

The Grand Ethiopian Renaissance Dam: An Appraisal of Colonial Agreements, Issues of Existence and Forum for Negotiation

Mihreteab T. Taye¹, Amare K. Aweke², Yidnekchew M. Mekonnen³

Abstract

Over the centuries, the Nile basin has served as a source of conflict and cooperation among the riparian states. Egypt especially jealously guarded its claim to the Nile waters, threatening military action against Sudan and Ethiopia whenever they announced water projects on the river. Although there have been various agreements signed over the use and utilization of Nile waters over the years, none of which includes all riparian states. Egypt and Sudan had built extensive water reservoirs and dams along the Nile and effectively utilized mechanized agriculture through irrigation and implanted hydropower electricity generators. However, Ethiopia, which contributes more than 85% to the Nile, did not use the Nile waters for agriculture or generate electricity until recently. Following the announcement of the construction of the GERD in 2011, Egypt and Sudan have been at odd terms with Ethiopia, claiming it has a devastating impact on their interests. Both Egypt and Sudan saw Ethiopia's commitment to building the GERD as an existential threat to the lower riparian states. Also, both claimed that Ethiopia had no legal right to build a dam along the banks of the Nile by reciting the colonial agreements. This paper, through a doctrinal and interpretative methodological analysis, therefore, assesses the existential-ness of the Nile waters to all riparian states and the need to focus on equitable share and utilization. It also refutes the colonial agreements of 1902, 1929, & 1959 by walking through plausible legal analysis relying on international laws of watercourses. It also discusses how the African Union (AU) led-trilateral negotiation can be the viable solution to end hostilities over the GERD by sticking to "African solutions for African problems" principles.

Key terms: AfSol, Colonial Agreements, Existential-ness, GERD, AU, Egypt, Ethiopia, Sudan

¹ Post-Doctoral Global Fellow at New York University (NYU), Institute for International Law and Justice, NYU, USA

² Lead Researcher and Director, Institute of Foreign Affairs (IFA), Addis Ababa, Ethiopia

³ Researcher for African Affairs, Institute of Foreign Affairs (IFA), Addis Ababa, Ethiopia

1. Introduction

Egypt has jealously guarded its claim to the Nile waters throughout its history, threatening military action against Sudan and Ethiopia whenever they have announced water projects on the river (Pemunta et al., 2021). As internal strife and poverty have racked both Ethiopia and Sudan for decades, neither has taken serious action to dam the river for irrigation or hydroelectric power. These have made Egypt control an overwhelming dominance over the waters of the Nile (Wheeler et al. 2016). More recently, Egypt used a reference of three colonial agreements signed in 1902 (signed between Ethiopia and British - on behalf of Sudan), which said to have discrepancies between the “original Amharic” version and its equivalent English interpretations, the 1929 agreement (Egypt and British), and finally, the 1959 agreement (Egypt and Sudan) to secure its dominance over the waters of the Nile (Salman 2013). These agreements outlawed any activity that diminishes the quality of Nile water flowing into Egypt.

Over the centuries, the basin has served as a source of conflict and cooperation among the riparian states, especially between Ethiopia, Sudan, and Egypt (G. Degefu 2003). Although there is no apparent physical boundary between Ethiopia and Egypt, there have been traceable state relations in history (Arsano 2007; Salman 2013). There is mythology stating their relationship based on a mutual understanding - Egypt for the waters of the Nile and Ethiopia for maintaining the shipping of Bishops from Egypt (McCann 1981). Regardless of the mythology, both maintained a closer tie and amicable relations for centuries until the late 19th c (1874-76) - when Egypt decided to launch a war against states in its immediate south. The military expedition was led by Mohammed Ali Pasha in an ambition to create “Greater Egypt” in North-East Africa by swallowing Sudan and Ethiopia (Turton 1970). It was directed ‘to control the source of the Nile’ (Turton, 1970). However, Ethiopia defeated the advancing Egyptian army at Gundet (1875) and Gura (1876) and repelled Egyptian ambition to control the mouth of the Nile (Zewde 1991).

This paper aims to shed light on the ongoing dispute between Ethiopia, Sudan, and Egypt over the construction and filling of the Grand Ethiopian Renaissance Dam (GERD) through a doctrinal analysis of the legal instruments and interpretative methodology. Doing so refutes the application of colonial agreements signed in 1902, 1929, and 1959. Finally, it contempts the intervention of regional and international institutions external to Africa such as the Arab League, United Nations Peace and Security Council (UNPSC), or else and promote the need to continue with an African Union (AU) – led trilateral negotiation to end the dispute amicably since the Nile is an African resource dispute emerging from the use of the water has to be solved through regional mechanisms. African Union (AU) has long-established regional means of resolving disputes called “African solution for African problems (AfSol),” in which Ethiopia, Sudan, and Egypt are outright members. Hence, this paper focuses on assessing Ethiopia’s reiterating reasons for sticking to AfSol and continuing with the AU-led trilateral negotiation as far as the GERD is concerned. Finally, it also consults with legal procedures of farewelling for colonial agreements.

2. Ethiopian Initiatives to Build a dam on the Nile

Although hampered by considerable financial and logistical constraints, several attempts were made by Ethiopia to build a dam on the Nile River since the 1920s (McCann, 1981). First, Britain and later Egypt were against those developments. Later, it was also interrupted following the Italian invasion of Ethiopia (1935-41). Successive military threats appeared, especially from Egypt, whenever Ethiopian attempts to use the Nile waters seemed a reality. Hence, despite the consequent feasibility study supported by the USA in the 1960s and by the Soviets later in the 70s, the Ethiopian plan to use its water resource has never been materialized (Swain 2011). Egypt was also instrumental in blocking the African Development Bank loan the *Derg* requested for the Nile water project in 1990 (Swain 2011). Furthermore, following the downfall of the *Derg*, Ethiopia also resumed its plan to implement a project along the Nile River in the late 1990s. But because of the outbreak of the Ethio-Eritrean war (1998-2000) and the subsequent economic collapse, it was forced to withdraw from any grand water projects. Egypt responded with more threats, but nothing happened because Ethiopia resumed war with Eritrea. The social and security situations following the war became further bulwarks and extended the inaugural construction of the dam until 2011.

Third, in 2011 Ethiopia declared to build the long-planned Great Ethiopian Renaissance Dam (GERD), a water project fully sponsored by Ethiopians. GERD is the “Dam of the People.” Regardless of social and economic status or ethnic and cultural background in Ethiopia or the diaspora, Ethiopians have paid certain percentages of their salaries or incomes for the GERD. Many people have even withdrawn from taking the dividend and full amounts of the bonds they have bought for GERD construction purposes. While building the GERD, Ethiopia primarily maintained the ethics of limited Territorial Sovereignty⁴. This principle promotes equitable share and utilization of international water among riparians. It also took maximum care not to cause significant harm to others. It maintained the principle of cooperation, information exchange, notification, consultation, and, most importantly, the peaceful settlement of disputes arising from the dam⁵. Although Ethiopia opted for peaceful settlement of the disputes, Egypt invariably maintained its dominance over the Nile waters as it used to enjoy over centuries with the assumption to the principles of Absolute Territorial Integrity⁶ stating the lower riparian states have absolute control over the course and use of the water (for it is their natural right) for whatever purposes with no consultation to the upstream states.

This principle is interpreted as the upstream states having no right over the course and utilization of the water that flows and originates from their territory. Since the construction and the filling of GERD, Egypt was in defiance of Ethiopia’s developmental zeal. Sudan also has been vacillating between Egypt and Ethiopia over the years and more recently bend to the Egyptian side, emphatically speaking that the filling of the GERD affects the national security of Sudan as it does

⁴ The principle states that sovereignty over shared water is relative and qualified. The co-riparians have reciprocal rights and duties in the utilization of the waters of their international watercourse and each is entitled to an equitable share of its benefits. This theory is also known as theory of sovereign equality and territorial integrity.

⁵ UN Convention on the Law of the Non-navigational Uses of International Watercourses. Adopted by the General Assembly of the United Nations on 21 May 1997, entered into force on 17 August 2014, Articles, 5,7,8 & 9.

⁶ The lower riparian of an international river has the right to a full flow of water of natural quality and interference with the natural flow by the upstream state require the consent of the downstream riparian. Therefore, the lower riparian has the right to claim the continued and uninterrupted flow of water from the territory of the upper riparian, ‘no matter what the priority’

to Egypt. In addition to the actual military threats, Egypt also engaged in maneuvering and irregular activities by supporting Ethiopian opposition groups that once used to operate in Eritrea and opposition groups in Sudan to at least weaken and destabilize, and if successful, polarize Ethiopia along ethnic and religious lines. These military threats and plotting of Egypt against Ethiopia and the rest of the upper riparian states came from their short-sighted understanding that “Egypt is the gift of the Nile.” Military threats and intimidations were among methods Egyptians used to prevent dams construction over the Nile River – ‘diplomacy by other means.’ For centuries Egyptians taught their offspring in regular schools. The *Madrassas*, whoever tries to take a drop of water from the Nile without consultation, is an imminent danger to Egypt (Arsano, 2007; Salman, 2013).

On the other hand, Sudan was also bought by Egypt recently. Its position concerning GERD is changing from time to time. As stated by the Sudanese Minister of Irrigation and Water, the construction of the GERD will benefit Sudan in two most important ways⁷. It has been a tradition that Millions of Sudanese farmers are displaced, and their cultivations eroded every year due to the annual rainy season flooding of the Nile. Hence, the construction of the GERD regulates the flooding by balancing the Nile waters flow into Sudan. Second, Sudan is also close to 48% short of electricity demands (WB, 2019). Hence, Sudan will secure the electricity demands upon completing the GERD since it is planned to share electric power generated from the GERD with the rest of the riparian states. Due to GERD’s proximity (only 40 km away from the Ethiopia-Sudan border), Sudan will be the first riparian state to share electricity to meet its demands.

3. Why is GERD becoming an Existential Issue to Ethiopia?

Both Egypt and Sudan, for years, failed to recognize that the Nile water is existential to Ethiopia. Upon completion of the GERD, it is expected to lift millions of Ethiopians out of abject poverty, food shortage, and starvation. According to the national statistics, over 60 million Ethiopians (over 50% of the national demography) still live under subsistence livelihoods, consuming less than they should (Devereux 2000). Over 10% require food assistance every year (WFP 2020). In addition to this, the average monthly income of Ethiopian citizens amounts to 200 USD, which is 18 times less than the average income of an Egyptian citizen (USD 3700) (WB 2020). GERD is also projected to take Millions of Ethiopians out of darkness and energy shortages by providing secure power and energy needed for development.

Studies and national statistics indicate that over 60% of Ethiopians (currently close to 70 million) still lack electricity and live in complete darkness due to a shortage of power grids (Economics, 2021). It is an absolute disgrace to Ethiopia and the rest of the upper riparian states compared to Egypt's surplus power supply (Economics 2021; WB 2019). Especially in Ethiopia, with a 90% share of the Nile waters, living in 70% darkness is unacceptable. Finally, the GERD is planned to provide secure power energy for an additional close to three hundred million people in the region by producing over 5000GW electric energy. According to the World Bank report (2019), except for Egypt, access to electricity to the rest of the riparian states of the Nile amounts only to 37.5% of the total power demand. The plan to distribute electricity to over three million people upon the completion of the GERD includes those in the upstream and downstream (Sudan) states, the majority of whose population (close to 63%) are currently in darkness (WB, 2019). Hence, the

⁷ <https://www.youtube.com/watch?v=5T723gS9BwQ>

GERD is an existential issue Ethiopians unanimously spoke about over the last decade since their development hinged on the construction and filling of the Dam.

Egypt and later Sudan officially made it clear that they would use a possible alternative course of action to halt, obstruct, or damage the GERD's filling (especially the second filling). There are also clear indications of preparation for war where both have been making military maneuvering (exercise of a joint military drill) dubbed "Guardians of the Nile" in North Sudan since March 2021 with a participation of naval, air, and ground forces (Michaelson 2020). In addition, Egypt and Sudan shied away from the African Union-led trilateral negotiation and sought the United Nations Peace and Security Council (UNPSC). All bore no fruit in resolving the dispute amicably until this point. Following this, the article explores the legal procedures of annulling earlier colonial agreements signed over the use and utilization of the Nile waters. Almost all of these documents were signed in the absence of Ethiopia or total negligence of its interests over the Nile waters. A handful of African Regional Mechanisms to end the dispute amicably have been presented following that.

4. Colonial Agreements over the Nile and Ethiopia

An acute problem in the Nile River basin is the lack of a comprehensive legal framework governing the Nile River. The few piecemeal treaties, such as 1902, 1929, and 1959 treaties, all of which date back to colonial times, could not solve the controversies among the Nile riparian states. These fragmented treaties feature predominantly in current debates surrounding the Nile River. At the heart of the dispute over the use of the Nile River are Egypt and Sudan's claim of historical and acquired rights to use the Nile water, which directly emanates, in their view, from the colonial treaties. In the following sections, 1902, 1929, and the 1959 treaties, legal statuses are examined in light of pertinent customary and international laws.

4.1. The 1902 Anglo-Ethiopian Treaty

The 1902 Anglo- Ethiopian treaty is a boundary delimitation treaty between Ethiopia and the United Kingdom, a colonial power controlling Sudan. Although the 1902 treaty's objective was to delimit the boundary between Ethiopia and Sudan, it included a provision relating to any construction on the Ethiopian side of the River Nile, which has become controversial to date.⁸ After more than a century since the 1902 treaty, Egypt and Sudan have opposed the construction of the GERD, arguing that the 1902 treaty binds Ethiopia and Ethiopia needs to secure prior consent of Egypt and Sudan as successor states to the treaty from the United Kingdom. However, Ethiopia at different times, Ethiopia locally refuted that it is bound by the treaty (Waterbury 1979).

There are insurmountable reasons that support the invalidity of the 1902 treaty. First, Ethiopia has never ratified the treaty (G. Degefu 2003; Tafesse 2011). Second, the treaty does not preclude Ethiopia from using the Nile by interpreting the Amharic and English versions. Third, the treaty is invalid as an unequal treaty (G. Degefu 2003; Waterbury 1979). Fourth, Ethiopia has terminated it due to a fundamental change of circumstance (Woldetsadik 2013). The below section shall discuss each of these reasons one by one.

⁸ Article III

4.1.1. The 1902 Anglo-Ethiopian Treaty: Ratified or not ratified?

To become a party to a treaty, a State must express its consent to be bound by it. Such consent can be expressed in various ways, including through the treaty's signature by a proper representative of the State. Under modern treaty practice, however, States often express their consent to be bound by a separate act of ratification carried out after signature. For bilateral treaties, this ratification is typically manifested by the exchange of instruments of ratification. Many scholars have disputed that Ethiopia has ratified the treaty (Degefu 2003; Tafesse 2011). Thus, whether ratification of the 1902 treaty was required to establish consent at that time requires further investigation. The Vienna Convention on the law treaties governs the validity of treaties. However, Vienna Convention on the law treaties was adopted sixty-seven years after the 1902 treaty. Therefore, to consider whether ratification of the 1902 treaty was required, reference should be made to customary international law applicable in 1902.

By the mid-twentieth century, there was some debate whether ratification was generally necessary to establish a state's consent to be bound by a treaty. It was not until the second half of the twentieth century that state practice solidified around the stance that ratification was only deemed necessary if the parties so agreed (Hoffmeister 2018). Thus, according to customary international law at that time, Ethiopia's ratification of the 1902 Treaty may indeed have been necessary. Looking at treaty practice in the seventeenth century, the Sovereign ratification of treaties was required after the signature. This practice of signature followed by ratification was a mere formality to verify whether the representative had acted within their powers in signing the treaty. However, this practice changed at the end of the eighteenth century. Despite signing treaties, officials at the head of the state felt at liberty to refrain from ratifying a treaty. Hence, a treaty was binding upon a state only when the head of State approved the treaty and after the exchange of instruments of ratification. This two-step procedure gained even more prominence in the nineteenth century. In the twentieth century, state practice consolidated, and ratification became necessary when the states agreed (Hoffmeister 2018). Thus, according to customary international law at that time, Ethiopia's ratification of the 1902 Treaty may indeed have been necessary if Ethiopia had agreed (Wehling 2020). There is no evidence that Ethiopia has ratified the 1902 treaty. However, under Article 3 of the 1902 Anglo-Ethiopian Treaty, only the United Kingdom's ratification was required for the treaty to enter into force. This was against state practice at that time. Even if Ethiopia had ratified the Treaty, there are discrepancies between the Amharic and English texts of the treaty, leading to the interpretation of the Amharic and English texts of the treaty.

4.1.2. The Interpretation of a Multi-Lingual Treaty: Discrepancies between the Amharic and English texts

Treaties in two or more languages cause problems to the stability of international order triggering disputes emanating from different language versions of the same treaty. There is an evident discrepancy in the meaning and interpretation of the English and Amharic texts of Article 3 of the 1902 Treaty. Excerpt from the Amharic version of 1902 Agreement read as:

፫ተኛ፡ ክፍል፡፡

ጃገሆይ፡ ዳገጣዊ፡ ምኒልክ፡ ገጉሠ፡ ነገሥት፡ ዘኢትዮጵያ፡
 በጥቁር፡ ዓባይና፡ በባሕረ፡ ፃና፡ በሰባት፡ ወገዝ፡ ወደ
 ነጭ፡ ዓባይ፡ የሚወርደው፡ ውሀ፡ በአገገሊዝ፡ ወገሥት፡
 ጋራ፡ አስተዳዋ፡ ባይሰጣ፡ ወገዝ፡ ተዳር፡ አዳር፡ የሚደ
 ፍገ፡ ሥራ፡ አገዳይሰሩ፡፡ ወይም፡ ወገዝ፡ የሚደፍገ፡ ሥራ፡
 ለጣሠራት፡ ለጣገም፡ ረታድ፡ አገዳይሰጡ፡ በዚህ፡ ውል፡
 አድርገዋል፡፡

Excerpt from the English version of 1902 Agreement read as:

“His Majesty, the Emperor Menelek 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 the agreement with his Britannic government and the Government of the Soudan.”

The disagreement concerns the meaning of the word "arrest" in the Amharic and the English versions. According to the provision of Article 33, paragraph 1 of the Vienna Convention on the Law of Treaties that codifies customary law, when a treaty has been authenticated in two or more languages, the text is equally authoritative in each language.⁹ Article 5 of the Anglo-Ethiopian Treaty of 1902 states that the English and Amharic texts are both authentic: “written in the English and Amharic languages, identically, both texts being official.” The Treaty contains no provisions in a divergence between the texts.

The ordinary meaning of “arrest the flow” is to completely stop or block the river flow. The Amharic version states that...”ተዳር እዳር የሚደፍን ስራ እንዳይሰሩ፡፡ ወይም ወንዝ የሚደፍን ስራ ለመስራት ለጣገም ፍቃድ እንዳይሰጥ፡፡....” which means to block entirely from one side to the other side.

Thus, in the Amharic version, the obligation imposed on Ethiopia did not preclude water use. What was prohibited was any scheme that would totally arrest the water flow. There was no evidence indicating that Ethiopia had acknowledged the meaning of "arrest" as not to utilize the water. The Amharic text merely enshrines Ethiopia’s duty not to completely stop the flow of water, whereas all other water uses are at the discretion of Ethiopia.

4.1.3. Negotiating with Imperialism: The 1902 treaty as “Unequal Treaty”

The 1902 Anglo-Ethiopian treaty has been designated by many as part of what is known “unequal treaty” since it was concluded under the supremacy of the United Kingdom in the region and provided no benefit for Ethiopia (Wehling 2020). At first sight, the 1902 treaty indeed appeared to be ‘unequal’. It seemed to mirror other colonial agreements, particularly those that the United Kingdom had extracted from its colonies in Africa and beyond by force through military, political, or economic coercion. In unequal treaties, there is generally an imbalance of reciprocal obligations. Unequal treaties contained provisions for extraterritoriality; they denied Africans the freedom to

⁹ Although the Vienna convention does not apply retrospective, it has codified customary practices.

set their terms and included most-favored-nation status for the Western signatories but not for Africans. The 1902 treaty provides most favored terms to the United Kingdom, excluding any benefit for Ethiopia, thus as an unequal treaty, it is invalid.

4.1.4. State Succession in Respect of Treaties

Egypt and Sudan argue that Article 3 of the 1902 treaty is binding upon Ethiopia despite the discrepancy in the English and Amharic texts. Egypt and Sudan claim that they succeeded to the rights and obligations under the Treaty upon independence. However, Egypt's argument based on state succession is untenable as the United Kingdom agreed solely for Sudan. The Treaty mainly governs the territorial delimitation between Ethiopia and Sudan. The English text states that its measures may not be implemented on the Nile, "except in agreement with His Britannic Majesty's Government and the Government of Sudan." The treaty does not have a provision that creates rights or obligations for Egypt. Indeed, the treaty does not mention Egypt in any of its conditions. Therefore, the argument based on treaty succession does not support Egypt's position. When Sudan became independent in 1956, the colonial treaties did not succeed. The clean-slate principle applied for Sudan to any treaty succession upon independence by customary international law.¹⁰ Although the clean-slate principle does not apply to territorial treaties, Sudan could not be a successor to the rights and obligations under Article 3 of the 1902 Treaty because this provision was not about territory.

4.1.5. Fundamental Change of Circumstances

Treaties are subject to the general principle of *pacta sunt servanda*. Treaties primarily depend on the premise that certain circumstances will remain unchanged, indispensable to the treaty's conclusion. These circumstances are the basis for the parties to enter into an agreement stipulating their standard expectations, and *pacta sunt servanda* protects these common expectations¹¹ (Stein and Carreau 1968)

However, *pacta sunt servanda* does not offer that all agreements remain unchallengeable whatsoever (Müllerson 2001). When circumstances leading to the conclusion of a treaty have changed, and obligations under a treaty have become excessively onerous, States can rely on the *rebus sic stantibus* principle, which means the party affected by the change of circumstance can terminate a treaty unilaterally (Stein and Carreau 1968). This is a rule of customary international law codified in Article 62 of the Vienna Convention on the Law of Treaties (VCLT).

It has to be noted, however, legal certainty should be maintained, and thus international law has prescribed exceptions to the *rebus sic stantibus* principle. First, for the rule to apply, there should not only be a change in circumstance, but the change should be fundamental (Sinclair, 1984). Second, the fundamental change of circumstance cannot be invoked as a ground for terminating a territorial treaty¹². The Anglo-Ethiopian Treaty of 1902 is mainly a territorial treaty to delimit the border between Ethiopia and Sudan. However, Article 3 of the 1902 treaty is a non-territorial provision. If a treaty contains mixed provisions— both provisions establishing a boundary and other, non-boundary related provisions, as in the case of the 1902 treaty— the *rebus sic stantibus*

¹⁰ The clean-slate rule was applicable under customary law for former colonies

¹² See Art. 62, para. 2(a) Vienna Convention on the Law of Treaties

principle generally remains applicable to the non-territorial provision such as Article 3 of the 1902 treaty without affecting the boundary relating provisions.

Concerning the fundamental change of circumstance, it is necessary to recognize the significant change in Ethiopia's economic, social, political, and legal circumstances since the conclusion of the Treaty in 1902. The 1902 status quo has changed significantly with the independence of Nile Basin States. The economic and political conditions, which have had a significant role in the conclusion of the 1902 treaty, no longer exist. The legal status of the Nile Basin states has changed. Population growth, climatic conditions, and the increasing development needs have forced Ethiopia, as a result of these changing circumstances, to evade the limitations imposed by these new circumstances and to unilaterally refute colonial-era agreements, including the 1902 treaty. Because of the fundamental change circumstances since 1902, Ethiopia embarked on constructing the GERD.

Given these new circumstances in Ethiopia and its need to provide for food, water, and electricity for its large population, it cannot in good faith be expected that it will continue to observe far-reaching restrictions on its use and development of the water resources in its territory. The conditions for invoking the principle of *rebus sic stantibus* are thus met. If the conditions are met, the state party must invoke the principle and try to adapt the treaty to the changed circumstances by negotiations (Brownlie 2008). Thus, it can be argued that Ethiopia could invoke the *rebus sic stantibus* principle to try to adapt to the changed circumstances through negotiations using the African Union as a forum (Woldetsadik 2013). Such adaptation to the changed circumstances could be to agree that, by the rules of current international watercourse law, notification and consultations for such works that the 1902 Treaty covers shall be necessary, rather than prior consent, and that the uses must be equitable and reasonable, which includes the obligation not to cause significant harm to the co-riparian states. This would allow Ethiopia to develop and use these water resources to provide for the needs of its growing population, and at the same time, protect the interests of downstream states in a water flow that allows the continued development and uses of the Nile on their territories for their own needs.

4.2. Effect of Treaties on third party-Non-Signatory States: The 1929 and 1959 Treaties

Egypt holds that the Nile Waters Agreements of 1929 and 1959 are binding upon Ethiopia. Ethiopia is a non-signatory State to both treaties. While the 1929 agreement limits Ethiopia's use of the Nile River, the 1959 agreement allocates the entire water flow of the Nile between Egypt and Sudan. According to the well-known customary international law principle *pacta tertiis nec nocent nec prosunt*, treaties cannot create third parties' obligations unless the latter accept such obligations. The 1929 and 1959 Agreements that limit the use of the Nile form neither rights nor obligations for Ethiopia as a third state, unless the parties intended this to the treaty, Sudan and Egypt, and Ethiopia as the third state had accepted the obligation in writing. The provisions that establish an obligation on third states did not mention Ethiopia. The 1929 treaty specifically denotes the Nile and its tributaries "so far as all these are in the Sudan or countries under British administration." Ethiopia was not one of these countries under the British administration. Neither did Ethiopia expressly accept the restrictions imposed by the treaty. Thus, the 1929 Agreement cannot bind Ethiopia. Similarly, Ethiopia refuted the 1956 treaty from the outset because it was excluded (Arsano 2007).

5. The GERD and the mandate of the UN Security Council

The United Nations Security Council (UNSC) mandates to secure international peace and security maintenance under chapters VI and VII of the UN Charter. The mandate of the UNSC is further based on the norms of international law, including (but not limited to) the laws of war and international humanitarian law. UNSC's mandate to act also derives from the normative and operational precedent established by the UNSC's practice (Conforti 2005). Questions concerning whether this mandate – legal, normative, and functional – can or should be extended to take into consideration transboundary watercourses issues such as the Nile have arisen against the background of Egypt's elevation of the GERD from a 'threat to regional peace and security to a 'threat to international peace and security. Based on its potential consequence to international peace and security, Egypt invoked Article 35 of the United Nations Charter and requested the Security Council to intervene in the negotiations over the GERD. This requires a more specific examination of the UNSC mandate in relation to transboundary watercourses.

Article 24 of the UN Charter establishes the Security Council's principal mandate to maintain international peace and security on behalf of the UN members. Article 39 provides the Security Council's mandate to determine what constitutes a threat to the peace, a breach of the peace, or an act of aggression. Chapters VI (on the peaceful settlement of disputes) and VII (on the action concerning threats to the peace, breaches of the peace, and acts of aggression) provide the UNSC with its operational guidelines. Together these chapters give the UNSC a set of options for action in the face of events that might endanger the maintenance of international peace and security. This ranges from investigating a dispute, enjoining parties to settle their dispute peacefully, recommending the terms of a settlement, establishing compliance measures, imposing sanctions, and taking such action based on the use of force as may be necessary. In exercising its mandate, the UNSC is required to respect the fundamental international legal principle of non-interference in the internal affairs of member states¹³. In practice, this requires the consent of sovereign governments before deploying forces on the ground under the UN mandate.

Despite the seemingly broad power of article 39, the practice has been that threats to peace and security were to be carefully defined as military aggression, armed conflict, or violence between two or more states. Under the UN Charter and the laws of war, the legitimate grounds for the use of force and UN intervention are self-defense and collective security¹⁴. Egypt's reference of the GERD issue to the UNSC is political and misrepresents the very concept of international peace and security and the mandate of the UNSC. The GERD issue does not fall within the mandate of the UNSC as it neither involves military use nor violence. Ethiopia's decision to utilize a Nile River by no means would pose a threat to international peace and security. Therefore, more focus should be given to the role of the AU and the concept of AfSol.

So, what is behind Egypt and Sudan's constant reference of the matter to non-AU forums?

Whenever Egypt and Sudan incessantly refer the matter to non-AU forums, they consider certain objectives to achieve. When taking the matter to the Security Council, Egypt and Sudan premised on Article 35 of the United Nations Charter. They invoked preventive diplomacy as a tenable

¹³ UN charter art 2(7) & art 24(2)

¹⁴ UN Charter art 51

ground for the UNSC to entertain the matter. However, what is underneath their action is trying out all available options to preserve their existing colonial water rights, which almost all is allocated to them. It is a strategy to win allies in their relentless effort to pressure Ethiopia to fall to their terms. But, to their dissatisfaction, many African countries are unwilling to buy the so-called ‘historical claim’ rights by Egypt and Sudan over the Nile.¹⁵ Hence, they do their best to shift it away from AU-led negotiation. Otherwise, there have been no merits in the details of GERD that would make it fall under the ambit of article 35 of the UN charter. GERD is purely a developmental issue in which Ethiopia aspires to lift millions of its people out of poverty. GERD is an issue of fair and equitable utilization of water rights. It is about the right of citizens of the Nile-Basin countries to develop and share rivers’ waters to provide water, electricity, and food. It is not an imminent security threat to the stability and security to be taken to the UN Security Council. The UNSC shall not be discussing the GERD issue due to its non-connection to peace and security. On top of that, there was no precedence where the UN Security Council has entertained a water issue. Hence, having it in the Security Council is just a throwaway to politicize the issue.

Egypt and Sudan’s tendency to invite various parties as negotiators/mediators to the issue is also an all-out strategy of amassing support in their accusation against Ethiopia. The recent resolution by the Arab League is nothing short of this explanation.¹⁶ The resolution did nothing but accuse Ethiopia of having taken an "obstinate stance" on GERD, which is to the satisfaction of Egypt. Such moves and unfounded accusations, however, undermine the ongoing efforts by the AU and disregard Ethiopia’s sovereign right to use its resource for development and to lift millions out of poverty. It disregards Ethiopia's right to fair use its resources without causing significant harm to the downstream countries permitted by the international law governing transboundary waters. But let’s not also forget that Egypt ascribes itself more to the Arab League than the AU. Moreover, currently, Egypt is the one that chairs the Arab League. So, no wonder the Arab League came up with such an unbalanced resolution.

¹⁵ In that regard, for instance, upon independence, Britain’s former East African colonies rejected the validity of the Nile Water Treaties, arguing that they were not party to them because they had no role in the formation and conclusion of those treaties. In fact, all the upstream riparian states have since argued in favor of a new, more inclusive legal framework for governing the Nile River Basin. No wonder, therefore, Egypt and Sudan shy away from Africa-led negotiations. Furthermore, the impasse on the Cooperative Frame Work Agreement (CFA) on the Nile Basin Initiative which persisted due to the major differences as a result of the resurfacing and hardening of the respective positions of the upper Nile riparian’s over the colonial treaties, as well as the Egyptian and Sudanese claims to what they see as their acquired uses and rights of the Nile waters, is also another demonstration to Egypt’s and Sudan’s low faith on any regional arrangements. For a further reference on same see Mwangi S. Kimenyi and John Mukum Mbaku, 2015, The limits of the new “Nile Agreement”. Brookings, Africa in Focus. Available at: <https://www.brookings.edu/blog/africa-in-focus/2015/04/28/the-limits-of-the-new-nile-agreement/>

¹⁶ On 15 June 2021, after its meeting held in Doha, Qatar, the Arab League has passed a resolution calling on the United Nations Security Council to take “necessary measures” to launch an “active negotiating process” in a dispute between Egypt, Sudan and Ethiopia over GERD. Ethiopia rejects the “Resolution” in its entirety. For a further reference on same see Aljazeera, 15 June 2021, Arab states call for UNSC intervention over Ethiopian dam dispute. Available at: <https://www.aljazeera.com/news/2021/6/15/arab-states-call-on-uns-c-to-convene-over-ethiopian-dam-dispute>

6. Towards an amicable solution for the GERD dispute: Why AfSol the right path for Ethiopia?

Though the phrase "African solutions to African problems" gained prominence after the Organisation of African Unity (OAU) transformed into the African Union (AU) in 2001, the idea of African solutions is not a new invention. It had always been the driving force behind the Pan-African movements since the 1900s and the quest for independence from colonial powers in the African continent (Mazuri 1967; Nikrumah 1961). Indeed, the quest for African-driven solutions motivated the formation of the OAU in 1963 to harness the capacity of Africa's weak states for a combined response to common challenges. As Emperor Haile Selassie I of Ethiopia noted at the establishment of the OAU in 1963, the idea behind the establishment of the OAU was to "create a single institution to which we will all belong, based on principles to which we all subscribe." But despite independence in the 1950s and 1960s, the realization of African-driven solutions remains a long way from being fulfilled (Ani & Matambo 2011). The imposition of external policies coupled with the ineptitude of post-independent African leaders hinders progress in this regard. When the OAU decided to transform itself to AU in 2001, it mainly aimed at enhancing Africa's capacity and coordination to realize African solutions in African states (Apuuli 2012; AU 2013). And, entered into force on 26th December 2003, the AU has adopted a protocol on the African Union's Peace and Security Council (AUPSC). Among the key objectives of the AUPSC are to promote peace, security, and stability and create conditions conducive to sustainable development. With that regard, African solutions appear among the central tenets of the AU's security culture (as contained in the 2000 Constitutive Act (CAAU)).

Today, as much as Africa and its current problems are often rooted in the past, it finds itself squarely at the forefront of new security thinking. It has become a testbed for innovative approaches and strategies. So, when Africans drive AfSol to the fore than never before, it acknowledges the role African traditional practices and principles could play in addressing conflicts at the local and global levels. It shows that Africa has the capability and determination to solve its problems. It demonstrates that AU is a suitable space to dialogue on issues of value to Africa. It is also based on a growing consensus amongst analysts, policymakers, academics, and civil society representatives on the continent that continental integration is a remedy for African problems. Moreover, the political ideal of AfSol, as Solomon (2015; 21) puts it, is essentially an issue of self-determination" that "seeks to bestow Africa, as a matter of principle, the lead role or ownership in the endeavor to prevent, manage and resolve conflicts on the continent." Here, it has to be reminded that AU is equipped with robust mandates for collaborative solutions to the challenges in the continent.

Besides, the AU provides a sort of legitimacy and support as the continent continues to work toward developing a full authority. While the role of external actors is indeed laudable, it appears crucial to acknowledge that there is a new realization in Africa that Africa is no longer anyone's backyard. This assertion seems pertinent, especially regarding the misgivings over external intervention's reliability, efficiency, and motive. As insisted by Alpha Oumar Konaré (2007), "the primary responsibility for ensuring peace in Africa belongs to Africans themselves; they must shoulder that responsibility." It reiterates that African partners must let Africans run their businesses. It is also an urge for the continent to shoulder its responsibility and demonstrate inter-African solidarity.

Therefore, Ethiopia's insistence on African solutions to African problems is based on recognition of those endeavors. Africa has to rely increasingly on its own to provide long-term solutions to its problems within the framework of its sub-regional groupings and the African Union. Speaking of regionalism, it implies cooperation among states in geographically proximate and delimited areas to pursue mutual gain in one or more issue areas (Akopari 2008). In line with that, an AfSol assumes a degree of regional awareness and collective identity to the extent that African states perceive themselves to be members of an 'African' international society based on a degree of shared historical experiences and cultural ties. And at the heart of this notion was the ideology of African nationalism and even perhaps Pan-Africanism. Thus, AfSol can be considered a political idea and a geographical pact. Therefore, what has been embedded with Ethiopia's persistent stance on AfSol is these core values of African nationalism and even perhaps Pan-Africanism. The Nile and the GERD, in this context, are African issues that require African solutions.

It would be only plausible to put those unresolved issues of the GERD would be solved in line with the spirit of African Solutions to African Problems. As George Ayittey (1994) advocates it, when Africans formulate their solutions to their problems, they would have every reason and incentive to see their work. External or foreign solutions were not viable in Africa since they were either "imported" or "dictated" to Africans. Hence, those attempts by Egypt and Sudan to bypass African conciliation mechanisms on the Nile and GERD matter are a direct disregard of these values. It attempts to break the self-reliant African spirit that Ethiopia is trying to keep intact through successive generations. Such actions would also play down the African judgment as insufficient and ineffective in African issues. In other words, it could signal the crippling of Africa's inherent conflict resolution mechanisms. Therefore, Africans cannot own those solutions.

In addition, it is essential to realize Ethiopia's stance on AfSol as a call for a constructive approach to regional security issues. Hence, it can be considered as a call for consultation rather than confrontation, transparency rather than secrecy, and interdependence rather than unilateralism. These appear essential because the regional cooperative security process will allow states to change their behavior from competition to cooperation with those states. Poverty alleviation, a significant concern for all Nile Basin countries, could form the basis of a cooperative arrangement between all the Nile's riparians when they come under regional agreements like the Nile-Basin Initiatives. In line with that, it is essential to note that GERD offers a unique opportunity for transboundary cooperation between the three countries and AfSol as a vital medium to offer a win-win solution to the problem between the three countries.

On the contrary, any attempt to shift the negotiation from AU leadership would undermine the unique opportunity for cooperation. It appears so because foreign alternatives are hardly feasible in Africa since they usually impose on Africans. It adds little to further complicating the chance of reaching an agreement shortly. African history also tells us that external involvement has resulted in more harm than benefit for African people (Solomon 2015). Furthermore, any such shift from the AU-led negotiation would signal to offer green light for outsiders to intervene on the domestic matters of Africans and appreciate subsequent belligerent interference in the future. It's not near that AU's capabilities to resolve the dispute have been exhausted. With all these considerations, the African solution, as insisted by Ethiopia, sound more legitimate to solve disputes arising from the use and utilization of the GERD.

Finally, it is also a moral responsibility from the Ethiopian perspective to push for AfSol as a solution to the Nile and the GERD, given its historical legacy on African nationalism and Pan-

Africanism. As an icon and one of the pioneers of pan-Africanism as well as a seat to the AU, it is only appropriate for Ethiopia to pin the axiom, which is a source of pride for the continent as well as a means of demonstrating Africa's independent conflict resolution mechanisms in which partners play a supportive role. If AU has to be the principal voice for Africans, no one could be better placed than Ethiopia to assert the same. More than that, however, it is a firm belief that Africans possess the requisite tradition, skills, and expertise to overcome the continent's multifaceted challenges. It is a strong gesture that African people and their leaders can solve their difficulties with their remedies. In general, Ethiopia's unwavering determination to solve the Nile and GERD dispute through AfSol sends a message to the world that it is time for Africans to take things into their own hands and use their resources to solve Africa's troubles. Egypt's and Sudan's move to stonewall regional arrangements and pursue other approaches is, thus, ill-advised, all of which have so far proved fruitless. Egypt and Sudan must understand that the Nile River is a regional watercourse, and its management must be approached from a regional perspective.

Conclusion

Conflict over the use of the waters of the Nile River has existed over the centuries. Successive Egyptian governments have successfully made water projects over the Nile futile by threatening with military action, destabilizing Ethiopia, and dissuading external financial assistance to Ethiopia and the other riparian states. Egypt had also used its extensive diplomatic connections and the colonial-era agreements to successfully prevent the construction of any major infrastructure projects on the tributaries of the Nile for decades. They have thereby weakened Ethiopia's internal capacity to construct the dam and made those previous attempts by successive Ethiopian regimes ineffectual. Consequently, Ethiopia has not effectively used the river's waters until 2011. When the Ethiopian government decided to construct GERD in 2011, it mobilized domestic resources to finance the dam fully. Therefore, it is not surprising that Ethiopia's decision to build GERD is a source of controversy, particularly with Egypt. While the three countries (Egypt and Sudan on the one side and Ethiopia on the other side) are now in standoff over the dispute on GERD, this article has shed light on issues of existence-ness, statuses of colonial agreements as well as AU as the proper forum of negotiation for the matter at hand. With that regard, the article has made it explicit that Ethiopia's use of the river Nile is an existential issue for millions of Ethiopians living in abject poverty and darkness. One of the critical constraints on the fast-economic growth of Ethiopia and other riparian countries is an extreme shortage of power, with more than 60 million people having no access to electricity, which threatens the sustainability of their economic growth. Due to this and other reasons which the article made explicitly, Ethiopia's use of its water resources shall be taken as an issue of existence.

The article has also capitalized on the refutability of colonial-era agreements concerning the matter. Over the years, Egypt, in particular, has persistently argued that the 1902, 1929, and 1959 colonial agreements are the binding legal frameworks for using the river Nile. However, such continued references by Egypt to so-called natural and historical rights are devoid of any international or customary legal backing. Hence, the article clarified the grounds for the non-applicability of the 1902 treaty (non-ratification by Ethiopia, variation of interpretation between the Amharic and English versions of the treaty, which does not preclude Ethiopia from using the Nile). It also assessed its invalidity based on unequal treaty principle, non-applicability of state succession principle for the treaty, and Ethiopia's termination of it due to significant change in Ethiopia's economic, social, political, and legal circumstances.

Similarly, the article also implicated the 1929 and 1959 treaties as un-governing treaties to Ethiopia because Ethiopia was never a party to the agreements. It is a well-known customary international law that treaties cannot create obligations on third parties unless the latter accept such obligations. Ethiopia was not invited at the time. Neither had it accepted the obligation. So, these treaties cannot impose an obligation to the non-signatory state to the treaty.

The article has also stressed the importance of relying on the African Union-led trilateral negotiation as a viable solution to the dispute despite Egypt and Sudan's insistence on the involvement of outside actors over the GERD negotiation. AfSol as the proper principle of negotiation for the GERD dispute has been vindicated on multiple grounds, including issues of providing legitimacy to the solution, constructive approach to regional issues, firm belief to Africans possession with the required skill, expertise, and tradition to solve African Problem as well as issue of moral responsibility from Ethiopia as an icon and pioneer of Pan-Africanism and also a seat to the AU.

REFERENCES

- African Union. 2013. "Assembly of the Union, Twenty-First Ordinary Session: Solemn Declaration on the 50th Anniversary of the OAU/AU." Addis Ababa, Ethiopia. https://au.int/sites/default/files/decisions/9654-assembly_au_dec_474-489_xxi_e.pdf.
- Ani N. & Emanuel M. 2011. "African Solutions" in Chains: External and Internal Causes of Africa's Continued Dependency Fifty Years on." *African Journal on Conflict Resolution* 12 (2): 135–60
- Apuuli, Kasajja Phillip. 2012. "The African Union's Notion of 'African Solutions to African Problems' and the Crises in Côte d'Ivoire (2010-2011) and Libya (2011)." *African Journal on Conflict Resolution*.
- Arsano, Yacob. 2007. *Ethiopia and the Nile: The Dilemma of National and Regional Hydropolitics*. Ph.D. Thesis.
- Brownlie, Ian. 2008. *Principles of Public International Law*. 7th ed. New York, USA: Oxford University Press (OUP).
- Conforti, Benedetto. 2005. *The Law and Practice of the United Nations*. Third. Leiden, Netherlands: Martinus Nijhoff Publishers.
- Degefu, Gebre Tsadik. 2003. *The Nile: Historical, Legal and Developmental Perspectives*. Trafford. <http://www.amazon.com/dp/1412000564>.
- Degefu, Gebretsadik. 2003. *The Nile: Historical, Legal, and Developmental Perspectives*. New York, USA: Traford Publishing.
- Economics, Trading. 2021. "Ethiopia - Access To Electricity (% Of Population)." New York, USA.

<https://tradingeconomics.com/ethiopia/access-to-electricity-percent-of-population-wb-data.html>.

- Hoffmeister, Frank. 2018. "Article 14." In *Vienna Convention on the Law of Treaties*, edited by Kirsten Schmalenbach; Oliver Dörr, LVIII, 1535. Berlin, Germany: Springer, Berlin, Heidelberg. <https://doi.org/https://doi.org/10.1007/978-3-662-55160-8>.
- Ian Sinclair. 1984. *The Vienna Convention on the Law of Treaties*. 2nd ed. BRILL.
- John Akokpari. 2008. "Dilemmas of Regional Integration and Development in Africa." In *The African Union and Its Institutions*, edited by and Tim Murithi John Akokpari, Angela Ndinga-Muvumba, 85–110. Auckland Park, South Africa: Center for Conflict Resolution.
- Mazuri, A. 1967. *Towards a Pax Africana: A Study of Ideology and Ambition*. London: UK: Weidenfeld & Nicholson. McCann, James. 1981. "Ethiopia, Britain, and Negotiations for the Lake Tana Dam, 1922-1935." *The International Journal of African Historical Studies*. <https://doi.org/10.2307/218231>.
- Michaelson, Ruth. 2020. "'It'll Cause a Water War': Divisions Run Deep as Filling of Nile Dam Nears." *The Guardian*. 2020. <https://www.theguardian.com/global-development/2020/apr/23/itll-cause-a-water-war-divisions-run-deep-as-filling-of-nile-dam-nears>.
- Müllerson, Rein. 2001. "The ABM Treaty: Changed Circumstances, Extraordinary Events, Supreme Interests, and International Law." *International and Comparative Law Quarterly*. <https://doi.org/10.1093/iclq/50.3.509>.
- Nkrumah, Kwame. 1961. *I Speak Freedom*. London: UK: Panaf Books.
- Pemunta, Ngambouk Vitalis, Ngo Valery Ngo, Choumbou Raoul Fani Djomo, Sianga Mutola, Judith Achin Seember, Grace Annih Mbong, and Enjeckayang Asomanei Forkim. 2021. "The Grand Ethiopian Renaissance Dam, Egyptian National Security, and Human and Food Security in the Nile River Basin." *Cogent Social Sciences*. <https://doi.org/10.1080/23311886.2021.1875598>.
- Salman, Salman M.A. 2013. "The Nile Basin Cooperative Framework Agreement: A Peacefully Unfolding African Spring?" *Water International*. <https://doi.org/10.1080/02508060.2013.744273>.
- Solomon, Hussein. 2015. "AFRICAN SOLUTIONS TO AFRICA'S PROBLEMS? AFRICAN APPROACHES TO PEACE, SECURITY AND STABILITY." *Scientia Militaria - South African Journal of Military Studies*. <https://doi.org/10.5787/43-1-1109>.
- Stein, Eric, and Dominique Carreau. 1968. "Law and Peaceful Change in a Subsystem: 'Withdrawal' of France from the North Atlantic Treaty Organization." *American Journal of International Law*. <https://doi.org/10.2307/2197283>.
- Swain, Ashok. 2011. "Challenges for Water Sharing in the Nile Basin: Changing Geo-Politics and Changing Climate." *Hydrological Sciences Journal*. <https://doi.org/10.1080/02626667.2011.577037>.
- Tafesse, Tesfaye. 2011. "Ethiopia's Position on the Nile Water Agreements." In *Cooperative Diplomacy, Regional Stability and National Interests: The Nile River and the Riparian States*, 67–83. Pretoria, South Africa: Trafford Publishing.
- Turton, E. R. 1970. "Kirk and the Egyptian Invasion of East Africa in 1875: A Reassessment." *The Journal of African History*. <https://doi.org/10.1017/S0021853700010197>.
- Waterbury, J. 1979. "Hydropolitics of the Nile Valley." *Hydropolitics of the Nile Valley*. <https://doi.org/10.2307/214205>.
- WB. 2019. "Access to Electricity (% of Population) - Sub-Saharan Africa." New York, USA. <https://data.worldbank.org/indicator/EG.ELC.ACCS.ZS>.
- Wehling, Philine. 2020. *Nile Water Rights: An International Law Perspective*. Nile Water Rights.

Wheeler, Kevin G., Mohammed Basheer, Zelalem T. Mekonnen, Sami O. Eltoum, Azeb Mersha, Gamal M. Abdo, Edith A. Zagana, Jim W. Hall, and Simon J. Dadson. 2016. "Cooperative Filling Approaches for the Grand Ethiopian Renaissance Dam." *Water International*. <https://doi.org/10.1080/02508060.2016.1177698>.

Woldetsadik, Tadesse Kassa. 2013. *International Watercourses Law in the Nile River Basin: Three States at a Crossroads*. *International Watercourses Law in the Nile River Basin: Three States at a Crossroads*. <https://doi.org/10.4324/9780203076682>.

Zewde, Bahru. 1991. *A History of Modern Ethiopia, 1855–1974*. London: UK: James Currey; Athens, Ohio University Press; Addis Ababa University Press.