Notification and Consultation of Projects in Transboundary Water Resources:

Confidence Building rather than Legal Obligation in the Context of GERD

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Abstract

Tension and confrontation between riparian states over planned measures are likely to occur in the absence of an inclusive legal framework governing the utilization, management, and conservation of transboundary watercourses. The construction of the Great Ethiopian Renaissance Dam (GERD), 2011, has re-ignited the tension on the use and share of the riparian countries over the Nile River. Egypt and Sudan have demanded notification of the project, the provision of all available information, and the time for the responses (to these questions) before Ethiopia continues with the construction of the GERD. However, Ethiopia has rejected the request for prior notification as a pre-condition for commencing the GERD project. As a result, Ethiopia and its downstream neighbours, particularly Egypt, have entered into various forms of consultations and negotiations due to concerns over the impact of the GERD. This article examines whether Ethiopia is under an international obligation not to implement the GERD without notifying and consulting Egypt and Sudan and whether the ongoing consultations and negotiations emanate from a legal obligation or mere confidence-building measures. The author argues that Ethiopia has no obligation (under international treaty obligations and customary international law on transboundary waters) to provide notification of planned measures such as GERD and engage in consultations.

Key terms

International water law; notification; consultation, planned measures; Nile; GERD

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Introduction

Various international principles and laws regulate transboundary water resources and disputes. Many of the international watercourses principles either

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prescribe the substantive rights and obligations of riparian states or formulate procedural means to enforce rights and obligations. One of the procedural rights that is widely getting acceptance among many watercourse states is the principle of notification and consultation on planned measures along international watercourses. The principle of notification and consultation on planned measures is embodied in many international[1] as well as regional agreements.[2] It has also been widely considered as a subject-matter of the works of international organizations[3] and decisions of international courts[4] of arbitration. Various scholars[5] have written articles and books on the subject.

In spite of attempts to codify and reach at some level of clarity with regard to the core procedural content of the principles, there remain continuous disputes among riparian states whenever any new plan is envisaged or an existing plan is either modified or altered. The Nile watercourse is an example whereby riparian countries are sharply divided on the content, scope and implications of planned measures. The GERD, currently under construction in western Ethiopia on the Blue Nile River has become contentious from the preliminary phase.[6] Undoubtedly, GERD is regarded as an important part of the strategic hydropower development plan in Ethiopia.[7]

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[1] The most comprehensive international agreement that deals with notification and consultation is Law of the Non-Navigation Uses of International Watercourses (1997) (hereinafter the Watercourse Convention). There are also bilateral and multilateral international agreements that deal with the same subject matter. *See* also The 1954 convention between the former Yugoslavia and Austria concerning water economic question relating to the Drava River, Indus River Treaty (IWT) between India and Pakistan, The 1973 Treaty concerning the Rio de la Plata and its corresponding Maritime Boundary adopted by Uruguay and Argentina, The 1995 Mekong River agreement, and the India-Nepal Mahaail treaty of 1996.

[2] South African Development Community (SADC) on August 23, 1995 (The revised protocol on shared watercourse), Senegal River Water Charter and the Nile Basin Cooperative Framework Agreement (herein after called CFA).

[3] *See* Helsinki Rules of 1966 (later substituted by the Berlin Rules of 2004) on the Uses of the Water of International Rivers developed by International Law Association, a private non-governmental institution and the internal guideline of the World Bank Policy on a fund in relation to developmental projects along international watercourses.

[4] *See* Lake Lanoux Arbitration (1957), Spain vs France, and Indus Waters Kishenganga Arbitration.

[5] Authors such as Stephen McCaffrey, and many others have written extensive academic works on notification and consultation along international watercourses.

[6] Ying Zhang, Solomon Tassew Erkyihum & Paul Block (2016), *Filling the GERD: evaluating hydroclimatic variability and impoundment strategies for Blue Nile riparian countries,* Water International, 41:4, 593-610, DOI: 10.1080/02508060.2016.1178467, p. 593.

[7] WWAP (2012), *Managing water under uncertainty and risk the United Nations world water development report*. Paris: UNESCO in Ying Zhang et al, *supra* note 6, p.593.

The announcement of the inauguration of the construction of the GERD project was met by a fierce objection from the lower downstream riparian states mainly Egypt, and with some concerns by the Sudanese government. In this regard, a question that is worth noting is whether Ethiopia is under an international obligation to consult Egypt and Sudan in order to implement the GERD. Another related question is whether Ethiopia has the right to implement the GERD during the period of consultation and negotiation. Furthermore, it is important to investigate whether Ethiopia's current engagement in the on-going consultations and negotiations regarding GERD emanates from a legal obligation or a mere confidence building measure. The purpose of this article is to address these questions with reference to the relevant international instruments and customary international law.

The *first section* deals with the justification for a riparian state's duty to inform and consult on planned measures along an international watercourse. The *second section* focuses on notification and consultation on planned measures under customary international law as well as bilateral and multilateral water treaties. Section 3 discusses the duty to notify and consult under the Watercourse Convention. Section four examines *the treaty regime* applicable to Ethiopia, Sudan, and Egypt as well as their respective state practices with regard to notification and consultation. The last section deals with the application of the principles along with its challenges in the context of GERD.

1. The Need for Riparian Duty to Inform and Consult on Planned Measures

Allocating shared waters in a manner acceptable to all parties is one of the most difficult aspects of transboundary water negotiations. These negotiations should establish a clear process through consultation as a step to determine benefit allocations, '*an obligation to notify* when new water needs arise, a requirement for co-riparian to consent to any increased water use and prioritization of water uses'.[8] In this connection, the most important and controversial component of any water negotiation is the *duty to notify and consult* [9] on planned measures on international watercourses. The obligation of the co-riparian states to inform and

[8] Kishor Uprety & Salman M. A. Salman (2011), *Legal aspects of sharing and management of transboundary waters in South Asia: preventing conflicts and promoting cooperation,* Hydrological Sciences Journal, 56:4, 641-661, DOI: 10.1080/02626667.2011.576252, p. 659.

[9] The duty to notify and consult have different meaning and scope. The difference between 'notification' and 'prior consultation' is that the former simply involves notifying other riparian states, while the latter obliges riparian states to have a dialogue. *See* Kyungmee Kim, *Sustainable Development in Trans-boundary Water Resource Management.* A case study of the Mekong River Basin, Uppsala University, p. 18.

notify each other prior to implementing or taking any action has become a recognized rule of customary international law.[10] This rule finds its roots in the principle of the duty to cooperate in international law. It has been noted that international river basins demand the cooperation of the states, which comprise them.[11] Such states need to work together if the full benefits of the sustainable development and use of watercourses are to be realized by the 'whole basin community'.[12]

An effective system of *notification and consultation* offers a vital means by which states can communicate and peacefully 'reconcile any competing interests' over their planned uses of an international watercourse.[13] Such procedures benefit all states. The planning state is able to effectively determine the likely impacts of its plans within other states and perhaps even adjust where necessary.[14] Good communication with potentially affected states will also put a planning state's proposal on a stronger footing. The planning state will be able to demonstrate that its decision was founded upon a legitimate process, whereby all concerns were considered meaningfully, and there was a deliberate and transparent process by which to adhere to international legal requirements.[15]

States that are likely to be affected by planned projects also benefit from such process. They will benefit from a forum with clear guidelines where they can raise and discuss their concerns, and they will have access to the data and information required to make 'informed decisions over any likely impacts'.[16] Moreover, *consultation* was justified by some international lawyers on the ground that 'it ensures that a state will not utilize the waters of an international drainage basin without examining all the factors involved'.[17] By consulting

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[10] This principle was considered by many international treaties such as the Danube Basin Agreement, 1987; the Helsinki Convention on the Protection and Use of Transboundary Watercourses and International Lakes 1992.

[11] Mohammed Sameh (2003*), Diversion of International Watercourses under International Law,* African Yearbook of International Laws, 109-179, African Foundation for International Law, p. 159.

[12] Ibid.

[13] Alistair Rieu-Clarke (2014), *Notification and Consultation on Planned Measures Concerning International Watercourse: Learning Lessons from the Pulp Mills and Kishenganga Cases,* Oxford University Press, p. 103 available at: http://yielaw.oxfordjournals.org (accessed on November 30, 2016) citing AT Wolf, SB Yoffe, and M Giordano, *International Waters: Identifying Basins at Risk* 5 (1) Water Policy 29 (2003) p. 104.

[14] Ibid.

[15] Ibid.

[16] Stephen McCaffrey, Third Report on the Law of the Non-Navigation Uses of International Watercourses 2 YB Intl L Comm'n 16 at para 61 (1987) in Alistair Rieu-Clarke (2014), *supra* note 13, p. 104.

[17] Mohamed S. Amr (2003), *supra* note 11, p. 163.

other states, a nation may discover 'another course of action', which is more beneficial to all the parties affected, or, at the very least, ascertain the 'legal ramifications of its proposed actions'.[18]

The obligations of *notification* by planned measures impose on upstream and downstream basin states the duty to exchange data and information about the possible adverse effect of the planned measures.[19] This planned measure can involve major projects such as constructing dams or programs of a minor nature, which can be planned and implemented by the public or private sector. Any planned measure, which may have an adverse effect on the condition of basin states, requires exchanging accurate data and information about them. This effect can be beneficial or adverse. However, the 'adverse should be significantly lower than that of significant harm to avoid it'. [20]

The obligation of *prior notification* can be during the 'preliminary stages of the planning phase' of any planned activity.[21] The state that purports to authorize such action is placed under an obligation to notify all potentially affected states of its plans.

The *duty to notify and consult* applies to upstream and downstream countries. Nonetheless, it is widely believed that notification and consultation have substance with regard to planned measures taken by upstream riparian states. Especially, many downstream countries focus on the obligation not to cause harm and require that they have the right to be notified of any activity of the upstream to ensure that such activity would not harm their interests. [22] Most downstream riparians believe that this is 'a unilateral requirement and does not apply to upstream riparians' and they consider it as the 'exclusive right of

[18] C. Bourne, "Procedures in the Development of International Drainage Basins: The Duty to Consult and Negotiate", *Canadian Yearbook of International Law* 10 (1972), p. 230 in Mohamed S. Amr (2003), *supra* note 11, p. 163.

[19] International Law Commission, *Draft Articles on the Law of the Non- Navigational Uses of International Watercourses and Commentaries Thereto and Resolution on Transboundary Confined Groundwater Ground,* 1994 U.N.Y.B. Int'l L. Comm'n 97 (1994); International Law Association in T Sayed Mohamed shaarawy (2016), *the Role of Customary International Water Law in Settling Water Disputes by Mediation: An Examination of the Indus River and Renaissance Dam Disputes*, the American University in Cairo, Egypt, p.19

[20] Ibid.

[21] Ilias Plakokefalos, *Prevention Obligations in International Environmental Law*, Research Paper Series, Amsterdam Center for International Law, available at <www.acil.uva.nl> , p.4.

[22] Salman M.A. Salman (2010), *Downstream riparians can also harm upstream riparians: the concept of foreclosure of future uses,* International Water, 35:4, 350-364, DOI: 10.1080/02508060.2010.508160, p.351.

downstream riparians'.[23] According to this view, downstream riparians do not need to notify upstream riparians of any project –they are undertaking or plan to undertake– because such project or activity cannot possibly harm the upstream riparians.[24] The justification provided is that 'since the water has already left the lands of the upstream riparian; so how can that upstream be harmed or even affected'? [25] This view fails to give due attention to the prospective water resource uses of upper riparians. There is thus a growing literature and development of a new concept called *'foreclosure of rights'*, that all the riparian states (irrespective of their geographical location) are under a *duty to notify and consult* on planned measures.

2. Notification and Consultation on Planned Measures under International Watercourse Law

The issue of notification and consultation on planned measures is present in a number of conventions, albeit in varying forms. It is equally applied in the context of environmental law and international watercourse laws. Its applications have different genesis. However, it is not within the scope of this article to deal with notification and consultation in the context of environmental laws. Thus, this article focuses on notification and consultation in the relevant treaty practices of states and customary international law. The relevant state treaty practices which take the form of bilateral and multilateral agreements are put in chronological order. Whereas, claims for the existence of customary international law are drawn from cases and soft law instruments established over the years.

2.1 Treaties and conventions

The riparian *duty to inform* on planned measures is included in the 1954 convention between the former Yugoslavia and Austria concerning water economic question relating to the Drava River.[26] Article IV of the Drava River Convention envisages that 'Austria, the upper riparian state shall when seriously contemplating plans for new installations to divert from the Drava basin or for construction work which might affect the Drava river regime to the detriment of Yugoslavia, undertake to discuss such plans with the Federal People's Republic and lower riparian states'.

[23] Ibid.
[24] Ibid.
[25] Ibid.
[26] Convention between Yugoslavia and Austria concerning water economy questions relating to the Drava, signed at Geneva on 25 May 1954: art. 4 (United Nations, *Treaty Series,* Vol. 227, p.MI; Legislative Texts, p. 513, No.144; document A/5409, para. 697.

India and Pakistan had also entered into an international watercourse treaty agreement known as 'the Indus Waters Treaty (IWT)', 1960. Article IV of the IWT sets the basic principles of water management by India and Pakistan, primarily through no harm (Art. IV (9)) and *prior information* about developments.[27] Article VII Section 2 specifically requires either party to notify the other if it plans to construct any engineering work that would cause interference or affect materially the other Party.[28] The IWT also provides that 'either Party may request the [Permanent] Court [of Arbitration] . . ., pending its Award, such interim measures as … are necessary to safeguard its interests under the Treaty with respect to the matter in dispute, or to avoid prejudice to the final solution or aggravation or extension of the dispute'.[29] Overall, IWT is elaborate in its provisions for *prior notification* of planned measures, permission, concessions and restrictions.[30]

Another important bilateral treaty where notification and consultation have been given emphasis is the 1973 Treaty concerning the Rio de la Plata and its corresponding Maritime Boundary adopted by Uruguay and Argentina. The treaty stipulates that both riparians may construct works or channels or modify existing ones in both the shared waters as well as the coastal belts, jointly or individually.[31] Pursuant to the treaty 'a party planning the construction of new channels, the substantial modification or alteration to existing ones or the execution of any other works of such magnitude as to affect navigation or the regime of the river, shall so inform the Commission'.[32] Thus, whenever either party wishes to undertake such work, it must follow the established procedures by notifying the Administrative Commission.[33]

The Administrative Commission will then decide within a period of thirty days whether the project may cause significant damage to the navigation interests of the other party, or the river's regime.[34] Should the Commission decide that 'the project may potentially cause harm or have damaging effects, it shall notify the other party, who may raise objections on technical grounds and

[27] Annexure D(9) of the Indus water Treaty.
[28] Mary Miner , Gauri Patankar, Shama Gamkhar & David J. Eaton (2009) *Water sharing between India and Pakistan: a critical evaluation of the Indus Water Treaty,* Water International, 34:2, 204-216, DOI: 10.1080/02508060902902193, p.206.
[29] Annexure G(28) Indus Water Treaty.
[30] Annexure C–E Indus Water Treaty.
[31] *See* article 12, paragraph 1 of the Treaty between Uruguay and Argentina concerning the Rio De la Plata and the Corresponding Maritime Boundary 19 November 1973 (hereinafter Rio de la Plata Treaty) available at <http://www.jstor.org/stable/20691236> (accessed on 14-02-2017).
[32] Id., Art. 17.
[33] Id., Art. 17 to 22.
[34] Id., Art. 17, paragraph 1.

suggest the necessary modifications to the proposed project or operations'.[35] In this notification, the essential aspects of the project must be described and, if necessary, the notification also states the mode of operation and other technical data which will permit the notified party to make an assessment of 'the probable effects of the work might have on navigation or on river policy'.[36] If the Parties do not reach an agreement according to the procedure stated above, Chapter IV on conflict resolution shall be applied to the case.[37]

The duty of notification and consultation of planned measurers has also been acknowledged in multilateral treaty agreements such as the 1995 'Mekong River agreement'.[38] The Mekong River agreement requires that timely information by a riparian on its proposed use of the water shall be submitted to the Mekong River Joint Committee.[39] The agreement allows other riparians to discuss and evaluate the impact of the proposed use upon their uses of water and any other effects, which is the basis for arriving at an agreement. However, the duty of prior consultation does not give the other riparian states to veto and stop the proposed planned measure.

Procedural mechanisms established under the 1995 Mekong Agreement have been further developed by the Mekong River Commission in which it adopted a procedural document for notification, prior consultation and agreement on November 12, 2002. The document establishes the procedures to be applied by the Mekong basin states in the case of planned measures defined as 'any proposal for a definite use of the waters of the Mekong river system by any riparian, excluding domestic and minor uses of water not having a significant impact on mainstream flows'.[40] This definition 'involves any kind of water retention and diversion for the purposes of electricity, irrigation, and flood management'.[41]

According to the Mekong Agreement, *'notification'* is required on development projects on a tributary in the national territory, and *'prior*

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[35] Id., Art. 17, paragraph 2.

[36] Id., Art. 17, paragraph 3.

[37] Lilian Del Casillo Laborde (1996), *Legal Regime of the Rio de la Plata*, Natural Resources Journal, Vol. 36 p.1 available at Hein online (accessed on Feb 14 08:23:59 2017).

[38] Agreement on the Cooperation for the Sustainable Development of the Mekong river basin 5 April 1995, available at: <www.mrcmekong.org/assets/publications/policies/Agreemnt.April 19.pdf> , accessed on 24-March-2017 (hereinafter called the Mekong River Agreement).

[39] Mekong River Agreement, Art. 26.

[40] *See* Article 1 of the definitional part of the 'proposed use' Mekong River Commission, Procedures for Notification, Prior Consultation, and Agreement, (hereinafter the Mekong River Commission).

[41] *See* Art. 4.1.2 of the 1995 Mekong River agreement Commission.

consultation' is required in two specific cases of (1) inter-basin diversions from the mainstream during the wet season; and (2) intra-basin uses on the mainstream during the dry season which can only be applicable to stretches of the mainstream that flow within a state's national territory.[42] Therefore, a riparian state is required to notify dam constructions in their national territory but it does not mean Mekong River Commission necessarily has to open a dialogue about the project. In the Council, a unanimous vote is required to make a decision and this procedure protects national self-interest of riparian states because any riparian state can cast a vote against it.[43]

Another important treaty that restricts unilateral development projects and requires notification, consultation, and agreement, is the India-Nepal Mahaail treaty of 1996. It states that 'any project to be developed on the Mahakali River, where it is a boundary river, should be designed and implemented by an agreement between the parties on the principles established by the treaty'.[44] Hence, it is an obligation for either party to reach an agreement before commencing any project on the Mahakali River.[45] It discourages the unilateral development of the river and approves the principles of cooperation, consultation and notification.[46]

Moreover, the South African Development Community (SADC), signed in Johannesburg, South Africa, by fourteen members (August 23, 1995) makes a clear reference to *the duty of notification*.[47] The revised protocol on shared watercourse in the SADC that was signed on August 2000 embodies provisions that require 'a riparian to notify other states of any planned measures of utmost urgency originating within its territory'.[48] Article 4(1) of the revised protocol concerning planned measures is a reiteration articles 11 to 19 of the UN Convention on Watercourses. It contains notification concerning planned

[42] Sneddon, C. and Fox, C. 2006. *Rethinking Transboundary Waters: A critical hydro-politics of the Mekong basin. Political Geography,* 25, 181-202 in Kyungmee Kim, supra note 9, p. 18.

[43] Kyungmee Kim, *Sustainable Development in Trans-boundary Water Resource Management,* A case study of the Mekong River Basin, Uppsala University, p. 18.

[44] Kishor Uprety & Salman M. A. Salman (2011), *Legal aspects of sharing and management of transboundary waters in South Asia: preventing conflicts and promoting cooperation,* Hydrological Sciences Journal, 56:4, 641-661, DOI: 10.1080/02626667.2011.576252, p.653.

[45] Ibid.

[46] Ibid.

[47] South African Development Community (SADC), Johannesburg (28 Aus 1995), the Convention on Shared Watercourse System in the Region.

[48] South African Development Community (SADC), Johannesburg (August 2000), revised protocol on shared watercourse in the SADC, Art 4 (1) (herein after called the SADC revised protocol).

measures with possible adverse effects, period for reply to notification, obligations of the notifying state during the period for reply to notification, absence of reply to notification, consultation and negotiations concerning planned measures, procedures in the absence of notification, and urgent implementation of planned measures.[49]

Similarly, the *duty of notification* is embodied in the Senegal River Water Charter (in force since March 11, 1972), which was established in response to droughts, and to meet the economic needs of the riparian states of Mali, Mauritania, and Senegal.[50] This instrument creates a system for decision making for the Senegal River basin, a formal structure of consultation and coordination among the Member States.[51] The three states agreed to the principles of equitable utilization, coordinated development, and *prior notification* in the 1972 Conventions.

A revised Senegal River treaty was concluded by Mali, Mauritania, and Senegal in May 2002; and Guinea became a party to it in 2006. The 2002 Water Charter maintains the same core institutions of the 1972 Convention. It also clarifies the river projects that require approval and indicates the notification process for such projects.[52] Article 4 of the Charter enumerates a number of principles for allocation of the waters of the Senegal River among the riparians. These principles include, among other things, 'the obligation of each riparian state *to inform* other riparian states before engaging in any activity or project likely to have an impact on water availability; and/or the possibility to implement future projects'.

2.2 Case law and soft laws

Case law consolidates the status of the obligation to notify and consult in international law. The award of 16 November 1857 by the arbitral tribunal in the *Lake Lanoux* is a typical example.[53] The 1957 Arbitral Tribunal in the *Lake Lanoux* case held that:

> [a] State which is liable to suffer repercussions from the work undertaken by a neighboring State is the sole judge of its interest; and if the neighboring State has not taken the initiative, the other State cannot be denied the right to

[49] S*ee* Art 4 (1). (a)-(i) SADC revised protocol.

[50] Margaret J. Vick, *The Senegal River Basin: A Retrospective and Prospective look at Legal Regime*, Natural Resources Journal, Vol. 46, p. 213.

[51] Theodore Parnall & Albert E. Utton, 'The Senegal Valley Authority: A Unique Experiment in International River Basin Planning', 51 *IND.L.J.* 235, 237 n.5 (1976) in Margaret J. Vick, 'The Senegal River Basin: A Retrospective and Prospective look at Legal Regime', *Natural Resources Journal*, Vol. 46, p. 214.

[52] Margaret J. Vick, *supra* note *50,* p. 214.

[53] *See* Lake Lanoux Arbitration (1957), Spain vs France, 24 I.L.R. 101, 111-12 (hereinafter referred as Lake Lanoux Arbitration).

insist on notification of works or concessions which are the object of a scheme.[54]

Issues of *notification and consultation* were also raised in a dispute between India and Pakistan in relation to the Indus River. The controversy is related to the Kishanganga Project. This is a hydropower plant constructed in India without prior notification and consultation of Pakistan, which diverts water to the Jhelum River from the Kishanganga River (called Neelum in Pakistan), a tributary of the Jhelum, before entering Pakistan.[55] Pakistan was concerned that such uses were in breach of the obligations under the Indus Water Treaty – including the procedural nature as to the timing of notification.[56] Due to the failure of both states to agree on a mutually satisfactory interpretation of the treaty, a case was submitted to the Permanent Court of Arbitration (PCA). The PCA ruled that *'critical period'* where 'a culmination of facts-tenders, financing secured, government approval in place, and construction underway' are the key stages in the notification process.[57]

In addition to the case laws, non-governmental organizations have also contributed to the development of the concept of *notification and consultation* on international watercourse. And, one soft law instrument in the field of international water law prior to the adoption of the Watercourses Convention by the General Assembly in 1997 was 'the 1966 Helsinki Rules on the Uses of the Water of International Rivers (later substituted by the Berlin Rules of 2004)'. The Helsinki Rules' were adopted by the International Law Association (ILA) in 1966 and they were widely accepted and quoted by states and scholars, and, hence, considered as reflecting customary international law.[58] However, they do not have a binding effect *per se.*[59]

The Helsinki Rules provide a requirement for notification and they do not distinguish between downstream and upstream riparians. The Helsinki Rules require that a state regardless of its location in a drainage basin, should furnish to any other basin state, the interests of which may be substantially affected, *notice of* any proposed construction or installation which would alter the regime

[54] Ibid.

[55] Kishor Uprety & Salman M. A. Salman (2011), *supra* note *44*, p. 646.

[56] Indus Waters Kishenganga Arbitration (Pakistan v India) (Partial Award) (2013) available at <http://www.pca-cpa.org/showpage.asp?pag_id=1392> (accessed on 04-Mar-2017).

[57] Alistair Rieu-Clarke (2014), *supra* note 13, p. 119 citing Indus Waters Kishenganga Arbitration (Pakistan v India) (Partial Award) (2013), para 429 available at <http://www.pca-cpa.org/showpage.asp?pag_id=1392> (accessed on 04-Mar-2017).

[58] C. Bourne, *International water law; selected writing of Professor Charles Bourne*, The Hague; Kluwer Law International in Salman M.A. Salman (2010), *supra* note 22, p.353.

[59] Ibid.

of the basin in a way which might give rise to a dispute. The notice should include such essential facts as will permit the recipient to make an assessment of the probable effects of the proposed alteration'.[60] The Helsinki Rules emphasize the requirements of notification regardless of the location of the state in the drainage basin.[61]

Article XXIX of the 1966 Helsinki Rules suggests that a basin state contemplating such an activity: (1) must give notice to the other basin states, which (2) are required to examine the situation within a reasonable period of time; (3) if no notice has been forthcoming, the new or expanded activity will not benefit from the presumption of priority that would normally attach to it under Article VIII. These rules are satisfactory in as much as they suggest a duty of giving notice and a sanction if that duty is not performed; but 'they fail to provide for any procedure in the event of an objection'.[62]

For that reason, the ILA devised some supplementary rules in its 1980 Draft Articles on the Regulation of the Flow of Water of International Watercourses. These rules may again be summarized in three points: (1) duty of giving advance notice; [63] (2) if there are objections, duty to negotiate with a view to reaching an agreement; and (3) in the event of a failure of the negotiations, duty to seek a solution through the channels of third-party dispute settlement offered by the 1966 Helsinki Rules.[64]

The requirements of international finance organizations like the World Bank[65] are also important regarding notification of works along international watercourse. According to World Bank internal guidelines, prospective borrowers are required to notify the other riparians (both upstream and downstream) of the proposed project and its details. The notification contains, to the extent available, sufficient technical specifications, information and other data (the project details) to enable the other riparians to determine as accurately as possible whether the proposed project has the potential for causing

[60] Article 29 the Helsinki Rules on the Uses of the Water of International Rivers.
[61] Salman M.A. Salman (2010), *supra* note 22, p.356.
[62] Lucus Caflisch (1996), *Emerging Rules on International Waterways: the Contribution of the United Nations,* Journal of Political Geography, Vol. 15, No. ¾, pp. 273-285, p.280.
[63] *See* Article 7, 1980 Draft Articles on the Regulation of the Flow of Water of International Watercourses (herein after Draft Articles on International Watercourse).
[64] *See* Article 8, Draft Articles on International Watercourse.
[65] The bank issued its first policy for projects on international waterways in 1956. This policy was updated and refined in 1965, and was later elaborated in 1985. The current version of the policy was issued in 2001 as Operational Policy and Bank Procedures 7.50 "Projects on International Waterways"). *See* Samlam M.A. Salman (2011), 'The Baardhere Dam and Water Infrastructure Project in Somalia- Ethiopia's objection and the World Bank response', *Hydrological Sciences Journal*, 56:4, 630-640, DOI: 10.1080/02626667.2011.574139 , p.658.

appreciable harm through water deprivation (whether actual deprivation as in the case of downstream riparians, or foreclosure of future uses in the case of upstream riparians), or through pollution or otherwise.

The obligation of the riparian state *to inform* co-riparian states as a customary rule was confirmed by some international lawyers, who stated that the riparian state has a 'duty to give co-riparian state an opportunity to object' to the proposed work in an international watercourse.[66] Judge Arechaga, when discussing the obligations of riparian states under international law, concluded that:

> '[t]he first of these duties is that any state which proposed the execution of works requiring water from a river basin has a duty to give notice of its intention to other riparian states. This duty exists even though the state proposing to undertake works considers that they will not cause any injury to other co-riparian'.[67]

Likewise, looking from the perspective of the rights of the other co-riparian States, Laylin and Blanchi concluded that:

> '[t]he right to receive appropriate and correct information on the existing regime and probable changes to be effected in a common river is coterminous with the fundamental duty to respect a riparian's legitimate interests. No co-riparian can evaluate the full extent of its rights without such information'.[68]

3. Notification and Consultation on Planned Measures under the Watercourse Convention

The UN General Assembly (UNGA) recognized the importance of strengthening customary law relating to international watercourses in its Resolution 2669 (XXV), which was adopted on 8 December 1970.[69] Pursuant to the resolution, UNGA has mandated the International Law Commission (ILC), a body of 34 independent legal experts elected by the assembly, to study 'the non-

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[66] In Mohammed Sameh (2003), *supra* note 11, p. 160.

[67] E. de Arechaga, 'International Legal Rules Governing Use of Waters from International Watercourses', *Inter-American Bar Review* 2 (1960) 2, p. 336 in Mohammed Sameh (2003), *supra* note 11, p. 160.

[68] J. Laylin and R. Blanchi, "The Role of Adjudicating in International River Disputes: The Lake Lanoux Case", *AJIL* 53 (1959), p. 48 in Mohammed Sameh (2003), *supra note 11*, p. 160.

[69] On 8 December 1970, the UN General Assembly adopted Resolution 2669 (XXV), which requested the International Law Commission to take up the study of the international law relating to international watercourses with a view to its codification and progressive development. Progressive Development and Codification of the Rules of International Laws Relating to International Watercourses, GA Res 2669, UN GAOR, 25th ,supp No. 8, UN Doc A/8028(1970).

navigational uses of international watercourses'.[70] The UN Convention on the Law of Non-Navigational Uses of International Watercourses, (which was adopted by the United Nations General Assembly on 21 May 1997, after 23 years of preparatory work by the ILC, and extensive deliberations by the General Assembly thereafter), has come into force on 17 August 2014.[71]

The Watercourses Convention is considered as one of the leading legal instruments in relation to non-navigation uses of international water courses. There are debates whether the Convention is a reflection of international customary law or merely a framework document. To use a comment from one of the external assessors of this article:

> There are two lines of arguments in this regard. One line of debate is whether the Convention in itself is a reiteration of customary international law, and if not, which of its provisions constitute customary international law, and which others reflect mere enterprise in progressive development of the law. The second line of debate is about form: whether the Convention should be organized as a 'framework' document generally composing substantive and procedural principles (with a possibility on the part of states to create their own treaty arrangements) or whether it should be organized like most other conventions which leave no room to states for deviation from their contents.

The Watercourses Convention (and its ILC Draft) is not very clear regarding the nature of the general multilateral convention to be concluded. Is it intended to bring about the codification and progressive development of the law of international waterways, or to serve as a model or framework agreement, or to be something of everything? *First,* Article 3(l) of the Draft and its commentary suggest that the primary intention is that of establishing a framework. Accordingly, the multilateral convention would be 'a set of guidelines for states intending to conclude individual watercourse agreements'.[72] These states would be free, however, to deviate from its provisions, for the individual agreements in question shall 'apply and adjust' the provisions of the Convention 'to the characteristics and uses of a particular international watercourse or parts thereof.'[73]

The *second* line of argument is related with the entry into force of the Watercourse Convention upon the deposit of 35 instruments of ratification or

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[70] Ibid.

[71] *See* Salman M.A. Salman (2015) 'Entry into force of the UN Watercourses Convention: why should it matter?', *International Journal of Water Resources Development*, 31:1, 4-16, DOI: 10.1080/07900627.2014.952072, p.1.

[72] Lucus Caflisch (1996), 'Emerging Rules on International Waterways: the Contribution of the United Nations', *Journal of Political Geography*, Vol. 15, No. ¾, pp. 273-285, p.276.

[73] Id., p. 277.

accession.[74] The deposit and the entry into force of the Convention represented 'a mere 18 per cent of the organization's current membership of 185 states -- a figure that was even lower if regional economic integration organizations were taken into account'.[75] This indicates that the Convention does not even qualify to establish a regional customary international law let alone a general customary law applicable at a global level.

In this regard, Stephen McCaffrey, who acted as special rapporteur during the work of the ILC reflected that 'it may be said with some confidence that the most fundamental obligations contained in the [watercourses] Convention do indeed reflect customary norms'.[76] It should be noted that regardless of the time it took for the convention to enter into force, some of its provisions - including the no significant harm rule and the equitable utilization principles constitute fundamental norms of customary international law.[77]

Notwithstanding the aforementioned debate, detailed provisions on notification are stipulated in the 1997 Watercourses Convention. In connection to the commentary on the draft works of the Watercourse Convention, Stephen C. McCaffrey stated that the provisions on planned measures 'constitutes perhaps the most detailed treatment of any subject dealt with in the draft', largely due to "the controversial nature of the obligations involved'.[78] Article 11 lays down the general duty to information concerning planned measures and it makes it an obligation to 'exchange information and consult each other and, if

[74] The Non-Navigation Uses of International Watercourses (1997) came into force in August 2014.

[75] Daudi N. Mwakawago (United Republic of Tanzania Representative) remark during the General Assembly official adoption of the Convention on the Law of the Non-Navigational Uses of International Watercourses available at <http://www.internationalwaterlaw.org/documents/intldocs/convention_press.html>. The parties to the Convention from Europe are: Finland, Norway, Hungary, Sweden, the Netherlands, Portugal, Germany, Spain, Greece, France, Denmark, Luxemburg, Italy, Monte Negro, the UK, and Ireland. The parties to the Convention from Africa are: South Africa, Namibia, Guinea Bissau, Burkina Faso, Nigeria, Niger, Benin, Chad, Cote d'Ivoire, Libya, Tunisia, and Morocco. The Arab states that are parties to the Convention, in addition to Libya, Tunisia and Morocco, are Syria, Lebanon, Jordan, Iraq and Qatar. Uzbekistan and Vietnam are the only Asian countries to join the Convention; while no state from the Americas is yet a party to the Convention. Some of the countries that abstained include Ethiopia. *See* Salman M.A. Salman (2015), *supra* note 71, p. 13.

[76] SC McCaffrey, 'The Contribution of the UN Convention on the Law of the Non-Navigational Uses of International Watercourses' 1(3/4) *Intl J Global Envntl Issues* 250 at 259 (2001) in Alistair Rieu-Clarke (2014), *supra* note 13, p.105.

[77] Salman M.A. Salman (2015), *supra* note 71, p. 13.

[78] Stephen C. McCaffrey (1992), 'Background and Overview of the International Law Commission's Study of the Non-Navigational Uses of International Watercourses', *Columbia Journal of Environmental Law and Policy* Vol. 3:17, p. 24.

necessary, negotiate on the possible effects of planned measures on the condition of an international watercourse'. Moreover, according to Article 12 of the Convention, states that are planning to adopt measures that might have significant adverse effects on other watercourse states should notify these states, and the state of origin shall transmit all appropriate technical data and information to the potentially affected watercourse state.

On the *issue of notification* of other riparians, the Watercourse Convention states that 'before a watercourse state implements or permits the implementation measures which may have a significant adverse effect upon other watercourse states, it shall provide those states with timely notification thereof.'[79] Thus, the Convention does not solely refer to notification to downstream riparians. Rather, it deals with significant effects 'upon other watercourse states'. Indeed, the Watercourse Convention does not mention the terms 'downstream' and 'upstream' riparians in any of its provisions.[80] It refers throughout its article and paragraphs to 'watercourse states'. It defines 'watercourse state' to mean 'a state party to the present Convention in whose territory part of an international watercourse is situated…'[81]

The 1997 Convention specifically sets out a time limit of six months for a reply to be transmitted to the state of origin.[82] The states notified pursuant to Article 12 will have six months to study and evaluate the possible effects of the planned use and to communicate their findings to the notifying state.[83] This provision provides for the imperative of ensuring the 'equitable participation of all watercourse states in the process of international water law'.[84] During the six-month period, which can be extended for another six months, that state may also be requested to provide additional data and information germane to the issue; and the planned use will remain in limbo during that period.[85] The Watercourse Convention provides that the notifying state shall not, during the timeline for the reply to notification[86] 'implement or permit the implementation of the planned measures without the consent of the notified states'.[87]

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[79] *See* Article 12 Watercourse Convention.
[80] Salman M.A. Salman (2010), *supra* note 22, p.356.
[81] Id., Art. 2(c), Watercourse Convention.
[82] Id., Art. 12.
[83] Id., Art. 13.
[84] Owen McIntyre (2013) 'Utilization of shared international freshwater resources – the meaning and role of "equity" in international water law', *Water International*, 38:2, 112-129, DOI: 10.1080/02508060.2013.779199, available at <http://www.tandfonline.com> p.117. (Accessed on 11-Mar-2017).
[85] *See* Article 14 Watercourse Convention.
[86] Id., Art. 13.
[87] Id., Art. 14(b).

The states notified in accordance with Article 12 may conclude that there is no risk, in which case the issue is disposed of. In the contrary event, they shall formulate and motivate their objections within the previously mentioned time limit.[88] If they do, negotiations ensue with a view to reaching an 'equitable resolution of the situation'[89] ; that is, presumably, one based on Articles 5-7 of the Watercourse Convention. The Convention requires good faith during such consultation.[90] However, the Watercourse Convention does not impose the co-riparian states any obligation to negotiate.[91] Therefore, it may be concluded that entering into negotiation by the concerned states should be agreed upon by the concerned states.

The Watercourses Convention also contains an emergency provision allowing watercourse states to implement planned measures immediately, even in the presence of objections, if there is an urgent need to do so (for health or security reasons, for example).[92] But the other watercourse states must be informed thereof; the notification procedure described above must be initiated immediately afterwards; and the principle of equitable and reasonable utilization, as well as the no-harm rule, will remain in full effect.[93]

According to Mohamed S. Amr, failure of the co-riparian state to *notify and consult* with other co-riparian states (regarding the future use of water in an international watercourse) constitutes a breach of the obligation under the international law governing the non-navigational use of an international watercourse.[94] However, it will be wrong to assume that the detailed procedural rules under Article 12-20 of the Water Course Convention are components of customary international rules, which are 'extremely onerous from the point view of the later-coming riparian states, which mostly happen to be upstream countries'.[95] It is to be noted that the Watercourse Convention does not impose any obligation on the co-riparian states to obtain a *prior approval* from the other co-riparian states before implementing such actions.

[88] Id., Art. 15.
[89] Id., 17(1).
[90] Id., Art.17 (1).
[91] The ILA Report of 1964 on the "use of international rivers", did not refer to any obligation to enter into negotiations but it considered it sufficient to state that: "parties should seek a solution by negotiation." *See* Mohamed S. Amr (2003), 'Diversion of International Watercourses under International Law', *African Yearbook of International Law*, p. 162.
[92] *See* Article 19 (1) Watercourse Convention.
[93] Id., Art. 19 (2) (3).
[94] Mohamed S. Amr (2003), *supra* note 11, p. 162.
[95] A comment the author borrowed from one of the reviewers.

4. Riparian State Agreements and Practices with regard to Notification and Consultation on Projects along the Nile

Ethiopia has objected the insertion of the provisions pertaining to notification and consultation over planned measures when the text of the Watercourses Convention was debated in the Sixth Committee of the UNG.[96] The opposition clearly relates to the text presented by the ILC and it refers to the detailed provisions laid down in Part III of the Watercourses Convention.[97] Ethiopia's ground for opposing the detailed rules on *notification and consultation* was that Part III placed 'an onerous burden upon riparian states'.[98]

In spite of considerable opposition to Part III of the Convention, however, there was no serious effort to accommodate the interests of upper riparian states. Ethiopia abstained during the adoption of the Convention stating that "(t)he Convention was tilted towards lower riparian states", and "while, reserving the right to use the water of its international watercourses" Ethiopia opted to abstain rather than voting against it in 'the hope that the Convention might encourage negotiations to ensure equitable utilization and promote cooperation'.[99]

On the other hand, Sudan adopted the 1997 Water Course Convention while Egypt abstained during the adoption of the instrument. This implies that there are no inclusive legal provisions regarding *notification and consultation* on planned measures along international watercourse that are equally binding on the three riparian states. Ethiopia's position on the insertion of the detailed provision regarding the notification and consultation on planned measures is its negative connotation that it could send to the downstream riparian states, Sudan and Egypt. Ethiopia has persistently objected the detailed rules on notification and consultation and this renders the principle inapplicable to Ethiopia, unless the principle of notification and consultation can be regarded as customary international law.

Ethiopia had signed an agreement with Egypt in 1902, and it was concluded between Emperor Menelik II of Ethiopia and the British government on behalf

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[96] *See*, for example, UNGA Sixth Committee, Summary Record of the 20th Meeting, UN Doc A/C.6/ 51/SR.20 (1996) at paras 7–55; UNGA Sixth Committee, Summary Record of the 53rd Meeting, UN Doc A/C6/51/SR.53 (1997) at paras 39–107. Ultimately, the convention was adopted by 106 votes in favor, with thirty-six abstentions, and three votes against (Burundi, China, and Turkey). *See* UNGA, Official Records of the 99th Plenary Meeting of the 51st Session, UN Doc A/51/PV.99 (1997) at 7–8 available at <http://www.internationalwaterlaw.org/documents/intldocs/convention_press.html>. *See* also Alistair Rieu-Clarke (2014), *supra* note 13, p. 107.

[97] UNGA Sixth Committee, *supra* note 102, at para 7.

[98] Id., at para 9.

[99] Ibid.

of Egypt and Sudan.[100] Article III of, the Anglo-Ethiopian Treaty (May 15, 1902) provides:

> His Majesty the Emperor Menelik II 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 Sabot, which would *arrest the flow of their waters into the Nile* except in agreement with His Britannic Majesty's Government and the Government of the Sudan *(italic added).*

This agreement that laid the foundation for the May 1902 agreement was 'the negotiations carried out at the final years of the 19th century and the diplomatic notes exchanged in March 1902 between Monsieur Alfred Ilg, Emperor Menelik's foreign affairs counsellor, and Lt. Colonel John Harrington, the British emissary in Addis Ababa'.[101] The March 1902 exchanges of notes contain 'an article which established limitations on future rights of Ethiopia in the utilization of the Nile River water sources'.[102]

The May 1902 Treaty provides 'restrictions on construction of dams across the Blue Nile, Lake Tana or Sobat without the prior consent of the British Government of Sudan'.[103] Based on these treaty instruments, Egypt has always threatened Ethiopia that it cannot construct any dam that could affect the size of the Nile River which it deems is Egypt's lifeline.[104] In other words, any attempt by Ethiopia to construct a dam should not affect the size of the Nile, a condition which is "analogous to the unenforceable 'verdict' (in Shakespeare's *Merchant of Venice*) which entitled Shylock to take a pound of Antonio's flesh without spilling a drop of blood".[105]

Ethiopia has persistently objected that it does not accept the March 1902 exchange of notes. Ethiopia also argues that the May 1902 agreement, *only*

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[100] In 1902, London dispatched John Harrington to Addis Ababa to negotiate border and Nile water issues with Emperor Menelik. *See* Tadesse Kassa (2014), 'the Anglo Ethiopian Treaty on the Nile and the Tana Dam Concessions: A script in legal history of Ethiopia's Diplomatic confront (1900-1956)', *Mizan Law Review*, Vol.8, no.2, 2014, p.273.

[101] Harold G. Marcus (1995), *The Life and Times of Menelik II, Ethiopia 1844- 1913*, New Jersey: The Red Sea Press Inc., p. 59 in Tadesse Kassa (2014*), supra* note 100, p.273.

[102] *See* Ilg to Harrington, 18 March 1902, FO 403/322 in Tadesse Kassa (2014), *supra* note 100, p.275.

[103] Tadesse Kassa (2014*), supra* note 100, p.278.

[104] Gebre Tsadik Degefu, 'The Nile Waters: Moving Beyond Gridlock'*, Addis Tribune* (June 25, 2004) in Fasil Amdesion (2009), *Scrutinizing the Scorpion Problematique: Arguments in Favor of the Continued Relevance of International Law and a Multidisciplinary Approach to Resolving the Nile Dispute*, Texas International Journal, Vol. 44:1, Texas, USA, 2009,p. 10.

[105] Elias N. Stebek, email exchanges, Aug. 31, 2017.

prohibits the complete arrest of the water. In fact, Ethiopia has not ratified the treaty or exchange notes.[106] The restriction on dam was annexed to the major treaty body through a note exchange between the advisor of Emperor Menilik and British Envoy in Ethiopia.[107] Although, the advisor has not been authorized to sign a treaty agreement, scholars and politicians in favor of Egypt's claim have taken for granted that such unauthorized note is binding treaty agreement.

Ethiopia has discarded the historical rights that Egypt advances based on colonial Treaty. Instead, Ethiopia has expressed its support to the principle of equitable use of all riparian states of the Nile River. Ethiopia has always rejected the request for notification of any of its Nile projects, claiming that the hidden objective of Egypt's demand is to claim (after it is notified) that the 1902 Agreement is valid and binding on Ethiopia.[108] To use the comments from one of the reviewers: 'Ethiopia may not have come forthwith to support the principle of notification and consultation, but it has never been an ardent opponent of the approach, if such is based on mutual recognition of equality'. Furthermore, Ethiopia contends that Egypt and Sudan had never notified Ethiopia of any of their projects across the Nile basin.[109]

Other important instruments on the use of the Nile waters are the 1929 and 1959 Nile water agreements. The 1929 agreement[110] was signed between Egypt and Great Britain on behalf of Sudan and other British colonies in the basin (Uganda, Kenya, and Tanzania).[111] The 1929 Treaty did not allow upper riparians to 'alter the Niles flow without obtaining consent first from the U.K'.[112] The second Nile Water Agreement, commonly called the 1959 Agreement, is aimed at the full utilization of the Nile Waters solely between

[106] Tadesse Kassa (2014), *supra* note 100, p. 275

[107] Bentinck, Lake Tana, 12 December 1927, FO 371/12341 Addis Ababa in Tadesse Kassa (2014), *supra note* 100 , p. 276.

[108] Salman M.A. Salman (2016), 'The Grand Ethiopian Renaissance Dam: the Road to the Declaration of Principles and the Khartoum Document', *Water International*, 41:4 512-527, DOI: 10.1080/02508060.2016.1170374.

[109] Ibid.

[110] The 1929 treaty is remarkably one-sided, demonstrating, the British desire to appease Egypt in order to secure the shortest sea-route to British-controlled India via the Suez and the Red Sea ports.

[111] David. S (2010), *Nile Basin Relations: Egypt, Sudan and Ethiopia*, George Washington University Press, Washington DC, USA, 2010, p.6, available at <http://www.mailto:elliott.org> (accessed on 19-Mar-17)

[112] Joseph W. Dellapenna (1994), 'Treaties as Instruments for managing Internationally shared water resource: restricted sovereignty v. community of property', 26 *Case W. Res. J.* Int'l L. 27, 48 (1994).

Egypt and Sudan.[113] The two parties under the 1959 agreement agreed that Egypt constructs the Sudd-el-Aali and Sudan shall construct 'the Roseires Dam on the Blue Nile and any other works which the Republic of Sudan considers essential for the utilization of its share, and including projects for the increase of the River yield'.[114] Ethiopia was not a party to both the 1929 and 1959 agreements, and hence could not be bound by the terms of those agreements. Ethiopia has expressly objected the bilateral negotiations between Egypt and Sudan on the allocation of the Nile waters, and to the Aswan High Dam in Egypt, and to the Roseiris Dam in the Sudan in the late 1950s.[115] Thus, the provisions included in both agreements that demand other Nile river riparian states including Ethiopia to obtain prior consent of Egypt and Sudan are not applicable.

Ethiopia, Egypt and Sudan had signed the 1968 African Convention on the Protection of Nature and natural Resource (ACPNW). The Convention requires the contracting states to coordinate the planning and development of water resources projects, *to consult with each other thereon*, and to set up inter-state commission to study and resolve problems arising from the joint use of these resources, and for the joint development and conservation of such resources. [116] Moreover, in relation to development plans, the ACPNW states that 'where any development plan is likely to affect the nature of resources of other states, the latter shall be consulted'.[117] The ACPNW can be taken as the only instrument that the disputant parties involved in the on-going construction of GERD are part of. Yet, Ethiopia has not ratified the ACPNW agreement; hence, it is not a binding legal instrument as far as Ethiopia's legal obligation is concerned.

On the other hand, there is bilateral state practice regarding notification and objection that involved Ethiopia as one of the parties in the construction of a Baardhere Dam and water infrastructure project in Somalia. The Baardhere Dam was supposed to be built with the financial backing of the World Bank along the Juba River, which Somalia shares with Ethiopia and Kenya.[118] As a result,

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[113] Ana Elisa Cascão (2009), *Changing Power Relations in the Nile River Basin: Unilateralism vs. Cooperation?,* King's College of London Press, United Kingdom, 2009, p. 2, Available at: <http://www.water□alternatives.org>. (Accessed: 10/11/2014).

[114] *See* 1959 Nile Water Agreement.

[115] Zewde Gabre-Sellassie, 'The Blue Nile and Its Basins: An Issue of International Concern', in *From Poverty to Development: Intergenerational Transfer of Knowledge,* IGTK Consultation Paper Series, No**.** 2 at 2-3 (Shiferaw Bekele ed., 2006); Gebre Tsadik Degefu, *The Nile Waters: Moving Beyond Gridlock,* ADDIS TRIB. (June 25**,** 2004) in Fasil Amdesion (2009), *supra* note 103, p. 21.

[116] African Convention on the Protection of Nature and natural Resource Art. 5(2) (herein after African Nature Convention)

[117] *See* Art. 14 (3) of the African Nature Convention.

[118] Samlam M.A. Salman (2011), *supra* note 65, p.631.

Ethiopia and Kenya were duly notified and provided with the detailed specification of the project.[119] However, Ethiopia opposed to the project on the grounds that the project would cause 'adverse effects to its interests'. [120] The Government of Ethiopia suggested prior negotiations with Somalia concerning the use of the waters of the Juba River, with the view of reaching an agreement that would be mutually satisfactory to both riparian states.[121] Ethiopia went further and suggested negotiations with Somalia to determine the amount of water of the Juba that each country would be allocated.[122] This indicates that Ethiopia has accepted (at least in this particular project) that notification and consultation for mutual benefits in the context of equitable utilization constitutes an international norm regarding the construction of developmental projects along a transboundary watercourse. And, it was done in the absence of sharing and managing agreements among the three riparian states.[123]

Moreover, in 1993, a framework agreement on the Nile water was signed between Ethiopia and the Arab Republic of Egypt. One of the substantive provisions of the agreement relates with 'consultation and cooperation on projects that are mutually advantageous, such as projects that would enhance the volume of flow and reduce the loss of the Nile water through comprehensive and integrated development schemes'.[124] In the same manner, the framework agreement stipulates that the parties agreed that they should hold periodic consultation on matters of mutual concern, including the Nile waters, in a manner that would enable them to work together for peace and stability in the region. In addition to the lack of specificity regarding specific obligations, the 1993 framework agreement has not been ratified by either of the governments.

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[119] Ibid.

[120] It is the policy of the World Bank not to finance any project that will cause appreciable harm to any other riparian. Similarly, the Bank was not able to finance the Aswan High Dam in Egypt, because, among other reasons, of the initial failure of Egypt and the Sudan to reach an agreement over the Nile River, particularly in light of the fact that the Aswan High Dam would inundate large areas in northern Sudan. It must be noted that neither Egypt and Sudan as well as the World Bank invited Ethiopia to be notified and consulted on the project. Samlam M.A. Salman (2011), *supra* note 65, p.631.

[121] Ibid.

[122] Ibid.

[123] The Juba River is fed by three main tributaries: the Genale, the Wabe Gestro and the Dawa, which originate in Ethiopia, with the Dawa becoming a boundary river with Kenya. These rivers converge at Dolo, near the Somali borders with Kenya and Ethiopia, forming the main Juba River. *See* Capondera, D.A., 2003, National and International water law and administration-selected writings. The Hague: Kluwer Law International in Samlam M.A. Salman (2011), *supra* note 65, p.637.

[124] Article 6 of the 1993 Agreement.

Post 1993 framework agreement rather demonstrate wilful refusal to observe the duty of communication and consultations of planned measures. For example, Egypt failed to consult or alert Ethiopia on the development project known as the Toshka or new valley project along the Nile River. Ethiopia objected to the project on 20 March 1997 via the Note Verbale which, Ethiopia stated; "Ethiopia wishes to be on record as having made it unambiguously clear that it will not allow its share to the Nile waters to be affected by a *fait accompli* such as the Toshka project, regarding which it was neither consulted nor alerted." [125] Ethiopia had lobbied against the same project, by sending several letters to international institutions.[126]

Ethiopia and many riparian states other than Egypt and Sudan have been engaged in pursuits of replacing the colonial treaty agreements (that do not bind them) by a multilateral treaty agreement, i.e., the "Cooperative Framework Agreement (CFA)" that guarantees equitable utilization of the Nile water resources.[127] The CFA disproved Egypt's claim as the sole powerhouse for any discussion on the Nile basin, and it was adopted in 2010. The CFA formally introduced the concept of riparian duty to inform on planned measures. The CFA stipulates the principle that 'the Nile basin states shall exchange on planned measures through the Nile River Basin Commission'.[128] However, Sudan and Egypt failed to sign the CFA, and it has not come into effect.

The principle of planned measures has been one of the most difficult issues throughout the CFA negotiations. The original negotiated draft of CFA incorporated the procedural rules of the Watercourse Convention, which was supported at the time by all parties, except Ethiopia as a 'persistent objector' to its introduction.[129] Ethiopia's objection to the rules stated that the issue of planned measures could be attended to under the regular exchange of data and information. In addition, it suggested that the issue of planned measures becomes 'relevant if and only if a water sharing arrangement acceptable to the basin states is put in place'.[130] The rules of procedure on planned measures were

[125] Salman M.A. Salman (2010), *supra* note 22, p. 352.

[126] Hala Nasra and Andreas Neef (2016), *Ethiopia's Challenges to Egyptian Hegemony in the Nile River Basin: the Case of the Grand Ethiopia Renaissance Dam,* Geopolitical, 214, 969-989, DOI:10.1080/14650045.2016.1209740 , p. 978.

[127] Eshetu Girma, Egypt vs. Ethiopia at the ICJ Part, 2014, p.10 . <http://aigaforum.com/articles/Ethiopia-vs-Egypt_and_ICJ.pdf> , Accessed: Dec.12, 2016.

[128] Article 8 of CFA.

[129] Musa Mohammed Abseno (2013), 'Role and relevance of the 1997 UN Watercourses Convention in resolving transboundary water disputes in the Nile', *International Journal of River Basin Management*, 11:2, 193-203, DOI: 10.1080/15715124.2013.811415, p. 199, available at <http://www.tandfonline.com/loi/trbm20> (accessed on 11-Mar-17).

[130] PoE Final Report, 2000, p. 17.

later removed from the text and replaced by a statement of principle in the current CFA text, leaving procedural details to the future Nile River Basin Commission.[131] While the Watercourse Convention provides detailed procedures on prior notification, consultation, and negotiation concerning 'planned measures', the CFA chose to adopt a general principle that can enable the Nile basin states exchange information on planned measures through the Nile River Basin Commission thereby leaving detailed procedures for the future Nile River Basin Commission.[132] Therefore, information on planned programs pursuant to Article 8 would not be directly between the party of origin and the 'affected states' as such.

Consequently, the Watercourse Convention and the final outcome of the CFA regarding the procedures concerning planned measures are different. The framework adopts a less detailed principle that only requires:

> 'the regular and reciprocal exchange among states of the Nile River Basin of readily available and relevant data and information on existing measures and on the condition of water resources of the basin, where possible in a form that facilitates its utilization by the states to which it is communicated'.[133]

In March 2015, the three riparian states signed an agreement entitled 'Agreement on Declaration of Principles between the Arab Republic of Egypt, the Federal Democratic Republic of Ethiopia, and the Republic of the Sudan on the Grand Ethiopian Renaissance Dam Project (DoP on the GERD)'. The Agreement has 10 principles, four of which are about the GERD. Relevant to the discussion to the subject at hand, Article 3 obliges 'the three parties to take all appropriate measures to prevent the causing of significant harm'.

Article 5 deals with the principle to cooperate in the first filling and operation of the dam. Article 7 addresses the issue of exchange of data and information between the three parties for carrying out the studies recommended by the panel, and to be carried out by the Technical National Committee. According to the Declaration of Principles (DoP) of GERD, Ethiopia retained the right to adjust these rules and 'inform downstream countries of any unforeseen or urgent circumstances' that has led to such adjustment.[134] The aforementioned agreement at least puts the framework on notification and consultation of information on the construction of the dam, and it can be concluded that it is the only agreement that has somehow taken the importance of notification and consultation during the construction of the GERD.

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[131] Musa Mohammed Abseno (2013), *supra* note 129, p. 199.
[132] Ibid.
[133] Art. 7, CFA, 2010.
[134] Hala Nasra and Andreas Neef (2016), *supra* note 126, p.978.

In a recent development in connection with sixth year anniversary of the commencement of the GERD, a higher government official asserted that 'the overall filling of the Dam will be conducted in consultation *(not necessarily in agreement)* with Egypt and Sudan *(emphasis added)*'.[135] However, there is no need to consult Egypt and Sudan on the initial stage of producing electricity (750 MW) as the amount of water required to produce hydroelectric energy is small and the impact on downstream riparian states is negligible.[136] By strictly adhering to the consistent Ethiopian position of the non-obligatory nature of notification and consultation on planned measures and ongoing constructions, Ethiopia's state practice confirms that the practice emanates solely from *confidence building* measures among the riparian parties.

5. The GERD and Riparian Duty to Inform and Consult on Planned Measures: Application and Challenges

The US Bureau of Reclamation (between 1956-1964) conducted the GERD initial project study on behalf of the then government of Ethiopia that identified four potential dam sites on the Blue Nile, including the one, which has now become the location of the GERD.[137] Subsequently, the current government of Ethiopia carried out the survey at the site in October 2009 and in August 2010.[138] The original design planned by the US Bureau of Reclamation was revised and made public on 31 March 2011.[139] Ethiopia began the GERD construction project in 2011; it has a planned full supply elevation of 640 m and will create 74 BCM of reservoir storage and the addition of 6450 MW[140] of installed generation capacity to the approximately 6833 MW that currently exists within the basin.

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[135] GERD in its completion of the first stage is almost ready to produce electricity' Ethiopian Amharic Reporter newspaper, (01, March 2017), available at <http://www.ethiopianreporter.com/content> (Debretsion Gebremichael, member of the national GERD public participation coordination assembly, claimed in an interview with Ethiopian Amharic newspaper, the Reporter)

[136] Ibid. The reservoir is assumed to fill during the initial year (2016) to 560 m (3.58 BCM) to test the first two installed turbines and remain at that elevation until the start of the second-year flood period (2017).

[137] Yohannes Yihdego, Alamgir Khalil & Hilmi S. Salem (2017), 'Nile River's Basin Dispute: Perspectives of the Grand Ethiopian Renaissance Dam (GERD)', *Global Journal of Human Social Sciences* (B), Volume XVII Issue II Version I, p.4

[138] Ibid.

[139] Ibid.

[140] GERD in its completion of the first stage is almost ready to produce electricity' Ethiopian Amharic Reporter newspaper, (01, March 2017), available at < http://www.ethiopianreporter.com/content>.

The Ethiopian government officially announced the commencement of the GERD in April 2011. The announcement marked the end to Ethiopia's exclusion from the utilization of the Nile or 'Abay' by the downstream countries. Ethiopia has stated that the GERD will not pose any significant harm on the rights of riparian States to use the Nile River.[141] Moreover, the Ethiopian government has undertaken pre-feasibility plan. Sudan has, in due course, expressed its support stating that the GERD will reduce loss of water due to evaporation. However, Egypt demanded that Ethiopia shall formally notify it and make available all information and allow time for response by Egypt and Sudan before the commencement and continuation of the GERD.

Ethiopia has rejected the request for notification for any of its Nile projects. It contends that "Egypt and Sudan never notified Ethiopia of any of their projects on Nile".[142] Regarding the pre-feasibility plan, Egypt expressed its disagreement stating that the 'actual size of the GERD was larger than what has been promised under the pre-feasibility plan'.[143] Egypt alleges that the GERD will adversely affect its rights to the Nile River. Ethiopia, on the other hand, insists that downstream countries would rather benefit from the production and export of electricity as the result of the GERD project.

One of the challenges in the application of notification and consultation regarding the GERD is the lack of an all-inclusive legal regime governing the Nile water. To date, there is no single legal document that Ethiopia, Sudan and Egypt can rely on to trigger notification and consultation. As indicated earlier, Ethiopia and Egypt have abstained from adopting the 1997 watercourse Convention. Therefore, the Watercourse Convention does not apply within the context of GERD regarding the duty to notify and consult as far as the three riparian states.

Ethiopia has signed and ratified the Cooperative Framework Agreement (CFA). The CFA has incorporated a provision on notification and consultation. The CFA states that there is a duty to exchange information on planned measures. However, Ethiopia owes no obligation to notify and consult its planned measure to Egypt and Sudan as they have refused to sign and ratify the CFA. Even if the CFA provision on exchange of information on planned measures had been agreed upon among the disputant parties in the on-going

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[141] A report released by an International Commission, which included representatives from Egypt, Ethiopia, and Sudan in August 2014, found that GERD would have a minimal impact on Egypt's water access. *see* Hala Nasra and Andreas Neef (2016), *supra* note 126, p.978.

[142] Salman M.A. Salman (2016), *supra* note 108, p.520.

[143] Rawia Tawfik (2016), 'The Grand Ethiopia Renaissance Dam: a benefit-sharing project in the Eastern Nile', *Water International*, 41:4, 574-592: 10:108010250860.2016.1170397, p. 575. *See* also Article 5 of the DoP.

GERD controversy, the inadequacy and lack of details on notification and consultation would have been a challenge. This challenge necessitates an additional protocol agreement that lays down detailed stipulations on notification and consultation.

Unlike the Statute of Uruguay River and the Indus Water Treaty, the Agreement on Declaration of the Principles (DoP) on the GERD is not helpful, as it does not include a resort to arbitration or ICJ. In this connection, the challenging part in any future consultation and understanding with regard to the institutional set-up towards amicably resolving possible disagreements and disputes (on the likely impact of the GERD on downstream countries) is bound to stay in limbo.

The DoP requires Ethiopia, Sudan and Egypt to settle any dispute arising out of the interpretation or implementation of the agreement amicably through consultation or negotiation in accordance with the principle of good faith.[144] A problem arises regarding the remedies available if the parties are unable to settle their disputes through negotiation. Resort to arbitration or judicial settlement is not embodied in the Declaration of the Principles (DoP). Nor can these mechanisms be initiated unilaterally. Therefore, one may conclude, that, lack of a compulsory dispute settlement body in the DoP renders consultation and negotiation a non-binding tool which can only facilitate *confidence building*.

Conclusion

The riparian duty to inform on planned measures is a growing norm of international law which is already gaining support through bilateral and multilateral agreements as well as state practice. As discussed in this article, the pronouncement of the ICJ and the PCA indicate the development of international law on notification and consultation, which is regarded as an integral part of the duty of a state not to cause significant harm on another riparian state. However, no customary law norm is established regarding the detail components of notification and consultation, and whether the project is interrupted until the other riparian states give their consent.

The duty to notify planned measures prior to their commencement and the suspension of the project until riparian states give their consent can only be claimed based on bilateral agreement or multilateral agreement, but not on the basis of customary international law which is not applicable in the context of GERD. Both Ethiopia and Egypt are not party to the UN Watercourse Convention; hence the specific procedures required under the Convention

[144] Article 10 of the DoP.

regarding the timing of consultations, suspension of planned projects, and the dispute settlement mechanisms therein do not bind both countries.

The 1902 agreement is the only treaty agreement, which Egypt, as successor of the British Empire in Egypt, may invoke. However, the 1902 treaty, if it still applies unhindered by fundamental change of circumstances (*rebus sic stantibus*), restricts complete stoppage as can be inferred from the phrase "arrest the free flow of water". This treaty is not relevant to the GERD, a hydro dam, which does not arrest the free flow of water to the downstream countries. On the contrary, Ethiopia, as a member of the CFA, has assumed the legal commitment to the principle of equitable use and causing no significant harm to a riparian State. Even if any provision in the 1902 Treaty had been relevant, the Vienna UN Convention on the Law of Treaties renders the Treaty null owing to fundamental change of circumstances.

State practice involving notification and consultation exhibits different practices. Egypt has, on various occasions, failed to consult Ethiopia in its projects thereby rendering the notification and consultation procedures inapplicable between the two states. Egypt, has, until recently refused to recognize the right of the upstream Ethiopia to have its fair share of benefits from the shared watercourse. And, it does not have the justification to ask Ethiopia to follow the notification and consultation procedures when Egypt has failed to do so in the past.

There are thus challenges to invoke the principles of notification and consultation within the context of GERD. The absence of all-inclusive international water agreements that involve all disputant parties in the GERD has made the application of the principles very challenging. And as indicated above, the Agreement on the Declaration of Principles (DoP) by Ethiopia, Sudan, and Egypt, does not avail a dispute settlement scheme beyond negotiation.

The way forward for possible coordination in upcoming development projects is the need to agree on a mutually acceptable procedural requirement of notification and consultation. The best option is for Egypt and Sudan to sign the CFA. Ethiopia should also expand the scope of Articles 7 and 8 of the CFA that only limits/restricts the duty 'to exchange information on planned measures' and address the concerns of the downstream Sudan and Egypt. Moreover, the Nile Basin Commission could be entrusted with the task of formulating a supplementary independent protocol that exclusively deals with notification, consultation and, if possible, negotiation procedures based on lessons drawn from the rules of similar basin commissions. ■