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Journal of International Law and Comity
Volume 2 / Number 1
Summer 2021

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Journal of International Law and Comity
Volume 2 /Number 1
Summer 2021

CONTENTS

ARTICLES

Modern Day Slavery in the Tea Gardens of Bangladesh: Abolished in Law, Persisting in Fact

FATEMAA WAARIITHAH AHSAN & PRIYA AHSAN CHOWDHURY 1-28

The Nigeria Correctional Service Act, 2019 and the Right to Diversion: An Appraisal in the Light of CRA and CRC

SYLVESTER TERHEMEN UHAA 29-51

Immunity Passports and the Necessity of Human Rights Compliance by States: A Normative Critique

KAVYA SALIM 52-77

Grand Ethiopian Renaissance Dam and the Nile: International Legal and Political Implications

MENNA KHALED & MICHAEL MULLIGAN 78-97

Domestic and International Legal Evaluation of the Dwindling Space for Dissent in Sri Lanka

PULASTHI HEWAMANNA 98-120

CASE COMMENT

The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé (ICC-AC, 31 March 2021)

LUÍS BARTILOTTI MATOS 121-130

BOOK REVIEW

I Am the People: Reflections on Popular Sovereignty Today- *Partha Chatterjee*

MOHAMMAD UMAR 131-134

GRAND ETHIOPIAN RENAISSANCE DAM AND THE NILE: INTERNATIONAL LEGAL AND POLITICAL IMPLICATIONS

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Abstract

This article analyses the conflict over the construction of the Grand Ethiopian Renaissance Dam from the perspective of international law and politics. There is an explanation of the historical context underpinning claims to rights over the Nile by Egypt, Sudan and Ethiopia. The paper has highlighted the problematic nature of relying on treaties, which were negotiated and signed during the imperial era in utter disregard to the interest of several stakeholders. There can be a potential conflict between Egypt, Ethiopia and Sudan over the dam and the issues of international law would be critical in addressing the dispute. The paper further highlights certain seemingly intractable issues which arise in respect of access to the Nile. They primarily include the ones emanating from the self-curated perception (or assumption) of rights and responsibilities by different states. As such, there is an incompatibility between existing legal obligations and political goals, which may potentially lead to armed conflict.

Keywords: Nile, treaties, imperial era, conflict, incompatibility.

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I. Introduction

The Nile River has for millennia been a matter of overwhelming importance for people who have relied on it for irrigation, transport and myriad other necessities. Though it has an indelible association with Egypt, the river flows through ten other countries.¹ In the late 20th and early 21st centuries, the Nile has been the subject of great tension between the States through which it passes. Additionally, fallouts of climate change have made access to water one of the most pressing issues of today's times. Several studies have indicated that future conflicts in the Middle East and Africa would be a result of scarcity of water resources. Twenty-five years ago, Ismail Serageldin, an Egyptian vice president of the World Bank, warned that wars of the 21st century will be fought over water rather than land or oil.² It is not surprising that previous Egyptian governments and presidents have described the significance of the Nile waters as a matter of national security for Egypt, and that any alteration to the distribution of the Nile water represents an imminent threat to the nation.³

¹ Adeleke Ogunnoiki & Bashiru Salihu, *The Nile River Dispute: Assuaging Egypt's Fear Over the Great Ethiopian Dam (GERD)*, 6:2 LAPAI INTERNATIONAL JOURNAL OF POLITICS 2 (December 2020). Herodotus famously declared in the 5th century BC, 'Egypt was the gift of the Nile'. The river flows for 6,700 kilometres through eastern Africa - Rwanda, Burundi, Congo, Tanzania, Kenya, Uganda, Eritrea, Ethiopia, the Sudan (and since 2011, South Sudan), and Egypt. As Adeleke Olumide Ogunnoiki notes:

The river, located in Northeastern Africa, is made up of two tributaries – the Blue and White Nile. Originating from Lake Tana (also spelt as Lake Tsana) in the Ethiopian highlands, the Blue Nile flows northward into Sudan where it joins the White Nile (draining from Lake Victoria) in its capital, Khartoum, to form the Nile River, before heading to the downstream country, Egypt, and emptying itself in the Mediterranean Sea.

² S.N. CHATTERJEE, WATER RESOURCES, CONSERVATION AND MANAGEMENT 53 (2008).

³ Kristin Wiebe, *The Nile River: Potential for Conflict and Cooperation in the Face of Water Degradation*, 41:3 NATURAL RESOURCES JOURNAL 747 (2001). In reference

II. Egypt, Sudan & Ethiopia- Access to the Nile

The riparian States that border the Nile have access to its waters, use the resources as they deem fit. However, the key to the dispute today dates back to the 19th century. Under Mohamed Ali (with his rule spanning from 1809 to 1840), Egypt was at the forefront of the efforts by the African States to modernise themselves. They aimed to achieve the European economic, social and military capabilities that Napoleon's invasion of Egypt in 1799 had demonstrated.⁴ Following his consolidation of power in 1811, Mohamed Ali turned his attention to utilising the Nile to irrigate farmland to grow cotton.⁵ Even after his death in 1840, Ali's successors continued his modernisation plans, but they were increasingly watched by the British who by 1922 were the *de facto* rulers in Cairo. The imperial administrator, Alfred Milner described Egypt as a 'veiled protectorate' of the British.⁶ The imperial writ also ran through Sudan and the territories that would over time become Uganda, Kenya and Tanzania. It empowered the British to impose a settlement on the existing and emerging Nile states.⁷ The relationship between Egypt and Sudan was predicated on a condominium agreement of 1899, through which Britain and Sudan

to both Ethiopia's declared statements in the UN water conference in 1977 by asserting its sovereign right to unilaterally develop its water resources in the absence of international agreement and to the challenging statements posed by President Mengistu' to Egypt's water rights to the Nile in 1978, President Sadat said:

We depend upon the Nile 100 percent in our life, so if anyone, at any moment thinks to deprive us of our life, we shall never hesitate [to go to war] because it is a matter of life or death.

⁴ HENRY DODWELL, *THE FOUNDER OF MODERN EGYPT: A STUDY OF MUHAMMAD 'ALI* 5-12 (2009).

⁵ *Id.* at 192-241.

⁶ ALFRED M. MILNER, *ENGLAND IN EGYPT* 28 (7th ed., 1892).

⁷ Peter Kagwanja, *Calming the Waters: The East African Community and Conflict over the Nile Resources*, 1:3 JOURNAL OF EASTERN AFRICAN STUDIES 321 (2007). The basis of this settlement was a treaty of 1902 between Britain and Ethiopia and a treaty in 1929 between Britain and Egypt. The exclusion of the other riparian states of the Nile would become a source of almost protracted contention to this date.

exercised joint sovereignty over Sudan.⁸ This agreement was signed out of political expediency that recognised Egypt's previous conquest of Sudan by Mohamed Ali. It also formalised the financial commitments Egypt had made to support British forces that defeated the Sudanese Mahdi (who had once successfully reversed the Egyptian conquest in 1898).⁹ In 1929, the Anglo-Egyptian Treaty granted Egypt and Sudan the full utilisation of the Nile waters.¹⁰ Britain signed the treaty on behalf of the majority of other Nile riparian states. It read:

no irrigation or power works or measures are to be constructed or taken on the River Nile or its tributaries, or on the lakes from which it flows in so far as all these are in the Sudan or in countries under British administration, which would entail prejudice to the interests of Egypt.¹¹

The treaty allocated 48 and 4 billion cubic metres (bcm) of water for Egypt and Sudan respectively.¹² Ethiopia, of all the riparian States, was the one that existed largely as a unitary entity throughout this period with its interests mostly entwined with Egypt and Sudan. Its relations with Egypt have been mired by a good deal of mutual suspicion as Egypt had earlier attempted to conquer Ethiopia in 1874-1876.¹³ However, by the early 20th century, the Nile Treaty signed in May 1902,

⁸ Agreement between Her Majesty's Government and the Government of His Highness the Khedive of Egypt relating to the future Administration of Sudan was signed in Cairo on 19 January 1899.

⁹ MUDDATHIR ABDEL-RAHIM, *IMPERIALISM AND NATIONALISM IN THE SUDAN: A STUDY IN POLITICAL CONSTITUTIONAL DEVELOPMENT, 1899-1956* 275 (1987).

¹⁰ Exchange of Notes in regard to the Use of the Waters of the River Nile for Irrigation Purposes. Cairo, May 7, 1929, LNTS, vol. 93-94 (1929).

¹¹ *Id.*

¹² *Id.*

¹³ YOHANNES K. MEKONNEN, *ETHIOPIA: THE LAND, ITS PEOPLE, HISTORY AND CULTURE* 84 (2013). Under the reign of Ismail Pasha, Egypt increased its longstanding interests in Sub-Saharan Africa and wanted to expand its power. The khedive sought to conquer Ethiopia in a military expedition from 1874 to 1876, which ended in the defeat of the Egyptian army.

was already in existence between Britain and Ethiopia.¹⁴ As per the terms, the representatives of Her Majesty's government and the Ethiopian Emperor Menelik II agreed that Ethiopia would commit itself not to tamper with the Blue Nile waters. Article III of the treaty provided:

His Majesty the Emperor Menelik II, King of Kings of Ethiopia, engages himself towards the Government of His Britannic Majesty not to construct or allow to be constructed, any works across the Blue Nile, Lake Tana or the Sobat, which would arrest the flow of their waters into the Nile except in agreement with His Britannic Majesty's Government and the Government of the Sudan.¹⁵

After 1918, the British gradually relinquished their hegemony over the Nile.¹⁶ Though the sovereign authority in Egypt was transferred to the King in 1936, the British retained a military presence and controlling interest in the Suez Canal until the Suez Canal Company was expropriated by the regime of Gamal Abdel Nasser in 1954.¹⁷ The 1959 Nile Water Agreement between Egypt and Sudan (the latter having achieved independence in 1956), attempted to strike a workable *modus vivendi*, albeit with the absence of the other interested parties to the Nile.¹⁸ This agreement paved way for the construction of the Aswan dam and allocated 55.5 bcm to Egypt and 18.5 bcm to Sudan respectively leaving 10 bcm for evaporation and other factors. Since the

¹⁴ Tadesse K. Woldetsadik, *Anglo-Ethiopian Treaty on the Nile and the Tana Dam Concessions: A Script in Legal History of Ethiopia's Diplomatic Confront (1900-1956)*, 8:2 MIZAN LAW REVIEW 271 (December 2014).

¹⁵ Amira Howeidy, Egypt-Ethiopia Nile water dispute: A Timeline, Al Ahram Online (May 20, 2021, 11:00 AM), <https://english.ahram.org.eg/NewsContent/50/1201/369666/AlAhram-Weekly/Egypt/EgyptEthiopia-Nile-water-dispute-A-timeline.aspx>.

¹⁶ The gradual withdrawal of the British from Egypt and Sudan was finalised only after the Suez Crisis in 1956.

¹⁷ The Anglo-Egyptian Treaty of 1936 was designed to give Egypt independence, but this was delayed by the Second World War and even afterward the British continued to operate as advisers to the Egyptian kings.

¹⁸ Agreement between the Arab Republic of Egypt and the Republic of the Sudan for the Full Utilization of the Nile waters, 1959, 453 UNTS, 64, 1963.

average annual Nile flow is around 84 bcm, seemingly the agreement did not at all take into consideration the legitimate interests of other riparian States.¹⁹

Though the agreement was beneficial to the two States, tensions arose in the 1990s between Egypt and Sudan as the Sudanese political establishment developed an Islamist outlook. In 1995 the prominent Muslim cleric, Hasan Abdallah al- Turabi and other Sudanese officials threatened to interfere with the Egyptian share of Nile water on the contingency of an attack on Sudan.

Just between the two of us', Turabi remarked, sarcastically, 'I would like to remind [the Egyptians] that [the Nile] waters flow from us to them'. President Hosni Mubarak responded by warning Sudan 'not to play with fire...and not to play with water.'²⁰

The issue of access to the Nile waters remained a source of simmering tension between Egypt, Ethiopia and Sudan. Though the *status quo* remained, the rapid economic development of Ethiopia and Sudan in the early 21st century shifted the balance of power. Immediately before the upheaval of the Arab Spring, the Nile Basin countries established the Nile Initiative (Cooperative Framework Agreement), which was signed by Ethiopia, Uganda, Rwanda and Tanzania in May 2010 with Kenya and Burundi signing in February 2011.²¹ Currently, in the face of disputed developments with Ethiopia over water shares, Egyptian President Abdel Al Sisi, declared the readiness of the Egyptian army to defend Egypt's national security inside and outside the borders.²²

¹⁹ Endalcachew Bayeh, *Agreement on Declaration of Principles on the Grand Ethiopian Renaissance Dam Project: A Reaffirmation of the 1929 and 1959 Agreements*, 7, ARTS SOCIAL SCI J. 2 (2016).

²⁰ YEHUDIT RONEN, SUDAN 576 (Bruce Weitzman ed., Westview Press 1995).

²¹ SMA Salman, *The Nile Basin Cooperative Framework Agreement: A Peacefully Unfolding African Spring*, 38:1 WATER INTERNATIONAL 17 (2013).

²² Sisi: Egypt's Army Able to Defend National Security, State Information Service (June 20, 2020, 2:20 PM), <https://sis.gov.eg/Story/147706/Sisi-Egypt's-army-able-to-defend-national-security?lang=en-us>.

What provoked President Sisi's ire, in particular, has been the ongoing issue of the Grand Ethiopian Renaissance Dam (GERD), potentially Africa's most powerful hydroelectric dam.²³ The affront to Egypt posed by the building of the dam was perhaps the only issue on which President Sisi had an agreement with his ousted predecessor Mohamed Morsi.²⁴

Economically and politically, GERD is of vital importance to Ethiopia and a symbol of its rising authority in the Nile Basin in particular and Africa in general. For Michael Asiedu, 'GERD will be the largest hydro-electric power plant in Africa'.²⁵ Constructed at USD 4.7 billion (80 billion Ethiopian birr), it is anticipated to produce 6000 megawatts of electricity.²⁶

As for Egypt, on one hand, it could not tarnish its positive image of being a cooperative state and neglect the rights of the Nile basin countries to use and benefit from the Nile water. On the other hand, it is difficult to abstain from its historical rights and forgo its needs for the Nile water, which is crucial to its existence and survival. Thus, Egypt has opposed the construction of the dam as it threatens to reduce its share in the Nile waters.²⁷ However, what has further complicated the situation is the changing stance of Sudan, as it appeared to side with Ethiopia by refusing to sign the February 2020 agreement, which was

²³ Max Bearak & Sudarsan Raghavan, Africa's Largest Dam Powers Dreams of Prosperity in Ethiopia —and Fears of Hunger in Egypt, The Washington Post (Oct. 15, 2020, 1:29 PM), <https://www.washingtonpost.com/world/interactive/2020/grand-ethiopian-renaissance-dam-egypt-nile/>.

²⁴ Nouran El-Behairy, Morsi: If Our Share of Nile Water Decreases, Our Blood Will be the Alternative, Daily News Egypt (June 11, 2021, 9:45 PM), <https://dailynewsegypt.com/2013/06/11/morsi-if-our-share-of-nile-water-decreases-our-blood-will-be-the-alternative/>.

²⁵ Michael Asiedu, *The Construction of the Grand Ethiopian Renaissance Dam (GERD) and Geopolitical Tension Between Egypt and Ethiopia with Sudan in the Mix*, PB No. 50 GPoT 3 (January 2018).

²⁶ Id.

²⁷ Andrew Miller, Dividing the Nile, Carnegie Middle East Center (July 6, 2021, 9:52 AM), <https://carnegie-mec.org/diwan/80283>.

sponsored by the United States (US) to regulate the filling and operation of the dam between Egypt, Ethiopia, and Sudan.

This left Egypt as the only signatory after almost four months of negotiations.²⁸ Furthermore, Sudan also rejected a March 2020 Arab League resolution supporting Cairo in the dispute.²⁹ On 1 May 2020, Egypt sent a letter to the president of the United Nations Security Council (UNSC) on the GERD crisis.³⁰ On 26 June, the leaders of Egypt, Ethiopia and Sudan agreed in a virtual summit organised under the auspices of the African Union to return to talks aimed at reaching an accord on the operation and filling of GERD's reservoir, in particular, during consecutive dry years.³¹ Three days later, Egypt's Foreign Minister, Sameh Shoukry, urged the UNSC to adopt a draft resolution as an expression of the deep interest of the international community in Egypt, Ethiopia and Sudan to reach an agreement on GERD.³² However, there has subsequently been no agreement and tensions have only been on the rise.

The high water dependency of Egypt coupled with the turn of events on the contentious issue of the Nile water sharing, brought Egyptian-Sudanese relations back to square one. *Prima facie* Sudan's position is difficult to understand as it is a party with Egypt to the 1959 Nile Treaty, which guarantees these countries a greater share of access to the Nile. At the same time, Sudan is positioned to benefit from GERD's

²⁸ Mohammed Abdu Hassanein, "*Sad al-Nahda al-Ethiopi wa al-Khayarat al-Hareja*" The Ethiopian Renaissance Dam and Difficult Choices (trans.), Asharq Al-Awsat (Mar. 25, 2021, 9:53 AM), <https://bit.ly/35ycrdF>.

²⁹ Shahira Amin, *Egypt Alarmed Over Sudan's Siding with Ethiopia in Nile Water Dispute*, Al Monitor (Mar. 25, 2021, 9:54 AM), <https://www.al-monitor.com/originals/2020/03/egypt-sudan-ethiopia-renaissance-dam-dispute-arab-league.html>.

³⁰ Id.

³¹ *Ethiopia makes controversial statements on filling GERD one day after agreeing to continue AU-sponsored negotiations*, Ahram Online (Jul. 23, 2021, 9:57 AM), <https://english.ahram.org.eg/NewsContent/1/64/375146/Egypt/Politics-/Ethiopia-makes-controversial-statements-on-filling.aspx>.

³² Ogunnoiki & Salihu, *supra* note 1.

construction through importation of electricity from Ethiopia.³³ After Sudan's independence from Britain in 1956, cross-border contacts with Egypt have been limited and border tensions have increased for four principal reasons.³⁴ Firstly, post the Egyptian Revolution of July 1952, the authorities in Cairo imposed restrictions on citizens wishing to leave Egypt, including those who were entering or going to enter Sudan. This was despite the fact that for some time the leaders of the revolution such as Mohamed Naguib (who was partly of Sudanese descent) and Gamal Abdel Nasser saw Sudan as part of a greater Egypt.³⁵ Secondly, the Egyptian and Sudanese governments caused the displacement of Nubians, a community living on the border, to make way for the construction of the Aswan High Dam during the 1960s.³⁶ This greatly reduced cross-border interaction and trade that had benefited the border communities over the period of time. Thirdly, the antagonism that arose during the Mubarak years (1981–2011) was also responsible and aggravated when the then Egyptian president Hosni Mubarak survived an assassination attempt (allegedly made by Sudan) in Ethiopia.³⁷

A significant fourth reason is the discontent between the two countries regarding the issue of the Hala'ib Triangle.³⁸ It is a land area of about 20500 square kilometres on the Egyptian-Sudanese border. Both States have claimed ownership over the Hala'ib Triangle since Sudan gained independence from Britain in 1956. Interestingly, it was designated as part of Sudan under the 1899 Condominium agreement. In the 1990s,

³³ Asiedu, *supra* note 25.

³⁴ Sherif Mohyeldeen, The Egypt-Sudan Border: A Story of Unfulfilled Promise, Carnegie Endowment for International Peace (Jun. 11, 2020, 10:16 AM), <https://carnegie-mec.org/2020/06/11/egypt-sudan-border-story-of-unfulfilled-promise-pub-81995>.

³⁵ Tareq Y. Ismael, *The United Arab Republic and the Sudan*, 23:1 MIDDLE EAST J. 14 (1969).

³⁶ *Ibid.*

³⁷ Mohyeldeen, *supra* note 34.

³⁸ Taha Sakr, Sudan Appeals to UN Security Council Over Halayeb Triangle Border Dispute, Daily News Egypt (Jan. 19, 2021, 10:28 AM), <https://dailynewsegypt.com/2020/01/19/sudan-appeals-to-un-security-council-over-halayeb-triangle-border-dispute/>.

as a result of the discovery of oil and other valuable natural resource deposits such as manganese in the triangle, Egypt sent its military to the territory. However, the two subsequent decades witnessed a *détente*. Disputes surrounding the land re-emerged in 2016 when Egypt signed a controversial agreement with Saudi Arabia to hand it over to strategically significant Red Sea islands - Tiran and Sanafir.³⁹ The agreement reworked the maritime border between the two countries and 'unilaterally acknowledged Egypt's sovereignty over the Hala'ib Triangle'.⁴⁰ Subsequently, Sudan sent a letter to the United Nations registering its strong objection of the deal between Egypt and Saudi Arabia. In a swift retort, the Egyptian officials condemned the letter and reemphasized the triangle as 'Egyptian territory'.⁴¹

Despite internal and external criticism of the Red Sea islands' cession, Egypt has been keen to assert that its rights over the Nile are guaranteed by treaties. However, the claim needs a revision for several reasons. Firstly, the 1929 'treaty' was in effect a unilateral declaration by Britain, which was still the *de facto* ruler of Egypt. The formalisation of the treaty only comprised 'an exchange of notes between the British High Commission in Cairo and the Egyptian Government concerning its position *vis-a-vis* Egypt and Sudan'.⁴² Secondly, the 1929 and 1959 treaties substantively ignored the intricately entwined interests of other Nile States. Thirdly, since the conclusion of the 1959 treaty, the other Nile states have become increasingly aware and assertive of their rights under international law and of their need for development. This has become a critical flash point, especially as Egypt's privileged position has led to what many observers see as abuse of privilege. It has increasingly allowed sprawling developments, mainly for the benefit of

³⁹ The cession of the two islands from Egypt to Saudi Arabia has not been unproblematic with a number of protests against the transfer in Cairo.

⁴⁰ Asiedu, *supra* note 25.

⁴¹ H.A., Adam, What Is Going on Between Egypt and Sudan? Al Jazeera (Jan. 12, 2021, 10:30 AM). <http://www.aljazeera.com/indepth/opinion/egypt-sudan-crisis180110134022602.html>

⁴² Ashok Swain, *Ethiopia, the Sudan, and Egypt: The Nile River Dispute*, 35:4 THE JOURNAL OF MODERN AFRICAN STUDIES 675 (December 1997).

the middle and upper classes, but nevertheless irrigated by waters from the Nile.

III. Rivers and International Law

The international law relating to rivers is still in the nascent stage. The International Law Association's Helsinki Rules on the Uses of the Waters of International Rivers (1966) rely on the criteria of 'just and equitable share' for utilising water resources.⁴³ In the absence of a robust regime formulated for an effective governance of watercourses, the Helsinki Rules are not effective enough to serve as the basis for any dispute resolution. The determination of a just and equitable share is hardly possible on an objective basis.⁴⁴

Furthermore, Orakhelashvili observes that 'General treaties providing for equitable and reasonable utilisation of transboundary water resources are not subscribed to by very many states'.⁴⁵ This is unfortunate but nevertheless predictable. Treaties are one of the key building blocks of international law. They are governed by the principle of *pacta sunt servanda*, which states that a treaty should be observed in good faith. The 1969 Vienna Convention on the Law of Treaties sets out the details of when and how a treaty may become void, invalid or terminated.⁴⁶ However, it does not take into account the surrounding circumstances of treaties signed in the past, most notably those agreed during the imperialist era of the 19th and early 20th centuries. This is important as many of the treaties signed during this period lacked equity, in the sense that they were either imposed or misunderstood by

⁴³ ALEXANDER ORAKHELASHVILI, *AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW* 155 (8th ed., 2019).

⁴⁴ Id. Although, the general principles incorporated in the UN Watercourses Convention of 1997 do take a step ahead towards ideating a fair regime on watercourses. It is discussed in some detail later.

⁴⁵ Id.

⁴⁶ These treaties contained matters such as coercion (prohibited under the law of treaty) that may well have vitiated treaties signed during the height of imperialism in the 19th century.

one side of the signatories.⁴⁷ The aforementioned 1902 agreement between Britain and Ethiopia in 1902 could be considered as one example.⁴⁸

The relative bargaining positions of Britain and Ethiopia in 1903 stood on completely different pedestals. It was clear what Britain achieved through the treaty, but less clear what benefit accrued to Ethiopia (or Abyssinia as it was then known). Instead, the agreement can be perceived as the imposition of Britain's will on Abyssinia for the benefit of its client state, Egypt. Moreover, the 1959 Nile treaty also ignored the interests of other parties.⁴⁹ Treaties can also be seen as an act of codification of the existing customary international law.⁵⁰ However, for anything to evolve as a customary rule, there must be the presence of *opinio juris* and an understanding that State practice in question has developed to evolve a customary rule of international law. In the present instance, this is not the case as Ethiopia has been a persistent objector to the privileges granted to Egypt and Sudan by the 1959 Nile treaty.⁵¹ As Arthur Okoth - Owiro has noted:

The legal regime for the utilisation and management of the Nile, therefore, consists of bilateral treaties concluded amongst the riparian states and the international customary law. [The

⁴⁷ For a discussion of the issue of unequal treaties see, Matthew Craven, *What Happened to Unequal Treaties? The Continuities of Informal Empire*, 74:3-4 NORDIC JOURNAL OF INTERNATIONAL LAW 335 (2005).

⁴⁸ Treaty between Ethiopia and the United Kingdom concluded in 1902 in Addis Ababa (Nile Treaty 1902).

⁴⁹ Salman, *supra* note 21. According to Salman, 'This agreement is totally rejected by the other riparian states (Kenya, Uganda, Tanzania), which argue that they are not parties to it and have never acquiesced to it'.

⁵⁰ For a discussion of the source and creation of rules of international law see Orakhelashvili, *supra*, pp. 31-56.

⁵¹ Arthur Okoth-Owiro, The Nile Treaty, State Succession and International Treaty Commitments: A Case Study of the Nile Water Treaties, Konrad Adenauer Foundation and Law and Policy Research Foundation (July 31, 2021, 10:45 AM), https://www.kas.de/c/document_library/get_file?uuid=03f3b3a7-47bc-a01d-0e28-300afddd3939&groupId=252038.

suggestion] that these bilateral treaties reflect customary law principles has been vigorously contested.⁵²

Consequently, arguing in favour of its own development and pulling its population out of poverty, Ethiopia no longer considers those treaties. Taking advantage of Egypt's unstable political situation in 2011, and perhaps going against the spirit of international law and comity, Ethiopia proceeded with the GERD project.⁵³

IV. The Nile Crisis and Use of Force

After multiple talks, rounds and diplomatic delegations between Ethiopia, Egypt, and Sudan over a decade, both Egypt and Ethiopia have signalled a possible use of force to protect their national interests. Sudan has long been caught between the interests of the two states.⁵⁴ The legal basis for this potential use of force raises some questions. Firstly, the legal justification for the use of force exists only in two ways: through self-defence or when authorised by the United Nations Security Council under Chapter VII of the Charter of the United Nations⁵⁵. Though the use of force to appropriate access to natural resources has arguably been a method employed by certain states, it has no basis in international law.⁵⁶ Hence, Egypt may justify any military action as self-defence under Article 51 of the Charter of the United

⁵² Id.

⁵³ Ethiopia Took Advantage of 2011 Turmoil in Egypt to Build GERD: PM, Egypt Today (July 31, 2021, 10:44 AM), <https://egyptindependent.com/ethiopia-took-advantage-of-2011-turmoil-in-egypt-to-build-gerd-pm/>.

⁵⁴ Elias Meseret, Ethiopian Army Official: Country Will Defend Itself Over Dam, AP News (June 12, 2020, 10:45 AM), <https://apnews.com/0bcfcd87f75c8fd61c9eb55366515286>.

⁵⁵ U.N. Charter, Chapter VII, art. 39, 41, 42.

⁵⁶ For instance, Alan Greenspan, the former chairman of the US Federal Reserve, openly mused in his book that the US invasion of Iraq in 2003 was largely to secure Iraq's oil reserves. Richard Adams, Invasion of Iraq was Driven by Oil, Says Greenspan, The Guardian, (Sept. 17, 2007, 10:47 AM), <https://www.theguardian.com/world/2007/sep/17/iraq.oil>.

Nations, perhaps even pre-emptive self-defence.⁵⁷ Similarly, Ethiopia may itself invoke self-defence or pre-emptive action against an impending or imminent attack.

The slow pace of negotiations since 2011 has led to GERD now being closer to realisation. Ethiopia began building the dam at the height of the Arab Spring when Egypt did not have a stable government and a consistent position. The COVID-19 crisis was further strategically used by Ethiopia and the dam was sanctioned on the Nile in early July 2020 whilst negotiations were at a standstill.

After declaring the failure of negotiations, Egypt moved towards engaging the international community to help broker a new agreement before Ethiopia could fully activate the dam.⁵⁸ It now depends on the UNSC to stall the GERD project, but seemingly it will be difficult to reach a mutually agreeable solution by diplomatic means so as to prevent the escalation of the conflict. On 19 June 2020, in an interview with the Associated Press, the Ethiopian Foreign Minister Gedu Andargachew declared that: “*For us it is not mandatory to reach an agreement before starting filling*”.⁵⁹

After Egypt raised the problem of the GERD project to the UNSC on 22 June 2020, Ethiopia’s state news agency ENA quoted Foreign Minister Andargachew saying ‘there are no internal or external forces

⁵⁷ This would mean using force to prevent the damming of the Nile even before this has occurred. Pre-emptive self-defence can be traced to *Caroline Affair* (1837) where the US Secretary of State- Daniel Webster mooted for self-defence against a threat which was ‘instant, overwhelming, and leaving no choice of means, and no moment for deliberation’. There are strong claims that the doctrine is now a part of customary international law. See generally, Michael Wood, *The Caroline Incident-1837* (Tom Ruys et al. eds., OUP, 2018)

⁵⁸ Charlene Gubash, & Isobel Van Hagen, Egypt calls for U.N. intervention after talks stall on Ethiopia's Grand Renaissance Dam, NBC News (June 20, 2021, 4:30 PM), <https://nbcnews.to/3CifDu0>.

⁵⁹ Ethiopia to Fill Disputed Dam, Deal or No Deal: Minister, Al Ahram Online (June 20, 2021, 4:35 PM), <http://english.ahram.org.eg/NewsContent/1/64/372538/Egypt/Politics-/Ethiopia-to-fill-disputed-dam,-deal-or-no-deal-Min.aspx>.

who will stop Ethiopia from realizing the Dam'.⁶⁰ This statement reflects, along with other actions and statements by the Ethiopian government, a declining possibility of the success of diplomacy or attempts of negotiations regarding the dam.

Seeing things escalated, Egypt has resumed talks with South Africa, which acts as the mediator in the dispute, to restart and steer the tripartite negotiations for a fair agreement on GERD.⁶¹ Some level of negotiations, therefore, continue until the present day under the auspices of the African Union and international observers from the United States and the European Union. Nevertheless, anxieties continue to mount. On 15 July 2020, Ethiopia announced it had started to fill the dam.⁶² Ethiopia's unilateral move flared anger, leading the Water and Energy Ethiopian Minister to alter his statements and declare the water inflow into the reservoir as a result of natural occurrence, heavy rainfall.⁶³ However, the Sudanese government raised its concerns in regards to the Ethiopian Minister's statements after noticing a decline in the water flow in the Deim water station bordering Ethiopia due to the closure of the gates of the Grand Ethiopian Renaissance Dam.⁶⁴ However, more recent satellite images taken by the European Space

⁶⁰ Egypt is 'always willing' to Negotiate Over Nile Dam in Good Faith: Minister, Al Ahram Online (June 20, 2021, 4:45 PM), <https://english.ahram.org.eg/NewsContent/1/64/372688/Egypt/Politics-/Egypt-is-always-willing-to-negotiate-over-Nile-dam.aspx>.

⁶¹ Id.

⁶² Reuters Staff, Ethiopia has Started Filling Grand Renaissance Dam on Blue Nile - Water Minister, Reuters (July 15, 2021, 3:45 PM), <https://www.reuters.com/article/ethiopia-dam/ethiopia-has-started-filling-grand-renaissance-dam-on-blue-nile-water-minister-idUSL5N2EM4CS>.

⁶³ Seleshi Bekele, Twitter (July 15, 2021, 5:55 PM), https://twitter.com/seleshi_b_a/status/1283430469141495808.

⁶⁴ Ayah Amman, Anger Flares as Ethiopia Announces, Denies Nile Dam Filling Has Started, Al Monitor (July 16, 2020, 10:55 AM), <https://www.al-monitor.com/pulse/originals/2020/07/egypt-ethiopia-filling-nile-dam-dispute-talks-fail.html>.

Agency reveal water being diverted intentionally so as to fill the in complete contrast to the Ethiopian official position.⁶⁵

In March 2021, Prime Minister Abdallah Hamdok of Sudan reiterated calls for mediation by sending letters of invitation of greater involvement to the African Union, European Union, United States and United Nations.⁶⁶ Till recently, Egypt and Sudan continue to proceed with their diplomatic efforts to reach a binding and legal agreement on filling and operating GERD that would achieve the common interests of the three countries. But for Ethiopia, despite multiple efforts by Egypt, Sudan, and different mediators, the negotiations have broken down as Ethiopia has announced its intention to proceed with the second filling of the dam.⁶⁷

Both States, Egypt and Sudan increased their efforts to gain international attention on the dangerous consequences of Ethiopia's unilateral actions. In April 2021, the Foreign Ministry sent letters to the UN Secretary-General Antonio Guterres and the UNSC explaining the unresolved issue.⁶⁸ In May 2021, Egypt appealed to the U.S. administration to play a role in breaking the current deadlock.⁶⁹ However, to what extent the US will be able to facilitate the GERD talks and reach an equitable solution for all Parties is highly doubted since the new US policy aims to limit the US's political and military involvement in the Middle East and Africa.⁷⁰

⁶⁵ Damian Zane, Ethiopia's River Nile Dam: How it will be filled, BBC News (July 16, 2020, 10:55 AM), <https://www.bbc.co.uk/news/world-africa-53432948> 2 June 2021.

⁶⁶ Sudan Formally Requests Four-Party Mediation in GERD Row, Al Jazeera (Mar. 16, 2021, 11:00 AM), <https://www.aljazeera.com/news/2021/3/15/sudan-formally-requests-external-mediation-over-ethiopian-dam-row>.

⁶⁷ Doaa El-Bey, GERD: Derailed talks, Ahram (May 5, 2021, 10:55 AM), <https://english.ahram.org.eg/NewsContent/50/1201/410586/AlAhram-Weekly/Egypt/GERD-Derailed-talks.aspx>.

⁶⁸ Id.

⁶⁹ Id.

⁷⁰ Interim National Security Strategic Guidance, The White House (July 15, 2021, 11:00 AM), <https://www.whitehouse.gov/wp-content/uploads/2021/03/NSC-1v2.pdf>.

The second phase of filling the dam began in July 2021. Coordination between Egypt and Sudan took place to prevent Ethiopia from proceeding further with its unilateral actions. In this heightened situation, Sudan has caused Ethiopia to reconsider its actions by highlighting Sudan's sovereign right over the Benishangul region (where GERD is located).⁷¹

Despite negotiations and warnings, deadlock by the Ethiopian counterpart continues. The lack of progress to reach an agreement under the auspices of the African Union, led Egypt and Sudan to request the formation of an international quartet led by the Democratic Republic of Congo, United States, European Union and United Nations. However, Ethiopia refused the Egyptian and Sudanese proposal for a quartet.⁷²

Egypt thus increased its diplomatic efforts and redirected its foreign policy towards the Nile Basin Countries by signing multiple military and economic agreements with Uganda, Kenya, Burundi, Rwanda, and Djibouti as a way of countering Ethiopia's actions and gaining African states international support and trust⁷³. In addition, Egypt has recently conducted joint military exercises with Sudan involving warplanes and special forces. On 12 June 2021, Egypt referred the GERD dispute to the UNSC for the second time, seeking that the international community, and the Great Powers, in particular, uphold their responsibility to maintaining international peace and security⁷⁴.

⁷¹ Benishangul was a Sudanese territory for most of the 19th century, and in 1898, Ethiopian forces occupied it, along with other Sudanese areas, until the British reached an agreement, the Treaty of Addis Ababa in 1902, where Ethiopia retained Benishangul. El-Bey, *supra* note 68.

⁷² Staff, Egypt Keen to Resume GERD Talks, Rejects Ethiopia's Unilateral Action, Egypt Today (June 11, 2021, 11:00 AM), <https://www.egypttoday.com/Article/1/104898/Egypt-keen-to-resume-GRED-talks-rejects-Ethiopia%E2%80%99s-unilateral-action>.

⁷³ River Nile Dam: Egypt New African Allies, BBC News (June 24, 2021, 11:00 AM), <https://www.bbc.com/news/world-africa-57467640>.

⁷⁴ *Id.*

V. The ICJ and Relevance of Principles under the UN Watercourses Convention of 1997 in the Nile Dispute

The dispute between Egypt and Ethiopia is potentially subject to resolution by the International Court of Justice (ICJ). Though ICJ does not follow *stare decisis*, the previous decisions do point to international rules on water sharing in particular instances. In dealing with disputes concerning access to trans-national water boundaries the ICJ has had the opportunity to elucidate on several important principles. One of these opportunities arose in the *Gabcikovo-Nagymaros Project* case in 1997.⁷⁵ The case concerned- a dam construction on the river Danube that had originally been proposed by Hungary and Czechoslovakia, and questions of state succession to treaty obligations in the case of Slovakia. Judge Christopher Weeramantry elaborated on the *erga omnes* obligations, which according to him were applicable in the case.⁷⁶ He highlighted broad contours of those obligations and prescribed their application on water disputes at the expense of narrow treaty interpretations confined to the selfish considerations of individual States. In doing so he drew upon international law's interaction with other norms quoting the words of former ICJ President- Jerry Makarczyk when he said that 'there should be a much greater, and a practical, recognition by international lawyers that the rule of law in international affairs, and the establishment of international justice, are inter-disciplinary subjects'.⁷⁷ Judge Weeramantry's judgment was not only a repudiation of the narrow treaty-based acquisition of rights visible in the Nile treaty finalised by the British in 1929, but it was also a purposeful linking of rights of access to waterways with environmental responsibilities for riparian states.

⁷⁵ *Gabcikovo-Nagymaros Project (Hungary v. Slovakia)*, 1997 I.C.J. Reports 7.

⁷⁶ Obligations *erga omnes* are the ones that are owed by states to international society as a whole and not merely on an inter-state basis. The principle was first enunciated in the *Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Second Phase 1970 I.C.J. Reports 3.

⁷⁷ I. LUKASHUK, CUSTOMARY NORMS IN CONTEMPORARY INTERNATIONAL LAW 423 (Jerry Makarczyk ed., Kluwer, 1996).

In the same year when the *Gabcikovo-Nagymaros Project* case was decided the UN adopted the Convention on the Law of Non-Navigational Uses of International Watercourses.⁷⁸ Part II of the Convention lays down general principles, the first of which is enunciated in article 5. It says that international watercourses should be subject to ‘equitable and reasonable utilization and participation’ and that several factors should be taken into account, under article 6, in deciding how that equitable and reasonable utilization could be achieved. However, the requirement under article 8 of there being a general obligation to cooperate has seemingly been undermined by a general lack of trust between the parties in the Nile dispute. In part, this is undoubtedly the legacy of the existing treaty framework, but also changing economic and social expectations of the parties.

VI. Conclusion

The issue of access to the waters of the Nile shines a light once again on the problematic legacy of treaties signed in the colonial era. The treaties lack parity and are devoid of equity. They are largely imposed for the benefit of the imperial power concerned, but it is also the case that their unravelling unveils geopolitical knots of Gordian complexity.

Egypt may not have enough capacity to challenge upstream attempts to control the flow of the Nile waters due to its geographical position. This challenging situation has been exacerbated by the perception reinforced by the behaviour of previous Egyptian governments that did not practice judicious usage of the Nile. From being relatively poor neighbours in the past, Ethiopia and Sudan have developed economically and militarily so much that they now challenge Egypt’s hegemony of the Nile. However, whatever the assertions of the various parties to the Nile in the past any future solution has to take into account environmental concerns. Water in Africa is increasingly a challenging resource and predictions of climate change consequences will surely

⁷⁸ Convention on the Law of the Non-Navigational Uses of International Watercourses, New York, 21 May 1997, UNTS, vol. 2999 Doc. A/51/869 G.A. Res. 51/229 at (May 21, 1997).

worsen that situation. Therefore, water usage has to be undertaken in a sustainable manner.

Egypt is in a challenging and risky situation as it attempts to secure its western borders against the threat of terrorist infiltration from Libya whilst supporting the security and the stability of the Libyan government at the same time. With all this, it also has to negotiate over GERD. Egypt is concerned about the ambivalent position of Sudan and the triggering of an additional conflict over the Hala'ib at a time when it is possibly engaged with Libya and Ethiopia. For Ethiopia, though GERD would be symbolic of its economic progress, it has its own predicaments of economic and political instability. Sudan, in the middle of the impasse between Egypt and Ethiopia, is still dealing with the repercussions of the secession of South Sudan in 2011 and economic problems. COVID-19 has introduced new socio-economic predicaments. Military confrontation for Egypt, Sudan, South Sudan or Ethiopia would be catastrophic for the three countries as almost most experts' agree. At this point of time, an agreement on the amount of water that will be released downstream from the dam, taking into consideration the environmental challenges facing all the riparian states is necessary. It would mean a greater emphasis on sustainable development at the expense of pretensions. The resolution of the dispute largely rests with the institutions and states as mediators. With the current strictures imposed by the COVID-19 crisis, the intervention of international observers can assist the African Union to mediate and resolve the conflict on time to avoid a wider, potentially more disastrous conflict in the region.⁷⁹ One cannot also ignore the utility of the broader principles of international water law as espoused in the ICJ judgment and the UN Watercourses Convention in the year 1997.

⁷⁹ Ahmed Aboudouh, 'Egypt is backed into a corner over the Nile dam – It May Have No Choice but to Go to War', The Independent (July 14, 2021, 11:05 AM), <https://www.independent.co.uk/voices/egypt-ethiopia-nile-dam-sudan-conflict-war-al-sisi-a9620041.html>.