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## EGYPT, NILE AND INTERNATIONAL LAW

SEYFİ KILIÇ

### ***About the author:***

*Seyfi Kılıç is a researcher in the ORSAM Water Research Programme. He studies especially Middle East water politics. He is also interested in international water law, environmental politics and North–South relations. Seyfi Kılıç has a PhD from Ankara University on environmental politics, master's degree from Hacettepe University on hydropolitics and bachelor's degree in international relations from Gazi University.*

### ABSTRACT

This policy brief assesses the international law dimension of the dispute between Egypt and Ethiopia over the Great Renaissance Dam on Blue Nile. The dispute between Egypt and Ethiopia regarding the main water source of the Nile River, the Blue Nile River, seems to be evolved into a different dimension. Although this problem dates back to the last part of the 19th century, the dispute has been inflamed with the start of construction activities of the Great Renaissance dam, which has a former name of Millennium, by Ethiopia. The Renaissance Dam, which was built for the purpose of energy production, has escalated the tension regarding the Nile River between Egypt and Ethiopia. Egypt benefits from the Nile River almost unilaterally and attributes this utilization to "historic rights", which is not secured alone in the international water law, and also not accepted by the other riparians in the basin. In the colonial period Britain made some arrangements with the other European colonial powers in order to guarantee the flow of the Nile. However the basin countries, after their independence announced that they do not recognize those agreements. Egypt recently seeks to take the dispute to the international arena by both judicial and non-judicial mechanisms. In this policy brief all the mechanisms are evaluated independently and tried to find an answer whether Egypt can achieve to hinder the construction of the Renaissance Dam by taking the issue to the international arena.



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### Introduction

With Ethiopia's starting to construct the Grand Renaissance dam on the Blue Nile River, Egypt's years of dominance over the Nile has almost come to an end. Egypt, both under British rule and also after gaining its independence, signed many bilateral and multilateral treaties with other countries in the basin in order to guarantee the Nile River flow without being interrupted. However, none of these arrangements covered all countries in the basin. Additionally, following their independence from British Empire, these countries had declared in many ways that they did not recognize the previous agreements signed by the United Kingdom on their behalf.

Egypt has expressed its discomfort on every occasion after Ethiopia started the construction of dam in 2011, and declared to the public that it could even take military measures to prevent the dam's construction during the rule of Morsi who was

ousted by a coup d'etat.<sup>1</sup> A series of negotiations have taken place between Egypt, Sudan and Ethiopia in the meantime, but the parties have failed to reach an agreement to fulfill each other's expectations. Egypt asserts that the amount of water that reaches to the country will dramatically diminish due to the aforesaid dam under construction. Despite the fact that the Grand Renaissance dam on the Blue Nile river, which contributes 85% of the Nile water, is primarily designed for hydroelectric power generation, not involving any water consuming activity, apparently Egypt is insistent on its claim. Considering the positions in the negotiations, Egypt's desire to guarantee its future utilizations of the river is stated explicitly.

Considering the Great Renaissance dam's main purpose, which is producing electricity, it is highly unlikely that there will be any reduction in the amount of the water reaching Egypt, except evaporation losses. However, it

should also be taken into account that during the filling period of the dam, there will be slight decrease in the flow that reaches to the downstream. Egypt alleges that its future benefits will be compromised by reduced water release not only at the filling stage of the dam, but also after the completion of the dam. However it does not seem to be in accordance with the international law to hinder upstream utilizations by claiming future needs.

It is observed that there has been no resolution to the problem between Egypt and Ethiopia since 2011, in spite of the ongoing three-lateral meetings namely Egypt, Ethiopia and Sudan. The third round of meetings ended on 4 January 2014 and it is understood that riparian countries could not reach an agreement on fundamental issues.<sup>2</sup> It appears that Egypt is ready to take the matter to the international platform. Some Egyptian officials have already stated their plan to take this issue to the United Nations Security Council.<sup>3</sup> Getting other countries involved in an issue relating to transboundary waters or other international problems is generally a preferred strategy of the relatively weaker side. However, in this particular issue, Egypt had been accepted as the dominant power in the basin for years. In this case, it will not be wrong to suggest that even Egypt has acknowledged that it has lost

the characteristic of being the dominant power in the basin.

While Egypt is confident about finding support in the international arena, it is highly unlikely that it will achieve the level of support it hopes to receive in this matter. There are several reasons, both political and legal, that justify that statement. Firstly, Egypt claims that upstream activities cannot be done without its consent according to international law and treaties. However, the colonial-era treaties have no binding force on the upstream countries. Secondly, despite being the most comprehensive regulations in the basin up until the 2010 Framework Treaty among upstream countries, the 1959 Treaty, between Egypt and Sudan, has binding force for only these two countries. Despite these reasons that undermine its position, Egypt considers a number of mechanisms to deal with this matter in terms of international law. These are grouped below as judicial and non-judicial mechanisms.

### 1. Non-Judicial Mechanisms

Egypt can seek for good offices, mediation, conciliation and inquiry as non-judicial mechanisms for the conflict. In this section, each mechanism is assessed individually.

**Good Offices:** Generally a third country or an international or-

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ganisation, which has no stake in the disagreement, offers its friendly assistance for the settlement of a dispute. While this mechanism can come directly from a third party, it can also be instigated by either party in the dispute. Naturally, both parties will reserve their right to accept or reject such initiative. The key point here is whether third party can bring any settlement to the core of the problem. Although it is generally accepted that good offices mechanism is not expected to so, in many cases, third parties are observed providing some recommendations for a settlement.<sup>4</sup>

In this particular problem, the African Union is accepted as the first actor which can start such an initiative. However, according to the recent news in the media, Egypt appears to be reluctant to involve the African Union into this dispute.<sup>5</sup> The reason for this is either Egypt does not want to weaken its position in the conflict due to its problematic relationship with the African Union, or Egypt does not believe that the African Union will be effective as needed. When considered in this context, a specialized agency of the United Nations is a preferable solution for Egypt. The justification for this can be explained with the general attitude of the United Nations agencies towards downstream countries'

claims. Nevertheless, it should be reiterated that all parties must approve good offices mechanism to lead the way.

**Mediation:** Mediation is similar to good offices mechanism. Third party engages in negotiations and offers its assistance by itself or engages with the conflict resolution upon receiving invitation from relevant countries. The main theoretical difference is that mediator attends negotiation process and directly proposes settlements to the parties. Again, both parties must accept the position of the mediator at the beginning of negotiations.<sup>6</sup> It is also possible that both parties are obliged to accept this mechanism based on a previously approved treaty.

However, there is not such a treaty between Egypt and Ethiopia. The most important mediation settlement was reached between India and Pakistan with the World Bank's intervention regarding Indus River water dispute. However, at the time of that dispute, World Bank had a stronger position in the eyes of both parties in the conflict. Because of its economic power, which was very important for both countries, World Bank used this influence and enforced the settlement relatively easily. Nowadays, there is no such organization - neither World Bank nor another - which has such influence on either Egypt or Ethiopia.

**Conciliation:** Conciliation can be described as a mechanism where disputed parties establish a body and then present their problem to this body and ask for settlement. In practice, these conciliation commissions are made up of three or five expert members. Following the selection of equal number of commissioners by each country in the conflict (one or two each), the rest of the members will be chosen by these commissioners.<sup>7</sup>

Blue Nile dispute also involves Sudan as a third country which is also part of the dispute. Sudan used to take sides with Egypt in many conflicts regarding Nile for years. However, Sudan changed its historical political course after the Great Renaissance Dam construction and started to support the upstream riparian Ethiopia.<sup>8</sup> Therefore, a conciliation commission, set up by all parties in the conflict, has the potential to leave Egypt at a disadvantaged position against Ethiopia and Sudan. It is possible that Ethiopia will seek Sudan's involvement in such a commission, while Egypt will disagree. It looks highly unlikely that a conciliation commission will be established under these circumstances.

**Inquiry:** Whilst it is possible to use inquiry mechanisms in different areas of conflicts, in this dispute, it will be useful to



determine substantive and quantitative data for the solution of the dispute. In order to apply this principle, there is a need to establish a commission. The same principle as in a conciliation commission is applied, when setting up this inquiry commission.<sup>9</sup> Two nominees come from each conflicted countries and another member is selected with the agreement of those. It is needless to say that these study commissions can be established after an agreement of all relevant parties.

## 2. Judicial Mechanisms

Judicial and non-judicial mechanisms are differentiated from each other in that judicial mechanisms are based on the main sources of international law norms, such as treaties, customs and general principles of law. Two main mechanisms come to the fore: international arbitration and international courts.

**International Arbitration:** Overall, arbitration is a mecha-

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nism where the dispute is presented to the third party whose decision has binding force. In other words, the parties to a dispute refer it to arbitrator (one or more persons or institutions) and agree to be bound by the arbitration decision. In a broad sense, rules to be applied in the arbitration can be *ex aequo et bono*, a amiable composition or containing political solutions as well as rules of law.<sup>10</sup> If taken in the narrow sense, only rules of law will be applicable to the dispute resolution and in this case arbitrator is envisaged to be a lawyer. In international law, there is no mandatory rule for the implementation of arbitration in resolving disputes. Moving on from this point, there are two ways to take a dispute to an arbitrator. First, there is a treaty indicating that any future disputes will be resolved by arbitration mechanisms. Second, after the emergence of a dispute, parties can agree on an arbitration agreement also known as *compromis*.

Currently, there is no previous agreement between Ethiopia and Egypt regarding arbitration mechanism. Under the current circumstances, both parties may agree on *compromis* to pursue this path to resolve their dispute. However, it ought to be considered that Ethiopia may not wish to take this dispute to international arbitration. Even if Ethiopia accepts arbitration

mechanism, by asking for narrow scope of arbitration rules, it will want to prevent the emergence of a final decision on the subject.

***International Court of Justice:*** The International Court of Justice (ICJ) is the principal universal judicial organ. A dispute can be brought to the Court through a unilateral application by one state against another or can be submitted together to the court on the basis of a special agreement between the two states.

If there is a unilateral application to the court, then *forum prorogatum* process starts. The Court seeks an answer from the other party in the dispute. In order to proceed with the case, the Court requires second party's acceptance of the Court's jurisdiction and explaining and answering questions regarding the essence of the problems before the Court or not refusing Court's jurisdiction or waive assertion of the Court's jurisdiction.<sup>11</sup> As seen here, the consent of both conflicted parties is essential in order to take any dispute before the International Court of Justice. It is not important whether the case proceeding is initiated with unilateral application or compromise agreement. This difference is only related to the timing of the will of disputed states. It is clear that if a party of the dispute does not want to submit the issue to the court, the International Court of Justice will not play a role.



## Conclusion

Submitting the issue to the United Nations Security Council is also evaluated by the Egyptian officials. From the hydro-political perspective, China, a member of the United Nations Security Council, which uses the full advantage of being an upstream country, must be taken into account. Egypt's chance to persuade China is close to zero, due to China's position as an upstream country. Egypt also ought to consider China's economic activities in Ethiopia. China's activities in the development of African water resources are receiving significant support from the African countries. Along with these activities, China increases its influence in Africa. At the same time, China avoids inflationary pressures by transferring accumulated foreign exchange abroad. It is high-

ly unlikely that China will give up all those benefits and its influential status in the Nile basin, especially in Ethiopia, where it has many investment and construction projects.

In this context, it seems that there is nothing that Egypt will achieve by taking the dispute into the international arena. Neither judicial nor non-judicial mechanisms are compulsory to resolve this dispute. This subject should be carefully considered by not only the Blue Nile's riparian countries, but also White Nile's riparian countries. These countries have to aim to resolve the issue while ensuring the greatest benefits to all riparian actors. It is clear that there will not be any benefit to be gained by relying on foreign powers, by involving them into the dispute. Negotiations among the riparians seem to be the best and applicable solution to the dispute.

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### ENDNOTES

- 1 "Ethiopia dam fears exaggerated, say experts", <http://egyptmonocle.com/EMonocle/ethiopia-dam-fears-exaggerated-say-experts/>, (02.04.2014).
- 2 "Egypt-Ethiopia dam impasse remains as talks reach dead-end", <http://english.ahram.org.eg/NewsContent/1/64/90880/Egypt/Politics-/EgyptEthiopia-dam-impasse-remains-as-talks-reach-d.aspx>,(09.03.2014).
- 3 "Egypt may take Nile dam dispute with Ethiopia to UN", <http://www.al-monitor.com/pulse/originals/2014/01/egypt-renaissance-dam-dispute-internationalize.html>, (02.04.2014).
- 4 B. G. Ramcharan, "The Good Offices of the United Nations Secretary-General in the Field of Human Rights", *The American Journal of International Law*, Vol. 76, No. 1, p. 131.
- 5 "Egypt has no plans to take Ethiopia dam complaint to African Union", <http://www.amharicmovies.com/news/7834-egypt-has-%EF%BB%BFno-plans-to-take-ethiopia-dam-complaint-to-african-union.html>, (02.04.2014).
- 6 Jacob Bercovitch et. al., "Some Conceptual Issues and Empirical Trends in the Study of Successful Mediation in International Relations", *Journal of Peace Research*, Vol. 28, No. 1, Special Issue on International Mediation (Feb., 1991), p. 7-8.
- 7 Permanent Court of Arbitration Optional Rules for Conciliation of Disputes Relating to Natural Resources and/or the Environment, article 4.
- 8 "Sudan FM criticises Egypt over Ethiopian dam dispute", <http://www.sudantribune.com/spip.php?article50013> (31.03.2014)
- 9 Richard B. Bilder, "International Third Party Dispute Settlement", *Denver J. International Law & Policy*, Vol: 17:3, 1989, p. 481.
- 10 Louis B. Sohn, "The Role of Arbitration in Recent International Multilateral Treaties", *Virginia Journal of International Law*, p. 177.
- 11 Sienho Yee, "Forum Prorogatum Returns to the International Court of Justice", *Leiden Journal of International Law*, vol 16 (2003), p. 702.

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**Ortadoğu Stratejik Araştırmalar Merkezi (ORSAM)**

Süleyman Nazif Sokak No: 12-B Çankaya / Ankara

Tel: 0 (312) 430 26 09 Fax: 0 (312) 430 39 48

[www.orsam.org.tr](http://www.orsam.org.tr)