"DECLARATION OF PRINCIPLES"
ETHIOPIA GOT A LOAF AND A HALF
Tecola W. Hagos

I. In General


Prof. Tecola W Hagos

I start this short commentary acknowledging Minga Negash, Seid Hassan, Mammo Muchie, Abu Girma, Aklog Birara and Getachew Begashaw (Scholars, for short reference) for bringing to our attention in a timely manner the copy of the translation in English of the Declaration of Principles (DoP, here after) agreed upon by Ethiopia, Egypt, and Sudan. I appreciate their brief comment as well even though it was cursory and glosses over key issues in generalized form: [See "Misplaced Opposition to the Grand Ethiopian Renaissance Dam (GERD): Update"] By contrast, Dr Aklog Birara's recent article is a lot more detailed and tackles several issues based on possible bad-faith of Egypt and Sudan, the two signatory States, against Ethiopia. There is also the comment from the SMNE that seems concerned about full disclosure of the negotiation process of the DoP, but spoiled the whole exercise by interjecting overly sectarian political agenda.

My reaction to the DoP is a shade or two different than the comments by the Scholars, Aklog Birara and a number of other commentators and chat bloggers, but it seems to me that we all share fundamental grounds/principles in our consideration of the DoP i.e., our concern for a fair deal for Ethiopia that will preserve the sovereignty, security, and territorial integrity of Ethiopia. However, one significant problem I see in most of the comments has to do with competence, for such comments are mostly written by laymen with limited legal training or no training in international law at all. Even though some of the commentators are experts in different fields, these types of issues on international rivers non-navigational use or in general require specialized knowledge. Thus, my first advice to such commentators is to be less vociferous and also less dogmatic and learn from people who have the training and experience in the field, even better to form discussion groups on the rich literature (collected material) on the legal regime dealing with the non-navigational use of cross border rivers and lakes.

The first item that must be recognized by all of us is the existence of an international regime of law and custom dealing with the waters of the Blue Nile and all other rivers flowing into the Nile River from the Ethiopian highlands. As a sovereign nation Ethiopia too, just like all other nations, is a subject of existing international law regime. We often hear and read about the 1929, and 1959 agreements between Egypt and Sudan (interested parties) and their one time colonial master/protector Britain. On the other hand, we hardly ever hear about other problematic treaties allegedly entered between Ethiopia and former colonial powers, such as Britain, or France, or Italy et cetera.

II. The Declaration of Principles [DoP]

a) New Paradigm

I consider the DoP as a step in the right direction. I am looking at a first international understanding by the three States with ancient roots, the DoP signatories, on the use of the waters of Abaye River (Blue Nile). No agreement, or understanding, or even an approving nod of any kind has ever happened where all the three States had participated in their long coexistence as

physically close neighbors. The status quo has always favored Egypt the most and Sudan as a distant second. It is this stalled or frozen condition that is being thawed and changed to accommodate the national interests of Ethiopia and other riparian states of the Nile River. The status of the DoP in international law and custom may not be crystal clear. It could be seen as having the force of a "Preamble" to a well constituted multinational treaty only if such a treaty is entered, or it may be considered having the force of some moral convention. Obviously, the DoP is not a treaty, not even an international instrument notwithstanding the claims by some experts to the contrary under the Vienna Convention on Succession of States in respect of Treaties of 1978, 1996. If the DoP is considered in a court of law, it might be used to show intent pursuant to a valid claim by the suing nation pursuant to some breach of a valid bilateral or multilateral treaty.

The most significant provisions of the DoP were drawn from the UN Convention on the Law of the Non-navigational Uses of International Watercourses (here after, UN Convention). The Convention was adopted by the General Assembly of the United Nations on 21 May 1997, and was entered into force on 17 August 2014. [See General Assembly resolution 51/229, annex, Official Records of the General Assembly, Fifty-first Session, Supplement No. 49 (A/51/49).]

This means the DoP is not some individuals' hubris or esoteric formulations, but is based on international guidelines or framework for such agreements between riparian states that share a common watercourse with varying degrees of historical use, need, and colonial period experiences. To wit:

1. DoP Article 1. Principle of cooperation, similar to UN Convention Article 8 General obligation to cooperate.

2. DoP Article 3. Principle of not causing significant damage, similar to UN Convention Article 7 Obligation not to cause significant harm.

3. DoP Article 4. Principle of fair and appropriate use, similar to UN Convention Article 5 Equitable and reasonable utilization and participation
- To ensure fair and appropriate use, the three countries will take into consideration all guiding elements mentioned below, similar to UN Convention Article 6 Factors relevant to equitable and reasonable utilization.

4. DoP Article 7. The principle of exchange of information and data, similar to UN Convention Article 9 Regular exchange of data and information.

5. DoP Article 10. The principle of the peaceful settlement of disputes, similar to UN Convention Article 17 Consultations and negotiations concerning planned measures and UN Convention Article 33 Settlement of disputes.

The above five items represent uncanny similarities of the core provisions in both the Declaration of Principles (DoP) and the 1997 United Nations Convention on the Non-navigational Uses of International Watercourses. These similarities in such significant areas of controversies ought to reassure skeptic Ethiopians to have some faith in the process of negotiation of a comprehensive series of agreements between the governments of Ethiopia, Egypt, and Sudan. I suggest for our benefit and sanity to think carefully before jumping into

making statements just based on political personal agendas or hate of a group. Far from such group, the patriotic and often lucid advocate for good governance, Aklog Birara, seems to have a deeply felt skepticism on the possibility that Egypt will take advantage of the situation by interpreting the provisions of the DoP in a manner that will support its position of exclusive use of the waters of the Nile as it has done for centuries, and thereby reading in the text of the DoP all kinds of imaginary monsters lurking behind vague provisions/articles to bounce on poor and innocent Ethiopia. I am amazed how Aklog would reach such concrete negative conclusions on the DoP when he has read the very Convention that is the basis for most of the provisions of the DoP as I have shown above. He pointed out also how the panel of experts called Group of the Nile Basin (GNB) from Egypt could be used to subvert and undermine the Sovereignty of Ethiopia. I understand the concern of Aklog for I too never trusted international experts of any kind on a crucial life and death decision involving a sovereign nation; however, I believe that is of second-tier issue and there will be adequate mechanism to confine the scope of the decisions of such outside panel of experts. .

I am convinced to give the benefit of doubt to our negotiators and the leadership behind all these effort with national agenda of good will rather than cut them down with sharp razor of political ambition and hunger for power. The DoP is no doubt a "Framework Agreement" than an international multilateral treaty. For that treaty to materialize, we may have to wait may be prompt the future our country as events unfold on the ground while finishing the building of the Great Ethiopia Renaissance Dam. Key words: "finishing the building" of the Dam.

b) Problems of Layman's legalese

When I read absolutist comments like the ones I mentioned above that assert in so many ways that Ethiopia has lost or is losing its sovereignty over its resources due to the signing of the DoP, I am concerned how anything could be done in Ethiopia at all. Such views tell me how one can easily lose sight of the way the world functions, that we pay no attention to the fact that nations, people, even individuals are tied together by complex man-made and natural systems and structures, such as conventions, economies, trade, travel, breeding, et cetera. No country is an island that is simply surviving on its own and on its own absolute terms. Even the United States, the richest and most powerful nation on earth, is tied down to great responsibilities and restraints to a great extent by such complex structures of conventions, law regimes, customs and norms, comparative advantages, history et cetera. .

I have read a number of comments including the one by the Scholars that seem in panic mode that Ethiopia lost its sovereign power over its resource by agreeing to the DoP. As I said earlier, the DoP did not create and allocate any form of legally binding rights and duties at this stage to any of the signatory states of the DoP. For example, the Scholars wrote the following that can easily confuse readers whether there is room at all for the anticipated and fully expected negotiations:

> "In fact, it is not clear what Ethiopia is getting out of this agreement other than allaying Egypt's official opposition to the dam. Indeed, Egypt appears to have succeeded in forcing Ethiopia to perform near impossible tasks as any perceived negligence or underperformance can serve as a ground for declaration of dispute. No free nation should be submitted into such a contract voluntarily."

To begin with, there is no "contract" but only a declaration of principles to be used as guide in a future negotiation. And no contract is valid if entered under duress, anyways. People should be really careful with their diction when they write incomprehensible statements like the one above that says absolutely nothing based on a fair reading of the DoP. Thus, this type of approach where individuals or groups write and argue as if there is already a treaty is premature and polarizes and undermines the future negotiations in tackling the serious problems that need be ironed out properly and a corresponding legal instrument is drawn. This is the beginning of a truly complex and difficult negotiations.

c) Sovereignty and National Security

Ethiopia must look at the situation of this "agreement" by looking at the half full rather than the half empty glass, to use a crude analogy. We live in an ever interdependent World of numerous nation-states. And each maximizing its advantages and seeking more—thus the sources of conflicts. Here is where statesmanship, support by citizens, creative outside-of-the-box thinking et cetera matters. Simply screaming or repeating "I am Sovereign" will end up becoming a kind of mantra without existential life-impact on the people of Ethiopia or on the people of Egypt and Sudan.

The confusion between "property" and "sovereignty" seems to persist in the minds of some individuals who are posting responses to the comments of the individuals and groups I mentioned. Let me be absolutely clear here that Sovereignty is not a concept that is born out of United Nations General Assembly Resolutions, Conventions, Covenants, or Multi-state treaties; rather "Sovereignty" is well established political and legal concept in customary international law. Wherever we are finding the term "sovereignty" used in conventions, covenants, multi-state treaties et cetera it can be considered as evidentiary, and strictly speaking such instruments are not sources of Sovereignty. I can understand the mix-up. Even those well versed in international law do falter at times in trying to figure out the demarcation where Sovereignty encompasses and where individual or corporate proprietary interest starts without affecting the basic concept of Sovereignty.

The concept of Sovereignty is presumed in very many United Nations Declarations, Covenants, Conventions, and multi-lateral treaties. I am stating, as a matter of fact, that the term "sovereignty" is being affirmed or being codified and not being created or sourced in such international instruments. We must appreciate the fact of the process of defining "sovereignty" also limits its scope as well. For Example, the ICCPR Article 47 is not a provision dealing with allocation of resources, it simply affirms the **sovereign rights of States in exploiting their resources**. Some have raised arguments to draw some kind of parameter (limitation) on the concept of sovereignty by claiming that ICCPR dealt with only shared resources and not all resources. There is not a single authoritative writing on that point. In fact, the legislative history as well as formal reservations and declarations of State Governments on record deposited with the United Nations Secretariat did not mention in any of such international public instruments anything of "shared resources."

d) Patriotism is Laudable

I acknowledge the fact that our leaders, past and present, with the best of intentions sometimes might have made wrong decisions that might result in disastrous consequences in years to come. The most recent was committed by Meles Zenawi in signing up the Algiers Agreement of 2000 preempting and reviving long dead colonial period Treaties and convention thereby resulting in Ethiopia's loss of its coastal territories and territorial waters historic claims of Sovereignty. Failure to discuss such poor judgments of our leaders is no less problematic than the original errors. For example, we are deliberately avoiding even an oblique discussion of the 1902 Treaty entered between Emperor Menilik II and Great Britain that both Egypt and Sudan claim the Treaty rights therein as successor states wherein Menilik II had agreed not to construct dams on the Blue Nile, the Atbara/Sobat, and Lake Tana that would "arrest" the flow of their waters:

> ***Art. III*** *– His Majesty the Emperor Menelek 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.]* [Note that the Amharic version has no reference to "the Government of the Soudan."]

The fact of the matter was that Menilik II was threatened with an imminent invasion by Britain unless he signed such a Treaty, and within such confined atmosphere he used language to protect Ethiopia's interest as best he could and succeeded to some extent too. The Treaty does not forbid construction as long as there is flow of water. Of course, the validity of such a colonial period treaty is questionable for obvious reasons of the fact that it is violently constituted. However, one must not justify using the argument of "colonial treaty" the independent actions of Ethiopian Emperors who dealt with colonial powers the same way as those leaders of colonized nations who sign agreements under full control of the colonial powers. The fact that Ethiopia was not a colony of Britain or of anybody else, must weigh in our comments. True, the 1902 Treaty was a treaty between two independent sovereign States but with enormously unequal military and economic power. [See Edward Ullendorff, "The Anglo-Ethiopian Treaty of 1902," Bulletin of the School of Oriental and African Studies, University of London, Vol 30, pages 641-654, 1967.]

A more enlightened interpretation of that Treaty holds that Ethiopia can build dams as long as Ethiopia does not "arrest" ["completely block," in the Amharic version] the flow of the waters of the Blue Nile, or that of Lake Tana. There are other problems with that treaty due to challenges whether the treaty was properly ratified in Britain and a challenge as to the status of Sudan as a successor state. Nevertheless, the construction of the GERD seems to be mindful of such understanding of our past Emperor's decision to sign the 1902 Treaty.

III. The Experience of other States

Ethiopia is not the only state with riparian state controversies. The number of international treaties governing or regulating the use of great rivers like the Nile River, the Euphrates River, the Rhine River, the Mekong River, the Ganges River et cetera are in abundance and the literature can be easily accessed by anyone willing to do the research and bear the reading of such painfully boring legal documents. I can attest to that tedious process because I have studied a number of such international agreements, treaties, and conventions on cross-border rivers and lakes shared by several nations. This would include also international dams that are shared by several nations.

Although there have been thousands of conflicting claims on sharing the waters of international rivers and dams built thereon, there was only one case that the International Court of Justice (ICJ) considered and entered judgment on, in its almost seventy years of life. [*GabCikovo-Nagymaros Project (HungarylSlovakia), Judgment,* ***1.*** *C. J. Reports 1997,* p. 7] It is quite puzzling that there were not that many cases decided by the ICJ. One plausible explanation could be the element of time, such conflicts when they flare-up quickly escalate to deadly confrontations of states facing other states with military might, leaves no time for courts. Thus a number of all-out wars were averted through the mediation of third countries. For example, a serious conflict between Syria and Iraq erupted in 1975 due to the building of *Tabqa Dam* by Syria that interfered with the flow of the waters of the Euphrates River into Iraq and it was Saudi Arabia's mediation that averted a sure war..

Itaipu Dam in South America is the largest gravity dam in the world until recently. It has some of the legal issues and concerns that my fellow Ethiopians raise in their comments and essays concerning the GERD, a dam that is also a gravity dam. I do not know how far the Ethiopian officials and their experts have studied this particular Dam, a dam that seems to be a useful guide to deal with similar issues of allocation of power, management of the flow of the water of the Blue Nile, and the different claims of contentious riparian states. The *Itaipu Dam* is built across the Parana River on Paraguay-Brazil borders; it was the world's largest hydropower producing dam until China's Three Gorges Dam over took it by 2007. Argentina is also an interested party because it is a down-stream riparian State and concerned of flooding if the water of that Dam was released or the Dam overflows.

IV. President El-Sisi Addressed the Ethiopian Parliament

I heard President El-Sisi's speech addressing the Ethiopian Parliament with great hope and anticipation. I heard him with the simultaneous translation of his speech into Amharic—probably the most authentic before it is reconstructed to reflect the special interests of diverse groups. I am more than satisfied in the content of his speech and even more watching on video his genuine reaction to the way the Ethiopian Parliamentarians received him. I admit that I liked el-Sisi from the day he toppled the terrorist Mohammad Morsi and his fanatical Muslim Brotherhood who spread havoc in the Christian community and young liberals in the short time they were in power.

I liked his speech for concrete reasons, though I was already biased in his favor because of his willingness to go to war defending a tiny Egyptian minority of Coptic Christians who were murdered in Libya. After recanting the intimate relationship the Egyptian People have with the Nile River from ancient time to date, he concluded his speech by pointing out clearly that the past should not confine us from moving to a future of wider horizon. Throughout his speech he repeatedly referenced that the people of Egypt and Ethiopia are tied by a long history as brothers. He reminded his audience that Egypt and Ethiopia were the founding members of the OAU, and recently Egypt was one of the countries who championed the move to keep the OAU/AU headquartered in Addis Ababa.

I believe Ethiopian leaders have in el-Sisi a partner that they can work with in promoting peace, prosperity, national security, and lasting friendly relations in the region. This a practical

man a soldier by training who appreciates the consequences of war and will not go to battle like some terrorist leader at a drop of a hat.

V. No Claw-back Provisions

I did not find what can be truly characterized as a claw-back provision in either the DoP or in the speech of el-Sisi addressing the Ethiopian Parliament. I am truly impressed with el-Sisi. I imagine Egypt with Morsi and shudder, and thinking of the type of difficulties we would be facing right now. El-Sisi in no uncertain terms stated in concluding his speech after emphasizing the historic role of the Nile River in the life of the People of Egypt that he was moving into a wider horizon and to be being confined by past history.

The most difficult to comprehend is the function of Article 5: On the principle of the dam's storage reservoir first filling, and dam operation policies. What they are exactly after is very helpful to Ethiopia. It cannot be a claw back provision. It allows Ethiopia to make the final decision whether to accept/apply the recommendations of the international technical experts committee. Here is the full text:

"Article 5: - To apply the recommendations of the international technical experts committee and the results of the final report of the Tripartite National Technical Committee during different stages of the dam project.

- The three countries should cooperate to use the final findings in the studies recommended by the Tripartite National Technical Committee and international technical experts in order to reach:

a. An agreement on the guidelines for different scenarios of the first filling of the Grand Ethiopian Renaissance Dam reservoir in parallel with the construction of the dam.

b. An agreement on the guidelines and annual operation policies of the Renaissance Dam, which the owners can adjust from time to time.

c. To inform downstream countries, Egypt and Sudan, on any urgent circumstances that would call for a change in the operations of the dam, in order to ensure coordination with downstream countries' water reservoirs.

- Accordingly the three countries are to establish a proper mechanism through their ministries of water and irrigation.

- The timeframe for such points mentioned above is 15 months from the start of preparing two studies about the dam by the international technical committee."

VI. The Duty to Negotiate

The only serious obligation that I can imagine that maybe derived from the DoP and a cause for further legal process is the "duty to negotiate." I considered the possibility of forced negotiation as one possible obligation based on the DoP. After a discussion with Prof Alemante Gebre Selassie who indicated to me that we should consider that concept on its own rather than think of the concept as simply the inner working of the good-faith aspect of any agreement. That was a good call. The duty to negotiate is implicit in any declaration of principles in anticipation of future negotiations.

The concept of "the duty to negotiate" has evolved from the Civil Law countries dealing with contract law and extended to cover some aspect private international law. It has managed to creep into the Common Law countries jurisprudence. In cases of international law, "the duty to negotiate" is primarily used to pressure national governments in the international environmental conventions, which of course includes healthy lives of rivers and dams et cetera. I believe one

important concern that I would like the Scholars and others focus their expertise is on the concept of the "duty to negotiate" that also invites concepts of "good faith" and "fair dealing." The more interesting question ultimately as I stated above is whether the DoP creates a "duty to negotiate" between Ethiopia, Egypt, and Sudan.

VII. Serious Error that must be Rectified

Ethiopian negotiators as well as the leadership of Ethiopia failed to recognize the value of having at the very least one other Partner in the negotiation as well as in the sharing of responsibilities from source countries such as Uganda and/or Kenya. Three members to a Group has inherent weakness for destabilization is inherent. At the worst one should aim at a stalemate, and that is possible only with four members than three. It also seems that the Ethiopian Government has abandoned long standing supporters in challenging Egypt and Sudan's monopolistic claim as historic right to all of the waters of the Nile River. This form of international relations of going after one's self interest and abandoning comrades who fought along leaves bad diplomatic after-test and would potentially destroy any future cooperation.

One of the attributes of greatness of Emperor Haile Selassie was his choice of partners when he identified newly independent African Nations just coming out of colonialism as the right brother and sister nations that Ethiopia can form solidarity with to stand against historic enemies as well as newly minted ones. Though I had criticized him about his shift of focus from Israel to Arab countries, I always thought of his African union effort greatly admirable. I was very impressed during the transition period of 1991-1993 how steadfastly African states except those in league of the hostile Arab States such as Egypt, Sudan, and Somalia, stood for the territorial integrity of Ethiopia against Hell-bent effort of Meles Zenawi and his supporters in the EPRDF who worked over-time to the cession of Eritrea from Ethiopia, thereby leaving Ethiopia land locked and at the mercy of tiny Djibouti as its only viable outlet to the rest of the world to date.

The Ethiopian government must find a way to bring back such loyal fellow African riparian States of the Nile River in the actual negotiation. I see no provision in the DoP that forbids expanding the number of participatory states in the final processes of negotiations. .

Conclusion

The fact is we did not have a Third World War, though at times it seems we are engaged in one (the never ending Middle East crisis). Even for that conflict solutions are just around the corner, for we are learning to love others by loving properly ourselves first. This optimism is not that of a jaded neophyte, but of a person that had studied the problems surrounding the Blue Nile River and its basin for a lifetime. One must have not only basic understanding of the international law regime dealing with cross-border rivers and their non-navigational use, but also compassion.

I believe the DoP signifies a major paradigm shift. The process must have involved the most difficult piece of negotiation and mature handling of the questions as embedded as the major principles based on "causing no significant harm" (Article 3) and the principle of "fair and appropriate use" with nine guiding principles (Article 4). One must applaud such great strides away from the antiquated claim of "historical use" advocated by Egypt and its junior partner Sudan for almost a century based on some colonial period treaties of 1929 and 1959 that did not

include Ethiopia as a participant. Now Ethiopia is the Key holder, and supreme Spigot master, as it should be, for 90% of the Water of the Nile is from Ethiopia's Abaye (Blue Nile) basin. Now I pray that all leaders of Ethiopia, Egypt, and Sudan grow further in wisdom and familial love and understanding. To be a warrior requires at the minimum some courage and a shield and a sword/spear, but to be a statesman requires a life time of wisdom and love of humankind.

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