

## The Principle of Fundamental Change in Circumstances and its Impact on the Nile Basin Agreements

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The rules, principles and norms of international law have codified the different rights of riparian countries of international river basins, including the River Nile. Thus, cooperation between these countries under the established rules of international law is required. However, recent years have witnessed differences and numerous allegations between some of the riparian states regarding these rights. These differences reached the peak between the Nile basin upstream countries and the two downstream countries as Ethiopia, Kenya, Uganda, Tanzania, Rwanda and Burundi have signed The Cooperation Framework Agreement (CFA) for the Nile Basin countries on May 14, 2010 in Entebbe, Uganda.

Not surprisingly that it is necessary to recognize the new political and legal situation after signing the Framework Agreement, the Ethiopian official statements concerning the ratification of this agreement by the Ethiopian Parliament, and also after the news that the State of South Sudan intends to join that agreement. This status quo will deteriorate with the increase of the number of Nile Basin countries signing the Framework Agreement, which will no doubt lead to conflicts between the previous agreements, that guarantee the rights of Egypt as a downstream state, and this new Framework Agreement.

Some of the Nile Basin countries in recent years continued to raise the principle of the change in circumstances in an attempt to evade their legal obligations that have previously been identified by the agreements ratified by these countries. This comes as a violation of the primary rule of general international law, namely "pacta sunt servanda". In addition to that, these countries claimed that the economic and political conditions, which have had a significant role in the conclusion of these agreements no longer exist, and that the legal status of these countries have changed. Most of the allegations of these countries concentrated on population growth, climatic conditions, and the increasing development needs of these countries, which in turn forces them, as a result of these changing circumstances, to evade the constraints imposed by these new circumstances

**Theory of the Fundamental Change in Circumstances:**

Those concerned with domestic law understand that the commitments are implemented according to the circumstances within which they were agreed upon "Omnis convention intellegitur rebus L'imprévision". Consequently, they talk about the lack of expectation or emergency "L'imprévision". This is what happens, too, in international law that considers this rule as one of its traditional rules; as the conditions for the application of a treaty, in international law, often take into account the circumstances in which that treaty was concluded following the Roman law "Omnis convention intellegitur rebus sic stantibus" So, implementation is based on the continuation of such circumstances. Typically, using that change as a pretext will result in an exception to the rule that prevents individual renouncing to the commitments of the treaty. This pretext is not easily resorted to maintain the credibility of the principle of "pacta sunt servanda". Consequently, any change of circumstances will not be taken into consideration unless that change has occurred in a manner that results in the unfeasibility of implementation.

The principle of fundamental change in circumstances is one of the reasons for the termination, or at least the modification of the treaties. It is established that every international treaty is concluded in certain circumstances,

these circumstances may change fundamentally after the conclusion period of the International Treaty. This is considered a condition contained in the treaty, namely: the condition of the survival of things as they are. This makes the treaty unbalanced after the fundamental change in the circumstances. Subsequently, this condition gives an opportunity to the parties to reconsider the treaty so as to make adaptation to make it fit in with the new circumstances. This comes after the agreement of all parties.

The prevailing view is that general international law recognizes the principle of fundamental change of circumstances. However, when the conditions are available, international treaties are not directly terminated, but they may only be invoked to be terminated. It is worth mentioning that even those who completely oppose this rule, accept the possibility of reviewing international treaties on the basis of the change of circumstances within the framework of the general principle of peaceful transformation.

The substantial change of circumstances as an objective base is almost unanimously jurisprudentially agreed upon. The disagreement remains on the conditions and effects. Thus, the conditions for the application of this theory to terminate or suspend international treaties will be reviewed.

Vienna Convention on the Law of Treaties of 1969 stated a text dedicated to this

issue in order to determine the nature of the theory, and the conditions for sticking to it in the field of international treaties in general. Article 62 of the Vienna Convention on the Law of Treaties provides that: "The unexpected fundamental change in circumstances that prevailed at the time of the conclusion of the treaty may not be used as a reason to terminate or withdraw from a treaty unless the following conditions are available":

[A] If the existence of these circumstances formed an important base for the agreement of the parties to be bound by the treaty.

[B] If the change resulted in a radical change in the scope of the obligations which must be implemented in the future in accordance with the Treaty.

The comments of International Law Commission on the draft of article (62), summarize these conditions into five ones as follows:

1. The change must occur to certain circumstances that were there during the conclusion of the treaty.
2. The change must be fundamental.
3. The change must be unexpected by the parties.
4. The existence of such conditions must have formed the basis of compromise to comply with the treaty.
5. The change in circumstances must result in a radical change to the enforced commitments in the future by virtue of the Treaty.

These conditions make the rule of

the fundamental change in circumstances very restrictive and unreliable unless there is only an exception. Moreover, the general change to the circumstances which did not form the motivation for complying with the treaty shall not be invoked to demand an end to the treaty except if it has the effect of amending basic conditions prevailed at the conclusion.

#### **Exceptions of the Rule of the Fundamental Change of Circumstances**

Some of the treaties aim to agree on a certain position, and permanently organizing it because it needs stability more than others. Hence, the exception that makes the rule of the fundamental change of circumstances has no effect on border treaties. On the other hand, it is unreasonable to use one's mistakes and violations of law as a pretext for evading fulfilling the rights of others. This is the principle that results in the second exception which tackles the case in which the fundamental change is the result of a violation committed by one of the parties to one of the commitments of the treaty, in accordance with the second paragraph of Article 62 of the Convention, which states:

"It is not permissible to rely on fundamental change in circumstances as a reason to terminate or withdraw from a treaty in the following circumstances":

- A - If the treaty is creating the borders.
- B - if the fundamental change is a result of a breach of a commitment by the party under the treaty or of any

other international obligation to any other party in the treaty.

We conclude from the foregoing, under the provisions of Article (62), as well as the jurisprudence of the various International Court of Justice, and the views of jurisprudence, that international law has granted a license of the change of circumstances to the countries to demand - in the maximum possibilities - the possibility of terminating or amending treaties. However, that same law has imposed strict governing restrictions, stated in Article 62 of the Convention, must be applied. Then a party can not resort to the principle of the change of circumstances in all times to terminate treaties, as using this principle in all cases as a pretext will lead to chaos and will provoke international disputes, which lead to threatening the state of stability, which in turn threatens international peace and security.

Therefore ending treaties unilaterally on the basis of the theory of the change of fundamental circumstances is considered a breach of an international obligation that leads to the realization of the provisions of international responsibility. This is considered a threat to stable established positions, a waste of the principle of acquired rights, a demolition of the mandatory force of treaties that resulting from the idea of "pacta sunt servanda", a demolition of the principle of the implementation of international

commitments in good faith, and a destruction to what is stipulated in Article 26 of the Vienna Convention on the Law of Treaties, which stipulates that: Every treaty in force shall be binding, and the parties shall implement the treaty in good faith.

#### **Nile Basin Countries... and the Base of Fundamental Change of Circumstances**

Some of the Nile basin countries shall not invoke this theory, or the fundamental change in circumstances to elude the implementation of the commitments towards Egypt, in an attempt to evade their legal obligations that have already been identified by the agreements ratified by these countries. This comes in violation of the primary rule of general international law explained previously, i.e. "pacta sunt servanda".

As for the adherence of some of the Nile Basin countries to this rule, it appears that Egypt and not these states, is the state that has a major interest in sticking to this rule, putting into consideration the fundamental change in all conditions prevailing in Egypt at the present time whether the over population, the scarcity of alternative water resources, or the increasing economic and developmental needs. It is enough in this regard to point out that the international body, which was formed from: Great Britain, the United States of America, and India, to iden-

tify the needs of Egypt in 1920 of the Nile water, estimated these needs to 58 billion cubic meters annually.

It may be noted in this context that Egypt is the only state that has the major interest in referring to the theory of the fundamental change to increase its share of water in the light of the population explosion which currently approximates 90 million people, and in the light of the fact that only Egypt, unlike the rest of the Nile basin countries, depend mainly on the Nile water by 97%. This requires the expansion of development projects to meet the different needs of this population increase. It is sufficient in this regard to refer to the conclusion of the international body set up by Great Britain, the United States and India, to identify the needs of Egypt of the Nile water in

1920, which reached about 58 billion cubic meters annually.

Despite the consistency of the Egyptian position on the issue of utilization of the Nile with the principles, rules and norms of international law, it could be argued that international law will not be a solution to the differences on the water, unless there were multilateral agreements for the entire Nile Basin countries on the rights of distribution of water, whether surface or groundwater between the conflicting parties. This is because the fact that the problem of water comprises many other problems including those related to the environment, the over population, the policy of each country, the alternative sources, the method of using the Nile water, and the technology used.