Substantive Scope of the Duty to Notify and Consult planned Measures under International Watercourse Law: The Case of Grand Ethiopian Renaissance Dam (GERD)

Haile Andargie Wondalem*

ABSTRACT

There exist uncertainties about the essence and substantive scope of riparian states' duty on planned measures under international watercourse law. Absence of an all-inclusive legal and institutional framework to regulate the duty, even more, complicate the issue in the Nile river basin. Since 2011, Ethiopia and Egypt have been in dispute over the construction of the Grand Ethiopian Renaissance Dam (GERD). The controversies over Ethiopia's duty to cooperate, inform and consult about GERD are among the heart of the dispute. This article examines the substantive scope of the riparian duty to inform on planned measures in the context of GERD. After an analysis of relevant literature, international watercourse law, and the practice of Egypt and Sudan, the article argues that Ethiopia has no treaty obligation to inform its projects to other riparian states. The practices of Egypt and Sudan also affirm the prevalence of unilateral measures on planned projects. Finally, the article suggests the establishment of the legal and institutional framework is of utmost importance to settle riparian states' duty of planned measure in the Nile basin.

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Keywords: - Utilization, Notification, Significant harm, Treaty, State practice, Renaissance Dam

*LL.B-Bahir Dar University, LL.M-Addiss Ababa University, Assistance Professor of Law at Debre Markos University, School of Law, PhD Candidate at Southwest University in Political Science and Law, China.
Email address- hailepowrs@gamil.com or haile17830034894@126.com

1. Introduction

Procedural Rules of the duty to inform on planned measures have been included in many international watercourse conventions[2], regional agreements[3], in the work of governmental and non-governmental organizations[4] , and international case law on international watercourse dispute.[5]The UN Convention on the Law of the Non-navigational Uses of International Watercourses (hereinafter referred to as UN watercourse Convention) provides detailed provisions related to the notification, consultation, and cooperation on *planned measures.*[6]Those legal frameworks oblige the state to plan a measure that may have *significant adverse effects* of planned measures upon other riparian states to provide such states with timely notification,

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[2] United Nation General Assembly, Resolution 51/299, Convention on the Law of the Non-navigational Uses of International Watercourses (1997, opened for signature May 21, 1997, 36 I.L.M. 700) Art. 8, [hereinafter referred as UN Watercourse Convention). Articles 11-19 explain the applicable procedures to encourage cooperation between riparian states when "planned measures" may adversely affect other riparian states.

[3] In Africa, the Revised Protocol on Shared Watercourses in the Southern African Development Community (2001), [hereinafter SADC Protocol] included a duty to inform on planned masseurs. The Revised Protocol was signed by Angola, Botswana, Congo, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia, and Zimbabwe. For more information and to see the text of the protocol, visit the SADC website athttp://www.sadc.int/overview/treaty.htm last visited on October 8, 2013). Article 4(b) of the SADC protocol provides 'before a State Party implements or permits the implementation of planned measures which may have a significant adverse effect upon the other Watercourse States, it shall provide those States with timely notification thereof. Such notification shall be accompanied by available technical data and information, including the results of any environmental impact assessment, to enable the notified States to evaluate the possible effects of the planned measures'. In Europe, we have the United Nations Economic Commission for Europe Convention on the Protection and Use of Transboundary Watercourses and International Lakes(hereinafter referred, UNECE) adopted in Helsinki, Finland on 17 March 1992 and entered into force on 6 October 1996. The convention under article 2(h) envisioned the establishment of joint bodies with the tasks to serve as a forum for the exchange of information on existing and planned uses of water and related installations that are likely to cause transboundary impact.

[4] Notification is also envisioned in the work of the International Law Association (ILA) that has provided further commentary on the issue of notification, International Law Association (ILA), the Helsinki Rules on uses of waters of International River. International law association Report of 52nd conference, Helsinki (14-20 August 1966), Art. 29(2)-(4), Report of the fifty-second conference held at Helsinki 484, 518-19 (1966) [hereinafter Helsinki Rules].."

[5] Lake Lanoux Arbitration (1957), Spain vs. France, 24 I.L.R. 101, 111-12 [hereinafter referred to as Lake Lanoux Arbitration]. The tribunal believed that France was under obligation to provide information to and consult with Spain to take Spanish interest into account in planning and carrying out the projected works.

[6] Whilst "planned measures" are not defined by the Convention, it is generally taken to mean any intended projects or program which may cause some form of significant adverse effect (s) on a watercourse, directly or indirectly. UN Watercourses Convention User's Guide Fact Sheet Series: Number 6 Notification Process for Planned Measures available at http://www.unwatercoursesconvention.org/documents/UNWC-Fact-Sheet-6-Notification-Process-for-Planned-Measures.pdf (accessed on 7/20/2013)).

accompanied by available technical data and related information, and to allow six months for a response.[7]

In the Nile river basin, there is no comprehensive and binding basin-wide treaty regulating the obligation of basin ' states. Therefore, the substantive scope of the duty to inform, consult, and cooperate remained unsettled. In the negotiation of the Nile basin Cooperative Framework Agreement (CFA), procedural rules regarding notification, consultation, and cooperation of planned measures were controversial.[8] Early at the beginning of the negotiation of the CFA, Ethiopia retained a reservation on the inclusion of the rules of planned measures in the framework text that is a reflection of its long-held stand back during the adoption of the UN Watercourse Convention.[9]When the UN General Assembly adopted the Charter on Economic Rights and Duties of states in 1974, the Ethiopian representative made a reservation to the 'provision of the charter'[10] that requires prior consultation and information in the exploitation of natural resources shared by two or more countries.[11]

Later on, during the diplomatic negotiation in Kigali, Rwanda and Ethiopia ventured a new strategy to carryout notification of information on planned measures, consult and cooperate through a third-party mechanism instead of bilaterally between the riparian states.[12] For them, the Nile basin commission, which would be established with the adoption of the CFA, would serve such a purpose.[13] Quite the opposite, downstream states wanted to strengthen the wording of the CFA to put the more onerous obligation of notification, consultation, and cooperation before upper riparian states venture any kind of project on the Nile River.[14]In the

[7] UN Watercourse Convention (1997), supra note 1, Article, 11-19.
[8] Musa Mohammed, 'How do the work of ILC and General Assembly on the International watercourse contribute towards a legal framework agreement for the Nile Basin?', Master thesis (unpublished),(2009), p.7.
[9] Musa Mohammed, 'The Nile River cooperative Framework agreement: contentious legal issues and future strategies for Ethiopia', a paper presented at the national consultation workshop on the Nile, (2009), p.14.
[10] UN General Assembly Resolution on Charter of Economic Rights and Duties of States, Res/3281/ (xxix), UN GAOR, 29th Sess. Supp. No. 31 (1974). Article 3 of the charter reads: 'In the exploitation of natural resources shared by two or more countries, each State must co-operate based on a system of information and prior consultations to achieve optimum use of such resources without causing damage to the legitimate interest of others.
[11] Gebre Tsadik Degefu, 'Nile Historical, Legal and Developmental Perspectives', Trafford Pub., New York, (2003), pp.133-114.
[12] Girma Amare,'Contentious issues in the negotiation processes of Cooperative framework agreement on the Nile: paper presented in the consultative meeting to be held in Addis Ababa, Ethiopia,(2009), p.10.
[13] Girma Amare (2009), Supra note 11.
[14]Id., p.11.

end, the CFA stipulates the principle under article 8 that lays down the obligation of Nile basin states to exchange information on planned measures through the Nile River Basin Commission.

When a bilateral or multilateral framework is not available to regulate the matter, as mentioned before, the resort could be made to customary international law to evaluate the essence of the duty to notify, consult and cooperate under international watercourse law. Indeed, there are few rules on the use of international watercourse such as the principle of reasonable and equitable utilization that has attained the status of a customary rule of international law, but the substantive scope of the duty to notify, consult and cooperate on planned measures has not yet attained the status of international customary law.[15] In terms of reasonable and equitable utilization, the assertion could be backed by the practice of states, which are found mainly in the treaties[16] concluded by them and decisions of international and national tribunals over conflicts on uses of shared waters[17], and the writings of lawyers in the field.[18] The only exception in this regard is the obligation to give notice in an emergency that has entered the realm of customary international law.[19]

Coming to the GERD, the dam precipitated renewed international legal squabble among the major riparian states of the Nile Basin, notably Ethiopia and Egypt. At the significant part, on the Egyptian side, inter alia, is the allegation that the Ethiopian government failed to inform, consult, and cooperate about the project that will harm the overall uses of Nile. Egypt strongly insists on Ethiopia's duty, as an upper riparian state, to provide prior notification documents about the technical details of the dam consult and cooperate on the construction and operation of the dam

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[15] Abiy Chelkeba, Notification and Consultation of Projects in Transboundary Water Resources: Confidence Building rather than Legal Obligation in the Context of GERD, Mizan Law Review, Vol. 11, No.1, September (2017), p. 125. Contribution of the UN Convention on the Law of the Non-Navigational Uses of International Watercourses', International Journal of Global Environmental Issues, Volume, 1, No.3, 2001, p.260.

[16]. See for example the early treaty of 11 January 1909 between Great Britain and the United States of America relating to boundary waters and questions concerning the boundary between Canada and the United States (British and Foreign State Papers, 1908-1909 (London), vol. 102 (1913).

[17]Gabcikovo-Nagymaros project case, (Hungary Vs Slovakia) ICJ judgment of 25 September 1997. The majority of judges, in this case, underlined that the principles of equitable and reasonable utilization of shared water resource as envisioned in the UN watercourse convention is a codification of international customary law and decided that Slovakia infringed the principles of equitable utilization while it appropriates between 80 and 90 percent of the waters of the Danube although the Danube is shared international water.

[18] For instance, in his explanation to Article 5 of the UN Watercourse Convention, Stephen McCaffrey pointed out that the rule of equitable and reasonable was the codification of norms of customary international law. See also Professor Kinfe Abraham, The issue of Nile: the quest for Equitable water allocation, (Amharic), 2005, P33-34

[19] Cosgrove, W.J 'Water security and peace' Syntheses of studies prepared under the UNESCO - water for peace processes, 2003, p25-26.

that would have possible adverse effect[20] In so doing, Egypt bases its claim on general international watercourse law, treaties[21], and customary international law.

Ethiopia, on the other hand, argues that the dam would instead benefit riparian states through flood and sediment control and regulation of the river flow and generate electricity that could be sold cheaply to other Nile riparian states. It also reiterates that Ethiopia does not have any binding obligation of notification, consultation, and cooperation nor the practice of Nile riparian countries has shown the same gesture.[22] If at all, according to Ethiopia's argument, it will be out of goodwill and courtesy.

Therefore, the problem remains as to whether or not international water law lays down duty on the Ethiopian government to inform, consult, and cooperate on planned projects like the GERD. The overall purpose of this article is thus to shed a light on the essence of the duty to inform, consult and cooperate under international law and in the Nile basin and then to draw conclusions in the context of the GERD.

The discussions are presented in the following chronological order: Part II explores principles of riparian duty to inform, consult, and cooperate under international watercourse law. Part III analyses the existing Nile River basin treaties and state practice on issues of riparian duty to inform, consult, and cooperate on planned measures. Part IV discusses GERD in the context of the principle of the duty to notify consult and cooperate. Lastly, the article ends with a conclusion and ways forward under Part V.

2. Notification, Consultation, and Cooperation under the UN Convention on the Law of Non-Navigational Uses of International Watercourse

As water is one of the most widely shared resources of the planet that often constitutes a border between states or flows across different countries, it can be a factor for cooperation among

[20]s. Habtamu Alebachew, 'International legal perspectives on the utilization of trans-boundary rivers: the case of the Ethiopian Renaissance (Nile) dam', paper presented to the ninth iucn colloquium, northwest university of south Africa, Eastern Cape town, (2011), P.23.

[21]Egypt today: Egypt slams Ethiopia for Renaissance dam remarks available at https://www.egypttoday.com/Article/2/82175/Egypt-slams-Ethiopia-for-Renaissance-dam-remarks last visited 3 March 2020.

[22] Downstream states have never notified Ethiopia while constructing giant projects in the Nile basin. In projects including the Aswan High Dam, Toshka project, and the Peace Canal (in Egypt), and Al-Rosaries, Khashm al-Girbah, and Merowe dams (in Sudan), the downstream states have never notified Ethiopia.

watercourse states. The principle of Cooperation stems from the broader and somewhat elusive principles of good-neighborly relations under international law.[23]Indeed, good-faith co-operation between states concerning the utilization of an international watercourse is an essential basis for the attainment and maintenance of an equitable allocation of the uses and benefits of watercourses. Cooperation is also necessary to enable watercourse states to take all appropriate actions for the fulfillment of the 'due diligence' obligation not to cause significant harm. Consequently, broad support for this general obligation is found in the UN watercourse convention, treaty practice states, and case law.[24]

The UN Charter recognizes international economic and social cooperation to create conditions of stability and well-being, which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights.[25] Moreover, the Charter of Economic Rights and Duties of states call for prior consultation among states in respect of shared natural resources to achieve optimum use of such resources without causing damage to the legitimate interest of others.[26] For water is the most shared natural resource in the world, Article 3 of the resolution embraces cooperation in the utilization of international watercourse law as an essential principle of international water law.[27]

In 1970, the UN General Assembly commissioned the International Law Commission (ILC) to draft a set of articles to govern Non-navigational Uses of Trans-boundary Water.[28] After 21 years of extensive work, in 1991, the ILC prepared the draft text of the UN Watercourses Convention. A considerable discussion had been made during 1991–1997 on the ILC's draft. Moreover, on 21 May 1997, the UN General Assembly adopted the Convention on Non-Navigational Uses of

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23 UN-Water Conference, 'the Interregional Meeting of International River Organizations convened by the UN in Dakar', Senegal 1981 underlines the importance of inter-State co-operation and the necessary organizational structures both at the international and regional levels and for specific watercourses.

24 International law Association, Report of the fifty-second conference held at Helsinki 484, 518-19, 1966 [hereinafter Helsinki Rules]. (Articles XXIX [1], XXIX [2], XXXI), the UN Watercourses Convention note 1 (Articles 5.2, 8, 9, 11, 12, 24.1, 25.1, 27, 28.3, 30), 1960 Indus Waters Treaty (Articles VI-VIII), 1995 SADC protocol on shared watercourse systems (Articles 2–5), 1995 Mekong Agreement (Preamble, Articles 1, 2, 6, 9, 11, 15, 18, 24, 30), 2004 Berlin Rules (Chapter XI, Articles 10, 11, 56, 64) and 1992 UNECE Water Convention (Articles 6, 9, 11, 12, 13, and 16)

25 The Charter of the United Nations, (1945), San Francisco, Article 55 available at Charter of the United Nations, 26 June 1945, San Francisco, available at http://:www.un.org accessed on 23 February 2013

26 General Assembly resolution on Economic and Social cooperation, resolution, 3281 (XXIX) of 12 December (1974),Art.3

27 International Law Commission (1979), Yearbook international law Vol.2. No, p. 171,

28 Report of the International Law Commission on the Work Forty-Six Session U.N.GAOR, 49th Sess., Supp.No.10, at 195, U.N.Doc.A/49/10/1994 an available at http://www.un.org/law/ilc/index.htm accessed on 12 January 2020

International Watercourses.[29]According to Article 36(1) of the Convention, 35 instruments of ratification, approval, acceptance or accession are necessary to bring the Convention into force. Some of the principles such as equitable and reasonable utilization have become norms of international legal practice and are cited in many international watercourse disputes. The principle of equitable and reasonable utilization has also been endorsed in ICJ's decision concerning the Gabcikovo-Naymaros Project case.[30] In this particular case, the Court decided that Czechoslovakia, by unilaterally assuming control of a shared resource, violated the generally accepted rules of equitable and reasonable utilization of the natural resource of an international watercourse and in turn deprived Hungary of its right to an equitable and reasonable share of the natural resources of the Danube River.

2.1. Scope of Notification of Planned Measures

Article 12 of the UN watercourse convention provides that a watercourse 'state should before it implements or permits the implementation of planned measures which may have a 'significant adverse effect' upon other watercourse states, provide those states with timely notification thereof. Such notification shall be accompanied by available technical data and information, including the results of any environmental impact assessment, to enable the notified states to evaluate the possible effects of the planned measures.

In its commentary on Article 12, the International Law Commission (ILC) pointed out that the threshold established in the article is intended to refer to *significant adverse effects*,' not to refer merely to some effects.[31]As a result, the position taken by the ILC is that notice of a planned measure must be furnished only when their implementation may have *a significant adverse effect u*pon the other watercourse state and not for every measure with little or no adverse effect on the other watercourse state. Besides, the obligation under the same provision concerning notification is accompanied by the duty to provide *available technical data and information*. The basin state in question cannot be called upon to or cannot be put to the expense and trouble of securing

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[29] Report of the International Law Commission on the Work Forty-Six Session (1994), U.N.GAOR, 49th Sess., Supp.No.10, at 195, U.N.Doc.A/49/10/1994 an available at http://www.un.org/law/ilc/index.htm accessed on 12 January 2020, p. 123. Out of 133 nations, 103 nations votes in favor (including Bangladesh, Finland, Jordan, Syria, USA, Mexico Slovakia, and Nepal), 27 nations abstained (including Egypt, Ethiopia, India, Israel, Rwanda, and France) and three nations voted against the Water Convention (Burundi, China, and Turkey).

[30] Gabcikovo-Nagymaros project (Hungary Vs Slovakia)(1957), Supra note 16.

[31] Charles B. Bourne, 'International Law and Pollution of International Rivers and Lakes', 6 U.BRIT. COLUM. L. REV. vol. 115, (1971), pp, 172-176.

statistics and data which are not already at hand or readily obtainable. In case a state which has been notified requests data or information that is not readily available, but is accessible only to the notifying state, it is deemed appropriate for the former to cover the expenses incurred in producing the additional material.[32]

The phrase 'implements or permits the implementation of' is intended to make clear that Article 12 of the convention covers not only measures planned by the state but also those planned by private entities. Thus, in the case of measures planned by a private entity, the watercourse state in question is under an obligation not to authorize the entity to implement the measures and not to allow it to go forward with their implementation before notifying other watercourse states as provided in Article 12 of the UN Watercourse Convention. Here, notifying other states should become effective not only where the riparian state plans new constructions, projects that may cause adverse effects to the rights or interests of another watercourse state, but also where alterations of or additions to existing constructions, projects, or use may cause such harm.[33]

2.2. Consultation and Negotiation Concerning Planned Measures

The obligation of the planning state to enter into the consultation will arise in consequence of two circumstances. First, the obligation arises if the notified state objects to the planned measure on the ground that it would be inconsistent with the provisions of Articles 5 or 7 that the measure is against reasonable and equitable utilization and likely to cause significant harm to other riparian states.[34] Second, the obligation arises when the planning state fails to notify and another watercourse state has reasonable grounds to believe that state is planning measures that may have a significant adverse effect upon it, and requests the planning state to comply with the processes of consultation and negotiation.[35]

In both cases, the purpose of consultation and negotiation is to arrive at an *equitable resolution* of the dispute involving the planned measure. The term 'equitable resolution' includes, among other things, modification to the initial plan to eliminate its potentially adverse effect, adjustment of other uses being made by either of the states, or the provision by the notifying state of

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[32] Report of the International Law Commission on the Work of its Forty-Sixth Session, UNGARO, 49th Secession, Supp (No. 10), UN Doc A/49/10 (1994), Art 12 para .5

[33] International Law Commission), 'Yearbook of the International Law Commission', vol. 2., No. 1, 1983, pp.175

[34] UN watercourse convention (1997), supra note 1, Art. 17.

[35] Id., Art. 18, para1.

compensation (monetary or other) acceptable to the notified state.[36] This does not mean removing all harms. As Prof. MacCaffrey expressed the rule does not require modification and change to the extent of removing all harm to the other watercourse state, but only such changes as will avoid impermissible appreciable harm.[37]

Sub Article 2 of Article 17 concerns how the consultations and negotiations are to be conducted. They shall be pursued on the basis that each state must in good faith pay reasonable regard to the rights and legitimate interests of the other states. Negotiating in good faith 'implies honesty, fairness, tolerance, lack of prejudice; consideration for the position, interests, and needs as well as flexibility, willingness to seek a solution, and, above all, cooperation.[38] It implies to act in good faith to carry out an act with honest intent, fairness, and sincerity, and with no intention of deceit.[39]Charter of Economic Rights and Duties of States also addressed the manner of consultation and negotiation in its article 3 as 'a processes of good faith consultation and negotiation purported to achieve optimum use of shared resources without causing damage to the legitimate interest of others.' The award of the tribunal in the Lake Lanoux Arbitration has also inspired the concept. The Tribunal believed that watercourse states should undertake consultation and negotiation according to the rules of good faith to seek to give them every satisfaction compatible with the pursuit of its interests and to show that in this regard it is genuinely concerned to reconcile the interests of the other states with its own.[40]

Sub article 3 of Article 17 requires the notifying state to suspend the implementation of the planned measures during the period of consultation and negotiation. The suspension seems reasonable since going ahead with the planned measures during the period of consultations and negotiations would not be consistent with the concept of 'good faith' required by sub-article 2 of Article 17. In the Lake Lanoux case, the arbitrator decided that the fact that there is a dispute between two states is not in itself enough to require suspension of a project by an implementing state.[41] In the UN Watercourse Convention, the notifying state shall, if so requested by the notified state at the time it makes the communication, refrain from implementing or permitting

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[36] Id., Art.18.
[37] International Law Commission, 'Year Book of International law Commission', (1987), Vol. 2, No.1, P.123
[38] N Zawahri, Dinar, and G Nigatu, 'Governing International Freshwater Resources: An Analysis of Treaty Design' Paper presented at, New Orleans, (2010), p.23.
[39] Id., p.24
[40] Lake Lanoux arbitration(1957), Supra note 4, p.281.
[41] Lake Lanoux arbitration(1957), supra note 4, p.39.

the implementation of the planned measures for six months unless otherwise agreed.[42] The restriction in the UN Watercourse Convention is the agreement of parties; if the planning state and notified state agree otherwise, the planned measure may be continued during the processes of consultation and negotiation. If, however, the state failed to agree on it the planning state is duty-bound to suspend the implementation for six months.

Once this period has expired, the notifying state may proceed with the implementation of its plans in line with reasonable and equitable use and without causing significant harm to other states. It is also important to note that, under the UN Watercourse Convention, the obligation to consult and negotiate does not imply an obligation to *require prior consent*. This understanding is in line with Lake Lanoux arbitration that stipulates that international practice prefers to resort to less extreme solutions [than requiring prior agreement].[43] In the case, the tribunal underlined that it did not find clear and convincing evidence that either customary international law or the regime was established by the Treaty that restricted sovereign states to the extent of subjecting the execution of works on transboundary watercourses upon consent.[44] Thus, the arbitral tribunal concluded that prior consultation is neither a right to veto the use nor a unilateral right to use water by any riparian without taking into account other watercourse states' rights.

2.3. Exceptions to the Duty to Notify Planned Measures

In some instances, the planning states are not required to adhere to the notification of the strict requirement of planned measures. The real needs of these exceptions are premised on balancing the undeniable interest of the planning state to retain confidentiality in sensitive circumstances or to protect the interest of overriding importance that require immediate implementation without awaiting the expiry of the period allowed for reply to the notification, consultation, and negotiations.[45]

The first exception is found in Article 19 of the convention, which provides that a watercourse state may immediately proceed with measures that are of the utmost urgency. The article refers to highly exceptional cases in which interests of overriding importance require the immediate

[42] UN WatercourseConvention(1997),supra note 1, art.17 (3).
[43] Lake Lanoux (1957), Supra note 4, p.128, para. 11.
[44] Yearbook International Law Commission (1987), supra note 32, para. 1065
[45] Charles Bourne(1971), Supra note 26, p.192.

implementation of planned measures. The interest involved in this exception includes the need for protecting public health, public safety, or other equally important interests such as protecting the population from the danger of flooding.

The other exception is provided in Article 31 of the UN Watercourse Convention that the notifying state is not required to divulge data or information that is vital to its national defense or national security. This exception involves information ranging from strategic or military types of information to matters of a trade secret.[46]The exception may further be widened to include the protection of any major facility such as a power plant, or factory as subjects of national security.[47] Recognizing the subjectivity of this exception, the Convention had attempted to narrow the scope by requiring the planning state to cooperate in good faith with other watercourse states to provide as much information as possible under the circumstances.[48] Hence, the does not automatically excuse the watercourse state to furnish information or data by a mere showing of a municipal law or regulation bars disclosure of information. The state planning the project has to show the real need none disclosure.

2.4. Effect of Failure to Comply with Notification

Sometimes the planning state may proceed with the execution of a project without complying with notification. The effect of failure to comply with its obligation on the part of the planning stage is not explicitly provided under the UN Watercourse Convention. However, the 1966 Helsinki Rules of the International Law Association attaches some legal significance to a failure to give that notice.[49]The prescription of the Helsinki Rules is that a utilization undertaken without notices shall not be given the weight normally accorded in the event of a determination of what is a reasonable and equitable share of the waters of the basin. Thus, it prevents an important factor from being placed on the scales used to weigh the equities of competing utilization.

The other watercourse state would thus normally be compensated for the value of its sacrifice; such compensation might be financial, or it might be in the form of electricity supplies, flood

[46] International Law Commission (1982), Yearbook of international law commission vol.2, No.1, p. 65,
[47] Ibid.
[48] UN Watercourse Convention (1997), note 1, art. 31
[49] International law Commission yearbook of international law vol. 2, no.1, 1982, p. 67

control measures, enlargement of another use, or other goods, provided that such damage could have been avoided if a timely notice of the danger had been given.[50]

3. Normative Framework of Notification, Consultation, and Cooperation of planned Measure in the Nile Basin

3.1. The 1902 Treaty

Several attempts have been made to regulate the Nile during and after the colonial era.[51]On 15 May 1902, Britain signed a frontier delimitation agreement with Ethiopia.[52] The agreement was the outcome of the British pursuit of such a broad strategy to guarantee the unimpeded flow of the Blue Nile to downstream states.[53]Although the treaty had been framed as a border arrangement aimed at delineating the boundary between Ethiopia and Anglo-Egyptian Sudan, a water provision was included in the third article which requires the prior consent of Great Britain and Sudan. Article III of the treaty has a nexus to notification and consultation on planned measures for it requires not only prior notification but also authorization. According to Article V, the treaty was drawn up in the Amharic and English languages; both languages are equally authentic and official. Article III of the English version of the treaty reads as follows:

His Majesty Emperor Menelik II, King of Kings of Ethiopia engages himself towards the Government of his Britannic Majesty, not to construct or allow to be constructed any work across the Blue Nile, Lake Tana or Sobat which would arrest the flow of their water into the

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[50] Ibid

[51] These agreements include the Protocol between the UK and Italy government for the demarcation of their respective share of influence in East Africa from Ras Kasar to Blue Nile (15 April 189); Treaty between Ethiopia and the UK Relative to the Frontier between Sudan, Ethiopia, and Eritrea, Addis Ababa(May 1902), London Printed for his Majesty's stationery office, Harrison and Sons, St. Martins Lane, (hereinafter called the Anglo-Ethiopian treaty); Treaty between the United Kingdom and Independent state of Congo to define their respective sphere of influence in Eastern and Central Africa, London (9 May 1906); Agreement between the UK, France, and Italy respecting Abyssinia (9 May 1906) (these agreements can be found in E. Hertslet, The Map of Africa by Treaty, 3rdedn. (London, Frank Cass 1967), (noted in 'The River Nile in the post-colonial age', edited by T. Tvedt. London: I.B. Tauris, 161-178); 1925 Exchange of Notes between the UK and Italy respecting concession for a barrage at Lake Tana and Railway across Abyssinia from Eritrea to Italy Somaliland 50 LNTS (1925; the Exchange of Notice between his Majesty's government in the United Kingdom and the Egyptian government concerning the use of the Water of the River Nile For irrigation purpose, Cairo(1929).

[52] Treaty between Ethiopia and the UK Relative to the Frontier between Sudan, Ethiopia, and Eritrea, Addis Ababa(May 1902), London Printed for his Majesty's stationery office, Harrison and Sons, St. Martins Lane, (hereinafter called the Anglo-Ethiopian treaty).

[53] Yacob Arsano,' Ethiopia and the Nile: Dilemmas of National and Regional Hydro politics', thesis Center for Security Studies, Swiss Federal Institute of Technology, Zurich ETH Zentrum SEI, Seilergraben, 2004), P.97

Nile except in agreement with his Britannic Majesties and the Government of Sudan.[54]Whereas the Amharic version reads as follows:

፫ተኛ፡ ክፍል ።።

ጃንሆይ፡ ጸ ግማ ሚ፡ ም ኒ ልክ፡ ንጉሠ፡ ነ ገሥ ት፡ ዘኢ ትዮጵ ያ፡
ከጥ ቱር፡ ዓ ባ ይና፡ ከ ባ ሕ ረ፡ ፀ ና፡ ከ ሶ ባ ት፡ ወ ንዝ፡ ወ ደ
ነ ጭ፡ ዓ ባ ይ፡ የ ሚ ወ ር ደ ው ን፡ ው ሀ፡ ከ አ ን ግ ሊ ዝ፡ መ ን ግ ሥ ት፡
ጋ ራ፡ አ ስ ተ ድ ሞ፡ ሰ ይ ሰ ማ ሙ፡ ወ ንዝ፡ ተ ጻ ር፡ እ ጻ ር፡ የ ሚ ደ
ፍ ን፡ ሥ ራ፡ እ ን ዳ ይ ሰ ሩ ።። ወ ይ ም፡ ወ ንዝ፡ የ ሚ ደ ፍ ን፡ ሥ ራ፡
ለ ማ ሠ ራ ት፡ ለ ማ ን ም፡ ፈ ቃ ድ፡ እ ን ዳ ይ ሰ ጡ፡ በ ዚ ህ፡ ው ል፡
አ ድ ር ገ ዋ ል ።።

Successive governments, both in Great Britain (and later Sudan) and in Ethiopia construed Article III of the accord as stipulating contrasting scales of obligation; the word ***arrest*** surfaced as a controlling and contentious part of the treaty.[55] Great Britain had naturally advocated the wider view that obliges Ethiopia not to arrest the flow of the rivers in whatsoever way without prior notification and consultation and even authorization by it. In fact, Great Britain deduced from the treaty and pursued its policies on the assumption that Ethiopia had been bound to completely refrain from laying any water control on the Nile and its tributaries without prior notification and subsequent authorizations by its government, the scale of the construction or its impact on the sustained flow of the watercourse notwithstanding.[56] For example, in the course of 1922 when the Lake Tana dam concessions negotiation was being undertaken, Major Dodds, the British delegate in Ethiopia reminded Ethiopia of its obligation not to construct any work 'which would diminish the volume of water flowing into the Nile without consultation with the British government.[57]

On the other hand, Ethiopia's argument, both the past and now, largely deviated from the reading mentioned above. Firstly, Ethiopia contested the very validity of the 1902 agreement on various

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[54] The Anglo-Ethiopian treaty (1902), note 218, Art. 3. See also Edward Ullendorff (1967), The Anglo-Ethiopian Treaty of 1902 Bulletin of the School of Oriental and African Studies, University of London, Vol. 30, No. 3, Fiftieth Anniversary Volume, Pp 641-654.

[55] Tadesse Kassa Woldetsadik), International watercourse law in the Nile basin: Three States at Crossroad, Routledge Taylor and Francis, London and New York, 2013, p.58

[56] Ibid.

[57] Id, p.63

grounds. It was asserted that the treaty's conclusion had involved coercion manifested in a political environment where there were perceived threats to Ethiopian sovereignty over its natural resources. To use a catching expression by one author, '*the glowing state of inequity instituted by the treaty gravely jeopardized Ethiopia's development prospect, and hence could afford a legal ground for calling the nullity of the arrangement'* on several legitimate grounds.[58] Besides, the validity of the 1902 treaty has been contested by Ethiopia based on a fundamental change of circumstances as stipulated under the relevant provisions of the Vienna Convention of the Law of Treaties.[59]

Among others, the establishment of Sudanese self-rule in the mid-twentieth century had represented a radical transformation of the status quo that fundamentally affects the position of the parties to the original accord. The very purpose of the 1902 treaty is upholding the welfare of the British colonial establishment in the Sudan and Egypt and the friendly relationship between Great Britain and Ethiopia could not any longer be fulfilled through the same treaty scheme.[60]Besides, by operation of the rules of state succession, Ethiopia would now be required to discharge the obligation to an essentially different party, a fact which itself depicts fundamental changes from the original anticipations of Great Britain and Ethiopia within the framework of the 1902 treaty.[61] Consequently, Ethiopia can base its claim for calling the abrogation of the agreement based on a fundamental change of circumstances.

Ethiopia also defended a wider construction of the treaty-based on technical interpretation. It submitted that under the 1902 treaty, the agreed-upon obligation under article III was about *not stopping* the entirety of the waters of the Abay, Lake Tana, and Sobat. The ordinary meaning of the text therefore does not prevent any Ethiopian uses that merely diminish (and do not completely obstruct) the water's flow. Substantiating the position of Ethiopia, one author noted the following.[62]

> *'In 1907, a few years after the conclusion of the treaty, Emperor Menelik was engaged in negotiation for the insertion of an interpretative note into the Anglo-*

[58] Tadesse Kassa (2013), Supra note 54, p.112
[59] United nation Vienna Convention on the Law of the treaty (1966), Vienna UN Treaty serious Vol .1155, 331, Art.62
[60] Tadesse Kassa (2013) note 54, p.117
[61] Ibid.
[62]Id.,p.64

Ethiopian treaty, which he computed would water down its own beating implication. Then, the Emperor succeeded in retaining Lord Cromer's guarantee that the terms of Article III of the treaty do not imply any intention of interfering with local rights, so long as no attempt is to be made to arrest or interfere in any way with the flow of this river.'

This line of interpretation entails that Ethiopia did bound itself neither to inform nor to secure the consent of Britain and later Sudan for any contemplated projects of a nature that *do not totally arrest* the flows of the aforesaid rivers and Lake Tana. Overall, it would appear from the above discussion that the riparian duty to inform, consult, and cooperate cannot be inferred indisputably from the contents of the 1902 Anglo-Ethiopian treaty. Nor does it provide details of the procedure to be followed in case of contemplated projects.

3.2. The 1929 and 1959 Agreements

The 1929 agreement was concluded between the UK - acting on behalf of Sudan and its Eastern African colonies (Kenya, Uganda, and Tanzania), and Egypt concluded to satisfy long-standing downstream interests. The agreement officially recognizes the 'natural and historical right of Egypt to the waters of the Nile' and vests in it a right to veto water development works undertaken by upstream riparian states that could jeopardize Egyptian interests.[63]

The Treaty also provided for upstream waterworks to be administered 'under the direct control of the Egyptian Government and left Sudan's water allocation subordinated to Egypt's water needs.[64]Consequently, without previous notification and agreement of the Egyptian government, no irrigation or power works or measures are to be constructed on the River Nile and its branches, or on the lakes from which it flows, as far as all these are in Sudan or countries under British administration.[65]This way of interpretation by Egypt would mean that Ethiopia should not entail any prejudice to the interests of Egypt, either reduce the quantity of water arriving in Egypt, or modify the date of its arrival, or lower its level.

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[63] Exchange of Notes between His Majesty's Government in the United Kingdom and the Egyptian Government on the Use of Waters of the Nile for Irrigation, Cairo, 7 May 1929, 93 LNTS p. 43 (hereinafter the 1929 Agreement).

[64] The 1929 Agreement, the Exchange of Notice between his Majesty's government in the United Kingdom and the Egyptian government concerning the use of the Water of the River Nile For irrigation purpose, Cairo(1929). para, 4(ii) and 4(iv).

[65] The 1929 Agreement, Supra note 63, para,4(b).

Upon independence, however, Sudan declared that it was not bound by the 1929 agreement - objecting to Egypt's veto rights and the restriction on Sudan's development.[66] Consequently, after rounds of intensive negotiation, Egypt and Sudan signed the 1959 Agreement for the full utilization of the Nile waters in which Sudan recognizes Egypt's historical rights; the waters were allocated to the two states only.[67] The agreement if after the Aswan High Dam becomes operational, Sudan would receive 18.5 Billion Meter Cube (BMC) and Egypt would receive 55.5 BMC as long as Nile yield remains the same.[68] The two downstream states have also presumed future demands of other riparian states and agreed to present a unified view in any other negotiation concerning the Nile water.[69]

Ethiopia was not a party to both the 1929 and 1959 agreements, and hence could not be bound by the terms of those agreements. Article 34 of the Vienna Convention on the Law of Treaty clearly states that a treaty does not create either obligations or rights for a third State without its consent.' Hence, whatever the procedural or substitutive provisions that may have been stipulated in those agreements regarding notification on planned measures will not bind Ethiopia. In summary, the 1929 and 1959 agreements only gave Egypt a veto power in the basin and imposed an obligation on other parties to get authorization for any development enterprise on the river, hence going beyond the commitment of notification on the contemplated project.

3.3. State Practice in the Eastern Nile on Notification, Consultation, and Cooperation of Planned Measure

Article 38(1) (b) of the ICJ Statute presents two traditional elements important in the formulation of international customary law: general state practice and *opinion juris*. Customary law emanates from the past conduct of states and comes into existence if a practice is extensive, virtually uniform, and supported by a sense of legal obligation (*opino juris*).[70] Mr.Michal wood**,** in his ILC's custom draft conclusions on the identification of customary international law, stated that to determine the existence and content of a rule of customary international law, it is necessary to

[66] Dellapenna, 'The Nile as a Legal and Political Structure', in E.H.P. Brans, E.J. de Haan and A. Nollkaemper, eds., The Scarcity of Water: Emerging Legal and Policy Responses (London, Kluwer Law International p. 125.
[67] Agreement between the Republic of Sudan and the United Arab Republic for the Full Utilization of the Nile Waters, Cairo, 8 November 1959, 453 UNTS p. 6519 (hereinafter the 1959 Agreement).
[68]Id., at article 2(3)
[69]Id., Art. 5.
[70] Kelly Patrick, 'Twilight of customary law', Virginia Journal of International Law, Vol.40, No.2 (1970), p.450-544

ascertain whether there is a general practice that is accepted as law (*opinio juris*).[71] In assessing evidence to ascertain whether there is a general practice and whether that practice is accepted as law (*opinio juris*), regard must be had to the overall context, the nature of the rule, and the particular circumstances in which the evidence in question is to be found.[72] The state practice needs to satisfy some requirements to consider it as a general practice. The requirement of general practice, as a constituent element of customary international law, refers primarily to the practice of States that contribute to the formation, or expression, of rules of customary international law.[73] In certain cases, the practice of international organizations also contributes to the formation, or expression, of rules of customary international law. In certain cases, the practice of international organizations also contributes to the formation, or expression, of rules of customary international law. The conduct of other actors is not practiced that contributes to the formation, or expression, of rules of customary international law, but may be relevant when assessing the practice of state and international organizations.[74]State practice consists of the conduct of the State, whether in the exercise of its executive, legislative, judicial, or other functions. The practice may take a wide range of forms. It includes both physical and verbal acts. It may, under certain circumstances, include inaction. Forms of State practice include, but are not limited to: diplomatic acts and correspondence; conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference; conduct in connection with treaties; executive conduct, including operational conduct "on the ground"; legislative and administrative acts; and decisions of national courts.[75]

Evidence of acceptance as law (*opinio juris*) may take a wide range of forms. Forms of evidence of acceptance as law (*opinio juris*) include, but are not limited to: public statements made on behalf of States; official publications; government legal opinions; diplomatic correspondence; decisions of national courts; treaty provisions; and conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference.[76]Failure to react

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[71] Sir Micheal Wood, 'Draft conclusions on the identification of customary international law, available at https://legal.un.org/ilc/texts/1_13.shtml last visited 6 November 20220.
[72]Ibid.
[73]Ibid.
[74]Niles Blokker, 'International Organization and Customary International Law', *International Organization Law Review*, Vol.14, Issue.1 available at https://doi.org/10.1163/15723747- , last visited 1 January 2021.
[75]Ibid.
[76] Ibid.

over time to practice may serve as evidence of acceptance as law (*opinio juris*), provided that States were in a position to react and the circumstances called for some reaction.

More importantly, the significance of treaties, resolutions of international organizations and intergovernmental conferences, decisions of courts and tribunals, and the teaching of scholars has also helped in the identification of customary international law. A rule outlined in a treaty may reflect a rule of customary international law if it is established that the treaty rule:

(*a*) codified a rule of customary international law existing at the time when the treaty was concluded;(*b*) has led to the crystallization of a rule of customary international law that had started to emerge before the conclusion of the treaty; or(*c*) has given rise to a general practice that is accepted as law (*opinio juris*), thus generating a new rule of customary international law.[77]

Though most rules relating to shared watercourses envisioned in treaty instruments, custom nevertheless plays an important role in understanding the perception of states to the certain principle of international watercourse law. The practice of states becomes even more important where the relations between states are not subject to any specific treaty regime. The relationship between Sudan, Egypt, and Ethiopia has that element and character. Not *all* the Nile basin states have signed the CFA and none of them is a party to the UN Watercourse Convention. Thus, comprehensive treaty regimes in the Nile basin do not provide a clear normative basis concerning the principle of the duty of notification, consultation instead of state practice to some extent shed light.

3.3.1. The Practice of Egypt

Egypt has undertaken giant projects in the Nile River on different occasions. In 1970, for example, Egypt completed the construction of the Aswan High Dam.[78] A question that should be raised is whether or not Egypt had ever provided appropriate notification to upstream nations, from whence the entirety of the waters comes.

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[77] Micheal Wood, supra note 70.

[78] Aswan High Dam, Arabic Al-Sadd al-ʿĀlī, rockfill dam across the Nile River, at Aswan, Egypt, completed in 1970 (and formally inaugurated in January 1971) at a cost of about $1 billion. The dam, 364 feet (111 meters) high, with a crest length of 12,562 feet (3,830 meters) and a volume of 57,940,000 cubic yards (44,300,000 cubic meters), impounds a reservoir, Lake Nasser, that has a gross capacity of 5.97 trillion cubic feet (169 billion cubic meters) available at http://www.britannica.com/EBchecked/topic/40203/Aswan-High-Dam: accessed on 13January 2020.

Concerning the construction of the Aswan High Dam which was undertaken within the framework of the negotiations between Egypt and Sudan for full utilization of the Nile waters, Egypt proceeded with the building of the construction without prior information, consultation, and participation of the upstream nations.[79] The unilateral action of Egypt also attempted to transfer water outside of the natural basin without any regard to the interest of the upstream states. For example, Ethiopia has protested the construction of the dam itself, as well as other beyond-basin transfer initiatives by Egypt several times arguing that such a project could affect its equitable and reasonable shares. The downstream response was contrary to Ethiopia's request to the extent of ignoring the projects that were built on the shared watercourse. This is particularly evident from the fundamentals of Egypt's national policy on the subject - which is influenced by the following reported statement by its late president Anwar Sadat.[80]

> *'Once I have decided to divert the Nile waters into Sinai I will not try to get permission from Ethiopia …. if they do not like our measures, they can go to hell.'*

The statement shows Egypt was not willing to listen to the concern of upper riparian states. Thus, Ethiopia protested against such an extra-basin transfer. However, Sudan has started to protest against a transfer of water from its natural basin by Egypt, saying: "The use of waters of the Nile and other shared water resources should be the exclusive right of the co-riparian countries alone, and no transfer should be permitted to any non-riparian country.[81]

Moreover, since 1997 Egypt unilaterally has adopted the implementation of grandiose schemes of water diversion out of the natural valley of the Nile River for new resettlements and urbanization. The plan includes horizontal expansion of projects over the Nile water to increase agriculture by 35 percent as a result of the expansion of two mega projects in Toshka and Sinai.[82] These projects purport to create a home for over 20 percent of the population.[83]Indeed Egypt's unilateral measures on the otherwise shared water resources underscore the nation's long-range water strategy because of which participation or support of upstream states was not considered essential.[84]

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[79] YacobArsano (2004), Supra note52 P.220
[80]Id., (noted from Anuar Sadat speech written on the Egyptian Gazette, June 5, 1980)
[81]Ibid.
[82] National Water Resource plan of Egypt, National Water Resource Plan for Egypt 2005, P. 21
[83]National Resource Plan(2005), , p.25
[84] YacobArsano (2004), Supra note 54 p.202.

In so doing, Egypt has never notified and consulted the upstream states in any way but has argued, quite consistently, that it is acting within its 1959 shares.[85] The unilateral measures, in fact, show that Egypt has not adhered to the principles of notification and consultation of planned measures. Besides, Ethiopia made its position very clear t the UN-Water Conference held in Argentina in 1977 stating that it was "…the sovereign rights of any riparian state, in the absence of an international agreement to proceed unilaterally with the development of water resources within its territory"[86]

3.3.2. The Practice of Sudan

Likewise, in line with the authorization provided under the 1959 treaty, Sudan carried out several projects without consulting and notifying other riparian states of the Nile basin, including Ethiopia. After the 1959 bilateral agreement with Egypt, Sudan started the construction of Rosaries Dam in 1961 and completed the same in 1966 - again without giving due regard to the interest of Ethiopia and other upstream states.[87] As recently as in 2013, the Sudanese government inaugurated the heightening of the Al-Rosaries Dam which would enable the nation to increase its irrigable land to 2 million hectares, power generation by 50%, and water storing capacity from 3 to 7.4 billion cubic meters, without any official consultation and notification to Ethiopia.[88]

Concisely, major projects by downstream states have been constructed unilaterally without notification and consultation to upstream states especially Ethiopia whence more than 85 percent of the Nile floods flow. Embarking on projects without notification, consultation, or participation of the upstream states is partly attributed to the monopolistic mindset instituted by the colonial and post-colonial treaties and subsequent practices, and most importantly, the erroneous belief that riparian states' duty to inform on planned measures applies only in upstream-downstream relationships and not the vice versa. Harm is generally perceived as emanating only from the actions of upstream states. Evidently, such perception has no support under the rules of international watercourse law. Indeed, the rule on notification and cooperation on planned

[85] Girma Amare (2009), Supra note11, P.9
[86] YacobArsano (2004), Supra note 54 p.202.
[87] Al-Rossires Dam Encourages Agriculture in Blue Nile State available at http://news.sudanvisiondaily.com/details.html?rsnpid=199448, accessed on 14 January 2020
[88] http://www.diu.gov.sd/en/index.php/home_en/show/94#.UtTsgrQQSXs, accessed on 14January 2014

measures can operate to both upstream and downstream states. Downstream development creates facts on the ground and that obviously affects the future use of the river by up-stream states; in light of this, downstream states have to notify and consult upstream states of such planned measures if argued it is common practice. Moreover, the UN Watercourse Convention does not at all make a distinction on riparian duty to inform on planned measures based on the state's geographical location.

3.3.3. The Practice of Ethiopia

For a long time, Ethiopia has consistently opposed the inclusion of a provision on riparian duty to inform on the planned measure in agreements that sought to regulate Trans-boundary Rivers. Ethiopia's stand can be inferred from the position it took at different international and regional negotiation forums regulating shared watercourses. During the 1974 United Nations Water Conference in Mar Del Plata, Argentina, for example, Ethiopia made it clear that 'it is the sovereign right of any riparian state, in the absence of any international agreement, to proceed *unilaterall*y with the development of water resources within its territory.'[89]Following the conclusion of the negotiation on the UN Watercourse Convention, Ethiopia protested the inclusion of some provisions and later abstained from voting in favor of the Convention alleging, among others, that Part III of the Convention, which deals with notification, consultation, and cooperation, puts an onerous burden on the upper riparian state.[90]This is consistent with ILC's draft conclusion on the identification of custom as mentioned before. The requirement, as a constituent element of customary international law, that the general practice is accepted as law (*opinio juris*) means that the practice in question must be undertaken with a sense of legal right or obligation. Quite to the contrary, Ethiopia opposes the practice saying that it is the sovereign right of any riparian state in the absence of international agreement to unilaterally proceed with the development of water resources within its territory.

Ethiopia reaffirms its position saying that any state has the right to take unilateral action on watercourse unless there is a valid treaty. Therefore, during the CFA negotiation Ethiopia has

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[89] Gebre Tsadik Degefu,'Nile Historical, Legal and Developmental Perspectives,' Trafford Pub., New York), (2010) pp.133-134

[90] Mohammed Abdo, The relevance and contribution of UN watercourse convention towards resolving the problems in the Nile basin available at http://www.dudee.ac.uk/cepmlp/journal/html/Vol15/Vol15 8.pdf accessed on 7/22/2019

taken the view that the exchange of information on planned measures should be made through third-party mechanisms than through bilateral arrangements involving the riparian states directly.[91]Ethiopia accepts the provision of notification of planned measures as envisioned in the CFA and must be conducted through the Nile Basin Commission and not via individual states. Moreover, it becomes clear that from the recent venture Ethiopia becomes more willing to consult and cooperate with downstream countries about the Renaissance dam out of goodwill and good neighborhood.

4. Contextualizing GERD in terms of the Notification, Consultation, and Cooperation

4.1. Divergent Perceptions Relating to the GERD

Ethiopia's unilateral decision to construct the GERD has naturally created divergent opinions between the main Nile riparian states Egypt, Sudan, and Ethiopia- and the international community at large. The Ethiopian government has argued that it has the sovereign right to exploit its water resources for the developmental needs of the nation.[92] Further, the government has outlined that the project will be beneficial not only for Ethiopia but also for the downstream countries in many aspects. The flow of the Nile waters will be regulated from season to season and hence water hazards emanating from flooding will decrease, especially in Sudan; floods and silt accumulation have challenged Sudan, and the excessive water lost through evaporation on the Lake Nasser troubles Egypt.[93] Ethiopia has repeatedly declared that clean and cheaper energy will be supplied from the Dam and will be made available to the region that would foster cooperation in Africa.

However, most Egyptian media outlets and official government statements put forward pessimistic opinions on Ethiopia's unilateral measures and about the potential benefits of the dam. Among other issues, Egypt argued that it was not formally informed by Ethiopia about the dam. Egypt insists that despite its entitlement to receive information about the dam, it did so only from the media. Egypt submitted that Ethiopia should tender notification about the project before

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[91] Girma Amare (2009), Sura note 11, p.10

[92] Interview by Aljazeera with late PM Meles Zenawi, Struggle over the Nile, Part I: Masters no More', documentary, broadcasted 7 June 2011, available at http://english.aljazeera.net/programmes/struggleoverthenile/2011/06/2011667594146703.htm accessed on 20 December 2019

[93] Interview by Aljazeera with late PM Meles Zenawi (2011), Supra note 77.

launching any construction.[94] Most recently, even Egypt went as far as claiming "*all three countries shall reach an agreement on the rules of filling and operating the dam before starting the process of filling the reservoir with water*[95]Ethiopia countered the argument that this would happen only through the CFA.[96] Still, Egypt also raised its concerns that the GERD will reduce its share of the Nile that has been explicitly recognized under the 1929 and 1959 treaties. On one occasion, Egypt's ex-president Mursi blatantly announced his confirmation that 'all options are open to deal with this subject and if a single drop of the Nile is lost, their blood will be the alternative.'[97]

4.2. Substantive Scope of Ethiopia's Duty in the Context of GRED

Across the Nile basin, there is no single comprehensively binding treaty regime that imposes a duty on Ethiopia to notify, consult, and cooperate with downstream states. Nor did state practice in the region support the same obligation on planned measures. As discussed before, the 1902 Anglo-Ethiopian agreement stipulated that the Ethiopian will not 'construct, or allow being constructed, and work across the Blue Nile, Lake Tana or the Sobat which would arrest the flow of their waters into the Nile except in agreement with His Britannic Majesty's Government and the Government of Sudan [the English version]. Whether this provision binds Ethiopia to notify and consult planned projects or even more, to obtain prior consent from Sudan to construct the GERD is subject to interpretative dilemmas involving the treaties and the continuing validity of the agreement itself.[98] For one thing, it was argued earlier, that the glowing state of inequity instituted by the treaty has gravely jeopardized Ethiopia's 'natural rights and in turn Ethiopia's development prospect which could serve as a legal ground for calling the nullity of the arrangement. Second, by operation of the rules of state succession, Ethiopia would now be

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[94] Ethiopian Reporter, weeklyVol. 1254, No 3, 2013

95 Egypt today, Egypt slams Ethiopia for Renaissance dam remarks available at https://www.egypttoday.com/Article/2/82175/Egypt-slams-Ethiopia-for-Renaissance-dam-remarksaccessed on 3/3/2020

[96] Kendie, Daniel, 'Egypt and the Hydro-Politics of the Blue Nile River Northeast African Studies', Volume 6, Number 1-2, 1999 (New Series), pp. 141-169 (Article) Published by Michigan State University Press, p.12.An interview with Fekeahmed note 49. In the interviews, the official affirmed the researcher that the Egyptian public diplomacy group had submitted a request to the late PM Melese Zenawi about the Renaissance dam and the PM responded that would happen only through the Nile basin cooperative Framework agreement.

[97] Perry and Alastair Macdonald, President Mursi said that 'all option is open to Egyptian over Ethiopia dam available online at http://www.gulf-times.com/Opinion/189/details/356859/Egypt-and-Ethiopia-must-settle-dam-row-through-dialogue accessed on 18 January 2020

[98]TadesseKassa(2013), supra note 54, p.112.

required to discharge the obligation to an essentially different party, Sudan, a fact which itself represents fundamental changes from the original stipulation of the Anglo-Ethiopian agreement.[99]Hence, the treaty could be considered as null as a result of a change of circumstance under the stipulation of Article 62 of the Vienna Convention on the Law of Treaties.

Even the technical interpretation of the 1902 Anglo-Ethiopian treaty does not clearly imply Ethiopia's obligation to inform and consult the GERD to Sudan or Egypt in the contemporary setting of the Nile basin legal discourse. Under the 1902 treaty, the agreed-upon obligation under article III *was about not stopping the entirety of the waters*. The construction of the GERD that purports to generate hydropower will *not stop the flow of the river in its totality and forever*. Now, it is also important to note that the 1902 treaty has empowered only Sudan to get consulted by Ethiopia. Sudan, however, has all along been positive about the shared benefits of the GERD and has not strongly claimed a right to be notified about the project in pursuance of the 1902 treaty. The foregoing discussion suggests that Ethiopia's duty to inform, consult, and cooperate with downstream countries concerning the construction of the GERD cannot be premised on any specific treaty framework.

In the case where there is no all-inclusive legally binding treaty or where the existing treaty is disputed, resort may be made to the rules of general international law on the non-navigational uses of international watercourses. The relevant works of the Institute of International Law (IIL), International Law Association (ILA), and the UN Watercourse Convention have made a vital contribution to the development of the principle of the duty to inform and consult on planned measures. All these would help to shed light on the question of whether Ethiopia has a duty to notify and consult the GERD to other watercourse states.

The IIL explored the riparian duty to notify on planned measures during its session in Salzburg held from 4-13 September 1961; among other things, it provides for a riparian duty of notification and consultation of planned measure if it *seriously* affects other states.
Similarly, the Helsinki Rule of the ILA under Article XXIX, paragraph 2 provided that a 'state, regardless of its location in a drainage basin, should in particular furnish to any other basin State, the interests of which may be substantially affected, a notice of any proposed construction.' More importantly, the UN Watercourse Convention, the most cited set of rules regulating non-

[99]Ibid.

navigational uses of international watercourse envisages the principles of notification of planned measures in a detailed fashion. In specifics, Article 12 of the Convention provides a duty to inform on planned measures that may have '*a significant adverse effect'* upon other watercourse states. According to the wording of all aforementioned authorities, it is evident that the scope of the obligation of the planning State is not applicable for all planned measures as such. Instead, the obligation law would arise only when a planned measure might cause *substantial injury, seriously affects or cause significant adverse effect* to other watercourse states. What constitutes a *serious* or *substantial injury* is often disputable and is decided on a case by case basis.

However, it clear that the duty of the state to inform on planned measures that may have a significant effect does not apply in the context of GERD as Ethiopia is not a member. The next questions that need to be explored are therefore whether the GERD, assuming Ethiopia becomes a member of the UN watercourse convention, has a significant adverse effect on other watercourse states, especially Sudan and Egypt. How does one constitute a 'significant adverse effect' in the context of GERD? What criterion applied to determine the effect of the GERD on other watercourse states?

The exact meaning of the significant adverse effect is still a point of difference between Ethiopia and Egypt. However, it must be shown that there is a real impairment of use as a result of unreasonable use of watercourse by planning States. What are to be avoided are, concerning a particular project or use, those, which have a significant adverse effect upon other watercourse states and not every minor effect. For example, in 1957 the Arbitral Tribunal in the Lake Lanoux case, in which Spain insisted upon delivery of Lake Lanoux water through the original system, found that:

> *'... at the lowest water level, the volume of the surplus waters of the Carol, at the boundary, will at no time suffer a diminution; in the absence of any assertion that Spanish interests were significantly affected tangibly, the tribunal held that Spain could not require maintenance of the natural flow of the waters'.*[100]

Elucidating the substantive scope of adverse trans-boundary effect, one author listed some instances that include that trans-boundary damage embodies a certain category of environmental

[100] Lake Lanoux (1957), *Supra note* 4 p. 123, para. 6

damage, including physical injury, loss of life and property, or impairment of the environment, or *diversion of an undue amount of shared water* (emphasis added).[101]

However, there are no justifiable reasons under international water law that purports that the construction of a hydropower dam by itself causes a significant adverse effect on downstream states. As affirmed by Ethiopia repeatedly, the GERD is a hydroelectric project that would benefit riparian states in many aspects than causing adverse effects.[102] The increased power availability for the entire region will also enhance regional power trading among the three countries, Ethiopia, Sudan, and Egypt. The claims raised by Egypt have not been based on concrete scientific facts conducted at the site of the dam. Therefore, as far as the GERD is destined to generate electric powers, its construction could not have a significant adverse effect on downstream states of Sudan and Egypt. All this would lead to conclude that although Ethiopia has abstained from voting on the UN Watercourse Convention and hence is not bound by it, the provisions of the Convention would still favor Ethiopia for they only require prior notification and consultation of planned measures that cause a significant adverse effect on other watercourse states.

Some scrutiny of state practice in the Eastern Nile states has revealed a lack of practice supporting the duty to notify planned measures. As mentioned before, the state practice in the region does not exhibit the requirement of general practice to be accepted as law (*opinio juris*) means that the practice in question must be undertaken with a sense of legal right or obligation.

The downstream states of Sudan and Egypt have never notified and exchanged information with Ethiopia. Likewise, the voting record of Ethiopia indicates that the country has never supported the principles of riparian duty to inform and consult on a planned project. Ethiopia rather

[101]HanquinXue, transboundary damage under international law Cambridge university press',2003 p,4

[102] Alemayehu Tegenu, the former Ethiopian Minister of Water, Irrigation, and Energy told the Associated Press that Egypt should not worry about a diminished water share from the Nile, (2013). Alemayehu, said that we don't have any irrigation projects around the dam. The dam is solely intended for electricity production … So there should not be any concerns about a diminished water flow," "Even during the period when we would be filling the reservoir, we are going to employ a careful and scientific water impounding technique to make sure the normal flow is not significantly affected," the minister added. available at http://bigstory.ap.org/article/official-dam-will-not-significantly-affect-egypt accessed on 18 January 2020.

considers that reasonable and equitable use of shared watercourse is a sovereign right of states. Ethiopia did not vote in favor of the UN watercourse Convention, it actually abstained.[103]

In light of these essential facts, it could be concluded that the principle of notification and consultation has no support among the Eastern Nile basin states. And under these circumstances, Ethiopia does not have a legal obligation to provide notification on its planned measures and execution of the projects, at least not in the scale and type anticipated by Egypt - except that which it may choose to do in the interest of good neighborliness and cooperation.

5. Conclusion

The treaty practice of states, case laws, and the works of international governmental and non-governmental organizations widely envisages the principle of prior notification and consultation of planned measures. These authorities of international watercourse law have agreed that a watercourse state should or is at least recommended to provide notice of planned measures that could potentially *cause significant adverse effects or substantial effects on other riparian states*. It is also demonstrated that authorities are not unanimous concerning the scope of the obligation. Authorities differ highly on issues of whether the principle of notification on planned measures is legally binding or simply constitutes a mere aspiration and on the effects of failure to comply with notification of planned measures.

The UN Convention on the Law of Non-Navigational Uses of International Watercourse stipulates a very elaborate set of procedural rules applicable to states in the implementation of planned measures on an international watercourse. The Convention sets forth procedures that a watercourse state may take before implementing or permits the implementation of measures that may have a *significant adverse effect* upon other watercourse states. The obligation of the planning state is, it was shown, to give a timely notice of planned measures that should be accompanied by available technical data and information when the contemplated plan may have *a significant adverse effect* and not just any sly type of effect.

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[103] Eckstein Gabriel, 'Study and analysis on voting records of states on the UN Watercourse Convention available at http://hdl.handle.net/10601/952. The convention was adopted by a UN General assembly in May 1997 by a vote of 103 for, against with 27 abstentions and 3 abstentions. Ethiopia is among those states that abstained. For the latest list of countries that submitted instruments of ratification see here: http://www.internationalwaterlaw.org/documents/intldocs/watercourse_status.html accessed on 23 January 2020

In the Nile river basin, it is demonstrated the existing legal framework has failed to regulate riparian duty to inform, consult, and cooperate on planned measures. Principally, the 1902 Anglo-Ethiopian treaty provided an obligation on Ethiopia to inform and consequently get the consent of British and later Sudan as a successor state before implementing or permitting the implementation of projects across the Blue Nile, Lake Tana, or the Sobat which *would arrest* the flow of their waters into the Nile. Nonetheless, the nature of this obligation and continued validity of the agreement has sparked argumentation, challenged both based on its own merit and technical interpretations.

It is also concluded that practice among the Nile basin only shows the prevalence of unilateral measures than notification and consultation. Lower riparian states have undertaken giant projects on the Nile River at different times without notification and consulting the upstream nations, from whence almost the entirety of the waters comes from. Ethiopia had consistently opposed the formulation of a principle that prescribes riparian duty to notify in various international negotiation forums. It has been found that recently, Ethiopia adopted a new approach to carry out the obligation of notification on planned measures through third party mechanisms instead of bilateral procedures involving the riparian states directly.

It is founded that the unilateral decision to construct the GERD has engendered divergent opinions across the basin - and the international community at large. Egypt has submitted it has a right to get prior information and consultation about the project. Egypt argued the unilateral announcement by Ethiopia as unfair and against international law of good neighborliness and cooperation in good faith. Equally, it is demonstrated that Ethiopia has made an essential contribution in complying with the principle by taking its own initiative on the establishment of a tripartite panel of experts.

Finally, Ethiopia has no treaty obligation to furnish information about its projects to other riparian states including Sudan and Egypt. Neither customary international law nor general principles of law oblige a state to get permission for damming an international river from downstream countries unless stipulated in a treaty between the concerned states.