

RE-THINKING ANOTHER POSSIBLE RIVER NILE TREATY

DR. PETER ONYANGO PhD¹

Re-thinking another strong regional treaty for the Nile Water is now possible with the new regional system in place and almost all African States gaining their independence from the European Imperialists in what is called African problems with African solutions. The defunct Nile Water Agreement unilaterally crafted and signed between Britain and Egypt in 1929 fall short of binding force within the 10 independent riparian states forming IGAD, Horns of Africa, EAC and Maghreb in the Sahel region. The river that covers almost 7600 kilometres turns out to be the longest in the world and rich in cultural history. The same River Nile has been the source of historical conflicts in Egypt, Sudan and Ethiopia. Now with new interested parties on board, it would be the right time to investigate the possibility of coming up with River Nile Treaty to regulate the water use, the needs for development of the riparian states and Egypt, environmental development of the River and its vitality in the regional peace and security.

Dr. Peter Onyango, international law researcher and lecturer, has undertaken this research to reveal the weak points in the alleged River Nile Water Agreement of 1929 and the subsequent legal and political agreements in force. The River Nile underpins diplomatic values in the region of IGAD with already 8 member States. As has been revealed Egypt has been claiming the entitlement of the river and its sources referring to the colonial Agreement which has already been overtaken by events and its historical beliefs and customary practices excluding other parties. The foresaid research is an attempt to prove that another treaty is possible to confer rights and impose obligations on the States that share and benefit from the River Nile and its resources. Such shall include inter alia the Great Lakes Region and their entitlement to the use of the water as a basic resource within their territories. Least but not last, the research is interested in revealing the already on-going tacit tensions between riparian States and Egypt with veto powers. It is also

¹ Lecturer School of Law, University of Nairobi, consultant with ILA and Law firms both in Kenya and abroad, a writer, researcher, and public speaker on legal matters.

important to spell out some Western legacies that have contributed to customary international law due to River Nile and diplomatic relations Egypt has been enjoying throughout. The researcher is revealing that the River Nile Water is a contentious issue involving almost 10 states and cannot be taken for granted by regional laws for the sake of peace and security within the geopolitical area of the African Union.

ABBREVIATIONS

IGAD- Intergovernmental Authority on Development

AEC- African Economic Community

AU- African Union

ECCAS- Economic Community of Central African States

EC- European Community

ECOWAS- Economic Community of West African States

SADC- Southern African Development Community

EAC- East African Community

COMESA- Common Market for Eastern and Southern Africa

OAU- Organisation for African Unity

I. CONTENTS

0. Part I. INTRODUCTION	3
1. 0 HISTORICAL BACKGROUND	4
1.1 THE RIVER NILE AND ITS SOURCES	10
2. TURN OF EVENTS	14

3.0 INVESTIGATING A POSSIBLE MULTILATERAL NILE TREATY	15
4.0 AFRICA AND THE COMMONWEALTH	18
5.0 COLONIAL LEGACY OF EUROAFRICA CONCEPT	19
6.0 BILATERAL TREATIES: THE NILE CONTROL PROJECTS AND THE DIVISION OF THEIR BENEFITS BETWEEN THE TWO REPUBLICS.....	22
7.0 PART III REACTION FROM THE RIPARIAN STATES: NILE BASIN INITIATIVE	23
REMARKS	26
Bibliography.....	Error! Bookmark not defined.

0. INTRODUCTION

As East African Community and IGAD are persisting on regional integration and their rights over natural assets, it is crucial to review some historical legal challenges that the region over the Nile Water. The IGAD and Great Lakes Regions have been undergoing substantial changes in terms of population growth, need for development, and need to exploit natural resources within their borders to fit their need for economic growth. It is a historical fact that these are some of the regions that have been troubled by European colonialism, Arab influence, and divisive geopolitics for over 3 decades after independence.

The River Nile Waters Agreement signed into law in 1929 between the United Kingdom and United Arab Republic (Egypt) stands out to be a controversial document that lacks binding force and recognition in the African region today. Italo-Ethiopian, Anglo-Ethiopian and Arab treaties were signed bilaterally to

favour the interests of involved States at the time in disregard of the upstream riparian states other than Egypt and Sudan.

The case is today different as new needs have emerged and independent States sharing the sources of the Nile water are emerging very fast.² Regionalism and new partnerships are constantly developing under the auspices of the United Nations. The new change implies need for new regional legal frameworks and sustainable interstate agreements concluded for peaceful mutual benefits. Some frameworks shall include inter alia, common water resources, common economic benefits and regional trade agreements and tariff zones that shall spur rapid growth to meet the needs of time.

1. HISTORICAL BACKGROUND

Historical Bilateral Treaties have resulted in inequitable rights to the use of Nile water between the countries of the Nile Basin namely Sudan and Egypt.³ The colonial bilateral treaties in the olden days had their own provisions regarding the rights of the Nile water and its course:

April 15, 1891 – Article III of the Anglo-Italian Protocol. Article III states that "the Italian government engages not to construct on the Atbara River, in view of irrigation, any work which might sensibly modify its flow into the Nile". The

² The formation of the East African Community (EAC) in 1999 by the United Republic of Tanzania, the Republic of Kenya and the Republic of Uganda was the achievement of the trio's cooperation since the collapse of the original EAC in 1977. - See more at:
http://www.ecdpm.org/Web_ECDPM/Web/Content/Content.nsf/0/BAE17C6703427158C1257A5A0078B3F5?OpenDocument#sthash.rBMNnuHv.dpuf

³ http://en.wikipedia.org/wiki/Water_politics_in_the_Nile_Basin

language used in this article was too vague to provide clear property rights or rights to the use of water.

May 15, 1902 – Article III of the Treaty between Great Britain and Ethiopia. Article three states “His Majesty the Emperor Menilik 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” This agreement has become one of the most contested agreements over the use of the Nile waters. The aim of this treaty was to establish the border between Ethiopia and the Sudan. One of its articles, number III, related to the use of Nile water. The English version, as reviewed by Britain and later by the Sudan, read: “His Majesty the Emperor Menilik 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.” The Amharic version, however, gave a different meaning and understanding to Ethiopia and “was never ratified by this country.”

May 9, 1906 – Article III of the Agreement between Britain and the Government of the Independent State of the Congo. Article III states “The Government of the independent state of the Congo undertakes not to construct, or allow to be constructed, any work over or near the Semliki or Isango river which would diminish the volume of water entering Lake Albert except in agreement with the Sudanese Government”. Belgium signed this agreement on behalf of the Congo despite the agreement favoring only the downstream users of the Nile waters and restricting the people of the Congo from accessing their part of the Nile.

December 13, 1906 – Article 4(a) of the Tripartite Treaty (Britain-France-Italy). Article 4(a) states “To act together... to safeguard; ... the interests of Great Britain and Egypt in the Nile Basin, more especially as regards the regulation of the waters of that river and its tributaries (due consideration being paid to local interests) without prejudice to Italian interests”. This treaty, in effect, denied Ethiopia its sovereign right over the use of its own water. Ethiopia has rejected the treaty their military and political power was not sufficient to regain its use of the Nile water.

The 1925 exchange of notes between Britain and Italy concerning Lake Tana which states “...Italy recognizes the prior hydraulic rights of Egypt and the Sudan... not to construct on the head waters of the Blue Nile and the White Nile (the Sobat) and their tributaries and effluents any work which might sensibly

modify their flow into the main river." Ethiopia opposed the agreement and notified both parties of its objections:

"To the Italian government: The fact that you have come to an agreement, and the fact that you have thought it necessary to give us a joint notification of that agreement, make it clear that your intention is to exert pressure, and this in our view, at once raises a previous question. This question which calls for preliminary examination, must therefore be laid before the League of Nations."

"To the British government: The British Government has already entered into negotiations with the Ethiopian Government in regard to its proposal, and we had imagined that, whether that proposal was carried into effect or not, the negotiations would have been concluded with us; we would never have suspected that the British Government would come to an agreement with another Government regarding our Lake."

When an explanation was required from the British and the Italian governments by the League of Nations, they denied challenging Ethiopia's sovereignty over Lake Tana. Notwithstanding, however there was no explicit mechanism enforcing the agreement. A reliable and self-enforcing mechanism that can protect the property rights of each stakeholder is essential if the principle of economically and ecologically sustainable international water development is to be applied.

May 7, 1929 – The Agreement between Egypt and Anglo-Egyptian Sudan. This agreement included:

Egypt and Sudan utilize 48 and 4 billion cubic meters of the Nile flow per year, respectively; The flow of the Nile during January 20 to July 15 (dry season) would be reserved for Egypt; Egypt reserves the right to monitor the Nile flow in the upstream countries; Egypt assumed the right to undertake Nile river related projects without the consent of upper riparian states.

Egypt assumed the right to veto any construction projects that would affect her interests adversely.

In effect, this agreement gave Egypt complete control over the Nile during the dry season when water is most needed for agricultural irrigation. It also severely limits the amount of water allotted Sudan and provides no water to any of the other riparian states.

The 1959 Nile Waters Agreement between the Sudan and Egypt for full control utilization of the Nile waters. This agreement included:

The controversy on the quantity of average annual Nile flow was settled and agreed to be about 84 billion cubic meters measured at Aswan High Dam, in

Egypt. The agreement allowed the entire average annual flow of the Nile to be shared among the Sudan and Egypt at 18.5 and 55.5 billion cubic meters, respectively. Annual water loss due to evaporation and other factors were agreed to be about 10 billion cubic meters. This quantity would be deducted from the Nile yield before share was assigned to Egypt and Sudan.

Sudan, in agreement with Egypt, would construct projects that would enhance the Nile flow by preventing evaporation losses in the Sudd swamps of the White Nile located in the southern Sudan. The cost and benefit of same to be divided equally between them. If claim would come from the remaining riparian countries over the Nile water resource, both the Sudan and Egypt shall, together, handle the claims.

If the claim prevails and the Nile water has to be shared with another riparian state, that allocated amount would be deducted from the Sudan's and Egypt's and allocations/shares in equal parts of Nile volume measured at Aswan.

The agreement granted Egypt the right to construct the Aswan High Dam that can store the entire annual Nile River flow of a year.

It granted the Sudan to construct the Rosaries Dam on the Blue Nile and, to develop other irrigation and hydroelectric power generation until it fully utilizes its Nile share. A Permanent Joint Technical Commission to be established to secure the technical cooperation between them.

Historical perspective has it that Egypt has considered River Nile as its historical gift and basing their belief on Herodotus assertion, Nile is a historical right for Egypt and no any other State in the upstream (upper riparian states) should interfere with this right. Upper riparian states, namely, Ethiopia, Uganda, Eritrea, Kenya, Tanzania, Rwanda, and Congo have posed challenges to this hegemony or monopoly of Egypt on the Nile waters for almost a Century. This happened due to colonial interest in Africa until the period of decolonization under the United Nations Trusteeship Council.

In 1963, African States signed an OAU Charter to be a regional platform to spearhead decolonization on the continent, to promote international cooperation, having due regard to the Charter of the United Nations and the Universal Declaration of Human Rights. To this regard the Member States shall coordinate and harmonize their general policies especially in the following fields: political and diplomatic cooperation; economic cooperation, especially in the fields of transport and communication; cooperation in the fields of education and culture; health, sanitation, nutritional cooperation; scientific and technical cooperation; and cooperation in matters of defence and security.⁴

With the spirit of the OAU Charter African states had idea of cooperation that safeguarded the Nile Water Agreement. The same document underlined the sovereign equality of all Member States; Non-interference in the internal affairs of States; respect for the sovereignty and territorial integrity of each State and for its inalienable right to independent existence; peaceful settlement of conflicts through negotiations, mediation, conciliation or arbitration; unreserved condemnation of all forms the political assassination and subversive activities on the part of neighbouring or any other states; absolute dedication to the total emancipation of African territories still dependent; and declaration of the policy of nonalignment with regard to all blocs.

⁴ EDEM KODJO, PP. 5f.

As the OAU was the manifestation of forces, feelings and aspirations of the African peoples it was a mechanism through which problems are resolved, a mechanism that among other functions, aims at diffusing crises and liquidating conflicts between Member States.⁵

With time the African interstate system underwent some substantive changes. The OAU mandate to liberate the continent from the colonisers was finally done and the organization became defunct allowing independent States to manage their own situations but the Nile Agreement was never touched. With the provision of non-interference with internal affairs of individual States there were cases of dictatorship, violations of human rights, assassinations and the OAU Charter was rendered toothless. Such changes came along with strains that forced some of the States to align with superpowers for their economic survival. As such, British Colonial Agreements on river Nile and Suez Canal were safeguarded with esteem by beneficiaries such as Egypt and Sudan in disregard to the spirit and letter of the OAU Charter.

In 2010, Nile Basin Cooperative Agreement was signed in Entebbe to deal with the use of waters from the Nile by other States such as Sudan, Ethiopia and Uganda. According to Prof. Ibrahim the upstream riparian States introduced the treaty not for its legal value but for its geopolitical value to counter stand the

⁵ EDEM KODJO, p. 6.

monopoly of United Arab Republic (Egypt)⁶. The Entebbe document was more of a political decision to deal with the veto power of Egypt and to out-rule its rights over the water.

The Nile Water Agreement was signed in 1929 – through colonial Agreement that gave Egypt full entitlement to use the water without involving Uganda, and other upstream States. The Nile water interest was purely based on colonial economic interests that favoured irrigation activities in the Nile delta and the Suez Canal region.

According to the United Kingdom-Egypt Agreement, upstream riparian States have responsibility that their use of the water should not interfere with the volume of the Nile water that Egypt receives per year. The contention is that other States, a part from Egypt and Sudan cannot make use of Nile Water or its sources without violating the provisions of the Nile Water Agreement of 1929 that gave Egypt property rights over the Nile Water.

1. THE RIVER NILE AND ITS SOURCES

The Nile is the longest River in Africa crossing many States. It has potential conflict and from the history Egypt has had great monopoly of River Nile. The

⁶ IBADIR M. IBRAHIM, J.S.D. Candidate at St. Thomas University School of Law LL.M./J.S.D. Program in Intercultural Human Rights, LL.M. in Intercultural Human Rights (St. Thomas University), LL.M. in International Law (Addis Ababa University); LL.B. (Addis Ababa University). See MO. ENVTL.L.&POL'Y REV., Vol. 18, No. 2

River forms part of the history of Egypt- A Greek Poet Heroditus wrote that Egypt is the gift of the Nile.

The Nile is closely associated with Egypt but the sources of the River are beyond Egyptian borders, from Lake Victoria the main source of White Nile and from Lake Tana, Ethiopian largest lake and the main source of Blue Nile that converge in Khartoum. Another tributary river is Atbara flowing seasonally from Eritrea into the Nile.

History has it that the Nile is one of the rivers mentioned in the Bible and holds religious values in Ethiopia. The river has nutrients and minerals which have been blessings for the Ethiopians and Egypt. In Egypt the Nile is named after a god, conferring to it some profound religious connotations such as the belief that fertility is granted by the Nile. Ancient Egypt is the backbone of agriculture within a vast desert environment making irrigation a great necessity.

The river has been a subject to devotions and adoration that leads to possession of the Nile.

By the 1900 British ruled major parts of the Nile, coming up with Suez Canal and Britain had all the say over the Nile water to protect their economic interest. Egypt and Sudan agreed on dividing Nile river waters without involving other involved States. In 1960s many African nations gained their independence and switched to challenge the Agreement.

Upstream states felt that the Agreement was not in their favour. They argued that Egypt assumes that the Nile belongs to them by history and religion. 2010 meeting in Entebbe in Uganda, the riparian States signed an Agreement to reverse the Nile Agreement with no substantive change of circumstances. Egypt and Sudan did not attend the Entebbe meeting and the document triggered off severe reactions in Cairo saying that any interference with Nile Water shall threaten Egyptian existence and may not exclude military option. Egypt is ready to fight anyone who threatens their source of water. Egypt constantly controls the level of the Nile water in order to reserve the water for irrigation and other uses during dry summer period. Egypt needs the water for irrigation and its economic development adversely relies on the Nile Water.

Aswan dam was built by Gamal Abdu Nasser following other dams. Nasser differed with the West during the Cold War, something that annoyed the Americans. Nasser attempted to nationalise Suez-Canal and finance the building of the dam. British staged war against Nasser in 1956. In 1958 Egypt signed agreement with the Soviet Union to finance the construction of Aswan high dam. After the death of Nasser, Anwar Sadat took over and saw the completion of the dream project.

The Aswan high dam was to control the Nile Water volume but with a price to be paid. The dam brought silt which was the main fertiliser in Egyptian Nile

Basin. Due to the construction of the dam the silt stopped flowing from Ethiopia making it hard for Egypt to access natural fertility caused by the high dam.

Behind the dam there is Lake Nasser which is one of the biggest man-made dams in the Nubian region. The water from the lake threatened to submerge historical Nubian monuments. United Nations had to intervene to save the historical Nubian monuments which are tourist attractions. Nubians are attached to the river for their livelihood. Nubian community make living out of the Nile.

In 1964, the Egyptian leader Abdul Nasser's project adversely affected the livelihood of the Nubians both in Egypt and in Sudan. The Egyptians and Sudanese government promised to find alternative for the Nubians far from the river which never yielded.

Sudan decided to build a dam for the generation of hydro-electric power affecting the Nubians again. The Sudanese project had to put the project on hold to respect the culture and the economic needs of the Nubians whose livelihood relied on the Nile water and its environs. In 1980-90 China funded the construction of a dam in the northern Sudan. It was officially opened in 2009 by President Omar Al Bashir. Again the water from the reservoir damaged so many homes causing revolts from the Nubian communities.

In Uganda there were 2 hydro-electric plants on the source of Nile. This was out of the need for hydro-electric power.

Lake Victoria is one of the re-known sources of White Nile water but due to climate change, the level of water in L. Victoria is dropping with great margins. Much of the water is being directed to River Nile affecting the development of the Nile water in the riparian States. For instance, much of the fish moves to Uganda where the water is abundant in respect to Kenya and Tanzania.

2. TURN OF EVENTS

The question today is who owns the Nile Water? Egypt and Ethiopia have been at tension over this question. Egypt passed property right rule to claim the ownership of the Nile Water. Uganda constructed two huge hydraulic dams for its hydro-electric needs and developments. Ethiopian moved to construct the biggest dam of its kind that would divert the Nile water grossly affecting the water volume in the Blue Nile. 84.6% of the Nile water flowing into Sudan and Egypt come mainly from Ethiopia at seasons. Now with Ethiopia constructing the dam, Egypt and Sudan will consequently be badly affected. Now the question is how to solve this problem by using international law apparatus without resorting to disputes? Britain has been on the receiving end when it comes to the Nile Water conflict due to Nile Agreement of 1929 which assigned to Egypt veto power over the Nile Water. The international law is not very clear on non-navigable watercourses and may not be helpful. The pressure on the riparian States to make profitable use of the Nile Water is not relenting with

time making the need for more sub-regional integration such as IGAD and EAC possible.

II. INVESTIGATING A POSSIBLE MULTILATERAL NILE TREATY

Research on The Nile River Agreement is a great concern in the legal sector to analyse the legitimization of the Nile Water Agreement and its validity in the post- independence era. The Agreement that was signed before the coming into force of the UN Charter has historical rights with strong colonial legacy that require thorough legal analysis in the community law (African Union, IGAD and EAC). Regionalism and AU law must be re-worked in a manner that there shall be no dispute within the region caused by the Nile water in question.

This hypothetical research is interested in investigating possible effective regional legal framework that would effectively and efficiently deal the contentions among Egypt, Sudan, Eritrea South Sudan, Ethiopia, Uganda, Kenya, Tanzania, Rwanda and the Democratic Republic of Congo without resorting to an international armed conflict.

Another motivation is supported by the fact that Kisumu city may become the capital of East African Region since it lies right on (former Port Florence) Lake Victoria (great fresh water lake joining Tanzania, Kenya and Uganda) which is adversely affected by the Nile Agreement of 1929.

The historical agreements did not reflect so much the rights and sovereignty of the independent East African States (upstream riparian States) since they were drafted, endorsed and came into effect before the independence of Kenya, Uganda, Tanzania, Rwanda, Burundi, Congo, Ethiopia and Eritrea. By then the Imperial British Government had sole legal authority to enter into such agreements under the Mandatory Trusteeship policies and regulations provided for *mutatis mutandis* by the Covenant of the League of Nations and later by the United Nations Charter in 1945.

At independence the new States had to apply the principle of *uti possidetis juris* according to the customs of international law adopting the bilateral treaty between the aforesaid United Kingdom and Egypt Agreement of 1929.

River Nile stands as a contentious issue within the states that share its values and there is need for stronger regional community law that will expeditiously deal with water related conflicts within the Nile Basin. Due to its legal value, River Nile, its waters, environs and sources stand out as points of disagreements, contentions and disputes that later may interfere with the peace within the region if not checked. “... *the fact that the Nile waters will increasingly be contested as the volume and quality of the Nile decreases with population growth and environmental degradation*”.⁷

⁷ IBID.

The economic question of Lake Victoria and the Nile Water is pressing hard on the developing countries making the need for valid community legal framework more urgent than ever before. The African region and various communities such as IGAD must ensure that they come up with an effective community treaty ruling on the Nile Water.

The research for a peaceful *modus vivendi* for 10 members of the East African Region and the Nile Basin members that enjoy the benefits of the Nile Waters, keeping in mind that some new treaties may be forthcoming. The question is whether the *status quo* is still viable or there is need to come up with another legal framework to challenge pertinent historical hydro-politics in the Sahel region today?

*The Nile watercourse, considered to be the longest in the world, crosses ten states whose combined populations constitute 40% of the entire population of Africa. The main tributaries of the Nile River are the Blue Nile and the White Nile. The source of the Blue Nile, which constitutes 86% of the volume of the Nile, is in Ethiopia and to some degree Eritrea, while the contribution of the White Nile is shared amongst Tanzania, Rwanda, Burundi, Kenya, Uganda and the Democratic Republic of Congo. The two lower riparian states, Egypt and Sudan, are traversed by the Nile that joins in Khartoum. The states through which the Nile passes need the Nile primarily for irrigation and, in varying degrees, for hydroelectric power generation, domestic use, transportation, industrial consumption...*⁸

Given the above fact finding statement, there is a valid legal problem and cause for action that affects almost 10 independent riparian States, the shareholders of the alleged Nile watercourse. It is in this basis that the research draws it

⁸ IBADIR M. IBRAHIM.

strongest motivation to discuss possibility of re-thinking of another River Nile Treaty.

III. AFRICA AND THE COMMONWEALTH

The creation of Commonwealth countries and the entry of Africa into the same club subjected independent African States to Her Majesty, the Royal Authority of the Great Britain. The Commonwealth became the best instrument through which British could perpetuate her interests over British former colonies such as, *inter alia*, Egypt, South Africa, Uganda, Tanzania, and Kenya. This reality made it easier for the Nile Water Agreement to proceed with force of law through decades without any concrete opposition as of its legitimacy and legality.

Commonwealth has become the basis for study, accessing development grants from the industrialised countries, participate in the international law and drafting legislations compatible with the United Nations and a link with the West. For instance, many African universities achieved their studies in the Commonwealth nations with guaranteed scholarships and fellowship plans.⁹

⁹ DEREK INGRAM, "Africa and the Commonwealth", in the *Africa*, Vol. 2, Facts on File, Oxford, New York, 1989, pp. 763f.

IV. COLONIAL LEGACY OF EUROAFRICA CONCEPT

European Community (EC) has had a long history partnering with Africa starting from the period beyond the scramble for Africa, Slave Trade, colonization, de-colonization, until today. There has always been bargain especially the period of preceding the Cold War. Militarization of Africa and seeking raw materials from the African territory has been a long historical fact between the European and African Continents.

Trade link with Egypt and safeguarding the long Biblical history of Egypt and Europe made it easier for the British to favour Egypt in the Nile Water Agreement in disregard to the upper riparian States. EC was seeking enlargement of its influence on the continent and even inspired such important documents as Lome Convention and ACP countries in 1975 and after by building the Suez Canal in 1959. Again the need for energy (petroleum) and other commodities bond Europe with Africa to an extent of influencing its political status in the post-colonial era.

It is clearly stated in the history that with the expansion of the African population and need to explore new grounds to sustain the most needed economy was tamed by grants from the former colonial masters for a lengthy period. Such relationship made some contributions as well in the armed conflicts that tormented the new States.

The relationship breaking loose after the end of the Cold War in 1989, and many African States tending to discover new partnerships especially with the Oriental bloc, the tides seem to tilt towards the East leaving the West with some bitterness and somehow betrayal.

Notwithstanding this critical crisis Africa still clings to the West for many reasons. First and foremost the need to counter stand the emerging trans-boundary and international terrorism, second is how to deal with its expanding market and thirdly how to tame its economic needs.

Said and done, the riparian States that share the watercourse of the River Nile feel the need to make profitable use of the natural water resource within their boundaries in disregard to the colonial bilateral Nile Agreement and unilateral national property rights.

In what could be seen as a successful story, Egypt seems not to be amused by other shareholders of the Nile Watercourse even if their decision is free and independent as per the State sovereignty and equality principles in the international law.

The only possible option left for Egypt is to admit the historical errors and join other African Members under regionalism process. In this case, Egypt can easily argue her case under IGAD and EAC other than under the intervention of the former colonial masters.

*For a long time EC policies towards Africa have rested on three points: the legacy of colonialism; the mercantilist idea of exchanging raw materials for manufactures; and the belief that European Culture and civilization can be bestowed as part of development.*¹⁰ This is clear a sign that inter-regional partnership is another important reality that shall determine the River Nile Treaty in the postmodernism time.

African debt crisis and the need for it to honour her international obligations have made it pretty difficult to decide independently without some economic consequences from donor countries, namely Britain and the United States of America.

Africa's new and recent entry into China is based on another pressure of foreign debts which is not going to be a relief from its already bigger burden. As it sounds, it will again make it considerably difficult to come up with enforceable Nile Treaty without offending the former colonial masters. Any law trying to interfere with the historical Egyptian veto power predictably may encounter the wrath of some United Nations Security Council veto powers especially the United Kingdom.

¹⁰ ADRIAN HEWITT, "The European Community and Africa", in the *Africa*, Vol. 2, p. 782.

V. BILATERAL TREATIES: THE NILE CONTROL PROJECTS AND THE DIVISION OF THEIR BENEFITS BETWEEN THE TWO REPUBLICS

After the 1929 colonial treaty controlling the Nile Water there is the 1959 Nile Water Treaty between the United Arab Republic and the Republic of Sudan on how to use and control the Nile Water course between the two lower riparian States. Under section two of the document it provides that:

1. In order to regulate the River waters and control their flow into the sea, the two Republics agree that the United Arab Republic constructs the Sudd el Aali at Aswan as the first link of a series of projects on the Nile for over-year storage.

2. In order to enable the Sudan to utilize its share of the water, the two Republics agree that the Republic of Sudan shall construct the Roseires Dam on the Blue Nile and any other works which the Republic of the Sudan considers essential for the utilization of its share.

3. The net benefit from the Sudd el Aali Reservoir shall be calculated on the basis of the average natural River yield of water at Aswan in the years of this century, which is estimated at about 84 Billiards of cubic meters per year. The acquired rights of the two Republics referred to in Article "First" as measured at Aswan, and the average of losses of over-year storage of the Sudd El Aali Reservoir shall be deducted from this yield, and the balance shall be the net benefit which shall be divided between the two Republics.

The bilateral treaty of 1959 allegedly ignored the riparian States' concern and went ahead. Such blunder seems to worsen peaceful relationship between the United Arab Republic (Egypt), Republic of Sudan and other Upper riparian

States. This is what moved the Upper riparian States to sign the Nile Basin Initiative of 2010 held in Entebbe which the United Arab Republic did not attend and failed to have binding legal authority till today.

VI. THE BOTCHED NILE BASIN INITIATIVE

Conflict on the Nile Water erupted as a reaction to the technicality and procedures adopting in drafting the bilateral treaties. This is a sign that there is need for a multilateral River Nile Treaty under the geopolitical regional organization particularly IGAD. In such new agreement, the colonial agreements and bilateral agreements shall possibly be deemed repealed or none binding on the signatory States. As a result the Nile Water Agreements of 1929 shall be considered repealed by the multilateral River Nile Treaty thereof.¹¹

Prof. Abadir M. Ibrahim in his article “The Nile Basin Cooperative Framework Agreement: The Beginning of the End of Egyptian Hydro-Political Hegemony”¹² discusses important issues appertaining to The Nile Water Agreement that signal some avenues to possible regional integration based on shared natural resources and indicating the historical Egyptian hegemony or

¹¹ http://works.bepress.com/joseph_kieyah/1/ accessed on 3/04/2014.

¹² J.S.D. Candidate at St. Thomas University School of Law LL.M./J.S.D. Program in Intercultural Human Rights, LL.M. in Intercultural Human Rights (St. Thomas University), LL.M. in International Law (Addis Ababa University); LL.B. (Addis Ababa University). See MO. ENVTL.L.&POL'Y REV., Vol. 18, No. 2

monopoly over the waters of the Nile. This was brought about by practices over time immemorial and according to the Egyptians the Nile water is their historical right without which their life shall be rendered difficult. Considering possible humanitarian disaster and crimes against humanity that the Nile Treaty may cause to Egypt and her population, may be the new Agreement may not propose claw back clauses that may violate some other international regulations already in force.

VII. THE DILEMMA

It is true that the River Nile Treaty will not come without critical legal challenges. First and foremost challenge will not be posed by historical facts and legacies or religious anecdotes but by human rights. The second challenge shall be posed by humanitarian rules and principles that may make the Treaty hard to attain without admitting to the new international law.

Human rights may pose the question as long as States can use Nile Water as a weapon to punish Egypt and her population as in the case of Nubian community whose livelihood depended on the river resources. Egypt has the right to self-determination and can decide to do whatever it deems right within her jurisdictions with the condition that this shall not infringe on the rights of the third parties. Building of dams was projected to spearhead agricultural development and generation of the most needed hydro-electric power. Yet it

caused collateral damages on the Nubian communities. The action interfered with their livelihood and means of survival. Again the action damaged some fundamental cultural monuments belonging to the Nubian communities caused by over-flooding.

The second dilemma is how to deal with humanitarian rules. Water should not be used to ruin a population or affect their survival in any way. It would be a nightmare for upper riparian States to sustain the argument of their right of self-determination when it comes to the Nile watercourse without interfering with some of the critical international humanitarian conventions. The same question of Nile Water has brought about untold conflicts between Egypt and Ethiopia; and Egypt and Sudan.

Hypothetically if Uganda or the EAC decide to cut-off the White Nile from supplying the river Nile with the required volume of water then it shall contravene the rights of the lower riparian States. The same applies to Ethiopia and Eritrea. Any attempt to tamper with the water supply or poisoning the water or interfering with its flow to the lower riparian States shall be alleged as one of the crimes against humanity.

The upper riparian States may not accept the legality of the Nile Agreement but may not find it easy to exclude the lower riparian States from the Treaty. The River Nile Treaty poses serious dilemma that can only be addressed through

mutual understanding. Signatories to the Treaty shall have rights to enjoy and obligations to fulfil according to the stipulated document.

The concern is that failure to come up with such an international legal framework concerning the Nile Water may precipitate into conflicts within the IGAD and EAC geopolitical jurisdictions. The River Nile region has no option but to come up with a Treaty that would regulate the use and distribution of the Nile Water other than the contentious colonial bilateral Nile Agreement that conferred veto power of the Nile Water to United Arab Republic (Egypt).

The third and the last dilemma is directly linked to the ecological generational theory of human rights. The obligation of every State to commit itself on environmental protection, conservation and ensuring that the river and its natural environment are safeguarded under the treaty. All States affected by the Nile Watercourse have their obligations under the United Nation and will not do anything less than what is required by the International Treaties.

VIII. REMARKS

Considering the three dilemma in the Nile Water Treaty, there is no any legal meaning maintaining historical mistakes and assuming their legitimization without masterminding legal instrument to ensure regional peaceful co-existence. After analysing in entirety the River Nile Agreement and pertinent

historical propriety issues, it is possible to predict possible urgent concern emanating from IGAD and EAC jurisdictions to spearhead a legal road-map for the river Nile Water and its equitable share among the affected Sovereign States. For the sake of diplomacy, peace and security over the Continent, River Nile Treaty shall show regional civilization and respect for the rule of law.

The writings about the colonial treaties and subsequent bilateral treaties on river Nile fall short of international standards and therefore should be considered illegitimate, void and null by the region. A treaty can be binding only if it meets the criteria provided for in the Vienna Convention of 1969. It must be ratified by the majority of the States affected by it. The River Nile Treaties have been either concluded on bilateral or unilateral basis. What is proposed in this research should be multilateral treaty that will be considered law making treaty in all effects by the meaning of the Treaty Law.

The River Nile Treaty will have options for reservations by member States.

BIBLIOGRAPHY

Translation by the Government of the United Arab Republic.

League of Nations, Treaty Series, Vol. XCIII, p.43.

Translation by the Government of the United Arab Republic.

League of Nations, Treaty Series, Vol. XCIII, p.43.

The Nile Treaty Between United Arab Republic and Sudan, 8 November, 1959 For the Full Utilization of the Nile Waters signed in Cairo.

SECONDARY SOURCES

TAFESSE, *supra* note 2, at 60; HAGGAI ERLICH, *THE CROSS AND THE RIVER: ETHIOPIA, EGYPT, AND THE NILE* 46–47 (2002). 29 Harold G. Marcus, *Ethio-British Negotiations Concerning the Western Border with*

Sudan, 1896–1902, 4 *J. AFR. HIST.* 81, 81 (1963). The anxiety of the British becomes a bit more understandable if one considered the possibility whereby a colonial power 'obstructs' the Nile either by colonizing the country or by acquiring the consent of the Ethiopian king. See Joseph W. Dellapenna, *Treaties as Instruments for Managing Internationally-Shared Water Resources: Restricted Sovereignty vs. Community of Property*, 26 *CASE W. RES. J. INT'L L.* 27, 48 (stating that Britain's colonial policy in East Africa was dictated by its apparent need to control the whole Nile basin). 30 Flintan and Tamrat, *supra* note 16, at 299;

BAHRU ZEWEDE, *A HISTORY OF MODERN*

ETHIOPIA, 1855–1991, 52–55 (2001). 31 Egypt had occupied Kasala, Metema, Masawa, Kunama and Harar. Daniel Kendie, *Egypt and the Hydro- Politics of the Blue Nile River*, 6 *NE. AFR. STUD.* 141, 145 (1999), available at http://muse.jhu.edu/journals/northeast_african_studies/v006/6.1kendie.pdf. 32 *Id.* at 145–46; see also MOHAMED H. FADLALLA, *SHORT HISTORY OF SUDAN* 23–26,

30–31 (2004). 33 Harold G. Marcus, *supra* note 29, at 89. See also Kendie, s Except for the provision of self-defense and collective security through the Security Council, the UN Charter prohibits the use of force in foreign relations. See generally Mary Ellen O'Connell,

Preserving the Peace: The Continuing Ban on War Between States, 38 CAL. W. INT'L L.J. 41, passim (2007). 36 Kendie, supra note 31, at 153–62; TAFESSE, supra note 2, at 64; Peter Kagwanja,

Calming the Waters: The East African Community and Conflict over the Nile Resources, 1 J. E. AFR. STUD. 321, 325 (2007) (describing how Egypt supported destabilizing forces in Eastern Africa and how Kenya sided with Ethiopia to the extent that it even intercepted and forced Somalia bound Egyptian military transport aircraft to land in Kenya); Nile River Politics: Who Receives Water?, GLOBAL POL'Y F., Aug. 10, 2000, supra note 31, at 147.

5 Wolf argues that the contemporary trend in history shows that it is unlikely states would go to war over water although water could lead to political tension between states.

Aaron T. Wolf, Conflict and Cooperation along International Water Ways, 1 Water Pol'y 251, 251–65 (1998). Turton, on the other hand, argues that although the disputed territories over which states go to war may include water and although water resources may be a target in wars there is no evidence showing that wars are fought over water.

Anthony Turton, Water Wars in Southern Africa: Challenging Conventional Wisdom, in WATER WARS: ENDURING MYTH OR IMPENDING REALITY? 54, 55 (Hussein Solomon & Anthony Turton eds., 2000).

<http://www.igad.org/>

EDEM KODJO, “Institutional Growth”, in *The OAU After Twenty Years*, Yassin El-Ayouty and I. William Zartman (editors), 1984, pp. 1-11.

DEREK INGRAM, “Africa and the Commonwealth”, in *Africa*, Volume 2, Oxford New York, 1989, pp. 762-769.

ADRIAN HEWITT, “The European Community and Africa”, in the *Africa*, Vol. 2, Oxford, New York, 1989, pp. 770-783.