Equitable and Reasonable Utilization of International Rivers in the UN Convention with a Particular Reference to the River Nile

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Introduction

The uses of the International Rivers that pass through or separate two or more states have dramatically varied in the last few decades. The multiplicity of river uses and the intensity of the activities associated have led to more fresh water scarcity, in addition to water conflicts and disputes among riparian states concerning using their water rights, as being the issue of the dispute, in various purposes. This aroused many questions on the nature and the scope of rights as well as the mutual commitments among riparian states on the international rivers. If each riparian state enjoys equal water rights *vis-à-vis* with other non-riparian states, how can be a just distribution of the benefits of the river reached, and what are the commitments that can restrict the riparian state from surpassing its share? Additionally, many questions have been aroused concerning the state's commitment to the innocent use from the international river, its international responsibility towards any tort might occur as a result of the river misuse, and its commitment to cooperate, notify and consult with other states for future projects. In other words, the fact that most of the international rivers can have multiple uses raises two key questions; the former is related to the uses' priority, i.e., a particular activity that should enjoy priority over every use else. The latter is related to the users' priority, i.e., certain users shall enjoy priority over others. Thus, I wonder if a country like Egypt, for example, which has established its prosperity on the pillars of the River Nile since ancient times, should enjoy more acquired rights in the Nile than other riparian states for its historical precedence of using this water, and the dependence of its economy and almost the whole lives of its people on this River.

This discussion raised a question before the researchers of both the international law and relations concerning the presence of specific legal rules to rely on in order to properly resolve any probable dispute in this concern, to guarantee ap-

plying the principle of good neighborhood, and to preserve the legitimate rights of each riparian state in benefitting from the international river resources. This led to the prominence of a new legal theory stating that every riparian state on using the river passing by its territory should not cause significant torts to other states on the international watercourse. Consequently, this led to the emergence of other legal rules such as the fair and just distribution of water and raised the idea of water contamination and the way to protect the river environment.

In this concern, it is worthy to note the difference between two cases; the first one where we are dealing with specific international agreements that manage the method of benefitting from international water resources by the states sharing the same river basin. Originally, there is no great difficulty in reaching the peaceful settlement for any probable dispute among any of these states where they can refer to the provisions of the related agreement(s). The second case is that where there is no such agreement concluded, thus a dispute, among the sates sharing the same basin, shall inevitably take place. Some or any of these states may stick, for example, to the unacceptable-today common theories of the customary international law such as the theory of absolute sovereignty of a riparian state over the watercourse of the international river passing by its territories. Actually, in both abovementioned cases, the political considerations often prevail over legal ones where they play a significant role in sharpening the differences among the states sharing the same river basin which may be attributed to the attempt of some of these states to use the water as a political weapon against others. Perhaps the River Nile is a clear-cut example in this regard, which embraces many grounds of discordance among its riparian states; previously it once had many factors of cooperation and utmost benefitting among its states in the presence of good intentions.

In its conclusion, the 1997 UN Convention admitted the commitment to cooperation, i.e., the commitment to the principle of non-causing substantial or serious harm to other watercourse states. This is represented in mere exchange of information or technical cooperation for developing water resources and preserving its natural characteristics through establishing joint committees and other forms of general cooperation in the field of information exchange, notification, consultation, and addressing and combating pollution. This commitment is a prerequisite of the equitable and reasonable utilization, mentioned in Article 5 therein, which is considered the cornerstone of the new Law of International Watercourses.

The Legal Status of the River Nile in View of the Equitable and Reasonable Utilization Principle

There is no doubt that many ques-

tions have been raised on the absence of any agreement among all eleven River Nile riparian states, the failure of any international permanent body to manage or to develop benefitting from the Nile, and the conservation of Ethiopia, among some upstream states, towards its rights in the Nile waters. These questions have stirred up the rights and obligations of each of these states, the rules governing the equitable utilization; if contradicted, the priorities of utilization of the Nile waters, and the way of coordination and mutual management of the water as compared to those in other international rivers. Whether if there is a method to develop the utilization of the river for the sake of mutual benefitting among the riparian states without prejudice to the rights of each other, especially on changing the development requirements and shifting to the permanent method of irrigation rather than mere rainfall. In addition to paying keen interest to the projects of electric power and addressing problems associated with the rapid overpopulation therein, i.e., there is an overwhelming change in the needs of these states from the Nile waters. The previous conditions were then ensuring a continuous and pacific flow from the Nile waters to Egypt, as being one of the water poorest and the river neediest one of the eleven Nile riparian states. Due to the low density of population or the enjoyment of these riparian states with other water resources, the problem facing these states was never the scarcity of water but, as Dr. Jamal Hamdan expressed, was the excessive rainfall that led to needing more drainage projects or to deterioration in their economic situations. These conditions have been recently changed and led these states to demand reconsidering the established agreements towards the River Nile and opposing the privileged status of Egypt in these agreements to the extent that some of them asked Egypt to necessarily pay for the water coming from the upstream states.

As Egypt being both a Nile Basin country and the downstream state, it has been depending on the Nile as a basic or rather as the sole source for potable water and agriculture. Thus, any deduction of water share from the Upper Nile that may entail a subsequent decrease in the amount of water available to Egypt would result in mere serious danger, and this would be inconsistent with the requirements of the just and reasonable utilization principle as previously mentioned.

The fact that Egypt's complete dependence on the Nile water, anciently and recently, have made the Egyptians realizing the importance, in addition to the inevitability, of establishing close cooperation and coordination relationships with other peoples on the Nile Basin. Recently, the latter has realized the importance of convergence and cooperation to reach the optimal bene-

fit and to ensure the best utilization and management of the Nile and its utilities. Additionally, the topography of the Nile, its long extension, its large number of variables and difficulties and the huge quantity of its water wasted in marshes; should collectively lead all Nile basin states to exert concerted efforts aiming at achieving mutual interest and the optimal utilization from this River.

Treaties Regulating the Utilization of the Nile

In fact, observations can be made on the treaties regulating the utilization of the Nile water as follows:

First:

Some of these treaties tackled regional and geographical situations of the contracting states. It is well known that this kind of agreements related to regional and boundary status represents a restriction or an obligation incumbent on the state and that the transfer of sovereignty over the territory does not result in its disintegration. This principle is confirmed in Article 11 of the 1978 Vienna Convention on the subject of succession of states in respect to the international treaties adopting the theory of extended objective agreements. This Article stipulated that "A succession of states does not as such affect: (a) a boundary established by a treaty; or (b) obligations and rights established by a treaty and relating to the regime of a boundary." The text of this Article is consistent with the stipulation of Article 62 (2) of the Vienna Convention of the 1969 Law of Treaties that states that "fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty if the treaty establishes a boundary." Hence, it is impermissible for the new independent state, such as in the case of the Nile basin states, to argue that their new status represent a fundamental change in circumstances to justify their termination of treaties related to or associated with the boundaries and that have already been entered into by the predecessor state.

Thus, it can be assumed that these two Articles stipulating that the treaties pertaining to delimitation and demarcation of boundaries or to regional and geographical status cannot be violated or breached by international inheritance. Such treaties remain in force and represent a commitment and a restriction on the successor state, as they should not be amended in the 1969 Vienna Convention of the Law of Treaties.

The International Court of Justice (ICJ) in its judgment on the international river dispute between Hungary and Slovakia emphasized that the regional treaties, including agreements relating to international rivers whether used in navigational or non-navigational purposes, are among treaties that cannot be breached as a result of international inheritance. This

means that such international treaties are inherited from the predecessor to the successor state and cannot be breached for any reason.

It is obvious that these rules are merely applied on the relationship of Nile basin states regarding their obligations and rights in using this international water network; putting into consideration these material committed treaties of this water network flowing in their territories. As these treaties deal in an organized manner with regional and geographical obligations, they are not affected by the mere transfer of sovereignty over this territory from the colonial to the new state. In other words, the effects of such treaties *de facto* and *de jure* transferred to the successor state and cannot be modified except by a new agreement approved by all states concerned.

To sum up, the entry of the aforementioned international agreements of the River Nile into force shall not be affected by the independence of the Nile basin states. Where these states shall remain bearing obligations, as are enjoying rights stipulated in these agreements and came in accordance with the Law of International Succession codified by the 1978 Vienna Convention. The International Law Commission, during examining the draft of the Vienna Convention on International Succession in Respect of Treaties, has considered that the treaties on international rivers came according to regional systems in Articles 11 and 12 of the Convention. The Commission, particularly, referred to the Nile agreements, and Alarum Convention between Iraq and Iran concerning Shatt al-Arab Boundary River, and the agreement signed by France and Siam (recently named Thailand) about navigation in the Mekong River.

Second:

In many cases, the signatory parties to these treaties were European colonial states that signed such treaties on behalf of the African states or territories under their rule. However, the International Law admitted the enforceability of these treaties in accordance with the Law of Succession of States. Basically, these treaties did not introduce new legal principles, unlike those general rules governing the legal system of the international rivers. They only confirmed the principles that have been already admitted by the international jurisprudence and norms, such as the principle of recognising the historical rights acquired, and the principle of the necessity of cooperation, consultation and notification.

These agreements as a whole have confirmed the existence of the so-called the negative right of easement mainly for the benefit of Egypt then for the Sudan, as they are considered the last two downstream states on the Nile Basin. As previously noted, these agreements did not create new legal centers to deal with the edges of the

Basin, yet they only revealed what actually is done with regard to the distribution of the Nile waters.

Third:

Many of these agreements reveal the legal commitment of the Nile basin states to grant the absolute priority to the historical rights and the previous water sharing. Under the Protocol signed in Rome in 1891 between Italy, as being the mandatory state over Abyssinia, and Britain. Italy committed itself to ensure the arrival of the historical quotas of Nile water from Abyssinia to other Nile states. Article 3 therein stipulated that "The Government of Italy undertakes not to construct on the Atbara any irrigation or other works which might sensibly modify its flow into the Nile". However, the 1902 Convention signed by the Abyssinian Emperor Menelik II with Britain and Italy, stipulated that: "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 Tsana or the Sobat, which would arrest the flow of their waters into the Nile".

Additionally, these agreements, committed by the equatorial downstream states, reveal their approval of respecting the historical rights and the past sharing priority. Article 3 of the Treaty, signed by the Independent State of Congo stipulated that: "The Government of the Independent State of Congo undertakes not to construct or allow to be constructed any work over or near the Semliki or Isango Rivers, which would diminish the volume of water entering Lake Albert, except in agreement with the Sudanese Government".

In 1929, the Agreement on the Use of the Nile Waters for Irrigation Purposes was signed through exchanging of Notes between Egypt and Britain, signing on behalf of the Sudan, Kenya, Tanzania and Uganda. The British government confirmed to the President of the Egyptian Council of Ministers in its letter sent on May 7, 1929 the priority of the historical rights where the British High Commissioner stressed the following in his note, "I would remind your Excellency that His Majesty's Government in the United Kingdom have already acknowledged the natural and historical rights of Egypt in the waters of the Nile". This meaning was obviously confirmed by the Agreement of the Full Utilization of the Nile Water in 1959 between Egypt and Sudan as aforementioned.

It is worth noting in this regard that Ethiopia, as being recurrently denying Egypt's historical rights of Nile water which were approved and confirmed by the abovementioned Nile water Agreements, strictly demanded applying Article 12 of the 1987 Vienna Convention against the Somali's demands to modify some in-kind regulations with Ethiopia particularly those regarding the borders. Consequently, it is

impermissible, logically, for Ethiopia to respect these agreements against the Somali demands and to deny them in the case of Egypt's confirmation on its historical rights of the Nile water.

Second: The Relationship between the 1997 UN Convention and the River Nile Agreements:

The adoption of the Convention of the Law of International Watercourses in Non-navigational Purposes by the UN General Assembly in May 1997 raised questions on its impact on the legal system of the River Nile, and its relationship with the international aforementioned agreements. These agreements went enforceable on the Nile States concerning sharing and utilizing the water, especially that the stances of these states to the 1997 Convention varied considerably.

There is no doubt that the UN Convention, as being considered a framework agreement, shall not have a direct application on the relations of the Nile basin states even if all basin states become parties thereto unless a detailed agreement, reflecting the rules and provisions mentioned in the framework agreement, should be drawn to tackle the exclusiveness of the River Nile. Until then, the Nile basin states shall remain committed to respect the international norms in utilizing the international rivers in general and the River Nile in particular, in addition to the international enforceable bilateral and multilateral agreements in this regard. Hence, the attention of Egypt has been drawn to Article 3 of the Convention, that is discussing the relations between this Convention and the established agreements and that, as previously mentioned and as textually being approved, is not affecting the enforceable agreements between the states of the same international river basin, including those of the Nile. The Egyptian statement, delivered on voting on the Convention, emphasized that the framework nature of this Convention had made it possible to provide a set of principles and articles on the non-navigational use of international rivers. Its application should be subject to the full agreement and consent of all parties sharing those watercourses. The special nature of each application, as well as existing agreements and customary uses, should be taken into account. The Framework Convention, by nature, cannot be directly applicable on the resources of the river basin, unless the riparian states concluded a special agreement regulating the relationship among them, even if all these states are parties to the Framework Convention. Thus, The Convention did not prejudice the legal weight of international law; its framework should not affect bilateral or regional agreements or established laws. These are the provisions that must, in accordance with the general rules of law, have, by virtue of their privacy, priority over those in the Framework Convention.