International Law and the Challenges of Transboundary Watercourses Governance: The Blue Nile Dam Controversy

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Abstract

Water—as an international public good—is at the core of sustainable development, and it is critical for socioeconomic development, healthy ecosystems, and for human survival itself. Many of river basin international organizations have been established by riparian States with the purpose of more effectively and sustainably govern their shared water resources. However, their achievements in ensuring sustainability in the use of water resources in their respective basins vary considerably: while some seem to be more successful in solving water-specific collective action problems and sustainability challenges, another fail. In international law, States enjoy sovereignty to exploit natural resources on their territory, insofar as such exploitation does not cause harm to neighboring States. The 1997 United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses entered into force on August 17, 2014. However, three of upstream and downstream African States: Egypt, Sudan, and Ethiopia have not yet joined it. Sudan and Egypt have been advantaged by the 1959 Treaty signed between the two countries, thus totally excluding the other Nile Basin States. The construction of the Grand Ethiopian Renaissance Dam (Blue Nile Dam) is now a national pride for Ethiopia which will generate power and constitute a better supply in electricity. If it is considered as a significant step in terms of sustainable development for the country and Africa as well, it is regarded in Egypt as an imminent danger to its Nile water. This study analysis the principles of international law related to transboundary watercourses governance in analyzing the 1997 United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses (UNWC) (Part I), and in focusing on the impact of the Grand Ethiopian Renaissance Dam in the mutual relations between the Nile river riparian States (Part II).

Keywords

International water law • 1997 United Nations watercourses convention • Sovereignty • Grand Ethiopian renaissance dam • Nile basin states • Sustainable development • Countermeasures • Use of force

1 Introduction

For the States, water is a resource of the territory, and therefore the territorial sovereignty must be exerted on it in all independence. Like the oil deposits, it is part of the territory of the state. Like the mountain ranges or other elements of the territory, even if the rivers cross them without stopping there and here come across the difficulty of finding an agreement on how to share them with other states.[1]

The principle of sustainable development illustrates the will to respect both economic and ecological considerations. There is no unanimous agreement as to its definition, but its origins and evolution make it possible to better understand its usefulness. This concept was coined in the United Nations framework to try to reconcile the differing views of both industrialized and developing countries on the importance of environmental concerns in their respective economic policies. According to the report of the World Commission on Environment and Development entitled Our Common Future 1987, it also aims to make the needs of the present, particularly in developing countries, compatible with the interests of future generations. This requirement is repeated in Principle 2 of Rio de Janeiro Conference.

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[1]Boutet and Lasserre (2002).

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It is essential to mention this principle, not only because it deserves its place in reflections on the international law of freshwater resources, but also because it has already manifested peculiarities in the field of aquatic resources.

Regrettably, such a principle does not appear clearly in the 1997 UN Convention. This is not surprising, however, according to Mondange.[2] Indeed, States have always manifested their intention to limit their sovereignty. The concept of sustainable development necessarily requires the establishment of regional solidarity. Although this concept appears as such in other treaties, its absence in the 1997 Convention is not surprising.[3]

The concept could, however, have the advantage of going beyond or at least clarifying the limitation of sovereignty. Indeed, it seems to be more readily applicable to a global context of aquatic resources whose use is mostly related to economic activities, that theories of limited sovereignty and limited territorial integrity seem to be tied to a border context. Proximity. The idea of sustainability fits with this concept not only in space but also in time by taking into account future generations.

Permanent sovereignty over natural resources is one of the significant aspects of the right to development. The classic provision supporting this principle remains Article 2 of the 1974 Charter of Economic Rights and Duties of States, which states that "Every State has and shall freely exercise full permanent sovereignty, including possession, use, and disposal, over all its wealth, natural resources and economic activities. Concerning the right to development, the text of Mar del Plata, about the right of access to water makes it possible to better understand this notion from the UN General Assembly. Therefore, it is posed as a principle that "all peoples, regardless of their stage of development and their economic and social situation, have the right to have access to information. Drinking water of sufficient quantity and quality to meet their essential needs […] it is universally recognized that the availability of this element is essential to human life and the full development of human life. As an individual and as a member of society".

Such a right is claimed by the States to increase their economic growth. In international watercourses, this right has taken a conception. Proponents of the right to development "claim a rule prohibiting the damage resulting from preventing an upstream State from developing its economy, since the rule prohibiting damage to the territory of a downstream State is finding thus reversed".[4] While the right to development ignoring the environment was perceived as legitimate in the past, this is no longer the case today, and the right to development as it was perceived is no longer tenable.

The fundamental principle of international law is the absolute sovereignty of each State, as opposed to all others, in its territory. The jurisdiction of the State in its territory is necessarily exclusive and absolute. Its only limitations are those he imposes on itself. The State is, therefore, free to use the water found on its territory as it sees fit: the resource is not at all conceived as typical.[5]

This doctrine of absolute territorial sovereignty over the territory and its resources is still implicitly invoked nowadays by Turkey and Tajikistan in particular. The latter has even planned to charge to its neighbor downstream, Uzbekistan, the water of Syr Daria and Amou Daria crossing its territory. Both for the Turkish and Tajic governments, we are touching the extreme limits of the use of this doctrine, which led the first to consider exercising a certain control over the use of water made by other residents and the second to make payment for the simple fact that the current source is on its territory.[6]

To explain the challenges facing international law in transboundary watercourses governance, we will analyze the doctrines, principles and practices of international law through the 1997 UN Watercourses Convention, and the 4 legal doctrines of international watercourses law (Part I), before studying the impact of the Grand Ethiopian Renaissance Dam on the upstream and downstream riparian States in Nile Basin (Part II).

2 The 1997 United Nations Convention on the Law of the Non-navigational Uses of International Watercourses (UNWC): A Legal Framework to Regulate Water Share Problems and Settle Disputes?

It is essential to know that there are 263 international watercourses in the world,[7] which concerns 40% of the world's population and accounts for almost 60% of the global freshwater volume according to WWF. However, the rivers thus shared between several States invite the least harmful use and management of water for the various countries concerned by the watercourse in order to avoid any interstate tension. Downstream states are thus particularly vulnerable and dependent on upstream states. In this respect, the very fact that Ethiopia, India, China, or Turkey, the upstream states of major international rivers, abstained or

[2]Mondange (2009), p.70.
[3]Ibid.
[4]Sohnle (2006).
[5]Lazerwitz (1993).
[6]Boutet and Lasserre (2002).
[7]Veber (2014).

voted against the 1997 resolution and did not ratify the text is not surprising. More generally, the position of several States about water sharing and the right to water prevents us from finding, at present, satisfactory solutions to address the many water issues.

In 1970, as a response to the need for more explicit rules to govern transboundary waters, the UN asked the International Law Commission (ILC) to codify and develop the applicable rules to the development and management of international watercourses.[8]

Until the 1980s, international water law was limited to the specific uses of navigation and hydroelectricity.[9] The implementation of international water law, however, remains strictly dependent on the sovereignty of the shared watercourse States.[10]

More than 20 years later, the raised questions are the same: who has the right to use what water—when, why, and how? Is the UN Watercourses Convention an adequate instrument to answer these complex questions? How can watercourses States use the Convention to prevent and, if necessary, resolve international disputes over water?

This Convention has behind it a very long history. Already in 1959, the General Assembly of the United Nations had asked the Secretary-General of the United Nations to undertake a study on the problem of sharing international water resources.

In 1970, it recommended to the United Nations Commission on International Law, composed of 34 experts, to examine legal questions governing relations between States —to study the law relating to the use of railway tracks; water for purposes other than navigation.

It will take 27 years for the work of this commission to lead in 1997 to the adoption of this Convention, known as New York, and another 17 years to come into force.

The term "Watercourse" as expressed in Article 2(a) of the Convention, means that it applies, watercourse systems that cross international boundaries, including major watercourses, their tributaries, connected lakes and aquifers. Generally, components of freshwater systems that may fall under the Convention's scope, when connected include rivers, lakes, aquifers, glaciers, reservoirs, and canals.

By "Watercourse", the Convention refers to a system of surface water and groundwater constituting, because of their physical relations, a unitary unit and usually terminating in a common point of arrival. The Convention, therefore, seeks to fill the existing legal vacuum about international watercourses on the one hand and their use for purposes other than navigation on the other.

Before the adoption of this Convention, there was no international framework for shared watercourses. According to Marion Veber, at present, about 40% of international watercourses benefit from a cooperative management agreement. However, these agreements are often mostly limited, either in the rules of the foreseen, which may be unambitious or not very adapted to the evolving context of the watercourse in question or that it is at the level of the stakeholders, even which rarely include all States concerned by the watercourses in question.

The legal framework established in the 1997 Convention sets out several fundamental principles which are detailed in the second part entitled general principles, such as utilization and equitable and reasonable participation (Article 5). Moreover, the obligation not to cause significant harm (Article 7).

As Sylvie Paquerot[11] points out […] in terms of sustainable management of water resources, although the New York Convention includes a number of articles aimed at ensuring cooperation in pollution protection it is still only a perspective of good neighborliness between sovereign States whose interests may enter into conflict, and not of a common concern of humanity that freshwater resources are generally preserved, in quantity and quality. Moreover, it observes that the very title of the New York Convention is significant in this respect since it does not contain the term "protection", only that of "utilization".

Because the Convention deals with international watercourses, one could expect the text to adopt a vision of water as a common good to be used, managed, and protected in global concern for the good of the human. The Convention is devoid of any reference to the status of res communes.[12]

In his communication of the meeting of American Society of International Law, "***If Water Resects No Political Boundaries, Does Politics Respect Transboundary Waters***?" Mc Caffrey argues that: (to say that a State has sovereignty over natural resources (forests, coal, iron, and other forms of ore, etc.) within its territory is, of course, much different from saying it has sovereignty over shared freshwater resources).[13]

As Sylvie Paquerot[14] explains, […] the states must share with their neighbors not because it is a shared resource that no one should appropriate but because their neighbors are also (sovereign and owners) of their natural resources.

[8]Wouters (2002).
[9]Sironneau (2002).
[10]Sironneau (2012).
[11]Pacquerot (2005).
[12]Veber, M.
[13]Mc Caffrey (2008).
[14]Pacquerot (2005).

2.1 Limitations of the UNWC

The UN Convention on the Law of the Non-Navigational Uses of International Watercourses entered into force on August 17, 2014. This Convention is criticized for being limited in its application. Indeed, it does not propose the institutionalization of an intergovernmental authority which would have a free intervention capacity, and which would be charged with implementing in concrete terms the principles set out in this text. Instead, the Convention has stated on several occasions that the establishment of mechanisms or commissions to facilitate cooperation […] is in no way obligatory and depends on the choice of States.

Another important limitation of this Convention is the blatant lack of ambition on the issue of settling disputes and sanctions for non-compliance with the principles. In the event of a disagreement or the absence of an applicable agreement, the watercourse States concerned shall endeavor to resolve the dispute by peaceful means (Article 33). The parties may have recourse to diplomatic (including third-party) or jurisdictional settlement through a joint institution established for this purpose, arbitration proceedings or by the International Court of justice.

The Convention, therefore, does not impose the creation of a jurisdictional structure specific to each international water agreement, neither it proposes the establishment of an international water tribunal which would be able to settle disputes and to establish sanctions.

Finally, one of the significant weaknesses of the text resides in its Article 3, which states:

1. In the absence of an agreement to the contrary, nothing in the present Convention shall affect the rights or obligations of a watercourse State arising from agreements in force for it on the date on which it became a party to the present Convention. None of the Nile Basin States are signatories of the Convention. Ethiopia has expressed its dissatisfaction that the Convention is 'not balanced, particularly concerning safeguarding the interest of upper riparian States'.[15]
2. Notwithstanding the provisions of paragraph 1, parties to agreements referred to in paragraph 1 May, where necessary, consider harmonizing such agreements with the basic principles of the present Convention.
3. Watercourse States may enter into one or more agreements, from now on referred to as 'watercourse agreements', which apply and adjust the provisions of the present Convention to the characteristics and uses of a particular international watercourse or part thereof.

Although the position of Article 3 paragraph 1 of the existing conventions is clear, the representative of Egypt felt that it would be apparent to the UN General Assembly that the Framework Convention cannot in any way affect international bilateral or multilateral agreements related to rivers.[16]

As we notice, there is no obligation for States Parties to integrate the rules of the Convention: this legal text is thus reduced to a simple list of principles. Principles which, moreover, have nothing new, being for the majority only the codification of customary norms.

Thus, the international watercourse has become a convention governing the uses, protection, and management of its uses and has finally ceased to be the only primary natural resource that is not governed by an international convention and is dependent on customary international law. The Nile Basin countries, including Sudan and Egypt, did not ratify the Convention. The main reason for the reluctance of the upstream states to join the Convention is the right of the veto enjoyed by Egypt and Sudan under these agreements on the upstream projects. The upstream countries fear that any notification to Egypt and Sudan on their part under the agreement will be interpreted by these two countries as acceptance from the upstream countries of these agreements, including the veto.

Thus, 1902, 1929, and 1959 conventions are significant barriers to cooperation not only in the regional environment of the Nile basin but also in the international environment of the International Watercourses Convention.[17]

Sovereignty remains at the heart of the concern of States about water resources. Despite the establishment of a principle of "limited sovereignty", some continue to consider that sovereignty over natural resources remains the only relevant legal principle in this area. Even though others may be aware of the need to study and collectively implement appropriate solutions, cooperation remains subordinate to the political relations between them. The riparian States may, however, seek to coordinate the use of their shared resources by establishing institutions through which their rights and obligations could be strengthened and clarified. States are setting up such institutions because they realize that formalized coordination will be better for them than unilateral action.[18]

2.2 Legal Principles of International Watercourses Law

According to the principle of **Absolute Territorial Sovereignty**,[19] the State has the right to act as it wishes in the part of the watercourse in its territory, irrespective of the adverse

[15]Musa (2013).

[16]Ali Taha (2005).
[17]Salman (2010b).
[18]Mondange (2009).
[19]Mc Caffrey (1996).

consequences of this for the riparian States. This theory was most expressed in the opinion of the Attorney General United States Harmon in 1895 at one of the stages of the conflict between the United States and Mexico over the waters of the Grande River. Farmers in the states of Colorado and New Mexico have diverted part of the waters of the Grande River, affecting the flow of water to some parts of Mexico. The issue of the Harmon doctrine was that the United States was not bound by Mexico to restrict its use of the Grande River because its sovereignty over its territory allowed it to act in that region in any way it wanted, regardless of what it meant for Mexico.

Symmetrical with the principle of absolute territorial sovereignty, that of **Absolute Territorial Integrity** specifies that each State must allow watercourses to continue their course; they cannot interrupt the flow, nor increase or reduce the flow. This doctrine, of course, favors the downstream states, which are vested with a right to monitor the activities of upstream countries over the rivers. Egypt, in particular, avails itself of such doctrine, but that is not the main argument.

According to the Egyptian representations of the structure of the Nilotic basin, the government cannot evoke any other doctrine. Its situation at the end of the Nile, in other words away from its sources, puts the country in a position of total dependence on the upstream countries. The Egyptian government would, therefore, have little recourse if the other governments opted for water policies that could have severe consequences for the flow of the Nile, which has been the case so far, and this despite, for example, the open hostility of the Ethiopian government. Indeed, none of the riparian countries has yet been able to equal the power, even relative, economic, political, or military of Egypt.[20] (Annabelle Boutet—La question de l'eau au Proche-Orient-Thèse de doctorat Aix-Marseille).

The 1929 Nile Water Agreement seems to have been based on the theory of absolute territorial integrity. Under the terms of this agreement, Britain recognized Egypt's natural and historical sights in the Nile waters. Britain also agreed that Egypt would be a condition for any projects on the Nile and its branches or lakes originating in Sudan or the country under British administration, namely, Uganda, Kenya, and Tanganyika.[21]

The principle of **Restricted Territorial Sovereignty** is the accepted theoretical basis of jurisprudence and the rule and practice of the two main rules of international sewerage law. Namely, the rule that each State has the right to the equitable use of the waters of its watercourse and the rule that each riparian State is required not to cause harm to other riparian States. In turn, these two principles emanate from fundamentalist principles of the principles of general international law, namely, the principle of sovereign equality and the principle that imposes duties upon the State in the exercise of its territorial sovereignty.

By the principle of sovereign equality, States bordering an international watercourse within their respective territories shall enjoy equal rights to benefit from the course. In the river Oder case, the Permanent Court of International Justice referred to "the absolute equality of all riparian States in the use of the entire course of the river and the exclusion of any preferential advantage of any riparian State for other States".[22]

Lac Lanoux Arbitration illustrates how international law is capable of dealing with issues related to water shares issues.

The dispute between Spain and France is because the French Government, the deviation of a river from its natural basin to another, to build a dam. The waters for which hydroelectric development was the object were Lake Lanoux. The first manifestations of these intentions of exploitation date from the first quarter of the twentieth century, but it was only until 1949 when the intentions of the French government were lost to the interests of Spain. In 1949, the planned project for France provided for the diversion of one of the tributaries of Lake Lanoux, the Carol River, from its natural course to a hydroelectric plant located in the Ariège River. The natural course of the Carol River flowed across the Franco-Spanish border and finally threw itself into the Mediterranean Sea. On the other hand, according to the project of 1949 the waters of the Carol river would be deviated in the Ariège river and, once used for the generation of electricity, they would be released directly in the Atlantic Ocean without entering Spanish territory. As is evident, the project would produce; of a part, the diversion of the waters of a basin (that of river Carol), toward another (this of river Ariège), but the most important fact, and significant with respect to a fair use of network was the direct damage to the Spanish farmers who would no longer have access to the same amount of water as in the natural course of the Carol River.

Even though the Lac Lanoux case recognized France's right to use its water resources, it also established that a State is not the sole judge of its water rights, as suggested by the Harmon doctrine.[23]

Indeed, sovereignty serves only as a presumption. According to international law, a State cannot use its

[20]Boutet (1999).
[21]Ali Taha, F.A.
[22]Ibid.
[23]O'Connel (1970).

territory without taking into account the consequences of such use on other States. Likewise, a State is expected to tolerate a certain degree of interference by other States.[24]

As O'Connel notes: "Obviously, the law cannot tolerate the situation that one riparian might, through an irrigation program which diverts the greater part of the available water, turn its neighbor's territory into a dessert and destroy the livelihood of its people; but neither can it bar unilateral development of river resources when only minor inconvenience is occasioned the neighbor".[25]

In light of the above, it is legitimate that the State seeks to secure water-related interests by relying on its sovereignty. However, as illustrated by the Lac Lanoux arbitral award and other decisions, sovereignty is not absolute.

Regarding the principle that put duties on the States when exercising its territorial sovereignty, Max Huber stated in the Palmas Islands Case that

> Territorial sovereignty entails the right to exercise the jurisdiction of the State, and as a result of this right, the State must protect the rights of other States within its territory". This right has been applied in many cases, such as the Corfu Channel case, in which the International Court of Justice had stated that "under the principles of international law, a State should not knowingly allow the use of its territory for acts contrary to the rights of other States.

Thus, the theory of limited territorial sovereignty is characterized by absolutism as more practical, more just and balanced as it stems from a fundamental rule of international law that sovereign rights are not absolute but are bound by duties. Therefore, this theory tends to reconcile the interests of the riparian countries to the watercourse without distinguishing between these countries according to their geographic location.

The Community of Interests Principle. This Principle is based on the fact that an international river is a natural unit, which in its entirety is the common property of all the States in its territory. In the case of the Gabčíkovo-Nagymaros Project, the only decision involving an international watercourse rendered over the last 60 years, the International Court of Justice applied the theory of interests to non-navigational uses of international watercourses as evidenced by the adoption by the General Assembly to the Convention of 21 May 1997 on the Law of the Non-Navigational Uses of International of the law of international watercourses. The decision of the Court is essential in many aspects:

It explicitly referred to the 1997 UNWC as an authoritative statement on the law of international watercourses. It is particularly remarkable given the fact that by that time the 1997 Convention had not been ratified by a single State. The Court also implicitly endorsed the principle of equitable and reasonable utilization as a governing principle of watercourse law. The ICJ decision contained 'no mention of the sterile and misconceived debate over the relationship between Articles 5 and 7 of the UN Watercourses Convention'.

According to McCaffrey,[26] this theory does not contradict or even reinforce the theory of limited territorial sovereignty. It refutes the notion that the state's sovereignty over water in its territory is authorized to do whatever it wants. However, he cited some of the elements that characterize the theory of "The theory of limited regional sovereignty". Including that the principle of limited territorial sovereignty is imposed by one side only, while the concept of a combination of interests implies a joint or collective action. It, therefore, makes sense that this concept is reflected in the form of a standard system for the institutional management of the watercourse.

The 1997 New York Convention, flawed in some respects, only partially satisfied the management of freshwater resources from a legal point of view. Legal gaps remain in international law concerning the distribution of freshwater resources, including a binding dispute settlement system, environmental considerations, and the right to water.

The principle of peaceful settlement of disputes is affirmed by the Convention in Article 33 (1). At present, the obligation to resolve any conflict by peaceful means is an imperative standard of value. Absolute, affirmed by Articles 2 (3) and (33) of the United Nations Charter. The only mandatory mechanism, that is to say, accessible at the request of one of the parties to the dispute and provided for in the draft of the International Law Commission, is an inpatient investigation procedure (Article 33 of the Convention).

According to Sylvie Paquerot,[27] (in the absence of a negotiation between the parties, the absence of an obligatory settlement mechanism renders the entire agreement almost obsolete). This is a severe criticism of the 1997 New York Convention. This may be justified to the extent that the settlement of disputes is about the sharing of freshwater resources, and whether or not it is one of the objectives of this Convention. Indeed, in the absence of a compulsory jurisdictional mechanism in the event of failure of the negotiation, how can one claim to equity or a regulation in conformity with the principle of justice?

Faced with this lack of a binding judicial mechanism capable of settling a dispute, some authors do not hesitate to evoke a hypothetic international water tribunal.[28]

In fact, since the Convention of May 21, 1997 did not establish a dispute settlement system that could be triggered

[24]Cassesse (2001).
[25]O'Connel (1970).
[26]Mc Caffery (2007).
[27]Pacquerot, S.
[28]Mondange, A., p. 69.

unilaterally, some jurists reflected on the establishment of an international water tribunal, as was the case of the Law of the Sea Tribunal established by the 1982 Montego Bay Convention. It should be noted that States have rejected the possibility of a binding appeal to jurisdictional remedies in respect of international watercourses had accepted in the context of the 1982 Montego Bay Convention on the Law of the Sea.[29]

The establishment of such a tribunal would make it possible to cover the whole range of problems relating to the management of freshwater resources, thanks to the establishment of several chambers, each with their jurisdiction. Access to this Tribunal could be open to both state and non-state actors, unlike the above, whose jurisdiction is general, but which can only be brought before States. At present, however, States are no longer the only actors in the field of the protection and use of freshwater resources.

The UNWC itself has been criticized for being too vague or misleading and some argue that the application of the UNWC in the case of Nile ended up "institutionalizing conflict." The Convention has also been blamed for replicating in new areas the neoliberal economic and political foundations upon which it was created. The line of argument is that the law may be considered simply as a tool to promote the interests of powerful States, for instance, by facilitating treaties that are skewed in their favor.[30]

Many in the non-legal water community may hold up perceptions about which principles of law favor-up or down streamers. It is expected, for example, that developed downstream States like Egypt will promote the principle of no harm in order to protect against upstream hydraulic development. The upstream States like Ethiopia would be expected to push for fair and reasonable use as it provides some scope for use for water at a later stage in their development trajectory. However, International Watercourses Law is much more nuanced. Perhaps counter-intuitively, the no-harm obligation may support the development plans of upstream States, especially if the downstream State has extensively developed watercourse in question.[31] As McCaffrey and Salman point out, there is increasing recognition (reflected in practice) that upstream use of the flows can be foreclosed when downstream development of watercourse is so extensive that any action by upstream State will cause downstream harm or give rise to downstream claims for inequitable use.[32]

[29]Ibid.
[30]Zeitoun (2015).
[31]Ibid.
[32]Salman (2010), pp. 350–364.

2.3 Relationship Between the Principles of "Equitable and Reasonable Use (Article 7)" and "No Significant Harm (Article 5)"

The Convention did not expressly prohibit a provision on the relationship between the principle of equitable utilization and the principle of non-injury or where precedence or precedence prevails in case of conflict between them. The question of this relationship would not have arisen if the Convention had not provided for the absence of harm as an independent principle and had been guided by the Helsinki Rules, which incorporated the principle of non-harm into the factors used to determine what was fair and reasonable.[33]

States have taken their positions on this matter depending on their geographical location in the watercourse. The upstream States believe that the principle of equitable utilization always prevails and argue that the primacy of the principle of non-harm is profitable to the first users. For example, Turkey says that the Convention should have clearly emphasized the priority of the principles of equitable and reasonable utilization of the obligation not to cause harm. Ethiopia went on to say that the Convention was unbalanced because it did not guarantee the interests of upstream States and referred in this regard to Article 7. While Egypt—a downstream State-formulated a reservation on what it described as the absolute wording of Article 5 and called for a link between the principle of equitable utilization and the principle of non-harm and the necessity to make them equal.

There are many jurisprudences on the relationship between the two principles. Based on Articles 7 and 10 of the Convention and the case of Gabčíkovo-Nagymaros Project, in which the International Court of Justice confirmed the equitable utilization as a fundamental principle in international law for Non-Navigational uses of international watercourses, McCaffrey believes that the Convention gives priority over the principle of equitable utilization, nevertheless he concludes that the two principles complement each other and, therefore, need not be reconciled because they are opposite sides of the same coin.[34]

It is the question of the formulation of Article 7 and its relationship with Articles 5 and 6 which has caused one of the major confrontations in the elaboration of the Convention, and it still exists between the specialists. The opposition between these two articles is also the opposition between upstream states and downstream states. These two articles reveal problems of interpretation, and Joseph W. Dellapena, an Anglo-Saxon specialist in international water law refers to an implicit contradiction. In his view, the text of the

[33]Ali Taha, F.A.
[34]Mc Caffery (2001).

Convention made Article 7 subject to the principle of equitable sharing.[35]

It is necessary here to recall that in the case of the Corfu Channel, the ICJ emphasizes (the obligation of every State not to allow its territory to be used for acts contrary to the rights of other States.).

Similarly, the Arbitral Tribunal in the Lac Lanoux case admits that the upstream State has no right to harm the downstream State through the alteration of the waters of a river. However, the introduction of the principle of fair and reasonable use poses new questions. Is a fair and reasonable use of an international watercourse by a watercourse State found its limit when such use has a detrimental effect on other watercourse States?

The upstream states will tend to justify their use under Article 5, in order to have greater leeway to operate at different locations and thus to make further use of the international watercourse. On the other hand, downstream States will tend to privilege Article 7, in order to protect their uses through the obligation not to cause harm. Besides, the risk is that in the name of the fair and reasonable use of any new use is condemned by preexisting users. In the worst-case scenario, any State that requests use that it deems reasonable could be opposed by the other users, they need not cause appreciable harm, especially if this new use imposes a restriction of consumption in neighboring states. In a situation of water scarcity, or directly in periods of the tense political situation, attempts at negotiation may be aborted and the status quo maintained. The success of the Convention in such a situation would then be quite relative.[36]

Downstream states, or those who believe they enjoy (historical) rights, will insist on the prohibition of causing harm. On the question of sharing the waters of the Nile, Ethiopia, an upstream country, had refrained from valuing Article 7 and had, on the contrary, deplored the lack of explicit recognition of Article 5, which included favor. In its interests, Ethiopia would value Articles 5 and 6 and not Article 7.

On the contrary, Egypt would value Article 7. However, in the end, neither of the two States did sign the Convention. Egypt is already advantaged by historic rights based on the Nile agreements of which Ethiopia had been excluded, and with the construction of the Blue Nile Dam (the Grand Ethiopian Renaissance Dam), it is threatening Egypt's share of Nile waters!

3 Ethiopia and Egypt: The Blue Nile Dam Controversy

The Nile River is a valuable resource that can contribute positively to the economic development of Africa. After the Amazon, the Nile is the longest river in the world (6,671 km). Despite the tranquility of the river, its majestic look, the lush greenery it gives rise to throughout its passage, despite its immense quantity in freshwater, it hides a forest of tensions which, in recent years, have emerged and are likely to turn into regional war if we are not careful. Despite what the river provides the Nile basin is characterized by poverty and the degradation of the environment. Some Nile Basin countries are among the poorest in the world—Burundi ranks as the third poorest country on the planet—or the need to redefine the use and sharing of Nile waters.

With a flow of 84 billion cubic meters, the Nile is a low-level river. Each year, 10% of the water evaporates because the Nasser lake is located in the desert region.[37]

However, the Nile River can also be a source of heavy and costly international conflict among the various riparian States.

The 1959, Treaty was signed between Egypt and Sudan, thus totally excluding the other Nile Basin States, geographically concerned which are arguing that: "the Nile is ours too![38]". It was drafted as part of the construction of the Aswan Dam. The flow at this dam is estimated at 85 billion cubic meters of water, 55.6 will be used by Egypt and 18.5 by Sudan, representing a total of 87% of river flow for both countries. The other eight remaining countries share the rest, which represents 13% of the river's flow.[39]

Egypt and Sudan claim to have "a historical right" over the Nile by the 1959 Treaty. It should be noted that the other countries were not present at the signing of the Treaty, most of them not yet constituted as a country at that time.

Not only do the two countries reserve the lion's share, but the treaty also gives them a veto over all works likely to affect the volume that provides Egypt with 90% of its water consumption. In addition, upstream countries must imperatively seek approval from Egypt and Sudan before implementing any project to develop or exploit the waters of the Nile or its tributaries.

Although this river represents an important resource for the different countries of the basin, Egypt alone exploits most of the flow of the river to the detriment of other

[35]Dellapena (1996).
[36]Mondange, p. 57.
[37]Le Floch (2010), p. 495.
[38]Mwangi (2010).
[39]Abbe Kajuju (2010).

countries, given the size of its population, as well as its almost absolute dependence on the river. With regard to the water of the Nile for its water supply, that is 90% of its consumption, and any attempt to question the existing distribution hurts the country.

Is it useful to want to keep the 1959 Treaty? Upstream countries will never accept it because they consider it unfair and out of step. It takes a political will for a fair share, each according to his needs to avoid one more war in the region.

3.1 The Nile Basin Riparian States Controversy

International law is too general, while international rivers are too particularistic. International law tends to be objective, but State interest in international rivers is too subjective. International law tends to be too vague and ambiguous in its provisions, while State use of international rivers demands an approach which is clearer and realistic.

For Habatamu Alebachew, the Grand Ethiopian Renaissance Dam represents the fact that the State practice in the area of international waters is still guided by State practice through unilateral actions. As such, international principles, in this case, follow far behind State practice, in the political sense of the term.[40]

The government of Ethiopia's initiation of construction of the Grand Ethiopian Renaissance Dam in 2011 occurred outside of the Nile Basin Initiative (NBI) process and contain no indication of being guided by international water law, yet the Declaration of Principles, signed in March 2015 has certainly taken on board the obligations of significant harm and equitable and reasonable use.[41]

For Ethiopians, the Blue Nile Dam has become a kind of national idea. For them, this construction is part of megaprojects not only in Africa but also worldwide by becoming a source of national pride.

From an engineer's perspective, one diplomatic official quipped, Ethiopia would generate the electricity, Sudan would plant the crops, and Egypt would drink the water.[42]

As a matter of fact, the main source of the Nile is the Blue Nile which originates in Ethiopia. With the construction of the Grand Ethiopian Renaissance Dam (The Blue Nile Dam), Ethiopia can escape widespread poverty and achieve sustainable development as the dam will be the largest hydroelectric power plant in Africa.[43] (Maryanne Mundy). In fact, it will generate 6.000 MW of hydroelectric power, equivalent to at least "6 nuclear power plants" ("Ethiopia diverts the Blue Nile for controversial dam build."[44] It is important to notice that the use of Nile waters confirms the idea of sustainable development of all riparian States. For Egypt, it will be risky to approve the dam construction, so it opposes it. However, "the absolute denial of the use and utilization of the tributaries of the Nile by upstream countries denies their right to sustainable development, thereby preventing them from eradicating extreme poverty. This contrary to the global agenda set by the international community".[45]

For Maryanne Mundy, who asserts that ***the Nile is not just a river in Egypt***, treaties between Britain and upstream states Sudan and Ethiopia heavily favored the downstream availability of the effect of the British cotton trade. She argues that the British colonialists of Egypt felt they had a right to steer water rights toward maintaining their colonial power and economic interests. She adds "Although colonial powers no longer control the region, the effect of British water concepts can still be felt in the recent United Nations Watercourses Convention and Egyptian opposition to Ethiopia's plan for Nile use".[46] (Maryanne, Mundy).

D. Benaim and M. Wahid Hanna think that the dam's benefits for Ethiopia and Sudan are clear, but its consequences for Egypt, one of the poorest nations in the world in terms of water availability per capita, are potentially dire.[47] 85% of the water supply for nearly 100 million Egyptians travels through Ethiopia. If Ethiopia fills the reservoir in less than a decade, Egypt's short-term water supply is at risk.[48]

3.2 Sudan and Egypt Controversy

The Blue Nile dam benefits for Sudan are not in Egypt interest (Regarding the sustainable development of Sudan).

Midstream between Ethiopia and Egypt, Sudanese support for international water law is more ambiguous. The Sudanese government's refusal to sign the Cooperative Framework Agreement may have been based more on concern over reallocation of Nile flows than on direct opposition to international water law. Its participation in 1959, Egypt-Sudan treaty still assures the State the right to develop an additional 1–5 km^3/y much of which is likely to be made possible following the Ethiopian construction of the Grand

[40]Alebachew (2011).
[41]Zeitoun (2015).
[42]Benaim and Wahid (2018).
[43]Mundy, M.
[44]BBC News (2013).
[45]Cullet (2009).
[46]Mundy, M.
[47]Conniff (2017).
[48]Benaim and Wahid (2018).

Ethiopian Renaissance Dam further upstream. In this sense, the UN Convention on Watercourses appears to support the development interests of both upstream countries.[49]

Ethiopia's neighbor Sudan initially stood with Egypt in opposing any upstream dams, but its position on the project evolved as the dam's potential benefits to its farmers became evident.

In fact, the Blue Nile, which is the most important tributary of the Nile River, represents 50 billion cubic meters. After the establishment of the dam, the flow of the Blue Nile in Sudan will be uniform throughout the year. As Sudan currently has only one agricultural cycle, the dam will provide Sudan with three agricultural cycles which will lead to regular electricity generation in the Merowe dam. Sudan has wholly failed to take advantage of the 10 billion cubic meters of Nile water that has been going to Egypt since 1959 (Sudan has loaned Egypt 1.5 billion cubic meters which has not been recovered yet). The Blue Nile will keep this water in Sudanese territory, and it will not go to Egypt anymore. That means the Blue Nile dam will give Sudan the right to the sustainable use of Nile water and Egypt will lose 10 billion cubic meters annually. Therefore, Egypt will also have a problem with Sudan as it is fully convinced that Sudan may be more beneficiary than Ethiopia from the Blue Nile Dam.

In addition, the construction of the dam will stop the silt that engulfs turbines which cause power cut and will end the floods that occur periodically in Sudan.

When the downstream country gets the benefit of a dam constructed by an upstream country, the latter—according to the Convention of 1997—can oblige the downstream country to participate in the construction of the dam but Ethiopia asked nothing from Sudan and Egypt.

3.3 Sovereignty Over Water?

To speak of sovereign equality on the water in the framework of the Nile Basin is not logical. It is a simple observation of the natural reality of the river which reveals a de facto inequality in which the law seems powerless. Since the Nile is a successive river, the obligations incumbent upon the watercourse States are not the same. In this sense, the states upstream from where the river's springs are found to have their sovereignty limited in accordance with principles such as fair and non-injurious use. This limitation is based on the rights of successive States. While the states in the mouth of the river, if any, Egypt, retain their full sovereignty over the Nile, if not absolute sovereignty.[50] (Hekma Achour, p. 395).

The discrepancy between States in the exercise of their sovereignty over water in the context of a successive river bears witness to an undeniable sovereign inequality. Indeed, it is not enough to consecrate it in conventions for it to operate. At best, it may be better to speak of sovereign equity to be established by pooling the sovereignty of states.

In short, there is a de facto sovereign inequality due to the nature of the river. In addition, there is sovereign legal inequality due to certain deficiencies in the rules of law of international watercourses also included in the Nile Basin Framework Agreement. There is in the latter a differentiation between the obligation's incumbent on the States according to the successive or continuous nature of the river. Consequently, the mere consecration of sovereign equality by the right of international water rights cannot remedy this inequality. It could even accentuate it, which would not facilitate the overall governance of the Basin already marked by the conceptual divergences of sovereignty.

There is some conception of sovereignty over water downstream from the view of Hekma Achour. Egyptian sovereignty over water is probably the one that stands out most of its congeners. Indeed, Article 44 of the Constitution explicitly affirms this sovereignty by affirming the State's commitment to the protection of historical rights over the Nile. In addition, the State is committed to ensuring the safety of the water. In fact, this commitment cannot be isolated from Egypt's interstate relations with neighboring residents in the negotiation of its rights over the Nile. As a result, the scope of this article goes well beyond the national framework to reaffirm itself at the regional level. (Hekma, p. 396) The state expresses at the same time assurance toward its subjects as to their right to water and displays an attitude of rigor as to its sovereignty over the Nile vis-à-vis with respect to its residents. This translates into a firm call to the respect of its territorial integrity by the upstream states.

The provisions of Article 44 of the Egyptian Constitution attest to the desire to preserve almost absolute sovereignty and territorial integrity over water in the traditional sense.

Since Egypt is the last state downstream, this conception is more justified. In this sense, Egypt is keen to assert its status as a sovereign power, a message that she keeps sending to the States ahead. Now, this sovereignty would not be absolute without its corollary territorial integrity. The latter, although it was a time when Egypt prevailed in an absolute way to preserve its rights, today about the evolution of the law of international watercourses this eventuality is removed.[51] Moreover, given the political situation in the Nile Basin turned toward more cooperation, Egypt is forced to relax its conception of sovereignty over water and to

[49] Zeitoun (2015).
[50] Achour (2016).
[51] Achour, H., p. 397.

accept more limitation of its territorial integrity for the benefit of other residents.

As for Sudan, given the agreement with Egypt on the division of the waters of the Nile, it often displays the same positions and the same conception of sovereignty.

3.4 Conflict of Sovereignties

In 1906, a treaty was concluded between the British, then the tutelary power of Egypt, and Ethiopia, according to which the government of Addis Ababa could not modify the regime of the Blue Nile without the agreement of London. Similarly, during the first half of the twentieth century, the authorities of the various British colonies had agreed not to engage in hydraulic works in the basin without the agreement of Egypt.[52] Finally, in 1929 and again in 1959, the Egyptian government signed two treaties binding it to the Sudanese government on the distribution of all available river volumes from Sudanese territory, which included the waters of the White Nile coming from of the South and the waters of the Blue Nile coming from the East.

The doctrine of Ethiopia, which has still little value in its hydraulic potential, is based on the principle of territorial sovereignty: the waters of the Blue Nile in Ethiopia are part of the sovereignty of Ethiopia.[53]

To counter the threat posed by mass withdrawals in the waters of the Blue Nile, Egypt has constantly sought to recognize the principle of first in time, according to (historical rights) conferred on it by its secular use of land waters of the Nile. Cairo refers to the note E/ECE/I. 36 of the Economic Commission for Europe of 1952, which refers to such historical rights to exclude the application of the Harmon Doctrine and to preserve the "rights of other riparian states over international rivers". This argument seems weak according to Boutet because one can doubt the legal scope, in customary international law, of the invocation by Egypt of a note formerly emanating from a commission with a European vocation.[54]

Egypt has retained this note to counter the Ethiopian doctrine of absolute territorial sovereignty, but it has come to develop the argument of implicit sovereignty over the waters of the Nile, sovereignty that would flow from its alleged historical rights rooted in the "ancient history". The current legal validity of the Egyptian claims is however questionable:

1. The 1906 Treaty was denounced by Ethiopia in 1954, and a legal vacuum replaces it, while Egypt and Sudan believe that it remains valid even after its denunciation[55]
2. The 1959 Sudan-Egyptian Treaty allocates all the river's waters measured at Aswan but does not bind the other States of the basin and cannot limit their access to the waters of the White Nile or the Blue Nile. The drafting of the text does not objectively claim anything else, but no doubt it is precise because of the glaring absence of the other riparian States: Cairo and Khartoum have opted for wording which provides for the appropriation of all the waters of the Nile, and not a distribution of river flow at its entrance to Sudan. Moreover, one of the articles of the treaty stipulates, logically from an Egyptian point of view, that no work can be undertaken outside the territory of the two countries without the agreement of the third parties, thus clarifying the regional and binding nature of the other non-signatory countries that Egypt intended to give to this treaty.

Apart from the diplomatic aspects surrounding its elaboration, this text, according to Frederic LASSERE and Annabelle BOUTET,[56] is not so much a legal aberration from a technical point of view—it shares a resource based on figures that took place in 1959, but rather because the two signatory countries claimed, on the basis of a bilateral treaty, and lack of support from Ethiopia and other upstream countries, to impose on them sharing, to the benefit of downstream countries only.[57] Ethiopia argues that this treaty was concluded between Egypt and Sudan. Thus, it is a bilateral treaty involving Ethiopia. In principle, a treaty only binds those who subscribe to it. As per Article 34 of the Vienna Convention on the Law of Treaties (VCLT), "a treaty does not create either rights or obligations for a third State without its consent."

Egypt argues that States should and could not divert the natural directions and courses of the river flows, which would have always negative consequences on lower riparian States. For Egypt "diversion" over the Nile or any of its tributaries is said to occur if the activities of the upper riparian States result in any one of the following changes in its water positions: first, if it causes a shortage of water supply as different from the amount previously used and held; second, if it causes damage to the environment; third, if it results in a reduction in the level and quality of the groundwater; fourth, if it causes a shortage in hydroelectric

[52]Majzoub (1994).
[53]Boutet, A.
[54]Boutet, A., p. 505.
[55]Delapenne (1996).
[56]Boutet, A.
[57]Boutet, A (pp. 505–506).

power; and fifth, if it inflicts other impacts including like the interception of a large proportion of the sediment carried by that river and if the diversion might damage tourist sites of the lower riparian States.[58]

For Habatamu Alebachew,[59] there are usually four traditional ways of interstate relations to implement such principles of international law and let us see which one Egypt opts for:

A. States may sign a treaty providing for a total prohibition of "diversion";
B. States may sign a treaty allowing "diversion" under total freedom of action;
C. States may sign a treaty over "diversion" of specific rivers, volumes, time schedules, tolerable degree of damage, etc.; and
D. States may sign no treaty at all leaving "diversion" decisions to be based on accepted "principles of international law." The author argues that scenario D is the established policy basis of Egyptian water utilization policy toward Ethiopia.[60]

For Ethiopia, the principles of "no-diversion, equitable utilization of the Nile waters, and no-harm" arguments could be reconciled only through close interstate mutual understanding. Ethiopia capitalizes on the equitable utilization doctrine and prefers no-diversion and no-harm principles to being tabled to interstate technical verifications. In the absence of formal bilateral or multilateral treaties over the use of Nile River, the remaining legal option for Ethiopia appears to stick to Article 2 of the Helsinki Convention[61] on the Protection and Use of Trans Boundary Watercourses and International Lakes 1992, which states that: "the State Parties to the Convention shall take all appropriate measures to ensure that the Transboundary waters are used in a reasonable and equitable way". This principle originated as a middle position of reasonableness between the two extreme principles: the absolute territorial sovereignty assertion of upstream States (Ethiopia), and absolute territorial integrity claims of downstream States (Egypt).[62]

Many terms have been used for this principle, such as "equitable apportionment" or "equitable participation" where most propositions have proved to be the chagrin of Egypt.

4 Military Intervention to Protect Water Interests?

To justify the current use of water, Egypt constantly reminds of its strong dependence on the Nile, unlike the upstream states, which can benefit from abundant equatorial rains. It believes that if these states were able to live without the Nile, they should be able to continue to live without it. This argument, however, cannot justify the intransigence of Egypt and Sudan.[63]

An Egyptian politician, Sheikh Abdel-Akher Hammad, had claimed that the Grand Ethiopian Renaissance Dam and the diversion of the Blue Nile amounts to a "declaration of war by Ethiopia to Egypt"[64] In response, Ethiopia reiterated that the dam would generate electric power which will be exported abroad and shall prove beneficial to most downstream and upstream countries.[65] Sudan agrees with Ethiopian assertions that it "would get many benefits from the dam, including the better supply of electricity and year-long regulation of the Blue Nile's flow and called upon Egypt to stop provocations of a water war in the Nile Basin nations".[66]

When the Grand Ethiopian Renaissance Dam project was declared it was disclosed by WikiLeaks that Egypt was considering establishing a base for Special Force in Sudan tasked with destroying the Ethiopian dam if other methods of resolving the crisis fail. The Egyptian president had put forward a number of proposals by participants ranging from striking the dam militarily to objecting such hostile suggestions against Ethiopia. He highlighted his respect for Ethiopia and Sudan at the end with the remark that "all options are open.".[67]

If Egypt resorts to use military force or interfere in the affairs of Ethiopia, it will be illegal and violating paragraphs 4 and 7 of Article 2 of the UN Charter under international law and violating African Union law as well. This is so even if the dam violates some aspects of the law of international rivers. States can only use force in international law in case of self-defense if they are attacked militarily as set forth by Article 51 of the UN Charter.

Even if the Blue Nile dam will significantly affect Egypt's interests Ethiopia's duty will be to

[58]Arsano (1990).
[59]Alebachew (2011), p. 10.
[60]Ibid.
[61]Yaekob (2003).
[62]Utton (1996).
[63]Le Floch (2010).
[64](Ethiopia dam is declaration of war': Al-Gamaa Al-Islamiya' (Ahram Online, 30 May, 2013) available online at http://english.ahram.org.eg/NewsContent/1/64/72730/Egypt/Politics-/Ethiopia-dam-is-declaration-of-war-AlGamaa-AlIslam.aspx.
[65]Yihdego (2003), http://www.globalwaterforum.org/2013/06/18/the-blue-nile-dam-controversy-in-the-eyes-of-international-law/.
[66]Amin (2013).
[67]Yihdego, Z., Ibid.

> take all appropriate measures…., in consultation with the affected State, to eliminate or mitigate such harm and, where appropriate, to discuss the question of compensation.[68]

Ethiopia's Note Verbale of March 20, 1997, addressed to Egypt, on Toshka or New Valley Project that Egypt was constructing, and which draws water from the Nile River. The Note Verbale stated: "Ethiopia wishes to be on record as having made it unambiguously clear that it will not allow its share to the Nile waters to be affected by a *fait accompli* such as the Toshka project, regarding which it was neither consulted nor alerted".[69]

Countermeasures could be invoked by Ethiopia to breach no significant harm principles following decades of Egyptian thwarting of upstream development, though this may not be politically expedient under current circumstances.[70]

Countermeasures are measures which would otherwise be contrary to the international obligations of an injured State vis-a-vis the responsible State, legitimate breaches of law, to use non-legal terms. This principle could thus be used to assert that violation of an obligation under International Water Law by one State could lead to a legitimate proportional breach of a corresponding obligation by another State, so long as the initial violation consists of a "serious or material" breach. This means that upstream Ethiopia could be within its legal rights to proportionally breach the no-harm obligation if downstream Egypt had breached the obligation ensuring equitable and reasonable use in a "serious and material way."[71] Proportionality is all but guaranteed, furthermore, where countermeasure is taken by way of reciprocity. This approach has been recognized by the International Court of Justice in the context of transboundary waters in the case of the Gabcikkovo–Nagymaros Project (Hungary vs. Slovakia).

Commenting in this paragraph of the Note Verbale, and on the Toshka Project, Professor Waterbury noted that: "The creation de novo, of projects that use significant amounts of water, may, and probably will become the basis of asserted newly acquired rights founded in established use. Egypt's action in the New Valley (or in the Sinai through the Peace Canal) in Ethiopia's view, preempts Ethiopia's rights to harness the Nile water. If the principle of first in time, first in the right prevails, then Ethiopia will have to forgo projects of its own in order to protect Egypt's use rights in the New Valley or Sinai. Ethiopia will suffer appreciable harm in order not to cause harm to Egypt".[72] Clarifying those rights further, Professor Waterbury went on to state: "Debating this project with Egypt may establish that downstream States, contrary to geographical logic, can cause appreciable harm to upstream States by preempting their options, in short by foreclosing the future".[73]

To achieve a framework that ensures equity and sustainability of the Nile, we should agree that the current one is neither equitable nor sustainable. Some authors suggest that the all riparian States must agree to undo all the lousy precedent Nile agreements and organize an international summit on the Nile, "to put together a set of principles that will govern the negotiations between all the Nile Basin's relevant stakeholders to develop an effective legal framework."[74]

In 2013, the Ethiopian Parliament ratified a controversial law calling for the replacement of colonial agreements with new ones to allow the country to legitimately dispose the waters of the Nile and Lake Tana, the primary source of the Blue Nile. The Egyptian authorities at that time had other problems and declared that they did not want to get involved in a war with Ethiopia, but that they would not allow water supplies to be endangered in Egypt. So, many Egyptian politicians in 2013 openly and publicly called for the immediate declaration of war on Ethiopia.

The fear and panic of Cairo go back to the exponential. First, the Egyptians fear a sudden decrease in the flow of the Nile after filling the reservoir of the dam. Second, the concentration of water in the reservoir will lead to its reduction because of evaporations. For Egyptian authorities: "No one can touch Egypt's share of water because for them: 'water is a matter of life or death'".

Cairo is not yet inclined to a settlement of the situation, especially as its result is not obvious. Certainly, the army and the capabilities of the two countries are incomparable, but what is proposed concretely? Occupying the Ethiopian province of Benishangul-Gumuz? Installing in Addis Ababa, a puppet government? Both options are a real headache. In addition, one should not forget that a great part of Ethiopia is a Christian, and such a conflict would quickly turn to Egypt into another serious problem.

Despite past military threats, the prospect of outright war between Ethiopia and Egypt remains remote and lower still given the recent diplomatic warming. For one, scholars suggest that outright water wars have rarely come to pass because transboundary water supplies create interdependence (bombing an upstream country that can divert your water supply is unwise).[75]

Egypt, for its part, has sought to steer clear of regional adventurism, and its military would struggle to carry out a direct strike on the dam. Nonetheless, the stakes remain

[68]Yihdego (2012).
[69]Mc Caffrey (2003).
[70]Zeitoun (2015).
[71]Ibid.
[72]Ibid.
[73]Salman (2010a).
[74]Mwangi (2010).
[75]Benaim and Wahid (2018).

high. Much more likely than full-scale war is a destabilizing lapse into proxy fights in which each side cultivates local forces to aggravate the other's pressure points.

Egypt, for example, has been accused of training forces in Eritrea, which is only beginning to emerge from its prolonged conflict with Ethiopia (Egypt has firmly denied these reports). Egypt can also pressure Sudan via armed opposition groups operating in Darfur, South Kordofan, and the Blue Nile. Sudan, meanwhile, has emerged as a haven for Islamist opponents for the Egyptian regime.[76]

For D. Benaim and M. Wahid Hanna, "As Ethiopia prepares to operationalize the dam and divert the Nile waters to fill its reservoir, the international dispute over the river has reached a make-or-break moment. In the coming years, Ethiopia and Egypt will either set their difference aside and forge a cooperative path forward together with an outcome technically feasible but politically fraught or face a diplomatic downward spiral".[77]

A French firm conducting impact study reports has suggested that Ethiopia could prevent undue disruptions in the water flow to downstream countries if it fills the reservoir more slowly.[78]

For decades, Egypt was the preeminent Nile power, in part, due to historical treaties regarding water distribution (in international water politics, it is especially hard to take away water once it is given), which allowed it to dictate river policies.[79] Faced with the fact that it is no longer wields the same influence over its upstream riparian and unable to twist Ethiopia's arm through coercion, Egypt should inevitably change its strategy toward conciliation.

Despite the loose talk about destroying the Ethiopian dam, war appears highly unlikely. In 2015, Egypt, Ethiopia, and Sudan signed a mutual do-no-harm agreement.[80]

Ethiopia as we said above, could minimize the immediate downstream damage by lengthening the time it takes to fill the reservoir. But that means delaying the benefits of the dam, which Ethiopia may already have oversold. Some experts think that Egypt needs to invest in desalinization for freshwater, like Saudi Arabia, and water-saving drip irrigation, like Israel.[81]

5 Conclusion

In conclusion, it can be noted that the difficulties inherent in the sharing of freshwater resources are flagrant. International law, the primary purpose of which is prevention and, where appropriate, the resolution of interstate conflicts, must reconcile conflicting interests. Water is an element that states have for a long time considered a classic natural resource and thus considered that they could treat it as sovereign states. Can such an approach be conceivable nowadays? State sovereignty must be limited? To assert total sovereignty over its freshwater resources is not to deprive another State of a vital resource for its economic activity, its population?

The myth of the water war is to be relativized to the extent that the conflict situations around the shared water resources practically never degenerate into armed conflict, the sharing of water resources is only one element fueling certain conflicts among others, but in no way constitute the sole cause of the conflict. According to Jacques Bethmont, "there may be no foreseeable future of (war) water in the agreed sense of the term, with ultimatum and reminder of ambassadors, but border incidents, the internal struggles, the processes of intention, even the characterized exactions are there and will probably go by multiplying, the water is, in turn, the cause, the pretext or one of the components of these multiple troubles".[82]

International water law is an evolving right that is built in response to specific problems and hardly brings together a majority of states on many points. For Adrien Mondange,[83] water can somehow always be perceived as an issue of power, and the international watercourses of geopolitical spaces in which sovereignty competes against. This is, in any case, the most pessimistic view that can be adopted because it means that communities of interest do not work and do not apply when it comes to sharing freshwater resources. According to Sylvie Paquerot,[84] "the contradictions, always more critical with the diversification and the increase of the uses of the water, between particular interests of the States and requirements of integrated management of a resource by universal nature, have prevented the crystallization of coherent principles with reality, based on a community of interests of all residents, although these have found expression in the doctrine".

[76]Ibid.
[77]Ibid.
[78]Ibid.
[79]Egypt's Options to Counter Ethiopia's Grand Dam Run Dry. https://worldview.stratfor.com/article/egypts-options-counter-ethiopias-grand-dam-run-dry, 6 June 2018.
[80]Conniff (2017).
[81]Ibid.
[82]Bethmont, J.
[83]Mondange.
[84]Pacquerot, S.

In the framework of regional relations, the Governments of the riparian states of Nile Valley took a further step in 1997 by creating the Nile Basin Initiative, which aims to reach a regional cooperation agreement on exploitation of water resources.[85] This new initiative is to hail the will of the parties to find peaceful arrangements for their differences. It is part of a tradition that marked the second half of the twentieth century, in the course of which successive cooperation agreements, one of the most notable of which was the origin of the ***Undugu***.[86]

Created out of the Cooperative Framework Agreement (CFA), an aspirational document that has been influential in the UNWC,[87] the goal of Nile Basin Initiative (NBI) 1999 is the cooperation between the Nile Basin States, based on a shared vision: "Achieving sustainable socio-economic development through the equitable use and its benefits, common resources of the Nile." Thanks to its strong international support and success in raising funds, the NBI has rapidly evolved over the last few years and is now in the process of preparing and implementing projects.

Many of these projects represent an unprecedented opportunity to develop the river's waters and the basin environment, to maximize the benefits available to all countries. This can improve socioeconomic development within the basin countries while helping to reduce insecurity conflicts. The primary purpose of the NBI's federal guidelines is:

Target the eradication of poverty and promote economic integration;
Develop the water resources of the Nile Basin in a sustainable and equitable manner to ensure prosperity, security, and peace for all its peoples;
Ensure efficient water management and optimal use of resources;
Ensure cooperation and joint action among riparian countries, seeking win-win benefits.

Water sharing requires recognition of the right of every riparian State to obtain a fair and reasonable share of water. It is the right of any riparian state to expand irrigated agriculture to achieve food security for its people. It is not fair that Ethiopia, which supplies the Nile with 85% of its waters, needs food for its people, or that vast areas of Tanzania are exposed to a shortage of drinking water while controlling 49% of the surface of Lake Victoria.

According to Faisal Abdelrahman Ali Taha, the dispute over the standards of water sharing of the Nile is one of the reasons for the failure to agree on the legal and institutional framework of the Nile, especially about the existing uses of water and what can give these uses weight. It is established that equal rights do not mean that the waters of the Nile will be divided equally between riparian states, but that all states have the right to use and benefit from the Nile in a fair and reasonable manner. The extent of each State's right to equitable and reasonable utilization depends on the facts and circumstances of each case.[88]

According to Maryanne Mundy, the NBI is regarded as a "beacon of light" in the often-murky debate about water use in the region. One of the main functions of the NBI is a foster dialogue: A soft law arbitrament by the Nile Council of Ministers could be a good option for balancing the interests of both Ethiopia and Egypt, easing tensions and possibly resolving this dispute.[89]

The increasing influence of the Nile Basin Initiative (NBI) can promote and foster cooperation between Ethiopia and Egypt. If the two States join the UNWC, they can benefit from its dispute resolution mechanism. Although the Convention does not impose the creation of a jurisdictional structure specific to each international water agreement, neither it proposes the establishment of an international water tribunal which would be able to settle disputes and to establish sanctions, it is an instrument of awareness and prevention of disputes in this regard. In addition, the Convention has developed the obligation of cooperation between the Contracting Parties.

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