JOURNAL OF INDIGENOUS KNOWLEDGE AND DEVELOPMENT STUDIES
JIKDS 03(02)2021
ISSN (online) 2708-2830 ISSN (print) 2707 – 7640
www.bhu.edu.et/jikds

Grand Ethiopian Renaissance Dam Vis-À-Vis Contemporary International Laws: Analysis of the Right to Development with Sustainable Development Goals

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ABSTRACT

The competition for water and inadequacy of comprehensive agreement in the utilization of the Nile water among riparian states resulted in different problems. The lack of perfect political will to cooperate by riparian countries in general and Egypt, in particular, is another problem that poses challenges to achieving equitable water share through years over the Nile. The main objective of this paper is to scrutinize the legal analysis of the Grand Ethiopian Renaissance Dam from a Sustainable Development Goals (SDGs) perspective. The researcher used document review methods such as colonial agreements (1891-1959), the 1986 UN Declaration of the right to development, and the 1993 Vienna Declaration on Human Rights. It was found Ethiopia has an international legal right, the right to development, and building the dam on its own Nile river-based rules and principles as required by the 1997 UN watercourse convention, African charter on human and peoples' rights, Customary international laws, the 1986 UN Declaration of Rights to Development (RTD) and the Sustainable Development Goals. The article recommends that the six countries that signed the Cooperative Framework Agreement in 2010 (CFA) should go ahead and ratify it and raise awareness about the benefits of CFA using data and technical experts. They also need to sign and ratify the UN-Water convention so that it acts as a basis for negotiating, and they have to use continuous negotiations of third parties as CFA is in light with the contemporary international laws and development programs such as the sustainable development goals that were adopted with a commitment to fight global poverty and ensuring sustainable development.

Keywords: Equitable Utilization, Millennium Development Goals, Sustainable Development Goals, United Nations Convention on the Law of Non-Navigational Water Courses.

1. INTRODUCTION

Water in general and freshwater, in particular, has always constituted 'the one natural resource over which states truly exercised permanent sovereignty and for which states compete for.[1] What exacerbates the complexity of this permanent exercise of sovereignty over water is the fact that from

[1]International Law Commission. Yearbook of International Law Commission1976, vol no.

the three fourth of the total water which covers the entire globe, only 3% of the total water (freshwater), is available to satisfy the unsustainable use and demands, economic growth, urbanization, and wasteful use of human needs. The competition for freshwater becomes serious when states select and promote different theories over water such as absolute territorial sovereignty, absolute territorial integrity, the right to reasonable and equitable uses, and the duty not to cause significant harm as these theories result in perusing different policies that may lead states into conflict[2]. These theories resulted in the development of some basic international water law rules, such as the Helsinki and Berlin Rules, and the United Nations Watercourses Convention. Accordingly, the multi-dimensional uses of international rivers and lakes have been classified, for legal purposes, into navigational and non-navigational uses[3]. The main reason for such a distinction is that a separate set of international rules has emerged for each of the two uses. The Nile, which is categorized under the non-navigational freshwater, is the world's longest river covers about 10% of the African continent, and flows from south to north is not an exception from the effects of challenges that occurred as a result of the competition for the share of the available scarce water and uneven distribution.

Hence, the realities that held Ethiopia back in the past from utilizing the Nile water and its hydro-politics have been changing. The Grand Ethiopian Renaissance Dam (GERD) is one indicator of this, and the dam enables the beginning of a new chapter in the long history of debate on the utilization and ownership of the Nile[4]. Therefore, it is more important than ever before to analyze the current hydro-politics revolving around the River Nile in general and GERD in particular taking into consideration the water security dilemmas discussed above and the relevant international laws. With this in mind, this research seeks to give a clear picture of the hydro-political analysis of the Grand Ethiopian Renaissance Dam with contemporary international laws (the right to development and sustainable development).

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[2] Dr. TadesaKasaWeldetsadik, Remodeling Sovereignty, overtures of a new water security paradigm in the Nile basin legal discourse, 2014

[3] Salman M.A. Salman, The United Nations Watercourses Convention Ten Years Later: Why Has its Entry into Force Proven Difficult? International Water Resources Association Water International, Volume 32, Number 1, Pg. 1-15, March 2007 © 2007 International Water Resources Association,available at http://www.salmanmasalman.org/wp-content/uploads/2012/12/UNWatercoursesConventionTenYearsFinal2.pdf

[4] *Ibid*

2. BACKGROUND LITERATURE

2.1. A Brief Facts about Nile River Basin

The Nile River has an estimated length of over 6800 km which makes it one of the longest and greatest rivers in the world. The river is shared by the 11 countries as follows: Tanzania, Uganda, and Kenya share Lake Victoria where the White Nile originates as the Victoria Nile[5]. The highlands of Burundi and Rwanda are the origins of the Kagera River, which is the major river flowing into Lake Victoria. The Democratic Republic of Congo shares the Semliki River, which flows into Lake Albert (one of the sources of the White Nile), as well as Lake Albert itself, with Uganda. The White Nile consolidates itself in the new state of South Sudan. Eritrea shares portions of the Setit River, which is a tributary of the Atbara River, with Ethiopia, where the Blue Nile and almost all of its tributaries originate[6]. The 11 states that share the Nile River have varying contributions, uses, and stakes. The stakes and interests of Egypt, Sudan, and Ethiopia are classified as very high. Egypt and Sudan are the lowest downstream riparian states and claim the entire flow of the Nile waters. Upstream countries are less developed as compared to downstream ones and almost all of them are busy with poverty alleviation agenda. Today, all riparian states are planning for more water projects, i.e, mega-dams for irrigation and/or hydropower[7].

As many as 263 million people were thought to be living in the Nilotic countries in 1993, which are among the poorest in the world, with an average of US$282 Gross National Product (GNP) per capita in1994. About half the total population was estimated to be dependent on the Nile, whose average annual runoff is comparatively modest for such a mighty and vitally important river.[8]

The famous Greek historian Herodotus had written in the fifth century B.C. 'Egypt is the gift of the Nile', and the dependence of the rapidly growing nation on the river has not diminished. Since time immemorial Egyptians have made the most use of the waters of the Nile[9].

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[5]*A History of Water, State Sovereignty, Water Systems andthe Development of International Law', (2014), Vol. VIII, I.B Tauris, p.4*

[6]*Ibid*

[7]*Ibid*

[8]ASHOK SWAIN "***Ethiopia, the Sudan, and Egypt:The Nile River Dispute***"*The Journal of Modern African Studies*, 2014, United kingdom, p.675

[9]*Ibid*

2.2. The Hydro Politics of The Nile

Following the fall in the eighteenth century of the Ottoman Empire, which had been dominant in the region, Egypt wanted to control the source(s) of the Nile and might have done so if Yohannes IV of Ethiopia had not successfully defended his territory at Gundet in 1875 G.C and Gura in 1876 G.C[10]. After the European colonial powers had penetrated the continent and created their zones of influence, Britain's control over Egypt lasted from the late nineteenth century until 1937, and over Sudan from 1899 until 1956[11]. Subsequent to the effective control of the British over Egypt in 1882, they were quick to realize the importance of the Nile River for their continued existence in Egypt. These treaties were concluded mainly by the British colonial government on behalf of Egypt and the treaties gave Egypt more rights over the waters of the Nile than other riparian countries. This situation has been subsequently replicated by the lower riparian states: Egypt and Sudan. That is why it is said that the hydro-politics of the Nile is to a greater extent based on the colonial history of the Nile-Basin.

2.3. Theories and Doctrines of Water Rights That Govern The Usage of Trans-Boundary River

2.3.1. Absolute territorial sovereignty

This doctrine has often been adhered to by the upper riparian states as it guarantees full sovereignty over their territory and to utilize its resources as they think fit to their interest regardless of the consequences of their acts on other co-riparians. Under this approach, States are taught to have exclusive, unrestricted, and all-encompassing sovereignty over the rivers traversing their boundaries[12]. According to this rule of customary international law, the upper riparian countries shall cooperate based on absolute territorial integrity to attain optimal utilization and unrestricted flow of the Nile River. This principle has been criticized and not recognized as a part of contemporary international water law[13].

2.3.2. Absolute territorial integrity theory

This theory is based on the assertion that the lower riparian of an international river has the right to a full flow of water without interruption of water flow. This doctrine implies that the right of upper

[10]Yahia Abdel Mageed, 'The Nile Basin: lessons from the past', in Asit K. Biswas (ed.),*International Waters of the Middle East: from Euphrates–Tigris to Nile* (Bombay, 1994), p. 156.

[11]Haile Adhana, 'The Roots of Organised Internal Armed Conflicts in Ethiopia, 1960–1991',in TerjeTrevdt (ed.), *Conflict in the Horn of Africa: human and ecological consequences of warfare*(Uppsala, 1993), Research Programme on Environmental Policy and Society, Department of Social and Economic Geography, pp. 27–45

[12]**Introduction to different theories of resource allocation, available at https://www.globalwaterforum.org/wp-content/uploads/2012/01/Barron-river-Cairns.jpg**

[13] Ibid

riparian states is inherently limited[14]. This theories also criticized for its failure to recognize the right of the upper riparian countries**.**

The two theories, **absolute territorial Integrity theory, and absolute territorial sovereignty theory** seem to be very conflicting and have common problems. The absolute **territorial Integrity theory looks** like the opposite of the principle of absolute territorial sovereignty as it is intended to favor downstream riparian countries, often by protecting existing uses or prior appropriation.

2.3.3. Limited territorial sovereignty or territorial integrity doctrine

The limited territorial sovereignty doctrine holds that a state may make use of the water flowing through its territory to the extent that such use does not interfere with the reasonable use of waters by the downstream states. This theory is based on the assertion that every state is free to use shared rivers flowing on its territory as long as the utilization does not prejudice the rights and interests of the co-riparian states. Since this theory recognizes the right of the two theories scholars recognized these theories.

2.3.4. Community theory

Community theory is[15] based on the assumption that "an entire river basin is an economic unit, and the rights over the waters of the entire river are vested in the collective body of the riparian states, or divided among them either by agreement or based on proportionality."

2.4. Major Treaties and Agreements Over The Nile River

Before directly indulging like treaties, defining transboundary water agreements is pertinent. Accordingly, A trans' boundary Water agreement defines the rights and obligations of the riparian states and creates the institutional framework to govern the transboundary nature of water resources[16].

Several treaties were concluded between the colonial powers that inter alia took cognizance of Egyptian concerns about the waters of the Nile. The Egyptian and Sudanese claims to their shares in the Nile are based on several treaties that have been in force for a long time which gave them the right

[14]*Ibid*

[15] Journal of water resources and ocean science 2013; 2(5): 141-154 published online October 30, 2013 (http://www.sciencepublishinggroup.com/j/wros) doi: 10.11648/j.wros. 20130205.22 P 150.

[16]Dr. Emmanuel Kasimbazi, The Complexities of developing a Transboundary Water Resources Management Agreement: The Experiences from the Nile Basin, Makerere University, Kampala, Uganda

to access a specific amount of water that the dam may obstruct. Several treaties were articulated specifically for sharing the Nile resources and regulating projects that will be constructed on the Nile under a legal framework. These treaties are briefly discussed below.

The first treaty agreement is the Protocol that is concluded between Italy and the United Kingdom on 15th April 1891. This protocol sought to protect the Egyptian interests in the Nile waters contributed by the Atbara River (known as the Tekkeze in Ethiopia). The Italian government undertook not to construct any works on the Atbara River that might "sensibly modify" its flow into the Nile.

The second treaty was concluded between Britain and Ethiopia in 1902. When the agreement was concluded, the United Kingdom was participating by acting for Egypt and Sudan[17]. The agreement bound Emperor Menelik not to construct, or allow to be constructed, and work across the Blue Nile, Lake Tana, or the Sobat which would arrest the flow of their waters into the Nile except with the agreement of Britain and Sudan.

One of the oldest treaties that are being invoked by the downstream riparian states is the 1902 Treaty (Ethiopia and Britain), in which Article III reads as:

> "His Majesty the Emperor Menelik II, …, 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".

Both Egypt and Sudan insist this article indicates that Ethiopia does not have the legal right to build any dam across the Blue Nile without the consent of Sudan. This treaty specifically, creates a lot of tension between the two contesting parties as both of them are interpreting it differently. Sudan claims that this treaty forces Ethiopia not to establish any dams on the Nile without the pre-approval of Sudan and Egypt.

Legally speaking, the construction of a dam by Ethiopia could be considered legal. The following arguments can be raised.

1. The treaty never came into force as Britain did not ratify it. So, Ethiopia cannot be bound to a treaty that is not ratified.

[17]ASHOK SWAIN "***Ethiopia, the Sudan, and Egypt:The Nile River Dispute***"

2. The treaty was about boundaries, and not about water.
3. Ethiopia rejected the treaty in the 1950s[18].
4. Ethiopia has a right to relieve itself of duties imposed since Britain had already violated its provisions through recognition of Italy's invasion of Ethiopia. Because Article 60 of the Vienna Convention on the Law of Treaties (VCLoT) confirmed the action of Ethiopia not to be bound by the treaty [19].
5. The treaty imposes a duty on Ethiopia not to 'arrest' – a duty not prohibiting it from using Nile water,
6. According to the clean slate doctrine, in-state succession, the successor state does not inherit the prior treaty rights or obligations of its predecessor state. Egypt's claims on the use of the waters and resources of the Nile cannot be justified by colonial treaties as they are illegitimate. No treaty can be directly applied to the Ethiopian-Egypt tension over the dam. Egypt conflicts with treaty law. And so, the construction of this dam is completely legitimate on behalf of Ethiopia. That is why Ethiopia is constructing the Grand Ethiopian Renaissance Dam (GERD) on the Blue Nile River, ignoring opposition from downstream Egypt[20].

The third was the 1906 agreement between Britain and the independent state of Congo article 3 tackled the same issue as Congo which is part of the Nile basin countries should not construct any dams over or near the Semliki or Isango River which will affect the amount of water flowing to Sudan and then Egypt. The fourth was the tripartite Agreement that is entered between the United Kingdom, France, and Italy on 13th April 1906. According to the agreement, the United Kingdom, France, and Italy

[18] **Kefyalew Mekonen, The Defects and Effects of Past Treaties Agreements on the Nile River Waters: Whose Faults Were they ? Available at https://www.ethiopianforeignpolicy.com/the-defects-and-effects-of-past-treaties-and-agreements-on-the-nile-river-waters-whose-faults-were-they/#:~:text=Neither%20Ethiopia%E2%80%99s%20military%20power%20nor%20its%20international%20political,15%2C%201902%20treaty%20signed%20between%20Ethiopia%20and%20Britain.. Accessed on may 18, 2022**

[19], Article 60 of the VCLoT provides that "*a material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part*"

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agreed to act jointly to preserve the interest of Great Britain and Egypt in the waters of the Nile and its tributaries.

The fifth was the exchange of notes between Britain and Italy in 1925 can be mentioned. This agreement enabled Britain to continue to pursue her interests in controlling the headwaters of the Blue Nile. It among other things recognized the prior hydraulic rights of Egypt and Sudan. It obliged Italy not to construct in the headwaters of the Blue Nile, the Sobat, and their tributaries any work, which might sensibly modify their flow into the main rivers. Ethiopia rejected it the UK admitted that this agreement does not bind Ethiopia.

The sixth was, that the Nile Waters Agreement of 1929 between Egypt and the United Kingdom is important. This is a very important agreement because it covered most of the riparian countries of the Nile Basin. It was signed by the Egyptian government and the British government, the latter on behalf of Sudan and the East African riparians to Lake Victoria (Kenya, Tanganyika [now Tanzania], and Uganda). The primary motive of the agreement was to facilitate an increase in the volume of water reaching Egypt. The Agreement included specific volumetric water allocations-48 billion m3 (Bm3/ year to Egypt and 4 Bm3/year to Sudan-and this institutionalized the belief that Egypt and Sudan have " natural and historical rights" to the Nile. As a result, it gave Egypt the right to inspect the entire length of the Nile. The Agreement: gives Egypt the rights to on-site inspectors at the SennarDam, no works would be developed along the river or on any of its territories, which would threaten Egyptian interests. The downstream countries argue that this colonial treaty is respected by upstream countries. This idea is confirmed under articles 34 and 35 of the Vienna Convention on the law of treaties.

When we see the 1929 agreement, first, the signatory parties themselves replaced it with the 1959 agreement. So, if parties to this treaty have, by themselves, discarded the 1929 treaty, not logical to argue that others should respect its provisions. That means, Egypt and Sudan cannot apply this agreement against Ethiopia.

The Agreement for the Full Utilization of the Nile between Egypt and Sudan was made in 1959. The main intention of the agreement was that after the independence of Sudan in 1956, Egypt had plans to build the High Aswan Dam and thus the need to renegotiate existing water allocations under the 1929 agreement. The two countries established that the total annual flow of the Nile measured at Aswan as 84 billion cubic meters, And as per article 1 of the 1959 agreement, 55.5 billion cubic meters of the water is allocated to Egypt and 18.5 billion cubic meters to Sudan. Any additional claim claims

should be met by a unified Egyptian/Sudanese front. Regarding this agreement, we may not need to state detailed arguments. Because, from the outset, the 1959 agreement is purely bilateral it cannot bind the third party.

In general, we can say that the 1902, 1929, and 1959 agreements are particularly intriguing for they ignore the interest of upstream riparian states, and most of these treaties were concluded and reinforced by the colonial powers that had the utmost dominance in the region at the time.

The Sudan - Ethiopia agreement of 1991 through which they committed to the principle of equitable utilization of the waters of the Blue Nile and Atbara rivers. Since the agreement authorized the establishment of a technical joint committee to exchange data and explore cooperation, it is possible to say that by this agreement, Sudan has moved away from the 'united front' with Egypt with the 1959 agreement[21].

2.5. Grand Ethiopian Renaissance Dam Vis-À-Vis Contemporary International Laws: Analysis of The Right To Development With Sustainable Development Goals

The historical evolution of the right to development [22]adopted by the UN general assembly on 4 December 1986,3 the United Nations Declaration on the Right to Development proclaims that 'every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized. At the time, its adoption was a major formal breakthrough in North-South-related convergence of human rights and development that had only started to emerge following the political wind of decolonization. Especially newly independent African States articulated the rights to development as a 'necessary companion of their newly acquired political emancipation'. In their original conceptualization, reportedly the Right To Development was perhaps meant to cover solely, or at least primarily, a collective peoples' right (of an erga omens nature). Thus, the claim was unconventional concerning the classical individualistic paradigm of human rights.

While the members of the UN have agreed to implement the declaration, the exact nature of the obligations involved and the modes of implementation have been the subject of intense debate for at least the last thirty years. The implementation of the Right To Development (RTD) have been hindered a great deal by political controversy and political considerations. 'developed' countries have largely refused interpretations of the RTD that legally require them to give development assistance to

[21] *Ibid*

[22] Karin Arts1 • AtabongawungTamo,The right to development in international law. 2016, p 15.

particular 'developing' countries, while 'developing' countries continue to insist on the need for more international cooperation, including development assistance and concessions, a fairer international trade climate, access to technology and debt relief from 'developed' counties.

Thus, the RTD has largely remained elusive. however, as will gradually be elaborated in this article, the UNDRTD is not the only legal instrument that is relevant for dining the substance and consequences of the RTD. rather, despite the sketched controversies, various core elements of this right also appear in international legal instruments other than the UNDRTD and these could be drawn upon to a greater extent.

The right to development was promulgated in the declaration on the right to development, adopted in 1986 by the united nations general assembly in its resolution 41/128.[23]This right to development has now been recognized in 1981 in the African Charter on human and peoples' rights, the 1992 Rio declaration on environment and development, the 1993 Vienna declaration and program of action, and the millennium declaration. the 2015 sustainable development goals (SDG) 2000 millennium declarations.

The 1986 declaration on the right to development article 1 proclaims that"the right to development is an inalienable human right under which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized."

Therefore, any sovereign state has an international legal right to develop and build a dam on its own Nile river based on rules and principles as required by the united nations watercourse convention.[24] Another legal expression or the will of the 1981 African charter on human and peoples' rights adopted by OAU, Article 22 proclaims the right of peoples to their development, and the duty of states, individually or collectively, to ensure the exercise of the right to development on the side of the African Union.

[23]The 1992 Rio declaration on environment and development.
[24]OAU, Article 22.

The 2015 sustainable development goals (SDG) 2000 millennium declaration which is outside of the United Nations declaration has played a very important role in promoting and regulating the right to development of the different programs.[25]

The legal right to development in the area of natural resources especially in the usage of water resources state has sovereignty right to exploit natural resources with no harm to the other states The united nations international covenant on civil and political rights of 1966, in article 47 states that "nothing in the present Convention shall be interpreted as impairing the inherent right of all peoples may, for their ends, freely dispose of their natural wealth and resources. ICCPR guarantees and recognizes the concept of the right to use its natural resource by member states of the united nation within the principle of equitable use of shared water resources.

CONCLUSION

This article tried to analyze Grand Ethiopian Renaissance Dam with contemporary international laws particularly connecting the Right to Development with Sustainable Development Goals. Regarding lateral and multilateral treaties, none of the treaties and agreements dealing with the use of Nile waters signed during the colonial period involved all the riparian countries and they did not deal equitably with the interests of these riparian states. They also did not take into account the impact of water development on the basin's social and biophysical environment. It demonstrates that the Nile River is unique and it has been a greater source of conflict among riparian countries than most other international river basins. However, when one sees these intense tensions and conflicts in the eyes of the law, s/he would conclude that Ethiopia has an international legal right to develop and build a dam on its own Nile River based on rules and principles as required by the united nations watercourse convention, the 1981 African charter on human and peoples' rights, and the customary international laws. The adoption of the 1986 United Nation Declaration on the Right to development, Millennium Development Goals (MDG) launched in 2000 with eight goals and the renewed Sustainable Development Goals (SDG) launched also affirms the natural and legal right of Ethiopia to utilize the Nile river for development diplomatically, in dealing with trans boundary water recourses, Ethiopia has been following a win-win approach, not win-loss approach, equitable and reasonable utilization, and the no significant harm principle on any users of the Nile river.

[25]Mohsen Nagheeby,* Mehdi Piri D.** and Michael Faure The Legitimacy of Dam Development in International Watercourses: A Case Study of the Harirud River Basin.

RECOMMENDATION

Based on the analysis and major findings, the author made the next recommendations. First and foremost, Ethiopia has to work vigorously to attain support from the international community relating to the construction of the Dam to maintain its national interest. To successfully achieve this, Ethiopia has to use different mechanisms such as working with different influential states, and international organizations, and using international media. Working aggressively helps Ethiopia to make pressure on Egypt and Sudan so which causes them to follow a win-win approach, equitable and reasonable utilization, and the no significant harm principle that leads to genuine cooperation. If Ethiopia work, it is much hoped that all riparian States would come to a common understanding and agree to sign the Cooperative Framework Agreement (CFA) to make the equitable and sustainable utilization of the Nile waters a reality. Given the divergent views of the respective countries towards the provisions of the Convention coupled with the existing tension and lack of genuine trust among downstream vis-à-vis upstream blocks, and given the 1997 Watercourses Convention is the only worldwide instrument enacted under the auspice of the United Nations as far as the non-navigational uses of international watercourses are concerned, Ethiopia has to join the convention.

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