

The Nile Question: The Accords on the Water of the Nile and Their Implications on Cooperative Schemes in the Basin

Mohammed Abdo*

Introduction

Some authorities identify the Nile basin as one of the hotspots in an area where violent conflict could break out over the shared water resource because of the various hydropolitical intricacies it involves. Mounting demands for more water, an alarming population growth rate, the absence of comprehensive legal and institutional frameworks, and relations among the riparian states that are marred with suspicion and misunderstanding, are among the major factors creating the potential for an extreme conflict in the basin. To date, the Basin states have not been able to cooperate in order to devise a solution to the issue of the Nile – the utilisation and management of Nile water for the benefit of all riparian states. One of the impediments to such a solution, is the absence of a basin-wide agreement. Although there have been various agreements over the Nile River, none of these has involved more than three states. The accords constitute one of the hurdles in the path towards cooperation. This article reviews the main agreements which have decided control over the Nile, their traits, and the implications for cooperative schemes in the basin. It also examines the current promising initiative, the Nile Basin Initiative, as a possible way forward to reach comprehensive cooperation. The article does not examine all the problems enveloping the Nile basin. It limits itself to the legal aspects of the questions of the Nile and proposes appropriate approaches to accords on the water of the Nile. Further, it concentrates on three countries, Egypt, the Sudan and Ethiopia, which are considered to be central actors in the Nile issues and deals with the accords involving them, or concluded on their behalf, during the colonial period.

1. Historical Antecedents

A number of forces have contributed in moulding the history of water utilisation, management, and development in the Nile basin in the past century. Among the notable factors that shaped the legal regimes over the Nile, are the presence in the basin of British interests during the colonial era and the water security policy pursued by Egypt.

* Mohammed Abdo has been serving as a lecturer in law at the Faculty of Law, ECSC, Ethiopia, since 1998.

During the first half of the Twentieth Century, the patterns in the utilisation and management of the water of the Nile River were dictated by the interests of the United Kingdom. This created a peculiarity in its relations with Egypt, as manifested in the arrangements made by them concerning the Nile.¹ The UK had a deep-rooted interest in controlling the water of the Nile, which was to provide irrigation for cotton plantations in the area which could provide raw material for its industries in Europe. This laid the foundation for water utilisation patterns that favoured Egypt at the expense of the interest of other riparian states.² Using its considerable influential power in the basin, it tried to ensure that there was no reduction of water flow to Egypt caused by the development of works in the upper riparian colonies. As a result, all the agreements to date, are a manifestation of this interest, and have thus given priority to the requirements of Egypt. Evidence of this can be seen for instance, in the 1902 Agreement, concluded by Ethiopia and Great Britain, which prohibited Ethiopia from engaging in any construction activities on the headwater of the Nile that would arrest the flow of water to Egypt,³ and the 1929 Nile Water Agreement, concluded by Egypt, and Britain, representing the Sudan, which provided that there should be no undertaking of development and construction works in up stream Sudan or other countries under British administration, that would entail prejudice to the interests of Egypt, without the prior agreement of the government of Egypt.⁴ Generally, the dominance of the British government over the basin States gave rise to an unconventional relationship between it and Egypt and this was reflected in the agreements made by them about the water of the Nile.⁵

Another factor that served as bedrock for the formulation of the regimes on the Nile, was the water security policy pursued by Egypt. Egypt is obsessed with water security, since it relies on the water of the Nile for about 97% of its water supply,⁶ and fifty six million of its people depend almost exclusively on the water of the Nile.⁷ For Egyptians, the water of the Nile is, therefore, an issue of national security. Evidence of this can be found in the official statements made by Jemal Abdulnasir, on the outcome of the construction of the Aswan High Dam. He stated

¹ Charles Bourne, "The Right to Utilise the Waters of International Rivers", in Patricia Wouters, *International Water Law: Selected Writings of Professor Charles B. Bourne*, 1997, p. 65.

² John Markakis, *Resource Conflict in the Horn of Africa*, Uppsala University, 1998, p 51.

³ Charles Okidi, "A Review of Treaties on Conceptive Utilisation of Waters of Lake Victoria and Nile Drainage Basins", in P.P. Howell and J.A. Allan, *The Nile Resource Evaluation, Resource Management, Hydro politics and Legal Issues*, 1990, p. 324.

⁴ Bourne, "The Right to Utilise the Waters of International Rivers" p. 64.

⁵ Id. P. 65

⁶ Patricia Wouters et.al, *Water Wars in the Near Future? Reconciling Competing Claims for the World's Diminishing Freshwater Resources: The Challenges of the Next Millenium*, cited at [http://www.dundee.ac.uk/cepmlp/journal/html/article 3-2.html](http://www.dundee.ac.uk/cepmlp/journal/html/article%203-2.html).

⁷ Sandra Postel, "The Politics of Water", in Charles and Eugene, *The Global Agenda*, 1995, p.406.

that Egypt would no longer, after the construction of the Aswan Dam, be the historic hostage of the upper riparian states of the Nile basin.⁸ This meant that the purpose of the Dam, was to provide freedom from foreign control over the water and security from water shortages.⁹ From this statement, one can deduce the intention to achieve water security by undertaking such hydraulic works. A similar statement is found in the speech made by Anwar Sadat, following the Camp David Peace Accord with Israel, in which he predicted that the only issue which could take Egypt to war was water.¹⁰ He was referring to the water of the Nile and what he was trying to underscore was the Nile water's special place in Egypt's life and policy, and the reactions of Egypt if this was tampered with. Egypt is obsessed with water security issues and consequently perceives, the utilisation and undertaking of water related development works, using the water of the Nile, by the upper riparian states, as a threat to its national security. It therefore pursues a water policy which has as a priority, the guarantee for Egypt, of an uninterrupted flow of Nile water.¹¹ The construction of the Aswan High Dam itself was undertaken to strengthen security concerns. The objective of the Aswan Project was to secure a source of water within Egyptian territory and thereby create a strong bargaining position, with the other riparian states, in future hydropolitics.¹² The Project is the refore, evidence of the motive to consolidate control over the water for security purposes. In a nutshell, as a result of security concerns, Egypt has been trying to put in place an agreement that promotes, favours, and strengthens its control over the water.

2. The Accords on the Water of the Nile

Below are some of the major treaties pertaining to the water of the Nile.

2.1. The 1891 Anglo- Italian Protocol

This was signed on 15 April 1891, between Britain, representing Egypt and the Sudan, and Italy, on behalf of Eritrea. The Protocol was not on the water of the Nile per se. The water of the Nile was referred to, under article III of the Protocol, as an incidental issue, since the Protocol was primarily meant for delimitation of the colonial boundary of Britain and Italy in the Sudan and Eritrea. Article III of the

⁸ Daniel Hillel, *Rivers of Eden: The Struggle for Water and the Quest for Peace in the Middle East*, 1994, p. 123.

⁹ Kinfe Abraha, *The Nile Issue: Psycho-political Hurdles to an Agreement and the Way towards Rapprochement*, Addis Ababa, IIPD, 1997, p. 5.

¹⁰ Postel, *The Politics of Water*, p. 7

¹¹ Yacob Arsano, "Sharing Water Resources for Economic Cooperation in the Horn of Africa", in *Trading Places: Alternative Models of Economic Cooperation in the Horn of Africa*, 1996, p. 41.

¹² Girma Amare, "Nile Waters- Hydrological Cooperation Vs. Hydro-politics", Paper Presented at the Eighth Nile 2000 Conference, Addis Ababa, 2000, p.2.

Protocol prohibited Italy from undertaking construction work at the headwaters of the Nile, which might sensibly modify it.¹³ The Protocol did not include, or make reference to, the upper riparian states, where the substantial share of the water comes from. Thus, it remains a bilateral agreement and does not extend its scope of application to the other riparian states. What makes it senseless and irrelevant is the fact that the Nile River did not flow in the territory colonised by Italy, which was the basis for its claim to its water.¹⁴ At the time of the treaty conclusion, Italy had not established itself in Ethiopia. As a result, it did not have the right to engage in negotiation over the headwater found in the upper riparian area, in particular Ethiopia. Nonetheless, from the obligation imposed on Italy, it is implicit that the intention of the British government was to safeguard the interest of its colonial subject, Egypt. Thus, the Protocol manifests part of a grandiose British strategy to fully control the water of the Nile.

2.2 The 1902 Agreement between Britain and Ethiopia

This was signed on 15 May 1902, between Britain, representing the Sudan, and Ethiopia, to determine the boundary between Ethiopia and the Sudan. Like the 1891 Protocol, this agreement was also meant primarily as a means to provide boundary delimitation. However, it contained a provision relating to the water of the Nile. Ethiopia agreed, under Article III of the agreement, not to construct or permit construction on the Blue Nile and its tributaries, of any works that would arrest their flow, without the prior agreement of the government of Britain.¹⁵ There was a disagreement on the meaning of the word "arrest" in the Amharic (Ethiopian Language) and the English versions. In the Amharic version, the obligation imposed on Ethiopia did not preclude the use of the water. What was prohibited, was any scheme which would totally arrest the flow of water. There was no evidence indicating that Ethiopia had acknowledged the meaning of the word "arrest" as to not utilise the water.¹⁶ The agreement was the most controversial one in the history of Nile agreements, as both parties claimed that their own understanding of it was correct.¹⁷ Like the 1891 Agreement, it repeated the same thing, in the sense that it prevented the Ethiopian government from engaging in development activities on the water of the Nile, in order to preserve the interests of the lower riparian states.

¹³ Tilahun Wondimneh, *Egypt's Imperial Aspirations over Lake Tana and the Blue Nile*, 1979, p. 49.

¹⁴ Mekkonen Kefyalew, "A New Basis for a Viable Nile River Water Allocation", Paper Presented at the Fifth Nile 2000 Conference, Addis Ababa, 1997, p. 3.

¹⁵ Wondimneh, *Egypt's Imperial Aspirations over Lake Tana and the Blue Nile*, p.14

¹⁶ Id

¹⁷ Kefyalew, "A New Basis for a Viable Nile River Water Allocation", p. 15

2.3. The 1906 Tripartite Treaty

This was concluded in London on 13 December 1906, between Britain, France, and Italy and dealt with the use of the Nile water in Ethiopia's sub-basin. They reached an agreement to safeguard the interest of Great Britain in Ethiopia's sub-basin by regulating, without prejudice to Italy's interest, the water of the Nile, and also agreed to protect the interest of Ethiopia.¹⁸ It is difficult to imagine how they could claim to protect Ethiopia's interest, without inviting Ethiopia to take part in the agreement process, or without consulting Ethiopia. Consequently, the Ethiopian government immediately voiced its vehement rejection of the agreement and indicated that no country had the right to stop it using its water.¹⁹

2.4. The 1925 Anglo-Italian Agreement

This was signed between Britain and Italy on 20 December 1925 in Rome and dealt with issues of the Nile water. Italy agreed to recognise the prior rights of Egypt and the Sudan on the headwater of the Nile and guaranteed not to construct on the headwater and its tributaries any works that might sensibly modify their flow into the main river.²⁰ Right after its conclusion, Ethiopia voiced its objection against the treaty. Following Ethiopia's rejection of it, the British government disclosed that it renounced its position and admitted that the agreement was bilateral and was not meant to bind Ethiopia.²¹

2.5. The 1929 Anglo-Egyptian Agreement

This was signed on 7 May 1929, between Egypt and Great Britain, representing the Sudan. The Agreement mainly aimed at securing the Nile water for Egypt by limiting the rights of the Sudan and rejecting those of the other riparian states.²² The Agreement recognised Sudan's right to use the water of the Nile in as far as Egypt's natural and historic rights were protected, and conferred upon Egypt the right to monitor the flows of the water in the upper riparian states, the right to undertake any projects on the Nile without the consent of the other riparian countries, and the right to veto construction works that would affect its interest adversely.²³ The agreement recognised, somehow, the right of the Sudan to utilise

¹⁸ Wondimeneh, *Egypt's Imperial Aspirations over Lake Tana and the Blue Nile*, p. at 79

¹⁹ *Id.*, P, 75

²⁰ *Id.*, P. 91

²¹ *Id.*

²² Kefyalew, "A New Basis for a Viable Nile River Water Allocation", P. 4

²³ D. Whittington and G.Guarriso, *Water Management Model in Practice: A Case Study of the Aswan High Dam*, 1983, p. 41.

the water but its exercise is contingent on whether or not its uses preserved Egypt's historic and natural rights.

2.6. The 1959 Agreement for the Full Utilisation of the Water of the Nile

This was concluded between the independent Sudan and Egypt on 8 November 1959. It was based on the revision of the 1929 Agreement. The Sudan called for the revision of the 1929 agreement in a manner that would divide the water in a rational way.²⁴ As the name itself implies, it allotted the entire water of the Nile to the two states only. Its purpose was, therefore, to gain full control of the water and this constitutes the culmination in efforts to give preference to both states. This is because it highlighted the construction of the Aswan High Dam as the major element for controlling the Nile water for the benefit of Egypt and the Sudan.²⁵ Thus, it is the legacy of the colonial era and affirmed the British approach to the water of the Nile. The two states acted as if the Nile starts in the Sudan and ends in Egypt and left, contrary to common sense, no room for the other riparian states.²⁶ This manifests an entrenched quest to have full control of the water.²⁷

2.7. The 1993 Framework for General Cooperation between Egypt and Ethiopia

This was signed on 1 July 1993, in Cairo, between Egypt and Ethiopia. It was the first bilateral framework for cooperation signed between Egypt and Ethiopia regarding the Nile issues, after the colonial period.²⁸ It stipulated that future negotiations between Ethiopia and Egypt, with respect to the utilisation of the water of the Nile, would be based on the rules and principles of international law.²⁹ The Framework was only indicative of the base of future negotiations and failed to provide detailed rules. The 'no harm' rule principle was mentioned in it and for this reason, some Ethiopians criticised it as favouring Egypt and compromising Ethiopia's sovereignty over the Nile.³⁰ Even if the 'no harm' principle was part of the agreement, this did not mean that it was the only principle on which water division would be based, since the rules and principles of international law are

²⁴ Tesfaye Tafesse, *The Nile Question: Hydro-politics, Legal Wrangling, Modus Vivendi and Perspectives*, Addis Ababa, Mega Pub., 2001, p. 75.

²⁵ Kefyalew Achameleh, *Problems and Prospects for Inter-country Cooperation for Integrated Water Resources Development of the Nile River*, Economic Commission of Africa, Addis Ababa, 1995, p. 20.

²⁶ *Id.*, p. 77

²⁷ Amare, "Nile Waters- Hydrological Cooperation Vs. Hydro-politics", p. 13

²⁸ Kefyalew, "A New Basis for a Viable Nile River Water Allocation", p. 6.

²⁹ Arsano, "Sharing Water Resources for Economic Cooperation in the Horn of Africa", p.52

³⁰ Tafesse, *The Nile Question: Hydro-politics, Legal Wrangling, Modus Vivendi and Perspectives*, p. 80

referred to as the guideline for negotiations in the document itself. Apart from the 'no harm' principle, other relevant principles in international law could then be employed. Hence, the assertion that the framework favours Egypt, for it makes reference to the no harm rule, is exaggerated. Even the basis of what it contains in general is not so strong.³¹ It merely represents the first attempt by the two states to come together, and does not have a binding effect.³² It is no more than the heralding of a new era of improved relations between the two states with regard to the water of the Nile.³³

3. Traits and Implications of the Agreements on Cooperative Schemes in the Basin

Traits that distinguish these treaties, are their common focus of attention and their scope of application.

All of the agreements made in regard to the water of the Nile are of limited scope in their application. None of them managed to involve more than three states and are concluded mainly to secure and safeguard the interest of the two lower riparian states. They are, therefore, bilateral in nature and devoid of legal application to the other riparian states. The fact that the treaties are bilateral means that they cannot legitimately be perceived to regulate all of the Nile waters and all the basin states. They approached the problems in the basin in a splintered manner. Thus, they have become an obstacle for cooperation.³⁴ This is because, they undermine, owing to their bilateral nature, the emergence of basin-wide shared understanding and the evolution of a communal identity between the riparian states, as basin states and thus did not provide opportunities for basin-wide interaction and trust-building.³⁵ The 1959 Agreement managed to institutionalise collaboration between the Sudan and Egypt, with the setting up of the Egypt-Sudan Permanent Joint Technical Commission on the Nile. This cooperative scheme has been, and is, effective only between the two countries. It does not symbolise an all-inclusive scheme embracing all riparian states.

Another attribute that distinguishes these bilateral treaties, is that they could be said to have established different "categories" among the Nile states, which applies to those states that had concluded agreements, and those that remained

³¹ Arsano, "Sharing Water Resources for Economic Cooperation in the Horn of Africa", p. 53.

³² Abraha, "The Nile Issue: Psycho-political Hurdles to an Agreement and the Way towards Rapprochement", p. 14.

³³ Id.

³⁴ Amare, "Nile Waters- Hydrological Cooperation Vs. Hydro-politics", p. 1.

³⁵ Brunnee J. and Toope S. J. "The Changing Nile Basin Regime: Does Law Matter?", Harvard International Law Journal Vol. 43, No.1, 2001, p. 146.

excluded.³⁶ As a result, the treaties have permitted the adoption of legal rhetoric that is entirely self-serving, fostering competition rather than cooperation.³⁷

Generally, the treaties have not addressed the water problems in the basin and are ill-suited to promote future good relations among the basin states, given the strategic concern that impelled them in relation to the Nile, the securing of control over or access to its waters.³⁸

In the absence of a comprehensive agreement, one cannot envision a cooperative system among the basin states. This could give rise to a scramble over the resource and ultimately lead to conflict. This is likely because the riparian states disadvantaged by the agreements, have pointed out their unfairness and have called for a basis on which a fair and equitable agreement is put in place.³⁹ Taking into consideration the demands of the upper riparian states to have a share of the water, one can safely say that the treaties do not accommodate the interests of all the riparian states.

The quest, by the lower watercourse states, to maintain the status quo, on the one hand, and the need for a new water accord, called for by the upper states, on the other, have jeopardised the potential to reach a mutual agreement among the Nile riparian states. Resolving the conflicts over the Nile is possible, but only if a new agreement, which differs significantly from those already in existence, is reached.⁴⁰

This is ascribed to the fact that the issue differs from state to state. For instance, for Ethiopia cooperation on the water of the Nile, is contingent on a decision to renegotiate the 1959 Agreement, since it allocated the whole water to Egypt and the Sudan alone.⁴¹ Both the early colonial-authored agreements and the 1959 agreements favoured Egypt in particular, and, hence, Egypt wants them to remain unchallenged, but Ethiopia is not willing to recognise Egypt's claims over the water,⁴² and has consistently been airing its grievances and objection against it.⁴³ The other watercourse states, namely, Uganda, Tanzania, and Kenya, consider the 1959 agreement to be a matter between the two lower riparian states only.⁴⁴ Owing

³⁶ Id. p. 146.

³⁷ Id. p. 147.

³⁸ Id. p. 146.

³⁹ Kefyalew, "A New Basis for a Viable Nile River Water Allocation", p. 2.

⁴⁰ Id. p. 18.

⁴¹ Postel, *The Politics of Water*, p. 409.

⁴² Arsano, "Sharing Water Resources for Economic Cooperation in the Horn of Africa", p. 51.

⁴³ Tafesse, *The Nile Question: Hydro-politics, Legal Wrangling, Modus Vivendi and Perspectives*, p. 79.

⁴⁴ Achamyeleh, *Problems and Prospects for Inter-country Cooperation for Integrated Water Resources Development of the Nile River*, p. 38.

to its bilateral nature, the upstream states are of the opinion that it has no place in the integrated development of the Nile basin and that it has posed an obstacle for its coordinated development.⁴⁵ Thus, among the riparian states, the agreements seriously hinder cooperation leading to the settlement of the disputes.

4. The Nile Basin Initiative (NBI) and the 1959 Agreement

Cooperation over shared water resources presupposes the existence of legal framework.⁴⁶ It cannot be sustained without a legal arrangement in place. There have been efforts made by some riparian states, to achieve cooperation on issues of management and development of the water of the Nile. The attempts to cooperate to create institutional schemes were doomed to failure, mainly because they addressed the problem on a small scale and did not also attract the confidence of all the riparian states.⁴⁷ All the past attempts have been characterised by setbacks, until the launching of the present cooperative mechanism, the Nile Basin Initiative (NBI). The NBI creates a flicker of hope in the basin. It represents a new approach, since two of its programmes, namely, the Strategic Action Programme and the Shared Vision Programme, are based on equitable utilisation of the water of the Nile, its sustainable development, efficient water management, ensuring cooperation and joint action.⁴⁸ This constitutes a departure from the past trend of unilateral uses and management of the water, in the sense that it attracted the support of almost all the riparian states and specifically emphasised the issues of fair water allocation, joint management and development of the resource. In the light of the prevailing disputes, and the mistrust and suspicion among the riparian states, which typify the basin, securing the participation, under the umbrella of the NBI, of all the states involved in the issues of the Nile, is a major breakthrough in the move towards cooperation.

In spite of its success in terms of bringing all the riparian states together, there are challenges ahead for the Nile Basin Initiative. One of the challenges facing the Initiative is the lack of a legal framework involving all the stakeholders. To tackle this problem, the Nile Cooperative Framework, which is within the purview of the NBI's Shared Vision Programme, aims to reach an agreement on legal principles which will lay the ground for determining a reasonable and equitable solution.⁴⁹ The experts in charge of devising such a governing rule, held discussions, but could not agree on the framework.⁵⁰ The major obstacle was the fate

⁴⁵ Id.

⁴⁶ Green Cross International, *National Sovereignty and International Watercourses*, p. 36

⁴⁷ Achameleh, *Problems and Prospects for Inter-country Cooperation for Integrated Water Resources Development of the Nile River*, p. 29.

⁴⁸ Tafesse, *The Nile Question: Hydro-politics, Legal Wrangling, Modus Vivendi and Perspectives*, p. 108.

⁴⁹ Amare "Nile Waters- Hydrological Cooperation Vs. Hydro-politics", p. 7.

⁵⁰ Id.

of the 1959 Agreement. Egypt wants to agree a position that maintains the status quo, and then puts forward the notion that the agreement is unchanging and sacrosanct.⁵¹ Ethiopia calls for the agreement to be scratched and replaced by another treaty. Thus, the fate of the agreement poses a threat to the full realisation and implementation of the objectives of the NBI. The NBI does not as such, signify an assurance by the lower riparian states of their intention to disregard the Agreement. This is because firstly, it is extremely difficult, if not impossible, for Egypt to make concessions which would have an impact on the amount of water allocated to it, in order to allocate more water resources to the other riparian states, because it proposes to meet its future food requirements through desert reclamations, which will require an increased use of water.⁵² Secondly, Egyptian's favour wide-ranging regional schemes, that downplay the importance of water sharing and want to put in place integrated development projects on such issues as environmental concerns, tourism, etc,⁵³ Thus, the destiny of the NBI largely rests on the rescinding of the 1959 Agreement and this has an implication, on the Initiative, an initiative that has been praised by many.

5. Plausible Solutions-Appropriate Approaches to the Accords on the Utilisation of the Water of the Nile

Unless the riparian states agree to set up a legal framework on how to deal with the uses of water they share, it is difficult, if not impossible, to resolve conflicts over water, and strike a balance between issues of sovereignty related to water and the need of all the concerned riparian states for water. The conclusion of bilateral and multilateral treaties, depending on the number of the riparian states involved, has always been instrumental in reducing disputes among riparian states and in enhancing cooperation.⁵⁴ Cooperation over shared water resources is unlikely to be put in place and maintained without a legal framework in place.⁵⁵

The Nile River is a shared water resource and belongs, as such, to all the watercourse states sharing it. No watercourse state is entitled to claim an exclusive right over the river and prevent its use by others. Its utilisation, management, and development in a sustainable way demands coordination and joint action between all the riparian states. Poverty, alarming population growth, expansion of different activities, and growing demands for more water are among a myriad of factors that necessitate the utilisation, management, and development of the Nile water by all riparian states. However, there is no legal framework involving all riparian states to

⁵¹ Tafesse, *The Nile Question: Hydro-politics, Legal Wrangling, Modus Vivendi and Perspectives*, p. 79

⁵² Markakis, *Resource Conflict in the Horn of Africa*, p. 36.

⁵³ *Id.*, p. 182.

⁵⁴ Salman A. Salman, "International Watercourses: Enhancing Cooperation and Managing Conflict", in Salman and De Chazournes, *International Watercourses: Enhancing Cooperation and Managing Conflict*, 1998, p.167.

⁵⁵ Green Cross International, *National Sovereignty and International Watercourses*, 2000, p.46.

regulate division and management of the water. The existing legal framework is essentially bilateral and iniquitous in dealing with the water and its management. There is no single set of international water laws governing allocation and management of water that binds the Nile basin states. It is imperative that all concerned states are disposed to cooperate and hammer out a legal framework embracing all riparian states. It is the absence of such legal framework that is posing a challenge to the Nile Basin Initiative. Unless backed by a legal framework, the Initiative could fail. The basin states should negotiate a new agreement pertaining to the harnessing and management of the water. The legal framework to be formulated should treat all watercourse states as stakeholders.

From the spirit of the Nile Basin Initiative, it seems that there is recognition of the need to have some sort of legal framework that takes into account the interests of all riparian states. The legal framework to be adopted should be drafted on the principle of fair and equitable allocation of water. However, it is a perilous passage down a long river to define and agree on what constitutes equitable utilisation.⁵⁶ As a guideline in this respect, the basin states could make reference to principles enshrined in the UN Watercourses Convention. The Convention contains some well-developed principles that are in tandem with the practices of states in the field of shared water resources.⁵⁷ The Convention makes an important contribution, as held by Brunnee and Toope, in the context of cooperation in the Nile, since its terms effectively 'neutralise' the previous computing rules, and hence deprive each side of convincing legal arguments for the priority of their claims, thereby forcing them to re-examine their entrenched positions and engage with one another to find common ground or fair solutions to their disagreements.⁵⁸ Articles 5 and 7⁵⁹ of the

⁵⁶ Collins R., "In Search of the Nile Waters, 1900- 2000", in Haggai Elrich and Israel Gershoni eds., *The Nile: Histories, Cultures Myths*, Lynne Rienner Publisher, 2000, P. 233.

⁵⁷ Stephen McCaffrey, "The UN Convention on the Law of the Non-Navigational Uses of International Watercourses: Prospects and Pitfalls", Salman and Dechazournes, *International Watercourses: Enhancing Cooperation and Managing Conflict*, 1998, p. 26-27.

⁵⁸ Brunnee J. and Toope S. J., "The Changing Nile Basin Regime: Does Law Matter?" p. 151.

⁵⁹ Article 5 of the UN Watercourse Convention: Equitable and Reasonable Utilisation and Participation

1. Watercourse states shall in their respective territories utilise an international watercourse in an equitable and reasonable manner. In particular, an international watercourse shall be used and developed by watercourse states with a view to attaining optimal and sustainable utilisation thereof and benefits therefrom, taking into account the interests of the watercourse states concerned, consistent with adequate protection of the watercourse.

2. Watercourse states shall participate in the use, development and protection of an international watercourse in an equitable and reasonable manner. Such participation includes both the right to utilise the watercourse and the duty to cooperate in the protection and development thereof, as provided in the present Convention.

Article 7: Obligations not to cause significant harm

1. Watercourse states shall, in utilizing an international watercourse in their territories, take all appropriate measures to prevent the causing of significant harm to other watercourse states.

2. Where significant harm nevertheless is caused to another watercourse state, the states whose use causes such harm shall, in the absence of agreement to such use, take all appropriate measures, having due regard for the provisions of articles 5 and 6, in consultation with affected state, to eliminate such harm and, where appropriate, to discuss the question of compensation.

Convention assert basic principles to be employed in sharing shared water resources. Fair allocation of water does not mean equal division of water, and that is why Article 6 of the Convention lists certain non-exhaustive factors to be taken into account with a view to achieving reasonable and equitable utilisation of shared water resources. The factors include-and are not limited to-social and economic needs of the watercourse states, the population dependent of the water, the effect of use of the watercourse in one watercourse state on the other watercourse state, existing and potential uses, etc. This type of open-ended list can be used as a guideline for the Nile basin states in order to consider the division of the water between all riparian states. The basin states could add other factors, which they deem relevant, and determine water entitlement to all in a fair manner. The existing patterns alone cannot be a factor for creating an equitable and reasonable way of using the water, for it defends past uses and avoids potential claims to use water by the other riparian states. Sticking to the existing use amounts to a reminder of an outdated principle of absolute territorial integrity. It cannot serve as a legal basis for cooperation towards a settled agreement over the issues of the Nile.

Reaching a new Nile water agreement means the replacement of the 1959 Agreement, which promotes monopoly over the water, with a new agreement. The 1959 Agreement does not accommodate the interests of all riparian states since it allotted the entire water to two states, is bilateral and remains effective only between them. The Agreement runs, therefore, counter to fundamental principles governing uses of international water resources. Nevertheless, the two countries pledged, under Article 5 of the 1959 Agreement, to adopt a unified view in the event that they had to review the agreement in negotiation with other riparian states. It also stipulated that there would be a possibility of reallocation of the water, when claims were lodged by other riparian states, and that the shares to be conceded to them, are to be deducted from the shares allocated to the two countries under the Agreement. It is now time to set aside this Agreement and replace it with a new one, owing to the aforementioned problems in the basin and the existence of the Nile Basin Initiative, which calls for a fair apportionment of the water among the riparian states. The new accord should entitle each watercourse state to have a share of the water. The amount of the share to be provided to each, could be determined on the basis of the principles of the UN Watercourses Convention and other variables that the riparian states agree on.

Allocation of the water in a fair and equitable manner to all riparian states involves complex issues of the relationships between the upper riparian and lower riparian states and brings forward questions connected to sovereignty, security, allocation of water in a fair manner and reviewing the existing share of water. Arriving at a settled agreement on such important issues, involves intricate consultations and the willingness to make solemn concessions on the part of

riparian states. Hence, the riparian states should show genuine commitment and political will and negotiate in good faith to resolve the problems hovering around the Nile basin and address the demands of all riparian states.

The agreement and cooperation to be laid down over the water of the Nile, should first be at a basin level, given the fact of the multiple challenges facing the riparian states. The basin-wide approach is an inclusive process of normative evolution that cuts the Gordian knot, to allow Nile basin states to move forward concrete cooperative projects, many of which will be undertaken at the sub-basin level.⁶⁰ It is not possible to promote "action on the ground" before a shared framework of principles is elaborated and an inclusive processes of discussion is created.⁶¹ Thus, the basin states should come up with a comprehensive agreement incorporating a basin-wide shared set of principles and rules dealing with the sharing of water, joint planning and implementation of development work based on the water, regulation of environmental concerns, resolution of conflicts between co-riparian states, etc. The development of such shared principles and rules prevent the basin states from advancing self-serving claims and arguments. The UN Watercourses Convention can be used as a starting point for such an agreement since the Convention serves as a framework agreement, and it is a framework which is currently missing in the Nile basin. The Convention provides the Nile basin watercourse states with a firm common foundation as a basis for negotiation, as it contains some important principles and rules applying to the uses of international watercourses, that are in harmony with the practices of states.

⁶⁰ Brunnee and Toope, "The Changing Nile Regime: Does Law Matter?" p. 156

⁶¹ Id.