

## Decolonizing and Reconstructing the Legal Discourse on the Nile River as *sine qua non*

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### Abstract

The Nile River is not only the longest river but is also endowed with fertile natural resources. Because of geo-political and economic advantages, Britain and its colonial allies had strategically occupied riparian states along the Nile River. The colonial powers have substantially contributed to setting precedents for colonial legal discourses in the Nile River basin. Examining the role of the colonial legal discourses along with their potential ramifications in the post-colonial era is thus significant. This article primarily seeks to examine the colonial legal discourse within the framework of the TWAIL (Third World Approaches to International Law) scholarship. Two downstream riparian states clearly seek to maintain the colonial legal discourses and the colonial era inequitable benefits. The influence of downstream riparian states on the attitude of international financial institutions has indeed reinforced the pressure against upstream states. Although upstream riparian states have strived to reconstruct colonial legal discourses, the premises of the arguments forwarded by downstream states are clearly inconsistent with post-colonial realities. This author argues that there is the need to decolonize and reconstruct the colonial legal discourses in light of the TWAIL Scholarship.

### Key terms:

Colonial Treaties · Colonial legal discourse · Post-colonialism · Nile River · TWAIL

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## 1. Introduction

The Nile River is “a giant in terms of length, and a dwarf in terms of the volume it carries,”<sup>1</sup> with its “6,825 km [long] and 3.3 million [km<sup>2</sup>] catchment area.”<sup>2</sup> The River is made up of two main sources, the Blue Nile and White Nile. The former coupled with the Tekeze-Atbara and Baro-Akobo Rivers is the lion’s share contributor of the water flow (which varies between 75% and 90%), while the latter contributes the remaining portion of the Nile River flow.<sup>3</sup> The Blue Nile River streams solely from Ethiopia, while the White Nile River runs from Uganda through Burundi, the Democratic Republic of Congo (DRC), Kenya, Rwanda, and Tanzania.<sup>4</sup> After the two rivers (the Blue Nile

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### Frequently used acronyms

CFA	Nile River Basin Cooperative Framework Agreement
DoPs	Declaration of Principles
GERD	Grand Ethiopian Renaissance Dam
NBI	Nile Basin Initiative
TWAIL	Third World Approaches to International Law
WB	World Bank

<sup>1</sup> Jon Harald Sande Lie (2010). “Supporting the Nile Basin Initiative: A Political Analysis ‘Beyond the River’,” Norwegian Institute of International Affairs, p. 3.

<sup>2</sup> Yacob Arsano (2011). “Negotiations for a Nile-Cooperative Framework Agreement,” Institute for Security Studies, Paper 222, p. 1.

<sup>3</sup> Joseph Dellapenna (1997), “The Nile as a legal and political structure” in Edward H P Brans *et al.*, eds, *The Scarcity of Water: Emerging Legal and Policy Responses* (London: Kluwer Law International), p. 4.

<sup>4</sup> Yusuf Ali Mohammed (2017). *The “Water Security” Principle under Nile Basin CFA and its Ramification* (Germany: Lambert Academic Publishing), p. 9.

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and the White Nile) converge in the capital city of Sudan (Khartoum), the Nile flows toward Egypt and finally discharges itself into the Mediterranean coast.<sup>5</sup>

During the era of the Scramble for Africa, the resources in the river basin fell under the political and economic ambition of British colonial power in the 19<sup>th</sup> century, particularly to transform the Nile River valley “into a cotton farm for the textile industry in England.”<sup>6</sup> With these aspirations, Britain along with its colonial partners, Belgium and Italy, occupied riparian states situated on the Nile River valley and colonized its respective territory for almost a half-century. To legitimize its action, Britain entered into agreements with its allied colonial powers. Thus, Britain and its colonial partners played a significant role in crafting and constructing the colonial legal discourses of the Nile River basin. Although riparian states gained their independence at the end of the colonial period, the colonial legal discourses have continued to exist and influence post-colonial watercourse management.

The approach of international financial institution/s in relation with projects on the Nile basin has contributed to the sustenance of the *status quo* of colonial legal discourses in the Nile River basin. This article gives due consideration to the potential ramifications of the colonial legal discourses on the hitherto watercourse management from the TWAIL perspective.

Although TWAIL can conceptually be articulated in several ways, it is generally considered a revolutionary approach to theoretically and/or methodologically critique international law from the Third World perspective. Furthermore, it aims to deconstruct hegemonic and/or colonial legal regimes to “rectify past injustices [and] meet contemporary needs”<sup>7</sup> of state/s.<sup>8</sup> Born at the Bandung Afro-Asian summit in Indonesia in 1955, the TWAIL

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<sup>5</sup> Ibid; National Geographic, “Nile River”

<https://education.nationalgeographic.org/resource/nile-river>, [Last accessed, 04 Oct. 2023].

<sup>6</sup> See, in general, Jonas Fosslø Gjersø (2015), “The Scramble for East Africa: British Motives Reconsidered, 1884–95,” *The Journal of Imperial and Commonwealth History*, Vol. 43, No. 5, <https://doi.org/10.1080/03086534.2015.1026131> ;Terje Tvedt (2011), “The Nile and the British road to imperialism,” *Aljazeera*, <https://www.aljazeera.com/program/struggle-over-the-nile/2011/6/12/the-nile-and-the-british-road-to-imperialism>, [Last accessed, 04 Oct. 2023].

<sup>7</sup> Endalew Lijalem Enyew (2022). “Sailing with TWAIL: A Historical Inquiry into Third World Perspectives on the Law of the Sea,” *Chinese Journal of International Law*, Vol. 21, No. 3, p. 446, <https://doi.org/10.1093/chinesejil/jmac028>.

<sup>8</sup> Basil Ugochukwu (2022), “When the T(W)AIL wags global environmental governance” in Frans Viljoen, Humphrey Sipalla & Foluso Adegalu, eds, *Exploring African approaches to international law: Essays in honour of Kéba Mbaye* (Pretoria: Pretoria University Law Press), p. 242.

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movement officially commenced at Harvard University in 1997.<sup>9</sup> As the Third World currently encompasses “the Global South, developing states, or postcolonial states”,<sup>10</sup> the riparian states of the Nile River basin belong to the Third World.

Recently, rethinking international law from the TWAIL context is gaining momentum.<sup>11</sup> In particular, scholars have lately revisited contemporary issues of the Third World under the theme of international human rights,<sup>12</sup> the law of the sea,<sup>13</sup> and arbitration,<sup>14</sup> among others, in view of the TWAIL. Although there are collective and independent academic papers dealing with international watercourses situated in the Third World, there is no publicly available article that specifically deals with the TWAIL *vis-à-vis* transboundary watercourses and, specifically, the Nile River basin.

Considering the TWAIL in the context of transboundary watercourses as an evolving one, it is significant to qualitatively scrutinize the colonial legal discourses and trace the contemporary basin-wide controversy of the Nile River basin from the TWAIL perspective. This is so because TWAIL pursues “to understand the deeper connections between international law [and] colonial[ism]”<sup>15</sup> and “seeks to expose the colonial foundations ... residing within international law”.<sup>16</sup> TWAIL not only gives insights to deconstructing

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<sup>9</sup> Larissa Ramina (2018). “TWAIL - ‘Third World Approaches to International Law’ and human rights: some considerations,” *Revista de Investigações Constitucionais*, Vol. 5, No. 1, p. 262.

<sup>10</sup> Enyew, *supra* note 7, p. 441; Ugochukwu, *supra* note 8, p. 240.

<sup>11</sup> See, in general, Antony Anghie (2023), “Rethinking International Law: A TWAIL Retrospective,” *European Journal of International Law*, Vol. 34, No. 1, <https://doi.org/10.1093/ejil/chad005>; Kırdım Şahin (2021), “Understanding TWAIL: A Critical Approach to International Law,” *Public and Private International Law Bulletin*, Vol. 41, No. 1, <http://dx.doi.org/10.26650/ppil.2021.41.1.0042>.

<sup>12</sup> Yıldız Elif (2023), “Postcolonial Approaches to International Human Rights Law: The TWAIL Case,” *Public and Private International Law Bulletin*, Vol. 43, No. 1, <https://doi.org/10.26650/ppil.2023.43.1181972>; Ramina, *supra* note 9.

<sup>13</sup> Enyew, *supra* note 7.

<sup>14</sup> Mansour Vesali Mahmoud & Hosna Sheikhattar (2023), “A Call for Rethinking International Arbitration: A TWAIL Perspective on Transnationality and Epistemic Community,” *Law and Critique*, <https://doi.org/10.1007/s10978-023-09344-7>.

<sup>15</sup> Robert Knox (2014), *A Critical Examination of the Concept of Imperialism in Marxist and Third World Approaches to International Law* (PhD thesis, London School of Economics and Political Science), p. 86.

<sup>16</sup> Amber Smith (2019). *Third World Approaches to International Law: The Responsibility to Protect and Regional Organisations: An Overview* (Lincoln: University of Lincoln), p. 3.

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the colonial discourses but also suggests reconstructing the basin-wide treaty regime/s in a way that is beneficial for all riparian states.

Against the above background, this article addresses the need to deconstruct and reconstruct the colonial legal discourses in the Nile River basin in accordance with the TWAIL scholarship. Accordingly, the next section highlights the colonial legal discourses in the Nile River Basin. The third section addresses the (upper) riparian states' efforts to decolonize and reconstruct colonial legal discourses. Sections 4 and 5 briefly examine the hegemonic role of international financial institutions, notably the intervention of the World Bank and its hegemonic pressure in the guise of facilitating negotiations. The last section provides concluding remarks.

## 2. Colonial Legal Discourse on the Nile River Basin

### 2.1 Genesis of colonial treaty regimes

Colonization (under the motto: *Scramble for Africa*) led to “the territorial annexation and occupation of non-European territories by European states”<sup>17</sup> with the ultimate objective of exploiting resources.<sup>18</sup> Targeting at geopolitico-economic advantages coupled with the Suez Canal’s waterway significance,<sup>19</sup> European colonial powers set their foot in the Nile River valley. Consequently, Britain occupied Egypt in 1882,<sup>20</sup> Kenya in 1920,<sup>21</sup> Uganda in 1893,<sup>22</sup> Sudan in 1898,<sup>23</sup> and Tanzania in 1919.<sup>24</sup> Likewise, Belgium colonized the Democratic Republic of Congo (DRC), Burundi, and

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<sup>17</sup> Knox, *supra* note 15, p. 132; James Gathii (2007), “Imperialism, Colonialism, and International Law,” *Buffalo Law Review*, Vol. 54, No. 4, p. 1014.

<sup>18</sup> See, in general, George Forji Amin (2023), *International Law and the History of Resource Extraction in Africa: Capital Accumulation and Underdevelopment, 1450-1918* (London: Routledge, 2023).

<sup>19</sup> See, in general, Gjersø, *supra* note 6; Amin, *supra* note 18.

<sup>20</sup> “Egypt,” *The British Empire*, <https://www.britishempire.co.uk/maproom/egypt.htm>, [Last accessed, 04 Oct. 2023].

<sup>21</sup> “Kenya,” *The British Empire*, <https://www.britishempire.co.uk/maproom/kenya.htm>, [Last accessed, 04 Oct. 2023].

<sup>22</sup> “Uganda,” *The British Empire*, <https://www.britishempire.co.uk/maproom/uganda.htm>, [Last accessed, 04 Oct. 2023].

<sup>23</sup> “Sudan,” *The British Empire*, <https://www.britishempire.co.uk/maproom/sudan.htm>, [Last accessed, 04 Oct. 2023].

<sup>24</sup> “Tanganyika,” *The British Empire*, <https://www.britishempire.co.uk/maproom/tanganyika.htm>, [Last accessed, 04 Oct. 2023].

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Rwanda in 1885, 1916 and 1918 respectively.<sup>25</sup> Italy occupied Eritrea in 1890,<sup>26</sup> but encountered defeat at the Battle of Adwa in 1896 and could not conquer the other parts of Ethiopia.<sup>27</sup>

Britain first moved to secure its interest against its colonial counterparts. However, its initial ambition appeared to conflict with the interests of its colonial allies, namely France, Germany, Belgium, and Italy.<sup>28</sup> They made concessions in favour of Britain.<sup>29</sup> Notably, France, and Germany, gradually waived their assertion and made peace with Britain after the *Fashoda* crisis<sup>30</sup> and the 1890 Heligoland-Zanzibar Treaty.<sup>31</sup> To maintain its monopoly over the Nile River, Britain negotiated the 1891, 1901, 1906, 1919, and 1925 accords with its colonial allies, Italy, Belgium, and France.

Although Italy could not set foot into Ethiopia and control the Blue Nile River as its colonial sphere of influence,<sup>32</sup> Britain had brokered several treaties with it. Their first agreement dates back to 1891, in which both Britain and Italy signed a “protocol for the demarcation of their respective spheres of influence in Eastern Africa.”<sup>33</sup> Article III of this protocol binds Italy to neither build “any irrigation [n]or other works on the Atbara which might sensibly

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<sup>25</sup> “Belgian Colonies,” *Encyclopedia*, <https://www.encyclopedia.com/social-sciences/encyclopedias-almanacs-transcripts-and-maps/africa-belgian-colonies>, [Last accessed, 04 Oct. 2023].

<sup>26</sup> See, in general, H R Tate (1941), “The Italian Colonial Empire,” *African Affairs*, Vol. XL, No. CLIX, <https://doi.org/10.1093/oxfordjournals.afraf.a099620>.

<sup>27</sup> See, in general, K V Ram (1977), “The Survival of Ethiopian Independence,” *Journal of the Historical Society of Nigeria*, Vol. 8, No. 4; Yirga Gelaw Woldeyes (2020), “The battle of Adwa: an Ethiopian victory that ran against the current of colonialism,” *The Conversation*, <http://theconversation.com/the-battle-of-adwa-an-ethiopian-victory-that-ran-against-the-current-of-colonialism-132360>, [Last accessed, 04 Oct. 2023].

<sup>28</sup> Teferi Mekonnen (2021), “Decolonising the Nile River: Colonial Agreements as Impediments to Sustainable Basin-wide Cooperation,” *Ethiopian Journal of Social Sciences*, Vol 7, No. 2, p. 58–63, <https://doi.org/10.20372/ejss.v7i2.740>.

<sup>29</sup> *Ibid.*

<sup>30</sup> See, in general, Patricia Wright (1972), *Conflict on the Nile: The Fashoda incident of 1898* (London: Heinemann); Mekonnen, *supra* note 28, p. 61–62.

<sup>31</sup> *Agreement between Great Britain and Germany, respecting Zanzibar, Heligoland, and the Spheres of Influence of the two Countries in Africa* (adopted at Berlin on 1 July 1890); Mekonnen, *supra* note 28, p. 62–63.

<sup>32</sup> See, in general, Ram, *supra* note 27; Woldeyes, *supra* note 27.

<sup>33</sup> Arthur Okoth-Owiro (2004), *The Nile Treaty: State Succession and International Treaty Commitments, a Case Study of the Nile Water Treaties* (Konrad Adenauer Foundation) p. 6.

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modify its flow into the Nile.”<sup>34</sup> With the spirit of avoiding conflict and strengthening the neighbourhood, the two colonial powers came up with another agreement in 1901, in which Italy agreed to “regulate its conduct in accordance with the principles of good neighbourship.”<sup>35</sup>

Britain brokered another deal with Italy over the Nile River. Compared to the abovementioned treaty regimes, the 1919 agreement was specifically meant to address Ethiopia’s Lake Tana, which is the main tributary of the Blue Nile River. In this agreement, while affirming Britain as the principal riparian state to use the flow of Lake Tana, Italy assured Britain “that [it] may obtain from Ethiopia the concession to carry out works of barrage in the lake.”<sup>36</sup> Intending to modify the 1919 agreement, the two powers came to terms, and accordingly, exchanged Notes in 1925. According to these Notes, Italy renewed its commitment and acknowledged Britain’s prior appropriation right over the Nile River course and agreed not to put up any hydraulic projects neither on the headstream of the course nor on their tributaries that would diminish the river flow.<sup>37</sup> These treaties and Exchange of Notes were underway while Italy was yet planning to colonize Ethiopia in the 1920s, after its defeat at the Battle of Adowa, in 1896.

Britain also signed additional agreements with other allied colonial powers, Belgium and France. According to Article III of the 1906 Anglo-Belgium treaty, Belgium agreed “not to construct, or allow to be constructed, any work which would diminish the volume of water entering Lake Albert except in agreement with”<sup>38</sup> Britain. In the same year, Britain also brokered the Tripartite treaty with France and Italy. Under Article 4 of this tripartite treaty, the colonial powers agreed to “safeguard the interests of Britain in the Nile basin without prejudice to Italian interests.”<sup>39</sup>

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<sup>34</sup> *Protocols between the Governments of Her Britannic Majesty and Of His Majesty the King of Italy, For the Demarcation of Their Respective Spheres Of Influence in Eastern Africa* (Signed at Rome on 24 March 1891); Okoth-Owiro, *supra* note 33 at 6.

<sup>35</sup> Geoffrey Mtua (2017), *Bilateral Treaties on the Nile River and their Impacts on International Relations* (Master Dissertation, Tumaini University Makumira), p. 32.

<sup>36</sup> *Agreement between Britain and Italy over Lake Tana (Signed at 1919)*; Id., p. 36.

<sup>37</sup> *Exchange of Notes between the United Kingdom and Italy respecting Lake Tsana* on 14 and 20 December 1925; *Ibid*.

<sup>38</sup> *Agreement between the United Kingdom and the Independent State of the Congo modifying the Agreement* signed at Brussels on 12 May 1894 (Signed at London on 9 May 1906); *Ibid*.

<sup>39</sup> *Agreement between the United Kingdom, France, and Italy respecting Abyssinia* (Signed at London on 13 December 1906); *Ibid*, p. 35–36; Okoth-Owiro, *supra* note 33, p. 7.

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Apart from those pacts with its allied partners, Britain also negotiated deals with Ethiopia and Egypt. Concerning the Blue Nile River, Britain tactfully entered into an agreement with Ethiopia in 1902.<sup>40</sup> Although the sole purpose of this treaty was to demarcate the 1600 km long border between Sudan and Ethiopia,<sup>41</sup> the agreement incidentally incorporated Article III, which deals with the Nile River. However, this Article, in general, and the meaning of the word ‘*arrest*’ in English and *Amharic* versions, in particular, only forbids total arrest of the water flow. The English version states:

“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 work across the Blue Nile, Lake *Tsana*, or the *Sobat* which would arrest the flow of their waters into the Nile except in agreement with His Britannic Majesty’s Government and the Government of the Soudan.”<sup>42</sup>

The *Amharic* version states:

“ጃንሆይ፡ ጃግማዊ፡ ምኒልክ፡ ንጉሠ፡ ነገሥት፡ ዘኢትዮጵያ፡ ከጥቁር፡ ዓባይና፡ ከባሕረ፡ ጣና፤ ከሶባት፡ ወንዝ፡ ወደ፡ ነጭ፡ ዓባይ፡ የሚወርደውን፡ ውኃ፡ ከእንግሊዝ፡ መንግሥት፡ ጋራ፡ አስቀድሞ፡ ሳይስማሙ፡ ወንዝ፡ ተዳር፡ እዳር፡ የሚደፍን፡ ሥራ፡ እንዳይሠሩ፤ ወይም፡ ወንዝ፡ የሚደፍን፡ ሥራ፡ ለማሠራት፡ ለማንም፡ ፈቃድ፡ እንዳይሰጡ፡ በዚህ፡ ውል፡ አድርገዋል።”<sup>43</sup>

In spite of efforts to misinterpret these words as if Ethiopia wilfully had abandoned its right to utilize the Blue Nile River other than “domestic uses and local irrigational rights,”<sup>44</sup> the treaty only forbids “complete arrest of the

<sup>40</sup> *Treaties between the United Kingdom, Italy and Ethiopia Relative to the Frontiers between the Soudan, Ethiopia, and Eritrea* (signed at Addis Ababa on 15 May 1902), 1902.

<sup>41</sup> See, in general, Edward Ullendorff (1967), “The Anglo-Ethiopian Treaty of 1902,” *Bulletin of the School of Oriental and African Studies, University of London*, Vol. 30, No. 3; Wondwosen Teshome (2009), “Colonial Boundaries of Africa: the Case of Ethiopia’s Boundary with Sudan,” *Ege Academic Review*, Vol. 9, No. 1.

<sup>42</sup> *Treaty on the Frontiers*, *supra* note 40, Art. III.

<sup>43</sup> The literal translation of the Amharic version is: “His Majesty Menelik II, King of Kings, Ethiopia, has agreed into this treaty not to construct, nor authorize anyone to construct a work that blocks/stops up from river bank to river bank the water descending from the Blue Nile, from the *Tana* Sea, and from the *Sobat* River towards the White Nile without previously agreeing with the English Government.” See Tadesse Kassa Woldetsadik (2013), *International Watercourses Law in the Nile River Basin: Three States at a Crossroads* (London: Routledge), p. 57.

<sup>44</sup> Tadesse Kassa Woldetsadik (2015), “Anglo-Ethiopian Treaty on the Nile and the Tana Dam Concessions: A Script in Legal History of Ethiopia’s Diplomatic Confront (1900-1956),” *Mizan Law Review*, Vol. 8, No. 2, p. 278, <https://doi.org/10.4314/mlr.v8i2.1>.



flows.”<sup>45</sup> The two contracting states were unable to reconcile their differences, and, Ethiopia refused to ratify “the agreement, [and it] consequently repudiated it.”<sup>46</sup>

In 1922, although Britain declared Egypt’s nominal independence, it retained “control of finance and foreign affairs, and maintained a garrison to secure the Suez Canal.”<sup>47</sup> Britain entered into a major shifting agreement with Egypt and brokered the 1929 Exchange of Notes.<sup>48</sup> These Notes not only “recognized Egypt’s acquired rights over the Nile”<sup>49</sup> for the first time, but also guaranteed “Egypt 92.3% [48 of 52 Billion Cubic Meters (BCM)] and Sudan 7.7% [4 of 52 BCM] of the [total] flow of the Nile” River,<sup>50</sup> respectively. Moreover, according to this Exchange of Notes, Egypt not only maintained the “right to monitor the Nile flow, [but also] the right to veto any construction projects”<sup>51</sup> on the watercourse of upstream riparian states’ territory.

In addition to the abovementioned agreement, Britain and Egypt agreed, again, through the 1952 Exchange of Notes, which was meant for the regulation of the Nile River flow and the production of hydroelectric power.<sup>52</sup> Consequently, while reaffirming the 1929 treaty regime, Britain assured the Owen Falls Dam operation would “not entail any prejudice to the interests of Egypt.”<sup>53</sup> Moreover, Britain also pledged the dam would “not adversely affect the discharge of water to be passed through the dam.”<sup>54</sup>

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<sup>45</sup> Ibid.

<sup>46</sup> Ibid; Mtua, *supra* note 35, p. 34; Richard K Paisley & Taylor W Henshaw (2013), “Transboundary governance of the Nile River Basin: Past, present and future,” *Environmental Development*, Vol. 7, p. 63, <https://doi.org/10.1016/j.envdev.2013.05.003>.

<sup>47</sup> The National Archives. “The Cabinet Paper: Britain, Egypt and the Suez Canal,” <https://www.nationalarchives.gov.uk/cabinetpapers/themes/egypt-suez.htm>, [Last accessed, 04 Oct. 2023].

<sup>48</sup> *Exchange of Notes between Her Majesty's Government in the United Kingdom and the Egyptian Government in Regard to the Use of the Waters of the River Nile for Irrigation Purposes* (Signed at Cairo on 7 May 1929).

<sup>49</sup> Erin Johnston (2009). *Factors Influencing a Basin-wide Agreement Governing the Nile River* (MA Dissertation, Simon Fraser University), p. 34.

<sup>50</sup> John Waterbury (1997). “Between Unilateralism and Comprehensive Accords: Modest Steps toward Cooperation in International River Basins,” *International Journal of Water Resources Development*, Vol. 13, No. 3, p. 284, <https://doi.org/10.1080/07900629749692>.

<sup>51</sup> Mtua, *supra* note 35, p. 38.

<sup>52</sup> Okoth-Owiro, *supra* note 33, p. 9.

<sup>53</sup> Ibid.

<sup>54</sup> Ibid.

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## 2.2 Colonial legal discourse in the post-colonial era

In the 1950s and 1960s, through postcolonialism<sup>55</sup> and Marxism,<sup>56</sup> “the anti-colonial movement had morphed into the Third World movement.”<sup>57</sup> In this movement, Africans stood for their rights and started “articulat[ing] a collective political set of grievances and aspirations for dignity and the basic necessities of life.”<sup>58</sup> The countries in the Nile River basin were among the states that expressed their grievance against their respective occupying powers.

Fortunately, Ethiopia was at liberty to object to all colonial treaty regimes.<sup>59</sup> The other upstream riparian states, following their respective independence, have neither retained “the validity of [those colonial] agreements [contracted on their behalf] nor did they ever accept Egypt's claim to acquired or historic rights,”<sup>60</sup> claiming it to be unjust/unfair, as it undermines their right to use the Nile River equitably and reasonably.

In spite of the above, Egypt continues asserting and insisting on the 1929 treaty regime on Kenya, Tanzania, Sudan, and Uganda based on the theory of Universal State Succession.<sup>61</sup> However, the upper riparian states have categorically rejected this assertion and instead invoked the ‘Nyerere’

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<sup>55</sup> See, in general, Ato Quayson (1998), “Postcolonialism” in *Routledge Encyclopedia of Philosophy* (Taylor and Francis).

<sup>56</sup> See, in general, Josiah Heyman (2018), “Marxism,” in *The International Encyclopedia of Anthropology* (John Wiley & Sons, Ltd).

<sup>57</sup> Knox, *supra* note 15, p. 63; Vijay Prashad (2007), *The Darker Nations: A People's History of the Third World* (New Press), p. xv.

<sup>58</sup> Knox, *supra* note 15, p. 63; Prashad, *supra* note 57, p. xv.

<sup>59</sup> See, in general, Ram, *supra* note 27; Mtua, *supra* note 35, p. 36; Mekonnen, *supra* note 28, p. 71.

<sup>60</sup> Mtua, *supra* note 35, p. 38.

<sup>61</sup> The Universal State Succession is a concept that “was inspired by the Roman law conception of succession to the property of a deceased person – regards the sovereign personality of the state as ‘permanent and immortal and thus transmissible to the successor’, and state territory as property sanctioning, thus, the compulsory transmission of all the rights and obligations of the predecessor state to the successor.” See Yusuf Ali Mohammed (2022), “The Endless Controversies Of The Nile River Basin In The Context Of International Transboundary Watercourse Doctrines,” *Social Science University of Ankara Law Journal*, Vol. 4, No. 2, p. 901, <https://doi.org/10.47136/asbuhfd.1050465>; Dereje Zeleke Mekonnen (2010), “The Nile Basin Cooperative Framework Agreement Negotiations and the Adoption of a ‘Water Security’ Paradigm: Flight into Obscurity or a Logical Cul-de-sac?” *European Journal of International Law*, Vol. 21, No. 2, p. 432–433, <https://doi.org/10.1093/ejil/chq027>.

Doctrine of State Succession.<sup>62</sup> This doctrine is named after the then President of Tanzania, *Mwalimu Julius Nyerere*, who is considered to be “an original TWAIL statesman.”<sup>63</sup> He persistently objected to the binding effect of “all [colonial] water agreements or understandings to which they had not been party that were prejudicial to their sovereign rights and national interests.”<sup>64</sup>

The ‘*Nyerere*’ doctrine is affirmed and endorsed as a ‘*clean slate*’ principle under the 1978 Vienna Convention on Succession of States in Respect of Treaties. According to Article 16 of this Convention, a newly independent (or successor) state “is not bound to maintain in force, or to become a party to, any treaty by reason only of the fact that at the date of the [independence or] succession, the Treaty was in force in respect of the territory to which the [independence or] succession of state relates.”<sup>65</sup> Thus, the ‘*Nyerere*’ Doctrine and ‘*clean slate*’ principle safeguard the interests of newly independent (or successor) state/s from any prejudicial action or inaction carried out by occupying colonial (or predecessor) state/s.

Sudan, following its independence, “challenged the lopsided 22:1 allocation ratio that the 1929 Agreement ordained.”<sup>66</sup> Egypt while ignoring the claim of upstream riparian states, gave weight to Sudan’s grievance. Thus, these two downstream riparian states came together for the first time in the history of the Nile River basin as independent states and re/negotiated on the water allocation ratio. Accordingly, they came up with the 1959 agreement for the Full Utilization of Nile waters.<sup>67</sup> They agreed “the entire average annual flow of the Nile to be shared among the Sudan and Egypt at 18.5 and

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<sup>62</sup> The ‘*Nyerere*’ Doctrine of State Succession dismisses “any categorization of international obligations which a successor state might have to accept or reject only because of the nature or type of the obligation.” See Mohammed, *supra* note 61, p. 901–902; Mekonnen, *supra* note 61, p. 434.

<sup>63</sup> *Mwalimu Julius Nyerere* is known for defining “the meaning and practice of neo-colonialism [from his perspective] as the inability of Third World states to change their dependency upon and exploitation by the former imperial powers.” See Makau Mutua & Antony Anghie (2000), “What Is TWAIL?” Proceedings of the Annual Meeting (American Society of International Law), Vol. 94, p. 35.

<sup>64</sup> Arsano, *supra* note 2, p. 4; Mohammed, *supra* note 4, p. 19.

<sup>65</sup> *Vienna Convention on Succession of States in respect of Treaties* (adopted at Vienna on 23 August 1978 by the UN General Assembly, entered into force on 6 November 1996), Art. 16.

<sup>66</sup> Mohammed, *supra* note 4, p. 19; Mekonnen, *supra* note 61, p. 434.

<sup>67</sup> *Agreement Between the United Arab Republic and the Republic of Sudan for the Full Utilization of the Nile Waters* (Signed at Cairo on 8 November 1959).

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55.5 [BCM], respectively,”<sup>68</sup> while assuming the remaining 10 BCM to evaporate.

Alerted by “the colonial era mentality”<sup>69</sup> of the above treaty regime, the upstream riparian states “have rejected the legal foundation of the agreement and its binding force,”<sup>70</sup> arguing that the treaty only binds the contracting downstream riparian states, Egypt, and Sudan. Furthermore, they assert that agreement between the two riparian states can “neither impose any obligations nor confer any rights on”<sup>71</sup> the remaining upstream riparian states.

### 3. Efforts of (Upper) Riparian States to Decolonize and Reconstruct the Colonial Legal Discourse

According to the TWAIL, international treaty regimes that were brokered during the colonial period were never meant to be neutral because they were merely “an instrument of naked power, skilfully dressed up to hide its objective of controlling the colonized world for the benefit of the colonial powers.”<sup>72</sup> Given TWAIL’s multi-disciplinary, academic, social, and political movement that seeks to expose the colonial foundations residing within international law,<sup>73</sup> it significantly helps to deconstruct the colonial legal regimes and neo-colonial initiatives/institutions that are detrimental to the majority riparian states’ interests of the Nile River basin.<sup>74</sup>

Therefore, it is crucial to articulate the legal regimes of the Nile River basin from TWAIL’s scholarship. As briefly provided in the preceding sections, to attain its ultimate colonial geo-politico-economic objectives, Britain tactfully

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<sup>68</sup> Ibid; Mtua, *supra* note 35, p. 41.

<sup>69</sup> T S Bulto (2008), “Between ambivalence and necessity in the Nile Basin: Occlusions on the path towards a basin-wide treaty,” *Mizan Law Review*, Vol. 2, No. 2, p. 224, <https://doi.org/10.4314/mlr.v2i2.56149>.

<sup>70</sup> Mohammed, *supra* note 4, p. 19–20.

<sup>71</sup> *Id.*, p. 20; Vienna Convention on the Law of Treaties (adopted at Vienna on 23 May 1969 by the UN General Assembly, entered into force on 27 January 1980), Art. 34–35.

<sup>72</sup> Obiora Okafor (2005), “Newness, Imperialism, and International Legal Reform in Our Time: A Twail Perspective,” *Osgoode Hall Law Journal*, Vol. 43, No. 1, p. 177; Muthucumaraswamy Somarajah (2001), “The Asian Perspective to International Law in the Age of Globalization,” *Singapore Journal of International and Comparative Law*, Vol. 5, No. 2, p. 285.

<sup>73</sup> Smith, *supra* note 16, p. 3; Michael Fakhri (2012), “Introduction - Questioning TWAIL’s Agenda,” *Oregon Review of International Law*, Vol. 14, No. 1, p. 1–2.

<sup>74</sup> Elif, *supra* note 12, p. 355.

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designed legal discourse in the Nile River basin; and accordingly entered into several treaties with its colonial allies.

According to TWAIL's reasoning, "the formal end of colonialism did not bring about the end of colonial relations."<sup>75</sup> Thus, although the actual occupation era of the colonial powers had ended mainly since the late 1950s and early 1960s, the colonial treaty regimes of the Nile River Basin did not cease to exist. They instead have continued shaping and playing a skewed role in the contemporary discourse. The downstream riparian states, primarily Egypt, are "undoubtedly behind the continuation of the colonial"<sup>76</sup> legal discourses, given the advantage acquired from the extended *status quo* of the colonial 'precedents' coupled with the privilege of receiving the entire water flow without interruption.

Consequently, basin-wide re/negotiation over equitable share and reasonable utilization of the Nile River has failed to bring desirable results. After several ineffective initiatives, such as the 1967 HydroMet,<sup>77</sup> the 1983 'Undugu',<sup>78</sup> and the 1992 TECCONILE,<sup>79</sup> the negotiation had started bearing fruit under the 1999 Nile Basin Initiative (NBI).<sup>80</sup> Thus, the NBI deserves credit for its efforts in the path of decolonization and reconstruction of a basin-

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<sup>75</sup> Anghie, *supra* note 11, p. 9.

<sup>76</sup> Mekonnen, *supra* note 28, p. 2.

<sup>77</sup> HydroMet (Hydrological-Meteorology) was the first initiative founded in 1967 with the UN Development Program and World Meteorological Organization's sponsorship to mainly follow up and regulate the hydro-metrology of Lake Victoria, but it is criticized, *inter alia*, for lack of bearing results, failing to accommodate the interests of upstream riparian states, and accompanying DRC and Ethiopia as observer. See Johnston, *supra* note 49, p. 37-38; Mtua, *supra* note 35, p. 66; Yacob Arsano (2007), *Ethiopia and the Nile: dilemmas of national and regional hydropolitics* (Zurich: Center for Security Studies, Swiss Federal Inst. of Technology), p. 64-65.

<sup>78</sup> 'Undugu' (brotherhood) was initiated by Egypt in 1983 to function along with HydroMet to serve as a forum for an overall basin-wide socioeconomic integration, however, failed due to Ethiopia, Kenya, and Tanzania's observer status coupled with a hegemonic influence of Egypt. See Paisley & Henshaw, *supra* note 46, p. 64; Jutta Brunnee & Stephen Toope (2002), "The Changing Nile Basin Regime: Does Law Matter?" *Harvard International Law Journal*, Vol. 43, No. 1, p. 133.

<sup>79</sup> TECCONILE (Technical Cooperation Committee for the Promotion of Development) was an ambitious initiative established in 1992 with funding from the Canadian International Development Agency, following the phase-out of HydroMet, to boost basin-wide cooperation on hydraulic and developmental Action Plans, but failed because of having Burundi, Eritrea, Ethiopia, and Kenya as observer, Egypt's hydro-hegemony, and delayed/insufficient funding, among others. See Mtua, *supra* note 35, p. 67-68; Johnston, *supra* note 49, p. 39.

<sup>80</sup> *Id.*, 69-70; Johnston, *supra* note 49, p. 40-42.

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wide treaty regime. In particular, it is praised for producing the Nile River Basin Cooperative Framework Agreement (CFA) in 2010.<sup>81</sup> This agreement is the first of its kind in the history of the Nile River basin that came into existence after decade-long negotiations in the presence and participation of all riparian states.<sup>82</sup> Moreover, it is crafted in line with the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses.<sup>83</sup> Upon coming into force, the CFA would establish the Nile River Basin Commission (NBC) and open the door for all riparian states to collectively re/negotiate on how to use the Nile River equitably and reasonably.<sup>84</sup>

However, the optimism relating to the CFA was short-lived due to opposing expectations of upstream and downstream riparian states.<sup>85</sup> For obvious reasons, the colonial and correlated legal regimes were the point of contention. The controversy was typically related to the newly introduced skewing principle named the ‘water security’ principle,<sup>86</sup> and its extended proposed expression to incorporate it into the CFA, in particular.

This can be observed from the efforts of the downstream riparian states to alter Sub-article (b) of Article 14 of the CFA which reads: the “Nile Basin States agree, in a spirit of cooperation, not to significantly affect the water security of any other Nile Basin States.” They insisted on changing the phrase “not to significantly affect the water security of any other Nile Basin State” to “not to adversely affect the water security and current uses and rights of any other Nile Basin State.”<sup>87</sup>

Accordingly, the downstream riparian states are unwilling to revisit the colonial legacy in the inequitable water allocation that goes back to colonial treaty regimes, and which clearly goes against the interest of upstream riparian states.<sup>88</sup> This attitude of downstream riparian states not only erodes the

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<sup>81</sup> *Agreement on the Nile River Basin Cooperative Framework* (opened for signature in May 2010).

<sup>82</sup> Mekonnen, *supra* note 61, p. 427–429; Johnston, *supra* note 49, p. 40.

<sup>83</sup> *Convention on the Law of the Non-navigational Uses of International Watercourses* (Adopted on 21 May 1997 by the UN General Assembly, entered into force on 17 August).

<sup>84</sup> CFA, *supra* note 81, part III.

<sup>85</sup> Mahemud Tekuya (2019), “Governing the Nile under Climatic Uncertainty: The Need for a Climate-Proof Basin-Wide Treaty,” *Natural Resources Journal*, Vol. 59, No. 2, p. 332.

<sup>86</sup> See, in general, Mohammed, *supra* note 4; Mekonnen, *supra* note 61; CFA, *supra* note 81, Art. 15.

<sup>87</sup> CFA, *supra* note 81, Art. 14b: Attachment.

<sup>88</sup> Mekonnen, *supra* note 61, p. 428.

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approach of decolonizing the colonial legal discourses but also undermines the forward-looking approach of reconstructing a basin-wide accord. In connection with this, TWAIL underscores “that such [pro colonial] discourses [are destructive by nature] because they denigrate -not affirm-”<sup>89</sup> a genuine negotiation for a fair share, equitable utilization, and overall proper management of the entire Nile River Basin.

Despite the above issues, a decision was made to make the CFA available for signature. Several riparian states have signed and/or ratified the CFA, signalling a step forward in decolonising the colonial treaty regimes and a fresh start in reconstructing the basin-wide legal framework.<sup>90</sup> Yet, there is still a long way to go, given those countries that have so far ratified are all upstream riparian states, and it has been more than a decade without CFA coming into force.<sup>91</sup> Even if the CFA entered into force after attaining the minimum ratification threshold, its scope of application is (as per Article 34-35 of the 1969 Vienna Convention on the Law of Treaties) limited to the upper riparian states that have ratified the framework. This is going to be the case unless downstream riparian states accede to the CFA by revisiting their ‘claims’ that are based on the colonial discourse.

#### 4. Interventions of the World Bank

As a result of the struggle for independence, “many colonies overthrew the yoke of direct colonial rule.”<sup>92</sup> However, states “quickly realized that political independence was largely illusory”<sup>93</sup> if political, legal, and economic hegemony and pressures persist and if the global hegemony strive by whatever means necessary, to maintain the *status quo* of neo-colonial discourses. In this vein, it is important to pay attention to the impact of international financial institutions, such as the World Trade Organization (WTO), the International Monetary Fund (IMF), and the World Bank (WB). Chimni, for example, notes their hegemonic character<sup>94</sup> and according to Mutua & Anghie these international financial institutions have “created a far-reaching system that

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<sup>89</sup> Mutua & Anghie, *supra* note 63, p. 37.

<sup>90</sup> Mekonnen, *supra* note 28, p. 77.

<sup>91</sup> For the CFA to come into force, although six riparian countries are required to ratify, save Kenya and Burundi which have signed but not ratified it, only four riparian states – Ethiopia, Tanzania, Rwanda, and Uganda – have hitherto ratified it. See *CFA*, *supra* note 81, Art. 43; Mohammed, *supra* note 61, p. 904–905.

<sup>92</sup> Mutua & Anghie, *supra* note 63, p. 34.

<sup>93</sup> *Ibid.*

<sup>94</sup> B S Chimni (2011), “The World of TWAIL: Introduction to the Special Issue,” *Trade Law & Development*, Vol. 3, No. 1, p. 20.

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furthered the neo-liberal project”<sup>95</sup> at the expense of the Third World. Critics underline that these institutions “promote the interests of [powers]”<sup>96</sup> that are at the helm of “the global economy,”<sup>97</sup> while the Third World states have “remained marginal and at the mercy of [foreign] capital.”<sup>98</sup>

In defiance of the foregoing international economic order and to create a fair global financial system, the Third World states had collectively initiated a New International Economic Order (NIEO).<sup>99</sup> However, the initiative could not bear fruit due to several factors.<sup>100</sup> In spite of such challenges, the NBI is operational. Unlike the former three initiatives (the HydroMet, ‘*Undugu*’, and TECCONILE initiatives), the NBI is established with the active engagement of all riparian states, except Eritrea. The initiative was founded with the principal financial support of the World Bank (WB).<sup>101</sup>

The WB has been acclaimed for funding hydraulic and developmental watercourse projects. Moreover, the Bank has a good track record in fostering and playing a positive role in major basin-wide transboundary cooperation and negotiations, of which the Indus water project between India and Pakistan is a notable one.<sup>102</sup> The Bank is similarly hailed for providing continued support to NBI through the Nile Basin Trust Fund (NBTS) and Cooperation in International Waters in Africa (CIWA). Accordingly, the WB helps in the areas of building “a platform for cooperation, expanding the investment

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<sup>95</sup> Anghie, *supra* note 11, p. 16.

<sup>96</sup> Chimni, *supra* note 94, p. 20.

<sup>97</sup> Mutua & Anghie, *supra* note 63, p. 37.

<sup>98</sup> *Id.*, p. 35.

<sup>99</sup> See, in general, Adeoye Akinsanya & Arthur Davies (1984), “Third World Quest for a New International Economic Order: An Overview,” *The International and Comparative Law Quarterly*, Vol. 33, No. 1; Nils Gilman (2015), “The New International Economic Order: A Reintroduction,” *Humanity Journal*.

<sup>100</sup> Anghie, *supra* note 11, p. 19; M Ya’kub Aiyub Kadir (2021), “The Failure of New International Economic Order: a Lesson Learned,” *Yuridika*, Vol. 36, No. 1.

<sup>101</sup> Arsano, *supra* note 77, p. 10.

<sup>102</sup> Saroj Kumar Jha (2023), “Water knows no borders: Transboundary cooperation is key to water security and avoiding conflict,” *The Water Blog*, <https://blogs.worldbank.org/water/water-knows-no-borders-transboundary-cooperation-key-water-security-and-avoiding-conflict> [Last accessed, 13 Nov. 2023]; Neda A Zawahri (2009), “India, Pakistan and cooperation along the Indus River system,” *Water Policy*, Vol. 11, No. 1, <https://doi.org/10.2166/wp.2009.010>.

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portfolio, and providing analytical and technical support to the Nile countries.”<sup>103</sup>

However, the World Bank’s support to the NBI has failed to be holistic because it is reluctant “to support any upstream [hydrohalic developmental project proposals] on the Nile [River course] that might disrupt the vital flow of water to”<sup>104</sup> downstream riparian states. According to the WB Operational Policies 7.50 (OP 7.50) Projects on International Waterways,<sup>105</sup> the Bank releases its fund “only when such [hydraulic project on a transboundary watercourse can] garner the support of water sharing political entities.”<sup>106</sup> Although this manual might be considered a positive move in encouraging basin-wide cooperation and treaty arrangement, it also serves as an instrument in sustaining the *status quo* of the colonial legal discourse in the Nile River basin.

The downstream riparian states are unwilling to compromise the 1929 Anglo-Egypt colonial treaty regime and the 1959 Egypt-Sudan treaty that had given them the privilege to exclusively use the whole river flow. This has impeded endorsement on any hydraulic project proposal on the upstream watercourse. The foregoing fact coupled with their geopolitical significance indicates that the downstream riparian states are accorded undue priority. Their interests, mainly “Egypt, are well represented in the” WB.<sup>107</sup> As a result, the upper riparian states, notably Ethiopia, have failed to secure international “funds to develop [their] own broad irrigation network [and other

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<sup>103</sup> World Bank (2019), “Stronger Together: 20 Years of Cooperation around the Nile,” <https://www.worldbank.org/en/news/feature/2019/02/22/stronger-together-20-years-of-cooperation-around-the-nile>, [Last accessed, 04 Oct. 2023].

<sup>104</sup> Roger Thurow (2003), “Ravaged by Famine, Ethiopia Finally Gets Help From the Nile”, *Wall Street Journal*, <https://www.wsj.com/articles/SB106979937643978400>, [Last accessed, 04 Oct. 2023]; Mahemud Tekuya (2018), “The Egyptian Hydro-Hegemony in the Nile Basin: The Quest for Changing the Status Quo,” *The Journal of Water Law*, Vol. 26, No. 2, p. 11–12.

<sup>105</sup> *World Bank Operational Policies 7.50 Projects on International Waterways* (adopted by the WB in June 2001, Revised in March 2012), 2012; S M A Salman (2009), “Appendix 5a. Op 7.50 – Projects On International Waterways (2001)” in *The World Bank Policy for Projects on International Waterways* (Brill Nijhoff).

<sup>106</sup> Tekuya, *supra* note 104, p. 11; Fasil Amdetsion (2008), “Scrutinizing the Scorpion Problematique: Arguments in Favor of the Continued Relevance of International Law and a Multidisciplinary Approach to Resolving the Nile Dispute” *Texas International Law Journal*, Vol. 44, No. 1/2, p. 12; J Anthony Allan (1999), “The Nile Basin: Evolving approaches to Nile waters management,” (University of London, SOAS Water Issues Group), p. 3.

<sup>107</sup> Allan, *supra* note 106, p. 3.

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developmental hydraulic projects; [thus] the land that feeds the Nile [becomes] unable to feed itself.”<sup>108</sup>

The prejudiced approach of the WB is also attributed to the ongoing dispute over the Grand Ethiopian Renaissance Dam (GERD). Unable to secure international project funds for the abovementioned reasons, upstream riparian states have no alternative but to look for other financial means for their developmental projects on the transboundary river course. In this regard, Ethiopia took the first step, and managed funding on its own, and commenced constructing the GERD on the Blue Nile River in April 2011.<sup>109</sup> The downstream riparian states, mainly Egypt, asserted their objection right from the inception stating that the project was launched without their express consent, which would be a threat to their water security and in violation of the colonial treaty regimes, among others.<sup>110</sup>

As the GERD became a *fait accompli*, the three riparian states, Egypt, Ethiopia, and Sudan, have started negotiations.<sup>111</sup> Although their decade-long negotiations have resulted in the establishment of various technical committees of experts and the signing of the 2015 Tripartite Declaration of Principles (DoPs),<sup>112</sup> they have not yet agreed on the phases of filling and operation of the GERD.<sup>113</sup> It is widely asserted that colonial legal regimes “are to blame for the unresolved dispute over”<sup>114</sup> these issues.

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<sup>108</sup> Thurow, *supra* note 104.

<sup>109</sup> John Mukum Mbaku (2020), “The controversy over the Grand Ethiopian Renaissance Dam”, *Brookings*, <https://www.brookings.edu/articles/the-controversy-over-the-grand-ethiopian-renaissance-dam/>, [Last accessed, 04 Oct. 2023]; Max Security (2012) “Strategic Analysis: Repercussions of Chinese investments in the Nile River Basin,” <https://www.max-security.com/reports/strategic-analysis-repercussions-of-chinese-investments-in-the-nile-river-basin/>, [Last accessed, 04 Oct. 2023].

<sup>110</sup> Hana Attia & Mona Saleh (2021), “The Political Deadlock on the Grand Ethiopian Renaissance Dam,” German Institute for Global and Area Studies.

<sup>111</sup> Fabricius Peter (2023), “GERD is a *fait accompli*, so it’s time to get real,” *Institute for Security Studies*.

<sup>112</sup> *Agreement on Declaration of Principles between the Arab Republic of Egypt, the Federal Democratic Republic of Ethiopia and the Republic of the Sudan on the Grand Ethiopian Renaissance Dam Project* (Signed at Cairo on 23 March 2015).

<sup>113</sup> See, in general, Wossenu Abtew & Shimelis Behailu Dessu (2019), *The Grand Ethiopian Renaissance Dam on the Blue Nile*, Springer Geography (Springer International Publishing, 2019).

<sup>114</sup> Mahemud Tekuya (2020), “Colonial-era treaties are to blame for the unresolved dispute over Ethiopia’s dam,” *The Conversation*, <http://theconversation.com/colonial-era-treaties-are-to-blame-for-the-unresolved-dispute-over-ethiopia-dam-133538>, [Last accessed, 04 Oct. 2023].

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## 5. Hegemonic Pressure in the Guise of Facilitating Negotiations

To maintain the privilege of the colonial legal discourse and secure its hegemonic interest while brokering on the framework of the first filling and operation of the GERD, the downstream riparian states, mainly Egypt, called for international interventions.<sup>115</sup> Although Ethiopia had persistently objected to a third-party intervention in their trilateral negotiations, it acquiescently accepted the intervention of the United States (US) during President Trump's administration in 2019.<sup>116</sup> This enabled the WB along with the US Department of the Treasury to tacitly take a proactive role in mediating the tripartite negotiations over the first filling and operation of the GERD.<sup>117</sup>

Given its rich technical expertise, the WB could have played a positive role in speeding up the negotiation process and narrowing down the differences among the three riparian states.<sup>118</sup> However, its partisan (non-neutral) role was unmasked when the WB crafted the framework agreement on the first filling and operation of the GERD and submitted the draft to the three riparian states for signature.<sup>119</sup> Egypt apparently accepted the proposed framework

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<sup>115</sup> The downstream riparian states, notably Egypt, made several efforts in pushing the international communities, *inter alia*, the USA, UN Security Council, Arab League, and the international financial institution, mainly the WB, on the GERD matter. See, Mahemud Tekuya (2021), "Sink or Swim: Alternatives for Unlocking the Grand Ethiopian Renaissance Dam Dispute," *Columbia Journal of Transnational Law*, Vol. 59, No. 1, pp. 88-89.

<sup>116</sup> *Enterprise* (2019), "Egypt, Ethiopia, Sudan agree to US-backed technical talks", <https://enterprise.press/stories/2019/11/07/egypt-ethiopia-sudan-agree-to-us-backed-technical-talks/>, [Last accessed, 04 Oct. 2023].

<sup>117</sup> US Department of the Treasury (2019), "Joint Statement of Egypt, Ethiopia, Sudan, the United States, and the World Bank", <https://home.treasury.gov/news/press-releases/sm827>, [Last accessed, 04 Oct. 2023].

<sup>118</sup> Ayat Al Tawy (2019), "World Bank can be key player in reaching final deal over Nile dam: Analyst", *Ahram Online*, <https://english.ahram.org.eg/NewsContent/1/64/355340/Egypt/Politics-/World-Bank-can-be-key-player-in-reaching-final-dea.aspx>, [Last accessed, 04 Oct. 2023].

<sup>119</sup> Ethan Chiu (2023), "The Grand Ethiopian Renaissance Dam: Approaches to Cooperation and Conflict Resolution," *The Yale Review of International Studies*; Attia & Saleh, *supra* note 110; Addis Getachew (2020), "Cutting aid to Ethiopia haunts Trump in election", *Anadolu Agency*, <https://www.aa.com.tr/en/africa/cutting-aid-to-ethiopia-haunts-trump-in-election/1960477>, [Last accessed, 04 Oct. 2023].

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agreement that clearly secures its best interest; while Ethiopia vehemently rejected the crafted agreement.<sup>120</sup>

Ethiopia backed down from signing the framework agreement asserting it would amount to undesirable water allocation results, which would, in turn, affirm the colonial treaty regimes and be detrimental to the interest of all upstream riparian states.<sup>121</sup> Furthermore, Ethiopia refused to bear all the burden alone in the case of annual drought, prolonged drought years, or prolonged dry seasons.<sup>122</sup> Ethiopia also rejected the binding nature of the draft agreement along with the proposed dispute resolution mechanism that would resort to arbitration.<sup>123</sup>

Despite disapproval of the draft, the US and WB pressured Ethiopia to sign the proposed legal framework agreement on the initial filling and operation of the GERD. They also engaged in further pressures and threatened to withhold aid funds and/or impose financial sanctions.<sup>124</sup> Nevertheless, Ethiopia

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<sup>120</sup> Mohamed Helal & Hesham M Bekhit (2023), "So near, yet so far: an Egyptian perspective on the US-facilitated negotiations on the Grand Ethiopian Renaissance Dam," *Water International*, Vol. 48, No. 5, p. 609. <https://doi.org/10.1080/02508060.2023.2230851>

<sup>121</sup> Elias Meseret (2020), "Ethiopia won't be forced by US on dam, foreign minister says", *AP News*, <https://apnews.com/article/39183ccfeed1c0796ad38796d459ff3b>, [Last accessed, 04 Oct. 2023]; Tekuya, *supra* note 115, p. 91–92.

<sup>122</sup> Considering annual drought, prolonged drought years, and prolonged dry seasons would occur if water flowing from the GERD is at/less-than 37 BCM/year, 37-39 BCM/4-year and 40 BCM/4-years in a row, respectively, Ethiopia shall commit to releasing agreed matrix, 62.5% and 50% of water above 603 meters above sea level of the Grand Dam, respectively. See Helal & Bekhit, *supra* note 120, p. 600–601; Tekuya, *supra* note 115, p. 90.

<sup>123</sup> Tewelde Aregawi (2020), "Analysis: Why Ethiopia should avoid arbitration as a means of dispute settlement in a possible GERD deal", *Addis Standard*, <https://addisstandard.com/gerd/>, [Last accessed, 04 Oct. 2023]; *Aljazeera* (2020), "Egypt: Ethiopia rejecting 'fundamental issues' on Nile dam," <https://www.aljazeera.com/news/2020/6/14/egypt-ethiopia-rejecting-fundamental-issues-on-nile-dam>, [Last accessed, 04 Oct. 2023].

<sup>124</sup> Daniel W Abate (2023), "The Global Perspective of the Dilemma of Cooperation and Complex Relationships between the Upper and Lower Nile Riparian States After 2011," *Journal of Globalization Studies*, Vol. 14, No. 1, p. 36; Mbaku, *supra* note 109; Robbie Gramer (2020), "Trump Mulls Withholding Aid to Ethiopia Over Controversial Dam", *Foreign Policy*, <https://foreignpolicy.com/2020/07/22/trump-administration-africa-aid-ethiopia-egypt-gerd-nile-sudan-dispute-negotiations/>, [Last accessed, 04 Oct. 2023].

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tactically withdrew from the negotiation, stating that it needed time for further national deliberation.<sup>125</sup>

Trilateral negotiations of Egypt, Ethiopia, and Sudan on the first filling and operation of the GERD took place under the auspices of the African Union (AU) in 2020; and it was confidentially pursued in the United Arab Emirates (UAE) for the following two years; yet, there was no breakthrough.<sup>126</sup> In spite of the stalemate in the negotiations, Ethiopia has undertaken its initial first,<sup>127</sup> second,<sup>128</sup> third,<sup>129</sup> and fourth<sup>130</sup> fillings of the GERD in accordance with its scheduled filling timeframe in 2020, 2021, 2022, and 2023, respectively. Ethiopia affirms that the fillings are in line with the 2015 Tripartite DoPs, and the principle of *equitable and reasonable use* of transboundary water resources *without causing significant harm* against downstream states. Moreover, Ethiopia has launched its first electrification phase from the GERD in 2022.<sup>131</sup>

In August 2023, the three riparian states publicly pledged to reinstate their dialogues and expressed their commitment to finalizing the remaining sticking issues over the framework on the filling and operation of the GERD.<sup>132</sup>

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<sup>125</sup> Enterprise (2020), “Washington GERD talks wrap without agreement as Ethiopia no-shows,” <https://enterprise.press/stories/2020/03/01/washington-gerd-talks-wrap-without-agreement-as-ethiopia-no-shows-12744/>, [Last accessed, 04 Oct. 2023].

<sup>126</sup> Yusuf Ali Mohammed (2023), “Battle over the Nile: Can Egypt, Ethiopia, and Sudan Reach an African Deal over the GERD?” *Politics Today*. <https://dx.doi.org/10.2139/ssrn.4557848>

<sup>127</sup> AFP (2020), “Ethiopia says it has reached first-year target for filling divisive mega-dam”, *France 24*, <https://www.france24.com/en/20200721-ethiopia-says-it-has-reached-first-year-target-for-filling-divisive-mega-dam>, [accessed, 04 Oct. 2023].

<sup>128</sup> AFP (2021), “Ethiopia completes second phase of filling of the ‘Grand Renaissance’ dam,” *Africanews*, <https://www.africanews.com/2021/07/19/ethiopia-completes-second-phase-of-refill-on-controversial-mega-dam-on-the-nile/>, [Last accessed, 04 Oct. 2023].

<sup>129</sup> Addis Getachew (2022), “3rd filling of Ethiopia’s Nile dam reservoir completed”, *Anadolu Agency*, <https://www.aa.com.tr/en/africa/3rd-filling-of-ethiopia-s-nile-dam-reservoir-completed/2660034>, [Last accessed, 04 Oct. 2023].

<sup>130</sup> Samson Berhane (2023), “Ethiopia Completes Fourth Filling Of Grand Ethiopian Renaissance Dam”, *The Reporter*, <https://www.thereporterethiopia.com/36438/>, [Last accessed, 04 Oct. 2023].

<sup>131</sup> Aljazeera (2022), “Ethiopia starts electricity production at Blue Nile mega-dam,” <https://www.aljazeera.com/news/2022/2/20/ethiopia-electricity-production-gerd-blue-nile-mega-dam>, [Last accessed, 04 Oct. 2023].

<sup>132</sup> John Mukum Mbaku (2023), “Egypt and Ethiopia are finally working on a water deal – what that means for other Nile River states,” *The Conversation*, <http://theconversation.com/egypt-and-ethiopia-are-finally-working-on-a-water-deal-what-that-means-for-other-nile-river-states-210255>, [Last accessed, 04 Oct. 2023].

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Accordingly, in late August, they pursued their first round of negotiations in Cairo, Egypt.<sup>133</sup> In late September, they had their second round of talks in Addis Ababa, Ethiopia.<sup>134</sup> However, there were no fruitful results.<sup>135</sup> The failure of the trilateral negotiations is, again, attributable to the colonial legal discourses.

Therefore, a paradigm shift in the Nile River basin legal discourse is indispensable. Egypt and Sudan should rethink and commit themselves to decolonizing and reconstructing the colonial legal discourses as per the TWAIL scholarship. Thus, decolonizing and reconstructing the colonial legal discourse is '*sine qua non*' for a step forward.

## 6. Conclusion

As discussed in the preceding sections, the Nile River, fell under the British politico-economic ambition which brokered several treaties with – its colonial allies, Italy, Belgium, and France, and – two riparian states, Ethiopia, and Egypt. Accordingly, Britain tactfully brokered bilateral treaties with Italy in 1891, 1901, 1919, and 1925, with Belgium in 1906, and a tripartite pact with France and Italy in 1906. In a similar vein, Britain pursued a skewed approach in the 1929 treaty to allow Egypt, “the lion share ... consumer of the Nile River”<sup>136</sup> flow. The 1929 Anglo-Egypt agreement and the subsequent 1959 immediate post-colonial treaty regime allocate the whole bulk of the Nile River flow between the two downstream riparian states. This pursuit has reappeared under the veil of acquired/ historical right of the two states, Egypt, and Sudan.

Saving Ethiopia's timely objection from the outset, the remaining upstream riparian states, upon gaining independence, have protested vehemently

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<sup>133</sup> Fred Oluoch (2023), “First round of Egypt, Ethiopia Nile talks stalemate,” *The East African*, <https://www.theeastafrican.co.ke/tea/rest-of-africa/first-round-of-egypt-ethiopia-nile-talks-stalemate-4355856>, [Last accessed, 04 Oct. 2023].

<sup>134</sup> Aljazeera (2023), “Second round of negotiations on Ethiopia's mega-dam wrap up,” <https://www.aljazeera.com/news/2023/9/25/second-round-of-negotiations-on-ethiopias-mega-dam-wrap-up>, [Last accessed, 04 Oct. 2023].

<sup>135</sup> Addis Standard (2023), “Ethiopia, Egypt and Sudan conclude GERD negotiations with no significant progress,” ASDailyScoop, <https://addisstandard.com/asdailyscoop-ethiopia-egypt-and-sudan-conclude-gerd-negotiations-with-no-significant-progress/>; AP (2023), “Latest talks between Ethiopia, Sudan and Egypt over mega dam on the Nile end without breakthrough,” *AP News*, <https://apnews.com/article/ethiopia-egypt-nile-water-dispute-143261644df90d9762a3392c300a4e27>, [Last accessed, 04 Oct. 2023].

<sup>136</sup> Mohammed, *supra* note 61, p. 915.

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against the colonial and immediate post-colonial regimes per the ‘Nyerere’ Doctrine and ‘*clean slate*’ principle of State Succession. Although the upstream riparian states have endeavoured to reconstruct colonial legal discourses, the negative impact of colonial legal discourses pursued by the two downstream states (Egypt and Sudan) in maintaining its status quo has impeded basin-wide negotiations that had led to the draft Cooperative Framework Agreement.

In a manner that exerts pressure against downstream riparians, the WB has issued its partial ‘OP 7.50’ waterway funding manual which blocks hydraulic project proposal on the Nile watercourse by imposing prior endorsement from downstream riparian states, which is impractical given their long-standing objection against such project and colonial veto privilege. As highlighted above, the WB had even stepped in and clearly played a non-neutral role in the tripartite mediation process by crafting a draft framework for the initial filling and operation of the GERD that secures the interest of Egypt by affirming the status quo of the colonial legal discourse. In spite of these direct and indirect coercive mechanisms, financial sanctions including withholding aid, Ethiopia did not give in, and it had no option other than withdrawing from the Washington-led negotiations.

Although the decade-long tripartite negotiations over the filling and operation of the GERD had intermittently continued, the issues raised by the downstream states (Egypt and Sudan) were greatly influenced by the colonial legal discourse thereby rendering fruitful results unattainable. The core factor in the basin-wide controversy and contestation over the GERD is deeply rooted in colonial legal discourses. Thus a pragmatic basin-wide convention and a win-win breakthrough including the GERD –as a *sine qua non*– require decolonizing and reconstructing the colonial legal discourses as per the TWAIL scholarship. \_\_\_\_\_■

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