>7</sup> In 10 April 2020, Ethiopia offered its first stage filling plan to Egypt and Sudan; however, both rejected the proposal.<sup>8</sup> Albeit the rejection, Ethiopia successfully conducted the GERD first year/phase filling in June 2020 where 4.9 BCM of water was retained in the reservoir.<sup>9</sup> Prior to and post the first year filling, there has been tough internationalization and securitization of the matter by Egypt

<sup>2</sup> ARSANO, *supra* note 1, at 25. In the flood seasons its share hikes 95% while only 5% comes from the White Nile. Daniel Kendie, *Egypt and the Hydro-Politics of the Blue Nile River*, 6 (1-2) NORTHEAST AFRICAN STUDIES (New Series), 141, 143 (1999).

<sup>3</sup> See Elias N. Stebek, *Eastern Nile at Crossroads: Preservation and Utilization Concerns in Focus*, 1 MIZAN LAW REV. 33, 34 (2007). Ethiopia is the source of Abbay/Blue Nile, Tekezie-Atbara and the Baro-Akobo-Sobat rivers providing, respectively, 59%, 13% and 14% of the entire annual floods of the Nile. Cf. ARSANO, *supra* note 1, at 82. Noting, the contribution of the Blue Nile shows increases due to seasonal variability of rainfall in the Nile Basin.

<sup>4</sup> The Blue Nile Basin comprises the upstream Ethiopia and the two most downstream states of Sudan and Egypt. Kendie, *supra* note 2, at 143.

<sup>5</sup> See, Permanent Rep. of Egypt to the U.N., *Letter dated 19 June 2020 from the Permanent Rep. of Egypt to the United Nations addressed to the President of the Security Council*. UN Doc., S/2020/566 (19 June 2020). [Hereinafter: Egypt’s letter to UNSC (19 June 2020)] See also Permanent Rep. of Egypt to the U.N., *Letter dated 4 May 2020 from the Permanent Rep. of Egypt to the United Nations addressed to the President of the Security Council*. UN Doc., S/2020/355 (4 May 2020). [Hereinafter: Egypt’s letter to UNSC (4 May 2020)]

<sup>6</sup> Permanent Rep. of Ethiopia to the UN., *Letter dated 14 May 2020 from the Permanent Rep. of Ethiopia to the United Nations addressed to the President of the Security Council*, UN Doc. S/2020/409 (15 May 2020), Aide Memoir at 8-9. [Hereinafter: Ethiopia’s letter to UNSC (14 May 2020).]

<sup>7</sup> The “First Filling” is initial filling of the GERD reservoir up to 625 meters above sea level (m-asl) or 49 BCM of water. The first stage filling plan is part of this initial filling targeted to fill the GERD up to 595 m-asl to be carried out in two phases/years. It aimed to retain a total volume of 18.4 BCM (the 4.9 BCM in the first year and 13.5 BCM in the second year). In this regard, see generally Ethiopia’s Draft (Confidential), *Guidelines and Rules for the First Filling and Annual Operation of the Grand Ethiopian Renaissance Dam* (10 June, 2020), Article 1 & 5. In Permanent Rep. of Ethiopia to the UN., *Letter dated 26 June 2020 from the Permanent Representative of Ethiopia to the United Nations addressed to the President of the Security Council*, UN Doc. S/2020/623 (7 July 2020). [Hereinafter: Ethiopia’s Draft Guidelines on the GERD First Filling.]

<sup>8</sup> See Permanent Rep. of Ethiopia to the UN., *Letter dated 22 June 2020 from the Permanent Rep. of Ethiopia to the United Nations addressed to the President of the Security Council*, UN Doc. S/2020/567 (22 June 2020) at 10, para. 16. [Hereinafter: Ethiopia’s letter to UNSC (22 June 2020)]; Cf. Egypt’s Letter to UNSC 19 June 2020, *supra* note 5, Annex I, at 2.

<sup>9</sup> BBC News, *River Nile dam: Reservoir filling up, Ethiopia confirms* (15 July 2020). Available at: <https://www.bbc.com/news/world-africa-53416277> (Accessed on 20 May 2021).

beside Sudan that engendered intense political pressure on Ethiopia.<sup>10</sup> Similarly, the second year filling in July 2021<sup>11</sup> also piled on the riparian controversy and tension on the GERD.<sup>12</sup>

Egypt's reports to the UN Security Council (UNSC) concerning the GERD filling and annual operation stand out as the first ever water issue referred to the Council.<sup>13</sup> In general, Egypt, supported by Sudan, accused the first stage filling as a 'unilateral' action that will reduce the flow of the Blue Nile, their 'water security' and survival in violation of international law.<sup>14</sup> Conversely, Ethiopia firmly upholds the filling as a legal path towards realizing equitable and reasonable utilization of its chief river under international water law and agreements it is a signatory with the two riparians particularly the DoP.<sup>15</sup> Therefore, by using a doctrinal approach, this article establishes the legality and equitability of GERD's filling and operation and examine the ramifications of Egyptian position against the dam vis-à-vis relations of BNB riparians under international law.

The article has six sections. Section 1 recalls the riparian relations and asymmetrical existing uses of the Nile waters among the three states (Egypt, Sudan and Ethiopia) and highlights the context Ethiopia launched construction of GERD. Section 2 shows developments in the first filling and operation of GERD, and the controversies among the three riparians along the way. Section 3 gives an overview of the international legal framework that governs utilization of transboundary waters putting GERD's filling and operation in context vis-à-vis the agreements Ethiopia is a signatory with one or two of downstream states particularly the 2015 DoP.<sup>16</sup> Section 4 analyzes the validity or otherwise of the allegations brought against the GERD filling and operation focusing on official letters submitted to the UNSC by Egypt. Section 5 analyzes legality of the filling on Ethiopia's side having regard to 'unilateralism' and equitability issues under international water law perspectives and the DoP. Section 6 evokes the legal implications of Egypt's past water works on the Nile and its current antagonistic position on the GERD filling and operation in relation to Ethiopia's right to equitably utilize the Blue Nile. Finally, the article presents concluding remarks by suggesting concerns for future negotiations on the GERD fillings and annual operation, and the ramifications on Ethiopia's interest in the GERD and beyond.

<sup>10</sup> See the discussion in Section 2 *infra*. (This includes Egypt's unilateral invitation to the US and the World Bank in the trilateral negotiations concerning the GERD filling and latter its report to the UN Security Council.)

<sup>11</sup> Dr Eng Seleshi Bekele [@seleshi\_b\_a] (2021, July 19). *Today, 19th July, 2021, the GERD reservoir reached overtopping water level* [Tweet]. Twitter. Retrieved from: [https://twitter.com/seleshi\\_b\\_a/status/1417077665681584128?s=20](https://twitter.com/seleshi_b_a/status/1417077665681584128?s=20) (Accessed on 27 October 2021).

<sup>12</sup> See, Permanent Rep. of Ethiopia to the UN., *Letter dated 23 June 2021 from the Permanent Rep. of Ethiopia to the United Nations addressed to the President of the Security Council*, UN Doc. S/2021/600 (25 June 2021) at 13. [Hereinafter: Ethiopia's letter to UNSC (25 June 2021)];

<sup>13</sup> United Nations (2021, 8 July), *Ethiopia on the Grand Ethiopian Renaissance Dam (GERD) - Media Stakeout* [Video], Youtube. Retrieved from <https://www.youtube.com/watch?v=QqfPMFVZ4bk> (Accessed on 27 October 2021 (Media stakeout of Seleshi Bekele (former Minister of Water, Irrigation, and Energy of Ethiopia) on the GERD).

<sup>14</sup> See Egypt's Letter to UNSC (4 May 2020), *supra* note 7; Egypt's Letter to UNSC (19 June 2020), *supra* note 7.

<sup>15</sup> See generally Ethiopia's letter to UNSC (14 May 2020), *supra* note 6; Ethiopia's letter to UNSC (22 June 2020), *supra* note 8.

<sup>16</sup> The other agreements (the 1902 Border Treaty and the 1993 Cooperative Framework Agreement) will also be highlighted.

## 1. THE BED-ROCK OF THE CURRENT DISPUTE: RECALLING ASYMMETRIC EXISTING USES IN BLUE NILE BASIN AND ETHIOPIA'S PATH TOWARDS THE GERD

### 1.1 Egypt's Long-time Hegemony in Utilizing the Nile: from the Aswan Low Dam to Desert Land Reclamation

In Egypt, modern uses and dam buildings in the Nile River traced back to the late 19<sup>th</sup> and early 20<sup>th</sup> centuries when it was under British colonial domination.<sup>17</sup> Britain brought irrigational revolution into Egypt from traditional flood irrigation to “all-year irrigation on a large scale” and built the first dam ever built on the Nile –Aswan Low Dam (ALD) – in 1902.<sup>18</sup> After its partial independence,<sup>19</sup> Egyptian ambition to control the Nile got blessing from Britain in the 1929 Nile Agreement according it with ‘historic and natural right’ to 48 BCM of the Nile mean annual flow while Sudan got 4 BCM.<sup>20</sup> This agreement denies interests of all other upstream countries, particularly Ethiopia, who declared it void.<sup>21</sup>

Nevertheless, as a superior beneficiary of the 1929 Agreement, Egypt was not able to harness the 48 BCM with ALD's limited storage capacity that triggered it for another dam project, the Aswan High Dam (AHD), to store the surplus water.<sup>22</sup> The AHD project instigated Sudan to demand revision of the 1929 Agreement for reallocation of the Nile waters.<sup>23</sup> This brought to a

<sup>17</sup> TVEDT TERJE, THE RIVER NILE IN THE AGE OF THE BRITISH: POLITICAL ECOLOGY AND THE QUEST FOR ECONOMIC POWER 20-21 (2004).

<sup>18</sup> *Id.*, at 90 & 114. ALD was raised to meet increasing water demands. See also Karen Conniff et al. *Nile water and agriculture: Past, present and future*. In THE NILE RIVER BASIN: WATER, AGRICULTURE, GOVERNANCE AND LIVELIHOODS 11-12 (B. Awulachew et al. eds., Abingdon, UK, 2012).

<sup>19</sup> Though got its partial independence in 1922, Egyptian foreign affairs and the Suez Canal were controlled by Britain that sparked anti-British movements in Egypt. Britain tried to soften it by the 1929 Agreement. ARSANO, *supra* note 1, at 87-88. See also Kinfu Abraham, *Imbalance in Water Allocation Stability and Collaboration within the Nile Basin*, ATPS SPECIAL PAPER SERIES No. 24, 4 (Nairobi, 2006).

<sup>20</sup> Britain represented its colonies of Sudan and other East African countries (Kenya, Uganda and Tanganyika). See Exchange of Notes between His Majesty's Government in the United Kingdom and the Egyptian Government in Regard to the Use of the Waters of the River Nile for Irrigation Purposes, Cairo May 7th, 1929. Available at: <http://gis.nacse.org/tfdd/tfdddocs/92ENG.pdf> (Accessed on 10 May 2021). (Hereinafter, the 1929 Nile Agreement).

<sup>21</sup> As a sovereign country free from any colonial domination including from Britain, the Agreement does not bind Ethiopia as it was never a party. Former upstream colonies of Britain refuted state succession by the clean-slate doctrine or *tabula-rosa* and revoked the agreement. Dereje Z. Mekonnen, *From Tenuous Legal Arguments to Securitization and Benefit Sharing: Hegemonic Obstinance - The Stumbling Block against Resolution of the Nile Waters Question* 4(2) MIZAN LAW REV. 232, 238-41 (2010); see also Korwa G. Adar, *The Interface between National Interest and Regional Stability: The Nile River and the Riparian States*, 11(1) AFRICAN SOCIOLOGICAL REVIEW 4, 6 (2007). Available at: <http://www.jstor.com/stable/24487582> (Accessed on 12 May 2021).; see also generally Arthur Okoth-Owiro, *The Nile Treaty: State Succession and International Treaty Commitments: A Case Study of the Nile Water Treaties*, Occasional Paper No. 9 (Konrad Adenauer Stiftung & Law and Policy Research Foundation, Nairobi 2004); see also Aaron Tesfaye, *The Politics of the Imposed and Negotiation of the Emerging Nile Basin Regime*, 7(1&2) INTERNATIONAL JOURNAL OF ETHIOPIAN STUDIES 57, 62-64 (2013). Available at: <https://www.jstor.org/stable/10.2307/26586231> (Accessed on 13 May 2021).; ARSANO, *supra* note 1, at 88.

<sup>22</sup> Because, despite concrete rises, the ALD failed to effectively control the Nile waters as Egypt needed. See TERJE, *supra* note 17, at 90.; Conniff et al., *supra* note 18, at 11; see also AHMAD ABU-SHUMAYS, ECONOMIC AND TECHNICAL ASPECTS OF EGYPT'S HIGH ASWAN DAM, 6 (1962).

<sup>23</sup> For the Sudanese, the 1929 Agreement denied their summer cultivation and made the country an Egyptian reservoir. Opposition against the AHD project grew in Sudan denying the dam building without compensation in water. Sudan had its own plan for future utilization of the Nile and demanded a minimum of 200 MCM additional

bilateral treaty between Egypt and Sudan for the full utilization of the Nile – the 1959 Agreement – where they, respectively, shared 55.5 BCM and 18.5 BCM of the Nile mean annual flow.<sup>24</sup> To secure this self-granted water share, Egypt self-assumed 'veto'<sup>25</sup> over all upstream dam buildings. Egypt also created a unified block with Sudan as long as water reallocation questions of upper riparians including Ethiopia are concerned.<sup>26</sup> However, this agreement is only effective as between the two states and does not bind other riparians including Ethiopia.<sup>27</sup>

After concluding the 1959 Agreement, Egypt unilaterally, without ever notifying upstream countries except Sudan, began the AHD construction in 1960 and completed it in 1970.<sup>28</sup> The AHD is one of world's highest dams having one of world's largest artificial lakes –Lake Nasser– whose storage capacity is 164 BCM of water, as twice big as the annual flow of the Nile.<sup>29</sup>

Thus far, Egypt remains to be “the main regional water user, withdrawing far higher levels of water from the basin.”<sup>30</sup> Notably, Egypt's huge desert land reclamation projects (e.g. the North Sinai and South Valley/Toshka) withdraw over 20 BCM of water of the Nile beyond its annual flow, outside its natural course and beyond Egypt's self-assumed 55 BCM of water.<sup>31</sup> These projects are unilaterally developed,<sup>32</sup> which further complicates the Nile waters question. These projects perpetually increase Egypt's dependence on the Nile waters which it uses in defense to and in extending its 'acquired historic right' to the extreme beyond the *status quo* that shatters potential uses of other riparians particularly Ethiopia.<sup>33</sup>

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water for its vital development, though it's concrete project by the time was *Roseires* Dam. TERJE, *supra* note 17, at 280-283.; *see also* Conniff *et al.*, *supra* note 18, at 12.

<sup>24</sup> Agreement between the Republic of the Sudan and the United Arab Republic for the Full Utilization of the Nile Waters, Cairo, 8 November 1959, Article 2(4) (hereinafter, the 1959 Agreement).

<sup>25</sup> *Id.*, Art. 4(c). However, it should be noted that no such power is legally bestowed to Egypt in to other upper riparian states including Ethiopia.

<sup>26</sup> *See* the 1959 Agreement, *supra* note 24, Art. (d) and Art. 5. *See also* ARSANO, *supra* note 1, at 89; Biong Kuol Deng, *Cooperation between Egypt and Sudan over the Nile River Waters: The Challenges of Duality*, 11(1) AFRICAN SOCIOLOGICAL REVIEW 38, 46 (2007). Available at: <https://www.jstor.org/stable/24487585> (Accessed on 13 May 2021).

<sup>27</sup> *See* Mekonnen, *From Tenuous Legal Argument*, *supra* note 21, at 242-4; Mohammed Abdo, *The Nile Question: The Accords on the Water of the Nile and Their Implications on Cooperative Schemes in the Basin*, 9 PERCEPTIONS, 45, 56 (2004); Deng, *supra* note 26, at 46.

<sup>28</sup> Tesfaye, *supra* note 21, at 66; *see also* Conniff *et al.*, *supra* note 18, at 12.

<sup>29</sup> The dam realized Egypt's ambition to control the Nile. *See* Conniff *et al.*, *supra* note 18, at 14; Abraham, *supra* note 19, at 5; ABU-SHUMAYS, *supra* note 22, at 11-16. TERJE, *supra* note 17, at 322; Tesfaye, *supra* note 21, at 67.

<sup>30</sup> Cascão, A.E. *supra* note 1, at 247; *see also* Cf. DAVID K. CHESIRE, CONTROL OVER THE NILE: IMPLICATIONS ACROSS NATIONS 21 (Thesis, Master of Science in Defense Analysis, Naval Postgraduate School, Monterey, California, 2010). Egypt's has the highest irrigated agricultural land of 3.4 million ha or 99.8% of its total cropland.

<sup>31</sup> Egypt launched these projects since 1990 in three regions (West Delta, North Sinai, and South Valley/Toshka) which divert water from the Nile outside its natural course via canals. *See* Conniff *et al.*, *supra* note 18, at 14.; Cascão, *supra* note 1, at 249.; CHESIRE, *supra* note 30, at 21 & 60.; Tesfaye, *supra* note 21, at 68.; Mengistu Woubé, *The Blue Nile River Basin: the Need for New Conservation-based Sustainable Measures*, 20(1) SINET: ETHIOP. J. SCI. 115, 122 (1997).; ARSANO, *supra* note 1, at 85-86.

<sup>32</sup> Egypt launched and implemented these projects against the expressed objection of Ethiopia. *See* Ethiopia's letter to UNSC (22 June 2020), *supra* note 8, at 3, para. 10 & at 6, para 25, & Annex III.

<sup>33</sup> Cascão, *supra* note 1, at 249; *see also* Deng, *supra* note 26, at 46-47; CHESIRE, *supra* note 30, at 21; TERJE, *supra* note 17, at 325.



## 1.2 Sudan: the second biggest user of the Nile waters

In Sudan, like it was in Egypt, modern recorded use of the Nile waters dated back to the colonial period under Britain colonial control.<sup>34</sup> Britain built the *Sennar* dam on the Blue Nile in 1925 and the *Gebel Aulia* dam (on the White Nile) in 1937.<sup>35</sup> In particular, the *Sennar* dam<sup>36</sup> irrigated the *Gezira* scheme which Britain established with a colonial desire to develop world's biggest cotton plantation on the Nile.<sup>37</sup> In the 1929 Nile Agreement, Britain desired, while balancing its political needs in Egypt, to secure enough water for the *Gezira* scheme in Sudan that was at the bedrock of its revenue for its colonial administration.<sup>38</sup> However, the 4 BCM water share based on 22:1 ratio in the agreement was not fair even to Sudan.<sup>39</sup>

Hence, after its independence in 1956, Sudan needed more irrigated land to maximize irrigational projects that inspired its demand for revision of the 1929 Agreement which brought to the 1959 Agreement.<sup>40</sup> This Agreement increased Sudan's previous share from the Nile to 18.5 BCM;<sup>41</sup> however, Sudan sought even more water.<sup>42</sup> Apart from securing enough water for its irrigated lands, the Agreement enabled Sudan to build the *Roseires* Dam on the Blue Nile (in 1966) with storage capacity of 2.4 BCM for irrigation and hydropower generation.<sup>43</sup> The dam was later raised unilaterally by Sudan to increase its water impounding capacity.<sup>44</sup> Further, as part of nourishing its 'acquired right', Sudan also built the *Merowe* Dam (in 2008) on the main Nile with the storage capacity of 12.5 BCM of water (about 20% of the Nile's annual flow)<sup>45</sup> unilaterally without consulting or notifying to any of upstream countries including Ethiopia.<sup>46</sup>

In sum, Sudan has the greatest arable potential in the Nile Basin and it is the second biggest water user next to Egypt. However, compared to its potential, its recorded use is said to be low

<sup>34</sup> Britain's grand project was expanding the *Gezira* Cotton plantation into the biggest cotton farm on earth. See generally TERJE, *supra* note 17, at 105-112.

<sup>35</sup> Abraham, *supra* note 19, at 6; Cascão, *supra* note 1, at 247.

<sup>36</sup> Completion of the *Sennar* Dam, referred by the Sudanese as 'a dam of God', in 1925 has important implication concerning riparian relations in utilization of the Nile as it "showed that the time had come when other countries than Egypt could build large dams in stone on the Nile." TERJE, *supra* note 17, at 112.

<sup>37</sup> Conniff et al., *supra* note 18, at 13. The *Gezira* scheme produced and exported cotton to British textile mills generating 60% of the foreign income to the colonial administration of Sudan. See also TERJE, *supra* note 17, at 323.

<sup>38</sup> See the 1929 Nile Agreement, *supra* note 20, para 23-40; see also Deng, *supra* note 26, at 44.

<sup>39</sup> Deng, *supra* note 26, at 44; see also Mekonnen, *From Tenuous Legal Argument*, *supra* note 21, at 238-9.

<sup>40</sup> TERJE, *supra* note 17, at 283.; ELIAS ASHEBIR, THE POLITICS OF THE NILE BASIN 73 (MA Thesis, University of the Wit Waters Rand, Johannesburg) (2009); ARSANO, *supra* note 1, at 88; Deng, *supra* note 26, at 50-51.

<sup>41</sup> See the 1959 Agreement, *supra* note 24, Article 2(4). However, Sudan has not fully used its "share" due to water loan arrangement Egypt sought. CHESIRE, *supra* note 30, at 23.

<sup>42</sup> Sudan, in the 1950s, during its negotiation with Egypt to reach at the 1959 Agreement, claimed for 35 BCM for its grown demands from the Nile waters to immune itself from water shortage operation of the HAD that would leave Egypt with 49 BCM. Egypt could take only 1 BCM additional to its share in the 1929 Agreement, i.e. 48 BCM. Egypt virtually rejected Sudan's demand. See TERJE, *supra* note 17, at 283.; CHESIRE, *supra* note 30, at 32.

<sup>43</sup> See Conniff et al., *supra* note 18, at 13.; Deng, *supra* note 26, at 45. Before *Roseires*, in 1964, Sudan also built the *Khashm El-Girba* dam on the Blue Nile to irrigate 100,000 ha of land. See, Abraham, *supra* note 19, at 6.

<sup>44</sup> See Cascão, *supra* note 1, at 247 & 257; Conniff et al., *supra* note 18, at 20.

<sup>45</sup> See Mahemud Rashad Yousef, *Grand Ethiopian Renaissance Dam and its effect on the Water Budget of Egypt*, 441 Al-Alam Magazine. p. 13 (2013.); Cascão, *supra* note 1, at 261.; also Conniff et al., *supra* note 18, at 20.

<sup>46</sup> Sudan only consulted Egypt which demanded the dam to be limited only to hydropower generation. See Dereje Z. Mekonnen, *Declaration of Principles on the Grand Ethiopian Renaissance Dam: Some Issues of Concern*, 11(2) MIZAN LAW REV. 255, 269 (2017).

(1.8 million ha).<sup>47</sup> According to Cascão, this shows future demands of Sudan for reallocation of the Nile waters where it would turn to “become the biggest challenger to the current hydro political regime and pose a threat to Egypt’s hydro hegemonic position.”<sup>48</sup>

## 1.2 Ethiopia’s Path to the GERD: changing the *status quo* towards ensuring its potential use

Ethiopia has gross annual surface water of 123 BCM from 12 river basins, of which only 3% of the water remains in the country, the rest 97% flows out of the country’s territory via eight cross-boundary river basins.<sup>49</sup> The Blue Nile Basin in Ethiopia alone comprises annual runoff of 52.6 BCM that is over 43% of the country’s annual surface water resource.<sup>50</sup> Ethiopia has over one million ha of irrigable land in the Blue Nile Basin; however, only 20,000 ha have been developed.<sup>51</sup> In the Blue Nile and its tributaries, Ethiopia’s estimate of hydropower potential is staggering 20,000 MW; from which 13,000 MW is found in the main Blue Nile River.<sup>52</sup>

Ethiopia implemented only micro-level irrigational and hydropower generating dam projects.<sup>53</sup> Ethiopia’s plan to develop major dam projects to achieve its potential use in the Blue Nile was not successful. Egypt’s continued blockage of international monetary funds, not to mention military threats and sponsoring internal instability, kept such plans/project to be only dreams.<sup>54</sup> Besides, water developments in Egypt and Sudan which are deeply rooted in the 1929 and 1959

<sup>47</sup> See Cascão, *supra* note 1, at 257; CHESIRE, *supra* note 30, at 23.

<sup>48</sup> Cascão, *supra* note 1, at 257.

<sup>49</sup> The great bulk of this proportion is covered by the Blue Nile, Tekeze/Atbara and Baro/Akobo rivers which flow into the Nile System. ARSANO, *supra* note 1, at 28-29; Cf. Tawfik Amer, *Revisiting hydro-hegemony from a benefit sharing perspective: the case of the Grand Ethiopian Renaissance Dam*, Discussion Paper No. 5/2015, 14-15 (German Development Institute, 2015, ISBN 978-3-88985-669-2).

<sup>50</sup> See Ministry of Water Resources (MoWR) of the FDRE, *Main Report: Water Sector Development Programme* (Vol. II) 12 (Oct. 2002). Available at: <http://extwprlegs1.fao.org/docs/pdf/eth180677.pdf> (Accessed on 15 May 2021). (Hereinafter MoWR 2002: 2).

<sup>51</sup> See Ministry of Water Resources (MoWR) of Federal Democratic Republic of Ethiopia, *Initial National Communication of Ethiopia to the United Nations Framework Convention on Climate Change (UNFCCC)*, 42 (NMSA, Addis Ababa, Ethiopia 2001). Available at: <https://unfccc.int/resource/docs/natc/ethncl.pdf> (Accessed on 15 May 2021). (hereinafter MoWR 2001). Cf. *id.*, at 13. (Notes, the Blue Nile Basin has over 5 million ha of irrigation potential.) *Contra*, ARSANO, *supra* note 1, at 29. (Noting, all of the 12 river basins of the country have only 2.5 million ha of potential irrigable lands and only the 0.6 ha is developed in the Blue Nile.) See also Conniff et al., *supra* note 18, at 14-15.; See also Woube, *supra* note 31, at 122-3; Tesfaye, *supra* note 21, at 71; CHESIRE, *supra* note 30, at 17.

<sup>52</sup> Yousef, *supra* note 45, at 19; Conniff et al., *supra* note 18, at 20; Cf., MoWE 2001, *supra* note 51, at 36; Ministry of Water Irrigation and Electricity (MoWIE) of FDRE, *Highlights of the Grand Ethiopian Renaissance Dam & Regional Interconnection*, Presentation to African Union (Togo, Lome, March 2017). [Hereinafter MoWIE 2017] see also Salman M.A. Salman, *The Nile Basin Cooperative Framework Agreement: a peacefully unfolding African spring?*, 38(1)WATER INTERNATIONAL 17, 24 (2013). [Hereinafter: Salman (2013)]

<sup>53</sup> Though the Blue Nile provides 68 GWh of mean annual electricity in *Tiss-Isat* (Tis-Abay I power plant), no major hydropower dam was built on the river. Woube, *supra* note 31, at 122. The causes for implementing such micro-dam projects on the Blue Nile by Ethiopia are blockage international funds and threats of attack by Egypt against such water works. See Conniff et al., *supra* note 18, at 15; Tesfaye, *supra* note 21, at 68 & 71. Cf. Deng, *supra* note 26, at 47; CHESIRE, *supra* note 30, at 60.

<sup>54</sup> See Mehari Taddele Maru, *A Regional Power in the Making: Ethiopian Diplomacy in the Horn of Africa*, 261 Occasional Paper 21-22 (SAIIA, 2017). Available at: <https://www.jstor.org/stable/resrep25906> (Accessed on 20 May 2021).

Agreements intensely restricted Ethiopia from implementing large scale water developments on the Blue Nile.<sup>55</sup> Ethiopia has been continuously objecting to these Agreements as well as downstream unilateral and monopolistic water developments.<sup>56</sup>

In attempt to avert such downstream hegemonic influence, Ethiopia took a leading role in the Nile Basin Initiative (NBI) negotiations for a multilateral basin wide cooperative framework within the “Shared Vision” for equitable utilization of the Nile waters among the riparians.<sup>57</sup> However, committed to the 1929 & 1959 Agreements, Egypt and Sudan negated the long-time negotiated agreement on the Nile River Basin Cooperative Framework (CFA) and refuted the rights of upper riparians to equitably utilize the Nile.<sup>58</sup> In the negotiation, though, Ethiopia restated its right and plan to develop water work projects in the Basin including the Blue Nile.<sup>59</sup>

Following impasse of the CFA negotiations to change the *status quo*, when Egypt and Sudan froze their membership of the NBI in 2010, Ethiopia had no alternative except commencing the GERD construction unilaterally in 2011.<sup>60</sup> The fully nationally funded \$5 billion GERD project is Ethiopia’s first ever major dam project on the Blue Nile for hydropower generation power with a reservoir impounding capacity of 74 BCM of water and installed capacity of 5150 MW per annum.<sup>61</sup> The GERD construction is regarded to be a “potent counter-hegemonic measure”<sup>62</sup> and a *fait accompli* to Egypt and Sudan “which has brought about a *de facto* change in the *status quo*”<sup>63</sup> which the CFA failed to achieve *de jure*. However, compliance producing mechanisms have still been posed on Ethiopia on the GERD including its filling and annual operation.<sup>64</sup>

Egypt and Sudan protested asserting that GERD will seriously affect their respective water shares they assumed in the 1929 and 1959 Nile Agreements; however, Ethiopia’s public diplomacy missions played a huge role in positively changing position of Sudan who considered the economic benefits the dam offers.<sup>65</sup> The public diplomatic step on GERD was taken by Egypt

<sup>55</sup> Tesfaye, *supra* note 21, at 71.

<sup>56</sup> See Ethiopia’s letter to UNSC (22 June 2020), *supra* note 8, at 6 & Annex III.

<sup>57</sup> See generally Dereje Zeleke Mekonnen, *Flight into Obscurity or a Logical Cul-de-sac?*, *supra* note 1. See also Maru, *supra* note 54, at 23.

<sup>58</sup> See Mekonnen, *From Tenuous Legal Argument*, *supra* note 21, at 246-248; see also Tesfaye, *supra* note 21, at 73.

<sup>59</sup> Deng, *supra* note 26, at 56.

<sup>60</sup> Ethiopia launched the dam after signing the CFA. See Mahemud E. Tekuya, *Sink or Swim: Alternatives for Unlocking the Grand Ethiopian Renaissance Dam Dispute*, 59:1 COLUMBIA JOURNAL OF TRANSNATIONAL LAW, 65, 78 (2020); Amer, *supra* note 49, at 14-15.

<sup>61</sup> International Panel of Experts (IPoE) on Grand Ethiopian Renaissance Dam Project (GERDP), Final Report, 7 (2013). The reservoir’s active storage is 59 BCM (1.2 times the Blue Nile’s mean annual flow). Its estimated mean annual energy production is 15,692 GWh (around 16 TWh) that would be Africa’s largest and world’s fifth. See Kevin G. Wheeler *et al.*, *Understanding and managing new risks on the Nile with the Grand Ethiopian Renaissance Dam*, 11:5222 NATURE COMMUNICATIONS 2 (2020). Available at: <https://doi.org/10.1038/s41467-020-19089-x>. (Accessed on 15 May 2021).

<sup>62</sup> See Mekonnen, *Declaration of Principle*, *supra* note 46, at 266.

<sup>63</sup> See PETER ENGELKE & HOWARD PASSELL, FROM THE GULF TO THE NILE: WATER SECURITY IN AN ARID REGION 11 (Atlantic Council, 2017). Available at: [https://issuu.com/atlanticcouncil/docs/from\\_the\\_gulf\\_to\\_the\\_nile\\_web\\_0322](https://issuu.com/atlanticcouncil/docs/from_the_gulf_to_the_nile_web_0322) (Accessed on 15 May 2021).; Tekuya, *Sink or Swim*, *supra* note 60, at 105.

<sup>64</sup> See generally, Mekonnen, *Declaration of Principle*, *supra* note 46, at 266-274 The current dispute on the filling and operation, as discussed in Section 2 *infra* is also the reflection such hegemonic efforts by Egypt.

<sup>65</sup> Ethiopia public diplomacy with Sudan further aimed to “enhance economic integration of the two countries in terms of trade, investment, infrastructure to the public” and to create awareness on GERD’s contribution for such



on the same month of the GERD launch when its first ever diplomatic delegation visited Ethiopia, to discuss the GERD project and CFA.<sup>66</sup> This marked a turning point in the basin because Egypt that is known in securitizing the Nile questions turned its face to public diplomacy and applying soft power.<sup>67</sup> In later years, Ethiopia also engaged public diplomacy in Egypt to attract support from people and influential figures of Egypt.<sup>68</sup>

On the same year of the dam launch, Ethiopia invited the two countries into the GERD discussion to form the International Panel of Experts (IPoE) to examine the dam. This invitation is regarded to be Ethiopia's wrong turn enabling Egypt to plan another hegemonic strategy "to entrap Ethiopia in an agreement" that would maintain the *status quo* of inequitability.<sup>69</sup> As subsequent sections of this article unfold Egyptian audacity to demand prior agreement before filling and operation of GERD found its root from this invitation.

The IPoE, in May 2013, submitted final report of its finding concerning, *inter alia*, impacts of the GERD size and the filling on downstream states.<sup>70</sup> It confirmed that the dam size is consistent with inflow of the Blue Nile at the project site; and the filling will not seriously reduce Egypt's hydrology if conducted in the flood season (June-September).<sup>71</sup> Yet, the Panel recommended further impact studies on the GERD, which gave rise to formation of the Tripartite National Committee (TNC).<sup>72</sup> During the TNC's meetings, however, Ethiopia rejected Egypt's demand to base impact studies on existing uses as provided in the 1929 and 1959 Agreements.<sup>73</sup>

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endeavors. See Henok Seifu Merid, *Grand Ethiopian Renaissance Dam and Changing Power Relations in the Eastern Nile Basin* (MA Thesis, Institute for Peace and Security Studies, School of Graduate Studies, Addis Ababa University, 2016), p. 69 citing his interview with Zerubabel Getachew: Expert of Boundary and Trans-Boundary Resource Affairs Directorate General in Ethiopian Ministry of Foreign Affairs: Interviewed at Ghion Hotel, on 16 March 2016. See Tekuya, *Sink or Swim*, *supra* note 60, at 78.

<sup>66</sup> In the discussion Ethiopia agreed to delay ratifying the CFA until Egypt elects new government. This was followed Egypt's interim president Essam Sharaf official visit to Addis Ababa to discuss about the dam. Amer, *supra* note 49, at 22 & 53 (see annex 1).

<sup>67</sup> Merid, *supra* note 65, at 67.

<sup>68</sup> Led by speaker of the HPR, in 2014, Ethiopia's public diplomacy also brought a leveraging counter-hegemonic mechanism in promoting its stance on the GERD that the dam is for hydro-power generation and does not harm downstream states but offers win-win and equitable use of the Nile. Merid, *supra* note 65, at 69; see also Amer, *supra* note 49, at 35.

<sup>69</sup> See generally Dejen Yemane Messele, *The Mystery of the GERD Negotiations: From Coercion to Obligation of Treaty Conclusion*, 15(2) MIZAN LAW REVIEW 523, 526-8 (2021).

<sup>70</sup> Thus the Panel's mission was to review the GERD report (studies), which Ethiopia conducted prior to the launching, on benefits and potential impacts of the dam on the downstream riparian states. IPoE, *supra* note 61, at 3. The Panel's report is said to be the most comprehensive and careful examination of all available preliminary studies of the GERD. Abdelazim, Nourhan et al., *Operation of the Grand Ethiopian Renaissance Dam: Potential Risks and Mitigation Measures*, 27 JOURNAL OF WATER MANAGEMENT MODELING 1 (2020).

<sup>71</sup> See IPoE, *supra* note 61, at 36-38.

<sup>72</sup> *Id.*, at 37-38. Formed in 2014, the TNC is a committee of 12 experts (four from each of the three states) formed to guide and follow up on conducting impact assessment studies based on recommendations of the Panel. See Ethiopia's letter to UNSC (22 June 2020), *supra* note 8, at 8, para 33.

<sup>73</sup> Ethiopia's letter to UNSC (22 June 2020), *supra* note 8, at 8, para 33.

Later in 2015, after a long lane of negotiations where Sudan played a positive role,<sup>74</sup> Egypt acknowledged the GERD construction by signing the trilateral Declaration of Principles on the GERD (the DoP).<sup>75</sup> In this period, the DoP had been considered to have marked a historic de-escalation of riparian tensions on the GERD.<sup>76</sup> The proponents mainly accentuate the DoP's recognition of the two major principles of international water law (i.e., equitable utilization and no significant harm)<sup>77</sup>; however, its provisions and recognition of the principles are criticized to be problematic.<sup>78</sup> Moreover, as upcoming sections address, the DoP also stipulates general rules on the GERD first filling and operation that eventually incite the current disputes on filling.

## 2. THE TURBULENT ROAD TO THE GERD FIRST FILLING

The riparian tension on the GERD began to revive in August 2017 when the dam reached 60% of completion ready to retain water in the reservoir.<sup>79</sup> Egypt demanded its share of 55.5 BCM of water be unaffected as a result of the GERD filling; which Ethiopia rejected for a reason that it is based on the colonial agreements to which Ethiopia does not bound to respect.<sup>80</sup> In turn, Ethiopia initiated formation of the National Independent Scientific Research Group (NISRG) to study potential impacts of the GERD first filling plans and annual operation on downstream developments and propose rules of guideline for the filling.<sup>81</sup> The NISRG's major finding is to conduct the initial filling in stages (stage based filling).<sup>82</sup> On the September 2018 meeting, the Ministers of Water Affairs of the three states agreed on findings of the NISRG; however, Egypt

<sup>74</sup> See Permanent Rep. of Sudan to the U.N., *Letter dated 2 June 2020 from the Permanent Representative of the Sudan to the United Nations addressed to the President of the Security Council*, S/2020/480 (2 June 2020). [Hereinafter: Sudan's Letter to UNSC (2 June 2020)]; See also Tekuya, *Sink or Swim*, *supra* note 60, at 78-79.

<sup>75</sup> Agreement on the Declaration of Principles between the Arab Republic of Egypt, the Federal Democratic Republic of Ethiopia and the Republic of Sudan on the Grand Ethiopian Renaissance Dam Project, signed at Khartoum, Sudan, 23 March 2015 (hereinafter the DoP).

<sup>76</sup> Jenny R. Kehl, *Water Security in Transboundary Systems: Cooperation in Intractable Conflicts and the Nile System*, 63. in JEAN AXELRAD CAHAN (eds.), *WATER SECURITY IN THE MIDDLE EAST*, (Anthem Press, 2017) Available at: <https://www.jstor.org/stable/j.ctt1jktqmk.8> (Accessed on 15 May 2021); see also, Salman M.A. Salman, *The Declaration of Principles on the Grand Ethiopian Renaissance Dam: An Analytical Overview*, In *ETHIOPIAN YEARBOOK OF INTERNATIONAL LAW* (Zeray Yihdego et al., eds., Springer International Publishing AG, Switzerland, 2017). [Hereinafter: Salman, 2017].

<sup>77</sup> See generally Salman, *the DoP*, *supra* note 76, at 210-218. Noting that the DoP adequately recognizes basic principles of International water law particularly equitable utilization based on sovereign equality of the three riparians. And, the no-harm principle as provided in the DoP is stated in subordination to equitable utilization.

<sup>78</sup> D.Y Messele, *supra* note 69. Mekonnen, *Declaration of Principle*, *supra* note 46, at 267-274. Mekonnen asserts that the DoP, in legalizing the inequitable status quo, limits use of the GERD only to non-consumptive hydropower generation purpose though Egypt's and Sudan's unilateral water consumptive irrigational projects are kept immune from such limitations. Besides, the DoP eroded the principles of international water law when it recognizes the "no significant harm" rule (in Principle III) omitting its underlying element, i.e. giving due regards to the factors and circumstance of equitable utilization (as provided in Principle IV) in consideration of the harm as significant or otherwise. As a result, DoP preserves the status quo by denying upstream equitable utilizations especially consumptive uses against any harm, the two downstream states may claim, without having regard to factual considerations as the DoP blended factual injuries with legal injuries.

<sup>79</sup> Michael Asiedu, *The construction of the Grand Ethiopian Renaissance Dam (GERD) and geopolitical tension between Egypt and Ethiopia with Sudan in the mix*, 50 GPoT PB 3 (2018). Available at: <http://www.jstor.com/stable/resrep14136> (Accessed on 10 May 2021). Noting: the speech of Egyptian President Abdel Fattah al-Sisi that "no one can touch Egypt's share of the water."

<sup>80</sup> Ethiopia's letter to UNSC (14 May 2020), *supra* note 6, at 12.

<sup>81</sup> The NISRG is formed in 15 May 2018. *Id.*, at 13.

<sup>82</sup> Sudan's Letter to UNSC (2 June 2020), *supra* note 74, *enclosure*, at 11.

backed-off from signing.<sup>83</sup> Though no consensus reached, the NISRG studies required Ethiopia to release 35 BCM of water (about 75% of annual flow of the Blue Nile) during the filling.<sup>84</sup>

While NISRG's studies were underway, in August 2019, Egypt came up with its own plan on the first filling by totally disregarding the NISRG's progresses and 11 months of negotiations.<sup>85</sup> In its plan, Egypt demanded Ethiopia: to conduct the first filling in more than seven years period with minimum annual release of 40 BCM of water; to secure the flow keeping AHD level at 165 m-asl; to obtain approval from Egypt for future filling stages;<sup>86</sup> to release 49 BCM (the whole natural/ mean annual flow of the river) during the GERD operation; and to allow Egypt open its office at the GERD site.<sup>87</sup>

Ethiopia rejected these demands and insisted to return to the NISRG to finalize its studies on agreed points in guiding the first filling and operation of the GERD. However, the trilateral talk in the NISRG studies had to be interrupted in stalemate due to Egypt's stubborn immobility on requiring agreement on all demands of its plan.<sup>88</sup> In the meantime, upon Egypt's invitation of the US and World Bank (WB) into the trilateral technical meetings on the GERD filling and operation, which Ethiopia accepted, the three countries jointly agreed on the observer role of the US and WB in December 2019.<sup>89</sup>

In the tripartite technical meetings, the US expected the three riparians reach at an agreement by the end of February, 2020 on outlined subjects of negotiations.<sup>90</sup> Meanwhile, the US turned its status from an observer of the tripartite talks to formulating the agreement –‘the Washington Document’– under the guise of “facilitating preparation of the final agreement.”<sup>91</sup> Further, stating Egypt's readiness to sign, the US demanded Ethiopia also to sign ‘the Washington

<sup>83</sup> Ethiopia's letter to UNSC (14 May 2020), *supra* note 6, Aide Memoire, at 13; Ethiopia's letter to UNSC (25 June 2021), *supra* note 12, at 13. Cf. Egypt's letter to UNSC (04 May 2020), *supra* note 5, Aide Memoire, at 11.

<sup>84</sup> William Davison, *Calming the Choppy Nile Dam Talks*, Commentary-Africa, International Crisis Group (23 Oct. 2019). Available at: <https://www.crisisgroup.org/africa/horn-africa/ethiopia/calming-choppy-nile-dam-talks> (Accessed on 21 May 2021).

<sup>85</sup> Ethiopia's letter to UNSC (14 May 2020), *supra* note 6, Aide Memoire, at 13; Ethiopia's letter to UNSC (25 June 2021), *supra* note 12, at 13. *see also* Tekuya, *Sink or Swim*, *supra* note 60, 85-86; *see also ibid*.

<sup>86</sup> *See* Egypt's letter to UNSC (19 June 2020), *supra* note 5, Annex I, at 1. This, in other words, based from Egypt's self-authorized ‘veto right’ that Ethiopia may not conduct the filling without ‘prior-agreement’ in unfounded interpretation of the 1902 Anglo-Ethiopian Border Treaty and the 2015 DoP.

<sup>87</sup> Ethiopia's letter to UNSC (14 May 2020), *supra* note 6, Aide Memoire, at 13; *see also* Tekuya, *Sink or Swim*, *supra* note 60, 85-86; Davison, *supra* note 84.

<sup>88</sup> Ethiopia's letter to UNSC (14 May 2020), *supra* note 6, Aide Memoire, at 13.

<sup>89</sup> *See* Press Release, U.S. Dep't of the Treasury, Joint Statement of Egypt, Ethiopia, Sudan, the United States, and the World Bank (Dec. 9, 2019). Available at: <https://home.treasury.gov/news/press-releases/sm851> (Accessed on 19 May 2021).

<sup>90</sup> The meetings outlined subjects of negotiations on: staged based filling of the GERD under conditions of the Blue Nile hydrology and “the potential impact of the filling on downstream reservoirs”; filling to take place during wet seasons (July to September) with mitigating mechanisms in dry seasons (including draught and prolonged draught periods); and to undertake initial filling stage of the GERD up to 595 m-asl. *See* Press Release, U.S. Dep't of the Treasury, Joint Statement of Egypt, Ethiopia, Sudan, the United States and the World Bank (Jan. 15, 2020).

<sup>91</sup> *See* Press Release, U.S. Dep't of the Treasury, Joint Statement of Egypt, Ethiopia, Sudan, the United States and the World Bank (Jan. 31, 2020). Available at: <https://home.treasury.gov/news/press-releases/sm891> (Accessed on 13 May 2021); *see also* Press Release, U.S. Dep't of the Treasury, Joint Statement of Egypt, Ethiopia, Sudan, the United States and the World Bank (Feb. 13, 2020). Available at: <https://home.treasury.gov/news/press-releases/sm907> (Accessed on 19 May 2021); *see also* Tekuya, *sink or swim*, *supra* note 60, at 71.

Agreement’, with its unwarranted interpretation of the DoP that “final testing and filling (of the GERD) should not take place without an agreement.”<sup>92</sup> Ethiopia rejected the US demand and withdrew from the last meeting.<sup>93</sup>

In turn, on 10 April 2020, Ethiopia proposed to the two downstream states the first stage filling plan of the GERD reservoir to retain 18.4 BCM of water in two years plan: 4.9 BCM (in the first year) and 13.5 BCM (in second year/phase).<sup>94</sup> As a drought mitigation plan, Ethiopia stated to postpone the second year filling plan to the next hydrological year if inflow of the Blue Nile is below 31 BCM.<sup>95</sup> Denouncing the proposal, Egypt took the matter to the UNSC (on 4 May 2020) by alleging the GERD negotiation on the filling that threatens its security is in deadlock.<sup>96</sup> In the meantime, Ethiopia completed the first year filling plan in June 2020 retaining 4.9 BCM of water.<sup>97</sup> Further, the second year filling plan was anticipated in the flood season of 2021 following, reportedly, 80% completion of the GERD construction in the same year.<sup>98</sup> In 19 July 2021, the first stage filling was completed by the second year plan.<sup>99</sup> Once more, as it happened in the first year filling, Egypt and Sudan reacted to the second year filling in securitizing and internationalizing the matter by reporting to the UNSC in 2021.<sup>100</sup>

In sum, completion of the GERD first-stage filling has important implication in the BNB water sharing questions. Egypt’s accusations against the filling highlight its long-standing ‘acquired right’ claim in securing absolute control over the Nile waters mainly in securing ultimate storage in the AHD. Besides, Egypt’s robust securitization and internationalization of the first stage filling are figurines of its hegemonic strategies to prolong its absolute control of the Nile waters.<sup>101</sup> However, international law does not forsaken Ethiopia to such hegemonic tactics of Egypt without an effective counter-hegemonic strategy.<sup>102</sup> In this regard, as Dereje Zeleke

<sup>92</sup> Press Release, U.S. Dep’t of the Treasury, Statement by the Secretary of the Treasury on the Grand Ethiopian Renaissance Dam (Feb 28, 2020). Available at: <https://home.treasury.gov/news/secretary-statements-remarks/statement-by-the-secretary-of-the-treasury-on-the-grand-ethiopian-renaissance-dam> (Accessed on 19 May 2021)

<sup>93</sup> Tekuya, *Sink or Swim*, *supra* note 60, at 71.

<sup>94</sup> Ethiopia’s letter to UNSC (14 May 2020), *supra* note 6, Memorandum: at 1, para 4.

<sup>95</sup> The hydrologic year is the period from July 01 to June 30 of the following year. See Ethiopia’s Draft Guidelines for the GERD First Filling, *supra* note 7, Article 1 cum. 5; see also *id.*, Memorandum: at 3, para. 10.

<sup>96</sup> Egypt’s Letter to UNSC (4 May 2020), *supra* note 5, Annex I, at 2.

<sup>97</sup> Wheeler et al., *supra* note 61, at 3.

<sup>98</sup> On May 2021, the GERD became ready to store more 13.5 BCM of water in the second year/phase totaling the first stage filling to 18.4 BCM enough to operate two turbines the same year. *GERD construction reaches over 80 percent completion*, The Ethiopian Herald, (May 21, 2021). Available at: <https://www.press.et/english/?p=35147#> (Accessed on 10 June 2021)

<sup>99</sup> Dr Eng. Seleshi Bekele, *supra* note 11.

<sup>100</sup> See Security Council Report, *What’s in Blue: Meeting on the Grand Ethiopian Renaissance Dam and Regional Relations* (7 July 2021). Available at: <https://www.securitycouncilreport.org/whatsinblue/2021/07/meeting-on-the-grand-ethiopian-renaissance-dam-and-regional-relations-2.php>. (Accessed on 11 July 2021) (Hereinafter, UNSC Report 2021). See also Sudan’s Letter to UNSC (2 June 2020), *supra* note 74, *Enclosure* at 6; Egypt’s Letter to UNSC (4 May 2020), *supra* note 5; Egypt’s Letter to UNSC (19 June 2020), *supra* note 5.

<sup>101</sup> See Mekonnen, *From Tenuous Legal Argument*, *supra* note 21.

<sup>102</sup> At this juncture, however, critiques show that international law is played by hegemon states in the furtherance of their hegemonic interests. See D.Y Messele, *supra* note 69, 524-5. Nonetheless, in the international arena, with due consideration of the matter at hand by negotiators and legal advocates in due course, Ethiopia has a big take in putting international law to secure its interests in the Nile. This is what the international water law scholars as well

Mekonnen rightly noted the “chink in the armour of the [Egyptian] hydro-hegemon is the grotesquely inequitable nature of the *status quo* which stands out in stark transgression of the fundamental principles of international water law.”<sup>103</sup> Thus, the following section explores the international regime that governs non-navigational uses of shared waters and the agreements Ethiopia is a signatory with one or two of downstream states particularly the 2015 DoP. As for the 1929 and 1959 Agreements, as pointed out in previous sections, they do not legally bind Ethiopia and the GERD as well.<sup>104</sup>

### 3. OVERVIEW OF THE INTERNATIONAL WATER LAW REGIME AND EXISTING NILE AGREEMENTS: THE GERD FILLING AND OPERATION IN CONTEXT

#### 3.1 The UN Watercourse Convention and the Two Basic Principles

Adopted in 1997 and entered into force in 2014, the UN Watercourse Convention<sup>105</sup> is the first and main international instrument that codified most important principles of international water law.<sup>106</sup> Although none of the BNB riparians are parties to it, the Convention has significance in setting the rights and duties of the riparians since its provisions reflect fundamental customary norms and general principles of law.<sup>107</sup> The concerned riparians also stated these provisions of the Convention on the same parlance.<sup>108</sup> Most importantly, rules of “equitable and reasonable use right” and “not-to-cause significant harm” which stem from “community of interest” and equality of sovereignty of riparians, are the two most fundamental customary norms that define the rights and obligations of riparians in the utilization of internationally shared waters.<sup>109</sup>

Enshrined under Article 5 of the Convention is “the basic right”<sup>110</sup> of riparians to equitable and reasonable utilization of international watercourses in their own territories.<sup>111</sup> It provides that all

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as case laws unfold in the utilization of international watercourse. In this regard Sections 4 and 5, *infra*, address such concerns as well.

<sup>103</sup> See Mekonnen, *From Tenuous Legal Argument*, *supra* note 21, at 254-255. For Ethiopia the best counter-hegemonic strategy is to keep the path of legal claims based on international law as its highest leverage.

<sup>104</sup> See *id.*, at 240.; Mekonnen, *Declaration of Principle*, *supra* note 46, at 260. This has also been admitted by Egypt in its letter to the UNSC. Egypt’s Letter to UNSC (19 June 2020), *supra* note 5, Annex I, at 2.

<sup>105</sup> UN Convention on the Law of Non-navigational use of International Watercourse (1997) (hereinafter the UNWCC). The UNWCC is framework convention consisting of general substantive and procedural rules on utilization, development and management of international watercourses. It leaves details for riparian states to complement it with specific treaties considering the contexts of the watercourse in question. See, *id.*, Article 3 (3).

<sup>106</sup> Tamar Meshel, *Swimming Against the Current: Revisiting the Principles of International Water Law in the Resolution of Fresh Water Disputes*, 61 HARVARD INTERNATIONAL LAW JOURNAL 135, 150 (2020).

<sup>107</sup> McCaffrey, Stephen C, *The Need for Flexibility in Freshwater Treaty Regimes*, 27 NATURAL RESOURCES FORUM 156, 156-7 (2003); Stebek, *supra* note 3, at 43; Mekonnen, *Declaration of Principle*, *supra* note 46, at 261; *Id.*, at 180-1.

<sup>108</sup> In this regard, Sudan reiterated that the convention is reflection of customary international norms in regulating utilization of international waters. Egypt also admitted that the two principles, as depicted in the Convention, are customary norms. See Sudan’s Letter to UNSC (2 June 2020), *supra* note 74, at 5-6. Cf. Egypt’s Letter to UNSC (19 June 2020), *supra* note 5, Annex I, at 3.

<sup>109</sup> See *Case relating to the Territorial Jurisdiction of the International Commission of the River Oder* (Sweden vs. Poland) September 10th, 1929 Seventeenth (Ordinary) Session 36, Judgment № 16, PCIJ, Ser. A., No. 23, 1929, at 21; *Case concerning GabCikovo-Nagymaros Project (Republic of Hungary v. Slovakia Federal Republic)*, International Court of Justice, Case No. 92, September 25, 1997, at 56, para. 85; see Mekonnen, *Declaration of Principle*, *supra* note 46, at 261; see also Meshel, *supra* note 106, at 148-149.

<sup>110</sup> See *GabCikovo-Nagymaros Case*, *supra* note 109, at 54, para. 78.; see also STEPHEN C. MCCAFFREY, *THE LAW OF INTERNATIONAL WATERCOURSE*, 411 (2007).



the relevant factors and circumstances enlisted under Article 6 of the same Convention are considered holistically.<sup>112</sup> From proviso of Article 5(1) that: “states *shall* ... utilize an international watercourse in equitable and reasonable manner”, the Convention stipulates a right as well as an obligation on all riparians to equitably utilize shared waters.<sup>113</sup> This rule is regarded as “basic right” of all riparians of shared waters in the utilization of the same.<sup>114</sup>

The other fundamental rule of the Convention, provided in Article 7, is not-to-cause significant harm that puts obligation on all riparians, both upstream and downstream, to utilize shared waters with due diligence to avoid or minimize potential adverse significant harms other riparians could sustain as a result of their uses.<sup>115</sup> No significant harm principle is one of the most controversial and most debated principles in the international water regime.<sup>116</sup> Downstream riparians strongly favor this principle with a view to protect their existing water developments from new upstream projects which would reduce the flow of shared watercourse.<sup>117</sup> Likewise, the two downstream states, especially Egypt indulges in this principle to secure the flow of the Nile in favor of their existing uses,<sup>118</sup> which has been developed by Egypt in anticipation that the 1959 Agreement would have to be observed by upper riparian states including Ethiopia.<sup>119</sup>

Conversely, scholars duly noted that no significant harm principle is commonly mistaken to only protect downstream states from upstream projects. Downstream states may also cause significant harm on upstream states. This happens when equitable share of upstream states (and their water developments) is affected by massive water developments in downstream states.<sup>120</sup> Furthermore, scholarly works, instruments as well as case laws clearly connote that the rule not to cause

<sup>111</sup> UNWCC, *supra* note 105, Article 5(1).

<sup>112</sup> *Id.*, Article 6(1). In general, these factors may be summarized as natural (hydrologic factors) and socio-economic (settlement, demography) including influences of public interest considerations, i.e. ecosystem and vital human needs. See, ALISTER RIEU-CLERK ET AL., UN WATERCOURSE CONVENTION USER’S GUIDE, 104 (United Kingdom, 2012); Attila Tanzi, *The UN Convention on International Watercourse as a Framework for the Avoidance and Settlement of Water Disputes*, 11 LEIDEN JOURNAL OF INTERNATIONAL LAW 441, 458 (1998); Cf. Aaron T. Wolf, *Criteria for equitable allocation: the heart of international water*, NATURAL 23 RESOURCE FORUM 3, 4 (2009).; Salman M. A. Salman, *The Helsinki Rules, the UN Watercourses Convention and the Berlin Rules: Perspectives on International Water Law*, 23(4) WATER RESOURCES DEVELOPMENT 625, 633. (2007).

<sup>113</sup> See International Law Commission, Draft Articles on the Law of the Non-navigational Uses of International Watercourses and Commentaries thereto and Resolution on Transboundary Confined Groundwater, (1994), p. 101. Available at: [https://legal.un.org/ilc/texts/instruments/english/commentaries/8\\_3\\_1994.pdf](https://legal.un.org/ilc/texts/instruments/english/commentaries/8_3_1994.pdf) (Accessed on 10 May 2021) (hereinafter UN, ILC Commentary).

<sup>114</sup> See *Ibid*; *GabCikovo-Nagymaros Case*, *supra* note 109; MCCAFFREY, *supra* note 110, at 408.

<sup>115</sup> See McCaffrey, Stephen, *The contribution of the UN Convention on the law of non-navigational uses of International Watercourses*, 1(3) INT. J. GLOBAL ENVIRONMENTAL ISSUES 250, 254 (2001). See also UNWCC, *supra* note 903, Article 7(1) & (2); see generally Meshel, *supra* note 106. The rule signifies that if significant harm occurred to a riparian despite the other riparian diligently took measures to prevent or minimize the harm, then these concerned riparian states are required to consult and negotiate to eliminate or mitigate the harm or, where elimination or mitigation is impossible, to discuss issue of compensation.

<sup>116</sup> See Andualem Eshetu Lema, *The United Nations Watercourses Convention from the Ethiopian Context: Better to Join or Stay Out?*, 4(1) HARAMAYA LAW REVIEW 1, 15 (2015). The controversy lingers on whether no-significant harm principle is inferior to equitable utilization or vice versa.

<sup>117</sup> *Id.*, at 15-16.

<sup>118</sup> This may directly be referred from Egypt’s Letter to UNSC (19 June 2020), *supra* note 5, Annex I, at 3, para. 2.

<sup>119</sup> Recall the discussions in Section 1 of this article. Further discussion on the ramifications of such Egyptian position and its legality is provided in Section 4 of this article, *infra*.

<sup>120</sup> See MCCAFFREY, *supra* note 110, at 408; See also Meshel, *supra* note 106, 166-167. Stebek, *supra* note 3, at 52.

significant harm is complementary to “basic right” of equitable use; hence, the right of riparians to equitable use may not be refuted merely because it causes significant harm to other riparians.<sup>121</sup> It rather initiates the duty to cooperate among riparians to extend adequate protection to the rights of other riparian states to an equitable use.<sup>122</sup> Otherwise, depriving a riparian state of its “basic right” to equitable use by another riparian constitutes causing of significant harm.<sup>123</sup>

In the context of the dispute on the GERD filling, as a framework convention with general rules, the UNWCC cannot provide a complete answer to the issues and dilemmas in the Nile including the GERD filling.<sup>124</sup> However, the two fundamental rules of international water law are paramount to guide riparian relations in the GERD. Furthermore, the Convention’s procedural rules on notification and consultation of planned measures<sup>125</sup> have important implications on the GERD filling and operation. On this topic, Ethiopia observed basic procedural steps in the first filling where it informed the two riparians; however, Egypt’s self-prized ‘veto’ turned the negotiation process negatively.<sup>126</sup>

### 3.2 The 1902 Border Agreement<sup>127</sup>

This agreement was signed between Ethiopia and Great Britain to delimit the boundaries of Ethiopia with the British colony of Sudan. However, it inserted a *proviso* that aimed to restrict Ethiopia’s potential water uses in the Nile tributaries including the Blue Nile.<sup>128</sup> Egypt, though never represented in this Agreement by Britain, invokes it against Ethiopia in the GERD first stage filling.<sup>129</sup> Yet, in post-colonial period, this agreement may only create legal relationship between Sudan and Ethiopia, instead of Egypt vis-à-vis Ethiopia concerning both border delimitation as well as the latter’s uses of the Nile tributaries.<sup>130</sup>

<sup>121</sup> See ILC Commentary, *supra* note at 113; *GabCikovo-Nagymaros Case*, *supra* note 109; MCCAFFREY, *supra* note 110, at 408.

<sup>122</sup> See ILC Commentary, *supra* note 113, at 97, para 2; see also MCCAFFREY, *supra* note 110, at 408.

<sup>123</sup> MCCAFFREY, *supra* note 110, at 408. (Explaining that customary international law also “protects a riparian state against the deprivation by another state of the equitable share of the former of the uses and benefits of an international watercourse.”)

<sup>124</sup> See Stebek, *supra* note 3, at 56. See also Meshel, *supra* note 106, at 139.

<sup>125</sup> It obliges riparians to notify other potentially affected riparians as to its planned project. Such prior notifications enable riparians to know at early stages any project which might affect their interest. It further calls upon states to consult and cooperate in response to the possible significant adverse effect a planned project might cause. See Articles 11 through 19 of UNWCC, *supra* note 105; ALISTER ET AL., *supra* note 112, at 134.

<sup>126</sup> In this regard, Section 5.1 *infra* discusses this issue according to the case laws and international practices alongside the UNWCC.

<sup>127</sup> Treaties Relative to the Frontiers between the Soudan, Ethiopia, and Eritrea, Eth.-U.K. (May 15, 1902). (Hereinafter, the 1902 Agreement)

<sup>128</sup> *Id.*, Art. 3.

<sup>129</sup> Egypt’s Letter to UNSC (19 June 2020), *supra* note 5, Annex I: at 2-3.

<sup>130</sup> During Sudan’s independence in 1956, Britain’s Foreign Office’s legal advisors also stated that the 1902 Agreement “should in principle be regarded as surviving the acquisition of independence by the Sudan and as remaining in force between the Sudan and Ethiopia.” Phillips, *Foreign Office to P.R.A. Mansfield*, Addis Ababa 15 May 1956, FO 371/119061. (Cited in TERJE, *supra* note 17, at 314.) Moreover, as opposed to Sudan, Egypt never shared any borders with Ethiopia even during Britain colonial domination, nor do the tributaries stated in Article 3 (Tekeze/Atbara, Baro/Sobat and Blue Nile) cross Egypt’s territory.

Article 3 of the Agreement particularly requires Ethiopia to enter into prior agreement if it wishes to use the Nile tributaries. This provision has dual meanings in the English and Amharic versions. In the English version, Ethiopia is obliged “not to construct ... any work across the Blue Nile ... which would *arrest* the flow” except in agreement with Britain and the Sudan.<sup>131</sup> However, the Amharic version that imposes on Ethiopia “...not to block up/stop up from river bank to river bank...”<sup>132</sup> is equally authoritative and judicially taken to have equivalent meaning with the English ‘not to arrest.’<sup>133</sup> Consequently, both terminologies of the English and Amharic versions would only prohibit ‘total stopping or complete blockage’ of flow of the river without prior agreement. Otherwise, Ethiopia is permitted to construct and execute water work projects without prior agreement with Sudan.

There are numerous legal assertions as to the invalidity of this treaty and as such to not bind Ethiopia. For instance, on ground of material breach of the treaty<sup>134</sup> British recognition of Italian occupation of Ethiopia in 1935/6 in violation of the very purpose of this treaty (i.e., to create friendly relation between the parties) relieves Ethiopia from observing its part of the obligation in the treaty.<sup>135</sup>

As it is the case in the GERD, the first stage filling is not directly predisposed to Article 3 of this Agreement as the flow of the Blue Nile may not completely be blocked as a result of the filling. This holds true for upcoming fillings as well as refilling and annual operations of the GERD alike.

### 3.3 The 1993 Cooperative Framework Agreements

This Agreement is signed between Ethiopia and Egypt in the utilization of the Nile.<sup>136</sup> It provides set of general rules as to the utilization of the Nile. The purpose of this agreement was to provide a cooperative framework between the two riparian states and recognize their mutual interest in the Nile Basin and realizing their potential uses based on the international law principles.<sup>137</sup> Especially, Article 5 stipulates that “[e]ach party shall refrain from engaging in any activity related to the Nile waters that may cause appreciable harm to the interests of the other party.”

At this juncture, although the provision lowered the threshold of harm from ‘significant’ to ‘appreciable’, it imposes similar obligation on Egypt too. Both of the countries assume this obligation mutually. As it has been highlighted in Section 3.1, the principle, even though the threshold of harm seems to be lowered, protects the equitable use right of riparians – both

<sup>131</sup> The 1902 Agreement, *supra* note 127, Article 3 (emphasis mine).

<sup>132</sup> The original Amharic version of the provision in the Agreement reads ‘ወንዝ ተዳር እዳር የሚደፍን ሥራ እንዳይሰሩ ወይም ወንዝ የሚደፍን ሥራ ለመስራት ለማንም ፈቃድ እንዳይሰጡ’.

*See the original text in Ethiopia’s letter to UNSC* (22 June 2020), *supra* note 8, Annex VI.

<sup>133</sup> *See* 1902 Agreement, *supra* note 127, Art. 5; *see also* United Nations, Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (1986), Art. 33(1).

<sup>134</sup> Vienna Convention on Law of Treaties, *supra* note 133, 128, Art. 60.

<sup>135</sup> *See* Tekuya, *supra* note 60, at 111.

<sup>136</sup> Framework for General cooperation between the Arab Republic of Egypt and Ethiopia, signed at Cairo, 1 July 1993. (Hereinafter the 1993 Agreement)

<sup>137</sup> *Id.*, Articles 3, 4 and 8. Accordingly, the two riparians commit to the principles of good neighborliness and peaceful settlement of dispute as well as mutual trust and understanding. *See also Id.*, Articles 1 and 2.

existing and potential uses.<sup>138</sup> Moreover, even if principle of equitable use seems to be overlooked in this agreement, Egypt has been committed to it in the 2015 DoP. In this regard, since the GERD is prominently governed by the DoP that incorporates equitable utilization principle, the 1993 Agreement will not be invoked to deny Ethiopia's equitable right in the GERD filling for a sole reason that it might cause significant harm.

### 3.4 The 2015 Tripartite Declaration of Principle on the GERD

The DoP is the first tripartite agreement among the three riparians signed by the top political figures of the respective states.<sup>139</sup> This shows the special legal significance of this agreement in binding the relations of these countries concerning the GERD.<sup>140</sup> The riparians also commits to fully implement provisions of the DoP in their 4<sup>th</sup> Ministerial meeting that produced “the Khartoum Document”<sup>141</sup> Moreover, major provisions of the DoP –principles of equitable and reasonable use and not to cause significant harm– binds the three countries as endorsements of existing customary norms governing internationally shared watercourses.<sup>142</sup> Yet again, the provisions of the DoP are meant to set a framework for future dialogues and agreements on the GERD.<sup>143</sup>

In its preamble, the DoP, in a very unique way from any other previous agreement on the Nile, emphasizes on significance of the Nile River for Ethiopia as much as the two downstream states.<sup>144</sup> Most importantly, the DoP recognized the two fundamental principles of international water law.<sup>145</sup> Article III deals with “not to cause significant harm” principle<sup>146</sup> that require all the three states to take all appropriate measures to prevent adverse significant harm on the other

<sup>138</sup> Meshel, *supra* note 106, at 154.

<sup>139</sup> The DoP is signed by the heads of governments of the three states. *See* DoP, *supra* note 75., *see also* Salman, 2017, *supra* note 76, at 209.

<sup>140</sup> However, considering the fact that the DoP is not ratified by any of these countries, there are questions as to the status of the DoP whether it is a binding agreement or a declaration of general guidelines for future agreements. In this regard, *see generally* Tekuya, *Sink or Swim*, *supra* note 60, at 79-81.

<sup>141</sup> They stated to “full commitment to implement the provisions of the Agreement on DoP.” The 4<sup>th</sup> Tripartite Meeting of the Ministers of Foreign and Water Affairs of Egypt, Ethiopia and Sudan on the Grand Ethiopian Renaissance Dam Project, Khartoum, Sudan (27 - 28 December 2015) p. 2, para. 2 & p. 3, Agenda III. This document is signed by the respective Water Affairs Ministers and Foreign Affairs Ministers of the three countries.

<sup>142</sup> These provisions are virtually transported from the UNWCC. *See* DoP, *supra* note 75, Articles III and IV *Cf.* UNWCC, *supra* note 105, Articles 5-7. *See also* Tekuya, *Sink or Swim*, *supra* note 60, at 81. Meshel, *supra* note 106, 180-181. Salman, 2017, *supra* note 76, at 211-2.

<sup>143</sup> Tekuya, *Sink or Swim*, *supra* note 60, at 92.

<sup>144</sup> *See* preamble of the DoP, *supra* note 75; Tekuya, *Sink or Swim*, *supra* note 60, at 79. This may be taken as a great step to scratch a commonly used cliché that Ethiopia is a water rich country with many alternative water resources that the Nile is a luxury to her. *See* this cliché for example in Egypt's Letter to UNSC (19 June 2020), *supra* note 5, Annex I, at 6.

<sup>145</sup> DoP, *supra* note 75, Article IV and III. The DoP is particularly dynamic in changing Egypt's claim from ‘no harm’ to the internationally accepted principle of ‘not to cause significant harm. Dr. Tedros Adhanom [former] Minister of Foreign Affairs on the Nile Declaration of Principle Agreement (Audio), Aigaforum. Available at: <http://aigaforum.com/audiovideo/Dr-Tedros-nile-agreement.php>. (Accessed on 1 May 2021).

<sup>146</sup> However, as noted earlier on *supra* note 78, recognition of these principles is criticized as problematic especially the omission of giving due regard to equitability of the use in the determination of the harm. *See also* Mekonnen, *Declaration of Principle*, *supra* note 46, at 267-274. *Contra* Salman, 2017, *supra* note 76, at 211-2.who holds that absence of such cross referencing to equitability of the use in the determination of significant harm is a reflection that the DoP takes the no-significant harm rule in subordination to equitable utilization principle.

riparian “in utilizing the Blue/Main Nile”<sup>147</sup> This terminology of “Blue/Mean Nile” clearly obliges the two downstream states not to significantly harm Ethiopia in their use of the “Main Nile” as Ethiopia is obliged the same towards them in its use of the “Blue Nile” in the GERD.

With regard to the equitable utilization principle, the DoP under Article IV recognizes the various factors for determining equitability of water uses that are virtually transported from the UNWCC and the 2010 CFA.<sup>148</sup> However, the DoP added two more factors that are neither included in the UNWCC nor in the CFA. These are “contribution of each Basin State to the waters of the Nile River system”<sup>149</sup> and “extent and proportion of the drainage area in the territory of each Basin State”<sup>150</sup> which favor Ethiopia as biggest contributor to the Nile waters and “and is third, after Sudan and South Sudan, in the size of the Nile drainage area in its territories.”<sup>151</sup> The equitability of the GERD filling and operation in this regard is discussed in Section 5.2 of this article.

With particular emphasis to the GERD filling and operation, the DoP under Article V stipulates general rule that instructs the filling and operation to base on joint studies in accordance to the recommendations of IPOE in its final report and as agreed by the TNC.<sup>152</sup> On this ground, the three states are required to “agree on guidelines and rules on first filling of GERD” which shall consider all various scenarios “in parallel with the construction of GERD.”<sup>153</sup> In this provision, the DoP requires cooperation of the riparians based on “sovereign equality, territorial integrity, mutual benefit and good faith” for optimal utilization of the Nile River.<sup>154</sup>

Article V remains to be a sticking point among the three riparians in the GERD filling and operation. Egypt alleges that the GERD first filling and operation may not be conducted without prior agreement among the parties; hence, for Egypt, the first stage filling Ethiopia conducted in 2020 and 2021 is a unilateral act that violates Article V of the DoP.<sup>155</sup> Conversely, Ethiopia holds that no such prior-agreement is provided as a precondition to the filling and operation of GERD hence the filling is conducted in line with the DoP.<sup>156</sup> In relation to this, Section 5.1 particularly discusses this issue.

#### **4. REVEALING FOUNDATIONS OF EGYPT’S ALLEGATIONS AGAINST THE GERD FILLING AND OPERATION: A VICIOUS CIRCLE OF IN-EQUITABILITY**

<sup>147</sup> DoP, *supra* note 75, Article III, para 1

<sup>148</sup> *Id.*, Article IV., UNWCC, *supra* note 105, Articles 5-7. *See also* Tekuya, *Sink or Swim*, *supra* note 60, at 81. Meshel, *supra* note 106, 180-181. Salman, 2017, *supra* note 76, at 211-2.

<sup>149</sup> DoP, *supra* note 75, Article IV, para 2 (h).

<sup>150</sup> *Id.*, Article IV, para 2 (i).

<sup>151</sup> Salman, 2017, *supra* note 76, at 213.

<sup>152</sup> DoP, *supra* note 75, Article V, para 1 & 2.

<sup>153</sup> *Id.*, Article V, para 2 (a). The same is provided in para 2 (b)&(c) as to annual operation of GERD which Ethiopia may adjust time to time provided it informs the downstream states as to unforeseen or urgent circumstances.

<sup>154</sup> *Id.*, Article V, para 2 & 3 cumulative with Article IX.

<sup>155</sup> Egypt’s Letter to UNSC (19 June 2020), *supra* note 5, Annex I, at 1. *See also* Egypt’s Letter to UNSC (04 May 2020), *supra* note 5, Aide Memoire, at 9.

<sup>156</sup> Detailed discussion on whether or not the filling is unilaterally done is made in Section 5.1 *infra*.



As discussed earlier, Egypt adjoined by Sudan robustly securitized and internationalized the GERD first stage filling in the letters to UNSC to which Ethiopia responded. The letters and official statements of the three riparian states represent their respective positions on the GERD. Their statements rely on legal arguments based on the Agreements signed among them particularly the DoP as well as customs and principles that govern internationally shared waters. In this section special emphasis is given on Egypt's letters and official statements to the UNSC as they duly reflect its deeply rooted position against the GERD filling and operation.

For starter, Egypt stated that the GERD filling is governed by “the customary rules of international law including the obligation not to cause significant harm and the principle of equitable and reasonable utilization.”<sup>157</sup> This sparks the issue whether or not Egypt is turning its face to the acceptable fundamental principles of international water law (principles of equitable and reasonable utilization and no significant harm) concerning the GERD first stage filling to the eclipse of ‘historic and natural right.’ At this juncture, it is appropriate to address three important issues: A) Is Egypt endorsing acceptable principles of international water law to the eclipse of the 1929 & 1959 Agreements? B) Does it have a point in claiming ‘significant harm’ against the GERD’s fillings? C) Or just another vicious circle to cling to ‘natural and historic right’? The following sub-sections address these issues one after the other by critically analyzing Egypt’s submissions to the UNSC vis-à-vis international water law regime and existing Nile Agreements.

#### **4.1 Is Egypt Dropping the 1929 & 1959 Agreements to Endorse the Two Principles?**

In defense to Ethiopia’s claim that the 1929 colonial treaty and the 1959 Agreement do not bind the GERD filling and operation, Egypt stated as a matter of “fact” that:

Ethiopia was never a colony, and all of the Nile waters agreements to which Ethiopia is bound were concluded when it was an independent, sovereign state. The GERD must be governed, as stipulated in the 2015 DoP, by the applicable principles of international law, which require preventing the causing of significant harm to existing water uses.<sup>158</sup>

It further stated that “all treaties that are in force between Egypt and Ethiopia were signed by Ethiopia as an independent, sovereign state ... [t]hese include the 1902 treaty ... the 1993 Framework for General Cooperation ... and the 2015 Declaration of Principles on GERD.”<sup>159</sup>

These statements clearly show that Egypt is not asserting the 1929 and 1959 Agreements against Ethiopia and the GERD filling as they do not bind Ethiopia as a nonparty.<sup>160</sup> Thus, it follows that negotiations concerning the GERD filling and annual operation cannot be setup by Egypt or Sudan based on the two agreements or issues of water sharing these agreements imply.<sup>161</sup>

<sup>157</sup> Egypt’s Letter to UNSC (19 June 2020), *supra* note 7, Annex, at 3.

<sup>158</sup> *Id.*, Annex I: at 2.

<sup>159</sup> *Id.*, Annex I: at 2-3.

<sup>160</sup> Nor did Egypt include these two agreements in the Annexes but only copies of the 1902, the 1993 and 2015 DoP Agreements. *See, id.*, Annex. This suggests Egypt’s realization of its tenuous arguments on the 1929 and 1959 Agreements. *See generally* Mekonnen, *From Tenuous Legal Argument*, *supra* note 21.

<sup>161</sup> As pointed out in Section 1.3 of this article, Ethiopia has continuously been stating that such water shares by Egypt and Sudan will not set up against it in its water developments.

Regarding to the 1902 Agreement, as previously discussed, it may not legally be set up against Ethiopia since its validity is seriously questioned.<sup>162</sup> The 1993 Agreement and the DoP mainly provide general rules on utilization of the Nile and, as for the latter, on the GERD. Egypt's intention in the DoP, besides to protecting existing uses, is to foreground its standpoint that Article V of the agreement requires prior-agreement before GERD's filling and operation. (This issue addressed in Section 5.1 of this article).

Further, concerning its relation with Ethiopia in the GERD filling and operation, Egypt stated the following regarding to the two fundamental principles of international water law regime.

Egypt is entirely supportive of the right of Ethiopia, and other Nile riparian states, to development and to enjoy the benefits of the Nile River. Egypt, however, believes that such a right must be *exercised equitably and reasonably and in accordance with the applicable rules of international law that, inter alia, protect downstream riparians against significant harm...*<sup>163</sup>

This statement as it stands seems like Egypt's admission of principles of customary international law in the utilization of shared waters. It also seems to correlate with the prevailing legal understanding that not to cause significant harm is complementary to equitable utilization rule in qualifying the latter beside to other factors.<sup>164</sup> Thus, what determines legality of GERD's filling and operation the two principles as incorporated in Article III and IV of the DoP in close correlation to Articles 5-7 of the UNWCC. However, to genuinely evaluate and understand foundations of such seemingly legally consistent statements, it is important to appraise Egypt's stance on 'no significant harm' rule in the Nile and particularly in the GERD filling and operation. The following sub-topics address this concern.

#### **4.2 Does Egypt have a Point in Asserting 'No Significant Harm' against the GERD Fillings?**

The first issue is whether Egypt's assertion of 'no significant harm' against GERD's filling the way it states in its submission to UNSC is palatable in international water law. Asserting that the GERD filling will cause significant harm on its existing and current uses, Egypt claims that:

... The obligation not to cause [significant] harm is designed to minimize the adverse effects of new projects, such as the GERD, *on current and existing water uses*. Also, *existing uses are one* of the factors that are used as the baseline to determine whether a new or planned water project is reasonable and equitable.<sup>165</sup>

From this statement, Egypt demands existing water uses, namely the Lake Nasser in the AHD,<sup>166</sup> to be 'protected' against the GERD's fillings and operation.<sup>167</sup> To Egypt, reduction of the Lake

<sup>162</sup> In this regard, recall the discussion in Section 3.2 of this article.

<sup>163</sup> Egypt's Letter to UNSC (19 June 2020), *supra* note 5, Annex I: at 6. para. 2. (Italics mine)

<sup>164</sup> MCCAFFREY, *supra* note 110, at 408. UNWCC, *supra* note 105, Article 6; DoP, *supra* note 75. Article IV.

<sup>165</sup> Egypt's Letter to UNSC (19 June 2020), *supra* note 5, Annex I, at 3, para. 2. (Italic mine)

<sup>166</sup> As previous discussions of this article especially Section 1.1 show, the Lake Nasser storage at AHD is twice the size of the mean annual flow of the Nile. Besides, new water projects developed by Egypt (like the *Toshka*) that

Nasser storage would reduce its hydrology thence dropping agricultural food production and hydropower generation. According to this assertion, the GERD fillings and operation would not be equitable and reasonable if it adversely reduces storage of Lake Nasser at the AHD. However, putting the first stage filling in perspective, it is essential to address whether the GERD has significantly reduced the flow of the Nile to cause significant impact on Egypt's water supply.

Studies conducted on simulated impact of GERD on AHD show that the GERD filling, coupled with seasonal rainfall pattern of the Nile Basin, would only have short-term or immediate impact on Egypt's water supply and food production.<sup>168</sup> Accordingly, the hydrologic factor on Lake Nasser does not change even if the GERD was never finished or filled. Because, the 2050 projection shows, even though the flow of the Blue Nile is never affected, the water supply in Egypt will inevitably be dwindled.<sup>169</sup> The problem rather lingers on Egypt's ever growing demand/dependence on the Nile,<sup>170</sup> and not on estimated shortage of water following the GERD's filling, that will have long term significant impact on Egyptian food production.<sup>171</sup> This is further exacerbated by Egypt's agricultural policy that does not follow water-saving trends; rather, as studies show, agricultural practices in Egypt are extravagant in water use where they "use more water for irrigation than their total annual renewable supply."<sup>172</sup>

In fact, studies show that serious impact will be sustained by Egypt if the GERD filling is done in the dry season whereby, in the worst scenarios, Egypt's water supply could be reduced by 40%.<sup>173</sup> However, Ethiopia conducted the first stage filling during the flood seasons of June and July where there is lavishing rainfall.<sup>174</sup> As of 24 August 2020, after the GERD first year filling, the initial storage level in the HAD Reservoir was nearly full at 178.4 m-asl.<sup>175</sup> In this regard, let

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divert water from the Lake Nasser require more water beyond the entire flow of the Nile. Therefore, here 'existing uses' represents even more water than the 55.5 BCM of water Egypt self-acclaimed to itself in the 1959 Agreement.

<sup>167</sup> Egypt's Letter to UNSC (19 June 2020), *supra* note 5, Annex I, at 2, para 3.

<sup>168</sup> See ENGELKE & PASSELL, *supra* note 63, at 12; see also Christopher D. Booth, *the Temperature is Rising, the Fever White Hot: the Grand Ethiopian Renaissance Dam as Flashpoint between Egypt and Ethiopia*, ATLANTIC COUNCIL 3 (2020). Available at: <https://www.jstor.org/stable/resrep29331> (Accessed on 9 May 2021).

<sup>169</sup> ENGELKE & PASSELL, *supra* note 63, at 12. "...demand from projected Egyptian population and economic growth will have a much more significant long-term impact on Nile water supply. Lake Nasser could be drained to its dead storage level sometime between 2025 and 2030, even if the GERD never finished."

<sup>170</sup> As it has been discussed in Section 1.1 of this article, Egypt's desert land reclamation projects significantly increase the water demand of the country more than the annual flow of the Nile waters.

<sup>171</sup> For instance, some reports suggest that the mean annual flow the Nile River is dwindling due to global warming which currently is estimated to be 56 BCM, showing gross reduction of 28 BCM from the common estimate of 84 BCM in the 1960s. See Ofir Winter & Yogev Ben-Israel, *Water in the Land of the Nile: From Crisis to Opportunity?*, INSS INSIGHT (1089) 3 (2018). Available at: <http://www.jstor.com/stable/resrep19448> (Accessed on 9 May 2021).

<sup>172</sup> Lawrence Susskind & Yasmin Zaerpoor (2017), *Water in the Middle East: Making Room for Informal Problem Solving* 8(2) BUSTAN: THE MIDDLE EAST BOOK REVIEW 132-150, (Penn State University Press.), pp. 136-7. Available at: <https://www.jstor.org/stable/10.5325/bustan.8.2.0132> (Accessed on 10 May 2021).

<sup>173</sup> Booth, *supra* note 171, at 146.

<sup>174</sup> Ethiopia's letter to UNSC (22 June 2020), *supra* note 8, Memorandum: at 3, para 13. In relation to the first phase filling in 2020 "...both the Blue Nile and White Nile have above normal flow... about 180 meters above sea level (182 m being the full supply level) that is a record high for the past 30 & 40 years."

<sup>175</sup> Wheeler *et al.*, *supra* note 61, at 3.

alone the first year filling plan, the second year filling plan does not have serious negative impact on Egypt as the country has enough storage of water to rely on in the AHD's reservoir.<sup>176</sup> At this juncture, no significant harm principle requires more than "trivial" or "real impairment of use" rather "substantial."<sup>177</sup> Therefore, in a situation where significant harm is not materialized on Egypt that it failed to show, the principle cannot be triggered against Ethiopia thus legalize the GERD first stage filling.<sup>178</sup> Even though the GERD filling causes significant harm, the legality of the filling, as international experiences and case laws show, may not be determined by the interest of Egypt. This issue will be discussed in Section 5.2.

### 4.3 Or Just Another Vicious Circle to Cling to 'Natural and Historic Right'?

The third issue, therefore, is whether Egypt's claims in the letters are malicious ways to cling to its 'acquired right' or 'natural and historic right' that it alleges to have based on the 1929 and 1959 Agreements. Especially, the 1959 Agreement that founded Egypt's existing uses in the AHD with the inflow of 55 BCM from the mean annual of the Nile is crucial. Here, the important statement that has been overly stated in the Nile Basin question by Egypt is over again averred in the letters to the UNSC that: "Egypt is a country of over 100 million souls that live on approximately 4% of its territory and that suffers from acute water scarcity and is entirely dependent since time immemorial on the Nile for its livelihood and survival."<sup>179</sup>

This statement, apparently, highlights the overly resonated "narrative which portrays the Nile waters as veritable lifeblood even a slight reduction of which would bring mortal harm to Egypt".<sup>180</sup> Appealing to its dependence on the Nile for time immemorial coupled with colonial agreements, Egypt relishes itself with "veritable ownership" over 75% or 55 BCM of the annual flow of the Nile.<sup>181</sup> Thereby, Egypt excessively requires Ethiopia to 'protect' its existing uses from 'significant harm' in conducting the GERD filling.<sup>182</sup> Egypt gages the GERD filling and operation within the needs and requirements of the AHD that sets its existing uses.<sup>183</sup> Given that Egypt built the AHD in tenacity that all upper riparians must adhere to the 1959 Agreement,<sup>184</sup>

<sup>176</sup> See *The second filling of the GERD will not impact our interests, assures Egypt's FM*, Egypt Independent (May 19, 2021). Available at: <https://egyptindependent.com/the-second-filling-of-the-gerd-will-not-impact-our-interests-assures-egypts-fm/> (Accessed on 21 May 2021); see also *GERD's second filing to cause 'water shock' for Egypt: Minister*, Egypt Independent (May 24, 2021). Available at: <https://egyptindependent.com/gerds-second-filing-to-cause-water-shock-for-egypt-minister/> (Accessed on 25 May 2021).

<sup>177</sup> Meshel, *Supra* note 106, at 164.

<sup>178</sup> *Id.*, at 167.

<sup>179</sup> Egypt's Letter to UNSC (19 June 2020), *supra* note 5, Annex, at 3, para. 2.

<sup>180</sup> Egypt's 'historic right' is associated to Herodotus's use of the term "Egypt is the gift of the Nile" that is distorted as "a codeword for the mythical absolute dependence of Egypt on the waters of the Nile that any reduction thereof would threaten the very survival of the country." Mekonnen, *From Tenuous Legal Argument*, *supra* note 21, at 237.

<sup>181</sup> *Ibid.*

<sup>182</sup> Egypt's Letter to UNSC (19 June 2020), *supra* note 5, Annex I, at 2, para 3.

<sup>183</sup> As discussed in Section 2 of this article, in the August 2019 Egypt's proposal demanded Ethiopia to release a minimum of 40 BCM of water during the GERD filling and to release the whole annual flow of the Blue Nile (49 BCM) during the GERD operation. This is aimed by Egypt to keep the AHD at 165 m-asl. See also Ethiopia's letter to UNSC (22 June 2020), *supra* note 8, at 12; Tekuya, *Sink or Swim*, *supra* note 60, 85-86; Davison, *supra* note 84.

<sup>184</sup> Hisham Eldardiry & Faisal Hossain, *Understanding Reservoir Operating Rules in the Transboundary Nile River Basin Using Macroscale Hydrologic Modeling with Satellite Measurements*, 20 NOVEMBER JOURNAL OF HYDROMETEOROLOGY 2253, 2255 (2019). See also the discussion in Section 1.1 of this article.

subjecting the GERD filling to its 'existing uses' reverberates its self-prized 'acquired right' or 'historic right' or 'water security'<sup>185</sup> to which Egypt clung to since the 1929 Agreement.

In a nutshell, the vicious circle of Egypt's claims in the Nile Basin found its way against Ethiopia in the GERD filling and operation: 1) from the outset, the 1959 Agreement established Egypt's self-awarded 'acquired right' that aimed at securing maximum storage of the Nile waters impounded in AHD/Lake Nasser; 2) in asserting 'water security' that existing uses must not be affected by upstream projects (like the GERD) on the Nile aims at maintaining unreduced water storage in AHD; 3) alleging the GERD filling and operation cause significant harm in reducing the Lake Nasser storage symbolizes 'acquired right' since it is the 1959 Agreement that predetermined the storage; and 4) labeling the GERD first stage filling as 'unilateral' made without prior-agreement with the downstream states is a self-grant of 'veto right'<sup>186</sup> which eventually leads to the first thread that started the circle. Thus, Egypt protracted these claims in a foundation of maintaining the *status quo* of inequity in the Nile Basin. This is a zero-sum to Ethiopia's interest in the Blue Nile and the GERD filling and operation.

In response to such Egyptian approaches, Ethiopia reiterated that Egyptian firmness to base impact assessments on its 'existing water uses' constitutes Egypt's "historic right" claimed that is built on bilateral colonial era treaties against which Ethiopia objected since 1950s.<sup>187</sup> Ethiopia denounced insistence on water developments in Ethiopia particularly the GERD and its filling to be scrutinized and reoriented based on Egypt's unilateral existing uses while the AHD reservoir is beyond doubling the GERD's reservoir size.<sup>188</sup> Thereby, Ethiopia maintains that it "has a legitimate right to develop and utilize its water resources" and that "Egypt's insistence on maintaining unjust colonial based treaties is the overarching impediment to the equitable and reasonable utilization of the Nile waters."<sup>189</sup>

## **5. GERD FILLING AND OPERATION UNDER THE DoP AND INTERNATIONAL WATER LAW: A 'UNILATERAL ACT' OR REALIZATION OF EQUITABLE USE?**

### **5.1 Context of the First Filling: is Ethiopia Required to Observe 'Prior-agreement' or to "Inform"?**

As the storyline of the current dispute on the GERD filling has been shown in Section 2, tripartite negotiations broken down when Egypt reported the matter to the UNSC in May 2020. Meanwhile, in June when the wet season came, Ethiopia conducted the first year filling plan. Egypt once again reported to the UNSC accusing Ethiopia that it acted unilaterally in filling the GERD without prior-agreement in violation of the DoP. Egypt asserted that the DoP only

<sup>185</sup> 'Water security' is another rebranding of the 'acquired right' claim whose roots is "in the 1929 Agreement which was reinforced by the 1959 Agreement." See Mekonnen, *Declaration of Principle*, *supra* note 46, at 258.

<sup>186</sup> See the full discussion in this regard in the next section (Section 5) *infra*. (It analyzes whether the first stage filling is unilaterally conducted or not.)

<sup>187</sup> Ethiopia's letter to UNSC (14 May 2020), *supra* note 6, Aide Memoire, at 12, para 33.

<sup>188</sup> Rep. of Ethiopia to the UN., *Letter dated 16 April 2021 from the Permanent Representative of Ethiopia to the United Nations addressed to the President of the Security Council*, UN Doc. S/2021/376 (16 April 2021), at 10-11, para 27. [Hereinafter: Ethiopia's Letter to the UNSC (16 April 2021)] Ethiopia, in the letters, also claims that such uses foreclosures of its equitable share by illegal and unilateral downstream water works.

<sup>189</sup> Ethiopia's letter to UNSC (14 May 2020), *supra* note 6, Aide Memoire, at 6 para 5.



allowed Ethiopia “to proceed with the construction of the GERD while the three states parties are negotiating on the rules governing the filling and operation of the GERD.”<sup>190</sup> Here, Egypt creates artificial dichotomy between the GERD construction and the filling as “two different things” alleging that the filling may not be carried on until such time that the GERD construction is completed.<sup>191</sup> Ethiopia utterly rejected this Egyptian claim. The following paragraphs assess these contentious views on Article V of the DoP that is at the heart of this dispute.

As highlighted previously, Article V of the DoP stipulates general rules on the GERD first filling and annual operation. It requires the GERD first filling and operation be guided by joint impact assessment studies based on the IPOE’s recommendations and the TNC’s confirmation. Based on findings of such joint impact studies the three states should “[a]gree on guidelines and rules on the first filling of the GERD which shall cover all different scenarios, in parallel with the construction of GERD.”<sup>192</sup> First of all, this provision is sufficiently clear that the first filling can be conducted alongside the construction as long as the filling is in line with joint studies. Hence, where Ethiopia intends to begin the first filling during the GERD construction, Article 5 requires joint studies to involve such a scenario in the construction process. In this regard, from the outset, the NISRG’s finding did not involve such restrictions except demanding the initial filling to be stage based to which Ethiopia adhered in the first stage filling.<sup>193</sup>

Going forth to address the ‘prior-agreement’ requirement Egypt avers,<sup>194</sup> analyzing Article V blended with other provisions of the DoP as well as the international water law regime and case laws is crucial. As a general rule, Article V does not regulate the GERD filling in solitary but in consistency with other provisions of the DoP. Most importantly, it correlates to the two basic principles – “equitable and reasonable use” and “not to cause significant harm” that are based on “sovereign equality” that are provided in the DoP.<sup>195</sup> These principles inherently negate ‘veto right’ or ‘prior-agreement’ in the utilization of international shared waters.<sup>196</sup>

Prohibiting Ethiopia from filling the GERD unless with ‘prior-agreement’ put its sovereignty and right to equitably use the Blue Nile at the veto mercy of the two downstream states. This entails ‘win-lose’ (lose to Ethiopia) and refutes its basic right to equitable use. This is not the very spirit of the DoP. The DoP rather requires the three riparians to negotiate “with spirit of cooperation,”<sup>197</sup> “common understanding, mutual benefit, *good faith, win-win, and principles of international law.*”<sup>198</sup> In this regard, the DoP remains silent as to what will follow if the three states failed to reach at an agreement on the guidelines and rules on the filling. Thus the DoP is only recommending the three states to agree than to oblige prior agreement.<sup>199</sup> This permits

<sup>190</sup> Egypt’s Letter to UNSC (19 June 2020), *supra* note 5, Annex I, at 1. *See also* Egypt’s Letter to UNSC (04 May 2020), *supra* note 5, Aide Memoire, at 9.

<sup>191</sup> Egypt’s Letter to UNSC (19 June 2020), *supra* note 5, Annex I, at 1.

<sup>192</sup> DoP, *supra* note 75, Article V, para. 1 & 2.A.

<sup>193</sup> Recall the discussion on Section 2 of this article.

<sup>194</sup> In this regard Sudan also reiterated reaching at ‘prior agreement’ before Ethiopia conducted the filling. *See* Sudan’s Letter to UNSC (2 June 2020), *supra* note 74, *Enclosure*, at 6 & 12.

<sup>195</sup> DoP, *supra* note 75, Articles: IV, III, IX.

<sup>196</sup> *See* McCaffrey, *The contribution of the UNWC*, *supra* note 115, at 256.

<sup>197</sup> DoP, *supra* note 75, Article V, para. 2.

<sup>198</sup> *Id.*, Article I. (*Italic mine*)

<sup>199</sup> *See* Tekuya, *Sink or Swim*, *supra* note 60, at 97; *see also* Mahemud T. Tekuya, *Governing the Nile under Climatic Uncertainty: the Need for a Climate-Proof Basin-Wide Treaty*, 59 NAT. RESOURCES J 321, 342 (2019).

Ethiopia to conduct the filling without an agreement based on the international rules that “everything which is not prohibited is permitted.”<sup>200</sup>

Moreover, fundamental principles of international water law, case laws as well as international practices do not guarantee riparians a ‘veto right’ to infringe equality of sovereignty.<sup>201</sup> Further, in hydropower projects, the international practice does not confer riparian states with ‘veto right’ in the utilization of internationally shared waters for hydraulic power works by another riparian.<sup>202</sup> Therefore, the GERD filling and operation cannot be subject to prior agreement as “*condition of a prior agreement cannot be established as a custom, even less as a general principle of law.*”<sup>203</sup>

As for its assertion on Article 3 of the 1902 Border Agreement,<sup>204</sup> Egypt may not legally invoke this agreement.<sup>205</sup> Though Sudan may invoke it,<sup>206</sup> as it has been addressed previously, Article 3 does not impose ‘veto’ of Sudan on Ethiopia since GERD filling and operation, particularly the first stage filling do not totally block flow of the Blue Nile. Even though Ethiopia signed the 1902 Agreement and the DoP, existence of such agreements may not be presumed to put the duty to prior-agreement for future projects as this implies loss of right to negotiate for future agreements.<sup>207</sup> Otherwise, interpretation of Article 3 of the 1902 Border Agreement and Article 5 of the DoP cannot be set up against Ethiopia’s “basic right” to equitable and reasonable utilization in the GERD filling.<sup>208</sup>

Rather, the obligation of Ethiopia before conducting the GERD fillings is “exchange of information and data”<sup>209</sup> as provided under the DoP. This requirement of “exchange of

<sup>200</sup> Tekuya, *Sink or Swim*, *supra* note 60, at 97.

<sup>201</sup> Lake Lanoux Arbitration (France v. Spain) (1957) 12 R.I.A.A. 281; 24 I.L.R. 101 Arbitral Tribunal (November 16, 1957), at 25. [Hereinafter, *Lake Lanoux Case*] (Noting, in the utilization of international watercourses where sovereignty of states is equal, “[c]ustomary international law ... does not supply evidence of a kind to orient the interpretation of [agreements] ... favouring the necessity for prior agreement; even less does it permit ... to conclude that there exists a general principle of law or a custom to this effect.”) *See also* McCaffrey, *The contribution of the UNWC*, *supra* note 115, at 256.

<sup>202</sup> *See* for example the experience in The 1923 Geneva Multilateral Convention on the Development of Hydraulic Power Affecting More than One State. Article 1 reads: “[the convention] in no way alters the freedom of each State, within the framework of international law, to carry out on its territory all operations for the development of hydraulic power which it desires.” (Bold mine) This is also confirmed in *Lake Lanoux Case*, *supra* note 201, at 25.

<sup>203</sup> *Lake Lanoux Case*, *supra* note 201, at 25. (Italic added)

<sup>204</sup> Egypt’s Letter to UNSC (19 June 2020), *supra* note 5, Annex I, at 2-3.

<sup>205</sup> In this regard, recall the discussion in Section 3.3 of this article on the 1902 Agreement.

<sup>206</sup> Since Egypt and Sudan committed to stand together in the 1959 Agreement against upstream developments, Sudan may invoke the 1902 Border Agreement against Ethiopia. *See* The 1959 Agreement, *supra* note 24, Article 5.

<sup>207</sup> *Lake Lanoux Case*, *supra* note 201, at 28. “If these engagements were to bind them unconditionally until the conclusion of an agreement, they would, by signing them, lose the very right to negotiate; this cannot be presumed.”

<sup>208</sup> The ICJ held that a riparian state may not lose its “basic right” to equitable and reasonable use by entering into an agreement. *See, GabCikovo-Nagymaros Case*, *supra* note 109, at 56. para 86, *see also* at 54. para 78.

<sup>209</sup> DoP, *supra* note 75, Article 7. It states that the three countries are obliged to exchange information and data, in good faith and timely, for the TNC joint studies.

information and data” is the key feature of the DoP<sup>210</sup> as opposed to the principle of “notification” in the UNWCC<sup>211</sup> and case laws.<sup>212</sup> Otherwise, action towards “notifying” the two states could imply recognition to colonial agreements and the 1902 Agreement that is not valid.<sup>213</sup> Nor did the two riparians notified or consulted Ethiopia during their unilateral water developments; thereby, in a scenario where there is no legal obligation provided in the DoP or any other binding instrument to do so, Ethiopia cannot be obliged to notify and pass through consultation and negotiation.<sup>214</sup>

In this regard, as pointed out earlier, Egypt as well as Sudan admitted that Ethiopia proposed guidelines and rules for the GERD initial filling up to 595 m-asl on 10 April 2020.<sup>215</sup> This may be taken as “prior notification” made prior to the filling that called for cooperation on the filling and operation; however, it has been broken down by Egypt’s demand for ‘veto’ and ‘water security.’ In this regard, as long as the two states do not cooperate, what legally expected of Ethiopia is “to continue filling the GERD without an agreement with Sudan and Egypt” while keeping “exchange of information and data” as no legal instrument may preclude it from conducting the filling and annual operation unilaterally.<sup>216</sup>

## 5.2 Equitability of the GERD Filling and Operation

The other most important issue is equitability of the GERD first stage filling. As encapsulated in Section 3, Ethiopia’s right to equitable and reasonable use in the Nile Basin is well recognized in international customs as well as the DoP.<sup>217</sup> In this regard this sub-section analyzes equitability of the first stage filling considering the natural hydrologic, socio-economic and other facts in

<sup>210</sup> Salman, 2017, *supra* note 76, at 215. The DoP in Article 7 follows the path of the 2010 CFA that does not include “notification” obligation on the riparians but only “exchange of data and information” under Article 10. Egypt and Sudan had been insisting the inclusion of “notification” in the CFA while Ethiopia strongly opposed. *See also*, SALMAN M.A SALMAN, NOTIFICATION CONCERNING PLANNED MEASURES ON SHARED WATERCOURSES: SYNERGIES BETWEEN THE WATERCOURSE CONVENTION AND THE WORLD BANK POLICIES AND PRACTICE 4 (BRILL, LEIDEN, Boston, USA) (2009).

<sup>211</sup> In this regard, the UNWCC under Articles 11 through 19 provide details of notification, consultation and negotiation on planned measures. It obliges a state to notify, as to its planned project, other riparians which could significantly be affected by the project. Such prior notifications enable states to know at early stages any project which might affect their interest so that they consult and cooperate in response to the possible significant adverse impact. *See* UNWCC, *supra* note 105, Articles 11-19. *See also* ALISTER *et al.* *supra* note 112, at 134.

<sup>212</sup> *Lake Lanoux Case*, *supra* note 201, at 25.

<sup>213</sup> *See* Salman MA Salman, *Mediation of international water disputes – The Indus, the Jordan and the Nile Basins Interventions*. In: INTERNATIONAL LAW AND FRESHWATER: THE MULTIPLE CHALLENGES 391 (Boisson de Chazourens L, Leb C, Tignino M (eds), Edward Elgar Publishing Ltd, Cheltenham, 2013).

<sup>214</sup> *See Id.*, at 397. Both downstream and upstream states could cause significant harm to each other, this obligation to notify was also required of Egypt and Sudan; however, they never observed it.

<sup>215</sup> Egypt’s Letter to UNSC (19 June 2020), *supra* note 5, Annex I, at 2; Ethiopia’s letter to UNSC (14 May 2020), *supra* note 6, Aide Memoire, at 10.

<sup>216</sup> Tekuya, *Sink or Swim*, *supra* note 60, at 115. *See also* D.Y Messele, *supra* note 69, at 540. In a situation where there is no basin wide legal framework, Ethiopia has a legitimate right to build and operate dams unilaterally and other riparians may only bring legal action against it if they sustain significant harm due to operation of the dam.

<sup>217</sup> *See* DoP, *supra* note 75, Article III; UNWCC, *supra* note 115, Article 5. *See also* ILC Commentary, *supra* note 113, at 98 (Noting that equitable utilization is the fundamental right of all riparian states “to the use of the watercourse that are *qualitatively equal to, and correlative with, those of other watercourse States.*” (Italic mine)

Ethiopia and the BNB in correlation to the factors that determine equitability and reasonability of water uses as provided in the DoP<sup>218</sup> and the international water law regime as well.

It has been established that there is clear asymmetric recorded existing use of the Nile waters among the three riparians of BNB where Ethiopia has too little use of the Blue Nile despite its enormous hydropower potential.<sup>219</sup> Besides to the fact that over half of the country's population (65 million) has no access to electricity; Ethiopia is currently in huge energy deficit with power demand rising by 19% every year where its existing gross installed capacity of 4425 MW fails to meet such serious needs.<sup>220</sup> To this end, the self-financed \$5 billion GERD project would generate 15,692 GWh/yr of clean energy<sup>221</sup> that is crucial for Ethiopia's vital socio-economic development.<sup>222</sup> The country has no alternative means of reliable clean energy production with the required magnitude; nor do any of the river basins in the country have comparable hydropower viability except the Blue Nile.<sup>223</sup> The GERD's size of total storage capacity of 74 BCM of water, with active storage of 59 BCM of water is highly correlated to the aforementioned socio-economic needs.<sup>224</sup> The dam's size is also confirmed by the IPoE to be consistent with the inflow of the Blue Nile at the GERD site.<sup>225</sup>

Aforementioned evidences concerning current and potential uses of the country as well as the hydrologic, geographic and socio-economic facts together coincide with the holistic weighting of factors that determine equitable apportionment of shared waters.<sup>226</sup> Therefore, in correlation to the holistic factors, at least in principle, the GERD first stage filling is within Ethiopia's right to exercise its equitable and reasonable use. However, the DoP's rules on the GERD filling provide no volumetric allocation of water of the Blue Nile among the three riparians. Nevertheless, the first stage filling retained 18.4 BCM of water of the Blue Nile in two years/phases.

<sup>218</sup> DoP, *supra* note 75, Article IV.

<sup>219</sup> The Blue Nile in Ethiopia constitutes over 43% of the country's annual surface water in the basin coverage of about 200,000 km<sup>3</sup> where over 25% of its population settled. *See* the discussion in Section 1.3 of this article. *See also* MoWE 2001, *supra* note 51, at 36; MoWR 2002: 2, *supra* note 50, at 12; Awulachew, S. B *et al.* Water Resources and Irrigation Development in Ethiopia, *Colombo, Sri Lanka: International Water Management Institute*. 78p. (working paper 123), p. 10 (2007).; *See also* Kendie, *supra* note 2, at 143.

<sup>220</sup> Ethiopia's letter to UNSC (14 May 2020), *supra* note 6, Aide Memoire, at 11. *Cf.* MoWIE 2017, *supra* note 52.

<sup>221</sup> IPoE, *supra* note 61, at 9 & 42; *see also* MoWIE 2017, *supra* note 52.

<sup>222</sup> The GERD is vital for "Ethiopia's economic potential on which the survival of its people hinges may only be unlocked through the supply of sufficient energy to improve agriculture and realize structural economic transformation through industrialization." Ethiopia's letter to UNSC (14 May 2020), *supra* note 6, at 11.

<sup>223</sup> *See* MoWE 2001, *supra* note 51, at 36; MoWIE 2017, *supra* note 52. *See also* Nikos Tsafos & Lachlan Carey, *Energy Transition Strategies: Ethiopia's Low-Carbon Development Pathway*", Center for Strategic and International Studies (CSIS), p. 11. (2020). Available at: <https://www.jstor.org/stable/resrep27034.6> (Accessed on 14 May 2021). (Noting, the GERD generates a zero carbon emitting energy that will decrease Green House Gas (GHG). 90% of energy consumption in rural areas is based on GHG emission.)

<sup>224</sup> *See* MoWIE 2017, *supra* note 52.

<sup>225</sup> IPoE, *supra* note 61, at 38.

<sup>226</sup> DoP, *supra* note 75, Art. IV; UNWCC, *supra* note 105, Art. 6. The GERD also offers benefits to riparians of the Nile in trading cheap electricity. Thus, as the filling progressed it has positive effect on other riparians. *See also generally* Agathe Maupin, *Energy Dialogues in Africa: is the Grand Ethiopian Renaissance Dam Transforming Ethiopia's Regional Role?* SAIIA OCCASIONAL PAPER (228) 11-12 (2016). Available at: <https://www.jstor.org/stable/resrep28379> (Accessed on 14 May 2021).

At this juncture, despite absence of determined water sharing rule among the riparians, as discussed in earlier sections, there exist volumetric figures concerning: the mean annual flow of the Nile (84 BCM); the mean annual flow the Blue Nile (49 BCM),<sup>227</sup> the water share Egypt and Sudan claims to have (55.5 BCM and 18.5 BCM, respectively),<sup>228</sup> and Ethiopia's first filling plan<sup>229</sup> (18.5 BCM in the first stage and 10 BCM in each of the second, third and fourth filling stages). As opposed to the total appropriation of the Nile waters by Egypt and Sudan with negative contribution to the flow; for Ethiopia, who feeds 59% of the Nile from the Blue Nile that counts 43% its surface water, retaining 18.4 BCM of water in the GERD first stage filling in two hydrological years may be taken as utterly equitable.<sup>230</sup> One may argue otherwise, as Egypt does, that the filling may not be equitable stressing its potential impacts on downstream 'existing uses.'<sup>231</sup> However, the filling does not actually caused significant harm.<sup>232</sup>

Even when the GERD filling causes significant harm, its equitability may not be discarded taking only a strand factor of significant impact on 'existing use.' The legality of the filling, as international experiences and case laws show, may not be determined by the interest of Egypt. In the shared water resource, there is no international experience justifying such prioritization of uses in subjecting a potential use to the needs and requirements of existing uses.<sup>233</sup> Both the DoP and the UNWCC considers existing and potential uses jointly,<sup>234</sup> which reaffirms the factors as holistic and to be considered equally and prioritize neither of them.<sup>235</sup>

What bind Ethiopia in relation to the two downstream states with respect to the GERD filling and operation rather is the DoP as well as the fundamental principles of International Water Law – equitable and reasonable use and no significant harm. The DoP's rule on equitable utilization basically "lies outside the bounds of the 1959 agreement."<sup>236</sup> Both Egypt and Sudan, devoid of the 1929 and 1959 Agreements, have nothing but the right to equitable and reasonable use as Ethiopia has. Therefore, the 18.5 BCM of water retained in the first stage filling may be regarded to be illegal or inequitable, only if Egypt's and Sudan's self-granted 'acquired right' to entire flow of the Nile is taken as legal or equitable. This further reinforces equitability of the GERD first stage filling for Ethiopia who has too little existing use of its chief river. This also holds valid for upcoming stage based fillings too.

<sup>227</sup> Stebek, *supra* note 3, at 34. Cf. ARSANO, *supra* note 1, at 82.

<sup>228</sup> See the 1959 Agreement, *supra* note 24, Article 2(4).

<sup>229</sup> See Ethiopia's Draft Guidelines for the GERD First Filling, *supra* note 7, Annex I.

<sup>230</sup> See Media stakeout of Seleshi Bekele, *supra* note 13.

<sup>231</sup> Egypt's Letter to UNSC (19 June 2020), *supra* note 5, Annex I, at 2; Sudan's Letter to UNSC (2 June 2020), *supra* note 74, *enclosure*, at 8.

<sup>232</sup> In this regard, as it can be recalled from Section 4.2. of this article, the first stage filling does not cause significant harm to downstream riparians especially on Egypt's hydrology as well as existing uses.

<sup>233</sup> *Lake Lanoux Case*, *supra* note 201, at 33. In *Lake Lanoux*, the Tribunal held that Spain (the downstream country) may not demand France (an upstream) to undertake its water works in the interests of Spain. "On her side, Spain cannot invoke a right to insist on a development of Lake Lanoux based on the needs of Spanish agriculture." In this regard, the UNWCC, *supra* note 105, also maintains the same under Article 10(1).

<sup>234</sup> DoP, *supra* note 75, Art. IV(e); UNWCC, *supra* note 105, Art. 6(1)(e).

<sup>235</sup> UNWCC, *supra* note 105, Article 10(1). The Convention also maintains that "[i]n the absence of agreement or custom to the contrary, no use of an international watercourse enjoys inherent priority over other uses."

<sup>236</sup> Ana Elisa Cascão & Alan Nicol, *GERD: new norms of cooperation in the Nile Basin?*, 41:4 WATER INTERNATIONAL, 550, 567 (2016).

However, such downstream 'existing uses' would have serious impact on equitable use right of Ethiopia in the GERD filling and operation as well as its future water developments. This concern is addressed in the following section.

## 6. EGYPT'S PAST AND CURRENT ACTIONS: SIGNIFICANT HARM ON ETHIOPIA'S EQUITABLE WATER SHARE IN THE GERD AND BEYOND?

Downstream 'existing uses' especially Egypt's continuous unilateral water developments went too far to such extent it forecloses all waters of the Nile to the detriment of other riparians particularly Ethiopia's equitable share.<sup>237</sup> Such Egyptian past unilateral water works left no drop of water to existing and future reasonable uses of Ethiopia in the Nile particularly the GERD. Besides, as discussed in previous sections, Egypt resolute to protect such unilaterally developed existing uses standing antagonistic to the GERD filling and operation by Ethiopia.<sup>238</sup>

As one of the factors to determine equitable and reasonable use,<sup>239</sup> existing uses have direct impact on Ethiopia's water share from the Nile. As illustrated by McCaffrey, since equitable use does not imply equal use, "where there is significant downstream development, consideration of all relevant factors is likely to lead to constraints on the upstream state's freedom to use and develop the watercourse, in order to achieve an equitable balance between the uses in the respective countries."<sup>240</sup> In other words, Ethiopia's share will seriously be dwindled than it would have gotten had Egypt's existing uses were developed equitably. Hence, the capacity and operation of projects by Ethiopia and its due share of the Blue Nile will always be haunted by downstream developments.<sup>241</sup> In developing such unilateral water works, Egypt failed to observe its obligation to equitably and reasonably utilize the Nile.<sup>242</sup> Consequently, such Egyptian existing uses foreclose the entire flow of the Nile depriving Ethiopia of its rightful equitable share from the Nile violating proportionality and good neighborliness – this constitutes significant harm on the legal right of Ethiopia to equitable use.<sup>243</sup>

Particularly, in the GERD filling, Egypt's existing uses sway the GERD fillings to adhere to the storage and operation capacity of downstream projects.<sup>244</sup> Even worse, basing on such existing

<sup>237</sup> See discussion in Section 1.1 of this article. Egypt unilaterally developed the AHD (in 1970) as well as land reclamation projects (since 1990s) which demand more than 75.5 BCM of the Nile waters beyond its mean annual flow (74 BCM) leaving the 18.5 BCM that Sudan 'acquired right' and the 10 BCM losses through seepage and evaporation.

<sup>238</sup> Recall discussions in Section 3 and Section 4 of this article to uncover how Egypt has been determined to curtail Ethiopia's use of its chief water resource. See also Egypt's Letter to UNSC (19 June 2020), *supra* note 5, Annex I, at 2-3, para. 2.

<sup>239</sup> DoP, *supra* note 75, Art. III; UNWCC, *supra* note 105, Art. 6.

<sup>240</sup> MCCAFFREY, *supra* note 110, at 412.

<sup>241</sup> Mekonnen, *Declaration of Principle*, *supra* note 46, at 262.

<sup>242</sup> See DoP, *supra* note 75, Art. III. In this regard the UNWCC, *supra* note 105, Article 5 obliges all riparians to equitably use internationally shared waters. See also ILC Commentary, *supra* note 113, at 101.

<sup>243</sup> See ICJ, *GabCikovo-Nagymaros Case*, *supra* note 109, at 56 para 85; Cf. MCCAFFREY, *supra* note 110, at 411-12; (Analyzing the Swiss Supreme Court decision on *Zwilikon Dam Case*, notes that rights of the downstream and downstream is equal. Hence by foreclosing entire flow it is legally invalid for downstream states to demand continued flow of the river from upstream states undiminished.) See also Meshel, *supra* note 106, 166-7; Stebek, *supra* note 3, at 52.

<sup>244</sup> See *GabCikovo-Nagymaros Case*, *supra* note 109, at 56 para 85. (Stating "...by unilaterally assuming control of a shared resource, and thereby depriving [another riparian] of its right to an equitable and reasonable share of the



uses, Egypt demanded a normative compliance producing mechanism of treaties to institutionalize the *status quo* it has full control of the Nile waters in Washington Deal.<sup>245</sup> When it failed, Egypt used obstructionist and stalling tactics, and securitized the GERD first stage filling, to *de-jure* or legal harm to Ethiopia's "basic right" to equitable and reasonable utilization.<sup>246</sup>

### CONCLUDING REMARKS

The main objective of this article was to assess the legality and equitability of the GERD first filling and operation, and reveal Egypt's allegations and the ramifications on Ethiopia's interest from international law perspectives. It explored the storyline how downstream hegemonic control of the Nile endured through GERD launch and its filling and operation stage unfolded in the first stage filling Ethiopia conducted amidst intense securitization and internationalization by Egypt having Sudan on its side. The article revealed Egypt's accusations against GERD filling and operation revolve all over again to secure its existing uses at the bedrock of which lays 'historic and natural right' from vicious interpretations of the DoP and the two principles of international water law.

This article also asserted that principles, instruments and case laws of the international water law regime as well as the rules of the DoP clearly reinforced the legality of the GERD filling as conducted by Ethiopia with due regard to procedural steps in realizing its "basic right" to equitably use the Blue Nile. This also holds true for the refilling and annual operation of GERD. However, it is worth noting that Ethiopia's right in the subsequent filling and operation of the GERD as well as future/potential uses in the Blue Nile basin are significantly threatened by Egypt's unilaterally developed existing uses and its current hegemonic steps against the GERD first stage filling to maintain the *status quo* of its full control of the Nile. This puts Ethiopia in threat of significant harm to be deprived of its equitable share in the Nile Basin due to Egypt's existing uses which the latter swore to secure in its current hegemonic tactics.

The stage of negotiations that followed the first stage filling is under the African Union auspice as instructed by the UNSC. However, the trilateral negotiations on the GERD are still adamant to resolve the issue due to unprecedented and unjustified demands of the two downstream states who continue stalling the negotiation process.<sup>247</sup> However, the trilateral negotiation on the GERD filling and annual operation would continue till it is resolved on an agreement. This possible scenario of signing of a binding agreement on the GERD filling and annual operation

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natural resource of the [shared watercourse] with the continuing effect of the diversion of these waters on the ecology of the riparian area ... failed to respect the proportionality which is required by international law." (Emphasis added)

<sup>245</sup> See Tekuya, *Sink or Swim*, *supra* note 60, at 71. This was actually tried in the 'Washington Deal' or 'Washington Agreement' that completely ignored the interest of Ethiopia in the GERD filling that demanding Ethiopia to release water from the reservoir during the drought periods for the ultimate security of Lake Nasser storage. The 'Agreement' tried to turn the GERD reservoir to be Egypt's water store up hills in Ethiopian territory.

<sup>246</sup> See generally Mekonnen, *From Tenuous Legal Argument*, *supra* note 21, at 234-6. Noting, hegemonic tactics of sabotaging rights of other riparians that includes stalling tactics whereby the hegemon painstakingly induce its unwarranted interests to be respected by other riparians against their right to equitable use.

<sup>247</sup> See Ethiopia's Letter to the UNSC (16 April 2021), *supra* note 188, at. 7, 11-12 (Noting: the disruption of the AU-led negotiation process by the two downstream states).

could have negative ramification on Ethiopia's equitable right to utilize the Nile. In such scenario, though it would be a daunting task to secure Ethiopia's interests on the Nile basin as well as the Blue Nile in the filling and operation of GERD, in the way forward, the author suggests three concerns to be taken cautiously during negotiations that could result to signing of a binding agreement.

Firstly, entering into an agreement on the GERD filling and operation would be expensive for Ethiopia as the two downstream states never showed softening of their 'historic right' claim which could compromise the sustainable filling and operation of the GERD to its installed capacity. This could be more expensive for Ethiopia than the power trade the country may lose from the Sudan or Egypt with lower generating capacity of the dam. It could also put a potential agreement on the GERD filling susceptible to another mile of securitization and misinterpretations as it suffered in the first stage filling. Instead, because the GERD filling and operation involves technical issue, negotiations in this regard should follow the DoP's pattern, though not in the way it is misinterpreted by Egypt and Sudan. Ethiopia should stick with a framework agreement like DoP's Article V that provides general guidelines and rules on technical aspects based on studies and recommendations of independent experts. In doing so, based on such studies and recommendations, Ethiopia could have a better deal to conduct fillings even in unforeseeable hydrologic periods like drought where there exists lower flow but the GERD can be maintained operational based on equitability and reasonability principles.

Secondly, though the question in dialogue seems to be GERD fillings and operation, downstream hydro-hegemony lingers behind it with a grand aim of maintaining control of the Basin by pressuring Ethiopia to enter into compliance producing legal instruments. Therefore, negotiations on the filling and operation of GERD should be ensured that they do not relate to water apportionment issues. In this regard, the author believes that Ethiopia's approach to negotiate on an agreement concerning "filling only rule"<sup>248</sup> is on the right track. However, during such negotiations technical water sharing could arise when the GERD's fillings is correlated to storages capacity of downstream dams particularly the AHD and Merowe Dam, which virtually represent 'acquired rights' of Egypt and Sudan respectively. Indulging into such correlations would create unnecessary legal complication and trap of institutionalizing 'acquired rights' of Egypt and Sudan. Consequently, signing a binding agreement on such issues would be setting a ticking time bomb to quash Ethiopia's future water developments in the Blue Nile and beyond.

Therefore, as a third concern, should such water sharing issues arise in the GERD filling and annual operation; the negotiations must base the international regime governing shared watercourses. The regime recognizes rights of all the three riparians to equitably utilize the Nile and provides mitigating mechanisms to minimize causing of significant harm on their legal rights. This suggests that Ethiopia's leverage, in this regard, is to demand rejoining of the two downstream states to the basin wide multilateral cooperative framework, i.e the CFA, guided by the equitable water sharing principle within international shared watercourse regime.

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<sup>248</sup> *Id.*, at 7, para. 8.