

Nile as a Transboundary River and The Ethiopian Grand Renaissance Dam (GERD): The Issue of Sovereignty-Cooperation Dilemma

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ABSTRACT

The Nile as a transboundary river attracts worldwide attention. 85% of the river originates in Ethiopia. However, Ethiopia has historically been excluded from using this resource for development purposes. Since 2011, Ethiopia has been building a dam on the Blue Nile. However, downstream countries Egypt and Sudan, joined by countries in the Middle East and the Arabs, claim absolute sovereignty over the Nile. The purpose of this article is to provide a look at the current evolution of the legal and policy debate over the everyday use of the Blue Nile River. This review article provides the historical and legal background of the Blue Nile and argues for shared responsibility.

Keywords: Transboundary river; International law; Sovereignty; Cooperation

INTRODUCTION

Nile River is the longest river in Africa stretching 6695 km. It has two tributaries: The White Nile from Victoria lake and the Blue Nile originating from Ethiopia. The Blue Nile, flowing from Ethiopia, covers a vast tract of land, occupies 85 percent of the total volume of the Nile, while the White Nile is only 15 percent [1]. For centuries, the Blue Nile River erodes the Ethiopian fertile high and lowlands and flows from its beginning to the Mediterranean Sea. The Blue Nile flows blessed and cursed. Neither the Ethiopian community living alongside the Blue Nile nor the government collected benefit from it. That being the fact, Ethiopians praise the Blue Nile and sing for its greatness, but in return, the river goes silent and useless, and in the worst case, it even kills them. Henceforth, it is an everyday aspiration of the Ethiopian people to see one day that this legendary river could be used and provides them with food, electricity and ultimately serves them as leeway for a blooming life.

Transboundary water disputes involving erga omnes sovereignty, security, and cooperation have become routine in developing countries [2]. Most importantly, since the notification and announcement of the construction of the GERD in 2011, with the capacity to produce 6450 watts, the Dam is considered to be the biggest in Africa and a significant shift forward and a hope for Ethiopian food and energy security for 55.7 percent of Ethiopia's population without access to electricity. The purpose of this article is to provide a look at the current evolution of the legal and policy debate over the everyday use of the Blue Nile River.

As the GERD nears completion, it needs to be filled as soon as possible. However, the riparian states of the Blue Nile are so saturated with discord and ambivalence that national interests remain embattled within the conventional legal framework [3]. This paper overview

briefly explains the genesis of the problem over the Nile, the current legal and political debate, and the way forward.

LITERATURE REVIEW

An overview of the historical genesis

Attempts in the past to build a Dam at the Blue Nile by the former Ethiopian regimes had failed for reasons difficult to count. The 1902 treaty on the Blue Nile River, which was concluded between the British colonial administration in Sudan and Egypt and Emperor Menelik II of Ethiopia on the border issues of Ethiopia and Sudan, inhibited Ethiopia. In Article III of the agreement, any construction attempt that would arrest the river flow need the prior agreement of the government of Britain [4].

The treaty, which was signed in 1902 during the reign of Emperor Menelik II, cannot be enforced because it has a discrepancy of meaning in its English and the Ethiopian Amharic (Ethiopia's official language) versions. The Amharic phrase of the treaty does not affect Ethiopia's interest to utilize the Blue Nile. It only says that Ethiopia does not curve the river, which means that a total curve of the river was not in Ethiopia's intention. The other argument speaks against the genuine unbalanced/unjust power relationship between the two parties meaning the colonial power England and Ethiopia to make a free and fair contractual bargain within the meaning of the Vienna Convention on the Law of Treaties. Therefore, the treaty does not reflect a consensual deal.

On the one hand, treaties concluded among the downstream countries, between Sudan and Egypt in 1929 and 1959 to the exclusion of Ethiopia had impeded Ethiopia from pushing a measure and a strict agenda to utilize the Blue Nile River. While the 1929 agreement allocated the Nile waters for exclusive use to Egypt and

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Received: May 12, 2021; **Accepted:** May 26, 2021; **Published:** June 02, 2021

Citation: Ayano GH (2021) Nile as a Transboundary River and The Ethiopian Grand Renaissance Dam (GERD): The Issue of Sovereignty-Cooperation Dilemma. J Pol Sci Pub Aff. 9:396.

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Sudan, that of 1959 predominantly favored the two lower Riparian states. One argument regarding the Dam was that the 1929 and 1959 treaties could not bind Ethiopia without Ethiopia's willingness and participation to be bounded by it. The May 7, 1929 treaty between Egypt and Great Britain for Sudan, excluding Ethiopia, recognized Sudan's right to use the waters of the Nile, provided that Egypt's historic rights were preserved [5]. By the time Great Britain was using the Nile waters to supply its textile industry through cotton production in Egypt and Sudan. Egypt attempted to justify its historical water use argument by invoking a 1929 treaty between the British colonial rulers and the Egyptian government that has nothing to do with present-day Ethiopia and cannot be justified based on international laws on state succession. This is because a contract does not create any obligation or a right for a third party without the third party's consent (*pacta tertiis nec nocent nec prosunt*.) Similarly, on November 8, 1959, Egypt and Sudan (breadbasket of the Arabs) [6] agreed on their exclusive share of the Nile River of 11 riparian states before Uganda, Tanzania, Rwanda, Burundi, and Kenya, excluding Ethiopia. The agreement, excluding Ethiopia, gave Egypt the right to 55.5 billion cubic meters of Nile water per year and Sudan 18.5 billion cubic meters per year. Consequently, Emperor Haileselassie ended the Ethiopian Orthodox Church's 1,600-year relationship with the Egyptian Coptic Orthodox Church of Alexandria.

Apart from the defective agreements, especially after Egypt's independence in 1922, historically, there was harsh and threatening rhetoric against Ethiopia by the presidents of Egypt in case Ethiopia tried to reduce a single drop of the Blue Nile water. Although Ethiopia had conducted a feasibility study on the Nile in 1964 during Haileselassie's reign, the country fell into a communist revolution after ten years. After 1974, when the Socialists and Communists took power in Ethiopia, a renewed attempt to use the river failed due to the lack of pacification and insurgent activity by the Tigray Liberation Front insurgents and other internal forces, including the Eritrean Liberation Front, which was reinforced by the demise of world communism in the 1980s. During that time, the Egyptian President Gamal Abdel Nasser (1918-1970) was known for his support to oppositions in Somalia who were fighting for irredentist reasons against Ethiopia. In the following times in 1979, President Anwar Sadat (1918-1981) proclaimed that "the only matter that could take Egypt to war again is water [7]." Pursuantly, an attempt to reduce a single amount of the river would mean a threat to national security for Egypt and historical use rights. Hence, it justifies a military measure. Sadat's 1979 Camp David agreement with Israel was also intended to share the Nile freshwater between Egypt and Israel so that Israelis and Palestinians share the city Jerusalem. One aspect of the 1993-1995 Oslo Accords between Israel and the Palestine Liberation Organization was based on Nile water for desert territories in the Middle East. On the same line, President Mohammed Morsi, who took power immediately after the downfall of President Hosni Mubarak through the Arab revolution, proclaimed in 2013 that "all options are open" against any threat on the Nile river to making Ethiopia ever weak to assert its full rights on the Nile [8]. Former President Morsi had also taken drastic measures to channel the Nile to the Middle East. The current Egyptian President Abdel-Fattah El-Sissi, on his part, considers water as a matter of „life and death.“ He said, "If anyone affects Egypt's water rights, they will see our reaction. Again, I am not threatening, but our water is a red line [9]." Still, he follows a diplomatic kind of relationship mixed up with concealed agitation. President El-Sissi claimed to have formed a military alliance with the southern and northern Sudanese transitional governments against Ethiopia. Northern Sudan has forcibly controlled the Ethiopian border area as far back as 2021.

For its part, broadly, Egypt has already built several Dams on the Nile river, including the Aswan Dam, which poses a high risk of evaporation [10]. With little transparency, Egypt also has canal projects on the Al-Salam and Toshka projects. To the detriment of international peace and security, Egypt's foreign policy over the past centuries has portrayed Ethiopia as a threat and done whatever is necessary to impoverish/weaken Ethiopia from using its water resources [11]. Ethiopians zeroed in on finding some peace to survive, forgetting the bigger picture along the way.

Water at the forefront of international discourse

Water will become more valuable than oil. Currently, the issue of equitable distribution of migrants among states has been the focus of international attention. Water is now the focus of international legal and political, specifically concerned with the distribution and use of Blue Nile water. Particularly, when Ethiopia announced plans to generate electricity with two turbines of the GERD in 2019, Egypt had raised strong objections. Egypt also proposed a longer time frame for water filling the project, citing concerns that the Nile's water level could drop as the reservoir fills with water during the initial phase. On the other hand, Ethiopia claims to use the additional rainfall only during the rainy season, thus keeping the usual amount of water in the river. Extending the filling period of 7 years and more costs the country a lot of money every day. For instance, the second filling period of the GERD falls in 2021 and requires 13.5 cubic meters of water. From its colonial share of 55.5 billion cubic meters, Egypt wants a minimum of 40 billion cubic meters per year guaranteed, while Ethiopia wants an annual flow of 31 million cubic meters [12].

In the meantime, Ethiopia claimed; instead, Egypt is using Nile River politics to quell its domestic crisis as widespread attention shifts to the Nile. Later, according to Foreign Policy's September 22 report, "the group calling itself Cyber-Horus Group hacked more than a dozen Ethiopian government websites in June 2020, replacing each page with an image of a skeletal pharaoh holding a scythe in one hand and a scimitar in the other." "When the level of the river drops, all of Pharaoh's soldiers should rush," "Prepare the Ethiopian people for the wrath of the Pharaohs [13]."

Egypt is one of the top recipients of aid from the United States because of its strategic importance. Since 1946, the United States has provided Egypt with over \$84 billion in bilateral foreign aid [14]. In this case, the U.S., without the African Union's involvement, has attempted to resolve the problem through negotiation. Amid the debate over GERD, the U.S., through U.S. President Trump, had unilaterally taken matters into its own hands and tried to get the Nile Riparian States to agree to an already formulated agreement as to fill the GERD's reservoir in 2020 [15]. During the negotiations in Washington DC between January and February 2020, while Ethiopia on one side offered Egypt 31 bcm, seeking a flow of no less than 40 bcm, the United States government on the other side proposed a compromise of 37 bcm [16]. Taking the issue seriously, Ethiopia withdrew from the discussion to not impair the interest of the coming Ethiopian generations by signing a unilaterally drafted binding agreement. Following that, unless agreed upon U.S. terms and conditions, the former President Trump warned of Ethiopia against the war in a telephone exchange intended to celebrate the normalization of relations between Sudan and Israel [17]. In the course of the conversation with the Sudanese and Israeli prime ministers, the U.S. president issued a belligerent threat to Ethiopia on behalf of Egypt and its president, Abdel Fattah al-Sisi, whom Trump calls "my favorite dictator [18]." Publicly, he proclaimed that "Egypt will end up blowing up the Dam.... they will blow up that

Dam. And they have to do something... They should have stopped it long before it was started.” Trump also reiterated that he is holding up U.S. aid to Ethiopia to pressure the government to agree to his administration's preferred deal [19]. This negligent rhetoric could have a severe concern for international peace and security [20]. Against this backdrop, after Trump lost November 3, 2020, presidential election, new President Joe Biden's administration sought to withdraw U.S. financial assistance to Ethiopia. The above was due to the Ethiopian government's crackdown on the Tigray People Liberation Front (TPLF) group as an additional factor and the resulting humanitarian crisis in northern Ethiopia and other human rights concerns. Nonetheless, the narratives on the conflict between the Federal government and the TPLF group is misinformed, taking the Atlantic community (the United Nations-UN, the European Union-EU, and the United States of America-U. S) by surprise to take a misinformed decision neglecting the long-term development schemes [21].

In a more volatile Horn of Africa region, Ethiopia's weak security capability to be able to exploit the Blue Nile, coupled with domestic political instability, threats, the ethos of fear, as well as economic malaise, has prevented the country from using its resources for an incredibly long time. The argument is relevant when considering that water rights claims for transboundary waters, in particular, are dependent on the relative military, economic, political, and social strength of the riparian states [22]. To this day, Egypt is accused of supporting insurgent forces trying to destabilize Ethiopia [23]. As Amen Gashaw rightly outlined, “GERD has also, on many occasions, fallen into obscurity and near disaster after insurgents, multinationals, and even the leader of the free world have tried to combat Ethiopia's Dam-building efforts.” She noted that “Israel, the United States, Egypt, and even other sub-Saharan African states such as Sudan and Congo have raised their voices and acted to prevent the completion of the Renaissance Dam because of deep-rooted conflicts of interest.” According to Gashaw, “developing and rich countries such as Israel have been beneficiaries of Egypt's North Sinai agricultural development plan since the late 1990s, through which it has received a steady flow of Nile water that Egypt has continued to supply despite initial geopolitical concerns [24].” At the same time, Ethiopia reportedly upgraded the anti-air missile for GERD after receiving support from Israel, complicating matters.

With all the ups and downs, major countries like Russia, China, and Israel have shown their interest in protecting GERD from any security threat. In particular, Russia and China alliance at the recent UN Security Council with a veto to reject discussion on Ethiopia's defense and law and order measure against “the TPLF forces supported by Egypt [25]” that attacked the Ethiopian National Defense Force on November 4, 2020. Other international research institutes are also involved in regulating the escalation regarding the Dam's sensitivities and the losses that could result from the possible extension of the Dam filling time. From the German Institute for International and Security Affairs, Tobias von Lossow, Luca Mieke, Stephan Roll argued that Germany and its European partners should pledge their financial contributions to the Nile water policy as part of the compensation solution [26]. Within the framework of such metamorphosis, cooperation potentials and options for action evolve through compensation based on the logic of peace and security [27]. The authors argued that a reorientation of Egypt's government spending policy should be called for, which should no longer be guided by an authoritarian logic [28]. Therefore, Egypt needs to compensate the Ethiopians for the economic disadvantages resulting from a slower filling taking into account the dry season. This would require policy reforms toward better governance and accountability. According to the authors, the analysis requires Ethiopia

to commit to responding flexibly in the event of an extreme drought within the agreed timeframe for filling the reservoir. It is a good start; however, the authors are silent on the timetable in which Egypt intends to dominate the negotiation process. It is questionable to what extent this proposal is aimed at a win-win solution. Moreover, what is the price value of darkness in the absence of energy is not clear. As for the dry season and its extent is debatable. The entire civilization of the two downstream states originated from the Nile. Do they compensate Ethiopia for the resources lost in the past [29]?

Regardless of all the controversy, Ethiopia now has a crucial national project on the Nile that requires more than \$5 billion. After rejection by the IMF and the World Bank, the Dam is financed primarily by Ethiopians' bond payments. Ethiopian contributes significantly to the Dam's final realization from all corners of the country and the world, whether voluntarily or involuntarily. Despite its resources, Ethiopia has been held up as an example of hunger and conflict by the international community for so long that it has a justifiable cause for self-determination, including using and managing its natural resources for development in its framework of sovereign rights. For many Ethiopians, the Renaissance Dam is a national pride and a bright hope for humane society [30].

International laws on transboundary rivers

What do international laws say about rivers like the Nile? Currently, internationally, 263 transboundary lakes and river basins. Transboundary rivers create challenges to the global governance of water and conflict [31]. By pulling and pushing the problems between national sovereignty and international co-operation, transboundary rivers are responsible for conflicts among nations [32].

Transboundary river management has gone through several theories and practices. According to David J. Lazerwitz, the first watercourse theory was developed in 1895 by Harmon, the United States Attorney General. Harmon applied the idea of absolute sovereignty to a dispute between the United States and Mexico over pollution of the Rio Grande, holding that an upstream state may exploit or use the river within its borders without regard to the effects of its actions on a downstream state [33]. On the other hand, prior appropriation theory gives the state prior right to use the water first, thereby protecting pre-existing uses just like Egypt's standpoint. The other theory is absolute territorial integrity, prohibiting a riparian state from developing a portion of a shared river course if doing so will harm another riparian state disadvantaging the upper riparian states [34]. The most accepted theory, the principle of *sic utere*, was developed in *Spain v. France* in 1957 in the *Lake Lanoux* arbitration [35]. In that case, the court upheld “the sovereignty of a State wishing to carry out hydroelectric developments on its territory.” Still, it recognized “the concomitant duty not to harm the interests of a neighboring State.” Based on balancing the principle of territorial sovereignty and limited territorial integrity, the maxim of *sic utere* provides that a riparian state may not use a river in a manner that substantially harms another riparian state [36].

Article 1 of the UN Charter entrenched respect for equality in relations between states and the self-determination of people within their territorial limits [37]. Apart from the principle of non-interference on which the United Nations stands, Article 2 (1) of the UN Charter provides for the equality of sovereign states; Article 2 (3) establishes the peaceful settlement of disputes, and Article 2 (4) prohibits the use of threats or force against the territorial integrity or political independence of any state or in any other manner inconsistent with the purposes of the United Nations [38]. According to Article 2 (2)

of the UN Charter, states must fulfill their obligation under the UN Charter in good faith. General Assembly resolution 1803 of 14 December 1962, over permanent sovereignty over natural resources, was an expression of decolonization and an expression of equality of states [39]. Article 55 of the UN Charter affirms that the creation of conditions of stability and well-being necessary for peaceful and friendly relations among nations is based on respect for equal rights and self-determination of peoples. The right to self-determination in the use of a resource also became an individually enforceable concept of human rights, later codified in the Civil and Social Pacts of the 1960s and further elaborated in the Program of Action of the Vienna Declaration [40]. The 1981 African Charter on Peoples and Human Rights (the African Charter), under Article 20, enshrined the inviolable right to self-determination, including determining political status, exercising policies of economic and social development freely. Article 21 (1) and (3) of the African Charter provides for the right of peoples to freely dispose of their wealth and natural resources, with a commitment to promote international economic cooperation based on mutual respect, equitable exchange, and the principles of international law.

As a transboundary river, the Blue Nile is thus subject to international law. International law dictates the equitable use of the transboundary river by the countries on its upper course, without serious prejudice to its legitimate interests on its lower river course [41]. In the Nile Riparian States, since 1997, the World Bank and the United Nations Development Program (UNDP) have begun to facilitate the creation of a formal framework for cooperation among the riparian of the Nile Basin. To regulate common interests, the Nile Basin Initiative was established in 1999 to promote peace and security among the Nile riparian states. The institutional initiative works with other organizations such as the New Partnership for Africa's Development (NEPAD) and the European Union Water Initiative for peaceful and effective management of the Nile Basin. Such collaborations work in funding projects, identifying potential conflict areas, and providing solutions. Besides, the Cooperative Framework Agreement (CFA), signed on May 10, 2010, by Burundi, Ethiopia, Kenya, Rwanda, Tanzania, and Uganda, and finally ratified by Ethiopia, aims to achieve equitable use, and provide for a baseline in the use of water. Article 5 of the Nile River Basin Cooperation Agreement demonstrates the agreement of the Riparian States not to cause significant harm to other States of the Nile River. Section I of the 2015 Declaration of Principles calls for agreed States to communicate based on shared understanding, mutual benefit, good faith, win-win, and principles of international law. Besides, Section II mandates cooperation and regional integration through a sustainable and reliable clean energy supply. While Section III prohibits causing significant harm, Section IV provides for a just and reasonable standard in using water resources.

Internationally shared watersheds provide 60% of the global freshwater supply and are covered by numerous international legal texts of a normative nature for the management of transboundary waters. Between 1820 and 2007, 688 agreements were identified, representing 250 independent treaties and covering 113 basins. The Convention on the Protection and Use of Transboundary Watercourses and International Lakes 1992 and the 2014 Convention on the Law of the Non-Navigational Uses of International Watercourses are among the most important regulations. The Helsinki Transboundary Watercourses Convention depicts that Transboundary impacts of any project appear when any significant adverse effect on the environment resulting from a change in the conditions of transboundary waters. Transboundary waters are defined as "any surface or groundwater that marks, crosses, or abuts the boundaries between two or more States..."

Under Article 10 of the same Convention, countries undertake to consult on request on the basis of reciprocity, good faith, and good neighborliness.

The Convention on the Law of the Non-Navigational Uses of International Watercourses also codified fundamental customary law principles of international water law. The water use in an Upstream State may directly impact the nature of the river, and the same applies the other way around. As stated in the preamble to the Convention, Articles 1 and 2 of the United Nations Charter's objectives is to ensure the optimal and sustainable use of rivers for present and future generations. Also, the protection, conservation, and management of international watercourses and the promotion of international cooperation and good neighborliness are of central importance. Whereas Article 5 (1) spells out the just and reasonable use of the international watercourse, Article 7 (1) obligates watercourse countries to take all appropriate measures to prevent substantial injury to other watercourse states. Broadly, the principle of *sic utere* is the typical characteristic of the new Nile Riparian States agreements. This is consistent with both the Helsinki Rules and the Convention on the Law of Non-Nautical Uses of International Watercourses. Nonetheless, it is also pertinent to note the missing of an actual comprehensive treaty that includes Ethiopia on the distribution of the Blue-Nile except for the 1959 asymmetrical agreement.

In this context, Ethiopia makes a science-based argument that GERD will be used in a reasonable and equitable manner and will not have a significant negative impact/harm on downstream countries. Ethiopia used the best available technologies of the 21st century and construction companies like the Salini in the construction compared to the Aswan Dam in the 20th century. The International Expert Panel, established in 2013, has also extensively addressed the impact of GERD based on transparency and accountability. In the same year, Ethiopia, Sudan, and Egypt signed off on the International Panel of Experts' studies, which confirmed the healthy nature of GERD. But, while Ethiopia seeks a fair, equitable, and mutually beneficial use of the Nile, Egypt insists on absolute sovereignty based on historical rights.

CONCLUSION

Notwithstanding these escalated tensions between the three nations, the 2015 tripartite agreement between Ethiopia, Sudan, and Egypt on the Nile Basin's fair use is noteworthy. Effective regulation of the water crisis requires a collective capacity backed by comprehensive norms on the share of the water and institutions and a fundamental willingness to benefit from each other and live peacefully and resolve disputes amicably. In other words, there needs to be a change in direction from authoritarian/asymmetric resource control to a participatory benefit-sharing mechanism. With territorial sovereignty and natural resources at stake, Riparian States need to share resources reasonably and equitably without causing serious harm. At this point, GERD is a testimony. Ethiopia should not suffer in any way for its good faith efforts to use its natural rights, which are clearly outlined in all major international laws. What is needed is international solidarity for a more just world. A case in point, the Congressional Black Caucus "urged the United States and all other international actors to respect the trilateral Declaration of Principles signed in 2015 between Egypt, Sudan, and Ethiopia. Furthermore, "there must be a continuation to play an impartial role, seeking only the advice of the African Union and diplomats on the ground in the region." In particular, the Congressional Black Caucus viewed the African Union as a critical figure in expressing to all parties that a peacefully negotiated agreement would benefit all on the continent. The African Council of Ministers

and the African Union Peace and Security Council on Water can play an essential role in resolving potential political disputes over the Nile. Broadly, “should African nations be able to successfully address, negotiate, and compromise their common interests in finalizing the structure, it is undoubted that the impact of GERD's rebirth will reach far beyond Ethiopia's borders,” Gashaw noted. Ethiopia's current approach, “African Solutions to Africa's Problem,” is also about peaceful conflict resolution based on dialog and sees the way forward as revitalizing resources for a better life on the African continent. In sum, mutually assured management of the river and the promotion of friendly international cooperation among the Riparian States of the Nile increasingly requires the attention of both governmental and non-governmental organizations, whether at the national or international level. Sovereignty is all about shared responsibility.

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