THE 1959 AGREEMENT "FOR THE FULL UTILIZATION OF THE NILE WATERS": THE CRUX OF THE PROBLEM IN THE NILE BASIN WATER USE

By Mekdelawit Messay Deribe

Mekdelawit Messay Deribe is a PhD student at Florida International University and a researcher on the Nile.

The introduction of the *1959 agreement* between the United Arab Republic and Sudan for the full utilization of the Nile waters notes that the earlier 1929 agreement "….provided only for the partial use of the Nile waters and did not extend to include a complete control of the river waters…." (United Arab Republic and Sudan, 1963: 64). With this aim of "fully utilizing" and controlling the Nile water, Sudan and Egypt signed a new updated agreement on November 8, 1959. Neither Ethiopia nor the other upstream riparian countries, which are the natural sources of the water, were parties to this agreement. As a bilateral agreement between Egypt and Sudan, this agreement has no legal hold over Ethiopia or the other riparian counties. However, the ramifications of this agreement for water use in the Nile basin extends beyond the two countries in the agreement and affects the whole basin and hence merits analysis.

The 1959 Agreement and its Controversies

I. The Spirit

The difficulty with the 1959 agreement starts with its nomenclature "Agreement for the full utilization of the Nile waters." Consider this scenario where two downstream countries with minimal to zero contributions to the Nile agree to "fully" utilize the Nile water, without consulting or including the other (at the time seven now nine) riparian countries. This is a disregard for the legitimate rights of the other countries and their interests. As Ethiopia's Ambassador to Kenya, Meles Alem noted, the agreement is an "*insult to the national prides*" of the other nations in the basin (Ezega News, 2019). This is especially so for Ethiopia, for whom the Blue Nile basin accounts for 70% of its surface water resources and which contributes more than 86% of the annual flow of the Nile. Never in the history of transboundary watercourse-related treaty making has there been such an unashamedly partial legal arrangement.

II. The Numbers

The 1959 agreement builds on what it calls the "acquired rights" (the existing water uses of Egypt and Sudan, which at the time was set at 48 billion cubic meters (BCM) for Egypt and 4 BCM for Sudan) and adds "the benefits of the Nile control projects" to reach at an allocation of 55.5 BCM of water to Egypt and 18.5 BCM to Sudan. (United Arab Republic and Sudan, 1963: 64-66). It even considers environmental losses and allots more than 10 BCM of water for evaporation losses from the High Aswan Dam in Egypt, accounting for the total annual flow of the Nile waters as measured at Aswan (at the time 84 BCM), leaving absolutely no water to the water source countries. This allocation can only be sustained if the other nine riparian countries keep utilizing absolutely nothing from the Nile, and here lies the crux of the problem in the Nile Basin.

III. The Provisions

The fifth section of the agreement under "General provisions" states that "if it becomes necessary to hold any negotiation concerning the Nile waters, with any riparian state, outside the boundaries of the two Republics, the Governments of the Sudan Republic and the United Arab Republic shall agree on a unified view after the subject is studied by the said Technical Commission." Note that this "technical commission" is composed of an equal number of members from Sudan and Egypt. Moreover, the agreement stipulates if negotiations with this commission results in an agreement to construct works by other countries on the Nile, this same technical commission would also "draw all the technical execution details and the working and maintenance arrangements' ', "…. supervise the carrying out of the said technical agreements" and "…. ensure that their (other riparians) consumption shall not exceed the amounts agreed upon" on any agreed upon constructions on the Nile (United Arab Republic and Sudan, 1963: 72-74). This provision further states that should the claims by other riparian countries, which are the natural sources of water, merit the possibility of allocating some portion of the Nile water, it would be "deducted" equally from the "shares"of Egypt and Sudan.

These provisions subject the legitimate claims and water rights of other riparian countries to the scrutiny and judgment of the technical commission and by extension to Sudan and Egypt. The agreement also extends and institutionalizes "veto power" on any project in the upstream states, reminiscent of the 1929 agreement.

The three pillars of current transboundary water laws are the principles of equitable and reasonable use, the principle of causing no significant harm and the duty to cooperate (UN, 1997: 4-6). However, the 1959 agreement stands in sharp contrast to all these principles, disregarding the sovereign rights of other riparian countries to their fair share and foreclosing the future developments of fellow basin states. It places Egypt and Sudan as the self-proclaimed "masters" of the Nile waters and subordinates claims by the other riparian countries to the good will of Egypt and Sudan.

IV. The Implications

Ethiopia and all the other Nile basin countries are not party to the 1959 agreement and as such, they are not legally bound by the treaty. In fact, they, most notably Ethiopia, have all along been objecting to this concord and the other colonial era agreements on the Nile. This is demonstrated by many equatorial Nile basin countries adopting the 1962 Nyerere Doctrine rejecting relics of colonial era treaties and by the multiple aide memoires, communiques and letters sent out by Ethiopia rejecting the agreement and reiterating its inalienable right to use its resource in 1956, 1957, 1980 and 1997.

Still, the 1959 agreement has pervaded Nile water discussions for decades because of its far-reaching implications and sanctioned discourse on the subject matter. The 1959 agreement presumes uninterrupted, natural flow from upstream countries to secure the aforementioned "claimed shares" for Sudan and Egypt and here lies the root of the problem. Egypt and Sudan can only get their self-allocated "shares" if the upper riparian countries do not consumptively use any of the Nile water. The 1959 agreement, in this sense, resembles another dated and myopic doctrine, the doctrine of absolute territorial integrity, which states that downstream riparian countries are entitled to the uninterrupted flow of a transboundary river, essentially curtailing any use

upstream. This doctrine, because of its partial, unequitable, and unreasonable premise has been discarded from the realm of international transboundary water sharing.

The supposed "shares" of Egypt and Sudan put forward by the 1959 agreement is claimed at the expense of the legitimate shares of the remaining nine riparian countries, which is at odds with the cardinal principles of international water law.

V. The Repercussions

The Negotiation on the Grand Ethiopian Renaissance Dam (GERD)

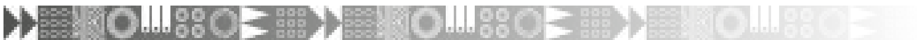
There are issues even among Sudan and Egypt as to how much each country is using from the Nile. While Sudan blames Egypt for using more than its "quota" *Egypt claims it is only "relieving" Sudan from the burden of "excess water"* (Sudan Tribune, 2017). Regardless of this controversy, the "current uses" of Egypt and the Sudan is established by the 1959 agreement. Therefore, any scenario, study or argument that uses "current use" as a basis by default uses the 1959 agreement as a starting point. Using this agreement as a starting point for research or analysis will always result in skewed outcomes since the playing field is not a level one to begin with. It doesn't matter whether the terms "existing use," "current use," or "historical use," are applied as a baseline in negotiation. This approach still amounts to accepting and legitimizing the 1959 agreement which involves accepting the zero shares of the other nine riparian countries which contribute the totality of the Nile water. This scenario is an impossibility, a non-starter for Ethiopia. This is why Ethiopia rejected the request to use "existing uses" as a baseline for additional studies recommended by the International Panel of Experts in 2013 in the GERD negotiations process.

The CFA Negotiation

The same conundrum is observed in the process of negotiating the Nile Basin Cooperative Framework Agreement (CFA). After fully participating in the CFA negotiations for 13 long years, Sudan and Egypt would not sign the CFA over disagreements on article 14b. All the riparian states except Egypt and the Sudan agreed Article 14b to read as "not to significantly affect the water security of any other Nile Basin state" whereas Egypt and Sudan wanted the sub-article to be rewritten as, "not to adversely affect the water security and current uses and rights of any other Nile Basin State" (emphasis added) (*Agreement on the Nile River Basin Cooperative Framework, 2010: 25*). The major difference on the mentioned sub-article lies on the need by all water source countries to change the status quo and replace it "a water security for all" approach, while Egypt and Sudan insist on maintaining a status quo which is based on the 1959 agreement that denies water source countries their fair share.

Scientific Studies

The far reaching and distorting impact of the 1959 agreement has even seeped into science and academic writings. Thousands of water resource studies online (such as *El-Rawy et.al, 2019* and *El-Nashar and Elyamany, 2018*) start by assuming 55.5 BCM and 18.5 BCM of water from the Nile as the "shares" or "water quotas" and part of the water budgets of Sudan and Egypt, which shows how ingrained this treaty is in the scientific sphere. Moreover, because there is no fair and equitable benchmark for water use, modelers, scientists, and researchers are pushed into an uncomfortable corner where they are forced to use these skewed baselines even though they openly state that their work is not a justification for validity of these biased arrangements.



Many acclaimed scientists in the field of water resource modeling and management such as *Wheeler et al., 2016, 2018, 2020, Sterl et al., 2021* use the numbers from the 1959 agreement as a basis for running their models. These authors openly write they do not acknowledge or approve of these agreements or their implications for water allocation in the Nile Basin. While this effort is commendable, it is extremely difficult to understate the impacts and the repercussions of these studies. The narrative that circulates in the media is the result of such studies, studies that assess the impact of GERD on the "historical shares," "existing use," and established workings of existing infrastructures in Sudan and Egypt, all designed on the premises of the 1959 agreement.

It is clear that no respectable scientist or researcher would give legitimacy to a system which reinforces a historical disparity and an unjust status quo. But implicitly that is exactly what science based on this baseline is achieving. Regardless of the good intentions and disclaimers of scientists and researchers, the damage is already done if the results of these studies are used for the assessments of harm or impact from the GERD. This is not a criticism of the science behind these studies but rather an inquiry of the premise analysis is based upon, the constraints used in the models and the yardstick used to measure harm caused to other riparian nations.

It is important to applaud and sincerely appreciate researchers who understand the implication of using the1959 allocation when using it as basis for their studies, who call it out and in no way endorse this skewed status quo. However, the fact that so many studies use the 1959 agreement as a baseline provides a respectable façade for this historical atrocity, gives it legitimacy and a semblance of propriety. The scientific community should be cognizant of this difficult predicament when it comes to researching the Nile water use. This mistake of implicitly endorsing the treaty is worse than the intent of the original treaty itself, as this historical mistake would now at face value have the protection of science.

The Threshold for Harm

The 1959 agreement allocated the whole of the Nile water between Sudan and Egypt completely. The Nile is accounted for between use in these two countries skewing the benchmark for measuring harm. Any upstream use, especially consumptive use, would take away from this total share of Egypt and Sudan and be perceived as "harm."

As far as international law is concerned, what is prohibited by law is the causing of significant harm, quite distinct from the causing of harm. As long as the equitable quota of each country is not known there is no way of assessing the legally significant harm on countries. The baseline for quantifying synergies and tradeoffs, harm and impacts cannot rationally be based on an arrangement which has a monopoly (rather a duopoly) on the system. To an entity which is used to enjoying the whole pie, when in fact it was only entitled to a slice, anything less than the whole pie is going to seem unjust and be perceived as "significant harm." However, it is the risk to each country's fair share of the pie (and not the whole pie) that constitutes significant harm. While studies which identify the impact of the GERD or future developments in Ethiopia or other upstream riparian countries can be used for internal adaptation and planning measures of Sudan and Egypt, they cannot be the measures of significant harm or impact on the transboundary or basin wide spectrum.

Foreclosure of Future Development

There is no doubt that the level of infrastructure development in the Nile Basin is quite lop-sided. As such any new development will surely affect the working of prior developments. Let's leave aside the crucial fact that these prior developments were not conducted with the acknowledgement or cooperation of the upstream countries and were completely unilateral endeavors that did not consider future development upstream. Still, the aim of negotiations and science should be to come up with adaptive and collaborative ways of synchronizing the workings of older infrastructure to the new circumstances in the basin and not have the workings of new infrastructures bend back backwards to ensure business-as-usual for existing ones. Sadly, the latter is what most research and interventions are aimed at.

The way the current talks and dealings are going, regarding the GERD for example, are interventions limiting the storage and operational flexibility of the dam, having the GERD bend backwards to maintain the usual operation or steer as little as possible from the current workings of the systems outside the GERD. This is the very definition of foreclosure of future developments.

Such studies overshadow the need for adaptive measures in downstream countries in response to development upstream. There is little talk of sharing the burden and adaptive solutions in downstream infrastructures with the exception of a few attempts (see *Eldardiry and Hossain, 2021; El-Nashar and Elyamany, 2018*). Take the US drafted agreement of 2019; while it proposes multiple stringent measures on the GERD to mitigate impacts of drought, there is absolutely no mention of suggested changes or adaptive measures to be taken by downstream workings (*Ethiopia Insight, 2020*).

Conclusion: Looking to the Future

It is clear there is a fundamental bias when it comes to the use of the Nile, a narrative which has developed over many years, be it in the science, politics, media or public setting. There is a long way to go with regards to leveling off the playing field, getting rid of the bias and installing some semblance of equity. Securing the water needs of Egypt must be detached from securing "historical rights," a concept which does not exist in the lexicon of international water law. Sadly, it would take nothing less than a constitutional amendment for Egypt to come to terms with the concept of equitable and reasonable use as it is committed to keeping the status quo and the "historical rights" of Egypt as a matter of its *constitutional duty* as stated in Article 44 (Egypt's Constitution,2014:19). This is a tall order, but a paradigm shift is necessary in the Nile Basin if the basin is to have any hope for sustainable and equitable use of this shared water in the long term.

There are mechanisms to ensure water security to all the basin riparian countries, without clinging to unjustly claimed water quotas. But without a level playing field we cannot possibly hope to engage in collaborative and integrated water use in the basin. The increasing demands in water resulting from population and economic growth combined with the stress on water resources due to climate change necessitates integrated and collaborative water use. There will be a growing discrepancy between the demand for water and the available supply in the Nile Basin. The way to bridge this gap is to capitalize on the resources of the basin for the benefit of all basin states. Research has shown that numerical water reallocation cannot be an end in itself to ensure long term, sustainable and equitable use in the Nile Basin (*Deribe and Berhanu ,2021*). The future of the basin lies in *regional collaboration* and utilizing the resources of the basin for the benefits of

all countries by considering it as a single unit. For this to happen, the first step would be to get rid of the outdated, exclusionist and unequitable 1959 agreement and enforce the Cooperative Framework Agreement (CFA) which would put equitable and reasonable use and the obligation not to cause significant harm and the duty to cooperate as the working principles in the basin. From there we can go on to establish the equitable shares of each country as baselines to engage in collaborative use. The knowledge of equitable shares of countries will open doors for better science and research, rational formulations for thresholds of harm and smoother collaborations for synchronized and integrated basin wide water use options such as physical and virtual water trade, development of co-owned infrastructures, benefit sharing schemes and synchronized regional planning and development plans. It is therefore in the interest of downstream countries to come to terms with the notion of equitable use by disavowing their association with the 1959 agreement – the crux of the problem in the Nile Basin.

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