The Sustainable Development Goals and the application of International Law: the case of the Grand Ethiopian Renaissance Dam

Los Objetivos de Desarrollo Sostenible y la aplicación del derecho internacional: el caso de la Gran Presa del Renacimiento Etíope

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Abstract

In this article, it is examined the role that the sustainable development goals may play in the harmonious interpretation and systemic integration of international law. The backdrop to evaluate this hypothesis is the conflict between Ethiopia, Sudan, and Egypt, which arose out of the construction of the Grand Ethiopian Renaissance Dam. Considering the wide range of interests at stake and the different special regimes of international law that may apply to the settlement of this controversy, in this paper, it is argued that a perspective grounded in the notion of sustainable development may contribute to ease the dialogue between the parties and ensure compliance of their reciprocal international obligations. Focusing on the harmonious interpretation of the different regimes converging in this conflict, it is proposed that the 2030 Agenda for Sustainable Development can operate as a kaleidoscopic lens to harmonize international obligations to a certain extent.

Keywords: Grand Ethiopian Renaissance Dam, sustainable development, interpretation, systemic integration, fragmentation, conflict of norms.

Resumen

En este artículo, se examina el papel que desempeñan los Objetivos de Desarrollo Sostenible en la interpretación armoniosa y la integración sistémica del derecho internacional. El telón de fondo para evaluar dicha hipótesis es el conflicto entre Etiopía, Sudán y Egipto, que surgió a raíz de la construcción de la Gran Presa del Renacimiento Etíope. Considerando la amplia gama de intereses en juego y los diferentes regímenes especiales de derecho internacional que pueden aplicarse a la solución de tal controversia, en este trabajo se argumenta que una perspectiva basada en la noción de desarrollo sostenible puede contribuir a facilitar el diálogo entre las partes y asegurar el cumplimiento de sus obligaciones internacionales recíprocas. Centrándose en la interpretación armoniosa de los diferentes regímenes que convergen en este conflicto, se propone que la Agenda 2030 para el Desarrollo Sostenible opere como una lente caleidoscópica con el fin de armonizar, en cierta medida, las obligaciones internacionales.

Palabras clave: Gran Presa del Renacimiento Etíope, desarrollo sostenible, interpretación, integración sistémica, fragmentación, conflicto entre normas.

1 Introduction

Through the case study of the Grand Ethiopian Renaissance Dam (GERD) conflict, in this article, it is explored an underdeveloped aspect in academic literature, namely, the interplay between normative conflicts in international law and the 2030 Agenda. In this regard, in the article it is explored the relationship between international norms and particular SDGs, to introduce the debate of the potential conflicts among norms, on one hand, and among SDGs, on the other. Additionally, in this article, it is examined which particular role can play the 2030 Agenda in overcoming the fragmentation of international law and the management of conflicts of norms.

Over the past decade, the construction of the GERD has triggered several diplomatic discussions between the Federal Democratic Republic of Ethiopia, the Arab Republic of Egypt, and the Republic of the Sudan. The meetings between these countries to address the effects of the GERD Project have covered many angles, from energy and power generation to economic development, water supply, agriculture, farmland, natural resources, or biodiversity, among the most relevant. All efforts to reach a political compromise that duly addresses the multiple concerns raised by each party have failed so far. According to the Ethiopian Government, the GERD Project is key to achieving its goals on economic development and power generation and supply, whereas Sudan and Egypt's concerns are mostly related to water supply and accessibility, the protection of biodiversity, and the sustainable use of watercourses (Gathmann 2021).

Parties to the conflict are considering a range of alternatives to move on and get their differences settled. Among these pathways, Sudan and Egypt have proposed the mediation of the European Union, the United States, or the United Nations, but this alternative has been rejected by Ethiopia. On the other hand, judicial settlement is also on the table as the operationalization of the GERD project is said to have severe environmental and social impacts that have not yet been fully addressed. Indeed, on April 23rd, 2021, the Sudanese minister of Irrigation declared that Sudan shall initiate legal actions against Ethiopia if the latter decides to fill-up and actually operationalize the GERD project without addressing Sudanese concerns (Gathmann 2021). Among the adjudicative bodies considered by Sudan, there are the International Court of Justice and the COMESA Court of Justice (established under the Treaty Establishing the Common Market for Eastern and Southern Africa). In addition, advocacy organisations are considering initiating procedures before the UN Human Rights Council, in the light of the potential impacts that the GERD Project may have on the human rights of Sudanese and Egyptian individuals.

Considering the wide range of fields and interests affected by the conflict, in this paper, it is argued that a perspective grounded

in the notion of sustainable development may contribute to ease the dialogue between the parties and, importantly, to preserve their compliance with their reciprocal international obligations. The United Nations 2030 Agenda for Sustainable Development (UN General Assembly 2015), its 17 Sustainable Development Goals (SDGs) and 169 Targets did not develop in the vacuum. Rather, these are rooted in norms and principles of international law (Kim 2016, p. 15; McCorquodale & McInerney-Lankford 2020, p. 141). As it is shown below, this origin entails that SDGs can be linked to certain sources of international law that have different obligational strength, that are not necessarily subject to normative hierarchies, and that are binding to different states.

In the light of the aforementioned context, in this article it is explored the role SDGs may play in the harmonious interpretation and systemic integration of international law in the conflict arising out of the construction of the GERD Project between Ethiopia, Sudan and Egypt. This analysis is particularly relevant to the extent that SDGs are rooted in international law and, just as international law, they can sometimes appear as potentially conflicting goals due to the pursuance of opposed interests in a particular scenario. As this article shows, depending on the approach adopted regarding to the relationship between SDGs, they may either reflect the fragmented structure of international law or contribute to overcoming fragmentation.

The choice of the GERD dispute as backdrop to the analysis is instrumental as it manifestly shows a real inter-states conflict where the achievement of different SDGs is at the core of the discussion. It allows to examine whether SDGs can be useful to ease normative conflicts between norms of international law applicable to the dispute. Bearing this in mind, in Section 2, it is addressed the context of the GERD conflict and the applicable law to the dispute. This analysis shows the extent to which SDGs can be related to apparently conflicting norms of international law, the multiplicity of normative conflicts that may arise in one single scenario, as well as their inter-regimental nature. Section 3 aims to give a comprehensive perspective on SDGs. This third Section argues against a fragmented understanding of the 2030 Agenda, considering, instead, that the achievement of the SDGs should be sought comprehensively. Sustainability demands seeking an equilibrium that enables a consecution of *all SDGs* at the same time, even if it entails sacrificing the full consecution of one. In the light of such consideration, a conception of SDGs as objectives that may potentially conflict loses grounds. Finally, Section 4 presents SDGs as a useful tool to dilute normative conflicts within international law and explores the role that the 2030 Agenda can play in the process of harmonious interpretation and systemic integration of international laws, *i.e.,* in conflict-avoidance techniques.

As to the methodological aspects, this research relies on a deductive approach to establish whether SDGs may enter conflict in the

case study, as well as to apply international legal theory to determine the role of SDGs within fragmentation and normative conflicts. On the other hand, this research relies on an inductive approach, to identify the normative conflicts that concur in the case study.

2
The context of the GERD controversy and the applicable law

The SDGs are developed in the core of the international system to enhance the life standard of peoples, looking towards the protection of the environment, while fostering economic development. As the following section shows, different arguments can be raised by the parties to the dispute, linking the applicable law to the case and the SDGs to give content to the legal obligations of the parties.

2.1. The context and the Sustainable Development Goals

In 2011, Ethiopia began the construction of the GERD Project in the basin of the Blue Nile. The GERD is a colossal project with an extension of almost 1,700 square kilometers which will be capable of holding 74 billion cubic meters (Gathmann 2021, Salman 2016). The Blue Nile runs through 11 countries of East and North Africa, including Tanzania, Uganda, Burundi, Rwanda, the Democratic Republic of Congo, Ethiopia, Kenya, Eritrea, South Sudan, Sudan, and Egypt. The Blue Nile contributes to 55 % of the Nile River waterflow (Wheeler *et al.* 2020, p. 2), and it is estimated that nearly 250 million people live or depend on the Nile (Salman 2016).

For the Ethiopians, the GERD Project is an opportunity to boost their economic growth as they will be able to sell the energy generated to neighbouring countries (Veselinovic 2015). The revenues from energy commercialisation in the region will contribute to Ethiopia's fight against poverty (Pappis *et al.* 2021, p. 18). Moreover, the GERD Project is expected to provide cheap and accessible energy to millions of households, raising the standard of living of the Ethiopian population —65 % of the population is not connected to electricity, *i.e.,* nearly 73 million people (The World Bank 2021)—. Hence, the construction of the GERD Project will help to social development of Ethiopia's population as it will contribute to tackling poverty, hunger, and is going to provide affordable energy to its people. Taking this into account, once the dam starts running, Ethiopia will be closer to achieving*, inter alia:*

- SDG1: *End Poverty in All Its Forms*
- SDG2: *End Hunger, Achieve Food Security and Improved Nutrition and Promote Sustainable Agriculture*

- SDG7: *Ensure Access to Affordable, Reliable, Sustainable and Modern Energy for All*
- SDG8: *Promote Sustained, Inclusive and Sustainable Economic Growth*

In contrast, Sudan, and Egypt —the downstream states— perceive the GERD Project as a threat. For these states, the GERD Project is said to have negative effects on their access to water, food supply, farmland for agriculture, and to their ecosystems and biodiversity. The GERD Project is particularly threatening to Egypt as it is the driest state in the planet, with a rainfall average of 18.1 mm/year (comparatively, Ethiopia's rainfall average is about 848 mm/year). Moreover, Egypt's 97 % of irrigation and drinking water comes from the Nile, and 55 % of the Nile flow originates in the Blue Nile (Wheeler *et al.* 2020, p. 2). All things considered, once the Ethiopian project is operationalized, it might have negative impacts on Sudan and Egypt's achievement of some SDGs, such as:

- SDG1: *End Poverty in All Its Forms*
- SDG2: *End Hunger, Achieve Food Security and Improved Nutrition and Promote Sustainable Agriculture*
- SDG6: *Ensure Availability and Sustainable Management of Water and Sanitation for All*
- SDG15: *Protect, Restore and Promote Sustainable Use of Terrestrial Ecosystems, Sustainably Manage of Forests, Combat Desertification, and Halt and Reverse Land Degradation and Halt Biodiversity Loss*

2.2. The applicable law

2.2.1. The permanent sovereignty of states over natural resources

States' sovereign right over natural resources is recognized in the UN General Assembly Resolution 1803 (XVII) of 14 December 1962 on «Permanent sovereignty over natural resources» (UN General Assembly 1962), and is considered a norm of customary international law.[1] The challenges regarding the extent of the rights deriving from the Ethiopian sovereignty over natural resources derive from the classical tension between Colonial heritage and independence, *i.e.,* between the application of *pacta sunt servanda* and self-determination. Particularly, a major challenge is that, during the first half of the 20th Century, Ethiopia and Egypt —by then British colonies— signed the Anglo-Ethiopian treaty of 1902 and the 1929 Nile Waters Agreement between the United Kingdom and Egypt, which granted a veto power to Sudan and Egypt on any projects developed by upstream states on the Nile (*Exchange of Notes between Her Majesty's Government in the United Kingdom and the Egyptian Government on the Use of Waters of the Nile for*

1 The consuetudinary nature of this right was recognized by the International Court of Justice in the Case *Armed Activities on the Territory of the Congo* (International Court of Justice 2005, paras. 243-246).

Irrigation, 1929; *Treaties Between the United Kingdom and Ethiopia, and Between the United Kingdom, Italy, and Ethiopia, Relative to the Frontiers Between Soudan, Ethiopia and Eritrea,* 1092, article III).

Nevertheless, these agreements constitute a colonial inheritance that could arguably be displaced by subsequent customary international law, including the right to self-determination and the principle of permanent sovereignty over natural resources.

The aforementioned consideration notwithstanding, the Principle of Permanent Sovereignty over Natural Resources cannot be interpreted in absolute terms as its scope has been shaped by other posterior norms of general international law, such as the principle 2 of the Rio Declaration. This provision reads as follows:

> States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and *the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment* of other States or of areas beyond the limits of national jurisdiction (UN Conference on Environment and Development 1992, principle 2) (emphasis added).

This principle has been confirmed by the ICJ in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*:

> *The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment* of other States or of areas beyond national control *is now part of the corpus of international law relating to the environment* (International Court of Justice 1996, para. 29) (emphasis added).

Out of these statements, the Permanent Sovereignty of States over Natural Resources cannot be considered in isolation from the rights of other states and individuals. Therefore, the exploitation of natural resources within the territory of a state must be carried out without affecting the environment of other states or of areas beyond national jurisdiction.

Therefore, all states involved in the GERD conflict are bound to exercise their right of sovereignty over natural resources considering their obligation to ensure that their activities do not cause transboundary environmental damages.

2.2.2. Obligations under international environmental law

a) The United Nations Convention on Biological Diversity

The United Nations Convention on Biological Diversity (CBD) transforms Principle 2 of the Rio Declaration into a binding treaty-based obligation for states parties by establishing that they have the «responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States

or of areas beyond the limits of national jurisdiction» (CBD 1992, article 3). This obligation can be enforced through the Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, adopted by the International Law Commission, which deals with activities not prohibited by international law which involve a risk of causing significant transboundary harm through their physical consequences (International Law Commission 2001).

Also, states parties to the CBD are under the obligation to cooperate on matters of mutual interest for the conservation of biological diversity (CBD 1992, article 5), and to promote the protection of ecosystems and natural habitats *to the maximum extent possible* (CBD 1992, article 8).

Relevantly, the obligation in article 3 is different from those established in articles 5 and 8 to the extent that it constitutes an obligation of result, which requires states to achieve a certain outcome through their conduct, while the latter are obligations of due diligence. The extent to which these obligations bind states' behaviour may have consequences in the evaluation performed on the conduct of the parties to the GERD conflict. The breach of obligations of result tends to be easy to demonstrate, at least theoretically, whereas the breach of due diligence obligations may be more intricate to demonstrate, as it will depend on the means deployed by the alleged wrongdoer to avoid or achieve a certain result, judging failure not upon the results, but rather on whether the means adopted were effective and sufficient. Worth to note, SDGs 6 and 15, referred above, may provide Sudan and Egypt an argument to challenge Ethiopia's due diligence under articles 5 and 8 CBD, as they explicitly relate to the conservation of biodiversity and the protection of ecosystems. SDGs, then, may help to determine the effectiveness and sufficiency of Ethiopia's conduct to fulfil its obligations.

b) The United Nations Framework Convention on Climate Change

According to the United Nations Framework Convention on Climate Change, states are urged to adopt precautionary measures to anticipate, prevent and minimise both the causes of climate change and its adverse effects, based on the precautionary principle (United Nations Framework Convention on Climate Change 1992, article 3.3). This is another due diligence obligation that deserves attention as climate change represents the biggest threat to the achievement of sustainable development. Compliance with this obligation needs to be assessed considering the conformity of the measures adopted by states with the SDGs. In this line, an integrated evaluation addressing the negative impacts of the measures upon the achievement of sustainable development must be carried out to put together both regimes, that of climate change and the one for sustainable development.

c) The United Nations Convention to Combat Desertification

In this line, it is worth noting that Ethiopia, Egypt and Sudan are parties to the United Nations Convention to Combat Desertification, which establishes the obligation to «promote cooperation among affected country Parties in the fields of environmental protection and the conservation of land and water resources, as they relate to desertification and drought» (United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa 1994, article 4.2.d). Also, by virtue of article 5, states are bound to «address the underlying causes of desertification and pay special attention to the socio-economic factors contributing to desertification processes» (United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa 1994, article 5.c).

To provide the obligations under the Convention to Combat Desertification with meaningful content it is necessary to look at the SDG15 which is aimed, among other things, to combat desertification. Bearing in mind the purposes, targets and indicators established in the SDG15 will allow to integrate an approach based on sustainable development, while performing the assessment of compliance. Being Egypt the party more interested in halting desertification in its territory, bringing in data about the effects of the GERD in this particular realm would add content to its argument regarding Ethiopia's fulfilment or non-fulfilment of its obligations, under the UN Convention to Combat Desertification.

2.2.3. Diverging standpoints on the customary international law rules on international watercourses

The Convention on the Law of Non-Navigational Uses of International Watercourses (UN General Assembly 1997) is an international treaty that codified some customary international law on the subject. These codified customary rules include the general principle on equitable and reasonable utilization of international watercourses and participation (article 5), the obligation not to cause significant harm (article 7), and the general obligation to cooperate (article 8), all of which are binding to the parties to the dispute as Customary International Law. However, as none of the parties to the GERD dispute has ratified the Convention, other non-customary rules therein shall not be binding upon them.

The principle of equitable and reasonable utilization of international watercourses intends to reconcile conflicting interests by providing «the maximum benefit to each basin state from the uses of the waters with the minimum detriment to each» (International Law Association 1967, General Comment to Article IV; UN General Assembly 1997, article 5). Applying this principle to the GERD dispute would entail that, despite Ethiopia's right to reasonably utilize

international water resources within its territory, this comes with the correlative obligation not to deprive Sudan and Egypt from their own right to use the resources of the Blue Nile and the Nile, respectively, in an equitably and reasonable manner (Wouters *et al.* 2008, p. 116).[2] To this extent, the Convention establishes that, in the determination of the meaning of reasonable and equitable use of watercourses, the social and economic needs of the basin States concerned, as well as the existing and potential uses of the watercourse, will have to be considered (UN General Assembly 1997, article 6.1.b).

In correlation to the customary rules of international law is the SDG6, which refers to ensuring the availability and sustainable use of water. A comprehensive assessment of the obligations concerning the sustainable use of watercourses needs to consider that this is part of the achievement of sustainable development as established by the international community.

2.2.4. Obligations under international human rights law

Under the UN Charter, all states have assumed the obligation to promote universal respect for and the observance of human rights and fundamental freedoms (Charter of the United Nations 1945, articles 55 and 56). Additionally, all three states have ratified the Banjul Charter, that proclaims in article 1 that all states shall recognize all human rights contained in the Charter and shall undertake to adopt legislative or other measures to give effect to them (African Charter on Human and People's Rights, article 1).

In addition to the Banjul Charter, Egypt, Ethiopia, and Sudan ratified the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). In this regard, Egypt and Sudan may argue that Ethiopia is endangering the right of Sudanese and Egyptians to an adequate standard of living, which encompasses the right to health and the right to food by virtue of the customary law obligations contained in article 25 of the Universal Declaration of Human Rights (UDHR 1948), as well as in article 11 of the ICESCR (ICESCR 1966). Additionally, it is currently accepted that the right to an adequate standard of living also encompasses the right to water, as a necessary precondition for life, food, and health (UN Committee on Economic, Social and Cultural Rights 2003; UN General Assembly 2010). In this sense, Ethiopia could be accused of failing to respect and protect human rights —also extraterritorially—, as demanded by the UN Charter.

However, we are confronted with a paradoxical scenario where the operationalization of the GERD project can constitute at the same time an obligation for Ethiopia, in order to protect the right to an adequate standard of living for Ethiopians, and a breach by Ethiopia of the very same right towards the population of Egypt and

2 This interpretation of the principle was confirmed by the ICJ in the *Gabčíkovo-Nagymaros* case (International Court of Justice 1997, paras. 78 and 85).

Sudan: given that article 11 of the ICESCR establishes that States need to take appropriate steps to ensure the realization of the right to an adequate standard of living, the construction of the GERD Project can be portrayed as an obligation owed by Ethiopia towards Ethiopians in pursuance of the full realization of their right to an adequate standard of living; however, at the same time the measure can constitute a breach of the right of Egyptians and Sudanese to an adequate standard of living, which is also an obligation owed by Ethiopia by virtue of articles 55 and 56 of the UN Charter.

Moving on, in favour of the Ethiopian point of view, it must be also recalled that the right to self-determination, as contained in article 1(1) common to the ICESCR and ICCPR, entails the right of Ethiopians to freely pursue their economic development. In this regard, it must be said that the three states voted in favour of the Declaration on the Right to Development, adopted by the UN General Assembly Resolution 41/128, of 4 December 1986 (UN General Assembly 1986), declaring the right to development as an inalienable human right according to which, all peoples are entitled to «participate in, contribute to, and enjoy» economic and social development (UN General Assembly 1986, article 1.1). In this regard, states are under the obligation to create favourable conditions both at the national and international level to achieve the realization of the right to development, cooperating to eliminate possible obstacles to achieve it (UN General Assembly 1986, articles 3.1, 3.3 and 4). In addition, they are under the obligation to formulate national development policies to constantly improve the well-being of the entire population (UN General Assembly 1986, article 2.3). Nevertheless, the unilateral approach adopted by Ethiopia does not sit well with what is expected by international law. For instance, the 1986 UN General Assembly Declaration on the Right to Development establishes the duty of States to «co-operate with each other in ensuring development and eliminating obstacles to development» and to «encourage the observance and realization of human rights» (UN General Assembly 1986, article 3.3).

The Banjul Charter makes a rounder sense of purpose by linking together the right to development, the protection of human rights and the protection of the environment. This link is enshrined in Article 24 of the Banjul Charter, according to which «[a]ll peoples shall have the right to a general satisfactory environment favourable to their development» (African Charter of Human and People's Rights, article 24), together with article 21, which declares the right of all peoples to «freely dispose of their wealth and natural resources», when it is exercised in the exclusive interest of the people. Altogether, the Banjul Charter recognizes the right of all peoples to their economic, social, and cultural development, and the correlative individual and collective duty of all states to ensure the exercise of the right to development (African Charter on Human and People's Rights, article 22). Relevantly, it prescribes that the dis-

posal of natural resources needs to be exercised without prejudice of the obligation of promoting international cooperation, and with a view to strengthening African Unity and solidarity (African Charter of Human and People's Rights, articles 21.2 and 21.3).

Universal and regional human rights regimes applicable to the GERD conflict provide a legal setting suitable for all parties to nurture their legal arguments with their objectives concerning the achievement of the SDGs. In this sense, Ethiopia may argue that the project aims to fulfil its human-rights-based obligations, improving the living conditions of its citizens pursuing the achievement of SDG7 —Ensure access to affordable, reliable, sustainable, and modern energy for all—, which, at its turn, gets sustainable economic growth closer to their people, moving towards the achievement of SDG8. Ethiopia may also put forward data about the impact of the GERD project on the achievement of SDGs 1 and 2, *i.e.,* the end of poverty and hunger in its territory and abroad —as the project is meant to supply power to other states in the region.

On the other hand, if the alleged negative impacts of the GERD project on the territory and population of Sudan and Egypt can be demonstrated, the human rights regime provides legal ground for these two states to raise claims against Ethiopia based on the failure to comply with its obligations under both the UN and the Banjul regimes. The presumed violation of the obligations established in these regimes may be reinforced, bringing in the consequences that they may have upon the achievement of SDGs 1, 2, 6 and 15.

2.2.5. The common market for Eastern and Southern Africa (COMESA treaty)

Following the thought of possible accusations of Ethiopian unilateralism concerning the GERD Project, Egypt and Sudan have a strong argument based on a breach of the Treaty Establishing the Common Market for Eastern and Southern Africa (COMESA 1994). The COMESA gathers 21 African states, amongst them, the parties to the GERD conflict, and was established in 1994 to promote cooperation for the development of the member states' natural and human resources. The COMESA establishes the obligation to take concerted measures to foster co-operation in the joint efficient management and sustainable utilisation of natural resources (COMESA, article 122.1). Contracting countries are mindful that economic activity comes with unwanted environmental degradation, excessive depletion of resources and serious damage to natural heritage and that a clean, as well as an attractive environment is a prerequisite for long-term economic growth (COMESA, article 122.2). To prevent all these impacts upon the environment, the contracting parties established the following obligations: *(a)* to take necessary measures to conserve their resources; *(b)* to co-operate in the management of their natural resources for the preservation of the eco-systems and prevent environmental degradation, and *(c)* to adopt common reg-

ulations for the preservation of shared land, marine and forestry resources (COMESA, article 123.1).

As in other obligations pointed out above, the obligation contained in article 123.1 COMESA is an obligation of means, which entails member states to put all in their hands to cooperate towards the achievement of the objectives concerning the conservation and management of natural resources for the conservation of the ecosystems. Certainly, SDGs relating to sustainable conservation, management, and preservation of natural resources, such as the SDGs 6 and 15, may nurture the content through which due diligence of states is assessed and considered to be fulfilled or, else, ineffective, and insufficient.

2.2.6. Treaty-based limitations on the use of watercourses between the parties

As already advanced, there are two international treaties that grant a veto power to Egypt on any projects developed by upstream states on the Nile (Salman 2016). These are the 1902 Agreement between Britain and Ethiopia and the 1929 Agreement between Britain and Egypt. However, to the extent that these agreements are a colonial inheritance, Ethiopia could argue that subsequent customary international law displace them by virtue of *lex superior* in the case of the right to self-determination, and *lex posterior* in the case of the sovereign right of states over natural resources.

A third international agreement that could be applicable is the 1959 Nile Waters Agreement, between Egypt and Sudan (*Agreement for the Full Utilization of the Nile Waters,* 1963). Through this agreement, the parties divided the entire flow of the Nile River between them. However, as international treaties are only binding among the parties, this agreement cannot be imposed upon Ethiopia (Vienna Convention on the Law of Treaties 1969, article 34).

3
The integrated and interdependent nature of SDGs: a non-conflicting Agenda

As it has been put forward in the previous Section, the GERD conflict illustrates a serious number of potential and apparent normative conflicts, where the international norms concerned can be related to different SDGs.

All parties can base their claims and arguments in their efforts to fulfil or protect certain SDGs: Ethiopia may claim that the electricity and wealth generated by the GERD project is necessary to fulfil certain SDGs, as it will help end poverty, hunger, guarantee

access to energy, and promote economic growth. Nevertheless, Egypt and Sudan may claim that the very same project runs counter certain —or even the same— SDGs, for it will impact agriculture and water access, thereby escalating poverty, hunger, malnutrition, as well as endangering the ecosystems of the Nile. In plain words, the approach adopted portrays a conflictual relationship not only between norms, but also between SDGs, where one SDG appears to be fulfilled at the expense of another.

This third Part tackles the first half of the problem, namely whether beyond a normative conflict there is also a conflict of SDGs in the case at hand. Bearing in mind the integrated and interdependent nature of the SDGs (UN General Assembly 2015, para. 18), in this section, it is argued that parties to the conflict should find a solution capable of embracing a perspective based in the SDGs, which entails that there cannot be a conflict between them. In other words, this approach should consider SDGs not as a fragmented set of goals, independent from one another, but rather as a comprehensive and integrated policy to achieve sustainable development.

The 2030 Agenda for Sustainable Development underscores seventeen areas needed to be taken care of to achieve sustainable development for all peoples. Through the 2030 Agenda, states agree to make all in their hands to commit their governments to foster domestic public policy towards the accomplishment of the SDGs and their specific targets. This endeavour comes to join the acquis on sustainable development, which can be traced back to the 1962 UN General Assembly Resolution 1831 (XVII) on Economic Development and the Conservation of Nature (UN General Assembly, 1962). However, there is consensus on considering the 1987 «Report of the World Commission on Environment and Development: *Our Common Future*» —also known as the Brundtland Report— as the document that introduced the term in the international realm. In this document, «sustainable development» was defined as the development «that meets the needs of the present without compromising the ability of future generations to meet their own needs» (World Commission on Environment and Development 1987, para. 27). The achievement of sustainable development requires striking a balance between its three pillars, *i.e.,* between economic development, social development, and the protection of the environment. These three pillars are mutually reinforcing elements and not intended to prevail one over the other (UN General Assembly 1997, para. 23; World Summit on Sustainable Development 2002, p. 1; UN General Assembly 2018, para. 8).

As it has been put forward in the previous Section, the parties can base their claims and arguments in their efforts to fulfil certain SDGs. However, while for Ethiopia the GERD Project entails getting closer to the achievement of some of these goals, for Sudan and

Egypt, the operationalization of the Project implies a setback in the achievement of other SDGs of their own. This apparent collision may only stem from a fragmented understanding of the SDGs, which would, ultimately, entail that the achievement of some SDGs may come at the price of sacrificing others. Accepting this understanding of the SDGs would come against their interrelated and interdependent nature, as well as against all the acquis on sustainable development grown up so far. Translated into the case at hand, the interrelated and interdependent nature of the pillars entails that an outstanding economic development and energy access to the expense of ecosystems shall not be in conformity with a development that is sustainable; neither will be to establish restrictions on water flows to protect agriculture to the expense of power generation.

Therefore, the sustainable answer shall not be to pursue one or a few SDGs to their maximum extent, but rather to strike a balance between the achievement of multiple SDGs. This shall be the sustainable solution, even when it comes at the cost of the maximum possible achievement of one of them, because among the SDGs there should be no preference, having all to be promoted equally. In this line, the UN General Assembly declared that:

> Sustainable development recognizes that eradicating poverty in all its forms and dimensions, combating inequality within and among countries, preserving the planet, creating sustained, inclusive and sustainable economic growth and fostering social inclusion are linked to each other and are interdependent (UN General Assembly 2015, para. 13).

To the extent that the achievement of sustainable development is an objective of the international community, the Agenda 2030 asserted that the SDGs need to be sought collectively through «win-win» cooperation (UN General Assembly 2015, para. 18). International cooperation is, therefore, essential to tackle some global issues of our times, such as poverty eradication, safe migration, climate change, desertification, access to water, food security, and many more. Addressing global problems through international cooperation should include avoiding activities that may go in detriment of the possibilities of other states to meet the goals set in the 2030 Agenda.

Measuring the impact of states' behaviour on the achievement of the SDGs by another state will differ provided on the field of knowledge this is attempted to be done. In the realm of international law, this will be directly related to the systemic interpretation of norms as, in any case, the affectation will be discussed in the context of the infringement of international law. Therefore, it will be through the interpretation of norms that judges will have to operationalise the interdependent and interrelated nature of the norm-related SDGs.

4
SDGs and the fragmentation of international law

At this point, it has been established that an understanding that perceives the SDGs as potentially conflicting objectives stems from particular misconceptions relating to the relationship between the three pillars of the 2030 Agenda. Nevertheless, whereas the arguments surrounding the SDGs collision have been diluted by virtue of the interrelated and interdependent nature of the 2030 Agenda, one must bear in mind that Egypt, Sudan, and Ethiopia are still facing an underlying potential conflict that arises in the process of application of international law. All the same, this contribution considers that the SDGs may play a relevant role in the process of normative conflict resolution, by providing a harmonious interpretation to international norms: the SDGs can operate as a kaleidoscopic lens through which international obligations can be modulated (or interpreted) in the same direction.

Hence, in this Section, it is discussed the role that the SDGs can play in overcoming the fragmentation of international law as tools for regime integration. Nevertheless, it is important to stress out the relative capability of the SDGs in their integrative role. Negotiating political compromises based on a discourse focussed solely on the SDGs, without reference to their international normative background, creates the risk of producing outcomes that may entail a breach of international law obligations: while political negotiations allow trade-offs, these may entail violate obligations of public international law.

4.1. Normative conflicts in international law

International law has moved from being a law on «coexistence» to a law of «cooperation» among states. This move has caused an important expansion of the areas governed by public international law, which has triggered a correlative multiplication of international norms.

The GERD conflict illustrates a common phenomenon in law: the existence of potential normative conflicts in the application of international law. In the case at hand, each state can raise conflicting arguments, based on different international norms, or even based on different interpretations of the same norm. For example, as already indicated, the argument of the Ethiopian permanent sovereignty over natural resources enters into conflict with the Anglo-Ethiopian treaty of 1902 and the 1929 Nile Waters Agreement, which restricted the capacity of Ethiopia to make use of the Nile waters. In the same vein, an argument brought forward by Egypt and Sudan concerning the obligation of Ethiopia to ensure that ac-

tivities within its jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction (article 3 CBD) may conflict with the Ethiopian obligation to take appropriate steps to ensure the realization of the right to an adequate standard of living for Ethiopians based on article 11 ICESCR. Additionally, the right to an adequate standard of living could also be invoked by Egypt and Sudan, as it encompasses the right to health and the right to food (articles 25 UDHR and 11 of ICESCR). In the latter case, we find a conflict of interpretations of the very same norm.

Whereas conflicts of norms are inherent to all legal systems, the phenomenon is particularly acute in public international law. There are several reasons why normative conflicts are more likely to arise in the international legal system as opposed to domestic legal systems; *inter alia,* the expansion of areas governed by public international law, coupled with the lack of a *ground norm* that hierarchies the different obligations; the lack of an adjudicator with mandatory jurisdiction over all fields of public international law, and the multiplicity of actors (states) that intervene in different norm-creating processes (Pauwelyn 2003, pp. 12-24; Klabbers 2011, p. 193). The interaction between norms created in different *fora* is further nuanced by the fact that depending on the field of international law, States may be represented by different domestic branches that may be concerned with different —and not always aligned— objectives. In this regard, one governmental branch may push for the adoption of an environmental deal which does not necessarily align fully with the objectives pursued by a different branch, which may be focussed on economic development, or even with human development (Pauwelyn 2003, pp. 15-16). In other words, these branches respond to different matrixes, objectives, and are affected by «structural biases» (Kennedy 2008, p. 846; Koskenniemi 2006, p. 521).

In the light of the functioning of public international law, the potential conflict of norms that emerges in the case of the GERD project is not at all exceptional. However, there is still one possibility to resolve these apparent conflicts without resorting to displacing one norm in favour of another: under public international law, one must first resort to the principle of harmonious interpretation, and it is precisely at this stage where SDGS may play a relevant role, because the open-textured nature of language opens up the need for interpretation.

4.2. SDGs and the harmonious interpretation of international law

The operationalization of international law prefers the harmonization of apparently conflicting norms by way of interpretation to render them compatible over invalidating or displacing a norm over

the other (International Law Commission 2006, paras. 411-412). The rationale behind this preference is that, in international law, there is a strong presumption of continuity and against normative conflict (International Law Commission 2006, para. 37; International Court of Justice 1957, p. 142). However, the presumption only operates as far as the interpretation of the apparently conflicting norms is not *contra legem* (International Law Commission 2006, para. 43; Pauwelyn 2003, p. 43). This entails, for example, that a potential conflict between the obligation of Ethiopia to address the underlying causes of desertification (article 5.c of the UN Convention to Combat Desertification) and the obligation to create the necessary conditions to achieve the realization of Ethiopians' right to development (UN General Assembly 1986, articles 2.3, 3.1, 3.3 and 4) should not be automatically resolved by prioritizing one obligation over the other, but rather interpreting both obligations in the light of the other.

Indeed, it is in this process of interpretation of the different regimes converging in the GERD conflict where SDGs may play a relevant role, for the 2030 Agenda can operate as a kaleidoscopic lens to harmonize international obligations because of its integrative and broad approach. This function of the 2030 Agenda can find its legal basis in Article 31 of the Vienna Convention on the Law of the Treaties (VCLT), as it provides that:

> Article 31(1): «A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose».
>
> Article 31(3)(c): «There shall be taken into account, together with the context […] any relevant rules of international law applicable in the relations between the parties».

According to article 31(1) of the VCLT, in the process of interpretation, an interpreter can make use of any instruments from which it may infer what is the current ordinary meaning of the words. In this sense, as Pauwelyn argues (2003, pp. 259-263), if an interpreter is allowed to make use of the *Oxford Dictionary* to impart meaning to the words of a certain provision, there is no reason why we should refrain from taking into consideration an instrument that has gathered as much consensus as the 2030 Agenda in an interpretative process under article 31(1) of the VCLT. Hence, the 2030 Agenda can constitute a true source of evolutive interpretation of particular legal concepts such as «equitable and reasonable utilization of International watercourses», or «right to a general satisfactory environment favourable to their development», or to determine the contours and contents of the right to development, to name a few.

More importantly, as highlighted by the example of the recourse to the *Oxford Dictionary,* the interpretation of the «ordinary meaning of the words» —article 31(1) VCLT— is not affected by the limi-

tations concerning membership correspondence. Therefore, it is not necessary that all parties to the GERD dispute participated or accepted the secondary source used for interpretative purposes for a decision-maker to use this source to ascertain the modern meaning of a particular wording. Hence, the 2030 Agenda can guide the evolutive interpretation of the wording of international rules.

On the other hand, when the process of interpretation extends beyond the wording and entails the interpretation of the extent and scope of the obligations, the interpretative process of article 31(3)(c) VCLT comes into play. In the situation foreseen under article 31(3)(c), the interpreter is asked to take into consideration the broader normative framework of obligations existing *between* the states, hence a membership correspondence is required. This interpretative process reflects the principle of systemic integration (International Law Commission 2006, para. 420), which is aimed at guaranteeing the coherence of the international legal order.

Hence, article 31(3)(c) entails that any interpretation of environmental law, the law of international watercourses, human rights law, or economic law *(inter alia)* that disregards the existence of other norms pertaining to other special regimes of international law applicable between the parties would be contrary to the principle of systemic integration. This approach has been confirmed by the ICJ in the Gabčıkovo-Nagymaros case, where the Tribunal found that the environmental norms that had developed since the conclusion of the treaty between Hungary and Slovakia, regulating the construction and operationalization of the Danube Dam, had to be considered in the application of the treaty (International Court of Justice 1997, paras. 140-141).

In this form of systemic integration, SDGs may play a double role. In the first place, the 2030 Agenda *reinforces* the legal obligation already contained in article 31(3)(c) of observing international obligations not in the vacuum, but rather in their broader normative context. In other words, SDGs and systemic integration are fully aligned prescribing the same harmonization, from both a political and legal standpoint: the interrelated nature of SDGs —understanding that SDGs cannot be pursued as independent goals— requires a holistic approach that incorporates, at the same time, human rights, environmental, economic, and developmental concerns. This approach is completely aligned with the fact that international law already requires that Egypt, Sudan, and Ethiopia interpret their obligations in a systemic manner, for example, the right to a fair and equitable use of water resources in the light of environmental and human rights law.

In the second place, when these states resort to systemic interpretation of the applicable law to their dispute by virtue of article 31(3)(c) VCLT, as already pointed out, the 2030 Agenda may facilitate such harmonization by providing an integrative and evolution-

ary ordinary meaning of the words under article 31(1), *i.e.,* by combining the two forms of interpretation.

4.3. The limits of the role of SDGs in the process of overcoming regime fragmentation

Finally, it is necessary to highlight the limits of SDGs as a tool to overcome regime fragmentation in order not to overvalue their role in such process. The first limitation that we must point out is that as a tool to resolve the apparent conflict of norms, the processes of interpretation can be stretched only to a certain extent: interpretation may be employed as means to harmonize norms, but it cannot entail modifying an existing treaty (Simma 2011, p. 584). In the GERD conflict, an instance of such an unavoidable conflict is found in the case of the principle of permanent sovereignty over natural resources and the Anglo-Ethiopian treaty of 1902 and the 1929 Nile Waters Agreement, which ruled out the capacity of Ethiopia to restrict the Nile watercourse. In this sense, when we are not able to harmonize the two sets of obligations by means of interpretation, it is time to apply normative pre-eminence, via the conflict rules of *lex specialis, lex posterior* and *lex superior,* which entails the displacement of one norm in favour for another; an outcome that does not necessarily fit with the holistic approach adopted by the 2030 Agenda. Furthermore, the principles of *lex superior, lex posterior, and lex specialis* are, sometimes, insufficient to establish which rule should be displaced and which one applied.

As already noted, international law expanded without a *ground norm,* which would give order and coherence to the different subsystems that emerge, or that would establish a normative hierarchy among special regimes of international law in case of conflict (for example, a lack of hierarchy between human rights law and environmental law). Additionally, in public international law, there is no hierarchy among sources. Given that hierarchy among norms of international law can only be predicated from peremptory norms, the principle of *lex superior* is hardly ever useful to resolve normative conflicts among two distant special regimes of international law; for example, in the case of the GERD Project, since the treaty norms contained in the Anglo-Ethiopian treaty of 1902 and the 1929 Nile Waters Agreement are hierarchically equal to the CIL norm developed from the Principle of Permanent Sovereignty over natural resources, there is no possibility to apply the principle of *lex superior.*

Moving on to the principles of *lex specialis* and *lex posterior,* it is possible to assert that the two principles are equally applicable to the example of the conflict between permanent sovereignty over natural resources and the 1902 and 1929 treaties, but they render contradictory outcomes and international law does not prioritize one conflict rule over the other: if an adjudicator applies the *lex*

posterior principle, the CIL principle of permanent sovereignty over natural resources —which developed from Resolution 1803 (XVII) of 14 December 1962— would prevail over the 1902 and 1929 Treaties, as a posterior rule in time is considered to express the change of mind of the lawmakers on a particular subject-matter and prevails over a previous conflicting one. In contrast, pursuant the principle of *lex specialis derogat legi generali,* the 1902 and 1929 Treaties would prevail over the principle of permanent sovereignty over natural resources, as the most precise expression of the state consent (Pauwelyn 2003, 56-57) on how to regulate the use of Nile watercourses. In this sense, the ILC contended that the «special law» shall be the one that responds better to the «special nature of the facts», which justifies a «deviation from what otherwise would be the "normal" course of action» (ILC 2006, para. 105).

Needless to say, the situation would be further nuanced if the conflict was to arise between norms pertaining to distant special regimes —*e.g.,* International Human Rights Law, International Environmental Law, and International Watercourses Law— regulating the same subject-matter; human rights law is not a more or less specific regulation of environmental law, or vice versa. Hence, distant regimes may all be *special law.* The GERD dispute illustrates that, where special regimes are concerned, determining which normative corpus is more proximate to the situation is a matter that will depend on the subjectivity of the international law operator as well as the arguments of the parties. Arguably, an international lawyer immersed on the study of international economic law would consider that the GERD dispute is a case of economic development; an international lawyer specialized in environmental law would place environmental conservation and sustainability at its core; a human rights lawyer would consider that the protection of the human rights of the individuals is the most specific regulation of the situation presented in the case at hand. For instance, in the Advisory Opinion on *The Legal Consequences of the Construction of a Wall in Palestinian Territory* (International Court of Justice 2004, paras. 106-114), as well as in the *Case Concerning Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Uganda) (International Court of Justice 2005, para. 216), the ICJ itself refused to displace human rights law in favour of humanitarian law albeit it considered humanitarian law more particular, opting for a harmonious interpretation of the two.

In a similar vein, it is noteworthy that the lex posterior rule also presents serious challenges of application in conflicts of norms pertaining to distant special regimes. Firstly, that parties to apparently conflicting norms may have not ratified or acceded them at the same point in time, which entails that the decision-maker cannot put a single timestamp on the conflicting norms to ascertain which is the subsequent will/consent of the lawmakers (Pauwelyn 2003, p. 368). Secondly, while most current conflicts arise between norms

that do not share the same subject matter, for the principle of *lex posterior* to norms must be «successive»; *i.e.,* they must share the same subject-matter (Vienna Convention on the Law of the Treaties 1969, article 30). The importance of this second contention is illustrated by the example of the conflict that arises from the fact that Ethiopia must provide electricity to households to guarantee the right to an adequate standard of living (ICESCR, article 11), and its responsibility to ensure that activities within its jurisdiction do not cause damage to the environment of other States (CBD 1992, article 3). If the intention were to apply the *lex posterior* in this case, the outcome would be that the CBD would prevail over the ICESCR because the three parties to the dispute ratified it at a later point in time. However, this outcome would be counterintuitive —and incorrect— because these treaties are not successive; they do not share the same subject matter.

5
Conclusions

The discussions regarding the potential effects of the operationalization of the Grand Ethiopian Renaissance Dam (GERD) has shown that a developmental project aimed at the consecution of some sustainable development goals (SDGs) for a state may have the opposite results for other states. Indeed, whereas for Ethiopia the GERD Project gets the country closer to the achievement of sustainable development, for Sudan and Egypt, the project is rather perceived as a regression in their quest for sustainable development.

Using the GERD conflict as backdrop to the analysis, this contribution has argued that states shall compromise a solution that considers the SDGs not as a fragmented set of goals, independent one from another, but rather as a comprehensive and integrated policy framework to achieve sustainable development. Hence, the sustainable answer shall not be to pursue one or a few SDGs to their maximum extent, but rather to strike a balance aimed at the achievement of multiple SDGs.

Mindful that the GERD conflict also entails a legal controversy, the argument moved on to address the role that the SDGs may play on the harmonious interpretation of international law. As discussed in the last Section, in the process of interpretation of the different regimes converging in the GERD conflict, due to their integrated and interdependent nature, SDGs have been argued to operate as a kaleidoscopic lens to harmonize international obligations. However, this role is to be taken with some reservations. Indeed, public international law does not necessarily provide Egypt, Sudan, and Ethiopia with a legal answer to their conflict, but SDGs may provide

a political one, since states may resort to partial trade-offs to reach an equilibrium between their different needs that responds to the equilibrium called for by the 2030 Agenda.

However, while trade-offs and balances may be acceptable between SDGs, this will not always fit well with certain premises of international law, including but not limited to the primacy of Jus Cogens norms. This is because the SDGs are not a legal agenda, but a political one; in other words, while politics and diplomatic negotiations permit trade-offs, international law does not always allow them. Moreover, SDGs cannot be implemented without having regard to international law. As the General Assembly noted, sustainable development needs to be implemented in consistency with the rights and obligations of states, under international law (UN General Assembly 2012, para. 58[a]). But, paradoxically, as illustrated by the discussion regarding the limits of *lex superior, lex posterior* and *lex specialis,* sometimes even international law itself fails to provide us with a much-needed guidance regarding its own application.

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