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The Nile Water Dispute – International Legal Aspects

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ABSTRACT
For millennia, the Nile has been the cradle of civilizations and an object of fierce hydro political competitions. Furthermore, the lack of an inclusive legal framework has made it one of the contemporary hotspots of the globe at risk of a water war. In recent years, the construction project of the Grand Ethiopian Renaissance Dam (GERD) has put the spotlight back on the delicate issues of the Nile river water management and strained relations between its three largest riparian States (Egypt, Sudan and Ethiopia). Beyond the diplomatic crisis, the construction of the GERD challenges the legal status quo that has prevailed in the Nile Basin for generations. This article aims to analyze the current legal framework governing the Nile waters, its relevance in International Water Law, as well as the legal guarantees it provides to both downstream states early developers and upstream states late developer in ensuring a mutually beneficial utilization of the shared watercourse.
Keywords*: international water law, Nile water dispute, Equitable Utilization, No harm rule, Grand Ethiopian Renaissance Dam, Foreclosure of future uses*

1. INTRODUCTION

Competition over the Nile waters is nothing new. For millennia, the river has been the cradle of civilizations such as that of Egypt, and has paced the socio-economic, political, and cultural aspects of its riparian countries. Despite its strategic importance, the Nile is one of the major transnational rivers which to date lacks an inclusive legal framework regulating its use and exploitation. For some of its riparians countries, notably Egypt, the Nile is vital and represents the only source of fresh water. Therefore, issues related to the obstruction or reduction of the free flow of its waters are considered as existential threats by those countries.

In 1979, Egyptian President Anwar Sadat said, "The only matter that could take Egypt to war again is water" [1]. A few years later, in 1988 it was the Egyptian Minister of State for Foreign Affairs, Boutros Boutros Ghali who predicted that the next war in the Middle East would be fought over the waters of the Nile, not politics. Although some academics such as Ashok Swain doubt Egypt's real intentions of going to war over such matters and rather see the threat of war as being purely strategic [2].

The construction project of the Grand Ethiopian Renaissance Dam (GERD), the largest hydroelectric dam on the African continent, with an electrical capacity of 6,450 MW and a water capacity of 74km^3, has revived old tensions between Ethiopia and its downstream co-riparians (*Egypt and Sudan*) [1] and put the spotlight back on the delicate issues of the Nile river water management. As the matter of fact, the political and economic situation, and the balance of power in the Nile Basin are no longer what they were fifty years ago. The growth of the population in the countries of the river basin, the rapid economic growth of countries like Ethiopia and the subsequent increasing demand for water and energy needs has intensified the need to exploit the shared watercourse.

Figure 1 Nile River (in brown, the 3 countries involved in the Nile dispute)

Furthermore, historic factors and claims of acquired rights have further complicated efforts to establish a new legal framework to deal with the competitive legitimate interests of the different Nile riparians countries. These difficulties "which are symptomatic of the strongly competitive political and legal environment that has dominated the Nile Basin for generations" [3], are in fact concomitant with the ambiguous interpretation of international water law principles.

Moreover, the current water distribution in the Nile river basin raises the question of the legal guarantees offered by international water law to downstream states early developers and upstream states late developer in ensuring an equitable and beneficial utilization of the shared watercourse, key element in the implementation of sustainable Development Goals (SDGs) [2, 3].

2. HISTORY OF THE NILE BASIN LEGAL REGULATION

As we mentioned in our introduction, the Nile basin is one of the rivers in the world which to date lack the comprehensive and inclusive legal framework encompassing all the riparian countries despite its regional importance. This does however not mean that the Nile river is not the subject of international legal instruments, quite the contrary. With the establishment of colonial powers in the Nile Basin region at the end of the 19th century, emerged the need to regulate the use and management of the waters of the Nile Basin.

Thus, on April 15, 1891, in Rome was signed between Italy and the United Kingdom, a protocol on the demarcation of the respective zones of influence of the two countries in the Horn of Africa. The protocol in its article 3 states: "The Government of Italy undertakes not to construct on the Atbara any irrigation or other works which might sensibly modify its flow into the Nile"(*Art. 3 of the 1891 Anglo-Italian protocol - officially referred to as the Protocol between the Governments of Great Britain and Italy, for the Demarcation of Their Respective Spheres of Influence in East Africa, from Ras Kasar to the Blue Nile*). Although the treaty did not cover the Nile, it is today considered to be the very first international legal instrument [4], regulating the use of the waters of the Nile River Basin. This first protocol already indicated the manifest concerns of the British crown in ensuring an unobstructed flow of the Nile waters reaching Egypt.

On May 15, 1902, Britain signed a treaty with Ethiopia on the border between Sudan and Ethiopia on the one hand, and between Ethiopia and Eritrea on the other. In addition to the border issue, as was the case with Italy, the British crown used this opportunity to obtain from King Menelik II of Ethiopia, a guarantee of the continuous flowing of the waters of the Nile river basin to Sudan and Egypt. This guarantee was enshrined in article 3 of the treaty which stipulates, "*His Majesty the Emperor Menelik II, King of kings of Ethiopia, engages himself towards the Government of His Britannic Majesty not to construct or allow to be constructed, any works across the Blue Nile, Lake Tsana or the Sobat, which would arrest the flow of their waters into the Nile except in agreement with his Britannic Majesty's Government and the Government of the Sudan*" [5].

The novelty in this article was the subordination of the realization of a project that may obstruct the flow of waters going into the Nile to the prior agreement, of the British crown or of the downstream states of the basin, in this case Sudan (represented here as well by the Britannic Majesty's Government).

Nearly 4 years later, in April 1906, a tripartite agreement among the United Kingdom, Italy and France enshrined the recognition by the latter of the importance of the waters of the Nile basin for Great Britain and Egypt. And it undertook to safeguard these interests (*Article IV of the 1906 Tripartite agreement between the United Kingdom, France and Italy signed in London on the 3rd of April 1906. The article stipulates, "in order to preserve the integrity of Ethiopia and provide further that the parties would safeguard the interests of the United Kingdom and Egypt in the Nile basin, especially as regards the regulation of the water of that river and its tributaries …")*.

On May 9 of the same year, in London, the agreements of May 9, 1906 were signed between Great Britain and the Independent State of the Congo, which was personally managed by King Leopold II of Belgium, of which the Congo was the private property. This agreement, which modified the previous Brussels agreements of May 12, 1894, relating to the spheres of influence of the two states, stipulated in article 3: "*The Government of the Independent State of Congo undertakes not to construct or allow to be constructed any work over or near the Semliki or Isango Rivers. This would diminish the volume of water entering Lake Albert, except in agreement with the Sudanese Government*" (Article III of the Agreement between Britain and the Government of the Independent State of the Congo). This article, which is almost identical to that contained in the treaty signed by King Menelik II in 1902, had the same objective, ensuring the continuous and constant flow of water from the other Nile basin rivers to Sudan, then to Egypt.

- The 1929 Nile Waters Agreement. - These are arguably the most consequential agreements from a hydro political and legal perspective, and the most controversial because of the rights it conferred to Egypt over the waters of the Nile. It was signed in 1929 between the Kingdom of Egypt and Great Britain (acting on behalf of Sudan, Kenya, Tanzania, and Uganda).

This agreement, which in fact is an exchange of correspondence between Lord Lloyd (the British High Commissioner) and Muhammed Mahmoud Pasha, President of the Egyptian Council of Ministers, was intended to guarantee and facilitate an increase in the volume of water reaching Egypt. "The Agreement was based on the outcome of political negotiations between Egypt and Great Britain in 1920s, and in particular on the report of the 1925 Nile Waters Commission, which was attached to the agreement as an integral part thereof" [6].

The agreement which recognized Sudan's water needs for its development, confirmed the recognition by the British crown (acting on behalf of Sudan, Kenya, Tanzania and Uganda) of the natural and historical rights of Egypt on the waters of the Nile [4, p. 50]. And it affirmed the will of the United Kingdom to ensure its implementation at any time and in any place. *In his correspondence to Mahmoud Pasha, Lord Lloyd, the British High Commissioner said, "…I also assure to your Excellency from now on, the*

British government – in spite of being interested in the welfare of Sudan – does not intend to harm the historical and natural rights of Egypt in the Nile. We acknowledge these rights today as we have acknowledged them in the past" .... ". . . "Finally, I would like to remind your Excellency that the government of his highness the king has already acknowledged the national and historical rights of Egypt in the Nile, and I assert your Excellency that the government of his highness the king considers securing those rights as one of the major principle of the British principles. And I assure Your Excellency that this principle and the details of the agreement will be implemented at every time regardless of the circumstances that may take place." [7].

Moreover, the agreement allowed Egypt, under authorization from the local authorities in Sudan, to undertake infrastructure projects in Sudan in order to increase the volume of water flowing to Egypt. It also confers the right to Egypt to supervise the construction of any Nile related infrastructure project upstream of the river *"The construction, maintenance and administration of the above-mentioned works shall be under the direct control of the Egyptian Government."* [8]. Establishing de facto and de jure a hydro hegemony of Egypt in the region.

In 1934 the obligation of "Prior Notification" on projects to exploit the waters of the Nile was enshrined in the 1934 agreements between Great Britain (acting on behalf of Tanzania) and Belgium (acting on behalf of Rwanda and Burundi) regarding Water Rights on the Boundary between Tanganyika and Ruanda-Urundi. The agreement addresses the issue of the utilization as well of the waters of the Kagera River for irrigation and power generation (*Art 6 of the agreement between the United Kingdom and Belgium regarding Water Rights on the Boundary between Tanganyika and Ruanda-Urundi-London, November 22, 1934.1 [Ratifications exchanged in London, May 10, 1938.]*).

In 1949, a precedent of the direct implication of Egypt in the implementation of a Nile related project is established in a riparian country other than Sudan its adjoining neighboring country. In an exchange of Notes between Egypt and Britain (Acting on behalf of Uganda) on the construction of the Owen Falls Dam. This can be regarded as an example of collaboration between the Nil riparian states, in one hand as pointed out by Mohamed Salman Tayie [9] or the application in substance of an Egyptian hydro hegemony in a further located upstream country, in the other hand.

The Agreement stipulates as follows: *"The two governments have also agreed that though the construction of the dam will be the responsibility of the Uganda Electricity Board, the interests of Egypt will, during the period of construction, be represented at the site by the Egyptian resident engineer of suitable rank and his staff stationed there by the Royal Egyptian Government to whom all facilities will be given for the accomplishment of their duties. Furthermore, the two governments have agreed that although the dam when constructed will be administered and maintained by the Uganda Electricity Board, the latter will regulate the discharges to be passed through the dam on the instructions of the Egyptian Government for this purpose in accordance with arrangements to be agreed upon between the Egyptian Ministry of Public Works and the Uganda authorities pursuant to the provisions of agreements to be concluded between the two Governments" (Art. 4 of the Exchange of Notes Constituting an Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of Egypt regarding the construction of the Owen Falls Dam, Uganda. Cairo, 31 May 1949).*

This agreement was the last colonial era agreement on the Nile.

With the independence of countries formerly under British colonial rule, the denunciations of the various agreements on the Nile began. Sudan was the first country to embark on a renegotiation of the 1929 treaty with Egypt. These negotiations culminated in 1959 on the Agreement on Full Utilization of the Waters of the Nile, to which we will return later.

Many of the other riparian countries, notably Ethiopia, Tanzania, and Burundi, also rejected the agreements made with or by Great Britain, most notably 1929 agreement. Tanzania (Tanganyika) for example in 1962 expressed its desire not to be bound by the 1929 agreements which was subscribed in its name by the British crown [10], this position, which in fact extended to all colonial agreements, was based on what will be later known as the Nyerere doctrine which " in the case of bilateral treaties, calls for provisional application, on a reciprocal basis, for a two-year period from the date of independence of those terms of treaties that are compatible with the sovereign rights of new states. In the case of multilateral treaties, there is no fixed period for the provisional application of their terms based on reciprocity." [11].

Other riparian countries like Kenya, despite having an unclarified position throughout the 1970-1980s on the Nile Basin treaties, will later in 2002, through its Minister for Water Development, make a comprehensive policy statement on the use of the waters of Lake Victoria and the River Nile where he reaffirmed their position [6, p. 38]. Ethiopia, on the other hand, expressed its wish to no longer be bound by the 1902 treaty invoking the doctrine of "Rebus sic Stantibus [12]. According to which, a party to a treaty can unilaterally terminate the treaty in case "the execution of the treaty is materially or morally impossible or which deprive one party of the advantages which the treaty intended to confer. "As asserted by Pasquale Fiore "all treaties are to be looked upon as null which are in any way opposed to the development of the free activity of a nation or which hinders the development of its industry or commerce. It prevents the exercise of any of its natural rights or which offends in any manner against the principles of absolute justice or the supreme law of right". However, despite the fact that these treaties notably that of 1929 are defended by certain scholars, as Arthur Okoth-Owiro pointed out, « the overwhelming weight of expert opinion appears to favour the view that the "The 1929 settlement of

the Nile waters was a political matter and that it cannot be used as a precedent in international law" [13].

Amid the 1950-1960 geopolitical shift in the region, was signed in 1959, the Agreement on Full Utilization of the Waters of the Nile Between Egypt and Sudan; it marked a new era as being the first treaty between two independent states of the Nile Basin. The pact which recognized the acquired rights of the two countries over the waters of the Nile, granted Egypt 55.5 BCM and Sudan 18.5 BCM of the total volume of the Nil waters as measured at Aswan High Dam in Egypt [14], the two states through this pact established a unified block of downstream States against the other riparian States (Upstream Riparian States). It was officially formulated in Article 5 of the treaty: "*Since other riparian countries of the Nile besides the Republic of the Sudan and the United Arab Republic claim a share in the Nile waters, both republics agree to study together these claims and adopt a unified view thereon"*.

Moreover, this article clearly states an acknowledgement by both Egypt and Sudan of the claims or future claims of upstream riparian states over their share of the Nile waters. As it was anticipated, the agreement was denounced before it was even signed. In fact, while the agreement was being negotiated, Ethiopia denounced the non-inclusive nature of the negotiations in December 1957, and in response adopted the Harmon doctrine, declaring absolute sovereignty over all the waters flowing on its territory [4, p.694].

The 1990s were characterized by a new regional dynamic of collaboration between the countries of the basin, a trend driven by the adoption in 1966 by the ILA of the Helsinki Rules on the Uses of the Waters of International Rivers. And the preparatory work for the ILC which would culminate in 1997 with the adoption by the General Assembly of the UN, of the United Nations' Convention on the Law of Non-Navigational Uses of International Watercourses. It is in this context that in 1991 Uganda and Egypt signed an agreement on the Ugandan project to construct a power station on Lake Victoria, after the IMF suspended the process of financing the dam following objections made by Sudan and Egypt.

In July 1993, Ethiopia and Cairo signed the 1993 Framework for General Co-operation, by this agreement, which is the first post-colonial agreement between these two countries on the Nile [15]. The two countries in this framework refrained from engaging in projects which may harm the interests of the other, but to collaborate in the implementation of projects which may make it possible to reduce the loss of the waters of the Nile and to increase its volume. The two countries also agreed that the question of the use of the waters of the Nile should be the subject of detailed work, based on the rules and principles of international law *(Art. 4 of the Framework for general co-operation between the Arab Republic of Egypt and Ethiopia signed at Cairo, 1 July 1993)*.

Following the Framework for General Co-operation between Egypt and Ethiopia, the Nile riparian state will go on to create on 22nd February 1999, the Nile Basin Initiative (NBI), an Intergovernmental partnership which seeks to achieve sustainable socio-economic development through the equitable utilization of, and benefit from, the common Nile Basin water resources [16]. It is the first inclusive basin wide institution on the Nile. Long negotiations in the NBI framework will culminate into The Cooperative Framework Agreement (CFA). The CFA formulates 6 fundamental principles of the Nile basin waters management, The principles of:

- Cooperation
- Sustainable development
- Subsidiarity
- Equitable and reasonable utilization
- Prevention of the causing of significant harm
- Right of Nile Basin States to use water within their territories.

The agreement was signed by all the riparian countries except Egypt and Sudan, who wanted to see their current rights and uses of the waters of the Nile enshrined in the final text (Article 14b of the CFA). It is a way to ensure a continued benefit of the rights conferred to them under the 1959 bilateral agreement between the two countries, but also the volume of water currently used by each of the two countries [15, p. 92].

3. THE GRAND ETHIOPIAN RENAISSANCE DAM (GERD)– NEGOCIATIONS AND LEGAL IMPLICATIONS

In 2011, Ethiopia's announcement of the GERD construction project sparked tensions with its fellow riparian states, Sudan, and Egypt. To resolve the tensions the three countries entered negotiations, which resulted in March 2015 in a Declaration of Principle (DoP) on the Grand Ethiopian Renaissance Dam Project (GERDP) [17]. The Declaration of Principle (DoP), which recognizes the increasing water needs of each party, also reaffirms the principles of "No harm" and "Equitable and Reasonable Utilization".

This order "No harm" principle first and "Equitable and Reasonable Utilization" is in direct contrast with the UN Watercourses Convention and illustrate the common and false belief of the unilateral and unconditional protection given to prior uses of waters resources, water quality, over water quantity distribution among riparian states [18].

Moreover, the DoP contains procedural standards such as the development of rules and guidelines for the operation of the GERD, informing downstream states of unforeseen or urgent circumstances, the establishment of an 'appropriate coordination mechanism, the exchange of data and information, and a dispute resolution mechanism. The ultimate underlying objective of the DoP, in addition to ensuring equitable and reasonable utilization of the Nile waters by the parties (Art 3 – 4 of the DoP), is to ensure that the GERD contributes not only to the provision of energy, but also to economic growth, regional cooperation and integration [19].

In the following years after the conclusion of the DoP, the three countries continued negotiations. On December 28,

after 2 days of negotiations, the ministers of water resources and the ministers of foreign affairs of the three countries signed the Khartoum Agreement, originally titled "Summary and the Outcomes of the Meeting [20]" as a reaffirmation of their full commitment to the DoP. The final document records the endorsement of the ministers of the modalities for two studies on the "Water Resources/Hydropower System Simulation Model" and "Transboundary Environmental and Socio-economic Impact Assessment" of the GERD.

However, disagreement on the baseline data to use in the two studies led to a stalemate in the negotiations and fractured the Egyptian/Sudanese alliance.

After 3 years of "on and off" negotiations, talks between the three countries were revitalize after Egypt appealed to the United States to broker a deal on the GERD in November 2019. However, the negotiations went in limbo in February 2020 with the withdrawal of the Ethiopian Minister of foreign affairs, accusing the US of favoring the Egyptians. "*The statement issued by US Treasury on GERD unacceptable & highly partisan, Ethiopia believes in continued engagement with Egypt & Sudan to address the outstanding issues and finalize the Guidelines and Rules on a win-win basis for all*" [21].

In June 2020, the head of states of the three countries agreed on agreed to an AU-led process to resolve outstanding issues, after Egypt submitted a formal complaint to the UN Security Council "*to urge Ethiopia to act as a responsible stakeholder by concluding a fair and balanced agreement on the GERD and by not undertaking unilateral measures in relation to this dam*". To date, the unresolved differences between the countries include the binding nature of a possible agreement, the dispute resolution mechanism and finally the management of waterflow during drought periods.

The major concern raised by the GERDP in the Nile basin today, as we have mentioned before, is the issue of water distribution. Despite the recognition by each of the riparian countries in the DoP of the legitimate rights of each other to use the waters of the Nile river basin. It must be recognized that each of these countries not only does not have the same degree of dependence of the Nile waters, but also does not have the same capacity of harnessing of Nile waters.

Egypt of all the other riparian countries is the only one to have developed extensively the waters of the Nile, this status of first developer, as well as the fact that the Nile is the only watercourse flowing in the country, explain its extreme reliance on the Nile waters (about 95% of its waters come from the Nile).

Furthermore, colonial era international treaties and conventions, to a certain extent not only favored Egypt and Sudan, but contributed to the foreclosure of future use of the Nile Basin waters by its upstream riparian, and enshrined the notion of historic rights claimed by Egypt (see: 1929 Nile Treaty). More so, the Helsinki rules, the UN Watercourses Convention of 1997, and the Berlin Rules do not call into question existing water treaties and conventions, quite the opposite.

In fact, when it comes to determining which use is equitable and reasonable or which use does not cause significant harm, more than half the criteria enumerated by these international instrument clearly favor and highly recommend taking into account current and previous utilization [22].

These two principles of equal value according to Salman [23] aim to reconcile the interests of upstream countries with those of downstream countries. It sought to avoid a status quo in the use of the waters of a basin, because as mentioned by Kai Wegericha and Oliver Olsson "the no-harm rule, if it were the only one to apply, would fully protect the status quo, i.e. the existing water rights of the lower riparians [. . .]. In other words, the economic and social growth of any newcomer, in particular upstream countries, would be stunted" [24].

It is in fact this status quo that is rejected by the upstream states like Ethiopia, which thus sees its ambitions for the utilization of the waters of the Nile basin hindered by the current water use of downstream states.

Hence, the various international recommendations on the management of shared watercourse between riparian States lean clearly, as we mentioned above, in favor of the first developers. Thus the argument made by Kai Wegericha and Oliver Olsson that these international rules would be fundamentally biased [25] and deserve to be reviewed because they are not equitable and accommodating of the future needs of late developers. However, more and more authors underly the fact that the "No harm rule" not only protects downstream states as it is generally understood, but also protects upstream states. Because an extensive exploitation of the shared watercourse by a downstream state exposes it considerably to harms subsequent to the use by an upstream state of its right to utilize the waters of the shared watercourse [26, 27].

Hence, an extensive use of an international watercourse by a downstream state first developer is in itself a violation of the "No harm rule" under the concept of foreclosure of future use in the sense that it encroaches on the future ability of upstream states, late developers, to equitably and reasonably utilize the shared resource without causing harm. In such circumstances according to Mark Zeitoun, the late developer would equally be in its legal right to "proportionately" violate the obligation not to cause significant harm; an approach taken by the ICJ in the case of the Gabcikovo-Nagymaros Project (Hungary v. Slovakia) [26, p.955].

4. CONCLUSION

Reading the various agreements on the Nile river basin from the colonial era shows how a one-sided perspective and the focus on the water needs of the two downstream countries (Egypt and Sudan) prevailed in the regional policy of the United Kingdom. This policy, which reached its climax with the 1929 Nile Waters Agreement between the United Kingdom (acting on behalf of Sudan) and Egypt, established Egypt, de jure and de facto, as a hydro-hegemon, by giving it a right of veto and scrutiny over any Nile related upstream project.

Subsequently, in 1959 Egypt and Sudan, now both independent riparian countries, will perpetuate this policy of Prior appropriation through the Agreement on The Full Utilization of the Waters of the Nile, by distributing the total water volume of the Nile, without taking into account the needs of upstream states.

Despite the fact that the current legal instruments of International Water Law in particular the Helsinki Rules, the UN watercourse Convention of 1997 and the Berlin Rules, seem to favor riparian states first developer through the attention paid to previous utilization, it is important to mention that the extensive use of Nile waters by Egypt. And the total distribution of Nile waters with Sudan constitutes a violation of the "no harm rule", a violation that can lead upstream states to “proportionally” violate this same principle according to the decision of the ICJ in the case of the Gabcikovo-Nagymaros Project (Hungary v. Slovakia) [28].

The Nile water dispute today is an illustration of the difficulties pertaining to the fair distribution of water resource, but also “reflects the limited ability of International Water Law to provide appropriate response to water disputes” as argued by Meshel Tamar [18, p. 139]. In the current context of climate change and the projected growth of water demand, a regional transboundary watercourse cooperation is an imperative in order to maintain peace and security in the region and paramount in the implementation of the Sustainable Development Goals (SDG6) [29]. The Nile River Basin therefore needs more than ever an inclusive comprehensive legal framework for joint management and cooperation between all its riparian countries. One way to foster such cooperation would be the ratification by the basin countries of the UN Watercourse Convention 1997, to which none of the Nile riparian countries is a signatory. Furthermore, initiatives already taken by the countries to the establishment of such a framework, which led to the creation of the NBI in 1999 and later of the Cooperative Framework Agreement CFA must be carried on and be ratified by all the riparian stats to enable a mutually beneficial utilization of the Nile waters in an equitable and sustainable manner.

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