

# International water law and GERD

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Eastern Nile Media Training, 28<sup>th</sup> July to 1<sup>st</sup> August,  
2016, Addis Ababa, Ethiopia

# Presentation overview



Objective:

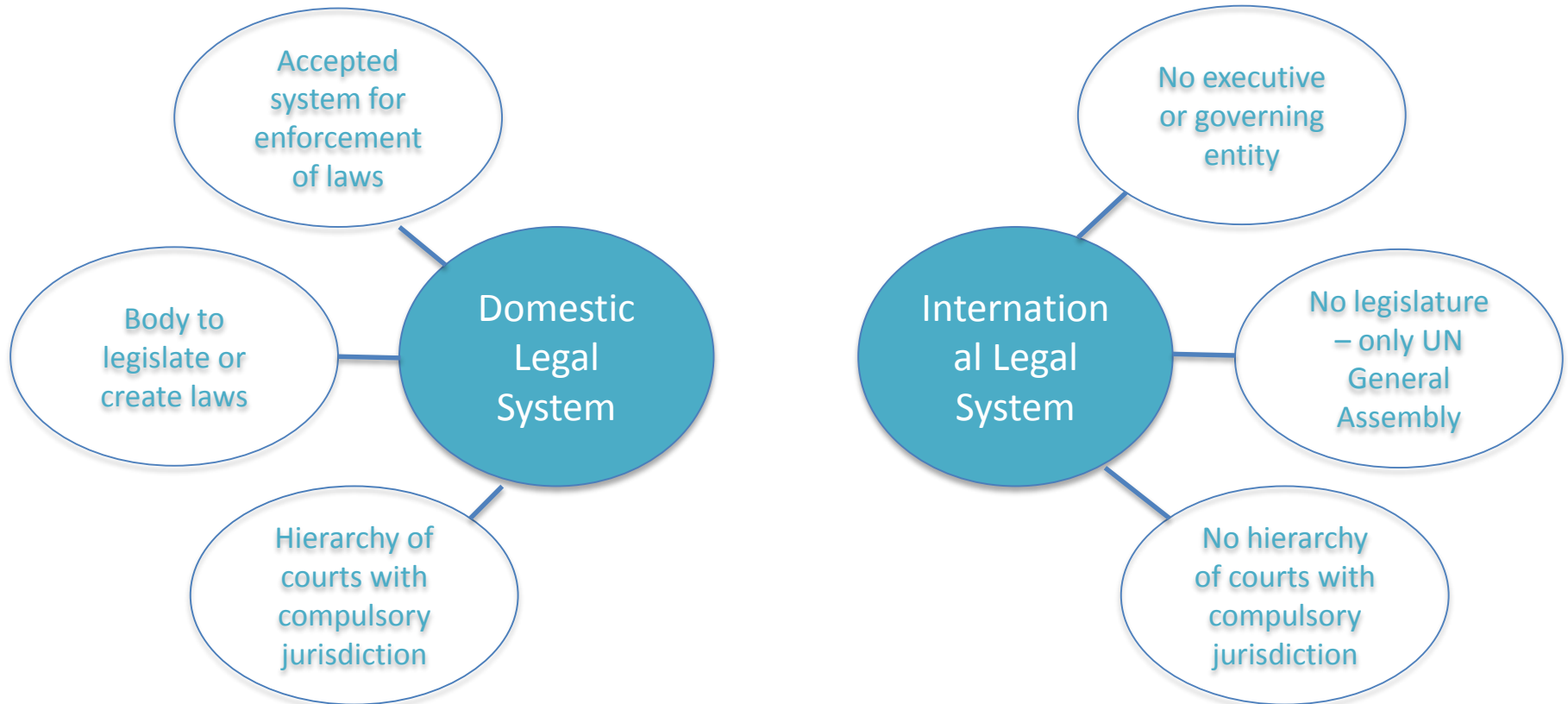
“Provide participants with in-depth understanding and analysis on key, legal issues concerning GERD”

# WHAT IS INTERNATIONAL LAW?

# Why is international law important?

- All communities develop rules and principles
  - Drive on one side of the road (or the other)!
  - Limit fish catch within a lake
- Adherence to certain values and standards
- Certainty, predictability, transparency and accountability
  - What a State is entitled to do
    - Freedom of navigation
  - What a State is obliged to do
    - Diplomatic rights
  - What a State must not do
    - Acts of genocide

# International law is not the same as domestic/ national law



# International law

- What is the effect of their being no legislative body?
  - Must demonstrate that State has given its consent to be bound by international law
  - Requires examination of sources of international law
- What is the effect of no compulsory courts and no overarching enforcement agency
  - Requires self-enforcement
    - States will only agree to what they feel comfortable with
      - Might just cement what they are doing anyway!
      - Difficult to move beyond the *status quo*
  - Rights and obligations must be clear so performance can be measured
  - Reputation and reciprocity becomes important
    - States do not want to be seen to be breaching their international legal obligations

# Where do we find international law?

Primary sources of international law [**create law**]

- **International conventions**
- **International custom**
- General principles of law

Secondary sources [**declare existing law**]

- Judicial decisions
- Teachings of the most highly qualified publicists

Article 38, Statute of the International Court of Justice



# Treaties

- 1969 Vienna Convention on the Law of Treaties (VCLT)
  - ‘An international agreement concluded between States in written form **and governed by international law**’
- Treaties are binding!
  - Reiterated by international courts
  - Only deviate from commitments in very limited circumstances
  - Must be implemented in *good faith*



# Treaties continued

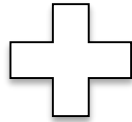
- How can you determine whether an instrument is a treaty, ie., legal binding or something else?
- Title is one indicator but not conclusive
  - Convention, treaty and agreement suggests legally binding
  - Might clearly be non binding
    - » “Non-legally binding authoritative statement of principles for a global consensus on the management, conservation and sustainable development of all types of forests”
  - Charter, declaration or covenant less clear
    - » UN Charter – binding; Charter on Economic rights and duties – non-binding
- Look beyond title and try to discover whether there is state intention to be legally bound
  - Does the content of the instrument seek to bind the parties
    - » Are rights and obligations clearly conferred?
      - ‘The states shall ...’ versus ‘The states should endeavour to ...’
    - » Are there clear procedures and timelines for implementation?
    - » Do institutional mechanisms support reporting and monitoring compliance?
  - Does process of adoption suggest legally binding, e.g. requirement to ratify instrument at the national level? Are states required to deposit instrument with UN Treaty Office, African Union, etc.

# Custom

- ‘Unwritten law’
- A general practice accepted as law
- Two elements
  - Practice: the material element
    - Use of certain weapons
    - Duration, repetition, consistency, and generality
  - *Opinio juris sive necessitatis*: the psychological or subjective element
    - State belief that it is bound by a legal obligation
- Evidence
  - Authoritative interpretations of what States say and do
  - Official statements of government; national laws and policies; domestic judicial decisions; diplomatic correspondence; treaties; UN General Assembly declarations, ministerial declarations, and so forth
- If there is sufficient evidence to suggest that States believe a particular practice is legal binding then it is!

# What makes international law work?

Legal framework



Communities of practice



Shared understanding

- Internal characteristics
  - Determinacy
  - Coherence, etc.

- Processes and networks at sub-basin, basin, regional and global levels, e.g. joint basin organisations, working groups, joint projects and programmes

- Awareness raising
- Trust and capacity building through workshops

- Brunnée and Toope, *Legitimacy and legality in International Law* (2010)
- Franck, Legitimacy in the International Legal System, *AJIL* (1988)

# WHY IS INTERNATIONAL *WATER* LAW (IWL) IMPORTANT?

# Concerted effort strengthen IWL at the global level

- UN GA Resolution, 1959
  - UN took up study of legal problems relating to international rivers
- 1970 – 1994
  - International Law Commission (ILC) worked with States to develop draft Articles on the Law of the non-navigational uses of international watercourses
  - Extensive process of surveying treaty practice
- 1997
  - UN Resolution adopting text of the UN Watercourses Convention
- Recorded vote
  - 103 nations in favour (3 subsequently informed the UN GA they they intended to vote in favour)
  - 27 Abstentions
  - 3 nations against (Burundi, China, Turkey)

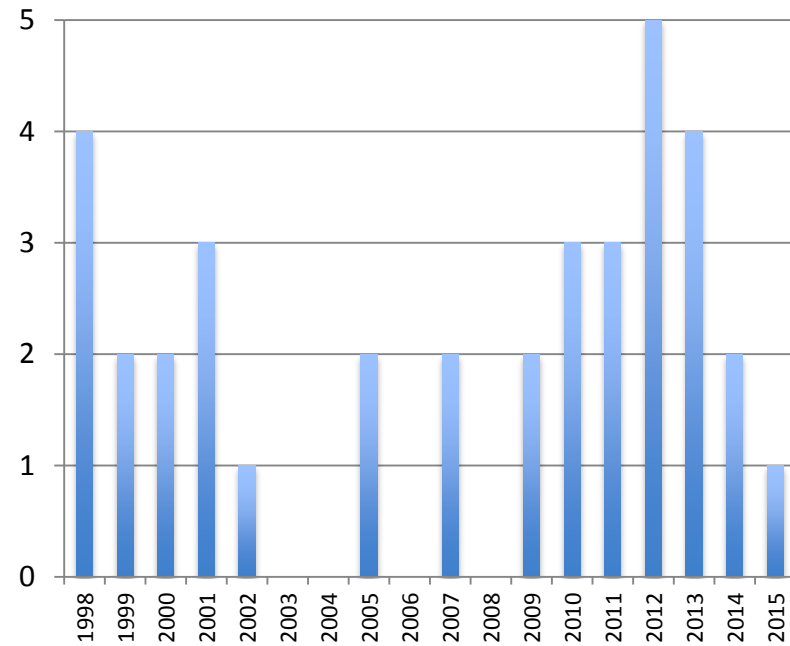


# Support for the UNWC amongst Egypt, Ethiopia and Sudan

- Voting record
  - In favour: Sudan
  - Abstaining:
    - Egypt
      - Welcomed adoption of UNWC and hope that it would promote better cooperation among the States of the Nile basin
      - Sought to clarify certain points: Art 3 existing agreements; Art 5 & 7 balance between ERU and NSH
    - Ethiopia
      - Did not vote against as UNWC provide useful guide for states
      - Concerns over Art. 3 existing agreements; Art 5 & 7 balance between ERU and NSH; and Part III notification
- Some states abstaining have now joined the UNWC
  - Belgium, France, Spain and Uzbekistan
  - State opinion on UNWC may evolve following developments at a country/ basin level

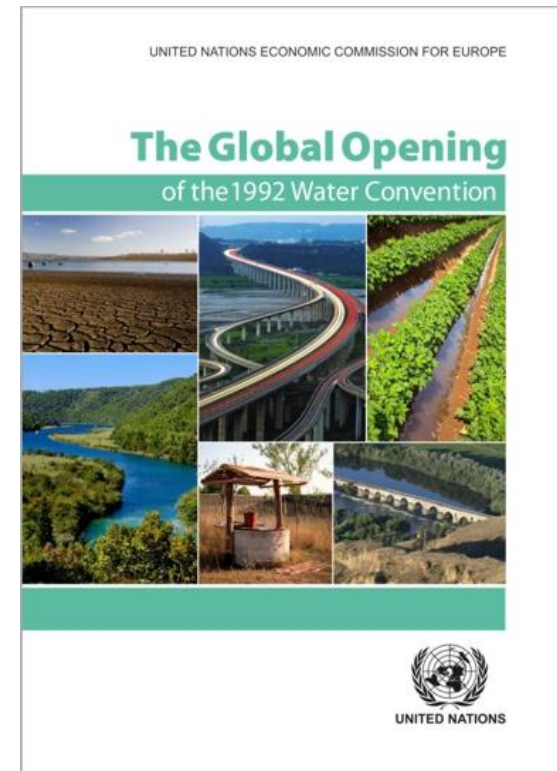
# Support for the UN Watercourses Convention (UNWC)

- First global convention setting out customary international law in the field
- Slow start
  - Only 13 ratifications from 1997 to 2004
  - 35 ratifications required for entry into force
  - Slow start due to
    - Misunderstandings
    - Lack of champions
    - Low awareness
    - Treaty congestion
- 2006 coalition led by WWF promote UNWC
  - Ratifications pick up
  - Entry into force following Vietnam's ratification in 2014
  - Currently 36 parties and significant momentum in support of the Convention

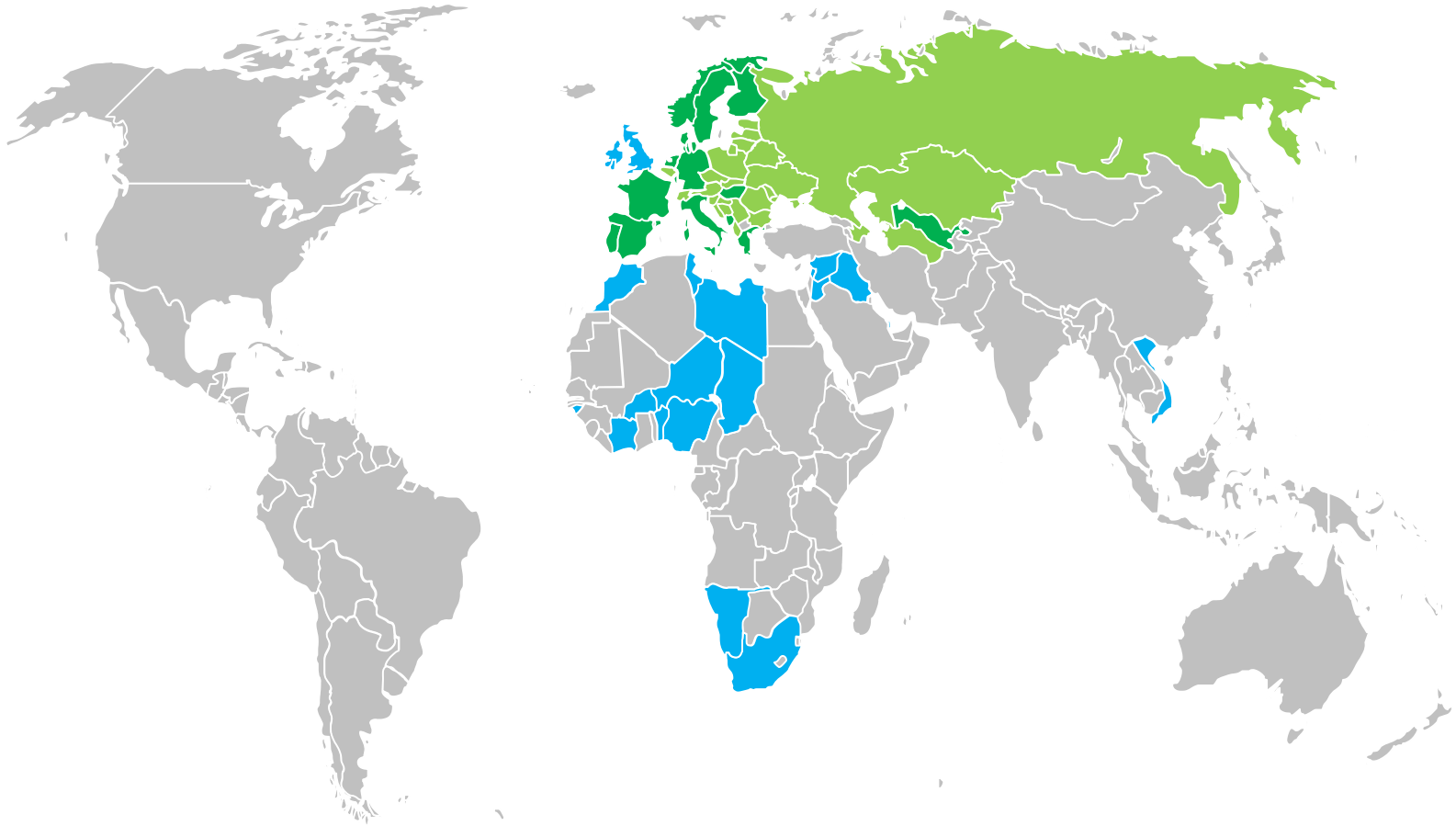


# UNECE Water Convention also operating at a global level

- 1992 UN Economic Commission for Europe adopts *Convention on the Protection and Use of Transboundary Watercourses and International Lakes*
- Framework instrument designed to support transboundary cooperation across multiple basins
- Embodies key rules and principles of IWL
- Supported by institutional framework, e.g. meeting of parties, working groups, and secretariat.
- 2003 UNECE Water Convention amended to allow all States to join
  - Amendment now operational
  - East African states already participate in knowledge sharing workshops organised by UNECE
- UNECE Water Convention and UNWC complementary
  - Advantages in promoting both together as a package of norms



# States party to one or both instruments



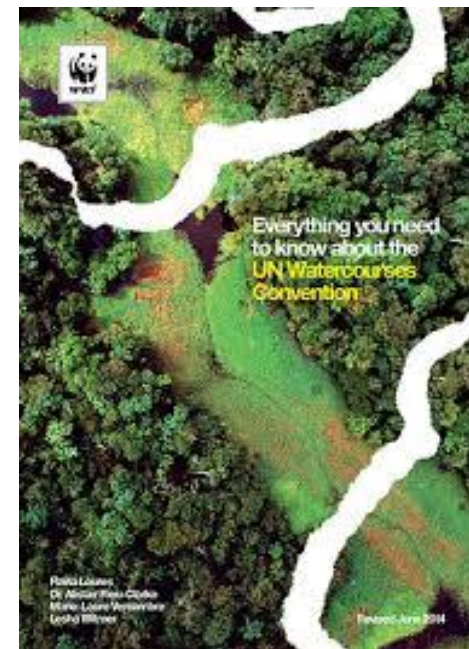
Party to UNECE Water  
Convention (1992)

Party to UN Watercourses  
Convention (1997)

Party to both Conventions

# Value added of global water conventions

- Value added in specific countries/ basins becoming a party
  - Address gaps in treaty architecture
  - Supplement existing arrangements
  - Harmonise different basins arrangements
  - Catalyst for further cooperation
- International/ regional organisations viewing UNWC and UNECE Water Convention as tools for fostering cooperation and strengthening implementation of existing agreements
  - Knowledge exchange
  - Capacity building
- Irrespective of its entry into force, conventions have influenced treaty practice at the basin level
  - UNWC influenced text of the CFA
  - Entry into force of UNWC just before adoption of DoPs
  - Development of IGAD Regional Water Policy and Protocol drew from UNWC



[www.unwater.org/downloads/wwf\\_un\\_watercourses\\_brochure\\_for\\_web\\_1.pdf](http://www.unwater.org/downloads/wwf_un_watercourses_brochure_for_web_1.pdf)

# Growing momentum supporting transboundary water cooperation

**6.5**

**By 2030, implement IWRM at all levels, including transboundary cooperation as appropriate**



**Indicator: proportion of transboundary basin area with an operational arrangement for water cooperation**

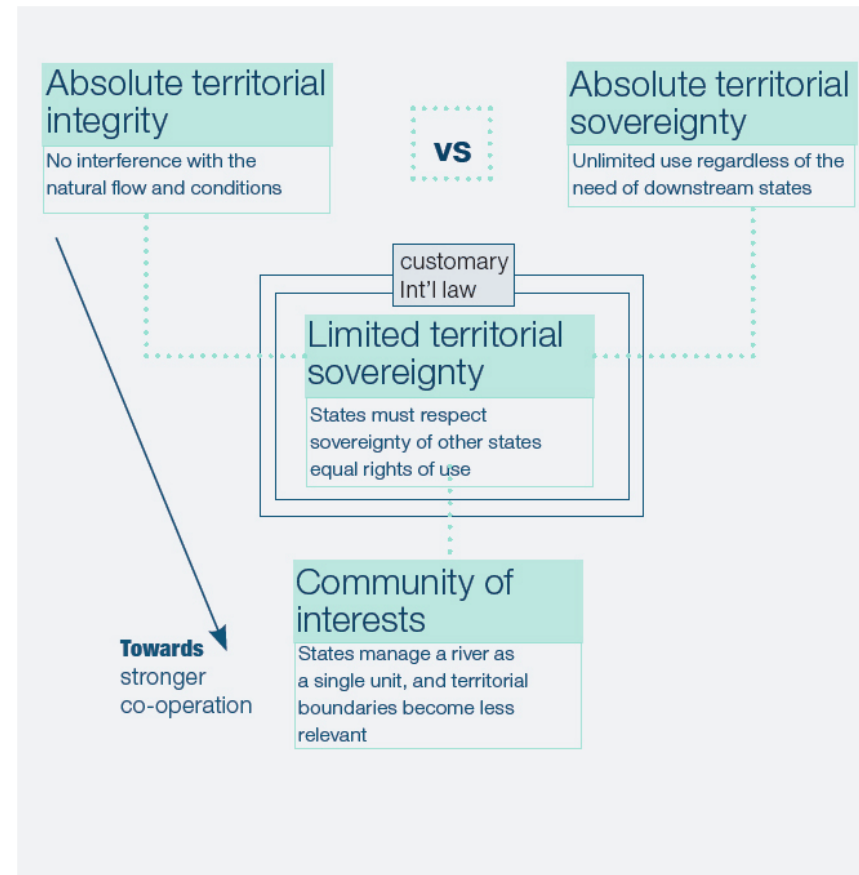
# WHAT ARE THE KEY LEGAL RIGHTS AND OBLIGATIONS CONCERNING INTERNATIONAL WATERCOURSES?

# Key content of international water law

Key Elements	Details
1. Scope	<ul style="list-style-type: none"><li>• Legal reach (what waters?)</li><li>• Definitions (watercourse; uses)</li><li>• Parties (States; RIEOs)</li></ul>
2. Substantive Norms	<ul style="list-style-type: none"><li>• Legal duties &amp; entitlements (equitable and reasonable utilisation; due diligence; protection)</li><li>• Rules of substance (general or precise)</li></ul>
3. Procedural Rules	<ul style="list-style-type: none"><li>• Rules of procedure (duty to cooperate as bridge)</li><li>• Notification / exchange of information</li></ul>
4. Institutional Mechanisms	<ul style="list-style-type: none"><li>• Joint bodies (RBOs)</li><li>• Conference of the Parties (MoP; CoP)</li><li>• Organisations / organs (Ministerial level; other)</li></ul>
5. Dispute Settlement	<ul style="list-style-type: none"><li>• Dispute avoidance (consultation)</li><li>• Dispute settlement (Art. 33 UN WC; other)</li><li>• Compliance verification (reporting; facilitation)</li></ul>

# Key substantive norms

- Who gets, what, when?
- Limited territorial sovereignty
  - Sovereign *right* to exploit own natural resources
  - *Responsibility* to ensure that activities within jurisdiction or control do not affect rights of other States
  - Established principle of international law



# Equitable and reasonable utilization (ERU)

- ERU cornerstone principle of IWL
  - Reflective
    - Customary international law
    - Limited territorial sovereignty
- Watercourse states...
  - have an equitable *right* to the use and benefits from an international watercourse
  - an *obligation* not to deprive other watercourse States of their equitable right
- Reconcile competing interests on basis of equity with a view to maximizing benefits whilst minimizing any harm
  - Recognises need for sustainability
  - Protect interests of present and future generations
  - Protection of ecosystems gaining greater importance

# How to determine ERU

- Requires taking into account all relevant factors (Art 6, UNWC)
  - Natural characteristics
  - Socio and economic needs
  - Existing and potential uses
  - Impact of uses
  - Availability of alternatives
- No use enjoys inherent priority (Art. 10, UNWC)
  - Special regard given to vital human needs
- ERU requires effective process to be in place to determine and reassess relevant factors



# No significant harm

- Evolved alongside ERU
- Also based on limited territorial sovereignty
- ‘Significant harm’
  - More than perceptible or trivial
  - Real impairment of use
    - Public health, industry, property, agriculture, culture, environment, etc.
  - Determined on case-by-case basis and requires cooperation

Watercourse states shall, in utilising an international watercourse in their territories, take all appropriate measures to prevent the causing of significant harm to other watercourse states

(Art 7(1), UNWC)

# No significant harm

- Duty to take ‘all appropriate measures’
  - Duty of conduct/ due diligence obligation
  - Strong procedural element
- Where harm occurs discuss prevention, mitigation and/or compensation on basis of equity (Art 7, UNWC)
  - Recognises ERU as overarching principle

Where significant harm nevertheless is caused to another watercourse state, the states whose use causes such harm shall, in the absence of agreement to such use, take all appropriate measures, having due regard for the provisions of Article 5 and 6, in consultation with the affected state, to eliminate or mitigate such harm, and where appropriate, to discuss the question of compensation

(Art 7(2), UNWC)

# Duty to cooperate

Watercourse states shall cooperate on the basis of sovereign equality, territorial integrity, mutual benefit and good faith in order to attain optimal utilisation and adequate protection of an international watercourse

Art 8, UNWC

Established principle of international law

# Good faith obligation with strong emphasis on process

- Reflected in UN Charter, Art. 2(2)
- Good faith
  - Act with honest intent, fairness and sincerity
  - *Meaningful* negotiations and consultations
    - Can't simply insist on own position without contemplating any modification (Gabcikovo-Nagymaros Case, North Sea Continental Shelf Case)
    - Lack Lanoux Case
      - 'accept all communications and contacts which could .... provide States with the best conditions for concluding agreements'
      - 'upstream State is under the obligation to take into consideration the various interests involved, to seek to give them every satisfaction compatible with the pursuit of its own interests, and to show that in this regard it is genuinely concerned to reconcile the interests of the other riparian State with its own'

# Duty to Cooperate and substantive norms

- A logical extension of substantive norms
  - Equitable and reasonable utilisation
    - Identification and weighing of factors
  - No significant harm
    - Due diligence obligation to take all *appropriate* measures
      - Consider and mitigate risk (strong procedural element)
        - » EIAs, notification and consultation, publication participation, data and information exchange, regulatory framework, licensing and permits, etc.

# ***HOW DOES INTERNATIONAL WATER LAW RELATE TO THE NILE AND GERD?***

# IWL and the Nile

- Nile states obliged to follow customary international (water) law as reflected in 1997 UNWC
  - Key customary norms are ERU, NSH and duty to cooperate
- Are key norms reflect in post-1997 Nile arrangements?
  - Cooperative Framework Agreement (CFA)
  - Declaration of Principles

# CFA status

- Nile Basin Initiative
  - NBI vision embodies IWL: ‘to achieve sustainable socio-economic development through *equitable utilisation of, and benefit from*, the common Nile Basin water resources’.
- CFA process supported by UNDP and International Legal Experts, e.g. Professor Stephen McCaffrey
- CFA signed by 6 states (Ethiopia, Rwanda, Tanzania, Uganda, Kenya and Burundi)
- CFA ratified by 3 states (Ethiopia, Rwanda and Tanzania)
- Not at present legally binding on all states
  - Needs 6 states to ratify before entry into force
  - Then only binding on states that have ratified it
- Key provisions of CFA strongly reflective of customary international law

# CFA and customary international law

- Equitable and reasonable use found in Art 4 of CFA
  - Two relevant factors added
    - Contribution of each Basin to Nile River System
    - Extent and proportion of drainage area in territory of each Basin
- No Significant harm found in Art 5 of CFA
  - Duty to take all appropriate measures (same as UNWC)
  - Duty to have regard to ERU
    - Prevent and mitigate harm, and/or discuss compensation (same as UNWC)
- The ‘principle of cooperation’ recognised in Art 3 of CFA
  - Also strong emphasis on procedural requirements
    - Data and information exchange, including on planned measures, EIA and audits, subsidiarity and public participation in planning processes, NBC

# Origins of the Declaration of Principles (DoPs)

- September 2011
  - Egypt, Sudan and Ethiopia agree to establish international panel of experts (IPoE) to study GERD
- May 2013
  - Report of IPoE issued
  - Call for additional studies
- Series of tripartite ministerial level meetings
  - Nov & Dec 2013; Jan, Aug, Sept & Oct 2014
  - Agreement reached at 7<sup>th</sup> ministerial meeting, Mar 2015
    - **Declaration of Principles between the Arab Republic of Egypt, the Federal Democratic Republic of Ethiopia, and the Republic of the Sudan on the Grand Ethiopian Renaissance Dam Project (GERDP)**

# Content of DoP – 10 principles

- I. Principles of cooperation
- II. Principle of development, regional integration and sustainability
- III. Principle not to cause significant harm
- IV. Principle of equitable and reasonable utilization
- V. Principle to cooperate on the first filling and operating of the dam
- VI. Principle of confidence building
- VII. Principle of exchange of information and data
- VIII. Principle of dam safety
- IX. Principle of sovereignty and territorial integrity
- X. Principle of peaceful settlement of disputes

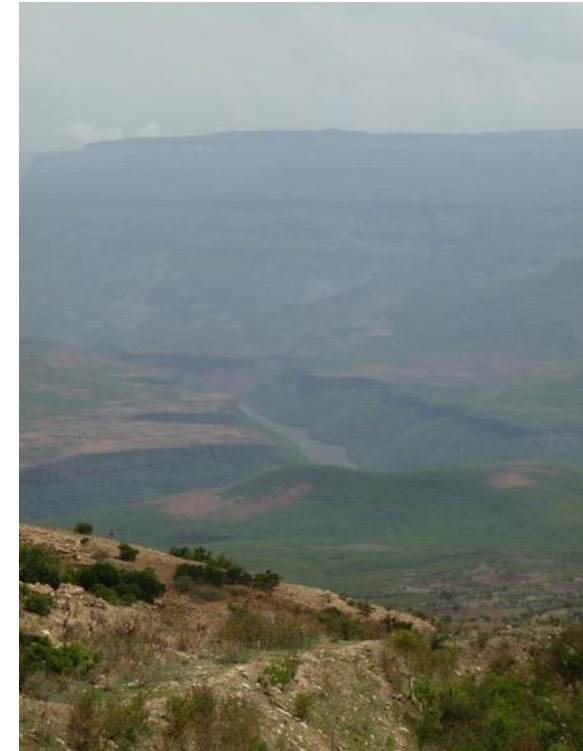
Some principles cover general international water law – evidence of state support for certain customary norms

Some principles are specific to GERD

# ***General principles contained in the DOP***

# Equitable and Reasonable Utilisation – Art IV

- 3 countries must utilise shared waters in an equitable and reasonable manner
- Factors to be taken into account same as CFA
- No explicit mention of weighting of factors in DoP
  - Look to customary international law for support?
  - UNWC and CFA can provide interpretative guidance
  - Shows important interaction between different instruments



# No significant harm – Art III

- 3 countries to take all appropriate measures to prevent the causing of significant harm in utilising the Blue/Main Nile
- Where harm is caused look to eliminate or mitigate such harm, and where appropriate discuss compensation
- Aligns well with customary international law, as also reflected in UNWC and CFA



# Duty to Cooperate

- Art I
  - Cooperate based on common understanding, mutual benefit, good faith, win-win and principles of international law
  - Cooperate in understanding upstream and downstream water needs in its various aspects
- Art IX
  - The Three Countries shall cooperate on the basis of sovereign equality, territorial integrity, mutual benefit and good faith in order to attain optimal utilization and adequate protection of the River

# Peaceful settlement of disputes

- Art X
  - The Three Countries will settle disputes, arising out of the interpretation or implementation of this agreement, amicably through consultation or negotiation in accordance with the principle of good faith. If the Parties are unable to resolve the dispute through consultation or negotiation, they may jointly request for conciliation, mediation or refer the matter for the consideration of the Heads of State/Heads of Government

# ***DoP Principles specific to GERD***

- Art V
  - States cooperate in implementation of outcomes of joint studies
    - Agree guidelines and rules for
      - Filling of GERD
      - Annual operation of GERD
    - Inform downstream States of any unforeseen or urgent circumstances
  - Establish coordination mechanisms
- Art VI
  - Provision of data and information to conduct joint studies

# Additional Principles

- Art II
  - GERD for power generation
- Art VI
  - Priority given to downstream states to purchase power generated by GERD
- Art VIII
  - Dam safety
  - Ethiopia commitment to implement IPoE recommendations

# Is DoP legally binding?

- Must have intention to be bound by international law (VCLT)
  - No ratification process, but
    - Signed by heads of state
    - Does content create rights and obligations?
      - ‘The three countries have committed to the following principles...’
      - ‘The three countries shall take all appropriate measures’
      - ‘The three countries shall utilise their shared waters ... in an equitable and reasonable manner’
      - ‘The three countries will take into account ... ‘
      - Countries agree to certain procedures
        - » Guidelines and rules for dam filling, annual operation, etc
        - » Set up coordination mechanisms
        - » Timelines set
- Irrespective of treaty status DoP is evidence of state support for key rules and principles of customary international law

# DoP implementation

- Followed by ‘Khartoum Document’, Dec 2015
  - Confirmed ‘sincere and full commitment’ to DoP
  - Endorsed firms carrying out joint studies and set out roadmap for completion
    - BRLi Group and Artelia (replace Deltares)
    - Corbett & Co law firm to draft contracts
  - Agreed to continue tripartite joint ministerial meetings
  - Commitment to enhance confidence building
    - Parliamentarians, media and public diplomacy groups

# Concluding remarks

- International law not a panacea!
  - States must consent to be bound
  - Commitments need to be clear
  - Must move beyond just law on paper
    - Institutional and procedural arrangements critical
- Growing momentum behind IWL
  - Reflected in UNWC entry into force, opening of UNECE WC and SDG6.5
  - Key principles of ERU, NSH and Duty to Cooperate firmly established
- GERD and the Nile
  - Post 1997 arrangements strongly endorse 3 key principles of IWL
  - DoP significant support for general principles as well as GERD specific commitments
  - Could be seen as a legal binding treaty or reflective of customary international law
  - Clear commitments and establishment of procedural and institutional mechanisms for implementation critical to its success
  - Khartoum document reiterates DoP support

Thanks for listening!