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The Efficacy of Water Treaties in the Eastern Nile Basin

Wuhibegezer Ferede and Sheferawu Abebe

Abstract: This paper attempts to analyse the efficacy of the water treaties of the Nile in light of the principles of international law. The following critical examination of the treaties brings to light numerous legal defects associated with fraud, coercion, exclusivity and the deficiency of many of the precepts of the international law. Moreover, the lower riparian states' advocacy for the succession of colonial treaties, which is branded as the re-affirmation of colonialism, is found to be incompatible with the principles of the clean-slate theory adopted by the upper riparian states. Therefore, the region lacks an efficacious regime that could address the interests of all riparian states.

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Keywords: Ethiopia, Sudan, Egypt, Nile Basin, transnational waters, water conflicts, decolonization, international law, international treaties

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According to Article 38(1) of the Rome Statute of the International Criminal Court, international conventions, customs and judicial decisions of qualified law experts serve as basic sources of international law. The governance of trans-boundary or shared water resources is subject to these precepts. However, the primary means for the establishment of international rights and obligations over international water resources are treaties. Hence, the article focuses on the analysis of treaties that were intended to regulate the utilization of the Nile River during and after the colonization of the basin in relation to state succession.

State Succession and the Nature of Treaties

State succession can be brought about by the decolonization of all or part(s) of a territorial unit; dismemberment of a state; secession; annexation; or merger (Shaw 2008: 676). It is usually followed by the question of whether a succession of treaties will also occur. Hence, whether the succeeding state will inherit all the rights and obligations of its predecessor is a contested issue. In this regard, some postcolonial states were willing to inherit the rights and obligations of their predecessors whereas others were reluctant.

When most African states gained their independence in the post-World War II period, they established their own new states, replicating the colonial-state model. However, decolonization produced a number of other changes which became a focus within the international legal system. Whether colonial rights and duties could be transferred from the colonizers to the newly independent states in the period following European colonialism was one of the focuses of these legal debates. The issue of the succession of treaties is the central notion lacking legal clarity in the discussion about the various treaties regarding the resources of the Nile. Though in practice states oriented themselves towards the middle ground, the two extreme positions regarding historical succession of treaties are the clean-slate theory and the continuity theory.

Theoretical Discussions

Clean-Slate Theory of Succession

This theory advocates that the successor state should assume none of the rights and obligations of the predecessor state. Accordingly, it entails

discontinuity of all rights and duties that are established by the predecessor state with the exception of international and boundary treaties.

This theory is often raised in regards to the Nile issue by the upper riparian states as a legal defence against the Egyptian and Sudanese positions. However, the lower riparian countries oppose the clean-slate theory – particularly Egypt, despite its having been a colony of Great Britain.

Continuity Theory of Succession

This theory obliges the newly created states to inherit all of the rights and duties from their predecessors. It is advocated for mostly by those states that stand to benefit from treaties reached by the colonial powers or predecessor states. This theory was applied by the Organization of African Unity in the postcolonial period only in reference to boundaries, despite the concerns of many who believed its use would unlock Pandora's Box. Egypt has consistently argued in favour of continuity theory in regard to the 1929 and 1959 agreements.

Principle of Freedom Contracts

One approach represents a balance between the two extreme positions listed above. It stresses the importance of agreement between the parties concerned in terms of whether existing treaties should be repudiated or endure, and it is based on the principle of freedom of contracts. The principle argues that parties to a given contractual agreement can multilaterally elect to be bound by their terms of agreement or simply reject the old agreement. Therefore, treaties made under the rule of colonialism will be transferred only with the consent of all relevant parties (d'Aspremont 2013). Another legal issue worth discussing here is the common-law concept of “privity of contracts”, also referred to as the “relative effect of contracts” in civil-law countries. According to this rule, the parties to the contract cannot pose any form of damage on a third party who is not a signatory to the agreement. Therefore, treaties that enabled certain countries to appropriate the Nile's water while excluding the co-basin states have gone against this principle. Having covered the basics of succession theories, in the next section we will critically examine the efficacy of the various Nile water treaties since 1891.

Water Treaties in the Eastern Nile Basin

Anglo-Italian Protocol (15 April 1891)

The Anglo-Italian Protocol was a colonialist protocol signed by Great Britain and Italy on 15 April 1891. It dealt with the Nile issue, though the latter was camouflaged by the delineation of the colonial borders and the respective spheres of influence of Great Britain and Italy in Eastern Africa (Swain 1997: 676). In this protocol, Article 3 was dedicated to indemnifying the undisturbed flow of the Nile by restricting Italy's endeavour to control a water project over the Atbara River (Tesfay Tafesse 2001: 71; Godana 1985: 104; Swain 1997: 676), whose upper reaches fell within the newly acquired Italian possession of Eritrea (Okoth-Owiro 2004: 6). The article ensures that the government of Italy will be able to undertake almost no irrigation projects or other works on the Atbara which might significantly modify its flow into the Nile (Elias Ashebir 2009: 37).

This protocol was signed by the colonial powers without taking into account the interest of third parties, most notably Ethiopia. Thus, the principle of “relative effects” of contracts, which aims to protect the interests of those parties who are not signatories of a given contract, was violated. Moreover, the succession of this invalid protocol could not be effectuated without the consent of Ethiopia. When the issue of the Nile is addressed in the protocol, it is hidden in territorial agreements concluded with another colonial power – Italy – that disregarded the relative effect of the protocol, making the protocol susceptible to fraud. This protocol binds only Britain and Italy because, in accordance with the principle of privity of contracts, only the signatory parties are bound to the terms of the agreement. Therefore such a protocol is voidable and cannot serve as a valid legal claim.

Anglo-Ethiopian Treaty (15 May 1902)

In 1902 English diplomat John Harrington was dispatched to Addis Ababa to negotiate a treaty on the boundary delimitations between Ethiopia and Anglo-Egyptian Sudan (Swain 1997: 676; Mulugeta Worku 1987: 19). The resulting Anglo-Ethiopian Treaty was signed on 15 May 1902 in Addis Ababa by Harrington on behalf of Great Britain representing Anglo-Egyptian Sudan and by Emperor Menelik II of Ethiopia (Okoth-Owiro 2004: 6). The direct translation of the Amharic version of the article that refers to the Nile reads:

His Majesty, King of Kings of Ethiopia, has entered into the commitment of not giving permission to any work that fully arrests the flow of the Blue Nile, Lake Tsana or the Sobat, which empty into the White Nile, without making a prior agreement with the British government. (Author's translation)

However, the English version of this article reads:

His Majesty the Emperor Men[e]lik II, King of Kings of Ethiopia, engages himself towards the government of His Britannic Majesty not to construct or allow to be constructed any work across the Blue Nile, Lake Tana, or the Sobat which would arrest the flow of their waters except in agreement with His Britannic Majesty's Government and the Government of Sudan. (Ullendorff 1967: 646; Kendie 1999: 146; Godana 1985: 104)

This accord has become one of the most contested agreements over the use of the Nile waters, primarily owing to the substantial differences between the Amharic and English versions. The English version of Article 3 states that Emperor Menelik "engages himself [...] not to construct, or allow to be constructed, any work across the Blue Nile, Lake Tana or the Sobat" (Ullendorff 1967: 646). However, the Amharic version speaks clearly of the impossibility of completely arresting the flow of the waters (*ibid.*: 642). The significant discrepancy is that the English version required Menelik to obtain permission from both the British and Sudanese governments to run water projects, while the Amharic version refers to the British government alone (*ibid.*).

The core intent of the specific article that deals with the issues of the Nile as indicated in the Anglo-Ethiopian Treaty was to limit Ethiopia's right to reach agreements on water use with possible colonial contenders to Britain. The agreement belies Britain's fear of other colonial powers interfering, this fear complementing Britain's underestimation of Ethiopia's capacity to build water projects across the Sobat, the Blue Nile and Lake Tana by itself. The phrase "not to [...] allow to be constructed any work across the Blue Nile, Lake Tana, or the Sobat" demonstrates Britain's aforementioned fear of other colonial states and underestimation of Ethiopia.

When a treaty is found to be defective, it will be voided or invalidated by the affected party (or parties). Treaties which have defects or basic errors can be invalidated upon request of the affected party. The Anglo-Ethiopian Treaty contains a defect of consent, which makes it invalid. In addition, the fact that Ethiopia signed this treaty under colonial pressure could evince fraud, corruption and physical or psychologi-

cal coercion. Moreover, this treaty was never ratified by the British Parliament or by the Ethiopian Crown Council as binding (Kendie 1999: 146). The ratification by the respective legislative organs is a precondition to make international treaties the integral law of the land, although different states adopt different mechanisms toward that end. In fact, there are two main approaches taken in regard to ratification: the monist view and the dualist view.

Monists contend that all treaties are valid without any action needing to be undertaken by the parliament or any organ of a municipal government, whereas dualists advocate the official incorporation of treaties by the municipal parliament or any competent organ of a given state into the integral law of that country. In the general treaty framework, Great Britain and Ethiopia are both known to follow a dualist approach. Hence, the 1902 Anglo-Ethiopian Treaty is not a legally binding document as long as it is not re-ratified. Therefore, neither approach can preclude Ethiopia from building any project without prior agreement (Gebre Tsadik Degefu 2003: 96). Moreover, Egypt has no direct say in, nor is it represented by, the 1902 agreement that would allow it to justifiably claim that it has an agreement with Ethiopia (Omer Mohamed Ali Mohamed 1984: 5) because the agreement was between Ethiopia and Great Britain representing Sudan.

The Tripartite Treaty (1906)

Britain, France and Italy had been hovering around Ethiopia for several years (Bahru Zewde 2002: 85), when finally in London on 13 December 1906, the three nations signed a treaty, targeting Ethiopia for a colonial scheme (Bahru Zewde 2002: 85; Swain 1997: 676). The objective of the countries' plan was to set a legal framework and steps to regulate their sphere of influence following the anticipated succession problems in the aftermath of Menelik II's stroke (Bahru Zewde 2002: 114, 151).

In Article 14(a) of this treaty, the three colonial powers agreed to act together to safeguard the interests of Great Britain and Egypt in the Nile Basin (Okoth-Owiro 2004: 7). This agreement neither included all riparian countries nor fulfilled the elements of a valid treaty. The parties to this treaty were exclusively colonial powers. Treaties entered into by colonial states on behalf of a given colony cannot be transferred to the newly independent state unless the latter agrees to the terms. In this case, most of the riparian countries rejected the treaty after their independence.

The Anglo-Italian Secret Agreement (1925)

In the Anglo-Italian exchange of letters that led to the Anglo-Italian Secret Agreement of 1925 (Swain 1997: 146; Bahru Zewde 2002: 85; Okoth-Owiro 2004: 7; Godana 1985: 105), Italy made concessions to Great Britain and promised to help it obtain permission from Ethiopia to construct a dam on Lake Tana (Kendie 1999: 146). Britain also sought Italy's support for its plan to construct a barrage at Lake Tana as well as a road from Sudan to Lake Tana in order to transport goods and personnel (*ibid.*).

As a *quid pro quo*, Britain was to support Italy in its attempt to obtain a concession from Ethiopia to construct a railway stretching from the border of Eritrea to the border of Italian Somaliland that was meant to intensify Italy's economic influence (*ibid.*: 147). As a result of the Anglo-Italian discussions, Great Britain accepted Italy's offer, and subsequent negotiations produced an agreement in the form of an exchange of notes. These notes included the following statement:

[Italy], recognizing the prior hydraulic rights of Egypt and the Sudan, will not engage to construct on the headwaters of the Blue Nile [...], the White Nile [...], their tributaries and affluents, any work which might [significantly] modify their flow into the main river. (*ibid.*)

Ethiopia denounced the secret deal and brought the case before the League of Nations. Both the government of Britain and Italy gave justifications for their action, denying claims of having infringed upon Ethiopia's sovereignty. The existence of the secret agreement itself reflects fraud, which is grounds for termination of treaties or agreements in international law. Moreover, Ethiopia was not a party to this agreement and opposed its validity before the League of Nations.

The 1929 Anglo-Egyptian Nile Water Agreement

On 7 May 1929 an exchange of notes took place between Egyptian Prime Minister Mohammed Mahmoud Pasha and British High Commissioner to Egypt Lord Lloyd, the latter of whom was acting on behalf of Sudan. This exchange became known as the 1929 Nile Water Agreement (Omer Mohamed Ali Mohamed: 6). The agreement stipulated that

no irrigation or power works are to be constructed or taken on the Nile or its tributaries, or on the lakes from which it flows in so far as all these are in Sudan or in countries under British administration, and entail prejudice to the interests of Egypt. (Kendie 1999: 48)

By virtue of this agreement, Egypt recognized Sudan's right to water in amounts adequate enough for its own development, as long as Egypt's "natural and historic rights" were respected (Swain 1997: 677). The agreement also specified a strict system of water information management and set a schedule for the flow of specific quantities of water to Egypt (Omer Mohamed Ali Mohamed 1984: 6). According to this agreement, Egypt's share was set at 48 billion cubic metres (bcm), in contrast to just 4 bcm for Sudan, and Egypt reserved the right to inspect and veto upstream water projects that would affect the volume and perennial flow of the river. Thus, this agreement was one of the basic tools used by Egypt to attain and project its hegemonic influence over the entire basin. However, it seems that, fearing organized counter-claims, 32 bcm went unallotted because the treaty was reached without the participation of the remaining riparian states (Swain 1997: 677). The agreement all but ignored the rights of the other upper riparian states, and its inappropriateness is evident as it favours Egypt over the remaining riparian states (Collins 1990: 157).

Some scholars attribute the exclusion of other riparian states to the weakness and indifference of those states themselves, whereas others link it to the colonial domination of the area by Great Britain. Either argument can explain the exclusion of Ethiopia, a non-colonial state that had been regularly requesting engagement and renegotiation.

In fact, the agreement had no jurisdiction in Ethiopia because it was never a British colony. Accordingly, Kenya, Tanzania and Uganda, as successor states of the British Empire, could have been bound by such terms if they had accepted them (d'Aspremont 2013). But these countries ignored such treaties as per the principle of the clean-slate theory, and they demonstrated their opposition to the international community many times. Ethiopia is not a party from the outset and is thus not bound to any such treaty. Moreover, since the treaty would have given veto power to Egypt over the shared natural resources of the Nile River while excluding the remaining riparian countries, it would be absurd for those excluded countries to have been bound by it.

The invalidity of the agreement was bolstered by the newly independent riparian states' adoption of the "Nyerere doctrine", a reformulation of the optional theory of succession. The principle of good faith – which is the general precept of law according to international standards – should be respected during the drafting of treaties as well as whenever they are subsequently interpreted. The 1929 treaty goes against the vested interest of the upper riparian countries and ensures the monopoly of power by Egypt, which goes against the principle of good faith. Therefore, under international law such an agreement is invalid. Gener-

ally, this exchange of notes confines itself to settling the scramble for the river toward a single purpose – namely, irrigation agriculture (Omer Mohamed Ali Mohamed 1984: 6)

The 1959 Nile Waters Agreement

The Nile Waters Agreement of 1959 is the first agreement between independent African states in regard to international water-sharing. On the eve of its independence, Sudan requested a renegotiation of the 1929 agreement (Swain 1997: 677) as well as demanding national self-determination (*ibid.*). Accordingly, the Anglo-Egyptian Agreement of 1953 gave the Sudanese the right to self-determination, which they used to vote for independence, rejecting the proposal of unity with Egypt.

Following the inauguration of the Republic of Sudan in 1956, Sudan's first prime minister, Ismail al-Azhari, immediately asked for a revision of the 1929 agreement (*ibid.*: 679). This coincided with the aspiration of Gamal Abdel Nasser to construct a massive dam at Aswan (*ibid.*). Disregarding the British Century Storage Scheme, which called for the construction of small-scale, upstream dams, in 1950 Egypt planned the Aswan High Dam Project in order to be able to store an entire annual flow of the Nile.

In 1952, Egypt took unilateral action in proposing the Aswan High Dam, as its basic aim was to secure water that could be used as a bargaining chip in the hydro-political wrangling of the postcolonial period (Girma Amare 2000: 2). Egypt realized the importance of attaining both agreement from Sudan and international recognition to raise financial support before executing this project. In addition, fearing a strong challenge emanating from an independent Sudan, Egypt made aggressive diplomatic moves to share Nile water while Sudan was still under the colonial yoke.

The bilateral negotiation between Egypt and Sudan, which was primarily centred on the construction of the huge reservoir for the Aswan High Dam, with a storage capacity of 156 bcm per year, was comprised of three stages. In the first round of negotiations, held between September and December 1954, Egypt demanded the prioritization of prevailing water needs and the building of harvest-related infrastructure at Aswan. Accordingly, Nile water was apportioned with respective shares of 62 bcm and 8 bcm for Egypt and Sudan. In response to Sudan's objection to the construction of the dam, Egypt withdrew its previous commitment to assist the Sudanese government with their plans to build a reservoir at Roseires (Swain 1997: 679).

Ultimately in 1958 Sudan unilaterally rejected the 1929 agreement. Due to these differences, negotiations ended inconclusively. The years

from 1956 to 1958 marked the apogee of the dispute. It was due to this deadlock that an Egyptian army unit marched toward Sudan in a show of strength, under the pretext of a border dispute (*ibid.*). The military braggadocio ended with an Egyptian-sponsored military coup in Sudan in 1958 under the leadership of General Ibrahim Abboud (Swain 1997: 679), which helped lay the groundwork for the 1959 agreement. This coup was designed to ward off post-independent Sudan's renewed claim to the Nile as well as to prepare fertile ground for the bilateral agreement of 1959. The agreement was designed to allocate the river's resources exclusively between Egypt and Sudan (Tesfay Tafesse 2001), to the detriment of other Nile riparian states.

This agreement settled the controversy over the quantity of the average annual Nile flow, which was agreed to be approximately 84 bcm, measured at the Aswan High Dam. The agreement allowed the entire average annual flow of the Nile to be shared between Sudan and Egypt, respectively taking in 18.5 and 55.5 bcm (Omer Mohamed Ali Mohamed 1984: 147-149). Annual water loss due to evaporation and other factors was agreed to be about 10 bcm. The two countries also agreed to deduct this loss from the Nile yield before assigning shares. Furthermore, they agreed that costs and benefits would be divided equally between them if Sudan, in agreement with Egypt, decided to construct water projects over the Nile.

According to this agreement, if any complaints come from the remaining riparian countries over the Nile water resources, Sudan and Egypt shall handle it together. If the complaint should prevail and a decision is reached to "re-share" the Nile water with another riparian state, Sudan and Egypt agreed to distribute the allocated amount equally from each country's share, to be officially measured at Aswan. The insertion of this clause in the agreement shows that both states were aware of the misappropriation of the rights of the remaining riparian states. The agreement granted Egypt the right to construct the Aswan High Dam, which can store the entire annual Nile River flow. It approved Sudan's plan to construct the Roseires Dam on the Blue Nile and to develop additional irrigation and hydroelectric power generation sources.

Moreover, a Permanent Joint Technical Commission was also designed to ensure the technical cooperation between Egypt and Sudan. Thus, the agreement, despite its exclusivity, pioneered the concept of the institutionalization of water-sharing in the Nile Basin. The agreement also endorsed its precursor and completely ignored the rights of the remaining countries in the basin.

Though Ethiopia contributes to 85 per cent of the total Nile flow, the agreement has entitled it to nothing (Kefyalew Mekonnen 1999: 150). For this reason, the Ethiopian government declared unilaterally that it would develop water resources within its territorial jurisdiction. However, in order to cool the urge of the Ethiopian government to exploit the Nile, Egypt deflected the mindset of the Ethiopian populace by emphasizing the possibility of the Ethiopian Orthodox Church attaining an autocephalous state by indigenizing its holy see, as the Ethiopian church had been under the jurisdiction of the Coptic Orthodox Church of Egypt for about 1,600 years. Moreover, tensions have arisen between Sudan and Egypt because many Sudanese feel dissatisfied with the sharing process (Wassara 2006: 140).

Conclusions

There is no consensus in reference to the succession of treaties, but the most accepted interpretation of international customary law regarding newly independent states rests on the clean-slate theory. Moreover, a critical investigation of the treaties held in the eastern part of the Nile Basin evinces legal defects, exclusivity and fraud. Hence, the region has no established, efficacious legal regime.

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N.B.: Following convention, Ethiopian authors are listed by their first name.

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Zur Wirksamkeit von Wasser-Abkommen im östlichen Nilbecken

Zusammenfassung: Dieser Beitrag untersucht die Wirksamkeit von Wasser-Abkommen zum Nil im Lichte der Prinzipien des Völkerrechts. Eine kritische Bestandsaufnahme der bestehenden Verträge fördert zahlreiche Rechtsmängel zutage, die im Zusammenhang mit Täuschung, Zwang, Ausschließlichkeit und der Nichteinhaltung von Geboten des Völkerrechts stehen. Zudem ist die Entscheidung der Anliegerstaaten am unteren Nil zur Übernahme der Verträge aus der Kolonialzeit – die eine Bestätigung des Kolonialismus impliziert – nicht vereinbar mit den Prinzipien der Anliegerstaaten am oberen Nil, die einen vertraglichen Neuanfang befürworten. Daher existiert in der Region bislang kein effizientes Wasserregime, das den Interessen aller Anrainerstaaten Rechnung trägt.

Schlagwörter: Äthiopien, Sudan, Ägypten, Nilbecken, Grenzüberschreitendes Gewässer, Wasserkonflikt, Entkolonialisierung, Internationales Recht, Völkerrechtlicher Vertrag