

**Patrick Loch Otieno Lumumba**

---

## ***The Interpretation of the 1929 Treaty and its Legal Relevance and Implications for the Stability of the Region***

Fierce national competition over [shared] water resources has prompted fears that water issues contain the seeds of violent conflict. By the year 2025 two thirds of the world's population is likely to live in countries with moderate or severe water shortages as demand for water approaches the limit of the available supply. – Former UN Secretary General Kofi Annan, Message, World Water Day, 22 March 2002.

### **1. Introduction**

The past few years has seen an increasing interest in the management of the Nile River and the disputes surrounding the use of the world's longest river. The same period has witnessed a number of initiatives aimed at addressing various components of the management of the Nile river resources. The increasing concern is attributable to two main factors. First, an estimated 160 million people depend on the Nile waters for survival. This population is expected to double within the next 25 years, placing additional strain on scarce water and other natural resources. Second, despite the extraordinary natural endowments and rich cultural history of the Nile Basin, its people face significant challenges. Today, the Basin is characterised by poverty, instability, rapid population growth, environmental degradation, failing rains, recurring droughts and famine, as well as declining land resources and productivity and frequent natural disasters. Some of the countries are among the world's poorest with annual per capita incomes of less than \$250 (<http://www.worldbank.org/afr/nilebasin/overview.htm>).

The Nile River traverses a total distance of about 6700 km and over 35 degrees of latitude. It drains a basin area of about 3,350,000 sq km stretching over ten east-central and northeast African countries namely Burundi, Rwanda, the DR of Congo, Tanzania, Kenya, Uganda, Ethiopia, Eritrea, the Sudan, and Egypt. However, the development and exploitation of the hydropower and irrigation potentials of the Nile River has been the exclusive domain of Egypt and the Sudan. Chronic political instability and economic underdevelopment in the upper Nile has prevented the riparian countries from utilising the resource fully. Currently, the only existing arrangement for water sharing within the Nile basin is the 1959 treaty between Egypt and the Sudan, which provides for the 'full utilisation of the Nile waters' by the two countries (1959 Agreement Between Sudan and United Arab Republic for the Full Utilisation of the Nile Waters).

In the face of mounting demographic pressures and adverse changes in their hydrological conditions, riparian states can no longer afford to ignore the potential of

the Nile waters that remain untapped in their respective sub-basins. In a nutshell, the unjust and inequitable use of the Nile waters cannot be perpetuated further. Initiatives have therefore been established to address these emerging tensions. Of particular interest has been how to check the conflicts and promote political stability and economic development throughout the region through an arrangement that accommodates the legitimate interests of all the basin countries.

Against this background, it is imperative to undertake an academic study on the impact of the treaties on the Nile waters on peace, stability and development in the region. It is generally viewed that where multiple countries share water supplies, the risk of conflict is especially high. This article examines the legal relevance and implications of the 1929 treaty on stability in the region hosting the Nile basin. The article proceeds as follows; first, it reviews the general terrain of international law with respect to the Nile River as a resource. Second, the article supplies a historical background to the 1929 treaty as a precursor to the legal examination of its status. Finally, the article provides an assessment of the implications of the treaty on the stability of the region.

### *1.1. Is The Nile River Part of Res Communis (The Common Heritage of Mankind)?*

According to classical international law, *res communis* refers to territory consisting of the high seas and the outer space and/or which is not capable of being placed under state sovereignty. Such territory is governed by the concept of the common heritage of humankind. The main governing principle with regard to the common heritage of humankind is that no state shall claim or exercise sovereignty or sovereign rights over any part of *res communis* or its resource nor shall any state or natural or political person appropriate it. No such claim or exercise of sovereignty or sovereign right nor such appropriation shall be recognised in international law.<sup>1</sup>

With regard to the Nile River, Egypt and the Sudan have throughout the years sought to claim territorial sovereignty and jurisdiction over its waters. This is evident from the numerous formal and informal agreements, negotiations and protocols that the two countries have entered into regarding access to and use of the waters of the River Nile.

Egypt's and Sudan's joint exercise of sovereignty over River Nile is premised on the concept of accretion where the new territory (the river itself) was added to the physical boundaries of the two countries mainly through natural causes. In this case, history has it that there was no formal act of assertion of title on the part of either country. As is the case with most trans-boundary natural water resources, there was a gradual and almost imperceptible movement of alluvial deposits and abrupt transfer of soil embedded within the territories of both states though the waters of River Nile were identifiable as originating mainly from territory of Ethiopia.<sup>2</sup>

The acquisition of title to the waters of River Nile by Egypt and Sudan has found further support in the principle of prescription, although hailed as more academic than practical. Such acquisition is characterised by and consequential to the peaceful exercise of *de facto* sovereignty for a very long period of time over the acquired territory. This could be as a result of immemorial exercise of such sovereignty or as a result of lengthy adverse possession only. There is no judicial decision which conclusively supports the doctrine of acquisitive prescription under international law.

In addition, effective control necessary to establish the Egyptian and Sudanese joint exercise of sovereignty over River Nile was historically accompanied by the tacit acquiescence on the part of neighbouring states. Consequently, if there were any protests or other acts or statements that demonstrated a lack of acquiescence, these could have prevented Egypt and Sudan from jointly laying claim to the waters of River Nile by prescription or otherwise. Today, therefore, the River Nile cannot be construed under the principle of the *res communis*.

## 2. Historical Background

In the early 1900s, a biting shortage of cotton in the world market put tremendous pressure upon Egypt and Sudan, then under a British-Egyptian condominium, to turn to the perennial irrigation of this summer crop instead of the traditional flood-fed methods earlier used by the two countries.<sup>3</sup> The need for summer water and flood control provided an unprecedented impetus for an intensive period of water development along the Nile, with proponents of Egyptian and Sudanese interests occasionally clashing within the British Foreign Office over whether the emphasis for development ought to be further upstream or downstream. ([www.transboundarywaters.orst.edu/projects/casestudies/nile\\_agreement.html](http://www.transboundarywaters.orst.edu/projects/casestudies/nile_agreement.html)).

With the end of the First World War, it became abundantly clear that any regional development plans for the River Nile and its basin would have to be preceded by some formal agreement on water allocation. In 1920, the Nile Projects Commission was formed, with representatives from India, the United Kingdom, and the United States.<sup>4</sup> The Commission estimated that of the river's average flow of 84 billion cubic meters (BCM)/year, Egypt needed 58 BMC/year. It was considered that Sudan would be able to meet its irrigation needs from the Blue Nile alone. Since the Nile flow fluctuated greatly, with a standard deviation of about 25 percent, an appendix was added which suggested that any gain or shortfall from the average output or flow be divided evenly between Egypt and Sudan. However, as fate would have it, the commission findings were not acted upon.<sup>5</sup>

The same year saw the publication of the most extensive scheme for comprehensive water development along the Nile, now known as the Century Storage Scheme, put forth by the British. It provided inter alia for:

- (i) A storage facility on the Uganda-Sudan border;
- (ii) A dam at Sennar to irrigate the Gezira region south of Khartoum; and,
- (iii) A dam on the White Nile to hold summer floodwater for Egypt.

The plan worried Egypt because all the major control structures were planned to be beyond Egyptian territory and authority. Some Egyptians visualised the plan as a British means of controlling Egypt in the event of Egyptian independence. As the Nile riparians progressively gained independence from their colonial masters, riparian disputes became international and consequently more contentious, particularly between Egypt and Sudan.<sup>6</sup> The core question of historic versus sovereign water rights was further complicated by the technical question of where the river ought best be controlled – upstream or downstream.<sup>7</sup>

In 1925, a new water commission was formed which made recommendations based on the 1920 estimates that would finally lead to the Nile Waters Agreement

between Egypt and the Great Britain of 7 May 1929. This Agreement was an 'Exchange of Notes' between Egypt and Britain. It had implications for Sudan, which was restricted with regard to the amount of water it could impound except during the flood period. The treaty did not only bind Sudan to Egypt's approval before undertaking any irrigation project, but also gave Egypt rights over the use of Lake Victoria and other water bodies around the River Nile.<sup>8</sup>

Egypt, as the downstream state, had its interests guaranteed in three-fold ways, viz:

- (i) Having a claim to the entire timely flow at a total amount of 48 BCM/year.
- (ii) Having rights to on-site inspectors at the Sennar dam, outside of Egyptian territory.
- (iii) Being guaranteed that no works would be developed along the river or on any part of its territory, which would threaten Egyptian interests.

In accordance with this Agreement, one dam was built and one reservoir raised, with Egyptian acquiescence.

The Aswan High Dam, with a projected storage capacity of 156 BCM/year was proposed in 1952 by the new Egyptian government, but debate over whether it was to be built as a unilateral Egyptian project or as a cooperative project with Sudan kept Sudan out of negotiations until 1954. The negotiations which ensued, and carried out with Sudan's struggle for independence as a backdrop, focused not only on what each country's allocation would be, but whether the dam was even the most efficient method of harnessing the waters of the Nile.<sup>9</sup>

It is instructive to note that the 1929 Egyptian-British treaty was last revised in 1959, but it still retained clauses barring the Nile Basin countries from using the waters for large-scale irrigation and other projects without permission from Egypt.<sup>10</sup>

It is quite surprising, ironical and paradoxical that the 1959 Treaty between Sudan and Egypt has been heralded as the most complete and comprehensive agreement on the use of the Nile waters.<sup>11</sup> This Agreement was only bilateral and did not include any of the other riparian countries of the Nile despite the fact that it portioned out all of the Nile's waters. Ethiopia, from which about 80 percent of the water comes, was not even consulted and no amount of water was even allocated for future usage by any upstream country except Sudan. It is even less comforting for the other riparian countries (other than Sudan) that all of the Nile's average water flow was divided between the two downstream countries.<sup>12</sup>

Despite its relative 'comprehensiveness', the 1959 Egyptian-Sudanese Agreement did not put an end to the long-standing raging conflict over the rights of ownership and access to the Nile waters. And for many decades after independence, particularly since 1980s, the riparian countries bordering the Nile River have engaged in numerous bilateral and multilateral diplomatic initiatives to resolve the dispute.<sup>13</sup> A strong tension still exists between the Nile basin countries whenever a new Nile development project is proposed. In addition, Egypt, as the country most in danger of losing access to the Nile waters through development projects in other riparian countries, remains willing and probably able to intervene militarily in order to preserve the status quo.<sup>14</sup>

Perhaps, the thorniest issue that threatens future cooperation on the sharing of the resources of the River Nile including the recent Nile Basin Initiative (NBI) is the lack of a binding agreement between all of the Nile Basin countries, on the equitable and

just distribution of the Nile waters.<sup>15</sup> The international community has stepped into this lacuna by promulgating the Convention on the Law of the Non-Navigational Uses of International Watercourses of 1997 that took more than 20 years of preparation. But, as of 15 August 2002, none of the Nile Basin countries had ratified the Convention.

The Convention provides two important principles; it stresses that states should use water courses in an equitable and responsible manner, and secondly, it defines a procedure to follow when planned schemes may have adverse impact on other states. In actual fact, when the Convention was presented to the United Nations General Assembly, Sudan was the only Nile Basin country in favour; Burundi opposed; Egypt, Ethiopia, Rwanda and Tanzania abstained; while Eritrea, Uganda and DRC (Zaire) were absent.<sup>16</sup>

However, Egypt has insisted that only the two treaties – the 1929 and 1959 Agreements – must be respected in any Nile water negotiations with other riparian countries.<sup>17</sup>

YEAR	MILESTONES (HISTORICAL HIGHLIGHTS)
1920	Nile Project Commission formed, offers allocation scheme for Nile riparians. Findings not acted upon. Century Storage Scheme put forward, emphasising upstream, relatively small-scale projects. Plan is criticised by Egypt.
1925	New water commission is named.
7 May 1929	Commission study leads to Nile Waters Agreement between Egypt and Britain, having serious implications for Sudan.
1952	Aswan High Dam proposed by Egypt. Promise of additional water necessitates new agreement.
Sept-Dec 1954	First round of negotiations between Egypt and Sudan which end inconclusively.
1956	Sudan gains independence through a pro-Egypt led military coup. Egypt becomes more conciliatory with new Sudanese Government after the 1958 coup.
8 Nov. 1959	Agreement for the Full Utilization of the Nile waters (Nile Waters Treaty) signed between Egypt and Sudan.

Source: Case Summary on the Nile Waters Agreement, available at [www.transboundarywaters.orst.edu/projects/casestudies/nile\\_agreement.html](http://www.transboundarywaters.orst.edu/projects/casestudies/nile_agreement.html)

### 2.1. Salient Features of the 1929 Treaty

- That Egypt and (Anglo-Egyptian) Sudan utilise 48 and 4 billion cubic meters (BCM) of the flow per year respectively, that is, 92.3 percent for Egypt and 7.7 percent (for Sudan) of the total utilisable flow. Precedence was given to the so-called ‘historic or acquired rights’
- That the flow of the Nile between January 20 to July 15 (the dry season (summer) be reserved for Egypt.
- That Egypt reserves the right to monitor the Nile flow in the upstream countries.
- That Egypt assumes the right to undertake Nile River related projects without the

consent of upper riparian states.

- That Egypt assumes the right to veto any construction projects that would affect her interests adversely. This was captured at Paragraph 27 which stipulates in part that ‘save with the previous agreement of the Egyptian Government, no irrigation or power works or measures are to be constructed or taken on the River Nile or its branches on the lakes from which it flows, so far as all these are in the Sudan or in countries under British administration, which would, in such manner as to entail any prejudice as to the interests of Egypt, either reduce the quantity of water arriving in Egypt or modify the date of its arrival or lower its level’.

### 3. Interpretation of the 1929 Treaty

The interpretation of treaties like that any other legal instrument depends on the aim and goal of the treaty interpretation.<sup>18</sup> On this issue there are three different schools of thought. On the one hand, there is a school which asserts that the primary and indeed the only aim and goal of treaty interpretation is to ascertain the intention(s) of the parties to the treaty. The other school starts from the premise that there must exist a presumption that the intentions of the parties are reflected in the text of the treaty which they have drawn up and that the primary goal of treaty interpretation is therefore to ascertain the meaning of this text. Finally, there is the school which maintains that the decision-maker must first ascertain the object and purpose of the treaty and then interpret it in such a way as to give effect to that object and purpose.

These three schools of thought reflect:

- The subjective approach (which looks at the intentions of the parties or founding father),
- The objective approach (which considers the textual or ordinary meaning of the words) and,
- The teleological approach (which adverts to the aims and objects of the treaty).
- One of the enduring problems facing courts, tribunals and lawyers, both in the municipal and international law spheres relates to the question of interpretation.<sup>19</sup> In recognition of this problem, various rules and techniques have been put forward to aid practitioners and judicial bodies in resolving such problems. In seeking to analyse the 1929 treaty, it behoves us to pose the following questions:
  - What are the major defects and effects of the 1929 colonial treatise? What would happen if the majority of the riparian nations agreed to abrogate the colonial treatise? Who would benefit from such action?
  - The impact of Egypt’s independence on the 1929 Treaty:<sup>20</sup> Did the newly independent Egypt inherit the 1929 treaty rights and obligations?
  - The case of upstream vs. downstream riparian states. It is notable that relative riparian positions result in comparable power relationships, with upper riparian having greater hydro-political room for manoeuvre. This has not been the case in River Nile. Egypt, although a most downstream country, owing to its geopolitical strength, has been able to forestall upstream attempts to sway its position. One may pose for instance that, why hasn’t Ethiopia, which is the main source of River Nile’s waters at 84

- percent, been able to be the main user of the Nile waters? The answer lies in the relative geo- and hydro-political strength, or lack of it, of Ethiopia.<sup>21</sup>
- Do the treaties bind riparian countries, which are not party to them?
  - What is the legal effect of the fact that the rights and interests of non-party (but affected) countries were not taken into consideration?
  - Is Egypt's purported monopoly over the Nile waters legally permissible?
  - What is the legality and legitimacy of Egypt's threat of war to protect its national interests vis-à-vis the Nile water? For instance, after signing the historic Camp David Peace Accords with Israel in 1979, the late President Anwar Sadat is reported to have said that the only reason his country might go to war against any of its neighbours would be a dispute over water.<sup>22</sup> With the current political and economic conditions of the Nile Basin states, what is the plausibility of this threat?
  - The internationalisation of the conflict: what does it portend for the region's stability? For instance, given the fact that Egypt is the second financial aid recipient (after Israel) from the US, does this create a power imbalance in the region?<sup>23</sup>
  - What legal factors impinge on attempts to reach a compromise amongst the Nile River riparian nations?
  - What is the legal effect of other riparian countries (for example, Ethiopia's) threats to pursue unilateral development and harvest of the Nile water resources within their territories?
  - Does the 1929 Treaty augur well for the region's stability?

It is notable that there has been no official judicial pronouncement on the 1929 Treaty. In general, the jurisprudence of the International Court of Justice (ICJ) tends to lend support and credence to the textual approach.<sup>24</sup> This approach places the principal emphasis on the actual words of the treaty. While the subjective approach treats as the first question 'what did the parties really mean?', the textual approach takes as the first question 'what did the parties say?' The textual approach admits the qualification that extrinsic sources may be used if the text is ambiguous or if the meaning of the words leads to a conclusion which is obviously absurd or unreasonable.

Articles 31-33 of the Vienna Convention on the Law of Treaties deal with the interpretation of treaties.<sup>25</sup> Article 31 (1) embraces the well-known doctrine of *pacta sunt servanda* and provides that a treaty shall be interpreted in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty and in the light of its objects and purposes. The paragraph thus embodies both the textual and teleological approaches to interpretation and, by failing to separate these two, would appear to conclude that whenever a problem of interpretation arises, the objects of the treaty must be taken into account.

Paragraph (2) of the article further provides that the context for the purposes of interpretation of a treaty shall comprise in addition to the text, the preamble and the annexes:

- (i) Any agreement relating to the treaty, which was made between all the parties in connection with the conclusion of the treaty.

- (ii) Any instrument which was made by one or more parties in connection with the treaty.

Paragraph (3) states that in the interpretation of a treaty, there shall be taken into account together with context:

- Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provision.
- Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.
- Any relevant rules of international law applicable in the relations between the parties.

Paragraph (4) concludes that a special meaning shall be given to a term used in the treaty if it is established that the parties intended so.

Where the interpretation of a treaty as per Article 31 leaves the meaning ambiguous or obscure or leads to a result, which is manifestly absurd or unreasonable, Article 32 of the Convention allows recourse to supplementary means including the *travaux préparatoires* of the treaty and the circumstances thereof.

An objective interpretation of the 1929 Agreement between Egypt and the Great Britain reveals a very one-sided contract, leaning heavily in favour of Egypt. As a recapitulation of the salient features of the treaty, Egypt was allocated 48 billion cubic meters (BCM) of the Nile flow per year; the flow of the Nile during January 20 to July 15 (the dry season) was also reserved for Egypt. As if that was not enough, Egypt reserved the right to monitor the Nile flow in the upstream countries and assumed the sole and exclusive right to undertake Nile river-related project without the consent of upper riparian states. Under paragraph 27 of the Treaty, Egypt also reserved the right to veto any construction projects on the river Nile or its branches or the lakes from which it flows that would prejudice her interest adversely by either reducing the quantity of water arriving in her territory or modifying the date of its arrival or lowering its level.

On the colonial front, the Great Britain must have been happy with the substance and spirit of this Agreement, because as was characteristic of most if not all colonial and imperial powers then, the British colonialists wanted to maintain and buttress their colonial grip and hegemony upon their 'main and strategic' colonial servant in the region, Egypt. Professor Allan notes that Britain was very influential in that it was so preoccupied with the economy of Egypt that it used its considerable power to ensure that there was no diminution of flows of water to Egypt through the development of works in its upper riparian colonies in the lakes Basin of East Africa – Uganda, Kenya and Tanganyika (now Tanzania).<sup>26</sup> This was because Egypt showed more economic potential. The learned author continued to note that Egypt was especially subject to European colonial engineering influence in the latter years of the nineteenth century and the first half of the twentieth century during a period when the 'hydraulic mission' was commonplace amongst colonising powers.<sup>27</sup>

Another vitiating factor that invalidates and illegalises this Agreement is the fact that not all the relevant stakeholders (read riparian countries) were consulted during its negotiations and ultimate conclusion. The Vienna Convention on the Law of Treaties enacts a cardinal rule of treaty law to the effect that treaties must be concluded in good



faith.<sup>28</sup> The fact of non-consultation with riparian countries that were directly and substantially adversely affected by the treaty is an instance of bad faith (or *mala fides*).

Some people have argued that the treaty must be interpreted in order to further stability in the region. A case must therefore be made for more effective riparian cohesion. The Nile hydro-politics have to be affirmatively interpreted in favour of increased regional stability. However, to the keen observer and analyser of the interface between national interest and regional stability as regards access to and ownership of the waters of the Nile River, the point has to be avidly argued that Egypt and its colonial power relegated riparian interests to the back seat in clear contravention of the spirit and tenets of both classical and emerging treaty law.

Malcolm Shaw advocates a more dynamic approach to treaty interpretation which entails a more flexible and programmatic or purpose-oriented mode of interpretation with substantial emphasis on construing treaties as living instruments that have to be interpreted in the light of present-day conditions.<sup>29</sup> Taking this approach, it is arguable that the 1929 Treaty is a living instrument, which has to be construed and interpreted in light of the prevailing Nilo-political and diplomatic conditions. Following this line of reasoning to its logical conclusion inevitably leads to advocating the negotiation and conclusion of a more embracing and autochthonous treaty regime essentially acceptable to all the riparian states.

In the premise, the 1929 Egypto-British Treaty rests on a very shaky juridical foundation bereft of the cardinal tenets of treaty law, Nile Basin hydro-politics and the demands of the global political order. Viewed from whichever angle, the Agreement cannot stand. Let us now ask the third question: did the newly independent Egyptian government inherit the treaty as part and parcel of its acquired rights and obligations? Contemporary discourse on the international law on the succession of states tends to have the overtones of the 'clean slate' approach to a succession of treaties. According to this principle, the new state (Egypt) inherited a 'clean slate' from its colonial master.

The UN Convention on the Law of Non-Navigational Uses of International Watercourses of 1997 favours the just and equitable distribution of the Nile waters.<sup>30</sup> The Convention further stresses that state should use water courses in an equitable and responsible manner and defines a procedure to be followed when planned schemes may have adverse impact on other states.<sup>31</sup> Apart from the riparian countries ratifying and domesticating the convention, there is an urgent absolute need for a progressive, all inclusive and comprehensive treaty regime on the River Nile that takes into account the rights, interests and obligations of all the riparian countries with their express consent thereto.<sup>32</sup>

#### 4. The 1929 Treaty and Third Parties

It is perhaps important to pose further questions. First, does the 1929 Treaty bind non-parties to it? And can these countries derive rights and incur obligations under this treaty? In other words, what are the practical implications of the treaty for non-party states?

Articles 34-38 of the Vienna Convention on the Law of Treaties of 1969 deal with the relationship between treaties and third parties.<sup>33</sup> Essentially, these provisions encapsulate the maxim '*pacta tertiis nec nocent nec prosunt*', a concept supported by

both general legal principle and common sense. It states that in so far as a treaty may bear the attributes of a contract, third states are clearly strangers to that contract and can neither be beneficiaries of any rights conferred thereunder nor be 'carriers' of any obligations imposed thereby.

Article 34 of the Vienna Convention lays down the accepted statement of principle that a treaty does not create either rights or obligations for a third state without its consent. As a matter of treaty law, this principle admits of no exceptions in the case of obligations although this is without prejudice to the principle that certain obligations stipulated in a treaty may bind third states independently as rules of customary international law.<sup>34</sup>

Article 35 allows a third state to bind itself to a treaty through a collateral agreement whereby it accepts an obligation or obligations under the treaty. Article 36 deals with the converse case of rights arising for a third state under the treaty in which case, two conditions must be satisfied *prima facie*, namely:

- The parties to the treaty must have intended the provision to accord or confer that right upon the third state or to a group of states to which it belongs or to all states.
- The third state must have assented thereto, assent being presumed so long as the contrary is not indicated unless the treaty has provided otherwise.

Article 38 preserves the principle that rules contained in a treaty may become binding upon third states as rules of customary international law recognised as such.

The 1929 Treaty was concluded between Egypt and its colonial master Great Britain to the total exclusion of the other riparian states. Therefore, flowing from the principle of *pacta tertiis nec nocent nec prosunt*, these non-party riparian states are total strangers to that contract and can neither be beneficiaries of any rights conferred under the treaty nor be bearers of any obligations imposed thereunder. The treaty does not create either rights or obligations for Ethiopia, Uganda, Zaire, Tanzania, Sudan or Kenya without their consent.

According to available literature, at least those gleaned by the author, none of these riparian countries have formally assented to the treaty as to entitle them to any rights thereunder. Neither is there any empirical evidence that Egypt and Britain intended the treaty to confer a right upon third states.

However, an attempt was made in the 1959 Egypto-Sudanese Nile waters treaty to recognise the interests of riparian countries.<sup>35</sup> Egypt and Sudan agreed that the combined needs of other riparians would not exceed a paltry 1,000-2,000 MCM/yr and that any claims would be met with one unified Egypto-Sudanese position. It was further agreed that Permanent Joint Technical Committee to resolve disputes and jointly review claims by any other riparian would be established.

Did the riparian countries accept this provision? Ethiopia, which had all along not been a major player in Nile hydro-politics, served notice in 1957 that it would pursue unilateral development of the Nile water resources within its territory, estimated at 75-85 percent of the annual flow.

## 5. The Implications of the Treaty on Regional Stability: Making a Case for More Effective Riparian Dialogue

The fortunate corollary of water as an inducement to conflict is that water, by its very nature, tends to induce even hostile co-riparians to cooperate, and even as disputes rage over other issues.<sup>36</sup> To them, the weight of historic evidence tends to favour water as a catalyst for cooperation. But former UN Secretary General Boutros Boutros-Ghali, an Egyptian whose country sits at the mouth of River Nile, predicted 16 years ago that the next regional war would be over the Nile.<sup>37</sup> Also in pessimistic support is Professor Allan who avers that in the field of international water relations, the position is one of anarchy. There are no institutions which uphold a widely recognised and formally agreed code of practice.<sup>38</sup>

A number of questions regarding Nile hydro-politics have vexed the minds of many a scholar. How can a strong case be made for more effective riparian dialogue? Does the 1929 Treaty (as amended in 1959) further or hinder the stability of the Nile region? How can the Treaty be interpreted in order to further stability in the region? What are the implications of the Treaty on Egypt's foreign relation with other riparian states? What therefore is the interface between national interest and regional stability with regard to access to and ownership of the waters of River Nile?

Historically, after the Second World War, the control of the Nile Waters became a central issue in regional politics as the self-determination and national liberation movements grew in strength. The Nile Basin being a region in transition, substantial pressure on the Nile resources is likely to increase dramatically in the coming years as a result of high population growth rates in all the riparian states and the ever increasing development needs of the riparian countries.<sup>39</sup> Currently, tensions in the Nile River are constrained by a number of factors, including Egypt's political and military dominance, the civil war in the Sudan and negligible use of water by upstream countries. Concurrently, however, other factors are working to increase the potential for conflict over water in the basin: high population growth rate both in upstream and downstream countries, accompanied by subsequent demand for increases in agricultural irrigation; nascent development in Ethiopia; environmental degradation of established Ethiopian irrigated land; and the possibility of an end to the Sudanese war, which would spur development in Sudan. Although each of the foregoing factors holds the potential to increase tension and cause conflict in the basin, many also present potential areas of cooperation. Prevention of armed conflict in the Nile Basin could occur in a great number of realms, from the technical to the political or from the domestic to the regional.<sup>40</sup>

The 1929 Treaty and its 1959 historic amendment have sent many ripples across the Nile basin and even further. The agreements have added renewed impetus to the turbulent waters of the Nile River and its hydro-politics. For instance, in early February, 2004, Tanzania launched a Tsh. 27.6 billion (\$27.6 million) project to draw water from lake Victoria to supply the Kahama area in Shinyanga region, in contravention of the two treaties controlling the use of water from the lake. The 1929 and 1959 treaties restrict riparian countries from initiating projects that would affect the volume of Nile waters without the permission of Egypt. Despite engaging in lengthy negotiations over the use of the waters from Lake Victoria, Tanzania has maintained that the two agreements were illegal.<sup>41</sup>

Professor Allan in his discussion of the factors affecting the saliency of river basin hydro-politics notes that the only agreements reached to date in the long history of the Nile were signed when one entity was very keen to address some imperative issues. These were 'expediency agreements'. The 1929 Egypt-Sudan Nile Waters Agreement scarcely counts as it was arranged under particular and unrepeatable circumstances. The 1959 Nile Waters Agreement was put in place by an Egyptian Government in a very great hurry to achieve a major and unique prize: the total control of the Nile with huge economic benefits and the bonus of the hydro-power. The international relations regime of the time was unusual being both different from that of the preceding century and very different from the present.<sup>42</sup>

In the totality of these arguments, the 1929 Treaty constitutes an obsolete colonial relic. It is patently out of touch with the present circumstances and the prevailing economic and political conditions of the inhabitants of the Nile basin region, including their basic needs. Therefore, there is an absolute and urgent need for a legal and institutional cooperation framework that will be the basis for sharing of the Nile resources among the ten countries that make up the Nile River basin. Central to this framework should be a more comprehensive, all-inclusive and autochthonous treaty regime governing access to and use of the river's resources. And the sooner this is done the better for all stakeholders.<sup>43</sup>

## Conclusion

International river basin and trans-boundary water management initiatives are increasing in importance and scope as the availability of water per capita is dropping significantly. Trans-boundary watercourse States now face more challenges in managing their national waters than ever before, resulting from increase of activities related to the use of shared waters. There are serious conflicts over water in most parts of the world at present and the dispute relating to the use of the Nile Basin provides a good example. At the risk of oversimplification, the crisis is not about having too little water to satisfy the needs. It is a crisis of management of these water resources and the legal regulation of the interests and sovereignties of trans-boundary watercourse States.

The international community having been prompted by the lack of coordination over shared water supplies and the interstate conflicts has in the recent past stepped up its efforts in promoting greater co-riparian cooperation. A number of declarations as well as organisational and legal developments have been realised to further this objective. The current debate on the review of the Nile Treaties must be located within this context.

## Notes and References

1. The 1982 United Nations Convention on the Law of the Sea recognises this principle by declaring the deep sea bed and ocean floor as part of the common heritage of mankind to be administered by the International Sea Bed Authority on behalf of the International Community.
2. At one point in history, it was considered that Lake Victoria was the main source of the river.
3. The creation of condominium is done by agreement between two states under which they exercise sovereignty jointly over a certain territory and its people. The existence of a

condominium rests upon a title in international law pursuant to which a number of states are vested with sovereignty. The legal title to the condominium binds the relevant states in such a way that their sovereignty over the territory appears as joint sovereignty. The basis for the Sudanese arrangement was the Agreement of 19 January 1899. And by the treaty of 12 February 1953 between Great Britain and Egypt the condominium was lifted to the extent that it was left to the Sudan to choose between full independence and further association with Egypt.

4. The keen observer is left to wonder what Indian and American interests were in the project. What immediately comes to mind is the fact that these two countries could have been the closest and most convenient allies of Britain at the time in relation to the project.
5. Supra Note 6.
6. The *Electric Law Library's* lexicon defines riparian rights as legal rights of owners of land bordering on a river or other body of water. It further defines riparian proprietors as those who own the land bounding upon a watercourse. Such a riparian proprietor owns that portion of the bed of the river (not navigable) which is actually his land to the thread or central line of the stream.
7. Supra note 6.
8. Ibid.
9. Ibid.
10. Ibid.
11. 1959, Agreement for the Full Utilization of the Nile Waters (Nile Waters Treaty).
12. Being Egypt and the Sudan.
13. Supra note 6.
14. Ibid.
15. This is a process that started in 1992 when the Council of Ministers (Nile-COM), the highest authority in the Nile Basin, formed the Technical Cooperation Committee for the Promotion of the Development and Environmental Protection of the Nile Basin (TECCONILE). Within this framework, the Nile River Basin Action Plan (NRBAP) was prepared with support from CIDA. See, also Nabil El-Khodari, 'The Nile Basin Initiative (NBI): Business as usual?' Available at <http://nilebasin.com/documents/madrid.htm>.
16. Quoted in Keith Hayward (2002): 'Catchment Convention', *Water* 21, the Magazine of the International Water Association (IWA), June, 2002.
17. United Nations General Assembly 9, 1997: Press Release UNGA/9248.
18. Supra note 17.
19. For treaty interpretation generally, See, for instance, Lord McNair, *The Law of Treaties* (Oxford University Press, Oxford 1961); Antony Aust, *Modern Treaty Law and Practice* (Cambridge University Press, Cambridge, 2000); J. Fawcett, 'The Legal Character of International Agreements', 30 BYIL 381 (1953); M.S. McDougal et al., *The Interpretation of International Agreements and World Public Order*, Yale, 1967 and Dordrecht, 1993 and H Lauterpacht, 'Restrictive Interpretation and the Principle of Effective in the Interpretation of Treaties', 26 BYIL, 1949, p. 48.
20. Malcolm N. Shaw, *International Law* (Cambridge University Press, Cambridge, 1997), p. 655.
21. For the international law applicable to succession of states and the impact of colonialism see generally work of the International Law Commission, for instance, in the *Yearbook of the International Law Commission* 1974, vol. II, part I, p. 157 et seq and the International Law Association, *The Effect of Independence on Treaties*, London, 1965.

22. Professor Anthony Allan, in his interesting piece 'The Nile Basin: Evolving Approaches to the Nile Waters Management' Occasional Paper 20 SOAS Water Issues Group, June 1999), puts this point succinctly thus: 'The Nile riparians are not equal with respect to their economic and political competence. This lack of asymmetry has always caused awkwardness in inter-state relations and there has been much evidence that downstream states have enjoyed decades of water security brought about by the incapacity of the upstream states to control and dam their tributaries'.
23. Elhance, *Hydropolitics*, 1999. President Sadat is quoted thus: 'We depend upon the Nile 100 percent in our life, so if anyone, at any moment, thinks of depriving us of our life, we shall not hesitate to go to war'. And speaking in 1978, Sadat said Egypt, a desert country, relied on the Nile for its agricultural economy besides producing cheap electricity that drives Egyptian industries. See also Benson Kathuri, 'Study Declares Nile Treaty Obsolete', *The East African Standard* (Kenya), 02.22.2005, Available at <http://www.afrika.no./Detailed/8484.htm>.
24. It has been noted that the globalisation or regionalisation of any conflict exacerbates existing tensions over the contentious issues rendering settlement even more difficult and illusory.
25. See, for instance, the UN Admissions Case (1947) where the international court held that the provisions of Article 4(1) of the UN Charter were exhaustive and that no member of the Security Council or the General Assembly could attach conditions to the admission of a new member beyond those contained in Article 4 (1). See also *The Expenses Case* (1962) ICJ 151.
26. 8 ILM 679 (1969). In force since 1980.
27. *Supra* (24). After the Second World War, the British government commissioned a complete hydrological study on the Nile Basin as a whole, which culminated in the 1958 Report on the Nile Valley Plan. The Report suggested ways to increase the amount of water that reached Egypt. The most important of these suggestions was the construction of the Jonglei canal, which would divert the Nile flow in Southern Sudan (in the Sudd) to avoid the enormous evaporation losses which occurred there. For a more elaborate discussion on this issue, See ICE Case Studies, Case NBO. 1, available at <http://www.american.edu/projects/mandala/TED/ice/NILE.HTM>. See also Collins R. O., 1990, *The Waters of the Nile: Hydropolitics and Jonglei Canal 1898-1988*, Oxford: Clarendon Press.
28. *Ibid*.
29. The principle of *pacta sunt servanda* is enacted at Article 31 (1) of the Convention.
30. *Supra* note 24.
31. *Supra* note 20.
32. Professor Allan (*Supra* 28) posits that the ILC Convention has attempted to de-emphasise the two contentious principles of 'sovereignty' over water within the boundaries of a state and that of 'no harm' which is closely related to that of 'prior use'. Upstream states tend to assert sovereignty; downstream states tend to assert that they should suffer no harm as a result of upstream developments put in place after the downstream has asserted prior use. Therefore, the 1997 Convention reflects the monumental struggle which the participants in the three decades of ILC meetings had to endure in order to bring forward the concept of equitable utilisation. This concept embraces a wide range of other contexts which it is argued should be taken into account when attempting to derive inter-state water entitlements. For a more in-depth analysis of the Convention, see McCaffrey S, 1998, 'Legal Issues in the United Nations Convention on International Watercourses: Prospects and Pitfalls', Paper delivered at World Bank

Seminar on International Watercourses, Washington, World Bank, Nov. 1997 and McCaffrey S. and Sinjela M., 1998, 'The United Nations Convention on International Watercourses', *American Journal of International Law*, Vol. 92, pp. 97 ff.

33. Supra note 30.

34. See, for example, the North Sea Continental Shelf Cases.

35. Professor Allan (Supra 23) notes that the other riparians were invited to participate in the discussions. None did; nor did they agree to recognise the terms of the ensuing agreement at any time since. However, Kenya and Ethiopia have been consistently and trenchantly critical of the 1959 Agreement. In fact, the then Kenyan Energy Minister Hon. Raila Odinga termed the 1929 treaty outdated and in need of review and renegotiation since it was signed on behalf of governments which were not in existence at that time. He went ahead to request Egypt and the Sudan to offer capital and compensation to Kenya, as an upstream country, to enable her invest in projects that would preserve the river system including its headwaters. See Planet Ark: 'Kenya Minister urges review of the Nile water treaty', Feb. 20, 2002. Available at <http://www.planetark.org/dailynewsstorycfr/newsid/14624/story.htm>

36. Jesse H. Hamner and Aaron T. Wolf, 'Patterns in International Water Resource Treaties: The Transboundary Freshwater dispute database', available at <http://www.transboundarywaters.orst.edu/publications/patterns/> and published in the *Colorado Journal of International Environmental Law and Policy*. 1997 Yearbook, 1998. See also Okidi C.O., 1988, 'The States and the Management of International Drainage Basins in Africa', *Natural Resources Journal*, vol. 28, pp.645-669 (Fall).

37. Quoted from David O. Reagan, 'The Nile River: Building or Stumbling Block?' AllAfrica.com, April 30, 2004.

38. Supra note 24.

39. ICE Case Studies (supra note 28), p. 2.

40. Supra note 24.

41. Faustine Rwambali, 'Tanzania ignores Nile Treaty, Starts Victoria Water Project', *The East African Standard* on the Web, Monday, February 9, 2004, p. 1.

42. Supra note 24.

43. The 1929 Treaty need not be the basis for these negotiations. The efforts of the Nile Basin Initiative (NBI) are laudable in this regard. This initiative has been cherished as the greatest plan for a better future in the Nile basin, but it still lacks a formal legal framework.

**Patrick Loch Otieno Lumumba**

**Faculty of Law**

**University of Nairobi**

**Nairobi**

**Kenya**