Egypt vs. Ethiopia at the ICJ Part II

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The Nature and basis of International liability for non-accidental trans boundary damages the Nile River case

This article is a continuation of the discussion I presented for readers regarding the use of the optional clause as more fully defined under the statute of the International Court of Justice (ICJ) regarding the exclusion of certain matters from the compulsory jurisdiction of the court using a declaration. In this second and final segment, in connection with the hypothetical scenario, Ethiopia vs. Egypt, I will review and examine the current state of the law and the evolution of trans boundary water course law relevant to the case. The court (ICJ) will ultimately decide this case relying on treaties bilateral and multilateral as well as on the body of customary international law governing trans boundary shared watercourses. Three questions will be before the court:

1. (a) Questions Presented

1 .Whether Ethiopia violated International law (Customary law, Treaty or any Convention) by diverting the waters of the Blue Nile and constructing A Hydroelectric Dam over the Blue Nile?
2. Whether any of the downstream riparian states suffered or will suffer any ""injury" or "environmental harm" as a consequence of the diversion of the Blue Nile and the construction of the Renaissance Hydroelectric Dam? Whether there is any imputed state liability under these circumstances?
3. Whether Ethiopia has any obligation Under International law to inform downstream riparian states of any future plans to build a dam or any other activity prior to the commencement of the intended project and whether Ethiopia has a legal obligation under International law to conduct an environmental Impact Assessment (EIA) report at any time during the construction phase of the Hydroelectric Dam?

1. (b) Key Condition that may alter my prediction and observation

Again, for reasons that I have fully explained in section I of this article, it is my firm position that Ethiopia must and should exercise its right to use the optional clause under paragraph 2 of article 36 of the statutes of the ICJ excluding

categories of disputes and claims concerning environmental damage claims associated with water issues. If that happens, the ICJ will have no Jurisdiction whatsoever to adjudicate the present Hypothetical dispute between Egypt and Ethiopia. During the initial hearing preliminary objection will be raised and the court will have no option but to dismiss the claim for lack of jurisdiction. If on the other hand Egypt and Ethiopia conclude a special Agreement to submit their disputes to the compulsory jurisdiction of the court pursuant to paragraph 1 of Article 36 (1) of the ICJ statute, the court will have jurisdiction to hear the case. Assuming the latter happening, here are my observations about the conventions, International substantive obligations on state liability for environmental damages, International customary norms and procedural rules that may come into full play depending on the collection and verification of factual evidence and other data that are bound to surface during the proceedings.

1. (c) **The protection and use of transbundary watercourses and the development of rules for the management of these resources**

International law provides …identifiable corpus of rules treaty and customary law that determine the legality of state actions for water resources that cross national boundaries.[1] More than 400 Agreements now govern International cooperation on trans boundary water courses. In addition to these treaties, rules of customary International law confer specific legal entitlements and impose obligations on water course states.[2]

The International law commission has provided an immense contribution in the study, codification and development of International watercourse law. Among its work the adoption of the Convention on the law of non-navigational uses of International water course deserves mentioning.[3] Parallel to the work of the commission, the International law association[4] based in the UK has made significant contribution in this area. The association produced the 1966 Helsinki rules and identified the basic rules of customary international Law namely: the principle of equitable Utilization.[5] The Helsinki rules deal with:

1. The Protection and use of Trans boundary watercourse and lakes,

2. Equitable Utilization of shared water courses,

3. When taking appropriate measures state parties to the convention shall be guided by the following principles.

(a) The precautionary principle
(b) The polluter pays principle and

(c) Cooperative water resource management of shared watercourses.

4. In 2004, the association adopted new rules that address new matters not previously addressed by the association in its various earlier rules regarding water resources. The revised text of the Helsinki rules incorporated developments relating to rules regarding trans boundary watercourses with rules derived from the customary International environmental law and the human rights law to all waters national as well as international. "The Berlin rules"[6] as it's formally known specifically incorporated new international customary rules on water resources.

2. **The Sources of International law**.

The most frequently used source of international law that the ICJ is required to apply in the present hypothetical case and in all other disputes are contained in article 38(1) of the statute of the International court of Justice.[7] Art. 38 provides that the court shall apply " International convention…..International custom,…..the General principles of law recognized by civilized nations…Judicial decisions, and the teachings of the most highly qualified publicists of the various nations.'[8] On the sources of International law, article 38 (2) of the statute of the International court of Justice states that the enumeration in article 38(1) of the sources of law to be applied by the court" shall not prejudice the power of the court to decide a case ex aequno et bono, if the parties agree thereto."[9] This implies "equity" has a significant role to play in the decision making process of the court. To understand the sources of international law the court is required to look into several sources. As indicated above, these may include: treaties, customary law, general principles of law and judicial decisions. 1) Treaties are written Agreements entered by two or more states creating or defining rights and duties. Treaties are the principal sources of International law. The ICJ is required to interpret treaties if it finds out there are ambiguities or are vague so that they can be correctly implemented.2) customary law "refers largely to the Unwritten laws" inferred from the conduct of states (practice) undertaken in the belief they were bound to do so by law. Customary law mainly comes from : the national legislation, diplomatic notes and correspondences, votes by governments in International organizations, diplomatic, reports of International incidents, statement of policy, International and national judicial decisions, the opinion of legal advisors and a pattern of treaties etc[10]. 3) General principles of law. Article 38(1) authorizes the court to apply "the general principles of law" this concept as used in the statute of ICJ is a source distinct from treaty or custom. Unlike Judicial decisions and the views of writers (the teaching of Publicists) general principles are not "subsidiary means for the determination of rules of law." They have been applied in various decisions of the court and arbitral awards. Basically, they are principles of laws common to many domestic legal systems that are not part of International law.

Frequently cited examples include: the principle of equity, others like "parties to a treaty must act in good faith" or "the obligation of a party who breaches an International obligation to pay reparation".[11] 4) Judicial decisions. The statute of the ICJ restricts the role of judicial decisions to that of " subsidiary means for the determination of law" in addition to the above the ICJ uses the writings of most highly qualified publicist or scholars in its decision making process. For the purpose of this appraisal, leaving aside international conventions, the rest of sources of laws can conveniently be grouped under the umbrella of "customary law."

Article 38(1) (b) of the ICJ statute presents two traditional elements and sources of International customary law: general state practice and opinion Juris. In other words, customary law emanates from the past conduct of states and comes into existence if a practice is both extensive and virtually uniform and additionally, it must always be supported by a sense of legal obligation (opino Juris).[12] Several questions need to be answered correctly in connection with the identification and finding customary international law. These may include; what exactly do we mean by state practice? What are the elements that must be shown to be present before a proposition can be regarded as having become a rule of customary International law? Can the practice of International organizations also create rules of customary law? How can we tell the difference between state practice and advocacy by states? The presence of opinio juris is a factual inquiry. However, it is not always easy or clear when particular state practices becoming a legally binding state practice. It is also unclear how one can identify a rule of International custom or how it can prove its existence. Legal experts often times look at the traditional list to prove the existence of state practice.

It must be pointed out that in recent years; some revisionist International legal scholars have emerged and created a new theory to establish International customary norms.[13] According to these revisionists "a unanimous and near unanimous resolutions and declarations of the UN General Assembly and other intergovernmental organizations" constitute a consensus on legal norms providing clear evidence to opinio Juris of nations. These revisionists assert that such norms quickly become customary international law based on little or no state practice presented as evidence[14]. Professor Patrick Kelly of Widener law school explains "This position has found support in recent Judgment of the International court of Justice.[15] (ICJ)"The professor says that "this approach is the preferred methodology of Human rights activists and environmental advocates. The traditional criticism against this revisionist theory is their exercise in finding customary international law is not based on general and consistent state practice but rather on non –binding verbiage. By way of example the professor provides "the primary environmental and human right declarations such as the Universal Declaration, The Stockholm

declaration and Rio declaration are aspirational or recommendatory instruments neither of them create any legal obligation."[16] The new customary international law norms expounded by the revisionists are therefore not based on general acceptance of states, as required by the traditional approach but by the claims and good intentions of advocates and the support that they got from few international legal scholars.[17]

While most rules relating to shared watercourses are treated in treaty instruments, Customary International law nevertheless plays an important role in many situations. Customary rules become even more important where the relations between states are not subject to any specific treaty regime. The relationship between Egypt and Ethiopia has that element and character. For example, Egypt has neither signed the Multilateral Nile basin framework convention covering significant number of Nile basin states nor is it a party to any other multilateral watercourse convention adopted by the United Nations general assembly. There is, however one exception and that relates to the Bilateral Cairo agreement Between Egypt and Ethiopia also known as "Framework for General Cooperation of 1993.[18]"I will examine and address the status and implications of that agreement to this Hypothetical dispute later on this presentation

3. An appraisal of the existing Legal Regime and the formulation of international liability rules for trans boundary damages.

There is a vast body of International treaties covering different types of trans boundary damages including damages to trans boundary watercourses. Some of the treaties cover a range of issues such as air space and outer space, the nuclear field, maritime area, the polar regions, international transportation, chemical toxic and hazardous substances and last but not least International water courses.[19] These treaties are concluded with the principal objectives of either to protect humans from hazardous and nonhazardous accidents, damages and create a legal framework where operators are held accountable for any injuries and damages sustained. Some of the rules impose specific liability against states or operators; others are broad and general but provide principles for future actions. The international rules and principles are intended to minimize harm without putting undue burdens and limitations on the pursuit of activities by states and operators in the fields enumerated above.

Large scale industrial, infrastructural, agricultural activities conducted in the territory of one state can cause detrimental effects in the territory of another state. Trans boundary damage may be an air pollution, land source damage to the ocean, pollution of international waters to just mention some examples[20]. Since the present case exclusively relates to international watercourses, I will as far as possible, be limited to the general principles common to all forms of damages and rules governing liability.[20] In international legal literature trans boundary damage and environmental

damage are interchangeably used to explain the phenomenon of damage caused by or originating in one state (the source state) and affecting the territory of another state (the affected state)[21]

The International law commission has been at the forefront of formulating Draft articles on Environmental harm and liability for damages under which states would be held responsible to pay compensation for trans boundary harm even in the absence of fault or negligence[22]. The work of the commission to develop an applicable standard for international liability has not been successful.[23] In 1978 it decided to separate its work into two topics. In addition to its original draft articles, the commission began its work on a second draft produced entitled "Draft articles on International liability for injurious consequences arising out of Acts not prohibited by International Law"[24] since then, there has been very little progress to create an agreement on the topic. One of the Rapporteurs expressed his disappointment and frustrations in not reaching to any agreement after 12 years in the committee as a special rapporteur.[25]

The international law commission is currently undertaking its work of codification in three areas (1) The regime of state responsibility (2) International liability for injurious consequences arising from acts not prohibited by international law; and (3) International Environmental law. State responsibility and international liability for injurious consequences have been two of the major issues on the agenda of the commission.[26]

The relevant three draft articles (Projects) are:

The Draft Articles[28] on the Responsibility of States for Internationally wrongful Acts,2001 (the articles on state responsibility);

(1) The Draft articles on the Prevention of trans boundary Harm from Hazardous Activities,2001(The Articles on trans boundary harm, formally titled International liability for injurious consequences arising out of Acts not prohibited by International law) ; and
(2) The Draft principles on the allocation of loss in the case of trans boundary harm arising out of hazardous Activities 2006(the principles on allocation of loss.)

These are basically complex international legal instruments. I wouldn't want to go further than showing that some work is being done at this moment by ILC to address the question of state liability and environmental damage. But keep in mind that the second draft articles have enormous bearing and implications on transbundary shared water courses and claims for damages arising out of activities not prohibited under International law.

The current state of International law and associated rules of state liability is in a state of flux and uncertainty. States remain reluctant to put in place rules which will have the potential to impose significant constraints and restriction on their development agenda and further restrict their sovereign rights.

4 **The concept of environmental damage and harm as incorporated in current treaties, declarations and obligations of states .**

The following are the most frequently mentioned conventions and declarations in relation to the environmental damage.

Declarations

4(1) The Stockholm Declaration

The Stockholm Declaration[27] of 1972 was adopted in 1972.Its most frequently quoted principle relates to the responsibility of states to the environment and trans boundary impacts. Principle 21 provides: "states have in accordance with the charter of the United Nations and the Principle of International law, the sovereign right to exploit their own resources pursuant to their own environmental policies and the responsibility to ensure that activities with in their jurisdiction or control do not cause damage to the environment of other states or states beyond the limits of their jurisdiction."

4.(2) The Rio Declaration on environment and development.

The Rio Declaration[28] was adopted by the Earth summit in 1992 the key principles adopted are:

-Liability and compensation (principle 13) it contains a provision which says "states shall develop national laws regarding liability for victims of pollution "

-Principle of precaution (principle 15) it states where there are threats of serious or irreversible damage, lack of full certainty shall not be used as a reason for postponing cost- effective measures to prevent environmental degradation.

Principle of prior Notification in case of emergencies (principle 18) a state shall immediately notify other states of any natural disaster or other emergencies that are like key to produce harmful effects on the environment of those states. The Rio Declaration also states:

"States have the sovereign right to exploit their own resources but a responsibility to ensure that activities within their jurisdiction…do not cause damage to the environment of other states or areas beyond the limits of national jurisdiction."

The declaration while pointing out the responsibilities of states not to cause damage also states when that happens, states have the obligation to pay compensation "The polluter pays principle"

4 (3) **Other Multilateral conventions dealing with environmental damage and state liability**

(a)) The convention on the law of non –navigational uses of international watercourses of 1997

Article 7(1) the convention on the law of non –navigational uses of international watercourses [29]adopted in New York in 1997 requires states in utilizing an International watercourse "to prevent the causing of significant harm to other watercourse states." Article 7 (2) further, suggests that where significant harm is caused by diligent conduct states must "take all appropriate measures to eliminate or mitigate such harm as appropriate.

-Obligation to cooperate and exchange information (article 8, 9)

- Articles (11, 12) States are obliged to provide information including results of (Environmental Impact Assessment) and consult/negotiate on possible effects of planned measures which may have significant adverse effect upon other watercourse states to evaluate the possible trans boundary effects of the planned activities including the adverse impacts in case of accidents.

(b) The convention on Biological diversity

The convention on Biological diversity[30] was adopted in 1992.The text of this conventions covers Principles similar to The Rio declaration dealing on prevention and protection. The Rio declaration provides " states have in accordance with the character of the United Nations and principles of International law the sovereign right to exploit their own resources…and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or areas beyond the limits of national Jurisdiction." The convention has provisions on the following topics:

-responsibilities, liabilities, compensation for trans boundary environmental damage,
-precautionary and prevention measures to be taken
-early warning and notification and
- Manner of settling disputes

5. **The Nile water Treaties and Agreements and efforts to create cooperative institutions**

5(1). In 1902, King Edward VII (a British Monarch) sent an emissary to Addis Ababa, Ethiopia to negotiate a treaty with Emperor Menilik II recognizing Sudan's boarders and governing the Blue Nile. Article III of that treaty contains an undertaking by Emperor Menilik "not to construct or allow to be constructed any works across the blue Nile, Lake Tana, or Sobat which could arrest the flow of their waters of the Nile "without the prior consent of the British Government of Sudan". This concession facilitated British recognition of Ethiopian independence. Ethiopia later repudiated the Anglo Ethiopian Agreement of 1902.In an Aide memoir of September 1957.The Ethiopian government asserted that it "has the right and obligation to exploit its waters for the benefit of present and future generation of its citizens." [31]

5(2)The Nile treaties of 1929 and 1959 unequal allocation and distribution of water

The focus here is on two Treaties:[32] the Treaty of 1929 and 1959. The 1929 treaty was between Egypt and Sudan and the UK the latter representing its colonies Uganda, Tanzania and Kenya. That treaty in its operative provisions contains the following:[33]

"The Egyptian government must grant its approval to the Nile basin countries if anyone of them wants to build any project on the Nile whether from Dams or station or another project ether on the river or the tributaries or lakes that would affect the share of Egypt."

Similarly the 1959 treaty contains a provision with another over reach:[34]

1. The two countries agree (Egypt and Sudan) that Egypt would build the High Dam Sudan would build the AL –Rusirs dam on the Blue Nile.

2. Egypt and Sudan shall keep their historical and natural shares which they got from the 1929 treaty. A cursory glance at these two treaties reveals that it did not take into account the legitimate interest of other Riparian states. Both treaties safeguarded Egypt's as well as Sudan's existing and historic rights and gave all of the benefits to the two countries. The treaties created an arrangement between Egypt and Sudan which involves the sharing on the basis of the volume of water whereby Sudan received 4 Billion cubic meters, and Egypt 48 billion cubic meters.

In International water allocation discourse the colonial era treaties between Sudan and Egypt are considered as extreme examples of iniquity and injustice in water allocation regimes. These treaties not only unequally allocated and distributed water between the contracting states, it out rightly ignored the legitimate interests of other riparian states. Two months after the signing of the 1959 Treaty, Ethiopia sent an official letter to the Government of Egypt denouncing the treaty. Similarly Tanzania immediately after its independence informed the Governments of Egypt and Sudan rejecting the treaty in its entirety.[35] Egyptians and Sudanese may think that this is valid treaty as between them. However, if a dispute arises between one of the contracting states and a third country which had not been a party to this treaty, but having a legitimate interest over the Nile waters, that scenario may not only trigger challenges it

may also in all likelihood develop to an outcome of invalidation of the treaties. In the opinion of this author, these colonial era "treaties" serve no legitimate regulatory aims and purposes whatsoever; they are essentially political instruments which have remained as chief obstacles and roadblocks towards the development of cooperative institutions to manage the shared water resource of the Nile for the benefit of all riparian nations and they are the single most important culprits and source of mistrust particularly between Egypt and Ethiopia.

5(3). Ethiopia, which had shown reserved attitude from signing any agreement throughout its history, concluded an agreement with Egypt in 1993 entitled "Framework for General Cooperation".[36] In the preamble of the agreement of 1993, the two countries have underlined their "commitment" to the UN and OAU charters and the "principles of International law" as well as to the Lagos plan of action. Several articles of the agreement emphasize cooperation over the River Nile. Article 1 contains their commitment to the principles of good neighborliness and "the peaceful settlement of disputes". In Article 4, regarding the use of the Nile waters, it provides "the agreement resulting from these negotiations shall be based on the rules and principles of international law." The two countries undertake to "refrain from any activity related to the Nile waters" that may cause "appreciable harm" to the "interests of the party" (Article 5). They recognize the "necessity" of conservation and protection of the Nile waters and oblige themselves to consult and cooperate.[37] This agreement has not been ratified by either of the Governments, nevertheless the document may be used as an evidence of state practice to prove or disprove a position taken by individual ICJ judges.

5(4). In 1998 Several countries bordering the Nile River, recognizing that cooperative development was the best way to bring mutual benefits to the region, all riparian countries (except Eritrea which had observer status only) joined in a dialogue to create a regional partnership to facilitate the common pursuit of sustainable development and management of Nile waters.[38] Thus in 1999 the Nile basin initiative (NBI), an intergovernmental organization dedicated to equitable and sustainable management of the shared water resources of the Nile was formed.[39] NBI members include Burundi, Democratic Republic of Congo, Egypt, Ethiopia, Kenya, Rwanda, Sudan, Tanzania, Uganda and the republic of South Sudan. In 2007 these countries started a dialogue to draft a cooperative Framework Agreement(CFA).The CFA is intended to replace the existing Nile treaty with a more equitable water sharing Agreement and formation of a river basin Commission[40] Ethiopia signed and ratified the treaty in 2013."[41] The shared vision of the NBI is "to achieve sustainable socio-economic development through the equitable utilization of and benefit from the common Nile Basin water resources".[42]

Relevant provisions:

Article 5 (1) Provides that Nile basin states shall in utilizing the Nile river system water resources in their territories, take all appropriate measures to prevent the causing of significant harm to the other basin states.[43]

Article 5(2) provides when significant harm occurs, the state shall take all appropriate measures ……to eliminate or mitigate such harm and where appropriate, to discuss the question of compensation.[44]

Article 6 (1) states undertake to take e all measures to protect, conserve….rehabilitate the Nile River and its ecosystem by:[45]

(a) Protecting and improving water quality within the river basin
(b) Prevent the introduction of species …. Which may have detrimental effect to the ecosystems of the Rive Nile Basin,

Article (9) states shall conduct environmental impact assessment and audits for planned measures that may have significant impacts at an early stage, undertake comprehensive assessments of those impacts with regard to their own territories or the other Nile Basin states.[46]

5. What is the meaning of Trans boundary damage? And what is the extent of state liability under International law?

Claims for damages or the occurrence of injuries resulting from dangerous activities on international watercourses and canals are not a new phenomenon. For example, in 1998 a dam containing toxic waste from a mine burst in south Spain, releasing a massive wave of toxic sludge that eventually reached the Donana National park. It poisoned soil and water and killed wild life that came into contact with it Spanish authorities spent more than $250 million on clean-up operation over a period of years.[47] I brought this example not with an intention of drawing a parallel or similarity between the controversy between Egypt and Ethiopia but to illustrate the magnitude and scope of environmental damage and the ensuing outcome of state liability. States may become liable for damages against life and property and have an obligation to pay compensation. The basic principle of customary International law is that no state may use its territory or allow the use of it in such a way to cause serious damage to the territory of another state.

There is a vast body of International treaties covering different types of trans boundary damages including damages to trans boundary watercourses. Some of the treaties cover a range of issues such as pollution of a river basin, the ocean, airspace, oil, nuclear pollution etc.[48] The focus of this Article is on trans boundary watercourses and in this area, nation states have experienced both hazardous and non-hazardous accidents. Activities that are carried out in one country with or without malicious intent may have adverse effects and consequences in the territory of another country. The key question is

how to determine what constitutes "adverse effect" in each specific context? "or what criterion is going to be applied to determine " harmful effects"? It is true, in the past, that some draft articles have been negotiated and debated however is there any unanimity as to the elements to be applied to determine "adverse effects" especially in the context of international trans boundary watercourses? Do the countries that have stakes on these issues going to leave the determination and interpretation of this concept to the discretion of ICJ judges or International arbitrators? These are crucial questions and uncertainties that have no concrete answers at this moment in time.

Professor. Xue Hankin of Beijing University law school has done an extensive research on the topic of trans boundary damage and has attempted to break down and simplify the legal standard to be applied in the determination of what constitutes trans boundary damage. She outlines four core elements that must be satisfied in order to determine the occurrence of trans boundary damage and they include:[49]

(1)Physical relationship between the activity concerned and the damage sustained (physical causation)

(2) Human causation- Excluding natural factors such as earth quake, acts of god and force majeure

(3) A certain threshold of severity that calls for legal action and

(4) Trans boundary movements of the harmful effects.

Professor Hanquin argues these four elements will limit the scope of the term "trans boundary damage". She goes on to say:[50]

> "Trans boundary damage embodies a certain category of environmental damage, including physical injury, loss of life and property, or impairment of the environment, caused by, or in the territory of, one country, but suffered in the territory of another country or in the common areas beyond national jurisdiction……In the normal course of events, damage is characterized as injury to human life, damage to property, detrimental change of air or water quality, diversion of an undue amount of shared water, etc."

In the views of this author item no.4 is crucial especially in trans boundary shared water resource context. The term "harmful effects" may mean something for downstream state and another for an upstream state. If an upstream state in developing its natural resources builds a dam or uses its waters for irrigation purposes, the downstream state may consider such activity as "harmful " even if the upstream state proves beyond any reasonable doubt that the activity does not at all harm the country downstream. This is not a Hypothetical question; it is a serious issue that will interfere with the developmental

objectives of states. It should not be delayed for long time without any kind of resolution. If the problem remains unresolved and in the interim period if states submit claims for payment of compensation, it amounts to jumping in an unchartered territory where the consequences may well be significant. Professor, Hankin provides only one example from trans boundary water course related damage claim perspective; she cites: raising the level of salinity of a watercourse as one example of "harmful effect."[51] however, the problem with this approach it not only lacks a definitive interpretation it also opens the door for arbitrariness. By now one thing seems very clear, the phrase is open for a wide and expansive interpretation and lacks specificity. It is, therefore, safe to conclude that there is no settled definition as to what activities give rise to harmful effect scenario and trigger claim for compensation and damage." States in general and Riparian states in particular are far apart in the way they approach and understand this issue.

It is instructive to mention at this point that there are very limited decided cases in relation to state liability for environmental Harm/damage. The Trial Smelter arbitral decision is the seminal case mentioned in the field of international environmental law[52]. At Trail, located in British Columbia Canada, seven miles away from the American Boarder there was a large lead smelting Canadian company. (Consolidated Mining and smelting or Cominco) During the smelting process sulfur dioxide fumes were carried over the border and caused damage to crops and vegetation in US territory. The citizens of the State of Washington asked the US government to intervene. The United States and Canada agreed and constituted an arbitral tribunal accordingly the tribunal rendered its decision in 1938 and 1941. The tribunal ruled:[53]

" Under the principles of International law …no state has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory another or the properties or persons therein. When the case is of serious consequence and the injury is established by clear and convincing evidence."

Ultimately, this case became a celebrated case for environmentalists and it established the principle that states have a duty to prevent trans boundary environmental harm and an obligation to pay compensation for the harm they cause. This case essentially involves claim for damages based on some kind of wrongful acts (hazardous activity by Cominco in this case) committed by states or private entities. Ironically, this case is mentioned and cited to support claims of damages based on non-wrongful acts such as diversion of water for construction of dams. Dam construction by any stretch of imagination is not a wrongful activity. As indicated earlier the International law commission is debating on a draft article where state liability will nevertheless be invoked even where the activity is lawful and non –prohibited.[54]

In the preceding sections, I have made an attempt to summarize the current state of international law dealing with shared water courses and its linkage with

International environmental law of damages. I have also highlighted some of the crucial conventions and bilateral treaties, customary norms germane to the resolution and determination of a case like this. Ultimately, this case is going to be decided by ICJ judges. I understand that it is very difficult to predict how 15 judges are going to react and decide a case like this. That depends on a number of factors including the opinion of fact finding experts to be appointed by the court and sent to locations where such damage might have occurred, nature and verification of actual damages sustained, expert witness statement, scientific data etc. there are a number of factors or "unknowns" or missing elements at this point in time. The principal aim of this paper is to uncover and analyze the entre gamut of treaties, customary law and legal scholarship concerning environmental damage. Reading the Egyptian digital and printed Media, I keep hearing some phrases over and over again phrases like "Will the Ethiopians pay damages?" "Egypt is going to be impacted by the dam." And the recent unofficial announcements by Al monitor that "Egypt is going to take the case to the UN" see here: http://www.al-monitor.com/pulse/originals/2014/01/egypt-renaissance-dam-dispute-internationalize.html##ixzz2r046pXzq etc. Those are the reasons that triggered this undertaking and investigation. I adopted this methodology and presentation of analyzing the subject matter and its connection to International law of state liability. I understand that the factual missing elements are very critical and will ultimately determine and define the final outcome of the case. Regardless of those missing elements, I will submit my views as follows.

Decision

Background

Most historians when writing about Egypt or the Nile River deliberately omit one aspect of its history. Most of them write about Egypt and the ancient Nile valley civilization, the pharaohs, archeological findings, the pyramids, The Aswan High Dam etc. The most overlooked but singularly significant aspect of Egyptian and Nile history is the injustice that has prevailed in its utilization for practically thousands of years. Instead of peace, wars were fought for its hegemony. As far back as eighteenth and nineteenth centuries its history is fraught with conspiracies and mistrust. No one thinks the waters of the Nile as belonging to all its inhabitants / riparians or as a global common being part of the" common concern of humanity".[55] This is a moment of truth. We need a redefinition of how to look and perceive at this scarce and diminishing shared resource as belonging to every inhabitants living in a basin environment. We have to start and set aside unequal distributive regimes, inequities, abandon territorial claims and look forward to make it a real resource the shared benefits of which is waiting to be redistributed fairly and equally for all its inhabitants.

It is against this background that I will analyze the present case and I will refrain as far as possible from applying dogmatic principles and strict rules and laws. Instead, I will apply and use equity and equitable principles wherever possible to resolve differences, In particular, I will follow the advice of professor schachter[56] who uses them in resource fields: 1) to mitigate unjust enrichment and abuse of rights;(2) to allocate and share benefits; and(3) to apply distributive justice.

Analysis

The claimant, the Government of Egypt initiated this case and submitted a statement of Claim against the Government of Ethiopia dated…….. Alleging violation of its treaty obligations and Customary International law and claiming damages for environmental damage it allegedly sustained because of the Construction of The Renaissance hydroelectric Dam and the diversion of waters of the Blue Nile. In its submission dated January……. 2014, the Government of Egypt also claimed compensation from the Government of Ethiopia in the amount of approximately hundreds of Millions or even Billions?……US dollars (together with interest and costs), resulting from :

- the reduction in the quantity and quality of water flowing from the Blue Nile river and associated loss of (To be Reduced In figures and quantified in monetary terms)
- Loss of agricultural income by farmers during the filling of the reservoir in Ethiopia
- Reduction in supply of electricity during the construction of the dam and
- Loss of generating capacity at Aswan High Dam current and anticipated loss to be included

Egypt's claim was brought, based on alleged breach of Ethiopia's International obligations specifically of article (5) of The Cairo Agreement of 1993 between Egypt and Ethiopia, Articles 5 (1) (2) and (9) of the Nile Basin Initiative agreement, Principle 21 of The Stockholm Declaration of 1972, The Rio Declaration on environment and development, article 7 (2) The convention on the law of non –navigational uses of international watercourses of 1997, The convention on Biological diversity of 1992 and customary International law. After several months of legal Proceedings, written submissions, oral hearings, and procedural sessions, the court has now reached a point to declare its decision in respect of those issues formulated at the opening paragraph of this article.

1. On the Merits of the claim, the Government of Ethiopia submits that there has been no breach of obligations in the provisions of the bilateral treaty or customary international law. The Government of Ethiopia alleges that Egypt has failed to establish to the applicable standard of causation (excluding proximate causation) that the damage it alleges were actually caused by the construction of the Dam and diversion of the Blue Nile River.
2. The Government of Ethiopia also submits that Egypt has in fact suffered no quantifiable loss at all. For all these reasons, the Government of Ethiopia submits that Egypt's claims be dismissed by the court with costs. The Government of Egypt in short has not discharged any relevant part of the legal and evidential burdens required to prove its pleaded claims against Ethiopia.
3. The Government of Ethiopia maintains that the Government of Egypt did not prove the actual damage and its causation. It further argued both in its oral hearing and written submissions that the Government of Egypt did not prove the existence of damage by "clear and convincing evidence" citing the decisions of two prior environmental damage related cases, the Trail Smelter case and the lake lanoux tribunal decision[57]. Egypt did not prove the casual link between the damage that it is alleging and has suffered and its causes. In other words, the Government of Ethiopia disputes that the Renaissance dam is the cause of the damage sustained is not directly attributable to the dam construction project. The Government of Ethiopia insists that the court should appoint independent fact finding experts to assess and submit a report supported by the latest scientific knowledge on the subject. The Government of Ethiopia reserves its rights to present any number of its own experts, and witnesses drawn from reputable institutions of higher learning and research bodies. The Government of Ethiopia further more rejected the application of the principle "proximate causation" by the claimant in the present case.

Having reviewed all the submission of the parties, factual evidence, expert testimony closing oral statement, and post hearing written statement, the court has announced the following decision.

Undisputed Facts

The claimant, the Government of the Arab republic of Egypt, and the respondent the Government of the Federal Democratic Republic of Ethiopia are riparian states sharing the waters of the Nile River. Both are members of the United Nations and are parties to the Statute of The International Court of Justice. They are parties to the Vienna convention on the law of treaties, the convention on Biological diversity of June 1992.Both states participated in the United Nations conference on the Human environment at Stockholm, the 1972 United Nations conference on environment and development in Rio Di janerio.

The Grand Ethiopian Renaissance Dam is a hydroelectric dam project currently under construction in Benishangul region in Ethiopia 25 miles east of the border with Sudan.[57]

The dam is being constructed on the Blue Nile River which is the main tributary of the River Nile. The construction of the dam was launched in April 2011.[58]

Disputed Facts about the Renaissance Hydroelectric Dam

The claimant believes that the construction of the dam will have adverse environmental impact on Egypt. Egypt alleges Environmental Impact assessment and the Hydro geology structural study of the project have not taken Egypt's environment into account and no mitigation measures are being proposed to prevent or reduce the potential impact on Egypt's Environment. The Government of Ethiopia dismisses this claim and maintains that the construction of the dam and the creation of the reservoir lake will have no adverse effects or impact on downstream communities in both Sudan and Egypt. Egypt demands the release of the environmental impact assessment report and Ethiopia while maintaining its position an impact assessment has been carried out for the portion of the project within its national boundaries, it alleges that it lacked unfettered access to collect data and complete and conduct the impact assessment study outside its national borders.

The court's most likely decision regarding issue no1

As pleaded in its statement of claim Egypt alleges that Ethiopia has breached its obligations under customary principles of International law of rivers as exemplified in the provisions of non-Navigational uses of International watercourses convention of 1997. In particular, it alleges that Ethiopia has breached Articles (11, 12) [59]. Ethiopia has a legal duty to provide information consult/negotiate on possible adverse effects of planned measures, in the present case, the obligation to release information about the project before the dam is planned or executed to the Government of Egypt or the Sudan. Egypt argues irrespective of the fact that Ethiopia has ratified the Convention; it is still bound by the customary principles International law of rivers. Ethiopia's objection for this allegation is twofold: Ethiopia does not agree and also questions the contention that the principles mentioned above in articles 11, 12 of the watercourse convention has reached the level of customary International law.

Reviewing state practice of this principle reveals no evidence of normativity at the regional level. The majority of riparian states do not exchange information or consult one another Egypt and Ethiopia included. There is no consistent and uniform state practice regarding this principle and consequently there is no developed norm or customary International law uniformly accepted by all states. Alternatively, the Ethiopian Government

argues, even if Ethiopia were to concede this principle as being part of customary international law, its voting record indicates a different picture. Ethiopia did not vote in favor of the convention. It actually abstained. And this should indicate to the court that Ethiopia did not assume or endorsed any specific provisions of the convention. [60] (Consistent objector) It has consistently pursued against this policy in its state practice for a long period of time. In support of its assertion Ethiopia cited the Anglo Norwegian Fisheries case of 1951(Evidence on formation of Customary International law and consistent and uniform state practice) The court agrees with the claims of Ethiopia that state practice in this area is insufficient, fragmentary and lacks uniformity and concludes that there is no customary norm uniformly accepted by all states.

In reaching its decision the court explained as follows: in order to establish a customary norm one has to prove the following two elements: state practice, repetition of actions and a more subjective psychological element: opinio juris, meaning that the action of a given state is motivated by a sense of legal obligation. Therefore, both conduct and the conviction on the part of the state are required for a norm to become customary norm and following this prerequisite another question arises namely whether the norm formed is of a global, regional or a particular nature existing only between certain states. In the views of the court this principle of notification has not been fully developed as a customary norm globally or regionally and under these circumstances, Ethiopia does not have any legal obligation to provide information and to consult the planning and execution of the project but may do so at its own free choice and consent in the interest of good neighborliness and cooperation. In the court's view, there are no justifiable reasons and basis to accept the claims of the Egyptian Government which alleges that the construction of the dam and diversion of the waters of the Blue Nile is in and of itself is a violation of International. Law. Dam construction is a lawful and permissible developmental activity. The Governments of Ethiopia is exercising its sovereign rights in launching the project taking into account the possible environmental impact against the environment and communities within Ethiopia as well as in downstream river basin states over an extended period of time.so Ethiopia is acting within its bounds and exercise of its legitimate rights. It is true that each riparian state is entitled for equitable and reasonable use of the shared waters of the Nile. The diversion of the Blue Nile River did not reduce the amount of water flowing to downstream states. What Ethiopia did, it utilized its reasonable and fair share that she is legally entitled under International law to use from the shared waters of the Blue Nile. For a country that has not used any quantity of water for any activity (either for energy, irrigation or Industrial uses), for centuries the current use can only be regarded as De minimis, equitable, fair and reasonable. Does the construction of the dam utilizing the waters of the blue Nile is an infringement of the rights of Egypt or Sudan as recognized under international law? Absolutely not. The amount of water diverted and the amount of water restored after the execution of the project are one and the same. It would be an injustice to deny Ethiopia the use of its share of water as long as it is reasonable and fair.

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Turning to issue no 2 the following statement can be made

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As indicated earlier, this court has not made an evaluation and an assessment of the scientific evidence regarding the causation of the damage. With this background and knowing fully well that a huge chunk of evidence work was not done at this stage, it may not be possible to make any prediction as to the outcome. However, I will attempt to explain the scope of environmental damage claims and the associated concept of state liability, and cases thus far decided involving environmental damages as follows.

As pleaded in the statement of claim, Egypt alleges that it has suffered environmental damage or harm. The court has carefully reviewed the positions of the parties on this matter and there is no need to restate their claims and their responses. Instead, the court had opted to discuss and provide an overview of the scope and meaning of the concept of trans boundary environmental damage.

The law of trans boundary damage is a field of law which touches at least three branches of international law namely: International environmental law, International water course law and the doctrine of International state civil liability (International tort law). It is a broad and complex subject matter intertwined but demanding careful examination and review. International legal scholars approach the study of this subject according to the nature and forms of damages occurring from time to time. Damages are grouped into three categories: accidental damage, non-accidental damage and damages to the global commons.[61] Accidental damage means damages that arise from sudden and generally unforeseen occurrences of an event (or a series of occurrences with a common origin). Common examples of accidental damage include those caused by industrial and technological activities such as nuclear reactor damage,[62] For instance, Fukishima daichi case in japan or, the case of Indian Bhopal industrial accident are cases in point. The second category of non-accidental damage refers to the injurious consequences resulting from gradual, incremental effects of an activity. It can come from a continuous process such as the emission of industrial fumes or from repeated acts such as dumping of waste into a river or the sea. It most commonly manifests itself in the form of pollution damage. Examples under this category are plenty. One example is "Harmful effects" caused by uses of an International watercourse which will fall in this category. The term" harmful effect" is an elusive term. It can be anything in upstream downstream riparian scenario whereby states designate activities as harmful that support their positions. For instance, under the 1997 watercourse convention a reduction in the quality and quantity of water is considered as a "harmful effect". [63]The last and final category of damage is damage to the global

commons. These are damages occurring in the polar areas, the high seas, in outer space, arctic and Antarctic areas etc. damages occurring beyond the jurisdiction of nation states.[64]

Since the focus of this case and the dispute between the parties relate to trans boundary damages in International watercourses our focus will be limited only to Non – accidental damages. When an arbitral tribunal was established in 1932 it was requested to determine certain questions.[65] Those questions are relevant to the present case. If we transpose the questions presented at the Trail Smelter case to the case at hand we can reformulate them something like this:

1. Weather Egypt has suffered any damages because of the construction of the Renaissance dam? In other words, how is the extent of the damage going to be determined assuming the answer to this question is in the affirmative, what indemnity should be paid?

2. In the event the answer to the preceding questions is affirmative what measures should be required to refrain from causing damage in the future?

The next question is how did, in the past, the International court of Justice determine the liability issue, in disputes involving non-accidental damages? The court is required to apply the elements of article 38 including specific Treaties, if any, concluded between the parties and additionally the following:

(a) The general Principles of law. Article 38(1) (c) authorizes the court to apply these principles. One such example is the obligation of a party that breaches an International obligation to pay reparation. And

(b) Judicial decisions: according to the ICJ statute, the court is not bound to follow its previous decisions but in practice the court does the opposite. The court often times justifies this source as guide to arrive at a decision or for its evidential value. Among the list of judicial decisions used By ICJ the following can be mentioned:

- Decisions of ad hoc International arbitrators e.g. The trail smelter arbitration tribunal decision
- Special International courts for a particular area. Such as, The law of the sea tribunal or the appellate body of WTO judicial organ and
- The Decisions of municipal courts- for their evidential value etc. In other words, in the past, the ICJ has used the above sources in its search to find substantive and procedural rules and to determine a legal problem submitted to it.

Turning to Judicial decisions, related to the present case, the following are the most important decisions that may have relevance:

(a) The Trail Smelter Arbitration tribunal decision between Canada and the United States[66]

(b) The Gut dam Arbitration decision (Canada vs. USA)[67]

(c) Case concerning the Gabcikovo-Nagyamaros Hydroelectric and diversion project over the river Danube (Hungary vs. Slovakia)[68]

(d) The lake lanoux Arbitration (France vs. Spain).[69(Case has some similarities with the Renaissance dam diversion Project

Notice here that the International court of Justice has decided only a few cases the remaining cases are the decisions of ad hoc arbitration tribunals. There are, however, other disputes that are settled out of court such as the dispute concerning upstream diversion project over the Colorado River between USA and Mexico. I will come back and discuss the significance of that approach later in this presentation.

When an activity conducted in one country causes injuries in the territories of another country it gives rise to state responsibility or liability. This principle is established in Trail Smelter case. In that case, the tribunal said 'No state has the right to use or permit the use of its territory …to cause injury against another state or its properties."[70]

One of the most "sensitive" issues under international law concerns the determination of state liability and compensation question for all types of damages whether they involve accidental and non-accidental damages. Even though a wide variety of draft articles have been negotiated and some adopted by the General assembly of the UN, unfortunately many countries have not as yet acceded to most of these conventions. In the absence of a global framework convention on an International regime on state liability and compensation on non-accidental damages having trans boundary impact, the ICJ will be required to go back to its own decisions or to the decisions of arbitrators to look for guidance whenever it is asked to decide on a dispute between two or more states.

Scholarly writings on the existence of general principles of international law imposing strict liability for transbounary harm or damage are not unanimous.[71] However, there appears to be a consensus on the duty to prevent harm without incurring international responsibility for the harm. The prevailing view is that states shall be held liable for damages only if they fail to prevent the harm by informing the injured state the foreseeable impact of the project and failing to take concrete steps to mitigate and repairing the harm. Under this view, States will, have a legal obligation to pay compensation /reparation even in the absence of responsibility for the damage sustained. Professor Xue hanquin explains this in the following terms:[72]

"The duty not to cause damage to other states is not absolute under International law, as a corollary International law does not presume that any damage caused would by itself constitute breach of an International obligation on the part of the acting state. ….as a general principle, a state shall not be held liable for damages it has caused unless it has failed to observe certain standards of conduct as required by International law. Therefore, to determine when the acting state should be held liable for damage it has caused to other states it is necessary to establish rules of conduct…. And these rules of conduct consist of

environmental assessment, notification, consultation, negotiation and settlement of disputes"

To invoke International liability the magnitude and extent of the damage has to be established. In non-accidental damage cases there has to be a threshold and damage has to be measured in quantifiable terms. In other words, certain quantum of damages is deemed tolerable.[73] In the Trail smelter case, the tribunal made it clear that a state should be held responsible for "serious consequences".[74] In the lake lanoux case, the tribunal said that the damage should be "serious and real….. A mere formal change in the natural condition of the resources should not constitute a claimable damage…"[75] In the years that followed these judicial decisions, a number modifications have been made to describe the criterion for damage some use "' appreciable" others use "significant". The bottom line is harmful effects must reach a certain threshold level before any international obligation is imposed on a watercourse state.

The other point that must be raised at this point is under the UN watercourse convention the obligation not to cause harm is owed to all watercourse states .Under the convention even when a watercourse state is not a party to a watercourse agreement concluded by other watercourse states, its rights and interests are still entitled to protection.[76] For instance, every watercourse state, whether or not a party to a particular watercourse agreement, has the right to participate in consultations to the watercourse agreement. Procedurally this triggers the process of consultation, and negotiation and negotiation among states that have interest in the shared resource.[77] At this point it is instructive to mention that under the 1993 framework agreement both Egypt and Ethiopia have undertaken an obligation "to refrain from any activity related to the Nile waters that may cause "appreciable harm" to the interest of the other party.[78]

Proof of actual injury and evidence of causation

In order to establish its claim for damages, the affected state must prove actual damage and its causation. The international standard for proof is "clear and convincing evidence" and "the principle of approximate caution "which is applied in Trail smelter case the tribunal endorsed the approach of the US supreme court by saying "the damage may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter just and reasonable, although the result be only approximate".[79] The process of evidence gathering is a painstaking and a very expensive work. It may involve the contribution of reputable experts in diverse fields such as hydrology, Hydrogeology, Economics, and other areas of scientific and technical fields. Beyond the evidence submitted and the conclusions reached by the parties, the court may have to devise its own strategy to arrive at its own opinion as to the real cause of the damage. The reasons for a detailed investigation of causation are not only to determine the damage issue but also to establish a permanent regime to prevent future damages.

Finally, the court's most likely decision regarding issue no 3

Environmental impact assessment is gaining increasing importance as an established procedural duty in various International Instruments. The acting state is required to make an environmental impact assessment in order to prevent, reduce, and control significant adverse trans boundary effects.[85] Unless there are treaty obligation, or there is a national legal requirement on the part of entities to carry out such a study. Generally, states do not have a duty under customary International law to conduct an environmental impact assessment study.[79] The convention on the law of the non-navigational uses of international watercourses does not specifically mention it as a duty. However, watercourse states through the cooperative exchange of information and data required under the convention, riparian states are required to a certain extent to assess their planned uses.[80]

It is instructive to mention that under Article 9 of the Nile Basin Framework treaty which Ethiopia has ratified, it has assumed an obligation to undertake environmental impact assessment. The treaty in part provides:[81]

Article 9

Environmental Impact assessment and audits

1. For planned measures that may have significant adverse environmental impacts, Nile basin states shall, at an early stage, undertake a comprehensive assessment of those impacts with regard to their own territories of other Nile basin states.
2. The criterion and procedure for determining whether an activity is likely to have significant adverse impact shall be developed by the Nile River basin commission.

Fortunately, Ethiopia launched the Grand Rainacsance hydroelectric Dam project before ratifying this multilateral treaty. Ethiopia at that moment did not have a Treaty obligation to any riparian state to conduct or undertake an environmental impact assessment study. However, in the interest of good neighborliness and its other obligation to exchange information Ethiopia until the time the treaty becomes fully operational may in the interim period undertake such a study in consultation and with a special Agreement with the riparian states likely to be impacted by the project. This state action is purely optional and not obligatory in respect of Egypt or Sudan The precautionary principle has not evolved as customary law in regional state practice as between the Nile riparian states.

Summary and Conclusion

As I have pointed out in the preceding paragraphs, the substantive and procedural rules concerning environmental damage and state liability are in the process of development and refinement. In the debates on submitted draft articles, states had shown a great deal of hesitation and reluctance to accept full responsibilities for transbundary environmental damages and to assume liability for their actions or omissions. The law of environmental damage is a new field of study undergoing rapid changes. The international court of justice has made very few decisions (the closest case is **the *Case Concerning the Gabíkovo-Nagymaros Project of 1998 (The Danube river diversion Project)*** even that case is not strictly speaking a state liability case for environmental damage per se identical to the Trail smelter case) and the judicial jurisprudence is not well developed compared to other branches of International law. The concept of "adverse effects" in relation to shared watercourses related damage does not yet have a settled definition. At what point an environmental "harm" or "injury" rises to the level of a violation of an international obligation does not have definitive and objective criteria. Under all these conditions, and the uncertainty prevailing in this emerging area of International environmental damage determination jurisprudence, it is not advisable to submit to the compulsory Jurisdiction of the International court of justice (ICJ). Instead, I urge the Government of Ethiopia to use the optional clause to exclude environmental damage claims related to water issues from the compulsory jurisdiction of the court. Disputes involving natural resources with sovereign states can best be settled out of court through mediation and conciliation or as in the case of the Colorado River dispute between USA and Mexico which were settled through a joint commission mechanism. It is time to take a proactive stance and avoid these kinds of cases "accidentally" falling in the hands of ICJ judges without making informed decision and assessment. Let us learn from our past mistakes and do the right thing now.

For environmental advocates a court case like this does not come quite frequently; when it does this is the moment they have been longing for an opportunity. The International court of justice, however, has two interests to reconcile – each of which involves an intrusion on the exercise of sovereignty of states- first, the developmental goal of a state which entails embarking on huge projects of national significance and impacts, the second and equally important interest is the protection of the environment. The court somehow has to balance the interest of these two policy objectives. Weather it actually does is a million dollar question. In present day reality, however, Governments are expected to balance these two interests without unduly favoring one policy objective over another in the interest of promoting cooperation in the management of shared natural resources for the benefit of the inhabitants of all riparian states.

Notes

1. Wouters, Patricia, "International Law-Facilitating Trans boundary Water Cooperation" 2013 GWP publication p.16 also available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2363809

2. Giordano M and T. wolf. "The world International Fresh Water Agreements. Historical Developments and Future Opportunities", Available at: http://www.transboundarywaters.orst.edu/publications/atlas/atlas_pdf/2_WorldsAgreements_atlas.pdf

3. See: The International Law commission home page at: http://legal.un.org/ilc/guide/8_3.htm#wgrprep and Un Res. 51/299 of May 1997

4. See: The International Law association home page available at http://www.ila-hq.org/en/about_us/index.cfm

5. See: Bourne, Charles," The International Law Association's contribution to International Law", Natural Resources Journal, vol.36 P.156-216

6. The Berlin Rules of 2004 available at: http://www.internationalwaterlaw.org/documents/intldocs/ILA_Berlin_Rules-2004.pdf

7. See: the Statute of The International Court of Justice article 38. Available here: http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0

8. Ibid.

9. Ibid.

10. See**:** GEORG. SCHWAR ZENBERGER &E.D.BROWN," Manual of International Law" 26 (6th ed.1976)

See also: "Researching Customary International Law, State Practice and the Pronouncements of States regarding International Law" by *by Silke Sahl available at: http://www.nyulawglobal.org/globalex/Customary_International_Law.htm#_Pronouncements_of_States*

11. See. "Equity and General Principles of law ", Akehhurst. Michael, The International and Comparative law Quarterly vol.25 no.4 (1976) Pp.801

12. Opinio Juris sive Necessistas is a conviction by states that a norm is required as an International legal obligation. See Kelly Patrick, "Twilight of customary law "Virginia Journal of International Law", Vol.40, No.2 p.450-544

13 Ibid. P.486-487, Professor Kelly writes Judge Jimenez de arhego in his writings Change and Stability in International Law(Antonio Cassese & Joseph H.H weiler eds. 1988) at p. 48 said " some resolutions declare rule of law ;others adopted unanimously or by consensus crystallize emerging rules; others become international law when followed by the practice of states or of the U.N." Professor Kelly vehemently disagrees with the Judge being a complete departure and reversal from the traditional view which relies exclusively on the practice of states.

14. Ibid at p.486-487

15. Ibid at P.486-487

16. Ibid. at p.486-487

17. Ibid. at P. 486-487

18. See. "Framework for General Co-operation" signed between the Arab Republic of Egypt and Ethiopia at Cairo July 1, 1993. See also encyclopedia of public International Law. (Max –plank institute publication Vol. 1. P. 595 (1994) and for analysis see also Omala Elwan, Nile River, Max Planck Institute Publication, P. 64-68

19. The following are sample representative treaties that involve damage issues adopted in different fields: In Nuclear Field, convention on the Liability of operators of Nuclear ships.(Brussels may 25,1963) American Journal of International Law, Vol 57(1963).P268. Air Space and outer space Convention relating to damage caused by foreign Aircraft to third parties on the surface(Rome,october7,1952),310UNTS 181.Maritime area, International convention for civil liability for oil pollution damages(Brussels ,November 29,1969). The Polar Regions: Antarctic Treaty (Washington, 1 December 1959), 402 UNTS 71. International transportation: International convention relating to liability of the railway for death and personal injury to passengers (Bern, february26, 1966). Chemicals and toxic and hazardous substances: convention on civil liability for damage resulting from activities dangerous to the environment (Lugarno, June 21, 1993) and many more.

20. See. "Trans boundary Damage under International Law", Hanquin Xue, Cambridge University Press, 2003 p 1

21. Ibid. p.1

22. See. U.N. International Law Commission, (ILC), Article 27 (b) of the Draft articles on State Responsibility. U.N.Doc. A/56/10 (Supp) (2001)

23. Since its inception, debates about state liability have often times been controversial. States are reluctant to accept strict tortious liability for damages. The idea of imposing such rules has given rise to resistance even today.

24. The ILC began its work aiming to codify the traditional law of state responsibility. After decades of work the commission produced Draft articles on State Responsibility, Report of the International Commission to the U.N.General Assembly, U.N. Doc A/35/10.In 1978, the commission began to work on a second topic and produced the "Draft Articles On International Liability For Injurious Consequences arising out of Acts not Prohibited by International Law", see Report of the International Law commission to the U.N. General assembly, U.N. Doc. A/45/10 (1990). For a summary history of ILC's work on this topic see: http://legal.un.org/ilc/summaries/9_6.htm

25. See "legal aspects of sustainable development, risk and liability in International Law", Barboza Julio Martinus Nijhoff Publishers. Leiden, Boston.2011 pp.160

26. See note 20 supra P.1

27. U.N. 1972; Declaration of the United Nations conference on Human Environment, Stockholm, 16 June 1972

28.See http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm and Here for summary of the declaration http://legal.un.org/avl/ha/dunche/dunche.html

29. See. The convention on the law of the non-navigational uses of International Waters adopted in New York in May 1997. Not yet in force. Available here https://treaties.un.org/pages/ViewDetails.aspx?mtdsg_no=XXVII-12&chapter=27&lang=en

30. Ethiopia has ratified the convention on Biological diversity See: the data base on treaties. Available at: https://treaties.un.org/Pages/CTCTreaties.aspx?id=27&subid=A

31. See. the original copy of the treaty relative to the frontiers between The Sudan, Ethiopia and other Colonial powers concerning Ethiopian Rivers and borders http://treaties.fco.gov.uk/docs/pdf/1902/TS0016.pdf., See also Daniel Kendie, Egypt and the Hydropoletics of the blue Nile river: Part I , Addis Tribune August 6, 1999..

32. See: Brunnee & S.J.Toope, "the changing Nile basin regime: Does the law matter?" 2002, V.43 no.1, Harvard International Law Journal, PP. 105-159. And here: http://egyptianchronicles.blogspot.com/2009/08/struggle-on-nile-background.html. See also, "The defects and effects of past treaties and Agreements on the Nile River Waters: Whose fault were they?" Kefyalew Makkonen, available at: http://www.ethiopians.com/abay/engin.html

33. Ibid.

34. Ibid.

35. Ibid.

36. See: Note 18 supra as well as Note 32

37. See: Note 18 supra.

38.See:http://www.internationalwaterlaw.org/documents/regionaldocs/Nile_River_Basin_Cooperative_Framework_2010.pdf

39. Ibid

40. Ibid

41. See: “Ethiopia Ratifies the New Nile Treaty”, reported by Wolfgang H. Thome http://wolfganghthome.wordpress.com/2013/06/14/ethiopia-ratifies-new-nile-treaty/

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42.see.http://internationalwaterlaw.org/documents/regionaldocs/Nile_River_Basin_Cooperative_Framework_2010.pdf

43. Ibid

44. Ibid

45. Ibid

46. Ibid

47. See: the definition of environmental liability and the example provided here: http://europa.eu/rapid/press-release_MEMO-07-157_en.htm?locale=en

48. See. Note 20 at page 1 supra

49. See. Note 20 at page 4 supra

50. See Note 20 at page10 and at page 158 supra

51. See Note 20 page 9 supra

52. Trail Smelter Arbitration, U.S vs. Canada reported in 3 R.I.A.A, (1941), at 1965. See the discussion in D Bodansky “Customary (and not so Customary) International environmental Law” (1995) 3 Global Legal Studies Journal 105 at 114. Bodansky writes “after Fifty Plus years, it is still the only case in which a state was held internationally responsible for causing Trans boundary harm “See also. D.A.Caponera (e d),” the law of International water resources”, Rome: FAO Legislative study no 23, 1980 PP: 233-234 and here: http://www.ohlj.ca/english/documents/OHLJ_45_3_Wood_FINAL.pdf

53. See .R.I.I.A, Volume III (1938, 1941), p.1905, and at P.1965.

54. See. Report of the International Law commission to the U.N.General assembly, U.N.Doc.A/45/10 (1990)

55. For the first time water as a “Common Good of Humanity” was floated by NGO’s and advocates during the Third world water forum in Tokyo, Japan.. The Holly see (Vatican) quickly supported this new concept. On another front, in July 28, 2010 advocates managed to secure a resolution at the U.N. General assembly (resolution no 64/292) recognizing water as a human right issue. See: http://www.ens-newswire.com/ens/apr2003/2003-04-24-03.html

56. See, Oscar Schachter," International Law in theory and Practice: General course in public International Law", 178 Recueil Des Cours 9, 82 (1982). See also International Law in Theory and Practice by Oscar Schachter Martinus Nijhoff Publishers, (1991) chapter- on General principles and equity.

57. Lac Lanoux Arbitration (France VS. Spain), award of 16 Nov., 1957, reported in 12 R.I.A.A. 281 See year book of the International Law commission vol.2 Part 2 194,at 197.para. 1065

58. See: Hammond .Michael, "The Grand Ethiopian Renaissance Dam and the Blue Nile: Implications for trans boundary water governance", February 18, 2013, available at:

http://www.globalwaterforum.org/2013/02/18/the-grand-ethiopian-renaissance-dam-and-the-blue-nile-implications-for-transboundary-water-governance/

59. See. The Text of the U N convention on the Law of the Non-**navigational Uses of International Watercourses. Available at:**
http://www.internationalwaterlaw.org/documents/intldocs/watercourse_conv.html

It is worthwhile to mention that the ICJ in its most recent Decision **the 1998 case *Concerning the Gabíkovo-Nagymaros Project (The Danube river diversion Project) the court applied the Convention on the law of non-navigational water courses. More specifically the court said each riparian state is entitled to a reasonable use of the shared waters of the Danube River. The court also said "Slovakia's diversion of the Danube River "Variant C" violated international law. The court asserted that depriving Hungary of its rights to a fair share to a river" proportionally in effecting a countermeasure and a lawful mitigating measures." The court did not elaborate on the element of proportionality. What scientific evidence did the court rely on to come up with such determination? The court has its own critics. These are issues that were raised by legal scholars. In any case, it is the first case where the principle of fair and equitable use of a shared water resource is applied from an International watercourse*** Convention ***by the court. The entire decision and pleadings are available here***: ***http://www.icj-cij.org/docket/index.php?p1=3&p2=3&code=hs&case=92&k=8d***

60. See Professor Eckstein Gabriel study and analysis on voting records of states on the UN Watercourse Convention at: http://hdl.handle.net/10601/952. The convention was adopted by a UN General assembly in May, 1997 by a vote of 103 for and against with 27 abstentions. Ethiopia is among those states that abstained. The current status of the convention is as of December 2013 only 2 more countries are required to make it a Global

Treaty. The Treaty must be ratified at least by 35 countries to enter into force that is now seems a real possibility. The convention is the most important multilateral treaty governing International watercourses. For the latest list of countries that submitted instruments of ratification see here:
http://www.internationalwaterlaw.org/documents/intldocs/watercourse_status.html

61. See Note 20 Page 2 Supra

62See. Note 20 page 11 supra

63. See. Note 20 page13. Supra.

64. See. Note 20 pages 6-7 supra

65.The United States and the Canadian Government entrusted the establishment of an Arbitral Tribunal to resolve their differences concerning The Trail smelter operation to an an International Joint commission. A tribunal was established and the tribunal was requested to determine the following questions:

1. Whether damage caused by the Trail Smelter in the State of Washington has occurred since the first day of January, 1932, and if so, what indeminity should be paid therefor?

2.In the event of the answer to the first part of the preceding Question being in the affirmative, whether the Trail Smelter should be required to refrain from causing damage in the State of Washington in the future and, if so, to what extent?

3. In the light of the answer to the preceding question, what measures or regime, if any, should be adopted or maintained by the Trail Smelter?

4. What indemnity or compensation, if any should be paid on account of any decision or decisions rendered by the Tribunal pursuantto the next two preceding questions? See: Article III of the 1935 convention between Canada and The United States.

66 See. Note 53 supra.

67. See. Reported in 8 ILM 118 (1969).

68. Case concerning Gabcikovo Nagymaros project (Hungary vs. Slovakia), Judgment of 25sept 1997 37 ILM 162 (1998). The text of the decision can be accessed here: ***:***
http://www.icj-cij.org/docket/index.php?p1=3&p2=3&code=hs&case=92&k=8d ***or here***
http://www.icj-cij.org/docket/files/92/7375.pdf

69. See.24 ILR (1961), p.101 also see: 53 AJIL (1959), P.156. This case is about allocation and sharing of freshwater. It was decided by an Arbitral tribunal. In order to

generate Hydro power France proposed to divert the lake lanoux waters over a mountain drop into the freige River in France later the same quantum of water was to drain into carol River. Spain objected to the diversion of the waters contending that it would have an adverse effect in its territory. The Arbitral Tribunal held that the proposed diversion wouldnot violate the treaty because there would be no net alteration to the flow of the carol river.

70. See Note 53 supra.

71. See Note 20 at page 320-320supra.

72. See. Note 20 at page 330 supra.

73.See Note 20 at page 158 supra

74. See note 20 at page 158 supra

75. Ibid

76. See Note 20 at page 161. Articles 3&4,7,20,21(2)of The U.N. watercourse convention sets out the obligation not to cause harm and any watercourse state regardless of its status of its accession to the treaty has a right to intervene if it considers harm is being inflicted on the waters.

77. Ibid.

78. See. Note 18 supra.

79. See. Note 20.at page 178 supra

80. See. Note 20.at page 168 supra

81.See.http://www.internationalwaterlaw.org/documents/regionaldocs/Nile_River_Basin_Cooperative_Framework_2010.pdf

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