

# The Dispute of Egypt and Ethiopia over the Utilization of the Nile Water

*“The water security of one nation cannot be maintained at the expense of the water security of all the other nations in the basin.<sup>1</sup>” By extending this scenario, it is inequitable and unreasonable to maintain the water security of Egypt at the Expense of water security of Ethiopia.*

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## ***Abstract***

The controversies related to the construction of GERD are still up in the air between Ethiopia and Egypt. The Current trend however indicate that both Nile riparian states have inclined to resolve the Nile water utilization dispute in peaceful means [for instance, good office, mediation and other related peaceful means of dispute resolution] than resorting to using force. For instance, while Abiy Ahmed of Ethiopian Prime Minister visited Cairo in June 2018, and in 2019 at African-Russia Summits promised to ensure that Ethiopia’s development projects do not harm Egypt, Abdel Fattah al-Sisi said that his country recognizes that the dispute ***has no military solution***. Despite the rhetoric warming relations, Ethiopia and Egypt are at odds over the issue related to Nile River utilization. Dr. Abiy underlined for the parliament that no force could stop Ethiopia from building dam. And he added that if there is a need to go to war, they could get millions readied. Likewise, currently, all of organ Egyptian states reiterated that they will defend their interest regarding Nile river use by all means available. Thus, this indicates that Egypt has announced it has chosen the path to war. But this article suggests that, it had better to go ICJ than go to war. Because resorting to arm could cause massive lose of human life and resource. Ethiopia and Egypt do not have a formal Nile water utilization agreement. Although none of them are not party to it, the 1997 of UN watercourse Convention is generally considered to be the most accurate representation of customary international Law regarding shared water utilization. Equitable and reasonable and no significant harm principles are the core principles of the Convention. This article discuss the type of harm that may or may not be permitted under international water law. The main theme of this article is thus; to elucidate how ICJ will

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<sup>1</sup> Riccardo Petrella, Professeur émérite at the Brussels University of Louvain

entertains the Nile dispute, if it would be taken to it. Based on the aforementioned principles, it can be said that the *court would be unlikely to find in Egypt's favor*.

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***Keywords: Egypt, Ethiopia, Equitable and reasonable principle, International Court of Justice, No significant harm, Nile River dispute***

## **1. Introduction**

The centrality of water resources for development and, as a source of conflicts, especially in developing countries who have struggled to alleviate their socioeconomic problems, indispensably presupposes the need for a predictable and comprehensive, and binding legal institutional and regulatory frameworks for the utilization of shared international water, since the absence of a globally binding treaty for regulating the sharing and uses of international watercourses factor for the rise of disputes.<sup>2</sup>

Disputes persist over most of the world's 261 international river basins because of contention on equitable use<sup>3</sup> including Nile River Basin. According to Sharif the reason of this dispute over the international water use and failure to resolve these disputes is the lack of international legal rules which clearly stipulated the process under which international water should be allocated and used in an equitable manner.<sup>4</sup>

The Nile basin is one of the trans-boundary basins where the livelihood of millions will depend on its hydrology more than ever. The Nile water is shared water by 11<sup>5</sup> river basin countries, and it is the main water artery in the North Eastern region of Africa.

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<sup>2</sup> Salman M.A. Salman, International Law and Freshwater: 'The Multiple Challenges, Mediation of international water disputes — the Indus, the Jordan, and the Nile Basins interventions', U.S.A, *Edward Elgar Publishing Limited*, 2013, P.360

<sup>3</sup> Elmusa, Sharif. 'Equitable Utilization and Significant Harm: Focusing International Water Law on Development', *The Ara World Geographer*, vol 7, no.4, 2004, p. 149. Available at: [http://www.researchgate.net/profile/sharifElmusa/piplication/28468094Equitable utilization and significant harm](http://www.researchgate.net/profile/sharifElmusa/piplication/28468094Equitable+utilization+and+significant+harm).

<sup>4</sup> *Ibid*

<sup>5</sup> The Nile Riparian States: *Rwanda, Burundi, Congo, Kenya, Uganda, Tanzania, South Sudan, Democratic Republic of Sudan, Ethiopia, Eritrea, and Egypt*.

Despite the non- existence of globally binding treaty which guides the shared water, the international community has developed different theories and principles that regulate the utilization of these shared watercourse resources. These principles have been provided in the UN watercourse convention. The convention contains a number of general principles; *inter alia*, the principle of equitable and reasonable utilization and no significant harm are the core principles.<sup>6</sup>

The question that should be answered by this article is thus, whether the utilization of Nile River by Ethiopia is within the context of Equitable and reasonable utilization, or whether its utilization of Nile by Ethiopia would have significant harm. There are scholars who advice, even Ethiopia to take the case Nile use to ICJ. For instance, Law professor Tom Campbell, dean of Campbell University, California, school of Law advice for Ethiopia to commence a legal process in the ICJ.<sup>7</sup> Thus, if either Ethiopia or in our hypothetical case Egypt submits the case to ICJ, what would be the most likely decision of Court [ICJ]? This is the main theme of this article.

## **2. Understanding of International Watercourses**

Understanding the concept of international watercourse is important for the sake of examining the determination of equitable and reasonable of an international watercourse. Because without understanding the concept of an international watercourse, we cannot determine whether riparian state utilize the shared water in an equitable and reasonable manner vis-a-vis other riparian states use. What types of watercourses does international watercourse law apply to? Since there are no general rules of international customary law applicable to all canals of international concern, it will use as a starting point the definition of ‘international watercourse’ set out in the 1997 UN Convention on the Law of the Non-navigational Uses of International Watercourses (UNWC). Under UNWC, Watercourse is defined as a system of surface waters and groundwaters constituting by virtue of their physical relationship a unitary whole and normally flowing into a common terminus.<sup>8</sup> Thus, the component of the watercourse is surface water and groundwater flowing into a common terminus. International watercourse ‘defined as ‘a watercourse, parts of

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<sup>6</sup> United Nations Convention on the Law of Non-Navigational Uses of International Watercourse, Adopted by General Assembly of the United Nations on 21 May 1997, General Assembly resolution 51/229, entered in to force on August 201 Article 5 and 7

<sup>7</sup> Tadias Magzin, Jun 11<sup>th</sup>, 2013

<sup>8</sup> United Nations Watercourses Convention, cited above, at note 21, Article 2(a)

which are situated in different States,<sup>9</sup> which would depend ‘on physical factors whose existence can be established by simple observation in the vast majority of cases.’<sup>10</sup> Thus, by virtue of the convention international watercourse encompasses all watercourses that either forms or crosses a border between the states. Therefore, since Nile River traverse 11<sup>11</sup> states, it is an international watercourse, and thus governed by international water law convention.

Bearing in mind those 106 states voted in favor of the Convention in the General Assembly, and thus also in favor of its definition of the term “international watercourse”, the definition has been both generally practiced and accepted as law in accordance with article 38 in the ICJ Statute.<sup>12</sup>

### 3. Dispute Over Nile River between Egypt and Ethiopia

With the growing water demand in the Nile riparian state, it is not surprising that disputes between Egypt and Ethiopia have emerged. Ethiopian Grand Renaissance Dams on Nile rivers, and diversion of flows of such rivers are the main cause of disputes between Ethiopia and Egypt. It is reported [by Egypt] that the construction of the Ethiopian Grand Renaissance dam in Ethiopia, Gambela Region over the Blue Nile river (shared by upper riparian and lower state ) has decreased the flow of water of the Blue Nile river to Egypt . Egypt fears the project will significantly reduce its share of the water from the Nile.<sup>13</sup> However Ethiopia, on the other hand, says the GERD [which is expected to generating more than 6,000 megawatts of electricity] will *not have any on Egypt’s share of water* and claim the project is necessary for its economic development<sup>14</sup>.

#### 3.1. Source of the Nile River Dispute

There is a looming conflict over the use and utilization of the Nile River which is a shared watercourse within the meaning of a UN convention. The absence of a globally binding treaty for regulating the sharing and uses of international watercourses is one factor for the rise of

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<sup>9</sup> Id,art.2[b]

<sup>10</sup> ILC, ‘Report of the International Law Commission on the work of its forty-sixth session: chapter III (The law of the non-navigational uses of international watercourses)’(1994) UN Doc A/CN.4/L.500, 90 [2].

<sup>11</sup> Burundi, Democratic Republic of Congo (DRC), Egypt, Eritrea, Ethiopia, Kenya, Rwanda, South Sudan, Sudan, Tanzania, and Uganda

<sup>12</sup> Available at [http://wwf.panda.org/what\\_we\\_do/how\\_we\\_work/policy/conventions/water\\_conventions/un\\_watercourses\\_convention/](http://wwf.panda.org/what_we_do/how_we_work/policy/conventions/water_conventions/un_watercourses_convention/), accessed date 19 February 2018

<sup>13</sup> Aljazeera news ,<https://www.google.com/ampls/www.aljazeera.com>, Accessed Oct 14, 2019

<sup>14</sup> *Ibd*

disputes.<sup>15</sup> Though few trans-boundary watercourses are governed by treaties regulating the utilization, they, in most cases, do not encompass or taking into account the interests of watercourse states concerned, and thus agreements, for instance, colonial and postcolonial treaty on Nile utilization, have themselves given rise to disputes due to disregarding the interest of other riparian state they have on Nile utilization.

The colonial treaties that were concluded with the sole aim of freezing upstream projects over the Nile in order to secure a continuous and undiminished flow of the water to Egypt resulted in the ongoing conflict over Nile utilization among Nile riparian states, though the colonial treaty has no legal effect.<sup>16</sup> It has to be noted that the current controversies about the use and management of the Nile all originate in colonial and neocolonial assertions.

As aforementioned the first source of a dispute over the Nile river utilization is an Anglo-Ethiopian treaty of 1902. The treaty is mainly the agreement about the Ethiopian and the Sudanese frontiers. It is only Article 3 of the treaty that deals with the use of the waters of the Blue Nile and other headwaters. And this provision is one of the sources of disputable provision. Article 3 of the treaty provided that: “His Majesty Emperor Menelik, king of kings of Ethiopia, engages himself towards the Government of His Britannic Majesty not to construct or allow to be constructed any works across the Blue Nile, Lake Tana or the Sabbath, which *would arrest the flow* of their waters into the Nile except with His Britannic Majesty’s agreement and the Government of the Sudan.<sup>17</sup> However, the Amharic version is different from the English version. The literal meaning of Amharic is that His Majesty Menelik II, King of Kings, Eth, has agreed in this treaty not to construct, nor authorize anyone to construct a work that ***blocks up/ stops up from the river bank to river bank into the water*** descending from the Black Abbey, from the Tana Sea, and from the Sobat River towards the White Abbey without previously agreeing with the English Government.<sup>18</sup> Thus, the Amharic and the English versions have different meanings regarding the scope of application and the contents of the treaty regarding Nile utilization. While

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<sup>15</sup> Salman M.A. Salman, International Law and Freshwater: ‘The Multiple Challenges, Mediation of international water disputes — the Indus, the Jordan, and the Nile Basins interventions’, U.S.A, *Edward Elgar Publishing Limited*, 2013, p.360

<sup>16</sup> Girma Amare, ‘Nile Issue: The Imperative Need for Negotiation on the Utilization of Nile Waters, occasional paper series ‘*Ethiopian Int’l Inst. for Peace & Dev.*, 1997 p. 2.

<sup>17</sup> *Treaty between United Kingdom and Ethiopia of 1902*, Treaty series No. 16, 1902, article 3, Addis Ababa

<sup>18</sup> 1902 treaty between UK and Ethiopia, Amharic version of article 3

the Amharic version states that Ethiopia has agreed with the government of Britain, the English version declares Ethiopia agreed both with the governments of Britain and Sudan-which never existed at the time.

The second source of conflict over the utilization of Nile river use is 1929 treaty. Still, this treaty had not taken into consideration the upper the Nile riparian states' share they were regarding the utilization of the Nile river, rather it is affirming the Egyptian historical and established right on the River of Nile. Thus, due to this unfair allocation of the Nile, the upper Nile, especially Ethiopia rejected and contested the legality of this treaty. Thus, since this treaty created a discriminatory regime in the upper state by imposing duties, which infringe their sovereign rights to use the waters of the Nile in an equitable and reasonable manner, it has been used as a source of dispute on Nile utilization.

The most post-colonial treaty that totally denied the equitable utilization of Nile River of upper Nile riparian state is a 1959 treaty signed between Egypt and Sudan. It is a new design for full utilization of the Nile waters. It is the full utilization of Nile water only between Egypt and Sudan without taking the interest and share of other Nile riparian state into consideration. Like its colonial predecessors, this treaty was aimed to protect Egyptian, and, to a lesser extent, Sudanese interests.<sup>19</sup> Thus, this treaty is one of the sources of a dispute over the utilization and allocation of Nile water among Nile river states.

#### **4. Current Trends towards Nile Dispute Resolution**

Few shared watercourses are governed by agreements regulating the uses, management, and sharing of such watercourses. Even when such agreements are concluded, they, in most cases, do not encompass all the riparian to the said watercourse.<sup>20</sup> For instance, the colonial and post-colonial agreement dealing with Nile allocation and utilization did not encompass all Nile riparian states. There has long been a conflict over Nile rights between the Nile riparian countries, especially among the Eastern Nile Basin. As a result, political tensions and war threat

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<sup>19</sup> Of the average 84 billion cubicmetres that flow along the Nile each year, according to the agreement, Egypt should receive 55,5 billion cubic metres and Sudan 18,5 billion cubic metres, and the rest disappears through evaporation

<sup>20</sup> Ibid

interactions were rampant between Egypt and Ethiopia. For instance, lawyer Mortada Mansour said that “water for Egypt is Egypt’s life, and he would not allow Ethiopia to build its dam and block water from Egypt and in the end famine occurs among the Egyptian people and *we kill each other for a drop of water and he added that it would be not up for discussion.*”<sup>21</sup> Moreover, following Ethiopia’s unilateral declaration of water projects on the Nile in 1979, Egypt’s President during that time, Anwar Sadat replied “If Ethiopia takes any action to block our right to the Nile water; *there will be no alternative for us but to use force.*”<sup>22</sup>

But what is the current trade that Egypt has tried resorting to solve the dispute over the utilization of Nile water? Egyptian president says Cairo seeks good relations with both countries as tensions continue to rise in reading Sea region and he added that they are not prepared to go to war against their brethren like Ethiopia and Sudan.<sup>23</sup> For instance, Egypt had requested that the World Bank should intervene to break the deadlock in dam negotiations. However, the former Prime minister of Ethiopia, Hailemariam Desalegn, has rejected a call by Egypt for World Bank arbitration in a dispute over a hydroelectric dam, though Egypt’s Foreign Minister Sameh Shoukry proposed that the World Bank be allowed to help settle the dispute. Moreover, now a day Egypt needs solving the Nile use issue via third party intervention such as good office [for instance, USA served as good office ] and mediation which are the peaceful means resolution of Nile dispute.

Thus, this indicates that Egypt currently has inclined to resolve the Nile water utilization dispute in a peaceful manner than resorting to using force. Basically, the offer of intervention could come from the third party itself upon its own initiative, or upon a suggestion from a fourth party, or could be requested by one or both parties to the dispute.<sup>24</sup> However, in all those circumstances, the intervention of the third party has to be accepted explicitly by both parties, in most cases, either by each party separately in writing, or through a written agreement between

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<sup>21</sup> Lawyer and head of a renowned Egyptian soccer club Mortada Mansour speaks during a press conference in the Egyptian capital, Cairo, on 6 April 2014 (AP) Available at [www.ribune.com/spip.php?articlr505661](http://www.ribune.com/spip.php?articlr505661)

<sup>22</sup> Ejigu, *Natan Aslake*, Construction of Grand Ethiopian Renaissance Dam on the Nile: Cause for Cooperation or Conflict among Egypt, Ethiopia and Sudan, *University of Tampere*, Masters thesis, 2016, P.9. Available at <https://tampub.uta.fi/bitstream/handle/10024/99271/GRADU1465551192.pdf?sequence1>

<sup>23</sup> Aljazeera News, Available at <https://www.aljazeera.com/news/2018/01/sisi-egypt-war-sudan-ethiopia-180116074205823.html>. Accessed date 27 February 2018

<sup>24</sup> Salman M. A.Salman, cited above, at note 12,p.364

the parties.<sup>25</sup> Thus, Ethiopia has a right to reject for arbitration or mediation or requires the consent of the parties to the issue. If the two agree, then they can go forward with the process. If one does not want to go to arbitration, then the matter ends there, unless there is an agreement for compulsory arbitration (which is not the case in the Nile or the GERD).

### 5. Nile River Dispute between Egypt and Ethiopia at ICJ

Irrespective of the rhetorical warm relationship between Egypt and Ethiopia related to the Nile Water use, still the debate and disagreement on the Nile water utilization is continues. Even sometimes specially Egypt forwarded war word.

Ethiopia and Ethiopia are party to the 1945 UN Charter. The charter obliged member states to settle their dispute in peaceful manner. Article 33 of the United Nations Charter lists the following methods for the *pacific settlement* of disputes between States: negotiation, enquiry, mediation, conciliation, arbitration, **judicial** [ICJ] settlement, and resort to regional agencies or arrangements.

Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means [arbitration, negotiation...and Judicial].<sup>26</sup> Ethiopia and Egypt are party to the Charter. Thus, pursuant to art. 33[2], SC can call Ethiopia and Egypt to resolve their dispute-Nile River use dispute via the court [ICJ]. Normally the court [ICJ] entertained a number of cases arising from shared water resource disputes and rendered decision. For instance Netherland and Belgium submitted their case related the dispute on the use of Meuse River to Permanent International Court of Justice in 1930.

In principle the ICJ was accessible to all States for the judicial settlement of their international disputes and they were able to declare beforehand that, for certain classes of legal disputes, they recognized the Court's jurisdiction as compulsory in relation to other States accepting the same obligation. **Egypt has submitted a compliant letter to the UN Security Council in protest to Ethiopian plan to fill the controversial Ethiopia hydro-power dam project**<sup>27</sup>

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<sup>25</sup> Id, p.365

<sup>26</sup> UN Charter, art.33[2]

<sup>27</sup> <http://allafrica.com/stories/202005080457.html>.



Thus, in this hypothetical case, this article assuming that **SC call up on Ethiopia and Egypt to submit their the issue of Nile utilization, or concluded a special agreement to take their dispute on the Nile use to the compulsory jurisdiction of the court [ICJ] by virtue of art.36[1] of the statute of ICJ.** So, by assuming the compulsory jurisdiction of the court, in connection with the hypothetical scenario, Ethiopia vs. Egypt, this article will examine the most likely decision of ICJ, briefly.

### 5.1. Egypt as Claimant and its Possible Legal Possion vis-à-vis Nile use at ICJ

Egypt as a claimant , may initiated and brought statement of claim against Ethiopia as folowes:

The first egypt's argument is based on the the colonial and post-colonilaNile use traeties touse the Nile.The government of egypt could submitte statement of claim against ethiopia by alleging that ethiopia violate 1929 nad 1959 Nile traety that recogonize the hegimony of Egypt over the Nile river. Those treaties was signed between the colonies and their 'masters' as well as treaties made between Egypt and Ethiopia are often mentioned as the legal foundation of their right to monopoly of the Nile waters by Egypt and Sudan.<sup>28</sup>

Persuant to traty of 1992, no project of upper Nile riparian[like Ethiopia] state would disrupt the supply of water to Egypt. According to egypt, any attempt to manipulate water of the Nile that would affect Egypt's interests could be considered contrary to the spirit of the 1929 Egyptian-British and 1959 Egyptian Sudanes etreaties<sup>29</sup>. Thus diversion of Nile river by any Nile River riparian state that would be affect the *share [55.5 BMC ]* of egypt as provided in the traety is contrary to egypt's right and interest.

Moreover Egypt insisted that there would be loss of agricultural income by egyptian farmer and reduction of electricity in the future during the filling the reservior.

Finally egypt also brought the statement of claim based on alleged breach Ethiopia's International obligation , specifically art. 7 of UN International WaterCourse Convention. Egypt claim that **the project will significantly reduce its share of the water from the Nile.**<sup>30</sup>She

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<sup>28</sup> Nebiyu Tedla, **In-depth analysis: Past agreements on the Nile in view of the Law of Treaty and the CFA,** [addisstandard / October 11, 2017 / 9.1k](https://www.addisstandard.com/2017/10/11/in-depth-analysis-past-agreements-on-the-nile-in-view-of-the-law-of-treaty-and-the-cfa/)

<sup>29</sup> HamdyA.HassanandAhmadAlRasheedy, The Nile River and Egyptian Foreign Policy Interests, African Sociological Review 11, 1, 2007, pp.7

<sup>30</sup> Aljazeera news ,<https://www.google.com/ampls/www.aljazeera.com>, Accessed Oct 14, 20

noted that the no rule harm principle was the corner stone of any regime on international watercourse.<sup>31</sup> Thus for Egypt the construction of GERD and, more specifically filling the reservoir within 5 years would harm the use and share of Egypt, and thus Ethiopia breaching international waterlaw obligation.

Moreover Egyptian asserted that most of the riparian states are not nearly as **dependent on the Nile River** waters compared to Ethiopia.<sup>32</sup> Egypt depends on the Nile River waters for its socioeconomic survival. Therefore, according to Egypt's since Egypt has been depended on the Nile river for its socio-economic needs than Ethiopia, it is unlawful for Ethiopia to harm its historically right or prior use, and share.

The other Egypt's main argument is based on the principle historic or inherent right to use the Nile. Egypt in particular argues that as a desert nation it has no other option for survival, but to depend on the Nile river, while Ethiopia has other available option, such as rain than Nile Water.

## **5.2. Ethiopia as Respondant and its Possible International Legal Position vis-à-vis the right to use Nile River at ICJ**

Ethiopia can submit that there has been no breach of any bilateral treaty obligation vis-à-vis Nile water use. Egypt and Ethiopia do not have a binding watersharing agreement. Ethiopia, strongly reject these treaties and label them as nullified and as having no legal effect on the use of the Nile.

Under 1959 Nile Water treaty, Egypt takes 55.5 Billion Metere Cubic [ here in after refere as, BMC] of water of Nile. Ethiopia was not party to those agreement, and thus have no binding effect on Ethiopia, according to her defence.

Furthermore, Ethiopia alleges that none of those agreements [1992 and 1959] incorporate her legitimate water share interests though the country is the source of the Blue Nile and contributes about 86% of the river water. Ethiopia reiterated that the colonial treaties on the Nile water which are signed by different parties at different time are not binding on Ethiopia all the for the reason that the upper riparian countries have never signed and ratified nor acceded to those treaties.

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<sup>31</sup> UN.GAoR, 6<sup>th</sup>.comm.40, UN.Doc.ALC.6151/SR.62/Add.1 [1997]

<sup>32</sup> *Ibid*

Thus, by virtue of the law of treaties only states party to a treaty shall be bound by the provisions of the treaty.

The other statement of claim of Egypt is that the filling of the reservoir's Dam over 5 years would harm the use and share of Egypt. In this regard, the position of Ethiopia is that filling the reservoir within 5 years would not cause significant harm. According to the 1997 of UN International Watercourse [here in after, UN watercourse], riparian state, specifically upper riparian state obliged not to take any action which could be cause the use of lower riparian states.<sup>33</sup> This means there might be harm or cause because of the action or the use of upper riparian state to lower riparian states. But the harm that should not be realised is, according Ethiopia, significant harm, not any harm. Thus, Ethiopia submits that filling the reservoir of the Dam might be will have harm, but will have no significant harm. Ethiopia also submits that there is no clear and convincing evidence that show the significant harm during the filling of the reservoir within 5 years. According to Ethiopia, thus there is no breach of international obligation, more specifically International water law. One of the source of International law is the teachings of the most highly qualified publicists of the various nations.<sup>34</sup> So Ethiopia can submits its defence based on the teaching or writing of the most highly publicists of the various nations. In this regard, for instance Water resource Researcher Kevin Wheeler of Environmental Change Institute of University of Oxford, UK, says that in a year with average rainfall, Egypt should experience little or no additional water scarcity if the reservoir is filled over 5-7 years, with at least 35 BCM of water releases billion cubic metre of water releases down stream.<sup>35</sup> Thus filling of the reservoir within 5 years and releasing 35 BCM each year would not cause significant effect to downstream state, Egypt.

The other claim of Egypt is that the utilization of Nile River by Ethiopia would cause harm to the Egypt's share. But the question is that which share that Egypt claimed? 55.5 BCM that was provided under 1959 treaty? If so, for Ethiopia, since that treaty was entered between Egypt and Sudan, it has no legal binding against Ethiopia. Even though this treaty said to be have legal binding on the Ethiopia, the manner of sharing of the Nile was in equitable and un reasonable.

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<sup>33</sup> UN IWCC, art.7[1]

<sup>34</sup> charter of the united nations and statute of the international court of justice, SAN FRANCISCO • 1945, Art.38[1]{d}

<sup>35</sup> Wheeler, K.G. et al. Water Int. 41, 611-634, 216

Ethiopia insisted that sharing the Nile water between two lower riparian state with out taking in to account the interest of upper riparian states, specially the interest of Ethiopia who contributing 85% of the water to Nile is against the sprit of equitable and reasonable principle. Because , one of the criterio that should be take into account in determining the quitablity and reasonablity of utilization of shared water is the contribution to that of shared water.<sup>36</sup> Thus, one of the argument that ethiopia could raise at ICJ is , firstly the agreement was not between Ethiopia and Egypt, secondly it was against the concept and sprite of equitable and reasonable principle.

Further, Article 7(2) of UN watercourse convention suggests that, even where significant harm is caused by diligent conduct, it is *lawful* so long as it results from activities that remain within a state's right to **reasonable and equitable use** under Article 5. So, according to the argument of Ethiopia since the utilization of the Nile is within the context of equitable and reasonable utilization , even if the filling of the reservior within 5 years would be proved that it would be caused significant harm to egypt, since its utilization is within the context of equitable ande reasonable principle , it would be lawful by virtue of International water law.<sup>37</sup>

Likewise egyptian asserted that most of the riparian states,specially Ethiopia are not nearly as **dependent on the Nile River** waters for its socio-economic needs compared to Egypt.Thus according to Egypt using almost all of Nile is within the context of equitable and reasonable principle. Because as to the argument of Egypt dependency on the shared water for economic needs is one of the criterio that should be taken in to account in determining equitable and reasonable utilization. However what dependecy signify? Deose it mean only the current dependancy? No, because dependency criterio include both the current and the future use of other riparian state such as Ethiopia.So the present and future needs of all Nile Riparian states should be taken in to account than the past use.

Finally the main argument that Ethiopia base its argument is o the equitable and reasonable utilization principle which is regarded by majorty of international watercoursre sates as part of costumary international law. For instance, the late PM of Ethiopia, Meles Zenawi said:

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<sup>36</sup> UNWCC art. 6[1]

<sup>37</sup> Id, art. 7[2] , Mohammed Abdo(PHD), *The Relevance and Contribution of the UN Watercourses Convention toward Resolving the Problems in the Nile Basin,2004*,p.16,even if Ethiopia and Egypt are among the states that abstained during the voting process for the adoption of the Convention, they are bound by the principle of reasonable and equitable use in sharing the waters of the Nile, not because they are party to the Convention, but because of a customary rule

*While Egypt is taking the Nile water to transform the Sahara Desert into something green ,  
We in Ethiopia who are the source 85% of the water are denied the possibility of using it to feed  
ourselves.*<sup>38</sup> Meaning that since the **contribution**<sup>39</sup> is one of the criteria to determine whether the  
utilization of shared water is/would be within the context of equitable and reasonable principle.  
As it has been stated above, this legal ground also has been raised by the current Ethiopian PM  
,Abiy Ahmed

## **6. Arguments of the Parties and The most likely decision of ICJ**

Depending on the aforementioned argument of both parties, the issue that should be framed and  
entertained by the court are:

1. Whether the treaties [1902, 1929 and 1959] talking about Nile River use and sharing have  
legal binding against Ethiopia
2. Whether filling the reservoir within 5 years would cause significant harm to Egypt?
3. Whether the construction of EGRD and the current use Egypt is within the context of  
equitable and reasonable principle
4. What kind of dependency? only current use or future use that should be taken into account  
in determining its equitability?
5. Does historical right or prior use be as the sole legal ground for Egypt to justify the use of  
Nile as equitable and reasonable utilization?

Thus, in this regard, the law of treaties and the international legal framework will be discussed  
*vis-à-vis* the aforementioned issues in order to entertain the Nile dispute. The claim and  
argument of each side will then analyzed within the context of international water law and  
treaties.

The first issue that should be answered by the court is whether the 1992 and 1959 treaties bind  
Ethiopia. The 1929 Anglo-Egyptian agreement allowed the Sudan to use only what was 'left  
over' once Egypt's needs had been fully satisfied. According to this agreement, only Egypt and  
Sudan were legally recognized for the use and ownership of the Nile waters. None of the

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<sup>38</sup> Mike Thomson, 'Nile Restrictions anger Ethiopia' [BBC News ,3 February 2005] available online at  
<http://news.bbc.co.uk/1/hi/world/Africa/4232107.stm>.

<sup>39</sup> 1997 UN Watercourse convention, art. 6[1]{a}

upstream riparian nations [including Ethiopia] was considered. According to this agreement, only Egypt and Sudan were legally recognized for the use and ownership of the Nile waters. In terms the 1959 of the agreement, Egypt would be allocated a lion's share of the available 55.5 BCM of the water while Sudan was to be allocated 18.5 BMC

The issue is therefore whether Egypt could claim her share as provided for in those treaties. As mentioned above Egypt's argument is the construction of the EGRD or the filling of the reservoir within 5 years would harm her share. What has to be noted is that since Nile River is one of the largest shared water traverse<sup>40</sup> shared by 11 states, the agreement related to Nile utilization should be entered among of these Nile Riparian states. So, what would be the fate those treaties [1929 and 1959]? Has binding effect on those states, especially on Ethiopia?

Article 2(1)(a) of the 1969 Vienna Convention on the law of treaties (VCLT) defines a treaty, for the purposes of the Convention, as 'an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments, and whatever its particular designation.

As to article 11 of the Vienna convention on the law of treaties, Consent to be bound by a treaty may be expressed in many different ways: by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed. Thus, states not party to a treaties [in our case non party to the aforementioned Nile treaties] , in any form as mentioned above , shall not be bound by the treaty in whatever ways. Because ,a treaty binds only the signatory states.<sup>41</sup> The upper riparian countries, including Ethiopia have never signed and ratified nor acceded to those treaties. Therefore pursuant to As per article 34 of the VCLT <sup>42</sup>a 1929 and 1959 treaties does not create obligation or right for a third party Ethiopia without its consent. Thus the court couldn't find that Ethiopia is breaching treaties obligation related to Nile river utilization

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<sup>40</sup> ILC, 'Report of the International Law Commission on the work of its forty-sixth session: chapter III (The law of the non-navigational uses of international watercourses)' (1994) UN Doc A/CN.4/L.500, 90 [2].

<sup>41</sup> Vienna Convention Law of Treaty, art..35

<sup>42</sup> Id, art.34

Moreover, the text of these treaties [1992 and 1959] shows that they did not take into account **the present needs** of other basin countries. One of the criteria to determine the equitable and reasonable utilization is taking in to account the present and future need of riparian state. But these treaties did not take the need of other, specially the Ethiopian's need. It was biased and inequitable and unreasonable allocation of the Nile's water, because it assumes that upstream countries do not use any water, especially by the virtue of the 1959 treaty left no share of Nile water for Ethiopia. Because according to this agreement while Egypt was entitled 55.5 BCM of water; the share of Sudan was 18.5 BCM. Thus this treaty totally divided the Nile water between Egypt and Sudan without considering the interest and right of Ethiopia which contribute 86% to the Nile water.

Even if Egypt argues that the afore mentioned Nile River treaties must take in to account at ICJ while entertaining the Nile river dispute , those treaties have to be seen vis-à-vis general customary law. For instance, ICJ makes reference to general international law or local custom as a secondary source of law when interpreting relevant treaties on the use of international water such as Nile water, as seen in the *Gabocikovo-Nagymaros Project* dispute.<sup>43</sup>

The other argument or claim of Egypt is that the loss of agricultural income by Egyptian farmer and reduction of electricity in the future during the filling the reservoir. In this regard what has to be noted is that whether the filling the reservoir within 5 years and only releasing 35 BCM would significantly cause the agricultural income and reduce the electricity of Egyptian. The likely significant harm that would be realised because of the filling of the reservoir within 5 years and releasing the water should be clearly proved. In this regard there is no piece of evidence that show the likely hood of harm resulted from the filling of the reservoir within 5 years. Eventhough the filling of the reservoir within 5 years will have harm on the productivity of Egypt's agriculturer, and reduction of electricity, Ethiopia is not said to be as breaching International law obligation . Because under international water law what is prohibited is not all harm , rather significant harm .

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<sup>43</sup> case concerning the gabcikovo-nagymarosproject [hungary v. Slovakia], judgment of september 1997, p.8

One of the source of International Law that ICJ should refer while entertaining inter state conflict is international convention.<sup>44</sup> As mentoioned above there is no formal binding bilateral treaties that govern the Nile water allocation and utilization.

So far, international entities have made just one attempt to create a binding international water law treaty. The U.N. General Assembly recommended the International Law Commission to study the issue in December of 1970,<sup>45</sup> and on May 21, 1997 the General Assembly adopted Resolution 51/229.<sup>46</sup> Though Ethiopia and Egypt are not party to the convention, the convention is considered a summary of the customary principles of international water law. Hence admittedly, the Nile riparian states are not members of these conventions; however Article 5 art.7 of the UNWC which are deemed as codifications of most, if not all, relevant customary principles have pledged the inherent right of all watercourse states to equitable and reasonable utilization shared waters in their territory.<sup>47</sup> So, the court [ICJ] can refer this convention to entertain the Nile dispute between Ethiopia and Egypt.

Under this convention [hereinafter, UN International Watercourse] do not prohibit causing any harm against other riparian state, rather which is not acceptable under international watercourse is causing significant harm. The fear of Egypt is, however not significant harm, rather the mere harm is. Egypt insisted that unless the reservoir would be filled over 7 years, and released 40BCM each year; agricultural product and electricity would be reduced and harmed. This scenario might be true. However, in this case what have to be noted is that what is prohibited under international water law is significant harm, not any harm.<sup>48</sup> The convention clearly stated that ‘‘Watercourse States shall, in utilizing an international watercourse in their territories, take all appropriate measures to prevent the *causing of significant* harm to other watercourse States.<sup>49</sup>’’ Meaning that, upstream countries [in our case, Ethiopia] cannot drastically harm the water of downstream countries [Egypt]. So, since there is no clear and convincing evidence that

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<sup>44</sup> ICJ statute, art. 38[1] {a}

<sup>45</sup> Convention on the Law of Non-Navigational Uses of International Watercourses – Main Page, audiovisual library of int'l law, <http://untreaty.un.org/cod/avl/ha/clnuiw/clnuiw.html>.

<sup>46</sup> G.A. Res. 51/229, U.N. Doc. A/RES/51/229, July 8, 1997

<sup>47</sup> Takele Soboka Bulto, ‘Between ambivalence and necessity: occlusions on the path toward a basin-wide treaty in the Nile basin,’ *Colorado Journal of International Environmental Law and Policy*, Vol, 20, No. 3, Madison James Publishing Corp, 2009,p.311, available at, <https://www.colorado.edu/law/sites/default/files/Vol.20.3,pp.311>

<sup>48</sup> UN WCC , art.7{1

<sup>49</sup> *Ibid*



proving the filling the reservoir within 5 years would have significant effect on the future use of Egypt, be it agricultural product and electricity, the court find that there is no breach of international water law by Ethiopia.

Moreover, where significant harm nevertheless is caused to another watercourse State in our case to Egypt, the States whose use causes such harm shall take all *appropriate measures*, having due regard for the provisions of articles 5 and 6, in consultation with the affected State, to ***eliminate or mitigate such harm*** and, where appropriate, to **discuss the question of compensation**.<sup>50</sup> So this provision indicates that let alone causing slight harm, causing significant harm is not be totally prohibited. Hence, let alone any harm, significant harm is not totally forbidden under international water law.

What is worth mentioning is that, the argument and fear of Egypt is not based on the scientifically evidence. Because whether the Dam on the Blue Nile or the filling of the reservoir will harm significantly on Egypt is a technical matter which requires that scientific expertise. Thus in this regard Egypt couldn't come up with such kind scientifically evidence that would show the filling of the reservoir or the construction of the Dam will significantly harm Egypt.

Further the principle of no significant harm should be seen within the context of equitable and reasonable utilization principle. And Ethiopia reiterated that she has the right to use Nile Water in equitable and reasonable manner. For example, Prime Minister Abiy Ahmed while held meeting with el-Sis of Egypt on the Russia-Africa Summit, reiterated that Ethiopia use the Nile within equitable and reasonable principle. So, the issue that should be answered is that whether filing the reservoir within 5 years is within the context of equitable and reasonable principle.

The principle of equitable and reasonable utilization is among the core rules provided in the 1997 UN Convention on the Law of the Non-navigational Uses of International Watercourses (hereinafter referred to as the 1997 UN Watercourses Convention). This convention provides that “watercourse states shall in their respective territories utilize an international watercourse in an equitable and reasonable manner.”<sup>51</sup> Thus equitable and reasonable utilization principle is the basic principle which guides international watercourse state the manner they must use their shared water. The court [ICJ] also used this principle as a guiding principle in the entertainment

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<sup>50</sup> *Id.*, art. 7{2}

<sup>51</sup> 1997 UN watercourse convention, art.5[1]

international water dispute. For instance, “the international court of Justice , in its recent decision in the Gabčíkovo -Nagymaros case, emphasized the importance of operating the project involved in the case in an equitable and reasonable manner.<sup>52</sup>” In the Gabčíkovo-Nagymaros case (Republic of Hungary v. Slovak Federal Republic, 1997).<sup>53</sup> the International Court of Justice has firmly established that “international rivers are shared resources and all riparian states have equal rights to enjoy both the commodity and non-commodity ecological benefits of the river” and this case “is an extremely important international and environmental protection precedent because the opinion ... clearly establishes that the doctrine of equitable apportionment is the grand norm of international water law.”<sup>54</sup> As mentioned above the principles enshrined in the 1997 Watercourses Convention are thus applicable to the extent that they are expressions of customary international law or general principles accepted by the major legal systems.

The issue is however how the court could determine whether Ethiopia or Egypt has been using the Nile water within the context of equitable and reasonable utilization. Although rigid definition is not feasible, there are some sort of criterion that should be taken into consideration to determine the degree of equitability and reasonableness in the utilization of international watercourses like Nile River. Article 6 of the UN watercourse Convention enumerated the non-exhaustive list of factors and circumstances. One of the factors that should be taken into account in determining the reasonableness of shared water use is population dependency.

Utilization of an international watercourse in an equitable and reasonable manner within the meaning of article 5 requires, *inter alia*, taking into the population dependent on the watercourse in each Watercourse State.<sup>55</sup> Egyptian claimed that most of the riparian states, specially Ethiopia are not nearly as **dependent on the Nile River** waters compared to Egypt. Thus according to Egypt, the current use of Nile River approximately 55.5 bcm is reasonable. The question is however what category of people that should be taken into account? Equally vital by population dependence which population- does it refer to the population who are living within, for instance,

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<sup>52</sup> Stephen McCaffrey, The UN Convention on the Law of the Non-Navigational Uses of International Watercourses: Prospects and Pitfalls, World Bank Technical Paper No. 414, p.19

<sup>53</sup> Case Concerning the Gabčíkovo-Nagymaros Project (Republic of Hungary v. Slovak Federal Republic), International Court of Justice, Case No. 92, September 25, 1997

<sup>54</sup> A. Dan Turlock, Law of Water Rights and Resources, July 2006, § 11:9

<sup>55</sup> 1997 of UN watercourse ,art.6{1}[c]

the Nile river basin or the whole population of the each Nile watercourse state which is taken into consideration in the process of determination of equitable and reasonable utilization of Nile River? Population dependency should constitute the *present and future population* which should be taken into account as a criterion for equitable and reasonable determination of Nile utilization and allocation. Thus the argument of Egypt –considering only the present population dependency by ignoring the future use of Nile riparian by other Nile Watercourse state like Ethiopia . The future dependency of other Nile riparian state like Ethiopia should be taken in to account.

Likewise, both inhabitant living inside and outside of the basin, but depending on Nile water for their livelihood via irrigation, sanitation and other activities should be taken into consideration in the process of determination of Nile River into equitable and reasonable manner, between and among Nile watercourse states. Therefore taking only the present population dependency on shared water to justify the use of Nile as reasonable is not lawful interpretation.

Thus for the mere fact that the majority of, for instance, 97 % Egyptian population live within the Nile Basin should not automatically entitle them to loin share of the Nile water allocation. Rather the degree of dependence [future and present] and non-existence of other available alternative means to satisfy the needs of those people, which should be taken into consideration. Moreover, the population dependence that must be taken into consideration in the process of determination of international watercourses in general and Nile River in particular should be the whole inhabitant of the of the riparian states whose livelihood depend on the international watercourse,<sup>56</sup> and have no other means to secure their livelihood than that water irrespective of any geographical restriction. Because if it is only in habitant living in the basin that taken into consideration, it is not inline the objective of equitable and reasonable utilization and the convention. And also it jeopardizes the need and interest of other Nile riparian states like Ethiopia whose majority of its population lives outside the basin, but directly or indirectly get their livelihood from that disputed water.

Egypt invokes historical or established right, arguing that she has been relying on the Nile water long before other Nile riparian, especially before Ethiopia has started to use Nile Water. Ethiopia. The 1959 treaty reiterates this argument [Prior or historical right claimed base].

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<sup>56</sup> Tadesse Kassa (Phd) , *International Water Courses Law In Nile River Basin: The State at a Crossroads*, (Routledge Taylor and Francis Group), London / New York, Routledge Taylor and Francis Group 2013, P.130

*Prior use or existing use* is one of the criteria that should be taken into account in determining equitable and reasonable utilization. The factor of existing use (i.e., prior use) is one of the factors stated in UN Watercourse convention.<sup>57</sup> Egypt reiterated that they have been using the Nile prior to Ethiopia, and thus according to the argument of Egypt since existing or prior use is one of the factors to determine the equitable and reasonable utilization, the current use of Egypt is within the context of equitable and reasonable principle. However it must also be noted that Article 6(e) does not only refer to ‘existing use (prior use)’ but also to ‘potential use. But, closer reference to various ICJ decisions, for instance, clearly indicates that claims of priority rights and historical consolidation cannot, on their own, be viable grounds for claiming rights under international law.<sup>58</sup> One of the sources of international law is judicial decision. The Court [ICJ], whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply, *inter alia* judicial decisions.<sup>59</sup> Thus closer reference to various ICJ decisions clearly indicates that claims of priority rights and historical consolidation cannot, on their own, be viable grounds for claiming rights under international water law. Historic rights have not been accepted as governing international law principles in various decisions of the International Court of Justice. For instance, in ICJ decisions regarding boundary disputes between Nigeria and Cameroon (2002), and Libya and Chad (1994),<sup>60</sup> historic rights based on historical consolidation and the claim of ‘coalescence of rights and titles’ over contested regions have not been accepted by the Court as decisive grounds in the determination of the cases. Therefore the mere fact that Egypt started to use Nile before Ethiopia cannot be taken as justification to get the lion share of the Nile water.

Therefore, from the aforementioned arguments of parties and analysis vis-à-vis international watercourse law, if the Nile dispute would be taken to either by Egypt or Ethiopia or referred to the court by UN SC, the court would be unlikely to find in Egypt’s favor.

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<sup>57</sup> UNWcourse convention, art. 6{1}[e]

<sup>58</sup> Elias N. Stebek, eastern Nile at crossroads: preservation and utilization concerns in focus, Mizan Law Rev, vol. 1, no 1, 2007, p. 48

<sup>59</sup> ICJ statute, art. 38{1}[d]

<sup>60</sup> Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria, International Court of Justice (10th October 2002), G. L. No. 194; and Case Concerning the Territorial Dispute (Libya Arab Jamahiriya v. Chad), International Court of Justice (3 February 1994) G. L. No. 83

## 7. Conclusion

The Nile River has been monopolized by Egypt for century and it claims an ‘historical right [Lion share]’ over the waters. The hegemony over the Nile Waters has been under these countries, thus building tensions among the Nile riparian states, specially between Egypt [the lower riparian] and Ethiopia [Upper riparian]. Egypt fears that especially during the filling of the reservoir within 5 years, it would harm the share Egypt’s Nile water that was provided under 1959 treaty.

Moreover, Egypt argues that her agricultural product and electricity would be significantly harmed because of filling of the reservoir. Egypt also claims that the historical right over the Nile water as provided under the colonial treaties that Ethiopia neither signatory nor ratify.

However, Ethiopia reiterates that the construction of the Dam would have no significant effect on Egypt. She argues that if the reservoir will be filled within 5years and released 35BCM each year, Egypt would not significantly affected. Moreover Ethiopia insists that since around 85% of water to Nile she has the right to use the Nile within equitable and reasonable manner, and thus, according to Ethiopia the use of Nile water by Ethiopia is in line with the equitable and reasonable utilization principle.

The 1945 of UN Charter biased to amicable resolution of interstate dispute than resorting to war. For example article 2 of UN Charter oblige Members to settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

Accordingly, it enumerated peaceful means of resolving international dispute. For instance, as has been stated above, art. 33 of the UN charter and 1997 of International Watercourse Convention lays down a number of mechanisms via which interstate dispute should be resolved. Such method includes negotiation, mediation, conciliation, arbitration and judicial settlement.

The current trend toward peaceful settlement of water disputes is manifested by the recent resort to Adjudication and Arbitration. Since 1997, the ICJ has adjudicated and decided three cases involving international watercourses. These cases are the *Gabacikovo-Nagyymaros* case in 1997, *the Kasikili-Sedudu* case in 1999, and the Cameroon Nigeria depute in 2002. Thus it is likely

that the trend of resolving trans boundary dispute by peaceful means, specifically via ICJ adjudication will continue. This article thus believes that there is a probability that the case of Nile water dispute between Egypt and Ethiopia will be taken to ICJ or this article suggest that, especially for Ethiopia to take the case to ICJ. Wars over waters inevitably lead to a ‘lose-lose’ destruction.

There is no formal agreement between Egypt and Ethiopia related to Nile water use, except DOP.

Even though there is no bilateral agreement that guides the Nile riparian states to use the Nile Water, as has been mentioned above, there are general principles that guides every watercourse states including Egypt and Ethiopia. Among of them, equitable and reasonable utilization and no significant harm principles are the major one. For instance, these two principles entered the vocabulary of many of the riparian states of the Nile Basin through the provisions of the NBI and DOP.

Further in the case of *Gabčikovo-Nagymaros* project, the court [ICJ] has established the principle of equitable and reasonable utilization as a ruling principle

Every watercourse states have the right to use their shared water resource within the context of equitable and reasonable utilization principle. This principle enshrined in the UN watercourse convention and in many water bilateral agreement. Thus it has been recognized as customary international law. As has been stated above, the other basic guiding principle of Trans -boundary water use is no-significant harm. As aforementioned every riparian states has duty bound to use international water within their territory as far as they do not significantly affect the water use right of other co-riparian states. Thus, Ethiopia has been using the Nile within these contexts and there is no scientific evidence that show that its use would significantly affect the interest of Egypt regarding the use of Nile. Therefore, if the case will be taken to ICJ, the ***court would be unlikely to find in Egypt’s favor, and thus it would better if Ethiopia takes the case to ICJ than enter into war.***