Water Resources and Inter-state Conflict: Legal Principles and the Grand Ethiopian Renaissance Dam (GERD)

Anne Funnemark
This research draws on the PA-X Peace Agreement Database (www.peaceagreements.org), a database of all peace agreements at any stage of the peace process from 1990 to 2019. The database is fully searchable and supports both qualitative and quantitative examination of peace agreements.

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Abstract

This report draws together the key principles of international law applicable to transboundary watercourse disputes regarding quantity of water, and assesses the extent to which these principles provide guidance in negotiating the Egypt-Ethiopia watercourse conflict. This conflict is characterised by high levels of tension, and low levels of cooperation, between the two main states, with Sudan also caught up in the negotiations. There is potential for larger regional conflict due to the ways in which this opens up historic claims relating to the use of the Nile. The report examines how the principles of international law identified have been used in other similar negotiations, and may help guide the negotiations of the Egypt-Ethiopia conflict.

The report finds that, whilst principles of international law do not resolve the conflict, they suggest a number of key principles and approaches useful to supporting its resolution. It is argued that both the principle of equitable and reasonable use and a human needs approach may facilitate a shift away from a security approach and an understanding of the situation as a zero-sum game, to an approach based on the need for cooperation between parties.
First, the principle of equitable and reasonable use as found in international watercourse law provides a basis for negotiating transboundary watercourse conflicts. This principle underscores the shared nature of transboundary watercourses and builds in a human needs approach.

It would be useful to try to encourage a public and transparent, updated and cross-border Environmental Impact Assessment, which could also bring in a human needs perspective to what is often understood by Egypt and Ethiopia as a sovereign dispute. A human needs approach can emphasise possible mutual gains in effective transboundary watercourse management, by highlighting the interdependence of human needs of peoples on both sides of borders.

Comparative frameworks in similar disputes have often worked well by regionalising their approach to cross-border water management, bringing in all the countries connected to the water courses. The contribution of the treaties and mechanisms for cooperation agreed have often been how they establish processes for ongoing technical cooperation, which can continue behind the scenes even though public interstate dispute and even violent conflict is continuing.
1. Introduction

1.1. Water Scarcity, Transboundary Watercourses and Inter-state Disputes

Access to freshwater is a fundamental human right: it is essential for sustaining life with dignity and health, the running of households, the production of food and agriculture, and development of energy and industry. Simultaneously, water is an increasingly scarce natural resource. The United Nations (UN) estimates that 2 billion people live in countries experiencing high water stress, whilst nearly two thirds of the world’s population, about 4 billion people, experience extreme water scarcity for at least one month per year. With strong population growth, increasing water-dependent agriculture, and climate change reducing available freshwater across the globe, water scarcity is set to heighten. The Intergovernmental Panel on Climate Change’s Fifth assessment report predicts that access to freshwater will decrease in many mid-latitude and dry subtropical regions. Further, the report draws a clear line between climate change, water scarcity, and the on-going crisis in food production. This underscores the ways in which water is a fundamental resource for the sustainment of life. Due to these developments, the UN Children’s Fund (UNICEF) estimates that by 2040, one in four children will live in areas of extremely high water stress.

High in demand and increasingly low in availability, freshwater is potential source of tension and even conflict. The bulk of the evidence, however, suggests that even countries with tensions often find a way to have continuing conversations over water resources, even when in dispute on other issues, and even when publicly critising each other over the issue of transborder water sources. Yet, given that the natural resource of water cannot be replaced or substituted, and water needs are generally such that local sources are found to be critical, transboundary watercourses and the management of these watercourses can be a source of tension between states. Mandel argues watercourses ‘have been transformed into tense arenas for competitive exploration by neighbouring nations’. It is increasingly difficult to distinguish between water as a development issue, water as an environmental issue, and water as a national security issue because all of these issues interconnect in the issue of water management. Transboundary watercourses can be defined as 'a system of surface water and groundwater constituting by virtue of their physical relationship as a unitary whole and normally flowing into a common terminus.'
The UN estimates that approximately 40 per cent of the world’s population lives in river and lake basins made up of two or more countries, with 90 per cent living in countries that share basins. 60 per cent of the world’s freshwater resources is estimated to come from transboundary lake and river basins. This makes evident the extent to which a significant part of the world’s population is vulnerable to inter-state disputes over transboundary watercourses.

1.1.1. The Conflict on the Nile: the Grand Ethiopian Renaissance Dam (GERD) Challenging Egypt’s Regional (Hydro)hegemony

1.1.1.1. A Brief Overview of the Conflict and its Characteristics

A current example of significant tension surrounding transboundary watercourses is the conflict between Egypt and Ethiopia over the water resources of the River Nile. The long-standing dispute between the countries has recently seen new tensions due to the construction of the Grand Ethiopian Renaissance Dam (GERD) by Ethiopia. In 2011, Ethiopia launched the building of what is set to be the eighth largest dam in the world. For Ethiopia, which has a high level of poverty and food insecurity, the project represents an opportunity for significant economic development.

Conversely, Egypt sees the construction of GERD and any interference with the Nile in general as a significant national security issue. The dam threatens to reduce the downstream flow of the River Nile because 82 per cent of the Blue Nile flow comes through Ethiopia. Given that Egypt is dependent on the Nile for 90 per cent of its water, a potential reduction in downstream flow caused by the dam, in conjunction with lower water quantities due to climate change and growing water demand due to population growth, will have devastating impacts on Egypt’s economy and population. Accurate estimates of the downflow water reduction caused by the construction and filling of the dam are difficult to make due to the tense situation causing Ethiopia to share minimal information regarding the dam. An International Panel of Experts was established by Ethiopia with the cooperation of Egypt and Sudan, comprised of ten members – two members from each of the three riparians (Egypt, Ethiopia and Sudan), plus four international experts agreed upon by the governments, with a geotechnical expert group added later.
However, reporting in 2013, the panel failed to fully address downstream and upstream impacts of the dam.\textsuperscript{23} Regardless of exact water measurements, this brief overview shows that the conflict is fundamentally characterised by both states’ attempts to meet domestic demands and sustain the lives and livelihoods of their citizens through the utilization of a resource that is at once inherently transnational, irreplaceable, and limited in quantity. The conflict exemplifies how the issue of water connects to competing demands related to national and international trade, development, environment, culture (water connected to sense of place and history and traditional sovereign relationships), and security (where water serves as a national boundary or water security issues come into play). In this particular case, the main tension is between Ethiopia’s right to development and Egypt’s national security concerns. These competing issues are difficult to manage within States, much less in transboundary environments.

The tension over water is amplified by changing power dynamics in the region. Egypt’s position as regional (hydro)hegemon has been facilitated and is reinforced by Egypt’s, until now, more or less unchallenged use of the Nile.\textsuperscript{24} Egypt’s use of the Nile is enabled by the 1929 and 1959\textsuperscript{25} watercourse treaties. The 1959 agreement between Egypt and Sudan, which Egypt argues is a modified version of the 1929 agreement,\textsuperscript{26} gives Egypt veto power over projects on the Nile in other riparian states, and splits the entirety of the Nile’s flow between Egypt and Sudan.\textsuperscript{27}

Egypt continues to rely on these treaties today in arguing its ‘natural and historic rights’ to the Nile, and in justifying its 65 per cent share of the Nile’s bounties.\textsuperscript{28} Riparian states, including Ethiopia, have objected to the validity of these treaties due to the fact that they were signed by colonial powers during a time of colonisation, and that they exclude the majority of the riparian states to the Nile.\textsuperscript{29}
Whilst effective opposition against these treaties has for decades been hindered by Ethiopia’s and other upper riparian’s poverty and instability, the last couple of decades have seen significant shifts within the region, with upper riparian states gaining political power. Ethopia has been at the forefront of establishing the Nile Basin Cooperative Framework Agreement (CFA). The Framework incorporates elements of equitable use into the management of the Nile and offers a partial alternative to the old treaties. While Egypt, Sudan (and South Sudan) are not signatories, and therefore not legally bound by the CFA, it has increasing support from other riparian states, significantly including Sudan. The framework therefore reflects a changing power dynamic within the region in that other Nile basin states now form a more unified block.

In addition, the tension around the Nile is bound up with the regional power-play entrenched in the South Sudan civil war, in which riparian states have been involved on both sides of the conflict. This context creates a situation in which, as Lawson argues, ‘any flare-up between Egypt, Ethiopia and Sudan over the allocation of the Nile River water can no longer be kept limited to these three protagonists’. The regional power dynamics tied up in the Nile conflict both increase the parties’ apparent willingness to use military power, and the scale on which such violence has the potential to erupt.

In summary, the key characteristics of the Egypt-Ethiopian conflict are:

1. it is an upstream/downstream water quantity conflict triggered by human-initiated technological disruption between riparian states, that have a tense relationship historically,
2. the historically less powerful upstream country, Ethiopia, is challenging the status quo characterised by Egypt’s long-standing hegemony; and
3. resultant tensions tie into and drive a shifting regional power balance, creating potential for larger scale regional conflict.
1.1.1.2. Negotiation Efforts and Status Quo

The characteristics of the Egypt-Ethiopia conflict are highlighted in the literature as conflict-inducing, and reflect some of the key challenges to successful negotiation. The way in which both countries approach the conflict as one of national security rather than a development or environmental issue fuels the perception of a zero-sum game, hindering cooperation and consideration of human need, which is necessary to emphasise common interests and might build confidence to negotiate successfully.\(^\text{39}\)

There has been some progress in the negotiation attempts so far. After long rounds of talks Egypt and Ethiopia signed a Memorandum of Understanding in March 2015.\(^\text{40}\) This Memorandum of Understanding enshrines the principles of no significant harm and equitable and reasonable use as the primary principles according to which transboundary watercourse use should be decided.\(^\text{41}\) But the agreement did not see a significant shift in the two states’ positions. In January 2020, a new US initiative seems to have seen more progress in negotiations, and came close to resolving many issues, but apparently without agreement on crucial points such as filling up the dam.\(^\text{42}\) On 29 June 2020, the dispute was discussed at in the UN Security Council. At the time of writing, Ethiopia had moved to start filling up the dam, which provides a focal point for conflict due to the associated threat of drought to Egypt, although at this stage the consequences are not really known. Consequently, the relationship between the states is worsening, setting the situation up for potential violent conflict.\(^\text{44}\)

1.2. Report Overview

This report sets out to draw together the key principles of international law applicable to transboundary watercourse disputes regarding quantity of water caused by planned human measurements. It assesses the extent to which these principles provide guidance in negotiating water disputes characterised by a high-level of tension and low level of cooperation, as well as guidance suitable for addressing the potential for larger regional conflict. In doing so, the report explores the way in which principles of international law might be used to facilitate a turn away from securitisation of water resources towards water cooperation in the conflict between Egypt and Ethiopia.
The report deals with both customary law and historical treaties as a part of this analysis, and whilst it is recognised that there are complicated arguments relating to the technicalities of what is customary law and what is not, as well as to the application of historical treaties which reinforces one set of claims (Egypt’s), these discussions are beyond the scope of this report. The report instead seeks to explore the way in which international law may provide guidance to transboundary watercourse disputes and reflect principles of good practice in dispute resolution, even if not strictly applicable to the specific dispute at hand.

Starting with international watercourse law, the international law applicable to watercourse disputes over water quantity is explored in Section 2. This section outlines how the principle of equitable and reasonable use of water resources found in watercourse law sits with and is informed by other applicable bodies of law such as the human right to water, the human right to self-determination, and the environmental law obligation to undertake Environmental Impact Assessments (EIA). Section 3 considers examples of transboundary water disputes that share many of the same characteristics as the Egypt-Ethiopia conflict, and assesses if and how the identified principles have been applied in these conflicts. Lastly, Section 4 draws together the principles and practices identified, and attempts to outline how these principles may prove helpful in negotiating the ongoing conflict on the Nile.

This report finds that whilst principles of international law do not resolve the conflict at hand, they provide key guiding principles which may facilitate a successful negotiation of the conflict by facilitating a shift away from a security approach and understanding of the situation as a zero-sum game, to an approach that considers the necessity of cooperation.
2. International Law Regulating Transboundary Watercourse Disputes

2.1. International Watercourse Law

2.1.1. The Doctrines of Absolute Territorial Sovereignty and Absolute Territorial Integrity

The principal body of law governing transboundary watercourse disputes is international watercourse law. This body of law has, until recently, largely been uncodified. States have historically aligned themselves with either the principle of absolute territorial sovereignty or the principle of absolute territorial integrity. The first principle, also known as the Harmon Doctrine, argues that states may freely use the water within their own territory, without taking into consideration the needs of other riparian states. Consequently, this principle has historically been favoured by upstream states.

In contrast, the principle of absolute territorial integrity has been advocated by downstream states because it advances the idea that every state is entitled to the 'natural flow of river systems crossing its border'. This converse principle limits upstream riparian states' use of transboundary watercourses, and effectively gives lower-riparian states veto over upper riparian states' use or alteration of watercourses. In cases where downstream riparians have historically taken more advantage of their water resources, as is the case in the Ethiopia-Egypt conflict where treaties exist, the principle of absolute territorial integrity supports Egypt’s argument of a right to preserve pre-existing uses of transboundary watercourses.

Both the principles of absolute territorial sovereignty and absolute territorial integrity take extreme stances in relation to the allocation and use of transboundary watercourses, anchoring themselves in a principle of sovereignty that is, as this report will show, somewhat out of date in ignoring the relational aspect of sovereignty in a globalised world. In doing so, both principles generate a zero-sum game approach to transboundary watercourse use.
Concepts rooted in territorial sovereignty bring with them a range of complex issues when applied to a constantly moving resource, such as water. The nature of the resource in question clearly calls for cooperation, a demand underscored also by an increasingly interrelated world. Therefore, there has been a shift away from these principles in the development and codification of international watercourse law from the late-twentieth century onwards.

Before exploring the developments of watercourse law, however, it is necessary to note that these principles continue to be used as tools of advocacy in watercourse disputes, and are especially present in the rhetoric employed by state leaders. Whilst the nuances of the stances taken in the Egypt-Ethiopia conflict go beyond the relative simplicity of these principles, the principles of absolute territorial sovereignty and absolute territorial integrity reflect the core aspects of Ethiopia’s and Egypt’s positions on the river Nile dispute, respectively. This makes evident the continued influence of the principles, though they are no longer viewed as reflecting international law.

2.1.2. The Doctrine of Limited Territorial Sovereignty

Today, the primary source of international law which applies itself to transnational watercourses is the UN Convention on the Law of the Non-Navigational Uses of International Watercourses (UNWC). The Convention came into force in 2014 and advances a so-called ‘limited territorial sovereignty’ approach to the use of transboundary watercourses. Neither Egypt nor Ethiopia are parties to the UNWC, and moreover Article 3 of the UNWC provides that ‘nothing in the present Convention shall affect the rights or obligations of a watercourse State arising from agreements in force for it on the date on which it became a party to the present Convention’, a provision that would reinforce Egyptian treaty law arguments were they signatories.
However, as this section goes on to show, key principles entrenched in the UNWC are argued to be customary international law and thus are useful to frame any attempt to resolve the dispute. The doctrine of ‘limited territorial sovereignty’ is also entrenched in the African Convention on the Conservation of Nature and Natural Resources (Algiers Convention) to which Egypt is party and the Revised African Convention on the Conservation of Nature and Natural Resources (Maputo Convention), which Ethiopia has signed. Further, the parties have signed a Memorandum of Understanding, which incorporates principles for the resolution of the dispute which are consistent and similar to the UNWC, which does bind the parties, and so the UNWC is therefore useful to guide their interpretation and implementation.

Compromising between the doctrine of absolute territorial sovereignty and absolute territorial integrity, the doctrine of limited territorial sovereignty 'asserts that every riparian state has a right to use the waters of the international river but is under a corresponding duty to ensure that such use does not harm other riparians'. Accordingly, the principle tries to strike the balance between the interest of upper and lower riparian states through limiting states’ ability to only consider their own needs in relation to transboundary watercourse use.

In the UNWC, this doctrine is embodied in Articles 5 and 7, two of the fundamental substantial obligations of the convention which also reflect international customary law. Article 5 of UNWC states that '[w]atercourse states shall in their respective territories utilize an international watercourse in an equitable and reasonable manner'. Article 7 of UNWC obliges states to 'take all appropriate measures to prevent the causing of significant harm to other watercourse states'. Through obligations to take into consideration the needs and rights of other riparians when seeking to use transboundary watercourses, both the principle of equitable and reasonable use and the principle of no significant harm, entrench limitations to a state’s own use of transboundary watercourses. The principles thus embody a move away from a state sovereignty-centred outlook, to one that recognises the shared nature of transboundary watercourses and the need for cooperation in the successful management of it.
Yet, whilst sharing these common traits, the principles can come into tension with each other in certain scenarios. McCaffrey\textsuperscript{66} demonstrates how, in a scenario where State A has a pre-existing use of water resources which may be argued to not be equitable and reasonable, the principle of equitable and reasonable utilisation would allow State B to undertake changes to its own use of the transboundary watercourse as long as it upholds the obligations of Article 5 (based on equitable and reasonable use). Conversely, from the perspective of the principle of no significant harm, this change in use by State B potentially breaches State B’s obligations under UNWC Article 7, because it is likely to cause significant harm to State A by negatively affecting its pre-existing use.

The inclusion of both of these principles in the UNWC allowed the UNWC to enjoy increased support in the international community.\textsuperscript{67} But many transboundary watercourse conflicts, such as the one between Egypt and Ethiopia, are rooted in exactly this tension between the often disproportionate pre-existing use of one riparian and the wish of other riparians to increase their use of the transboundary watercourse. In these scenarios, the tension between the principles allows both parties in a conflict to argue that they have international law on their side, instead of guiding resolution of the conflict and fostering cooperation. This is the case in the Egypt-Ethiopian conflict. As is often the situation,\textsuperscript{68} the principle of equitable and reasonable use lends itself to upper riparian Ethiopia’s side, and the principle of no significant harm lends itself to lower riparian Egypt’s stance (which it also argues is backed up by historical treaties). The law thus contributes little to conflict resolution.

In order to solve this, Paragraph 2 of Article 7 of the UNWC reads that:

\begin{quote}
[w]here significant harm nevertheless is caused to another watercourse State, the State whose use causes such harm shall... have due regard for the provisions of article 5 and 6... to eliminate or mitigate such harm.\textsuperscript{69}
\end{quote}

The inclusion of this paragraph sees scholars such as McCaffrey\textsuperscript{70}, McIntyre\textsuperscript{71} and Caflisch\textsuperscript{72} argue that the principle of equitable and reasonable use is the overall objective of UNWC, and that the principle of no-significant harm sits within this principle. This has been confirmed in the \textit{Gabcikovo-Nagymaros} case,\textsuperscript{73} and in the 2004 Berlin Rules,\textsuperscript{74} and is examined further in the next point.
2.1.2.1. The Principle of Equitable and Reasonable Use and the Question of Implementation

The above reading of the UNWC leads to the question of what the substantial principle of equitable and reasonable utilisation entails, and how it may help guide negotiations over quantity in transboundary watercourse disputes. As McIntyre writes, 'substantial legal principles should be sufficiently detailed and definite as to lend some degree of predictability to the result of any dispute or process of negotiation'.

The principle of equitable and reasonable use, as argued above, makes evident the shared nature of watercourses and their resources, thus highlighting the need for cooperation between riparians. Beyond this, however, the principle is vague. Whilst allowing for flexibility and consideration of context in its application, this also means, as McIntyre argues, the principle 'must inevitably suffer from some legal indeterminacy'. Wolf argues the lack of accepted measures for equitable division of shared water resources is the major hindrance to watercourse law’s ability to foster negotiations and peaceful relations among riparians. Instead, as Caflish argues, the principle as it stands today seems to ‘pre-suppose the ability of states to cooperate and work closely together’.

In order to attempt to answer the question of how equitable and reasonable use should take place, this report now turns to environmental law and human rights law. Consideration of environmental and human rights factors are both called for by Article 6 of the UNWC.
2.2. International Human Rights Law and its Interlinkage with Environmental Law

This section addresses the issue of transboundary watercourse disputes from the perspective of human rights law and its intersection with environmental law, which also has some application and may further guide approaches to ‘equitable and reasonable use’. In assessing states’ obligations flowing from their human rights commitments, and how these obligations may inform and add to the principles of watercourse law by requiring consideration of transboundary watercourse use from the point of view of actors and entities other than states, this section finds that human rights require a human-needs approach to transboundary watercourse disputes. This also aligns with directions in environmental law. In doing so, human rights drive the focus away from the state centrism entrenched in international watercourse law and highlight the potential for mutual gains in treating watercourses as unitary wholes by highlighting the interdependence of human needs on both sides of borders.

This section primarily examines the human right to self-determination and the human right to water. Both Egypt and Ethiopia are parties to the International Convention on Economic, Social and Cultural Rights (ICESCR) and the International Convention on Civil and Political Rights (ICCPR), without significant declarations or reservations for its application in this context.
2.2.1. The Human Right to (Internal) Self-determination

Whilst watercourse law and the principle of equitable and reasonable utilisation of transboundary watercourses continue to be state-centred, states’ utilisation of watercourses affect the lives and livelihoods of the people and communities who depend on these watercourses. This is evident in the conflict between Egypt and Ethiopia, where, as Section 1 outlined, both the Egyptian and Ethiopian populations’ freshwater needs are at the heart of the conflict. This reality points to the existence of key interests and stakeholders in transboundary watercourse disputes beyond the state, and consequently the need to move beyond a state-centred approach to transboundary watercourse dispute negotiations. These are also, unhelpfully, zero-sum. The right to self-determination, as entrenched in Common Article 1 of ICESCR and ICCPR and Article 20 of the African Charter of Human and Peoples Rights, centers on the relationship between people and the state and may therefore inform what an approach to watercourse disputes which moves beyond state-centrism could look like.

Common Article 1 of ICESCR and ICCPR states that:

“*All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.*

This is now understood not just to refer to rights to form a state, but rights to participate in how that state is governed. The Human Rights Committee (HRC) stresses the interlinkage between the right to self-determination and the right to participation in public affairs and the right to vote. States have a duty to actively promote these participatory dimensions of the right to self-determination, and the obligation to consult local communities is also stressed in international environmental law.
This conceptualisation of the right to self-determination centres on a set of procedural rights which requires, as Klabbers argues, that people and communities 'see their position taken into account whenever their futures are being decided'.88 This reading of Article 1(1) is reinforced by the reference to economic self-determination which in Article 1(2) requires that peoples are able to 'freely dispose' of natural resources such as water 'for their own end',89 thereby placing a duty on the state to exploit natural resources for the benefit of the people.90 Discharging this duty requires an understanding from the state of the needs and interest of local communities.91

In the case of transboundary watercourse use, the right to self-determination, at a minimum, requires that states which seek to reap benefit from natural resources such as transboundary watercourses must do so in line with the needs and rights of the affected population. In the case of the conflict on the Nile, this arguably means that to fulfil their obligation under international human rights law, Egypt, Ethiopia, and other involved riparian states – especially Sudan – should facilitate engagement from those local communities likely to be affected by the building of the dam during negotiations. The participatory qualities of the right to self-determination are fundamental in empowering peoples in relation to states,92 drawing the focus further away from state securitisation of transboundary watercourse use towards human needs. It qualifies state sovereignty through necessitating that sovereign powers are used for the 'greater good' of the people.

Framing the issue in terms of human rights law, including the right to self-determination, draws attention to the way in which the sharing of transboundary watercourse benefits should not only be between state entities but within states, and requires that natural resources such as water are used in a way that aligns with the needs and interests of local peoples and communities. This requires inclusion of local actors, because it requires an understanding and consideration of how local peoples and communities are affected by state utilisation of transboundary watercourses.
The obligation to include local actors is likely to increase local ownership of any potential agreements reached, and draw attention away from states’ sovereign rights towards the common concerns regarding human interests underlying the dispute. These common concerns can be addressed by a shared commitment to understanding the needs of local populations. The obligation also provides the opportunity to consider how the other human rights of local communities are affected by a state’s use of transboundary watercourses. On this basis, this report now turns to one of the most clearly affected human rights in cases of transboundary watercourse use: the right to water.

2.2.2. The Human Right to Water

The right to self-determination has made evident the way in which states have an obligation to ensure the consideration and consolidation of the rights of entities within the state when using transboundary watercourses. A second key right at the heart of watercourse disputes, as showed in Section 1, is the right to water. The Committee on Social, Economic and Cultural Rights (CESCR) established the right to water in General Comment No. 15, drawing it from the right to adequate housing and the right to health. It states that ‘[t]he human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses’. The right to water is also enshrined in a range of human rights conventions protecting specific groups. Interestingly Article 24 of the African Charter provides that ‘All peoples shall have the right to a general satisfactory environment favourable to their development’, as well as the self-determination provision of Article 20.
As a socio-economic right, the right to water does not require immediate fulfilment but rather progressive realisation on the basis of each states’ resources. However, even in situations of water scarcity and few state resources, states have a minimum obligation to refrain from interfering ‘directly or indirectly with the enjoyment of the right to water’. In addition, states are obliged to take steps to progressively realise the right to water. These minimum requirements make evident how the right to water necessitates a consideration of people’s right to water when negotiating transboundary watercourse disputes. As McCaffrey writes:

“if states are under the obligation to exercise their best efforts to ensure an adequate supply of water to meet basic human needs, it follows that they also manage their water resources and development as to ensure a supply of water for the benefit of present and future generations.”

The right to water thus sits with the right to self-determination in that it makes evident the fundamental human needs considerations necessary when negotiating transboundary watercourse disputes.

CESCR supports this line of argument, asserting that states are required to consider the right to water in international agreements. In doing so CSECR highlights the way states’ obligations under the right to water apply to internationally oriented issues. The application of the human right to water to international issues such as transboundary watercourse disputes is further strengthened by the extraterritorial element of states’ obligations in relation to the right to water: states are obligated to refrain from undertaking any activity within their own territory which will hinder the right to water in another territory. States’ extraterritorial obligation under the right to water requires that states do not only consider the needs of own populations where using watercourses, but also consider the needs of other riparian states and their populations. The obligation therefore reinforces a human needs-focused approach to transboundary watercourse use and dispute negotiations.
2.2.2.1. The Human Right to Water and the Obligation to Undertake Environmental Impact Assessments (EIA) in Environmental Law

Though states’ obligations flowing from the right to water are highly relevant in relation to transboundary watercourses, human rights law does not say much about how assessments of water needs should take place. Recently, however, links between human rights law and environmental law have been made. The Framework Principles on the Human Rights and the Environment (2018) produced by the UN Special Rapporteur on Human Rights and the Environment provide a more specific set of human rights duties with relation to the environment, as an application of existing standards in this area, some of which are relevant to the GERD dispute. Principle 7 asserts that states should provide public information and access to environmental information; and Principle 8 provides that states should:

“avoid undertaking or authorizing actions with environmental impacts that interfere with the full enjoyment of human rights. States should require the prior assessment of the possible environmental impacts of proposed projects and policies, including their potential effects on the enjoyment of human rights.”

Furthermore, Principle 9 states that states should ‘provide for and facilitate public participation in decision-making related to the environment, and take the views of the public into account in the decision-making process.’
Further guidance can be taken from environmental law itself, which sets outs processes to be undertaken as a way of ensuring that environmental issues are dealt with. States have obligations under environmental law to undertake an Environmental Impact Assessment (EIA). The obligation to undertake EIA is entrenched in a range of environmental treaties, including the Maputo Convention which Ethiopia has signed. An EIA is also argued to be required by key obligations of the Kyoto Protocol which both Ethiopia and Egypt have ratified, though the obligation is not as clear here as in, for example, the Aarhus Convention. However, most notably, in a case with clear relevance to the GERD dispute, the International Court of Justice (ICJ) established that the requirement to undertake an EIA was a requirement of customary international law in a case involving Pulp Paper Mills on the River Uruguay that were affecting transboundary water shared with Argentina. The ICJ found that where 'there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource', the requirement for an EIA was a requirement of customary international law. The judgement went on to note that 'due diligence, and the duty of vigilance and prevention which it implies, would not be considered to have been exercised, if a party planning works liable to affect the régime of the river or the quality of its waters did not undertake an environmental impact assessment on the potential effects of such works'.

An EIA embodies key procedural obligations, including the obligation to assess the effect of human-made interventions and projects on transboundary watercourses. Due to the interdependence between the environmental conditions of watercourses and people’s ability to enjoy their human right to water, such an assessment of the effect of intervention on the watercourse as a unit is likely to also shed light on the way in which human rights may be affected. It can thus be used as a tool for assessing the extent to which states are upholding both their internal and extraterritorial human rights obligations. Consequently, EIAs help further the human needs-centred approach to watercourse dispute negotiations.
Moreover, through underscoring the interconnection between the environmental wellbeing of transboundary watercourses and people’s ability to enjoy their human right to water, EIAs make evident the way in which human rights interests may be best facilitated through approaching watercourses as ‘inseparable environmental units’. In other words, as units that cannot be dealt with as a series of separate or distinct in-country state resources. This unitary approach to transboundary watercourses suggests that inter-state cooperation can facilitate not only benefit sharing, but also benefit creation and mutual gains. Through state cooperation and joint management, the resources that states may draw from transboundary watercourses may be increased.\textsuperscript{114} The opportunity for mutual gains as a result of cooperation is crucial for successful conflict negotiation. As Gyzbowski et al argue, through mutual gains agreements ‘[t]he focus of negotiation can shift away from limiting impact on sovereignty, to planning and devising ways and means of maximising benefits’.\textsuperscript{115} A human rights approach draws attention to this opportunity.

Together, the consideration of human rights in watercourse disputes requires a higher level of inclusion of local populations, and moves the focus away from the needs and right of states to the needs and rights of humans. Furthermore, states’ extraterritorial obligations flowing from the human right to water and their obligation to undertake EIAs have highlighted states’ obligations to also consider the human needs of other states’ populations when negotiation transboundary watercourse disputes. Human rights considerations bring attention to the ways in which international agreements and negotiations affect the lives and livelihoods of people on the ground, whichever state they reside in, by affecting the transboundary watercourse units they depend on. Approaching transboundary watercourses as a unit makes evident the way in which state cooperation may pave the way for benefit creation and mutual gains - a key step in any dispute negotiation.
2.3. Legal Principles Combined: Towards an Understanding of Transboundary Watercourses as Inseparable Units

Together, the principles of watercourse law and human rights law considered in this section qualify the rights sovereign states have over the transboundary watercourses flowing through their territory. The principle of equitable and reasonable utilisation requires that states do not only consider their own needs and interests but also that of other states, although it remains vague on what constitutes equitable and reasonable use. But it requires that the benefits of watercourses are shared. As such, equitable and reasonable use arguments may contribute towards the negotiation of transboundary watercourse conflicts over quantity of water by making states take the initial step away from a state sovereignty and security focused approach to transboundary watercourse disputes.

Building on this, the assessment of the right to self-determination and the right to water, in combination with interlinked environmental law principles, makes evident the way in which sharing of transboundary watercourses’ resources needs to benefit not only states but also populations within states. Further, by recognising the unitary nature of watercourses, a human-needs oriented approach suggests there is potential for riparian states to reap mutual gains from their management of transboundary watercourses. Recognising the unitary nature of transboundary watercourses means recognising the way in which the resources available from watercourses in one state depends on how the watercourse is managed in the other riparian states, including how states consult and consider needs of people. It becomes evident that a cooperation on transboundary watercourse management may not only help share benefits but create benefits. The recognition of the opportunity for mutual gain is crucial for states to opt for cooperation and negotiation over conflict and state-centred security approaches.
3. International Legal Principles in Practice: the Examples of the Senegal River, the Euphrates-Tigris River System, and the Indus Basin

This section assesses the extent to which the principles of international law identified in Section 2 have been applied when negotiating watercourse conflicts that share many of the same characteristics as the Egypt-Ethiopia conflict. The section looks specifically at the disputes over watercourse resources in (1) the Senegal River; (2) the Euphrates-Tigris (ET) river system between Turkey, Syria and Iraq; and (3) the Indus Basin between India and Pakistan. It does so in order to examine whether, and consequently how, these principles are utilised in order to circumvent conflict-inducing issues and negotiate agreements. This is achieved, primarily, by assessing the Charter of the Waters of the Senegal River (Senegal Water Charter), the Memorandum of Understanding (MoU) between Turkey and Iraq, the MoU between Turkey and Syria, and the Indus Water Treaty. These watercourse treaties and disputes have been chosen because they are all characterised by many of the same conflict-inducing characteristics as the Egypt-Ethiopia conflict: all three involve infrastructure development and questions concerning quantity of water resources; all three arose between countries with historic enmities; and all three were complicated by larger regional power-balances. Between Pakistan and India, and between Turkey, Syria and Iraq, there are also histories of ongoing distrust and even militarized conflict, and while this conflict has not been over water it means that water issues have to be managed in a way not to exacerbate or ignite other tensions. The three conflicts differ on the level of resolution achieved, providing the opportunity to examine how the principles identified have or have not been utilised in disputes which have (1) largely been resolved; (2) stalled despite promising development; and (3) recently deepened despite acclamation of the long-standing treaty in place (see Table 1). For an overview of inter-state watercourse conflicts in which dams are a causal link, see Annex 1.
<table>
<thead>
<tr>
<th>TREATY/DISPUTE</th>
<th>LEVEL OF CONFLICT IN LEAD UP TO NEGOTIATIONS</th>
<th>PARTIES TO NEGOTIATION</th>
<th>NEGOTIATION PERIOD</th>
<th>STANDING OF TREATY/DISPUTE IN 2020</th>
</tr>
</thead>
<tbody>
<tr>
<td>Senegal Water Charter</td>
<td>Some regional turmoil caused primarily by drought in lead up to original 1972 agreement; low level of conflict in 2002</td>
<td>Mali, Mauritania and Senegal, assisted by the World Bank</td>
<td>2002</td>
<td>Charter frequently cited as example of good practice, low conflict level</td>
</tr>
<tr>
<td>MoUs on ET Basin</td>
<td>1960s - 1990s sees conflict at the brink of war triggered by large-scale development projects, but also some instances of promising development</td>
<td>Bilateral negotiations between Turkey and Iraq and bilateral negotiations between Turkey and Syria</td>
<td>2008-2009 (preceded by friendlier relations and cooperation from beginning of 2000s)</td>
<td>Promising development at standstill, tension between countries linked to Syrian war</td>
</tr>
<tr>
<td>Indus Water Treaty</td>
<td>Long-standing dispute over water sharing leads India to stem flow of tributaries to Pakistan in April 1948</td>
<td>India, Pakistan, assisted by the World Bank</td>
<td>1951-1960</td>
<td>Rekindling of conflict due to dam construction by India</td>
</tr>
</tbody>
</table>
3.1. Integration of Principles of Watercourse Law

3.1.1. The Senegal Water Charter

The Senegal Water Charter negotiated between Senegal, Mali, and Mauritania in 2002, explicitly incorporates the principle of equitable and reasonable use. As there were low levels of conflict in the time leading up to the agreement, the Senegal example is limited in its ability to shed light on how implementation of the principle of equitable and reasonable use may drive a shift from hostility to cooperation, a key question identified in Section 2. Nevertheless, lessons can be drawn from how the Charter operationalised the principle of equitable use.

The Senegal Water Charter goes far in its cooperative approach to water management: it pools states’ sovereignty and gives significant authority to the Senegal River Basin Development (OMVS) and its Standing Committee for Water. The Standing Committee of Water consists of representatives of member states and is charged to define, in accordance with provisions of the charter, the distribution of water. This membership and role informs its operationalisation of the principle of equitable and reasonable use. Rather than implementing the principle as a way of distributing benefits between state parties, the principle is used as a way of distributing the benefits between different sectors such as agriculture, environment and health. This approach furthers an understanding of the transboundary watercourse as a unitary whole, and the necessity of treating it as such to be able to foster mutual gains for the riparian states.

Of particular relevance for the GERD conflict relating to the Nile is the way in which this approach has facilitated joint hydrological projects on the river managed by the OMVS, from which all riparian states are deemed to benefit. This provides a clear example of the way in which a sovereignty-oriented approach to watercourse management is set aside in order to negate potential conflict and foster mutual gains. Whilst this type of sovereignty pooling goes beyond what is called for by the principle of equitable and reasonable use, the Senegal Water Charter provides a pioneering solution as to how the principle of equitable and reasonable use can be applied in order to foster peace and cooperation.
3.1.2. The Memorandums of Understanding (MOUs) on the Euphrates-Tigris (ET) Basin

A more traditional, state-centred approach is evident in the MoUs between Turkey, Iraq, and Syria from 2008-9, relating to the ET river system. The MoU between Turkey and Syria does not reference the principle directly, opting instead for ‘effective utilisation’ of the watercourse through cooperation on the basis of ‘equality, reciprocity and mutual benefit’. Though vague and not directly committing to the foundational principles of international watercourse law, the MoU recognises the mutual interest of the parties in a sufficient and efficient cooperation. The MoU could, therefore, work as a springboard towards the adoption of the principle of equitable and reasonable use. The possibility of such adoption at a later stage is heightened by the reference to the term ‘equitable and reasonable sharing’. This is referenced in the MoU between Turkey and Iraq, albeit as a reference to ‘release equitable and reasonable river waters to Iraq’ rather than to sharing per se. This shows intention from Turkey to adhere to international watercourse law beyond the sovereignty concept. As a result, the states take a key step towards recognising the necessity of considering other riparian’s needs, and the importance of cooperation in order to successfully manage transboundary watercourses. Section 2.1.2. identified this as a key feature of the principle of equitable and reasonable use and key for successful negotiations. This is a significant step in the right direction for states with pre-existing hostile relations.

3.1.3. The Indus Water Treaty

In contrast, the recognition of the need for cooperation in order to foster own gains guided by the principle of equitable and reasonable utilisation is not present in the 1960 Indus Water Treaty between India and Pakistan. The treaty was signed before the relevant legal standards had developed, however, and has often been praised for its durability. This suggests there are alternative ways in which stability may be secured. Sharing the benefits of the Indus River System is achieved by division into the Wester Rivers (Chenab and Jhelum) and the Eastern Rivers (Ravi, Beas and Sutlej). The treaty gives Pakistan more or less ‘absolute territorial integrity’ rights over the western rivers (Pakistan is allowed unrestricted use, India to allow to flow unimpeded), whilst the principle of ‘absolute territorial sovereignty’ is applied to the eastern rivers, granting India control over their resources.
Through this system, water resource management is essentially split rather than shared. But the Treaty did provide for the monthly exchange of daily data (Article VI) future cooperation (Article VII), the establishment of a Permanent Indus Commission (Article VIII) as a mechanism of cooperation and dialogue and data exchange, and a dispute resolution mechanism (Article IX). These mechanisms, which require regular meetings and ongoing dialogue and technical exchange, have been very effective in ensuring ongoing technical cooperation even through periods of armed conflict and tensions relating to other border issues, and can be argued to even be beneficial due to the long-standing tension between India and Pakistan.¹⁴³

However, the overall architecture for how river waters are to be used is dependent on the nature of the watercourse as able to be ‘split’ and governed by two states in its geography. This limits its conflict resolution benefits because there is little foundation for, or history of the cooperation for joint gains necessary to solve the current conflict, triggered by India’s dam constructions.¹⁴⁴ India initiated the construction of the Kishanganga Hydroelectric Project on the Jhelum River in 2007, which Pakistan objected to, arguing that the project would decrease its own quantity of water. Whilst the two countries have followed the dispute resolution mechanisms provided for in the Indus Water Treaty, raised the issue in the Indus Commission, and referred the case to arbitration, these steps have done little to ease the disagreement between the states, although they have continued to meet at the technical level.¹⁴⁵ This case emphasises the way in which the principle of equitable and reasonable use is valuable exactly because of how it encourages reframing of the dispute around human need, thus highlighting cooperation. Cooperation over transboundary watercourses can create positive dependency between states, and may help negotiate any emerging points of tension also in the long term.
Taken together, the three case studies lend support to the argument presented in Section 2 that the introduction of the principle of equitable and reasonable use takes a key step in moving transboundary watercourse disputes beyond an assertion of sovereign rights, and necessitates a consideration of the interests and rights of other riparian states. Moreover, though it is not possible to generalise on three case studies alone, they suggest that the cooperation and mutual dependency facilitated by the principle is fundamental in creating long-term stability between neighbouring states with shared watercourses. Even in the Indus Water Treaty, where the principle of equitable and reasonable use was not central and a ‘split the difference’ approach was used with some success, the longer-term implications point to the ongoing need for cooperative approaches.

This section also suggests that the implementation of mechanisms which foster such mutual dependency is easier if pre-existing relations between the states are friendly. Accordingly, it seemingly underscores the criticism of the principle of equitable and reasonable use that it pre-supposes good relations and cooperation between riparian states, as highlighted in Section 2.1. Finally, the cases show that even where equitable and reasonable use is only marginally advanced, as is the case with Turkey, these agreements establish technical collaboration, information exchange and joint study of water challenges. This serves as the basis by which future water conflict can be resolved because it creates both a channel for the resolution of low level conflicts before they escalate, and provides a common set of facts to work from when negotiating how to operationalize the principle of equitable and reasonable use.
3.2. Integration of Human Rights Law and Interlinked Principles of Environmental Law

3.2.1. Equitable Reasonable Use as a Stepping Stone for Consideration of Human Needs and Environmental Concerns

Moving on to consider the incorporation of human rights and interlinked environmental principles, an analysis of the legal documents assessed suggests a correlation between the level of integration of the principle of equitable and reasonable utilisation, and consideration of human rights and environmental concerns. The Indus Water Treaty creates no significant mechanism for cooperation, and fails to mention both human rights and environmental concerns. It must be emphasised here that these omissions are explained by the treaty being agreed before the adoption of the UNWC, the ICCPR and the ICESCR. The MoUs on the ET river system, setting the framework for some level of cooperation and sharing, also lack explicit mention of human rights or local communities. But both MoUs do directly address climate change and emphasise the pressing nature of climate-induced challenges such as drought and flooding.

Finally, the Senegal Water Charter, guided by the principle of equitable and reasonable utilisation and enshrining a high level of cooperation, emphasises the need to fulfil human rights throughout. It also facilitates the consideration of the needs and rights of, as well as participation from and information sharing with, local communities. Whilst not explicitly mentioning climate change, environmental concerns feature throughout. This suggests that the initial step away from a purely state sovereignty-centred approach inherent in the implementation of equitable and reasonable utilisation, may work as a key driver for further consideration of human rights and environmental concerns.
3.2.2. Climate Change and Environmental Concerns as Key Drivers for Cooperation

At the same time, Section 2.2. suggests that human rights and environmental concerns themselves can drive states’ willingness to cooperate through fostering an understanding of transboundary watercourses as unitary wholes. In the three case studies analysed, this argument is especially relevant given climate change. First, a key reason for negotiating the original 1972 River Agreement on the Senegal River – on which the 2002 Senegal Water Charter builds – was the increasing impact drought and environmental changes had on the ability of riparian states to fulfil the needs of their citizens. This showcases an underlying recognition in the creation of a joint cooperation mechanism that states have limited ability to tackle environmental and climate change related matters unilaterally.

Second, this recognition is also evident in the MoUs governing the ET Basin. In addition to adaptation to climate change being one of the key objectives of the MoUs, both MoUs explicitly enshrine climate change as a key area in which the states are to cooperate. This is significant due to the pre-existing tense relationship between the countries. There is therefore an evident link between the challenge of climate change and states’ recognition of the need for cooperation in both agreements. In this linkage there is an implicit recognition of the unitary nature of transboundary watercourses. The link suggests that climate change may play a key part in forcing the states concerned to recognise the limitations of state-centred unilateral approaches to transboundary watercourse use and the potential for mutual gains through cooperation.

Finally, the recognition of the need for cooperation in the face of climate change is underscored by the insecurity currently surrounding the Indus Water Treaty. As touched on above, the treaty preceded awareness on climate change or legal development of environmental standards. This raises present-day problems because climate change is at the heart of the current dispute, creating water scarcity at a much higher level than before. The dam India has built, according to India itself, is a key climate change adaptation mechanism. From downstream state Pakistan’s point of view, it is threatening its own already dwindling water supplies.
In this situation, the need for a more flexible water treaty that can support climate change adaptation strategies would be welcome. And yet the cooperation mechanisms and dispute resolution mechanisms have to some extent withstood the tests of time, even if the overall approach is one of 'splitting' access to the river, joint commitments to issues such as non-contamination, and establishing mechanisms of dialogue and technical collaboration, rather than focusing more holistically on 'equitable and reasonable sharing'. In relation to the Egypt-Ethiopia conflict, this makes evident the need for the states to move their focus beyond the dam as an issue of national security, and instead recognise climate change as a common threat.

It suggests that a focus on climate change in peace negotiations may prove helpful in fostering an understanding of the need for cooperation.

It also suggests that putting in place strong mechanisms of technical cooperation can play a lasting role.

Through examining the case studies of the disputes on the ET river system, the Indus Water, and the Senegal River, this section suggests that addressing climate change – which in itself is often a key underlying cause of conflict in transboundary watercourse disputes over water quantity – may force an understanding of transboundary watercourses as comprehensive units and consequently provide the necessary incentive for states to cooperate. As such, it supports the argument presented in Section 2.2., that human rights and environmental concerns may further states’ approaches to transboundary watercourses as an opportunity to foster mutual gains rather than a zero-sum game between state interest. This section further suggests that implementation of the principle of equitable and reasonable use may provide a key stepping-stone for such a human needs approach.
4. Conclusion: Principles for Negotiations as Applied to the Ethiopia-Egypt Dispute

At the time of writing, the Egypt-Ethiopia transboundary watercourse disputes are reaching unprecedented levels of tension. The dam is ready to be filled, and whilst Ethiopia continues to argue it could fill the dam unilaterally without a deal, Egypt argues that a deal is necessary. Egypt also continues to approach the issue as one of national security, strengthening Ethiopia’s view of Cairo’s position as based primarily on the desire to maintain hegemony over the Nile. To date, hegemony has rested with Egypt, rooted in claims based on historic treaties. As the issue made its first appearance in the UN Security council meeting on the 29 June 2020, the window of opportunity for successful negotiations of the conflict narrows as the dam continues to progress and be filled.

By drawing together key principles of international law applicable to transboundary watercourse disputes and assessing the extent to which, and with what effect, these principles have been applied in similar disputes to that on the Nile, this report provides a suggested set of principles that should underpin the negotiations between Egypt and Ethiopia – and preferably also Sudan – going forward. While, as Section 1 has outlined, transboundary watercourse disputes over quantity of water will always be political and influenced by national, regional, and global political trends and interests, the main focus here, as in the report overall, is how principles of international law apply to the conflict both as a matter of legal entitlement, but more as a guide to negotiations.

4.1. Equitable and Reasonable Use

First, the report has argued that as a foundational principle of international watercourse law, negotiations and any possible agreement between the countries should be guided by the principle of equitable and reasonable use of transboundary watercourses. Though this principle is vague in many ways, it embodies a key recognition of the shared nature of transboundary watercourses and consequently the necessity of considering the needs and rights of other riparian states.
This is fundamental for successful negotiations between Egypt and Ethiopia. In particular, it would entail a consideration from Egypt’s side of Ethiopia’s right to use the natural resources of the Nile in a way that may potentially impact other riparian states’ current use. From Ethiopia’s point of view, the principle underscores the necessity of an agreement on the use of transboundary watercourses. Willingness from Ethiopia to commit itself to an agreement on the running of the dam is a key step in showing that the building of the dam is not an act of aggression, but could rather benefit the region as a whole because it would make evident the country’s commitment to cooperation over unilateral action.

As a matter of customary law, the principle of equitable and reasonable utilisation is binding on the states. Both states have argued throughout the negotiations to have international law on their side, displaying their eagerness to demonstrate adherence to principles of international law. Adhering to the principle of equitable and reasonable utilisation should therefore be in both their interests. Both the CFA and the 2015 Memorandum of Understanding between Egypt, Ethiopia, and Sudan entrench this principle (in combination with the no significant harm principle). This shows the states’ familiarity with the principle itself, and suggests an initial willingness to adhere to it in their use of the resources of the Nile. The CFA and the Memorandum of Understanding could thus work as building blocks for further adherence and cooperation.

4.2. Human Rights Considerations

The cases studies explored in this report suggest that the initial recognition of the shared nature of transboundary watercourses embodied in the principle of equitable and reasonable use, may function as a stepping-stone for states to approach transboundary watercourses from the point of view of human needs and its interlinkage with environmental protection. This is because the principle builds in a human rights consideration. The necessity of considering transboundary watercourse disputes from a human needs perspective – as underpinned by international human rights law – is the second key principle this report has argued as necessary for the successful negotiation of transboundary watercourse disputes. Specifically, this report has showed that states have obligations flowing from the right to self-determination and the right to water, which should be considered in the negotiation of transboundary watercourses.
In line with the argument presented in Section 2.2., a consideration of human needs in the Egypt-Ethiopia watercourse dispute would enable the states to recognise the need for cooperation and the potential for mutual gains. By moving beyond a state-centred approach to include a consideration of human rights, and the interdependence of human needs on both sides of borders, it highlights the ways in which the interests and needs of Egypt and Ethiopia not only overlap but are also interdependent. Arguably, both Egypt’s desire to ensure access to water for its household and farming needs, and Ethiopia’s desire to draw benefits from the Nile through aggregation of hydropower, have roots in a common interest in the effective management of the Nile.

The necessity of effective water management is heightened by increasing water scarcity caused by climate change. Today one of the key areas of tension in the negotiations of the dispute is water management and use during possible periods of drought.165 Due to the unitary and moving nature of transboundary watercourses, as well as the global nature of climate change, neither state is able to ensure the sustainability of the River Nile on their own, but both states will draw benefit from successful management of the Nile. A human needs approach would highlight this, as can be seen in the Senegal Water Charter analysed in Section 3.

Whilst both Egypt and Ethiopia are parties to both the ICCPR and ICESCR, current negotiations and the 2015 MOU both lack clear incorporation of participation or evident consultation of local communities and peoples.166 Consideration of human rights and the widening of participation in negotiations is often criticised for destabilising negotiation efforts.167 Accordingly, whilst human rights principles should underpin the negotiations in order to further a human needs approach, which may highlight the opportunity for mutual gains between the states, the likelihood of successful implementation of such an approach would require strong combined local and international support to be galvanised around a clear process to introduce it to begin with.
4.3. Climate Change as Driver for the Recognition of Human Needs

The introduction of a strong human rights framework can be facilitated by the implementation of Environmental Impact Assessments (EIA), the third principle of good practice identified in this report. This report argues that states’ obligations to assess environmental impacts flowing from international environmental law may also facilitate a move towards a human needs focused approach to negotiations due to the dependency of local communities on the environmental well-being of transboundary watercourses. In the Egypt-Ethiopia conflict, this would entail pushing for fulfilment of Ethiopia’s obligation under the Maputo Convention\(^\text{168}\) to undertake an EIA of the GERD. What EIAs have already taken place is not entirely clear – there seem to have been two in 2012,\(^\text{169}\) as well as an element of EIA in the International Panel Report. But these are now out of date, and there remains uncertainty as to what they contained, and how far they involved consultation beyond borders if at all. As Section 2.2.2. has argued, a human-needs centred EIA could provide a mechanism to address and consult on ongoing uncertainty around the consequences of the dam and furthering an understanding of the mutual gains that states could achieve through cooperation and a human needs approach. Ideally this would be operationalised as a cross-state initiative, as attempted by the International Panel of Experts in 2013, which laid the ground for in the Senegal Water Charter in that context.

Whilst there have been several attempts at agreeing on the execution of an EIA between Egypt and Ethiopia, there has so far, to the best of the author’s knowledge, not been a comprehensive, publicly-available EIA which considers regional impacts of the dam.\(^\text{170}\) An EIA would ideally have taken place before the building of the dam began, and has not been substituted for by the International Panel’s as yet unpublished report. But ongoing uncertainty of the consequences of the dam, especially in relation to drought, makes evident the continued value of such an assessment.
With climate change at the heart of the conflict of the Nile, a strong focus on the states’ obligation to consider environmental impacts of transboundary watercourse use under environmental law and the way in which cooperation is necessary to tackle the effects of climate change should underpin any negotiations between the states. The ability to take advantage of the enforcement mechanism of Ethiopia’s obligation to undertake an EIA under the Maputo Convention is limited because Egypt is not a party to the convention. Similarly, enforcement of the EIA requirement in the ICJ as articulated in the Pulp Mills case is not possible because Ethiopia has not accepted the ICJ’s contentious jurisdiction. Nevertheless, an EIA may benefit Ethiopia by illustrating the ways in which the dam may benefit all downstream states, including Egypt.

4.4. Legal Principles Combined: the Need for Cooperation on Transboundary Water Management

As noted by Under-Secretary-General Rosemary DiCarlo in the UN Security Council Meeting on the dispute on 29 June 2020:

"climate change, combined with projected demographic growth and socio-economic changes, will increase water management challenges worldwide... Cooperation is not a zero-sum game. It is the key to successful collective effort to reduce poverty and increase growth, thus delivering on the development potential of the region."

On the eve of the rainy season and on the brink of violent conflict, with domestic capabilities in all countries stretched further due to the ongoing Covid-19 crisis, the need for Egypt and Ethiopia to cooperate is evident. This report finds that the legal principle of equitable and reasonable utilisation, the necessity of a human needs approach underpinned by states’ human rights obligations, and the recognition of transboundary watercourses as unitary wholes with vulnerability to climate change driven by environmental law, may foster such cooperation. At the heart of these observations lies the notion that successful negotiations over a transboundary watercourse on which hundreds of millions of people rely, needs to be human needs focused. Through a human needs focused approach to transboundary watercourse disputes, the opportunity for states to foster mutual gains and thus move away from the idea of transboundary watercourse use as a zero-sum game is evident.
Through the assessment of the usefulness of the principles of international law to transboundary watercourse over quantity of water, and the application of these principles to the Egypt-Ethiopia conflict, it is clear that international law, in itself, does not resolve the conflict at hand. Transboundary watercourse use and management is influenced and decided by domestic, regional, and global power dynamics as well as global and regional environmental and climate changes, many aspects of which international environmental law stands unable to regulate or influence.

The international law which applies in this context – historic treaties between states, customary law, and regional treaties where signed – is complicated, indicating how choice of which law applies and attitudes towards the relative legal framework are part of the political dispute, rather than mechanisms which clearly resolve it. Nevertheless, contemporary approaches to human rights treaties, which both Egypt and Ethiopia are party to, taken in conjunction with wider principles of good practice as set out in environmental law and watercourse law, provide a framework which can guide how to support resolution of the problem. The principles of international law applicable to transboundary watercourses, though at times vague, together shift the focus away from states’ sovereign rights towards the need for cooperation between states and consideration of entities beyond states. In doing so, it provides guiding principles that can inform conflict management and resolution. This illustrates the value of international law consideration in dispute negotiation.
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Yihdego Z, Rieu-Clarke A and Cascão AE, *How has the Grand Ethiopian Renaissance Dam changed the legal, political, economic and scientific dynamics in the Nile Basin?* (Taylor & Francis 2016)


**Contributions to Edited Works**


**Books**


Dubois O, *The state of the world’s land and water resources for food and agriculture: managing systems at risk* (Earthscan 2011).


Online Resources


Annex 1: Overview of Inter-state Water Conflicts in which Infrastructure Development (Dams) are a Causal Link.

This overview is taken from Factbook.com which provides a mapping of environmental conflicts across the world. When filtering for conflict with an international dimension, conflicts that are about water and conflicts which have ‘infrastructure development changes the allocation of water’ as a causal link, the factbook reports 20 conflicts. Two of these identified conflicts are intra-state conflicts and are thus not included here. Additionally, conflicts which do not concern dams and conflicts which appear twice (for example the Nile conflict between Egypt and Ethiopia and the Nile conflict as concerning the larger river basin and other riparians) have been filtered out manually. This leaves 12 conflicts.
<table>
<thead>
<tr>
<th>DISPUTE</th>
<th>STATES INVOLVED</th>
<th>PERIOD OF CONFLICT</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dam projects and disputes in the Mekong River Basin</td>
<td>Lao, Cambodia, Vietnam, Thailand, China</td>
<td>1995-ongoing</td>
</tr>
<tr>
<td>Transboundary water disputes between Afghanistan and Iran</td>
<td>Afghanistan, Iran</td>
<td>2001-ongoing</td>
</tr>
<tr>
<td>Iraq-Iran: from Water Disputes to War</td>
<td>Iraq, Iran</td>
<td>1994-1988</td>
</tr>
<tr>
<td>Turkey-Armenia: water cooperation despite tensions</td>
<td>Armenia, Turkey</td>
<td>1990-ongoing</td>
</tr>
<tr>
<td>Disputes over GERD</td>
<td>Ethiopia, Egypt, Sudan</td>
<td>2011-ongoing</td>
</tr>
<tr>
<td>Yarmouk River: Tensions and cooperation between Syria and Jordan</td>
<td>Syria, Jordan</td>
<td>1948-ongoing</td>
</tr>
<tr>
<td>Turkey, Syria and Iraq: Conflict over the Euphrates-Tigris</td>
<td>Iraq, Turkey, Syria</td>
<td>1960-ongoing</td>
</tr>
<tr>
<td>Dam conflict between Kyrgyzstan and Uzbekistan</td>
<td>Kyrgyzstan, Uzbekistan</td>
<td>1980-ongoing</td>
</tr>
<tr>
<td>Salween River dam conflict in Myanmar</td>
<td>Myanmar, Thailand, China</td>
<td>2013-ongoing</td>
</tr>
<tr>
<td>India and Bangladesh conflict over Ganges river</td>
<td>India, Bangladesh</td>
<td>1957-ongoing</td>
</tr>
<tr>
<td>Water conflict and cooperation between India and Pakistan</td>
<td>Pakistan, India</td>
<td>1947-ongoing</td>
</tr>
<tr>
<td>Rogun dam conflict between Tajikistan and Uzbekistan</td>
<td>Tajikistan, Uzbekistan</td>
<td>1991-ongoing</td>
</tr>
</tbody>
</table>

The Senegal River does not feature here because the Senegal River Charter was concluded without significant conflict leading up to it, as set out in Section 3.
Endnotes


2 Mesfin M Mekonnen and Arjen Y Hoekstra, ‘Four billion people facing severe water scarcity’ (2016) 2 Science advances e1500323, p. 1


4 Olivier Dubois, The state of the world’s land and water resources for food and agriculture: managing systems at risk (Earthscan 2011), p. 21


6 Ibid, p. 11

7 CESCR, General Comment No. 15, para 1


9 See, for example, Thomas Homer-Dixon, ‘Environmental scarcities and violent conflict: evidence from cases’ (1994) 19 International Security 5; Aaron T Wolf, Criteria for equitable allocations: the heart of international water conflict (Wiley Online Library 1999); Lucia De Stefano and others, ‘Assessment of transboundary river basins for potential hydro-political tensions’ (2017) 45 Global Environmental Change 35


12 ibid, p. 25; De Stefano and others, ‘Assessment of transboundary river basins for potential hydro-political tensions’, p. 39-40

13 Mandel, ‘Sources of international river basin disputes’, p.25


17 Zeray Yihdego, Alistair Rieu-Clarke and Ana Elisa Cascão, How has the Grand Ethiopian Renaissance Dam changed the legal, political, economic and scientific dynamics in the Nile Basin? (Taylor & Francis 2016), p. 504


25 Agreement (with annexes) for the full utilization of the Nile Waters (Signed at Cairo, on 8 November 1959) UNTS 6519


Abdulrahman, ‘The River Nile and Ethiopia’s Grand Renaissance Dam: challenges to Egypt’s security approach’, p. 143. Sudan, for example, has shown increasing sympathy for Ethiopia’s position – significantly it rejected a Arab league resolution in March 2020 which expressed support for Cairo in the Negotiations, see https://www.al-monitor.com/pulse/originals/2020/03/egypt-sudan-ethiopia-renaissance-dam-dispute-arab-league.html Can be cut, the main thing I wanted to get across was developments in the power dynamics in the region

Agreement on the Nile River Basin Cooperative Framework (CFA), Available at: https://www.nilebasin.org/documents-publications/30-cooperative-framework-agreement/file

CFA, art. 3(4)

Fred H Lawson, ‘Egypt versus Ethiopia: the conflict over the Nile Metastasizes’ (2017) 52 The International Spectator 129, p. 136

ibid, p. 136

ibid, p. 139

See typology of water conflicts by Song and Whittington, Jennifer Song and Dale Whittington, ‘Why have some countries on international rivers been successful negotiating treaties? A global perspective’ (2004) 40 Water Resources Research

See Zeitoun and Warner, ‘Hydro-hegemony—a framework for analysis of trans-boundary water conflicts’,

Lawson, ‘Egypt versus Ethiopia: the conflict over the Nile Metastasizes’, p. 139; Mandel, ‘Sources of international river basin disputes’, p. 47-48


Agreement on Declaration of Principles, arts, 3 and 4


47 McIntyre, Environmental protection of international watercourses under international law, p. 13


49 Wolf, Criteria for equitable allocations: the heart of international water conflict, p. 6

50 McIntyre, Environmental protection of international watercourses under international law, p. 17, this point is repeated in much of the literature on watercourse law without any clear explanation or suggested correlation to the development of the law

51 Charter of the United Nations (1945), Article 2(1)

52 McCaffrey, 'The harmon doctrine one hundred years later: buried, not praised', p. 550-551


54 McIntyre, Environmental protection of international watercourses under international law, p. 15


56 Convention on the Protection and Use of Transboundary Watercourses and International Lakes (CPUTWIL), (adopted March 1992, entered into force October 1996), UNTS 269 and


57 The issue of whether this customary law technically binds either is complicated as it depends on additional matters such as whether an exception has been stated; whether the states have acted as if bound; and *opinio juris*. These issues are beyond the scope of this report, except to note that the Convention at the very least acts to guide good practice in the resolution of the dispute and therefore remain ‘useful’.


60 Art. XXIV of the Maputo Convention states that in relations between parties to the old convention (the Algiers Convention) and the revised convention (the Maputo Convention), the provisions of the old convention governs.

61 Agreement on Declaration of Principles


64 UNWC, art. 5(1)

65 UNWC, art. 7(1)


69 UNWC, art.7(2)


71 McIntyre, Environmental protection of international watercourses under international law, p. 23

72 Lucius Caflisch, 'The law of international watercourses: achievements and challenges' in Laurence Boisson De Chazournes, Christina Leb and Mara Tignino (eds), International Law and Freshwater: the Multiple Challenges (E. Elgar 2013), p. 25


74 ILA, Berlin Rules on Water Resources Law, art. 12, Commentary p. 20

75 McIntyre, Environmental protection of international watercourses under international law, p. 54

76 ibid, p. 53

77 Wolf, Criteria for equitable allocations: the heart of international water conflict, p. 9

78 Caflisch, 'The law of international watercourses: achievements and challenges', p. 70
79 UNWC, art. 6 state that ‘1. Utilization of an international watercourse in an equitable and reasonable manner within the meaning of 5 requires taking into account all relevant factors and circumstances, including: (a) Geographic, hydrographic, hydrological, climatic, ecological and other factors of a natural character; (b) The social and economic needs of the watercourse States concerned; c) The population dependent on the watercourse in each watercourse State; (d) The effects of the use or uses of the watercourses in one watercourse State on other watercourse States; (e) Existing and potential uses of the watercourse; (f) Conservation, protection, development and economy of use of the water resources of the watercourse and the costs of measures taken to that effect; (g) The availability of alternatives, of comparable value, to a particular planned or existing use.

80 International Convention on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), art. 1; ICESCR, art 1


82 In signing the ICESCR Egypt declared: ... Taking into consideration the provisions of the Islamic Sharia and the fact that they do not conflict with the text annexed to the instrument, we accept, support and ratify it ... At the time of writing Ethiopia also had in place a nationwide State of Emergency due to the ongoing Covid-19 pandemic some of the measures of which ‘may involve a partial derogation form the obligations under the International Covenant of Civil and Political Rights’ such as the freedom of movement. See C.N.243.2020.TREATIES-IV.4 (Depositary notification)


85 ICCPR, art. 25

86 General Comment No. 12, para 6; see also Social and Economic Rights Action Centre (SERAC) and Another v Nigeria, African Commission on Human and People’s Rights (ACHPR) Communications 155/96 15th Annual Activity Report, AHRLR 60

87 Rio Declaration on Environment and Development, principle 10, See also Social and Economic Rights Action Centre (SERAC) and Another v Nigeria, African Commission on Human and People’s Rights (ACHPR) Communications 155/96 15th Annual Activity Report, AHRLR 60. The case closely tie together states’ obligation to respect peoples’ self-determination and obligation to protect the environment though arguing that states have an obligation to maintain an environment that benefit the lives and health of local communities

89 ICESCR and ICCPR, art. 1(2)


91 ICESCR and ICCPR, art. 1(1)


93 Hannah Arendt saw the right to self-determination as the right to have rights, see Hannah Arendt, *The origins of totalitarianism* (Third edition. edn, London 1967), p. 279-297

94 UN Committee on Social, Economic and Cultural Rights (CESCR), General Comment No. 15: The Right to Water (Arts 11 and 12 of the Covenant), (23 January 2003) UN Doc E/C/12/2002/11 (General Comment No. 15)

95 ICESCR art. 11

96 ICESCR art. 12

97 General Comment No. 15, para 2


99 ACPHR, art. 20

100 General Comment No. 15, para 17

101 General Comment No. 15, para 21

102 General Comment No. 15, para 17

103 Stephen C McCaffrey, ’A human right to water: Domestic and international implications’ (1992) 5 Geo Int’l Envtl L Rev 1, p. 15

104 General Comment No. 15, para 35

105 General Comment No. 15, para 31

107 Significantly UNWC, art 3(h)

108 Maputo Convention, art. XIV 2(b)

109 Kyoto Protocol on the United Nations Framework Convention on Climate Change, (adopted December 1997, entered into force September 2005), UNTS 2303, see art. 2.3, 3.14,12.3(a), 12.5, 13.4(a). As signatories they are not to undertake actions that would negate the obligations of the treaty, even though the states are not fully bound by it.


112 Ibid, paragraph 204.


116 Charter of the Waters of the Senegal River (singed on 28 May 2002), Available at: https://iea.uoregon.edu/treaty-text/2002-senegalriverwatercharterentxt


120 Mary Miner and others, ‘Water sharing between India and Pakistan: a critical evaluation of the Indus Water Treaty’ (2009) 34 Water International 204, p. 204; Margaret J Vick, ‘The Senegal River Basin: A retrospective and prospective look at the legal regime’ (2006) Natural Resources Journal 211, p. 211-212; Laurence Boisson de Chazournes, ‘The uses of international watercourses and equity’ (2018) , p. 51. It must be noted that in the case of the Senegal River dams were not a trigger for the conflict but were rather built in cooperation after the first international water agreement was agreed in 1972.


122 El-Fadel and others, ‘The Euphrates–Tigris Basin: A case study in surface water conflict resolution’, p. 1; Wolf and Newton, ‘Case study of transboundary dispute resolution: The Indus water treaty’, p. 3-4

123 The Convention Concerning the Status of the Senegal River (Signed 11 March 1972); Mandel, ‘Sources of international river basin disputes’, p. 54

124 Al-Khasawneh, ‘Do judicial decisions settle water related disputes?’, p. 345; Boisson de Chazournes, ‘The uses of international watercourses and equity’, p. 51


126 ibid, p. 288-289

127 ibid, p. 291

128 Wolf and Newton, ‘Case study of transboundary dispute resolution: The Indus water treaty’, p. 1

129 Charter of the Waters of the Senegal River, art. 4

130 Mandel, ‘Sources of international river basin disputes’, p. 54

131 Organisation pour la mise en valeur du fleuve Sénégal (OMVS)

132 Charter of the Waters the Senegal River, Chapter 5
133 Charter of the Waters of the Senegal River, Chapter 5

134 Charter of the Waters of the Senegal River, art. 2 and 19, and chapter 3,


136 Ibid, p. 212

137 Memorandum of Understanding between Turkey and Syria, art. 1

138 Memorandum of Understanding between Turkey and Iraq, art. 2(a)

139 1960 Indus Water Treaty


142 Indus River Water treaty, Art. 2 and 3

143 Mandel, ‘Sources of international river basin disputes’, p.39

144 Boisson de Chazournes, ‘The uses of international watercourses and equity’, p. 51


146 We are indebted to Anna Schulz for bringing this point to the paper.

147 Implicit mentions the right to water can be found in Memorandum of Understanding between Turkey and Syria, art. 2(c), and Memorandum of Understanding between Turkey and Iraq art. 2(i)

148 Memorandum of Understanding between Turkey and Syria, art. 2(o), see also preamble for direct reference to ‘sustainable development’; Memorandum of Understanding between Turkey and Iraq, art. 2(a).

149 Explicit mention of human rights can be found in art. 4, art. 5,6, 8,9 , 10 and 18 refer to human rights through its emphasis on the need for water for drinking water, food and domestic uses

150 Charter of the Waters of the Senegal River, art. 5, 13 and 23

150 Charter of the Waters of the Senegal River, Chapter 4, and art, 2,3,5, 7, 8 and 10

153 Memorandum of Understanding between Turkey and Syria, art. 2(o), see also preamble for direct reference to ‘sustainable development’; Memorandum of Understanding between Turkey and Iraq, art. 2(a).


158 Ibid


160 International Crisis Group, ‘The Nil Dam: A Short Window to Embrace Compromise’

161 International Crisis Group, ‘The Nil Dam: A Short Window to Embrace Compromise’

162 CFA, art. 3(4)

163 Agreement on Declaration of Principles, art. IV

164 See UNWC art. 6

165 International Crisis Group, ‘The Nile Dam: A Short Window to Compromise’

166 Federal Democratic Republic of Ethiopia Office of the Prime Minister, ‘Press Release on the Extraordinary Meeting of the Bureau of the African Union Assembly on the Grand Ethiopian Renaissance Dam’ (June 27th 2020), Available at: https://twitter.com/PMEthiopia/status/127677215856430672/photo/1 [Accessed 9th July 2020]
This especially evident in the on-going debates around the inclusion of women and women’s rights in peace negotiations and interlinks with the larger debate on peace vs justice in peace negotiations. See for example, Christine Bell and Catherine O’Rourke, ‘Peace agreements or pieces of paper? The impact of UNSC Resolution 1325 on peace processes and their agreements’ (2010) 59 International & Comparative Law Quarterly 941; and Ellen Lutz, ‘Human rights and conflict resolution from the practitioners’ perspectives’ (2003) 27 Fletcher Forum of World Affairs 173


In disputes between parties, ACCNN art. XXX sets out referral to the Court of Justice at the African Union as key dispute resolution mechanism

The Algiers Convention does not include an obligation to undertake an EIA, thus enforcement mechanisms under this convention cannot be utilized

https://www.icj-cij.org/en/declarations


https://factbook.ecc-platform.org gives a helpful overview of environmental conflicts in the world, and lets the user filter for variables such as triggers and interstate/intrastate

See https://factbook.ecc-platform.org/conflicts?f%5B%5D=index_type_of_resource%3A5&f%5B%5D=index_conflict_national_international%3A1&f%5B%5D=index_causal_link%3Asocial_6
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The Political Settlements Research Programme (PSRP) is centrally concerned with how political settlements can be made both more stable, and more inclusive of those affected by them beyond political elites. In particular, the programme examines the relationship between stability and inclusion, sometimes understood as a relationship between peace-making and justice.

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2. How can political settlements be improved by internally-driven initiatives, including the impact of gender-inclusive processes and the rule of law institutions?

3. How, and with what interventions, can external actors change political settlements?

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