The Grand Ethiopian Renaissance Dam and the Nile Basin Conflict

John Mukum Mbaku

Georgetown Journal of International Affairs, Volume 23, Number 1, Spring 2022, pp. 84-91 (Article)

Published by Johns Hopkins University Press

DOI: https://doi.org/10.1353/gia.2022.0014

For additional information about this article
https://muse.jhu.edu/article/856122

For content related to this article
https://muse.jhu.edu/related_content?type=article&id=856122
The Grand Ethiopian Renaissance Dam and the Nile Basin Conflict
John Mukum Mbaku

In 2011, Ethiopia started building a dam on the Blue Nile called the Grand Ethiopian Renaissance Dam (GERD). That decision exacerbated long-simmering conflicts between Ethiopia and the two downstream States, Egypt, and Sudan. Since then, the three countries have been unable to agree on legally binding rules on filling and operating the GERD. While there are many reasons why these three countries have not been able to resolve their disagreements, especially about the GERD, the most important is the insistence by the downstream States that the colonial-era Nile Waters Treaties must be made the baseline for determining the impact of the GERD on their economies. Hence, the key to resolving the conflict over the GERD is the adoption of a new treaty that is mutually acceptable and recognizes the rights of all relevant States. For that to happen, both Egypt and Sudan must give up the claim to the rights acquired through the Nile Waters Treaties.

Introduction
In the summer of 2021, Egyptian President Abdel Fattah El-Sisi told visiting Chinese Foreign Minister Wang Yi that he would take a firm stance on “preserving [Egypt’s] water security in the face of an ongoing dispute over a giant Nile dam project.” El-Sisi also reiterated what he called Egypt’s “historical rights to the Nile waters and stressed the need to reach a binding legal agreement on the operation of the Grand Ethiopian Renaissance Dam (GERD) that worked in the interests of Egypt, Sudan, and Ethiopia.”

In July 2021, El-Sisi “vowed retribution if Addis Ababa denied Egypt its vital share of the Nile’s waters.” In response, Ethiopia’s water minister Seleshi Bekele stated: “There is no need to enter an unnecessary war. A war can’t start because of water. Water flows if you fight today, it’ll continue to flow tomorrow.” Experts have noted that a decision by Egypt to go to war with Ethiopia over Nile waters would present Cairo with mostly insurmountable challenges. These include Ethiopia’s geography, the need for Egypt to strengthen its relations with other African countries, particularly the Nile’s upstream riparian states, the political turmoil in Sudan, and the proliferation of foreign military bases across the region.

The conflict between Egypt, Ethiopia and Sudan involves much more than the GERD, how long it will take to fill the reservoir, and how the GERD will be managed. There is also fear in Cairo that if Addis Ababa is allowed to complete and operate the dam without a legally binding agreement, that could open the door for other Nile riparian states to act similarly, effectively threatening Egypt’s water security and its ability to control projects on the Nile and its tributaries. This is why Cairo wants an agreement that preserves Egypt’s acquired rights, including its ability to veto Nile River projects.
The GERD as a threat to Egypt and Sudan

On April 2, 2011, then Prime Minister of Ethiopia, Meles Zenawi, announced that the country would build a dam on the Nile River, about forty kilometers from the Sudanese border.7 The decision to build the GERD exacerbated long-simmering conflicts between the downstream and upstream States of the Nile Basin over the allocation and utilization of Nile waters. Rivers originating in the Ethiopian highlands, which include the Blue Nile (Abay), Sobat (Baro-Akobo), and the Atbara (Tekeze), provide over 85% of the water that flows into the Nile, with the rest coming from the White Nile, which flows from the Great Lakes Region of Central Africa. For many years, Ethiopia’s use of Nile waters has been negligible; this has been due to many factors, the most important of which are lack of capacity, and legal and institutional constraints imposed by various bilateral colonial-era treaties.8 This has resulted in what has been referred to by one researcher as “one of Africa’s cruelest ironies: the land that feeds the Nile is unable to feed itself.”9

Legal instruments governing the Nile

To fully appreciate the nature of the conflict over the GERD, it is important to be conversant with the various legal instruments that currently exist in the basin, including the colonial-era bilateral treaties, which are collectively referred to as the Nile Waters Treaties. These include the 1902 Anglo-Ethiopian Treaty, which was concluded between Britain (representing Sudan) and Ethiopia to delineate the boundary between Ethiopia and Sudan;10 the 1929 Anglo-Egyptian Treaty, in which Britain was representing its East African colonies—Kenya, Tanganyika, and Uganda;11 and the 1959 Nile Treaty, which was a bilateral agreement between Egypt and Sudan.12

These treaties are at the center of the conflict over the GERD. After estimating the average annual flow of the Nile River as measured at Aswan to be 84 billion cubic meters (BCM), the Nile Waters Treaties allocated 55.5 BCM (66%) to Egypt; 18.5 (22%) BCM to Sudan; and 10 BCM (12%) to account for evaporation and seepage, effectively exhausting the Nile’s average annual water flow.13 The 1959 Nile Treaty called these allocations Egypt’s and Sudan’s acquired rights to Nile waters.14 The upstream States were not granted any water allocations.15 In addition, the Nile Waters Treaties granted Sudan and Egypt the power to veto all construction projects on the Nile and its tributaries. The upstream States have rejected the Nile Waters Treaties, arguing that they are not party to them and hence are not bound by them. Additionally, with respect to the 1902 Anglo-Ethiopian Treaty, Addis Ababa has argued that what that treaty prohibits is a total blockage of the entire Nile flow, and that the GERD will not do that.16

There are two other Nile Basin legal instruments that are relevant to the conflict over the GERD. First is the Cooperative Framework Agreement (CFA), which was the outcome of efforts by the Nile Basin states, including Egypt and Sudan, to create a basin-wide legal instrument that was acceptable to all of them and that could replace the Nile Waters Treaties. Negotiations to draft the CFA began in the 1990s and the treaty was opened for signature on April 13, 2010.17 As of 2022, the CFA has been signed by six States and ratified by four States.18

Egypt and Sudan, however, have refused to sign and ratify the CFA, arguing that it would deprive them of their historically acquired rights to Nile waters. Both downstream States wanted the CFA negotiating process to compel the upstream States to recognize and validate the Nile Waters Treaties, and the rights that Egypt and Sudan had been granted by these treaties. This was, however, rejected by the upstream States.

Second, is the Declaration of Principles (DoP), which was signed on March 23, 2015 at Khartoum by President Abdel Fattah El-Sisi (Egypt), President Omar Al-Bashir (Sudan), and Prime Minister H. Desalegn (Ethiopia).19

The DoP is important because, unlike the Nile Waters Treaties, it specifically and “expressly considers Ethiopia’s interests and recognizes the significance of the Nile River for the sustainable development of its people.”20 In addition, the DoP codifies two important and fundamental
principles of international customary law, the "principle not to cause significant harm," and the "principle of equitable and reasonable utilization." 21

However, since it was signed in 2015, it is not clear whether the DoP creates rights for and imposes obligations on any of the parties. Egypt has argued that the DoP is an international treaty, which imposes legal obligations on all parties. In an aide mémoire dated May 1, 2020 and addressed to the UN Security Council, Egypt’s Permanent Representative to the UN, Mohamed Edrees, noted that “[i]n an attempt to facilitate the reaching of an agreement on the GERD, Egypt concluded an international treaty with Ethiopia and Sudan titled the Agreement on Declaration of Principles on the GERD (DoP) on 23 March 2015.” 22 Ethiopia, however, has argued that the DoP is not a treaty as evidenced, for example, by the fact that Principle V “merely states the importance of cooperation and does not impose a duty to cooperate.” 23 However, regardless of whether the DoP is a treaty or not, it is important to note that it codifies two important and fundamental principles of international customary law—the “principle not to cause significant harm,” and the “principle of equitable and reasonable utilization.” 24

Framing the conflict
Addressing the present conflict in the Nile Basin actually consists of two important but related parts. First is the need to develop and adopt a GERD Treaty, which will provide the legal framework for filling and operation of the GERD, including how to mitigate drought. Second is that while the design and adoption of a GERD Treaty should result from negotiations between Egypt, Ethiopia, and Sudan, the allocation and utilization of Nile waters should be left to a separate, basin-wide treaty, preferably the CFA, which the Nile Basin states developed and opened for signature on April 13, 2010. 25

Accordingly, Egypt, Ethiopia, and Sudan must agree on a legally binding timetable and modalities for filling the GERD; how the GERD will be operated after it is filled, which includes how much water Ethiopia would have to release as part of its effort to mitigate droughts; Ethiopia’s right to equitable and reasonable utilization of Nile waters for agriculture and household consumption; and Egypt’s and Sudan’s fears about any significant harm to their respective countries from the GERD.

The most important issue for Egypt and Sudan is water security, which both countries made clear during the negotiation of the CFA. To deal with the Nile Waters Treaties, the committee that negotiated the CFA had introduced the concept of water security into the agreement, believing that it would help subordinate the existing treaties to general rules of international law. However, Egypt and Sudan interpreted water security to mean their historically acquired rights or current water uses. 26 The main problem was Article 14(b), which reads as follows: The Nile Basin states agree “not to significantly affect the water security of any other Nile Basin states.” 27 All NBI states, except Egypt and Sudan, agreed to this wording. Egypt and Sudan proposed the following alternative wording: All Nile Basin states agree “not to adversely affect the water security and current uses and rights of any other Nile Basin states.” 28 The alternative phrasing can be interpreted to mean at least the following: water security means a guarantee of Egypt’s and Sudan’s acquired rights and current uses and rights means the status quo—that is, both Egypt and Sudan would continue to receive 55.5 BCM and 18.5 BCM of Nile waters respectively, leaving the other Nile Basin states with no water allocations. As the three countries struggle to secure an agreement for the filling and operation of the GERD, Egypt and Sudan fear that the dam could impose significant damage on them by interfering with their access to Nile waters. 29

While the design and adoption of a GERD Treaty should result from negotiations between Egypt, Ethiopia, and Sudan, the allocation and utilization of Nile waters should be left to a separate, basin-wide treaty, preferably the CFA.
Ethiopia has argued that it must be allowed to utilize the waters of the Blue Nile and the other tributaries of the Nile that originate within its highlands to generate electricity for national development and eventually for agricultural and other purposes. However, Professor Mahemud Tekuya, an expert on international water law, has argued that Egypt’s “effective hydro-hegemony in the Nile Basin” has “prevented upstream countries, like Ethiopia, from utilizing the waters of the Nile.”

The other upstream States have complained that they do not want the allocation and utilization of Nile waters to be governed by the colonial-era Nile Waters Treaties and that is why they participated in the design of the CFA, which they believed would replace any existing treaties and provide a legal framework that is mutually acceptable and respects the rights of all Nile Basin states.

A history of failed efforts to resolve conflicts in the Nile Basin

There are really two conflicts that need to be resolved—one over the GERD, and the other over the allocation of the waters of the Nile. The CFA was expected to resolve issues over the allocation and utilization of Nile waters, but it remains in limbo because Egypt and Sudan have refused to sign and ratify the treaty.

After the DoP was adopted, all three countries agreed that international experts should be engaged to study the impact of the GERD on the downstream countries. This decision, however, “reignited the dispute over the colonial Nile Waters Treaties” and Egypt’s and Sudan’s acquired rights. Egypt, which “still bases its [water] supply on the 55.5 [BCM] agreed upon in 1959,” has insisted that that figure be used as the “baseline to determine the impact” of the GERD on its economy.

Although the flow rate of the Nile differs by season, with significant increases occurring during the rainy season (June through August) in the Ethiopian highlands, Egypt does not agree to any adjustments in its current uses, which are based on its acquired rights. For example, in 2004, then Egyptian Minister of Water Resources and Irrigation, Doctor Mahmoud Abu Zeid, declared that “Egypt will reject any proposal to lower its quota of Nile water,” and that the CFA talks would “have to comply with one permanent feature: not to touch Egypt’s historical rights.”

Egyptian President El-Sisi reiterated this position with respect to negotiations to draft a GERD Treaty. After the April 2021 Kinshasa negotiations failed to resolve disagreements between the three countries and secure an agreement on the GERD, President El-Sisi declared as follows: “I am telling our brothers in Ethiopia, let’s not reach the point where you touch a drop of Egypt’s water, because all options are open.” Sudan, like Egypt, has also insisted that its acquired rights—those granted by the 1959 Nile Treaty—be the starting point for all negotiations on the GERD. This unwillingness by Egypt and Sudan to give up the colonial-era water allocations and seek a legal instrument based on the two international customary law principles that have been recognized by the three countries and made explicit in the DoP lies at the heart of the disagreements between the upstream and downstream States of the Nile Basin.
era treaties and seek a new basin-wide treaty that is mutually acceptable and recognizes the rights of all Nile Basin states, Egypt continues to insist that any agreement must recognize the Nile Waters Treaties and the rights and obligations created by them, and that these are binding on all Nile Basin states.39

The need for two new treaties in the Nile Basin
Effectively resolving existing Nile Basin conflicts calls for designing and adopting two new treaties. First, a basin-wide treaty that recognizes and guarantees the rights of all eleven Nile Basin states, and which must be the outcome of basin-wide negotiations based on the principles of no significant harm and equitable and reasonable utilization, must be negotiated and adopted. What constitutes “equitable and reasonable utilization,” as well as “significant harm,” must be clarified by Egypt, Sudan, and Ethiopia through good faith negotiations and subsequently elaborated in the treaty. The CFA already exists as a framework for such a treaty. All eleven States can return to it and use it to provide them with the foundation for negotiating the new treaty.40

If, however, there is disagreement over the meaning of these concepts, the parties “may jointly request for conciliation, mediation or refer the matter for the consideration of the Heads of State/Heads of Government.”41 The CFA also has a provision on the settlement of disputes between the parties—if they are unable to resolve the disputes themselves, they can take them to the Nile Basin Commission or to the International Court of Justice.42

The other one is the GERD Treaty, which must provide legally binding guidelines for filling and operating the dam, including what each party must do during drought, prolonged drought, and prolonged periods of dry years. The issue of how much water the GERD should release during each of these drought periods should also be resolved and elaborated in the treaty. Water, including that of the Nile, is a scarce resource, which means that no one State can use as much water as it wants whenever it wants. Hence, there must be some form of rationing based on generally accepted international customary law principles. Again, all parties can determine what is an equitable and reasonable entitlement and make that determination part of the treaty. Finally, as noted by Egypt, “[t]he negotiations on the GERD relate to a single project on a single tributary of the Nile River,” while “[w]ater sharing and water apportionment are simply inapposite in these negotiations.”43 Hence, there should be two treaties—one for the GERD and the other covering the allocation and utilization of Nile Waters.

The way forward
The ICJ has already held that all the riparian states of an international watercourse have a “basic right to an equitable and reasonable sharing of the resources of the watercourse.”44 With respect to the Nile Basin countries, this norm requires that access to and the utilization of the Nile waters be balanced and reflect a standard grounded in equity and reasonableness and is accepted by all riparian states as mutually beneficial. Thus, after the GERD is completely filled, Ethiopia’s use of Blue Nile waters, even if it negatively affects water flows to Egypt and Sudan, would be considered harmful and hence a violation of the non-harm rule only if such utilization exceeds Ethiopia’s equitable and reasonable share.45

If a GERD Treaty is not secured, Ethiopia will proceed with unilateral filling and operation of the GERD “not only because it is permissible under international law, but also because the downstream states’ past behavior suggests they cannot be relied upon to come to an agreement and will instead drag out the negotiation process in perpetuity.”46 Ethiopia has already completed two fillings of the dam (2020 and 2021). In October 2021, Egyptian newspapers reported that “[a]s negotiations remain stalled over the [GERD], Ethiopia is beginning to make preparations for the third-stage filling of its mega-hydroelectric dam on the Blue Nile.”47 The two fillings, however, have not imposed any significant harm on the downstream States.

By February 20, 2022, when Ethiopian Prime Minister Abiy Ahmed officially inaugurated the
dam, it was 84% completed, with 18.5 BCM of water in its reservoir. The dam will initially produce 750 megawatts (MW) of electricity, but it has a potential for generating 6,000 MW of electricity. The GERD’s electricity could significantly transform development in Ethiopia and help the government industrialize its rural areas and reduce deforestation. Sudan and the other Nile Basin states are also expected to benefit significantly from having access to clean and relatively affordable power. The GERD is also expected to “smooth variations in the Nile flow,” resulting in “increased water availability during the low-flow summer months, more hydropower generation from Sudanese dams at Sennar, Roseires and Merowe, and reduced flood damages.”

As a consequence, Sudan has a “vested interest in bringing the dispute to a peaceful resolution” and making certain that the GERD is not damaged. The fact that Sudan has already recognized the potential benefits of the GERD and has subsequently “aligned itself with Ethiopia” means that Egypt will be under pressure to change its position regarding its current and existing water uses and pave the way for agreement to be reached on a GERD Treaty.

Notes

2. Zaid, “Egypt vows firm stance on protecting Nile water security.”
5. Shady Ibrahim, “Egypt may be looking for a military solution to Ethiopia dam dispute,” Middle East Eye, June 30, 2021, https://www.middleeasteye.net/opinion/egypt-ethiopia-military-solution-gerd-dispute. For example, Djibouti, which provides access to more than 80% of Ethiopian trade, is home to U.S., French, Italian, Chinese, Japanese, and Saudi military bases. In addition, Sudan is not likely to allow Egypt to use its air- or land-space to effect its attack of Ethiopia.
6. Ibrahim, “Egypt may be looking for a military solution to Ethiopia dam dispute.”
Kenya, Rwanda, Tanzania, and Uganda. When South Sudan gained independence from Sudan on July 9, 2011, it became a separate Nile riparian State. Hence, there are now eleven Nile Basin states.


21. DoP, articles III and IV.


24. DoP, articles III and IV.

25. NBI, “Cooperative Framework”

26. These are 55.5 BCM of Nile waters per annum for Egypt and 18.5 BCM for Sudan. See the 1959 Nile Treaty, Chapter 2, para. 4.

27. CFA, art. 14(b), Annex 1. Emphasis added.


29. See, e.g., “Egypt’s Sisi says response will be felt if water supply affected by dam,” *Reuters*, March 30, 2021, https://www.reuters.com/world/middle-east/egypt-sisi-says-response-will-be-felt-if-water-supply-affected-by-dam-2021-03-30/, expressing Egypt’s fears that the dam will negatively affect Egypt’s access to the waters of the Nile River.


31. The CFA opened for signature in 2010. As of 2022, Egypt and Sudan have still not signed the treaty.

32. Tekuya, “Sink or Swim,” 84.


34. “Egypt insists on keeping its share of Nile water,” *Sudan Tribune*, March 6, 2004, https://sudantribune.com/article2802/ (March 14, 2022). See also “Letter dated 19 June 2020 from the Permanent Representative of Egypt to the United Nations addressed to the President of the Security Council,” UN Doc. S/2020/566. At Annex I, Egypt states as follows: “Ethiopia is also bound to uphold the customary rules of international law, including the obligation not to cause harm and the principle of equitable and reasonable utilization. The obligation not to cause harm is designed to minimize the adverse effects of new projects, such as the GERD, on current and existing water uses. Also, existing uses are one of the factors that are used as the baseline to determine whether a new or planned water project is reasonable or and equitable. Ignoring existing and current uses is technically impracticable, inconsistent with international law, and politically untenable.” Egypt’s current and existing water uses include the 55.5 BCM allocated by the 1959 Nile Treaty.

35. “Egypt’s Sisi warns of potential for conflict over Ethiopian dam,” *Reuters*, April
37. These international customary law principles are the principle not to cause significant harm and the principle of equitable and reasonable utilization. They are Principles III and IV of the DoP and can also be found in the Convention on the Law of the Non-navigable Uses of International Watercourses (hereinafter UN-WCC), 2999 U.N.T.S. 77 (1997), at arts. 5 & 7. However, it is important to note that Egypt interprets the two principles—obligation not to cause significant harm and the principle of equitable and reasonable use—to mean that its current and existing water uses are maintained. Any deviation from that is considered as imposing significant harm. See Letter dated 19 June 2020, Annex I.
40. To Egypt, equitable and reasonable use and the obligation not to cause significant harm means that it continues to maintain its current and existing uses, a view that has been rejected by Ethiopia and the other upstream States. See Letter dated June 19, 2020, Annex I.
41. DoP, Principle X.
44. “Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia), ICJ (1997),” at 54 (para. 78).
45. The concept of equitable and reasonable share would be defined jointly by the parties and elaborated in both the GERD Treaty and the basin-wide treaty.